NSW Government

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

by the

Senate Employment, Workplace Relations and Education Legislation Committee

NSW Government Submission

February 2003

Workplace Relations Amendment (Termination of Employment) Bill 2002

NSW Submission to Senate Inquiry

EXECUTIVE SUMMARY 3

CHAPTER 1: INTRODUCTION 6
Structure of Submission 7

CHAPTER 2: WHAT IS THE FEDERAL GOVERNMENT PROPOSING? 8
Background 8
EXTENDING THE COVERAGE OF THE FEDERAL SYSTEM 8
Who will be covered? 8
Who will be left out and what will happen to them? 11
Some businesses will find themselves operating in two systems 12
Will these businesses move to the federal system? 14
The cost to business and the economy of adopting the bill 16
Discrimination against employees of a small business 17
Termination generally 19
Focus on reinstatement 19
Termination on grounds of operational requirements 20

CHAPTER 3: IS THERE A LINK BETWEEN UNFAIR DISMISSAL LAWS AND JOB CREATION? 21
The argument: Excluding employees is good for job creation 21
Federal Government commissioned research on the effect of unfair dismissal laws on small and medium sized business 22
Business awareness of industrial legislation 23
Unfair dismissal legislation and employment 25
The cost to business of unfair dismissal laws 26
Comments in conclusion on the relationship between unfair dismissal legislation and employment 27

CHAPTER 4: THE BENEFITS OF HAVING SEPARATE STATE INDUSTRIAL RELATIONS SYSTEMS 29
Efficiency versus fair go all round 29
The Federal Government's track record IN providing 'fair go all round' 30
Is there something wrong with the state unfair dismissal systems? 32
Are there any benefits to having a federal (dual) system of regulating industrial relations? 34
The benefits of federalism 34
A competitive environment for new ideas 35
The rights of casual employees in NSW 35
Other examples of NSW innovation 36
State industrial relations system contributes to strength and responsiveness of state economy 38
Success of the 2000 Olympic and Paralympic Games 39
Rural and regional sittings of the NSW Commission 39
Unfair dismissal matters in regional areas 41

CHAPTER 5: IS A TRUE UNITARY SYSTEM POSSIBLE? 42
Not if the Commonwealth attempts unilateral takeover 42
Limits on Commonwealth powers 42
Invoking other powers to deal with non-corporations is not the answer .. 43
Not all corporations are constitutional corporations 43
Constitutional arrangements mean cooperation is the way forward 44
The Corporations Law as an example of cooperative federalism 45
An important reservation of power 46
Disregard for machinery of cooperation 47

CHAPTER 6: IS THERE A CASE FOR CHANGE? 48

EXECUTIVE SUMMARY

1. The Workplace Relations Amendment (Termination of Employment) Bill 2002 proposes the extension of the federal unfair dismissal jurisdiction to cover employees and employers that currently have access to the state unfair dismissal jurisdictions, and proposes significant limitations on the discretion of the Federal Commission in dealing with unfair dismissal applications.

2. The Federal Government's argument in support of the changes proposed in the bill rests on two underlying arguments:

   (a) that unfair dismissal laws are bad for business and bad for job creation and job security and that the changes to processes and rights that are proposed in the bill would be better for business, job creation and job security; and

   (b) that having to deal with more than one system of employment law (unfair dismissal laws in particular) is inefficient and bad for business and that the new system proposed in the bill would be more unitary and less complex.

3. The NSW Government submission demonstrates that the above assertions made out by the Federal Government are not well-founded. The cost to business and the economy of implementing the bill would be either neutral or minimal, and in many cases more expensive.

4. Accordingly, the NSW Government submits that the bill should be rejected by the Senate for the reasons set out below.

5. Firstly, the Federal Government has not made out a case for why the bill is necessary. In particular, the case fails on the following grounds:

   - The Federal Government has failed to justify there is any problem with the operation or application of the current state unfair dismissal systems.

- The Federal Government has failed to justify why more people should be covered by the federal system than by the existing state system.

- A shift to the federal system would create complexity for business and employees that currently operate within state industrial relations systems.

- The Federal Government's argument that its system for dealing with unfair dismissal is better for business and more conducive to job creation is based on reasoning that is flawed.

- A shift to the federal system would deny a 'fair go all round' to more people. The federal system is geared heavily in favour of employers and against the right of employees to have their allegations of unfair dismissal dealt with.

- The current system of interlacing federal and state laws ensures that all employers and employees in Australia have access to a fair and impartial means of dealing with allegations of unfair dismissal. The Federal Government has not made out a case why this reasonably harmonious and understood system should be disturbed and the rights of some classes of employees should be put in jeopardy.

6. Secondly, the bill clearly discriminates against employees of small businesses. It:

- Allows unfair dismissal cases brought by employees of a small business to be decided without a hearing.

- Makes employees of small businesses serve a probation period twice the period of other workers.

- Allows employees of small businesses only half the compensation that other workers can claim.

- Restricts the grounds on which an employee of a small business can claim their dismissal was unfair.

There is simply no justification for this discriminatory treatment.

7. Finally, the bill should be rejected on the basis that it is a precursor to further attempts by the Federal Government to expand its coverage of industrial relations. Attempts by the Federal Government to expand its coverage should be rejected on the following grounds:

   - The Federal Government cannot achieve a unitary industrial relations for the whole nation on the basis of the present distribution of constitutional powers. Any expansion of powers will only lead to further complexity and uncertainty for business and employers.

   - A unitary system of industrial relations should be judged not on the basis of perceived efficiencies, but rather on the nature of the system that is proposed. A system that is not truly predicated on the guiding principle of 'a fair go all round' should be rejected.

   - The creative tension between the Commonwealth and the states provides a robust arena for the development of new ways of dealing with industrial issues.

   - Finally, the Federal Government has failed to observe the conventions of co-operative federal/state relations in failing to discuss the present bill with the states before its introduction. There is strong concern about the likelihood of the Federal Government repeating this failure in the future.

8. For all the reasons set out above, the bill should be rejected.

CHAPTER 1: INTRODUCTION

1. The Workplace Relations Amendment (Termination of Employment) Bill 2002 (the bill) was introduced into federal Parliament on 14 November 2002. The bill was referred to Committee, for consideration of the following principal issues:

    - 'The impact of the bill on job security
    - The constitutional implications of the bill
    - The development of the bill and Commonwealth-State relations
    - The impact of the bill on procedures'

    Each of these issues is addressed in the following submission which is made on behalf of the New South Wales Government.

2. The NSW Government submits that the bill should not be supported. The bill would not achieve the Federal Government's stated aims.
    - There is no evidence that the changes proposed would increase the rate of job creation or levels of job security.
    - The bill does not create a unitary system of dealing with unfair dismissal.
    - Rather than simplifying and creating efficiency, the bill is likely to create further confusion about coverage and increase costs.
    - The Federal Government has not demonstrated that the system it proposes would be in any way superior to the current dual system of state and federal unfair dismissal laws.
    - It discriminates against employees of small businesses by providing them with a lower standard of employment rights than other employees.

3. More broadly, it is clear that there are numerous and various benefits in retaining the current dual system based on the federal distribution of powers.

STRUCTURE OF SUBMISSION

4. The submission addresses the issues set out above as follows.

5. Chapter 2 examines the provisions of the bill and their intended effect. It concludes that rather than simplifying the system for dealing with unfair dismissal, the bill will make the system more complex for many parties. The Chapter also argues that the bill's provisions will lead to less fairness for the employees to be covered.

6. Chapter 3 analyses the evidence that has been relied on by the Federal Government to found its claim that unfair dismissal laws are bad for business and bad for employment, and finds that the research from which this evidence is drawn is flawed.

7. Chapter 4 considers the appropriate distribution of power to legislate with regard to industrial relations in Australia's federal system of government, and demonstrates the strengths of having six or seven jurisdictions competing and interacting to produce an unfair dismissal system that, in general, provides a 'fair go all round' to employers and employees alike. The role played by the NSW jurisdiction as an innovator in the field of industrial relations is set out. This Chapter also argues that strong and responsive state economies and social structures require states to have the capacity to exercise their own industrial relations powers.

