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ACCI SUBMISSION TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

INQUIRY INTO THE PROVISIONS OF THE WORKPLACE RELATIONS AMENDMENT (TERMINATION OF EMPLOYMENT) BILL 2002

FEBRUARY 2003

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ACCI

- The Australian Chamber of Commerce and Industry (ACCI) is Australia's peak council of Australian business associations. ACCI's members are employer organisations in all States and Territories and all major sectors of Australian industry.

- Through our membership, ACCI represents over 350,000 businesses nationwide, including:

  - The top 100 companies.

  - Over 55,000 medium sized enterprises employing 20 to 100 people.

  - Over 280,000 smaller enterprises employing less than 20 people.

- Membership of ACCI comprises State and Territory Chambers of Commerce and national employer and industry associations. Each ACCI member is a representative body for small employers and sole traders, as well as medium and larger businesses.

- Each ACCI member organisation, through its network of businesses, identifies the concerns of its members and plans united action. Through this process, business policies are developed and strategies for change are implemented.

- ACCI members actively participate in developing national policy on a collective and individual basis. ACCI members, as individual business organisations in their own right, are able to also independently develop business policy within their own sector or jurisdiction.

Employers and Termination of Employment Regulation

- Employers are the key subjects of regulation in the area of termination of employment, and have a principal interest as those who must apply, comply with and enforce any regulatory obligations.

- ACCI has made many submissions in recent years to the Commonwealth Government, the Opposition, other parties and this Senate Committee on the subject of termination of employment.

- This submission, of necessity touches on some of the broader policy issues that have already been before the Committee on previous occasions – as well as on the specific and new matters raised by the Bill. This submission should be read in conjunction with previous ACCI submissions to the Senate Committee on termination of employment.

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INTRODUCTION

1. The *Workplace Relations Amendment (Termination of Employment) Bill 2002* was introduced into the House of Representatives by the federal government on 13 November 2002.

2. The Bill addresses the operation of federal termination of employment laws, more colloquially referred to as unfair dismissal laws, as provided for in Part VIA of the *Workplace Relations Act 1996*.

3. The Bill has been referred to the Senate Employment, Workplace Relations and Education Legislation Committee. The Senate Committee will conduct public hearings on the Bill in Melbourne on Monday 24 February 2003.

4. In broad terms, the policy effect of the *Termination of Employment Bill 2002* is three fold:

   a) Jurisdictional Amendments

      i) The Bill would extend the operation of the federal unfair dismissal system by making greater use of the corporations power in section 51(xx) of the Constitution. This would effectively ensure that employees have access to either federal or State unfair dismissal redress, and would expand the area of federal coverage.

   b) Amendments relating to all Businesses under federal laws

      i) There Bill would amend the operation of unfair dismissal laws more generally, including the following policy and procedural matters:

         (1) Requiring the AIRC to have regard to conduct by an employee which contributed to dismissal.

         (2) Refining scope for claims where dismissal is for operational reasons.

         (3) Requiring the AIRC to have regard to the safety and welfare of fellow employees in assessing whether a dismissal was harsh, unjust or unreasonable.

         (4) Requiring the AIRC to consider the size of an employers business in determining an appropriate remedy.

         (5) Requiring the AIRC to take account of any income an employee who is to be reinstated may have earned since their dismissal.

         (6) Emphasising reinstatement as the primary remedy.

c) Amendments relating to Small Businesses under federal laws

i) The Bill would amend the operation of the federal unfair dismissal laws as they impact on small business, including the following policy or procedural matters:

(1) Extending the qualifying period from 3 to 6 months for small business employees.

(2) Empowering the Australian Industrial Relations Commission to dismiss, without a hearing, applications made against a small business on the ground that the application is beyond jurisdiction or that the application is frivolous, vexatious or lacking in substance.

(3) Halving the maximum compensation payable to employees of small businesses to 3 months remuneration.

(4) Refining penalty provisions for lawyers and agents who encourage unmeritorious claims against small business.

(5) Streamlining the criteria for determining whether a termination by a small business employer was unfair.

