



# Freedom to fire: economic dismissals under work choices

Report

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OFFICE OF THE  
**WORKPLACE RIGHTS**  
ADVOCATE

A Victorian  
Government  
initiative





**FREEDOM TO FIRE:  
ECONOMIC DISMISSALS UNDER WORK CHOICES**

**REPORT FOR THE VICTORIAN OFFICE OF THE  
WORKPLACE RIGHTS ADVOCATE**

**AUGUST 2007**

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## ABOUT THE AUTHOR

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Dr Forsyth has carried out in-depth research on various legal aspects of workplace change, restructuring and redundancies, including his PhD thesis: *Transplanting Social Partnership: Can Australia Borrow from European Law to Improve Employee Participation Rights in Business Restructuring* (University of Melbourne, 2005).

He has also written extensively on various aspects of the Work Choices legislation and the workplace reform debate in Australia, including the following publications and papers:

- ‘Arbitration Extinguished: The Impact of the Work Choices Legislation on the Australian Industrial Relations Commission’ (2006) 32:1 *Australian Bulletin of Labour* 27-44
- ‘Collective Labour Relations under Siege: The Work Choices Legislation and Collective Bargaining’ (2006) 19:2 *Australian Journal of Labour Law* 183-197 (with Carolyn Sutherland)
- ‘From ‘Uncharted Seas’ to ‘Stormy Waters’: How Will Trade Unions Fare under the Work Choices Legislation?’ (2006) 16:2 *The Economic and Labour Relations Review* 215-236 (with Carolyn Sutherland)
- ‘Decentralisation and ‘Deregulation’ of Labour Relations through ‘Ultra-Regulation’: Australia’s 2005 Labour Law Reforms’, in S Ouchi and T Araki (eds), *Decentralizing Industrial Relations: The Role of Labour Unions and Employee Representatives*, (Kluwer Law International, 2007), 125-142
- ‘The 2006 Independent Contractors Legislation: An Opportunity Missed’ (2007) 35 *Federal Law Review* (forthcoming)
- ‘Dispute Resolution under Work Choices: The First Year’ (2007) 18 *Labour and Industry* (forthcoming)
- *Worker Representation in Australia: Moving Towards Overseas Models?* Paper for the International Industrial Relations Association (IIRA), European Regional Congress, Manchester, UK, September 2007.

Dr Forsyth thanks **Ingrid Landau** for research assistance in preparing this report.

## **FREEDOM TO FIRE: ECONOMIC DISMISSALS UNDER WORK CHOICES**

### **EXECUTIVE SUMMARY**

#### **PART 1 – INTRODUCTION: THE RATIONALE FOR, AND SCOPE OF, THE REPORT**

1. The Victorian Office of the Workplace Rights Advocate ('VWRA') commissioned this research report in June 2007. The impetus for this was the VWRA's concern, arising from several high profile cases in the early part of 2007 (primarily, *Village Cinemas v Carter* and *Cruickshank v Priceline*), that the new 'genuine operational reasons' exclusion from Federal unfair dismissal laws had significantly reduced protections for employees.
2. The Federal Government's 2005 'Work Choices' legislation introduced several new exclusions applicable to employees wishing to bring unfair dismissal claims under the Workplace Relations Act ('WR Act'). One of the main new restrictions was to prevent employees from making a claim, where their dismissal is for 'genuine operational reasons' or reasons that include genuine operational reasons: WR Act, section 643(8)-(9).
3. For purposes of this report, 'economic dismissals' are defined as dismissals based on operational, economic, technological, structural or similar grounds. These are often also referred to as dismissals arising from 'restructuring' implemented by the employer, leading to the 'redundancies' or 'retrenchments' of affected employees.
4. This study consists of an analysis of the new statutory provisions regulating economic dismissals under Work Choices, focusing particularly on the new genuine operational reasons exclusion. The study also analyses the 42 decisions in which this exclusion was considered (in a substantive sense) by the Australian Industrial Relations Commission between 27 March 2006 and 31 July 2007.

#### **PART 2 – REGULATION OF ECONOMIC DISMISSALS PRIOR TO WORK CHOICES**

5. Under the Keating Labor Government's 1993 unfair dismissal laws, employees were able to challenge economic dismissals on both substantive and procedural grounds. A dismissed employee needed to show that there was no valid reason for the termination based on the employee's capacity or conduct, or the *operational requirements of the business*; and/or that the termination was procedurally unfair.
6. In *Selvachandran v Peteron Plastics Pty Ltd*, 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’ under the 1993 legislation.

7. The courts also held that a termination would be based on the operational requirements of the undertaking, if it was ‘necessary to advance the undertaking’.
8. However, even where restructuring or redundancy dismissals might be 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 for redundancies, and provide notice and severance payments in line with award/statutory requirements.
9. The unfair dismissal provisions were changed by the Howard Coalition Government’s ‘first wave’ of industrial relations laws in 1996. The ability of employees to challenge economic dismissals was retained, although it was formulated differently.
10. An employee had to show that the termination of employment was ‘harsh, unjust or unreasonable’. In determining whether this was so, the AIRC was required to consider: ‘whether there was a valid reason for the termination related to the ... *operational requirements of the employer’s undertaking, establishment or service*’.
11. The AIRC was also required to have regard to whether an employee had been accorded procedural fairness. However, a major difference between the 1993 and 1996 provisions was the removal of procedural fairness as a ‘stand-alone’ ground for determining whether an employee had been unfairly dismissed.
12. The overall approach to determining whether there was a valid reason for dismissal, established in *Selvachandran*, continued to be applied by the AIRC under the 1996 provisions. Likewise, the assessment of whether there were operational requirements of the business justifying the dismissal of employee(s) continued in much the same way. Procedural fairness aspects of economic dismissals were still considered.

### **PART 3 – THE WORK CHOICES REFORMS AND REGULATION OF ECONOMIC DISMISSALS**

13. A very important change introduced by the Work Choices legislation was to establish the dominance of the Federal unfair dismissal regime through the ousting of State jurisdictions. Employees covered by the Federal workplace relations system may only bring an unfair dismissal claim under the WR Act. If they are subject to one of that legislation’s many exclusions from bringing a claim, they cannot bring a claim under State law.
14. This does not arise as an issue in Victoria, which referred its industrial relations powers to the Commonwealth in 1996. Almost all employers and employees in Victoria are subject to the Federal unfair dismissal provisions.

15. 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 (ie ‘unfair dismissal’); and/or that the termination was in breach of specified provisions of the WR Act (ie ‘unlawful termination’; these claims are subject to fewer exclusions than unfair dismissal claims).
16. In determining an unfair dismissal claim by arbitration (if conciliation fails), the Commission must have regard to the same substantive and procedural factors as under the pre-reform WR Act provisions – with the exception that there is no longer any consideration of whether operational requirements of the business may have provided a valid reason for the employee’s dismissal.
17. The WR Act now contains 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 (new) exclusion of *all* unfair dismissal claims in relation to those businesses.
18. 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 section 643(8)-(9) of the WR Act:
  - (8) An [unfair dismissal] application ... must not be made ... 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 ...
19. WR Act, section 649 provides a process for determining operational reasons jurisdictional issues – on the motion of the respondent/employer, or on the AIRC’s own motion – following a hearing. If the AIRC is satisfied that the employee’s termination was for genuine operational reasons, then it must make an order that the unfair dismissal application is invalid (although this does not prevent the employee from bringing an unlawful termination claim, if applicable).
20. Many commentators raised concerns (before and soon after Work Choices came into effect) about the apparent breadth of the ‘operational reasons’ exclusion, compared to the former ‘operational requirements’ criterion for lawful economic dismissals. Attention was also focused on the opportunities provided by the new exclusion for contrived business restructures and redundancies, and restructures aimed at cutting labour costs.
21. The Work Choices legislation also weakened the statutory provisions requiring consultation over large-scale redundancies; placed limits on award severance pay entitlements; and repealed the WR Act provisions allowing the AIRC to make orders for severance pay.

**PART 4 – CASE LAW ON THE ‘GENUINE OPERATIONAL REASONS’  
EXCLUSION: MARCH 2006 – JULY 2007**

22. The approach taken by the AIRC to the construction of the exclusion in sections 643(8)-(9) and 649 of the WR Act is closely examined in Part 4 of the report.
23. This discussion consists of a summary of each of the 42 decisions, framed by the two main ‘phases’ to date in which distinct approaches to the interpretation and application of the exclusion can be identified – ie before and after the AIRC Full Bench decision in *Village Cinemas* on 15 January 2007. The principles established in the leading decisions are also summarised.
24. The key aspects of the study of the case law in Part 4 of the report are highlighted in Part 5.

**PART 5 – ANALYSIS AND CONCLUSIONS:  
IMPACT OF THE NEW FRAMEWORK FOR REGULATING  
ECONOMIC DISMISSALS UNDER WORK CHOICES**

**To What Extent, and How Successfully, Are Employers Relying on the Genuine Operational Reasons Exclusion?**

25. As indicated above, the AIRC considered the exclusion in a total of 42 decisions between 27 March 2006 and 31 July 2007. 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.
26. 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/her unfair dismissal claim. The employer ‘success rate’ in operational reasons cases has increased significantly since *Village Cinemas* (see further below).
27. The number of cases coming before the AIRC (only 42 decisions in almost 18 months) cannot in any way provide an accurate reflection of the extent of employers’ reliance on the exclusion. In fact, this neatly demonstrates the whole point of the exclusion: it operates as a complete bar to an employee bringing an unfair dismissal claim. And because the exclusion is worded, and is being interpreted, very broadly, this is bound to have some ‘dampening’ effect on the number of employees lodging unfair dismissal claims.
28. Some indication of this is provided by the *overall* fall in the number of termination of employment applications lodged with the AIRC in the first year of Work Choices. 4,998 applications were lodged in the year 27 March 2006-26 March 2007; down from 6,127 in the preceding year. The fall was even

more pronounced in Victoria: 1,994 applications lodged in 2006-2007, down from 3,688.

29. There appears to be a *perception* in the business community that they now have much greater freedom to dismiss workers. This perception is reinforced by the observation of Simmonds C, in *Campagna v Priceline Pty Ltd*, that: ‘It may be ... that it would be a rare situation where an employer could not construct a situation where an operational reason would provide the reason, or one of the reasons for the termination.’
30. In addition to the matters that have come before the AIRC, there have been several instances reported in the media of businesses sacking workers for ‘operational reasons’ (see para [5.12] of the report).

### **The 100 Employees Exclusion**

31. This exclusion means that workers in small to medium-sized businesses have no avenue of redress for unfair dismissal – regardless of whether the reasons for dismissal are related to poor performance, misconduct or operational requirements/reasons. The impact of the 100 employees exclusion is extensive: it takes out of the unfair dismissal jurisdiction around 62% of the Australian workforce (4.2 million employees). This exclusion has been applied to prevent employees from bringing unfair dismissal claims in many AIRC decisions.

### **The Removal of the ‘Valid Reason’ Requirement**

32. The valid reason requirement that applied under the Federal unfair dismissal regime between 1993 and 2005 meant that employers had to *prove* that there were sound, defensible and well-founded reasons for sacking an employee. The valid reason requirement acted as a bulwark against capricious or arbitrary dismissal – or what is described in the United States as the concept of ‘employment at will’.
33. Under the changes introduced by Work Choices, the former focus on whether there was a valid reason for termination has been replaced by consideration of whether the employer’s asserted operational reasons were *genuine* – ie *real, true or authentic, and not counterfeit*: see the AIRC Full Bench decision in *Village Cinemas*. The Full Bench in *Cruickshank v Priceline No 2* added that the reasons advanced by an employer must also be *capable of withstanding reasonable scrutiny*.
34. Watson SDP’s attempt in *Perry v Savills* to link the ‘genuineness’ component of section 643(8) to the termination of the employee, rather than just to the operational reasons for the dismissal, was short-lived – as was his reasoning that the termination must be a ‘logical response’ to the operational needs of the business. This approach was rejected by the Full Bench in *Village Cinemas*.

35. The upshot of removing the valid reason requirement is a significant enhancement of employer freedom to dismiss employees, as long as an operational reason can be shown.
36. The operational reasons exclusion provides a substantial boost to managerial prerogative in relation to the extent and manner of implementing workplace restructures. While the rights of management were recognised under the former statutory provisions, important safeguards for workers were also built in (ie the valid reason and procedural fairness requirements). These protections have now been removed.

### **The Broad Definition of ‘Operational Reasons’**

37. Concerns that ‘operational reasons’ would be a much easier hurdle for employers to jump than the former statutory test of ‘operational requirements’ have been realised – in fact, they may even have been surpassed.
38. The AIRC decisions to date show that the operational reasons exclusion – already broad on its plain terms – is being interpreted very widely, and is being used to 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.
39. The *Village Cinemas* case illustrates the extent of the breadth in the prevailing approach to the exclusion. The Full Bench focused exclusively on the circumstances of a cinema complex closure as *the* reason for Mr Carter’s dismissal. It rejected the idea that other factors may have intruded (and become the real reason for dismissal) – such as the employer’s refusal to allow Mr Carter to take long service leave, to see if another position might arise to which he could be redeployed.
40. The Full Bench in *Village Cinemas* also stated that an employee’s dismissal does not have to be an *unavoidable consequence* of the operational reason – the latter just has to be a *ground or cause* for termination. This takes the current legal test for employers seeking to justify economic dismissals a long way away from previous statutory formulations, which required a closer connection to be established between the operational needs of the business and the redundancies/dismissals that followed.
41. The important element of the *necessity* of the employer’s restructuring measures has been taken out of the equation. Nor does it have to be shown, any longer, that the position or job previously performed by a dismissed employee is no longer being done by anyone (the traditional test of ‘redundancy’).
42. The Full Bench decision in *Village Cinemas* has had enormous implications for the subsequent operation of the exclusion. While employers were marginally less successful than employees in operational reasons decisions prior to *Village Cinemas*, the application of the broader approach established

in that decision has led to a far greater number of operational reasons cases being decided in favour of employers since January 2007 (see Table 4 at para [5.34] of the report for details).

43. After *Village Cinemas*, a dismissed employee is left with having to show that an employer's purported operational reasons were a sham or contrivance. However, the difficulties for employees in making out a case that their dismissal was a sham is illustrated by the decisions in *Cruickshank v Priceline*. The notion that Mr Cruickshank's redundancy was a sham was rejected by Eames C at first instance; a Full Bench found that Eames C had not provided sufficient reasons for this conclusion; and the matter has now been referred for rehearing (see further below).
44. This highlights another aspect of the unfairness of the new operational reasons exclusion. When the operational reasons jurisdictional issue is reheard, Mr Cruickshank will have had to go through three AIRC hearings – just to determine whether or not he is able to bring his unfair dismissal claim. This is a cumbersome, lengthy and potentially expensive process for employees, raising (in turn) significant 'access to justice' issues.
45. Another very important feature of the wording of the genuine operational reasons exclusion is that it permits dismissals for reasons that *include* operational reasons. The full effect of this was demonstrated by Lewin C's second decision in *Rawolle v Don Mathieson & Staff Glass Pty Ltd*. There, it was found that although one of the reasons for the employee's dismissal was that he was engaged under a union collective agreement, and the employer wanted to utilise the flexibilities offered by Work Choices, economic and structural reasons were also included among the reasons for dismissal – thus attracting the operational reasons exclusion (see further below).
46. 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 section 643(9). The others include 'structural' and 'technological' reasons, and organisational restructures driven simply by a general desire to improve efficiency or 'streamline' staffing structures will attract the operation of the exclusion.
47. 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 genuine operational reasons exclusion are summarised in Table 5 (at para [5.41] of the Report).
48. The AIRC has also indicated that dismissals based on personal or other non-business related reasons do not fall within the operational reasons exclusion – eg dismissals based on grounds of poor performance, absenteeism, bullying/misconduct, and employee/manager personality conflicts.

### **The Inability to Challenge a Lack of 'Procedural Fairness'**

49. Under the new operational reasons exclusion, the AIRC has absolutely no scope to consider whether a dismissal was ‘unfair’ or ‘harsh, unjust or unreasonable’. The Commission’s focus is simply on whether the operational reasons bar to jurisdiction applies. 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.
50. Watson SDP’s decision in *Perry v Savills* appeared to open the door for consideration of factors going to the appropriateness of purported operational reasons dismissals (eg whether the employee was offered an alternative position). However, the Full Bench in *Village Cinemas* explicitly rejected that notion, indicating that this ‘is precisely the type of inquiry that the Parliament sought to avoid when it created the statutory bar’ to unfair dismissal claims in section 643(8).
51. 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 the following types of circumstances:
- a dismissed employee’s 19.5 years’ service with the employer, his versatility over that period and therefore strong capacity for redeployment, and the employer’s refusal to consider other options such as long service leave or appointment to a lower position: see *Village Cinemas*, where the Full Bench stated that these were ‘extraneous or irrelevant matters’;
  - whether the selection processes for redundancies were fair, or not: see eg *Nicholson v Riviera Marine Pty Ltd*; *Hipwell v Australian Pharmaceutical Industries*;
  - 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 agreement: *Sperac v Global Television Services Pty Ltd*;
  - the hiring of new employees and labour hire staff following the implementation of redundancies: *Bell, Kirwin and Hinds v H&M Engineering and Construction Pty Ltd*;
  - whether an employer made efforts to find alternative positions for redundant employees: *Kingsley Smith v Macmahon Holdings*; *Bell, Kirwin and Hinds v H&M Engineering and Construction Pty Ltd*.

### **The Possibility of Abuse of the Genuine Operational Reasons Exclusion**

52. Two of the cases examined in Part 4 of the report provide stark illustrations of the capacity for employers to utilise the operational reasons exclusion as a basis for labour cost reduction strategies.

53. The first is *Cruickshank v Priceline*. The first instance decision of Eames C of the AIRC attracted significant media attention in April this year. This was because Eames C allowed the employer to rely on the operational reasons exclusion as a basis for a restructure and the consequent redundancies of 32 employees, in circumstances where it was claimed that Mr Cruickshank's position was later re-advertised at lower cost.
54. In the appeal decision, the Full Bench 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. However, the Full Bench found that Eames C's conclusions on this evidence (ie that it did not indicate that Mr Cruickshank's dismissal was a sham) were open to him.
55. The Full Bench went on to find that Eames C had provided inadequate reasons for his decision, and incorrectly applied *Village Cinemas*, and on this basis overturned his decision and ordered a rehearing of the operational reasons jurisdictional issue.
56. Despite this outcome, the *Cruickshank v Priceline* case remains an important illustration of the potential for employers to use the operational reasons exclusion to dismiss existing employees, and re-hire new staff to do the same jobs for less remuneration.
57. An even more clear-cut illustration of the potential for the operational reasons exclusion to form the basis for labour cost-cutting strategies is *Rawolle v Don Mathieson & Staff Glass Co Pty Ltd*. Lewin C's two decisions in this matter most fully demonstrate the extent to which the genuine operational reasons exclusion has undermined protections for employees.
58. In the initial proceedings before Lewin C (Mr Rawolle's application for an extension of time to lodge his unfair dismissal claim), the employer gave evidence and made submissions to the effect that:
  - the company wanted greater flexibility in its employment arrangements;
  - this was being pursued by offering new employees AWAs, through a labour hire agency;
  - the inflexible working conditions of the union collective agreement under which Mr Rawolle was employed were the operational reasons for his dismissal.
59. The evidence also indicated that the employer's business was *expanding*; and that Mr Rawolle later saw an advertisement for a very similar position to his former job.
60. 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. He took this into account in deciding to allow Mr Rawolle's extension of time application. He added that the dismissal was arguably a sham and for a prohibited reason under the freedom of association

provisions of the WR Act (ie Mr Rawolle's entitlements under an industrial instrument).

61. However, when the matter next came before Lewin C (on the employer's motion to dismiss the 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 Mr 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.
62. Another reason for Mr 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 ...*'.
63. But 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 Mr Rawolle's unfair dismissal claim was dismissed.
64. An appeal is pending against Lewin C's second decision in *Rawolle v Don Mathieson & Staff Glass Co Pty Ltd*. However, as things stand, the case provides a remarkable example of the latitude now afforded to employers to implement brazen labour cost-cutting strategies under the guise of 'operational reasons'.
65. 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. However, those protections have also been undermined by Work Choices, as illustrated by the Cowra Abattoir sackings soon after the new laws came into effect.

### **A Possible 'Handbrake' on the Operational Reasons Exclusion: Employers Must Have a 'Paper Trail'**

66. Several cases have highlighted the need for employers to adduce substantive evidence of the operational reasons being relied upon. This is one of the very few protections afforded to employees under the new operational reasons exclusion. However, it is subject to variations in the approaches taken by different members of the AIRC as to the evidentiary threshold required.
67. Lacy SDP's recent decision in *Moxham v Baxter Business Pty Ltd* provides an encouraging indication that employers seeking to rely on the operational reasons exclusion will be put to a high standard of proof. However, this really just signals to employers that they have to thoroughly document their 'operational reasons'. It does not really affect how genuine those reasons

might be to begin with, the tests for which fall well short of the previous requirement to show a valid reason for dismissal based on the operational requirements of the business.

