Submission of the Shop Distributive and Allied Employees Association to the Senate Employment, Workplace Relations and Education References Committee Inquiry into Unfair Dismissal Policy in the Small Business Sector

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The Association welcomes the Senate inquiry into Unfair Dismissal Policy.
The terms of reference for the Inquiry use the phrases “small business sector”, “small business” and small businesses” without identifying what is a “small business”.

The Association notes that the Government in introducing into Parliament the Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004 has identified that the purpose of that Bill is to exempt employers who employ less than 20 employees from the operation of the unfair dismissal provisions of the Act.

In introducing the Workplace Relations Amendment (Small Business Employment Protection) Bill 2004 the Government has sought to exempt employers who employ fewer than 15 employees from having to pay redundancy pay.

A “small business” in the Governments view is either one employing less than 15 or one employing less than 20 employees depending upon the subject matter at the time.

Whilst there needs to be some certainty as to what numeric value is to be put on the number of employees in order for the business to be considered to be a “small business” there is a serious issue to be dealt with which has not yet been given proper consideration, namely:

WHAT CONSTITUTES A “BUSINESS”?????.

The approach adopted by the Government in introducing both the Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004 and the Workplace Relations Amendment (Small Business Employment Protection) Bill 2004 has been to define the “small business” in terms of being an employer.

Equating an “employer employing fewer than” 15 or 20 employees, as the case may be, with a “small business” is a key defect of both Bills.

The particular problem of these Bills is that by providing an exemption to employers who employ fewer than 15 or 20 employees is that the concept of ***employer*** would appear to comprehend **only** the legal entity which is the employer of the employees involved in redundancy or the termination of employment.

A practical application of the Bills would be that where **a business** was operated through a series of separate constitutional corporations each of which would be the technical legal employer for their relevant employees, then the Bills would allow the business to be able to avoid redundancy pay and the application of the unfair dismissal provisions if each of the constitutional corporations, as individual employers, each employed fewer than 15 or 20 employees, as the case may be. That a business may operate through several separate constitutional corporations is common.

A recent matter in the Australian Industrial Relations Commission in which the Association was involved shows the way in which the Bills would enable employers to use the provisions of the Workplace Relations Act to avoid paying redundancy pay or being effected by the unfair dismissal provisions, even where the total business clearly employed more than 15 or 20 employees.

In a Matter No. AJ2004/8846, an application for certification of the Jasbe Petroleum Certified Agreement 2004, the application sought to have an agreement certified covering a number of separate companies. The companies were:

- Jasbe Baullkan Hills Pty
- Jasbe Cranbourne Pty Ltd
- Jasbe Editvale Pty Ltd
- Jasbe Frankston Pty Ltd
- Jasbe Holdings Pty Ltd
- Jasbe Investment Pty Ltd
- Jasbe Malvern Pty Ltd
- Jasbe Multi Pty Ltd
- Jasbe Normanhurst Pty Ltd
- Jasbe Oakes Pty Ltd
- Jasbe Plantation Pty Ltd
- Jasbe Roxby Pty Ltd
- Jasbe Seaford Pty Ltd
- Jasbe Supremacy Pty Ltd
- Jasbe Westernport Pty Ltd
- Jasbe Willoughby Pty Ltd

Each of these companies form a group known as Jasbe Petroleum. Jasbe Petroleum operates a number of petrol retail outlets in the South East suburbs and in the Mornington Peninsula areas of Melbourne.

The application for certification of the agreement was filed on the basis that it was an agreement covering a single business. The employer relying upon the definition in Section 170LB(2), which provides:

> "**170LB(2) [Single employer**] For the purposes of this Part:
>
> (a) if 2 or more employers carry on a business, project or undertaking as a joint venture or common enterprise, the employers are taken to be one employer; and
>
> (b) if 2 or more corporations that are related to each other for the purposes of the *Corporations Act, 2001*, each carry on a single business;
>
> (i) the corporations may be treated as one employer; and
> (ii) the single businesses may be treated as one single business."

Under this provision it was clear that each of the separate employers were to be treated as being a single employer by virtue of the operation of Section 170LB(2), in that Jasbe Petroleum constituted a single business even though there were 16 separate constitutional corporations making up Jasbe Petroleum.

