Dominion Building
533 Little Lonsdale Street
Melbourne Vic 3000

Ph: (03) 9602 6888
Fax: (03) 9600 0290

www.slatergordon.com.au

Correspondence to:

Solicitor: Rob Jackson
Legal Assistant: Monique Carpenter

GPO Box 4864VV
MELBOURNE 3001

DX 229 MELBOURNE

Direct Ph: (03) 9602 6925
Fax: (03) 9600 0290

Email:
mcarpenter@slatergordon.com.au

Our Ref: RLJ:MC

31 August 2000

Mr John Carter
Secretary
Senate Committee on Workplace Relations
CANBERRA ACT 2600

Facsimile: 02 6277 5706

Dear Mr Carter

Workplace Relations Amendment (Termination of Employment) Bill 2000

On behalf of Slater & Gordon I enclose our Submission for the attention of the Committee.

Slater & Gordon request an opportunity to make oral representation at the Public Inquiry to take place on Thursday 31 August 2000. Please confirm whether the Committee requires our attendance.

Yours faithfully

Rob Jackson
Senior Associate
SLATER & GORDON

Submission by Slater & Gordon Solicitors

to the

Senate Employment Workplace Relations Small Business and Education Legislation Committee

Public Inquiry into the Workplace Relations Amendment (Termination of Employment) Bill 2000

28 August 2000

Introduction

Slater & Gordon adopts and repeats the contents of its Submission dated 17 September 1999 (Attachment "A") made to the Committee's Inquiry into the Workplace Relations Amendment (More Jobs Better Pay) Bill 1999 in so far as the submission is relevant to the contents of the Workplace Relations Amendment (Termination of Employment) Bill 2000 ("Bill"). Specific references are made to the Attachment where appropriate.

We refer the Committee to the Introduction at Pages 5 – 7 of Attachment "A" for a full exposition on Slater & Gordon's history and philosophy.

Slater & Gordon considers that the amendments proposed by the Bill :

- Alters the balance of the law in favour of employers away from employees;
- Adds unnecessarily to the complexity of the law and procedure governing unfair dismissal claims ("Clams");
- Are unlikely to reduce the perceived number of unmeritorious claims filed at the Australian Industrial Relations Commission ("Commission");
- Are likely to undermine the objects of the Workplace Relations Act 1996 ("WR Act") as it currently stands;
- Undermines lawyer-client professional privilege;
- Does nothing to address how unregulated advisers operate, and charge members of the public for their services;
- Does nothing to address the underlying causes of job insecurity; and
- Contravenes Australia's treaty obligations under public international law.

We strongly urge the Senate to scrutinise fully the contents of the Bill presented for its consideration.

Slater & Gordon's Submissions

1. Late Filing of Claims –Schedule One, Paragraphs 11 and 36

In the proposed section 170CE(8), the definition of "equitable" is unclear. Equity, as a legal doctrine, is a broad concept, which avoids undue technicality and seeks to provide substantive justice to an aggrieved party. This appears not to be the definition applied in that paragraph 170CE(8A) limits the jurisdiction of the Commission to grounds only with paragraphs (a) to (e).

The footnote refers to the application of the principles in the case of *Brodie-Hanns v. MTV Publishing Ltd.* This case is unhelpful firstly because the judgment is based on quite a different statutory context, namely the Victorian unfair dismissal regime, which then provided for an application to be lodged within 10 days of the dismissal. It transpired some months later that the claim could have been filed at the former Industrial Relations Court of Australia (now part of the Federal Court of Australia). The decision focuses on whether a claim, having failed in one jurisdiction should then be entertained some months later in an alternative jurisdiction. The decision does not focus on the more common grounds for seeking an extension of time, such as delay in finding a suitably qualified adviser to identify and assess leal rights.

Any amendment should do no more than codify the principles applied in the case of *Kornicki v.Telstra (Network Technology Group)* (see Paragraph 3.4 of Page 19 of Attachment "A") as providing the most balanced test between the interests of employers and employees. The present Government introduced the current statutory test. The Bill does not disclose any sound reason why the test for accepting late applications should be altered.

