COMMONWEALTH OF AUSTRALIA

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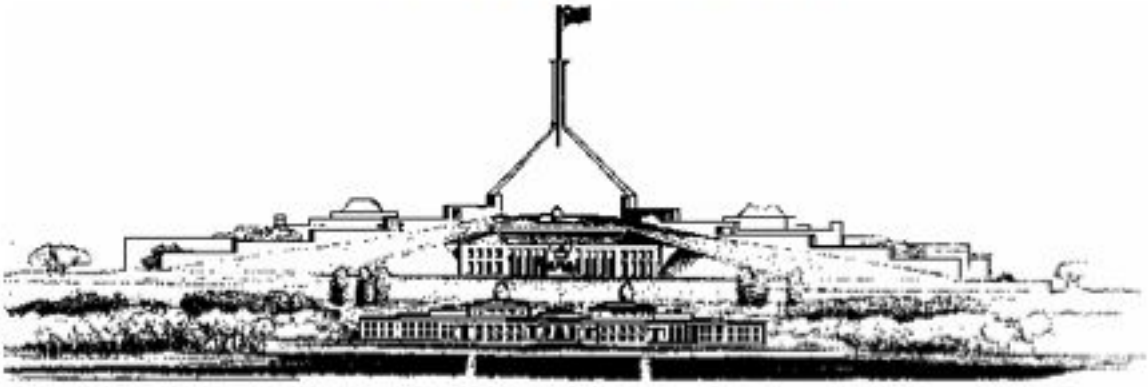

THE SENATE

WORKPLACE RELATIONS AMENDMENT (FAIR TERMINATION) BILL 2002

Consideration of House of Representatives Message

SPEECH

Thursday, 11 September 2003

BY AUTHORITY OF THE SENATE

SPEECH

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Speaker	Collins, Sen Jacinta	**Question No.**	

Senator JACINTA COLLINS (Victoria) (11.47 am)—It will not surprise senators that the position of the Labor Party is that we insist on these amendments. There is quite a long history on this issue, and I think it would be helpful at this stage to go through some of it. The government proposes with the Workplace Relations Amendment (Fair Termination) Bill 2002 to exclude casual employees of less than 12 months regular and systemic service and those who do not have a reasonable expectation of continuing employment. The standard for exemption from unfair dismissal for employees engaged on a casual basis for a short period is that set by article 2.2(c) of the International Labour Organisation's Termination of Employment Convention 1982. This convention has been ratified by Australia and is a schedule to the act. The general question, going right back to the critical principle, is what is reasonably regarded as a short period. The government seeks to argue that 12 months is a short period; the opposition's preference ultimately would have been three months, the compromise six months; and the Democrats view was six months. But still the government seeks to insist on 12 months.

Before I go into some other aspects of the history, let us put this into an international context. It is interesting to note that in 1999 the OECD compared the standard of employment protection legislation in member states and ranked the standard from one to 26, with one being the least strict and 26 being the strictest. Australia ranked fourth—that is, at the least strict end of the scale—behind the US, the UK and New Zealand. We do not stand out as a paragon of employee rights, we fall at the other end of the scale, but this is apparently not good enough for the government. The rhetoric and the scare campaign that is out there amongst employers on unfair termination is what is mounting this case. It is outrageous—given the many genuine issues of concern with the cuts and other proposals the government is canvassing—that the government claims that the opposition and the minor parties are running scare campaigns when this very government itself is prepared to develop the perception amongst employers that is damaging access to employment.

Let us reiterate that point for starters: Australia ranks fourth of 26, fourth being at the worst end of the scale. In that context it is quite clear that this bill is designed to make it easier for employers to sack casual workers. The government is intent on removing protection for workers, particularly casuals, against unfair treatment in the workplace. I remember that this was discussed in some earlier debates on unfair dismissal. Senator Len Harris brought to the attention of the Senate some of his views and experiences in relation to casual employment, and he agreed that the growing trend of casualisation in Australia and the uncertainty that is being provided to many ordinary Australian families as a consequence of this needs to be redressed. If I recall the last occasion issues similar to this were debated in the Senate, the government was out there on its own. The position of the minor parties—the Greens, the Democrats and the Independents—and the Labor Party is that they all see this for what it is: a scare campaign in which the government seeks to maintain the support of small business by deluding them that this is a significant issue to them. I can recall several years ago that even COSBOA eventually said to us in a committee hearing: `We just want the government to get their act together. We just want something genuine here, and this is yet another one of these ingenuous stunts.'

Let us go back to some of the issues that Senator Harris raised. For many casuals, if their labour is simply not needed on a particular day or part of a day, they will join the ranks of the unemployed—depending on the current definition of `unemployed'. I suppose that if they have worked one hour in the week they are in reality counted as `employed', but what that means for their lifestyle, their security and their dignity is a very different reality. This uncertain situation is compounded by no rights to paid leave, paid holidays and all sorts of other entitlements. For many casuals, a holiday with their family, with a few extra dollars for the Christmas period, remains nothing but a very distant dream.

Despite the government's agenda here, there have been movements in the other direction in other areas. This is perhaps what has been most concerning to the government. The unsatisfactory fact that casual workers have low pay and very few rights was the subject of recent groundbreaking cases in the Australian Industrial Relations Commission. I will revisit some of those that have been canvassed in this debate and other debates in the past, but before I do that I will go to my favourite one: parental leave. We finally extended parental leave to casuals

working on a regular and systemic basis. On the one hand, the commission are able to say, `Casuals working on this basis should have access to parental leave,' but, on the other hand, they are saying, `We're going to limit, though, for 12 months their access to protection from unfair termination.' It is, frankly, just unprincipled and rank.

