

Chapter 1

Introduction and background to inquiry

1.1 The Senate referred this inquiry into unfair dismissal laws and small business employment to the Employment, Workplace Relations and Education References Committee on 7 December 2004, with a reporting date of 14 June 2005. The inquiry was conducted with the added consideration of the Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004, which was referred by the Senate on 17 March 2005.

1.2 The committee was asked to examine and report on the following matters:

- the international experience concerning unfair dismissal laws and the relationship between those laws and employment growth in the small business sector;
- the extent to which federal and state unfair dismissal laws adversely impact on small businesses;
- evidence cited by the Government that exempting small business from federal unfair dismissal laws will create 77,000 jobs in Australia,
- the relationship, if any, between previous changes to Australian unfair dismissal laws and employment growth in Australia;
- the extent to which small businesses rate concerns with unfair dismissal laws against other matters that effect running a small business;
- policies, procedures and mechanisms to reduce the perceived negative effect negative effect of unfair dismissal laws, without affecting the rights of employees.

Conduct of the inquiry

1.3 The inquiry was advertised in the *Australian* and submissions were invited from relevant interest groups, organisations and individuals with an interest in federal and state unfair dismissal laws and the small business sector. Seventeen submissions were received, mainly from unions, peak industry groups and academic researchers. The Department of Employment and Workplace Relations and the New South Wales Government also made submissions. Public hearings were held in Melbourne and Canberra early in May 2005.

Background

1.4 Legislation to implement the Government's commitment to an unfair dismissal exemption for small business has been examined by the Employment, Workplace Relations and Education (EWRE) Legislation Committee on four previous

occasions.¹ The Government presented three major arguments in each of its attempts to legislate for a small business exemption from federal unfair dismissal laws:

- unfair dismissal is perceived to affect hiring intentions and job creation in the small business sector;
- the range of surveys and the period over which they have been conducted strongly suggests that such a link exists between unfair dismissal and small business hiring intentions; and
- introducing an exemption will remove one of the perceived barriers to employment growth in the small business sector.²

1.5 This is the first time the EWRE References Committee has examined issues surrounding unfair dismissal laws, especially the relationship between these laws and small business employment, including legislation which is currently before the Parliament. The committee notes that the Senate failed to pass all previous bills designed to implement the Government's policy of an exemption for small business.

1.6 The committee notes that the strong criticisms made in previous minority reports by Labor and Democrat senators as early as 1999 are particularly relevant to issues raised in evidence during this inquiry. The Labor senators' minority report on the Workplace Relations Amendment (Unfair Dismissal) Bill 1998 concluded that the various surveys and reports of concern about unfair dismissal laws by employer organisations did not establish any connection with jobs growth in the small business sector. It found that no independent report or analysis confirmed what the Government had claimed. The Labor senator's report on the Workplace Relations Amendment (Termination of Employment) Bill 2002 reached a similar conclusion. It found that:

- any connection between fear of unfair dismissal claims and the rate of overall small business employment is extremely tenuous; and
- the claim that without the unfair dismissal laws there would be 77,000 more people employed in small and medium sized firms must be regarded as absurd.

1.7 The Australian Democrats' minority report on the Unfair Dismissal Bill 1998 also found that a case had not been made for exempting small business from federal unfair dismissal laws. It argued that the proposed exemption introduces into the system considerable unfairness by upsetting the 'fair go all round' principle embedded into the WR Act:

1 See the committee reports on the following bills: Workplace Relations Amendment (Unfair Dismissals) Bill 1998, February 1999; Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999, November 1999; Workplace Relations (Termination of Employment) Bill 2000, September 2000; Workplace Relations Amendment (Termination of Employment) Bill 2002, March 2003.

2 See, for example, Workplace Relations Amendment (Unfair Dismissals) Bill 1998, February 1999, p.28

The Coalition's majority report, and indeed the Coalition at large, have failed to make a case on three fundamental counts: That the *Workplace Relations Act 1996* is not effective in restricting federal unfair dismissal claims to the minimum consistent with equity and natural justice; that the Bill's passage will create jobs; and that the public good resulting from significant job creation would be greater than the public evil consequent to giving a discriminatory right to a sector of employers to sack workers unfairly.³

1.8 Although the EWRE Legislation Committee has been dealing intermittently with unfair dismissal laws for a number of years, this committee believes that at no time has the Government demonstrated that major problems with federal and state unfair dismissal laws required legislation to amend the Workplace Relations Act. This report examines the latest empirical evidence to question claims by the Government about the relationship between unfair dismissal laws and small business employment. Specifically, the report questions two claims which have been made by the Government repeatedly in its public relations campaign to win support for unfair dismissal legislation. The first claim is that unfair dismissal laws are a serious deterrent to the hiring intentions of small businesses and have resulted in the loss of 77,000 small business jobs which would otherwise have been created in the absence of those laws. The second claim is that unfair dismissal laws place a disproportionate burden on small business by imposing high compliance costs which should appropriately be borne only by medium and larger businesses.

