



INFORMATION, ANALYSIS
AND ADVICE FOR THE PARLIAMENT

INFORMATION AND RESEARCH SERVICES

Bills Digest
No. 91 2002–03

Workplace Relations Amendment (Termination of Employment) Bill 2002

ISSN 1328-8091

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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Workplace Relations Amendment (Termination of
Employment) Bill 2002

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Economics, Commerce and Industrial Relations Group
10 February 2003

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Workplace Relations Amendment (Termination of Employment) Bill 2002

Date Introduced: 13 November 2002

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: Most items in Schedules 1, 2 and 3 of the Act commence on proclamation. If any Schedule has not commenced within 6 months of Royal Assent the schedule commences on the first day after 6 month's of the Act receiving Royal Assent.

Purpose

According to the Hon Tony Abbott MP, Minister for Employment and Workplace Relations in his [Second Reading Speech](#) to this Bill, its purpose is to extend federal unfair dismissal coverage from about 4 million to 7 million Australian workers, thereby excluding the State jurisdictions from hearing most unfair dismissal cases and providing a single dismissal jurisdiction for companies.¹ The Bill also introduces separate criteria and compensation for the Australian Industrial Relations Commission to apply when arbitrating a termination application from a small business employee, as well as extending the qualifying period of employment for small business employees (to 6 months before an application for a remedy can be made).

The Bill attempts to prevent an unfair dismissal application arising where the termination was made due to 'operational reasons', ie in redundancy situations. The Bill also attempts to limit compensation payable by all businesses by having the Commission consider: any contributory conduct of the employee; whether the employee has benefited from a redundancy payment and what earnings a employee to be reinstated has earned in other employment.

Background

The Bill intends to broaden the jurisdiction of the *Workplace Relations Act's* (WR Act) termination of employment provisions so as to provide the sole avenue of redress for unfair dismissal applications for employees of companies (mainly trading, financial or

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foreign corporations and some other businesses in the private sector), as well as Commonwealth employees.

Under the dual nature of federal and State industrial legislation, State award employees (about 4.2 million of 8.13 million²) have sought redress for dismissals perceived to be unfair via their State laws. However, this Bill proposes for federal unfair dismissal provisions to 'cover the field' (to the limit of constitutional authority) and will reverse current WR Act provisions which have hitherto protected the role of State termination jurisdictions. Commonwealth law overrides inconsistent State law to the extent of the inconsistency under [section 109](#) of the Australian Constitution. While the WR Act has attempted to preserve a role for the State industrial systems, these provisions will be amended to facilitate the intent of this Bill. State dismissal systems will be left to deal with employees of non-incorporated businesses and other employee groups such as State public servants.

The Bill is not premised on any new constitutional powers, but merely removes the restraints which limit the scope of the federal dismissal provisions of the currently utilised constitutional powers. The *Australian Labour Law Reporter* notes

The unfair dismissal provisions of the Act rely on a range of constitutional powers. This contrasts to the position under the former *Industrial Relations Act 1988* where the provisions relied fully on the external affairs power, (sec 51(29)). The current unfair dismissal provisions rely on the corporations power (sec 51(20)), the trade and commerce power (sec 51(1)), the Commonwealth's power to legislate in respect of its own employees (sec 52(2)), the territories power (sec 122), as well as the external affairs power.³

Of these, the corporations power of the Constitution ([section 51\(20\)](#)) has relevance to most of the private sector businesses already under the federal termination system (ie incorporated entities bound by federal awards). But reference to 'federal award employees' in the current WR Act at [paragraph 170CB\(1\)\(c\)](#) will be substituted with 'employee' thus extending coverage of the provision to a majority of employees in the workplace (the majority being employed by trading, financial or foreign corporations). Other constitutional underpinnings of the termination provisions are discussed below.

Previous attempts to establish unitary industrial relations

Proposals to broaden the scope of the WR Act by using the corporations power and so bring more of the workforce under the federal workplace jurisdiction were canvassed by Peter Reith in his 1999 address to the National Press Club, as the then Minister for Employment Workplace Relations and Small Business.⁴ These ideas had been communicated earlier by Mr Reith in a letter to the Prime Minister, Mr Howard, following the 1998 federal election.⁵

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The Hancock Report 1985

The difficult Federal-State issues involved in establishing a national industrial relations framework were raised previously in the Hawke Government's inquiry into Australia's industrial relations system (the Hancock report).⁶ The Hancock report was dismissive of the idea of the Commonwealth resorting to 'exotic' constitutional powers to expand the federal system. Yet, as is evident, in the period since 1985, the variety of constitutional powers have come to underpin key provisions, including the termination provisions of the [WR Act](#) (and its predecessor).

