Submission

to

Senate Employment, Workplace Relations and Education References Committee

Inquiry into Unfair Dismissal Policy in the Small Business Sector

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Submission to Senate Inquiry into Dismissal Policy in the Small Business Sector

March 2005

1. The ACTU welcomes the opportunity to contribute to the ongoing debate into the relationship between business size and its contribution to employment growth in Australia. We also welcome the opportunity to make submission regarding the operation of unfair dismissal provisions in Australia.

2. It is our strong submission that there is no compelling evidence in either Australia or internationally that would justify relaxing the operation of the unfair dismissal laws to exclude employers of fewer than 20 employees. The conclusions the ACTU invites the Committee to draw from our submission are that:

   (a) Although employers argue that unfair dismissal legislation dampens employment, the empirical studies are inconclusive regarding the effect of employment protection legislation on aggregate employment and unemployment;

   (b) Any evidence of a link between the strictness of employment protection laws and employment rates does not translate to evidence that relaxing unfair dismissal laws for small business will result in higher employment levels. Such a premise assumes small business is a net jobs generator, and that this is attributable to business size not other factors related to small business growth;

   (c) However the international studies of the contribution of small business to net jobs growth are also mixed. It appears that high growth firms account for much of the absolute jobs growth and that these are found in all sectors, including larger firms. The attributes of high growth firms are innovation and attention to human resources. In particular, attention to training, hiring skilled employees and staff motivation are reported as attributes of high growth firms. It could be argued that businesses that are most likely to create jobs are least likely to face an unfair dismissal claim.

   (d) In any event Australia's unfair dismissal laws are relaxed by international standards. Studies that show a link between strict employment protection laws ("EPL") and lower employment have largely been concerned with nations with stricter EPL than Australia;

   (e) There is no reliable evidence of any link in Australia between unfair dismissal laws and jobs growth;

   (f) When asked what assistance small business operators require to grow their business, workplace relations issues are not foremost amongst small business concerns. When asked specifically about barriers to employment Australian small businesses overwhelmingly nominate other factors as more important than unfair dismissal laws; and

(g) There is scope to improve the quality and accessibility of information about fair termination of employment and unfair dismissal procedures to both business and employees.

Terms of Reference 1(a)(i)(A)

The international experience concerning unfair dismissal laws.

3. The Committee has requested information regarding the international experience regarding unfair dismissal laws. According to the ILO "an employee's right not to be unfairly or unjustifiably dismissed is a modern cornerstone of the law relating to termination of employment"[1]. Most nations provide protection against arbitrary termination, or termination without cause. In some nations protection against arbitrary dismissal is enshrined into the national constitution and considered a fundamental human right. This is true of 13 of the 20 nations that make up Latin America. [2]

4. Australia's unfair dismissal laws are not inconsistent with those overseas. In particular the ILO Digest of Termination of Employment, published in 1998, indicates that only two developed nations[3] provided full exemptions from unfair dismissal based upon the size of the employer.

5. Some countries afford employers below a certain size-threshold exemptions from a part of the unfair dismissal law. However this is not widespread. In Italy employees of non-commercial enterprises employing fewer than 15 employees (or 5 in the farm sector) are not automatically able to claim re-instatement, with the issue of re-instatement instead being arbitrated.[4]

6. In Venezuela mandatory re-instatement does not apply in businesses under 10 employees, and in Panama exemptions cut in at 10, 15 or 20 employees depending upon the nature of the work. However these exemptions only apply to whether the employee can enforce their right to re-instatement, not to compensation.[5]

7. Some jurisdictions limit the quantum of compensation payable according to the size of the employer. Italy has a two tiered compensation rate based on business size. [6]

8. Overwhelmingly however international regulation of unfair or unjustifiable termination of employment does not discriminate on employer size. Despite a trend over the past two decades to significantly relax employment protection legislation, only Germany has extended its small business exemption. There, the threshold for the small business exemption has been amended three times in 10 years. In 1996 the threshold increased from 5 to 10 employees, but this legislation was reversed in 1999. On 1 January 2004 the higher threshold was re-instated.

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[1] ILO, Termination of Employment Digest, ILO Geneva 1998, p 11.
[2] Ibid p 11
[3] Germany and Austria
[4] Ibid p 190
[5] Ibid p
[6] Ibid p. 26

9. Thus, if Australia were to adopt a discriminatory exemption based on employer size it would be of step with the practices adopted in comparable nations.

10. This is instructive. Despite global interest in the contribution of small firms to employment growth throughout the 1990's no OECD nation has amended its unfair dismissal regime to introduce a small business exemption. The vast majority of the de-regulation and relaxation of employment protection has been directed as easing restrictions upon the use of temporary labour.

11. Advocates of a small business exemption claim that the exemption is justified because the unfair dismissal provisions in the WRA are too onerous upon employers. International comparisons show this is not the case.

12. The OECD has developed an index to measure certain elements of employment protection legislation. The index was developed to allow quantitative measurement of the impact of EPL on employment and unemployment across nations. The main source of the index is legislation, although the OECD will adjust the index in light of regulatory reform, judicial interpretation or widespread collective bargaining outcomes.

13. The index measures the procedural requirements for dismissal, unfair dismissal, redundancy and retrenchment pay, special measures for terminations of groups of employees, and regulations governing the use of fixed term employment. The index was updated in 2004.[7]

14. The index provides a yardstick against which the strictness of the Australian unfair dismissal laws can be assessed. While indexes such as that used by the OECD have their limits, the ACTU strongly submits Australia's unfair dismissal laws are significantly less onerous upon employers than in most comparable nations. This is despite that fact that a number of OECD nations have relaxed the extent of employment protection over since the 1980's, resulting in a convergence of the laws.

The OECD Index and unfair dismissal

15. Applying the OECD index, only four nations have less strict protection against individual dismissal than Australia: the USA, UK, Switzerland and Denmark. The USA has no unfair dismissal laws, but collective contracts regulate dismissal.

16. The index measures unfair dismissal by assessing procedures for termination, and the difficulty of unfair dismissal laws. Four measures related to individual difficulty of dismissal: the definition of unfair dismissal, the trial period before eligibility arises, the compensation payable to an employee with 20 years tenure, and the extent of re-instatement as a remedy.

[7] OECD Employment Outlook 2004, Chapter 2, OECD Paris 2004.

Procedures for termination

17. With respect to the general indicator of strictness of procedures surrounding employment, the OECD rated nations on a scale of 0-3. Factors included whether terminations need be in writing or oral, whether written reasons must be supplied to the employee, and whether third parties (eg works councils) must be notified, or must authorise the termination. Australia's termination provisions were rated 1, indicating that the procedural requirements involved in terminating an employee in Australia are considered less onerous than most other OECD nations. Only three other nations, the USA (0) Switzerland and Belgium (0.5), were rated below Australia.

The definition of dismissal

18. The OECD ranked national definitions of unfair dismissal on a scale of 0-3 with 3 being the strictest definition. Included in the rating was whether employee capacity or redundancy constituted sufficient grounds for dismissal, whether social considerations (eg age or job tenure) are a part of the decision making, whether there must be efforts to redeploy or retrain and whether worker capability is a prohibited ground for dismissal.

19. Australia's laws were rated 0. Nations such as Mexico (3), Norway (2.5), the Czech Republic, Denmark, France, Germany. Portugal, Spain and Sweden (2) all rank highly. Portugal continued to rank highly despite having introduced dismissal for individual redundancy in 1989 and dismissal on grounds of unsuitability to the job in 1991.

Probation

20. The qualifying period before which an unfair dismissal application may be made ranges from no qualifying period (New Zealand) to 12 months (Ireland and UK). In the UK the laws were changed in 2000 to reverse a 1985 law which had increased the period to 2 years.

21. A three-month trial is the most common qualifying period before which a claim may be brought, with ten of the twenty-five nations for whom answer was available imposing a 3-month trial period.