8. Chapter 5 sets out the limits of the Commonwealth's constitutional powers to provide for a truly unitary national system of industrial relations and makes the case for further cooperation and interaction between the jurisdictions.

9. Chapter 6 concludes that no case has been made out in favour of this bill.

CHAPTER 2: WHAT IS THE FEDERAL GOVERNMENT PROPOSING?

BACKGROUND

10. The Bill envisages a significant expansion of the jurisdiction of the Australian Industrial Relations Commission (Federal Commission) to deal with claims that a termination of employment was harsh, unjust or unreasonable.

11. The bill has three parts, which are considered under the headings indicated below:

- Schedule 1 extends the federal unfair dismissal system to cover *all* employees of constitutional corporations (as that term is defined in the *Workplace Relations Act 1996* (WR Act)) rather than just federal award employees of such corporations – thus encroaching into the current coverage of the state unfair dismissal systems (Extending the Coverage of the Federal System).
- Schedule 2 proposes amendments that require the Commission to treat applications by employees of small business differently from applications by other employees (Small Business).
- Schedule 3 makes miscellaneous changes to the overall effect of the termination of employment provisions some of which would make the system less fair (Termination Generally).

EXTENDING THE COVERAGE OF THE FEDERAL SYSTEM

Who will be covered?

12. The bill seeks to amend the WR Act to exclude state unfair dismissal jurisdictions from being available to terminated employees of constitutional corporations. It would expand the jurisdiction of the Federal Commission to deal with allegations of unfair dismissal.

Currently, only federal award employees of constitutional corporations are able to make such claims to the Federal Commission. The bill would remove the 'federal award' limitation and open up the federal jurisdiction to all employees of such entities. Many of these employees, however, would continue to have other aspects of their employment governed by state industrial awards or agreements and state industrial relations legislation.

13. Briefly, a 'constitutional corporation' is an incorporated entity that has sufficiently significant trading or financial activities to come within the constitutional meaning of 'corporation' such as a proprietary limited company but not, for example, a partnership or sole trader. The meaning of 'constitutional corporation' is further discussed in Chapter 5.

14. The language of the bill clearly shows the intention of the federal Parliament to 'cover the field' in relation to any allegation that the dismissal of an employee of a constitutional corporation was unfair. This means that if an employee of a constitutional corporation is excluded from bringing a federal unfair dismissal claim (for example, because they are employed by a small business) they would also be excluded from bringing a state unfair dismissal claim. Thus, they would be left with no forum in which to bring their claim.

15. It is claimed that this will increase the proportion of Australian employees covered by the federal termination of employment regime from 50 percent to 85 percent (from four million to about seven million workers). [1] However, the lack of any current or precise data to support the claimed 85 percent coverage figure is acknowledged in the Regulation Impact Statement that was issued with the bill.[2]

[1] House of Representatives, *Hansard*, 13 November 2002 at page 8777.
[2] Regulation Impact Statement at page 6.

16. When in October 2000, former Minister Reith issued discussion papers proposing the expansion of the federal industrial relations system on the basis of the corporations power, it was estimated that around 70 per cent of workers then under state systems would be covered by a federal system based on the corporations power and that overall federal coverage would rise to around 85 per cent.[3]

17. The latest figures on numbers of employees employed by type of entity date from the September 1998 ABS Business Register. These figures indicate that of the 7.3 million employees in Australia:

- 56 percent were employed by incorporated management units,
- 25 percent were working for sole proprietors, partnerships and other non-incorporated management units, and
- 19 percent were employed by government sector management units.

Even allowing for some increase in the numbers of businesses that are incorporated (given various incentives to do so, particularly tax incentives), and accepting that federal employees, the employees of some associations that are incorporated under state laws and the employees of some state trading enterprises would be covered by the federal system, the figure of 85 percent must still be regarded as being an estimate on the high side. It should also be remembered that not all corporations are 'constitutional corporations' (for example, if they have limited trading or financial activities – see further in Chapter 5), so employees of such entities also need to be excluded from the calculations.

[3] *Breaking the Gridlock: Towards a Simpler National Workplace Relations System. Discussion Paper 1: the Case for Change* (issued by former Minister Reith in October 2000) at page 24.

Who will be left out and what will happen to them?

18. Even if it is accepted that the 85 percent coverage figure is accurate, this will leave some 15 percent of employees, or about one million people, mostly working for unincorporated businesses (such as partnerships, sole traders and associations) and state public sector workers, to be covered by the state systems. In his Second Reading Speech, Minister Abbott said:

> 'The Government believes that an expansion of Federal jurisdiction on this scale should eventually lead to a "withering away of the states" at least in this aspect of workplace law.'[4]

19. Minister Abbott does not make it clear how the needs of the 15 percent will be dealt with. The term 'wither away' suggests that there may be no system at all to cover these employees.

20. The expectation that the state jurisdictions will 'wither away' is presumably based on the economics of the states maintaining their own newly limited systems. In the case of the smaller states, these amendments may mean that it becomes uneconomic for them to maintain their unfair dismissal systems when those systems only cater for a very small number of people.

21. It is possible that some smaller states might find themselves in a position where the only way they can ensure fairness to the 15 percent of employees not covered by the proposed federal system is to refer the relevant power to the Commonwealth.

22. However, there would be no guarantee that the Commonwealth would act on such referred powers – it might choose to leave these employees without protection, as has happened in Victoria.

[4] House of Representatives, *Hansard*, 13 November 2002, page 8777.

23. However, ‘withering away’ will not be of concern to NSW where, despite a drop in coverage, the volume of the remaining 15 percent would still be substantial enough to justify the maintenance of our state system. It would also be necessary to maintain our state system to cover NSW public servants. Therefore it is not clear what the Federal Government’s objectives are in relation to the unfair dismissal systems of the larger and better resourced states.

Some businesses will find themselves operating in two systems

24. The Federal Government indicates that the aim of the bill is to provide a less complex unified national workplace relations system. However, for many businesses, in particular those that have chosen to operate exclusively within the relevant state system, this will mean that, for the first time, they will be forced to participate in an industrial relations system that they are not familiar with.

25. For those businesses, whilst the majority of their industrial relations issues will continue to be covered by state laws and state industrial instruments, the lone matter of unfair dismissal will be covered by federal law. In other words, for a business that currently operates within a single state system, the bill, if passed, will result in the business having to deal with two systems. For such a business, industrial relations will become more complex, not less complex. This will mean additional cost.

26. The greatest difficulties will be experienced by small businesses which are accustomed to operating in the state common rule award system and have limited resources for dealing with industrial relations issues. It will be difficult for them to deal with the complexity of mastering two industrial systems. They are unlikely to want to transfer fully to the federal system because of the benefits of a common rule system where everyone in a particular industry or occupation is covered by a single award.

27. However, some large businesses will also experience difficulty. For example, state trading enterprises that currently operate within state industrial relations systems, would find themselves dealing with general industrial relations issues in the state system and separately with unfair dismissal applications in the federal system, even in cases where dismissal issues are linked with or symptomatic of broader industrial relations issues at the enterprise.

28. In this context it is appropriate to note that in NSW, controversy about a particular dismissal may be dealt with by a range of processes. In particular, in addition to the unfair dismissal application route, dismissals may also be considered in the context of conciliation and arbitration of industrial disputes. Section 137(1)(c) of the *Industrial Relations Act 1996* (the NSW Act) empowers the Industrial Relations Commission of New South Wales (the NSW Commission) to make orders for the reinstatement of one or more employees in the context of resolving a dispute. An order made under this section cannot include an order for compensation or lost remuneration or any other amount (section 137(3)).

29. It is not clear what the effect of the bill will be on this power of the NSW Commission. The terminology used in the bill does not seem to contemplate the effect of the bill on the broader dispute settling powers of the NSW Commission (and other state tribunals which possess such powers). The bill refers to the exclusion of state or territory legislation that 'provides rights or remedies in respect of the harsh, unjust or unreasonable termination of the employment of such an employee'. It might be argued that the power in section 137(1)(c) of the NSW Act is not directed explicitly at either providing a remedy to the employee (the section 137(3) prohibition on monetary payments supports this view) or at determining the question of whether the dismissal was 'harsh, unjust or unreasonable'. Rather the provision empowers the NSW

Commission to order reinstatement where it considers that such an order would contribute to the settlement of a dispute.

