

## Chapter 3

### The right to dismiss unfairly: the Government's 'fair dismissal' reform bill 2004

3.1 This chapter outlines the role of unfair dismissal laws, sets out the provisions of the Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004 and provides an analysis of the effect the provisions are likely to have, including those which might be unintended, and the necessity or otherwise of the amendments.

#### Unfair or unlawful?

3.2 Commonwealth legislation sets out the provisions in relation to unfair dismissal in Part VIA, Division 3 of the *Workplace Relations Act 1996*. The legislation, at section 170CB, distinguishes between terminations which may have been harsh, unjust or unreasonable (known as unfair dismissals), and those alleged to be unlawful. Provisions for unlawful dismissals are contained in section 170CK(2) of the Act. This section provides that an employee may not be dismissed for reasons based on such things as trade union membership, race, colour, sex, age, religion and pregnancy. The committee acknowledges that under the Government's proposed legislation, all employees will continue to enjoy existing protections in the WR Act against unlawful termination of employment by an employer. Employers will also be able to bring an application for unlawful termination under the WR Act where their employer has failed to provide the employee with the required period of notice (s.170CM) or has failed to notify the relevant authorities in the case of a redundancy (s.170CL).<sup>1</sup>

3.3 Employees who believe they have been unlawfully dismissed may seek remedy through the Federal Court, which is a more costly and complex jurisdiction than for unfair dismissals, which are heard by the Australian Industrial Relations Commission (AIRC).

#### The purpose of unfair dismissal legislation

3.4 The Government's stated rationale for its proposed amendments is the creation of extra employment by small business uninhibited by unfair dismissal provisions.<sup>2</sup> In the second reading speech, the Minister for Employment and Workplace Relations, the Hon. Kevin Andrews MP, elaborated on the Government's reasoning for the amendments as follows:

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1 Department of Employment and Workplace Relations, Answer to Question on Notice No.4, 17 June 2005

2 See, for example, DEWR, *Submission 11*, pp.1, 9

The current unfair dismissal laws place a disproportionate burden on small businesses. Most small businesses do not have human resource specialists to deal with unfair dismissal claims. Attending a commission hearing alone can require a small business owner to close for the day. The time and cost of defending a claim, even one without merit, can be substantial. In fact, according to a study by the Melbourne Institute of Applied Economic and Social Research, the cost to small and medium sized businesses of complying with unfair dismissal laws is at least \$1.3 billion a year. Many small businesses do not understand unfair dismissal laws. A survey by CPA Australia in March 2002 found that 27 per cent of small business owners thought that they were unable to dismiss an employee even if the employee was stealing from them, and 30 per cent of small business owners thought that employers always lost unfair dismissal cases.<sup>3</sup>

3.5 Given the well-founded criticism of the spuriousness of the Melbourne Institute's calculations, the committee gives no credence to the cost estimate in the Minister's speech.

3.6 The committee notes the introduction to Dr Jill Murray's submission, which states in part:

One of the functions of good government in a liberal, democratic system is to ensure that all citizens are protected from arbitrary or capricious actions which impinge on their liberty to conduct their lives, including their occupations, in relative peace and freedom.

3.7 The committee accepts that a role exists for unfair dismissal legislation, yet the important question is how to balance the rights and responsibilities of employers and employees. The committee believes strongly that the Government's proposed amendments tilt the balance in the employers' favour.

### **The provisions of the bill<sup>4</sup>**

3.8 Item 2 inserts new subsections which stipulate that an unfair dismissal application may not be made where the employer, at the relevant time, employed fewer than 20 people. These include the employee who was dismissed and casual employees employed for more than 12 months, but not other casuals. Applications can be made by trainees under a registered training agreement and by apprentices. The Explanatory Memorandum notes that apprentices and trainees may still be excluded from making an unfair dismissal application on other grounds. The relevant time is defined as the time when the employer gave the employee notice of termination of employment, or the time when the employer terminated the employee's employment, whichever ever happened first.

