Submission

to

Senate Employment, Workplace Relations and Education
References Committee

Inquiry into unfair dismissal laws

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SUBMISSION

Since 2001 I have written various articles about unfair dismissal (UFD) and small business as well as contributed to the debate (see for example, 'Unfair dismissal laws – just who is being treated unfairly, *Australian Financial Review*, 26 October 2002; 'Another dismissal issue haunts Labour', *Business Review Weekly* , 24 January 2002; 'Unfair dismissal laws for big and small', *Australian Financial Review (News; Letters)*, Dec 4, 2001, p. 50; MATP (28 March 2004) 'Sacking law misses mark' *The Sunday Telegraph* (p.C22); Unfair dismissal' Interview with R Barrett, T Matthies and P Anderson, Life Matters, *Radio National*, 4 March 2003) about the need to exempt small business from the UFD provisions in the *Workplace Relations Act* 1996

In my view changes to the legislation to exempt small business are not warranted. Reasons for this view are clearly outlined in my research note in the *Journal of Industrial Relations* (ATTACHMENT 1) and my article in the *Australian Financial Review* on 19th March 2003 (ATTACHMENT 2).

I do not believe there is any clear and convincing evidence that shows an exemption of small business from UFD will generate new jobs in small business (whether this is 50,000, 53,000 or 77,000). This does not mean I do not think the Act can be amended to streamline the procedure for the administration of the UFD provisions, it can be and it has been, but this is not the current question before the Committee.

Part of my opposition to this exemption stems from the fact that the issue of small business job generation is a highly problematic. I currently hold an Australian Research Council grant of $100,000 for a project entitled ***Small Business Job Creation: Employer and Employee Perspectives of Job Quality*** (Project ID DP0451059) to investigate this issue in the context of small business employer and employee perspectives of job quality. The rationale behind wanting to exempt small business from UFD is that small businesses generate jobs. However research has produced inconsistent or diverging results about the role of small business in job generation (see Storey (1994) for analysis of UK research; Parker (2000; 2001); Revesz & Lattimore (1997) for Australian overviews). It all depends on methodology and Kirchhoff and Greene (1998) illustrate the problem when they outline the differences between a comparative static analysis and a dynamic analysis of small business job creation. They explain that the use of the former shows large businesses generate jobs and the use of the latter shows jobs are generated by small businesses. Their conclusion is that although these methodological arguments are interesting they distract policy makers. In particular, I would argue that they distract policy makers from the fact that small business jobs are generally of lower quality than jobs in larger business, particularly when they are compared in terms of objective criteria such as wage levels, employment status, job security, skill level, employment conditions, and training and career development opportunities (Barrett, 2002; 2004; Barrett and Khan, 2005; Revesz and Lattimore, 1997).

The idea that small businesses will generate new jobs is also problematic when we consider the fact that research shows only a very small proportion of small business will ever grow – David Birch estimates that is only 3-4% of any small business population that are, what he terms, 'gazelles' – the fast growth start-ups (Birch, Haggerty, and Parsons, 1995; Birch and Medoff, 1994). Moreover, David Storey (1982) has estimated that there is a 0.5% to 0.75% probability that a new firm will have 100 or more employees within 10 years of start-up. When it comes to who will contribute new jobs then Storey, Keasey, Watson and Wynarczyk (1987) showed that out of every 100 new ventures it is only the largest four firms at the end of a decade that will contribute 50% of the jobs. Unfortunately it is impossible to know who those four are in the beginning and for policy to target them.