Whilst it has not yet been established by the Association how many employees each of the Jasbe companies employ, our knowledge of the petrol retail industry leads us to conclude that each individual company employs less than 15 employees. With 16 separate companies constituting the single business, the **business** of Jasbe Petroleum certainly contains well over 15 employees. For the purposes of certifying an agreement, the Workplace Relations Act treats all 16 of these separate employers as constituting a single employer, thus enabling Jasbe Petroleum operating through 16 separate employers to have a single enterprise agreement covering its combined operations.

However, this approach to treating Jasbe Petroleum as a single business for the purposes of making a certified agreement will not extend to treating Jasbe Petroleum as a single business for redundancy purposes or for unfair dismissal purposes under the provisions of the proposed Bills.

Simply because Jasbe has been crafty enough to set up 16 separate companies to operate its petrol retail outlets means that the entire operations in Jasbe Petroleum would if these Bills were enacted be free of any requirements to pay any form of redundancy payment should a redundancy occur at any one or more than one petrol retail sites run by Jasbe Petroleum or should a claim of unfair dismissal be made.

In the Association's very strong submission, if the Workplace Relations Act already recognises the concept of having numbers of separate constitutional corporations acting together as related companies being treated as a single business, or a single employer, then a similar approach should be required to be met and adopted in relations to exempting businesses with less than 15 or 20 employees from unfair dismissal laws and from redundancy pay. In other words, if there is to be an exemption for employers employing less than 15 employees, then that exemption should only operate where the total business is looked at.

It should be necessary to 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 its good enough to have groups of employers treated as being a single entity for the purposes of certification of agreements, it should be good enough to apply the same rule to exempting employers from their requirements to pay redundancy pay.

To put this particular aspect of the Submission in context, we draw attention to several provisions of the Corporations Act which deal with the concept of associated entities and related companies. Division 6 – Subsidiaries and Related Bodies Corporate of Part 1.2 – Interpretation of the Corporations Act deals with the issue of subsidiaries related bodies and associated entities in Corporations Law. Section 46 of the Corporations Act discusses and provides for the concept of a subsidiary of a body corporate, Section 50 deals with related bodies corporate and Section 50AAA deals with the concept of associated entities to a body corporate.

Each of these Sections is attached to this Submission.

It is important, in our Submission, for the Senate to have regard to the fact that the Corporation's Code has quite comprehensively dealt with the concept of bodies corporate having relationships with other bodies corporate and other entities in such a way that they form a complete whole. This approach in the Corporations Act is designed to ensure that those who own and have constructed the Constitutional Corporations are not able to avoid their obligations under the Corporations Act by simply having such a large raft of related companies, subsidiaries or associated entities that they can effectively bypass their obligations in relation to the normal operation of the Corporation Act. By creating clear statutory provisions relating to subsidiaries, related bodies corporate and associated entities, the Corporations Act is making very clear that it intends to ensure that where groups of companies are operating together, that they are treated essentially as single entities for different purposes of the Corporations Act.

In the Association's very strong view, only if the concepts of subsidiaries, related bodies corporate and associated entities were incorporated into the Workplace Relations Act approach to identifying an employer employing less than 15 or 20 employees would the Workplace Relations Act both operate consistently with the approach of the Corporations Act and also operate in a manner which was genuinely fair to the all employers and employees.

As the Jasbe example clearly indicates, where the government has as its stated aim the protection of small business employers from the requirements to pay redundancy payments or where the government has also publicly proclaimed an intention to protect small business employers from unfair dismissal laws, then the government should at least be prepared to ensure that a protection which is publicly stated to be for small business employers is only able to be accessed by genuine small business employers.

Simply because the approach of the Workplace Relations Act and in the proposed Bills relating to unfair termination are so different from the approach adopted in the Corporations Act, it is clear that the Workplace Relations Act as amended by the (misnamed) Fair Dismissal Reform Bill, would provide a benefit to employers who were not small businesses employing less than 20 employees. As the Jasbe example clearly indicates, businesses employing hundreds of employees can,

through the very simple device of creating subsidiaries, related companies or associated entities, be able to take advantage of a statutory provision which the government has publicly proclaimed is only for the protection of small businesses.

