Submission no: 3
Received: 6 February 2003

SENATE EMPLOYMENT WORKPLACE RELATIONS SMALL BUSINESS & EDUCATION LEGISLATION COMMITTEE

INQUIRY INTO

THE WORKPLACE RELATIONS AMENDMENT (TERMINATION OF EMPLOYMENT) BILL 2002

SUBMISSION BY

SHOP DISTRIBUTIVE & ALLIED EMPLOYEES' ASSOCIATION

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WORKPLACE RELATIONS AMENDMENT (TERMINATION OF EMPLOYMENT) BILL 2002

The SDA is totally opposed to this Bill.

The clear underlying aims of this Bill are to substantially water down the current unfair dismissal provisions of the *Workplace Relations Act 1996,* and in particular to make it very difficult for employees in small businesses with less than 20 employees from accessing unfair dismissal provisions at all.

The Bill provides for the following changes in respect of unfair dismissal:

- Federal unfair dismissal laws to prevail over state laws, awards and agreements for all employees of constitutional corporations.
- Special provisions for businesses employing less than 20 employees, including:
  - 6 months probation for small business employees (3 for everyone else);
  - applications made by small business employees can be dismissed without a hearing if outside jurisdiction or frivolous;
  - the matters to be considered in small business dismissals exclude whether a warning was given, and the Commission's general discretion to consider "other matters" is removed;
  - size of the business to be considered in relation to remedy, with maximum compensation halved to 3 months wages for small business employees;
  - where small business application dismissed because it was frivolous, etc the lawyer or adviser can be fined.
- Changes to apply to all unfair dismissal applications:
  - Commission to have regard to employee conduct in determining whether a dismissal was unfair;
  - dismissal for operational reasons (redundancy) unfair only in exceptional circumstances;
  - before awarding compensation, Commission must consider whether reinstatement is appropriate;
  - Commission to have regard to health and safety of other employees;

- Any income earned since dismissal must be taken into account in calculating back pay, which must be reduced if employee misconduct contributed to the dismissal.

These changes are unwarranted and unjustifiable.

Fair Treatment For All

The SDA starts from the principle that all people are entitled to fair and equal treatment. This Bill would deny some workers but especially those in small businesses that fundamental right.

The proposed amendments are nothing other than an attempt to deny many workers legitimate redress where they have been unfairly dismissed by their employer. This is an issue about equity and fair treatment.

There are no grounds to allow some employees to be sacked unfairly without redress. This issue goes to the heart of the notion of the principles of natural justice. It is our very strong submission that small businesses should not be differentiated from any other businesses when it comes to the need to act fairly, justly and reasonably in relation to an unfair dismissal.

There is a need for all relevant factors and the circumstances of all players to be taken into due account when an unfair dismissal application is being processed. Already the Commission has sufficient flexibility and discretion to adjust its decision making to take into account the realities that currently occur in any business. The Commission already has the capacity to reject vexatious claims, to order reinstatement or compensation and to reasonably fix the amount thereof. These amendments therefore are simply not necessary. All they would effectively do is restrict access to unfair dismissal action and fair redress by some employees – particularly those with less than 6 months service – and to generally encourage a climate whereby people were ever more reluctant to lodge unfair dismissal applications. However, at the end of the day there are fundamental aspects of the principles of natural justice which should not be able to be removed from being applicable in the workplace and that should not alter simply because a business is a small business.

Small businesses demand fair and equitable treatment when they deal with larger corporations. So much so, this has been proven by the fact that the Government introduced the fair trading provisions into the Trade Practices Act specifically to protect small businesses from unfair conduct by larger corporations.

If it is good enough for small business to be the recipient of fair treatment, then it also must be good enough for small businesses to be the dispensers of fair treatment in all circumstances.

The amendments add nothing to the Workplace Relations Act in terms of making the process fairer but adds everything in relation to giving an unfair advantage to employers, especially small employers against their employees if they have unfairly dismissed from their employment.

The current unfair dismissal laws act, in our judgement , as a catalyst towards ensuring employment practices which are fair and just. The passage of this Bill will be nothing other than a green light to employers who wish to act in an unconscionable and inhumane manner.

These amendments would particularly disadvantage young workers and women returning to the workforce after an absence therefrom. It is these groups who statistically are most likely to enter into new employment contracts. Young workers are more likely to move between jobs.

Every time a worker started a new job, if it was in a small business, the probationary period would apply anew Providing an additional probationary period in this way would encourage some employers to institute poor work and employment practices such as regularly "turning over" staff to avoid any unfair dismissal claims. Staff not able to claim unfair dismissal may be more likely to be treated poorly as they have no effective means of redress.

