

## FROM 'VALID REASON' TO 'GENUINE REDUNDANCY' REDUNDANCY SELECTION: A QUESTION OF (IM)BALANCE?

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### I INTRODUCTION

By its very nature, in purporting to give protection against the loss of employment, unfair dismissal law lies at the heart of employment protection legislation.<sup>1</sup> In this regard there is little doubt that two of the statutory bars introduced by the former Coalition Government under Work Choices<sup>2</sup> removed that protection from large sectors of the eligible workforce. Employees working for employers with 100 or fewer employees formed one such category, employees terminated for 'genuine operational reasons' formed another.<sup>3</sup> It is fair to say that employees made redundant were targeted by the latter 'operational reasons' exclusion. The former Coalition Government never denied this to be the case but always insisted that only employees *genuinely* made redundant would be affected by such changes.<sup>4</sup> When the incoming Labor Government replaced the *WR Act* with the *Fair Work Act 2009* (Cth) ('*FW Act*') it purported to restore

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1 Steven Anderman, 'Unfair Dismissals and Redundancy' in Roy Lewis (ed), *Labour Law in Britain* (Basil Blackwell, 1986) 415, 415–16, 418; Marilyn Pittard, 'Fairness in Dismissal: A Devalued Right' in Julian Teicher, Rob Lambert and Anne O'Rourke (eds), *Work Choices: The New Industrial Relations Agenda* (Pearson Education, 2006) 74, 81–8.

2 *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), amending the *Workplace Relations Act 1996* (Cth) ('*WR Act*').

3 *WR Act* ss 643(8), (9), (10). See Marilyn Pittard, 'Back to the Future: Unjust Termination of Employment under the Work Choices Legislation' (2006) 19 *Australian Journal of Labour Law* 225, 227–31; Anna Chapman, 'Protections in Relation to Dismissal: From the *Workplace Relations Act* to the *Fair Work Act*' (2009) 32 *University of New South Wales Law Journal* 746, 755–6.

4 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 16 (Kevin Andrews, Minister for Employment and Workplace Relations); Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 93 (Kevin Andrews, Minister for Employment and Workplace Relations); ABC Television, 'Andrews Defends IR Changes', *Lateline*, 3 November 2005 (Tony Jones) <<http://www.abc.net.au/lateline/content/2005/s1497400.htm>>.

‘balance’ and a ‘fair go’ to the federal unfair dismissal law,<sup>5</sup> and in line with that objective abolished the 100 employee exemption. However it still remains the case that a dismissal cannot be regarded as unfair if it involves a ‘genuine redundancy’.<sup>6</sup>

What is the significance of the Labor Government having continued with what is, in effect, the former government’s policy of exclusion with respect to redundancies? For one thing redundancy dismissals are treated differently. How differently? Before Work Choices a redundancy dismissal had to be for a valid reason (related to an employer’s operational requirements) and it had to be fair, that is, not ‘harsh, unjust or unreasonable’. Since Work Choices neither requirement applies to redundancy dismissals (though it continues to apply to dismissals related to an employee’s capacity or conduct).<sup>7</sup> Equally however, any evaluation that purports to assess this shift in policy cannot ignore the impact of replacing the ‘operational reasons’ exclusion with the ‘redundancy exemption’ given the definitional differences between the two sets of provisions.<sup>8</sup>

In December 2011 the Minister for Employment and Workplace Relations announced the establishment of a Fair Work Review Panel to examine the extent to which the operation of the *FW Act* is consistent with the object set out in section 3 of providing ‘a balanced framework for cooperative and productive workplace relations’.<sup>9</sup> Specific attention is to be paid to seven areas, among them ‘genuine unfair dismissal protection’ and one of the questions participants are invited to consider when preparing submissions is ‘the impact of removing the genuine operational reasons defence to an unfair dismissal claim and replacing it with the requirements for genuine redundancy’.<sup>10</sup> Consistent with the task of the Fair Work Review Panel, this article will examine the nature of both reforms since Work Choices. The article is in three parts. The first part explores the rationale for the ‘operational reasons’ exclusion. It looks at some of the general arguments as to why the law of unfair dismissal should intervene in the employer’s decision to dismiss on redundancy grounds. The question raised here is how far the employer’s prerogative to manage its labour ought to be constrained in the interests of employees. Following on from this, part two

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5 Julia Gillard, ‘Introducing Australia’s New Workplace Relations System’ (Speech delivered at the National Press Club, Canberra, 17 September 2008) 224–5 <<http://www.ministers.deewr.gov.au/gillard/introducing-australias-new-workplace-relations-system>>. See generally Andrew Stewart, ‘A Question of Balance: Labor’s New Vision for Workplace Regulation’ (2009) 22 *Australian Journal of Labour Law* 3, 45–6; Anna Chapman, ‘The Decline and Restoration of Unfair Dismissal Rights’ in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press 2009) 207, 224–5.

6 *FW Act* s 385(d); Stewart, above n 5, 38; Chapman, above n 5, 221.

7 See generally Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010) 650–2; Carolyn Sappideen et al, *Macken’s Law of Employment* (Lawbook, 7<sup>th</sup> ed, 2011) 448–9; Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2<sup>nd</sup> ed, 2011) 507.

8 See *FW Act* s 389. Cf the pre-reform *WR Act* ss 643(8), (9). See above n 6.

9 See Department of Education, Employment and Workplace Relations, ‘Fair Work Act Review Background Paper’ (Background Paper, Australian Government Department of Education, Employment and Workplace Relations, January 2012).

10 *Ibid* 1–2, 20–1.

retrospectively examines events leading up to the enactment of the ‘operational reasons’ exclusion. Judicial interpretation of legislation can often be as significant as the legislation itself. In this regard it will be shown how a jurisprudence emphasising the need for a fair redundancy selection process developed around the key legislative requirement that a termination must be for a valid reason based on (or related to) an employer’s operational requirements.

On one level the enactment of the ‘operational reasons’ exclusion may be seen as a reaction to that development. Was it an overreaction? The initial assessment that the exclusion went beyond what normally passes for a redundancy<sup>11</sup> was subsequently confirmed. Forsyth pointed out that the ‘operational reasons’ exclusion changed the law ‘by completely stamping out unfair dismissal claims that are in any way related to operational reasons’.<sup>12</sup> The problem so defined, Labor’s limited response to its enactment is understandable but not necessarily justifiable. While the ‘fair work’ changes may be viewed as a response to the ‘excesses’ of Work Choices,<sup>13</sup> part three considers whether they went far enough.

## II EXPLORING THE RATIONALE

Any serious discussion of the events leading up to the enactment of the Work Choices ‘operational reasons’ exclusion cannot begin without reference to what it stood for. Its philosophical core or what Forsyth has described as its ‘true rationale’,<sup>14</sup> is conveniently located in a statement of former Prime Minister Howard. The statement was made during parliamentary debate on Work Choices and in response to the question (without notice) whether ‘operational reasons’ was so broadly defined as to have practically eliminated dismissal rights for all

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- 11 See generally Anna Chapman, ‘Unfair Dismissal Law and Work Choices: From Safety Net Standard to Legal Privilege’ (2006) 16(2) *Economic and Labour Relations Review* 237, 246–7; Andrew Stewart, ‘Work Choices in Overview: Big Bang or Slow Burn?’ (2006) 16(2) *Economic and Labour Relations Review* 25, 46; Paul Munro, ‘Changes to the Australian Industrial Relations System: Reforms or Shattered Icons? An Insider’s Assessment of the Probable Impact on Employers, Employees and Unions’ (2006) 29(1) *University of New South Wales Law Journal* 128, 145–6; Pittard, above n 3, 230–1.
- 12 Anthony Forsyth, ‘Australian Regulation of Economic Dismissals: Before, During and After “Work Choices”’ (2008) 30 *Sydney Law Review* 506, 518. See also Anthony Forsyth, *Freedom to Fire: Economic Dismissals under Work Choices* (Report for the Victorian Office of Workplace Rights Advocate, 26 August 2007); Louise Keats, ‘No Logical Response Required: The Full Bench Explains Genuine Operational Reasons’ (2007) 20 *Australian Journal of Labour Law* 104; Emma Goodwin, ‘Dumped: Termination for “Genuine Operational Reasons”’ (2007) 81(4) *Law Institute Journal* 50; Chapman, ‘Unfair Dismissal Rights’, above n 5, 214–17.
- 13 See generally Forsyth, ‘Economic Dismissals’, above n 12, 536; Kim Southey, ‘Forward with Unfair Dismissal Claims’ (2008) 19 *Labour and Industry* 25, 31–2, 41–4; Chapman, ‘Unfair Dismissal Rights’, above n 5, 221–2; Anthony Forsyth, ‘Protection Against Economic Dismissals: Australian Law Compared with Five Other OECD Countries’ (2009) 51 *Journal of Industrial Relations* 723, 725; Creighton and Stewart, above n 7, 651–2; Andrew Stewart, *Stewart’s Guide to Employment Law* (Federation Press, 3<sup>rd</sup> ed, 2011) 327–8.
- 14 Forsyth, ‘Economic Dismissals’, above n 12, 517–18.

employees.<sup>15</sup> The Prime Minister replied: ‘It stands to reason that, in any fair industrial relations system, redundancy for a bona fide operational reason cannot be regarded as an unfair dismissal, and these changes are not going to alter that’.<sup>16</sup>

While in that statement the Prime Minister did not directly answer the question put to him, he made it clear that the law of unfair dismissal has little or no role to play in cases of genuine redundancy. To find a similar viewpoint one would have to go back in time, to the fourth quarter of the 20<sup>th</sup> century when it was customary to perceive the problem of redundancy in ‘managerial terms’. What Creighton, Ford and Mitchell described as ‘the orthodox public policy position taken towards redundancy in most industrial countries’ proceeded on the premise that the problem for redundancy was not how to prevent it from arising but how to ameliorate its effects.<sup>17</sup> Then however, redundancy was closely associated with the ‘contemporary phenomenon’ of ‘mass dismissals’.<sup>18</sup> Essentially the product of technological change, such dismissals were said to involve ‘situations of redundancy’ and ‘not ones which raise questions of unfairness’.<sup>19</sup>

The word ‘redundancy’ is said to have a range of meanings, and foremost among these, now as then, is that of Bray CJ, emphasising that it is the job not the worker that becomes redundant with effect that a dismissal on account of redundancy is not on account of any ‘personal act or default of the employee dismissed’.<sup>20</sup> So understood there is a certain degree of incongruity in applying the law of unfair dismissal, with its fault based orientation, to redundancy dismissals, collective or otherwise.<sup>21</sup> Nevertheless claims by workers that they have been unfairly retrenched have become a not insignificant ‘subset of unfair dismissal cases’.<sup>22</sup>

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15 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 82 (Stephen Smith, Shadow Minister for Industry, Infrastructure and Industrial Relations).

16 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 83 (John Howard, Prime Minister).

17 WB Creighton, WJ Ford and RJ Mitchell, *Labour Law: Materials and Commentary* (Law Book, 1983) 445. See also Di Yerbury and Robert Clark, ‘Redundancy and the Law: The Position in Mid-1983’ (1983) 25 *Journal of Industrial Relations* 353; Stephen Deery, Ray Brooks and Alan Morris, ‘Redundancy and Public Policy in Australia’ (1985) 11 *Australian Bulletin of Labour* 154, 166.

18 Brian Brooks, *Contract of Employment* (CCH, 4<sup>th</sup> ed, 1992) 240; Stephen Deery, ‘Trade Unions, Technological Change and Redundancy Protection in Australia’ (1982) 24 *Journal of Industrial Relations* 155.

19 Brooks, above n 18.

20 *R v Industrial Commission (SA); Ex parte Adelaide Milk Supply Co-operative Ltd* (1977) 16 SASR 6, 8 (Bray CJ); *Hawkins v Commonwealth Bank* (1996) 66 IR 322, 333 (Moore J); Hugh Collins, *Justice in Dismissal: The Law of Termination of Employment* (Clarendon Press, 1992) 55–6; Andrew Frazer, ‘Redundancy and Interpretation in Industrial Agreements: *The Amcor Case*’ (2004) 26 *Sydney Law Review* 241, 244; Sappideen et al, *Macken’s Law of Employment*, above n 7, 304–7; Creighton and Stewart, above n 7, 602–3.

