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Submission To the Senate Employment, Workplace Relations & Education, Legislation Committee

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

Western Australia

February 2003

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INTRODUCTION

1. We refer to the invitation of the Senate Employment, Workplace Relations and Education, Legislation Committee to provide a submission for the Inquiry into provisions of the Workplace Relations Amendment (Termination of Employment) Bill 2002 (Clth). Western Australia appreciates the opportunity to comment on this proposed Commonwealth legislation.

2. The Bill has far reaching implications for employees and employers in Western Australia. The Western Australian Government questions the figure of "85%" that has been cited by the Federal Government in relation to the number of employees who will be covered by this proposed legislation (for which no research source has been provided). However, regardless of the quantitative impact of this Commonwealth legislation, the proposed legislative changes will have a significant and detrimental impact on the Western Australian legislative provisions, jurisdiction and administration of unfair dismissal matters.

3. Indeed, what proposed section 170HA endeavours to do would render state legislation (to use the terminology of section 109 of the Commonwealth Constitution) "invalid".

4. The Western Australian Government's position is that it is inappropriate to use the corporations power (in section 51(xx) of the Commonwealth Constitution) to impose a Commonwealth industrial relations system on the states. The Western Australian Government strongly opposes any industrial relations model that undermines or diminishes the flexibility and effectiveness of the Western Australian industrial relations system.

5. The State Government is, of course, always prepared to consider the merits of a fair and equitable unitary industrial relations system for Australia. However, its current position is that it does not support unification, as no acceptable unification model has been proposed at this time. The unilateral imposition of legislative changes proposed by the Commonwealth Bill is not supported.

6. The *Industrial Relations Act 1979* (WA) (IR Act) regulates termination of employment and unfair dismissal for those employers and employees falling within the Western Australian jurisdiction. Recent amendments to the IR Act by the *Labour Relations Reform Act 2002* (WA) made significant improvements to this State's unfair dismissal provisions. Consequently, the State legislative scheme, which has been recently reviewed, fairly and appropriately balances both the needs of employers and employees in Western Australia.

7. Consequently, the current Western Australian IR Act does not deal specifically with unlawful termination, which is included in the *Workplace Relations Act 1996* (Clth) (Federal Act). However, grounds of unlawful termination under the Federal Act can be dealt with fairly, appropriately and expeditiously under this State's unfair dismissal law.

8. For the reasons elaborated below, the Western Australian Government also opposes aspects of the Commonwealth Bill relating to small business.

Western Australia - Statistics

9. In Western Australia, the IR Act unfair dismissal provisions are more frequently utilised than the equivalent federal provisions. Parties can easily and simply utilise the Western Australian Industrial Relations Commission (WAIRC) jurisdiction with respect to unfair dismissals and denial of contractual benefits through section 29 of the IR Act. The Chief Commissioner of the WAIRC's 2001/2002 Annual Report states that 1141 applications were commenced for alleged unfair dismissal (under 29(1)(b)(i) of the IR Act) in the WAIRC.[1] The total number of applications commenced under section 29 of the IR Act, for unfair dismissal, denial of contractual benefit or both, in the 2001-2002 financial year was 2023.[2] Section 29 applications made up 56% of the total number of applications lodged in the WAIRC in the 2001/2002 period.[3] This is obviously a significant amount of the WAIRC's workload.

10. By way of contrast, the Australian Industrial Relations Commission (AIRC), Perth Registry finalised 373 termination of employment matters during the 2001/2002,[4] while a total of 1968 applications were finalised in the WAIRC for unfair dismissal, denial of contractual benefit or both.[5]

11. Therefore, the majority of such matters were dealt with under the Western Australian jurisdiction. Clearly, Western Australian employers and employees favour the State, not the federal, industrial relations system. The precise number of those applications that involved employees of constitutional corporations (which would be excluded from the State jurisdiction under the Commonwealth Bill) has not been quantified. However, it is clear that a vast majority of claims would involve constitutional corporations and, consequently, would be forced by the proposed Commonwealth amendments into the Commonwealth jurisdiction.

