Submission No 31
Small Business Employment
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Inquiry into Small Business Employment

Submission to the
Senate Employment, Workplace Relations
and Education Reference Committee

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OVERVIEW AND SUMMARY

1.1 The Australian Catholic Commission for Employment Relations (ACCER) is an organisation established by the Australian Catholic Bishops' Conference and supported by the Australian Conference of Leaders of Religious Institutes. Its role is to provide research, advocacy and support to Catholic organisations on employment relations matters. Catholic organisations in Australia employ people across health, aged care, education and welfare sectors, as well as in diocesan and parish administration. Some, if not many of these organisations, might be deemed as *small businesses*.

1.2 The ACCER makes this submission to the Senate Employment, Workplace Relations and Education References Committee (the Committee) in respect of the effect of *workplace relations, occupational health and safety* and *superannuation* regulations on small business. The ACCER also comments on the effect of the duplication of regulation between the State and Federal workplace relations jurisdictions on small business.

1.3 In making this submission the ACCER bases its comments on the principles and values espoused by Catholic Social Teaching.

1.4 In summary, the ACCER acknowledges many of the circumstances in which small business operate. In particular, it is appreciated that workplace relations, occupational health and safety and superannuation regulations require particular compliance and administration by small business operators. In this respect, regulations need to be easily accessible and understood. Further, small business requires support and assistance from organisations that have relevant expertise.

1.5 However, Catholic Social Teaching outlines a number of rights and responsibilities that should be inherent in any employment relationship. In this context, the size of an organisation does not release that employer from its responsibilities to its employees.

While some surveys have been carried out of small business to identify the main impediments to the engagement of employees - with varying degrees of opinion about whether or not unfair dismissal laws are obstacles to employment- the real reasons may be found in other factors. More important factors militating against employment growth by small business might include a lack of demand or potential markets for products and services; and a lack of skilled, motivated and reliable applicants seeking employment with small businesses, which may be perceived by some applicants as not offering career paths, professional development or adequate conditions of employment.

1.6 Further, Catholic Social Teaching proclaims a role for the *indirect employer* or the State to establish a code of minimum terms and conditions of employment to reduce instances of exploitation and coercion. Herein, the State has a role to provide a regulatory framework as a means to protecting the rights and responsibilities of both the employer and the employee.

1.7 In conclusion, the ACCER submits there are a number of improvements that could be made to the current regulatory framework in the areas of workplace relations, occupational health and safety and superannuation to assist small business while maintaining the rights of employees. There may be other matters that could be identified but this research is restricted by a lack of available data about the circumstances of small business and the unreliability of anecdotal evidence.

1.8 Such improvements to assist small business include:

- the development of consistent and plainly expressed legislation and regulations and the publication of practical codes and guidelines on specific topics;

- the initiation of an education campaign on relevant workplace relations, occupational health and safety and superannuation regulations;

- the review of processes and procedures for the consideration of employment related applications and claims to industrial tribunals and statutory authorities with a role or responsibility for employment related legislation;

- the streamlining of unfair dismissal compensation claims processes through the adoption of low cost and non-legalistic small claims procedures;

- the targeted provision of government funded advisory or support services to small business;

- the introduction of relevant data collection and analysis by government on employment relations matters affecting small business; and

- the objective consideration of a convergence of overlapping jurisdictions on employment related matters.

DEFINING SMALL BUSINESS

2.1 There is no formally recognised standard definition of a small business.

2.2 However, in recent times a colloquial definition of small business appears to have been developed that is based on the *number* of employees of the entity.

2.3 In 1998, proposed amendments to the *Workplace Relations Act 1996* (the Act) for the exemption of small business from the unfair dismissal provisions identified a "small business" as being an organisation employing 15 or less employees.[1]

2.4 In the more recent proposal to amend the unfair dismissal provisions of the Act, a "small business" was considered to be an organisation employing 20 or less employees.[2]

2.5 Further, the Australian Bureau of Statistics has identified "small business" as non-agricultural organisations employing less than 20 full time employees. [3] In addition, the Australian Chamber of Commerce and Industry, in its annual *Survey of Small Business*, has also defined small business as being those organisations employing less than 20 people.