21 Collins, above n 20, 55–6, 59. See also Andrew Stewart, ‘Employment Protection in Australia’ (1989) 11 *Comparative Labor Law Journal* 1, 24–40.

22 Creighton and Stewart, above n 7, 650. See generally Collins as to ‘the right to dignity’, *Justice in Dismissal*, above n 20, 153–4, ch 2.

Even during the period of ‘mass dismissals’ redundancies made their way before Australian courts and tribunals as individual cases of unfair dismissal.<sup>23</sup> The South Australian unfair dismissal jurisdiction, in particular, had by the late 1980s developed a coherent body of jurisprudence, it being accepted that ‘even where there is a genuine need for redundancy’ a dismissal could be ‘harsh, unjust or unreasonable’ for a number of reasons, including the failure to offer alternative employment or ‘because the employee should not have been the person selected for redundancy’.<sup>24</sup> The prospect of an ‘unfair redundancy’ has generally been associated with the manner of dismissal and, more particularly, redundancy selection.<sup>25</sup> That someone has to go is not the question. Rather the question is who? The further question then arises whether it is for the employer alone to so decide, bearing in mind that decisions about such matters are said to be within the prerogative of management.

How a business is organised has often been described as the prerogative of management.<sup>26</sup> In that context it is often said that the employer’s prerogative to manage its labour must be acknowledged. But so too (it is said) must the employee’s right to employment protection be respected. In the words of Creighton and Stewart, ‘[t]he problem for labour law in dealing with redundancies’ is not whether but ‘the extent to which the acknowledged right of an employer to make economic decisions about the optimal level and distribution of staff can and should be constrained by reference to the interests of workers in the security of their jobs’.<sup>27</sup> Essentially then, the question is one of balance and the degree to which a court or tribunal intervenes in that decision-making process both reflects and reinforces that balance.<sup>28</sup>

### A Identifying the Boundaries for the Exercise of Managerial Prerogative

In finding the ‘right’ balance a good starting point is with the observation that courts and tribunals have generally been reluctant to review redundancy

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23 Stewart, above n 21, 39–40.

24 *Wynn’s Winegrowers Pty Ltd v Foster* (1986) 16 IR 381, 384 (Stanley P, Lee J and Commissioner Cotton); *Corkrey v General Motors-Holden’s Ltd* (1986) 53 SAIR 531, 538 (Stanley J). See generally Andrew Stewart, ‘The New Unfair Dismissal Jurisdiction in South Australia’ (1986) 28 *Journal of Industrial Relations* 367, 389–94; Andrew Stewart, *Unfair Dismissal in South Australia* (Corporate and Business Law Centre, 1988) 42–9. Cf Mark Baragwanath, *Unfair Dismissal in New South Wales* (LBC Information Services, 1999) 209–10.

25 See Michael Whincup, *The Right to Dismiss* (BSP Professional Books, 2<sup>nd</sup> ed, 1987) 112–13; Anderman, above n 1, 424–5; Stewart, above n 21, 39; Creighton and Stewart, above n 7, 650–1; Baragwanath, above n 24, 211, 215–18.

26 See generally C J Arup, ‘Redundancy and the Operation of an Employment Termination Law’ (1983) 9 *Monash University Law Review* 167, 187–8; W B Creighton, W J Ford and R J Mitchell, *Labour Law Text and Materials* (Law Book, 2<sup>nd</sup> ed, 1993) 490.

27 Creighton and Stewart, above n 7, 603.

28 Mark Bray and Peter Waring, ‘The Rise of Managerial Prerogative under the Howard Government’ (2006) 32 *Australian Bulletin of Labour* 45, 46. See generally Andrew Frazer, ‘Reconceiving Labour Law: The Labour Market Regulation Project’ (2008) 8 *Macquarie Law Journal* 21; Aaron Rathmell, ‘The Relation Between Function and Form in the Main Federal Industrial Tribunals’ (2011) 53 *Journal of Industrial Relations* 596.

dismissals on merit.<sup>29</sup> In the case of the federal termination of employment jurisdiction, which is the focus of this article, it is not without significance that this issue taxed the minds of judges exercising that jurisdiction during its early years. The (then) judges of the Industrial Relations Court commissioned a report on the meaning of the valid reason requirement as it first appeared in section 170DE(1) of the *Industrial Relations Act 1988* (Cth) ('*IR Act*').<sup>30</sup> One of the questions they wanted answered concerned its second limb, the expression valid reason based on operational requirements. In particular the judges wanted to know whether applying such a valid reason 'involves any inquiry into the merits of the decision to terminate, beyond obvious threshold matters, such as being satisfied that such operational requirements furnished the employer with an honest and reasonably-held belief in the necessity for the termination'.<sup>31</sup> Sub-section 170DE(1) was based on the International Labour Organisation's ('ILO') Termination of Employment Convention 1982 (No 158) ('*Convention*') and the authors of the Report found little in the available international literature to support such a narrow reading of the legislation.<sup>32</sup>

While care must be taken before relying on individual decisions of a federal commissioner as reflecting broader trends in judicial thinking, an exception could, perhaps, be made for *Rus v Giroto Precast Pty Ltd*.<sup>33</sup> The case was concerned with the construction of section 170DE(1) as it related to an employee whose position (of cleaner and general labourer) was abolished, the work redistributed. The applicant submitted that the respondent employer must objectively verify the need for such a restructure 'on the grounds of operational efficiency' for there to be a valid reason for dismissal based on its operational requirements.<sup>34</sup> Commissioner Smith rejected that submission, bearing in mind that questions as to the most efficient way to run a business are the prerogative of management, that this is not a novel concept in the federal jurisdiction and that the High Court had said as much.<sup>35</sup>

What the High Court had to say in *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd*<sup>36</sup> made it clear that the doctrine of managerial prerogative would continue to hold sway, notwithstanding its rejection as a

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29 Stewart, *Unfair Dismissal in South Australia*, above n 24, 43–4; Stewart, 'The New Unfair Dismissal Jurisdiction in South Australia' above n 24, 391–2; Creighton and Stewart, above n 7, 650–1.

30 Anna Chapman et al, 'Valid Reasons for Termination of Employment: A Research Report Prepared for the Judges of the Industrial Relations Court of Australia' (Working Paper No 12, Centre for Employment and Labour Relations Law, The University of Melbourne, 12 January 1997).

31 *Ibid* 1.

32 *Ibid* 4, 18.

33 (1996) 71 IR 207 (Commissioner Smith) ('*Rus v Giroto*').

34 *Ibid* 211.

35 *Ibid* 212.

36 (1987) 163 CLR 117 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ) ('*Re Cram*').

criterion of jurisdiction.<sup>37</sup> Like *Rus v Giarotto, Re Cram* concerned the scope of an employer's prerogative to manage its labour. At issue was the jurisdiction of an industrial tribunal to settle an 'industrial dispute' arising from an employer's refusal to abide by an existing arrangement it had with a union for the recruitment of labour from a register kept by the union.<sup>38</sup> The Tribunal ordered the employer to honour that arrangement and in upholding that order as within jurisdiction, the High Court urged restraint. Industrial tribunals were cautioned against making orders that could amount 'to a substantial interference with the autonomy of management to decide how the business enterprise shall be efficiently conducted'.<sup>39</sup>

In *Rus v Giarotto* the Commission not only heeded that advice but welcomed it, against the backdrop of having promoted productivity and efficiency over a number of years.<sup>40</sup> Encouraging flexible work practices, not unlike that arising from the applicant's job being abolished, was an example of such activity.<sup>41</sup> Redundancy selection however, fell on the other side of the ledger:

In my view, it is not the role of the Commission to consider whether or not an enterprise should be the subject of change, as this is essentially the prerogative of management, but it is the role of the Commission to objectively assess the selection criteria used for any redundancy programme.<sup>42</sup>

In singling out redundancy selection in this way, the Commission was guided, in all probability, by the order upheld by the High Court, which did no more than impose on the employer an obligation to recruit labour from the union's register 'so long as there were sufficient or suitable persons on the register'.<sup>43</sup> Reviewing redundancy selection was presumably viewed by the Commission as an equally benign activity.

## B Bringing Fairness into the Balance

It was stated initially that in providing protection against the loss of employment the law of unfair dismissal lies at the heart of employment protection legislation. Anderman made that observation when discussing British employment protection legislation and in that context described the law as

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- 37 Ibid 136–7. See generally D E Fisher, 'Redundancy and the Law: Some Recent Problems' (1969) 11 *Journal of Industrial Relations* 212; Christopher Arup, 'Job Security or Income Support' (1976) 7 *Federal Law Review* 145, 159–163; J E Isaac, 'Industrial Democracy in the Context of Conciliation and Arbitration', in Russell D Lansbury (ed), *Democracy in the Workplace* (Longman and Cheshire, 1980) 34; Andrew Stewart, 'Federal Jurisdiction over Industrial Matters: The Demise of Managerial Prerogative' (1988) 1 *Australian Journal of Labour Law* 70; Esther Stern, 'Industrial Disputes' and the Jurisdiction of the Federal Industrial Tribunal: An Analysis of Recent Developments' (1990) 3 *Australian Journal of Labour Law* 130.
- 38 *Re Cram* (1987) 163 CLR 117, 136 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).
- 39 Ibid 136–37. See also Brooks, above n 18, 171–3.
- 40 *Rus v Giarotto* (1996) 71 IR 207, 213 (Commissioner Smith).
- 41 Ibid 211–12.
- 42 Ibid 213.
- 43 *Re Cram* (1987) 163 CLR 117, 136 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

offering a perspective from which to assess the extent to which the interests of employees in employment security are protected from what managers regard as their prerogative to dismiss.<sup>44</sup> Essentially a question of balance, an assessment of this kind cannot be made without first considering how far an employer's prerogative to manage its labour 'can and should be constrained' in the interests of employees.

In *Re Cram* the High Court drew the line at reviewing management decisions touching on 'how the business enterprise shall be efficiently conducted'<sup>45</sup> and in *Rus v Grotto* a federal Commissioner took this to mean that the Commission could not review whether a business should be the subject of change, but that it could review the employer's redundancy selection process. The balance thus struck is not, in essence, an unreasonable one. It is one thing for a tribunal to review the employer's substantive decision to effect change. It is another thing to review the way that decision is implemented. In this regard parallels may be drawn with the British law of unfair dismissal law, not least because a similar consistency in approach has been observed in the context of that law, whereby courts and tribunals have shied away from imposing restrictions on the employer's right to make organisational change, while being far more willing to do so when it came to the process of redundancy, such as redundancy selection.<sup>46</sup>

Looking back at its first decade, Elias saw the British law of unfair dismissal as operating to constrain 'a key area of managerial prerogative, the right to fire', through 'the notion of fairness, the central element in the concept of unfair dismissal'.<sup>47</sup> This view as to the role of fairness was justified given the overriding statutory requirement that the employer must act reasonably in treating a reason for dismissal as sufficient.<sup>48</sup> Elias also located fairness within a framework that recognised the employer's right to dismiss in pursuit of its business interests. Fairness entered into the equation to mitigate rather than challenge the harshness of that pursuit. Viewed more broadly, its function was limited to reconciling 'these various and conflicting interests' by obliging the employer to adopt 'a pluralist rather than a unitary perspective'.<sup>49</sup>

As to what impact 'this obligation to balance conflicting interests had on management's powers'<sup>50</sup> could not be readily determined without first conducting a detailed review of how courts approach the different types of dismissal. Nonetheless Elias was of the view that the law's greatest impact lay in setting procedural standards, having observed that courts are more comfortable

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44 See generally Anderman, above n 1, 415; Steven D Anderman, *The Law of Unfair Dismissal* (Butterworths, 2<sup>nd</sup> ed 1985) 3.

45 *Re Cram* (1987) 163 CLR 117, 136 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

46 Simon Deakin and Gillian S Morris, *Labour Law* (Hart Publishing, 5<sup>th</sup> ed, 2009) 494; Anderman, above n 1, 426–7.

