

THE LAW SOCIETY OF WESTERN AUSTRALIA

Seminar:

***Work Choices or Worst of Choices?
The New World of Workplace Relations***

**The Axe unto the Root?
Unfair Dismissals and Unlawful Terminations
Post Work Choices**

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(* The views expressed in this paper are the views of Federal Magistrate Lucev. They are not, and do not purport to be, the views of the Federal Magistrates Court or any other Federal Magistrate.)

INTRODUCTION

When wandering preaching in the wilderness of Judea John the Baptist¹ uttered memorable words:

“And now also the axe is laid unto the root of the trees: therefore every tree which bringeth not forth good fruit is hewn down, and cast into the fire.”²

He was speaking of the fate of the wicked, to be cast to their death in the lake of fire.³

A casual observer of the Australian workplace relations scene over the last year or so might think that, with the introduction of *Work Choices*,⁴ the “wicked” employees had been “cast” into the “fire”, and that rights and remedies upon termination of employment were dead.⁵

But is it so? Has that much really changed?

There is no doubt that the introduction of *Work Choices* has been mired in controversy, no part more so than the changes to unfair dismissal laws.

The unions oppose *Work Choices* – vehemently! The ACTU’s Rights at Work campaign website alleges an “attack on job security, leaving 4 million employees vulnerable to unfair dismissal.”⁶

¹ The Holy Bible (King James version) (“Bible”), Matthew 3:1

² Bible, Matthew 3: 10.

³ Bible, Revelation 20:14.

⁴ *Work Choices* is the accepted colloquialism for the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) which extensively amended the *Workplace Relations Act 1996* (Cth) (“WRA”).

⁵ A child observing might think that, like Chicken Licken, the sky is falling down. In that ancient fable a chicken called Chicken Licken believes that the sky is falling down because an acorn falls on her head: “The Sky is Falling”, en.wikipedia.org/wiki/The_Sky_is_Falling.

⁶ www.rightsatwork.com.au/thefacts.

Small business are said not to understand *Work Choices*, and to “have the wrong idea that they can get rid of employees when they like.”⁷

Legal practitioners “admit they are struggling to understand” *Work Choices*⁸ and that it is a “minefield”.⁹

In what follows I set out in conventional form the federal rights and remedies in relation to unfair dismissal and unlawful termination. However, I want to suggest that it may be arguable¹⁰ that:

- (a) conceptually, and possibly practically, not a lot has changed with the introduction of *Work Choices* for many employees who will be terminated; and
- (b) perhaps somewhat tentatively, there may be available alternative rights and remedies, some more powerful than “orthodox” termination rights and remedies.

CONSTITUTIONAL BASIS

The validity of the *Work Choices* amendments is the subject of a current reserved High Court decision in which the applicants (the States and various unions) have challenged the constitutional validity of the amendments, and in particular the use of the corporations power¹¹ as the basis for the amendments. Hence, constitutional validity is not specifically analysed in this paper, beyond the somewhat cursory discussion of the previously accepted orthodoxies which follow.¹²

⁷ M. Fenton-Jones, “Battling with Work Choices legislation”, Australian Financial Review, Special Report – Enterprise Quarterly, 31 August 2006 p.2. (“Battling Work Choices”).

⁸ Battling Work Choices.

⁹ “IR changes a legal minefield, lawyer says”, (PM, 5 April 2006), www.abc.net.au/pm/content/2006/s1609493.htm.

¹⁰ I say “may be arguable” because I do not have a concluded view on these issues, but consider them to possibly be arguable propositions.

¹¹ *Constitution*, s 51(xx).

¹² For transcript of the challenge see *State of New South Wales & Ors v Commonwealth (AKA Workplace Relations Challenge)* [2006] HCATrans 215, 216, 217, 218, 233 and 235. For an excellent overview of the challenge see I. Taylor, “Workplace Relations and the Federal Magistrates Court and An Overview of the

The unfair dismissal provisions of *Work Choices* apply principally to employees engaged by “constitutional corporations”¹³ and therefore principally rely on the use of the corporations power¹⁴ for their constitutional validity, but probably also the conciliation and arbitration power¹⁵ and the incidental power.¹⁶ However, the unfair dismissal provisions also extend to employees:

- (a) employed in Australian Territories;
- (b) employed in Victoria;
- (c) employed in the Commonwealth Public Sector;
- (d) engaged as waterside workers, maritime employees or flight crew officers, employed in the course of interstate or overseas trade or commerce.¹⁷

In these respects there is also reliance upon the Territories power,¹⁸ the referral power,¹⁹ the Commonwealth’s power to legislate with respect to its own employees,²⁰ the external affairs power,²¹ and the interstate and overseas trade and commerce power.²²

The unlawful termination provisions, applicable to all employees in Australia, rely generally upon the same powers as the unfair dismissal provisions, but also the external affairs power²³ for their constitutional validity,²⁴ and the utilisation of that power to enact into

Workplace Relations Case”, New South Wales State Legal Conference Paper, 28 August 2006 (“Taylor, “Workplace Relations”).

¹³ A “constitutional corporation” is defined to mean “a corporation to which paragraph 51(xx) of the *Constitution* applies.” See *Quickenden v O’Connor & Ors* (2001) 109 FCR 243 at pages 254-262 per Black CJ and French J, and pages 270-273 per Carr J. See also *City of Mandurah v Hull* (2000) 100 IR 406 at page 414 per Anderson J (“Hull”).

¹⁴ *Constitution*, s. 51(xx).

¹⁵ *Constitution*, s. 51(xxxv).

¹⁶ *Constitution*, s. 51(xxxix).

¹⁷ *WRA*, ss 5(1), 6(1) and 636.

¹⁸ *Constitution*, s 122.

¹⁹ *Constitution*, s 51(xxxvii).

²⁰ *Constitution*, ss 52, 61 and 69.

²¹ *Constitution*, s 51(xxix).

²² *Constitution*, s 51(i). For general discussions of the relevant decisions relating to the issues discussed above see N Williams and A Gotting “The interrelationship between the industrial power and other heads of power in Australian industrial law” (2001) 20 Aust Bar Rev 264 and A Stewart “Federal Labour Law and New Uses for the Corporations Power” (2001) 14 AJLL 145.

