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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

WORKPLACE RELATIONS AMENDMENT (TERMINATION OF EMPLOYMENT) BILL 2002

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations, the Honourable Tony Abbott MP)

WORKPLACE RELATIONS AMENDMENT (TERMINATION OF EMPLOYMENT) BILL 2002

OUTLINE

This Bill would amend the *Workplace Relations Act 1996* (the WR Act) to:

- extend the operation of the federal unfair dismissal system by making greater use of the corporations power in section 51(xx) of the Constitution (Schedule 1);
- improve the operation of the federal unfair dismissal laws as it impacts on small business (Schedule 2);
- make a number of other improvements to the way the unfair dismissal laws operate (Schedule 3).

Each of these is discussed below.

Expanded federal scheme

These amendments would expand the federal jurisdiction dealing with harsh, unjust or unreasonable dismissals (the federal unfair dismissal jurisdiction) so that it covers all employees of constitutional corporations, in addition to employees currently covered under other constitutional heads of power. Presently, the corporations power is not used to its full extent - the federal unfair dismissal legislation only applies to employees of constitutional corporations who are also covered by a federal award or agreement.

To ensure the effective operation of the new arrangements, the amendments would also prevent employees within the scope of the federal unfair dismissal jurisdiction (including those employees excluded from seeking a remedy) from accessing remedies under comparable State unfair dismissal schemes. However, the interaction of federal unfair dismissal law with other Commonwealth, State or Territory laws - for example, anti-discrimination laws – remains largely unaffected.

It is estimated that the number of employees covered by the expanded system will increase from approximately 3.9 million to around 6.8 million.

Measures to assist small business

This Bill would also make amendments to the unfair dismissal jurisdiction as it impacts on small businesses (those employing fewer than 20 employees). These amendments will:

- extend the qualifying period from three to six months for small business employees;
- permit the dismissal, without a hearing, of applications made against a small business – on the ground that the application is beyond jurisdiction or because the application is frivolous, vexatious or lacking in substance;

- refine the penalty provisions for lawyers and agents who encourage unmeritorious claims against small business;

- streamline the criteria for determining whether a termination by a small business employer was unfair; and

- halve the maximum compensation payable to employees of small businesses to 3 months remuneration.

Measures to improve the operation of unfair dismissal law

This Bill will make several improvements to the operation of the unfair dismissal scheme to:

- require the Australian Industrial Relations Commission (the Commission) to have regard to conduct by an employee which contributed to their dismissal;
- limit dismissal claims where dismissal is for operational reasons;
- require the Commission to have regard to the safety and welfare of other employees in assessing whether a dismissal was harsh, unjust or unreasonable;
- require the Commission to consider the size of an employer's business in determining an appropriate remedy;
- require the Commission to take account of any income an employee who is to be reinstated may have earned since their dismissal, when making an order for back pay; and
- emphasise that reinstatement is the primary remedy available under the WR Act.

FINANCIAL IMPACT STATEMENT

The measures in this Bill aimed at expanding the federal unfair dismissal scheme will involve additional matters coming before the Commission. Appointment of additional members of the Commission may be necessary.

REGULATION IMPACT STATEMENT

EXPANSION OF THE COMMONWEALTH UNFAIR DISMISSAL SCHEME

Current situation

1. The unfair dismissal provisions, contained in Part VIA, Division 3, Sub-Division B of the *Workplace Relations Act 1996* (the WR Act), allow a dismissed employee to seek a remedy from the Commission on grounds that the dismissal was 'harsh, unjust or unreasonable' (ie: that the dismissal was unfair).

2. As the legislation now stands, many employees do not have access to this federal process and are left to seek relief in the various State tribunal jurisdictions. This is a result of the constitutional basis of the current provisions which cover:

- Victorian employees;
- Commonwealth public sector employees;
- Territory employees;
- employees in selected areas covered by the Constitution's trade and commerce power; and
- employees in constitutional corporations who are also federal award employees.
  - a 'federal award employee' means an employee any of whose terms and conditions of employment is governed by an award, a certified agreement, an AWA or an agreement made under the former provisions of the *Industrial Relations Act 1988* (refer subsection 170CD(1)).

3. The federal provisions also allow for the possibility that employees eligible to bring a claim under the federal law may be able to choose between alternative remedies in the federal and State jurisdictions, provided that they do not attempt to pursue more than one remedy.

4. Section 170HA makes it clear that the unfair dismissal provisions are not intended to limit any other right to appeal against a termination, or to secure an award or order in relation to a termination. This leaves open the possibility of accessing State unfair dismissal laws, as well as remedies under other laws such as federal and State anti-discrimination legislation.

5. Section 170HB provides, however, that if proceedings under another law are commenced seeking relief on the grounds that a termination was harsh, unjust, unreasonable or unlawful, then no complaint of unfair dismissal can be made under the WR Act unless and until those other proceedings are discontinued or fail for want of jurisdiction. It also provides that the making of an application under section 170CE of the WR Act must be treated as an election to pursue rights under the federal termination of employment provisions to the exclusion of any other proceedings until the federal application is discontinued or found to be beyond jurisdiction.

Problem

6. The current arrangements have negative consequences for employees, employers and for the operation of the Commonwealth provisions themselves.

7. One consequence is that identical cases are handled differently merely because they fall into different jurisdictions, resulting in inequitable treatment for both the employees and employers concerned. In a speech earlier this year, the President of the Commission commented that such inconsistent application of unfair dismissal law diminished public confidence in the

courts and tribunals[1]. For instance rules governing eligibility based on casual employment status, probationary status, out of time limits or on the level of the applicant's wage vary from jurisdiction to jurisdiction. In addition, the factors that tribunals must consider and the relative importance they are required to give to them in determining the fairness of a dismissal, whether relief is warranted and the form and level of such relief vary depending upon the legislative framework and related case law that is being applied. Other factors, such as application fees and penalties, also differ.

8. Employers and employees are also confronted by the complexity of overlapping jurisdictions. This creates confusion. The May 2002 *Senate Report on the Provisions of Bills to Amend the Workplace Relations Act 1996* found that many employers were unsure as to whether federal or State dismissal laws covered them.

9. Further evidence of this confusion is found in a survey report of nearly 2000 small to medium businesses commissioned by the Department of Employment and Workplace Relations (DEWR) in July 2002 from the Melbourne Institute of Applied Economic and Social Research at the University of Melbourne. This report, published in October 2002, found that almost a third of businesses did not know whether they were covered by State or federal unfair dismissal laws[2].

10. Similarly, many employees will not know the jurisdiction in which they are eligible to lodge a claim.

11. Such complexity weakens efforts by government agencies and employer organisations to educate and inform businesses about how to handle and prevent unfair dismissal claims.

