



## **Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004**

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## Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004

**Date Introduced:** 2 December 2004

**House:** House of Representatives

**Portfolio:** Employment and Workplace Relations

**Commencement:** The substantive provisions commence on Proclamation, or 6 months after Royal Assent, whichever is the earlier.

### Purpose

The Bill will add to the classes of federal award employees without standing to seek a remedy for an unfair dismissal in the Australian Industrial Relations Commission (AIRC) under the [Workplace Relations Act 1996](#) (at Part V1A, Division 3). Currently, short term casual employees, 'high' paid, non-award executives, fixed term employees and other employees such as certain building workers are excluded from seeking such a remedy ([section 170CBA](#)).

To these groups, the Bill will add the class of new permanent or on-going employees of businesses employing less than 20 employees [see proposed subsection 170CE(5C) below], thus providing an initial means toward achieving the oft quoted aim — to exempt small business from legal actions from their employees over dismissal (the small business exemption). However the exemption is partial, as this Bill does not attempt to override State dismissal laws.

### Background

The background to this Bill has been reported previously, but in light of the longevity of the dismissal issue to the Parliament, some comment on the history of the proposal is warranted. The Parliamentary Library's [Bills Digest No. 36 1998](#) on the Workplace Relations Amendment (Unfair Dismissal) Bill 1998 provides a detailed background to the initial proposed small business exemption.<sup>1</sup>

The Digest notes that the Government's commitment to an unfair dismissal exemption for small business was announced on 24 March 1997, as part of the Government's small business statement.<sup>2</sup> These statements responded to *Time for Business*, the 1996 report of the Small Business Deregulation Task Force. The proposed changes to dismissal law were outlined by the Hon Geoffrey Prosser MP in these terms:

... the Government will reduce the compliance burden on small business by excluding from Federal unfair dismissal laws new employees of small businesses with fifteen or fewer employees until they have one year's continuous service.

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"This extended exemption will be introduced in consultation with interested parties, particularly the small business community," he said.

"Employees will still be protected against unlawful discriminatory dismissals and will be subject to the statutory minimum notice requirements.

"These concessions will help small businesses to hire new staff with more confidence and grow more jobs, while fully protecting the interests of existing employees and new employees once they have been employed for a year or more."

The Government will also require the Australian Industrial Relations Commission to minimise any disruption to small business caused by unfair dismissal actions by, for example, holding hearings at convenient times and places.

"These reforms are another step in the process started by my colleague the Minister for Industrial Relations in focusing the industrial relations system on the needs of small business.<sup>3</sup>

### **Proposed exemption by regulation**

The Government initially intended to make this small business exemption by way of amendment to the *Workplace Relations Act 1996* (WR Act) Regulations, and such a regulation was designed to come into force from 1 July 1997 (a second small business exclusion attempt by way of regulation was made in 1998)<sup>4</sup>.

The first exclusion by regulation was limited to employees of a small business who were employed after the commencement of the regulation, and would have operated only in relation to the 12 months of a new employee's employment with that employer. That is, after 12 months employment the small business employee would have regained the rights then available to federal employees in larger businesses. That regulation was disallowed by the Senate on 26 June 1997, and on the same day the Government introduced the Workplace Relations Amendment Bill 1997 which was to incorporate the small business exemption into the main body of the WR Act's termination of employment provisions.<sup>5</sup>

The opposition parties in the Senate rejected the small business exemption at that time and on a number of occasions thereafter on the grounds of fairness and that the exemption was not announced in the 1996 election.<sup>6</sup> However this anomaly was corrected in 1998 in the subsequent Coalition election policy *More Jobs for Better Pay*<sup>7</sup> and in Coalition workplace relations policies thereafter. Most recently, for the 2004 federal election, the commitment was put:

A re-elected Coalition will continue to pursue changes to take the unfair dismissal laws burden off the back of small business and protect small business from redundancy payments.<sup>8</sup>

