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On 27 March 2006 the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth) came into effect. This Act, known popularly as 'Work Choices', made a number of significant amendments to the *Workplace Relations Act* 1996 (Cth) (the WR Act).

The changes made by Work Choices to Australia's industrial relations system are the most significant and far reaching since the federal system of conciliation and arbitration was introduced at the beginning of the last century. The changes are controversial and continue to be fiercely debated. There have been extensive advertising campaigns both for and against the changes, street demonstrations around the country and a challenge to the constitutional validity of the legislation in the High Court. That challenge was unsuccessful and Work Choices has been confirmed as a constitutionally valid Act of the Commonwealth parliament: *New South Wales v Commonwealth* [2006] HCA 52.

Among the most controversial aspects of Work Choices are the changes made to the unfair dismissal laws. Overall, the protection that Australian employees had against a harsh or unfair dismissal has been reduced. Despite the apparent expansion of the categories of employees who can bring an unfair dismissal application, there is in fact a significant contraction of the jurisdiction both with respect to employees who can bring an application and the grounds upon which an application can be brought. (The new unfair dismissal laws are to be found in Part 12 Division 4 of the amended WR Act.)

This article outlines the major changes to the federal unfair dismissal laws.

What is an unfair dismissal?

An 'unfair' dismissal is the expression generally used to describe a dismissal for which an employee, pursuant to s 643(1) of the WR Act, can make an application to the Australian Industrial Relations Commission (the AIRC) for a remedy on the ground that the dismissal was 'harsh, unjust or unreasonable'. The remedy is reinstatement or compensation.

The concept of 'harsh, unjust or unreasonable' remains substantially unchanged. The overarching object is for the AIRC to accord a 'fair go all round' to both employer and employee. Overall, the factors that the AIRC must consider under s 652 of the WR Act remain unchanged and are:

(a) whether there was a valid reason for the termination related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees);
(b) whether the employee was notified of that reason;
(c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee;

(d) if the termination related to unsatisfactory performance by the employee – whether the employee had been warned about that unsatisfactory performance before the termination;
(e) the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination;
(f) the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and
(g) any other matters the AIRC considers relevant.

Essentially, an unfair dismissal is one where the employer did not have a sound or defensible basis for terminating the employment and/or did not adopt a fair process in coming to the decision to terminate.

An important precondition to determining whether a dismissal is unfair is satisfaction of the requirement that the dismissal was at the initiative of the employer: s 643(1). Prior to Work Choices there were a number of AIRC decisions about whether an employee's resignation might nevertheless satisfy this requirement. An employee who had resigned might still be able to argue that the employer terminated their employment if they were in effect given no choice but to resign. This is an example of what is called a constructive dismissal. In essence the test was whether it was the employer's conduct that was the principal causative factor: *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200.

The WR Act now specifically deals with involuntary resignations, providing in s 642 that 'the resignation of an employee is taken to constitute the termination of the employment of that employee at the initiative of the employer if the employee can prove, on the balance of probabilities, that the employee did not resign voluntarily but was forced to do so because of conduct, or a course of conduct, engaged in by the employer.'

This might be a more onerous test than that previously adopted by the AIRC because the requirement of being 'forced' to resign is harder to establish than demonstrating that the conduct of the employer was a principal contributing factor.

In *Annette Megna v No 1 Riverside Quay (SEQ) Pty Ltd* (PR973785, AIRC, DP Richards, 24/8/2006), Deputy President Richards held that the law had changed and did not necessarily embrace all the wider contextual considerations considered in the earlier (pre Work Choices) cases. The Deputy President said that the term 'force' encompasses both the application of physical power to directly achieve a result and the actions of a person to persuade or otherwise convince another for the same purposes. On the evidence in this case, the employee had not made out that she lacked all knowledge of the consequences of her actions, including that she had resigned her employment. Her complaint was that she had been misled about the prospect of re-employment in another location of her choice. This was not a constructive dismissal.

