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Unfair Dismissal: the new laws

by

Honor Figgis

Briefing Paper No 2/98

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NSW PARLIAMENTARY LIBRARY RESEARCH SERVICE

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EXECUTIVE SUMMARY

This briefing paper examines recent changes to the law of unfair dismissal in New South Wales and the Commonwealth, and considers how the two systems are likely to interact. There is also some discussion of the effect of unfair dismissal laws on job creation. The main points are:

- The general approach of both the Federal and NSW unfair dismissal legislation is to provide ‘**a fair go all round**’ for employers and employees (pp 5 and 11).
- The **Commonwealth Workplace Relations Act 1996** sets up two distinct schemes for protection against termination of employment: an ‘**unfair dismissal**’ scheme, available only to certain classes of employees under federal awards or agreements, that provides remedies for dismissals that are harsh, unjust or unreasonable; and an ‘**unlawful dismissal**’ scheme, widely available to Australian employees, that provides remedies for dismissals that contravene requirements for the lawful termination of employment. The Federal Government has drawn back from the broad regulation of unfair dismissals that was a feature of industrial relations legislation under the former Labor Government. The current Federal Government has narrowed the scope of its unfair dismissal laws, has reduced its reliance on the external affairs power in the Commonwealth Constitution, and has encouraged co-operation between the federal and State unfair dismissal systems (pp 5-9).
- The **New South Wales Industrial Relations Act 1996** carries forward the unfair dismissal system from the previous *Industrial Relations Act 1991*, with some changes to the scheme aimed at improving its operation. The most important change is the expansion in the class of employees who can claim for unfair dismissal. The unfair dismissal provisions now apply to employees in NSW who are: employed in the public service; employed under a NSW award or agreement; or employed without an award or agreement and earning less than the specified rate of remuneration. The NSW unfair dismissal provisions do not apply to employees under federal awards or, it seems, federal agreements. Some employees employed by an unincorporated body under a federal award or agreement do not have access to either the federal or the NSW unfair dismissal systems (pp 10-12).
- The interaction of the federal and NSW employment termination systems continues to create complexity and raise **difficult jurisdictional questions**. These problems lead to pressure to introduce a single industrial relations system, like Victoria. However, neither the current NSW or Federal Governments are likely to withdraw from the field of employment termination (pp 12-17).
- As a result of the legislative changes, there has been **a substantial increase in unfair dismissal claims under the NSW Act**, and a decrease in claims in the Federal jurisdiction (p 15).

- Both the Federal and NSW legislation excludes certain kinds of employees, such as probationary employees or those on fixed-term contracts, from unfair dismissal claims. The Federal Government is currently attempting to **exclude employees who work for a small business**. The object of the exclusion is to avoid exposure of small businesses to unfair dismissal claims, in the interests of encouraging small businesses to take on more employees. It is argued that small business employers are particularly deterred by unfair dismissal laws from taking on new workers (p 17).
- Most of the evidence that unfair dismissal laws are a disincentive to employment is anecdotal, or based on surveys of the perceptions of employers of impediments to job growth. There seems to be **little empirical evidence on the extent to which unfair dismissal laws affect employment rates**, whether in small, medium or large businesses (pp 17-18).
- Even if a small business exemption is introduced into the federal unfair dismissal legislation, it is likely to have little impact on small business in New South Wales. Most small business employees in New South Wales are covered by State awards, and these employees do not have access to the federal unfair dismissal provisions. **A broad exemption of NSW small business employers from the unfair dismissal laws requires legislation by NSW** complementing the proposed Commonwealth exemption (pp 18-19).
- **Unfair dismissal laws, both State and federal, are likely to remain in a state of flux in coming years**. The issues which will continue to prompt controversy and perhaps change include: the role of Commonwealth legislation; and the balance which should be reached between the interests of employers and employees. For example, in what circumstances should reinstatement rather than compensation be the remedy for unfair dismissal? Should an employer's financial viability be relevant to the question of compensation? What classes of employees should be excluded from unfair dismissal laws? (pp 20-21).

1. INTRODUCTION

All the Australian States and the Commonwealth have some legislation in place that provides a remedy to employees who are unfairly dismissed by their employer, although these laws vary considerably.¹ A dismissal can be ‘unfair’ either because there was not a good reason for dismissing the employee, or because of the way the employee was dismissed, or both.

Unfair dismissal has become one of the most highly litigated industrial relations issues, and the balance between employees’ rights and security, and commercial freedom and workplace flexibility, is of enormous importance to the social and economic life of the nation. The profound effects that employment termination laws can have on employees and employers make this one of the most controversial areas of industrial relations, and one that is subject to frequent legislative change in the quest for the most acceptable balance between the competing interests.

This briefing paper examines recent changes to the law of unfair dismissal in New South Wales and the Commonwealth, and considers how the two systems are likely to interact. There is also some discussion of the effect of unfair dismissal laws on job creation. The paper updates *Unfair Dismissal: International Obligations and Jurisdictional Issues*, New South Wales Parliamentary Library Briefing Paper No 35/95 by Vicki Mullen.

The following abbreviations are used in the paper:

WR Act *Workplace Relations Act 1996* (Cth)

NSW Act *Industrial Relations Act 1996* (NSW)

AIRC Australian Industrial Relations Commission

IRC(NSW) Industrial Relations Commission of New South Wales

2. COMMONWEALTH TERMINATION OF EMPLOYMENT LAWS

2.1 Background to the Workplace Relations Act 1996

In Australia, for most of the century there was little legislation protecting employees from arbitrary or unfair termination. Employees could sue their employer at common law for termination that was in breach of the contract of employment, for example because the required period of notice was not given. However, the damages recoverable were usually

¹ *Workplace Relations Act 1996* (Cth) Pt VIA Div 3; *Industrial Relations Act 1996* (NSW) Ch 2 Pt 6; *Workplace Relations Act 1997* (Qld) Ch 5; *Industrial and Employee Relations Act 1994* (SA) Ch 3 Pt 6; *Industrial Relations Act 1979* (WA) s 29; *Industrial Relations Act 1984* (Tas) ss 3(1), 19(1), 29(1A). Employment termination in Victoria is now governed by federal law, following the referral of most of the State’s industrial relations system to the Commonwealth: *Commonwealth Powers (Industrial Relations) Act 1996* (Vic).

so limited that legal proceedings were rarely worthwhile for the employee. Further, at common law there is no obligation on the employer to act fairly or give any reason in dismissing an employee, as long as the contract of employment is not breached.²

The hardship to employees that arose from the common law position led the various States to introduce statutory schemes allowing employees to claim a substantial remedy (primarily reinstatement) for a termination that was unfair.³ Access to these remedies was generally limited to those employed under industrial awards or agreements. Unfair dismissal claims were treated as a form of industrial dispute, with actions being brought by unions on behalf of their members.

