CHAPTER 9

THE IMPACT ON JOB SECURITY, UNFAIR DISMISSALS, JOB PROSPECTS, THE PROTECTION OF EMPLOYEE ENTITLEMENTS AND CONDITIONS AND WHETHER THESE CAN BE IMPROVED

Job Prospects and Job Security

9.1 The nature of employment in Australia has been transformed over the past 20 years, and especially over the past three years. The most significant element in this transformation has been the decline of what could be called traditional lifelong and standard-time employment and its displacement by less secure forms of employment such as casual, part-time, fixed term and other forms of contingent work.

9.2 Evidence to the Committee demonstrates that the pace of this change has picked up considerably over the past ten years. More insecure or precarious forms of employment have grown almost ten times the rate of growth in standard employment. From August 1989 to August 1999, the number of casual employees in Australia rose by 69 per cent and the number of other employees by 7per cent.[1] Between 1996 and 1998 alone, the number of full-time casual employees rose 10.5per cent and part-time casual employees by 3.6 per cent.[2] One in four Australians is now in casual employment.[3]

9.3 The extraordinary rate of growth of casualisation in Australia can be linked to various developments such as globalisation of the economy, corporate restructuring and development of new technology and new forms of work organisation. It can be linked also to labour market deregulation, which was the basic area of concern to the Committee. Evidence to the Committee demonstrates that, under present and prospective labour market deregulation policy, the growth in casualisation has led to an 'explosion in precarious employment without security or the entitlements which attach to permanent employment'.[4]

9.4 This development has led to the concern that a dual labour market is emerging in Australia, divided between those in standard jobs and those in non-standard jobs.[5]

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1 Submission no. 473, Queensland Government, Volume 23, p. 5947.

2 Dr Barbara Pocock, Department of Social Inquiry, University of Adelaide, Evidence, Canberra, 28 October 1999, p. 516.

3 Submission no. 496, Dr Pocock, Volume 24, p. 6191.

4 Submission no. 423, ACTU, Volume 19, p. 4352.

5 Submission no. 473, Queensland Government, Volume 23, p. 5950.

People in the latter category tend to have jobs at what has been called the boundary of employee and non-employee status, with unfavourable wages and working-time arrangements. They tend not to have the same rights and entitlements as those in standard jobs: less protection from awards, unions and tribunals, less access to structured training and less influence over how or how long they work. Though these jobs are not attractive to the bulk of unemployed people who want regular, full-time work, their 'increasing preponderance' draw in many of the unemployed.[6] 'Such workers are less likely to be productive if they have fears about job security, if their terms and conditions of employment are under threat, and if they do not have a right to fair treatment at work'.[7]

9.5 The apprehension and insecurity that go with precarious forms of employment apply with particular force to women workers and young people. Such issues and others that confront these workers are discussed in Chapter 7 of this report.

9.6 Labor senators strongly agree therefore with the view of the Queensland Government that this is a significant public policy issue that should be addressed through the industrial relations legislative framework.[8] A wide range of evidence to the Committee makes it clear, however, that neither the Act nor the Bill provides the wherewithal to address the issue. Indeed, the indications are that the effect of both is to aggravate the social and economic consequences.

> The proposals in this Bill take no account of this and other changes; instead they are likely to *increase* the growing number of Australians that are outside the protective capacity of agreements or awards and denied the genuine possibility of union membership and the capacity to bargain collectively.[9]

9.7 The Minister has argued that the growth in casualisation (and presumably therefore the need to deal with its consequences) has come to an end: '…you've just heard Leigh Hubbard say as a bald fact that casualisation has been rising. Well actually that is not true.'[10] Evidence to the Committee shows that the Minister is wrong.

> …this is the first time I have ever heard that claim made…Australia now has one of the highest rates of casualisation in the OECD, second only I believe to Spain. The rate of casualisation, according to ABS figures, is currently running at about 26per cent and that has increased…from something approximating 14per cent in the early 1980s….There may well be some individual pockets of the labour market where there have been

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6 Submission no. 165, Dr Iain Campbell and Prof Peter Brosnan, Centre for Applied Research, RMIT University, Volume 3, p. 680.

7 Submission no. 473, Queensland Government, Volume 23, p. 5946.

8 Ibid., p. 5950.

9 Submission no. 496, Dr Pocock, Volume 24, p. 6191.

10 ABC Radio, 18/8/99.

> trends in the opposite direction. But to make a broad claim that casualisation has been decreasing is without any substantive evidentiary basis that I am aware of.[11]

9.8 One witness has suggested that the Minister's comments are 'really in defiance of the ABS figures'.[12]

9.9 The explosion in precarious employment and the workplace experience that goes with it confirm the logical conclusion from the evidence that one of the effects of casualisation is mounting apprehension and insecurity among employees. The evidence demonstrates that this apprehension and insecurity is considerable, serious enough to engage the attention of a responsible government that should be interested impartially in balanced workplace relations. This is the view of the State governments that provided submissions and evidence to the Committee's inquiry.