Coverage of the federal unfair dismissal system

Work Choices, *subject to a number of significant exclusions,* extends the reach of the unfair dismissal regime to a larger range of employees than was the case under the pre-reform WR Act. This reflects the Federal Government's long held aim of creating a national unfair dismissal system. This has been done by extending the federal industrial relations system to cover all employers that are trading and financial corporations formed within Australia or foreign corporations, and their employees. (These types of corporations are called 'constitutional' corporations because they are the types of corporations listed in s 51(xx) of the Australian Constitution and in respect of which the Commonwealth parliament has power to legislate.)

The unfair dismissal provisions now apply to employees within the meaning of s 5(1) of the WR Act who are employed by an employer within the meaning of s 6(1) of the Act. An employee within the meaning of s 5(1) is an employee within the ordinary common law meaning of that term. An employer within the meaning of s 6(1) is:
(a) a constitutional corporation, so far as it employs, or usually employs, an individual;
(b) the Commonwealth, so far as it employs, or usually employs, an individual;
(c) a Commonwealth authority, so far as it employs, or usually employs, an individual;
(d) a person or entity (which may be an unincorporated club), so far as the person or entity, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:
  (i) a flight crew officer;
  (ii) a maritime employee; or
  (iii) a waterside worker; or
(e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or
(f) a person or entity (which may be an unincorporated club) that carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person or entity employs, or usually employs, an individual in connection with the activity carried on in the Territory.

The employers covered by Work Choices are commonly referred to as 'federal system employers'.

The Federal Government's estimate is that the new unfair dismissal system now covers about 85% of employees in Australia, due largely to the extension of the system to employees of constitutional corporations. The remaining 15% of employees falling outside the federal unfair dismissal system include those who work for unincorporated employers such as sole traders, partnerships, non-corporate clubs and associations (except in the Territories and the State of Victoria, which referred its industrial relations powers to the Commonwealth in 1996). State (including Victorian) government employees also are not covered by the federal law. These groups can fall back on State statutory unfair dismissal systems.

Not surprisingly, the States' unfair dismissal legislation does not cover federal system employers and their employees. The Commonwealth legislation overrides the State legislation in this area.

It seems then that the new federal unfair dismissal laws cover more employers and employees. But, read on! There are some important exclusions and exemptions.

1. Employers who employ 100 employees or fewer are excluded

Despite the apparently broad coverage of the federal unfair dismissal system, one important category of employer

is now excluded – federal system employers who employ 100 employees or fewer. The Government had previously attempted, unsuccessfully, to amend the WR Act to exclude employees of small businesses. In these various attempts a small business was a business that employed fewer than 15 employees or fewer than 20 employees. The increase to 100 represents a significant increase on the Government's earlier attempts to exclude small businesses.

Section 643(10) of the WR Act provides that an application for relief on the ground that a dismissal was harsh, unjust or unreasonable, or grounds that include that ground, must not be made if, at the relevant time, the employer employed 100 employees or fewer. This number includes the employee whose employment was terminated, full time employees, part-time employees and any casual employee who had been engaged by the employer on a regular and systematic basis for at least 12 months, but not any other casual employee.

The 'relevant time' at which the head count takes place is 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: s 643(12).

Importantly, the head count applies only to *employees*. It does not, for example, extend to persons engaged as independent contractors or to volunteer staff.

In response to debate in the Senate, the Work Choices Bill was amended to deal with the issue of 'group' employers. Now, for the purpose of calculating the number of employees employed by an employer, related bodies corporate are taken to be one entity: s 643(11). 'Related bodies corporate' has the same meaning as in s 50 of the *Corporations Act* 2001, encompassing a holding company of another body corporate, a subsidiary of another body corporate, or a subsidiary of a holding company of anther body corporate. The terms 'holding company' and 'subsidiary' are further defined in the *Corporations Act*. It is fair to say that the question of whether bodies corporate are 'related' can in certain cases be a complex one.

It must be noted that this 'grouping' deals only with the grouping of 'related bodies corporate'. It does not extend to situations where, for example, a business engages employees through a combination of say a corporate entity and a partnership or through a number of corporate entities that are associated but not related. 'Grouping' for the purposes of the head count would not be permitted in such an example.

