Submission no: 7
Received: 14 February 2003

JOBWATCH
Employment Rights Legal Centre

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

Job Watch submission to the Senate Employment, Workplace Relations and Education Legislation Committee

14 February 2003

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Job Watch Inc: a Victorian Community Legal Centre specialising in employment and industrial rights.

1. Job Watch Inc is a community legal centre specialising in employment law. Job Watch was established in 1980 and is the only service of its type operating in Victoria. The organisation is funded primarily by the Victorian State Government (the Department of Innovation, Industry and Regional Development – Industrial Relations Victoria) and also receives funding from the Office of the Employment Advocate.

2. Job Watch's core activities are:

   (a) The provision of advice and information to Victorian workers via a free and confidential telephone advisory service[1];

   (b) A community education program that includes publications, information via the Internet, and talks aimed at workers, students and other organizations;

   (c) A legal casework service for disadvantaged workers and workers experiencing abuses of human rights;

   (d) Research and policy advice on employment and industrial law issues;

   (e) Advocacy on behalf of those workers in greatest need and disadvantage.

3. Job Watch's client base

3.1 Job Watch has a state-wide focus and services in excess of 20,000 Victorian workers annually. We have played a vital role in providing advice and assistance about mainstream employment issues to the workforce since the deregulation of the Victorian industrial relations system in the early 1990s and subsequent dismantling of the state industrial relations system.

3.2 Job Watch maintains a database record of our callers, which assists us to identify key characteristics of our clients and trends in workplace relations.

3.3 Our records indicate that our callers have the following characteristics:

   (a) the majority are not covered by federal awards or agreements and are only entitled to the minimal employment conditions contained within Schedule 1A of the *Workplace Relations Act 1996* ("the Act");

   (b) the majority are not union members;

   (c) a large proportion are employed in businesses with less than 20 employees;

   (d) a significant number are engaged in precarious employment arrangements such as casual and part-time employment or independent contracting;

   (e) many are in disadvantaged bargaining positions because of their youth, sex, racial or ethnic origin, socio-economic status or because of the potential for exploitation due to the nature of the employment arrangement (for example, apprentices or trainees).

[1] The Job Watch advice service has incoming 11 phone lines, including a designated 1800 telephone number which prioritises calls from rural and remote areas of Victoria.

Termination of employment

4. Job Watch views termination of employment and its effects on individuals as a serious problem affecting society. In our experience, termination of employment can cause serious financial problems for individuals and families, it causes severe emotional distress, it can place pressure on relationships and families, and it can exacerbate societal problems such as unemployment and financial insecurity.

5. Job Watch believes that statutory regulation over the manner in which termination of employment may occur is essential. Such regulation should provide speedy access to resolution of disputes arising from termination of employment and relief from the effects of unfair or discriminatory termination which is cost-effective for both workers and business.

6. Statutory regulation of termination of employment and the provision of relief from its effects is crucial in reducing the incidence of unfair and discriminatory dismissal. If statutory regimes are difficult to access or are weak, the incidence of unfair and discriminatory dismissal will increase.

7. Job Watch supports statutory regimes which provide broad access to relief from termination of employment and opposes moves which would narrow access to such schemes.

8. Division 3 of Part VIA of the *Workplace Relations Act 1996* ("the Act") is a statutory scheme providing recourse to the Australian Industrial Relations Commission in relation to termination of employment. The *Workplace Relations Amendment (Termination of Employment) Bill 2002* ("the Bill") proposes a number of amendments to this scheme which would narrow access to it.

9. The following submissions oppose this Bill. The submission refers to three parts of the Bill: "Part One: Proposals relating to employees of small business"; "Part Two: General proposals"; "Part Three: Proposals to widen the scope of the Act".

PART ONE: PROPOSALS RELATING TO EMPLOYEES OF SMALL BUSINESS

Termination applications affecting "small business"

10. The Bill represents the Government's seventh attempt to create measures which would restrict or abolish access to the federal unfair dismissals scheme for employees of small businesses. Job Watch is becoming increasingly concerned at the confusion these failed attempts are causing business and employees alike.

