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Bills Digest

No. 79 2001–02

**Workplace Relations Amendment (Fair Dismissal)
Bill 2002**

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Workplace Relations Amendment (Fair Dismissal) Bill 2002

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Law and Bills Digest Group
19 February 2002

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Workplace Relations Amendment (Fair Dismissal) Bill 2002

Date Introduced: 13 February 2002

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: Substantive amendments are to come into effect on a date to be set by proclamation but no later than 6 months after the date of Assent.

Purpose

The Bill exempts businesses with fewer than 20 employees from the unfair dismissal provisions of the *Workplace Relations Act 1996* (Cwth) (the Principal Act).

The Bill does not affect:

- State unfair dismissal laws, or
- Commonwealth legislation dealing with *unlawful* dismissal.

The proposed changes will only apply to persons hired by a small business after the amendments come into effect and the existing rights of trainees and apprentices are maintained.

Background

This is not the first proposal to remove small businesses from the federal unfair dismissal jurisdiction.

On 24 March 1997, Prime Minister Howard promised new regulations to exclude small business from unfair dismissal laws in response to the report of the Small Business Deregulation Task Force chaired by Mr Charlie Bell, the managing director of 'McDonalds'. The Prime Minister's statement promised that the regulations would only affect employees with less than a year's continuous service, and who worked for a small business with no more than 15 employees.¹ Regulations were made on 30 April 1997 to implement the Prime Minister's undertaking and were to commence on 1 July 1997. The

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Senate, however, disallowed those Regulations on 26 June 1997. Later the same day the Minister for Industrial Relations, Mr Reith, introduced the Workplace Relations Amendment Bill 1997 containing similar provisions. That Bill was defeated in the Senate on 21 October 1997. It was re-introduced as the Workplace Relations Amendment Bill [No. 2], which in turn was rejected by the Senate on 25 March 1998.

The proposal to exempt small business was revived after the 1998 General Election. The Workplace Relations Amendment (Unfair Dismissals) Bill 1998 was introduced on 12 November 1998 providing for the exclusion of small business from federal unfair dismissal laws. In that instance, it was again to be businesses with 15 or fewer employees that could attract the exemption.

Towards the close of the last Parliament, the Government introduced the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001 containing the same small business exemption as the present Bill.² The key difference between this and earlier exemptions was that it would apply to businesses with fewer than 20 employees. The 2001 Bill lapsed with the prorogation of Parliament for the 10 November 2001 Election.

Genesis

Prior to 24 March 1994 there were no Commonwealth unfair dismissal laws except those operating in the public sector.

The absence of such laws is largely attributable to a perceived lack of Commonwealth power to legislate in respect to the termination of employment generally. The lack of Commonwealth law necessarily undercut the jurisdiction of federal industrial courts and tribunals. For private sector employees covered by federal awards and industrial agreements, access to the Commonwealth Conciliation and Arbitration Commission (the Commission) was confined to those rare cases where the affected employer agreed to participate in the proceedings. In the parlance of the time, the Commission was said to be exercising a *de facto* jurisdiction, meaning that it was acting outside or at the outer limits of its powers. This necessarily limited the number of matters dealt with by the Commission and narrowed the choice of practical remedies available to employees who had been wrongfully dismissed.

The principal constitutional inhibition on federal award employees – in the 1980s about 40 percent of the workforce – accessing remedies for wrongful dismissal was the view of the High Court that the Commonwealth industrial power was limited to regulating collective industrial relations. Instances of wrongful dismissal gave rise to questions of individual and not collective rights and therefore were outside the scope of Commonwealth power. No such inhibitions affected the States where relief was available at common law, and following a path first taken by South Australia in 1972, as a statutory remedy accessed from industrial tribunals.³

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From the late 1970s, the legal obstacles that up to then had meant that private sector workers employed under federal awards did not enjoy the same rights as their State award counterparts began to disappear. Federal unions began to use the award making process to try to obtain rights on termination for individual employees. This trend was consolidated by the Commission's decision in 1984 in the Termination Change and Redundancy Test Case that endorsed the inclusion in federal awards and agreements of a provision prohibiting harsh, unjust or unreasonable termination of employment.⁴ The Courts gave greater scope to the Commonwealth to use heads of power – principally the external affairs power [section 51 (xxxix)] and the corporations power [section 51 (xx)] – other than the conciliation and arbitration power [section 51(xxxv)] to regulate industrial matters, including disputes over reinstatement.⁵ This use of non-industrial powers to regulate industrial matters had received a significant boost from the Fraser Government's 1977 amendments to *Trade Practices Act 1974* to deal with secondary boycotts which relied on a cocktail of constitutional powers.⁶

The high-water mark of Commonwealth regulation of wrongful dismissals⁷ generally came in March 1994 when the Keating Government's *Industrial Relations Reform Act 1993* (the 1993 Act) came into effect.