My firm belief, and this is clear in the two articles I wrote for the *Australian Financial Review* on 11 December 2001 (ATTACMENTS 3 and 4), is that unfair dismissal is a 'symptom' and not the 'disease'. The 'disease' is human resource management practices in small firms. There are multiple studies (Australian and international) that point to informality in managing people as being the defining characteristic of human resource management in small firms. This is unfortunate as there are a range of research studies which suggest that competitive advantage can be gained by taking a systematic approach to HRM – this is the case for all firms (Dyer 1993; Pfeffer 1994; 1998), as well as small ones (Deshpande and Golhar 1994; Heneman, Tansky and Camp 2000; Hornsby and Kuratko 2003; Marlow 2000; Mayson and Barrett, forthcoming 2005). A systematic approach can be achieved by aligning HRM policies and practices, for example, recruitment and selection, training and development and reward systems, with the overall business strategy. However, most small business research shows that this is not often the case – in fact the problem starts when planning is not given a high priority in small business – a situation all too common in Australian small businesses. Moreover some studies show that accounting, finance, production and marketing areas all take precedence over the development of personnel management practices and processes in small business (McEvoy, 1984).

The need to better understand HRM in small firms and the problems small business face in relation to their HRM is a key component of my current research agenda. With my colleague Dr Susan Mayson (Monash) we have reanalysed the CPA small business employment data and show that growing small firms are more likely to formalise their HRM practices (Barrett and Mayson, 2004; Mayson and Barrett, forthcoming 2005). We are currently writing up the results of a further survey (funded by CPA Australia) to investigate HRM in small firms.

In summary, it is my firm belief, based on available evidence, that an exemption from UFD for small business is not warranted. There is not the evidence to suggest that by doing so further jobs will be generated in small business. In fact, I believe exempting small business from UFD, and thereby removing rights from new employees in small business, will worsen the quality of small business jobs and make it even harder for small business to attract skilled, experienced and committed employees.

SMALL BUSINESS AND UNFAIR DISMISSAL

ROWENA BARRETT*

The Coalition has said that exempting small business from unfair dismissal provisions in the Workplace Relations Act *1996 (WRA) will create 53 000 new jobs in the small business sector. The purpose of this research note is to evaluate small business access to and use of unfair dismissal provision in the WRA. In doing so, the small business job-generating potential is examined, as is the evidence that the unfair dismissal provisions inhibit small business employment growth. In conclusion, suggestions for further research on the link between unfair dismissal and small business are made in order to ensure policy is grounded in evidence rather than ideology.*

INTRODUCTION

Changes to the unfair dismissal provisions in the *Workplace Relations Act* 1996 (WRA) have been a key component of the Coalition's small business reforms since taking office in 1996. This exemption would, according to Tony Abbot (Minister for Workplace Relations) generate 53 000 new jobs in the small business sector (Australia, *House of Representatives* 2002, *Debates*, No. 1, 2002: 47). To date, this exemption has been rejected five times by the Senate, while the latest attempt is in the *Workplace Relations Amendment (Fair Dismissals) Bill* 2002. This indicates that the Coalition believes that the August 2001 amendments, which introduced a requirement on the Australian Industrial Relations Commission (AIRC) to consider the firm's size in their ability to comply with proper dismissal processes and procedures, and exempted new employees from unfair dismissal legislation for the first three months of their employment (a period able to be increased or decreased by written agreement) (DEWRSB 2001), are deemed insufficient.

The purpose of this research note is to consider small business access to and use of the unfair dismissal provisions in the WRA. In doing so, the job generation potential of small business is briefly addressed as this underpins arguments for further legislative change. The first section contains an overview of small business in Australia and a brief examination of small businesses as job generators. Exemptions from seeking a remedy for termination of employment in the WRA are outlined in the second section, while the ability of employees in small business to access and use the current provisions is also analysed. It is argued that the current provisions already exclude many small business employees. Finally, the argument that unfair dismissal provisions inhibit small business employment is considered. The conclusion by the Full Court of the Federal Court (Wilcox, Marshall and Katz JJ) *Hamzy v Tricon International Restaurants t/as KFC and ors* (2001) FCA 1589 (the *KFC* case), that 'a proper factual foundation'

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(at 73) is lacking in understanding the effect of unfair dismissal legislation on job generation, is used as a basis for suggestions for further research on this matter.

