Submission No: 54
Small Business Employment
Received: 19 June 2002

Department of Employment and Workplace Relations

National Office

GPO Box 9879 CANBERRA ACT 2601

Ms Margaret Blood
Acting Secretary
Senate Employment, Workplace Relations and Education
References Committee
Parliament House
CANBERRA ACT 2600

Dear Ms Blood

INQUIRY INTO SMALL BUSINESS EMPLOYMENT

The Senate Employment, Workplace Relations and Education References Committee has invited the Department to make a submission to the Inquiry into Small Business Employment.

The Committee has indicated a particular interest in the effect of government regulation on the small business sector in the areas of workplace relations and occupational health and safety. To assist in the Committee's deliberations, I am submitting information on the following:

(a) amendments to the *Workplace Relations Act 1996* that have been introduced, or are proposed by the Government, that will encourage job creation by reducing the regulatory impact for small businesses, and better balancing the rights and obligations of employers and employees – refer **Attachment A**;

(b) initiatives to assist small businesses with occupational health and safety regulation – refer **Attachment B**; and

(c) an extract from the Department's submission to the Senate Employment, Workplace Relations and Education Legislation Committee's Inquiry into Workplace Relations Amendment Bills providing detailed information on the Fair Dismissal Bill 2002 and the Fair Termination Bill 2002 – refer **Attachment C**.

I note that the Committee is also interested in assessing the impact on the small business sector of the complexity and duplication of regulation by the various Commonwealth, state and territory governments. In this regard, the Minister for Employment and Workplace Relations, the Hon Tony Abbott MP, has recently supported consideration of a simpler national workplace relations system (refer to his speech entitled "A National Workplace" presented on 9 May 2002 available at www.dewr.gov.au/ministers/mediacentre.)

To open debate on this issue, during 1999 and 2000 the Government released a series of discussion papers entitled 'Breaking the Gridlock – Towards a Simpler National Workplace Relations System'.

The papers provide detail of the cost, complexity, overlap and duplication of the current system and debate the merits and benefits that a simpler system could bring for the vast majority of Australian workplaces. The papers are available at the following website: www.simplerwrsystem.gov.au.

I trust the above information will assist the Inquiry. The departmental contact officer for this matter is Ms Sue Sadauskas, Assistant Secretary, Framework Policy Branch – contact by telephone at (02) 6121 7459 or by email at sue.sadauskas@dewr.gov.au.

Yours sincerely

Rex Hoy
Group Manager
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June 2002

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Attachment A

Amendments to the Workplace Relations Act 1996

The Government has introduced significant changes to the *Workplace Relations Act 1996* (the Act) in order to introduce greater flexibility for Australian businesses and their employees in negotiating working conditions and productivity gains and to remove disincentives to job creation. Some of the key changes that are particularly relevant for small businesses are outlined below.

Unfair Dismissal

From 30 August 2001 changes were made to the unfair dismissal laws in order to better balance the rights of employers and employees. In introducing the changes, the Government 's aim was to restore confidence amongst employers and give unemployed Australians and school leavers better chances of employment. The changes included:

- A requirement that new employees have to be employed for three months before they can bring Commonwealth unfair dismissal claims (this period can be increased or decreased by written agreement in advance of the employment);

- A requirement that the Australian Industrial Relations Commission must take into account the different sizes of businesses when assessing whether their dismissal procedures were reasonable;

- Greater scope for costs to be awarded against parties who act unreasonably in pursuing or defending claims;

- The introduction of penalty provisions for lawyers and advisers who encourage parties to make or defend unfair dismissal claims where there is no reasonable prospect of the claim or defence being successful. The penalties are up to $10,000 for a company and $2000 for an individual;

- Lawyers and advisers must now disclose whether they are operating on a "no win no pay" or contingency fee basis;

- The Australian Industrial Relations Commission can now dismiss a claim following an initial conciliation hearing if it has no reasonable prospect of success;

- The Australian Industrial Relations Commission can dismiss a claim earlier if the Commission does not have the power to hear it;

- The Australian Industrial Relations Commission can dismiss a claim earlier if the dismissed employee fails to attend hearings or where the dismissed employee makes another application in respect of the same dismissal;

- There are now tighter rules about extensions of time for the lodgement of late applications; and

- There are now tighter rules about claims by demoted employees.

The Government has proposed further changes to assist small business and remove disincentives to job creation. In particular, the Government has introduced legislation into the Parliament to exempt small businesses (employing less than 20 employees) from the unfair dismissal laws. The policy rationale and detail of the further changes are outlined in detail in **Attachment C**.

Workplace agreements

The Act now provides employers and employees with greater choice about the types of agreements that they can make to cover terms and conditions of employment. The framework for workplace agreements now provides businesses and their employees with greater flexibility in negotiating working conditions and productivity gains. The Act now provides for three different types of workplace agreement: Australian workplace agreements (or AWAs) made with individual employees; certified agreements made directly with a group of employees; and certified agreements made with trade unions representing a group of employees.

For small businesses flexible working arrangements are particularly important and flexibility in the workplace better enables employees to balance their work and family responsibilities. The Government proposes to further review the agreement-making provisions of the Act in order to simplify agreement making processes to make it easier for employers and employees in small business to enter into workplace agreements.

Freedom of association

The 1996 Act provided, for the first time, broad legislative recognition of the freedom to join or not to join an industrial association. The Act now contains provisions that prohibit compulsory unionism and preference to unionists, and establishes enforcement functions of the Employment Advocate in relation to freedom of association. These provisions not only safeguard fundamental freedoms of employees, but also aid the development of more efficient and productive workplaces.

Other regulation

In its 2001 election policy document *Choice and Reward in a Changing Workplace*, the Government indicated other areas where more needed to be done to take employment red tape off small business. These areas included:

- trade union right of entry;

- provisions that allow small businesses to be forced into award conditions without sufficient consideration of their, or their employees', specific circumstances; and

- the engagement of contractors.

Trade Practices Act

The Government has also introduced the Trade Practices Amendment (Small Business Protection) Bill 2002 which proposes to give the Australian Competition and Consumer Commission the power to take representative legal action on behalf of small businesses that are affected by union secondary boycotts of goods or services in contravention of sections 45D and 45E of the *Trade Practices Act 1974*.

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Attachment B

Occupational Health and Safety Initiatives

There are currently ten Australian jurisdictions with responsibility for occupational health and safety (OHS) regulation. Due to the complexity of these arrangements, the Federal Government under the auspices of the Workplace Relations Ministers Council (WRMC) has developed a number of reports to aid businesses in general with their regulatory obligations. These reports are available from the Australian Workplace portal (www.workplace.gov.au).

OHS Matrix

The publication 'Comparison of OHS Arrangements in Australia' (OHS Matrix), aims to assist employers and employees to understand their OHS responsibilities and obligations under the legislative framework. The OHS Matrix gives a range of information including duty of care responsibilities and consultation requirements under the various OHS Acts across the jurisdictions. The contact details contained within the document also provide an avenue for small business owners/operators to seek further assistance from their relevant OHS Authority.

A second edition of OHS Matrix is expected to be available in June 2002. The second edition will cover a number of topics relevant to small business. These include:

- jurisdictional scheme overviews including prevention strategies, enforcement policies and regulatory reform;
- the principal OHS Acts that apply as well as relevant regulations, code of practice and guidelines available;
- general duty of care responsibilities for employers, employees and suppliers;
- reporting and consultation requirements; and
- industries and sectors currently being targeted.

Comparative Performance Monitoring Reports

A further reference for small business is the Comparative Performance Monitoring (CPM) reports which are released annually. The fourth report is expected to be available in June 2002. This report compares performance on OHS and workers' compensation outcomes across all Australian jurisdictions and New Zealand. Data contained within the report includes:

- incidence of injury rates for 1, 6 and 12 weeks compensated time off work, by industry and by size of business;
- fatality rates; and
- premium rates by industry and jurisdiction.

National Improvement Strategy

The National Occupational Health and Safety Commission (NOHSC) has recently released a 'National Improvement Strategy' with the endorsement of WRMC, the Australian Chamber of Commerce and Industry and the Australian Council of Trade Unions. The strategy aims to consolidate individual jurisdictional efforts to reduce work-related fatalities and injuries under a national framework by concentrating on key national priorities. Small business will potentially benefit from the priority to develop the capacity of business operators and workers to manage OHS effectively.

OHS Initiatives for Meeting Small Business Needs

NOHSC is currently developing communication strategies to assist small business operators to understand what they can do to manage occupational health and safety effectively and comply with occupational health and safety regulations, under the program 'OHS Initiatives for Meeting Small Business Needs'. Information about this is available at www.nohsc.gov.au/smallbusiness.

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Attachment C

Detailed information on the following bills:

Workplace Relations Amendment (Fair Dismissal) Bill 2002
Workplace Relations Amendment (Fair Termination) Bill 2002

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EXTRACT FROM THE SUBMISSION BY THE DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE INQUIRY INTO WORKPLACE RELATIONS AMENDMENT BILLS

Workplace Relations Amendment (Fair Dismissal) Bill 2002

BACKGROUND

Federal legislation regulating termination of employment was first introduced by the *Industrial Relations Reform Act 1993*, which inserted new provisions into the *Industrial Relations Act 1988*. The Act prohibited an employer from terminating an employee's employment unless there was a valid reason connected with the employee's capacity or conduct or based on the operational requirements of the business (section 170DE). A reason was deemed not to be a valid reason if, having regard to the employee's capacity and conduct and those operational requirements, the termination was harsh, unjust or unreasonable (unfair dismissal). Specific prohibition was also made of dismissal on certain prescribed grounds (unlawful termination), including sex, race, membership or non-membership of a union, age, disability and religion (section 170DF).

2. Section 170EA allowed an employee to apply to the Industrial Relations Court of Australia for a remedy in respect of a termination of employment. Some categories of employees (eg those undertaking a qualifying or probationary period, short-term casual employees and fixed-term employees) were excluded from making an application to the Court.

3. Amendments were made by the *Industrial Relations and other Legislation Amendment Act 1995* to require preliminary conciliation by the Australian Industrial Relations Commission (the Commission) before allowing the parties to elect to pursue a claim in the Commission (by arbitration) or the Court.

4. The termination of employment provisions were amended by the *Workplace Relations and Other Legislation Amendment Act 1996* and now form part of the *Workplace Relations Act 1996* (WR Act). Section 170CE of that Act allows certain employees whose employment has been terminated at the initiative of their employer to apply to the Commission for a remedy in respect of that termination. The grounds upon which an employee can apply are that the termination was harsh, unjust or unreasonable (unfair dismissal) or that the termination was unlawful (for instance, the termination was for a prohibited reason, or the employee was not given the required notice).

5. If an employee lodges a claim alleging both unfair and unlawful termination, and the claim is not settled by conciliation, the employee must elect to either pursue the unfair dismissal claim through arbitration by the Commission, or to have the unlawful termination claim heard by a Court. As under the Industrial Relations Act, certain categories of employees are excluded from the operation of the termination of employment provisions.