An Existing Equitable and Fair System

12. In *City of Mandurah v Hull* [2000] WASCA 216 the Western Australian Industrial Appeal Court indicated that employees on federal awards and federal certified agreements employed by constitutional corporations can generally choose to either claim in the federal or State unfair dismissal systems. Presently, this is the only group in Western Australia that has access to the federal system. Federal award and certified agreements employees not employed by constitutional corporations currently only have a remedy for unfair dismissal in the State system.

13. The Commonwealth Bill will still not bring those federal award and federal certified agreements employees into the federal unfair dismissal system if

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1 Chief Commissioner of the Western Australian Industrial Relations Commission Annual Report, 1 July 2001 to 30 June 2002, p 13

2 Ibid p 13; Note: equivalent statistics not ascertainable from the AIRC Annual Report 2001-2002

3 Ibid, p 14

4 The Australian Industrial Relations Commission Annual Report, 2001-2002, "Work of the Commission: Termination of Employment Matters", Table 6

5 Chief Commissioner of the Western Australian Industrial Relations Commission Annual Report, 1 July 2001 to 30 June 2002, p 14

7 Ibid, p 14

constitutional corporations do not employ them. This is an example of how the Commonwealth Bill fails in its attempts to create a unitary industrial relations system.

14. The 2002 amendments to the State IR Act require that the focus of the WAIRC should be on conciliation and that arbitration should be used only when conciliation has failed to be effective in resolving matters. That is a much better and effective industrial relations regime for employers and employees than that proposed in the Commonwealth Bill.

15. The following are some of the features of the Western Australian IR Act:

    a) Under section 23A of the IR Act, the WAIRC considers awarding compensation in relation to an unfair dismissal claim only after it has firstly considered reinstatement or re-employment to be impractical.

    b) The filing fee for lodgement of an application for unfair dismissal has been increased from $5.00 to $50.00. This is one of the State measures that prevents and discourages frivolous and vexatious claims.

    c) Except as provided in e) below, the amount of compensation that can be awarded cannot exceed 6 months' remuneration of the employee. This legislative prohibition applies regardless of the size of the employer's business.

    d) Section 83B of the IR Act deals with enforcement of orders made in relation to unfair dismissal applications. If an employer contravenes or fails to comply with an order under section 23A, an application can be made for enforcement to the Western Australian Industrial Magistrate's Court (the Court). The Court may, in addition to making an order for a person to do or cease to do a specific activity, impose a penalty not exceeding $5,000.

    e) Under section 83B(3)(a)(ii), the Court can also order an employer to pay to the employee an amount decided by the Court, which (according to section 83B(7)) must not be less than 6 months' but no more than 12 months' remuneration of the employee. The amount may be calculated in accordance with the average rate of pay during any relevant period of employment.

    f) Furthermore, the Court must have regard to certain factors (subsection 83B(9)), such as efforts of the employer or employee to mitigate the loss suffered by the employee as a result of the dismissal, and any redress the employee has obtained. Non-compliance with such orders of the Court attracts a penalty of $5,000 with a daily penalty of $500.

    g) Presently, section 29AA of the IR Act prevents the WAIRC from hearing a claim for harsh, oppressive or unfair dismissal from employment if a like application has been lodged in the equivalent federal jurisdiction. If an employee under a common law contract of employment has a salary, which exceeds $90,000, he or she is also excluded from the WAIRC's jurisdiction.

16. These provisions in the IR Act deal with and overcome concerns the Federal Government has regarding the unfair dismissal process and which it seeks (albeit in an inappropriate manner) to address in the Commonwealth Bill.

17. In contrast to the Commonwealth Bill, Western Australian Government believes that an efficient and effective unfair dismissal system should provide an appropriate balance between the interests, rights and obligations of both employers and employees. The system should reflect the following key features:

    a) a simple process, which provides as much scope as possible for agreed outcomes without resort to arbitration;

    b) appropriate mechanisms to discourage unmeritorious claims;

    c) expeditious processing and resolution of claims; and

    d) appropriate remedies which reflect the intent and purpose of unfair dismissal protection.

18. The Western Australian industrial relations system achieves these objectives.

19. The Western Australian jurisdiction currently handles the vast majority of termination matters in this State. Unfair dismissal and denial of contractual benefit matters (section 29 of the IR Act) made up 56% of the total number of matters initiated under the IR Act that were lodged in the WAIRC last financial year.[7] Consequently, the expertise and administrative experience resides with the WAIRC, not with its federal counterpart. This experience and expertise will be lost to the detriment of industrial relations in Western Australia if the proposed amendments are enacted.