Levels of Compensation[8]

22. On this index the Australian limit on compensation to six months wages is towards the lower end of the range within OECD nations. Only Poland (with a three month cap) provides less generous compensation for unfair dismissal than Australia. Most nations cap compensation at 6-12 months wages. Like Australia, dismissal laws in Austria, Korea and Switzerland contain a six month cap.

[8] Note the index measures the months of compensation paid to an employees with 20 years tenure who successfully claims to have been unfairly dismissed.

23. Eleven nations provide compensation of more than 12 months wages. Of these Belgium (14), Finland (14), France (18), Italy (15), Mexico (16), the Netherlands (18), Portugal (20) and Spain (22) provide between 12 and 24 months. Three nations, Ireland (24), Turkey (26) and Sweden (32) provide two years or more compensation.

Reinstatement

24. The OECD measures the extent to which reinstatement is at the option of the employee or employer following a finding of unfair dismissal. With regard to the extent of re-instatement the OECD rated Australia 1.5 on a ranking scale of 0-3. This ranked Australia equal 15th amongst the 28 OECD nations. In Austria, the Czech Republic, Japan and Korea employees who successfully claim unfair dismissal may return to their job, regardless of the wishes of the employer.

Conclusion regarding the strictness of Australia's unfair dismissal laws

25. The OECD combines all elements of unfair dismissal to ascertain a summary rating. Australia's difficulty of dismissal provisions ranked amongst the most relaxed in the OECD. 20 nations were rated as having stricter (i.e. more costly provisions). Of the 28 nations, Australia was ranked equal 21st, along with Canada and Ireland. Despite its limitation and the artificiality of this type of index, the OECD index reinforces that, when compared to other developed nations, Australia's unfair dismissal laws are amongst the least onerous upon employers.

Number of applications

26. From the above the Committee should conclude that Australia's unfair dismissal laws are on their face less strict than comparable nations. However it is sometimes argued by employer representatives that the Australian system facilitates the making of applications, that it is "too easy" to make a claim of unfair dismissal. One indicator that it is "too easy" to make a claim would be if Australia had a very high application rate compared with other nations.

27. However it seems that number of dismissal that are contested in Australia is within the range experienced in comparable nations. Guestimates prepared by the OECD[9] suggest that in the UK 7.1 percent of dismissals are taken before a court or tribunal, in New Zealand 5.8 are taken to mediation and 2 percent to court, in Ireland 3.5 per cent of dismissal end up before the Rights Commissioner and 4.8 per cent before the employment tribunal, and in Finland 5.1 per cent of cases are contested. In France and Germany 25 and 22 per cent of dismissals are contested, while in Italy only 1.6 are contested.[10]

[9] OECD 2004 table 2.1
[10] ILO 1998 Op cit, p

28. By comparison the OECD estimates that only 1.1 per cent of terminations are contested in Australia. This strongly suggests that the proportion of terminations that are the subject of a claim of unfairness in Australia is low in comparison to other OECD nations.

Impact upon small business

29. The changes to the threshold size of firm covered by German unfair dismissal laws prompted studies of the extent of unfair dismissal claims against small businesses. The European Observatory Online,[11] reported on a 2004 survey of 2,407 employees whose jobs had come to an end. The report confirmed that labour turnover is highest in small firms, with the turnover rate in firms employing fewer than five employees (19.3 per cent), double that of firms employing more than 500 employees (9.4 per cent). The labour turnover rates in firms employing under 10 employees (15.5 per cent) and under 20 employees (13.6 per cent) were also higher than for large firms. This tended to contradict claims that the existing laws inhibited hiring or firing in small firms.

30. The study found that only 32 per cent of terminations were dismissals, with the remainder being resignations, expiry of contracts and mutual decisions. Of dismissed employees eleven per cent had filed an application for protection against unfair dismissal. Ten per cent of employees received compensation. In the majority of cases (58 per cent) the level of compensation was below six months wages. Higher levels of compensation correlated with the employee's level of education, with employees with tertiary qualifications six times at likely to receive more than six months compensation than those without formal training.

31. In commenting upon the study the Institute for Economic and Social Research noted that the low levels of contested dismissals and modest levels of compensation constituted an argument to improve employee protection rather than extend the exemption to more employers.

32. Other studies also cast doubt upon the assertion that small business has significantly greater difficulty complying with employment regulation. The UK Department of Trade and Industry conducted a series of case studies to allow a qualitative assessment of the impact of employment legislation on small firms[12]. With respect to dismissal, experience in having a case go to employment tribunals encouraged a formalisation of discipline procedures.

[11] Dribbusch, H Study examines employment effects of statutory protection against dismissal European Observatory online www.eirofound.eu.int/2003.04/feature/de0304204f.html accessed 14/03/2005.

[12] Edwards et el, The impact of employment legislation on small firms: as case study analysis, DTI, Employment Research Series No 20, September 2003.

33. While this study was used case studies and therefore in not indicative of all business attitudes, a UK DTI survey of over 8,000 small business employers (ie. with fewer than 250 employees) found that employers nominated factors other than employment protection legislation as barriers to growth.

34. Nearly 70 per cent of UK businesses with fewer than 250 employees had no employees. About a half of these businesses (47.7 per cent, or exactly a third of all small businesses) felt that they could not, or were not, attracting enough work to require taking on any staff.

35. Another 27.1 per cent (or nearly 19 per cent of all small businesses) said that the proprietor actively preferred to work alone, and so had no wish to employ staff. Indeed even a fifth of non-employing businesses proposing to grow in the coming year (20.5 per cent) preferred to work alone. The expense of employing labour (11.9 per cent, or just over eight per cent of all small businesses) and employment regulations (7.4 per cent, or just over five per cent of all small businesses) were much less widely cited. It appears that unfair dismissal laws do not impose a significant barrier to employment amongst non-employing small businesses in the UK.

Summary – International experience of unfair dismissal laws

36. On the available evidence the Committee should conclude that protection against unfair dismissal is almost universally available. Exemptions, where they exist, tend to relate to categories of employee, not the characteristic of the employer. When compared to other developed nations, Australia's unfair dismissal laws are considered less onerous than most.

37. The past fifteen years has seen significant relaxing of employment protection legislation across the OECD, but the focus has been upon the use of temporary labour, and few nations have sought to amend their individual dismissal laws. Small business exemptions are rare. Nothing in the design of unfair dismissal provisions overseas invites a conclusion that Australia's unfair dismissal provisions require relaxation, whether through the introduction of a small business exemption or otherwise.

Terms of reference 1(a)(i)(B)

The international experience concerning the relationship between unfair dismissal laws and employment growth in the small business sector.

38. There have been relatively few efforts to examine the link between unfair dismissal provisions and employment growth in the small business sector. This is not surprising given the level of debate amongst labour market economists regarding both the determinants of net employment growth in the small and medium enterprise sector, and the impact of employment protection legislation upon aggregate employment and unemployment.

39. One of the few directly relevant studies was conducted in Germany in last year. In October 2004 the Institute for Employment Research (IAB) published a study investigating the impact of Germany's dismissal protection legislation on employment in small establishments. According to the European Observatory Online the study found that the stringency of this legislation had no significant effect on labour turnover in small firms. The EIRO reports

> *The IAB study assessed the reactions of small enterprises to: first, the lower level of dismissal protection legislation that came into force in 1996 (as a result of the workforce-size threshold being raised); and, second, the repeal of this reform in 1999. The study is based on a representative sample of around 50,000 establishments, each of which had fewer than 30 employees. The IAB analysis concludes that: 'The change in the threshold level for employment protection legislation in Germany did not change either the number of recruits or the number of dismissals in a measurable way. Therefore, a significant influence of employment protection legislation on either employment levels or unemployment cannot be shown.'*

40. The report of the study notes that this is inconsistent with the theory that predicts that dismissal protection legislation raises the level of adjustment costs to firms, on hiring and 'separation' rates. According to the EIRO, the authors of this report do not argue that the results are sufficient to claim that constraints on dismissal do not matter at all. Nonetheless the study adds to the basket of empirical research that is unable to demonstrate measurable effects on employment levels through relaxation of termination of employment laws.

