# Submission

to

Senate Employment, Workplace Relations and Education
References Committee

# Inquiry into Unfair Dismissal Policy in the Small Business Sector

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| **Submitter:** | Peter Anderson<br>Director – Workplace Policy<br><br>Scott Barklamb<br>Manager – Workplace Relations |
| **Organisation:** | **Australian Chamber of Commerce and Industry (ACCI)** |
| **Address:** | Level 4, 55 Exhibition Street, Melbourne |
| **Phone:** | (03) 9668 9950 |
| **Fax:** | (03) 9668 9958 |
| **Email:** | peter.anderson@melb.acci.asn.au<br><br>scott.barklamb@melb.acci.asn.au |


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# ACCI

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## Senate Employment, Workplace Relations and Education References Committee

## Inquiry into Unfair Dismissal Policy in the Small Business Sector

## March 2005

LEADING AUSTRALIAN BUSINESS

# ACCI

- The Australian Chamber of Commerce and Industry (ACCI) is Australia's peak council of business associations.

- ACCI is Australia's largest and most representative business organisation.

  - Through our membership, ACCI represents over 350,000 businesses nationwide, including:

    - Australia's top 100 companies.

    - Over 55,000 medium sized enterprises employing 20 to 100 people.

    - Over 280,000 smaller enterprises employing less than 20 people.

- Businesses within the ACCI member network employ over 4 million working Australians.

- ACCI members are employer organisations in all States and Territories and all major sectors of Australian industry.

- Membership of ACCI comprises State and Territory Chambers of Commerce and national employer and industry associations. Each ACCI member is a representative body for small employers and sole traders, as well as medium and larger businesses.

- Each ACCI member organisation, through its network of businesses, identifies the policy, operational and regulatory concerns and priorities of its members and plans united action. Through this process, business policies are developed and strategies for change are implemented.

- ACCI members actively participate in developing national policy on a collective and individual basis.

- As individual business organisations in their own right, ACCI members also independently develop business policy within their own sector or jurisdiction.

## ACCI, Small Business and Unfair Dismissal

- ACCI is Australia's largest and most representative organisation representing smaller businesses.

- ACCI members represent and advise small businesses in all industries on a wide range of matters, including recruitment and selection, performance management, disputation, discipline and termination of employment.

- In regard to dismissal, ACCI members advise and represent small businesses in disciplining, performance managing and terminating the employment of staff, and also in relation to any post dismissal claims which may be made under State or Federal termination of employment laws.

- ACCI thereby represents, and makes this submission on behalf of, precisely the small businesses who:

  - Are currently impacted on through the operation of federal and state termination of employment laws.

  - Are suffering uncertainty in managing staff, in hiring and in firing, through the operation of unfair dismissal laws.

  - Stand to gain additional operational capacities from further reform of unfair dismissal procedures and regulations at the federal and state level.

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# INTRODUCTION

1. The issue of small business and the extent to which they should be subject to termination of employment laws has been before this Committee repeatedly during the period since 1997. As the Committee indicates in relation to this inquiry:

> This inquiry coincides with the Government's re-introduction of the Workplace Relations Amendment (Fair Dismissal) Bill. While the inquiry may cover may cover some points relevant to the particulars of this bill, its focus is on general principles and policy underlying the regulation of small business employment. The Legislation Committee has inquired and reported into unfair dismissal laws five times, in February 1999, and as part of the MOJO inquiry in November 1999, 2000, 2002 and 2003.

2. ACCI has consistently sought to contribute to the work of this Committee making submissions to each of these inquiries.

3. The constant throughout this process has been ACCI's support for proposals to improve the operation and balance in Australia's unfair dismissal laws (Commonwealth and State), including but not limited to support for a Bill to provide a small business exemption on hiring of new employees.

4. ACCI's support for the Bill is established, and the previous submissions go to the detail of the proposed exemption as introduced. We again commend this material to the Committee to the extent relevant.

5. More fundamentally, this time the Committee has indicated it will focus on "general principles and policy underlying the regulation of small business employment". As set out in the following submission, this consideration and the detailed terms of reference supplied:

    a. Should in themselves compel an on-balance conclusion in favour of the small business exemption on the same or similar terms proposed by the *Workplace Relations Amendment (Fair Dismissal) Bill*.

    b. Do not and cannot dispose of arguments in favour of the on-balance justification for the exemption of small business from the unfair dismissal jurisdiction.

    c. Should compel a conclusion in favour of further changes to Commonwealth unfair dismissal laws to make them operate in a more balanced manner in those workplaces that do not fall within the framework of a 'small business exemption.

d. Do not represent the complete range of considerations upon which the *Workplace Relations Amendment (Fair Dismissal) Bill* or broader unfair dismissal reform should be considered by the Senate during 2005. Where a fuller range of considerations is taken into account, the exemption (in one form or another) and other reform measures should pass.

e. Should compel a conclusion in favour of a more national approach to the regulation of unfair dismissal laws in Australia.

## AN EMPLOYER PERSPECTIVE

6. The Commonwealth unfair dismissal system was first established in 1993. In general terms, the 1993 laws have been subject to two important subsequent variations – in 1996 and in 2001 (with some other lesser changes made in 2003). Despite these variations there has been almost continuous debate at a public, industry, political and legislative level over the operation of these laws.

7. The 1993 law established, for the first time, a national jurisdiction. Until then, for the previous 20 or so years States had established unfair dismissal laws, which had a significant but restricted coverage due to the interaction of dual federal/State industrial systems and related constitutional constraints. Until 1993 federal law only regulated issues related to dismissal of employees in a limited and indirect manner (e.g. through the award based conciliation and arbitration system).

8. The 1993 Commonwealth law can be seen as a major turning point in employer attitudes to unfair dismissal laws, especially amongst smaller businesses. The 1993 law expanded access to the unfair dismissal system across workplaces (more employers were exposed to more claims or the risk of claims). And the substance of the 1993 law was significantly more burdensome on employers than had previously been the case in State jurisdictions. That the 1993 laws were based (in a constitutional sense) on the external affairs power and an international convention that was ratified by the Commonwealth without the concurrence of the States only added to the public controversy surrounding the 1993 laws.

9. The 1996 changes sought to ameliorate this position, largely by making amendments under the concept of a ‘fair go all round’. Most of the 1996 amendments (at least those that were passed) were designed to remove the harshest features of the 1993 laws.

10. However, it is apparent that since the 1996 changes employer dissatisfaction with unfair dismissal laws has, in general terms, not abated – although it is recognised that there has been improvement to some degree. The changes, which

have been made, have been, in part beneficial. The law is obviously less extreme than it was in 1993. But in saying this, employers are not of the view that the balance of interests between employers and employees is properly established by the current system. The core characteristics of the system remain, and changes that have been made have been primarily directed at the rules that operate within the jurisdiction, and not to the jurisdiction itself.