20. Further, the Western Australian jurisdiction is less cumbersome and more accessible to employees and employers alike. The enactment of the Commonwealth Bill would force many employers and employees unwillingly out of the State jurisdiction. This is indicated by the clear fact that those who currently do have dual access choose the State system rather than utilising the federal provisions.

SCHEDULE 1: COVERING THE FIELD OF HARSH, UNJUST OR UNREASONABLE TERMINATION

Schedule 1, Part 1, Clause 3 - Paragraph 170CB(1)(c)

21. The Western Australian Government believes that the use of the corporations power in the Commonwealth Constitution to expand the scope of the federal unfair dismissal jurisdiction is not the appropriate method for dealing with the issue of unification. If enacted, the effect would be that a substantial number of cases will be transferred from the State jurisdiction to the federal jurisdiction. The legal, legislative and administrative authority will therefore largely lie with the Commonwealth in an area properly and traditionally the domain of the State jurisdiction. It will result in a diminution of State involvement in settling local disputes in industrial matters.

22. The proposed amendments will not lead to uniformity or consistency because the Commonwealth law will not cover those employees that are not employed by constitutional corporations. That is, the Bill is fundamentally flawed in its attempts to create a unitary industrial relations system. Further, the states would be required to operate an unfair dismissal system, which would be cost ineffective.

23. Western Australia is conscious of the scope of the corporations power and the effect on Commonwealth/State relations and federalism of the Commonwealth under that power.

24. The proposed amendments will have an adverse effect on the federal nature of Australia's federal constitutional system and on the role and responsibilities of the States. The direct attempt to manufacture inconsistency and exclude the utilisation of the State system altogether is merely a prominent example of that adverse and detrimental impact. A federal system of government promotes diversity and takes into account regional differences and needs, as well as enabling the best and most appropriate legislative model to be enacted. In addition, this allows checks and balances for the benefit of all citizens to remain in place between State and federal systems. All of these advantages would be eroded by the proposed Commonwealth legislation, which will seriously undermine the State system to the point of excluding a majority of those who would otherwise prefer to be utilising the State unfair dismissal regime.

25. The position outlined in the previous paragraphs has already been recognised. For example, all States and the Commonwealth indicated clearly at the time of negotiating and signing the Corporations Agreement 2002 (which accompanied the changes to the Corporations Law legislative framework), that they did not want the Commonwealth to use via corporations powers, whether directly under section 51(xx) or via referred State corporations powers under section 51(xxxvii) of the Commonwealth Constitution, to regulate industrial relations (see for example clause 504A of the Corporations Agreement 2002). This Commonwealth Bill ignores and contravenes that understanding.

Constitutional Issues

26. The High Court has not, as yet, expressly decided whether the corporations power enables Commonwealth legislation to govern employer and employee relationships where the employer is a trading corporation. At the most, the High Court in *Victoria v Commonwealth* (1996) 187 CLR 416 accepted the previous Western Australian Government's concession that the corporations power could extend to 'industrial rights and obligations of …[trading or financial corporations] … and their employees'.[8] However, although the Court accepted the concession, it did not expressly agree with it in its decision. It is appreciated that there have been some Federal Court decisions suggesting that the corporations power may enable Commonwealth legislation to regulate employer/employee relationships when the employer is a constitutional corporation. Even so, this expansive view, upon which this Commonwealth Bill is based, of the corporations power has not been endorsed by the High Court.

27. In addition to the matters already raised, it is also clearly arguable that aspects of the Commonwealth Bill may contravene aspects of the Commonwealth Constitution. For example, in relation to the purported exclusion of state courts and tribunals (see paragraph 15 of the Explanatory Memorandum). There may well be a constitutional implication protecting state courts. Some aspects of the Bill may be unconstitutional as Chapter III of the Commonwealth Constitution draws a very clear distinction between federal courts and state courts. It recognises that the High Court and the federal courts are creatures of the Commonwealth and that state courts are creatures of the states. Notwithstanding that state courts may, pursuant to section 77(iii), be invested with federal