²³ *Constitution*, s 51(xxix).

²⁴ *Victoria v Commonwealth* (1996) 187 CLR 416 at pages 511-521 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

domestic law various obligations under international agreements and International Labour Organisation standards to which Australia is party.

UNFAIR DISMISSAL (OR HARSH, UNJUST OR UNREASONABLE TERMINATION)

In common parlance, the Australian Industrial Relations Commission ("AIRC") determines whether a dismissal within its jurisdiction was unfair. More correctly, it determines "whether a termination was harsh, unjust or unreasonable".²⁵

Between 27 March 2006 and the end of August 2006 there was an increase in unfair dismissal applications to the AIRC in all states except Victoria and Tasmania, and in Queensland the number of applications had trebled.²⁶

The phrase "harsh, unjust or unreasonable" was considered by the High Court in *Byrne & Frew v Australian Airlines*.²⁷

"Clause 11(b) [the term in the relevant award] is aimed at the situation where the termination of employment brought about by the dismissal, rather than the steps leading up to the dismissal, or lack of them, is harsh, unjust or unreasonable. A dismissal with notice may be harsh, unjust or unreasonable because it is based on a ground defined as such by cl 11(b). This refers to such matters as termination 'on the ground of' race, colour, sex and marital status. 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."²⁸

²⁵ WRA, s 652(3).

²⁶ Workplace Express, "Every second dismissal claim cites unlawful grounds: Guidice" (1 September 2006), www.workplaceexpress.com.au/nav?id=32274&no=336617820 ("Workplace Express, "Guidice")

²⁷ (1995) 185 CLR 410 ("*Byrne*").

²⁸ *Byrne* at page 465 per McHugh and Gummow JJ.

In *Bostik (Australia) Pty Ltd v Gorgevski (No 1)*²⁹ Sheppard and Heerey JJ held, in relation to the words “harsh, unjust or unreasonable”:

“These are ordinary non-technical words which are intended to apply to an infinite variety of situations where employment is terminated. We do not think any redefinition or paraphrase of the expression is desirable. We agree with the learned trial judge’s view that a court must decide whether the decision of the employer to dismiss was, viewed objectively, harsh, unjust or unreasonable. Relevant to this are the circumstances which led to the decision to dismiss and also the effect of that decision on the employer. Any harsh effect on the individual employee is clearly relevant but of course not conclusive. Other matters have to be considered such as the gravity of the employee’s misconduct.”³⁰

The determination of whether a termination is harsh, unjust or unreasonable is subject to mandatory statutory qualifications, in that the Commission “must have regard to”³¹ the following factors:

- “(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
- (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

²⁹ (1992) 36 FCR 20 (“*Bostik*”). See also *Australia Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1 at page 10 per Ross VP, Polites SDP and Hoffman C (“*Australia Meat*”).

³⁰ *Bostik* at FCR 28

³¹ WRA, s 652(3).

- (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.”³²

The reference to “including its effect on the safety and welfare of other employees” in paragraph (a) apart, these provisions are identical to those previously contained in s 170CG(3)(b)-(e) of the *WRA* as it was pre- *Work Choices*.

The use of the phrase “must have regard to” requires the Commission to have regard to each of the factors set out, as far as they are relevant to the factual circumstances of the case.³³

An examination of the s 652(3) factors follows.

VALID REASON

A valid reason is one which is:

“... sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s 170DE(1) [now s 652(3)(a)]. At the same time the reason must be valid in the context of the employee’s capacity or conduct or based upon the operation requirements of the employer’s business.”³⁴

The valid reason inquiry is not limited to the particular reason or reasons given by the employer: rather, the AIRC must be satisfied that the particular conduct alleged to provide the reason for termination:

- (a) actually occurred; and

³² *WRA*, s 652(3)(a)-(g).

³³ *Edwards v Giudice* (1999) 94 FCR 561; *Annetta v Ansett Australia* (2000) 98 IR 233 (“*Annetta*”). See also *R v Hunt; ex parte Sean Investmens Pty Ltd* (1979) 180 CLR 322 (consideration of “have regard to”).

³⁴ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at page 373 per Northrop J. *Bao Vu v Victoria* (2001)110 IR 383 at page 400 per Lacy SDP (“*Bao Vu*”).

(b) was sufficient to constitute a valid reason for termination.³⁵

A valid reason must also be “lawful in the sense of not being prohibited, and genuinely must be based on those operational requirements.”³⁶

CAPACITY

Capacity relates to the employees ability to do the work the employee is employed to do.³⁷

Capacity means more than an individual employee’s personal best,³⁸ and includes physical ability to perform tasks and the ability to perform the inherent requirements of a particular job.³⁹

CONDUCT

Conduct alleged as the basis for a termination must be proven to have occurred.⁴⁰ A belief as to conduct, even if reasonably held, is not sufficient.⁴¹

NOTIFICATION OF REASON

The “reason” to be notified is the alleged “valid reason”, and must be notified prior to termination.⁴² If no, or no sufficient information, is provided in a purported notification, it may be that notification of reason has not been given.⁴³

³⁵ *MM Cables v Zammit* (unreported, Full Bench AIRC, Print 38106, 17 July 2000).

³⁶ *Cosco Holdings Pty Ltd v Thu Thi Van Do* (1997) 79 FCR 566 at page 576 per Northrop ACJ.

³⁷ *Crozier v AIRC* [2001] FCA 1031 at para [14] per Gray, Branson and Kenny JJ (“*Crozier FCA*”).

³⁸ *Crozier FCA* at para [14] per Gray, Branson and Kenny JJ

³⁹ *Erskine v Chalmers Industries Pty Ltd* (unreported, Full Bench AIRC, PR 902746, 30 March 2001).

⁴⁰ *King v Freshmore (Vic) Pty Ltd* (unreported, Full Bench AIRC, Print S2413, 17 March 2000).

⁴¹ *Australia Meat* at page 14 per Ross VP, Polites SDP and Hoffman C; *Burke v Reander Pty Ltd* (1996) 69 IR 346 at page 359 per Millane JR.

