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16 November 2005

Senator the Hon Judith Troeth
Chair
Senate Employment, Workplace Relations and
Education Legislation Committee
Parliament House
CANBERRA ACT 2600

BY FAX: (02) 6277 5706

Dear Senator

Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005

The Law Institute of Victoria ("LIV") has had the opportunity to read the submission prepared by the Law Society of New South Wales Workplace Law Committee ("the NSW Submission") in relation to the *Workplace Relations Amendment (Work Choices) Bill* 2005 (Cth) ("the Bill").

The LIV supports and reiterates the concerns raised in the NSW Submission, particularly with respect to the size of the Bill and its Explanatory Memorandum and the lack of opportunity to carry out a thorough review. It is essential that a proper examination of the Bill be carried out. We support the request of the NSW Submission for a delay in the passage of the Bill until at least March 2006 so that careful and extensive scrutiny of the Bill can be undertaken.

The LIV has previously forwarded a letter to Workplace Relations Minister, the Honourable Kevin Andrews MP, regarding the proposed changes to unfair dismissal laws. We enclose a copy of the letter which sets out our concerns regarding this aspect of the Bill. In short, the LIV has concerns about a law that will not apply across the board to the whole workforce and which is based on a seemingly arbitrary limit of having fewer than 100 employees.

The LIV also agrees with the NSW Submission that the potential for employers to set up business structures that use "corporate groups" to avoid the jurisdiction of the Australian Industrial Relations Commission ("AIRC") in unfair dismissal cases is problematic. It is likely that employers with between 100 and 200 employees will divide their employees between two or more employing entities so as to protect themselves against the possibility of unfair dismissal claims.

Various laws (including payroll tax laws) deal with this issue by "grouping". The LIV suggests that the inclusion of grouping provisions in the proposed laws would assist in avoiding potential abuses and inequities based solely on the business structures adopted by the employer.

Further, the LIV notes that provisions for parents wishing to move to part time work when returning from parental leave may not be able to be included in awards. Under section 116B of the Bill, one of the matters to be made non-allowable is "transfers from one type of employment to another type of employment". Even though this section is most likely to have been intended to prevent awards from containing provisions regarding the transfer of casual employment to permanent employment, it may also have the effect of removing clauses relating to 'family friendly' working arrangements. The LIV considers that awards should be able to contain the standard clause from the recently decided Family Provisions Test Case of the Australian Industrial Relations Commission (AIRC) [PR082005].

Finally, it would be useful to review the impact of the new legislation within 12 – 18 months to ensure that it does not adversely affect the more vulnerable members of our community. Areas for review could include whether the new Australian Fair Pay and Conditions Standard (AFPCS) should be extended to include other conditions of employment and whether employees have been able to utilise the unlawful termination provisions in the Act. Consideration may need to be given to moving these types of cases to a more accessible jurisdiction. There should also be a review of the ability of employees to enforce provisions in awards or agreements in an inexpensive and timely manner.

The LIV would be pleased to assist in any further review of this Bill that may occur.

Yours sincerely,

V.E. Strong

Victoria Strong
President

Law Institute Victoria

20 October, 2005

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The Hon Kevin Andrews MP
Minister for Employment and Workplace Relations
Level 2, 4 Treasury Place
MELBOURNE VIC 3000

By Facsimile: (03) 9650 0323

Dear Minister,

Re: Proposed Changes to Unfair Dismissal Laws

I am writing in relation to the proposed changes to the unfair dismissal laws as outlined in recent months by the Federal Government. The Government's current proposal is that employers with fewer than 100 employees will be exempt from unfair dismissal claims.

The LIV supports the Federal Government's aims of increasing productivity and lowering unemployment which we understand underpin the raft of reforms that are proposed for the workplace relations system. We have concerns, however, about a law that would not apply across the board to the whole workforce and which is based on a seemingly arbitrary limit of having fewer than 100 employees. The LIV questions how the interests of employers and employees are being balanced by such an exemption.

"Fair go all round"

One of the principles of the *Workplace Relations Act 1996 (Cth)* ("the Act") is the notion of the 'fair go all round'. The LIV questions whether it can be said that there is a 'fair go all round' if certain employees are excluded from protections afforded to other employees.

Further, the proposed reforms will mean that employees from larger employers, those who are already benefiting from having a recognised human resources department, will receive the additional protection of being able to bring a claim against their employer if their employment is terminated unfairly. These employers are actually the ones that are most likely to ensure that disciplinary procedures and termination of employment is carried out in a fair and transparent manner. The removal of the right to seek reinstatement or compensation

for being unfairly dismissed from employees in smaller businesses targets those who are already without the abovementioned protections.

Disadvantage to employers

There is also some concern expressed by our members that the proposed reforms may disadvantage employers as well.

Currently the implied duty of good faith in the employment relationship is rarely extended to the fairness of the termination (see *Mohazab v Dick Smith Electronics Pty Ltd* (1995) 62 IR 200) due to the existence of the statutory regime for unfair dismissals (see *Miller v University of New South Wales* 200 ALR 565). It is a likely consequence of the removal of the statutory regime that courts will give a greater emphasis to the implied duty of good faith.

Disgruntled employees may also be more likely to issue reasonable notice claims in the common law courts. Alternatively, such employees may pursue claims alleging unlawful termination. Such cases are both more expensive and time consuming than unfair dismissal cases.

Dealing with unmeritorious claims

The perceived or actual concerns of employers having to pay "go away money," could be reduced by the further strengthening (s 170CJ was strengthened in August 2001) of the existing cost penalties, provided for under the Act, for instituting unmeritorious claims or unreasonably refusing to discontinue proceedings.

Difficulties with the proposed changes

There are some practical difficulties with the proposed changes. In many cases, it will be difficult to accurately establish the number of employees at a particular time. Will the limit include or exclude part-time and casual employees or employees on parental or long service leave? Large businesses often have a workforce that fluctuates in number on a daily basis. This means that circumstances could arise where two employees dismissed by the same employer but on different days may have entirely different legal options available to them. The first employee dismissed may bring a claim for unfair dismissal as the employer has more than 100 employees at that time, whereas the second employee would not have that option if the employer now has fewer than 100 employees. This appears to be an inequitable situation.

There are also likely to be difficulties where employees are sourced from labour hire companies. This means that it may well be impossible to make an accurate assessment at the time initiation or defence of an unfair dismissal claim is contemplated. It means that the actual number of employees will need to be determined as a separate issue and by onerous and voluminous evidence, both verbal and documentary.

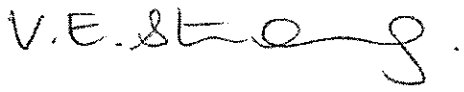
In addition, there is uncertainty about whether the exclusion will apply to companies with fewer than 100 employees or to businesses of that size. Many businesses are structured with employees working in the same undertaking but employed by different entities within the business. The LIV questions how this will be addressed in the proposed legislation.

Conclusions

A fairer (and simpler) system would be to have one law apply to all businesses regardless of the number of employees. Arbitrary limits should be avoided so as to ensure equal access to the law, and a level playing field for businesses of all sizes. Greater powers, to make costs orders, could be given to the AIRC to deal with unmeritorious claims to satisfy those employers aggrieved in the past.

We would welcome the opportunity to discuss these issues with you further.

Yours sincerely,



Victoria Strong
President
Law Institute of Victoria