> The Queensland Government recognises…that workers are less likely to be productive if they have fears about job security, if their terms and conditions of employment are under threat, and if they do not have a right to fair treatment at work…Industrial relations legislation needs to keep pace with (changes in the nature of employment) and new perspectives need to be developed. More of the same is not an option. Further labour market deregulation does not provide the response needed to address these issues.[13]

> The need to ensure that employees are properly protected is made greater by the growing incidence of various forms of "precarious" employment…Casual employees are much more likely than permanent employees to be excluded from standard benefits, receive lower rates of pay and be exposed to employment insecurity. Against this background, the objective should be to increase the protection available to workers, rather than diminish it further as would occur if the…Bill were enacted.[14]

9.10 We were therefore surprised by the Commonwealth Government's assertion through the evidence of the Department that, while the precarious nature of jobs has increased and workplace regulation withdrawn, 'perceptions of job security have continued to improve under the WR Act'.[15] The department's 'range of evidence', once the AWIRS95 data are excluded (because they actually refer to pre-1996 conditions), consists only of the Morgan Poll series data which show that perceptions of job insecurity 'have not changed dramatically' between 1975 and November 1998.[16] A more recent survey conducted by the Saulwick organisation for Job Futures

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11 Dr Richard Hall, Senior Researcher, Australian Centre for Industrial Relations Research and Training, University of Sydney, Evidence, Sydney, 22 October 1999, p. 250.

12 Dr Campbell, Evidence, Melbourne, 8 October 1999, p. 187.

13 Submission no. 473, Queensland Government, Volume 23, p. 5946.

14 Submission no. 520, NSW Government, Volume 26, p. 6921.

15 Submission no. 329, DEWRSB, Volume 11, p. 2249.

16 Ibid., p. 2250.

is reported also to have found a majority of respondents who are 'secure in their jobs'.[17] Without being critical either the Morgan Poll data, gained from telephone polling of 543 people, or the Saulwick canvass of 1,000 people, other more comprehensive polling produces quite different results.

9.11 A survey of 6,770 respondents in more than 100 industries conducted by ACIRRT for the ACTU in 1998 is an example.[18]

> The ACTU report arising from the survey (*Employment Security and Working Hours -- A national survey of current workplace issues*) found 'a significant perception by employees of increased job insecurity over the last 12 months…Key findings of the survey are:
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> - One third of respondents said that there had been a decline in job security, with 23 per cent reporting a growth in casualisation, 23 per cent a growth in contract employment and 19 per cent increased fixed term employment. Fifty four per cent gave increased job security as a key workplace improvement.
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> - Fifty nine per cent of casuals and sixty per cent of fixed term employees said that they wanted permanency.
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> Apart from the inherent insecurity associated with these precarious employment forms, employees also miss out on a number of significant entitlements that are normally attached to permanent employment. Examples of this are:
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> - Casuals do not receive annual leave, personal/carer's leave, parental leave, notice of termination or redundancy pay. In many cases they do not receive long service leave, even if they have been employed on a regular basis for the required length of time. The casual loading, which varies from 15 to 25 per cent, does not fully compensate for the loss of these entitlements.
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> - Independent contractors also do not receive these entitlements, even in cases where the contract is for labour only.
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> - Employees of contractors lose entitlements when the principal changes the contractor, even if their employment continues with the new contractor, as this has not traditionally been viewed as a transmission of business for the purposes of…the Act…[19]

9.12 The ACIRRT survey found that the issue of working hours was associated with the problem of precarious employment and job insecurity. This issue was

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17 *Sydney Morning Herald,,* 12 November 1999.

18 Submission no. 423, ACTU, Volume 19, p. 4511.

19 Ibid., pp. 4392-3.

characterised by increased unpredictability and insecurity of hours and either excessive or insufficient hours.

> …only one third of employees now work a 'standard' working week of 35-40 hours, while others work multiple jobs, are part-time wanting more hours, are unemployed or working unpaid overtime…[20]

> Sixty five per cent of respondents…reported an increased amount of work, 59 per cent reported greater stress and 56 per cent an increase in the pace of work over the past 12 months…[21]

9.13 The Queensland Government has also pointed out that a number of qualitative surveys (pointed) to the increased prevalence of job insecurity in the Australian community.

> For instance, the Middle Australia project conducted in 1997 produced survey data that pointed to some of the uncertainties and anxieties experienced in today's labour market. The survey found that 63 percent of people considered their income and job prospects were decreasing…[22]

> (These and the ACTU) figures suggest that regardless of economic indicators that show signs of improvements, if people feel insecure in their jobs then the appearance of a stronger economy has little meaning for them. This view is confirmed by recent community-based research that ANOP conducted for the Australian Industry group (ANOP, 1999). ANOP found that while the benefits of low mortgage interest rates and falling unemployment are recognised, positive comments are often qualified by fears such as job insecurity. During focus groups, ANOP regularly heard comments like:
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> > *So the economy is meant to be in good shape. Okay. But I'm still struggling.*
> >
> > *So unemployment is meant to be falling. Okay but my job isn't safe…job security is a thing of the past.*
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> The move towards a more deregulated system therefore has been associated with the growth of less secure forms of employment…The concern in recent times is that a dual labour market is emerging that is leaving behind many of those in non-standard, precarious employment. This is a significant public policy issue that the Queensland Government believes can and should be addressed through the industrial relations legislative framework.[23]

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20 Submission 423, ACTU, Volume 19, p. 4395.

21 Ibid., p. 4396.

22 Pusey, M., (1997) "Inside the Minds of Middle Australian (Findings From the Middle Australian Project on Incomes, Standards of Living and Quality of Life)", in Australia Quarterly, V.69 (4), pp. 14-21.