30. Thus it might be that businesses find themselves in the situation that some dismissals will be dealt with by the federal system, but that others are dealt with by the NSW Commission in the context of an industrial dispute. It can hardly be argued that this bill will make industrial relations coverage easier to understand.

31. If the bill has the effect of overriding the power of the NSW Commission to deal with dismissal as part of an industrial dispute, then an important tool in the NSW Commission's armoury for dealing with and settling industrial disputes will be rendered inoperative. This may impinge on the NSW Commission's power to arrive at dispute settlements that are appropriate to the circumstances of the dispute.

32. The passage of the bill might also cause some confusion and uncertainty for state trading enterprises over the jurisdiction of state tribunals established to consider, amongst other things, dismissals arising out of public sector disciplinary proceedings. In NSW the relevant tribunals are the Government and Related Employees Appeal Tribunal and the Transport Appeals Board.

Will these businesses move to the federal system?

33. The Federal Government may envisage that the state systems will 'wither away' through a wholesale defection to the federal sphere to avoid the complexities of operating in two systems. However, it is doubtful that many businesses would transfer their coverage. As stated above, there are significant advantages for business in the NSW system, particularly the common rule award system and our focus on consultation.

34. Even if some businesses decide to move wholly to the federal industrial relations system, they may face difficulty in achieving this because of the complexities and expenses inherent in the WR Act.

35. For some it may be a matter of joining a federally registered employer organisation that is a named party to relevant federal awards (members of organisations that are named respondents to federal awards are themselves bound by those awards). The cost of joining and ongoing membership may not be attractive to all businesses, particularly not to the smallest businesses.

36. For other businesses it may be a matter of going through the often costly and time consuming process of bargaining with their employees and/or their unions for certified agreements or Australian Workplace Agreements.

37. Even those who choose the relatively simple but cost-laden option of joining an employer organisation may find it necessary to engage in further bargaining. The federal award system operates at a bare safety net level and restricts awards to 20 allowable matters. Agreement making is the only way to deal with the greater range of matters and the details that are necessary to ensure that all workplace issues are covered.

38. Finally, it cannot be overlooked that agreement making involves two parties. The wishes of employees, whether represented by unions or not, will have to be taken into account if an employer wants to move to the Federal system. Even when employers have significant will and substantial resources to pursue such a goal, obtaining the agreement of employees to a change of industrial instrument and a change of coverage may be difficult.

39. For all these reasons, businesses affected by the present bill may not be willing to join the federal system and abandon the states.

The cost to business and the economy of adopting the bill

40. The specific benefits of the legislation before Parliament remain unquantified by the Federal Government. No particular cost reduction figure or estimate of the number of jobs to be created has been provided or is available.

41. The result of passing the legislation will be the partial ineffectiveness of current state legislation, the broadening of the existing Commonwealth jurisdiction, and a subsequent period in which current participants in existing state systems will be required to operate in both state and Federal systems. This will clearly impact on the costs of those using the system. It would be appropriate to expect a government proposing such change to provide some quantification of the costs to business of this transition and the ongoing costs of operating in dual systems.

42. No such detail is currently available. The Regulation Impact Statement makes only a few unsubstantiated references to costs.

43. The Federal Government, however, acknowledges that the expansion of the federal system 'will involve additional matters coming before the Commission' and that 'Appointment of additional members of the Commission may be necessary'.[5] Under questioning by the Senate Estimates Committee on 21 November 2002, Departmental officers made it clear that the proposal had not been costed.[6] It has not been determined how many more Commissioners or Commission staff might be required to cope with the extra workload that the Federal Commission would take on.

44. There is no quantification of the cost to users of the system. Overall, it is difficult to see how the proposed legislation would provide any

[5] Regulation Impact Statement at page 2.
[6] Senate, *Hansard*, EWRE at page 31

positive outcome for employees and employers who currently operate in state systems.

DISCRIMINATION AGAINST EMPLOYEES OF A SMALL BUSINESS

45. Under the bill, employees of small business are treated differently from other employees. A small business employer would be defined as an employer with fewer than 20 employees at the time of the termination (or the notice of termination).

46. It is difficult to justify the reduction in the rights of employees of small business simply on the basis of the size of their employer. Several provisions of the bill contain proposals that would decrease the rights of these employees:

- Proposed section 170CE(5B)(a) would prevent a small business employee from making an application if they are dismissed within six months of their engagement. For other employees the relevant time limit is only three months.

- Proposed section 170CH(8A) would halve the maximum amount of compensation available to an unfairly dismissed employee of a small business – whereas other employees can be compensated to a maximum of six months remuneration, small business employees would only be able to be compensated to a maximum of three months remuneration.

- Proposed section 170CEC would empower the Commission to dismiss certain applications made against a small business employer 'on the papers', that is, without a hearing. The Commission would be required to dismiss an application against a small business employer that it believes is beyond jurisdiction, or that it believes is frivolous, vexatious or lacking in substance. There would be no opportunity for the dismissed employee in such a situation to appear before the Commission to put his or

her submissions on the matter or to question the submissions of the employer.

- Proposed section 170CG(3A) would require the Commission, when considering the fairness of the dismissal of a small business employee, to have regard to five criteria only. This is distinct from its much broader jurisdiction in relation to other employees.

47. Each of these provisions is based solely on the grounds that the applicant was employed by a small business. The Federal Government's justification for this is that excluding small business employees from the unfair dismissal jurisdiction will have positive effects on unemployment and will reduce the cost of doing business. Chapter 3 examines the research that underpins these assertions and finds it wanting in a number of important respects.

48. The effects of such an exclusion will be overwhelmingly negative. The exclusion of small business employees from the jurisdiction suggests:

(a) that small business employers will not be under the same obligation as their counterparts in larger businesses to take account of principles of fairness in relation to the dismissal of their employees; and
(b) that small business employees should not have the same employment rights as those who work for larger businesses.

49. The bill creates a discriminatory and two-tiered system. A more effective way of restricting the burden on small business in the unfair dismissal jurisdiction would be to make the procedure quicker and more cost effective whilst providing small business education services. Such services and accompanying education seminars are routinely conducted by the NSW Department of Industrial Relations with great success.

50. This aspect of the bill also puts small business at a distinct disadvantage in attracting quality employees. Job seekers will understand that they will have less rights working for a small business. If they cannot expect fair treatment from a small business employer, they are likely to avoid looking for work with such employers.

51. When available research and academic work on the relationship between employment protection legislation and unemployment is examined (see Chapter 3), and when consideration is given to the practical realities of such an exclusion, it is apparent that there is no justification for excluding certain classes of employees from the unfair dismissal jurisdiction.

TERMINATION GENERALLY

52. The bill also proposes amendments to the general termination jurisdiction.

Focus on reinstatement

53. Proposed section 170CH(2) would see a new focus on reinstatement as the primary remedy for unfair dismissal. It provides that compensation is not to be considered unless the Federal Commission has first considered whether reinstatement is appropriate.

54. All state unfair dismissal jurisdictions contain similar formulations of the primacy to be afforded to reinstatement as the principal remedy. NSW, in particular, has been examining ways to make the primacy of the reinstatement remedy even more meaningful. Where an employee has lost his or her job in unfair circumstances, the best way to restore the fairness of the situation is to restore the job of the employee. In this way the unfair dismissal laws operate as an important mechanism in ensuring job security.

55. It seems that the Commonwealth has recognised that the formulation of the hierarchy of remedies that is common in the state jurisdictions is appropriate in the federal system also. The Explanatory Memorandum to the bill clearly states that the bill aims to 'emphasise reinstatement as the primary remedy available under the WR Act.'[7] This is an example of the creative and progressive aspects of having a federal or dual system of dealing with industrial relations. Developments or benchmarks set in one jurisdiction can influence and improve other systems. This is discussed further in Chapter 4.