11. Even if one accepts for the purposes of argument that the 1996 amendments were good enough at the time, it is now nine years since those amendments were made. There is obviously a need for ongoing policy attention to an area of public policy as important (yet difficult) as unfair dismissal laws. Case decisions continue to alter the application of the law, and in some areas have departed from or expanded its legislative intent. Opportunistic advisers and consultants still advertise for and issue proceedings challenging terminations which in the past may not have been litigated. The increased cost of litigation bears more and more heavily on employers as they weigh up the costs of defending claims against the costs of settlement, even where dismissal has been warranted. Out of court settlements in the thousands of dollars are still paid by an employer for commercial reasons, reflecting – in that employer's view – a flawed system. And as new cases continue to be filed and more decisions made the differing or subjective approaches of individual conciliators and arbitrators to similar facts creates uncertainty when dismissing staff or when assessing the merits of or claims that are lodged. The amendments since 1996 have been timely, but do not go far enough in dealing with these outstanding issues.

12. Aside from these practical considerations there are systemic issues of concern. We continue in Australia to have multiple unfair dismissal jurisdictions – one Commonwealth (certain federal employees, plus Victoria and the Territories) and five state systems (certain employees in NSW, Qld, WA, SA and Tasmania). One of the structural problems with unfair dismissal laws in Australia is the lack of coherence in the interaction of these laws. A case certainly exists for an open examination of whether a coherent harmonised or national structure for unfair dismissal laws in Australia is desirable. It is not a matter that should be ignored by policy makers, or go unmentioned in this submission.

13. It is due to the multiplicity of federal and State unfair dismissal laws that it is often difficult to separate attitudes of employers between federal laws as distinct from State laws. This should not be a surprise – in circumstances where so-called legal and industrial experts find it difficult to resolve questions of jurisdictional interaction it is not unexpected that many employers will not distinguish between federal and State industrial respondency.

# INTERNATIONAL EXPERIENCE

Term of Reference 1(a)(i), to examine:

*(i) the international experience concerning:*

*(A) unfair dismissal laws, and*

*(B) the relationship between unfair dismissal laws and employment growth in the small business sector,*[1]

## Relevance of International Research

14. Firstly, we must question the apparent premise of this term of reference.

15. No other system is facing the circumstances faced in Australia, which is:

    a. A system of termination redress has been inappropriately extended to sectors of the economy it is fundamentally inapplicable to, and damaging to.

    b. There is a proposition to now provide the outcome which should have been delivered in the first place, i.e. ensuring that fair dismissal obligations only attach to those businesses which can properly meet them, and where the balance of interests supports these obligations being observed (note our emphasis on the concept of a balance of interests).

    c. The Committee is trying to understand the impacts of the proposed change in this unique situation.

16. Thus, we would question the value of international comparisons generally on this issue. This said, international experience in fact supports the exemption of small businesses from inapplicable areas of employment law.

## International approaches generally

17. The size of a business is used to determine the application of employment laws (not just unfair dismissal or employment protection laws) across a range of OECD economies comparable to Australia. As became clear during the recent work and family case / family provisions case in the AIRC for example:

[1] http://www.aph.gov.au/Senate/committee/eet_ctte/unfair_dismissal/tor.pdf

a. The US Family and Medical Leave Act applies procedural and leave obligations on US private sector employers only where they have 50 or more staff. It is reported to apply to:

> private-sector employers who employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year and who are engaged in commerce or in any industry or activity affecting commerce — including joint employers and successors of covered employers.[2]

b. Access to part time work in Germany (scope to adjust hours of work) for returning parents is restricted to those employed in companies employing more than 15 employees.[3]

c. Access to part time work in the Netherlands (scope to adjust hours of work) for returning parents is restricted to those employed in companies employing more than 10 employees.[4]

18. This is just one area of employment law (that relating to the interaction of work and family). However it provides clear international evidence of the operation of exemptions based on the size of the business.

19. It should also be recalled that these exemptions have been implemented in the face of one of the most regularly used arguments employed in Australia to oppose an exemption. Just as it is claimed small business employees suffer the same losses as larger business employees; it is equally true that there is nothing different in parenting in the US, Germany or the Netherlands based on the size of one's employer. However, these countries have been able to correctly determine where the appropriate balance of policy interests lie. This is the challenge for this Committee.

20. Exemption is also a recognised part of the Australian regulatory system based on business size.

a. We have never, for example, required EEO reporting of businesses employing less than 100 persons.

b. Even the 2004 decision in the redundancy test case ultimately recognised that there were different financial and operational capacities for smaller businesses, such that different levels of obligations were warranted.

21. Under international law and experience, the notion of exempting businesses from obligations based on the number of employees they employ is a well understood and accepted one.

[2] http://www.dol.gov/esa/regs/compliance/whd/whdfs28.htm
[3] Evidence of Dr Jillian Murray, University of Melbourne, AIRC Family Provisions Case, 2003-2005.
[4] Evidence of Dr Jillian Murray, University of Melbourne, AIRC Family Provisions Case, 2003-2005.

22. It is well recognised internationally that:

    a. Some laws are fundamentally unsuited to application to the smallest businesses in any economy.

    b. Some laws demand levels of compliance, human resource and legal expertise which is simply not available to small business.

    c. Some laws impose penalties for non-compliance which cannot be borne by small business.

    d. Crude and unthinking application of some labour laws to all businesses would have a destructive effect.

### The ILO Convention Specifically Envisages This Exemption

23. The Committee has previously been informed that the ILO instrument from which termination of employment regimes in Australia originally evolved[5], envisages that individual ratifying states may exempt particular sectors of business in their countries from access to termination redress. Reference is made later in this submission to the terms of the ILO 158.

24. ACCI understands that the international community in setting this treaty standard envisaged that ratifying states could and would set the boundaries of access to termination litigation.

25. The terms of ILO 158, which contemplate an exclusion "in the light of the particular conditions of employment of the workers concerned or the size or the nature of the undertaking that employs them" has been used to provide an exemption for small or micro businesses from comparable employment protection laws in a number of European states.

### Effect of Dismissal Laws

26. There is a substantial ongoing academic discourse, led by the OECD, on what is termed *EPL (Employment Protection Law) Strictness* and its relative impacts on employment.

    a. This is a complex area of economic research and debate, and of comparative international economics, however, as ACCI understands it:

    b. There is an academic and econometric understanding that relative imposts of employment protection laws at the national level do impact on employment and employment opportunities.

[5] C158 Termination of Employment Convention, 1982

c. This academic discourse may offer some assistance to the Committee in addressing this term of reference.

