

Australian Regulation of Economic Dismissals: Before, During and After ‘Work Choices’

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Abstract

This article examines the regulation of economic dismissals under Australian federal law over the last fifteen years. Economic dismissals of employees, or ‘retrenchments’, are usually based on operational, technological, or similar grounds arising from ‘restructuring’ decisions made by employers. The article focuses in particular on the 2005 ‘Work Choices’ legislation, the *Workplace Relations Amendment (Work Choices) Act 2005 (Cth)* (‘Work Choices Act’), and the exclusion (introduced by that legislation) of unfair dismissal claims in respect of dismissals based on ‘genuine operational reasons’. The article begins by examining the regulation of economic dismissals prior to Work Choices, commencing with the Keating Labor Government’s unfair dismissal laws in 1993 and the Howard Coalition Government’s 1996 amendments. Attention then turns to the policy rationale and statutory formulation of the genuine operational reasons exclusion, in the context of the broader changes to the unfair dismissal framework implemented under Work Choices. This is followed by detailed discussion and analysis of the case law on the operational reasons exclusion emanating from the Australian Industrial Relations Commission since March 2006. One of the main conclusions drawn from this analysis is that the operational reasons exclusion has significantly reduced the employment security of Australian workers. The article concludes with a brief consideration of the Rudd Labor Government’s proposed reforms of federal unfair dismissal laws, and suggests that this process should be informed by the research findings presented herein.

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1. Introduction

This article examines the regulation of economic dismissals under Australian federal law over the last fifteen years. The article focuses, in particular, on the period in which the former Coalition Government's Work Choices legislation¹ was in operation and briefly examines the Rudd Labor Government's proposed changes to federal unfair dismissal law. Much of the article is based on a research report prepared by the author for the Victorian Office of the Workplace Rights Advocate ('VWRA')² in August 2007.³ The VWRA commissioned this research, in order to monitor the operation and impact of the exclusion (introduced by the *Work Choices Act*) of unfair dismissal claims in respect of dismissals based on 'genuine operational reasons'.⁴ This amounted to a reversal of the legal position that had applied since the introduction, in 1993, of the right of employees to challenge a dismissal on grounds including that it was not based on a 'valid reason' relating to the 'operational requirements' of the business.

The article is structured as follows. Part 2 sets out the historical development of the statutory provisions regulating economic dismissals under federal law prior to Work Choices. This covers the Keating Labor Government's statutory unfair dismissal regime introduced in 1993, and changes to the legislation made by the Howard Coalition Government in 1996. Part 3 examines the provisions regulating economic dismissals inserted by the *Work Choices Act* amendments in 2005. The policy rationale and statutory formulation of the genuine operational reasons exclusion from unfair dismissal claims are considered, in the context of the broader changes to the unfair dismissal framework implemented under Work Choices.

Part 4 summarises the main findings of the *Freedom to Fire Report*, based on its analysis of the case law dealing with the genuine operational reasons exclusion between 27 March 2006 and 31 July 2007.⁵ Significant Australian Industrial Relations Commission (AIRC) decisions since that time are also considered. A central conclusion of the *Freedom to Fire Report* was that the operational reasons

1 *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth) ('Work Choices Act'), which substantially amended the *Workplace Relations Act* 1996 (Cth) ('WR Act'). Many of the amending provisions took effect from 27 March 2006. References to provisions of the WR Act in this article are to that legislation, as amended by the Work Choices Act. The WR Act as it existed prior to the Work Choices Act amendments will be referred to as the 'pre-Work Choices WR Act'. Following the election of the Rudd Government in November 2007, the WR Act was further amended by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act* 2008 (Cth) ('FWF Transition Act'); while this amending legislation does not have any direct bearing on the subject of this article, it is discussed briefly in the context of the Government's broader workplace reform agenda in Part 5 below.

2 Established under the *Workplace Rights Advocate Act* 2005 (Vic); see s 5 on the functions and powers of the VWRA, and see <<http://www.business.vic.gov.au/workplacerrights>>.

3 Anthony Forsyth, *Freedom to Fire: Economic Dismissals under Work Choices* (Research Report for the Victorian Office of the Workplace Rights Advocate, August 2007) ('Freedom to Fire Report') <http://www.business.vic.gov.au/busvicwr/_assets/main/lib60148/4756%20freedom%20to%20fire_artfinal.pdf>. The author wishes to thank the VWRA and the current Workplace Rights Advocate, Anthony Lawrence, for funding the research and granting permission for the publication of this article.

4 WR Act ss 643(8)–(9).

exclusion has significantly reduced many long-standing legal protections of job security in Australia. Finally, Part 5 of the article examines the Rudd Labor Government's proposed reforms of the federal unfair dismissal laws, indicating that (at least in part) this process should be informed by the research findings presented in this article.

At this point, it should be noted that for the purposes of this article, 'economic dismissals' are defined as dismissals based on operational, economic, technological, structural or similar grounds.⁶ These are often also referred to as dismissals arising from 'restructuring' implemented by the employer, leading to the 'redundancies'⁷ or 'retrenchments'⁸ of affected employees. Economic dismissals, so described, are to be contrasted with dismissals arising from some form of action or omission on the part of the employee for example, dismissal on the basis of misconduct, poor performance, or incapacity for work. However, there can, on occasions, be some overlap between these latter types of dismissals, and economic dismissals; for example, where an employer has decided to terminate the employment of employees for economic reasons and then selects those to be made redundant on the basis of past misconduct, poor work performance, or incapacity.

A further preliminary point should be made at this juncture. The discussion of economic dismissals in this article proceeds from an assumption that legal protections of job security are necessary due to the investment of human capital that employees make in the enterprises that employ them and to ensure that employees are treated fairly and with dignity in the workplace. These matters have been traversed in detail in academic and other literature.⁹ The rights of workers to employment security are also recognised, for example, in the International Labour Organization ('ILO's') *Termination of Employment Convention*, adopted on 22 June 1982, No 158, (entered into force 23 November 1985) ('*Termination of Employment Convention*'), and *Termination of Employment Recommendation*, adopted on 26 June 1983, No 166.¹⁰ Accordingly, the theoretical justifications for employment protection legislation will not be examined in this article; nor will the

5 That is, decisions of single members and Full Benches of the Australian Industrial Relations Commission (referred to herein as the AIRC, or the Commission) in which the exclusion was considered, in a substantive sense, during this period.

6 See again WR Act ss 643(8)–(9).

7 Technically: '[r]edundancy occurs when employees are no longer required for work through no fault of their own, because the employer no longer needs or requires the job to be done by anyone. It is the position, rather than the employee which becomes redundant.' See Joydeep Hor & Louise Keats, *Managing Termination of Employment: A Best Practice Guide under Work Choices* (2007) at 107.

8 'The dismissal of an employee whose position has become redundant is called "retrenchment".' See Hor & Keats, above n7 at 107.

9 See, for example: Hugh Collins, *Justice in Dismissal: The Law of Termination of Employment* (1992); Steven Willborn, 'Workers in Troubled Firms: When Are (Should) They Be Protected?' (2004) 7 *University of Pennsylvania Journal of Labor and Employment Law* 35; Guy Davidov, 'In Defence of (Efficiently Administered) 'Just Cause' Dismissal Laws' (2007) 23 *International Journal of Comparative Labour Law and Industrial Relations* 117; Marilyn Pittard, 'Protection from Unfair Dismissal' in Mordy Bromberg & Mark Irving (eds), *Australian Charter of Employment Rights* (2007).

article consider the objectives of managerial freedom and the flexibility needs of employers,¹¹ which the author recognises must be balanced with employment security when framing unfair or unjust dismissal laws.

2. *Regulation of Economic Dismissals Prior to Work Choices*

A. *Federal Regulation Pre-1993*

There were no statutory unfair dismissal protections under Australian federal law until 1993. Before then, employees and their representatives (primarily trade unions) sought to agitate unjust dismissal issues by way of dispute notifications to the AIRC, or State industrial tribunals; or by making claims in one or other of the state unfair dismissal jurisdictions.¹² Award provisions prohibiting 'harsh, unjust or unreasonable' dismissal became commonplace after the *Termination, Change and Redundancy Case* in 1984,¹³ although these provisions were beset by enforcement limitations.¹⁴ The *TCR Case* also established certain information and consultation rights for employees (and unions) in respect of restructuring proposals that could lead to economic dismissals, and the right to severance payments based on length of service.¹⁵

B. *The 1993 Federal Legislation*

The Keating Labor Government included provisions establishing a federal statutory unfair dismissal scheme as part of a broader package of labour market reforms in the *Industrial Relations Reform Act 1993 (Cth)* ('IR Reform Act'). The unfair dismissal provisions were inserted as Division 3 of Part VIA in the *Industrial Relations Act 1988 (Cth)* (IR Act).¹⁶ These provisions,¹⁷ which commenced operation on 30 March 1994, were based on the ILO *Termination of Employment Convention*.¹⁸

10 See for example International Labour Office, *Protection against Unjustified Dismissal*, General Survey on the Termination of Employment Convention (No 158) and Recommendation (No 166) (1995).

11 See for example Steven Anderman, 'Termination of Employment: Whose Property Rights?' in Catherine Barnard, Simon Deakin & Gillian Morris (eds), *The Future of Labour Law: Liber Amicorum Sir Bob Hepple QC* (2004) 101.

12 Andrew Stewart, 'And (Industrial) Justice for All? Protecting Workers Against Unfair Dismissal' (1995) 1 *Flinders Journal of Law Reform* 85 at 87–89, 89–94. South Australia was the first state to establish a statutory unfair dismissal jurisdiction, in 1972. The other states followed suit: Western Australia and Victoria in 1979; Queensland in 1990; and New South Wales in 1991; Tasmania did not pass its unfair dismissal laws until December 1994.

13 (1984) 8 IR 34 ('TCR Case'); see also (1984) 9 IR 115.

14 Breen Creighton & Andrew Stewart, *Labour Law* (4th ed, 2005) at 452.

15 Id at 430–431; the limitations of these award 'TCR clauses' are discussed in Brad Pragnell & Paul Ronfeldt, 'Redundancy Under Enterprise Bargaining and New Federal Laws' in Ron McCallum, Greg McCarty & Paul Ronfeldt (eds), *Employment Security* (1994) 115 at 116–118 (see also the discussion of TCR provisions in enterprise agreements at 129–136).

16 For an overview of these provisions, see Stewart, above n12 at 96–122; Marilyn Pittard, 'The Age of Reason: Principles of Unfair Dismissal in Australia' in McCallum et al, above n15 at 16.

The key provision of Part VIA, Division 3 of the IR Act was s 170DE, which provided as follows (emphasis added):

- (1) An employer must not terminate an employee's employment unless there is a valid reason, or valid reasons, connected with the employee's capacity or conduct *or based on the operational requirements of the undertaking, establishment or service.*
- (2) 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. This subsection does not limit the cases where a reason may be taken not to be valid.¹⁹

Employees were therefore able to challenge economic dismissals (and obtain remedies, including reinstatement and compensation) on both substantive and procedural grounds. That is, it could be argued that there was no valid reason for the termination based on the operational requirements of the business, *and/or* that the termination was procedurally unfair.