47 Patrick Elias, 'Fairness in Unfair Dismissal: Trends and Tensions' (1981) 10 *Industrial Law Journal* 201, 201.

48 *Ibid.* See *Employment Protection (Consolidation) Act 1978* (UK) s 57(3).

49 Elias, above n 47, 211.

50 *Ibid.*



doing so than they are in reviewing the substantive management decision.<sup>51</sup> Sticking to fair procedures was essential to reaching a fair decision as this is where courts could make the greatest difference in enhancing management practices, given that ‘an effective independent scrutiny of the substance of the decision must inevitably be limited’.<sup>52</sup> The inevitability of such a limitation was said to reside in ‘[t]he nature of many management decisions’. Dismissals arising from a business restructure or incapacity were seen as resting largely ‘on a subjective assessment of the factors involved’, although Elias acknowledged that in the former case, courts were rightly criticised for giving insufficient weight to employee interests.<sup>53</sup>

The foregoing review of the unfair dismissal law in the British context in its early years, though not confined to redundancies, assists in understanding how that law operated in the Australian context in cases of redundancy during a similar period in time. In particular Elias’ account of how that law sought to reconcile and so balance the conflicting interests of employers and employees is not inconsistent with the distinction drawn by the Commission in *Rus v Girotto* between matters that are within the prerogative of management and matters that are within the Commission’s power to review. Fairness entered into the balance on the understanding that it did not interfere with an employer’s substantive decision to institute redundancies. The net effect was a compromise of sorts. The employer retained the right to dismiss without too much scrutiny but the process had to be fair.

Whether the interests of employers and employees can truly be reconciled may be doubted. What cannot be doubted is that without fairness being accommodated in some way there cannot be anything to balance. So to return to (then) Prime Minister Howard’s statement defending the enactment of the ‘operational reasons’ exclusion, why adopt a system that rejects any semblance of balance? Part of the answer, it is suggested, lies in the way that fairness was accommodated by federal courts and tribunals before Work Choices took effect. As Elias pointed out, accommodating fairness is riven with ‘a variety of tensions arising out of the way in which the courts view the concept of fairness’.<sup>54</sup> Differences over standards for judging reasonable employer behaviour was one source of such tensions that he identified as having arisen under British law in its first decade.<sup>55</sup> Of a similar order though greater impact were the tensions that emanated from how federal courts and tribunals came to view appropriate standards of employer behaviour in the context of the obligation imposed on the employer to have a valid reason for dismissal.

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51 Ibid.

52 Ibid 213.

53 Ibid, citing John Bowers and Andrew Clarke ‘Unfair Dismissal and Managerial Prerogative: A Study of “Other Substantial Reason”’ (1981) 10 *Industrial Law Journal* 34. As to the source of restrictions on the federal Commission’s decision-making see Arup, above n 37, 159.

54 Elias, above n 47, 216.

55 Ibid 216–17.

### III FROM VALID REASON TO OPERATIONAL REASON

For the purposes of this article the story begins with the Keating Government's *Industrial Relations Reform Act 1993* (Cth) which introduced the first set of federal minimum standards covering termination of employment.<sup>56</sup> Mostly sourced from standards set by the ILO, a number of these provided individual access to remedies for 'unlawful termination'.<sup>57</sup> Notably section 170DC made it unlawful to terminate without giving employees the opportunity to be consulted about the reasons for their dismissal, but since it only applied if these reasons were based on conduct or performance it was not immediately apparent that it applied to redundancies.<sup>58</sup> By comparison the reference to 'operational requirements' in section 170DE indicated from the outset that it was unlawful to retrench without a valid reason.<sup>59</sup>

Based squarely on Article 4 of the Convention, section 170DE(1) required the employer to have a valid reason for termination either connected to an employee's capacity or conduct or based on the operational requirements of the employer's undertaking. Sub-section 170DE(2) further provided that 'a reason is not valid if, having regard to the employee's capacity and conduct and those operational requirements, the termination is harsh, unjust or unreasonable'. Unlike section 170DE(1) the origins of section 170DE(2) can be traced to non-ILO sources, the phrase 'harsh, unjust or unreasonable' first appearing in state legislation as far back as 1972.<sup>60</sup> In *Victoria v Commonwealth*<sup>61</sup> the High Court held that 'harsh, unjust or unreasonable' and 'valid' were not equivalent terms. The former expression went 'beyond the terms of the Convention to a constitutionally impermissible degree' by providing an 'additional ground' for relief that went 'not to the reason ... but to the overall effects of the termination'.<sup>62</sup> It is against this background that the debate on the federal and

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56 The *Industrial Relations Reform Act 1993* (Cth) ('*Reform Act*') introduced Div 3 Part VIA into the (then) *IR Act*. See generally Marilyn J Pittard, 'The Age of Reason: Principles of Unfair Dismissal in Australia' in Ron McCallum, Greg McCarty and Paul Ronfeldt (eds), *Employment Security* (Federation Press, 1994) 16; Andrew Stewart, 'The Industrial Relations Reform Act 1993: Counting the Cost' (1994) 20 *Australian Bulletin of Labour* 140, 147–52.

57 Geoffrey Giudice, 'The Evolution of an Institution: The Transition from the Australian Industrial Relations Commission to Fair Work Australia' (2011) 53 *Journal of Industrial Relations* 556, 559.

58 Pittard, above n 56, 35.

59 *Garbett v Midland Brick Co Pty Ltd* (2003) 129 IR 270, 286 [74]–[75] (Heenan J); Brian Napier, 'Dismissals – The New I.L.O Standards' (1983) 12 *Industrial Law Journal* 17, 21.

60 See Stewart, above n 21, 29–31; Andrew Stewart, 'And (Industrial) Justice for All? Protecting Workers Against Unfair Dismissal' (1995) 1 *Flinders Journal of Law Reform* 85, 87–96; Anna Chapman, 'The Declining Influence of ILO Standards in Shaping Australian Statutory Provisions on Unfair Dismissal' (2003) 29 *Monash University Law Review* 104, 107–19.

61 (1996) 187 CLR 416 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

62 *Ibid* 517–8 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). See Chapman et al, 'Valid Reasons for Termination of Employment', above n 30, 15.

industrial relations courts concerning the scope of section 170DE(1) first assumed significance.<sup>63</sup>

An appreciation of the nature and intensity of that debate necessarily begins with the interpretation of section 170DE(1). As the sole criterion for determining whether a termination was for a valid reason, section 170DE(1) came to be closely associated with the phrase ‘sound, defensible or well founded’. The adjective ‘valid’ having been so defined by Northrop J in *Selvachandran v Peteron Plastics Pty Ltd*,<sup>64</sup> ‘[a] reason which is capricious, fanciful, spiteful or prejudiced’ could never be valid.<sup>65</sup> What could be a valid reason was the more contentious question. An issue of immediate concern to employers after section 170DE(2) was declared invalid was the extent to which fairness was a requirement of section 170DE(1). In this regard *Nettlefold v Kym Smoker Pty Ltd*<sup>66</sup> and *Kerr v Jaroma Pty Ltd*<sup>67</sup> are the two cases that drew attention to the notion of a fair redundancy pursuant to its second limb. It is not without significance that both relied on *Kenefick v Australian Submarine Corporation Pty Ltd [No 2]*<sup>68</sup> that nothing short of an objective assessment of the employer’s reasons would suffice. In the words of Marshall J: ‘a decision to terminate ... for operational reasons from the subjective view of the employer will not necessarily result in a termination for a valid reason’.<sup>69</sup>

### A Can Redundancy Selection Constitute a Reason for Dismissal?

Better known as a decision of the Full Industrial Court with respect to section 170DE(1), *Kenefick [No 2]* was also an appeal in relation to section 170DC. The appeal was against the decision of Wilcox CJ who reversed an earlier finding (of a judicial registrar) that the Australian Submarine Corporation (‘ASC’) was in breach of sections 170DC and 170DE.<sup>70</sup> The appellants were welders selected for redundancy from a larger pool of such workers and though each was selected ‘because of conduct/performance characteristics thought to make them less valuable ASC employees than others’, the Chief Justice held that section 170DC did not apply.<sup>71</sup> The explanation given, that redundancy was the sole reason for dismissal, is reasonable. An assessment of ‘relative merit’ is not the same as allegations of misconduct or poor performance. However the argument put to Wilcox CJ that if all employees were satisfactory, volunteers should be the first to go, was flawed because it did not take employer needs into account. As the Chief Justice explained, ‘[i]n a genuine redundancy situation it is not

63 Chapman et al, ‘Valid Reasons for Termination of Employment’, above n 30, 15–18; Max Spry, ‘A Valid Reason for Termination’ (1998) 11 *Australian Journal of Labour Law* 216; Andrew Frazer ‘Major Tribunal Decisions in 1998’ (1999) 41 *Journal of Industrial Relations* 80.

64 (1995) 62 IR 371 (‘*Selvachandran*’).

65 Ibid 373.

66 (1996) 69 IR 370 (Lee J) (‘*Nettlefold*’).

67 (1996) 70 IR 469 (Marshall J) (‘*Kerr*’).

68 (1996) 65 IR 366 (Ryan, Beazley and North JJ) (‘*Kenefick [No 2]*’).

69 *Kerr* (1996) 70 IR 469, 474 (Marshall J). See also *Nettlefold* (1996) 69 IR 370, 372–3 (Lee J).

70 *Kenefick v Australian Submarine Corporation Pty Ltd* (1995) 131 ALR 197 (‘*Kenefick*’).

71 Ibid 206.

unreasonable for an employer to determine who shall go by considering its own needs, rather than accepting all who volunteer'.<sup>72</sup>

Kollmorgen, who reviewed *Kenefick* as a contemporary, described Chief Justice Wilcox's decision with respect to section 170DC as having 'upheld the right of an employer to exercise its managerial prerogative'.<sup>73</sup> That this reflected a more broadly held belief emerged from his Honour's further decision with respect to section 170DE(1). Based on Justice Northrop's interpretation of section 170DE(1) in *Selvachandran*, a dismissal must be 'a logical response' to an employer's operational requirements. Bearing in mind that '[t]he subsection was designed to inhibit capricious terminations, not to put the court in the employer's managerial chair', the dismissal need not be 'the only logical course'.<sup>74</sup> Consequently, a logical response to ASC's problem of excess labour (due to a reduced demand for its submarines) was to reduce employees in the overstaffed category of welders by a given number and, in so doing, select the applicants, albeit that it might have been equally logical to have chosen some other employees instead. Kollmorgen described this approach to redundancy selection as 'a logical exercise of managerial discretion'.<sup>75</sup> So understood an employer need not justify its choice of the particular employees made redundant other than by reference to its operational requirements. If the selection process was unfair as between employees that was a matter for section 170DE(2).<sup>76</sup>

*Kenefick* was decided before section 170DE(2) was declared invalid, but even then Kollmorgen described the case as 'of particular importance in setting the boundaries for employers of legitimate exercise of managerial prerogative' with respect to 'operational requirements' dismissals.<sup>77</sup> It is fair to suppose that Kollmorgen did not wholly agree with where these boundaries were set with respect to redundancy selection for he concluded his review with the observation that '[a] careful balance must be found between the rights of a responsible employer to exercise managerial prerogative in the efficient operation of their business and the interests of employees in legitimate job security'.<sup>78</sup> As previously noted, the High Court in *Re Cram* also drew the line at the efficient operation of the business and a federal Commissioner had understood that to mean, not unreasonably, that reviewing the process of redundancy selection was within its discretion.

Kollmorgen surmised, while the appeal was pending, that '[m]ore development is required, and may flow from the appeal'.<sup>79</sup> In the event it was the essence of the Full Court's joint judgment on appeal that redundancy selection can constitute a distinct reason for dismissal. The Court explained that each

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72 Ibid.

73 Stuart Kollmorgen, 'What Remains of Managerial Prerogative in "Operational Requirements" Dismissals?' (1995) 8 *Australian Journal of Labour Law* 247, 249.

74 *Kenefick* (1995) 131 ALR 197, 208 (Wilcox CJ).

75 Kollmorgen, above n 73, 249.

76 *Kenefick* (1995) 131 ALR 197, 208 (Wilcox CJ).

