



Australian Government

**Department of Employment and
Workplace Relations**

**Senate Employment, Workplace Relations and
Education References Committee**

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

**Submission by the Australian Government
Department of Employment and Workplace Relations**

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1 Introduction

On 7 December 2004 the Senate agreed to a motion from Senator Murray referring to the committee the question of exempting small businesses from unfair dismissal laws, with a particular focus on:

- international experience;
 - the impact of unfair dismissal laws on small business employment; and
 - the extent of small business concern about unfair dismissal laws.
2. The Department of Employment and Workplace Relations (DEWR) is pleased to be able to make a submission to the committee. Since many of the issues dealt with in the terms of reference have been extensively addressed in previous inquiries, this submission confines itself to supplementing information already available.
 3. The body of this submission, comprising sections 2 to 12, deals with the terms of reference in order. Section 13 presents concluding remarks.

2 International experience with unfair dismissal laws

4. Term of reference (1)(a)(i)(A) calls on the committee to examine the international experience concerning unfair dismissal laws.
5. Laws of other countries that subject small businesses to unfair dismissal laws less strict than those applying to other businesses are described in DEWR's submission to the committee's 2002 inquiry into the provisions of bills to amend the *Workplace Relations Act 1996* (the 2002 inquiry). That submission outlines the main provisions of small business exemptions in Austria, Germany, South Korea and Italy (paragraphs 85-88).
6. The OECD's *Employment Outlook 2004* presents research about the impact on labour market aggregates of employment protection legislation, including unfair dismissal laws. The OECD concluded that strict employment protection legislation:
 - protects existing jobs; but
 - reduces the re-employment chances of unemployed workers, thereby exerting upward pressure on long-term unemployment;
 - decreases the employment rates of young people and women; and
 - discourages permanent employment, encouraging employers to use temporary and casual employment, especially for young workers and the less skilled.

3 International experience with unfair dismissal laws and employment growth in the small business sector

7. Term of reference (1)(a)(i)(B) calls on the committee to examine the international experience concerning the relationship between unfair dismissal laws and employment growth in the small business sector.
8. Small business exemptions from unfair dismissal laws have already been introduced in countries such as Germany, Austria, Italy and South Korea.
9. In particular, the German experience serves as a useful comparison as the scope of the exemption was only recently increased to include businesses employing up to 10 employees. This increase took effect from January 2004 and formed part of a reform package designed to increase employment among small and medium enterprises.
10. It is interesting to note that Germany had previously reduced the threshold for the exemption and the 2004 increase was a return to the former limit. Between 1996 and 1999, the exemption applied to businesses with up to 10 employees, and was reduced to five employees between 1999 and 2003. The restored threshold is aimed at encouraging small firms to react more swiftly to favourable demand conditions by hiring additional workers, thus opening up better employment opportunities for job seekers.

4 Federal and state unfair dismissal laws and their adverse impacts on small businesses

11. Term of reference (1)(a)(ii) calls on the committee to examine the provisions of federal and state unfair dismissal laws and the extent to which they adversely impact on small businesses.
12. This question has received close attention in numerous surveys over some years and was considered in detail in the committee's report of its 2002 inquiry – in the majority report, the Labor Senators' report and the Democrats' minority report.
13. Since the release of that report a number of other survey results have become available. Summaries of relevant results follow.

4.1 The Executive Connection (TEC); December 2004

14. The Executive Connection (TEC), an international organisation for mentoring and developing CEOs, conducts a quarterly survey of CEOs of Australian businesses. In November 2004, TEC surveyed 215 CEOs on a range of issues, including unfair dismissal regulation. Nineteen per cent of respondents identified the potential for unfair dismissal cases as the key hindrance to business when hiring new staff. Of the 106 CEOs who responded to a question for CEOs who have fewer than 20 staff, 79 per cent thought

that the proposed exemption from unfair dismissal laws for small business would be a positive change.

15. The TEC survey identified potential unfair dismissal cases as the second highest hindrance to business when hiring new staff. The only factor identified as a greater hindrance was training time for new staff.