The 1993 Act relied on the external affairs power by reference to Australia's ratification of International Labour Organisation Convention 158 on the Termination of Employment.⁸

Opposition to the 1993 Act was strong and its residual effects are evident in hostility to the present law that is much narrower in scope and much more "employer-friendly" than the version that came into force in March 1994.

The underlying causes for this hostility apart from understandable employer self-interest were that:

- The law went beyond merely conferring rights on federal award employees but provided all Australian employees with access to a federal wrongful dismissal regime where 'no adequate (State) alternative remedy' existed⁹
- The new law was (and remains) quite comprehensive. It provides remedies for both 'unfair' and 'unlawful' dismissal. (Instances of alleged *unlawful* dismissal are comparatively rare and ultimately are matters for the Court and not the Commission.¹⁰ They arise out of specific breaches of the legislation involving prohibited forms of discrimination on grounds such as race, colour, sex, sexual preference, age etc and membership or non membership of a trade union – refer section 170CK(2) of the Principal Act. These specified grounds for maintaining an action in the Court have proven less contentious than the less clearly defined grounds available in respect of an alleged 'harsh, unjust or unreasonable termination' before the Australian Industrial Relations Commission under sections 170CE and 170CM of the Principal Act.)
- The 1993 Act cast the initial burden of proof on the employer.

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- Reliance on the external affairs power was an issue in itself and formed part of a wider debate about the use of that power, national sovereignty and the intervention of international agencies in Australian domestic affairs.
- The law represented something of a culture shock to those private sector employers not previously subject to comparable State laws.
- As might be expected and with the legislation foreshadowed for some time, there was an initial rush of applications in the first year of the new law's operation.
- Some individual determinations made by Australian Industrial Relations Commission¹¹ led to concerns that the law made it unduly difficult to dismiss tardy or incompetent employees.
- Scope seemed to exist for an employee (or unions on their behalf) to launch unmeritorious actions in the hope that the employer would settle the claim rather than subject himself or herself to time consuming and emotionally draining legal proceedings.
- Many small businesses, being comparatively less well resourced, operating on narrower margins, or simply unfamiliar with industrial protocols generally, saw the law as a potential threat to their very survival.

Such was the level of concern about the law's impact on business that it was claimed by the Executive Director of the NSW Employers Federation, Garry Brack, that the law may have dissuaded Australia's small businesses from creating between 100 000 and 200 000 jobs.¹²

Scope of the legislation

Since March 1994, there have been many attempts to wind back the scope of federal unfair dismissal laws.

Many proposals have been defeated and, as previously noted, attempts to enact a specific small business exemption have been rejected. The main argument against such an exemption has been that it represents a 'special pleading' on behalf of small business interests.

Beginning with amendments made by the Keating Government, the scope and significance of the federal unfair dismissal regime has been substantially curtailed. Matters that were once contentious have been addressed.

The history of and reasons for what might, for want of a better term, be called this legislative roll back of federal unfair dismissal laws is detailed in previous Bills Digests¹³ and need not be repeated here.

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Some major changes that should be noted are, however:

- Introduction in 1996 of a legislated 'fair go all round' requirement to address employer concerns about the onus of proof in unfair dismissal proceedings.¹⁴
- A narrowing of the scope of the unfair dismissal jurisdiction to confine the federal law primarily to workers employed under federal awards by incorporated employers, persons employed by the Commonwealth or in a Territory.¹⁵
- Placing reduced reliance on the external affairs power.¹⁶
- Limiting the scope and the incentive to threaten, begin or continue unmeritorious actions.¹⁷

The effects of these changes have flowed through to businesses both big and small.

Exclusions

Apart from general changes to its operation, numerous specific changes have been made which reduce the Principal Act's application.

