1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INDUSTRIAL RELATIONS AMENDMENT BILL (No.2) 1994

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

**(Circulated by authority of
the Minister for Industrial Relations,
the Hon Laurie Brereton MP)**

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OUTLINE

Government amendments of the *Industrial Relations Amendment Bill (No.2) 1994*

These amendments will alter certain aspects of the provisions in the *Industrial Relations Act 1988* (IR Act) about termination of employment, namely:

- the range of employees covered by those provisions;
- the remedies available for a breach of those provisions;
- the onus of proof;
- representation of employers in proceedings.

The amendments will confine those provisions to employees who are either employed under an award (federal or State) or have a base wage of no more than $60,000 per year (the bill allows for regulations to provide for this amount to be indexed annually to reflect increases in average weekly earnings). This restriction will not affect applications made to the Court before the bill is enacted.

There will be a broader power to make regulations excluding categories of employees from the provisions about termination of employment (as allowed by the relevant ILO Convention).

Compensation, in respect of a dismissal, that is awarded instead of reinstatement is to be limited to an amount not exceeding six months' remuneration. For non-award employees, the compensation will be limited to the lower of either six months' remuneration or $30,000. The bill also allows for regulations to provide for this amount to be indexed annually to reflect increases in average weekly earnings.

The onus of proof in Court proceedings alleging unlawful dismissal is to be altered. The employer will bear the onus of establishing that the dismissal was for a valid reason. The applicant will have the onus of establishing any other elements of the case.

Employers will be given the right to be represented (in proceedings before the Industrial Relations Court about termination of employment) by any association of employers to which they belong. At present, only registered federal organisations can represent their members in these proceedings, although any association of employers can represent its members in proceedings before the Australian Industrial Relations Commission..

FINANCIAL IMPACT STATEMENT

The amendments will have no significant impact on Government expenditure.

Notes on the proposed new clauses of the bill

New clause 4A

1. This amendment broadens the power to make regulations excluding employees from the provisions about termination of employment. The existing power, in section 170CC, is limited to exclusions permitted by one specified paragraph of the relevant ILO Convention (paragraph 2 of Article 2). The amendment will allow exclusions permitted by paragraph 4 or paragraph 5 of that Article of the Convention.

2. Paragraph 4 allows each country to exclude "categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention". Paragraph 5 allows each country to exclude "other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them". (The full text of the ILO Convention is set out at Schedule 10 to the IR Act.)

Paragraph (b)

3. The new paragraph (b) repeats the substance of a provision already in the Act. This is necessary because the original provision has been redrafted to allow for the broader regulation-making power. Paragraph (b) gives effect to a requirement of the ILO Convention. Because that requirement is only relevant to one paragraph of the ILO Convention (paragraph 2 of Article 2), paragraph (b) refers only to an exclusion permitted by that paragraph of the Convention.

New clause 4B

4. New clause 4B of the bill will insert a new section 170CD in the IR Act. This new section will exclude certain employees from "the following Subdivisions" of Division 3 of Part VIA of the Act, ie, it will exclude these employees from the substantive provisions about termination of employment.

5. The employees excluded are those who:

- are not employed under award conditions [this is explained below]; and

- received wages of more than $60,000 per year, or a higher amount reflecting indexation for increases in average weekly earnings [wages, in this context, do not include penalty payments or overtime : this is the effect of the definition of "relevant wages" in proposed subsection (4)].

6. There is provision for the ceiling of $60,000 (or a higher indexed amount) to apply pro rata if the employee had not been employed by the employer for a full 12 months. This is the effect of the formula in proposed paragraph (1)(b).

7. Indexation of the amount of $60,000 is explained in the notes below on new clause 4E.

8. This new restriction will not affect applications made to the Court before this amending bill is enacted. They will proceed under the old law. This is the effect of the definition of "termination of employment" in proposed subsection (4).

"award conditions"

9. An employee is "employed under award conditions" if either a federal award or a State award regulates wages and conditions of employment of that employee [this is the effect of proposed subsection (3) and the definition of "relevant award" in proposed subsection (4)].