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[8] (1996) 187 CLR 416 at 539

jurisdiction, and that the Commonwealth Constitution requires that the states maintain courts (or at least a court) for the exercise of the judicial power of the Commonwealth,[9] Chapter III nonetheless recognises that those courts remain state courts.[10] This was clearly recognised by participants in the Constitutional Convention.[11] Constitutional support for these implications may also be drawn from section 106 of the Commonwealth Constitution, which ensures that the continued existence of such state courts, as are established by the Constitutions of the states from time to time. As state courts are an essential branch of the government of a state, the continuance of state Constitution by section 106 has been held to preclude a law of the Commonwealth which prohibits state courts from exercising their functions.[12] Therefore, it is arguable that the Commonwealth Constitution impliedly prohibits the Commonwealth Parliament's power to interfere with state courts.

Schedule 1, Part 1, Clause 7 – Section 170HA

28. The Western Australian Government views the current State unfair dismissal system to be preferable to that established under the Federal Act. It strongly objects to proposed section 170HA, as it would prevent a large proportion of those people who currently have access to the State system from having access altogether, rather than being complementary to the State system.

29. The federal system contains various arbitrary exclusions from access to the jurisdiction. However, the Western Australian system only excludes one category of employee from unfair dismissal (section 29AA(3)). The implementation of this Bill would result in those who currently have access under the State system but who are excluded under *Workplace Relations Regulations 1996*, regulations 30B, 30BBA and 30BA, from having access to *any* termination of employment system. Examples of those affected are trainees, employees on a probation period of 3 months or less and casual workers. The Western Australian Government strongly believes that such groups should not be excluded from accessing the State system.

30. At the very least, if the Commonwealth expands its jurisdiction to provide access to all employees of constitutional corporations, it should not do so to the exclusion of the states. The Western Australian system has evolved through consultation with local stakeholders to meet the needs of the Western Australian industrial relations environment specifically. It is a more workable system, which is easier for small business employers to understand and operate within. It also balances the needs of both employee and employers. The State system is readily accessible to WA stakeholders, who have the advantage of having direct access to political representatives and therefore direct input into the evolution of the State legislation.

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9 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 103 (Gaudron J), 110-111 (McHugh J), 139-140 (Gummow J).

10 *R v Murray and Corml; ex parte the Commonwealth* (1916) 22 CLR 437, 453 (Isaacs J), 464 (Higgins J), 471 (Gavan Duffy and Rich JJ); cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 100, 1001-102 (Gaudron J)

11 See, eg, *Official Records of the Debates of the Australasian Federal Convention*, Third Session, Melbourne 1898, 28 January 1898 at 276 (Sir John Downer)

12 *Re Tracey: exparte Ryan* (1989) 166 CLR 518, 547 (Mason CJ, Wilson and Dawson JJ), 575 (Brennan and Toohey JJ)

31. Western Australia therefore refutes the claim made in the Bill's second reading speech in the House (see Hansard, 13 November 2002 at p 8853) that, "…the federal unfair dismissal law is generally less burdensome to employers and less destructive of employment growth than the state laws". There is no evidence to establish or support this claim. In fact, precisely the opposite is the correct position. Firstly, out of the total of 1137 unfair dismissal matters finalised by the WAIRC, there were only 70 arbitrated claims in which orders were issued (that is, not settled). Secondly, as indicated above, the IR Act has many mechanisms specifically aimed towards bringing about an effective and efficient resolution of unfair dismissal matters.

SCHEDULE 2: TERMINATION APPLICATIONS AFFECTING SMALL BUSINESS

32. The Federal Government is unduly focused on the issue of small business and unfair dismissal. Its position is based on ideology not practical endeavours to improve the system. It often utilises misleading information in relation to the correlation between small business employment, unfair dismissal and jobs growth. In this context it should be noted that also presently before the Commonwealth Parliament is the Workplace Relations Amendment (Fair Dismissal) Bill 2000 (Clth), which seeks to exempt small businesses from unfair dismissal claims. The Western Australian Government's position is that there is no direct statistical or other credible linkage between unfair dismissal laws and jobs growth.