2.6 As a result, certain characteristics have been ascribed to all small firms simply because they employ the same or less than a threshold number of employees. In relation to this, Curran states:

> *Size is not a very interesting or important attribute of an economic unit sociologically when set alongside other such as economic sector, technology, locality, labour and product markets etc, which are theoretically more significant. Of course size plays some part*

[1] *Workplace Relations Amendment (Unfair Dismissal) Bill 1998*
[2] *Workplace Relations Amendment (Fair Dismissal) Bill 2002*
[3] Australian Bureau of Statistics *Small Business in Australia*, Cat. 1321.0

> *in the functioning or the organisation but only in relation to other factors*.[4]

2.7 The number of employees, therefore, is only one means of attributing characteristics to an organsiation. Other criteria may include ownership properties (i.e. self employed, partnership, subcontractors, constitutional corporation, sole traders, franchisers, independent entities or workplace unit), industry and/or sector characteristics (i.e. public or private sector, producing goods or providing services) or economic indicators (i.e. such as assets, market share, annual turnover or profit, or sales).[5]

2.8 In 1996, the Report of the Small Business Deregulation Task Force, *Time for Business*, (the Small Business Report) defined *small business* as being:

- independently owned and operated;
- most, if not all, capital contributed by owners and managers;
- closely controlled by owner/managers who make principal decisions; and
- having turnover of less than $10 million.[6]

2.9 The Small Business Report then continued to indicate that "most small businesses have less than 20 employee in non-manufacturing industries and less than 100 employees in manufacturing industries."[7]

2.10 The variable criteria used to identify organisations as a "small business" can create confusion, especially for identifying and proposing public policy prescriptions. Caution must be exercised when debating public policy changes or initiatives aimed at benefiting the "small business" sector. What may be an appropriate solution for some

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[4] Curran J., 'Rethinking economic structure: Exploring the role of the small firm and self-employment in the British economy,' *Work, Employment and Society,* May 1990, page 129.

[5] Barrett R., *Small Firm Industrial Relations; Evidence from the Australian Workplace Industrial Relations Survey,* Working Paper No. 57, National Key Centre for Industrial Relations; Melbourne, April 1998, page 5.

[6] *Time for Business, Report of the Small Business Deregulation Task Force*, AGPS: Canberra, November 1996, page 13.

characteristically similar small businesses may ignore the reality for other dissimilar businesses of the same size. Notably, the sector in which the business operates, the method of provision and the type of goods or services, and the amount of profit generated, may all affect the special needs and circumstances of the organisation relative to other similar sized businesses.

2.11 It has been claimed that the current system of regulation assumes a "*one size fits all*" approach to business and ignores the special position of small business. Given the above discussion about the various definitions of small business, it may be just as necessary to avoid a "one size fits all" *solution* when making recommendations to address the difficulties faced by small business in the areas of government regulation. In particular, care must be taken in evaluating the needs of a business simply on the basis of the number of employees it engages.

2.12 Therefore, it is suggested that an appropriate definition of small business be identified that respects the complexity of small business and thereby avoids well-intentioned but potentially one-dimensional approaches to issues confronting such employers. This will assist in the design of appropriate data collection, so that informed analysis can be introduced into the discussion of these issues.

2.13 Accordingly, it is suggested that data collection on key employment relations issues affecting small business be implemented by government.

2.14 It is noted that a definition of small business does not appear to have been provided by the Committee nor is one given in the Terms of Reference for this Inquiry.

[7] ibid. page 13.

EFFECT OF GOVERNMENT REGULATION

3.1 Catholic Social Teaching identifies the principle of the *indirect employer*. The indirect employer includes "both persons and institutions of various kinds, and also collective labour contracts and the *principles* of conduct which are laid down by these persons and institutions and which determine the whole socio-economic system or are its results."[8]

3.2 In this context, Government regulation provides a framework in which organisations and people operate to achieve a range of economic and social benefits for the benefit of the community as a whole.[9]

3.3 Government regulation can be divided into three broad areas:

- economic regulation which are intended to improve the efficiency of markets;
- social regulation whish are intended to protect social values and rights; and
- administrative regulation, which controls how government collects, manages and allocates funds and property.[10]