SMALL BUSINESS IN AUSTRALIA

While there are many ways of defining a 'small' business, the Australian Bureau of Statistics (ABS) (2002) uses employment size and sets an upper limit of 20 employees. The ABS (2002) shows that there are 1 122 000 small businesses in the non-agricultural, private sector (see Table 1).[1] These small businesses represent 88 per cent of all businesses or around 96 per cent of all private sector, non-agricultural firms and account for 38 per cent of the total Australian workforce (see Table 1). In total, this sector accounts for over 3.2 million people, 78 per cent of who are employees, while the remaining people work in their own business either as employers or 'own account' employees (self-employed).

SMALL BUSINESS AND JOB GENERATION

Factors contributing to the policy interest in small business include their potential to contribute to the economy in terms of innovation, competition, flexibility, and to act as 'seedbeds' for the development of new industries (Bureau of Industry Economics (BIE) 1992, Loveman & Sengenberger 1990, Parker 2000; 2001). However, it is their job generation potential that has been of most interest and since the early 1990s federal governments have promoted small business as a means of alleviating unemployment. The problem with such a policy interest is that research has produced inconsistent or diverging results about small business job generation (see Storey (1994) for a full discussion of the problems with UK job generation research and Parker (2000) and Revesz & Lattimore (1997) for an overview of the Australian research). Job generation studies rely on enterprise level, longitudinal data of job creation and destruction (Revesz & Lattimore 1997), and are therefore more than a snapshot of the changing size distribution of firms.[2] Furthermore, they identify where jobs are generated and therefore the question of whether jobs are generated by the small business sector or by social, economic and technical changes favouring small business creation, can be addressed.

Table 1 *Australian firms: Structure and employment*

Sector	No. firms (% total)	No. employment (% total)
Private (small 1–20)	1 122 000 (87.6)	3 259 100 (38.1)
Private (large 20+)	42 100 (3.3)	3 642 800 (42.5)
Public	5 500 (0.4)	1 307 600 (15.3)
Agriculture	112 100 (8.7)	355 000 (4.1)
Total	1 281 700 (100)	8 564 500 (100)

Source: ABS (2000: 6).

The Business Longitudinal Survey (BLS) (also known as the Business Growth and Performance Survey), conducted by the ABS from 1994–5 to 1997–8, shows the extent of job generation and destruction for businesses of all sizes. Table 2 shows that about 900 000 jobs have been generated from June 1995 to June 1998 in Australia.

When these figures are broken down by business size, as in Table 3, they show that small businesses generated 516 000 jobs, while medium and large businesses generated 374 000 jobs from June 1995 to June 1998. Table 3 also shows (with the exception of 1997–8) that more jobs were generated from new small businesses than in continuing small business. In other words, there is some support for the view that small business jobs are being generated by social, economic and technical changes favouring small business creation rather than by small businesses themselves.

Parker's (2000, 2001) review of the studies of small business job generation leads her to argue that in many countries (including Australia) small businesses

Table 2 *Total employment generation and destruction: June 1995 to June 1998*

Year	Employment generation	Employment destruction	Net employment generation
1995–6	950 000	745 000	205 000
1996–7	1 073 000	750 000	324 000
1997–8	1 013 000	652 000	361 000

Source: ABS (2000: 90–91).

Table 3 *Employment generation and destruction by business size: June 1995 to June 1998*

Business size	Employment generation and destruction (total)	Years ('000) 1995–6	1996–7	1997–8
Small	**Employment generation**	**541**	**516**	**492**
	New business	299	265	224
	Continued business	242	250	268
	Employment destruction	**390**	**332**	**311**
	Ceased business	205	161	150
	Continued business	185	171	161
Medium and large	**Employment generation**	**409**	**558**	**521**
	New business	206	355	239
	Continued business	203	202	281
	Employment destruction	**355**	**418**	**340**
	Ceased business	172	208	95
	Continued business	183	208	246

Source: ABS (2000: 90–91).

create as many jobs as can be expected from their share of employment. The evidence here suggests that small businesses in Australia generate a slightly higher proportion of jobs than their employment share. Despite this, unfair dismissal legislation is widely perceived as being a key factor inhibiting small business employment growth, and it is therefore necessary to look at small business access to and use of the current federal unfair dismissal provisions.

