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SUBMISSION OF THE GOVERNMENT OF TASMANIA

TO THE

AUSTRALIAN SENATE'S EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

RE

INQUIRY INTO THE PROVISIONS OF THE *WORKPLACE RELATIONS AMENDMENT (TERMINATION OF EMPLOYMENT) BILL 2002*

FEBRUARY 2003

In his Second Reading speech on 13 November 2002 to the *Workplace Relations Amendment (Termination of Employment) Bill 2002*, Minister Abbott stated that:

> This bill has three objectives: first, to improve federal unfair dismissal law for small business; second, to improve federal unfair dismissal law generally; and third, and most important, to widen very significantly the federal law's coverage.

These objectives are addressed in turn.

Amendments to the unfair dismissal in respect of small business

(1) The Tasmanian Government does not believe that workers employed in small businesses should be regarded as 'second class' employees for the purpose of termination of employment. It is blatantly unfair and discriminatory that such employees should be 'penalised' for working in small business. Yet that is precisely what will happen if the measures in the Bill become law. Moreover, this is not an unintended consequence, on the contrary it reflects a conscious and very deliberate policy decision by the Commonwealth Government.

(2) Where an employee has a reasonable expectation of continuing employment, no distinction should be made on the grounds of whether the employee works in 'small', 'medium' or 'large' business. Employees who have a reasonable expectation of continuing employment are entitled to fundamental protection against unfair termination of their employment.

There is not, in the Tasmanian Government's strongly-held view, any justification for differentiating between employees' rights solely on the basis of the size of the employer that they work for.

(3) The Tasmanian Government acknowledges that unfair dismissal claims can be a frustrating and sometimes protracted process for employers. That of course applies equally to employees, for whom unfair dismissal is almost invariably a traumatic experience. This was a major reason why the Tasmanian Government moved in 2000 to simplify and clarify the termination of employment criteria applying in the State's industrial jurisdiction.

Those changes, however, did not come at the cost of diminishing the rights, or obligations, of either employees or employers.

(4) Employees' needs and aspirations vary from person to person, but job security is of vital concern to all workers, regardless of the size of their employers' businesses. All workers should have equal, uniform access to a remedy for unfair dismissal.

(5) Similarly, the criteria under which unfair dismissal applications are dealt with should be uniform for all employees and applied equally to all employees. The proposals contained in the Bill will initiate unwarranted discrimination against millions of employees whose only 'sin' is to work in small business. The proposals are antithetical to the notion of a 'fair go all round'.

(6) The Tasmanian Government opposes the proposal to extend the qualifying period from three to six months for employees of small businesses (i.e. those businesses employing fewer than twenty workers).

(7) The Tasmanian Government opposes the proposal that an application, made against a small business, can be struck out without a hearing because it is held to be frivolous, vexatious or lacking in substance. The nature and extent of an unfair dismissal claim is rarely revealed in any great detail merely by reference to the application.

Not all employees are comfortable with completing forms, or are able to articulate the nature and circumstances of their case clearly in writing; this is especially the case for those employees whose first language is not English. Striking out applications 'on the papers' has the potential to cause grave denials of natural justice.

(8) It is of particular concern that the Bill explicitly prohibits an appeal against a decision to dismiss an application 'on the papers'. The Tasmanian Government does not agree that an application should be dismissed for want of jurisdiction 'on the papers' unless there is a right of appeal to a full bench.

(9) The Tasmanian Government strongly opposes reducing the maximum compensation payable to employees of small businesses who have been unfairly dismissed from six months to three months' remuneration.

Measures to improve the operation of unfair dismissal law

(10) The Tasmanian Government does not believe that these proposals can, for the most part, reasonably be claimed as 'improving the operation of the unfair dismissal law'.

The proposals, for the most part, are in keeping with the tenor of the entire Bill, that is they seek to reduce the protection, access to remedy and entitlements of employees who have been found to be unfairly dismissed.

(11) The intention and effect of the proposals is to reduce the cost to employers of treating their employees unfairly.

The measures make no concession to the principle as well as the reality that employers should shoulder their responsibilities to treat their employees fairly.