⁴² *Crozier v Palazzo Corp Pty Ltd* (2000) 98 IR 137 at page 151 per Ross VP, Acton SDP and Cribb C (“*Crozier AIRC*”).

⁴³ *Nicholson v Heaven & Earth Gallery Pty Ltd* (1994) 126 ALR 233 at pages 243-244 per Wilcox CJ (“*Heaven & Earth*”); *Pacey v Henry Walker Eltin Contracting* (unreported, AIRC, Print S7072, 15 June 2000).

OPPORTUNITY TO RESPOND TO REASONS RELATED TO CAPACITY OR CONDUCT

An opportunity to respond means a practical opportunity afforded to the employee in a reasonable way by the employer, with adequate time to respond.⁴⁴ The opportunity may be afforded in writing, or orally.⁴⁵

WARNING ABOUT UNSATISFACTORY PERFORMANCE

Warnings are only necessary where performance is in issue.⁴⁶ Performance is more likely to relate to capacity than conduct.⁴⁷ Of the form of warning a Full Bench of the AIRC has said:

“... a warning must:

- identify the relevant aspect of the employee’s performance which is of concern to the employer; and
- make it clear that the employee’s employment is at risk unless the performance issue identified is addressed.

In relation to the latter requirement, a mere exhortation for the employee to improve his or her performance would not be sufficient. We also note that we accept that these criterion are to be applied in a practical and commonsense way taking into account the employment context.”⁴⁸

SIZE OF THE EMPLOYER’S UNDERTAKING AND ABSENCE OF DEDICATED HUMAN RESOURCE MANAGEMENT SPECIALISTS OR EXPERTISE

These provisions allow the AIRC to take into account the resources of businesses both small and large, and the likely effect⁴⁹ of the absence or presence of size and resourcing of the business upon termination procedures.⁵⁰

⁴⁴ *Schaale v Hoescht Australia Ltd* (1993) 47 IR 249 at page 252 per Heerey J; *GH Operations Pty Ltd v Smith* (unreported, Full Bench AIRC, PR 904136, 14 May 2001)

⁴⁵ *Targo v Southern Cross Times* (unreported, AIRC, Print S7983, 13 July 2000); *Slann v Western Power* (unreported, AIRC, Print T1965, 13 October 2000).

⁴⁶ *Fischer v Telstra Corp Ltd* (unreported, Full Bench, AIRC, Print R2558, 1 March 1999).

⁴⁷ *Annetta* at page 237 per Giudice J, Williams SDP and Cribb C.

⁴⁸ *Fastidia Pty Ltd v Goodwin* (2000) 102 IR 131 at pages 141-142 per Ross VP, Williams SDP and Blair C.

⁴⁹ *Sawiris v BMS Entertainment Pty Ltd* (unreported, AIRC, PR 951322, 27 August 2004) at para [63] per Lacy SDP (provisions speculate upon likely impact of size and resources on an employer’s business).

⁵⁰ *Pergaminos v Thian Pty Ltd* (AIRC, PR 920123, 16 July 2002) at paras [37] and [40] per Lacy SDP, *Gates v Jordan Transport Pty Ltd* (unreported, AIRC, PR 936112, 19 August 2003) at para [92] per Richards C (limited resources explain perfunctory manner of termination), *Corrin v Lunchez on Highbury* (unreported, AIRC, PR 925072, 25 November 2002) at para [41] per Grainger C (classic small business behaved entirely appropriately).

OTHER RELEVANT MATTERS

This provision allows the AIRC to exercise a wide discretion having regard to the circumstances of a particular matter. Matters considered by the AIRC include:

- (a) impact upon the employee;⁵¹
- (b) whether termination was proportionate to reason for termination;⁵²
- (c) differential treatment;⁵³
- (d) opportunity to improve performance;⁵⁴
- (e) award obligation;⁵⁵ and
- (f) communication with employee.⁵⁶

EXCLUSIONS – SECTION 638

Section 638 of the WRA excludes certain types of employees from making a claim of harsh, unjust or unreasonable termination.

An examination of some of the exclusions follows:

Employee engaged under a contract of employment for a specified period of time

A contract is not a contract for a specified period of time unless commencement and conclusion dates are certain and unambiguously identified in a manner enabling the exact duration of the contract to be able to be ascertained.⁵⁷

⁵¹ *Container Terminals Australia Ltd v Toby* (unreported, Full Bench AIRC, Print S8434, 24 July 2000), *Rice Growers Co-op Ltd v Schliebs* (unreported, Full Bench AIRC, PR908351, 31 August 2001).

⁵² *Byrne* at page 465 per McHugh and Gummow JJ, *Potter v Work Cover Corporation* (2004) 133 IR 458 at page 473 per Ross VP, Williams SDP (summary dismissal disproportionate to misconduct supports conclusion termination harsh despite existence of valid reason).

⁵³ *Donaldson v NSW National Parks & Wildlife Service* (1997) 74 IR 168 at pages 180-181 per Madgwick J (differential treatment does not require equality of result but consistency of treatment); *Capral Aluminium Ltd v SAE* (1997) 75 IR 65 at page 68 per Madgwick J. See also *Portilla v BHP Billiton Iron Ore Pty Ltd* (2005) 147 IR 1 at pages 24 and 35-37 per Sharkey P and Kenner C and pages 44-48 per Beech CC, *Sexton v Pacific National (ACT) Pty Ltd* (unreported, AIRC, Print 931440, 14 May 2003).

⁵⁴ *Bao Vu* at pages 411-412 per Lacy SDP, *Hurskin v Australian Jewish Press Pty Ltd* (1996) 69 IR 123 at page 141 per Millane JR.

⁵⁵ *Temp Services Ltd v Klooger* (2004) 136 IR 358 at page 363 per Williams and Cartwright SDPP and Larkin C (non compliance with award obligation factor to be taken into account).

⁵⁶ *Barclay v Nylex Corporation Pty Ltd* (2000) 126 IR 294 at page 339 per Ross VP (failure to clearly articulate disciplinary policy relevant consideration).