77 Kollmorgen, above n 73, 247; *Quality Bakers of Australia Ltd v Goulding* (1995) 60 IR 327 (Beazley J).

78 Kollmorgen, above n 73, 254.

79 Ibid.

provision was directed at the dismissal of an *individual* employee. Therefore reducing the overall number of welders would not, of itself, have led to the dismissal of any particular welder, the selection process having begun only after the decision to do so was taken.<sup>80</sup> That is, excess labour and the application of selection criteria were both reasons for each appellant's dismissal and since the latter reason was based on conduct or performance 'that brought s 170DC into play'.<sup>81</sup> With respect to section 170DE(1) the Court added that both reasons were based on ASC's operational requirements and that the ASC had failed to make out its case in relation to the second reason, that it had 'a valid reason for the selection of each appellant'.<sup>82</sup> It was in relation to this dicta that a division emerged in the Court in *Cosco Holdings Pty Ltd v Do*.<sup>83</sup>

### B Placing Limits on *Kenefick*

A decision of the Full Federal Court, *Cosco* like *Kenefick* involved an appeal in relation to section 170DE(1). The appeal was against the decision of Madgwick J who ruled that *Cosco* had no valid reason for selecting the six particular employees made redundant and hence no valid reason pursuant to its second limb.<sup>84</sup> While the appeal was unanimously upheld, Northrop J was particularly critical of the authorities the trial judge had relied upon in support of that decision. As well as *Kenefick*, these included *Nettlefold*, *Kerr* and a decision of the trial judge in *Westen v Union Des Assurances De Paris* [No 2].<sup>85</sup> With reference to *Kenefick*, Northrop J preferred 'the opinion expressed by the Chief Justice' to that of the Full Court on appeal.<sup>86</sup> He could not see how a reason for dismissal could be based on operational requirements yet not be 'sufficiently defensible' to be deemed 'valid'.<sup>87</sup> More generally Northrop J maintained that elements of the defunct section 170DE(2) were being imported into section 170DE(1) and that the source of that importation was 'the erroneous dicta of the Full Court in *Kenefick*'.<sup>88</sup>

The majority judgment of Lindgren and Lehane JJ differed from that of Northrop J in key respects. Whilst agreeing with Northrop J that *Nettlefold*, *Kerr* and *Westen* conferred on the word 'valid' a wider meaning than was consistent with *Victoria v Commonwealth* and to that extent should be overruled,<sup>89</sup> their Honours made it clear that this criticism was not to be taken as 'inconsistent with anything decided in *Kenefick*'.<sup>90</sup> It was still the law, *Victoria v Commonwealth* notwithstanding, that the employer must comply with section 170DC if it is

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80 *Kenefick* [No 2] (1996) 65 IR 366, 370–73 (Ryan, Beazley and North JJ).

81 *Ibid* 371–72.

82 *Ibid* 372–73.

83 (1997) 79 FCR 566 ('*Cosco*').

84 *Cosco Holdings Pty Ltd v Thu Thi Van Do* [1997] IRCA 215 [17]–[18].

85 (1996) 88 IR 268 (Madgwick J) ('*Westen*').

86 *Cosco* (1997) 79 FCR 566, 581.

87 *Ibid* 574–5, 577, 580–1, 585–7.

88 *Ibid* 581–2.

89 *Ibid* 592.

90 *Ibid*.

determined, as a question of fact, that there are two operative reasons for dismissal, for this followed from its opening words.<sup>91</sup> Similarly Lindgren and Lehane JJ endorsed the *Kenefick* proposition that the second limb of section 170DE(1) like the first was concerned with the dismissal of an individual employee.<sup>92</sup> In so doing they declined Cosco's invitation 'to distinguish, but not overrule' *Kenefick*, being of the view that on this point the decision was 'on the contrary, demonstrably right'.<sup>93</sup> To establish that operational requirements justify a reduction in the work force by six is not necessarily to establish a valid reason for the dismissal of any particular employee. That said, their Honours considered that in some cases it may come fairly close towards doing so, for example, where the work performed by the six employees is similarly unskilled and where each of the six are selected from a larger pool of such workers.<sup>94</sup>

Arguably the figure 'six' was not plucked out of the air but was in fact a reference to the six respondents all of whom, having worked (with one exception) on the appellant's facial tissues production line, were similarly unskilled. This would account for the majority readily accepting the trial judge's findings that excluded as an operative reason one based on an employee's capacity or conduct – with effect that section 170DC did not apply.<sup>95</sup> The basis of that finding was Cosco's submission that 'there were no fair or sensible criteria' it could have applied based on the employees' value to its business.<sup>96</sup> However the trial judge did not accept Cosco's further submission that 'the fairest way to carry out the selection process was randomly'.<sup>97</sup> Rather Cosco should have considered the 'individual circumstances' of the employees, the impact on them of the dismissal, alternatives such as 'natural attrition' or 'voluntary redundancy'.<sup>98</sup> In so deciding the trial judge gave the word 'valid' a wider meaning than was compatible with *Victoria v Commonwealth*. This would account for Lehane and Lindgren JJ joining Northrop J in allowing the appeal.<sup>99</sup>

It follows from what has been said that members of both courts were sharply divided as to whether redundancy selection was reviewable for the purposes of section 170DE(1). In *Kenefick* the position was clear cut, with Wilcox CJ opposed to any review while the appellate court was in favour of one. In *Cosco* the positions were reversed with the entry into the debate of the High Court decision in *Victoria v Commonwealth*. But behind the apparent unanimity of the Full Federal Court was an equally sharp division. While Northrop J clearly preferred the opinion of Wilcox CJ, Lindgren and Lehane JJ jointly endorsed the decision of the Full Court in *Kenefick*, insofar as it was compatible with *Victoria v Commonwealth*.

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91 Ibid 592–3.

92 Ibid 590.

93 Ibid.

94 Ibid.

95 Ibid 589, 592.

96 *Cosco Holdings Pty Ltd v Thu Thi Van Do* [1997] IRCA 215 (Madgwick J), [12]. See also [13], [16].

97 Ibid 12.

98 Ibid 16–17.

99 *Cosco* (1997) 79 FCR 566, 592–3. See also Spry, above n 63.

There remains the question whether in so deciding the majority judgment in *Cosco* struck the ‘right’ balance between the interests of employees and employers. As previously discussed, finding the right balance requires some give and take. Fairness as a concept enters into the balance on the understanding that it does not significantly interfere with an employer’s prerogative to run a business in the most efficient manner. A useful reference point in this regard is the distinction identified as the basis for that balance: between the merits and the process of redundancy. The question then arises how was the balance struck as reflected in the decision of Madgwick J in *Cosco* any different from that of the majority on appeal?

Unlike the majority on appeal Madgwick J took the interests of the community into account. Specific reference to the community having an interest in the balance struck between employer and employee appears in *Westen*, an earlier decision of Madgwick J, though the source of this community-based approach appears to have been Lee J in *Nettlefold*. Justice Lee maintained that in giving effect to the ILO Convention the *Reform Act* sought to establish a balance between the rights of the employer on the one hand, and the employee and the community on the other.<sup>100</sup> Greater emphasis was, however, placed by Madgwick J on the rights and interests of the community being accommodated ‘in the ascertainment of the point of balance between the competing interests of employer and employee’.<sup>101</sup> His Honour explained that those interests extended beyond preserving labour as an economic asset to securing ‘appropriate standards of fair and proper dealings’ among all citizens, not just employers and employees.<sup>102</sup>

In *Cosco* Northrop J disapproved of *Westen* for having justified reliance on *Kenefick* by reference to ‘broadly accepted community standards’.<sup>103</sup> The decision was also roundly criticised by the majority (alongside *Nettlefold* and *Kerr*) for giving the word ‘valid’ in section 170DE(1) a wider meaning than was consistent with *Victoria v Commonwealth*. It is evident that the community’s interests were not fully accommodated in the balance struck by the majority on appeal in the sense envisaged by Madgwick J. The balance his Honour had in mind recognised that a dismissal may have a disproportionate impact on some employees rather than others. That is, it would have taken into account not just disparate treatment as between employees but disparate impact on employees, based on such individual circumstances as age, family and financial circumstances. The incoming Coalition Government did not pass judgment on the balance struck by the majority in *Cosco*. Pre-empting *Cosco* are the amendments introduced by the Coalition in 1996.

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100 *Nettlefold* (1996) 69 IR 370, 372.

101 *Westen* (1996) 88 IR 268, 273.

102 *Ibid.*

103 (1997) 79 FCR 566, 586.

### C The 1996 Amendments

The 1996 amendments were meant to redress the perceived imbalances in favour of employees in the former legislation. Employer concerns that the 1993 provisions were ‘far too detailed, too prescriptive and too legalistic and hence a disincentive to employment’ were some of the reasons given by the Coalition for having them amended ‘based on the principle of a “Fair Go All Round”’.<sup>104</sup> Perhaps less obvious is why the Coalition adopted what may be described as a hybrid model.

When the *WR Act* replaced the *IR Act* it provided for relief to be granted on the one overarching ground copied from the states, that the dismissal was ‘harsh unjust or unreasonable’.<sup>105</sup> Further guidance was provided by section 170CG(3) which directed the Commission ‘to have regard to’ the matters listed therein in deciding whether a dismissal was unfair, and it is here that the equivalent *IR* provisions were to be found. Both limbs of the former section 170DE(1) now appeared in section 170CG(3)(a), while section 170CG(3)(c) still closely resembled the former section 170DC in providing for employees to be consulted if the reason for their dismissal was based on capacity or conduct. On the other hand, their context was entirely different.

In suggesting that undue weight was accorded to procedural fairness under the former section 170DC, the Explanatory Memorandum to the Workplace Relations Bill underlines a key reason why the Coalition Government adopted a hybrid model.<sup>106</sup> Whereas section 170DC operated as a stand alone provision, section 170CG(3)(c) was simply one of a number of matters the Commission was required ‘to have regard to’ when deciding, overall, whether a dismissal was harsh, unjust or unreasonable. Admittedly it is difficult to envisage the circumstances in which, absent a valid reason, there would not be a finding that a dismissal was harsh, unjust or unreasonable. Nonetheless, in allowing for a range of matters to be considered, none of which was determinative of the result, a more ‘balanced’ approach was reasonably anticipated. This was reinforced by the objects clause (section 170CA (2)) that directed the Commission, when hearing

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104 Peter Reith, ‘Better Pay for Better Work – The Federal Coalition’s Industrial Relations Policy’ (Political Party Documents, Liberal Party of Australia, 18 February 1996) 1 <[http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/VHLG6/upload\\_binary/VHLG6.pdf](http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/VHLG6/upload_binary/VHLG6.pdf)>. See also Anna Chapman, ‘Termination of Employment Under the *Workplace Relations Act 1996* (Cth)’ (1997) 10 *Australian Journal of Labour Law* 89, 100, 89–90, 93, 111; Peter Waring and Alex De Ruyter, ‘Dismissing the Unfair Dismissal Myth’ (1999) 25 *Australian Bulletin of Labour* 251, 251–52.

105 *WR Act* s 170CE(1). See generally Greg McCarry, ‘Relationships Between the Federal and NSW Industrial Relations Systems’ (1998) 11 *Australian Journal of Labour Law* 69, 82; Chapman, above n 104, 91–2; Creighton and Stewart, above n 7, 629–30.

106 Explanatory Memorandum, Workplace Relations and Other Legislation Amendment Bill 1996 (Cth) [7.44]; see Department of Parliamentary Services (Cth), *Workplace Relations and Other Legislation Amendment Bill 1996*, Bills Digest No 96 of 1995–96, 4 June 1996, Schedule 7 (iv) The Reith proposals; <[http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/BD96/96bd96](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/BD96/96bd96)>; Explanatory Memorandum, Workplace Relations and Other Legislation Amendment Bill 1996 (Cth) [7.44]. See also Chapman, above n 104, 92.



an application, to ensure that a ‘fair go all round’ be accorded to both employer and employee.

