CHAPTER 1

INTRODUCTION

1.1 On 20 March 2002 the Senate referred to its Employment, Workplace Relations and Education Committee (the Committee) the Workplace Relations Amendment (Fair Dismissal) Bill 2002. The provisions of the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002, the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002, the Workplace Relations Amendment (Genuine Bargaining) Bill 2002 and the Workplace Relations Amendment (Fair Termination) Bill 2002 were also referred to the Committee. All bills propose amendments to the *Workplace Relations Act 1996* (the Act).

1.2 The Workplace Relations Amendment (Fair Dismissal) Bill 2002 was introduced into the Senate on 11 March 2002 after being agreed to in the House of Representatives. The remaining bills were introduced into the House of Representatives on 20 March 2002 with debate adjourned on the same day.

1.3 The Committee received 30 submissions in relation to the bills and held public hearings on 2 and 3 May 2002 in Melbourne. A list of submissions and hearing witnesses are to be found in appendices to the report.

Background to the Bills

1.4 The Act provides the framework for Australia's current workplace relations system and retains and builds on features of the *Industrial Relations Reform Act 1993*. A major change that was introduced in the 1993 Act was a shift from a compulsory arbitration system that disallowed strikes, to an enterprise bargaining system that made strikes lawful provided they were taken to win an enterprise agreement.

1.5 The Act retains and reinforces the primacy of the workplace and the individual enterprise in negotiating conditions of employment. The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

> (a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and
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> (aa) protecting the competitive position of young people in the labour market, promoting youth employment, youth skills and community standards and assisting in reducing youth unemployment; and
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> (b) ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level; and
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> (c) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act; and

(d) providing the means:

(i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards; and

(ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment; and

(e) providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them; and

(f) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and

(g) ensuring that employee and employer organisations registered under this Act are representative of and accountable to their members, and are able to operate effectively; and

(h) enabling the Commission to prevent and settle industrial disputes as far as possible by conciliation and, where appropriate and within specified limits, by arbitration; and

(i) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and

(j) respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and

(k) assisting in giving effect to Australia's international obligations in relation to labour standards."[1]

1.6 The second Howard Government identified the need for further evolutionary changes to the workplaces relations system to build on the reforms of 1996. On 30 June 1999 it introduced the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 (the MOJO Bill) to achieve that objective. Measures contained in the MOJO Bill included a prohibition on pattern bargaining, the introduction of secret ballots for protected action and an exemption for small business from the provisions of unfair dismissal law. The MOJO Bill did not pass the Senate.

1.7 A series of bills designed to implement some of the specific proposals contained in the MOJO Bill were introduced during 2000 and 2001. These included bills to require secret ballots for protected action, prevent protected industrial action in the case of pattern bargaining and to exempt small business from the operation of the unfair dismissal provisions. Those proposals also failed to pass the Senate, although a small number of other amendments to the Act were passed.

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1 section 3, *Workplace Relations Act 1996*

1.8 In its election 2001 policy statement "Putting Australia's Interest First; More Jobs, Better Future," the Coalition identified a flexible and productive workplace relations system as one of the six pillars of its employment action plan. Each of the five bills referred to the Committee are designed to give effect to this commitment and to promote more employment opportunities through a workplace system based on enterprise bargaining and freedom of choice.

Background to the Bills and Summary of Provisions

Workplace Relations Amendment (Fair Dismissal) Bill 2002

1.9 This is not the first proposal to remove small business from the federal unfair dismissal jurisdiction. Since March 1994 there have been many attempts to wind back the scope of the federal unfair dismissal laws, with most proposals defeated and all attempts to enact a specific small business exemption rejected. This Committee has considered the proposal to exempt small businesses from the unfair jurisdiction on four occasions and this issue has been dealt with in great detail in previous Committee reports. This report will therefore not revisit all of the issues relating to unfair dismissal.

1.10 The unfair dismissal provisions in the Act essentially make provisions for employees who are subject to the provisions to seek redress through the Australian Industrial Relations Commission (the Commission) if their dismissal is unfair (that is harsh, unjust or unreasonable). The 'fairness' of a dismissal relates not only to the grounds or merits of the decision to dismiss, but also the process followed. Some employees who would otherwise come under the Commonwealth jurisdiction are exempt from the unfair dismissal provisions, either because they are not, for example, employed by an incorporated company or because they are in a class of employees specifically exempted, such as employees on fixed term contracts.

1.11 The Act also provides for redress against unlawful dismissal (that is, on prohibited grounds such as discrimination on the basis of race, religion and so on). Claims in relation to unlawful dismissal are relatively few in comparison with claims in relation to unfair dismissal.

