Western Australia's Termination Laws: Is the Nightmare Over?

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When can an employee who has been unfairly dismissed claim compensation from his or her employer? Though the question is simple enough, the answer in Western Australia is far from clear.

WESTERN Australia's employment termination laws have been anything but certain in the last decade. The causes of this are twofold. First, there has been a chronic lack of resolve by the State Parliament to enact termination laws which are clear and unambiguous. Secondly, the Federal termination laws enacted by the Keating Labor government were themselves not free from doubt. The interaction of the State and Federal termination laws has been a major source of confusion.

With the recent coming into force of the Howard government's Workplace Relations Act 1996 (Cth), it is time once again to assess the State's termination laws and their interaction with the new Federal legislation.

STATE TERMINATION LAWS: JURISDICTIONAL PROBLEMS

At the time Premier Richard Court's government first came to power in Western Australia, the State's termination laws were beset by two separate, but closely related, jurisdictional problems. The first was whether the Western Australian Industrial Relations Commission ('the Commission') had jurisdiction to deal with a termination *after* it had taken effect. In other words, was there an 'industrial matter' for the Commission to consider

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when the employee had already been dismissed?[1] The second issue was whether the Commission had power to grant compensation to a person whose employment had been unfairly terminated but who was not seeking reinstatement or re-employment.

1. Pepler's law

Until 1988, the Commission took the view that it did have jurisdiction to award compensation in unfair termination cases where the applicant was not seeking reinstatement or re-employment.[2] The first time that the Western Australian Industrial Appeal Court ('the Appeal Court') had the opportunity to consider the issue was in *Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees of Western Australia*,[3] commonly known as *Pepler*'s case. Mr Pepler and two other employees, all salaried staff of the respondent company, were summarily dismissed for gross misconduct. At the time Mr Pepler, who was 49, was on a gross annual salary of $56 652. The union sought his reinstatement as well as compensation on the ground that the dismissal had been unfair.

At first instance the Commission found that the summary dismissal was not justified. It also formed the view that the relationship between Mr Pepler and the respondent company had broken down irretrievably and so awarded Mr Pepler compensation in the sum of $48 000, but it did not reinstate him. A challenge to the Commission's jurisdiction to award compensation failed in the Full Bench of the Commission.

After reviewing case law stretching back more than 30 years, and after careful analysis of the legislative provisions (especially sections 23(1), 26(1) and 29(b) of the Industrial Relations Act 1979 (WA)), the Appeal Court unanimously held that the Commission did *not* have jurisdiction to award compensation to an unfairly dismissed employee where the person was not being reinstated or re-employed. The Appeal Court's view was succinctly summed up by Olney J:

> There is nothing in the Act to justify the exercise of a jurisdiction to award a dismissed employee compensation or any other money payment except as an incident to an order for reinstatement or re-employment.[4]

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1. 'Industrial matter' is defined in s 7(1) of the Industrial Relations Act 1979 (WA).
2. Eg *Cliffs WA Mining Co Pty Ltd v The Assoc of Architects, Engineers, Surveyors and Draughtsmen of Aust* (1978) 58 WAIG 1067; *O'Dwyer v Karratha Recreational Council (Inc)* (1981) 61 WAIG 850; *Amalgamated Metal Workers and Shipwrights Union WA v Bell Bros Pty Ltd* (1983) 63 WAIG 1547.
3. (1988) 68 WAIG 11.
4. Ibid, Olney J 20. For commentary: see MV Brown 'The Demise of Compensation as a remedy for Unfair Dismissal in WA: A Casualty of the Robe River Dispute' (1989) 19 UWAL Rev 29.

In those situations in which compensation had hitherto been awarded for unfair termination, *Pepler*'s case delivered a fatal blow. The blow meant that in cases where the dismissed employee was not seeking to return to his former employment for whatever reason, he or she would be left without a remedy. A slightly different situation arose where the dismissed employee desired to return to the former employment, but the Commission decided it was not desirable for industrial harmony in the workplace to grant such an order. This was precisely what occurred in *Pepler*'s case. Again, it was held that compensation could not be awarded.

2. The ghost of Pepler

The Commission dutifully accepted the ratio of *Pepler*'s case in unfair dismissal cases,[5] but not in redundancy cases. The Full Bench of the Commission sought to make a distinction between unfair dismissal cases and redundancy cases holding that it had jurisdiction to award redundancy payments to a dismissed employee in the absence of an order for reinstatement or re-employment.