Taken from a decision of a New South Wales industrial tribunal, the Explanatory Memorandum indicated that the phrase, a ‘fair go all round’ had acquired a special meaning in the sense of ‘industrial justice’, an element of which was ‘the importance but not inviolability of the right of an employer to manage the employer’s business’.<sup>107</sup> It was anticipated that this would encourage federal tribunals to adopt new standards of ‘fair play’ for judging employer behaviour, ‘directed to achieving some balance between the interests of employers and employees’ as opposed to constituting ‘a charter of rights for employees’, which was said to be the hallmark of the 1993 provisions.<sup>108</sup> What the Government apparently did not factor in when it adopted this hybrid model is how enduring the legacy of *Kenefick* and *Cosco* would prove to be in transcending their statutory framework.

#### D Transition in Jurisdiction

Within a year of *Cosco* having been decided a Full Bench held in *Windsor Smith v Liu*<sup>109</sup> that redundancy selection can constitute a distinct reason for dismissal, at least for the purposes of section 170CG(3)(c). What the Full Bench described to be ‘the true position’ was a question of fact.<sup>110</sup> That is, it was for the Commission to factually identify the selection criteria comprising the redundancy selection process. In this regard three bases for selection were contemplated. Employees dismissed on redundancy grounds could be ‘selected for redundancy ... for a reason related to the operational requirements of the employer’s business, for a reason related to the employee’s capacity or conduct, or for reasons of both kind’.<sup>111</sup> If the reason related to capacity or conduct, or included such a reason, the employee had to be consulted. Failure to do so was a factor the Commission was required to take into account in deciding whether a dismissal was harsh, unjust or unreasonable.<sup>112</sup>

The transition between Acts was more circuitous with respect to section 170CG(3)(a) in part because the Full Bench questioned the relevance of *Kenefick* and *Cosco* in the construction of that paragraph. Both were decided under the *IR Act* whereas under the *WR Act* the issue of whether a valid reason existed was no

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107 Explanatory Memorandum, Workplace Relations and Other Legislation Amendment Bill 1996 (Cth) [7.19]. See Chapman, above n 104, 90, 93–4; Therese MacDermott, ‘Industrial Legislation in 1996: The Reform Agenda’ (1997) 39 *Journal of Industrial Relations* 52; Stewart, ‘The New Unfair Dismissal Jurisdiction in South Australia’, above n 24, 385–9.

108 *Fryar v Systems Services Pty Ltd* (1995) 130 ALR 168, 189 (Gray J). See generally Stewart, ‘And (Industrial) Justice for All?’, above n 60, 113; Chapman, above n 104, 91, 94–5; MacDermott, above n 107, 65. See also Therese MacDermott and Joellen Riley, ‘Alternative Dispute Resolution and Individual Workplace Rights: The Evolving Role of Fair Work Australia’ (2011) 53 *Journal of Industrial Relations* 718, 722–4.

109 (1998) 140 IR 398 (Giudice J, Polites SDP and Commissioner Gay) (*Windsor Smith*’).

110 *Ibid* 404.

111 *Ibid*.

112 *Ibid*.

longer ‘the critical question’ in determining whether a dismissal was unfair.<sup>113</sup> *Windsor Smith* involved an appeal by a shoe manufacturer against an earlier decision that the dismissal of six employees was harsh, unjust or unreasonable,<sup>114</sup> and the Full Bench pointed out that the existence of a valid reason did not determine that question.<sup>115</sup> However, the existence of a valid reason was a central issue at first instance and on appeal.

In the earlier decision the Senior Deputy President had found that no valid reason existed because the selection process was unfair and the appellant submitted that his Honour’s reliance on *Kenefick* in support of that finding was misplaced in view of the more recent decision in *Cosco*.<sup>116</sup> While the Full Bench did not address that submission directly, it made its disagreement with the appellant’s interpretation of *Cosco* clear, based as it was on the judgment of Northrop J. It was pointed out that Northrop J alone declined to follow *Kenefick*. The remaining members of the Federal Court, whilst agreeing with his Honour’s conclusions, ‘found them not inconsistent with *Kenefick*’.<sup>117</sup> That is, to the extent that employees were selected at random and not on the basis of their capacity or conduct, the majority had little difficulty with Justice Northrop’s conclusion that there was just a single (valid) reason for their termination based on operational requirements.<sup>118</sup>

Though the Full Bench was not prepared to rely on *Cosco* directly in deciding whether a valid reason existed pursuant to section 170CG(3)(a), it made its position known in other ways. Notably it questioned the need for the Senior Deputy President to have reviewed the appellant’s selection process in the case of those respondents who were selected ‘on the basis of operational requirements, and not because of their capacity or conduct’.<sup>119</sup> The Full Bench acknowledged that distinguishing between the two was problematic. The ‘lack of cutting skills’ (in the case of one respondent) may indicate that selection was based on employee capacity.<sup>120</sup> Or it could equally be said to have been based on operational requirements (in that the merger of two positions meant that the employee was not able to fill the new position). In these circumstances the Full Bench could not understand why the Senior Deputy President did not accept the appellant’s evidence of its reasons for selection (as having been based on operational requirements).<sup>121</sup>

The difficulty in some cases of determining when a selection was based on capacity or conduct as opposed to operational requirements alone, raises the obvious question of whether the balance struck in *Cosco*, and which survived the

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113 Ibid 402–4.

114 *Liu v Windsor Smith* (Unreported, Australian Industrial Relations Commission, Watson SDP, 15 December 1997).

115 *Windsor Smith* (1998) 140 IR 398, 405 (Giudice J, Polites SDP and Commissioner Gay).

116 Ibid 401.

117 Ibid.

118 Ibid 403.

119 Ibid 405.

120 Ibid.

121 Ibid.

transition in jurisdiction, could be sustained. Perhaps deferring to the employer on this ‘question of fact’, as suggested by the Full Bench, was one way of maintaining that balance. It is proposed to return to this question later in this article, having reviewed the remaining cases. For present purposes it suffices to note that the earlier decision was upheld notwithstanding that the Full Bench had misgivings regarding the approach taken by the Senior Deputy President with respect to section 170CG(3)(a).<sup>122</sup> *Windsor Smith* was decided during the early phase in the operation of the *WR Act*, and at a time when it was customary to apply a ‘broad approach’ to section 170CG(3), that is, without strict regard for findings under each of its paragraphs.<sup>123</sup> With the increased emphasis on findings that was initiated by the Full Federal Court in *Edwards v Giudice*,<sup>124</sup> came an increased emphasis on their importance.<sup>125</sup> This offered the Full Bench a fresh opportunity to revisit the issue of what constitutes a valid reason for dismissal in cases of redundancy.

### E The Two Propositions in *Sulocki*

In *Lockwood Security Products Pty Ltd v Sulocki*<sup>126</sup> the Full Bench removed any lingering doubt that redundancy selection was reviewable for the purposes of section 170CG(3)(a) of the *WR Act*. The case involved an appeal against an earlier decision that the dismissals of the five respondents from the appellant’s warehouse were not for a valid reason and therefore harsh, unjust or unreasonable.<sup>127</sup> The appellant submitted that in so deciding the Commissioner had given insufficient weight to its operational requirements, despite having acknowledged that there were operational reasons for such a reduction in its workforce. The Full Bench understood that argument to be based on the premise that the operational requirement in itself justified giving management a degree of leeway in selecting the employees to be retrenched. More particularly, the size of the appellant’s warehouse workforce (of 28) was advanced as a mitigating factor. It mattered little that employees were selected on the basis of personal traits and

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122 Ibid 405–6.

123 See, eg, *Australia Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1 (Ross V-P, Polites SDP and Commissioner Hoffman); *Brown v SBA Foods Pty Ltd* (1998) 86 IR 6 (Commissioner Whelan).

124 (1999) 94 FCR 561 (Moore, Marshall and Finkelstein JJ).

125 See, eg, *Chubb Security Aust Pty Ltd v Thomas* [2000] AIRC 822 (McIntyre V-P, Marsh SDP and Commissioner Larkin); *King v Freshmore (Vic) Pty Ltd* [2000] AIRC 1019 (Ross V-P, Williams SDP and Commissioner Hingley); *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 143 [26]–[27] (Ross V-P, Acton SDP and Commissioner Cribb); *Britax Rainsford Pty Ltd v Jones* (2001) 109 IR 381, 389–91 (Munro J, O’Callaghan SDP and Commissioner Foggo); *Steggles Ltd v West* (Unreported, Australian Industrial Relations Commission, Watson, Williams SDPP and Commissioner Smith, 11 May 2000); *Tenix Defence Systems Pty Ltd v Fearnley* (Unreported, Australian Industrial Relations Commission, Ross V-P, Polites SDP and Commissioner Smith, 22 May 2000); *Smith v Moore Paragon Australia Ltd* [2002] AIRC 317, [93] (Ross V-P, Lacy SDP and Commissioner Simmonds) (‘*Moore Paragon*’).

126 [2001] AIRC 851 (Giudice J, Lacy SDP and Commissioner Blair) (‘*Sulocki*’).

127 *Sulocki v Lockwood Security Products Pty Ltd* [2001] AIRC 108 (Commissioner Whelan).

attributes ‘because the management knows what is best for the business’.<sup>128</sup> So understood, the Full Bench did not hesitate. It rejected that submission together with its underlying premise. This took the form of two propositions:

while operational requirements may provide a valid reason for staff reductions they do not necessarily provide a valid reason for the retrenchment of particular employees. The Commission must be satisfied, on the facts, as they appear before it, that there is a valid reason for the termination of the employment of the particular employees who have been selected for retrenchment.<sup>129</sup>

In *Cosco* the majority adopted the *Kenefick* approach with respect to section 170DE(1) and in *Sulocki* the Full Bench did likewise with respect to section 170CG(3)(a). That much is clear from the first proposition. Embedded in the second proposition was the obligation imposed on the Commission to objectively determine whether a valid reason existed for the retrenchment of the particular employee (in question). The Full Bench went on to explain that a valid reason must be “‘*sound, defensible or well founded*”... in relation to that employee’,<sup>130</sup> and in this case the appellant did not meet that standard with respect to the method of selection in a way that was either ‘objective or transparent’.<sup>131</sup> As a result the dismissals of the respondents were not for a valid reason and hence harsh, unjust or unreasonable.<sup>132</sup> That was enough to dispose of the case, however the Full Bench had regard to *Windsor Smith* for a third proposition, as it related to the obligation to consult under section 170CG(3)(c).

This third proposition stated in no uncertain terms that denying the respondents an opportunity to answer allegations of unsatisfactory performance would, of itself, have rendered their dismissals harsh, unjust or unreasonable ‘even though there was a genuine need to reduce the number of positions in the warehouse’.<sup>133</sup> Nonetheless it was the first two propositions that appear to have concerned employers the most, given their reluctance to accept the finality of the Full Bench’s decision with respect to section 170CG(3)(a). On the positive side, the persistence that employers displayed in seeking to have the first two propositions overruled provided successive Full Benches with the opportunity to clarify the nature of what may termed as the ‘two valid reasons’ approach.

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128 *Sulocki* [2001] AIRC 851 [18] (Giudice J, Lacy SDP and Commissioner Blair). See also Transcript of Proceedings, *Lockwood Security Products Pty Ltd v Sulocki* (Australian Industrial Relations Commission – Full Bench, C2001/1250, Giudice J, Lacy SDP, Commissioner Blair, 23 August 2001) 108–10.

129 *Sulocki* [2001] AIRC 851 [19] (Giudice J, Lacy SDP and Commissioner Blair).

130 *Ibid* [28].

131 *Ibid* [13], [20]–[26].

132 *Ibid* [13], [29]. See *Sulocki v Lockwood Security Products Pty Ltd* [2001] AIRC 108, [60]–[99] (Commissioner Whelan).

