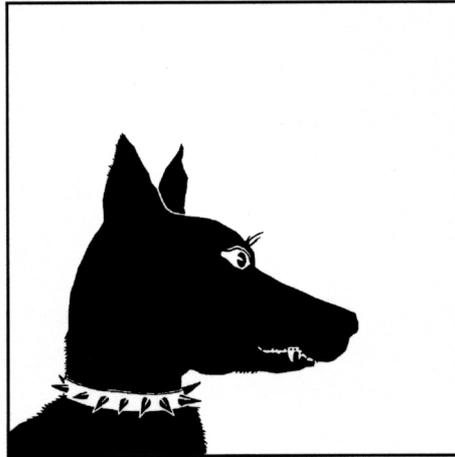


Job Watch



The Employment Rights Watchdog

Submission to:

THE SENATE EMPLOYMENT, WORKPLACE
RELATIONS AND EDUCATION COMMITTEE

Workplace Relations Amendment (Fair Dismissal) Bill 2002

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INTRODUCTION

Job Watch

Job Watch Inc is a community legal centre specialising in employment law. Job Watch was established in 1980 and is the only service of its type operating in Victoria. The organisation is funded primarily by the Victorian State Government (the Department of State and Regional Development – Industrial Relations Victoria) and also receives funding from the Office of the Employment Advocate.

Job Watch's core activities are:

- the provision of advice, information and referral to Victorian workers via its free and confidential telephone advisory service¹.
- A community education program that includes publications, information via the Internet, and talks aimed at workers, students and other organisations.
- A legal casework service to disadvantaged workers and workers experiencing abuses of human rights.
- Research and policy advice on employment and industrial law issues.
- Advocacy on behalf of those workers in greatest need and disadvantage.

Job Watch's client base/constituency

Job Watch has a statewide focus and services a broad range of Victorian workers. We maintain a database record of our callers, which assists us to identify key characteristics of our clients and trends in workplace relations. It is possible to make the following observations about our callers:

- the majority of our callers are not members of unions;
- a large proportion are employed in business with less than 20 employees.
- the majority are not covered by federal awards or agreements and are entitled only to the minimal employment conditions contained within Schedule 1A of the *Workplace Relations Act 1996*;
- over one third of callers' enquiries relate to unfair dismissal issues;
- a significant number are engaged in precarious employment arrangements such as casual and part-time employment and independent contracting;
- many are in disadvantaged bargaining positions because of their youth, sex, racial or ethnic origin, socio-economic status; or because of the potential for exploitation due to the nature of the employment arrangement, ie apprenticeships and traineeships;
- many are job seekers attempting to return to the labour market after long or intermittent periods of unemployment.

The *Workplace Relations (Fair Dismissal) Bill 2002*

The Explanatory Memorandum accompanying the Bill indicates that it proposes to:

- Prevent small business employees (other than apprentices and trainees) from applying under the *Workplace Relations Act 1996* for a remedy in respect of harsh, unjust or unreasonable termination of employment ('unfair dismissal'); and
- Require the Australian Industrial Relations Commission (the Commission) to order that an unfair dismissal application made by a small business employee is invalid, if the Commission is satisfied that the application is outside the Commission's jurisdiction because of the small business exemption. The Commission would have the power to make such an order without holding a hearing².

¹The Job Watch advice service has incoming 11 phone lines, including a designated 1800 telephone number which prioritises calls from rural and remote areas of Victoria.

² For the purposes of this Bill, a 'small business' is a business with fewer than 20 employees,

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Job Watch took 20,000 enquiries in the last financial year, over a third of which related directly to unfair dismissal. Almost half of all calls received were from employees working in businesses employing less than 20 employees³. Consequently, Job Watch is uniquely placed to comment on the likely impact that the proposed small business exemption will have on Victorian workers.

Job Watch's experience supports the conclusion that there is no justification to limit the access to the unfair dismissal system and that any such move will have a significant and negative effect on the rights of Victorian workers⁴.

Job Watch strongly opposes any move to limit access to the unfair dismissal system and recommends that the *Workplace Relations (Fair Dismissal) Bill 2002* be rejected by the Senate.

