ELC Employment Law Centre of WA (Inc)
Working for WA Workers

Submission in relation to the Fair Work Bill 2008

1. Introduction

This submission has been prepared by the Employment Law Centre of WA (Inc) (**ELCWA**)[1]. ELCWA is a not for profit community legal centre which specialises in employment law. It is the only free legal service in Western Australia offering employment law advice, assistance and representation. Each year ELCWA provides advice and assistance to approximately 4000 non-union employees in Western Australia.

ELCWA applauds the Federal Government's intent to overhaul the "Work Choices" legislation[2], which favoured business interests at the expense of workers' entitlement to a fair go, as demonstrated by its 'Forward With Fairness" (**FWF**) policy initiative. Several provisions of the proposed Fair Work Bill 2008 (**Fair Work Bill**) are strongly supported and welcomed by ELCWA, in particular:

- method of payment and payment deduction protections (ss323-327);
- equal remuneration protections (ss302-306);
- the introduction of uncapped carer's leave (s96);
- the introduction of an "adverse action" class of protection (ss340-342);
- inclusion within the federal regime of state legislation concerning claims for the enforcement of employment contracts (s27(2)(o)); and
- the increased scope of basic protections effected by the National Employment Standards (ss59-123).

However, it is ELCWA's view that certain elements of the Fair Work Bill do not sufficiently protect vulnerable workers. These elements form the subject matter of this submission.

In order to ensure that the legislation adequately protects all employees in every workplace, it is useful to consider potential 'worst case' scenarios to test the efficacy of protective measures and minimum standards. For this reason, we have included such scenarios within each section of this submission to highlight how theoretical problems might work in operation. In ELCWA's experience, although such scenarios are described as 'worst case', they are not necessarily uncommon. As commercial pressures proliferate base standards in employment, such scenarios commonly become normalised practices.

[1] www.elcwa.org.au
[2] *Workplace Relations Amendment (Work Choices) Act 2005* (Cth)

2. Seven day limitation period for unfair dismissal claims

In our view, the reduction of the limitation period for unfair dismissal applications to 7 days from the time of dismissal[3] is concerning. It is one of the few changes which affords less protection to employees than the equivalent provision under the current regime. Although our database does not allow us to collect statistics on this specific issue, anecdotal evidence from ELCWA's paralegals and Principal Solicitor suggests that the majority of clients seeking legal advice in relation to unfair dismissal contact us within the last third of the current limitation period (14 to 21 days after dismissal).

In ELCWA's experience, many recently dismissed employees do not have the emotional capacity to begin seeking redress for an unfair dismissal for days, and sometimes even weeks, after the event. When they are finally mentally ready to proceed, they may then find that obtaining legal advice can be a lengthy and difficult process. Even where both these hurdles are overcome, time is required to fill out and lodge the relevant documents. For many, this is not always a simple or brief task. This problem may be exacerbated where the dismissed employee is geographically isolated, and therefore limited in his or her ability to correspond and seek assistance. Even citizens of the larger regional centres report periods of up to 5 working days for mail delivery to and from the West Australian capital[4]. For these reasons, it is impractical and potentially unfair to require that applications be made within 7 days of termination taking effect.

In comparable jurisdictions there are far lengthier limitation periods. As the table below illustrates, the proposed amendment would put Australian law in stark contrast to many Western liberal democratic states. It is difficult to find a single comparable jurisdiction outside of the United States' "employment-at-will" environment that has a limitation period anywhere close to the brevity of the 7 days currently being proposed.

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[3] *Fair Work Bill 2008* (Cth), s 394(2)(a)

[4] For example, in Geraldton

Jurisdiction	Section	Limitation period
Australia	s s394(2)(a) of Fair Work Bill	**7 days**
United Kingdom	s111(2) of ERA[5]	3 months
New Zealand	s114 of ERA[6]	90 days
Canada	s240 of CLC[7]	90 days
Italy	Act 604[8]	60 days
Sweden	ss40,41 of EPA[9]	14 to 28 days (for reinstatement) 4 months (for damages)
Germany	ss4,7 of PADA[10]	21 days
Luxembourg	Case Law[11]	3 months

It has also been noted that a longer limitation period makes it more likely that an issue will be resolved internally[12]. This is because a short limitation period can encourage an employee to bring an action so as not to "miss out". This can then potentially sour relations between the employee and employer and ruin the chance for a private resolution.