23 Submission no. 473, Queensland Government, Volume 23, p. 5947.

> As well as the stress created by uncertain work, this sort of employment can limit a worker's future options -- for buying homes, planning a family and household budgeting -- because of financial uncertainty. Many people become stuck in the vicious cycle of unemployment and casual, short-term low paid jobs. There is also a strong connection and a great deal of movement between low-skilled, insecure employment and short-term unemployment, especially among young people. Many of these find that opportunities for secure full-time employment are closed to them -- often casual employment does not appear to be a stepping stone to more secure employment.[24]

Impact on employment security of the Workplace Relations Act 1996

9.14 This and other evidence to the Committee demonstrates the close connection between the insecurity in the labour force and economic change that has brought about, among other things, the extraordinary growth in Australia of precarious employment. Labor senators do not argue that change should be resisted. What must be said is that it is the responsibility of good government to manage change and ameliorate its consequences. Evidence to the Committee shows that the Government's policy, as it is seen in the 1996 Act and the 1999 Bill by community organisations and others who are interested in the consequences, not only does not deal with these consequences but also that it will in many ways aggravate them.

> (The Act) has failed to address the changing nature of the labour market today, including the increase in female employment and the growth in casual, part-time and contract work employment…
>
> (It) has removed the protections available to those working in irregular, insecure forms of employment…the award simplification process…places under threat many important safeguards and conditions of employment, ignoring the fact that large numbers of workers, including any in low-paid, non-standard forms of employment, continue to rely on awards for their terms and conditions of employment.[25]

9.15 This and other evidence to the Committee shows in other words that the Workplace Relations Act 1996, which eroded the protective capacity of the award system, reduced the powers of the Commission and the unions and left many employees to fend for themselves in bargaining for their wages and conditions, has had a particularly severe effect on those in precarious forms of employment. The Government claims that its next round of so-called 'reform' would create more jobs, bring about better pay and improve productivity and competitiveness. Evidence to the

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24 Submission no. 476, ACOSS,. Volume 23, p. 6071. See also Richard Hall, Evidence, Sydney, 22 October 1999, p. 256.

25 Submission no. 473, Queensland Government, Volume 23, pp. 5952-3. See also Submission no. 423, ACTU, Volume 24, p. 4391; Submission no. 499, Brotherhood of St Laurence, Volume 24, p. 6385.

Committee shows that it would entrench the inequity and disadvantage which the 1996 legislation created and which has caused so much apprehension and insecurity among employees.

Impact on employment security from the proposed Bill

9.16 In his second reading speech on the Bill, the Minister, explaining that workplace relations do not involve only economic considerations, said that they were 'also about human relationships, about fair dealing between employers and employees and about social considerations, such as getting the relationship between our work and family life better balanced and giving the many unemployed an opportunity to compete in the labour market'.[26] This next phase of reform therefore, while it would continue to maintain the safety net for the low paid and disadvantaged, would also provide more choice, eliminate centralisation and control and remove unjustified cost to employers. What his Bill actually proposes is:

- to further weaken the role and capacity of the Commission;
- to continue stripping back the award system and its capacity to protect working conditions;
- to inhibit effective independent scrutiny of individual agreements and discourage efforts to reach collective agreements;
- to put extra restraints on employees taking protected industrial action; and
- to obstruct unions from carrying out their responsibilities to protect their members' interests.

Award Stripping

9.17 A great deal of evidence came before the Committee on the implications of award simplification on workers vulnerable to discrimination. Outworkers in particular were highlighted as a category of workers who's situation could be jeopardised under the bill's proposals.

> The (TCFUA) was forced to conduct a test case to convince the…Commission to preserve the current clauses in the Clothing Trades Award that protects outworkers. The award simplification case for outworkers involved a lengthy and expensive court case…This case…achieved a successful outcome even though the Federal Government challenged the…case and argued to reduce award protection for outworkers…

26 Reith, P., House of Representatives, *Hansard*, 30 June 1999, p. 7852.

> The (Bill) will mean reviewing this lengthy process again. This will be both time and resource intensive for all parties…
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> If this legislation is passed, the union will not be able to go into workplaces and check the records. This is a major concern. In the past, federal and state governments had inspectors who did this work but now this is no longer done. The union is the only organisation actively seeking to enforce award compliance in an industry long known for its exploitative practices. Further limiting unions' right of entry will make it easier for companies to break the law and remain undetected. It will allow sweatshops and exploitation to continue and increase.[27]

9.18 It was evident to the Labor senators that the most vulnerable sections of the workforce would be hurt most.

> Any further reduction in the number and range of allowable matters will remove entitlements from those vulnerable sections of the workforce who do not have the bargaining strength to negotiate agreements…
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> The lower paid are the most vulnerable to exploitation and it is unreasonable to expect that they could improve their position by "disarming" the organisations that have an interest in ensuring compliance with awards and agreements. The Bill does not provide an adequate means to fill the gap if unions are marginalised from the system…
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> …there is no sustained case based on research and evaluation of the current system to justify the changes proposed in this Bill.[28]

9.19 As evidence to the Committee shows, this is not the way to 'fair dealing'. It is not the way to ensure 'a fair go all round'. It is not the way to bring about security in the workplace.

> …in its preoccupation with restructuring the influence of awards and unions, this Bill fails to deal with the most serious workplace and labour market problems facing Australia. In particular, the serious problems I think we should be concerned about are: firstly, casualisation and job insecurity; secondly, working hours; and, thirdly, the proliferation of low wage employment. Indeed, the bill on my estimation and the estimation of others, is likely to exacerbate these problems rather than ameliorate them. While average wage outcomes…have improved…wage inequality has increased. What we are seeing is a polarisation in the Australian labour market…
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> Award stripping, the encouragement of Australian Workplace Agreements, the limitations on the role of the Industrial Relations Commission…will lead

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27 Submission no. 327, Fair Wear Campaign, Volume 10, pp. 1957-8. See also Submission no. 311, Good Shepherd Social Justice Network, Volume 8, pp. 1522-5; Submission no. 298, Dr Richard Hall/Ms Tanya Brotherton, ACIRRT, Volume 7, p.1423.

