Submission

to

Senate Employment, Workplace Relations and Education References Committee

Inquiry into unfair dismissal laws

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Submitter: Ms Poppy Drekis
Executive Officer

Organisation: NSW Young Lawyers

Address: Level 6, 170 Phillip Street
SYDNEY NSW 2000

Phone: 02 9020 5600

Fax: 02 9926 0282

Email:

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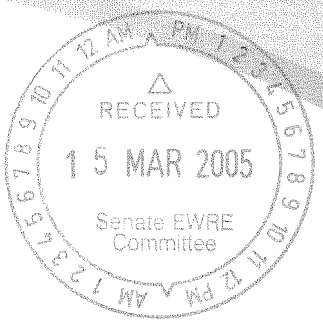
A Fresh Perspective

9TH March, 2005



Committee Secretary
Senate Employment, Workplace Relations and Education Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

BY FAX: (02) 6277 5708

Dear Sir/Madam

Attached please find a submission prepared by the NSW Young Lawyers Employment & Industrial Law Committee on "Inquiry into Unfair Dismissal Policy in the Small Business Sector".

If you needed to speak to anyone in relation to the submission please contact directly Committee Member, Sue Ern Tan on (02) 9020 5600.

Yours faithfully,

Poppy Drekis
Executive Officer
NSW YOUNG LAWYERS

Level 6
170 Phillip Street
Sydney NSW 2000
DX 362 Sydney
Phone (02) 9926 0270
Fax (02) 9926 0282
Website:www.younglawyers.com.au

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A Fresh Perspective

EMPLOYMENT & INDUSTRIAL LAW COMMITTEE

SUBMISSIONS ON INQUIRY INTO UNFAIR DISMISSAL POLICY IN THE SMALL BUSINESS SECTOR

PART 1 SUMMARY

The Committee makes the following recommendations in relation to the Federal Government's proposal to exclude small business from unfair dismissal laws:

- That the definition of small business is defined:
  - (i) as not more than 15 employees at the relevant time; or
  - (ii) on the basis of a business' revenue, that is a small business is a business that had a turnover of less than $3 million in the preceding financial year.
- That instead of a straight statutory exclusion for employees employed in a small business, limit access to unfair dismissal for employees employed for less than 12 months.
- In specific reference to the *Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004,* the Committee recommends:
  - (i) That a new subsection is inserted after subsection 170CE(5F) to provide that subsection 170CE(5C) does not apply in circumstances of extreme unfairness. The definition would include a notion of unreasonableness, that is, where the dismissal is blatantly unreasonable or unfair or carried out in an arbitrary manner.
  - (ii) That a process to deal with jurisdictional hearings is included in the *Australian Industrial Relations Commission Rules 1998* or in a Practice Direction.
  - (iii) That a new subsection is inserted that defines employers for the purposes of the proposed amendments to exclude those who are wholly owned by a parent entity or are otherwise part of larger corporate group.
- That in addition to any amendments to legislation, a comprehensive education campaign targeting small businesses, supported by appropriate telephone enquiry services and information package be provided.

PART 2 INTRODUCTION

It is the experience of the NSW Young Lawyers Employment and Industrial Law Committee ("the Committee") that most employers, including small business employers, want to do 'the right thing' by their employees. However, the Committee has also observed that many employers are not aware of the steps that should be taken to provide both procedural and substantive fairness to an employee whose employment they wish to terminate.

Many employers, for example, fail to appreciate that an employee accused of misconduct should be given the opportunity to respond to allegations made against them, or fail to appreciate that an employee may value the opportunity to have another person present in a performance management meeting, or meeting in which the termination of the employee's employment is being discussed, to witness the conversation, or simply to provide moral support.

This lack of knowledge increases the likelihood a small business employer will have an unfair dismissal claim brought against them and no doubt increases the sense of uncertainty an employer may have about the potential for unfair dismissal claims to be made against them.

Some small businesses assert that unfair dismissal laws work on the assumption that most employers treat their employees unfairly, in laying down procedures which must be followed when terminating employment. They claim that this is not correct and that "*such bad management practices, by undermining workplace morale, are against an employer's interests.*"[1]

Whilst the Committee agrees that not all employers treat their employees unfairly, there are some exceptions to the rule. Small business employers do not always make sound business decisions. As such, protections need to be put in place to protect those employees who are treated unfairly by their employers.

