A Submission by Slater & Gordon Solicitors

to the

Senate Employment, Workplace Relations, Small Business and Education Legislation Committee

Inquiry into the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999.

17th September 1999

EXECUTIVE SUMMARY

Slater & Gordon have extensive experience with the unfair dismissal law. We act for dismissed employees seeking a remedy under Part VIA, Division 3 of the *Workplace Relations Act*. The changes to the Act proposed by the *Workplace Relations Legislation Amendment (More jobs, Better Pay) Bill* 1999 cause us great concern. However, our submission is directed towards those amendments that affect the unfair dismissal law.

We consider the amendments significantly alter the balance of the law in favour of employers. The amendments with respect to costs and the proposals directed at so-called unmeritorious and speculative claims represent an attempt to reduce the access of employees to the jurisdiction. The amendments further undermine the Applicant's access to the law by adopting thinly veiled measures that seek to penalise those who represent dismissed employees.

The progress of an unfair dismissal application will be made more complex and costly by the amendments concerning conciliation conferences. In our experience these conferences provide an effective forum in which both parties can discuss and resolve applications quickly and informally. The amendments would add a significant new dimension to such conferences requiring conciliators to conduct a mini-trial. In our view, such a course is wholly inappropriate and likely to lead to significant delays and increased costs for both parties to an unfair dismissal application.

The amendments to substantive law, in particular the proposals for termination at the initiative of the employer and operational requirements, are in our view unfair and onerous. The termination at the initiative of the employer proposals require the Court or Commission to focus upon the employer's state of mind at the time it engages in conduct that leads to the employee resigning from the employment. In our opinion, such a focus is illogical and likely to lead to unsatisfactory outcomes. The relevant criterion must be the employee's state of mind in response to an employee's conduct when considering the degree of choice exercised by the employee at the time the employment relationship terminates.

The amendments preventing a termination from being unfair if the reason relied upon by the employer is operational requirements has the potential to serve as an impenetrable

shield leaving otherwise unfairly dismissed employees from obtaining a remedy. The case law is replete with examples of unfair termination practices masquerading as redundancies. In our view, the amendments are a positive incentive for employers to find innovative ways of characterizing dismissals as termination on the ground of operational requirements and are likely to serious undermine the policy of the law.

We urge the Senate to closely examine the Bill presented for its consideration. It is clear that most if not all of the amendments are motivated by a desire to advantage employers. The proposals are not intended to remedy deficiencies in the law and do not have that effect. In a labour market characterized by high unemployment and job insecurity we consider the amendments to be inappropriate.

1. INTRODUCTION

1.1. Who we are

Throughout its 65 year history as a law firm, Slater & Gordon has utilised the legal system to win justice for underprivileged people. Slater & Gordon's origins lie in the trade union movement in Australia, and over the years the firm has represented working people and unions in a variety of legal areas. Slater & Gordon currently has a staff of around 275, with offices in Melbourne, Sydney, Perth, and regional Victoria.

Since the 1980's, Slater & Gordon has become known for innovations that have increased awareness of, and access to, legal rights and remedies for working people. One significant innovation was the pioneering of "No Win No Fee" arrangements in Victoria. Today, this remains one of the primary means available to Slater & Gordon of addressing client needs in a practical and cost effective manner.

1.2. The purpose of our submission

Slater & Gordon practices in a range of legal areas, with employment and industrial law forming a significant area of activity for the firm. We draw upon our experience in the fields of law governed by the *Workplace Relations Act 1996* to make our submission. Whilst we have a number of concerns about the range of proposed amendments to *the Workplace Relations Act* 1996 contained in the *Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill* 1999 ("the Bill"), this submission is intended to address only the proposed changes to the Unfair Dismissal laws.

1.3. Our Unfair Dismissal Practice

Each week, Slater & Gordon solicitors provide free telephone advice to around 200-250 people who call seeking assistance in relation to employment law issues. Most of the calls we receive are as a result of referrals from Community Legal Centres, Unions, Community Groups and our general reputation in the field. Slater & Gordon does not advertise its unfair dismissal practice in the media. Notwithstanding this, approximately half the calls we

receive relate to Unfair Dismissals. Less than 10% of these callers become our clients. It is worth noting at this point that Victoria does not have its own unfair dismissal laws. All Victorian employees must therefore rely on the federal legislation.

1.4. Our philosophical position

As a law firm with extensive experience in this field, we are concerned about the effect the proposed changes will have on the balance between the rights and obligations of employers against those of employees. The introduction of the *Workplace Relations Act* 1996 significantly advantaged employers over employees, and the proposed amendments seek to tip the balance further in favour of employers.

In his second reading speech, the Minister stated to the House of Representatives that 'the burden on employers, especially small and medium businesses, of unfair dismissal claims will be further eased through reforms'. The explanatory memorandum of the Bill states that the objectives of the changes are to '[ease] the burden that unfair dismissal applications impose on employers, by reinforcing disincentives to speculative and unmeritorious unfair dismissal claims, and by introducing greater rigour into processing by the Australian Workplace Relations Commission of unfair dismissal applications.'