28 Submission no. 476, ACOSS, Volume 23, pp. 6073, 8.

> to increased wage dispersion and therefore to more inequality. The growth of casual and contract work and the decline of full-time permanent employment, with the rights, entitlements, protections and security that implies, has also been greatly affected. This Bill does nothing to address these problems, nothing to protect the conditions of casual workers and nothing to enable them to seek more security or better compensation for their insecurity or their access to career paths.
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> …it is difficult to understand the further attacks on awards, the Commission and unions as anything other than ideology. It is difficult to see the logic of what is going on out there in the Australian labour market as justifying the Bill.[29]

9.20 It is important however, to note that other forms of employment which would not usually be considered precarious could be considered problematic. An example of this is provided by the AFP Association which drew attention in its submission to the continuing judicial indecision over whether or not a member of a police force is an employee, and consequently would attract protections under unfair dismissal legislation and other related matters.

> There has been much judicial division about whether or not a member of a Police Force is an employee.
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> The uncertainty of the status of Police as employees is highlighted in the decisions of Marshall J. and Moore J. in Konrad and Ward respectively…There is, however, a clear risk that the courts may uphold the line of authority in Perpetual Trustees and decide that Police and AFP members are not employees for the purposes of the Workplace Relations Act generally, with the exception of Division VIA. This requires urgent clarification and should be considered as a matter for inclusion within any amendments to the Workplace Relations Act.[30]

Conclusion

9.21 Labor senators believe that job security is important for all workers. All workers should be covered by an industrial instrument. This includes workers not in a typical employment relationship, such as those in precarious employment and those whose employment may prove problematic in this area. Such workers include independent contractors (discussed in Chapter 11), outworkers and Police.

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29 Dr Richard Hall, Evidence, Sydney, 22 October 1999, p. 251. See also Submission no. 520, NSW Government, Volume 26, p. 6935.

30 Submission no. 507, Australian Federal Police Association, Volume 25, p. 6495.

Employee Entitlements

9.22 The great majority of employers are diligent in setting up processes to meet their liability for accrued employees' entitlements in the event of insolvency. Over the past two years, however, there has been a spate of cases in which companies becoming insolvent have not put aside sufficient assets which would allow their employees to be paid their lawful accrued leave and other entitlements.

9.23 Some of these cases have become notorious because they have involved many employees being owed many millions of dollars, causing great hardship to them and to their families. Moreover, the hardship has been aggravated in some instances when company insolvency and the loss of employees' lawful entitlements have occurred in regional and rural centres which already suffer more than their fair share of economic and social disadvantage.

9.24 The Committee heard evidence from individuals who were able to relate their own personal experiences of such situations. The following is an example from Mr Anthony Dick:

> I was one of 100 people working at the Parrish Meats. I had been there for just under 10 years. I turned up for work on Monday, 16 August. I was called to the general manager's office by someone I did not know. I was told that he was a liquidator appointed by the court and that Parrish Meats was closing down. I was informed by the liquidator that it would be appropriate for me…to leave the premises immediately…
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> …
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> We would come out of this closure being paid annual leave, long service leave and superannuation. I would not get their seven per cent, which they were supposed to be paying for me. It had not been paid for quite a while. There was no provision for the breach of contract. I would not be getting that. I would also not be getting my redundancy pay either, which brings to a total the amount of over $22,000.
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> As of this date, I have not received anything at all…There are more meetings to come, and I am still a bit concerned at this point whether or not I am going to get my annual leave and long service leave as an entitlement. I have just about written off the rest of it. I have virtually been told that there is no money there, that I cannot get it . It has also been indicated to the rest of the workers that, if they do not take this, they might not get anything at all, which I think is very unsatisfactory and, as I said, I had been there for probably a couple of weeks under 10 years.[31]

9.25 The Government has responded to this trend by producing a discussion paper which proposes two options for protecting employees' entitlements in the event of company insolvency.

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31 Mr Anthony Dick, Evidence, Sydney, 22 October 1999, p. 262.

9.26 The Government's discussion paper identifies options for dealing with this issue which require the use of taxpayer funds. Both its Basic Payments Option and its Compulsory Insurance Option are inadequate in that neither of them will protect 100 per cent of employees' entitlements.

9.27 Not only is it unacceptable that the Government has taken so long to produce the discussion paper, either end result is seen as inadequate by some.

> With regard to protection of employee entitlements, we say that the ministerial discussion paper on this topic is an important step forward, and we do not shrink from that, but at the same time we underline that it falls far short of what we regard to be an equitable system. The basic approach that we have here is the requirement that any legislative change should ensure full payment of accrued entitlements. That is the point that we would underline.[32]

9.28 For a smaller call on taxpayers, Labor has put forward a third option which could offer a better, more comprehensive, less cumbersome and less bureaucratic solution. Moreover, though it envisages 100 per cent protection of employees' entitlements as against the Government's limited protection, it could be more affordable.

9.29 The Committee received limited evidence on the issue of protecting employee entitlements in the case of corporate insolvency, it appeared to be overwhelmed by the broad scope of this inquiry. The Labor senators therefore maintain the position that the issue of protecting employee entitlements in the case of corporate insolvency should, as a priority, be looked at closely through a separate committee inquiry.

Unfair Dismissals

9.30 In this climate of precarious and contingent, and therefore insecure, employment and in light of convincing evidence to the Committee that has been discussed above, we say that, in both the Act and the Bill, the law relating to unfair dismissals is harsh and unfair to employees.