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## Exemption by bills

Between 1997 and 2002, seven bills had been presented to the Parliament seeking the small business exemption from unfair dismissal (in addition to the two attempts to introduce the small business exemption by regulation). In October 2002 the Hon Tony Abbott observed:

This (the small business exemption) has become one of those bits of watershed legislation. It has become something of a political icon. This government has now proposed, in one or other house of this Parliament, to improve the unfair dismissal laws 21 times, and we have been opposed by the ALP 21 times.<sup>9</sup>

While it has been reported that Parliament has considered the exemption more than 40 times<sup>10</sup> this is an exaggeration. Merely because a bill proposes to amend the WR Act's termination of employment provisions does not mean that it proposes to exclude small business; in fact there have been eight bills seeking the small business exemption since 1997. These being:

- [The Workplace Relations Amendment Bill 1997](#)
- [The Workplace Relations Amendment Bill 1997 \[No.2\]](#)
- [The Workplace Relations Amendment \(Unfair Dismissals\) Bill 1998](#)
- [The Workplace Relations Amendment \(Unfair Dismissals\) Bill 1998 \[No.2\]](#)
- [The Workplace Relations and Other Legislation Amendment \(Small Business and Other Measures\) Bill 2001](#)
- [The Workplace Relations Amendment \(Fair Dismissal\) Bill 2002](#)
- [The Workplace Relations Amendment \(Fair Dismissal\) Bill 2002 \[No 2\]](#)
- [The Workplace Relations Amendment \(Fair Dismissal\) Bill 2004](#)

It might be noted that the Workplace Relations Amendment (Termination of Employment) Bill 2002 and the [Workplace Relations Amendment \(Termination of Employment\) Bill 2002 \[No 2\]](#) which while rejected by the Senate, did not propose to exempt small business from unfair dismissal. The intent behind the two bills was to expand the coverage of the federal termination system (at the expense of the states – see [Senate Report](#)<sup>11</sup>) and provide a 'secondary stream' for the consideration and dispensation of termination applications involving small businesses (as well as making other procedural changes, for example, attempting to curb 'forum-shopping', limiting claims where dismissal was for operational reasons etc).

On the other hand, both the [Workplace Relations Amendment \(Termination of Employment\) Bill 2000](#), and the [Workplace Relations Amendment \(Fair Termination\) Bill 2002](#) were passed by the Parliament. They dealt respectively (inter alia) with minimising vexatious claims and excluding short-term casual employees from making dismissal claims, but neither bill proposed a small business exemption.

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### Proposed small business size for the exemption

Another development in the course of the small business exemption debates has been a change in the employment size of the proposed exemption. The former Minister for Industrial Relations, the Hon. Peter Reith reported to Parliament that the initial employment size for the proposed small business exemption was agreed to apply to businesses with less than 10 employees:

The opportunity was also taken to discuss the substance of the regulations for unfair dismissal. It was agreed that the Democrats would support the \$50 filing fee and a provision which exempted small business with less than 10 employees from the 170CG harsh, unjust or unreasonable section but not 170CK, which lists proscribed reasons.<sup>12</sup>

However when the first small business exemption bill came before the Parliament ([the Workplace Relations Amendment Bill 1997](#)), small businesses were defined as businesses employing 15 or fewer employees. As Mr Reith explained, this size of small business was chosen because of the precedent provided by the *Employment Protection Act 1982* (NSW), which was introduced by the Wran Government.

It should be noted that the NSW 1982 Act was not intended to facilitate a small business exemption from award redundancy obligations. The then NSW minister, the Hon Pat Hills reported that redundancy clauses could only be found in 22 per cent of NSW awards and the 1982 Act was designed to remedy the effects of this situation, by requiring employers to notify the State industrial registrar of an intention to retrench so that redundancy and related orders could be made by the NSW Commission, if required.<sup>13</sup> Small businesses were exempt from this requirement to notify, but could still be bound by awards containing redundancy provisions.

