Submission no: 5
Received: 14 February 2003

SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE INQUIRY INTO THE PROVISIONS OF THE WORKPLACE RELATIONS AMENDMENT (TERMINATION OF EMPLOYMENT) BILL 2002

ACTU SUBMISSION

February 2003

EXECUTIVE SUMMARY

The primary purpose of the Bill is to restrict access to the federal unfair dismissal jurisdiction and reduce remedies for those whose applications succeed.

Covering the field

- The Government is not consistent in seeking to cover the field in relation to industrial relations legislation generally, or termination of employment in particular.

- In 1996 the Coalition legislated to restrict access to the federal unfair dismissal jurisdiction; the only reason for the change in policy is the legislative reforms carried out by the Labor governments elected since that time.

- The Bill will create greater constitutional complexity and more reliance on costly litigation about the reach of the Commonwealth's power.

- Employers and employees will be forced out of the more flexible state jurisdictions into more procedurally complex federal tribunals; in many cases, applications will be heard in the Court because of restrictions on the Commission's ability to hear cases and award remedies.

- The Bill is not supported by any state government and is likely to worsen commonwealth-state relations.

Small business

- There is no evidence that excluding or restricting small business employees from making unfair dismissal applications would assist employment growth.

- In Queensland, large business employment growth outstripped that of small business during the period when an exemption was in place, although the opposite trend was evident prior to the introduction of the exemption.

- The Melbourne Institute report finds little more than that employers would rather not be subject to unfair dismissal laws.

- The proposal for extended probation is unnecessary; employers can already do this if it is reasonable.

- The provisions for dismissal of applications without a hearing are contrary to long-established principles of judicial fairness.

- Deletion of consideration of whether the employee received a warning sends the wrong message to employers; warning an employee about unsatisfactory performance is not onerous.

- The Commission needs to retain its general discretion to consider relevant matters in order to ensure a fair go all round.

- There is no justification for halving the maximum compensation available to employees of small business, as this takes no account of the degree of employer culpability or of damage to the employee.

Other amendments

- The effect of the proposed exclusion from the jurisdiction of employees dismissed as redundant leaves employers free to use retrenchment as an opportunity to unfairly dismiss employees.

- Requiring reduction of employee compensation if misconduct contributed to the dismissal, without providing for increased compensation above the cap where warranted due to employer misconduct is unbalanced and unfair.

INTRODUCTION

1. The ACTU welcomes the opportunity to make a submissionto the Committee on the provisions of the Workplace Relations (Termination of Employment) Bill 2002 ("the Bill").

2. The submission will deal with the Bill's three schedules separately, and will cover the specific issues raised in the Senate's reasons for referral as relevant to each of the schedules.

3. The ACTU is opposed to the Bill because its primary objective is to restrict the ability of employees whose termination of employment is harsh, unjust or unreasonable from seeking an appropriate remedy from an independent tribunal.

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

The purpose of seeking to "cover the field"

4. The Government has made it clear that it has two main purposes in seeking to apply federal unfair dismissal legislation to as much of the current state jurisdiction as is constitutionally possible.

5. The first purpose is to answer critics of its campaign to exempt small business from the unfair dismissal jurisdiction who point out that most of these applications are currently dealt with under state legislation, or that this would be available if employees' federal rights were removed.[1]

6. The second purpose is to reduce employees' access to remedies, given that "the federal unfair dismissal law is generally less burdensome to employers……".[2]

7. Although the Bill is also advocated by the Government as a step towards a national industrial relations law, there is no evidence that the Coalition supports a national system other than on the basis of applying the lowest possible standards of employee rights and protections.

8. If this were not the case, the Government would have been prepared to support federal legislation to apply to Victoria the system of common rule federal awards which operates in the ACT and the Northern Territory, as desired by the Victorian Government. The Victorian Labor Government has now won a majority in the Legislative Council, on an electoral platform which included a commitment to apply federal common rule awards in Victoria.

9. Further, if the Government was committed to national standards, rather than merely low standards, it would not have repealed those provisions of the *Industrial Relations Act 1988* which facilitated the making of federal awards to

[1] see Senator Murray's Minority Report to the Committee's Inquiry into the Workplace Relations Amendment (Unfair Dismissals) Bill 1998 February 1999

[2] Minister for Employment and Workplace Relations Second Reading Speech *Hansard* p8853 13 November 2002

override state jurisdictions, nor would it have amended section 152 of the *Workplace Relations Act 1996* ("the Act") to allow for state employment agreements to override federal awards.

10. More specifically, the Government has substantially changed the position it took in 1996, when it limited the application of the termination provisions of the Act to federal award employees of constitutional corporations. Previously, any employee was able to make an application,[3] as the validity of the termination provisions was based on the external affairs power of the Constitution, rather than, as is now the case, the corporations power.

