

THE WORKPLACE RELATIONS
AMENDMENT (FAIR
DISMISSALS) AND (FAIR
TERMINATION) BILLS 2002

SMALL BUSINESS COALITION
SUBMISSION
TO THE SENATE EMPLOYMENT, WORKPLACE
RELATIONS AND
EDUCATION COMMITTEE

8 April 2002

Background

The Small Business Coalition (SBC) is an informal grouping of 30 industry associations in Australia with an interest in small business issues. Members are drawn from a wide range of trade, commerce, professional and industry associations.

In relation to this submission, the following SBC members have provided key support information:

- Australian Chamber of Commerce and Industry (ACCI);
- National Farmers Federation (NFF);
- Motor Trades Association of Australia (MTAA);
- Australian Business Limited (ABL);
- Victorian Automobile Chamber of Commerce (VACC);
- The Pharmacy Guild of Australia (PGA); and
- Restaurant & Catering Australia (R&CA).

The SBC was formed in 1990 and meets three to four times a year to discuss issues affecting the prosperity and growth of the small business community. Current high priority issues from a small business perspective include unfair dismissals, public liability insurance and taxation reform.

The SBC has had an active role in reviewing policies and where there is broad consensus making representations. It acts as a conduit to government on the views of the small business sector and plays an educative role with the small business community.

Introduction

On 20 March 2002, the Senate referred five Bills to the Senate Employment, Workplace Relations and Education Legislation Committee for consideration. The SBC in this submission will address two of these Bills, these being the *Workplace Relations Amendment (Fair Dismissal) Bill* and the *Workplace Relations Amendment (Fair Termination) Bill 2002*.

This submission will look specifically at:

- The merit of these two Bills;

- Additional measures that would reduce the time, inconvenience and cost of responding to a claim for unfair dismissal;
- Testimonials from small business proprietors demonstrating the current burden of the unfair dismissals legislation; and
- Survey findings that demonstrate the extent to which the legislation does act as a deterrent to employment.

Specific Comments

Merit of the two Bills

The SBC welcomes the opportunity to provide comment to this Senate Inquiry on unfair dismissals. At the most recent meeting of SBC Members (14 February 2002), members welcomed the renewed governmental debate on the issue and were buoyed by recent ALP attempts to reach compromise and seek workable solutions.

The SBC believes there are two distinct, but interrelated issues in relation to unfair dismissals, these being:

- the time, inconvenience and cost of responding to a claim for unfair dismissal; and
- the uncertainty created by the possibility of attracting an unfair dismissal claim which inhibits employers from taking on staff at a time when their business may be capable of expanding and increasing employment.

The SBC is of the opinion that the current *Fair Dismissals Bill*, by proposing to exempt businesses with fewer than 20 employees from the unfair dismissal provisions of the *Workplace Relations Act 1996*, would, if passed, go a long way in addressing the above issues. The SBC is also advocating passage of the *Fair Termination Bill*.

The SBC considers the *Fair Termination Bill* to be a step in the right direction for small business. In that, by denying 'short-term' casual employees access to federal termination remedies the status quo is rightfully being restored. The SBC is of the opinion that anything less than a 12-month exemption for casual employees is un-acceptable. At a time when governmental priority should be to improve the small business/unfair dismissals legislative framework to ensure a 'fairer go all round', a lessening of the status quo (ie a 6 month exemption) would mean that small businesses are effectively worse off (ie compared to the position they enjoyed before the *Hamzy v Tricon International Restaurants* case).

Further, the proposal to include in the principal Act a provision requiring applicants to lodge a \$50 filing fee, to be adjusted to movements in CPI, is welcomed but does not go far enough. Details of

a proposed amendment to this provision are provided below.

Additional measures that would reduce the time, inconvenience and cost of responding to a claim for unfair dismissal

As noted, the SBC welcomes any legislative measures that assist in reducing small business/unfair dismissals compliance costs and the general uncertainty associated with its compliance and implementation.