### Summary of the Conclusions

68. The new genuine operational reasons exclusion, and other aspects of the regulation of economic dismissals introduced by the Work Choices legislation, have significantly reduced many long-standing legal protections of job security for Australian workers.
69. 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 Work Choices laws have therefore significantly enhanced the freedom of employers to ‘hire and fire’ staff.
70. To date, many of the concerns raised about the potential *unfairness* of the genuine operational reasons exclusion have been realised. The case law between March 2006 and July 2007 demonstrates the many dimensions of the unfairness of the exclusion.
71. 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 point to a valid reason for dismissal or to treat employees fairly and reasonably in the process leading to dismissal.
72. Even more alarmingly, the exclusion has also opened the door for 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.
73. The genuine operational reasons exclusion is also *inappropriate*, having regard to the protections provided to Australian workers in the context of economic dismissals in the 1984 *TCR Case* and the 2004 *Redundancy Test Case*; under Federal legislation between 1993 and 2005; and under the various State unfair dismissal jurisdictions over a much longer period.
74. The exclusion also takes Australia further away from compliance with the ILO Termination of Employment Convention.

## **FREEDOM TO FIRE: ECONOMIC DISMISSALS UNDER WORK CHOICES**

- 1. INTRODUCTION: THE RATIONALE FOR, AND SCOPE OF, THE REPORT**
- 1.1 The Victorian Office of the Workplace Rights Advocate ('VWRA') commissioned this research report on 'Economic Dismissals under Work Choices' in June 2007. The impetus for this was the VWRA's concern, arising from several high profile cases in the early part of 2007, that the new 'genuine operational reasons' exclusion from Federal unfair dismissal laws had significantly reduced protections for employees.
- 1.2 The Federal Government's 'Work Choices' legislation, which commenced operation on 27 March 2006,<sup>1</sup> introduced several new exclusions applicable to employees wishing to bring unfair dismissal claims under the WR Act. One of the main new restrictions was to prevent employees from making a claim, where their dismissal is for 'genuine operational reasons' (or reasons that include genuine operational reasons).<sup>2</sup> This amounted to a reversal of the legal position that had applied since the introduction, in 1993, of the right of employees to challenge their dismissal on grounds including that it was not based on a 'valid reason' relating to the 'operational requirements' of the business.<sup>3</sup>
- 1.3 After an early narrow approach to the genuine operational reasons exclusion,<sup>4</sup> a Full Bench of the Australian Industrial Relations Commission<sup>5</sup> interpreted the exclusion more expansively in *Village Cinemas Australia Pty Ltd v Carter* ('*Village Cinemas*').<sup>6</sup> The Full Bench established that as long as an operational reason for dismissal is 'genuine', rather than 'valid', an employee has no relief under the unfair dismissal provisions.
- 1.4 The full effect of the operational reasons exclusion was demonstrated in *Cruickshank v Priceline No 1*,<sup>7</sup> in which the Commission found that the exclusion applied in circumstances where a dismissal may have been motivated by a desire to reduce wage costs by hiring other workers to perform the same job at lower rates of pay. This decision (since overturned on appeal)<sup>8</sup>

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<sup>1</sup> *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('Work Choices Act'), which substantially amended the *Workplace Relations Act 1996* (Cth) ('WR Act'). References to provisions of the WR Act in this report 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-reform WR Act'.

<sup>2</sup> WR Act, section 643(8); see also sections 643(9) and 649 (these provisions are examined in detail in Part 3 of this report).

<sup>3</sup> See further Part 2 of this report.

<sup>4</sup> This approach was taken in *Perry v Savills (Vic) Pty Ltd* ('*Perry v Savills*') (2006) 58 AIRL 100-525 and a number of subsequent cases; see further Part 4 of this report.

<sup>5</sup> The Australian Industrial Relations Commission will be referred to in this report as the 'AIRC', or the 'Commission'.

<sup>6</sup> (2006) 158 IR 137.

<sup>7</sup> [2007] AIRC 292.

<sup>8</sup> See *Cruickshank v Priceline No 2* [2007] AIRCFB 513.

attracted significant attention in the media, with the Federal Workplace Relations Minister pledging to look closely at the decision and, if necessary, amend the legislation<sup>9</sup> (however, no such amendment has been made). The VWRA expressed concern that the decision highlighted the breadth of the operational reasons exemption, and left employees open to abuse.<sup>10</sup>

- 1.5 Accordingly, I was asked by the VWRA to examine the impact of the new statutory provisions relating to economic dismissals introduced by the Work Choices Act. For purposes of the study undertaken in this report, ‘economic dismissals’ are defined as dismissals based on operational, economic, technological, structural or similar grounds.<sup>11</sup> These are often also referred to as dismissals arising from ‘restructuring’ implemented by the employer, leading to the ‘redundancies’<sup>12</sup> or ‘retrenchments’<sup>13</sup> 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.
- 1.6 Specifically, the VWRA requested me to examine the *fairness* and *appropriateness* of the new provisions, including:
- (i) the exclusion from the unfair dismissal jurisdiction of persons employed in businesses of 100 or fewer employees;
  - (ii) the removal of the requirement that there be a ‘valid reason’ for the termination;
  - (iii) the broad definition of ‘operational reasons’, and the fact that the exemption applies to dismissals for ‘mixed’ personal and business reasons;
  - (iv) the inability to challenge dismissals which are made on genuine economic grounds but which are effected in a procedurally unfair manner;
  - (v) the possibility of abuse (for example, by employers providing spurious economic grounds for dismissals that are in fact motivated by other reasons).

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<sup>9</sup> Misha Schubert, ‘Priceline case puts focus on IR laws’, *The Age*, 25 April 2007; see further Part 4 of this report.

<sup>10</sup> ‘Vic Advocate launches operational reasons inquiry’, *Workforce Daily*, 24 April 2007; see also Schubert, above note 9.

<sup>11</sup> See again WR Act, section 643(8)-(9); and Part 3 of this report.

<sup>12</sup> Technically: ‘Redundancy 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 and Louise Keats, *Managing Termination of Employment: A best practice guide under Work Choices*, CCH, 2007, page 107.

<sup>13</sup> ‘The dismissal of an employee whose position has become redundant is called “retrenchment”.’ See Hor and Keats, above note 12, page 107.

- 1.7 I was also asked to locate the study of the new Australian provisions regulating economic dismissals in an international context, by examining how economic dismissals are regulated in other relevant jurisdictions and under international law. These matters will be covered in a supplementary report to be provided to the VRWA.
- 1.8 The study that I have undertaken consists of an analysis of the new statutory provisions, and every decision in which these provisions were considered (in a substantive sense) by the AIRC between 27 March 2006 and 31 July 2007 (42 decisions in total). I have also consulted secondary reference sources, including books, journal articles and other commentary, particularly in preparing Parts 2 and 3 of the report.
- 1.9 The report is structured as follows:
- Part 2 (pages 17-21) sets out the historical development of the statutory provisions regulating economic dismissals under Australian Federal law prior to Work Choices. This covers Labor's statutory unfair dismissal regime introduced in 1993, and changes to the legislation made by the Coalition Government in 1996.
  - Part 3 (pages 22-30) examines the new provisions regulating economic dismissals inserted by the Work Choices Act amendments in 2005, with effect from 27 March 2006. The policy rationale and statutory formulation of the new '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 (pages 31-57) examines the case law dealing with the genuine operational reasons exclusion in the WR Act, between 27 March 2006 and 31 July 2007. This discussion consists of a summary of all 42 AIRC decisions, framed by the two main 'phases' in which distinct approaches to the interpretation and application of the exclusion can be identified – ie before and after the AIRC Full Bench decision in *Village Cinemas* on 15 January 2007. The principles established in the leading decisions are also highlighted.
  - Part 5 (pages 58-75) contains a concluding analysis of the impact of the new statutory provisions regulating economic dismissals under Work Choices, including my conclusions on the fairness and appropriateness of the genuine operational reasons exclusion.
  - Appendix One (pages 76-79) contains a table of the 42 AIRC decisions dealing with the exclusion.

## 2. REGULATION OF ECONOMIC DISMISSALS PRIOR TO WORK CHOICES

### 2.1 Federal Regulation Pre-1993

2.2 There were no statutory unfair dismissal protections under Australian Federal law until 1993. Before then, employees (and their representatives, primarily 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.<sup>14</sup>

2.3 Award provisions prohibiting ‘harsh, unjust or unreasonable’ dismissal became commonplace after the *Termination, Change and Redundancy Case* in 1984,<sup>15</sup> although these provisions were beset by enforcement limitations.<sup>16</sup> 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.<sup>17</sup>

### 2.4 The 1993 Federal Legislation

2.5 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’).<sup>18</sup> These provisions,<sup>19</sup> which commenced operation on 30 March 1994, were based on Convention No 158 of the International Labour Organisation (‘ILO’) on Termination of Employment.<sup>20</sup>

<sup>14</sup> Andrew Stewart, ‘And (Industrial) Justice for All? Protecting Workers Against Unfair Dismissal’ (1995) 1 *Flinders Journal of Law Reform* 85, pages 87-89. 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 (see Stewart, pages 89-94).

<sup>15</sup> ‘*TCR Case*’ (1984) 8 IR 34; see also 9 IR 115.

<sup>16</sup> Breen Creighton and Andrew Stewart, *Labour Law*, 4<sup>th</sup> edition, The Federation Press, 452.

<sup>17</sup> *Ibid*, pages 430-431; the limitations of these award ‘TCR clauses’ are discussed in Brad Pragnell and Paul Ronfeldt, ‘Redundancy Under Enterprise Bargaining and New Federal Laws’ in Ron McCallum, Greg McCarry and Paul Ronfeldt (eds), *Employment Security*, The Federation Press, 1994, 115 at pages 116-118 (see also the discussion of TCR provisions in enterprise agreements, at pages 129-136).

<sup>18</sup> For an overview of these provisions, see Stewart, above note 14, pages 96-122; Marilyn Pittard, ‘The Age of Reason: Principles of Unfair Dismissal in Australia’ in McCallum et al, above note 17, pages 16-40.

<sup>19</sup> 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, sections 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 report.

<sup>20</sup> The ‘Termination of Employment Convention’; see further Anna Chapman, Breen Creighton, Richard Naughton and 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.

2.6 The key provision of Part VIA, Division 3 of the IR Act was section 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.<sup>21</sup>

2.7 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.

2.8 In *Selvachandran v Peteron Plastics Pty Ltd*,<sup>22</sup> 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.

2.9 Cases dealing with the operation of IR Act, section 170DE in the context of economic dismissals established the following principles:<sup>23</sup>

- 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';<sup>24</sup>
- a termination would be based on the operational requirements of the undertaking, if it was 'necessary to advance the undertaking' – and 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';<sup>25</sup>

<sup>21</sup> Note that IR Act, section 170DE(2) was declared constitutionally invalid by the High Court of Australia in *Victoria v The Commonwealth* (1996) 187 CLR 416.

<sup>22</sup> '*Selvachandran*' (1995) 62 IR 371.

<sup>23</sup> See also the decisions discussed in Chapman et al, above note 20, pages 15-18.

<sup>24</sup> James Macken, Paul O'Grady, Carolyn Sappideen and Geoff Warburton, *The Law of Employment*, 5<sup>th</sup> edition, Lawbook Co, 2002, pages 331-332.

<sup>25</sup> *Nettlefold v Kym Smoker Pty Ltd* (1996) 69 IR 370, quoted in Macken et al, above note 24, page 331.

- generally, 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/redundancies) should not be called into question;<sup>26</sup>
- even where terminations might be valid (ie 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.<sup>27</sup>

2.10 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 (ie those affecting 15 or more employees).<sup>28</sup> Employers were also required to notify the Commonwealth Employment Service ('CES') of mass redundancies,<sup>29</sup> and employees could seek orders for the making of severance payments in certain circumstances.<sup>30</sup>

## 2.11 The WR Act 1996 Provisions

2.12 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.<sup>31</sup> The amended provisions (found in Part VIA, Division 3 of the pre-reform WR Act) were aimed at addressing certain aspects of the IR Act provisions that were thought to favour unfair dismissal applicants over employers.<sup>32</sup> This was encapsulated in the concept of a 'fair go all round', which was introduced as the guiding principle for the AIRC to follow in determining unfair dismissal applications and remedies.<sup>33</sup>

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<sup>26</sup> *Quality Bakers of Australia v Goulding* (1995) 60 IR 327, referred to in Creighton and Stewart, above note 16, page 479.

<sup>27</sup> 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 (1996) 65 IR 366). See also *Cosco Holdings Pty Ltd v Do* (1998) 150 ALR 127, discussed in Max Spry, 'A Valid Reason for Termination' (1998) 11 *Australian Journal of Labour Law* 216.

<sup>28</sup> IR Act, sections 170FA and 170GA.

<sup>29</sup> IR Act, section 170DD.

<sup>30</sup> IR Act, section 170FA(1). For discussion of the provisions referred to in notes 28-30, see Pragnell and Ronfeldt, above note 17, pages 118-129.

<sup>31</sup> *Workplace Relations and Other Legislation Amendment Act 1996* (Cth), substantially amending and re-naming the IR Act as the WR Act.

<sup>32</sup> Creighton and Stewart, above note 16, pages 453-454; see further Anna Chapman, 'Termination of Employment Under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 1.

<sup>33</sup> Creighton and Stewart, above note 16, page 454; Chapman, above note 32, pages 5-7. 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-reform WR Act, sections 170CK and 170CM; and see Chapman, above note 32, pages 7-12.

- 2.13 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 (rather than the Industrial Relations Court), alleging that the termination of his/her employment was ‘harsh, unjust or unreasonable’.<sup>34</sup> 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*’.<sup>35</sup>
- 2.14 The Commission was also required to have regard to whether an employee had been accorded procedural fairness; 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.<sup>36</sup> 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.<sup>37</sup>
- 2.15 The overall approach to determining whether there was a valid reason for dismissal, established in *Selvachandran*,<sup>38</sup> continued to be applied by the AIRC under the 1996 provisions.<sup>39</sup> 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.<sup>40</sup>
- 2.16 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.<sup>41</sup>
- 2.17 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.<sup>42</sup> However, provisions requiring consultation

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<sup>34</sup> Pre-reform WR Act, section 170CE(1)(a).

<sup>35</sup> Pre-reform WR Act, section 170CG(3)(a) (emphasis added).

<sup>36</sup> Pre-reform WR Act, section 170CG(3)(b)-(d).

<sup>37</sup> Chapman, above note 32, page 4; see also pages 6-7, where the potential influence of the ‘fair go all round’ principle in diluting procedural fairness considerations is examined.

<sup>38</sup> See above note 22.

<sup>39</sup> See for example the decisions referred to in Macken et al, above note 24, page 330 (especially footnote 94).

<sup>40</sup> See notes 21-23 above; and the decisions referred to in Macken et al, above note 24, page 332 (footnote 116).

<sup>41</sup> See Creighton and Stewart, above note 16, page 479; Macken et al, above note 24, pages 333-334.

<sup>42</sup> See para [2.10] above; and pre-reform WR Act, sections 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* 184. The

over workplace restructuring and layoffs became ‘non-allowable’ award matters,<sup>43</sup> although such provisions could still be included in certified agreements and Australian Workplace Agreements (‘AWAs’).<sup>44</sup> Provisions for redundancy pay continued to be allowable in both awards and agreements.<sup>45</sup>

## 2.18 The Post-1996 Period

- 2.19 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.<sup>46</sup> However, some minor amendments to the unfair dismissal laws were passed, such as the provisions enabling the AIRC to have regard to the size of the employer’s business and whether it had a dedicated human resources department, in determining whether a dismissal was harsh, unjust or unreasonable.<sup>47</sup>
- 2.20 Following its re-election in 2004, with control of the Senate from 1 July 2005, the opportunity arose for the Government to implement more far-reaching reforms of the Federal unfair dismissal laws. These reforms were introduced through the amendments to the WR Act effected by the Work Choices Act, explored in Part 3.

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requirement to notify the CES in instances of 15 or more redundancies was also retained; see pre-reform WR Act, section 170CL.

<sup>43</sup> Under pre-reform WR Act, section 89A; see also *Re Award Simplification Decision* (1997) 75 IR 272; *Re Universities and Post Compulsory Academic Conditions Award* (1998) 45 AILR 3; *Section 109 Reviews Decision* (1999) 90 IR 123.

<sup>44</sup> See further Anthony Forsyth, Samantha Korman and 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.

<sup>45</sup> The minimum award redundancy pay standards established in the TCR Case (see note 15 above) were increased in the *Redundancy Test Case* (2004) 129 IR 155, which also provided for a lower scale of redundancy payments to employees in businesses with less than 15 employees.

<sup>46</sup> Creighton and Stewart, above note 16, page 454; see further Marilyn Pittard, ‘Unfair Dismissal Laws: The Problem of Application to Small Businesses’ (2002) 15 *Australian Journal of Labour Law* 1.

<sup>47</sup> Pre-reform WR Act, section 170CG(3)(da)-(db), introduced by the *Workplace Relations Amendment (Termination of Employment) Act 2001* (Cth); see Pittard, above note 46, pages 11-12.

### 3. THE WORK CHOICES REFORMS AND REGULATION OF ECONOMIC DISMISSALS

#### 3.1 Overview of the Unfair Dismissal Scheme under Work Choices

- 3.2 Effective from 27 March 2006, the Work Choices Act introduced major changes to the provisions of the WR Act regulating termination of employment.<sup>48</sup> Much of the Government's justification for the reforms to unfair dismissal laws was based on the assertion that they acted as a disincentive for employers (especially small-medium businesses) to take on new staff.<sup>49</sup> An often repeated claim was that exempting small business from unfair dismissal laws would lead to the creation of up to 77,000 new jobs.<sup>50</sup> These, and many of the 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.<sup>51</sup>
- 3.3 One very important change introduced by the Work Choices Act, flowing from the general Federal override of State industrial laws that it effected,<sup>52</sup> was to establish the dominance of the Federal unfair dismissal regime through the ousting of State jurisdictions.<sup>53</sup> That is, employees covered by the Federal workplace relations system<sup>54</sup> may only bring an unfair dismissal claim under the WR Act.<sup>55</sup> 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.
- 3.4 However, this does not arise as an issue in Victoria, which referred its industrial relations powers to the Commonwealth in 1996.<sup>56</sup> 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.<sup>57</sup>

<sup>48</sup> See the 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.

<sup>49</sup> See for example Explanatory Memorandum, *Workplace Relations Amendment (Work Choices) Bill 2005*, pages 24-26.

<sup>50</sup> See the investigation of this claim (among others) in the report of The Senate, Employment, Workplace Relations and Education References Committee, *Unfair dismissal and small business employment*, June 2005.

<sup>51</sup> See for example Pittard, above note 46, pages 13-15; The Senate, Employment, Workplace Relations and Education References Committee, above note 50; Benoit Freyens and Paul Oslington, 'The Likely Impact of Removing Unfair Dismissal Protection' (2005) 56 *Journal of Australian Political Economy* 56.

<sup>52</sup> See WR Act, section 16(1), upheld in *New South Wales v Commonwealth* (2006) 81 ALJR 34.

<sup>53</sup> See Chapman, above note 48, pages 239-241.

<sup>54</sup> 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, sections 6(1) and 858. Outside Victoria and the Territories, unincorporated businesses (such as partnerships) and State government departments and agencies fall outside of the Federal system, and are covered by State industrial legislation.

<sup>55</sup> This is the combined effect of WR Act, sections 5(1) and 637(1).

<sup>56</sup> See *Commonwealth Powers (Industrial Relations) Act 1996* (Vic).

<sup>57</sup> 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

- 3.5 The exclusions from 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;<sup>58</sup> casual employees (unless they are engaged on a regular and systematic basis for more than 12 months);<sup>59</sup> certain types of trainees;<sup>60</sup> and ‘non-award’ employees earning more than the amount of annual remuneration specified in the regulations (currently \$101,300).<sup>61</sup>
- 3.6 The main *new* exclusions from unfair dismissal claims introduced by the Work Choices Act are as follows:
- the ‘100 employees’ exclusion – an employee cannot bring a claim where, at the time of the dismissal, the employer employed 100 employees or less; 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;<sup>62</sup>
  - the 6 month ‘qualifying period’ – an employee cannot make a claim before he/she has completed the qualifying period of his/her employment; the qualifying period is 6 months (increased from 3 months under the pre-reform WR Act), or any shorter or longer period agreed in writing between the employer and employee;<sup>63</sup>
  - the ‘genuine operational reasons’ exclusion – see further below, paras [3.13-3.27].
- 3.7 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 (ie ‘unfair dismissal’),<sup>64</sup> and/or that the termination was in breach of specified provisions of the WR Act (ie ‘unlawful termination’).<sup>65</sup>

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CCH, *Australian Master Workplace Relations Guide: The Work Choices Edition*, CCH, 2006, 103, at pages 104-108, 112-117.

<sup>58</sup> WR Act, section 638(1)(a)-(b) and (3).

<sup>59</sup> WR Act, section 638(1)(d) and (4)-(5).