6. The *Workplace Relations Amendment (Termination of Employment) Act 2001*, which came into effect in August 2001, made further important changes to the legislation, designed to improve the operation of the provisions (including for small business). Some of the key changes introduced by this Act include that:

- new employees have to be employed for three months before they can bring an unfair dismissal claim (this period can be increased or decreased by written agreement in advance of the employment);

- the Commission must take into account the different sizes of businesses when assessing whether their dismissal procedures were reasonable;

- there is greater scope for costs to be awarded against parties who act unreasonably in pursuing or defending claims;

- penalties have been introduced for lawyers and advisers who encourage parties to make or defend unfair dismissal claims where there is no reasonable prospect of the claim or defence being successful (up to $10,000 for a company, $2000 for an individual); and

- lawyers and advisers must now disclose whether they are operating on a 'no win – no fee' or contingency fee basis.

7. The Government considers that further amendments are needed to specifically address the negative impact of unfair dismissal legislation on small businesses, through an exemption from unfair dismissal legislation in relation to new employees.

Small Business Exemption

8. On 24 March 1997, the Prime Minister announced the Government's intention to exempt businesses with 15 or fewer employees from the operation of unfair dismissal laws in respect of new employees until they have been continuously employed for 12 months[1]. Regulations to give effect to this commitment were made on 30 April 1997 (SR No. 101 of 1997). On 26 June 1997, the Senate disallowed these regulations.

9. On the same day, the Government introduced the Workplace Relations Amendment Bill 1997, which would have excluded all new employees of businesses with 15 or fewer employees from federal unfair dismissal laws.

10. This Bill was passed by the House of Representatives on 27 August 1997, but rejected by the non-Government parties in the Senate on 21 October 1997. The Bill was reintroduced to the House of Representatives, where it was again passed on 3 March 1998. However, the Bill was again rejected in the Senate on 25 March 1998.

11. The Government's 1998 election policy on workplace relations, *More Jobs, Better Pay*, included a commitment to exempt small businesses from unfair dismissal laws and to introduce a qualifying period of employment before new employees of all businesses could make unfair dismissal claims. The policy stated that '[a] re-elected Coalition Government will have a fresh electoral mandate to implement this measure as a matter of high priority.'[2]

12. Following its re-election, the Government introduced the Workplace Relations Amendment (Unfair Dismissals) Bill 1998 on 12 November 1998, to exempt businesses with 15 or fewer employees from federal unfair dismissal laws.

[1] *More Time for Business*, page v.
[2] *More Jobs Better Pay*, page 22.

13. In *More Time for Business*, the Government undertook to review the new unfair dismissal provisions of the WR Act 12 months after their introduction. This review was published in December 1998.

14. In relation to small business, the review recommended that the Government note that changes made to the unfair dismissal laws in 1996 had 'not alleviated the concerns of small business about the impact of unfair dismissal laws upon them.'[3] In its response to the review, the Government highlighted its commitment to exempt small business from the operation of the unfair dismissal laws, and reiterated its view that the proposed measure was a job creation initiative and that it had a mandate to introduce the changes.

15. Pending passage of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998, to give immediate effect to the Government's election commitments, the Government made regulations to exempt small businesses from unfair dismissal laws on 17 December 1998 (SR No. 338 of 1998). The Senate disallowed these regulations on 16 February 1999.

16. The Workplace Relations (Unfair Dismissals) Bill 1998 was passed by the House of Representatives on 2 December 1998. The Bill was referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee on the same day for inquiry and report. The Committee tabled its report in the Senate on 15 February 1999. The majority report recommended that the exemption of small business from unfair dismissal laws be supported.[4]

17. The Bill was defeated in the Senate on 14 August 2000. The Bill was reintroduced to the House of Representatives, where it was passed without amendment on 6 March 2001. The Senate again rejected the Bill on 26 March 2001.

18. On 20 August 2001, the Government introduced the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001. This Bill would have exempted small businesses employing fewer than 20 employees from unfair dismissal laws. The Bill was not considered by the Parliament before the 2001 election was called and the Bill lapsed.

POLICY RATIONALE

19. Prior to the 2001 federal election, the Coalition again made policy commitments to exempt small businesses from the operation of the unfair dismissal provisions of the WR Act:

> Unfair dismissal claims continue to be a significant concern for small business. The Coalition is committed to removing this job-destroying burden from small business…A re-elected Coalition Government will pursue a full exemption from unfair dismissal claims for small business employers. The Coalition has introduced legislation into Parliament to secure a full exemption for all small businesses with less than 20 employees from unfair dismissal claims when employing new staff…[5]
>
> The Coalition believes that more needs to be done to take employment red tape off small business. Unless we do so, small business will not get a fair deal from the

[3] *Twelve Month Review of Federal Unfair Dismissal Provisions*, page 9.
[4] *Majority Report: Consideration of the Provisions of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998*, Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, page 29.
[5] *Getting on with Business – Small Business Moving Ahead*, page 21

> workplace relations system. The Coalition will: exempt small businesses from unfair dismissal laws when employing new employees…[6]

20. The Workplace Relations Amendment (Fair Dismissal) Bill 2002 (WRA (FD) Bill 2002) is designed to give effect to these policy commitments, and is intended to alleviate the burden on small business of technical and procedural requirements associated with unfair dismissal laws, in order to generate increased employment in the small business sector.

Profile of Small Business

21. There are around 1,075,000 non-agricultural small businesses (that is, private sector businesses with fewer than 20 employees) in Australia, employing over 2.2 million employees. Around 50 percent of non-agricultural small businesses do not have employees.[7]

22. Non-agricultural small businesses constitute around 96 percent of all non-agricultural private sector businesses and 47 percent of all non-agriculture private sector business employment. Employment growth in the non-agricultural small business sector has averaged 3.1 percent per annum between 1983–84 and 1999–2000, compared with 2.8 percent for all private sector non-agricultural businesses.[8]

23. Small businesses are distributed across Australia generally according to population. In 1999–2000, most States and Territories recorded similar proportions of non-agricultural private sector small and larger businesses. The main exceptions were Victoria with a slightly lower incidence of small businesses (25 percent) than larger businesses (28 percent), while New South Wales had a higher incidence of small businesses (34 percent) than larger businesses (30 percent). Between 1983–84 and 1999–2000, growth in the number of small businesses was highest in the Northern Territory (8.4 percent per annum), Western Australia (4.6 percent per annum) and Queensland (4.4 percent per annum).[9]

24. Over 60 percent of non-agricultural small businesses operate in the Property and Business Services, Construction, Retail Trade, or Personal Services industries. Compared to larger private sector businesses, small businesses are more likely to be in the Construction, Personal and Other Services, and the Transport and Storage Services industries, and less likely to be in the Manufacturing, Wholesale Trade, Accommodation, Cafes and Restaurants, and Education industries. Between 1983–84 and 1999–2000, growth in the number of small businesses was highest in Property and Business Services (6.7 percent per annum), Education (6.6 percent per annum), Health and Community Services (6.0 percent per annum) and Personal and Other Services (4.6 percent per annum). [10]

25. Employing non-agricultural small businesses typically have fewer than 5 employees, with the principal owner present in the workplace. Ninety four percent of small businesses are non-unionised compared to 62 percent of larger private sector businesses.[11]

26. The 1995 Australian Workplace Industrial Relations Survey (AWIRS 95) collected data from workplaces with five or more employees and classified as ‘small businesses’ those

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[6] *Choice and Reward in a Changing Workplace*, page 31

[7] Australian Bureau of Statistics, *Small Business in Australia, Update 1999-2000*, (ABS Product number 1321.0.40.001), table 1.1

[8] Ibid., tables 1.1 and 3.1

[9] Ibid., tables 3.1

[10] Ibid., table 2.1

[11] Department of Employment, Workplace Relations and Small Business, 1999, *A Portrait of Australian Business – Results of the 1997 Business Longitudinal Survey*, Ausinfo, Canberra, p22

workplaces that had 5 to 19 employees, operated in the private sector and were not part of a larger organisation. Amongst other findings, data from AWIRS 95 indicate that, in non-agricultural small businesses with 5 to 19 employees, the principal owner was more likely to be present in a non-unionised workplace.[12]

27. In addition, the AWIRS 95 survey found that, in non-agricultural small businesses with 5 to 19 employees, 69 percent of employees worked full-time, with two-thirds of these being men. Women employed in small businesses, like their counterparts in larger workplaces, were more likely to be part-time than full-time and more than twice as likely as men to be employed on a casual basis.[13]

28. The small business sector is responsible for a large proportion of jobs in Australia, and increased employment in small business will improve the outlook for the Australian economy. It is Government policy that regulation of small business should be minimised in order to alleviate the administrative burden on small business, reduce costs, improve small business confidence and increase small business employment growth.

Why should small businesses be exempted from unfair dismissal laws?

29. The *Workplace Relations Act 1996* sets out the matters that the Commission is required to consider in deciding whether a dismissal was harsh, unjust or unreasonable (subsection 170CG(3)):

> ***IN DETERMINING…WHETHER A DISMISSAL WAS HARSH, UNJUST OR UNREASONABLE, THE COMMISSION MUST HAVE REGARD TO:***
>
> *(a) whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service; and*
>
> *(b) whether the employee was notified of that reason; and*
>
> *(c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and*
>
> *(d) if the termination related to unsatisfactory performance by the employee—whether the employee had been warned about that unsatisfactory performance before the termination; and*
>
> *(da) the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and*
>
> *(db) the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination…*

30. Paragraph 170CG(3)(e) also allows the Commission to have regard to any other matters that it considers relevant. The Commission therefore has a wide discretion to consider any other matters in determining whether a dismissal was unfair. Over time, the Commission has developed principles and approaches to determining 'fairness' in particular factual situations. Many of these decisions and principles have resulted from cases involving larger employers. Although the Commission is an arbitral body, rather than a judicial body,

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[12] Morehead, A., Steele, M., Alexander, M., Stephen, K. & Duffin, L. 1997, *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey*, Addison, Wesley, Longman Australia Pty Limited, South Melbourne, p302

[13] Ibid.

the Commission still follows previous decisions to ensure consistency of approach. This means that some of the Commission's approaches to determining whether a termination of employment was fair originally developed from particular cases involving larger enterprises, and may not necessarily be appropriate for smaller businesses.

31. For instance, decisions of the Commission have required employers to develop policies on specific employment issues, such as the use of employer resources by employees, if employers want to dismiss employees for abusing these resources. Other decisions have set out particular procedural requirements for selecting employees for redundancy, and requirements that must be followed before an employee can be dismissed for failing or refusing drug tests. These principles may not be appropriate for a small business.

32. The large body of case law that has developed, particularly since 1994, at times imposes significant procedural requirements on employers. However, small business employers generally do not have the time or resources to fulfil formal procedural requirements. On the other hand, larger businesses often employ human resource managers or even whole human resource departments with particular expertise in employment law and the ability to undertake formal procedural requirements.

