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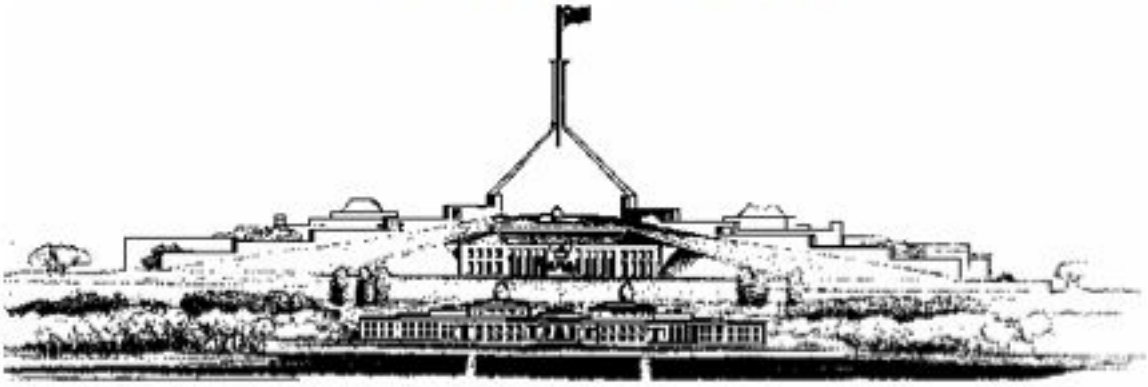

THE SENATE

WORKPLACE RELATIONS AMENDMENT (FAIR TERMINATION) BILL 2002

Consideration of House of Representatives Message

SPEECH

Monday, 15 September 2003

BY AUTHORITY OF THE SENATE

SPEECH

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

Senator JACINTA COLLINS (Victoria) (1.05 pm)—Senator Murray is, of course, correct. This debate in its various forms over many years has been a significant beat-up of a false connection between unfair dismissal in small businesses and job creation. I think I heard Senator Ian Campbell accurately a moment ago when he said that he did not accept there was such a link, when Senator Murray asked him the question. I will check the *Hansard* or give Senator Ian Campbell the opportunity to correct the statement. That being the case, I quickly refer back to the second reading speech on the Workplace Relations Amendment (Fair Termination) Bill 2002. On this occasion it does not refer to that link but I am pretty confident I could go back to a few other bills and find a second reading speech on behalf of the government clearly asserting that link. The government has, as Senator Murray said, quite misleadingly been exercising this beat-up for many years.

The data that Senator Murray put before the Senate today was very interesting and it certainly confirmed material that has been before this chamber time and time again. It is no surprise that the courts were equally unconvinced with arguments from the government that such a connection exists. In fact, I seem to recall that the patience of small business ran out on this matter as well—probably about three years ago when COSBOA said at that time, `We just want the government to stop carrying on about this and to do something concrete to get rid of complicated red tape, not so much to introduce unfair standards for casual workers.' However, Senator Murray, your contribution today, in my mind, leads to the conclusion that the Senate should maintain its resistance. Unfortunately, as you outlined on Thursday, the Democrats have reached an arrangement with the government and I will come to that in a moment.

Senator Murray—Not on unfair dismissal.

Senator JACINTA COLLINS—No, not on unfair dismissal—you are correct. Before I go to the unlawful termination issue, I want to address another area of data which, again, picks up on Senator Ian Campbell's point—and he is quite correct—that the casualisation of the work force has been a long-term trend and a very distressing trend. The policy imperative though is what we as a parliament should do about it. This is where there are significant differences between the government, the opposition and, I would say, the Democrats—and also the Australian Industrial Relations Commission. The commission, the Democrats and the opposition say that this is a very alarming trend, and we should be doing more about introducing security for casual employees.

On the last occasion this issue was debated I went through quite a number of areas where the commission had acted to effect those types of outcomes—but no, not for the government. The government wants to maintain, quite out of step with any of the state jurisdictions dealing with unfair dismissal, an exemption of 12 months from protection for unfair dismissal for casual workers. But let us see what this casualisation trend is delivering. It is delivering a situation where one in five Australians living in poverty have wages as their main source of income. It would be a fair guess, if we are talking about families living in poverty, that their wages come from irregular casual employment. One in five families, and what are we doing for them? In this case, the government is saying, `You guys should have to wait 12 months before you have any access to the standards that apply to other workers in relation to fair treatment in the workplace.' That is the guts of this message.