1.12 The aim of this bill is to protect small businesses from unfair dismissal claims by excluding small business employees, other than apprentices and trainees, from access to remedies for harsh, unjust or unreasonable termination of employment. A small business employee would still be entitled to apply to the Commission for redress where the termination has been unlawful. The bill applies only to employees who commence employment in a small business after the bill becomes law. Employees working in small businesses before the bill is passed would retain access to unfair dismissal remedies.

1.13 This bill largely reflects measures that were contained in the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001. That bill was introduced but not considered before parliament was prorogued for the election. The bill differs in some significant respects from the Workplace Relations (Unfair Dismissals) Bill 1998, which was considered by this Committee in late 1998 and early 1999. The main differences between the 1998 bill and the current bill are, firstly, that the definition of small business has been changed to refer to businesses with fewer than 20 employees. The 1998 bill

would have excluded from the operation of the unfair dismissals provisions those employees working in a business with 15 or fewer employees.

1.14 The second major difference is that the current bill establishes a process to allow the Commission to deal with the jurisdictional issue of whether the employer is a small business as defined by the Act; the Commission would have the discretion to determine this issue without a hearing.

1.15 This bill is intended to ensure that unfair dismissal laws do not unreasonably burden employers when making decisions to employ or dismiss staff.

The Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002

1.16 The Act promotes the principles of freedom of association and freedom of choice. It ensures that employers, employees and independent contractors are free to join, or not to join, an industrial association of their choice and are also protected from victimisation and discrimination regardless of that choice.

1.17 The Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 arises out of a need to address attempts by some unions to require non union members to pay for union activities through the imposition of bargaining service fees. The Committee previously considered a similar issue in the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001. Although this Committee recommended that bill to the Senate last year, the bill was not agreed to, with debate being adjourned on 6 August 2001. A more detailed analysis of the circumstances leading up to the bill's introduction into the parliament last year can be found in the Committee's report on that bill.

1.18 The use of bargaining fees in certified agreements has been the subject of recent legal challenge. In 2000 the Australian Council of Trade Unions (ACTU) Congress endorsed a policy allowing for the imposition of bargaining fees on non-union members for union services in the negotiation of certified agreements. Seeing the use of bargaining fees as a de-facto compulsory union fee, the Employment Advocate (EA) intervened in the certification process of a number of agreements negotiated by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union. The EA's objection in this mater was eventually brought before the Commission and heard by Vice President McIntyre. His honour found that bargaining fee clauses did not contradict the strict letter of the freedom of association provisions in the Act. This was despite their acknowledged coercive intent.

> In my opinion, it (*the bargaining fee*) is there to persuade new employees to join, or to coerce new employees into joining, the ETU. The minimum fee of $500 is substantially more than the ETU membership fee. Further there is little doubt, I think, that the ETU would waive the fee in respect of persons who are or become members. The obligation to pay the fee is therefore unlikely to be required by the ETU of anyone who is a member of the ETU.[2]

1.19 A subsequent judgement of the Federal Court in November 2001 held that a bargaining service fee clause was not a matter pertaining to the relationship between

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2 *Accurate Factory Maintenance Labour Hire Enterprise Agreement 2000-2003*, McIntyre VP, AIRC, 9 February 2001. PR9009919

employers and employees.[3] This decision reiterates the view that bargaining fee clauses in certified agreements do not provide a basis on which unions can legally compel non members to pay such fees. Despite this judgement, the Government considers that the continued presence of bargaining fee clauses in certified agreements, including those negotiated before the Federal court decision, lends them unwarranted legitimacy.

1.20 The bill is consistent with the Federal Court decision in 2001 (which is now subject to appeal in the Full Court). It differs from the previous bill in a number of significant respects. Unlike the previous bill it focuses on conduct that is aimed at forcing people to pay bargaining services fees rather than on regulating the circumstances in which fees could be paid. It operates more directly to make it clear that bargaining services fee clauses in certified agreements are void and provides a mechanism for their removal. It also includes a power to expressly prevent the Commission from certifying an agreement, or amending an existing agreement, that contains a bargaining fee clause.[4]

Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002

1.21 This bill requires a secret ballot to be held prior to the taking or organising of protected industrial action. The Commission must oversee the ballot process.

