# SUBMISSION BY THE VICTORIAN BAR

## WORKPLACE RELATIONS AMENDMENT (TERMINATION OF EMPLOYMENT) BILL 2000

In September 1999, the Bar made a submission to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee opposing provisions proposed to be enacted by the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999. In that submission the Bar supported a submission made to the Committee by the Law Council of Australia. The Bar provided further information in that submission in relation to three of the proposed amendments which are of particular concern to barristers who practice in Industrial Law. The proposed sections 170CIA and Subdivision G of Division 3 of Part VIA of the Workplace Relations Amendment (Termination of Employment) Bill 2000 are, so far as is relevant, in the same terms as those to which the Bar submission in 1999 was addressed.

The proposed provisions of the Bill are of a serious concern to practitioners, as they require the representatives of employees at the Australian Industrial Relations Commission to disclose to the Commission whether they are engaged on a contingency fee basis. In addition, the provisions render solicitors and barristers (only those who appear for employees) liable for the imposition of a penalty for "encouraging" applicants to institute or pursue unmeritorious applications.

In particular, the Bar makes the following submissions on the proposed Bill:-

### 1. Proposed Section 170CIA

1.1 This proposed provision applies to Termination of Employment proceedings, namely arbitrations conducted by the Australian Industrial Relations Commission (Athe Commission@), commonly known as Aunfair termination@ proceedings.

1.2 The proposed section provides that in unfair termination proceedings, the Commission **must** ask legal practitioners who appear whether they have been Aretained by the party under a contingency fee[1] agreement as to the practitioner=s costs@ (see proposed s170CIA(2)).

1.3 The practitioner of whom such an inquiry is made is then bound, by virtue of s170CIA(3), to inform the Commission of the fact that he or she has been retained pursuant to a contingency fee agreement.

1.4 The rationale for s170CIA is not revealed in the Bill=s Explanatory Memorandum. It appears the proposed provision has its genesis in the Australian Democrats= Minority Report of the Senate Employment, Workplace Relations Small Business and Education Legislation Committee, AConsideration of the Provisions of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998@, February 1999, pp 63 B 64. In that Minority Report, Senator Murray stated Acases

[1] A proposed new section 4(1) of the WRA defines Acontingency fee agreement@ as an agreement between a legal practitioner and a person under which the payment of all or a substantial proportion of the legal practitioner=s costs is contingent on the outcome of the matter in which the practitioner provides the legal services for the person.

being conducted on a >no win, no fee, contingency= (sic) basis should be a matter of public record@. The Senator did not give a reason for this recommendation, however the comment appeared in proximity to a statement by the Senator that the Commission ought to possess the power to award costs on an indemnity basis

1.5 While the jurisdiction is prima facie a no costs one, the Commission does have power to award costs in some circumstances, including a power to award costs on an indemnity basis. The terms and basis on which contingency agreements may be entered into by practitioners are governed by legislation and/or the ethical rules of the Profession in each state. There is no justification for the imposition of an additional requirement that practitioners disclose the basis on which their services are engaged to the Commission. The basis on which a legal practitioner is retained reveals nothing about the merits of the case of the party in question, nor can it be relevant on the question of costs.

## 2. Proposed Subdivision G of Division 3 of Part VIA

2.1 This proposed Subdivision contains a new s170HE, pursuant to which an Aadviser@[2] must not encourage an employee to make or pursue an unfair termination application if, Aon the facts that have been disclosed or that ought reasonably to have been apparent to the adviser, the

[2] Defined in s170HD as a person or body who represents an applicant in unfair termination applications.

adviser should have been, or should have become, aware that there was no reasonable prospect of success in respect of the application.@

2.2 Where s170HE has been contravened, application may be made to the Federal Court[3] for an order under s170HJ. Section 170HG provides that if the applicant makes out a prima facie case that the course of action followed by the adviser contravenes the section, the course of action Awill be taken to have contravened that section unless the adviser can establish to the contrary on the balance of probabilities@. Pursuant to proposed s170HI, the Court may make an order imposing a penalty on the adviser for the contravention.[4]

2.3 If the rationale for this proposed provision is to deter frivolous and vexatious claims, it is unnecessary. There is no evidence that the Commission is being flooded by spurious unfair termination claims. The available statistics demonstrate that of the 926 unfair termination cases arbitrated by the Commission from 31 December 1996 to 25 June 1999, 662 were decided in favour of the employee and 264 were decided in favour of the employer[5]. There is, therefore, no evidence either that the Commission=s time is being wasted by unmeritorious

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[3] Application may be made by the applicant to the proceedings, the Respondent to the proceedings or the Minister.

[4] The maximum penalty for an adviser who is a natural person is $2,000.00, and in the case of an adviser which is a body corporate, is $10,000.00.