The size of business employment (less than 15 employees) was adopted by the then Australian Conciliation and Arbitration Commission in the 1984 Termination, Change and Redundancy Test Case.<sup>14</sup> Later, the [Workplace Relations and Other Legislation Amendment \(Small Business and Other Measures\) Bill 2001](#) proposed that the exemption would apply to business of fewer than 20 employees.

Differences in the size of the exemption continued to be raised in the recent parliamentary inquiries into termination of employment/dismissal. The Australian Industry Group for example argued in its [submission](#) on the Workplace Relations Amendment (Termination of Employment) Bill 2002 that the definition of small business should not be confined to businesses employing fewer than 20 persons. Instead, it suggested the *Corporations Act* definition of small business be considered which, inter alia, allows a business to be defined as small even if it employs up to 50 persons.<sup>15</sup> On the other hand, Professor Ron McCallum has recently argued that if the small business exemption is to be mandated, then a business size limit of 5 employees would be more appropriate.<sup>16</sup>

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### **Small Business Employment – numbers affected by the Bill**

Excluding agricultural small businesses, 1 122 000 or 96 per cent of total non-agricultural private sector businesses were classified as small in 2000–01 by the Australian Bureau of Statistics.<sup>17</sup> Of these there were 582 100 non-employing businesses operating in Australia. Just under 70 per cent of persons employed in small business were employees while the remaining 30 per cent were persons working in their own business, either as employers or own account workers. So, in 2000–01, 539 900 small employing non-agricultural businesses were operating in Australia, employing 2.26 million employees (apart from the owner/s).

An estimate for the federal small business exemption has been provided previously. The [Explanatory Memorandum](#) to the [Workplace Relations and Other Legislation Amendment \(Small Business and Other Measures\) Bill 2001](#) noted that, broadly estimated, the federal small business exemption could potentially affect around 685 000 employees a year, that is, the number of employees in small business estimated to have the legal standing to be able to seek a remedy for unfair dismissal in the federal jurisdiction. It would be reasonable to assume that this measure of the 2001 Bill's effect also applies to the current Bill (or perhaps a somewhat higher figure due to labour force growth since 2001).

Not that this many employees are likely to lodge dismissal claims. For 2003-2004, the AIRC finalised 7125 termination of employment matters. Of these 75 per cent were resolved at the (required) conciliation phase. A further 1139 were finalised prior to arbitrated orders. Of the 429 matters which were determined under a decision, less than 25 per cent (106) went in favour of the employee. From previous information on small business dismissal applications, we can assume that about one third involve small business.<sup>18</sup>

### **Employment growth and dismissal costs**

An often used refrain in the dismissal laws debate has been the extent to which their repeal might launch employment. This is possibly due to the legacy of 11 per cent plus unemployment in 1992-93, coinciding with the national termination of employment provisions coming into effect in the following year. As is shown below, the labour market has changed considerably since then.

The Government made recourse to comments attributed to the Council of Small Business of Australia that repeal of the laws (later implied to include those of the states) would create 50 000 jobs. The Hon Peter Reith reflected this observation in the House of Representatives in 1997:

Mr Rob Bastian of the Council of Small Business Organisations of Australia was asked to comment on this matter. He said that small business would create 50,000 jobs if this matter could go through the Senate. Those are 50,000 jobs we will not have as a result of the actions of the Labor Party and the Democrats in the Senate.<sup>19</sup>

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Later, the Federal Court's decision in *Hamzy*<sup>20</sup> reviewed evidence on jobs growth and the advent of 'more comprehensive' unfair dismissal (UFD) laws and concluded that solid jobs growth had occurred under a period when comprehensive national unfair dismissal laws came into force. That decision noted that in the period of approximately three years, from March 1994 to December 1996, employment growth was stronger than in the following three years, during which less comprehensive protections applied. Employment growth under the *Industrial Relations Reform Act 1993* was also stronger than in the three years immediately before the commencement of that Act, when there was no comprehensive unfair dismissal protection.