<sup>60</sup> WR Act, section 638(1)(e).

<sup>61</sup> WR Act, section 638(1)(f) and (6)-(7); and *Workplace Relations Regulations 2006* (Cth) (‘WR Regulations’), Chapter 2, regulations 12.3 and 12.6.

<sup>62</sup> WR Act, sections 643(10)-(12).

<sup>63</sup> WR Act, section 643(6)-(7). Note also that under section 638(1)(c), an employee cannot bring an unfair dismissal claim if he/she has not completed any applicable period of ‘probation’ (which should be not longer than 3 months, or any longer period that is reasonable in the circumstances of the employment).

<sup>64</sup> WR Act, section 643(1)(a), (c).

<sup>65</sup> WR Act, section 643(1)(b)-(c); see also (primarily) the prohibited grounds of termination specified in section 659 and the notice requirements in section 661. Unlawful termination claims are subject to fewer exclusions than unfair dismissal claims: see section 638(11). If they are not settled by conciliation in the AIRC, these claims are now determined in the Federal Magistrates Court or the Federal Court.

- 3.8 As before, the AIRC deals with unfair dismissal claims, first, by conciliation<sup>66</sup> (although this is now commonly preceded by consideration of motions for dismissal on jurisdictional grounds, either by hearing or ‘on the papers’<sup>67</sup>); and if conciliation is unsuccessful, by arbitration.<sup>68</sup>
- 3.9 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 provisions<sup>69</sup> – 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.<sup>70</sup> In other words, an employee can only challenge his/her dismissal on the basis that there was no valid reason relating to the employee’s capacity or conduct,<sup>71</sup> and that there was an absence of procedural fairness.<sup>72</sup>
- 3.10 The AIRC retains the power to order reinstatement and/or compensation to a successful applicant in an unfair dismissal claim.<sup>73</sup> The overarching ‘fair go all round’ principle also remains in place under the unfair dismissal provisions introduced by the Work Choices Act.<sup>74</sup>
- 3.11 Concerns have been expressed, in various quarters, that the new Federal unfair dismissal system has significantly reduced the protections for employees against harsh or arbitrary termination, and undermined job security. For example, the 100 employees exclusion has been described by Pittard as leaving employers covered by the exclusion under no obligation to dismiss employees fairly.<sup>75</sup> The effect of the new unfair dismissal provisions more generally, according to Chapman, is that:

Protection against unfair dismissal has become an exclusive right, enjoyed by some, and only in some circumstances. It is now truly a privilege, and no longer a minimum employment standard of general application.<sup>76</sup>

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<sup>66</sup> WR Act, section 650.

<sup>67</sup> See WR Act, sections 645-649.

<sup>68</sup> WR Act, section 652; see also section 651 dealing with (among other matters) the applicant’s decision whether to proceed to arbitration in the AIRC.

<sup>69</sup> See paras [2.13-2.14] and [2.18] above.

<sup>70</sup> See further Part 5 below.

<sup>71</sup> WR Act, section 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.

<sup>72</sup> WR Act, section 652(3)(b)-(f).

<sup>73</sup> Although some limits have now been placed on the remedies that the AIRC can order: see WR Act, section 654.

<sup>74</sup> WR Act, section 635(2).

<sup>75</sup> Pittard, above note 48, page 227.

<sup>76</sup> Chapman, above note 48, page 238 (footnote omitted); see also Pittard, above note 48; and Marilyn Pittard, ‘Fairness in Dismissal: a Devalued Right’ in Julian Teicher, Rob Lambert and Anne O’Rourke (eds), *Work Choices: The New Industrial Relations Agenda* (Pearson Education Australia, 2006) 74.

- 3.12 One of the main focal points of concern has been the enhanced opportunities provided to employers to dismiss employees on grounds related to workplace restructuring, through the new genuine operational reasons exclusion.

### 3.13 The ‘Genuine Operational Reasons’ Exclusion

#### 3.14 Background to the Exclusion

- 3.15 When the Government’s workplace relations reform proposals were first announced in May 2005,<sup>77</sup> one aspect (in particular) was somewhat surprising. 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).<sup>78</sup> For employers with more than 100 employees, the 3 month qualifying period was to be extended to 6 months. No mention was made of any proposal for an operational reasons exclusion.

- 3.16 Such an exclusion first appeared<sup>79</sup> 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)’, and 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.<sup>80</sup> This was confirmed by the (then) Workplace Relations Minister in 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.<sup>81</sup>

- 3.17 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 Prime Minister 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.<sup>82</sup>

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<sup>77</sup> Prime Minister of Australia, *Address to Parliament: Workplace Relations Reform*, 26 May 2005, available at: <http://www.pm.gov.au/media/Speech/2005/speech1446.cfm>.

<sup>78</sup> See Pittard, above note 46; Chapman, above note 48, page 241.

<sup>79</sup> Although Chapman (above note 48, page 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.

<sup>80</sup> See Commonwealth of Australia, *WorkChoices: A New Workplace Relations System*, 9 October 2005, pages 51-52.

<sup>81</sup> Parliamentary Debates, House of Representatives, *Hansard*, Mr Andrews (Second Reading), page 21.

<sup>82</sup> See Parliamentary Debates, House of Representatives, *Hansard*, Mr Howard (in response to Question without Notice by Mr Smith), 3 November 2005, pages 82-83; see also ‘John Howard’s

- 3.18 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.<sup>83</sup>

- 3.19 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].<sup>84</sup>

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

### 3.21 Formulation of the Genuine Operational Reasons Exclusion in the WR Act

- 3.22 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.<sup>85</sup>

- 3.23 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 section 643(8)-(9) of the WR Act:

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industrial revolution', Transcript of Channel Nine 'Sunday' Program, 20 November 2005, available at: [http://sunday.ninemsn.com.au/sunday/cover\\_stories/article\\_1915.asp](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 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 have 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, pages 12-13. See also *Rio Tinto Coal Australia Pty Ltd (formerly Pacific Coal Pty Ltd) v Smith and Others* (2005) 56 AILR 100-354 (one of the many tribunal and court decisions in the seven-year Blair Athol dispute).

<sup>83</sup> Parliamentary Debates, above note 82, page 83.

<sup>84</sup> Hon Kevin Andrews MP, 'Dismissal for operational reasons', *Press Release*, 3 November 2005; see also 'Govt denies IR laws abolish unfair dismissal protection', Transcript of ABC Radio 'PM' Program, 23 March 2006, available at: <http://www.abc.net.au/pm/content/2006/s1599389.htm>.

<sup>85</sup> See para [3.6] above.

(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.

3.24 The Explanatory Memorandum gives 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'.<sup>86</sup> It also indicates 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'.<sup>87</sup>

3.25 WR Act, section 649 provides 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 – following a hearing on that issue:

(1) If:

(a) an application is made, or is purported to have been made, under subsection 643(1):

- (i) on the ground referred to in paragraph 643(1)(a); or
- (ii) on grounds that include that ground; and

(b) either:

- (i) the respondent has moved for the dismissal of the application on the ground that the application is outside the jurisdiction of the Commission because the employee's employment was terminated for genuine operational reasons or for reasons that include genuine operational reasons; or
- (ii) it appears to the Commission, on the face of all the materials before it, that the employee's employment may have been terminated for genuine operational reasons or for reasons that include genuine operational reasons;

the Commission must hold a hearing to deal with the operational reasons issue before taking any further action in relation to the application, other than dealing with a matter on the papers as provided by section 645, 646, 647 or 648.

(2) If, as a result of the hearing, the Commission is satisfied that the operational reasons relied on by the respondent were genuine, the Commission must:

- (a) if subparagraph (1)(a)(i) applies—make an order dismissing the application; or

<sup>86</sup> Explanatory Memorandum, above note 49, page 320; see also the examples at pages 321-322.

<sup>87</sup> Explanatory Memorandum, above note 49, page 320.

(b) if subparagraph (1)(a)(ii) applies—make an order dismissing the application to the extent that it is made on the ground referred to in paragraph 643(1)(a).

(3) Subject to any right of appeal to a Full Bench of the Commission, a finding by the Commission that it is not satisfied that the operational reasons relied on by the respondent were genuine is final and binding between the parties in any proceedings before the Commission.

(4) To avoid doubt, this section does not require the Commission to hold a hearing in relation to an application that has been dismissed under subsection 645(5) or 646(1).

(5) In this section:

*operational reasons* has the meaning given by subsection 643(9).

3.26 Section 649 makes it clear that, unlike some of the other jurisdictional objections to unfair dismissal claims which can be determined ‘on the papers’ (for example, the 100 employees exclusion),<sup>88</sup> a hearing *must* be held to determine whether a claim is invalid due to the operational reasons exclusion. If the AIRC is satisfied that the employee’s termination was for genuine operational reasons, then it must make an order that the unfair dismissal application is invalid.<sup>89</sup>

3.27 If an employee’s unfair dismissal claim is determined to lack jurisdiction due to the operational reasons exclusion, this does not prevent the employee from pursuing an unlawful termination claim arising out of his/her dismissal (if, for example, the employee’s dismissal was also based on a discriminatory ground under WR Act, section 659).<sup>90</sup>

### 3.28 Early Analysis of the Genuine Operational Reasons Exclusion

3.29 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*.<sup>91</sup>

3.30 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.<sup>92</sup>

<sup>88</sup> See further WR Act, section 645.

<sup>89</sup> See also Explanatory Memorandum, above note 49, page 326.

<sup>90</sup> See Explanatory Memorandum, above note 49, pages 320, 322.

<sup>91</sup> See Part 2 above.

<sup>92</sup> Chapman, above note 48, 246.

- 3.31 Munro also 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 *Amcors Limited v Construction, Forestry, Mining and Energy Union*<sup>93</sup>) 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.<sup>94</sup>
- 3.32 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.<sup>95</sup> 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.<sup>96</sup>
- 3.33 The potential for contrived business restructures was highlighted, such as in situations where it might be ‘convenient’ for employers to reduce staff who had been difficult, uncooperative, and/or union activists;<sup>97</sup> or where performance or misconduct grounds were the real motivating reason(s) for the employer’s dismissal of an employee.<sup>98</sup>
- 3.34 Several commentators raised concerns 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’<sup>99</sup> 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.<sup>100</sup>

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<sup>93</sup> (2005) 214 ALR 56.

<sup>94</sup> 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 page 146; see further Chapman, above note 48, page 247, referring to earlier case law on the meaning of redundancy including *R v Industrial Commission of SA; Ex parte AMSCOL* (1977) 16 SASR 6 and *Redundancy Test Case*, above note 45.

<sup>95</sup> Pittard, above note 48, page 231; similarly, Munro (above note 94, page 146) argued that the new exclusion ‘removes the third-party process ... by which the objective existence of a valid reason based on [operational] requirements ... could be tested and determined’.

<sup>96</sup> Pittard, above note 48, page 231; see further Chapman, above note 48, pages 246-247.

<sup>97</sup> See Rosemary Owens and Joellen Riley, *The Law of Work*, Oxford University Press, 2007, pages 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.

<sup>98</sup> Or even ‘an unsound or malicious allegation of misconduct or lack of performance’: see Chapman, above note 48, 246.

<sup>99</sup> Owens and Riley, above note 97, page 425.

<sup>100</sup> Chapman, above note 48, page 247; see also Pittard, above note 48, page 231. Dismissing employees and replacing them with independent contractors to perform the same work is now

- 3.35 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*’.<sup>101</sup> Similarly, the exclusion was described in one media report as a ‘catch all’ provision, with the Australian Council of Trade Unions (‘ACTU’) arguing that it meant that the Government ‘has in fact abolished unfair dismissal protection for every Australian worker’.<sup>102</sup> The Government strongly rejected these claims.<sup>103</sup>
- 3.36 Finally, concerns were also raised that the new operational reasons exclusion takes Australian law away from compliance with the ILO Termination of Employment Convention, which prohibits dismissal unless there is a valid reason based on an employee’s capacity or conduct or the operational *requirements* of the undertaking.<sup>104</sup>
- 3.37 Other Aspects of Economic Dismissals Regulation under Work Choices**
- 3.38 In addition to the operational reasons exclusion, the Work Choices amendments have also reduced employee protections in respect of economic dismissals in the following ways:<sup>105</sup>
- the statutory redundancy consultation provisions have been weakened, by expressly precluding the AIRC from making orders for reinstatement or the payment of compensation or severance pay;<sup>106</sup>
  - award provisions for severance pay cannot apply to employees in businesses with less than 15 employees,<sup>107</sup> and the statutory process for obtaining AIRC orders for severance pay have been repealed.<sup>108</sup>
- 3.39 While these changes are no doubt significant, the genuine operational reasons exclusion is the major feature of the new regime for regulating economic dismissals introduced by the Work Choices Act. It will therefore be the main focus of the remainder of this report, starting with the detailed examination of the relevant case law that follows in Part 4.

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prohibited by WR Act, section 902; see Anthony Forsyth, ‘The 2006 Independent Contractors Legislation: An Opportunity Missed’ (2007) 35 *Federal Law Review* (forthcoming).

<sup>101</sup> Andrew Stewart, ‘Work Choices in Overview: Big Bang or Slow Burn?’ (2006) 16 *The Economic and Labour Relations Review* 25, at page 46 (emphasis added).

<sup>102</sup> See for example ‘Govt denies IR laws abolish unfair dismissal protection’, above note 84.

<sup>103</sup> See for example above note 84.

<sup>104</sup> Termination of Employment Convention, above note 20, Article 4; see for example Munro, above note 94, page 146.

<sup>105</sup> For discussion see Chapman, above note 48, pages 248, 252-253; Pittard, above note 48, page 231.

<sup>106</sup> See WR Act, section 668.

<sup>107</sup> WR Act, section 513(1)(k) and (4); this overrides the effect of the *Redundancy Test Case*, above note 45.

<sup>108</sup> See notes 30 and 42 above. The requirement to notify mass redundancies to the CES (now Centrelink) remains: see WR Act, section 660, and WR Regulations, Chapter 2, regulation 12.9.

#### 4. CASE LAW ON THE ‘GENUINE OPERATIONAL REASONS’ EXCLUSION: MARCH 2006 – JULY 2007

##### 4.1 Introduction

4.2 Appendix One to this report shows that the AIRC considered the genuine operational reasons exclusion (in a substantive sense) in a total of 42 decisions between 27 March 2006 and 31 July 2007. 39 of these decisions were by single members of the Commission; 3 were Full Bench appeal decisions.<sup>109</sup>

4.3 The approach taken by the AIRC to the construction of the exclusion in sections 643(8)-(9) and 649 of the WR Act will now be closely examined. This discussion consists of a summary of each of the 42 decisions, framed by the two main ‘phases’ to date in which distinct approaches to the interpretation and application of the exclusion can be identified – ie before and after the AIRC Full Bench decision in *Village Cinemas* on 15 January 2007.<sup>110</sup> The principles established in the leading decisions are also highlighted.

##### 4.4 The Pre-*Village Cinemas* Case Law: March – December 2006

4.5 The first phase of AIRC decisions dealing with the genuine operational reasons exclusion started with the decision in *Koya v Port Phillip City Council*<sup>111</sup> on 13 June 2006, and continued until December 2006. During this period, some members of the Commission applied the narrow approach to the exclusion established in *Perry v Savills*,<sup>112</sup> while others either disagreed with this approach or decided the matters before them without referring to it at all.

4.6 In summary, during this first phase, the genuine operational reasons exclusion was found to be established in 7 out of 17 decisions; it was rejected in 9 decisions; and in the other decision, the issue was not determined. All of the decisions in this phase were by single members of the AIRC.

**Table 1: AIRC Decisions on Genuine Operational Reasons (GOR) Exclusion  
March – December 2006**

Employer’s GOR Objection Established	Employer’s GOR Objection Refused	Not determined	Total
7	9	1	17

<sup>109</sup> See Tables 1, 2 and 3 below.

<sup>110</sup> See above note 6, and paras [4.56-4.64] below.

<sup>111</sup> (2006) 58 AIRL 100-524.

<sup>112</sup> See above note 4.

#### 4.7 The First Genuine Operational Reasons Decision

4.8 In *Koya v Port Phillip City Council*,<sup>113</sup> Deputy President Ives dismissed the applicant's<sup>114</sup> unfair dismissal claim on the basis of the operational reasons exclusion. The employee's position as Chief Technical Officer had been made redundant following an external review of the business unit that he worked in, which led the employer to undertake a restructure. The employee had declined offers of alternative positions.

4.9 Ives DP accepted the employer's evidence that the restructure leading to the employee's termination was motivated by economic, technological, structural or similar reasons, including the need to improve management practices and customer services.[PR973045, para 31] Further, there was no evidence that the restructure and abolition of the employee's position was a sham or contrivance.[32] While the employee had raised concerns as to the unfairness of the process adopted, the Commission could only examine whether there was a genuine operational reason to abolish his position. If such a reason is established, then there is no jurisdiction to determine whether the employer's decision to terminate his employment was harsh, unjust or unreasonable.[32, 35]

4.10 Ives DP made the following further (significant) observation about the new exclusion:

The practical effect of an exclusion from jurisdiction if a genuine operational reason is among the reasons for the termination of employment is that few applications where a respondent employer claims such genuine operational reasons will be able to be dealt with beyond a jurisdictional hearing. This is so because an employee's ability to produce evidence to successfully challenge the claim that a genuine operational reason was among the reasons for termination will be beyond most employees' capabilities and resources.[29]

#### 4.11 Reading Down the Exclusion: *Perry v Savills* and the 'Logical Response' Test

4.12 *Perry v Savills*<sup>115</sup> involved the dismissal of a Finance Manager by 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.

4.13 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.[PR973103, paras 27, 36, 40]

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<sup>113</sup> See above note 111.

<sup>114</sup> References to the 'applicant' in the discussion of the case law in Part 4 of the report are to the applicant in the relevant unfair dismissal proceedings (ie the dismissed employee).

<sup>115</sup> See above note 4 (the decision was handed down on 20 June 2006).

- 4.14 However, Watson SDP considered that another step was necessary before the section 643(8)-(9) exclusion 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].[41]<sup>116</sup>

- 4.15 Applying this ‘logical response’ test, Watson SDP found that the restructure of the employee’s position (even if genuine) did not require her termination – 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.[see paras 42-44, 53-56] For these reasons, the employer’s motion to dismiss the unfair dismissal application was denied.

4.16 Decisions after *Perry v Savills* (prior to *Village Cinemas*)

- 4.17 The approach to interpreting the operational reasons exclusion outlined in *Perry v Savills* was adopted in 7 subsequent AIRC decisions (prior to *Village Cinemas*). While it could be expected that the *Perry v Savills* approach might provide greater scope for refusing an employer’s motion to dismiss, this did not always follow – in fact, the employer’s jurisdictional objection based on the operational reasons exclusion was refused on the basis of *Perry v Savills* in only 3 of these decisions, but in the other 4, the objection was upheld.

- 4.18 In a further 4 decisions, the employer’s operational reasons jurisdictional objection was refused without applying the approach in *Perry v Savills*. In 1 decision, the objection was refused despite express disapproval of the approach in *Perry v Savills*. In 2 other decisions, the jurisdictional motion was upheld without applying *Perry v Savills*.

4.19 *Genuine Operational Reasons Objection Refused on the Basis of Perry v Savills*

- 4.20 In *Springer and Cunningham v The Northcott Society*,<sup>117</sup> the employer (a disabilities charity) embarked on a restructure to increase its level of fundraising and overall financial performance. This involved the outsourcing of its ‘events’ function and (ultimately) the redundancies of the two applicants (who had made up the ‘Events Team’). Commissioner Cargill found that there

<sup>116</sup> Importantly, Watson SDP used the terminology ‘operational requirements’, rather than the wording ‘operational reasons’ found in WR Act, section 643(8)-(9).

<sup>117</sup> (2006) 58 AIRL 100-537 (1 September 2006).

was insufficient evidence that the applicants' dismissals (not merely any preceding restructuring: *Perry v Savills*) were for genuine operational reasons.[PR973840, paras 35-38] She added that:

My comments should not be taken as suggesting that matters such as these need to involve an endless parade of witnesses. However, persons with relevant, direct knowledge need to be available to provide evidence on which the Commission can make a soundly based decision. In my view that has not been provided in these matters.[39]<sup>118</sup>

- 4.21 In *Nicholson v Riviera Marine Pty Ltd*,<sup>119</sup> the applicant (a Trades Assistant-Detailer) was one of 17 employees retrenched due to a downturn in business arising from reduced boat orders and a contraction of the Australian market; employees were selected for redundancy based on their scores on a 'skills matrix'. [PR974198, para 7; see also 16, 23-24]
- 4.22 Commissioner Spencer took the view that there were genuine operational reasons for the restructure of the business unit from which the employees were made redundant. However, as the company was advertising new positions in another business unit, and these business units were divisions of the same employer (rather than separate corporate entities), the resulting termination of the applicant's employment was not necessarily for operational reasons (*Perry v Savills*). [46-50, 57] Because the company had not examined redeployment opportunities across its operations, it could not be 'safely concluded' that the termination was for genuine operational reasons. [58-59]
- 4.23 *Szekerczes-Boda v Novadale Enterprises Pty Ltd*<sup>120</sup> involved the termination of a Photographer/Manager following a sale of part of the business which was losing money; a decision was taken that work in the remaining business did not justify a full-time management role. Commissioner Harrison accepted that there were genuine operational reasons of an economic nature for the restructure. [PR974653, para 24]
- 4.24 However, Harrison C decided (applying *Perry v Savills*) that the termination of the applicant's employment was not a logical response, because alternative positions in the business were not considered. [25-27] Other relevant factors included that the employer recruited for photographers soon after the applicant's termination; other parts of the business were performing well, and there were plans to open up a new division; the applicant's skills were still useful to the company; much of his work was now being carried out by his former assistant; and there had been no consultation with the applicant about alternative positions. [28-32]<sup>121</sup>

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<sup>118</sup> See further *Kieselbach v Amity Group Pty Ltd*, below note 129.

