Unfair Dismissal Law and Work Choices: From Safety Net Standard to Legal Privilege

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Abstract

This article examines the amendments made to the Australian system of unfair dismissal law by the federal Work Choices Act. The main theme underlying those changes is one of contraction. Notably, a much larger proportion of the Australian labour force will now not have recourse to challenge their dismissal on the basis that it was "harsh, unjust or unreasonable". This is the effect of the Work Choices exemption of corporate employers with up to 100 employees, the operational reasons exemption, the exemption of seasonal workers and the extension of the qualifying period from three to six months. It is also the effect of moving towards a national system of unfair dismissal.

Introduction

From the return of the Liberal/National Coalition to federal government in October 2004, it was clear that there would be major changes to the federal workplace relations system, including to the unfair dismissal scheme. No longer thwarted in the Senate, the government would be able to implement its full vision for, not only the federal unfair dismissal system, but the Australian-wide scheme regulating "harsh, unjust or unreasonable" termination of employment.

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The Work Choices amendments, enacted through the *Workplace Relations Amendment (Work Choices) Act 2005 (Cth)* ('*Work Choices*'), dramatically alter the Australian system of unfair dismissal law. A number of themes underlie these changes, with perhaps the strongest being that of contraction. The federal jurisdiction, and indeed the Australian jurisdiction regulating unfair dismissal, has been greatly constricted, most obviously in terms of coverage of employees.[1] *Work Choices* excludes many more employees throughout Australia from the ability to seek a review of their dismissal on the basis that it was "harsh, unjust or unreasonable". Protection against unfair dismissal has become an exclusive right, enjoyed by some, and only in some circumstances. It is now truly a privilege, and no longer a minimum employment standard of general application.[2] This theme of contraction is not new to the jurisdiction, and indeed has been present from June 1994, when the Keating Labor government first started to back away from the broad coverage it had put into place only three months earlier in the form of the *Industrial Relations Reform Act 1993 (Cth)* (Pittard 1995; Chapman 2003: 121-122). The policy objective of constriction was taken up with vigor, and became central in the jurisdiction, when the Liberal Coalition government took office federally in 1996. It now underlies many aspects of the Work Choices package, including most obviously, the exemption for corporate employers with up to 100 employees, the exemption relating to dismissals for operational reasons, the exemption of seasonal employees, the extension of the default qualifying period from three to six months, and the attempt to displace the State systems of unfair dismissal and unlawful termination.[3]

A second and related theme in the *Work Choices* provisions on unfair dismissal is to continue the move away from international labour standards, particularly ILO Convention 158 (Convention Concerning Termination of Employment at the Initiative of the Employer 1982). Australian law became closely tied to this ILO Convention through the enactment of the 1993 *Industrial Relations Reform Act* (McCallum 1994; Chapman 2003: 113-120). Since that time, Australian law has been successively positioned further and further away from the Convention standards, due in large part to the exemptions introduced into the federal legislative scheme over the years, by both the Labor government from 1994, and the Coalition government from 1996 (Chapman 2003). The raft of additional exemptions in *Work Choices* places Australia further out of compliance with ILO Convention 158, even though notably the government has not sought to break completely with the Convention, and it remains attached to the *Workplace Relations Act 1996 (Cth)* ('*WR Act*') as a Schedule.

This article examines the main amendments made by *Work Choices* to the federal unfair dismissal framework in the *WR Act*. Unlawful termination has been largely left alone, although there have been some changes there too, and these are briefly canvassed.[4] In this article unfair dismissal is used as shorthand to refer to the ability under s 643(1)(a) of the *WR Act* for an employee whose employment has been terminated by the employer to apply to the Australian Industrial Relations Commission ('Commission') for relief on the ground that the termination was "harsh, unjust or unreasonable". Unlawful termination refers generally to the collection of rights contained in Subdivision C of Division 4, Part 12 of the *WR Act*. Specifically, this is s 659(2) (discriminatory dismissal provisions), s 660 (notice requirements in relation to redundancies), s 661 (minimum notice periods) and the former s 170CN (Commission orders about redundancies) (repealed by *Work Choices*).

A National System?

The government's policy objective of moving Australia to a single, national system of workplace relations, first took root in the arena of unfair dismissal law (Williams 2003; Riley 2003: 159). In 2002 the government attempted to secure the passage of legislation with the purpose of overriding the State systems of unfair dismissal, by preventing employees working for a corporation from accessing the unfair dismissal jurisdiction of a State tribunal, even where they were otherwise covered by a State award. The *Workplace Relations Amendment (Termination of Employment) Bill* did not however get through the Senate, and ultimately no State government, apart from Victoria (in 1996), has been prepared to refer power to the Commonwealth to legislate over unfair dismissal, or more broadly.

The *Work Choices* amendments contain a further attempt to override the State systems of unfair dismissal and unlawful termination. It remains to be seen whether this attempt is constitutionally valid, a matter explored elsewhere in this special issue. *Work Choices* seeks to expand the federal system over the top of the State systems, and so crowd them out, through two main interlocking mechanisms. First, the legislation has been drafted to extend the reach of the federal unfair dismissal provisions to a broader range of employees across Australia. Specifically, the Act provides that the unfair dismissal provisions apply in relation to the termination of employment of an "employee" within the meaning of section 5(1) (s 637(1)). "Employee" is defined in section 5(1) to mean an individual who is employed, or usually employed, (in the common law sense of having a

contract of employment), by an "employer", but not an employee on a vocational placement. The concept of "employer" is then defined to mean a constitutional corporation, the Commonwealth, a Commonwealth authority, a person or entity that employs a flight crew officer, a maritime employee or a waterside worker, a body corporate incorporated in a territory, and a person or entity that carries on business in a territory (s 6(1)).[5] In addition, employees and employers in Victoria (with the exception of the State of Victoria as employer) remain covered by the unfair dismissal provisions, pursuant to the Victorian Parliament's referral of powers in 1996 (Part 21; Kollmorgen 1997). The Government claims that this redrafting will gather in an estimated 85% of employees across Australia under the federal unfair dismissal umbrella (Australian Government 2005: 11; EWR & ELC 2005: 2.18).[6] The remaining 15% (those employed, for example, outside Victoria and the Northern Territory by sole traders, partnerships, trusts, charitable bodies that do not fall within the meaning of a constitutional corporation, and those employed in all State public sectors) will remain regulated through State systems, unless and until the State Parliaments refer legislative power to the Commonwealth (EWR & ELC 2005: 2.18-2.20). At the time of writing, State governments have indicated that they will not be referring legislative power to the Commonwealth.