An illustration of the Full Bench's approach is provided by *Adelaide Timber Company Pty Ltd v Western Australian Timber Industrial Union of Workers.*[6] An employee of 25 years' standing was dismissed on being given a week's pay in lieu of notice as required by the award. The union brought an action on the employee's behalf seeking redundancy payments; however, it did not seek reinstatement. The Full Bench upheld the decision of the Commission at first instance that there was jurisdiction and awarded 15 weeks' wages as a redundancy payment. Among the reasons given was that in the case of a redundancy the job disappeared and thus a redundancy payment was not to be categorised as 'compensation' for a 'dismissal'. A claim for an enhanced redundancy package between a union and an employer was an industrial matter. Thus it would be artificial to insist that such a claim could only be made while the contract of employment was in existence.

The Commission's approach in reading down *Pepler*, in effect confining it to unfair dismissal cases, was to continue for a full five years.[7] However, in *Kounis Metal Industries Pty Ltd v Transport Workers Union of Australia,*[8] the Appeal Court had the opportunity to pull the Commission into line. The issue in this case was whether a truck driver who had been dismissed in accordance with the provisions of the award was entitled to a redundancy payment. The Full Bench of the Commission had held that

5. Decisions of the Court are binding on the Commission.
6. (1990) 71 WAIG 325.
7. Cf *Tip Top Bakeries v FCU* (1990) 70 WAIG 289; *McLeans Consolidated Pty Ltd v United Timber Yards Employees' Union* (1990) 70 WAIG 3944.
8. (1992) 45 IR 392.

there was jurisdiction to grant such a payment. The Appeal Court, however, unanimously rejected the Full Bench's approach. Owen J (with whom the other members of the Court agreed) gave what has since become the locus classicus on this point:

> The judgments in *Pepler* suggest that the decision rests upon a point of principle, namely, that jurisdiction depends on the present or future existence of the employer/employee relationship. Unless, at the time when the application is made, the relationship actually exists, or is expected to come into existence in the future, or did exist and is to be restored, the key element of an 'industrial matter' is missing. The very language of the judgments carries this implication.[9]

The final nail in the coffin came in the case of *Coles Myer Ltd v Coppin.*[10] Three employees who had been made redundant sought increased redundancy payments but did not seek reinstatement or re-employment. The Appeal Court unanimously re-affirmed the principle in *Pepler*. Interestingly, the *Coles Myer* case was argued as a claim for denied contractual benefits under section 29(1)(b)(ii).[11] This case put it beyond doubt that *Pepler*'s case extends beyond unfair dismissals.

3. Attempts to exorcise the ghost of Pepler

In neither *Kounis Metal*[12] nor *Coles Myer*[13] was the Appeal Court asked to reconsider *Pepler*'s case and to overrule it; rather it was asked to distinguish it.

However, a full frontal attack on *Pepler* was made in *Federated Miscellaneous Workers Union of Australia v Nappy Happy Hire Pty Ltd.*[14] The respondent operated a nappy service involving the collection and laundering of soiled nappies and the supply on hire of clean nappies. Four workers, whose work involved the folding of freshly laundered nappies by hand, were dismissed by the respondent after some disagreements and their refusal to sign new contracts of employment. Shortly after the dismissals, the respondent disposed of its business to an unrelated company. The Commission, at first instance, found the dismissals 'harsh and unfair'. It also found the ghost of *Pepler* staring it menacingly in the face. As the Commission put it, re-employment of the four employees was 'simply not open to the Commission at all as the offending employer has gone out of

9. Ibid, 402-403. His Honour went on to list 5 propositions which point to the ratio of *Pepler*.
10. (1993) 49 IR 275.
11. At that time it was s 29(b)(ii). For commentary: see MV Brown 'Recovering Denied Contractual Benefits in the Industrial Relations Commission — A WA Experience' (1992) 22 UWAL Rev 418.
12. Supra n 8.
13. Supra n 10.
14. (1994) 56 IR 62.

business'.[15] Suprisingly, the Commission concluded that the only 'remedy' was compensation. It therefore ordered the respondent to pay an amount of $35 800 to each of two former employees and $44 300 to each of the other two. However, this was overturned by the Full Bench.