Summary of ACCI Position

5. In summary ACCI's position on the *Termination of Employment Bill 2002* is that:

a) ACCI supports, with some qualifications, the proposed amendments with respect to the use of the corporations power in Commonwealth unfair dismissal laws.

b) ACCI supports the proposed policy or procedural amendments which vary the operation of federal unfair dismissal laws relating to all businesses under the federal system.

c) ACCI supports the proposed policy and procedural amendments which vary the operation of federal unfair dismissal laws on smaller businesses under the federal system but raises the prospect that some of the initiatives in this category could viably apply to all businesses.

d) The policy or procedural amendments raised in the Bill have the prospect of improving the operation of federal unfair dismissal laws and thereby overcoming some of the general concerns of employers about the regulatory burden imposed by the operation of unfair dismissal laws.

e) Noting that the Bill does reflect some of the policy and procedural issues raised in previous ACCI submissions, the Bill does not go far enough in proposing relief to the burden of unfair dismissal laws on employers. Additional legislative measures

previously outlined by ACCI, including in relation to extensions of time, should be considered.

This ACCI submission represents the collective view of member organisations. As with all ACCI submissions, individual members organisations may supplement or qualify this submission with their organisation's own policy on particular issues – including priority issues in industry sectors for legislative amendments and specific observations on the proposal for the wider use of the corporations power in federal unfair dismissal laws.

THE IMPACT OF THE BILL ON JOB SECURITY AND PROCEDURES.

Job Security

6. The relationship between termination of employment laws, employment and job security has been a much debated issue in the public and political arena since federal unfair dismissal laws were first introduced in 1993.

7. It is not possible to consider the impact on job security *per se*, without also considering the impact on employment itself. Indeed, legislating 'job security' or 'job protection' laws is a well intended but superficial notion. Legislation itself cannot provide job security. Legislation can create certain remedies and regulate certain behaviour. But without a job there is no job security. Without an employment creating, growing economy, there is no job security.

8. In designing or amending unfair dismissal laws, high on the list of factors to balance in policy terms against the rights that such laws create for employees, is the burden that unfair dismissal laws impose upon employers and their capacity to viably trade and employ.

9. Unfair dismissal laws are one species of so-called job protection laws. From an employers perspective, there are a number of important factors to consider in the legislative framework. These include:

   a) Eligibility to make claims.

   b) Fairness in the process of dealing with claims.

   c) Fairness in outcomes (conciliated or arbitrated).

   d) Cost of defending claims.

   e) Impact of the system on jobs and hiring intentions.

10. This latter point has been the subject of much public controversy in recent years. However it is only one of a number of policy factors that need to be taken into proper account. For example, even if it is thought that there is no connection or no proven connection between unfair dismissal laws and hiring intentions (a point of view we do not share) it remains the case that policy makers must still ensure that:

    a) There are sensible, clear and consistent eligibility arrangements.

    b) The process of dealing with claims is fair and expedient.

    c) Outcomes are (so far as possible) just.

    d) Remedies are appropriate (and not excessive).

    e) The burden of defending claims is not unreasonable.

11. The *Termination of Employment Bill 2002* is relevant to these very issues given the policy and procedural amendments it proposes.

12. In supporting changes to unfair dismissal laws employers are not arguing that employees ought to be dismissed capriciously or for no good and valid reason. Indeed, it is as much in an employers interest that staff in whom an investment has been made are retained and add ongoing value to the business, as it is for the employee to remain in a job which provides income and career development. It is not uncommon for employers when discussing unfair dismissal laws to make the point that their business suffers when a good performing employee in whom they have invested time and money for training and skill development leaves to either another company or to pursue other interests – and that the employer can do little if anything to recoup this loss. In short, there is no 'unfair resignation' law.