11. In summary, the Bill would restrict access to the federal unfair dismissals scheme for employees of small business by:

    (a) increasing the period of employment service required to qualify for access unfair dismissal from three to six months;

    (b) limiting the power of the Australian Industrial Relations Commission ("the Commission") to order compensation in lieu of reinstatement from its current limit 26 weeks salary to 12 weeks salary;

    (c) allowing the Commission to dismiss certain claims without a hearing;

    (d) preventing the Commission from considering all the circumstances of the case when considering applications for unfair dismissal from employees of small business.

12. Job Watch endorses many of the arguments that have previously been made in opposition to proposals that would prevent or limit access to the federal unfair dismissals scheme for employee of small business[2]. We are particularly opposed to the form of the proposal in this Bill because:

(a) The definition of "small business employer" is flawed;

(b) Inferior treatment of employees of small business is unjust and would exacerbate existing disadvantages suffered by these workers

(c) The Government remains unable to make the case that justifies restrictions on access to unfair dismissal for employees of small business.

(d) Some of the arguments that the Government has raised in support of this Bill are flawed or wrong

13. The small business definition

13.1 The Government's Bill seeks to introduce restrictions on access to the scheme for employees of "small business employers". The Bill's defines a small business employer as one with less than 20 employees, not counting casual employees with less than 12 months "regular and systematic" service.

13.2 The Government's definition of a small business employer means that businesses with many more than 20 employees could be considered "small" for the purposes of the Bill. Many large businesses employ more casual employees than permanent workers. Large businesses who ensure that their staffing structure includes a majority of casual employees with short periods of service could restrict their employee's rights to access unfair dismissal under this proposal. The definition therefore creates an incentive for employers to:

(a) increase their numbers of casual employees;

(b) offload casual employees just prior to their twelve-month anniversary date[3].

13.3 The Bill's definition of a small business employer may encourage casual, short-term, precarious employment and is a measure which could pose serious threats to security of employment for workers in small and indeed in larger business. Such a policy is not in the interest of workers or the community at large, it does nothing to further the objects of the Act and it should be opposed.

14. The injustice of a small business distinction

14.1 JobWatch believes that all workers are entitled to equal and fair treatment, regardless of the size of their employer's business. Termination laws should foster fairer outcomes and greater equity for all workers, not create a class of disadvantaged workers with limited rights. Restricting small business employees

[2] see in particular "Labor Senators Report", *Report on the provisions of Bills to amend the Workplace Relations Act 1996*, Senate Employment, Workplace Relations and Education Legislation Committee, May 2002, pp.33-39; "Democrats Minority Report" *ibid*, pp.58 - 60; and further Job Watch submission in respect to the *Workplace Relations Amendment (Fair Termination) Bill 2002* (Senate Employment, Workplace Relations and Education Legislation Committee), April 2002

[3] Casual employees with less than twelve months service are not eligible to make applications for unfair or unlawful dismissal under the federal scheme: s.170CC *Workplace Relations Act 1996* and reg.30B(1)(d) *Workplace Relations Regulations*. Casual employees just short of twelve months service, who are dismissed simply because their continued employment will take their employer out of the definition of a "small business employer" would therefore have no recourse for unfair dismissal. There is therefore no legislative impediment to a business "offloading" casual employees whose continued employment will disqualify that business from the small business concessions.

from access unfair dismissal laws may mean that employers can dismiss them for no reason or for reasons that are spiteful, capricious or unfounded.

14.2 Restrictions on access to unfair dismissal for employees of small business will add to an already long catalogue of disadvantage suffered by these workers as a group. Full-time employees working in small businesses are less likely to have superannuation contributions made on their behalf than their counterparts in larger workplaces (88% compared to 96%), less likely to receive holiday leave, sick leave or long service leave and less likely to be a union member (9% compared to 42% of businesses with 20 or more employees)[4]. Further, employees in small businesses earn around 12% less than the average amount earned by employees across all businesses.[5]

14.3 The proposed legislation will have a particular detrimental effect on the rights of Victorian and Territory workers. Forty-four per cent of Victoria's 2.3 million workers are employed in businesses with less than 20 staff.[6] Unlike workers from the other states, this group of workers do not have access to state industrial relations systems, which do not exclude small business employees. The small business proposals in this Bill would unfairly disadvantage Victorian workers when compared to other Australian workers.