The Reith proposals 1999

It is fair to say that expansion of the federal termination of employment system per se was not a priority in Mr Reith's proposals in 1999. Rather, his aim was to seek an employment framework which could neutralise the complexity of the federal award system based on the creation and resolution of paper industrial disputes. Instead, and by relying on the corporations power, he proposed a simpler, near universal safety-net award and agreement system, although the matters, for example penalty rates, which might be included in the safety net were not specified

The problems for business and employees thrown up by the existing federal-State employment arrangements can be seen in his critique

... use of the (conciliation and arbitration) power in section 51(35) of the Constitution requires the system to be based on industrial disputes and then their (supposed) remedy by conciliation and arbitration by third party tribunals ... This framework is further complicated by the constitutional requirement that the dispute be an "interstate" dispute, not an intrastate dispute, leading to dual coverage of federal and state systems in the same workplace, dual registration of unions and employer bodies and differing application of residency rules between federal and state awards, to name but a few.⁷

Perhaps ironically, similar observations of the award system formed part of the basis for unions seeking direct enterprise bargaining relations with employers, evident in comments made by former Secretary of the ACTU, Mr Kelty some years earlier

We have an award system now which has been developed over the best part of this century. It has been too complex and it has been inconsistent and that is why we supported award restructuring as a fundamental first step in this process.⁸

So, by the early 1990s there was some consensus amongst unions, employers and government for significant reform to the federal award system, by essentially moving away from it to enterprise agreements where awards acted as a safety net, ie played a lesser role in this new system. Legislative reforms to awards and bargaining were introduced by both ALP and Coalition governments over the 1990s.

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However for Mr Reith, the federal award system, despite undergoing award simplification since 1997, was still too complex. The solution envisaged 'roping-in' both award-free and award-based employment arrangements into a simpler, yet more extensive award system, as he reported

... a system based on the corporations power would permit simpler requirements for award making ... Federal awards could also provide a more secure safety net of conditions to be specified across the workforce (where employed by corporations) and into award-free areas, rather than simply be orders made within the ambit of prescribed disputes.⁹

In other words this proposed new award system would be more extensive as it would extend to corporations not currently bound under any award, although the matters which these awards may address was not spelt out. Mr Reith subsequently released three discussion papers in 2000 exploring his proposal under the title [Breaking the Gridlock](#). Nevertheless, despite this perceived urgency for reform to the federal award system, its scope and role has declined over the 1990s. Most industrial advocates and practitioners would now have a distant memory of the system which Mr Reith criticised. It was pre-eminent up and until the end of the 1980s, but as Professor Ron McCallum argues

... the neo-liberal labour law alterations of the last decade have been of such a magnitude that current Australian labour law bears little resemblance to the pre-1990 laws mandating compulsory conciliation and arbitration for the settlement of labour disputes.¹⁰

Corporations law and corporations power

In any case, by late 2000 the Reith proposal of extending federal industrial jurisdiction at the expense of the States had run into flack from some newspapers over the issue of corporate law reform and the legal arrangements which the Commonwealth, States and Territories had entered into. A national corporate law system was established over the 1990s, which in one part of the cooperative arrangement permitted courts to 'cross-vest' each other with the jurisdiction to hear certain matters. The High Court struck down cross-vesting arrangements in *Re Wakim*.¹¹ In the debates between the levels of governments to resolve the cross-vesting issue, undertakings were sought from the Commonwealth that it would not use its powers over corporations to override State industrial relations legislation.

The consensus from business and the business sections of the media was that corporate law needed the consensus for its restoration, and to expedite the restoration, State industrial systems should not be subject to Commonwealth attack.¹² In defence of his proposal, Mr Reith wrote to the *Australian Financial Review*, claiming that where once the newspaper had opined that a more unitary industrial scheme 'deserved serious consideration', now it was advising that he 'back off', because it could upset the States on a solution to the then troubled national corporate law reform system.¹³ Nevertheless the

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States perceived that the Commonwealth intended to expand its employment jurisdiction, potentially at their expense. The proposal thus faded.

The current proposal limited to unfair dismissal

The present Minister for Employment and Workplace Relations, the Hon Tony Abbott, revised the corporations power strategy in an address to the Australian Food and Grocery Council in May 2002.¹⁴ The proposal of a more uniform termination regime responded to criticisms made in the Senate Employment Committee's report on the Bill to exempt small business from the unfair dismissal laws, also published in May.¹⁵ The [Explanatory Memorandum](#) to this Bill notes that the Committee received evidence about the limited coverage of the federal termination system due to the presence of State awards and laws

... the value of survey information on the operation of the (federal) laws and the efficacy of any Government efforts to fine tune them were questioned on the grounds of their limited and uneven coverage.¹⁶

It would be fair to say that in light of evidence of the limited and uneven coverage of the current Commonwealth termination laws, the Senate Committee still did not propose to expand the Commonwealth's termination jurisdiction. Nevertheless Mr Abbott proposed to expand the termination jurisdiction to cover small business dismissals, arguing

... only businesses which are covered by federal awards and agreements are subject to federal unfair dismissal laws. Without extending federal coverage, improvements to federal unfair dismissal laws would only benefit about 30 per cent of small businesses. If new federal laws were expressed to "cover the field" using the corporations power, at least 60 per cent of small businesses (as well as almost every large business) could benefit.¹⁷

As the intention of this Bill is for the federal termination laws to 'cover the field', it is thus useful to assess how federal and State termination provisions have coexisted to date.

