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

Background

The ANF is the national union for nurses, with branches in each State and Territory of Australia. The ANF is also the largest professional nursing organisation in Australia. The ANF's core business is the industrial and professional representation of nurses and nursing. The ANF's 120,000 members are employed in a wide range of enterprises in urban, rural and remote locations in both the public and private sectors, including hospitals, health and community services, schools, universities, the armed forces, statutory authorities, local government, offshore territories and industry.

While the public sector remains the primary employer of registered and enrolled nurses, a significant number of nurses work in small businesses or are small business people themselves.

The aged care sector remains a significant employer of nursing staff (32% of nursing staff [1]. Many aged care providers are classified as small businesses. Additionally, a significant number of nurses are employed in private medical rooms (5372 registered nurses and 1,443 enrolled nurses[2]). Remote area nurses, community and domiciliary nurses, agency nurses and nurses in independent practice, either self employed or providing private consultancy services, are other examples of nurses working in and/or owning small businesses.

[1] AIHW, 2001, Nursing Labour Force 1999, AIHW Canberra
[2] AIHW, 2001, Nursing Labour Force 1999, AIHW, Canberra

Residential aged care facilities are operated by a diverse range of providers with beds fairly equally divided between private for-profit providers and private not-for-profit providers. Among this group, there are a mixture of larger organisations and many small independently run facilities. Approximately half of the facilities are 40 beds or less.[3] Many would be categorized as small business for purposes of the proposed legislation. Aged care providers already have difficulty attracting and retaining nursing staff and the proposed amendments concerning small businesses are likely to add to those problems.

1. Provisions to extend federal unfair dismissal laws to all employees of constitutional corporations and prevent access to state laws.

The ANF does not support the proposal to move all employees of constitutional corporations under the federal unfair dismissal system and bar access to state jurisdictions. The ANF operates under both State and Federal jurisdictions and has not experienced any difficulties or confusion among members or is aware of any confusion among employers in the industry. The proposed amendments are unnecessary and will result in a loss of rights and entitlements with respect to unfair dismissals for those ANF members who do rely on state systems.

2. Provisions for businesses employing less than 20 employees

The ANF strongly opposes proposed amendments to provisions in the Act covering unfair dismissal applications. Specifically those provisions which seek to:

- Extend the three month qualifying period for employees to access unfair dismissal provisions to 6 months for small business employees;
- Allow applications made by small business employees to be dismissed without a hearing if deemed to be outside the jurisdiction or frivolous;
- Remove the Commission's general discretion to consider "other matters" and remove the requirement to consider whether a warning has been given;
- Cut by half (to 3 months) the maximum compensation available to employees of small business, and require the Commission to take into account the size of the small business when determining a remedy;

[3] Productivity Commission 1999, Nursing Home subsidies, Inquiry Report, AusInfo, Canberra.

- Expand the powers of the Commission to order costs or impose penalties on advisers and lawyers in circumstances where applications are considered unmeritorious.

The above amendments will reduce the rights and prevent access to the unfair dismissal jurisdiction for a significant number of employees. Those employees who do qualify will have access to lesser remedies than employees generally.

It is the view of the ANF that no employee should be penalised or disadvantaged simply because they are employed in a workplace defined as a small business. Legislation regulating the workplace should aim to establish fair and equitable processes resulting in good employment practices and greater productivity within the workplace. Already amendments to the unfair dismissal legislation in 2001 reduced the rights of employees.

The current proposal shifts the balance even further in favour of the employer. It removes completely access to unfair dismissal for a significant group of employees and reduces the remedies available. This point is noted in the Explanatory Memorandum at paragraph 21 on page 11. It states *"Small business employees may be disadvantaged by these measures compared to those dismissed from larger enterprises".*

If the current legislation is based on the principle of a fair go all round it cannot be argued that the proposed amendments are consistent with that principle. Again the Explanatory Memorandum acknowledges this in relation to the proposed amendment to remove the Commission's general discretion to consider "other matters" and remove the requirement to consider whether a warning has been given. At paragraph 22 it says: "*Small business employees may be disadvantaged when compared to those dismissed from larger businesses,….. as the range of matters the Commission can consider is more limited."*

Employees of small business will be denied a fair hearing if the Commission is prevented from considering all matters relevant to the dismissal, including whether warnings have been issued. Denial of such matters raises questions of natural justice and the ability of the Commission to perform its functions in a fair and equitable manner and could serve to undermine public confidence in the system.

Excluding warnings from the appeal process will also have a negative effect on the workplace impacting on employees in general not just those who have been dismissed. If the warning process is irrelevant to an application for unfair dismissal many employers will not bother with warnings about unsatisfactory performance before dismissing an employee. This will obviously bring increased tension and disharmony in the workplace as well as increased hardship for the employee who is not given an opportunity to overcome any alleged shortcomings and simply shown the door.

Similar concerns arise in relation the amendment allowing applications made by employees of small business to be dismissed without a hearing if outside the jurisdiction of the Commission or deemed to be frivolous. Under this proposal applicants may be denied the right to a hearing to argue questions of jurisdiction and/or the merit of the matters. The applicant must be invited to provide further information before a decision is made however this is not a adequate substitute for a proper hearing where the employee's case can be argued and an employer's arguments challenged and tested in accordance with the standard of proof required in these matters. Compounding this injustice, the proposed amendments also prevent any appeal against an order made under this section. The right to be heard is fundamental to any bona fide judicial process.

The ANF is also concerned that such amendments contravene sections of the Termination of Employment Convention (C158) specifically in relation to Article 8 and Article 9.

Article 8 Point 1 states that: *"A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator."*

It is not unreasonable to suggest that having an entitlement to appeal implies the right to a hearing. The proposed amendments will remove that right in some cases.

Article 9 Point 1 states that: *"The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified."*

The amendments which remove the Commission's general discretion to consider "other matters" undermine the Commissions obligation under Article 9 to examine the other circumstances relating to the case.

3. Provisions which relate to all unfair dismissal applications

The ANF is opposed to further amendments to the legislation which will limit the access and reduce the remedies available to all employees. The amendments provide that:

- The Commission have regard to the conduct of the employee that contributed to their dismissal including its effect on the safety and welfare of other employees.

  In most circumstances it would be expected that the Commission already takes the conduct of the employee into consideration; Similarly the other part of the amendment relating to safety and welfare also appears unnecessary and can already be dealt with under section 170CG(3)(e) – any other matters considered relevant.

- Dismissal for operational reasons can be unfair only in exceptional circumstances.

This amendment offers an escape route for employers who can construct an argument around operational factors. It shifts the onus onto the employee to show that the operational reasons are not valid and places responsibility on the applicant to argue exceptional circumstances. Either way it directs an unfair burden onto the employee who is always disadvantaged by difficulties in accessing relevant information to argue their case.

- Reinforcing that reinstatement is the primary remedy.

  The ANF agrees that the primary objective following an unfair dismissal finding should be the reinstatement of the employee to their previous position without any loss of entitlements or benefits.