## NUMBERS OF APPLICATIONS

> Term of Reference 1(a)(ii), to examine:
>
> *(ii) the provisions of federal and state unfair dismissal laws and the extent to which they adversely impact on small businesses, including:*
>
> *(A) the number of applications against small businesses in each year since 1 July 1995 under federal and state unfair dismissal laws, and*

27. It is ACCI's understanding that:

    a. There has been a diminution of termination of employment claims generally following the introduction of the federal system in the early 1990s.

    b. Reforms to the termination of employment system at the federal level, particularly in the wake of the initial *Industrial Relations Reform Act 1993*, and through the *Workplace Relations and Other Legislation Amendment Act 1996,* have delivered real reductions in levels of termination of employment claims.

    c. There is arguably an emerging 'level' of termination of employment claims each year, and an increasingly settled level of such claims against smaller businesses.

### A fall in claims does not remove the problems

28. ACCI and its members have never denied that the system learns from its experience, or that the unfair dismissal system would not in time settle to some equilibrium level of claims after a period of operation.

29. We would strongly dispute however that change in numbers of matters can illustrate a redress of the concerns of small businesses.

30. Where small business people are dragged into dismissal litigation, this is inherently and necessarily costly, damaging and unsatisfactory. Whether this is 3,000 or 20,000 cases does not diminish the impacts on individuals or their enterprises. Another way to look at this is not to ask how many small business unfair dismissal claims there are in total, but rather, of those claims taken against small businesses:

    a. How many have damaged the small business?

b. How many have been costly to small business people?

c. How many have taken small business people from their businesses?

31. There is also the "tip of the iceberg" argument at play here. Formal unfair dismissal claims represent only those claims where formal litigation has been commenced. Numbers of such claims cannot tell us anything about:

a. The lengths to which small business employers have been forced to go to since 1994 to manage out unsuitable and ill performing employees.

b. The additional advisory and management costs to small businesses of attempting to follow the demands of procedural fairness.

c. The costs and impacts upon small businesses of following complex and difficult termination procedures, including the impact on small business people of spending a disproportionate amount of their finite time on such issues.

d. Those cases where small business people have paid employees to essentially go away, in the hope that they will not take any termination of employment claim.

e. The financial and operational impact of the decision paralysis the threat of dismissal claims forces upon small business. This includes effects on custom, efficiency, productivity and reputation of being forced to retain staff who are unsuitable or ill performing.

### It doesn't matter if it's state or federal

32. It may be that the Committee considers that the poorest decisions against small businesses and the worst examples are coming from the state rather than federal jurisdictions.

a. This would not match ACCI's understanding. We are informed that poor and disproportionate outcomes against small businesses are being yielded within all systems (but obviously not in all cases).

b. Even if it were the case, this does not remove the need for change. For reasons mentioned later in this submission, the remaining state systems should be displaced in favour of a single federal system which exempts small businesses.

# NUMBERS OF BUSINESSES COVERED

> Term of Reference 1(a)(ii), to examine:
>
> *(ii) the provisions of federal and state unfair dismissal laws and the extent to which they adversely impact on small businesses, including:*
>
> *(B) the total number of businesses, small businesses and employees that are subject to federal and state unfair dismissal laws,*

33. ACCI understands that the vast majority of small business staff do enjoy access to termination of employment redress, including both unfair and unlawful dismissal redress at the federal or state level:

    a. The net of both federal and state coverage ensures these systems operate widely.

    b. The high earnings threshold for access to federal claims ($94,000 p/a), combines with the levels of earnings in smaller businesses to ensure that most employees are covered.

34. More fundamentally:

    a. What does it mean to conclude that that vast majority of small business employees have access to termination redress, at either the federal or the state level?

    b. ACCI is struggling to see how this term of reference could assist the Committee in its considerations.

35. A note of caution:

    a. It would not be valid to assess the impact of dismissal law on small business by reference to small businesses who do not employ anyone.

    b. The only valid assessment under this term of reference would be one examining small businesses that employ staff (i.e. beyond owner operators).

    c. The relevant percentage coverage of dismissal laws in small businesses is the percentage of those who employ, not of all smaller enterprises.

# SMALL BUSINESS EMPLOYMENT

Term of Reference 1(a)(iii), to examine:

> *(iii) evidence cited by the Government that exempting small business from federal unfair dismissal laws will create 77 000 jobs in Australia (or any other figure previously cited),*

36. The consistent feedback from ACCI member organisations has been:

    a. The threat of unfair dismissal claims is a real one. Many small business people fear dismissal claims and this is influencing their hiring behaviours.

    b. Small business people can feel particularly paralysed by the threat of dismissal litigation. It is this fear which impacts on hiring. Remove the cause of the fear, and you remove the paralysis; remove the paralysis, and job creation will be more attractive.

    c. Small business people (quite correctly) perceive that they can act in accordance with their life experiences of a fair go and take professional advice, and still suffer damaging adverse outcomes from dismissal claims.

    d. They genuinely fear they can be sued and lose their houses and investments purely for exercising their best judgements in their interpersonal relationships with staff.

    e. Small business people perceive the threat of dismissal as potentially adding to the cost of creating and maintaining employment. They think that employment is rendered more costly by needing to take costly ongoing legal advice to avoid a legal mine field of dismissal threat. They also think that employment is more costly through having to factor in money and time to fight and settle claims from disgruntled former employees.

    f. Small business people are taking the threat of dismissal claims into account in their decisions on whether or not to create new jobs.

    g. Small business people are substituting their own proprietor-labour and family-labour for employing people, primarily to avoid unfair dismissal (and also high wage costs, and superannuation, etc etc).

        i) This leads to much longer hours of work than employees in our community.

        ii) Very low returns on hourly terms.

iii) No nett job creation from such smaller businesses.

h. Importantly, by not creating jobs, and not growing their businesses, they are also threatening the viability of their businesses and their investments. The climate of fear these laws create is in some sense causing small business people to harm themselves by retarding necessary commercial and operational growth in small businesses.

37. These are not illusory or academic concerns for small business people. They perceive the houses they have mortgaged to take a risk and start a business being threatened if they take the risk to employ someone. It is no wonder they are reticent to take people on.

38. The feedback from small business also underscores the extent to which this cannot be viewed as a stand alone issue. Perceived threats of termination claims come on top of increasing compliance and cost obligations in a wide range of areas in running a small business. This is very much a cumulative concern for small business people, and simply piles on top of the other scares and strictures they must navigate.

39. Small businesses are looking to legislators and the policy community to provide some leadership and to redress the disproportionate and damaging regulatory burden they are being forced to work under. They are looking for this leadership in particular in areas where they view the law as unbalanced and the potential penalties utterly disproportionate to their financial and operational capacities. They see unfair dismissal laws in the real world contest – one of the myriad of regulatory controls upon them.