12. Some employees, perhaps the most vulnerable, confused by the complexity, may fail to seek redress or to lodge an application in time, with the result that injustices that the law has been established to rectify will go un-remedied. In addition, as the President of the Commission has pointed out, time in the courts and tribunals is taken up with jurisdictional questions, which imposes costs on both Government and on the individual litigants.

13. Confusion about coverage also complicates efforts by Government and other bodies to gather information about the operation of the laws. For instance, surveys on attitudes to unfair dismissal laws have difficulty distinguishing whether or not respondents are covered by federal laws and whether the views expressed relate to the operation of federal laws[3].

14. The uneven coverage of the Commonwealth laws limits the effectiveness of changes made by the federal Parliament to improve the operation of the laws.

Objective

15. The objective of the proposed legislation is to amend the WR Act so that coverage by a federal industrial instrument will no longer be a condition for employees working in a constitutional corporation to be able to bring an action in the federal system in respect of 'harsh, unjust or unreasonable' termination of their employment. At the same time, all employees covered by the expanded jurisdiction will be prevented from having the right to bring actions in State tribunals or courts on the grounds that the dismissal was unfair.

16. Alternate actions challenging a dismissal on any other ground, such as discrimination under another federal law or a law of a State or Territory, would not be proscribed by this change.

[1] Address to Australian Workers Union Conference, 19 April 2002, paragraph 12.
[2] 'The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses', Melbourne Institute of Applied Economic and Social Research, 29 October 2002, p. 9.
[3] This limitation on most of the surveys was accepted by the majority of the Senate Committee in their May 2002 Report on the Provision of Bills to Amend the Workplace Relations Act 1996, at p. 17.

However the WR Act would prevent dismissed employees from pursuing more than one remedy in respect of their termination of employment.

17. This amendment will provide businesses with greater certainty as to which unfair dismissal laws apply to them as most will be covered by the federal system only. It will also prevent employees from 'forum shopping'.

18. This should result in a streamlining of business human resource management practice, including termination management, and allow businesses to reduce the amount of time, money and effort they put into these issues.

Option – maintaining the status quo

19. One option, which was not considered, would be to make no change. As discussed above, this would be to maintain the current inequitable and complex arrangements that have prompted the Government to propose this legislative reform.

Other options considered

20. Three other options were considered:

Alternate option 1: Expand the scope of the system, without affecting existing rights.

21. Under a minimalist approach, the corporations power could be used to extend the reach of federal unfair dismissal laws without affecting the existing provisions dealing with the interaction of the federal unfair dismissal provisions with other laws.

22. This would mean that employees currently covered by State systems, but who would be picked up by an expanded federal system, would still be able to choose to bring an action in the State unfair dismissal jurisdiction (and, if they did so, would be precluded from proceeding under the WR Act, as happens at present).

23. This option would exacerbate the present unsatisfactory situation, which creates confusion and unnecessary cost for all involved. It would also increase the scope for forum shopping.

Alternate Option 2: Specify which other actions employees may bring

24. The WR Act could be amended to specify which other alternative remedies an employee covered by the WR Act's unfair dismissal provisions would be entitled to bring.

25. The risk with this approach is that something unforeseen could inadvertently be omitted as a broad range of legislation might potentially be relevant in dismissal cases.

Alternate Option 3: Prevent employees from access to any other remedies.

26. The broadest approach would be to amend the WR Act so that an employee eligible to bring an action under the WR Act for unfair dismissal is prevented from bringing an action under **any** other legislation in respect of that dismissal.

27. While this option would cover the field, it would also restrict access to a range of State and Territory remedies for anti-discrimination and would represent an unwarranted intrusion by the Commonwealth into an area of State and Territory activity beyond the workplace relations arena.

Policy development and consultation

28. The Government has undertaken formal and informal consultation with small businesses on problems caused by the unfair dismissal provisions, including formal roundtable meetings throughout Australia. Hearings and submissions into the Senate inquiry on the *Workplace Relations Amendment (Fair Dismissal) Bill 2002* raised the issue addressed by this proposal to

extend the coverage of the laws. In particular, the value of survey information on the operation of the laws and the efficacy of any Government efforts to fine tune them were questioned on the grounds of their limited and uneven coverage.

29. In 2000, as part of a broader process of exploring the use of the corporations power in the Australian Constitution to create a simpler national system of workplace relations regulation including unfair dismissal regulation, the then Minister, the Hon Peter Reith, issued a number of discussion papers and officers of the Department consulted with stakeholders in the preparation of these papers. The focus of the papers was on broad discussion and raising public awareness of the issues involved in moving towards a uniform set of workplace laws across the country. A summit was held in November 2000 by the Business Council of Australia at which ideas for a simpler system based on the corporations power were extensively discussed.

30. In May 2002, the Minister for Employment and Workplace Relations, in a speech to the Australian Food and Grocery Council, focused on the specific example of unfair dismissal laws as one relatively straightforward and practical example of how the corporations power could be used to create a uniform system of workplace relations regulation.

Impact analysis of the option

31. There are no current data available that can provide a precise estimate of the proportion of employees who are in the federal unfair dismissal jurisdiction. However, it is estimated that currently around 49 per cent[4] of Australian employees are covered by federal unfair dismissal legislation. Under the proposal, it is estimated that the coverage of federal unfair dismissal legislation would be increased to around 85 per cent of employees. The remaining 15 per cent of employees would continue to be covered by State unfair dismissal schemes or be excluded from either scheme due to their status, eg short term casual. In terms of employee numbers, those covered by federal unfair dismissal legislation would increase from approximately 3.9 million to around 6.8 million.

32. In terms of the impact of the legislation on the number of federal unfair dismissal claims, the Australian Industrial Registry (AIR) reported that 8 109 federal termination of employment applications were lodged during the 2000–2001 financial year[5]. If the assumption is made that the number of federal unfair dismissal applications is directly proportional to the number of employees who are covered by federal unfair dismissal legislation, it is estimated that under the proposed legislation the number of federal unfair dismissal applications would increase by around 73 per cent. It is estimated that this would represent an increase in the number of federal unfair dismissal claims of up to 6 000 claims per year resulting in an approximate number of federal unfair dismissal applications of up to 14 000 per year[6].

33. There would be a consequential reduction in State claims and, therefore, there is unlikely to be any net increase in cost to the national economy.

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[4] 'Breaking the Gridlock: Towards a Simpler National Workplace Relations System – Discussion Paper 1, the Case for Change', Discussion paper issued by the Hon Peter Reith MP, Federal Minister for Employment, Workplace Relations and Small Business, October 2000, p. 64.

