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6 February 2003

Mr John Carter
Secretary
Senate Employment, Workplace Relations and Education Committee
Parliament House
Canberra ACT 2600

Dear Mr Carter

Inquiry into the Provisions of the Workplace Relations Amendment (Termination of Employment) Bill 2002

Thank you for the opportunity to make a submission on the Workplace Relations Amendment (Termination of Employment) Bill 2002 (the Bill). My comments are limited to the constitutional issues, including the effect of the Bill on the Australian federal system. Further material can be found in my book *Labour Law and the Constitution* (Federation Press, 1998). I make no submission on the substantive content on the Bill, including on the appropriateness of the amendments to the unjust dismissal regime.

Policy Factors and the 'Federal Balance'

This Bill would greatly expand the coverage of the existing federal regime that regulates the harsh, unjust or unreasonable dismissal of employees, as set out in Part VIA, Division 3 of the *Workplace Relations Act 1996* (Cth) (the Act). In doing so, the Bill would displace State and Territory law. This might be seen as altering the 'federal balance' or impinging upon State's rights (as indeed might any new legislation that conflicts with an existing State statute).

However, it is clearly the responsibility of the federal Parliament to enact laws for national needs. Our economy does not consist of discreet and insular sectors of commerce within each

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State or even within Australia, but exists within a world of global markets that creates competition and interdependence with the economies of other nations. In order to compete effectively on a global scale given our small population and geographical location, Australia requires national laws on a issues ranging from industrial relations to consumer protection and trade practices. Australian businesses operating in different States are less likely to be competitive if they must comply with different, and possibly conflicting, standards across our nine law-making jurisdictions. It can also be more difficult and costly for employees to enforce their rights where more than one set of laws apply (particularly where, as a result of the High Court decision in *Re Wakim; Ex parte McNally (Cross-vesting Case)* (1999) 198 CLR 511, their claims under federal and State law might not be heard in the same federal court). As a matter of policy, a national unfair dismissal regime, or indeed a national industrial relations regime, can be justified. This has been accepted in the analogous area of corporations law, where a national scheme has operated for over a decade. Furthermore, if there is to be a national scheme, it makes sense for this to be the only scheme to apply to a particular claim. Hence, any national scheme should be exclusive.

In addition, I cannot see any reason of principle why the federal Parliament should not rely upon its full range of constitutional powers to regulate industrial relations matters (although it may wish instead to create a national co-operative scheme with the States and territories). There is no reason why the federal Parliament should be limited to using its power in section 51(xxxv) of the Constitution over 'Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'. In seeking to enact a national regime, it makes sense for the Commonwealth to rely upon the full range of its legislative powers from that over external affairs to that over corporations.

What Does the Bill do?

The Bill would expand the reach of federal unfair dismissal laws in two ways. First, it would extend the federal scheme to all employees employed by a constitutional corporation (that is, as defined in section 4 of the Act, a foreign, trading or financial corporation as listed in section 51(xx) of the Constitution, a body corporate incorporated in a Territory and a Commonwealth authority).

Section 170CB of the Act currently provides:

170CB Application

- (1) Subdivision B applies, in so far as it relates to an application to the Commission for relief in relation to the termination of employment of an employee on the ground that that termination was harsh, unjust or unreasonable, if the employee concerned was, before the termination:
 - (a) a Commonwealth public sector employee; or
 - (b) a Territory employee; or
 - (c) a Federal award employee who was employed by a constitutional corporation; or
 - (d) a Federal award employee who was a waterside worker, maritime employee or flight crew officer, employed in the course of, or in relation to, trade or commerce between Australia and a place outside Australia, between the States, within a Territory, between a State and a Territory, or between 2 Territories.

Item 3 of the Bill would omit the words ‘a Federal award employee’ and substitute ‘an employee’. The effect would be that subdivision B (which deals with applications to the Australian Industrial Relations Commission for relief in respect of termination of employment) would extend ‘to an employee who was employed by a constitutional corporation’. As para 31 of the Explanatory Memorandum to the Bill makes clear, this would increase the coverage of the federal unfair dismissal regime from 3.9 to 6.8 million employees (or from 49% to 85% of employees). This increase is due to the large number of people who work in constitutional corporations but are not federal award employees.

Second, the Bill would make this expanded unjust dismissal regime exclusive in the sense that it would prevent an employee covered by the federal regime from accessing remedies under a State or Territory unfair dismissal regime. It would not, however, prevent access to other State and Territory laws, such as those dealing with discrimination on the basis of sex or race in employment.

Section 170HA of the Act currently provides:

170HA Division not to limit other rights

Subject only to the operation of sections 170HB and 170HC, the provisions of this Division are not intended to limit any rights that a person or trade union may have to appeal against termination of employment or to secure the making of awards or orders relating to termination of employment.

