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Workplace Relations Amendment (Fair Dismissal) Bill 2002 [No.2]

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Workplace Relations Amendment (Fair Dismissal) Bill 2002 [No.2]

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Date Introduced: 18 September 2002

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: Sections 1-3 on the day the Act receives Royal Assent. Schedule 1 on Proclamation, or on the first day after 6 months of the Act receiving Royal Assent.

Purpose

To exempt those small businesses with fewer than 20 employees, bound by federal awards and which are constitutional corporations (but including all small businesses in Victoria) from the dismissal laws of the *Workplace Relations Act 1996* (the WR Act). However only 'new' employees dismissed from federally regulated small businesses will be excluded from seeking an unfair dismissal remedy. A new employee will retain the right to contest a termination where it appears to have been made on discriminatory grounds (eg age, pregnancy, religious beliefs etc).

Background

The Minister for Employment and Workplace Relations, the Hon. Tony Abbott MP observed in his Second Reading Speech to this Bill that it is 'the same Bill that was laid aside on 28 June 2002 after Members of this House rejected Senate amendments'. That Bill, the Workplace Relations Amendment (Fair Dismissal) Bill 2002 was reported in Bills Digest No.79 2001–2002. The Bills Digest contains extensive background to proposals to exempt small business from the WR Act's termination of employment provisions (Part V1A Division 3).

The background commences with the Coalition Government's response to the report of the 1996 Small Business Deregulation Task Force, and the 1997 proposed regulations designed to effect the exemption (then defined as a business which employed 15 or less employees) and details the proceedings and fates of previous Bills. On 26 June 1997 the Workplace Relations Amendment Bill 1997 was introduced to the House of Representatives 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 Workplace Relations Amendment (Unfair Dismissals) Bill 1998 was introduced on 12 November 1998 and defeated in the Senate on 14 August 2000. The Workplace Relations Amendment (Unfair Dismissals) Bill 1998 [No.2] was introduced to the House of Representatives on 29 November 2000 but voted down in the Senate on 26 March 2001.

The Government introduced the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001 into the House of Representatives on 30 August 2001, this time raising the small business exemption to the level provided in the current Bill (ie to businesses employing less than 20 employees). However the Bill had not passed the House of Representatives prior to the calling of the November 2001 Federal Election. The Government introduced the Workplace Relations Amendment (Fair Dismissal) Bill 2002 on 13 February 2002 to the House of Representatives.

Reflecting on previous attempts to exclude small business from the termination laws, the Hon. Tony Abbott noted in a media release on the current Bill

> (This) is the seventh time a bill containing a small business exemption has been introduced into the House of Representatives. Its passage could create tens of thousands of jobs.[1] (media release)

Developments in unfair dismissal

The theme of the small business exemption being justified in terms of a consequent jobs creation potential has been canvassed by Kayoko Tsumori from the Centre for Independent Studies (CIS) in Poor Laws (1): The Unfair Dismissal Laws and Long-term Unemployment who argues

> The Workplace Relations Amendment (Fair Dismissal) Bill 2002, introduced on 13 February this year, is intended to exclude small businesses from the unfair dismissal laws and thereby to encourage job creation. Such an exemption is sensible because the unfair dismissal laws have a particularly adverse effect on small businesses without enough resources to cope with unfair dismissal allegations. Survey results indicate that small business employment would have been higher had it not been for the unfair dismissal laws. [2]

However this paper did not consider or refute the issues raised in the Federal Court's decision in *Hamzy*. Bills Digest No.79 2001–2002 reported on *Hamzy v Tricon International Restaurants trading as KFC* (2001).[3] The decision resulted in WR Act regulations being held invalid. The regulations excluded short-term casual employees from accessing the Act's termination provisions (although new and similar regulations have been determined by the Parliament[4]). The Commonwealth relied on Professor Mark Wooden as a labour market expert who gave evidence to the effect that the removal of the exemption for casual employment from the unfair dismissal provisions of the WR Act would have 'an adverse effect on job creation in Australia'.

The Full Court rejected Professor Wooden's arguments noting that there had not been any direct research on the effects of introducing unfair dismissal laws on job creation. To the contrary, the Court referred to evidence which showed that employment in Australia in the 1990s had been at its strongest when federal unfair dismissal laws had been at their most protective. As the report from the CIS (quoted above) does not produce additional evidence, it would appear not to meet the test suggested by the Court concerning the need for direct research on the (federal) dismissal law and negative effects on job creation.[5]

In any case, the Australian labour market recently appears to be performing strongly. Minister Abbott reported in September 2002 on the Australian labour force noting that full-time employment rose by 87 700 in seasonally adjusted terms for the month of August to a 'near record high' of 6.722 million. While the data does not report on underemployment or 'job-rich job-poor' issues, it does show that total employment reached a record of 9.378 million, with the total labour force exceeding 10 million. The participation rate increased to 63.8 per cent and the seasonally adjusted unemployment rate remained at 6.2 per cent.[6]

