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Bills Digest

No. 95 2001–02

Workplace Relations Amendment (Fair  
Termination) Bill 2002

ISSN 1328-8091

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Workplace Relations Amendment (Fair Termination) Bill  
2002

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12 March 2002

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# Workplace Relations Amendment (Fair Termination) Bill 2002

**Date Introduced:** 20 February 2002

**House:** House of Representatives

**Portfolio:** Employment and Workplace Relations

**Commencement:** Substantive provisions are to come into effect on a date or dates to be set by proclamation but in the case of each schedule of substantive amendments, no later than 6 months after the date of Assent.

## Purpose

The Bill amends the *Workplace Relations Act 1996* (the Principal Act) to:

- Deny 'short-term' casual employees access to federal unfair termination remedies
- Repeal regulations denying defined types of employee (including probationary employees and persons employed for specified periods) access to federal unfair termination laws and to re-enact, with minor changes, those exclusions in the Principal Act
- Retrospectively 'validate' the operation of federal termination of employment regulations held by the Federal Court to be beyond the regulation making powers available under the Principal Act, and
- Include in the Principal Act a provision requiring applicants for relief under federal unfair termination laws to lodge a \$50.00 filing fee. Such a fee is imposed presently by way of regulation. The new filing fee will be adjusted according to movements in the Consumer Price Index.

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## Background

This is the second of two Bills introduced in the new Parliament to restrict access to federal unfair termination laws.

The other Bill, the Workplace Relations Amendment (Fair Dismissal) Bill 2002, exempts businesses with fewer than 20 employees from the unfair dismissal provisions of the Principal Act. The general legislative background to those proposals and the related changes provided for under the present Bill are discussed elsewhere and are not repeated here.<sup>1</sup>

Prior to March 1994 there was no Commonwealth legislation dealing with the termination of employment except in respect of certain types of public sector employment.

The Keating Government's *Industrial Relations Reform Act 1993* (the 1993 Act) introduced a near universal regime regulating wrongful dismissal in the federal jurisdiction and provided the means for sacked workers covered by State laws to gain access to the federal system where 'no adequate (State) alternative remedy' existed.

These laws proved contentious and have been the subject of much public debate and almost continuous legislative activity over the past 8 years.

A pivotal feature of the 1993 Act was that relief was available to sacked workers where the termination of the contract of employment by the employer was either (a) 'harsh, unjust or unreasonable' or (b) attributable to some prohibited ground such as age, race or gender. The former is known as 'unfair dismissal' and the latter, 'unlawful dismissal'.<sup>2</sup> As is the case with the present exclusions effected by way of Regulation 30B of the Workplace Relations Regulations, the proposed exclusions restrict access to both unfair and unlawful dismissal remedies.

Since 1994, either by amending the Principal Act or by regulation, Governments have sought to wind back the scope of federal unfair termination laws.

Broadly stated, the following classes of worker are unable to access the federal law:

- 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 be for a reasonable period).

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- 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.)
- Casual employees, ie those who they have been working for a particular employer for less than 12 months.
- 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.

### Casual worker exclusion

The Australian Bureau of Statistics defines casual employees in its *Employee Earnings, Benefits and Trade Union Membership Survey*<sup>3</sup> as comprising those employees who are not entitled to either paid holiday nor sick leave in their main job.<sup>4</sup>

ABS data show a strong growth in casual employment over the past fifteen to twenty years. Figures cited in a recent Federal Court decision showed that casual employment more than doubled from 848 300 in 1984 to 1 931 700 in 1999, an increase of 117 percent. In the same period permanent employment grew from 4 509 900 to 5 372 500, an increase of barely 19 percent.

As at August 2000, there were about 2 097 300 casual workers in Australia, representing about 27 percent of employees.

Casual employment is slightly more common amongst women (32.30 percent of all female employees) and younger workers (65.8 percent of all employees aged 15 to 19 years).<sup>5</sup>

### Federal Coverage

Many persons treated by the ABS as 'casual employees'/'employees without leave entitlements' do not come within the scope of the federal unfair termination laws because of the general exclusions relating to unfair termination claims incorporated in the Principal Act since 1994.