In *Selvachandran v Peteron Plastics Pty Ltd*,²⁰ the Industrial Relations Court of Australia held that a reason for termination must be 'sound, defensible or well-founded' — rather than 'capricious, fanciful, spiteful or prejudiced' — so as to constitute a 'valid reason' for purposes of section 170DE of the IR Act. Cases dealing with the operation of IR Act, s 170DE in the context of economic dismissals established the following principles.²¹ First, the onus was on the employer to show 'that there was a genuine need for the redundancy related to the operational requirements of the business' and 'that the selection of the particular employee concerned was sound, defensible, well-founded and objectively justifiable'.²² Secondly, a termination would be based on the operational requirements of the undertaking, if it was 'necessary to advance the undertaking'. The phrase 'operational requirements' allowed consideration of, for example:

past and present performance of the undertaking, the state of the market in which it operates, steps that may be taken to improve the efficiency of the undertaking by installing new processes, equipment or skills, or by arranging for labour to be used more productively.²³

17 It should be noted that Part VIA, Division 3 of the IR Act also contained prohibitions on termination of employment based on certain discriminatory grounds, or without providing specified periods of notice (see IR Act ss 170DB and 170DF). These prohibitions have since formed part of the concept of 'unlawful termination' of employment (as distinct from 'unfair dismissal'), which will only be referred to in passing in this article.

18 See above n10; see further Anna Chapman, Breen Creighton, Richard Naughton & Wai-Quen Chan, *Valid Reasons for Termination of Employment*, Centre for Employment and Labour Relations Law (University of Melbourne, Working Paper No 12, January 1997); Anna Chapman, 'The Declining Influence of ILO Standards in Shaping Australian Statutory Provisions on Unfair Dismissal' (2003) 29 *Monash University Law Review* 104.

19 Note that s 170DE(2) of the IR Act was declared constitutionally invalid by the High Court of Australia in *Victoria v The Commonwealth* (1996) 187 CLR 416.

20 *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 ('Selvachandran').

21 See also the decisions discussed in Chapman et al, above n18 at 15–18.

22 James Macken, Paul O'Grady, Carolyn Sappideen & Geoff Warburton, *The Law of Employment* (5th ed, 2002) at 331–332.

Thirdly, the case law established that provided it had acted in good faith, an employer's judgment as to the needs of the enterprise (and therefore, the need for any restructuring or redundancies) should not be called into question.²⁴ Finally, even where terminations might have been considered to be for a valid reason (that is, based on genuine operational requirements), procedural fairness obligations required employers to fully inform and consult with affected employees, consider alternative employment opportunities, formulate and apply objective selection criteria in a non-discriminatory manner, and provide notice and severance payments in line with award/statutory requirements.²⁵

The IR Reform Act also introduced provisions in the IR Act enabling employees and/or unions to obtain orders from the AIRC, requiring employers to inform and consult with them about large-scale redundancies (that is, those affecting 15 or more employees).²⁶ Employers were also required to notify the Commonwealth Employment Service ('CES') of mass redundancies²⁷ and employees could seek orders from the AIRC for the making of severance payments in certain circumstances.²⁸

C. *The 1996 Legislative Changes*

Following the Howard Coalition Government's election to office in 1996, the former IR Act provisions dealing with termination of employment were amended as part of the Government's 'first wave' of industrial relations changes passed later that year.²⁹ The amended provisions (found in Part VIA, Division 3 of the pre-Work Choices WR Act) were aimed at addressing certain aspects of the IR Act provisions that were thought to favour unfair dismissal applicants over employers.³⁰ This was encapsulated in the concept of a 'fair go all round',³¹ which was introduced as the guiding principle for the AIRC to follow in determining unfair dismissal applications and remedies.³²

23 *Nettlefold v Kym Smoker Pty Ltd* (1996) 69 IR 370, quoted in Macken et al, above n22 at 331.

24 *Quality Bakers of Australia v Goulding* (1995) 60 IR 327, referred to in Creighton & Stewart, above n14 at 479, footnote 230.

25 See Stuart Kollmorgen, 'What Remains of Managerial Prerogative in 'Operational Requirements' Dismissals?' (1995) 8 *Australian Journal of Labour Law* 247, discussing *Quality Bakers of Australia v Goulding* (1995) 60 IR 327 and *Australian Submarine Corporation v Kenefick* (1995) 131 ALR 197 (note also the appeal decision in *Kenefick v Australian Submarine Corporation Pty Ltd (No 2)* (1996) 65 IR 366). See also *Cosco Holdings Pty Ltd v Do* (1997) 150 ALR 127, discussed in Max Spry, 'A Valid Reason for Termination' (1998) 11 *Australian Journal of Labour Law* 216.

26 IR Act ss 170FA and 170GA.

27 IR Act s 170DD.

28 IR Act s 170FA(1). For discussion of the provisions referred to in nn26–28, see Pragnell & Ronfeldt, above n15 at 118–129.

29 *Workplace Relations and Other Legislation Amendment Act 1996* (Cth), substantially amending and re-naming the IR Act as the WR Act.

30 Creighton & Stewart, above n14 at 453–454; see further Anna Chapman, 'Termination of Employment Under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 89.

31 As originally enunciated in the New South Wales' industrial tribunal's decision in *Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.

The ability of employees to challenge economic dismissals was retained in the 1996 amendments, although it was formulated differently. An employee could bring a claim before the AIRC alleging that the termination of his or her employment was ‘harsh, unjust or unreasonable’.³³ In determining whether the dismissal was harsh, unjust or unreasonable, the AIRC was required to consider: ‘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*’.³⁴ The Commission was also required to have regard to whether an employee had been accorded procedural fairness such as, for example, through the provision of warnings regarding poor performance, an opportunity to respond to allegations of misconduct or incapacity, and notice of the reason(s) for dismissal.³⁵ However, a major difference between the 1996 and former IR Act provisions was the removal of procedural fairness as a ‘stand-alone’ ground for determining whether an employee had been unfairly dismissed.³⁶

The overall approach to determining whether there was a valid reason for dismissal, established in *Selvachandran*,³⁷ continued to be applied by the AIRC under the 1996 provisions.³⁸ Likewise, the assessment of whether there were operational requirements of the business justifying the dismissal of employee(s) continued in much the same way as under the former IR Act provisions.³⁹ Other aspects of economic dismissals — such as whether employees were properly informed and consulted about impending redundancies, whether they received the required amount of notice or severance pay, or whether they were otherwise treated ‘unfairly’ (for example, in the selection processes adopted by the employer) — assumed less significance under the 1996 provisions. However, these types of factors could still be taken into account, and in fact formed the basis for the AIRC to find that employees had been unfairly dismissed in many cases.⁴⁰

The statutory provisions enabling the AIRC to make orders for information and consultation over large-scale redundancies, and severance payments, were retained in the 1996 legislation.⁴¹ On the other hand, provisions requiring consultation over workplace restructuring and lay-offs became ‘non-allowable’ award matters,⁴² although such provisions could still be included in certified

32 Creighton & Stewart, above n14 at 454; Chapman, above n 30 at 91–93; see now WR Act s 635(2). Another important feature of the 1996 changes was the establishment of the separate ‘streams’ of unfair dismissal and unlawful termination claims; as to the latter, see the main grounds set out in pre-Work Choices WR Act ss 170CK and 170CM; and see Chapman, above n30 at 95–100.

33 Pre-Work Choices WR Act s 170CE(1)(a).

34 Pre-Work Choices WR Act s 170CG(3)(a) (emphasis added).

35 Pre-Work Choices WR Act s 170CG(3)(b)-(d).

36 Chapman, above n30 at 92; see also at 94–95, where the potential influence of the ‘fair go all round’ principle in diluting procedural fairness considerations is examined.

37 *Selvachandran* (1995) 62 IR 371.

38 See for example the decisions referred to in Macken et al, above n22 at 330 (especially footnote 94).

39 See above nn19–21; and the decisions referred to in Macken et al, above n22 at 332 (footnote 116).

40 See Creighton & Stewart, above n14 at 479; Macken et al, above n22 at 333–334.

agreements and individual Australian Workplace Agreements ('AWAs').⁴³ Provisions for redundancy pay continued to be allowable in both awards and agreements.⁴⁴

D. Further Reform Attempts Prior to Work Choices

Between 1996 and 2005, the Coalition Government made many attempts to introduce further reforms to the federal unfair dismissal provisions, in order to reduce the 'burden' of these laws on employers. Legislation implementing the Government's main reform objective (exempting 'small businesses' from unfair dismissal claims) was repeatedly rejected by the Senate.⁴⁵ Despite this, some minor amendments to the unfair dismissal laws were passed, including provisions enabling the AIRC to have regard to the size of the employer's business and if it had a dedicated human resources department, in determining whether a dismissal was harsh, unjust or unreasonable.⁴⁶ Following its re-election in 2004, with control of the Senate from 1 July 2005, the opportunity arose for the Coalition Government to implement more far-reaching reforms of the federal unfair dismissal laws. These reforms were introduced through the amendments to the WR Act and given effect by the Work Choices Act, which are considered in the next Part of this article.

3. Regulation of Economic Dismissals under Work Choices: The Statutory Framework

A. Overview of the Unfair Dismissal Scheme under Work Choices

The Work Choices Act introduced major changes to the legislative provisions regulating termination of employment.⁴⁷ Much of the Coalition Government's justification for the reforms to unfair dismissal laws was based on the assertion that

41 See n26 above; and pre-Work Choices WR Act, ss 170FA and 170GA. These provisions, and case law exploring their limitations, are examined in Anthony Forsyth, 'Giving Teeth to the Statutory Obligation to Consult over Redundancies' (2002) 15 *Australian Journal of Labour Law* 177. The requirement to notify the CES in instances of 15 or more redundancies was also retained; see pre-Work Choices WR Act, s 170CL.

42 Under pre-Work Choices WR Act, s 89A; see also *Re Award Simplification Decision*; *Re The Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1995* (1997) 75 IR 272; *Re Universities and Post Compulsory Academic Conditions Award* (1998) 45 AILR 3; *Section 109 Reviews Decision* (1999) 90 IR 123.

43 See further Anthony Forsyth, Samantha Korman & Shelley Marshall, *Joint Consultative Committees in Australia: An Empirical Update* (Corporate Governance and Workplace Partnerships Project Working Paper Series, Centre for Employment and Labour Relations Law/ Centre for Corporate Law and Securities Regulation, University of Melbourne, January 2007).

44 The minimum award redundancy pay standards established in the *TCR Case* (see above n13) were increased in the *Redundancy Case* (2004) 129 IR 155, which also provided for a lower scale of redundancy payments to employees in businesses with less than 15 employees.

45 Creighton & Stewart, above n14 at 454; see further Marilyn Pittard, 'Unfair Dismissal Laws: The Problem of Application to Small Businesses' (2002) 15 *Australian Journal of Labour Law* 154.

