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Workplace Relations Amendment
(Termination of Employment) Bill 2002
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AMWU

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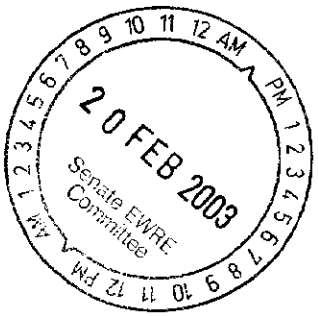
John Carter
Secretary
Australian Senate
Senate Employment Workplace Relations
and Education Committee
Parliament House
CANBERRA ACT 2600



Dear Mr Carter,

Workplace Relations Amendment (Termination of Employment) Bill 2002

Please find attached the Australian Manufacturing Workers Union submission to the Senate Inquiry into the Workplace Relations Amendment (Termination of Employment) Bill 2002.

Do not hesitate to contact me should you have any queries regarding our submission.

Yours sincerely,

DOUG CAMERON
NATIONAL SECRETARY

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Executive Summary

The AMWU's submission to the Senate Inquiry into the Workplace Relations Amendment (Termination of Employment) Bill 2002 (the Bill) is presented in five Sections. Section one discusses the background of the Bill and raises the union's concerns over the number of previous attempts made by the Government to exempt small business from unfair dismissal laws. This section also deals with the AMWU's concerns over the disturbing absence of credible evidence the Government has relied on in the past, and continues to rely on, when making the claim that unfair dismissal laws have a detrimental effect on small business.

Section two discusses Australia's international standing in relation to employment protection. This section highlights that even without the passing of the Bill Australia's unfair dismissal laws are alarmingly at the "easy to dismiss" bottom quintile amongst OECD countries.

Section three argues that there is a lack of credible empirical evidence in support of the Government's claim in relation to the existance of a direct correlation between the growth of small business and unfair dismiss laws. This section also examines the evidence that Government is relying in support of the Bill and argues that this evidence does not withstand the rigours of standard testing.

Section four looks at the effect that the Bill, if passed, will have on small business employees. This section makes a comparison of existing protections and highlights that the Bill will seriously disadvantage employees of small business. This section uses NSW unfair dismissal laws as an example to highlight the significant loss of entitlements for small business employees if they are forced, by the Bill, into the current Federal jurisdiction.

Section 5 raises the AMWU's concerns that the Bill will not achieve the Government's stated aim to lessen the complexity of current unfair dismissal laws. On the contrary the AMWU argues that the Bill will serve to increase the complexity of the current laws in two ways i.e. 1) by the introduction of another category of eligible employee and 2) the inevitable jurisdictional arguments that will arise in relation to definitions of a constitutional corporation.

The AMWU makes this submission not only as a major party within the Industrial relations arena, but more importantly this submission is made in light of the union's significant interest in this matter as a result of the large number of workers who are employed in small business within the manufacturing industry. There are currently approximately 25% of employees employed in small business within the manufacturing industry[1] The AMWU estimates that a similar number of it's membership will be affected by the changes proposed in Workplace Relations (Termination of Employment) Bill 2002 (the Bill). The AMWU therefore has a important role in representing it's concerns to the Senate Inquiry into the Workplace Relations Amendment (Termination of Employment) Bill 2002

The AMWU rejects the Bill in it's entirety and submits that the Senate do the same.

The AMWU does not believe that the Bill is a balanced proposal and we question the genuineness of the Prime Minister's claim that this Bill is to "introduce a new system based on the principle of fair go all around"[2]. The AMWU contends that if the Bill is passed, a substantial number of employees will not be given 'a fair go' and will be be deprived of fundamental employment provisions which serves to protect them in the workplace. Such employment protection rights should be available to **all** Australian employees.

This submission will specifically pertain to the issues which the AMWU considers are relevant when the Senate considers this Bill. The issues are as follows:

1. Background of the Bill;
2. Australia's international obligations with respect to employee protection;
3. The evidence that the Government is relying on to substantiate it's claim that unlawful termination provisions create an unnecessary burden for small business.
4. The effect that the Bill will have on employees of small business and the potential problems that will arise for small business should the Bill be passed by the Senate.
5. The Difficulties arising from the definition of a Constitutional Corporation.