ELIGIBILITY TO MAKE AN UNFAIR DISMISSAL APPLICATION UNDER THE WRA

The principle of 'a fair go all round' underpins the unfair dismissal provisions in the WRA (see s.170CA).[3] Despite this, exemptions for small business have been sought since the Coalition's first term of government and while the Senate has rejected these exemptions five times, some legislative changes have been made to the advantage of small employers.[4]

The primary constitutional basis for Part VIA Div. 3 of the WRA is s.51(xx) or the corporations power. As a result only those employees of 'constitutional corporations' (or incorporated companies) who are covered by a federal award, certified agreement or Australian Workplace Agreement (AWA) are eligible to seek a remedy for termination of employment on the basis of it being 'harsh', 'unjust' or 'unreasonable'. In addition, Commonwealth public sector employees, employees in Victorian and territory workplaces, maritime, waterside and flight crew officers are also eligible to use the provisions.[5]

Furthermore, s.170CC specifies the 'classes' of employees who can be excluded from seeking a remedy. These include:

- persons engaged under a contract of employment for a specified period of time or for a specified task (regulations 30B(1)(a) and 30B(1)(b);
- all new employees for the first three months of their employment (regulation 30B(1)(c)) (This August 2001 amendment applies to employees serving a period of probation or qualifying period, the duration or maximum duration of which is determined in advance, and is three months or less, or otherwise reasonable, given the nature and circumstances of the employment (AIRC 2001) and extends the previous three-month probation exclusion by removing the need to specify a probation period in a new employee's contract.);
- trainees whose employment under a National Training Wage traineeship or an approved traineeship (as defined in s.170X) is for a specified period, or is, for any other reason, limited to the duration of the agreement (regulation 30B(1)(e)); and
- employees not employed under award conditions whose remuneration exceeds $75 200 per year (regulation 30B(1)(f)).

The exclusion of casuals engaged for a short period (regulations 30B(1)(d) and (3)) was found by the Full Court of the Federal Court on 16 November 2001 to be invalid in the *KFC* decision (FCA 1589). Reinstatement of this exclusion is being sought in the *Workplace Relations Amendment (Fair Dismissals) Bill* 2002, which is currently before the Senate.

These exclusions limit access of small business employees to the unfair dismissal provisions. This is also made clear in the *Explanatory Memorandum* to the *Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill* 2001, where the Government estimates some 180 000 or 20 per cent of all small businesses in Australia operate in the federal jurisdiction (*Explanatory Memorandum* 2001: 4). Further, they estimate that in these small businesses only 35 per cent of employees—some 770 000 employees—are covered by the federal system (*Explanatory Memorandum* 2001: 5) but only 685 000 employees are estimated to be able to seek a remedy for unfair dismissal in the federal jurisdiction (*Explanatory Memorandum* 2001: 8).

Moreover, the *Explanatory Memorandum* says, 'the number of unfair dismissal applications by employees in small business in the federal jurisdiction has averaged around 7 700 applications in the past 4 years' (*Explanatory Memorandum* 2001: 8). This means that only 22 per cent of the 35 099 unfair dismissal applications since the WRA's commencement to 30 June 2001 (AIRC, 2001) were made against small business employers. This unmistakably shows that there is a disproportionate amount of applications from medium-sized and large businesses in relation to their employment shares.

It would appear that there is little evidence to suggest that small businesses need further exemptions from the federal unfair dismissal legislation, particularly when the AIRC already has to take into account (at s.170CG(3)(a)) firm size when assessing whether their dismissal procedures were reasonable (DEWRSB 2001). Moreover, it is questionable whether further reform would achieve the outcome of generating 53 000 new small business jobs and the conclusion in the *KFC* case (FCA 1589) can be used to examine this issue.

