A TIGER WITH NO TEETH: GENUINE REDUNDANCY AND REASONABLE REDEPLOYMENT UNDER THE *FAIR WORK ACT*

ELIZABETH SHI*

I INTRODUCTION

In the Fair Work Bill's second reading speech, Julia Gillard berated the Work Choices' philosophy of 'making your own way in the world without the comfort of mateship, without the protections afforded by a compassionate society, against odds deliberately stacked against you'.[1] She vowed that the *Fair Work Act 2009* would bring more compassion and fairness than Work Choices.[2] On its face, the new definition of genuine redundancy in the Fair Work Act does appear to bring more compassion and fairness by exposing employers to liability if a worker is made redundant in circumstances where it would have been reasonable for the redundant employee to have been redeployed. However, the reality is quite different. The new law, as it has been applied by Fair Work Australia (FWA), allows employers to ignore redeployment considerations except where the possible alternative position is almost identical from the original position. The new law also allows employers to consider redeployment in isolation without communicating their thoughts to the employee. There are no statutory guidelines about what factors are relevant to the new 'reasonable redeployment' test, leaving individual members of FWA to apply the test on an ad hoc basis. This paper will argue that all of these factors lead to the result that the real outcomes under the new provisions are substantially similar to the old outcomes under Work Choices, despite claims of a new approach.

This article will firstly argue that Australian law had not imposed an obligation on employers to investigate redeployment alternatives prior to the invention of 'reasonable redeployment' in the Fair Work Act. This argument will be substantiated by surveying the attitudes towards redeployment in the 1984 *Termination Change and Redundancy Case* (*TCR Case*), the 2004 redundancy test case, the Howard government's Work Choices 'genuine operational reasons' law, as well as its interpretation by the then Australian Industrial Relations Commission (AIRC). Secondly, the article will examine the Fair Work Act 'reasonable redeployment' provisions and its interpretation by FWA. Finally, the Fair Work Act provisions will be juxtaposed next to the Work Choices provisions to demonstrate that no real change has been achieved.

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* Lecturer, Graduate School of Business and Law, RMIT University. The author would like to thank the anonymous referees for this journal.

1 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, 11189 (Julia Gillard, Deputy Prime Minister).

2 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2009, 325 (Julia Gillard, Deputy Prime Minister).

II REDUNDANCY TEST CASES

A *Context of 1984 Test Case*

The almost uninterrupted era of post-war economic growth accompanied by full employment ended in 1974 in Australia. From 1974 onwards Australia began to suffer the effects of recession, the problems of which were increased by attempts to rationalise industries that had been supported by way of government subsidies.[3] The effects of the economic downturn were further exacerbated in the area of employment by rapid technological developments.[4] Whilst technology had always been changing over time, it was particularly an issue in the lead up to the 1984 *Termination Change and Redundancy* decision ('*TCR case*') for a number of reasons. Advances in technology leading to job losses had generally been offset by the growth of jobs in other areas: the view being that 'technology destroys jobs and creates new ones'.[5] However, whilst in the past this had been true and new technology had mainly led to the elimination of unskilled jobs, during this period rapid developments in microelectronics were also threatening 'high level mental jobs'.[6] This meant that the threat was not only to unskilled jobs but also to the areas that were expected to grow. This resulted in not only an increasing number of job losses but also greater difficulty in finding re-employment. For example, throughout the '60s and '70s employment had declined in the manufacturing industry and as a result of developments in computerisation it was feared that the growing tertiary sector would not offset these losses.[7]

These issues were further brought to the fore by the high profile issues with the Telecom Australia industrial dispute over technological change in 1979 and the closure of the General Motors-Holden Pagewood plant in 1980 during which 1,500 employees were made redundant.[8] The Telecom dispute related to the employer's decision to computerise its telephone exchange system, with the trade union demanding 'a greater say in the decisions relating to the introduction of that new technology'.[9] Other advances such as the rise of automatic teller machines also contributed to fears of more job losses across the financial sector.[10]

In 1978, these concerns led the Fraser government to set up the Committee of Inquiry into Technological Change in Australia ('CITCA') to make recommendations[11]. The Committee delivered its report in 1980,[12] where, amongst

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3 Richard Mitchell, 'Industrial Relations Under a Conservative Government: The Coalition's Labour Law Program 1975-1978' (1979) 21 *Journal of Industrial Relations* 435, 437; S.J. Jones and Diane Yerbury, 'Australia' (1980) 11 *Bulletin of Comparative Labour Relations 7,* 8.