The Court referred to ABS statistics which showed casual employment at 1 271 800 in August 1990 and 1 435 000 in August 1993 – an increase of 163 200; 1 841 200 in August 1996 – an increase of 406 200 on the August 1993 figure; and 1 931 700 in August 1999 – only 90 500 more than three years earlier. The Court also noted:

... employers are used to bearing many obligations in relation to employees (wage and superannuation payments, leave entitlements, the provision of appropriate working places, safe systems of work, even payroll tax). Whether the possibility of encountering an unlawful dismissal claim makes any practical difference to employers' decisions about expanding their labour force is entirely a matter of speculation. We cannot exclude such a possibility; but, likewise, there is no basis for us to conclude that unfair dismissal laws make any difference to employers' decisions about recruiting labour.<sup>21</sup>

The Federal Court's *Hamzy* decision also suggested that further research on the effect of UFD laws and employment might be warranted. The Commonwealth Department of Employment and Workplace Relations responded to the general call for further research on dismissal costs to business by commissioning the Melbourne Institute of Applied Economic and Social Research to research business employment decisions and dismissal laws. The Melbourne Institute surveyed some 1802 small and medium businesses with fewer than 200 employees.

Its report (in 2002) purported to show that dismissal laws contributed to the loss of about 77 452 jobs from businesses which used to employ staff but no longer employ anyone (about 60 000 of these were small businesses with fewer than 20 employees).<sup>22</sup> There were 34 812 job losses in which dismissal laws played a major role, 17 100 job losses where dismissal laws played a moderate role and 25 572 job losses where the laws played a minor role.

Criticisms of this survey were put to the Senate Employment Committee inquiring into the Workplace Relations Amendment (Termination of Employment) Bill 2002 concerning the survey's methodology of using 'leading' questions – see [Senate Report](#)<sup>23</sup>. One submission observed that the 77 000 job loss figure to be 'an estimate based on a series of estimates' and a 'curious exercise providing a weak foundation' for Government pronouncements on the benefits of the legislation.<sup>24</sup>

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Some two years later, there remains a view that the Melbourne Institute study relied on a survey of business opinion of dismissal costs rather than evidence and was “not taken terribly seriously” in academic circles, according to Dr Paul Oslington. His research into quantifying the hiring and firing costs in Australia will use economic modelling to assess their impact on employment. In a report on the progress of this work, it was suggested that termination costs were not a major driver of employment.<sup>25</sup> These issues are likely to be canvassed in the Senate Employment Workplace Relations and Education Committee’s inquiry into UFD policy, which will, inter alia, investigate evidence cited by the Government that exempting small business from federal unfair dismissal laws will create 77 000 jobs in Australia. The Committee is due to report by 14 June 2005. Certainly the unfair dismissal debate in Australia lends weight to the assertion of the International Labour Office that:

A vast amount of political energy and related empirical research has been expended in recent years on the supposed links between employment security and unemployment.<sup>26</sup>

### **Other views**

Meanwhile, a key academic Professor Mark Wooden, whose evidence was relied on by employers in the *Hamzy* case, has argued that the current Bill should be extended to override State dismissal laws:

I expect to see the reintroduction of a bill which will extend the coverage of the federal unfair dismissals jurisdiction to all corporations, not just those covered by federal awards or agreements.<sup>27</sup>

Putting the counter view, Dr Breen Creighton is reported as saying it was precisely in the small business sector that workers needed protection against unfair dismissal. In small business, collectivisation was most conspicuously absent as a countervailing force to the power imbalance between employers and employees, and as the law’s job was to prevent such an imbalance then to deny small business employees access to unfair dismissal remedies appeared to be ‘verging on the obscene’.<sup>28</sup> The ILO puts the position that,

For wage and salary workers, employment security exists where there is a strong protection against unfair and arbitrary dismissal from employment.<sup>29</sup>

On the other hand, the ILO is also aware of the incremental weakening to employment security:

Since the 1980s, pressed by international agencies such as the IMF, OECD and the World Bank, governments have introduced many changes in the laws and regulations to erode employment protection in the name of reducing labour market *rigidities*.<sup>30</sup>