The stated intention of the amendments is to prevent "speculative" and "unmeritorious" claims being brought by applicants. This is based on the assumption that these types of claims exist in epidemic proportions and impose an enormous economic burden on employers. There is no evidence whatsoever that these assumptions are correct. The true purpose of the amendments is to further restrict the right of employees to a modicum of job security in line with the government's belief that employers should have the right to hire and fire at will.

The Minister's rhetoric suggests that the proposed amendments will achieve their aims without restricting the rights of "genuine" applicants to pursue a remedy for unfair dismissal. Many of the proposed amendments would have a significant and negative impact upon the rights of applicants to pursue and achieve a remedy for unfair dismissal. In addition, many of the amendments will work to create a procedure that is less directed at the 'rigorous' resolution of disputes and will be more onerous for both applicants and respondents.

S170CA(2) of the Workplace Relations Act provides that the guiding principle for the unfair dismissal regime is to accord a "fair go all round" to both employers and employees. Should the proposed amendments be implemented, many employees would be denied a “fair go all round”.

1.5. An outline of our submission

- Our submission relates to the proposed changes to the unfair dismissal laws and how they would effect Victorian employees.
- It outlines the proposed changes, their likely effects and practical alternatives.
- Our evidence is largely anecdotal, based upon our experience in the field.
- We do not pretend to be impartial, however we attempt to present a practical perspective.

2. THE PROVISIONS OF THE WORKPLACE RELATIONS LEGISLATION AMENDMENT (MORE JOBS BETTER PAY) BILL 1999

2.1. Costs

In circumstances where the government regulates the operation of the labour market by establishing a private legal right of action to individual workers, the cost involved in enforcing this right is a major issue of concern. Accordingly, we deal first with the government's proposed amendments regarding legal costs:

a. The Current System

Employers can obtain costs against employees in circumstances where the Commission has begun arbitrating a claim, and:

- the application is made vexatiously or without reasonable cause; or
- the applicant acts unreasonably by failing to discontinue the application; or
- the applicant discontinues the application
- the applicant acts unreasonably by failing to agree to terms of settlement that could lead to the discontinuance of the matter.

In contrast, Employees can only obtain costs against employers where the Commission has begun arbitrating, and:

- The respondent acts unreasonably by failing to agree to terms of settlement that could lead to the discontinuance of the matter.
- The respondent acts unreasonably by failing to discontinue a jurisdictional objection

Therefore the current cost regime clearly favours employers, and according to the explanatory memorandum accompanying the *Workplace Relations and other Legislation Amendment Bill* 1996, was motivated by a desire to 'discourage applicants from making applications which are without any reasonable foundation.' The current regime is unfair to employees, and should be modified. Currently the system fails to provide applicants with adequate opportunities to seek redress against respondents for vexatious or unreasonable conduct in the course of proceedings. In addition, the extremely limited amount of

compensation available at arbitration for successful applicants is further eroded by the fact that applicants must bear their own costs in asserting their legal rights.

b. The proposed system

The proposed amendments would result in a greater imbalance between the ability of applicants to recover costs as opposed to respondents.

The proposed scheme would allow employers to obtain costs against employees at any stage of the claim process, including and potentially prior to conciliation, regardless of the stage at which the application was resolved, where:

- it should have been reasonably apparent to the employee that there was not a substantial prospect of success in relation to the application or proceeding; or
- the employee has acted unreasonably in failing to discontinue the proceeding;
- the employee has acted unreasonably in failing to agree to terms of settlement that could lead to discontinuance of the proceeding;
- the employee acted unreasonably in connection with the conduct of the proceeding.

In contrast, employees could only obtain costs against employers where:

- The employer makes a jurisdictional objection and it should have been reasonably apparent to the employer that there was not a substantial prospect of success;
- the employer has acted unreasonably in failing to agree to terms of settlement that could lead to discontinuance of the proceeding;
- the employer acted unreasonably in connection with the conduct of the proceeding.

c. Our position on the proposals

We submit that the proposed cost regime should not be implemented. There are a number of significant problems with the proposal that would have the effect of impeding a practical

and accessible resolution of claims, and undermine the 'fair go' principle that underpins the unfair dismissal laws. These are:

i. Applicants should not be required to provide security for costs

The amendments provide that employees may be required by the Commission to provide security for costs. This amendment places an unreasonable burden on applicants, because:

- there is no corresponding provision for respondents to provide security for costs, thus the provision is directly discriminatory; and
- in many cases applicants simply would not be able to afford to comply with this requirement. Even if the amendment applied equally to applicants and respondents, it is far more likely that an applicant would be disadvantaged by this requirement than a respondent.

We recommend that this amendment should not be supported.

ii. Conciliation proceedings should not to be subject to costs

The amendments provide that Conciliation proceedings may be subject to an application for costs. This would have a detrimental effect on the effective operation of the conciliation process, and impede the rigourous processing of claims.

Conciliation is a procedure that benefits both applicants and respondents, because:

- it allows a large number of employers and employees to resolve claims quickly and practically without the need for a formal hearing;
- it is a confidential, informal, without prejudice proceeding, and therefore allows issues to be canvassed, conflicts of fact to be identified, and an assessment to be made by each party of the relative merit of their positions;
- it allows unrepresented parties access to the legal system that is largely precluded where a formal hearing is involved and also allows both employers and employees to engage representation at a relatively low cost.