We appreciate that there will be a necessary compromise in relation to the interests of both businesses and employees in order to effect an overall balance between the competing interests. While the pursuit of such a balance is to be applauded, neither party should have to concede basic rights to which they are normally entitled under a modern liberal democracy, notwithstanding any economic benefit which such a sacrifice might achieve. This idea was underpinned by the Australian peoples' rejection of the Work Choices 100 employee or fewer exemption to unfair dismissal law. Inherent in this rejection was the implication that individual rights should not be sacrificed for the efficiency of the system as a whole.

[5] s112(2), *Employment Rights Act 1996* (United Kingdom)
[6] s114, *Employment Relations Act 2000* (New Zealand)
[7] s240, *Canada Labour Code R.S.C. 1985* (Canada)
[8] Act 604 (15 July 1966) (Italy)
[9] ss40,41 *Employment Protection Act 1982:80* (Sweden)
[10] ss4,7
[11] Tribunal Travail Luxembourg 2 October 1992, Case No. 2986/92, DELVAUX v PROMOTIC Luxembourg sarl, F. 2000, p. 162; Cour d'Appel Luxembourg, 16 October 1984, SANTER v ASSOC. DES CHEMINOTS, Pas. 26, p. 22
[12] Barnett, Daniel, "A Guide to the Extension of Limitation Procedures", *Employment Law Journal*, November 2004

We consider it vital that these values be upheld. Accordingly, we do not support a provision which results in a significant restriction on the ability of individuals to make an unfair dismissal application. The proposed limitation is inconsistent with the majority (almost the totality) of equivalent legislation in comparable jurisdictions.

Seven day limitation period: worst case scenario

Sarah is a meat packer in the far north of Western Australia who has been dismissed by her employer without warning. As a single mother, Sarah is distraught at the prospect of not having a job. Three days after the dismissal Sarah sees her sister who informs her that she can make an unfair dismissal claim. Sarah experiences bouts of depression in between taking care of her children and seeking a new job and is not convinced that making the claim is worth the trouble.

Despite the pressures, Sarah's sister convinces her that it is worthwhile. However, Sarah has trouble finding legal advice she can afford without an income. Eventually she comes across a fact sheet outlining the claim application process. Without assistance it takes her time to fill in an application. Sarah then learns that there is a 7 day limitation period which by now she has well exceeded, and that as a result she needs to make an out of time application. Sarah feels that between her family commitments, the pressure of speedily finding another job and the distress of having been sacked, she does not have the time or the emotional reserves to continue with the claim process. Instead, she decides to focus on the immediate issues of finding a new job and supporting her family.

3. Six and 12 month non-claim period for unfair dismissal claims

We believe that it is not necessary to:

- retain the lengthened qualifying periods for unfair dismissal claims introduced by Work Choices; and
- introduce a 12 month qualifying period for small businesses.

The strongest argument for a qualifying period is to protect employers during a 'trial period' at the beginning of an employment relationship. However, employers are currently entitled to require employees to undergo a probationary period. We submit that this gives employers adequate time to assess a new employee's suitability and sufficiently protects employers who dismiss an employee during this time for being genuinely unsuitable. Therefore, we do not consider there to be a genuine need for a qualifying period for unfair dismissal to apply in addition to the optional probationary period.

In this regard, it should be noted that the workplace relations regimes in New Zealand and Canada have dispensed entirely with a statutorily proscribed non-claim period. This option should also be feasible in Australia, particularly given the operation of optional probationary periods.

If a mandatory qualifying period is deemed necessary, we consider 3 months to be a reasonable qualifying period. Prior to Work Choices, a 3 month probationary period could be applied to all businesses regardless of size. It is our view that there was no reasonable justification for increasing the qualifying period under Work Choices. Similarly, we consider that it remains to be seen how the extension of the qualifying period to 12 months for small businesses[13] is justifiable.