46 Pre-Work Choices WR Act, s 170CG(3)(da)-(db), introduced by the *Workplace Relations Amendment (Termination of Employment) Act 2001* (Cth); see Pittard, above n45 at 164–165.

they acted as a disincentive for employers (especially small to medium-sized businesses) to take on new staff.⁴⁸ An often repeated claim was that exempting these businesses from unfair dismissal laws would lead to the creation of up to 77,000 new jobs.⁴⁹ These, and many of the former Government's other arguments, have long been strongly contested in the public policy debate about the appropriate level of unfair dismissal protection for employees in Australia.⁵⁰

One very important change introduced by the Work Choices Act, flowing from the general federal override of State industrial laws that it brought into effect,⁵¹ was to establish the dominance of the Federal unfair dismissal regime through the ousting of State jurisdictions.⁵² That is, employees covered by the Federal workplace relations system⁵³ may only bring an unfair dismissal claim under the WR Act.⁵⁴ If they are subject to one of that legislation's many exclusions from bringing a claim, they have no scope to bring a claim under State law. However, this does not arise as an issue in Victoria, which referred its industrial relations powers to the Commonwealth in 1996.⁵⁵ As a result of the referral, and the extension provisions in Part 21, Division 7 of the WR Act, *all* employers and employees in Victoria are subject to the Federal unfair dismissal provisions.⁵⁶

The exclusions from Federal unfair dismissal claims were broadened considerably by the Work Choices Act. Several previously-applicable exclusions were retained, including those preventing employees from making an unfair dismissal claim if they are engaged for a specified period or task,⁵⁷ casual employees (unless they are engaged on a regular and systematic basis for more

47 See Marilyn Pittard, 'Back to the Future: Unjust Termination of Employment under the Work Choices Legislation' (2006) 19 *Australian Journal of Labour Law* 225; Anna Chapman, 'Unfair Dismissal Law and Work Choices: From Safety Net Standard to Legal Privilege' (2006) 16 *The Economic and Labour Relations Review* 237.

48 See, for example, Explanatory Memorandum, *Workplace Relations Amendment (Work Choices) Bill 2005* (Cth) at 24–26.

49 See the investigation of this claim (among others) in the report of Employment, Workplace Relations and Education References Committee, Parliament of the Commonwealth, *Unfair dismissal and small business employment* (2005).

50 See for example Pittard, above n45 at 166–168; Employment, Workplace Relations and Education References Committee, above n49; Benoit Freyens and Paul Oslington, 'The Likely Impact of Removing Unfair Dismissal Protection' (2005) 56 *Journal of Australian Political Economy* 56.

51 See WR Act s 16(1), upheld by the High Court of Australia in *New South Wales v Commonwealth* (2006) 229 CLR 1.

52 See Chapman, above n47 at 239–241.

53 Mainly, these are employees of employers that are 'constitutional corporations', Federal public sector departments and agencies, or employers based in Victoria, Australian Capital Territory or Northern Territory: see WR Act ss 6(1) and 858. Outside Victoria and the Territories, most unincorporated businesses (such as partnerships) and State government departments and agencies fall outside of the Federal system, and are covered by State industrial legislation.

54 This is the combined effect of WR Act ss 5(1) and 637(1).

55 See *Commonwealth Powers (Industrial Relations) Act 1996* (Vic).

56 Except those Victorian public sector employees not covered by the terms of the 1996 referral, such as certain types of senior public servants and officers of the Crown; see further Mark Irving, 'Victoria' in *Australian Master Workplace Relations Guide: The Work Choices Edition* (2006) at 104–108, 112–117.

than 12 months),⁵⁸ certain types of trainees,⁵⁹ and ‘non-award’ employees earning more than the amount of annual remuneration specified in the regulations (currently \$106,400).⁶⁰ Further, the ‘qualifying period’ that an employee must serve before being able to bring an unfair dismissal claim was extended by the Work Choices Act. As a result, an employee cannot make a claim before he or she has completed six months’ employment (increased from three months under the pre-Work Choices WR Act), or any shorter or longer period agreed in writing between the employer and employee.⁶¹

The main *new* exclusions from unfair dismissal claims introduced by the Work Choices Act are, first, the ‘100 employees’ exclusion through which an employee is prevented from bringing a claim where, at the time of the dismissal, the employer employed 100 employees or fewer. The ‘head count’ for these purposes includes the dismissed employee, other full-time and part-time employees, and regular/longer-term casual employees, along with employees of any related entity of the employer corporation.⁶² Secondly, the Work Choices Act introduced the ‘genuine operational reasons’ exclusion, which is discussed in detail below.

Federal system employees who are not subject to any of the exclusions may make an application for relief to the AIRC on the ground that the termination of their employment was harsh, unjust or unreasonable (‘unfair dismissal’)⁶³ and/or that the termination was in breach of specified provisions of the WR Act (‘unlawful termination’).⁶⁴ As was the case prior to Work Choices, the AIRC deals with unfair dismissal claims, first, by conciliation⁶⁵ (although this is now commonly preceded by consideration of motions for dismissal on jurisdictional grounds, either in a hearing or ‘on the papers’)⁶⁶ and if conciliation is unsuccessful, by arbitration.⁶⁷

57 WR Act ss 638(1)(a)-(b) and (3).

58 WR Act ss 638(1)(d) and (4)-(5).

59 WR Act s 638(1)(e).

60 WR Act ss 638(1)(f) and (6)-(7); and Workplace Relations Regulations 2006 (Cth) (‘WR Regulations’), Ch 2, Pt 12, Div 4 regs 12.3 and 12.6.

61 WR Act ss 643(6)-(7). Note also that under s 638(1)(c), an employee cannot bring an unfair dismissal claim if he or she has not completed any applicable period of ‘probation’ (which should be not longer than three months, or any longer period that is reasonable in the circumstances of the employment).

62 WR Act ss 643(10)-(12). It has been estimated that the 100 employees exclusion has left 62% of the Australian workforce (4.2 million employees) without access to unfair dismissal claims: see Parliament of Australia, Department of Parliamentary Services, *Bills Digest: Workplace Relations Amendment (Work Choices) Bill 2005* (2 December 2005, No. 66, 2005–06) at 61.

63 WR Act ss 643(1)(a), (c).

64 WR Act ss 643(1)(b)-(c); see also (primarily) the prohibited grounds of termination specified in s 659 and the notice requirements in s 661. Unlawful termination claims are subject to fewer exclusions than unfair dismissal claims: see s 638(11). If they are not settled by conciliation in the AIRC, these claims are now determined in the Federal Magistrates Court of Australia or the Federal Court of Australia.

65 WR Act s 650.

66 WR Act ss 645–649; and see below n85.

67 WR Act s 652; see also s 651 dealing with (among other matters) the applicant’s decision whether to proceed to arbitration in the AIRC.

In determining an unfair dismissal claim by arbitration, the Commission must have regard to the same substantive and procedural factors as under the pre-reform WR Act provisions⁶⁸ with the exception that (flowing from the new genuine operational reasons exclusion) there is no longer any consideration of whether operational requirements of the business may have provided a valid reason for the employee's dismissal. In other words, an employee can only challenge his or her dismissal on the basis that there was no valid reason relating to the employee's capacity or conduct,⁶⁹ that there was an absence of procedural fairness,⁷⁰ or that the dismissal was in some other way 'harsh, unjust or unreasonable',⁷¹ (for example, because it was a disproportionately harsh response, given the employee's overall employment record). The AIRC retains the power to order reinstatement and/or compensation to a successful applicant in an unfair dismissal claim.⁷² The overarching 'fair go all round' principle also remains in place under the unfair dismissal provisions introduced by the Work Choices Act.⁷³

B. The 'Genuine Operational Reasons' Exclusion

(i) Background to the Exclusion

When the Howard Government first announced its workplace reform proposals in May 2005,⁷⁴ its proposed unfair dismissal changes came as a surprise to many observers. The Government intended to introduce a 'small business' exemption from unfair dismissal laws for businesses with up to 100 employees (the Government's previous proposals had sought to exempt firms with only 15–20 employees).⁷⁵ For employers with more than 100 employees, the three month qualifying period was to be extended to six months. No mention was made of any proposal for the operational reasons exclusion.

The exclusion first appeared⁷⁶ in the Government's more detailed policy proposals, released in October 2005. There, it was formulated as an exclusion from the unfair dismissal regime on the ground of 'operational *requirements* (redundancy)'. An example was provided of a dismissal where the employer no longer required the job to be done by anyone due to the introduction of new technology.⁷⁷ This was confirmed by the (then) Workplace Relations Minister in

68 See above nn34–36.

69 WR Act s 652(3)(a); under this provision, in cases where the dismissal was based on misconduct by an employee, the AIRC must also consider the effect of that misconduct on the safety and welfare of other employees.

70 WR Act ss 652(3)(b)–(f).

71 WR Act ss 643(1)(a), (c) and 652(3).

72 Although some limits have now been placed on the remedies that the AIRC can order: see WR Act s 654.

73 WR Act s 635(2).

74 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 26 May 2005 (John Howard) at 38.

75 See Pittard, above n45; Chapman, above n47 at 241.

76 Although Chapman (above n47 at 246) notes that the Government had attempted 'to exempt redundancy dismissals from the scope of unfair dismissal law', through bills in 1999 and 2000 that were defeated in the Senate.

his Second Reading Speech introducing the Bill that became the Work Choices Act, in which he described the proposed operational *reasons* exclusion as follows 'In addition, no claims can be brought where the employment has been terminated because the employer genuinely no longer requires the job to be done.'⁷⁸

In late 2005, during debate on the Bill that became the Work Choices Act (both in Parliament and in the media), some light was shed on the Government's rationale for the proposed operational reasons exclusion from unfair dismissal laws. It seems that the intention was to prevent employees dismissed on grounds of redundancy from 'double-dipping', by receiving redundancy payments and then bringing an unfair dismissal claim against their employer. The (then) Prime Minister Howard pointed to the long-running redundancy dispute at the Blair Athol coalmine in Queensland, as an example of the kind of situation that the operational reasons exclusion was designed to overcome.⁷⁹

The *true* rationale for the operational reasons exclusion is most likely found in the Prime Minister's assertion in November 2005 that:

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.⁸⁰

The notion that the proposed operational reasons exclusion did not involve any departure from the previous legal position was repeated by the Workplace Relations Minister:

Work Choices will retain the current law on this issue and also retain the right of employees to contest such issues in the [AIRC].⁸¹

77 Commonwealth of Australia, *WorkChoices: A New Workplace Relations System* (2005) at 51–52.

78 Commonwealth of Australia, Parliamentary Debates, House of Representatives, 2 November 2005 (Kevin Andrews) at 21.

79 See Commonwealth of Australia, Parliamentary Debates, House of Representatives, 3 November 2005 (John Howard) at 82–83; see also Channel Nine, 'John Howard's Industrial Revolution', Sunday Program, 20 November 2005 <http://sunday.ninemsn.com.au/sunday/cover_stories/article_1915.asp>. It has been pointed out that the Blair Athol dispute was not really about the question of double-dipping by employees, as suggested by the (then) Prime Minister; rather, it raised complex legal questions relating to (among other issues) the fairness of selection processes utilised by the employer to determine which employees should be made redundant; allegations that unionists were targeted for redundancy; and the extent of the AIRC's powers to order reinstatement, where the positions of dismissed employees had (purportedly) become surplus to the employer's requirements: see Research Evidence About the Effects of the 'Work Choices' Bill, A Submission to the Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005 by A Group of 151 Australian Industrial Relations, Labour Market and Legal Academics (November 2005) at 12–13. See also *Rio Tinto Coal Australia Pty Ltd (formerly Pacific Coal Pty Ltd) v Smith* (2005) 56 AILR ¶ 100–354 (one of the many tribunal and court decisions in the seven-year Blair Athol dispute).