4 Ibid.

5 Russell Rumberger, 'High Technology and Job Loss' (1984) 6 *Technology in Society* 263, 266.

6 Ibid.

7 Russell Lansbury and Edward Davis, 'Technological Change and Industrial Relations in Australia: An Introduction' in Russell Lansbury and Edward Davis (eds), *Technology, Work and Industrial Relations* (1984) 3, 7.

8 Bob Carr, 'Advance Warning of Redundancy' (1981) 6 *The University of New South Wales Occasional Papers* 20.

9 Stephen Deery, 'Trade Unions, Technological Change and Redundancy Protection in Australia' (1982) 24 *Journal of Industrial Relations* 155, 168.

10 Gerard Griffin, 'Technological Change and Industrial Relations in the Banking and Insurance Industries' in Russell Lansbury and Edward Davis (eds), *Technology, Work and Industrial Relations* (1984) 65.

11 Deery, above n 9, 168.

12 Jones and Yerbury, above n 3, 9.

other things, the Committee indicated that it favoured 'the establishment of conditions that clearly and directly confer rights on the parties involved in the process of change'.[13] To that end, it recommended that the government sponsor a test case with a view to the setting of minimum standards to be observed by enterprises on notification, provision of information, and consultation when technological change is to occur;[14] and a two-part retrenchment compensation scheme that would include provision in awards for: a period of notice before retrenchment; monetary compensation for lost seniority and other accumulated credits only; and assistance to find alternative employment.[15]

In discussing what the minimum standard in relation to consultation should be, the CITCA referred to the National Labour Advisory Council (NLAC) guidelines which stated:

> … the aim of employers should be to provide employees and their organisations with information on the nature of the technological changes proposed; the likely date of implementation of the change; how they expect the change to be implemented; the expected effect on employees; proposals for retraining and redeployment if they are likely to arise; the possibility of retrenchment and any other matters likely to significantly affect employees.[16]

Notably, the CITCA report did not recommend prescriptive requirements on employers to redeploy employees. Instead, CITCA envisaged this as one of the topics that could be discussed within the period of consultation. The recommendations were limited to information, consultation, and compensation. These aspects were also the main areas of regulation adopted by the Commission in the TCR case.

The Fraser Government met the CITCA report with little enthusiasm[17] and it took no action to implement the suggestions other than a few of the minor recommendations. Nor did it support the running of a test case.[18] In regard to the issue of notification and consultation, the government considered that these were not matters that lent themselves to effective legislation or award provision.[19] The government expressed concern that the recommendations had the potential to 'add significantly to labour costs and, thereby, inflationary pressures'.[20]

B *The Termination Change Redundancy Case 1984 ('TCR Case')*

The ACTU brought a claim for improved protections in termination, change and redundancy in 1981, in the *TCR Case*.[21] Hearings began in November 1981, with the final decision being handed down by the Full Bench of the Australian Conciliation and

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13 Committee of Inquiry into Technological Change in Australia, *Technological change and its consequences* (Australian Government Publishing Service, 1980) vol 1, 132.
14 Ibid 173.
15 Ibid 182.
16 Ibid 133.
17 Michael Carter, 'Technological Change in Australia: A Review of the Myers Report' (1982) *The Australian National University Centre for Economic Policy Research Discussion Papers* No 20, 1.
18 Dianne Yerbury, 'Redundancy: The Response of Australian Law' (Working Paper No 82-002, Australian Graduate School of Management, 1982) 76.
19 Russell Lansbury and Edward Davis, above n 7, 3, 10 -12.
20 Dianne Yerbury, 'Redundancy: The Response of Australian Law' (Working Paper No 82-002, Australian Graduate School of Management, 1982) 79.
21 *Change and Redundancy Case* (1984) 8 IR 34 (hereafter the 'TCR Case').

Arbitration Commission ('the Commission') in August 1984.[22] In the meantime, the election of the Hawke Labor government in 1983 had changed the Australian political landscape. The Hawke government and several state Labor governments supported the ACTU's claims.

On requiring employers to endeavour to redeploy employees, notwithstanding the ACTU's arguments for a prescriptive requirement, the Commission was of the view that 'these matters are indicative of the matters which should be discussed between the parties in the conferences we envisage taking place in relation to proposed retrenchments'.[23] In addition, it stated that:

> in general, employers do try to minimize retrenchments and to accommodate the displacement effects in relevant cases through natural wastage and re-training, and we do not think it necessary, or desirable, to make award prescriptions to cover these matters.[24]

Although there was some evidence that *some* employers were already using redeployment measures,[25] and such requirements did exist in *some* redundancy awards and agreements,[26] this seems to be a very poor justification for not imposing a general standard provision into *all* Federal Awards. The Commission had failed to acknowledge and address the inconsistencies arising from some Awards and agreements providing this protection while others did not.