A discrepancy in treatment based on the size of a business seems counter-intuitive. Arguably it takes less, rather than more time to assess the suitability of an employee in a small, rather than a large business. Given this, a natural conclusion as to the reason for the discrepancy is that it exists to reduce the number of claims against small businesses. If this is the intention, then an alternative measure which balances the needs of employees and employers would be more in keeping with the Government's ostensible intentions regarding workplace reform.

Further, the increased qualifying period creates an unacceptable opportunity for potential exploitation by employers. It is not difficult to imagine a situation where an unscrupulous employer may turn over unskilled staff every 12 months to enjoy the benefit of perpetual protection from unfair dismissal laws. This is a potential problem which we do not consider can be adequately addressed by ancillary measures. Even if regulations were introduced to prevent this type of exploitation, it would prove difficult to ascertain the intent of the employer.

Qualifying period: worst case scenario:

Jasper is employed under a 5 year agreement by a small but up and coming web design firm which is doing well enough to offer a relatively good wage. After he successfully passes his 6 month probation period, Jasper feels sufficiently secure in his job to take out a $30,000 private loan for a new station wagon for his young family, after a consultation with his bank suggests he can easily afford the repayments. However, 4 months later, co-inciding with a market downturn, Jasper has a personal falling out with his boss. A week later he is fired without warning for "poor performance" despite receiving much praise for his last project. When he goes to make an unfair dismissal claim, Jasper is dismayed to learn that despite passing probation, he has not fulfilled a mandatory 12 month qualification period. The economic downturn means Jasper has trouble finding new work and he begins to fall behind in his loan repayments.

[13] *Fair Work Bill 2008* (Cth), s 382(a), s383

4. Adequacy of the Fair Dismissal Code for small businesses

The proposed small business Fair Dismissal Code (**Code**) and accompanying checklist are undoubtedly simple from the perspective of the employer. However, they are not without potential problems for the unfair dismissal claims process as a whole. The Code and the checklist are both expressed in very general terms, meaning that the outcome of any given unfair dismissal claim would rely largely on a subjective interpretation of what is "reasonable" in any given situation.

It is the experience of ELCWA that opinions on what is "reasonable in the circumstances" or "common sense" often differ markedly between an employer and an employee and often constitute the crux of an unfair dismissal claim itself. Therefore, the presence of more objective and concrete (rather than generalised) terms and language would be preferable (where it does not unreasonably stifle the ability of the tribunal to consider each case on its merits) in terms of resolving disputes both prior to and during the claim process.

It has been indicated that the new unfair dismissal will be streamlined, with a focus on swiftness and informality. This change is consistent with the Government's intention to make the unfair dismissal system simpler and more efficient. However, it should be acknowledged that wherever a judicial or a quasi-judicial process is made less formal, the potential exists for a reduction in the effective application of the principles of natural justice.

Where a particular instance of dismissal is not clear-cut, the intended changes outlined above may lead to a situation where an arbiter has few formal rules of process to apply to a very subjective test in relation to a vague set of circumstances. This combination of increased generality of legislation and decreased formality of process may well combine to reduce the consistency and predictability of the tribunal's decisions.

For these reasons, it is suggested that the benefits of interpretational flexibility obtained from the generalised nature of the Code and the checklist be supplemented with more specific language in certain areas.

Section 5 of the Code's checklist refers to "some other form of serious misconduct", without any clear guidelines as to what this might involve. The idea of what constitutes "serious misconduct" will differ from employer to employer, yet the Code suggests to the employer that if the employer is personally satisfied that serious misconduct has occurred, there is no need to finish the checklist and the dismissal is prima facie legitimate. Where interpretations of "serious misconduct" differ between employers and the tribunal, the process might be frustrated by frivolous claims with insufficient evidence.

Generality of small business code: worst case scenario

Ramesh is employed by Giovanni, an elderly Italian migrant of Jewish descent, at a packing factory. While walking through the shop floor, Giovanni hears Ramesh's friend Toby tell him to stack the produce differently to which Ramesh responds, "Ok ya Nazi". Giovanni is so upset with Ramesh's insensitivity that he fires him on the spot despite Ramesh's constant apologies and Toby's assurance that no offence was intended. Giovanni is worried that he may not have complied with workplace regulations and consults the Fair Dismissal Code. He is satisfied beyond any doubt that "serious misconduct" has occurred. He is then upset and offended at a perceived lack of empathy from the system when Ramesh brings a successful unfair dismissal claim.

