

WORK CHOICES DISMISSALS: AN INTERNATIONAL COMPARISON

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I INTRODUCTION

This article seeks to objectively examine the amendments enacted by the *Workplace Relations Amendment (Work Choices) Act 2005* ('*Work Choices amendments*') as they relate to remedies for unfair dismissals. In general terms these amendments have strongly polarized Federal politics.

The Liberal Government asserts: 'what we are fashioning here in Australia is a unique set of labour laws for the future of the Australian nation'.¹ The Liberal Government claims the Work Choices amendments will greatly improve the Australian economy and benefit both employers and employees: 'There is not just anecdotal evidence about this; there are numerous empirical studies which show that the current unfair dismissal system is bad for business'.² 'It is not wrong, unfair, un-Australian or immoral to set out measures that will help to ensure the continued success of this country's economy and that will help to provide more jobs, higher wages, more opportunities and greater prosperity'.³

In response the Australian Labor Party ('ALP') has been scathing: 'Labor opposes these unfair and extreme industrial relations changes and we will fight these changes in every city and in every town across the nation'.⁴ The ALP asserts that the Work Choices amendments abolish:

protection from being sacked harshly, unjustly or unfairly for around four million working Australians. This is what the minister and the rest of the Howard government believe but they are too gutless to come out and say it. Instead, they hide behind \$55

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¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 2005, 38-43 (Hon. John Howard).

² Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2005, 88 (Kevin Andrews).

³ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 58 (Luke Hartsuyker).

⁴ Commonwealth, *Parliamentary Debates*, Senate, 30 November 2005, 11 (Trish Crossin).

million worth of weasel words and an advertising campaign that would make a Nazi propagandist blush.⁵

The ALP claims that the Work Choices amendments are based on ideology and not research: ‘this legislation will be recognised for what it is: “antiworker hatred spilling from the Liberal and National parties”’.⁶

The ALP claims the Work Choices amendments are: ‘the product of an extreme, outdated ideology — an ideology that has nothing to do with the challenges we face in the first quarter of the 21st century and nothing to do with the nation’s economic needs’.⁷ The Liberal Government has: ‘gone down the ideological road. It has gone down the road of abolishing the rights of employees in firms with fewer than 100 employees’.⁸

Rather than getting tied up with such ideological arguments, the author proposes to attempt to provide a value-free comparison between the Work Choices employment termination amendments and the dismissal provisions in international jurisdictions. This article will firstly discuss the small business exclusion, the extended statutory probation period and the genuine operational reasons exclusion amendments. The article will then compare Work Choices internationally through an examination of equivalent unfair dismissal laws in:

- the United Kingdom;
- New Zealand;
- Canada;
- Germany;
- the United States of America;
- Japan; and
- Korea.

II WORK CHOICES AMENDMENTS

The unfair dismissal jurisdiction in s 170CE of the *Workplace Relations Act 1996* (Cth) (the ‘WRA’) was amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (‘*Work Choices*’) and now appears in s 643 of the WRA. Section 643(1)(a) enables employees who have been dismissed in a manner ‘harsh, unjust or unreasonable’ to make an application to the Australian Industrial Relations Commission (the ‘AIRC’). When determining whether the employee’s dismissal was ‘harsh, unjust or unreasonable’, the AIRC must have regard to:⁹

- (a) whether there was a valid reason for the termination related to the employee’s capacity or conduct (including its effect on the safety and welfare of other employees); and

⁵ Commonwealth, *Parliamentary Debates*, Senate, 30 November 2005, 20 (Lyn Sterle, Leader of the Democrats).

⁶ Commonwealth, *Parliamentary Debates*, Senate, 1 December 2005, 19 (Stephen Conroy).

⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 4 (Kim Beazley, Leader of the Opposition, ALP).

⁸ Commonwealth, *Parliamentary Debates*, 3 November 2005, 62 (Chris Bowen).

⁹ *Workplace Relations Act 1996* (Cth) s 652(3).

- (b) whether the employee was notified of that reason; and
- (c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and
- (d) if the termination related to unsatisfactory performance by the employee — whether the employee had been warned about that unsatisfactory performance before the termination; and
- (e) the degree to which the size of the employer’s undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and
- (f) the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and
- (g) any other matters that the Commission considers relevant.

Work Choices has amended the WRA to introduce additional situations where an employee is excluded from bringing an unfair dismissal claim within the Commonwealth’s extended industrial jurisdiction.¹⁰ The effect of an exclusion is to bar the employee from prosecuting an employer for an unfair dismissal.¹¹ If the employee is excluded from the unfair dismissal jurisdiction, it is immaterial if their employer was unfair, unjust and unreasonable when dismissing them.¹² Chapman has argued that the Work Choices dismissal amendments have shifted the employment relationship from a basic standard to a legal privilege at the discretion of the employer.¹³

The Work Choices exclusions include:

A The Small Business Exclusion

The small business unfair dismissal exclusion will be increased from zero employees¹⁴ to 100 employees or more.¹⁵ When counting the 100 employees, part-time employees and casual employees, who have been engaged by the employer on a regular and systematic basis for at least 12 months, will count the same as full-time employees.¹⁶

¹⁰ The High Court of Australia in *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* [2006] HCA 52 (Gleeson CJ, Gummow, Hayne, Heydon and Brennan JJ) upheld the constitutional basis for Work Choices. While Work Choices has reduced state industrial jurisdictions, the Work Choices exclusions do not impact upon state based unfair dismissal protection. For an example of a successful state based unfair dismissal case see *Nathan McGreevy and Gandel Group, trading as Gandel Retail Management Pty Ltd* (TD/2005/315) (Unreported, Thompson C, 18 September 2006).