In the Commission's decision, there were only very brief discussions of requiring the employer to endeavour to redeploy redundant employees.[27] Much of the discussion by the Commission seemed to accept as a *premise* that retrenchments were unavoidable and the jobs were already lost. The lack of proper discussion was disappointing, especially because the advantages of a redeployment requirement were recognised in the 1978 policy of CAI on retrenchments, in the CITCA report and in the 1972 National Labor Advisory Guidelines.[28]

The Commission ruled that if an employer did redeploy an employee it would be relieved from the obligation to make redundancy payments.[29] This point could be construed as a small gesture by the Commission to encourage employers to redeploy staff.

Significantly, a standard clause was decided upon to require the employer to inform and consult employees or their unions about proposed redundancies.[30] This consultation clause included a requirement to 'discuss the effects the changes are likely to have on employees, measures to avert or mitigate the adverse effects of such changes on employees'.[31] However, compared to a redeployment clause, the consultation clause was a very weak requirement. It is conceded that the information and discussion could have been useful in giving the employees some advance warning

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22 C. G. Polites and G. R. Watson, 'Major Tribunal Decisions in 1984' (1985) 27(1) *The Journal of Industrial Relations 76*, 77.

23 *TCR Case* (1984) 8 IR 34, 67.

24 Ibid 67.

25 For example, in their submission to CITCA, the National Labour Advisory Council (NLAC) pointed out that of 17,000 employees surveyed whose jobs had been displaced due to technological change, 12,000 had been redeployed to other positions by their employers. See, Committee of Inquiry into Technological Change in Australia, above n 13, 125.

26 *TCR Case* (1984) 8 IR 34, 66.

27 The entire decision was 69 pages long, but the discussion on redeployment was dealt with in 4 paragraphs, see *TCR Case* (1984) 8 IR 34, 66.

28 Ibid.

29 *TCR Supplementary Decision* (1984) 9 IR 115, 135.

30 Ibid 127.

31 Ibid.

of the impending loss of their jobs, thus preparing them for the event and allowing some time to look for other employment. However, there was no direct obligation for the employer to find ways to redeploy staff. The employer could simply discuss measures of avoiding retrenching staff without having any real intention of carrying them out.

It is important to note that the consultation clause was deleted from the standard clause in 1997 in the *Award Simplification Decision*.[32] In that decision, the consultation clause was held by the Commission to contravene the allowable award matters provision (s 89A(2) of the *Workplace Relations Act* 1996) and was deleted. This meant that from 1997 onwards, employers governed by Federal Awards could make managerial decisions to retrench employees without discussing it with the employees or their unions. Employees were deprived of this protection.

C *Redundancy Test Case 2004*

Similar to the 1984 case, the AIRC in 2004 also did not address the redeployment requirement in any detail, except for a brief discussion about why it was impractical for small businesses to consider redeployment.[33] Significantly, the State of Victoria supported the increase in redundancy pay claimed by the ACTU on the basis, among other things, that it would *encourage* employers to consider alternatives to retrenchment.[34]

Similar to the Commission's view in the 1984 case, its view in the 2004 case was that redeployment should be a subject of discussion when the employer consults the trade unions after a redundancy decision is made, rather than a subject for prescriptive regulation.

D *Summary of the 1984 and 2004 Test Cases' View on Redeployment*

In both the 1984 and 2004 test cases, the Commission gave substantial consideration to what employee losses redundancy pay should be *compensating,* but failed to give any attention to the question of whether the law should also encourage employers to look for alternatives to redundancy, thus preventing the losses altogether. The premise seemed to be, in both test cases, that redundancy decisions were generally unavoidable.

III WORK CHOICES

In 2006, the Howard government undertook major reforms of labour law resulting in the Work Choices legislation. After the Work Choices changes, s 643(8) of the *Workplace Relations Act* provided that an employee could not apply for relief in respect of an alleged unfair dismissal if the dismissal was for genuine operational reasons or for reasons that included genuine operational reasons.[35] The phrase 'operational reasons' was defined as 'reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business, or to a part of the employer's undertaking, establishment, service or business'.[36]

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32 *Re Award Simplification Decision* (1997) 75 IR 272, 285-286
33 *Redundancy Case* PR032004 (26 March 2004) AIRC, [281]-[283].
34 Ibid [114].
35 *Workplace Relations Act 1996* (Cth) s 643(8).
36 *Workplace Relations Act 1996* (Cth) s 643(9).

