Queensland Government Submission

in response to

SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

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

Department of Industrial Relations

February 2003

INTRODUCTION

The Queensland government has prepared this submission in response to a call for written submissions from the Senate Employment, Workplace Relations and Education Legislation Committee (the Committee) on the *Workplace Relations Amendment (Termination of Employment) Bill 2002* (the Bill), referred to the Committee on 10 December 2002.

The Bill has three objectives, according to the Second Reading Speech of the federal Minister for Employment and Workplace Relations. These are:

(1) to improve federal unfair dismissal law for small business;
(2) to improve federal unfair dismissal law generally; and
(3) to widen very significantly the federal law's coverage.

The Bill seeks to restrict the protection of employees of small businesses from unfair dismissal, continuing a campaign (albeit in modified form) to exempt small business from the unfair dismissal laws applying to other employers. The federal government's previous attempts to create separate unfair dismissal regimes for small business have been repeatedly rejected by the Senate. Other proposals in the Bill to 'improve' federal unfair dismissal law are all aimed at reducing the rights of employees, continuing a process begun with the enactment of the *Workplace Relations Act 1996* (WR Act), which wound back the protections from unfair dismissal conferred by the previous Labor government's *Industrial Relations Act 1988*. The proposal to unify unfair dismissal laws is the latest manifestation of a long-standing federal government desire to take control of industrial relations matters at a national level, a push begun by the former Workplace Relations Minister.

The Queensland government's objections to the Bill are pragmatic rather than ideological. Despite the repeated claims of the federal Minister, the Bill does not simplify industrial laws for employers and employees but makes a very complex federal system even worse. It does nothing to eliminate multiple sets of laws, because while eliminating the laws of the states, it creates a new (and different) set of laws to apply to small corporations. The Bill does not achieve an equitable balance between

the rights of employers and employees but strongly favours employers to the detriment of employees. It takes away workers' rights under state laws without consulting the states, seriously compromising the Queensland government's economic, social and labour policies and its mandate to deliver a balanced and fair industrial relations system to the people of Queensland.

The Queensland government believes that industrial harmony and strong economic outcomes can only be achieved by balancing the interests of the primary stakeholders. Workers who are not treated fairly in the workplace and do not receive an equitable distribution of income are less loyal, committed and productive. There is strong evidence that this impacts adversely on businesses and, in a broader sense, diminishes the capacity for economic growth. The Queensland government also believes that an industrial relations system should take account of social as well as economic objectives. These considerations underpinned the 1999 review of Queensland's industrial relations legislation and were ultimately enshrined as Principal Objects in section 3 of the IR Act. The Queensland government's balanced approach has delivered positive outcomes for the Queensland community, for industry and for the economy and has mitigated some of the harsh and inequitable outcomes resulting from the former government's *Workplace Relations Act 1997*.

NEED FOR COOPERATION AND CONSULTATION

The Queensland government objects to the lack of consultation in developing the Bill. Queensland was not consulted on the Bill or the federal government's intentions, despite the Bill's significant potential impact on state jurisdiction. The federal Minister wrote to the Queensland Minister for Industrial Relations in September 2002 inviting discussions on unifying dismissal laws with respect to casual employees. In reply, the Minister for Industrial Relations indicated his willingness to discuss this issue. However, no further contact was forthcoming from the federal Minister.

The Bill has a significant potential impact on the states' jurisdiction over industrial matters and their control of state economies. The issue of unifying industrial laws should be properly pursued through the forums of the Council of Australian Governments and the Workplace Relations Ministers Council, bodies purposely

formed to consider such issues. It is inappropriate for the federal government to act unilaterally and without prior consultation in an attempt to expand its own jurisdictional coverage.

The federal government is aware of the Queensland government's position on using the corporations power to establish a single unified system of industrial relations. The Queensland government's position was stated in a written submission in response to the federal government's two discussion papers, released in October 2000, on using the corporations power to create a national industrial relations system.[1] In summary, the Queensland government submitted that:

(1) the scope of the corporations power is too uncertain to rely upon as a foundation for a national industrial relations system;
(2) the proposals in the discussion papers would result in a more complex system of overlapping jurisdictions than at present;
(3) a unified system would be difficult to implement given the substantial differences in policy objectives (and the effect of this on institutional arrangements, such as the industrial tribunals) between the federal and Queensland governments;
(4) the proposals would extensively damage existing industrial relations institutions and the interests and trust of participants in the system; and
(5) industrial relations calls for a more balanced approach between employer and employee interests than that adopted by the federal government.

