

## Government Senators' Report

Government senators on the committee reject the findings of the majority report. The Opposition's argument that the Government's position is without foundation is misleading and ultimately futile. The Government's position is overwhelmingly supported by small business and by numerous surveys which show that small business employers are concerned about the impact of the unfair dismissal laws on employment growth. The Opposition's stance shows the extent to which it has lost touch with the concerns of small business operators.

Government senators cannot stress enough the significant role that small business plays in the Australian economy and society. Small business accounts for 96 per cent of all businesses in the private sector, or nearly 1.2 million businesses in total. Roughly 80 per cent of these are micro-businesses which employ fewer than five workers. Significantly, small business provides employment for over three million people and accounts for one-third of Australia's GDP.<sup>1</sup>

The Government has stated repeatedly that the current unfair dismissal laws are an impediment to job growth in the small business sector. It has tried on more than 40 occasions to provide an exemption for small business from unfair dismissal laws. Yet each attempt has been blocked by the Opposition and minor parties in the Senate. There is no question that the Government's return to office in October 2004 provided it with a fresh mandate to implement its unfair dismissal policy. The people of Australia have a right to expect the passage of the Government's Fair Dismissal Reform Bill through the Parliament.

### Small business confidence

Government senators believe that perceptions can be extremely important in the job market, and accept the view that introducing a small business exemption from unfair dismissal laws will remove one of the perceived barriers to employment growth. At the heart of this debate is the effect of unfair dismissal laws on the confidence of small business employers, an issue which the majority report chose to ignore. Government senators stress that confidence plays a key role in small business planning and action, especially in relation to investment decisions and the hiring of new staff. One witness representing the Victorian Automobile Chamber of Commerce stated that under the current unfair dismissal system employers lack the confidence to engage additional employees: '...rather than engaging additional employees, employers themselves are simply working longer hours or family members are encouraged to work longer hours'.<sup>2</sup>

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1 Employment, Workplace Relations and Education References Committee, *Small Business Employment*, February 2003, p.2

2 Mrs Leyla Yilmaz, *Committee Hansard*, 3 May 2005, p.21

The erosion of small business confidence resulting from the unfair dismissal laws is also related directly to the ability or willingness of employers to dismiss staff. It was pointed out by the Australian Chamber of Commerce and Industry that unfair dismissal laws 'hamstring' employers by discouraging them from making dismissals: 'It is making small business employers retain people within businesses where otherwise the proper and prudent course would be not to retain them...'.<sup>3</sup> This is why the figures on state and federal unfair dismissal applications referred to in the majority report are not necessarily representative of the picture they try to present. Again, small business has been pointing out for some time that official figures on unfair dismissal cases only show the 'tip of the iceberg'; that is, they only refer to claims where litigation has commenced. The figures conceal cases which do not involve litigation but which impose significant financial and operational costs on small business employers.<sup>4</sup>

### **Small business employment**

The main objective of Government policy on unfair dismissal is the expansion of employment opportunities in the small business sector. The removal of impediments to employment is the principal goal of legislation currently before the Parliament. Government senators believe it strikes the right balance between the needs of employers and the rights of workers. The provisions of the Workplace Relations Act which protect workers from unlawful termination will remain in force. The relevant section of the Act provides that an employee may not be terminated on a number of grounds such as race, colour, sexual preference, absence from work during maternity leave or parental leave, and membership of a trade union (see attachment).

Government senators believe that the majority report has used selective evidence and data to downplay the concerns of small business employers about the effect of the current unfair dismissal laws. A survey of 700 small and medium-sized companies conducted by the Australian Industry Group as recently as May 2005 found that over 90 per cent of respondents wanted exemptions for small business from unfair dismissal laws and 88 per cent wanted measures to discourage speculative unfair dismissal claims.<sup>5</sup> This new evidence demonstrates that current unfair dismissal laws are a barrier to employment and that the cost to small business in defending unfair dismissal claims is disproportionately high.

The findings of this latest survey build on a series of small business surveys over recent years which reflect the same concerns of small business. Research commissioned by the Department of Employment and Workplace Relations in 2002 and conducted by the Melbourne Institute of Applied Economic and Social Research found that unfair dismissal laws had contributed to 77,000 job losses in small and

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3 Mr Scott Barklamb, *Committee Hansard*, 3 May 2005, p.22

