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14 February 2003

John Carter
Secretary
Employment, Workplace Relations,
and Education Committee

Email: eet.sen@aph.gov.au

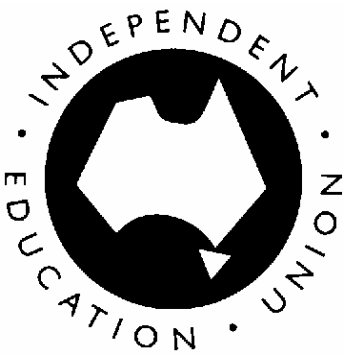
Dear Mr Carter,

Please find attached the Independent Education Union's submission to the Inquiry into the Workplace Relations Amendment (Termination of Employment) Bill 2002.

Many thanks for your assistance.

Yours sincerely,

Lynne Rolley
Federal Secretary



INDEPENDENT EDUCATION UNION OF AUSTRALIA

SUBMISSION TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS, AND EDUCATION COMMITTEE

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

February 2003

1. INTRODUCTION

1.1 The Independent Education Union of Australia (lEU) has prepared this submission for the Senate Employment, Workplace Relations, and Education Committee Inquiry into the Workplace Relations Amendment (Termination of Employment) Bill 2002

1.2 The IEU has read and supports the submission made by the ACTU to this Inquiry.

1.3 Essentially, the effect of this Bill is to further diminish the industrial rights and entitlements of workers. In particular, the Bill seeks to substantially tamper again with the general unfair dismissal provisions contained in the Workplace Relations Act and to also lessen any avenue for redress and compensation should an employee belong to a small workplace. The Bill also intends to force a large proportion of Australian employees, those in constitutional corporations, into accessing federal unfair dismissal laws rather than their state laws.

1.4 The IEU and the Non Government Education Sector

The IEU is a federally registered organisation pursuant to the provisions of the *Workplace Relations Act 1996* and operates in the non government education industry which comprises Catholic and other independent schools, pre schools and kindergartens, English and Business Colleges. The union's membership of approximately 55,000 consists of teachers, principals, teacher aides, education support staff, clerical and administrative staff and other ancillary staff such as cleaners and grounds and maintenance staff.

1.5 The IEU and its Associated Bodies are party to numerous awards and certified agreements. The awards and agreements applying to schools in Victoria, the ACT and the Northern Territory are federal awards. Other federal awards to which the union is a party cover English and Business Colleges across most states and the ACT.

1.6 The IEU is strongly committed to an orderly and fair approach to industrial regulation for all education workers. The union is also open and responsive to a flexible system of industrial relations which recognises the particular history, ethos, organisational and professional practices of the various educational institutions in our sector. This is evident in the substantial number of awards and certified agreements negotiated by the union under the present system of industrial relations.

1.7 The non government education sector is a significant and diverse one. In the schools area alone there are approximately 2,500 non government schools, of which approximately 1701 are Catholic Schools, employing some 67,000 staff. There are approximately 1350 system or individual employing authorities. Non government schools are often affiliated with groups which have a particular educational, ethnic or religious philosophy.

1.8 There is considerable diversity in the size of schools and educational institutions. There are approximately 700 primary schools with enrolments of between 100 and 300 students, 109 primary schools with enrolments of between 1 and 35 students and 5 primary schools with 800 to 1000 students. A significant number of schools would be characterised as small workplaces in respect to the definitions contained in Schedule 2 of the Bill.[1]

1.9 Approximately one third of schools in the non government schools sector operate in the federal jurisdiction. Colleges which provide English Language Intensive Courses for Overseas Students (ELICOS) are respondent to federal awards. There are approximately 90 of such accredited institutions operating in the non government sector. Of the substantial number of child care institutions in which the IEU has coverage approximately 65 are respondent to a federal award.

1.10 It is the IEU's belief that in the non-government education sector, the proposed changes in access to federal unfair dismissal laws for employees of constitutional corporations would affect a significant proportion of our members who currently have access to state laws, awards and agreements. Such effects would result in a diminution of their rights under state jurisdictions.

1.11 Should the Bill be accepted there would inevitably be confusion in regard to issues of constitutional complexity, corporations power, and the status of particular employers in our sector. An unrepresented applicant would have to navigate through this jurisdictional arena on their own.