Not only does this mean that large businesses who clearly have the capacity to properly deal with and comply with unfair dismissal laws, will be able to be exempt from the operations of those laws by the simple device of restructuring their businesses through using multiple constitutional corporations, each employing no more than 20 employees, but it also effectively removes the perceived advantage being given by the government to genuine small businesses.

The above discussion focuses on 2 Bills currently before Parliament but in doing so we highlight the need for this Senate Inquiry to have a clear and concise definition as to what constitutes a small business.

One aspect of the need for a clear definition of small business is to determine the numerical value to be given to the identifier, which appears to be (by default in the absence of debate about qualifiers) the number of employees.

If the number of employees is to be the numeric qualifier then the Association makes the very strong submission that all employees must be counted. The Governments approach to date in relation to bills introduced into Parliament which have the stated aim of protecting small business all start from the premise that some employees are not to be considered when calculating the cut-off for being a small business.

Under the Governments approach a business employing 100 casuals with less than 12 months service and 14 permanent employees is a small business. This would be so even if the employer churned through casual staff so that the employer always had a 100 casuals but never had a casual with 12 or more months of service.

To allow such a business to be considered a small business is nothing but a rort of the worst sort!

The final aspect of the need for a clear definition relates to the issues raised above concerning the difference between being a business and being a constitutional corporation.

The 2 terms are not synonymous in all situations.

A single small business may be constituted by a single constitutional corporation.

A large business may be constituted by many related or associated constitutional corporations.

However it appears to be only in the minds of the current Government that many related or associated constitutional corporations can constitute a small business.

The Association makes the very strong submission that any approach to the proper identification of "Small business" should be predicated upon acceptance of the following criteria:

1 If 2 or more corporations are related to each other for the purposes of the Corporations Act 2001 the corporations are to be treated as one employer; or

2 If 2 or more employers are associated entities for the purposes of the Corporations Act 2001 the employers are to be treated as one employer

3 If 2 or more corporations are a single business for the purposes of S 170LB of the Workplace Relations Act the employers are to be treated as one employer.

Acceptance of these 3 criteria would mean that the terms "small business" and "small employer' could be interchanged.

Further, given that the Workplace Relations Act is so strongly focused on the concept and identity of the employer then adoption of these criteria would allow the debate to be conducted using the phrase "small business" while any amendments to the Act were couched in language using the term "employer".

The additional importance attached to the adoption of these criteria would be that research conducted in relation to international experience and employment issues would be able to focus on genuine small businesses rather than apparent small businesses which were in fact merely part of a medium or large business.

The whole of the effort of the Senate Inquiry could be wasted if there is no clear and unambiguous definition of what constitutes a “business” so that a “small business” is also able to be clearly and unambiguously identified.

John Ryan
National Industrial Officer

EXTRACT FROM CORPORATIONS ACT 2001

PART 1.2--INTERPRETATION

Division 6--Subsidiaries and related bodies corporate

CORPORATIONS ACT 2001 - SECT 46

What is a subsidiary A body corporate (in this section called the *first body*) is a subsidiary of another body corporate if, and only if:

(a) the other body:

(i) controls the composition of the first body's board; or

(ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the first body; or

(iii) holds more than one-half of the issued share capital of the first body (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or

(b) the first body is a subsidiary of a subsidiary of the other body.

CORPORATIONS ACT 2001 - SECT 47

Control of a body corporate's board Without limiting by implication the circumstances in which the composition of a body corporate's board is taken to be controlled by another body corporate, the composition of the board is taken to be so controlled if the other body, by exercising a power exercisable (whether with or without the consent or concurrence of any other person) by it, can appoint or remove all, or the majority, of the directors of the first-mentioned body, and, for the purposes of this Division, the other body is taken to have power to make such an appointment if:

(a) a person cannot be appointed as a director of the first-mentioned body without the exercise by the other body of such a power in the person's favour; or
(b) a person's appointment as a director of the first-mentioned body follows necessarily from the person being a director or other officer of the other body.