A broad estimation of a period of time, such as “approximately 12 to 16 weeks” does not constitute a specified time.⁵⁸

The possibility of employment for a further fixed term does not alter the character of a contract which is otherwise one for a specified period of time.⁵⁹

An unqualified right to terminate the employment contract is inconsistent with the contract being a contract for a specified period of time.⁶⁰ It appears that the right to terminate the employment contract, if granted by an Act, is also inconsistent with the contract being for a specified period of time.⁶¹

Employee engaged under a contract of employment for a specified task

For a contract of employment to be for a specified task it must be a contract under which the employee is to carry out a specified task. A specified task is different to an employer’s task or project.⁶² In *Hewitt v ACT vk Custom Engineering Pty Ltd*⁶³ Lacy SDP said:

“The phrase ‘a specified task’ should be interpreted narrowly so as to cover only situations where an employee has been engaged under a contract to perform a project or job which is distinct or identifiable in its own right. The task to which the original employment contract relates should be self contained and not leave open the possibility of the employee performing any work outside the realm of the specific task for which the employee is being employed.”⁶⁴

⁵⁷ *Andersen v Umbakumba Community Council* (1994) 56 IR 102 at page 106 per von Doussa J (“*Andersen*”).

⁵⁸ *Drury v BHP Refractories Pty Ltd* (1995) 62 IR 467 (“*Drury*”).

⁵⁹ *Trigar v La Trobe University* (unreported, Full Bench IRC Print T2860, 1 November 2000), *Lloyd v Pacific Rim Employment Pty Ltd* (unreported, AIRC, Print PR 912882, 4 January 2002).

⁶⁰ *Andersen* at page 106.

⁶¹ *D’Lima v Board of Management, Princess Margaret Hospital for Children* (1995) 64 IR 19, *Kinniburgh v Printers Press Pty Ltd* (unreported, AIRC, P6340, 30 October 1997), *Ogilvie v Aboriginal Hostels Ltd* (unreported, AIRC, Print PR9044133, 2 March 2004). Compare, however, *Dadey v Edith Cowan University* (1996) 70 IR 295.

⁶² *Drury* at page 472 per Wilcox CJ.

⁶³ Unreported, AIRC, PR904665, (25 May 2001).

⁶⁴ *Hewitt* at paragraph [24] per Lacy SDP.

A contract for a specified task can be extended provided that the specified task remains the same.⁶⁵

Employee serving a period of probation

A period of probation has been variously described as:

- (a) a time of provisional employment for the purposes of testing suitability;⁶⁶
- (b) as not being equivalent to a training period;⁶⁷
- (c) as a period to gauge the viability of continuing the employment relationship;⁶⁸ and
- (d) as being different to trial, qualifying and evaluation periods.⁶⁹

The employee must actually be “serving” the period of probation at the time of termination of employment for the exclusion to apply, that is, it does not apply after the conclusion of the probation period.⁷⁰

The period must be of a specifically limited duration, clearly spelt out (where the reasonableness requirement does not apply).⁷¹

Termination of a probationary period in advance of employment requires determination in advance of the employment relationship, and not simply in advance of entry into the employment contract.⁷² Probationary time periods begin to run when the employment relationship commences, not when the employment contract is signed.⁷³

⁶⁵ *D’Ortenzio v Telstra* (1997) 78 IR 468, *D’Ortenzio v Telstra (No 2)* (1998) 82 IR 52.

⁶⁶ *McLeod v Scicluna & Associates* (unreported, Industrial Relations Court of Australia, No 77 of 1997, 13 March 1997).

⁶⁷ *Fielder v Casual Life Furniture Co International Pty Ltd* (unreported, AIRC, PR 5244 19 September 1997).

⁶⁸ *Tabb v Electronic Services Canberra Pty Ltd* (unreported, AIRC, Print P5892, 17 October 1997).

⁶⁹ *Hardie v Starcon Pty Ltd* (unreported, Industrial Relations Court of Australia, No 188 of 1997, 22 May 1997), *Mainpoint Enterprises Pty Ltd v Henderson* (unreported, Full Bench AIRC, Print Q3750, 17 July 1998).

⁷⁰ *Potter v Australian Capital Territory* (1997) 72 IR 163 at page 173 per Moore J, *Potter v Australian Capital Territory (No 2)* (1997) 74 IR 403 at pages 406-407 per Wilcox, Marshall & North JJ.

⁷¹ *Conroy v Leisure Australia* (unreported, Industrial Relations Court of Australia, 16 November 1994), *Scott v Robison* (unreported, AIRC, Print P5023, 12 September 1997).

⁷² *Thompson v Sons of Gwalia* [1997] 2-997.

⁷³ *Wilkinson v Skippers Aviation Pty Ltd* (unreported, Full Bench, AIRC, PR 903635, 30 April 2001) (“*Skippers Aviation*”).

The period must be determined in advance by either contractual agreement between the parties or by a statutory instrument, such as an Act or an industrial award.⁷⁴ The parties cannot contract out of a statutory probationary period.⁷⁵

In determining whether a probationary period is reasonable (where that criterion applies) the matter is an exercise of judgment based on proved effective facts, but having regard to the nature and circumstances of the employment.⁷⁶

In determining reasonableness innumerable factors might be considered, including the following:

- (a) industry practice;⁷⁷
- (b) whether or not the work is supervised;⁷⁸
- (c) the seniority of the employee;⁷⁹
- (d) the repetitive nature of the work;⁸⁰
- (e) whether the work requires considerable full time training at the employer's expense;⁸¹ and
- (f) personal circumstances, including prior experience.⁸²

Other section 638 exclusions include:

- (a) *casual employee engaged for a short period;*
- (b) *trainees;*
- (c) *non award remuneration capped employees; and*

⁷⁴ *CFMEU v Borg Manufacturing Pty Ltd* (1997) 72 IR 263.

⁷⁵ *Potter (No 2)*, (*Director-General of Education v Suttling* (1987) 162 CLR 427.

⁷⁶ *Heaven & Earth Gallery* at page 242 per Wilcox CJ, *Potter (No 2)* at page 409 per Wilcox, Marshall & North JJ.

⁷⁷ *Heaven & Earth Gallery*.