**<u>This is about perceptions, not models…</u>**

40. It is also important to note so much of economics is reducible to sentiment, confidence and behaviours of individuals making decisions.

41. Any model or econometric assessment on this issue is simply a proxy for the impacts on the decision making options of small business people. Vectors, graphs, elasticities etc merely represent the type of real world decisions being made in the small shops, factorised, cafes etc of Australia. And ACCI's understanding from small business people is that the current state of dismissal law in Australia is negatively impacting on their attitudes to job creation.

42. In a sense it doesn't matter if econometric and empirical challenges can be made to the particular number yielded by particular research. If the proper employment yield from removing the exemption is 20,000, 50,000, 77,000 or 100,000 – this is not the point. The point is that based on research and feedback

from small businesses, tens of thousands of employment decisions are made or not made in part because of concern about unfair dismissal claims.

43. It is also important to appreciate the informal and community interconnectedness of small business. A single small business experience with a termination claim can translate through the community organisations, chambers local of commerce, rotary clubs, churches and high streets of Australia, into a widespread impression amongst smaller businesses that dismissal claims can be highly damaging. The key to understanding the impact of negative outcomes for small business people is the knock on effect amongst people in shared circumstances. It is very easy for small business people to see such bad things happening to them, and therefore they can quickly become cautious in their own employment behaviours.

**Be fair on this research…**

44. It is unreasonable to expect the 77,000 figure to be exactly on point in a changed labour market and economic context.

45. This isn't to say however that more jobs will not be created, nor that the number of jobs will not be substantial.

46. Merely, the Committee should not conclude that there are not additional jobs to be unlocked from the small business sector (or a different character of jobs) through reform in this area, simply because research dates over time.

47. It is also important to consider the context in which this inquiry is undertaken:

    a. Australian has secured generationally low unemployment.

    b. This is not any cause for complacency. Having neared 5% unemployment, this is precisely the point at which the economy should seek to create more job opportunities to make gains into the long term unemployed.

    c. However, even in the first part of 2005, there are emerging risks to the economic outlook. We should respond to the apparent emerging change in our economy by further unlocking capacities for job creation – this is one of the avenues for doing so.

# DISMISSAL REFORM AND EMPLOYMENT GROWTH

Term of Reference 1(a)(iv), to examine:

> *(iv) the relationship, if any, between previous changes to Australian unfair dismissal laws and employment growth in Australia,*

48. In designing or amending unfair dismissal laws, high on the list of factors to balance, in policy terms, is the burden that unfair dismissal laws have on employers, as against the rights that such laws create for employees.

49. Unfair dismissal laws are one species of so-called job protection laws. From an employers perspective, there are a number of important factors to consider in the legislative framework. These include:

50. Eligibility to make claims;

    a. Fairness in the process of dealing with claims;

    b. Fairness in outcomes (conciliated or arbitrated);

    c. Cost of defending claims; and

    d. Impact of the system on jobs and hiring intentions.

51. This latter point has been the subject of much public controversy in recent years. But it is only one of a number of policy factors that need to be taken account of. For example, even if it is thought that there is no connection or no proven connection between unfair dismissal laws and hiring intentions (a point of view we do not share) it remains the case that policy makers must still ensure that there are sensible eligibility rules, that the process of dealing with claims is fair and expedient, that the outcomes are (so far as possible) just, that the remedies are appropriate (and not excessive), and that the burden of defending claims is not unreasonable.

52. Employer attitudes to unfair dismissal laws are a reflection of two factors:

    a. Actual experiences by employers (under federal or State laws); and

    b. Perceptions about the operation of such laws.

53. There are obviously a variety of views amongst employers about just what changes ought to be made to unfair dismissal laws, as there are amongst the

community generally. Many of the employer views are a reflection of personal experiences either in the unfair dismissal system, or in terminating and employing staff. Those views range from those that advocate no such laws, to those that simply seek a stronger recognition of employer interests in the operation of such laws. And there are many points of view in between, as can be expected.

54. In supporting changes to unfair dismissal laws employers are not arguing that employees ought to be dismissed capriciously or for no good and valid reason. Indeed, it is as much in an employers interest that staff in whom an investment has been made are retained and add value to the business, as it is for the employee to remain in a job which provides income and career development. It is not uncommon for employers when discussing unfair dismissal laws to make the point that their business suffers when a good performing employee in whom they have invested time and money for training and skill development leaves to either another company or to pursue other interests – and that the employer can do little if anything to recoup that loss.

55. In considering the policy balance required in unfair dismissal laws it is important to recognise what unfair dismissal laws intrinsically do. They provide a right for an employee whose employment is terminated to take legal action against their employer in a third party tribunal or court. Unfair dismissal laws create a right to sue, a cause of action. In this sense they do not deal only with unfair dismissals. They can deal with all dismissals. An assertion by an employee that they have been unfairly (or more strictly speaking harshly, unjustly or unreasonably) dismissed is sufficient to expose the employer to the risk of an adverse finding. An employer, once having dismissed an employee, is exposed to the process and the power of the 'system' whether the dismissal was fair or unfair.

56. In addition, once it is the case that hiring intentions are affected by the right to make claims (as distinct from an actual claim or experience of a claim) then unfair dismissal laws affect the attitude of the whole cohort of persons who employ (that is, employers as a whole) and not just those employers or small businesses that have been summonsed into the jurisdiction. In this sense, the number of claims made in Commonwealth or State jurisdictions does not provide any real indication of the extent to which employer attitudes are affected by unfair dismissal laws. It does provide some guide as to why small business attitudes generally appear to be risk averse to unfair dismissal laws, despite a reducing incidence of claims. By way of analogy, if there are hostile (say, cyclonic) weather conditions outside then it affects the behaviour of all persons, not just those outside experiencing the weather conditions. Those that have made the deliberate decision to remain indoors and not experience the weather

conditions have done so for a specific purpose – a belief (actual or real) that the weather conditions are hostile and could harm them if they were to take the risk of venturing outside.

57. In assessing appropriate responses to calls for changes to unfair dismissal laws the views of employers who have had claims as well as those who have a perceived view about such laws are equally valid. This is because, at the core of the policy considerations is the issue of risk. If employers know or believe that there is a negative risk associated with the employment of a person then that is a factor which weighs against that employment. The decision not to employ or to be less inclined to employ because of the presence or operation of unfair dismissal laws is of equal practical impact whether the decision is based on an employers actual experience in the jurisdiction or their perceptions of how the jurisdiction operates.