A second main aspect in crowding out the State systems is to render inoperative certain State and Territory law. This means in effect that employees within the 85% potentially covered by the federal system, but who are in fact excluded from the federal protections because, for example, they are engaged under a contract of employment for a specified period of time or for a specified task (s 638(1)), or are employed in a business with less than 100 employees (s 643(10)), cannot access State or Territory law on unfair dismissal or unlawful termination. Section 16 states that the *WR Act* is intended to apply to the exclusion of certain State and Territory laws, including "a State or Territory industrial law" and "a law providing for the variation or setting aside of rights and obligations arising under a contract of employment, ... that a court or tribunal finds is unfair" (the NSW and Queensland unfair contracts jurisdictions are obvious examples of State laws fitting this description). "State or Territory industrial law" is then defined in s 4(1) by naming each State's principal industrial relations statute, and also by a general description of State and Territory employment law (and regulations), including law providing for rights and remedies connected with termination of employment.[7]

Exempting Employers with up to 100 Employees

It was during the Prime Minister's speech to Parliament on 26 May 2005 that the government's plan to exempt businesses with up to 100 employees from the unfair dismissal provisions first came to light (Prime Minister of Australia 2005a). The Prime Minister's announcement was greeted with alarm, and a degree of outrage, as this exemption had not been flagged in the 2004 Liberal Party election policies, nor had it been previously mooted by the government. It was expected that the government would amend the federal scheme to exclude small businesses; the announcement of the exemption for businesses with up to 100 employees came as a shock, and was perhaps the single biggest surprise of the 26 May announcement (Peetz 2005: 99). Although it is not possible to state precisely what percentage of the employee labour force will be excluded by this exemption, the data that does exist indicates that a majority of employees in Australia work for businesses with fewer than 100 staff (ABS Dec 2001).

As has been well documented, since 1997, the government has tried, on numerous occasions, to bring about an exemption to the federal unfair dismissal scheme for businesses with 15 or less employees, and from 2001 for businesses with less than 20 employees.[8] The attempted exemption has taken the form of both amending Bills in addition to regulations, and on each occasion has been rejected, or disallowed, in the Senate (which the government did not control) (Pittard 2002). Not able to get a small business exemption through, the government was ultimately successful in ensuring the passage of some amending legislation designed to assist small business in the jurisdiction. In particular, in 2001 two factors were added to the list of matters in s 170CG(3) (now s 652(3)) that the Commission is required to take into account when adjudicating an unfair dismissal application:

- the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and
- the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination (Riley 2002: 200).

The *Work Choices* exemption clearly extends beyond small business, on any credible definition of that term. It provides that an employee must not make an application alleging unfair dismissal if "the employer

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employed 100 employees or fewer" (s 643(10)).[9] Two dimensions of this 100 threshold warrant mentioning. First, this is purely a head count. It is a head count of employees in the common law sense of being engaged under contracts of employment; it excludes contractors and other non-employees (s 643(12)(b)).[10] The head count includes the applicant employee, full-time employees, part-time employees and casual employees who had been engaged by the employer on a regular and systematic basis for at least 12 months (but not including any other casual employees) (each to be counted as one employee). Secondly, the 100 head count is to be adjudged "at the relevant time".[11] This is stated to be the time when the employer gave the employee notice of termination, or the time when the employer terminated the employee's employment, whichever happened first (s 643(12)(a)).

Any bare numerical count, such as the 100 threshold here, will lead to anomalous outcomes in certain situations. For example, if the size of a firm's workforce fluctuates between, say 99 and 101 employees, or one or more short term casuals become longer-term casuals to be included in the head count, at different times the corporation's workforce will, and will not, be protected by federal unfair dismissal law. Likewise, if a corporation with a headcount of 101 employees gives two employees notices of termination on consecutive days, the first employee will prima facie be entitled to lodge an application alleging unfair dismissal whilst the second employee will not. These simple scenarios illustrate the arbitrary, fluid and unsatisfactory character of an exemption based on a bare numerical count.[12]

During debate on the *Work Choices Bill* much concern was expressed about the prospect of larger employers with more than 100 employees restructuring their workforces to split staff between subsidiary companies so as to attract the exemption in s 643(10), thereby effectively avoiding the operation of unfair dismissal law.[13] The same issue potentially exists in relation to businesses that are expanding and taking on new staff, choosing to do so through subsidiaries in order to avoid unfair dismissal law. Although the government showed little concern for these potential problems in public debate, a further subsection was nonetheless added to the Bill in the Senate at the instigation of National Party Senator Barnaby Joyce.

The new clause provides that for the purpose of calculating the number of employees for the 100 threshold, "related bodies corporate" (within the meaning of section 50 of the *Corporations Act 2001*) are taken to be one entity (s 643(11)). Section 50 of the *Corporations Act 2001 (Cth)* defines related bodies corporate to mean a holding company of another body

corporate, or a subsidiary of another body corporate, or a subsidiary of a holding company of another body corporate. The terms "body corporate", "holding company" and "subsidiary company" are then defined in sections 9 and 46 of the *Corporations Act*. Section 46 provides three exhaustive tests of whether a corporation is a subsidiary of another. These are:

(1) where P [parent] corporation controls the composition of the board of directors of S [subsidiary] corporation;
(2) where P corporation is in a position to cast or control the casting of more than half the maximum votes that might be cast at a general meeting of S corporation;
(3) where P corporation holds more than half the amount of issued share capital ... of S corporation (Ford, Austin and Ramsay 2005: [4.330]).