CORPORATIONS ACT 2001 - SECT 48

Matters to be disregarded

(1) This section applies for the purposes of determining whether a body corporate (in this section called the *first body*) is a subsidiary of another body corporate.

(2) Any shares held, or power exercisable, by the other body in a fiduciary capacity are treated as not held or exercisable by it.

(3) Subject to subsections (4) and (5), any shares held, or power exercisable:

(a) by a person as a nominee for the other body (except where the other body is concerned only in a fiduciary capacity); or
(b) by, or by a nominee for, a subsidiary of the other body (not being a subsidiary that is concerned only in a fiduciary capacity);

are treated as held or exercisable by the other body.

(4) Any shares held, or power exercisable, by a person by virtue of the provisions of debentures of the first body, or of a trust deed for securing an issue of such debentures, are to be disregarded.

(5) Any shares held, or power exercisable, otherwise than as mentioned in subsection (4), by, or by a nominee for, the other body or a subsidiary of it are to be treated as not held or exercisable by the other body if:

(a) the ordinary business of the other body or that subsidiary, as the case may be, includes lending money; and
(b) the shares are held, or the power is exercisable, only by way of security given for the purposes of a transaction entered into in the ordinary course of business in connection with lending money, not being a transaction entered into with an associate of the other body, or of that subsidiary, as the case may be.

CORPORATIONS ACT 2001 - SECT 49

References in this Division to a subsidiary A reference in paragraph 46(b) or 48(3)(b) or subsection 48(5) to being a subsidiary, or to a subsidiary, of a body corporate includes a reference to being a subsidiary, or to a body corporate that is a subsidiary, as the case may be, of the first-mentioned body by virtue of any other application or applications of this Division.

CORPORATIONS ACT 2001 - SECT 50

Related bodies corporate Where a body corporate is:

(a) a holding company of another body corporate; or
(b) a subsidiary of another body corporate; or
(c) a subsidiary of a holding company of another body corporate;

the first-mentioned body and the other body are related to each other.

CORPORATIONS ACT 2001 - SECT 50AAA

Associated entities

(1)
One entity (the *associate*) is an associated entity of another entity (the *principal*) if subsection (2), (3), (4), (5), (6) or (7) is satisfied.

(2)
This subsection is satisfied if the associate and the principal are related bodies corporate.

(3)
This subsection is satisfied if the principal controls the associate.

(4)
This subsection is satisfied if:

(a) the associate controls the principal; and
(b) the operations, resources or affairs of the principal are material to the associate.

(5)
This subsection is satisfied if:

(a) the associate has a qualifying investment (see subsection (8)) in the principal; and
(b) the associate has significant influence over the principal; and
(c) the interest is material to the associate.

(6)
This subsection is satisfied if:

(a) the principal has a qualifying investment (see subsection (8)) in the associate; and
(b) the principal has significant influence over the associate; and
(c) the interest is material to the principal.

(7)
This subsection is satisfied if:

(a) an entity (the *third entity)* controls both the principal and the associate; and
(b) the operations, resources or affairs of the principal and the associate are both material to the third entity.

(8)

For the purposes of this section, one entity (the *first entity*) has a *qualifying investment* in another entity (the *second entity*) if the first entity:

(a) has an asset that is an investment in the second entity; or
(b) has an asset that is the beneficial interest in an investment in the second entity and has control over that asset.

CORPORATIONS ACT 2001 - SECT 50AA

Control

(1)

For the purposes of this Act, an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies.

(2)

In determining whether the first entity has this capacity:

(a) the practical influence the first entity can exert (rather than the rights it can enforce) is the issue to be considered; and
(b) any practice or pattern of behaviour affecting the second entity's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).

(3)

The first entity does not control the second entity merely because the first entity and a third entity jointly have the capacity to determine the outcome of decisions about the second entity's financial and operating policies.

(4)

If the first entity:

(a) has the capacity to influence decisions about the second entity's financial and operating policies; and
(b) is under a legal obligation to exercise that capacity for the benefit of someone other than the first entity's members;

the first entity is taken not to control the second entity.