¹¹ *Fisher v Edith Cowan University (No 2)* (1997) 72 IR 464.

¹² *Hanzy v Tricon International Restaurants t/as KFC* (2001) 115 FCR 78.

¹³ A Chapman, 'Unfair Dismissal Law and Work Choices: From Safety Net Standard to Legal Privilege' (2006) 16 *ELRR* 237.

¹⁴ The Howard government attempted to introduce a 20 employee limit with the Workplace Relations Amendment (Fair Dismissal) Bill 2002 (Cth).

¹⁵ *Workplace Relations Act 1996* (Cth) s 643(10).

¹⁶ *Workplace Relations Act 1996* (Cth) ss 643(10)(a), (b).

The Shop, Distributive & Allied Employees Association's Senate submission¹⁷ argued that the 12 month tenure requirement for casual employees would result in employees in high turn over industries - such as fast-food and retail, where a large percentage of the workforce remain with one employer for a shorter tenure - being unable to access unfair dismissal protection.

Section 643 does attempt to limit the potential for employers to abuse this exclusion, through deeming related bodies corporate (within the meaning of s 50 of the *Corporations Act 2001* (Cth)) as being one employer.¹⁸ Without this provision, businesses could have restructured, so that employees were employed by holding companies which employed less than 100 employees. Through this approach, but for s 643(11), employers could have easily avoided all unfair dismissal claims.

Prior to Work Choices, small businesses received special treatment for unfair dismissals under s 170CE of the WRA. Sections 170CG(3)(da) and (db) anticipated the inability of small businesses to implement formal dismissal procedures. This enabled the AIRC to uphold dismissals from small businesses where the only ground for setting aside the dismissal was that the small business did not follow correct dismissal procedures. While these sections gave small businesses some special consideration, this was certainly not a small business exclusion. Commissioner Grainger explained in *Application for relief re termination of employment, Hopkins v Polyfoam Australia Pty Ltd* that employees: 'who are about to lose their employment are entitled to expect a fair go, regardless of the size of the employer's undertaking or the absence of specialist human resources'.¹⁹ 'These provisions ... were not intended to "deny" employees of smaller businesses a fair go, but would recognize [that] the expectations as to administrative processes need not be the same in small businesses as they are in larger businesses'.²⁰ Therefore, prior to Work Choices, small businesses were subject to the unfair dismissal jurisdiction.

Section 170CE provides that a dismissal is unfair if it is: 'harsh, unjust or unreasonable'. McHugh and Gummow JJ considered this phrase in *Byrne & Frew v Australian Airlines Ltd* where they held:

It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.²¹

¹⁷ Evidence to the Senate Employment Workplace Relations Education Committee, Commonwealth Parliament, 2005, 49.

¹⁸ *Workplace Relations Act 1996* (Cth) s 643(11).

¹⁹ [2005] PR964032 (Unreported, Grainger C, 18 November 2005) 107. See also *Pergaminos v Thian PL t/as Glenhuntly Terrace* [2002] PR920123 (Unreported, Lacy SDP, 16 July 2002) [10], [43]; in *Rieusset v Pastry Art Design PL* [2002] PR922187 (Unreported, Williams SDP, 5 September 2002) [36].

²⁰ *Application for relief re termination of employment, Hopkins v Polyfoam Australia Pty Ltd* [2005] PR964032 (Unreported, Grainger C, 18 November 2005) 1099.

²¹ (1995) 185 CLR 410, 465.

Under Work Choices, the degree of ‘unreasonableness’ in this manner is immaterial when the employer has less than 100 employees.

B *Extended statutory probation period*

The probationary period, in which employees are excluded from unfair dismissal protection, has been re-enacted in s 638(1) of Work Choices. Previously s 170CC(1)(b) of the WRA provided for a three month statutory period, unless the employer and employee had agreed prior to commencing employment on a longer probation period, and this extended period was reasonable having regard to the nature and circumstances of the employment. As to the required length of this period, Wilcox CJ stated in *Nicholson v Heaven & Earth Galleries Pty Ltd*:

Whether or not the stipulated period is reasonable, is a matter that has to be determined by the person hearing the case, as an exercise of judgment. The judgment should be based on the proved objective facts, not on someone else's opinion. Probably the most important consideration, in determining what is a reasonable period, will be the nature of the job. In the case of a person employed to carry out repetitive duties under close supervision, a reasonable period may not extend beyond a week or two. In the case of a person employed in a marketing or managerial position, working with little or no direct supervision and whose quality of performance cannot be immediately apparent, it may be reasonable for an employer to specify a probationary period measured in months. Circumstances will vary from case to case; the size, location and mode of operation of the employer being relevant factors, along with the personal characteristic and circumstances of the employee. The legislature has not prescribed the maximum extent of a reasonable period. It is not for me to do so.²²

While the three month probation period has been continued by Work Choices, it has introduced a qualifying period, which operates effectively as an extended probationary period. Section 643(6) of Work Choices requires an employee to be employed with an employer, for at least six months, to be eligible to bring an unfair dismissal claim. Unlike the probationary period in s 638, which requires the contract of employment to agree to the probationary period, the qualifying period in s 643(6) is implied into all contracts by s 643(7), unless the employment contract expressly excludes the qualifying period.

