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Workplace Relations Amendment (Termination of Employment) Bill 2002

Submission to the Senate Employment, Workplace Relations and Education Committee

This submission addresses the proposals in the Workplace Relations Amendment (Termination of Employment) Bill 2002: notably the attempt to "cover the field" to the exclusion of State law in relation to the regulation of unfair dismissals, at least where corporations are concerned; and the introduction of provisions which would formally enshrine a distinction between "small businesses" and larger employers.

In doing so, it comments in particular on the "evidence" on which the government seeks to rely in arguing for a winding-back of unfair dismissal laws.

COVERING THE FIELD?

The effect of the amendments in Schedule 1 of the Bill would be to ensure that workers employed by almost all corporations in Australia could only bring unfair dismissal proceedings under the Workplace Relations Act 1996, if at all. To the extent that such workers currently have access to a State tribunal empowered to hear claims of unfair dismissal, that access would be withdrawn.

In what follows, I will suggest that although these amendments would for most purposes be constitutionally valid, for a number of important reasons they represent a retrograde step in policy terms.

The Commonwealth Parliament is empowered under s 51(xx) of the Constitution to make laws with respect to trading, financial and overseas corporations. Although the scope of that power is yet to be fully tested, and there is no truly definitive High Court decision on the point, there is every reason to believe that the amendments in Schedule 1 would, if passed, be a valid exercise of that power.[1]

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1 See the analysis in Stewart, "Federal Labour Law and New Uses for the Corporations Power" (2001) 14 *Australian Journal of Labour Law* 145 at 155–160 and the sources cited there.

If so, then by virtue of s 109 of the Constitution the new provisions would override any State laws that purported to allow those employed by "constitutional corporations" to lodge a complaint of unfair dismissal in a State tribunal, even where those workers were not otherwise regulated by federal awards or agreements.

One possible exception would be in relation to State instrumentalities which fall within the definition of a "trading" or "financial" corporation. The High Court has taken the view that the Commonwealth's power to regulate State public sector employment is impliedly limited in various ways under the Constitution. Nevertheless, it appears that in most cases federal law may validly apply to the dismissal of a State public sector worker on grounds related to their conduct or capacity, though not where they have been made redundant.[2]

However the validity of a measure is one thing, its desirability in policy terms is another.

For many years now, along with other commentators and lobby groups, I have advocated the creation of a unitary system for the regulation of industrial relations and employment conditions. Australia is too small in economic terms to have six such systems (or seven, counting what is left of the Victorian system), and for constitutional, historical and political reasons the boundaries between those systems are far from coherent. Inefficiencies and overlaps abound.

From that viewpoint, there is some attraction in the Commonwealth Parliament taking a first step towards rationalising industrial regulation by ensuring that the great majority of employers are subject only to a single set of laws on employment termination.

Nevertheless, I would strongly oppose the current proposals for three key reasons.

The first is that they seek to override State unfair dismissal laws in favour of a federal regime that is inferior in both design and operation.

Aside from the gaps in coverage which are considered below, the provisions in Division 3 of the Part VIA of the Workplace Relations Act and their attendant regulations are (much like the remainder of the statute) unnecessarily complex and unduly prescriptive. They are very hard for ordinary workers or managers to understand, necessitating legal advice for even the simplest procedures. Instead of simply empowering the Australian Industrial Relations Commission (AIRC) to deal with certain claims and providing broad guidance as to how to do so, as most State laws do, the legislation seeks to regulate each step of the process in ever-increasing detail. As is generally the way when Parliament

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2 See Creighton and Stewart, *Labour Law: An Introduction*, 3rd ed, Federation Press, pp 89–92, and especially the cases cited in fn 198.

tries to anticipate and counter every eventuality, this level of detail simply creates potential gaps and uncertainties for litigants and their lawyers to exploit.

Secondly, the proposed amendments would not in fact contribute to the goal of simplifying the coverage of federal and State labour laws.

It is true that for corporate employers who have workers on federal awards or agreements, the proposed changes might remove the possibility of State unfair dismissal claims, though it should be noted that this is already precluded in some States (eg New South Wales) in any event.

But it would also take many employers who are currently covered solely or predominantly by State awards or agreements and expose them to the federal system (with all its added complexity and cost) for unfair dismissal purposes.

