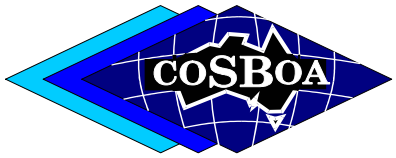
Submission no: 17
Received: 19 February 2003

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# Council of Small Business Organisations of Australia Ltd.

ABN 43 008 597 304

19 February 2003

**Attention: John Carter**
Australian Senate
Employment, Workplace Relations & Education Committee
Suite SG.52
Parliament House
Canberra ACT 2600

Email – eet.sen@aph.gov.au

**Subject: Inquiry into the provisions of the Workplace Relations Amendment (Termination of Employment) Bill 2002**

Dear John,

Please find attached the Council of Small Business Organisations of Australia Ltd (COSBOA) response to subject inquiry. This overview and response has been prepared by the Chair of COSBOA's Industrial Relations Policy Committee, Ian Baldock, Executive Director of the Queensland Retail Traders and Shopkeepers Association.

Please feel free to contact Ian on 07 or myself in regard to this submission. I apologise for not meeting your deadline but our Council meeting only took place last week and we were waiting for some additional responses and as they come in I will contact you because we are linking this in with the Employment, Workplace Relations and Education References Committee Small Business Employment Report – Feb 2003.

Yours sincerely

Mike Potter

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# Council of Small Business Organisations of Australia Ltd.

ABN 43 008 597 304

**Council of Small Business Organisations of Australia Ltd overview and response to**

**'Inquiry into the provisions of the Workplace Relations Amendment**

**(Termination of Employment) Bill 2002"**

**Prepared by the Queensland Retail Traders and Shopkeepers Association, Industrial Organization of Employers**

## 1. Background to the Creation of the Bill

Provisions regulating Industrial Relations in Australia run on two parallel systems, the Federal system and the respective State-based systems.

If a business operates under a State Award the Industrial Relations laws of that particular State will govern it. If a business operates under a Federal Award the Federal Industrial Relations laws will govern it.

There is a clear line of distinction at present, the exception being the Northern Territory, Australian Capital Territory and Victoria. It is clear why the two territories are covered by a Federal system, however the situation in Victoria requires some limited explanation.

Through referral of powers, Premier Kennett achieved a move from a Victorian State-based Industrial Relations system, to a Federally based system. This effectively abolished the role of the Victorian Industrial Relations Commission.

The Federal Government considers this a pioneering move in their goal toward achieving a unified one-system-fits-all response to Australian Industrial Relations.

The next step is the creation of a unified one-system-fits-all approach to the area of Dismissal: *The Workplace Relations Amendment (Termination of Employment) Bill 2002* (Cth) (The Bill).

This Bill has three main objectives:

1. To Improve Federal Unfair Dismissal Law for Small Business;
2. Improve Federal Unfair Dismissal Law generally;

3. Widen Federal Unfair Dismissal Law's coverage.

An analysis of the likelihood of achieving these objectives requires a comparison to be made between the contents of the Bill itself and the outcome likely to be achieved, against wider implications such as Impacts on Procedures, Impacts on Small Business, Relations Between the Commonwealth and States, and possible Constitutional Implications.

## 2. The Likely Outcomes

### 2.1 Impacts on Procedures

Currently, the only businesses covered by Federal Awards are those that exist in more than one State, with the exception (as stated) of the Territories and Victoria. Any business, whether they are a constitutional corporation or not, who is only based in one state, will be subject to the relative state based Awards. This means that a state based business will be also subject to the state based Unfair Dismissal laws.

The Bill operates under the specific premise that the Federal Unfair Dismissal legislation is less onerous on businesses, particularly small businesses, than the state based Unfair Dismissal legislation.

As such, the Bill proposes to allow any constitutional corporation, whether they are in one or many states, access to the Federal Unfair Dismissal legislation. It is argued that the procedures will be much more beneficial to both the business and the employees.

#### 2.1.1 Is State-based legislation more onerous?

There is no doubt that the Bill proposes a move toward uniformity in Unfair Dismissals across the states and Territories of Australia. The question is though, are the state-based laws more onerous?

If we analyse some of the specific proposals we get a more accurate picture of what the likely impact on procedures will be:

*Proposal A: Reduce the Amount of Compensation Available to Employees*

Any reduction in the available compensation awarded to employees who have been unfairly dismissed is beneficial for employers. However, it is the experience of the QRTSA that very rarely would a retail employee who has been unfairly dismissed, receive costs awarded higher than one month's damages. In such cases the damages are usually meritorious, in that the employer has completely handled the dismissal incorrectly.

As such we do not believe that a reduction in the amount of compensation under the Federal system will have any great impact on employers currently operating under the State systems.

*Proposal B: Contributory Conduct of Employees Considered; AND*

*Proposal C: Safety and welfare of other employees.*

It is definitely a benefit for the provisions to contain specific direction regarding the consideration of contributory conduct of employees in hearings of allegations of unfair dismissal along with the safety of other staff members. However, the Federal Government has not shown anything by way of evidence to suggest that the state-based Commission do not take these items into consideration. In most instances this element of consideration would fall within 'other matters relevant'.

As such we believe that the proposal has limited impact on businesses working under state systems.

*Proposal C: Increase of 'probation period' from three to 6 months.*

A 'probationary period' is one in which an employer and employee can choose to end the employment relationship with no repercussions for either side. This means that an employee is prohibited from making a claim of unfair dismissal, unless the reason for the dismissal itself is invalid (e.g. discriminatory).

