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Employers First™
COMPLETE EMPLOYER PROTECTION

INQUIRY INTO SMALL BUSINESS EMPLOYMENT

SUBMISSION

TO THE

SENATE EMPLOYMENT WORKPLACE RELATIONS AND EDUCATION REFERENCES COMMITTEE

MAY 2002

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SUBMISSION TO SENATE INQUIRY

A. Why small business does not employ: the employee risk factor

Introduction

Employers First™ is one of the oldest and largest employer organisations in Australia. Formed in 1903, we are a registered industrial organisation representing the interests of over 4,000 employers and over 70 affiliated industry organisations. Our membership extends across a broad range of industries, providing representation, information and advice to employers of all sizes. Over 70% of our members employ 20 employees or less.

Employers First™ is uniquely placed to comment on the reasons why small business is not maintaining its share of the labour market, and why the pace of job creation in this sector has slowed. Our entire focus is on the workplace and the issues and concerns of employers. Each year we take over 70,000 calls from members on our employer hotline, in addition to our workplace consulting, training, legal services, representation on a daily basis in industrial tribunals and lobbying on behalf of employers.

With a century of involvement in employment and workplace relations, our experience is undeniably significant. Through our daily work, we see the pressures and problems which confront small employers, and their responses to attempting to stay on top of these demands. The examples used in this submission are typical of the situations they face, and illustrate the ever widening gap between the commercial realities of staying in business and the demands of social reformers and regulators.

A.1 Risks and costs for small business: employees are their largest risk factor.

Employers now have to comply with more legislation and regulation than any other group in society. In NSW alone, over 48 different Acts of Parliament (in addition to the Common Law) apply to the workplace with heavy penalties attached. The net result of this layering of legislation is that a small employer attempting today to manage their business and their employment obligations faces an impossibly time consuming, costly and high risk activity.

In addition to the fines and penalties payable for non-compliance, statutory and non-productive on costs now average 36%[1] of total labour costs, and in some industries (such as construction), are as high as 95%. It is hardly surprising that the construction industry, whilst having the largest number of small businesses, has more non-employing small businesses than any other industry, and its employing businesses are smaller than average.[2] Compliance costs have a disproportionate impact on small business. As a percentage of wages, compliance costs are higher for small business. Mean compliance costs as a percentage of turnover of the smallest category of firms have been calculated at more than six times that of the largest firms and more than twice that of the medium sized firms. [3]

For most small employers, employees are now the highest risk factor in their business. This risk arises from the complex and unmanageable raft of legislative obligations and duties they now owe their employees.

A.2 Small business employment has slowed

Of the 185,000 employing businesses in NSW, 85% employ less than 10 people and over 94% employ less than 20 people. Most of these businesses are independently owned, operated and financed by their owner/managers, adding to their vulnerability. An increasing number of them have elected to keep their businesses small. Over half of small businesses have no employees. Between 1999-2001, the annual average growth rate in the number of non employing businesses was 18%, compared with 3% per annum between 1984 and 1999. Rates of growth for businesses with 1 to 4 employees was 3%, down from the 4.3% recorded in 1984-1999. [4] The Australian Bureau of Statistics notes that The New Tax System may have impacted on the number of small businesses reporting, giving a much larger than usual overall increase in 1999-2001of 11% in the number of small businesses, compared with a decade average of around 3%. This large increase is also contrary to the trend recorded over the three years to 1999,which showed slowed growth both in terms of numbers employed and in numbers of businesses.[5] The ABS data also show that during the most recent period of strongest economic growth (1994 to 1999) employment growth in small business declined from a 15 year average of 3.7% to 1.6%.

The impact of this increase in non-employing small business is clear considering that small employers account for around half of total private sector employment and contribute around one third of non-farm industry gross production.

This is a group which is deserving of regulation that supports their commercial interests, rather than subjecting them to the regulatory imperatives of social policy reform. It is also a group which is in the firing line from unions (small business has low levels of membership and is seen as hard to organise) and others who characterise small business as a source of non-standard, exploitative and precarious employment.

A.3 The increased regulatory burden

Governments, unions and other interest groups have been unrelenting in their pressure forcing employers to take on an ever widening burden of financial and administrative obligations. In the past ten years, employers of all sizes have been compelled to accept financial and social responsibility for superannuation, discrimination and harassment, job protection (unfair dismissal) and redundancy laws, employees' family circumstances and a variety of employment related taxes. Moreover, many employers are obliged by award or agreement to provide a mixed assortment of time off and leave arrangements, for purposes as diverse as stress relief to carers leave. More recently, state governments, responding to their union supporters have extended regulation into new areas which have been variously termed the "psychological contract" and "work-life balance".