Those *not* covered by the federal law now include:¹⁸

- The majority of private sector workers employed in all States except Victoria and who are not covered by a federal award and concurrently employed by a corporation.
- Most employees of State Governments and instrumentalities (except Victoria).
- Independent contractors.
- Employees who have not on or after 30 August 2001 completed a qualifying period of employment with an employer (usually 3 months but this term may be varied by agreement although if longer than 3 months must only for a reasonable period).
- Employees who are not employed under a federal award or agreement and whose annual remuneration exceeds a prescribed sum (currently \$72 500 per annum).
- Employees engaged under a contract of employment for a specified period of time or for a specified task (unless the main purpose of such engagement was to avoid the employer's obligations under the termination provisions of the Principal Act.)
- Employees serving a 'reasonable' period of probation.
- Casual employees, ie those if they have been working for a particular employer for less than 12 months.

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- Trainees engaged under a National Training Wage Traineeship or an approved traineeship (as defined in section 170X) which is for a specified period, or is, for any other reason, limited to the duration of the agreement.

Two principal effects of the various exclusions and exemptions enacted since 1994 have up to now resulted in:

- a greater proportion of small businesses coming under the umbrella of State (not federal) unfair dismissal laws
- the federal jurisdiction tending to over reflect unionists as opposed to non-unionist members with unfair dismissal claims.

The former tendency is due to the high proportion of small businesses (sole traders and partnerships) which are unincorporated and therefore are outside the federal jurisdiction. The latter trait may also be ascribed to higher union density levels in the public sector and in larger entities such as corporations.

Given the constitutional foundations of the proposed law and the incidence of union membership, it is likely however, that the current Bill's main impact on employees will be on non-unionists. This is a reflection of extremely low union membership rates in small companies.¹⁹

The precise impact of the proposal to exempt small businesses is more difficult to judge. As has been noted in previous Bills Digests, although it is now closer than it once was, the ABS definition of small business is not identical to that used in the Bill.²⁰ Earlier estimates were that less than 25 percent of Australian business would be affected by the proposed exemption.²¹

More recent calculations which allow for a 20 employee cut-off, rather than the 15 employee threshold as applied with earlier proposals, suggest that perhaps up to about 600 000 employees may be affected by this Bill. This figure is derived by taking the total number of persons employed by small businesses with fewer than 20 employees and subtracting those employees who for constitutional and other reasons would not be affected by the small business exemption.²² (It is perhaps unfortunate that, given the importance of the unfair dismissal issue and its longevity, that an official estimate of the number of employees likely to be affected by the exemption is not readily available for the purposes of parliamentary debate.)

Incidence of Claims

Two other ways of getting a feel for the scale of the issue and the changes proposed are to look at the trend in claims over time and to compare the number of unfair dismissal claims with the level of labour market turnover. Again these are indicative measures and need to be treated with caution.

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The available figures are also not comprehensive and there are some statistical irregularities arising from jurisdictional changes such as the transfer of most Victorian workers to the federal jurisdiction in 1996. In interpreting the figures account also needs to be taken of variations in the underlying level of economic activity.

Figures issued by the Department of Employment and Workplace Relations and its predecessors show a sustained decline in the number of federal unfair dismissal claims after the initial burst that followed the commencement of the Keating Government's *Industrial Relations Reform Act 1993* in March 1994.

Early figures from the then Department of Workplace Relations and Small Business comparing the period January-August 1997 (under the Reith law) with the January-August 1996 period (under the last version of the Keating law) showed a national decline of about 20 percent in the number of unfair/unlawful dismissal applications lodged.

Similarly, the number of applications in the federal jurisdiction fell from 9864 in January-August 1996 to 4 492 in January-August 1997.²³ Later figures, comparing the first six months of 1998 with the first six months of 1996, showed that the general decline in applications in the federal system had been sustained with a fall of about 46 percent over the comparable period in 1996.²⁴

The most recent figures made available by the Minister in response to a parliamentary Question on Notice point to a levelling out in the number of applications.²⁵ The figures show that the number of unfair dismissal applications lodged in the federal jurisdiction between 1 July 2000 and 30 June 2001 at 8095. The total national figure encompassing federal and State jurisdictions was 17 200. Of the 8095 federal matters, 4781 claims were lodged in Victoria where practically all workers come under the federal law.

The total number of claims for unfair dismissal in the federal arena of 8095 in the last financial year compares with figures of 14 533 for January to December 1996 and 7 463 for January to December 1997.²⁶ Making allowances for growth in total employment over the past 5 years, last year's figures are roughly comparable to those in 1997.