10. The word "award" includes a certified agreement or enterprise flexibility agreement in force under the IR Act, even when the period specified in the agreement has expired. This is the effect of the existing definition of "award" in subsection 4(1) of the IR Act.

11. It is not necessary that all the conditions of employment be regulated by an award.

12. An award will only be relevant if it binds the employer in respect of the particular employee.

New clause 4C

13. This new clause will insert a new section 170EDA in the IR Act.

14. The new section will alter the existing provision for onus of proof when an application is made to the Court alleging unlawful dismissal. The existing section 170EE places the onus entirely on the employer (that section will be repealed by proposed clause 4D of these amendments). The new section 170EDA will place an onus on the employer to prove particular specified matters (when they are raised by the application).

15. For other aspects of the case, the applicant will bear the usual onus of having to establish their case.

Subsection (1)

16. The existing subsection 170DE(1) of the IR Act provides that an employer must not terminate employment unless there is a valid reason or reasons:

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

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

17. The existing subsection 170DE(2) provides that a reason is not valid if the termination is harsh, unjust or unreasonable.

18. The effect of proposed subsection 170EDA(1) - to be inserted by this proposed new clause of the bill - will be as follows. If an applicant to the Court alleges that the termination contravened subsection 170DE(1), the employer will have to prove that the termination was for a valid reason or reasons either connected with the employee's capacity or conduct or based on operational requirements. However, it will be unnecessary for the employer to show that the termination was not harsh, unjust or unreasonable : this is the effect of the inclusion in proposed paragraph 170EDA(1)(a) of the words "apart from subsection 170DE(2)". Proposed paragraph 170EDA(1)(b) confirms that the onus is on the applicant to establish that the termination was harsh, unjust or unreasonable (if the applicant is relying on this ground).

Subsection (2)

19. The existing subsection 170DF(1) of the IR Act provides that an employer must not terminate employment for any one or more of the reasons referred to in that subsection (or for reasons including one or more of the reasons referred to in that subsection).

20. The effect of proposed subsection 170EDA(2) - to be inserted by this proposed new clause of the bill - will be as follows. An applicant to the Court can allege that the termination contravened 170DF(1), by alleging that the termination was for a prohibited reason; the application would specify the particular reason alleged. The employer would then bear the onus of proving that the termination was not for that reason.

21. The existing subsections 170DF(2) and (3) of the Act provide exceptions from the general prohibition on terminating employment for a prohibited reason. These exceptions apply only to reasons specified in one paragraph of the existing subsection 170DF(1). The proposed new provisions preserve these exceptions, without altering them. This is the effect of proposed paragraph 170EDA(2)(d). That paragraph places on the employer the onus of proving one of these exceptions (if the employer relies on one of the exceptions). The paragraph refers to the employer proving that the reason for the dismissal was a reason "to which subsection 170DF(2) or (3) applied". Because those subsections only apply to reasons specified in paragraph 170DF(1)(f), this new provision merely retains the existing effect of those subsections (now within the new framework about onus of proof).

22. For example, if an application alleges that the employee was dismissed because of physical disability (one of the prohibited reasons listed in the existing paragraph 170DF(1)(f) of the Act), the employer will have to prove either:

- that this was not a reason for the dismissal; or

- that this reason was based on the inherent requirements of the job [this is the exception provided by the existing subsection 170DF(2)].

"prove"

23. The references to the employer (or the applicant) having to "prove" the particular specified aspects of their case refer to proving on the balance of probabilities.

Subsection (3)

24. This change will apply to all cases, except those already decided by the Court before this amending bill is enacted.

New clause 4D

25. This clause will repeal the existing section 170EE of the IR Act and substitute a new section 170EE.

26. The new section 170EE sets out the remedies the Court can grant when it decides there has been an unlawful dismissal. This new section expressly places limits on the amount of compensation that can be ordered. The new section sets out available remedies more specifically than the section it replaces.

27. In particular, the new section clarifies that reinstatement is the preferred remedy. It does this by allowing the Court to choose compensation instead of reinstatement only when the Court thinks that reinstatement is "impracticable". Whether this condition is satisfied will be for the Court to decide within its discretion (the statutory test is that the Court "thinks" that reinstatement is impracticable). In considering whether this condition is met, it is expected that the Court will consider the surrounding circumstances, such as the likely effect on the working relationship and the industrial consequences[1].