Employment protection was largely the domain of the State governments until the 1990s. Workers covered by State awards had access to statutory and award-based remedies for some years, but the approximately 40% of Australian workers in the federal system did not have access to similar remedies.⁴ Workers in the federal industrial sphere could not access State unfair dismissal laws, and the traditional source of federal power to legislate with respect to industrial matters, the conciliation and arbitration power in s 51(xxxv) of the Commonwealth Constitution, did not support federal legislation regulating unfair dismissals. Constitutional limitations also made it difficult for the federal industrial tribunal to provide remedies to individual employees who were dismissed.⁵

Although attempts were made to overcome these difficulties in the 1980s, (such as the inclusion in federal awards of clauses prohibiting unfair dismissals), it was not until 1993 that comprehensive federal legislation regulating employment termination was introduced. In 1993 the federal Labor Government took advantage of the High Court's expanded interpretation of the external affairs power in s 51(xxix) of the Commonwealth Constitution, and the ratification of several international labour conventions by the Government,⁶ to create a national regime of minimum entitlements for employees. These minimum entitlements,

² For more information on the common law of dismissal, see Mullen V, *Unfair Dismissal: International Obligations and Jurisdictional Issues*, New South Wales Parliamentary Library Briefing Paper No 35/95 pp 17-18.

³ Various terms have been used in legislation, such as 'unfair', 'harsh', 'unjust', 'unreasonable', 'unconscionable' or 'oppressive' dismissals. The formula generally used now in legislation is 'harsh, unjust or unreasonable'. The term 'unfair dismissal' is widely used as a convenient shorthand to refer to the statutory formula.

⁴ *Workplace Relations Amendment Bill 1997*, Bills Digest 17/1997-98, Commonwealth Parliamentary Library, p 4.

⁵ See Creighton B and Stewart A, *Labour Law: an introduction*, 2nd edition, The Federation Press, 1994, pp 201-202.

⁶ McCallum discusses the growing prominence of ILO Conventions on the basis that they can be used to 'trigger a significant head of Federal constitutional power', and remarks that 'Over the last dozen years, the use by the Australian parliament of this head of power [the external affairs power] has created a great deal of controversy': McCallum R, 'International Standards in Industrial Relations and their Application in Australia', (1995) 2 *The Judicial Review* 163 at 171-172.

which included protection against unfair dismissals, were inserted into the *Industrial Relations Act 1988* (Cth) by the *Industrial Relations Reform Act 1993*. The Commonwealth Parliament relied on its external affairs power to enact the unfair dismissal laws as legislation implementing the Federal Government's obligations under the International Labour Organisation Termination of Employment at the Initiative of the Employer Convention 1982 and other international instruments.⁷

The *Industrial Relations Act 1988* as amended provided that an employer 'must not terminate an employee's employment unless there is a valid reason ... connected with the employee's capacity or conduct or based on the operational requirements of the undertaking, establishment or service' (s 170DE(1)). A reason was not valid if a termination was 'harsh, unjust or unreasonable' (s 170DE(2)). The Act set out a list of grounds on which an employee must not be dismissed (such as race, sex etc). An employee could make a claim under the federal provisions, unless an 'adequate alternative remedy' was available to the employee under State law.

The effect of the *Industrial Relations Reform Act 1993* (Cth) was that federal award workers who previously had no remedy for an unfair dismissal gained protection from dismissals which were procedurally unfair or not for a legitimate reason. In addition, the unfair dismissal provisions of some States were held not to provide an 'adequate alternative remedy' to the federal provisions,⁸ and in consequence many employees covered by State unfair dismissal jurisdictions were able to make their claims for unfair dismissals under the federal law. As a result there was an enormous increase in the number of unfair dismissal applications in the federal industrial relations system.⁹

The new federal unfair dismissal regime was harshly criticised in some quarters for being weighted too heavily in favour of employees. It was claimed that the legislation and the courts placed too much emphasis on whether an employer had provided procedural fairness for the employee (that is, whether the employee had been given an adequate opportunity to defend him or herself against dismissal based on his or her conduct or performance). The focus of the federal provisions on the procedural rights of employees was highlighted in a judgment of Gray J of the Industrial Relations Court of Australia in which he contrasted the aims of the federal legislation with that of the unfair dismissal regime of South Australia:

The former State Act and the present State Act, like their counterpart in New South

⁷ ILO Termination of Employment at the Initiative of the Employer Recommendation 1982; ILO Discrimination (Employment and Occupation) Convention 1958 and Recommendation 1958; ILO Workers with Family Responsibilities Convention 1981 and Recommendation 1981.

⁸ *Liddell v Lembke* (1994) 127 ALR 342; *Bengtsson v Australian Taxation Office* (1994) 57 IR 457; *Fryar v Systems Services Pty Ltd* (1995) 130 ALR 168; *Wylie v Carbide International Pty Ltd* (1994) 55 IR 326; *Medhurst v Pallet Industries* (1994) 58 IR 335.

⁹ E Hannan, 'Employees shun State IR systems', *The Australian*, 19/6/95. In 1995-96 the Industrial Relations Court of Australia finalised 10, 208 claims for unfair dismissal, a 31% increase on the previous year: Industrial Relations Court of Australia, *Annual Report 1995-96* p 42.

Wales, operate in the realm of the ‘fair go all round’... that is not a realm which this court inhabits. The provisions of Div 3 of Pt VIA of the federal Act are not directed to achieving some balance between the interests of employers and employees in particular cases. They constitute a charter of rights for employees. They are directed towards the protection of the existing jobs of employees.¹⁰

It was said that the federal provisions discouraged businesses (in particular small and medium-sized businesses) from employing extra workers. The NSW Premier, the Hon RJ Carr MP, criticised the federal provisions on the basis that they ‘stand in the way of his desire to promote employment and economic growth in NSW’, with a particular concern for the impact of the provisions on the rate of youth unemployment.¹¹

Amendments were made to the *Industrial Relations Act 1988* in 1994 and 1995 in order to overcome some of these problems.¹² Objections to the federal legislation continued, however, and in 1995 the States of Victoria, Western Australia and South Australia challenged the constitutional validity of many of the reforms introduced by the *Industrial Relations Reform Act 1993*, including the unfair dismissal provisions. In its decision¹³ the High Court upheld the validity of most of the federal unfair dismissal provisions, but found invalid:

- s 170DE(2), which provided that a dismissal was not for a ‘valid reason’ if it was ‘harsh, unjust or unreasonable’; and
- s 170EDA(1)(b), which provided for a shifting onus of proof, so that if the *employer* proved that there was a valid reason for the dismissal connected with the employee’s capacity or conduct or the employer’s operational requirements, the onus shifted to the *employee* to prove that the dismissal was ‘harsh, unjust or unreasonable’.

