Law Institute Victoria

Submission

Workplace Relations Section

Senate Inquiry: Fair Work Bill 2008

To: Mr John Carter, Committee Secretary, Senate Education, Employment and Workplace Relations Committee, Department of the Senate

A submission from the Law Institute of Victoria (LIV)

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1 Introduction

The Law Institute of Victoria (LIV) welcomes the opportunity to comment upon the Fair Work Bill 2008 (FWB). Please find below the LIV's comments on aspects of the Bill that are of particular interest to our members, or which otherwise touch upon access to justice for Australians or the efficient administration of dispute resolution.

2 Personal Leave

2.1 Pro-rated entitlements

The LIV observes that s 96 of the FWB contains no reference to pro-rata entitlements for part time employees. As a matter of drafting, the LIV recommends that this section be expressed more clearly.

The LIV further observes that whatever the intention for this Bill, pro-rated entitlements and / or a failure to accommodate the needs of part-time workers may indirectly discriminate against particular groups of employees. In particular, ABS data shows that as many as 75% of part time workers are women1.

2.2 Cashing out of Personal leave

The LIV is opposed in principle to provisions which allow for the cashing out of personal leave entitlements as described in ss 100 and 101. The LIV is mindful that creating a path to the cashing out of personal leave may create an incentive for employees to avoid taking leave for its intended purpose in order to obtain a financial benefit. This is contrary to public interest.

3 Annual leave

The LIV observes that there is little prescription regarding the ability for employers to direct the taking of leave in situations of annual shut down or excessive leave balances. The lack of prescription may lead to disputation on the issue and accordingly should be clarified.

4 Anti – Discrimination

4.1 Creation of an alternate jurisdiction for discrimination matters

The LIV observes that the provisions of s 351 of the FWB create new protections for employees against adverse action on the basis of a person's race, religion, sex, sexual preference, age, physical or mental disability, marital status, family or carers responsibilities, pregnancy, religion, political opinion, national extraction or

social origin. These protections then allow an applicant to apply to a court of competent jurisdiction for an injunction, compensation, and/or a pecuniary penalty.

The protections are linked to State and Territory anti-discrimination laws by way of stating that the protections do not apply where an action is authorised by or under such laws (s 351(2)(a)). The LIV observes that the inclusion of this new protection is likely to create a new body of anti-discrimination case law. There appears to be no link, however, to the existing State or Federal anti-discrimination legislation (other than for authorisations noted above) and accordingly no link to the associated existing jurisprudence.

While the LIV supports all measures taken to eliminate discrimination and advocate for equity, the LIV expects that these protections will lead to at least partial duplication of legal reasoning and of resources. Whereas the LIV understands that part of the aim of the FWB is to create a single body (FWA) to deal with employment disputes, this part of the FWB is actually creating is additional layers of obligations without clarifying how the different jurisdictions should interrelate.

4.2 Further ground of action – Irrelevant Criminal Record

If s 351(1) is to come into operation, the LIV would recommend that a further protection be created against adverse action on the basis of irrelevant criminal record. This would allow full and fair workforce participation of citizens who have spent convictions and / or convictions that are wholly unrelated to any aspect of their employment.

4.3 Drafting with regard to State / Territory laws authorising particular action

As a matter of drafting, the LIV observes that the wording of s 351(2) (a) may permit an argument that action that is authorised in one state may create an authorisation that would not otherwise apply in the state where the adverse action is occurring.

The LIV recommends that the drafting of s 351(2)(a) be refined to clarify that laws permitting or authorising actions in a particular State or area that would otherwise be unlawfully discriminatory are not extended to other States or areas by virtue of of s 351. For example where a Northern Territory law authorised a particular action that would not be permitted under Victorian law and the adverse action or discrimination is occurring in Victoria the Northern Territory law should not be able to be relied upon to negate the obligation created in s 351(1).

Additionally it is the view of the LIV that this section should clarify what the obligation or protection is where existing state legislation is silent as to whether action is authorised or otherwise, to avoid disputation on this point.