The vast majority of small business employers have little understanding of the detail of their legislative obligations until an issue arises in their workplace. Their response is then usually one of incredulity at what is required of them. However, whilst not knowing the detail, they have a very clear perception of the magnitude and consequences of their regulatory burden. It sits like a black cloud over their business activities, and has a clear impact on their employment decisions. They know the penalties for non-compliance have the potential to destroy their businesses. Around half of small businesses have been in operation for less than five years. Only 32% make it past the 10 year mark. Being risk averse and vulnerable, they take the rational commercial decision to minimise their risk of being caught up in litigation and penalties, and minimise employee numbers.

The Committee may wish to take comfort in a variety of surveys which have been interpreted as showing that small business is not deterred from employing because of unfair dismissal legislation, or sees regulation as less of a deterrent than market conditions.[6] In our view, a more accurate appraisal is made by the Small Business Coalition in its recent submission to the Senate Inquiry.[7]

From our daily work with over three thousand small businesses, we know that in reaching the decision to employ, small business operators take into account the total costs and risks of employing an additional person. Whilst one specific piece of regulation (the details of which they are uncertain) may not of itself act as a deterrent, the overall impact of an ever-widening burden of financial and administrative obligations has raised the bar on the point at which they will employ. Clearly, market conditions will always be the prime determinant of employment. However, demand conditions and business income now have to reach a far higher level before the decision to employ is made. It is very clear to us that small employers regard taking on a new employee as a costly and high risk activity, and will avoid doing so until there is no alternative.

This reluctance is reflected in:

- slowed small business employment
- the very long hours worked by owner operators. Despite claims that we have a long hours culture, owner managers are one of the few groups working more than 45 hours per week, and work the longest hours of all occupational groups.[8]
- the trend to fixed term contracts and outsourcing

Some see outsourcing as a competitive response to rapidly changing market needs, efficiency gains and so on. Our view is that the main driving motivation is not a positive, market driven response but a negative, defensive strategy of risk minimisation. Small business reluctance to employ is also a significant factor in our poor performance in getting unemployment below 6% during a period of sustained economic growth where similar or lower growth rates in other economies, notably the United States, managed to reduce unemployment below 3%.

B How small business manages workplace regulatory demands

In our experience, over 90% of small businesses do not comply with employment laws. They simply do not have the time or resources. The volume and complexity is simply too much to manage.

Consequently, being faced with an unfair dismissal claim, WorkCover inspection, underpayment claim or request for family friendly/ work-life balance arrangements etc, their typical response is to deal with the problem in the most cost effective manner and to avoid its recurrence by minimising their exposure; ie have as few employees as possible.

Through lack of time, resources and given escalating business pressures, most of these businesses have never been able to cope with the employment regulatory rules, which are generally completely alien concepts to the training, experience and practical skills of small business owner managers.

This is especially problematic when acts, regulations, codes of practice and "guidance material" are written in such deliberately wide terms as to increase dramatically the uncertainty of their scope and potential for business to be unwittingly trapped. The outcome is worse still when courts and tribunals interpret these instruments in such a way that rational management becomes impossible.

The remedy is not a matter of government providing small business with more, or better information. Business is inundated with compliance "assistance" from government. For example, the NSW government's Good Family Friendly Ideas for Small Business is 60 pages long; its WorkCover Guide to Consultation 70 pages and the Queensland government's draft Code of Practice on Bullying runs to 80 pages. Such myriad publications, whilst now produced in glossy plain English, continue to reflect a public sector mentality, drafted by legislators and interpreted by public servants used to the resources and procedures of large government bureaucracies. Governments of all persuasions continually peddle messages about the benefits of their workplace legislation for productive, healthy, best practice business. In short, "*we're from the government, we're the experts and we're here to help you run your business*."

The inescapable fact is that most employment legislation is based on a philosophy entirely alien to the real world of small business.

Some examples are:

- the notion that procedural fairness may be afforded an employee but not the employer
- that they may be compelled to continue in litigation simply to compensate or worse reinstate an employee who has been fairly dismissed
- that they are liable for the actions of employees who are acting contrary to their instructions
- that indirect discrimination and reasonable accommodation may require them to completely reorganise their work hours and methods
- that they must have complete foreseeability for OHS hazards and risk, including psychological injury.

None of these are deliverable in the real world of small business if the business is to survive. In many cases, not surviving means surrendering the family home to the creditors and going back to 'scratch' with nothing. Examples of these, and other instances of the impact of regulation and legal reasoning on small business will be returned to below.

Small business does not need to be better educated in how government thinks and operates, particularly in its use of the workplace as an instrument of social policy reform. What is needed is a complete reorientation of legislation, away from our current focus on adopting European Union directives and extending mandatory workplace standards to a new view of workplace governance which encourages businesses to function fairly and efficiently in a global, knowledge driven economy. Rather than continuing with regulatory intervention to promote "best practice"(for example, the use of deregulation of working hours to satisfy other policies such as family friendly, work life balance or to maintain "fairness" at work) the objective should be create a climate of greater legal certainty, less opportunity for litigation, and lower non wage labour costs. Legislation which is not framed on the assumption that employers will routinely abuse or mistreat employees would be a good starting point.