The amendment should not be introduced, because;

- it would fundamentally change the nature of the conciliation process. This change would have negative effects for both employers and employees. It would introduce a far more adversarial dynamic to the proceeding, and by virtue of this, limit the potential for parties to resolve their claims; and
- costs should only be awarded where a full and fair examination of all the evidence has been made. This is the function of arbitration rather than conciliation.

We recommend that this amendment should not be supported.

iii. Claims withdrawn prior to election to proceed should not to be subject to costs

The amendments provide that applications that are discontinued prior to an election to proceed to arbitration may be subject to an application for costs. This would have a detrimental effect on the efficiency of the system and the practical handling of claims by applicants. Applicants who discontinue their claim prior to making an election to proceed to arbitration should not be subject to a cost order.

- Many applicants lodge an application without having received advice as to the merits of their claim, solely to ensure that they are within the 21-day time limit. The Commission's Annual Report from 1997/1998 (the "Annual Report") indicates that between 31st December 1996 and 30th June 1998 about 15% of applications were withdrawn, discontinued or settled prior to conciliation. Many applicants, after seeking legal advice, withdraw their claim at this initial stage. They should not be liable for costs
- Many other applicants find work quickly and due to the compensation structure of the system it is no longer viable for them to continue with their claim. Neither should these applicants be liable for costs.
- A small number of applicants withdraw their claim prior to electing to proceed to arbitration (according to the Annual Report, around 2.6% of all claims prior to July 1998). In our experience the primary reason for this is inability to afford the cost of continuing with legal action.

Exposing applicants who discontinue their claim in any of these circumstances to costs would undermine the practicality, workability and fairness of the system. Rather than acting as a disincentive to commencing an application, the proposals would discourage applicants from dealing with their claims in the most practical manner.

We recommend that this amendment should not be supported.

iv. Claims that settle should not be subject to costs

The amendments provide that applications that are settled may be subject to an application for costs. This proposed amendment should not be implemented both for practical and policy reasons.

- In practice, settlement agreements will include a term indicating that neither party will seek to have costs awarded against the other. If such a term is not included, it is likely to be due to the inexperience or lack of legal knowledge of one or other of the parties. This is unfair and should not occur.
- On policy grounds, the philosophy and purpose of a settlement is to resolve the dispute between the parties. Allowing that resolution to then be the subject of further legal action is antipathetic to the resolution.

We recommend that this amendment should not be supported.

v. The requirement of a substantial prospect of success is too onerous

The amendments provide that applicants can have costs awarded against them where it should have been reasonably apparent that the application did not have a *substantial* prospect of success. This would significantly increase the inequitable costs pressure on applicants, especially when considered in conjunction with other proposed provisions relating to costs.

Presumably, if an applicant does not receive a certificate after conciliation indicating that their claim has a substantial prospect of success, there is significant potential for a cost order relating to the conciliation to be made. We refer to our comments above as to the nature of conciliation and the inappropriateness of involving costs in this procedure.

If a similar provision applied to a respondent employer defending a claim, potentially it would become liable for the applicant's costs for a conciliation if the employer attended and participated in the process without a "substantial prospect" of successfully defending the claim. This would not be fair. Requiring either party to objectively *know* that they are

likely to win, before any details have been presented about the strength of the claim or the defence, would be unfair to that party. However only the applicant is subject to this test. This proposal would not provide a “fair go all round” for applicants and respondents.

We recommend that this amendment should not be supported.

d. Our proposals for amending the provisions relating to costs

There are a number of ways in which the costs scheme for unfair dismissal claims could be modified and improved. Fundamental to all these methods is the requirement that applicants and respondents are provided with equivalent opportunities to have costs awarded against the other. These include:

- Providing that costs are not to be awarded at all in the jurisdiction unless **either party** either brings **or** defends an application frivolously or vexatiously; or
- Providing that costs are not to be awarded at all in the jurisdiction unless **either party** either brings **or** defends an application frivolously or vexatiously, or conducts itself in a manner aimed at causing the other party to incur costs, or fails to agree to reasonable terms of settlement.
- Allowing either party to claim costs against the other party where it should have been reasonably apparent to **either party** that there was not a substantial prospect of success in bringing **or** defending the application or proceeding; or
- Providing simply that costs follow the event.

2.2. Advisers' Liability and Disclosure of fee arrangements

a. Adviser’s Liability

i. Liability – proposed section 170HE

The proposed sub-division G purports to provide an “avenue of redress against advisers who encourage applicants to institute or pursue unmeritorious or speculative claims”. However, whilst this may be the form in which the amendment is packaged, the sub-

division is in substance punitive and appears to be directed towards limiting access of dismissed employees to the unfair dismissal law.

- The practical effect of proposed section 170HE would be to require the representative to vet an applicant's claim. This places the applicant's representative in an untenable position.
- The gravamen of liability under section 170HE are *facts* that have been disclosed or that ought reasonably to have been apparent to the adviser. However, an Applicant's representative is not a tribunal of fact but an adviser who acts on the information the Applicant provides. It is unrealistic to expect an adviser to make an assessment on anything more than the information provided by the Applicant.
- The section appears to require the representative to look behind the Applicant's instructions in an effort to satisfy him or herself that there was no matter that ought *to have been* reasonably apparent to the adviser affecting the prospects of the claim. These requirements are reinforced by obligations that are continuing and positive in nature. The words "should have been, or should have become" in the section require the adviser to take active steps at the time he or she receives instructions up until the determination to be satisfied the application is not unmeritorious or speculative.