33. Defending an unfair dismissal claim places relatively greater burdens and costs on small businesses than on larger businesses. There may be several Commission hearings involved in an unfair dismissal claim (for instance, two conciliation conferences, and an arbitration hearing). There may also be preliminary jurisdictional hearings where the employer objects to an application – for instance because it has been made out of time, or where the employee making the claim is potentially excluded by the Regulations.

34. Because many small business owners run and manage their own business, attending even one Commission hearing may require the employer to close the business for a day, and the time and costs of defending a claim through to arbitration can be substantial. Also, as noted in More Time for Business[14], '[l]ack of time and resources for elaborate staff management processes means any proceedings are likely to be disproportionately complex because of the employer's need to rely on oral evidence instead of documents'.

35. The Victorian Automobile Chamber of Commerce gave the following evidence to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee in 1999:

> Small business such as those we represent generally are employers who work their way up through the trades themselves. They run a small shop, perhaps a panel beating shop or something like that, where they are actually out there doing the work alongside their staff. There really is no one there to run or manage the business while they are absent…[15]

36. In addition, the costs of engaging legal representation impact differentially on small businesses. Many small businesses may find it difficult to stay in operation when substantial unplanned expenses arise.

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[14] More Time for Business, page 31.

[15] Senate Inquiry into Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, *Hansard,* Mrs Leyla Yilmaz, 7 October 1999, EWRSBE 187.

37. The fact that high legal costs can impact significantly on business earnings means that many small business employers are reluctant to defend even unmeritorious unfair dismissal claims, and instead prefer to settle the claim as quickly and cheaply as possible.

38. Mr Grant Poulton from Australian Business Limited gave the following evidence to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee in 1999:

> Of the 248 matters that we dealt with [during 1998] I would estimate that at least three quarters were settled without regard to the question of merit, of relative strength. They were settled on the basis that – and it is good, commercial, pragmatic advice – it was going to cost X dollars; it could be got out of for a figure somewhat less than X to settle it. Colloquially it is known as 'piss off' money. You get an awful lot of applicants who will try it on in the sure and certain knowledge that they will obtain something. And that is a reflection of a system which is distortionary.[16]

39. The Government has itself received many representations from small business employers about the legal costs of unfair dismissal claims. The following generic examples draw upon those representations.

Example 1: Downturn in business

An employer had been forced to terminate the employment of a permanent employee due to a significant downturn in business caused by external factors.

The employee brought an unfair dismissal claim. The employee's solicitor requested a settlement of over $5,000. The employer attended a conciliation conference, but the employee's solicitor failed to attend, so the matter was referred for arbitration by the Commission.

The employer spent many hours preparing to defend the claim to this point. However, after receiving advice from its solicitor that it would cost between $10,000 and $15,000 to prepare and present a defence at arbitration, the employer considered settling the case regardless of the merits of the claim, and the fact that the employer couldn't see that they had done anything wrong, because the time and legal costs to the business had been so large.

[16] Majority report, Senate Employment Workplace Relations, Small Business and Education Legislation Committee Inquiry into the provisions of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998, p 24.

Example 2: Small business closure

A long-standing small business, which employed between six and ten people, began to run into difficulties. The employer believed that had he been able to dismiss one employee he would have been able to keep the business running. However, he was afraid to dismiss anyone because he feared unfair dismissal proceedings being brought, having heard similar stories from other small business operators.

The employer believed that it would have cost him more than $20,000 to defend an unfair dismissal claim, and that he was unable to keep the business going facing this level of legal costs. Consequently, he decided to close the business, resulting in the loss of at least six jobs instead of just one.

Example 3: Claim by casual employee

The owners of a small store settled an unfair dismissal claim made by a casual employee, who had only worked an average of five hours a week, and was believed to probably be excluded by the Regulations from making an unfair dismissal claim.

The employee lodged a claim, then sought $1000 in settlement of the claim. The employer incurred about $1000 in legal costs in defending the claim, but at this point decided that it would be more cost efficient to pay the employee $1000 to settle the claim.

Example 4: Dismissal for poor performance

A small business owner received an unfair dismissal application made by a former employee who had been dismissed for poor work performance, following repeated training.

The company agreed to a settlement of the claim in order to avoid incurring further legal costs and disruptions to the business. The settlement cost the company thousands of dollars. Subsequently, the employer decided to engage new staff only on a casual basis.

Example 5: Misconduct

An employer had difficulty in establishing when an employee would attend for work due to excessive non-attendance. The employee also stole from the business.

Following three written warnings, the employee's employment was terminated. The employee claimed unfair dismissal and unlawful termination. There were a number of conciliation hearings and the employer incurred over $5,000 in legal fees as well as many hours obtaining statements from other employees. The employer sought to settle the claim rather than defend it, in light of the costs and stress involved and the disruption to the business.

40. The Government's policy position is that small businesses should be exempted from unfair dismissal laws, at both federal and State level, in order to protect small businesses from the costs and administrative burden of unfair dismissal claims, improve business confidence and increase employment opportunities. There is a clear perception among many small business owners that unfair dismissal laws make it very difficult to legitimately dismiss staff, even where performance is unsatisfactory or there is a downturn in business and the employer does not have enough work for their employees. In addition, small business owners perceive that the unfair dismissal laws hamper job creation because small businesses are reluctant to put on additional staff during peak periods. This means that many Australians miss out on work and experience and the Australian economy does not operate to its full potential.

41. If small businesses were exempted from unfair dismissal laws, small business owners may be more confident about employing, and more willing to risk putting on additional employees. There is considerable support in the small business community for the proposed small business exemption from unfair dismissal laws. The Department's submission to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee's inquiry into the provisions of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998 sets out details of this support (see pp 18 – 20).

42. The Department has produced many publications and information sheets, and provides free termination of employment seminars to the public. Publications by the Department include: *Managing Workplace and Termination Issues - A practical guide for employers*[17], and *The Workplace Relations Act 1996: A Guide for Microbusinesses*[18], and *Hiring or Firing: Are you complying?*[19].

43. In addition, the regional offices of the Department regularly conduct free seminars for employers about the operation of the termination of employment provisions of the WR Act. These seminars have been held at a number of suburban and regional centres and have been attended by many small business employers. A hotline was also established (with telephone calls from all areas charged at local call rates) to provide information about the changes to the termination of employment provisions in August 2001.

44. Despite information services being widely available, small business concerns about unfair dismissal remain. It is not possible to provide a simple list of all procedural requirements that small businesses must follow when dismissing an employee. Unfair dismissal has become a complex and detailed area of law by virtue of a multitude of Commission decisions addressing particular fact situations. Unless small businesses employ human resource experts, or engage external consultants each time they need to dismiss an employee, small business owners need to consider the possibility of an unfair dismissal claim whenever they dismiss an employee.

[17] AGPS, 1997
[18] Department of Workplace Relations and Small Business, Canberra, 1998
[19] Department of Employment, Workplace Relations and Small Business, Canberra, 1999. Revised edition published in 2001.

45. Also, as outlined above, some employees may make speculative unfair dismissal claims, in the hope that the employer will be reluctant to spend a large amount of money on the legal costs associated with defending an unmeritorious claim, and would prefer to give the employee some money to settle the claim cheaply. Further Government information and education services will not address this problem.

Why should small businesses and their employees be treated differently?

46. Unfair dismissal laws have a disproportionate impact on small businesses, compared with larger businesses, for a number of reasons:

- there is usually no dedicated HR manager or person with specialist expertise in employment law working in a small business - the owner of the business usually manages employment relationships;
- relationships are managed in a less formal way than in large businesses;
- small businesses do not have the time or expertise to represent themselves in unfair dismissal proceedings, which can necessitate being away from the workplace for some time – this difficulty may be compounded when the small business is located in regional or rural Australia;
- engaging external legal representation represents a significant larger proportion of business capital and earnings for a small business.

47. Small businesses do not have access to the same financial and human resources as larger businesses. Unplanned legal expenses and attendances at hearings away from the workplace can threaten the viability of small businesses and the jobs of those working for them.

48. The purpose of the proposed small business exemption from unfair dismissal laws is to allow small businesses to grow, and to create new jobs. The aim of the Bill is not to remove employee rights. For this reason, the Bill would only apply to new jobs, where employees are engaged after the commencement of the Bill. Existing employees would not be affected, and new employees would be aware of the small business exemption from unfair dismissal laws before they accepted employment.

49. It is also important to note that the Bill would not remove the rights of small business employees to take action against their employer where it is alleged that an employer dismissed them unlawfully. Most commonly, unlawful termination claims relate to dismissal on illegal grounds, for instance, where an employer dismisses someone because of their age, sex, race, disability, or union membership, or where an employer dismisses someone without giving them notice of termination as required by the legislation.

50. The Bill would not allow employers to dismiss people illegally, or to dismiss them without giving notice or paying compensation in lieu of notice. Rather, the Bill would simplify procedural requirements for lawfully dismissing an employee with appropriate notice.

51. For instance, where a small business experienced a downturn in business, the employer would be able to let an employee go without the possibility of the employee making an unfair dismissal claim, provided that the employer complies with notice requirements, and provided that the employer does not select the employee for redundancy on

discriminatory grounds – for instance because the employee is a woman, or is a member of a particular religious group or is not a union member.

52. In this way, federal laws that provide fundamental employment protection would remain the same for both small business employees and other employees. On the other hand, the procedural standards that have been established by the Commission over time for 'fair' dismissal of employees, in many cases generated by cases involving large employers, require that an employer has adequate financial and human resources to follow those procedures. Businesses that have those financial and human resources would continue to be required to follow these procedures. Businesses that do not have those resources would no longer be penalised for technical mistakes in procedures adopted when dismissing employees.

53. There are many existing examples of when legislation differentiates between small and larger businesses. These include:

- the *Income Tax Assessment Act 1997* provides exceptions and special rules for small business taxpayers, for example in relation to depreciation of plant and eligibility for Capital Gains Tax concessions;
- the *Fringe Benefits Tax Assessment Act 1986* exempts benefits related to small businesses providing car parking;
- the *A New Tax System (Goods and Services Tax) Act 1999* in relation to the registration threshold, the tax period, bases of accounting and electronic lodgement;
- the *Privacy Act 1988,* in relation to the application of that Act to small business operators;
- the *First Corporate Law Simplification Act 1995* in relation to financial reporting requirements.

54. Also, the Australian Banking Industry Ombudsman Scheme differentiates between small and larger businesses in relation to eligibility for ombudsman support.

Why does the Bill define a small business as one with fewer than 20 employees?

55. The Bill would exempt all businesses with 'fewer than 20 employees' from unfair dismissal laws. The definition of a small business in the current Bill is consistent with that in the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001. Earlier Government measures to exempt small businesses from unfair dismissal laws would have defined a small business as one with '15 or fewer employees'.

56. The Government made an election policy commitment in 2001 to exempt small businesses with fewer than 20 employees from unfair dismissal laws.[20] The change in the definition of a small business was made in response to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee report on the provisions of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998. The report noted that the Bill had been criticised because it contained a different definition of a small business to that used in the Australian Bureau of Statistics' surveys.[21]

[20] *Getting on with Business – Small Business Moving Ahead*, page 3.
[21] Page 17.