4.4 Exception relating to Religion or Creed

The LIV observes that s 351(2)(c)creates a very broad exception in relation to institutions conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.

The exception applies to institutions and not the church or religious body in and of itself. Accordingly the LIV is of the view that it is inappropriate to exempt institutions in a general way from anti-discrimination legislation.

It is the LIV's recommendation that such an exception either:

1. be removed from the Bill altogether; or
2. be removed, except to the extent that action against a staff member of a religious or associated institution is both in good faith, and is necessary to avoid injury to the religious susceptibilities of the adherents of that religion or creed.

5 Unfair dismissal

5.1 Time for application:

The LIV observes that two time limits are set for applications in respect of Unfair and Unlawful dismissal. These time limits are 7 days and 60 days respectively.

In the view of the LIV, 7 days is too short a time frame to allow an applicant to obtain appropriate advice regarding unfair dismissal.

The LIV observes that the short time frame may lead to applications that are frivolous and vexatious as applicants and their representatives may choose to lodge applications prior to obtaining advice or prior to learning the circumstances of a dismissal in order to preserve the right to bring a claim.

As lawyers may be unable to see clients within the 7 day limit,, the short time frame may potentially expose those representatives to costs based on the provisions in s 401 and / or claims of negligence against them from clients if a claim was not lodged within the 7 day limit.

It is clearly the intention of the Bill to avoid claims that are lacking in substance, accordingly it is the LIV's submission that a longer time period such as the existing 21 day time limit would be more appropriate.

Conversely in relation to Unlawful Dismissal under Chapter 6, it is unclear to the LIV why the longer application period of 60 days has been inserted into the FWB. This more than doubles the existing time limits and creates a long period during

which a respondent may be uncertain as to whether a claim is being brought against them.

The LIV is of the view that there is no clear reason for the alteration of the time limits currently imposed and that the time frames ought to be returned to 21 days for both unfair and unlawful dismissal.

5.2 Discretionary hearings

The LIV notes that in relation to many matters and particularly in unfair dismissal matters hearings are discretionary. The Bill does not appear to give guidance on how decisions are to be made in the absence of hearings and evidence in a way that will afford natural justice to the parties to a dispute.

5.3 Appeals

The LIV notes that the FWB specifically excludes appeals other than on significant errors of fact in relation to unfair dismissal proceedings (s 400). The LIV observes that such wording is redundant. To be appealable, an error of fact must be significant.

The new condition precedent for either party to show public interest in an appeal from an unfair dismissal decision is in the view of the LIV onerous. Unlike predecessor legislation which provided that an appeal would be granted if the public interest test were met, this section prevents FWA from allowing an appeal unless the threshold question is positive. It is unlikely to be usual that matters concerning a singular employer and a singular employee will be able to meet the relevant threshold. This does not serve the interests of social justice.

6 Representation by Lawyers & Paid Agents before FWA

The LIV notes that provision has been made for Lawyers to be able to appear in certain circumstances with the permission of FWA. The LIV has corresponded with the Minister in relation to the Role of Lawyers before FWA prior to the introduction of the FWB Bill to the House of Representatives.

The LIV queries the need to alter existing provisions on representation without proper analysis and data to rely upon showing an inherent unfairness or inefficiency resulting from representation of parties to a dispute. The LIV has seen no mention of any analysis in any documents relating to the Fair Work Bill 2008.

The LIV observes that the wording of the Bill allows consideration of only three matters in s 596. In the opinion of the LIV the matters for consideration are too narrow. Additionally comments within the explanatory memorandum are likely to dissuade FWA from using their discretion to grant permission for representation.

The explanatory memorandum states:

"FWA will move away from formal, adversarial processes, with legal representation and intervening parties. There will also be a higher bar set for representation. Permission for representation will only be granted to parties (including the Minister) where it would enable the matter to be dealt with more efficiently or fairly. It is envisaged that in most cases legal representation will not be necessary."2

The LIV queries why legal representation is seen as synonymous with formality. Lawyers are at the forefront of alternative dispute resolution in all areas of the law. It is the view of the LIV that representation should be viewed as a fundamental right that is necessary for the balancing of competing interests. This will be particularly so in the situation of an unrepresented party opposing a more experienced HR manager or Union official before FWA.