The relationship between State and federal termination provisions

Award clauses: termination change and redundancy

In 1984, the then Conciliation and Arbitration Commission (the Commission) granted a union application for federal awards to contain clauses addressing termination, change and redundancy (TCR) following similar developments in State jurisdictions. The two TCR decisions became a test case standard and federal awards were soon varied to include TCR provisions. The termination component of the test case clause addressed the individual's separation from employment, but weaknesses over what the Commission could do, or order, to settle a contest to an unfair dismissal became apparent. The clauses essentially set out a code for the prevention of unjust dismissals, but prescribed no enforceable remedy or options for resolution, for example, by way of enforcing a reinstatement of the dismissed employee. These limitations related to the Commission's jurisdiction in resolving interstate industrial disputes (rather than an individual grievance).

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In 1988, the Federal Court held that it could award damages to employees dismissed in breach of federal award clauses prohibiting harsh, unjust or unreasonable termination, as, it was held, these terms became part of the employee's contract of employment.¹⁸ Consequently, the way was opened for sacked employees to sue for damages for breach of contract. Essentially, a line of termination cases posited that damages available were for future loss of earnings of the employee up to his/her retirement. *The Australian Financial Review* reported that

Sacked workers used this legal avenue to obtain damages payouts significantly higher than the compensation available under unfair dismissal legislation, with the highest damages award amounting to \$295,000 plus interest for a factory worker dismissed by Bostik Australia Pty Ltd.¹⁹

This avenue of redress was closed off in a case involving the dismissal of workers by Australian Airlines, first by a Federal Court decision in February 1994 and ultimately by the High Court in October 1995.²⁰ Its effect was to redirect termination applications through the statutory systems, where compensation payments were generally capped. On the other hand non-award executives have used the State industrial jurisdictions to claim breach of their employment contract, or to claim that the contract was unfair, and some have been awarded compensation in \$millions.²¹ New South Wales has amended its unfair contract provisions in light of these determinations, not to cap payments as with the 'blue collar' termination jurisdiction but to exclude very high salaried executives from seeking redress. It could be argued that the area of executive separation is largely unregulated.²²

Industrial Relations Reform Act 1993

The *Industrial Relations Reform Act 1993* amended the *Industrial Relations Act 1988* (the IR Act) to include, amongst other things, a remedy for a wide range of employees against termination of employment which was harsh, unjust or unreasonable, effective from 30 March 1994. It extended certain 'minimum entitlements' to all workers, not just federal award employees.

The termination of employment provisions under Part V1A Division 3 of the IR Act relied on the external affairs power of the Constitution (section 51(39)), rather than the conciliation and arbitration power (section 51(35)). Matters relating to termination of employment pertain to Australia's external affairs given Australia's ratification of International Labour Organisation Convention No. 158 on Termination of Employment in February 1993. This Convention also underpins part of the WR Act's termination provisions, but not that part dealing with 'unfair' dismissals (dismissal which may be 'harsh, unjust or unreasonable' and usually associated with some form of misconduct).

The earlier provisions introduced the requirement that an employer have a **valid reason** for terminating an employee which was:

- connected with the employee's capacity or conduct, or,

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- based on the operational requirements of the undertaking, establishment or service.

The federal termination provisions were soon amended under the *Industrial Relations Amendment Act (No.2) 1994*. That Act:

- restricted access to the termination provisions and set upper limits on the level of compensation to be awarded
- limited access to the Industrial Relations Court's unfair dismissal jurisdiction to employees employed under either federal or State awards and to those with an annual income of (what was then) less than \$60 000
- capped the amount of compensation payable to employees dismissed in contravention of the termination provisions to six months' salary as compensation in the case of employees covered by awards and not more than \$30 000 or six months' remuneration (whichever the lower) for non award employees as compensation for unfair dismissal
- limited the onus of proof imposed on employers to charges of dismissal made on 'prohibited' grounds. Otherwise, the onus of proof rested with the employee (ie to prove that the dismissal was unfair).²³

Adequate alternative remedies

Certain provisions of the 1994 federal termination law allowed the continued operation of State unfair dismissal regimes, to the extent that such regimes provide 'adequate' remedies for applicants.

Section 170HB of the IR Act provided that the provisions were not intended to limit any right that a person or trade union might otherwise have to secure awards or orders relating to the termination of employment.

However section 170EB of the IR Act provided that the Industrial Relations Court of Australia (IRCA) could refuse a termination application if there was available to the employee an adequate alternative remedy under existing State industrial machinery

The Court must decline to consider or determine an application under section 170EA if satisfied that there is available to the employee by or on whose behalf the application was made an adequate alternative remedy, in respect of the termination, under existing machinery that satisfies the requirements of the Termination of Employment Convention.