15. <u>The case for small business concessions</u>

15.1. Job Watch is of the view that unfair dismissal laws must balance the interest of the community in allowing small and large businesses to engage in commerce and to create employment without impediment, with the interest of the community in secure employment and the need to protect workers from arbitrary, unfair and discriminatory termination of employment. Accordingly, Job Watch does not agree that restricting access to unfair dismissal is a positive policy initiative simply because some employer groups suggest that their members would support it. Similarly, Job Watch does not agree that restricting access to unfair dismissal for small business is a positive policy initiative simply because it will save those businesses money. Rather, Job Watch is of the view that that the Government should make out the case that small business will derive such a positive benefit from unfair dismissal restrictions that the public interest in protection from unfair dismissal is outweighed.

15.2 To date, the Government has failed to make out the case for restricting employees of small business from access to unfair dismissal. The foundation-stone of the Government's argument in favour of this case is its "identification of business and community concerns that termination of employment provisions are an employment disincentive for small business"[7]. In *Hamzy v Tricon International Restaurants trading as KFC,*[8] the Full Court of the Federal Court, in considering the validity of regulations excluding casuals from unfair dismissal laws, discussed the link between employment growth and the strength of unfair dismissal laws concluded:

"Whether the possibility of encountering an unlawful dismissal claim makes any practical difference to employers' decisions about expanding their labour force is entirely a matter of speculation. We cannot exclude such a possibility; but likewise, there is no basis for us to conclude that unfair dismissal laws make any difference to employers' decisions about recruiting labour."

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[4] Australia Now: Australian Social Trends 1997 Work-Paid Work: Small business www.abs.gov.au

[5] *ibid*

[6] The "overwhelming majority" of Victoria's estimated 263,000 workplaces are small businesses employing less than 20 employees (ACIRRT (July 2000) University of Sydney, *Earnings Employment Benefits & Industrial Coverage: A Report to the Victorian Industrial Relations Taskforce*, vol.1, p.5).

[7] Explanatory Memorandum, *Workplace Relations Amendment (Termination of Employment) Bill 2002*, p.9

[8] [2001] FCA 1589 Page 16 of 18

14.3 The most recent research conducted in this area confirms that only a tiny percentage of businesses believe unfair dismissal laws are an important impediment to taking on new employees[9]. Indeed, while some business people believe unfair dismissal laws increase their business costs, a larger number do not[10].

14.4 In August 2001, the Government introduced a series of reforms to the federal unfair dismissals scheme designed to address the alleged unfair dismissal "burden" for the small business sector and its "longstanding concerns in respect of its capacity to effectively participate in Commission processes"[11]. Recent surveys of business confirms that these changes were ineffective. Over 90% of businesses surveyed were either unaware of the changes, felt that the changes had no effect on their business, or felt that the changes were bad for business[12].

14.5 The Government's key argument in favour of the case to restrict access to unfair dismissal for employees of small business remains unproven. The majority of small businesses do not see the unfair dismissal scheme as an impediment to hiring staff, and do not believe legislative concessions to small business has been of any real benefit.

15. Absence of a dedicated human resources professional

15.1 Job Watch takes issue with the Government's assertion that the absence of human resources professionals or specialised personnel departments among small businesses or the size of the businesses themselves warrants unfair dismissal concessions[13]. It should be remembered that one of the objectives of Division 3 of Part IVA of the Act is to ensure that parties to the employment relationship are accorded a "fair go all round"[14]. Neither the absence of a dedicated human resources specialist nor the size of the business generally justifies an employer's failure to accord an employee a "fair go all round" on termination. Job Watch respectfully endorses the comments of Commissioner Grainger in *Sykes v. Heatly Pty Ltd (t/as Heatly Sports)*[15] who stated:

"No employer should ever consider that the provisions of s.170CG(3)(da) could be used as a shield behind which to hide when they had engaged in conduct which is improper, belligerent and bullying. Commonsense courtesies of conduct ought to exist in any workplace, whatever the size of the employer's undertaking, establishment or service, and the respondent in this case has clearly not complied with those courtesies."

