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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

INDUSTRIAL RELATIONS AMENDMENT BILL (No.2) 1994

EXPLANATORY MEMORANDUM

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

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INDUSTRIAL RELATIONS AMENDMENT BILL (No.2) 1994

OUTLINE

This bill will amend the *Industrial Relations Act 1988*. The amendments are about two separate topics:

- age discrimination; and
- termination of employment.

Age discrimination

The bill will partially postpone, for three years, provisions of the IR Act that prevent age discrimination in awards and agreements. The postponement will be confined to wage rates which discriminate because an employee has not reached a particular age. The purpose is to allow another three years for the transition from junior wage rates to wage rates that are based on skill and competency rather than on age.

The relevant provisions of the bill are summarised at page 2 of this Memorandum.

Termination of employment

The bill will alter certain aspects of the provisions of the 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; and
- representation of employers in proceedings.

The relevant provisions of the bill are summarised at page 3 of this Memorandum.

FINANCIAL IMPACT STATEMENT

The bill will have no significant impact on Commonwealth expenditure.

SUMMARY

Age discrimination [clauses 3, 4, 11 and 12]

The bill restricts - for three years - the effect of provisions of the IR Act that relate to age discrimination in awards and agreements. These provisions of the IR Act are:

- section 3 [the objects of the Act];
- section 150A [review of awards by the Commission];
- section 170MD [certified agreements];
- section 170ND [enterprise flexibility agreements].

In each of these provisions of the IR Act, the reference to discrimination because of age is to be restricted so that it does not include rates of wages that discriminate because an employee has not reached a particular age. In substance, this aspect of the existing provisions is to be postponed.

The postponement will be until 22 June 1997. This is the date by which the Australian Industrial Relations Commission is required to complete its first three-year cycle of reviewing all awards.

Review of awards

The postponement will exclude junior wage rates from this first full cycle of the review of all awards *(clause 4)*.

Certified agreements and Enterprise flexibility agreements

The postponement will also allow agreements containing junior wage rates to continue to be certified or approved by the Australian Industrial Relations Commission before 22 June 1997 *(clauses 11 and 12)*.

Objects of Act

The anti-discrimination objects of the IR Act will not prevent the Commission setting junior wage rates during this three-year postponement *(clause 3)*.

SUMMARY

Termination of employment [clauses 5, 6, 7, 8, 9 and 10]

Range of employees covered

The provisions in the IR Act about termination of employment will be confined 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 (this amount will 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. *(Clause 6).*

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). *(Clause 5).*

Remedies

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 (this amount will be indexed annually to reflect increases in average weekly earnings). The bill clarifies that reinstatement is the preferred remedy (when practicable). Reinstatement can be accompanied by an order for payment of the remuneration lost. *(Clause 8).*

Onus of proof

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. *(Clause 7).*

Representation of employers

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. *(Clause 10).*

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Notes on clauses

Clause 1: Short title, etc

1.1 This is a formal provision.

Clause 2: Commencement

2.1 The bill will commence on the day on which it receives Royal Assent.

2.2 Subclause 2(2) is a formal provision which allows for the possibility of this bill being enacted before one of the provisions amended by this bill is itself added to the IR Act. Clause 4 of the bill amends a section added to the IR Act by an earlier provision that had not yet commenced at the time this bill was introduced in the Parliament. As a drafting formality, the amendment cannot commence until the section being amended has actually been inserted in the IR Act. The form in which subclause 2(2) is drafted allows for the effect of existing legislation, as explained in the following paragraph.

2.3 Clause 4 of the bill amends section 150A of the IR Act. Section 150A will be added to the IR Act, on 22 June 1994, by section 17 of the *Industrial Relations Reform Act 1993* (the Reform Act). Section 17 of the Reform Act will commence on 22 June 1994 because it will not be proclaimed earlier (the effect of subsection 2(7) of the Reform Act is that section 17 of that Act commences six months after that Act received Royal Assent, unless it is proclaimed to commence earlier : the Reform Act received Royal Assent on 22 December 1993).