The present regime already provides sanctions in the event vexatious or unreasonable proceedings are commenced. The nature and width of the liability contemplated by proposed section 170HE in our opinion is not only onerous but also manifestly unfair.

We recommend that this amendment should not be supported.

ii. Applications for a Penalty – Proposed Section 170HF.

The proposed section 170HF permits the parties to an unfair dismissal proceeding to make application to the Court for a penalty, *and* permits the Minister to make such an application. This provision appears to target applicants' representatives with a view to reducing or eliminating legal practitioners from the jurisdiction. The proposal is problematic.

- If the purpose of the sub-division is to provide an avenue of redress, it is not clear what public purpose is served by enabling the Minister to intervene in a proceeding to which he or she is a stranger.

- The proposed section discriminates as between advisers. Sub-section 170HF(4) does not alter the law relating to legal professional privilege. Legal professional privilege applies only to advisers who are legal practitioners, yet the privilege belongs to the client of a legal professional not the professional. Accordingly, if the client is not inclined to waive privilege, a legal practitioner is not in a position to resist liability by relying on information that is protected. This achieves greater significance when considered with the reverse onus under the sub-division.

We recommend that this amendment should not be supported.

iii. Burden of Proof – Proposed Section 170HG.

The proposed section relieves the person seeking a penalty under the sub-division from the responsibility of proving the contravention. The Minister's second reading speech makes the somewhat remarkable point that evidence of the adviser's "encouragement" might be difficult to obtain in the absence of an obligation to disprove.

- There is no reason why the party asserting a contravention ought to be relieved of proving their case, especially when the consequences of liability under the sub-division involve the imposition of a substantial penalty.
- The reverse onus has more significant consequences for legal practitioners. As the Minister's second reading speech suggests, evidence of encouragement may "peculiarly (be) within the knowledge of the adviser". Of course, that evidence may also be privileged, thereby preventing the legal practitioner from relying on it unless his or her client waives privilege. In these circumstances, it seems inevitable that a Court will have no option but to find the practitioner contravened the sub-division.
- There is a long history in the civil courts of the availability for wasted costs orders to be made against a solicitor. Despite this, the civil courts exercise such orders with caution, and acknowledge that a solicitor may be in conflict with a clients instructions or best interests if a solicitor takes an unduly cautious path.

The effect of the reverse onus, especially in respect of legal practitioners, will lead to outcomes that are harsh and unjust. As such, the sub-division represents a significant disincentive to practice in the jurisdiction. This may have the consequence of further limiting access to the unfair dismissal law and, as between the parties, undermine the fairness of the system itself.

We recommend that this amendment should not be supported.

iv. Constitutional Issues.

Finally, it is not clear what constitutional authority the Commonwealth has to regulate the conduct of the legal practitioners. In Victoria, the *Legal Practice Act* entrenches standards of conduct and professional competence. Moreover the Act entitles a person to lodge a complaint about a practitioner and seek a remedy for unsatisfactory conduct and misconduct. The proposed sub-division goes well beyond the Commonwealth's powers by seeking to penalise a practitioner for the advice he or she may provide to a client about their legal rights.

b. Contingency fee agreements.

The proposed section 170CIA obliges the Commission to ask a representative, including a legal practitioner, whether they are acting for a party on the basis of an arrangement that is contingent on the outcome of the proceedings. The section is oppressive. It constitutes an unnecessary interference in a private arrangement that has no relevance to the proceedings or the merit of the application.

- The obligation to disclose falls upon the representative or practitioner rather than the party. The amendment does not penalise a failure or refusal to comply with the obligation, it merely requires that the contingency arrangement be made public. It is unclear to us what purpose such an obligation serves other than to advantage a party who is not required to reveal the arrangement it has with its representative. The Minister's second reading speech offers no justification for the obligation. In the absence of a clear and coherent rationale there seems little to commend the amendment.
- We have said that our firm acts for clients on the basis of "No Win, No Fee". This arrangement is a contingency arrangement as defined in the Bill. This arrangement enables people who may not otherwise be in a position, especially after they have been dismissed, to exercise their legal rights However, the implication of the amendments is that arrangements such as "No Win, No Fee" encourage unmeritorious claims. We reject the imputation. It is without foundation and unsustainable. It is not in our interest

to support unmeritorious claims nor does our policy have that effect. It simply allows dismissed employees access to their legal rights.

- An interesting comparison can be drawn with the operation of 'no win no fee' agreements in the field of medical negligence. The availability of representation on this basis has not resulted in an increase in litigation for medical negligence, despite early concerns of the medical profession and their representative bodies. Such arrangements are only available from firms who are expert in the field, and are only extended where the proposed litigation is likely to be viable for the firm. Medical Defence Organisations now recognise this specialisation of the market and high scrutiny of claims to be beneficial to efficient and high quality functioning of the legal system in the field. In other words, it is recognised as beneficial rather than detrimental by all concerned.
- Finally, the constitutional foundation for the exercise of Commonwealth power in the manner contemplated by section 170CIA is not apparent. It is difficult to see how such interference in an otherwise private contractual arrangement is authorised directly or incidentally by the Constitution or the *Termination of Employment Convention.*

We recommend that this amendment should not be supported.