Alternatively, if there is enacted a stricter test as proposed, there should be a reasonable period of time within which to file a Claim of, say, six months. A period of six months is quite modest, bearing in mind that the common law period of limitation is six years from the date of dismissal. The current time limit of 21 days precipitates Claims, which otherwise may not be made if there were further time for reflection. A realistic time limit would enjoy the following features:

- Reduce the time spent by the Commission in adjudicating extension of time applications;
- Less likely to create poor assessments about whether to file a Claim. Once a client has accessed appropriate advice, little or no time, may be left to make a full assessment of the merits of the Claim. It is in these circumstances that an unmeritorious Claim is more likely to be filed;
- A time limit of six months would enable a client in most circumstances to overcome the logistical difficulties in seeking advice. Rural, Non-English speaking, clients with disabilities and non-union clients are all at a particular disadvantage.
- It would enable the adviser to speak to potential witnesses, view and analyse relevant documents, research the law, and take further instructions from, and provide further advice to, a client, before a Claim is filed.

Additionally, we refer the Committee to our earlier Submission at Paragraph 3.4 at Pages 18 – 21 of Attachment "A".

We urge the Committee to retain the current statutory test, and that the test proposed in the Bill be rejected.

2. Dismissal due to Operational Reasons – Schedule One, Paragraphs 10, 25 and 27

We refer the Committee to our earlier Submission at Paragraph 3.8 at Pages 25 – 28 at Attachment "A". Our earlier submission deals substantively with the proposed amendment in the Bill.

The exclusion of employees dismissed for "operational reasons" is quite arbitrary. It will lead to employers being tempted to disguise a dismissal as one for "operational grounds" as a means of avoiding liability under the WR Act, and thereby give rise to greater litigation. Even if there exists *bona fide* operational reasons, there remains a risk that an employee, over another employee, may still be unfairly selected for quite arbitrary reasons unrelated to his/her work performance or conduct.

One of the leading cases on this question is *Kenefick v. Australian Submarine Corporation (No 3)* (unreported, Industrial Relations Court of Australia, Full Court, 8July 1997). A number of employees were dismissed for what were *bona fide* operational reasons. There were significant defects in the selection procedure. Some employees were selected for redundancy for past poor performance, which had never been put to the employees concerned at the relevant time. The Court found that the unfair dismissal regime as it then was (with substantively the same provisions per the current WR Act) required an employer to act fairly in relation to any dismissal, whether brought about by operational reasons or otherwise. This case has received consistent judicial and Commission support. The Bill provides no rationale for altering this position.

Australia is a signatory to the International Labour Organisation's Convention concerning the Termination of Employment at the Initiative of the Employer. This forms Schedule 10 to the WR Act. Article 7 of the Convention requires an employee to be provided with an "*opportunity to defend himself* (sic*) against the allegations made*" in relation to "*conduct*" or "*performance*". There is no exception in the Convention for operational reasons. The proposed amendment in the Bill is contrary to Australia's international treaty obligations.

We urge that this amendment be rejected.

3. Motions for Dismissal of Application for Want of Jurisdiction - Schedule One, Paragraph 12

We refer the Committee to our earlier Submission at Paragraph 3.4 at Pages 21 of Attachment "A".

As explained in our earlier submission, there exists already the procedural ability for the Commission to dismiss Claims outside its jurisdiction. This amendment

would add another, unnecessary layer of procedure adding to the complexity and cost for both employee and employee alike. This procedure provides no effective mechanism to ensure that weak claims are dismissed.

We urge that the amendment be rejected.

4. Certificate as to Unsuccessful Conciliation – Schedule One, Paragraph 13 - 24

We refer the Committee to our earlier Submission at Paragraph 3.7 at Pages 22 – 24 of Attachment "A".

We emphasise and repeat the contents of our earlier Submission. The proposed amendment is disturbing in that it undermines the entire conciliation process as envisaged by section 51(xxxv) Constitution. The Bill alters the character of Conciliation dramatically from a process that focuses on finding a pragmatic, informal solution to an outstanding dispute to one that focuses on making formal findings of fault. Conciliation, as it currently stands, successfully settles many Claims, by steering the parties away from the emotive issues of who is at fault and instead exploring possible resolutions.

The Commission has itself ruled that at Conciliation it is not equipped to make formal findings as to the merits. (see the reference to *Kumar v Fisher & Paykel* at Page 24 of Attachment "A"). Witnesses do not submit for cross-examination and documents are not tendered during Conciliation. This occurs at arbitration when all evidence is formally tested. Conciliation is about exploring the possibilities of settlement, and should remain so.

We urge that the amendment be rejected.