Our objection to the proposed legislation is based on the following considerations:

1. All workers are entitled to equal and fair treatment, regardless of the size of their employer's business. Termination laws should foster fairer outcomes and greater equity for all workers, not create a class of disadvantaged workers with limited rights. Excluding small business employees from unfair dismissal laws will mean that employers can dismiss them for no reason or for reasons that are spiteful, capricious or unfounded.
2. The proposed legislation will have a significant and detrimental effect on the rights of Victorian and Territory workers. Forty-four per cent of Victoria's 2.3 million workers are employed in businesses with less than 20 staff.⁵ Unlike workers from the other states, this group of workers do not have access to state industrial relations systems, which do not exclude small business employees.
3. There are many myths surrounding unfair dismissal. Unfair dismissal laws only apply if someone has been unfairly dismissed. Employees cannot succeed at the Commission where employers have treated workers fairly and have a "valid" reason for the termination, which may relate to the employee's ability to do the job, their conduct at work or the operational needs of the business.
4. In our experience, dismissed employees do not make spurious claims. Rather, many dismissed workers whose employment has been terminated in circumstances which are harsh, unjust or unreasonable elect not to bring unfair dismissal claims. Sometimes this is because they feel ashamed and humiliated by their experience and/or wish to move on to alternative employment as quickly as possible. In other circumstances they do not make a claim as they do not wish to experience the anxiety, cost and inconvenience of initiating

³ 47.2 percent of callers to the Job Watch telephone advice service in the 2000-01 financial year were employed in business with less than 20 employees. A summary of the calls to the telephone advice service relating to small business is provided in Appendix A.

⁴ The case studies in Appendix B outline the circumstances surrounding the termination of small business employees who have contacted the Job Watch telephone advice service. Were the proposed legislation to pass, these workers would not be entitled to make application in respect to unfair dismissal.

⁵ The "overwhelming majority" of Victoria's estimated 263,000 workplaces are small businesses employing less than 20 employees (ACIRRT (July 2000) University of Sydney, *Earnings Employment Benefits & Industrial Coverage: A Report to the Victorian Industrial Relations Taskforce*, vol.1, p.5).

proceedings. If given the choice, the vast majority of dismissed workers would prefer to remain in their employment, than to be faced with making an unfair dismissal claim.

5. As a group, small business employees already face a number of disadvantages. Full-time employees working in small businesses are less likely to have superannuation contributions made on their behalf than their counterparts in larger workplaces (88% compared to 96%), less likely to receive holiday leave, sick leave or long service leave, less likely to be a union member (9% compared to 42% of businesses with 20 or more employees)⁶. Further, employees in small businesses earned, on average, 12% less than the average amount earned by employees across all businesses.⁷
6. The small business exemption will have a disproportionately negative effect on workers in rural and regional areas as they are more likely to be employed by small businesses. It will increase the likelihood of employees in rural and regional areas moving away due to lack of job security and protection from harsh treatment.
7. The government has no solid data or evidence to support its arguments for introducing the new laws. In particular, there is no evidence to suggest that the proposed exclusion of small business employees will create jobs. In a recent decision, the Full Bench of the Federal Court found no provable link between unfair dismissal laws and employment growth⁸. The Minority Report of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee Report on the provisions of the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, provided a similar observation, namely that
*"..In subsequent public debate, throughout the course of two Senate inquiries and the introduction of its 1999 proposals, the Government has ..not provided evidence for its position that less protection against unfair dismissal laws means more jobs."*⁹
8. There is no avalanche of Unfair Dismissal Claims against small businesses and businesses in general. Statistics from the Australian Industrial Relations Commission show that over the last 4 years unfair dismissal applications have remained steady at between 7,500 to just over 8,000¹⁰.
9. The applications primarily involve workers from Victoria, as Victoria does not have its own state industrial relations system. Of 2.3 million workers employed by 263,700 workplaces in Victoria only 4,791 applications for unfair dismissal were made in 2000/2001¹¹. In Victoria only 0.2 percent of employees across all businesses (whether small or large) made unfair dismissal claims.
10. Access to unfair dismissal has been stripped back to an unacceptable level since the enactment of the *Workplace Relations Act 1996*. The passage of the *Workplace Relations Amendment (Termination of Employment) Bill 2000* in August 2001 further eroded employee protection and further limited access to unfair dismissal. Given the harshness of these laws, there is no compelling reason to further limit access.