C Why the legislative framework surrounding employment should be re-oriented

The Legislative response to the "work is harmful" lobby

Over the past decade, there has emerged a popular and widely held view of the labour market as having changed dramatically from secure, fair and lifetime employment for all, (usually with one employer), to endemic job insecurity, multiple jobs, tenuous employment relationships and an increased willingness on the part of employers to mistreat their employees. Legislative changes are said to have benefited the employer at the expense of the employee. Popular perceptions of the emergence of an insecure, overworked and exploited workforce are perpetuated in marketing strategies by organisations as diverse as the Sydney Morning Herald in its My Career section,[9] TMP Worldwide[10] or bodies such as the ACTU, its research ally ACIIRRT[11] and various advisers to occupational health and safety authorities.[12] Their message is that the workplace has been deregulated, that the labour market has been stripped of its external, protective regulation, and the capacity of the state to play a role in the formulation of community standards and pursue social and ethical ends through workplace regulation and intervention is now severely limited.[13]

Despite this rhetoric, a raft of wide ranging employment legislation has been implemented, largely adopted from the European Union, and framed to protect employee rights and impose ever widening obligations on employers. As a consequence, in the largest employing state alone, NSW, employers now face over 48 separate pieces of legislation covering their employees. This could hardly be described as deregulation.

How has this situation arisen when we have heard so much about regulatory reform in industrial relations and employment law, that is intended to remove obstacles to employment and improved labour productivity?

Certainly the Federal government busied itself, as far as it could, given an unhelpful Senate, with the Workplace Relations Act, encouraging moves away from centrally determined, across the board wages and conditions. Some change has been achieved, not so much because of changes to the legislative framework, though this helped, but largely because of economic and social pressures toward greater flexibility and variability and an emphasis on individual, rather than collective needs. Meanwhile, state governments have been busy undoing much of what could have been achieved in the industrial relations area, and extending regulation into new areas. This has been the case particularly with occupational health and safety and anti-discrimination legislation, which have been drafted to maximise their coverage. Lawyers and the judiciary have responded with enthusiasm. The resulting increase in regulatory and common law litigation in all areas of work has acted as a counter-balance to any deregulation in wages and conditions determination.

Consequently, regulatory intervention and litigation in the employment relationship did not diminish over the past decade, but increased dramatically. Small employers have felt the impact of this. Regulation is no longer confined to determining wages and conditions (where the involvement of an industrial tribunal, the award system and preservation of minimum conditions remained sacrosanct) but now extends to every aspect of the employment relationship.

C.2 The Employment Deregulation Myth

The following provides some indication of the extent of small employer exposure, quite apart from traditional pay and employment conditions obligations:

C.2.1 Risk assessment OHS legislation

OHS has always been subject to regulation, and rightly so. But the nature of this regulation has changed fundamentally. Most states have now introduced what is called the risk assessment philosophy, which requires considerable resources and expertise to be workable. Legislation has been drafted to require perfection in the workplace. Small and medium businesses face a real struggle to comply with this regime. Employers now have to foresee, eliminate and control **every** single hazard and risk which may occur at their workplace. (In NSW this includes psychological risk, and the instances of claims for mental injury have climbed from 2% in 1992 to over 17% in 1999-2000).

State WorkCover authorities have long known that, despite all their apparent expertise, they are incapable of drafting prescriptive regulations that can deliver the perfect OHS environment at work. Rather than shoulder the obvious liability and risk, they have embraced the notion that all they need do is prescribe the perfect outcome and impose upon every individual employer the obligation for delivering it. In other words, impose upon hundreds of thousands of small businesses, with virtually no resources, the obligation to both prescribe and implement and perpetually, minutely, expertly oversee every single aspect of their own perfect occupational health and safety system, the like of which these same authorities recognise they are incapable of delivering themselves. And to confirm their incapability and unpreparedness to do the job, at the same time WorkCover jurisdictions have withdrawn from advising these businesses on the specific things they should do to conform. Why? Because perfection is beyond them too and any accident and injury will demonstrate a breach of the obligation to have a perfect workplace.

Any avenue of defence has been deliberately blocked by the drafters of the legislation in NSW WorkCover. The NSW Occupational Health and Safety Regulation 2001 even says that compliance with the Regulation is no defence to a prosecution but failure to comply can be used as evidence against the employer in a prosecution. [14] NSW employers paid over $3.3 million in fines in 1997-98 and over $5.4 million in 2000/01.

With fines of up to $825,000, health and safety breaches can be fatal for employers as well as employees. In addition to heavy corporate fines, directors and managers are deemed guilty when a corporation is found guilty of an offence against the Act and can be personally fined up to $55,000 and face the prospect of 2 years imprisonment. The deeming provisions are a device which would be unacceptable anywhere else in society, reversing the onus of proof and negating the presumption of innocence.

