

# Federal Unfair Dismissals

A Briefing Paper

Issued by Senator Andrew Murray  
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Australian Democrats

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Australia: Federal Unfair Dismissal Cases					
Date <sup>1</sup>	Annual total	Annual Reduction/Growth		Small Business <sup>2</sup>	
		Number	%	%	Number
11/96	14707	-	-	-	-
11/97	7897	(6810)	(46.3)	-	-
11/98	8046	149	1.9	36	2896
11/99	7678	(368)	(4.6)	34	2610
11/00	7747	69	0.9	32	2479
11/01	8188	441	5.7	33	2702
11/02	7227	(961)	(11.7)	34	2457
11/03	7002	(225)	(3.1)	34	2381
09/04	7049			35	2467

Note: <sup>1</sup> Latest available figures from the Department of Employment and Workplace Relations. 02/04 are the 12 months from 03/03.

<sup>2</sup> Estimate from the Australian Industrial Registry returns - small business as a percentage of total employer responses received.

Australia: Employment <sup>1</sup>				
Date	Employed	Unemployed	Participation Rate	Unemployment Rate
3/96	8,328,900	740 100	63.5%	8.2%
4/04	9,694,200	575,900	63.9%	5.6%
+/-	1,365,300	(164,200)	0.4%	(2.6%)

<sup>1</sup> Source ABS *Labour Force* (Cat. 6202.0)

## **The Development of Federal Unfair Dismissal Laws**

Prior to 1993, state tribunals dealt with unfair dismissals, with workers having to show that a dismissal was harsh, unfair or unjust in order to obtain relief. In 1993, Victoria's Kennett government moved to significantly lessen access and relief for unfair dismissal. In response, the Federal Labor government moved to override the Kennett legislation using the external affairs power.

To access the external affairs power, the Federal Government needed to stick very closely to the terms of the ILO Convention 158, which holds that an employer must have a "valid reason" for dismissing an employee. This introduced a large number of procedural requirements and a more complex jurisdiction than the old state laws, as well as a change in onus from the employee to the employer. Employers strongly opposed the provisions because of this change in onus. An unintended effect of the employers' high profile campaign was an increase in worker awareness about their rights to challenge unfair dismissal. This had a consequent increase in applications for reinstatement.

Prior to the 1996 federal election, the Coalition promised to replace Labor's unfair dismissal laws with a "fair go all round" for employers and workers. Little detail was provided, but it was clear that all workers would have access to the regime, and that the test for unfair dismissal would be closer to the pre-1993 rules.

During the 1996 election campaign, the Council of Small Business Organisations of Australia (COSBOA) asked the Coalition, the Democrats and the ALP to support an exemption for small business. All refused on the basis that it would breach the "fair go all round" approach.

The 1996 Workplace Relations Act passed through the Senate with the Democrats support, implementing the "fair go all round" approach.

Amendments agreed in 1996 included:

- hearings to be heard in the AIRC instead of the Federal Court, making proceedings less formal, expensive and time-consuming;
- disincentives to speculative or unmeritorious unfair dismissal claims;
- costs can be awarded against an employee found to have made a frivolous or vexatious claim;
- employees must pay a \$50 application fee;
- the viability of the employer is to be taken into account in deciding whether to award damages in lieu of reinstatement;
- greater restrictions are placed on probationary, casual and specified term contract employees applying for unfair dismissal relief.

The unfair dismissal regime contained in the Workplace Relations Act relies mostly on the corporations' power rather than the external affairs power, allowing the Act to avoid the procedural difficulties of the ILO Convention.

The 1996 Federal law changes saw the numbers of unfair dismissal cases fall by at least 40%, despite Victoria coming completely under federal workplace relations law, with a consequent transferral of state unfair dismissal cases.

## Unfair Dismissal Laws and Small Business <sup>2</sup>

The impact of the federal unfair dismissal on small business is a constant feature of attempts to amend the 1996 Act. The laws are portrayed as an onerous burden on small business to such a point that capacity to employ is reduced. A correlation is drawn between unfair dismissal legislation and employment rates, specifically that the total cost is sufficient to deter small and medium businesses from taking on more staff. The Federal Government has on several occasions attempted to amend the 1996 Act to exempt those small businesses that fall within the Federal jurisdiction, from the operation of Federal unfair dismissal laws. Labor, the Democrats, and members of the cross benches have consistently voted against these attempts to exclude small business employees from legal recourse against an employer who has sacked them harshly, unjustly or unfairly.

The Government introduced a new Bill in September 2001. The Democrats supported further moderate changes to unfair dismissal laws whilst opposing more radical Government reforms. The 2001 law changes have resulted in improved processes, reduced litigation and reduced delays, addressing small business concerns without impairing employees' substantive rights. The most recent 2001 amendments include:

- a 'default' three month qualifying period of employment before unfair dismissal claims can be brought by new full-time employees<sup>3</sup>;
- greater rigour in the processing of unfair dismissal claims by the Australian Industrial Relations Commission (AIRC).

Since these changes, the figures collected by the Australian Industrial Registry show a further decline in the annual number of federal unfair dismissal claims, down by 1000 claims a year.

It is untrue for the Coalition to say Federal law changes will generate 50 000 to 80 000 jobs. The experiment under Queensland State laws, when their then Coalition government introduced an exemption for small business, had no effect on job creation.