⁶ Australia Now: Australian Social Trends 1997 Work-Paid Work: Small business www.abs.gov.au

⁷ ibid

⁸ *Hamzy v Tricon International Restaurants trading as KFC* [2001] FCA 1589

⁹ page 351

¹⁰ *AIRC Annual Report 2000-2001*, page 7

¹¹ Independent Report of the Victorian Industrial Relations Taskforce: Part 1: page 37 and Annual Report AIRC 2000-01 page 11

11. The existing laws already make special allowances for the needs of small business owners - the Commission is already required to consider the likely effect that the size of the employer's business and the lack of a human resources officer had on the procedures followed in an employee's dismissal and also the impact of any order it makes on the viability of the business.
12. If a claim has no merit or no reasonable prospect of success, the Commission must issue a certificate indicating this and employees may be ordered to pay costs. Furthermore, applications lacking merit may be struck out before an employer incurs significant costs¹².
13. Unfair dismissal proceedings do not need to be costly for employers or employees. The Commission is a user-friendly forum, which produces a number of publications and guides to its services to assist parties to represent themselves.
14. Most cases are settled or discontinued at the conciliation stage. If an employee does not genuinely believe that they have a strong case, they are unlikely to proceed to arbitration. Of the 4,822 unfair dismissal applications finalised by the AIRC in 2000-2001 154 or 3 percent went to arbitration¹³. The vast majority of applications were resolved by conciliation.
15. The current unfair dismissal process is relatively quick for both employers and employees. AIRC figures show that the median time taken from lodgement of an unfair dismissal application to finalisation of conciliation was 53 days¹⁴.
16. Excluding small business employees from unfair dismissal may make proceedings more complicated, time consuming and costly as dismissed employees may have no other option but to pursue more complex claims through the Court system.
17. The blanket exclusion of small business employees serves to further undermine the job security of workers and increase employers' capacity to use and discard workers at will. Termination of employment can have devastating consequences for employees in both financial and personal terms.
18. Workers who are not protected from unfair dismissal will be less likely to complain about unfair conditions such as harassment, underpayment, non-payment of super, Occupational Health & Safety issues if they can be dismissed without a reason. This means that small business employees will have no protection against employers who are unscrupulous.
19. Better workplace relationships will be achieved by educating employers and employees about co-operative work practices, not by reducing regulation and removing access to the independent umpire.

¹² ss 170CF(2) and 170CJ *Workplace Relations Act 1996*

¹³ *AIRC Annual Report 2000-2001*: page 12

¹⁴ *AIRC Annual Report 2000-2001*: page 95

APPENDIX A

- Job Watch's telephone advice service took 20,000 enquiries last financial year.
- Over a third of enquiries to Job Watch relate to unfair and constructive dismissal.
- Workers employed by small businesses of less than 20 employees constituted 47.2 percent of callers to Job Watch last financial year.
- Of callers to Job Watch who reside in rural and regional Victoria 55.8 percent are small business employees.
- Of Job Watch callers who reside in Metropolitan Melbourne 46.2 percent are employees of small businesses.
- The majority of small business employees who contacted Job Watch were female (57.6 percent) compared to male (42.4 percent).
- The age groups that small business employees came from were 25-34 year old age group (34.9 percent); 35-44 year old age group (23.1 percent); 19-24 year old age group (21.9 percent); 45 year old plus age group (15.4 percent) and 18 years old and under (4.7 percent).
- Main industries that small business employees worked in were Retail (19.8 percent); Accommodation, Cafes and Restaurants (13.3 percent); Manufacturing (12.7 percent); and Property and Business Services (12.5 percent).
- The main employment issues for small business employees who contacted Job Watch were unfair dismissal (25.4 percent); constructive dismissal (8.3 percent); redundancy (7.9 percent); general enquiries (6.5 percent); contract issues (6.1 percent) and workplace violence (5.7 percent).