UNFAIR DISMISSAL, SMALL BUSINESS AND JOB GENERATION

The *KFC* case or *Hamzy v Tricon International Restaurants t/as KFC and ors* (2001) FCA 1589 concerned the validity of regulation 30B (exclusion of short term casuals). However, as the Federal Court was also trying to determine whether 'the regulation is supported by statutory provision regarding employees in relation to whom the operation of the termination of employment provisions would cause "substantial problems because of their particular conditions of employment", the relationship between unfair dismissal and job generation was also examined.

The expert witness for the Minister for Workplace Relations—Professor Mark Wooden—was unable to show that there was any evidence to support Tony Abbot's claim that unfair dismissal legislation inhibited small business employment growth. When commenting on ABS figures documenting casual employment growth, particularly among 15–19 year olds, Professor Wooden stated 'the application of the unfair dismissal provisions of the federal *Workplace Relations Act* 1996 to the types of casual employees excluded by the regulations would have an adverse effect on job creation in Australia' (at 69 of affidavit and quoted at 59, FCA 1589). Unfortunately, no evidence was presented to support this assertion and under cross-examination he said, 'there certainly hasn't been any direct research on the effect of introducing unfair dismissal laws' (at 60).

Furthermore, Professor Wooden agreed with the statement that 'the existence or non-existence of unfair dismissal legislation has very little to do with the growth of employment and that it is dictated by economic factors' (at 66). This left the Full Bench to conclude, 'in the absence of any evidence about this matter, it seems to us the suggestion of a relationship between unfair dismissal laws and employment inhibition is unproven' (at 70).

FURTHER RESEARCH

Clearly, what is needed is a serious program of research that investigates the relationship between small business and unfair dismissal and whether the legislation inhibits job generation. The Full Court, at paragraphs 67 and 68 FCA 1589, suggested that the pattern of employment in an industry which was newly affected by unfair dismissal provisions with the pattern over the same years in industries where no such provisions applied could be one way to examine this relationship. Other research could focus on the size distribution of firms facing unfair dismissal claims, which could be followed-up to see the effect on employment decisions (and human resource management practices) in the firms where cases were successful. Yet more research could utilise the BLS panel data as one of the few job generation studies to which we have access in Australia. Finally, the arguments and evidence used by Westrip (1982) to examine the effects of unfair dismissal legislation on small business in the UK could be re-examined in the Australian context.[6]

Only when this issue has been studied from a number of different angles can we say with any certainty whether exempting small business from the unfair dismissal provisions is necessary. In doing so, Curran and Blackburn (2001: 163) could be proved wrong when they argue 'any idea of purely objective (small business) research, linked closely to rationally based, evidence-driven policy making and implementation, is unlikely in any modern society'. Until then, policy will remain grounded in ideology rather than evidence.

ENDNOTES

1. This Australian Bureau of Statistics (ABS) analysis of small business is based upon data collected from 'management units', which control their own productive activities but in doing so may have a number of establishments. The ABS (2002: 2) defines a small business as having a full-time equivalent (FTE) employment of less than 20 persons, a medium-sized business as having between 20 and 200 people and a large business as having 200+ people. It should also be noted that the ABS excludes Agriculture from their analysis because a small Agricultural business is defined in terms of the Estimated Value of Agricultural Operations (EVOA): only if it is between A$22 500 and A$400 000 then the business is considered small (ABS 2002: 2).
2. With such statistics, businesses are classified by size according to their size at the beginning of the period. Therefore, a small business with 15 people which employs a further 10 people (thus becoming a medium-sized business) is still classified as small, whereas in a snapshot estimate it would be allocated to the medium size category. So, while a snapshot of the medium sized category would show an increase in employment, net employment change measured by a job generation survey may be negative. As a result, the Australian Bureau of Statistics (ABS) (2000: 89) says it is important to note that in any particular size category, net employment generation figures do not mirror changes in total employment numbers.
3. See Waring and De Ruyter (1999) for a full discussion of the changes to the unfair dismissal provisions from their introduction into the *Industrial Relations Reform Act* 1993 by the Keating Labour government.