1.12 <u>Workplace Relations Amendment (Termination of Employment) Bill 2002</u>

The IEU is opposed to all three components of the Bill – those that seek to have federal laws prevail over state laws for employees of

[1] It is proposed that Subsection 170CD(1) be amended to insert a definition of small business employer as an employer who employs less than 20 people.

constitutional corporations, those that seek to further reduce the rights of employees through the general changes proposed to federal unfair dismissal laws, and those that seek to oblige the Commission to afford less favourable access and treatment to employees in small workplaces. The particular reasons for our objections are contained in the body of the submission, but the Committee is also referred to the IEU's previous submission to this Committee[2] regarding the package of five bills sought in 2002, particularly the comments made in relation to the proposed Fair Dismissal Bill 2002 and Fair Termination Bill 2002.

2. Federal unfair dismissal laws to prevail over state laws, awards and agreements for all employees of constitutional corporations.

2.1 In his second Reading speech[3], Minister Tony Abbott's rationale for such a change was that the federal unfair dismissal laws are "less destructive of employment" than state laws and "there would be advantage in having to deal with only one imperfect set of laws, rather than several". In regard to the former claim, there is no evidence to support a claim that a state based industrial relations system somehow diminishes employment growth by its treatment of unfair dismissal claims, whilst a federal based one would enhance employment. The real effect of the Bill will be to force a significant proportion of Australian employees into the federal jurisdiction, a lowering of the standard in terms of procedural fairness and eligibility to access the Commission in every state (excepting Victoria, which has had to endure the "simplicity" of the federal system since 1996).

2.2 The following briefly examines the differences between some of the state legislation and federal laws relating to unfair dismissal that would negatively affect IEU members should they be denied access to state laws.

2.3 There are differences between the classes of employees who are excluded in the federal jurisdiction and the state jurisdictions, with the federal jurisdiction having more restrictive access.

For example, probationary employees are automatically excluded federally if the period of probation is less than three months or is reasonable, if longer than three months. However, there is no automatic exclusion for probationary employees in WA. For example, S23 of the Industrial Relations Act (WA) merely requires the Commission to have

[2] IEU Submission to the Senate Employment, Workplace Relations and Education Committee, May 2002.
[3] Minister for Employment and Workplace Relations, Second Reading Speech, November 2002.

regard to whether the employee was probationary or employed for less than three months.

2.4 Federally, a casual employee engaged on a regular and systemic basis for at least 12 months has access to the Commission. However, the comparable provision in NSW provides access if the period is only six months. Further, employees on a contract for a specified period of time of more than six months can access the NSW Commission where all specified period employees are exempt from the Federal Commission.

2.5 There is no prescription in any state act that prevents less than 15 employees affected by redundancy taking their claim to the Commission. There is no statutory default probationary period in NSW, SA, WA and Tasmania.

2.6 The Workplace Relations Act defines termination of employment as not including demotion in employment if "the demotion does not involve a significant reduction in the remuneration or duties of the demoted employee and the demoted employee remains employed with the employer who effected the demotion". (170CD(1B)). In legislation in Queensland and NSW, for example, there is no comparable provision.

2.7 Significant differences exist in state laws regarding the weighting given to reinstatement. Reinstatement is the first remedy that state Commissions must apply, and compensation only when reinstatement is impracticable. For example, in Tasmania, the employer must demonstrate that the employment relationship has broken down completely, before the Commission will examine compensation. Federally, the AIRC must only reinstate if it is considered "appropriate", and must have regard to a range of factors including "the efforts of the employee (if any) to mitigate the loss suffered by the employee as a result of the mitigation".

2.8 Importantly, state Commissions are able to deal with the full range of disputes relating to termination of employment, while in the federal jurisdiction, those that involve the exercise of judicial power must be referred to the Federal Court. Should the Bill be enacted, applications relating to termination on the grounds of discrimination would have to be referred to the Court.

2.9 The broader scope of the state Commission's powers is also demonstrated in, for example, the West Australian Commission. Its Industrial Relations Act allows a claim of unfair dismissal to be heard together with a claim for denied contractual benefit, that is, entitlements

which an employee held as part of their employment contract but not contained within an Award or agreement. There is no comparable provision within the federal jurisdiction. It is estimated that approximately 50% of state based applications in West Australia contain these matters.

2.10 No state based industrial relations system requires its Commission to examine the size of a business as a relevant factor in determining whether a dismissal was harsh, unjust or unreasonable. However, federal unfair dismissal laws now contain this provision, an inclusion that the IEU opposed and continues to oppose on the grounds of equity and natural justice for all employees, regardless of their workplace. Should this Bill be enacted, employees who might have been able to access fairer state industrial laws would face a diminution in their industrial rights.