Senator Murray says that the arrangement with the government is not in relation to fair dismissal, and in one sense he is correct. The Democrats' preferred position is maintained at six months. However, unfortunately, the effect of this message going through will be to allow the government to continue the 12-month exemption. This is despite the fact that the government made a commitment to the Democrats to review the legislation. We certainly have not heard the outcomes of that review in this debate. We have not heard, other than Senator Murray's discussion now, any debunking of the link in relation to unfair dismissals across the board in small business and job creation, and certainly we have heard nothing at all about why 12 months should be regarded as a reasonable position for casuals—just that it is the government's desire, and that has been the substance of this debate.

I think I have already made it clear that the opposition will oppose the Democrats' amendments to the question that the committee does not insist on the Senate amendments disagreed to by the House of Representatives. Apart

from the fact that we still obviously agree with the Democrats that it should be six months, let me dwell on some of our concerns about other aspects of the arrangement that the Democrats have come to with the government. In the article that appeared last Thursday in the *Australian* newspaper outlining the arrangement, Senator Murray said two things. One was that he believed this would be a valuable win for casual employees but, on the other hand, he did not believe unlawful dismissal was an area of high litigation. This is partly my point in relation to unlawful termination. There is no great record of cases, so the value of the measure is very difficult to determine.

In the discussions I have had with colleagues who deal with these matters, they have advised me that unlawful termination is extremely difficult to use. Cases either go before the Magistrate's Court or the Federal Court and, whilst the test is on the balance of probabilities, in this matter as well as in relation to unfair dismissal, there is much less discretion with unlawful termination than there is with fairness. The other issue is costs. In these cases workers cannot claim costs and there are limitations in the outcome that can be determined for a worker. These limitations are, for instance, a penalty of up to $10,000 to a body corporate and a limitation on a maximum of six months pay—fairly limited options. But perhaps the most difficult aspect of this issue is that, unlike for full-time or part-time workers, casuals with less than 12 months experience are not able to elect to have their cases heard before the Australian Industrial Relations Commission.

This, in my mind, is perhaps the most critical point because we are looking at the most marginalised workers and, in terms of power within the work force, workers with the least resources available to them, and they will need to confront the courts rather than the commission. This is where we see the very clear agenda of the likes of the H.R. Nicholls Society. This is a further step towards saying, `Let's allow matters to be determined within the courts rather than in the commission.' But I cannot understand why we would allow that to be the case for the weakest or most marginalised of workers and think that that is something of great value to them. I think that the unlawful termination option will be rarely used because these are casual workers with very limited resources.

We should go back and ask why the Australian Industrial Relations Commission was established in the first instance. Certainly it was established as a means of dealing with dispute settlement. But it was also established as the means by which workers with lesser power or lesser resources would not need to confront courts, whereas in this arrangement which now exists between the Democrats and the government that will be the only point of access for casuals with less than 12 months experience. Senator Murray, I am sure, will say that that is better than nothing. My argument would have been: let us maintain the resistance and let us bring about the situation where the sunset clause disappears and we come back to the six-month period for casuals. As a second line position I would have suggested, had Labor had an opportunity before this arrangement had been concluded, that at the very least we explore a way through which casuals could opt to have their unlawful termination cases dealt with as unfair before the commission. Still apply, if you will, the government's desire to limit the test to just unlawful termination, but at least allow casuals to argue that their unlawful termination is unfair and that it could be heard on that limited basis before the commission rather than the courts.

Unfortunately, I believe, that option is not available. And now, with this message, we will have 12 months set in stone with respect to casuals. This is a most unfortunate culmination of a debate that has gone on for many years. I accept what Senator Murray says, that at least giving these casuals access to unlawful termination is a step. I would argue, though, that it is a very small step and in some ways a cruel step, because it is not a real step for many casuals to confront magistrates or the Federal Court in these types of cases. On that basis, as I have said, the opposition will oppose the Democrats' amendment to the question. We insist on all amendments and will continue to insist that all of the amendments should be maintained.