4. Exemptions were initially sought for new employees in businesses with less than 15 employees, however, they are currently being sought for employees in businesses with less than 20 employees. The government has not provided a rationale for why they have redefined 'small'.
5. The Kennett government's transfer of industrial relations powers to the Federal Government in 1996 has meant that employees in Victorian workplaces are covered by the federal legislation. In all other states, employees ineligible to access the federal provisions are covered by state unfair dismissal legislation.
6. Despite its age the article by Westrip (1982) remains the most comprehensive overview of unfair dismissal and small business in the European literature.

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FINANCIAL REVIEW

Tue 19 Mar 2002

Coalition knows its jobs creation claim is spurious

The impact of unfair dismissal laws on small business is overstated, writes **Rowena Barrett**.

The Federal Government has a lot riding on having small business exempted from unfair dismissal laws. However, it is unclear who would win should it succeed. In particular, it is questionable whether this exemption would generate the 53,000 new jobs in the small business sector the Coalition claims.

First, consider how many small businesses this exemption would reach. The Government estimates that only about 180,000 small businesses (20 per cent) operate in the federal jurisdiction. This means that the federal unfair dismissal laws do not affect the majority of Australian small businesses anyway.

Nevertheless, the Workplace Relations Act was amended last year to ensure the Australian Industrial Relations Commission takes into account a firm's size when assessing whether dismissal procedures were reasonable.

Most small businesses are covered by state legislation and there is little likelihood state governments will amend their unfair dismissal legislation to exempt small business.

We can also consider how many people this exemption would affect. In total, the small business sector accounts for just over 37 per cent of the total Australian workforce, or about 3.1 million people.

There are 2.5 million small business employees in our non-agriculture private sector. Of these people, the Government estimates that about 685,000 can seek a remedy for unfair dismissal in the federal jurisdiction.

That's about 28 per cent of all employees in small businesses.

If only 28 per cent of small business employees can seek a remedy for unfair dismissal in the federal jurisdiction, then why do we need to exempt them? Is it because they make a disproportionate number of unfair dismissal applications? The answer is no.

The explanatory memorandum to last year's bill.exempting small business says: "The number of unfair dismissal applications by employees in small business in the federal jurisdiction has averaged about 7,700 in the past four years."

Let's be clear here. That's less than 2,000 applications each year.

What's more, according to the AIRC's records, there have been 35,099 unfair dismissal applications since the Workplace Relations Act's commencement to June 30 last year.

This means only 22 per cent of these applications came from small business employees. Unmistakably, these figures show that there hasn't been an outbreak of federal unfair dismissal applications in the small business sector.

Why does the Government continue to seek this exemption?

The Minister for Workplace Relations, Tony Abbott, has said in Parliament that 53,000 new jobs could be created. But the relationship between unfair dismissal legislation and job creation is dubious.

Last November, the Federal Court considered this issue and determined: "In the absence of any evidence about this matter, it seems to us the suggestion of a relationship between unfair dismissal laws and employment inhibition is unproven."

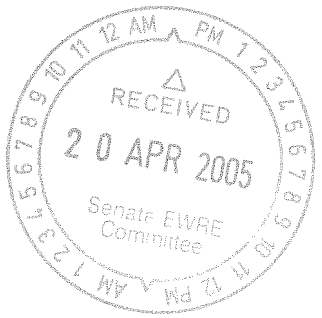
So where does this leave us?

We know not many small businesses are covered by the federal legislation but the AIRC has to take the firm's size into account when questioning whether dismissal procedures were reasonable.

And we also know that there is nothing to suggest that if you exempt small business from the legislation, many – or even any – new jobs will be created.

What's more, the Federal Government knows this too.

■ *Rowena Barrett is a senior lecturer in the Department of Management at Monash University.*



FINANCIAL REVIEW

Tue 11 Dec 2001

Dismissal law reform is not the answer

Instead of complaining about unfair dismissal laws, small business needs to reform its recruitment and management practices, says **Rowena Barrett.**

Changes to unfair dismissal provisions in the Workplace Relations Act have been a key component of the Coalition s small-business reforms. However, exemptions for employers of fewer than 15 people from unfair dismissal provisions in the Workplace Relations Act 1996 have been rejected by the Senate five times.