The High Court held that the provisions creating the ‘harsh, unjust or unreasonable’ test as a ground of unlawful termination were invalid because they went beyond the requirements of the ILO Termination of Employment Convention to a constitutionally impermissible degree. Article 4 of the Convention¹⁴ states that:

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

¹⁰ *Fryar v Systems Services Pty Ltd* (1995) 130 ALR 168 at 189.

¹¹ ‘Carr finds faults in new IR Act’, *The Australian*, 17/4/95. On this issue, see section 6 of this paper, ‘Unfair dismissal laws and job creation’.

¹² *Industrial Relations Amendment Act (No 2) 1994* (Cth); *Industrial Relations and Other Legislation Amendment Act 1995* (Cth).

¹³ *Victoria v Commonwealth* (1996) 138 ALR 129.

¹⁴ The Termination of Employment Convention is attached to this paper as an appendix.

Articles 5 and 6 set out a list of matters which do not constitute valid reasons for termination. The list does not include terminations that are ‘harsh, unjust or unreasonable’. The Court held that ‘... the inclusion of the ‘harsh, unjust or unreasonable’ criterion does not implement the terms of the Convention but goes beyond its requirements and adds an alternative ground for making terminations unlawful’. The result of the High Court decision is that it is beyond doubt that the Commonwealth Parliament may rely on the Termination of Employment Convention to enact legislation regulating dismissals, but the Convention does not provide a basis for legislation dealing with ‘harsh, unjust or unreasonable’ dismissals.

2.2 Workplace Relations Act 1996

When the federal Coalition Government was elected in March 1996, its stated aim was to amend the federal termination of employment provisions to ensure the legislation establishes a scheme that provides employees with access to a fair and simple process of appeal against dismissal, that is fair to both employees and employers, and that is in accord with Australia’s international obligations.¹⁵

The *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) received assent on 25 November 1996. It radically amended the *Industrial Relations Act 1988*, and renamed it the *Workplace Relations Act 1996* (WR Act).¹⁶ As forecast, the termination of employment provisions in Division 3 of Part VIA were substantially amended to adjust the balance between the interests of employers and employees to give each side ‘a fair go all round’.¹⁷ This represents a shift away from the approach of a ‘charter of rights for employees’ in the former *Industrial Relations Act 1988* (Cth). The new provisions place less emphasis on procedural fairness for employees, and more emphasis on flexibility for employers to manage their workforce.

The new employment termination provisions in the WR Act set up two distinct schemes:

- an ‘**unfair dismissal**’ scheme, available only to a narrow range of employees, that provides remedies for dismissals that are harsh, unjust or unreasonable; and
- an ‘**unlawful dismissal**’ scheme, widely available to Australian employees, that provides remedies for dismissals that contravene requirements for the lawful

¹⁵ Hon P Reith MP, *Better Pay for Better Work: The Coalition’s Industrial Relations Policy* pp 11-12.

¹⁶ See Figgis H, *Awards and Enterprise Agreements in the New South Wales and Commonwealth Industrial Relations Systems*, New South Wales Parliamentary Library Briefing Paper No 3/97.

¹⁷ The term ‘fair go all round’ is used expressly in s 170CA, which sets out the objects of the employment termination provisions. The concept was picked up from New South Wales industrial law, where it was used by Sheldon J in *In re Loty and Holloway v Australian Workers’ Union* [1971] AR (NSW) 95 to describe the approach to be taken in applying the NSW unfair dismissal provisions as they were at that time.

termination of employment.

The Division contains complex provisions designed to prevent employees claiming remedies for both unfair and unlawful dismissal. In essence, after a period of conciliation by the AIRC, an employee must elect to pursue either an unfair dismissal claim in an arbitration before the AIRC, or an unlawful dismissal claim in the Federal Court.¹⁸

Excluded employees: The Regulations to the WR Act¹⁹ exclude several types of employees from access to both federal unfair and unlawful dismissal provisions:

- employees engaged under a contract of employment for a specified period of time;
- employees engaged under a contract of employment for a specified task;
- employees serving a period of probation or a qualifying period of employment;
- casual employees engaged for a short period of time;
- trainees employed for a specified period; and
- employees who are not employed under an award and whose rate of remuneration exceeds \$64 000 p.a. as indexed annually.

The proposal to exclude employees of small businesses from access to federal unfair dismissal claims is discussed below, in section 6, ‘Unfair dismissal laws and job creation’.

(a) **Unfair dismissal**

A fairly limited range of employees can make a claim to the AIRC that the termination of their employment was harsh, unjust or unreasonable under the WR Act. Under s 170CB(1), those who can make an unfair dismissal application are:

- a Commonwealth public sector employee;
- a Territory employee;
- an employee under a federal award, certified agreement or Australian Workplace Agreement who was employed by a constitutional corporation;²⁰
- an employee under a federal award, certified agreement or Australian Workplace Agreement who was a waterside worker, maritime employee or flight crew officer employed in international or interstate trade or commerce; or
- an employee in Victoria.

The limited scope for Federal unfair dismissal applications is in part due to constitutional restrictions on the Commonwealth Parliament. In providing for unfair dismissal rights, the Federal Government has relied upon a combination of its constitutional powers: the public

¹⁸ Section 170CFA.

¹⁹ Regulation 30B-30BC of the *Workplace Relations Regulations* 1996 (Cth)

²⁰ ‘Constitutional corporation’ is defined in s 4(1) of the WR Act. It includes corporations with respect to which the Commonwealth has power to legislate under s 51(xx) of the Commonwealth Constitution (foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth). It also includes Commonwealth authorities and bodies incorporated in a Territory.

service power, the Territories power, the corporations power, the interstate trade and commerce power and the powers referred to it by the State of Victoria.²¹ It has not relied on the external affairs power, for reasons noted above (p 4).

Note that not all workers under federal awards or agreements are protected against unfair dismissal; in essence, only those federal award or agreement employees who are employed by a 'constitutional corporation' may claim unfair dismissal. If a person is employed under a federal award or agreement by a non-corporation, the person will not be able to claim unfair dismissal under the WR Act. Many businesses, particularly small business and rural enterprises, are not incorporated, being trusts, partnerships or sole traders. There are a number of other bodies which may or may not be characterised as 'constitutional corporations', such as voluntary associations, charitable organisations or educational institutions.²²

Employees will not have access to the federal unfair dismissal jurisdiction if they are employed by a State government, or under State awards or industrial agreements, or if they are without an award or industrial agreement. There is a table summarising the jurisdictions of the federal and New South Wales unfair dismissal laws in section 4, 'Interaction between NSW and Commonwealth laws' at p 14 below.