3.4 Invariably, and perhaps inevitably, government regulation imposes a cost on all business. This '*regulatory burden*' includes compliance and administration costs associated with government regulations, as well as disincentives and other factors, which may affect an organisations productivity and business performance.[11] In essence, the regulatory requirements can be the traditional *paperwork*, implementation and monitoring of programs, and other reporting activities that must be undertaken to

[8] Pope John Paul II, *Laborem Exercens; On Human Work*, St Paul Publications; Homebush, 1981, para.17.
[9] Bickerdyke, I., Lattimore, R., (1997), *Reducing the Regulatory Burden: Does Firm Size Matter?*, Industry Commission Staff Research Paper, AGPS, Canberra, December 1997, page 7.
[10] ibid. page 7.
[11] ibid. page 7.

complete or comply with government regulations. It includes the time and expense outlaid that is in excess of the normal commercial practices of the organisation.[12]

3.5 Costs of compliance and administration of government regulatory requirements may or may not be greater for smaller organisations when compared to larger organisations, as "opportunity costs and disincentives are very hard to quantify."[13]

3.6 Moreover, "businesses can misjudge the impact of regulations because … in making their assessments of the costs and benefits of regulations (or taxes), most firms will probably do so on the basis that their industry and market will remain unchanged – but, in reality, these may well change if regulations are introduced or amended. For example, an easing of an industry regulation may not benefit incumbent firms to the extent they anticipate because *new* firms are attracted to the industry (which checks the profitability growth of existing firms)."[14]

3.7 Yet, the Small Business Report indicated "employment related issues, particularly unfair dismissal and other elements of the current industrial relations system, superannuation payments, workers' compensation and occupational health and safety, are a major challenge for small business. Small business operators say it creates uncertainty, is a disincentive to employment and has opportunity costs. Professional advice is often needed to deal with these issues which impose significant additional compliance costs."[15] These sentiments have been indicated more recently again in submissions from various employer groups to the Senate Inquiry into proposed amendments to the termination provisions of the Act.

3.8 An informal and random survey conducted by the ACCER of *small* Church employers found that most, if not all, *did not* view compliance with government regulation as a major impediment to employment.

3.9 In the absence of authoritative and comprehensive data, it is difficult to evaluate whether the potential for small business employment growth is inhibited by government regulation, and, in particular, industrial regulation. It may be that small

[12] *Time for Business,* op.cit., page 1.
[13] Bickerdyke, I., Lattimore, R., op.cit., page 11.
[14] ibid., commentary found at footnote 3, pages 11 – 12.

business employment is affected by other factors, such as the prevailing social, technical and economic drivers of growth. It may be that small business is currently employing its optimum number of employees. There may be other reasons. For instance, a 2002 survey undertaken by *CPA Australia* found that small businesses are employing more casuals and contractors than permanent employees because of varying business income and work patterns; to reduce costs; and the difficulty in finding skilled and motivated employees to work for small business.[16]

[15] *Time for Business,* op.cit., page 47.
[16] *Small Business Survey Program: Employment Issues*, CPA Australia, Melbourne, March 2002, page 4.

Workplace Relations

3.10 Pope John Paul II has written that:

> *...it is the State that must conduct a just labour policy.* [17]

3.11 The regulatory framework governing workplace relations at the Federal level is provided in the main by the *Workplace Relations Act 1996*. It allows for various industrial instruments, such as awards, enterprise agreements and workplace agreements, to reflect rights and obligations, including the conditions of employment of employees.

3.12 The ACCER submits that the award system is one of the most important features of the Australian workplace relations system. The Act establishes the award system as the means of ensuring a safety net of *fair* minimum terms and conditions of employment.[18] In this respect, not only does the award system provide protection to employees, it also forms the basis for the no-disadvantage test and enterprise bargaining.[19] In addition, statistics have previously indicated that small business employers rely on awards, either as the direct determinant or as a reference benchmark for employee remuneration.[20] Indeed, this is the experience of the ACCER in responding to inquiries from many Church employers.