1.22 The introduction of secret ballots as a precondition for protected industrial action is designed to ensure that employees who will be affected by protected industrial action are fully consulted in the decision and that the decision is based on a democratic process. The explanatory memorandum sets out the intent of the ballot provisions:

> The new provisions are intended to ensure that protected action is not used as a substitute for genuine discussion during a bargaining period, and to ensure that the final decision to take industrial action is made by the employees concerned.[5]

1.23 The secret ballot provisions should be considered in the context of the significant protection that attaches to industrial action undertaken as a means of advancing claims when negotiating enterprise agreements. Provided unions and employees comply with certain procedural requirements (such as giving notice to the employer of proposed industrial action) and are genuinely attempting to reach agreement on an enterprise agreement, they gain immunity from most forms of civil liability that may arise from industrial action. They are also protected from dismissal or other penalties by the employer as a result of taking part in protected action.[6]

1.24 The requirement for a secret ballot features in several contexts in the workplace relations system. For example, before the Commission can certify an agreement, it must be agreed to by a majority of employees voting in a secret ballot. The Act requires that union

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3 *Electrolux Home Products V AWU* [2001] FCA 1600 (14 November 2001)

4 Smythe, James. Department of Employment and Workplace Relations, *Hansard,* Friday 3 May 2002, p EWRE102

5 explanatory memorandum to Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002 p 2

6 Department of Employment and Workplace Relations, Submission number 25, p46

officials be elected through a secret ballot. It also provides the Commission with the power to order a secret ballot as a means of assisting the settlement of an ongoing industrial dispute.

1.25 The Department of Employment and Workplace Relations (the Department), explains the policy rationale for the provisions in this bill:

> Current approval mechanisms for authorisation of industrial action are left to the organisation's rules, and so authorisation may occur at the higher levels of the organisation without reference to the members who will be directly affected. Such a process undermines the intention of the WR Act to ensure that decisions in relation to agreement-making are made at the workplace level. It does not guarantee that employees have the opportunity to participate in the decision making process or, to the extent that they do participate, that they do so freely.
>
> Even in circumstances where members have the opportunity to vote on proposed industrial action, there is no requirement for the ballot to be conducted secretly, leaving open the possibility that members could be pressured into voting in favour of industrial action.[7]

1.26 In outlining the value of the secret ballot process, the Department quotes Professor Niland:

> Concerns are frequently expressed regarding the need for secret ballots, before industrial action is taken to ensure that members can exercise a democratic right. The view is often expressed that the silent and timid majority are outvoted by the industrially militant where open or no votes are taken before industrial action.[8]

1.27 This bill requires that a secret ballot of union members or employees be held as a precondition for protected industrial action. The process requires a union representative or employee to apply to the Commission for an order that a secret ballot be held. Before ordering a secret ballot, the Commission would need to be satisfied that a bargaining period is in place and the applicant is genuinely negotiating to reach an agreement.

1.28 The bill also sets out the procedural requirements for secret ballots for protected action. These include that at least 40 per cent of eligible voters participate in the ballot (the 'quorum') and that more than 50 per cent of the votes cast are in favour of the proposed industrial action.

1.29 This model differs from the previous models that the Government has proposed in relation to secret ballots in the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 and the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000. This Committee endorsed both those models. However minority reports raised a number of objections, including that the process proposed was an unreasonable impediment to lawful industrial action, contrary to International Labour Organisation (ILO) and had would encourage unions to take more far-reaching industrial action.

1.30 The Government has stated that this bill takes account of reasonable concerns raised during previous inquiries and following consultations with the International Labour Office .

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7 IBID p 47.

8 Professor Niland (1989), *Transforming Industrial Relations in NSW,* Green Paper Volume 1, p101. Cited in Submission 25, the Department of Employment and Workplace Relations p47.

The ballot process proposed in this bill is more streamlined and flexible than its predecessors. In this bill, applicants are able to conduct their own ballots, attendance ballots are allowed in place of postal ballots in specified circumstances and the ballot question has been simplified so that only the nature of the proposed industrial action need be specified and not the precise form and duration of the action and the specific days on which it will occur.

1.31 The bill also contains protection against legal challenges to the validity of a ballot. Further, whereas previous models required that certified agreements had expired before a ballot could be conducted, in this bill the ballot process can commence up to 30 days prior to the expiry date of a certified agreement. This is intended to address concerns about the delays that would occur in negotiating new agreements under previous models.

