SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION COMMITTEE

INQUIRY INTO UNFAIR DISMISSAL AND SMALL BUSINESS EMPLOYMENT

GOVERNMENT RESPONSE

JANUARY 2006

GOVERNMENT RESPONSE TO THE SENATE INQUIRY INTO UNFAIR DISMISSAL POLICY IN THE SMALL BUSINESS SECTOR

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BACKGROUND

On 7 December 2004, the Senate referred to the Employment, Workplace Relations and Education References Committee the matter of unfair dismissal policy in the small business sector, with a reporting date of 14 June 2005. The inquiry also considered the Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004, which the Senate referred to the Committee on 17 March 2005.

The Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004 proposed amendments to the *Workplace Relations Act 1996* to provide that an application for relief in respect of termination of employment may not be made if, at the relevant time, the employer employed fewer than 20 people. Since the Bill was referred to the Committee, the Government announced its intention to legislate to exempt businesses with up to 100 employees from unfair dismissal laws, as part of its broader workplace relations reform agenda under its Work Choices legislation. The *Workplace Relations Amendment (Work Choices) Act 2005* received Royal Assent on 14 December 2005.

The terms of reference for the inquiry covered:

- the international experience concerning unfair dismissal laws;
- the extent to which federal and state unfair dismissal laws adversely impact on small business;
- evidence cited by the Government that exempting small business from federal unfair dismissal laws would result in 77,000 more jobs in Australia;
- the relationship, if any, between previous changes to Australian unfair dismissal laws and employment growth in Australia;
- the extent to which previously reported small business concerns with unfair dismissal laws relate to survey questions that were misleading, incomplete or inaccurate;
- the extent to which small businesses rate concerns with unfair dismissal laws against other matters that effect running a small business;
- the extent to which small businesses are provided with current, reliable and easily accessible information and advice on federal and state unfair dismissal laws; and
- policies, procedures and mechanisms to reduce the perceived negative effect of unfair dismissal laws, without affecting the rights of employees.

The Committee tabled its report in the Senate on 21 June 2005. The majority report makes three recommendations. The Government Senators on the Committee produced a minority report, which does not make explicit recommendations.

RESPONSE TO THE COMMITTEE'S MAJORITY REPORT

For some years the Government has consistently argued that changes to unfair dismissal laws are needed to reduce the burden on business and to free up the jobs that these laws are costing the Australian economy.

The Government maintains its position that the unfair dismissal laws place a disproportionate burden on small to medium sized businesses, and that this manifests itself in the hiring decisions of these businesses. Workplace relations laws should not inhibit job creation.

The Government remains of the view that the most effective way to address this barrier to employment growth is to exempt small to medium sized businesses from unfair dismissal laws, while still retaining protections for employees under existing unlawful termination provisions.

The aim of the Government's proposals in relation to termination of employment – announced on 26 May 2005 and enacted in the WorkChoices legislation in December 2005 – is to create a streamlined, national scheme for dealing with applications in relation to termination of employment. This approach will ensure greater consistency across Australia. Until now, there have been six different pieces of legislation that address unfair dismissal, one in each state (except Victoria) and the federal system. This creates unnecessary confusion for employers and employees. The move towards a more efficient unfair dismissal system that will cover the field will expand employment opportunities in the small to medium sized business sector.

The Prime Minister, in an address to the Sydney Institute on 11 July 2005, put it this way:

> Firms are concerned not just with the direct cost of defending an application or settlement, where that occurs, but costs in terms of time, paperwork and disruption to working relationships. … Without deep pockets or dedicated human resources departments, small and medium-sized businesses lack the capacity to cope with such claims. … These laws have a chilling effect on job creation by adding extra uncertainty for firms wanting to employ staff. Employers are more likely to rely on family and friends as a result. Alternatively, existing workers may bear a burden by having to work longer or harder. Firms are also likely to rely more heavily on temporary or casual staff. Both the World Bank and the OECD have found that strict employment protection laws result in fewer permanent jobs being created. Those who bear the burden tend to be the young, the low-skilled and the long-term unemployed. … Either way you look at it, the cost of the existing unfair dismissal laws falls most heavily on firms and individuals who can least afford it.[1]