41. In the absence of a large body of directly relevant studies, the ACTU submission breaks down the two elements of this terms of reference and looks at the international literature under two heads:

(a) what is the impact of employment protection legislation on aggregate employment? and

(b) what is the contribution of small business to employment growth?

42. The ACTU strongly submits that there is no compelling evidence to support the view that relaxing the unfair dismissal regime in Australia (whether by a small business exemption or in any other way), would have a positive impact on employment. Nor is there evidence that it would reduce unemployment, assist the long-term unemployed, or promote jobs in certain sub labour markets (eg young people or unskilled workers). This submission examines the OECD literature in some detail in drawing this conclusion.

What is the impact of employment protection legislation on aggregate employment?

43. In 2004 the OECD used its index of employment protection legislation to model the impact of employment protection legislation on labour markets. The study is not directly relevant to this inquiry's terms of reference for two reasons: it seeks to measure the effect of all forms of EPL, not simply unfair dismissal, and it does not seek to draw any conclusions based on business size.

44. Despite these limits, the authors' conclusion is that the theoretical the relationship between EPL and employment is ambiguous, while the empirical evidence on the impact of employment protection legislation on aggregate employment and unemployment rates was mixed.

45. The OECD confirmed that employment protection legislation limits employers capacity to fire, but at the same time reduces the re-employment prospects of unemployed people. Thus is has two opposite effects on the labour market.

46. In assessing the previous empirical studies the OECD reports that they lead to conflicting results. Further the OECD notes that the robustness of the studies had been questioned.

47. The authors reviewed eleven attempts to measure the effect of EPL on labour markets. The summaries prepared by the OECD confirm that the results are varied. Of the eleven studies examined by the OECD, six found that EPL had no effect on unemployment[13], and in one it was found to reduce unemployment. In the five studies that considered the effect on employment rates, two found no significant effect on employment rates, and a third found that that the effect on employment was not significant for prime age men, but was significant for other sub groups of employees.

48. Put simply, the economic modelling of the effect of employment protection laws proves very little about how EPL moderates labour market functioning.

49. The OECD then constructed its own model using data from 19 countries to measure the impact of employment protection legislation on unemployment inflows and outflows, and the incidence of long term unemployment, after controlling for other potential factors that influence labour market functioning.

50. The OECD's own model confirmed that that strict EPL was associated with lower employment rates, but there was no real correlation with unemployment rates. The model confirmed the theoretical assumption that while stricter EPL is correlated lower flows out of unemployment, it is also correlated with reduced flows into unemployment (i.e. less job destruction).

[13] This figure includes the study by Belot and van Ours where EPL did not affect unemployment at mean levels of union density, but did raise structural unemployment when union density was higher than the mean. See OECD 2004 Table 2.3

51. In addition, when the OECD looked at the employment effects of EPL across population subgroups it found mixed results. While EPL appeared to be associated with lower employment rates for prime aged women and young workers, stricter EPL appears to be correlated with higher employment rates amongst prime age men (consistent with other studies) and with older men and unskilled workers[14]. Thus relaxing unfair dismissal laws may assist one segment of the labour market to the detriment of another.

52. The OECD also argues that assessing the impact of EPL must include a broader cost benefit analysis: and it argues that EPL fosters employment relationships, promotes worker effort, cooperation and skill formation.[15]. These effects of unfair dismissal laws have received very little attention in the debate within Australia over the past decade. The ACTU urges the Committee to have regard to the importance of secure employment relationships in the context of productivity and the need for a highly skilled workforce. These factors must be balanced in any assessment of the impact of unfair dismissal in Australia.

What is the contribution of small business to employment growth?

53. The second part of the assessment on the impact of unfair dismissal on small business employment requires an understanding of the contribution of small business to aggregate employment. Again, the literature seems to be mixed, with the general conclusion being that, when net job creation is examined, small business generates about its share of jobs, but the jobs generation is concentrated in a few small firms not uniformly spread across all small enterprises.

54. This has ramifications referred to later when assessing the validity of claims about the potential for Australian small businesses to generate new jobs. There are two relevant OECD studies which are discussed below.

<u>High Growth SME's and Employment (2002)</u>

55. In 2002 the OECD published a study of the role of high growth small and medium enterprises and employment, which cast doubt upon the emerging view that that small and medium enterprises generate a disproportionate share of jobs growth. [16] The key findings were that:

(a) While small firms exhibit high jobs creation, they also exhibit high job destruction rates, ie small firms have high labour turnover;

(b) High growth firms account for a disproportionate share of jobs created, and the job creation rates in high growth firms exceed large firms.

[14] OECD 2004 Table 2.4
[15] OECD 2004 p. 63
[16] High Growth SMEs and Employment 2002 OECD

(c) However in absolute terms large firms are also high job creators, and they play a more important role amongst high growth firms as job creators than among growing firms; and

(d) Growing firms tend to be young firms.

56. The study examined net job creation in 8 nations. The case studies included permanent firms employing over 20 employees over varying time periods.

57. The case studies confirmed gross job creation and gross job loss tended to diminish with firm size. While the studies also confirmed that higher net job creation rates appeared to be associated with smaller firms, the authors caution that the relationship between firm size and job creation is not linear. They point evidence that in Germany the smallest and largest firms accounted for net job creation, whilst in France the smallest and largest firms had shed jobs, with firms in the 500-1999 size accounting for the highest net job creation.

58. The authors also caution that firm size may be a proxy for firm age, and that new firms are more likely to grow than old firms, which may be an independent determinant of net job creation. If so, then any regulatory assistance for growth business would be determined by age of firm, not size of firm. They cite a significant Canadian study Balwin and Picot examined jobs generation by small firms in the manufacturing sector. Although Baldwin and Picot concluded that the SME's were responsible for a disproportionate proportion of jobs growth in Canada, their conclusion does not attribute causation to the size of the firm. They state that the reason why small business in Canada has contributed to job creation may be attributed to changing technology which permits smaller business to compete with larger business without economies of scale, and may also be attributable to lower wages paid by smaller firms. They also speculate that outsourcing by larger business may drive employment growth in the SME sector.

59. The authors sought to model the determinants of employment growth. Significantly, the study found that high growth firms contribute significantly to the net job creation within a nation. For example in France, high growth firms contributed more than half of net employment growth, although their share of employment was less than 10 per cent. In the Netherlands, high growth firms contributed 65 per cent of net employment growth, whilst accounting for only 28 per cent of employment. In Spain, high growth firms accounted for all most of the net employment growth.

60. Although job creation rates high growth small and medium enterprises were higher than amongst high growth larger firms, in term of absolute job creation, larger firms played a more important role than small firms. [17]

[17] The authors note mergers and acquisitions may inflate the contribution of small and medium enterprise larger firms to genuine jobs growth, Ibid pa 28)

61. High growth firms were found across all business sizes, including medium enterprises, and subsidiaries of larger corporate structures. The OECD says that if high employment is the aim, then government policies should target high growth firms which occur across a range of business size.

62. Importantly, the most important variable in growth was workforce training. The ACTU submits that this is critical to understanding any link between firms that generate jobs and unfair dismissal laws. Generally employment protection laws, including unfair dismissal laws promote security in employment, which fosters employer and employee investment in skill formation. It is possible that stricter job protection laws will have the effect of promoting workforce training, which is associated with high growth firms.

63. It is the ACTU's submission that the Committee should conclude from this study that it is not business size that is the key to what firms generate new jobs within an economy.