Tests one and three are further articulated in sections 47 and 48 of the *Corporations Act*, and it is clear that the task of assessing whether or not corporations are related bodies corporate may involve complex questions of law and fact (Ford, Austin and Ramsay, 2005: [4.330]).

The potential complexity in this issue sits somewhat uneasily with new procedural arrangements under which the Commission may dismiss an application of unfair dismissal on the papers, that is, without a hearing, on the basis of the 100 threshold exemption under s 643(10)). *Work Choices* provides that an employer may move, at any time, and before the Commission has begun to deal with the application, for the dismissal of an allegation of unfair dismissal on the ground that the 100 threshold exemption applies (s 645(1)). The Commission is not required to hold a hearing into the matter, and if satisfied that the s 643(10) exemption applies, is required to make an order dismissing the allegation of unfair dismissal (s 645(5), (7)). This new procedure – of dismissing applications on the papers – is discussed further below.

Notably, the Senate amendment regarding related bodies corporate covers incorporated entities only. It does not, for example, cover the Corporations Law concepts of "associated entities" (*Corporations Act* s 9, s 50AAA), "related entity" (*Corporations Act* s 9) and the concept of "entity controlled by another entity" (*Corporations Act* s 50AA), each of which is broader than the concept of related bodies corporate and potentially includes unincorporated employers such as service trusts, partnerships and joint ventures (Ford, Austin and Ramsay 2005: [4.340]). Of interest also is that other provisions in the *WR Act* provide for a broader understanding of the concept of an employer than the related bodies

corporate concept of the Senate amendment. For example, the provisions regulating the making of collective agreements contain a concept of a single business comprising two or more employers carrying on a business, project or undertaking as a joint venture or common enterprise (*WR Act* s 322(2)). In this sense, the Senate amendment is narrow in not extending beyond the *Corporations Act* concept of related bodies corporate, and does not embrace a broader, and more commercial, view of the employing entity.

Since 1997 the government has consistently asserted that its proposed small business exemption, and now the 100 threshold exemption, is justified on the basis of job creation (Reith 1999: [11]; Prime Minister of Australia 2005a; Parliament of the Commonwealth of Australia, House of Representatives 2005: 24-26). The government's claims regarding job creation have been thoroughly discredited, from the beginning of the debate almost ten years ago, to the present day. In an early piece on the hypothesised relationship, Waring and De Ruyter present a compellingly case that there was no reliable empirical evidence at that time (1999) to support the exclusion of employers with less than 15 employees. They concluded that the empirical evidence that the government cited simply did not support the Minister's claims on job creation (Waring and De Ruyter 1999). A few years later in 2001 the Full Court of the Federal Court investigated the relationship between unfair dismissal laws and employment growth, including taking expert evidence from a number of leading scholars in the field, and concluded that "the suggestion of a relationship between unfair dismissal laws and employment inhibition is unproven" (*Hamzy v Tricon International Restaurants t/as KFC* (2001) 111 IR 198 at [70]). The Full Court commented:

> It seems important that nobody has investigated whether there is any relationship between unfair dismissal legislation and employment growth. There has been much assertion on this topic during recent years, but apparently no effort to ascertain the actual fact situation (at [67]).

More recent research is to the effect that there is no evidence that unfair dismissal laws act as a brake on employment growth (Robbins and Voll 2005; Freyens and Oslington 2005a; Freyens and Oslington 2005b; De Ruyter and Waring 2004; see also Barrett 2003). After extensive investigations, in June 2005 the Senate Employment, Workplace Relations and Education References Committee concluded as follows:

> The committee finds that there is no empirical evidence or research to support the Government's claim that exempting small business from unfair

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> dismissal laws will create 77,000 jobs [the figure the Government had cited at that time]. The proposition at the heart of this argument is breathtaking for its lack of logic and empirical support. A review of the evidence shows conclusively that the claims made by the Government and employer groups are fuelled by misinformation and wishful thinking rather than objective appraisal of the facts (at [4.1]).

The public debate about exempting small and medium sized employers from unfair dismissal law tended to focus rather narrowly on the job creation claim of the government. It failed to engage with wider economic arguments, such as the potential advantages to business of unfair dismissal regulation, let alone the idea of protection against arbitrary dismissal as an international labour standard. It has been argued that the adoption of fair dismissal procedures reduces the likelihood of dismissing an employee in circumstances where consideration by a cooler head would reveal that dismissal was not warranted, and so potentially saving the firm the substantial costs of hiring a replacement employee (Johnstone, Mitchell and Riekert 1991: 117). Other benefits for business in being bound by unfair dismissal law are also apparent. De Ruyter and Waring discuss research that indicates that unfair dismissal law encourages employers to invest in the education and training of their workforces, thereby enhancing labour productivity in the longer term (at 28). They use organizational justice theory to conclude that perceived injustice around dismissal issues can result in reduced performance by employees, and reduced commitment by employees to the organization, including preparedness to undertake discretionary roles and tasks (at 28-29).

Exempting Dismissals for Operational Reasons

From the early days unfair dismissal protections were used by employees made redundant. Although the Commission consistently took the view that it would not interfere with an employer's decision to abolish a position, provided that decision was exercised in good faith, retrenched employees have nonetheless been able to successfully assert that their dismissal was "harsh, unjust or unreasonable" for other reasons. These included, for example, that they were unfairly selected for redundancy ahead of other employees, or that as their conduct or performance played a role in the decision to dismiss them, they ought to have been afforded an opportunity to respond to allegations of misconduct or inadequate performance. Additionally, retrenched employees have sometimes been able to establish

unfair dismissal on the basis that the severance benefits provided to them were below the industrial norm (Creighton and Stewart 2005: [16.67]-[16.68]).