133 *Sulocki* [2001] AIRC 851 [33] (Giudice J, Lacy SDP and Commissioner Blair). The language was moderated in *Smith v Moore Paragon Australia Ltd* [2002] AIRC 317 [79] (Ross V-P, Lacy SDP, Commissioner Simmonds) (*Moore Paragon*). See generally *Abt v Ericsson Australia Pty Ltd* [2003] AIRC 275 (Harrison SDP, Blain DP and Commissioner Raffaelli) [31]; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

## F Genuine Operational Reason

As the leading authority on section 170CG(3)(a) in a redundancy context, *Moore Paragon*<sup>134</sup> provides further insight into the ‘two valid reasons’ approach in a number of important respects. As well as extracting the key propositions arising from *Windsor Smith* and *Sulocki*,<sup>135</sup> the case expanded upon the nature of what may be termed as the first valid reason. It is arguable that the Full Bench’s characterisation of that concept as a ‘genuine operational reason’ provided the template for the Work Choices ‘operational reasons’ exclusion and is therefore worthy of consideration for that reason alone. In this regard, it is doubtful whether such an exposition would have occurred had the issue not been raised by the respondent employer on appeal.

*Moore Paragon* involved an appeal by seven employees disputing an earlier finding that there was a valid reason for their selection for redundancy, based as it was on their Work Cover or injury status.<sup>136</sup> As well as defending this earlier finding, counsel for the respondent mounted a broader challenge to the appeal, in contending that to the extent that *Sulocki* stood for the first two propositions it was ‘wrongly decided’.<sup>137</sup> In rejecting that submission, that Full Bench referred to its standard practice of not departing from previous decisions,<sup>138</sup> but also provided more substantive reasons for not doing so.<sup>139</sup>

Each of these reasons addressed different aspects of what the Full Bench saw as the fundamental flaw in the respondent’s challenge to the first two propositions in *Sulocki*. The first reason pointed out that the respondent had asked the wrong question. The question that should have been asked was whether there was a ‘valid reason’ for the dismissal of a particular employee. ‘Whether there was a genuine operational reason to reduce the number of persons employed at a particular enterprise does not provide a complete answer to this question’.<sup>140</sup> The second reason dismissed ‘as too simplistic’ the respondent’s submission that the two limbs of section 170CG(3)(a) were mutually exclusive so that a dismissal on redundancy grounds can only relate to the second limb.<sup>141</sup> The third reason addressed what lay ‘at the heart’ of the respondent’s submission that to establish a valid reason (for termination) related to operational requirements requires establishing ‘a genuine causal relationship’ between the termination and the operational requirements.<sup>142</sup> Again the Full Bench considered that proposition to be only half right. It was not enough to show that the two were *genuinely* related to one another ‘in the sense that the termination is a logical response to

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134 [2002] AIRC 317 (Ross V-P, Lacy SDP, Commissioner Simmonds).

135 *Ibid* [71]–[79].

136 *Smith v Moore Paragon* [2001] AIRC 1156 (Commissioner Hingley).

137 *Moore Paragon* [2002] AIRC 317, [80].

138 *Ibid* [88]–[89].

139 *Ibid* [73]–[79].

140 *Ibid* [83].

141 *Ibid* [85].

142 *Ibid* [86].

those (operational) requirements'.<sup>143</sup> Due weight had to be given to the word 'valid' and that meant, in line with the approach taken in a number cases, 'that the reason for dismissal of the particular employee was "sound, defensible or well founded"'.<sup>144</sup>

In *Moore Paragon* the Full Bench gave the word 'valid' due weight by applying the first two propositions from *Sulocki*. To the extent that the seven appellants were selected for redundancy on the basis of their Work Cover or injury status, their dismissal could not be described as 'sound, defensible or well founded'.<sup>145</sup> The Full Bench thus confirmed that a valid reason grounded in redundancy has two distinct meanings, depending on which stage in a redundancy process is being considered. Whether the employer has a valid reason for reducing the size of its workforce poses a fundamentally different question from whether the employer has a valid reason for selecting a particular employee for retrenchment. The 'first valid' reason was, in effect, a 'genuine operational reason'. At issue was the existence of a genuine redundancy. Very different considerations applied in respect of the second valid reason, considerations that arguably led to the enactment of the 'operational reasons' exclusion.

### G Second Valid Reason

There is a case to be made that the approach taken by successive Full Benches to the interpretation of section 170CG(3)(a) was a factor in the Coalition Government's decision to enact the 'operational reasons' exclusion. *Windsor Smith*, *Sulocki* and *Moore Paragon* have already been discussed but the picture is incomplete without reference to *Pacific Coal Pty Ltd v Smith*.<sup>146</sup> Described during debate on the 'operational reasons' exclusion as an example of the kind of situation 'that this change clarifies', then Prime Minister Howard mentioned the 'Blair Athol' case to illustrate the invidious practice of 'double-dipping' that is, where employees take redundancy payments and then sue for unfair dismissal.<sup>147</sup> However, as Forsyth pointed out, *Pacific Coal* had little to do with such double-dipping.<sup>148</sup>

Though a litigant in one of the longest and more contentious redundancy disputes to come before the Full Bench,<sup>149</sup> the employer in *Pacific Coal* was not atypical in seeking to have the 'two valid reasons' approach overruled.<sup>150</sup> How

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143 Ibid.

144 Ibid.

145 Ibid [90]–[91].

146 (2002) 119 IR 389 (Watson, Kaufman SDPP and Commissioner Smith) ('*Pacific Coal*').

147 See Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 82–3 (John Howard, Prime Minister). See also Commonwealth, *Parliamentary Debates*, Senate, 29 November 2005, 10–13 (Ruth Webber); Margaret Lee, 'Work Choices, the Demise of the State Systems and the Future for Working Life in Queensland' (2005) 56 *Journal of Australian Political Economy* 207, 213–14.

148 Forsyth, 'Economic Dismissals', above n 12, 517.

149 Applications were filed in July 1998 with the last case coming before a full bench in 2005. See *Rio Tinto Coal Australia Pty Ltd (formerly Pacific Coal Pty Ltd v Smith)* [2005] AIRC 318; [2005] AIRC 687 (Watson, Kaufman SDPP and Commissioner Smith).

150 *Pacific Coal* (2002) 119 IR 389, 396 [24] (Watson SDP and Commissioner Smith).

the Full Bench responded to this submission points to the more likely reason why Prime Minister Howard would have regarded the law in need of reform. The answer the Full Bench gave, while not unanimous, was clear. Senior Deputy President Watson and Commissioner Smith were not persuaded that the approach taken by previous Full Benches, in viewing section 170CG(3)(a) as being concerned with an individual termination, was wrong. So in the event that a termination involved ‘the selection of an employee, amongst others’, consideration had to be given to ‘whether there exists a valid reason for the selection of the particular employee to be made redundant’.<sup>151</sup>

It would also have been of concern to the Prime Minister that both questions were readily answered in favour of the 16 respondents. In a workplace where some employees are selected for redundancy from ‘amongst others’, the selection process ordinarily involves an assessment of each employee’s capacity or conduct, and Pacific Coal was no exception. Since it had applied a Performance Effectiveness Review (‘PER’) process to identify employees for redundancy, it was necessary for the Commission to determine whether there was a valid reason for that selection that was so related.<sup>152</sup> The Full Bench concluded there ‘was not a valid reason relating to their capacity or conduct’,<sup>153</sup> and that ‘the actions of the employer were harsh, unjust and unreasonable.’<sup>154</sup>

The key finding in this regard concerned the context in which the PER selection process was conducted. Supervisors had ‘incorporated a bias against CFMEU members’ (such as the respondents) and this militated against a fair assessment of their performance.<sup>155</sup> Reference was made to British authorities that redundancy selection was essentially a comparative selection process between employees, judged objectively ‘within the range of fairness and reason’, tempered by a pragmatism that ruled out any ‘officious scrutiny’ of marking regimes.<sup>156</sup> That did little to reassure Pacific Coal, which went on to argue on appeal before a Full Federal Court<sup>157</sup> that because of this focus on the selection process, the validity of its ‘operational reasons’ were treated ‘as a side issue’. The Full Court disagreed. It considered that in appropriate cases, as where the selection process is ‘attacked as biased and inaccurate’, both limbs of section 170CG(3)(a) applied.<sup>158</sup>

The foregoing review of four Full Bench decisions, handed down under the *WR Act*, makes it clear that employer antipathy towards the ‘two valid reasons’ approach continued unabated after the 1996 amendments took effect. This is understandable. An employer’s characteristically unchallenged assertion that it had a valid reason to institute redundancies would, not infrequently, be

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151 Ibid 396 [26].

152 Ibid 396 [27]–[28].

153 Ibid 404 [59].

154 Ibid 404 [57].

155 Ibid 397–400, 404 [56]–[59].

156 Ibid 401–4.

157 *Re Australian Industrial Relations Commission: Ex parte Smith* (2004) 134 IR 316 (Lee, Goldberg and Weinberg JJ).

158 Ibid 338 [96].

neutralised by the further finding that there was not a valid reason for selecting the particular employees made redundant.<sup>159</sup> Such concerns would have been compounded by the fact that a finding that no valid reason existed would virtually guarantee a dismissal being declared ‘harsh, unjust or unreasonable’.<sup>160</sup> Which is probably why employers persisted in seeking to have the ‘two valid reasons’ approach overruled or the test for evaluating the fairness of the selection process moderated. Both attempts were singularly unsuccessful. Notably the notion that management knows best when it comes to redundancy selection did not receive a sympathetic hearing in *Sulocki*, although in *Pacific Coal* the Full Bench seemed to waver somewhat when it had regard to the more pragmatic UK approach of what constitutes a fair selection process.

There is something to be said for the view that the UK approach would have been more acceptable to employers. Reference has been to the overriding statutory requirement under British unfair dismissal law that the employer must act reasonably in treating a reason for dismissal as sufficient. What Davies and Freedland described as ‘the central and defining point of the concept of unfairness’,<sup>161</sup> became closely associated with the ‘the range of reasonableness test’ which required a court or tribunal to assess the reasonableness of the employer’s decision to dismiss by reference to a range of reasonable employer responses.<sup>162</sup> In discussing more generally how courts and tribunals assess reasonable employer behaviour, Elias expressed concern that the focus on how employers actually behave as a group was a ‘dangerous development’, since reasonableness would be ‘defined by the attitudes of the most prejudiced body of employers’.<sup>163</sup> Noting Elias’ comments, Anderman further pointed out that ‘the range of reasonableness test’ as it developed did little to interfere with managerial discretion. That is, instead of adhering to an objective standard of fairness, courts focussed on ‘the lowest common denominator of acceptable managerial practice’.<sup>164</sup> He considered that this inevitably impacted on the balance struck between the competing policies of employers and employees, with priority being given to the former, of ‘avoiding undue interference with managerial prerogative’.<sup>165</sup> Elsewhere, when discussing redundancies, Anderman thought it worth mentioning that close attention was paid by courts to redundancy selection because of judicial concern that tribunals should not intervene too

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159 See, eg. *Clarke v Formfile Infosoft Pty Ltd* (2003) 122 IR 348 (Watson, Lacy SDPP and Commissioner O’Connor); *Rosedale Leather Pty Ltd v Metcalf* (2004) 144 IR 365 (Watson SDP, Hamilton DP and Lewin C); *Australian Nuclear Science and Technology Organisation v Rajaratnam* (2005) 145 IR 165, 173–4 (Giudice J, Marsh SDP and Commissioner Thatcher). Cf *Powerlab Pty Ltd v Georgiadis* (2005) 147 IR 406 (Lawler V-P, McCarthy DP and Commissioner Mansfield) (‘*Powerlab*’).

160 See *Rail Corporation New South Wales v Vrettos* (2008) 176 IR 129 (Kaufman SDP, McCarthy DP and Commissioner Blair).

161 Paul Davies and Mark Freedland, *Labour Law: Text and Materials* (Weidenfeld and Nicolson, 1979) 349. In relation to s 57(3) see generally Anderman, above n 44, ch 5.

162 Elias, above n 47, 205; Anderman, above n 44, 149, 202.

163 Elias, above n 47, 213.

164 Anderman, above n 44, 322.

165 *Ibid.*



closely in the selection processes.<sup>166</sup> This attitude by British courts may be contrasted with the approach taken by Australian courts and tribunals, at least at the federal level.