This arrangement notwithstanding, the standard for the basis of assessing the alternative remedy was set against ILO Convention 158 and in the event of challenge, few jurisdictions withstood a comparison. The Industrial Relations Court held that the review provisions contained in the (then) Commonwealth *Public Service Act 1922* did not amount to an adequate alternative remedy.²⁴ Similarly the Industrial Relations Court found that the NSW termination jurisdiction did not provide an adequate alternative remedy in *Liddell's*

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case, where the majority of the Court determined that an alternative remedy must be assessed against the Convention, and the federal Act, where there was a difference between the two.²⁵

Consequently a further amendment to the IR Act's termination laws was designed to clarify the operation of the adequate alternative remedy provision. The *Industrial Relations and Other Legislation Amendment Act 1995* (operative from January 1996) addressed the above issues by providing that:

- the termination of employment provisions of the IR Act would not apply where there is an alternative available under another law that satisfies the requirements of the Convention that are relevant to wrongful dismissal, and
- the Court would be required to consider all the circumstances of the case in deciding what remedy (if any) should be given.

Adequate alternative remedy under the Workplace Relations Act

The current termination of employment provisions under Part VIA Division 3 of the WR Act were initially introduced under Schedule 7 of the Workplace Relations and Other Legislation Amendment Bill 1996 (WROLA). WROLA also amended and re-named the *Industrial Relations Act* as the *Workplace Relations Act*. Its various schedules were enacted from December 1996 to May 1997.

The significant changes made to unfair dismissal laws by WROLA included:

- separate streams for handling unfair and unlawful dismissals were created
- a compulsory conciliation process was coupled with the Commission issuing a certificate where conciliation failed (to proceed to arbitration)
- the jurisdiction of the Industrial Relations Court of Australia was removed to the Federal Court, and the Federal Court would arbitrate over unlawful dismissals
- the jurisdiction of the Commission to hear unfair dismissal claims was reduced such that applicants needed to be covered by federal awards and employed by 'constitutional corporations' (or be employed under another suitable constitutional basis)
- the definition of 'fairness' was changed so that account must be taken of the ongoing interests of all the parties – 'a fair go all round'. Procedural fairness was reduced to one factor in determining whether a dismissal is unfair
- the power of the Commission to award costs against employees was dramatically increased
- a standard \$50.00 filing fee was introduced

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- the new unfair dismissal provisions were not required to give effect to ILO Convention 158 and also the provisions were set so as not to 'cover the field', and
- federal award employees excluded from the federal dismissal provisions could seek redress through a State tribunal.²⁶

However, before the WROLA Bill was enacted, the High Court held that the prohibition in the IR Act 1988 on 'harsh, unjust, or unreasonable' (ie 'unfair') dismissals set out in subsection 170DE(2) of the IR Act was invalid.²⁷ There was some urgency to redraft the federal unfair dismissal provisions, albeit based on a restricted basis, and in turn the State termination jurisdictions were recognised by the Commonwealth's intention not to 'cover the field'.

Thus subsection 152(1A) (now repealed) of the WR Act provided

If a State law or a State award makes provision in respect of the termination of an employee's employment, any provision in a federal award that also makes provision in respect of the termination of employment of the employee is not to be taken to show an intention to cover the field to the exclusion of that State law or State award.

This provision was repealed under the *Workplace Relations Amendment (Termination of Employment) Act 2001* as it was perceived that the provision was no longer needed since federal award TCR clauses can no longer contain extensive provisions on termination, and thus no longer cover the field. Federal award provisions have been required to comply with the transitional provisions of the WROLA Act, meaning award clauses must be simplified, and address only allowable matters prescribed under [section 89A](#) of the WR Act. In respect of termination, award clauses may only address notice of termination.

Also, section 170HB of the IR Act which provided that the termination of provisions were not intended to limit any rights which a person or trade union may have to appeal against a termination of employment was imported into the WR Act (now [section 170HA](#)). However, additional provisions under section 170HB now attempt to prevent parallel applications in other jurisdictions (and are proposed to be bolstered under this Bill).

[Subsection 5\(8\)](#) of the WR Act in effect allows the Commission to hear termination of employment applications from federal award employees excluded from the federal termination system on jurisdictional grounds, provided that the relevant State in which the employee worked has passed complementary legislation (if and where necessary). In the alternative, the State tribunal may hear unfair dismissal applications of 'excluded' federal award employees. The following extract from the *Australian Labour Law Reporter* (ALLR) highlights the important role of complementary State legislation to prevent federal award employees from falling between the gaps of State and federal jurisdictions.