4.2 ACCI Pre-election Survey; September 2004

16. In September 2004, the Australian Chamber of Commerce and Industry released the results of a pre-election survey which examined business attitudes on a range of subjects, including unfair dismissal. It was based on 1687 responses, 800 of which were from small businesses. Almost 73 per cent of small businesses nominated unfair dismissal as a major or moderate concern, with the large majority identifying it as a major concern.

17. Unfair dismissal legislation was found to be the second highest concern to small businesses, only marginally behind workers compensation costs.

4.3 Sensis Business Index Survey; August 2004

18. The August 2004 Sensis Business Index Survey contained specific questions on unfair dismissal regulation. Fourteen hundred small businesses and 400 medium businesses (defined as businesses employing fewer than 20, and between 20 and 199, people respectively) were surveyed. The findings included that:

- 28 per cent of small and medium businesses have decided not to take on additional employees because they fear possible unfair dismissal action. If these businesses had put on those additional employees, they would have put on an average of 2.7 additional employees each;
- over half of SMEs believe that the unfair dismissal laws have had some impact on their business. The main impact nominated was that it is more difficult to hire and fire (11 per cent). Six per cent reported that because of the laws they only employed more staff when essential, 4 per cent said they do not employ new staff and a further 3 per cent said they employ casuals; and
- 13 per cent of SMEs with employees had had an employee, or former employee, take action against them for unfair dismissal at some stage. A further 6 per cent had been threatened with action.

19. Respondents to the survey were supportive of the Federal Government's workplace relations policies. Workplace relations issues were highlighted as one of the highest areas of regulatory concern after taxation.

4.4 ABL Business Priorities Survey; June 2004

20. Australian Business Limited's Business Priorities 2004 survey found that unfair dismissal laws were a major or moderate concern for 75 per cent of respondent businesses. This was the highest level of concern for any workplace relations issue.

21. The survey involved 675 business decision makers across NSW and the ACT. It was conducted in April 2004 and the results released in June 2004.

4.5 Charles Sturt University; February 2004

22. During April to June 2003, Charles Sturt University surveyed around 600 small businesses in the Albury Wodonga area. It found that for 5.5 per cent of small business respondents, unfair dismissal laws were the most important factor that influenced their decisions to hire or not hire extra staff. In addition, the survey found that less than 40 per cent of respondents were familiar with current unfair dismissal legislation, and only around 16 per cent of respondents considered unfair dismissal laws to be fair or very fair to small businesses.

23. Respondents indicated that unfair dismissal laws were the fourth most important factor in decisions about hiring or not hiring extra staff. It is unsurprising that factors such as workload, economic viability and availability of appropriate job-seekers all received greater consideration. However it is worth noting that unfair dismissal laws was the next most important factor in the hiring decision and the only specific workplace relations matter cited.

5 Applications against small businesses under federal unfair dismissal laws

24. Term of reference (1)(a)(ii)(A) calls on the committee to examine the number of applications against small businesses in each year since 1 July 1995 under federal and state unfair dismissal laws.

25. Since 1997 the Australian Industrial Registry (AIR) has surveyed respondents to termination of employment claims to determine whether they employ fewer than 20 employees. Since that time, the proportion of applications against small businesses has remained fairly stable at approximately one-third of all applications.

26. The following table sets out:

- the total number of termination of employment applications received by the AIR;
- the number of respondents to those applications who complied with a request for information on employer size;

- the number of employers that indicated that they employed fewer than 20 employees; and
- the number of small business respondents, as a percentage of all employers answering the request for information on business size.

Table 1: Termination of employment applications - Dec 1997 to Dec 2004

Year	Total termination of employment applications lodged	Total employer responses received	Employers employing fewer than 20 employees	Employers employing 20 or more employees	Employers employing fewer than 20 employees as % of total employer responses received
2004	7046	1978	718	1260	36.3
2003	6954	2153	735	1418	34.1
2002	7214	2495	837	1658	33.6
2001	8177	2666	870	1800	32.6
1997-2000	24144	8142	2764	5378	34.0
Total	53535	17434	5924	11514	34.1

27. Attachment A provides additional data on federal termination of employment applications lodged between December 1997 and December 2004, including the State or territory of lodgement.