1.32 The quorum requirement has also been reduced from 50 per cent to 40 per cent of eligible members or employees.[9]

1.33 The Department's submission summarises the contrast between this bill and its predecessors:

> It takes into account key concerns raised before this Committee when considering the SBPA 2000 Bill. It also follows consultation with the International Labour Office, with a view to ensuring that the underlying elements of the model for secret ballots meet Australia's international obligations. A key element was to ensure that the model would not interfere with the capacity of employees to access industrial action when there was genuine support amongst employees for such action.
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> This approach has resulted in a more streamlined process for applying for and conducting ballots and a more flexible approach to the framing of the ballot question. The procedures enhance the opportunity for participation by employees in the decision to take industrial action while ensuring that the process is simple and quick and does not diminish the capacity for employees to take legitimate industrial action.[10]

Workplace Relations Amendment (Genuine Bargaining) Bill 2002

1.34 This bill is designed to reinforce the emphasis on enterprise bargaining in the Act.

1.35 Since the early 1990s there has been general support for a move towards decentralised, enterprise – level bargaining. This shift has been at both state and federal levels and endorsed by all political parties. In its submission the Department writes:

> Whilst differing approaches were advocated, the need to make enterprise agreement-making part of the system was endorsed by both major political parties, all major employer associations, the ACTU and the majority of individual unions. The widespread acceptance of this need for change reflected the fact that in the more competitive and open international economy that emerged in the 1980s, the capacity for Australia to maximise its economic growth, employment opportunities and living standards required a more flexible labour market.[11]

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9 Smythe, James op cit, p EWRE102.

10 Department of Employment and Workplace Relations, op cit p45

11 IBID, p 59

1.36 The 1996 workplace relations reforms broadened the range of agreement types available including agreements for both union and non-union collective agreement making at the enterprise level as well as individual Australian Workplace Agreements. The agreement-making framework put in place by the Act was also underpinned by a compliance framework which included protection for industrial action taken in support of claims in respect of proposed (single business) agreements. The Act extended such protection to action in relation to agreements reached directly with employees (in contrast to the previous Enterprise Flexibility Agreements arrangements) and to Australian Workplace Agreements. [12]

1.37 There are now more than 41,000 collective agreements formalised in the federal system and over 1.3 million employees covered by federal wage agreements. [13]

1.38 The second reading speech states:

> In reforming the workplace relations system, the government has ensured that Australia has workplace relations arrangements that sustain and enhance our living standards, our jobs, our productivity and our international competitiveness. The government has also promoted a more inclusive and cooperative workplace system where employers and employees are able to make agreements on wages, conditions and work and family responsibilities subject to a safety net of minimum standards.
>
> Australia's system of genuine workplace or enterprise level bargaining has underpinned these achievements. The overwhelming majority of Australian employees in the federal workplace relations system are now employed under enterprise or workplace agreements—whether collective or individual.
>
> Enterprise bargaining has produced benefits for both employees and employers. Employees have gained better wages, more relevant conditions, more jobs and greater workplace participation. At the same time, employers have gained higher productivity, increased competitiveness and lower industrial dispute levels.[14]

1.39 The Government has expressed concern that the gains associated with enterprise bargaining are being placed at risk as a result of attempts by some elements within the union movement to return to industry level bargaining through a process known as pattern bargaining. Pattern bargaining is a process whereby a negotiating party attempts to negotiate across a range of workplaces but does not genuinely bargain at the enterprise level.

1.40 This bill is the third attempt to reinforce the principles of enterprise bargaining and ensure that access to protected industrial action is limited to circumstances where there is genuine bargaining at the enterprise level. The MOJO Bill and the Workplace Relations Amendment Bill 2000 both attempted to restrict access to protected industrial action in cases of pattern bargaining. This Committee's reports on those bills provide detailed discussion of the context and background of the bills. The Committee majority argued in those reports for support for the bills in order to protect and preserve the benefits of enterprise bargaining, including higher productivity and improved wages and conditions.

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12 IBID, p 61

13 Abbot, Tony. MP, *Hansard,* 20 February 2002, p504

14 IBID, p 504

1.41 The purpose of the Workplace Relations Amendment (Genuine Bargaining) Bill 2002 is to reinforce the statutory intent and emphasis of the Act in relation to workplace bargaining and access to protected action. The explanatory memorandum outlines the aim of the bill as being to:

> • provide guidance to the Commission when it is considering whether a party is not genuinely trying to reach agreement with other negotiating parties, particularly in cases of so-called 'pattern-bargaining';
>
> • empower the Commission to make orders preventing the initiation of a new bargaining period, or attaching conditions to any such bargaining period, where a bargaining period has been withdrawn; and
>
> • empower the Commission to order 'cooling–off' periods in respect of protected industrial action where it believes this will facilitate resolution of the issues in dispute.[15]