[5] Data collected at the time termination of employment applications are lodged with the Australia Industrial Registry do not identify whether the applications are in relation to unfair dismissal or unlawful termination. However, it is understood that the vast majority of such applications are unfair dismissal applications.

[6] This assumes that all employees seeking to challenge a dismissal decision on the grounds of unfairness who are currently eligible to apply under the federal system do so in the federal system. To the extent that 'leakage' to the State systems occurs under the present arrangements, the number of applications could potentially increase by more than 6000. Also, the 8109 figure may contain a number of applications from employees eligible for a State remedy but not for a federal remedy. Some of these applications, which are presently disqualified after a jurisdictional hearing, may proceed to further conciliation and/or arbitration hearings under the proposed change.

Implementation and review

34. The proposed reform measure is to be given effect by amendments to the WR Act. The Department of Employment and Workplace Relations will monitor the impact of the legislation.

35. The legislation will also be reviewed through formal mechanisms for consultation already in place. In particular, the National Labour Consultative Council will have an ongoing role in monitoring the legislation and any issues that may arise.

36. Consultation with interested parties and groups will also continue.

REGULATION IMPACT STATEMENT

FURTHER LEGISLATIVE MEASURES TO IMPROVE THE COMMONWEALTH UNFAIR DISMISSAL SCHEME

Current Situation

1. Since 1996, the Government has pursued legislative amendments to the Commonwealth unfair dismissal scheme in an attempt to create a better balance between the interests of employers and employees and improve the operation of the scheme, particularly for small business.

2. Some legislative amendments to the operation of the Commonwealth unfair dismissal scheme were accepted by the Parliament in August 2001. These include:

(a) implementing a 'default' three-month qualifying period of employment during which time an employee will be excluded from seeking a remedy in respect of harsh, unjust or unreasonable (ie unfair) termination of employment;

(b) limiting the right of demoted employees to seek a remedy;

(c) tightening the tests for the granting of extensions of time to make termination of employment applications;

(d) requiring the Commission to deal with jurisdictional objections before referring a claim to conciliation;

(e) giving the Commission power, following conciliation, to dismiss unfair dismissal applications that do not have a reasonable prospect of success;

(f) requiring the Commission to pay specific regard to the size of the business (eg the absence of a dedicated human resources function) in determining whether a dismissal was unfair;

(g) giving the Commission express power to dismiss an application where an applicant fails to attend proceedings;

(h) restricting the ability of a person to make a second application in respect of the same termination;

(i) expanding the powers of the Commission to order costs against parties who act unreasonably in pursuing, managing or defending claims;

(j) requiring the Commission to ask representatives of parties whether they have been engaged on a 'no win, no fee' basis; and

(k) giving the Federal Court the power to order penalties against lawyers and other advisers who encourage applicants to make unfair dismissal claims where there is no reasonable

prospect of success, or who encourage respondents to defend applications where there is no reasonable prospect of a successful defence.

3. The measures described above will be enhanced by the amendments proposed in Schedule 2 of this Bill, outlined in this regulation impact statement. These measures will have the two-fold effect of relieving some of the concerns of the small business community by reducing the number of unfair dismissal claims made against small businesses, and reducing the impact of these claims on the time and financial resources of small businesses and improving the balance between the interests of employers and employees. The full exemption for small business remains a Government priority to be pursued through the Workplace Relations Amendment (Fair Dismissal) Bill 2002.

Problem

Small business issues

4. *More Time for Business*, the 1997 Government response to the 1996 Small Business Deregulation Task Force, identified business and community concerns that termination of employment provisions are an employment disincentive for small business. The Government's report found that these provisions have a disproportionate and detrimental impact on small business in terms of human resource administration procedures, representation at Commission hearings and lost business opportunities while defending claims (p. 30).

5. A range of mainly attitudinal surveys of small business have since been done by various organisations with the majority of surveys indicating that small business employers would be more likely to employ new staff, and more likely to employ staff on a permanent basis, if they were not concerned with the prospect of unfair dismissal claims. This survey information was covered by the Department of Employment and Workplace Relations (DEWR) in its submissions to Senate Inquiries into bills seeking to exempt small business in 1998 and 2002[7]. Most recently, a new Yellow Pages survey report commissioned by DEWR from the Melbourne Institute of Applied Economic and Social Research, with results released in late October, has found that State and federal unfair dismissal laws impose extra costs of $1.3 billion a year on small and medium businesses and reduce employment for low paid workers by 1 percent[8].

6. Many business organisations representing a wide range of small business including the Australian Chamber of Commerce and Industry and the Small Business Coalition have argued that the laws should be changed to make them less onerous, particularly for small business.

7. A major cause for concern is that small businesses are generally less likely to have dedicated human resource professionals within their management structures, let alone personnel departments to handle recruitment and performance management processes needed to help them defend unfair dismissal claims. They are less likely to engage specialist outside assistance in

[7] Submissions to Senate Employment, Workplace Relations, Small Business and Education Legislation Committee – Inquiry into Workplace Relations Amendment (Unfair Dismissals) Bill 1998, vol. 3, submissions 13-21, January 1999, pp. 80-84; Submission by the Department of Employment and Workplace Relations to Senate Employment, Workplace Relations, Small Business and Education Legislation Committee Inquiry to Bill to Amend the Workplace Relations Act 1996, 18 April 2002, pp. 15-18.

[8] 'The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses', Melbourne Institute of Applied Economic and Social Research, 29 October 2002, p. 17.

dealing with human resource matters[9]. In addition, small business operate under much tighter cash flow constraints so that an award of compensation will be a much greater burden than it would be in a larger business.

8. Currently, a hearing is convened in all unfair dismissal cases with the resulting imposition of cost and time to the businesses concerned. Because of the lack of specialist human resource management in small business, any time out to deal with such issues is time out from line activities which go to the operation and survival of the business.

9. Even in cases where the claim is obviously vexatious many businesses prefer to reach a settlement rather than disrupt their core business activities by attending hearings[10]. The threat of incurring a high compensation payout makes such settlements all the more likely. In addition, the type of inquiry undertaken by the Commission in determining whether a dismissal was unfair requires the employer to have maintained a certain standard in recruitment, training and performance management as well as a certain level of documentation of these processes. As noted in *More Time For Business*[11] '… lack of time and resources for elaborate staff management processes means any proceedings are likely to be disproportionately complex because of the employer's need to rely on oral evidence instead of documents'. In the Melbourne Institute analysis, 44 per cent of businesses reported that unfair dismissal laws made it more difficult to manage and supervise their workforce with around 41 per cent saying it now takes longer to resolve issues associated with poor performance[12].

10. Aside from the obvious cost to small business which these improvements to the Commonwealth unfair dismissal scheme are intended to address, the Commission itself must still set aside time and resources to hear claims even where they are obviously frivolous or vexatious.