1996 changes

9.31 The present Government came into office with a policy to abolish altogether the previous Government's unfair dismissal regime. In the event, it did not go so far, putting in place instead in the Workplace Relations Act 1996 and other legislation various changes to the unfair dismissal provisions of the *Industrial Relations Reform*

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32 Mr Bruce Nadenbousch, Association of Professional Engineers, Scientists and Managers, Australia, Evidence, Perth, 25 October 1999, p. 332.

Act 1993. These changes effectively narrowed opportunities for employees seeking remedy from unfair dismissal through such provisions as:

- excluding from protection under the law numbers of employees, including casuals;
- introducing new costs and charges for applicants;
- limiting access to conciliation and arbitration of applications; and
- transferring the onus of proof in determining applications from employers to employees.

9.32 The consequences for employees is that the first ever rights-based regime of remedy for unfair dismissal has been reduced to what has been described to the Committee as one of only 'minimalist protection'.[33]

9.33 The Committee has received considerable evidence of the consequent significant and negative impact on employees from community and other organisations which represent disadvantaged employees and which are not directly concerned with the clash itself of workplace interests so much as its effects. This evidence shows that in significant respects the 1996 legislation actually denies the guiding principle in S170CA(2) of a fair go all round, the establishment and support of which had been specifically pledged by the Prime Minister before the election that year.

9.34 The intracacies of the process, of seeking remedy from unfair dismissals are covered below.

Eligibility

9.35 The broadening of categories of employees who are inelegible will lead to a grossly unjust and unfair system.

> The broadening of classes or categories of employees who are deemed to be ineligible...has widened the net of workers who have no statutory rights to have their claims heard and assessed on their merits...
>
> In particular, the extension of ineligibility relating to casual and fixed term employees has a considerable impact...on the numbers of employees being able to access the termination provisions...
>
> The rationale for the exclusion of trainees on registered training agreements is also problematic given the extensive concessions and financial assistance provided to employers when they employ a trainee...

33 Submission no. 462, Turner Freeman Solicitors, Volume 22, p. 5650.

In the experience of Job Watch many employees who would otherwise have strong arguments in relation to the unfairness or unlawfulness of their dismissal are automatically denied access to the process because of these technical and arbitrary exclusions. We highlight these 2 specific exclusions because their impact on our client base is more apparent. However, in our view the whole area of exclusion needs to be revisited and its rationale assessed.[34]

Costs

In circumstances where the government regulates the operation of the labour market by establishing a private legal right of action to individual workers, the cost involved in enforcing this right is a major issue of concern.

Employers can obtain costs against employees in circumstances where the Commission has begun arbitrating a claim, and:

- the application is made vexatiously or without reasonable cause; or
- the applicant acts unreasonably by failing to discontinue the application; or
- the applicant discontinues the application
- the applicant acts unreasonably by failing to agree to terms of settlement that could lead to the discontinuance of the matter.

In contrast, Employees can only obtain costs against employers where the Commission has begun arbitrating, and:

- The respondent acts unreasonably by failing to agree to terms of settlement that could lead to the discontinuance of the matter.
- The respondent acts unreasonably by failing to discontinue a jurisdictional objection.

Therefore, the current cost regime clearly favours employers and, according to the explanatory memorandum accompanying the Workplace Relations and other Legislation Bill 1996, was motivated by a desire to 'discourage applicants from making applications which are without reasonable foundation.' The current regime is unfair to employees and should be modified. Currently, the system fails to provide applicants with adequate opportunities to seek redress against respondents for vexatious or unreasonable conduct in the course of proceedings. In addition, the extremely limited amount of compensation available to arbitration for

34 Submission no. 398, Job Watch, Volume 14, pp. 3241-2. See also Submission no. 484, Fitzroy Legal Service, Volume 24, p. 6160.

> successful applicants is further eroded by the fact that applicants must bear their own costs in asserting their legal rights.[35]

Filing fee

9.36 The introduction of a filing fee for the application of an unfair dismissal claim aims to discourage spurious or unmeritous claims. The major objection to such a fee is that a real cost barrier is imposed up on those dismissed employees with genuine claims from achieving justice.

> While it is assumed that filing fees discourage spurious applications or those without merit these claims are often unsubstantiated, and in fact act as a barrier to justice. Furthermore, these fees are often imposed at a time of considerable stress and hardship. There is an important argument for the removal of the filing fee altogether. In both the Victorian and federal anti-discrimination jurisdictions there is no filing fee for applications. Neither jurisdiction complains of speculative or spurious applications.[36]

> Taken together (the filing fee and costs provisions) act as a real barrier to a dismissed worker irrespective of the merits of the claim. A worker who has been unfairly dismissed, who is not generating an income, is not sure where his/her next income is coming from, who is not in a position to engage legal counsel is clearly in a disadvantaged position under these proposals. They are heavily weighted against employees...The imposition of a cost barrier is in breach of the requirement that a terminated employee is entitled to an avenue of appeal regarding the dismissal as is shifting the onus of proof from the employer to the employee.[37]

Time limit for applications

> Under the previous Industrial Relations Act 1988 the time limit for applications was 14 days after written notice of termination was received by the employee. Under the Workplace Relations Act 1996 this was amended to 21 days after the termination takes effect.

> The difference...is significant. The former requirement for notice to be in writing placed an important obligation on employers to confirm to the employee the reason why they were being dismissed. The Parliament and the courts and Commission has consistently accepted that it (is) an element of natural justice and due process that employees be given a reason for their dismissal...

