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AUSTRALIAN SENATE

ECONOMICS LEGISLATION COMMITTEE

**CONSIDERATION OF LEGISLATION
REFERRED TO THE COMMITTEE**

Workplace Relations Amendment Bill 1997

October 1997

Parliament of the Commonwealth of Australia

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Senate Economics Legislation Committee

(as at 29 September 1997)

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Contents

Membership of the Committee

iii

REPORT

Background to the inquiry

The status quo

The bill

Comment of Senate Standing Committee for the Scrutiny of Bills

Financial implications

Issues raised in evidence

The Government's view

Comment

Summary and recommendations

MINORITY REPORT ??

Appendices -

Appendix 1: list of submissions

Appendix 2: list of witnesses

Appendix 3: comment of Senate Scrutiny of Bills Committee

Report

Background to the inquiry

The bill was introduced into the House of Representatives on 26 June 1997, passed unamended on 27 June 1997 and introduced into the Senate on 1 September 1997. The Senate adopted a Selection of Bills Committee recommendation¹ and referred the bill to the Economics Legislation Committee on 28 August 1997 for examination and report by 20 October 1997. The Senate Selection of Bills Committee, when recommending the present inquiry, noted that the provisions of the bill be referred to the Committee for examination and report.

The Committee received 7 submissions (see APPENDIX 1) and held a public hearing on 26 August 1997 (see APPENDIX 2).

The status quo

Provisions of the *Workplace Relations and Other Legislation Amendment Act 1996* state that there are certain grounds on which an employer must not terminate an employee's employment. Employers must not dismiss an employee for a reason not connected with either the performance of the employee or organisational requirements and that reason must not be harsh, unjust or unreasonable. If an employee's employment is to be terminated for reasons associated with the performance of the employee, he or she must have the opportunity to appeal the allegation. These provisions relate to all employees regardless of their award status².

The Workplace Relations Amendment Bill 1997 provides an exemption for businesses of up to 15 employees to be exempt from the federal unfair dismissal provisions.³

The bill

The Government's intention for the bill is to ensure that small businesses are exempt from the federal unfair dismissal provisions, in respect of new employees⁴. The Government's *Better Pay for Better Work* policy establishes the termination of existing employment provisions in relation to unfair dismissal and proposes to replace them with a fairer and more simple process of appeal⁵. After consultation with small business and community groups, the Government believes that the current legislation was 'too

¹ Selection of Bills Committee Report No. 12 of 1997.

² Senate Economics References Committee *Report on Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996*, dated August 1996.

³ Workplace Relations Amendment Bill 1997, Explanatory Memorandum.

⁴ Workplace Relations Amendment Bill 1997, Second reading speech, 1 September 1997.

⁵ Department of Workplace Relations and Small Business submission No. 7, p.1.

legalistic and too prescriptive⁶ and therefore providing Government with the motive for change.

"...this bill will provide that an employee (other than an apprentice), who is first engaged by the relevant employer after the commencement of the bill, will not be able to make an application on the ground that the termination of his or her employment was harsh, unjust or unreasonable.....if he or she was employed by an employer who employs no more than 15 employees"⁷

Dissallowance of Statutory Rule 101 of 1996

On 30 April 1997, the Governor-General in Council made amendments to the Workplace Relations Regulations. These amendments included a new regulation, 30BAA. This regulation, which was to have commenced on 1 July 1997, would have provided for the exclusion from the operation of the unfair dismissal provisions of certain employees who were employed by a business with 15 or fewer employees. The proposed exemption was limited to employees of a small business who were employed after the commencement of the regulation, and would have operated only in relation to the 12 months of a new employee's employment with that employer.

After the regulations were tabled before both Houses of Parliament, the Australian Democrats and the Opposition signalled their intention to disallow the regulation. On 26 June 1997, the regulation was disallowed by the Senate. Later on the same day the Workplace Relations Amendment Bill 1997 was introduced into the House of Representatives.