Balancing the interests of employers and employees

11. When the WR Act was first introduced, the Government made a commitment to review the legislation. Since that time, as case law has developed, various anomalies have appeared in the application of the law indicating a need to clarify the operation of the Commonwealth unfair dismissal scheme. For instance, employers in genuine redundancy situations have lost their case on the grounds of procedural unfairness even where the Commission has acknowledged the validity of the operational grounds and the redundancy selection process itself has not been found to be unfair[13]. Also, cases where employees have been sacked for endangering other workers have been lost because the unfair dismissal scheme did not allow the Commission to give

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[9] For instance the March 2002 CPA Australia Small Business Survey program found that only 21 per cent of small business engaged the help of outside consultants for recruitment.

[10] Mr Grant Poulton from Australian Business Limited, a major employer organisation, in evidence before the 1999 Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, estimated that at least three-quarters of the cases his organisation dealt with in 1998 were settled without regard to merit or relative strength of the applicant's case. The employers concerned estimated that the cost of settlement would be less than the cost of fighting the case.

[11] Page 31

[12] 'The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses', Melbourne Institute of Applied Economic and Social Research, 29 October 2002, p. 17.

[13] Examples are *Ly Kung Lao v Australian Tie Company* (2002) [Print PR919424] Holmes C.; *J.G. Adam and ors v Mount Thorley Operations Pty Ltd* (2002) [Prints PR909053 and PR914896] Leary C.

sufficient weight to this kind of circumstance. Most of these reforms have been advocated by employer groups and represent a necessary tightening of the current scheme[14].

12. The further legislative amendments to improve the Commonwealth unfair dismissal scheme are an expression of the 'fair go all round' principle on which the current unfair dismissal provisions are based. They are aimed at giving the Commission stronger direction in cases to allow it to more effectively balance the interests of all parties concerned.

Objective

13. The objective of Schedules 2 and 3 of the Bill is to amend the unfair dismissal provisions of the WR Act to:

(a) allow the Commission to dismiss unfair dismissal applications against small business employers without a hearing where 'on the papers' it considers the claim to be without jurisdiction or frivolous, vexatious or lacking in substance;

(b) refine the penalty provisions for lawyers and agents encouraging unmeritorious claims. Where the Commission has dismissed an application against a small business employer without a hearing on the grounds that it is frivolous, vexatious or lacking in substance, the Federal Court will be required to take this into account in determining the penalty;

(c) simplify the criteria that the Commission must consider in determining whether a dismissal is unfair in the case of a small business;

(d) halve the applicable maximum amount of compensation that can be awarded to applicants dismissed from a small business;

(e) set a qualifying period of six months service with the employer before a new employee of a small business can make a claim for unfair dismissal;

(f) require the Commission, in determining the fairness of a dismissal, to have regard to any conduct of the employee contributing to the dismissal;

(g) exclude access to remedies for unfair dismissal where an employer dismisses an employee on operational grounds, except in exceptional circumstances;

(h) require the Commission, in determining the fairness of a dismissal, to have regard to whether the safety or welfare of other employees was factor in the decision to dismiss;

(i) require the Commission to take the size of the business into account in determining an appropriate remedy;

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[14] For instance, the Small Business Coalition, representing around 40 industry organisations with an interest in small business across all sectors of the economy, and ACCI, representing a large cross-section of business in their recent submissions to the Senate inquiry into the 5 bills to amend the WR Act advocated many of the measures here proposed.

(j) require the Commission, in making an order for back-pay in conjunction with a reinstatement order, to take into account any income earned from other employment in the period since the dismissal; and

(k) emphasise reinstatement as the remedy of first resort.

Option – maintaining the status quo

14. One option, which was not considered, would be to make no change. As discussed above, this would leave small business disproportionately affected by the Commonwealth unfair dismissal scheme and the scheme will continue to be ill-equipped to find an appropriate balance between the interests of all parties.

Other option considered - exempt small business from unfair dismissal laws

15. Businesses with less than 20 employees could be exempted from all unfair dismissal claims. This is being pursued through a separate legislative amendment in the Workplace Relations Amendment (Fair Dismissal) Bill 2002.

Policy development and consultation

16. Many of the legislative measures to improve the Commonwealth unfair dismissal scheme were initially suggested by representative employer organisations, such as the Australian Chamber of Commerce and Industry (ACCI) and the Australian Industry Group, most recently in Senate proceedings to consider the amendments to the federal termination of employment laws.

17. The Australian Labor Party and the Australian Democrats have called for amendments to improve the efficiency and effectiveness of the unfair dismissal process. They have suggested that it is necessary to assist small business through quicker resolutions, greater certainty of outcomes and reduced legal costs.

18. In addition, employers and employer organisations including ACCI, the Victorian Employers' Chamber of Commerce and Industry, and the Small Business Coalition have called for further legislative amendments to provide for a better balance between the interests of employers and employees.

Impact analysis (costs and benefits) of the option

Small business measures

19. The measures to benefit small business contained in Schedule 2 of the Bill would have the effect of reducing financial costs, increasing certainty of outcomes and resolving claims more quickly.

20. There will be a reduction in the financial costs currently incurred by small businesses. The ability of the Commission to dismiss applications without a hearing 'on the papers' will mean that small businesses will no longer have the time and monetary cost of attending hearings for frivolous or vexatious claims. Such claims may also be discouraged through the refinement of penalty provisions for lawyers and agents that encourage such claims. Employees have the benefit of having their claim resolved quickly under this arrangement. While their opportunity to

be heard before the Commission is more limited, both parties will be given the opportunity to provide further information before an order to dismiss is made.

21. Financial costs will be reduced for small businesses through both the halving of the maximum amount of compensation payable to employees dismissed from small business and in the requirement for the Commission to take into account the size of an employer's business when determining compensation. Small business employees may be disadvantaged by these measures compared to those dismissed from larger enterprises.

22. By simplifying the criteria that the Commission must consider in determining whether a dismissal is unfair, small business employers and employees benefit through increased certainty in the matters to be considered and through a reduction in time associated with hearings. Small business employees may be disadvantaged when compared to those dismissed from larger businesses, however, as the range of matters the Commission can consider is more limited.

23. A range of survey evidence, including evidence presented to the Senate in 1998 and 2002, suggests that potential unfair dismissal claims discourage a significant proportion of small businesses from recruiting additional staff. In the recent Melbourne Institute report on the effect of unfair dismissal laws on small to medium businesses, almost 40 per cent of respondents reported that the unfair dismissal laws meant that they were now less likely to hire unemployed job applicants or people who had changed their jobs frequently[15].