33. Further, using international comparisons, Australia does not have a restrictive unfair dismissal system. An OECD Report from June 2000 indicates that Australia has the fourth least strict dismissal regime out of all the OECD countries. On a scale of 0 to 6 (with 6 being the strictest), Australia ranks 1.0 in "overall strictness of protection against dismissal".[13]

34. The Western Australian position is that unfair dismissal laws are intended to and should, where there has been an unfair dismissal, provide redress for employees. Of course, such laws by ensuring that they only operate where a dismissal is unfair appropriately protect employers where the dismissal is not unfair. The Western Australian Government does not believe that sections of the community and workforce should be treated differently in relation to unfair dismissal regulation on purely economic grounds. To do so would obviously be arbitrary and discriminatory.

35. The relevant Commonwealth second reading speech of 13 November 2002, refers to the Melbourne Institute of Applied Economics and Social Research report. This report was commissioned by the Federal Government and written by Don Harding.

36. The report dated 29 October 2002 titled "The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses", concludes that federal and state unfair dismissal laws impose a cost of $1.3 billion a year on the economy. It relied on questions that were included in the July 2002 Yellow Pages Business Index Survey, for which 1802 completed interviews were obtained.

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[13] OECD (June 2000), *Employment Outlook 1999:* Chapter 2 "Employment Protection and Labour Market Performance", p 57

37. The main conclusion that unfair dismissal laws impose a cost of $1.3 billion is itself a statement based on what is described as "opportunity cost". Employers were asked to compare a situation where there were no unfair dismissal laws and to indicate the degree to which "unfair dismissal laws increase my business costs".

38. Harding then took these "reported costs" and "factoring them up to the population of small and medium businesses yields an estimated $1329 million …"[14]. There are several defects with this methodology. Firstly, for example, it is not explained in the report what exactly "factoring them up" actually means and medium size businesses are also included in this calculation. Secondly, the figure reached appears to be based on the difference in casual and permanent rates of pay. Thirdly, it may also include the amounts expended by firms surveyed in responding to unfair dismissal claims made against them. However, whether this is the case is not clear from the report.

39. It can therefore be properly concluded that this report announces a figure of $1.3 billion based on the presumption that if employers were not subject to unfair dismissal laws, they would employ all their casual labour force as permanent employees. However, this does not take into account other reasons for employing on a casual basis, such as to allow more flexibility to meet business needs and to simplify the administrative requirements in calculating wages and entitlements.

40. Unfortunately this is merely one example of the Federal Government's use of questionable statistics in an endeavour to support its arguments in relation to small business and unfair dismissal laws.

Schedule 2, Part 1, Clause 3 – Paragraph 170CE(5B)(a)

41. The duration of the "qualifying period of employment" to allow an employee to apply to the Australian Industrial Relations Commission (AIRC) for relief under section 170CE(1) is extended from 3 months to 6 months if the employer is a "small business employer". This is defined in proposed subsection 170CD(1) to be "… an employer who employs less than 20 people …".

42. Western Australia's position is that small business employers should not be treated differently from other employers in this respect.

Schedule 2, Part 1, Clause 4 – Before section 170CF (170CEC Dismissal of applications relating to small business)

43. Proposed section 170CEC(2) states that the AIRC "must" make an order that an application is not a valid application for harsh, unjust and unreasonable termination if it is satisfied that the application cannot be made because of another provision of that Division, including proposed paragraph 170CE(5B)(a). The AIRC does not have to hold a hearing to do so. In determining whether to do

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[14] Harding, D. (2002) *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses, Melbourne Institute of Applied Economic and Social Research, University of Melbourne*, p19

so or not, it must take into account the cost to the employer's business of requiring the employer to attend such a hearing.

44. Western Australia does not support a system whereby the determination of whether a matter should go to hearing should be subject to consideration of the cost of the respondent of attending such hearings. It is inappropriate and discriminatory towards one particular party and unnecessarily restricts the operations of the AIRC.

45. The approach taken with this proposed amendment is a minimalist approach based on ideology, not practical considerations. A hearing allows evidence to be ascertained and enables both parties to put their position before the AIRC. This proposed Commonwealth amendment would periodically restrict the parties' rights to be heard and argue their positions as to why the matter should commence.

46. In Western Australia, a matter that is commenced in the WAIRC can go to mediation and conciliation. The IR Act also provides that conciliation can still be carried on even after arbitration has commenced.

