Australian Democrats' Report

Inquiry into Workplace Relations Amendment (Termination of Employment) Bill 2002

The provisions covering termination of employment in the *Workplace Relations Act* (WRA) include provisions concerning unlawful and unfair dismissals, and have been the subject of intense political and policy debate for the past decade.

As the Majority Report indicates, these matters have been the subject of several previous Bills and previous inquiries.[1]

In my capacity as Workplace Relations Spokesperson for the Australian Democrats I have provided substantial Minorities for a number of these Reports, so will not seek to repeat their arguments here, since those Reports are readily available from the Committee. For any researcher interested in the unfair dismissal area, there are also extensive remarks from me over the years, on the Hansard record.

The appendices to this Minority Report provide some useful statistical data on unfair dismissals.

These comments would normally constitute Supplementary Remarks rather than a Minority Report because while we have a number of criticisms of elements of the Bill, the Australian Democrats support the central proposition of the Bill, to extend coverage of the Federal WRA.

However the Coalition Majority once again perpetuates a view on unfair dismissals' economic and employment effects for which there is still little hard evidence. We do not agree with the Majority view.

Our criticisms of a number of items in the Bill go to attempts to yet again reduce rights of certain employees, and to reduce the discretion of the Australian Industrial Relations Commission (AIRC).

Second step toward a Unitary Industrial Relations System

The first step towards a unitary industrial relations system was a major one – the referral of the Victorian system to the Commonwealth from 1997. With that referral also came a category of several hundred thousand Victorian employees under inferior employment conditions under the State law of the time. This category of workers were put under Schedule 1A of the WRA.

To its shame, the Coalition has refused to date to transition Schedule 1A workers across to the full benefits of the WRA. I look forward to the day the Federal

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1 For instance, see the Employment, Workplace Relations and Education Legislation Committee's reports on the following bills: Workplace Relations Amendment (Unfair Dismissals) Bill 1998, February 1999; Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999, November 1999; and, Workplace Relations (Termination of Employment) Bill 2000, September 2000.

Government will be successfully pressured to do so by a Victorian Labor Government that for the first time now controls both houses.

This Bill is the second step towards a unitary industrial relations system, using the unlikely field of unfair dismissals to significantly increase the coverage of federal law.

There is an odd contradiction in seeking to extend the coverage of Federal law on unfair dismissals, while simultaneously proposing to exempt small business from unfair dismissal law through the (again Senate-rejected) *Workplace Relations Amendment (Fair Dismissal) Bill [No 2]*.

Such an inconsistent approach is easily understood when we remember that the sole purpose of the latter Bill is political, to provide an easy double-dissolution trigger.

The Democrats consider it important that the Commonwealth attempt to procure some commonality across industrial relations jurisdictions as a first step to a uniform system. In this sense, we welcome the Government's decision to attempt to double the coverage[2] of their unfair dismissal provisions, and halve the coverage of the states. It will be helpful to have more commonality in this area.

There are areas of policy and jurisdiction the States no longer have sensible involvement in. After seventy plus years we finally got a unitary system of trade practices law. After one hundred years states rights and vested interests finally gave way to one unitary financial system for Australia. Although the process was messy in execution we have a unitary system in corporations law.

The same shift is necessary in industrial relations.

As far back as seventeen years ago, the Hancock review of Australia's IR system called for a complete overhaul, and pointed to the desirability of a unitary system. Like his predecessor Minister Reith, Minister Abbott has signalled the Coalition's support for a unitary system, and that is to the good.

We need one industrial relations system not six. We have a small population, yet we have nine governments and a ridiculous overlap of laws and regulations. There are areas of the economy that genuinely require a single national approach. Like finance, corporations or trade practice law, labour law is one of those areas.

Globalisation and the information revolution have created competitive pressures that require us as a nation to be as nimble as possible in adapting to changing circumstances.

It will be a difficult task but it is time we moved toward a national system of industrial regulation that will do away with unnecessary replications, conflicts and complexity.

The Australian Democrats negotiated the passage of the WRA with the Coalition Government in 1996. We supported the referral of Victoria's State industrial relations powers to the Commonwealth. We supported subsequent amendments to the WRA in 2001 affecting termination of employment.