The benefits of protection from unfair dismissal are not limited to those employees who are unfairly dismissed and who subsequently seek redress. All employees benefit from knowing that their employer is required to provide them with a "fair go" should the employer wish to terminate their employment. The Committee is concerned that increased pressure will be placed on individuals (and family relationships) if the employment of an employee is at risk of being terminated at any time, without fairness or due process being afforded to the employee.

It is the Committee's view that protection from unfair dismissal is a pillar of the Australian industrial relations environment. Unfair dismissal laws aim to ensure "a fair go all round" for employers and employees. That aim is too important to be abandoned, simply because some employers have taken the view that existing laws, do not strike the right balance between an employer's need to manage (and sometimes terminate) the employment of its employees and employees' interests, in being given a "fair go". It is important that a balance be found, between the two rather than for the views of one party to be adopted, to the detriment and sacrifice of the other.

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[1] See, for example, http://www.cis.org.au/IssueAnalysis/ia6/ia6.html *Issues Analysis: Why Small Business is Not Hiring* No 6, Issue 10, February 1999

PART 3 SUBMISSIONS ON SELECTED TERMS OF REFERENCE

1(B)(iii) Evidence cited by the Government that exempting small business from Federal unfair dismissal laws will create 77,000 jobs

The Committee is concerned at the lack of evidence cited by the Government in support of its claim that exempting small business from unfair dismissal laws will create 77,000 jobs. The Committee is also concerned that the Government has not cited any evidence that demonstrates a causative link between unfair dismissal laws and job creation. The Committee's research on the topic has found that small business has expressed concern about both:

(i) the expenditure required to minimise the risk of an employee bringing an unfair dismissal claim, such as providing counselling, written warnings and the need to keep written records of an employee's performance; and

(ii) the costs of defending an unfair dismissal action[2].

The Committee has not found evidence that demonstrates that there is a causative link between concern about unfair dismissal laws and the failure of small business to hire a greater number of employees. Nonetheless, the Committee recognises that the need to afford procedural and substantive fairness to under-performing employees or employees accused of misconduct places a heavy burden on small business.

1(B)(vi) The extent to which small business rate concerns with unfair dismissal laws against concerns on other matters that impact negatively on managing a small business

Unfair dismissal laws are only one of many concerns for small business that may affect the decision to hire staff such as compliance with discrimination laws, and payroll obligations, including wages, leave loadings, penalties and entitlements, tax deductions and superannuation. Compliance with regulations governing PAYE regulations and Fringe Benefit Tax have also been cited as particular concerns. The Committee suggests it would be more appropriate to encourage employment by the small business sector by exploring ways to reduce the burden of these other concerns, rather than releasing small business from any requirement to afford fairness to employees in the termination of their employment.

1(B)(vii) Small business access to current, reliable and easily accessible information and advice on State and Federal unfair dismissal laws

Whilst some information concerning unfair dismissal laws is currently available for all employers, through the various industrial relations commissions' websites such as the Australian Industrial Relations Commission website and the various government departments (eg. WageNet at the Federal level), many small businesses do not know how to access information on unfair dismissal laws, let alone understand which jurisdiction they should be looking at and what information is available.

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[2] ibid.

From our position as young lawyers advising small businesses from time to time, there appears to be a complete lack of understanding of the unfair dismissal laws and the interaction of the State and Federal jurisdictions in Australia with respect to industrial relations laws. For example, small businesses are often unaware of any applicable industrial awards that may apply to employees employed in their businesses.

Whilst many employer associations provide this information to their members, many small businesses do not belong to such association. This is because the cost of being a member of such associations is often prohibitive or there is little perceived benefit of being a member. In this respect, membership of an employer association is more prevalent for small businesses whose employees are covered by Federal awards, given coverage arises from an employer association being a respondent to that award.

Access to further information and advice is essential for small businesses who cannot always afford to obtain private legal advice. The Committee also notes that small businesses are unable to access Community Legal Centres as such centres cater for individuals only.