Termination on grounds of operational requirements

56. Proposed section 170CG(4) seeks to exclude employees who are terminated because of redundancy from challenging their termination. The NSW Government submits that it cannot be assumed that every redundancy is prima facie a fair redundancy as the Bill does. If an employee has grounds for believing he or she has been unfairly selected for redundancy, or that the redundancy exercise has been undertaken unfairly, or indeed that there is no true redundancy situation, that employee have the same rights as others to challenge the fairness of that termination.

57. However, it is possible that the proposed provision will not in fact prevent such challenges, for two reasons. Firstly, it would take a ruling to determine whether or not a particular termination really did occur 'on the ground of the operational requirements of the employer'. Secondly, it may require more than one ruling to determine what might be the 'exceptional' circumstances in which a termination that did take place on the ground of the operational requirements of the employer might still be regarded as harsh, unjust or unreasonable.

[7] Explanatory Memorandum at page 2.

CHAPTER 3: IS THERE A LINK BETWEEN UNFAIR DISMISSAL LAWS AND JOB CREATION?

THE ARGUMENT: EXCLUDING EMPLOYEES IS GOOD FOR JOB CREATION

58. The Federal Government has introduced several other Bills in recent times aimed at amending the termination of employment laws. Two of these are:

(a) The Workplace Relations Amendment (Fair Termination) Bill 2002 (the Fair Termination Bill) seeks to restore the exemption from the federal unfair dismissal laws of casual workers employed for a short period in the same terms as was provided in regulations 30B(1)(d) and (3) of the *Workplace Relations Regulation*. That is, a casual employee would be excluded from making an application unless he or she had been engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months and, but for the decision of the employer to terminate the employee's employment, would have had a reasonable expectation of continuing employment by the employer. (The intention of the Fair Termination Bill is to move the exemption out of the newly amended Regulation and into the Act.)

(b) The Workplace Relations Amendment (Fair Dismissal) Bill 2002 (the Fair Dismissal Bill) would exclude small business employees (a business with fewer than 20 employees) from accessing the federal unfair dismissal jurisdiction. It is the seventh in a series of failed bills with the same aim – excluding the employees of small businesses from the jurisdiction. Each of

the earlier bills was defeated or amended in the Senate. None has become law.

59. The Federal Government's primary justification is that there is a close relationship between access to the unfair dismissal jurisdiction and employment levels.

60. In *Hamzy v Tricon International Restaurants trading as KFC* (2001) FCA 1589, the Federal Court ruled for on this issue the first time. The Full Federal Court noted that no investigation had been undertaken on any relationship between unfair dismissal and employment growth and that there was no evidence of a connection between the two.

61. In evidence to the Federal Court in *Hamzy*, Professor Mark Wooden, a Professorial Fellow with the Melbourne Institute of Applied Economic and Social Research at the University of Melbourne, and a witness for the Federal Government intervening in the case, admitted that at that time there had been no empirical research to support the view that excluding classes of employees will result in higher employment.

62. *Hamzy*'s case is notable because it resulted in a finding that the then regulations that purported to exclude certain casual employees from the unfair dismissal system were invalid. This led to the introduction of the Fair Termination Bill and the Regulation described above.

FEDERAL GOVERNMENT COMMISSIONED RESEARCH ON THE EFFECT OF UNFAIR DISMISSAL LAWS ON SMALL AND MEDIUM SIZED BUSINESS

Federal Government commissions research

63. Presumably in response to the lack of evidence described in *Hamzy*, the Department of Employment and Workplace Relations commissioned a report on the effect of unfair dismissal laws on small

and medium sized businesses.[8] The report claims that compliance with unfair dismissal legislation costs business $1.3 billion per year and the economy more than 77,000 jobs per year.

64. The Federal Government has relied heavily on this research as evidence of the link between access to the jurisdiction and employment, especially in relation to small business. The Second Reading Speech in support of the present bill quoted this research to support the view that small business should be exempted from the reach of unfair dismissal laws.

65. However a number of problems with the research have been identified, rendering the report ineffective as persuasive evidence of a causal link between unfair dismissal exemptions and increased employment.

Business awareness of industrial legislation

66. A key finding in the survey was that 30.7 percent of respondents were not aware whether they were covered by state or Federal unfair dismissal laws.[9] This clearly discredits the report's claim that 23.3 percent of respondents considered unfair dismissal laws to be a major influence on business operations.[10] It is difficult to believe that businesses that do not know which law applies can adequately assess the impact of that law.

67. In addition 62.6 percent of businesses were unaware of the recent changes to Federal unfair dismissal laws which purported to make the unfair dismissal system work better for small business.[11] Again, it is difficult to argue that businesses which are unaware of important changes to unfair dismissal laws can determine their impact.

---

[8] Don Harding, Assistant Director (Economic Performance) at the Melbourne Institute of Applied Economic and Social Research, *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses,* 29 October 2002.
[9] *The Effect of Unfair Dismissal Laws* at page 9.
[10] *The Effect of Unfair Dismissal Laws* at page 13.
[11] *The Effect of Unfair Dismissal Laws* at page 10.

68. The contradictions inherent in the survey responses suggest that respondents have given negative answers based on their entrenched views about unfair dismissal, rather than any detailed understanding of the legislation. Given this, the research questions should have been more carefully worded to avoid leading the respondents.

69. However, the report places great emphasis on suggestive lines of questioning in order to gain 'statistically valid' responses.[12] Other surveys like the Australian Workplace Industrial Relations Survey (AWIRS) and Yellow Pages surveys (referred to further below) did not use 'suggestive' questioning and therefore yielded far fewer mentions of unfair dismissal.[13]

70. It is important to bear in the mind the 'closed-end' nature of the questions and to consider the effect of this type of questioning on the results. For example, question 12a in the survey is worded thus:

> *Thinking about the processes and practices your business uses to recruit and select staff, manage its workforce; and manage staff whose performance is unsatisfactory – which of the following best describes the extent to which unfair dismissal laws influence the operation of your business?*

It could be argued that a preferable methodology would be, as has been the case in other surveys, to ask for issues that are important to business and then to probe further if unfair dismissal is mentioned. The leading nature of the questions has produced a response rate, in relation to unfair dismissal, that is nearly five times the rate in other surveys on this issue. Its reliability must therefore be questioned.

[12] *The Effect of Unfair Dismissal Laws* at page iii.
[13] ACIRRT, *Changes at work: the 1995 Australian Workplace Industrial Relations Survey*

Unfair dismissal legislation and employment

71. The Federal Government commissioned research claims that unfair dismissal laws have contributed to the loss of 77,482 jobs.[14] This estimate is based on a question that leads respondents to answer the extent unfair dismissal laws were a factor in the decision to reduce employment.

72. For almost 90 percent of the respondents, unfair dismissals laws were not reported as having *any* influence on decisions to reduce employee numbers.

73. Of the 1,802 respondents, 377 businesses reported that they currently had no employees. Of these 377, 158 businesses used to have one or more employees. Of these 158 businesses that no longer have any employees, only 42 (or 11.1 per cent, Table 25, page 23) stated that unfair dismissal laws had some role in their decision to reduce the number of employees to zero. It is important to understand that *only* these 158 businesses who had reduced their number of employees to zero were asked the extent to which unfair dismissal laws played some role in this decision. Based on the staffing experiences of these 42 businesses who stated that unfair dismissal played some role in their decision to reduce employee numbers, the quoted figure of 77842 job losses is extrapolated.

74. This estimate is based on the survey responses of only 42 businesses. There are more than one million businesses in Australia. An estimate based on such a small sample of respondents is meaningless and should not be used to inform the development of Commonwealth legislation.

[14] *The Effect of Unfair Dismissal Laws* at page 23.

The cost to business of unfair dismissal laws

75. The report also claims that state and Federal unfair dismissal laws cost small and medium businesses $1.3 billion each year.[15] The report states that this figure is at the lower end of the scale and is probably much higher.

76. The costs that the report claims are incurred by business as a result of unfair dismissal laws fluctuate dramatically. Table 21 of the report refers to the estimated total costs 'in time and money of complying with the law and reducing your businesses' potential for exposure to unfair dismissal claims', by industry and size of business.

77. The table indicates that for manufacturing businesses employing between one and five employees, the cost of dealing with unfair dismissal legislation is $17.2 million per year. On the other hand the research indicates that transport businesses with between one and five employees incur a cost of $40.7 million due to unfair dismissal laws. Both industries have very similar levels of employment, according to the research, but wildly differing costs incurred by unfair dismissal legislation.