Main issues

1.9 The *Workplace Relations Act 1996* includes provisions for both unfair dismissal and unlawful termination. Unfair dismissal occurs when the employee's dismissal is 'harsh, unjust or unreasonable'.⁴ In determining if this has been the case, the Commission must have regard to a number of factors including:

- whether there was a valid reason for the termination and whether the employee was notified of that reason;
- whether the employee was given an opportunity to respond;
- if the termination related to unsatisfactory performance by the employee and whether the employee had previously been warned about that unsatisfactory performance; and
- the degree to which the size of the employer's business, or the absence of dedicated human resource management specialists, may have had an impact on termination procedures.⁵

3 Workplace Relations Amendment (Unfair Dismissal) Bill 1998, Minority Report, Australian Democrats, February 1999, p.62

4 Section 170CG(1)(b)

5 Australian Industrial Relations Commission, *Termination of Employment – General Information*, p.4

1.10 Employees who are eligible to make a claim for unfair dismissal must have been covered by a federal award or agreement and whose employer is a constitutional corporation; or employed in interstate or overseas trade or commerce as a waterside worker, maritime employee or flight crew officer; or a Commonwealth public sector employee; or employed in Victoria or in a territory.⁶

1.11 Unlawful termination occurs if the termination is based on one or more of a number of reasons listed under the WR Act. These include a failure to meet the required notice provisions (s.170CM) and reasons concerning alleged discrimination (s.170CK). All employees nationally are eligible to apply.⁷

1.12 At the heart of the committee's concerns is the Government's latest attempt to change unfair dismissal laws without any empirical evidence showing that legislation is needed. The committee notes that the Government's reasons for pushing ahead with legislation to reform federal unfair dismissal laws are not new. Such evidence as the Government provides should be examined rigorously against empirical data. Evidence indicates that debate about unfair dismissal policy has often been driven by rhetoric and misinformation rather than objective appraisal of the facts. The committee challenges the logic behind the Government's claims that a significant number of jobs will be created by exempting small business from unfair dismissal laws. It notes that previous Government senators' reports assert that unfair dismissal laws are perceived to affect hiring intentions and job creation in the small business sector. The argument is then taken further that, notwithstanding disputes over survey methodology, there is a link between unfair dismissal laws and small business hiring intentions. The committee accepts that negative perceptions of federal and state unfair dismissal laws do exist in the small business community. However, it rejects the logic behind the Government's claim which equates to the argument that if you say something often enough people will actually believe you.

1.13 Chapter 2 of this report challenges the Government's position using the latest evidence from Australia and abroad. While many of the arguments in submissions cover familiar ground, the committee is assisted by some new data on unfair dismissal cases under federal and state jurisdictions. The committee finds that assertions by the Government and employer groups about the effect of unfair dismissal laws on employment growth in the small business sector are not based on any empirical evidence. The committee notes that uncertainty and confusion which has clouded debate on unfair dismissal will continue in the absence of research data on the effect of firing costs on employment in small and medium-sized businesses. This inquiry has demonstrated that evidence needed to move the debate beyond what one witness described as the 'fairly pointless exchanging of opinions'⁸ does not exist.

6 *ibid.*, p.6

7 *ibid.*, p.7

8 Dr Paul Oslington, *Committee Hansard*, 2 May 2005, p.10

1.14 The committee has examined as part of its terms of reference the Government's Workplace Relations (Fair Dismissal Reform) Bill 2004. Chapter 3 examines evidence which raised concerns about the unintended consequences of the bill and highlights the Government's failure to provide a clear policy rationale for its legislation. The committee looked to other evidence on the adverse effects of state and federal unfair dismissal laws on small businesses. It shows that unfair dismissal claims are not a significant impost on small business. This challenges the claim by employer groups that dismissal litigation is costly, damaging and unsatisfactory for small business.⁹ The committee notes a small business survey by Robbins and Voll which shows a low incidence of unfair dismissal claims. It also challenges assertions of widespread dissatisfaction with the outcome of cases and dispels myths about the level of compensation paid to employees. The committee believes that employer groups have overstated the argument that the small number of unfair dismissal cases represents the 'tip of the iceberg'.

1.15 Chapter 4 presents the committee's major findings and recommendations. They reflect the committee's firm opposition to the Government's Fair Dismissal Reform Bill. The Committee believes that the Government's heavy-handed approach to unfair dismissal is not the answer to the problems facing small business. The bill withdraws the protection of the law from employees based on the size of the business in which they work, something which the committee opposes as a matter of principle. The committee prefers that a range of constructive measures be implemented to improve the current unfair dismissal process, and that an independent expert review of unfair dismissal be conducted before any legislative proposal on this issue is considered by the Parliament.

The future of unfair dismissal laws

1.16 Reconsideration of unfair dismissal policy in the context of small business employment is important because this inquiry will be the committee's last attempt to examine this issue before the Coalition parties assume control of the Senate from 1 July 2005. The committee's concerns about the future direction of federal unfair dismissal laws were heightened towards the end of the inquiry when, on 26 May 2005, the Prime Minister announced to the Parliament the Government's intention to introduce legislation to overhaul the workplace relations system, including unfair dismissal laws. The committee is concerned that any proposed law to give effect to the unfair dismissal policy announced by the Prime Minister will apply only to companies that employ more than 100 people. The committee is alarmed that this will result in up to four million workers having no remedy for unfair dismissal.

1.17 The Prime Minister referred to the unfair dismissal laws introduced in 1993 as 'job destroying' and as having 'held back employment'. He claimed that exempting small businesses with up to 100 employees 'will generate jobs in small and medium businesses, the engine room of the Australian economy'. The committee notes that the

9 ACCI, *Submission 7*, p.11

statement did not mention how many jobs the proposal will create or any evidence that current unfair dismissal laws have hindered small business employment. The statement is also contradicted by the significant growth in employment which has occurred over the period 1996 to 2005. The committee believes that a D&B National Business Expectations survey supports its conclusion that the Government's unfair dismissal policy is without foundation. The May 2005 survey included 1200 business owners and senior executives representing the major industry sectors. When questioned specifically about the unfair dismissal component of the industrial relations reforms announced by the Prime Minister, more than 80 per cent of businesses said that changes foreshadowed would have little or no impact on their intention to employ new staff.¹⁰

10 D&B National Business Expectations, Survey, June 2005, pp.2, 15