The Work Choices formula of genuine operational reasons departed significantly from the previous accepted definition of redundancy in the redundancy test cases, which was:

> redundancy occurs when an employer decides that the employer no longer wishes the job the employee has been doing to be done by anyone and this is not due to the ordinary and customary turnover of labour.[37]

As a group of 151 academics observed in their submission to the Senate, if an employer were to decide to dismiss award-covered employees with the objective of replacing them with lower cost employees engaged on the Australian Fair Pay and Conditions Standard, these dismissals would fall outside the concept of redundancy as defined in the above definition, because the jobs have not disappeared. Such a dismissal would, however, fall within the meaning of 'genuine operational reasons'.[38] In short, it was far easier to satisfy the 'genuine operational reasons' test than the 'redundancy' test when arguing something was a valid ground for dismissal.

A *AIRC's Interpretation of 'Genuine Operational Reasons'*

In 'genuine operational reasons' cases, it was common for retrenched employees to argue that there was no *need* to retrench, and that employees could have been redeployed instead of being retrenched. As will be discussed in detail below, before the AIRC full bench decision in *Carter v Village Cinemas Australia Pty Ltd,*[39] single member decisions took divergent views on the relevance of redeployment. Some AIRC members ruled that redeployment arguments were relevant, while other single members ruled they were not. An example of the first approach can be found in the case of *Perry v Savills Pty Limited,*[40] and an example of the latter approach can be found in the case of *Aswar Koya v Port Phillip City Council.*[41] All three cases will be discussed below to illustrate the different approaches.

In *Aswar*, an IT technical officer claimed he had been unfairly dismissed and that his employer had used redundancy as a sham to dismiss him. The employee gave evidence that he was offered redeployment positions which were less senior than his original position when he could have been redeployed into an equally senior position. Ives DP found, on the evidence, the redundancy was for genuine operational reasons. He accepted that the restructure was motivated by reasons of 'an economic, technological, structural or similar nature', that is, to 'improve the management and implementation of innovation', expand the services offered and to improve customer service. Ives DP reasoned that even if the employee thought the decision to restructure was a bad or an ill-considered one, that did not render the operational reason advanced by the employer any less genuine.[42]

He went on to find that the Commission lacked jurisdiction to review the substance of a dismissal to ascertain whether a dismissal is harsh, unjust or unfair,

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37 *Redundancy Case* (*2004*) *129 IR 155*, 244; see also *R v Industrial Commission of SA. Ex parte AMSCOL* (1977) 16 SASR 6, 8, noted in *Termination, Change and Redundancy Case* (1984) 8 IR 34, 55-6).

38 A Group of 151 Australian Industrial Relations, Labour Market and Legal Academics (2005) 'Research Evidence About the Effects of the Work Choices Bill', *Submission to the Senate Employment, Workplace Relations and Education Legislation Committee Inquiry into the Workplace Relations Amendments (Work Choices) Bill 2005*, 12.

39 *Carter v Village Cinemas Australia Pty Ltd* [2007] AIRCFB 35.

40 *Perry v Savills (Vic) Pty Limited* PR973103 (20 June 2006) AIRC 3*63.*

41 *Azwar Koya v Port Phillip City Council* PR973045 (13 June 2006) AIRC 350, [31].

42 Ibid.

because the dismissal was for a genuine operational reason. Therefore, the argument that the redeployment opportunity possibly existed could not be considered at all without satisfying the hurdle requirement of the dismissal not being for a 'genuine operational reason'.[43]

A subsequent case, *Perry v Savills Pty Limited*[44] illustrated a completely different interpretation by another single member of the AIRC. In this case, Ms Perry succeeded in arguing that her employer Savills' decision to dismiss her was not based on a genuine operational reason.[45] Watson SDP found that the operational reasons justifying the restructure of the employee's position did not require the termination of Ms Perry's employment, and accordingly were not genuine operational reasons. On the evidence, he found that there was an alternative position available for Ms Perry, in part performing duties she performed in her previous role. Ms Perry was regarded as capable of performing a continued role within Savills and the operational circumstances of the company, with an expanding business, supported the retention of Ms Perry in her employment in the alternative position at the same level of remuneration. However, Savills never offered such a position to Ms Perry.

The decision in *Perry* raised several questions: Was there a *need* to make this employee redundant? Has the position genuinely *disappeared*? Were there any alternatives?

The question of whether an alternative job is available for an existing employee is premised on the assumption that the employee has a legitimate expectation to keep the job if the job still exists (even if in a slightly altered form), in the absence of a valid reason for losing the job. Such a question would not be relevant if the employee did not have such a legitimate expectation. The decision in *Perry* reflects the traditional definition of redundancy, rather than the Work Choices definition interpreted by cases such as *Aswar*.