The scope of the proposed exclusion is thus dependent both on the precise wording of the casual employee exclusion provision and on the reach of other existing generic exclusions. The latter are quite significant bearing in mind that the coverage of federal remedies is limited largely to persons employed by the Commonwealth, in the Territories or by a corporation subject to a federal industrial award.

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As is the case with the proposed small business exemption provided for in the Workplace Relations Amendment (Fair Dismissal) Bill 2002, no precise figure exists for the number of employees likely to be affected by the proposed casual employee exclusion or the existing exclusion made by way of regulation. The Minister gives no guidance in his Second Reading Speech<sup>6</sup> and no further assistance is to be found in the Explanatory Memorandum.

### Who is a casual worker?

Unlike the ABS definition discussed above, the definition of casual employee adopted for the purposes of the *Workplace Relations Act 1996* makes an employee's length of service the main determinative factor. Any definition that relies on a subjective measure of an employee's attachment to an enterprise necessarily creates a degree of uncertainty because it leaves open the possibility that an employee's status may change over time. So, for instance, when does a person hired as a short term worker become so integrated into an employer's business over time that their status ought properly be regarded as permanent rather than casual? Moreover, what particular rights should short term workers acquire by dint of ongoing service and what rights can only be acquired by virtue of the explicit renegotiation of the contract of employment?

The answer given by the *Industrial Relations Reform Act 1993* adopted the approach in article 2 of International Labour Organisation Convention No. 158 (Termination of Employment at the Initiative of the Employer). Section 170CC(1) although amended in 1994 and 1996 largely continued that approach,<sup>7</sup> ultimately providing that regulations could be made excluding employees from the unfair termination provisions of the Principal Act where:

- The worker had been engaged for a specified task
- The worker was serving a period of probation or a qualifying period, determined in advance and of reasonable duration, and
- The worker was engaged on a casual basis for a short period.

Regulation 30B as made on 30 March 1994<sup>8</sup> purported to give a more precise meaning to the expression 'a casual employee engaged for a short term period' in section 170CC of the Principal Act. Regulation 30B(3) provided that those employees working on 'a short term basis' (and therefore denied access to relief under the Act) did not include persons:

- engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 6 months, and
- with a reasonable expectation of continuing employment with their present employer.

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Regulation 30B(2) sought to limit the scope for intentional avoidance of the unfair termination provisions by rendering ineffective artificial arrangements specifically entered into for that purpose.

Since the changes made by the *Workplace Relations and Other Legislation Amendment Act 1996* section 170CC(1) has been unaffected by subsequent changes to the Principal Act. However, regulation 30B(3) was amended in 1996 to increase from 6 to 12 months the period of engagement required for applicants (who would otherwise be deemed casual employees) to be granted access to the Principal Act's termination of employment remedies.<sup>9</sup> An attempt to disallow this change was defeated in the Senate.<sup>10</sup>

Uncertainty as to the scope and validity of the termination of employment regulations continued as to the precise status of casual employees. In 1999 the Minister for Employment, Workplace Relations and Small Business, Hon Peter Reith, released a discussion/implementation paper that foreshadowed the Government's intention to determine the status of casuals by reference to the position at the time of first engagement and in payslips.<sup>11</sup>

### *Hamzy's case*

The denial of casuals access to unfair termination laws finally came to a head with the Full Federal Court's decision in *Hamzy v Tricon International Restraunts trading as KFC* handed down on 16 November 2001.<sup>12</sup>

*Hamzy* concerned a challenge to the purported dismissal of a 16 year old who had been engaged by KFC for a period of less than 12 months and paid as a casual employee under the KFC National Enterprise Agreement.

On the face of it Mr Hamzy could not seek relief under the Principal Act by virtue of section 170CC and regulation 30B(3).