The current Bill raises similar objections.

The Second Reading Speech states that to achieve a national regulatory approach to industrial relations, the federal government would 'prefer to proceed by agreement (with the states) and by referral of powers' along the lines of Victoria. This suggests that the agreement of the states to harmonise laws without a referral of powers would be insufficient. It ignores the success of various customs, practices and arrangements

[1] The discussion papers were entitled *Breaking the Gridlock: Towards a Simpler National Workplace Relations System – The Case for Change* and *Breaking the Gridlock: Towards a Simpler National Workplace Relations System – A New Structure*

in the state jurisdictions to achieve harmony between the state and federal jurisdictions. For example, Justice Guidice, President of the Australian Industrial Relations Commission, has noted[2] that the very high degree of consistency between the various industrial tribunals (in the context of wage fixation) 'maintains a stable minimum system throughout all of the jurisdictions of the Commonwealth' and that this approach 'has been extremely important to the national economy, particularly through periods of high inflation and unemployment'. Other examples of cooperative harmony are the practice of dual appointments of commissioners to the federal and state industrial tribunals and the compliance, information and advisory services provided to the public by state governments on behalf of the Commonwealth.

It is not possible to ascertain the extent of the federal government's consultation with employee organisations about the Bill. The Explanatory Memorandum refers only to the policy objectives of a number of employer organisations, such as the Australian Chamber of Commerce and Industry (ACCI). It is notable that even the ACCI, which broadly endorses a uniform national system, has advocated a nine-step orderly development phase involving a national summit, a national taskforce and a special meeting of the Council of Australian Governments before any national system is adopted.[3] The federal government, on the other hand, has chosen to introduce a radical Bill, most of which has been rejected previously, without any serious consultation.

In contrast to the federal government's non-consultative approach, the Queensland government considers that if the industrial relations system is to bring about job growth and enhanced economic performance, it is necessary to work constructively with all relevant parties. Genuine consultation was the model used in the development of Queensland's *Industrial Relations Act 1999* (IR Act). The IR Act was based on the recommendations of an independent industrial relations taskforce which examined the industrial relations system in Queensland, a process which involved widespread meetings and consultations throughout the state with employers,

[2] Speech to the Industrial Relations Society of Victoria, 18 October 2002
[3] *Modern workplace: Modern Future – A Blueprint for the Australian Workplace Relations System 2002-2010*, ACCI, November 2002

employees and other interested members of the public and the consideration of over two hundred written submissions.

SCHEDULE 1 – COVERING THE FIELD OF UNFAIR DISMISSAL

The ideological basis of Schedule 1

The amendments in Schedule 1 aim to expand the federal jurisdiction dealing with harsh, unjust or unreasonable dismissals so that all employees of constitutional corporations in Australia are covered (currently, employees of constitutional corporations are only covered if they are also covered by a federal award).

In his Second Reading Speech, the federal Minister states that 'the Government proposes to use its existing constitutional powers, where it reasonably can, in a step-by-step progress towards a more unified system' which should eventually lead to a 'withering away of the states', at least in this aspect of workplace law.

The Queensland government is not opposed to the principle of achieving greater harmonisation of national industrial systems. However, it is strongly opposed to any non-consultative grafting of federal laws onto state systems. To justify such an approach with ideology and rhetoric rather than sound reasoning, empirical data and clearly defined benefits is irresponsible. The particular provisions of the Bill will do nothing to improve federal or state systems and the Bill as a whole is vastly disproportionate to the problems identified in the Explanatory Memorandum. The federal government is simply using the argument for unity to reduce workers' rights.