Small businesses, job creation and growth: Facts, obstacles and best practices (1997)

64. The 2002 OECD study built upon a 1997 review of the contribution of small business to employment growth[18].

65. As part of the 1997 study, a summary of individual country studies on job creation was prepared. Whilst a number of these studies showed that net job creation rates fall with the size of the firm, others found no correlation. A copy of the OECD summary is attached to this submission.

66. Further, and consistent with the its later studies, the OECD found that a small number of high growth firms account for the lion's share of employment growth.

> *Analysis suggests that a small group of high-growth small and medium-sized enterprises(HGSMEs) make important contributions to job creation and productivity growth. In particular, it has been shown that both job creation and job destruction tend to be concentrated: a significant part of gross job creation is in a comparatively small number of very rapidly expanding firms and a large part of gross job destruction is in a relatively small number of rapidly contracting or exiting firms. However, the role of, and factors influencing, growing firms is not fully understood. A more complete understanding of high-growth firms may lead to adjustments in government policies to enhance their unique contributions to economic growth.*[19]

67. The authors draw what they term tentative conclusions about the characteristics of high growth small and medium firms, and the barriers to growth. Interestingly these characteristics all contra-indicate the exemption of small business from unfair dismissal laws, as they relate to investment in skilled employees, a focus of training, and attention to human resources and management capability.

68. The OECD reports that:

(a) Innovation and attention to human resources are most strongly related to growth. At the earlier stages management capabilities are crucial to survival. As the firm matures, human resource and innovation strategies increase in importance. By the time the firm has reached an established stage, its management and human resource capabilities are typically quite developed, and growth is more closely associated with innovation.

(b) Faster-growing new firms are almost twice as likely to innovate as slow-growing firms. Successful fast growing firms are those undertake R&D, innovation and training.

[18] OECD, Small Businesses, Job Creation And Growth: Facts, Obstacles And Best Practices, OECD, Paris, 1997

[19] Ibid p 34.

(c) Successful fast-growing firms place greater emphasis on hiring skilled employees and motivating their employees.

69. The main barriers to growth were:

(a) Failures in capital markets, making it more difficult for small firms to gain finance;

(b) Access to foreign markets was considered difficult for small businesses. Exchange rate fluctuations, identifying and prospecting markets, different technical standards, discriminatory public contract award procedures and bureaucracy all represent barriers to international trade and globalisation.

(c) Access to existing technologies hampered by lack of information, insufficient bargaining power or abuse of dominant positions by large firms.

(d) Difficulties in recruiting qualified staff and skilled.

70. While government regulations and policies are seen by the entrepreneurs of the fastest growing firms as the main obstacles to the development of their businesses, the OECD notes that red tape and tax rate more highly than employment issues:

> *"Entrepreneurs rate bureaucracy, social security contributions, company taxes, personal income taxes, fiscal policy and labour law, in that order, (our emphasis) as representing the governmental interference with the most negative impact. In general, entrepreneurs indicate that indirect labour costs are a barrier to growth"*[20]

71. From this study the Committee should conclude that aggregate employment growth is not a function of business size, but rather associated with supporting growing firms regardless of size. Growing firms are characterised by investment in skills and employees, ie with high quality jobs, which is atypical of Australian small businesses. [21]

Conclusions from the international literature

72. In summary, there is no support within the international literature for a small business exclusion from unfair dismissal laws.

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[20] Ibid p. 37

21 Barrett, R Are Small Business Jobs 'Good' Jobs A paper presented at the 48th World Conference of the International Council of Small Business, June 2003, Belfast.

73. Few nations currently exempt employees form coverage based upon the size of the business in which they work.

74. The most recent comprehensive review of the impact of employment protection legislation on aggregate employment failed to substantiate claims that relaxing employment protection laws is associated with rising employment rates or falling unemployment, instead pointing to differential impact upon different groups of workers.

75. Systematic reviews of the literature investigating the role of small firms in net jobs growth have pointed to factors other than employer size as the determinant of growth. It appears that, to the extent that employment growth is generated in small and medium size firms, this is concentrated in the gazelle firms. These firms tend to be better managed and have good human resource practices. In theory firms most likely to generate jobs growth are least likely to face unfair dismissal claims.

Terms of Reference 1(a)(ii)(A) and (B)

The provisions of federal and state unfair dismissal laws and the extent to which they adversely impact on small businesses, including:

- **the number of applications against small businesses in each year since 1 July 1995 under federal and state unfair dismissal laws, and**
- **the total number of businesses, small businesses and employees that are subject to federal and state unfair dismissal laws.**

76. According to the ABS in 2001 there were 539,900 employing small businesses employing 2,269,400 wage and salary earners[22]. Of the 1.12 million small businesses in Australia, more than half (582,100) do not employ anyone. These businesses account for 22 per cent of the small business workforce. When employed owners are excluded, (who cannot make allegations against themselves) small business employ 2.2 million wage and salary earners who are eligible to make applications alleging unfair dismissal under federal and State unfair dismissal laws.

77. The Committee has previously addressed the incidence of unfair dismissal provisions in the various jurisdictions. The ACTU is not privy to data sources other than those relied on by the Committee in the past. We note however that Senator Murray recently published current data showing the number of unfair dismissal applications in the AIRC under the Workplace Relations Act 1996. This data simply confirms that small business has claims made

[22] While the ACTU adopts the definition of small business used by the ABS, we re-state our belief that this definition is unhelpful as it ignores others factors such as profitability, business age, industry sector which affect a firms role on employment

against it in proportion to its employment of wage and salary earners, with 32 per cent of applications being brought by employees of small firms. [23]

78. A recent survey of 600 small businesses in the Albury Wodonga region provides evidence that unfair dismissal claims are not a significant impost on small business[24].

79. Firstly it reveals low incidence of unfair dismissal claims. More than four out of five employers had not dismissed any employee over the past five years. Of the 101 employers who had terminated the services of 229 employees over a period of five years, only 17 per cent of dismissing employers, and only 2.9 per cent of all small business employers in the survey had been the subject of an unfair dismissal claim. Two employers had been the subject of two claims, the remaining employers had experienced only one claim.

80. It is argued by some that the number of unfair dismissal claims represent the tip of the iceberg, with many more potential claims managed through internal processes within firms. It is an intended outcome of unfair dismissal legislation that employers, including small businesses, manage the risk by improving employee relations, including recruitment, selection and performance management. If this has happened then this is good for both employees and firms.

81. Secondly, the Robbins and Voll survey challenges assertions about widespread dissatisfaction with the outcome of cases. Six out of ten employers were not dissatisfied with the outcome of the case. Interestingly when specifically asked about whether small business should be exempted from unfair dismissal laws, slightly more small business employers opposed the exemption (38 per cent) than supported it (37 per cent). As Robbins and Voll note this "is curious given the federal government assertion that it is speaking for and acting on behalf of the interest of small business".

82. Thirdly the survey dispels some myths about the level of compensation paid to employees, with the amounts ranging from $0 - $5,000 and averaging $2,015, which is approximately 2 weeks wages at average weekly wage rates.

83. It is sometimes argued that the extent to which employers pre-empt claims by paying "hush money" or settle claims in conciliation is evidence that unmeritorious claims are being made against employers. The ACTU is not aware of any evidence that supports this claim. In anti discrimination jurisdictions it is commonly argued that the incidence of pre-trial settlement is evidence of the extent of discrimination, and that only weaker cases make it

[23] Murray, A Federal Unfair Dismissals – A Briefing Paper September 2004
[24] Robbins, WM, and Voll, G Who's Being Unfair? A survey of the Impact of Unfair Dismissal laws on Small Regional Businesses

to trial. It is also argued the emphasis on conciliation means that a full body of law is not developed[25], leaving employers unsure of their obligations.

84. While there is considerable rhetoric regarding the impact of dismissal claims on small employers, the evidence suggests that small business experiences claims in proportion to its share of employment, that levels of dissatisfaction with the outcomes are not unexpectedly high, and that compensation payments are modest.