The 100 employees exemption has already been the subject of a number of decisions by the AIRC. For example, in *Baldacchino & Ors and Triangle Cables (Aust) Pty Ltd* (PR972581, AIRC, Commissioner Smith, 24/5/2006), nine employees dismissed by the company Triangle Cables on 28 March 2006 claimed under s 643(1) of the WR Act that their termination was harsh, unjust and unreasonable. Triangle Cables moved to have the application dismissed so far as it related to the harsh, unjust or unreasonable ground on the basis that it employed fewer than 101 employees. The employer bears the onus of establishing that it employs 100 employees or fewer. In discharging this onus, Triangle Cables' evidence was that it and two related bodies corporate employed 97 employees of the relevant categories. The AIRC accepted the evidence that various businesses referred to on the website of Triangle Cables – Triangle Cables (USA), Triangle Cables (Germany), Triangle Cables (Italy) and Triangle Cables (Netherlands) – were trading names only and not incorporated bodies. Further, it was accepted that three labour hire companies through which some labour was engaged were not related bodies corporate.

The practical effect of the 100 employees exemption is that employers that employ 100 or fewer employees can dismiss employees unfairly as to reason and process (assuming that the employee has no other cause of action under, for example, their contract of employment or discrimination legislation). The impact of the exemption is all the more significant when one takes into account the fact that many Australian businesses employ 20 or fewer employees.

2. Excluded categories of employees

Prior to the Work Choices amendments, the following were the main categories of employees excluded from bringing an unfair dismissal claim:

(a) an employee engaged under a contract of employment for a specified period of time;
(b) an employee engaged under a contract of employment for a specified task;
(c) an employee serving a period of probation (the 'default' probationary period remains 3 months – where the period is longer it must be reasonable having regard to the nature and circumstances of the employment);
(d) a casual employee engaged for a short period (an employee is taken to be engaged for a short period unless the employee is engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months and had, but for the decision to terminate the employment, a reasonable expectation of continuing employment by the employer);
(e) a trainee engaged under a traineeship agreement or approved traineeship for a specified period or limited duration; and
(f) an employee who was not employed under award conditions and whose remuneration exceeded the threshold amount.

These categories of excluded employees remain in s 638 of the WR Act, but an additional category – that of seasonal employees – has been added.

Note that if an employee is not employed under 'award-derived' conditions, they will not be able to seek a remedy in relation to the unfairness of their dismissal unless they earn below the remuneration threshold. Such an employee who earns above the remuneration threshold cannot apply to the AIRC for relief on the basis that their dismissal was unfair. The remuneration threshold is currently $98,200 per annum.

3. Extension of the qualifying period

In addition to the excluded categories of employees, under the old WR Act an application could not be made to the AIRC on the ground that the dismissal was harsh, unjust or unreasonable unless the employee had completed the qualifying period of employment at the time that the employer gave the employee notice of termination or at the time when the employer terminated the employee's employment, whichever occurred earlier. The default minimum period was 3 months. The employer and employee could agree in writing, in advance, that there would be no qualifying period, a shorter qualifying period or a longer qualifying period. If the agreed period was longer than 3 months it had

to be reasonable having regard to the nature and circumstances of the employment.

The default qualifying period has been extended to 6 months for employees whose employment commenced after 27 March 2006: s 643(7). However, the extension of the qualifying period does not affect the provision allowing for the exclusion of employees serving a probationary period.

4. Excluded grounds – genuine operational reasons

Under the pre-Work Choices WR Act, an employee whose employment was terminated by reason of redundancy could apply to the AIRC and claim that the dismissal was unfair. While the AIRC would not question a *bona fide* redundancy, other factors might have made the dismissal unfair and resulted in relief. Factors that the AIRC would consider were the fairness or otherwise of the selection process used and how employees were selected. So, if an employee were selected on the basis of conduct or performance, the AIRC would consider whether the employee had been given an adequate opportunity to respond to the allegations about their conduct or performance. Also, the absence of a severance payment, even where there was no legal entitlement to such a payment, might be a relevant factor in determining fairness.

This has changed. Now, an application cannot be made to the AIRC on the ground that the termination was harsh, unjust or unreasonable, or grounds that include that ground, if the employee's employment was terminated for genuine operational reasons or for reasons that include such a reason: s 643(8).

This exclusion is particularly important when viewed in the context of other significant changes with respect to redundancy in the WR Act: redundancy pay can no longer be a term of an award (except with respect to redundancies by an employer of 15 or more employees); redundancy pay (except with respect redundancies of 15 or more employees) is not a preserved entitlement; and redundancy entitlements can be bargained away in a Workplace Agreement.