1.42 A major difference between this bill and its predecessors is that in this bill the emphasis is on the conduct of the negotiating parties at the workplace, rather on the pursuit of common claims and common outcomes across an industry. Whereas the 2000 bill sought to introduce new procedures specifically targeting pattern bargaining, this bill seeks to build on the existing provisions in the Act requiring that negotiating parties seeking the benefit of a bargaining period and access to protected action are genuinely attempting to reach agreement. The bill would provide guidance to the Commission when considering whether a negotiating party is not genuinely trying to reach agreement with other negotiating parties. The Commission will retain its discretion to suspend or terminate the bargaining period where it concludes that the negotiating party is engaging in non-genuine bargaining. Under the 2000 bill, in contrast, the termination of a bargaining period was mandatory once the Commission was satisfied that a union was engaging in pattern bargaining. [16]

1.43 The bill draws on a Commission ruling in October 2000 whereby Justice Munro[17] set down some clear and practical rules for differentiating between legitimate common claims that unions are entitled to pursue and unlawful industrial action in pursuit of industry outcomes. It preserves the right of unions to make common claims across an industry but requires those claims to be genuinely negotiated at the enterprise level.

1.44 The bill would also provide the Commission with a power to order a cooling off period in the case of a protracted dispute. The second reading speech sets out the policy rationale for this proposal:

> The government believes that cooling-off periods should be given statutory recognition because of their potential to refocus negotiations. Accordingly, this bill would give the Commission discretion to suspend a bargaining period for a specified period, on application by a negotiating party. [18]

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15 explanatory memorandum to Workplace Relations Amendment (Genuine Bargaining) Bill 2002, p2

16 Smythe, James op cit, p EWRE102

17 *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union & Ors* Dec 125/00 [Print T1982].

18 Abbot, Tony. MP, *Hansard,* 20 February 2002, p504

1.45 Unlike in the 2000 bill, the Commission would have a discretion to order a cooling-off period.

1.46 Finally, the bill would also prevent unions from withdrawing from a bargaining period and then commencing a new bargaining period in pursuit of the same claims, as a tactic to escape the jurisdiction of the Commission. It is intended to address the misuse of bargaining periods that occurred during Campaign 2000, an industry wide campaign by elements of the manufacturing unions.

Workplace Relations Amendment (Fair Termination) Bill 2002

1.47 This bill is the only one in the package that contains matters not addressed in legislation previously considered by this Committee. It is designed to deal with a matter that arose after the conclusion of the last Parliament.

1.48 In November 2001, the Federal Court in the *Hamzy* decision, ruled that regulations that excluded short-term casual from unfair termination remedies were invalid, because they went further than the regulation making power in the Act.[19] The regulations found to be invalid had excluded casuals from accessing termination of employment remedies unless they had been working for their employer on a regular and systematic basis for at least twelve months and had a reasonable expectation of continuing employment with the same employer.

1.49 A consequence of this decision is that casual employees are able to bring an unfair dismissal claim against an employer (unless they are subject to some other exclusion from the provisions, for example during the 3-month probationary period). The Government expressed concern that this decision would suddenly expose employers of many casual employees to the risk of an unfair dismissal claim, contrary to their understanding on engaging those employees, and create great uncertainty. On 6 December 2001, as an interim arrangement, the Government made new regulations that would exclude certain short term casual employees from the unfair dismissal provisions, to the extent allowable under the Act in light of the *Hamzy* decision.

1.50 The regulations introduced on 6 December 2001 excluded those casual employees that were engaged by a particular employer for a period of less than twelve months from the termination remedies under the Act. This is narrower than the previous regulation because there is no requirement that the casual employees must also have been employed on a regular and systematic basis. It would not necessarily exclude those casual employees who are on 'lists' of casuals held by employees and are engaged only intermittently, perhaps for only several days or weeks, but who may have been first engaged more than 12 months previously. It is also subject to a disallowance motion.

1.51 In introducing this bill the Government has stated that its purpose is to restore the casual exclusion that was in place prior to the *Hamzy* decision. In light of *Hamzy,* the bill is also designed to validate the invalid regulations so as to ensure that the rights and liabilities of employers and employees are the same as they would have been if the invalid regulations had been validly made.

1.52 The bill would also insert a new provision into the Act requiring applicants seeking relief under federal termination laws to lodge a $50 filing fee. The fee, which is currently

19 *Hamzy v Tricon International Restaurants trading as KFC* [2001] FCA 1589

provided for under regulations, will be indexed annually in line with movements in the Consumer Price Index. The Government considers that the filing fee is an important mechanism to deter frivolous or vexatious unfair dismissal claims, and that indexation of the fee is essential to ensure that it retains the deterrence effect over time.