The scenario above illustrates that it might prove helpful to refer employers to an easily obtainable set of guidelines which more comprehensively define serious misconduct and give a more exhaustive set of examples. The checklist would include the reference, but not the guidelines themselves. Further, the employer should still be required to fill out the remainder of the checklist, to assist in the resolution of the claim where the employer has not correctly interpreted a "serious" case of misconduct.

In a similar manner, the requirement that the employee be given a "reasonable amount of time" to improve performance is likely to attract differing interpretations. Mirroring the stipulated time periods of notice for dismissal (s117 of the Fair Work Bill), for example, would clarify the issue for employees, employers and the tribunal. To prevent injustice in unique situations where less time might be considered adequate, there could be an opportunity within the checklist for the employer to state why, if the stipulated time period was not complied with, this was reasonable in the circumstances. Flexibility or rigidity with regard to this requirement could be determined by precedent over time according to the tribunal's experience. In any case, the presence of a specified time limit would provide far more certainty than is present in the current formulation of the checklist.

A further problem with the Code is that it will often be practically impossible for the tribunal to determine whether or not an employer filled out and complied with the checklist in good faith, or simply went through the motions after the fact. One way to reduce the potential for this type of abuse is to stipulate that the warning given to an employee prior to dismissal must be in writing. The employer should be encouraged to archive a copy of the warning. Such a requirement should not be considered onerous, given that only one warning is required and that a dismissal would presumably be a relatively infrequent occurrence in a business of less than 15 employees.

An additional benefit of requiring a warning in writing is that it would help ameliorate the potential perception by the employee that one warning is not adequate, given the gravity of such a notice being served.

Employer abuse of the Code checklist: worst case scenario

Dana employs Helen. One morning Helen is chatting with a fellow employee and Dana tells her to "stop slacking off", a phrase she commonly uses when chastising all her employees. The next week Dana fires Helen without warning or reason. When Helen brings an unfair dismissal claim, Dana fills out the checklist and during the hearing presents the comments made the previous week as a legitimate warning and encouragement to increase performance. The dismissal is deemed fair because the checklist is considered sufficient evidence.

5. Summary dismissal

The proposed changes regarding summary dismissal are another area where there exists the likelihood of gross disadvantage to individual employees. Of most concern is the automatic legitimation of dismissals in the situation where a police report is made. Presumably it is envisioned that a report will not be made except in extreme circumstances. However, as long as human beings are fallible, reports will be made which will often produce no outcome, or which will be resolved in favour of the employee. This may happen despite the employer having "reasonable grounds" for making the report.

Often, it is a sense of injustice, as opposed to the practical consequences of losing one's job, that will most adversely affect a dismissed employee. This provision undermines the ability of individuals wrongly dismissed to feel that they have been "heard", and this can limit their capacity to get over the issue swiftly and move on, causing ongoing problems and potentially costly litigation for both employer and employee.

The idea that an employee not proven guilty or even proven innocent will nonetheless have to deal with the economic consequences of dismissal, as well as live with the stigma of implied wrongdoing despite exoneration, is contrary to standards of decency. It is also at odds with principles of natural justice enshrined in the Constitution and present throughout our justice system. The qualifying necessity for the report to be made on "reasonable grounds" is, in our opinion, an insufficient check on the potential for injustice, when weighed up against the potential consequences for individuals wrongly accused.

Summary dismissal: worst case scenario

Miles runs a newsagency in a small town with 4 employees. When money begins to go missing from the till, Miles suspects that Sophie is responsible. Because he has known the other 3 employees since birth and because Sophie is new to both the business and the town, Miles is confident of her guilt to the extent that he makes a police report and fires Sophie. The police explain that without any hard evidence it is difficult for them to pursue the case. Sophie tries to make a claim to clear her name but is unable to under the Code. Sophie finds out that money has continued to go missing since she was fired but when she approaches Miles he remains stubborn in his stance and tells her that he "just doesn't trust her". Sophie is so embarrassed by the constant implication of guilt that eventually she chooses to leave the town.