<sup>119</sup> (2006) 58 AILR 100-555 (29 September 2006).

<sup>120</sup> PR974653 (20 November 2006).

<sup>121</sup> Harrison C's decision was overturned on appeal by an AIRC Full Bench; see below, para [4.72].

4.25 *Genuine Operational Reasons Objection Established on the Basis of Perry v Savills*

4.26 In *Prociv and Others v Bilfinger Berger Services (Australia) Pty Ltd*,<sup>122</sup> Commissioner Cargill found that the restructuring of operations by a road maintenance provider to address financial difficulties at a particular depot, leading to a reduction of positions and the redundancies of the three applicants (among others), was for genuine operational reasons of an economic and structural nature. Also relevant was a change in the contractual arrangements under which the company provided services to the motorway operator.[PR973542, para 53]

4.27 Applying *Perry v Savills*, Cargill C decided that the depot closure, redundancies, and creation of new positions (which she accepted were different from those held by the applicants):

... were not a sham or other than a logical response to genuine operational reasons. That there could have been other, equally logical, responses does not make this one any less appropriate.[54, see also 55]<sup>123</sup>

4.28 In *Organ v Climate Technologies Pty Ltd*,<sup>124</sup> the applicant was made redundant as part of an air-conditioner and hospital products manufacturer's restructure precipitated by declining product markets, falling exports to the USA, and a failure to obtain government production assistance. The restructure involved the transfer of some manufacturing operations from the company's NSW plant to another in South Australia, where production costs were lower; around 30 NSW-based employees were made redundant.[PR973801, para 9] However, the applicant argued that as the area in which he worked was continuing in operation at the NSW plant, he should not have been made redundant.

4.29 After considering both *Perry v Savills* and *Prociv v Bilfinger*, Commissioner Roberts found that there were genuine operational reasons for the termination of the applicant's employment: 'In fact, [this] case seems to typify the type of termination ... which s.643(8) ... is intended to exclude from the jurisdiction of the Commission.' [25] Importantly, Roberts C also expressed the view that the employer 'is entitled to utilise its labour force in ways which it judges to be of the most economic benefit' (for example, by retaining those employees with the best skills); and while the applicant might think that his services were still required, the company disagreed and its view is 'determinative'. [23]

4.30 *Diserens v The Allied Express Group of Companies*<sup>125</sup> involved the termination of the applicant's employment as a Sales Manager, following the employer's restructuring of the branch where the applicant was employed in

<sup>122</sup> 'Prociv v Bilfinger' (2006) 58 AILR 100-529 (14 August 2006).

<sup>123</sup> The question whether the restructuring/redundancies in question were a sham or contrivance to remove particular employees is addressed in many of the decisions on the operational reasons exclusion; see further below, para [5.35].

<sup>124</sup> (2006) 58 AILR 100-523(15) (1 September 2006).

<sup>125</sup> (2006) 58 AILR 100-540(15) (25 September 2006).

order to reduce costs and increase sales (the applicant's position had already been changed from that of Branch Manager).

- 4.31 Commissioner Cargill found that there was a genuine operational reason of an economic nature for the restructure; the employer's actions were 'a logical response' (*Perry v Savills*) to the financial situation of the loss-making part of the business.[PR974116, para 30] The employer 'could have undertaken a more assiduous search for other possible positions for the applicant', including offering him a driving position in Sydney as an independent contractor.[32] However, this may not have prevented the termination of his employment, which was based on a genuine operational reason.[34]
- 4.32 In *McPherson v Vitality Care Operations Pty Ltd t/as Bridgewater Aged Care Facility*,<sup>126</sup> Senior Deputy President Watson applied his decision in *Perry v Savills* but found that the termination of a Care Coordinator/Division 2 Registered Nurse was the logical result of a genuine restructure. There was an operational need to engage a Division 1 Registered Nurse and restructure senior positions within the aged care facility [PR974870, paras 5-7, 16-17], and (unlike in *Perry v Savills*) there were no alternative positions available.[19] The suggestion that the termination was motivated by a personality conflict was rejected.[14, 18]

4.33 *Genuine Operational Reasons Objection Refused without Applying Perry v Savills*

- 4.34 *Evans v CLB No.1 Pty Ltd t/as Wagamama*<sup>127</sup> related to the dismissal of a chef due to poor performance; the employer then claimed both performance and 'cost reduction' grounds as the reasons for termination.[PR973439, paras 31-33] Based on the terms of the termination letter, the employer's failure to pay any redundancy entitlements, and the absence of any evidence of a restructure, Senior Deputy President Hamberger decided that the termination was not for reasons that included genuine operational reasons, noting that:

The fact that an employee's poor performance might be seen as contributing to an employer's financial problems does not turn a termination on the grounds of poor performance into one for "operational" reasons.[34]

- 4.35 Commissioner Hingley refused the employer's jurisdictional objection in the first instance decision in *Carter v Village Cinemas Australia Pty Ltd*,<sup>128</sup> this decision is discussed along with the appeal decision in paras [4.56-4.64] below.
- 4.36 Deputy President Hamilton's decision in *Kieselbach v Amity Group Pty Ltd*<sup>129</sup> established further important principles regarding the evidentiary onus on an employer seeking to rely on the operational reasons exclusion. In this case, the employer introduced a new roster with reduced hours for some nursing staff

<sup>126</sup> PR974870 (7 December 2006).

<sup>127</sup> (2006) 58 AILR 100-520(34) (4 August 2006).

<sup>128</sup> (2006) 58 AILR 100-539(22) (20 September 2006).

<sup>129</sup> (2006) 58 AILR 100-556 (9 October 2006).

and offered redundancies, due to a shortfall in government funding. The applicant refused to work the reduced hours offered, leading the employer to make her position redundant.

- 4.37 Hamilton DP found that the employer had provided insufficient evidence to satisfy the Commission that operational reasons existed for the applicant's termination; rather, it had simply made assertions, for example, about the comparative level of staffing costs and funding levels.[PR973864, paras 31, 33-34, 37-38, 43-45] Noting that the onus is on the employer to prove its case on the balance of probabilities [34, 36], Hamilton DP rejected the suggestion that this might require an employer to bring 'evidence from a barrage of accountants' or 'audited statements for the last five years'. [35] However, more is required than a simple statement or assertion by the employer of the operational reasons; otherwise, the onus would effectively shift to the applicant to disprove the statement, which would be difficult as the employer usually holds all of the relevant evidence.[39-42]
- 4.38 In *Hull v Clipsal Australia Pty Ltd*,<sup>130</sup> Deputy President Jennings rejected an employer's submission that the AIRC did not have jurisdiction to determine the applicant's unfair dismissal claim. It was found that the section 643(8) exclusion does not apply to cases where an employee is dismissed for absenteeism and failure to notify the employer of absences.
- 4.39 *Genuine Operational Reasons Objection Refused – But Disapproval of the Approach in Perry v Savills*
- 4.40 *Peters v Leighton Kumagai Joint Venture*<sup>131</sup> concerned the termination of a safety representative on part of a building site when work on the project was winding down. The applicant argued that he in fact carried out the safety role across the whole project, so he should have been considered for employment in other parts of the project. Commissioner Gregor accepted that argument, finding that there were no genuine operational reasons for the termination; indeed, he described it as a 'sham'. [PR974411, para 28]
- 4.41 At the same time, Gregor C explicitly rejected the approach in *Perry v Savills*, ie that the termination must be a logical response to the employer's operational requirements. In his view, those words cannot be imported into section 643(8) and nor does that provision require operational requirements to be taken into account.[17-19] Further:

Section 643(8) is worded broadly and allows the employer to make an unfettered decision to terminate for genuine operational reasons ... In reviewing whether an employer has made a decision to terminate based on genuine operational reasons, the Commission is not authorised to go behind the ordinary natural meaning of the words. It is obliged to apply the statute as legislated by Parliament.[20]

<sup>130</sup> PR974772 (29 November 2006).

<sup>131</sup> (2006) 58 AIRL 100-543(26) (23 October 2006).

4.42 *Genuine Operational Reasons Objection Established without Applying Perry v Savills*

- 4.43 In *Nankervis v Custom House*,<sup>132</sup> Senior Deputy President O’Callaghan found that there were genuine operational reasons for the termination of a Chief Dealer Foreign Exchange, stemming from the loss making position of the employer’s Adelaide office over 8 of the previous 10 financial quarters. The need to improve profitability and reduce costs justified making the applicant’s position redundant, and merging his role with that of the Adelaide manager.[PR974401, paras 4, 10-11, 18, 23] O’Callaghan SDP also observed that:

It would be entirely inappropriate and outside the requirements of the [WR] Act for the Commission to usurp the Custom House management role by deciding which of the cost saving measures open to the employer should have been selected. It is sufficient that a reason, which in this instance is the only discernible reason for the termination of Mr Nankervis’ employment ..., relates to a genuine operational reason.[29]

- 4.44 In *Hipwell v Australian Pharmaceutical Industries Ltd*,<sup>133</sup> operational changes were made to the business in response to customer demands, increased competition, and reduced profit margins due to new regulatory arrangements. The changes included new working hours, and reduced staffing levels starting with labour hire workers.[PR974356, paras 6-11, 25] Subsequently, the applicant (a Casual Storeman) and two other employees were made redundant; the employer had selected the casuals who had worked the fewest hours in the preceding 12 months for redundancy.[26-28, 33]
- 4.45 Senior Deputy President Hamberger found that the applicant was terminated for genuine operational reasons [45], and rejected the suggestion that the applicant was terminated because he had been forthright in pursuing a pay increase/underpayment issue on behalf of the casual staff.[12-24, 46]

4.46 *Other Pre-Village Cinemas Decisions*

- 4.47 The genuine operational exclusion was also considered in *Wilkinson v Hospitality Marketing Concepts Pty Ltd*.<sup>134</sup> Commissioner Thatcher found that the operational grounds relied upon by the employer were inextricably interwoven with the applicant’s work performance; therefore the jurisdictional objection should be determined as part of the substantive hearing (ie as to whether the dismissal was harsh, unjust or unreasonable).
- 4.48 In two other decisions, it was not necessary for the AIRC to consider the employers’ jurisdictional objections based on the operational reasons

<sup>132</sup> (2006) 58 AILR 100-543(22) (19 October 2006).

<sup>133</sup> PR974356 (21 November 2006).

<sup>134</sup> (2006) 58 AILR 100-519(17) (11 August 2006).

exclusion, as the unfair dismissal claims were dismissed on the basis of the 100 employees exclusion.<sup>135</sup>

#### 4.49 Summary of the Pre-Village Cinemas Phase of AIRC Decisions

4.50 The above analysis of the decisions shows that that the *Perry v Savills* approach did not exert any significant influence on decision-makers in the AIRC, or create a major obstacle to employers seeking to utilise the genuine operational reasons exclusion. When *Perry v Savills* was applied, it more often led to the employer's operational reasons jurisdictional objection being upheld; and such motions were dismissed without applying *Perry v Savills*.

4.51 Even so, it remains the case (as indicated at para 4.6 above) that, overall, prior to *Village Cinemas*, the AIRC refused more jurisdictional objections based on the operational reasons exclusion than it upheld (9:7). However, the Commission's approach to the exclusion has altered significantly since the Full Bench decision in *Village Cinemas*.

#### **4.52 Village Cinemas and Beyond: The January – July 2007 Case Law**

4.53 The second phase of decisions dealing with the genuine operational reasons exclusion began with the AIRC Full Bench decision in *Village Cinemas*, which marked a repudiation of the 'logical response' test and other aspects of the approach in *Perry v Savills*.

4.54 The impact of the broader approach established in *Village Cinemas* has been profound. During this second phase, the genuine operational reasons exclusion was found to be established in 14 out of 22 decisions of single members of the Commission. The employers' operational reasons jurisdictional objections were refused in 6 other decisions; and the result in the other 2 decisions was inconclusive.

4.55 3 of the 22 decisions were appealed to AIRC Full Benches: in 2 of the appeal decisions, the employers' jurisdictional objections were upheld (overturning the relevant single member decisions); and in the other appeal, the operational reasons exclusion was found not to be made out (again, overturning the decision below), and a rehearing was ordered.

### **Table 2: AIRC Decisions on Genuine Operational Reasons (GOR) Exclusion January – July 2007**

[see next page]

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<sup>135</sup> *Berryman v Residential Truss Systems Pty Ltd* (2006) 58 AILR 100-487(13); *Briskey v Waminda Services*, PR974733 (22 November 2006). These two decisions do not form part of the total of 42 decisions referred to in para [4.2] above and Appendix One of this report.

**Table 2: AIRC Decisions on Genuine Operational Reasons (GOR) Exclusion  
January – July 2007**

	Employer's GOR Objection Established	Employer's GOR Objection Refused	Inconclusive	Total
Single Member	14	6	2	22
Full Bench (on appeal)	2	1	-	3
Total	16	7	2	25

#### 4.56 *Village Cinemas*

4.57 In the *Village Cinemas* case, the applicant was made redundant after 19 and a half years' service with the employer. At the time of his termination, he was Manager of the company's Doncaster cinema complex. The company had decided to close that complex after receiving a notice to vacate the premises. Initially, the applicant 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 that he could be redeployed to. The employer considered this request, but decided instead to terminate his employment.<sup>136</sup>

4.58 In the first instance decision in *Village Cinemas*,<sup>137</sup> Commissioner Hingley found that the closure of the cinema complex was 'factual and unavoidable' [PR974111, para 11] and, further, that: 'the Commission is [not] entitled to step into the shoes of the employer in the management of its business.' [18]

4.59 However, Hingley C decided that the termination of the applicant's employment was *not* for genuine operational reasons having regard to all the 'relevant considerations', including:[see 18-23]<sup>138</sup>

- he was a long-serving, multi-skilled employee who had worked at nine different locations and was 'therefore eminently redeployable';
- he was the only one of 12 staff to be made redundant;
- he was denied the opportunity to take long service leave, to see whether a vacancy might arise;
- he was not offered another position of lower status (which he would have accepted).

<sup>136</sup> See (2006) 158 IR 137 [para 6].

<sup>137</sup> See above note 128.

<sup>138</sup> Interestingly, these considerations are similar to those considered relevant in *Perry v Savills* (see para [4.15] above), although that decision was not referred to by Hingley C in his decision in *Village Cinemas*.

- 4.60 In summary, the employer did not discharge its onus to prove the motion for dismissal of the applicant's claim.[24] The reasons advanced for the applicant's termination 'do not meet the test of genuine reasons and do not conform to the intent the [WR] Act in s.643(8) seeks to convey.'[25]
- 4.61 Village appealed against Hingley C's decision, and the Federal Government intervened in the appeal proceedings in support of the employer's appeal.<sup>139</sup> 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 sections 643(8)-(9) and 649 of the WR Act.
- 4.62 In the appeal, it was argued on the employee's behalf that the closure of the cinema complex was not the reason for his termination; rather, it was the employer's refusal to allow him to take long service leave, with the failure to redeploy him or to offer him a lower position also being relevant to the assessment of whether the termination was for genuine operational reasons.<sup>140</sup> On the other hand, the company argued that as a result of the cinema closure, there was no longer a manager's position available; the closure was therefore a genuine operational reason.<sup>141</sup>
- 4.63 In a decision handed down on 15 January 2007, the Full Bench (Senior Deputy President Drake, Senior Deputy President Kaufman and Commissioner Eames) found in favour of the employer:

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 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.<sup>142</sup>

- 4.64 In reaching its decision, the Full Bench articulated the following principles as to the proper interpretation and application of the genuine operational reasons exclusion:
- The phrase 'genuine operational reason' should be given its natural meaning, having regard to the context in which it appears. It is not 'helpful

<sup>139</sup> See Mark Skulley, 'Minister steps into sacking test case', *The Australian Financial Review*, 21 November 2006.

<sup>140</sup> (2006) 158 IR 137 [para 21].

<sup>141</sup> (2006) 158 IR 137 [18].

<sup>142</sup> (2006) 158 IR 137 [38] (emphasis in original).

to analyse the expression further' or to determine whether it establishes an objective or subjective test, or something in between.<sup>143</sup>

- The Full Bench applied the dictionary meaning of 'genuine', stating that a reason for termination of employment 'can be genuine in the sense that it is real, true or authentic, and not counterfeit', although it need not be:

... valid, meaning sound, defensible or well founded in the *Selvachandran* sense. The enquiry as to validity does not arise at the stage of the Commission determining whether a reason for termination was based on genuine operational reasons.<sup>144</sup>

- 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:

To pose the question whether the termination was "a logical response to" the employer's operational requirements [*Perry v Savills*] will also not necessarily assist in determining whether the termination was for genuine operational reasons.<sup>145</sup>

- 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): 'This, 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 s.643(8).'<sup>146</sup> So, the circumstances surrounding Mr Carter's termination to which Hingley C had regard<sup>147</sup> were 'extraneous or irrelevant matters' that should not have guided his determination of whether the dismissal was for genuine operational reasons.<sup>148</sup>
- While an applicant for relief in an unfair dismissal claim bears the onus of proving the elements required to establish the claim (including that the Commission has jurisdiction in the matter), where a respondent seeks to rely on section 643(8):

... the respondent bears the evidentiary onus of persuading the Commission that the termination ... was for genuine operational reasons or for reasons that include genuine operational reasons. It is in that context that a mere assertion by an employer to that effect will usually not be sufficient to

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<sup>143</sup> (2006) 158 IR 137 [35], see also [37]

<sup>144</sup> See (2006) 158 IR 137 [26-27]; and the discussion of *Selvachandran* at paras [2.8] and [2.15] above.

<sup>145</sup> (2006) 158 IR 137 [28].

<sup>146</sup> (2006) 158 IR 137 [36].

<sup>147</sup> See above, para [4.59].

<sup>148</sup> (2006) 158 IR 137 [39]; see further [41].

discharge the evidentiary onus. What evidence will suffice will vary from case to case depending on the circumstances.<sup>149</sup>

- The Work Choices Act has ‘wrought a significant alteration to the termination of employment regime.’<sup>150</sup> Past jurisprudence, relating to whether there was a valid reason for termination based on the operational *requirements* of the business, developed in a different statutory context; in contrast:

The present Act speaks of a termination of employment *for genuine operational reasons*. Had the Parliament intended the present provision to bear the same meaning as [section 170DE(1) of the IR Act] then it could have used those words.<sup>151</sup>

#### 4.65 Reaction to the *Village Cinemas* Decision

- 4.66 The AIRC Full Bench’s decision in *Village Cinemas* was widely thought to have provided larger employers with significant latitude to use workplace restructures as a basis for dismissing staff.<sup>152</sup> Some (including the relevant Federal Labor spokesperson) suggested that the decision meant, in effect, the end of unfair dismissal claims in firms with more than 100 employees.<sup>153</sup> And although it had intervened in support of the employer and argued for a broad interpretation of the operational reasons exclusion, the Federal Government maintained that even after the *Village Cinemas* decision, employers would have to show that redundancies were driven by a commercial justification.<sup>154</sup>
- 4.67 More considered responses to the decision suggested (for example) that its importance lay in its overruling of the reasoning in *Perry v Savills*, going to the importance of the employer’s ‘operational ability’ to redeploy an employee who has been made redundant. Following *Village Cinemas*, such considerations are now irrelevant.<sup>155</sup> Further: ‘the decision effectively operates to preclude all retrenched employees from bringing an unfair dismissal claim, unless the retrenchment was a “sham”.’<sup>156</sup> Employers therefore have:

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<sup>149</sup> (2006) 158 IR 137 [40].

<sup>150</sup> (2006) 158 IR 137 [23].

<sup>151</sup> (2006) 158 IR 137 [24] (emphasis in original); see further [22], [29], [32-34] where the Full Bench also dismissed arguments that the genuine operational reasons exclusion should be interpreted consistently with the WR Act ‘freedom of association’ provisions (see WR Act, Part 16) and the ILO Termination of Employment Convention.

<sup>152</sup> See for example Adrian Rollins, ‘Employers win wider powers to sack’, *The Australian Financial Review*, 16 January 2007; Susannah Moran, ‘Shedding staff made so much easier’, *The Australian Financial Review*, 16 January 2007.

<sup>153</sup> See Rollins, above note 152; Adrian Rollins, ‘Unions to test firms’ wider sacking power’, *The Australian Financial Review*, 17 January 2007.

