Back to the Future: Unjust Termination of Employment Under the Work Choices Legislation

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Responsibilities of employers under Federal and State laws to dismiss for proper reasons and in accordance with fair processes are substantially dismantled by the Workplace Relations Amendment (Work Choices) Act 2005 (Cth). Access to the unfair dismissal jurisdictions of industrial tribunals is now so limited that most employees and employers are returned to the position before awards gave unfair dismissal protection, and laws were enacted to ameliorate the inadequacies of the common law. This article analyses the changes and contends that federal law is 'back to the future' for unfair dismissal, and predicts a return to reliance on contract law and other remedies.

The most significant and radical aspects of the changes to unfair dismissal laws brought about by the Workplace Relations Amendment (Work Choices) Act 2005 (Cth) (Work Choices Act) are the elimination of remedies for employment termination for 'operational reasons', the exclusion from unfair dismissal remedies of employees who are engaged by employers with 100 or fewer employees, and the introduction of a new national system for termination of employment. Federal employees who are now excluded from access to the unfair dismissal jurisdiction will be governed by a similar industrial regulation framework to that which prevailed over 20 years ago, before the *Termination Change and Redundancy* case (*TCR* case) of 1984.[1] Moreover, employees of corporate employers will lose any unfair dismissal protection which they may have enjoyed at State level for decades, and in the case of South Australia for the last three and a half decades.

This article first summarises the Work Choices Act amendments to unfair dismissal provisions in ss 635 to 658 of the Workplace Relations Act 1996 (Cth) (WRA). It then analyses the transformation in the law for employers of 100 or fewer employees, including the way in which the cut-off point of 100 employees is determined; the changes made in relation to unfair dismissal claims for employees of 'larger' employers, including the inability to make claims for dismissal based on 'operational reasons'; and the possibility that there may be an increase in claims for unlawful termination,[2] as opposed to 'harsh, unjust or unreasonable' dismissal in order to find remedies for some dismissals. The implications for seeking unfair dismissal protection through awards, collective agreements and Australian Workplace Agreements (AWAs), and dispute resolution mechanisms, will also be discussed. It is argued that the effect of the Work Choices Act is to return the majority of Australian employees to the position they were in prior to the Industrial Relations Reform

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1 (1984) 8 IR 34; 9 IR 115.

2 See WRA s 659.

Act 1993 (Cth) (1993 Reform Act) with reliance on contractual remedies; that for many employees previously protected by State legislation the clock has been turned back two to three decades; and that the new system means it is 'back to the future'. The question is posed whether other statutory remedies might be enlivened to lessen the effect of the changes introduced by the Work Choices Act.

Overview of the Unfair Dismissal Changes

The framework for the reasonably comprehensive unfair dismissal remedy for employees introduced by the 1993 Reform Act underwent minor amendments in the WRA,[3] but protection for unfairly dismissed workers remained largely unchanged until the enactment of the Work Choices Act. The main Work Choices Act amendments relating to employment termination appear in Pt 12 Div 4 of the WRA dealing with 'minimum entitlements of employees'. These changes include:

- The introduction of a national system of remedies for unfair dismissal for federal employees,[4] to the exclusion of the State systems which provide unfair dismissal remedies;
- The utilisation of the corporations power, s 51(xx) in the Constitution, to enact the relevant provisions;
- The abolition of any remedy for a dismissal based on or including 'operational reasons' of the employer;
- The exclusion of unfair dismissal remedies for federal employees whose employer employs 100 or fewer employees;
- Changes to the relevant characteristics of employers within the scope of the unfair dismissal requirements;
- An extension of the qualifying period of employment before the employee can utilise the unfair dismissal remedies;
- The exclusion of compensation for humiliation and distress suffered in relation to unfair dismissal;
- The introduction of the concept of misconduct of the employee as relevant in assessing compensation;
- The retention of unlawful termination of employment claims under s 659 of the WRA, in contrast to unfair dismissal claims, for all employees; and
- The exclusion of protection from unfair dismissal in workplace agreements through the use of the concept of 'prohibited content'.

Employees Engaged by Employers of 100 or Fewer Employees

One of the momentous changes brought by the Work Choices Act is the elimination of a remedy for harsh, unjust or unreasonable dismissal (unfair

3 See also changes introduced by Industrial Relations Amendment Act (No 2) 1994 (Cth); and Industrial Relations and Other Legislation Amendment Act 1995 (Cth) Sch 2. See, generally, M J Pittard, 'Statutory Unlawful Termination of Employment: Review and Revision' (1995) 8 *AJLL* 238.