24. To the extent that potential unfair dismissal claims discourage recruitment in small businesses, measures such as extending the qualifying period for all new employees to six months before an unfair dismissal claim can be made could encourage increased small business activity and employment by addressing small business employers' concerns about the legislation. The Melbourne Institute report found that one effect of unfair dismissal laws on small and medium enterprises was that employees would be more likely to be dismissed in their probationary period[16]. Extending the period of probation will give business a longer period of time in which to assess the capability of a new employee and provide new employees with a better opportunity to demonstrate their ability to do the job.

Measures to balance the interests of employers and employees

25. The measures to create a better balance between the interests of employers and employees contained in the Bill will have the effect of increasing certainty of outcomes, claims being resolved more quickly and the interests of all parties being taken into consideration.

26. The legislative amendment includes a provision to exclude access to remedies for unfair dismissal where an employer dismisses an employee on operational grounds, other than in exceptional circumstances. This will provide more certainty for employers where they no longer have ongoing work for an employee.

27. The amendments will allow the Commission to take into account any contributory conduct by an employee when determining compensation and also to consider whether the safety

[15] 'The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses', Melbourne Institute of Applied Economic and Social Research, 29 October 2002, Table 14.

[16] 'The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses', Melbourne Institute of Applied Economic and Social Research, 29 October 2002, page 16.

and welfare of other employees was a factor in the dismissal. These amendments will benefit employers in the decision making process associated with dismissing an employee and reduce financial costs by limiting compensation payable in these circumstances.

28. By emphasising reinstatement as the remedy of first resort, employees benefit by returning to their previous position and having the matter resolved quickly. The employer benefits by not having additional recruitment costs. However, reinstatement may not be appropriate and may not be desired in some circumstances. The proposed requirement that, when determining compensation, the Commission is to take into account any income earned, will benefit the employer by reducing the compensation payable. There is a possible, but unlikely, effect that an employee will wait until a settlement has been reached before seeking new employment.

Implementation and review

29. The proposed reform measures are to be given effect by amendments to the WR Act. The Department of Employment and Workplace Relations will monitor the impact of the legislation.

30. The legislation will also be reviewed through formal mechanisms for consultation already in place. In particular, the National Labour Consultative Council will have an ongoing role in monitoring the legislation and any issues that may arise.

31. Consultation with interested parties and groups will also continue.

NOTES ON CLAUSES

Clause 1 – Short title

This is a formal provision specifying the short title of the Act.

Clause 2 - Commencement

This clause specifies when the various provisions of the Act commence.

Subject to exceptions for which specific provision is made, the provisions of schedules 1, 2 and 3 of the Act commence on Proclamation. However, if any Schedule has not commenced within 6 months of Royal Assent, subclause 2(3) has the effect that the Schedule commences on the first day following that six month period.

Specific provision is made for the commencement of items that interact with each other or with the provisions of other Bills before the Parliament, to ensure that they commence in the correct order.

Clause 3 – Schedule(s)

Clause 3 provides that each Act specified in a Schedule to this Act is amended or repealed as set out in the Schedule, and that any other item operates according to its terms.

SCHEDULE 1 – COVERING THE FIELD OF HARSH, UNJUST OR UNREASONABLE TERMINATION

1.1 Schedule 1 will extend the operation of federal unfair dismissal legislation by making greater use of the corporations power in section 51(xx) of the Constitution.

1.2 The amendments will expand the federal jurisdiction dealing with harsh, unjust or unreasonable dismissals (the federal unfair dismissal jurisdiction) so that it covers all employees of constitutional corporations, in addition to employees currently covered under other constitutional heads of power.

Part 1 – Amendments

Workplace Relations Act 1996

Item 1 – at the end of section 5

1.3 This item inserts a new subsection 5(9) to ensure that subsections 5(6) and 5(8) operate subject to new section 170HA (which provides that the expanded federal unfair dismissal jurisdiction operates to override unfair dismissal rights and remedies provided for by some State laws – see notes on **item 7** below).

1.4 Section 5 provides for the additional operation of the *Workplace Relations Act 1996* (the WR Act).

- Subsection 5(6) of the WR Act allows complementary legislation to be enacted for the coal mining industry in New South Wales and Queensland.

- Subsection 5(8) of the WR Act allows a State to legislate to give federal award employees, who are not otherwise covered by it, access to the federal unfair dismissal jurisdiction.

Item 2 – at the end of section 152

1.5 Section 152 deals with the relationship between federal awards, and State awards and employment agreements. The section establishes rules of priority for the operation of these awards and agreements.

1.6 This item makes it clear that the relationships established by section 152 are subject to section 170HA (which provides that the expanded federal unfair dismissal jurisdiction operates to override unfair dismissal rights and remedies provided for by some State laws, awards or employment agreements).

Item 3 – paragraph 170CB(1)(c)

1.7 This item will extend the constitutional base of the federal unfair dismissal jurisdiction by placing greater reliance on the corporations power.

1.8 Presently, the jurisdiction relies on a number of constitutional heads of power including, amongst others, the corporations power. However, the corporations power is not used to its full extent.

1.9 Currently, under paragraph 170CB(1)(c), an employee wishing to access the jurisdiction must be employed by a constitutional corporation *and* be a Federal award employee (as defined in section 170CD).

1.10 This item removes this limitation by replacing the reference to 'a Federal award employee' with 'an employee'.

Item 4 – Subsection 170CBA(4)

1.11 This item is consequential upon the proposed extension of the federal jurisdiction.

1.12 The WR Act provides that regulations may be made excluding from access to a remedy employees not employed under award or agreement conditions whose remuneration is above a certain level (currently $81,500 per annum).

1.13 This item ensures that the phrase 'employed under award conditions' (insofar as it relates to the exclusion of certain employees) extends to instruments under State as well as federal law, reflecting the greater reach of the federal system.

1.14 The current exclusion is cast in terms of employees covered by a <u>federal</u> award or agreement (reflecting the limited application of the current provisions).

1.15 This amendment would ensure that, in extending the application of the unfair dismissal provisions, a significant group of employees being brought within the federal system – those covered by State awards or agreements – are not excluded from access to a remedy.

1.16 This item is contingent upon an amendment to the WR Act proposed by the Workplace Relations Amendment (Fair Termination) Bill 2002, currently before the Parliament. That Bill would move the provisions setting out exclusions from a remedy from the *Workplace Relations Regulations 1996* to the WR Act. Item 4 would amend the provision being inserted into the Act as a result of this move.

Item 5 – Subsection 170CD(3)

1.17 Item 5 is also related to the extension of the federal system.

1.18 This item would amend the definition of 'employed under award conditions' that applies generally throughout the termination of employment provisions to ensure it extends to instruments under State as well as federal law. It also corrects a technical defect to ensure that the definition covers federal agreements made under the former *Industrial Relations Act 1988*.