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3 The Hon. Kevin Andrews, *House Hansard*, 2 December 2004, p.2

4 Discussion of the provisions of the Bill is taken from Bills Digest 112, 2004-05, Parliamentary Library, Parliament of Australia, 11 February 2005

3.9 Item 3 requires the AIRC to make an order that an application is not valid, if it considers that the applicant was not entitled to make the application because of the small business exemption provided for under Item 2. The AIRC also holds the discretion not to have a hearing if making an order refusing a small business application, but if it does it must take into account the cost to the employer's business. The AIRC may also request further information before making an order, and the Commission is bound to consider any information received.

3.10 Item 4 specifies that a person covered by an order is not entitled to apply to have that order varied or stayed, and Item 5 provides that there will be no right to appeal to a full bench of the Commission against an order. Item 6 confirms that the amendments made by items 1 to 5 only apply to an unfair dismissal application relating to employment commenced by the applicant after the commencement of those items.

### **Consequences of the bill**

3.11 Evidence presented to the committee suggests that a number of unintended consequences may result from the Government's amendments. A number of these have been discussed previously in Senate reports conducted as precursors to the current inquiry.<sup>5</sup> In addition to the existing delineation between those employed under state and territory employment arrangements and those employed under federal arrangements, the bill proposes to create another distinction, between those who work in businesses or less than 20 people, and those who do not.

3.12 Many witnesses saw this as a negative development, and a number saw the possibility that businesses would be deliberately restructured so as to ensure that the number of employees falls and remains below the threshold of 20. The Shop Distributive and Allied Employees Association (SDA) submitted that it was not uncommon for businesses to operate through a number of legal entities, even though each entity is engaged in the same business for the same employer. Where employees are engaged by individual legal entities, the situation could arise where, even though a business employs thousands of employees, none of them enjoy unfair dismissal protection because the business is composed of a number of 'small businesses'.<sup>6</sup> The SDA argued that:

It should be necessary [for the act to require that the AIRC] have regard to the number of employees of all related companies and associated entities under the Corporations Act, and to have regard to the number of employees employed by one or more employers who carry on a business project or undertaking as a joint venture or a common enterprise. If it's good enough to have groups of employers treated as being a single entity for the purposes of certification of [workplace] agreements, it should be good enough to

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5 See, for example, Chapter 2, Report on the provisions of bills to amend the Workplace Relations Act 1996, May 2002

6 SDA, *Submission 4*, pp.3-4

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apply the same rule to exempting employers from their requirements to pay redundancy pay.<sup>7</sup>

3.13 There are also problems with the notion of a business being classified small or otherwise at the 'relevant time'. The Centre for Employment and Labour Relations Law submission argued that the 'relevant time' is defined as that which the employer gives notice of termination of employment, or that which termination of employment occurs, whichever happens first. However, winners and losers would be created for reasons quite independent of the conduct or business needs of the enterprise. All workers would now enjoy protection under the unfair dismissal provisions, but should a number of employees subsequently resign, unfair dismissal protection would be withdrawn. The point was made that protection could ebb and flow on an almost daily basis, which the committee believes is inequitable.<sup>8</sup>

3.14 The committee is concerned that removing access to unfair dismissal will inevitably result in an increase in the number of applications before the Federal Court and other common law courts by aggrieved employees seeking remedy for unlawful dismissal. There is no doubt that both Federal and common law courts are significantly more time consuming and costly than other jurisdictions in which applications for unfair dismissal are currently being fought out. This is likely to have adverse consequences for both employers and employees.<sup>9</sup>

3.15 Some respondents argued that the Bill could destabilise business, primarily through the movement of staff into larger firms in order to enjoy unfair dismissal protection. This could diminish the pool of labour available to small business and potentially push up the cost of labour.<sup>10</sup> While the committee queries whether the volume of movement would be sufficient to induce dramatic change in labour market dynamics, it acknowledges that a segment of the labour pool would be aware of the protections offered by larger employers, and would target them for employment. Should this occur, it would make worse an already well-documented difficulty for small business: locating and engaging quality staff.