Mr Hamzy, however, succeeded in his action by successfully challenging the validity of Regulations 30B(1)(d) and 30B(3) on the basis that their making was not authorised by section 170CC of the Principal Act. The Court held that an employee's employment status on the basis of the present wording of the Regulations ought to be determined at the date of termination.<sup>13</sup> It then went on to find that the use of the term 'casual employee' in Regulation 30B(1) could potentially cover persons beyond the class of employees referred to in section 170CC of the Principal Act and was therefore invalid.<sup>14</sup> Regulation 30B(1)(d) was also held invalid.<sup>15</sup>

The instant effect of the Full Court's decision was that casual employees were able to bring unfair dismissal claims in the Australian Industrial Relations Commission unless they were subject to some other exclusion under the Act, such as the 3 month qualifying period.

The Government, however, moved quickly to overcome the Federal Court's decision.

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On 6 December 2001 regulations were made which had the immediate effect of restoring the statutory exclusion of short-period casual employees. To quote the Minister for Employment and Workplace Relations' *Media Release* of 7 December 2001:

From today, casual employees are excluded from the Workplace Relations Act termination of employment remedies if they have been working for a particular employer for less than 12 months.

More specifically, the new regulation 30B(3) provides that:

(3) For the purposes of (1)(d), a casual employee is engaged by a particular employer for a short period if the occasions on which the employee works for that employer under that engagement occur within a period of less than 12 months.

Regulation 30B(1)(d) was also remade under the same instrument.<sup>16</sup>

Like all regulations, these new provisions are subject to disallowance by either House of Parliament. Until either disallowed or repealed by primary legislation they remain in force.

## Pros and Cons

Generic arguments concerning the exclusion of particular classes of employee from the unfair termination regime have been recently canvassed elsewhere and are only referred to here in passing.<sup>17</sup>

**Supporters** of this proposal would argue that the proposed exemption covering casual employees:

- Restores to business the level of protection from dismissal claims that existed prior to the *Hamzy* decision and provides greater certainty by transferring the relevant provisions from subordinate to primary legislation.
- Notwithstanding other legislated safeguards protecting employer's interests, rejection of this Bill would send a poor signal to business.
- Allowing casual employees to access unfair termination remedies would act as a significant brake on employers' willingness to take on additional staff and would therefore harm many of those seeking casual work.
- In 'validating'<sup>18</sup> the operation of the regulations held invalid in *Hamzy*, the legislation is restoring the law as 'everyone' understood it at the time.
- Other related changes proposed here to the unfair termination laws are merely included to keep the legislation up to date.
- Government has a mandate for the proposed measures.

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On the other hand those wanting to criticise or **oppose** the Bill might argue:

- Regulations made on 6 December 2001 restricting access of casual employees to unfair termination remedies are an adequate response to *Hamzy*.<sup>19</sup>
- If further legislative action is appropriate, it would be fairer to return to the casual employee exemption that existed prior to 1996, ie the 1994 version of regulation 30B(3). The latter exemption denied casuals who had been with the same employer for less than 6 (rather than 12) months access to federal unfair termination remedies.
- The Parliament should not agree to the legislation until it has a more precise idea of the number of employees likely to be affected.
- As was accepted by the Federal Court in *Hamzy*, the alleged link between unfair termination laws and employment inhibition is unproven. As the Court said, ‘...even if unfair dismissal laws do have a general effect of inhibiting employment growth, this is not an effect that flows from the ‘particular conditions’ of casual employees’ employment. The inhibition would apply equally to permanent employment.’<sup>20</sup>
- More generally, and this is a criticism that might be made of both the present proposal and the Keating Government’s approach, it is inappropriate to exclude any casual workers from the *unlawful* dismissal component of federal unfair termination laws. The latter refer to those grounds of termination specifically enumerated at section 170CK(2) of the Principal Act. Excluding employees from the protection against unlawful dismissal denies, for example, a casual employee who is dismissed because their employer discovers they are/are not a member of a union, or a homosexual or a member of particular racial group, relief available to other workers under the Principal Act.<sup>21</sup> In short, even if there is an argument for denying casual workers access to federal *unfair* dismissal laws, the basic standards of fairness and decency established by the *unlawful* dismissal requirements in section 170CK of the Principal Act ought to apply to all employment relations.