It is clear that the federal government's unification proposal is ideologically driven rather than based on a desire to improve industrial relations in Australia. The proposal to unify unfair dismissal laws first gained prominence when Labor governments won elections in a majority of the states. Prior to that, when New South Wales had the only Labor government and the other states were moving rapidly to deregulate their industrial relations regimes, the federal government moved to specifically preserve state powers under the WR Act, including powers in relation to unfair dismissals. Section 111AAA, for example, was inserted in 1996 to make movement from the state system to the federal system much more difficult, whilst

section 152 enabled employers to use state agreements to opt out of otherwise applicable federal award coverage. The federal government had no concerns, at that time, about the disadvantages of a dual system.

Today, Labor governments established in every state present a threat to the divisive and deregulatory approach of the federal government to industrial relations. The federal government's response to the states has become similar to its response to employees and trade unions – uncommunicative at best and openly antagonistic at worst. This is evidenced not only by the way the Bill was presented to Parliament without prior consultation with the states, but by the federal government's approach to the adoption of a national construction code, viz. using threats aired in the media to withhold funding from state governments for major construction work unless the federal government's construction guidelines are adopted on construction sites.

A more complex and confused system

The ideological basis for the federal government's push to intrude into the states' industrial relations systems is obvious from the Explanatory Memorandum and the Bill itself. Particularly obvious is the failure of the Bill to alleviate the complexities and confusion that allegedly arise from having different sets of laws in the federal and state jurisdictions. The Bill does not deliver a better, simpler system but establishes:

(a) two different sets of federal laws and procedures governing unfair dismissal matters, depending on the size of the respondent;
(b) different federal and state unfair dismissal regimes for incorporated and unincorporated entities;
(c) different federal and state unfair dismissal regimes for incorporated entities, depending on whether they meet the definition of a 'constitutional corporation';
(d) concurrent but separate federal and state jurisdiction over different aspects of workplace relations in the one business, for example a federal regime governing a business' unfair dismissals and a state regime governing workplace harassment and industrial disputes;

(e) concurrent but separate federal and state jurisdiction over different aspects of the one employee's claim (for example, the federal regime for unfair dismissal and the state regime for insufficient notice or unpaid entitlements).

By way of example, a state award employee of a constitutional corporation, who has a claim for unfair dismissal and the withholding of wages in lieu of notice, would have to lodge two claims, one in the federal jurisdiction for the unfair dismissal component and another in the state jurisdiction for the wages component. The employer would have two separate actions to defend in two separate jurisdictions. Under the current system, the applicant could simply lodge a single claim in the Queensland Industrial Relations Commission. Under the Bill, the AIRC, before hearing its half of the claim in the federal jurisdiction, would have to determine whether the employer were a small corporation, because different proceedings, rights and remedies would apply. To determine this question for a business that employed more than 20 employees, some or all of whom are casuals, it might be necessary to analyse the working pattern of each and every casual, since casuals can only be counted if they are 'engaged on a regular and systematic basis for a sequence of periods of employment of at least 12 months'.

In the same scenario, if the unfair dismissal were part of an industrial dispute (for example, where redundancies have occurred), the state tribunal would be obliged to deal with the dispute but may be prevented by the Bill from making orders about the redundancies in order to settle the dispute. This could severely hamper the ability of state industrial tribunals to settle disputes. In addition, the potential for protracted industrial disputes, while these sorts of legal questions are resolved, is great.

It is clear that the Bill merely adds to the complexity of what is already highly complex and legalistic federal legislation. The WR Act, at around 600 pages, challenges the comprehension of even the most experienced lawyers. The vast majority of employees and employers who have to understand it for an unfair dismissal claim are not represented by lawyers. The complexity of the legislation is partly due to previous strained extensions of the federal industrial relations system through constitutional powers other than the conciliation and arbitration power. This has already resulted in two jurisdictionally distinct streams for unfair dismissal claims

(unfair dismissal and unlawful dismissal) which, perversely, applicants cannot plead in the alternative but must pursue as separate claims.

The corporations power does not cover all corporations, but only trading, financial and foreign corporations. Although most corporations would probably come within the corporations power's ambit, there will always be cases where it is unclear whether this is so. Importantly, unincorporated entities, such as partnerships and sole traders, cannot be covered by the proposed laws. The vast majority of these entities are in the small business sector, which means that a large proportion of small businesses will be subject to state jurisdiction in spite of the Bill.