The AIRC begins by conciliating unfair dismissal claims; if conciliation is unsuccessful, it proceeds to arbitration. In determining whether a termination was harsh, unjust or unreasonable, the AIRC must have regard to:²³

- whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service;
- whether the employee was notified of that reason;
- whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee;
- whether the employee was warned of any unsatisfactory performance; and
- any other matters that the AIRC considers relevant.

If a termination is found to be unfair, as a remedy the AIRC can order that an employee be reinstated, or if it thinks that reinstatement is inappropriate, it can order the employer to pay the employee compensation. If compensation is ordered, the maximum amount is:

- for an award employee, 6 months remuneration;
- for a non-award employee, either \$32 200 (as indexed from time to time) or 6 months remuneration, whichever amount is lower.

²¹ Respectively, Commonwealth Constitution s 52(ii), s 122, s 51(xx), s 51(i), and the *Commonwealth Powers (Industrial Relations) Act 1996 (Vic)*.

²² See Lane PH, *Lane's Commentary on the Australian Constitution*, 2nd ed, LBC Information Services 1997 pp 232-240.

²³ Section 170CG(3).

An unusual feature is that in determining a remedy, whether for reinstatement or compensation, the AIRC must have regard to (among other matters) the effect of the order on the viability of the employer's business.²⁴ This raises the possibility that an employee's compensation may be reduced where the employer is a small business or is in financial difficulty. Chapman has observed that:

...the projected impact of any proposed order on the party committing the unlawful act is not usually taken into account in other legal actions, for example, tort, a common law action for breach of contract and anti-discrimination law. The application of this principle by the AIRC may mean that people dismissed from small businesses receive less in terms of compensation than people dismissed in similar circumstances from larger employers. As noted in the majority report [of the Commonwealth Senate Economics Reference Committee, *Report on Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996*, August 1996], this introduces 'a principle of discrimination in compensation which appears to be unknown in any other field'.²⁵

(b) Unlawful dismissal

The WR Act provides a minimum entitlement to lawful termination of employment for a wide range of Australian employees. These provisions are based on the federal external affairs power, and the ILO Termination of Employment Convention 1982, ILO Discrimination (Employment and Occupation) Convention 1958 and the ILO Family Responsibilities Convention 1981.²⁶ In essence, any employee can make a claim for unlawful termination under the WR Act, except those excluded by the regulations (as detailed on p 6).

A termination is **unlawful** if it contravenes any of the following provisions:

- an employer must not dismiss an employee for certain **proscribed reasons**, including: temporary absence from work because of illness or injury; trade union membership (or non-membership) or taking part in certain trade union activities; acting as representative of employees; participating in legal proceedings against an employer involving alleged violation of laws; race; colour; sex; sexual preference; age; physical or mental disability; marital status; family responsibilities; pregnancy; religion; political opinion; national extraction or social origin; refusing to negotiate or sign an Australian Workplace Agreement; or absence from work during parental leave (s 170CK).

²⁴ Section 170CH(2)(a) and (7)(a).

²⁵ A Chapman, 'Termination of Employment Under the Workplace Relations Act 1996 (Cth)', (1997) 10 *Australian Journal of Labour Law* 89 p 109.

²⁶ Sections 170CB(5) and (6), and 170CK(1). As a back up to the reliance on the external affairs power, the legislation also draws on the public service power, the Territories power, the corporations power and the trade and commerce power: s 170CB(4).

- an employer must **notify the Commonwealth Employment Service** if the employer decides to terminate the employment of 15 or more employees for reasons of an economic, technological or structural nature (s 170CL).
- an employer must give an employee the **required amount of notice** (or compensation instead of notice) of termination of employment (except if the employee is guilty of serious misconduct) (s 170CM).
- an employer must not terminate an employee's employment in **contravention of an order of the AIRC** relating to severance benefits or consultation with workers' representatives about redundancies (s 170CN) .

Unlawful termination claims are determined by the Federal Court, unlike unfair dismissal claims, which are arbitrated by the AIRC. If the Federal Court is satisfied that an employer has dismissed an employee for a prohibited reason or in contravention of the other provisions, the Court make an order of: a penalty of up to \$10 000; reinstatement; compensation; or any other order necessary to remedy the effect of the unlawful termination. The maximum amount of compensation is:

- for an award employee, 6 months remuneration;
- for a non-award employee, either \$32 200 (as indexed from time to time) or 6 months remuneration, whichever amount is lower.

If the Federal Court is satisfied that an employer has contravened s 170CL (notification to CES of redundancies), the Court may order that the employer must pay a penalty of up to \$10 000, or the employer must not terminate the employment except as permitted by the order, or both.

3. NEW SOUTH WALES UNFAIR DISMISSAL LAWS

3.1 Background to the Industrial Relations Act 1996

The States have always had the capacity to legislate with respect to termination of unemployment 'in any way they see fit - so long as they do not do so in a manner which is inconsistent with a valid law of the Commonwealth. For most of this century no positive provision was made on the matter at all, other than in relation to certain forms of 'victimisation'. At most a claim for the reinstatement of a dismissed worker might become the subject of an industrial dispute in the same way as any other issue.'²⁷

In 1991 New South Wales employees were for the first time given direct individual access to industrial tribunals in respect of a dismissal or threatened dismissal which was claimed to be harsh, unreasonable or unjust (*Industrial Arbitration (Unfair Dismissal) Amendment Act*

²⁷ Creighton and Stewart, *Labour Law*, n 5, p 195.

1991, amending the *Industrial Arbitration Act 1940*).²⁸ This legislation was inspired by the fact that ‘less than one third of private sector employees in Australia now [in 1991] belong to a trade union’,²⁹ and on this basis it was questioned ‘whether unions should be the sole avenue through which individuals can gain access to industrial tribunals.’³⁰ This new jurisdiction was, however, limited to those individuals whose conditions of employment were fixed by an award or an industrial or enterprise agreement.

The *Industrial Arbitration Act 1940* (NSW) was repealed by the *Industrial Relations Act 1991* (NSW). Chapter 3 Part 8 of the 1991 Act established a new unfair dismissals scheme. The provisions applied to an employee covered by an award or agreement, and Crown employees. The 1991 Act provided that a dismissal or threatened dismissal may be claimed by the employee to be unfair on the basis that such event was or would be ‘harsh, unreasonable or unjust’. The Industrial Relations Commission of New South Wales dealt with such a claim, first by way of conciliation, and if unsuccessful, then by arbitration. The Commission could order the employer to reinstate, re-employ or compensate the employee (if the Commission considered that it would be impracticable to make an order for reinstatement or re-employment) an amount not exceeding 6 months remuneration.