13. In considering the policy balance required in unfair dismissal laws it is important to recognise what unfair dismissal laws intrinsically do. They provide a right for an employee whose employment is terminated to take legal action against their employer in a third party tribunal or court. Unfair dismissal laws create a right to sue, a cause of action. In this sense they do not deal only with unfair dismissals. They can be used to address with all dismissals. An assertion by an employee that they have been unfairly (or more strictly speaking harshly, unjustly or unreasonably) dismissed is sufficient to expose the employer to the risk of an adverse finding. An employer, once having dismissed an employee, is exposed to the process and the power of the 'system' whether the dismissal was or was not in fact unfair. This is an important point as it bears not only on how employers see the jurisdiction operating, but also on the need to constrain costs and expense once claims are made, and to create some greater certainty or consistency in the independent judgements that are made by conciliators and arbitrators. It should be recognised that employers bear the costs of dismissal from the point at which a claim is lodged regardless of the merit or otherwise of the claim.

14. In assessing appropriate responses to calls for changes to unfair dismissal laws the views of employers who have experienced claims as well as those who have formed a view about such laws are equally valid. This is because, at the core of the policy considerations is the issue of risk. If employers know or believe that there is a negative risk associated with the employment of a person then this will be a factor which weighs against that employment. The decision not to employ or to be less inclined to employ because of the presence or operation of unfair dismissal laws is of equal practical impact whether the decision is based on an employers actual experience in the jurisdiction, or on their perceptions of how the jurisdiction operates.

15. ACCI believes that there is a strong connection between unfair dismissal laws and the hiring intentions of employers. That connection should not be overstated, nor understated. It is not something that lends itself to empirical proof, or disproof for that matter. But its validity as a proposition is based in the fact that all employers necessarily take risk and cost into account in making business decisions – including decisions to employ.

16. There is some worthwhile discussion of these aspects in the recent report of the Senate Employment, Workplace Relations and Education References Committee on Small Business Employment tabled in the Senate on 6 February 2003 – both in the overall report and in the reservations by government members:

> *"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." (page 135, Report of All Members)*
>
> *"Changes to the processes and requirements for unfair dismissal can make a difference." (page 135, Report of All Members)*
>
> *"Proposals for providing a simplified and cheaper process for resolving claims also have merit" (page 137, Report of All Members)*
>
> *"Fear of the consequences of recruiting an unsuitable employee discourages many small businesses from employing people outside their own family, it prompts some to turn to labour hire firms; it results in many others choosing to employ people as casual rather than permanent staff; and it deters many others from employing at all" (Government members reservations, page 149)*

17. There is no doubt that a myriad of different factors apply to motivate employers to employ or not to employ a particular employee. Not surprisingly the dominant feature is and will always be economic - work requirements based on business needs. However, issues of cost and risk are also significant. It is in this context that negative experiences or negative perceptions of unfair dismissal laws act as one factor that weighs against decisions to employ.

18. Moreover, to the extent that the regulatory system makes it more likely that some employers will offer temporary or casual employment, where they would otherwise or in preference offer ongoing employment, there may be implications for job tenure, and ongoing levels of aggregate employment and unemployment.

19. The 1993 Commonwealth law can be seen as a major turning point in employer attitudes to unfair dismissal laws. The 1993 law expanded access to the unfair dismissal system across workplaces (more employers were exposed to more claims or the risk of claims). The substance of the 1993 law was significantly more burdensome on employers than had previously been the case in State jurisdictions.

20. The 1996 changes sought to ameliorate this position, largely by making amendments to enshrine the concept of a 'fair go all round'. Most of the 1996 amendments (at least those that were passed) were designed to remove the harshest features of the 1993 laws.

21. However, it is apparent that since the 1996 changes employer dissatisfaction and disquiet with unfair dismissal laws has, in general terms, not abated – although it is recognised that there has been improvements. The changes which have been made (including some of the changes in 2001), have been, in part beneficial. The law is obviously less extreme than it was in 1993. However, in saying this, employers are not of the view that the balance of interests between employers and employees is

properly established by the current system. Characteristics of the system remain unbalanced, and changes that have been made have been primarily directed at the rules that operate within the jurisdiction, and not to the jurisdiction itself.

22. Even if one accepts for the purposes of argument that the 1996 amendments were good enough at the time, it is now seven years since those amendments were made. There is obviously a need for ongoing policy attention to an area of public policy as important (yet difficult) as unfair dismissal laws. Case decisions continue to alter the application of the law, and in some areas have departed from or expanded the legislative intent. Opportunistic advisers and consultants advertise for and issue proceedings challenging terminations which in the past may not have been litigated.

