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17<sup>th</sup> February 2003

Mr John Carter  
Secretary  
Senate Employment, Workplace Relations  
& Education Legislation Committee  
The Senate  
Parliament House  
CANBERRA ACT 2600

Email: [eet.sen@aph.gov.au](mailto:eet.sen@aph.gov.au)

Dear Mr Carter

**RE: WORKPLACE RELATIONS AMENDMENT (TERMINATION OF EMPLOYMENT)  
BILL 2002**

1. We refer to the above Bill which has been referred to the Senate Employment, Workplace Relations & Education Legislation Committee for inquiry.
2. We thank you for the opportunity of presenting a submission and you will find this outlined below.

**Introduction**

3. This submission is made on behalf of the Association of Professional Engineers, Scientists & Managers, Australia, the Managers & Professionals Association and the Professional Officers Association (Victoria) [the organisations] all of which are registered under the Workplace Relations Act 1996. The combined membership of the organisations totals almost 30,000 and covers the fields of both professional and managerial employment in the private and public sectors throughout Australia. They are the only industrial associations representing exclusively the industrial and professional interests of employees and contractors in these groups.

4. By the nature of their academic training and their roles as professionals and managers in the workforce the employment arrangements for our members are often structured differently by employers when compared with other occupational and employment groups.
5. We estimate that approximately 75% to 80% of our members would be employed under awards and enterprise agreements of the Federal and State industrial jurisdictions. The remaining 20% would be award-free.
6. We estimate that approximately 35% of our members employed under Federal and State awards/enterprise agreements would at the same time have individual employment contracts. Overall we estimate that approximately 60% of our total members (i.e. those under awards/EBA's and those who are not) would have individual employment contracts.
7. A growing proportion of the membership of the organisations, approximately 10% (3,000), operate micro and small businesses as independent contractors and consultants, largely in the business services sector. We expect this number to grow significantly over coming years particularly in the IT, architecture and consulting engineering sectors of the economy.
8. The organisations estimate that approximately 33% (10,000 of their members) are employed in industries where there is a high incidence of small business activity, i.e. where there are employers with fewer than 20 employees. These industries include pharmacy, architecture, surveying, veterinary practice, information technology and consulting engineering. It is a characteristic of the employment of professionals in areas such as veterinary science and pharmacy that the overwhelming majority are employed in small practices and retail community outlets. In addition architecture, surveying, IT and consulting engineering is populated by a high proportion of small consultancy groups.

### **Small Business Employment**

9. The estimates we make in paras 7 and 8 are supported by figures from the Australian Bureau of Statistics in the table below:

Table 1 Number of Small Businesses & Persons Employed, By State 1999-2000

| State & Territory            | Employing         |                  |                  | Non-Employing     |                        | Small Business Total Small Business |               | Total all Business |               |
|------------------------------|-------------------|------------------|------------------|-------------------|------------------------|-------------------------------------|---------------|--------------------|---------------|
|                              | No. of Businesses | No. of Employers | No. of Employees | No. of Businesses | Own Account Workers(a) | No. of Businesses                   | Employment    | No. of Businesses  | Employment    |
|                              | '000              | '000             | '000             | '000              | '000                   | '000                                | '000          | '000               | '000          |
| New South Wales              | 188.7             | 99.1             | 776.7            | 172.0             | 214.1                  | 360.6                               | 1089.9        | 372.6              | 2256.5        |
| Victoria                     | 135.8             | 61.1             | 540.5            | 128.5             | 160.2                  | 264.3                               | 761.8         | 275.2              | 1758.7        |
| Queensland                   | 93.3              | 58.0             | 382.6            | 112.4             | 146.3                  | 205.8                               | 586.9         | 213.3              | 1226.9        |
| South Australia              | 35.4              | 20.8             | 150.4            | 42.7              | 55.8                   | 78.2                                | 227.0         | 81.5               | 493.4         |
| Western Australia            | 53.4              | 37.1             | 237.2            | 62.9              | 82.3                   | 116.3                               | 356.5         | 120.3              | 701.1         |
| Tasmania                     | 10.7              | 6.9              | 50.7             | 12.0              | 14.6                   | 22.7                                | 72.3          | 23.6               | 140.5         |
| Northern Territory           | 5.0               | 2.3              | 26.0             | 4.1               | 5.0                    | 9.1                                 | 33.3          | 9.5                | 61.6          |
| Australian Capital Territory | 10.4              | 3.8              | 40.3             | 7.6               | 9.1                    | 18.0                                | 53.2          | 18.6               | 96.0          |
| <b>Total Australia</b>       | <b>532.7</b>      | <b>289.2</b>     | <b>2204.4</b>    | <b>542.2</b>      | <b>687.4</b>           | <b>1075.0</b>                       | <b>3181.0</b> | <b>1114.6</b>      | <b>6734.8</b> |

(a) Includes working proprietors and partners of unincorporated non-employing businesses. Working directors of incorporated businesses are classified as employees.