So why does the Coalition persevere? And, more worryingly, why is the ALP starting to think there's something in this?

In short, the answer is jobs. As the leading British small-business academic, David Storey, says: "Nowadays, it is difficult to find politicians who fail to subscribe to the view that small firms are vital to job creation."

Unfair dismissal legislation is said to inhibit small-business employment, and we all know the old truism that if all small firms put on one extra person, there would not be an unemployment problem.

This rests on a false view of small-business homogeneity and ignores the problematic issue of lower job quality in small firms.

More fundamentally, it will never happen. The evidence of small-firm job generation is mixed.

So does the unfair dismissal legislation inhibit job generation? According to some small business employers, and their representatives, it does.

Here's what one employer said on the ABS Business Growth and Performance survey: "We recently employed someone who had been unemployed for four years. The hours of work and skill levels did not match exactly what we wanted, but we gave the person a go. The person was completely unsuitable and was dismissed.

"Now we face unfair dismissal proceedings. Never again will I give such a person a go until this legislation is repealed. It is counter-productive to creating employment."

There's no denying that defending an unfair dismissal claim can be costly for small business in terms of time, money, business reputation and employee morale, and you wouldn't want to do it twice.

But what is the real problem here? Why did the employment relationship end in such unhappy circumstances?

The problem lies in the employer's recruitment and retention strategies. That's where the disease is. Unfair dismissal is just a symptom.

It's not the legislation that inhibits small-business employment – it's not knowing how to get and keep the right person.

Even the Australian Chamber of Commerce and Industry would agree that small-business people are almost as likely to point to the problem of finding the "right" person as they are to blame unfair dismissal laws as a factor stopping them from recruiting.

Recourse to unfair dismissal provisions is an outcome of the larger problem of ineffective recruitment, selection and retention strategies in small – and large – firms.

Studies of small-firm recruitment support this argument and point to a reliance on informal, word-of-mouth methods. This increases as firm size decreases, to the point where recruitment in the smallest firms can be conditional on the availability of a known individual.

It's important that employees "fit in" and those who are most likely to be informally recruited in small firms (family members, employees' friends, women returning to work after kids go to school, and young people looking to gain skills and/or experience) are likely to do so with time.

If not, this can probably be found out in the three-month "cooling off" period that the Coalition introduced in August, during which the unfair dismissal legislation doesn't apply.

Informal recruitment practices can mean the "right" person is not employed, as the pool of suitable recruits is potentially untapped.

These methods also leave the firm open to accusations of indirect discrimination.

If the "almost right" person is employed, all is not lost as training can fill the gap between the recruit's skills and knowledge and what they need for the job.

To reduce costs, this can be done in-house or on the job – maybe as simply as having an employee work alongside the new recruit until they have mastered the job.

Unfortunately, research tells us that small firms are less likely than large firms to invest in training. Knowing what the recruit will be doing underpins this, which requires analysing the person, job and organisational needs.

Again, there's evidence to suggest that this type of planning is less likely to occur in small firms. Small-business people are often too busy working *in* their business to spend time working *on* their business.

The adage "our people are our most important resource" has been over-used and, as a result, the message has been devalued. But when there's recognition that people can add value to a business, policies can be implemented to reflect this.

Norms of reciprocity mean there are rewards where the management style emphasises communication, team-building and trust.

The Department of Trade and Industry study of unfair dismissal in hotels and catering, transport and engineering sectors found that in small firms where this management style prevailed, disciplinary procedures were less likely to be used (and unfair dismissal cases to arise). They also found that the immediate response to defending an unfair dismissal claim was to implement a dismissal procedure to avoid further claims.

So what's the problem? Why is unfair dismissal legislation back on the small-business reform agenda?

Call me a cynic (you won't be the first) but perhaps it's really more about ideology and winning "aspirational" votes than creating jobs.

