Workplace Relations Amendment (Unfair Dismissals) Bill 1998

Opposition Minority Report

February 1999

Minority Senate Report into the *Workplace Relations Amendment (Unfair Dismissals) Bill 1998*

Labor Minority Senators believe that the proposal in the Workplace Relations Amendment Bill (Unfair Dismissals) Bill 1998 to:

- Require a 6 month qualifying period of employment before new employees (other that apprentices and trainees) can access an unfair dismissal remedy under the Act; and

- Exclude new employees of small business (other than apprentices and trainees) of 15 or fewer employees from the unfair dismissal remedy under the act,

is seriously flawed and its introduction is not supported by credible evidence.

History
In 1996 the Government introduced the Workplace Relations and Amendment Act which amended the previous Labor Government's unfair dismissal laws.
Regulations to exclude access to the unfair dismissal laws by employees with less than 12 months continuous employment and those who worked for a business of 15 or fewer employees were introduced by the Government in July 1997.

The Senate disallowed these regulations.

The Workplace Relations Amendment Bill 1997, proposing a permanent exemption for small business of 15 or fewer employees from the unfair dismissal laws was introduced into the Senate in September 1997 and referred to the Senate Economics Legislation Committee for inquiry and report.

Minority Labor and Democrat Committee members presented dissenting reports recommending that the Bill not be passed.

The Bill was defeated in the Senate in October 1997.

A further bill with identical provisions was introduced into Parliament in November 1997 and defeated in the Senate in March 1998.

On the 12th November 1998 the Government introduced the Workplace Relations Amendment (Unfair Dismissal Bill) 1998 into the House of Representatives.

On the second of December 1998 the Senate referred this Bill to the Senate Employment Workplace Relations, Small Business Education Legislation Committee for examination.

The measures proposed in the Bill were contained in the Workplace Relations Amendment Regulations 1998 (no 2) (SR No 338 of 1998) which was gazetted on the 18th December 1998.

Labor Senators have serious concerns about the Minister's actions in introducing these regulations particularly when the legislation bill had been referred to the Committee for inquiry.

Mr Reiths " Evidence"

In his second reading speech Mr Reith spoke of the evidence to support the small business exclusion. He claimed:

" *Senators who spoke against the previous bill to introduce the Small Business exclusion said there was insufficient evidence of the need of the Bill and its benefits. There was plenty of evidence but they would not allow themselves to be convinced.*

That evidence included the Morgan and Banks' 1996 survey, the April 1997 Recruitment solutions survey, and the May 1997 New South Wales Chamber of Commerce and St George Bank survey. The Council of small Business Organisations of Australia said that small business would create 50,000 jobs if the Bill was passed….

Then there was the Yellow Pages Small Business Index Survey conducted in October and November 1997 and further surveys conducted in March 1998 and July 1998 by the New South Wales, South Australian and Queensland Chambers.

These surveys, and others like them, make completely plain the importance which business attaches to this issue."

The difficulty for Mr Reith is that his claims do not stand up to close analysis. An examination of the evidence he cites indicates that he has either selectively chosen statistics which buttress his case, has relied on surveys with dubious methodology, relied on guesses or simply ignored data which he views as not helpful to his case.

Mr Reith has then directed his own Department to follow his example. This has placed the Department in an invidious situation of having to ignore definitive unbiased surveys such as its own AWIRS 95 survey, which contradict the Ministers rhetoric.

The Minister has also further compromised officers of his own Department by directing that they present his selected witnesses from small business to a hearing by the Committee on this Bill as part of its own submission to the Committee. The inappropriateness of this directive was demonstrated when one of the witnesses testified about a case that is currently before the Australian Industrial Relations Commission.

This matter has been referred to the procedures committee with the respect to the Minister's lack of regard for due process and his disregard for appropriate convention.

A Review of the Current Law

In considering the proposed amendments to the Governments own unfair dismissal laws it is worth considering the changes that the Howard Government made to the previous Labor Governments Unfair Dismissal Laws.

What has fundamentally changed since the amendment of the former Labor Governments legislation is the onus of proof from the employer to the employee in unfair dismissal cases.

With the introduction of the unfair dismissal provisions of the Workplace Relations Act 1996 the onus of proof placed upon the employee to prove that they have been subjected to unfair, harsh or unjust treatment in the dismissal process.

This is a significant and fundamental change.