4 See WRA ss 5 and 858.

dismissal) for employees who are employed by relevant employers — corporate employers, the Commonwealth, Territory or Victorian employers — which engage 100 or fewer employees.[5] For these employees their previous right to seek redress for unfair dismissal is completely eliminated under the federal statute; consequently their employers are under no implicit obligation under that statute to act fairly when dismissing the employee. This means that in effect under the WRA, dismissal for a valid reason is no longer required; the manner of dismissal may be harsh; and the sanction of dismissal may be disproportionate to the misconduct of the employee.[6] In all of these instances the employee will not have an unfair dismissal remedy under the federal statute.[7]

The puzzle of the '100 employees' limit

The Howard Liberal National Coalition Government had always contemplated exempting small business employers from compliance with unfair dismissal provisions. In October 1996 the then Minister for Workplace Relations, Mr Peter Reith, had considered fewer than 10 employees to be the appropriate small business limit.[8] In the period 1997 to 2001 the small business exception increased — from 10 to 15 employees — in the several Bills that were introduced into the Federal Parliament attempting to relieve small business employers from the unfair dismissal provisions. During 2001 and onwards, the proposal changed to exempt employers engaging fewer than 20 employees from fair dismissal obligations.[9] However the eight attempts from 1997 to implement the policy in the different Bills failed, largely because the government did not hold a majority in the Senate during the period 1996 to 2005.

The main stated reason for the small business exemption was that these businesses, unhampered by dismissal laws, would engage more employees, thereby increasing employment.[10] It is not the place to debate the policy's merits, suffice to say that the evidence does not overwhelmingly support the employment expansion view.[11]

Under the Work Choices Act, the threshold size for activating unfair dismissal rights is 101 employees or more. It is a matter of speculation why

5 WRA s 643(10). The employers covered are discussed below: see 'Tiers of Coverage'.

6 In determining whether a dismissal was 'harsh, unjust or unreasonable' the Australian Industrial Relations Commission (AIRC) considered a number of factors, including whether there was a valid reason for dismissal, whether adequate notice was given, and whether there was opportunity to present the employee's case: see WRA former s 170CG(3).

7 However, there may be access to a remedy for unlawful termination of employment if the reason for dismissal includes a prohibited reason: see WRA Pt 12 Div 4 subdiv C.

8 S O'Neill, 'Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004', *Bills Digest*, No 112, 2004–2005, Parliament of Australia, 11 February 2005, p 5.

9 For discussion of attempts to amend the legislation up to 2002, see M Pittard 'Recent Legislation: Unfair Dismissal Laws: The Problem of Application to Small Businesses' (2002) 15 *AJLL* 154; and beyond 2002, see O'Neill, ibid.

10 See Pittard, ibid, at 165–8; O'Neill, above n 8, at 6–9.

11 For discussion of economic aspects of the Work Choices Act and existing surveys and academic literature, see R LaJeunesse, W Mitchell and M Watts, 'The Economics of Industrial Relations Reform' in J Teicher, R Lambert and A O'Rourke (Eds), *WorkChoices: The New Industrial Relations Agenda*, Pearson Education Australia, Sydney, 2006, Ch 10, esp pp 129–30.

the government selected this cut-off. No policy document outlining projected effects on employment levels is publicly available and policy debate was scant. The increased limit not only exempts genuine small businesses from fair dismissal but also medium to larger employers.

How many employers will be relieved from unfair dismissal laws? The bulk of Australian businesses engage 20 or fewer employees. Data in 2004[12] showed that there were 754,504 businesses that employed 19 employees or fewer, while 77,656 employers engaged between 20 and 199 employees. For truly large employers, only 4918 businesses engaged 200 or more employees. While the true employment picture relating to the 100-employee limit is hard to gauge, these figures do give some idea. The potential effect is enormous — most employers are not subject to any requirements under the federal workplace laws and are free to dismiss employees unfairly as to reason and manner.[13] The employment, social and economic ramifications of this change should be monitored.

Calculating employer size

By reference to the number of employees

Which employees are included in the 100 limit? Section 643(1) of the WRA indicates that the number 100 includes the employee whose employment is terminated. This will prevent some employers from undertaking many (or mass) dismissals in order to avoid the operation of unfair dismissal laws on the basis that their numbers fall below 100 following the dismissals.

The calculation incorporates the total number of employees, whatever their contractual position, and includes casual employees 'engaged by the employer on a regular and systematic basis for at least 12 months' but not other 'short-term' casual employees.[14] No distinction is drawn between part-time and full-time employees; and the number of effective full-time employees is not relevant to the count. Difficult issues may arise as to whether persons working for the business are actually employees, especially in relation to persons purportedly engaged as contractors,[15] or persons who are said to be employees of agencies or labour hire firms which supply labour to the business.

A business with a higher proportion of casual and part-time employees than a similar sized competitor in revenue terms with a full-time workforce will reach the cut-off more readily, thereby acting as an incentive to employ more

12 Australian Bureau of Statistics, *Counts of Businesses — Summary Tables*, Cat No 8161.0.55.001, June 2004, available at <http://abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8161.0.55.001Explanatory%20Notes1Jun%202004?OpenDocument> (accessed 11 June 2006).

13 Constraints arising under the contract of employment and the statutory prohibition on unlawful termination of employment qualify this: see the discussion below under the headings 'Contractual Remedies: Back to the Future' and 'Exploring Statutory Remedies Outside the WRA'.

14 WRA s 643(10).

15 The true legal characterisation of a worker as 'employee' or 'independent contractor' remains difficult to determine in marginal cases: see, eg, the recent decision of the High Court in *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19 (unreported, 16 May 2006, BC200603256).

full-time workers. Further, there is a positive incentive to engage contractors where possible.