2.3. Changes to the definition of termination at the initiative of the employer

The proposed section 170CDA fundamentally alters the existing law on termination at the initiative of the employer where *prima facie* the employee has resigned. It shifts the focus of inquiry from the employee's state of mind, in response to conduct initiated by the employer, to the employer's intentions. This subverts the purpose of the unfair dismissal law, the object of which is to provide an employee with a remedy where the termination of the employment relationship is against the will of the employee and unfair. Accordingly, if the relationship is brought to an end by the employee's act the relevant factors are those bearing on the employee's not the employer's state of mind.

- In *Mohazab v Dick Smith Electronics Pty Ltd* (1995) 62 IR 200 the Court made the observation that an important feature of termination at the initiative of the employer is that "the act of the employer results directly or consequently in the termination of the

employment and the employment relationship is not voluntarily left by the employee". The contract of employment is founded on consent, realised through the conduct of the parties in the course of their relationship. However, proposed section 170CDA requires that the employer engage in conduct it intended would cause the employee to resign.

- Alternatively, a resignation will amount to termination at the initiative of the employer pursuant to the amendment if the employee can make out a prima facie case that the employer's conduct could reasonably be regarded as conduct intended to force the resignation. The obligation to prove the intention rests with the employee, yet it is unclear whether the intention operates subjectively or objectively. If subjective, it is unlikely an employee will be able to discharge the onus in the absence of unequivocal evidence. However, even if the test is objective, the employee will need to show the employer's conduct was directed towards achieving the resignation. This is likely to lead to unsatisfactory outcomes. For instance, it would deprive an employee who is sexually harassed by her supervisor of access to the unfair dismissal law unless she could demonstrate that at least one objective of the harassment was to cause or force her to resign. In sexual harassment cases such an objective is generally not the reason for engaging in the conduct. Moreover, a resignation in such circumstances could hardly be characterised as a voluntary act. Nonetheless, such a resignation is unlikely to satisfy the test proposed in the amendment.
- The amendments cut down the scope of the law on termination at the initiative of the employer and exclude the common law doctrine of constructive dismissal. The objective of the unfair dismissal law is to remedy unfairness in employment not perpetuate and reward the arbitrary exercise of power by an employer who by its conduct deprives an employee of their employment. The proposed amendments to the law on termination at the initiative of the employer are misconceived and likely to lead to injustice. We consider that the present law is adequate and fair.

We recommend that this amendment should not be supported.

2.4. Changes to Extension of Time.

The 21-day time limit for lodging applications under the current legislation has been a major disadvantage to unfairly dismissed employees. It provides only a small window within which dismissed workers must decide whether to make a claim, assuming that they are aware of their rights or are become aware of those rights within the time limit. This is

coupled with the fact that in our experience many employees are ignorant of their legal rights to pursue a claim, and often do not even know how to find out what their rights are. Many do not possess a fluent knowledge of English, or an understanding of the workings of the legal system. Many are distressed and displaced by the fact that their job security and income has been taken from them in a manner that they consider to be unfair.

The Commission has adopted a reasonable standard for exercising its discretion under the current system to grant extensions of time to workers who have missed the deadline. Notwithstanding the problems caused by the short time limit, the government proposes to limit the Commission's discretion to grant extensions of time. This proposed amendment represents a significant change to the circumstances under which the Commission can accept a late application. The proposed amendment is unfair, unnecessary and would eliminate a large number of meritorious claims on an arbitrary basis. Such a provision would certainly not provide a "fair go all round."

a. The current provisions

The current provisions relating to extension of time provide that the Commission 'may accept an application that is lodged out of time if the Commission considers that it would be unfair not to do so'. This provision has been interpreted in the well-known and often cited full bench decision of the Commission, *Kornicki* v *Telstra – Network Technology Group* (Print no P3168, 22nd July 1997, per Ross VP, Watson SDP, Gay C). The test outlined in this decision requires the applicant to show that there was (a) an acceptable reason for the delay, and (b) that the substantive application is not without merit.

This test works in a practical and fair manner.

- It successfully balances the interests of both the applicant and the respondent.
- It places an obligation upon the applicant to outline the circumstances leading to a failure to lodge the application within the specified time limits, as well as an obligation to provide evidence of a prima facie claim.
- It allows the Commission a broad discretion to make a finding based on fairness.

b. The proposed provisions

The amendments not only require that there be an acceptable reason for the delay, but *in addition*, this acceptable reason must be *exceptional*. This would eliminate many late applications made for acceptable yet common reasons.

- For example, a frequently cited reason for late lodgment of an application is that the applicant is incapacitated in some way. Under the test prescribed in the Bill, this would appear to be an acceptable, but not an exceptional, reason.
- Further, the applicant would be required to show that he or she took action to contest the termination within the 21-day time limit. We submit that there are a number of circumstances where an applicant has taken no action to contest the termination within the 21-day period, but it would still be unfair to eliminate their clam. For example, an applicant may have language difficulties or for other legitimate reasons be unaware of the right to make a claim within the 21-day period. It is not reasonable to expect employees to confront their former employers without the protection of the law as a pretext for allowing them to make a claim out of time.
- Finally, even if the applicant can negotiate their way through these substantial hurdles, the Bill further provides that if the respondent can establish that the late application caused it prejudice, then the application for an extension of time cannot be granted. While we acknowledge the need to balance the interests of employers and employees, all an employer would need to do is show *some* prejudice to resist an application for an extension of time. If the Commission is to be directed to consider prejudice to the respondent in determining an application, it should be directed to have regard to this factor in determining the overall equity of granting the application. It should not be presented as the essential criteria for the grant of an extension of time.