Financial implications

This bill has no significant impact on Commonwealth expenditure.

⁶ Department of Workplace Relations and Small Business submission No. 7, p.1.

⁷ Workplace Relations Amendment Bill 1997, Explanatory Memorandum.

Issues raised in evidence⁸

Employment

38% of employees are employed by businesses employing less than 20 employees. The proportion differs across the various industries, such as retail - 42.7%, personal and other services - 53.6%, property and business services - 50.2% and construction - 63.1%.⁹

Currently small business is reluctant to employ new full time staff due to the uncertainty of the future. Small businesses are finding it increasingly difficult to terminate an employee if the employee is not suitable for the job. As a consequence small businesses are less inclined to put on permanent staff thus providing the sector with no real incentive in relation to jobs growth.

"Notwithstanding these changes, the legacy of the previous regime remains and small businesses continue to be reluctant to employ out of fear of what may occur if it does not work out."¹⁰

The proposed legislation will alleviate some of the burdens placed on the small business sector in relation to the ability to 'hire and fire' staff, with small business believing it will create stimulate jobs growth.

"It is an unavoidable fact that the defence of an unfair dismissal claim, however groundless, is especially burdensome for small business. In many larger businesses, expertise and resources can be put into recruitment and termination procedures. Small businesses have no such resources. Even attendance of witnesses at a hearing can bring a small business to a standstill."¹¹

Vulnerability of employees

In many cases, employees of small business are the most vulnerable, and least likely to be able to resolve their problem through processes at the workplace.¹² They are less likely to be able to afford legal representation in an unfair dismissal case, and as a consequence rely on the Australian Industrial Relations Commission (AIRC) to be a 'watch dog' over employers in dismissal cases.

"We also believe that stripping up to 1.3 million employees of small businesses in Australia of their dismissal rights would be most unfair. It would not be a good signal to workers already worried about their

⁸ For brevity we use 'evidence' and 'witness' to include written submissions.

⁹ Australian Council of Trade Unions submission No. 5, p.3.

¹⁰ ACCI Review, August 1997, p. 9.

¹¹ *Hansard*, House of Representatives, 26 June 1997, p. 6068.

¹² Australian Council of Trade Unions submission No. 5, p.3.

legal standing under the massive economic changes in this country, and could lead to a major backlash against the new Federal laws.”¹³

It is a strong belief that stripping small business employees of the opportunity to appeal dismissal claims through the AIRC will open the door for abuse.

“Such an exemption would put out a message and feed a perception that small businesses can be as unfair as they like to their employees without any legal consequences”¹⁴.

“There is a real risk that small [business] employers will see the bill as a message that they can sack employees at will, without any requirement for a ‘fair go’.”¹⁵

Employment Growth

The Australian Bureau of Statistics has used 20 employees as the determinant of what is and is not a small business. The bill may open debate from those businesses employing between 16 and 20 employees being unfairly discriminated against their small business compatriots that employ less than 16 employees.¹⁶

On the possible production of employment growth, unions stated that with the abolition of grounds for appeal in possible unfair dismissal cases for employers employing 15 or less staff that this alone would discourage employers employing more than 15 staff.¹⁷

A scenario often raised in evidence was the factor relating to 15 employees or less. Unions believed that employers may even try to shed staff to become in line with the new exemption. It is a perception that an employer who already employs 16 employees could dismiss one or more employees to make the business eligible for the exclusion. Even if the first dismissal was valid, the employer now has the opportunity to 'hire and fire' at will, with new staff, providing the business employs 15 or less staff.¹⁸ This will in turn provide an incentive for small businesses to employ no more than 15 staff. If this scenario was to take place, it may increase the employment share of small business, however it may also have a negative factor on employment creation.

It is a belief of some union groups that the 15 employee threshold will be raised to 20, 50 or even 100 employees over time¹⁹. If this was to happen, unions believe it

¹³XxMurray letterxx

¹⁴Xxmurray letterxx

¹⁵Australian Council of Trade Unions submission No. 5, p.3.