80 Commonwealth of Australia, above n79 at 83.

81 Hon Kevin Andrews MP, 'Dismissal for Operational Reasons' (Press Release, 3 November 2005); see also ABC Radio, 'Govt Denies IR Laws Abolish Unfair Dismissal Protection', *PM Program*, 23 March 2006, <<http://www.abc.net.au/pm/content/2006/s1599389.htm>>.

Clearly, however, the operational reasons exclusion as formulated in the amendments introduced by the Work Choices Act *did* amount to a major change in the law. It also went well beyond addressing the double-dipping ‘problem’ described by Prime Minister Howard, by completely stamping out unfair dismissal claims that are in any way related to operational reasons (broadly defined).

(ii) *Formulation of the Genuine Operational Reasons Exclusion in the WR Act*

The WR Act provisions introduced by the Work Choices Act contain, in effect, a ‘two-step’ exclusion of unfair dismissal claims on the basis of genuine operational reasons. First, such claims are excluded for employees in firms with up to 100 employees, by virtue of the blanket exclusion of *all* unfair dismissal claims in relation to those businesses.⁸² Secondly, for employees of employers with over 100 employees, there is the specific exclusion of unfair dismissal claims where the dismissal is based on genuine operational reasons, found in s 643(8)–(9) of the WR Act:

(8) An application under subsection (1) must not be made on the ground referred to in paragraph (1)(a), or on grounds that include that ground, if the employee’s employment was terminated for genuine operational reasons or for reasons that include genuine operational reasons.

(9) For the purposes of subsection (8), *operational reasons* are 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.

The Explanatory Memorandum gave the following example of a genuine operational reason: ‘a termination by reason of redundancy because a machine will do a job that was previously done by an employee’.⁸³ It also indicated that the AIRC must be satisfied that an employer’s stated operational reasons for dismissal were genuine, before dismissing an unfair dismissal claim on this basis: ‘a mere assertion by the employer ... will not be sufficient’.⁸⁴

Section 649 of the WR Act establishes a process for the determination by the AIRC of unfair dismissal claims where the genuine operational reasons exclusion arises, on the motion of the respondent/employer or on the AIRC’s own motion. Under s 649, the Commission must hold a preliminary hearing on the jurisdictional question as to whether the operational reasons exclusion applies.⁸⁵ Where the Commission finds that the operational reasons relied upon by an employer were genuine, it must make an order dismissing the employee’s unfair dismissal application.⁸⁶ An employee whose unfair dismissal claim is ‘struck out’ due to the operational reasons exclusion may still be able to pursue an unlawful termination

82 See above n62.

83 Explanatory Memorandum, above n48 at 321; see also the examples at 322–323.

84 Explanatory Memorandum, above n48 at 321.

85 In contrast, certain other jurisdictional objections to unfair dismissal claims may be determined ‘on the papers’ (that is, without a hearing); see further WR Act s 645.

86 WR Act s 649(2).

claim arising out of his or her dismissal (if, for example, the dismissal was also based on a discriminatory ground contrary to s 659 of the WR Act).

(iii) *Early Analysis of the Genuine Operational Reasons Exclusion*

Much of the early commentary on the genuine operational reasons exclusion focussed on the apparent breadth of the wording of the exclusion, compared to the previous provisions enabling employers to defend unfair dismissal claims where they could point to a valid reason for termination based on operational requirements.⁸⁷ For example, Chapman observed that:

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.⁸⁸

Munro contrasted the new focus on whether there were genuine operational reasons for dismissal, with the traditional test for *redundancy* (most recently stated by the High Court in *Ancor Limited v Construction, Forestry, Mining and Energy Union*)⁸⁹ which:

asked whether ‘the job’ or ‘the position’ was no longer required to be performed by anyone. The definition of operational reasons in the *WorkChoices Act* goes to another, much wider ground. ‘Operational reasons’ imports notions of economic or structural expedience for the undertaking; neither those considerations, nor the genuineness of reasons relying upon them, are linked to cessation of the work being done by, or the job of, the particular employee.⁹⁰

Pittard asserted that the new exclusion is ‘potentially vast and far-reaching’. While questions as to ‘the genuineness of redundancies ... have always existed’, in her view they would now be ‘writ large’ due to the formulation of operational reasons as an exclusion from unfair dismissal claims, which prevents consideration of whether there is a valid reason for the termination or whether a fair procedure is adopted.⁹¹ Further ‘the operational reason need not be dominant or motivating, but simply one reason ...’ for an employee’s dismissal and still attract the operation of the exclusion.⁹²

87 See Part 2 of this article, above.

88 Chapman, above n47 at 246.

89 *Ancor Limited v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241.

90 The Hon 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 *UNSW Law Journal* 128 at 146; see further Chapman, above n47 at 247, referring to earlier case law on the meaning of redundancy including *R v Industrial Commission of SA; Ex parte Adelaide Milk Supply Co-op Ltd* (1977) 16 SASR 6 and the *Redundancy Case* (2004) 129 IR 155.

91 Pittard, above n47 at 231; similarly, Munro, above n90 at 146, argued that the exclusion ‘removes the third-party process ... by which the objective existence of a valid reason based on [operational] requirements ... could be tested and determined’.

92 Pittard, above n47 at 231; see further Chapman, above n47 at 246–247.

The potential for contrived business restructures was highlighted by several commentators, such as in situations where it might be convenient for employers to reduce staff who had been difficult, unco-operative, and/or union activists⁹³ or where performance or misconduct grounds were the real motivating reason(s) for the employer's dismissal of an employee.⁹⁴ Concerns were also raised that, to the extent that the new exclusion allows dismissals based on *economic* reasons, it could enable employers to undertake restructures aimed at improving 'profitability or competitiveness',⁹⁵ based on labour cost reductions, for example, by dismissing award-based employees and engaging workers on the lower minimum conditions set out in the Australian Fair Pay and Conditions Standard.⁹⁶

Stewart went so far as to suggest that, while the operational reasons exclusion might be intended to prevent retrenched employees from complaining about a lack of consultation or unfair selection process for redundancies, 'a broad reading of this exclusion could make it applicable to *just about every termination*'.⁹⁷ Similarly, the exclusion was described in one media report as a 'catch all' provision, with Greg Combet of the Australian Council of Trade Unions ('ACTU') claiming that it meant that the Government 'has in fact abolished unfair dismissal protection for every Australian worker'⁹⁸ (although the Coalition Government strongly rejected these claims).⁹⁹ Finally, it was argued that the operational reasons exclusion takes Australian law away from compliance with the ILO's *Termination of Employment Convention*,¹⁰⁰ which prohibits dismissal unless there is a valid reason based on an employee's capacity or conduct or the operational *requirements* of the undertaking.¹⁰¹

C. *Other Aspects of Economic Dismissals Regulation under Work Choices*

In addition to the operational reasons exclusion, the Work Choices Act amendments also reduced employee protections in respect of economic dismissals in the following ways.¹⁰² First, the statutory redundancy consultation provisions were weakened, by expressly precluding the AIRC from making orders for

93 See Rosemary Owens and Joellen Riley, *The Law of Work* (2007) at 425–426, referring to the earlier decisions in *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 IR 165 and *National Union of Workers v Qenos Pty Ltd* (2001) 108 FCR 90.

94 Or even 'an unsound or malicious allegation of misconduct or lack of performance': see Chapman, above n47 at 246.

95 Owens and Riley, above n93 at 425.

96 Chapman above n47 at 247; see also Pittard, above n47 at 231. Dismissing employees and replacing them with independent contractors to perform the same work is now prohibited by WR Act s 902; see Anthony Forsyth, 'The 2006 Independent Contractors Legislation: An Opportunity Missed' (2007) 35 *Federal Law Review* 329 at 342–346.

97 Andrew Stewart, 'Work Choices in Overview: Big Bang or Slow Burn?' (2006) 16 *Economic and Labour Relations Review* 25 at 46 (emphasis added).

98 See, for example, ABC Radio, above n81.

99 *Ibid.*

100 See above n 10.

101 *Termination of Employment Convention*, art 4; see for example Munro, above n90 at 146; and see further below n189.

102 For discussion see Chapman, above n47 at 248, 252–253; Pittard, above n47 at 231.

reinstatement, or the payment of compensation or severance pay.¹⁰³ Secondly, award provisions for severance pay can no longer apply to employees in businesses with fewer than 15 employees.¹⁰⁴ Thirdly, the statutory process for obtaining AIRC orders for severance pay was repealed.¹⁰⁵ While these changes were no doubt significant, the genuine operational reasons exclusion was the major feature of the new regime for regulating economic dismissals introduced by the Work Choices Act. The next Part of this article considers the operation of the exclusion, based on the analysis of the relevant case law in the Freedom to Fire Report and several more recent decisions.

4. Regulation of Economic Dismissals under Work Choices: Operation and Impact of the Genuine Operational Reasons Exclusion

A. The Extent of Employer Reliance on the Operational Reasons Exclusion

The research undertaken by the author for the VWRA¹⁰⁶ set out to ascertain how frequently employers were relying on the operational reasons exclusion and the extent to which they succeeded in doing so. This was done by examining all of the decisions in which the AIRC considered the exclusion between 27 March 2006 and 31 July 2007 (42 decisions in total).¹⁰⁷ Taking into account those cases where an appeal or other subsequent AIRC decision affected the outcome of the original decision, there were a total of 38 matters during this period in which outcomes were determined by the Commission as to whether the operational reasons exclusion applied. Employers were successful in 22 (57.9%) of those cases, with the result that the employees' unfair dismissal claims ended at that point. Employees 'won' 13 of those cases (34.2%), although this was only a victory in an interim sense – it simply meant that the employee could continue on with his or her unfair dismissal claim, proceeding to conciliation and ultimately arbitration in the AIRC if necessary.¹⁰⁸ Significantly, though, the employer 'success rate' in genuine operational reasons cases increased significantly following the AIRC Full Bench decision in *Village Cinemas Australia Pty Ltd v Carter*.¹⁰⁹

103 WR Act s 668(3).

104 WR Act ss 513(1)(k) and (4); this overrides the effect of the 2004 *Redundancy Case* (2004) 129 IR 155.

105 See above nn28 and 41. The requirement to notify mass redundancies to the CES (now Centrelink) remains: WR Act s 660, and WR Regulations, Ch 2, Part 12, Div 4, reg 12.9.