16. Cost effectiveness of the present system

16.1 The Government's assertions as to the onerous and costly nature of the Commission's unfair dismissal scheme are at times discoloured by inaccuracy. In particular, its assertion that "[c]urrently, a hearing is convened in all unfair dismissal cases with the resulting imposition of cost and time to the businesses

[9] "That for between 1.4 and 5.6 per cent of businesses (depending on whether one looks at the AWIRS or various Yellow Pages surveys) unfair dismissal laws are among the most important impediments to taking on new employees…" Don Harding, "The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses", Melbourne Institute of Applied Economic and Social Research, 29 October 2002, p.iii

[10] In the Harding survey, only 33.4% of businesses believed that unfair dismissal laws increased business costs; 34.7% felt that unfair dismissal laws did not increase their costs "at all", Don Harding, *ibid*, p.19

[11] Department of Employment, Workplace Relations and Small Business, submission to the Senate Employment, Workplace Relations, Small Business and Education Legislation Review Committee, 2000, p.26

[12] Don Harding, "The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses", Melbourne Institute of Applied Economic and Social Research, 29 October 2002, p.10

[13] Explanatory Memorandum, *Workplace Relations Amendment (Termination of Employment) Bill 2002*, p.9

[14] s.170CA(2), *Workplace Relations Act 1996*

[15] Print PR 914149, Grainger C, 6 February 2002

concerned…" is manifestly wrong[16]. The Commission's annual report in 2001 - 2002 shows that of 8600 applications finalised during the reporting period, less than 300, or just over 3 per-cent involved a substantive hearing[17]. Three quarters of unfair dismissal applications are resolved through the Conciliation process.

16.2 The resultant scheme is one where resolutions can be achieved in most cases without a hearing, without the preparation of <u>any</u> legal document (such as affidavit evidence, a statement of claim or defence, preparation of documents for discovery or an outline of submissions) and indeed in some cases without recourse to legal advice or representation at all. In our view, this is an appropriate balance between providing aggrieved individuals with a forum to resolve disputes without resorting to Court, with the need to ensure a streamlined and affordable system.

16.3 This system might be contrasted with the scenario where a worker opts to have recourse to a Court, in respect to a wrongful dismissal or breach of contract action. In such cases businesses will always need to file legal documents in their defence, and such documents will almost always be prepared in conjunction with costly legal advice.

Increasing the qualifying period

17. The Bill proposes to increase the period of employment service required to qualify for access unfair dismissal from three to six months, for employees of small business only.

18. We repeat our objections to small-business specific restrictions on the basis that they are unjust, and that the case in favour of them has not been made out. We further object to this proposal on the basis that it proliferates and extant legislative anomaly.

19. <u>Legislative confusion</u>

20.1 Since reforms to the Act in August 2001, it is now the case that employees must complete a 3 month qualifying period, before becoming eligible to access remedies under the Act in relation to unfair dismissal[18].

20.2 The Act had already allowed the Regulations to exclude workers from the scheme who are serving a "probationary or qualifying period" when terminated[19]. Regulation 30B of the *Workplace Relations Regulations*, excludes employees serving a probation or qualifying period determined in advance of the commencement of employment, of three months length unless a longer period is reasonable, from access to remedies under the Act not just in relation to unfair dismissal, but in relation to all remedies arising from the termination of employment provisions (including remedies arising from harsh, unjust unreasonable dismissal, the failure to give notice on termination, or dismissal for a prohibited discriminatory reason).

20.3 Accordingly, the scheme is now complicated by dual qualifying exclusions provisions which appear to overlap. Even more confusingly, two alternative strains of interpretation of these provisions have emerged from decisions of the Commission.

20.4 In *NT Friendship & Support Inc v. McCarthy*[20] a Full Bench of the Commission stated:

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[16] Explanatory Memorandum, *Workplace Relations Amendment (Termination of Employment) Bill 2002*, p.10
[17] See Table 6 - Summary of Outcomes of Termination of Employment Matters finalised during 2001 - 2002, Australian Industrial Relations Commission, *Annual Report 2001 - 2002*, p.15
[18] ss.170CE(5A) & (5B), *Workplace Relations Act 1996*
[19] s.170CC, *Workplace Relations Act 1996*
[20] Print PR925075, Ross & Lawler VPP, Roberts C, 29 November 2002 at [30]

" For our part we doubt the correctness of the Commissioner's conclusion that `whenever an employer and employee have negotiated a probationary period shorter or longer than three months in writing before the commencing of employment that will be a qualifying period of employment for the purposes of s.170CE (5A) and (5B).' If the legislative intent was for s s.170CE (5A) and (5B) to extend to both qualifying and probationary periods then it could easily have so provided."