11. In fact, it was made explicitly clear in the Act that the federal termination provisions were not intended to cover the field or override state legislation, although this provision was removed in 2001.[4]

12. In searching for reasons why the Government changed its mind on the primacy of federal legislation, only one development between 1996 and the present day becomes obvious: the election of Labor Governments in Queensland and Tasmania in 1998, in Victoria in 1999, Western Australia in 2001 and South Australia in 2002. Seeking to increase federal jurisdiction over unfair dismissal is no more than an attempt to override state Labor governments.

13. The ACTU is not necessarily opposed to uniform industrial relations legislation, but that is not the question here. The real issue is not the legal framework, but the content of the rights and obligations of employees, their unions and employers. The Government agrees; that is why there is no suggestion of extending Queensland or NSW industrial relations legislation nationally.

Constitutional implications

14. The means used by the drafters of the Bill to widen federal coverage include removal of the current requirement for an application to be made by an employee who is both an employee of a constitutional corporation and a federal award employee, together with a statement of intention to cover the field.

15. Section 51(xx) of the Constitution has been generally considered to authorise the federal Parliament to legislate as to the industrial rights and obligations of persons employed by constitutional corporations[5] (that is, a foreign corporation, or a trading or financial corporation formed within the limits of the Commonwealth).

16. Although the precise scope of this authorisation has not been tested, there must be doubts as to whether a constitutional challenge to the Bill, should it be passed, would be successful. However, this does not mean that it would not create areas of constitutional complexity, mainly in relation to the issue of whether or not an employer is a constitutional corporation, but also in relation to the scope of the application of the corporations power to employment-related

[3] *Industrial Relations Act 1988* s170EA(1)
[4] *Workplace Relations Act 1988* s152(1A)
[5] *Victoria v The Commonwealth* (1996) 187 CLR 416

matters.

17. Unincorporated employers, together with those which cannot be characterised as trading or financial, pursuant to the large body of case law which has developed on this subject, would still be subject to applications under state jurisdiction. At least 15 per cent of Australian employees do not fall within the scope of the corporations power, and this rises to one quarter in Queensland.[6]

The impact on procedures

18. Apart from the litigation on constitutional issues which could be expected to arise from the passage of the Bill, it would, in general, impose greater difficulties on employers and employees involved in unfair dismissal applications. Primarily because of constitutional limitations, federal unfair dismissal law is more complex, and the procedures more onerous than is the case under state jurisdictions.

19. In particular, state industrial relations commissions are able to deal with the full range of disputes relating to termination of employment, including those which, in the federal jurisdiction, involve the exercise of judicial power and so must be determined by the Federal Court.

20. The effect of the Bill would be to bring those applications alleging termination on discriminatory and related grounds to the Court, a far more expensive and time-consuming jurisdiction than a state industrial tribunal.

21. The greater flexibility available to state jurisdictions allows NSW, for example, to consider providing for arbitration, if necessary, to follow on directly from conciliation proceedings and enabling the Commission to enforce its own orders.[7]

22. To the extent that it is an issue that employers do not know whether or not they come under state or federal jurisdiction it will be assisted by the harmonisation measures implemented in some states, meaning that a single registry deals with all applications, and that members of state commissioners who have dual appointments can also deal with applications under the federal system.

23. However, the importance of the issue of employer knowledge can be overstated. The obligation under both state and federal jurisdictions is not to unfairly terminate the employment of an employee. Knowledge of the particular jurisdiction which would apply should an application by an employee be made alleging unfair dismissal is not needed to comply with this standard.

24. The real problem with lack of knowledge is that small employers do not have an adequate understanding of their basic obligations in relation to fairness. A survey conducted last year by CPA Australia contains findings which can only be explained by the scare campaign which has been run against the unfair

[6] *People First - putting the balance back into industrial relations* Queensland Government 2000 pp14-15
[7] *Unfair Dismissal Discussion Paper* DIR (NSW) 2002

dismissal laws. More than one third of employers said that they did not know how to comply with the unfair dismissal laws, while half of those who said they did also expressed some uncertainty. [8]

25. Even more remarkably, almost one third of employers believe that employers always lose unfair dismissal cases, 28 per cent believe that they cannot dismiss staff even if their business is struggling and 27 per cent that they cannot dismiss staff who are stealing from the business.[9] The facts are quite different: Of the 3,267 cases decided by the Commission since 1996, remedies for employees were awarded to employees in only 1,113 or 34 per cent.[10]

26. There is an issue of ignorance and misinformation amongst employers, but this ought to be dealt with through better information, as proposed by Labor, rather than by restricting rights and remedies in legislation about which employers are likely to remain ignorant.