Unfair dismissal hearings are now heard in the Industrial Relations Commission instead of the Federal Court, which reduces costs to the applicant. However costs may be awarded against the employee if it is considered that the claim was vexatious or frivolous.

The Government introduced an application fee of $50 as a disincentive to spurious or frivolous claims. Additionally the Commission is required when assessing an unfair dismissal claim not only to assess whether an employee has been dealt with unjustly or harshly but whether or not the employer is able to viably deal with any costs or award of damages in lieu of reinstatement

Accordingly you could, as an employee, have a scenario where the Commission recognises that you have been unfairly and unjustly dealt with by your employer but you are unable to seek appropriate restitution due to the financial viability of the employer.

Procedural fairness is no longer a mandatory requirement, probationary employees are excluded from access to the unfair dismissal legislation and casual employees cannot access the legislation until they have been employed for a 12 month period. Also those on term contracts are denied access to the unfair dismissal laws.

It is our view that the existing legislation favours employers with respect to unfair dismissal with the ancillary effect of encouraging small businesses to put employees on limited term contracts.

Our position

Labor Senators will not support the Bill

We have in our previous minority report stated our objections and dealt with arguments put forward to amend the unfair dismissal provisions of the Workplace Relations Act 1996. None of these concerns have been adequately addressed in spite of Minister Reith’s rhetoric.

Core Concerns

In arguing against the bill Labor Senators categorise their concerns in 3 core areas. Indeed we would restate our concerns as we have done in our previous minority report.

1. ***Our concern remains that the Bill contravenes the Prime Ministers key commitment to the Australian people when he claimed that under his Government employees would not be worse off under his government’s industrial relations legislation.***

2. ***Our concern remains that the exemption is unfair.***

3. ***Our concern remains that the exemption is unnecessary.***

Core Concerns

1. **That the Amendment remains a breach of the Prime Minister's key commitment to the Australian people when he claimed that under his Government employees would not be worse off.**

We have consistently seen past evidence of the Government reneging on election commitments and on core and non-core promises.

The Government first introduced changes to its unfair dismissal laws, by Regulation, in April 1997. This action completely contradicted the public position of the Coalition cited in an article in the Sydney Morning Herald on the 20th February 1996 where a small business exemption was explicitly ruled out:

" *The Coalition has flatly ruled out any exemption for small business in its redrafted unfair dismissal laws, despite a plea that the sector should not be subject to the same treatment as ' the big end of town'. The author of the policy, the Opposition's industrial relations spokesman, Mr Peter Reith, said the redrafted system would not contain any exemptions"*

In the lead up to the 1996 election Peter Reith publicly promised that all employees would have access to appeal against unfair dismissal:

" *Look, our position's very clear. If you've been unfairly dealt with at work, you should have a right of appeal."* (ABC daybreak, 28 February 1996)

This commitment was reflected in the Coalitions pre – election policy "Better Pay for Better Work" which stated:

"The Coalition believes that employees should have access to a fair and simple process of appeal against dismissal – based on the principle of a ' Fair Go All Round" (18th February 1996)

The most damning piece of evidence with respect to the Governments breach of its commitments comes in Senator Andrew Murray's October 1997 Minority Report on the unfair dismissal law amendment. In this report Senator Murray states:

" Prior to the 1996 Election, the Coalition promised to replace Labor's Laws with a 'fair go all round for' for employers and employees. While little detail was provided, it was clear that all workers would have access to the regime, and that the test for unfair dismissal would be closer to the pre 1993 rules.

"The Democrats prior to the election and since, supported the Coalition's policy direction. During the election campaign, ***COSBOA asked the Coalition, the Democrats and the ALP to support an exemption for small business and all three parties refused****, on the basis that it would breach the 'fair go all round' approach."*

Mr Reith has made much of his so-called mandate arising from the 1998 Federal Election campaign. In his second reading speech on the Bill he claimed:

“ These initiatives were specifically outlined by the Coalition parties during the recent Federal Election campaign in our workplace relations policy, More Jobs, Better Pay. We have a specific electoral mandate to proceed with their implementation as a matter of priority. In regard to the small business exemption we have a fresh mandate, given the rejection by the Senate of similar proposals during the first term of the Howard Fisher Government.”

The fallacy of the so called mandate is amply demonstrated by the fact that the Coalition obtained less than 50% of the vote for the House of Representatives and approximately 40% of the vote in the Senate.

The Government’s amendments to the unfair dismissal laws clearly discriminate against workers of small business with 15 or less employees. It also clearly discriminates against those new employees on a six-month qualifying period.