[25] Gaze, B The SDA after twenty years: Achievements, Disappointments, Disillusionment and Alternatives, HREOC 2004.

Terms of Reference 1(a)(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) and

Terms of Reference 1(a)(iv)

The relationship, if any, between previous changes to Australian unfair dismissal laws and employment growth in Australia

Terms of Reference 1(a)(v)

The extent to which previously reported small business concerns with unfair dismissal laws related to survey questions which were misleading, incomplete or inaccurate

85. Claims about the link between unfair dismissal and small business employment are undermined by the international literature examined earlier. They rest upon an assumption that small business generates more than its share of net job growth.

86. Examination of the 2001 ABS data[26] shows that although the annual rate of change between 1983-84 to 2000-01 reveals higher employment growth in smaller businesses than larger businesses this pattern is not consistent across all industry sectors. Only in manufacturing was the rate of growth linear – with the rate of growth reducing as employment size increased. In all other sectors a more mixed pattern was shown. For example in retail trade the strongest growth rate was recorded in firms employing more than 200 employees, and in transport and storage and finance and insurance stronger growth was in larger firms.

87. In respect of small business, Queensland provides a case study. On coming to Government in 1998, the Queensland Labor Government repealed the exemption for small business which had been provided for in the state's industrial relations legislation. In a submission to the Federal Government, the Queensland Government said on this issue:

> *"The facts clearly show that exempting small business from unfair dismissal laws has no effect whatsoever on small business employment levels.*
>
> *"Using Queensland as an example, the ABS statistics demonstrate that employment growth by small business exceeded that of large business between March 1995 and March 1997 under Labor's unfair dismissal laws*

[26] ABS 1321, Small business In Australia, 2001, Table 3.5

and fell between March 1997 and March 1999 during the operation of the Coalition's Workplace Relations Act 1997 with its exemption for small business from unfair dismissal. During the operation of the Coalition's Workplace Relations Act, employment growth by large business measured 64.6%, outstripping that of small business at 35.4%."[27]

88. The ACTU has also drawn the attention of this Committee to the Industry Commission's 1997 paper.[28] In that report it is argued that small business' increasing share of employment is attributable to outsourcing and contractions in the public sector, the growth of the services sector in particular health and community services, property and business services and finance and insurance, and structural change in manufacturing. That is there have been structural changes to the economy which result in increasing share of employment in smaller firms. This is not evidence that small firms create jobs.

89. If, for the sake of argument, it is accepted that small business is the generator of jobs, there is still no clear evidence linking expansion or contraction of employment in the small business sector to changes in unfair dismissal laws.

90. The Centre for Independent Studies has alleged that small business share of employment fell from 1993-4 to 1996-7, and attribute this change to the introduction of the unfair dismissal regime introduced by the Keating government in 1993. However the data used in that analysis includes a decline in the number of people working in their own business- as the CIS puts it potential entrepreneurs were not going in to business. It is a inconceivable that a decline in own–business employment is attributable to unfair dismissal laws.

91. The ACTU strongly contests the assertion that exempting small business from unfair dismissal laws will create 77,000 new jobs. In previous consideration of this claim Senator Murray noted that the estimates are far-fetched when the relative role of the WRA is each of the states and territories is examined.

Since this notional 50 000 jobs benefit is entirely predicated on getting rid of federal unfair dismissal laws, it follows that any confusion of small business attitudes to state unfair dismissal laws has to be avoided, if this policy is to be justified. And since the Government wishes to take away rights, which is always a very serious matter, it also means that facts, not assertions, need to be established.

By now it is well established that that 50 000 jobs figure arose from an estimate by Mr Rob Bastian of COSBOA, an influential small business

[27] Queensland Government op cit pp9-10
[28] Revesz, J and Lattimore, R Small Business Employment: Industry Commission Staff Research Paper, Industry Commission, Canberra, August 1997

organisation. It is also absolutely clear that Mr Bastian's estimate was based on getting rid of both federal and state unfair dismissals legislation, and required a whole range of other things to be done as well.[29]

92. The magical 50,000 jobs re-appeared in 2002, when the Centre for Independent Studies claimed that 50,000 jobs would be created via the exemption. This claim, in an article by Kayoko Tsumori, has been described by others as "close to fanciful"[30]. The 50,000 is based upon a 2000 CPA survey which found that five per cent of the 600 small businesses employed indicated that unfair dismissal laws to be a major impediment to employment. Extrapolating from the ABS figure of 1.051m small businesses, Tsumori claims that if just those 5 per cent employed one person an extra 50,000 jobs would be created.

93. This figure does not stand up to scrutiny. First, the figure of 1.052 million small businesses includes non-employing small businesses. Just over half of these (539,900) businesses are employing small businesses. [31] Although some non-employing small businesses *might* become employing businesses, it is simply unsustainable to include all non-employing in the data. This simple flaw reduces the 50,000 to 25,685 jobs.

94. Secondly, the CPA survey asked employers, including non employing businesses what were the main impediments to hiring new staff in their industry. It didn't ask what inhibited the business from employing. It is a long stretch to believe that each business would engage a new employee, regardless of market conditions. This point was made by Professor Harding in his report for the Melbourne Institute in 2002.

95. Commenting on the Yellow Pages survey, which asks whether a measure would "prevent you form taking on a new employee" Harding states that *"many firms may agree that UFD laws would influence their decision to employ but would be unwilling to agree with the stronger statement centred on the word "prevent*".[32] Yet surely this is the very point. Many more firms may also say unfair dismissal would influence their decision to hire, but would no agree that the absence of unfair dismissal laws would prompt them to hire.

96. Yet it is Harding who is responsible for the purported 77,000 jobs which have been lost due to the imposition of unfair dismissal provisions on small business.

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[29] Senate Employment Workplace Relations, Small Business And Education Committee Inquiry into the Workplace Relations Amendment (Unfair Dismissals) Bill 1998, Australian Democrats Minority Report, Canberra 1999, page 5

[31] Interestingly the CPA survey found a very high proportion of employing small businesses compared to the ABS (85 per cent compared to 51 per cent). It is not clear whether they incidence of family employees (53 per cent) accounts for some of this difference.

[32] Harding, D. The effect of unfair dismissal laws on small and medium sized businesses. Commonwealth of Australia October 2002.

97. This figure was derived from the questions in Harding's study put to the 21 per cent of respondent firms that were non-employing small business operators, not the majority of respondents who were employing businesses.

98. Of these non employing business owners, 42 per cent had had an employee at some stage. These employers with no employees, but who had previously employed staff, were asked if the unfair dismissal laws had played a part in their decision to reduce staff. Even with the leading question, only 11 per cent of employers said that this had been the case, with only 4.6 per cent saying that the laws were a major factor. In an extraordinary feat of reasoning, Harding concludes that the unfair dismissal laws caused the loss of 77,482 jobs:

> *"Firms that previously had employees, but currently do not have employees, were asked what was the maximum number of people they had employed. Factoring this up to the population as a whole results in the conclusion that there were 77,482 job losses in which UFD laws played a part. Of these there were 34,812 job losses in which UFD laws played a major role, 17,100 job losses where UFD laws played a moderate role and 25,572 job losses where the laws played a minor role."*[33]

99. Harding assumes that where a business once employed five people, and now has none, that the unfair dismissal laws played an equal role in the entire reduction in staff, where it may have been a factor in only one, if at all.

100. Even more disturbingly, Harding encourages an inference that "but for" the unfair dismissal laws there would be 77,482 more people employed, which is absurd. Whether or not the laws were a factor, the key question, which was not asked, is what was the determinative factor. As Harding himself concedes in his discussion of the methodology of other small business surveys, other factors, such as tax, market share and general economic conditions would be seen to play a bigger role in hiring decisions by small business than industrial relations regulation, including unfair dismissal.