5. Amendments to Determining whether Dismissal Harsh Unjust or Unreasonable" – Schedule One, Paragraph 26

We refer the Committee to our earlier Submission a Paragraph 3.9 at Page 28 of Attachment "A".

The proposed amendment requires the Commission to consider the "*size*" of the employer in assessing the level of fairness that should be dispensed by an employer dismissing an employee. The provision is unworkable in that there can be no scientific measurement of fairness as correlated to the size of an employee's business. Size cannot be an excuse to avoid a legal obligation. The requirement to act fairly is not a complex legal matter. The Government would not permit a small rather than a large union to breach what is otherwise the law simply because of its size. It is illogical to see how the same argument can be used for employers.

All employers and all employees have an obligation implied at common law to act in a manner that accords mutual trust and respect in the employment relationship.

Size is irrelevant. This amendment would place the WR Act in conflict with the standards applied in the civil courts.

To attempt a legal definition of "*size*" will add unnecessary complexity and cost for employer and employees alike. There is no such exception in the Convention that forms Schedule 10 of the WR Act or any of Australia's other international treaty obligations.

We urge that the amendment be rejected.

6. Disclosure of Contingency Fee Agreements/ Speculative Litigation– Schedule One, Paragraphs 30 and 40

We refer the Committee to our earlier at Submission at Paragraph 3.2 at Pages 13 to 17 of Attachment "A".

We first refer to the definition used of "contingency fee". Legal Practitioners in Victoria (and other States) are not permitted to charge on a contingency basis as its meaning is understood within the legal profession. A contingency fee permits a lawyer to charge a percentage of an amount recovered through a legal process or by way of a settlement, and is a common practice in North America. The fee structure has no bearing on the amount of work or time spent on a file. The Bill is the first endorsement of the existence of a contingency fee arrangement ever given by any Government, State or Commonwealth.

What the various legal bodies in Australia do permit is to charge an uplift in fees based on the time spent on a file. In Victoria the Legal Practice Act places a ceiling of 25% of the total time-costed fee. The time spent on a file is subject to scrutiny by the courts and the regulatory body.

It is further important to note that a legal practitioner, as an officer of the Court, owes the Court an obligation to act professionally and ethically not just in relation to costs charged to clients but in all aspects of legal practice. It extends to acting professionally towards opposing parties.

This contrasts to the unregulated advisers permitted to practise at the Commission (and other non-judicial tribunals) without any formal training, insurance, supervision, code of ethics or remedy for a client in relation to excessive fees. The amendments are misconceived by making access to justice more difficult when the appropriate issue to be addressed is unregulated advisers or for that matter rogue solicitors.

By disclosing the fee arrangements of a client is an unwarranted intrusion into the client's privacy. It is noted there is no requirement in the Bill for the disclosure of the method and terms of payment for respondents. It is quite unclear what benefit will follow, for anybody, from such disclosure?

Slater & Gordon pioneered the "No Win No Fee" ("NWNF") arrangement in Australia as a means of accessing justice for our clients who otherwise were unable to access the legal system. The NWNF arrangement was initially introduced in relation to personal injury claims, including medical negligence claims. There was a widespread fear held widely within the medical profession that

NWNF arrangements would lead to an explosion in litigation, and particularly of unmeritorious claims. The experience has been found to be otherwise. What has happened that most medical negligence claims are filed by a few specialist legal practitioners, with many weak or unworthy claims being eliminated by the practitioners' own law firms. Those claims found to be problematic were conducted on the traditional fee for service basis by non-specialist legal practitioners. The Committee can verify this view by contacting, for example, Dr Paul Nisselle of Medical Indemnity Protection Society of Melbourne.

Our legal staff focus very early on the merits of a claim, before determining whether to grant a No Win No Fee arrangement. Slater & Gordon has nothing to gain either for its reputation or its cash flow from funding claims without merit against business that are always sufficiently resourced to afford either legal representation or an employer association in stark contrast to the overwhelming majority of our clients. Legal aid is unavailable for unfair dismissal claims. Many of our clients are from low-income groups in unskilled or semi-skilled occupations, without formal educational qualifications, and are unfamiliar with the law and its workings. A number of clients speak English as a second language.