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[1] For example, court decisions have established that reinstatement should not be ordered when it would in practice be useless to try to re-establish the employer/employee relationship. This has been considered particularly important when the job involves a high degree of confidentiality and personal contact with the employer. In addition, the High Court has observed that there will be many cases where the working relationship of employer and employee is so close that to impose that relationship would be destructive of industrial harmony [*Slonim* v *Fellows* (1984) 154 CLR 505]. This statutory test of "impracticable", in an industrial relations context, is not intended to displace these settled principles.

Subsection (1)

28. The court can order reinstatement (except for a failure to give the employee adequate notice or to notify the CES : ie, a contravention of section 170DB or 170DD). Reinstatement can be either to the same position or to another position - if to another position, it is to be on terms and conditions no less favourable than those on which the employee was employed.

29. If the Court orders reinstatement, it can also make any order to maintain the continuity of employment.

30. If the Court orders reinstatement, it can also order the employer to pay to the employee the remuneration lost because of the termination. No other order for compensation for the dismissal will be available in this situation (although the employee will be entitled to any legal entitlements - such as payment for accrued leave - in addition to compensation).

Subsections (2), (3) and (4)

31. If the Court thinks reinstatement is impracticable, it can order compensation (the word "impracticable" is explained above).

32. This compensation cannot exceed six months' remuneration. It also cannot exceed $30,000, if the employee is not "employed under award conditions" (this phrase is explained in the notes above on clause 4B). Therefore, for non-award employees the compensation cannot exceed either six months remuneration or $30,000, whichever is the lower amount. The amount of $30,000 can be indexed, by regulation, as explained below in the notes on new clause 4E.

33. Subject to these limits, the new subsection (3) expressly provides for the Court to have regard to the remuneration the employee would have received had the employer not terminated the employment. This does not exclude any other factor relevant to the Court's decision about the amount of compensation.

Subsection (5)

34. For the employer's failure to give the required length of notice, the only compensation is the amount the employer should have paid in lieu of notice.

Subsection (6)

35. This repeats a provision of the original section 170EE that is to be replaced by this new section. The intention is that the Court be able to exercise its ordinary power to make an interim or interlocutory order, after an application has been made to it under section 170EA for a remedy in respect of termination of employment. Without this provision, this ordinary power to make an interim or interlocutory order might be unintentionally limited by provisions in this section (about the orders the Court can make in final judgment) and by the provisions of section 170EC (about referring a matter to the Commission before the Court considers the merits of the application).

Subsection (7)

36. This is explained in paragraphs 9-12 above.

Subsection (8)

37. This new section - including the limits on damages - will apply to all cases except those which the Court has decided before this bill is enacted.

New clause 4E

38. This clause will insert a new Subdivision CA, "Regulations may prescribe formula for indexing certain amounts", comprising new section 170EI, "Regulations may prescribe formula for indexation". This relates to the amounts referred to in new subsection 170CD(2), for the purpose of excluding certain employees from the termination provisions generally, and in new subsection 170EE(4), for the purpose of setting a cap to the amount of compensation payable (where reinstatement is impracticable).

39. Both of these amounts are to be adjusted automatically, on an annual basis, in accordance with increases in the average total weekly earnings (seasonally adjusted) of all employees in Australia. New section 170EI will specifically provide a power to make regulations providing for this. The regulations will provide details of a mechanism, based on the statistical series published by the Australian Statistician.

New clause 4F

40. This clause will insert a new section 170JEA into the IR Act to provide for representation of employers in proceedings about termination of employment. The amendment will apply to proceedings before the Industrial Relations Court of Australia or the Australian Industrial Relations Commission. This will supplement existing provisions (in sections 42 and 469), which allow an employer to be represented by a member, officer or employee of a registered organisation to which the employer belongs. The amendment will extend this right to include other associations of employers (ie, associations not registered as federal organisations). These associations are already entitled (by regulation) to appear before the Australian Industrial Relations Commission.

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