CHAPTER ONE

INTRODUCTION

Progress and referral of the bill

1.1 Prior to the 1998 Federal Election, the Government released its workplace relations policy, *More Jobs, Better Pay*, in which it undertook to change the unfair dismissal laws by exempting small business from the existing legislation and introducing for new employees of all businesses a qualifying period before being able to make an unfair dismissal claim. The policy also stated that '[a] re-elected Coalition Government will have a fresh electoral mandate to implement this measure as a matter of high priority.' Following the election, this policy was incorporated in the Workplace Relations Amendment (Unfair Dismissals) Bill 1998, which was introduced into the House of Representatives on 12 November 1998. The bill was read a second time on 1 December 1998 and passed the House of Representatives without amendment on 2 December 1998.

1.2 On 2 December 1998, the Senate referred the provisions of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998 to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee for inquiry and report by 15 February 1999. The bill was introduced into the Senate on 3 December 1998 and the second reading debate adjourned on the same day.

Provisions and objectives of the bill

1.3 The purpose of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998 is to amend the *Workplace Relations Act 1996* to:

- require a 6 month qualifying period of employment before new employees (other than apprentices and trainees) can access an unfair dismissal remedy under the Act; and
- exclude new employees of small businesses (other than apprentices and trainees) of 15 or fewer employees from the unfair dismissal remedy under the Act.[1]

1.4 The bill would not affect the scope of unfair dismissal laws under state legislation or Commonwealth laws dealing with 'unlawful' dismissals. The bill would only affect employees (but not trainees or apprentices) hired after the date the Act comes into effect.[2]

1.5 Exemptions from unfair dismissal provisions are listed under section 170CC of the *Workplace Relations Act 1996*, with provision for further exemptions where certain criteria are met. The Government may exempt from the unfair dismissal provisions employees in relation to whom the operations of these provisions cause or would cause substantial problems due to their particular conditions of employment or the size and nature of the undertakings in which they are employed. The Government argued that on its analysis of the evidence before it, small businesses employing 15 or fewer people met the latter criteria for exemption from provisions relating to unfair dismissals. The Government stated that

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1 Explanatory memorandum, p. 1.

2 Bills Digest No. 36 1998-99.

exempting small business from the unfair dismissal laws would promote jobs growth.[3] The decision to introduce a six month qualifying period was aimed at providing a 'fairer balance between the rights of employers and employees in this statutory cause of action' and to 'deter frivolous claims'.[4]

Background to the bill

1.6 In Australia, the small business sector has always been considered a job-creating area. It has been estimated that small business constitutes 97 per cent of all private sector businesses, 49 per cent of all non-agriculture private sector business employment and employs over 2.7 million people.[5]

1.7 Small businesses typically have five to 10 employees, with the principal owner present in the workplace, and are predominantly non-union.[6] Some 83 per cent of small businesses are non-unionised compared to 36 per cent of larger private sector workplaces and 26 per cent of all larger workplaces. The principal owner is more likely to be present in a non-unionised workplace. The majority of workers in the small business sector are full-time, with two-thirds of these being men. Women are more likely to be employed part-time and are twice as likely as men to be employed on a casual basis.

1.8 The first significant changes made to Commonwealth termination of employment legislation were incorporated in the *Industrial Relations Reform Act 1993*. It established a rights based system which extended termination of employment protection to all employees and established Commonwealth primacy over state-based systems with respect to termination of employment. Regulations made pursuant to the legislation excluded fixed term, casual and probationary employees, and specified classes of trainees. 1994 amendments to the Industrial Relations Act restricted access to the termination of employment provisions to employees earning $60,000 or less per annum and set an upper limit for compensation that could be awarded. The Keating Government used its regulation powers to exclude categories of employees from unfair dismissal laws on some five occasions between 1994 and 1996. The Keating Government used ILO Convention 158 as the basis for its unfair dismissal regime and incorporated that Convention in its legislation. That Convention (article 2(5)) provided for the exclusion from the application of the Convention 'limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them'. In addition, the onus of proof was transferred from the employer to the employee in establishing whether the grounds for dismissal were prohibited under the Act. Further changes were made to the legislation in 1996, which removed access to the termination of employment provisions in cases where there was an alternative under another relevant law, and required the Industrial Relations Court to take all circumstances of the case into account, so as not to focus on procedural fairness alone.

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3 Second Reading Speech, 1 December 1998.

4 Second Reading Speech, 1 December 1998.

5 Alison Morehead *et al*., *Changes at Work. The 1995 Australian Workplace Industrial Relations Survey*, South Melbourne, 1997, p 299.

6 Alison Morehead *et al*., *Changes at Work. The 1995 Australian Workplace Industrial Relations Survey*, 1997, p 300.

1.9 In 1996, the Howard Government introduced the Workplace Relations and Other Legislation Amendment Bill 1996, which removed the jurisdiction of the Industrial Relations Court to the Federal Court, reduced the jurisdiction of the federal tribunal to hear unfair dismissal cases, changed the statutory definition of 'fairness', created separate streams for the handling of unfair dismissal and unlawful dismissal cases, introduced a mandatory conciliation stage, increased the power of the Australian Industrial Relations Commission to award costs against employees if claims are found to be vexatious, and introduced a $50.00 filing fee. When the High Court ruled against the use of the external affairs power to cover all employees and override state systems in relation to unfair dismissal, the operation of the Commonwealth law was restricted to Commonwealth and Territory employees and employees covered by federal awards.