The two Bills currently before the Senate would, if passed, address these concerns and are therefore fully supported by the SBC. A full exemption for small business from the federal unfair dismissal provisions is desirable, however, if this is not obtainable, it is imperative that emphasis be placed on improving the procedural provisions of the Federal (and State) unfair dismissals legislation.

Below are a number of proposals put forward by SBC members that aim to address the core issue of the 'time, inconvenience and cost of responding to a claim for unfair dismissal'.

These proposals are drawn up as proposals for amendment of the current legislation and are intended to reflect the principles of a 'fair go all round' as well as that of fairness in employment. They are intended to ensure that employers retain the right to properly manage their staff, effectively control their behaviour and not suffer consequences arising from the vindictive attitudes of employees terminated as a result of their inability to accept reasonable management practices. Employers should, in response, be able to plan and conduct their business activity with certainty and be able to respond to market conditions in a way which maximises the welfare of both the firm and its human capital.

The SBC believes the measures outlined below need to be adopted as a means of improving the unfair dismissals legislative environment under which small businesses currently operate.

Proposed Amendment # 1

Power to Dismiss Applications

The SBC is of the belief that if the Commission was given greater powers to dismiss applications, frivolous and vexatious claims - and the subsequent expense of defending these claims - could be reduced. The SBC recommends that *Commission members should be given greater discretion to dismiss an unfair dismissal claim before any conciliation hearing if it is frivolous or vexatious, an excluded claim or otherwise outside of jurisdiction. Further, an amendment which would provide that where an applicant fails to attend a hearing at the allocated time and after allowing for a reasonable waiting period for*

the applicant to be heard on the scheduled hearing day, the AIRC should be permitted to dismiss the application.

Proposed Amendment # 2

Legal Environment needs to be improved

The SBC believes that there are a number of fundamental problems within the legislative framework underpinning unfair dismissals, these being:

- the general complexity of the legislation;
- the lack of robustness to deter unmeritorious claims; and
- a lack of regulation in the legal profession.

A number of SBC Members provide industrial relations support and services to their members. It is their opinion that many small businesses struggle with the complexity of the legislation and ultimately this has an adverse affect on employee management practices. The SBC recommends that the *legislation should be amended to make it simpler and clearer than what it is at present and educative programmes should be undertaken by the government.*

SBC Members have reported that there is currently a lack of robustness in the unfair dismissals provisions to deter unmeritorious claims. The SBC recommends:

a) Increasing the current \$50 filing fee. This fee should be increased to \$100, legislated, indexed (in accordance with remuneration caps) and made permanent (ie should not remain a sunset provision); and

b) Alter the current provision that new employees have to be employed for three months before making a claim to nine or 12 months.

Further, some SBC Members have reported that they are increasingly defending unfair dismissals brought forward by legal representatives of 'questionable standard'. *A system whereby consultants/advocates must become registered, except those employed by a registered organisation, is one measure the SBC believes could be used to overcome this issue.*

Proposed Amendment # 3

Constructive Dismissals

SBC Members are of the belief that there are increasing numbers of serial litigants pursuing unmeritorious claims. It is the experience of Members that these litigants typically resign from their employment and claim constructive dismissal after he or she is employed elsewhere. To circumvent this, the SBC recommends *a review of the current constructive dismissal provisions*.

The SBC feels that by reviewing these provisions, the problem of resignations could also be addressed.

According to Members, the number of applications alleging constructive dismissal after resignation represents a significant proportion of claims. SBC Members recommend *that the onus of proof should be tightened in the Act - that is, the applicant must demonstrate that the termination is at the initiative of the employer*.

Proposed Amendment # 4

Redundancy

SBC Members are of the belief that when a small business experiences an operational downturn and redundancies are necessary, that business reserves the right to be protected from the unfair dismissals jurisdiction. The SBC recommends *that disputation should be restricted to an award breach, rather than a question of whether the process etc was harsh, unjust, unreasonable or unlawful*.

Proposed Amendment # 5

Access to Costs

The SBC considers lack of access to costs to be a serious problem. The SBC recommends *that there should be greater recourse for small businesses to access costs when a party has instituted an action without reasonable cause*.