There is no doubt that an extension in the availability of probationary periods would be beneficial to all businesses. However, this aspect is considered by the Federal government as a 'carrot', to access small businesses support for The Bill. The question is, will small businesses really benefit from this?

To answer this one must consider how many small businesses are likely to be affected by The Bill? This is a key question, particularly when one considers that the Federal Government are advocating The Bill as a 'saviour' for small business.

## 2.2 Impact on Small Business

Firstly, there is no definition of small business contained in The Bill. The Federal Government assumes that many constitutional corporations would be small businesses, therefore 'roping them in' under the proposed changes. The figures quoted are between 50 to 85% of employees to be eventually covered.

Unfortunately in the opinion of QRTSA, the reality is there are not as many constitutional corporations operating as a small business, as the Federal Government would advocate. Specifically, we submit that a small business is a business that is operating with less than 20 staff working at any one time.

Our membership statistics shows that only approximately 20% of our 3000 odd members are constitutional corporations. That is, only about 600 members. Of these members many are large businesses that would not fall within the definition of small business as stated above.

Effectively this means that the true small businesses who really need an extended probationary period, will not have access to the six months in any case.

In summary, we submit that the Federal Government arguments to Improve Federal Unfair Dismissal Law for Small Business only apply in a limited capacity to the small percentage of small businesses who are or possibly could be under the proposed changes, covered by the Federal system. True small businesses under state systems are unlikely to benefit.

**We strongly submit that the ONLY WAY to assist small business is through a small business exemption, applying Federally and in the states.**

This leads one to consider why the Federal Government is advocating the plight of small businesses so heavily in this instance. We believe that the answer lies in the proposed objective of widening the Federal Unfair Dismissal Law's coverage.

2.3 Relations Between the Commonwealth and States

It is certainly no secret that the Federal Government seeks one set of Unfair Dismissal Laws across Australia. They advocate Premier Kennett's moves in Victoria as 'pioneering'.

However, the QRTSA submits that the 'withering away of the states' is not necessarily beneficial for Industrial Relations in Australia. We base this on a number of reasons:

*Defending the Queensland State System*

The Federal Government advocates that the State systems are more burdensome than the Federal system.

An 'On the papers' scheme, where the Federal Registrar has the power to summarily dismiss invalid claims of unfair dismissal upon receipt, was part of *Industrial Relations Act 1999* (Qld). In practice, it is the submission of the QRTSA, that the registrar rarely considers the 'papers' in question, and all claims are heard regardless of their validity in the first instance. Having the legislation in place does not mean having the legislation in practice. No doubt the same thing would occur in the Federal proposal.

*Placing emphasis on the framework of the State systems and faults of inconsistency*

The Federal Government advocates that, compared to the Federal system, the State systems have a poor framework for dealing with unfair dismissals. Further, it is argued that differences between the Federal and State systems, creates levels of inconsistency that undermine the force of legislation in this area.

However it is the submission of QRTSA that what is lacking is the admission that where very similar systems exist, with minor differences in detail, it is not the system which provides the most inconsistency, it is the administrators of that system, the individual commissioners, who all interpret actions of applicants and respondents differently and are all subject to human error.

In summary, we do not believe that the level of consistency proposed will be achieved in practical terms.

The QRTSA believes that the Government's proposal in this sense serves only to weaken the role of the state based Industrial Relations Commissions. We feel this is problematic in that a Federally based system creates a situation where our Queensland-based members are governed by decisions which are made in Victoria or New South Wales. An example is annual Wage increases for federal Awards. The initial decision is typically made in Victoria with repercussions filtering through to businesses in the States. We do not want a situation where decisions on unfair dismissal laws and potentially all industrial relations decisions are made in another state where the interests of our members maybe of low priority.

## 2.4 Constitutional Implications

Whilst the Federal Government has power under the Constitution to make these amendments, we note the words of the constitution also must be considered in the light of whether there are changing needs and values of the Australian community.

Unfortunately we believe that inadequate evidence has been shown to suggest that the changing needs and values of the Australian community necessitate the changes outlined. The Federal Government has actually provided very limited detail on the reasoning for the changes in its Second Reading Speech and explanatory memorandum. The study that is quoted is actually a Melbourne Institute of Applied Economic and Social Research study, the results of which would have very limited capacity to explain the situation in Queensland, or the other states for that matter.

Our submissions show that the proposal has none of the practical benefits that the Federal Government advocate, except for the benefit the Federal Government has in widening its coverage in the arena of Industrial Relations.

3. A Summary of QRTSA's Submission

The outcomes the Federal Government hopes to achieve, in reducing confusion and 'tightening' the Australian Industrial Relations system, would only be achieved through a change in Federal and State Award coverage. This is where the confusion truly lies. If the State Awards are abolished first with only Federal Awards across the states, the practice of Industrial Relations will be much more streamlined. Only then will the legislation be able to be amended to reflect a true Australian system.

The QRTSA submits that the best option is maintaining the status quo until such time that the base of the system, the Awards under which businesses operate, are changed to reflect a Federal approach to Award-coverage. Only then can specific details such as unfair dismissal be addressed. The relevance of the State based Industrial Commissions remains unchallenged by the government's arguments with regard to this matter.

In stating the aforementioned (i.e. Abolish State Awards) we should at the same time advise that these comments are made in the context of the argument relating to the proposed unfair dismissal laws only. The wider argument regarding the award system as a whole is one for another time.

We would state however that we would still have reservations regarding any such future proposal that it would depend on the structure proposed and the fine print contained within any such proposal.