57. The definition of a small business contained in the current Bill (fewer than 20 employees) is consistent with the definition of a small business used by the Australian Bureau of Statistics.

58. There is no information available to accurately indicate how many additional employees in the federal unfair dismissal jurisdiction would be affected by the change in definition from '15 or fewer employees' to 'fewer than 20 employees'. However, an estimate can be extrapolated from the Australian Bureau of Statistics' Survey of Employment and Earnings.[22] For Australia as a whole, in November 2000, businesses with 15 or fewer employees employed 27.7 percent of non-agricultural wage and salary earners, while businesses with 16 to 19 employees employed 2.6 percent of non-agricultural wage and salary earners.

59. Data from the Australian Industrial Registry indicates that during the 2000 calendar year, there were 7613 federal unfair dismissal applications. Thirty-four percent of respondents who provided information on employer size indicated that they employed 15 or fewer employees (representing 2588 unfair dismissal claims).

60. Making the assumption that the number of unfair dismissal applications is directly proportional to the total number of employees, the Survey of Employment and Earnings data above suggest that businesses with fewer than 20 employees will be party to approximately 37 percent of total federal unfair dismissal applications. This equates to around 2817 applications for the 2000 calendar year (or approximately an additional 229 claims that could be excluded if the Bill was passed).

Proposed new process for dismissing unfair dismissal claims against small businesses

61. The Bill contains provisions that would allow the Commission to reject an unfair dismissal application made against a small business without holding a hearing. These provisions complement the proposed small business exemption by providing a simple and inexpensive means of having unfair dismissal applications discontinued where they are made against small business employers.

62. As outlined above, there is evidence that small businesses settle unfair dismissal claims rather than go to the expense of attending hearings and engaging legal representation. If the Bill is passed, and small businesses are exempted from unfair dismissal laws, the Commission will have no jurisdiction to deal with unfair dismissal claims made by small business employees. In these circumstances, the small business owner should not have to waste time and money attending a hearing at which the claim will be rejected for jurisdictional reasons.

63. Therefore, the Bill would allow the Commission to dismiss an application made by a small business employee 'on the papers' where it is clear that the Commission does not have jurisdiction to hear the claim due to the small business exemption.

64. The Commission would be able to seek further written information from the applicant and the employer if, for example, the Commission was not sure whether the employer employed less than 20 employees. However, if the Commission was not sure whether the small business exemption applied, then the Commission would be able to hold hearings and take evidence necessary to decide this point.

[22] Australian Bureau of Statistics, unpublished data from the December quarter 2000 Survey of Employment and Earnings.

65. If the Commission decided that it did not have jurisdiction to hear a claim against a small business employer, this decision would not be subject to appeal. Allowing appeals against these decisions would defeat the purpose of allowing the Commission to dismiss claims without holding a hearing. The threat of an appeals process would give employees making speculative claims additional leverage to force a small business employer to settle the claim, in the same way that the threat of proceeding to arbitration does at present.

66. The Government is confident that the Commission would exercise the proposed power to dismiss unfair dismissal applications without a hearing carefully, and would only use this power when it was satisfied that the application was clearly outside of its jurisdiction.

Surveys and statistics supporting a small business exemption

67. Small business representatives regularly tell the Government that the prospect of unfair dismissal claims discourages them from hiring employees. A number of studies have supported these views by indicating that concerns about unfair dismissal claims are a factor affecting small business employment decisions.

68. While most of the evidence of the link between unfair dismissal laws and employment in the small business sector is drawn from attitudinal surveys, and the sample size and questionnaire design of these surveys differ, the majority of the findings indicate that small business employers would be more likely to employ new staff, and more likely to employ staff on a permanent basis, if they were not concerned about the prospect of unfair dismissal claims.

69. Much of this evidence was summarised in the Department's submission to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee's Inquiry into the provisions of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998. Rather than reproduce that evidence here, the Committee is referred to the Department's earlier submission[23]. This section will cover only surveys undertaken since that time. The findings of these later surveys support the earlier studies, and suggest that the potential for unfair dismissal claims continues to impact on small business staffing decisions.

70. In early 1998, a survey of members of the Australian Chamber of Manufacturers (ACM) was jointly conducted by the ACM and Deakin University. This survey involved the distribution of 2000 questionnaires to respondents in the south-eastern States of Australia. The initial mail-out was followed up by telephone calls to prompt identified non-respondents.

71. The researchers applied factor analysis to identify significant critical issues and deterrents to further employment in smaller firms (those with less than 300 staff) in the manufacturing sector, with particular attention directed to legislation and associated direct and indirect costs.[24]

72. The researchers noted two limitations of the ACM study. Firstly, the geographical restriction to the south-eastern States, and secondly that it did not allow for 'open ended' questions. They concluded, however, that:

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[23] Submissions to Senate Employment, Workplace Relations, Small Business and Education Legislation Committee – Inquiry into Workplace Relations Amendment (Unfair Dismissals) Bill 1998, vol. 3, submissions 13-21, January 1999, pp. 80-84.

[24] Jean Raar, Eric Smith, Kath Cummings, "Critical Factors Influencing Employment: A Study of Small Manufacturing Firms in South-East Australia".

> 'Our findings indicate small firms are concerned with the influence of legislation on employment related issues. Deterrents to staff employment included financial outlays in terms of indirect costs relating to employment and the direct costs of downtime. In addition, the human resource management issues associated with training and maintaining the necessary skills and harmonious workplace relations are of concern. Expertise is currently outsourced, albeit at a cost. Unfair dismissal legislation and the associated implications for the small business were also highlighted as employment deterrents'.[25]

73. In February 2001, Sweeny Research, on behalf of the Victorian Trades Hall Council, conducted a telephone survey of 400 small business owners and operators. The survey found that unfair dismissal laws ranked as the lowest concern out of 11 issues affecting small business (behind the GST, Government regulations, labour costs, rent/leases and other overheads, labour skill availability, other taxation issues, market for product, interest rates, vocational training, and industrial relations generally). Nevertheless, 39 percent of respondents said that unfair dismissal laws affected their businesses.

74. In November 2001, the Australian Chamber of Commerce and Industry (ACCI) released the results of a survey that had been mailed to members by ACCI's affiliated organisations. Some 2,500 firms responded to the survey (a response rate in excess of 20 percent). The report of the survey, published in the *November 2001 ACCI Review*, found that small businesses ranked unfair dismissal laws as the fifth most important problem facing them. Unfair dismissal laws were ranked behind:

- frequency and complexity of changes to tax laws and rules, level of taxation, telecommunication costs, and complexity of government regulations.

75. However, unfair dismissal laws were ranked ahead of:

- superannuation guarantee, cost of compliance with government regulations, energy costs, penalties for failure to comply with government regulations, workers' compensation payments and payroll tax.

76. In March 2002, CPA Australia released the results of its *Small Business Survey Program on Employment Issues*. CPA Australia surveyed 600 small businesses (defined as independently owned and operated businesses employing fewer than 20 employees) and 105 Certified Practicing Accountants (CPAs) drawn from CPA Australia's membership database. The survey was conducted by telephone and participants were selected at random across all States and territories and in both regional and metropolitan areas. The survey specifically dealt with the influence that various factors, including unfair dismissal laws have on the hiring intentions of small businesses.

77. Key findings of the survey were that:

> '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 laws. The same number of businesses believe that employers' always lose unfair dismissal cases if a dispute arises. Only 58 percent of small businesses are confident they know how to dismiss staff under the legislation and of these only 30

[25]Ibid, pp. 24. The indirect costs to which the conclusions refer included Workcover premiums, superannuation contributions, payroll tax, leave loadings and fringe benefits tax. The 'cost of downtime' included legal fees and the replacement of short-term staff associated with dismissals.

> percent are very confident. Sixty-two percent of small business and 81 percent of accountants believe that unfair dismissal laws require them to follow complex process.'

78. The researchers commented that 'these perceptions are as much a barrier to employment as the operation of the law' and went on to suggest that more needs to be done to educate small business employers. As noted in this submission, however, small business concerns persist despite the Government having undertaken a number of educational initiatives.

79. The CPA Australia survey also found that small businesses were employing more casuals and contractors despite a belief that they were not as valuable to their business as full-time employees. The reasons for hiring casuals over permanents included varying business income and work, and to reduce costs. However, 30 percent of small business respondents and 44 percent of CPAs cited a desire to avoid unfair dismissal issues as a reason for employing casuals.

80. When asked to nominate for themselves the main impediments to hiring staff, five percent of small business respondents and 16 percent of CPAs nominated the unfair dismissal laws as a primary issue. Other important impediments nominated included lack of skilled, experienced or motivated applicants, slowing economy, and cost of non-wage elements in an award.

81. In a recent decision, *Hamzy v Tricon International Restaurants trading as KFC* [2001] FCA 1589, the Federal Court commented about the lack of empirical data supporting a link between unfair dismissal laws and employment growth. It should be noted, however, that in this decision, the matters before the Court concerned the exemption of casual employees from termination of employment laws and not the exemption of small business employees from unfair dismissal laws.

82. The Court made some general observations, however, saying that:

> In the absence of any evidence about the matter, it seems to us the suggestion of a relationship between unfair dismissal laws and employment inhibition is unproven. It may be accepted, as a matter of economic theory, that each burden that is placed on employers, in that capacity, has a tendency to inhibit, rather than encourage, their recruitment of additional employees.[26]

83. Many other countries have introduced employment protection laws and have adopted measures to suit the special needs and characteristics of small business. Examples of these special measures are provided at paragraph 88 below. The Department has sought international empirical data on the effects of employment protection legislation on employment growth. However, there appears to be no reliable international data available.

84. The Department is seeking assistance from academic researchers and the Australian Bureau of Statistics to further establish the impact of the dismissal laws on Australian small businesses.

International precedents for a small business exemption

[26] [2001] FCA 1589, paragraph 70.

85. The Department of the Parliamentary Library's Bills Digest on the Fair Dismissal Bill states that: "Critics and opponents of the Bill might argue that the proposed (small business) exclusions are out of step with relevant overseas practice and potentially at odds with Australia's international treaty obligations."[27]

86. The International Labour Organization's Termination of Employment Convention, 1982 (which is reproduced in Schedule 10 of the WR Act) recognises that it could be appropriate to exclude small businesses from the termination of employment legislation. It provides that:

> In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them *(emphasis added)*.[28]

87. The International Labour Organization's Committee of Experts made the following observations about this part of the Convention:

> During drafting of the Convention, it was considered that a certain amount of flexibility was required, in particular to allow member States to exclude certain categories of workers to whom it was particularly difficult to extend certain aspects of the protection afforded by the Convention. The examples mentioned in this context include workers employed in small enterprises or family enterprises, managerial staff, workers who have reached the normal age of retirement, agricultural workers, apprentices, seafarers and domestic workers. Instead of seeking to determine the categories whose coverage presented difficulties for exclusion to be justified, it was considered preferable to include in the Convention a provision allowing, in general terms, the exclusion of limited categories of employed persons in respect of which special problems of a substantial nature might arise…In several countries, the provisions of labour legislation or those relating to termination of employment do not apply to small enterprises employing fewer than a specified number of workers… (emphasis added), [29]

88. As the Committee of Experts points out, other countries have recognised that unfair dismissal laws have a disproportionate impact on small businesses, and have adapted employment protection legislation to suit the special needs and characteristics of small business.