> The period of the time limit itself also demands attention given that it would have to be one of the shortest time periods for filing legal proceedings of

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35 Submission no. 412, Slater and Gordon Solicitors, Volume 16, p. 3508. See also Submission no. 519, McDonald Murholme, Volume 26, pp.6914-5.

36 Submission no. 484, Fitzroy Legal Service, Volume 24, p. 6161. See also Submission no. 398, Job Watch, Volume 14, pp. 3244-5.

37 Submission no. 172, Liberty Victoria - Victorian Council of Civil Liberties, Volume 4, p. 815.

> any jurisdiction not only in Victoria, but in Australia. Whilst the need for applicants not to sit on their rights is understood and appreciated, the justification for such a short time limit is not compelling.[38]

9.37 These are significant, substantial and so far unanswered charges as to the partial and inequitable ways in which the 1996 legislation set out to limit access by employees to fair and affordable remedies against unfair dismissal. Accordingly, Labor senators concur with the judgment of the Fitzroy Legal Service that the 1996 legislation had 'severely impacted on the balance of interests between employees and employers in the employment relationship',[39] especially as far as they concern unfair dismissals.

1999 proposals

9.38 Nevertheless, the Government has judged the 1996 provisions to be good and fair. The Coalition declared in its policy for the 1998 election that, as the result of its unfair dismissal changes, the number of applications against employers had fallen by 49 per cent in the federal jurisdiction and by 18 per cent in all jurisdictions ('More Jobs, Better Pay', September 1998). In the same policy document, however, it also argued that:

> ...unfair dismissal laws are still holding back job creation and deterring employers from taking on new employees. The reform of unfair dismissal laws needs to go further, if unemployed Australians and young people are to get new job opportunities."

9.39 In subsequent public debate, throughout the course of two Senate inquiries and the introduction of its 1999 proposals, the Government has neither explained this extraordinary contradiction nor provided evidence for its position that less protection against unfair dismissal means more jobs.

9.40 It was noticeable that in introducing the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill, Mr Reith did not take the opportunity to explain the Government's assertion that 'unfair dismissal laws are still holding back job creation'. Instead, he spoke only of the need to ease the 'burden' on employers, especially small and medium businesses. In doing so, he probably revealed more of the Government's intent than he meant. The evidence to the Committee on the consequences of the Bill makes it absolutely clear that the Minister's proposals will ease the burden on employers for the most part by unfairly increasing it for employees.

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38 Submission no. 398, Job Watch, Volume 14, pp. 3243-4. See also Submission no. 477, Maurice Blackburn Cashman, Volume 23, pp. 6089-90; Submission no. 484, Fitzroy Legal Service, Volume 24, p. 6161.

39 Submission no. 484, Fitzroy Legal Service, Volume 24, p. 6160.

9.41 We oppose the proposals listed below. As the following evidence shows, they are not only profoundly unfair but they will also add complexity and impracticality to what is still basically -- despite the 1996 changes -- a relatively uncomplicated system.

Exemption of small business

9.42 In his second reading speech, Mr Reith included among seven major objectives for the Bill the removal of 'red tape and unjustified cost, especially from small and medium sized businesses, including in the area of unfair dismissals'. At no point in the speech did he give any reason or any information for the reason for this objective, which is not surprising perhaps given the paucity of his argument the last time he advanced it, during debate on the Workplace Relations Amendment (Unfair Dismissals) Bill 1998.

9.43 It is clear that the Government has two significant problems here. One is that the reasons for exempting from the unfair dismissal provisions is business employing 15 or fewer people are so threadbare, as his second reading speech shows. The other is that he is getting little concrete assistance in this regard from the small business sector, as evidence to the Committee shows. Certainly, the evidence from practitioners and community organisations involved in representing employees in unfair dismissal cases shows that they are not impressed by the proposal.

9.44 The NSW Government's submission is of the view that:

> The proposal to include consideration of the size of a business when determining 'harsh, unjust or unreasonable' should not be pursued. Fairness should be a standard that all workers are entitled to expect. Access to tribunals and unfair dismissal laws should apply equally to all employees, regardless of whether their employer is large or small.[40]

> The Fitzroy Legal Service considers that the intention of the (proposal) is to weaken the obligation on small businesses and enterprises in regards to providing procedural fairness to employees. We are concerned that any diminution of this obligation sends the wrong message to smaller employers who, from our understanding are already over-represented in termination of employment matters. If passed, this amendment would further discourage small employers from conducting termination processes with fairness and due process.[41]

Costs

9.45 The Minister's second reading speech provides no real explanation of the costs proposals in relation to unfair dismissals, saying only in the context of his intent

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40 Submission no. 520, NSW Government, Volume 26, p. 6928.

41 Submission no. 484, Fitzroy Legal Service, Volume 24, p. 6162. See also Submission no. 369, Redfern Legal Centre, Volume 12, p. 2516; Submission no. 477, Maurice Blackburn Cashman Lawyers, Volume 23, pp. 6085-6; and Submission no. 462, Turner Freeman Solicitors, Volume 22, p. 5654.

to ease further the 'burdens' on employers that 'access to costs will be widened'. Costs, of course, are among the most influential of the factors involved in the question whether or not employees are able to gain the protection of a law whose guiding principle is 'a fair go all round'.

9.46 Evidence to the Committee makes it absolutely plain that the Government's costs proposals will put the law out of the reach of employees who, though they may believe that they have been unfairly or unlawfully dealt with, are without the means to obtain help in a jurisdiction where legal aid is not available.