78. The research provides another contradiction in this regard. In retail trade businesses with between one and five employees there are, as measured by this report, 237,900 employees. In communications businesses in the same size classification, there are 274,229 employees in Australia. However the cost differential in relation to unfair dismissal is massive, it being $48.8 million for retail against $158.9 million for communications. This would seem to defy any rational analysis. There is no consistency in the survey results.

[15] *The Effect of Unfair Dismissal Laws* at page 19.

79. It is suggested that the huge variation in estimates of the costs of unfair dismissal may arise from a misunderstanding on the part of the respondents as to what they were being asked to quantify. It is likely that those who estimated a higher cost might have been including the costs of rehiring and retraining employees to fill positions, and not just costs directly associated with unfair dismissal as such.

80. The cost estimates are calculated across six business sizes in 10 industry sectors. However they are, according to the survey report, reliable estimates in only 25 of these 60 sectors. The other 35 unreliable estimates which 'should be treated with great care'[16] due to small sample sizes are nonetheless used to calculate total cost impositions across all industry sectors and inform the quoted figure of $1.3 billion. In fact, the research report says that every estimate of the cost to businesses with over 50 employees should 'be treated with great care'. With respect, an estimate of a $1.3 billion cost to business on such grounds and with such small sample sizes should be disregarded.

COMMENTS IN CONCLUSION ON THE RELATIONSHIP BETWEEN UNFAIR DISMISSAL LEGISLATION AND EMPLOYMENT

81. As mentioned in the Government commissioned research, the July 2002 Yellow Pages Survey of Small and Medium Sized Businesses found that only 5.6 percent of firms mentioned either employment conditions/unfair dismissal/industrial relations/safety and health as factors preventing an employer from taking on new employees.[17] In the 1995 AWIRS 1.4 percent of respondents specifically mentioned unfair dismissal laws as impediments to hiring staff.

82. Peter Waring and Alex DeRuyter note the fact that after federal unfair dismissal legislation was first introduced by the Keating Government in

[16] *The Effect of Unfair Dismissal Laws* at page 21.
[17] *The Effect of Unfair Dismissal Laws* at page 5.

1993, there was strong employment growth in the period 1993/94 to 1996/97.[18] They also refer to the Howard Government taking credit for the creation of 300,000 jobs in its first term of office, despite the presence of unfair dismissal laws for small business.

83. Unfair dismissal is therefore a marginal, but nevertheless important, concern for small business. With some irony, Waring and DeRuyter note that greater concerns for small business have been, as recorded in earlier surveys, superannuation and taxation. However these concerns have not led to exemptions from paying tax or the superannuation levy.

84. There can be no doubt that there will be some business costs associated with unfair dismissal legislation, as there are in complying with a range of taxation and superannuation legislation. However it is not unreasonable to expect business to bear such costs, when the object is to ensure fair treatment of employees.

[18] Peter Waring and Alex DeRuyter, 'Dismissing the Unfair Dismissal Myth'*, Australian Bulletin of Labour*, Vol 25, September 1999.

CHAPTER 4: THE BENEFITS OF HAVING SEPARATE STATE INDUSTRIAL RELATIONS SYSTEMS

EFFICIENCY VERSUS FAIR GO ALL ROUND

85. Supporters of a unitary system of industrial relations in Australia generally base their arguments on efficiency grounds. In a paper issued by former Minister Reith in 2000, the case for changing the constitutional foundations of the Commonwealth industrial relations system had three objectives, one of which was 'moving away from the wasteful duplication and complexity involved in the application and maintenance of overlapping Federal and State workplace relations systems'.[19]

86. The Paper went on to say

> 'The effectiveness of arrangements to provide for minimum wages and conditions is compromised by the enormous complexity of having dual workplace relations systems and a multiplicity of awards operating in every state except Victoria …'.[20]

87. But efficiency is not the only goal that governments should strive towards. The Hon Murray Gleeson AC, Chief Justice of the High Court has said:

> 'A federation, it must be said, is not a model of efficiency … If efficiency were the main objective, there would be better ways of running a country than by a federal representative democracy.'[21]

88. In the case of industrial relations, efficiency is not and should not be the only objective. A 'fair go all round', a balancing of the sometimes competing objectives of employers and employees, is the main

[19] *Breaking the Gridlock* at page 1.
[20] *Breaking the Gridlock* at page 3.
[21] Boyer Lectures 2000: The Rule of Law and the Constitution, 2000 at page 10.

objective of an industrial relations system. Indeed, it is arguable that the dual system of regulating industrial relations that has been the norm in Australia for over a century has contributed to and promoted the importance of a fair go all round as the centrepiece of good industrial relations.

89. The former Minister for Industrial Relations in NSW, the Honourable Jeff Shaw, commented on the then Minister's proposals in October 2000.[22] His view was that, whilst there might be technical problems at the periphery with the dual systems, these are not of great practical import and do not create too much day to day difficulty. The real issue was the proposal to replace the systems put in place by Labor State Governments with the deregulated model of industrial relations preferred by the Federal Government.

90. A unitary industrial relations system is not an end in itself. Support for such a proposal depends on a political or philosophical judgment about how appropriately the proposed unitary system balances the tension between the demands of employers and the rights of employees.

THE FEDERAL GOVERNMENT'S TRACK RECORD IN PROVIDING 'FAIR GO ALL ROUND'

91. The NSW industrial relations system has been firmly based on the concept of a 'fair go all round' for many years. It provides a framework for the management of relations between employers and employees that ensures a 'fair go' for both sides. In fact, the formulation of a 'fair go all round' originated in NSW.[23] The NSW unfair dismissal provisions, in particular, are an expression of the commitment to a fair go all round, with the NSW Commission enjoying a broad discretion to consider the circumstances of a dismissal and to determine whether a remedy is appropriate.

[22] Radio National, Life Matters program, broadcast on 24 October 2000.
[23] *Re Loty and Holloway v Australian Workers Union* (1971) AR (NSW) 95.

92. In fact, the federal WR Act also contains express reference to the original NSW formulation – section 170CA(2) claims that it is the intention of the termination of employment provisions to provide that 'a "fair go all round" is accorded to both the employer and employee concerned'. However, NSW submits that a series of workplace relations bills introduced by the Federal Government since its election in 1996 demonstrates a move away from supporting the equilibrium between employer and employee interests (particularly where the latter are collectively organised or expressed) towards an increase in managerial prerogative.

93. The present bill demonstrates this move away from a system that balances the rights of employers and employees in the provisions that would make it more difficult for an employee of a small business to gain access to the federal unfair dismissal system, and also those provisions that would exclude the Federal Commission from considering the fairness of a dismissal based on operational grounds (see the discussion in Chapter 2). The Fair Termination Bill and Fair Dismissal Bill that are briefly described in Chapter 3 would exclude significant classes of employees from access to the federal unfair dismissal jurisdiction.

94. The Minister in his Second Reading Speech clearly flagged the intention that this would be the first in a series of bills designed to progress towards a 'single workplace relations system for the whole country':

> 'Since my predecessor, Peter Reith, launched a series of discussion papers in late 2000, it has been Government policy to explore options for working towards a simpler, fairer workplace relations system based on a more unified and harmonised set of laws. Maintaining six separate industrial jurisdictions makes as much sense as keeping six separate railway gauges. A national economy needs a national regulatory system and the sooner we can achieve this, the better. A more unified national workplace relations system means less complexity, lower costs and more jobs. …

> [T]he federal unfair dismissal law is generally less burdensome to employers and less destructive of employment growth than the State laws. Even if this were not the case, there would be advantages in having to deal with only one imperfect set of laws (rather than several). The Government hopes to achieve, not only one set of unfair dismissal provisions covering Australian workplaces, but also the best possible set of provisions covering Australian workplaces. …
>
> This bill is the first legislative step towards a single workplace relations system for the whole country.'[24]

95. Chapter 2 has already demonstrated that the present bill is likely to lead to more complexity and cost, not less. It is the submission of the NSW Government that the current bill also builds on the already one-sided nature of the federal termination of employment system, tipping the balance further in favour of employers and providing less fairness for workers. The bill does not support a 'fair go all round' and nor do the other bills currently before the Federal Parliament.