Effects on commonwealth-state relations

27. The ACTU is not in the best position to judge the likely effect of the Bill's passage on commonwealth-state relations. No doubt the state governments will make their position clear to the Committee and the Government. However, a number of points seems obvious.

28. First, the Government's interest in uniform standards is aimed at state legislation which it sees as a barrier to its efforts to restrict access to unfair dismissal remedies, particularly for employees of small business.

29. Second, NSW and South Australia are reviewing the legislative provisions applying to unfair dismissal, with the intention of making changes appropriate to their conditions and experience. Queensland and Western Australia have already done so. It stands to reason that interference of this sort from the Commonwealth will not be welcome.

SCHEDULE 2: TERMINATION APPLICATIONS AFFECTING SMALL BUSINESS

The ongoing debate about the small business exemption

30. The case for providing special conditions or total exemption for small businesses which unfairly terminate employees has been argued several times before the Committee.

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[8] CPA Australia *Small Business Survey - 2002*
[9] Ibid
[10] AIRC *Annual Report* 2002

31. On previous occasions the ACTU has strongly opposed the proposition to exempt small business form the application of the unfair dismissal laws.

32. The ACTU has cited Senator Murray's minority report in the inquiry into the *Workplace Relations Amendment (Unfair Dismissals) Bill 1998* which proposed an exemption for employers with fewer than 15 employees, as persuasively sets out the evidence for the following conclusions.

    (i) Business opposition to unfair dismissal laws is based on a view that managerial prerogative should include the right to hire and fire at will.

    (ii) Survey evidence either shows little small business concern with the issue, or is so loaded as to lack credibility.

    (iii) Examples of problems are frequently drawn from cases under state legislation, which deals with the majority of claims in all states but Victoria, and which would be unaffected by amendments to the Act.

    (iv) Employees of small business are less likely to make unfair dismissal applications than those of big business.

    (v) The claim that exempting small business would lead to the creation of 50,000 jobs "rests on no empirical research, no case studies, no international and domestic studies," and lacks credibility, particularly given that in 1998 there were 304 federal small business unfair dismissal applications in NSW, 79 in WA, 56 in Tasmania and 20 in SA.

33. The 50,000 jobs claim was considered by the Full Court of the Federal Court in a case concerning the validity of the Regulation exempting some casual employees from the unfair dismissal laws.[11] In the course of the proceedings, the Court considered evidence on behalf of the Commonwealth provided by Mark Wooden from the Melbourne Institute of Applied Economic and Social Research in support of the proposition that there is a link between unfair dismissal laws and employment. The Court concluded that no such link could be shown to exist.

34. The ACTU has also previously cited a 1997 paper which comprehensively examined the role of small business in employment creation and in the job market generally.[12]

35. The paper argues that although the small business employment share is growing at the expense of large business, it cannot be inferred that this is due to job creation by small business. It then sets out a number of factors which have contributed to the growing employment share of small business:

    (i) employment reductions in larger firms, resulting in them employing less than 19 employees;

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[11] *Hamzy v Tricon International Restaurants trading as KFC* [2001] FCA 1589 (16 November 2001),
[12] J Revesz & R Lattimore R. *Small Business Employment* Industry Commission August 1997

(ii) a decline in public sector employment;

(iii) a trend to outsourcing services;

(iv) increases in the importance of the service sector, particularly finance and insurance, property and business services, and health and community services, which traditionally has a high proportion of small employers;

(v) structural change affecting large-scale manufacturing.

36. The paper points out that although a large proportion of new jobs occur in small businesses (61.7 per cent of private non-farm wage and salary earners), this "does not necessarily imply that they have been autonomously generated by the small business sector".[13]

> *"Small businesses appear to be a major source of new jobs in the economy. But this is open to misinterpretation. While small firms may be* where *many of the new jobs have been created, this does not necessarily mean they are* responsible *for their creation. In fact, the sectoral data (chapter 4) imply that the smallness of firms is, to a large degree, incidental to the process of job creation. Many of the new jobs were created in small business, not because that size of firm is particularly able to generate new jobs, but because the products for which demand has increased are mainly supplied by small business. In a sense, the customers of these firms created the jobs, not the firms."*

37. Revesz and Lattimore set out their reasons for opposing the provision of special incentives and/or concessions to small business as an aid to job creation:

(i) Selective support ignores the optimal size distribution of firms, encouraging a shift to small firms of operations which would be more efficiently performed by a larger enterprise. As small firms are less likely to survive than larger businesses, this could create more dislocation.

(ii) It is no more logical to support small firms to "create" a job than to support a large firm or the public sector so that it does not "destroy" a job. " .... once there is a mechanistic focus on where jobs are 'created' or 'destroyed', there is nothing which gives the arguments of small business advocates any more coherence than those of big business or private sector advocates".