A more unfair system

The Explanatory Memorandum frequently refers to the inequities of the current system without explaining what those inequities are. It purports to address inequities by wiping out protections for employees under state laws and restricting protection under federal laws. A reasonable and balanced approach to improving industrial laws would have identified the inequities in the current system for employees and employers and made proposals that would result in a fairer system for both groups. Instead, not only does the Bill diminish the statutory protection of employees, it also appears to make it impossible for employees to negotiate their own job security clauses in state awards or agreements or rely on clauses that are already there. (Such clauses may arise from state 'Termination Change and Redundancy' test case decisions). This is because job security clauses typically protect workers from being dismissed or laid off at the employer's whim and proposed section 170HA(2) provides that provisions in awards and agreements which provide rights in respect of harsh, unjust or unreasonable dismissal (however described) have no effect. Not only does this undermine employment security, but by nullifying provisions in awards and agreements it interferes with the parties' own bargain and increases the potential for industrial disputation.

Lack of evidence

Very little research has been presented in the Explanatory Memorandum to justify the assertion that the current dual system is so complex and confusing that it warrants the drastic reforms proposed. A survey report commissioned by the Department of

Employment and Workplace Relations (DEWR) in July 2002 is cited, which reports that almost one-third of businesses surveyed did not know whether they were covered by state or federal unfair dismissal laws. However, this does not necessarily reflect that employers are confused by having two systems. It more likely reflects a fact picked up in most industrial relations surveys – employers generally do not know much about industrial relations law. Employer confusion about jurisdictional issues indicates that very many businesses have never actually been involved in an unfair dismissal case. Had they been, they would know whether the federal or state jurisdiction applied. For the vast majority of businesses, dealing with unfair dismissal laws is a hypothetical situation and not considered a pressing or priority issue.

The Explanatory Memorandum states that the greater clarity of having a single jurisdiction would allow businesses to reduce the amount of time, money and effort they put into these issues. However, the widespread confusion about basic industrial laws reported in the Memorandum indicates that the amount of time, money and effort put into these issues is in fact small. In addition, the federal system will not deliver greater clarity because it is far from being a simple regime and will not relieve businesses of the need to educate themselves about unfair dismissal laws.

Constitutional issues and impact on State laws

Legal advice provided to the Queensland government indicates that the provisions of the Bill may not survive a constitutional challenge. Notably, members of the High Court have expressed a range of views on the reach of the corporations power with respect to matters beyond the trading and financial activities of corporations. The broadest view of this power has not received unanimous or unconditional support. Nor has the issue been tested before the High Court as it is presently constituted. To implement amendments with such significant implications for the states, employers and employees, when the extent to which they are constitutionally *intra vires* is debatable, will condemn all parties to years of uncertainty as courts and legislatures grapple with the results of High Court challenges.

Senior counsel has also indicated that the operation of the Bill is uncertain as to its effect on state unlawful dismissal provisions and may override them because the Bill excludes provisions which have a main purpose of regulating workplace relations,

employee relations or industrial relations (Schedule 1, Item 7). The unlawful dismissal provisions reflect innovative and important policy decisions of the Queensland government, such as protecting all employees, including casuals and those on probation, from dismissal because of pregnancy or taking parental leave. The WR Act excludes short-term casuals and probationary employees (among others) from protection for unlawful dismissal. The Bill may also override the IR Act's protection of non-award employees from unfair contracts, a protection not afforded by the WR Act. The uncertainty of the Bill's operation on State laws other than unfair dismissal is of serious concern.

Costs for states

The federal government has not addressed the administrative and financial cost imposts on the states from the Bill. For example, the Queensland government would have to reconsider the size and structure of the QIRC if the expanded federal jurisdiction results in the federal government's estimated 36% drop in employees covered by state unfair dismissal laws. A complication in any restructure of the QIRC is that commissioners have tenure of appointment until age 70, as part of the Queensland government's commitment to a strong and independent industrial tribunal. Queensland also provides compliance, information and advisory services to the public about industrial laws, including federal laws. The federal government has not revealed whether or how it will reimburse the states for the increased expenditure in these areas associated with unanticipated major changes in the law.