<sup>154</sup> Rollins, above note 152.

<sup>155</sup> Hor and Keats, above note 12, page 170.

<sup>156</sup> Hor and Keats, above note 12, page 169; see further Louise Keats, ‘No Logical Response Required: The Full Bench Explains Genuine Operational Reasons’ (2007) 20 *Australian Journal of Labour Law* 104, pages 110-111; and para [5.35] below.

‘considerable flexibility in relation to the employees they select and the procedures they follow when implementing redundancies.’<sup>157</sup>

#### 4.68 Decisions Since *Village Cinemas*

4.69 The *Village Cinemas* decision has been applied in 17 of the 24 decisions in which the genuine operational reasons exclusion has subsequently been considered. In 13 of those 17 decisions, the employer’s jurisdictional objection was upheld. The post-*Village Cinemas* decisions will now be examined. This discussion also shows that, more recently, the AIRC Full Bench decision in *Cruickshank v Priceline No 2* has had some influence (along with *Village Cinemas*) on the approach of Commission members to the operational reasons exclusion.

#### 4.70 *Genuine Operational Reasons Objection Established on the Basis of Village Cinemas*

4.71 In *Dunstan v EDS (Business Process Administration) Pty Ltd*,<sup>158</sup> the applicant’s application for an extension of time to lodge his unfair dismissal claim was refused, partly on the basis there was no jurisdiction to pursue the claim. Senior Deputy President O’Callaghan applied *Village Cinemas* to find that as the applicant’s former work function was absorbed into other roles within the organisation as part of a ‘realignment process’, there was a genuine operational reason for his dismissal.[2007 AIRC 59, para 23]

4.72 An AIRC Full Bench decided the appeal in *Novadale Enterprises Pty Ltd v Szekerczes-Boda* in favour of the employer. Commissioner Harrison’s first instance decision<sup>159</sup> was overturned, on the basis of the *Village Cinemas* decision.<sup>160</sup> No written reasons for decision were issued by the Full Bench (Senior Deputy President Harrison, Senior Deputy President Richards and Commissioner Roberts).

4.73 *Campagna v Priceline Pty Ltd*<sup>161</sup> was one of a number of AIRC decisions arising from the dismissals of 32 Priceline employees. The terminations formed part of a restructure undertaken in response to a period of turmoil in the employer’s parent company (including the suspension of trading in its shares, the appointment of a new CEO, a \$17.2 million loss of profit, and being the subject of two unsuccessful takeover attempts).[2007 AIRC 147, para 3] The applicant was one of two more highly paid Space Planners, whose employment was terminated to make way for another person to be employed on lower pay.[4]

4.74 Commissioner Simmonds agreed with and applied the reasoning of the Full Bench in *Village Cinemas*, to find that it was clear that at least one of the

<sup>157</sup> Keats, above note 156, page 111.

<sup>158</sup> [2007] AIRC 59 (30 January 2007).

<sup>159</sup> See above, paras [4.23-4.24].

<sup>160</sup> See AIRC Transcript, Appeal by Novadale Enterprises Pty Ltd, 28 February 2007.

<sup>161</sup> [2007] AIRC 147 (23 February 2007).

reasons (if not the sole reason) for the applicant's termination was a genuine operational reason.[7-8, 10] Simmonds C also stated that:

It may be, as some commentators have suggested, that it would be a rare occasion where an employer could not construct a situation where an operational reason would provide the reason, or one of the reasons for termination. In such a case it would be necessary to establish that it was not a sham. There is no suggestion in this case that the restructure of the operations, or the economic position facing the company, were shams.[9]

- 4.75 ***Cruickshank v Priceline No 1***<sup>162</sup> related to the dismissal of another of the Space Planners employed by Priceline, for the reasons outlined in para [4.73] above.<sup>163</sup> In this case, the applicant argued that because his former position (which he was told had been made redundant) had subsequently been advertised, his dismissal was a sham.[2007 AIRC 292, paras 13-15] The Commission was urged not to allow an interpretation of section 643(8)-(9) that would enable an employer to replace employees simply by showing that it needs to reduce costs.[16]
- 4.76 Commissioner Eames found that there was an economic or structural reason for the restructure leading to the applicant's dismissal; it would not have occurred if the company's financial position had been better, and it was 'at least in part, if not fully, for operational reasons'.[31-32] The company's financial difficulties and need to restructure were genuine, and there was no evidence that the applicant's dismissal was a sham or that he was targeted inappropriately.[22] Eames C stated that his decision came within, but did not extend, *Village Cinemas*. [29-30]
- 4.77 Eames C also reiterated the following points that had been made clear in *Village Cinemas*:
- the relevant WR Act provisions constitute a 'significant change' affecting unfair dismissal claims in circumstances like this case;[25]
  - '[t]he concept of an operational "reason" is much broader than the idea of an operational "requirement" (the ground which existed in previous unfair dismissal provisions)';[24]
  - '[t]he question of a "valid reason" need not be considered, when an argument is advanced regarding the termination being for operational reasons ...'. [26]

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<sup>162</sup> See above note 7 (the decision was handed down on 17 April 2007).

<sup>163</sup> Further aspects of the facts relevant to *Cruickshank v Priceline* are provided in both the first instance decision, and the appeal decision (see paras [4.114-4.119] below), ie the restructure of the company's operations was aimed at reducing costs by around \$10 million per year, half of this through reductions in employee numbers; while it was decided to retrench 32 employees, at the end of the restructure 29 employees had been made redundant; the business unit in which the Space Planners were employed was brought into another unit; prior to the redundancies there were four Space Planner positions, although only three were filled; and it was decided that the two highest earning Space Planners should be made redundant.

- 4.78 As indicated in Part 1 of this report, the decision in *Cruickshank v Priceline* triggered significant media interest (and, along with the Full Bench decision in *Village Cinemas*, it also led the VWRA to commission this report). Much of this attention focused on the capacity that *Cruickshank v Priceline* appeared to provide for employers to use the operational reasons exclusion to dismiss existing employees, and replace them with other employees on lower salaries.<sup>164</sup>
- 4.79 The Prime Minister publicly rejected that interpretation of both the decision and the exclusion:
- Operational reasons are not and should never be seen as code for saying ‘I will get rid of X because I’m paying him \$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.<sup>165</sup>
- 4.80 The Labor Shadow Minister for Industrial Relations drew attention to the fact that in *Cruickshank v Priceline No 1*, Mr Cruickshank’s total salary package 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.<sup>166</sup> However, a Priceline representative disputed the claim that the re-advertised position was the same as that previously held by Mr Cruickshank.<sup>167</sup>
- 4.81 Mr Cruickshank brought an appeal against the first instance decision of Eames C. In the appeal, a Full Bench of the AIRC decided that Eames C had not correctly applied *Village Cinemas*, and ordered the matter to be reheard. The Full Bench’s decision is examined in paras [4.114-4.119] below.
- 4.82 In *Duncan v Altshul Printers Pty Ltd*,<sup>168</sup> a part-time HR Manager was made redundant (along with 8 other employees) as part of a restructure to address a downturn of sales and profits in 2006. The remaining positions in the organisation were also re-organised, with some reallocation of duties (including those of the applicant).[2007 AIRC 286, paras 10-14] The applicant argued the employer’s business was improving, and that as none of the remaining employees could perform HR functions, she should not have been dismissed.[17-18]
- 4.83 Commissioner Lewin applied what he described as the ‘literal approach’ to the operational reasons exclusion in *Village Cinemas*, to find that there was an operational reason of an economic or structural nature for the applicant’s dismissal.[26-29] Lewin C rejected the applicant’s arguments as being

<sup>164</sup> See for example Schubert, above note 9; and ‘PM weighs into Priceline ‘operational’ sacking’, *Workforce Daily*, 24 April 2007.

<sup>165</sup> Quoted in AAP, ‘Employers need bona fide reason to sack workers: Howard’, 24 April 2007 (accessed via <http://www.cch.com.au>).

<sup>166</sup> See AAP, ‘Labor won’t allow low-wage replacements for sacked workers’, 24 April 2007 (accessed via <http://www.cch.com.au>).

<sup>167</sup> See Schubert, above note 9; and Meaghan Shaw, ‘Appeal puts sacking laws to the test’, *The Age*, 13 June 2007.

<sup>168</sup> [2007] AIRC 72 (6 February 2007).

directed at whether the employer had made the right decision about how to restructure its operations to meet market circumstances: ‘However, the merit, wisdom or appropriateness of the [employer’s] decision is not an issue for determination only its genuineness.’[32]

- 4.84 The company had ‘provided a coherent account’ of its economic history, current business circumstances, and the causes of the current situation arising from developments in the market for its goods and services.[30-31] Further, in Lewin C’s view:

While the tasks performed by Ms Duncan will continue to be performed, they will not be performed by a dedicated HR practitioner. Relevantly, that is the "job" which the employer genuinely no longer requires to be done. This ... is clearly and genuinely a part of the restructuring of the respondent's organisation for an economic reason. It is the reason for the termination of Ms Duncan's employment.[33]

- 4.85 ***Kingsley Smith v Macmahon Holdings***<sup>169</sup> involved the dismissal of a Truck Operator on a mine site, as part of a larger round of retrenchments due to the closure of the project. The applicant was not initially terminated because he was off work on workers compensation, but when he was medically certified as fit to return to normal duties, he was advised of his redundancy.
- 4.86 Commissioner Williams decided that the dismissal clearly fell within the definition of ‘operational reasons’.[2007 AIRC 336, para 50] The employer had no work for the employees, because its contract to carry out work on the mine site was terminated.[43] Applying *Village Cinemas*, Williams C found that the employer was not required (as the applicant argued) to make efforts to find him another position: ‘If the Commission determines that the reasons for termination were, or included, genuine operational reasons that is the end of the matter.’[48]
- 4.87 In ***Sperac v Global Television Services Pty Ltd***,<sup>170</sup> an Account Manager’s position was made redundant after a review of the company’s branch structure to improve economic performance. Several other positions were abolished, and the applicant’s former duties were incorporated within a new senior sales management role.[2007 AIRC 441, paras 8-9] The applicant suggested that she had been dismissed because she had agitated for a bonus.[12-13]
- 4.88 Commissioner Smith followed *Village Cinemas*, deciding that as the business changes were genuine and not a sham, the AIRC lacked jurisdiction to hear the matter.[18-19] He also indicated that he was unable to have regard to considerations such as whether the applicant had been promised another position; the company’s ‘bland understatement’ that it could have handled the dismissal better; and the company’s failure to follow its certified agreement in relation to the dismissal.[16-17]<sup>171</sup>

<sup>169</sup> [2007] AIRC 336 (14 May 2007).

<sup>170</sup> [2007] AIRC 441 (1 June 2007).

<sup>171</sup> See Susannah Moran, ‘New laws sanction sackings’, *The Weekend Australian*, 2 June 2007.

- 4.89 In *Moulang v Federal-Mogul Pty Ltd*,<sup>172</sup> Senior Deputy President Harrison found that a senior HR Consultant's dismissal was for genuine operational reasons, or for reasons that included genuine operational reasons.[2007 AIRC 453, para 40] The applicant was made redundant as part of a cost-saving restructure that involved closure of the office from which she worked, and outsourcing/re-allocation of the HR and payroll functions that formed part of her duties.
- 4.90 Applying *Village Cinemas*, Harrison SDP decided that the applicant's disagreement that the employer's decision would lead to cost reductions, did not alter her view that the reasons for dismissal were genuine. The employer led significant witness and documentary evidence to show that 'the changes were made in the bona fide belief they would be more cost effective and justified as being a more efficient way ... to operate'.[41] Suggestions by the applicant that the dismissal was a sham, because it was motivated by concern over certain personal issues that she had raised, were not supported by the evidence.[42-46]
- 4.91 Harrison SDP again found that genuine operational reasons were established in *Bell, Kirwin and Hinds v H&M Engineering and Construction Pty Ltd*.<sup>173</sup> Here, two Boilermakers and a Trades Assistant were retrenched as the employer aimed to address 'an unacceptable level of non-productive hours'. This in turn had resulted from a downturn in work and the completion of a major project, which had also led the employer to reduce overtime and the engagement of labour hire staff.[2007 AIRC 516, paras 16-24] Ultimately, it became necessary to retrench seven permanent staff (including the applicants), who were selected using a skills matrix; alternative positions were considered, but (with one exception) could not be found.[25-27, 29]
- 4.92 Harrison SDP decided that the redundancies were due to a downturn in available work; and that (following *Village Cinemas*) it was not relevant to consider the employees' views that there was work remaining that they could do, that the employer could have done more to keep them employed in another capacity, or that one of the employees had only just completed his probationary period prior to being made redundant (the latter may have been relevant if the enquiry was whether his termination was 'harsh, unjust or unreasonable').[37-39] The subsequent hiring of new employees and labour hire personnel were for new projects gained after the dismissals of the seven employees, and did not affect the genuineness of those dismissals.[33, 40]
- 4.93 *Genuine Operational Reasons Objection Established without Applying Village Cinemas*
- 4.94 In *Holmes v Downer Connect Pty Ltd*,<sup>174</sup> an extension of time application was refused – in part, because Commissioner Larkin was satisfied that the redundancies of two Team Leader positions in a restructure driven by the need

<sup>172</sup> [2007] AIRC 453 (6 June 2007).

<sup>173</sup> [2007] AIRC 516 (25 June 2007).

<sup>174</sup> [2007] AIRC 286 (19 April 2007).

to reduce overheads in response to lower work volumes, came within the genuine operational reasons exclusion.[2007 AIRC 72, paras 33-34]

4.95 *Genuine Operational Reasons Objection Refused on the Basis of Village Cinemas*

4.96 ***Owens v Whyalla Aged Care Incorporated***<sup>175</sup> involved the dismissal of a senior employee (the Manager Community Services) in an aged care facility, following an investigation into alleged bullying by the employee. The employer argued that the allegations, and the consequent resignation of another employee, meant that it had to re-organise the management structure; and there was no suitable alternative position available for the manager.

4.97 Commissioner Lewin rejected the argument that these considerations turned the termination – due to the manager’s bullying (ie misconduct) – into one based on operational reasons of a structural nature.[2007 AIRC 245, paras 56-61] Drawing a parallel with the argument in *Village Cinemas* that the reason for the employee’s dismissal was the decision not to let him take long service leave, rather than the closure of the cinema, Lewin C found that:

Conversely, in this case, the decision not to attempt to employ Ms Owens in another position elsewhere in the organisation by demotion did not convert what was otherwise a termination of her employment for a reason, misconduct, which is *not* a genuine operational reason, as defined by the [WR] Act, to one which was.<sup>176</sup>

4.98 In Lewin C’s view, to allow the employer’s argument in this case would enable employers to argue that almost any dismissal based on misconduct or poor performance is beyond the Commission’s jurisdiction, where it has not been possible or desirable to demote the employee to an alternative position: ‘such an application of the relevant statutory language would tend to absurdity and must be rejected ...’.[106-108]

4.99 In ***Mr L v The Employer***,<sup>177</sup> a Meat Worker engaged on a ‘section 457 visa’ was dismissed due to the end of his sponsorship arrangement with another company; and because of the effects of drought and the restricted availability of stock. In the AIRC proceedings, the sponsorship issue was treated separately from the question whether there was an operational reason for the applicant’s dismissal.

4.100 After referring to the *Village Cinemas* decision, Senior Deputy President O’Callaghan indicated that he was:

... unable to conclude that the termination of Mr L's employment occurred simply as part of a general reduction in staffing, consequent upon a seasonal

<sup>175</sup> [2007] AIRC 245 (12 April 2007).

<sup>176</sup> [2007] AIRC 245, at [65] (emphasis in original); see further at [69-73], and especially [74-76] on the distinction between misconduct as a reason for dismissal compared to operational reasons of an economic, technological, structural or similar nature.

<sup>177</sup> [2007] AIRC 457 (5 June 2007).

workload fluctuation. The evidence in this respect is inconclusive and inconsistent.[2007 AIRC 457, para 42]

- 4.101 O’Callaghan SDP also highlighted the employer’s failure to refute evidence brought by the applicant, showing that the employer had engaged some new overseas workers since the applicant’s termination.[41] Evidence of other steps taken by the employer, including the cancellation of overtime and labour hire arrangements, was not sufficient to demonstrate genuine operational reasons for the applicant’s dismissal.[40, 43-44] However, such a reason ‘may emerge with greater clarity in a more comprehensive proceeding’.[45-46]

4.102 *Genuine Operational Reasons Objection Refused, Partly on the Basis of Village Cinemas*

- 4.103 In *Acworth v Boeing Australia Ltd*,<sup>178</sup> a Software Engineer’s employment was terminated after he refused a re-assignment necessitated by his former role concluding on the conclusion of a project; he had also refused other offers of comparable alternative positions. The employer argued that this led it to form the view that it could no longer utilise the applicant’s skills in its work structure, and this was the operational reason for his dismissal.[2007 AIRC 413, para 41]
- 4.104 Senior Deputy President Richards considered *Village Cinemas*, which he indicated was an example of a case where the genuineness of an operational reason is fairly clear: ‘Such circumstances might be a business or business unit closure, a structural change owing to a revenue shortfall or an operational restructure driven by a business case.’[43-44]
- 4.105 However in this case, the factual matrix required further examination. This revealed that the proper characterisation of the reason for dismissal was the employee’s conduct in not acceding to the employer’s request to undertake the re-assignment.[45-49] Richards SDP acknowledged that there may be a combination of reasons at play here (the cessation of work on a particular project, leading to the employer’s direction to re-assign the employee, which was refused). On this issue, Richards SDP found that:
- ... the reasons to which the [WR] Act refers may emerge from the same circumstantial milieu. But it also appears that the Act requires the reasons to be distinguishable reasons such that the genuine operational reason can be identified as having a discrete existence.
- That is, it is only if the operational reason is a discrete reason that its necessary character or quality of genuineness is capable of being demonstrated.[57-58]
- 4.106 In the present situation, the relevant circumstances could not be disassociated; the reason relied on by the employer was ‘unavoidably causally interrelated’ with the re-assignment dispute, such that it could not constitute a discrete, genuine operational reason. The employee had been dismissed for refusing to

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<sup>178</sup> [2007] AIRC 413 (25 May 2007).

carry out a reasonable and lawful direction under his employment contract, and not the operational requirements of the business.[60-61]

#### 4.107 *Genuine Operational Reasons Objection Refused without Applying Village Cinemas*

4.108 ***Rawolle v Don Mathieson & Staff Glass Pty Ltd***<sup>179</sup> involved the termination of a Machine Operator on the ground of redundancy, because the employer's business was expanding and it required more qualified tradespersons (the applicant was not qualified). The applicant later saw a job advertisement for a very similar position to his former job, placed by a labour hire firm on behalf of his former employer.

4.109 The applicant lodged his unfair dismissal application outside the 21 day time limit (see WR Act, section 643(14)). In the hearing on the extension of time application before Commissioner Lewin, the company gave evidence/submitted that it wanted greater flexibility in its employment arrangements. This was being pursued by offering new employees AWAs (through the labour hire agency). It was further contended that the 'inflexible working conditions' of the union collective agreement under which the applicant was employed was the operational reason for his dismissal.[2007 AIRC 240, paras 12-14,18] Another reason was the applicant's inability to operate certain machinery (although he was on restricted duties with a back injury), and his lack of skills compared to the company's future needs.[15-17]

4.110 Lewin C noted that although no jurisdictional objection based on operational reasons had been lodged by the employer, he had to consider it as part of determining the 'merit' aspect of the applicant's extension of time application.[27] Without finally deciding the question, Lewin C found that there was considerable doubt whether the claim would be barred due to the operational reasons exclusion. He was not satisfied that the employer's claim that it was obtaining an economic benefit from 'pursuing the options made available to it under "*Work Choices*"', amounted to an operational reason.[28] He added that the dismissal was arguably a sham and also for a prohibited reason under the WR Act (ie the applicant's entitlement to an industrial instrument: sections 792, 793(1)(i)). If this were proven, the termination would likely be characterised as harsh, unjust or unreasonable.[29-30]<sup>180</sup> However, Lewin C reached different conclusions when the matter next came before him.<sup>181</sup>

#### 4.111 *Other Post-Village Cinemas Decisions*

4.112 In ***Ekin-Smyth and Pearmain v On-Q Human Resources***,<sup>182</sup> the applicants' extension of time applications were refused, although Senior Deputy President Richards could not finally determine whether the dismissals were based on genuine operational reasons. He applied *Village Cinemas*, but found there was

<sup>179</sup> [2007] AIRC 240 (11 April 2007).

<sup>180</sup> See also Ewin Hannan, 'Work Choices used in 'sham' layoff', *The Australian*, 8 May 2007.

<sup>181</sup> See below, paras [4.123-4.126].