The current telephone inquiry services which are available (namely WageLine at a Federal level which is operated by the Department of Employment and Workplace Relations, and the Office of Industrial Relations inquiry service at a New South Wales level), are poorly promoted and the information given is often not as detailed as that required and the inquiry services do not provide advice. The Committee believes that the current services provided to businesses is inadequate and that the telephone inquiry services should be expanded to provide advice to both employers and employees on a wide range of issues, including procedures to fairly terminate the employment relationship.

It is the Committee's view that small businesses do not currently have access to sufficient current, reliable and easily accessible information and advice on State and Federal unfair dismissal laws. Any action taken by a small business to gain information or advice is often too late, (that is when a problem has already arisen or a termination has already occurred and an unfair dismissal claim is served on them).

B *Policies, procedures and mechanisms to reduce perceived negative impacts that unfair dismissal laws may have on small business employers*

The Committee believe that dissemination of further information is the key to assisting small businesses. Increased knowledge of what is likely to be seen as unfair, good practice in relation to the termination of employment, and the steps involved in unfair dismissal litigation would greatly assist the small business sector to adopt and implement a procedurally and substantively fair dismissal process, and reduce the perceived negative impact of unfair dismissal laws. The Committee, in addition to the further dissemination of information, also supports minor changes to the current unfair dismissal laws. The Committee's proposed recommendations in this respect are outlined in Part 5 of these submissions.

PART 4 SUBMISSIONS ON THE *WORKPLACE RELATIONS AMENDMENT (FAIR DISMISSAL REFORM) BILL 2004*

The Committee recommends that the *Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004* ("the Bill") in its current form should be amended in the following ways:

1. Process to deal with jurisdictional hearings

The proposed new section 170CEB provides that the Commission must make an order that the application is not a valid application if it is satisfied that the application cannot be made under section 170CE(5)(c), that is if, at the relevant time, the employer employed less than 20 people.

Unlike the other exclusions for unfair dismissal applications as set out in section 170CB, the proposed amendments do not require a formal hearing to determine the jurisdictional issue. The policy reason behind this is presumably to ease the financial burden on small business employers. However, the process of how the Commission will handle such jurisdictional issues needs to be provided, to both small business employers and employees, so that they are fully aware of the process.

The Committee recommends that the proposed amendments address or specify how the Commission would deal with a situation where there is an evidentiary dispute between the employer and employee as to the number of people employed by the employer at the relevant time. The Committee also recommends that the process, once the employer raises the jurisdictional issue, be specified. For example, the Commission will notify the employee and inform them that a jurisdictional challenge has been made and what steps are available to them to challenge or respond to the jurisdictional challenge.

The Committee recommends that these issues be addressed by the Commission in a Practice Direction, or for the issues to be incorporated into the *Australian Industrial Relations Commission Rules 1998*.

2 Provision to cover small business employers who are wholly owned by a large parent entity or are otherwise part of larger corporate groups

There is no provision to deal with small employers who are wholly owned by a parent entity or are otherwise part of larger corporate groups. In the second reading speech by Kevin Andrews MP, Minister for Employment and Workplace Relations, Mr Andrews stated that the purpose of the bill was to "protect small businesses with fewer than 20 employees from the costs and administrative burden of unfair dismissal claims". In particular, Mr Andrews identified the lack of human resource specialists and the costs incurred by small business owners being required to attend a Commission hearing. These issues would not arise where the small business is wholly owned by a parent entity or is otherwise part of a larger corporate group.

As the current definition of 'employer' in section 4 of the *Workplace Relations Act 1996* is broad and general, the Committee recommends that a new provision be inserted into the Bill that defines employers, for the purposes of the proposed amendments, to

exclude those who are wholly owned by a parent entity, that is not a small business or are otherwise part of larger corporate group.

PART 5 COMMITTEE'S RECOMMENDATIONS

The Committee recommends:

1. Campaigns and Information

Education campaign

A wide-ranging and comprehensive education campaign both in print and on television that provides small business employers with information about unfair dismissal and identifies sources where further information can be obtained. Such an education campaign could be supported with appropriate telephone inquiry services and information packs for employers.