These employees will be demonstrably worse off under the proposed legislation. It removes a substantial group of employee’s rights to access appropriate protection from unfair dismissal. How then can the Government claim that workers are not worse off under this legislation and have been given a ‘fair go all round’?

2) The Exemption Remains Unfair

As Labor Senators noted in the previous minority report the exemption is discriminatory, arbitrary and it will add to job insecurity. None of these issues have been addressed in the current Bill.

If anything the evidence to this inquiry has amplified the unfairness involved.

The case studies presented by the SDA highlight the unjust behaviour which will be allowed to occur without redress if this Bill succeeds.

Alternatively workers may be driven to high cost common law remedies such as those which have occurred in the United States recently. Such a recourse would involve high risk and high cost for both employers and employees.

Additionally we have seen the lengths that employers will go to create $2 shelf companies to avoid their obligations to workers. The waterfront dispute with Patricks is the most obvious example. An exemption set at 15 employees will encourage unscrupulous employers to structure their company arrangements to avoid their obligations to provide secure employment.

This is not a *“ fair go all round.“*

3.The Exemption Remains Unnecessary

The Government has provided much rhetoric as to why small business exemption to unfair dismissal laws is warranted. We contend that it is not necessary and that evidence that the government claims that supports a change is not credible.

There are three key reasons why the proposed small business exemption to the unfair dismissal laws is unnecessary.

1) **The Government has already amended the unfair dismissal law and had stated that no further change was necessary.**

2) **That those changes had already affected the unfair dismissal claims and had made further amendment unnecessary.**

3) **There is no credible evidence to suggest that the unfair dismissal law needs to be changed.**

We would now address these key reasons

1) **The Government has already amended the unfair dismissal law and had stated that no further change was necessary**.

As has canvassed previously Labor's unfair dismissal laws were extensively amended by the Government Workplace Relations Act and came into effect on the 1st January 1997.

Statements by John Howard such as:

" We have swept away Labor's jobs destroying unfair dismissal laws"
(Ministerial statement in response to Bell Report 24th March 1997)

and Peter Reith:

' *We have delivered a workable system for dealing with unfair dismissal*"
(Speech on return of the Bill from the Senate, 21st November 1996)

clearly demonstrated that the Government had not believed that the introduction of further amendment to the unfair dismissal law was warranted.

Additionally the Democrats certainly believed that an exemption for small business was unnecessary.

In his minority report in October 1997 when commenting on the unfair dismissal provisions of the Workplace Relations Amendment Bill 1997 Senator Andrew Murray commented:

" The Federal Government now has the law it wanted in these respects with only minimal changes. Indeed the new Federal law (WRA 1996) is even more attuned to the needs of small business than the pre- Brereton 1993 State laws. The Democrats have delivered what we think is a fairer balancing between the rights of employers and employees. To go further would be to create a new unfair dismissal problem in reverse – the same sort of situation which, in 1993, lead to the campaign for Federal laws on unfair dismissals in the first place"

Indeed when the Government introduced its first attempt to amend the unfair dismissal legislation in 1997 Senator Murray scathingly hypothesised in his minority report on the real motives of the Howard Government in putting forward the legislation:

" *It remains my belief that the Coalition introduced this single issue Bill encapsulating gross unfairness, to provoke the Senate to absolute rejection.*

"It remains my belief that this Bill was conceived to achieve a double dissolution trigger. And in that act of creation is exposed the Coalitions utter heartlessness. It would create job insecurity and arbitrarily discriminate against one to two million employees for a political end."

The Democrats quite rightly presumed that an exemption for small business was unnecessary.

Even a Government commissioned task force into small business concluded that the exemption for small business was unnecessary

The Bell Taskforce, chaired by Mr Clarie Bell concluded that an exemption was unnecessary. After an extensive and detailed report the only recommendation that the taskforce came up with in relation to unfair dismissal laws was that the unfair dismissal laws be reviewed after 12 months operation to ensure that it is delivering a more balanced and flexible approach for small business.

The Ministers subsequent review has been as limited and selective as the evidence and analysis presented to this and previous inquiries.

2) **That changes had already affected the unfair dismissal claims and made further amendment unnecessary.**

In its evidence to the Economics Legislation Committee which examined the 1997 Workplace Relations Bill the Department of Workplace Relations produced the following data in relation to the effect of the Governments amendments to the unfair dismissal laws.