A more rational reform at this point would be to aim for a sharper and more predictable demarcation, by extending the federal unfair dismissal system to cover all employees covered by federal awards and agreements, not just those employed by constitutional corporations, and by confining the State systems to workers who are either covered by State instruments or award-free.

Thirdly, and most importantly, the predominant effect of the amendments would be to reduce the overall coverage of unfair dismissal laws in Australia and exclude many workers who currently have access to a remedy from being able to challenge their dismissal.

This is because the effect of the amendments would be to exclude all workers employed by a constitutional corporation from bringing a claim of unfair dismissal under State law, *even if they were excluded from bringing a claim under the federal regime and had no other connection to the federal system*. This is made clear by proposed s 170HA(3).

As matters stand, the exclusions that apply under federal law (covering workers in their first three months of employment, probationers, those on fixed term or task contracts, "short term" casuals, "high-earning" non-award workers and trainees) are more extensive than under any State statute. In Western Australia and Tasmania in particular, and to a lesser extent in New South Wales, Queensland and South Australia, there would be many workers who would effectively be deprived of a right to challenge their dismissal.

Accordingly it is highly misleading for the Minister to claim, as he does in his second reading speech for the Bill, that "the percentage of employees covered by Federal unfair dismissal provisions should rise from about 50 per cent to about 85 per cent". Many of those employees would be "covered", yes, but only to the extent of denying them a remedy against unfair dismissal!

I have been arguing for many years now that the right not to be arbitrarily or unjustly deprived of a job (and hence often the means of earning a livelihood) should be regarded as a fundamental human right:[3] From that viewpoint it is difficult to justify many of the current exclusions from access to the unfair dismissal jurisdiction under the 1996 Act, notwithstanding that most (though by no means all) of them are permitted by ILO Convention 158 on Termination of Employment.

Now is not the occasion to detail all of the pernicious consequences of the current federal exclusions, especially that concerning fixed term employment. It suffices to say that the government has not demonstrated the need to apply them to workers who presently enjoy the right to seek a remedy under State laws that were in many instances enacted under conservative governments.

In conclusion on this point, there is every reason why unfair dismissal laws in Australia should be harmonised — but around a fairer and less complex model than the present federal system.

DO UNFAIR DISMISSAL LAWS COST JOBS?

The federal government has repeatedly sought to justify its attempts to exclude small businesses from unfair dismissal laws by asserting that they deter employers from hiring. A similar emphasis on the "burdens" imposed by such laws features in the explanatory memorandum for the current Bill and in the Minister's second reading speech.

What the government seems unwilling to concede is that there is no hard evidence either internationally or in Australia to support the view that unfair dismissal regulation has an adverse effect on overall employment levels, whether in the small business sector or elsewhere. If there were such an effect, one would expect to see some correlation between the introduction or variation of unfair dismissal laws and employment rates. But none has been shown to exist.[4]

This was demonstrated to telling effect in the *Hamzy* case in 2001, concerning the validity of a regulation excluding many casuals from bringing an unfair dismissal claim. Despite being given ample opportunity by the Federal Court, the government was unable to back up its claims of a link between unfair dismissal laws and employment levels. The

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3 See eg Stewart, "And (Industrial) Justice for All? Protecting Workers Against Unfair Dismissal" (1995) 1 *Flinders Journal of Law Reform* 85.

4 See Waring and de Ruyter, "Dismissing the Unfair Dismissal Myth" (1999) 25 *Australian Bulletin of Labour* 251.

Court concluded that there was "no basis for us to conclude that unfair dismissal laws make any difference to employers' decisions about recruiting labour".[5]

It is true that surveys have demonstrated that employers would much rather not be burdened with unfair dismissal complaints. That is not surprising in the slightest: of course they would say that. The issue is whether removing unfair dismissal laws would actually create jobs — and even if it did, whether it would be worth the enhanced levels of injustice and insecurity. On neither score does such a reform stand up to scrutiny.

The government has sought to bolster its claims by pointing to the results of a new study by Don Harding of the Melbourne Institute of Applied Economic and Social Research, entitled *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses*. This is not, it should be noted, an independently generated piece of research, but was specifically commissioned by the government.

In his second reading speech, the Minister claims that the study shows "that the cost to small and medium sized businesses of complying with unfair dismissal laws is at least $1.3 billion a year and that these laws have played a part in the loss of over 77,000 jobs from small and medium business".