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Federal award employees who are excluded from the federal jurisdiction are intended to access State laws in relation to harsh, unjust or unreasonable termination of employment.²⁸

The ALLR reports that NSW amended its industrial laws twice to facilitate termination of employment remedies for federal award employees, the second time following the High Court's decision in *Re Wakim* which struck down State attempts to 'confer' powers on the Commonwealth.²⁹ Indeed, certain 'cross-vesting' provisions of the WR Act concerning termination have been repealed in subsequent legislation as a result of *Re Wakim*.³⁰ The ALLR also advises that the relevant States have now in place arrangements enabling their tribunals to hear dismissal applications from federal award employees excluded from the federal laws on jurisdictional grounds.

In any case, the transition to the WR Act has closed off the option of an employee seeking a federal termination remedy if a State remedy did not provide an adequate alternative.

Basis of policy commitment

Is the intention for the Commonwealth to 'cover the field' in relation to termination of employment, government policy? When Mr Reith put the proposal for greater Commonwealth role in workplace relations he was careful to note at the time that the intention was not policy

Today, I want to devote most of my time with you to fleshing out one of those ideas that, interestingly, has not yet received a great deal of attention. It was set out on page 9 of the letter under the heading 'additional labour market reform options'. It is not government policy, but it is an idea worthy of considered debate. It is the proposal to make greater use of the corporations power in the Australian Constitution for the regulation of workplace relations and workplace agreements, rather than the current conciliation and arbitration power.

Key elements of the Coalition's [2001 workplace relations policy](#) addressed unfair dismissal.

The Coalition will:

- Ensure that dismissal laws do not unreasonably burden employers when making decisions to employ or dismiss staff
- Exempt small businesses from unfair dismissal laws when employing new employees so that 50,000 new jobs can be created in small business
- Retain the new requirement that during the first three months of employment an employer is not exposed to an unfair dismissal claim by new employees

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- Ensure recent changes to dismissal laws work as intended to focus more on the real reasons for dismissal and less on the paper-work and processes, especially in claims against smaller businesses
- Enforce the new obligations on lawyers and advisers not to encourage the making of baseless unfair dismissal claims
- Index annually the \$50 filing fee for the lodgement of unfair dismissal claims
- Make the lodgement fee a permanent requirement in federal laws (with dispensation allowed in cases of genuine hardship), and
- Close down scope for state unfair dismissal laws to be used as an avoidance mechanism by employees who are ineligible under federal laws to make claims against their employer.³¹

This last dot point would seem to have some relevance to the Bill. Its aim is to prevent an excluded federal employee from seeking a remedy in a State jurisdiction. For example, a dismissed casual employee on a regular roster with nine months service and an expectation of ongoing employment would be excluded from seeking a dismissal remedy in the federal jurisdiction, however some States would not exclude the same employee from seeking a remedy if the person was employed under the State jurisdiction. The policy is to prevent that excluded employee seeking a remedy in a State jurisdiction. Nonetheless, Coalition workplace relations policy appears not to have set out to expand the Commonwealth's termination jurisdiction at the expense of the States.

Position of significant interest groups/press commentary

At this stage it is difficult to make observations of interested parties about the Bill. The employers, represented by the Australian Chamber of Commerce and Industry do support the intent of the Bill and as noted recently released a discussion paper about future industrial relations reform which, inter alia, supports more uniformity of the federal and State systems.³² As the Bill has been referred to the Senate Employment, Workplace Relations and Education Legislation Committee for report by 18 March 2003, it would be useful to await the outcome of this report to gauge the positions of various parties.

Pros and cons of this Bill

Pros

- The Bill offers clear advantages to incorporated businesses, including those which have small to medium-sized workforces. In its employment relations blueprint, *Modern Workplace, Modern Future* for the Australian workplace relations system the Australian Chamber of Commerce and Industry seeks harmonisation of the current federal and State employment jurisdictions so that the regulatory content is

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minimised.³³ The Bill would allow most companies to deal with terminations in one jurisdiction.

- The Bill offers advantages for non-award employees. The Bill is likely to provide an unfair dismissal redress for employees of incorporated businesses for which neither federal nor State awards are binding. The former employees of the communications firm, One.Tel were employed under non-award circumstances, ie employment contracts.³⁴ The Bill would provide a termination jurisdiction to this growing sector of the workforce.
- To some extent the Bill may end debate on unfair dismissals. It will allow incorporated businesses to operate under one termination jurisdiction, and under this, a parallel, less expensive regime for small business is established. So, a number of government objectives are satisfied. Note that New South Wales has legislation to amend its unfair dismissal laws by limiting contingency fee applications, acknowledging the concerns of small business. On the other hand, NSW refuses to grant a small business exemption nor prevent dual applications (eg to an anti-discrimination tribunal).³⁵
- Rather than fighting the loss of their jurisdiction, the States may anticipate the benefits and welcome the part removal of a cost to the State, much in the way the Kennett Government 'contracted out' its State industrial system to the Commonwealth Government in 1996.