At what point in time are employee numbers to be calculated?

The number of employees is set out in s 643(12) of the WRA as being calculated at 'the time when the employer gave the employee the notice of termination, or the time when the employer terminated the employee's employment, whichever happened first'. There will no doubt arise in particular instances issues about the actual number of employees at the relevant time, which casual employees should be counted at the precise time, and exactly when the employer gave notice. Such issues may be crucial for employees and employers in marginal cases as to whether unfair dismissal laws apply.

Employer entity and structure

Can employers divide up or restructure their business into separate entities, thereby engaging fewer than 100 employees in each business, in order to circumvent the application of unfair dismissal laws? This issue was the subject of concern in submissions to the Senate Employment, Workplace Relations and Education Committee, and to the Opposition Senators who were members of the committee which addressed the matter in its report on the Workplace Relations Amendment (Work Choices) 2005 Bill (Cth).[16]

In the Senate, the original Bill was amended to introduce a corporate 'grouping' approach to this issue. Section 643(11) of the Work Choices Act provides that 'related bodies corporate (within the meaning of section 50 of the Corporations Act 2001) are taken to be one entity'. Hence employees of related corporate bodies must be included in the calculation. Thus a holding company of another company and that company are treated as the one entity, so that splitting employment between operational entities in a corporate group will not enable an employer to avoid the unfair dismissal jurisdiction. While there still may be some opportunity to keep staff levels below 100, the extent to which these provisions can be circumvented remains to be seen. However, the grouping concept does not take account of corporate and non-corporate groupings, such as occur in the legal and accounting sectors.

Relevance and impact of employer size

Several questions emerge from the exemption from unfair dismissal provisions of employees working in business employing more than 100 employees. Why is the exemption tailored to *employer* size? Why measure employer size by the number of employees? Why expand the focus of exemptions, previously mainly on the nature of the employment contract, to the size of the employer? What account is, or should, be taken of the employer's level of expertise?

The exemptions pre-dating the Work Choices Act depended (and still do) on the nature of the employee's contract — probation, fixed term, traineeship and

16 See 'Opposition Senators' Report' in Senate Employment, Workplace Relations and Education Committee, 'Provisions of the Workplace Relations Amendment (Work Choices) Bill 2005', *Parliamentary Paper*, No 402/05, Commonwealth of Australia, 2005, p 47. The main committee regarded the matter as beyond its terms of reference.

so on — or the employee's salary level.[17] Once on-going employment status was reached, unfair dismissal rights were activated. This policy could be justified as similar employees were treated in a similar fashion. The additional new exclusion focusing on business size measured by staffing levels may result in inequities between businesses of similar size measured by turnover, depending on employment patterns and numbers. Individual business circumstances, such as availability of advice from employer associations or from the employer's own expertise (eg, recruitment company), are irrelevant to the exclusion. Will these anomalies or differential treatment of employers force any legislative change or come to surface in policy debates? At the very least, the magnitude of the effect on employment engagement decisions or whether certain functions should be outsourced should be monitored. The blanket exemption for such a large group of employers also creates differential obligations across various employment matters with little policy coherence. Employers of 100 or fewer employees must comply with occupational health and safety laws and equal opportunity laws, but are relieved of unfair dismissal obligations.[18]

Excluded Grounds: 'Genuine Operational Reasons'

The elimination of dismissal remedies for employees dismissed for 'operational reasons' is drastic as it applies across the board, regardless of employer size. Unfair dismissal applications must not be made for terminations 'for genuine operational reasons or for reasons that include genuine operational reasons'.[19] 'Operational reasons' are expressly defined as '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'.[20]

A new preliminary hearing process will determine whether there are 'genuine operational reasons'. The Australian Industrial Relations Commission (commission) must hold a hearing as follows:

- when an employer seeks to have an application dismissed because the termination is based on (or includes) genuine operational reasons; *or*
- at the commission's initiative, when the materials before it indicate that the reason for the termination appears to include genuine operational reasons.[21]

After the hearing, the commission must dismiss the application where it is satisfied that the dismissal is for a genuine operational reason, or it must 'make an order dismissing the application to the extent that it is made on'

17 Since 1994 remuneration over a certain level has excluded an employee from the unfair dismissal jurisdiction under the federal statute.
18 Further equity considerations are discussed in M Pittard, 'Fairness in Dismissal: A Devalued Right' in Teicher, et al, above n 11, Ch 7.
19 WRA s 643(8).
20 WRA s 643(9).
21 WRA s 649(1).

operational reasons.[22] Any finding that the operational reasons are not genuine purports to be 'final and binding between the parties in any proceedings before the commission'.[23]

Many arguments about various issues surrounding the operational requirements exemption can be foreseen. For example:

- did the reasons include 'operational reasons'?
- does the phrase 'economic or technological nature' cover dismissals taken to enable substitution of cheaper labour?
- were the reasons really relating to the employee's performance?
- can employees dismissed for reasons including 'operational reasons' claim unlawful termination?[24]

Formerly 'operational requirements' could be relevant to whether a dismissal was fair. Now 'operational reasons' exclude any possibility of an unfair dismissal claim. Will the difference in terminology and context have any significant practical effect?

