# Labor Senators' Report

Labor senators on the committee oppose this legislation on three grounds. First, its provisions tip the balance in unfair dismissal claims in a way which undermines employee safeguards., because the use of the corporations power as a constitutional basis for the legislation will lead to legal uncertainties, and because the use of such power cannot, by itself, be regarded as anything more than a temporary expediency to secure limited and short-sighted legislative ends.

It should be noted that the bill will not achieve the government's stated aims. There will be no increase in jobs, the bill will actually increase the industrial relations costs borne by business because many who choose to use the state system will now be forced to operate in two systems, a unitary system will not result, and workers will be discouraged from working for small businesses because it offers them less security and fewer rights.

Minority reports of this committee (being those of Labor senators) have on three previous occasions dealt with issues centering on unfair dismissals, and the merits of making special concessions to the small business sector in regard to reducing to rights of employees. This report will deal only with new aspects of this issue which arise in this bill.

## Unfair dismissal revisited

This committee has been dealing intermittently with unfair dismissal for years. As one submission stated:

> The Federal Government has failed to justify there is any problems with the operation or application of the current state unfair dismissal systems.[1]

Another constant theme in Government policy has been to place small business proprietors in a privileged position in regard to determining conditions of the employment they offer. While Labor senators acknowledge that small business has particular characteristics which affect employment practice, there has never been a strong case made for the proposition that employees in the small business sector should possess fewer rights and legal safeguards than people who work in other employment sectors. The inquiry by the references committee into small business employment, tabled in February 2003, found that the preoccupations of small business differed very little from those of large and medium business, having to do with business cycles, taxation, regulations and general economic conditions. Small business employs to the extent that business levels and business growth strategies determine. For reason that will be dealt with later, any connection between the fear of unfair dismissal claims and the rate of overall small business employment is extremely tenuous.

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1 Submission No. 11, NSW Government, p. 3

## Small business employment concessions

The committee received much evidence on the privileged treatment of small business that is proposed in this bill. The Government appears to believe that small businesses are especially sensitive to the 'burdens' imposed by this the Workplace Relations Act. Implicit in the Government's position is a presumption that small business proprietors may also be more prone to act in ways that provoke claims of unfair dismissal. This has never been conceded, although it is generally acknowledged that small businesses are usually without corporate management support. Labor senators believe that for an employee who is dismissed, the size of the business should not be the determinative factor. To argue otherwise is to argue for an inequality of rights. The Government claims that it seeks more 'balance' in the legislation than currently exists, but in arguing for differential legal rights for employees it will achieve the opposite outcome.

In opposing the concept of differential rights, Labor senators note the strong argument that small business may have compensating advantages that undermine any argument for concessional treatment in regard to employment laws. As one submission stated:

> There is a wide variety of forces at work that determine the 'make-up' of the economy between small and large business. Some of these favour large businesses and others small businesses. The oft-cited importance of small business in the overall economy is of itself evidence that by no means all advantages lie with bigness. If the unfair dismissal law is relatively disadvantageous to small business, this is but one of a myriad of factors operating on both sides. It is an aspect of the economic environment with which all businesses have to come to terms. There is no suggestion that large businesses should be compensated to offset advantages of small business, such as the close contact with customers that is possible for (say) small retailers and local plumbers.[2]

Labor senators consider this to be a 'balanced' description of the circumstances of small business in the context of the wider economy, and they commend this comment to the Government. They will continue to oppose this legislation for the reason that it is a response to false perceptions about the extent of the problem confronted by employers.

## The Harding report

Critics of previous bills dealing with unfair dismissals have regarded survey results produced or commissioned by employer organisations showing high levels of concern and anxiety amongst small business proprietors to be highly questionable. The efforts that have been made to establish the veracity of such opinion have been listed in an appendix to this report, but can be regarded as having historic interest only.