On appeal, the Appeal Court was called upon to overrule *Pepler* once and for all. However, although the Court accepted that 'cogent arguments' had been made in support of overruling *Pepler*'s case, it declined to do so. The following points may be extracted from the judgment:

- The arguments were not sufficiently persuasive to demonstrate that *Pepler*'s case was 'plainly wrong';
- *Pepler*'s case was decided after a careful and thorough examination of the issues;
- The case had become established law, having been followed in a considerable number of cases. Persons and organisations had arranged their affairs on the basis of it;
- There is a need for certainty in the law and the Appeal Court has to be cautious in overruling important and long-standing precedents.

Finally, all three judges of the Court observed that it was for Parliament to intervene if it so desired.[16] Thus, in the end, the ghost of *Pepler* roamed free. The gaping hole that the case exposed in the State's termination laws remained. Attention then turned to State Parliament.

PARLIAMENT'S RESPONSE

When the Court Government came to power it lost no time in implementing its employee relations agenda. Two principal pieces of legislation were introduced, namely, the Workplace Agreements Act 1993 (WA) and the Minimum Conditions of Employment Act 1993 (WA), both of which commenced on 1 December 1993. In addition, a number of consequential amendments were made to the Industrial Relations Act 1979 (WA).

When it came to the obstacle of *Pepler's* case, however, the new Government, like its Labor predecessor, displayed a lack of resolve. Section 23A was inserted into the Industrial Relations Act 1979 (WA). This stated that in unfair dismissal cases the Commission had power to order reinstatement or re-employment plus loss of earnings as an ancillary order, but *not* compensation.[17] Where, however, an employer failed to comply with an order for reinstatement or re-employment, the Commission might

15. Ibid, 65.
16. Even back in *Pepler*'s case, Kennedy J had sounded the clarion call. See also *Sakal v O'Connor & Sons Pty Ltd* (1995) 75 WAIG 1509.
17. This should be read together with s 23(3)(h).

upon further application revoke that order and grant compensation.

The Government's approach was curious indeed. This was especially true against the background of havoc which *Pepler*'s case was wreaking, and the fact that the same Parliament had cured one of the problems of *Pepler* in the Workplace Agreements Act 1993 (WA). Right from its inception, section 57(1)(d) of this Act had provided for the payment of compensation where reinstatement or re-employment was impracticable. The result was that the new system of workplace agreements was superior to the award system, at least in relation to the payment of compensation. But the situation also confirmed the views of the judges of the Appeal Court in the *Nappy Happy Hire* case that if Parliament had desired to change the law as stated in *Pepler*, it would have done so.

1. The impact of Labor's federal termination laws

In *Wylie v Carbide International Pty Ltd,*[18] the Industrial Relations Court of Australia held that the Industrial Relations Act 1979 (WA) did not provide an adequate alternative remedy within the meaning of s170EB of the Industrial Relations Act 1988 (Cth). This was because section 23A of the State Act, as it then stood, did not vest the Western Australian Industrial Relations Commission with a general power to award compensation where it was impracticable to order reinstatement or re-employment.

The effect of this case was that the Commission's unfair dismissal jurisdiction faced the real prospect of becoming redundant. It meant that residents of Western Australia who had unfair dismissal or redundancy claims were better off making their claims under the Federal scheme. This was not a situation which the Court Government could accept, given its seemingly endless wrangles with the then Federal Labor Government, particularly in the area of industrial relations.

2. State parliament vanquishes Pepler

In early 1995, a number of amendments were made to the Industrial Relations Act 1979 (WA). These took effect on 9 May 1995. First, section 7(1a) was inserted into the Act. This made it clear that the dismissal of an employee, or the refusal or failure of an employer to allow an employee a benefit under a contract of service, 'is and remains an industrial matter for the purposes of this Act even though their relationship as employee and employer has ended.'