One provision of the proposed legislation would be to fine a lawyer or advisor (including a union), who represented an employee in a case which was judged frivolous. This clearly assumes that unfairly dismissed employees only seek redress where a union or lawyer encourage them to. The reality is

that unfairly treated employees seek redress of their own volition, although they may also seek to be represented by an advocate. This proposed Bill would deny natural justice by effectively saying to a potential advocate that if you represent an employee in a matter which is later judged frivolous then you will be penalised. Whatever happened to the notion that everyone is entitled to be represented by an advisor or advocate in any matter as a matter of procedural fairness ?

A constant theme articulated by the advocates of this Bill is that small business costs are exacerbated in fighting unfair dismissal claims where the worker is supported by a union or a lawyer. Much of this rhetoric is premised on the assumption that invariably a union will represent the dismissed worker.

The reality is that most workers in small business are not unionised and do not have the benefit of union representation when unfairly dismissed.

In most respects, the only protection that employees in small business have is the fact of the existence of unfair dismissal laws and the hope that the employer will pay some (even slight) lip service to the recognition of those laws.

The removal of the existing unfair dismissal provisions, as proposed by the Bill, will dramatically increase the balance of power in favour of employers and dramatically decrease the fundamental protections available to workers.

No Evidence To Justify Proposed Changes

Claims have been mounted by the government that these amendments are necessary to reduce costs upon small businesses and to encourage employment.

The current unfair dismissal laws do not, of themselves place extra cost imposts upon small businesses.

Independent surveys have found that the unfair dismissal laws are not a key priority concern for small business. The 1995 AWIRS Survey reported that

only 0.9% of small businesses gave unfair dismissal laws as a reason for not hiring more staff. It cannot legitimately be said that this legislation will in any material way aid small business by addressing an issue of burning concern.

A constant claim from both Minister Abbott and his predecessor Minister Reith has been that the unfair dismissal laws act as a deterrent against small businesses from employing employees. Whilst different figures have been bandied around, the Government has continually asserted that the current application of unfair dismissal laws to small business is preventing the employment of tens of thousands of employees.

These arguments have been waged predominantly at the level of political rhetoric. They have not been waged on the basis of arguing from clearly established facts. The Government has relied upon assertion and nothing more.

The Association takes this opportunity to draw attention to aspects of a Federal Court decision (Hamzy v Tricon International Restaurants trading as KFC (2001) FCA 1589, 16 November 2001) in which a Full Court of the Federal Court, comprising Justices Wilcox, Marshall and Katz, engaged in a reasonably thorough examination of the effect of unfair dismissal laws on employment growth. This examination by the Federal Court on what is predominantly a political argument, arose because the Minister, who had intervened in the proceedings before the Federal Court, led evidence supporting a contention that there was a strong link between the presence of unfair dismissal laws and growth in employment.

Essentially, the Minister argued before the Court that a regulation excluding a range of casuals from unfair dismissal laws, was justified because casual employees were a group of employees against whom the availability of access to unfair dismissal provisions would operate to their disadvantage by limiting growth in casual employment. In other words, there was a direct nexus between the existence of unfair dismissal laws and the availability of, and growth of, employment for casual employees.

As this matter was argued before a court of law, the Government could not rely merely on political rhetoric, but was forced to produce "evidence" to justify its assertions that there was a link between the presence of unfair dismissal laws and growth in employment. The Minister's evidence consisted of both ABS statistics and expert evidence from Professor Mark Wooden, a Professorial Fellow with the Melbourne Institute of Applied Economic and Social Research at the University of Melbourne.

Professor Wooden provided expert evidence on the basis both of an affidavit and in oral examination before the court.

Whilst the expert evidence of Professor Wooden dealt with the issue of casual employment only, Professor Wooden admitted before the court that his opinions and views, in relation to the link between employment growth and the presence of unfair dismissal laws, applied equally to full time and part time employees.