Cons

- The Bill may be seen as the 'thin end of the wedge'. The Federal Government may choose to override the States on other aspects of their jurisdiction. As awards including State awards tend to be seen as sacrosanct, the Commonwealth may choose to target other, more expansive State provisions. For example, overriding State-based statutory right of entry provisions which the Commonwealth perceives as burdensome on employers, so that the federal right of entry scheme expands to cover the corporate sector.
- Small business employees employed in incorporated small businesses may feel that the Bill makes them scapegoats, particularly those currently covered under the more beneficial State dismissal regimes. They have not sought to be covered in the federal system. For this group the transfer may come at a significant loss of process and future compensation in the event of a contested unfair dismissal.
- There is no guarantee that this Bill will finish debate on termination of employment. The federal scheme doesn't purport to provide a national scheme in which all employees have access, ie by looking to other constitutional powers to fill the gaps, as suggested by Professor Andrew Stewart.³⁶ State termination jurisdictions will need to remain to provide for employees of non-incorporated business and the States appear to have a role potentially for 1.5 million or so employees including State public servants.

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Medium and large businesses may query as to why a special dismissal regime has been set for small businesses of less than 20 employees – why couldn't it apply to businesses with, say, less than 50 employees?

Any consequences of failure to pass (e.g. potential double dissolution trigger)

The Government has made eight legislative attempts to exempt small business from the federal dismissal laws, most recently in the form of Workplace Relations Amendment (Fair Dismissal) Bill [No.2]. It is not clear whether the 'Fair Dismissal' Bill is to be set aside, contingent upon the current Bill being passed. In any case they are fundamentally in tension with each other, as one seeks to remove small business from the scope of the termination provisions, while the current Bill specifically includes small business, indeed creates a separate jurisdiction for small business. Nevertheless any failure by the Senate to pass this Bill may prompt the Government to seek a double dissolution over the 'Fair Dismissal' Bill.³⁷

Significant technical flaws

The general query one has with this Bill, is to what extent does it support or create a national, uniform scheme? Professor Stewart has suggested that industrial relations uniformity is best achieved through a referral of powers by the States.³⁸ Not surprisingly, the States, particularly NSW, have canvassed the possibility of the provisions being challenged in the High Court should this Bill become law.³⁹ The West Australian Employment Protection Minister, Mr Kobelke has stated that 'the WA government is opposed to the [use of] corporations law for industrial relations purposes'.⁴⁰

Importantly, without the States supporting the scheme, the Bill can only extend the scope of federal termination coverage to a higher proportion of the national workforce, but falling short of creating a national uniform termination jurisdiction. It could be argued that that the Bill will introduce another tier into the termination system.

These criticisms aside, the recent authorities (*Re Dingjan*⁴¹ and *Victoria v the Commonwealth*⁴²) on using the corporations power to base employment relations of trading corporations have generally indicated that the basis is sound. Professor Stewart's paper reviewing these cases on the corporations power and employment is most useful.⁴³

Main Provisions

Schedule 1 – Covering the field of harsh, unjust or unreasonable termination

Item 1 inserts new subsection 5(9) to ensure that subsections 5(6) and 5(8) which are cross vesting provisions in respect termination of employment (and in respect of the coal industry), will operate subject to section 170HA (see item 7 below). (Subsection 5(7) had previously been repealed).

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Item 2 inserts new subsection 152(6) stipulating that the federal termination of employment laws are intended to apply to the exclusion of those State laws, awards and agreements which provide rights or remedies for unfair dismissal expressed as 'harsh, unjust or unreasonable termination'.

Item 3 substitutes 'federal award employee' in paragraph 170CB(1)(c) with 'employee'.

Item 4 amends a provision (subsection 170CBA(4)) to be inserted into the WR Act by the Workplace Relations Amendment (Fair Termination) Bill 2002. The proposed provision addresses employees who may be excluded from accessing a remedy on the grounds they are not employed under award or agreement conditions and whose remuneration is above a certain level (\$81 500 pa). The proposed provision extends the exclusion to employees employed under State awards and agreements.

Item 7 repeals and replaces section 170HA so that the intention of Parliament for the federal termination provisions to exclude State/Territory termination provisions is made explicit. Regulations may be made to exempt particular State laws, awards and agreements which contain dismissal provisions.

Item 8 repeals and replaces section 170HB to ensure that a person is not entitled to make an application for a dismissal remedy if an application for a termination of employment has been commenced elsewhere, eg under another provision or another Commonwealth Act.

Item 9 repeals and replaces section 170HC to ensure that a person is not entitled to make an application for an unlawful termination remedy if an application for a termination of employment has commenced elsewhere. The WR Act prohibits termination of employment made on the grounds of the employee's race, religion age and other reasons, and separate remedies to the unfair dismissal remedies are provided.

Schedule 2 – Termination applications affecting small business

Items 1 and 2 insert definitions under subsection 170CD(1). The *relevant time* is the earlier of the time when the employer gave notice of termination and the time when employment was terminated. A *small business employer* is defined as an employer of less than 20 people, including the employee who was terminated and any long term casuals (with 12 months service or more), but not short term casuals.