## Filing Fee

From 31 December 1996, applicants seeking relief from the Australian Industrial Relations Commission under federal unfair termination laws have been liable for a \$50.00 filing fee which may be waived by the Commission in cases of hardship.<sup>22</sup>

This measure was foreshadowed as part of the Workplace Relations Reform Package of 1996<sup>23</sup> and was introduced by way of regulation for the express purpose of discouraging malicious or frivolous claims.<sup>24</sup> Before the passage of the Workplace Relations Reform Package, however, the Government and the Australian Democrats reached a compromise whereby:

- After 12 months of operation the filing fee would be subject to a review, and

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- A sunset clause (initially) of 18 months would operate in relation to the fee.<sup>25</sup>

To date the promised review has not eventuated although the fee has been examined on several occasions in the context of wider consideration of the Principal Act by the Parliament.<sup>26</sup>

The sunset clause was extended on several occasions but prior to the last election the Senate declined to grant a further extension past 31 December 2003.<sup>27</sup>

The Government has previously attempted to increase the fee but the Senate blocked this move by disallowing the relevant instrument.<sup>28</sup>

On 27 June 2001 the Senate voted to disallow Workplace Relations Amendment Regulations 2000 (No.3)<sup>29</sup> which would have extended operation of the filing fee indefinitely by removing the sunset clause from Regulation 30BD.<sup>30</sup>

With effect from 30 August 2001, further and more extensive protection from unmeritorious claims was provided by the enactment of the *Workplace Relations (Termination of Employment) Act 2001* which expands the availability of costs orders available against parties who act unreasonably in pursuing, managing or defending unfair dismissal claims.<sup>31</sup>

The Government now proposes primary legislation providing for a filing fee indexed to the Consumer Price Index.

Minister for Employment and Workplace Relations, Tony Abbott, summarised the Government's position in the following terms in his Second Reading Speech:

The filing fee will discourage frivolous and vexatious claims while ensuring that genuine dismissal applications can be dealt with efficiently.

In fairness to low-income earners, the act will continue to provide that the fee can be waived where it would cause financial hardship. In addition, the fee will be refunded where an application is discontinued at least two days before being dealt with by the commission.

The Senate has repeatedly endorsed regulations containing the filing fee. However, there has been disagreement over whether the fee should be made permanent or continue to be subject to parliamentary review. With this in mind, the government included in its election platform a commitment to making the fee permanent and now has a mandate to implement it.<sup>32</sup>

Failure to index or otherwise increase the filing fee since 1997 has meant that its real value has been eroded over the past 5 years and will continue to decline until the present sunset clause comes in to effect at the end of 2003.

Initial opposition to the filing fee was based on the proposition that it was an unreasonable impost on persons who had just lost their job.<sup>33</sup> To this argument may now be added the

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observation that the erosion of the real value of the fee does not appear to have led a marked upsurge in either genuine or unmeritorious claims over the past 5 years. Similarly, it might also be argued that the measures contained in the *Workplace Relations Amendment (Termination of Employment) Act 2001* constitute a sufficient deterrent to malicious or vexatious litigants and their advisers.

## Main Provisions

The substantive provisions of the Bill appear in the Schedules.

**Schedule 1** deals with the question of unfair termination and, as previously noted, amends the Principal Act to restore the exclusion dealing with the unfair termination of casual employees to the pre *Hamzy* position. In doing so, the Bill also transposes the essence of what is presently Regulation 30B of the Workplace Relations Regulations into the Principal Act. The Bill relocates not only the provisions dealing with casual employees but also those dealing with employees engaged for a specified time or for a specific task and probationary employees into the Principal Act (**proposed section 170CBA**).

The pre *Hamzy* position is encapsulated in **proposed section 170CBA(3)** and provides that for the purposes of the Principal Act a casual worker is subject to the exclusion unless:

- The employee has worked for the same employer on a regular basis during a period of at least 12 months , and
- Up until the moment he or she was dismissed, the employee had reasonable grounds for believing that they would enjoy continuing employment with that employer.