3.13 For an employer to be covered by a Commonwealth award, the Australian Constitution requires an industrial dispute to exist between the employer and employees or their representatives (i.e. the union).[21] As a result, a *log of claims* is served on the workplace. In order to initiate dispute resolution functions of the Australian Industrial Relations Commission (the AIRC), the log of claims will necessarily include "ambit" claims; that is, claims to which no employer would agree

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[17] Pope John Paul II, op.cit., para.17.
[18] *Workplace Relations Act 1996* (Cth), section 88A
[19] *Workplace Relations Act 1996* (Cth) Part VIE
[20] See for example; Australian Bureau of Statistics, *New figures on award and agreement coverage in Australia*, Cat. 6305.0 and Department of Workplace Relations and Small Business, *Changes at work; The 1995 Australian Workplace Industrial Relations Survey, Summary of Findings,* GPS: Canberra, page 24.

to nor is truly expected to accept. A dispute may then be notified. Once this occurs, the AIRC may then settle the dispute by making or varying the award to reflect an arbitrated, conciliated or consented outcome.

3.14 Small business owners may not necessarily understand this process. That is, they may be served with a log of claims without having any understanding of its workplace implications or legal consequences:

> *Small business does not understand the logs of claims process or its implications, and operators can have legal responsibilities and obligations of which they have no knowledge.*[22]

3.15 Therefore, a small business may not necessarily respond when a log of claims is served on it. The ACCER notes that it has found this to be the case with some of the smaller organisations conducted by Church employers, especially where the management board is largely of a volunteer composition.

3.16 The lack of response to a log of claim will act as the trigger to the initiation of dispute proceedings. Notably, a submission to the Small Business Report described small business owners response to the logs of claims process in the following manner:

> *Employers, upon receipt of them, often throw them away because they do not understand or do not want to understand. Many employers are often caught in an award that they should not have been caught in and subsequently attract legal liabilities of which they have no knowledge…and once caught there is virtually no way out*.[23]

3.17 It is submitted that the Government, in conjunction with the Australian Industrial Relations Commission, unions and small business operators, and their representatives, should review the current log of claims process to identify ways in which it may be made comprehensible to and realistic for small business. Further, that it might be prudent to review the processes and procedures for all employment related

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[21] *Commonwealth of Australia Constitution* Act, section 51(xxxv).
[22] *Time for Business,* op.cit., page 48
[23] ibid. page 48.

applications and claims to industrial tribunals and employment related statutory authorities.

3.18 Philosophically, the foundation of the award system - the initiation of a dispute in order to make or vary an award - engenders a workplace relations system based on conflict and disputation.

3.19 This approach to the industrial regulation of the employment relationship does not align with the principles espoused by Catholic Social Teaching about the desired relationship between employees and employers. Catholic Social Teaching encourages a relationship between employers and employees at the workplace based on mutual respect and dignity, with both parties working together to achieve the objectives of the business and security of employment.

3.20 Despite these philosophical issues, and acknowledging the constitutional issues involved in moving away from the current system, the ACCER maintains that the current award system is one way in which a *fair* minimum standard or code can be established to protect the rights and responsibilities of employees and employers. In this respect, awards should be accessible and comprehensible for both employees and employers. It is not correct to present awards as simply a vehicle for the protection of employee rights and entitlements. Awards can also provide employers with certainty about their rights, including such matters as engagement of employees, working hours, duties, performance management, discipline and termination of employment. For some, this may be seen as an impediment because it is not an *unfettered* right to hire and fire.

3.21 It has been suggested that the number of awards should be reduced and that awards reflect a "*one size fits all*" approach. Currently, the award system is made up of a myriad of awards, some of which can cover the same or similar types of work. For a small business owner required to determine whether they are a party to an award and an appropriate rate of pay for their employees, this can be confusing. However, the number of awards in itself is not necessarily the problem, as there are some awards that apply to particular employers.

3.22 The ACCER recommends that the presentation of industrial legislation, regulation and awards, and importantly the rights and responsibilities of employers and employees, be set out in an easily understood format and written in plain English. The current revision of awards for the purposes of simplification has predominantly concentrated upon the removal of non-allowable matters. There is a real need to rewrite awards, as well as legislation and regulation, in a manner that is free of jargon, legalese and ambiguity.

3.23 It is the experience of ACCER that many disputes or conflicts arise because of misunderstandings about the underlying intent of award clauses. This is compounded when relevant sections of awards, such as those relating to consultation procedures for *introduction of change* and *redundancy* are removed, leaving some employers with a belief that they do not have to observe such provisions. This is particularly ill-advised when it comes to termination provisions that do not cite the need for consultation and process before termination of employment is effected. This can be misleading in that the employer will not realise that there is a need for process if it has been removed from or is not present in the award. Many employers read awards at their face value and some are not aware of the industrial and legal precedents relevant to the various provisions.