In terms of ever widening regulation, employers now face the possibility of being charged with what is termed "corporate killing", or "industrial manslaughter". Unions are pushing for this in NSW and a Bill is before the Victorian Parliament. Whilst this latter Bill is apparently doomed for the present to a hostile upper house, it is only a matter of time before this new avenue of litigation against employers re-emerges.

C.2.2 Workers Compensation

Employers face an insurance system over which they have virtually no control, commandeered by WorkCover and, whilst now requiring insurers to consult with the employer before deciding if a claim is to be accepted or not, showing little evidence of this outcome to date.

Employers are vulnerable to spurious, indeed fraudulent, workers compensation claims in the face of courts that evince a determination to find for the claimant despite evidence that contradicts the claims of incapacity. The expansion by the common law courts of employers' duty of care to the point where it equates to "strict liability" (despite muted judicial denials that are contradicted by the factual circumstances) has made negligence actions virtually indefensible.

Workers Compensation Case 1
An employee who had been warned about poor work performance by a new manager with whom he did not get on had his claim for nervous anxiety, allegedly bought about by work pressure, accepted by the insurer with no employer consultation or involvement as to the facts of the case. The company had to devote considerable time and effort in convincing the insurer to reinvestigate the claim, with the result that the insurer agreed that it would accept liability for the costs and would not affect the company's premium levels. However, legislation requires the claim to remain on record.

Workers Compensation Case 2
An employee was asked to complete her usual task of mail sorting and filing and complained that this should not be part of her job. She shortly after took leave for neck and shoulder pain, which according to her medical certificate was caused by her work duties. Alternative duties were arranged as part of her return to work program. However the employee then developed wrist and subsequently leg pain, and was unable to perform these, or any other new duties agreed on as part of her rehabilitation program. This pattern of time off, assessment for rehabilitation and suitable duties, brief return to work followed by another absence continued for 18 months before the insurer declined the claim.

Workers Compensation Case 3
An employee of a cleaning services company who had just returned to work on rehabilitation following a workers compensation claim for back pain was dismissed for breaching company security procedures by rummaging through a client's rubbish skip. This followed an earlier incident in which the employee had stolen a mobile phone from a client, had been charged by police and placed on a good behaviour bond, but not dismissed. The employee claimed that the termination was unfair because he had been on workers compensation. He lodged an unfair dismissal application and a complaint with WorkCover. The WorkCover investigation involved the company in a complete assessment of the its safety practices, procedures, records and payments to the employee - with no fault being found. The employee's unfair dismissal claim has now proceeded to arbitration for the second time, following his refusal to conciliate and failure to appear at the initial arbitration hearing. This litigation has now continued for over a year, at significant cost and time loss to the employer.

Workers Compensation Case 4
An employee of a small plumbing company claimed to have injured his back whilst leaning over a scaffold using an angle grinder. An injury management provider put in place a rehabilitation program. The employee's doctor's response to the list of suitable duties including clerical work, was that there was nothing on the list his patient could do, and that he (the doctor) would decide when the employee could return to work and what were suitable duties. After negotiation between the doctor and the injury management provider, the employee returned to work but then developed an anxiety disorder, which, according to a letter from his doctor to the insurer, resulted from the "stress" of believing he was not being paid correctly, and his changed duties. The insurer did not accept the stress claim, and the employee is now alleging that he has been harassed at work. He has not yet returned to normal duties, and the employer now faces the cost and effort of dealing with the harassment claim.

C.2.3 Discrimination & Harassment

All employers are subject to detailed scrutiny by the five federal anti-discrimination laws as well as state legislation in their management of hiring, firing, promotion, work organisation and allocation and most other aspects of the employment relationship. Anything from the wording of forms to the nature of supervision and actions of other employees may be potential grounds of liability.

In terms of just one ground of discrimination, the Anti-Discrimination Board of NSW (ADB) has estimated that the average cost of a sexual harassment complaint was a minimum of $36,000 excluding compensation and time spent attending proceedings. It estimates that 1 in 5 employees alleges to have been harassed. The Human Rights and Equal Opportunity Commission (HREOC) has found that more than 135 hours per claim of an employer's internal management time was needed in attending to a sexual harassment complaint.

Employer obligations under these laws are in potential conflict with unfair dismissal laws. If a firm fires an offending employee because they have harassed or discriminated against a fellow employee or customer, an unfair dismissal claim is likely to result and watertight procedural evidence is essential to successfully defend this claim.

The claims outcomes reported by HREOC and the ADB annual reports show the extent of claims involving employers in considerable time and expense, which are not proceeded with, or are dismissed by the tribunal. Of the 1,277 formal complaints made to the ADB in 2000-2001, 937 (73%) concerned employment. Over half were dropped or declined (567), less than 180 proceeded to formal hearing. Most are settled before conciliation or after conciliation, reflecting (as with unfair dismissal claims) an expedient "pay and get rid of it" approach by employers —regardless of the merits of the case.