The difficulties this presents to an employee can be demonstrated by *William Rogers v Reflections Group Pty Ltd*.²³ Here Senior Deputy President Richards determined a security guard's probationary period restarted, when the his employer transferred ownership of the business.²⁴ The transfer of the business involved a transfer of all employees with their entitlements.²⁵ Despite this, Richards SDP observed the employee's employer had changed, thus the qualifying period was relevant. As a consequence, the employee was prevented from bringing an unfair dismissal claim.²⁶

²² (1994) 126 ALR 233, 242.

²³ [2007] AIRC2 PR975688 (Unreported, Richards SDP, 2 January 2007).

²⁴ Ibid 50.

²⁵ Ibid 13.

²⁶ Ibid 52.

C *Genuine Operational Reasons Exclusion*

If an employee is dismissed on several grounds, and one of those grounds is for genuine operational reasons of the employer, or reasons which include genuine operational reasons, then the employee is excluded from unfair dismissal protection.²⁷ Where an employer attempts to rely upon this exclusion, the AIRC must hold a hearing to determine whether in fact there was a genuine operational reason.²⁸ The Work Choices' Explanatory Memorandum provides the following example of where the genuine operational reasons exclusion operates:

Great Stockings Pty Ltd's logistics division is no longer required. The manager decides that, as five positions are redundant in the logistics division, the company should terminate the employment of five employees in the Great Stockings Pty Ltd logistics division. The manager directs that the human resources manager of Great Stockings Pty Ltd should provide notice of termination, and all other amounts owing upon termination, to five of the employees who are employed in the logistics division.²⁹

The AIRC full bench, Senior Deputy Presidents Drake and Kaufman and Commissioner Eames considered how the genuine operational reasons exclusion can be used in *Carter v Village Cinemas Australia Pty Ltd*.³⁰ Here a cinema manager was dismissed when the cinema he managed was closed. It was accepted his dismissal was for no other reason.³¹ At first instance, Commissioner Hingley had considered the manager's: transferability to other operations of the employer; over 19 years experience; and offer to take six months long service leave to enable him to maintain his employment, together with the fact the employer was large.³² The full Bench concluded such material was 'extraneous or irrelevant matters' and should not be considered in determining if the dismissal was for operational reasons.³³ The particular position the employee was employed to fill was redundant for genuine operational reasons, thus the employee could be unfairly dismissed, yet be excluded from a remedy.

1. *Unlawful Dismissal*

Section 170CK of the WRA (now s 659 following amendment by Work Choices), contains what is commonly known as 'unlawful dismissal'. The old s 170CK and the new s 659 both prohibit dismissals on discriminatory grounds,³⁴ such as the grounds of sex, race, trade union activity, disability, pregnancy, family activity or work injury. Unlawful dismissal is a separate cause of action to unfair dismissal, and is not affected by the unfair dismissal exclusions.³⁵

²⁷ *Workplace Relations Act 1996* (Cth) s 649 (1)(a).

²⁸ *Workplace Relations Act 1996* (Cth) s 649.

²⁸ *Workplace Relations Act 1996* (Cth) s 649 (1)(b).

²⁹ Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005 (Cth) 32 (paraphrased by author).

³⁰ [2007] AIRCFB 35 (Unreported, Hingley C, 20 September 2006).

³¹ *Ibid* 18.

³² *Ibid* 22-3.

³³ *Ibid* 38-9.

³⁴ For a list of other Australian legislation offering protection against discrimination in the context of employment termination, see the below discussion of the position in the United States of America under 'III International Comparison'.

³⁵ Application for relief in respect of termination of employment, *Yeats v T & R Murray Bridge Pty Ltd* [2004] U2004/1937 (Unreported, O'Callaghan SDP, 21 April 2004) 22.

The continuing existence of unlawful dismissal protection is increasingly being used to replace actions which would have previously been brought under unfair dismissal. A recent example of such a manifestation can be found in *Lee v Hills Before & After School Care Pty Ltd*.³⁶ In *Lee v Hills* the employee suffered an injury in October 2002, received Worker's compensation and commenced a return to work program in 2005. In April 2006 the employee took a day of sick leave and was dismissed. The employee brought an unlawful dismissal claim pursuant to s 659(2)(a) of the WRA, which prohibits an employee for being dismissed due to a temporary absence from work caused by work related illness or injury. The employer asserted they were able to dismiss the employee pursuant to reg 2.12.8 of the *Workplace Relations Regulations 2006* (Cth), which excludes employees from the sick leave protection if they have been absent from work for three months, unless they are on paid sick leave. The employer argued sick leave did not include compensation payments.

Federal Magistrate Raphael noted such cases would have previously been brought under unfair dismissal provisions, and not under unlawful dismissal provisions.³⁷ Federal Magistrate Raphael considered Australia's obligations under relevant International Labor Organization treaties and found that the protection which parliament extended to employees on sick leave, was equally intended to apply to employees on workers' compensation.³⁸ Through taking this approach, Federal Magistrate Raphael provided the unlawful dismissal provisions the widest possible ambit. Nevertheless, the unlawful dismissal has a limited scope for extension.