Item 7 of the Bill would repeal this section and replace it with the following provision to the opposite effect:

170HA Relationship with State and Territory termination of employment laws etc.

Intention to exclude State and Territory harsh etc. termination laws

(1) It is the intention of the Parliament that this Division apply to the exclusion of a provision (the *State or Territory provision*) of a law of a State or Territory if:

- (a) the main purpose of the State or Territory law is to regulate workplace relations, employee relations or industrial relations; and
- (b) the State or Territory provision provides rights or remedies in respect of harsh, unjust or unreasonable termination of employment (however described); and
- (c) the State or Territory provision applies to an employee referred to in subsection 170CB(1).

However, this Division is only intended to exclude the State or Territory provision to the extent that the provision provides rights or remedies in respect of the harsh, unjust or unreasonable termination of the employment of such an employee.

(2) It is the intention of the Parliament that this Division apply to the exclusion of a provision of a State award or a State employment agreement if:

- (a) the provision of the award or agreement provides rights or remedies in respect of harsh, unjust or unreasonable termination of employment (however described); and
- (b) the provision of the award or agreement applies to an employee referred to in subsection 170CB(1).

However, this Division is only intended to exclude the provision of the award or agreement to the extent that the provision provides rights or remedies in respect of the harsh, unjust or unreasonable termination of the employment of such an employee.

(3) For the avoidance of doubt, subsections (1) and (2) apply in respect of every employee referred to in subsection 170CB(1), including employees who are excluded, by or under this Act, from applying to the Commission under section 170CE.

Regulations may identify provisions of State and Territory laws etc.

(4) If regulations made for the purposes of this subsection identify a provision of a State or Territory law, then the provision is, or is not, as specified in the regulations, taken to satisfy paragraphs (1)(a) and (b).

(5) If regulations made for the purposes of this subsection identify a provision of a State award or State employment agreement, then the provision is, or is not, as specified in the regulations, taken to satisfy paragraph (2)(a).

No intention to exclude other State and Territory termination of employment laws etc.

(6) Other than as provided by this section, it is not the intention of the Parliament that this Division apply to the exclusion of a State or Territory law, a State award or a State employment agreement.

The Constitutional Issues

The central constitutional issues that arise are:

1. Is the proposed section 170CB(1)(c) valid in seeking to extend the unfair dismissal regime to all employees of constitutional corporations?

Section 51(xx) of the Constitution grants legislative power to the Commonwealth over 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. Most of the case law on section 51(xx) has concerned trading corporations. There is an unresolved division of opinion in the High Court on the scope of the power (although more judges have tended towards a broader view of the power in latter cases). The focus of debate has been upon which activities of the listed corporations can be regulated under the power. Two possible views, a narrow and a broad view, border the possible scope of the power:

- *Narrow View:* The clue is in the categories of corporations specified as being within power: 'foreign corporations', and Australian-based 'trading' or 'financial' corporations. Thus the aspects or activities that the Commonwealth can regulate must have something to do with the characteristic that brings corporations within Commonwealth power. This would mean, for example, that only the trading activities of a trading corporation could be regulated and not any of the other activities of the corporation (such as the relationship between the corporation and its employees where this lies outside of its trading activities).
- *Broad View:* There are no limits at all. Provided a corporation has the characteristics that bring it within section 51(xx), any aspect or activity of that corporation can be

regulated by the Commonwealth (including the relationship of a constitutional corporation with its employees).

If the broad view were to be accepted by a majority of the High Court, section 170CB(1)(c) would in all likelihood be valid. On the other hand, its operation could be circumscribed under the narrow view.

A majority of the High Court has gone beyond the narrow view but has yet to accept the broad view of the corporations power. In the *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 a majority of the Court held that section 51(xx) at least enables the Commonwealth to regulate the activities of trading corporations undertaken *for the purposes of the trading activities* of that corporation.

This interpretation of section 51(xx) provides some constitutional support for section 170CB(1)(c). It is likely that the Court would find that the Commonwealth can regulate some aspects of the employment of the employees of a constitutional corporation (the degree is unclear) on the basis that such employment is for the purpose of the trading activities of the corporation. While the reasoning might logically be extended to the regulation of all of the employees of a constitutional corporation (each employee being taken on for the purpose of the trading activities of the corporation), it is unclear whether the High Court would allow the power to be extended that far. The current High Court has not expressed any judicial opinion on this issue. Indeed, the question could be major test case of where the High Court now stands on matters of federal legislative power.