'Operational reasons' is defined to mean reasons of an economic, technological, structural or similar nature in relation to the employer's undertaking, establishment, service or business or to a part of the employer's undertaking, establishment, service or business: s 643(9). An example of a termination for operational reasons is a redundancy.

The operational reason for the termination need not be the sole, dominant or substantial reason for the termination. It need only be *a* reason. It need not be something that demands or brings about an obligation to terminate the employment of a particular employee. Thus, whether the employer could have done something other than terminating the employee's employment will generally be irrelevant in deciding whether the termination was for genuine operational reasons, or reasons that include genuine operational reasons: *Village Cinemas Australia Pty Ltd and Carter* (PR975821, Full Bench AIRC, 15/1/2007).

Nevertheless, the reason must be 'genuine'. This means that there must be a real and *bona fide* business case for the termination. It must not be a sham or contrived.

This exemption has been the subject of a number of decisions in the AIRC and has received quite a bit of attention in the press.

One dispute that deserves mention is the Cowra Abattoir dispute. The Office of Workplace Services (the Commonwealth government body that ensures compliance with the WR Act) investigated the termination of 29 employees and the offer to re-employ a number of them on allegedly inferior conditions. In the end, perhaps under the weight of publicity, the termination notices were withdrawn while negotiations continued. Twenty-two of the employees have since been employed on a new collective agreement while other employees were to be offered voluntary redundancy. The company claimed that the terminations were brought about because of concerns relating to the company's viability. On the reports available it is hard to say for certain whether the terminations would have fallen within the operational reasons exclusion. A sacking and re-hiring to do the same job, but on different conditions, would not have met the traditional definition of a genuine redundancy. However, some commentators at the time thought that the terminations might still have fallen within the operational reasons exclusion. If that were the case then the employees would not have been able to pursue an unfair dismissal claim.

Another case that has received considerable press concerns the position of employees at Tristar. It is said that Tristar's business is all but closed down and there is no work for employees to do. Usually an employer in those circumstances would make the employees' positions redundant, terminate their employment and formally close the business. The employees at Tristar were entitled to generous redundancy payments under the terms of their collective agreement. Many of the employees have more than 30 years of service, so their potential payout is substantial. After Work Choices came into effect the AIRC (on an application made by Tristar) terminated that agreement. This means that the redundancy payments under the agreement will expire in February 2008. So, if the employees' positions are made redundant and their employment terminated next year they will not be entitled to those generous payments. Instead, they will only be entitled to the minimum redundancy payment set out in the award. The amount is significantly less. In addition, the employees will not be entitled to bring an unfair dismissal claim because of the operational reasons exclusion. It is alleged that Tristar is trying to avoid its current redundancy obligations by refusing to dismiss the employees now, even though it is said that there is no work for them to do. The Office of Workplace Services has brought proceedings in the Federal Court to try to get orders that the employees be paid their redundancy payments under the agreement. The Federal Industrial Relations Minister has been meeting with the company to try to resolve the dispute.

An unfair dismissal check list

Here are some of the key questions you should ask yourself if you are trying to work out whether you could bring an unfair dismissal claim in the AIRC in the event that your employment, or that of someone you know, is terminated:

- Is the employer a 'federal system employer'? This will include considering whether the employer is a 'constitutional' corporation.
- If yes, did the employer employ 101 or more employees of the relevant categories at the time of the termination?
- If yes, has the employee completed the probationary and qualifying periods?
- If yes, is the employee in one of the excluded categories – for instance, were they a short-term casual?

- If no, is the employment covered by an award or workplace agreement and, if not, did the employee earn less than $98,200 per annum in the year prior to the termination?
- If yes, is the reason (or one of the reasons) for the termination genuine operational reasons?
- If no, was the dismissal unfair either as to reason or process?

You should also consider whether there might be some other actions and remedies the dismissed employee can pursue. Unfair dismissal is only one type of claim that a dismissed employee might be able to bring. But that's another story!

Where do you stand?

Do you support the existence of 'unfair dismissal' laws, or do you think employers should be free to hire and fire at will? Explain your views.