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2 Minister Abbott Second Reading Speech: "*This 'cover the field' provision means that the percentage of employees covered by Federal unfair dismissal provisions should increase from about 50 per cent to about 85 per cent and that the number of workers covered by unfair dismissal provisions should increase from about 4 million to about 7 million.*"

It is logical for us to back the extension of provisions we already support that will double the coverage of Federal unfair dismissal provisions, and halve the coverage of the States. It will be helpful to have more commonality in this area. Given the great confusion evident by employees and employers over which system they fall into, and the provisions that apply to them, the case is strong for more uniformity.

This is not to argue that a more unified system would solve all problems. But how much better off has Victoria been with one system, not two.

There are just too many conflicting workplace laws, too many courts, tribunals and agencies regulating industrial relations. Too many vested interests, too many fee takers and rent seekers.

We agree the most effective way to get a single IR system would be by referral of powers to the Commonwealth by the States. Victoria successfully did that with Democrat support. But further referrals are presently unlikely.

Apart from the attractions of efficiency and simplicity, a unitary system would mean that all Australians, employers and employees alike, would have the same industrial relations rights and obligations, regardless of where they live.

The Democrats consider a unitary system would have three prime motivations.

First, it would achieve common human rights across Australia – at present they differ.

The second motivation is economic. Common easily administered rules and laws make for more efficient, competitive and productive enterprises.

And thirdly, it would facilitate more comprehensive coverage for workers. There have been estimates of up to 800,000 employees not covered by federal or state awards or agreements.

The Bill cannot go as far as it needs to. Constitutional limitations prevent complete coverage. As we have stated earlier[3] the Democrats are concerned that relying on the Corporations power alone will still leave large chunks of employees working for non incorporated business, many of these small business, with no protection from State or Federal laws.

The Democrats acknowledge concerns raised during this inquiry that some employees such as short-term casuals, those on fixed term or task contracts, and 'high-earning' non-award workers and trainees, who in some States are able to challenge their dismissal, would not be covered by the Federal system.

For instance, casuals are excluded for 12 months in the Commonwealth (including Victoria, ACT, and the NT) and Queensland jurisdictions, for 6 months in New South Wales and South Australia, and there is no exclusion in WA and Tasmania.

Due to a lack of available statistics we do not know how many employees within these categories do actually currently utilise the state laws and therefore it is difficult to estimate how many employees would in fact be disadvantaged.

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3 Senator Andrew Murray: *A Unitary Industrial Relations System: Unfinished Business of the 20th Century?* Speech to Business Council of Australia, Melbourne 17 November 2000, pg. 6.

Balanced against those considerations, on the plus side is that the Bill will capture a potentially very large number of individuals currently not covered. For instance, as pointed out in the Bills Digest[4]

> the Bill is likely to provide an unfair dismissal redress for employees of incorporated businesses for which neither federal nor state awards are binding. The former employees of One.Tel were employed under non-award circumstances…The Bill will provide a termination jurisdiction to this growing sector of the workforce.

Unfair dismissal laws for Small Business

The Coalition Government have repeatedly sought to justify its attempts to exempt small business from unfair dismissal laws by arguing that they deter small business from recruiting employees, and place a greater burden and cost on small business.

In other words that taking away the rights of a little over 2000 annual Federal small business employees' applications for relief from unfair dismissal is justified by job creation and cost savings.

In the Majority Report at para 12 page 4 - they use an excerpt from Professor Hancock's submission to support their view that small business are disadvantaged because of economies of scale. Professor Hancock did indeed say this but then went on to say at page 3 that there are other considerations:

> There are a wide variety of forces at work that determine the 'make-up' of the economy between small and large business. Some of these favour large business and others small business.... It (unfair dismissal) is an aspect of the economic environment which all business have to come to terms with.

There continues to be no hard evidence to support the view that unfair dismissal laws have an adverse effect on overall employment levels. If there were an effect we would expect to see some correlation between the introduction or variation of unfair dismissal laws and employment rate. The experiment under Queensland State laws, when their then Coalition government introduced an exemption for small business, had no evident effect on job creation.

The Majority Report refers to the new study by Don Harding of the Melbourne Institute of Applied Economic and Social Research, entitled *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses*, which the government are using to support their case that unfair dismissal laws place a greater burden and cost on small business.