6 The number of businesses and employees covered by federal and state unfair dismissal laws

28. Term of reference (1)(a)(ii)(B) calls upon the committee to examine the total number of businesses, small businesses and employees that are subject to federal and state unfair dismissal laws.

29. It is not possible to provide a robust estimate of the number of small businesses that fall under federal workplace relations law. Coverage by the federal scheme depends in part on whether a business is covered by a federal award or agreement. Data on such coverage is unreliable, mainly because many employers do not know whether their business is, or workers within their business are, covered by a State or federal industrial instrument. For this reason, the ABS has not published estimates of State and federal coverage since 1990 and no robust estimates of the current situation are available.

30. It is, however, possible to provide a very broad estimate of the number of employing, non-farm small businesses – that is, small businesses with at least one

employee that are not in the agriculture, forestry or fishing industries – that are subject to federal workplace relations law.

31. Drawing on a number of data sources, DEWR estimates that around one third of non-farm small businesses:

- have employees who are covered by federal awards, federal certified agreements or Australian Workplace Agreements; or
- are located in the ACT, the NT or Victoria.

32. The most recent estimate from the ABS's *Small Business in Australia* (cat. no. 1321.0) is that, in 2000-01, there were 539,900 employing non-farm small businesses in Australia.

33. Based on the figures set out in the previous two paragraphs, there were around 180,000 employing non-farm small businesses subject to federal workplace relations law in 2000-01.

34. It is not possible to break this figure down by state and territory.

35. Similar difficulties attend the estimation of the number of employees of small businesses that fall under state and federal workplace relations law.

36. Drawing on a number of data sources, DEWR estimates that around 35 per cent of employees of non-farm small businesses:

- have employees who are covered by federal awards, federal certified agreements or Australian Workplace Agreements; or
- are located in the ACT, the NT or Victoria.

37. The most recent estimate from the ABS's *Small Business in Australia* (cat. no. 1321.0) is that, in 2000-01, there were 2,269,400 employees were employed by non-farm small businesses in Australia.

38. Based on the figures set out in the previous two paragraphs, there were around 795,000 employees of non-farm small businesses subject to federal workplace relations law in 2000-01.

39. It is not possible to break this figure down by state and territory.

40. It is important to note that, irrespective of how many small businesses potentially could be faced by federal unfair dismissal applications, or how many federal unfair dismissal applications involving small businesses are actually made, a strong perception exists amongst small business operators that unfair dismissal legislation makes it difficult to shed staff, even staff who are dishonest or not performing. This in itself is sufficient to deter small businesses from employing more staff.

7 Evidence that exempting small business from federal unfair dismissal laws will create 77 000 jobs in Australia

41. Term of reference (1)(a)(iii) calls upon the committee to examine evidence cited by the Government that exempting small businesses from federal unfair dismissal laws will create 77 000 jobs in Australia (or any other figure previously cited).

42. The 77 000 figure refers to an estimate by Don Harding of the Melbourne Institute of Applied Economic and Social Research in 2002 research commissioned by DEWR.¹ Dr Harding is a well-regarded researcher with a strong record of work in relation to labour market and employment issues. Dr Harding used the Yellow Pages Business Index survey in his research. The survey involved 1802 telephone interviews with small and medium enterprises employing fewer than 200 employees.

43. According to Dr Harding's findings, at the time of the survey, some 20.9 per cent of small and medium sized businesses currently had no employees. Of these 58 per cent had never had employees and 42 per cent had previously had employees. When asked about the role that unfair dismissal laws played in their decision to reduce the number of employees, 11.1 per cent reported that these laws played some role in that decision. Factoring this up to the population as a whole results in the conclusion that there were 77 842 job losses in which unfair dismissal laws played a role.

44. The validity of Dr Harding's methodology was extensively debated in the committee's inquiry into the *Termination of Employment Bill 2002* and, in DEWR's view, the methodological issues have been sufficiently examined in that context.

8 Unfair dismissal laws and employment growth in Australia

45. Term of reference (1)(a)(iv) calls upon the committee to examine the relationship, if any, between previous changes to Australian unfair dismissal laws and employment growth in Australia.