The federal government has not provided actual costings for the proposed expansion of federal jurisdiction. The Explanatory Memorandum indicates that there is unlikely to be any net increase in cost to the national economy from unifying unfair dismissal laws, because the large increase in federal applications would be offset by a reduction in state applications. However, any reduction in state applications is potentially a saving to the states, not the federal government.

Benefits of federalism

Having two separate systems of law is a consequence of federalism and applies to a whole range of laws, both criminal and civil. If the federal government is so seriously concerned about the complexities for users of dual legal systems in the Australian

federation, it should open this very vital issue up to public debate and look at it in much broader terms than industrial relations.

Although there are some disadvantages in having separate state systems of industrial regulation in a federal system, there are also clear advantages. These include:

(a) the ease with which innovative labour reforms can be introduced and tested at a state level compared to a national level;

(b) the advantage of each jurisdiction learning from the reforms introduced in other jurisdictions;

(c) the comparative ease, when decision-making is localised, to reach appropriate compromises to ensure industrial harmony;

(d) decision-makers are closer and more accessible to stakeholders at state level than at national level;

(e) a national "one size fits all" approach to industrial regulation cannot take regional circumstances into account;

(f) industrial regulation plays a key role in each state's overall economic and social policy frameworks - replacing any part of the framework with federal laws based on conflicting objectives can only jeopardise the states' attempts to achieve their own strategic goals;

(g) state government-owned corporations would become subject to federal regulation under the Bill and impact on the states' ability to manage their own workforces.

The referral by Victoria to the Commonwealth of its industrial powers in 1996 has not created a unified system with respect to Victoria and the Commonwealth, as was its purported intention. The referral of powers created a two tier system in which 350,000 Victorian workers lost access to many minimum terms and conditions, such as penalty and overtime payments, leave loading, personal, carers and bereavement leave, allowances and redundancy pay. The huge disparity between federal award covered employees and those Victorian workers has still not been rectified, six years later.

The federal government's real agenda

The Queensland government believes that the federal government's attempt to extend its unfair dismissals jurisdiction over the employees of constitutional corporations is merely to 'test the waters' and that the ultimate aim is to extend federal jurisdiction over more politically contentious areas of industrial relations. Previous proposals by the Coalition government have indicated that the corporations power would be used to legislate minimum terms and conditions for employees and federal common rule awards.[4] In such a case, there would be no room left for state awards or agreements to apply to constitutional corporations. The federal government's political ideology of deregulating workers' terms and conditions would be foisted onto all of the states, regardless of the economic and social consequences for the states or the wishes of state electorates.

Alternatives

If the federal government were sincere about its desire to harmonise unfair dismissal laws, it would recognise that there are many similarities between the laws of the states and would examine the options of bringing federal law into closer alignment with the states or exiting the field of unfair dismissal. These options were not even considered. Another better alternative would be for the federal government to address the complexity and confusion in federal unfair dismissal laws rather than blaming the existence of state jurisdictions for the confusion.

SCHEDULE 2 – TERMINATION APPLICATIONS AFFECTING SMALL BUSINESS

Schedule 2 is unworkable and unfair

The changes proposed by the Bill are significant and, if passed, will dramatically alter the application of the WR Act for small corporations. The Bill should not be supported because it:

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[4] See, for example, speeches by the former federal Minister for Employment, Workplace Relations and Small Business, Peter Reith, to the Australian Mines and Metals Association Conference on 2 March 2000 and to the ACCI's Labour Market Reform Conference on 3 March 2000. See also *Breaking the Gridlock: Towards a Simpler National Workplace Relations System* (2000), a discussion paper released by the federal government on national unification of the industrial relations system.