58. These are important points as it bears not only on the case for a small business exemption, but also how employers see the jurisdiction operating, but also on the need to constrain costs and expense once claims are made, and to create some greater certainty or consistency in the independent judgements that are made by conciliators and arbitrators.

59. ACCI believes that there is a connection between unfair dismissal laws and the hiring intentions of employers, especially in small business. That connection becomes stronger the smaller the business. That connection should not be overstated, nor understated. It is not something that lends itself to empirical proof, or disproof for that matter. But its validity as a proposition is based in the fact that employers take risk and cost into account in making business decisions – including decisions to employ.

60. There is no doubt that a myriad of different factors apply which motivate employers to employ or not to employ an employee. Not surprisingly the dominant feature is and will always be economic - work requirements based on business needs. But issues of cost and risk are also significant – and are part of that economics. It is in this context that negative experiences or negative perceptions of unfair dismissal laws act as one factor that weighs against decisions to employ.

61. As one employer who had experienced two unfair dismissal claims (albeit under State laws) told this Senate committee in 1999:

> *"Are you more cautious as a result of this or were you always cautious about your procedures for taking on staff?"*

*"We have always been quite cautious with respect to taking on staff but as a result of our recent experiences we have become more so."*

*"In terms of offering jobs to new staff would this change in our legislation make a difference to the way you are prepared to hire staff?"*

*"Yes, we would certainly put on more people. At the moment every person you put on now is a potential litigation waiting to happen. We are terrified – and we have only had two experiences. You only have to talk to your peers to find out that they have had many of the same experiences. We could put on and would have put on two straightaway, but at the moment we are resisting that at all costs and we are working our other staff as much overtime as we can."*

*(Mr B. Tonkin, Senate Committee Hansard, 29th January 1999)*

62. And another who had experienced a claim under Commonwealth laws:

*"I just cannot see the sense in trying to build a business with 5, 10, 15 or 20 employees where you can be bankrupted or beaten around the head at a moments notice because one of them does not like you. This year I was planning to hire two people full time. Those people will now not have jobs. In my business – and I have discussed this with other people and it is quite common – I am going to employ information technology wherever possible to minimise labour and I am also going to outsource my tasks which I cannot perform myself. So two people will remain unemployed as a result of these laws…"*

*(Mr. C. Maloney, Senate Committee Hansard, 29th January 1999)*

63. There is also a different – but related aspect to the connection between unfair dismissal laws and employment. Unfair dismissal laws (depending on their content) can also operate as a disincentive to terminate a non-performing employee, and replace that employee with a more satisfactory staff member. In this way unfair dismissal laws operate as a brake on business efficiency, rather than employment per se. From an employers perspective, that is no less important a consideration.

64. Many businesses, and arguably most, remains deeply resentful of the way in which employees who have been dismissed for cause are able to take actions that require their former employers to pay them large sums of money to finally see them on their way. There are some legitimate cases of unfair dismissal, and that has never been at issue. But this process has now become contaminated in a way that ensures that firms will often be required to defend their actions before a tribunal. To small business, the managerial time needed to process and deal with such claims is generally just not worth it to the firm. The result is that unfair dismissal applications are a cost to business that has absolutely no return. In

these circumstances it is not hard to conclude that hiring intentions will factor in the complications of unfair dismissal laws.

65. One way that they are factored in may be to source labour from a lower risk category. Again, while there are many reasons for the growth of casual and contracting in our labour force one of them is likely to have been (at least amongst smaller employers) the costs and risks associated with permanent employment. That includes the risks of unfair dismissal claims in the event that termination of employment is needed.

66. Concurrence is not a substitute for proven causation. And phenomena such as employment growth are a function of complex macro and micro economic causations. Hence, it is very difficult to retrospectively isolate and quantify the specific contribution a specific policy change has made to a whole of economy outcome (i.e. levels of employment).

67. However, it is commonly understood that Australia's employment performance has improved markedly (now approximately 5%) from the period in which the initial very prejudicial versions of dismissal redress were introduced (unemployment of 8 to 10% in the early 1990s).

68. It is true that unemployment has continued to fall, and employment and participation have continued to grow during the past decade, despite the existence and maturing of an unfair dismissal system at the national level.

69. However, it would be unbelievable to suggest that the comparatively minor, isolated and limited dismissal reforms after 1996 (though important to practitioners and strongly supported by ACCI) would have had any impact on community perceptions such that they would have stimulated employment growth. If the premise of this question is to ascertain the employment impact of the minor dismissal amendments secured since 1996, then ACCI considers this will be fruitless.

70. ACCI cannot in fact see any proven relationship between changes to date to Australian unfair dismissal laws and employment growth, save for the massive diminution in employment confidence wrought by the introduction of unfair dismissal in the first place. Again, it appears that the premise of this term of reference is misguided.

71. If the premise of this question is to argue that Australia's excellent employment record since the creation of dismissal laws removes any argument for exemption, we also simply cannot agree. We cannot know what impact dismissal perceptions and experiences have been since the mid 1990s – nor how much higher job creation could have been, were business to have had even greater

confidence in job creation. It would be erroneous and simplistic to conclude that strong jobs growth in the past decade means unfair dismissal has not impacted on employment.

# SMALL BUSINESS VIEWS; SURVEYS AND THEIR ACCURACY

Term of Reference 1(a)(v), to examine:

> *(v) the extent to which previously reported small business concerns with unfair dismissal laws related to survey questions which were misleading, incomplete or inaccurate,*

72. ACCI stands by all previously reported and released survey materials from our organisation and wider employer membership. The views of employers are important, and have been consistently and accurately presented to the Australian public for many years.

73. We reject any suggestion that there have been relevant methodological flaws in our surveys.

    a. ACCI would be happy to respond to any specific questions or queries regarding our surveys and positions.

    b. However, in the absence of any detailed and specific queries, we reject the apparent premise of this term of reference. Unless specific issues are raised regarding these surveys with the organisations which publish them (including ACCI) it is not appropriate for us to make an at large defence of our public materials.

74. To be of some further assistance to the Committee however, we can add:

    a. Through our experience in the Commission it has become abundantly clear to ACCI that if one is so minded, one can employ the survey sciences hostilely to destroy any piece of survey, opinion or experiential evidence.

    b. No survey is absolutely faultless or impervious to methodological challenge. If one applies a process of Cartesian Hyperbolic doubt, akin to the levels of statistical rigour demanded by the medical research sciences, any opinion, perception or experience based survey can be dissembled and subjected to doubt; any survey.

    c. The question must however be asked as to what the impact of such an approach is. Australian companies make massive commercial investments based on confidence in survey materials. Political parties rely on opinion and altitudinal surveys with confidence in their accuracy. However, quite inconsistently, such surveys come under a level of hostile questioning and

assumed illegitimacy in the area of labour relations which has the effect of robbing us of the benefits they provide.

d. If such a hyperbolic doubt approach to surveys were taken in the areas of market research or product development, investment and product development by Australian industry would be paralysed.

e. We remain confident in our surveys however because they are backed up by the direct feedback smaller employers provide to ACCI members. On a daily basis, employers in Australia are continuing to leave their employer associations in no doubt as to their dismay at the disproportionate impact of dismissal obligations, and the impact of such threats on their capacity to employ. We know our surveys are correct because we know what our small business members are telling on a regular basis.