[1] Manufacturing Industry Australia, ABS, Cat. No. 8221
[2] John Howard, 1996

Section One

Background of the Bill

This is the eighth attempt by the Government to introduce exemptions for small business employers in relation to unfair dismissal laws. It is important to note that as with the past seven attempts the Government has not provided any real and genuine evidence to substantiate it's claim that exemptions for unfair dismissal laws are indeed necessary or warranted. The Senate has quite rightly rejected the Government's past seven attempts to introduce these types of changes. Nevertheless the Government continues to persist with what can only be seen as an ideological bent to further erode the employment protections of Australian employees.

Section Two

Australia's international obligations with respect to employee protection

The AMWU is extremely concerned that if the Bill is passed, it will have a further negative impact on Australia's current low standing viz labour relations at an international level. In 2001 the OECD[3] reported that Australia's federal unfair dismissal laws are in the "easy to dismiss" bottom quintile. What this means is that Australia's level of employment protection rates amongst the lowest in OECD countries. This not a position Australia can be proud of. Given our already low reputation in this area the Government should not be seeking to make it even "easier to dismiss" it's employees as the Bill seeks to do.

Furthermore, this Bill does not show that Australia is at all genuine about the protection of worker's entitlements. This Bill sends a very clear message to the world that Australia is not genuine about international obligations in relation to employee protection. Rather than proposing further reductions to existing provisions the Government should be seeking to improve Australia's position in this regard.

3 Innovations in Labour Market Policies, the Australian way, OECD, 2001

Section Three

The evidence that the Government is relying on to substantiate it's claim that unlawful termination provisions create an unnecessary burden for small business.

The Government claims that burdens on small business include substantial financial impacts as well as significant impediments on employment growth. This section will also highlight the lack of credible evidence that the Government has provided in relation to these claims.

The AMWU remains extremely concerned over the lack of supporting evidence provided by the Government in relation to it's claims that small business should be given exemptions from unfair dismissal laws. In 2001 the Government was unable to convince the Full Court of the Federal Court that unfair dismissal laws impeded small business in any way. In fact such lack of evidence was highlighted by the Full Court of the Federal Court in a decision it made in relation to matters concerning unfair dismissals laws (the "Hamzey" decision)[4]. In it's decision the Full Court stated:

> "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".

Not only is there an absence of credible evidence to support the Government's claim of the effect of unfair dismissal laws on small business, studies that have been undertaken reveal that unfair dismissal laws are not an issue for small business .

[4] *Hamzey v Tricon International Restaurants trading as KFC* [2001] FCA 1589 (16 November 2001]

The Telstra Yellow Pages, Small Business Index July 2002[5], reveals that small business is not concerned with its obligations under the current unfair dismissal laws. This study shows that as little as 5.6 % of small business includes unfair dismissal as a potential employment growth impediment or restriction.

Similarly the 1995 Australian Workplace Industrial Relations Survey[6] found that only 6% of employers rated unfair dismissal laws as an area which required change.

In it's report on small business employment which was tabled on 6 February 2003, the Employment, Workplace Relations and Education Reference Committee also found that unfair dismissal laws were not an issue for small business[7].

The results of the above together with the Government's continuing refusal to accept the results of other quantitative data provides the basis for the AMWU submission that the Government's ongoing attempts to exempt small business from these laws are based on nothing more that ideology.

In the absence of any evidence supporting the claim that unfair dismissal laws have a detrimental impact on small business the Government commissioned a study in 2002. This study was conducted by Don Harding of the Melbourne Institute of Applied Economics and Social Research [8]. Mr Abbott refers to the results of this study during the second reading of the Bill. The main areas that were highlighted by Mr Abbott in his second reading speech were that unfair dismissal laws are a source of concern for small business; that the existance of both state and federal jurisdictions creates confusion and unnecessary complexity and the financial burden incurred by small business in relation to compliance of such laws.

[5] Telstra Yellow Pages, Small Business Index July 2002
[6] 1995 Australian Workplace Industrial Relations Survey
[7] Parliamentary Debates, Senate, 6 February 2003, p.378
[8] Don Harding *The Effect of Unfair Dismissal Laws on Small and Medium Sized Business* Melbourne Institute of Applied Economics and Social Research 2002

Unlike the other survey's cited above where the views of small business employers were being sought on a range of issues, this survey dealt with the single issue of termination of employment only. This resulted in the employers being unable to prioritise genuine concerns they may face with the operation of their business such as taxation, GST and superannuation. Rather, employers were required to focus only on questions regarding unfair dismissal laws. This type of survey techniques is referred to as "closed ended" questioning. The closed ended questioning format narrows the range of responses but more importantly can distort the findings[9]it also is used in to assist the surveyor in seeking the response she/he requires[10]. The validity of the studies findings are therefore questionable.