<sup>182</sup> [2007] AIRC 149 (23 February 2007).

insufficient material to establish whether (or not) the changes to management structure due to budgetary constraints, and ultimate redundancies of the applicants, were genuine.[2007 AIRC 149, paras 49-55]

- 4.113 In *Harris v Torrens Transit Services Pty Ltd*,<sup>183</sup> the applicant's extension of time application was refused by Senior Deputy President O'Callaghan, partly because the employer's operational reasons objection *might* preclude consideration of the claim.[2007 AIRC 148, para 17]

4.114 *The Full Bench Decision in Cruickshank v Priceline No2*

- 4.115 The appeal decision in *Cruickshank v Priceline No 2*<sup>184</sup> was significant, in that it was only the second detailed Full Bench consideration of the genuine operational reasons exclusion. The Full Bench (Justice Giudice, Senior Deputy President Drake and Commissioner Whelan) overturned the first instance decision of Commissioner Eames, in which he dismissed Mr Cruickshank's unfair dismissal claim on the basis of the operational reasons exclusion.<sup>185</sup>

- 4.116 The Full Bench found against the appellant (Mr Cruickshank) on the first ground of appeal, that Eames C had made the wrong decision based on the evidence. In the Full Bench's view, there was evidence supporting the conclusion that there was *no* genuine operational reason for Mr Cruickshank's dismissal (ie 'that there was no "real, true or authentic reason": *Village Cinemas*). This evidence included that Mr Cruickshank's former position remained after the restructure; it was subsequently advertised internally, with the job description matching his former job; and it was then advertised on the internet, with the same salary as Mr Cruickshank was receiving (\$75,000) but not the same overall package (\$101,150). But the Full Bench decided that as Eames C's conclusions on all of the evidence were open to him, the first ground of appeal must fail.[2007 AIRCFB 513, paras 23-28]

- 4.117 However, the Full Bench upheld the second ground of appeal, that Eames C's reasons for decision were *inadequate* in that they did not explain how the various evidentiary issues were resolved. The Full Bench found that a decision under WR Act, section 649 'should ordinarily be accompanied by adequate reasons'[29], but Eames C's decision was not:

It is clear that there were conflicts in the evidence which required to be resolved by the exercise of judgment and by the apportionment of relative weight to the evidence and material before the Commission. While the Commissioner made some findings he made no intermediate findings. He moved directly to the overall conclusion that the termination of employment was not a sham and that the appellant was not targeted inappropriately. Assuming that the Commissioner decided to accept [the employer's] evidence, despite the contrary indications to which we have referred, the appellant was entitled to know why. Furthermore, in the absence of intermediate findings we are unable to be confident that the Commissioner approached the application of the test in ss.643(8) and (9) in the correct way.

<sup>183</sup> [2007] AIRC 148 (1 March 2007).

<sup>184</sup> [2007] AIRCFB 513 (27 June 2007).

<sup>185</sup> See paras [4.75-4.81] above.

It is accepted that the decision of the Full Bench in *Village Cinemas* properly sets out the nature of that test, *but it is not clear that the Commissioner in fact applied it. Whether or not a termination of employment is for genuine operational reasons, or for reasons which include such reasons, is to be ascertained by an examination of the reasons for the termination of employment in question, rather than by identifying a generalised operational need to reduce employment.* In that context the question of witness credibility may loom large ... Because the Commissioner did not indicate how important evidentiary conflicts were resolved or how he applied the statutory test, we have concluded that the reasons for decision fell short of what is required.[30; emphasis added]

- 4.118 The Full Bench upheld the appeal and quashed the first instance decision of Eames C. It ordered that Priceline’s motion to dismiss Mr Cruickshank’s unfair dismissal claim be reheard, by a different member of the Commission. However, as his lawyer stated after the Full Bench decision was handed down: ‘It’s a technical win for Mr Cruickshank, but the saga continues because he has to do it all over again.’<sup>186</sup>
- 4.119 In its decision in *Cruickshank v Priceline No 2*, the AIRC Full Bench also made several observations about the operational reasons exclusion (some, but not all, of which had been made in *Village Cinemas*), as follows:
- The operation of the exclusion in section 643(8)-(9) ‘will usually be a matter of controversy’, which is to be resolved ‘at an early stage’ under section 649 (see further below).[4]
  - To be a ‘genuine’ operational reason, ‘*the reasons advanced must be genuinely held and must be capable of withstanding reasonable scrutiny.* It would not be sufficient that an employer had a sincere belief that a termination was for operational reasons ...’, unless the reasons were also real, true or authentic.[5; emphasis added]
  - The exclusion is a ‘complete bar’ to an unfair dismissal application. Therefore, it is impermissible, when considering whether there were genuine operational reasons for a termination, to inquire whether it was harsh, unjust or unreasonable: ‘The two inquiries must be kept separate.’[6]
  - In determining whether it is ‘satisfied’ that an employer’s stated operational reasons are genuine (under section 649(2)), while the AIRC must be persuaded to that effect by evidence produced by the employer: ‘Questions of onus ... are unlikely to play a large part in the decision-making process.’[9]
  - The High Court’s decision in *General Motors-Holden’s Pty Ltd v Bowling*<sup>187</sup> (a case dealing with predecessor statutory provisions to those

<sup>186</sup> Quoted in Tracy Ong, ‘Priceline sacking: new hearing’, *The Australian Financial Review*, 28 June 2007. According to the Australian Industrial Registry, the matter has been listed for further hearing before Lewin C (the date is not yet known).

<sup>187</sup> (1976) 51 ALJR 235.

now relating to freedom of association, under which a ‘reverse onus’ of proof applied), sheds some light on the nature of the AIRC’s task under section 649(1):

To ascertain the reasons for an employer's decision to terminate an employee's employment, it is necessary to focus on the reasons, if any, advanced by the decision-maker. It is clear that the credibility of evidence given by the decision-maker may be put in issue in some cases. If this occurs the Commission will be required to evaluate the evidence given by the decision-maker against the other evidence and the circumstances overall in the usual way.[14]

4.120 *Genuine Operational Reasons Objection Established on the Basis of Village Cinemas and/or Cruickshank v Priceline No 2*

- 4.121 In *Smith v Georgiou Group Pty Ltd*,<sup>188</sup> the applicant was dismissed when work on a construction project in Port Kembla was wound down as the project came to an end. Commissioner Harrison found that the dismissal was for genuine operational reasons (the employer’s need to demobilize some of its workforce). Following *Village Cinemas*, the personal circumstances of the applicant were irrelevant (eg the fact that he and his wife had relocated to Port Kembla and rented out their house in Melbourne, on the basis that the employment would be for 15 months).[2007 AIRC 582, 22-25]
- 4.122 In *Moschatos v Aero-Care Flight Support Pty Ltd*,<sup>189</sup> the employer lost the contract to provide ground-handling services for United Airlines at Sydney Airport, leading to a reduction in its workforce. The applicant was made redundant, even though she was employed on servicing Singapore Airlines (not United). Applying *Village Cinemas*, Commissioner Raffaelli decided that it was ‘beside the point’ that the employer had chosen ‘to review its entire employee group’ following the loss of a large part of its business. If it had not lost the United contract, there would have been no terminations. There was therefore a genuine operational reason for the dismissal.[2007 AIRC 630, paras 10-13]<sup>190</sup>
- 4.123 Commissioner Lewin had allowed the applicant’s extension of time application in *Rawolle v Don Mathieson & Staff Glass Pty Ltd*, in part by finding (on an interim basis) that there were no genuine operational reasons for the dismissal.<sup>191</sup>
- 4.124 However, when Lewin C came to determine the employer’s subsequent motion to dismiss on the basis of the operational reasons exclusion, he found in the employer’s favour.<sup>192</sup> Further evidence was provided that the company had suffered a downturn of work and financial losses, leading to cost reductions, a restructure, and redundancies (including the applicant). In selecting employees for redundancy, the company tried to retain those with the

<sup>188</sup> [2007] AIRC 582 (13 July 2007).

<sup>189</sup> [2007] AIRC 630 (30 July 2007).

<sup>190</sup> See also *Perkins v Aero-Care Flight Support Pty Ltd* [2007] AIRC 632 (1 August 2007).

<sup>191</sup> See paras [4.108-4.110] above.

<sup>192</sup> See [2007] AIRC 446 (29 June 2007).

highest skills. The applicant disputed this, and argued that the real reason for his dismissal was that he was covered by a union collective agreement; a prohibited reason under the WR Act could not be an operational reason under section 643(8)-(9).

- 4.125 Applying the *Village Cinemas* test of what constitutes a ‘genuine’ operational reason (ie real, true or authentic, not counterfeit), and that in *Cruickshank v Priceline No 2* (ie capable of withstanding reasonable scrutiny), Lewin C found that the applicant’s dismissal was for several reasons – some of which could be described as structural or economic in nature.[2007 AIRC 446, paras 76-79] Although the operation of the certified agreement applicable to the applicant’s employment was *one* of the reasons for his termination, so too were the economic and structural considerations identified.[82] The company:

... was faced with changed market conditions which led to its restructuring of the component parts of its business and undertaking so that persons who had normally been employed as glaziers were deployed as production workers. For associated economic reasons, it reduced the number of production workers to make room for the glaziers, rather than incur the costs of the effective addition to the production workforce caused by the deployment of the glaziers. It was then necessary to decide whose employment would be terminated.

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 which would become available under Work Choices* when employing persons to work in production when an upturn in the business enabled the glaziers to use their skills as glaziers and return to that function. ...[84-85; emphasis added]

- 4.126 However, Lewin C was swayed (‘although not strictly bound’) by the ‘literalist approach’ in *Village Cinemas* to find that because economic or structural reasons were ‘included’ in the reasons for the termination, the operational reasons asserted by the company were not a sham. In reaching this view, Lewin C also took into account that there was no evidence that the applicant’s former job was now being performed by anyone.[87, 89] He also added that a ‘purposive approach’ to the operational reasons exclusion could have led to a different result.[88] Finally, whether the termination was for a prohibited reason under the WR Act would be a matter for the Federal Court to determine.[90-91] The union representing Mr Rawolle (the CFMEU) indicated that it would appeal against Lewin C’s decision,<sup>193</sup> and (according to the Australian Industrial Registry) an appeal has been lodged.
- 4.127 In *Bourke v Corporation of the Diocesan Synod of North Queensland operating St Mark’s College as a Charitable Trust*,<sup>194</sup> a Purchasing and Functions Coordinator was made redundant when her position was abolished and her functions re-allocated to existing and new staff in order to re-align the college’s work structures. She was invited to apply for a kitchen hand position,

<sup>193</sup> See Ewin Hannan, ‘Unions to fight on over sacking’, *The Australian*, 9 July 2007.

<sup>194</sup> [2007] AIRC 564 (9 July 2007).

but she did not attend for interviews. Applying *Village Cinemas*, Commissioner Richards found that the applicant's dismissal was for genuine operational reasons. A new manager had addressed sub-optimal organisational structures and related job designs, in order to increase the efficiency of the college's operations.[2007 AIRC 564, para 55]

- 4.128 Again following *Village Cinemas*, Richards C refuted the applicant's suggestion that the college's failure to re-appoint her to a new position impugned the asserted operational reasons for her dismissal. Richards C stated further, in relation to the view expressed in *Cruickshank v Priceline No 2* that there is no scope (under section 643(8)-(9)) to consider whether a termination was harsh, unjust or unreasonable:

This is not to say that the conduct of the employer in dealing with the Applicant should not be considered. It should and has been. The reason for this is such conduct may shed some light on the employer's motives and find some interconnection with other evidence to assist the Commission in satisfying itself that the reason or a reason for the termination of the employee's employment was genuine.[66; see further 67-74]

4.129 *Genuine Operational Reasons Objection Established without Applying Village Cinemas or Cruickshank v Priceline No 2*

- 4.130 In *Daly v Beleyre Holdings Pty Ltd t/as Bel Ayre Tavern*,<sup>195</sup> the applicant was dismissed from her day time bar job due to changes in State liquor licensing laws which required an approved manager to be on duty during all operating hours. The employer did not consider her to be suitable to become an approved manager. Deputy President McCarthy accepted that the change of management personnel due to legislative changes led to 'a surplus of coverage for day time hours' in the hotel, and that the resultant termination of the applicant's employment was for a genuine operational reason.[2007 AIRC 546, paras 13, 16]

4.131 *Genuine Operational Reasons Objection Refused on the Basis of Village Cinemas and Cruickshank v Priceline No 2*

- 4.132 *Moxham v Baxter Business Pty Ltd*<sup>196</sup> involved the dismissal of an administrator from a bin hire company because her position had become surplus to the operational needs of the business, and the role had been restructured to create internal efficiencies and reduce costs. This formed part of a broader reorganisation following a change in the ownership of the business, including the rationalisation of administrative functions onto one site (rather than two). However, the applicant felt that personal considerations had motivated the decision to dismiss her, including her receipt of a first and final warning only a month earlier, and the relationship between her manager and a woman whom the applicant claimed had replaced her.

<sup>195</sup> [2007] AIRC 546 (5 July 2007).

<sup>196</sup> [2007] AIRC 488 (18 July 2007).

- 4.133 Applying *Village Cinemas* and *Cruickshank v Priceline No 2*, Senior Deputy President Lacy found that the evidence did not establish that the termination was a sham or contrivance [2007 AIRC 488, para 30]; however, there was no probative evidence of the employer's contention that there were reasons of an economic nature for the structural change. It was only shown that there had been a serious budget deficit for one month; other economic data (eg budgeted and year-to-date profits) were far more positive.[36; see also 37] Lacy SDP went on to state that:

... more is needed to establish an economic imperative for structural change than a snapshot of a one month deficit in the context of a year of plenty and an increased budget. *At the very least one would expect to see some analysis of the data for the past year in the context of projections for the future.*[38; emphasis added] ...

The absence of any minutes of meetings at which discussions about internal efficiencies were said to have taken place is difficult to understand. *There is no paper trail at all* to show any rational analysis of the resources necessary to achieve the so-called desired internal efficiencies.[41; emphasis added]

- 4.134 Lacy SDP also found that an internal management directive to create 'internal efficiencies' did not suggest any need for redundancies, and: 'the real structural issue for [the employer] arose from managerial dysfunction in controlling the two sites.'[39] He was satisfied that there was an imperative for structural change in the employer's business, but not that there was a genuine operational reason for the dismissal of the applicant.[40] Further: 'There is no probative evidence to establish any *nexus* between that structural imperative and the termination of Ms Moxham's employment.'[43; emphasis added]

- 4.135 In *Brown v Macedon Ranges Shire Council*,<sup>197</sup> Commissioner Whelan found that the dismissal of an IT Programmer/Analyst was not for genuine operational reasons. The applicant was made redundant following two external reports on the council's IT department, which recommended the appointment of new staff with certain skills but did not suggest any existing staff should be made redundant. The proposal for a restructure and two redundancies, including the applicant, was made by his supervisor and was motivated by her antagonism towards him after an irretrievable breakdown in their working relationship. Applying the tests in *Village Cinemas* and *Cruickshank v Priceline No 2*, Whelan C could not be satisfied that the applicant's dismissal was driven by the technological or structural needs of the council.[2007 AIRC 524, paras 117-119]

#### 4.136 Summary of the Post-Village Cinemas Phase of AIRC Decisions

- 4.137 As indicated above, the *Village Cinemas* decision has resulted in a marked shift in the AIRC's approach to the operational reasons exclusion, leading to greater rates of success for employers seeking to rely upon the exclusion. These matters are explored further in Part 5 below.

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<sup>197</sup> [2007] AIRC 524 (20 July 2007).

## **5. ANALYSIS AND CONCLUSIONS: IMPACT OF THE NEW FRAMEWORK FOR REGULATING ECONOMIC DISMISSALS UNDER WORK CHOICES**

### **5.1 Introduction**

5.2 As indicated in Part 1 of this report, the VWRA asked me to examine the overall impact of the new statutory provisions regulating economic dismissals introduced by the Work Choices Act – in particular, the *fairness and appropriateness* of the provisions, including the following specific aspects:

- (i) the exclusion from the unfair dismissal jurisdiction of persons employed in businesses of 100 or fewer employees;
- (ii) the removal of the requirement that there be a ‘valid reason’ for the termination;
- (iii) the broad definition of ‘operational reasons’, and the fact that the exemption applies to dismissals for ‘mixed’ personal and business reasons;
- (iv) the inability to challenge dismissals which are made on genuine economic grounds but which are effected in a procedurally unfair manner;
- (v) the possibility of abuse (for example, by employers providing spurious economic grounds for dismissals that are in fact motivated by other reasons).

5.3 My conclusions on these issues, and other matters going to the practical impact of the genuine operational reasons exclusion in sections 643(8)-(9) and 649 of the WR Act, are set out below. These conclusions are based on the detailed study of the case law in Part 4 of the report.

### **5.4 To What Extent, and How Successfully, Are Employers Relying on the Genuine Operational Reasons Exclusion?**

5.5 As indicated in Part 4 and Appendix One to the report, the AIRC considered the genuine operational reasons exclusion in a total of 42 decisions between 27 March 2006 and 31 July 2007.<sup>198</sup> 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.

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<sup>198</sup> No citation details for these decisions are provided in this Part of the report; these can be found in the more extensive treatment of the decisions in Part 4 and Appendix One.

- 5.6 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/her unfair dismissal claim, proceeding to conciliation and ultimately arbitration in the AIRC if necessary.<sup>199</sup> It should also be remembered that the employer 'success rate' in genuine operational reasons cases has increased significantly since the Full Bench decision in *Village Cinemas* (see further para [5.34] below).

**Table 3: Outcomes of AIRC Matters relating to Genuine Operational Reasons (GOR) Exclusion: March 2006 – July 2007**

Employer Won (GOR Objection Established)	Employee 'Won' (GOR Objection Refused)	Inconclusive/ Not determined	Total
23 (57.9%)	12* (34.2%)	3 (7.9%)	38

[\* this includes the Full Bench decision in *Cruickshank v Priceline No 2*, in which a rehearing on the GOR issue was ordered]

- 5.7 That the genuine operational reasons exclusion has generated only 42 decisions in almost 18 months may tend to suggest that the exclusion is not being relied upon as extensively by employers as may have been expected. However, the number of cases coming before the AIRC cannot in any way provide an accurate reflection of the extent of employers' reliance on the exclusion. In fact, this neatly demonstrates the whole point of the exclusion: as indicated in a number of the decisions examined in Part 4, it operates as a complete bar to an employee bringing an unfair dismissal claim.<sup>200</sup> And because the exclusion is worded, and is being interpreted, very broadly, this is bound to have some 'dampening' effect on the number of employees lodging unfair dismissal claims.
- 5.8 Although it may not be possible to measure the precise extent to which this is occurring, some indication is provided by the *overall* fall in the number of termination of employment applications (unfair dismissal *and* unlawful termination) lodged with the AIRC in the first year of Work Choices.<sup>201</sup> 4,998 applications were lodged in the year 27 March 2006-26 March 2007; down from 6,127 in the preceding year. The fall was even more pronounced in Victoria: 1,994 applications lodged in 2006-2007, down from 3,688. The new operational reasons exclusion, along with the 100 employees exclusion and other exclusions introduced by the Work Choices Act, must be contributing to this decline.

<sup>199</sup> 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.

<sup>200</sup> See eg the AIRC Full Bench's decision in *Cruickshank v Priceline No 2*.

<sup>201</sup> The following figures are obtained from Justice Giudice, President of the AIRC, *Opening Address to the Industrial Relations Society of Australia National Conference*, Canberra, 30 March 2007, available at: [http://www.airc.gov.au/about\\_the\\_commission/speeches/giudicej300307.htm](http://www.airc.gov.au/about_the_commission/speeches/giudicej300307.htm).

- 5.9 Evidence is also emerging, indicating that the changes to unfair dismissal laws introduced by Work Choices have left employees feeling more vulnerable to managerial fiat and adverse decisions affecting their job security.<sup>202</sup>
- 5.10 It is also difficult to measure the extent to which the operational reasons exclusion may be leading employers to dismiss staff on the basis of restructuring and redundancies. However, there appears to be a *perception* among employers and the business community that they now have much greater freedom to dismiss workers. For example, the ACTU notes that: ‘a prominent legal adviser to big business has ... been reported publicly as saying that any large business that sacks any worker for anything but ‘operational reasons’ would be crazy.’<sup>203</sup>
- 5.11 This perception is reinforced by the observation of Simmonds C of the AIRC, in *Campagna v Priceline Pty Ltd*, that: ‘It may be ... that it would be a rare situation where an employer could not construct a situation where an operational reason would provide the reason, or one of the reasons for the termination.’
- 5.12 In addition to the matters that have come before the AIRC in the last 18 months where employers have sought to rely on the genuine operational reasons exclusion, the following instances of businesses sacking workers for ‘operational reasons’ (or similar reasons) have been reported:
- Cowra Abattoir dismissed 29 employees and offered to re-engage them as contractors;<sup>204</sup>
  - Optus made 60 workers redundant, with the dismissed workers invited to re-apply for their jobs as independent contractors;<sup>205</sup>
  - Vopak Terminals sacked 12 employees, with new workers engaged under AWAs on substantially lower pay;<sup>206</sup> this also (allegedly) occurred following the dismissal of workers from the Mobil Bagot Road petrol station in Darwin;<sup>207</sup>
  - Pele Curtains in suburban Melbourne made 9 long-serving workers redundant without paying severance pay or long service leave entitlements.<sup>208</sup>

<sup>202</sup> See eg David Peetz, *Assessing the Impact of ‘WorkChoices’ One Year On*, Report to Department of Innovation, Industry and Regional Development, Victoria, 19 March 2007, pages 20-24; Sara Charlesworth and Fiona Macdonald, *Going too far: Workchoices and the experience of 30 Victorian workers in minimum wage sectors*, Report for Industrial Relations Victoria/Department of Innovation, Industry and Regional Development, July 2007, pages 13-18; Jude Elton and Barbara Pocock, *Not fair, no choice: The impact of WorkChoices on twenty South Australian Workers and their households*, A report to SafeWork SA and The Office for Women, July 2007.