[5] This figure does not include all cases commenced in the Commission which are withdrawn or dismissed prior to arbitration, either before or after compulsory conciliation takes place. If all applications are taken into account during the same period, 825 were decided in favour of the employer and 662 in favour of the employee. See attached extract from Supplementary Regulation Impact Statement.

claims or that applicants= advisers are routinely encouraging the pursuit of hopeless claims.

2.4 The ethical rules applicable to barristers already require them not to advise or encourage clients to commence or pursue claims or defences without foundation. There is no other jurisdiction in which advisers are subject to penalty provisions with respect to the advice they provide to clients.

2.5 In addition, it is troubling that the proposed provision applies only to the advisers of applicants. While it is true that unfair dismissal applications are obviously only brought by employees, it is also the case that jurisdictional / strike out applications are routinely made by employers. It must be asked why, if such a provision is to operate in the jurisdiction, it ought not also apply to advisers who encourage employers to make jurisdictional objections with no reasonable prospects of success ?

2.6 The reference in s170HE to, Athe facts that have been disclosed or that ought reasonably to have been apparent to the adviser@ raises a number of difficulties. Does, Adisclosed@ refer to facts disclosed to the barrister or disclosed in the course of the proceeding? If Adisclosure@ encompasses the latter, a barrister might conceivably be liable under s170HE, even where the barrister was not aware of a fact (being one

which rendered the action one without Areasonable prospects of success@) prior to evidence being given.

2.7 Section 170HE refers to facts of which an adviser Aought to have become aware@. Again, this raises difficulties for the barrister who Abecomes aware@ of a fact during the running of an arbitration. Those who appear for applicants in the jurisdiction often possess scant information with respect to the business of the employer who is respondent to the application. Clients are able to instruct only that they were Asacked@ and that, Athe boss told me I was redundant@. It is often the case the facts relevant to the veracity of the employer=s claim of genuine redundancy are revealed only after witness statements are provided, or even later during cross examination. Section 170HE places an unnecessary burden on practitioners in the area.

## 3. Further Comments on the Submission by the Law Council of Australia

3.1 In its submission, the Law Council states that:-

> 3.21 Increasing restrictions on Legal Aid funding have imposed an increasing burden on practitioners to facilitate access to justice. Contingency fees serve that purpose. In at least

one jurisdiction contingency fees are given statutory recognition: see s.186 *Legal Profession Act 1987 (NSW)*.

3.22 The Law Council considers that the proposal in relation to contingency fees and costs agreements will probably have the effect of restricting or impairing the quality of parties= access to justice.

3.2 The Bar notes that (despite press reports and urban legend to the contrary) awards of compensation in the Commission are generally low; around two to three months= wages (which may be as little as $5,000.00 gross). Due to the fact that the jurisdiction is prima facie a >no costs= one, it is obvious that even for those offering contingency fee agreements, the jurisdiction is not an attractive one in terms of fees to be made. Applicants= cases are run extremely cheaply and are often characterised by barristers declining their fees where the client loses or recovers little by way of compensation. There is no apparent rationale for further increasing the difficulties faced by applicants (who are generally unemployed) in achieving access to legal representation.

3.3 In its submission, the Law Council states that:-

> 3.28 The Law Council is concerned that to require an employee to prove the subjective intentions of an employer would exclude otherwise meritorious claims from determination.

3.4 The Federal Court has long recognised the notion of constructive dismissals in circumstances where there is no Aindication@ by the employer that the employee will be dismissed if they do not resign. In cases where an employee is, for example, subject to sexual harassment in the workplace, there is very rarely any such Aindication@ by the employer of which the employee could lead evidence in order to substantiate their claim.

3.5 In its submission, the Law Council states that:-

> 3.31 The Law Council doubts whether the provision will have the intended effect as set out in the Explanatory Memorandum of preventing forum shopping and may have other consequential effects, including the denial of other remedies to employees who may be unable to use the Act.

3.6 A consequence of the amendments may be to exclude certain employees from access to remedies pursuant to human rights

legislation, including enactments such as the Racial Discrimination Act and the Sex Discrimination Act.

3.7 In paragraph 6 of its submission, the Law Council discusses Mediation. The Bar supports the Law Council=s comments and adds that there is no evidence that yet another form of dispute resolution is required; conciliation and arbitration have worked very well; in addition, the most commonly appearing parties at the Commission are union, governments and employers (the latter very often represented by experienced industry representatives and/or human resources managers). In short, those appearing are well-versed in alternative dispute resolution, and usually attempt negotiation between themselves before having recourse to the Commission in any case.

3.8 In paragraph 8 of its submission, the Law Council discusses Freedom of Association and particularly the definition of Athreat@. The Bar does not share the Law Council=s concerns with respect to the new definition of the word Athreat@; the authorities in the area demonstrate that the Court was already adopting a broad approach to the notion of threat, and there is good reason for it to do so.

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