The reasoning in *Perry* was unequivocally overruled by the full bench in *Carter v Village Cinemas Australia Pty Ltd.*[46] Mr Carter was a general manager at the Doncaster Village Cinemas. He had been employed there for 19 years. The employer decided to close down the Doncaster cinemas because they were not profitable. Mr Carter did not wish to be made redundant and gave evidence that he would have accepted a demotion just to stay on[47]. However the employer argued there were genuine operational reasons to retrench Carter and that it was difficult to redeploy high-level management staff.[48] This was in spite of the fact the employer agreed to redeploy several other staff also employed at the Doncaster operation. At first instance, Hingley C found that the termination was not for genuine operational reasons.[49] Hingley C found several factors relevant in reaching his conclusion:

- Mr Carter was a 'long serving multi-skilled employees who had worked at numerous different locations', he was therefore 'eminently redeployable'.
- Mr Carter was the only staff made redundant in the Doncaster cinema complex.
- Mr Carter was willing to take 6 months long service leave to wait for a vacancy.
- Mr Carter was never asked if he would consider a lower level position.
- During 12 months before the dismissal, several general managers left Village,

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43 Ibid [35].
44 *Perry v Savills (Vic) Pty Limited* PR973103 (20 June 2006) AIRC 3*63.*
45 Ibid [56].
46 *Carter v Village Cinemas Australia Pty Ltd* [2007] AIRCFB 35. For a discussions of the *Carter* case, see Louise Keats, 'No Logical Response Required: The Full Bench Explains Genuine Operational Reasons' (2007) 20 *Australian Journal of Labour Law* 104.
47 Ibid.
48 Ibid.
49 Ibid.

> making future vacancies likely.

Hingley C's approach was similar to that of Watson SDP in *Perry*. He recognised the employee's long service as a factor, and implicitly recognised a legitimate expectation that the employee should keep his job if at all possible.

Subsequent to Hingley C's decision, the then Workplace Relations Minister Kevin Andrews appealed on behalf of the employer. On appeal, the Full Bench of the AIRC reversed the decision and decided there were genuine operational reasons. In contrast to Hingley C, the Full Bench held that the word 'genuine' should be given its dictionary meaning of 'real, or true', and not the more onerous meaning of 'valid, sound or defensible'. The Full Bench distinguished the wording 'genuine' from the wording under the 1996 Act of a 'valid reason'. Therefore a reason could be genuine but not sound, and that is enough to satisfy s 643(8). Further, the alleged reason need only be one of the reasons for termination, not *the* reason for termination. Termination did not have to be an unavoidable consequence of the reason. According to the Full Bench, considerations that the employer did have other alternatives to terminating the employee, such as redeployment or demotion, should be regarded as irrelevant.

The Full Bench's decision in *Carter* was a decisive blow to any notion that redeployment is a relevant factor to 'genuine operational reasons'. As Chapman observed, the provisions and the AIRC's interpretation in *Carter* refer to 'operational reasons' not 'operational *requirements*'.[50] The concept of operational reasons was clearly much broader than the idea of operational requirements.

It is clear that Work Choices laws displayed a far less sympathetic view towards redeployment than the test cases. At least in the test cases it was accepted that redeployment should be a subject of consultation. Cases such as *Carter* illustrated that little weight would be placed on arguments for redeployment, while increasingly favouring managerial prerogatives.

B *Trade Unions' Reaction to the Carter v Village Cinema Case And the Public Campaign against Work Choices*

The broad interpretation of the 'genuine operational reasons' in the *Carter* case provoked much comment and protest, especially from the trade unions. Another contributing reason for the strong reaction was the involvement of the Federal Workplace Relations Minister in appealing the decision on behalf of the employer, after the single Commissioner had decided in favour of the employee.[51] This clearly suggested that the Coalition Government had a political interest in the outcome of this case.

The then ACTU president Sharan Burrow was highly critical of the case in a radio interview:

> In this case 19 years of service counts for nothing when a huge corporation like Village decides that it owes an employee no loyalty and doesn't even seek to try to redeploy him, simply making them redundant at whim… There was an offer from the employee to take long service leave for I understand pretty much up to six months to give the business an opportunity to seek redeployment, and within weeks he was told that there was no interest from the management.

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[50] Anna Chapman, 'Unfair Dismissal Law and Work Choices: From Safety Net Standard to Legal Privilege' (2006) 16(2) *The Economic and Labour Relations Review* 237.

[51] Denis Peters and Melissa Iaria, 'Furore Erupts Over Ease of Dismissal of Longstanding Worker' *Australian Associated Press General News* (Factiva Database, 16 January 2007).