3.2 Industrial Relations Act 1996

In 1995 a Labor Government was elected in New South Wales with a substantially different industrial relations agenda to the former Coalition Government. The *Industrial Relations Act 1991* was repealed and replaced by the *Industrial Relations Act 1996* (the NSW Act). The *Industrial Relations Act 1996* carries forward the unfair dismissal system from the 1991 Act, but makes some changes to the scheme ‘aimed at improving its operation’.³¹ The Minister for Industrial Relations, Hon J Shaw MLC, stated that: ‘The view of most parties is that the New South Wales system concerning unfair dismissal works reasonably well and requires only minimal legislative change to address certain technical issues.’³²

The key changes effected by the *Industrial Relations Act 1996* are:

²⁸ For a detailed discussion of this important development, see A Stewart, ‘A Quiet Revolution: Unfair Dismissal in New South Wales’, (1992) 5 *Australian Journal of Labour Law* 69. Prior to the commencement of the *Industrial Arbitration (Unfair Dismissal) Amendment Act 1991* (NSW), ‘the jurisdiction to reinstate in employment depended on the conjunction of a number of provisions in the *Industrial Arbitration Act 1940* including ss 20 and 30 of the 1940 Act.’ : *Industrial Law New South Wales* (Looseleaf service), Butterworths, 1992, [s 245].

²⁹ Hon J Fahey MP, *NSWPD*, 21/3/91, p 1529.

³⁰ *Ibid.*

³¹ Hon K Yeadon MP, *NSWPD*, 29/5/96 p 1716.

³² *NSWPD* 23/11/95 p 3849. This statement was made about the *Industrial Relations Bill 1995*. That Bill lapsed and was superseded by the *Industrial Relations Bill 1996*. The Minister’s comments on the 1995 Bill should be taken as applying to the 1996 Bill: Hon J Shaw MLC, *NSWPD*, 17/4/96 p 82.

- The jurisdiction of the Industrial Relations Commission to hear unfair dismissal claims is expanded to include employees who are not covered by an award or enterprise agreement and who earn less than \$62,200 per year (as indexed from time to time).³³
- An application may be brought for compensation alone, although this does not affect the requirement that compensation is available only if the IRC considers that reinstatement or re-employment would be impracticable.

Unlike the federal WR Act, no distinction is made between unfair and unlawful terminations. The general approach of the legislation continues to be to provide ‘a fair go all round’ for employers and employees. Under the unfair dismissal scheme set up by the NSW Act, an employee to whom the Act applies may claim a remedy from the IRC for a dismissal that is ‘harsh, unreasonable or unjust’. Section 83 of the Act provides that the unfair dismissal provisions apply to employees in NSW who are:

- employed in the public service;
- employed under a NSW award or agreement; or
- employed without an award or agreement and earning less than the specified rate of remuneration.

Excluded employees: The NSW unfair dismissal provisions do **not** apply to employees who are excluded by the regulations.³⁴ The regulations exclude:

- employees engaged under a contract of employment for a fixed term of less than 6 months;
- employees engaged under a contract of employment for a specific task.
- employees serving a period of probation of less than 3 months (or if more than 3 months, a reasonable period having regard to the nature and circumstances of the employment);
- employees engaged on a casual basis for a short period (except regular casuals employed for at least 6 months).

The IRC(NSW) held in *Moore v Newcastle City Council*³⁵ that the NSW unfair dismissal provisions **do not apply** to workers who are employed under federal awards. It would also seem from the reasoning in the decision that workers under federal certified agreements or Australian Workplace Agreements cannot use the NSW unfair dismissal system. The IRC held that the unfair dismissal provisions of the NSW Act do not apply to workers under

³³ Under the Industrial Relations (General) Regulation 1996 (NSW) reg 5A this ‘cut off’ rate of remuneration is to be the same as the rate prescribed in the federal Workplace Relations Regulations 1996, reg 30BB. The specified rate is indexed at as 1 July each year under the federal regulations. As the amount under those regulations changes, so will the cut-off rate of remuneration under the NSW regulations.

³⁴ Industrial Relations (General) Regulation 1996 Part 2A.

³⁵ *Moore v Newcastle City Council* (1997) 42 AILR ¶15-139.

federal awards because the NSW Act was not intended to apply to employees within the federal industrial relations system. Section 83 was directed at employees in the NSW industrial system - specifically public sector employees, employees under a NSW award or agreement, and employees not employed under an award or agreement earning less than the stipulated amount. The NSW Act as a whole did not show an intention to cross the boundary between the separate federal and New South Wales industrial spheres and regulate the dismissal of employees in the federal award system.

It has been reported that the NSW Government is considering introducing legislation making it clear that the NSW unfair dismissal provisions are intended to apply to federally-covered employees, in order to overcome the effect of the decision in *Moore v Newcastle City Council*.³⁶

In determining an unfair dismissal claim, the IRC may take into account:

- whether a reason for the dismissal was given to the employee;
- if a reason was given, its nature, whether it had a basis in fact, and whether the employee was given an opportunity to make out a defence or give an explanation for his or her behaviour;
- whether a warning of unsatisfactory performance was given before the dismissal;
- the nature of the duties of the employee immediately before the dismissal, and the likely nature of the duties if the employee were to be reinstated or re-employed;
- whether or not the employee requested reinstatement or re-employment.

Reinstatement remains the primary remedy for unfair dismissal. If IRC considers that it would be impracticable to reinstate the person in the former position, it may order the employer to re-employ the person in another suitable position. If re-employment would be impracticable, the IRC may order the employer to pay compensation of up to 6 months' remuneration. Note that the test is whether reinstatement or re-employment is 'impracticable', a fairly stringent test.³⁷ In contrast, under the federal *Workplace Relations Act 1996*, the test is whether reinstatement would be 'inappropriate'. Where an employer does not want the dismissed employee back, it will probably be easier to establish that reinstatement would be 'inappropriate' than that it would be 'impracticable'. As a result, the remedy of reinstatement is likely to be easier to obtain under the New South Wales Act than under the Federal Act.

4. INTERACTION BETWEEN NSW AND COMMONWEALTH LAWS

The existence of both State and federal employment protection legislation poses the problem of how the two systems will work together. Which employees will the federal provisions cover, and which will be covered by the New South Wales provisions? Are there any areas

³⁶ 'IR amendment in wake of *Moore*?', *Workforce*, Issue 1139, 31/10/97.