An additional 1,263 complaints were made to HREOC. Again, over 60% were dropped or declined, and 35% were conciliated. As an indication of employer time and effort expended, over one third of claims take more than nine months to resolve. Less than a quarter are resolved in under 3 months.

Discrimination Case 1:
Claimant did a day's trial work with an optometrist and claimed he was offered the position but the offer was withdrawn when the employee disclosed he was suffering from Hepatitis C. The employer settled the case after conciliation for $13,500—for a one day work trial.

Discrimination Case 2:
A manager identified a foreseeable occupational health and safety risk in the ongoing conflict and confrontation between two employees, one of whom suffered from diagnosed ischaemic heart disease. When the employer asked the other employee to transfer to another location nearby, this employee claimed that she was being discriminated against on grounds of her thyroid-induced aggressive disorder. Being a small workplace, there were limited possibilities for transfer, suitable duties and reasonable accommodation for either employee. Given the situation's potentially serious health consequences, urgent action was needed and the employer requested the employee move to the new location. The employee has now claimed constructive dismissal as well as discrimination on the grounds of her disability.

Discrimination Case 3
An employee of a small community college employing two permanent part time clerical employees claimed she had been forced to resign because of her carer's responsibilities and that she had been treated less favourably because she had a relative with a disability. The employee had been given 19 weeks paid and unpaid leave before resigning when her request for a further six months leave was refused. In this case the employer was found not to have discriminated. However, it is illustrative of the time and effort expended by employers in having to defend their reasonable actions in litigation, plus the operational difficulties of keeping the employee's position open whilst a carer's responsibilities are being met.

C.2.4 "Family-friendly" workplaces

"Family friendly" issues are the latest avenue of discrimination risk for employers: failure to provide part time work, time off, shared jobs, on-site nursing facilities, or the failure to have a "supportive work culture." All have the potential to land an employer in trouble.

Family responsibility discrimination based on the "reasonable accommodation/unreasonable hardship" principles common to disability discrimination legislation is a relatively new area of regulation with potential to exceed the bounds of unfair dismissal law in its scope for uncertainty, perversity and unmanageability.

Conflict with other legislation is inevitable. There have already been a number of cases where the employer has changed a pregnant employee's tasks for occupational health and safety reasons, and been successfully challenged under anti-discrimination legislation. The employer is expected to perfectly foresee potential safety risks and hazards, with complete responsibility for the outcome of these, but the choice remains with the pregnant employee as to her capability.

Suitable duties case example A pregnant garage attendant was moved from laneway petrol service to other duties by the garage proprietor who believed she was subject to additional OHS risk because of her pregnancy. The employee successfully sued the employer for discrimination.

Conflict with the efficient management of the business is also inevitable. Employers have to organise the job and the workplace to suit what the employee, and the courts, consider reasonable, not what the employer thinks will work for the business.

Family Friendly Case 1
Following changes to her childcare arrangements, an employee did not want to remain at work after 5.00 pm (an agreed condition of her employment) and successfully claimed that her employer's demands were unreasonable. In an extraordinary decision indicating the court's belief that it had special knowledge of how best to run the business, the court could find "no good reason" as to why the employee should work back, simply because it suited the employer to have her do so.

Family Friendly Case 2
An employee returning to work in a small medical centre did not want to return to her previous full time position, and insisted that a job share, part-time position be created to accommodate her family needs. The employer refused on the grounds of cost and running the business efficiently. The court found that whilst this may have suited the employer's needs, it disadvantaged the employee and the employer had to provide part time employment.

C.2.5 Unfair Dismissal

Over 80,000 employers have faced unfair dismissal claims; I in 7 NSW employers since 1991. These are not good odds for small employers, with the cost potentially representing a significant threat to their viability — up to 6 months of an employee's salary, possible reinstatement plus all the lost time to the business.

The history since the early 1990's of unfair dismissal laws and decisions graphically illustrates that there is scarcely any situation where a termination will stick without a laborious and almost perfect procedural fairness process — but where the process itself is usually impossibly long and complicated.

Unfair Dismissal Case 1
A small electronics manufacturing business with 8 employees closing after 38 years in operation, its activities pared down to importing and distribution. The employer reached this decision following unfair dismissal litigation, having sacked an employee for poor performance and aggression. Whilst the matter is still before the court, the employer has been subjected to intimidation and harassment from the employee and his union representative. He has decided that the cost and effort involved in defending his position is unwarranted. Eight jobs will disappear with this company closure.

Unfair Dismissal Case 2
A roof cladding business is shutting down after 15 years in operation following two ex-employees claiming unfair dismissal. The two employees were sacked following a lengthy period of poor performance, lying, not complying with reasonable instructions and harassment.

