

Submission

to

Senate Employment, Workplace Relations and Education
References Committee

Inquiry into Unfair Dismissal Policy in the Small Business Sector

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Business Sector**

On behalf of

**The Combined Community Legal Centres Group
(NSW)**

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Introduction

The NSW Combined Community Legal Centres' Group (CCLCG) is the peak association for 42 community legal centres across NSW located in metropolitan, regional, rural and remote areas. The CCLCG advocates on behalf of centres and their clients. Community legal centres (CLCs) provide legal advice, information and education to people from a wide range of disadvantaged communities. A full list of NSW CLCs is available from the website www.nswclc.org.au.

Community Legal Centres not only provide legal advice and assistance, but encourage and enable people to develop skills to be their own advocates. They work towards achieving systemic change through community legal education, and through law and policy reform. CLCs aim to provide services to people who are on low incomes (but are ineligible for legal aid), and those who, for a range of reasons, have difficulty in accessing legal services, including people with disabilities, women, young people, Indigenous people and people from non-English speaking backgrounds.

Submissions

The CCLCG has major concerns as to the creation of what is effectively a two tiered unfair dismissal regime providing more extensive protection to employees of larger businesses than those employed in small business. The CCLCG believes that the concerns of small business are best addressed by better resourcing small business to deal with the issues that arise and not by the abolition of compliance with the law. The perceptions of small business as to the negative impact of unfair dismissal laws¹ should not be used as a basis for such a radical removal of accepted human rights¹ when there are other options that may serve to improve the lack of understanding of law and procedure.

We refer the Senate Committee to Australia's revised *National Action Plan on Human Rights*, released in December 2004, the Prime Minister's foreword to which notes:

We continue to strive to protect and promote human rights and to address disadvantage. The Government's reform agenda is actively ensuring that each member of the Australian community has the opportunity to participate in the life of our community and to experience the benefits and accept the responsibilities that flow from such participation.²

The CCLCG believes that small business should be better resourced to deal with such employment issues through employer groups and the government. It is believed that this would significantly improve the level of understanding. It is wholly inappropriate for the government to say that it will fix the issues of small business being ill-equipped and under-resourced by abolishing laws on unfair dismissal and the fundamental rights of employees to fair treatment.

¹ Australia is a party to the International Covenant on Economic, Social and Cultural Rights, Article 7 of which provides, relevantly:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work...

² Available at < http://www.dfat.gov.au/hr/nap/nap_2004.pdf>, accessed 18.3.05. The National Action Plan refers to Article 7 of the ICESR at pg 98.

Is unfair dismissal the burden it's portrayed to be?

In all material citing reasons for pursuing the exemption for small business there is an emphasis on this point, that is, that small business cannot manage unfair dismissal either from a human resources or financial perspective. The same could certainly be said of compliance with all other laws relating to the workplace including superannuation, workers compensation, occupational health and safety and, perhaps the biggest source of anxiety to small businesses, GST compliance and other taxation laws. On the basis of the Government's own research, taxation ranks as the number one concern for most small businesses. We note the following surveys cited by the Government in its 1999 Report into the Provisions of the *Workplace Relations Amendment (Unfair Dismissal) Bill 1998*.³

- *Tasmanian Chamber of Commerce and Industry (1997 – 1998)*: Employers cited Taxation Reform as their biggest concern, along with lack of population growth, lack of demand and worker's compensation.
- *Queensland Chamber of Commerce and Industry 1998*: The primary concern for small business employers was complexity of changes to tax laws and rules
- *Australian Business Chamber 1998*: The three primary areas were frequency and complexity of changes to tax laws and rules, level of compliance and the costs of compliance with the new tax system.
- *Australian Chamber of Commerce and Industry 1998*: The three primary areas of concern were the frequency and complexity of taxation law and rules changes, the level of taxation and debit taxes.

Clearly, changes to taxation law and rules were a major concern at the time of the survey. The advent of the GST brought with it the costs arising from compliance. These costs, in both the labour time used to complete and maintain paperwork and financial costs in using outside assistance such as accountants, will be as ongoing as the GST itself. If the reasoning of the Government in the proposed small business unfair dismissal exemption is to stand, then the Government would surely have to consider a multitude of other exemptions from compliance with workplace related laws and regulations. The question must then be asked: will the Government release small business from taxation compliance? We suspect the answer is a definite no. The taxation regime of the Commonwealth serves a higher purpose of course, being the financial maintenance of the Commonwealth and the States, therefore the capacity of the small business to reach a maximum level of economic prosperity is sacrificed in order to achieve that higher purpose.