<sup>203</sup> ACTU, *One Year On: The impact of the new IR laws on Australian working families*, 27 March 2007, page 21.

<sup>204</sup> This was the well-publicised first example of mass sackings under Work Choices: see eg ‘Cowra Abattoir becomes Work Choices Battleground’, *Workplace Express*, 3 April 2006; and para [5.67] below.

<sup>205</sup> ‘Optus denies sackings due to Work Choices’, *Workplace Express*, 11 April 2006.

<sup>206</sup> Justine Ferrari, ‘Union blasts port workers’ sackings’, *The Australian*, 28 April 2007.

<sup>207</sup> AAP, ‘Busload workforce takes over jobs’, *The Australian*, 30 July 2007.

<sup>208</sup> Meaghan Shaw, ‘Sacked curtain factory workers owed up to \$10,000 each’, *The Age*, 29 June 2007.

- Melbourne City Council recently made 100 staff redundant, then re-advertised many of the positions at lower pay rates.<sup>209</sup>

5.13 It is also noted that the number of AIRC decisions considering the operational reasons exclusion has increased since the start of this year. There were 17 decisions in nine months in 2006; and 25 decisions in the first seven months of 2007 (see further Table 4 and Appendix One below).

#### **5.14 The 100 Employees Exclusion**

5.15 The exclusion from the unfair dismissal jurisdiction of employees in firms with 100 or less employees (see paras [3.6] and [3.22] above) means that workers in small to medium-sized businesses have no avenue of redress for unfair dismissal – regardless of whether the reasons for dismissal are related to poor performance, misconduct or the operational requirements of the business (or operational reasons).

5.16 The impact of the 100 employees exclusion is extensive: it has been estimated that 62% of the Australian workforce (4.2 million employees) no longer have access to unfair dismissal claims as a result of this exclusion.<sup>210</sup> According to the ACTU (drawing on ABS data on the number of private sector employers with more than 100 staff), employees in 99% of private sector businesses (more than 575,800 workplaces) have lost protection from unfair dismissal.<sup>211</sup>

5.17 The 100 employees exclusion has been applied to prevent employees from bringing unfair dismissal claims in many AIRC decisions.<sup>212</sup>

#### **5.18 The Removal of the ‘Valid Reason’ Requirement**

5.19 As outlined in Part 2 of the report, the requirement that an employer have a valid reason for an employee’s dismissal – based on the employee’s capacity or conduct, or the operational requirements of the business – was a key element of the Federal unfair dismissal regime between 1993 and 2005. It meant that employers had to *prove* that there were sound, defensible and well-founded reasons for sacking an employee (see *Selvachandran*, above paras [2.8] and [2.15]). In that sense, the valid reason requirement acted as a bulwark against capricious or arbitrary dismissal – or what is described in the United States as the concept of ‘employment at will’.<sup>213</sup>

5.20 As explained in Part 3, Work Choices’ removal of the valid reason requirement follows from the introduction of the genuine operational reasons

<sup>209</sup> Clay Lucas, ‘Union fury as So axes council jobs’, *The Age*, 9 August 2007.

<sup>210</sup> Parliament of Australia, Department of Parliamentary Services, *Bills Digest: Workplace Relations Amendment (Work Choices) Bill 2005*, 2 December 2005, No. 66, 2005-06, page 61.

<sup>211</sup> ACTU, above note 203, page 20.

<sup>212</sup> See eg *Baldacchino and Others v Triangle Cables (Aust) Pty Ltd* (2006) 58 AILR 100-477(18); *Tomaz v Copy Cat Costumes Pty Ltd* (PR973289, 10 July 2006); *Fullston v D & V Services Pty Ltd*, [2007] AIRC 565 (9 July 2007); and the cases referred to in note 135 above.

<sup>213</sup> That is, the doctrine prescribing that an employee can ‘be hired or fired for any reason or no reason at all’: see Mark A Rothstein et al, *Employment Law*, West Publishing Co, St Paul, Minn, 1994, pages 9-11.

exclusion. Under the new provisions, the former focus on whether there was a valid reason for termination has been replaced by consideration of whether the employer's asserted operational reasons were really 'genuine'.

- 5.21 This has led to explicit rejection, by the AIRC Full Bench in *Village Cinemas*, of the *Selvachandran* test – so that the inquiry is no longer whether the reasons for dismissal were valid (ie sound, defensible or well-founded), but whether they were *genuine*, ie *real, true or authentic, and not counterfeit*. The Full Bench in *Cruickshank v Priceline No 2* added that the reasons advanced by an employer must not only be genuinely held, but must also be *capable of withstanding reasonable scrutiny*.
- 5.22 Watson SDP's attempt in *Perry v Savills* to link the 'genuineness' component of section 643(8) to the termination of the employee, rather than just to the operational reasons for the dismissal, was short-lived – as was his reasoning that the termination must be a 'logical response' to the operational needs of the business. This approach was rejected in *Peters v Leighton Kumagai Joint Venture*, then by the Full Bench in *Village Cinemas* (see further paras [5.29-5.30] below). Lacy SDP's recent decision in *Moxham v Baxter Business Pty Ltd* arguably amounts to an attempt to resurrect the *Perry v Savills* logical response test in another guise. However, if that is the case, its prospects of surviving further Full Bench consideration of the operational reasons exclusion are likely to be minimal (see further paras [5.75-5.76] below).
- 5.23 The upshot of removing the valid reason requirement is a significant enhancement of employer freedom to dismiss employees, as long as an operational reason can be shown. As Gregor C observed in *Peters v Leighton Kumagai Joint Venture*, the operational reasons exclusion 'is worded broadly and allows the employer to make an unfettered decision' to dismiss for operational reasons.
- 5.24 The operational reasons exclusion provides a substantial boost to managerial prerogative. Time and again, members of the Commission determining matters arising under the exclusion expressed the view that it must be left to management to decide what restructuring measures may be appropriate for their business, which employees should be made redundant, how best to utilise the workforce, what changes are necessary to improve efficiency, etc.<sup>214</sup> The rights of management were also recognised in cases dealing with the pre-Work Choices unfair dismissal provisions. However, important safeguards for workers were also built into those provisions, ie the valid reason requirement and the various 'procedural fairness' obligations imposed on employers (see paras [5.45-5.51] below). These protections have now been removed.

## 5.25 The Broad Definition of 'Operational Reasons'

- 5.26 As indicated in Part 3 of the report, many commentators expressed concerns about the apparent breadth of the genuine operational reasons exclusion at the

<sup>214</sup> See eg *Organ v Climate Technologies Pty Ltd*; *Nankervis v Custom House*; *Village Cinemas* (Hingley C at first instance); *Duncan v Altshul Printers Pty Ltd*; *Moulang v Federal-Mogul Pty Ltd*.

time of, or soon after, the passage of the Work Choices Act. Comparisons were made between the new operational reasons exclusion, and the former statutory provisions under which employers had to show that dismissals were necessitated by the ‘operational requirements’ of the business. ‘Operational reasons’, it was thought, would be a much easier hurdle for employers to jump.

- 5.27 The case law examined in Part 4 clearly illustrates that these fears have been realised – in fact, they may even have been surpassed. The operational reasons exclusion – already broad on its plain terms – is being interpreted very widely, and is being 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.
- 5.28 The distinction between the former and new statutory terminology was recognised by the Full Bench in *Village Cinemas*, which suggested that previous case law considering the term ‘operational requirements’ has no application in respect of the new exclusion based on ‘operational reasons’.
- 5.29 The *Village Cinemas* case illustrates the extent of the breadth in the prevailing approach to interpretation of the exclusion. The Full Bench focused exclusively on the circumstances of the cinema complex closure as *the* reason for Mr Carter’s dismissal. It rejected the idea that other factors may have intruded (and become the real reason for dismissal) – such as the employer’s refusal to allow Mr Carter to take long service leave, to see if another position might arise to which he could be redeployed.
- 5.30 Further, the Full Bench in *Village Cinemas* expressed the view that an employee’s dismissal does not have to be an *unavoidable consequence* of the operational reason – the latter just has to be a *ground or cause* for termination. This takes the current legal test for employers seeking to justify economic dismissals a long way away from previous statutory formulations, which required a closer connection to be established between the operational needs of the business and the redundancies/dismissals that followed.
- 5.31 The important element of the *necessity* of the employer’s restructuring measures (flowing from the former statutory language of ‘operational requirements’) has been taken out of the equation.<sup>215</sup> Nor does it have to be shown, any longer, that the position or job previously performed by a dismissed employee is no longer being done by anyone (the traditional test of ‘redundancy’; see para [3.31] above).<sup>216</sup>

<sup>215</sup> The case law on the former statutory provisions indicated that the dismissal(s) must be *necessary to advance the undertaking*: see above, para [2.9].

<sup>216</sup> See eg the Full Bench decision in *Cruickshank v Priceline No 2*, where it was recognised that the former employee’s position remained after the restructure and had been re-advertised; see further paras [5.54-5.57] below. It should also be noted that the AIRC does sometimes have regard to the traditional test for redundancy, when considering whether the operational reasons exclusion applies: see eg *Duncan v Altshul Printers Pty Ltd*.

- 5.32 The Full Bench in *Cruickshank v Priceline No 2* endorsed the approach in *Village Cinemas*, although adding that:

Whether or not a termination of employment is for genuine operational reasons ... is to be ascertained by an examination of the reasons for the termination of employment in question, *rather than by identifying a generalised operational need to reduce employment*.

- 5.33 However, a number of the decisions – both before and since *Cruickshank v Priceline No 2* – have involved situations where the employer has implemented restructuring and redundancies that could be described as being based on ‘a generalised operational need to reduce employment’ (see further para [5.40] below).
- 5.34 The Full Bench decision in *Village Cinemas* has had enormous implications for the subsequent operation of the exclusion. While employers were marginally less successful than employees in operational reasons decisions prior to *Village Cinemas*, the application of the broader approach established in that decision has led to a far greater number of operational reasons cases being decided in favour of employers.

**Table 4: AIRC Decisions<sup>217</sup> relating to  
Genuine Operational Reasons (GOR) Exclusion,  
March – December 2006 and January – July 2007 Compared**

	Employer’s GOR Objection Established	Employer’s GOR Objection Refused	Inconclusive/ Not determined	Total
March-Dec 2006	7	9	1	17
Jan-July 2007	16	7	2	25
Total	23	16	3	42

- 5.35 After *Village Cinemas*, a dismissed employee is left with having to show that an employer’s purported operational reasons were a sham or contrivance. While this possibility was recognised in *Campagna v Priceline Pty Ltd* (among other cases), the difficulties for employees in making out a case that their dismissal was a sham is illustrated by the first instance and appeal decisions in *Cruickshank v Priceline*. The notion that Mr Cruickshank’s redundancy was a sham was rejected by Eames C; the Full Bench found that he had not provided sufficient reasons for this conclusion; and the matter has now been referred for rehearing (see further paras [5.54-5.57] below).

<sup>217</sup> The distinction between the number of *decisions* relating to the genuine operational reasons exclusion, and the number of *matters*, is explained in para [5.5] above; see also Table 3.

- 5.36 This highlights another aspect of the unfairness of the new operational reasons exclusion. When the operational reasons jurisdictional issue is reheard, Mr Cruickshank will have had to go through three AIRC hearings – just to determine whether or not he is able to bring his unfair dismissal claim. He was dismissed on 3 November 2006 (over nine months ago). But it will only be in the event that he succeeds at the next stage, that the Commission can begin to consider the *merits* of his claim – ie was he unfairly dismissed, or not? This is a cumbersome, lengthy and potentially expensive process for employees, raising (in turn) significant ‘access to justice’ issues.<sup>218</sup> It contrasts unfavourably with the process applicable under the former statutory provisions, where the question whether there were operational requirements for the dismissal was dealt with as part of the overall unfair dismissal proceedings.
- 5.37 Of course, another very important feature of the wording of the genuine operational reasons exclusion is that it permits dismissals for reasons that *include* operational reasons. And the operational reason does not have to be a dominant or motivating reason, just *one* of the reasons for dismissal.
- 5.38 The full effect of that wording was demonstrated by Lewin C’s second decision in *Rawolle v Don Mathieson & Staff Glass Pty Ltd*. There, it was found that although one of the reasons for the employee’s dismissal was that he was engaged under a union collective agreement, and the employer wanted to utilise the flexibilities offered by Work Choices, economic and structural reasons were also included among the reasons for dismissal – thus attracting the operational reasons exclusion (see further paras [5.58-5.67] below).
- 5.39 Another case involving more than one reason for dismissal was *Acworth v Boeing Australia Ltd*, where the employee was dismissed for refusing to accept a re-assignment on the completion of a project. The employer argued that this meant there was no longer a position for him in the organisational structure. Richards SDP concluded that the real reason for dismissal was misconduct (ie the employee’s refusal to accept the employer’s direction), and while there may have been a combination of reasons at play, it was necessary to identify a *discrete* operational reason. In my view (with respect), this interpretation ignores the language of section 643(8)-(9) permitting dismissals for reasons that *include* genuine operational reasons.
- 5.40 The cases 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 section 643(9).<sup>219</sup> The others include ‘structural’ and ‘technological’ reasons, and the cases demonstrate that organisational restructures driven simply by a general desire to improve

<sup>218</sup> For example, Mr Cruickshank may not have been able to pursue his claim had he not obtained ‘pro bono’ legal representation in the appeal proceedings.

<sup>219</sup> However, where an employer seeks to rely on economic reasons as the basis for the exclusion, it must adduce probative evidence in support of this contention: see *Moxham v Baxter Business Pty Ltd*, paras [5.73-5.74] below.

efficiency or ‘streamline’ staffing structures will attract the operation of the exclusion.

- 5.41 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 genuine operational reasons exclusion are summarised in the following table.

**Table 5: Types and Causes of Restructuring Found by AIRC to Fall Within Genuine Operational Reasons Exclusion**

<b>Type/Cause of Restructuring</b>	<b>Decisions</b>
Internal or external review of business unit/organisation leading to restructure of positions	<ul style="list-style-type: none"> <li>• <i>Koya v Port Phillip City Council</i></li> <li>• <i>Sperac v Global Television Services Pty Ltd</i></li> </ul>
Need to improve management procedures and customer services	<ul style="list-style-type: none"> <li>• <i>Koya v Port Phillip City Council</i></li> </ul>
Closure of site or completion of project	<ul style="list-style-type: none"> <li>• <i>Provic and Others v Bilfinger Berger Services (Australia) Pty Ltd</i></li> <li>• <i>Village Cinemas</i></li> <li>• <i>Kingsley Smith v Macmahon Holdings</i></li> <li>• <i>Smith v Georgiou Group Pty Ltd</i></li> <li>• <i>Bell, Kirwin and Hinds v H &amp; M Engineering and Construction Pty Ltd</i></li> </ul>
Customer demands, increased competition, declining profits due to new regulatory arrangements	<ul style="list-style-type: none"> <li>• <i>Hipwell v Australian Pharmaceutical Industries Ltd</i></li> </ul>
Cost reductions to address financial difficulties and lower work volumes; and/or need to improve sales or other performance	<ul style="list-style-type: none"> <li>• <i>Provic and Others v Bilfinger Berger Services (Australia) Pty Ltd</i></li> <li>• <i>Holmes v Downer Connect Pty Ltd</i></li> <li>• <i>Diserens v The Allied Express Group of Companies</i></li> </ul>
Downturn in work, financial losses, changed market conditions	<ul style="list-style-type: none"> <li>• <i>Rawolle v Don Mathieson &amp; Staff Glass Pty Ltd</i></li> </ul>
Employer’s dissatisfaction with conditions in employee’s collective agreement, and desire to utilise flexibilities offered by Work Choices	<ul style="list-style-type: none"> <li>• <i>Rawolle v Don Mathieson &amp; Staff Glass Pty Ltd</i></li> </ul>
Declining product markets and reduction in exports; failure to obtain government production assistance	<ul style="list-style-type: none"> <li>• <i>Organ v Climate Technologies Pty Ltd</i></li> </ul>
Downturn in sales and profits	<ul style="list-style-type: none"> <li>• <i>Duncan v Altshul Printers Pty Ltd</i></li> </ul>
Financial losses in last 8/10 financial quarters; need to improve profitability and reduce costs	<ul style="list-style-type: none"> <li>• <i>Nankervis v Custom House</i></li> </ul>
‘Realignment process’; employee’s work function absorbed into other roles	<ul style="list-style-type: none"> <li>• <i>Dunstan v EDS (Business Process Administration) Pty Ltd</i></li> </ul>
Problems in employer’s parent	<ul style="list-style-type: none"> <li>• <i>Campagna v Priceline Pty Ltd</i></li> </ul>

company, including \$17.2 million loss of profit and suspension of share trading	<ul style="list-style-type: none"> <li>• <i>Cruickshank v Priceline Pty Ltd</i></li> </ul>
Office closure and reallocation/outsourcing of functions	<ul style="list-style-type: none"> <li>• <i>Moulang v Federal-Mogul Pty Ltd</i></li> </ul>
Employer's loss of contract	<ul style="list-style-type: none"> <li>• <i>Moschatos v Aero-Care Flight Support Pty Ltd</i></li> </ul>
Revamp of organisational structures/job design to increase efficiency	<ul style="list-style-type: none"> <li>• <i>Bourke v Corporation of the Diocesan Synod of North Queensland operating St Mark's College as a Charitable Trust</i></li> </ul>
Changes to liquor licensing laws, impacting on staffing arrangements	<ul style="list-style-type: none"> <li>• <i>Daly v Beleyre Holdings t/as Bel Ayre Tavern</i></li> </ul>

5.42 The next table contains examples of the types of restructures that the Commission has considered did *not* fall within the scope of the genuine operational reasons exclusion. However, it should be noted that the first three decisions referred to in the table were handed down before the Full Bench decision in *Village Cinemas*.

**Table 6: Types and Causes of Restructuring Found by AIRC Not to Fall Within Genuine Operational Reasons Exclusion**

Type/Cause of Restructuring	Decisions
Redundancies in one business unit while advertising positions in another part of corporate entity	<ul style="list-style-type: none"> <li>• <i>Nicholson v Riviera Marine Pty Ltd</i></li> </ul>
Redundancy due to work ending on one part of project; work available in other parts	<ul style="list-style-type: none"> <li>• <i>Peters v Leighton Kumagai Joint Venture</i></li> </ul>
Shortfall in government funding	<ul style="list-style-type: none"> <li>• <i>Kieselbach v Amity Group Pty Ltd</i></li> </ul>
Seasonal workload fluctuation (drought and restricted availability of stock in meat industry); employer employed new workers after making redundancies	<ul style="list-style-type: none"> <li>• <i>Mr L v The Employer</i></li> </ul>

5.43 The AIRC also has indicated, in a number of decisions, that dismissals based on personal or other non-business related reasons do not fall within the operational reasons exclusion. For example:

- an employer cannot effectively 'dress up' a termination on grounds of poor performance as an operational reasons dismissal – even though the

employee's performance may have contributed to the employer's financial problems: *Evans v CLB No.1 Pty Ltd t/as Wagamama*,<sup>220</sup>

- the exclusion does not apply to cases where an employee is dismissed for absenteeism: *Hull v Clipsal Australia Pty Ltd*;
- a dismissal on the grounds of bullying (ie misconduct) by an employee, cannot be converted into one for operational reasons, by arguing that the bullying allegations and consequent resignation of another employee required a management restructure and the redundancy of the dismissed employee: *Owens v Whyalla Aged Care Incorporated*;
- a restructure/redundancies motivated by a manager's personal antagonism towards one of the dismissed employees was not for genuine operational reasons: *Brown v Macedon Ranges Shire Council*.

5.44 However, if the employers in these cases had been able to provide sufficient evidence to establish that the dismissals were also for reasons that *included* an operational reason, that would have been enough to attract the application of the exclusion – even if the dismissals were *primarily* motivated by personal or non-operational reasons.

#### 5.45 The Inability to Challenge a Lack of 'Procedural Fairness'

5.46 It was explained in Part 3 above that another 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 treated fairly in the process leading to dismissal. It is true that the significance of the concept of procedural fairness declined following the 1996 amendments. However, 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.

5.47 This meant that a dismissal based on operational requirements might be found to be harsh, unjust or unreasonable, if the employer did not (for example) properly inform and consult affected employees; consider redeployment options; formulate and apply objective selection criteria for redundancy; and provide award/statutory notice and severance payments.