Applications for relief alleging that a termination of employment was unlawful will still be able to be made under the reformed workplace relations system. The grounds on which such an application can be made include: temporary absence from work due to illness or injury, because an employee filed a complaint or was involved in legal proceedings against an employer or due to discriminatory grounds, for example, race, colour, sex, age, union membership, family responsibilities and pregnancy. The full list of grounds is in the attachment to the Government

[1] http://www.pm.gov.au/news/speeches/speech1455.html

Senators' minority report. In addition, employers will still be required to provide employees with the period of notice of termination prescribed under the *Workplace Relations Act 1996*.

Over the last decade significant legislative reform of the workplace relations system by the Australian Government has contributed to a strong economic performance and higher standards of living for Australians. The reforms in relation to unfair dismissal legislation are necessary if recent economic progress is to be sustained. The reforms will facilitate the creation of additional jobs in the small to medium sized business sector, by giving business the confidence to employ extra staff.

The Government stands by the evidence it has previously cited to support the claim that existing unfair dismissal laws represent a costly burden for small and medium sized enterprises and provide a disincentive for these businesses to hire staff.

Recommendation 1:

> The committee recommends to the Senate that the Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004 be rejected.
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> (Committee report, page 31)

Response

The Government did not proceed with the Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004. Changes to unfair dismissal laws were instead introduced in the *Workplace Relations Amendment (Work Choices) Act 2005*, which received Royal Assent on 14 December 2005.

An exemption from unfair dismissal laws to businesses with fewer than 100 employees has been provided in the legislation. Accordingly, the Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004 is redundant.

Recommendation 2:

> The Committee recommends that the Government work with small business, unions and peak industry bodies to make unfair dismissal laws more effective by reducing the procedural complexity and cost to small business of the current unfair dismissal process.
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> (Committee report, page 32)

Response

The Government considers the most effective way to minimise the impact and cost of unfair dismissal laws on small and medium businesses is to exempt them from the laws. It does not believe that any available means of streamlining unfair dismissal procedures would be sufficient to eliminate the disincentive to employment generated by the existing laws.

The Government currently funds and supports the provision of public information and education on termination of employment laws. The Department of Employment and Workplace Relations (DEWR), through its Office of Workplace Services, provides advice through its free telephone service (Wagel ine), its website (WageNet), and its Workplace Advisory Service. The Service

has advisers in each state and territory to assist business, mainly small business, by providing information and education services on federal workplace relations matters.

Options for reducing the procedural complexity of unfair dismissal laws have previously been considered in the context of the Senate Inquiry into the Workplace Relations Amendment (Termination of Employment) Bill 2002 and the ALP's Workplace Relations Amendment (Unfair Dismissal – Lower Costs, Simpler Procedures) Bill 2002. As outlined in DEWR's submission to previous inquiries, none of the available measures to streamline the operation of unfair dismissal laws would remove the burden those laws impose on small and medium businesses.

The cost to a business of an unfair dismissal application is not measurable only in terms of monetary cost. For a small to medium sized employer to defend a claim, it requires the employer to leave the business to attend a conference or a hearing on the merits of the matter. In a small business, even half a day away from the business can cause significant disruption to the business's operations.

A survey conducted by the Restaurant and Catering Association found that 38 per cent of owners had defended an unfair dismissal claim. The average cost to the employer of defending such a claim was 63 hours of their time, and $3,675 in legal costs. That estimate translates into $18.2 million in direct costs, and $15.5 million in indirect costs to the industry as a whole.[2]

A recent study by Australian Business Limited (ABL) demonstrates that businesses pay "go away money" to former employees, rather than defend a claim at an industrial tribunal. Some 900 businesses participated in the survey which was conducted in late July-early August 2005. The study found that 62 per cent of businesses have experienced, or know of, speculative unfair dismissal claims by workers. Almost 40 per cent of businesses surveyed said that the practice of paying "go away" money occurred regularly, with another 30 per cent saying that it occurs occasionally. Former employees may receive between $5000 - $25,000 as "go away money" so that employers can avoid defending themselves before the Australian Industrial Relations Commission (AIRC) or the NSW Industrial Relations Commission. The cost of defending a claim, even one without merit, can be up to $50,000.[3]

The Government believes that introducing a single, harmonious set of unfair dismissal laws will do much to reduce the complexity and uncertainty of the current system. Until now, there have been six different workplace relations systems in Australia. As each state has different statutory requirements, there is confusion about the operation of unfair dismissal laws.