- In Austria, termination of employment legislation does not apply to employees working in a business that employs fewer than five people.
- In Germany, between 1996 and 1999, unfair dismissal laws did not apply to businesses employing fewer than 10 employees. The German legislation was

[27] Workplace Relations Amendment (Fair Dismissal) Bill 2002, Bills Digest No. 79 2001-02, Department of the Parliamentary Library, 2002, pp 8-9.
[28] Termination of Employment Convention, 1982, Article 2, paragraph 5.
[29] *Protection Against Unjustified Dismissal: General Survey on the Termination of Employment Convention (No. 158) and Recommendations (No. 166) 1982*, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 82nd Session, 1995.

changed in 1999 to reduce the size of businesses excluded from unfair dismissal laws. Since 1999, unfair dismissal laws in Germany have not applied to businesses employing fewer than five people.

- In the Republic of South Korea, termination of employment laws do not apply to businesses employing fewer than five employees.

- In Italy, special informal unfair dismissal laws apply to companies that employ 60 or fewer employees in total, and to businesses employing fewer than 15 employees in a particular business unit.

SUMMARY OF PROVISIONS

89. The WRA (FD) Bill 2002 would amend the WR Act to exempt small businesses from unfair dismissal claims.

90. The WRA (FD) Bill 2002 would prevent employees who work in a small business from making an unfair dismissal claim.[30] It would not affect the ability of these employees to make unlawful termination claims (for instance, where an employee alleges that they have been dismissed for a discriminatory reason – sex, race, disability, etc).

91. Only new employees of small businesses would be affected by the legislation – existing employees (those employees whose employment commenced before the provisions of the WRA (FD) Bill 2002 commence) would not be affected.[31]

92. Apprentices and trainees would not be affected by the small business exemption, as they are specifically excluded from the exemption.[32] Apprentices and trainees in small, medium and large businesses would have the same access to termination of employment remedies as is currently the case (note that some apprentices and trainees are already excluded from the termination of employment provisions under the Workplace Relations Regulations 1996).

93. The WRA (FD) Bill 2002 would only exempt small businesses with less than 20 employees from unfair dismissal claims. In working out whether an employer employs less than 20 people, the employee whose employment has been terminated is counted.[33] Casual employees are not counted, unless they have been working for their employer on a regular and systematic basis with the employer for at least 12 months.[34]

94. The WRA (FD) Bill 2002 would require the Commission to make an order that an unfair dismissal application is not valid where it is satisfied that the application has been made against an employer that is a small business.[35] If a termination of employment claim relates to both unfair dismissal grounds and unlawful termination grounds, then the Commission would dismiss the claim so far as it relates to the unfair dismissal ground – the unlawful termination claims would continue to proceed as normal.

95. The Commission would be authorised to reject unfair dismissal applications against small businesses without holding a hearing if the Commission is satisfied on the material

[30] Fair Dismissal Bill, Schedule 1, item 2 – proposed subsection 170CE(5C).
[31] Fair Dismissal Bill, Schedule 1, item 6.
[32] Fair Dismissal Bill, Schedule 1, item 2 – proposed subsection 170CE(5D).
[33] Fair Dismissal Bill, Schedule 1, item 2 – proposed paragraph 170CE(5C)(a).
[34] Fair Dismissal Bill, Schedule 1, item 2 – proposed paragraph 170CE(5C)(b).
[35] Fair Dismissal Bill, Schedule 1, item 3 – proposed subsection 170CEB(1).

before it that the unfair dismissal claim relates to a small business, and the Commission does not have jurisdiction to deal with the claim. In deciding whether or not to hold a hearing, the Commission would be required to take into account the costs to the small business employer's business of attending a hearing.[36] The Commission would also be able to seek further information in writing from the parties to an unfair dismissal claim to assist it in determining whether the Commission has jurisdiction to deal with the claim.[37]

96. Where the Commission decided that an unfair dismissal claim was not valid as it related to a small business employer, no appeals against that decision would be permitted.[38]

97. A comparison of the provisions of the WRA (FD) Bill 2002 and earlier instruments to exempt small business from unfair dismissal laws is at Appendix 2A.

[36] Fair Dismissal Bill, Schedule 1, item 3 – proposed subsection 170CEB(2).
[37] Fair Dismissal Bill, Schedule 1, item 3 – proposed subsections 170CEB(3) and (4).
[38] Fair Dismissal Bill, Schedule 1, items 4 and 5.

Appendix 2A

Comparison of the Workplace Relations Amendment (Fair Dismissal) Bill 2002 and earlier instruments to exempt small business from unfair dismissal laws

Between 1997 and 2001, the Government introduced three Bills and two sets of amending regulations to exempt small businesses from unfair dismissal laws. This section of the submission compares the provisions of these earlier Bills and regulations with the current proposals for a small business exemption contained in the WRA (FD) Bill 2002.

Workplace Relations Regulation 1997 (SR No. 101 of 1997)
Section 170CC of the *Workplace Relations Act 1996* provides that the regulations may exclude specified classes of employees from the operation of the termination of employment provisions in Division 3 of Part VIA of the Act. Subparagraph 170CC(1)(e)(ii) of the Act provides that regulations may be made to exclude employees where the application of the provisions would cause substantial problems because of the 'size or nature of the undertakings in which they are employed'.

On 30 April 1997, amendments were made to the Workplace Relations Regulations to include a new regulation 30BAA, which would have exempted small businesses from unfair dismissal laws with effect from 1 July 1997. The proposed small business exemption would have:

- excluded employees working in a business with **15 or fewer employees** from the operation of the unfair dismissal provisions;
- only applied to employees who were employed after the commencement of the regulation (**new employees**);
- only operated in relation to the **first 12 months** of a new employee's employment with that employer;
- preserved the ability of small business employees to seek a remedy for **unlawful termination** of employment.

Workplace Relations Amendment Bill 1997
The Workplace Relations Amendment Bill 1997 was first introduced on 26 June 1997. The proposed small business exemption would have:

- excluded employees working in a business with **15 or fewer employees** from the operation of the unfair dismissal provisions;
- only applied to employees who were engaged after the commencement of the Bill (**new employees**);
- preserved the ability of small business employees to seek a remedy for **unlawful termination** of employment.

The exclusion proposed by this Bill differed from the earlier regulation in a number of respects, most notably that:

- the exclusion of new employees was to be **permanent**;
- the exclusion would not apply to **apprentices**; and
- in determining whether a business has 15 employees, the employee whose employment was terminated was counted, but **casual employees** would not have been counted unless they had been employed on a regular and systematic basis for at least 12 months.

As mentioned, small business employees retained the ability to seek a remedy in respect of unlawful termination of employment. In addition, small business employers to whom the exemption was to apply would have remained subject to other provisions of the *Workplace Relations Act 1996* prohibiting termination of employment, including the prohibitions against dismissal on the grounds set out in section 298K, and prohibitions against dismissal of employees engaged in protected industrial action relating to certified agreements or Australian workplace agreements (sections 170MU and 170WE, respectively).

Workplace Relations Amendment (Unfair Dismissals) Bill 1998
The Workplace Relations Amendment (Unfair Dismissals) Bill 1998 was first introduced on 12 November 1998. The proposed small business exemption contained in this Bill would have:

- permanently excluded employees working in a business with **15 or fewer employees** from the operation of the unfair dismissal provisions (in determining whether a business had 15 employees, the employee whose employment was terminated was counted, but **casual employees** would not have been counted unless they had been employed on a regular and systematic basis for at least 12 months);
- only applied to **new employees** who were engaged after commencement of the Bill;
- preserved the existing ability of **apprentices** working in small businesses to make unfair dismissal claims;
- preserved the ability of small business employees to seek a remedy for **unlawful termination** of employment.

In this Bill, trainees were excluded from the proposed small business exemption, in addition to apprentices.

As was the case with the Workplace Relations Amendment Bill 1997, employees affected by the small business exemption would still be able to seek a remedy in respect of dismissals in contravention of:

- the freedom of association provisions of the WR Act (Part XA); and
- the prohibitions against dismissal of employees engaged in protected industrial action in the context of negotiating a certified agreement or Australian workplace agreement (section 170MU and section 170WE).

Workplace Relations Amendment Regulations 1998 (No. 2) (SR No 338 of 1998)
The Workplace Relations Amendment Regulations 1998 (No. 2) were made in the same terms as the Workplace Relations Amendment (Unfair Dismissals) Bill 1998, to give the earliest possible effect to the exemption for small business, while the Government pursued the passage of the Bill through the Parliament. The Workplace Relations Amendment (Unfair Dismissals) Bill is described above.

Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001
The Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill was introduced on 30 August 2001. This Bill was not considered by the Parliament before the 2001 election was called.

Schedule 2 of the Bill proposed to exempt small businesses from unfair dismissal laws in the *Workplace Relations Act 1996*. Similarly to the Workplace Relations Amendment (Unfair Dismissals) Bill 1998, the small business exemption would have:

- only applied to **new employees** who were engaged after commencement of the Bill;
- preserved the existing ability of **apprentices and trainees** working in small businesses to make unfair dismissal claims;
- preserved the ability of small business employees to seek a remedy for **unlawful termination** of employment, and to seek remedies for dismissals that contravened the freedom of association provisions or section 170MU and 170WE of the *Workplace Relations Act 1996*.

The provisions of the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001 differed from the earlier Bill in the following respects:

- employees working in businesses with **fewer than 20 employees** would have been permanently excluded from the operation of unfair dismissal laws, rather than employees working in businesses with 15 or fewer employees (however, in the same way as the earlier Bills, to work out how many employees were employed by a business, the terminated employee was counted, but casuals were not counted unless they had been working for the employer on a regular and systematic basis for at least 12 months);
- the Bill established a process allowing the Commission to dismiss unfair dismissal claims made against small businesses, and to dismiss frivolous and vexatious claims, or claims lacking in substance against small businesses, **without holding a hearing**;
- if the Commission decided to dismiss an application because it related to a small business, the Bill would have **prevented appeals** against this decision.

Workplace Relations Amendment (Fair Dismissal) Bill 2002
The provisions of the WRA (FD) Bill 2002 are very similar to the provisions of Schedule 2 to the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001.

The proposed small business exemption would:

- apply to permanently exclude employees of businesses with **fewer than 20 employees** from the operation of the unfair dismissal provisions (in working out how many employees are employed by a business, the terminated employee is counted, but casuals are not counted unless they have been working for the employer on a regular and systematic basis for at least 12 months);

- only apply to **new employees** engaged after the commencement of the Bill;

- preserve the existing ability of **apprentices and trainees** working in small businesses to make unfair dismissal claims;

- preserve the ability of small business employees to seek a remedy for **unlawful termination** of employment, and to seek remedies for dismissals that contravene the freedom of association provisions or section 170MU and 170WE of the *Workplace Relations Act 1996*.