The limited nature of unlawful dismissal can be demonstrated by further utilizing the example provided in Work Choices' Explanatory Memorandum illustrated above:

Todd suspects that he was selected for 'termination' not for the reason stated by Great Stockings, but because he had been involved in a fight at the workplace a few weeks earlier. A dismissal on such grounds is not protected by unlawful dismissal. Prior to Work Choices, Todd was able to make an application to the AIRC alleging that the termination of his employment was harsh, unjust or unreasonable. The AIRC, pursuant to the then s 170CE could have determined if an employee had been dismissed on grounds which were unfair, unjust or unreasonable. If the AIRC concluded the dismissal was unfair, unjust or unreasonable, then the AIRC had the power pursuant to s 170CH to order the dismissed employee to be reinstated, or could order compensation in lieu of reinstatement.

Section 170CG(3)(a) of the WRA previously asked: 'whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the genuine operational reasons of the employer's undertaking, establishment or service'. For an employer to rely on the genuine operational reasons defence, the 'valid reason' must be 'sound, defensible or well founded'.³⁹

Prior to Work Choices, the fact the employer was motivated by operational necessities did not exclude an employee from prosecuting a successful unfair dismissal claim. In

³⁶ [2007] FMCA 4.

³⁷ Ibid 13.

³⁸ Ibid 26.

³⁹ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

Rajaratnam v Australian Nuclear Science and Technology Organisation,⁴⁰ the defendant ('ANSTO'), decided to reduce their staffing levels in direct response to government funding cuts. The selection process to identify the employees which ANSTO would make redundant was flawed. Vice-President Lawler held the process unfairly distributed the risk of redundancy between employees in different sections. Despite the government funding cuts being the only motivation for the dismissal, Lawler V-P held the dismissal was unfair and ordered reinstatement and compensation.

As the Work Choices Explanatory Memorandum demonstrates,⁴¹ after Work Choices Todd's options are now more limited. Todd cannot make an application to the AIRC 'because the reasons for his termination included genuine operational reasons'. Post-Work Choices, a ground for dismissal now could be capricious, fanciful, spiteful or prejudiced. Before Work Choices, the existence of such grounds would be grounds for a successful unfair dismissal claim. For example, in *Selvachandran v Peteron Plastics Pty Ltd* it was held a reason that was 'capricious, fanciful, spiteful or prejudiced' could never be a valid reason.⁴²

III INTERNATIONAL COMPARISON

This comparison will be limited to considering the unfair dismissal protections and exclusions in several international jurisdictions. Due to the length afforded by a journal article, this examination is far from complete. Nevertheless, the below discussion provides the foundation for a cross-jurisdictional understanding of where Work Choices has taken Australia's labour laws relating to employment termination.

A United Kingdom

In the United Kingdom, the *Employment Rights Act 1996* (UK) (the 'ERA (UK)') requires a longer period of continuous employment than the six month probationary period under Work Choices. The ERA (UK) requires employees to have completed one year's continuous service, prior to being eligible to claim unfair dismissal. If the employee is suspended on medical grounds however, the required period for continuous employment is reduced to one month.⁴³

Since 25 October 1999 the ERA (UK) has rendered void contractual clauses which seek to incorporate waivers for unfair dismissal in fixed term contracts.⁴⁴ Work Choices, in contrast, has implied a six month probationary period into every employment contract, unless the parties have expressly waived the probationary period in their contract.⁴⁵

⁴⁰ [2005] PR946907 (Unreported, Lawler VP, 18 August 2005) 10-13.

⁴¹ Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005 (Cth), 322.
⁴² (1995) 62 IR 371, 373.

⁴³ Health and Safety Regulations, Suspension from work on medical or maternity grounds (PL705) 1999 (UK).

⁴⁴ *Employment Rights Act 1996* (UK) s 12(b).

⁴⁵ See *William Rogers v Reflections Group Pty Ltd* [2007] AIRC2 PR975688 (Unreported, Richards SDP, 2 January 2007) [52].

B *New Zealand*

In contrast to Work Choices, New Zealand's *Employment Relations Act 2000* (the 'ERA (NZ)') has no set probationary period. For a probationary period to apply to an employment relationship at all, the length of the probationary period must be contained in the employment contract in writing.⁴⁶

A further difference between Work Choices' and the ERA (NZ)'s probationary period laws, is the affect of a probationary period. When an employee is on probation under Work Choices they are excluded from claiming unfair dismissal. Under the ERA (NZ) the fact an employee is under probation has no affect upon the employee's ability to claim unjustifiable dismissal.⁴⁷

When determining what constitutes unjustifiable dismissal, the ERA (NZ) considers the substantive and procedural circumstances of the case the same as Work Choices.⁴⁸ The ERA (NZ) however goes further and requires the employer to have acted in 'good faith'. The *Employment Relations Amendment Act (No.2) 2004* (NZ) introduced the notion that the employment relationship should be developed through good faith. Good faith here equates to more than the duty of trust and confidence or to requirements under a commercial contract.⁴⁹ The amendments require increased disclosure and information exchange to assist in addressing the power imbalance of employees.⁵⁰ The ERA (NZ)'s philosophy of good faith was outlined in the explanatory note that accompanied the Employment Relations Bill 2000 (NZ) when it was introduced to Parliament.⁵¹

This Bill... introduce[s] a better framework for the conduct of employment relations... That framework is based on the understanding that employment is a human relationship involving issues of mutual trust, confidence and fair dealing, and is not simply a contractual economic exchange.