Further, the study was not limited to small businesses i.e. 20 or less employees the target group of the Bill. The study surveyed business with fewer than 200 employees[11]. The study therefore does not accurately reflect the genuine views of small business in relation to unfair dismissal laws. In addition the results of the survey do not accurately reflect the real issues and difficulties faced by small business.

The methodology used in the survey does not stand up to the application of any rigourous testing and therefore its conclusions are flawed. For example, the manner in which Mr Harding undertook to reach his conclusion that compliance with unfair dismissal laws cost small business at least $1.3 billion a year is questionable.

Simply put Mr Harding reached his opinion based on a question put to small business to give a "best estimate" of the cost of such compliance. Mr Harding then took an average of these "best estimate" figures and multiplied this by the number of small business to reach an overall conclusion that unfair dismissal laws cost small business $1.3 billion dollars a year. What is most concerning to the AWMU is that irrespective of the apparent manipulation of the results, the Government is

[9] Macioni.J. Sociology, *A Global Introduction*, 1997, Prentice Hall, Europe
[10] Ibid
[11] Don Harding *The Effect of Unfair Dismissal Laws on Small and Medium Sized Business* Melbourne Institute of Applied Economics and Social Research 2002

nevertheless relying on this information as one of the primary grounds for introducing the Bill. Conveniently, the Government has not mentioned of the fact that two thirds of the respondents to the survey report that compliance had had no financial impact. The Government appears to have no regard whatsoever for these facts.

The Government continually asserts that the exemption of small business from unfair dismissal laws will create more than 50,000 new jobs. Again the government has yet to provide any credible evidence in support of this claim. In fact on the contrary Australian Bureau of Statistics[12] results show that during the period in which the predecessor to the Workplace Relations Act 1996, the Industrial Relations Act 1988 operating significantly stronger unfair dismissal protection for employees in relation to unfair dismissals, the small business sector grew and developed.

The Full Court of the Federal Court in It's decision in Hamzey expressed It's concern that there was no correlation between employment growth and unfair dismissal laws. The Full Court stated:

> ...it seems to us the suggestion of a relationship between unfair dismissal laws and employment inhibition is unproven.

In fact there are more relevant factors which provide the basis for employment growth in small business. These areas include supply and demand, subsides and taxation relief[13].

The Government claims that the Bill will assist with the process of heading towards a desire to create a national industrial relations regime. It is difficult to accept this as a genuine claim given that in 1996 parts of its own amendments to the Industrial Relations Act 1998 introduced the current limits to the unfair dismissal provisions. The Industrial Relations Act 1998 provided a remedy to all employees for unfair

[12] ABS, Australians' Employment and Unemployment Patterns 1994-1996, ABS Cat. No.6286.0
[13] J Revesz & R Lattimore. Small Business Employment Industry Commission August 1997

dismissal claims. The Government's amendments to the Act took away this access and limited Federal remedy to Federal awards employees only.

In light of the Government's reversal of the amendments it made in 1996 the AMWU submits that the Government is simply seeking to regain the control of the industrial relations regime it lost with the demise of the state Coalition Governments. This is not the basis upon which sound legislation is made.

Section Four

The effect that the Bill will have on employees of small business and the potential problems that will arise for small business should the Bill be passed by the Senate.

The Government's claim that the Bill will improve federal unfair dismissal laws begs the question "who will benefit from it?" The Government claims that the bill will provide benefits to small business even though the changes are not being sought by small business.

Further this bill does not improve the unfair dismissal laws for employees. The terms of employees' rights this bill erodes existing protections and establishes two further classes of employees i.e.. those who have access to unfair dismissals and those who don't. For example employees of small business:

- will be required to wait twice the amount of time as other employees before becoming eligible to make an unfair dismissal application;
- in some circumstances employees will find that the AIRC is able to dismiss an application prior to a hearing; and
- be unable to appeal a decision by the AIRC to dismiss an application.