(iii) The effectiveness of subsidies in creating net employment is unknown.

(iv) Subsidies have to be financed through taxation, while selective measures applicable to small business "can actually reduce the incentive for the growth of businesses which are about to exceed the small firm threshold".[14]

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[13] Ibid p30
[14] ibid pp97-100

38. On coming to Government in 1998, the Queensland Labor Government repealed the exemption for small business which had been provided for in the state's industrial relations legislation. In a submission to the Federal Government, the Queensland Government said on this issue:

"The facts clearly show that exempting small business from unfair dismissal laws has no effect whatsoever on small business employment levels.

"Using Queensland as an example, the ABS statistics demonstrate that employment growth by small business exceeded that of large business between March 1995 and March 1997 under Labor's unfair dismissal laws and fell between March 1997 and March 1999 during the operation of the Coalition's Workplace Relations Act 1997 with its exemption for small business from unfair dismissal. During the operation of the Coalition's Workplace Relations Act, employment growth by large business measured 64.6%, outstripping that of small business at 35.4%."[15]

39. The position of the NSW Government has also been made clear in its recent discussion paper.

"In their submissions to the Issues paper, employer organisations seem to have accepted that the Government is generally of the view that it is not appropriate to discriminate against employees on the basis of the size of their employer's business."[16]

The Melbourne Institute report

40. The Melbourne Institute report, carried out by Don Harding,[17] was commissioned by the Government in an attempt to address weaknesses in its argument for s small business exemption. In particular, there had been substantial criticism of the lack of evidence of any perceived need for such an exemption by small business or any evidence that an exemption would lead to employment growth in small business.

Methodology

41. The methodology adopted by Harding was to survey businesses with fewer than 200 employees. Employers were asked about the extent to which unfair dismissal laws affected their employment practices and their costs. It should be noted that the Government is seeking primarily to restrict rights of employees employed by businesses with fewer than 20 employees.

42. There was no distinction made in the survey between "unfair dismissal", meaning, under federal law, dismissal which is harsh, unjust or unreasonable, and "unlawful termination", which covers dismissal on discriminatory grounds,

[15] Queensland Government op cit pp9-10
[16] DIR NSW op cit p10
[17] Don Harding *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses* Melbourne Inst7ute of Applied Economic and Social research October 2002

such as on the basis of sex, race, disability and so on.

43. Assuming for the moment that the survey's findings are valid, they only apply if all legislation providing employees with remedies in case of termination of employment was removed, not a policy option being considered by the Government. The inevitable result of removing the right to make an application alleging harsh, unjust or unreasonable termination will be an increase in applications alleging discrimination on the various grounds set out in subsection 170CK(2) of the Act, given that these factors underlie many of the cases currently determined by the Commission rather than the Court.

44. In these circumstances, not only will the cost and complexity for employers and employees be increased, but much of the psychological change leading to changed practices which Harding argues would result from a change in the law will not eventuate.

45. Harding defends his use of "closed end" questions, where unfair dismissal was identified as the issue, rather than "open ended" questions which ask employers to identify barriers to employment.

46. Harding distinguishes between his "closed-end" question, which asks employer to choose between four statements on the effect of unfair dismissal laws on the processes and practices used to recruit and select staff, manage its workforce and manage staff whose performance is unsatisfactory (major, moderate, minor or no influence on what we do) and a "leading" question in the following passage:

"……there is some confusion as closed-ended questions are seemingly equated with 'leading questions'. This is not correct. To understand why it is useful to refer to the Oxford Dictionary of Law which states that a 'leading question' is:

> A question asked of a witness in a manner that suggests the answer sought by the questioner (e.g. You threw the brick through the window, didn't you) or that assumes the existence of disputed facts to which the witness is to testify.

"Thus, a question can be considered as leading if it assumes the existence of a fact that has not yet been established at the stage at which the question is asked in the survey. Leading questions can be avoided in surveys by employing screening questions that first establish the existence of a fact and then asking only those respondents that have reported the existence of that fact to provide more information about the extent or nature of the effect."[18]

47. As can be seen, Harding has concentrated on the second part of the definition, rather than the first. A question which asks employers what influence unfair dismissal has had on their processes and practices, particularly when three of the four alternative answers suggest some influence, is clearly suggesting an answer. This is in contradistinction to a question asking what are the factors influencing these processes and practices, which could be used as a screening question, with

[18] Ibid p8

further questioning of those employers who identified unfair dismissal laws as such a factor.