Implicit in the CIS study is the notion of a trade-off of legal rights for a class of people against job creation. The trade-off is essentially a public policy choice. Consideration of this trade-off was raised by Senator Murray in an inquiry into the predecessor Bill. His dissenting report in *Report on the provisions of bills to amend the Workplace Relations Act 1996* by the Senate Employment, Workplace Relations and Education Legislation Committee (the Senate Committee) contended that

> … the assertion of the employment-creation effects of removing unfair dismissal access in small businesses remains unproven. This effect and some of the estimates circulating in public debate were questioned by unions and employer associations (for example, COSBOA's President had limited confidence in the claim that 53,000 new jobs would be created through the Bill).
>
> This is a vital point. The Government's case rests on a public interest trade-off. They say the public good would be served by the creation of 53 000 jobs, set against the public harm of removing rights from a little over 2 600 federal small business unfair dismissal applications. Until the evidence exists, the argument that employment will be created by removal of rights from a class of employees based on business size is moot, to put it mildly.[7]

On the other hand, the Committee's Main Report did not consider the partial coverage of small business under the federal jurisdiction to be a reason not to pass the Bill

> The partial coverage of federal unfair dismissal laws is, not, however, a good argument to do nothing to alleviate the burden on small business owners. If unfair dismissal is a very real problem for small business, then there are good reasons why that problem should be addressed, even if only initially for the quarter of small businesses that fall under Commonwealth law benefit. The Committee majority believes that a uniform system across all jurisdictions would serve to maximise the benefits of any Commonwealth small business exemption and that the States should be stimulated to follow this job creation mood.[8]

In Committee debates on the Bill, Senator Murray explored the 'partial coverage' of the federal termination provisions over small business in so far as the majority of small business employees would be covered by State termination provisions, and compared federal and State termination of employment provisions. This exercise suggested that the federal provisions were the more stringent of the 6 termination systems in Australia. Stringency may be associated with setting the rules for a termination application so that the application may have a greater chance of failure, and is based on a number of criteria

- the exclusion of potential applicants based on their (previous) form of employment, such as casual (with less than 12 months service) or probationary employees (WR Act s.170CC). Not all jurisdictions exclude casual or similar employees from making termination of employment applications, eg Western Australia, while the Commonwealth jurisdiction does

- the respondent is able to move that the application be dismissed without hearing in circumstances where the tribunal believes the application is beyond jurisdiction (WR Act s.170CEA)

- a 'filing fee' accompanies the application to dissuade frivolous claims. The Commonwealth fee is currently $50; no jurisdiction sets a higher charge and in Tasmania, for example, there is no charge

- Under the federal provisions, penalties apply to 'advisers' pursuing 'vexatious' claims (WR Act s.170HE). There are no similar State provisions, and

- 'Contingency fee' disclosure. The Commonwealth jurisdiction requires 'no win no fee' payment of costs arrangements to be disclosed (WR Act s.170CIA), while other jurisdictions do not.[9]

As a result of the Senate Committee's work, there is now evidence suggesting that the processes for making and considering a termination of employment application under the federal termination provisions are more stringent in comparison to State termination of employment provisions. But how does the collective body of Australia's termination provisions weigh up internationally?

This question has been recently answered by the OECD in a report on the Australian labour market. It notes

> The OECD has assessed on several occasions how Australia's employment protection legislation (EPL) compares with that of other OECD countries. EPL is defined as covering a number of areas, including **dismissal procedures**, severance pay and notice requirements, **remedies for unfair dismissal** as well as restrictions pertaining to the use of temporary labour contracts. **Australia has consistently come out as one of the countries with the least EPL in the OECD area** (emphasis added). An initial ranking in the OECD *Jobs Study* placed Australia in the bottom quintile in terms of EPL strictness
>
> Australia was ranked particularly low on procedural requirements in case of individual dismissal, and on the criteria given for unfair dismissal … There are also relatively low legal requirements for notice periods and no requirements for tenure-related severance pay in case of individual dismissal.[10]

The data for this comparison was presented initially in the 1994 OECD's *Jobs Study*. It reported that the 'easy to dismiss' countries (of 21) assessed by the OECD were, in order: the United States of America, New Zealand, Canada and Australia. The most difficult to dismiss countries were Portugal, Spain and Italy.[11] Updating the information in 1999 the OECD (2001) again showed

> (Australia) still in the bottom quintile. The only countries with less strict EPL were the United States, United Kingdom, Canada and Ireland.[12]