# RANKING OF CONCERNS REGARDING DISMISSAL

Term of Reference 1(a)(vi), to examine:

> *(vi) the extent to which small businesses rate concerns with unfair dismissal laws against concerns on other matters that impact negatively on successfully managing a small business,*

## Survey Rankings

75. ACCI understands that in whole or in part this term of reference is referring to materials we have inserted into the public debate based on the feedback from our members.

76. Our previous submissions in support of the small business exemption in p[art rely on employer reports of concerns regarding small business and termination of employment.

77. In analysing this material, it is important to note that the disproportionate proportion of responses come from smaller businesses. These are in substantial part small business surveys.

## Why rankings may change

78. The Committee may consider it significant that the relative ranking of dismissal as a concern for small business people changes.

79. However, there may be a number of reasons for this:

    a. We know that small business people fight the fires that confront them at a particular time, and that their practical capacities for foresight and planning can be limited – in a sense they may be reporting on what is burning out of control for them at the time (GST compliance, rising insurance costs, industrial manslaughter etc).

    b. Some issues pass through the surveys as significant, displacing others, are redressed and move out as a concern – e.g. GST compliance. This can displace more constant concerns such as termination.

    c. There is also a sense without being trite that small business people learn to endure. The negative impact of dismissal and the threat of litigation have been with small business people for at least a decade, and they have learnt to cope in some way (notwithstanding its effects on small business hiring

intentions). This is in no way however an illustration that these laws are validly applied to small business on an ongoing basis.

d. Behaviours solidify and firm decisions can become less front of mind. A small business person may have internalised a decision to not employ (or not employ a certain category of employee – say a full timer) to the point where they no longer report it as a concern – more of a given. The point is that they are not growing their businesses in the optimum way – even if this is not front of mind for them.

e. There may also be a sense in which concerns regarding dismissal may be reported as other things, and become conflated with other concerns. The pressure of unfair dismissal on some small businesses could be reported as concerns about regulation as a whole. Alternatively reported concerns regarding difficulties in finding suitable staff may also essentially be about finding people who will not be dismissed / not pursue the small business person for a dismissal claim. So – some of the concern about dismissal may be appearing under other headings.

### Do changes in ranking matter?

80. In another sense, ACCI would again question this term of reference at a more fundamental level.

a. The point to us is that small business people are concerned and report an impact on their capacity to employ as a function of unsatisfactory unfair dismissal laws. How they rank this relatively against other challenges is to some extent immaterial – they are making employment decisions based on this consideration.

b. Running a small business is complex and difficult. A wide range of regulatory and commercial demands press upon small business people on a daily basis - literally dozens. These are all massive concerns and multiple challenges are having a negative impact on the confidence, aspirations and plans of small business people. The order which presses them at the particular time of any survey may be a function of a wide range of considerations.

c. Dismissal laws appear consistently in the reported concerns of employers. Despite any leaps up or down a nominal ranking of concerns, the constancy (i.e. trend) of concern and reported detriment should compel fundamental change in this area.

# INFORMATION AVAILABLE TO SMALL BUSINESS

> Term of Reference 1(a)(vii), to examine:
>
> *(vii) the extent to which small businesses are provided with current, reliable and easily accessible information and advice on federal and state unfair dismissal laws; and*

### Information/Advice Is Already Current, Reliable and Accessible

81. Information, education, training and know-how are all important in business management. However, if the premise of this term of reference is a presupposition that the negative impact of existing termination of employment law on smaller businesses can be redressed simply by filling some perceived information gap, ACCI rejects this strenuously.

82. ACCI members provide excellent advice and representation to their employer members of all sizes and in all industries. This advice covers:

    a. Pre-dismissal advice: Advice on performance management, putting allegations, providing opportunities to respond etc. This is in the effort to ensure that any dismissals are 'fair' and defensible.

    b. Post-dismissal advice and representation: Advice on claims of unfair dismissal, representation in conciliation and agreed settlement and representation in contested matters.

83. ACCI knows of no reason to conclude that this advice is anything other than current and reliable. Where companies are members of ACCI member organisations, they already have the benefit of current, reliable and easily accessible information and advice on federal and state unfair dismissal laws.

### Isn't Information and Advice All Small Businesses Need?

84. Some may ask why a small business advised by an ACCI member or some other advisor cannot make a fair dismissal. The premise of this thinking would be, if small business can access advice and representation, why can't they be subject to the unfair dismissal regime?

85. It is true that businesses of all sizes look to ACCI members on a daily basis for advice in navigating a wide range of regulatory imposts. We do attempt to help small business navigate the difficult area of termination of employment.

86. Such thinking would however ignore:

a. The fact that professional conciliators and arbitrators themselves differ on what is a fair and unfair dismissal, even on the same or similar facts. If the experts appointed to make judgements can't adopt consistent positions then no amount of education or training can provide the requisite degree of certainty to small business when faced with an actual workplace decision to make;

b. The fundamental inapplicability of the levels of redress and settlement yielded by termination claims under the *Workplace Relations Act 1996* for small business. Whatever the rights and wrongs of a particular dismissal (in terms of fairness, not lawfulness), it is inequitable to seek to transfer up to six months pay from one family (the employer) to another family (the former employee).

   i) However precipitous or unfair their actions, it is not a right outcome that someone extracting often less than minimum award wages from running their business be expected to come up with tens of thousands of dollars in redress to a disgruntled employee.

   ii) The level of income transfer between applicant and respondent in these matters is simply not properly capable of being borne by those running our smallest businesses.

c. Even where a small business person assiduously follows all advice, slows the process of performance management, bends over backwards to be seen to accord procedural fairness etc, an employee can still initiate a claim challenging this process.

d. The level of cost to small business in defending even the most defensible termination is prohibitive. There is an additional incentive upon small business to settle matters, even where they are in the right.

e. The operation of the system to encourage financial settlements prior to hearing, even where the employer case is faultless. It remains the case that small businesses must make commercial decisions to settle matters with their ex-staff – and that this can include paying monies to staff dismissed perfectly in preference to financing an expensive process of litigation.

f. There is many a slip betwixt advice and execution. Small business people are not lawyers, are not used to executing complex legal instructions, and are not used to substituting them for the common sense they usually use to run their businesses.