23. The increased cost of litigation bears more and more heavily on employers as they weigh up the costs of defending claims against the costs of settlement, even where dismissal has been warranted and the merits of the case are on their side.

24. Often out of court settlements in the thousands of dollars are paid by an employer for commercial reasons, reflecting – in that employer's view – a flawed system. And as new cases continue to be filed and more decisions made the differing or subjective approaches of individual conciliators and arbitrators to similar facts creates uncertainty when dismissing staff or when assessing the merits of or claims that are lodged.

25. Many employers would claim they are not experiencing a fair go all round from the system as it has continued to evolve – particularly if out of court settlements are paid in unmeritorious claims under the threat of continuing litigation.

26. There is also a different – but related aspect to the connection between unfair dismissal laws and employment. Unfair dismissal laws (depending on their content) can also operate as a disincentive to terminate a non-performing employee, and replace that employee with a more satisfactory staff member. In this way unfair dismissal laws operate as a brake on business efficiency, rather than employment *per se*. From an employers perspective, that is no less important a consideration. Nor is this a valid basis to argue that unfair dismissal laws protect job security. Retaining under performing employees does no good to the overall job security of the remaining staff, nor the capacity of the Australian economy to generate jobs.

27. Over the years, ACCI has conducted a number of surveys of employers relating to unfair dismissal issues. These surveys are discussed in previous ACCI submissions and in some of the previous Senate committee reports. These include the Survey of Investor Confidence and ACCI's Pre-Election Survey (completed prior to the 2001 federal election).

28. In addition, in 2002 ACCI prepared a compendium of materials containing case studies where unfair dismissal laws had worked unfairly against the interests of employers, and where case examples justified some of the specific policy and procedural amendments that ACCI and employers were seeking. All of these materials have previously been provided to the Senate parties, and can again be provided if required.

29. ACCI also notes that the conclusions of the Melbourne Institute of Applied Economic and Social research study, referred to in the second reading speech to this Bill, generally support the abovementioned conclusions and submissions.

Termination of Employment & Unfair Dismissal Procedures

30. In order to assist consideration of previous amendment Bills in 2002 (the *Workplace Relations Amendment (Fair Termination) Bill 2002* and the *Workplace Relations Amendment (Fair Dismissal) Bill 2002*) ACCI included in its Senate Committee submission a series of policy and procedural measures which remained outstanding from an employers perspective, and which require policy attention. These are repeated below.

31. Some of these matters, in an amended form, are issues dealt with by way of the amendments proposed in the *Termination of Employment Bill 2002,* currently before this Committee.

32. ACCI is pleased that amendments in this regard are proposed. However, the full range of issues raised by ACCI ought to be explored for inclusion in the Bill, and for discussion between Senators.

33. These additional measures (and the case examples) were brought forward by ACCI in a constructive way in an attempt to break through some of the gridlock that has characterised the unfair dismissal debate in recent years.

34. The policy and procedural changes proposed by the *Termination Bill*, plus the additional suggestions made by ACCI, if adopted and passed, would go a long way to restoring what employers see as a fair balance of interests between stakeholders in this area of policy. Indeed, one advantage of these additional measures is that the more the balance of interests between employers and employees is set right by changes to detail and process, then the more this is likely to ameliorate some of the concerns of employers - concerns which have underscored the case for a small business exemption.