This was particularly noted by the Federal Court in paragraph 64 of its decision, when the Court said:

> *"During the course of cross-examination, Mr. Rogers suggested to Professor Wooden that, if his assumption about the effect of unfair dismissal laws on casual employment opportunities was correct, it would also apply to full time permanent employment. Professor Wooden agreed. His evidence went on:*
>
> *' Do I take it then that you accept the consequence for employment is not dependent upon the designation of the employee, that is as between full time, part time and casual, correct?……Yes.*
>
> *Is it dependent upon the fact that the given employee or the given class of employees have access to unfair dismissal laws?……Correct."*

Thus, where Professor Wooden gave evidence in relation to casual employment in each instance, the reference can be interpreted as being for all employees. The Court noted, at paragraph 59 of its decision that:

> *"In paragraph 69 of his affidavit, Professor Wooden stated what he understood (accurately) to be the effect of the current regulations. In paragraph 70 he said:*
>
> *'In my view, the application of the unfair dismissal provisions of the Federal Workplace Relations Act 1996 to the types of casual employees excluded by regulations would be likely to have an adverse effect of job creation in Australia. In particular, I consider that it would be considerably more difficult for more vulnerable classes of potential employees, such as early school leavers, to find work and to gain the ability to progress to other positions within the workforce.' "*

Of this assertion by Professor Wooden, which is also the constant assertion of the current Minister and the Coalition Government, the Federal Court said at paragraph 60:

> *"Professor Wooden did not offer any empirical evidence to support his view. He was unable to do so. In cross-examination, Professor Wooden said:*
>
> ***'There certainly hasn't been any direct research on the effects of introducing unfair dismissal laws.'*** *" (Emphasis added)*

Much of what Professor Wooden argues is exactly the same as the line of argument consistently run by the current Government in support of attempts to remove unfair dismissal protections from a range of employees.

On another aspect of the matter before the Court, the ABS statistics on employment growth were drawn to Professor Wooden's attention.

In particular, and the Court noted this at paragraph 65 of its decision:

> *"It was pointed out to him that, in the period of approximately three years, from March 1994 to December 1996, during which the more comprehensive unfair dismissal protections of the 1993 Act were in place, employment growth was stronger than in the following three years, during which less comprehensive protections applied.*

> *Employment growth under the 1993 Act was also stronger than in the three years immediately before the commencement of that Act, when there was no comprehensive unfair dismissal protection."*

At paragraph 66 of it decision the Federal Court noted:

> *"Professor Wooden agreed 'the peak in increased employment happens to coincide with the most protective provisions, from the employees' point of view'. He also agreed that the pattern in relation to permanent employment was similar. It was suggested this 'rather demonstrates that the existence or non-existence of unlawful dismissal legislation has got very little to do with the growth of employment and that it is dictated by economic factors'. Professor Wooden agreed 'the driving force behind employment is clearly the state of the economy' and mentioned the recovery from recession after 1993."*

Thus even on this point Professor Wooden was prepared to concede that unfair dismissal laws do not necessarily inhibit growth in employment.

Whilst the general evidence of Professor Wooden and the Government was challenged by contrary evidence presented to the Court from Dr. Richard Hall, a Senior Research Fellow with the Australian Centre for Industrial Relations Research and Training at the University of Sydney, the Court did not overly rely upon Dr. Hall's evidence when dealing with its conclusions on Professor Wooden's evidence.

The key conclusion drawn by the Full Court of the Federal Court of Australia in relation to the arguments run by the Government that there was a link between the existence of unfair dismissal laws and employment growth was expressed in paragraph 70 of its decision as follows:

> "*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. However, employers are used to*

> *bearing many obligations in relation to employees (wage and superannuation payments, leave entitlements, the provision of appropriate working places, safe systems of work, even payroll tax). Whether the possibility of encountering an unlawful dismissal claim makes any practical difference to employers' decisions about expanding their labour force is entirely a matter of speculation. We cannot exclude such a possibility; but, likewise, there is no basis for us to conclude that unfair dismissal laws make any difference to employers' decisions about recruiting labour."*

It was clearly the lack of any clear evidence to support the contentions of the Commonwealth Government which moved the Court to find against the Government. The Court, however, was very concerned about the lack of evidence. It made the following, highly relevant comments at paragraph 67 and 68 of its decision, when it said:

> *"It seems unfortunate that nobody has investigated whether there is any relationship between unfair dismissal legislation and employment growth. There has been much assertion on this topic during recent years, but apparently no effort to ascertain the factual situation.*
>
> *Professor Wooden thought research would be difficult because of the absence of an appropriate control group. However, unfair dismissal provisions were introduced gradually during the 1980's on an industry by industry basis, by awards of industrial commissions. It may have been possible, and may still be possible, for a researcher to have compared, or to compare, the pattern of employment in an industry newly affected by such a provision with the pattern, over the same years, in industries to which no unfair dismissal provisions applied. The results of any comparison might need to be treated with caution; however, any empirical material would be an improvement on mere assertion."*

The very clear, and the very strong, message flowing from this decision of the Full Court of the Federal Court of Australia is that the **Government's arguments** about **links** between **employment growth** and the presence of **unfair dismissal laws** is **totally** and **absolutely unfounded.**

It may be a part of economic theory but it is unproven theory.