Questions of the genuineness of redundancies or whether the employer is simply masking another reason by using redundancy or operational procedures have always existed. However, this issue will now be writ large because:

- dismissal for operational reasons operates as an exclusion from the unfair dismissal jurisdiction, which means the responsibilities of employers and rights of employees relating to the existence of a valid reason and the use of a fair procedure are totally excluded; and
- the operational reason need not be dominant or motivating, but simply one reason, as the exclusion operates where reasons *include* 'genuine operational reasons'.

The exclusion is potentially vast and far-reaching.

Other changes introduced by the Work Choices Act are relevant here. Redundancy pay, too, is now more restricted. While it remains an allowable matter in existing awards, redundancy pay is limited to employees engaged by an employer of 15 or more employees.[25] Provisions about consultation for redundancies of 15 or more employees remain,[26] however WRA s 668(3) excludes orders for reinstatement or compensation.

Tiers of Employer Coverage: Incorporated/ Unincorporated and Federal/State Governments

Other than the significant exclusion of dismissal for 'genuine operational reasons' discussed above, 'larger' corporate employers (with 101 or more employees) and their employees will see some, but not drastic, changes to

22 WRA s 649(2). Such an order will be appropriate where the application also relates to a claim of unlawful dismissal.

23 WRA s 649(3). This is subject to a right of appeal to a Full Bench of the commission.

24 There are provisions to prevent bringing simultaneous claims for unlawful termination and discrimination: WRA Pt 12 Div 4 subdiv E.

25 WRA s 513(1)(k),(4). Note: redundancy pay must also be either at the initiative of the employer and on the basis of operational requirements, or because the employer is insolvent.

26 See WRA Pt 12 Div 4 subdiv D.

unfair dismissal. Victorian employers remain covered by the federal law,[27] but changes have occurred in the definition of an employer that is bound to comply with the unfair dismissal provisions, due to the reliance on the corporations power in the Constitution as the source of legislative authority.

Section 6 of the WRA now defines 'employer' as a 'constitutional corporation' (that is, as a trading, financial or foreign corporation), the Commonwealth or Commonwealth authority, a person or entity which engages a flight crew officer, a maritime employee or a waterside worker in connection with constitutional trade or commerce, or an employer in a Territory. Thus, whether an employer is bound to comply with fair dismissal is no longer linked to whether the employee is covered by an award, but rather is dependent on the legal character of the employer. Legal issues will arise as to whether particular entities (for example, some State instrumentalities or charitable organisations) are 'constitutional corporations' as compliance with federal law (or relief from it) will depend on their resolution.

In addition to employees excluded expressly by their employer's size or the nature of their employment,[28] there is also what I call 'a tier of non-coverage'. The unfair dismissal laws do not cover unincorporated employers, such as partnerships, sole traders, non-corporate clubs and associations, except in Victoria and the Territories. While employees of the Federal Government remain covered, State (including Victorian) government employees are not covered by the federal law.

These groups beyond the legislation's constitutional reach may fall back on State statutory unfair dismissal jurisdictions for any remedy. A role for those State bodies continues. It remains to be seen whether unincorporated employers will incorporate to avoid unfair dismissal compliance under State laws, and whether other States will follow New South Wales in legislating to ensure that the State, rather than State instrumentalities, directly engages employees.[29]

Qualifying Period of Employment

The employee must be employed for six months to be able to exercise the right to seek redress for unfair dismissal.[30] The qualifying period is double that of the previous three month period. By written agreement, however, the qualifying period may be less than six months, no period at all, or a longer period provided it is reasonable given the nature and circumstance of employment.

In contrast, the primary probationary period remains at three months, although, as before, longer periods may be agreed if determined in advance and reasonable. An employer adopting three months' probation to test the employee's suitability would not be subject to unfair dismissal laws if

27 See WRA Pt 21 Div 7, which applies the termination of employment provisions to Victorian employers, as defined in s 858.

28 The excluded categories of employees are discussed below under the heading 'Expressly excluded employees'.

29 See Public Sector Employment Legislation Amendment Act 2006 (NSW); and 'News' (2006) 12 *ELB* 10 at 10–11.

30 WRA s 643(7)(a).

termination occurred during, or at the end of, the probationary period.[31] Once employment is confirmed or continues beyond the probationary period, the employee would ordinarily be entitled to protection against unfair dismissal under the WRA. However, the new longer six month qualifying period essentially means that the employee has no fair dismissal rights within the first six months of employment, even where the probationary period has expired and employment is confirmed or continued. Lengthening the qualifying period further relieves the employer from responsibility for unfair dismissal.