Another claim from the Government is that the exlstance of a state and federal regime creates a significant level of confusion for small business which leads to difficulties with compliance. If there is a genuine issue regarding small business' understanding of unfair dismissal laws there are a number of ways to deal with such matters without seeking to erode workers' protection and employment rights. For example the Government could provide small business with easy to understand information in relation to the obligations for unfair dismissal in a similar manner in which the Government sought to enlighten the Australian community on it's ant-terrorism strategy.

If passed the Bill will restrict small business employees and employers from access to easy to use unfair dismissal regimes. For example under the New South Wales Industrial Relations Act 1996 it is possible for unfair dismissals to be dealt with before a dismissal takes place. This type of provision results in a saving of resources for all parties involved . Further, in NSW casuals can make application for unfair dismissal after 6 months of employment on a regular and systematic basis whether employed in the small business sector or otherwise. If this Bill passes then these types of vulnerable employees will be required to wait a further 6 months before becoming eligible to apply for unfair dismissal remedy.

If the bill is passes NSW employees will be disadvantaged by:

1. not having access to the preventative measures which can assist with preventing an unfair dismissal taking place[14].
2. having less emphasis placed upon procedural fairness and natural justice[15]
3. losing the right for all employees including small business employees, are eligible to make application[16]
4. the commission is able to deal with unlawful dismissals[17]

[14] s89(7) New South Wales Industrial Relations Act 1996
[15] s88(b) New South Wales Industrial Relations Act 1996
[16] s83 New South Wales Industrial Relations Act 1996
[17] s210New South Wales Industrial Relations Act 1996

5. losing a more accessable regime.

As with many of the States, the unfair dismissal provisions in NSW have been developed in consultation with employer and employee representatives and have resulted in a well balanced procedure which benefits all involved. Interference from the Federal Government in this process will amongst other things be detrimental to this balance.

As previously submitted the AMWU believes that there is no sound basis for the Government to extend the federal unfair dismissal jurisdiction whilst at the same time attempting to reduce the entitlements of employees employed by small business.

What this expansion of eligibility will result in if the Bill is passed is the introduction of a decrease in of the current entitlements of small business employees. For example the probationary period will be increased from 3 months to 6 months for small business employees. Thereby creating another class of employee who can seek remedy for unfair dismissal. And as with all other aspect of the Bill the Government has not provided any sound reasoning for making such changes which disadvantage small business employees. Rather than achieving it's purported aim to simplify the Industrial relations regime, the Bill simply adds another category of eligibility for unfair dismissal into the mix.

If granted this Bill will enforce an obligation on the AIRC to dismissal small business employee's application without a hearing if during the conciliation process the matter has no merit. The Bill denies small business employees with access to the natural justice principles which all other employees are entitled to. Small business employees will not have the opportunity to have their case decided upon on matters of fact. The fabric of our legal system is built upon the rights of individuals to have their issues dealt with based on facts. This bill disregards this very basic right.

Further the bill prevents an employee from appealing a decsion of the AIRC to dismiss an application prior to hearing.

These types of amendments in the context proposed will also disadvantage employees who are unable to be represented during the conciliation process. Employees who are not represented may be at a disadvantage.

Section 5

The Difficulties arising from the definition of a Constitutional Corporation

Case law in relation to the definition of a constitutional corporation can often be complex. Introducing the Corporations powers to underpin the termination of employment legislation will only serve to bring further complexity into the proposed unfair dismissal provisions for both employers and employees. If this Bill passes, it will be inevitable that jurisdictional arguments will arise over whether an employer is a corporation, as defined by the Constitution. This will result in added costs for both the employer and employee and for additional time to lapse before the merits of each case can be examined.

Conclusion

Irrespective of the unsubstantiated claims made by the Government regarding the cost of unfair dismissal on small business, there remains no moral, factual or legal reasons why these employers should be exempt from treating their employees fairly. If passed the Bill takes away the fundamental right of employees in small business to seek the same remedies which are available to employees who are employed in a business with more than 20 employees .

The AMWU seeks that the Senate continue it's rejection of the Government's proposal to exempt small business from unfair dismissal laws on the basis that:

- it will further damage Australia's international standing;
- there is a lack of evidence supporting the Government's claims that unlawful termination provisions create an unnecessary burden for small business and preventing, amongst other things, jobs growth;
- and finally, the disadvantage created for small business employees.

The AMWU makes this submission in addition to lending our full support to the ACTU's submission to the Senate Inquiry into the Bill.