35. In summary the proposals advanced by ACCI are:

    a) Amend statutory objects to express the ‘fair go all round’ concept.

    b) Improve the prospects of resolution at conciliation conferences.

    c) Limit automatic access to arbitration following conciliation.

    d) A tighter test of what is an “unfair dismissal”.

    e) Relieving the burden of procedural fairness by making the reason(s) for dismissal the paramount consideration.

    f) Preventing, so far as possible, excluded employees from making similar claims against the employer under other Acts or laws.

g) Extending the qualifying period to the first six months of employment.

h) Increasing the filing fee to $100.

i) Excluding unfair dismissal claims based on genuine redundancy.

j) Limiting the scope for constructive dismissal claims (that is, resignation based claims).

k) Requiring the consideration of business size and the presence/absence of a human resource manager to apply to all dismissals, not just those for "unsatisfactory performance".

l) Providing a schedule of legal/representative fees, and provide for costs orders to be generally available against solicitors, not just parties.

m) Not permitting extensions of time in cases of failure by an applicant' representative; having applications for extensions of time deal only with the extension applications and not merit issues on the dismissal; having extensions of time heard initially, quickly and with minimum cost; and reducing the scope for extensions of time to be granted where long delays have occurred.

n) Requiring the Commission to conduct its hearings expeditiously.

o) Requiring a dismissed employee to have a statutory obligation to mitigate loss and declare all earnings, and require reinstatement and back wages orders to be discounted by the earnings, redundancy pay, social welfare payments or workers compensation payments the employee is entitled to keep.

p) Orders for payment of compensation not to include non-economic loss (pain, suffering, hurt feelings).

q) For smaller businesses:

   i) Longer qualifying period for small business (9 or 12 months).

   ii) Lesser procedural requirements (valid reason plus opportunity to explain).

   iii) Family members to be excluded from claims.

   iv) Flexibility in the time and location of conferences.

36. The *Termination of Employment Bill 2002* addresses some of these matters to the extent that it proposes:

a) Contributory conduct to be taken into account when determining compensation.

b) Limiting claims where an employer no longer has work for an employee

c) Requiring income earned since dismissal to be taken into account in determining pack-pay orders

d) Requiring the health and safety of other employees to be considered when determining whether an employer's decision to dismiss was harsh, unjust or unreasonable.

e) Emphasising reinstatement as the primary remedy

f) Extending the qualifying period from 3 to 6 months

g) Allowing some claims to be dealt with informally without initial compulsory hearings – on the papers

h) Reducing the quantum of compensation that can be awarded

i) Improving the criteria used for determining if the dismissal was unfair. and

j) Making technical changes to the penalty provisons for lawyers and agents who encourage unmeritorious changes.

37. Under the *Termination of Employment Bill 2002* these last five initiatives only apply to claims in the small business sector. ACCI supports these initiatives but believes that they can and should apply to claims in respect of all workplaces under the federal system.

38. The issue of extensions of time is a practical issue that is increasingly causing problems for employers. Sections 170CE(7) and 170CE (7A) are too broad. The statutory criteria for an extension of time is simply "such period as the Commission allows on an application made during or after those 21 days." Such a broad discretion gives inadequate value to the 21 day limit. Indeed it should be recognised that in Australia unfair dismissal laws were initially subject to a 14 day limitation.

39. A stricter statutory test and approach is necessary for employer interests to be given balance with employee interests. The introduction of a statutory note in 2001 referring to the *Brodie-Hanns* case is inadequate – a broad discretion still applies even within the criteria set out in that case.

40. There are very good reasons for a strict time limit. If within three weeks an employee is not sufficiently motivated to take action to challenge their dismissal or find out if they can challenge their dismissal then they ought not have the right to do so. Delay creates prejudice for the employer and to the arrangements that have been made to replace the dismissed employee. Waiting until termination monies run-out, or lodging applications when told by associates of the right to sue should be inadequate grounds for extensions of time.

41. In a recent case an application was made 13 months out of time - after hearing that a fellow worker who made an application within time was successful. The application for an extension was ultimately not granted (it was established that within the 21 day period the worker had obtained information about the right to sue and had approached a union which had sought a years union dues up front plus the filing fee if they were to help out, and the worker had chosen not to take it further) – but the employer was put to substantial time and cost in defending their position well after the dismissal.