Clause 3: Insertion of new section 90AB: Discrimination because of age

3.1 Clause 3 will insert a new section 90AB in the IR Act. This new section will qualify the effect of existing sections 90 and 90AA of the IR Act. The relevant effect of sections 90 and 90AA is that they require the Australian Industrial Relations Commission (the Commission) to perform its functions in a way that furthers the objects of the IR Act. Because of paragraph 3(g) of the IR Act, part of one object of that Act is to help prevent and eliminate discrimination on the basis of age. The new section 90AB will ensure that this will not prevent the Commission prescribing junior wage rates before 22 June 1997. No other aspect of the "anti-discrimination" object of the IR Act will be affected.

Clause 4: Commission to review awards

4.1 This clause amends section 150A of the IR Act. Section 150A requires the Commission to review all awards every 3 years. Paragraph 150A(2)(b) requires that, as one aspect of this review, the Commission take steps to remedy award provisions which discriminate against an employee because of age. This amendment to section 150A will exclude from this review process any provision relating to rates of wages that discriminates because the employee has not reached a particular age. This exclusion will only apply until 22 June 1997; this will be the end of the first 3-year cycle during which all awards are to be reviewed.

Clause 5: Regulations may exclude employees as permitted by Convention

5.1 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.

5.2 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)

5.3 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.

Clause 6: Insertion of new section 170CD: Exclusion of employees not employed under award conditions whose wages exceed a particular amount

6.1 Clause 6 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.

6.2 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)].

6.3 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).

6.4 Indexation of the amount of $60,000 is explained in the notes below on clause 9.

6.5 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"

6.6 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)].

6.7 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.

6.8 It is not necessary that <u>all</u> the conditions of employment be regulated by an award.

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

Clause 7: Insertion of new section 170EDA: Onus of proof

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

7.2 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 clause 8 of this bill). The new section 170EDA will place an onus on the employer to prove particular specified matters (when they are raised by the application).

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

Subsection (1)

7.4 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.

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

7.6 The effect of proposed subsection 170EDA(1) - to be inserted by this 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)

7.7 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).

7.8 The effect of proposed subsection 170EDA(2) - to be inserted by this 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.

7.9 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).

7.10 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"

7.11 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)

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

Clause 8: Repeal of section 170EE and substitution of new section 170EE: Remedies the Court may grant

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

8.2 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.

8.3 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].

Subsection (1)

8.4 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.

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

8.6 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)

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

8.8 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 paragraphs *6.6* to *6.9* above). Therefore, for non-award employees the compensation cannot exceed either six months remuneration or

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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.

$30,000, whichever is the lower amount. The amount of $30,000 can be indexed, by regulation, as explained below in the notes on clause 9.

8.9 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)

8.10 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)

8.11 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)

8.12 This is explained in paragraphs *6.6* to *6.9* above.

Subsection (8)

8.13 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.

Clause 9: Insertion of new Subdivision CA : Regulations may prescribe formula for indexing certain amounts

9.1 This clause will insert a new Subdivision CA 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).

9.2 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.

Clause 10: Insertion of new section 170JEA: Representation of employers

10.1 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.

Clause 11: When Commission to refuse to certify agreements

11.1 Clause 11 amends section 170MD of the IR Act. Section 170MD specifies the circumstances in which the Commission is to certify an agreement made under Division 2 of Part VIB of the IR Act (this Division is the "certified agreements" Division of the "bargaining" Part of the Act). Subsection 170MD(5) requires that the Commission refuse to certify an agreement if it thinks that a provision of the agreement discriminates against an employee because of age. Clause 11 will qualify this. Before 22 June 1997, the Commission will not be required to refuse to certify merely because the agreement relates to rates of wages that discriminate because an employee has not reached any particular age.

Clause 12: When Commission to refuse to approve implementation of agreement

12.1 This clause makes, to the "enterprise flexibility agreement" Division, the same change that clause 11 makes for the "certified agreement" Division. The effect of this is explained in the note above on clause 11.

12.2 Clause 12 refers to subsection 170ND(10) of the IR Act. The explanation of subsection 170MD(5) - in paragraph *11.1* above - applies equally to subsection 170ND(10), except that subsection 170ND(10) applies to enterprise flexibility agreements rather than certified agreements.

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