In his review of South Australian unfair dismissal law, Stewart drew attention to the similarities between the ‘range of reasonable responses’ test used in the UK and the industrial fair play principle developed in that State (and in New South Wales).<sup>167</sup> As noted earlier, reference was made to that principle in the Explanatory Memorandum to the 1996 Workplace Relations Bill. The expectation was that federal tribunals would be encouraged to look for guidance to decisions of state tribunals. It is fair to say that this did not happen, and the adoption of a hybrid model appears to have muddied the waters.<sup>168</sup> A fallback position would have been to further limit significantly the circumstances in which the second valid reason applied. That argument would, however, have been difficult to sustain without significant changes to the balance hitherto struck between the interests of employers and employees.

What seems to have developed alongside the ‘two valid reasons’ approach is that one valid reason related to an employer’s operational requirements and the other to an employee’s capacity or conduct. While it was only in the latter case that the employer was required to adopt a fair selection process, the distinction between the two was not always evident. No doubt acknowledging this difficulty the Full Bench deferred to the employer on this question of fact in *Windsor Smith*, while in *Pacific Coal* it shifted the focus to ‘the selection of an employee amongst others’.<sup>169</sup> The key development, however, occurred on the eve of the enactment of the ‘operational reasons’ exclusion.

In *Powerlab*<sup>170</sup> the Full Bench spelt out more precisely when consideration should be given to redundancy selection and in a way that sought to acknowledge ‘the prerogative of management to restructure an employer’s business based on its operational requirements’.<sup>171</sup> In a joint judgment Lawler VP and McCarthy DP sought to affirm an employer’s prerogative to decide ‘which positions should be retained and which should be abolished’ and, to that end, distinguished between two scenarios. The first involved ‘a reduction in a number of identical or substantially identical positions (or a reduction in the number of employees in a particular classification)’ and the second ‘the abolition of one or more unique positions’.<sup>172</sup> Only in the first scenario was the employer required to conduct a

166 Ibid 204. See also Davies and Freedland, above n 161, 374–8.

167 See Stewart, ‘The New Unfair Dismissal Jurisdiction in South Australia’, above n 24, 386 n 9.

168 Stewart, ‘And (Industrial) Justice for All?’, above n 60, 112–13. While Stewart made that observation in relation to the 1993 provisions, those remarks are equally applicable to the 1996 amendments. See also Chapman, above n 104, 94–5.

169 *Pacific Coal* (2002) 119 IR 389, 396 [26] (Watson SDP and Commissioner Smith).

170 (2005) 147 IR 406 (Lawler V-P, McCarthy DP and Commissioner Mansfield).

171 Ibid 412 [11] (Lawler V-P and McCarthy DP). Cf *Paper Australia Pty Ltd v Day* (2005) 139 IR 275 (Lawler V-P, Ives DP and Commissioner Eames) albeit in relation to s 170CG(3)(c) where the Full Bench sought to confine ‘the capacity of the employee’ in s 170CG(3)(a) to the position actually occupied by the employee (and not an alternative position).

172 *Powerlab* (2005) 147 IR 406, 412–13 [11] (Lawler V-P and McCarthy DP).

fair selection process before the restructuring would ‘amount to a valid reason for the selection of particular employees for redundancy’.<sup>173</sup> In the second scenario the restructuring would, of itself, supply a valid reason for dismissal unless the objective was to facilitate the dismissal of a particular employee. In which case there would be no valid reason for that dismissal ‘notwithstanding the existence of genuine operational requirements necessitating a reduction in staff’.<sup>174</sup>

Thus the distinction that was drawn was between similar and unique positions. The distinction was, admittedly, a fine one but one that sought to balance the prerogative of management to restructure positions, as against the right of employees to be fairly selected ‘from amongst others’. However the difficulty noted in *Windsor Smith* in determining when a review of the selection process is warranted, did not go away. This emerges from the relevant submissions on appeal which related to whether the respondent had been validly terminated. The appellant disputed an earlier finding that it had no valid reason for doing so because the respondent had been selected for redundancy, ahead of another employee, ‘for the reason of pregnancy or family responsibilities’.<sup>175</sup> The respondent was employed in an administrative capacity and in considering this ground of the appeal the majority accepted the argument that possession of tertiary accounting qualifications could legitimately be used as a criterion to determine which of two employees occupying similar positions should be retained. But if the respondent and the other employee occupied different positions ‘the precise issue would be the basis upon which Powerlab decided to abolish Ms Georgiadis’ position’ (rather than the basis upon which she was selected for redundancy).<sup>176</sup>

In the circumstances of the case the majority was uncertain in which category the respondent belonged since it was not clear whether the positions were ‘unique’ or ‘substantially identical’. ‘The better view’, that the respondent belonged in the latter category,<sup>177</sup> appears to have hinged on whether the two positions were interchangeable.<sup>178</sup> That is, both were found to be permanent employees, occupying ‘the same position or substantially similar positions’, so that it was necessary to consider whether a valid reason existed for the respondent’s selection for redundancy.<sup>179</sup> While the majority upheld the appeal, having found that such a valid reason existed,<sup>180</sup> employers would have been disappointed by the need to make such a finding in the first place. *Powerlab* was

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173 Ibid 413 [12].

174 Ibid.

175 *Georgiadis v Powerlab Pty Ltd* [2005] AIRC 289, [30]–[31] (Commissioner Hingley).

176 *Powerlab* (2005) 147 IR 406, 413 [13] (Lawler V-P and McCarthy DP).

177 Ibid.

178 Transcript of Proceedings, *Powerlab Pty Ltd v Georgiadis* (Australian Industrial Relations Commission – Full Bench, C2005/2655, Lawler V-P, McCarthy DP and Commissioner Mansfield, 21 June 2005) 39–42, 196.

179 *Powerlab* (2005) 147 IR 406, 413 [13] (Lawler V-P and McCarthy DP).

180 Ibid, 417–18 [31]–[33] (Lawler V-P and McCarthy DP). In giving effect to the ‘fair go all round’ requirement under s 170CA(2), the majority concluded that failure to consult did not render the respondent’s dismissal harsh, unjust or unreasonable.

decided just before Work Choices was enacted and so could hardly have swayed the passing of the ‘operational reasons’ exclusion. Still, in confirming the ‘two valid reasons’ approach, this decision would have confirmed employers in their conviction that the decision to enact the ‘operational reasons’ exclusion was the correct one.

#### IV FROM GENUINE OPERATIONAL REASON TO GENUINE REDUNDANCY

The foregoing retrospective has focussed on one core aspect of fairness that operated before Work Choices as a key element of the legislative requirement that the employer must have a valid reason for termination as it related to its operational requirements. That element, a judicial construct, was the notion that the redundancy selection process must be fair. The article has sought to argue that the enactment of the ‘operational reasons’ exclusion was, to some extent, a response to that development. As discussed, it was under the Keating Government’s 1993 termination of employment legislation that a close association first developed between fairness and the valid reason requirement and one important by-product of that association was the emergence of the notion that redundancy selection must be fair.

The 1996 amendments were meant to redress the perceived imbalances in favour of employees in this regard but proved unequal to that task. When the incoming Coalition Government retained the threefold valid reason formula under the *WR Act*, it necessarily retained the close association between fairness and the valid reason requirement that had developed under the former legislation. The passing of Work Choices led to the removal of the phrase ‘operational requirements’ from the valid reason requirement (section 652(3)(a)) and a corresponding enactment of the ‘operational reasons’ exclusion. For the first time within the framework of federal termination of employment law redundancy dismissals were treated differently from dismissals related to an employee’s capacity or conduct. As it stood and until its replacement with the ‘genuine redundancy’ exemption, the ‘operational reasons’ exclusion functioned as a jurisdictional barrier at the preliminary stage in proceedings. Section 643(8) barred the making of claims for unfair dismissal ‘if the employee’s employment was terminated for genuine operational reasons or for reasons that included genuine operational reasons’ as defined (to include ‘reasons of an economic, technological, structural or similar nature’) under section 643(9).

The ability of the ‘operational reasons’ exclusion to affect employees whose dismissal was for reasons only remotely associated with redundancy has already been noted.<sup>181</sup> No doubt there are many reasons, beside the issue of redundancy selection, as to why the Coalition took the far-reaching step of having enacted a provision that made virtually no allowance for the interests of employees. Its timing obviously had a lot to do with the 2004 Federal election that gave the

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181 See above, n 12.

Coalition Government control of both Houses of Parliament.<sup>182</sup> Moreover the ‘operational reasons’ exclusion was part of the Work Choices package that had the effect of ‘swinging the workplace relations pendulum to the extreme’, and not just in relation to the law of unfair dismissal.<sup>183</sup> Nonetheless, it would not have been helpful to the cause of preserving the existing provisions that the balance struck in *Cosco*, that survived the transition in jurisdiction, turned out to be, in its execution, problematic.

Notably there was the difficulty of sustaining a viable distinction, which formed the basis of that balance, between the merits of a redundancy dismissal and the redundancy process. In *Powerlab* the Full Bench sought to spell out this distinction in a way that acknowledged the employers prerogative to restructure but, in so doing, revealed that it was a distinction without a difference. One solution, indicated in *Windsor Smith*, was to defer to the employer’s view on this issue. This did not happen. Nor did the Full Bench accept the submission in *Sulocki* that management should be afforded greater leeway in selecting the employees to be retrenched. In this regard it has been suggested that the objective standards set by the Full Bench may have been far too stringent for employers. On the other hand, what Anderman perceived as a ‘lack of balance’ in the UK ‘range of reasonable responses’ test may have been, for that very reason, better tolerated.

It is fair to suppose that the ability to dismiss employees for genuine operational reasons is something employers have always wanted, so it is not surprising that such legislation, once enacted, could not have been readily retracted. Lobbying by employer interests appears to have been a factor in the decision taken by Rudd Labor not to restore claimants made redundant to their former position.<sup>184</sup> In the lead-up to the 2007 federal election Labor’s key policy documents indicated that the ‘operational reasons’ exclusion would be wound back significantly,<sup>185</sup> that under Labor retrenched employees would, for the most

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182 Michael Lyons and Thomas Khoshaba, ‘Pragmatism, Principles and Policy: Federalism and Industrial Relations Regulation in Australia’ (2009) 51 *Journal of Industrial Relations* 173, 187–9.

183 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, 11197 (Julia Gillard, Minister for Employment and Workplace Relations). See generally special issues on Work Choices (2006) 19(2) *Australian Journal of Labour Law*; (2005) 56 *Journal of Australian Political Economy*; (2006) 16(2) *Economic and Labour Relations Review*; (2006) 29(1) *University of New South Wales Law Journal*. See also Julian Teicher, Rob Lambert and Anne O’Rourke (eds), *WorkChoices: The New Industrial Relations Agenda* (Pearson Education, 2006); Anthony Forsyth et al, *Transition to Forward with Fairness: Labor’s Reform Agenda* (Lawbook, 2008); Anthony Forsyth and Andrew Stewart (eds) *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009); Mary Gardiner, ‘His Master’s Voice? Work Choices as a Return to Master and Servant Concepts’ (2009) 31 *Sydney Law Review* 53.

184 Tom Bramble, *Trade Unionism in Australia: A History from Flood to Ebb Tide* (Cambridge University Press, 2008) 227–30; Southey, above n 13, 31; Chapman, above n 3, 764 n 119.

185 The second of these exempted small business. See Kevin Rudd and Julia Gillard, ‘Forward with Fairness: Labor’s Plan for Fairer and More Productive Australian Workplaces’ (Political Party Document, Australian Labor Party, April 2007) 3, 19–20. Cf Australian Labor Party, ‘Forward with Fairness: Policy Implementation Plan’ (Political Party Document, Australian Labor Party, August 2007) 19; CCH, *Understanding Forward with Fairness: A practical guide to the new workplace relations system* (CCH 2008) 16, 38–39, 42, 82.

part, regain access to the mainstream unfair dismissal jurisdiction.<sup>186</sup> That did not happen. By the time Labor's Fair Work Bill was tabled in Parliament in November 2008 it was apparent that the proposed changes had been watered down.