Item 3 repeals and replaces paragraph 170CE(5B)(a) providing for 3 months qualifying employment (needed for a terminated employee to seek relief), unless at the relevant time the employer was a small business employer, in which case 6 months of qualifying employment is stipulated.

Item 4 inserts new section 170CEC and allows the Commission to dismiss an application for an unfair dismissal remedy on the grounds that the Commission believes the application is beyond its jurisdiction or that it believes the application frivolous, vexatious

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or lacking in substance. **New Subsection 170CEC(4)** states that the Commission is not required to hold a hearing when making an order. **New Subsection 170CEC(5)** requires the Commission to write to the employee and employer inviting further information before dismissing the application.

Item 5 inserts new subsection 170CG(3A) which provides the criteria for the Commission to consider when arbitrating an unfair dismissal. These are essentially those applying generally under existing subsection 170CG(3), with the exception of previous warnings over unsatisfactory performance. This criterion is removed in respect of small business.

Items 8 to 13 insert provisions into section 170CH which limit the maximum compensation awarded to a small business employee to 3 months previous salary, or in the case of non-award employees to half the current compensation limit (meaning limited to \$20 400).

Schedule 3 – Other amendments relating to termination of employment

Item 8 adds new subsection 170CG(4) which provides that a dismissal of an employee or group of employees on the grounds of the employer's operational requirements is not to be considered unfair, unless the circumstances of the dismissal are exceptional. Note that the use of performance appraisal systems as a selection device for making employees redundant has come to the attention of the Commission, notably concerning the coal industry, by unions alleging that the terminations were not made on operational grounds.⁴⁴

Item 9 inserts subsection 170CH(2A) which directs the Commission to consider the suitability of an order for reinstatement before making any order for compensation.

Item 11 inserts subsection 170CH(4A) which directs the Commission when making a reinstatement order, to take into consideration income earned or likely to be earned between the periods of the termination, the order for reinstatement and the actual reinstatement when assessing any compensation amounts.

Item 13 inserts subsection 170CH(7A) which directs the Commission to reduce the amount of compensation it would have otherwise determined, if it is satisfied that the employee's conduct contributed to the employer's decision to terminate the employee.

Concluding Comments

The Bill makes important changes to the WR Act's termination of employment provisions. It makes explicit the Government's intention for the federal termination provision to 'cover the field', that is, to the limit of the constitutional powers relied on in respect of providing rights and remedies for employees alleging unfair dismissal. It provides a separate remedy for small business employees, while not excluding these employees from seeking a

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remedy as well as extending the qualifying period of employment for small business employees needed to contest an unfair dismissal. It also reduces the procedural test which the Commission applies to assess whether a dismissed employee has been given due process (in respect of small business employees). It also attempts to prevent parallel applications for remedy under different Acts or provisions.

On the other hand, the Bill may provide scope for further regulation of the termination process. Mention has been made of separation payments for company executives. These sometimes extraordinary payments have caused public disquiet. It was noted above that NSW has sought to curb access to its unfair contracts jurisdiction which has provided the means of redress for executives. Expanding the role of the corporations power as proposed in this Bill, may provide the potential to address executive terminations and place them under a similar separation code as ordinary employees. A legislative termination scheme for executives might provide both a floor (for notice of termination) and a cap on executive separation payments. The Bill's reference to 'employed under award conditions' is important to limiting the application of the proposed provisions to salaried and wage workers, but is not as crucial as the reference once was, as the Bill's jurisdiction is not to be limited to federal award employees. However such a development is not contemplated in the current Bill. The Bill also has significant consequences for the State termination jurisdictions by reducing their workload, and overall represents a significant development for Commonwealth law. As noted, the Bill has been referred to the Senate Employment, Workplace Relations Legislation Committee for report by 18 March 2003.

Endnotes

- 1 The Hon Tony Abbott MP, Second Reading of the Workplace Relations Amendment (Termination of Employment) Bill 2002, *Hansard*, 13 November 2002, p. 8777.
- 2 The Bill's [Explanatory Memorandum](#) estimates that the federal dismissal legislation extends to about 3.9 million employees. Total employees number 8.138 million according to the ABS *Labour Force Survey* (Cat. No. 6203) as at December 2002. Those in employment measured over 9.4 million, with the difference between the two figures being made up of employers and own account workers.
- 3 CCH *Australian Labour Law Reporter* at [¶2-800]: 'Other Constitutional sources of Commonwealth labour power'.
- 4 The Hon Peter Reith MP, 'Getting the outsiders inside - Towards a rational workplace relations system in Australia', address to the National Press Club, 24 March 1999.
- 5 The Hon Peter Reith MP, 'Employment Initiatives Canvassed', 17 February 1999.
- 6 Report of the Committee of Review into Australia's Industrial Relations and Law Systems, Volume 2, in Chapter 6 (AGPS 1985).
- 7 The Hon Peter Reith MP, 'Getting the outsiders inside - Towards a rational workplace relations system in Australia', address to the National Press Club, 24 March 1999.