Testimonials from small business proprietors demonstrating the current burden of the unfair dismissals legislation

The following testimonials are from small business proprietors from a number of states and from a number of different industries and sectors. They seek to demonstrate the effect the legislation has on the day-to-day operation of a small business.

Example 1

"I had one staff member "stalking" (yes, this is correct!) another staff member. The victim was receiving threatening telephone calls, had tradesman perform unsolicited tasks at her house that then had to be paid for, received unsolicited gifts, and face to face harassment.

Needless to say, these events caused enormous tension in the workplace and I, as the owner, had to become involved. It was terrifying for me because the perpetrator of the stalking was quite unbalanced and I have three young children. The bottom line was that the perpetrator was bad news, my business was being compromised, and I had to spend 100s of hours trying to manage the problem and receive advice etc. I should have been able to sack the perpetrator in order to protect my staff, my business, and my family. I should have had the power to do it swiftly and completely to limit damage."

Example 2

"This case necessitated travel to Port Macquarie at the cost of over \$400.00. The matter was set down to be conciliated at Wauchope, twenty minutes outside of Port Macquarie. A long serving employee had refused an employer's occupational health and safety request and was dismissed. Grounds existed for terminating this employee yet the cost was borne by the employer to settle the case for a monetary sum."

Example 3

"I had one girl commence work and on the first day she turned up late, chewed gum in front of customers, was rude to customers and staff. It was terrible. I sought legal advice on this day and exercised the clause in her employment contract that all staff were on 3 months probation and could be dismissed with 24 hours notice.

The girl threatened to take IR action against me unless I provided her with a reference and 3 months' pay (She knew how busy I was and figured I would just bring out the cheque book). I said no and so it started. After 3 very stressful weeks she got \$500. But I had to pay \$2000 in legal fees and she got free advice at DEVETIR!!! My solicitor told me that there was no unfair dismissal, I was completely within all State and Federal laws, and would win any case. But he advised me that I would have to pay \$200 per hour for his time and she would pay nothing so give her \$500 and be finished with the drama.

It was obviously her standard trick. She gets paid \$500 for a days "work". Better than what I get!!"

Example 4

“This matter will necessitate a trip to Armidale from Association. This is at this stage just for conciliation! There may at least be two further trips for pre-trial matters and the hearing.”

Example 5

“I had a 17 year old who I was certain was stealing from me but couldn't prove it. (She worked 38 hours a week and I was working 100 hours a week, employing 20 staff, and was trying to manage a sick wife and 3 small children : so needless to say this girl could allocate more time to covering her tracks than I could in exposing her!!!!!!!!!!!!!!).

She then fell pregnant and only told me after everyone else in the staff knew. When I approached her about the rumours I had heard of her pregnancy she then told me what SHE wanted with respect to maternity leave and work flexibility. I was outraged given the fact that this girl's work was disgraceful and that I was paid no respect by her in terms of being informed of the issues in her life that would impact on my business and that had to be managed.

Yes, I started the 3 warnings process but these people are clever and always improve just enough to impune your progress. My solicitor gave me several options all requiring lots of work for me and legal fees! And at the end of the day, she was a pregnant teenager and the IR people seem to look after these people better than people like me.

I eventually got my way and I haven't seen her since but it was SO stressful and the girl kept stealing to the end.

My suspicions were vindicated after she left and we have had no troubles balancing the tills since.”

Example 6

“Regarding the problems when faced with a notice of unfair dismissal is that I have been caught without any documentation noting warnings, conferences with the staff member etc.

We live in an area with Coal Mines and strong union representation and note that the mining companies have employment officers etc that cover all aspects of recruitment and dismissal only, without having to carry out all the other mundane and time consuming chores that are a part of small business. They meticulously take notes at every meeting and when an employee is put through the process of warnings etc it is all noted and then produced in court for a watertight case.