As with the 2001 Bill, the WRA (FD) Bill 2002 would establish a process for the Commission to order that an unfair dismissal claim that relates to a small business is not valid, and authorise the Commission to make such an order without holding a hearing. There would be no appeal rights against such an order. Unlike the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001, however, there is no specific provision in the WRA (FD) Bill 2002 allowing the Commission to dismiss applications made against small businesses that are frivolous, vexatious or lacking in substance.

EXTRACT FROM THE SUBMISSION BY THE DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE INQUIRY INTO WORKPLACE RELATIONS AMENDMENT BILLS

Workplace Relations Amendment (Fair Termination) Bill 2002

BACKGROUND

The Workplace Relations Amendment (Fair Termination) Bill 2002 (WRA (FT) Bill 2002) proposes to:

- introduce new provisions into the *Workplace Relations Act 1996* (WR Act) excluding certain classes of employees, including short-term casuals, from the operation of the termination of employment provisions, and repeal the existing regulations on the same subject;

- modify the provisions excluding certain classes of employees from the operation of the termination of employment provisions. In particular, the Bill will restore provisions excluding casual employees engaged for a short period, ie less than twelve months, following the decision of the Federal Court that the regulations that purported to exclude these employees were invalid (*Hamzy v Tricon International Restaurants t/as KFC* [2001] FCA 1589);

- validate the operation of regulations, purporting to exclude short-term casual employees from the termination provisions, that were declared invalid by the Federal Court in *Hamzy*;

- introduce a permanent, indexed, filing fee for the lodgement of termination of employment applications into the WR Act and repeal the existing regulations on the same subject. The filing fee is intended to discourage frivolous and vexatious claims, while ensuring that genuine termination of employment applications can be dealt with efficiently.

POLICY RATIONALE

(a) Casual Exclusion

98. The majority of casual employees work on a part-time basis,[39] and many work very few hours each week.[40] The incidence of casual employment is much higher among young people than any other group.[41] Casual employment is concentrated in particular industries,

[39] Australian Bureau of Statistics (ABS), *Forms of Employment Survey* (Cat. 6359.0), which indicates that in August 1998 there were 1,486,900 self-identified casual employees (excluding owner managers of incorporated enterprises). Of these, 71.9% worked fewer than 35 hours per week (ie. part-time hours).

[40] In the Productivity Commission's *The Diversity of Casual Employment* Research Paper (2001), Murtough and Waite estimate that 52.1% of all casual contract employees worked 19 or less hours per week. Of these, about half worked less than 10 hours per week (ie approximately 25% of the overall population of self-identified casuals), while the remaining half worked between 10-19 hours per week.

[41] ABS, *Forms of Employment Survey* (Cat. 6359.0) shows that, as at August 1998 (a) self-identified casual employees aged 15-19 made up 62.5% of all employees between those ages and that persons in this age group comprised 23.3% of all casuals; and (b) self-identified casual employees aged 20-24 made up 29.1% of all employees between those ages and that persons in this age group comprised 17.6% of all casuals.

especially retail trade; accommodation, cafés and restaurants; cultural and recreational services; and agriculture, forestry and fishing.[42]

99. Casual employment has been responsible for the majority of employment growth in recent times. A table is attached at Appendix 6A which shows that:

- between 1984 and 1990, 35.1 percent of the growth in total employees was due to growth in casual employment
- between 1984 and 2001, 52.6 percent of the growth in total employees was due to growth in casual employment; and
- between 1990 and 2001, 70.1 percent of the growth in total employees was due to growth in casual employment.

100. In 1994, the Federal Government made regulations under the *Industrial Relations Act 1988* (as amended by the *Industrial Relations Reform Act 1993*) which excluded certain categories of employees, including short-term casual employees, from accessing federal termination of employment provisions.

101. Casual employees were entitled to access termination of employment remedies if they:

- had been 'engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a six month period', and
- 'but for the decision by the employer to terminate the employee's employment, would have had a reasonable expectation of continuing employment by the employer'.

102. In 1996, the Government extended the qualifying period from six to twelve months. The casual exclusion remained otherwise unchanged.

103. In March 1997 a disallowance motion in the Senate, moved by the Australian Labour Party, was defeated by the Government with the support of the Australian Democrats.[43]

104. On 16 November 2001, in *Hamzy v Tricon International Restaurants*,[44] the Full Court of the Federal Court of Australia declared the regulations invalid on technical legal grounds. The parts of the regulation that concerned the Court had been in place since 1994.

The Hamzy decision

105. Mr Hamzy was employed as a casual employee at a Kentucky Fried Chicken restaurant, but his employment was terminated after seven months.

106. He applied to the Australian Industrial Relations Commission (the Commission) for relief, alleging that his dismissal was both unfair and unlawful. The Commission dismissed his application on the grounds that he was excluded from the jurisdiction because he was a short-term casual employee.

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[42] Ibid.

[43] Senate Hansard, 26 March 1997, page 2580.

[44] [2001] FCA 1589.

107. Mr Hamzy appealed to the Full Bench of the Commission arguing that the regulations excluding casuals with less than 12 months employment were invalid as they exceeded the regulation-making power in section 170CC of the WR Act. The Full Bench referred the question of the legal validity of the regulations to the Federal Court pursuant to subsection 46(1) of the WR Act.

108. Paragraph 170CC(1)(c) provides that regulations may be made to exclude from some or all of the termination of employment provisions of the WR Act, 'employees engaged on a casual basis for a short period'.

109. Paragraph 30B(1)(d) of the WR Act purported to exclude casual employees engaged for a short period from both unfair dismissal and unlawful termination remedies. Subregulation 30B(3) deemed all casual employees to be employed for a short period unless the employee concerned was engaged by an employer on a 'regular and systematic basis' for at least 12 months and 'had a reasonable expectation of continuing employment'.

110. The Full Court of the Federal Court found the regulations excluding casuals to be invalid because they went further than allowed by the regulation-making power in section 170CC.

111. The Full Court held that the definition of short-term casual employee provided by the regulations could potentially exclude from access to a remedy employees who were not in fact short-term casual employees.

112. The Full Court's decision did not find that it is impermissible at law to exclude short-term casuals from the termination provisions. Rather the Court found that the manner in which the regulations sought to achieve this was ineffective. The Full Court did not rule on whether 12 months was a 'short period' and therefore within the regulation making power.

Response to the Hamzy decision

113. The Australian Hotels Association (the AHA) said the decision threatened thousands of jobs in the hospitality industry:[45]

> 'Casual employment is at the cornerstone of flexible workplace practices and, for industries that experience significant peaks and lows, it is an essential tool in successful business management,' Mr Mulcahy said.
>
> 'The erosion of the flexibility of casual employment will simply hurt the chances of many young Australians to get their first break into the workforce.
>
> 'Industry uncertainty is the last thing we need at present. The only thing it can bring is job insecurity, while it will drive many employers to simply stop hiring casuals.
>
> 'The hospitality industry has already been hard hit by the global travel crisis and had our problems exacerbated by the collapse of Ansett and the general economic outlook.

[45] "Action needed on unfair dismissal laws". Press release, Mr Richard Mulcahy, AHA National Executive Director, 21 November 2001.

> 'Employment is already down in our industry, which employs more than 250,000 Australians, and the effects of this judgement could be absolutely disastrous.'

114. He called on the Government to act swiftly, and with the support of the Senate, to fix the problem.

115. In response to the *Hamzy* decision, the Government made new regulations in a form consistent with the Federal Court decision.

116. The new regulations, which commenced on 7 December 2002,[46] exclude casual employees engaged by a particular employer for a short period, that is, 'if the occasions on which the employee works for that employer under an engagement occur within a period of less than 12 months'.

117. The requirement for the employee to be engaged on a regular and systematic basis and have a reasonable expectation of continuing employment is no longer included. The effect of this is that a larger number of casual employees are potentially able to access termination remedies than was previously the case.

118. However, as the Minister for Employment and Workplace Relations, the Hon Tony Abbott MP, noted in his second reading speech on the Bill, the Government considers the regulations to be only a temporary solution. The Bill is intended to offer a permanent solution by reinstating in the Act the exclusion as it stood in the regulations before the Federal Court decision in *Hamzy*.

119. If the Bill is passed, the regulation will cease to have effect.

Why have an exclusion for casuals?

120. The exclusion is designed to ensure that short term casual employment is a viable employment option for employers and employees.

121. The fact that such an exclusion may be appropriate is expressly recognised in the International Labour Organisation's Termination of Employment Convention (ILO Convention No. 158), which allows ratifying states to exclude certain categories of employees from access to termination remedies, including workers engaged on a casual basis for a short period.[47]

122. Traditionally, employers have used short-term casual employees as a way of balancing peaks and troughs in workloads. A range of Australian Bureau of Statistics data supports this view, including that:

- approximately one-third of all casuals do not work regular hours; and
- 44 percent of casuals described their working pattern as 'casual/relief' work.[48]

123. If the legislative scheme does not recognise this, then employers may be reluctant to employ staff to meet fluctuations in demand, leading to reduced labour-market flexibility with implications for employment.

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[46] Statutory Rules 2001 No. 323
[47] Article 2, paragraph 2(c).
[48] ABS, *Survey of Employment Arrangements and Superannuation* (ABS.cat. No. 6361.0) May 2000.

124. The legislative scheme should ensure that employers are not discouraged from taking on temporary staff to address short-term business needs.

125. This is reflected in the objects of the WR Act - paragraph 3(a) makes pursuit of high employment an objective of the WR Act.

126. As illustrated earlier, casual employment has been a significant source of jobs creation since at least the mid-1980s.

127. Casual employment also serves a broader purpose, which the Government considers should be encouraged – it provides a means for employees (particularly young workers) to establish a presence in the labour market. In many industries, casual employment represents an entry point into the general workforce for those without substantial prior experience.

128. Casual employment also provides a means for young people to earn money to support full-time study (nearly one quarter of all casuals are full-time students).[49]

129. Given that an exclusion period has been in place since early 1994, businesses have developed their employment practices to take account of this exemption. A change to this exemption would place an additional burden on employers, particularly small businesses, by requiring a reorganisation of employment practices.

130. It could be expected that the removal or limiting of the current exemption on casuals would impact particularly in sectors which by their nature place special reliance on casual employment; for example, over half the employees in the Accommodation, Cafes and Restaurants sector are employed as casual workers.[50]

131. The exemption means that employers can continue to have the flexibility offered by short-term casual employment without having to be concerned about the prospect of dismissal proceedings where the job is only for a limited period.

Scope of the exclusion – long term v short term casuals

132. The termination of employment provisions in the WR Act seek to strike an appropriate balance between the rights of employers and employees, ensuring a 'fair go all round'. In striking this balance, the legislation recognises that it may be appropriate to exclude certain categories of employees from access to some or all of the termination of employment provisions.