87. ACCI and its members are rightly proud of the assistance we provide to small business people in seeking to navigate their regulatory obligations, particularly in regard to employment.

88. However, an excellent mechanic however is not a justification for being forced to keep driving an un-roadworthy car. Simply because employers can obtain the best possible advice does not obviate fundamental problems with the substance of the regulation they are being asked to comply with.

### More Information Will Not Really Fix the Problem

89. As mentioned, ACCI members and other organisations provide excellent advisory and representative services to Australian businesses. Elements of the legal profession also provide a level of skilled representation based on their professional and legal duties of competence and proper representation of clients. For all their skills and commitment to excellence; they cannot however make a silk purse from a sow's ear.

90. Processes and obligations, including in particular the navigation of the complex demands of fair behaviour and procedure in executing terminations of employment, are simply too complex to be reduced to proper guidance materials for small businesses.

91. It is just not possible to render the highly complex legal and human resource rules which fair dismissal demands under the *Workplace Relations Act 1996* comprehensible to the small business community. It would be fruitless and misguided to proceed on this basis.

92. The concept of "fair dismissal" which has emerged in Australia is essentially not comprehensible to any non-workplace relations experienced Australian managers absent of professional expertise, either in-house or external. An Australian manager cannot confidently make a fair termination with any confidence without a level of expertise and support which is (practically and financially) denied to small business people.

93. At some point we need to look to the fundamentals, not the window dressing. The regulatory deficiency here is a substantive one. The regulatory impost on small business is fundamentally flawed and inappropriate. No amount of additional information and explanation can redress this.

### What might help

94. Perhaps the only information which could really help small business people would be a clear set of guidelines which, if followed would absolutely fire-proof

and totally exempt them from any dismissal claims. But then again, such guidelines are only as good as the law would allow fire-proofing.

95. This is what small business people want in regard to all areas of compliance – a list of what they must do, which if they follow it they can be absolutely confident they will not be required to enter any legal process under any circumstances.

96. This cannot be provided in the case of unfair dismissal. There is no set list of obligations which if followed can exempt small business people from dismissal claims. As such, there is no sense in which an information deficit can provide a real substitute for the merited exemption of small business from unfair dismissal claims.

# POLICY RECOMMENDATIONS

Term of Reference 1(b)(viii):

> *(b) to recommend policies, procedures and mechanisms that could be established to reduce the perceived negative impacts that unfair dismissal laws may have on employers, without adversely affecting the rights of employees.*

## Pass the Exemption Bill

97. ACCI reiterates its support for the passage of the small business exemption, in the same or similar form to that currently contained in the *Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004*.

98. ACCI has seen no basis to resile from this support in the years since this proposal first emerged. It is one of a suite of measures which, in totality, would improve the operation of the federal unfair dismissal system.

99. The proposal in the Bill to broaden the categories of excluded employees to include certain persons employed by small business is not new. Arguments for and against have been well identified in previous submissions to the Senate by numerous parties, including ACCI, during the period 1997 to 2004. There is no need to re-traverse that ground (see for example 1998 ACCI submission to the federal Department of Employment, Workplace Relations and Small Business in its review of Commonwealth unfair dismissal laws; and 2002 ACCI submission and evidence to this Senate Committee – which included a compendium of cases examples of problems encountered by employers with the Commonwealth and State jurisdictions). Those submissions still provide a useful summary of the grounds on which ACCI has supported the exemption proposal.

100. In supporting the Bill ACCI notes the following:

    a. That the Bill would not exclude from the jurisdiction unfair dismissal claims against an employer by persons currently employed in small business, should they think they are unfairly dismissed; in this way the Bill seeks to create a link between new employment and the hiring risks to employers associated with unfair dismissal claims (discussed above);

    b. That the Bill would not exclude scope for new employees employed by small businesses from exercising rights under the Act for unlawful dismissal (e.g. notice periods on termination, discrimination based termination);

    c. That the definition of small business for the purposes of this Bill is more closely aligned (but not identical) to the ABS definition of small business;

d. That defined categories of exclusion from unfair dismissal laws have always been a feature of the design of such laws;

e. That categories of exclusion, by their very nature, involve arbitrary limits;

f. That other areas of public policy in employment law distinguish between employers of different sizes (e.g. equal opportunity/affirmative action law, redundancy law);

g. That other areas of public policy take into account the differing commercial circumstances between businesses large and small (e.g. fair trading, trade practices law);

h. That the international treaty on which the Commonwealth unfair dismissal law was based (ILO 158 reproduced at schedule 10 of the *Workplace Relations Act*) itself provides a policy basis to exclude *"employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned* ***or the size or the nature of the undertaking that employs them****."* *(emphasis added);*

i. That the federal parliament has accepted, in its August 2001 amendments, the principle that operational circumstances of businesses to manage termination issues may vary according to the size of the business; and

j. That the small business sector is a labour intensive part of the economy on which much of the employment growth in the past decade has been built.

101. Compliance with fair dismissal obligations (and in particular following the constantly evolving technical 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.

102. The burden of these legal obligations continues.

103. Despite the tenor of the terms of reference for this inquiry, ACCI sees no basis to not conclude in favour of the proposed exemption.

104. For all the Gordian knots this debate has become tied in over the past 7 or 8 years, it remains the unambiguous understanding of those who actually deal on a day-to-day basis with small business on termination and discipline issues, that small businesses are patently unable to meet the fair dismissal obligations of the *Workplace Relations Act 1996*. They just can't do it.

105. As ACCI has repeatedly done in the past, ACCI respectfully suggests that the Senate should pass the exemption of small businesses from unfair dismissal when employing new employees as a measure which on-balance provides a net benefit to the Australian labour market and part relief from the regime of employment protection and other laws that impact on the small business sector.

## Options for wider reform

106. However, the exemption of small business is not the sole area of reform required to dismissal redress under the *Workplace Relations Act 1996*. ACCI has never suggested that the exemption would complete the scope of reform required to the system of termination redress in Australia.

107. It is axiomatic that an employer which is just beyond the size criteria specified in the Bill is not affected, one way or the other, by the Bill. Yet those employers, as do employers generally, have additional matters of a policy nature that require attention. We have already mentioned the interaction of federal unfair dismissal laws with the multiple State systems. There are others.

108. In order to assist consideration of the Committee, ACCI has included in this submission a series of measures which remain outstanding from an employers perspective, and which require policy attention. These are outlined below.

109. These additional measures are presented in a constructive way in an attempt to better balance unfair dismissal laws and their broader policy interaction with the day to day business of employers and employees. They can either be considered in conjunction with a more sensible approach to small business obligations, or in the context where an exemption will not be progressed.