The same may be said of unfair dismissal law.

If it is accepted that all employees have the right to respect, dignity and fair treatment in the workplace then it must be accepted that there should be some form of remedy when respect, dignity and fair treatment are not afforded to an employee. As Mr Peter Reith stated on ABC Daybreak, 28 February 1996: "Look, our position's very clear. If you've been unfairly dealt with at work, you should have a right of appeal." That right of appeal should not be abolished by the overstated concerns of small business.

³ Employment, Workplace Relations, Small Business and Education Legislation Committee: Provisions of the Workplace Relations Amendment (Unfair Dismissal) Bill 1998, The Senate, February 1999.

Given the choice, small businesses would advocate for the abolition of all rights that interfere with their economic prosperity. This does not mean that the abolition would be forthcoming – there are more important questions at stake such as the role of human rights in our society and the role of the law in enhancing and ensuring those rights.

Who may miss out on a fair consideration of their dismissal? Examples from Community Legal Centres.

Given the large number of employees relying on small business as a source of employment in community legal centres' client base, many of those employees represent the class proposed to be excluded from access to unfair dismissal law. The following is a cross section of real cases of employees who would now be unable to access any remedy for their unfair treatment.

- An employee was provided employment in the retail sector and told the employee he was replacing had been sacked for being drunk. After six weeks had passed the employee was “retrenched” because the previous worker was only on annual leave. The employer then told the small local community that the employee had been sacked because he could not spell. The employee then went on a Centrelink pension.
- A young man was assaulted at work by his employer and charges were laid by the Police. His nose had been broken. He subsequently resigned from his employment. This employee would not be able to claim constructive dismissal and seek a remedy for the termination of his employment because the workplace was a small business.
- A young male arrived at work 15 minutes late and the boss unreasonably responded with “you’re sacked” without seeking an explanation for the lateness or considering the employee’s good record.
- A middle aged female worker arrived at work to be told that her and another worker had been made redundant. There had been no consultation and they were told to leave the workplace within the hour. Both had worked in the organisation for a decent period of time and no problems had ever been raised with their performances nor was there any consideration for re-employment of the workers. The redundancy did not appear to be genuine and under the proposed changes the employees would not be able to seek explanations or remedy for their treatment.
- A young woman queried her entitlements and politely advised her employer that she was being underpaid. She was fired that day.
- A young woman’s hours were cut due to the business being “slow” however the employer added new workers.
- A middle aged man was sacked for missing two calls on his personal mobile from his employer while he was outside his truck working. The man had worked for approximately 8 months without any problems. The employer

stated to him that his failure to answer the phone meant he couldn't run his business and the employee could "f* off."

- An employee worked as a "casual" for 15 years and was injured in a car accident. Her Doctor allowed her 4 weeks off however she took 2.5 weeks. Shortly before she was due to return to work she received a letter telling her she had been replaced and was no longer needed.
- A worker of 4.5 years standing questioned whether she was being paid correctly. The employer terminated her employment in a phone call during which the employer claimed that they couldn't possibly work with her anymore because she had questioned them.
- A permanent part time worker of 5 years was working a 10 hour shift for a security company during the night without any provision for breaks. She later experienced vomiting and gastric upsets requiring her to take trips to the bathroom. The employee missed one alarm but no person was hurt and during her employment she had never missed an alarm. The employer fired her the following day without any consideration of the employee's condition or prior good work record.
- A man in his mid forties who had worked for a landscape gardener for more than 9 years was summarily dismissed in a dispute in relation to when he could take leave, which he had accrued. There were no other disciplinary issues and no apparent reason why he could not take leave.
- A kitchen hand who worked in a takeaway food shop for 4 years was sacked. He was not given payment in lieu of notice and was made to sign a document in English stating that he had received compensation for the dismissal. The client did not speak or read English and had no one with him to advise on the document.
- A university student was sacked from a video store where he had worked for 4 years after he asked about the applicable rate of pay for working on a public holiday.
- A hairdresser was sacked on the spot midway through cutting a customer's hair. She was accused of stealing customers because she had their contact details. Most were customers the hairdresser had brought to the salon when she had started working there 9 years before.
- A gym instructor was forced to resign when her employer would not deal with swearing and threats directed at the client by a fellow employee after the client discovered that her customers were being poached by this other employee.
- A man in his late forties who had worked for a small company for 6 years was sacked after he injured his back at work and was moved into a different section where he was then warned for not meeting performance targets. The new position aggravated his back condition and his work was compared with that of workers who had been in that section for several years. Importantly for