Expressly Excluded Employees

While the qualifying period is a condition of application, the already expressly excluded categories of workers remain as follows:[32] employees engaged on fixed term contracts or for specified tasks; genuine or short-term casual employees; employees on specified probation; 'non-award'[33] employees with remuneration above $94,900; or trainees for a specified period or duration.[34] Seasonal workers are unable to utilise the unfair dismissal procedures as they are now also expressly excluded, having no statutory right to unfair dismissal, regardless of employer size.[35]

The existing casual employee exemption remains with WRA s 638(1)(d) provides that a casual employee 'engaged for a short period' is exempt. The WRA thereby recognises that true casual work is very short-term in nature and such workers can be engaged quickly and for short periods of time, or as required. One of the perennial questions is whether in particular circumstances workers are truly casual employees, for example when contracts, labelled casual, are actually on-going in nature requiring commitment to uncertain hours by employees. The legislation continues to grapple with the concept of who is regarded as a casual employee for the purposes of the exemption from unfair dismissal laws.[36] Issues of whether employees are casual will continue to arise under the Work Choices Act.[37]

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31 WRA s 638(1)(c).

32 See WRA ss 638(1)(f), and (6)–(7). Section 642(6) defines 'award-derived conditions' so that this exclusion covers employees paid under awards, workplace agreements, or an APCS.

33 WRA s 638(1)(a)–(f).

34 See WRA ss 638(1)(f) and (6)–(7). Section 642(6) defines 'award-derived conditions' to cover employees paid under an award, workplace agreement, or an APCS.

35 WRA ss 638(1)(g) and (8)–(9).

36 The nature of short period exemption is defined further under WRA s 638(4)(a)–(b) as being fulfilled unless the employee is engaged 'on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months' by the particular employer; and the employee would have a 'reasonable expectation of continuing employment by the employer' (but for the employer's decision to terminate employment).

37 In *Dakin v HGC Administrative Services Pty Ltd* (AIRC, Full Bench, PR967417, 11 January 2006) for example, Ms Dakin unsuccessfully appealed against the commission decision — that her employment was casual in nature for less than 12 months — on the ground that she was engaged as a 'permanent casual' after an initial period of probation. The Full Bench found that, although the employee may have regarded it as permanent, the contract was truly casual in nature, as an examination of the contents of the original contract revealed.

Unfair Dismissal — Particular Issues

As before, for the purposes of arbitration, the factors relevant to establishing whether a dismissal was 'harsh, unjust or unreasonable' include the reason for the dismissal, and the fairness of the process in effecting the dismissal.[38]

Valid reason

One of the factors relevant to the fairness of a dismissal is whether there is a valid reason for dismissal.[39] For the most part where an employer establishes misconduct or performance falling short of agreed or established standards, the employer will have a valid reason for dismissal.[40] Two recent Commission cases are used to illustrate how matters will remain the same or change for larger employers.

In *Bizdoaca v Greyhound Australia Pty Ltd*,[41] a bus driver was dismissed, after investigation and without notice, for misconduct (speaking on talkback radio while bus driving). The commission decided that there was no valid reason for dismissal, finding that the driver:

- expressed his own views, without representing them as those of the employer;
- was not shown to breach company policy 'in sharing his Greyhound coach driver pride and highway knowledge'[42] over the radio (although inadvisably identifying Greyhound) and in using a 'hands-free' phone;
- had no intention of damaging his employer's reputation; and
- appeared to maintain control of the vehicle.

The driver was stood-down on full pay during an investigation, which was fair.[43] On balance, taking into account the 'fair go all round' principle under the WRA, the commission ruled the dismissal was harsh.[44]

Following the Work Choices Act, there is likely to be no change to this sort of case,[45] but if the employer sought to show the application was frivolous, lacking substance, out of time or without jurisdiction, the commission's decision on such matters may be made without oral hearing.[46] While conduct at work might give cause for concern, a valid reason must still be established

38 WRA ss 643(1)(a) and 652(3).

39 WRA s 652(3)(a). In relation to 'operational reasons' see the discussion above.

40 The law relating to valid reason is discussed elsewhere: see M Pittard and R Naughton, *Australian Labour Law: Cases and Materials*, 4th ed, LexisNexis, Sydney, 2003, Ch 6, esp [6.6.1]–[6.6.11]; B Creighton and A Stewart, *Labour Law*, 4th ed, The Federation Press, Sydney, 2005, at [16.38]; and A Chapman, 'Termination of Employment under the Workplace Relations Act 1996 (Cth)' (1997) 10 *AJLL* 89.

41 AIRC, PR967180, 4 January 2006 (*Greyhound* case).

42 Ibid, at [34].

43 The only flaw in process was that there was no attempt to listen to or read the transcript of what had been said to the talkback radio station by the driver.

44 Given the breakdown in the employer–employee relationship, reinstatement was not appropriate and compensation was awarded.

45 Unless the compensation is reduced due to employee conduct: see 'Changes to remedies' below.

46 WRA ss 645–647. Under WRA s 648, the commission may take into account the cost caused to business by requiring attendance at the hearing.

for dismissal; and alternatives, for example warning the employee, might be more appropriate.[47]

The difficulty continues, however, of determining whether conduct not directly related to the job performed provides a valid reason. In *Cunningham v Australian Bureau of Statistics*,[48] a public sector employee claimed unfair dismissal after his employment was terminated for breaching the Australian Public Service Code of Conduct when he utilised his access to the computer system to improve his workplace football tipping competition results. Commissioner Eames held there was no valid reason for dismissal largely because the tipping was not work-related. The Full Bench of the commission disagreed on appeal, ruling that there were 'multiple breaches' of the tipping competition's rules, the employee gained 'at the expense of other tippers' and that 'a breach of trust reposed in those given system privileges' was involved.[49] The contrasting views of Commissioner and Full Bench highlight the fact that issues of valid reason are not always easily resolved. If larger employers err in assessing the reason as valid, that assessment remains subject to independent review, but such review is dismantled for excluded employees.