The government has wanted to exempt redundancy dismissals from the scope of unfair dismissal law for some time, with two attempts, in 1999 and 2000, rejected in the Senate (Chapman 2000: 31). The new exemption in *Work Choices* states that an application cannot be made alleging unfair dismissal "if the employee's employment was terminated for genuine operational reasons, or for reasons that include genuine operational reasons" (s 643(8)).[14] "Operational reasons" are then defined as being "reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business, or to a part of the employer's undertaking, establishment, service or business" (s 643(9)).

Notably, the new provisions refer to "operational reasons", not operational requirements. The concept of an operational reason is clearly much broader than the idea of an operational requirement, and so easier for an employer to satisfy. In the context of interpreting an earlier scheme requiring the employer to have a valid reason for termination, based on the capacity or conduct of the employee, or the "operational requirements" of the undertaking, the Commission had this to say:

> In general terms it may be said that a termination of employment will be shown to be based on the operational requirements of an undertaking if the action of the employer is necessary to advance the undertaking and is consistent with management of the undertaking that meets the employer's obligations to employees (*Nettlefold v Kym Smoker Pty Ltd* (1996) 69 IR 370 at 373).

An "operational reason" is clearly less than a "requirement" in the sense of something "necessary to advance the undertaking".

Importantly, the wording of section 643(8) suggests that the genuine operational reason need only be a factor in the decision to dismiss the employee, it need not be the dominant reason, or even a substantial reason for the decision to dismiss. It follows that if the dominant reason for the dismissal was plainly unfair – for example, that the employer did not like the way the employee was "chewing gum" (EWR & ELC 2005: 1.14), or the employer was motivated by an unsound or malicious allegation of misconduct or lack of performance – provided that a genuine operational reason was a factor in the decision to dismiss, then the dismissal is exempt from challenge under unfair dismissal law. The word "genuine" is

somewhat ambiguous. In their submission to the Senate Inquiry, Australian Lawyers for Human Rights suggest a number of possible meanings that might be given to this term: it "could exclusively mean that the employer honestly believed there was an operational reason for the termination. It could also mean that the operational reason did truly exist. Or it could mean that the operational reason did truly justify the termination" (ALHR 2005: para 16).

This new statutory formula of genuine operational reasons appears considerably wider than current industrial understandings of redundancy, which are sourced to a 1977 decision articulating that a redundancy arises where the termination occurs "not on account of any personal act or default of the employee dismissed ..., but because the employer no longer wishes the job the employee has been doing to be done by anyone" (*R v Industrial Commission of SA. Ex parte AMSCOL* (1977) 16 SASR 6 at 8, noted in *Termination, Change and Redundancy Case* (1984) 8 IR 34 at 55-6). Similar sentiments were expressed in the more recent *Redundancy Case* ((2004) 129 IR 155): "[r]edundancy occurs when an employer decides that the employer no longer wishes the job the employee has been doing to be done by anyone and this is not due to the ordinary and customary turnover of labour" (at 244). The meaning of genuine operational reasons in *Work Choices* may be considerably wider than this articulation of redundancy. For example, the point has been made that were an employer to dismiss award-covered employees with the objective of replacing them with lower cost employees engaged on the Australian Fair Pay and Conditions Standard, these dismissals might be exempt from an application of unfair dismissal on the basis that they were terminations of employment based on a genuine operational reason "of an economic ... nature relating to the employer's undertaking" (that of saving labour costs) within the meaning of section 643(9) (A Group of 151 Academics 2005: 12). Clearly these sorts of dismissals fall outside the concept of redundancy articulated by the Commission, most recently in the *Redundancy Case* of 2004, as the jobs the dismissed employees had been doing are continuing.

In contrast to the exemption for businesses with up to 100 employees, the Commission is directed to hold a hearing and deal with any issue of dismissal for a genuine operational reason before proceeding to a full hearing of the unfair dismissal claim (s 649). This new process is examined further below. It has been suggested that the Bill ought to have been amended to impose a reverse onus of proof in relation to this exemption, as practically, only the employer has the information relevant to this issue. A reverse onus would require the employer to establish that the termination

of employment was for a genuine operational reason within the meaning of the legislation, rather than for the employee to positively establish that it was not (Law Society of NSW 2005: 4; Punch 2005: 8). The idea of a reverse onus is not new in the federal termination of employment jurisdiction, as the discriminatory dismissal provisions in s 659(2) require the employer to establish that the termination was for a reason which did not include a proscribed reason (s 664). This acknowledges the obvious point that it is the employer, rather than the employee, that has access to the relevant information on the reason or reasons why the employee was dismissed.

Finally, it is useful to note, regarding redundancy, that employees who are dismissed for genuine operational reasons may not be entitled to redundancy pay.[15] This is because severance benefits are award entitlements that may be bargained away, and in addition, the exemption for employers with less than 15 employees from award redundancy payment provisions has been restored by *Work Choices*.[16]

Extending the Qualifying Period

In 1998 the government tried, unsuccessfully, to enact a six month qualifying period into the federal unfair dismissal scheme. This Bill provision was introduced with a further attempt by the government to enact a small business exemption, and, along with the small business exemption, failed to pass the Senate (Chapman 1999: 73-74). A few years later in 2001 the government succeeded in imposing a shorter qualifying period, ensuring that a claim of unfair dismissal could not be brought by an employee until he or she had completed the qualifying period of employment. The qualifying period was stated to be three months, unless the parties agreed in writing to a shorter period (or no period), or, the parties agreed to a longer period in writing, provided that longer period was reasonable having regard to the nature and circumstances of the employment. Such written agreements were required to be made prior to the commencement of the employment (Riley 2002: 200). In 2002 the government sought unsuccessfully to extend that three month period to six months (Riley 2003: 159).