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- 8 Bill Kelty, Secretary of the ACTU, interview on ABC TV: *Lateline*, 8 June 1993.
- 9 The Hon Peter Reith MP, 'Getting the outsiders inside - Towards a rational workplace relations system in Australia', address to the national Press Club, 24 March 1999.
- 10 Ron McCallum, 'Trade union recognition and Australia's neo-liberal bargaining laws', *Industrial Relations*, v.57, no.2, 2002, p.227.
- 11 *Re Wakim; ex parte McNally* [1999] HCA 27.
- 12 'Corporations Law botch-up', *The Australian Financial Review*, 21 November 2000.
- 13 The Hon. Peter Reith, Letter to *The Australian Financial Review*, 'Industrial Laws a separate issue', 30 November 2000.
- 14 The Hon Tony Abbott MP, *A National Workplace*, Speech to the Australian Food and Grocery Council Canberra, 9 May 2002.
- 15 Senate Employment, Workplace Relations and Education Legislation Committee, [Report on the provisions of bills to amend the Workplace Relations Act 1996](#), (including the Workplace Relations Amendment (Fair Dismissal) Bill 2002), May 2002.
- 16 Workplace Relations Amendment (Termination of Employment) Bill 2002, *Explanatory Memorandum*, pp. 5-6.
- 17 The Hon Tony Abbott MP, *A National Workplace*, Speech to the Australian Food and Grocery Council Canberra, 9 May 2002.
- 18 *Gregory v Phillip Morris Ltd* (1988) 80 ALR 455.
- 19 'Landmark ruling on unfair dismissal', *The Australian Financial Review*, 12 October 1995.
- 20 *Byrne v Australian Airlines* (1995) 131 ALR 422.
- 21 For a list of successful litigants and their awards, see 'Jobless rich may lose de facto dismissal laws', *The Australian Financial Review*, 6 July 2001. On the other hand, executives may not necessarily receive notice of termination nor award standard redundancy pay on their termination.
- 22 *Industrial Relations Amendment (Unfair Contracts) Act 2002* (NSW). The provisions exclude executives on salary packages greater than \$200,000 from accessing the NSW unfair contracts provisions.
- 23 Refer [Bills Digest No.19, 1995-96](#).
- 24 *A. Maggs v Comptroller General of Customs* (1995) AILR at ¶13-093.
- 25 *Liddell & Anor v Lembke t/as Cheryl's Unisex Salon & Anor* (1994) 127 ALR 342.
- 26 [Bills Digest 116, 1996-97](#) provides a good summary of WROLA's changes to termination of employment.
- 27 *Victoria v The Commonwealth* (1996) 138 ALR 129.
- 28 *CCH Australian Labour Law Reporter* at ¶47-232.
- 29 *Re Wakim; ex parte McNally* [1999] HCA 27

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- 30 Jurisdiction of Courts Bill 2000, reviewed in [Bills Digest 149 1999-2000](#).
- 31 Liberal Party of Australia: *Choice and reward in a Changing Workplace* (October 2001).
- 32 Australian Chamber of Commerce and Industry, *Modern Workplace, Modern Future*, 4 December 2002.
- 33 Australian Chamber of Commerce and Industry, *Modern Workplace, Modern Future, A Blueprint for the Australian Workplace Relations System 2002-2010* pxi. ([Press Release](#))
- 34 However on 8 November 2002 the federal *Telecommunications Service Industry Award* came into effect roping in businesses such as Vodafone, Ozemail and TeleOne (and others). *Industrial Relations and Management Letter* v.19,n.11, December 2002, p.10.
- 35 See NSW [Unfair dismissal: a discussion paper](#), September 2002.
- 36 Andrew Stewart, 'Federal Labour Law and New Uses for the Corporations Power', *ACIRRT Working Paper Series*, Proceedings from the 8th Annual Labour Law Conference, 16 June 2000.
- 37 'Bills clutter up Senate in-tray', *The Australian*, 27 November 2002.
- 38 Andrew Stewart, 'Federal Labour Law and New Uses for the Corporations Power', *ACIRRT Working Paper Series*, Proceedings from the 8th Annual Labour Law Conference, 16 June 2000.
- 39 'Abbott's new bill could meet High Court challenge' *WorkplaceInfo* 11 November 2002.
- 40 'Democrats set to back termination Bill', *Workforce* Issue 1377, November 2002.
- 41 *Re Dingjan; Ex parte Wagner & Anor* (1995) 183 CLR 323.
- 42 *Victoria v The Commonwealth* (1996) 138 ALR 12.
- 43 Andrew Stewart, 'Federal Labour Law and New Uses for the Corporations Power', *ACIRRT Working Paper Series*, Proceedings from the 8th Annual Labour Law Conference, 16 June 2000.
- 44 'Sacking the Australian way', *The Australian Financial Review*, 4 May 2002.

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