The study shows no such thing. It in fact reports on yet another survey, which (among other things) asked businesses to estimate the increase in their costs caused by unfair dismissal laws. Amazingly, only 17% were clear that their costs had actually increased at all, with a further 16% more tentatively reporting an increase. These two categories of respondent were then promoted to give an estimate of the increase. The resulting figures were then aggregated by Harding to provide a total estimate of $1329 million in compliance costs for small and medium businesses.

So the figure of "at least $1.3 billion a year" is merely an estimate by Harding based (and this is the important point) on estimates by the respondent businesses. Nothing is said in the report about the basis on which the respondents calculated their compliance costs and how likely those calculations were to be accurate. Indeed it does not appear that the respondents were even asked to explain themselves in this respect. Rather, they were simply requested by the interviewer to produce a figure, no matter how approximate. No indication is given as to how long the respondents were given to consider their estimates before answering.

As to the supposed job loss figure of 77,000, this is once again an estimate based on a series of estimates — in this instance by businesses that had reduced their number of employees to zero and who reported that unfair dismissal laws had played *some* role in

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5 *Hamzy v Tricon International Restaurants* [2001] FCA 1589 (16 November 2001) at para 70.

this happening. To say that this curious exercise provides a weak foundation for the Minister's assertion would be an understatement.

Some further points can be made about this exercise. The first is that given the fuss the government and certain business groups have been making over unfair dismissal laws over a period of many years now, it is almost inconceivable that the responses to this survey would have been entirely unaffected. Regardless of how much the designers of this survey may have sought to avoid asking leading questions, the publicity over this issue must surely have had some effect on some respondents.

Secondly, it can hardly be denied that unfair dismissal laws will have caused some businesses not to hire workers on certain occasions. Indeed it could hardly be otherwise, given the scare campaign mounted on this issue. But the possibility remains that any workers potentially affected by these decisions have been hired instead by competitors who are less worried about these laws. This is where the evidence against unfair dismissal laws is completely lacking.

Thirdly, the mere fact that unfair dismissal laws impose compliance costs upon businesses is not in itself a reason for abolishing or weakening them. All forms of regulation tend to have such costs. The question is whether the costs are kept within reason, and can in any event be justified by the benefits.

The potential benefits of unfair dismissal laws can be considered at two levels. As suggested, they can arguably be justified simply on the fundamental argument of principle that people should not be deprived of their livelihood for no good reason. But it can also be argued that encouraging employers to be more careful about the way that they recruit and terminate staff, and promoting greater security of employment, should have positive rather than negative economic effects. How can seeking to enhance the quality of management decision-making or to improve workers' confidence that they will be treated fairly be bad for productivity?

Such arguments are dealt with by Harding in a cursory and incomplete way. He briefly acknowledges that unfair dismissal laws may encourage firms to engage in better management practices, but then concentrates on what he claims to be "unintended consequences" of the laws, as recorded by what turns out in each case to be a minority of respondents to the survey.

Some of these are distortions in hiring practices (such as putting employees on fixed terms or hiring more casuals) brought about not by the availability of unfair dismissal remedies as such, but by the current set of exclusions. Others are entirely predictable consequences that are not necessarily harmful or problematic: that management are more careful about whom they hire, or have to work harder to manage their workforces, or are less ready to dismiss for alleged poor performance.

Much more could be said on this score, but it suffices to note that the Harding study makes very little attempt to engage with the full range of arguments on this important issue.

Finally, there is one problem with all current unfair dismissal systems (State and federal) that should be acknowledged. Anecdotal evidence (and indeed survey results) suggest that many claimants with marginal cases are able to walk away with settlements paid by employers who simply cannot be bothered to go to the time, trouble and cost of fighting an unfair dismissal case all the way through to arbitration.

The simple fact is that, as things stand, it almost always makes commercial sense for an employer to settle. In most cases, the figure that will settle a claim will be no greater, and indeed will often be much smaller, than the legal costs associated with fighting a case through to arbitration — let alone the additional costs associated with lost time and distraction for the staff involved. This in itself highlights the small size of most compensation awards. [6] Employers often seem to take a stand only where they are large organisations and see a major issue of principle at stake, or where they are small businesses and there is a personal conflict involved.

To a considerable extent, this is simply the reality of any litigation system. After all, parties cannot and should not be forced to fight claims rather than settle them. If employers believe that it is commercially appropriate to pay what has so inelegantly been termed "piss-off money" to make an unfair dismissal application (or any other kind of litigation) go away, it is hard to stop them.