20.5 Conversely in *Dunstan v. Department of Justice*[21], Deputy President Kaufman, while acknowledging the views of the Full Bench in *NT Friendship*, disagreed:

"The full bench seems to have drawn a distinction between qualifying and probationary periods, although the full bench in [36] then observed that the retention of the expression "or a qualifying period of employment" in the regulation seems to serve no practical purpose in the light of the new statutory provisions . In my respectful opinion the terms are used interchangeably. .. To treat a probationary period as something different from a qualifying period of employment could lead to anomalous results that do not, to me, seem to have been intended by the Parliament"

20.6 If the view of the Full Bench is preferred, the scheme currently adopts a two-tiered qualifying period exclusion. On the one hand, an automatic exclusion operates for three months in respect of unfair dismissal claims only, unless an alternative agreement is reached. On the other hand, an exclusion against all claims operates if it is agreed to, and if it is reasonable.

20.7 The Government's Bill seeks to proliferate this confusion by introducing a third tier of exclusion. This tier would automatically exclude employees of "small business employers" who have less than six months service from unfair dismissal only.

20.8 The resultant legislative position is a collision of statutory uncertainty. Some employees are excluded from some types of claims in some circumstances. If the Government's assertions about the complexity of the current system are accepted, we wonder how business will grapple with the three-tiered qualifying exclusion.

20.9 If the Government's stated objective of reducing confusion in its unfair dismissal scheme is to be reached, the multi-layered qualifying exclusion ought not be adopted. Job Watch believes the original position that required a probationary period, of reasonable length, about which the employee was properly informed before the commencement of the employment, should be reinstated.

Dismissal for vexatiousness without a hearing

21. The Bill proposes to allow the Commission to dismiss applications for unfair dismissal where it appears that the Commission has no jurisdiction in the matter[22], or where it appears the claim is frivolous, vexatious or lacking in substance[23]. The intention of the Bill is that the Commission may determine such applications without a hearing or "on the papers"[24].

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[21] Print PR926337, Kaufman SDP, 7 January 2003

[22] Clause 4, Schedule 2, *Workplace Relations Amendment (Termination of Employment) Bill 2002* (new s.170CEC(2))

[23] Clause 4, Schedule 2, *Workplace Relations Amendment (Termination of Employment) Bill 2002* (new s.170CEC(3))

[24] Second Reading Speech, *Workplace Relations Amendment (Termination of Employment) Bill 2002* p.2; Clause 4, Schedule 2, *Workplace Relations Amendment (Termination of Employment) Bill 2002 (*new s.170CEC(4))

21. We repeat our objections to small-business specific restrictions on the grounds outlined above. We further object to this proposal on the basis that there may be difficulties in its practical application.

22. The dangers of unsworn evidence

22.2 Currently, the Commission uses a "Form R21A Motion to Dismiss the Application for want of Jurisdiction" to allow a Respondent to indicate its request that an application be struck out for want of jurisdiction. The Form is in a "tick the box" format. A Respondent simply indicates the ground of the objection by ticking the appropriate box. A "jurisdictional hearing" is then convened to hear evidence and determine the motion.

22.3 An important aspect of a jurisdictional hearing is the determination of fact. Facts which might arise for determination include whether a probationary period existed, whether casual service was beyond twelve months, whether a training agreement existed and so on. If objections may now be raised on the basis of vexatiousness, the factual questions for determination at the stage where an objection is lodged are even more considerable.

22.4 One wonders how such questions are to be determined without a hearing. To put the issue bluntly, in a situation where an employee alleges he/she was dismissed for poor performance and that this dismissal is unfair, what is to stop an employer making an assertion on the papers that the employee was guilty of theft ? In Job Watch's submission, sworn evidence should be essential before an application may be dismissed out of hand for any reason, including alleged vexatiousness. If sworn evidence is not presented, any decision is simply a guess that assertions having been made are true.

22.5 We acknowledge that the Commission could require applications for strike out under a new s.170CEC to be accompanied by affidavit material. But it seems clear that there should be an opportunity for the applicant to respond with similar sworn material. We then arrive a situation where the Commission may have a factual conflict in sworn evidence presented to it.

22.6 This is especially likely where neither party's evidence has been tested. In such situations, there appears no alternative but to convene a hearing to allow the evidence to be tested, and to allow the Commission to make a factual determination as to which of the conflicting positions should be preferred. There is no easy way around conflicting evidence.

22.7 In Job Watch's experience, unfair dismissal claims often involve conflicting questions of fact. Given this reality, it is our view that this new proposal for dismissal of applications without a hearing will simply not work.