IS THERE SOMETHING WRONG WITH THE STATE UNFAIR DISMISSAL SYSTEMS?

96. Even if it were conceded that there might be efficiency benefits from having a single system of industrial relations in Australia, it is important also to consider the positive benefits in having separate systems. The federal division of power to deal with industrial issues is, after all, mandated by the Commonwealth Constitution. The Commonwealth should not be permitted to take over areas that are currently covered by state law if it cannot provide convincing evidence that there are real problems with the state systems as they presently operate and that its proposed solution would be superior.

97. This leads to the question of whether the Commonwealth attempting to 'take over' large parts of the current state industrial relations systems (or at least the unfair dismissal jurisdictions of the states, as presently

[24] House of Representatives, *Hansard*, 13 November 2002 at 8777-8.

proposed) is a sensible use of the Commonwealth's constitutional powers.

98. The Minister's Second Reading Speech for this bill does no more than propound the view that a unitary system is preferable to a dual or federal system, followed by the statement that 'the Federal unfair dismissal law is generally less burdensome to employers and less destructive of employment growth than the State laws'. There is simply no evidence that this is correct (see Chapter 3). The weakness of this assertion is acknowledged in his very next sentence: 'Even if this were not the case, there would be advantages in having to deal with only one imperfect set of laws (rather than several)'. The implication seems to be that a unitary system is an end in itself and it does not matter that that system may not meet the needs of employers and employees.

99. The Second Reading Speech does not draw attention to any specific failing in any of the state systems – rather the Federal Government objects to them solely because they are state systems and their very existence, it is alleged, creates economic inefficiency.

100. As compared to the broad discretion of the NSW Commission under the NSW Act, the federal provisions are far more complex because they are designed to exclude as many employees as possible from seeking a review of the fairness of their dismissal. Questions such as who does or does not have access; should issues relating to the size of the employer's undertaking be taken into account; was a certificate stating that there is no reasonable prospect of a successful arbitration properly issued etc cause more concern to those who might have to deal with that system about the costs of dealing with such issues than the relatively straightforward state unfair dismissal systems. It is submitted that by expanding the coverage of the federal unfair dismissal system to those who presently have access to the NSW system, the effect of the bill would be to replace a relatively simple and

straightforward system for dealing with unfair dismissal with a more complex system.

ARE THERE ANY BENEFITS TO HAVING A FEDERAL (DUAL) SYSTEM OF REGULATING INDUSTRIAL RELATIONS?

The benefits of federalism

101. In Geoffrey de Q Walker's ten advantages of a federal Constitution, he states:

> A properly working federation government is more adaptable to the preferences of the people, more open to experiment and its rational evaluation, more resistant to shock and misadventure, and more stable. Its decentralised, participatory structure is a buttress of liberty, a counterweight to elitism, and a seedbed of 'social capital'. It fosters the … qualities of responsibilities and self-reliance.[25]

102. Other commentators have argued that a federal system 'creates a competitive environment for democratic and liberal values, and for public policy solutions'.[26]

103. The coexistence of state and federal industrial relations systems exemplifies some of the qualities lauded above and has provided an excellent competitive environment for the development of systems that are sensitive to the demand for a fair go all round. The existence of separate state systems has permitted experimentation with new ideas and approaches to industrial relations in Australia and led to a more vibrant and equitable industrial relations environment.

---

[25] Geoffrey de Q Walker, 'Ten Advantages of a Federal Constitution' (1999) 73(9) *Australian Law Journal* 634 at 653.

[26] D J Elazar, *Exploring Federalism*, University of Alabama Press, Tuscaloosa, 1987; Ronald Watts, *Executive Federalism: A Comparative Analysis*, Institute of Intergovernmental Relations, Queen's University, Kingston, 1989; both quoted in Victorian Federal State Relations Committee's Report October 1998

A competitive environment for new ideas

104. In particular, the NSW jurisdiction has, in recent decades, led the way in exploring and developing concepts such as payment for redundancy, rights on termination of employment, pay equity and equal remuneration, the incorporation of anti-discrimination concepts into industrial relations, expanding the rights of casual employees and addressing the exploitation of clothing outworkers. Many of these initiatives have been picked up by other jurisdictions.

The rights of casual employees in NSW

105. The NSW jurisdiction provides employers and employees with a stable industrial relations system capable of adapting to changing needs. The NSW Commission has been able to creatively develop its role in ways that have recognised the particular needs of specific classes of workers. For example, the NSW Commission was one of the first in the country to recognise that casual employees who have been employed on a regular and systematic basis and who had a reasonable expectation of the continuation of that employment, should have access to the unfair dismissal jurisdiction. This principle is now accepted in all jurisdictions, including Federally in the WR Act, where the main arguments are over the length of time a casual employee must have served before being eligible to make an application.

106. The NSW Government has recognised both the increased frequency and importance of casual employment to those who require a certain amount of flexibility in their working arrangements, often due to parental and/or caring responsibilities. This recognition also encompasses an understanding that many employers also require access to flexible workforces. The *Industrial Relations Amendment (Casual Employees Parental Leave) Act 2001* (NSW) extended the

right to parental leave to casual employees with 12 months experience with one employer. Previously such employees had to have 24 months experience to make use of the Act's parental leave provisions. Since the legislation was assented to on 17 July 2001, Queensland quickly followed the NSW lead, with nearly identical parental leave provisions commencing on 3 December 2001. The recent review of South Australia's industrial relations legislation, also recommended an extension of parental leave to casual employees with 12 months experience with the one employer.

Other examples of NSW innovation

107. There are a number of other examples of NSW innovation.

108. The area of redundancy is particularly instructive. With the insertion of section 88G dealing with the effects of automation into the *Industrial Arbitration Act 1940* (NSW) in 1964, NSW became the first jurisdiction in Australia with provisions relating to redundancy. The *Employment Protection Act 1982* (NSW) was the first legislation in Australia to deal in detail with the obligations of employers in redundancy situations. After detailed consideration of the issues and appropriate levels of severance pay by the NSW Commission[27], Regulations were made under the Act setting minimum severance pay requirements. The current Regulations establish the most generous severance pay conditions in Australian legislation (based on the severance scale set by the NSW Commission[28]). For example, employees over the age of 45, with a minimum of six years of service, are entitled to up to 20 weeks of redundancy pay. In the Federal sphere the same employee would be entitled to only eight weeks pay.

[27] *SDAEA v Countdown Stores* (1983) 7 IR 273.
[28] *Re application for Redundancy Awards* (1994) 53 IR 419.

109. The Federal Commission is shortly to hear the Termination Change and Redundancy Test Case where the ACTU has put its case for redundancy entitlements similar to those in NSW. The Federal Government still lags on redundancy regulation and to date has failed to meet the standard of fairness and equity in relation to termination of employment.

110. Pay equity is another concept that was developed first in NSW and has since been adopted in other jurisdictions. On 28 March 2000 the NSW Commission handed down its decision in *Re Equal Remuneration Principle* [2000] NSWIRComm 113. The decision followed the Pay Equity Inquiry which concluded in 1998. The decision set standards for equal remuneration and other conditions of employment for men and women doing work of equal or comparable value.

111. The Principle and the results of the Pay Equity Inquiry continue to be highly influential in other jurisdictions. A claim has now been lodged by the Australian Services Union in the Federal Commission for childcare workers in community and government centres in Victoria, referencing the NSW Pay Equity Inquiry findings that the childcare workers' work had been substantially undervalued and underpaid. The claim seeks recognition of the professional nature of the work. The claim is proceeding in the context of recurrent shortages of childcare workers. Queensland's own Pay Equity Inquiry was directly inspired by the NSW developments, with the terms of reference including reference to the Report of the NSW Inquiry. The Queensland Inquiry examined the NSW Report and generally supported and adopted its findings. As a result, Queensland now has its own Equal Remuneration Principle. Further, on 6 July 2002 the Tasmanian Industrial Relations Commission handed down its Pay Equity Wage Fixing Principle that applies to workers covered by Tasmanian state awards.