There is no evidence that employment growth of 1.37 million employees since 1996, largely in small business, has been negatively affected or slowed by federal unfair dismissal laws.<sup>4</sup>

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<sup>2</sup> The provisions covering termination of employment in the *Workplace Relations Act* (WRA) include provisions concerning unlawful and unfair dismissals, and have been the subject of intense political and policy debate for the past decade. These matters have been the subject of several previous Bills and previous inquiries. For instance, see the Employment, Workplace Relations and Education Legislation Committee's reports on the following bills: Workplace Relations Amendment (Unfair Dismissals) Bill 1998, February 1999; Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999, November 1999; and, Workplace Relations (Termination of Employment) Bill 2000, September 2000.

<sup>3</sup> Casuals have a twelve-month qualifying period. (Qld has 12 mths; NSW & SA 6 mths; Tas & WA 0 mths.)

<sup>4</sup> In the *Hamzy v Tricon International Restaurants t/a KFC and ors* (2001) FCA 1589. case: The expert witness for the Minister for Workplace Relations – Professor Mark Wooden – was unable to show there was any evidence to support Minister Abbott's claim that unfair dismissal legislation inhibited small business employment growth...under cross examination he said 'there certainly hasn't been any direct research on the effect of introducing unfair

## **Problems with Unfair Dismissal Laws**

Unfair dismissal applications are most often pursued under state laws, not federal law, with variation between states and between industries. Likewise, not all small businesses fall under federal jurisdiction, with not more than 30% of employing small businesses falling under the Federal laws. This amounts to approximately 600,000 small business employees.<sup>5</sup>

The Government's constantly stated proposition is that exempting these 600,000 employees from the federal unfair dismissal laws would deliver 50,000 to 80 000 jobs. There is no credible or empirical evidence to justify this astonishing assertion<sup>6</sup>.

*Most small business employees are dealt with by State not Federal Tribunals.*

On the basis of both statistics and individual reporting, it is clear that Federal unfair dismissal legislation is not the major issue facing small businesses that the Coalition claims it to be, especially since most fall under state law.

Under the federal law, most applications are in fact made against larger companies, rather than small business, with 65% of claims made against big business.<sup>7</sup> The Federal system only applies to workers employed on Federal Awards and agreements. The State systems continue unaffected.

There are six different systems of industrial relations in Australia. This naturally causes a great deal of confusion about different unfair dismissal provisions.

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dismissal laws'...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.'

<sup>5</sup> Democrats Minority Report, Inquiry into the provisions of five Bills amending the Workplace Relations Act: Workplace Relations Amendment (Genuine Bargaining) Bill 2002, Workplace Relations Amendment (Fair Dismissal) Bill 2002, Workplace Relations Amendment (Fair Termination) Bill 2002, Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002, Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002, May 2002, p. 59.

<sup>6</sup> See for instance the Democrats Minority Report March 2003: Inquiry into the provisions of the *Workplace Relations Amendment (Termination of Employment) Bill 2002*

<sup>7</sup> Senator Andrew Murray, Workplace Relations Amendment (Unfair Dismissal) Bill 1998, Minority Report, Feb 1999, p .6

## Appendix 1

**Table: Features of Federal and State termination laws**

	<b>Cmwth, Vic, ACT &amp; NT</b>	<b>NSW</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>Tas</b>
Employee able to apply for remedy?	Yes	Yes	Yes	Yes	Yes	Yes
Max time period after termination to apply	21 days	21 days (out of time applctns possible)	21 days	21 days	28 days (out of time applctns considered)	21 days
Salary cap	\$81 600 for 'non-award conditions' employees	\$81 500 and not covered by award	\$75 200	\$77 681 for non-award employees	\$90 000 for non award etc employees	
Filing Fee	\$50.00	\$50.00	\$48.00 unless union application	\$0.00	\$50.00	\$0.00
Casuals et al excluded, for what period?	12 months	6 months	12 months, except for invalid reasons	6 months	No	No
Statutory default probationary period	3 months	No 3 months (may be less)	3 months	No	3 mnths (but not blanket exclusion)	No
Conciliation before arbitration	Yes	Yes	Yes	Yes	Yes, Registrar may mediate	Yes
Certificate issued if conciliation fails?	Yes	No	Yes	Assessment made	No	No
Penalty for disregarding assessment?	Yes	No	No	Yes	No	No
Commission to consider size of business?	Yes					
Penalties against advocates for vexatious claims	Yes					
Requirement to disclose 'no win no fee'	Yes					

Dismiss claims which have no prospect of success?	Yes					
Consider size of business & skills of small business re HR matters	Yes					
Is salary compensation capped?	6 months remuneration. Limited to \$40,800 for 'non-award' employees	6 months remuneration	6 months average wage	6 months remuneration or \$38,800 whichever is greater	6 months remuneration	6 months ordinary pay

Note:

- Termination provisions contained in the CCH Australian Employment Legislation at 21 December 2001.
- Provisions updated in August 2002 for new WA amendments and the Commonwealth salary/compensation cap.
- No attempt has been made to include other authority a tribunal might rely on to deal with a matter beyond those prescribed under the particular termination provisions.

WA Provisions (August 2002) (Advice from Labour Relations Branch DCEP):

- 1) There is no exclusion of casuals.
- 2) There is a requirement for the WAIRC to take account of a probationary period of up to 3 months in deciding the merits of a claim (see new S23A(2)). This does not preclude probationers from lodging claims or having them determined but does compel the WAIRC to consider them.
- 3) The filing fee has increased to \$50.00.
- 4) The Registrar of the WAIRC can have functions of the Commission delegated to them. In effect the Registrar may now deal with preliminary matters (ie: may mediate a claim). They will not be able to issue orders (see new S96 - inserted by Clause 161 of the LRRRA 2002).
- 5) The blanks against WA in the table are technically "no" since there is no express power provided. However, there is some ability provided through the general powers of the Commission (see S27 of the IR Act).