SENATE EMPLOYMENT WORKPLACE RELATIONS SMALL BUSINESS & EDUCATION LEGISLATION COMMITTEE

INQUIRY INTO

THE WORKPLACE RELATIONS AMENDMENT (FAIR DISMISSAL) BILL 2002

SUBMISSION BY

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WORKPLACE RELATIONS AMENDMENT (FAIR DISMISSAL) BILL 2002

The SDA is totally opposed to this Bill.

The aim of this Bill is to exempt employers with fewer than 20 employees from the unfair dismissal provisions of the *Workplace Relations Act 1996*.

The Bill allows the Commission to dismiss an unfair dismissal application where there are fewer than 20 employees without a hearing and without the applicant having a right of appeal. Casuals with less than twelve months regular service are not counted in the 20. This could mean an employer could have 30 employees but 11 are casuals with 11 months service and therefore the employer is exempted.

It is unwarranted and unjustifiable.

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

This proposed amendment is nothing other than an attempt to deny workers in small businesses legitimate redress where they have been unfairly dismissed by their employer. This is an issue about equity and fair treatment.

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

There is a need for the overall circumstances of all players to be taken into due account. Already the Commission has sufficient flexibility and discretion to adjust its decision making to take into account the realities that currently occur in any business. However, at the end of the day there are

fundamental aspects of the principles of natural justice which should not be able to be removed simply because a business is a small business.

Fair Treatment of Small Businesses Equally Applies to their Employees

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

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

The proposed amendment removes from small businesses the obligations that they seek to impose upon everyone else, namely fair and equitable treatment.

The structure of the amendment means that an application by an employee will not be able to be processed by the Commission unless the employer has a particular number of employees. It must be considered that such a provision will invariably work to the disadvantage of employees in small businesses.

As the Commission already has an overriding obligation to apply a fair go all around in relation to any unfair dismissal before it, there appears to be no justification whatsoever for the proposed amendment.

Proposed Section 170CG adds nothing to the Workplace Relations Act in terms of making the process fairer but adds everything in relation to giving an unfair advantage to small employers against their employees if they have unfairly dismissed from their employment.

If, as the proposed amendment provides, only large employers can be held accountable for the unfairness of a termination, it will, in our view, encourage some small employers to be brutal in the manner in which they

terminate employees. If small employers are protected absolutely from any redress being pursued through the Commission as a result of the way in which the termination was carried out, this will be nothing other than a green light to employers who wish to act in an unconscionable and inhumane manner.

The current unfair dismissal laws act, in our judgement , as a catalyst towards ensuring employment practices which are fair and just.

What Evidence?

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

Independent surveys have found that the unfair dismissal laws are not a key priority concern for small business. The 1995 AWIRS Survey reported that only 0.9% of small businesses gave unfair dismissal laws as a reason for not hiring more staff. It cannot legitimately be said that this legislation will in any material way aid small business by addressing an issue of burning concern.

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

The key justification for removing unfair dismissal laws from small business is to enable small business to embark upon an employment growth exercise which will see significant growth in employment by small business.

The Government has continually asserted that the major, if not overriding, constraint against small business employing additional labour is the presence of unfair dismissal laws. These claims have been repeated since the election by Minister Abbott as justifying the early re-introduction into

Parliament of legislation amending the Workplace Relations Act to exempt small business from unfair dismissal laws.

In the political debate to date, on each occasion that the Government has introduced Bills into Parliament seeking to reduce the application of unfair dismissal laws to business or to categories of employees, the government has continually relied upon an alleged nexus between the presence of unfair dismissal laws and growth in employment. On each occasion the Government has asserted very strongly, and with support of various academics and employer organisations, that unfair dismissal laws act as a real constraint against employment growth.

This argument has been waged predominantly at the level of political rhetoric. It has not been waged on the basis of arguing from clearly established facts. The Government has relied upon assertion and nothing more.

The Real Evidence, Not Rhetoric: Federal Court Examination

The Association takes this opportunity to draw attention to aspects of a recent Federal Court decision in which a Full Court of the Federal Court, comprising Justices Wilcox, Marshall and Katz, engaged in a reasonably thorough examination of the effect of unfair dismissal laws on employment growth. This examination by the Federal Court on what is predominantly a political argument, arose because the Minister, who had intervened in the proceedings before the Federal Court, led evidence supporting a contention that there was a strong link between the presence of unfair dismissal laws and growth in employment.