An examination of the 'genuine redundancy' exemption indicates that, as with the 'operational reasons' exclusion, retrenched employees continue to have their unfair dismissal claims discontinued at the preliminary stage in proceedings. Relevantly section 385(d) of the *FW Act* provides that a dismissal said to be on redundancy grounds cannot be regarded as unfair if Fair Work Australia ('FWA') is satisfied that the dismissal was a 'genuine redundancy'.<sup>187</sup> This is reinforced by section 387 which, again like its Work Choices counterpart (section 652(3)), identifies the criteria for harshness etc without reference to a valid reason related to operational requirements.

The use of the phrase 'genuine redundancy' further serves to underscore that it was not the intention of the incoming Rudd Government to depart fundamentally from the 'operational reasons' exclusion. Entitled 'Meaning of *genuine redundancy*', section 389 sets out comprehensively when a person's dismissal was a case of genuine redundancy. The requirements of that provision are also cumulative. A case of genuine redundancy will have arisen under section 389(1) if (a) 'the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise' and (b) 'the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy'. In addition, a case of genuine redundancy will not have arisen 'if it would have been reasonable in all the circumstances for the person to be redeployed within (a) the employer's enterprise or (b) the enterprise of an associated entity of the employer'. In short, a dismissal will only be regarded as a case of genuine redundancy if all three requirements have been met as set out in sections 389(1)(a), 389(1)(b) and 389(2).

Doubtless this threefold definition has raised the bar for establishing a 'genuine redundancy'. Employees found to have been made redundant because their job is no longer required can now further argue that the process was unfair either because the employer had not complied with an obligation to consult contained in any applicable modern award or enterprise agreement or because they could have been reasonably redeployed. Thus in the leading case on the redundancy exemption, involving two separate appeals, Xstrata subsidiary, Ulan

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186 See generally Misha Schubert, 'Priceline Case Puts Focus on IR Laws', *The Age* (Canberra), 25 April 2007, 8; Tracy Ong, 'Labor to Give Sacking Clause the Boot', *The Australian Financial Review* (Canberra), 10 September 2007, 4; Ewin Hannan and Brad Norington, 'Unions in IR Threat to Rudd' *The Australian* (New South Wales) 19 December 2007, 2; Forsyth et al, above n 183, 237–8; Forsyth, 'Economic Dismissals', above n 12, 535–6; cf Southey, above n 13, 30–2; Ron McCallum, 'Australian Labour Law and the Rudd Vision: Some Observations' (2008) 18(2) *Economic and Labour Relations Review* 23, 27; Chapman, above n 3.

187 See Explanatory Memorandum, Fair Work Bill 2008 (Cth) 246 [1546].

Coal Mines, surmounted the first two hurdles<sup>188</sup> but fell at the third. In the second of two appeals, a differently constituted Full Bench upheld an earlier finding that six of the 10 workers could have been reasonably redeployed to associated entities.<sup>189</sup> More recently still the Full Bench ruled that an individual applicant could have been offered alternative employment within the enterprise, even though that employment involved a demotion and less pay.<sup>190</sup>

That fairness is now an integral part of what constitutes a ‘genuine redundancy’ cannot be doubted. The complementary obligations to consult and redeploy, albeit circumscribed, are now a key part of the definition of genuine redundancy. Not, however, the requirement that the redundancy selection process be fairly conducted. That this was a deliberate decision on the part of the Rudd Government rather than an oversight is evident from the Explanatory Memorandum to the Fair Work Bill 2008. Paragraph 1553 of that Memorandum states unreservedly that the question of ‘[w]hether a dismissal is a genuine redundancy does not go to the process for selecting individual employees for redundancy’.<sup>191</sup> The implication of this omission should not be underestimated when evaluating the impact of the redundancy exemption in redressing the imbalance in the former legislation.

The first Full Bench decision on the redundancy exemption indicates, anecdotally at least, that some members of FWA do not view the redundancy exemption as having turned back the clock to the pre-Work Choices position, notwithstanding the reintroduction of procedural fairness in relation to consultation and redeployment. Delivered in transcript, *Mills v Lextor Developments Pty Ltd*<sup>192</sup> involved an appeal against an earlier finding that the appellant’s dismissal by a labour hire company ‘reflected a genuine redundancy’.<sup>193</sup> While leave to appeal was refused, the important aspect of this decision for present purposes concerns observations made during the hearing by a member of the Bench in response to the appellant’s submission that there should have been ‘an objective assessment of who should be made redundant’.<sup>194</sup> Deputy President Ives pointed out that the authorities the appellant had relied upon in support of that submission were no longer pertinent as the legislation had ‘changed quite considerably in March 2006’ (when Work Choices took effect), whereas up until then ‘there was a requirement that there be an objective

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188 See *Howarth v Ulan Coal Mines Ltd* [2010] FWA 167 (Commissioner Raffaelli); *Ulan Coal Mines Ltd v Howarth* (2010) 196 IR 32, (Justice Boulton SDP, Drake SDP and Commissioner McKenna).

189 *Howarth v Ulan Coal Mines Ltd* [2010] FWA 4817 (Commissioner Raffaelli); *Ulan Coal Mines Ltd v Honeysett* (2010) 199 IR 363 (Giudice J, Hamberger SDP and Commissioner Cambridge). Cf *Campbell Australasia Pty Ltd v McNay* (2010) 198 IR 124 (Acton SDP, Ives DP and Commissioner Ryan).

190 *Jenny Craig Weight Loss Centres Pty Ltd v Margolina* [2011] FWAFB 9137 (Giudice J, Hamilton SDP and Commissioner Roberts).

191 Explanatory Memorandum, Fair Work Bill 2008 (Cth) 247 [1553].

192 [2010] FWAFB 979 (Justice Boulton SDP, Ives DP and Commissioner Gay).

193 *M v LD Pty Ltd* [2009] FWA 1676 (O’Callaghan SDP).

194 Transcript of Proceedings, *Mills v Lextor Developments Pty Ltd* (Fair Work Australia Full Bench, C2009/11407, Boulton SDP, Ives DP and Commissioner Gay, 10 February 2010) 71 (copy on file with author).

selection mechanism essentially for the selection of people for redundancies'.<sup>195</sup> On the other hand, the redundancy exemption hardly rated a mention, beyond the bare acknowledgment that the Act had 'again changed just recently'.<sup>196</sup>

The importance of procedural fairness in restoring balance in cases of redundancy was emphasised by commentators after Labor took office, and in anticipation of appropriate remedial action being taken. Thus Forsyth urged the Government to introduce legislation that 'more evenly balances the competing objectives of managerial freedom and employment security',<sup>197</sup> bearing in mind the major failings of Work Choices, including the many cases where the (then) Commission was precluded from considering lack of procedural fairness, not least in relation to redundancy selection.<sup>198</sup> Southey endorsed this call to address the imbalance in the former legislation, maintaining, moreover, that 'a balance between managerial prerogative and employee security' could be achieved based on the proposed changes in Labor's policy document, 'provided the redundancy candidates are selected fairly'.<sup>199</sup> Stewart, writing immediately after its enactment, did not quite go that far in his assessment of the *FW Act*, but thought that it was not without significance that an employee still cannot claim for unfair dismissal on the ground of having been unfairly selected.<sup>200</sup>

Having reviewed the *FW Act* in the context of the policies Labor took to the 2007 Federal election, Stewart concluded that 'restoring *balance* to the regulatory system' was a priority of the incoming Rudd Government, and this included the need to balance 'protection against unfair dismissal with the employer's right to manage'.<sup>201</sup> Judging that Act by reference to these policies added the new dimension of striking a balance between the interests of business and unions, and '[m]aking both sides unhappy' could be seen as proof that these policies 'got the balance right'.<sup>202</sup> This may explain the collective bias evident in the inclusion of consultation provisions limited to modern awards and enterprise agreements, whilst continuing the former government's policy of exclusion.

Looked at from the point of balancing fairness to employees with the employer's right to manage, Chapman asked '[w]hat does "balance" in this context mean and is it useful to assume a natural juxtaposition of employee and

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195 Ibid 73, 74.

196 Ibid 74. See also *Manoor v United Petroleum Pty Ltd* [2010] FWA 2571, 7 [34]–[35] (Commissioner Smith); *Camilleri v Sunbury Bowling Club* [2010] FWA 5146, 8 [35] (Commissioner Roe). See also Janine Smith, Carroll & O'Dea Lawyers, 'Unfair Dismissal/Unlawful Termination Law' in CCH (ed), *Australian Master Fair Work Guide* (CCH Australia, 2010) 437, 448–9.

197 Forsyth, above n 12, 536.

198 Ibid 528–9.

199 Southey, above n 13, 31 (emphasis in original). According to the author the overwhelming number of claimants made redundant (75.6 per cent) succeeded in their claims for unfair dismissal in 2004 and 2005 (on the eve of Work Choices). What proportion of those involved redundancy selections is not made clear, it being noted that 'employers were being noticed for a deficiency in their methods for conducting redundancies': at 42. Cf Ong, above n 186, citing Forsyth, *Freedom to Fire*, above n 12, that during the 18 months after Work Choices took effect 'three out of five cases were thrown out'.

200 Stewart, above n 5, 38.

201 Ibid 45–6.

202 Ibid 46.

employer interests in this regard?<sup>203</sup> As far as redundancies are concerned, it appears that a new balance has been established under the *FW Act*, with the reintroduction in a limited form of the twin obligations to consult and redeploy; but there is nothing natural in establishing a balance that continues the former government's policy of absolving employers from the need to conduct a fair selection process. Does that warrant the conclusion that the 'fair work' changes did not go far enough?

## V CONCLUSION

One conclusion that can readily be drawn from this article is that, insofar as the act of 'balancing' the interests of employers and employees involves 'setting the boundaries for the legitimate exercise of managerial prerogative', employers never accepted the legitimacy of these boundaries as set before Work Choices. Previously industrial courts and tribunals were the arbiters of that balance and in setting the boundaries they drew the line, not unreasonably, at reviewing substantive management decisions. Apparently it was on that basis, and on that basis alone, that fairness was allowed to enter into the balance. It made sense to distinguish between the merits and the process of redundancy as central to that distinction was the notion that the redundancy process, being concerned with procedural fairness, did not affect employers in a fundamental way. On the face of it, redundancy selection fell into that category. Ultimately, however this elegant distinction failed to gain legitimacy among employers, given successive challenges, though singularly unsuccessful, to the notion of a fair redundancy selection process.

Based on the foregoing analysis there are two related reasons why this was the case, bearing in mind that in drawing appropriate boundaries the question is to what extent 'can and should' the employer's prerogative be constrained in the interests of employees. That is, there is both a practical and normative aspect to that question. The practical aspect relates to the degree of difficulty of drawing a line between a core management decision, such as restructuring, and what may be regarded as the more benign activity of redundancy selection. While these are generally separate decisions, that may not be so in all cases. Indeed they can often overlap, or be virtually indistinguishable, making a mockery of attempts at identifying redundancy selection as a distinct management decision. This may be contrasted with consultation and, to a lesser extent, redeployment, neither of which raise this type of difficulty.

As for the 'normative' aspect to the question, it is fair to say that even in cases where selection proceeds independently of the restructure, employers appear to have difficulties with the notion of a tribunal mandating who they can retain or let go by proscribing a particular method of selection. To put it bluntly, such scrutiny by an external body is viewed by employers with suspicion and as a

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203 Chapman, above n 3, 770.



significant interference with their prerogative in dealing with its workforce. In which case no degree of separation from restructuring would satisfy employers. By comparison, consultation,<sup>204</sup> and to lesser extent redeployment, are relatively more benign in that neither involves that degree of scrutiny, notwithstanding that all three may be characterised as involving procedural fairness.

Arguably redundancy selection is the exception that proves the rule that procedural fairness can impact on an employer's prerogative in a fundamental way. On the other hand, the prevalence of employees seeking a remedy for unfair dismissal on the ground of an unfair selection is, in itself, an important indicator of the value they place on this aspect of a fair redundancy. If balance is the art of compromise and employers refuse to compromise is that sufficient reason for denying employees the right to be fairly selected for redundancy? The limited nature of the Fair Work changes may be justified on many grounds, but upholding managerial prerogative for its own sake should not be one of them.

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204 Mark Hall and Paul Edwards, 'Reforming the Statutory Redundancy Consultation Procedure' (1999) 28 *Industrial Law Journal* 299, 312–13.