48. Harding dismisses this approach essentially because few employers nominate unfair dismissal laws as a problem:

"These interpretations of the survey evidence are incorrect as there will have been impediments that were of secondary importance to each firm, and thus were not mentioned, but which when aggregated over firms are important in determining aggregate employment."[19]

49. Information about the cost of the unfair dismissal laws to employers are similarly subjective. Employers were asked for an estimate of the cost of complying with the unfair dismissal laws if one additional employee was put on. If the employer was unable to put a dollar figure on this, the interviewer was instructed to prompt by asking for a "best estimate". No attempt was made to follow up how these estimates were arrived at, or to validate them, although the conclusion was drawn that the same cost structure could be attributed across the board to businesses that could not estimate the cost.[20]

50. This might be fair enough if there was objective evidence from the survey relating employment growth to unfair dismissal laws. Unfortunately, there is not. The quantitative conclusions abut the effect of the laws on employment are obtained by asking similarly leading questions of these employers in relation to their hiring decisions.

51. For example, employers with no employees, but who had previously employed staff, were asked if the unfair dismissal laws had played a part in their decision to reduce staff. Even with the leading question, only 11 per cent of employers said that this had been the case, with only 4.6 per cent saying that the laws were a major factor. In an extraordinary feat of reasoning, Harding concludes that the unfair dismissal laws caused the loss of 77,482 jobs:

"Firms that previously had employees, but currently do not have employees, were asked what was the maximum number of people they had employed. Factoring this up to the population as a whole results in the conclusion that there were 77,482 job losses in which UFD laws played a part. Of these there were 34,812 job losses in which UFD laws played a major role, 17,100 job losses where UFD laws played a moderate role and 25,572 job losses where the laws played a minor role."[21]

52. Harding assumes that where a business once employed five people, and now has none, that the unfair dismissal laws played an equal role in the entire reduction in staff, where it may have been a factor in only one, if at all.

53. Even more disturbingly, Harding encourages an inference that but for the unfair dismissal laws there would be 77,482 more people employed, which is absurd.

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[19] Ibid p5
[20] Ibid pp18-19
[21] Ibid p22

Whether or not the laws were a factor, the key question, which was not asked, is what was the determinative factor. As Harding himself concedes in his discussion of the methodology of other small business surveys, other factors, such as tax, market share and general economic conditions would be seen to play a bigger role in hiring decisions by small business than industrial relations regulation, including unfair dismissal.

54. A helpful way to evaluate this methodology is to replace "wages" for "unfair dismissal laws". There can be little doubt that employers would say that they would employ more employees if they did not have to comply with legally mandated wage rates. Whether or not this would be the case would depend on whether they could attract employees for the wages they were prepared to offer. At the end of the day, employers will employ staff if the level of business justifies it: that is, if the employment cost is offset by higher profit.

55. While employers were asked whether the unfair dismissal laws were or would be a factor in hiring and firing decisions, the more appropriate question would have been on the lines of: *If the profitability of your business would be improved by hiring additional staff, would the existence of unfair dismissal laws deter you from doing so?*

Equity issues

56. Harding works hard to demonstrate that the unfair dismissal laws have a negative effect on labour market equity. Although grudgingly conceding that the laws *"do result in what might be regarded as fairer practices when dealing with workers whose performance is unsatisfactory,*[22] he questions whether the institution of systems of documentation of warnings and formal opportunities to respond are in the interests of less literate workers. Seemingly Harding supports the use of the "less formal modes of supervision" traditionally used in some industries, such as yelling, abuse and on-the-spot sackings.[23] This is reinforced by the 44 per cent of employers who said that the unfair dismissal laws made it more difficult to manage and supervise their workforce.[24]

57. There can be little dispute that the requirement to treat employees fairly can be more onerous than an unfettered ability to treat them any way at all, although this is hardly the point. The real issue has to be whether the requirement to act fairly, taking into account the moral issues, the interests of the employee (who does not only face loss of livelihood, but often psychological or even physical danger from unfair or discriminatory treatment) and the employer in workplace governed by fair rules and procedures and fewer transaction costs, balances the interest of the employer in unlimited prerogative.

58. There is little recognition in the report of the importance of a job to an employee, and the right such an employee should have to fair treatment before facing loss of his or her livelihood. Instead, there is a false battleground drawn up between the employee in work and the unemployed, so that any rights accruing to an

[22] Ibid p25
[23] ibid p14
[24] ibid p17

employee is a direct attack on the rights of the unemployed.[25]

59. Harding finds that a proportion of employers, although a minority in each case, said that unfair dismissal laws meant that they were less likely to employ a person who had changed jobs, or who was unemployed, particularly for a long time.

60. The existence of Government subsidies to encourage the employment of the long-term unemployed substantially predates unfair dismissal laws, due to a recognition that employers, given a choice, will choose employees who they see as having a good work history. Again, this is hardly surprising. Employers want to reduce the transaction costs involved in employee turnover, irrespective of unfair dismissal laws.