9.47 The bill proposes to incur costs against applicants without 'substantial prospects of a successful claim'. Only the applicants are subject to the threatened costs, which in addition to the filing fee serves to deter workers from accessing claims.

> The threat of costs being awarded against people who are often in hardship situations is an attack on appropriate levels of access to justice and further complicates a process that disadvantaged applicants very often find stressful and overwhelming. The possibility of costs being awarded in addition to a proposal to increase the application fee will reduce the number of claims amongst those most in need of the protection of sound unfair dismissal laws which emphasise natural justice. [42]

9.48 The proposal that the Commission may order an applicant (worker), but not a respondent (employer) to provide security for payment of costs has been described as 'particularly pernicious'.

> This amendment places an unreasonable burden on applicants because
>
> - there is no corresponding provision for respondents to provide security for costs, thus the provision is directly discriminatory; and
>
> - in many cases applicants would simply not be able to afford to comply with this requirement. Even if the amendment applied equally to applicants and respondents, it is far more likely that an applicant would be disadvantaged by this requirement than a respondent.[43]

9.49 Not only would the costs proposals act to make the system unfair: they would also act to undermine the objective (if indeed this is the objective) that the system provide a relatively uncomplicated as well as affordable method of settling disputes.

> (The proposals) will in practice see far more respondents making applications for costs on the basis that it will actively discourage the

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42 Submission no. 520 NSW Government, Volume 26, p. 6928. See also Submission no. 369, Redfern Legal Centre, Volume 12, pp. 2516-7; Submission no. 412, Slater and Gordon Solicitors, Volume 16, pp. 3511-12.

43 Submission no. 412, Slater and Gordon Solicitors, Volume 16, p. 3509. See also Submission no. 477, Maurice Blackburn Cashman Lawyers, Volume 23, p. 6095.

> applicant from pursuing their claim because of the risk of an order for security being made by the AIRC. Administratively, this will place an increased burden on the AIRC.[44]

9.50 Job Watch in fact has recommended that these proposals not be passed into law because of its concerns that they would

> …result in respondents making vexatious, punitive or speculative cost applications, simply in order to deter claims.[45]

9.51 Slater and Gordon Solicitors is of the view that:

> (The proposals to subject conciliation proceedings to costs) would have a detrimental effect on the effective operation of the conciliation process and impede the rigorous processing of claims.
>
> The amendments provide that applications that are discontinued prior to an election to proceed to arbitration may be subject to an application for costs. This would have a detrimental effect on the efficiency of the system and the practical handling of claims by applicants...(and) would undermine the practicality, workability and fairness of the system...
>
> (The proposal that settled claims should be subject to costs) should not be implemented for practical and policy reasons.
>
> - In practice, settlement agreements will include a term indicating that neither party will seek to have costs awarded against the other. If such a term is not included, it is likely to be due to the inexperience or lack of legal knowledge of one or the other parties.
>
> - On policy grounds, the philosophy and purpose of a settlement is to resolve the dispute between the parties. Allowing that resolution to then be the subject of further legal action is antipathetic to the resolution. [46]

Constructive dismissal

9.52 New s.170CDA proposes that if an employee resigns as a result of the conduct of the employer the employee must establish that the employer:

> a) Indicated that the employee would be dismissed if he or she did not resign
>
> b) Had engaged in conduct that the employer intended to cause the employee to resign.

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44 Submission no. 398, Job Watch, Volume 14, p. 3254.

45 Ibid., p. 3255.

46 Submission no. 412, Slater and Gordon Solicitors, Volume 16, pp. 3509-11.

9.53 The onus of proof is thus shifted from the employer to the employee in adducing evidence of proving the employer's intention.

> This subverts the purpose of the unfair dismissal law, the object of which is to provide an employee with a remedy where the termination of the employment relationship is against the will of the employee and unfair...
>
> The amendments cut down the scope of the law on termination at the initiative of the employer and exclude the common law doctrine of constructive dismissal. The objective of the unfair dismissal law is to remedy unfairness in employment not perpetuate and reward the arbitrary exercise of power by an employer who by its conduct deprives an employee of their employment. The proposed amendments to the law on termination at the initiative of the employer are misconceived and are likely to lead to injustice.[47]

9.54 From their experience in this area, Job Watch was able to elaborate further on constructive dismissal provisions.

> Job Watch provides assistance and representation to many workers who have been constructively dismissed. The decision by an employee to leave their place of employment because of the untenable working environment/situation is invariably an extremely difficult action for that worker to take. In our experience, workers are far more likely to try and tough out the conditions and hope the situation improves, rather than make a spontaneous, although very understandable decision to leave. Employment is fundamental to a worker's economic and financial security and it (is) false to assume such decisions are taken lightly or for vexatious reasons.
>
> The link in the Bill between the...course of conduct, and the employer's intention is problematic in the many cases where employees have ceased employment because of onerous or untenable conditions at work. Job Watch regularly represents workers who have been forced to leave their employment because of: workplace harassment and discrimination; workplace violence; victimisation; and serious breaches of occupational health and safety standards. These are, unfortunately, not isolated cases. In many matters, the employer personally had knowledge of and/or participated in the incidents or should have had knowledge of them especially if they had properly monitored health and safety conditions in the workplace.[48]

Operational requirements

9.55 The Bill proposes to exempt relief of employers from unfair dismissal claims on the grounds of 'the operational requirements of the undertaking, establishment or service', regardless of the capacity, conduct, skill, or experience of employees. This

47 Ibid., pp. 3516-7.

48 Submission no. 398, Job Watch, Volume 14, pp. 3246-7.

contravenes the right to contest the fairness of termination by workers, and opens the way to exploitation and injustice for employees in the following ways.