Item 6 – Subdivision F of Division 3 of Part VIA (heading)

1.19 This item changes the heading to Subdivision F of Division 3 of Part VIA of the WR Act from 'Other rights relating to termination of employment' to 'Limitations on rights relating to termination of employment'. This change reflects the changes proposed by items 7-9, which deal with the interaction of the federal system with other laws (see the discussion of **items 7, 8 and 9** below).

1.20 Subdivision F contains sections 170HA, 170HB, 170HBA and 170HC. These provisions outline the way the federal unfair dismissal jurisdiction interacts with other relevant laws.

1.21 Presently, the federal unfair dismissal jurisdiction operates in conjunction with other remedies available under other State, Territory and Commonwealth laws. For example, in addition to State unfair dismissal legislation, remedies may exist in a particular case under anti-discrimination legislation.

1.22 The WR Act currently deals with potential overlap by ensuring that, where an employee may have a cause of action under both the unfair dismissal provisions of the WR Act and another law in respect of an alleged unfair dismissal, the employee may not proceed under the WR Act if he or she has initiated proceedings under another law, unless that claim is discontinued by the applicant or fails for lack of jurisdiction.

1.23 However, the Government intends to change the way the federal unfair dismissal laws interact with these other laws to make it clear that an employee covered by the federal unfair dismissal system no longer has access to comparable State jurisdictions.

Item 7 – Section 170HA

1.24 This item repeals current section 170HA (which provides for the continuing operation of other laws) and substitutes a new section 170HA.

1.26 New section 170HA provides that the unfair dismissal provisions in the WR Act apply to the exclusion of State or Territory legislation:

- the main purpose of which is to regulate workplace relations, employee relations or industrial relations; and

- which provide rights or remedies in respect of unfair dismissal (however described).

1.27 Equivalent provision is made in relation to State awards and agreements (subsection (2)).

1.28 This exclusion will extend to employees who are covered by the federal jurisdiction (for example because they are employed by a constitutional corporation), but who are excluded from bringing an action for unfair dismissal by the WR Act (for example, because they are a short-term casual employee) (subsection (3)).

1.29 Regulations may be made identifying relevant provisions of a State or Territory law, or a State award or agreement, as provisions which meet the criteria outlined above (subsections (4) and (5)).

Item 8 – Section 170HB

1.30 Item 8 repeals existing section 170HB and substitutes a new section 170HB. The new section does much of the same work as the old section. However it has been drafted to make it easier to read, and it no longer deals with the interaction of the federal unfair dismissal legislation with State and Territory unfair dismissal legislation (new section 170HA provides that federal law operates to the exclusion of State or Territory law in such cases).

1.31 In general terms, section 170HB is intended to stop 'double-dipping' in cases where an employee may be able to bring proceedings in respect of an alleged unfair dismissal under the federal unfair dismissal provisions and another law (other than a State or Territory unfair dismissal law), including another provision of the WR Act.

1.32 The new section 170HB provides that an action may not be commenced under another law, where proceedings have been initiated in the federal unfair dismissal jurisdiction, unless the proceeding has been discontinued by the applicant or has been dismissed for lack of jurisdiction.

1.33 Similar provision is made in relation to cases where proceedings have been initiated other than in the federal unfair dismissal jurisdiction.

Item 9 – Section 170HC

1.34 This item would repeal section 170HC and substitute a new section. This new section essentially does the same work as the old one. However, the section has been redrafted to make it easier to read, and addresses a technical deficiency in the existing provision (this is explained below).

1.35 As with existing section 170HC, the new provision would limit 'double dipping'.

1.36 Subsection (1) would limit access to remedies relating to a termination of employment available under other laws (including other provisions of the WR Act) where the applicant has previously sought relief under section 170CK (which prohibits dismissal on certain discriminatory grounds), and that application has not been discontinued or failed for lack of jurisdiction.

1.37 Subsection (2) deals with the situation where an application is made other than under section 170CK. In such cases, an application may not also be made under section 170CK unless the application has been discontinued or failed for lack of jurisdiction.

1.38 Consistent with the approach taken in proposed new section 170HA (to provide for the exclusive operation of federal unfair dismissal laws), the definition of ***other termination proceeding*** in subsection (3) has been drafted to ensure that it is not possible to initiate proceedings alleging unlawful dismissal (ie dismissal for a discriminatory ground, such as sex or race) in the federal system and unfair dismissal proceedings under State or Territory workplace relations law.

1.39 The definition of ***other termination proceedings*** would also address a potential anomaly in the existing provision.

1.40 The definition will ensure that an application alleging unlawful termination may not be lodged under a State or Territory law where the application is based on the same, or a substantially similar, ground as an application lodged under the federal legislation.

1.41 Under the current legislation, no provision is made in respect of applications under State or Territory law on 'substantially similar' grounds to those in section 170CK - ie for the section to operate to ensure that parallel applications are not made, the grounds under the two laws must be the same. However, as very few 'other' laws are in identical terms to subsection 170CK(2), the existing provision may enable an applicant to pursue remedies under laws that were substantially similar, yet not identical, to subsection 170CK(2). New section 170HC would address this deficiency.

Item 10 – At the end of subsection 170LZ(3)

1.42 This item adds a note after subsection 170LZ(3) to make it clear that it operates subject to new section 170HA.

1.43 Section 170LZ deals with the interaction between certified agreements, and State laws, awards and employment agreements.

1.44 Subsection 170LZ(3) makes it clear that a certified agreement does not override a State law dealing with unfair dismissal so far as the provisions can operate concurrently with the certified agreement. However, the note added by this item makes it clear that subsection 170LZ(3) is subject to section 170HA.

Item 11 – At the end of subsection 170VR(3)

1.45 This item adds a note after subsection 170VR(3).

1.46 Section 170VR deals with the interaction between Australian Workplace Agreements (AWA) and State laws and is similar in operation to section 170LZ.

1.47 Subsection 170VR(3) makes it clear that an AWA does not override a State law on unfair dismissal providing that two can operate concurrently. However, the note added by this item makes it clear that subsection 170VR(3) is subject to section 170HA.

Part 2 – Application provisions

Item 12 – Application of items 1, 2, 3, 5, 6, 7, 8, 9, 10 and 11
Item 13 – Application of item 4

1.48 Items 12 and 13 provide that the amendments made by this Schedule will apply only in relation to terminations of employment that occur after the commencements of the items, regardless of whether the employment started before or after the commencement of the items.

1.49 Item 12 provides for the application of the majority of the items of the Schedule.

1.50 Item 13 provides for the application of item 4. A separate application provision is required for this item because of the separate commencement provision applicable to the item – see item 3 of the table in subclause 2(1).