46. The link between particular changes in unfair dismissal laws and aggregate employment growth is difficult to accurately quantify. The large number of different factors that influence aggregate employment growth makes it difficult to disentangle the contribution of unfair dismissal laws from that of the business cycle, differences between states, structural change, one-off economic shocks and other factors.

47. The Department has conducted a search of the academic literature and has been unable to find convincing statistical evidence to quantify the employment effects of past changes in unfair dismissal laws. The difficulty of separately identifying the effect of

¹ Harding, D. 2002. *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses*. Melbourne: Melbourne Institute of Applied Economic and Social Research.

unfair dismissal legislation as a barrier to employment lends greater importance to attitudinal surveys which can directly gauge small business views on the effects that unfair dismissal laws are having on their hiring decisions (see section 4).

9 The reliability of survey evidence about small business concern with unfair dismissal laws

48. Term of reference (1)(a)(v) calls upon the committee to examine the extent to which previously reported small business concerns with unfair dismissal laws related to survey questions which were misleading, incomplete or inaccurate.

49. A large number of surveys, conducted at different times and taking samples from different populations have concluded that unfair dismissal laws, State and federal, are a serious concern to small business.

50. Critiquing survey methodology is not DEWR's area of expertise. For this reason the Department commissioned research in 2002 by Don Harding of the Melbourne Institute of Applied Economic and Social Research which found that unfair dismissal laws inhibited employment growth. See section 7.

51. The numerous surveys into unfair dismissal laws have all been conducted according to differing methodologies and using independent sample data. While any particular survey may suffer from lack of methodological rigour, the large number of inquiries into unfair dismissal laws renders it unlikely that every survey has reached a false conclusion. Survey evidence overall indicates strongly that unfair dismissal laws are a concern to small business and have an adverse impact on hiring decisions.

10 The importance of unfair dismissal laws to small businesses

52. Term of reference (1)(a)(vi) calls upon the committee to examine 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.

53. Unfair dismissal laws have been identified in numerous surveys as a cause of concern to small businesses. The findings of recent surveys are available at section 4 along with an examination of the relative importance placed on unfair dismissal laws in comparison with other concerns.

54. It should be no matter for surprise that operational considerations often rate as a more important factor in hiring decisions than unfair dismissal legislation. Undoubtedly factors such as consumer demand, economic viability, and the availability of suitable job seekers are all crucial factors in any employment decision. Small businesses may also take into account other aspects of workplace relations regulation or other regulatory fields such as taxation. However the existence of these other factors does not diminish the

concern expressed by small businesses about unfair dismissal laws. Small businesses have repeatedly indicated that potential unfair dismissal claims act as a disincentive to hiring additional staff.

11 Information provided to small businesses about unfair dismissal laws

55. Term of reference (1)(a)(vii) calls upon the committee to examine the extent to which small business are provided with current, reliable and easily accessible information and advice on federal and state unfair dismissal laws.

56. The Government continues to fund and support public information and education campaigns on termination of employment laws. These are described in paragraphs 42 and 43 of DEWR's submission to the committee's 2002 inquiry. In addition to the activities described in that submission a number of further initiatives have been taken in this area.

57. DEWR delivers information on unfair dismissal laws to the public by telephone, office counters, workplace visits, the Internet and educational seminars. For example, DEWR:

- provides a free telephone enquiry service, WageLine, which gives general information on termination of employment laws;
- produces facts sheets on aspects of industrial law and practice, including termination of employment. These are available free of charge through the WageNet website; and
- conducts seminars that cover federal termination of employment matters.

58. Between 1 July 2003 and November 2004 the Office of Workplace Services has conducted some 67 seminars covering termination of employment issues, which were attended by over 1670 employees and employers. Over 75 per cent of the seminars were held in regional areas.

59. A video information package on termination of employment proceedings is available to the public from the AIRC free of charge. The package comprises a 15 minute video and 12 page information booklet and was developed with extensive consultation with the Termination of Employment Users' Group in Melbourne, together with members of the AIRC, conciliators and registry officers. The video and booklet are available to the public over the counter at any of the Commission's registries or by post. The video may be viewed on-site at most registries. The booklet is available on the Commission's website. The video has been distributed to representative organisations such as unions, employer bodies and law firms as well as to regional libraries in centres where conciliation conferences are regularly held.