Work Choices extends the default period of three months to six months for employees whose employment begins after the commencement of the Work Choices amendment (s 643(6)).[17] This change in the default qualifying period does not affect the probation provisions in s 638(1)(c), which continue to operate independently of the qualifying period rules

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(Parliament of the Commonwealth of Australia, House of Representatives 2005: para 2121-2122).

Excluding Seasonal Employees

Work Choices excludes from the unfair dismissal provisions, and many of the unlawful termination provisions (s 660, s 661, Subdivisions D and E, but not s 659(2)), employees "engaged on a seasonal basis" within the meaning of the Act (s 638(1)(g)). The new provisions specify that an employee is engaged on a seasonal basis "if the employee is engaged to perform work for the duration of a specified season" (s 638(8)). The concept of a season is articulated in sub-section (9) to mean a period that:

(a) is determined at the commencement of the employee's engagement (the *commencement time*); and

(b) begins at the commencement time; and

(c) ends at a time in the future that

(i) is uncertain at the commencement time; and

(ii) is related to the nature of the work to be performed by the employee; and

(iii) is objectively ascertainable when it occurs (emphasis in original).

A note to the sub-section specifies the following as some examples of seasons: "... the part of a year characterised by particular conditions of weather or temperature ... the part of a year when a product is best or available ... [and] the part of a year marked by certain conditions, festivities or other activities". The Explanatory Memorandum provides more specific examples of engagements that may be for a specified season:

- engagement at a fruit cannery for the duration of the picking season for a particular fruit or fruits;
- engagement at a retail store until the end of the post-Christmas sales; or
- engagement at a beach-side resort until the end of the summer peak holiday season (at para 2093).

The Explanatory Memorandum gives two examples of engagements that would not be for a specified season:

- an engagement until the employer decides, for whatever reason the employer likes, to terminate the employment – this would involve a subjective assessment by the employer of when the employment ends and would not be objectively ascertainable; or
- an engagement as a motor mechanic until Collingwood Football Club

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wins another AFL premiership – although the timing of this event is uncertain at commencement and would be objectively ascertainable when it occurs, it fails to meet the requirement that the future event is related to the nature of the work to be performed by the employee (at para 2094).

Importantly, *Work Choices* enables regulations to be made specifying whether a particular period is, or is not, a season within the meaning of the exemption (s 638(10)). At the time of writing no such regulations have been made.

The Explanatory Memorandum indicates (at para 2079) that this amendment to exclude seasonal workers is in response to a recent Commission decision to the effect that two process workers at a fruit cannery were not excluded from the unfair dismissal jurisdiction as being engaged under contracts of employment "for a specified period of time" (s 638(1)(a)) or contracts "for a specified task" (s 638(1)(b)) (*SPC Ardmona Operations Ltd v Esam & Organ* (Full Bench, AIRC, 20 April 2005, PR957497)).[18] The two employees were engaged on the basis of "temporary seasonal employment" to work on the production line of the employer's fruit processing facility in regional Victoria (at [17], [24]). This arrangement had been in place since 1994, with their employment generally commencing in around late December each year and usually ending around August, as the season for fresh fruit came to an end. In 2004 the employees were dismissed in June, as the supply of fresh fruit was less than in previous years, and as a consequence only one processing line remained operating. They both lodged applications of unfair dismissal.

Work Choices has narrowed these provisions in important respects. First, the provisions giving the Commission power to make orders to give effect to articles 12 and 13 of ILO Convention 158 have been repealed (repeal of Subdivision D of Division 3, Part VIA; repeal of s 170CN). Further, the renamed Subdivision D has been narrowed by a clear directive to the Commission that any order it makes must not include, for example, an order for reinstatement of an employee, severance pay, or payment of an amount in lieu of reinstatement (s 668(3)). This is a significant weakening of the redundancy rights in the *WR Act*. Coupled with the exemption for genuine operational reasons, and the negotiable character of award redundancy payment provisions, *Work Choices* substantially removes redundancy from Commission scrutiny and supervision.

The Full Bench determined that Esam and Organ were not employees engaged under contracts of employment "for a specified period of time" within the meaning of s 638(1)(a). The articulation of principle by von Doussa J in *Anderson v Umbakumba Community Council* ((1994) 126

ALR 121 at 126) was applied finding that "the contracts in question run until some future event, namely the end of the 'season', the timing of which was uncertain when the contracts were made" (at [69]), and for this reason Esam and Organ were not employed under contracts "for a specified period of time". The Full Bench also determined that Esam and Organ were not engaged under contracts "for a specified task" within s 638(1)(b). Although a specified task could be identified – "to process the fruit delivered to the ... plant during the 2004 season until there was insufficient fruit to operate both" processing lines (at [85]) – the contracts here included an expressly incorporated term (from an award) permitting termination on two days notice, and this factor alone meant that the contracts could not be said to be for a "specified task". In the opinion of the Full Bench, "[t]he contracts in question cannot be said to be for a '*specified task*' in circumstances where they may be terminated by the employer on a whim, merely upon the giving of two days notice, or payment in lieu, *prior to* the completion of the task in question" (at [108]) (emphasis in original). Were it not for the notice period in the contract, it is clear that the Full Bench would have determined that the employees were engaged under contracts for a "specified task" and so excluded from the unfair dismissal jurisdiction.

Certainly it seems clear that Esam and Organ would be excluded under the new s 638(1)(g) exemption for seasonal workers. Interestingly, they would in any case appear to be excluded from the unfair dismissal jurisdiction under the genuine operational reasons exemption in s 643(8).