By further restricting the test by which late applications will be accepted, and eliminating claims on this arbitrary basis with no consideration of the merit of the claim, these employees are not provided with a fair system. It would be a system that discriminates against and further marginalises those employees who are already the most disadvantaged.

If the government is intent on reducing the number of extension of time applications, then it would seem that the ideal solution would be to extend the length of time in which the Commission can accept applications. It should be borne in mind that an employee has six years (with the possibility of an extension of time) to file a wrongful termination claim in the civil courts. The 21-day time limit, if anything, should be substantially increased to ensure

access to employees, particularly those with additional barriers to accessing legal advice (for example rural employees, migrants or employees with disabilities).

We therefore recommend the proposed amendment should not be accepted. We further recommend that the time limit for lodging applications should be substantially increased.

2.5. Motions for dismissal of applications

Under the current legislation, the Commission will allow a respondent to object to an application on jurisdictional grounds prior to conciliation, or alternatively will allow the respondent to reserve its right to object if conciliation of the matter is unsuccessful. In some cases, the Commission will refuse to hear or decide a jurisdictional point where it appears necessary to fully hear the matter in order to gain sufficient evidence as to the jurisdictional issue in question. The government proposes to amend the legislation to require the Commission to consider a respondent's motion to dismiss an application on jurisdictional grounds.

- It appears that this provision attempts to codify the existing practice of the Commission, however it limits the Commission's discretion as to when it deals with a jurisdictional issue. The Commission should retain its discretion to deal with jurisdictional issues.
- Further, it appears that this provision has been included in an attempt to allow more of the alleged 'speculative' or 'unmeritorious' claims to be dealt with expeditiously. It is worth noting that according to the Annual Report, in the period between 31st December 1996 and 30 June 1998 only 2.7% of claims were dismissed by the Commission at a preliminary stage on jurisdictional grounds AND 'out of time' grounds. Only about a further 2.2% of claims were dismissed at final arbitration on these grounds. These figures do not indicate that the Commission is experiencing an epidemic of claims brought outside jurisdiction.

If the Government is concerned about this matter, perhaps a better alternative would be to widen the jurisdiction of the Commission to include more or *all* employees. This would reduce the legalism of the system and its associated costs.
We recommend that this amendment should not be supported, or should be modified to provide that the Commission retains its discretion.

2.6. Dismissal of application if applicant does not attend.

The amendments provide that the Commission may dismiss an application if the applicant fails to attend any proceeding in relation to the application. In our experience it is uncommon for either applicants or respondents to fail to attend a proceeding as defined in the amendment Bill. Further, on the rare occasion that it does occur, both applicants and respondents generally have a defensible reason for not attending.

The Bill proposes to allow the Commission to take punitive action upon the *applicant* but not the respondent to an action. There is no demonstrated need for such a provision to be made. This amendment is clearly designed to enable the Commission to eliminate claims irrespective of their merit.

We are not opposed to the Commission having discretion to dismiss an application where an applicant is *willfully or deliberately* impeding the progress of a claim by failing to attend a proceeding. However the Commission should have equivalent discretion in respect of a *respondent* who willfully or deliberately impedes the progress of a claim by failing to attend a proceeding. The consequence for a respondent found to have so impeded a claim would be to allow the Commission to refuse the respondent leave to defend a claim against it in these circumstances. Allowing the Commission discretion in these terms would mean a far more equitable balance between the rights of employers and employees.

We recommend that this amendment should not be supported, or should be modified in the above manner.

2.7. Requirement for positive assessment on conciliation certificates.

The Bill seeks to confer on the Commission the power to prevent an applicant from proceeding to arbitration of their claim unless the Commission certifies that the applicant is likely to succeed on arbitration. This is one of the more disturbing amendments proposed by the government as it has serious implications for the validity, informality and effectiveness of Conciliation, and would place a further limitation on an applicant's right to a hearing. It might be expected that employers would try to exploit this provision by forcing applicants to seek a certificate rather than genuinely negotiating over the claim.

a. Conciliation Certificate – s 170CF

Under the existing legislation, the Commission is required to issue a certificate once Conciliation has been attempted and is unsuccessful in resolving the claim. The certificate must include the Commission's assessment of the merits of the application, and the Commission has discretion as to whether to make recommendations to an applicant against proceeding with the application or particular grounds of the application. In practice, the Commission in most cases declines to make an assessment of the merits of the claim due to a conflict in the facts of the matter and the necessity for the Commission to hear evidence before making such an assessment.