1.10 Regulations introduced in December 1996 excluded from the unfair dismissal remedy casuals who had not been engaged continuously for 12 months, employees on probation where the probationary period does not exceed three months and employees absent from work for medical reasons for a period of three months if not in receipt of paid sick leave. Further undertakings by the Government to the small business sector were included in July 1997 regulations in the form of an exclusion from unfair dismissal provisions of employees with less than 12 months continuous employment and who work for a small business of 15 or fewer employees. These regulations arose from the Government's response in March 1997 to the Bell Committee's Small Business Deregulation Task Force established in 1996. The regulations were disallowed by the Senate.

1.11 The Workplace Relations Amendment Bill 1997, proposing a permanent exemption for small business of 15 or fewer employees from unfair dismissal laws was introduced into the Senate in September 1997 and referred to the Senate Economics Legislation Committee for inquiry and report. The Government majority on the Committee recommended the passage of the bill with the Opposition and Australian Democrat members presenting dissenting reports. The Bill was defeated in the Senate in October 1997. A Bill with identical provisions to the Workplace Relations Amendment Bill 1997 was introduced into the Parliament in November 1997 and defeated in the Senate in March 1998.[7]

1.12 In introducing the present bill, the Government argued that it had a mandate to proceed with the proposed changes, because it had outlined them in its workplace relations policy, *More Jobs, Better Pay* during the election campaign. The Government argued that the fear of costs, not only of the settlement, but also stress, cost to business in lost time, disruption in working relationships and the cost of defending a claim, adversely affected small business employing intentions. The Government cited a number of surveys which supported its position on the exemption of small business from unfair dismissal laws, including the 1996 Morgan & Banks Survey, the April 1997 Recruitment Solutions Survey, the May 1997 NSW Chamber of Commerce and St George Bank Survey, the 1997 National Institute of Labour Studies report *Trends in Staff Selection and Recruitment*, the October and November 1997 Yellow Pages Small Business Index surveys and 1998 surveys by the NSW, South Australian and Queensland state chambers of commerce. A brief summary of the results of these and other surveys is outlined in the next chapter.

7 Bills Digest No. 36. 1998-99.

Unfair dismissals – the current law (Commonwealth)

1.13 The law relating to termination of employment is dealt with under Part VIA, Division 3 of the Workplace Relations Act 1996 (the Act).

1.14 The object of the division is, *inter alia*, to ensure that remedies for employees, whose termination of employment is determined to have been 'harsh, unjust or unreasonable' or 'unlawful', constitute a 'fair go for all' with respect to the employees and employers concerned.[8]

1.15 Applications for remedies for terminations, which are considered 'harsh, unjust or unreasonable', are dealt with under Part VIA, Division 3, Subdivision B of the Act. Subdivision B applies to employees who, prior to the termination, were:

- a Commonwealth public sector employee
- a Territory employee (or Victorian employee[9])
- a Federal award employee who was employed by a constitutional corporation[10]
- a Federal award employee who was a waterside worker, maritime employee or flight crew officer engaged in trade or commerce between the states, within a territory, between a state and territory, between two territories or between Australia and a place outside Australia.

1.16 Section 170CC provides that regulations made under the Act may exclude from the operation of Subdivision B, 'specified classes' of employees which are included in any of the following classes:

- employees engaged under contract for a specified time or task
- employees serving a qualifying or probationary period
- employees employed casually for a short period
- employees whose terms of employment included protection in respect of termination of employment
- employees in relation to whom the operations of these provisions cause or would cause substantial problems due to
    - their particular conditions of employment
    - the size and nature of the undertakings in which they are employed.

1.17 Employees may also be identified as a class of employees that may be excluded from the operation of these provisions if:

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8 *Workplace Relations Act 1996*, section 170CA.

9 In late 1996, complementary laws were passed by the Victorian and Commonwealth Parliaments to transfer jurisdiction of various industrial relations matters from Victoria to the Commonwealth.

10 That is, 'foreign corporations' and domestically formed companies carrying on financial or trading activities within the meaning of section 51(xx) of the Constitution.

- the employees' remuneration immediately prior to termination was not wholly or partly based on commission or piece rates and the rate of remuneration applicable to the employee exceeds a rate specified in the regulations; or
- the employees' remuneration immediately prior to termination was based wholly or partly on commission or piece rates and the rate of remuneration taken to be applicable to the employee exceeds the rate specified in the regulations.