Other Amendments to Substantive Rights

Three further sets of amendments to the substantive rights in the jurisdiction warrant noting. First, a pre-requisite to a claim of both unfair dismissal and unlawful termination is that there has been a "termination of employment at the initiative of the employer" (s 642(1)). Issues have arisen, from time to time, regarding whether an apparent resignation by an employee could constitute a termination at the initiative of the employer, in circumstances where the employee has terminated the contract in response to breaches (including repudiation) by the employer. The main principle applied has been that provided "the action of the employer is the principal contributing factor which leads to the termination of the employment relationship", then this satisfies the statutory test of termination at the initiative of the employer (*Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200 at 205). *Work Choices* enacts a new statutory test on this matter. It states that:

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> the resignation of an employee is taken to constitute the termination of the employment of that employee at the initiative of the employer if the employee can prove, on the balance of probabilities, that the employee did not resign voluntarily but was forced to do so because of conduct, or a course of conduct, engaged in by the employer (s 642(4)).

This appears to be a more onerous test for an employee to satisfy than the existing position developed under *Mohazab*. In particular, the amendment speaks of the employee being "forced" to resign, suggesting no real choice in the matter, whereas *Mohazab* requires only that the action of the employer was the "principal contributing factor". This amendment did not appear in the original Bill; it was added in the Senate as one of the amendments instigated by the government.

The second amendment that is noted here relates to the wording of a factor in the list of matters that the Commission must take into account in arbitrating whether a dismissal was "harsh, unjust or unreasonable" (s 652(3)). The first factor used to read "whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service". This wording is similar to that used in ILO Convention 158. *Work Choices* rewords this first factor to read "whether there was a valid reason for the termination related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees)" (s 652(3)(a)). The deletion of the reference to the operational requirements of the employer's undertaking follows from the new exemption for dismissals based on genuine operational reasons (Parliament of the Commonwealth of Australia, House of Representatives 2005: para 2175).

Thirdly, some of the unlawful termination provisions relating to redundancy have been deleted, and others weakened. A set of provisions relating to economic dismissals was introduced into the federal legislative scheme with the 1993 *Industrial Relations Reform Act*. Briefly, the legislation provided that where 15 or more employees were to be dismissed for reasons of "economic, technological, structural or similar nature", or for reasons that include those reasons, notice must be given to a specified government agency (it was the Commonwealth Employment Service) as soon as practicable after the decision to terminate was taken (s 660). Ultimately the Federal Court had power to issue injunctions to prevent the terminations of employment from taking place in contravention of this provision (s 665(6)(b); s 651). In addition, the Commission was given

broad power, upon application by an employee or a trade union, to make orders to give effect to articles 12 and 13 of ILO Convention 158 (now repealed Subdivision D, Division 3, Part VIA). Article 12 deals with severance payments. Article 13 relates to employers providing information to, and consulting with, trade unions (in relation to proposed retrenchments of 15 or more employees). Employers were, in effect, under an obligation to inform trade unions of proposed redundancies of 15 or more employees and provide them with an opportunity to consult on measures to avert or mitigate the terminations (Subdivision D, Division 3, Part 12). This Subdivision empowered the Commission to intervene, where it formed the view that the notification and consultation had been inadequate. It had wide discretion as to the form of order it could make, with orders potentially extending beyond a mere penalty to ordering reinstatement of employees.

Work Choices has narrowed these provisions in important respects. First, the provisions giving the Commission power to make orders to give effect to articles 12 and 13 of ILO Convention 158 have been repealed (repeal of Subdivision D of Division 3, Part VIA; repeal of s 170CN). Further, the renamed Subdivision D has been narrowed by a clear directive to the Commission that any order it makes must not include, for example, an order for reinstatement of an employee, severance pay, or payment of an amount in lieu of reinstatement (s 668(3)). This is a significant weakening of the redundancy rights in the *WR Act*. Coupled with the exemption for genuine operational reasons, and the negotiable character of award redundancy payment provisions, *Work Choices* substantially removes redundancy from Commission scrutiny and supervision.

Compensation, Procedure and Costs

Work Choices amends the rules regarding the award of compensation following a finding of unfair dismissal. These amendments will take effect to reduce the already relatively low levels of compensation ordered in the jurisdiction (Creighton and Stewart 2005: [16.64]). The new rules contain two main components. First, in ordering compensation in lieu of reinstatement after a finding of unfair dismissal, the Commission must take into account any misconduct of the employee that contributed to the employer's decision to dismiss him or her (s 654(8)(e)), and must reduce the amount it would otherwise fix in order to take into account that misconduct (s 654(10)). This is a mandatory requirement on the Commission.

Secondly, compensation orders for unfair dismissal must not now

include a component representing compensation for "shock, distress or humiliation, or other analogous hurt, caused to the employee by the manner of terminating the employee's employment" (s 654(9)). This new rule applies to orders for compensation alone, and to orders for reinstatement plus compensation. In addition, the principle applies in relation to orders for compensation following a contravention of the unlawful termination provision of s 659(2) (s 665(2)).

Deleting damages for mental distress has been on the government's agenda for some time. In 2000 it sought to enact legislation to prohibit the award of compensation for mental distress, but was not able to get the provision through the Senate (Riley 2001: 151). In the unfair dismissal jurisdiction the Commission has been prepared to order damages for mental distress where there is clear evidence of it (*Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144; *Coms 21 Ltd v Liu* (Full Bench, AIRC, 25 February 2000, Print S3571); *Vickery v Assetta* [2004] FCA 555 (a case under the former s 170CK(2)). In this, the statutory jurisdiction has been more generous than the common law of wrongful dismissal, which has refused to award damages for distress and humiliation arising out of the manner of dismissal (*Intico (Vic) Pty Ltd v Walmsley* [2004] VSCA 90; Riley 2005: 87-93). The *Work Choices* Explanatory Memorandum states that the new amendment is intended to keep the statutory jurisdiction in line with the common law position (at para 2189).