As the Court makes abundantly clear, it is the case that the Government has not made any effort whatsoever to generate the research that would establish once and for all whether or not there was a real and actual link between the presence of unfair dismissal laws and employment growth.

It is abundantly clear that real benefits flow to employees from the presence of unfair dismissal laws. Their very name suggests the reality of that benefit. These laws prevent employees from being treated unfairly by their employer in relation to termination of employment. The setting aside, or removal of these laws, should only occur, if at all, if there is compelling and overwhelming evidence that the presence of these laws is harming, to a significant degree, the Australian economy.

To date the Government has not produced one iota of empirical data to support its assertions that the presence of unfair dismissal laws inhibits employment growth.

The most unfortunate aspect of the debate over unfair dismissal laws for the last few years has been the total absence of solid empirical data to support any of the rhetoric and assertions of the government and those supporting the Government's political line. Despite this matter, in various forms, having been the subject of on-going public debate for quite some time the government has still not provided any clear evidence to back its claims.

The issue of unfair dismissal laws, and the issue of employment growth, are both matters of significant importance to the Australian economy as a whole. Decisions on such important issues should not be made merely on the basis of political rhetoric and assertion. The Australian community should deserve no less than that there be a proper debate over the effect and application of unfair dismissal laws with such debate, by both Labor and the Coalition, being based upon genuine and tested empirical data.

The Federal Court decision has, for the very first time, thrown into very stark relief, the reality that the Government has argued for removal of unfair dismissal laws on nothing other than assertion and rhetoric. The decision of

the Full Court of the Federal Court of Australia deserves to be taken seriously and it offers quite clear instruction to all players in the political debate on this matter, namely, generate the accurate empirical data which will allow the debate to go ahead on the basis of facts rather than rhetoric.

It may well be that a section of the small business community has become confused as to when or how they may dismiss an employee. Given the amount of rhetoric from the Minister over a lengthy period this would hardly be surprising. There is however substantial precedent and case law on this matter. To the extent there is confusion it should be addressed. The answer is not to amend legislation so as to deny a section of the workforce fundamental rights. Rather the government should instruct the relevant departments to undertake proper educative programs designed to ensure that all persons in the community are aware of their rights at work.

It is not surprising that some small business employers may be unsure of the situation given that there is a vocal element amongst employers, employer organisations and political interest groups calling for further draconian changes to Australia's industrial relations laws, especially in relation to placing further limitations on workers' access to unfair dismissal processes.

It is important to clearly understand that those who claim to champion the cause of small business, especially in relation to unfair dismissal legislative reform, do not produce or rely upon any hard data supporting their claims. The moves by the Federal Government to have federal unfair dismissal laws prevail over state laws, awards and agreements for all employees of constitutional corporations must be seen in the context of the intent of the overall changes which are being proposed by the government to unfair dismissal law. The proposed intent to give primacy to federal legislation wherever possible simply cannot be seen as anything other than an attempt to have as many employees as possible covered by inferior unfair dismissal provisions.

Already many state jurisdictions have fair and just unfair dismissal provisions in state legislation. As previously suggested by us the proposed

changes to federal legislation would create an unfair and unjust federal jurisdiction.

It is ironic that the government proposed this "moving federal" scenario at the very same time as it was expending substantial resources of the Department of Workplace Relations on opposing the attempt by the SDA to have Victorian employees covered by the provisions of the Victorian Shops Award of the Australian Industrial Relations Commission. The federal government intervened in that case and opposed Victorian employees being covered by that award.. The government argued that Victorian employees should continue to be covered by state minimum wage provisions. Under such circumstances it is very difficult to believe that the proposal of the government is motivated by anything other than having as many employees as possible covered by the weakest unfair dismissal legislation possible.

This proposal is not justified. It would result in unfairness and inequity.

Conclusion

There is no reasoned or rational argument or data supporting the necessity of this Bill.

The Bill aims to attack the weakest sector of employment and does so in a way which is cynical and hypocritical. It denies fundamental principles of equity and fairness.

Ultimately the total lack of argument in support of the need for changing the unfair dismissal laws, as proposed by the Bill, leads to the conclusion that this Bill is not, and was never, intended to address any real issue but rather is a base political exercise to divert attention away from the real plight of small business and the real and serious issues facing the Government, the Parliament and the Australian people.

The SDAEA urges the Senate to reject the Bill.