6. Definition of "Small Business" with regard to unfair dismissal exemption

ELCWA is strongly supportive of the proposed amendments to the unfair dismissal exemptions which will see the 100 employee or under small business definition reduced to fewer than 15 employees. However, it has been stated that this change will become operative from July 2009[14]. The Government has made a promise to end the most unfair elements of Work Choices as soon as is practicable, "…and to give Australians relief from the harshest remaining aspects of Work Choices as quickly as possible. The new bargaining framework, unfair dismissals and associated protections will come into force 6 months earlier on 1 July 2009[15]."

The 100 employee limitation has been widely construed as one of the most unfair and "out of touch" aspects of the Work Choices regime[16]. Further, there is no requirement for a transitional period here as there might be for other amendments. Therefore, it is suggested that, in the interests of the many employees who may be disadvantaged by the 100 employee exemption over the months prior to the proposed commencement date of 1 July 2009, the change be made operative immediately following the successful passing of the legislation.

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[14] S2, Fair Work Bill 2008 (cth), Gillard, Julia, "Introducing Australia's New Workplace Relations System" The National Press Club, Canberra, 17 September 2008

[15] Ibid

[16] See, for example, Harpur, Paul, 'Work Choices Dismissals: An International Comparison' *Queensland University of Technology Law and Justice Journal*, 2006, Chapman, Anna, 'Unfair Dismissal Law and Work Choices: From Safety Net Standard to Legal Privilege' - [2006] ELRRev 11; (2006) 16(2) The Economic and Labour Relations Review 237 ,

7. Federal denial of contractual benefits claim

Prior to the introduction of Work Choices, a far greater number of Western Australian employees had access to the Western Australian Industrial Relations Commission (**WAIRC**) for the purposes of making a Denial of Contractual Benefit (**DCB**) claim[17]. This claim process provides a simple resolution to an issue that is otherwise resolvable only through the more expensive and time consuming civil court system.

ELCWA supports section 27(2)(o) of the Fair Work Bill to the extent that it allows for DCB claims to be made accessible to West Australian employees under the federal system. We would suggest further that a specific provision within the Fair Work Bill replicating the West Australian provision would provide for uniformity across the federal system and benefit those employees on common law contracts in State jurisdictions without equivalent legislation. This would prove to be in the interests of both employers and employees, neither of which benefit from the draining process of a formal court action, and is consistent with the Federal Government's demonstrated trend towards simplicity and swiftness in resolving workplace disagreements.

The absence of a federal DCB claim system: worst case scenario

Paul is employed by Travis at the "Blooming Great Pty Ltd" flower store. When he receives his pay check, Paul realises he has not been paid any of his contractual bonuses, which he was relying on for credit card repayments. When he approaches Travis, he is told that "bludgers don't get paid". When Paul seeks legal advice, he discovers his only option for redress is to sue Travis, which he finds intimidating and concludes is financially beyond him.

8. Leave exemption for community legal centres

ELCWA considers that all community legal centres (**CLC**) should be exempt from the requirement to seek leave to appear in matters heard by Fair Work Australia. Accordingly, s596(4) which currently grants this exemption to peak bodies and bargaining representatives (among others) should be expanded to include CLCs. As representatives of the most vulnerable workers, and in the absence of any policy reasons for CLCs not to be considered alongside peak bodies in this context, CLCs should enjoy the benefits of exemption in the interests of their clients, as well as to alleviate their own operational limitations.

Conclusion

The Fair Work Bill demonstrates that this administration is willing to make a meaningful attempt at creating a true balance between the rights of employers

[17] s29(1)(b)(ii) *Industrial Relations Act 1979* (WA)

and employees. However, in accordance with ELCWA’s belief in a “fair go” for *all* workers, we consider that certain elements of the Fair Work Bill are unacceptable. The most severe of these imbalances is the 7 day limitation period in relation to unfair dismissal claims, the unfairness of which is supported by a comparative analysis with other Western liberal democracies. The proposed legislation, in attempting to achieve an overall balance, has glossed over several imbalances within certain areas. The Government’s mandate for change was predicated on the notion that individual workers should not have to suffer for the benefit of the efficiency of the workplace system as a whole. In the interests of fulfilling this mandate, ELCWA requests a serious consideration of the concerns raised above.