³⁷ 'Impracticable' involves 'imposing unacceptable problems or embarrassments, or seriously affecting productivity, or harmony within the employer's business': *Nicholson v Heaven & Earth Gallery Pty Ltd* (1994) 126 ALR 233 at 244.

of overlapping jurisdiction? Are any employees unable to access either system? Below is a table approximately setting out which classes of employees will be in which jurisdictions. It assumes that the NSW unfair dismissal laws do not apply to employees under federal certified agreements or AWAs, on the basis of the decision in *Moore v Newcastle County Council* (see p 12).

| Instrument governing employment | New South Wales unfair dismissal laws apply | Federal unfair dismissal laws apply | Federal unlawful dismissal laws apply |
|---|---|--|---|
| No award or enterprise agreement | Yes, unless - earn over prescribed amount; or - excluded by the regulations | No | Yes, unless - earn over prescribed amount; or - otherwise excluded by the regulations |
| NSW award | Yes, unless - excluded by the regulations | No | Yes, unless - earn over prescribed amount; or - otherwise excluded by the regulations |
| NSW enterprise agreement | Yes, unless - excluded by the regulations | No | Yes, unless - earn over prescribed amount; or - otherwise excluded by the regulations |
| New South Wales public sector employee | Yes, unless - excluded by the regulations | No | Yes, unless - earn over prescribed amount; - otherwise excluded by the regulations |
| Federal award | No | Yes, if - employed by a constitutional corporation; or - a waterside etc employee in interstate or international trade or commerce; unless - excluded by the regulations | Yes, unless - excluded by the regulations |
| Federal certified agreement | No | Yes, if - employed by a constitutional corporation; or - a waterside etc employee in interstate or international trade or commerce; unless - excluded by the regulations | Yes, unless - excluded by the regulations |
| Federal Australian Workplace Agreement | No | Yes, if - employed by a constitutional corporation; or - a waterside etc employee in interstate or international trade or commerce; unless - excluded by the regulations | Yes, unless - excluded by the regulations |
| Commonwealth public sector employee | No | Yes, unless - no award or agreement and earn over prescribed amount; or - otherwise excluded by the regulations | Yes, unless - no award or agreement and earn over prescribed amount; or - otherwise excluded by the regulations |

In general, it seems that there will be few areas of overlap between the NSW and federal **unfair** dismissal provisions. It appears that the NSW system can only be used by State public sector employees, or employees under State awards or agreements, or those who are not employed under an award or agreement,³⁸ while the federal system can only be used by certain classes of employees under federal awards or agreements, or Commonwealth public sector employees.

It should be noted that the bar on federal award employees being able to use the New South Wales unfair dismissal laws arises from a decision of the NSW Industrial Relations Commission, not from the federal WR Act. In fact, the WR Act provides for State employment termination laws to operate concurrently with federal awards and agreements. Under the WR Act a State law that deals with termination of employment can continue to apply to an employee who is covered by a federal award, certified agreement or Australian Workplace Agreement as long as the State law is consistent with the federal award or agreement.³⁹ However, in *Moore v Newcastle City Council* the NSW IRC decided that it did not have jurisdiction to deal with an unfair dismissal claim by an employee employed under a federal award (see p 12).

The limits on access to the federal unfair dismissal provisions and the broadened scope of the NSW unfair dismissal provisions have led to a dramatic increase in the number of unfair dismissal applications in the NSW jurisdiction and a decrease in applications in the federal jurisdiction. It has been reported that the number of unfair dismissal claims to IRC(NSW) has doubled since 1996,⁴⁰ while applications to the AIRC have declined by approximately 52%.⁴¹ Overall, the total number of federal and state unfair dismissal claims has dropped substantially since 1996. Estimates of the nationwide fall in unfair dismissal applications since 1996 range from 18%⁴² to 23%.⁴³

Some NSW employees do not have access to any remedy, either federal or State, for **unfair** dismissal, due to the decision in *Moore v Newcastle City Council* (see above p 12). These are workers who are employed under a federal award (or, it seems, a federal agreement) and

³⁸ *Moore v Newcastle City Council* (see p 12).

³⁹ WR Act s 152(1A), 170LZ(3), 170VR(3).

⁴⁰ 'Unfair dismissal claims flood IRC', *Workforce*, Issue 1128, 15/8/97. See also 'Dismissal changes cut Cmn workload', *Workforce*, Issue 1141, 14/11/97; Senate Economics Legislation Committee, *Report on the Workplace Relations Amendment Bill 1997*, October 1997, (hereafter *Workplace Relations Amendment Bill Report*), Appendix 5.

⁴¹ *Workplace Relations Amendment Bill Report*, n 40, p 3.

⁴² 'Dismissal claims drop 18%', *Workforce*, Issue 1131, 5/9/97.

⁴³ *Workplace Relations Amendment Bill Report*, n 40, Appendix 5. The projection for the number of State applications does not take into account applications made under Queensland legislation, as these figures are not available for publication. It should also be noted that there has been no separate Victorian unfair dismissal system since 31/12/96.

who are **not**:

- Commonwealth public sector employees;
- employed by a constitutional corporation; or
- a waterside or maritime worker or flight crew employee employed in international or interstate trade or commerce.

It has been said that the decision in *Moore v Newcastle City Council* will ‘ease the recent swamping of the NSW IRC, but it will also leave federally-covered employees of unincorporated companies out in the cold, as the WR Act also shuts them out of the system... It is unclear at this stage how many workers will be left stranded by the decision. ABS statistics show there are almost 500 000 employees of non-incorporated bodies in NSW but a large chunk would be State-covered (about 55% of the NSW workforce are under State awards)’.⁴⁴

The federal **unlawful** dismissal provisions will be available to most Australian employees, as a minimum standard for termination. Most employees in NSW will have access to them, regardless of whether they are employed without an award or agreement or under a Federal or State award or agreement. There will therefore be some overlap in coverage between the federal unlawful dismissal system and the NSW unfair dismissal system.

Both the NSW Act and the WR Act prevent employees ‘double-dipping’ by pursuing claims in both the federal and state jurisdictions in respect of the one dismissal.⁴⁵ It is suggested that dismissed employees faced with a choice between the federal unlawful dismissal provisions and the NSW unfair dismissal provisions will probably turn to the NSW Act. The grounds for a claim under the federal unlawful dismissal provisions are much narrower⁴⁶ and may be more difficult to establish than the NSW ground of a harsh, unjust or unreasonable dismissal.

It should be noted that the Commonwealth Government has in the WR Act encouraged the States to adopt laws consistent with the WR Act. Section 5(8) allows States to adopt parts of the WR Act, with or without modification, as State laws. If a State does this, and it confers power on the AIRC or the Federal Court in relation to terminations of federal award employees, the AIRC or the Court may exercise those powers. This is a means by which a State can provide unfair dismissal remedies for federal award employees who do not have access to the WR Act unfair dismissal provisions. This course has been followed in Queensland.⁴⁷

⁴⁴ ‘Some NSW workers out in the cold’, *Workforce*, Issue 1139, 31/10/97.