3.24 On the other hand, another form of confusion about the ability of employers to terminate employees was noted in the *CPA Australia* survey:

> *Almost a third of small businesses believe that they cannot dismiss staff, even if their business is struggling or the employee is stealing from them, under the unfair dismissal law.*[24]

3.25 To follow on from this discussion, the major area of the Act presented by some employer groups as an *impediment* to the creation of employment by small business is that of termination of employment.

3.26 It has been claimed that small business could employ additional people but do not because of the termination of employment provisions of the Act. The Minister, in the

[24] *Small Business Survey Program*, op. cit., page 4

Second Reading Speech for the Bill, stated that "dismissal laws have an important role in providing a safety net for employees but they need to be made fairer for both employers and employee and should be improved where they still prevent jobs being created."[25]

3.27 Changes to the termination of employment provisions of the Act were initially proposed in 1998. More recently, the *Workplace Relations Amendment (Fair Dismissal) Bill 2002* sought to exempt small business from the unfair dismissal provisions of the Act.

3.28 In its submission to the Committee on that Bill, the ACCER argued that the question of whether a termination of employment is *fair* or *unfair* should be dependent on the fact and circumstances of each case, not the size of the organisation. Further, the current provisions require the AIRC to take into account the size of the business undertaking and the absence of dedicated human resource specialists when considering the procedures followed in affecting the termination. While the ACCER has maintained that the principle of procedural fairness should apply to all organisations, it has also been acknowledged that it is unrealistic to expect the same degree of procedural documentation from a small business as would be from a larger business.

3.29 The recent debate surrounding exemptions from unfair dismissal provisions of the Act has emphasised the cost to small business of defending an unfair dismissal claim by a former employee. There appears to be a perception that organisations may be "better off" paying an amount to a person claiming unfair dismissal against the organisation, rather than defending the claim. The Office of Small Business has identified the existence of "go away" money, which includes the cost of legal advice required in defending a claim. "Go away" money has been estimated to be from $3,000 to $12,000.[26]

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[25] Hon. T. Abbott MP, Second Reading Speech *Workplace Relations Amendment (Fair Dismissal) Bill 2002*, February 2002.

[26] Ms.Susan Weston, evidence before Senate Inquiry, *Workplace Relations Amendment Bills 2002*, Proof Committee Hansard, 3rd May 2002, page 103.

3.30 However, objective or unambiguous data is lacking in this debate. For instance, the *CPA Australia* survey stated that:

> *Only 5 per cent of businesses considered unfair dismissal to be the main impediment to employment.*[27]

3.31 On the other hand, the Australian Chamber of Commerce and Industry has posited that:

> *The fifth item in the small business agenda is unfair dismissals legislation. This is a problem that is creating year after year a growing reluctance by business to add to the number of employees.*[28]

3.32 Furthermore, the argument appears to presume that an employee does not have a valid claim in making an application for unfair dismissal and is mainly looking for compensation rather than redress of an alleged wrong. The discussion also presumes that because a person is seeking compensation rather than reinstatement of employment, they are being opportunistic. However, this ignores a just as likely scenario wherein the employee has been so wronged or aggrieved that they would not wish to work for that employer again.

3.33 Further, the cost of defending vexatious or unmeritorious claims has also been put forward as an issue of concern for small business. In relation to this, the ACCER does not support such claims being made by employees. However, each unfair dismissal claim must be given a fair hearing to ensure the principals of natural justice and procedural fairness are met for both parties. On the other hand, it is arguable that "no-win, no pay" arrangements can encourage some unmeritorious claims to be lodged in the hope of achieving a "go away" settlement either before or at conciliation. Yet, it would appear logically not to be commercially viable for law firms to be running a great number of cases from which they had little or no prospect of winning or gaining a settlement.

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[27] *Small Business Survey Program,* op.cit. page 5

[28] Australian Chamber of Commerce and Industry, *What SmallBusiness Wants - ACCI's Pre-Election Survey Results,* , Canberra, November 2001, page 2

3.34 If a claim is pursued that is vexatious, frivolous or unmeritorious then costs can be sought under the Act.

3.35 However, the prospect of prohibitive or excessive costs may affect also many employees, especially those who are may not be members of unions.