Labour force mobility also provides an indication of the dimension of the issue. The most recent ABS Labour Mobility figures for the period ending February 2000 show that about 1.5 million workers changed their job at least once in the previous 12 months. In the same period, a total of 2.1 million persons ceased a job, of these 1.465 million left the job voluntarily and 698 000 left their last job involuntarily.²⁷

As a rough measure then, the number of unfair dismissal claims nationally (all jurisdictions) represents about 2.5 percent of total labour market *involuntary* separations. The comparable rate for federal unfair dismissal claims as a percentage of total involuntary separations would be about half that.

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Pros and cons

Proposals to restrict the scope of federal unfair dismissal laws have been debated extensively for close to a decade both in the parliament and in the wider community.

The merits of some form of small business exemption have been debated for about 5 or 6 years.

The following is a short summary of the main arguments ‘for’ and ‘against’ a small business exemption and does not canvass the full gamut of issues that have been raised by numerous participants in what has been a protracted debate. One aspect that is dealt with in some detail is the claim made by proponents of the proposed exemption that the failure to exempt small business from the legislation is costing jobs. Not only is this a critical issue in weighing the costs and benefits of the law but it is a matter which has recently been examined closely by the Full Federal Court. Likewise, ongoing concerns over the cost and nature of Commission proceedings still appear to be at issue despite the Government’s successes to date in addressing any perceived problems.

Supporters of the Bill would argue that a small business exemption is justified as:

- small business is more adversely affected by unfair dismissal laws and claims than are larger firms with greater resources
- the present law also disadvantages employees by discouraging small business from taking on additional workers
- current Australian Industrial Relations Commission procedures for handling unfair dismissal applications need to be further streamlined and are ill adapted to the small business sector
- the exemption does not affect the rights of existing employees
- the exemption does not diminish the rights of many vulnerable employees such as trainees and apprentices
- it does not extend to cases of alleged unlawful (discriminatory) dismissal
- it is not at odds with Australia’s international treaty obligations and is consistent with exemptions available under the International Labour Organisation’s Termination of Employment Convention 1982
- the Government has a mandate to enact its proposed reforms
- some parliamentary opposition to the Bill is primarily due to the hold of the union movement over the ALP.²⁸

Critics and opponents of the Bill might argue that:

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- the basic rights of all employees ought to be same irrespective of the size of their employer.
- there is no evidence to support claims that the federal unfair dismissal laws have acted as a significant brake on employment growth.
- statutory exclusions from the unfair dismissal regime are already quite significant and the case for further exemptions specifically directed to small businesses fails to take these into account
- changes to Australian Industrial Relations Commission procedures, including those mandated during the life of the last Parliament by way of the *Workplace Relations Amendment (Termination of Employment) Act 2001* more than adequately address any legitimate concerns about such matters.
- federal unfair dismissal laws are well down the list of small business concerns.²⁹
- the proposed exclusions are out of step with relevant overseas practice and potentially at odds with Australia's international treaty obligations. Only a handful of countries exempt small businesses from wrongful dismissal laws.³⁰
- the Government's claim to a mandate for its proposed amendments, discounts the fact Australia has a bicameral legislature and the Government was not able in 1996 or 1998 or 2001 to gain sufficient electoral support to secure a majority in the Senate as well as the House of Representatives. Those parties opposing the Bill might also argue that their views on the proposed exemption were thoroughly canvassed prior to and during the last election campaign and a change of heart now would be a betrayal of those who voted for them on the basis of their publicly stated policies.
- existing unfair dismissal laws confer substantive rights on individual employees, not industrial organisations like trade unions. This is not an issue of unions trying to protect union power particularly given the extremely low unionisation rates of workers likely to be subject to the small business exemption.³¹
- the Government is being disingenuous in introducing this proposal yet again, with its real aim being to secure a double dissolution trigger.