- irrationally shifts the focus to the business circumstances of an employer in determining whether an employee has been treated fairly;
- creates an underclass of employees who are denied equality before the law purely because of their employer's size and status;
- discourages employee participation in small corporatiosn by undermining job security;
- creates greater complexity in the law;
- creates another, different unfair dismissals regime (substantively and procedurally) in addition to the existing regimes;
- gives primacy to the interests of small corporations at the expense of larger corporations who will be subject to more stringent legislation;
- ignores the benefits to business of the amendments to the WR Act in August 2001 and the amendments proposed in Schedule 3 of the Bill;
- significantly restricts the AIRC's capacity to determine each case on the grounds of merit, equity and the public interest; and
- overrides state unfair dismissal laws and ignores the wishes of the Queensland electorate, who voted for the Labor Government on a platform of delivering more equitable industrial laws than the predecessor Coalition government.

A two-tier system based on arbitrary distinctions

The Queensland government is opposed to different sets of laws applying to employees depending on the size of the employer's operation. This is a completely arbitrary and unjustifiable distinction at odds with the whole rationale of unfair dismissal legislation, which exists solely to protect employees from being dismissed capriciously and unjustly. If the federal government does not support unfair dismissal legislation then it should say so, rather than undermine public confidence in the system by creating a regime where unfairness depends on what you are and not what you do.

Much is made in the Explanatory Memorandum of the impact on the time and financial resources of small business when an employee seems a remedy for unfair dismissal. Not a word is mentioned of the impact on an employee of being sacked unfairly, such as the shock and humiliation of being dismissed, the anger at being treated unjustly, the sudden loss of income and the attendant anxiety about finances

and unemployment. There is the enormous difficulty of gaining new employment after being sacked from the previous employment. These outcomes affect all persons who are dismissed but the emotional consequences are hugely magnified for employees who are dismissed unfairly. Employers as well as employees should be accountable for their actions.

The Bill also creates inequity between employers. Under proposed sections 170CH(8)(a) and 170CH(9), an employer with 20 employees would have to pay double the remedy of an employer with 19 employees for exactly the same statutory wrong (i.e. unfairly dismissing an employee).

Substantive and procedural unfairness

The extent of the differential treatment between employees of small and larger businesses should not be underestimated. The Bill gives employers six months in which to decide whether an employee is suitable, during which time an employee cannot apply for unfair dismissal even if they are dismissed because of illness or for being a member of a trade union. The Bill effectively removes an employee's right to be warned about conduct or performance before being dismissed (Schedule 2, Item 5), contrary to the International Labor Organisation's *Termination of Employment Convention 1982*, and places conditions on their right to a hearing in the AIRC (Schedule 2, Item 4). After making it twice as difficult for the employees of small corporations to be heard by the AIRC, the Bill then halves the compensation they can receive for being unfairly dismissed (Schedule 2, Items 8 and 10), regardless of how reprehensible was the employer's behaviour.

The differential treatment even extends to the standard of procedural fairness to apply in the AIRC, with proper processes only in place for the employees of larger businesses. The Bill allows applications to be dismissed without a hearing if the AIRC determines that the applicant is excluded by the WR Act or that the application is frivolous, vexatious or lacking in substance (Schedule 2, Item 4). This only applies to small corporations, creating a system whereby the rules of natural justice depend on the size of the employer. In deciding whether to hold a hearing, the AIRC must take into account the cost to a business of attending. How is the AIRC to calculate this cost? In the absence of a hearing, the AIRC could only base its decisions on what the

employer states in writing. It could not test the facts and credibility of witnesses on this or any other point. The ability of a fact-finding tribunal to test witnesses is one of the recognised hallmarks of the Australian justice system. It is no argument for its dispensation to say that it costs one of the parties too much time and trouble. No analysis is made of the advantages of conducting hearings nor of the cost of dispensing with hearings. Determining evidence on the papers will disadvantage those with low literacy levels, probably the most vulnerable and disadvantaged workers of all.

Bad for business

The federal government claims, in essence, that different rules should apply to small businesses because they are unlikely to have the human resource management skills or training to treat staff fairly and cannot afford the financial consequences of unfair dismissal laws under the current legislative regime. The solution, however, is not to stimulate a race to the bottom in human relations management. The aim should be to stimulate best practice. There is strong evidence that investing in employees results in more profitable businesses. If employees are easier to fire, employers will take less care in hiring them. This can only result in lowering human resource management standards and a greater likelihood that the wrong person will be chosen for the job. Poor hiring and firing practices will lead to higher rates of dismissal, lower staff morale, an inevitable decrease in productivity and much higher turnover costs for the business. Poor hiring and firing practices will also lead to much greater volatility in employment numbers, as hastily chosen employees are sacked, new employees are hired and the cycle repeats.