The Bill proposes to amend s 170CF of the *Workplace Relations Act 1996* by repealing s170CF(2)(b) and inserting ss170CF(2)(aa) and 170CF(2)(b). These new provisions would, if the applicant's claim is based on the ground that the termination was harsh, unjust and unreasonable, require the Commission to indicate to the parties whether or not the Commission considered that the applicant's claim was *likely to succeed* on the balance of probabilities. If the claim was based on other grounds the Commission would be required to assess the merits of the claim.

b. Elections to Proceed

Currently, s170CFA provides the procedure by which an applicant whose conciliation has been unsuccessful can elect to proceed or not to proceed to an arbitration of his or her claim, or to proceed with claims in other jurisdictions. The applicant must make a decision, often with the assistance of a representative, as to whether or not it is advisable to proceed to arbitration.

The proposed amendments would fetter the right of the Applicant to proceed to arbitration. The Bill proposes to allow an applicant to proceed only in the event the Commission issues a Conciliation Certificate indicating that the claim is *likely to succeed.* These proposed amendments are flawed on several grounds.

- Firstly, the Commission is required to decide at Conciliation whether or not the Applicant's claim is 'likely to succeed'. This sets the conciliator up as a tribunal of fact, requiring them to make conclusive determinations based on the representations of the parties. Presently, Conciliation is an informal forum where the Applicant and

Respondent debate the merits of the claim and discuss its resolution with assistance from the Commission. Witnesses are not called, only minimal written material or documentation is presented or relied upon and legal argument is not required. These factors keep costs down for Applicants and Respondents and contribute to an efficient and quick resolution service.

- By requiring Commissioners to make a decision on the merits, the Bill forces the conciliation process to become far more adversarial, and therefore time consuming and expensive. The Applicant must satisfy the Conciliator that the matter is "likely to succeed". This is a question of impression and degree and requires the presentation of evidence.
- The amendments also bring into question the very concept of "conciliation". In essence, what the Bill asks the Commission to do is to conduct a mini-hearing on the merits at Conciliation stage. The Full Bench of the Commission has already expressed the view that it is inappropriate to conduct conciliation as a "mini-trial". In *Kumar v Fisher and Paykel Manufacturing Pty Ltd* Print P1109, 23 May 1997 the representative of the Respondent insisted the conciliator form an opinion on the merits of the Application. The Conciliator declined due to lack of evidence. The Full Bench held that "Parliament could not have intended the conciliation process…. to take on the features of a mini-trial… Such an approach cannot be said to promote a fair and simple process of appeal against dismissal as to ensure that legalism is minimised". In addition, the Full Bench observed that the Minister in the second reading speech of the *Workplace Relations Act* said that minimising legalism was part of what was meant by a "fair go all round".

The practical effect of the amendments would be to make conciliation more legalistic and costly. It is also likely to make the process significantly more time consuming and adversarial, undermining the purpose and operation of conciliation as a simple, low cost dispute resolution forum.

We recommend that this amendment should not be supported.

2.8. Exclusion of Operational Requirements from Harsh, Unjust & Unreasonable Termination.

a. The existing law

As the law currently stands, the operational requirements of an employer's undertaking, establishment or service provide a valid reason for termination of employment. In order to challenge a decision to terminate employment on this basis, an employee must establish either that:

(a) the operational requirements being cited by the employer did not genuinely require the termination of their employment; or

(b) that the employer failed to notify the employee at the earliest opportunity, used an inappropriate selection process, or failed to consider alternatives to termination, or otherwise failed to ameliorate the harsh effects of a termination of employment.

b. The proposed law

The proposed amendment attempts to introduce a presumption that where the employer's operational requirements form even a minor part of the reason for termination, the termination is not unfair. The purpose of this amendment seems to be to allow employers the ability to terminate employees at will, so long as the termination is at least partially referable to an 'operational requirement'. This amendment would have the effect of precluding a large number of applications. The types of applications it would preclude are as follows:

i. Genuine operational requirements

It would preclude all claims by employees whose employment has been terminated because of the employer's genuine operational requirements. This will be so irrespective of the circumstances surrounding the termination. We submit that in some cases, termination based on genuine operational requirements will still be unfair upon the employee, and for that reason should not be precluded from being found to be harsh, unjust or unreasonable.

A. Some Examples

- Where a work team of 5 is to be downsized to a team of 4, and the employee chosen for redundancy is the longest serving employee with an impeccable work

record, and is not informed of the reason for his or her selection. As the law currently stands, this employee could argue that the selection process used by the employer was unfair. We submit that this right should be preserved.

- Where a multi-skilled employee is transferred to a new position at the request of his or her employer. The new position becomes redundant after a short period of time. The employer knew of the impending redundancy, but failed to consult with the employee. The employee is made redundant, even though the employee's old position still exists. As the law currently stands, this employee could argue that the failure to consult was unfair. We submit that this right should be preserved

- Where an employee is made redundant, however the company is recruiting new staff for positions that the employee is capable of performing. As the law currently stands, this employee could argue that he or she should have been redeployed within the company, and the employer's failure to do this was unfair. We submit that this right should be preserved.

ii. More than one reason for termination

It will preclude all claims by employees whose employment has been terminated for a number of reasons, including the employer's genuine operational requirements. This will be so even though the substantial reason for the termination may not be a valid reason, or may be a reason relating to poor performance or misconduct. We submit that terminations for other reasons where there is also an operational requirement may still be unfair upon the employee, and for that reason should not be precluded from being found to be harsh, unjust or unreasonable.