¹⁶Shop, Distributive and Allied Employees' Association submission No. 1. P.3.

¹⁷Australian Council of Trade Unions submission No. 5. P.7.

¹⁸Australian Council of Trade Unions submission No. 5. P.3.

¹⁹Shop, Distributive and Allied Employees' Association submission No. 1. P.4.

would provide a large proportion of employees within Australia with no legislative mechanism of appeal in dismissal cases.

Casualisation

A current trend for small business is to employ staff on a casual basis thus relieving the legislative burdens placed on the business if required to dismiss staff. A negative effect on the employer is a higher cost for casual labour however the employer does have greater flexibility in the placement and dismissal of staff.

"...employers frequently resort to temporary contracts and other 'non-standard' forms of employment to meet their needs for greater work-force flexibility"²⁰

"Although there are 250,000-plus employees in small business, because of the nature of the employment—there is a very high casualisation rate in retail amongst those small businesses—the casuals effectively are excluded from the unfair dismissal laws."²¹

The Government's view

It is widely regarded that regulation in the labour market is an obstacle for employment growth, particularly in relation to small business. The more labour regulation, the less incentives are given to businesses to employ higher volumes of staff.

An inquiry conducted by the Small Business Deregulation Task Force heard evidence from small business to the effect that the federal termination of employment laws were proving to be a disincentive for employment in small businesses. The small business sector stated that whilst the current provisions relating to unfair dismissal were in place, it could not see opportunity for jobs growth in that sector.²²

"Small business is cautiously optimistic about the Government's proposals to amend the unfair dismissal laws, and the sector will not change its attitude unless better outcomes result from the new arrangements"²³

Comment

"A balance has to be struck between allowing employers greater freedom in decisions to hire and fire, and ensuring both sufficient employment security for workers and firms to be willing to invest in long-term training and protection for workers against unfair dismissal."²⁴

²⁰ OECD Jobs Study, June 1994, p.36.

²¹ Evidence p. E39.

²² Department of Workplace Relations and Small Business submission No. 7. P. 3.

²³ Small Business Deregulation Task Force, Report *Time For Business*, November 1996.

²⁴ OECD Jobs Study, June 1994, p.36.

Recommendation

The Committee recommends that the bill be passed.

Senator Alan Ferguson
Chairman

MINORITY REPORTS IF ANY??
FORCE AN ODD PAGE FOR EACH MINORITY REPORT

Appendix 1

List of Submissions

Submission	Name
No. 1	Shop, Distributive and Allied Employees' Association Ian Blandthorn National Assistant Secretary
No. 2	Austrlian Liquor, Hospitality and Miscellaneous Workers Union Jeff Lawrence Joint National Secretary
No. 3	The Association of Professional Engineers, Scientist and Managers, Australia Bruce Nadenbousch Director Industrial Relations
No. 4	Austrlian Liquor, Hospitality and Miscellaneous Workers Union Brian Daley Divisional Branch Secretary
No. 5	Australian Council of Trade Unions Tim Pallas Assistant Secretary
No. 6	Australian Chamber of Commerce and Industry Reg Hamilton Manager (Labour Relations)
No. 7	Department of Workplace Relations and Small Business

Appendix 2

Witnesses at hearing

Name

Mr John Ryan
National Industrial Officer
Shop, Distributive and Allied Employees' Association

Ms Silvana Sgro
Branch Official
Australian Liquor, Hospitality and Miscellaneous Workers' Union

Mr Reg Hamilton
Manager (Labour Relations)
Australian Chamber of Commerce and Industry

Mr Timothy Pallas
Assistant Secretary
Australian Council of Trade Unions

Mr Alexander Anderson
Acting Assistant Secretary
Legal Services Group
Department of Workplace Relations and Small Business

Mr James Smythe
First Assistant Secretary
Legal and Industry Division
Department of Workplace Relations and Small Business

Senator the Hon. Rod Kemp
Assistant Treasurer