And with this, unfortunately, we can't tell the difference between the Coalition and the ALP.

■ *Dr Rowena Barrett is a senior lecturer in the Department of Management at Monash University. She teaches small-business management.*

FINANCIAL REVIEW Tue 11 Dec 2001

Disciplinary procedures can reduce the success of claims

A UK unfair dismissal study can be applied to the debate here, writes **Rowena Barrett.**

Studies of the impact of unfair dismissal legislation on small business emanate from two sources: contract research for government and groups representing small business interests, and academia.

One study that crosses the boundaries is that conducted by John Goodman, Jill Earnshaw, Mick Marchington and Robin Harrison, academics from Manchester, funded by the UK Department of Trade and Industry.

That study sought to examine the major influences on the operation of discipline procedures in the context of arguments for and against change to the UK unfair dismissal legislation.

A number of points from their matched comparisons of predominantly small businesses in the hotels and catering, transport and engineering sectors can be applied to the unfair dismissal debate in Australia.

The first point is that despite the continued policy interest, there are relatively few academic studies of the subject that inform policy.

Well-known academics James Curran and Robert Blackburn from the Small Business Research Centre at Kingston University in Britain want to see "dedicated specialists with their strong background knowledge of previous research, and skills and experience they have developed to overcome the formidable problems of researching the small business" having a greater influence on policy making.

There are particular problems researching small business as well as owning and operating one.

But in terms of this debate the critical issue is the informality of small business management and workplace practices.

This point is made in the DTI study. The authors explain that poor recruitment, selection and supervision are often blamed for the need to resort to disciplinary procedures.

"There are particular problems researching small business."

Unfortunately these procedures are less likely to exist in small business, being associated with multi-establishment firms, trade union presence and having faced an unfair dismissal claim.

While the authors state that the existence of a disciplinary procedure is no guarantee against an unfair dismissal claim, their evidence suggests that if "operated and applied satisfactorily" such a procedure is likely to reduce chances of a successful unfair dismissal claim.

The authors examine the claim that introducing a bureaucratic procedure into a firm characterised by informality would be resisted. Instead it's the reverse: employers/managers use disciplinary procedures to formalise their authority, set standards of behaviour for employees and inform employees of the treatment should a problem occur.

Employers/managers saw disciplinary procedures as advantageous to themselves and their employees.

How can this be applied in Australia?

The Government's Annual Review Small Business Report 2000 shows some 23,500 federal unfair dismissal applications from December 1997 to November 2000.

Rather than knowing that 34 per cent are against employers of 15 people or less, it would be more fruitful to know whether a disciplinary procedure was used or not.

In doing so we might see that the firm's size is a descriptive rather than an explanatory factor in this debate.

The Government already knows this – the research by the National Institute of Labour Studies for the Department of Education failed to find any statistical significance between a firm's size and its attitude towards unfair dismissal. Perhaps Curran and Blackburn are right when they say "any idea of purely objective research, linked closely to rationally based, evidence-driven policy making and implementation, is unlikely in any modern society".

ATTACHMENT 1: RESEARCH NOTE
BARRETT, R. (2003) 'Small business and unfair dismissal', *Journal of Industrial Relations,* Vol. 45, No. 1, pp. 87–93.

ATTACHMENT 2: NEWSPAPER ARTICLE
Barrett, R. (19 March, 2002) 'Coalition knows its jobs creation claim is spurious', *Australian Financial Review (Small Business)*, p.47.

ATTACHMENT 3: NEWSPAPER ARTICLE
Barrett, R. (Dec 11, 2001) 'Dismissal law reform is not the answer', *Australian Financial Review (Small Business)*, p.41. [**Reprinted** in DeCieri, H., Kramer, R., (2002) *Human Resource Management*, McGraw Hill: Australia.]

ATTACHMENT 3: NEWSPAPER ARTICLE
Barrett, R. (Dec 11, 2001) 'Disciplinary procedures can reduce the success of claims', *Australian Financial Review (Small Business)*, p. 40.

ATTACHMENT 4: REFERENCES

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