3.36 The common concern that both employers and employees have about the cost of claims is understandable because a great number of the cases are in effect similar to "small claims", given that they are claims for compensation and not reinstatement. It is suggested that it may be appropriate to introduce a "small claims" procedure within the AIRC for those unfair dismissal applications where the employee seeks compensation, but not reinstatement, and where the amount of compensation claimed does not exceed a prescribed amount.

3.37 That is, the matter would be resolved without the need for lengthy and potentially costly arbitration proceedings. Where an employee has filed for compensation only, there is a recognition that the employment relationship is at an end. Accordingly, the matter should not require the complexity of hearing evidence that an application for reinstatement should necessitate.

3.38 This approach would not be without precedent in terms of existing procedures to be found in the Act. For instance, sections 179C and 179D allow for a plaintiff to elect to recover unpaid wages through a defined *small claims procedure*.

3.39 Obviously, the precise detail and practice of such a procedure for the resolution of unfair dismissal applications for compensation would need to be developed. (The ACCER is aware of complaints about the difficulties encountered by applicants in Victoria[29].)

3.40 Additionally, the question of unfair dismissal being an impediment to employment might be based on a mistaken understanding or perception about the actual law. The *CPA Survey* noted:

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[29] Willems, J., *Problems Recovering Wages in Victoria*, Job Watch Inc., Carlton, 1998, pages 9-10.

> *Sixty-two per cent of small business and 81 per cent of accountants believe the unfair dismissal laws require them to follow a complex process. These perceptions are as much a barrier to employment as the operation of the law.*[30]

3.41 The ACCI Survey tends to reinforce this perception of complexity:

> *No one denies that there can be unfair dismissals. But the way that the current legislation is crafted makes it extremely costly in terms of executive time to achieve an outcome which should be completed in a more expeditious manner.*[31]

3.42 Significantly, Senator Murray, from data provided in the recent Senate Inquiry, noted that only "a small portion of federal unfair dismissal applications are in small business."[32]

3.43 The Senator stated that the two main challenges for unfair dismissal reform included "taking steps to better inform employers of their real capacities to dismiss employees."[33]

3.44 Accordingly, it is suggested that a targeted education campaign be developed for small business about the actual requirements of the law and the correct procedures in respect to unfair dismissal.

3.45 Another area of concern for small employers appears to be the lack of a common definition of an "employee" in various pieces of legislation. The varying definition of an employee found in the numerous pieces of regulation emanating from Commonwealth, State and Territory governments affecting taxation, workers' compensation, superannuation and fringe benefits taxation was noted in the *Report of*

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[30] *Small Business Survey Program,* op.cit. page 4
[31] *What Small Business Wants*, op.cit. page 2
[32] Senator A. Murray, *Report on the provisions of bills to amend the Workplace Relations Act 1996*, Democrats Minority Report, AGPS Canberra, May 2002, page 60.
[33] ibid. page 60.

the Small Business Deregulation Taskforce in November 1996[34]. This situation is still one of confusion for employers even though efforts have been made to clarify these matters. For example, some employers do not realise that the definition of employee for the purposes of superannuation would include a genuine independent contractor where the contract is wholly or principally for labour.

3.46 The ACCER has noted also legal cases over recent years where the courts have determined that an independent contractor was more properly defined as an employee or in other circumstances was an employee.[35] While the cases are illuminating to lawyers, taxation experts and industrial relations practitioners, most small employers would not have necessarily be aware of the final detail of these cases, and some have seen earlier decisions overturned upon further appeal. It is an area where Church employers have regularly sought clarity to ensure that they do not breach the relevant regulations.

3.47 A further definitional and practice issue can arise with the engagement of *casual* employees by small business. The ACCER has observed that some small employers have engaged casuals over a long period of time for a small number of hours per week and have faithfully paid the casual rate of pay. However, they have not realised that such employees may be considered by industrial tribunals to be permanent part-time employees. This is usually revealed when termination of the employment relationship occurs and the employer is notified of an unfair dismissal application, and often accompanied by a claim for backpayment of annual leave and long service leave entitlements.