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2 Submission No. 1, Professor Keith Hancock, p. 3

Labor senators note that the Government, having belatedly acknowledged the need to produce new and irrefutable evidence of the connection between employer fears of current unfair dismissal laws and their readiness to employ, has commissioned research intended to put the matter beyond doubt. The Government claims that the Melbourne Institute Report, the work of Don Harding, is final and authoritative evidence of the need for unfair dismissal legislation changes.

The methodology underpinning the Melbourne Institute report was several times described and defended by witnesses at the committee's Melbourne hearing. Questions put to employers asked what influence unfair dismissal had on their processes and practices in such a way as to suggest answer affirming some degree of influence. This approach was favoured because employers might otherwise overlook the issue. A number of submissions made scathing comment on the methodology of the Harding survey and, in a variety of ways, described the conclusions as badly flawed. Criticism was directed in particular at conclusions drawn about the effect of current laws on, first, the loss of employment, and second to the related issue of labour costs.

On the issue of employment loss, Labor senators note the evidence provided by the ACTU in identifying the flawed reasoning behind some of the report's conclusions:

> For example, employers with no employees, but who had previously employed staff, were asked if the unfair dismissal laws had played a part in their decision to reduce staff. Even with the leading question, only 11 per cent of employers said that this had been the case, with only 4.6 per cent saying that the laws were a major factor. In an extraordinary feat of reasoning, Harding concludes that the unfair dismissal laws caused the loss of 77,482 jobs.[3]

The ACTU submission then quotes from the report:

> Firms that previously had employees, but currently do not have employees, were asked what was the maximum number of people they had employed. Factoring this up to the population as a whole results in the conclusion that there were 77,482 job losses in which UFD laws played a part. Of these there were 34,812 job losses in which UFD laws played a major role, 17,100 job losses where UFD laws played a moderate role and 25,572 job losses where the laws played a minor role.[4]

Labor senators note the assumption that where a business once employed five people, and now has none, this reduction may be attributed not only to economic or trading circumstances, but to the existence of unfair dismissal laws. The claim that without the unfair dismissal laws there would be 77,000 more people employed in small and medium sized firms must be regarded as absurd. It is, as Professor Andrew Stewart

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

4 ibid.

has remarked in his submission describing this figure as 'an estimate based on a series of estimates' and a 'curious exercise providing a weak foundation' for Government pronouncements on the benefits of the legislation.[5]

It is also noted that the assumption underlying the Harding conclusion in relation to the employment cost of unfair dismissal laws rests on his view that employment levels are determined solely by labour costs. This has not been a view shared by the Australian Industrial Relations Commission. For Harding, as apparently for the Government, the economic rational for changes to unfair dismissal laws is as follows: reduced labour costs lead to higher employment; compliance with unfair dismissal laws represents a cost on labour; therefore, repealing unfair dismissal laws will lead to higher employment.[6] As the ACTU has pointed out, the same could be said about superannuation and occupational health and safety laws.[7]

On the issue of costs, criticism of the Harding methodology was made in the submission for the Government of Western Australia. This commentary sums up the views of Labor members of the committee.

> The main conclusion that unfair dismissal laws impose a cost of $1.3 billion is itself a statement based on what is described as 'opportunity cost'. Employers were asked to compare a situation where there were no unfair dismissal laws and to indicate the degree to which 'unfair dismissal laws increase my business costs'.
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> Harding then took these 'reported costs' and 'factoring them up to the population of small and medium businesses yields an estimated $1329 million …'[8]. There are several defects with this methodology. Firstly, for example, it is not explained in the report what exactly "factoring them up" actually means and medium size businesses are also included in this calculation. Secondly, the figure reached appears to be based on the difference in casual and permanent rates of pay. Thirdly, it may also include the amounts expended by firms surveyed in responding to unfair dismissal claims made against them. However, whether this is the case is not clear from the report.
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> It can therefore be properly concluded that this report announces a figure of $1.3 billion based on the presumption that if employers were not subject to unfair dismissal laws, they would employ all their casual labour force as permanent employees. However, this does not take into account other reasons for employing on a casual basis, such as to allow more flexibility to

5 Submission No. 9, Professor Andrew Stewart, p. 6

6 Submission No. 5, ACTU, p. 15

7 ibid.

