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Inquiry into the Fair Work Bill 2008

Unfair Dismissal

This submission concerns the unfair dismissal provisions in the Fair Work Bill 2008. This is the only aspect of the Bill commented on.

I have made a deliberate decision in preparing this submission to not engage in a critique of the broad parameters, form and direction of legal regulation regarding unfair dismissal. Rather, the submission offers some pragmatic suggestions on how to make improvements within the framework of unfair dismissal protection laid down in the Bill. I use the government's own concept of fairness as my measure, or touchstone, for improvement.

Three aspects of the proposed jurisdiction are commented on.

1. Application Time Frame is too Restrictive

The current time frame for lodging an application of unfair dismissal under the Workplace Relations Act is 21 days from the day on which the termination took effect. Extensions of time may be granted at the discretion of the AIRC (WR Act s 643(14), s 647). The leading case on whether to permit an out of time application is *Brodie-Hanns v MTV Publishing* (1995) 67 IR 298. That case laid down six principles that should govern the adjudicator's discretion to extend the time:

> '1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay, which makes it equitable to so extend.
> 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
> 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
> 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
> 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.

6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion.' (p 299)

The Fair Work Bill provides that applications for a remedy for unfair dismissal are to be made to Fair Work Australia (FWA) within seven days after the dismissal took effect. FWA may allow an extension of time, where satisfied that 'exceptional circumstances' warrant it. The Bill provides a list of matters that FWA ought to consider in determining whether such 'exceptional circumstances' exist to justify an extension of time: the reason for the delay, whether the applicant first became aware of the dismissal after it had taken effect, any action taken by the applicant to dispute the dismissal, prejudice to the employer, the merits of the application, and fairness as between the applicant and other persons in a similar position (cl 394(2), (3)). The Explanatory Memorandum identifies that list as exhaustive (para 1573), and notes that these factors (except the second one) are based on the principles set down in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 (para 1573-4).

This submission makes two main points on these proposed new rules in clause 394. First, seven days is simply too short a time frame to impose. It is too tight for the vast majority of people who will often be in an emotionally vulnerable state by virtue of their dismissal, and so unable at that point to make an informed and rational decision about whether to lodge an application. Indeed, it may inadvertently encourage people to lodge applications in haste, without considering fully their situation. A seven day window may in addition have overly harsh consequences for the most vulnerable workers, including people with disabilities (such as mental illnesses, which may have been exacerbated by the dismissal), and people from culturally and linguistically diverse backgrounds. The government's objective of imposing a substantially tighter time frame under the Bill is said to be to ensure that reinstatement remains a practical option. Whilst certainly there is merit in applications being lodged expeditiously, seven days is simply an unrealistic deadline, and may in practice take effect in a discriminatory manner to lock out many meritorious applications.

Secondly, the new proposed rule on extensions requiring 'exceptional circumstances' will clearly render it more difficult for applicants to obtain an extension under the scheme in the Bill compared to the WR Act jurisdiction. Whilst 'special circumstances' were not needed in order to gain an extension under the WR Act (*Brodie-Hanns*), 'exceptional circumstances' are a prerequisite to obtaining an extension under the scheme in the Bill. This constriction in the ability to gain an extension is unduly harsh, especially in the context of an extremely tight seven day time frame.

2. Fair Dismissal Information Statement

The National Employment Standards (NES) require employers to give all new employees a Fair Work Information Statement (cl 125). The Fair Work Information Statement will be determined by FWA, and must contain information about the NES, modern awards, agreement-making, freedom of association, the role of FWA and the Fair Work Ombudsman, and any other matter prescribed by regulation (cl 124).

Unfair dismissal rights are not (at this point) listed as matters that will be addressed in the Fair Work Information Statement. At the very least they ought to be, because a right to claim unfair dismissal is a central legal protection for employees. Moreover, the seven day lodgment time frame, were it to remain in the Bill, means in effect that unfair dismissal is a protection easily lost by employees unless they are aware of the tight time constraints involved. The seven day time frame renders the topic of unfair dismissal eminently suitable for inclusion in an Information Statement for employees.

This submission urges that the legislation go further to introduce a new mechanism to the effect that employers must provide to all dismissed 'national system employees' a document (perhaps titled the Fair Dismissal Information Statement) that sets out the rights of employees regarding unfair dismissal and the other provisions in the General Protections in Part 3-1 of the Bill, so far as they relate to dismissal. FWA is ideally placed to determine the content of such a Fair Dismissal Information Statement. The provision of such a Statement to dismissed employees is particularly important were the seven day time frame to remain, and would go to ensuring at least that employees had a level of awareness of the tight time frame they faced in lodging an application of unfair dismissal.

(This idea of a Fair Dismissal Information Statement draws on M Mourell and C Cameron, 'Neither Simple Nor Fair – Prohibiting Legal Representation Before Fair Work Australia', *Australian Labour Law Association, Fourth Biennial Conference*, 14-15 November 2008, Melbourne).

3. The Small Business Fair Dismissal Code

The Small Business Fair Dismissal Code is an innovative feature of the Fair Work Bill. The objective of providing small business employers with an accessible and simple step by step process of fair dismissal is a worthy one. In this submission I make three comments on the Code. First, it is regrettably narrowly focused on dismissal alone. The UK Code, titled Disciplinary and Grievances Procedures, covers all aspects of disciplinary procedures, and not just dismissal. This breadth seems important for an agenda of fairness, and reflects a missed opportunity in the drafting of the Australian Code.

Disciplinary processes and termination in practice lie along the same continuum in the management of employees, and so should ideally be regulated together. Termination of employment ought to be the end of a process of fair procedure of management which might look to, for example, whether the position description adequately expressed the responsibilities expected of the employee, whether the employee's performance had been monitored adequately, whether the employee had received counselling and warnings regarding any unsatisfactory performance, and whether the employee's induction and subsequent training had adequately equipped the employee for the developing demands of the position. Although the Australian Code does contain limited reference to the possibility of the employer needing to provide additional information and training to the

employee in order to assist her or him to rectify a lack of performance, it remains nonetheless narrowly focused on dismissal alone.

The second comment I make regarding the Australian Code is that it is disappointing in requiring only low standards from small business employers. In relation to alleged serious misconduct, an employer is not required to afford the employee any procedural fairness at all, in terms of, for example, an opportunity to respond to the allegation made against them. This effectively generates the common law situation on termination of employment. In relation to dismissals on other (less serious) grounds, procedural fairness is limited to a single warning (which may or may not be in writing) and the ability for the employee to have a support person present. Again, the Code does not explicitly require that the employer give the employee an opportunity to be heard on the matter. The standards set by the Code for small business are significantly lower than long-standing expectations of employer behaviour under the 'harsh, unjust or unreasonable' rule. For example, in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 the High Court determined that suspicion of theft is unlikely to be sufficient to render a dismissal fair because procedural matters may play an important role in shaping the overall fairness of any particular dismissal (at p 434, 461-3). In short, the Code certainly will not ensure employees of small business are treated with respect and dignity, or fairness, in their dismissal. At the very least the warning should be required to be in writing, which would alert the employee to the gravity of the situation, and employees should be afforded with a right to defend themselves against allegations made against them.

The third comment I make is that the Code provides that a small business employer 'may' be required to provide evidence of compliance with the Code. At the very least the Code should provide a reverse onus of proof, in effect that employers are under an obligation to establish that they have complied with the Code. This is appropriate because usually it will be employers who have the records and information to document their compliance, not employees.

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