(12) The proposals do not recognise the need to educate employers about their existing responsibilities, and the need to meet those obligations. Rather, the sole emphasis is on reducing the cost of to employers who act unfairly and who disregard their legal obligations.

(13) The Tasmanian Government agrees that the Commission should take into account conduct or performance by an employee which may have been a factor contributing to dismissal.

In the Tasmanian Government's view, however, this aspect is already catered for in the *Workplace Relations Act 1996*, in both the 'fair go all round' principle of s.170CA(2), and in the 'any other matters that the Commission considers relevant' criterion of s.170CG(3)(e).

In this context, the attention of the Committee is drawn to s.30(2) of the Tasmanian *Industrial Relations Act 1984*, which provides that:

> In considering an application in respect of termination of employment, the Commission must ensure that fair consideration is accorded to both the employer and employee concerned and that all of the circumstances of the case are fully taken into account.

The Tasmanian Government believes that this is an appropriate provision which ensures the greatest possible fairness and balance is afforded to both employees and employers.

(14) The Tasmanian Government does not agree that dismissal claims should be limited where the termination has purportedly occurred for operational reasons.

Unfair dismissal can and too often does occur under the guise of 'operational reasons' – redundancy for instance – and employees should not be prevented from seeking to argue a case accordingly.

(15) The Tasmanian Government strongly opposes reducing from six months to three months' remuneration the maximum compensation payable to employees of small businesses who have been unfairly dismissed.

No real attempt has been made to justify why this discriminatory distinction is being proposed, except some ill-explained and ill-defined notions of 'imbalance', the cost to small business and the concomitant effect of employment and/or jobs growth.

These are unarguably important issues and they should be treated seriously. So too are the rights and interests of employees, yet this Bill contains no apparent recognition of that, concentrating rather on ways to reduce or minimise the consequences of small business employers treating their employees unfairly.

(16) The Tasmanian Government agrees that the Commission should have regard to the safety and welfare of other employees in assessing whether a dismissal was harsh, unjust or unreasonable.

It is reiterated, nevertheless, that such issues are already able to be dealt with under the existing provisions of s.170CA(2) and s.170CG(3)(e).

(17) The Tasmanian Government strongly opposes the proposal that the size of a business should be a factor in determining an appropriate remedy in instances where the Commission has found a dismissal to be unfair.

The inference to be drawn from this proposal is that it is only half as unfair if a small business unfairly dismisses an employee than it is if a large business unfairly dismisses an employee. This irrational, unbalanced and unfair approach to remedy is seemingly justified wholly on the basis that small business should not have to bear the full consequences of treating its employees unfairly.

Again, this proposal seeks to enshrine the second class status of workers employed in small business.

(18) The Tasmanian Government agrees that the Commission, when ordering reinstatement that encompasses compensation for 'lost wages', should take into account any remuneration that the unfairly dismissed employee may have earned subsequent to the dismissal.

(19) The Tasmanian Government strongly supports the principle that reinstatement should be the primary remedy available to employees who have been unfairly dismissed. In that context, the Committee's attention is drawn to s.30(9) of the Tasmanian Industrial Relations Act 1984, which prescribes that:

> The principal remedy in a dispute in which the Commission finds that an employee's employment has been unfairly terminated is an order for reinstatement of the employee to the job he or she held immediately before the termination of employment or, if the Commission is of the opinion that it is appropriate in all the

> circumstances of the case, an order for re-employment of the employee to that job.

The Committee's attention is also drawn to s.30(10), which states:

> The Commission may order compensation, instead of reinstatement or re-employment, to be paid to an employee who the Commission finds to have been unfairly dismissed only if, in the Commissioner's opinion, reinstatement or re-employment is impracticable.

(20) The Tasmanian Government strongly advocates that there should be uniform criteria relating to unfair dismissal, and that the criteria should be uniformly applied.

To differentiate between the remedies available to unfairly dismissed workers merely by reference to the size of their employer is manifestly unjust.

Moreover, the proposals in effect are more likely to encourage rather than discourage unfair treatment of employees and disregard of a 'fair go' and existing employment law.

(21) The Tasmanian Government recognizes that there are many obligations and responsibilities placed upon employers, of all sizes.