Effect on Job Creation

As already noted a repeated criticism of federal unfair dismissal laws is that they cost jobs. The Minister for Employment and Workplace Relations, Mr Abbott, suggested in his Second Reading Speech to the present Bill:

What is good for Australian small businesses is good for Australian jobs. Small business is the engine room for job growth in the Australian economy. And the government believes that it is in the public interest to open the door to the new jobs that can be created by small business by easing the pressure that excessive workplace

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regulation puts on Australia's hard working small businessmen and women. If one in 20 small business employers in Australia took on an additional employee because of a changed legislative framework for unfair dismissal, then an extra 53,000 jobs would result.³²

In an answer to a Question without Notice on the same day Minister Abbott also stated:

The member for Hunter is absolutely right. It is about time the unfair dismissal burden was taken off the back of small business. If just one in 20 small businesses were to put on an extra staff member as a result of changes the government might make, there would be more than 50,000 new jobs in Australia—50,000 more jobs that Australian workers and would-be workers need.³³

Business spokespersons also appear to take a similar view although in some instances the solutions they have proposed are rather different to that of the present Government.³⁴

The suggestion that federal unfair dismissal laws have cost many thousands of jobs has been disputed in the past. It has been pointed out that the awards made against employers are relatively small, the processes under the (much amended) Principal Act are relatively inexpensive and that, in any event there is no hard evidence to establish the alleged link.³⁵

Argument over the effect of unfair dismissal on casual and total employment levels was recently tested in the case of *Hamzy v Tricon International Restaurants trading as KFC* (2001).³⁶ In that case the Full Federal Court held invalid certain provisions in regulation 30B of the Workplace Relations Regulations dealing with casual employees as being beyond power.

In *Hamzy*, Professor Mark Wooden appeared on behalf of the Commonwealth as an expert witness. Professor Wooden argued that removal of the exemption for casual employment from the unfair dismissal provisions of the *Workplace Relations Act 1996* would have 'an adverse effect on job creation in Australia'. Prompted by counsel, Professor Wooden then went on to agree that if that was the effect on casual employment, a similar outcome could be expected in relation to permanent or full-time employment.

The Full Court rejected Professor Wooden's arguments. Noting that:

Professor Wooden did not offer any empirical evidence to support his view. He was unable to do so. In cross-examination Professor Wooden said 'there certainly hasn't been any direct research on the effects of introducing unfair dismissal laws'.³⁷

Professor Wooden also conceded that growth in employment in Australia in the 1990s had been at its strongest when federal unfair dismissal laws had been at their most protective. He also agreed that the 'driving force behind employment is clearly the state of the economy' and not the existence or non-existence of unfair dismissal laws.³⁸

Dr Richard Hall, a Senior Research Fellow at the University of Sydney also gave expert testimony to the Court. Dr Hall disagreed with Professor Wooden's underlying analysis

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and in dealing with the issue of casual employment, suggested that the exclusion of probationary employees from the unfair dismissal regime meant that the risks faced by small business people in taking on new employees were actually less than commonly assumed.³⁹ (Persons hired as probationary workers do not attract the protection of federal unfair dismissal laws until their period of probation is completed.)

None of this, of course, need necessarily persuade small business that they have nothing to fear from the law as it presently stands. The point being made is that there is no hard evidence to date to support the assertion that the law has had a significant impact on employment levels.

Commission Processes

A core criticism of the federal unfair dismissal laws as first enacted was that they placed an unreasonable administrative burden on employers and encouraged unmeritorious claims by former workers sometimes encouraged by trade unions or by avaricious lawyers.

The Howard Government's 1996 amendments⁴⁰ streamlined procedures under the Principal Act. In doing so it created separate streams for handling unfair and unlawful dismissal, introduced a legislated 'fair go all round approach' to discharging the burden of proof in proceedings, transferred the jurisdiction of the Industrial Relations Court of Australia to the Federal Court, and reduced the ambit of federal unfair dismissal laws.

The *Workplace Relations (Termination of Employment) Act 2001*, made further changes to the Principal Act and Australian Industrial Relations Commission procedures, providing for:

1. A three month default qualifying period before unfair dismissal claims can be brought by new employees (period able to be increased or decreased by written agreement).
2. An obligation on the Australian Industrial Relations Commission to specifically consider the differing capacity of businesses of different sizes to comply with dismissal process and procedures – such as the absence of dedicated human resource specialists in small and medium business.
3. Expanded costs orders able to be made against parties who act unreasonably in pursuing, managing or defending claims.
4. Penalties available against lawyers and advisers who encourage making or pursuing unfair dismissal applications where there is no reasonable prospect of success, or who encourage defence of applications where there is no reasonable prospect of a successful defence (penalties - up to \$10 000 company, \$2000 individual).
5. Requirement for lawyers and advisers to disclose 'no win no pay' or contingency fee arrangements.