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

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

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

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

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

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

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

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

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

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

The Federal Court immediately went on to say at paragraph 61:

> *"Professor Wooden's view was an entirely theoretical construct. He said in his affidavit:*
>
> *'The question may well be asked as to what would happen if the unfair dismissal laws were to apply to the types of casual employees excluded by the regulations. The answer essentially is that there would be fewer jobs, especially for early school leavers, unemployed people and persons seeking to re-enter the workforce after a period of absence. Firms value the flexibility afforded by casual employment. In particular, they value the ability to vary working hours quickly and sever employment relationships at short notice. Extending the reach of unfair dismissal laws to casual employees would effectively remove*

one of these flexibilities. That is, employers would no longer have the same flexibility to vary employment numbers in line with variations in demand for their product. Further, employers would have to spend more time, money and effort in deciding who they hire. If they hire someone who is a poor fit with their business, it will now be much more difficult and costly to remove that person.'

The Federal Court went on at paragraph 62 to say:

Professor Wooden conceded 'many employers do not use this flexibility', 'as is reflected in the large proportion of casuals working regular hours in apparently long term jobs'. However, he argued that, 'just because a firm does not use the flexibility that casual employment potentially affords does not mean it does not value it."

At paragraph 63 the Full Court said:

Professor Wooden suggested flexibility was especially important to small business enterprises, which had relatively higher casual densities. However, he did not offer any evidence, either statistical or anecdotal, to support his belief about the importance of flexibility to small business." (Emphasis added)

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

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

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

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

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

At paragraph 66 of it decision the Federal Court noted:

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

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

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

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

> "*In the absence of any evidence about the matter, it seems to us the suggestion of a relationship between unfair dismissal laws and employment inhibition is unproven. It may be accepted, as a matter of economic theory, that each burden that is placed on employers, in that capacity, has a tendency to inhibit rather than encourage, their recruitment of additional employees. However, employers are used to*

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

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

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

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

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

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

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

Words are not Evidence

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

The most unfortunate aspect of the debate over unfair dismissal laws for the last few years has been the total absence of solid empirical data to support any of the rhetoric and assertions of the government and those supporting the Government's political line.

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

The Federal Court decision has, for the very first time, thrown into very stark relief, the reality that the Government has argued for removal of unfair

dismissal laws on nothing other than assertion and rhetoric. The decision of the Full Court of the Federal Court of Australia deserves to be taken seriously and it offers quite clear instruction to all players in the political debate on this matter, namely, generate the accurate empirical data which will allow the debate to go ahead on the basis of facts rather than rhetoric.

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

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

It is important to clearly understand that those who claim to champion the cause of small business, especially in relation to unfair dismissal legislative reform, do not produce or rely upon any hard data supporting their claims.

Current Legislation and Best Practice

Currently unfair dismissal provisions exist in States which have their own industrial relations laws and these laws operate when not inconsistent with the federal law.

Victoria has (with some exceptions) handed over its industrial relations jurisdiction to the Commonwealth. The ACT and NT have no choice but to have their industrial relations regulated by the Commonwealth.

Where a State jurisdiction exists, there will remain the possibility that the State unfair dismissal laws will ameliorate the worst aspects of this Bill. Such cannot be the case in Victoria, NT and ACT. In these three jurisdictions the denial of access to the federal unfair dismissal jurisdiction for employees employed by an employer who employs 20 or less employees is in fact a denial of access to any effective unfair dismissal jurisdiction.

The proposed Bill will therefore have a disproportionate effect on Victorian NT and ACT employees.

The presence of an effective unfair dismissal jurisdiction should act as a positive incentive to small business employers to adopt "Best Practice" in the treatment of their employees.

Utilisation of Best Practice in Human Resource Management will lessen the occurrence of unfair dismissal claims and even where such claims are made, will lessen the resources spent in addressing such claims.

The SDAEA contends that the removal of the unfair dismissal jurisdiction from operating against a very large number of small business employers may, at the worst, encourage those employers to actively adopt "Worst Practice" in relation to their employees, or at best, remove any incentive for such employers to adopt Best Practice.

The SDAEA contends that there will be an adverse impact on the adoption and utilisation of Best Practice in a whole range of important business management practices if the Government proposed Bill is passed.

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

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

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

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

No Disadvantage Test

The Senate should also consider the impact of this Bill in the context of the *no disadvantage test* which operates under the Workplace Relations Act in the case of AWA's and non-union certified agreements.

The *no disadvantage test* in Part VIE of the ACT applies a global approach that takes into account both relevant awards and relevant Commonwealth or State laws. The removal of the unfair dismissal legislation as proposed by the Bill will lower the level of the *no disadvantage test* for an employer.

Given the global nature of the *no disadvantage test* it may be possible for a small business employer to reinstate the current unfair dismissal provisions (if the Bill is passed) by way of an AWA or non-union certified agreement and offset that by a significant reduction in other employee entitlements, e.g. wages. A clever employer could gain the offsetting advantage described above and still never be caught by the unfair dismissal provisions by only employing short term casuals or fixed term employees.

Conclusion

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

The Bill aims to attack the weakest sector of employment and does so in a way which is cynical and hypocritical. It denies fundamental principles of equity and fairness to some employees, purely on the grounds of them being employed in small business.

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

The SDAEA urges the Senate to reject the Bill.