8 Harding, D. (2002) *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses, Melbourne Institute of Applied Economic and Social Research, University of Melbourne*, p. 19

> meet business needs and to simplify the administrative requirements in calculating wages and entitlements.[9]

## Small business employment in perspective

While the onus of proof must always remain with those who desire to strip employees of legal rights to fairness, the references committee did conduct an inquiry into small business unemployment in 2002 which provided some insights into the relative importance of the issue to small business. The committee's findings on unfair dismissal were as follows:

> Consistent with survey rankings of small business concerns, unfair dismissal did not arise as a major issue during the inquiry: other issues such as the need for improved business management, problems with recruiting suitable employees, the compliance burden associated with the New Tax System and the total framework of employment obligations were far more prominent. Where unfair dismissal laws were raised as a concern, the main issues were a lack of understanding in how to dismiss staff consistent with the law, the costs and complexity of the current processes for determining claims and the uncertainty of outcomes.[10]

In its small business employment report the committee also pointed out that changes to the processes and requirements for unfair dismissal have made a difference. following the introduction of the *Workplace Relations Act 1996*, unfair dismissal cases in the Commonwealth jurisdiction fell from 14,499 for the twelve months ending 1996 to 8,631 for the twelve months ending September 1997; following changes to procedures and requirements in August 2001, the number of cases fell from 8,287 for the twelve months prior to September 2001 to 7,298 for the twelve months prior to September 2002.[11] The annual number of cases is now half of what it was six years ago. The Government has chosen not to be influenced by this trend. It is also selective in reading the evidence of its own research.

The references committee noted from the evidence that there was a serious unaddressed need for personnel management skills in the small business sector. The committee noted that small business concerns about unfair dismissal indicated the need for more training and support, including clear information materials on hiring staff and the dismissal process disseminated through the small business network. The committee agreed that proposals for providing a simplified and cheaper process for resolving unfair dismissal claims also had merit.

Employer organisations (whose information is apparently accepted without question by the Government) often refer to particular instances of employee recalcitrance or of the disruption of business as a result of employers having to attend tribunal or court

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9 Submission No. 20, Government of Western Australia, p. 10

10 EWRE References Committee, *Small Business Employment*, February 2003, p. 135

11 Data from the Department of Employment and Workplace Relations provided to Senator Andrew Murray.

cases. Labor senators do not deny that such problems have arisen from time to time, and point to 2001 amendments to the Workplace Relations Act which have served to eliminate misuse of the unfair dismissal provisions. What was presumably an acceptable balance of rights two years ago has now become a burdensome imposition on business.

Labor senators do not believe that the problems presumed by the Government to exist have any basis in fact. If anything, the situation has improved as the importance of sound management practice, for the sake of profits, is gradually affecting the thinking of the wide spectrum of small business proprietors. For such employers the looming problem is the shortage of skilled labour, rather than fears of vexatious litigation by employees.

## Use of the corporations power

The major new element to this bill is the use of the corporations power (section 51(xx)) of the Constitution to override state legislation. Over a number of years several planks of the Constitution have been used to underpin industrial relations laws. It has been recognised for some time that the use of the corporations power in such cases as this legislation presents certain difficulties, most obviously that around 20 per cent of employers cannot be covered because they are not employed by constitutional corporations. The bill as it stands is both a limited and blunt instrument of legislation. It leaves a small but significant group of workers beyond its ambit, and it creates legal complications in cases where current state legislation covers regulatory matters affecting unfair dismissal. It is a measure of the Government's preoccupation with short-term political goals that it has persisted with measures demanded by its industry supporters, but which will create legal and administrative difficulties for them over the long term.