106 See the Freedom to Fire Report, above n3.

107 Id at 31–57, which contains a digest of all the decisions. Note that Chapman has recently updated this analysis of the AIRC's decisions on the operational reasons exclusion, covering the period from 1 August 2007 to 30 May 2008; see Anna Chapman, 'Unfair Dismissal: From Work Choices to Forward with Fairness', in A Forsyth & A Stewart (eds), *Australian Labour Law: From Work Choices to Fair Work* (forthcoming).

108 Information on the final outcomes of those cases in which employees had successfully resisted the employers' operational reasons jurisdictional objections could not be obtained from the Australian Industrial Registry.

It may have been expected that the operational reasons exclusion would generate more than the 42 decisions made by the AIRC in the first 16 months of its operation. However, the number of cases coming before the Commission does not provide an accurate reflection of the full extent of employers' reliance on the exclusion. In fact, this neatly demonstrates the whole point of the operational reasons exclusion. It operates as a complete bar to an employee bringing an unfair dismissal claim. And because it is worded (and has subsequently been interpreted) very broadly,¹¹⁰ this is bound to have had some 'dampening' effect on the number of employees lodging unfair dismissal claims. Some indication that the operational reasons and '100 employees' exclusions may be having such an effect is provided by the *overall* fall in the number of termination of employment applications (unfair dismissal and unlawful termination) lodged with the AIRC since Work Choices commenced operation. In 2004-5 6,707 applications were lodged, with this number falling to 5,758 in 2005-06, with a further drop to 5,173 in 2006-07.¹¹¹ Of the 458 termination of employment matters determined by an AIRC decision in 2006-07,¹¹² 255 (55.7%) were dismissed on jurisdictional grounds, 133 on the basis of the 100 employees exclusion, and 21 due to genuine operational reasons.¹¹³ It should also be noted that in addition to the matters that came before the AIRC, numerous instances of businesses sacking workers for 'operational reasons' (or similar reasons) have been reported since Work Choices came into effect.¹¹⁴

B. The AIRC's Approach to the Operational Reasons Exclusion

(i) The Early Phase: Perry v Savills and the 'Logical Response' Test

The decision of Watson SDP in *Perry v Savills (Vic) Pty Ltd*¹¹⁵ provided an early indication that the AIRC would try to 'read down' the genuine operational reasons exclusion in a way that would prevent it applying to some dismissals arising from business restructuring decisions. In this case, a Finance Manager was dismissed by

109 *Village Cinemas Australia Pty Ltd v Carter* (2007) 158 IR 137 ('Village Cinemas'); this pivotal decision is discussed further in Part 4(B), below.

110 See further the discussion in Part 4(B), below.

111 AIRC, *2006-07 Annual Report* (2007) at 7; see also Justice Geoffrey Giudice, 'Industrial Relations Society of Australia National Conference Opening Address' (Given at the Industrial Relations Society of Australia National Conference, Canberra, 30 March 2007), <http://www.airc.gov.au/about_the_commission/speeches/giudicej300307.htm>. As one of the *Sydney Law Review's* anonymous referees pointed out, the reduction in unfair dismissal applications may be even greater than these statistics indicate, given that (under Work Choices) many unfair dismissal cases that would previously have been brought under State industrial legislation became subject to Federal jurisdiction, which should have led to some increase in the numbers of Federal unfair dismissal claims.

112 The vast majority of applications for relief in respect of termination of employment are resolved through conciliation in the AIRC (81% in 2006-07), or are otherwise finalised prior to arbitration (17%; only 2% were finalised with an arbitrated order in 2006-07): AIRC, above n111 at 10.

113 AIRC, above n111 at 12-13; *Jurisdictional Limits Halt Half of Unfair Dismissal Cases Decided Under Work Choices* (16 January 2008) Workplace Express <http://workplaceexpress.com.au/news_selected.php?act=2&selkey=35641&hlc=2&hlw=jurisdictional%20limits>.

a property services company following the restructuring and merger of her position with that of the Office Manager and her unsuccessful application for the newly created position. Watson SDP accepted (with some reservations) that the restructure of positions was for genuine operational reasons, including the desire to reduce wage expenses and re-align the company's corporate structure. However, Watson SDP considered that another step was necessary before the exclusion in s 643(8)-(9) of the WR Act could be said to apply, that is, whether the employee's *termination* was for genuine operational reasons, rather than simply whether there were such reasons for the *restructuring* of her position:

While operational requirements may provide a reason for the restructuring, they do not necessarily provide a reason for the termination of Ms Perry's employment. ... The restructuring of positions so that an employee's position is no longer available does not, in itself, establish operational reasons for the termination of an individual employee's employment. The termination must be "genuinely" [emphasis in original] related to the employer's operational requirements in the sense that the termination is a *logical response* to those requirements. [Emphasis added.]¹¹⁶

Applying this 'logical response' test, Watson SDP found that the restructure of the employee's position (even if genuine) did not require her termination. This was so, having regard to factors such as: the availability of an alternative position that was never offered to her in specific terms, her skills and past performance (which made her an asset to the company), and the company's expansion (creating an operational requirement to retain her in an alternative position). For these reasons, the employer's motion to dismiss the unfair dismissal application was denied.

The narrow approach to interpreting the operational reasons exclusion outlined in *Perry v Savills* was adopted in a number of subsequent AIRC decisions, although this did not always lead to the refusal of the employer's operational reasons jurisdictional objection.¹¹⁷ In any event, the approach adopted in *Perry v Savills* was explicitly rejected by a Full Bench of the AIRC in *Village Cinemas*.

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- 114 See, for example, *Cowra Abattoir becomes Work Choices Battleground* (3 April 2006) Workplace Express <http://workplaceexpress.com.au/news_selected.php?act=2&selkey=31376&hlc=2&hlw=cowra%20abattoir%20becomes%20work%20choices>; *News in Brief, April 11, 2005: Optus denies sackings due to Work Choices* 11 April 2006, *Workplace Express* <http://workplaceexpress.com.au/news_selected.php?act=2&selkey=31433&hlc=2&hlw=ptus%20denies%20sackings>; Justine Ferrari, 'Union blasts port workers' sackings', *The Australian*, 28 April 2007; AAP, 'Busload Workforce Takes Over Jobs', *The Australian* (30 July 2007); Meaghan Shaw, 'Sacked Curtain Factory Workers Owed up to \$10,000 Each', *The Age* (29 June 2007); Clay Lucas, 'Union Fury as So Axes Council Jobs', *The Age* (9 August 2007).
- 115 *Perry v Savills (Vic) Pty Ltd* (2006) 58 AILR ¶100-525 ('Perry v Savills'); AIRC, Watson SDP, PR973103 (20 June 2006), available at: <<http://www.airc.gov.au/cases/alldecisions.htm#>> (all of the AIRC decisions discussed in the remainder of this article are available from this web-site).
- 116 *Perry v Savills* (2006) 58 AILR ¶100-525; AIRC, Watson SDP, PR973103 (20 June 2006) at [41].

(ii) *The Broad Approach to the Exclusion Established in Village Cinemas*

The *Village Cinemas* case was the first to attract significant media and public attention to the effect of the operational reasons exclusion. An employee ('Carter') who was Manager of one of the company's cinema complexes was made redundant after 19 and a half years' service. The company had decided to close the complex after receiving a notice to vacate the premises. Initially, Carter was simply informed of these developments and that no decision had been made about his position. He suggested that he be allowed to take six months' accrued long service leave, to see whether a position might arise during that time to which he could be redeployed. The employer considered this request, but decided instead to terminate Carter's employment. When determining the employer's jurisdictional objection to Carter's unfair dismissal claim, Hingley C of the AIRC found that the closure of the cinema complex was 'factual and unavoidable'.¹¹⁸ However, Hingley C decided that the termination of the Carter's employment was *not* for genuine operational reasons having regard to all the 'relevant considerations'. These included the fact that he was a long-serving, multi-skilled employee who had worked at nine different locations and was 'therefore eminently redeployable', that he was the only one of 12 staff to be made redundant, that he was denied the opportunity to take long service leave (to see whether a vacancy might arise), and that he was not offered another position of lower status (which he would have accepted).¹¹⁹

The employer appealed against Hingley C's decision and the Coalition Government intervened in support of the appeal.¹²⁰ The Commission's decision in the appeal was the first Full Bench consideration of the terms and scope of the genuine operational reasons exclusion. In a decision handed down on 15 January 2007,¹²¹ the Full Bench (Drake & Kaufman SDPP, & Eames C) found in favour of the employer, stating that:

Here the situation was clear. The cinema complex was closing and there was no longer a position for a manager. That circumstance led to the termination of Mr

117 See *Springer and Cunningham v The Northcott Society* (2006) 58 ¶AILR 100–537, AIRC, Cargill C, PR973840 (1 September); *Nicholson v Riviera Marine Pty Ltd* (2006) 58 AILR ¶100–555, AIRC, Spencer C, PR674198 (29 September 2006); *Szekerzes-Boda v Novadale Enterprises Pty Ltd*, AIRC, Harrison C, PR974653 (20 November 2006); and compare *Proxiv and Others v Bilfinger Berger Services (Australia) Pty Ltd* (2006) 58 AILR ¶100–529, AIRC, Cargill C, PR973542 (14 August 2006); *Organ v Climate Technologies Pty Ltd* (2006) 58 AILR ¶100–523(15), AIRC, Roberts C, PR97380 (1 September 2006); *Diserens v The Allied Express Group of Companies* (2006) 58 AILR ¶100–540(15), AIRC, Cargill C, PR973801 (25 September 2006); *McPherson v Vitality Care Operations Pty Ltd t/as Bridgewater Aged Care Facility*, AIRC, Watson SDP, PR974870 (7 December 2006). For further detail, see Freedom to Fire Report, above n3 at 32–39.

118 *Village Cinemas* (2006) 58 AILR 100–539(22); AIRC, Hingley C, PR974111 (20 September 2006) at [11].

119 *Village Cinemas* (2006) 58 AILR 100–539(22); AIRC, Hingley C, PR974111 (20 September 2006) at [18]–[23].

120 See Mark Skulley, 'Minister Steps into Sacking Test Case' *The Australian Financial Review* (21 Nov 2006).

121 *Village Cinemas Australia Pty Ltd v Carter* (2007) 158 IR 137.