Inadequacy of process and procedure leading to unfair dismissal

Larger employers should generally still follow fair processes in relation to the manner of effecting dismissal, even where a valid reason exists.[50] The existing jurisprudence of the commission and the Federal Court of Australia is relevant, so to avoid harsh dismissal, the employer might need to stand-down the employee pending an investigation, and the 'sanction' of dismissal must be proportionate to the misconduct. Alternatives — warning, reprimand, or counselling — may need to be considered by the employer. Now where employees can establish on the balance of probabilities that their (involuntary) resignation was caused by the employer's conduct, there will be a 'termination of employment' covered by the legislation.[51]

Changes to Remedies

While unfair dismissal remedies upon arbitration by the commission remain — reinstatement,[52] or, if reinstatement is inappropriate, compensation[53] — the compensation provisions are altered to ensure that there is no compensation awarded for 'shock, distress or humiliation, or other analogous hurt, caused to

47 It may have been more appropriate for the employer to give a warning about talking to radio stations while working, the commission suggested in the *Greyhound* case, above n 42.
48 AIRC, Full Bench, PR963720, 10 October 2005.
49 Ibid, at [22]. Moreover, there were 'no serious flaws' in the process adopted for investigating and terminating the employment: ibid, at [23].
50 WRA s 652(3)(b) (notification of reason); WRA s 652(3)(c) (opportunity to respond); and WRA s 652(3)(d) (warning).
51 WRA s 642(4). A question arises as to whether this provision, which refers to the resignation being 'forced' by the employer, is more limited than the concept of constructive dismissal.
52 WRA s 654(3).
53 WRA s 654(7).

the employee by the manner of terminating the employee's employment'.[54] This clearly prevents some consequences of unfair dismissal being included in the assessment of compensation and, in this respect, draws that task closer to the generally prevailing standard utilised by the common law for breach of contract.[55] The level of compensation for manner of dismissal will now be reduced, even where the employer's behaviour in effecting the termination involves unnecessarily humiliating conduct. For employees on award-derived conditions, the cap of six months' wages remains for compensation.[56] For 'non-award' employees, compensation may not exceed $32,000 (subject to indexing).[57]

Further, the concept of employee misconduct is now legislatively enshrined in assessing damages — compensation should be reduced where the employee's misconduct contributed to the termination decision.[58] The question thus arises as to whether the commission will adopt the method seen in negligence cases where damages may be reduced by, say, the percentage of contributory negligence.

Federal Dominance: Impact on State Unfair Dismissal Jurisdictions

The Work Choices Act seeks to provide a unitary system of industrial relations regulation.[59] The consequence, which should not be underestimated, is that unfair dismissal rights and redress provided by the States are virtually eliminated in respect of federal employers, including corporations. Section 16(1) expresses an intention to apply the WRA to the exclusion of certain laws of a State or Territory, including under para (a) 'a State or Territory industrial law' and under para (d) any State unfair contracts jurisdiction.[60]

The Work Choices Act eliminates the States' long-standing, developed, and arguably efficacious systems for redress for corporate and other federal employees. As we have seen, employees not covered by the new federal laws (eg, employees of unincorporated employers) will retain the ability to seek redress at State level (except Victoria). However, expressly excluded employees cannot access State jurisdictions.

From the viewpoint of equity there is differential treatment between employees who are excluded from the remedies at federal or State levels, such

54 WRA s 654(9).

55 See *Addis v Gramophone Co Ltd* [1909] AC 488 (*Addis*); which remains authority for limits on the factors taken into account in the assessment of damages for termination of the contract of employment distress. See further Creighton and Stewart, above n 41, at [16.14]; Pittard and Naughton, above n 41, at [5.5.8]–[5.5.15].

56 WRA s 654(11).

57 WRA s 654(12).

58 WRA s 654(10).

59 WRA s 3(b) identifies 'establishing and maintaining a simplified national system of workplace relations' as an object of the Act.

60 WRA s 16(1)(d) provides: 'a law providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair'. Such a law could be ss 105 and 106 of the Industrial Relations Act 1999 (NSW).

as employees of smaller to medium businesses, and those who retain a State remedy because they happen to be employed by an unincorporated employer, or State government employer. The following question arises: in States (except Victoria) which have maintained the industrial tribunals' power to settle industrial disputes, can the dispute-settling mechanism be used to provide unfair dismissal redress? In *Unions NSW v Carter Holt Harvey Wood Products Australia Pty Ltd*,[61] there was discussion whether the NSW industrial dispute-settling jurisdiction would give relief where the express State unfair dismissal jurisdiction was excluded.