112. Finally, an outstanding example of recent innovation in NSW is the Behind the Label strategy, which seeks to improve the situation of

grossly exploited outworkers in the clothing industry. Under the auspices of the Ethical Clothing Trades Council established by the NSW *Ethical Clothing Trades Act 2001*, on 18 September 2002, a Code of Practice was signed by the Textile Clothing and Footwear Union of Australia and the Australian Retailers Association. This has been a breakthrough agreement, where business has taken on a significant measure of responsibility for the plight of outworkers. It is an example of how New South Wales has moved to address real workplace issues where an industry has not delivered fair outcomes for its employees. It is a collaborative model of regulation, involving all industrial parties. Both Queensland and Victoria are investigating similar regulatory strategies, based on the NSW model.

STATE INDUSTRIAL RELATIONS SYSTEM CONTRIBUTES TO STRENGTH AND RESPONSIVENESS OF STATE ECONOMY

113. The arguments put forward in favour of the present bill as a precursor to further legislation for a unitary national industrial relations system appear to rest on an assumption of a unitary national economy, operating in the same way in all states and regional areas, requiring the same legislative infrastructure in all these areas, and capable of being centrally managed.

114. In the NSW Government's submission, such assumptions are mistaken. Decentralisation and sensitivity to regional needs are also important features of a federal constitution. State Governments have a distinct and positive role to play in fostering economic development. However, a necessary condition for playing such a role is legislative autonomy in those areas not set aside by the Constitution for Commonwealth power. Part of that autonomy is the power to legislate for the best industrial relations system for this state.

115. The State Government currently has a cooperative and constructive relationship with businesses operating in NSW. A wide range of activities maintain and expand this relationship and facilitate a

supportive business environment. A capacity to respond in an immediate way to the industrial relations needs of business is a crucial part of the NSW Government's ability to maintain these relationships and to contribute to a thriving NSW economy.

Success of the 2000 Olympic and Paralympic Games

116. One example of how having our own industrial relations system helps make NSW strong is the role that it played in the acknowledged success of the Sydney 2000 Olympic and Paralympic Games.

117. NSW received global recognition for the success of its 2000 Olympic and Paralympic Games. A key factor underpinning the success of the Games was the co-operative and flexible industrial relations system in this state. To ensure a successful Sydney Games the key players in the industrial relations arena agreed on a system to regulate the employment of workers at the Games. All parties worked towards an outcome of industrial harmony.

118. In describing the success of the NSW system the Minister for Industrial Relations, the Honourable John Della Bosca, told Parliament that:

> 'The industrial harmony and co-operative industrial relations that were evident during the Games are an excellent illustration of what can be achieved in the context of a supportive industrial relations framework.[29]

119. It is also an excellent example of how the State jurisdiction is able to account for specific circumstances and how agreements in sensitive and important circumstances can be more easily facilitated by having a local industrial relations system.

Rural and regional sittings of the NSW Commission

[29] NSW Legislative Council, *Hansard*, 23 October 2001, page 17,686.

120. A second example that further establishes the value to the citizens of NSW of having their own industrial relations system is the rural and regional focus of the NSW Commission.

121. For many years, the NSW Commission has routinely heard unfair dismissal matters in regional and rural locations. In September 2001, the NSW Commission revised and implemented a new regional panel system whereby members of the NSW Commission are assigned to deal with disputes and other matters arising in those regions. The four regions are as follows:

- Sydney
- North (main regional centres are Newcastle and Lismore)
- West (main regional centres are Wagga Wagga, Dubbo and Orange)
- South (main regional centre is Wollongong).

122. The formalisation of the regional panel system means that specific members of the NSW Commission are assigned to particular regions. The numbers assigned to each region outside Sydney are as follows:

- North – one Deputy President and five Commissioners
- West – one Deputy President and four Commissioners
- South – one Deputy President and three Commissioners.

123. The Deputy President and one Commissioner assigned to the North are permanently based in Newcastle. All other members are based in Sydney, and travel to the regional area assigned to them as required.

124. Sittings occur in towns throughout the regional areas, not just in those noted as the main regional centres. For example, of the 896 sitting days in the West during the period January 1998 to December 2001, there were 65 sitting days in Broken Hill, 115 in Bathurst, 138 in Wagga Wagga and 61 in Dubbo.

125. The use of NSW Commission resources outside Sydney is not only an important symbol of the decentralisation of government resources. It is a practical measure that enables the Commission to better appreciate employment related issues in non-metropolitan areas and diminishes the costs incurred by the parties.

Unfair dismissal matters in regional areas

126. In the first three months of the operation of the panel system (October to December 2001), almost 80 percent of unfair dismissal matters were being heard in Sydney. This dropped to just under 70 percent in the second three months (January to March 2002). In both the previous two years, about three quarters of unfair dismissals had been heard in Sydney.

127. NSW Commission figures indicate that the focus is shifting from hearing most unfair dismissal matters in Sydney to hearing them in more convenient rural and regional locations closer to where the parties live and work.

128. It is important that the NSW Commission travel to regional locations where the matter, be it an industrial or unfair dismissal dispute, occurs. This enables the NSW Commission to be more aware of the particular circumstances of the case and of issues that are of particular concern to a specific regional area. Further, it provides significant cost savings for the parties involved in the dispute.

129. The Commission predominantly sits in the main metropolitan cities. It would be important to maintain the presence of the relevant tribunal in rural centres and presumably, if the Federal Government were to take over such a significant proportion of the NSW jurisdiction, this presence would disappear and workers and employers would be significantly disadvantaged.

CHAPTER 5: IS A TRUE UNITARY SYSTEM POSSIBLE?

NOT IF THE COMMONWEALTH ATTEMPTS UNILATERAL TAKEOVER

Limits on Commonwealth powers

130. As is well illustrated by the limited reach of the present bill, the limits on Commonwealth constitutional power mean that it will never be possible, barring constitutional amendment or wholesale referral of industrial relations powers by the states, for the Federal Government to create a truly unitary system.

131. Any industrial relations system the Federal Government establishes unilaterally on the basis of the corporations power will be limited in its coverage, with some businesses falling inside the federal system, and others outside it. This will perpetuate the dual system that the Federal Government claims is so burdensome to business.

132. Although the question has not been settled definitively by the High Court, on the basis of its decisions to date, it is arguable that the Federal Government, in reliance on the corporations power, could create an industrial relations system that covers a substantial proportion of Australian workplaces, that is, those where the employer is a corporation within the constitutional meaning of that term.

133. The Second Reading Speech on the present bill envisages that the takeover of a claimed 85 percent of Australian employees by the federal termination of employment laws will lead to the 'withering away' of the state jurisdictions, at least in this aspect of workplace law.

134. The corporations power does not extend to legislating for the remaining 15 percent of employees and their employers. Nor, seemingly, does it extend to being able to make industrial laws in relation to dependent or

exploited contractors unless at least one of the parties is a constitutional corporation. Thus there will always be limits on the capacity of the Federal Government to create a truly unitary system that provides equality of access and appropriate protection for all Australian workers and their employers without the co-operation of all the states.

Invoking other powers to deal with non-corporations is not the answer

135. Other powers might be relied on to 'plug' some of the holes left by reliance on the corporation power.

136. For example, some aspects of workplace relations could be dealt with by legislation based on the external affairs power, invoking ILO or UN Human Rights Conventions. However, the scope of such legislation would be limited by the international instrument on which it relies. Such difficulty was faced by the Keating Government in their attempt to use the Termination of Employment Convention.[30]

137. In short, it will not be possible for the Federal Government to fully 'cover the field' with the use of other constitutional powers.

Not all corporations are constitutional corporations

138. Further, there is the question of whether any particular employer is or is not a constitutional corporation. Putting aside the question of foreign corporations and corporations that are covered by virtue of being located in the Territories or because they are Commonwealth authorities, the key criterion for being a constitutional corporation is that the organisation is either a financial or a trading corporation. It is to be noted that it is not a necessary precondition that the body be incorporated under the Corporations Act. Associations that are

[30] *Industrial Relations Reform Act 1993* (Cth); *Victoria v The Commonwealth* (1996) 187 CLR 416.

incorporated under state legislation can also be included, but again, the criterion is that the organisation has trading or financial activities.