The second effect of the 1995 amendments was that the Commission was vested with jurisdiction to order an employer to pay compensation to an employee where a dismissal was found to be 'harsh, oppressive or unfair'

18. (1994) 55 IR 326.

but where reinstatement or re-employment was impracticable. Such compensation was not to exceed six months' remuneration of the claimant.[19]

Thirdly, a set of provisions was inserted into the Act dealing specifically with termination issues. Section 23AA sets out the onus of proof in claims for unfair dismissal. Section 29(2) imposes a time limit of 28 days within which a claim for unfair dismissal must be referred to the Commission. However, and this is particularly important, subsections (3) and (4) give the Commission the discretion to extend the time where it is satisfied that, at the time of making the application to the Commission, an application has also been made under the Federal termination laws and the extension of time is necessary to ensure that a remedy in respect of the dismissal is available under the State legislation. The State Parliament also made amendments to the termination provisions of the Workplace Agreements Act 1993 (WA).[20]

A number of observations may now be made. By these amendments State Parliament finally vanquished the ghost of *Pepler*. For the first time, the termination laws of the State became uniform under both the workplace agreements system and under the award system. Furthermore, the amendments were clearly designed to overcome the decision of the Industrial Relations Court of Australia in *Wylie v Carbide International Pty Ltd.*[21]

Great relief must have been felt that the State Parliament had at long last addressed both the jurisdictional difficulties of *Pepler* and the inadequacy of the State legislation exposed by the Industrial Relations Court of Australia. However, the relief was short-lived. In what must have been a telling blow to the State authorities, the Industrial Relations Court of Australia held in *Willcocks v Makfren Holdings Pty Ltd*[22] that despite the recent amendments, the Industrial Relations Act 1979 (WA) did not provide an adequate alternative remedy within the meaning of the Federal legislation as it then stood.

The Industrial Relations Court of Australia based its decision mainly on the following grounds:

(i) The requirement in section 29(3) that the Western Australian Industrial Relations Commission be satisfied that an extension of time is necessary to ensure that a remedy is available to the applicant under the State Act (where an application has been made under the Federal legislation) is discretionary. Therefore, the applicant does not have an entitlement to bring a claim.

(ii) The State legislation does *not* stipulate that employment is not to be

19. Ss 23A(1)(ba), 23A(1a), 23A(4).
20. See ss 51, 56, 57.
21. Supra n 18.
22. (1995) 61 IR 420.

terminated for reasons related to the employee's conduct or performance without first giving the employee an opportunity to respond to the allegations. The requirement that a dismissed employee show that the dismissal was harsh, oppressive or unfair falls short of the requirements of Article 7 of the Termination of Employment Convention.

(iii) Section 23AA(1) of the State legislation which requires the employer to establish a ground on which the Commission could find that the dismissal was justified does not satisfy the requirement of Article 9(2) of the Convention regarding onus of proof.

(iv) The State legislation does not provide an employee with an entitlement to a reasonable period of notice or compensation in lieu (unless the employee is guilty of 'serious misconduct') as required by Article 11 of the Convention.

Based on the reasoning in *Willcocks,*[23] it would seem that the termination provisions under the Workplace Agreements Act 1993 (WA) did not provide an adequate alternative remedy either. However, as previously indicated, the 1995 amendments to the Workplace Agreements Act made the termination provisions of both State and Federal systems the same.

THE NIGHTMARE CONTINUES

In *Nappy Happy Hire*,[24] all the judges of the Appeal Court stressed the need for certainty in the law of employment termination. Members of the Commission, employees and employers, not to mention the State Parliament, would surely share this view. Unfortunately the effect of the Federal cases had been to continue the uncertainty in the State termination laws despite the attempts made by State Parliament to achieve the opposite result.

The two Federal cases discussed above were decided under section 170EB of the Industrial Relations Act 1988 (Cth) as it then stood.[25] However, the Federal termination laws were subsequently amended by the

23. Ibid.

24. Supra n 14.

25. See P Moorhouse & P Punch *Termination of Employment — The New Federal Law* (Sydney: CCH, 1994); RC McCallum & MJ Pittard *Australian Labour Law: Cases and Materials* 3rd edn (Sydney: Butterworths, 1995) ch 11; B Creighton & A Stewart *Labour Law* 2nd edn (Sydney: Federation Press, 1994) ch 9; P Punch *Australian Industrial Law* (Sydney: CCH, 1995) Pt 5; R McCallum, G McCarry & P Ronfeldt (eds) *Employment Security* (Sydney: Federation Press, 1994); MJ Pittard 'International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment' (1994) 7 AJLL 170; RC McCallum, 'The Internationalisation of Australian Industrial Law: The Industrial Relations Reform Act 1993' (1994) 16 Sydney L Rev 122.

