Submission

to

Senate Employment, Workplace Relations and Education
References Committee

Inquiry into unfair dismissal laws

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SUBMISSION TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION REFERENCES COMMITTEE: INQUIRY INTO UNFAIR DISMISSAL LAWS

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I have read the submissions to the Committee by the following: Dr Jill Murray, the Australian Chamber of Commerce and Industry, the NSW Government, the Department of Employment and Workplace Relations the Australian Council of Trade Unions, Dr Robbins and Mr Voll, and Dr Paul Oslington. Between them, these submissions cover thoroughly the questions raised in the terms of reference. As I see no point in repetition, my submission is brief.

The Commonwealth Government's proposal to exempt small businesses from the unfair dismissal provisions of the *Workplace Relations Act* has been before the Parliament on numerous occasions and is now embodied in the *Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004*. The exemption would license small businesses to effect dismissals that are harsh, unjust or unreasonable. It is possible to distil two main grounds for providing such a license:

- The existing burdens of compliance and redress imposed on small businesses are excessive.

- Freeing small businesses from the requirement that dismissals be not harsh, unjust or unreasonable will generate extra employment.

Relevant evidence of the burdens borne by employers includes the incidence of actions in the tribunals by employees claiming to have been unfairly dismissed, the costs that such actions impose on small employers and the extent to which small employers feel oppressed by the requirement to avoid unfair dismissals. Such evidence is dealt with in the submissions to which I have referred. I limit myself to an observation that is relevant also to the employment effects, namely, that information gained from inquiry of employers as to their opinions should be treated with extreme caution. The submissions, such as that of Robbins and Voll, show that employer responses to questions are sensitive to the terms in which the questions are posed. Open-ended questions, that do not prompt the respondents as to possible answers, are the least likely to generate misleading evidence.

In the remainder of this submission I discuss the likely employment effects of licensing small employers to dismiss employees unfairly. To my knowledge, none of the empirical evidence tests whether in this respect there is any difference between small and larger employers. Hence the evidence will not help the Committee in judging whether there is any factual basis, in respect of employment, for discriminating between small and large businesses.

In theory, we might suppose that an untrammelled ability to dismiss at will would have value to some employers and might therefore dispose them toward hiring more workers. We might also suppose that an employer who is subject to restraint on unfair dismissal would be less prone to dismiss. These two motivations have opposing effects on employment, leaving the net effects theoretically indeterminate. Evidence that goes merely to hiring is obviously insufficient. Some of the literature suggests that an effect of the restraint might be more stable employment levels: in a period of economic expansion employers may take on fewer workers and in a contraction dismiss fewer. Hence the net effect may vary with the level of economic activity.

But the theoretical uncertainty leaves the matter as one that can only be resolved, if at all, empirically. Much of the available evidence is cited in the submissions, but I offer some comments for the Committee's consideration.

The evidence of surveys of employer attitudes has some value, but only if the questions are carefully constructed so as to avoid leading the respondents. Moreover, there may well be a gap between attitude and action.

The alternative is to identify what employers actually *do* in response to different states of the law. Here, of course, the difficulty lies in distinguishing what happened *because* of the law and what would have happened anyway. We should always be alive to the fallacy of *post hoc ergo propter hoc*. For example, the Committee should disregard evidence to the effect that the period since federal unfair dismissal laws came into effect has been one of economic growth. Nothing follows from that. The unanswered questions are whether the expansion would have been faster if the laws had not existed and, if so, how much faster.

The risk of mistaken inference is minimised by having a sufficiently large sample of cases with varying states of the law. Time series are of little use, because the law does not change often enough to provide meaningful correlations. A better prospect is to correlate the experiences of different countries. The hope is that other influences can be allowed for or, less satisfactorily, be neutralised by the multiplicity of cases. Studies that use this method typically refer to the different countries in the EU or the OECD, which have a variety of employment-protection laws. The pioneering study was that of E. P. Lazear, published in 1990.* Subsequently, there have been a number of studies relying on cross-country correlations. Some of these are discussed in the submissions.

It is a problem, however, that there is no objective measure of the 'bite' of employment protection laws. Because of this, the research has had recourse to subjective measures. For example, countries may be 'graded' on a scale of 0-3, with these gradings being fed into correlation analysis. The gradings take into account various factors such as restraints on unfair dismissal, required periods of notice, redundancy compensation and requirements for consultation with unions. (As some

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* 'Job Security Provisions and Employment'. *Quarterly Journal of Economics*, vol. 105, pp. 699-726.

of the submissions point out, Australia, on such assessments, has one of the less demanding regimes of job protection.) It is fair to say that the studies have mixed findings, but on balance suggest *some* negative effect on employment of more exacting requirements. Some of them, however, indicate no significant effect, and there is much uncertainty about the strength of any association.

So far as I am aware, however, none of the studies purports to identify the specific effects of restraints on unfair dismissal. They are not necessarily the same as the effects of other forms of job protection.

In my submission, the Committee can have little or no confidence in any assertions as to the likely effects on employment and unemployment of exempting small businesses from the unfair dismissals law. Such effect as it *might* have would need to be balanced against other effects. Increasing employment and reducing unemployment are worthy goals, but are surely not the only goals of labour market policy. Depriving employees of the protection now accorded them will surely lead to more authoritarian workplaces. Is it too much (for example) to require an employer - large or small - to warn an employee that his or her work is below expectations before proceeding (if there is no improvement) to dismissal? In workplaces where termination is at will, there may well be less cooperation between management and labour and less motivation for management to bring out the best in workers and lower productivity than in workplaces where employers observe requirements of fairness. The Committee may well wonder why the proposal to license unfair dismissals has such a priority in the Government's thinking.