**Proposed section 170CBA(7)** excludes certain classes of worker, principally ‘short-term casuals’, from mandatory notification provisions contained in sections 170CL and 170CM of the Principal Act. The former requires an employer to advise Centrelink if they decide to make redundant 15 or more employees. The latter, section 170CM, requires employers to give all employees a minimum period of notice before terminating their employment. The duration of the notice period is dependent on the individual employee’s length of service.

**Item 4** proposes a **new section 170CCA** to ‘validate’ the operation of the Regulations declared invalid by the Full Federal Court in *Hamzy*.

The Explanatory Memorandum to the Bill states that:

Proposed section 170CCA does not deem the invalid regulations to have been valid. Rather, it declares that the rights and liabilities of employers and employees are to be taken to have been as if the regulations had been validly made. This provision is designed to ensure that everyone is and was in the same position that they would be

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in, or would have been in, had the invalid regulations been validly made. However, this section would not affect the rights of parties to proceedings which have been finally determined by a court or by the Commission before the commencement of this item, so far as the rights and liabilities that were the subject of the determination directly relate to the invalid regulations.<sup>34</sup>

The rationale provided for this measure by the Minister in his Second Reading Speech is that ‘...in order to provide certainty for business that made employment decisions based on the law as everyone understood it at the time, this bill validates the operation of the invalid regulations.’<sup>35</sup>

The main effect of this provision would be to deny the rights of some short-term casual employees who may have been unfairly or unlawfully dismissed after the decision in *Hamzy* but who have yet to institute or complete legal proceedings in respect of such a dismissal.

This measure might to some appear overly draconian in that the Government made Regulations on 6 December 2001, ie less than 3 weeks after *Hamzy*, which erected a fairly substantial barrier to many unfair termination actions that might conceivably be brought by casual employees.

As the proposed measure is also retrospective and will prejudice legal rights and interests in existence prior to the measure itself becoming law, it may well attract the adverse comment from the Senate Standing Committee on the Scrutiny of Bills.<sup>36</sup>

For those in search of debating points, the justifications for this measure provided by the Minister in his Second Reading Speech and in the Explanatory Memorandum could also be questioned.

First, it has been suggested that retrospective ‘validation’ is appropriate because the proposed law merely re-establishes the position as ‘everyone understood it at time’.<sup>37</sup> There is no evidence advanced to date by the proponents of the Bill to suggest that this assertion is correct. For a start, the contention that ‘everyone’ saw the law a particular way would seem at odds with the definitive and unanimous view expressed by the three members of the Federal Court of Australia who said that the law was beyond power in *Hamzy*. As a general principle, a suggestion that legislation – especially that which has a retrospective effect – is justified on the basis of ‘everyone’ got it right except the court will attract a degree of scepticism.

Second, the Explanatory Memorandum suggests that what is proposed here merely puts everyone back in the position that they would have been in if the pre *Hamzy* regulations had been validly made. The problem with this argument is that, according to the Federal Court, regulations prescribing the particular requirements spelled out previously could not have been validly made. They were beyond the rule-making powers conferred on the Executive by the Parliament when it enacted the Principal Act. As is implicit in the very existence of present Bill, we now know after *Hamzy* that what the regulations sought to

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achieve can only be brought about by primary legislation and not by the making of further regulations. New regulations might be made to place certain restrictions on the rights of casual employees to pursue unfair termination claims, but the specific restrictions on such claims sought by the Government here can only be supported by the passage of primary legislation and not by a subordinate legislative instrument.

Whether the fate of the Bill should turn on what some might see as largely semantic issues, is, of course, another matter entirely.

**Schedule 2** provides for the payment of a filing fee with the lodgement of unfair termination applications under **new section 170CEAA** of the Principal Act. The filing fee is to be set at \$50.00 [**proposed section 170CEAA(2)**].