Carter's employment. The closure of the cinema was at least one of the operational reasons for the termination of Mr Carter's employment. Indeed, it seems to us that it was **the** reason. We reject [Mr Carter]'s submission that the reason was the failure by Village to allow Mr Carter to avail himself of long service leave and thereby remain employed for at least another six months. That decision by Village was a refusal to allow Mr Carter to take long service leave and thereby delay the implementation of its decision to terminate his employment. The refusal of Mr Carter's request by Village, did not convert what was otherwise a termination of employment of a particular employee for genuine operational reasons into one that was not for such reasons.¹²²

In reaching its decision, the Full Bench articulated a number of principles as to the proper interpretation and application of the genuine operational reasons exclusion. These included that the operational reason relied on by the employer need only be the ground or cause for the termination. It does not have to demand or bring about an obligation to terminate the employment, and nor does the termination have to be an unavoidable consequence of the operational reason. Therefore, the question whether an employer could have done something other than terminating an employee's employment, is irrelevant to determining whether a genuine operational reason existed. Further, responding directly to the approach taken by Watson SDP in *Perry v Savills*, the Full Bench expressed the view that:

To pose the question whether the termination was "a logical response to" the employer's operational requirements will also not necessarily assist in determining whether the termination was for genuine operational reasons.¹²³

On this view, according to the Full Bench in *Village Cinemas*, no inquiry is required into the circumstances of a redundancy termination to determine its *appropriateness* (rather than whether the termination of the particular employee was for genuine operational reasons): '[t]his, it seems to us, is precisely the type of inquiry that the Parliament sought to avoid when it created the statutory bar to bringing applications for relief in s643(8).'¹²⁴ So, the circumstances surrounding Carter's termination to which Hingley C had regard were 'extraneous or irrelevant matters' that should not have guided his determination of whether the dismissal was for genuine operational reasons.¹²⁵

The media reporting of the AIRC Full Bench's decision in *Village Cinemas* suggested that it provided larger employers with significant latitude to use workplace restructures as a basis for dismissing staff.¹²⁶ Hor and Keats highlighted the decision's importance in overruling the reasoning in *Perry v Savills*, regarding the employer's 'operational ability' to redeploy an employee

122 *Village Cinemas Australia Pty Ltd v Carter* (2007) 158 IR 137 at [38] (emphasis in original).

123 *Village Cinemas Australia Pty Ltd v Carter* (2007) 158 IR 137 at [28].

124 *Village Cinemas Australia Pty Ltd v Carter* (2007) 158 IR 137 at [36].

125 *Village Cinemas Australia Pty Ltd v Carter* (2007) 158 IR 137 at [39]; see further at [41].

126 See for example Adrian Rollins, 'Employers Win Wider Powers to Sack', *The Australian Financial Review* (16 Jan 2007); Susannah Moran, 'Shedding Staff Made So Much Easier', *The Australian Financial Review* (16 Jan 2007).

who has been made redundant. In their view, this type of consideration became irrelevant following *Village Cinemas*.¹²⁷ Further, according to Keats, the Full Bench's decision left employers with: 'considerable flexibility in relation to the employees they select and the procedures they follow when implementing redundancies.'¹²⁸

(iii) *Applying the Broad Approach to the Exclusion: The Post-Village Cinemas Case Law*

The broad approach established in *Village Cinemas* has had a significant effect on the AIRC's subsequent consideration of the operational reasons exclusion. Over the period examined in the *Freedom to Fire Report* (that is, 27 March 2006 until 31 July 2007), the number of unfair dismissal cases in which employers' operational reasons jurisdictional objections succeeded increased markedly following the Full Bench's decision in *Village Cinemas*.¹²⁹ A key finding of the Report was that the AIRC's broad interpretation of the exclusion has enabled it to be used to legitimise, and render beyond the reach of unfair dismissal complaints, dismissals that in some cases have only a very remote connection to the economic, technological, structural, or other operational needs of the business concerned (which the former statutory test of 'operational requirements' required an employer to satisfy when justifying economic dismissals). In other words, the important element of the *necessity* of the employer's restructuring measures has been taken out of the equation.¹³⁰ Further, it no longer has to be shown that the position or job previously performed by a dismissed employee has ceased to be performed by anyone (that is, the traditional test of 'redundancy').¹³¹

The cases also show that there does not have to be any pressing *financial imperative* for the employing business to undertake a restructure and implement redundancies that will fall within the operational reasons exclusion. This follows from the fact that 'economic' reasons are only one type of operational reason referred to in s 643(9) of the WR Act. The others include 'structural' and 'technological' reasons, and the cases demonstrate that organisational restructures driven simply by a general desire to improve efficiency or 'streamline' staffing structures will attract the operation of the exclusion. Examples of the wide array of restructuring situations, and factors behind such restructuring, that have been endorsed by the AIRC as a legitimate use of the exclusion (since the Full Bench decision in *Village Cinemas*) are summarised in the following table.

127 Hor and Keats, above n7 at 170.

128 Louise Keats, 'No Logical Response Required: The Full Bench Explains Genuine Operational Reasons' (2007) 20 *Australian Journal of Labour Law* 104 at 111.

129 For details see *Freedom to Fire Report*, above n3 at 39, 44–57, 64.

130 The case law on the former statutory provisions indicated that the dismissal(s) must be necessary to advance the undertaking: see Part 2(B) above.

131 See nn7 and 90 above.

Table 1: Types and Causes of Restructuring Found by AIRC to Fall Within Genuine Operational Reasons Exclusion, Post-Village Cinemas

Type/Cause of Restructuring	Decisions
Internal or external review of business unit/organisation leading to restructure of positions	<i>Sperac v Global Television Services Pty Ltd^a</i>
Closure of site or completion of project	<i>Kingsley Smith v Macmahon Holdings^b</i> <i>Smith v Georgiou Group Pty Ltd^c</i> <i>Bell, Kirwin and Hinds v H & M Engineering and Construction Pty Ltd^d</i>
Cost reductions to address financial difficulties and lower work volumes	<i>Holmes v Downer Connect Pty Ltd^e</i>
Downturn in work, financial losses, changed market conditions	<i>Rawolle v Don Mathieson & Staff Glass Pty Ltd^f</i>
Employer's dissatisfaction with conditions in employee's collective agreement, and desire to utilise flexibilities offered by Work Choices	<i>Rawolle v Don Mathieson & Staff Glass Pty Ltd^g</i>
Downturn in sales and profits	<i>Duncan v Altshul Printers Pty Ltd^h</i>
'Realignment process'; employee's work function absorbed into other roles	<i>Dunstan v EDS (Business Process Administration) Pty Ltdⁱ</i>
Problems in employer's parent company, including \$17.2 million loss of profit and suspension of share trading	<i>Campagna v Priceline Pty Ltd^j</i> <i>Cruickshank v Priceline Pty Ltd^k</i>
Office closure and re-allocation/outsourcing of functions	<i>Moulang v Federal-Mogul Pty Ltd^l</i>
Employer's loss of contract	<i>Moschatos v Aero-Care Flight Support Pty Ltd^m</i>
Revamp of organisational structures/job design to increase efficiency	<i>Bourke v Corporation of the Diocesan Synod of North Queensland operating St Mark's College as a Charitable Trustⁿ</i>
Changes to liquor licensing laws, impacting on staffing arrangements	<i>Daly v Beleyre Holdings t/as Bel Ayre Tavern^o</i>
Employee's refusal to accept re-assignment to different role following conclusion of project	<i>Boeing Australia Ltd v Acworth^p</i>

a. *Sperac v Global Television Services Pty Ltd* [2007] AIRC 441.

b. *Kingsley Smith v Macmahon Holdings* [2007] AIRC 336.

- c. *Smith v Georgiou Group Pty Ltd* [2007] 582.
- d. *Bell, Kirwin and Hinds v H & M Engineering and Construction Pty Ltd* [2007] AIRC 516.
- e. *Holmes v Downer Connect Pty Ltd* [2007] AIRC 72.
- f. *Rawolle v Don Mathieson & Staff Glass Pty Ltd* [2007] AIRC 446 ('*Rawolle v Don Mathieson*'); see further commencing at n166 below.
- g. *Rawolle v Don Mathieson* [2007] AIRC 446
- h. *Duncan v Altshul Printers Pty Ltd* [2007] AIRC 286.
- i. *Dunstan v EDS (Business Process Administration) Pty Ltd* [2007] AIRC 59.
- j. *Campagna v Priceline Pty Ltd* [2007] AIRC 147
- k. *Cruickshank v Priceline Pty Ltd* [2007] AIRC 1005 ('*Cruickshank v Priceline*'); see further commencing below at n158.
- l. *Moulang v Federal-Mogul Pty Ltd* [2007] AIRC 453.
- m. *Moschatos v Aero-Care Flight Support Pty Ltd* [2007] AIRC 630.
- n. *Bourke v Corporation of the Diocesan Synod of North Queensland operating St Mark's College as a Charitable Trust* [2007] AIRC 564.
- o. *Daly v Beleyre Holdings t/as Bel Ayre Tavern* AIRC, *McCarthy DP*, [2007] AIRC 546 (5 July 2007).
- p. *Acworth v Boeing Australia Ltd* [2007] AIRCFB 730.

(iv) *The AIRC's Inability to Consider 'Procedural Fairness' Issues in Operational Reasons Dismissals*

As outlined in Part 2 of this article, an important dimension of the Federal unfair dismissal regime between 1993 and 2005 was the scope for the AIRC to consider whether an employee had been afforded procedural fairness in the process leading to dismissal. Although the significance of the procedural fairness concept declined following the 1996 amendments, the Commission continued (until 2005) to have regard to procedural fairness considerations in determining whether employees had been unfairly dismissed in the context of economic dismissals.¹³² In contrast, the AIRC has repeatedly made the point that under the operational reasons exclusion, it has absolutely no scope to consider whether a dismissal was 'unfair' or 'harsh, unjust or unreasonable'.¹³³ The Commission's focus is simply on whether it has jurisdiction to deal with the unfair dismissal claim (that is, whether the operational reasons bar to jurisdiction applies).¹³⁴ Therefore, it cannot have regard to evidence that an employee might produce about the unfairness of the process adopted by the employer that resulted in dismissal.

Watson SDP's decision in *Perry v Savills* appeared to open the door for consideration of factors such as whether an employee dismissed for operational

132 See Part 2(C) above.

133 See for example *Cruickshank v Priceline Pty Ltd* [2007] AIRCFB 513; *Bourke* [2007] AIRC 564.

134 See for example *Koya v Port Phillip City Council* AIRC, Ives DP, PR973045 (13 June 2006); *Perry v Savills* (2006) 58 AILR ¶100-525; AIRC, Watson SDP, PR973103 (20 June 2006); *Nicholson v Riviera Marine Pty Ltd*, AIRC, Spencer C, PR974198 (29 September 2006); *Hipwell v Australian Pharmaceutical Industries Ltd*, AIRC, Hamberger SDP, PR974356 (21 November 2006).

reasons was offered an alternative position, and the employee's skills, past performance and value to the company.¹³⁵ However, as indicated above, the AIRC Full Bench in *Village Cinemas* explicitly rejected any notion that such factors can be considered under the terms of the exclusion in s 643(8)-(9) of the WR Act.¹³⁶ The AIRC's impotence when faced with evidence of a lack of procedural fairness in the context of operational reasons dismissals is demonstrated by numerous decisions, in which the Commission has been required to disregard, for example: whether the selection processes for redundancies were fair (or not),¹³⁷ whether a dismissed employee had been promised another position, the employer's poor handling of the dismissal process and its failure to follow relevant provisions of a certified agreement¹³⁸ and the hiring of new employees and labour hire staff following the implementation of redundancies.¹³⁹ Echoing the Full Bench's position in *Village Cinemas*, in at least two subsequent decisions the AIRC has expressed the view that an employer is not required to make efforts to find alternative positions for redundant employees.¹⁴⁰

(v) *The Potential for Abuse: 'Operational Reasons' as a Device to Reduce Labour Costs*

As outlined earlier in this article,¹⁴¹ a number of commentators raised concerns about the potential for abuse of the operational reasons exclusion through business 'restructures' aimed at improving profitability or competitiveness by cutting labour costs. Two of the cases decided since *Village Cinemas* have illustrated that these concerns were quite well-founded.