From 1999 the federal government has brought about successive amendments to the procedural rules of unfair dismissal, for the stated purpose of reducing the complexity and cost for employers in the jurisdiction. In 2002 the government first mooted the idea of empowering the Commission to deal with matters on the papers, that is, without a hearing. The proposal (which did not survive the Senate) was that the Commission deal with applications of unfair dismissal relating to small business without a hearing (Riley 2003: 159). *Work Choices* expands on this idea by introducing new procedural rules enabling the Commission to deal with a number of different applications relating to unfair dismissal on the papers.[19] These applications mostly relate to jurisdictional objections potentially raised by respondent employers, that:

- the 100 threshold exemption in s 643(10) applies;
- the employee is excluded from applying because he or she is covered by s 638 (for example, because he or she is engaged under a contract of employment for a specified period of time, or for a specified task, or is an employee serving a period of probation as specified in the section, or is a casual employee engaged for a short period, as articulated, or is an

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employee engaged on a seasonal basis);

- the employee is excluded from applying because he or she has not yet completed the qualifying period of employment in s 643(6) (s 645(5), (6));
- the application is frivolous, vexatious or lacking in substance (s 646).[20]

In addition, the Commission may choose to forgo holding a hearing in relation to an application by employee for an extension of time in which to lodge a complaint of unfair dismissal (s 647). Notably, Commission orders made under this new procedure (s 645(5), s 646 and s 647) are not able to be appealed to a Full Bench of the Commission (s 685(3)). In exercising its discretion to determine these various matters without holding a hearing, the Commission is required to take into account the cost that would be incurred by the employer were it required to attend a hearing. If the Commission decides against holding a hearing, it must, before it makes a decision on the application, invite (by written notice) the employee and employer concerned to provide further information (by a certain date) relevant to the application made. After taking into account this information the Commission may then decide, at that point, to hold a hearing (s 648).

In contrast to these circumstances where an application to dismiss a case may be dealt with on the papers, where the issue is whether the genuine operational reasons exemption in s 643(8) applies, the Commission must hold a hearing. Specifically, *Work Choices* provides that where the respondent has moved for the dismissal of an application on the basis of the genuine operational reasons exemption, or where it appears to the Commission from the material before it that the termination may have been for genuine operational reasons, the Commission is required to hold a hearing to deal with this issue before hearing the substance of the unfair dismissal application (s 649). The decision of the Commission following such a hearing can be appealed to a Full Bench of the Commission (subject to s 120).

A second major objective of government amendments to procedure over the years has been to discourage applications that are seen as lacking in merit. From the early days employer groups have consistently articulated concerns with what they claim has been the development of the "unfair dismissal industry ... featuring lawyers and consultants touting for business" by encouraging applicants to lodge speculative claims lacking in substance (ACCI 2005: 8; also Sheldon and Thornthwaite 1999: 159). For several years the government has attempted to respond to this issue. In 2001 two sets of provisions were enacted. First, representatives and

legal practitioners are required to disclose to the Commission whether they had been retained under a costs arrangement or contingency fee arrangement (for example, an arrangement of no win, no fee) (s 656). Secondly, advisers (as defined) were prohibited from encouraging a party to make an application, pursue it, or to defend an application, when it should have been apparent to the adviser that there was no real prospect of success in doing so (ss 675-679). *Work Choices* adds to this regulation of advisers and representatives by providing that the Commission may make an order for costs against a party's representative, where that representative caused costs to be incurred by the other party by an unreasonable act or omission in the conduct of the proceedings (s 658(4)).

Conclusion: Where to Now?

The *Work Choices* legislation greatly contracts, not only the federal jurisdiction of unfair dismissal, but all Australian avenues to challenge "harsh, unjust or unreasonable" terminations of employment at the initiative of the employer. The theme of constriction is most evident through the new exemptions relating to employer size, dismissals for genuine operational reasons, the extension of the default qualifying period, and the exemption of seasonal employees. It also underlies the obliteration of the State systems of unfair dismissal and unlawful termination. Unfair dismissal protection in Australia is now truly a privilege, and no longer a minimum employment standard of general application across the labour force. The theme of constriction also underlies other aspects of the *Work Choices* amendments. These include narrowing the meaning of the phrase termination at the initiative of the employer, deleting some, and weakening other, rights to information and consultation regarding redundancy, and reducing the level of compensation orders by deleting a component for mental distress. The theme of contraction also arguably underlies the new powers of the Commission to dismiss applications on the papers, thereby restricting the cases that go to a hearing on the merits.

This contraction in the unfair dismissal jurisdiction begs the question of how grievances relating to arbitrary dismissal will be played out in the new *Work Choices* world of work. Protection from unfair dismissal has existed in Australia, in different guises, for around 30 years (Chapman 2003), and as such, the right to a review of a dismissal on the ground of fairness is well and truly embedded in the Australian working ethos. Disputes over dismissals perceived as being unfair, in small and medium sized businesses, and in redundancy situations, for example, won't cease

to exist in the government's new system of regulation, they will merely take a different form. It remains to be seen what form, or more likely, range of forms, that will be. There is some evidence to suggest that removing access to unfair dismissal law may result in employees taking matters into their own hands, through, for example, unlawful strikes, demonstrations and industrial sabotage (De Ruyter and Waring 2004: 28-29).

Employees, trade unions and their advisers may look to a range of legal avenues to fill the gap left by a departing unfair dismissal jurisdiction. These include the common law, unlawful termination claims under s 659(2) of the *WR Act*, applications to human rights and anti-discrimination agencies under anti-discrimination statutes such as the *Sex Discrimination Act 1984 (Cth)*, and potentially applications under the *Trade Practices Act 1974 (Cth)*, particularly the unconscionable dealing provisions. Obviously none of these avenues provides a direct equivalent to the open-textured test of "harsh, unjust or unreasonable", and clearly will not cover the range of situations previously encapsulated by the federal unfair dismissal jurisdiction. Moreover, each alternate avenue has its own shortcomings, including the expensive, slow and cumbersome process of the common law, the expense of a s 659(2) hearing in the Federal Magistrates Court or Federal Court,[21] the slow and relatively ineffective remedies of an anti-discrimination claim, and the lack of development (and so uncertainty) in the application of the *Trade Practices Act* to the employment context. Finally, although *Work Choices* prevents registered agreements including provisions containing unfair dismissal remedies (s 356; regulation 8.5(5)), with careful drafting such protections may be able to be included in an unregistered collective agreement enforceable in the common law (*Ryan v TCFUA* [1996] 2 VR 235; Creighton and Stewart 2005: [7.02]-[7.08]).