> So what it says to working Australians is that business no longer will provide any loyalty or any attempt at loyalty even in this case by way of trying to secure employment for even long-serving workers.[52]

The concepts of loyalty and job security go to the heart of the trade unions' campaign message against Work Choices. The *Carter* case provided an example of how heavily the scales had tipped in favour of managerial prerogatives.

In the same radio interview, the workplace relations minister Kevin Andrew retorted:

> These were matters which were put before the independent umpire, the Industrial Relations Commission, and taken into account by the Industrial Relations Commission.[53]

Employer groups accused trade unions of being 'hysterical' in their criticism of the *Carter* case. For example, the Australian Chamber of Commerce and Industry (ACCI) president Peter Hendy commented that the case merely clarifies a 'balanced law'. According to Hendy, the law prior to Work Choices was heavily loaded in favour of the employees, and Work Choices strikes a better balance.

During the lead up to the 2007 federal election, the ACTU ran a very successful campaign called 'Your Rights at Work' to gain public momentum against Work Choices.[54] Many of its television advertisements contained case studies of unfair dismissal that included references to the genuine operational reason exception.[55] This ACTU campaign contributed to the defeat of the Howard government in the 2007 election.

IV FAIR WORK ACT

Following the election of the Rudd Labor Government in 2007, changes were made in the law of unfair dismissal and redundancy. Section 385 of the *Fair Work Act* provides that a person has been unfairly dismissed if Fair Work Australia is satisfied that: the person has been dismissed; the dismissal was harsh, unjust or unreasonable; the dismissal was not consistent with the Small Business Fair Dismissal Code; and the dismissal was not a case of genuine redundancy.[56]

Section 389(1) of the *Fair Work Act* defines a 'genuine redundancy' to be where the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy. This part of the definition is identical with the test cases' definition, with an additional mention of the consultation requirements. This definition is clearly different from the 'genuine operational reasons' definition in Work Choices and is intended to overrule that definition.

Section 389(2) introduces the new reasonable redeployment test:

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52 ABC Radio National, 'Federal Government Defends IR Laws After Unfair Dismissal Ruling', AM, 16 January 2007 < http://www.abc.net.au/am/content/2007/s1827989.htm>.

53 Ibid.

54 For a comprehensive discussion of the campaign, see Kathie Muir, *Worth Fighting For: Inside the 'Your Rights At Work' Campaign* (University of New South Wales Press, 2008).

55 Ibid 67.

56 *Fair Work Act 2009* (Cth) s 385.

> A person's dismissal was not a case of *genuine redundancy* if it would have been reasonable in all the circumstances for the person to be redeployed within:
> (a) the employer's enterprise; or
> (b) the enterprise of an associated entity of the employer.[57]

Whilst redeployment requirements have been commonplace in legislation in various European countries,[58] this is the first time a provision along these lines has ever appeared in an Australian statute. On its face, this provision overrules the 'genuine operational reasons' section and the *Carter* case. It also has the potential to go further than the redundancy test cases. In the test cases, the Commission merely required an employer to *consult* with trade unions after the employer had made a decision to retrench employees. Section 389(2) adds possible liability for unfair dismissal into the mix if employers fail to *investigate* redeployment. As such, section 389(2) is potentially a stronger provision than a consultation provision, because a token consultation can occur without any real effort by the employer to find redeployment possibilities.

Given the potential strength of section 389(2), it is disappointing that the interpretation given to it by Fair Work Australia in the cases discussed below is so weak.

A *When is it reasonable to redeploy?*

The *Fair Work Act* does not provide a definition of reasonable redeployment. However the Explanatory Memorandum for the *Fair Work Bill* provides some guidance on when it will not be reasonable to redeploy by providing the examples of a small business where there are no redeployment opportunities and where there are no positions for which the employee has suitable qualifications or experience.[59]

B *Inferior Positions*

Would the existence of inferior positions render the redundancy not genuine? In *Neil John McDade v Mills Charters Pty Ltd*[60] a full time worker was made redundant, and casual positions were created. Mr McDade had been employed as a full-time skipper working for Mills Charters and following a ban on recreational fishing the company considered a reduced demand for their business and made his position redundant. The applicant's position was then subsequently replaced with a pool of casual skippers. In the course of the decision one of the issues before Fair Work Australia was whether it was 'reasonable in all the circumstances' for Mr McDade to have been redeployed within the enterprise.[61] It was held that on the evidence it was clear that there were no suitable full-time or permanent positions to which Mr McDade could have been redeployed. While he could have been placed in the casual pool (this was in fact offered, but the employee insisted on guaranteed hours) Fair Work Australia specified that given the casual nature of the pool, this was not a genuine opportunity for redeployment as it would have amounted to merely the opportunity of

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57 Ibid s 389.