60. A general information guide on termination of employment was expanded and re-released in February 2004. It answers many of the most commonly asked questions about unfair dismissal and termination of employment proceedings. The 16 page document is available to the public in hard copy and on the AIRC website. In May 2004, the AIRC also released a procedural guide for people representing themselves at hearings. It is available in hard copy and on the AIRC website.

61. There are limits to what can be achieved by providing further information because:

- the WR Act does not set out particular procedural steps that must be followed when dismissing an employee. Each case is decided on its particular merits. This imposes limits on the specificity of the information that can be provided;
- responsibility for termination of employment laws is divided between the Commonwealth and the States. Evidence suggests that many small businesses are unsure which jurisdiction applies to them; and
- small businesses are a very large and diverse group with limited capacity to absorb information about situations that may or may not arise. This poses challenges for effective communications.

12 Policies, procedures and mechanisms to reduce the negative impacts of unfair dismissal laws

62. Term of reference (1)(b) calls upon the committee 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.

63. Procedural changes to unfair dismissal laws have already been considered in the context of:

- the Senate inquiry into the Workplace Relations Amendment (Termination of Employment) Bill 2002;
- the ALP's Workplace Relations Amendment (Unfair Dismissal – Lower Costs, Simpler Procedures) Bill 2002; and
- the proposals put forward by the ALP's Stephen Smith and Tony Burke on 7 December 2004.

64. There is some limited scope for procedural reforms that would ease the burden of unfair dismissal laws on small business. None of the available measures to streamline the operation of unfair dismissal laws, however, would have a very significant impact on the

burden that those laws impose on small business. Even as a package, it is unlikely that they would be sufficient to address the concerns of small businesses.

- Giving unions the right to lodge claims on behalf of employees who are not even union members would do nothing to improve the efficiency of the unfair dismissal system. It would only increase the role of unwanted third parties in the workplace relations system.
- Requiring the AIRC to conduct conciliation conferences at the convenience of small businesses would make relatively little difference. The AIRC already provides a measure of flexibility as to the time and place of conferences.
- Encouraging the use of telephone conferencing would make little difference: telephone conferences are already used when face-to-face conferences are not practicable. The chances of a successful outcome are higher when the parties meet face-to-face.
- Legislating an indicative time frame for the AIRC to deal with unfair dismissal claims would make no difference. The AIRC already has a statutory obligation to deal with matters as quickly as practicable.
- Allowing the Commission to order costs against applicants who pursue speculative or vexatious claims is unnecessary. The AIRC already has this power under sections 170CJ and 347 of the *Workplace Relations Act 1996*.
- Increasing efforts to inform small businesses about unfair dismissal laws would make little difference. Small businesses simply do not have time to master the complexities of the existing laws. See section 11.
- Establishing a register of agents who can appear in unfair dismissal matters would increase red tape for minimal real benefit.

65. The Government has pursued other procedural reforms which have been blocked in the Senate. These include the provision in the Workplace Relations Amendment (Termination of Employment) Bill 2002 that would allow the AIRC to dismiss some unfair dismissal claims against small businesses without holding a hearing.

66. While there is some limited scope for making procedural improvements to the existing unfair dismissal laws, there is little chance that such reforms would be sufficient to meet the concerns of small business or to eliminate the depressing effect that the laws exert on hiring behaviour.

13 Conclusions

67. DEWR remains of the view that unfair dismissal legislation places a greater burden on small businesses than on larger businesses. Small business employers have limited

time and resources to devote to defending claims, even if they are without merit. In larger businesses employers can hire human resource managers or put more time and resources into recruitment and termination procedures. Additionally, legal costs represent a higher proportion of revenue for small business. Small business owners may even have to close their businesses to attend a hearing.

68. The time and cost of defending an unfair dismissal claim, even one without merit, can be substantial. If they were not subject to unfair dismissal laws, small business employers would be willing and able to hire extra staff on a needs basis because they would not have to worry about the potential cost of defending unfair dismissal claims.

69. Workplace relations laws should encourage, not inhibit job creation. Many surveys have shown that the small business community believes that the laws make it difficult to dismiss employees. This affects hiring decisions and acts as a disincentive to increased employment, especially for higher risk hirings like young workers and re-entrants to the labour market.