Source: Australian Bureau of Statistics

10. These figures indicate firstly that 2,204,400 of the 6,734,800 total employees or, 32.7% of all employees, were employed in small businesses in Australia in 1999-2000. Small businesses for this purpose are defined as those which employ less than 20 persons. Secondly they indicate that 10.2% of total employees were own account (own business) workers.
11. Australian Bureau of Statistics Catalogue 1321.0 Small Business in Australia, 1999, shows that between 1983-84 and 1998-99 the number of small businesses increased by 71.4%, an increase of 3.7% per annum. During the same period small employing businesses increased by 87.5% or 4.3% per annum, non-employing businesses increased by 55% or 3.0% per annum and small business employees increased by 72.5% or 3.7% per annum.
12. The contribution of the small business sector to total private sector employment rose from 49.7% to 50.2% in the period 1983-84 to 1996-97 (Year Book Australia 1999).
13. The non-employing sector though is also an important component of small business. During 1999—2000 there were 542,200 non-employing businesses in Australia representing 50.4% of total small businesses.

14. These figures underline the important contribution made by the small business sector to the Australian economy. But they also highlight two other important points in the context of the move to restrict access to unfair dismissal laws for small business employees. Firstly, the change will over time have a detrimental impact on a large part of the nation's workforce. Secondly, the figures debunk the argument that small business growth is retarded by the right to challenge unfair dismissal. The ABS data shows that the reverse has happened: the number of small businesses has actually increased by 71.4%; the number of small business employees has grown by 72.5% and the contribution of the small business sector to total private sector employment outstripped its rival growing from 49.7% to 50.2% of total employment.
15. The organisations estimate that approximately 2.5% (750) of their members are employed as casuals principally in the industries mentioned in para 8 above.

#### **Small Business Workplace Relations**

16. *"Changes at Work: The 1995 Workplace Industrial Relations Survey"* is the second major survey of workplace industrial relations undertaken by the then Commonwealth Department of Industrial Relations. Significantly this study found that small businesses differed from larger private sector workplaces on a number of industrial relations characteristics. From the perspective of the current debate over the application of the unfair dismissal provisions of the Workplace Relations Act the following points to emerge from the study are in our view important:
- (i) Small businesses by definition have no higher level of organisation where employment policies can be determined and so they are likely to operate in a less structured way when it comes to dealing with issues of discipline and grievance.
  - (ii) Small business managers are less likely than larger workplaces to hold formal meetings with all employees.
  - (iii) Small businesses are less likely than larger workplaces to offer formal training programs for non-managerial employees.

- (iv) Compared to large workplaces, small businesses rarely have collective industrial agreements. The study found that 19 per cent of small businesses had a verbal agreement and only 10 per cent had a written collective agreement. Only 27 per cent of small businesses with agreements had them registered. Instead small businesses rely more on the use of awards (and therefore on the more formal procedures available such as those under the Workplace Relations Act) in regulating their employment relationships. (Note: The words underlined are ours).
- (v) Small businesses with the owner present are less likely to have union members. In our view this factor makes it less likely that employees will be informed of their rights under industrial and common law and therefore less able to act to protect their interests.
17. The conclusion we draw from these points in the *Changes at Work* study is that if there is one area of the Australian workforce which requires the availability of access to an independent umpire in cases of unfair dismissal it is the group employed by small business. It is clear that employees of small business are likely to be less organised, less informed, work in situations where there is a less structured approach to workplace relations and where policies for dealing with grievances and disciplinary issues are not well developed. They are in these circumstances a highly vulnerable group who will be left even more exposed in the event that the amendments now being proposed are translated into law.

#### **ILO Convention on Termination of Employment**

18. The ILO Convention on termination of employment proposes that all employees, with a small number of defined exclusions, should have the facility to appeal against termination of employment to an impartial body. Size of the employment establishment is not one of the limited number of exclusions cited in the Convention.
19. Our view is that Australia should honour its international obligations by continuing to provide access to the unfair dismissal provisions of the Workplace Relations Act to those employees for whom limitations are now being proposed.