42. It may be said in response that a broad discretion is needed to cover all justifiable circumstances. Our view is that seeking to cover all justifiable circumstances, whilst well intended, is a flawed approach. Once a broad discretion is granted then both the justifiable and the non justifiable cases get heard. Until a decision is made the same prejudice to the employer and the replacement employee exists whether the application is justifiable or not justifiable. The non justifiable cases put employers to time and cost in the same way the justifiable cases do. No employer knows exactly how a tribunal member may react to a particular case, and so all cases need to be prepared and defended with vigour. Given that the jurisdiction is a right to sue jurisdiction over both fair and unfair dismissals, and given that prejudice accrues to the employer and the replacement employee the longer delay occurs, then stricter criteria and direction is required in the statute.

43. ACCI proposes that this include:

- Not permitting extensions of time in cases of failure by an applicant' representative;

- Having applications for extensions of time deal only with the extension applications and not merit issues on the dismissal (*Brodie-Hanns* does not reflect this position);

- Having extensions of time heard initially, quickly and with minimum cost;

- Reducing the scope for extensions of time to extraordinary and exceptional circumstances only.

CONSTITUTIONAL IMPLICATIONS / IMPLICATIONS FOR COMMONWEALTH/STATE RELATIONS

44. The Commonwealth unfair dismissal system was first established in 1993.

45. The 1993 law established, for the first time, a national jurisdiction. Until then, for the previous 20 or so years States had established unfair dismissal laws, which had a significant but restricted coverage due to the interaction of dual federal/State industrial systems and related constitutional constraints. Until 1993 federal law only regulated issues related to dismissal of employees in a limited and indirect manner (eg. through the award based conciliation and arbitration system).

46. The 1993 laws were based (in a constitutional sense) on the external affairs power and an international convention that was ratified by the Commonwealth without the concurrence of the States. This greatly added to the public controversy surrounding the 1993 laws.

47. In previous submissions to the Senate Committee ACCI has raised the multiplicity and interaction of multiple unfair dismissal systems as a substantial area of employer concern. In our 2002 submission on the *Fair Termination Bill* and the *Fair Dismissal Bill,* ACCI said:

> *"Aside from these practical considerations there are systemic issues of concern. We continue in Australia to have multiple unfair dismissal jurisdictions – one Commonwealth (certain federal employees, plus Victoria and the Territories) and five state systems (certain employees in NSW, Qld, WA, SA and Tasmania). One of the structural problems with unfair dismissal laws in Australia is the lack of coherence in the interaction of these laws. Although not at this point in time ACCI policy, a case exists for at least an open examination of whether a coherent harmonised structure for unfair dismissal laws in Australia is desirable. That concept is however beyond the parameters of these Bills – but is not a matter that should be ignored by policy makers, or go unmentioned in this submission."*
>
> *"It is due to the multiplicity of federal and State unfair dismissal laws that it is often difficult to separate attitudes of employers between federal laws as distinct from State laws. This should not be a surprise – in circumstances where so-called legal and industrial experts find it difficult to resolve questions of jurisdictional interaction it is not unexpected that many employers will not distinguish between federal and State industrial respondency."*

48. This matter was canvassed in general terms in the *Modern Workplace: Modern Future 2002-2010* Policy Blueprint that ACCI released in November 2002.

49. This Blueprint is a substantial policy document prepared by ACCI which overviews the operation of the Australian workplace relations system, and which makes recommendations on policy initiatives across multiple subject matters, including termination of employment and associated constitutional arrangements.

50. The Blueprint also highlights the regulatory nature of the system, and the direction of policy reform to achieve the desirable economic, industrial and social policy objectives.

51. *Modern Workplace: Modern Future 2002-2010* includes general support for harmonisation initiatives that are of net benefit. The Blueprint provides as follows:

> *"The scope to move towards a national harmonised system could be tested by creating in the interim a more uniform national system covering issue specific subject matters in appropriate areas as and when they come before the parliament." (page 43)*

52. Unfair dismissal is such a specific subject matter; and the *Termination of Employment Bill 2002* moves in this very direction.

53. Attached for the information of Committee members are extracts of the *Modern Workplace: Modern Future 2002-2010* Blueprint concerning harmonisation (chapter 2.6), unfair dismissal (chapter 7.2) and Termination of Employment (chapter 7.3).

54. Use of the corporations power in federal workplace relations laws (including unfair dismissal laws) is not new; employers have become accustomed to its use – particularly to underpin some of the major agreement making provisions of the federal *Workplace Relations Act 1996*.