Pre-Work Choices, the AIRC held that it was incumbent upon employers to demonstrate there was a valid reason for the termination of employment.⁵² With the Work Choices amendments, employers who have 100 employees or less, or where the employee has been employed for less than six months, do not need to provide any reasons why an employee is being dismissed. Where those circumstances do not exist, the employer need only identify an operational reason as one of the grounds of the dismissal.

⁴⁶ *Employment Relations Act 2000* (NZ) s 67(a).

⁴⁷ *Employment Relations Act 2000* (NZ) s 67(b).

⁴⁸ See, eg, *Employment Relations Act 2000* (NZ) s 214(5); *Buchanan and Symes v Chief Executive Department of Inland Revenue* [2006] NZSC 37, 10; *Workplace Relations Act 1996* (Cth) s 652(3).

⁴⁹ *Ogilvy and Mather (NZ) Ltd v Turner* (1996) 1 NZLR 641.

⁵⁰ *Employment Relations Act 2000* (NZ) s 4.

⁵¹ Explanatory Note, *Employment Relations Bill 2000* (NZ) 1 (Summary of key elements).

⁵² *Dynon v Platinum Healthcare Pty Ltd* [2005] PR959285 (Unreported, Grainger C, 24 June 2005) 53, 54; *Kerr v Jeroma Pty Ltd trading as Treasury Motor Lodge* [Decision No. 470/96] (Unreported Marshall J) 14; *Russo v Australia Pacific Airports (Melbourne) Pty Ltd* [2002] PR923579 (Unreported, Ives DP, 22 October 2002) 102.

C Germany

Unlike Work Choices, German employers must provide reasons when ever they dismiss employees. In Germany the Civil Code⁵³ and the *Protection Against Dismissal Act*⁵⁴ (the 'PADA') require all employers to provide their employees with reasons for their dismissal.⁵⁵ Section 1 of the PADA requires all dismissals to be socially justified. A dismissal will be socially justified only if the employer dismisses the employee due to:

- the employee's personal attitude; or
- the employee's conduct; or
- operational reasons.

A significant difference between the Commonwealth and Germany is the access threshold to unfair dismissal. The Civil Code and s 23 of the PADA restrict unfair dismissal legislation to companies with five or more employees, not including vocational trainees and marginal part-time workers.⁵⁶ Between October 1996 and January 1999 the threshold limit was lifted to 10 employees.⁵⁷ This alteration in the threshold provided material for research into the effect of unfair dismissal protection on businesses. Research presented at the European Association of Labour Economist's 2004 Conference found that there was no clear evidence that the alteration had any positive or negative impact on businesses.⁵⁸

As mentioned earlier,⁵⁹ the Howard Liberal government has argued that Work Choices will result in an increase in employment and economic prosperity. Whether excluding all employees, who work for an employer with 100 or less employees, from unfair dismissal will assist in increasing employment, or not, will certainly provide interesting research. The German research is not directly comparable to Work Choices, as Germany altered their threshold by five employees where Work Choices has altered the threshold by 100 employees. However future Australian research which adopts the same methodology and attempts to produce, as near as possible, similar variables, would offer a valuable contribution to the discussion whether small business exclusions increase employment or not.

D Canada

Canadian employees, who are employed on indefinite contracts and have not given their employers grounds for summary dismissal, cannot be dismissed without reasonable

⁵³ Bürgerliches Gesetzbuch.

⁵⁴ Kündigungsschutzgesetz.

⁵⁵ Providing the employment relationship comes within s 9 of the *Protection Against Dismissal Act*.

⁵⁶ Geringfügig beschäftigte or 'marginal part-time workers' are employees who are employed for less than 15 hours per week and whose income does not exceed one seventh of the monthly reference wage or one sixth of the total income.

⁵⁷ Achim Seifert and Elke Funken-Hötzel, *Wrongful Dismissals in the Federal Republic of Germany* (2005) University of Illinois College of Law <http://www.law.uiuc.edu/publications/cll&pj/archive/vol_25/issue_4/SeifertArticle25-4.pdf> at 12 February 2007.

⁵⁸ Sher Verick, *Threshold of Dismissal Protection Legislation in Germany* (2004) <<http://www.eale.nl/conference/eale2004/article/Articles2004/Verick.pdf>> at 21 July 2006..

⁵⁹ See above n 1-3 and accompanying text.

notice or a reasonable severance package.⁶⁰ What constitutes reasonable notice is determined:

with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant, and the availability of similar employment, having regard to the experience, training and qualifications of the servant.⁶¹

In addition to the notice periods, Canadian employers cannot dismiss employees in bad faith. The Canadian Supreme Court has provided employers must act in good faith when dismissing employees.⁶² Writing for the majority in *Wallace v United Grain Growers Ltd*, Justice Iacobucci explained this requirement as:

at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.⁶³

If an employer breaches the doctrine of good faith, then they will be held to have dismissed the employee wrongfully. Damages for wrongful termination are awarded to place the employee in the same position as they would have been had reasonable notice been given. In Australia s 654 of the WRA entitles unfairly dismissed employees to reinstatement or damages in lieu of reinstatement.⁶⁴ In Canada, wrongfully dismissed employees are only entitled to damages and have no entitlement to seek reinstatement.