While purportedly addressing the demand side of the labour market equation, the Bill simultaneously undermines the supply side. By undermining one of the most important benefits of permanent, full-time employment – job security – it decreases incentives for people to rejoin the labour force. This is at a time when the male participation rate in the full-time labour force is at an all-time low and the female participation rate appears to have stalled.

Bad for employees

Employees of small business are frequently disadvantaged with respect to their counterparts in large organisations. They may be less well-paid, have fewer opportunities for promotion or career growth, fewer training opportunities and less job security. Economic rationalism has made job security a thing of the past for a burgeoning number of employees. The shift towards casualisation means that a large sector of the workforce is more vulnerable than ever in their dealings with their employer. In such a climate, the argument for increasing the statutory protection of workers from capricious and unjust dismissal is stronger than the arguments for decreasing it.

Contrary to the federal government's propaganda on this issue, unfair dismissal laws do not prevent employers from dismissing employees – they simply require employers to treat their employees fairly. The Queensland government is committed to the fair and just treatment of workers. In its landmark *Industrial Relations Act 1999* (IR Act), the government increased workers' protection from unfair dismissal and removed the previous Coalition government's inequitable exemption from unfair dismissal laws of businesses with 15 or less employees.

The only result of the amendments proposed in this Schedule is to strip rights away from employees because they happen to work for a business with less than 20 workers. This makes a mockery of one of the objects of the WR Act to provide 'a fair go all round'.

Evidence does not support Schedule 2

An important basis put forward by the federal government for treating small businesses differently is that it might create more employment. This assertion is based on hypotheses, guesswork and estimates. In a recent paper, the federal government identified a number of factors contributing to the unemployment rate. Significant among these are federal income tax arrangements. An examination of economic analyses of the employment rate in the major newspapers for the last month reveals not one that mentions unfair dismissal laws as a relevant contributory factor.

As noted in the Queensland government's submission to the Senate Employment, Workplace Relations, Small Business and Education Committee regarding the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, evidence does not support the federal government's assertion that unfair dismissal laws deter small business from employing people. The survey data provided by DEWR in its submissions to Senate inquiries into bills seeking to exempt small business from unfair dismissal laws in both 1998 and 2002 have been roundly criticised for their methodologies and their conclusions. It is poor policy-making to strip away the legal rights of a large section of the community in the absence of empirically sound data demonstrating a tangible benefit.

The most recent research quoted in the Explanatory Memorandum does not change this assessment. The latest piece of survey evidence commissioned by DEWR from the Melbourne Institute of Applied Economic and Social Research states that federal and state unfair dismissal laws impose extra costs of $1.3 billion a year on small and medium sized businesses and reduce employment for those on average wages by 0.46 per cent and those on minimum wages by 1 per cent. No information is given in the report as to how the total impact figure of $1.3 billion is arrived at, so there is no way of checking the validity of this calculation.

The employment loss conclusions in the report are based on an assumption that the wage elasticity of demand is 0.7. This unusually high figure is not justified or explained in the paper. If the cost figures were accepted, a more realistic wage elasticity of demand figure of 0.2 or 0.3 would reduce the wage impact to between 30 to 40 per cent of that suggested in the paper. However, the costs figures (from which the employment loss figures are derived) cannot be taken seriously. The dollar amounts come from asking the following, highly leading question:

> *Thinking of the costs in time and money of complying with the law and reducing your business' potential for exposure to unfair dismissal claims, by how much, in dollars per year, do unfair dismissal laws increase your business' costs?*

The ability of managers to calculate such a cost, given that it is done on the spur of the moment in a telephone interview, is highly questionable. There would be a strong argument that managers would substantially overstate costs in these circumstances, particularly given the leading nature of the question. The research report provides no information on the actual number of respondents who answered this question or its distribution.