139. Decisions to date have generally been expansive in their interpretation of these requirements. Bodies held to have sufficient financial or trading activities to be caught by the definition include public universities, local councils and some charitable organisations. However, there has been no definitive High Court ruling on this issue. Thus, while there is clearly a substantial core of bodies corporate that undoubtedly fall within the meaning of a constitutional corporation, there may still be others whose status is uncertain.

140. The legislation leaves room for confusion and uncertainty. Two examples suffice to show the different results that might come from not-so-different factual situations. In one case, the Corporation of the Trustees of the Roman Catholic Diocese of Brisbane achieved certification of an agreement on the basis that it was a trading corporation, notwithstanding that it had other more extensive non-trading activities which might warrant it being also classified as some other kind of corporation.[31] In another case, a company providing public welfare services, surviving almost wholly on government grants, was held not to be a trading corporation, despite involvement in some trading activities.[32]

CONSTITUTIONAL ARRANGEMENTS MEAN COOPERATION IS THE WAY FORWARD

141. Rather than attempting to deal with the perceived inefficiencies of dual industrial relations systems unilaterally, and therefore imperfectly and incompletely, the Federal Government might be better advised to engage in more cooperative strategies.

[31] *Application by the Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane and others for certification of Division 2 agreement* (1997) 42 AILR para 3-612.
[32] *Fowler v Syd-West Personnel Ltd* (1998) 44 AILR para 3-836.

142. As has been acknowledged by many commentators on Australia's federal constitution, the division of powers between the states and the Commonwealth, combined with the concurrent nature of many of those powers, requires a good degree of cooperation between the constituent elements of the Commonwealth in order to advance the interests of the nation as a whole and the needs of particular groups and regions within the nation.[33]

The Corporations Law as an example of cooperative federalism

143. There are many examples of cooperative federalism in action. An appropriate example to refer to is the development of a national system for regulating the activities of corporations, financial markets, securities and similar instruments more generally. Whilst at first glance one might think that the Federal Government could simply legislate in this regard on the basis of its corporations power, there are in fact (and at law) significant limitations on what can be achieved under this power. For example, it has been held that the Commonwealth cannot legislate for a national unitary system for the incorporation of companies. [34]

144. In order to create a truly national scheme, it has therefore been necessary for there to be significant cooperation and coordination between the states and the Commonwealth. After a series of High Court decisions questioning the validity of earlier cooperative schemes, the states ultimately agreed to a referral of the necessary heads of power to the Commonwealth, to permit the creation of a single national law with a valid constitutional foundation – the Corporations Act 2001.

[33] see for example the Victorian Parliament's Federal State Relations Committee's Federalism Report, October 1998 at http://www.parliament.vic.gov.au/fsrc/report2/contents.htm
[34] *NSW v Commonwealth* (1990) 169 CLR 482.

An important reservation of power

145. In the creation of the Corporations Act, the states took great care to ensure that the referral of powers that provided a constitutional basis for that legislation explicitly excluded any referral of powers to the Commonwealth to legislate for the purpose of regulating industrial relations.

146. Whilst it seems clear that in proposing the present bill, the Federal Government is not seeking to make any impermissible use of the referred powers, but simply relying on the existing head of power in section 51(xx), it is strongly submitted by NSW that the proposed legislation is contrary to the spirit of that earlier referral of power. The agreement that enabled the enactment of the Corporations Act 2001 was based on an explicit understanding that, while the Commonwealth and the states agreed that corporate and financial affairs were a matter that required national unitary regulation, industrial relations was not such a matter, and was a matter left to be dealt with concurrently by the states and the Commonwealth.

147. This is not to say that greater uniformity and cooperation between the various jurisdictions on the way in which their industrial relations systems operate may not be a valid goal in itself.

148. However, it is fair to say that the states have clearly stated that they do not agree to federal usurpation of the field of industrial relations.

149. Where there is such fundamental disagreement about the appropriate regulatory mechanisms, cooperation will obviously be more difficult to achieve. However, this can hardly justify a unilateral attempt by the Federal Government to take over well established state functions and jurisdictions.

Disregard for machinery of cooperation

150. One of the mechanisms established for the states and the Commonwealth to consider issues of mutual concern in the area of industrial relations is the Workplace Relations Ministerial Council (WRMC). However, despite the fact that a meeting of the WRMC was held just days before the present bill was introduced, the Federal Minister made no mention of the bill at that meeting.

151. Two days after that meeting, on Sunday 10 November, the press carried news items flagging the Federal Minister's intent to present the bill that was eventually introduced into the Commonwealth Parliament on Thursday 14 November 2002.

152. Although a termination of employment issue was included on the agenda of the WRMC meeting (the prospect for uniform national treatment of casual employees under the various unfair dismissal jurisdictions), the Federal Minister did not take the opportunity, in the context of that discussion, of alerting his counterparts in the states and Territories of the imminent introduction of this bill. There can be little doubt that the bill had already been drafted in advance of the time of the meeting. The Federal Government's view on a co-operative approach is clear.

CHAPTER 6: IS THERE A CASE FOR CHANGE?

153. The Federal Government's argument in support of the changes proposed in the bill rests on two underlying arguments:

(a) that unfair dismissal laws are bad for business and bad for job creation and job security and that the changes to processes and rights that are proposed in the bill would be better for business, job creation and job security; and

(b) that having to deal with more than one system of employment law (unfair dismissal laws in particular) is inefficient and bad for business and that the new system proposed in the bill would be more unitary and less complex.

154. The NSW Government submission demonstrates that the above assertions made out by the Federal Government are not well-founded. The cost to business and the economy of implementing the bill would be either neutral or minimal, and in many cases more expensive.

155. Accordingly, the NSW Government submits that the bill should be rejected by the Senate for the reasons set out below.

156. Firstly, the Federal Government has not made out a case for why the bill is necessary. In particular, the case fails on the following grounds:

- The Federal Government has failed to justify there is any problem with the operation or application of the current state unfair dismissal systems.

- The Federal Government has failed to justify why more people should be covered by the federal system than by the existing state system.

- A shift to the federal system would create complexity for business and employees that currently operate within state industrial relations systems.

- The Federal Government's argument that its system for dealing with unfair dismissal is better for business and more conducive to job creation is based on reasoning that is flawed.

- A shift to the federal system would deny a 'fair go all round' to more people. The federal system is geared heavily in favour of employers and against the right of employees to have their allegations of unfair dismissal dealt with.

- The current system of interlacing federal and state laws ensures that all employers and employees in Australia have access to a fair and impartial means of dealing with allegations of unfair dismissal. The Federal Government has not made out a case why this reasonably harmonious and understood system should be disturbed and the rights of some classes of employees should be put in jeopardy.

157. Secondly, the bill clearly discriminates against employees of small businesses. It:

- Allows unfair dismissal cases brought by employees of a small business to be decided without a hearing.

- Makes employees of small businesses serve a probation period twice the period of other workers.

- Allows employees of small businesses only half the compensation that other workers can claim.

- Restricts the grounds on which an employee of a small business can claim their dismissal was unfair.

There is simply no justification for this discriminatory treatment.

158. Finally, the bill should be rejected on the basis that it is a precursor to further attempts by the Federal Government to expand its coverage of industrial relations. Attempts by the Federal Government to expand its coverage should be rejected on the following grounds:

- The Federal Government cannot achieve a unitary industrial relations for the whole nation on the basis of the present distribution of constitutional powers. Any expansion of powers will only lead to further complexity and uncertainty for business and employers.

- A unitary system of industrial relations should be judged not on the basis of perceived efficiencies, but rather on the nature of the system that is proposed. A system that is not truly predicated on the guiding principle of ‘a fair go all round’ should be rejected.

- The creative tension between the Commonwealth and the states provides a robust arena for the development of new ways of dealing with industrial issues.

159. Finally, the Federal Government has failed to observe the conventions of co-operative federal/state relations in failing to discuss the present bill with the states before its introduction. There is strong concern about the likelihood of the Federal Government repeating this failure in the future.

160. For all the reasons set out above, the bill should be rejected.