In my instance at the compulsory conference I was asked by the Commissioner what notes or diary entries I had in relation to my warnings. I had to reply that I had none. When asked why I offered the explanation that I had spoken with the employee with the confidence that the problem would be righted and even when the problem persisted I assumed that it would go away. When it continued again and again I asked the employee to leave. The Commissioner accepted this and the unfair dismissal case was rejected but I was shaken and the next time I was careful to have notes and copies of meetings given to the employee.

I guess what I am trying to say is that big companies plan for the worst and have personnel and systems in place to rid themselves of trouble immediately something is not resolved and small business tends to put up with a problem way beyond when they should because of the threat of 'unfair dismissal'."

Example 7

"Had an employee who I caught on camera stealing large amounts of money - took her to court etc - however during the process she sued for unfair dismissal - (completely vexatious) but I still had to waste good money after bad addressing this claim through the legal system - had another employee who we couldn't trust. After dismissing we had to re-employee because of this legislation.

The whole system is artificial & unworkable as it makes people work with each other when they don't like each other. How would it be if I made a law that made politicians have to stay married , even though each person in the relationship hated the other person's guts? Yet this is exactly what they impose on business. And you spend more time at work with the employee than you do with your spouse. As far as I'm concerned the unfair dismissal legislation could & should be completely overturned based on key principles of the constitution & major issues touted in modern society . Those of civil liberties & freedom of choice.

There would be an outcry & rightfully so, if a law was to impose all employees to have to stay with the employer (they can leave at will) because it would clearly breach these principles of freedom of choice & civil liberties yet this is exactly what is imposed on the employer!! These legislators need to live in the real world. There should be no such legislation. Get rid of it now."

Example 8

"A junior assistant employed for 10 – 11 hours per week for approximately 9 months was granted extended leave to travel overseas during her school holidays. She asked for a further two weeks which

was also granted. The third request for a further extension was given to another employee on a scrap of paper with no time for the employer to contact the employee to advise it was not acceptable.

On her return, and as January 2002 was quiet in the business, the employer advised her he would contact her for work when it became busier. At no time did he terminate her employment.

The employer has received a claim for an unfair dismissal involving him in getting a reliever so he can attend the hearing. He is currently offering her some monetary compensation of \$240 being four weeks pay with a Deed of Release to be signed if she does accept his offer.

This is a rather frivolous claim involving the employer in unnecessary time and costs as she was not terminated.’’

Example 9

‘‘A senior Pharmacy Assistant with a history of rude and disruptive behaviour, the cause for two other good employees resigning, was creating increased stress for the staff such that the employee pharmacist refused to work with her and transferred to the employer’s other pharmacy. The remaining staff said they would also refuse to work with her. A warning letter was written, accepted badly by her and she refused to sign that she had read and understood it. Her hours were reduced from four to two days per week.

At the review interview she had attempted to modify her behaviour which the employer believes was the result of reduced stress from working fewer hours. There was still room for improvement.

The third interview will take place shortly. However, it is suggested the employee will revert to type.

Why does the employer have to jeopardise his business for such an employee?’’

Example 10

‘‘A retail assistant with an aggressive and rude manner, poor service attitude and inability to work as a member of a team received a first warning letter. This was followed up by a self-justifying letter to the employer to which he replied in a more detailed manner. At the second interview with a written letter the employee was advised she had made some improvements to her behaviour, but it was still not of an acceptable standard. A third interview will be held.

This protracted and time consuming process has a negative effect on the business, other staff coping with such behaviour, and the

employer's time and stress level."

Example 11

"A retail assistant only wanted to do what she believed needed to be done and in her own way. She also refused point blank to leave the workplace to buy her employer's lunch as she said she was not his maid. He gave her a first and last written warning letter on her negative attitude and refusal to comply with this reasonable request for her to buy his lunch as he could not, by law, leave the workplace without a supervisor. She accepted the letter badly, refused to sign the letter and stormed out of the building.

The employer received a claim for unfair dismissal which the Commissioner threw out saying the employee was wasting the Commissioner's time on such a frivolous matter. It was perfectly reasonable for the employer to ask her to buy his lunch under the circumstances."