The first case became something of a saga, attracting even greater media, public and political attention than *Village Cinemas* and involving three separate AIRC decisions. *Cruickshank v Priceline Pty Ltd*¹⁴² involved the dismissal of an employee ('Cruickshank') along with 28 other employees, as part of a restructure undertaken in response to a period of turmoil in the employer's parent company.

135 See above Part 4(B)(i).

136 See above nn123–125.

137 See for example *Nicholson v Riviera Marine Pty Ltd* AIRC, Spencer C, PR974198 (29 September 2006); *Hipwell v Australian Pharmaceutical Industries* AIRC, Hamberger SDP, PR974356 (21 November 2006).

138 See *Sperac v Global Television Services Pty Ltd* [2007] AIRC 441.

139 See for example *Bell, Kirwin and Hinds v H&M Engineering and Construction Pty Ltd* [2007] AIRC 516 (where it was recognised that the new hirings were for projects gained after the redundancies had been implemented); compare however *Mr L v The Employer* [2007] AIRC 457 (where evidence of the engagement of new workers formed part of the reason for the AIRC's rejection of the employer's operational reasons argument).

140 See *Kingsley Smith v Macmahon Holdings* [2007] AIRC 336; *Bell, Kirwin and Hinds v H&M Engineering and Construction Pty Ltd* [2007] AIRC 516.

141 See above Part 3(B)(iii).

142 The following description of the proceedings in *Cruickshank v Priceline* [2007] AIRC 1005 draws on both the Freedom to Fire Report, above n3, and Corrs Chambers Westgarth, 'AIRC Upholds 'Operational Reasons' Dismissal of Priceline Employee', *Corrs In Brief*, January 2008, <http://www.corrs.com.au/corrs/website/web.nsf/Content/Pub_InBrief_AIRC_Priceline_Dismissal_170108> (which was also written by the present author).

Cruickshank was employed as a Space Planner in a business unit (the Space Planning division) which was merged with another business unit, with the result that the two highest paid employees occupying Space Planner positions (including Cruickshank) were made redundant. Cruickshank claimed that following his dismissal, his position was re-advertised at a lower rate of remuneration. The matter first came before Eames C of the AIRC who found that Cruickshank's dismissal fell within the operational reasons exclusion because there was an economic or structural reason for the restructure leading to his dismissal.¹⁴³ The company's financial difficulties and need to restructure were genuine, and there was no evidence that the termination was a sham or that Cruickshank was inappropriately targeted for dismissal.

In the increasingly volatile build-up to the 2007 Federal election, with industrial relations issues perhaps assuming greater prominence than ever before, the *Cruickshank v Priceline* case turned into a '*cause celebre*' for opponents of Work Choices. Much of this attention focused on the way that Eames C's decision appeared to allow employers to use the operational reasons exclusion to dismiss existing employees, and replace them with other employees on lower salaries.¹⁴⁴ The (then) Prime Minister publicly rejected that interpretation of both the decision and the exclusion, stating that:

Operational reasons are not and should never be seen as code for saying "I will get rid of X because I'm paying him [or her] \$100,000 a year so I can employ Y at \$80,000 a year." There has to be a bona-fide operational reason and that of course has always been the law.¹⁴⁵

The (then) Shadow Minister for Industrial Relations drew attention to the fact that Cruickshank's total annual salary package at the time of his dismissal was \$101,000, but the salary for the re-advertised position was only \$75,000. Labor pledged to ensure (if elected to government) that companies could not hire cheaper replacements for dismissed workers.¹⁴⁶ However, a Priceline representative disputed the claim that the re-advertised position was the same as that previously held by Mr Cruickshank.¹⁴⁷

Cruickshank brought an appeal against Eames C's decision. In the appeal, an AIRC Full Bench (Giudice J, Drake SDP & Whelan C) accepted the evidence that Mr Cruickshank's position remained after the restructure, and that it had been re-advertised with a lower overall remuneration package.¹⁴⁸ Even so, the Full Bench

143 *Cruickshank v Priceline* [2007] AIRC 292 see also *Campagna v Priceline Pty Ltd* [2007] AIRC 147.

144 See for example Misha Schubert, 'Priceline Case Puts Focus on IR Laws' *The Age* (25 Apr 2007).

145 Quoted in AAP, 'Employers need bona fide reason to sack workers: Howard' (24 Apr 2007) <<http://www.cch.com.au>>; see also 'PM weighs into Priceline 'Operational' Sacking' *Workforce Daily* (24 Apr 2007).

146 See AAP, 'Labor Won't Allow Low-Wage Replacements for Sacked Workers' 24 April 2007 <<http://www.cch.com.au>>.

147 See Schubert, above n160; and Meaghan Shaw, 'Appeal Puts Sacking Laws to the Test' *The Age* (13 Jun 2007).

found that Eames C's conclusions were open to him, on the basis that the evidence did not indicate that Cruickshank's dismissal was a sham. Ultimately, however, the Full Bench concluded that Eames C had provided inadequate reasons for his decision, and had incorrectly applied the approach to the operational reasons exclusion adopted in *Village Cinemas*. For these reasons, the Full Bench overturned Eames C's decision and ordered a rehearing of the operational reasons jurisdictional issue.

The rehearing was conducted by Lewin C. In a decision handed down on 14 December 2007 (more than 12 months after Cruickshank's dismissal), Lewin C found that there were true and authentic reasons for Priceline to reduce its operational costs, through the restructuring of the Space Planning function, the reduction from three to two Space Planner positions (although one position remained unfilled at the time the case was heard) and the decision to remunerate the remaining positions at a lower rate.¹⁴⁹ On this basis, the reasons for the termination of Cruickshank's employment genuinely *included* reasons of an economic or structural nature. The termination therefore fell within the operational reasons exclusion and the AIRC did not have jurisdiction to deal with Cruickshank's unfair dismissal claim.

An even more clear-cut illustration of the potential for the operational reasons exclusion to form the basis for labour cost-cutting strategies is provided by *Rawolle v Don Mathieson & Staff Glass Co Pty Ltd*.¹⁵⁰ This case was the subject of two decisions by Lewin C of the AIRC. The initial proceedings before Lewin C involved an application by the dismissed employee (Rawolle) for an extension of time in which to lodge his unfair dismissal claim.¹⁵¹ In these proceedings, the employer gave evidence and made submissions to the effect that it had wanted to obtain greater flexibility in its employment arrangements (this was being pursued by offering new employees AWAs, through a labour hire agency) and the inflexible working conditions of the union collective agreement under which Rawolle was employed constituted the operational reasons for his dismissal. The evidence also indicated that the employer's business was expanding and that (after his dismissal) Rawolle saw an advertisement for a very similar position to his former job. Lewin C found that the employer's claim that the economic benefit it obtained from pursuing the options available to it under Work Choices was not an operational reason for dismissal. He took this into account in deciding to allow Rawolle's extension of time application.¹⁵² He added that the dismissal was arguably a sham, and for a prohibited reason under the freedom of association provisions of the WR Act, that is, Rawolle's entitlements under an industrial instrument.¹⁵³

148 *Cruickshank v Priceline* [2007] AIRCFB 513.

149 *Cruickshank v Priceline*, AIRC, Lewin C, [2007] AIRC 1005 (14 December 2007).

150 *Rawolle v Don Mathieson* [2007] AIRC 446.

151 Under WR Act s 643(14), an employee must lodge an unfair dismissal claim within 21 days of the date on which the termination of employment took effect, or such longer period as the AIRC allows.

152 *Rawolle v Don Mathieson* [2007] AIRC 240.

When the matter next came before Lewin C (on the employer's jurisdictional objection to the unfair dismissal claim based on the operational reasons exclusion), the company provided evidence that a downturn of work and financial losses had led to the restructure in which Rawolle was made redundant. Faced with this evidence, Lewin C found that the dismissal was for several reasons, some of which could be described as structural or economic in nature. Another reason for Rawolle's termination was the operation of the collective agreement covering his employment. In Lewin C's words:

While there were no doubt additional considerations, the respondent chose to terminate the employment of Mr Rawolle because it wished to avail itself of the flexibilities ... available under *Work Choices* ...¹⁵⁴

However, because economic or structural reasons were *included* in the reasons for dismissal, Lewin C (applying *Village Cinemas*) concluded that the operational reasons asserted by the company were not a sham. Accordingly, the genuine operational reasons exclusion applied, and Rawolle's unfair dismissal claim was dismissed.

Lewin C's decisions in *Rawolle v Don Mathieson* most clearly demonstrate the extent to which the genuine operational reasons exclusion has undermined protections for employees. The second decision in this case means that federal unfair dismissal law now sanctions companies openly sacking their employees because they are engaged under a collective agreement. For as long as that remains the legal position, only the freedom of association provisions in Part 16 of the WR Act can protect workers from discriminatory treatment of this nature. These last remaining protections have also been undermined by *Work Choices*,¹⁵⁵ as was illustrated by the Cowra Abattoir sackings soon after the new legislation came into effect.¹⁵⁶ The WR Act now contains prohibitions on employees being dismissed and re-hired as independent contractors.¹⁵⁷ But there are only minimal protections for employees from dismissal by their employer, followed by the hiring of *other* workers (whether as employees or contractors) on lower wages.

(vi) *Constraints on the Operational Reasons Exclusion*

The foregoing discussion has illustrated the effects of the AIRC's broad interpretation of the operational reasons exclusion since *Village Cinemas* and the

153 See WR Act Part 16, in particular ss 792(1)(a) and 793(1)(i); and below n171.

154 *Rawolle* [2007] AIRC 446 at [85].

155 Under the pre-reform *Work Choices* Act, it was only necessary to show that a prohibited reason for dismissal (for example, an employee's entitlements under an award or agreement) was *one* of the reasons for dismissal; now, it must be shown that the prohibited reason was the *sole or dominant* reason for dismissal: see WR Act ss 792(1)(a) and (8), and 793(1)(i).

156 See n114 above; an Office of Workplace Services investigation into this matter expressed the view that the employer had not acted for the sole or dominant reason proscribed in s 793(1)(i), but rather for legitimate reasons related to the financial viability of the company: see Office of Workplace Services, 'Summary of the Investigation into Alleged Breaches of the *Workplace Relations Act 1996* at Cowra Abattoir' (Media Release 7 July 2006).