58 See for example, *Employment Protection Act 1982* (Sweden, Lagen om anstallningsskydd). Under this Act, employers may only dismiss employees for just cause. No just cause exists if the employer can reasonably be required to transfer the worker to another job; Taco Van Peijpe, *Employment Protection Under Strain (Sweden, Denmark, The Netherlands)* (Kluwer Law International, 2009) 83.

59 Explanatory Memoranda, Fair Work Bill 2008 (Cth) 247.

60 *Neil John McDade v Mills Charters Pty Ltd* [2009] FWA 357 (23 November 2009).

61 Ibid 6.

future work with no guarantee. Therefore, it was not possible for him to be redeployed and his dismissal was not unfair.

C *Positions Which are Not Directly Related to the Current Position*

What happens if the employee is qualified for other positions within the employer's business? Does the employer have to identify all of these possibilities? These questions arose in *McAlister v Bradken Limited.*[62] Mr McAlister was employed as an Occupational Health and Safety Coordinator with Bradken Limited. Bradken Limited suffered a downturn in demand for its products due to the global economic crisis and decided to retrench Mr McAlister. Bradken Limited argued that there were no redeployment possibilities because the Occupational Health and Safety Coordinator role was a specialised one and no equivalent positions existed. On the other hand, Mr McAlister argued that section 389(2) created a 'positive obligation to identify positions for which the applicant was capable of performing' other than in relation to the position held at the time of the redundancy.[63]

In response to this argument, Richards SDP stated that he could not 'discern from where such an obligation might arise'.[64] He stated that as the meaning of genuine redundancy provided in section 389(1) related specifically to 'a person's job' at the time of the redundancy there is no evidence of a broader meaning to be used for section 389(2) relating to redeployment. Richards SDP went on to state:

> In my view, if the FW Act intended that an employer was required by virtue of s 389(2) of the FW Act to identify any position at all that an employee may be able to perform it would have expressly so directed, and perhaps with some conditionality as to the range of such alternative positions which might so be identified.[65]

However, he added that even if he gave the wider reading to s 389(2), there were still no suitable alternative positions for the employee.

According to this case, employers are only under an obligation to redeploy staff to positions *directly related* to their existing position (which means basically identical). Such an interpretation of section 389(2) is not an expansive one and not the only possible reading of the section, especially given the explanatory memorandum. The employee might be willing to choose a demotion or a different role she is qualified for, if the only other choice is to be made redundant.

On its face, the word 'reasonable' in section 389(2) does not stipulate that the only reasonable redeployment is to an identical position. The employee may be multi-skilled and able to take on a different role which would still have allowed the employee to continue employment. Richards SDP's reasoning seems to focus squarely on the role the employee occupies rather than the skills of the actual employee. This narrow interpretation greatly diminishes the power of s 389(2) to impose a stronger obligation on the employers.

D *Positions Which Are Directly Related to the Current Position*

In contrast to the *McDade* case and the *McAlister* case, in *Wright v Cheadle Hume Pty Ltd T/A Macedan Spa*[66] FWA found that it was reasonable in the circumstances for the applicant to be redeployed within the enterprise. Here Ms Wright

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62 *McAlister v Bradken Limited* [2010] FWA 203 (22 January 2010).
63 Ibid.
64 Ibid.
65 Ibid.
66 *Wright v Cheadle Hume Pty Ltd T/A Macedan Spa* [2010] FWA 675 (10 February 2010).

was employed as a chef and was made redundant. However there were other hours of work available for chefs and subsequent to her redundancy there was evidence of these hours being filled by newly hired staff. As a result of these circumstances Commissioner Lewin considered that it was more probable than not that it would have been reasonable to redeploy Ms Wright and that as a result this was not a genuine redundancy. The company made some strange arguments about intending to offer Ms Wright alternative hours. Yet it told her that it was letting her go, and finalized all her accrued leave payments. This conduct was found to be completely inconsistent with any claims of intending to redeploy.

E *Selection of Who to Make Redundant Does Not Affect Genuine Redundancy*

In *Kekeris v A. Hartordt Australia Pty Ltd T/A a.hartrodt*[67] Ms Kekeris was made redundant as a result of a restructure. Hamberger SDP found that the respondent no longer required Ms Kekeris' job to be performed by anyone and then considered the issue of redeployment. The applicant had made it clear that she would only consider being redeployed to two particular positions. However, those positions had been filled by other staff during the restructuring process. Therefore, the Deputy President stated that 'to argue that the applicant should have been redeployed into either of these two positions amounts to contending that it should have been one or other of those two who should have been made redundant rather than the applicant'.[68] The explanatory memorandum makes it clear that selection of who to make redundant was not a relevant issue when determining whether a redundancy is genuine and as such the application was dismissed.