⁷⁸ *McLean v Kids Korner Pty Ltd* (unreported, Industrial Relations Court of Australia, 21 May 1997) ("Kids Corner"), *Watt v Intercultural Management Services Pty Ltd* [1997] 41 AILR at 3-520.

⁷⁹ *Cook v Commissioner of Police* (1996) 66 IR 361 ("Cook").

⁸⁰ *Lion v Furneys Stock Feeds Ltd* (1996) 66 IR 298.

⁸¹ *Gianfelici v Qantas Airways Pty Ltd* (unreported, AIRC, Print N5369, 27 September 1996).

(d) *employee engaged on a seasonal basis*

OTHER EXCLUDED EMPLOYEES

Under Work Choices new grounds excluding categories of employees have been enacted.

Corporation employing 100 employees or fewer

An employee is prohibited from making an application alleging termination was harsh, unjust or unreasonable if the employee was at the relevant time employed by an employer employing 100 employees or fewer.⁸³

This provision has excited significant comment. It has been suggested that it “open[s] Pandora’s box”.⁸⁴

Arguably, however, the effect of excluding corporations with 100 employees or fewer might be less than expected. There are several reasons for this:

- (a) significant numbers of the employees concerned might not be employed by corporations, and therefore not caught by the *WRA*;⁸⁵
- (b) employees of State Government and State Government instrumentalities may not be covered, depending on the scope of the corporations power in relation to the State public corporations and the effectiveness of legislation being put in place by State Governments to “claw back” employees of State public corporations into the State Public Service proper;⁸⁶

⁸² *Cook, Kids Korner.*

⁸³ *WRA*, s 643(10), and see s 643(11), (12) for method of calculating whether an employer employed 100 employees or fewer at the relevant time.

⁸⁴ Stephen Smith, Shadow Minister for Industry, Infrastructure and Industrial Relations quoted in *Labor eHerald*, 28 June 2005.

⁸⁵ As many of 30% of employees in W.A. may be employed in businesses that are unincorporated: see A.R.Beech, “The Road Ahead for the WA Industrial Relations Commission” (7 September 2006) page 3 (“Beech, “The Road Ahead”).

⁸⁶ In Western Australia the State Government Employees account for about 8.6% of employees in the State: Beech, “The Road Ahead”, page 3; “States Build New Ramparts Against Work Choices”, www.workplaceexpress.com.au/nav?id=32413&no=338067590 (21 September 2006) announcing the introduction by the government of South Australia of legislation to move 61,000 employees of government

- (c) a possibility that not all local government corporations are caught by the corporations power;⁸⁷ and
- (d) the fact that, arguably and largely anecdotally, any employees in small unincorporated businesses are likely not to be highly unionised, and therefore, not to have previously availed themselves of the pre-*Work Choices* unfair dismissal laws without union support.

Ironically, it may be that this change does open a Pandora's box. Reports indicate that employees, and their lawyers, are actively exploring common law breach of contract claims, and possible actions under the *Trade Practices Act, 1974* (Cth).⁸⁸

Misleading and deceptive representations in employment negotiations concerning security of employment might give rise to actions under s 52 of the *Trade Practices Act*.⁸⁹ A careful analysis of the implied duty of mutual trust and confidence might also give rise to some interesting actions, particularly in relation to an employer's duty prior to termination, and the consequences of pre-termination breaches of that duty.⁹⁰

Genuine Operational Reasons

An employee is prohibited from making an application alleging termination was harsh, unjust or unreasonable, "if the employee's employment was terminated for genuine

owned corporations out of the reach of work choices and the new ethical purchasing policy of the Victorian Government requiring suppliers of services to the Victorian Government to comply with a no disadvantage test measured against State awards and State laws.

⁸⁷ See *Hull* at page 414 per Anderson J, and the cases there cited: *Burrows v Shire of Esperance* (1998) 86 IR 75 (municipality a trading corporation), *Mid Density Development Pty Ltd v Rockdale Municipal Council* (1992) 39 FCR 579 (municipality not a trading corporation) and *Jazabas Pty Ltd v City of Botany Bay Council* [2000] NSWSC 58 (municipality not a trading corporation).

⁸⁸ Cf. Smith, "Bringing Power to the People", *Australian Financial Review*, 29 August 2006, page 58.

⁸⁹ *O'Neill v Medical Benefits Fund of Australia Ltd* (2002) 122 FCR 455, *Macdonald v Australian Wool Innovation Ltd* [2005] FCA 105, *Magro v Fremantle Football Club Ltd* (2005) 142 IR 445.

⁹⁰ *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, *State of New South Wales v Paige* [2002] NSWCA 235 at para [154] per Spigelman CJ, *Intico (Vic) Pty Ltd & Ors v Walmsley* [2004] VSCA 90, *Bednall v Wesley College* [2005] WASC 101 at para [29] and paras [58]-[72] per Newnes M. See also J. Riley "Mutual Trust and Good Faith": Can Private Law Guarantee Fair Dealing in the Workplace?" (2003) 16 AJLL 28, K. Godfrey "Contracts of Employment: Renaissance of the Implied Term of Trust and Confidence" (2003) 77 ALJ 764.

operational reasons or for reasons that include genuine operational reasons.”⁹¹ Thus, an employee harshly, unjustly or unreasonably terminated, but also terminated for genuine operational reasons, cannot make an application.

Operational reasons are defined as “reasons of an economic, technological, structural or similar nature relating to the employer’s undertaking, establishment, service or business, or to a part” thereof.⁹²

Dire consequences were predicted as a result of the enactment of these provisions. One high profile plaintiff solicitor was quoted as saying that “genuine operational reasons” was so broad it “could mean almost anything”, and that he had “already seen some employer lawyers advise their clients that they had rocks in their head if they didn’t fire people for genuine operational reasons”.⁹³ Others were more cautious: suggesting that employer actions would be subject to “scrutiny” and that “businesses are concerned about their reputations” and would therefore concentrate on “getting employment issues right.”⁹⁴ But it is the AIRC’s approach to “genuine operational reasons” which has seized centre stage.