Labor Government. An application alleging unlawful termination had to be lodged within 14 days with the Australian Industrial Relations Commission, which application was to be treated as a request for the Commission to attempt to settle the matter by conciliation. The application could be lodged by the dismissed employee or by his or her trade union.[26] If the Commission decided that the matter could not be settled within a reasonable period by means of conciliation it was required to inform the parties accordingly. The parties could then elect to have the matter dealt with by arbitration. (The parties also had the right to elect to go to consent arbitration even before conciliation had been completed.)[27] If a matter had not been satisfactorily resolved by conciliation, and if the party did not elect to have it dealt with by consent arbitration, then the Commission was required to refer the matter to the Registrar of the Industrial Relations Court of Australia, accompanied by a certificate stating that the Commission had been unable to settle the matter.[28]

Section 170ED(4) required the Court to decline to consider or determine an application if it was satisfied that the dismissed employee was 'entitled to apply for an alternative remedy' in respect of the termination under a law of the Commonwealth, a State or a Territory that satisfied 'the requirements of Articles 4 to 11 of the Termination of Employment Convention'. Without attempting to limit the circumstances in which such a law would be taken to satisfy those requirements, subsection (5) stated that where a body was expressly required to give effect to Articles 4 to 11 of the Convention, and it had sufficient jurisdiction and appropriate powers to do so, the law was to be taken to satisfy the requirements.

These changes were made to save State jurisdictions which had in substance complied with the Federal provisions. Before the changes, most State jurisdictions had been found to have fallen foul of those provisions.[29] In *Victoria v the Commonwealth,*[30] a challenge by the States of Victoria, South Australia and Western Australia to the termination provisions and other provisions of the Industrial Relations Act 1988 (Cth) was largely unsuccessful. But the High Court struck down two termination provisions, namely sections 170DE(2) and 170EDA(1)(b), which purported to add a 'harsh, unjust or unreasonable' test to the grounds for unlawful termination

26. S 170EA.
27. S 170EB(4) made it clear that the Commission's functions under the section were additional to its other functions and that therefore the Commission was not subject to the implied limitations arising from the existence of any of its other functions.
28. S 170ED.
29. Eg Tasmania: *Medhurst v Pallett Industries* (1994) 58 IR 335; NSW: *Liddell v Lembke* (1994) 56 IR 447; SA: *Fryar v Systems Services Pty Ltd* (1995) 60 IR 68. See also J Catanzariti 'Dismissed Employees: When a State's Remedies Aren't Adequate' (1995) 33(3) Law Soc Journ 24.
30. (1996) 70 ALJR 680.

of employment, as not being validly based on the external affairs power. The High Court also held that to the extent that certain provisons of the Act could affect employees of the higher echelons of State governments, those provisions were invalid. This is because they contravened the implied prohibition on Federal legislation discriminating against the States or affecting their ability to function as such. Those provisions were, therefore, to be read down so as not to have that effect.[31]

In Western Australia, however, the uncertainty continued. Based on the reasoning in *Willcocks'* case, it would appear that the State's termination laws still did not provide an 'alternative remedy' within the meaning of the amended Federal provisions. In particular, procedural fairness, which was a central tenet of the Federal provisions, was conspicuous by its absence from the State legislation.[32]

IS THE NIGHTMARE NOW OVER?

A blanket of uncertainty hung over Western Australia's termination laws while Labor's Federal termination laws were in existence. Two options were open to State Parliament. One was to overhaul the State's termination laws in order to bring them into line with the requirements of the Federal provisions. The other was to do nothing with the result that the State's termination laws would effectively be rendered redundant, as applicants from Western Australia by-passed the State system and made their claims under the Federal scheme.

Whilst State Parliament was considering its options,[33] the Howard Government came to power. As a result the entire landscape changed. The

31. As a result of the decision, appeals were allowed in termination claims which had been found unlawful based on the sections declared invalid: eg *System Services Pty Ltd v N Fryar* (1996) 3 AILR, 357.