A recent case decided by the High Court on the scope of the corporations power, *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, falls short of the broad view (the even more recent decision in *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 adds little to our understanding of the scope of the power). Section 127A of the *Industrial Relations Act 1988* (Cth) allowed the Australian Industrial Relations Commission to review contracts made with independent contractors on the grounds of their being unfair, harsh or against the public interest. Such contracts could be set aside wholly or in part or varied under section 127B. Under section 127C(1)(b), the Commission's power to review under section 127A could be exercised 'in relation to a contract relating to the business of a constitutional corporation'. By 4:3, the Court found that section 127C(1)(b) could not be supported under the corporations power as the connection between the provision and the corporations specified in section 51(xx) was too tenuous. Significantly, in reaching this conclusion only Justice Dawson adopted a narrow view of the power. The lowest common position of four other judges, Chief Justice Mason and Justices Deane, Gaudron, and McHugh, was, at 365, that 'the power conferred by section 51(xx) extends, at the very least, to the business functions and activities of constitutional corporations and to their business relationships'.

It is not clear whether this interpretation would allow federal regulation of allegations of the unfair dismissal of any employee of a constitutional corporation. In any event, since this decision the High Court has been almost completely reconstituted. From February 2003 when Justice Gaudron retires, only Justice McHugh will remain from those judges who decided *Dingjan's Case*. Nevertheless, the decision does provide a foundation for at least arguing for the validity of the proposed section 170CB(1)(c).

Dingjan's Case illustrates that the High Court may allow the Parliament only so much leeway in basing a law upon the corporations power. If the connection between a law and the constitutional corporation is too remote, the law will be invalid. In these circumstances, it

cannot be said with confidence whether section 170CB(1)(c) will be held valid or invalid. My own view is that the provision is more likely than not to be held valid by the High Court, although its operation may be read down, or given a more limited operation, in some cases.

2. Is the proposed section 170HA valid in seeking to exclude the operation of State unfair dismissal laws in regard to employees who are covered by the federal unfair dismissal regime?

It is likely that section 170HA is valid. Section 109 of the Constitution provides that: ‘When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid’ (see generally Blackshield and Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (3rd ed, 2002), Ch 9). As federal legislation and awards have entered into the field of industrial relations, they have steadily rendered inoperative the State legislation and awards that had occupied the field. Moreover, the High Court has found that this can be achieved though express words in a federal statute (such as by the regulation making power in sections 170HA(4) and (5))

In *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453 the High Court unanimously held that section 109 could be used by the Commonwealth to render inoperative several recited New South Wales laws in respect of their impact upon licensees carrying out work for the Commonwealth in building a third runway at Sydney Airport. An environmental impact statement under the *Environment Protection (Impact of Proposals) Act 1974* (Cth) found no significant problems with the project. However, two Sydney councils sought an injunction in the New South Wales Land and Environment Court, arguing that the dredging of the bay floor required an additional environmental impact statement under the *Environmental Planning and Assessment Act 1979* (NSW).

Before the matter was heard by the Land and Environment Court, the Commonwealth made regulations under the *Federal Airports Corporation Act 1986* (Cth). Regulations 7 and 8 established a system by which ‘works’ would be undertaken and ‘rights’ exercised by licensees. Regulation 9(1) provided that ‘a person who is not a licensee’ must not carry out any part of the ‘works’ or exercise any of the ‘rights’. By regulation 9(2): ‘A licensee is authorised to carry out the part of the works . . . referred to in the licence in spite of a law, or a provision of a law, of the State of New South Wales . . .’ There then followed a list of New South Wales laws specifically overridden, including the *Environmental Planning and Assessment Act*.

In a joint unanimous judgment, the High Court found that the regulations, including regulation 9(2), were valid. The Court stated at 465 that: ‘There can be no objection to a Commonwealth law on a subject which falls within a head of Commonwealth legislative power providing that a person is authorized to undertake an activity despite a State law prohibiting, restricting, qualifying or regulating that activity.’ In any event, the Court also suggested at 469-470 that the *Environment Protection (Impact of Proposals) Act* ‘constitutes a comprehensive code governing environmental aspects of actions and decisions made by or on behalf of the Australian Government and authorities of Australia’.

In light of this unanimous decision, it is difficult to see how an attack on the proposed section 170HA could succeed.

Conclusion

While I make no comment on the substance of the proposed changes to the unfair dismissal regime, I believe that the federal Government is pursuing an appropriate policy objective in seeking to enact an exclusive national regime in this area. The federal Parliament is entrusted with the power to enact laws of national importance. Laws regulating industrial relations fall into this category.

A small and geographically isolated country like Australia is not well served by multiple laws on a topic of such importance as basic employment issues. The cost to both business and their employees of regulating employment across up to nine jurisdictions is difficult justified. Of course, if this is correct it would suggest that in the long term there should be a national regime covering all aspects of employment and not just unfair dismissal.

Yours sincerely

George Williams