157 See above n96.

various ways in which this has reduced the level of protection for employees' job security. The exclusion operates subject to very few constraints. One such constraint, highlighted in several AIRC decisions, is the need for employers to adduce substantive evidence of the operational reasons being relied upon.¹⁵⁸ On the other hand, even this requirement is subject to variations in the approaches taken by different members of the AIRC as to the evidentiary threshold required. In some decisions, the need for evidence has been expressed in terms of the *onus* being on the employer to prove its case in support of the operational reasons exclusion.¹⁵⁹ The Full Bench in *Cruickshank v Priceline* disagreed with this expression, stating instead that the Commission must be persuaded of the genuineness of operational reasons by evidence produced by the employer.¹⁶⁰

In *Springer and Cunningham v The Northcott Society* the AIRC took the view that, although evidence from an 'endless parade of witnesses' would not be necessary in support of an operational reasons jurisdictional objection, the Commission would need to hear from 'persons with relevant, direct knowledge' of the situation that led to dismissal.¹⁶¹ The AIRC stated, in *Kieselbach v Amity Group Pty Ltd*,¹⁶² that an employer is not required to bring evidence from a barrage of accountants or audited statements for the last five years. However, more was required than a simple statement or assertion that government funding cuts necessitated redundancies. A higher evidentiary bar seemed to be imposed by Lacy SDP in *Moxham v Baxter Business Pty Ltd*.¹⁶³ In that case, the employer's operational reasons argument failed because it had not provided 'probative evidence' of the economic reasons for a restructure that led to an employee's redundancy. Instead, the employer had sought to rely on figures showing a budget deficit for one month. Lacy SDP considered that the following information should be produced: analysis of the economic data for the past year in the context of future projections; and a 'paper trail' to show a rational analysis of the resources necessary to achieve the desired internal efficiencies.

Another constraint on the reach of the operational reasons exclusion is that it does not apply to dismissals based on personal or other non-business related reasons. For example, the AIRC has found that the exclusion did not apply: where a dismissal based on grounds of poor performance was 'dressed up' as an

158 See Explanatory Memorandum, above n84; in addition to the decisions discussed below, see *Anselmi v Austral Insulation (Vic) P/L* [2007] AIRC 1048 ('Anselmi'); *Phillips v Custom Security Services Pty Ltd* [2008] AIRC 25 ('Phillips'); and *Orrcon Operations Pty Ltd v Saverino* [2008] AIRCFB 98 ('Orrcon').

159 See for example *Kieselbach v Amity Group Pty Ltd*, AIRC, Hamilton DP, PR973864 (9 October 2006); *Village Cinemas* (2007) 158 IR 137 (Full Bench decision) and (2006) 58 AIRL 100–539(22) [c.f. DC 24], AIRC, Hingley C, PR974111 (20 September 2006) (Hingley C's decision).

160 *Cruickshank v Priceline* [2007] AIRCFB 513; in any event, the practical effect of this view is to place the evidentiary onus on the employer.

161 *Springer and Cunningham v The Northcott Society* AIRC, Cargill C, PR973840 (1 September 2006) at [39].

162 *Kieselbach v Amity Group Pty Ltd* AIRC, Hamilton DP, PR973864 (9 October 2006).

163 *Moxham v Baxter Business Pty Ltd* [2007] AIRC 488.

operational reasons dismissal,¹⁶⁴ where an employee was dismissed for absenteeism,¹⁶⁵ on the grounds of bullying constituting misconduct,¹⁶⁶ because the employee had pursued an underpayment claim¹⁶⁷ or where a restructure and redundancies were motivated by a manager's personal antagonism towards one of the dismissed employees.¹⁶⁸ However, the decision in *Johns v Kane Constructions Pty Ltd* shows that a dismissal motivated in part by an employee's (alleged) poor performance, absenteeism, illness and conflict with a supervisor may fall within the operational reasons exclusion – where the employer can also point to evidence of an economic reason for reducing the size of its workforce.¹⁶⁹

C. Conclusions

The research undertaken by the author for the VWRA¹⁷⁰ concluded that the genuine operational reasons exclusion and other aspects of the regulation of economic dismissals introduced by the Work Choices Act,¹⁷¹ have significantly reduced many long-standing legal protections of job security for Australian workers. The AIRC's broad interpretation of the operational reasons exclusion has left employers largely free to restructure their operations and staffing arrangements, and implement redundancies, without the need to treat employees fairly and reasonably in the process leading to dismissal. The exclusion has also allowed employers to dismiss employees with the express purpose of engaging other workers to do the same jobs for lower wages and conditions as long as some kind of 'operational reason' can also be shown. These changes, along with others such as the 100 employees conclusion, have left many workers exposed to unfair or arbitrary dismissal without any legal remedy (unless, for example, the termination is based on a discriminatory ground). The case law emerging from the AIRC since the author's Freedom to Fire Report for the VWRA was completed¹⁷² confirms these views, and the ultimate conclusion of the Report that the Work Choices laws have significantly enhanced the freedom of employers to 'hire and fire' staff.¹⁷³

164 *Evans v CLB No.1 Pty Ltd t/as Wagamama* AIRC, Hamberger SDP, PR973439 (4 August 2006); see also *Wilkinson v Hospitality Marketing Concepts Pty Ltd* AIRC, Thatcher C, PR973660 (11 August 2006); and *Phillips* [2008] AIRC 25.

165 *Hull v Clipsal Australia Pty Ltd* AIRC, Jennings DP, PR974772 (29 November 2006).

166 This cannot be converted into an 'operational reasons' dismissal, by arguing that the bullying allegations and consequent resignation of another employee required a management restructure and the redundancy of the dismissed employee: see *Owens v Whyalla Aged Care Incorporated* [2007] AIRC 245.

167 *Jones v Kypert Pty Ltd* [2007] AIRC 744.

168 *Brown v Macedon Ranges Shire Council*, AIRC, Whelan C, [2007] AIRC 524 (20 July 2007); see also *Anselmi* [2007] AIRC 1048.

169 *Johns v Kane Constructions Pty Ltd* [2008] AIRC 131; see also *Orrcon* [2008] AIRCFB 98.

170 See the Freedom to Fire Report, above n3.

171 That is, the limitations on the statutory redundancy consultation provisions and award/statutory rights to severance pay: see nn102–105 above.

172 Some of which has been referred to in this article; see further Chapman, above n107.

5. *Regulation of Economic Dismissals Post-Work Choices: The Rudd Government's Proposed Reforms*

The research findings presented in this article have important implications for the process of reforming the Federal unfair dismissal legislation now being undertaken by the Rudd Labor Government, which was elected to office at the November 2007 election. In its 'Forward with Fairness' (FWF) industrial relations policy released in April 2007,¹⁷⁴ the (then) Labor Opposition outlined proposals to 'establish a simpler unfair dismissal system which balances the rights of employees to be protected from unfair dismissal, with the need for employers to manage their workforce, and to ensure a faster, less complex process for all'.¹⁷⁵ The following minimum qualifying periods of employment would apply before an employee could bring an unfair dismissal claim: six months in larger businesses or 12 months where the employing business has fewer than 15 employees. Claims would usually have to be lodged within seven days of dismissal. They would be dealt with in a conference convened by Labor's proposed new workplace agency, Fair Work Australia ('FWA').¹⁷⁶ In this conference, parties would be able to put their views and answer questions, but there would be no written submissions or cross-examination; it would not be a hearing. FWA would be required to come to a 'conclusion' as to whether the dismissal was unfair. It could order reinstatement (unless this would not be in the interests of both parties) or compensation (which would be capped to discourage speculative claims). A 'Fair Dismissal Code' would apply to small businesses. Genuine compliance with this code by a small business employer would result in a dismissal being considered fair. Some (albeit limited) further details about the ALP's proposed new unfair dismissal system were outlined in its 'Policy Implementation Plan' for FWF, released in August 2007.¹⁷⁷

Following the release of the present author's report for the VWRA¹⁷⁸ in September 2007, the ALP strongly criticised the genuine operational reasons exclusion from unfair dismissal claims and pledged to abolish it, while also indicating that '... businesses under genuine and significant financial strain will

173 Another conclusion of the Freedom to Fire Report was that the operational reasons exclusion has taken Australian law further away from compliance with the ILO *Termination of Employment Convention*: see further Anthony Forsyth, *Protection Against Economic Dismissals: How Does Australian Law Compare with ILO Standards and Five Other OECD Countries?* (Supplementary Report for the Victorian Office of the Workplace Rights Advocate, November 2007) <http://www.business.vic.gov.au/busview/_assets/main/lib60148/economic%20dismissals-artfinal.pdf>.

174 Australian Labor Party ('ALP'), *Forward with Fairness: Labor's Plan for fairer and more productive Australian workplaces* (April 2007).

175 Id at 19–20.

176 As to which see Id at 17–18; and ALP, 'Federal Labor's New Independent Industrial Umpire: Fair Work Australia' (Media Statement 26 April 2007).

177 ALP, *Forward with Fairness: Policy Implementation Plan* (August 2007) at 18–20. For further discussion of Labor's proposed changes to federal unfair dismissal laws, see Anthony Forsyth, Breen Creighton, Tim Sharad & Val Gostencnik, *Transition to Forward with Fairness: Labor's Reform Agenda* (2008) at 235–240.

178 See the Freedom to Fire Report, above n3.

have the option of making employees redundant.¹⁷⁹ Labor had also stated in the FWF Implementation Plan that

Under Labor's system, employees can be dismissed in cases of redundancy. Where a small business owner has suffered a downturn and needs to reduce staff to reduce costs, the dismissal will be a genuine redundancy and not an unfair dismissal. Similarly, if a small business needs fewer employees due to the use of new technologies, this is a redundancy.¹⁸⁰

Overall, Labor's pre-election policy constituted a step in the right direction towards improving the level of protection for Australian employees against economic dismissals. Without explicitly saying so, the ALP appeared to be signalling a return to the former test of 'operational requirements' as a valid reason for dismissal along with the employer's obligation to demonstrate the necessity for any restructuring measures and ensuing redundancies.

The introduction of the Labor Government's unfair dismissal changes will form part of the second stage of its implementation of the FWF policy, through a piece of substantive reform legislation which the Government has stated it intends to have enacted by the end of 2008¹⁸¹ although it is now not likely to be passed until early 2009. This follows the passage of the *FWF Transition Act*¹⁸² in March 2008, which abolished AWAs, introduced a new stream of 'Individual Transitional Employment Agreements', re-instituted a 'no disadvantage test' for workplace agreements and provided the basis for the AIRC to undertake an 'award modernisation' process.¹⁸³ As well as the unfair dismissal reforms, the substantive legislation to come will establish FWA, implement a new system of collective 'good faith bargaining' and if agreement can be reached with the States, effect a shift to a fully 'national' workplace relations system for the private sector which will be completely operational by 1 January 2010.¹⁸⁴ However, the Government has indicated that it intends the proposed changes to the unfair dismissal laws to take effect some time before that date.¹⁸⁵ It is hoped that the Government will take into account the findings of this article in formulating a new statutory basis for dealing with restructuring and redundancy dismissals — one that more evenly balances the competing objectives of managerial freedom and employment security than the current Work Choices laws.

179 Tracy Ong, 'Labor to Give Sacking Clause the Boot' *The Australian Financial Review* (10 September 2007).

180 ALP, above n193 at 19.

181 See 'Substantive Bill to Pass this Year' *Workforce* (14 March 2008).

182 See n1 above.

183 See Forsyth et al, above n 193, Chapters 2–6.

184 See Forsyth et al, above n 193, Chapter 9.

185 See S Scott, 'Gillard Anticipates Delays to IR Laws', *The Australian Financial Review* (20 December 2007).