The Democrats have a number of concerns with this study (commissioned specifically by the Government), including:

- It does not compare the human resource management practices (recruitment, contract, and performance procedures) of those who stated that unfair dismissal laws have no influence on the operation of the business; and

4 O'Neill, S (2003) Workplace Relations Amendment (Termination of Employment) Bill 2002, Bills Digest No. 91 2002-2003.

- it asked the respondent to 'estimate' the costs to business of unfair dismissal laws; the resulting figure was then aggregated by Harding to provide a total estimate in compliance costs for small business.

As an example at para 25, page 8 - The calculations for job loss is based on a very small number of firms, which are given a false sense of significance. Yes there were 1802 businesses surveyed but there were only 158 businesses who answered this question, 17 of which said that UFD had a major influence on a firm's decision to reduce employees; 10 of which said that UFD had a moderate influence on firms decision to reduce employees; and 14 of which said that UFD had a minor influence on the firm's decision to reduce employees.

Yet the authors have aggregated these three responses and then multiplied them to the rest of the small business population to get the figure of 77,000. There is a real danger of exaggeration through this technique.

More importantly, the fact that unfair dismissal laws - laws which encourage good human resource and management practices - impose compliance costs upon business is not, as Professor Andrew Stewart[5] points out, a reason in itself for abolishing or weakening them.

The Majority has incorrectly quoted and misrepresented Stewart's point (para 15, page 5) - he does not say, *'as the law stands'* he says *'as it stand'* and then Stewart goes on to later say that *'this is simply the reality of any litigation system'*.

It is worth quoting Dr Barrett at some length.[6] She was referring to the KFC[7] case:

> The expert witness for the Minister for Workplace Relations – Professor Mark Wooden – was unable to show there was any evidence to support Tony Abbott's claim that unfair dismissal legislation inhibited small business employment growth…under cross examination he said 'there certainly hasn't been any direct research on the effect of introducing unfair dismissal laws'…Furthermore, Professor Wooden agreed with the statement that 'the existence or non-existence of unfair dismissal legislation has very little to do with the growth of employment and that it is dictated by economic factors.

The Government Majority in the Committee asserts that because small business *perceive* the unfair dismissal laws an impediment that it justifies abolishing them.

Economics aside, the Democrats fundamentally have concerns with reducing the rights of employees employed by small business, on human rights and equity grounds.

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5 Submission, Professor Andrew Stewart p. 6.

6 Dr Rowena Barrett, Director Family and Small Business Research Unit, Faculty of Business and Economics, Monash University: *Small Business and Unfair Dismissal* The Journal of Industrial Relations March 2003

7 Hamzy v Tricon International Restaurants t/a KFC and ors (2001) FCA 1589.

Additional Amendments – Schedule 3

The Bill has proposed a number of measures to reduce employee protections under the law. No real case has been made for a number of these. For instance, in line with our test of fairness the Democrats will not support:

- the proposed reduction in the maximum amount of compensation that can be awarded to applicants dismissed from small business;
- an increase in the qualifying period with the employer before an employee of a small business can make a claim for unfair dismissal;
- proposed changes to some of the criteria that the Commission must consider in determining whether a dismissal is unfair, especially when it reduces the discretion of the Commission.

The Democrats will be proposing amendments at the Committee stage of the Bill. We will not be supporting items in the Bill that we consider unfair and reductionist in nature.

The Democrats are always wary of attempts to limit the AIRC's discretionary powers and will need to consider items affecting their powers closely.

Senator Andrew Murray

Attachment 1

Table: Features of Federal and State termination laws

	Cmwth, Vic, ACT & NT	**NSW**	**QLD**	**SA**	**WA**	**Tas**
Employee able to apply for remedy?	Yes	Yes	Yes	Yes	Yes	Yes
Max time period after termination to apply	21 days	21 days (out of time applctns possible)	21 days	21 days	28 days (out of time applctns considered)	21 days
Salary cap	$81 600 for 'non- award conditions' employees	$81 500 and not covered by award	$75 200	$77 681 for non-award employees	$90 000 for non award etc employees	
Filing Fee	$50.00	$50.00	$48.00 unless union application	$0.00	$50.00	$0.00
Casuals et al excluded, for what period?	12 months	6 months	12 months, except for invalid reasons	6 months	No	No
Statutory default probationary period	3 months	No 3 months (may be less)	3 months	No	3 mnths (but not blanket exclusion)	No
Conciliation before arbitration	Yes	Yes	Yes	Yes	Yes, Registrar may mediate	Yes
Certificate issued if conciliation fails?	Yes	No	Yes	Assess-ment made	No	No
Penalty for disregarding assessment?	Yes	No	No	Yes	No	No
Commission to consider size of business?	Yes					
Penalties against advocates for vexatious claims	Yes					