3.16 Dr Jill Murray highlighted the negative effects of the amendments:

Granting employers a blank cheque to dismiss at any time, without natural justice, for any reason, is likely to have an adverse impact on the economic stability of small businesses. For example, workers who have ideas which contribute to the more efficient running of the business, or have concerns about current safety procedures, are unlikely to speak up. One unintended consequence of this proposed law may be the stagnation of small and

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7 *ibid.*, p.5

8 Centre for Employment and Labour Relations Law, University of Melbourne, *Submission 15*, p.16

9 *ibid.*, p.16. See also Ms Sharlene Naismith, *Committee Hansard*, 2 May 2005, p.28

10 Jobwatch, *Submission 5*, p.3

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medium businesses, and the growth of a 'yes person' culture in this part of the labour market, to the detriment of the Australian economy as a whole.<sup>11</sup>

3.17 Dr Murray reminded the committee that the effect of removing unfair dismissal protections is not to restore the right of employers to dismiss, as has always been their right, but to enable employers to dismiss *unfairly*:

We are talking about the right to dismiss unfairly. In other words, small business is not being stopped from dismissing people...they can have confidence that they can dismiss fairly at any point. That is not the problem to them. That is not what the act is about. What they are seeking, as I understand it, through their advocacy groups, is the right to dismiss unfairly. My reason for coming before the committee is that I do not think that is a law the Australian Parliament should pass.<sup>12</sup>

### **Is change needed?**

3.18 A number of witnesses questioned the need to reform the existing unfair dismissal system. The ACTU considered that taxation, occupational health and safety, and insurance are more or a burden for small business than employment issues. Citing a recent Sensis Business Survey, the ACTU claimed that finding quality staff was the highest concern for small business, followed by a lack of work/sales, competition, cash flows and rising costs.<sup>13</sup> The ACTU also reported that only about half of small businesses believed there are any barriers to employment in the current business context and, of those who did, the leading factor was lack of work.<sup>14</sup> The ACTU argued that this finding supports the contention that businesses only take on staff when work exists to support them, and not when constraints such as unfair dismissal are relaxed. Similar findings were reported by the ACTU from independent surveys, and from its own polling.

3.19 A survey conducted by Robbins and Voll in 2003 in the Albury-Wodonga region found that while 48 per cent of respondents considered the unfair dismissal provisions unfair, 97 per cent had never experienced an unfair dismissal claim. Thirty seven per cent of respondents considered that small business should be exempt from provisions, while 38 per cent did not. Finally, the most important factor reported in deciding whether to hire more staff was workload/turnover (49 per cent), followed by the cost/viability of the business (15 per cent).<sup>15</sup>

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11 Dr Jill Murray, *Submission 1*, p.1

12 Dr Jill Murray, *Committee Hansard*, 3 May 2005, p.7

13 ACTU, *Submission 12*, para. 122, citing Sensis Business Index – small and medium enterprises, February 2005

14 ACTU, *Submission 12*, para. 123

15 Dr Robbins and G. Voll, *Submission 13*, p.13, drawn from Robbins and Voll, 'Who's Being Unfair? A Survey on the Impact of Unfair Dismissal Laws on Small Regional Business', Charles Sturt University, 2004

3.20 ACCI argued that there are a number of reasons why businesses might not consistently rank unfair dismissal as a chief concern. These include the notion that small business owners tend to focus on one problem at a time and have difficulty in seeing the 'big picture' for the purposes of completing surveys. ACCI also suggest that, while unfair dismissal laws continue to be a problem, there is a sense in which small business has learned to cope and that this is reflected in unfair dismissal's less consistent appearance in survey data.<sup>16</sup> This also confirms how negative advocacy from the Government and employer organisations can directly affect employer sentiment. The committee believes that a strong negative advocacy campaign by employer groups and the then Opposition between 1993 and 1996 created an environment in which the operation of unfair dismissal laws was never going to be judged dispassionately.

3.21 It is in this context that the committee does not believe that the amendments are really necessary. Small business would benefit more from reforms in areas they consider a higher priority than from legislation to provide an exemption to the unfair dismissal process.

### ***The incidence of unfair dismissal claims***

3.22 The Government has argued that unfair dismissal provisions are too burdensome and that small business operators must devote inordinate amounts of time and energy complying with their requirements.<sup>17</sup> Evidence presented to this and previous Senate inquiries does not support this claim.