This view is widely supported in submissions from the states, which are naturally affronted by the Commonwealth's attempts to override properly functioning laws enacted in state parliaments. The Government asserts, without explanation or justification, that the proposed Commonwealth legislation will be 'better balanced' than current state laws which, according to the Explanatory Memorandum contain 'inequalities', which are not identified.

Several state submissions expressed strong opposition to any attempt by the Commonwealth to make overriding legislation without consultation with the states, especially in attempting to graft federal laws onto state systems. The bill before the committee shows all the signs of failure to deal cooperatively with the states. It also shows that the complexities and confusions that the Government alleges to arise from having conflicting and overlapping jurisdictions would be made even worse if this bill were to pass. The submission from the Queensland Government points out that far from resulting in improved legislation, as the Government claims, the bill establishes:

- two different sets of federal laws and procedures governing unfair dismissal matters, depending on the size of the respondent;

- different federal and state unfair dismissal regimes for incorporated and unincorporated entities;

- different federal and state unfair dismissal regimes for incorporated entities, depending on whether they meet the definition of a 'constitutional corporation';

- concurrent but separate federal and state jurisdiction over different aspects of workplace relations in the one business, for example a federal regime governing a business' unfair dismissals and a state regime governing workplace harassment and industrial disputes; and

- concurrent but separate federal and state jurisdiction over different aspects of the one employee's claim (for example, the federal regime for unfair dismissal and the state regime for insufficient notice or unpaid entitlements).[12]

Therefore, a state award employee of a constitutional corporation with a claim for unfair dismissal and withholding of wages would need to lodge claims in both federal and state jurisdictions, one for the unfair dismissal component, and the other for the wages component.[13] Employers, who complain now about time wasted in court under the current law will find the regime proposed under this bill to be even more onerous.

The arguments of state governments are supported by Professor Andrew Stewart. In his submission, Stewart make it clear that while he has always supported the principle of unitary industrial relations laws, he is opposed the proposal in this bill on the following grounds.

The first is that they seek to override state unfair dismissal laws in favour of a federal regime that is inferior in both design and operation. Second, the proposed amendments would not in fact contribute to the goal of simplifying the coverage of federal and state labour laws. Third, and most importantly, the predominant effect of the amendments will be to reduce the overall national coverage of unfair dismissal laws and exclude many workers who currently have access to a remedy from being able to challenge their dismissal. Labor members of the committee believe that Stewart's argument needs to be reported in some detail.

On the point of the defective design of this bill, Stewart points to the inordinate complexity of the Workplace Relations Act, its attendant regulations, and the unduly prescriptive nature of its provisions. Further to this, Stewart writes about the provisions of the Act:

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12 Submission No. 21, Government of Queensland, pp. 8-9

13 ibid.

> They are very hard for ordinary workers or managers to understand, necessitating legal advice for even the simplest procedures. Instead of simply empowering the Australian Industrial Relations Commission (AIRC) to deal with certain claims and providing broad guidance as to how to do so, as most State laws do, the legislation seeks to regulate each step of the process in ever-increasing detail. As is generally the way when Parliament tries to anticipate and counter every eventuality, this level of detail simply creates potential gaps and uncertainties for litigants and their lawyers to exploit.[14]

Stewart's second point, on the false claim of simplifying the coverage of federal and state labour laws, makes it clear that while matters would be simplified for some employers, it would also take many employers who are currently covered solely or predominantly by state awards or agreements and expose them to the federal system, with all its added complexity and cost, for unfair dismissal purposes. If the Government had been serious about simplifying the coverage of labour laws it could, according to Stewart, have extended the federal unfair dismissal system to cover all employees covered by federal awards and agreements, not just those employed by constitutional corporations, and confined the state systems to workers who are either covered by state instruments or award-free.