Further questions also arise: does the Work Choices Act evince an intention to cover the field under s 109 of the Constitution and to exclude State industrial tribunals from ruling on the fairness of dismissals? Does WRA s 16(1)(d) referring to State 'industrial law' exclude an order made by State Commissions in settling industrial disputes?

Unfair Dismissal Redress: Alternative Avenues Under the WRA?

Despite the changes made by the Work Choices Act, to what extent can awards, workplace agreements or industrial dispute resolution under the WRA provide remedies for excluded employees or impose obligations on employers to comply with fair dismissal?[62] Will unlawful termination rights provide an avenue for redress?

Through award protection?

Will the Work Choices Act return employees to the position following the 1984 *TCR* case, but pre-dating the 1993 Reform Act? The *TCR* case held that a model clause prohibiting unfair dismissal — 'harsh, unjust or unreasonable' termination of employment — could be inserted into federal awards. At the time, this was a significant decision providing some job security and unfair dismissal protection for employees.

Until unfair dismissal rights were conferred under federal law in 1993,[63] the remedy for employees whose employer had contravened award clause prohibitions on dismissal was very limited. The employer could be fined for award breach, but neither court nor tribunal had any remedial power to order compensation or reinstatement. Any relief may have been obtained industrially — in conciliation, perhaps, of an industrial dispute, or due to union or employee bargaining power — but it was not a right given to dismissed employees, even where the award protected employees against such dismissal.

Federal awards currently do not include provisions relating to harsh, unjust or unreasonable dismissal, as these have not been allowable award matters since the enactment of the WRA in 1996. To the extent that awards remain sources of employment rights, they cannot provide unfair dismissal protection.

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61 (2006) 149 IR 361.

62 The effect of the Work Choices Act changes on the ability to seek alternative contractual remedies will be discussed below.

63 1993 Reform Act.

Moreover, there is no opportunity for cleverly crafted clauses to confer job security as the commission can now neither arbitrate industrial disputes nor make new awards. Thus awards provide no relief to unfairly dismissed workers.

Through workplace agreements?

Can workplace agreements provide such relief? Certified agreements, after 1996, often included the provisions excluded from awards due to the concept of allowable award matters. However the federal statutory regime for unfair dismissal introduced in 1993 obviated the need for clauses in certified agreements prohibiting unfair dismissal, or providing remedies for it. Workplace Relations Regulations 2006 (Cth) reg 8.5(5) impedes the insertion of such unfair dismissal clauses in the collective form of workplace agreements. It provides:

> A term of a workplace agreement is prohibited content to the extent that it confers a right or remedy in relation to the termination of employment of an employee bound by the agreement for a reason that is harsh, unjust or unreasonable.

Similarly, as reg 8.5(5) applies to the individual form of workplace agreements, individuals cannot negotiate dismissal protection in AWAs. While there may be some scope for interpreting reg 8.5(5) restrictively or for creative drafting, no doubt the regulation would be revised to prevent such circumvention were it to occur.

Resolving unfair dismissal disputes?

Might there be a return to the commission resolving unfair dismissal industrial disputes — notification of an industrial dispute about dismissal and its fairness and settlement of that dispute by order of the commission? Formerly this possibility existed, subject to meeting jurisdictional requirements of an interstate industrial dispute about matters pertaining to the employment relationship. If the commission had no valid jurisdiction over the dispute, it would often make recommendations, which the parties usually followed having agreed to the commission's involvement.[64] However, there were no mechanisms to enforce recommendations.

No similar solution is possible now under the WRA. The commission has no power to make new awards and can only exercise dispute resolution powers in very limited circumstances. Moreover, other formerly relevant powers — notably WRA s 111AA which enabled the commission to make recommendations — have been repealed.

Hence the parties are returned to the position prevailing before the 1984 *TCR* case, shorn of the possibility of an award or recommendation to resolve the dispute. The contract of employment may be the imperfect vehicle left for some relief.[65]

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64 See Pittard and Naughton, above n 41, at [6.3.2]; Creighton and Stewart, above n 41, at [16.18].

65 This article considers contractual remedies below.

Through unlawful termination of employment provisions?

The unlawful termination provisions in the WRA first introduced in 1993 for the protection of employees remain and have not been altered, regardless of the size of their employer.[66] No doubt employees may attempt to seek redress where the circumstances give rise to a suggestion (or even a 'whiff') of termination on prohibited grounds as follows:

- discriminatory grounds such as sex, race, disability, and pregnancy;[67]
- membership[68] or non-membership of trade unions;[69]
- lodging complaints in respect of an employer's alleged breaches of law;[70]
- refusing to negotiate, make or sign an AWA;[71]
- absence from work on parental leave,[72] or temporary absence because of illness or injury.[73]

This offers equitable protection for all employees because it is not dependent on employer size. However, the ability of employees to utilise this statutory entitlement as a proxy for unfair dismissal proceedings will vary according to circumstances, but is unlikely to be broadly utilised.

Exploring Statutory Remedies Outside the WRA

Excluded employees will also seek other sources of remedy. Trade practices and anti-discrimination legislation may be utilised. It is predicted (depending on the facts or particular circumstances, as always) that there will be full exploration of any possible remedies under other statutes, including federal and State anti-discrimination laws.