In *Perry v Savills (Vic) Pty Ltd*⁹⁵ Watson SDP had before him an application to dismiss that part of a harsh, unreasonable or unjust termination application that fell within the genuine operational reasons exception. The evidence disclosed that the applicant had a significant medical condition which in time would result in her inability to work. Income protection insurance was provided as part of her terms and conditions of employment. The employer decided to amalgamate the applicant’s role with that of another employee into a single role. A business case for the abolition of the two roles and the creation of a new role was put

⁹¹ WRA, s 643(8).

⁹² WRA, s 643(9).

⁹³ Josh Bernstein, partner, Maurice Blackburn Cashman quoted in A. Symonds, “Dismissed, not disarmed, over Work Choices”, Australian Financial Review, Special Report – Enterprise Quarterly, 31 August 2006, p.5. (“Dismissed Work Choices”).

⁹⁴ Russell Allen, partner, Freehills, quoted in Dismissed Work Choices.

⁹⁵ Unreported, AIRC, PR973103, 20 June 2006.

forward and approved by the employer. The new role was advertised. The applicant applied. She was unsuccessful. She was terminated on 21 April 2006. She commenced proceedings in the AIRC alleging unfair and unlawful termination of employment.

The AIRC, despite some concerns about the nature of the restructured position, came to the view that the restructuring was genuine and reflected genuine operational reasons. The matter did not end there however. The AIRC determined that the issue raised by ss 643(8) and (9) of the *WRA* was not whether there were genuine operational reasons for the restructuring of the position previously occupied by Ms Perry, but whether the restructuring resulted in a genuine operational reason for the termination of her employment. This involved a consideration of wider issues including:

- (a) whether or not the employer had formulated or put an alternative offer of employment in proper terms of the applicant;
- (b) the likelihood of the applicant accepting any offer of alternative employment;
- (c) whether there were other positions available within the employer's operations at the applicant's remuneration level for which the applicant was qualified;

and in light of those considerations the AIRC determined that there was no genuine operational reason for the termination of the applicant's employment.

In *Springer & Cunningham v The Northcott Society*⁹⁶ Cargill C followed the decision in *Perry* finding that the relevant termination had to be for genuine operational reasons and not merely because of a restructure preceding the termination. In that case, the employer failed to make out the genuine operational reasons for termination. In *Trajkovska v Australian Associated Press Pty Ltd*⁹⁷ Raffaelli C upheld the criteria upon which the employer AAP selected a manager for redundancy, but in doing so accepted that it

⁹⁶ (Unreported, AIRC, PR973840, 1 September 2006).

⁹⁷ (Unreported, AIRC, PR974086, 18 September 2006).

focussed on whether an employee's employment was terminated for genuine operational reasons.

Lawyers familiar with this area of the law will see that the test in *Perry* imports many of the pre-*Work Choices* criteria into the assessment of whether the termination was for genuine operational reasons. Further, it might be argued that by narrowing the focus to genuine operational reasons for termination *Work Choices* has made it more difficult rather than easier to terminate where operational reasons are the basis for termination.

Finally, it is arguable that closer examination of the "genuine" qualification to the "operational reasons" criteria might result in further restrictions on employer's ability to terminate for genuine operational reasons. That issue does not appear to me to have been fully explored in the cases to date.

Qualifying Period

The default qualifying period for making an application has been increased to six months employment.⁹⁸

REMEDIES

The primary remedy for harsh, unjust or unreasonable dismissal continues to be reinstatement.⁹⁹

As was previously the case, the AIRC may order compensation if it believes that reinstatement is inappropriate. Compensation is capped at six months pay or \$32,000, whichever is lowest.¹⁰⁰

⁹⁸ WRA, s 643(7).

⁹⁹ WRA, s 654(3).

The AIRC cannot include compensation for “shock, distress or humiliation, or other analogous hurt caused to the employee by the manner of terminating the employee’s employment”,¹⁰¹ and must reduce the amount of compensation if employee misconduct contributed to the decision to terminate employment.¹⁰²

UNLAWFUL TERMINATION

The Federal Magistrates Court now has concurrent jurisdiction with the Federal Court to hear unlawful termination claims.¹⁰³

Potentially, every employee who is terminated can bring an unlawful termination application. The restrictions and exclusions applicable to harsh, unjust or unreasonable termination claims do not apply to unlawful termination claims.

Informed comment suggests that “there will be an increase in the number of unlawful termination claims”¹⁰⁴ which come before the Federal Court and Federal Magistrates Court. The trend seems to have already commenced: Justice Guidice, the President of the AIRC, recently observed that “slightly more than half of all applications under Work Choices seeking relief for termination of employment claimed unlawful dismissal – either on its own or in combination with a claim for harsh, unjust or unfair dismissal.”¹⁰⁵

PROHIBITED REASONS

¹⁰⁰ WRA, s 654(7), (11) and (12).

¹⁰¹ WRA, s 654(9).

¹⁰² WRA, s 654(8)(a).

¹⁰³ WRA, s 847(4).

¹⁰⁴ Taylor, “Workplace Relations”, page 6, paragraph 19; Abbott Tout Lawyers, “Employment Law E-News issue 24” (22 September 2006), www.abbotttout.com.au/email.asp?c=149.

¹⁰⁵ Workplace Express, “Guidice”. See also F Smith, “Bringing power to the people”, Australian Financial Review, 29 August 2006, page 58: “Spanner [head of workplace relations at Deacons] says he had also witnessed a growth in discrimination claims since the advent of Work Choices.”

For an unlawful termination claim to succeed a dismissed employee must satisfy the Court that employment was terminated for a prohibited reason, or for reasons that included a prohibited reason.

The prohibited reasons are:

- “(a) temporary absence from work because of illness or injury within the meaning of the regulations;
- (b) trade union membership or participation in trade union activities outside working hours or, with the employer’s consent, during working hours;
- (c) non-membership of a trade union;
- (d) seeking office as, or acting or having acted in the capacity of, a representative of employees;
- (e) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- (f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- (g) refusing to negotiate in connection with, make, sign, extend, vary or terminate an AWA;
- (h) absence from work during maternity leave or other parental leave; and
- (i) temporary absence from work because of the carrying out of a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.”¹⁰⁶

The prohibited reasons are to be construed liberally as beneficial legislation, and interpreted in accordance with the international conventions to which they give effect.¹⁰⁷

Aspects of some of the prohibited reasons are dealt with hereunder.