Slater & Gordon have dedicated a team of Client Service advisers who provide initial advice free of charge on a toll free telephone number. Our Client Service team gives frank advice about the merits of a Claim. The Client Services team may advise that a Claim is, for whatever reason, without merit. If a Claim possesses a reasonable prospect of success, an appointment is made with a Solicitor in the Employment Unit. The Employment Unit, as its title suggests, practices exclusively in the employment law field. Our Solicitor makes a further, more detailed assessment about the merits of a Claim. This may lead to the Solicitor advising that the Claim is without merit, and that Slater & Gordon is unwilling to act. This first interview is also free of charge. Our Client Services team receives on average 20 – 140 telephone inquiries per week. Employment inquiries form approximately 30 – 50% of that volume. Approximately 20 inquiries translate into first appointments each week.

The implication in the Bill appears otherwise that NWNF arrangements somehow mischievously create unmeritorious Claims that otherwise would not exist. No evidence is presented for this contention. The NWNF arrangement actually leads to early assessments to provide realistic advice to clients and eliminating Claims without merit at an early stage. Law firms that do to operate on a NWNF basis may be more inclined to continue with an unmeritorious claim, given that their fees are being paid in any event whatever the outcome.

A condition of Slater & Gordon's NWNF arrangement is that a client must follow our advice. If a client ignored our advice, the NWNF arrangement would be withdrawn, and we would only proceed on a fee-paying basis. The Bill is unclear about what happens in these circumstances. Is the client, or the firm, obliged to formally raise this with the Commission? If so, this may lead to an undermining of legal professional privilege. If, for example, a client wished to proceed to arbitration, despite rejecting a reasonable offer made by the former employer that Slater & Gordon recommended. If this must be disclosed to the Commission, it is easy for both the former employer and the Commission to assess the nature of our advice in relation to offer of settlement. Legal professional privilege is a vital cornerstone of the legal system. It should not be compromised.

The proposed amendment to enable a Court to investigate the motives behind filing speculative claims is unnecessary. The Courts already possess an inherent jurisdiction to supervise its own proceedings and legal practitioners, which can include making wasted costs order personally against solicitors who abuse court process. This amendment again adds another unnecessary layer of complexity.

We urge that this amendment be rejected.

7. Application for Costs (including Security for Costs)– Schedule One, Paragraphs 31 – 34

We refer the Committee to our earlier Submission at Paragraph 3.1 of Page 8 to 13 of Attachment "A".

The ability of a former employer to recover costs for an unsuccessful Claim is greater than that of the former employee/applicant to recover for costs for the unreasonable acts of a former employer in defending a Claim.

Employees do not possess a monopoly in pursuing unreasonable Claims. One of the leading recent legal authorities in the Federal Court of Australia concerned unreasonable conduct in an unfair dismissal application relating to an employer defending a claim in dishonest circumstances. The amendment makes greater the imbalance, which already favours employers on the question of recovery of legal costs in the Commission.

We urge that this amendment be rejected.

8. Exclusion of Injury to Feeling Etc., in assessing Compensation – Schedule One, Paragraph 38

The amendment is regressive. At a time when the common law has become more receptive to non-financial loss, this provision undermines the progress made by the common law.

The fact is that the manner of termination of employment can vary greatly, from a private, thoughtful exit interview carefully addressing issues in the employment relationship to a public ill-founded statement that can have disastrous effects on he employee's reputation and future income-earning potential.

The varying manner of dismissal has been judicially recognised. For example in *Burazin v. Blacktown City Guardian,* the former Industrial Relations Court awarded damages for the manner of termination, where the police were called in for no reason other than to humiliate the employee concerned. While the decision was overturned on appeal, the Full Court nevertheless recognised the legitimacy of this head of loss. To not recognise the conduct of an employer in dismissing an employee is counter-productive in a modern and professional workplace.

We urge that this amendment be rejected.

CONCLUSION

It is Slater & Gordon's view that the Bill severely restricts access to the Commission. Without proper legal redress for unfairly dismissed employees, the aspirations of creating an equitable fairer workplace are frustrated. It undermines, rather than enhances, the Government's stated intention of a 'fair go all round'.

Slater & Gordon support the need to ensure that respect for the Commission, and its functions, are maintained and enhanced. The Bill's provisions add only to the complexity of Commission procedure without securing any benefit. The Bill introduces divisive practices between a legal practitioner and his/her client, while leaving the less desirable practices of unregulated advisers unaddressed.

Reference has also been made to the potential for breaches of provisions of international instruments and the Constitution.

Slater & Gordon urge the Senate to give careful and detailed consideration to all of the provisions contained within the Bill.

Rob Jackson
Senior Associate
Employment Unit
Slater & Gordon

28 August 2000