INQUIRY INTO THE PROVISIONS OF THE WORKPLACE RELATIONS AMENDMENT (TERMINATION OF EMPLOYMENT) BILL 2002

The Secretary of the Senate Committee that is inquiring into this Bill has invited me to make a submission. I wish to make a brief submission but, on this occasion, do not seek an opportunity to appear before the Committee.

The Scope of the Bill

The provisions of the Bill can usefully be subdivided into two aspects: (1) the extension of federal jurisdiction over unfair dismissals (raising the proportion of employees subject to the jurisdiction from an estimated 49 per cent to an estimated 85 per cent); and (2) amendment of existing federal provisions. Some of the amendments are directed to the scheme in its totality; others are intended to make the law more favourable differentially for small businesses (with fewer than twenty employees).

Neither of these aspects is contingent on the other, and the mixture of them is unfortunate. The Committee may support (1) but not (2), or vice versa. The Senate might be disposed to support a move toward greater uniformity in relation to dismissals, but wish to retain its capacity to deal on their merits with proposed alterations to the substance of the federal law. My primary submission, therefore, is that the Senate should consider inviting the Government to submit separate Bills.

In the remainder of my submission, I deal separately with the two aspects.

Extension of Federal Authority

The case for (1) is, in my view, quite strong. The evidence of confusion among employers as to the relevant jurisdiction is telling. Employees may experience similar uncertainty. There is also much to be said for the development of consistent principles facilitated by the appeal procedures of the Australian Industrial Relations Commission.

Substantive Changes to the Act

The intent of the Act is to protect employees against unfair dismissals by providing for reinstatement or, if reinstatement is inappropriate, monetary compensation. Overall, the substantive provisions of the Bill would reduce the level of protection. The alterations proposed, if implemented, would have a greater effect for small businesses and their employees than for larger businesses. The Government would prefer to exempt small business from the unfair dismissals regime, but in this Bill seeks more modest changes.

I refer first to proposals that would be of general application. In some respects, the stated purposes of the Bill in respect of the scheme's general application

seem to be met by the present Section 170CH. For example, the priority of reinstatement is implicit in the terms of Sub-section 170CH(6), which authorises the Commission to order a money payment only if it thinks that reinstatement is inappropriate. Both Sub-sections 170CH(2) and 170CH(7) require the Commission to have regard to 'the effect of the order [for reinstatement or payment] on the viability of the employer's undertaking, establishment or service'. These provisions ensure that due weight is given to the employer's interest in determining what remedy, if any, is granted to the employee.

The Bill appears to break new ground, first, in requiring the Commission to have regard to any conduct of the employee contributing to the dismissal. This provision would avoid situations wherein employees guilty of outrageous conduct are reinstated or compensated solely because of faults in the procedures followed by employers in effecting dismissal. Those procedures would be a consideration, but would not be conclusive. The Commission would still, if called upon to do so, adjudicate as to the truth of the allegation of misbehaviour, 'curing' the employer's denial of procedural fairness. I support the proposed change.

Secondly, the Bill would require the Commission, in determining the fairness of a dismissal, to have regard to whether the safety or welfare of other employees was a factor in the decision to dismiss. Given that the employer's concern about safety or welfare of employees would simply be one of the considerations to be weighed by the Commission, I would support the proposal.

Thirdly, the Bill would exclude access to remedies for unfair dismissal where an employee is dismissed on operational grounds, 'unless the circumstances are exceptional'. As I have noted, the present Act requires the Commission to take into account the effects of any remedy granted to an employee on the viability of the business. Subject to the uncertain operation of 'unless the circumstances are exceptional', the Bill appears to place beyond challenge the *employer's judgment* about operational requirements. The employee could not challenge the alleged operational requirement, raise an issue about the choice of person(s) to be dismissed or contend that his or her duties could be modified to accommodate the operational requirement. This proposal can only be supported as part of a scheme to enhance employer authority and autonomy: it contradicts the notion of protection of employees against unfairness. Accordingly, I submit that the Committee should oppose it.

Fourthly, the Commission would be required to take the size of the business into account in determining an appropriate remedy. I cannot see that this provision would add usefully to the existing requirement for the Commission to have regard to the effect of its order on the viability of the business. The size of the business is a factor that the Commission has often taken into account in determining whether reinstatement is an appropriate remedy.

I turn to the provisions that are specific to small businesses. (The arbitrariness of the definition of 'small' business is obvious.) The philosophy that underlies these provisions (and the Government's wish to exempt small business entirely) appears to be a view that small businesses are especially sensitive to the 'burdens' imposed on employers by the legislation.

If we ask why this might be so, there seem to be two possible answers.

One is that small businesses are more prone than larger ones to 'offend' against the requirements of fairness in dismissals. This possibility is not advanced as a justification for the Bill. It would tend to defeat the purpose of the legislation if the businesses most likely to offend were given the benefit of a more lenient regime.

The other possibility is that the enforcement process itself impacts more severely on small businesses, even if they are no more likely to dismiss unfairly. It may, indeed, be true that there are 'economies of scale' in complying with the terms of the Act. The *Regulation Impact Statement* points out that small businesses are less likely than larger ones to have specialist human resources sections; and that involvement of an owner or manager in Commission proceedings is more disruptive for a small business. For large businesses, the incidence of claims of unfair dismissal may be relatively stable and predictable and can be factored into business decisions. For small business, there is a greater element of risk, and risk-averse employers will understandably perceive a disadvantage.

These points are conceded. There are, however, considerations to be weighed against differentiation:

- To the employee who is unfairly dismissed, the size of the business is of no relevance. I cannot find in the supporting documents more than the vaguest consideration of the interests of employees.

- Employers – small and large – can (and commonly do) go far to limit the costs of the jurisdiction by ensuring that they act fairly, in relation to both the grounds for dismissals and the procedures that they follow in effecting them.

- There is 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 businesses and others small businesses. The oft-cited importance of small business in the overall economy is of itself evidence that by no means all advantages lie with bigness. If the unfair dismissal law is relatively disadvantageous to small business, this is but one of a myriad of factors operating on both sides. It is an aspect of the economic environment with which all businesses have to come to terms. There is no suggestion that large businesses should be compensated to offset advantages of small business,

such as the close contact with customers that is possible for (say) small retailers and local plumbers.

Two provisions discriminate against the employees of small businesses in ways that, to me, seem unfair to those employees. These are the reduction by half of the amount of payment that can be ordered by the Commission and the doubling of the probationary period from three to six months. Such provisions do not relate to the impact of procedural requirements and can only be interpreted as 'stepping stones' toward the Government's objective of exempting small business. Some other proposals in the Bill can be seen as going to the procedural problems of small business. This is the case, for example, with the provision to allow the Commission to deal 'on the papers' (i.e. without oral hearings) with claims that it considers to be frivolous, vexatious or lacking in substance. It is reasonable to ask, however, why such provisions, if they do not militate against fairness in outcomes, should not apply to large businesses.

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