Submission

to

Senate Employment, Workplace Relations and Education
References Committee

Inquiry into unfair dismissal laws

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Inquiry into Unfair Dismissal Policy in the Small Business Sector

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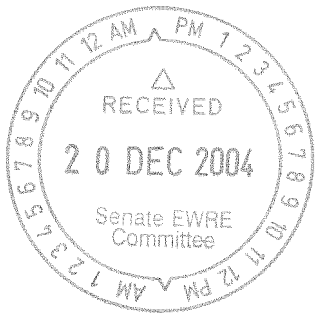

Submission

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The *Workplace Relations Amendment (Fair Dismissal) Bill* 2004

What is the alternative to complete exclusion of small businesses from the unfair dismissal regime?

1 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. The proposal to exclude small and medium businesses from the scope of Part VIA, Division 3 of the Workplace Relations Act (termination of employment) is an unacceptable withdrawal from the government from these obligations.

2 The current arrangements in the Act provide a cheap, informal and user-friendly process : employers and employees may deal with an 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. There is no reputable evidence that the current system represents an unjustified burden on small/medium businesses, or that the proposed change would create more jobs.

3 One ramification of the proposed legislation is that small and medium employers will be permitted to sack workers for any reason, or none, and that those workers will have no recourse to this quick and cheap review process. Workers may therefore be sacked without notice because their boss decides he or she doesn't like their face any more, or because the employer's cousin has come to town and is looking for a job.

4 Such capricious decisions to dismiss have nothing to do with the economic efficiency of the business, nor with the capacity of the business to employ more people. *For this reason, the Bill is not properly adapted to its ostensible policy goal.* Indeed, 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 would contribute to the more efficient running of the business, or who 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 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.

5 It is argued that the total exclusion of small businesses from the unfair dismissals regime is not appropriate, and that the proposal legislation is not based upon strong empirical research or upon a clearly articulated policy basis. If, however, the Government is determined to proceed, then consideration should be given to a legislative mechanism which is aimed that limiting capricious employer dismissals for reasons which are unconnected with the operational requirements of the business.

6 A model for this approach may be borrowed from the recent United Kingdom legislation governing a worker's right to seek flexible work. Under the *Employment Act* 2002, workers are entitled to request a change in the hours or place of work for family reasons. Employers are only permitted to refuse upon certain grounds, which are specified in the legislation. The relevant section is set out below.

Section 80G Employer's duties in relation to application under s 80F

(1) An employer to whom an application under s 80 F is made –
(a)...
(b) shall only refuse the application because he considers that one or more of the following grounds applies –
(i) the burden of additional costs,
(ii) detrimental effect on ability to meet customer demand,
(iii) inability to re-organise work among existing staff,
(iv) inability to recruit additional staff,
(v) detrimental impact on quality,
(vi) detrimental impact on performance,
(vii) insufficiency of work during the periods the employer proposes to work,
(viii) planned structural changes, and
(ix) such other grounds as the Secretary of State may specify by regulations.

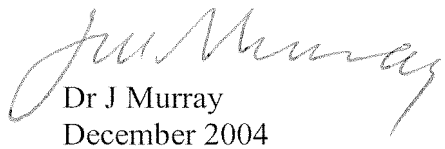
7 Obviously, the issue which is being dealt with by the above provision is quite different from that under consideration here. In the UK case, the law provides a range of grounds upon which an employer may refuse an employee request. **What is proposed in relation to Australia is that the law specify a range of grounds upon which a small/medium business may dismiss a worker and avoid the provisions of the *Workplace Relations Act*. It would be necessary to construct a meaningful set of legislative provisions which clearly outlined *legitimate operational requirements of a business as grounds for dismissal*. It is also important that the law *specify a clear procedure* by which workers are informed of which of the available operational grounds their dismissal is based, and a brief, clear outline of the reasons for the application of this ground in this particular case.**

8 Workers in small/medium businesses would retain access to the Workplace Relations Act's regime in relation to harsh, unjust and unreasonable dismissal in

cases where the employer did not nominate one of the 'operational requirements grounds' specified in legislation, or where the worker believed that the nominated ground was not the genuine reason. Given the employer's superior (indeed probably sole) access to material relating to the reason for decision, the burden of proof should rest with the employer to prove that the nominated 'operational requirement' was in fact the reason for the dismissal.

9 While the proposed process is open to abuse (an employer may nominate an operational requirement and prove it, while actually dismissing the worker for an illegitimate reason or reasons), it has a number of advantages over total deregulation. First, it gives workers and small/medium businesses important information about what is right and what is wrong in the area of dismissal. The mere existence of the law may have a powerful 'demonstration' impact, and limit the incidence of capricious dismissals. Second, it shows that the Government is committed to creating a labour market which is both 'flexible and fair' (see Section 3(a), Workplace Relations Act). Third, it bolsters sound economic development based upon adherence to the rule of law and fundamental principles of justice. The idea that small/medium businesses are too pressed by economic circumstances to learn the law and apply it is dangerous, and, may, over the long term, stifle innovation and productivity growth.

10 Article 2(5) of the ILO Convention concerning Termination of Employment at the Initiative of the Employer, to which the current Act purports to give effect, states that ratifying countries may, in certain circumstances, exclude sectors from the Convention as a whole or from 'certain provisions thereof'. The proposal put forward in this submission, if adopted, would mean that workers in small/medium businesses received some protection under Article 4 of the Convention : 'The termination of a worker shall not be terminated unless there is a valid reason for such termination...based on the operational requirements of the undertaking, establishment or service.' At the same time, the Government would be excluding such workers from the full protection of the Convention, which is aimed at prohibiting harsh, unjust and unreasonable dismissals, whether for sound operational reasons or not. It is strongly argued that there are no objective or empirical grounds justifying this exclusion.



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