101. While employers were asked whether the unfair dismissal laws were or would be a factor in hiring and firing decisions, the more appropriate question would have been on the lines of: *If the profitability of your business would be improved by hiring additional staff, would the existence of unfair dismissal laws deter you from doing so?*

102. The Melbourne Institute survey asked employers about how the laws affected their hiring decision, but restricted the answer to changes in the types of employees hired or the duration of probation. Harding did not take the opportunity to directly assess the effect on aggregate hiring numbers.

103. Perversely, the main section of the report devoted to employing small businesses does not address impact upon aggregate employment and

[33] Ibid p22

unemployment. Harding avoids this issue, instead examining where the costs of unfair dismissal are borne, and their distribution between lower wages and lower employment. This is curious given Harding's view that in order to find out about the effect of unfair dismissal on small business it is necessary to ask direct and closed questions.

104. Harding's assessment of the impact of the laws on aggregate employment is based on an assumption that in an unrestricted labour market, where wages are not set other than through competition between employees, the cost of the unfair dismissal laws would be reflected in lower wages. However, given that in Australia wage levels are set by the Commission or through bargaining, the cost of the laws is reflected in higher unemployment.[34]

105. This theoretical argument between the cost of labour and employment is not borne out by evidence. The debate about the relationship between labour costs is heard by the Commission every year in the Living Wage Cases, where the minimum wage in increased by up to $1000 per annum, with consequences for on-costs which increase actual labour costs by a greater amount. This is real cost, not estimates based on surveys, yet the Commission has determined that the cost of these increases "*would not materially detract from employment growth*".[35]

106. It is not only the AIRC that has rejected the link between modest labour costs and employment. The Full Court of the Federal Court drew this conclusion in a case concerning the validity of the regulation exempting some casual employees from unfair dismissal laws.[36]

107. Many of the conclusions in the Melbourne Institute report are fantastic. However, even on its face the Melbourne Institute survey does not suggest that unfair dismissal laws depress hiring, it suggests that small firms hiring practices are affected by unfair dismissal laws by changing the nature of the jobs created, and the type of employee recruited. These internal adjustments would not affect aggregate employment numbers, but would be reflected in the quality of jobs in small firms.

108. The ACTU has previously criticised the Melbourne Institute methodology. As this survey is touted as independent, we have chosen to repeat those criticisms before this inquiry.

109. The methodology adopted by Harding was to survey businesses with fewer than 200 employees. Employers were asked about the extent to which unfair dismissal laws affected their employment practices and their costs. The applicability of much of the survey to businesses employing fewer than 20 employees is questionable.

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[34] Harding op cit p24
[35] *Safety Net Review Wages* PR002002 May 2002
[36] Hamzy v Tricon International Restaurants trading as KFC [2001] FCA 1589 (16 November 2001)

110. There was no distinction made in the survey between "unfair dismissal", meaning, under federal law, dismissal which is harsh, unjust or unreasonable, and "unlawful termination", which covers dismissal on discriminatory grounds, such as on the basis of sex, race, disability and so on.

111. Assuming for the moment that the survey's findings are valid, they only apply if all legislation providing employees with remedies in case of termination of employment was removed, not a policy option being considered by the Government. The inevitable result of removing the right to make an application alleging harsh, unjust or unreasonable termination will be an increase in applications alleging discrimination on the various grounds set out in subsection 170CK(2) of the Act, given that these factors underlie many of the cases currently determined by the Commission rather than the Court.

112. In these circumstances, not only will the cost and complexity for employers and employees be increased, but much of the psychological change leading to changed practices which Harding argues would result from a change in the law will not eventuate.

113. Harding defends his use of "closed end" questions, where unfair dismissal was identified as the issue, rather than "open ended" questions which ask employers to identify barriers to employment.

114. Harding distinguishes between his "closed-end" question, which asks employer to choose between four statements on the effect of unfair dismissal laws on the processes and practices used to recruit and select staff, manage its workforce and manage staff whose performance is unsatisfactory (major, moderate, minor or no influence on what we do) and a "leading" question in the following passage:

> *"……there is some confusion as closed-ended questions are seemingly equated with 'leading questions'. This is not correct. To understand why it is useful to refer to the Oxford Dictionary of Law which states that a 'leading question' is:*

i) A question asked of a witness in a manner that suggests the answer sought by the questioner (e.g. You threw the brick through the window, didn't you) or that assumes the existence of disputed facts to which the witness is to testify.

> *"Thus, a question can be considered as leading if it assumes the existence of a fact that has not yet been established at the stage at which the question is asked in the survey. Leading questions can be avoided in surveys by employing screening questions that first establish the existence of a fact and then asking only those respondents that have reported the existence of that fact to provide more information about the extent or nature of the effect."*[37]

[37] Ibid p8

115. As can be seen, Harding has concentrated on the second part of the definition, rather than the first. A question which asks employers what influence unfair dismissal has had on their processes and practices, particularly when three of the four alternative answers suggest some influence, is clearly suggesting an answer. This is in contradistinction to a question asking what are the factors influencing these processes and practices, which could be used as a screening question, with further questioning of those employers who identified unfair dismissal laws as such a factor.

116. Harding dismisses this approach essentially because few employers nominate unfair dismissal laws as a problem:

> *"These interpretations of the survey evidence are incorrect as there will have been impediments that were of secondary importance to each firm, and thus were not mentioned, but which when aggregated over firms are important in determining aggregate employment."*[38]

117. Information about the cost of the unfair dismissal laws to employers are similarly subjective. Employers were asked for an estimate of the cost of complying with the unfair dismissal laws if one additional employee was put on. If the employer was unable to put a dollar figure on this, the interviewer was instructed to prompt by asking for a "best estimate". No attempt was made to follow up how these estimates were arrived at, or to validate them, although the conclusion was drawn that the same cost structure could be attributed across the board to businesses that could not estimate the cost.[39] It should also be noted that Harding's costs are not related to employers of fewer than 20 employees, but include medium sized business too.

Terms of reference 1(a)(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.

118. Small business success is dependent upon a host of factors: access to financial markets, the availability of skilled staff, and levels of innovation. While regulatory compliance and reducing red tape is important, and seen to be important, small business regularly rate taxation, OHS and insurance and more burdensome than employment laws, including unfair dismissal.

119. Small business understand this. When surveyed about a range of issues, including their economic outlook, then unfair dismissal laws barely rates a mention.

[38] Ibid p5
[39] Ibid pp18-19

120. Even under the Keating government's unfair dismissal regime unfair dismissal was not high on small business employers list of issues. A 1995 Yellow Pages Survey, conducted before the federal election and before amendments to the unfair dismissal regime introduced in association with the passage of the WRA, found that only four percent of small business rated industrial relations

121. Further, when asked specifically what the government should do to assist small business, industrial relations was nominated by only four percent of employers in small business, behind lower taxes, reduce red tape, provide advice and support, provide incentives to employ, cut the superannuation levy, keep interest rates low, and lower administratio costs.

122. The most recent Sensis Business Index [40]rated finding quality staff as the highest concern of small business. This was followed by lack of work/sales, competition, cash flows, and rising costs. The combined rating for all federal and state regulation was 6 per cent.

123. In terms of barriers to employment the Sensis Business Index survey consistently finds that only around half of employers believe there are any barriers to employment. In February 2005, of those that did perceive a barrier to employment, lack of work (26 per cent) was the top ranking response. This suggests that employers only employ more staff when work demands justify their employment. HR issues are important, but finding skilled staff (16 per cent) rated higher than the cost of employing (stable at 12 per cent).

124. The November 2004 Sensis survey[41] reported that lack of skills (18 per cent) finding people who want to work (13 per cent) , and finding the right person (10 per cent) were the main difficulties in finding quality staff.