¹⁰⁶ WRA, s 659(2). Taylor notes that “the prohibited reasons include matters such as race, colour, sex, sexual preference, age, physical or mental disability and the like, the jurisdiction has a close similarity to the Federal Magistrates Court jurisdiction in relation to unlawful discrimination under the *Human Rights and Equal Opportunity Commission Act 1986*... This jurisdiction is to hear and determine complaints of discrimination under the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*. Pursuant to that legislation the Federal Magistrates Court has since its inception heard and determined claims for compensation for unlawful discrimination alleged to have

TEMPORARY ABSENCE FROM WORK

Temporary absence is defined by regulation.¹⁰⁸

Temporary absence includes absence for which a medical certificate is supplied within 24 hours of the commencement of the absence, or a longer period reasonable in the circumstances,¹⁰⁹ or where an industrial instrument requires notification and substantiation of the absence by the employee and the employee has done so,¹¹⁰ or where the employee has supplied a “required document” under *WRA*, s254.¹¹¹

The foregoing provisions do not however apply if the employee’s absence exceeds three months, or three months in a twelve months period, unless the employee is on paid sick leave for the duration of the absence or absences.¹¹²

The “not easily comprehensible”¹¹³ definition of “temporary absence” in the *WRReg* is intended to be exhaustive.¹¹⁴

TRADE UNION MEMBERSHIP AND ACTIVITIES

The formal status of membership is sufficient. Membership does not include the activities that might flow from being an “active” or “activist” member of a union.¹¹⁵

occurred in respect of a termination of employment. That experience will no doubt assist the Court in hearing unlawful discrimination claims”: Taylor, “Workplace Relations” page 7, para 22.

¹⁰⁷ *Grout v Guunedah Shire Council* (1994) 57 IR 243, *Commonwelath v HREOC* (2000) 108 FCR 378.

¹⁰⁸ *Workplace Relations Regulations, 2006 (Cth)* (“*WRReg*”), Ch 2 reg 12.8.

¹⁰⁹ *WRReg*, Ch 2 reg 12.8(1)(a).

¹¹⁰ *WRReg*, Ch 2 reg 12.8(1)(b).

¹¹¹ *WRReg*, Ch 2 reg 12.8(1)(c). A “required document” for these purposes means a medical certificate from a registered health practitioner, or where it is not reasonable practicable to provide a medical certificate, a statutory declaration made by the employee: *WRA*, s 254(2).

¹¹² *WRReg*, Ch 2 reg 12.8(2). *Nikolich v Goldman Sachs JB Were Services Pty Ltd* [2006] FCA 784 at para [175] per Wilcox J (“*Nikolich*”), agreeing with *Sallehpour v Frontier Software Pty Ltd* (2005) 139 IR 457 at page 463 per Marshall J, [2005] FCA 247 at para [45] per Marshall J (“*Sallehpour*”) (unpaid sick leave exceeding three months precludes the prohibition). See also *Crowley v Parker Hannafin (Australia) Pty Limited* [2006] FCA 901 at paras [40]-[41] per Marshall J (“*Crowley*”).

¹¹³ *Nikolich* at para [169] per Wilcox J.

¹¹⁴ *Nikolich* at para [169] per Wilcox J.

¹¹⁵ *AWU v BHP Iron Ore* (2001) 102 IR 410.

Trade union activities might include activities as an elected union delegate or the circulation of union petitions.¹¹⁶

REPRESENTATIVE OF EMPLOYEES

In *Shearer* the termination of the employee was found unlawful by reason of the employer's failure to prove that it did not terminate the employee because of his activities as a representative of employees.

FILING A COMPLAINT ALLEGING VIOLATION OF LAWS

This provision requires the making of a complaint to a body external to an employer.¹¹⁷ The invoking of a dispute resolution procedure under an award providing for a Commissioner of an Industrial Relations Commission to try to resolve a dispute is an example of such a complaint.¹¹⁸

The employer must be made aware of the complaint.¹¹⁹

RACE, ETC

The following are some simple case examples for some of the various heads of discrimination under s 659(2)(f).

Race

In *Shackley v Australian Croatian Club*¹²⁰ the Secretary-Manager of the Club was dismissed because she was not Croatian, despite the Club President denying telling Shackley that she was being terminated because she was not Croatian. Moore J found that

¹¹⁶ *Shearer v Everitt* [1998] FCA 55 (“*Shearer*”).

¹¹⁷ *He v Lewin & Ors* (2004) 137 FCR 266 at page 280 per Gray and Mansfiel JJ, [2004] FCAFC 161 at para [44] per Gray and Mansfiel JJ, *Crowley* at para [22 per Marshall J].

¹¹⁸ *Fox v St Barbara Mines Ltd* [1998] FCA 306. For an unsuccessful application on this basis see *Griffiths v Freedom Furniture* [2002] FCA 595 (“*Freedom Furniture*”).

¹¹⁹ *Robertson v South* [2000] FCA 1402.

¹²⁰ (1995) 61 IR 430.

the evidence corroborated the employee's version of events, and the Club failed to overcome the burden of proving that the termination was not for a prohibited reason.

Sex

In *Stewart v Nickles*¹²¹ discrimination on the basis of sex was inferred where a female motor cycle instructor's duties were diminished over time by comparison to her male counterparts. Again the employer failed to overcome the burden of proving that the termination was not for a prohibited reason.

Age

In *Qantas Airways Ltd v Christie*¹²² a pilot was not discriminated against on the basis of age because of a requirement that a pilot be under 60 years of age. This was because it was held that to be able to fly to a reasonable number of the airline's overseas destinations was an inherent requirement of the position, and many countries excluded aircraft flown by a pilot over 60 years.

Mental disability

Termination based on "psychological symptoms" is sufficient to constitute termination for mental disability.¹²³

Family Responsibilities

In *Laz v Downer Group Ltd*¹²⁴ the managing director's personal assistant proved discrimination on the basis of family responsibilities where her termination related to her

¹²¹ 1999 [FCA] 888.