In the view of the Tasmanian Government, not enough has been done by the Commonwealth Government to inform and educate small business about unfair dismissal, and the requirements and obligations that the federal law imposes on business in this regard.

(22) It is acknowledged that unfair dismissal law may be daunting, and frustrating, to some employers, irrespective of size. It is also

acknowledged that it is axiomatic small business is unlikely, or less likely, to have dedicated human resource management staff than may be the case with larger business.

(23) Nevertheless, treating employees fairly, and providing them with a fair go in the workplace, is scarcely something that requires a high degree of technical and discrete professional skill.

The notion of a 'fair go', whether in the workplace or elsewhere, is too well understood to need any elaboration here. A fair go for employees in the workplace is not and should not be regarded as a nuisance, but an absolute right.

(24) It is not as if termination of employment is something of a new phenomenon. Businesses of all sizes are required to be aware of, and to observe, all manner of rules and regulations.

Knowing what the fundamentals of labour law should not be any more or any less of an impost on employers than any other legal requirement, regardless of the size of the business.

Is the principle of treating employers more leniently for non-compliance on the basis of their size to be extended into other areas where legal requirements are breached?

(25) There is obviously something unfair and unsound about the notion that, if a small business transgresses, the penalty should be reduced merely because the business is small. The concomitant that because a business is small it is less likely to be familiar with, and by extension to comply with, its obligations is an unfair and unsound basis upon which to ground unfair dismissal law.

(26) The Commonwealth Government is essentially seeking to make employees of small business subsidise the potential cost of their employer's unfair employment practices.

The focus should instead be on increasing small business's awareness of their obligations under the federal law, and improving their knowledge and understanding of basic, sound employment practices. The answer is certainly not simply a matter of reducing the cost to an offending employer of treating an employee unfairly.

(27) It is, however, important to emphasise that the Tasmanian Government will give unequivocal support to any measure that will bring about an improvement in the unfair dismissal process. That is, measures which will make the operation of the system simpler, more timely, more efficient and more effective.

Expanded federal scheme

(28) According to the Commonwealth Government, its proposal to expand the federal unfair dismissal jurisdiction will increase the number of employees covered by the new system from around 3.9 million to around 6.8 million.

Put another way, to use the Commonwealth Government's words, "this 'cover the field' provision means that the percentage of employees covered by federal unfair dismissal provisions should rise from about 50 per cent to about 85 per cent."

(29) This is a very significant expansion indeed, and will clearly have a considerable effect on the Tasmanian state industrial relations jurisdiction.

(30) Furthermore, the effect is intended to be of even greater significance in the longer term.

The Commonwealth 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."

(31) The rationale for this dramatic change is replete with rhetoric and generalisations, but very little by way of evidence or detailed analysis.

For example, the proposal is said to be a step in the progress towards a "simpler, fairer workplace relations system based on a more unified and harmonised set of laws."

And "A national economy needs a national workplace relations system."

And "a more unified national system means less complexity, lower costs and more jobs."

(32) The Commonwealth Government goes on to claim that:

> Even as it stands, the 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.

(33) The Tasmanian Government does not accept as valid the premise upon which the proposals contained in the Bill are predicated.

The Commonwealth can speak for itself in respect of how burdensome its system is to employers, or to what extent its system is destructive of employment growth.

But there has been no evidence put forward in support of the proposition that the federal system is 'generally less burdensome to employers' and 'less destructive of employment growth' than the various state jurisdictions.

Broad statements of 'imperfection' are absolutely meaningless and do nothing to inform or to assist the constructive consideration of such a serious subject.

(34) The Tasmanian Government does not accept these assertions. The Government does not accept that the way forward proposed by the Commonwealth Government is an improvement on the system currently in place.

Neither does the Tasmanian Government agree with the assertion that the existing unfair dismissal system is in need of the kind of changes proposed for it.

(35) It is further stated that the Commonwealth Government "hopes" to achieve a single unfair dismissals system, and one with "the best possible set of provisions covering Australian workplaces."

The Commonwealth is not able to say how that will, or can, be achieved.