110. The ACCI proposals have been the subject of consultation with members, and have the benefit of applying to employers generally irrespective of business size. They should be considered on the merits.

111. The additional suggestions, if passed, would go a long way to restoring what employers see as a fair balance of interests between stakeholders in this area of policy. Indeed, one advantage of these additional measures is that the more the balance of interests between employers and employees is set right by changes to detail and process then the more this is likely to ameliorate some of the concerns of employers - concerns which have underscored the case for a small business exemption.

112. The proposed reform ideas include the following:

**SUMMARY OF ACCI UNFAIR DISMISSAL REFORM PROPOSALS**

1. Amend statutory objects to express the 'fair go all round' concept.
2. Improve the prospects of resolution at conciliation conferences.
3. Limit automatic access to arbitration following conciliation.
4. A tighter test of what is an "unfair dismissal".
5. Relieving the burden of procedural fairness by making the reason(s) for dismissal the paramount consideration.
6. Prevent, so far as possible, excluded employees from making similar

claims against the employer under other Acts or laws.

7. Extend the qualifying period to the first six months of employment.
8. Increase the filing fee to a more realistic and balanced level.
9. Exempt unfair dismissal claims based on genuine redundancy.
10. Limit the scope for constructive dismissal claims (that is, resignation based claims).
11. Require the consideration of business size and the presence/ absence of a human resource manager to apply to all dismissals, not just those for "unsatisfactory performance".
12. Provide a schedule of legal/representative fees, and providing for costs orders to be generally available against solicitors, not just parties.
13. Not permitting extensions of time in cases of failure by an applicant' representative.
14. Require the Commission to conduct its hearings expeditiously.
15. Require a dismissed employee to have a statutory obligation to mitigate loss and declare all earnings, and require reinstatement and back wages orders to be discounted by the earnings, redundancy pay, social welfare payments or workers compensation payments the employee is entitled to keep.
16. Orders for payment of compensation not to include non-economic loss (pain, suffering, hurt feelings).
17. For smaller businesses, if no full exemption is provided, then:
    - Longer qualifying period for small business (9 or 12 months).
    - Lesser procedural requirements (valid reason plus opportunity to explain).
    - Family members to be excluded from claims.
    - Flexibility in the time and location of conferences.
18. Reduce or freeze the earnings ceiling for access to the jurisdiction. A person earning $94,500 per year is not low paid, and does not need the protection of the statutory system. A figure far closer to average weekly earnings would be more appropriate (e.g. $51,000 per year).
19. More comprehensively exclude apprentices and trainees from access to claims of unfair dismissal, and ensure that the AIRC does not have jurisdiction over training disputes already able to be addressed through state training jurisdictions.
20. Section 170CG(3)(c) needs to be tightened. Options to provide an opportunity respond to reasons relating to employee conduct are not being interpreted or applied consistently.
21. Automatically dismiss applications where an applicant does not comply with directions from the Commission.
22. Ensure that where an employee has not worked a significant

proportion of their 3 month qualifying period (e.g. illness or being on workers compensation) the period of probation / exclusion from unfair dismissal should be able to be extended to 3 months of actual service.

23. No unfair dismissal can be found where termination is based on conduct necessary to comply with other Acts or laws (such as discrimination or safety laws).

### Structural Reform / Harmonisation

113. The other major area of policy which should be re-examined as a product of this inquiry is fundamental reform to regulatory structures, and in particular relieving the damaging impact of parallel federal and state dismissal systems.

114. ACCI strongly supported the passage of the *Workplace Relations Amendment (Termination of Employment) Bill 2002*.

115. The reforms proposed in this Bill should be re-examined. Fundamental harmonisation towards a single, tight, targeted and balanced system of termination redress should remain a priority consideration in any policy reforms to reduce the negative impacts of termination laws, and render them more balanced and effective.

### Ongoing Review and Continuous Improvement

116. Based on the experience of a decade of the operation of the federal termination of employment review system, it is clear to ACCI that this is likely to be an area in need of a process of continuous review and of comparatively regular amendment.

117. A range of factors warrant a process of ongoing continuous improvement to the Australian unfair dismissal system, including:

a. The litigious nature of this element of the jurisdiction.

b. The involvement of lawyers and litigation mentalities.

c. The scattering of decision makers across the AIRC, including differences in approach and interpretation.

d. Differential decision outcomes.

e. Inappropriate interpretations.

f. Understanding continuously being overturned on appeal.

g. Interaction of employer obligations with obligations under other Acts and laws.

h. Completely new issues emerging in the discharge of the jurisdiction.

118. This demands of policy makers a process in which the termination provisions of the *Workplace Relations Act 1996* are properly reviewed and updated on an ongoing basis.

119. On the best things which could be done to "*reduce the perceived negative impacts that unfair dismissal laws may have on employers, without adversely affecting the rights of employees*" is to ensure that sensible and necessary amendments to the *Workplace Relations Act 1996* are able to be implemented on an ongoing basis.

120. The unfair dismissal system remains a contentious area of public policy, especially within the employer community. We have not yet achieved a satisfactory policy balance between the rights of dismissed employees and the burdens imposed on employers. The small business exemption – whilst contentious and involving some difficult policy decisions – should, on balance, be part of a suite of measures that are made to the law. There are other measures, which should also be pursued.

# ACCI MEMBER ORGANISATIONS

**STATE/TERRITORY ASSOCIATIONS**

ACT and Region Chamber of Commerce and Industry

Australian Business Ltd

Business SA

Chamber of Commerce and Industry Western Australia

Chamber of Commerce Northern Territory

Commerce Queensland

Employers' First ™

State Chamber of Commerce (New South Wales)

Tasmanian Chamber of Commerce and Industry

Victorian Employers' Chamber of Commerce and Industry

**NATIONAL INDUSTRY ASSOCIATIONS**

Agribusiness Employers' Federation

The Association of Consulting Engineers Australia

Australian Beverages Council

Australian Consumer and Specialty Products Association

Australian Entertainment Industry Association

Australian Hotels Association

Australian International Airlines Operations Group

Australian Made Campaign Limited

Australian Mines and Metals Association

Australian Paint Manufacturers' Federation

Australian Retailers Association

Housing Industry Association

Insurance Council of Australia

Investment and Financial Services Association

Master Builders Australia

Master Plumbers and Mechanical Services Association Australia

National Electrical and Communications Association

National Retail Association Limited

NSW Farmers Industrial Association

Oil Industry Industrial Association

Pharmacy Guild of Australia

Plastics and Chemicals Industries Association

Printing Industries Association of Australia

Restaurant and Catering Australia

Standards Australia Limited

Victorian Automobile Chamber of Commerce