It is clearly appropriate to consider ways in which to dissuade the lodging and settlement of marginal claims. But to seek to do this by erecting barriers to deserving and undeserving claimants alike is irrational and unjust.

MAKING EXCEPTIONS FOR SMALL BUSINESS?

As noted, the government has repeatedly but unsuccessfully endeavoured to introduce a small business exclusion to the federal system that would effectively give employers of a certain size the freedom to fire their staff at will for some or all of their period of employment. From a policy standpoint, the idea has little or nothing to recommend it.

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6 See Hagglund and Provis, "Conciliation and Unfair Dismissal in South Australia" in McAndrew and Geare (ed), *Proceedings of the 16th AIRAANZ Conference*, Vol 1, 2002, p 222 at pp 228–9, whose study of unfair dismissal claims in the South Australian jurisdiction revealed that the great majority of cash settlements agreed to following conciliation involved payment of two to four weeks' pay, with 60% amounting to less than $2,000.

Aside from the lack of compelling evidence that such a move would increase employment levels, it is after all in the non-unionised workplaces which predominate in the small business sector that employees are most vulnerable to arbitrary treatment.

Schedule 2 of the Bill embodies a more modest set of amendments, but ones that would nonetheless "privilege" employers with less than 20 workers in various ways.

As a result of amendments in 2001, the Workplace Relations Act already requires the AIRC to take account of the needs and circumstances of smaller employers in various ways. The government has not demonstrated that these amendments have been ineffective, or why these further reforms are necessary — other than to put arguments against the very concept of unfair dismissal regulation.

As far as some of the individual proposals go:

- It is not clear why smaller employers need six months rather than three to assess an employee's suitability. If anything, in a smaller enterprise one might think that any problems would become apparent more quickly than in a larger firm. Besides, it remains open for a reasonable probation period of longer than three months to be imposed in appropriate cases.

- Allowing the Commission to dismiss claims without conducting a hearing smacks of denying natural justice. Particularly bearing in mind that applicants from smaller businesses are less likely to be supported by a union, there is every reason to defend the principle that workers should be entitled to have their "day in court". It remains open to employers to seek costs where an applicant has acted unreasonably.

- Compensation payments to successful applicants rarely go anywhere near the current maximum — a cap which in any event arguably contravenes the requirement under Article 10 of the ILO Convention that "adequate compensation" be awarded in cases where reinstatement is impracticable. There is no warrant to halve that maximum for small business defendants, especially given that the Act already provides that in calculating compensation regard be had to the effect of any award on the "viability" of the employer's business.

OTHER PROVISIONS IN THE BILL

As to the other amendments proposed by Schedule 3 of the Bill, many are unobjectionable taken on their own. Collectively, however, they add yet more detail and complexity to the legislation. It is also unclear that they will make a great deal of difference in practice, other than to add to the cost of advising on or participating in proceedings. Yet again, they involve an attempt to limit the AIRC's discretion and

powers, despite the fact that in the great majority of cases these are exercised in a sensible fashion.

The one particular reform that deserves comment is the proposal that redundancy dismissals should be upheld in the absence of (undefined) "exceptional" circumstances. In reality it is rare under the federal system for a redundancy dismissal to be successfully challenged. It is an established principle that the AIRC will not question an employer's decision that the applicant's job needs to be shed, unless it appears that the case is not one of redundancy at all, and that the dismissal is in fact entirely motivated by the applicant's conduct or capacity.

What can be questioned is the procedure used by the employer to select the applicant for redundancy (which often involves considerations very similar to a dismissal on conduct or capacity grounds), the extent to which the employer gave adequate notice of the dismissal, and (occasionally) the adequacy of severance benefits provided to the applicant.

The explanatory memorandum appears to concede that there is nothing objectionable about redundant employees challenging selection procedures, as this is mentioned as a possible example of "exceptional circumstances". But no explanation is given as to why the legislation (of which the EM does not form part) should cast doubt on whether unfairly selected employees should have a remedy, nor as to why it is "anomalous" for the AIRC to intervene in the other situations mentioned above.

Accordingly, this provision in particular of those in Schedule 3 should be opposed as unnecessarily narrowing the rights of dismissed workers; while the others, though less harmful, are not demonstrably necessary and would add to the complexity of the system.

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