61. Bearing in mind that employees dismissed for discriminatory reasons would be required to pursue their cases through the Court rather than the Commission, a considerably more costly jurisdiction, it is reasonable to assume that fewer of these terminations will be challenged. It is difficult to see how restricting the ability of employees to challenge dismissals based on sex, race, religion, family responsibilities, disability, absence from work because of illness or trade union membership is in the interests of greater equity.

62. The Melbourne Institute's belief that equity flows from the free operation of the market is not one which can be substantiated, although it is the thread which runs through the report. As far as small business is concerned, the evidence points to the contrary conclusion: employees of businesses employing fewer than 20 employees earn, on average, $118.40 or 17 per cent less than the average for all employees.[26] Small business employees are also less likely to receive superannuation, annual leave, sick leave or long service leave than other employees.[27]

Employment

63. Harding's conclusions in relation to the employment cost of the unfair dismissal laws is underpinned by his view that the level of employment in small and medium business is governed solely by labour costs. He then concludes that in an unrestricted labour market, where wages are not set other than through competition between employees, the cost of the unfair dismissal laws would be reflected in lower wages. However, given that in Australia wage levels are set by the Commission or through bargaining, leading to an uncompetitive labour market, the cost of the laws is reflected in higher unemployment.[28]

64. The debate about the relationship between labour costs is heard by the Commission every year in the Living Wage Cases, where the minimum wage in increased by up to $1000 per annum, with consequences for on-costs which increase actual labour costs by a greater amount. This is real cost, not estimates

[25] Ibid p16
[26] ABS Cat 6305.0
[27] ABS Cat 6334.0
[28] Harding op cit p24

based on surveys, yet the Commission has determined that the cost of these increases "*would not materially detract from employment growth*".[29]

65. In essence, Harding's argument is as follows: reduced labour costs lead to higher employment; compliance with unfair dismissal laws represents a cost on labour; therefore, repealing unfair dismissal laws will lead to higher employment. The same could, of course, be said about health and safety laws, superannuation, workers' compensation insurance and many other aspects of legislative protection for workers.

66. Harding does not, and was not asked to address the real issues of promoting employment: economic growth at the macro level, and increased market share at the firm level.

67. The ACTU submits that there is nothing new in Harding's research to support providing lesser protection for employees of small business.

The specific proposals

Increased period of probation

68. The Bill proposes that the standard period of probation for employees be extended from three to six months. Item 3 assumes passage of the Workplace Relations Amendment (Fair Termination) Bill 2002, which inserts the regulations relating to termination of employment into the Act. Currently, the provisions concerning exclusion of probationary employees is contained in Regulation 30B(1)(c). The Fair Termination Bill was passed by the Senate with a number of amendments which were not supported by the Government in the Senate, meaning that its future is somewhat uncertain.

69. It should also be noted that the current Regulation does not provide for a maximum period of three months probation. Any business is entitled to set a period of probation in excess of three months so long as it *"is reasonable, having regard to the nature and circumstances of the employment"*. Given that any probation period, including one of three months or less, is required to be set in advance by the employer, it would seem that the primary coverage of the proposed amendment would be to periods of probation which are in excess of three months and are not reasonable.

70. The ACTU submits that a three month period is more than sufficient for an employer to judge whether an employee is capable of doing the job for which he or she was employed. For many jobs this period is in excess of what should be required.

71. In its consideration of this issue, the NSW Government concluded:

"Although a number of submissions to the Issues Paper urged the adoption of mandatory probationary periods, little or no persuasive evidence was received

[29] *Safety Net Review Wages* PR002002 May 2002

as to why the present process (which permits pre-determined probationary periods of up to three months - or more if reasonable in the circumstances) is unsatisfactory. The present process seems to provide a means of ensuring that both parties can discuss and be aware of the probationary period that applies to their particular situation.[30]

Dismissal without a hearing

72. The Bill proposes to permit the Commission to dismiss applications by employees of small business if satisfied that they are not valid jurisdictionally or that they are frivolous, vexatious or lacking in substance.

73. This proposal will impact most on those applicants who are not able to provide persuasive written submissions responding to employer allegations about issues involving jurisdiction or merit, and who are unable, for financial reasons, to engage lawyers or other qualified persons to assist them. Such persons are likely to be the low-paid, those who do not have a good grasp of written English and of the legal system, young people and those with the least formal education.

74. A Full Bench of the Commission has raised serious concerns about the operation of sections 170CF(2)(d), (3), (4) and (5) of the Act in an appeal against the issuing of a certificate pursuant to subclause 170CF(4).[31] These provisions require the Commission, following the completion of conciliation, to form a view as to whether the applicant's claim has no reasonable prospect of success and if, after inviting the applicant to put further information, it does form such a view, a certificate must be issued to that effect which operates to dismiss the application.