⁴⁵ WR Act s 170HB; NSW Act s 90.

⁴⁶ The grounds are set out at pp 14-15 above.

⁴⁷ *Workplace Relations Act 1997* (Qld) s 215.

5. UNFAIR DISMISSAL LAWS AND JOB CREATION

The process of balancing the interests of employers and employees in employment termination law is given particular importance by the potential for these laws to discourage employers from taking on workers. It is said that laws that provide strong employment protection measures for existing employees may reduce employment opportunities for the unemployed. In a time of high unemployment, this possibility increases the pressure on legislators to allow employers greater freedom to dismiss employees without fear of an unfair dismissal claim.

This debate is reflected in the current attempts by the federal Government to exclude employees who work for an employer with 15 or less employees from the federal **unfair** dismissal system.⁴⁸ The object of the exclusion is to avoid exposure of small business to unfair dismissal claims.⁴⁹ It is argued that unfair dismissal claims are more disruptive and damaging to small businesses than to larger ones, and that small business employers are particularly deterred by unfair dismissal laws from taking on new workers.⁵⁰

Would the proposed exclusion have a significant effect in increasing employment by small business? Most of the evidence that unfair dismissal laws are a disincentive to employment is anecdotal,⁵¹ or based on surveys of the perceptions of employers of impediments to job growth. The question was recently examined by the Commonwealth Senate Economics Legislation Committee, the Majority Report of which recommended the exclusion.⁵² From the Committee's consideration of the available information, there seems to be little empirical evidence on the extent to which unfair dismissal laws affect employment rates, whether in small, medium or large businesses. The Committee noted that there are no accurate percentage figures for the quantity of unfair dismissal claims that relate to small businesses employing 15 or less employees.

The federal Department of Workplace Relations and Small Business in its submission to the Senate Economics Legislation Committee cited several surveys where employers had

⁴⁸ Workplace Relations Amendment Bill 1997. The Bill was introduced in the House of Representatives on 26/6/97 and passed on 27/8/97 but rejected by the Senate on 21/10/97. It was re-introduced in the House of Representatives on 26/11/97. The Government had previously made regulations excluding employees of small business in their first 12 months of employment (Workplace Relations Regulations (Amendment), Statutory Rules 1997 No 101, reg 4) but these were disallowed by the Senate on 26/6/97.

⁴⁹ Explanatory Memorandum. The proposed exclusion would not affect the rights of small business employees to take action against **unlawful** termination of employment.

⁵⁰ *Workplace Relations Amendment Bill Report*, n 40, pp 6-7.

⁵¹ For example, Hon F Nile MLC, *NSWPD*, 7/12/95 p 4370; B O'Farrell MP, *NSWPD*, 4/6/96 p 2456.

⁵² *Ibid.* See also *Workplace Relations Amendment Bill*, Bills Digest 17/1997-98, Commonwealth Parliamentary Library.

reported that unfair dismissal laws were affecting their employment intentions.⁵³ For example, it was said that Morgan & Banks conducted a survey in 1996 and concluded that 16.4% of businesses with fewer than 30 employees had been affected by federal unfair dismissal laws when wanting to increase staffing levels. A survey by Recruitment Solutions of businesses in metropolitan Sydney, Melbourne and Brisbane found that approximately 9% of businesses stated that they had employed less permanent staff or had deferred plans to employ permanent staff as a result of current dismissal laws, and that 13.5% of businesses are currently hiring temporary or contract staff because of the impact current dismissal laws had on their businesses.

The Commonwealth Government has also referred to a Yellow Pages Small Business Index survey conducted from 30 October 1997 to 12 November 1997 focusing on businesses with 19 or fewer employees. In this survey 33% of small businesses reported that they would have been more likely to recruit new employees if they had been exempted from unfair dismissal laws in 1996 and 1997, and 38% of small businesses reported that they would be more likely to recruit new employees if they were exempted from the current unfair dismissal laws.⁵⁴

The Democrat and the Labor members of the Senate Economics Legislation Committee wrote Minority Reports recommending against the exemption of small business employers. The Minority Reports argued that removing the right of small business employees to a remedy for unfair dismissal would be inequitable and discriminatory. It was also argued that a small business exemption was unnecessary because current unfair dismissal laws are not a significant barrier to job growth. The Minority Report criticised the conclusions drawn by the Government from the surveys cited in the Majority Report. The Minority Report produced by the Labor Senators questioned the Department's choice of surveys and the credibility of some of those surveys. The Labor Minority Report drew on other surveys (including a survey conducted by the Department but not mentioned in its submission) to argue that small businesses do not rate unfair dismissal laws as a major disincentive to taking on new staff, in comparison with disincentives such as insufficient work, low profitability, taxation or the economic climate.⁵⁵

The Labor Minority Report also used statistics from the 1995/96 Industrial Relations Court of Australia Annual Report to argue that small business is not greatly affected by federal

⁵³ *Workplace Relations Amendment Bill Report*, n 40, Majority Report, pp 6-7.

⁵⁴ Hon P Reith MP, *CPD(HR)*, 26/11/1997 pp 11259-11260.

⁵⁵ *Workplace Relations Amendment Bill Report*, n 40, ALP Minority Report, pp 25-31. See also Robertson, R, 'Unfair dismissal a "side issue"', *Australian Financial Review*, 4/11/97, where it was reported that in a recent survey funded by the federal Department of Employment, Education, Training and Youth Affairs of 300 small businesses which asked about impediments to job creation, unfair dismissal laws were rated last. 7.1% of the businesses saw unfair dismissal legislation as a bar to job creation: R Green and R Zeffane, *Skill Gaps and Training Needs in Australia's Holiday Coast Region*, Employment Studies Centre, University of Newcastle, 1997.

unfair dismissal claims, since most unfair dismissal claims are made against larger businesses. According to the Labor Minority Report, in the federal jurisdiction only a third of unfair dismissal claims are from the small business sector, although 91.7% of employers have fewer than 20 employees.⁵⁶ It was estimated on the basis of the Industrial Relations Court statistics that 1 in 100 involuntary dismissals in Australia are challenged by a federal unfair dismissal claims under the new WR Act provisions; most of these would be against larger businesses.⁵⁷

The Chief Justice of the Industrial Relations Court of Australia has said:

We know that, in the two years that elapsed between the commencement of the old Division 3 of Pt VIA and the 1996 federal election, as a result of which it became clear the Division would be radically amended, the Australian workforce grew by over half a million people. Would the growth have been greater if the new provisions had been in force during that time? I know of no data that answers that question. Perhaps skilled researchers could suggest an answer, more likely it will be left for us to provide individual answers according to our own prejudices.⁵⁸

Even if a small business exemption is introduced into the federal unfair dismissal legislation, it is likely to have little impact on small business in New South Wales. Most small business employees in New South Wales (85-90%) are covered by State awards, and these employees do not have access to the federal unfair dismissal provisions.⁵⁹ Only the small business employees covered by federal awards or agreements (about 10-15% of small business employees in NSW) would be affected by a federal small business exemption. It seems that these excluded employees would not be able to access the NSW unfair dismissal provisions.