Reduction of compensation

23. The Bill proposes to limit the power of the Commission to order compensation from its current limit of payment in lieu of 26 weeks salary to 12 weeks salary.

24. We repeat our objections to small-business specific restrictions on the grounds outlined above. We further object to this proposal on the basis that it would worsen an already unjust limitation on the Commission's power to properly compensate a victim of unfair dismissal.

25. The injustice of the compensatory cap

25.1 In Job Watch's view, the current limit on the Commission's power to award compensation to workers who have been unfairly dismissed beyond six months in

lieu of salary means that the federal scheme will often correctly recognise a situation as being unjust, but will fail to properly remedy it. The system is hamstrung by an arbitrary and inflexible compensation cap.

25.2 The compensation cap permeates every aspect of the scheme. It influences every settlement discussion and ultimately, every decision of the Commission. A dispute resolution process which should be directed at a genuine attempt to restore a wronged individual to the position they would have been had the wrong not occurred is either a cheap haggle and the payment of some "piss of money" at the conciliation, or a hollow and sometimes almost sardonic victory at the hearing.

25.3 Consider for example the recent matter of *Kinder v. Woods & Reeves Pty Ltd*[25]. On this Commission's findings, this case involved:

"a woman…

- *with 19 years service with an employer as a book keeper*
- *who is reported to police without any basis of incrimination*
- *where allegations or like inferences of wrongdoing are communicated to others*
- *who comes under suspicion of misappropriation of monies,*
- *while ill with breast cancer, and*
- *working abbreviated hours, and*
- *is unfairly dismissed as if for serious and wilful misconduct, and*
- *informed of this by letter delivered by taxi"*

25.4 The Commission recognised that in light of the employee's work history age, and employment circumstances that it was likely that she would have been employed (but for the termination of her employment) for a period of at least two years. In addition to the distress experienced by the worker in respect of the trauma of losing her job, her "economic loss" in this case can be conservatively estimated at close to two years salary.

25.5 While the Commissioner deserves commendation for his effort to properly compensate the worker, and for taking as he did to the unusual step of awarding compensation for the shock, humiliation and distress associated with the dismissal, the worker received not one cent more than she would have earned in the six months following termination. While the Commission in this case made every attempt to arrive at an outcome that would return the worker to the position she would have been, but for the injustice that occurred, the federal unfair dismissals scheme prevented it from even getting half way.

25.6 Job Watch opposes further limitations on the power of the Commission to order compensation in lieu of reinstatement under any circumstances. We call on the Parliament to seriously reconsider this outdated and unjust shackle on the remedial force of the Act.

Limitations on the matters which the Commission may have regard to.

26. Currently, in determining whether a dismissal is harsh, unjust or unreasonable, the Commission should have regard to matters outlined by s.170CG(3) of the Act, inclusive of "any other matter the Commission deems relevant". The Bill proposes to prevent the Commission from considering all the circumstances of the case when considering applications for unfair dismissal from employees of small business by requiring it have regard only to those matters specified by s.170CG(3).

[25] Print PR917711, Lewin C, 2 July 2002

27. JobWatch repeats its objections to small-business specific restrictions on the grounds outlined above. We further assert that this is a manifestly unjust proposal. To allow the Commission to examine all the circumstances of a case when considering termination from a business with more than 20 employees, but to restrict this power where a business has less than 20 employees is illogical and unjustified.

PART TWO: GENERAL PROPOSALS

Restriction of access to unfair dismissal where the termination arises as a result of operational requirements

28. The proposed operational requirements reform

29.1 Currently, when considering whether a termination of employment is harsh, unjust or unreasonable, the Commission is required by s.170CG(3) of the Act to look at whether there was a valid reason for the dismissal relating to the capacity or conduct of the employee, or the operational requirements of the employer's business, and whether there was procedural fairness in the manner the dismissal was effected. The Commission approaches this section in a broad manner, in attempt to ensure that a "fair go all round" is accorded to both parties[26].

29.2 The Bill proposes to alter this situation by providing that terminations caused by the operational requirements of the employer's undertaking will not be unfair other than in exceptional circumstances[27].

30.2 JobWatch opposes this reform because it would deprive workers whose termination of employment is plainly unfair from accessing relief from the Commission. We are also concerned at the practical complexity this reform would bring.