Notes

1 A trend of exclusion from employment protection is evident in many developed economies: de Ruyter and Waring, 2004.

[2] It is incongruous and arguably misleading that the unfair dismissal provisions, such as they are now, remain in Part 12 of the WR Act, headed Minimum Entitlements of Employees. Notably, protection against unfair dismissal is not part of the Australian Fair Pay and Conditions Standard.

[1] Not all aspects of the *Work Choices* package regarding termination of employment take effect to constrict the jurisdiction. A notable extension of protections regarding termination is the amendment instigated by National's Senator Barnaby Joyce prohibiting an employer from dismissing an employee

due to his or her refusal on reasonable grounds to work on a particular public holiday (s 615).

[2] Not all amendments to unfair dismissal and unlawful termination are examined. Those not examined include the extraterritorial extension of the jurisdiction to Australian-based employees of Australian employers who are working outside Australia (s 641); the alteration from the concept of an employee employed under award conditions to the formula of an employee employed under award-derived conditions (as defined) (s 638(1)(f)(i), s 642(6)); an extension for the election to proceed after an unsuccessful conciliation on a s 659(2) claim (s 651(6)(b), added in the Senate, to allow sufficient time for the applicant to apply for, and if successful take up, the government's offer of up to $4,000 worth of legal advice: DEWR, 2005:63; Andrews, Consideration of Senate Message); changes to the rules about the Commission receiving elections to proceed out of time (s 651(8), (9), amended in the Senate); the exercise of arbitration powers by a Commission member who exercised conciliation powers (s 653); factors to be taken into account in ordering compensation for lost remuneration when ordering reinstatement (s 654); a rule that s 659(2)(h) is contravened where termination of employment occurs because the position no longer exists due to the absence of an employee on parental leave (s 659(5), added in the Senate); and the transitional arrangements.

[3] Note s 636, which contains general definitions of "employee", "employer" and "employment" for the purposes of Division 4 of Part 12. These definitions apply unless the s 5(1) definitions are stated to apply. So, for example, the s 636 definitions apply in relation to the unlawful termination provisions of s 659(2), s 660, s 661 and Subdivision D. Note also s 687, explained in the Explanatory Memorandum at para 2263. The new s 5(1) formula is also used to supplement the unlawful termination provisions: s 637(4).

[4] Subject to not being excluded by the remuneration limit, or excluded as an employee engaged under a contract of employment for a specified period of time or specified task, or excluded as an employee serving a reasonable period of probation, or as a short term casual (s 638), or excluded as an employee within one of the new exemptions introduced with *Work Choices*.

[5] Note also s 16(2) and (3) which indicate that the WR Act is not intended to exclude State and Territory law such as anti-discrimination statutes, workers' compensation and occupational health and safety law. Notably this list can be added to, or subtracted from, by regulation.

[6] Initially the proposed exemption was for new employees only of businesses with less than 15 employees: MacDermott, 1998: 63.

[7] Importantly, this exclusion relates to unfair dismissal only. Access to remedies regarding unlawful termination is not affected by this new exemption for employers with up to 100 employees.

[8] This exclusion of contractors and other non-employees (in the common law sense) from the headcount may effectively encourage employers to reorganize their hiring practices in favour of engaging workers as non-employees rather than as employees.

[9] Those longer term casual employees are to be included in the count, regardless of whether they were actually at work "at the relevant time" or not: Parliament of the Commonwealth of Australia, House of Representatives, 2005: para

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2135.

[10] The point has been made that the 100 threshold may actually act to discourage employers from hiring new staff, if that would place them over the 100 headcount: Peetz, 2005: 100.

[11] David Peetz suggests that employing entities may find it more feasible to engage in such reorganization of their workforces where the threshold is 100 than if the threshold were set at 20 employees: Peetz, 2005: 100.

[12] This exemption does not apply to the unlawful termination provisions in s 659(2), s 660 and s 661.

[13] The example contained in the Work Choices booklet on this matter presents an overly simplified and possibly inaccurate picture: Australian Government, 2005: 52.

[14] WR Act s 513(1)(k), (4). This exemption was recognized in the *Termination, Change and Redundancy Case* (1984) 8 IR 34, and then was removed (with some limitations) by the Commission in the *Redundancy Case* (2004) 129 IR 155.

[15] The qualifying period rule is not relevant to the unlawful termination provisions of s 659(2), s 660 and s 661.

[16] This appears to be the decision that the Explanatory Memorandum refers to, although the print number stated in the Explanatory Memorandum is not correct.

[17] These new procedures do not apply in relation to claims of unlawful termination under s 659(2), s 660 and s 661.

[18] The amendments do not define "frivolous, vexatious or lacking in substance", however the Explanatory Memorandum states that these words ought to be given their ordinary meaning (at para 2148). They are words that are familiar in anti-discrimination law: see, for example, Human Rights and Equal Opportunity Commission Act 1986 (Cth) s 20(2)(c)(ii), s 32(3)(c)(ii); Equal Opportunity Act 1995 (Vic) s 108, s 109; Anti-Discrimination Act 1977 (NSW) s 92(1)(a)(i).

[19] As part of the Work Choices package, the Prime Minister announced a scheme to provide eligible employees with up to $4,000 worth of independent legal advice regarding the likely success of their claim of unlawful termination in a court hearing (Prime Minister of Australia, 2005b). It has been reported that the scheme will be means-tested and limited to employees with an annual income of $30,000 to $40,000 (Workplace Express, 2005

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