ELC Employment Law Centre of WA (Inc)
Working for WA Workers
ABN 36 365 876 841

Committee Secretary
Senate Education, Employment and Workplace Relations Committees
PO Box 6100
Parliament House
Canberra ACT 2600

By email: eewr.sen@aph.gov.au

12 November 2012

To whom it may concern

Fair Work Amendment Bill 2012 (Cth)

The Employment Law Centre of Western Australia (Inc) (**ELC**) welcomes the opportunity to make a submission to the Senate Education, Employment and Workplace Relations Committees inquiry in relation to the *Fair Work Amendment Bill 2012* (Cth) (**Fair Work Amendment Bill**).

ELC is a community legal centre which specialises in employment law. It is the only free and not for profit legal service in Western Australia offering employment law advice, assistance and representation. Each year ELC provides advice and assistance to over 4,500 non-union employees in Western Australia.

ELC makes the following comments and recommendations in relation to the Fair Work Amendment Bill:

- **Limitation period for unfair dismissal claims**

  ELC welcomes the proposed increase of the limitation period for unfair dismissal claims from 14 days to 21 days. However, in our view, 21 days is still too short.

  ELC is concerned that many employees with legitimate unfair dismissal claims will be prevented from making a claim merely because of the 21 day limitation period, as evidenced by ELC's statistics. In the 2011 calendar year, at least 71 callers contacted ELC for advice on making an unfair dismissal claim under the Fair Work Act more than 21 days after they had been dismissed.

  In ELC's experience, many recently dismissed employees are not aware of their rights, do not know how to lodge an unfair dismissal claim or even who to go to for advice or assistance. Some employees are in such a state of shock at having been dismissed that they do not seek redress for an unfair dismissal for days, weeks and sometimes months after the dismissal. When dismissed employees finally do seek assistance, it may not be possible for them to obtain legal advice straight away.

These problems are exacerbated where the employee is from a non-English speaking background, has literacy issues or a disability, is unfamiliar with the laws or the legal system, or is in a rural, regional or remote location.

We acknowledge that there is provision in the Fair Work Act for unfair dismissal claims to be accepted outside the prescribed limitation period. However, in practice, very few claims are accepted outside this period because the applicant must show that the delay was due to "exceptional circumstances".

Finally, we note that the 21 day limitation period for unfair dismissal claims is in stark contrast to most liberal democratic states, other than the United States. The three most directly comparable jurisdictions, the UK, Canada and New Zealand, all provide 90 day limitation periods for unfair dismissal claims.

ELC is of the view that the Fair Work Act does not achieve its goal of genuine unfair dismissal protection when large numbers of employees are prevented from making unfair dismissal merely by virtue of the limitation period.

Recommendation: that the limitation period for unfair dismissal claims be increased, ideally to 90 days (in line with other comparable jurisdictions), or alternatively to 60 days (in line with the existing general protections limitation period).

- Limitation period for general protections claims involving a dismissal

The proposed reduction of the limitation period for general protections claims involving a dismissal from 60 days to 21 days is highly undesirable and should be rejected.

In ELC's view, this proposed reduction of the general protections limitation period would have the effect of preventing many employees who have been dismissed unlawfully by their employers from seeking any redress merely because of the limitation period.

As noted above, ELC's statistics indicate that large numbers of employees who seek advice where they have been dismissed only do so more than 21 days after they have been dismissed – in the 2011 calendar year alone, at least 71 callers contacted ELC for advice more than 21 days after they had been dismissed. Although these statistics were for unfair dismissal matters, it is likely that the same would be true for general protections matters.

Further, as noted above, many employees are unaware of their rights or how to enforce them, or are still in shock about what happened in the workplace, making it very difficult for them to lodge a claim within 21 days. These problems are exacerbated where the employee in question is geographically isolated, does not have access to the internet, does not speak English as a first language, or has a disability, for instance.

General protections claims involve very serious breaches of the Fair Work Act – not only is the employer's behaviour considered unfair, it is unlawful. The general protections provisions deal with the situation, for example, where an employee is dismissed because of his or her race, ethnicity, sex, or pregnancy, or is dismissed because he or she took sick leave.

ELC considers that it is highly undesirable that employees who are the subject of such conduct should be prevented from making a claim simply because they were unable to do so within the short time-frame required.

As with unfair dismissal claims, there is some provision for general protections claims to be accepted outside the limitation period, however, in practice, very few claims are accepted out of time.

The Explanatory Memorandum to the Fair Work Amendment Bill provides various rationales for reducing the general protections limitation period.

One of the reasons provided is that the amendment "will align the timeframe for lodging dismissal-related general protections claims with the new 21 day time limit for lodging unfair dismissal applications."[1]

ELC agrees that it is desirable that the limitation period for unfair dismissal claims and general protections claims involving dismissal be aligned. However, the solution is not to reduce the general protections limitation period to 21 days. Instead, the unfair dismissal limitation period should be increased to match the general protections limitation period.

In our view, both the unfair dismissal limitation period and the general protections limitation period should be 90 days, to bring Australia in line with other comparable jurisdictions. At the very least, the general protections limitation period should remain at 60 days and the unfair dismissal limitation period be increased to 60 days to match this.

Another stated reason for the proposed reduction in the general protections limitation period is that "it is in the interest of both the employee and the employer for the matter to be resolved quickly so that, in the event of a successful challenge, the employee can return to their original position with minimal impact on relationships and management of the business."[2]

We submit that this rationale is misconceived. First, it assumes that employees who have been dismissed unlawfully by their employers are generally seeking reinstatement. However, it has been ELC's experience that the majority of employees who have been dismissed are not seeking reinstatement because their relationship with the employer has already broken down to too great an extent.

Second, this stated rationale assumes that the most likely cause of any delay in the employee returning to the workplace is the employee's delay in bringing the claim. However, in our view, what takes the most time is simply the process of the claim proceeding through Fair Work Australia and subsequently the Federal Magistrates Court or the Federal Court.

Recommendation: that the limitation period for general protections claims involving a dismissal either be increased to 90 days (in line with our recommendation above that the limitation period for unfair dismissal claims be increased to 90 days), or be left at 60 days.

Further, we recommend that the limitation period for general protections claims involving a dismissal be aligned with the limitation period for unfair dismissal claims.

[1] Explanatory Memorandum to the Fair Work Amendment Bill, p. 8.
[2] Ibid.

- **Costs orders against parties**

  ELC does not support broadening FWA's powers to order costs against applicants.

  The Explanatory Memorandum to the Fair Work Amendment Bill provides that section 400A is "intended to capture a broad range of conduct, including a failure to discontinue an unfair dismissal application made under section 394 and a failure to agree to terms of settlement that could have led to the application being discontinued."

  For many of ELC's clients, an offer of an amount of money may not be acceptable. It is common for employees to place great importance upon acknowledgment or a finding of wrongdoing, rather than financial compensation.

  In ELC's view, the proposed section 400A would have the effect of coercing applicants to accept unreasonably low settlement offers, for fear of a costs order being made against them.

  Recommendation: reject proposed section 400A.

We would be happy to provide further information in relation to the Fair Work Amendment Bill.

Yours faithfully

Toni Emmanuel
Principal Solicitor