31. Harsh dismissals which involve operational requirements

31.2 Terminations which arise due to operational requirements are often still harsh. In a recent submission to the Commission in support of the *Redundancy Test Case*, Job Watch related the story of "Steven", who in responding to a recent survey said:

> *"I had brought property 3 months earlier – I had clarified with Operations Manager whether there were any concerns with my position. They said no. On the day I was retrenched I had asked how long they knew about situation – they said 6 months. They lied to me. My relationship broke down. Feel helpless and something taken from you. (Steven – 31 - Call Centre Manager 18 months)"*[28]

A similarly distressing response came from Fred:

> *"My wife and myself. My wife could not work. On scrap heap. Had 2 bob in pocket and no money in bank. Had to wait for next Centrelink cheque. It's terrible. Think lower than low. To see my wife's face when lost home. At mercy of low life people. (Fred – 64 - Console Operator 4 years)"*[29]

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[26] see *Windsor Smith v. Liu* M Print Q3462, Guidice J, Polites SDP, Gay C, 13 July 1998, p.5

[27] Clause 8, Schedule 3, *Workplace Relations Amendment (Termination of Employment) Bill 2002*

[28] Outline of contentions, *Application to vary various Awards in relation to Redundancy Provisions* (C2002/4087 & ors), JobWatch, p.20

[29] Outline of contentions, *Application to vary various Awards in relation to Redundancy Provisions* (C2002/4087 & ors), JobWatch, p.35

31.3 The feature of the present system is that the Commission is empowered to look at all the circumstances of the case. A particular purpose of the Commission's enquiry will be to ensure that a "fair go all round" is accorded to both parties. If Steven's case is considered, while it may be that operational requirements are the reason for the dismissal, the manner of the termination seems plainly harsh. If the effects on Steven were anything like those experienced by Fred, it would seem essential that our legal system provide him with a remedy.

31.4 Job Watch recently appeared before the Commission for a worker whose employer argued that the termination of her employment was justified by its operational requirements. *Kelly Ritchie v. Rosbi Pty Ltd*[30] involved a worker who lost her job without being told why. She even wrote to her employer requesting an explanation and was ignored. In a hearing eventually convened almost ten months later, Kelly Ritchie finally learned that the cancellation of a service agreement had caused the termination of her employment. After losing a permanent full-time job without knowing why, the worker was forced into short-term insecure employment for a period of over eight months. The Commission found that while the termination of Kelly Ritchie was likely to be justifiable by the cancellation of the service agreement, the employer's failure to provide her with any consultation or notification about the termination made it harsh. Compensation was therefore ordered.

31.5 In a system reformed by this Bill, Steve and Kelly Ritchie would be denied a remedy. Clear injustices would remain uncorrected.

32. <u>Practical effect of this reform</u>

32.1 It appears that the Bill's operational requirements reform would mean that a jurisdictional issue would arise where it is alleged that operational requirements caused a termination. A similar situation presently exists where there is an allegation that a termination of employment did not occur at the initiative of the employer. In such situations, an Respondent to an unfair dismissal claim may lodge jurisdictional objection, and a hearing is generally convened to determine whether the objection is upheld or not.

32.2 We assume that a similar process would be used to administer a new operational requirements exclusion. An application would be lodged, an objection would be raised that the termination is beyond the jurisdiction of the Commission because it was caused by operational requirements and a hearing would be held to determine whether this was indeed the case.

32.3 At present, where a respondent to an unfair dismissal claim seeks to argue before the Commission that the termination is not unfair because it arose due to operational requirements, the central question for determination by the Commission is whether such operational factors do indeed exist. In *Tasmania Development & Resources v. Martin*[31], Justice Kiefel addressed the question of the meaning of an "operational requirements" provision:

"*What is, however, required by the provision is that there be a factual basis for a conclusion that there were requirements arising from the way in which the undertaking operated which, in turn, necessitated the termination of the employment the subject of the contract. It is difficult then to consider that it would ever be sufficient for an employer merely to rely upon the abolition of the position or cessation of the employment as the operational undertaking itself, since it should*

[30] Print PR926718, Mansfield C, 16 January 2003
[31] [2000] Federal Court of Australia 414 (5 April 2000)

be able to say what requirements of finance or efficiency dictated the need for the termination."