Survey findings that demonstrate the extent to which the legislation does act as a deterrent to employment.

Results 1

Does the uncertainty created by the possibility of attracting an unfair dismissal claim inhibit employers from taking on staff at a time when their business may be capable of expanding and increasing employment?

This question has been long debated by government, industry associations, academics and the general community alike – with seemingly little or no evidence to justify its legitimacy.

Contrary to this popularly held belief, intensive survey work has been completed by a number of bodies legitimising this hypothesis.

In 1999, the Australian Chamber of Commerce and Industry, as part of its *Survey of Investor Confidence*, asked the following question to more than 2300 employers across Australia:

Question: Has unfair dismissals legislation had any effect on employment decisions in your business during the past twelve months?

- a) It has had no effect on employment decisions*
- b) I have employed fewer employees because of this legislation.*

The results were as follows:

Table One**FULL SURVEY RESULTS**

	%
EFFECT ON EMPLOYMENT	
No effect on decisions to employ	60.3
Fewer people have been employed	39.7

Table Two

**EFFECT ON EMPLOYMENT OF UNFAIR DISMISSALS
LEGISLATION BY SIZE OF FIRM**

	NUMBER OF EMPLOYEES		
	1 to 19	20 to 99	100+
	%	%	%
EFFECT ON EMPLOYMENT			
No effect on decisions to employ	46.1	52.3	71.8
Fewer people have been employed	53.9	47.7	28.2

From **Table Two**, 53.9% of businesses with 1 to 19 employees (ie small business) indicated that they had 'hired fewer employees because of the [this] legislation'. Please note, this was a nation-wide survey (ie survey respondents would be referring to both State and Federal unfair dismissal jurisdictions when forming a response).

From *ACCI's Pre-Election Survey* completed prior to last year's Federal election, small businesses indicated that the unfair dismissals legislation was the fifth most critical issue confronting them in today's operating environment (please note - the survey requests small businesses to rate the importance of 63 different issues). In rural/regional Australia, the survey found that the issue of unfair dismissals was the second most critical issue confronting small

business proprietors. Again, respondents would be referring to both State and Federal unfair dismissal jurisdictions when forming their responses.

Results 2

Restaurant & Catering Australia completed a survey (sample size 250) in February/March of this year asking six questions in relation to unfair dismissals. Please note, this was a nation-wide survey - survey respondents would be referring to both State and Federal unfair dismissal jurisdictions when forming a response.

The findings in summary were:

- In 100% of cases the threat of unfair dismissal had changed the way in which operators managed staff;
- 46% said that it had stopped them hiring staff and 70% said it had encouraged them to hire casuals over permanent staff;
- 38% had defended an unfair dismissal claim in the past three years – in these cases the defence was at an average cost of \$3,675.00 and 63 hours away from their businesses;
- 49% had a staff member threaten to take unfair dismissal action of which (in the restaurateurs view) only 44% would have had reasonably thought they had been unfairly dismissed; and
- On average, of those businesses that had been threatened with a claim for unfair dismissal, 2.7 employees had threatened to take action in a three-year period (with an average of 16 employees).

Results 3

CPA Australia completed a survey of 600 small businesses and 105 CPA accountants on a range of employment issues in February 2002. The following key findings in relation to unfair dismissals were reported. Again, this was a nation-wide survey:

- 26 per cent of small businesses were not confident that they knew how to dismiss staff in line with the unfair dismissals laws – further, 76 per cent of CPAs believe small business owners do not understand the laws;

- 28 per cent of small businesses think they cannot dismiss staff even if their business is struggling;
- 62 per cent of small businesses considered the process they have to comply with to be complex;

Conclusion

This submission has looked specifically at the *Fair Dismissals* and *Fair Termination Workplace Relations Amendment Bills 2002*.

The SBC is of the view that any legislation that assists in reducing the time, cost and inconvenience of responding to an unfair dismissals claim and reduces the general uncertainty of hiring additional staff is to be supported.