4 Australian Chamber of Commerce and Industry, *Submission 7*, p.12

5 The AiG survey is referred to in the *Age*, 4 June 2005, p.5

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medium-sized businesses, and were costing those businesses \$1.3 billion each year. Government senators noted in 2003 that the Restaurant and Catering Association had found that 38 per cent of their owners had defended an unfair dismissal claim at an average cost to the employer of 63 hours of their time and \$3675 in legal costs. These estimates translate into \$18.2 million in direct costs and \$15.5 million in indirect costs to the industry as a whole.<sup>6</sup> These costs apply a disproportionate and unreasonable burden on small business. There is no doubt that the cost to small business of complying with unfair dismissal laws warrant special consideration and a measure of legislative protection. This is why Government senators commend to the Senate the Fair Dismissal Reform Bill and legislation which may result from the industrial relations reforms announced by the Prime Minister on 26 May 2005.<sup>7</sup>

Government senators accept that many small businesses have reason to believe that current laws relating to unfair dismissal prevent them from employing people. Perceptions of disadvantage have become a reality for small business. The evidence from Australia and abroad shows a clear causal link between the perceptions of small business employers and their willingness to employ new staff. Surveys of Germany's experience with employment protection laws show that statutory protection against dismissal is harmful to small firms. Government senators note that the majority report on the Workplace Relations Amendment (Termination of Employment) Bill 2002 found that surveys of small business attitudes to unfair dismissal laws provide a secure foundation for Government policy and legislation. Surveys have been too numerous and their findings too consistent to be rejected by the Opposition as evidence of little or no value. They include the Australian Business Limited Business Priorities Survey of June 2004; Sensis Business Index Survey, August 2004; ACCI Pre-election Survey, September 2004; and the Executive Connection Survey of December 2004.

Government senators believe that providing more information to small business employers about the unfair dismissal laws in the belief that they can be better educated will not solve the problems facing small business. The Department of Employment and Workplace Relations made it clear to the committee at a public hearing that it already provides comprehensive education and information services to small business employers.<sup>8</sup> While better training and information may be of some assistance, it cannot overcome the highly complex legal and human resource rules involved in unfair dismissal claims.

### **The need for a national industrial relations system**

Government senators take this issue further and argue that the procedural changes recommended in the majority report are not sufficient to fix the problems which face

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6 Government Senators' Reservations, *Small Business Employment*, Employment, Workplace Relations and Education References Committee, February 2003, p.150

7 Ministerial statement, workplace relations, *House Hansard*, 26 May 2005, pp.25-29

8 Ms Miranda Pointon, Department of Employment and Workplace Relations, *Committee Hansard*, 2 May 2005, p.41

small business. They only tinker at the edges of a system which is in need of an overhaul. Government senators accept the view of peak employer bodies that the time has come to look to the fundamental structural problems with the unfair dismissal system, not the window dressing of process and procedure. The figures on federal and state unfair dismissal applications referred to the majority report reinforce the need for a single industrial relations jurisdiction, rather than the current fragmented system. They show that the number of unfair dismissal cases in all state jurisdictions rose by 23 per cent in the seven years to 2003. This includes a staggering 145 per cent increase in the number of unfair dismissal cases in Tasmania under that state's industrial relations system. Yet, the number of unfair dismissal cases in the federal arena over the corresponding period fell by 52.2 per cent.

Government senators are particularly concerned by these disparate figures and note that different federal and state laws have resulted in an increase in jurisdiction hopping, or 'cherry picking', across the country. This is unsatisfactory for small business operators who require certainty and stability in the application of the law. They need to know that their decisions will be treated fairly and will not be dependent on the make-up of the Australian Industrial Relations Commission or how well lawyers are able to argue the technicalities of a case.

It follows that a more simple and fair workplace relations system based on a unified and nationally harmonised set of laws is required. Government senators believe the industrial relations system which was introduced in 1904 no longer serves the interests of small business. Maintaining six separate industrial jurisdictions is not only inefficient but excessively complex and costly for small business. The current system creates confusion and uncertainty for employers and employees alike. This is supported by surveys which show consistently that small business owners are often unaware of which jurisdiction, federal or state, they fall under. Government senators repeat their strong belief in the goal of a national industrial relations system which reflects the competitive national character of the Australian economy in 2005. This will do much to remove complexity and uncertainty under the current system, and provide small business operators with the confidence to hire new staff.

Senator Guy Barnett

Senator Judith Troeth

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**Attachment**  
***Workplace Relations Act 1996***

**Employment not to be terminated on certain grounds**

**Section 170CK(2)**

Except as provided by subsection (3) or (4), an employer must not terminate an employee's employment for any one or more of the following reasons, or for reasons including any one or more of the following reasons:

- (a) temporary absence from work because of illness or injury within the meaning of the regulations;
- (b) trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours;
- (c) non-membership of a trade union;
- (d) seeking office as, or acting or having acted in the capacity of, a representative of employees;
- (e) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- (f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- (g) refusing to negotiate in connection with, make, sign, extend, vary or terminate an AWA;
- (h) absence from work during maternity leave or other parental leave;
- (i) temporary absence from work because of the carrying out of a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.