In both these cases, the employees were dismissed without receiving a final written warning, although numerous oral and first written warnings had been given. The employers held the view that the damage the employees were causing the business outweighed the procedural fairness obligations they faced. As a consequence, both employers may be found wanting by the tribunals and compelled to compensate the employees for their job loss. The current mandatory prescriptions for procedural fairness may well be appropriate for a large government bureaucracy. Presumably, this is the context from which they have been derived by their parliamentary legal drafters but in the context of a small business, they are frequently just unworkable.

Unfair Contract Case
A financial controller had been employed for 8 months on a salary of $70,000 per annum. Her contract was terminated after she allowed debts to blow out to $1.5 million, and failed to remit tax to the ATO, incurring a fine of $50,000. She was awarded three months salary in compensation for unfair termination of her contract. In addition, the result for the company was litigation over 2 years, over $100,000 in legal costs, and the closure of its Australian operations. Six other employees lost their jobs, with their work now undertaken in the US and the UK.

Small employers have to tread a very fine balancing act between the requirements of various pieces of legislation, the threat of an unfair dismissal claim and the needs of their business.

In a legislative framework which provides no disincentive against claims with no merit and real incentives to continue until applicants' legal expenses and compensation are paid, small business remains vulnerable to unfair dismissal claims.

Unmeritorious Claims Case
A small cleaning contracting firm, employing five people including its two owner operators, has been involved in litigation concerning an unfair dismissal application from July 2001 to March 2002. The ex-employee, a cleaner, was dismissed for misconduct after having gained unauthorised access to a client's premises after hours. This was a major security breach in the company's view.

This view was upheld by the Industrial Commissioner who expressed the opinion that the matter should not have proceeded to arbitration and that the defendant's counsel had an unusual perspective on the function of conciliation.

The duration of this case, and legal costs to the employer, well illustrate how unfair dismissal legislation has facilitated applicants' advocates extending cases regardless of merit.

C.2.6 Bullying and Workplace Violence

Employers are now required to have in place policies, guidelines, checklists, consultative procedures and fully trained staff to manage workplace bullying and violence. This may be anything from a customer demanding faster service or just complaining (even over the phone) to armed hold up and murder. Small business employers readily understand the concept of physical violence and assault. What will present more of a challenge is that the concept of workplace bullying, as viewed by WorkCover and other authorities, is not just about recklessness, aggressive or violent physical acts or verbal abuse.

Some states in Australia have statutory definitions of bullying in place. But in NSW the term is used to include violence (chargeable with assault under criminal law) through to setting unrealistic work targets, undervaluing people at work or ignoring employees or their point of view (according to the NSW Department of Industrial Relations).

Managers and supervisors are presented as the main perpetrators of bullying. The Queensland Government Guide, for example describes "covert" bullying as sabotaging an employee's work by withholding information, hiding documents or equipment so they can't complete tasks and not providing appropriate resources or training. The Victorian WorkCover Authority's Issues Paper links workplace violence or bullying with management style and supervision, job design, consultation processes, performance expectations, and workplace layout, amongst other factors.

This "guidance" from government is so far removed from a small business perception of why they are in business and why they employ staff as to be incomprehensible. For example the notion that work be hidden to prevent an employee getting on with the job is inconceivable in a small business.

C.3 Excessive Workplace Intervention and Inadequate Job Supply

The disparity between fact and fiction in the labour market raises serious questions about the efficacy of such a heavy handed legislative response, particularly in terms of its impact on small business employment. The job insecurity lobby continually promotes job security in terms of a specific job, and does nothing for actual employability. An individual's real employment security lies in having the right skills and attitude, not rights attached to a particular job by law.

None the less, small employers, along with employers generally, continually face a barrage of commentary alleging the enormous adverse impact of deregulation and uncontrolled market forces in the labour market.

What is interesting about such criticism is that analysis of what is actually going on in the workforce does not match up with the allegations, and the real problem is persistent unemployment.

Despite all the hype, we do not have a decline in skills and quality of jobs, we are not all (or even most) of us working longer, and most of those in part time work are there because they want to be there. The claims of so called growth in casual precarious work and increased job insecurity over the past two decades are of the same mythical proportions as deregulation of the workforce.

To summarise from some extensive research into these issues [15]

- Despite the spread of enterprise and individual agreements, the period since 1995 has seen a decrease in the proportion of people working very long hours, following a jump in hours under the highly centralised Accord in the 1980's

- The majority of those working long hours want to work those hours. Time series evidence shows there has not been a growth in the divergence between preferred and actual working hours. Just 8.3% of full time employees report that they would prefer to work less hours and receive less pay. This is almost identical to levels reported in 1982 and 1986.[16]

- Those who work 40 hours or more are not spread across the workforce. Longer hours are much more common among employers and the self-employed than among employees. In the main they are worked by owners, managers, the professional groups and some trades.

- There is still a clear preference amongst those working part time not to work full time

- Compared with 1975, the average worker today has been in their current job slightly longer, the proportion in short term jobs has fallen and the incidence of job changing has declined. Similarly, in 12 out of 16 OECD countries surveyed by the ILO, job tenure had either remained unchanged during the 1990's, or had in fact increased.[17]

- Deskilling and decline in quality of jobs has not accelerated. When similar points in the business cycle are compared, job growth has been concentrated in the skilled occupations. [18] These have had growth rates above 25%, compared with 17.8% for unskilled jobs.