3. National consistency

3.1 Were the federal laws "best practice" there might be an argument for achieving national consistency. Even if this were so, it would be more effectively managed by State and Commonwealth consultation and agreement on aiming for common provisions as opposed to the Commonwealth attempting a rough and immediate makeover. As the Minister himself conceded, the federal laws are "imperfect", and yet it is suggested that there would be something to be gained by sweeping changes to the legislation to force a jurisdictional shift for all employees of constitutional corporations. The arguments advanced in this respect about job security and employment are unproven and spurious. The real intent of the Bill is to further erode employee rights.

3.2 The IEU supports the compelling arguments contained in the ACTU submission regarding this component of the Bill, in particular its outline of the history of changes to federal legislation demonstrating that the Government has never evinced any practical interest prior to this Bill in creating a national system. In fact it has repealed provisions which allowed the making of federal awards to override state jurisdictions, and limited the application of the termination provisions of the Act to federal award employees of constitutional corporations and employees in Victoria.

4. Strengthening employment

4.1 The IEU rejects outright the view that this Bill would strengthen employment or achieve other economic benefits. In particular, the union refers to the decision of the Full Court of the Federal Court in the Hamzy v Tricon decision[4] which concluded that no link could be shown to exist between unfair dismissal laws and employment.

4.2 The argument used by proponents of the Bill seems to reside on a premise that more people would be employed by small business if they could terminate people's employment more easily. Much seems to be made of the confusion between state and federal systems, and the unfair impact this has on a small enterprise. Regardless of the difference between a state and federal system, the real onus should be on ensuring that all employers understand how the legislation actually works, not to remove or tamper substantially with the legal protection that should be in place for employees should they need to pursue a claim for unfair dismissal.

4.3 The CPA Australian March 2002 survey of small business, reported that many employer responses related to unfair dismissal were based on a lack of knowledge. The survey recommended that the government address "misinformation and lack of awareness". The Labor Senators' report on the package of five Bills makes a number of practical recommendations that would assist in this area, including disseminating an information package on appropriate recruitment and dismissal practices, produced in consultation with the state and territory governments. The IEU supports this type of measure as being far less costly, and as actually identifying the real problem in some workplaces.

4.4 The ACTU submission provides a detailed analysis of the Melbourne Institute report[5], (commissioned by the Commonwealth), a survey of businesses with fewer than 200 employees. The lack of distinction in questions between unfair dismissal and unlawful termination, leading questions, the frankly subjective conclusion and very shaky logic used in estimating that unfair dismissal laws have prevented over 77,000 people being employed, does not encourage belief in its validity or reliability.

[4] Hamzy v Tricon International Restaurants trading as KFC [2001] FCA 1589 (16 November 2001)
[5] Don Harding, The Effect of Unfair Dismissal Laws on Small and Medium sized businesses, Melbourne Institute of Applied Economic and Social Research, October 2002.

5. Special provisions for businesses employing less than 20 employees

5.1 The WRA has already been seriously weakened in its life by the weighting that the current federal government has been able to give to employer rights as opposed to those of employees in almost every aspect. Now there is proposed further reduction in the procedural fairness and redress that an employee can hope to gain from the "independent" umpire.

5.2 The aspect of this Bill which proposes differential treatment for small business of less than a certain number of employees (in this case less than 20) has regularly been before the parliament on prior occasions and been rejected with the same regularity. Further, a number of amendments dealing with process issues were made to the Act with the passage of the Workplace Relations Amendment (Termination of Employment) Bill 2000[6]. The IEU believes that these seriously weakened the industrial rights of employees and no further diminution of employment protection should occur.

5.3 Many employers in the non government education sector would be categorised as small businesses were the Bill to become law. A very substantial number of Catholic primary schools in every state and territory would have fewer than 20 permanent employees and this is also the case with the ELICOS industry across Australia, and early childhood centres in NSW and Queensland. These institutions would therefore be exempt from requirements to exercise the same standards of fairness. The IEU is opposed to the following provisions which would legalise inequitable outcomes for an employee dependent on the character of their workplace.

6. Maximum compensation halved for small business employees

6.1 For example, should an employee from a small Catholic school seek, and be successful in making a claim for unfair dismissal, she would be entitled to a maximum compensation of three months, while a colleague in a similar situation down the road at a secondary college with over 20 staff would be entitled to double. The union believes the principles of procedural fairness should apply to all organisations irrespective of the size of the employer.

[6] These changes included three month probationary default excluding employees from seeking remedy, limiting rights of demoted employees to seek remedy, giving Commission power, following conciliation, to dismiss unfair dismissal applications that do not have a reasonable prospect of success, and requiring the Commission to pay regard to the size of a business in determining whether a dismissal was unfair.