3.23 Dr Murray agreed with the evidence, and argued that:

The current arrangements in the Act provide a cheap, informal and user-friendly process: employers and employees may deal with [a] disputed dismissal without the need to pay for lawyers, and the vast majority of matters are settled at the conciliation phase. Only a small minority of cases proceed to arbitration by the AIRC or determination by the Federal Court.<sup>18</sup>

3.24 While a discussion of the number of unfair dismissal applications tells only part of the story, it is illustrative. The committee heard that in 2003-04, the Australian Industrial Relations Commission received 7044 claims, and that the annual number is consistent.<sup>19</sup> Dr Robbins and Mr Voll's analysis found that, even if small business were to make up all these claims, less than 1 per cent of the sector would have been affected. Their analysis goes on to suggest that:

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16 ACCI, *Submission 7*, p.25

17 See, for example, Senator John Tierney, AAP News release, 29 October 2003

18 Dr Jill Murray, *Submission 1*, p.1

19 This is the total number of claims, from both small and other businesses

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There is no evidence that the number of formal claims handled by the AIRC should alarm anyone in an economy the size of Australia's.<sup>20</sup>

3.25 Robbins and Voll conclude:

...the AIRC data on unfair dismissal claims makes it clear [that] there are not large numbers of claims, conciliation resolves almost 75% of all claims while the more complex process, arbitration occurs in only 6% of claims. In addition, the results achieved at arbitration are much more often in favour of employers than employees.

3.26 ACCI suggested that a drop in the number of matters being brought before the Commission does not necessarily lessen the concerns of small business. ACCI argued that the number of claims does not vary the impacts on individuals and enterprises who are the subject of a claim.<sup>21</sup> The committee believes that a decline in the number of claims can only be characterised as a positive development, and questions ACCI's logic that a drop in claims does not represent a drop in net costs, financial or otherwise, to business.

3.27 ACCI argued that the number of claims officially lodged represents only 'the tip of the iceberg'. ACCI pointed out that, before employees are dismissed, employers often go to extreme lengths to 'salvage' an employment relationship. ACCI argued that such measures involve costs, such as those associated with managing underperformance, compliance with procedural fairness requirements, and cases where employees have been 'paid off' in the hope that they will not pursue formal claims.<sup>22</sup> The ACTU pointed out that unfair dismissal legislation aims to promote internal management of risk through better employee relations, including recruitment, selection and performance management. The ACTU argued that, if such measures have been taken, both employer and employee are better for it. The ACTU could see no evidence to support the argument that businesses are pre-empting unmeritorious claims through the payment of 'hush money'.<sup>23</sup>

3.28 The committee did not receive sufficient evidence about the relative difficulty of employers in responding to an unfair dismissal claim to come to a firm conclusion. However, ACCI reported that its members found unfair dismissal processes onerous:

Compliance with fair dismissal obligations (and in particular following the constantly evolving technical and legal niceties of procedural fairness) is a practical impossibility for such a proportion of small businesses as to render it an inappropriate and disproportionate burden.<sup>24</sup>

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20 Dr Robbins and G. Voll, *Submission 13*, p.10

21 ACCI, *Submission 7*, p.12

22 *ibid.*, p.12

23 ACTU, *Submission 12*, para. 80

24 ACCI, *Submission 7*, p.32

3.29 This view was disputed, but the widespread lack of knowledge in relation to unfair dismissal by both employers and employees was considered unhelpful.<sup>25</sup> Research undertaken by Voll found that:

Regionally located small business employees find it quite difficult to obtain good advice about dismissal because generally, the only avenues for this sort of advice are unions (if the employee is a member) or a solicitor. The latter is usually too expensive...[and] the employees in the case studies examined by Voll were not union members and this, given the low level of unionisation in the small regional business sector, is an extremely common situation.<sup>26</sup>

3.30 As to the difficulty for employees, the evidence was patchy, and the committee has reached no conclusions. Ms Gabrielle Marchetti from Jobwatch observed:

Not only do employers win many cases but it is also important to bear in mind that during the conciliation process, which is the process at which the majority of cases are resolved, often employees walk away feeling that they have got the raw end of the deal, because they have basically decided it is going to be too difficult, too costly and too time consuming for them to go on to arbitration. They would rather have some compensation than none, so they are more likely to settle for a pitiful sum of money.<sup>27</sup>