125. Other independent surveys confirm that small and medium enterprises rate other concerns higher than unfair dismissal. Robbins and Voll's survey of 594 small business in the Albury Wodonga region found that unfair dismissal legislation was rated an the most important factor in the decision not to hire by only 5.5 per cent of small businesses. Respondents were more likely to nominate Workload/Turnover (48.6 per cent), followed by Costs/Economic Viability (14.9 per cent) and finding the right person (13.3 per cent).

126. In 2002 ACTU polled a random sample of 300 small businesses[42] within three of the electorates – Higgins, Hindmarsh, and Warringah, to ask what they thought were the major impediments to them employing more staff.

127. When asked what was the main reason for not recruiting more employees, an overwhelming 79 per cent stated that it was either because of insufficient work or need for additional staff or outlook for expansion of the business.

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[40] Sensis Business Index – Small and medium Enterprises, February 2005
[41] Sensis Business Index – Small and medium Enterprises, November 2004
[42]

128. Other reasons given by respondents included, lack of available or adequately qualified employees (ie. skill shortages), inadequate infrastructure to expand or funds to do so, employment costs and paperwork, or that they had just completed the last hiring cycle. Not one respondent suggested 'unfair dismissal legislation' as an impediment to employing more staff.

129. These small businesses were then asked to identify what efficiency changes they would like to make within their business, but were currently unable to. Respondents strongly identified with issues such as need to improve/change their current infrastructure (buildings and/or machinery and equipment), technology, productivity, quality of staff and staffing numbers, additional training of staff, and some workplace relations issues such as penalty rates, or lack of enterprise agreement at their workplace.

130. Finally, small businesses were asked to suggest what current Government policy most concerns them. Four suggested responses were put to respondents (the GST, payroll issues, unfair dismissal, and workers compensation), as well as offering the small businesses to nominate any other policies they saw as more concerning.

131. An overwhelming 45 per cent of all respondents suggested the GST was their main concern – dwarfing the other responses. Eighteen per cent of respondents regarded Workcover as their greatest concern, followed by 8 per cent and 7 per cent who respectively nominated unfair dismissal and payroll.

132. A further 22 per cent nominated other policies of their own choosing, which ranged from inadequate funding of education and training, industry deregulation and competition policy, paperwork complication and compliance issues, taxation, trading hours to human rights issues such as concern over the Government's stance on refugees. There was also a number of surprising responses from small businesses who were concerned over the poor treatment of casual employees.

133. Industry groups, pro-business lobbyists and government surveys support the finding of ACTU survey.

134. Some of these surveys are of dubious reliability. For example an undated survey by the Page Research Centre Limited [43] contains no explanation of the population, the sample size or the response rate.

135. This survey presented employers with seven options and employers were able to nominate matters as important, and then as the most important. 30 per cent of small business employers nominated complexity of the tax legislation as the most important issue followed by reduction in compliance costs (22 per cent) advice and assistance to small business (15 per cent). Unfair dismissal ranked just ahead of low interest rates, the Trade Practices Act and help to take on new apprentices.

[43] Page Research Centre Limited www.page.org.au accessed 20.3.2005.

136. When the top four responses nominated by each respondent were counted and ranked then all other issues, (with the exception of assistance with apprentices) outranked unfair dismissal laws.

137. When asked about problems in running their businesses red tape associated with GST paperwork, OHS and superannuation rated highest. This was followed by costs associated with finance, insurance, superannuation, work cover, and general rises in costs. Staffing issues, which encompassed matters such as costs of employment and training, as well as unfair dismissal was the third greatest problem identified. Yet when asked what could be done to assist their business, staffing issues was the most important response. It is difficult to reconcile this with the responses to the two previous questions but it might signal that respondents answers were conditioned by their expectations of what government would do rather than what would actually assist their business.

138. Some support for this interpretation is found in the answers to the fourth question. When asked what could be done to create more jobs and improve the regional economy, government incentives was selected by 46 per cent of respondents, dwarfing all other answers.

139. The 2004 ACCI pre election survey[44] provides scant indication of the relative importance of issues to small business, as it does not force any ranking or rating of priorities. Nonetheless a simple comparison of the proportion of employers nominating issues of importance shows that unfair dismissal was less important to small business employers than the level of taxation, the frequency with which tax law changes, the complexity of tax law, and the levels of pay as you go taxation. As many employers cited the level of SGC and termination. Change and redundancy payments as a matter of concern, as rated unfair dismissal as concerning.

140. The 2002 *Certified Practicing Accountants, Small Business Survey Program: Employment Issues 2002* found that only five per cent of small business cited unfair dismissal provisions as an impediment to hiring more staff.

141. The CPA survey was open to employers with fewer that 20 full time employees, and hence potentially more total employees. Nonetheless the overwhelming response was from micro businesses. Half the respondents employed one or two employees, and fewer than ten per cent (56 employers) employed 10 to 20 employees. It is worth noting that over half the businesses employed family members. This suggests that a large number of respondents are not employers of unrelated employees.

142. The survey provided employers with two opportunities to identify impediments to employment. Employers were directly asked whether payroll

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[44] ACCI, 2004 Pre-Election Survey Small Business Priorities: Taxation, Economic Management & Workplace Relations. 2004

tax (40 per cent), superannuation (38 per cent) and workers compensation insurance (25 per cent) were barriers to employment.

143. Employers were not asked this question regarding unfair dismissal legislation. Given the opportunity to ask a prompted question it is curious that the survey chose instead to ask an unprompted or open-ended question.

144. All employers, including those who had made a definite decision to not have employees, were asked what they consider the main impediments to employment of new staff in their industry. The question was not directed at their business, allowing for employers to project their beliefs about other employers as well as their own situation.

145. A quarter of responses related to demand factors, and almost half to factors related to employee attributes. Wage costs were the main impediment to employment for 18 per cent of businesses. Only five per cent of businesses considered unfair dismissal to be the main impediment to employment.

146. In 2003 Australian Business Limited surveyed 400 NSW employers. Almost three quarters (72 per cent) of respondents employed fewer than 20 employees, and only six per cent employed more than 50 employees. The survey instrument is not published with the report, nor is the method of recruitment of participants explained. It is clear however that the responses focus upon State government not federal government regulation.

147. When considering workplace issues, unfair dismissal ranked 5th of concerns of those employers employing 11-20 workers, and 6th overall. It was ranked below access to a skilled workforce, workers compensation premiums, insurance premiums, OHS compliance, and workers compensation compliance.

148. It also appears that participants were asked to rate the impact upon their business. Unfair dismissal ranked slightly below Workers compensation premiums, OHS compliance, Workers compensation Reporting and Rehabilitation compliance, and slightly ahead of award conditions and anti discrimination provisions. However all five forms of regulation were seen as affecting business. This lends credibility to the ACTU submission that the arguments made by some small business campaigners regarding the application of unfair dismissal laws apply equally to other minimum conditions of employment. Undoubtedly no regulation would free small business from regulatory compliance, but at what cost? . It is certainly not possible to conclude from this survey that unfair dismissal is the overwhelming regulatory burden impeding employment. In fact, outranking all workplace relations issues was the rising cost of insurance premiums generally.

149. Taken together these surveys sponsored by pro-business organisations indicate that unfair dismissal provisions are low down the list of priorities for action amongst small business employers.

150. It is not surprising that independent surveys confirm that demand for work is the key determinant in whether or not to employ. A recent academic study by Robbins and Voll of 594 small business employers in the Albury Wodonga region found that the most important factor in not taking on new staff was workload/turnover (48.6 per cent). This was followed by costs/economic viability (14.9 per cent) and finding the right person (13.3 per cent). Unfair dismissal legislation was rated as the most important factor in the decision not to hire by only 5.5 per cent of small businesses.

151. The conclusion which can be drawn from the surveys is that the major factor in small businesses decision to employ are economic, not regulatory. Where respondents where asked to identify their major concerns with Government regulation, taxation and the GST ranks highly. And even when the field is narrowed to employment related regulation, workers compensation and OHS outrank unfair dismissal as imposts upon business.