this client, his terms of settlement included a statement of service. In the months since his dismissal, the client had been unable to get new employment and he cited the absence of any reference as a major factor.

While there is no obligation for an employer to provide a reference, a statement of service outlining the dates of employment and duties performed is almost always requested as part of settlement negotiations. References are a crucial consideration for employees who have been terminated. In many cases, a statement of service is at least as important as monetary compensation, if not more so as it can have a significant effect on prospects for future employment. For older clients who may have had considerable experience in the one workplace this is especially important. The consequences of an unfair dismissal can thus be compounded when it leads to long term unemployment. Further, people with skills and experience may be much needed by employers but if individuals cannot provide proof of their abilities then it is unlikely that they will be employed.

The benefit as opposed to the burden of unfair dismissal applications

Unfair dismissal provisions provide a forum in which an employer and employee can negotiate and, hopefully, settle their dispute. This may also provide an opportunity to deal with any broader workplace problems that may have fed into the dispute. It can thus highlight issues that may lead to further breakdowns between employers and other employees if not addressed.

This can be of benefit to both the employer and employee. The assistance of expert commissioners in not only facilitating settlements but in highlighting concerns in the practices and actions of both parties, may help prevent the recurrence of such conflicts in those workplaces. While this may be viewed as an optimistic appraisal of unfair dismissal proceedings, it is clearly a possible bonus available to parties proceeding in a specialist jurisdiction.

Conclusion

Small employers, presumably without human resources facilities, may be spared unfair dismissal applications by the proposed reforms but what may be the alternative? As the above listed cases demonstrate, employees are sometimes dismissed in ways in which there is a clear failure of the employer to properly address employee needs. Alleged breaches of common law obligations of employers may still give rise to legal action but this may be more onerous for both parties given that proceedings will be conducted in a non-specialist and costs jurisdiction.

We acknowledge that, for a small business, an unfair dismissal application can be a significant issue. Nevertheless, the perceived burdens should not be overplayed. As discussed above, the purported concerns of small business in dealing with the cost and effort of addressing unfair dismissal applications are far outweighed by other regulatory burdens such as administering tax records and payments. At the same time, the broader financial and societal costs of unfair dismissals raise practical as well as compassionate concerns – for employers and employees.

- Much needed skilled and experienced employees may be lost to the employment market because an unfair dismissal has seriously jeopardised their future employment prospects.
- Employment practices that may undermine productivity and also lead to greater than necessary turnover of staff will present significant costs to employers if not recognised and addressed.
- For employees, the financial, emotional and welfare costs should never be underestimated. Each employee in the above examples suffered because of the treatment received. The clients all incurred financial and social costs resulting from unfair treatment at work. Some had problems maintaining their families and had to resort to the Government to provide financial benefits, others found themselves in emotional pain. The impact on an individual's health and welfare can lead to substantial costs incurred by the community.

These are clearly foreseeable consequences of a diminution of protection of employees. Addressing workplace practices that lead to the breakdown in the employment relationship could provide a practical response to the perceived problems for small business of the unfair dismissal regime. It is submitted that such an approach will be far less costly – in economic and social terms – for the Australian community. Finally we refer the Committee again to the National Action Plan on Human Rights, which states:

Australia's leading role in developing the international human rights system, and its commitment to the principle of fair treatment for all, is enforced by our nation's robust domestic system of human rights protection. Australia takes the view that universal observance of human rights, both at home and abroad, helps to achieve a more stable and just international order, which benefits the security and prosperity of all nations and individuals.⁴

⁴ Above n 2, at pg 5.