It is the experience of LIV members that unrepresented litigants often are unaware of the law and /or administrative processes applying to their circumstances. This often leads to delays and or unfairness as an unrepresented or less experienced party is unable to present arguments in support of the requirements to prove their case or to appropriately test evidence adduced by an opposing party.

Conversely, lawyers, as experts in statutory interpretation and in alternative dispute resolution, will be able to guide their clients through FWA's processes and assist members of FWA to come to fair and efficient decisions.

These are observations that have been made by Deputy Prime Minister Gillard in relation to the Administrative Review Tribunal Bill 2000 which abolished the automatic right of representation before the relevant administrative appeal tribunal. This bill did not pass the senate.3

The limitations on legal representation imposed by the combination of the legislative wording and comments in the explanatory memoranda are in LIV's view unduly onerous and ought to be revisited.

In particular, the LIV suggests that FWA should in addition to the circumstances set out in s 596 have a general discretion to grant permission for legal representation as well as an ability to grant permission with the consent of the parties. If the government is minded, this could be done alongside a discretion to impose conditions to prevent unfair disadvantage, as in small claims matters (s 548).

7 Costs

The creation of an ability for FWA to award costs in a wide range of matters is a significant departure from preceding legislation which allowed AIRC to award costs only in dismissal matters (check) but allowed a court of competent jurisdiction to

make orders for costs relating to other matters (see existing s 658 & s 824 Workplace Relations Act 1996).

Section 611 of the FWB would now allow a general provision for the awarding of costs in matters before FWA. The LIV notes, however, that it appears that costs can only be awarded against persons who should reasonably have known that their application or response had no reasonable prospect of success.

In the case of unfair and unlawful termination matters, FWA will now also have powers to award costs against lawyers and paid agents who similarly have encouraged a person to make a claim in the same circumstances as above or through conduct or omission have caused costs to be borne by another party (s 376 s 780).

The LIV queries why lawyers will be subjected to such cost provisions but industrial associations (registered or otherwise) appear not to be liable for encouraging applications that are without merit and / or conduct which causes costs to be borne by another (unless that association is the person that has brought the application - see s 611).

This distinction between representatives from an in industrial association representing its members and lawyers representing clients seems artificial, particularly in light of the serious regulatory and ethical obligations imposed upon lawyers as Officers of the Court.

The LIV rejects any inference that lawyers require heightened obligations, such as and including the prospect of costs awards.4

Costs provisions are stated to be designed to deter lawyers and others from bringing speculative claims.5 The very object of bringing a claim before a tribunal, however, is to resolve a matter by either dispute resolution techniques or by arbitration. It is rarely easy to judge the true prospects of success before a matter has been run in full and the evidence of both parties is tested. The prospect of a costs order against a lawyer for having run a matter may result in claims which do have merit not being pursued for fear of a costs order or in costs being awarded against a representative when the proper merits of the claim could not be judged early in the matter and, in this respect, may lead to unfair or unreasonable outcomes for applicants and / or their representatives.

8 Conclusion

We thank you for the opportunity to comment upon the Fair Work Bill 2008. We look forward to reading the Senate Committee's report and also the foreshadowed Transitional Bill in the near future.

1 http://www.abs.gov.au/AUSSTATS/abs@.nsf/2f762f95845417aeca25706c00834efa/185c0d7f39d0b784ca2570ec007868d4!OpenDocument

2 Fair Work Bill 2008 Explanatory Memorandum page lxx

3 M Mourell & C Cameron 'Neither simple Nor Fair restricting legal representation before Fair Work Australia" Paper presented at Australian Labour Law Association Fourth Biennial Conference 14 & 15 November2008 and Common wealth Parliamentary Debates Senate 7 December &26 February 2001

4 Fair Work Bill 2008 Explanatory Memorandum - see paras 1498 (p239) and 2795 (p422)

5 Fair Work Bill 2008 Explanatory Memorandum page 255