As with current Regulation 30BD that the new provision replaces, the proposed measure provides an exemption from the fee where the Industrial Registrar is satisfied that the applicant will suffer serious hardship if the applicant is required to pay the fee [**proposed section 170CEAA(7)**]. ‘Hardship’ is not defined. Now that this issue is to be dealt with by primary and not subordinate legislation, the Parliament may want to consider whether some guidance to the Commission on the hardship question might appropriately be included in the Principal Act.

## Endnotes

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- 1 Bills Digest No. 79 2001–2002. <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd079.pdf>
- 2 The term ‘unfair termination’ is in the context of this legislative proposal used here to refer to both unfair and unlawful dismissals.
- 3 ABS Catalogue No. 6310.0.
- 4 Since August 2000, the term ‘casual employee’ has been replaced in the ABS series by the expression ‘employee without leave entitlements’. This, however, is a change in terminology only and there is no corresponding break in the relevant statistical series.
- 5 ABS, op cit, p. 33.
- 6 House of Representatives, *Debates*, 20 February 2002, pp. 351–352.
- 7 Refer *Industrial Relations Amendment Act (No. 2) 1994* and *Workplace Relations and Other Legislation Amendment Act 1996*.
- 8 *Statutory Rule No. 79 of 1994*.
- 9 *Statutory Rule No. 307 of 1996*.
- 10 Senate, *Debates*, 26 March 1997, pp. 2573–2580.

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- 11 Refer 'The Continuing Reform of Workplace Relations: Implementation of More Jobs, Better Pay,' May 1999 at para 116.
- 12 [2001] FCA 1589.
- 13 Ibid, p. 12.
- 14 Ibid, p. 13.
- 15 Ibid, p. 18.
- 16 *Statutory Rule No. 323 of 2001.*
- 17 <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd079.pdf>
- 18 Note the Explanatory Memorandum to the Bill suggests (at page 4) that proposed section 170CC does not actually deem the regulations held invalid in *Hamzy* to be valid.
- 19 Workplace Relations Amendment Regulations 2001 (No. 2), *Statutory Rule No. 323 of 2001.*
- 20 *Hamzy*, op cit, para 71. The Court also rejected the contention that unfair dismissal laws have a general employment inhibiting effect.
- 21 A similar argument could be raised in respect of employees engaged for a specific task or for a specific period of time.
- 22 Refer section 170CE of the Principal Act and Regulation 30BD of the Workplace Relations Regulations.
- 23 Senate Economics References Committee, *Report on Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996*, August 1996, pp. 123–124.
- 24 Hon Peter Reith, House of Representatives, *Debates*, 26 June 1997, p. 6469.
- 25 Letter from the Minister for Industrial Relations, Hon Peter Reith, to Senator Andrew Murray (Australian Democrats) tabled in the Senate on 26 March 1997. Refer Senate, *Debates*, 26 March 1997, p. 2578.
- 26 Senate, *Debates*, 27 June 2001, pp. 25241–25242.
- 27 See, for example, Workplace Relations Amendment Regulations 2000 (No.2) which deferred the operation of the sunset clause in Regulation 30BD to 31 December 2003.
- 28 Workplace Relations Amendment Regulations 1998 (No. 3), *Statutory Rule No. 353 of 1998*, which would have doubled the filing fee to \$100.00 was disallowed by the Senate on 16 February 1999.
- 29 *Statutory Rule No. 328 of 2000.*
- 30 Ibid, pp. 25241–25243.
- 31 Refer section 170CJ of the Principal Act.
- 32 House of Representatives, *Debates*, 20 February 2002, pp. 351–352.
- 33 Senate Economics References Committee, *Report on Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996*, August 1996, op cit, pp. 123–124.

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- 34 *Explanatory Memorandum*, Workplace Relations Amendment (Fair Termination) Bill 2002, pp. 4–5.
- 35 House of Representatives, *Debates*, 20 February 2002, p. 351.
- 36 For a statement of the Committee’s principles on retrospective legislation see: <http://www.aph.gov.au/senate/committee/scrutiny/work38/CHAPTER2.HTM>.
- 37 House of Representatives, *op cit.*, 20 February 2002, p. 351.

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