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## The labour market

Finally, on the general health of the Australian labour market over 2003-04, academics Burgess, Lee and O'Brien observed that the unemployment rate has remained below six per cent and by the end of the year it had declined to 5.1 per cent (seasonally adjusted for December 2004, 4.9 per cent in original terms for November).<sup>31</sup> It marked the 11th successive year in which the average unemployment rate has declined. A breakthrough to below the 5 per cent unemployment rate appears possible (into 2005, ahead of what appears then to be an economic slow-down).<sup>32</sup>

In any case, nearly two million new jobs have been added to the labour market since 1992-93.<sup>33</sup> Burgess, Lee and O'Brien also observed that over this time, not only had the unemployment rate declined, but also the number of the long-term unemployed had diminished, as had the share of the long-term unemployed in total unemployment, with the majority of additional jobs being full-time jobs.

## Main Provisions

### Schedule 1 – Amendment of the Workplace Relations Act 1996

**Item 2 inserts new subsections 170CE(5C), 5(D) and 5(E).** **Proposed subsection 170CE(5C)** stipulates that an unfair dismissal application may not be made under subsection 170CE(1) where the employer, at the relevant time, employed less than 20 people. These include the employee who was terminated and casual employees employed for more than 12 months, but not other casuals. **Proposed subsection 170CE(5D)** allows applications to be made by trainees under a registered training agreement and apprentices. (The Explanatory Memorandum notes that apprentices and trainees may still be excluded from making an unfair dismissal applications under other grounds). **Proposed subsection 170CE(5E)** defines the *relevant time* to mean the time when the employer gave the employee notice of termination, or the time when the employer terminated the employee's employment, whichever happened first.

**Item 3 inserts proposed section 170CEB.** **Proposed subsection 170CEB(1)** requires the AIRC to make an order that an application is not valid, if it perceives that the applicant was not entitled to make the application because of the small business exemption provided for under subsection 170CE(5C). **Proposed subsection 170CEB(2)** allows the AIRC the discretion not to hold a hearing if making an order refusing a small business application, but if it does it must take into account the cost to the employer's business. **Proposed subsection 170CEB(3)** authorises the AIRC to request further information before making an order under this section. **Proposed subsection 170CEB(4)** obliges the AIRC to consider any information so received.

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**Item 4** inserts **proposed subsection 170JD(3A)** which specifies that a person covered by an order made under section 170CEB is not entitled to apply to have that order varied or stayed.

**Item 5** inserts **proposed subsection 170JF(2A)** providing that there will be no right to appeal to a full bench of the Commission against an order made under section 170CEB.

**Item 6** confirms that the amendments made by items 1 to 5 only apply to an unfair dismissal application relating to employment commenced by the applicant after the commencement of those items.

## Concluding Comments

The Bill follows the provisions of the small business exemption contained in the Workplace Relations Amendment (Fair Dismissal) Bill 2002 and its successor, the Workplace Relations Amendment (Fair Dismissal) Bill 2004. It represents the seventh bill to provide for a small business exemption, and reflects long-standing commitments by the governing coalition parties to the business constituency. It is likely to apply to businesses with more than 20 'staff' as the ABS would define. Given the Government's expected majority in the Senate from 1 July 2005, the question of passage of this Bill by the Parliament appears to be only a matter of timing.

## Endnotes

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- 1 Bob Bennett, Workplace Relations Amendment (Unfair Dismissals) Bill 1998, [Bills Digest No. 36 1998](#), Department of the Parliamentary Library, 1998.
  - 2 G. Prosser MP, 'Flexible industrial relations and better training for small business', *Media Release*, 26 March 1997.
  - 3 *ibid.*
  - 4 See Marilyn Pittard, 'Unfair dismissal laws: the problem of application to small business', *Australian Journal of Labour Law*, v.15(2), Sept. 2002, p. 156.
  - 5 The Hon Peter Reith, *Second Reading Speech* to the Workplace Relations Amendment Bill 1997, House of Representatives *Hansard*, 26 June 1997, p. 6469.
  - 6 Refer to [Bills Digest No. 36 1998](#), under: 'History of exclusion and exemption provisions'.
  - 7 The Coalition's 1998 workplace relations policy was located at <http://liberal.org.au/election98/policy/workplace/workplace.html>.
  - 8 For the Coalition's 2004 policy see: <http://www.liberal.org.au/documents/ACF748F.pdf>.