3.48 It is acknowledged that there has been, and will continue to be, difficulty in determining whether employment is "regular and systematic" or if there is a "true expectation" of "ongoing" or "further" employment. Such terms are open to interpretation. However, there is a need to provide small business with guidance about this issue so as to avoid the mistaken practice that by paying a person a casual rate of pay that the person is therefore a casual employee.

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[34] *Time for Business,* op.cit., pages 50-51.

[35] *Roy Morgan Research Centre v Commissioner of State Revenue* [2001] HCA 49 (9 August 2001), *Hollis v.Vabu Pty Ltd*, [2001] HCA 44 (9 August 2001).

3.49 With all of the above areas of concern, current government agencies providing advisory services to employers and employees should be reviewed for the effectiveness of their accessibility and service delivery. These agencies should be enhanced as major points of specialist information and practical assistance to small business. Where necessary and within proportion, the activities of these government agencies should be targeted at campaigns on topics of concern to small business, as distinct from dispersing general information about broad issues.

Occupational Health and Safety

3.50 Occupational health and safety is an issue of fundamental importance to both an organisation and its employees. In maintaining the dignity of the worker, the ACCER submits that employees have a right to attend the workplace without fear of harm or injury. In this respect, preventative measures in occupational health and safety are vital and government regulation should have an important function to ensure that there is a framework of responsibilities and obligations.

3.51 Currently, each State and Territory in Australian has enacted a principal piece of legislation regulating occupational health and safety at the workplace. Such legislation outlines the duties of the different bodies and people who have a role in workplace health and safety. In addition, each State and Territory may establish codes of practice or regulations on a particular health and safety issue or hazard, in order to establish the specific duties of a group in relation to that issue or hazard. Further, regulations may be enforceable, while codes of practice provide guidance about the regulatory framework.

3.52 In addition to the State and Territory legislation and regulation, the National Occupational Health and Safety Council (NOHSC) has established National Occupational Health and Safety Standards and Codes of Practice. However, these are not enforceable until adopted by the State or Territory.

3.53 The regulation at these different levels is extremely complex and confusing, especially for small business which does not necessarily have expertise in this area.

Therefore, it is suggested that nationally consistent minimum standards be developed so as to reduce the level of disparity between Commonwealth, State and Territory legislation and regulation.

3.54 The framework of rights and responsibilities surrounding occupational health and safety should reflect clearly the respective responsibilities of employers and employees for occupational health and safety. In particular, some of the codes of practice are too general in their application and accordingly do not offer practical guidance. Accordingly, it is suggested that codes of practice be developed for specific employment sectors or circumstances rather than for a generic audience. In this context, simplicity of approach is not necessarily effective for small employers; they require comprehensive but plainly expressed procedural information to ensure they comply with the relevant regulations.

3.55 While it is the pre-eminent responsibility of the employer for the workplace, employees also have some degree of responsibility for their own health and safety and that of their fellow employees. In this context, the commitment to a safe and healthy workplace should be encouraged as a partnership between employers and employees, and not one primarily based on the employer as perpetrator and the employee as victim (though criminal negligence should be able to be pursued against individual employers and managers where appropriate).

3.56 Moreover, when comparing occupational health and safety regulations to regulations covering workplace relations, there appears to be greater imperatives for compliance with occupational health and safety. That is, managers may be held personally liable for breaches of occupational health and safety regulations, whereas this is not the case for breaches of workplace relations regulations.

3.57 The ACCER notes that for organisations seeking government contract work or funding, there appears to be an additional imperative for them to ensure a safe and healthy workplace as it is often a contractual requirement. With respect to workplace regulations, contract or funding arrangements do not necessarily stipulate the conditions of employment for each position to be employed. In general, they provide funding based on a key position award rate of pay, with it being the responsibility of

the organization to identify how such funding is utilized to engage the necessary employees.

Superannuation

3.58 From 1992, the Superannuation Guarantee Scheme has encouraged employers to provide a minimum level of superannuation support for employees to plan for their retirement. This requirement has placed an additional regulatory obligation upon employers to ensure that the correct amount is paid to employees.