### **Expansion of the Commonwealth Unfair Dismissal Scheme**

20. The objective of these amendments as outlined in the Explanatory Memorandum accompanying the Bill is *“to amend the WRA so that coverage by a federal industrial instrument will no longer be a condition for employees working in a constitutional corporation to be able to bring an action in the federal system in respect of harsh, unjust or unreasonable termination of their employment.”*
21. The organisations oppose this change for the following reasons:
- (i) The change will disadvantage those currently having access to more favourable State unfair dismissal jurisdictions both as to process and compensation. Whilst the current proposal would bring more employees within the scope of the Federal Workplace Relations Act it will do so at the cost of emasculating unfair dismissal rights that currently exist for many employees under state industrial systems.
  - (ii) State unfair dismissal jurisdictions will still be required to provide an avenue of review for employees of non-incorporated businesses including state public servants. Proposals to use the corporations power to widen the scope of the Workplace Relations Act have been canvassed before by this Government in the context of the move towards a more unitary industrial relations system for the nation. Their use in the context of the changes now proposed represent an imperfect solution where the case for change has not been made out.
  - (iii) The change would introduce another layer to the review system of unfair dismissal jurisdictions available under both Federal and State Acts and would complicate the federal unfair dismissal jurisdiction even further. It would fail to produce a result that would cover the field with respect to review of unfair dismissals.

### **Further Legislative Measures to Improve the Commonwealth Unfair Dismissal Scheme**

22. The object of these amendments is to introduce greater leniency under the Workplace Relations Act for small businesses confronted with unfair dismissal action and to in effect create a separate unfair dismissal jurisdiction altogether for small business. As such it adds a further stratum to the federal unfair dismissal regime.

23. The organisations are opposed to these changes for the same reasons as outlined in their 23<sup>rd</sup> April 2002 submission to the Senate Employment, Workplace Relations & Education Legislation Committee with respect to the Workplace Relations Amendment (Fair Dismissal) and (Fair Termination) Bills 2002. In this context we reiterate the following points:

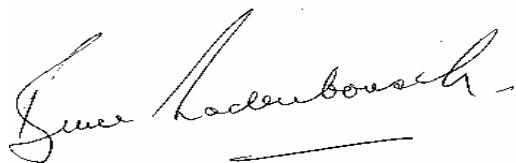
- (i) The organisations support an unrestricted right to seek redress in the event of unfair dismissal in a cost-free jurisdiction before an independent tribunal.
- (ii) As noted in para 8 above approximately 33% of the organisations' membership would be adversely impacted by the Bill currently before the Senate. In the case of the pharmacy industry we estimate that there are approximately 4,950 community pharmacies across Australia employing approximately 22,500 employees of which 4,500 would be community pharmacists. We further estimate that there would be 80 community pharmacies across Australia employing more than 20 employees each. This group would comprise around 1,000 employees or approximately 4.5% of total employees in the industry. The effect of the changes being proposed in the current Bill would therefore impact 95% of employees in the pharmacy industry. Whilst some pharmacy assistants are covered by state awards and therefore currently have access to a state unfair dismissal jurisdiction the same cannot be said of the 4,500 community pharmacists of whom almost 100% are employed under the Federal Community Pharmacy Award 1998.
- (iii) Correspondingly we estimate that almost all of the 2,000 veterinary practices throughout Australia who are respondents to the Veterinary Surgeons Award 2001 would be impacted by the changes now proposed under the Bill. We estimate that the overall number of employees in the industry would be about half that of community pharmacy, meaning that approximately 11,000 employees, of whom at least 2,000 would be veterinary surgeons under the federal award mentioned, would have their unfair dismissal rights diminished.

### **Conclusion**

24. The organisations are opposed to the package of amendments in the Workplace Relations Amendment (Termination of Employment) Bill 2002.

25. The organisations question the efficacy of the attempt to introduce a more national approach to regulation of unfair dismissals. The changes proposed do not cover the field. They depend upon complementary state legislation and with *political* ownership of state IR systems in all states belonging to Labor Governments there is a real issue as to the motivation for the changes being put forward in this regard. It would be fair to say that the Bill has further politicised the debate over unfair dismissal rights and raised the stakes in the debate over a unitary IR system without attempting to provide a rational framework within which reform can be achieved.
26. The changes aimed at tipping the scales more in the direction of small business confronted with unfair dismissal action is the eighth attempt to introduce reform in this sector. The organisations take the view that it is now time for employers and employees in the small business sector to be given the opportunity of getting on with what they do best in an atmosphere free from the uncertainty and tension generated by the seemingly never ending debate over whether they are in or out of the federal unfair dismissal jurisdiction.

Yours faithfully



**BRUCE NADENBOUSCH**  
Director Industrial Relations APESMA  
For & On Behalf of APESMA, MPA & POAV

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File No. 90.1.31