Requirement to disclose 'no win no fee'	Yes					
Dismiss claims which have no prospect of success?	Yes					
Consider size of business & skills of small business re HR matters	Yes					
Is salary compensation capped?	6 months remuneration. Limited to $40,800 for 'non-award' employees	6 months remuner-ation	6 months average wage	6 months remuner-ation or $38,800 which ever is greater	6 months remuner-ation	6 months ordinary pay

Note:

- Termination provisions contained in the CCH Australian Employment Legislation at 21 December 2001.
- Provisions updated in August 2002 for new WA amendments and the Commonwealth salary/compensation cap.
- No attempt has been made to include other authority a tribunal might rely on to deal with a matter beyond those prescribed under the particular termination provisions.

WA Provisions (August 2002) (Advice from Labour Relations Branch DCEP):
1) There is no exclusion of casuals.
2) There is a requirement for the WAIRC to take account of a probationary period of up to 3 months in deciding the merits of a claim (see new S23A(2)). This does not preclude probationers from lodging claims or having them determined but does compel the WAIRC to consider them.
3) The filing fee has increased to $50.00.
4) The Registrar of the WAIRC can have functions of the Commission delegated to them. In effect the Registrar may now deal with preliminary matters (ie: may mediate a claim). They will not be able to issue orders (see new S96 - inserted by Clause 161 of the LRRA 2002).
5) The blanks against WA in the table are technically ‘no’ since there is no express power provided. However, there is some ability provided through the general powers of the Commission (see S27 of the IR Act).

The following websites have been referred to in this update

http://www.airc.gov.au/termination/practice/home.html
http://www.dir.nsw.gov.au/workplace/practice/endemp/unfair.html
http://www.wageline.qld.gov.au/dismissal/index.htm#unfair
http://www.industrialcourt.sa.gov.au/frameset.php?location=07
http://www.wairc.wa.gov.au/
http://www.justice.tas.gov.au/oir/eir_guide/page8.htm#unfair

Prepared by Steve O'Neill; Information Research Service
Parliamentary Library Canberra; as at: 29/08/02

Attachment 2

Federal Unfair Dismissal Cases

Australia: Federal Unfair Dismissal Cases					
		Annual Reduction/Growth		Small Business [2]	
Date [1]	Annual total	Number	%	%	Number
11/96	14707	-	-	-	-
11/97	7897	(6810)	(46.3)	-	-
11/98	8046	149	1.9	40	3218
11/99	7678	(368)	(4.6)	27	2073
11/00	7747	69	0.9	38	2944
11/01	8188	441	5.7	38	3111
11/02	7227	(961)	(11.7)	30	2168

Note: [1]Latest available figures.

[2]Estimate from the Australian Industrial Registry returns - small business as a percentage of total employer responses received.

Attachment 3

Other Relevant Statistics

Number of employing non-farm small businesses	539 900
Number of non-employing non-farm small businesses	582 100
Total[8]	1 122 000
Number of employing non-farm small businesses	539 900
Number of agriculture, forestry & fishing small businesses	111 200[9]
Number of employees in non-farm small businesses	2 269 400[10]
Number of employees in agriculture, forestry & fishing small businesses	173 200[11]

Note: The data can be very confusing. For instance Dr Rowena Barrett, Director Family and Small Business Research Unit, Faculty of Business and Economics, Monash University: *Small Business and Unfair Dismissal* The Journal of Industrial Relations March 2003 – in Table 1 using ABS (2000:6) – comes up with a figure of

3 259 100 employees in private firms with less than 20 employees.

8 Source: Small Business in Australia 2001 (ABS Cat No 1321.0)

9 James Smythe: Chief Counsel Workplace Relations Policy and Legal Group; Supplementary Evidence to the Committee

10 Source: Small Business in Australia 2001 (ABS Cat No 1321.0)

11 James Smythe: Chief Counsel Workplace Relations Policy and Legal Group; Supplementary Evidence to the Committee