55. The use of the corporations power to underpin unfair dismissal laws will create an expanded federal jurisdiction – and in that sense it is a move towards a simpler and more uniform system for nationally operating businesses or businesses operating or employing in more than one State/Territory.

56. The use of the corporations power more generally in the workplace relations system is also not a new concept. The proposal at a broad level was raised in a series of discussion papers released by the Commonwealth government in 2000, under the title '*Breaking the Gridlock – Towards a Simpler Workplace Relations System'*. Some of the analysis of the concept in those discussion papers is relevant to the consideration of just how the use of this constitutional power in the unfair dismissal context might operate.

57. Based upon the 'Breaking the Gridlock' series, it should be noted though that the use of the corporations power as proposed has its limitations:

a) At best, about 80-85% of workplaces may be covered (up from perhaps the current 50-55%).

b) Non-constitutional corporations such as partnerships, incorporated associations and sole traders would not be included.

c) State unfair dismissal laws and jurisdictions would remain, albeit with reduced overage.

58. It can be seen from the above that the Bill would have an impact on Commonwealth/State arrangements. However, it must be borne in mind that the level

of industrial coverage between Commonwealth and State systems has varied throughout the history of dual federal and state regulation, that it still does on a daily basis, and as the Breaking the Gridlock series illustrates, can do so in an arbitrary, dysfunctional and non rational manner.

59. Despite these limitations the proposal is a move in the right direction. If there is to be more uniform unfair dismissal laws operating in Australia then, this is probably the only realistic way that this can be achieved. Policy harmonisation between seven jurisdictions (six State and one Commonwealth) in such a contentious area as unfair dismissal regulation appears a forlorn hope. Limited administrative harmonisation has been attempted – for example, through the use of dual appointee tribunal members in some jurisdictions hearing matters under both federal and State unfair dismissal laws.

60. However ACCI's support for the concept is not unconditional.

61. It would be desirable, as *the Modern Workplace: Modern Future 2002-2010* Blueprint suggests that there be a process for considering in detail the case for and against moving towards a harmonised system more generally. The Blueprint suggests a process for that to occur over the course of this decade.

62. As mentioned national employers operating across jurisdictions will generally see this initiative as sensible and meaningful.

63. However employers operating only in one jurisdiction will see no immediate impact on their business (but some may nonetheless see conceptual merit in the proposal).

64. For employers in both categories, the source of unfair dismissal laws (ie whether they are made by federal or State parliaments) – important as that may be – cannot be divorced from the content and regulatory impact of the laws.

65. In other words, it is not in the interests of individual employers to have a source of law if that law imposes higher or more rigorous regulatory or procedural burdens when terminating staff than would otherwise be the case.

66. For this reason ACCI considers it essential that this proposal be accompanied by amendments that provide some substantive policy or procedural relief for employers from the burden of unfair dismissal laws.

67. As mentioned above, the *Termination of Employment Bill 2002* does that, and is supported with the qualifications outlined in this submission.

SUMMARY

68. The Commonwealth unfair dismissal system has been the subject of repeated reviews and debate since its introduction in 1993. It remains a contentious area of public policy, especially within the employer community. We have not yet achieved a satisfactory policy balance between the rights of dismissed employees and the burdens imposed on employers.

69. In any event, this is an area of law that is in need of ongoing review and attention given the potential for decisions and practices to alter the statutory purpose and intent on an ongoing basis. Similarly, taxation laws are subject to ongoing amendments on a near annual basis to ensure that the implementation and interpretation of laws continues to properly reflect the will of parliament, and the supervening goal of protecting the taxation revenue base.

70. The procedural and policy amendments in the *Termination of Employment Bill 2002* are supported, but should apply to all business. They will, if enacted, improve the operation of the Commonwealth unfair dismissal system. They should be part of a suite of measures that are made to the law. There are other measures, which could be in addition or as alternatives, which should also be pursued.

71. The constitutional amendments proposed by the Bill through the use of the corporations power are supported with the qualifications set out in this submission.