Most submissions to the Committee considered that the existing unfair dismissal laws are overly complex. Introduction of the unified workplace relations system based on the Constitution's corporations power, which covers approximately 85 per cent of Australian employees, will contribute significantly to a less complex unfair dismissal regime in Australia.

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[2] Hansard, Senate, 21 June 2005, page 82

[3] Orton, Paul. *Time for Fair Go on Unfair Dismissal Law*, Australian Financial Review 163, Wed 21 September 2005) First Edition

Recommendation 3:

The Committee recommends that the Government make no further changes to unfair dismissal laws until an independent review has been conducted by experts selected from employee and union groups, employer groups and academics. The Committee recommends that:

- the review examine the Government's policy on unfair dismissal and evidence used to support its legislation, relevant Senate Committee reports which have addressed the issue of unfair dismissal, state government views and any other relevant sources; and
- findings of the review be presented to the Council of Australian Governments (COAG) with a request that it develop a set of common principles to guide future reform of unfair dismissal laws at the state and federal level.

(Committee report, page 32)

Response

The Government does not support this recommendation, and passage of the *Workplace Relations Amendment (Work Choices) Act 2005* has made it redundant.

The Government's commitment to reforming unfair dismissal laws is longstanding. The proposal to exempt small businesses from unfair dismissal laws has been before Parliament in a number of Bills, including the Workplace Relations Amendment (Unfair Dismissal) Bill 1998 and [No. 2] 1998, the Workplace Relations Amendment (Fair Dismissal) Bill 2002 and [No. 2] 2002, the Workplace Relations Amendment (Termination of Employment) Bill 2002 and [No. 2] 2002, and the Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004.

The Senate Committee has inquired into unfair dismissal laws five times since 1998. Throughout this inquiry, and in previous inquiries, the Committee has conducted public hearings, invited submissions, and given parties the opportunity to present supplementary information to it. The Committee has received submissions from a wide range of employee organisations, employer organisations, and academics. Consequently, there has been much debate on the Government's proposals to amend unfair dismissal laws and the views of the relevant stakeholders are well and truly in the public domain.

Neither does the Government support COAG involvement in developing principles for future reform of unfair dismissal laws. The Government already regularly consults with the States and Territories at twice yearly Workplace Relations Ministers Council meetings. States, other than Victoria which has referred its powers to the Commonwealth, do not support Commonwealth control over unfair dismissal proceedings.

The Government believes that its Work Choices legislation is in the best interests of all Australians.

MINORITY REPORT

Two Government Senators, Senator Guy Barnett and Senator Judith Troeth, produced a minority report that supports the principle of exempting small business from unfair dismissal laws. The minority report does not make explicit recommendations.

The Government Senators stress the significant role that small business plays in the Australian economy and society. They believe that perceptions and confidence in small business planning contribute significantly to the hiring decisions that small business make. The minority report cites evidence given by Ms Leila Yilmaz of the Victorian Automotive Chamber of Commerce who notes that "... rather than engaging additional employees, employers themselves are simply working longer hours or family members are encouraged to work longer hours."

Senators Troeth and Barnett question whether the numbers of state and federal applications for relief in terminations of employment matters accurately illustrate the difficulties that unfair dismissal laws cause for small business. They support the submission of the Australian Chamber of Commerce and Industry that the published figures show the 'tip of the iceberg' because they count only cases where proceedings have commenced.

The Senators also support the introduction of a national workplace relations system. There have been different unfair dismissal laws in state and federal jurisdictions. This leads to applicants "cherry picking" the jurisdiction in which to lodge their claim, the Senators assert. Having one workplace relations system will provide certainty and stability for small business employers. Furthermore, the Senators believe that a uniform workplace relations system will provide small business employers with the confidence to hire new staff.

The Government supports the tenor of the minority report.