Terms of Reference 1(a)(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;

152. The ACTU recalls the views of Senator Murray expressed in the Democrat Minority Report into the Workplace Relations Amendment (Unfair Dismissals) Bill 1998.

> *This is a debate riddled with perception, assertion, and anecdote. The facts are that in every jurisdiction except Victoria, federal unfair dismissal applications are very small in number. But perceptions rule the debate. A business perception that there is a major problem with federal unfair dismissals appears to have become reality. The perception creates the reality. The Coalition Government has avidly fuelled the perception. So have some employer representatives.*

153. In 2004 Sensis conducted a survey of 1400 small businesses and 400 medium sized businesses to ascertain how they access information[45]. Only five per cent of small and medium enterprises reported needing information on unfair dismissal over the past year, and almost half of these accessed information from an industry association. Regional employers were more likely to use government departments and unions for advice than metropolitan employers. When asked hypothetically where they would access advice 18 per cent nominated employer/industry associations, followed by state governments (17 per cent) and lawyers (14 per cent). The fourth most common response was that it was not relevant to their business.

[45] Sensis Business Index Special report for the department of Industry, Tourism and Resources – How small and medium enterprise's access information. April 2004.

154. Given this reliance upon industry associations, it is important that the information they provide is accurate. There is some evidence that small business employers have very inaccurate understandings of the operations of unfair dismissal laws. The CPA survey found that thirty per cent of small business operators believed employers always lose unfair dismissal claims, twenty-eight per cent think they cannot dismiss staff even if their business is struggling and 27 per cent felt they cannot dismiss staff even if they are stealing from the business.[46] This mis-understanding presumably taints the reliability of the employer surveys. It also signals that the role of industry associations in lobbying for change may account for some of the erroneous understandings of unfair dismissal laws amongst operators of small firms.

155. In contrast, the information provided by government is more reliable, but not as accessible as it could be. The ACTU has reviewed the unfair dismissal information provided by various government websites, and accessible via the Business Entry Point. The information falls in to two categories: procedural information which is designed to assist parties to litigation (typically found on the tribunal website) and information regarding employers obligations and good employment practices (typically found on government sites).

156. On the whole the quality of the information is high. For example the NSW Department of Commerce provides written information on ending employment, covering topics such as managing performance, dismissing an employee, unfair dismissal, alternatives to dismissal and avoiding unfair dismissals. These are translated into Vietnamese and Chinese languages. The NSW IRC also has a web based information in plain English and including frequently asked questions.

157. The Queensland DIR website covers topics such as

(a) When is a dismissal harsh, unjust or unreasonable?
(b) What is required of employers?
(c) What should be included in a disciplinary policy?
(d) Should employers keep records?
(e) What is the next step if an employee still needs to be dismissed?
(f) How much notice is required when an employer dismisses an employee?

158. The AIRC information includes a very good guide to self representation in conciliation and arbitration. The South Australia the Commission website contains a guide to unfair dismissal which includes a step by step guide to the process, including a “how to” for each question on the employer response form.

159. However accessing the information requires small employers to web surf and to switch between government sites and tribunal sites. It is likely that small

[46] CPA Small Business Survey Program: Employment Issues, March 2002

business employers (and potential employee applicants) would benefit from further work to ensure all jurisdictions provide comprehensive advice regarding employment practices and dismissal generally as well as procedural advice for the parties once a termination has occurred, and that both type of advice are accessible form the one point. This should be the government site, as it is not generally the role of the tribunals to provide HR advice.

Terms of reference 1(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.

160. In light of the submission addressing the other terms of reference the ACTU submits that the Committee should conclude the following:

(a) that Australia's unfair dismissal laws are less onerous on employers than comparable nations;

(b) that there is no evidence that relaxing the laws (whether by a small business exemption or otherwise) will have the effect of increasing employment, or opening employment up to certain sub sectors of the labour market;

(c) that the unfair dismissal laws do not impact disproportionately upon small employers;

(d) that levels of compensation paid to successful applicants are usually moderate; and

(e) in light of this, the Committee is right to focus upon the perceptions amongst small business employers, rather than the laws themselves.

161. Employer organisations, as the primary source of advice to employers, have a responsibility to provide factual advice to employers. However in light of their fundamental opposition to the application of the laws to small business regardless of the facts[47] it is probably unrealistic to expect industry associations to assist in correcting these false assumptions.

162. In the United Kingdom the introduction of new laws governing flexible work for parents was accompanied by widespread education campaigns, including television advertising. It is the view of ACCI48 that this assisted employers in understanding and embracing the new laws. The UK government now intends to extend these laws to all carers with the support of the business community. This might provide a model for Australia.

[47] See ACCU Submission page 28

[48] Family Provisions Test Case, ACCI Final Submission Para 7.83

163. The ACTU has supported calls for the Minister to publish information to assist employers and employees with compliance.

164. An unfair dismissal portal and further improvements in the Business Entry Point website would streamline access to information.

165. State and federal government websites should integrate information regarding employers obligations in respect of terminations of employment with procedural advice on defending (and making) applications of unfair dismissal.

166. The ACTU has previously suggested procedural reform which would provide assistance to small business as respondents to applications whilst ensuring fairness for their employees. These are:

(a) restrict representation of parties by lawyers or agents in conciliation proceedings to circumstances where it would assist the just and expeditious resolution of the proceeding, taking into account complexity, access by the other party to representation and cost;

(b) require agents appearing in unfair dismissals to be a registered industrial agent;

(c) applications seeking financial compensation only not to be accepted unless there are exceptional circumstances for not seeking reinstatement;

(d) provide for unions to make a single application on behalf of a number of employees who have been dismissed at the same time or for related reasons;

(e) encourage the conduct of proceedings by telephone or video link.

Extract from OECD 1997, Table 1.4

Table 1.4 Overview of studies on job creation: qualitative results

Country/Author	Period	Sector	Allocation to size class	*Gross* job creation rates	*Net* job creation rates
Canada Picot, Baldwin, Dupuy (1994)	1978-92	Business sector	Base-year	fall with firm size	fall with firm size
	1978-92	Business sector	Average	fall with firm size	fall with firm size
	1978-92	Manufacturing	Base-year	fall with firm size	fall with firm size
	1978-92	Manufacturing	Average	fall with firm size	fall with firm size
Denmark Leth-Sorensen, Boegh-Nielsen (1995)	1985-86	Business sector	Base-year	fall with firm size	fall with firm size
	1989-90	Business sector	Base-year	fall with firm size	only micro-firms show high net job creation rates - no systematic relationship for other size classes
Germany Wagner (1995)	1978-93	Manufacturing	Base-year	fall with firm size	highest net job creation rate in 20-49 size class
	1978-93	Manufacturing	Average	fall with firm size	no relationship
Japan OECD (1995)	1987-92	Manufacturing	Base-year	..	no systematic relationship
Netherlands Broersma and Gautier (1995)	1979-91	Manufacturing	Average	fall with firm size	job creation rates in firm with less than 100 employees exceed job change rates of firms with more than 100 employees
Sweden Davidsson (1995)	1985-89	Business sector	Base-year	fall with firm size	smallest firms show largest net creation and destruction rates
United Kingdom Gallagher *et al.*	1982-91	Business sector	Base-year	fall with firm size	highest net job creation rates for micro enterprises, weaker performance of 20-49 size class
United States Haltiwanger (1995)	1973-88	Manufacturing	Base-year	fall with firm size	fall with firm size
	1973-88	Manufacturing	Average	fall with firm size	no relationship
United States Dennis *et al.*	1977-90	Business sector	Base-year	fall with firm size	fall with firm size
United States OECD (1995)	1987-92	Manufacturing	Base-year	..	fall with firm size

Source: OECD (1996c).