Work Choices will require employees to have worked for an employer for six months before they are eligible for unfair dismissal. In Canada employees are eligible to claim a breach of the doctrine of good faith at any time. Indeed, it is not even necessary for an employment relationship to have developed! In *Kilpatrick v Peterborough Civic Hospital* an employee of 30 years standing had been approached over a six year period by a headhunting firm on behalf of a competitor.⁶⁵ The employee resigned and the competitor did not make an offer. Whilst the competitor had made no express inducements or offers, the competitor was held liable for not acting in good faith. The employee was awarded 30 months wages in damages

E *United States of America*

The United States of America ('USA') has limited termination protection for employees. Employment contracts can contain protection expressly or implicitly through employer policies or employer representations. However, most non-union employees in the USA are employed under 'employment at will' contracts. These contracts retain employees for an indefinite period of time. Employers can dismiss employees at will for any lawful reason. In essence, the doctrine of employment at will enables an employer to

⁶⁰ *Wallace v United Grain Growers Ltd* [1997] 3 S.C.R. 701 [50], [51]; J Savard, 'General Overview of Employment Law in Canada' (2001) 41 *ALI-ABA* 505.

⁶¹ *Bardal v Globe & Mai* [1960] 24 D.L.R.2d 140, 145; applied by the Canadian Supreme Court in *Machtinger v Hoj Industries* [1992] 1 S.C.R. 986.

⁶² [1997] 3 S.C.R. 701, 741-59.

⁶³ *Ibid* 743.

⁶⁴ See *Workplace Relations Act 1996* (Cth) s 170CH pre-Work Choices.

⁶⁵ *Kilpatrick v Peterborough Civic Hospital* [1998] 38 O.R.3d. 298, 300.

terminate their employee for a good reason, bad reason, or no reason at all.⁶⁶ A reason is lawful providing it does not breach any express or implied terms of the employment contract or breach any employment protection statutes.⁶⁷

These statutes do not address dismissals, which under the WRA, are generally protected by unfair dismissal. The USA statutes only consider the equivalent to the Commonwealth's unlawful dismissal protection. Unlawful dismissal aims to protect employees against being dismissed due to their sex, disability or other grounds. Unfair dismissal focuses upon protecting employees from dismissals which are unfair, unjust or unreasonable. USA employers can dismiss employees for any other reason, for example, if the employer does not like the employee's car.

Australian employers with less than 100 employees or where the employee has been employed for less than six months will have the same power as USA employers under Work Choices to dismiss employees without reasons or with bad reasons. Otherwise, under the WRA employees are entitled to reinstatement, or compensation in lieu thereof, if they demonstrate that they were unfairly dismissed.⁶⁸

In the USA, courts have rejected the idea that an employee should be able to sue their employer for a wrongful dismissal.⁶⁹ In *Hillesland v. Federal Land Bank Association of Grand Forks* the court went as far as to state that forcing employers to act in good faith when dismissing employees: 'would effectively abrogate the at-will rule as applied in this state'.⁷⁰ When an employment contract is 'at will', the parties have agreed to a contract which excludes wrongful termination. Courts are not in a position to alter the express terms of a contract, agreed to by the parties.⁷¹ The majority of USA jurisdictions have consistently refused to grant employees at will wrongful termination protection.⁷²

As stated above however, similar to the Commonwealth, USA employees are protected from dismissals based on prohibited discriminatory grounds, or 'unlawful dismissals'. In Australia, unlawful dismissals are actionable either: as a dismissal on prohibited grounds under s 659 of the WRA; or under specific pieces of antidiscrimination legislation, such as *the Disability Discrimination Act 1992* (Cth), *the Racial Discrimination Act 1975* (Cth) or *the Sex Discrimination Act 1984* (Cth). The combination of protection for discriminatory dismissals in both the USA and Australia is extensive, as demonstrated by the plethora of legislation below:

⁶⁶ D Ballam, 'The Traditional View of the Origins of the Employment-at-Will Doctrine: Myth or Reality?' (1995) 33 *AM. Bus. L.J.* 1, 1; R Epstein, 'In Defense of the Contract at Will' (1984) 51 *University of Chicago Law Review* 947, 947.

⁶⁷ Examples of employment protection statutes in the United States of America are detailed below.
⁶⁸ *Workplace Relations Act 1996* (Cth) s 654 (s 170CH pre-Work Choices).

⁶⁹ *City of Midland v O'Bryant* (2000) 18 S.W.3d 309; *Indiana Pub. Serv. Co. v Dabagia* (1999) 721 N.E.2d 294, 298; D Walsh and J Schwarz, 'State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, and Rationales' (1996) 33 *AM. Bus. L.J.* 645, 678-89.

⁷⁰ (1987) 407 N.W.2d 206, 215 (ND).

⁷¹ *Murphy v American Home Products, Inc.* (1983) 448 N.E.2d 86, 91 (N.Y).

⁷² *Noye v Hoffman-La Roche Inc.* (1990) 570 A.2d 12, 14-15 (N.J. App).

Commonwealth	USA
<i>Equal Opportunity for Women in the Workplace Act 1999</i>	<i>The Equal Party Act 1963</i>
<i>Age Discrimination Act 2004</i>	<i>The Age Discrimination in Employment Act</i>
<i>Disability Discrimination Act 1992</i>	<i>The Americans with Disabilities Act 1990</i>
<i>Safety, Rehabilitation and Compensation Act 1988</i>	<i>Workers Compensation Act</i>
<i>Occupational Health and Safety (Commonwealth Employment) Act 1991</i>	<i>Occupational Safety and Health Act</i>

F Japan

The equivalent to unfair dismissal in Japan is abuse of the right of dismissal. A Japanese employee can sue their employer for the abuse of the right of dismissal if the employer has not followed relevant statutes and agreements, or has not acted reasonably.