" As a result of the amendments, there has been a significant decrease in the number of applications made under the federal unfair dismissal legislation. In the first 37 weeks there were 10,408 applications under the then Industrial Relations Act 1988;in the first 37 weeks of 1997(up to 12 September 1997) there were 4,801 applications under the Workplace Relations Act – that is a decrease by 54%. This decrease is not only the result of the change to the scope of the federal jurisdiction. Combined totals of Federal and State applications (excluding applications in Queensland, in either federal or state jurisdictions) decreased by 20%, for the period from January – July 1997 compared with January – July 1996.

More recent data has been provided by the Department of Workplace Relations and Small Business in its submission to the Employment, Workplace Relations, Small Business and Education Committee on the 21 January 1999.

" In the period 13 December 1996 to 31 December 1997, the first 12 months of operation of the provisions, 7,461 applications were filed. This represented a 49% reduction in claims compared with the same period in 1996. …..

From 1 January – 31 December 1998, there were 8,186 applications in respect of termination of employment in the federal jurisdiction. This represents a 44% decrease, compared to the same period in 1996."

This trend has assisted small business as the number of small business claims has remained in proportion to their share of the workforce during this decline.

3) There is no credible evidence to suggest that unfair dismissal laws need to be changed.

In their submission to the committee the Department of Workplace Relations and Small Business cited numerous surveys and other "credible" anecdotal and other data to support its case.

Examples of this selectiveness are detailed in the following surveys cited by the Department and in one surveyed it ignored.

Australian Workplace Industrial Relations Survey 1995

One point that astounded Labor minority members was the continued omission of data from the most comprehensive survey of employment – including small business ever conducted in Australia – the Australian Workplace Industrial Relations Survey 1995.

It is all the more extraordinary given that the AWIRS 95 specifically addresses the question whether the unfair dismissal laws prevented small business from employing new staff.

It is important to again note that this survey was conducted in 1995 when Labor's unfair dismissal laws were in operation and when unfair dismissal law had been targeted by the then Coalition in a major campaign.

In response to a survey which asked, *why haven't you recruited new employees?* 68% of businesses responded that they didn't need any more employees. 33% gave as their reason insufficient work, lack of demand for their product or low profitability.

Unfair dismissal law did not rate a mention but may have been a fraction of the 6% response of high employment costs.

Another survey in the AWIRS specifically asked small business
(categorised as businesses employing less than 20 employees) : *why haven't you recruited more employees?*

Again only 6% of respondents mentioned high employment costs. It must be assumed that a fraction of the respondents couldn't recruit more employees because of the unfair dismissal laws.

In a third AWIRS survey small businesses were asked: what, if any, significant efficiency change would you like to make at your workplace but are unable to?

The leading response, by 21% of small business, was to improve or change buildings and equipment.

Other leading responses were to improve technology (16%), change staff numbers (9%), increase productivity (7%), have an enterprise agreement (7%) , abolish penalty rates (7%) and other significant efficiency changes (20%).

The Response ‘ change unfair dismissal laws’ was provided by only 6% of small business respondents.

The most relevant piece of AWIRS 95 survey evidence, that was unpublished, but was reported in an ACCIRT reference was a survey into reasons for not recruiting employees during the previous 12 months

66.2% of small business respondents indicated that they didn’t need any more employees. 23% listed insufficient work as the main impediment.

Only 0.9% of respondents nominated that they had not recruited employees due to unfair dismissal legislation.

It is obvious why the Department did not refer to its own data. It demonstrates that there is no need to change the unfair dismissal law.

The Yellow Pages Small Business Index Surveys (1997 and 1998)

In its submission DEWRSB referred to the Yellow Pages Small Business Index surveys that were undertaken in 1997 /1998. The Department referred to one particular survey conducted from the 30th October 1997 to 12th November 1997 where specific questions were asked about unfair dismissal laws.

Whilst this yielded figures such as 79% respondents thought small business would be better off if they were exempted from unfair dismissal laws and 38% said they would recruit more employees if they were exempted from unfair dismissal laws the methodology of this survey has been called into question.

Associate Professor Rosemary Claire, Principle Researcher of the Justice Research Centre, raised concerns regarding the methodology utilised in the survey questions on unfair dismissal in this October 1997 Survey.

When appearing before the Committee inquiry into the 1998 Unfair Dismissal Bill Associate Professor Claire was asked to identify the flaw in the methodology of the question:

Would you be more likely to recruit more employees if you were exempted from current unfair dismissal laws?