F *Cost and Length of Service Affects the Reasonable Redeployment Test*

Consistent with the approach taken in *Perry* and the first instance decision of *Carter*, Commissioner Smith was of the view that length of service is a relevant factor in applying the reasonable redeployment test in *Manoor v United Petroleum Pty Ltd.*[69] In *Manoor*, the duties of Mr Manoor were moved to the Townsville office, from the Melbourne office of United Petroleum. He was made redundant. In determining whether this was a genuine redundancy, Commissioner Smith turned his attention to the redeployment provisions. Mr Manoor stated in evidence that he would have relocated to Townsville, however the respondent did not offer to relocate Manoor and argued that the costs associated with this would have been greater than those of hiring someone in Townsville.[70] In assessing whether it would have been reasonable to redeploy the applicant, Commissioner Smith stated that 'it is clear that s 389(2) is directed towards action being taken by the employer to mitigate the effects of redundancy on an employee'.[71] He states however that the 'intention is not absolute' and confusingly refers to the explanatory memorandum's information on section 389(1)(b) which states that there is no absolute obligation to consult about the redundancy unless there is an obligation under an award or agreement.[72] The Commissioner appears to be suggesting that whilst there is an obligation to consider redeployment, there is no corresponding obligation to consult with the employee about

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67 Ibid.
68 *Ms Vicky Kekeris v A. Hartordt Australia Pty Ltd T/A A. Hartrodt* [2010] FWA 674 (19 February 2010).
69 *Sriharsha Manoor v United Petroleum Pty Ltd* [2010] FWA 2571 (31 March 2010).
70 Ibid 5.
71 Ibid 6.
72 Ibid.

this. Having found that there was no duty to consult with Mr Manoor about the redeployment, and therefore his willingness or not to relocate was irrelevant, it was found that the redundancy was genuine given the distance between the work locations.

The Commissioner also stated that 'it is difficult to conclude that the cost consideration of the employer is not reasonable also given the *relatively short service* of Mr Manoor'.[73] The inference then, is that had the applicant had a longer history of employment with the respondent it is possible redeployment may have been reasonable in these circumstances despite the cost of relocation. This in turn suggests that the longer employees are employed the greater the employer's obligations are towards them. However, the Act does not state that length of service is not a relevant factor to determine reasonable redeployment and *Manoor* is only a decision made by a single Commissioner. Just how much other Commissioners will follow *Manoor* remains to be seen.

G *Comparing 'Reasonable Redeployment' with Work Choices 'Genuine Operational Reasons'*

The discussion above argues that it is extremely difficult to prove an employer did not satisfy the reasonable redeployment test. The legal position under the new law is substantially similar to the position under Work Choices 'genuine operational reasons'. Under Work Choices and the *Carter* case, as long as the employer had a 'real' or 'true' reason for retrenching employees, and the reason was one of the reasons for termination, then the termination decision could not be challenged. Under the Fair Work Act 'reasonable redeployment' test, as long as the employer does not have another almost identical position available, even when the employer has inferior positions or positions different in nature, the redundancy would still be considered a 'genuine redundancy'. If the employer must meet additional costs to redeploy, then it may not be reasonable for it to redeploy.

If the *Carter* case were heard today, after the enactment of section 389, it is very probable that Village Cinemas could still succeed. Only if Village Cinemas had a vacant position which was almost identical to Mr Carter's previous job, would it fail to satisfy the genuine redundancy definition. If Village had an inferior position, or a position not directly related to Mr Carter's previous job, it would not be obligated to consider redeploying Mr Carter and could still satisfy the genuine redundancy definition. On the other hand, Mr Carter's length of service of 19 years could lead FWA to conclude that more effort should be made to redeploy him under the new law. However, the length of service is not explicitly referred to in the Fair Work Act as relevant and was only considered relevant by a single FWA commissioner in *Manoor*. *Manoor* is not a full bench decision and therefore is only persuasive and not binding on future cases.

V CONCLUSION

This article has attempted to show that the new reasonable redeployment test has not resulted in significant change. It is indeed possible that the government has its own self-interest at heart. The government is a large employer itself. To impose a positive obligation to consider redeployment is something it may not want for itself. Of course there is the political pressure placed by businesses onto the government not to sway too far in the direction of employees.

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[73] Ibid.

Whatever the motives, section 389 is a clear example of overpromising and under delivering. The backlash against the *Carter* case was so strong that the Gillard government felt compelled to change the 'genuine redundancy' law. The change, however, is in wording only and not in outcomes.