SCHEDULE 2 – TERMINATION APPLICATIONS AFFECTING SMALL BUSINESS

2.1 This Schedule amends the termination of employment provisions of the WR Act, to ease the burden of unfair dismissal laws on small business.

2.2 In particular, the items in this Schedule will:

- extend the qualifying period from three to six months for small business employees;
- permit the dismissal, without a hearing, of applications made against a small business;
- refine the penalty provisions for lawyers and agents who encourage unmeritorious claims against small business;
- streamline the criteria for determining whether a termination by a small business employer was unfair; and
- halve the maximum compensation payable to employees of small businesses to 3 months remuneration.

Part 1 – Amendments

Workplace Relations Act 1996

Item 1 – Subsection 170CD(1)
Item 2 – Subsection 170CD(1)

2.3 These items would insert new definitions of 'relevant time' and 'small business employer' in subsection 170CD(1) of the WR Act.

2.4 A 'small business employer' is defined as an employer who employs less than 20 employees, including:

- casual employees who have been engaged on a regular and systematic basis for a period or sequence of periods of at least 12 months (but not other casual employees); and
- the employee whose employment was terminated.

2.5 The 'relevant time' in relation to a termination of employment is defined as the earlier of:

- the time the employer gave notice of termination to the employee;
- the time when the employer terminated the employment of the employee.

2.6 The definition of 'relevant time' is necessary to enable the Commission to determine whether a business falls within the category of a small business employer at the time of the termination and, as such, the relevant exemptions apply.

Item 3 – Paragraph 170CE(5B)(a)

2.7 This item amends the WR Act to extend the qualifying period for employees of small business for eligibility to bring an unfair dismissal application. Currently all employees must serve a qualifying period of 3 months.

2.8 This item provides for the qualifying period for small business employees to be extended to 6 months.

Item 4 – Before section 170CF
Item 15 – At the end of section 170JD
Item 16 – At the end of section 170JF

2.9 Item 4 inserts a new section 170CEC.

2.10 Currently, under section 170CEA an employer may, at any time, ask the Commission to dismiss an application on the grounds that it is outside the Commission's jurisdiction.

2.11 New section 170CEC would allow the Commission to dismiss some claims made against small businesses 'on the papers', ie without holding a hearing. New section 170CEC would also establish the process by which the Commission is to deal with such matters.

2.12 The Commission must dismiss an application against a small business employer if it believes it is beyond its jurisdiction (subsection (2)) or the application is frivolous, vexatious or lacking in substance (subsection (3)).

2.13 Subsection (4) provides that, in dismissing such an application, the Commission is not required to hold a hearing. In deciding whether a hearing is appropriate, the Commission is required to have regard to the cost to the employer's business of attending at a hearing.

2.14 Before the Commission makes an order dismissing an application, both parties must be given the opportunity to provide further information, and if further information is provided, must take that into account (subsection (5)).

2.15 Items 15 and 16 are intended to prevent procedural devices being used to undermine the simplified 'on the papers' process outlined above.

2.16 Currently, section 170JD of the WR Act provides that the Commission may vary or revoke orders made in regard to termination of employment.

2.17 Item 15 introduces a new subsection 170JD(4), excluding from the power to vary or revoke, an order dismissing an application 'on the papers' against a small business employer under new section 170CEC.

2.18 Item 16 excludes such orders from being appealed to a Full Bench.

Item 5 – After subsection 170CG(3)

2.19 This item would insert a new subsection 170CG(3A), setting out streamlined criteria for assessing whether a dismissal by a small business employer was harsh, unjust or unreasonable.

2.20 Subsection 170CG(3) sets out the criteria to be considered by the Commission in assessing whether a dismissal was harsh, unjust or unreasonable. These criteria currently apply to all business regardless of their size. The criteria are:

- whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service;
- whether the employee was notified of that reason;
- whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee;
- if the termination related to unsatisfactory performance by the employee—whether the employee had been warned about that unsatisfactory performance before the termination;
- the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and
- the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and
- any other matters that the Commission considers relevant.

2.21 New subsection (3A) would provide streamlined criteria for small business.

2.22 The requirement that the Commission consider whether an employee was warned about unsatisfactory performance before being terminated is removed.

2.23 The ability of the Commission to consider 'any other matter' is also removed. This will assist small business by ensuring that the legislation sets out in clear terms all of the factors which a small business employer must address to ensure that a dismissal is fair.

2.24 Items 5-8 of Schedule 3 propose amendments to this new provision (see the discussion of these items, below).

Item 6 – After paragraph 170CH(2)(a)
Item 7 – After paragraph 170CH(7)(a)

2.25 These paragraphs require the Commission to have regard to the size of the employer's undertaking, establishment or service when considering:

- whether a remedy in respect of a dismissal is appropriate (paragraph 170CH(2)(a));
- the appropriate calculation of damages in lieu of reinstatement (paragraph 170CH(7)(a)).

2.26 The size of the employer's undertaking, establishment or service is already a relevant factor in assessing whether a dismissal was harsh unjust or unreasonable. These items extend this principle to assessment of an appropriate remedy.

Item 8 – Paragraph 170CH(8)(a)
Item 9 – After subsection 170CH(8)
Item 10 – Subsection 170CH(9)
Item 11 – Paragraph 170CH(9)(b)
Item 12 – After paragraph 170CH(9)(b)
Item 13 – Subsection 170CH(9)

2.27 Subsections 170CH(8) and (9) of the WR Act set out the maximum compensation that may be awarded to an employee whose dismissal is found to have been harsh, unjust or unreasonable in cases where the Commission considers that reinstatement would not be appropriate.

2.28 In the case of an employee covered by a federal award or agreement, the maximum compensation available is capped at the total remuneration that the employee received, or was entitled to receive, during the six-month period preceding the dismissal (subsection 170CH(8)).

2.29 As a result of amendments proposed by Schedule 1 of this Bill, this cap would also apply to employees covered by State awards or agreements.

2.30 The cap for employees not covered by an award or agreement is set by reference to a formula (set out in the Regulations) that draws upon average weekly full time earnings. The cap is adjusted each financial year – it is currently $40,800.

2.31 New items 8-13 halve the maximum compensation cap for employees of small businesses to 3 months remuneration for award and agreement-covered employees, and half the applicable indexed amount for employees not covered by an award or agreement.

Item 14 – At the end of section 170HH

2.32 Section 170HE of the WR Act prohibits lawyers or other advisers from encouraging a claim or defence that has no reasonable prospect of success.

2.33 Section 170HF allows the Federal Court to impose fines on advisers who encourage such a claim or defence.

2.34 This item amends the WR Act to require the Federal Court to consider, in imposing a fine on a lawyer or adviser, whether an application against a small business was dismissed without a hearing by the Commission because it was frivolous, vexatious or lacking in substance.