70. While procedural improvements to the current system offer some limited scope for reducing the burden on small business, it appears unlikely that any package of available improvements would be sufficient to allay the concerns of small business.

71. Exempting small businesses from unfair dismissal laws would appear to be the most effective way to address this significant barrier to employment growth in the small business sector.

FEDERAL UNFAIR DISMISSAL APPLICATIONS

**Summary: Federal unfair dismissal applications by State of lodgement –
Dec 1997 to Dec 2004**

Registry	Total termination of employment applications lodged	Total employer responses received	Employers employing fewer than 20 employees	Employers employing 20 or more employees	Employers employing fewer than 20 employees as % of total employer responses received
ACT	1665	587	228	359	38.8
NSW	9982	2435	602	1833	24.7
NT	1699	919	332	587	36.1
QLD	2793	1530	287	1243	18.8
SA	1402	660	88	572	13.3
TAS	983	406	86	320	21.2
VIC	32563	10420	4143	6277	39.8
WA	2448	477	158	323	33.1
TOTAL	53535	17434	5924	11514	34.0

January 2004 - December 2004

Registry	Total termination of employment applications lodged	Total employer responses received	Employers employing fewer than 20 employees	Employers employing 20 or more employees	Employers employing fewer than 20 employees as % of total employer responses received
ACT	237	76	28	48	36.8
NSW	1426	241	66	175	27.4
NT	199	98	36	62	36.7
QLD	352	138	20	118	14.5
SA	170	69	13	56	18.8
TAS	112	56	9	47	16.1
VIC	4293	1231	527	704	42.8
WA	257	69	19	50	27.5
TOTAL	7046	1978	718	1260	36.3

January 2003 - December 2003

Registry	Total termination of employment applications lodged	Total employer responses received	Employers employing fewer than 20 employees	Employers employing 20 or more employees	Employers employing fewer than 20 employees as % of total employer responses received
ACT	227	53	18	35	34.0
NSW	1270	275	76	199	27.6
NT	240	125	50	75	40.0
QLD	397	186	29	157	15.6
SA	153	59	16	43	27.1
TAS	109	38	6	32	15.8
VIC	4242	1353	524	829	38.7
WA	316	64	16	48	25.0
TOTAL	6954	2153	735	1418	34.1

January 2002 - December 2002

Registry	Total termination of employment applications lodged	Total employer responses received	Employers employing fewer than 20 employees	Employers employing 20 or more employees	Employers employing fewer than 20 employees as % of total employer responses received
ACT	215	72	20	52	27.8
NSW	1358	359	84	275	23.4
NT	243	149	51	98	34.2
QLD	453	234	45	189	19.2
SA	184	75	13	62	17.3
TAS	116	77	13	64	16.9
VIC	4335	1439	584	855	40.6
WA	310	90	27	63	30.0
TOTAL	7214	2495	837	1658	33.5

January 2001 - December 2001

Registry	Total termination of employment applications lodged	Total employer responses received	Employers employing 15 or fewer employees	Employers employing more than 15 employees	Employers employing 15 or fewer employees as % of total employer responses received
ACT	244	90	39	51	43.3
NSW	1725	379	90	289	23.7
NT	260	148	41	107	27.7
QLD	467	298	59	239	19.8
SA	172	87	9	78	10.3
TAS	140	87	31	56	35.6
VIC	4799	1423	538	885	37.8
WA	370	154	63	95	40.9
TOTAL	8177	2666	870	1800	32.6

December 1997 - December 2000*

Registry	Total termination of employment applications lodged	Total employer responses received	Employers employing 15 or fewer employees	Employers employing more than 15 employees	Employers employing 15 or fewer employees as % of total employer responses received
ACT	742	296	123	173	41.6
NSW	4203	1181	286	895	24.2
NT	757	399	154	245	38.6
QLD	1124	674	134	540	19.9
SA	723	370	37	333	10.0
TAS	506	148	27	121	18.2
VIC	14894	4974	1970	3004	39.6
WA	1195	100	33	67	33.0
TOTAL	24144	8142	2764	5378	33.9

* Between December 1997 and December 2000, only aggregate figures are available.