Incredibly, the research paper raises concerns as to why the costs may be understated. It suggests that in larger firms, managers will be less aware of what these costs are because they are dispersed throughout the firm and so will tend to indicate unfair dismissal laws impose no costs on the business. This is implausible. Just because a respondent does not know the actual costs, it does not mean he/she does not appreciate that there are costs involved. It seems most unlikely that respondents would indicate there were no costs involved. They may say they do not know what the costs are, but this is different to saying there are no costs. In addition, the statement indicates a complete lack of understanding as to how people respond in surveys when they are unsure of the answer to a question but feel they would be expected to know the answer given their position. They are much more likely to guess and potentially overstate the costs than say they do not know.

The federal government only calculates the costs of its proposals for one of the stakeholders. An appropriate cost-benefit analysis of changes to unfair dismissal laws would count the costs to employees of unfair dismissal laws being downgraded or removed. Not even the slightest attempt is made by the federal government to do this.

There are many interlocking factors, both micro and macro-economic, involved in whether a business will hire new staff, for example whether there is enough work to justify an extra staff member (a reflection of the level of consumer demand for business products and services), the level of confidence and investment in the economy and the availability of staff with the required training or experience (a reflection of national training, education and welfare policies). To assert that unfair dismissal laws have an identifiable bearing on the willingness of business to hire new

staff is simplistic in the extreme. To put actual figures on the effect of removing unfair dismissal laws is grossly misleading.

SCHEDULE 3 – OTHER AMENDMENTS RELATING TO TERMINATION OF EMPLOYMENT

The provisions in Schedule 3 of the Bill are referred to in the Explanatory Memorandum as provisions to improve the operation of unfair dismissal law but as set out in the proposed legislation may operate to diminish the rights of employees who have been unfairly dismissed.

The most significant amendment is at Item 8, which provides that employees who are terminated on the ground of the operational requirements of an employer's undertaking are not dismissed harshly, unjustly or unreasonably unless exceptional circumstances exist. This provision may be applied by employers to dismiss employees for all sorts of reasons, including discriminatory ones, and use the argument that the employee was laid off because of the operational requirements of the business (for example, because the employer could no longer afford to keep the employee on). The latitude allowed to employers by the AIRC in determining their own operational requirements may have the effect of severely disadvantaging the position of employees in making their case.

CONCLUSION

Very few of the objectives of the Bill are achieved by its provisions. It does not 'improve federal unfair dismissal laws for small business' but merely subjects small corporations to a different and complex unfair dismissals regime. At the same time, it savagely undercuts the legal protection of employees from being sacked without good reason by these corporations. It does not 'improve federal unfair dismissal law generally' but allows employers to dismiss employees on the amorphous basis of the operational requirements of the business, even if the procedures followed to dismiss the employee are grossly unfair.

The Bill may achieve its object of significantly widening the federal law's coverage but this, in itself, is of no clear benefit to anyone. The Bill does not simplify the law by removing state jurisdiction over unfair dismissal matters – in Queensland's case, it merely substitutes a balanced, straight-forward system in which an employee can lodge all parts of a claim in the one tribunal, for a complicated and unfair federal system in which some parts of a claim might have to be lodged in the AIRC, some in the state tribunal and others in the Federal Court.

The only effective way of unifying unfair dismissal laws throughout Australia is through cooperative harmonisation and this should be pursued through the forums of the Workplace Relations Ministers Council and the Council of Australian Governments.

The Queensland government believes that the industrial relations system can only deliver positive economic and social outcomes if all major stakeholders feel reasonably comfortable with the major elements of the system. This can only be achieved through consultation between government, employers, employees and their industrial organisations. In considering radical reforms to its WR Act, the federal government could adopt the strategy of the Queensland government when it developed the *Industrial Relations Act 1999 (Qld)* – an independent taskforce to examine the existing system and widespread consultation with employers, employees and the public to ensure that the issues most pressing to these parties are not mistaken.

The Queensland government's consultative approach and its commitment to achieving an industrial relations system which fosters productivity and commitment have delivered positive outcomes for Queensland industry, the economy and the community. If the federal government really wants a single, simple system which delivers better outcomes for employers and employees, it would do well to examine the Queensland model.