Part 2 – Application provisions

Item 17 – Application of items 3, 8, 9, 10, 11, 12 and 13
Item 18 – Application of items 4, 5, 6, 7, 14, 15 and 16

2.35 These items provide for the application of the amendments made by Schedule 2.

2.36 Item 17 provides that the amendments made by items 3, 8, 9, 10, 11, 12 and 13 apply only in cases where the relevant employment commenced after the commencement of the items.

2.37 Item 18 provides that the amendments made by items 4, 5, 6, 7, 14, 15 and 16 apply where the termination of employment occurred after the commencement of the items.

SCHEDULE 3 – OTHER AMENDMENTS RELATING TO TERMINATION OF EMPLOYMENT

3.1 Schedule 3 makes several improvements to the operation of the unfair dismissal jurisdiction. These amendments will:

- require the Commission to have regard to conduct by an employee which contributed to their dismissal;
- limit dismissal claims where dismissal is for operational reasons;
- require the Commission to have regard to the safety and welfare of other employees in assessing whether a dismissal was harsh, unjust or unreasonable;
- require the Commission to consider the size of an employer's business in determining an appropriate remedy;
- require the Commission to take account of any income an employee who is to be reinstated may have earned since their dismissal, when making an order for back pay; and
- emphasise that reinstatement is the primary remedy available under the WR Act.

Part 1 – Amendments

Workplace Relations Act 1996

Item 1 – Subsection 170CG(3)
Item 4 – Paragraph 170CG(3)(a)
Item 5 – Subsection 170CG(3A)
Item 7 – Paragraph 170CG3A)(a)
Item 8 – At the end of section 170CG

3.2 Items 1, 4, 5 and 7 are consequential upon the amendment proposed by item 8 (to insert a new subsection 170CG(4)).

3.3 Items 1 and 5 amend subsections 170CG(3) and 170CG(3A) respectively so that the criteria in those subsections would not apply if subsection 170CG(4) applies.

3.4 Items 4 and 7 amend subsections 170CG(3) and 170CG(3A) respectively to remove references to dismissal due to operational requirements.

3.5 Item 8 would insert a new subsection 170CG(4), and provides that where a termination of employment occurs because of operational requirements, the termination will not be harsh, unjust or unreasonable unless the circumstances are exceptional.

3.6 The new provision inserted by item 8 does not seek to define the situations which might be considered by the Commission to constitute exceptional circumstances.

3.7 However, an example of such circumstances might be where an employer, faced with the need to reduce employee numbers for operational reasons, adopts an unfair process for selecting the employees whose employment is to be terminated.

Item 2 – Subsection 170CG(3)

3.8 Subsection 170CG(3) sets out the criteria to be considered by the Commission in assessing whether a dismissal was harsh, unjust or unreasonable.

3.9 Item 2 is consequential upon the amendment proposed by item 5 of Schedule 2 – to insert specific criteria that the Commission must consider in assessing whether termination of employment by a small business employer was unfair.

3.10 The amendment is included in this schedule because of its interaction with item 1.

3.11 The effect of item 2 is to ensure that the Commission considers the factors in subsection 170CG(3) only where the specific factors in subsection 170CG(3A) do not apply. (Item 1 makes similar provision in relation to proposed new subsection 170CG(4).)

Item 3 – Paragraph 170CG(3)(a)
Item 6 – Paragraph 170CG(3A)(a)

3.12 Items 3 and 6 amend subsections 170CG(3) and 170CG(3A) respectively to make clear that, in assessing whether an employee's dismissal was harsh, unjust or unreasonable, the Commission is to have regard to any conduct of the employee that may have put at risk that the safety or welfare of other workers.

3.13 This requirement applies in the case of small business employers and non-small business employers.

Item 9 – After subsection 170CH(2)

3.14 Item 9 would insert a new subsection 170CH(2A).

3.15 This new provision emphasises that reinstatement is the primary remedy under the WR Act for harsh, unjust or unreasonable terminations.

3.16 The provision makes express the requirement that the Commission first consider whether reinstatement is appropriate. Only after the Commission has determined that reinstatement is not appropriate may it consider an alternate remedy (an order for payment in lieu of reinstatement).

Item 10 – Paragraph 170CH(4)(b)
Item 11 – After subsection 170CH(4)

3.17 Subsection 170CH(4)(b) requires the Commission, in making an order for lost remuneration when an employee is to be reinstated, to have regard to the matters set out in subsection 170CH(5).

3.18 Subsection 170CH(5) is designed to insure against windfall gains.

3.19 Item 11 will amend the WR Act to further insure against windfall gains, by requiring the Commission to have regard to additional matters in making an order for lost remuneration. The additional matters are set out in new subsection 170CH(4A); specifically:

- income earned by the employee from employment or other work during the period between dismissal and reinstatement; and
- the amount of any income reasonably likely to be earned by the employee during the period between the making of an order for reinstatement and the actual reinstatement.

3.20 Item 10 is a consequential amendment to include in paragraph 170CH(4)(b) a cross reference to new subsection 170CH(4A).

Item 12 – Subsection 170CH(7)
Item 13 – After subsection 170CH(7)

3.21 Subsection 170CH(7) requires the Commission to have regard to all the circumstances of the case in assessing an appropriate amount of compensation in lieu of reinstatement (ie, in cases where the Commission determines that reinstatement is not appropriate).

3.22 The subsection sets out an inclusive list of factors to be considered, including the effect of any order on the employer's viability, the amount of remuneration the employee would have earned but for the termination, and any efforts made by the employee to mitigate the loss suffered as a result of the termination of their employment.

3.23 Item 13 inserts a new subsection 170CH(7A). This new provision would require the Commission to reduce the amount of compensation awarded to an employee who is unfairly dismissed, where the employee's misconduct contributed to the dismissal.

3.24 The Commission will be required to reduce the compensation by an appropriate proportion to reflect the contribution of the employee to the dismissal.

3.25 Item 12 is a consequential amendment, inserting a cross reference to new subsection 170CH(7A) in subsection 170CH(7).

Part 2 – Application provisions

Item 14 – Application of items 1, 3, 4 and 8 to 13
Item 15 – Application of items 2, 5, 6 and 7

3.26 Items 14 and 15 provide that the amendments made by this Schedule of the Bill will only apply in relation to terminations of employment that occur after the commencements of the items, regardless of whether the employment started before or after the commencement of the items.

3.27 Item 14 provides for the application of the majority of the items of the Schedule.

3.28 Item 15 provides for the application of items 2, 5, 6 and 7. A separate application provision is required for these items because of the separate commencement provision applicable to the items - items 8 and 10 of the table in subclause 2(1) refer.