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6. Power to have the Australian Industrial Relations Commission dismiss matters following initial conciliation if they have no reasonable prospect of success.
7. Power to have the early dismissal of claims which are made beyond the jurisdiction of the Australian Industrial Relations Commission.
8. Power to have speedier dismissal of claims where workers fail to attend hearings, or where second applications on the same dismissal are made.
9. Tightening the rules relating to the granting of extensions of time for the lodgement of late applications.
10. Tighter rules relating to claims by demoted employees.⁴¹

These changes came into effect on 30 August 2001.

It is also worth noting that in any event, and prior to the 2001 amendments, only a comparatively small percentage of unfair dismissal claims in the federal arena were determined using the formal processes of arbitration. According to the 2000-2001 Annual Report of the Australian Industrial Relations Commission, of 7809 termination of employment matters finalised last financial year:

- 6096 (78%) were finalised prior to or at the informal conciliation stage,
- a further 1422 (18%) were settled prior to arbitration being completed, and
- 291 (4%) were the subject of substantive arbitration.

Main Provisions

The substantive provisions of the Bill appear in the Schedule.

Item 1 amends subsection 170CE(1) of the Principal Act to facilitate the inclusion of new subsection 170CE(5C) in the Principal Act. The amendment makes the right to apply for relief in cases of unfair dismissal subject to all existing exclusions and to the new small business exclusion included in the present Bill.

Item 2 stipulates the main conditions for determining whether the small business exemption is applicable in respect to an unfair dismissal application under the Principal Act. **New subsection 170CE(5C)** provides that in calculating the number of persons employed by the respondent business, the terminated employee and any casual employee who has been employed by that firm on a regular or systematic basis for a sequence of periods of at least 12 months, are included. **New subsection 170CE(5D)** provides that the small business exemption does not apply where the applicant employee was at the time of their dismissal an apprentice or registered trainee. **New subsection 170CE(5E)** provides

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that the time for calculating the size of the relevant business for the purposes of the small business exemption shall be the time that the applicant was served with their notice of dismissal or was terminated, whichever occurred first.

Item 3 inserts **new section 170CEB** dealing with procedural matters. It provides the means for the Australian Industrial Relations Commission to deal with applications that fail because of the small business exemption. The new section permits the Commission to dismiss an application for relief without a hearing.

Item 4 inserts **new subsection 170JD(3A)** which provides that a Commission order dismissing an application under **proposed section 170CEB** may not be varied or revoked.

Item 5 inserts **new subsection 170JF(2A)** preventing appeals to a Full Bench of the Commission in relation to orders made under **new section 170CEB**.

Item 6 provides that the small business exemption is only applies to employment relations that began after the present Bill comes into operation.

Endnotes

- 1 Refer, *More Time for Business*, pp. 85.
- 2 Refer Bills Digest No. 60 2001–02.
- 3 Breen Creighton and Andrew Stewart, *Labour Law: An Introduction*, 3rd edition, Federation Press, 2000, pp. 310–337.
- 4 For a time, this approach was extended, with the Federal Court treating the Termination, Change and Redundancy provisions as implied terms in each individual employee’s contract of employment. In *Byrne v Australian Airlines* (1995) 185 CLR 410, the High Court, however, rejected the Federal Court’s ‘implied term’ reasoning and the further extension of individual termination rights became a matter for legislation or individual negotiation between employers and employees.
- 5 See: *Re Ranger Uranium Mines Pty Ltd: Ex parte Federated Miscellaneous Workers Union Australia* (1987) 163 CLR 656 and subsequent cases referred to by B. Creighton and A. Stewart, op cit, p. 311.
- 6 Under sections 45D and 45E of the Trade Practices Act.
- 7 ‘Wrongful dismissal’ is used here as a generic term to refer to both unfair and unlawful dismissals, ie any instance where an employer terminates a worker’s employment without legal authority.
- 8 An approach which was substantially upheld by the High Court in *Victoria v Commonwealth* (1996) 187 CLR 416.