A broad exemption of small business employers from the unfair dismissal laws will require legislation by the States complementing the proposed Commonwealth exemption. The federal Government has requested that the State Governments introduce such legislation to exempt small business from State unfair dismissal laws. Currently South Australia and Queensland have such an exemption.⁶⁰ The Tasmanian and Western Australian Governments

⁵⁶ *Workplace Relations Amendment Bill Report*, n 40, ALP Minority Report, p 20.

⁵⁷ *Ibid* p 22.

⁵⁸ Wilcox M, 'Dismissal: a fair go all round? The nature and likely operation of the new provisions' in M Lee and P Sheldon (eds), *Workplace Relations: Workplace Law and Employment Relations*, Butterworths, 1997, p 84.

⁵⁹ Robertson, R, 'Unfair dismissal a "side issue"', *Australian Financial Review*, 4/11/97; 'Unfair dismissals and small business employees - who will really miss out?', *Workforce*, Issue 1120, 20/6/97.

⁶⁰ Industrial and Employee Relations (General) Regulation 1994 (SA) reg 10(d); Workplace Relations Regulation 1997 (Qld) s 34(3). Both these regulations exempt employees of employers who employ no more than 15 employees during the first 12 months of employment.

are reported to be considering a similar exemption.⁶¹ Victorian employees are already governed by the federal unfair dismissal laws. A small business exemption is unlikely in New South Wales under the current Labor Government. The NSW Minister for Industrial Relations has stated that he would be sceptical of the notion that small business should be exempt from unfair dismissal in general, but that the Government is waiting to see what happens in the Federal Parliament on this issue.⁶²

6. CONCLUSION

The unfair dismissal laws applying to employees in New South Wales have changed significantly in the past two years, due to the amendments to the Federal and New South Wales industrial relations legislation. As a result of the changes, there has been a substantial increase in unfair dismissal claims under the New South Wales Act, and a decrease in claims in the Federal jurisdiction. The shift towards the New South Wales unfair dismissal system arises from the widening of the class of employees who can make a claim for unfair dismissal under the New South Wales Act, and a narrowing at the federal level of the class of employees who can use the federal unfair dismissal system.

New South Wales unfair dismissal laws apply to New South Wales public sector employees, and any other employees except those who are not employed under an award or enterprise agreement and who earn over a specified amount. The New South Wales laws do not apply to employees who are covered by federal awards or, it seems, federal agreements. The Federal unfair dismissal laws apply to certain classes of employees under federal awards or agreements, and Commonwealth public sector employees. There are some employees who do not have access to either the federal or the New South Wales unfair dismissal systems.

The federal *Workplace Relations Act 1996* also creates an entitlement for Australian employees not to be unlawfully dismissed. These provisions set out grounds on which an employee may not be dismissed (eg race, sex, national origin, union involvement) and also sets out other minimum termination rights (such as a minimum period of notice of dismissal). These federal 'unlawful dismissal' provisions have a wide application, but they provide less protection than the 'unfair dismissal' provisions in the federal Act.

Unfair dismissal laws, both State and federal, are likely to remain in a state of flux in coming years. The issues which will continue to prompt controversy and perhaps change include:

- **Role of Commonwealth legislation.** In the *Workplace Relations Act 1996* (Cth) the Federal Government has drawn back from the broad regulation of unfair dismissals that was a feature of industrial relations legislation under the former Labor Government. The current Federal Government has narrowed the scope of its unfair dismissal laws, has reduced its reliance on the external affairs power, and has encouraged co-operation between the federal and State unfair dismissal systems.

⁶¹ *Workforce*, Issue 1120, 20/6/97.

⁶² Hon J Shaw MLC, *NSWPD*, 25/6/97 p 11 100.

Nevertheless, the interaction of the federal and NSW employment termination systems continues to create complexity and raise difficult jurisdictional questions. In this climate, there is some pressure to introduce a simpler single unfair dismissal system. Victoria has introduced a single system by ceding much of its industrial relations powers, including its unfair dismissal powers, to the Commonwealth. However, the prospects of the current New South Wales Government following a similar path are remote. It is also unlikely that the Federal Government will withdraw completely from regulating unfair dismissal for employees under federal industrial instruments. As a result, there is likely to be continuing complexity and litigation as the scope of the federal and state jurisdictions are tested.

- **Balance between interests of employees and employers.** Unfair dismissal legislation involves balancing two public interests: security of employment, and commercial freedom. The federal legislation expresses its approach to be one of ‘a fair go all round’, and a similar philosophy applies to the New South Wales legislation. However, different conclusions may be reached on the question of what amounts to a ‘fair go’. Some issues which may continue to arise include: in what circumstances reinstatement rather than compensation should be the remedy for an unfairly dismissed employee; and whether an employer’s financial viability should be relevant to the question of compensation.
- **Who should have a remedy for unfair dismissal.** A particularly controversial aspect of balancing the interests of employers and employees is the question of what classes of employees should be able to claim a remedy for unfair dismissal. The debate draws on wider concerns about the effect of unfair dismissal claims on the profitability or viability of businesses, and ultimately on employment rates. Both the Federal and New South Wales unfair dismissal laws prevent certain kinds of employees, such as fixed-term or probationary employees, from claiming that they have been unfairly dismissed. There are also proposals at the federal level to exempt small business employers from unfair dismissal claims. In the absence of conclusive empirical evidence on the effect of unfair dismissal laws on job creation, there may be continuing adjustments to the class of employees covered by unfair dismissal provisions.

APPENDIX

International Labour Organisation Convention No 158 - Convention concerning Termination of Employment at the Initiative of the Employer

- **International Labour Organisation Recommendation No 166 - Recommendation concerning Termination of Employment at the Initiative of the Employer**

(As reproduced from Attachment 1 to Creighton, B, 'Industrial Regulation and Australia's International Obligations', *A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations*, edited by Paul Ronfeldt and Ron McCallum, ACIRRT, Monograph No 9, University of Sydney, 1993 p.101.)