6.2 The amount of compensation awarded in any successful unfair dismissal claim should not be limited by the size of the business, nor is a small workplace and the financial capacity to pay appropriate compensation mutually exclusive. The Commission should be free to determine in respect of every application whether procedural fairness was afforded to the employee by the employer.

7. 6 months probation for small business employees (as opposed to three months for others)

7.1 Similarly, the penalty an employee will pay by working in a small workplace will be to have their length of probation doubled. The assumption seems to be that small businesses should have these provisions because they are less able to document, discipline, or review performance of employees. Twice the amount of probation will not remedy inefficient employer practices in workplaces, and it is the IEU's experience that poor management of employee relations and work performance issues can be found across the sector.

8. Applications made by small business employees can be dismissed without a hearing if outside jurisdiction or frivolous.

8.1 The right to a hearing is a basic industrial right. Determining that a case is frivolous based on the strength of an application alone is not easy – there may be a combination of factors, such as the applicant's inexperience if unrepresented, failure to complete appropriate paperwork, lack of knowledge about the jurisdiction. It would be inappropriate to expect the Commission to decide on the basis of an application or a written statement that a matter is frivolous. An initial hearing may be less wasteful of the Commission's time as it would at least guarantee the right to state one's case, for questions and answers, and brief conversations with both parties to explore respective positions.

8.2 Equally disturbing is the amendment that would prevent any appeal to the Full Bench should an application be dismissed in this manner. The right to appeal to the Full Bench allows a proper review, and if necessary, an overturning of a decision made by a single Commission member. Refusal to provide a right of appeal runs directly counter to the principles of natural justice.

9. Matters to be considered exclude whether a warning was given, removal of Commission's discretion to consider other matters.

9.1 Similarly, this proposal runs counter to the principles of natural justice and would exclude the Commission from examining all relevant evidence. In an unfair dismissal case, related to a claim of unsatisfactory performance, the Commission would be unable to apply a test of procedural fairness that an employee from a larger enterprise would be granted. The notion of someone receiving a warning is neither costly nor difficult – the removal of this right is contrary to the spirit of a "fair go".

9.2 The Commission's discretion to consider other matters is a valuable one. It allows examination of all the evidence before it, and in the often complex forum of a dismissal where there may be conflicting evidence, reference to "leading" events, the Commission must have the power to consider any matters it determines relevant in its analysis of such factors. To restrain the Commission's powers in this way is fettering its capacity to act thoroughly and deliberatively.

10. Changes to apply to all unfair dismissal applications

10.1 "Exceptional circumstances" and operational requirements

The proposed amendments to 170CG(3) of the WRA substantially alter the weighting the Commission should give to an employee's conduct, and exclude the Commission from ruling that a dismissal is harsh, unjust or unreasonable should employment be terminated on the grounds of operational requirements unless the circumstances are "exceptional".

10.2 The effect of this would entrench even further the disproportionate weighting given to an employer. As the laws currently operate, the Commission must have regard to the conduct of an employee and also to the operational requirements of the workplace[7]. To refuse to give the Commission the capacity to determine that a dismissal is unfair because of workplace requirements such as redundancy, does not allow the necessary examination of the procedures the workplace instituted and the manner in which employment was terminated. There is no definition given of what would constitute "exceptional" circumstances. The underlying rationale for this amendment is to make mutually exclusive the operational requirements of a workplace and the right to pursue and seek appropriate redress for a dismissal that occurred as a result of them, which may have occurred in harsh unjust or unreasonable circumstances.

10.3 Health and Safety

[7] Australian Workplace Relations Act 1996, Section 170CG(3)(a).

The proposed new requirement that the Commission must have regard to the health and safety of other employees is not offered with a rationale for its existence. As the laws currently operate, the Commission may have regard to other factors it considers reasonable to examine. Should the health and safety of other employees be a significant and relevant issue for the respondent employer's case in its relationship to employee conduct, it is free to make that case, and the Commission is free to determine whether it should be considered.

11. Conclusion

The proposed Workplace Relations Amendment (Termination of Employment) Bill 2002 is presented as a Bill to improve the operation of the Act and to "create a better balance between the interests of employers and employees".[8] It is clear that in the life of this government the amendments to the unfair dismissal provisions in the Act to date have not achieved this. Rather, there has been a disproportionate weighting given to the needs of small business employers at the expense of the rights of employees, and scant regard to genuine legislative reform. The unfair dismissal provisions have already been seriously weakened by the legislative amendments adopted in August 2001. The proposed amendments are discriminatory, and entrench disadvantage to employees even further.

The IEU is opposed to the Bill and urges the Committee to recommend that it not be supported in the Senate.

[8] Regulation Impact Statement, House of Representatives, p.8