(36) On its own admission, under the current proposals state tribunals will still deal with at least fifteen per cent of unfair dismissals. And state tribunals will still continue to deal with a host of other business besides termination of employment issues.

It may be that the Commonwealth will take the majority of unfair dismissal disputes, but it will not take all of them.

The state-federal industrial jurisdiction will thus continue, with all of the perceived differences and 'imperfections'. By extension, this necessarily means that few or none of the benefits that the Commonwealth claims for its proposed changes can in fact be accomplished.

(37) The Tasmanian Government is not by any means opposed to the concept of unfair dismissals being regulated by a set of operating criteria which are broadly consistent across Australia.

In fact it is the Government's view that to some considerable degree this is already the case.

(38) The Tasmanian Government, however, reiterates its strongly-held view that the federal unfair dismissals system, in either its current or proposed form, is not the best model to follow, or even an appropriate model to follow.

(39) That is not, however, to advocate a single, federal system, either in the narrower context of unfair dismissals or the wider context of industrial systems generally, as foreshadowed in the Commonwealth's 'withering away' concept.

(40) Issues of such magnitude require vastly more consideration and discussion than has been offered by way of support for this Bill.

(41) It is of great concern that the Commonwealth Government has made no attempt to consult with the Tasmanian Government about the proposals, and the likely effect that they would have on Tasmania, its employers and employees, and the state industrial relations jurisdiction.

(42) For its part, the Tasmanian Government has for several years co-operated constructively with the Commonwealth Government in the federally-instigated industrial relations harmonisation process. During the course of that process a number of significant and mutually advantageous initiatives have been implemented.

It may well be the case that other measures, perhaps relating to unfair dismissals but not of course excluding other aspects of the industrial relations system, could similarly be developed and implemented.

But these outcomes can only come after extensive and meaningful consultation, and agreement, between the States and the Commonwealth.

(43) The best interests of industrial relations for Tasmania are not well-served by the Commonwealth Government seeking to unilaterally superimpose its own system on the State jurisdiction.

(44) Moreover, the Commonwealth Government has not identified why it has chosen to do so. The Commonwealth Government has not attempted to explain to the Tasmanian community what the perceived shortcomings of the state system are. The Commonwealth Government has not tried to explain how supplanting the state system would be better for Tasmanians and Tasmania.

(45) The Commonwealth Government has shown not the slightest inclination to consult and discuss these profoundly important issues in a constructive and co-operative way. Indeed, the Commonwealth Government is proceeding to try to implement its

proposals without seeing any need to discover the views of the Government of Tasmania, or few if any of the key industrial relations stakeholders in the State.

(46) The very least that should be expected from the Commonwealth Government is an in-depth comparative analysis of the State system vis-à-vis the federal system, and some informed commentary on their respective operation and efficacy.

(47) Yet the Tasmanian Government, along with everyone else, is in effect being asked to 'defend' its system without even knowing the basis of the perceived shortcomings that have apparently galvanised the Commonwealth Government into attempting to over-ride the State system.

(48) The Tasmanian industrial relations system has evolved over a number of years, and under a number of Governments, always with the intention of having in place a jurisdiction that is conducive to the efficient and expeditious settlement of industrial disputes.

The aim has been to create a system unashamedly directed to the best interests and the needs of the Tasmanian community. That objective has been met.

(49) The Tasmanian *Industrial Relations Act 1984* was amended in 2000 in respect of unfair dismissals. It stands as a model of simplicity, balance and fairness.

This system is now to be largely usurped by the Commonwealth Government, without any cogent explanation, let alone discussion, about why this should be so. And without any invitation, let alone opportunity, to discuss the wisdom and effectiveness of the system that is to supplant it.

(50) Given the significance of the proposed changes, and the lamentable lack of consultation, and wholly inadequate opportunity to consider the ramifications of the Bill, the Tasmanian Government urges the Committee to reject the Commonwealth Government's proposals.

(51) The Government urges the Committee to take whatever steps are available to it to ensure that the Tasmanian Government, and indeed all those potentially affected by the Bill, and all of those parties who have a vital interest in the direction of industrial relations in this country, are consulted comprehensively and afforded adequate time to consider the implications of these far-reaching proposals.