  When total labour demand is measured, using hours worked, the demand for high skill jobs compared with low skill is even more marked. Seventy per cent of the total growth in hours worked in the period 1989 to 2000 was in the professional and associate professional occupations. While the **number** of low skill jobs continued to rise, their growth in aggregate hours worked barely changed (1.1%). There was virtually no growth in the total volume of low skilled work.

The Productivity Commission has also clearly demonstrated what it terms the "skill biased technical change" effect on jobs across the majority of Australian industries.[19]

- The level of casual employment is not vastly different from 1972. Also, given the increased level of employer regulation, a casual position today is far less precarious than in the 1970's. Casuals have evolved into many varieties, including "permanent" casuals who are entitled to maternity leave, unfair dismissal protection and so on.

Much has been made of ABS data showing a 10 percentage point increase in casuals from 1984 to 1999 (from 16% to 26% of all employees — almost half the growth in employment.) Many saw this as evidence that employers, particularly small employers, were generating undesirable, precarious jobs which should be curtailed.

However the Productivity Commission has estimated that less than half the people classified by the ABS as such were in fact casuals. [20] In a subsequent redesigned survey with a revised definition of casual, the ABS reports that[21]:

- the level of casual employment(self identified) to be 18%
- this group is characterised by younger employees (just over 40% aged between 15 and 24 years)
- 77% of 15 to 19 year old casuals, and 35% aged 19 to 24, were in full time study.
- 75% expect to be with the same employer in 12 months
- 14% had worked for the same employer for at least 5 years

Despite this less than drastic labour market situation, casual employment is to be further restricted. Already there are moves at state level to adopt yet another European Union initiative, the restriction of part time and casual employment. In addition there is state government intervention in three states, with a Bill soon to be introduced in NSW, to ensure that contractors are deemed employees for the purposes of all industrial legislation, as they are under all occupational health and safety legislation.

All employers are now facing a political and public relations exercise about control in the workplace. The discussion mirrors wider community debate about globalisation, quality of family life, personal growth and development and so on. All these are, in the view of regulators and the unions, employer responsibilities. Employers are being coerced into accepting responsibility for society's perceived ills as well as every aspect of their employees' mental, emotional and physical health. However, business, especially small business is simply not in a position to accept this responsibility, and is showing its unwillingness to do so in its reduced employment numbers.

C.4 A new approach to regulation and labour market protection is needed

The more job protection and similar legislation is introduced, fewer jobs will be created. There is evidence that stringent employment protection reduces participation rates and makes access to the labour market difficult for certain groups, such as the long term unemployed and youth. It also influences the types of employment contract offered, eg the increased number of temporary and fixed term contracts.[22] Strict employment protection legislation and regulated labour markets appear to have little or no effect on overall unemployment and produce a variety of altered labour market employment outcomes. [23]

As numerous Australian interest groups and politicians are enthusiastic supporters of European Union style social policy legislation, close attention should be paid to the actual outcome of the EU's social activism and in particular, its creative use of health and safety criteria on employment.

Empirical studies show that the net effect of employment protection and similar regulation is lower employment, greater and longer unemployment for some and, indirectly, a fall in the speed with which labour relocates from declining to growing sectors of the economy. [24]

Apart from economic and statistical evidence about the effects of over regulation, we know first hand from our small business members that compliance risks, on-costs and the extra administrative burdens are a major disincentive to employing. As heavier capitalisation is not always an option, small business strategy overall has been to not expand the business, rather than be exposed to greater risk. The owner/manager simply does more of the hands-on work.

Our labour market has not been deregulated and will perform even less well in the future unless both federal and state governments become less driven by alleged "fairness at work" and workplace "social equity" issues and more concerned with creating a work environment in which employers are not afraid to hire. Unless small employers perceive that they too will be accorded fairness in the litigious minefield of employment legislation, they will avoid hiring.

This is not to say that employment should not be regulated or that there are no employers who commit breaches of what ought to be regarded as acceptable standards in all these areas of regulation. Our problem is with the particularity of the law, with its real underlying objectives, with the social agendas that dictate the content of the legislation, the nature of enforcement and the predilections of the judiciary.

Finally, if the Senate wants to see more jobs in small business, it has to remember the simple fact that business creates jobs to make money, not for a better "work life" balance or to facilitate social change and new ways of working. If making money is made too difficult or too risky, jobs will not be created.

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[1] Australian Chamber Commerce Industry 1997 On Costs The Small Business Sector

[2] ABS Small Business 1321 1999, ABS Australian Social Trends 1997 Work-Paid Work:: Small Business [AusStats]

[3] Cabalu, Doss and Dawkins 1996, 'Employers' Compliance Costs', Discussion Paper, The Centre for Labour Market Research.