We need to have some consistency in standards for casuals—some consistency and certainty for these people. In some areas they may not be eligible for the conditions of employment for part-timers and full-timers—there may even be some good, genuine arguments for why that might be, in respect of some conditions—but, on this one, there is nothing. There is no principled basis for arguing that, on the one hand, we accept that casuals should have access to parental leave but, on the other hand, in relation to access to fair termination that they are different to full-time or part-time workers. It is just utterly inconsistent.

The independent umpire in the field is already telling us these things. Let us look at some of those points. Affidavits presented in the metals case of 2000 show that casuals were deprived of holidays, sick leave, family leave, income security and, as I have said before, dignity. The evidence showed that most casuals are entitled to a loading of 20 per cent but many receive wages lower or not much better than those of their permanent counterparts. This harsh situation largely reflects the reduced capacity of casuals to bargain for better pay and conditions. Most casuals are reliant on award and statutory rights for protection against exploitation.

The commission is starting, slowly, to respond to these things. The commission is tightening up award protections for casuals. It has raised the loading for casuals from 20 to 25 per cent, and it gave casuals the right to convert to permanent employment after six months. Whilst the commission was limited to workers in the metal and engineering industry, it is worth noting the reaction to the casuals decision by the Chief Executive of the Australian Industry Group, Mr Bob Herbert. Senator Murray and I have had a long history of hearing from Mr Herbert, but he is often one of my favourites to quote because he does often represent a balanced, genuine perspective of employers. On this occasion, Bob Herbert said:

> There has been no adjustment to casual employment for 26 years. Certainly, there will be some murmurs among employers over the increased loading rates but, in reality, the AIRC ruling simply brings casuals to roughly the same pay and condition levels as their full-time colleagues.

It is similar to what I said about parental leave: the commission is reflecting that employers are more and more casualising their employment arrangements, and often this is unfair. Better conditions closer to those of their full-time and part-time counterparts are required not only to improve those conditions but also to prevent further casualisation.

Let us revisit the history of this particular matter. Late last year the full court of the Federal Court of Australia issued a decision that ruled invalid a regulation that prevented regular casual employees from mounting an unfair dismissal action until they had been with an employer for a year on a regular and systemic basis and had the expectation of continuing work. I think in the past the minister has indicated that he thought I had mischaracterised this decision, so let me be quite clear on what this decision said. In Hamzy v. Tricon International Restaurants trading as KFC the Federal Court faced the question of whether the statutory discretion conferred on the government to prescribe an exemption from unfair dismissal protection for employees engaged on a casual basis for a short period meant that the commission could knock out casuals who had not put in 12 months regular service with an employer or who could not hold out an expectation of continuing employment.

Let us look at the decision. The full court was unanimous in holding that the prescribed regulation—namely, regulation 30B(3) of the Workplace Relations Regulations—did not conform with what the act allowed. In other words, the regulation unlawfully excluded various classes of casuals who were entitled by an act of parliament and the international precedents I have referred to—and that we are committed to—to the right to some measure of employment security. Labor believes that, where there is an exception for casual employees for a short period, a short period is six months not 12 months. In fact, I think, apart from the government, the Senate is united in that view.

But back to the history: the government had broadened the exclusion to 12 months. Shortly thereafter Labor moved to disallow the government's regulations. We did so on the basis—amongst the reasons I have raised earlier—that this arrangement would further promote the casualisation of the work force, which we certainly have seen since that time. I have to say that we have been proven correct in that assessment. The Democrats allowed the government's regulations to stand on the important condition that the minister review the regulations after 12 months and the Democrats be given an opportunity to review empirical evidence of the operation of the exclusion after that period.

It is now more than 57 months since that occurred, and we are still waiting to see the evidence. I understand that this was an arrangement between the Democrats and the government over support to allow the regulation to stand, but I ask in this debate whether such a review has ever occurred. Do we understand how this is operating? Is it going to be the basis of our considerations now? I have some fairly strong suspicions that, no, that review never did occur. We have certainly never seen any public indication that it had. There was no indication in the last debate, if I recall correctly, that it had. So the government has dishonoured its agreement with the Democrats, if I am correct, and the review never occurred.

It is important to be clear about the impact of a 12-month exclusion. Australia is close to leading the world in the trend towards casualisation of the work force. According to the ABS, in 1982 there were 700,000 casual employees in Australia. By the turn of the millennium there were 2.1 million—from 700,000 up to 2.1 million. Casual employees now represent more than one-quarter of the labour force. Federal legislation should not provide an artificial incentive for employers to prolong the period in which a person is employed as a casual unnecessarily. Labor believes that the government's 12-month exclusion has exactly that effect. If a casual employee has been working for six months and has every expectation that their employment will continue indefinitely, it is probable that the government's 12-month exclusion in part influences the employer's decision to maintain the employee's casual status.

The government has denied the benefit of the exclusion to an employer where the substantial purpose of holding the employee as a casual is to avoid their obligations under the act. The opposition recognises that an employer may have legitimate reasons for employing a casual, but what is often missed, and is certainly never mentioned by this government, is that an employee has legitimate reasons for wanting security and stability in their employment. Labor notes that the government proposes to exclude employees engaged under a contract of employment for a specified period of time, but Labor is concerned that this exclusion does not impose any limit on the period of time or require that those periods be reasonable. Some of these issues we will probably address a bit later in the debate; I would like to give Senator Murray an opportunity to deal with his amendments before I raise some questions there. But Labor believes that the period of time should be less than 12 months because Labor believes that employers should not be given an incentive to avoid their obligations under unfair dismissal legislation by placing an employee on a fixed term contract where in reality their employment will be ongoing. *(Time expired)*