¹²² (1998) 193 CLR 280 ("*Christie*")

¹²³ *Nikolich* at para [193] per Wilcox J, but in that case the mental disability also constituted an inherent requirement exception: *Nikolich* at para [199] per Wilcox J. Similar issues arose in *Sallehpour* but it was not necessary to decide them because, on the evidence, Marshall J decided that the onus of disproving mental disability had been met by the employer: *Sallehpour* IR at page 463 per Marshall J, FCA at para [46] per Marshall J.

¹²⁴ *Laz v Downer Group Ltd* (2000) 108 IR 244, [2000] FCA 1390 ("*Laz*").

inability to work back (after 5.30pm) without notice on days where her child had to be picked up from child care.

Pregnancy

In *Stojanovic v The Commonwealth Club*¹²⁵ Moore J held that an employer had discriminated against an employee by terminating her, with notice, consequent upon confrontation following the employee being told there would be no job for her to return to following childbirth (she was not eligible for maternity leave). Moore J held that whilst the confrontation was a reason for termination, so was pregnancy, and discrimination on that basis was proven.

HEARING UNLAWFUL TERMINATION APPLICATIONS

The employee does not have to prove that the termination was for a proscribed reason.¹²⁶

It is a defence for an employer to prove a termination was for a reason or reasons that do not include a proscribed reason.¹²⁷

Section 664 has been described as a reverse onus of proof provision.¹²⁸ Taylor says it “is similar but not identical to a reverse onus of proof.”¹²⁹ The section allows a mere allegation by an employee to stand as sufficient proof of fact unless the employer proves otherwise.¹³⁰ The provision, then s 170CQ, was described by Moore J in *Laz* in these terms:

“In my opinion an applicant alleging termination in contravention of s 170CK(2) will succeed in the application unless the employer establishes a defence by proving

¹²⁵ (unreported, Industrial Relations Court of Australia, Moore J, No AI267R of 1994, December 1995)

¹²⁶ *WRA*, s. 664(a).

¹²⁷ *WRA*, s 664(b).

¹²⁸ *Freedom Furniture* at para [35] per Mansfield J.

¹²⁹ Taylor, “Workplace Relations”, page 12, para 43.

¹³⁰ *Laz*.

that the alleged reason was not the reason or one of the reasons for the termination. Perhaps it can be put in terms that though the applicant must prove on the balance of probabilities each element of the contravention, s 170CQ enables the allegation that a reason was a proscribed reason to stand as sufficient proof of the fact unless the employer proves otherwise: see *Dauids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR where Wilcox and *Cooper JJ refer to R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 507. The success of the application does not depend on the Court being satisfied, other than by reference to the allegation of the applicant, that the termination was for a proscribed reason (or one reason was a proscribed reason) if the employer fails to make good its defence.”¹³¹

It is not lawful to terminate employment for a proscribed reason where that reason “is based on the inherent requirements of the particular position concerned”.¹³² As to what is meant by the expressions “inherent requirements” and “particular position” see *Christie*¹³³ where a requirement that a pilot be able to fly a reasonable number of the airline’s overseas destinations was held to be an inherent requirement of the position (the case involved a pilot who was required to retire on turning 60 years because many countries excluded aircraft flown by a pilot over 60 years). It is that which is essential to the performance of a particular position that is regarded as an inherent requirement of the position.¹³⁴

REMEDIES FOR UNLAWFUL TERMINATION

If satisfied that an employer unlawfully terminated an employee the Court can make one or more of the following orders:

- (a) impose a penalty of not more than \$10,000;
- (b) reinstatement;
- (c) order compensation of such amount as the Court thinks appropriate, subject to the provisions of *WRA* s 665(2)-(5);
- (d) any other order that the Court thinks necessary to remedy the effects of such determination;

¹³¹ *Laz* IR at pages 254-255 per Moore J, FCA at para [26] per Moore J.

¹³² *WRA*, s 659(3).

¹³³ (1998) 193 CLR 280.

¹³⁴ *Christie* at page 305 per McHugh J.

(e) any other consequential orders.¹³⁵

The Court is restricted in the amount of compensation it can order. It may order no more than 6 months compensation for any employee, and for non-award employees it may order no more than \$32,000 for the 2006/2007 financial year (the sum increases on 1 July each, indexed to the cost of living). The Court may not order any amount for shock, distress or humiliation or any analogous hurt.¹³⁶

CONCLUSIONS

The potentially detrimental effect of *Work Choices* on the law relating to employee termination may have been significantly overstated.

The substantive grounds for harsh, unjust and unreasonable termination remain almost unchanged.

The substantive grounds for unlawful termination are unchanged, but claims may now also be brought in the Federal Magistrates Court.

The genuine operational reasons exclusion appears much narrower in operation than was thought to be the case. It appears to be capable of further narrowing in its field of “genuine” operation.

The 100 or fewer employees exception might leave those employees affected within existing State unfair dismissal jurisdictions, or possibly unregulated. If unregulated, and in any event given the general perception of the effect of *Work Choices* or termination of employment rights (albeit an inaccurate perception in my view), this might lead lawyers to

¹³⁵ WRA, s 665(1)

¹³⁶ WRA, s 665(2)-(5)

the exploration, and expansion, of available causes of actions and remedies, by more detailed examination of:

- (a) breach of contract at common law;
- (b) misleading and deceptive conduct under the *Trade Practices Act*, and
- (c) the implied duty of mutual trust and confidence.

Employees ought not think that *Work Choices* casts them into a lake of fire from which there is no escape. Lawyers ought not think the sky is falling down. Rather, for many lawyers and their employee clients, not much will have changed in terms of available termination actions. Where it has other actions, with which “bright mischief”¹³⁷ may be made, bear exploration.

¹³⁷ The English poet Francis Thompson wrote of another English poet Percy Bysshe Shelley, in a poem entitled “Shelley” “The universe is his box of toys... He makes bright mischief with the moon”. Lord Denning, dissenting, in his very first decision in the House of Lords, might have made a similar expanded point: “Whatever the outcome, I hope I may say, as Holt CJ once did after he had done much research on his own: ‘I have stirred these points, which wiser heads will settle.’”: *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 at page 424.