In Japan, the Japanese Civil Code enables non-fixed term employees to be dismissed at any time, subject to statute and agreements. The *Labor Standards Law*⁷³ (the ‘LSL’) applies to all employees who are employed at an enterprise or place of business and receive wages therefrom, without regard to the kind of occupation.⁷⁴ However, the dismissal protection in the LSL only applies to employees who are:

- employed on a daily basis, unless the employee has been employed ‘consecutively for more than one month’;⁷⁵
- employed for a fixed period not longer than two months;⁷⁶
- employed in seasonal work for a fixed period not longer than four months;⁷⁷ or
- in a probationary period, where the probationary period cannot exceed 14 days.⁷⁸

The LSL’s dismissal protection is found in art 20. Article 20 of the LSL requires employers to give employees 30 days notice of dismissal or pay them in lieu. Employers are not obliged to provide notice where the continuance of the enterprise has been made impossible by a natural disaster, or other unavoidable cause, nor when the worker is dismissed for reasons attributable to the employee. If, an employer wishes to summarily dismiss an employee, the employer must first obtain the approval of the Labor Standards Inspection Office. This approval will only be granted if the employee is guilty of serious misconduct.

Work rules or employment contracts can increase the obligations on employers when dismissing. The LSL requires all employers, employing more than ten employees, to

⁷³ *Labor Standards Law* (Law No. 49 of 1947).

⁷⁴ *Labor Standards Law* (Law No. 49 of 1947) art 9.

⁷⁵ *Labor Standards Law* (Law No. 49 of 1947) art 21(1).

⁷⁶ *Labor Standards Law* (Law No. 49 of 1947) art 21(2).

⁷⁷ *Labor Standards Law* (Law No. 49 of 1947) art 21(3).

⁷⁸ *Labor Standards Law* (Law No. 49 of 1947) art 21(4).

file work rules with the Japanese Ministry of Labor. These work rules must provide, inter alia, details of the procedure for dismissing employees.⁷⁹

One of the most notable differences between Japan's system and Work Choices is the requirement of reasonableness. Under Work Choices employers with 100 employees or less can act totally unreasonably when dismissing. When dismissing employees, Japanese employers must act reasonably. The Japanese Civil Code requires dismissals to be conducted honestly and with fidelity.⁸⁰ Employers must demonstrate that they have serious grounds for dismissal. If the employer cannot substantiate their grounds, the grounds will be held to be unreasonable.⁸¹

Reflecting the Japanese notion of 'life time employment', where an employer abuses their right of dismissal, Japanese courts will issue a provisional disposition order⁸² rendering the dismissal void. These orders are similar to reinstatement orders made under s 654 of the WRA.⁸³

G Korea

Unlike the *Commonwealth Constitution*, the *Korean Constitution* provides citizens with the right to work.⁸⁴ For this reason, dismissing employees in Korea is highly regulated.⁸⁵ Prior to 1997, the *Korean Labor Standards Act* (the 'LSA') curtailed the ability of employers to terminate employees. Employers had to provide employees with reasons prior to termination. Following the Korean Financial Crisis of 1997 the LSA was amended and employers were given more freedom to dismiss employees.⁸⁶ The LSA prevents employers from dismissing employees without 'just cause'.⁸⁷

The Civil Law significantly weakens the LSA protection. Article 660 of the Civil Law enables employers to dismiss employees on any grounds, providing the employer has provided employees with sufficient notice. If the notice period is not given, then the employer must provide reasons. In Australia, post-Work Choices, dismissal on notice without reasons would constitute an unfair dismissal (providing the employer employs more than 100 employees and the employee has worked for the employer for more than six months).⁸⁸

The Korean LSA does not indicate what constitutes a 'just cause'. The employer's 'rules of employment' or a collective bargaining agreement will indicate what constitutes a just cause. If the rules of employment provide that an employee cannot engage in certain conduct in their personal life, and the employee engages in that conduct, then the employer will have grounds to dismiss the employee. If the rules of employment did not anticipate the kind of conduct, then to dismiss on that ground

⁷⁹ *Labor Standards Law* (Law No. 49 of 1947) art 89(3).

⁸⁰ *Labor Standards Law* (Law No. 49 of 1947) art 1, pt 3.

⁸¹ *The Nihon Shokuen case* (1975) Minshu (29) 4 (Japanese Supreme Court).

⁸² Kari-shobun.

⁸³ See *Workplace Relations Act 1996* (Cth) s 170CH pre-Work Choices.

⁸⁴ *Korean Constitution* art 31(1).

⁸⁵ Yong-man Cho, 'Essay on the theory of Measures to Avoid Dismissal for Economic Reasons' (2002) 13 *Lab. L. Rev.* 107, 107-10.

⁸⁶ *Labor Standards Act* (Act No. 5309, Mar. 13, 1997).

⁸⁷ *Labor Standards Act* (Act No. 5309, Mar. 13, 1997) art 30.