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- 9 There was at the time considerable doubt as to whether any of the State regimes represented an 'adequate alternative' to the federal law. Hence, there was a not entirely baseless concern at the time that the federal regime was in fact a unitary or national one.
- 10 Refer section 170CFA which requires an applicant to make an election between Court and Commission proceedings.
- 11 Created under the *Industrial Relations Act 1988* as the replacement for the Conciliation and Arbitration Commission.
- 12 *Australian Financial Review*, 11 April 1995.
- 13 Bills Digest No.36 1998–99. <http://www.aph.gov.au/library/pubs/bd/1998-99/99bd036.htm> and Bills Digest No. 60 2001-02. <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd060.htm>
- 14 *Workplace Relations and Other Legislation Amendment Act 1996* – refer section 170CA(2) of the Principal Act.
- 15 *Workplace Relations and Other Legislation Amendment Act 1996* – refer section 170CB of the Principal Act.
- 16 *Workplace Relations and Other Legislation Amendment Act 1996* – refer section 170CA(1)(e) of the Principal Act.
- 17 *Workplace Relations (Termination of Employment) Act 2001* – refer sections 170CF, 170CFA, 170CG, 170CH of the Principal Act.
- 18 See Australian Industrial Relations Commission site for more detail.
http://www.airc.gov.au/termination/info_other/home.html.
- 19 See below in 'Pros and Cons'. Non-unionists will probably account for about 90 percent of those employees affected by the exemption. See also Endnote 32.
- 20 ABS No. 1321.0, *Small Business in Australia 1999*, p. 1.
- 21 Bills Digest No.36 1998–99, pp. 8–10.
<http://www.aph.gov.au/library/pubs/bd/1998-99/99bd036.htm>
- 22 The Government estimated in 2001 that about 35 percent of employees in businesses with less than 20 employees were covered by the federal industrial relations system. This it was said meant that about 770 000 small business employees came within the federal industrial relations system. (Refer: *Explanatory Memorandum, Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001*, p.5). However, not every federal award employee is covered by federal unfair dismissal laws. Those who do not work in a Territory, or in Victoria, or for the Commonwealth, or for a corporation are not covered. As only something like 43% of small businesses are incorporated, a large number of their employees will not be covered. Others such as casuals, staff on probation, some trainees etc will fall outside the ambit of the federal unfair dismissal regime because of other exclusions in the Principal Act.
- 23 Answers provided to Senator Andrew Murray (Australian Democrats, WA) by the Department of Employment, Workplace Relations and Small Business. See Senate Economics

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- Legislation Committee, *Report: Workplace Relations Amendment Bill 1997*, October 1997, Appendix 5.
- 24 Senate, *Parliamentary Debates*, 4 March 1998, pp. 421–422.
- 25 Senate, *Parliamentary Debates*, 13 February 2002, p. 179.
- 26 Senate, *op cit*, 4 March 1998, pp. 421–422.
- 27 ABS, *Labour Mobility*, Cat No. 6209.0, 12 October 2000, pp. 3–6.
- 28 House of Representatives, *Parliamentary Debates*, 13 February 2002, p. 77.
- 29 *Canberra Times*, “Abbott attacked over ‘fair dismissal Bill’”, 14 February 2002.
- 30 International Labour Organisation, *Protection Against Unjustified Dismissal*, Geneva, 1995, pp. 27–29.
- 31 ABS data compiled by the Bureau for the purposes of this Digest show unionisation rates of only 9.2% for firms with fewer than 10 employees and of 14.2% amongst firms with 10 to 19 workers. Figures are derived from ABS Cat No. 6310.0, *Employee Earnings, Benefits and Trade Union Membership*, August 2000.
- 32 House of Representatives, *Parliamentary Debates*, 13 February 2002, p 33.
- 33 *ibid*, p. 77.
- 34 *The Australian*, ‘Easing of law ‘would create jobs’, 14 February 2002.
- 35 Refer *Bills Digest* No.116 1997-98, pp 12–13: <http://www.aph.gov.au/library/pubs/bd/1997-98/98bd116.htm>, and
Bills Digest No. 36 1998-99, pp. 15–16: <http://www.aph.gov.au/library/pubs/bd/1998-99/99bd036.htm> citing data made available by the now defunct Industrial Relations Court of Australia.
- 36 [2001] FCA 1589 (16 November 2001)
http://www.austlii.edu.au/au/cases/cth/federal_ct/2001/1589.html
- 37 *ibid*, para 60.
- 38 *ibid*, pars 65–67.
- 39 *ibid*, para 69.
- 40 *Workplace Relations and Other Legislation Amendment Act 1996*
- 41 Cited in Bills Digest No. 60 2001–2002, pp. 5–6. Quoting *Joint Media Release* by Hon Tony Abbott and Hon Ian Macfarlane, ‘Government secures unfair dismissal changes’, 8 August 2001.

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