APPENDIX B

Case Studies from Job Watch Telephone Advice Service

The following case studies represent calls received by the Job Watch Telephone Advice Service during the last eighteen months. Only names have been changed to protect the anonymity of the parties.

Case Study 1

Ted worked on a part-time basis for a number of years for a storage company. The money he earned supplemented his invalid pension. One day he received a call from his manager saying he was sacked. No reason was provided to him but he found out later that a friend of the employer was replacing him.

Case Study 2

Eliza worked as a counter hand for a sandwich shop for 5 years. She was terminated from her job on the basis that she was eating one of the shop's muffins. However for the last 4 years it was accepted practice for her to eat one of the muffins. Eliza believed the real reason for her termination was that she had been on workcover and was only able to work half days.

Case Study 3

Loretta was employed as a legal secretary at a small suburban law firm. She was on annual leave when she received a letter in the post saying that her job had been terminated due to recent staff changes and she would be forwarded 2 weeks pay in lieu of notice and adjustments. Loretta believes the real reason was due to her developing a medical condition called "carpal tunnel".

Case Study 4

Harry worked on a property in rural Victoria. He worked between 50 and 80 hours a week. Harry had been working there for nearly a year when he approached the owners about taking some annual leave over the Xmas and New Year period. The owners refused his request. Soon afterwards their attitude towards him began to change. The owner's wife became abusive towards him. The owner then fired Harry on the basis that Harry was not handling the work. But Harry's performance had not changed during the period he was employed there. The owners had never mentioned anything about his performance previously. Harry took unfair dismissal action. He represented himself at the Australian Industrial Relations Commission and received a settlement from his employer.

Case Study 5

Richard was employed as a cleaner. He had to go into hospital to have a gastroscopy. Richard went to his employer and said he needed the day off to go into hospital. His employer told Richard that as his procedure wasn't scheduled until 10.00 am he had to come into work beforehand and do a couple of hours between 7.00 am to 9.00 am. He also told Richard that if he didn't come in he would be sacked.

On the day of the gastroscopy Richard spoke to his employer and also faxed him a letter about having the day off. Richard's employer told him that he need not have bothered about the letter and he took Richard's action in not turning up as meaning he had resigned and then hung up on him.

Case Study 6

Sam was employed on a full-time basis as a shop assistant for a bakery. He had worked 9 nights in a row. Sam's employer asked him if he could work the next night, which would have made it 10 nights in a row. Sam refused and he was sacked.

Case Study 7

Ricardo worked as a chef at a small family restaurant. The owner's son was also employed at the restaurant. Ricardo told his employer that the son's work performance was not up to scratch. The employer responded by screaming at Ricardo, grabbing him around the throat and telling him to get out.

Case Study 8

Tuong worked for a small manufacturer. Tuong's wife Cam was suffering from postnatal depression after the birth of their first child. The depression was so severe that Cam and the baby had to be hospitalised. The treating Doctor told Tuong that as part of the Cam's treatment he required Tuong to live with Cam and the baby at the hospital for a 2-week period. Tuong would not be able to go to work during this period. Tuong gave his employer a medical certificate stating that he required 2 weeks off. Cam's doctor also contacted the employer explaining the importance to Cam's recovery of Tuong being there with her and the child.

However the owners of the business gave Tuong an ultimatum – if he did not turn up to work on a prescribed date during those 2 weeks he would be sacked. Tuong did not turn up to work and was duly sacked.

Case Study 9

Kathryn worked as a retail assistant for her local newsagency. She had worked on a permanent part time basis for over 12 months. One day she went to work and mentioned to her boss that she had not been offered any annual leave even though she was entitled to it after 12 months of service. The following day Kathryn was sacked.

Case Study 10

Trent had worked as an apprentice hairdresser for 2½ years. He was away from work for a week with chicken pox. At the time of his illness the boss was away overseas and left his daughter in charge. She sacked him for being sick. He wasn't paid out any notice or annual leave and just received \$50.