1.18 Under section 170CE(1)(a) of the Act, an employee whose employment has been terminated may apply to the Australian Industrial Relations Commission (AIRC) for relief on the grounds that the termination was 'harsh, unjust or unreasonable'.[11]

1.19 Except in specified circumstances[12], termination of employment on the basis of the following reasons would be treated as 'unlawful' termination and therefore would not fall within the scope of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998:

- temporary absence from work because of illness or injury[13]
- trade union membership or participation in trade union activities outside working hours or in working hours with the employer's consent
- non-membership of a trade union
- seeking to act, or having acted, as a representative of employees
- filing a complaint or participating in proceedings against an employer involving alleged violation of laws
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin
- refusing to negotiate, make, sign, extend, vary or terminate an Australian Workplace Agreement
- absence from work during maternity or other parental leave.[14]

1.20 Under section 170HB, an employee can not make an application under section 170CE in relation to the termination of employment if the employee has already commenced proceedings—and the proceedings have not been discontinued or have failed for want of jurisdiction—in respect of that termination under another provision of the Act, under

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11 The section also provides other grounds for an employee to apply to the Commission for relief including cases where a termination of employment is unlawful (s.170CK), where the relevant authorities have not been notified when the employment of 15 or more employees is to be terminated (s.170CL), where sufficient notice has not been given—or, if notice has not been given, the employee has not been paid compensation or the employee has not engaged in serious misconduct (s.170CM)—or where a termination would be in contravention of a Commission order (s.170CN).

12 See *Workplace Relations Act 1996*, s.170CK(3) and(4).

13 Under 1996 regulations (Statutory Rules 1996, No. 307), employees may be lawfully dismissed if they have been absent from work for a continuous period of three months (or for more than three months in a period of 12 months) except when in receipt of paid sick leave.

14 *Workplace Relations Act 1996*, section 170CK(2).

another law of the Commonwealth or under a law of a state or territory alleging that the termination was harsh, unjust or unreasonable, for a reason other than a failure by the employer to provide a benefit to which the employee was entitled on the termination of employment.

1.21 On 17 December 1998, the Commonwealth Government announced its decision to introduce its unfair dismissal policy by the amendment of regulations made under s170CC(1) of the *Workplace Relations Act 1996.* [15] The Workplace Relations Amendment Regulations 1998 (No. 2) and (No. 3) were gazetted on 18 December and provided for small businesses of 15 or fewer employees to be excluded from the Commonwealth unfair dismissal legislation, for a six month qualifying period to be introduced during which time new employees do not have access to unfair dismissal provisions, and for the filing fee for a federal unfair dismissal application to be increased from $50 to $100 from 1 January 1999.[16]

1.22 In 1996, effective from 1997, Victoria 'transferred' its industrial jurisdiction to the Commonwealth. Termination provisions under the *Workplace Relations Act 1996* are administered by federal tribunals with respect to Victorian employers and employees.

1.23 The Northern Territory and Australian Capital Territory operate under Commonwealth legislation with respect to unfair dismissal laws.

Twelve month review of federal unfair dismissal provisions

1.24 The termination of employment provisions set out in Part VIA, Division 3 of the *Workplace Relations Act 1996* (the Act), reflect the changes made to the previous unfair dismissal laws and commenced on 31 December 1996. Prior to the introduction of these changes, a Small Business Deregulation Taskforce presented its report *Time for Business* to the Commonwealth Government. In its response, *More Time for Business*, the Government undertook to review the new unfair dismissal provisions of the Workplace Relations Act 12 months after their introduction. This review was published in December 1998.

1.25 In relation to small business, the Review recommended that the Government note that the 1996 changes to the law had 'not alleviated the concerns of small business about the impact of unfair dismissal laws upon them.' In its response the Government referred to its commitment to exempt small business from the operation of the unfair dismissal laws. It reiterated its view that the proposed measure was a job creation initiative and that it had a mandate to introduce the changes.

1.26 The Review also drew the Government's attention to cases where the validity of probationary periods determined in advance were questioned at the AIRC, which had created uncertainty with respect to the application of probationary periods. The Review also noted that there were conflicting views on the reasonableness of establishing an extended probationary period for all employees. The Government responded by claiming that the

15 *Unfair Dismissal Laws Implemented through Regulation*, Media Release, The Hon Peter Reith, MP, Minister for Employment, Workplace Relations and Small Business, 17 December 1998.

16 Cf. Statutory Rules 1998 No. 338 and Statutory Rules 1998 No. 353.

proposed six month qualifying period for access to the Commonwealth unfair dismissal remedy would introduce 'greater certainty and fairness in this area'.[17]

The Committee's current inquiry

1.27 The Committee advertised its inquiry on Saturday, 5 December 1998. The Committee received 24 submissions and held one public hearing in Canberra on Friday, 29 January 1999. Details of submissions received and witnesses who appeared at the hearing are listed at Appendix 1.

Acknowledgment

1.28 The Committee would like to thank departmental officers, and those organisations and individuals that were able to provide submissions or appear at the public hearing. The Committee would also like to thank Mr Stephen O'Neill from the Department of the Parliamentary Library for advice provided on unfair dismissal laws.

17 Department of Employment, Workplace Relations and Small Business, *Twelve Month Review of Federal Unfair Dismissal Provisions* (including Federal Government Responses to the Review), December 1998.