32. See Industrial Relations Act 1988 (Cth) s 170DC. In *Nicholson v Heaven & Earth Gallery Pty Ltd* (1994) 57 IR 50, 60, Wilcox CJ of the Industrial Relations Court of Australia remarked: 'Section 170DC carries into Australian labour law a fundamental component of the concept known to lawyers as "natural justice" or, more recently, "procedural fairness". The relevant principle is that a person should not exercise legal power over another, to that person's disadvantage and for a reason personal to him or her, without first affording the affected person an opportunity to present a case. The principle is well-established in public administrative law. It was accepted into international labour law when Art 7 was inserted in the Termination of Employment Convention. S 170DC is directly modelled on Art 7. The principle is, I believe, well understood in the community. It represents part of what Australians call "fair go". In the context of s170DC, it is not to be treated lightly. The employee is to be given the opportunity to defend himself or herself "against the allegations made"; that is, the particular allegations of misconduct or poor performance that are putting the employee's job at risk. S 170DC(a) is not satisfied by a mere exhortation to improve'.

33. Despite calls by many for the State Parliament to act quickly to make the State termination

Workplace Relations Act 1996 (Cth) marked a radical departure from the approach taken by its predecessor. The policy underpinning the new Act is encapsulated by this statement:

> The Government is committed to introducing a new unfair dismissal scheme which provides employees with access to a fair and simple process of appeal against dismissal based on the principle of a 'fair go all round'; is fair to both employee and employer; ensures legal costs are minimised and discourages frivolous and malicious claims; and is in accord with Australia's international obligations.[34]

In light of this, section 170CE of the Workplace Relations Act 1996 (Cth) provides that an employee whose employment has been terminated by his or her employer, or whose employment is proposed to be terminated, may apply to the Australian Industrial Relations Commission for relief. The Commission is required to attempt to settle the matter by conciliation. Once the Commission is satisfied that all reasonable attempts have been made to settle the matter by conciliation and that such attempts have been, or are likely to be, unsuccessful, it must issue a certificate to that effect, specifying the grounds in respect of which it has formed the opinion. The Commission must then indicate to the parties its assessment of the merits of the application and, if the Commission thinks fit, it may recommend that the applicant elect not to pursue one or more grounds of the application.[35] Within seven days of a certificate being issued, the applicant must elect either (i) to have the matter dealt with by arbitration by the Commission to determine whether the termination was harsh, unjust or unreasonable or (ii) to not proceed. Where, in addition to the ground that the termination was harsh, unjust or unreasonable, the certificate has identified a ground or grounds of alleged contravention of the Act, the applicant may also opt to commence proceedings in the Federal Court.[36]

In sharp contrast to the approach of the Labor Government, the new Federal provisions relating to harsh, unjust or unreasonable termination do not have general application. Rather they are confined to the traditional Federal jurisdiction. Thus applications may only be made by employees covered by Federal awards or agreements, Commonwealth public sector employees, and employees of the Territories.[37]

The consequence is that employees in Western Australia (excluding

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laws mirror those of the Federal government, it was recommended to the State government not to act until the Federal provisions became better understood and their limits more fully defined: see GL Fielding *Review of WA Labour Relations Legislation: A Report to the Minister for Labour Relations* (Perth, July 1995) 104, recommendation 31.

34. Dept of Industrial Relations (Cth) *Changes in Federal Workplace Relations Law: Legislation Guide* (Canberra, Dec 1996) 39.
35. S 170CF.
36. S 170CFA
37. Ss 170CB(1)-(2), 152(1A).

Federal government employees or those on Federal awards in the State) will now have no choice but to pursue their claims for unfair dismissal through the avenues available in the State — that is, the Western Australian Industrial Relations Commission or a State court of competent jurisdiction.[38]

In the final analysis, it would seem that the uncertainty which has enveloped the State's termination laws for so long has at last been lifted. It was lifted not by any action of State Parliament, but by the new Federal legislation enacted by the Howard Government. Nevertheless the State Parliament will need to make amendments to the State's termination laws to remove the references to the now repealed Federal provisions.

38. Note, however, s170CB(3). There are transitional provisions in Part 2 which apply to terminations lodged under the previous provisions. A former Trades and Labor Council officer who took his dismissal to the Federal Commission on 31 December 1996 found that that avenue no longer existed: see L Betti 'Sacking Claim Hits TLC' *West Australian* 15 Jan 1997, 35.