> ...the proposed amendment will result in injustice to employees in the following situations:
>
> 1. where employees are, in fact, selected for redundancy for a reason which has no foundation;
>
> 2. where employees are, in fact, selected for a reason unrelated to their conduct, capacity or performance;
>
> 3. where the selection process used by the employer, in fact, breaches workplace agreements regulating retrenchment; and
>
> 4. where the real reason for selection involves the employee's history of workplace activism such as pursuing occupational health and safety issues or union rights.
>
> ...operational requirements should not be used as a threshold issue with which to remove the legal entitlement of employees to access the jurisdiction.[49]

9.56 Compounding these injustices is the fact that employees dismissed on operational grounds are not in any practical position to check the validity of the above reasons.[50]

Time limit for applications

> Currently the Commission has a broad discretion under section 170CE(8) to allow out of time applications in circumstances where it would be unfair not to do so...[51]

9.57 The current Bill proposes that the acceptance of late lodgements now satisfy 'exceptional' circumtances. The proposed amendments make it more difficult for employees to access fair outcomes as should be oversee by the unfair dismissals jurisdiction. The time limit does not consider the difficulties faced by NESB, migrants, those applicants with disabilities, those applicants subjected to constructive dismissal and those from remote areas.

> The 21-day time limit for lodging applications under the current legislation has been a major disadvantage to unfairly dismissed employees...The proposed amendment is unfair, unnecessary and would eliminate a large number of meritorious claims on an arbitrary basis. Such a provision would certainly not provide a "fair go all round."

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49 Submission no. 477, Maurice Blackburn Cashman Lawyers, Volume 23, pp. 6081-2.

50 See Submission no. 398, Job Watch, Volume 14, pp. 3249-50.

51 Submission no. 477, Maurice Blackburn Cashman Lawyers, Volume 23, pp. 6088-9.

> ...It should be borne in mind that an employee has six years (with the possibility of an extension of time) to file a wrongful termination claim in the civil courts. The 21-day time limit, if anything, should be substantially increased to ensure access to employees, particularly those with additional barriers to accessing legal advice (for example rural employees, migrants or employees with disabilities*).*[52]

Merits review/Dismissal of claim at conciliation

9.58 The Bill proposes that:

> The AIRC will be required at the conciliation stage to make a finding as to whether or not a claim is likely to succeed, with the employee stopped from having the claim arbitrated if the Commission says it is unlikely to succeed.[53]

9.59 Several concerns arise out of such a proposal. It is procedurally unfair that judicial power be exercised to make an assessment at the conciliation stage. Arbitration is not predictable and the informality of conciliation conferences are not suitable for testing the veracity of matters. For example, witnesses are not called. Jobwatch[54] also points out that an applicant would have no avenue of appeal if a conciliator assessed their case as unlikely to succeed.

9.60 The merits review of unfair dismissal claims at conciliation is not supported by employer and employee groups alike.

> Ai Group wholeheartedly supports the objective of introducing greater rigour into the processing of 'unfair dismissal' applications, however, it believes that the mechanisms proposed...may frustrate rather than promote these objectives...
>
> Current practice is that conciliation conferences are relatively informal proceedings, with applicants and respondents making unsworn statements giving a summary of the facts as they know them and an indication of their attitude toward various forms of settlement. In the great majority of cases, such a process is not suitable for testing the veracity of the matters stated by the parties to the extent required to support a finding on the balance of probabilities.[55]

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52 Submission no. 412, Slater and Gordon Solicitors, Volume 16, pp. 3517-8. See also Submission no. 462, Turner Freeman Solicitors, Volume 22, p. 5652.

53 Submission no. 369, Redfern Legal Centre, Volume 12, p. 2516.

54 Submission no. 398, Job Watch, Volume 14, p. 3254.

55 Submission no. 392, Australian Industry Group, Volume 14, p. 3092. See also Submission no. 412, Slater and Gordon Solicitors, Volume 16, p. 3523.

Contingency fees

9.61 The Bill proposes that practitioner's disclose whether cases are conducted on a 'no win, no fee' contingency basis.

> The rationale for (the proposal) is not revealed in the..Explanatory Memorandum. It appears (it) has its genesis in the Australian Democrats' Minority Report (on the Workplace Relations Amendment (Unfair Dismissals) Bill 1998 which stated that) "cases being conducted on a 'no win, no fee contingency (sic) basis should be a matter of public record".
>
> While the jurisdiction is prima facie a no costs one, the Commission does have power to award costs in some circumstances, including a power to award costs on an indemnity basis. The terms and basis on which contingency agreements may be entered into...are governed by legislation and/or the ethical rules of the Bar in each state. There is no justification for the imposition of an additional requirement that practitioners disclose the basis on which their services are engaged...The basis on which a legal practitioner is retained reveals nothing about the merits of the case of the party in question, nor can it be relevant on the question of costs.[56]

Conclusion

9.62 Labor senators agree with these criticisms by practitioner and community organisations of the ways in which the proposed amendments act to limit and obstruct access to fair and affordable remedies against unfair and unlawful dismissal. Taken together, these proposals would:

- cut off claimants from sources of financial and legal support,
- force them to represent and defend their own interests,
- make the system more complicated,
- make settlement more legalistic, and
- tilt the balance of influence in unfair dismissal cases squarely and thoroughly on the side of the employer.

9.63 For these reasons, Labor senators oppose the amendments.

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56 Submission no. 463, The Victorian Bar, Volume 22, pp. 5671-72.