Overall, the foregoing analyses suggests the federal dismissal laws to be more onerous on termination applications than are the State dismissal laws. This is done by setting the framework of rules governing the federal termination system to discourage, and in certain circumstances, dismiss termination applications. However, the collective body of federal and State dismissal law relegates Australia as a weak employment protection country, evident from the OECD studies of comparative termination (employment protection) provisions. The OECD review which provided the update and comparison of Australia's termination laws was welcomed by the Government. (media release[13])

Pros and cons of the Bill

The following points **in favour of the small business exemption** were put in Bills Digest No.79 2001–2002. Some of these are

- small business is more adversely affected by unfair dismissal laws and claims than are larger firms with greater resources
- the present law 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 (seeking to achieve a similar effect, note the *Workplace Relations Amendment (Unfair Dismissal - Lower Costs, Simpler Procedures) Bill 2002* proposed by the Leader of the Opposition, the Hon. Simon Crean MP)
- 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.

Key reasons for opposing the Bill were given as

- 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* go some way to addressing small business concerns, and
- existing federal unfair dismissal laws confer rights on individual employees, and less directly on registered industrial organisations.

The Bill as a potential Double Dissolution trigger

The Senate passed the predecessor Workplace Relations Amendment (Fair Dismissal) Bill 2002 on 27 June 2002 but with a number of non-government amendments. The House of Representatives considered and rejected these amendments on 28 June, and set the Bill aside. For there to be a double dissolution of both Houses of the Parliament, an interval of 3 months is required between the rejection of the proposed law by the Senate, and the House of Representatives passing the proposed law a second time. A second failure by the Senate to pass the Bill has the potential to trigger a simultaneous dissolution of both Houses under section 57 of the Australian Constitution.[14]

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 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.

(Note that the Australian Bureau of Statistics publication *Small Business in Australia*[15] defines a small business as one which employs less than 20 employees. The definition in the Bill differs by excluding casual employees in a business who have less than 12 months service from the 'less than 20 people' quota. The exclusion of casuals effectively 'raises the bar' so that the scope of the exemption is likely to extend to a number of businesses which the ABS would define as medium-sized businesses).

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 only applies to employment relations that began after the present Bill comes into operation.

Endnotes

1 The Hon. Tony Abbott MP, Fair dismissal bill introduced, 18 September 2002.

2 Kayoko Tsumori, *Issue Analysis* No.26 of the Centre for Independent Studies, 20 August 2002.

3 [2001] FCA 1589 (16 November 2001) http://www.austlii.edu.au/au/cases/cth/federal_ct/2001/1589.html.

4 The Hon. Tony Abbott MP, Labor moves to change unfair dismissal defeated, 20 August 2002.

5 This issue on the trade-off between legal rights and the public policy objective of higher employment is also canvassed in Marilyn Pittard's 'Unfair dismissal laws: the problem of application to small business' in *Australian Journal of Labour Law*, v.15(2), September 2002.

6 The Hon. Tony Abbott MP, *Labour Force - August 2002 One Million More Jobs since March* 1996, 12 September 2002. While the September 2002 job figures left the seasonally adjusted unemployment rate at 6.2%, there was a fall in part-time jobs somewhat offset by a lesser rise in full-time jobs. The consensus appears to be that the Australian labour market is currently very strong, see 'Jobs market finally turning the corner', *The Australian Financial Review* 11 October 2002.

7 Senator Andrew Murray's 'Democrats Minority Report' in the Senate Employment, Workplace Relations and Education Legislation Committee's, Report on the provisions of bills to amend the Workplace Relations Act 1996, 15 May 2002, p. 59.

8 ibid., the main report by Senator John Tierney at p.17.

9 ibid., p.71, and by Senator Murray in the Senate's Second Reading Debate on the Workplace Relations Amendment (Fair Dismissal) Bill 2002, 16 May 2002.

10 *Innovations in Labour Market Policies, the Australian way*, OECD, 2001, p. 238.

11 OECD, *The OECD Jobs Study, evidence and explanations*, Part 2, 1994, p. 74.

12 *Innovations in Labour Market Policies, the Australian way*, OECD, 2001, p. 238.

13 The Hon. Tony Abbott MP, *OECD report supports Government workplace reforms*, 9 August 2001.

14 Victoria v. the Commonwealth and Connor ; New South Wales v. the Commonwealth ; Queensland v. the Commonwealth ; Western Australia v. the Commonwealth (1975) 134 CLR 81.

15 Australian Bureau of Statistics *Small Business in Australia 1999* Cat. No.1321. Note that the special treatment of manufacturing businesses has ceased and the ABS now defines manufacturing businesses with more than 20 employees as medium sized businesses. This redefinition 'has led to some minor changes in the business size classifications used and a minor change to the employment size cut-off for small business in the manufacturing industry. This cut-off change has moved about 5,300 manufacturing firms from the small business category to the medium business category', p. 7.