32.4 As discussed above at [16], it would be manifestly unfair for the Commission to simply dismiss an application on a mere assertion. If an objection as to operational requirements were raised, the Commission would doubtless need to convene a hearing, and determine the sorts of questions that Justice Kiefel discussed in *Martin*.

32.5 A new jurisdictional limitation on terminations caused by operational requirements therefore does nothing to improve the current system. The Commission will need to hear arguments about whether operational requirements existed just as it does now. All the reform would do is introduce an additional layer of complexity: where the objection is not upheld, another hearing would be required to determine the substantive application. The Commission might have just as easily heard and determined the substantive application.

Other General Proposals

33. <u>The effect of an employee's conduct on the safety and welfare of other employees</u>

33.1 The Bill proposes to amend the current definition of a "valid reason" for dismissal by requiring the Commission to have regard to whether the employee's conduct had an impact on the health and safety of other employees in examining this issue[32].

33.2 It is well established that in examining whether a dismissal is harsh, unjust or unreasonable, the Commission should look at both the effect of the termination on the employee, and the gravity of the employee's misconduct[33]. JobWatch supports the current approach of the Commission, expressed in many of its decisions, that in examining the question of whether there is a "valid reason" for a dismissal, that all the circumstances of the case should be considered, included whether the behaviour of the employee impacted on the health and safety of other employees[34].

33.3 Given that the Act already allows for this matter to be taken into account, JobWatch views this proposal as unnecessary.

35. <u>Reinstatement</u>

35.1 The Bill proposes to insert a provision that requires the Commission to first consider whether reinstatement of the worker's lost job is appropriate, before considering the question of compensation[35].

35.2 It should be noted that s.170CH(6), which empowers the Commission to make orders of compensation in lieu of reinstatement already includes the qualification that the Commission may only consider this option "if the Commission thinks that the reinstatement of the employee is inappropriate".

35.3 In our submission this proposed amendment to the Act does nothing more than emphasise that reinstatement is the primary remedy to be considered arsing from a finding of unfair dismissal. The Commission already recognises this to be the case[36].

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[32] Clauses 3 & 6, Schedule 3, *Workplace Relations Amendment (Termination of Employment) Bill 2002*

[33] see *Bostick (Australia) Pty Ltd -v- Gorgevski (No 1)* (1992) 41 IR 452 at 459

[34] see for example *Smith v. Spicers Paper*, S Print R8909, Lawson C, 7 September 1999; *Sheppard v. Curragh Queensland Mining Limited* B Print R8081, Hoffman C, 12 August 1999; *Kovacevic v Pirelli Cables Australia Limited* Print S2575, Lawson C, 25 January 2000; *Robin v Worley ABB* Print PR910167, Hingley C, 10 October 2001

[35] Clause 9, Schedule 3, *Workplace Relations Amendment (Termination of Employment) Bill 2002*

[36] *Wark v. Melbourne City Toyota* M Print R4864, Williams, Acton SDPP, Tolley C, 20 May 1999 at [12]

35.3 Job Watch opposes this proposal as it is unnecessary and does nothing but add to the size and complexity of this Division of the Act.

36. Contributory conduct of employees

36.1 The Bill proposes to insert a provision that requires the Commission to examine the question of whether the employee's misconduct may have contributed to the decision to terminate the employment and if so, reduce the compensation payable to that worker accordingly[37].

36.2 The current s.170CH(7) which list those matters the Commission should have regard to when considering an award of compensation, includes at subsection (e) "any other matter the Commission considers relevant". The Commission uses this section to take into account the impact of the behaviour of employees on the reason for dismissal and if necessary, discount compensation accordingly[38].

36.3 Accordingly, Job Watch opposes this proposal as it is unnecessary and does nothing but add to the size and complexity of this Division of the Act.

PART THREE: WIDENING THE SCOPE OF THE ACT

37. The Bill proposes to widen the application of this scheme to all Australian employees whether covered by a Federal Industrial Instrument or not, by preventing employees from accessing State unfair dismissal schemes.

38. There is no Victorian statutory termination of employment scheme. This proposal will have no apparent effect on Victorian workers. We provide no comment on this proposal.

[37] Clause 13, Schedule 3, *Workplace Relations Amendment (Termination of Employment) Bill 2002*
[38] see for example *Goldsworthy v. Polyseal Pty Ltd* Print PR920504, Duncan SDP, 25 July 2002 at [176]