133. Successive Governments have considered it appropriate to exclude from the operation of the provisions casual employees who are employed on an irregular or non-systematic basis, with no expectation of on-going employment. Such employees are also generally paid loadings instead of receiving certain entitlements such as sick leave or holiday pay.

- Seasonal workers are a good example. A seasonal worker may work day-to-day at different locations for different employers at different times of the year with no expectation of ongoing and/or regular employment. Typically, these workers are paid as casuals and are not entitled to annual leave, sick leave or public holidays but instead have a loading incorporated into their pay in lieu of these other entitlements.

[49] The Forms of Employment Survey (ABS 6359.0). 24.4 percent of all casuals are studying full-time and aged under 25.

[50] ABS, *Survey of Employment Arrangements and Superannuation* (No. 6310.0 2001).

134. However, Governments have accepted that access to remedies in respect of termination of employment should be available to employees who, whilst being paid as casuals and receiving a loading, may appropriately be considered 'continuing' casuals, in the sense that they have an ongoing association with the one employer and a reasonable expectation of continuing employment. This type of work is not typically casual in the sense of it being 'temporary' or 'short-term'.

- ABS data indicates that many casuals have been with their current employer for lengthy periods of time. Over half have been with their current employer for more than one year; around 24 percent have been with their current employer for 3 or more years; and 5 percent have been with their employer for 10 years or more.[51] It should be noted that not all of these long-term casuals will necessarily have been engaged on a regular basis.

135. When the exclusion was first introduced in 1994, the qualifying period was six months. In 1996, the Government amended the regulations to require casuals to work for their employer for a minimum period of twelve months' regular and systematic employment before being able to make dismissal applications.

136. This change ensures that only those casual employees who are truly 'continuing' casuals are able to access a remedy. As noted above, a significant proportion of casual employees fall into this category.

137. The change addresses the fact that the often limited weekly hours, or particular work arrangements, of some casual employees may make it difficult for an employer to properly assess an employee's performance in a period substantially less than twelve months.

138. A motion to disallow the twelve-month exclusion was defeated with the support of the Australian Democrats. In debate, the Australian Democrats' Industrial Relations spokesman, Senator Andrew Murray, said the regulations were about balance and judgement:[52]

> 'At this stage, we think the balance is about right in the amended regulation and we are going to leave it at that. But the minister has agreed, at our request, to review these regulations after twelve months and we will need to look at the empirical evidence then.'

139. A review[53] was established the following year and sought submissions. The question of whether there should be a casual exclusion attracted only limited comment. Only one submission dealt specifically with the issue of a casual exclusion,[54] and none addressed the duration of any such exclusion.

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[51] Ibid.

[52] Senate Hansard, 26 March 1997, page 2577.

[53] *The Twelve Month Review of Federal Unfair Dismissal Provisions*. Report by the Department of Employment, Workplace Relations and Small Business, including Federal Government responses to the review, December 1998.

[54] 'Job Watch's Submission to the Review of Unfair Dismissal Laws', 22 July 1998 recommended that no casual employee should be excluded from the unfair termination provisions (p 6). It is also worth noting that whilst the submission from the Australian Chamber of Commerce and Industry did not deal directly with the casual exclusion, it did submit that all employees should be exempted from termination remedies for the first year of employment, except for prohibitions on discriminatory termination (ACCI Submission to Federal Government's Unfair Dismissal Laws,' 22 July 1998, p 11). The ACTU referred to the benefit the casual exclusion gave to small business but did not comment on the appropriateness of the exclusion (ACTU

140. The Queensland Government introduced a twelve-month exemption in its legislation that is almost identical to the exclusion proposed in this Bill.[55] The exclusion was first included as part of the former Government's *Workplace Relations Act 1997 (Qld)*, and was retained in the *Industrial Relations Act 1999(Qld)* after the new Government reworked Queensland's industrial relations laws.

141. The Australian Chamber of Commerce and Industry (ACCI), has called on the Parliament to enact this Bill, so as to continue the 12-month exclusion for casuals.[56]

> 'Enacting the Government's legislation unamended does no more than retain the status quo that has applied for five years,' Mr Lyndon Rowe said.
>
> '…any lesser period than a 12-month exclusion for casual employees … will have increased, not decreased, the burden of unfair dismissal laws on employers.'

Validating the operation of the invalid regulations

142. The Bill will validate the past operation of the regulations declared invalid by the Federal Court in the *Hamzy* decision.

143. The provisions will declare, as far as possible, that the rights and liabilities of employers and employees are the same as they would have been had the invalid regulations been validly made (and as if the replacement regulations made after the Federal Court's decision, which contained a more limited casual exemption,[57] had not been made).

- A similar declaration was inserted into the *Corporations Act 2001* following the High Court's decision[58] invalidating the Corporations Law scheme.

144. The validating provisions will prevent casual employees who had their employment terminated after the invalid regulations were purported to have been made (31 December 1996) from now seeking to bring late applications for a remedy. Decisions will be unaffected, however, where a casual employee has already made an application for a termination remedy and the application is finally determined by a court or the Commission before the validating provisions commence.

- This will avoid confusion and costs associated with 'unravelling' Commission decisions, and will avoid potential constitutional problems associated with legislative interference with the exercise of judicial power.

145. The High Court has previously approved the approach of validating rights. For example, in the case of *R v Humby; Ex parte Rooney*,[59] the High Court upheld the validity of

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Submission to the Review of the First Twelve Months' Operation of the Unfair Dismissal Provisions of the *Workplace Relations Act 1996*, 22 July 1998, p 5).

[55] Section 72 of the *Industrial Relations Act 1999 (Qld).*

[56] "12 Month Unfair Dismissal Exemption For Casuals Is Essential For Jobs". Press release, Mr Lyndon Rowe, Acting Chief Executive, 14 March 2002.

[57] The current regulations prevent a casual employee from bringing an action unless the employee had worked for the employer over a twelve-month period. The new provisions would prevent a casual employee from bringing an action unless the employee had worked for a particular employer on a regular and systematic basis for a sequence of periods over twelve months, and has an expectation of continuing employment.

[58] *R v Hughes* [2000] HCA 22.

[59] (1973) 129 CLR 231.

provisions in the *Matrimonial Causes Act 1971* (Cth) which sought to declare valid, the rights, liabilities and obligations contained in invalid orders (the orders had previously been held by the High Court to be invalid because they were made by a Master of the SA Supreme Court, rather than a judge of the SA Supreme Court).

146. The validating provisions in the WRA (FT) Bill 2002 would have the effect of amending the law as it applies to the entire period since the *Hamzy* decision.

- This Bill restores the law to what it was commonly understood to be until the *Hamzy* decision.

- It also seeks to ensure that the same rules apply after that time (including from 7 December 2001 when the narrower casual exemption commenced) until this Bill commences.

147. The Government believes this legislation is necessary to avoid confusion and to ensure that a consistent regulatory regime is in place, which is easy for both employers and employees to understand.

148. Otherwise, three different sets of rules would be in operation in quick succession in relation to:

- the period up until the *Hamzy* decision on 16 November 2001;

- the three weeks from 16 November 2001 to 6 December 2001 (immediately before the new regulation commenced); and

- the period from 7 December 2001 until this Bill commences.

149. It is not possible to determine how many employees will be effected by the validation provisions, although it is unlikely there would be many, given the relatively short periods of time involved, and the fact that any new employees would normally have had to have served a qualifying period (usually of three months)[60] before being able to bring a termination action.

150. The number of employees who could be affected is further limited by the fact that under the WR Act, an employee has 21 days within which to lodge an application for a termination remedy – although the Commission does have discretion to accept a late lodgement.

151. The Government indicated its intention to restore the full scope of the casual exemption soon after the *Hamzy* decision was handed down. In a doorstop interview on 21 November 2001,[61] Minister Abbott said:

> 'The Government will be taking urgent action to restore the policy intention of the Government so we will be moving swiftly to make new regulations which restore the Government's intentions, which are to generally exempt casual employees, certainly short term casual employees from the operation of the unfair dismissal laws.'

[60] Under section 170CE(5A), which came into effect in August 2001, all employees must serve a qualifying period of employment of three months, unless it is determined in advance by written agreement between the employer and employee, to shorten or lengthen the period, or waive the period altogether.
[61] Media Monitors Transcript, Doorstop interview, 21 November 2001 (Slip ID S00005518164).

152. The full scope of the casual exclusion cannot be restored by regulation. That can only be done by legislation.

(b) Permanent Filing Fee

History of the filing fee regulation

153. The requirement for a filing fee commenced on 31 December 1996. Subregulation 30BD(1) imposed the $50 filing fee, and subregulation 30BD(2) provided for waiver of the fee in cases of hardship.

154. On 5 March 1997, Senator Sherry (ALP) gave notice that he intended to move a motion to disallow (among other regulations) subregulations 30BD(1) and (2). As the result of an agreement between the Government and the Australian Democrats, the Government amended regulation 30BD to provide for the refund of the lodgement fee in the case of early discontinuance, and to insert a sunset clause on the operation of the filing fee (the original sunset date was 30 June 1998).

155. In addition, the Government agreed to conduct a review of the operation of the filing fee, as part of a broader review of the unfair dismissal provisions of the WR Act. The sunset period was extended to 31 December 1998 to allow the review to be completed. The review report was released on 17 December 1998. The Government proposed, in its response to the review, an increase in the filing fee from $50 to $100.

156. On 17 December 1998, the Government made Workplace Relations Amendment Regulations 1998 (No. 3), which, amongst other things, removed the sunset clause, and increased the fee to $100. This accorded with the Coalition's workplace relations election policy, *More Jobs, Better Pay*, which was issued in September 1998.

157. These regulations were disallowed on 16 February 1999 by the Senate, which had the effect of ending the filing fee from 31 December 1998.

158. Regulation 30BD was remade, with effect from 24 March 1999, reinstating the $50 filing fee, with a sunset date of 31 December 1999. Regulation 30BD(4) was later amended with effect from 22 December 1999 to extend the sunset date to 31 December 2000.

159. Regulation 30BD was again amended with effect from September 2000 to provide for a sunset date of 31 December 2003.

160. The Workplace Relations Amendment Regulation 2000 (No. 3) sought to remove the sunset clause, but this regulation was disallowed by the Senate on 27 June 2001. Therefore, the 2003 sunset date still stands.

161. The Government has subsequently re-iterated its intention to make the filing fee a permanent requirement, and also promised to index the amount annually in accordance with the CPI.[62]

162. Government policy is that a permanent filing fee will discourage frivolous, vexatious and speculative claims which impose a burden on the system, making it harder for employees with genuine complaints to get a timely hearing, and imposing unnecessary and unfair costs on employers having to reply to them.

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[62] *Choice and Reward in a Changing Workplace*, Coalition workplace relations policy platform, Election 2001.

163. Furthermore, to ensure that employees with limited means are not prevented from lodging applications, merely because they cannot afford the filing fee, the Registry has a discretion to waive the fee in cases of serious hardship.[63]

164. Indications are that about ten percent of applicants have their fee waived. According to information provided by the Australian Industrial Registry[64], in the calendar year 2000, a total of 762 applications were made for a waiver, with only 45 refused. For the first five months of the calendar year 2001, 380 applications were made, 23 were refused.