3.31 The ACCI submission countenanced the possibility that, in some minds, unfair dismissal is being invoked as a proxy for daily human-resource related challenges faced by employers in the course of running their businesses.<sup>28</sup>

### ***The costs of an unfair dismissal claim***

3.32 The committee received some evidence of the direct costs to small business of defending an unfair dismissal claim. Robbins and Voll submitted that, from their Albury-Wodonga survey, median compensation payment to former employees is \$2000, and of other costs, the median is \$1000. They concluded that:

There is no evidence from these results that unfair dismissals are a financial burden on small businesses. Indeed 60% of the respondents to these answers were happy with the outcomes achieved and costs incurred.<sup>29</sup>

3.33 It is generally agreed that costs associated with termination would rise in proportion to the strictness of unfair dismissal provisions.<sup>30</sup>

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25 See, for example, Dr Jill Murray, *Submission 1*, p.1

26 Dr Robbins and G. Voll, *Submission 13*, p.15, drawn from G. Voll, 'Case Studies in Unfair Dismissal Process', University of Sydney, 2005

27 Ms Gabrielle Marchetti, *Committee Hansard*, 3 May 2005, p.37

28 ACCI, *Submission 7*, p.26

29 Dr Robbins and Mr Voll, *Submission 13*, p.13



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### ***Measures already in place***

3.34 In addition to establishing small business' top priorities, there is another important element in considering whether legislation is needed. That is, in the absence of the reform, are other options available which will deliver similar benefits to those promised by the reform? While the Government claims that unfair dismissal provisions place undue constraints on small business owners and hamper employment, respondents such as the Centre for Employment and Labour Relations Law at the University of Melbourne pointed out that a range of workers are already excluded from the unfair dismissal provisions, giving employers ample opportunity to employ staff and enjoy the 'benefits' being offered by the bill. Classes of employee excluded include workers on fixed-term contracts, those engaged to perform specified tasks, and many casual employees. Indeed, the express rationale for making these exclusions was at least in part to provide flexibility for employers in how they engage labour.<sup>31</sup> Nor is it the case that dismissed employees are encouraged to lodge claims regardless of merit. DEWR made the point that the AIRC already has the power to impose costs on a vexatious claimant, a significant power acting to restrict abuse of unfair dismissal provisions.<sup>32</sup>

### ***Reforms to unfair dismissal procedures***

3.35 The committee believes that if the Government was serious about trying to improve the unfair dismissal system it would focus on improving and simplifying the procedures involved for unfair dismissal applications, and reducing the costs for small businesses. The committee believes the Government should seriously consider sensible procedural improvements to the unfair dismissal system, including that:

- the Australian Industrial Relations Commission (AIRC) conduct conciliation conferences at the convenience of small business;
- telephone conferencing be used whenever possible to assist small businesses who have difficulty attending hearings in person;
- the AIRC be allowed to order costs against applicants who pursue speculative or vexatious claims;
- the AIRC be required by legislation to deal with unfair dismissal applications in a timely fashion; and
- small businesses be provided with better information to assist them and their workforce to understand their obligations about termination of employment.

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30 See, for example, Dr Paul Oslington, *Committee Hansard*, 2 May 2005, p.12

31 Centre for Employment and Labour Relations Law, University of Melbourne, *Submission 15*, p.13

32 s170CJ and s347 Workplace Relations Act 1996, cited in DEWR, *Submission 11*, p.13

3.36 A number of similar practical measures to improve the current unfair dismissal system were touched on by several submissions. The ACTU submission, for example, argued that procedural reform is necessary to provide assistance to small businesses and to ensure that employees are treated fairly. It suggested that representation of parties in conciliation proceedings should occur only where it assists with the just and expeditious resolution of the matter; agents appearing in unfair dismissal proceedings should be a registered industrial agents; and applications for financial compensation should only be accepted in circumstances which prevent reinstatement. The ACTU also suggested that it would be helpful for unions to make a single application on behalf of a number of employees who have been dismissed at the same time or for related reasons.<sup>33</sup>

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33 ACTU, *Submission 12*, para.166