5.48 The point is repeatedly made in many of the decisions that under the new operational reasons exclusion, the AIRC has absolutely no scope to consider whether a dismissal was 'unfair' or 'harsh, unjust or unreasonable'.<sup>221</sup> The Commission's focus is simply on whether it has jurisdiction to deal with the unfair dismissal claim – and, in the present context, whether the operational reasons bar to jurisdiction applies.<sup>222</sup> Therefore, it cannot have regard to

<sup>220</sup> See also *Wilkinson v Hospitality Marketing Concepts Pty Ltd*.

<sup>221</sup> See eg *Cruickshank v Priceline No 2*; *Bourke v Corporation of the Diocesan Synod of North Queensland operating St Mark's College as a Charitable Trust*.

<sup>222</sup> See eg *Koya v Port Phillip City Council*; *Perry v Savills*; *Nicholson v Riviera Marine Pty Ltd*; *Hipwell v Australian Pharmaceutical Industries*.

evidence that an employee might produce about the unfairness of the process adopted by the employer that resulted in dismissal.

5.49 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 reasons was offered an alternative position, and the employee's skills, past performance and value to the company.<sup>223</sup> However, the Full Bench in *Village Cinemas* explicitly rejected any notion that such factors can be considered under the terms of the exclusion in section 643(8)-(9). The Full Bench hammered home the extent of the change in the law that the Work Choices Act has brought about, by indicating that any consideration of the circumstances of a dismissal to determine its *appropriateness* 'is precisely the type of inquiry that the Parliament sought to avoid when it created the statutory bar' to unfair dismissal claims in section 643(8).<sup>224</sup>

5.50 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 the following types of circumstances:

- a dismissed employee's 19.5 years' service with the employer, his versatility over that period and therefore strong capacity for redeployment, and the employer's refusal to consider other options such as long service leave or appointment to a lower position: see *Village Cinemas*, where the Full Bench stated that these were 'extraneous or irrelevant matters';
- whether the selection processes for redundancies were fair, or not: see eg *Nicholson v Riviera Marine Pty Ltd*; *Hipwell v Australian Pharmaceutical Industries*;
- 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 agreement: *Sperac v Global Television Services Pty Ltd*;
- the hiring of new employees and labour hire staff following the implementation of redundancies;<sup>225</sup>
- the AIRC has expressed the view that an employer is not required to make efforts to find alternative positions for redundant employees: *Kingsley Smith v Macmahon Holdings*; *Bell, Kirwin and Hinds v H&M Engineering and Construction Pty Ltd*;

<sup>223</sup> See also eg the first instance decision in *Szekerczes-Boda v Novadale Enterprises Pty Ltd*.

<sup>224</sup> See also eg *Duncan v Altshul Printers Pty Ltd*.

<sup>225</sup> See eg *Kirwin and Hinds v H&M Engineering and Construction Pty Ltd* (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* (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).

- the Commission has also stated that an employee's view that he/she should have been 'kept on' is irrelevant: *Organ v Climate Technologies Pty Ltd*; *Duncan v Altshul Printers Pty Ltd*.

5.51 On the other hand, in the recent decision in *Bourke v Corporation of the Diocesan Synod of North Queensland operating St Mark's College as a Charitable Trust*, Richards C indicated that the conduct of the employer in dealing with the dismissed employee should be considered, as it may shed light on the employer's motives and assist in determining whether the dismissal was for operational reasons.

## 5.52 The Possibility of Abuse of the Genuine Operational Reasons Exclusion

5.53 As outlined in Part 3 of the report, a number of commentators raised concerns about the potential for abuse of the new exclusion, through restructures aimed at improving profitability or competitiveness by cutting labour costs. Again, these fears have been realised. Two of the cases examined in Part 4 of the report provide stark illustrations of the capacity for employers to utilise the operational reasons exclusion as a basis for labour cost reduction strategies.<sup>226</sup>

5.54 The first is *Cruickshank v Priceline*. The first instance decision of Eames C of the AIRC attracted significant media attention in April this year. This was because Eames C allowed the employer to rely on the operational reasons exclusion as a basis for a restructure and the consequent redundancies of 32 employees, in circumstances where it was claimed that Mr Cruickshank's position was later re-advertised at lower cost.<sup>227</sup>

5.55 In its decision on the appeal in this matter,<sup>228</sup> the Full Bench 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. However, the Full Bench found that Eames C's conclusions on this evidence (ie that it did not indicate that Mr Cruickshank's dismissal was a sham) were open to him.

5.56 The Full Bench went on to find that Eames C had provided inadequate reasons for his decision, and incorrectly applied *Village Cinemas*, and on this basis overturned his decision and ordered a rehearing of the operational reasons jurisdictional issue.

5.57 Despite this outcome, the case remains an important illustration of the potential for employers to use the operational reasons exclusion to dismiss existing employees, and re-hire new staff to do the same jobs for less remuneration. While the Full Bench regarded this course of action on the part of Priceline as indicating that there was no genuine operational reason for Mr Cruickshank's dismissal, it did not disturb Eames C's earlier findings to the opposite effect – rather, it simply pointed out the failure by Eames C to provide adequate reasons for his conclusions in this respect.

<sup>226</sup> See also some of the examples referred to in para [5.12].

<sup>227</sup> See *Cruickshank v Priceline No 1*; above, paras [4.75-4.81].

<sup>228</sup> See *Cruickshank v Priceline No 2*; above, paras [4.115-4.119].

- 5.58 An even more clear-cut illustration of the potential for the operational reasons exclusion to form the basis for labour cost-cutting strategies is *Rawolle v Don Mathieson & Staff Glass Co Pty Ltd*. It is interesting that the two decisions of Lewin C in this case received some media attention, but not nearly as much as the decisions in *Cruickshank v Priceline*.
- 5.59 In my view, Lewin C's decisions in *Rawolle v Don Mathieson & Staff Glass Co Pty Ltd*<sup>229</sup> – more than any others – demonstrate the extent to which the genuine operational reasons exclusion has undermined protections for employees.
- 5.60 In the initial proceedings before Lewin C (Mr Rawolle's application for an extension of time to lodge his unfair dismissal claim), the employer gave evidence and made submissions to the effect that:
- the company wanted greater flexibility in its employment arrangements;
  - this was being pursued by offering new employees AWAs, through a labour hire agency;
  - the inflexible working conditions of the union collective agreement under which Mr Rawolle was employed were the operational reasons for his dismissal.
- 5.61 The evidence also indicated that the employer's business was *expanding*; and that Mr Rawolle later saw an advertisement for a very similar position to his former job.
- 5.62 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. He took this into account in deciding to allow Mr Rawolle's extension of time application. He added that the dismissal was arguably a sham and for a prohibited reason under the freedom of association provisions of the WR Act (ie Mr Rawolle's entitlements under an industrial instrument).
- 5.63 However, when the matter next came before Lewin C (on the employer's motion to dismiss the 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 Mr 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.
- 5.64 Another reason for Mr 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 ...*'.

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<sup>229</sup> See above, paras [4.108-4.110] and [4.123-4.126].

- 5.65 But 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 Mr Rawolle's unfair dismissal claim was dismissed.
- 5.66 An appeal is pending against Lewin C's second decision in *Rawolle v Don Mathieson & Staff Glass Co Pty Ltd*. It will be interesting to see what approach the Full Bench will take to determining the issues raised in this case. However, as things stand, the case provides a remarkable example of the latitude now afforded to employers to implement brazen labour cost-cutting strategies under the guise of 'operational reasons'.
- 5.67 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. However, those protections have also been undermined by Work Choices,<sup>230</sup> as was illustrated by the Cowra Abattoir sackings soon after the new legislation came into effect.<sup>231</sup> The WR Act now contains prohibitions on employees being dismissed and re-hired as independent contractors.<sup>232</sup> 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.
- 5.68 A Possible 'Handbrake' on the Operational Reasons Exclusion: Employers Must Have a 'Paper Trail'**
- 5.69 Several cases have highlighted the need for employers to adduce substantive evidence of the operational reasons being relied upon.<sup>233</sup> This requirement stems from the Government's statement (in the Explanatory Memorandum for the bill that became the Work Choices Act) that a 'mere assertion' by an employer as to the existence of operational reasons will not be sufficient; the AIRC has to be satisfied that such reasons were genuine.<sup>234</sup> And, unlike some of the other unfair dismissal exclusions which can be determined 'on the papers', a hearing must be held when the operational reasons exclusion is raised (see further paras [5.77-5.79] below).

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<sup>230</sup> Under the pre-reform WR Act, it was only necessary to show that a prohibited reason for dismissal (eg 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, sections 792(1)(a) and (8), and 793(1)(i).

<sup>231</sup> See above, para [5.12]; an Office of Workplace Services investigation into the matter found that the employer had not acted for the sole or dominant reason proscribed in section 793(1)(i), but rather for legitimate reasons related to the financial viability of the company: see OWS, 'Summary of the Investigation into Alleged Breaches of the *Workplace Relations Act 1996* at Cowra Abattoir', *Media Background*, 7 July 2006.

<sup>232</sup> See above, note 100.

<sup>233</sup> See eg *Springer and Cunningham v The Northcott Society*; and the decisions discussed below.

<sup>234</sup> See para [3.24] above.

- 5.70 In my view, the need for employers to substantiate their operational reasons arguments through evidence is one of the very few protections afforded to employees under the new statutory provisions establishing the operational reasons exclusion. However, it is subject to variations in the approaches taken by different members of the AIRC as to the evidentiary threshold required.
- 5.71 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.<sup>235</sup> However, the Full Bench in *Cruickshank v Priceline No2* disagreed with this expression, stating instead that the Commission must be persuaded of the genuineness of operational reasons by evidence produced by the employer.
- 5.72 It was stated in *Kieselbach v Amity Group Pty Ltd* 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.
- 5.73 The most recent (and far-reaching) decision along these lines is that of Lacy SDP in *Moxham v Baxter Business Pty Ltd*. The employer's operational reasons jurisdictional objection 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 would need to 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.
- 5.74 This provides an encouraging indication that employers seeking to rely on the operational reasons exclusion will be put to a high standard of proof. However, it remains to be seen whether Lacy SDP's approach is adopted by other members of the Commission. Even if it is, this really just signals to employers that they have to thoroughly document their 'operational reasons'. It does not really affect how genuine those reasons might be to begin with, the tests for which fall well short of the previous requirement to show a valid reason for dismissal based on the operational requirements of the business (see paras [5.18-5.44] above).
- 5.75 A further aspect of Lacy SDP's decision in *Moxham v Baxter Business Pty Ltd* warrants comment. That is, his findings that while there may have been an imperative for structural change in the employer's business, there was no genuine operational reason for the employee's dismissal; and 'There is no probative evidence to establish any *nexus* between that structural imperative and the termination of Ms Moxham's employment.'

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<sup>235</sup> See eg *Kieselbach v Amity Group Pty Ltd*; *Village Cinemas* (Hingley C at first instance, and Full Bench on appeal).

5.76 The requirement to show a nexus between the asserted structural reasons and an employee's dismissal could be seen as another formulation of the (now rejected) *Perry v Savills* 'logical response' test (see para [5.22] above). However, it is unlikely that such an approach (however formulated) would obtain approval at Full Bench level, given the narrow construction adopted by Full Benches in decisions on the operational reasons exclusion to date (see eg *Village Cinemas*, at para [5.30] above).

### 5.77 Other Procedural Aspects of the Operational Reasons Exclusion

5.78 It has been noted several times in this report that the genuine operational reasons exclusion operates as a complete bar to an employee's unfair dismissal claim. The AIRC is required by section 649(1) to hold a hearing to deal with the operational reasons issue – whether arising on a motion by the employer, or on the Commission's own motion – before taking any further action in relation to an unfair dismissal claim.

5.79 This means that the operational reasons exclusion must be dealt with before the Commission conciliates an unfair dismissal claim.<sup>236</sup> That is what has occurred in most of the cases in which the exclusion has arisen for consideration to date. In several cases, the employer has consented to the matter proceeding to conciliation first; as these matters were not settled at conciliation, the AIRC then proceeded to deal with the employers' operational reasons jurisdictional objections.<sup>237</sup>

### 5.80 Summary of the Conclusions

5.81 It was acknowledged by the AIRC Full Bench in *Village Cinemas* that the Work Choices Act has 'wrought a significant alteration' to the Federal unfair dismissal regime.<sup>238</sup>

5.82 The new genuine operational reasons exclusion, and other aspects of the regulation of economic dismissals introduced by the Work Choices Act,<sup>239</sup> have significantly reduced many long-standing legal protections of job security for Australian workers.

5.83 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 Work Choices laws have therefore significantly enhanced the freedom of employers to 'hire and fire' staff.

<sup>236</sup> See eg *Chrysostomou v Autohaus Classic BMW t/as Trivett Classic Pty Ltd*, [2007] AIRC 473 (8 June 2007).

<sup>237</sup> See eg *Szekerczes-Boda v Novadale Enterprises Pty Ltd*; *Acworth v Boeing Australia Ltd*; *Daly v Beleyre Holdings t/as Bel Ayre Tavern*; *Bourke v Corporation of the Diocesan Synod of North Queensland operating St Mark's College as a Charitable Trust*.

<sup>238</sup> See also *Cruickshank v Priceline No 1*.

<sup>239</sup> That is, the limitations on the statutory redundancy consultation provisions and award/statutory rights to severance pay: see para [3.38] above.

- 5.84 To date, many of the concerns raised about the potential *unfairness* of the genuine operational reasons exclusion have been realised. The case law between March 2006 and July 2007 demonstrates the many dimensions of the unfairness of the exclusion.
- 5.85 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 point to a valid reason for dismissal or to treat employees fairly and reasonably in the process leading to dismissal.
- 5.86 Even more alarmingly, the exclusion has also opened the door for 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.
- 5.87 The genuine operational reasons exclusion is also *inappropriate*, having regard to the protections provided to Australian workers in the context of economic dismissals in the 1984 *TCR Case* and the 2004 *Redundancy Test Case*; under Federal legislation between 1993 and 2005; and under the various State unfair dismissal jurisdictions over a much longer period.
- 5.88 The exclusion also takes Australia further away from compliance with the ILO Termination of Employment Convention.<sup>240</sup>

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<sup>240</sup> See above, paras [2.5] and [3.36]; this issue, along with a number of international comparisons, will be examined in the Supplementary Report to be provided to the VWRA.

## APPENDIX ONE

**AIRC DECISIONS IN WHICH THE ‘GENUINE OPERATIONAL REASONS’  
(GOR) EXCLUSION HAS BEEN CONSIDERED:**

**MARCH 2006 – JULY 2007**

[note: Full Bench appeal decisions appear in bold]

<b>Employer’s GOR objection established?</b>	<b>Decision</b>	<b>Decision No</b>	<b>AIRC Member(s)</b>	<b>Date</b>
Yes	<i>1. Koya v Port Phillip City Council</i>	PR973045	Ives DP	13 June 2006
No	<i>2. Perry v Savills (Vic) Pty Ltd</i>	PR973103	Watson SDP	20 June 2006
No	<i>3. Evans v CLB No.1 t/as Wagamama</i>	PR973439	Hamberger SDP	4 August 2006
Not determined; to be considered in substantive case	<i>4. Wilkinson v Hospitality Marketing Concepts Pty Ltd</i>	PR973660	Thatcher C	11 August 2006
Yes	<i>5. Provic and Others v Bilfinger Berger Services (Australia) Pty Ltd</i>	PR973542	Cargill C	14 August 2006
Yes	<i>6. Organ v Climate Technologies Pty Ltd</i>	PR973801	Roberts C	1 September 2006
No	<i>7. Springer and Cunningham v The Northcott Society</i>	PR973840	Cargill C	1 September 2006
No [overturned on appeal; see below]	<i>8. Carter v Village Cinemas Australia Pty Ltd</i>	PR974111	Hingley C	20 September 2006
Yes	<i>9. Diserens v The Allied Express Group of Companies</i>	PR974116	Cargill C	25 September 2006
No	<i>10. Nicholson v Riviera Marine Pty Ltd</i>	PR974198	Spencer C	29 September 2006
No	<i>11. Kieselbach v Amity Group Pty Ltd</i>	PR973864	Hamilton DP	9 October 2006
Yes	<i>12. Nankervis v Custom House</i>	PR974401	O’Callaghan SDP	19 October 2006

No	13. <i>Peters v Leighton Kumagai Joint Venture</i>	PR974411	Gregor C	23 October 2006
No [overturned on appeal; see below]	14. <i>Szekerczes-Boda v Novadale Enterprises Pty Ltd</i>	PR974653	Harrison C	20 November 2006
Yes	15. <i>Hipwell v Australian Pharmaceutical Industries Ltd</i>	PR974356	Hamberger SDP	21 November 2006
No motion to dismiss; submissions re GOR rejected	16. <i>Hull v Clipsal Australia Pty Ltd</i>	PR974772	Jennings DP	29 November 2006
Yes	17. <i>McPherson v Vitality Care Operations Pty Ltd t/as Bridgewater Aged Care Facility</i>	PR974870	Watson SDP	7 December 2006
Yes	<b>18. <i>Village Cinemas Australia Pty Ltd v Carter</i></b>	<b>[2007] AIRCFB 35</b>	<b>Drake SDP Kaufman SDP Eames C</b>	<b>15 January 2007</b>
Yes [extension of time application only]	19. <i>Dunstan v and EDS (Business Process Administration) Pty Ltd</i>	[2007] AIRC 59	O'Callaghan SDP	30 January 2007
Yes [extension of time application only]	20. <i>Holmes v Downer Connect Pty Ltd</i>	[2007] AIRC 72	Larkin C	6 February 2007
Yes	21. <i>Campagna v Priceline Pty Ltd</i>	[2007] AIRC 147	Simmonds C	23 February 2007
Inconclusive [extension of time application only]	22. <i>Ekin-Smyth and Pearmain v On-Q Human Resources Ltd</i>	[2007] AIRC 149	Richards SDP	23 February 2007
Yes	<b>23. <i>Novadale Enterprises Pty Ltd v Szekerczes-Boda</i></b>	<b>Decision in transcript</b>	<b>Harrison SDP Richards SDP Roberts C</b>	<b>28 February 2007</b>
Inconclusive [extension of time application only]	24. <i>Harris v Torrens Transit Services Pty Ltd</i>	[2007] AIRC 148	O'Callaghan SDP	1 March 2007

No [extension of time application only; see further decision below]	25. <i>Rawolle v Don Mathieson &amp; Staff Glass Pty Ltd</i>	[2007] AIRC 240	Lewin C	11 April 2007
No	26. <i>Owens v Whyalla Aged Care Incorporated</i>	[2007] AIRC 245	Lewin C	12 April 2007
Yes [overturned on appeal; see below]	27. <i>Cruickshank v Priceline Pty Ltd</i>	[2007] AIRC 292	Eames C	17 April 2007
Yes	28. <i>Duncan v Altshul Printers Pty Ltd</i>	[2007] AIRC 286	Lewin C	19 April 2007
Yes	29. <i>Kingsley Smith v Macmahon Holdings</i>	[2007] AIRC 336	Williams C	14 May 2007
No	30. <i>Acworth v Boeing Australia Ltd</i>	[2007] AIRC 413	Richards SDP	25 May 2007
Yes	31. <i>Sperac v Global Television Services Pty Ltd</i>	[2007] AIRC 441	Smith C	1 June 2007
No	32. <i>Mr L v The Employer</i>	[2007] AIRC 457	O'Callaghan SDP	5 June 2007
Yes	33. <i>Moulang v Federal-Mogul Pty Ltd</i>	[2007] AIRC 453	Harrison SDP	6 June 2007
Yes	34. <i>Bell, Kirwin and Hinds v H &amp; M Engineering and Construction Pty Ltd</i>	[2007] AIRC 516	Harrison SDP	25 June 2007
<b>No [but rehearing ordered]</b>	<b>35. <i>Cruickshank v Priceline Pty Ltd</i></b>	<b>[2007] AIRCFB 513</b>	<b>Giudice P Drake SDP Whelan C</b>	<b>27 June 2007</b>
Yes [appeal pending]	36. <i>Rawolle v Don Mathieson &amp; Staff Glass Pty Ltd</i>	[2007] AIRC 496	Lewin C	29 June 2007
Yes	37. <i>Daly v Beleyre Holdings t/as Bel Ayre Tavern</i>	[2007] AIRC 546	McCarthy DP	5 July 2007
Yes	38. <i>Bourke v Corporation of the Diocesan Synod of North Queensland operating St Mark's College as a Charitable Trust</i>	[2007] AIRC 564	Richards C	9 July 2007

Yes	39. <i>Smith v Georgiou Group Pty Ltd</i>	[2007] AIRC 582	Harrison C	13 July 2007
No	40. <i>Moxham v Baxter Business Pty Ltd</i>	[2007] AIRC 488	Lacy SDP	18 July 2007
No	41. <i>Brown v Macedon Ranges Shire Council</i>	[2007] AIRC 524	Whelan C	20 July 2007
Yes	42. <i>Moschatos v Aero-Care Flight Support Pty Ltd</i>	[2007] AIRC 630	Raffaelli C	30 July 2007

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