Has the fair go

WorkChoices removes employee protection and strengthens the managerial prerogative, reports *Sarah Haining* and *Jan Schapper*.

Somewhere in Brazil acres of rainforest have been laid bare to feed the enormous tracts of editorial space taken up by the polarised commentariat bleating the pros or cons of the recent industrial relations reforms known as *WorkChoices*. The most contentious point seems to be the legislation's provisions for an exemption from employee dismissal law for the 90 per cent of Australian businesses employing one hundred staff or less..

WHAT IS AN UNFAIR DISMISSAL?

Under the *Workplace Relations Act* (WRA) (1996) an unfair dismissal is considered to have occurred when a termination is considered to be "harsh, unjust or unreasonable" by the Australian Industrial Relations Commission (AIRC). Of the unfair dismissal claims between 1997 and 2001, a disproportionate number were from medium and large companies, despite the fact that small business makes up 40 per cent of the Australian workforce. Research indicates that small business *perception* of costs and the *actual* costs associated with dismissal and unfair dismissal cases are overestimated. Despite this, the perception still persists and remains a key government justification for relieving small business the burden of unfair dismissal legislation.

ARGUMENTS FOR CHANGES TO LEGISLATION

"Whatever their intended purpose," claimed Australia's Prime Minister John Howard, "unfair dismissal laws have acted in a very significant way to slow the entrepreneurial pulse of the economy and to make many smaller firms less competitive, and directly impede the creation of jobs." The government relied heavily on studies by both Professor Don Harding of the National Institute of Labour Studies in 2000 and the Certified Practising Accountants (CPA) in 2002, which suggested the reforms would create 77,000 and 56,000 new jobs respectively. In contrast, research by Freyens and Oslington suggested that "the likely gains from removing unfair dismissal protection were extremely small". Meanwhile a Senate enquiry by the Employment, Workplace Relations and Education Reference Committee in June 2005 found "the claim by the government and employer groups the reforms would create 77,000 are fuelled by misinformation and wishful thinking".

CASE STUDY

The arguments offered in the Senate enquiry and in the literature of the time hinged on the perceptions of small business owners and operators. Interested by this notion of 'perception as reality', a series of targeted interviews were conducted to uncover the perceptions of six small business owners in one local community in south east Melbourne and representatives from five key employee and employer groups.

FAIR GO... GONE?

Reflecting their commonality of interests, the government and employer associations argued unfair dismissal was unfair on employers, placed a considerable burden on small business and demanded unrealistic formal procedures. As one of the representatives of the employer associations said: "It's not natural then to sit up all formally in my chair and say, 'right this is a formal meeting about your performance' ... You don't suddenly sit down and assume a level of formality that is an

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alien concept to your day-to-day interactions." Thus for many commentators including small business owners themselves, informality is the reality of small business employment relations. With this reality, is it unrealistic to expect small business owners to conduct employment relations within a formalised legal framework?

Before recent changes to the legislation, the AIRC clearly considered small business' lack of dedicated human resource expertise (and presumably formal procedures) as a significant ameliorating factor when making an unfair dismissal decision. Therefore, while the perception of small business owners may indicate that a level of formality has to be assumed, in reality consideration is given to the informal nature of the small business sector.

Despite small business owners' perception to the contrary, the annual reports of the AIRC show that between 2003 and 2004, 6 per cent of all total unfair dismissals applications went to arbitration and of these, 25 per cent were positive results for employees. Evidence also offered to the recent Senate Enquiry indicates that the majority of unfair dismissal claims were settled in the conciliation stage and since 1997, 19 per cent of all unfair dismissal applications were settled before conciliation, with 55 per cent at conciliation. Despite this reality, the 2002 CPA survey found that the 30 per cent of small business respondents felt employers "always" lose.

Through the legislative provisions outlined above, the previous laws encouraged employers to develop human resource practices and policies that would minimise the likelihood of an unfair dismissal claim being brought against them. One interviewee from the Labour movement said: "What it's [the WorkChoices legislation] going to do is increase the capacity of employers to not manage well – to not manage performance well, to not manage rostering needs well, and to not manage their recruitment processes well."

Further, by removing the necessity for employers to be held accountable for their decisions, the government is significantly strengthening small business owners' managerial prerogative. With fewer checks on managerial power, employee groups interviewed in the case study fear the exemption will create a wider gap between small business and large enterprises employees.

Despite the unions' and academics' view of the imbalance of power between employer and employee within the employment relationship, the small business owners, along with the Prime Minister and the Minister for the Department of Employment and Workplace Relations (DEWR), point to the low unemployment rate as evidence that the Australian workplace is in fact a 'workers' market'. This position offers little recognition of the potential vulnerability of employees in a system that now allows them to be dismissed without any legislative protection.

People will always have economic concerns about government-imposed law, but that does not justify scrapping them, particularly when you are feeding a misperception as well. Law serves a higher purpose than just making things financially easier. It seems evident that while the political reality might rest on perception, the evidence we present shows the reality in small business sector being ignored for purely political reasons.

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