75. In upholding the appeal, the Commission emphasised the danger of making findings of fact on contested issues without sworn evidence which is not appropriate in conciliation proceedings.

"Furthermore, and speaking generally, it would be wrong if an applicant's right to have his or her application determined by arbitration was abrogated by a procedure in which findings of fact were made without proper process. The legislature could not have intended such a result."[32]

76. The Commission also identified potential difficulties arising from appeals against the issue of a certificate where there is no record of conciliation proceedings and no reasons given.

77. Issues of fact as well as of law are involved in determining whether an application is within jurisidiction, including length of emloyment and nature of the employment contract. Similarly, the issue of frivolous or vexatious applications will also involve questions of fact.

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[30] DIR(NSW) op cit p10
[31] *Wright v Australian Customs Service* PR926115 Guidice P, Williams SDP & Foggo C (23 December 2002)
[32] Supra para 29

78. The provisions of the Bill take the lack of fair process even further by allowing for the dismissal of applications prior to conciliation taking place and barring appeals.

79. The Commission referred to the strict test imposed by courts when they consider use of the inhgerent jurisidiction to summarily dismiss.

*"*In *General Steel Industries Inc v Commissioner for Railways (N.S.W.) and Others* (*General Steel*), *Barwick CJ accepted that " the jurisdiction summarily to terminate an action is to be sparingly employed and is not to be used except in a clear case where the Court is satisfied that it has the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion ". His Honour went on to state -*

> *'It is sufficient for me to say that these cases uniformly adhere to the view that the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action - if that be the ground on which the court is invited, as in this case, to exercise its powers of summary dismissal - is clearly demonstrated. The test to be applied has been variously expressed; "so obviously untenable that it cannot possibly succeed"; "manifestly groundless"; "so manifestly faulty that it does not admit of argument"; "discloses a case which the Court is satisfied cannot succeed"; "under no possibility can there be a good cause of action"; "be manifest that to allow them" (the pleadings) "to stand would involve useless expense".*
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> *'At times the test has been put as high as saying that the case must be so plain and obvious that the court can say at once that the statement of claim, even if proved, cannot succeed; or "so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument"; "so to speak apparent at a glance".*
>
> *'As I have said, some of these expressions occur in cases in which the inherent jurisdiction was invoked and others in cases founded on statutory rules of court but although the material available to the court in either type of case may be different the need for exceptional caution in exercising the power whether it be inherent or under statutory rules is the same. Dixon J. (as he then was) sums up a number of authorities in* Dey v. Victorian Railways Commissioners (1949) 78 CLR 62 *where he says (at p.91): "A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. The fact that a transaction is intricate may not disentitle the court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process." Although I can agree with Latham C.J. in the same case when he said that the defendant should be saved from the vexation of the continuance of useless and futile*

proceedings (at p 84), in my opinion great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal. On the other hand, I do not think that the exercise of the jurisdiction should be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff's claim. Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed.'[33]

80. The Commission held that the same strict test should be adopted by the Commission in the exercise of its powers to dismiss an application.[34]

81. The provision for fines to be imposed on lawyers or other advisers where an application is dismissed without a hearing because it was frivolous, vexatious or lacking in substance is intended to operate as a deterrent to these advisers taking up unfair dismissal cases, leaving applicants ill-equipped to argue their cases, whether "on the papers" or in person.

82. The proposals that the Commission would not be able to vary or revoke orders made to dismiss an application, and that appeals to the Full Bench would be barred in relation to these dismissals of applications means that the only option for applicants whose applications have been dismissed due to a mistaken view by a single member of the Commission would be to seek prerogative relief from the High Court, hardly realistic for most employees.

83. The lack of balance in the proposal can be seen in the requirement that the Commission consider the cost to the employer's business of a requirement to attend a hearing, but not the cost to the employee of losing employment.

Issues for consideration by the Commission

84. The Bill proposes to remove the Commission's ability to consider whether, if a termination relates to unsatisfactory performance by the employee, whether the employee had been warned about that unsatisfactory performance before the termination, as well as the Commission's general discretion to consider any matter, apart from those specified, which it considers relevant.

85. The ACTU is opposed to this proposed amendment to the Act on two grounds.

86. First, basic fairness requires that an employer warn an employee before dismissing that employee, after the period of probation, on the grounds of poor performance. If this is not done, the employee has no way of knowing that the employer wishes for him or her to do the job differently. The current provision does not require an employer to give a warning; it merely makes it a relevant factor for the Commission to consider.