165. This compares with an estimated 7,613 termination of employment applications lodged for the calendar year 2000, and an estimated 3,541 applications lodged for the first five months of the calendar year 2001.

166. A filing fee would represent a small, but appropriate contribution on the part of employees, towards the costs of unfair dismissal proceedings. Other jurisdictions have similar fees.[65]

167. The fee has been in place almost continuously since 1996 and the Government believes that this is an ample period of time in which to assess the measure, including whether it unfairly prevents employees with limited means from making applications.

168. The Senate Standing Committee on Regulations and Ordinances has expressed reservations on a number of occasions about the repeated imposition of a sunset clause. (One of the key principles that the Committee applies when assessing regulations is whether the regulation has certainty of meaning and operation.)

169. For example, in a letter dated 16 March 2000, the then Chair of the Committee, Senator Helen Coonan, wrote to the then Minister for Employment, Workplace Relations and Small Business, the Hon Peter Reith:

> 'The Committee is of the view that to continue to extend the sunset clause may be a breach of Parliamentary propriety and would therefore appreciate your advice as to whether consideration has been given to making the application fee a permanent provision of these Regulations.'

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[63] Regulation 30BD(2)

[64] Answer to a question on notice to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, 2001-2002 Budget Estimates Hearing- 4 –5 June, 2001. The following table was provided in answer to the question:

Applications for Waiver - Applications for relief in respect of termination of employment

Calendar Year 2000	ACT	NSW	NT	Q'ld	Tas	WA	SA	VIC	Total
total applications made	42	103	66	8	10	21	23	489	762
applications refused	4	6	2	0	1	3	5	24	45

Calendar Year 2001 to May 2001	ACT	NSW	NT	Q'ld	Tas	WA	SA	VIC	Total
total applications made	8	49	26	6	4	9	9	269	380
applications refused	0	5	2	0	1	1	1	13	23

[65] For example the NSW IRC filing fee is $50; the Queensland IRC filing fee is $46.50; and the Federal Court of Australia filing fee is $50 for applications in respect of unlawful discrimination applications under section 46PO of the *Human Rights and Equal Opportunity Act 1986* and for unlawful termination applications under section 170CP of the WR Act.

170. In responding to this query, Minister Reith noted that the Government had always intended to make the filing fee permanent, as it was an important measure aimed at discouraging frivolous and vexatious claims, whilst helping to ensure that genuine termination of employment cases were dealt with efficiently.[66]

171. During debate in the Senate on Workplace Relations Amendment Regulations 2000 (No. 3) on 27 June 2001, the Australian Democrats acknowledged that the Government had attempted to remove the sunset clause in response to the Committee's concerns.[67]

172. Senator Murray also acknowledged during debate that the filing fee served a useful purpose.

> 'The filing fee is instrumental in the discouragement of frivolous and vexatious claims and ensures that genuine termination of employment applications are dealt with efficiently.'

SUMMARY OF PROVISIONS

(a) Casual Exclusion

173. New section 170CBA (to be inserted by item 1 of schedule 1) would exclude short-term casual employees from the termination provisions of the WR Act. The exclusion reflects that in place in the WR Regulations before the Federal Court decision in the *Hamzy* case.

- A casual employee will be taken to be engaged for a short period, and therefore excluded from the termination provisions unless the employee has been engaged by their employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and the employee has, or would have had, a reasonable expectation of continuing employment with the employer.

174. The Bill also moves the other existing exclusions (currently in the regulations) into the WR Act, thus consolidating all the provisions in one location, and making it easier for employers and employees to quickly ascertain their rights and responsibilities. These are also contained in new section 170CBA.

175. The classes of employees are:

- employees engaged for a specified period of time (unless the purpose, or a substantial purpose, of this arrangement was to avoid the employer's obligations under the termination provisions – this reflects existing subregulation 30B(2) of the WR Regulations);

- employees engaged for a specified task (unless the purpose, or a substantial purpose, of this arrangement was to avoid the employer's obligations under the termination provisions – this reflects existing subregulation 30B(2) of the WR Regulations);

- employees who are on probation (as long as the length of the probation period is 3 months or less, or reasonable having regard to the particular employment);

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[66] The Government has also taken other steps, for example, measures in the *Workplace Relations Amendment (Termination of Employment) Act 2001*, which came into operation in August last year.

[67] *Senate Hansard*, 27 June 2001, page 25241

- trainees who are employed under particular types of traineeship agreements, or who are employed under a traineeship for a specified period; and

- non-award employees who earn more than the rate calculated in accordance with the formula in the WR Regulations.

176. The Bill also makes necessary minor alterations to these exclusions.

- For example, a potentially confusing reference to a 'qualifying period of employment' has been removed from the exclusion for employees on probation (currently in regulation 30B(1)(c)). Following amendments made by the *Workplace Relations Amendment (Termination of Employment) Act 2001*, the WR Act provides a general three month qualifying period for all employees (including probationers) unless a longer or shorter period is agreed in writing in advance. The use of the phrase 'qualifying period' in the specific context of probationary employment is no longer necessary and could have proved confusing.

177. Other changes are necessary to keep the provisions relevant and up to date. For more details, see Appendix 6B.

178. Item 4 of the Bill will also validate the operation of the invalid regulations by providing that, as far as possible, the rights and liabilities of employers and employees are the same as they would have been had the invalid regulations been valid all along – and as if the regulation made after the *Hamzy* decision had never been made.

179. Those casual employees whose cases had been determined by a court, or by the Commission, are specifically protected by the Bill and they will be unaffected by the validation provisions.

(b) Permanent Filing Fee

180. New section 170CEAA would require a person lodging a termination of employment application with the Australian Industrial Registry to pay a fee.

181. This section lists the applications in respect of which a fee is payable (applications made under subsections 170CE(1), (2), (3) and (4) of the WR Act). The amount of the fee is $50 if an application is lodged during the first financial year in which the provision commences.[68] If an application is lodged in later financial years, the fee would be indexed to reflect CPI adjustments during the previous year (with reference to the March quarter).

182. The proposed section 170CEAA will also provide that an Industrial Registrar may exempt an applicant for relief from termination of employment from paying the fee, if the fee would cause that person serious financial hardship.

183. Likewise, the Industrial Registry must refund any fee paid for lodging a termination of employment application if the application is discontinued at least two days before the first proceedings in the Commission relating to that application are scheduled to begin.

[68] Section 22 of the *Acts Interpretation Act 1901* provides that the term 'financial year' means a period of 12 months beginning on 1 July.

Appendix 6A

Trends in Employment – Permanent and Casual Employees 1984 to 2001

Year	Permanent employees	Casual employees	Total employees	Casual Density
1984	4509.9	848.3	5358.2	15.8%
1985	4625.7	887.3	5513.0	16.1%
1986	4704.1	979.3	5683.4	17.2%
1987	4791.0	1075.6	5866.6	18.3%
1988	4949.0	1152.9	6101.9	18.9%
1989	5199.4	1298.0	6497.4	20.0%
1990	5293.8	1271.8	6565.6	19.4%
1991	5037.2	1280.0	6317.3	20.3%
1992	4919.8	1415.0	6334.8	22.3%
1993	4888.4	1435.0	6323.4	22.7%
1994	4976.7	1549.1	6525.8	23.7%
1995	5229.0	1653.3	6882.2	24.0%
1996	5220.9	1841.2	7062.1	26.1%
1997	5176.6	1795.5	6972.1	25.8%
1998	5298.7	1946.1	7244.8	26.9%
1999	5372.6	1931.6	7304.2	26.4%
2000	5598.3	2097.3	7695.6	27.3%
2001	5654.6	2117.6	7772.2	27.2%

Source: ABS Cat. No. 6310.0 for columns 1 to 3. Column 4 calculated by dividing column 2 by column 3.

Contributions to employment growth by type of employment were calculated as follows:

- growth from 1984 to 2001 - this was calculated by subtracting the number of employees in each of the columns 1, 2 and 3 for 1984 from the respective number of employees for 2001;
- contribution to growth from 1984 to 2001 - this was calculated by dividing the growth from 1984 to 2001 in columns 1, 2 and 3 by the total employment growth from 1984 to 2001 in column 3 and recording the result as a percentage;
- growth from 1984 to 1990 - this was calculated by subtracting the number of employees in each of the columns 1, 2 and 3 for 1984 from the respective number of employees for 1990;
- contribution to growth from 1984 to 1990 - this was calculated by dividing the growth from 1984 to 1990 in columns 1, 2 and 3 by the total employment growth from 1984 to 1990 in column 3 and recording the result as a percentage;
- growth from 1990 to 2001 - this was calculated by subtracting the number of employees in each of the columns 1, 2 and 3 for 1990 from the respective number of employees for 2001; and
- contribution to growth from 1990 to 2001 - this was calculated by dividing the growth from 1990 to 2001 in columns 1, 2 and 3 by the total employment growth from 1990 to 2001 in column 3 and recording the result as a percentage.

Appendix 6B

Minor Alterations to Simplify or Update Exclusions

In addition to restoring the full scope of the provision excluding 'short-term' casual employees from termination of employment remedies, the WRA (FT) Bill 2002 will make minor amendments to simplify or update the exclusions applying to other categories of employees. These changes are as follows:

- The exclusion for probationary employees will be simplified. The reference to "qualifying period of employment" in the probationary exclusion will be removed. This phrase could cause confusion, given that it appears in a different context elsewhere in the Act — section 170CE(5A), which requires all employees, whether probationers or not, to complete a qualifying period of employment with their employer before making an unfair dismissal application.

- The exclusion for trainees will be updated. The meaning of "traineeship agreement" will be amended to reflect updates to the national training wage award. References to NETTFORCE will also be removed because this traineeship organisation has been wound up and no longer operates.

- The exclusion for seamen will be removed, because the Maritime Industry Seagoing Award 1983 is no longer in force. Seamen are subject to a new system of engagement.

The other excluded categories of employees have no changes to their definitions, but are also to be relocated from the WR Regulations into the WR Act. These exclusions are:

- The exclusion for employees engaged under a contract of employment for a specified period, or for a specified task.

- The exclusion for 'daily hire employees'.

- The exclusion for 'non-award employees'.

- The exclusion for employees on the basis of excessive rates of remuneration. The calculation of the excessive rates of remuneration is provided for in the WR Regulations, as before.

- The exclusion for certain categories of employees from the operation of sections 170CL (Employer to notify Centrelink of termination of employment) and 170CM (Employer to provide notice of termination of employment), and from Subdivision D (Applications for severance allowance) and Subdivision E (Employer failure to consult with trade unions about terminations).

Another change proposed by the WRA (FT) Bill 2002 is consequential to the relocation of exclusion provisions in the WR Regulations into section 170CBA of the WR Act.

- Section 170CC will be amended to provide only for the exclusion of additional categories of employees by regulation at a later time.