Perhaps the most glaring omission in the bill, in the view of Labor senators, is the exclusion of many workers who now have access to a remedy for unfair dismissal from being unable to challenge their dismissal. This is a limitation in the use of the corporations powers which does not appear to concern the Government unduly. When Labor senators refer to the corporations power as a 'blunt instrument' it is in such matters that the truth of this observation can be made. It goes further than this as Stewart has observed. Exclusions under federal laws apply more widely than under most state laws, and many workers will be effectively deprived of a right to challenge their dismissal.

> Accordingly it is highly misleading for the Minister to claim, as he does in his second reading speech for the Bill, that 'the percentage of employees covered by Federal unfair dismissal provisions should rise from about 50 per cent to about 85 per cent'. Many of those employees would be 'covered', yes, but only to the extent of denying them a remedy against unfair dismissal![15]

The Government's proposal to overcome this anomaly is that the states should transfer powers to enable the Commonwealth to cover the field. That would require a degree of cordiality and compromise which does not appear likely given the lack of consultation that has marked Commonwealth-state relations in the field of industrial relations over the past seven years.

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14 Submission No. 9, op.cit., pp. 2-3

15 ibid.

On the issue of Commonwealth-state consultation, the views of the Australian Chamber of Commerce and Industry are of interest to the committee and should be instructive for the Government. ACCI, in common with other employer organisations, has favoured the introduction of a unitary industrial relations system. It has been acknowledged on all sides of the argument that the required constitutional rearrangements present a formidable obstacle to this change, and the use by the Commonwealth of other 'heads of power' upon which to frame legislation present the kinds of difficulties which Labor senators have identified in this report.

ACCI has acknowledged all of these difficulties in its report, but its proposal for an orderly process of change is particularly noteworthy in the context of this inquiry:

> The case for moving toward a harmonised national workplace relations system could be assessed in a nine-step orderly development phase. The objective would need to focus on exploring the concept with the maximum possible bipartisan national support, and in a constructive non-political manner. An open-minded approach would need to be adopted, particularly by governments (federal and state), with a recognition by all parties of the legitimate role each jurisdiction has historical (sic) had and currently exercises in the system. The initial focus would have to be on confidence building and an objective analysis of options and models for change, without requiring any interested party to commit a position or formulate definitive policy during the development phase. At the end of the day, the content of the system will determine whether it has acceptance by employer and employee interests.[16]

This statement from ACCI echoes to some degree comments made by industrial legal academic Professor Ron McCallum, who has argued that if a robust national industrial relations mechanism is to be created, governments must refrain from seeking short-term political advantages. They should instead focus on long-term consultative strategies for bringing about a robust national labour law regime.[17]

It may be said that the ideas expressed both by ACCI and by Professor McCallum suggest an idealistic way forward, but in recognising the stubborn existence of entrenched political interests they cannot be regarded as naïve. While ACCI may be regarded as a special interest group with axes of its own to grind, it also represents a strong community view that progress and fair dealing are unlikely to derive from entrenched positions and ideological campaigns, which have been the characteristics of Government policies over seven years. If the Government does not heed advice from the Senate, it should at least listen to its industry supporters.

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16 ACCI, *Modern Workplace: Modern Future, A Blueprint for the Australian Workplace Relations System 2002-2010*, November 2002, p. 41

17 Professor Ron McCallum, Business Council of Australia: Industrial Relations Forum Proceedings, Melbourne, 17 November 2000, p. 15

## Conclusion

Labor senators regard this bill as implementing a basically flawed policy of creating two classes of employees: those who work for small business, and those in more privileged employment sectors. This is fundamentally wrong in a country with perhaps the strongest tradition of legally entrenched fairness and equity practices anywhere in the world. This flaw is compounded by the use of a constitutional power which will have the effect of creating legal confusion. In the view of Labor senators, this is one of the least defensible amendments to the Workplace Relations Act which the committee has so far had to deal with.

Labor senators **recommend** the Senate oppose this bill in its entirety.

**Senator George Campbell** **Senator Kim Carr**