As well as the general prohibitions on misleading or deceptive conduct in trade and commerce,[74] the Trade Practices Act 1974 (Cth) (TPA) prohibits corporations from engaging in conduct in relation to employment that is 'liable to mislead persons seeking the employment as to the availability, nature, terms or conditions of, or any other matter relating to, the employment'.[75] Depending on the circumstances, these various provisions could be utilised to seek injunctive relief or damages for termination for operational reasons or for manner of termination. For example, representations might be made prior to or during employment about plans for business expansion or fair practices of the employer and these may be re-visited in an endeavour to provide a basis for seeking a remedy. These TPA provisions have not been utilised extensively to date. In addition, unconscionable conduct provisions of the TPA may provide possible avenues but these will need development in this context.

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66 WRA s 659.
67 WRA s 659(2)(f).
68 WRA s 659(2)(b).
69 WRA s 659(2)(c).
70 WRA s 659(2)(e).
71 WRA s 659(2)(g).
72 Ibid s 659(2)(h).
73 WRA s 659(2)(a).
74 TPA s 52.
75 Ibid, s 53B.

Contractual Remedies: Back to the Future

I have argued that excluded federal employees will revert to the pre-*TCR* case situation and fall back on contractual remedies. Contract law steadfastly holds to not providing relief for unjustified dismissal (no matter how capricious or unproven) where proper termination notice is given, or for the harsh manner of a dismissal. However, the common law of wrongful dismissal may give some remedy for persons whose employment has been wrongfully terminated without notice or with inadequate notice. The remedy is usually confined to damages equalling the remuneration for the notice period required to determine the contract,[76] with specific performance a remedy still not readily granted by the courts.[77] Largely due to costly legal proceedings, wrongful dismissal may assist only employees with relatively long notice clauses in the contract (or long implied reasonable notice) and who, because of the need to mitigate damages, have been unable to find alternative employment.

Employees will seek to negotiate in their contracts: longer notice periods to promote job security; express clauses prohibiting unfair termination of contract and/or incorporating procedures to be followed prior to any dismissal decision (thereby endeavouring to gain contractual remedies for breach of such clauses), and termination for specified and limited causes only.

Developments in contract law, such as those relating to the duty of mutual trust and confidence, will be awaited with interest as they may pave the way for contractual relief for unfair dismissal.[78] We may see a burgeoning of contract cases by dismissed employees endeavouring to persuade the courts to grant remedies in areas where they have previously expressed reluctance, for example, specific performance. Moreover, there may be attempts to seek compensation for distress and humiliation, focusing submissions on initiatives in jurisdictions where the courts have shown greater amenability, at least in some instances, to review the *Addis* principle.[79] Canadian courts, for example, have on occasion been prepared to expand the heads of damage to include non-pecuniary loss.[80] More attention may be paid to whether an employer's termination policy, for example, in disciplinary processes, is an implied contractual term.

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76 Pittard and Naughton, above n 41, at [5.5.8]–[5.5.10]; Creighton and Stewart, above n 41, at [16.08]–[16.15].

77 Pittard and Naughton, above n 41, at [5.6.1]–[5.6.13]; Creighton and Stewart, above n 41, at [16.05]–[16.07]. This of course is in contrast to the primary remedy of reinstatement under statutory unfair dismissal provisions.

78 See, eg, *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20; [1997] 3 All ER 1. In Australia this doctrine remains to be resolved in respect of decisions to terminate employment. See *Heptonstall v Gaskin (No 2)* (2005) 138 IR 103; cf *Intico (Vic) Pty Ltd v Walmsley* [2004] VSCA 90 (unreported, 21 May 2004, BC200402977); and cases and discussion in Creighton and Stewart, above n 41, at [13.76]–[13.79]; Pittard and Naughton, above n 41, at [4.5.35]–[4.5.43]; and J Riley, 'Mutual Trust and Good Faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace?' (2003) 16 *AJLL* 28.

79 See *Addis*, above n 56.

80 See discussion in Pittard and Naughton, above n 41, at [5.5.8]–[5.5.15]; Creighton and Stewart, above n 41, at [16.14].

In Conclusion: Looking Ahead

Legal issues will arise, as we have seen. The definitions of 'operational reasons' and 'constitutional employers' will be developed and may require case-by-case clarification; the precise calculation of the 100 employee limit and employer entity will be scrutinised; the dominance of federal unfair dismissal laws will be tested; and the common law of contract may be utilised and its boundaries pushed.

Other consequences should be monitored. Will there be a two-tier system of labour rights as between 'excluded' and 'included' employees? Will relieving employers from compliance expand employment? The 'model' employer aspiring to retain the workforce in which it has invested will continue fair dismissal practices, regardless of the law, but will the practices of other employers change? As inroads in the unfair dismissal laws may reduce incentives to maintain screening of job applicants and utilisation of probationary periods, will recruitment practices also change?

The return to the law of contract remains the most predictable outcome. The overall effect on employment regulation awaits study, review and assessment, and ultimately the contention that it is 'back to the future' will be tested.