[33] Supra para 25
[34] Supra para 26

87. Specifying the warning issue in the Act provides assistance to employers in relation to expectations when terminating the employment of an employee. Removing it sends a message that warnings are no longer required.

88. Warning an employee who is not performing to expectations is not onerous; there is no requirement that this be in writing, although obviously it would assist the employer's position if there was a record of the warning. If there is an assumption on the part of the Government that small business operators do not have the skill to issue a written warning to an employee, they should say so. It would be an extraordinary position to take, given the administrative burden placed on employers by, for example, the GST.

89. Second, the ACTU is opposed to the removal of the Commission's general discretion in its consideration of matters relevant to the termination. In considering whether or not an applicant has been unfairly dismissed the Commission must be free to consider all relevant matters in order to ensure a fair go all round.

Remedies

90. The ACTU is opposed to the size of an employer's business being a relevant factor in determination of remedy, particularly given that it is already a relevant factor in considering whether a termination is held to be harsh, unjust or unreasonable.

91. In particular, the ACTU is opposed to the proposed halving of the cap on compensation for employees of small business. Employees whose termination of employment was found to be unfair should not be treated differently on the basis of the number of employees employed by their employer. This is completely irrelevant to the extent of the wrong done to the employee or the degree of culpability of the employer. It also has nothing to do with the capacity of the employer to pay.

SCHEDULE 3: OTHER AMENDMENTS RELATING TO TERMINATION OF EMPLOYMENT

92. The proposed amendments to apply to all unfair dismissal applications, irrespective of the size of the employer's business, are directed towards two objectives: first, to limit the grounds on which the Commission can find that a dismissal is unfair and, second, to reduce the financial compensation which can be awarded where the dismissal is, nevertheless, held to be unfair.

Grounds for dismissal

Effect on safety and welfare of other employees

93. The effect of an employee's lack of capacity or conduct on other employees would obviously be a factor in the Commission's consideration of the validity of the employer's reason for terminating the employment of the employee and the

fairness of that action.

94. The ACTU submits that this amendment is unnecessary, and represents only an attempt to load the Commission's considerations against applicants.

Redundancy

95. The Bill includes an amendment which would have the effect of deeming a termination on the ground of the employer's operational requirements not to be harsh, unjust or unreasonable unless the circumstances are exceptional.

96. There is no requirement that the reason for a termination based on operational requirements be valid; it would seem to be enough for the employer to claim that the termination was based on an operational requirement for the onus to shift to the employee to show the existence of unspecified exceptional circumstances.

97. This amendment is a response to a number of cases in which employers have used a stated need for staff reductions, whether real or not, to select employees for termination on grounds including union activity, age and absence on workers' compensation. It should not be acceptable for employers to use the need for staffing reductions as an opportunity to get rid of employees in circumstances which would, otherwise, be clearly unfair.

98. In many cases, these employees will have the option of proceeding with an allegation of unlawful termination, which will result in increased cost and complexity for all parties.

Remedy

99. The proposed amendment to require the Commission to reduce the compensation it would otherwise award if employee misconduct contributed to the termination decision is not only unnecessary, given the Commission's discretion, but unbalanced. The effect of the amendment would be to further restrict the Commission's ability to award compensation as it thinks fit. The existence of the cap on compensation means that, irrespective of the degree of loss and damage to the employee or the extent of the harsh, unjust or unreasonable treatment by the employer, the Commission cannot award more than the equivalent of six months remuneration.

100. The ACTU submits that it is grossly unfair to require that compensation be reduced due to the employee's misconduct, but to make no provision for it to be increased beyond the cap due to the employer's misconduct.

CONCLUSION

101. The ACTU submits that the Committee recommend that the Bill not be passed by the Senate.

102. Its sole functions are to reduce access to remedies for employees whose employment has been unfairly terminated, and to reduce the level of

compensation available to those employees who do succeed in making out their case.

103. If the Government were really concerned to improve procedures, rather than sacrificing the fair go all round principle in favour of employers, it would give favourable consideration to the proposals included in the Workplace Relations Amendment (Unfair Dismissal - Lower Costs, Simpler Procedures) Bill 2002, introduced by Labor. These are:

- restrict representation of parties by lawyers or agents in conciliation proceedings to circumstances where it would assist the just and expeditious resolution of the proceeding, taking into account complexity, access by the other party to representation and cost;

- require agents appearing in unfair dismissals to be a registered industrial agent;

- the Minister to publish information to assist employers and employees with compliance;

- applications seeking financial compensation only not to be accepted unless there are exceptional circumstances for not seeking reinstatement;

- provide for unions to make a single application on behalf of a number of employees who have been dismissed at the same time or for related reasons;

- encourage the conduct of proceedings by telephone or video link.