3.59 Recent decisions[36] have dealt with the payment of superannuation to casual employees and in particular with the definition of ordinary time earnings for casual employees. This is still an area of confusion, especially for small business, in that it may not have knowledge of such cases or the access to expert advice to inform or direct them in their dealings with casual employees. In this respect, such confusion could be alleviated with a comprehensive education campaign.

[36] See for example: *Deputy Commissoner of Taxation v Australian Communication Exchange Ltd* [2001] FCA 1664 (28 November 2001) and *Quest Personnel Temping Pty Ltd v Commissioner of Taxation* [2001] AATA 124 (20 February 2001).

JURISDICTIONAL ISSUES

4.1 In recent times, the dual system of industrial relations regulation in Australia has come under criticism for being complex, confusing and costly to administer, and especially for small business employers.[37]

4.2 It has been suggested that a national industrial relations system would "deliver huge gains in efficiency, simplicity and productivity."[38]

4.3 Catholic Social Teaching does not support one form of industrial relations system over another. It is critical, however, that all laws, particularly those that govern economic strategies and industrial relations, should hold firmly the right of citizens to work and the primacy of the dignity of the human person.[39]

4.4 For the purposes of this Inquiry, the ACCER does not intend to make a definitive submission regarding the appropriateness or otherwise of dual regulation in the industrial relations system. That would require a detailed examination of the constitutional basis of the current industrial relations system in its own right, with consideration beyond the issues affecting small business employers and its employees.

4.5 The ACCER observes, though, that the structure of the current federal workplace relations system contains "gaps" in which employee and employer rights are not protected. For example, there are many employees not covered by awards in the federal jurisdiction. In this respect, the state jurisdiction can fill this "gap" by providing a system of award coverage, thereby protecting employee and employer rights and responsibilities.

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[37] *Breaking the Gridlock, Towards and Simpler National Workplace Relations System, The Case For Change*, Ministerial Discussion Paper 1, October 2000.

[38] Senator Andrew Murray, as reported in . *Breaking the Gridlock, Towards and Simpler National Workplace Relations System, The Case For Change*, Ministerial Discussion Paper 1, October 2000.

[39] Bishops' Committee for Industrial Affairs, *Industrial Relations - The Guiding Principles*, August 1993, page 1.

4.6 Yet, in this regard, the situation of employees in Victoria who are not covered by federal awards is extremely problematic and pertinent, even though they are included under the federal jurisdiction (Schedule 1A).

4.7 The ACCER does recognise that complexity and confusion can arise where two different jurisdictions have application to the one matter. Indeed, this can be not just a matter of overlapping federal and state government legislation but also between individual pieces of federal legislation.

4.8 For example, the practice of making an application in two different federal jurisdictions relating to the one matter notably arises with termination of employment matters, especially where there may be also a claim for unlawful termination of employment or discrimination. Where this occurs the applicant may have the ability to make a claim in the Australian Industrial Relations Commission (the federal industrial relations tribunal) as well as to the Human Rights and Equal Opportunity Commission (the federal anti-discrimination body).

4.9 The Act requires the AIRC to refrain from hearing or considering a termination of employment application if there is an alternative mechanism for its resolution.[40] However, the practical effect of this sometimes appears to be the lengthening of the period of time before a matter may be heard. The Victorian Automobile Chamber of Commerce has stated recently "the AIRC is reluctant to make a decision as to whether or not the claim should be processed. Often what occurs is that the claim is put on hold until the applicant decides what they want to do…[41]

4.10 In this respect, the ACCER believes that this practice of making a claim in more than one jurisdiction for the same matter– otherwise known as *forum shopping* - needs to be curtailed. That is, an applicant should not be able to make two applications in relation to the same termination of employment in different jurisdictions, even where that is within the same level of government regulation.

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[40] *Workplace Relations Act* 1996 (Cth) s. 170FC

[41] Mrs. Leyla Yilmaz, evidence before Senate Inquiry into Workplace Relations Amendment Bills, 2002, Hansard, 3rd May 2002, page 58.

4.11 In conclusion, the ACCER would agree in principle that there be an objective consideration of a move "towards some convergence in state and federal approaches"[42] to not just unfair dismissal legislation but for all employment related matters, wherever constitutionally feasible and with due regard for the rights and needs of employers and employees.

[42] *Report on the provisions of bills to amend the Workplace Relations Act 1996*, op.cit. page 60