A. Some Examples

- An employee is selected for redundancy because he or she has not been reaching budget, however has not received a warning that his or her failure to reach budget may result in dismissal.

- An employee is selected for redundancy and he or she has returned to work and is performing light duties pursuant to the WorkCover scheme.

iii. Reasons other than operational requirements

It will preclude many claims by employees whose employment has been terminated for reasons other than the employer's genuine operational requirements. It will be easy for employers to assert operational requirements as the reason for termination. The explanatory memoranda make it clear that the onus would lie with the employer to establish that at least one of the reasons for termination relates to operational requirements. However despite this evidentiary burden we submit that the practical effect of this amendment would be a substantial number of terminations falsely characterised as being due to 'operational requirements'.

iv. A prohibited reason for termination

It will preclude many claims by employees whose employment has been terminated for prohibited reasons, by denying these employees a choice of forums to pursue their claim. These employees would be denied access to the Commission, and forced to pursue their claim in the Federal Court. Many employees can not afford the high costs associated with proceeding with their claim in the Federal Court. Further, many employers will be exposed to higher costs to defend claims that are pursued in the Federal Court by Applicants. Indeed, the reforms pursued by this government in 1996 moving the hearing of unfair dismissal claims from the Industrial Relations Court to the Commission recognised the added expense and formality of the Court as a burden on the players in the system. The proposed amendment fails to consider this point.

Allowing this amendment would have a corresponding undermining effect on the remaining requirements for procedural fairness. It would encourage employers to remain silent as to the reasons for termination which are able to be scrutinised and may therefore expose them to a finding that the termination was harsh, unjust and unreasonable.

c. Policy grounds

Terminations relating to the operational requirements of the employer's business are often the most devastating to employees, as the termination occurs through no fault of their own. Because of this, it is of paramount importance to ensure that employers continue to carry out redundancies in a manner that is fair to the employee, to consider all alternatives to termination and to ameliorate the harsh effects of the termination as far as is reasonable.

Employees should continue to have the right to ensure that these obligations are met, and to seek a remedy if they are not.

We recommend that this amendment should not be supported.

2.9. Lowering the procedural standard for small businesses

a. The existing law

Existing paragraph 170CG sets out grounds that the Commission must have regard to in determining whether a termination is harsh, unjust or unreasonable. As it presently stands, it requires the Commission to have regard to whether there was a valid reason for the termination, or whether a fair procedure was used to carry out the termination.

It has been established through decisions of the Commission that in circumstances where a valid reason for termination exists, failure to accord procedural fairness can of itself render a termination harsh, unjust or unreasonable. The rationale behind these provisions and their interpretation by the Commission is if a fair procedure was employed, the problem could have been rectified and the termination could have been avoided.

The procedure required by the present system is far from onerous upon the employer, and requires common sense rather than technical knowledge of complex regulations. An employer must warn an employee that continuing conduct or performance problems could lead to termination, must notify an employee of the reason for their termination and must give the employee a chance to respond to performance or conduct allegations made against them.

b. The proposed amendment

The proposed amendment requires that the Commission consider whether the size of the respondent's business affected the procedure it used to carry out the termination. Presumably this provision is intended to excuse small businesses for using deficient procedures in carrying out terminations merely because they are small businesses. Because, the argument goes, small businesses tend to be bad at affording procedural fairness to employees, the Commission is directed to allow a lower standard of procedural fairness for small businesses.

This proposed amendment speaks volumes about the government's perception of small businesses. Small businesses are clearly perceived as being more likely to terminate an employee in a manner that is unfair to the employee. We would, based on anecdotal evidence and experience, generally agree with this perception. However given this perception, it is *most* important that small business not be excused for its deficiencies by a law that allows for them. As well as denying remedies to employees who are unfairly dismissed, this provision would substantially undermine the public policy aspects of the unfair dismissal scheme and the corresponding community standards that it promotes.

Senator Murray concluded his Minority Report of the Senate Inquiry into the Workplace Relations Amendment (Unfair Dismissals) Bill 1998 by stating that '[I]t is neither fair, right, nor necessary to give fewer rights to workers in small business versus those in other sectors.' Indeed, in respect of this amendment, it is these very workers who require the protection of the laws.

We recommend that this amendment should not be supported.

3. CONCLUSION

The Bill before the Senate is colloquially entitled the "*More Jobs, Better Pay"* Bill. However it is clear that the epithet "More Jobs, Better Pay" is no more than a rhetorical flourish, with no substance for dismissed employees. The rationale of unfair dismissal laws is to provide employees with some measure of protection from the exercise of arbitrary social and economic power by their employers. In this respect the law is intended to be beneficial and remedial in nature. The amendments proposed in the Bill seriously undermine the purposes of the law and in some cases actively militate against it.

The right to work is an international human right. The *Termination of Employment Convention,* to which Australia is a signatory, was embraced by the international community in recognition of this right, and the social and economic consequences of dismissal. We urge the Senate to seize the opportunity to confirm Australia's commitment to its international obligations and the spirit they embody. Accordingly, we recommend the Senate reject the Bill. It is our firm conviction that in a labour market characterised by

increasing job insecurity and historically high levels of unemployment the Bill does nothing more than reinforce the power of the employer at the expense of the employee.

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