Information Packs

An information pack would compliment a comprehensive media campaign in educating small business employers about good practice in respect of the dismissal of employees. The information pack could include a guide with basic information on employment and industrial law in Australia, the different jurisdictions in operation and unfair dismissal laws.

Such an information pack and employment guide could be distributed to all new small businesses when applying for an ABN through the Australian Taxation Office and for existing small business employers with the return of a BAS statement by the Australian Taxation Office over a period of six months. The inclusion of a question of whether an employer has, or proposes to, employ less than 15 employees on an application form for an ABN or on a BAS statement would assist in the distribution of such material.

2. Statutory Amendments

Definition of a Small Business Employer

The traditional approach in looking at what constitutes a "small business" is based on the number of employees employed in a business. The AIRC has in relation to decisions concerning the Termination, Change and Redundancy standard clause looked at any exclusion or otherwise based on a small business being a business that employs less than 15 employees. This definition of small business was first introduced by the AIRC's predecessor in the *Termination Change & Redundancy Case* (1984) 8 IR 34.

The Committee notes that the *Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004* proposes to define a small business as a business that employs less than 20 employees.

It is the Committee's view that the increase in the number of employees from 15 to 20 in the definition of a small business is inappropriate. Defining small business as a

business that employs less than 20 employees is inconsistent with the established understanding of a "small business" in the industrial relations arena. Such a definition would increase confusion and would also increase the number of employees unable to access the unfair dismissal jurisdiction. The Committee notes that the majority of industrial instruments and decisions of the commissions apply to those employers who employ 15 or more employees. For example, the provisions of the *Employment Protection Act 1982 (NSW)* do not apply to employers who employ less that 15 employees.

It is the Committee's recommendation that if a definition of small business is to be based on the number of employees, that small business is defined as not more than 15 employees at the relevant time.

Re-define the meaning of a Small Business

An alternative approach to a definition based on the number of employees is to re-define the term "small business" on the basis of a business' revenue. For example, that a small business is a business that turned over less than $3 million in the preceding financial year. This would be consistent with the applicability of the *Privacy Act* 1988 (Cth), which does not require those businesses with an annual turnover of less than $3 million to comply.

This approach is aimed at removing the reference to the number of employees employed and instead focus on the size of the business in terms of its actual revenue. The rationale being that businesses with a higher turnover are more likely to have the funds available to seek advice on issues and/or be members of employer organisations, this being despite the number of employees employed.

Employed for Less than One Year

Instead of a straight statutory exclusion for all employees who are employed in a "small business" (however the term is defined), the exclusion could be amended to apply only to those employees who have been employed for a period less than 12 months. Such an approach would capture the vast majority of terminations by a small business employer and provide some protection to longer serving employees. The amount of time could be increased up to five years if it could be validated that such a period would be appropriate.

It is the Committee's recommendation that rather than a straight statutory exclusion for employees employed in a small business, an approach limiting access for a set period of time is more appropriate.

Definition of "Extreme Unfairness" for Small Businesses

The Committee recommends that a new subsection be inserted after subsection 170CE(5F) to provide that subsection 170CE(5C) does not apply in circumstances of extreme unfairness. The new subsection would apply to small businesses only. That is, where a small business employer has acted in a manner that is deemed as "extreme", the exemption from unfair dismissal laws will not apply.

The Committee appreciates that the term "extreme unfairness" is difficult to define. The definition would encompass a notion of unreasonableness, that is, where the dismissal is blatantly unreasonable or unfair or carried out in an arbitrary manner. A list of conduct by the employer that would constitute "extreme unfairness" could be included in the subsection. For example, a dismissal would constitute 'extreme unfairness' where an employee with a long period of service is summarily dismissed, in a humiliating manner in front of their colleagues.

The Committee believes that providing employees of a small business whose dismissals fall within the "extreme unfairness" category access to unfair dismissal laws would achieve a balance between providing some protection to employees from unscrupulous employers, whilst at the same time, protecting small business employers from the costs of defending a vexatious or frivolous application. The Committee further believes that a definition of "extreme unfairness" would also encourage good or best business practice and promote good working relationships more generally.

NSW Young Lawyers Employment and Industrial Law Committee

March 2005