This survey question was asked in the 1997 October Yellow Pages survey ”

Associate Professor Claire responded:

“ It is what we call in law a ‘leading question.’ A question that simply asks, ‘ would you be likely to recruit if you were exempt from the unfair dismissal laws?’ is inevitably going to achieve a response which is very different from the response that you would get if you said, for example, “ What would help you to hire people?’

That is a more open ended question which allows the respondent to take into account the range of factors that might be impacting on them rather than simply drawing attention to a single factor which is then presumed to be the only factor operating in this situation."

It is also instructive to note what data from Yellow Pages Surveys from May 1997 – November 1998.that was omitted by the DWRSB in its submission to the Committee. Information that the Department assessed was quite clearly detrimental to the Minister's case for amendment of the unfair dismissal law.

In the May 1997 Yellow Pages Survey in the section" The Prime Ministers Response to the Bell Task force, More Time for Business Statement". 37% of
Businesses surveyed were aware of the Statement. Of this 37%, 15% were aware of the unfair dismissal bill initiative."

In the May 1998 Survey in the area of "Small Business Issues", respondents were asked to rate the importance to their business prospects of 12(apparently unspecified) policy initiatives. A four-point level of importance scale was also used in conjunction with this question.

Unfair dismissal changes rated 7 out of 12 in priority with a mean rating of 2.68 on the Four Point importance scale.

Following this question small business proprietors were asked to nominate which of the 12 factors was the most important issue to them. 6% mentioned unfair dismissal laws.

In the August 1998 Survey under the category of "Small Business Issues" proprietors were asked what the most important small business issues were for government. 6% of respondents nominated unfair dismissal laws.

St George Bank / State Chamber of Commerce (NSW) Survey

Further evidence of the selective utilisation and interpretation of data manifested itself in the Departments submission to the Committee which cited a press release dated 22 March 1998 by the NSW Chamber of Commerce.

It appears that the Department chose to utilise the press release issued by the Chamber rather than analyse the data provided in the actual survey, which was conducted in December 1997.

In its evidence the Department claimed that it had not seen the actual survey when subjected to questions on this issue by Senator Jacinta Collins at the Committee hearing into the Unfair Dismissal Bill on the 29th January 1999:

Senator Collins asked:

" Are you aware of the fact that roughly 50% of the New South Wales Chamber of Commerce and Industry employers surveyed who responded positively to the question that they had experienced an unfair dismissal claim did not believe it affected their hiring intentions"

A Departmental Officer Mr Leahy responded:

“ We do not have that information Senator”

Additionally the Department in its submission, when citing the NSW Chamber of Commerce press release claimed that 51% of small businesses surveyed stated that the current unfair dismissal laws were a deterrent to employing more staff.

In fact the actual data from the survey indicated that of the approx 32.5% of small business respondents that had been involved in an unfair dismissal case, only half confirmed that the current laws were a deterrent to new staff.

Unfortunately despite the Ministers claims with respect to evidence,
the Department neither sought nor claimed to provide a comprehensive discussion or analysis of all the survey material, research findings and points of view relevant to the subject matter of the Bill”

The references to surveys and related material included in the submission
were included for the purpose of explaining the Governments policy position.”

Evidence Concerning the Proposed 6 Month Probationary Period

The only evidence before the Committee (which includes material from the SDA, ALHMWU and the ACTU not cited in the majority report), supports the view that the present legislation provides sufficient scope of flexibility and that there is no need to institutionalise a period of six months. Discretion on this matter should continue to reside with the AIRC.

Conclusion regarding evidence

There have been several surveys and reports of concern with unfair dismissal laws by organised employers but any correlations with jobs growth has not been established. No independent report or analysis confirms the Employer / Ministers claims.

Alongside the reports of organised employers seeking to have their responsibilities reduced stand in evidence the examples of workers who would lose their rights under this legislation and the lack of any credible correlation with a public gain such as increased employment that would justify such change.

We cannot agree with the majority logic at point 1.85 of their report which equates to the argument that if you say something often enough people will actually believe you.

We would suggest the Minister listen to Mr Bastian of COSBOA who pleaded for us to “*redefine the debate*”. The Government should focus on the real priorities of small business and discontinue this red herring which is inciting perceptions maintaining this debate.

Recommendation

We recommend that the bill not be passed.

Senator Jacinta Collins
ALP Senator for Victoria

Senator Kim Carr
ALP Senator for Victoria