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- 9 The Hon Tony Abbot, Workplace Relations Amendment (Fair Termination) Bill 2002 No.2, House of Representatives, *Hansard*, 22 October 2002, p. 8268.
- 10 See for example, D. Peters, 'Unfair dismissal bill back again', *The Canberra Times*, 3 December 2004.
- 11 Senate Employment, Workplace Relations and Education Legislation Committee, *Provisions of the Workplace Relations Amendment (Termination of Employment) Bill 2002*, March 2003.
- 12 The Hon Peter Reith referring to the *Agreement between the Government and the Australian Democrats on the Workplace Relations Bill* (October 1996) which does not make reference to a small business exemption; see: Question without Notice: Unfair Dismissal Laws, House of Representatives *Hansard*, 20 October 1997, p. 9209.
- 13 The Hon Pat Hills, Minister for Industrial Relations NSW House of Assembly, Second Reading Speech to the Employment Protection Bill, *Hansard*, 8 December 1982, p.3690.
- 14 Refer endnote 5, p. 6470.
- 15 Australian Industry Group submission to the Senate Employment, Workplace Relations and Education Legislation Committee's review of the Workplace Relations Amendment (Termination of Employment) Bill 2002, at par. 3.2.
- 16 Reported in *WorkplaceExpress* at <http://www.workplaceexpress.com.au> on 25 October 2004.
- 17 ABS, *Small Business in Australia*, (Cat. No. 1321), 23 October 2002.
- 18 For detail of federal and state small business dismissal applications, see reply to Question on Notice by the Hon Tony Abbott, 'Employment: unfair dismissal applications', House of Representatives *Hansard*, 19 March 2002, p. 1612.
- 19 The Hon Peter Reith, response to a Question on Notice, House of Representatives, *Hansard*, 23 October 1997, p. 9696.
- 20 *Hamzy v Tricon International Restaurants trading as KFC* [2001] FCA 1589 (16 November 2001) par. 65.
- 21 *ibid.*, at par.70.
- 22 Don Harding, *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses*, Melbourne Institute of Applied Economic and Social Research, University of Melbourne, 2002.
- 23 Refer to endnote 11.
- 24 Professor Andrew Stewart's submission quoted in The Senate Employment, Workplace Relations and Education Legislation Committee *Report on the Provisions of the Workplace Relations Amendment (Termination of Employment) Bill 2002*, p.18.
- 25 M. Skulley, 'Challenge to dismissal claims', *The Australian Financial Review*, 13 November 2004. A published report on this research is due in 2005.
- 26 International Labour Office, *Economic Security for a Better World*, ILO, Geneva, 2004, p. 137.

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- 27 M. Wooden, 'It's time for workplace reform', *The Australian Financial Review*, 13 January 2005, p. 47.
- 28 A summary of Dr Creighton's address to the WA Industrial Relations Society in October 2004 has been reported in *Workplace Express*, ([www.workplaceexpress.com.au](http://www.workplaceexpress.com.au)) under 'Obscene to deny dismissal protection to small business workers, says Creighton', 22 December 2004.
- 29 International Labour Office, *Economic Security for a Better World*, ILO, Geneva, 2004, p.137.
- 30 *ibid* , p.138.
- 31 Australian Bureau of Statistics, *Labour Force*, (Cat. No.6202, 6203) November 2004.
- 32 J.Gordon, 'Jobless rate heading for a new low', *The Age*, 7 December 2004.
- 33 J. Burgess, J. Lee and M. O'Brien, 'The Australian labour market in 2003', *Journal of Industrial Relations*, June 2004.

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