[4] ABS Characteristics of Small Business 8127 2001, Small Business in Australia 1321 1998

[5] ABS Small Business 1321 1999

[6] See for example a union description of two such surveys at ALIA's inCite magazine - January-February 2002.htm:

"*In November 2001, the Yellow Pages Small Business Index asked employers to identify barriers stopping them taking on more staff. Forty-two per cent said 'lack of available work'. Six per cent said 'don't need more staff'. A further fourteen per cent cited 'profitability and cash flow'. In other words, almost two thirds had no capacity to increase their workforce. Of the remainder, small proportions mentioned skill shortages, superannuation and employment costs. None -- not one -- mentioned unfair dismissal laws.*

Even when small business is invited to comment specifically on unfair dismissal laws as a problem (a case of leading the witness if ever there was one), they are placed well below other issues. The Australian Chamber of Commerce and Industry's 2001 Survey of Small Business Problems placed the topic fifth in a list of ten. Dismissal laws were rated well behind constant taxation changes, tax levels, telecommunications charges and government regulation as prime irritants for small business. So it seems that, while political columnists and opportunistic politicians see this as issue number one, those most involved have a far less strident view."

[7] Small Business Coalition Submission to the Senate Employment, Workplace Relations and Education Committee Senate Inquiry in relation to the Workplace Relations Amendment (Fair Dismissals) and (Fair Termination) Bills 2002 pp 18-21

[8] Around 36% of owner managers work over 50 hours per week, compared to 11% of employees, and 3% of employees work more than 60 hours, compared to 17% of owner managers. ABS Employment Arrangements and Superannuation 6361 0 April-June 2000

[9] For example feature articles in the My Careers section of the Saturday edition such as Cost of an Arm and a Leg SMH 11-12 May 2002, Bully for You 18-19 May 2002, could hardly be described as encouraging for anyone advertising a job, with articles portraying huge levels of work stress, long hours, insecure jobs and difficult bosses

[10] Recruiting firm TMP Worldwide regularly releases surveys reporting Australian workplaces as being poorly managed hotbeds of conflict, feuds, bullying, stress and insecurity. Of its 22 surveys conducted during March- April 2002, 15 presented a negative aspect of work or workplace problem for employees. http://au.tmp.com/press/

[11] The ACTU Hours campaign, including B Pocock's "Fifty Families: What unreasonable hours are doing to Australians, their families and their communities", submitted as evidence in the ACTU reasonable hours claim in the AIRC http://www.actu.asn.au/vunions/actu/campaigns.cfm , ACTU Stress at Work campaign, http://www.cpsu.org/stress/ ACIIRT 1999 Australia at Work, just managing Prentice Hall; all which describe work as a negative and damaging experience, harmful to health

[12] For example, M Quinlan appointed by WorkCover NSW to research OHS implications of precarious employment as a precusor to additional regulation, including restrictions on the use of contractors and casuals, http://www.irob.unsw.edu.au/html/WP138.pdf

[13] The political expression underlying such views is characterised by, for example, B Howe Economic Growth and the Ethical State in J Niewenhyusen et al, Reshaping Australia's Economy CEDA 2001

[14] NSW Occupation Health and Safety Regulation 2001 Section 4

[15] M Wooden 2000 The Transformation of Australian Industrial Relations Federation Press Chapter 9, 2001 Working Time Patterns in Australia and the Growth in 'Unpaid' Overtime: A Review of the Evidence Melbourne Institute of Applied Economic and Social Research, University of Melbourne Report commissioned by The Australian Chamber of Commerce and Industry
J Borland Job Stability and Job Security in Borland et al 2001 Work Rich Work Poor Centre for Strategic Economic Studies

[16] ABS 2000 survey of Employment Arrangements And Superannuation Australia 6361.0 2001 showed almost two thirds (65%) of employees were satisfied with their current hours. About 22% said they would prefer to work more hours (for more pay) while 13% said they would prefer to work fewer hours (7% would accept less pay while 6% felt they should receive the same pay).

[17] ILO Work Employment Report 2001 Life At Work In The Information Economy

[18] M Wooden 2000 The Changing Skill Composition Of Labour Demand Australian Bulletin of Labour September

[19] Productivity Commission 2000 The Increasing Demand For Skilled Workers In Australia: The Role of Technical Change

[20] Productivity Commission 2000 The Growth of Non Traditional Employment: Are Jobs Becoming More Precarious?

[21] ABS 2000 survey of Employment Arrangements And Superannuation Australia 6361.0 2001

[22] J Addison & S Siebert 1999 Regulating European Labour Markets: More Costs than Benefits? Hobart Paper no. 138

[23] OECD Economic Outlook June 1999

[24] Addison and Siebert op cit, D Card and R Freeman 2002 What have two decades of British Economic Reform delivered? National Bureau of Economic Research Working Paper 8801