Schedule 2, Part 1, Clause 5 – After subsection 170CG(3)

47. Proposed subsection 170CG(3) also unnecessarily restricts the powers of the AIRC by restricting it (for the purposes of arbitration in relation to harsh, unjust or unreasonable termination applications) to only take into account the listed factors. Of particular interest are proposed paragraphs (d) and (e), whereby the AIRC is compelled to take into account:

    a) how the size of the employer's "undertaking, establishment or service" would impact on procedures followed when terminating the employee, and

    b) the absence of human resource management specialists and the impact of that on procedures.

48. It is inappropriate to afford members of the small business community concessions with respect to termination of employees for inadequate human resources practices within their organisations. The Federal Government should be focusing instead on educating the small business community on good human resource management practices and providing the appropriate support.

Schedule 2, Part 1, Clause 6 – After Paragraph 170CH(2)(a)

49. In making orders as to remedy, the AIRC would also be compelled to take into account the size of the employer's business if this proposed amendment is implemented.

50. The Western Australian position is that small business employers should not be treated differently from other employers in this respect.

Schedule 2, Part 1, Clauses 8, 9, 10, 11 & 12 - Paragraph 170CH(8)(a) & ss 170CH (8a) & (9)

51. These proposed amendments restrict the AIRC to fixing an amount for compensation calculated to half the amounts that would otherwise apply under paragraphs 170CH(8) and (9).

52. The proposed restriction on compensation that may be ordered, from that which does not exceed 6 months to 3 months (in relation to small business employers) is inequitable. The amount of compensation payable should not be dependent on the size of the employer's business but on the circumstances of the case. It should take into account relevant natural justice considerations relating to the facts surrounding the dismissal and the processes followed.

53. The Western Australian Government's position is that small business employers should not be treated differently from other employers in this respect.

Schedule 2, Part 1, Clause 15 – Section 170JD

54. Following on from comments on Clause 4, the Western Australian Government's position is that small business employers should not be treated differently from other employers. The AIRC's ability to vary or revoke an order should not be interfered with in this way.

Schedule 2, Part 1, Clause 16 – Section 170JF

55. Following on from comments about Clause 4, the Western Australian Government's position is that small business employers should not be treated differently from other employers.

CONCLUSION

56. Removing a large proportion of employees from access to the states' termination of employment regime is a draconian attempt to unilaterally impose the federal industrial relations system on the States rather than developing a nationally appropriate and consistent Australian industrial relations system in consultation with the states.

57. The effect of the Workplace Relations Amendment (Termination of Employment) Bill 2002 (Clth) will be to virtually eliminate the Western Australian unfair dismissal system to the detriment of both employers and employees and consequently, to the detriment of all the community and the State's economy.

58. Additionally, the Commonwealth Bill, if enacted, would bring about changes in the industrial relations framework in Australia, which will have an adverse effect on the federal nature of Australian government and the role and responsibilities of the states. It directly goes against the previously expressed position of all the states in the Corporations Agreement 2002 that they oppose Commonwealth legislation regulating or controlling industrial relations via corporations powers,

whether directly under section 51(xx) or via referred state corporations powers under section 51(xxxvii) of the Commonwealth Constitution. To do so, clearly contradicts and undermines the states' fundamental assumptions and position as evidenced in clause 504A of the Corporations Agreement 2002.

59. In any case, the use of the corporations power to extend to industrial rights and obligations of constitutional corporations and their employees has not been endorsed by the High Court.

60. The Western Australian Government opposes this Bill as it sees this proposed legislation as an attempt to erode States' rights.

61. Furthermore, it also objects to the provisions of the Bill affecting small business employers and believes the purposes of unfair dismissal regulations are undermined by the proposed amendments in Schedule 2. Western Australian does not believe that certain sections of the community should be treated differently in relation to unfair dismissal regulation on purely economic grounds.

62. For all of these reasons the Western Australian Government opposes the enactment of the Workplace Relations Amendment (Termination of Employment) Bill 2002.

63. If further information or elaboration is required, the Senate Committee's officers should contact Ted Anthony, Director, Labour Relations, Department of Consumer and Employment Protection on (08) 9222 7618.

HON JOHN KOBELKE MLA
MINISTER FOR CONSUMER AND EMPLOYMENT PROTECTION
WESTERN AUSTRALIA