⁸⁸ See above n 53 and accompanying text.

would not be a just cause.⁸⁹ Employment rules and collective bargaining agreements which give cause for dismissal must be judicially reviewed for the employer to rely upon them.⁹⁰

The most relevant reason for dismissal for the purpose of this article is the LSA's dismissal for genuine operational reasons. The LSA provides:

If an employer wants to dismiss a worker for managerial reasons, there shall be urgent managerial needs. In such cases as transfer, acquisition and merger of business which are aimed to avoid financial difficulties, it shall be deemed that there is an urgent managerial need.⁹¹

What constitutes a 'managerial need' is a subjective test based upon the company's financial position.⁹² Interestingly, Korean courts do not consider that a financial loss in a work team necessarily amounts to a managerial need.⁹³ If the company is large and the work group is small, then managerial need may not exist. The Korean Supreme Court has enabled dismissals following technological advances,⁹⁴ where the company is attempting to rationalise the workforce or where dismissals are necessary to avoid serious financial difficulty.⁹⁵

In Korea, even if there is a managerial need, employers must demonstrate that they have explored alternative means. The National Labor Relations Commission has held an employer, who had a genuine managerial need, but did not consider suspending employees or putting employees on stand-by, had not done enough to avoid dismissing employees. As the employer had taken insufficient steps to avoid dismissal, the National Labor Relations Commission found against the employer.⁹⁶

The LSA's requirement for 'managerial need' can be contrasted with Work Choices' 'genuine operational reasons' exclusion.⁹⁷ Work Choices excludes employees from unfair dismissal jurisdiction, where a reason for their dismissal was the genuine operational reasons of the employer. Using the examples in the Work Choices' Explanatory Memorandum⁹⁸ and the phrasing of the amended WRA section,⁹⁹ it appears that the 'genuine operational reasons' will be far easier to satisfy than the Korean equivalent. There is, in Australia, certainly no requirement to examine alternative options to dismissals.

Unlike the Work Choices amendments, Korean employers must select the employees for redundancy through rational and fair processes.¹⁰⁰ If the employment rules do not already prescribe the termination process, the employer must consult with unions and

⁸⁹ Ruling No.2003Da63029 (February 18, 2005).

⁹⁰ Ruling No.99Nu6639 (Seoul App. Ct. May 24, 2000).

⁹¹ *Labor Standards Act* (Act No. 5309, Mar. 13, 1997) art 31(1) (translated from Korean).

⁹² Ruling No.94Nu10931 (S. Korea Sup. Ct. November 24, 1995).

⁹³ Ruling No.89DaKa24455 (S. Korea Sup. Ct. March 13, 1990).

⁹⁴ Ruling No.2000Do9373 (S. Korea Sup. Ct. July 9, 2002)

⁹⁵ Ruling No.88DaKa34094 (S. Korea Sup. Ct. January 12, 1990).

⁹⁶ National Labor Relations Commission Decision No.97 Buhae 76 (NLRC July 23, 1997).

⁹⁷ See above n 27 – 43 and accompanying text.

⁹⁸ Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005 (Cth), 32.

⁹⁹ *Workplace Relations Act 1996* (Cth) s 649.

¹⁰⁰ *Labor Standards Act* (Act No. 5309, Mar. 13, 1997) art 31(1).

employees before setting the process.¹⁰¹ If the process is not performed correctly the dismissals will be set aside.

IV CONCLUSION

This article has attempted to perform an objective examination of where Work Choices places Australia in terms of labour law. This analysis is by necessity brief and does not fully consider the variables each jurisdiction presents. For example, the United Kingdom has a long history of unionism, while the USA has had a history of anti-unionism.¹⁰² Germany until recently was split into West Germany and East Germany. The reforming of the labour markets in Germany significantly altered the labour demographics.¹⁰³ Both Japan and Korea have been affected by the 1997 and 1999 Asian Financial Crashes. The jurisdictions with the most similar history to the Commonwealth are Canada and New Zealand. Despite the similarities however, all nations have different electorates, different political parties in power and targeted policy responses to each jurisdiction.

While it is difficult to isolate certain provisions, it is possible to consider the jurisdictions as a whole. When the three main amendments under Work Choices are compared internationally it can be seen that Work Choices shifts the frontier of control further in favour of employers. On paper, New Zealand, Germany, Canada and Japan seem to have a more employee favoured labour law. In both New Zealand and Canada, for example, employees on probation can access dismissal protection. Japanese law presumes employees are employed for life. Germany's small business exclusion is limited to five employees while Work Choices lifts Australia's small business exclusion to 100 employees.

It could be argued that the United Kingdom, USA and Korea have unfair dismissal laws which are more employer friendly. The USA has no unfair dismissal equivalent protection. In Korea, employers can avoid unfair dismissal provisions by merely providing the employee with the required notice. In the United Kingdom employees face a year probationary period.

It could also be argued that the United Kingdom's laws are more pro-employee than Work Choices. In the United Kingdom, once employees are past the probationary period, they then have full access to dismissal protection. By comparison, Australian employees under Work Choices remain excluded if their employer has dismissed them for operational reasons or if their employer employs more than 100 employees.

In conclusion, internationally Work Choices is certainly pro-employer, however it is not the most employer friendly jurisdiction examined. Out of the seven international jurisdictions investigated, three jurisdictions appear more employer friendly than Work Choices. Based on this comparison, this article concludes that Work Choices is moving Australia to the middle ground of employee dismissal protection. Whether such a position is 'good' for Australia is an ideological question and beyond this article.

¹⁰¹ Ruling No.92Da12285 (S. Korea Sup. Ct. November 23, 1993).

¹⁰² P Ward, *Unionism in the United Kingdom, 1918-1974*, (Palgrave Macmillan UK, 2005).

¹⁰³ A Zimmer and E Priller, 'The Third Sector and Labour Market Policy in Germany' (2000) 5 *German Policy Studies* 1.