CHAPTER 2

ISSUES RAISED IN EVIDENCE

Introduction

1.1 In its examination of the provisions of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998, the Committee considered the following issues:

- Whether a relationship exists between the operation of unfair dismissal laws and hiring intentions and job creation by small business employers;
- Whether surveys of business opinion assist to determine if such a link exists;
- Whether a case exists for small business employers to be subject to differential operation of unfair dismissal laws than larger businesses;
- Whether support exists within the small business community for the passage of the Bill;
- The conclusions (if any) that can be drawn from the numbers of unfair dismissal applications made against big and small business, by federal, state and territory jurisdiction;
- Whether the provision of more information about the scope and operation of unfair dismissal laws to small business is necessary or desirable;
- Whether an eligibility period of six months before an unfair dismissal claim can be made reflects a reasonable balance between the interests of employers and employees.

1.2 The Committee has drawn on survey material, submissions and evidence presented at the public hearing to address these matters.

What the surveys say

1.3 The Government's determination to press ahead with the implementation of this legislation is based on what is sees as an unmistakable message sent to it by small business interests that current unfair dismissal legislation in force is a hindrance to their business and an impediment to the hiring of additional employees. The evidence provided by surveys of small business operators indicates that the current unfair dismissal regime is assuming an increasing significance. That is, there is a perception held that unfair dismissal claims are increasingly onerous, costly and time consuming in their resolution. These perceptions are fuelled by a clear body of anecdotal information passed around small business circles. The Committee has looked at surveys of business opinions, and the relevant findings are summarised below.

The 1995 Australian Workplace Industrial Relations Survey

1.4 This survey found that while there was an increase between 1990 and 1995 in the number of small businesses using standard disciplinary procedures from 5 per cent to 13 per cent, the majority of small business still relied on informal and individual methods (67 per cent). It has been claimed that this increase may have been partly due to the introduction of new unfair dismissal laws in 1993. In the lead up to the 1995 survey, small businesses were

less likely to have dismissed employees than larger workplaces. Within the small business sector, small businesses in mining and construction were more likely to have dismissed staff that those in other industries. Of those small businesses that did dismiss employees, 19 per cent encountered difficulties, including with unfair dismissal procedures.[1]

1.5 The survey also found that small businesses were more likely to be concerned about unfair dismissal laws (10 per cent) compared with larger businesses (2 per cent). However, both small and large businesses were more concerned that they could not make efficiency changes because of financial or economic problems, management, head office or government policy and other 'unspecified' reasons.

The Morgan and Banks Job Index (1996)

1.6 The 1996 Morgan and Banks Job Index shows that 75 per cent of all businesses were unaffected by the federal unfair dismissal laws. Small business appeared to be no more concerned than large enterprises, with 14 per cent claiming to have hired fewer new staff than they would otherwise have done. In New South Wales, however, the figure is closer to 30 per cent.

1.7 The May-July 1996 Morgan and Banks Job Index reported that small business[2] had 'continued to report strong employment growth expectations despite a fall-off on the previous quarters results.' The Index stated that from anecdotal evidence, the main reason for small business' optimism was that large businesses were employing smaller businesses to fulfil outsourcing requirements.[3] The survey indicates an increasing level of anxiety among small business entrepreneurs about the effect of the unfair dismissal laws.

Recruitment Solutions (1997 and 1998)

1.8 A 1997 Recruitment Solutions Survey found that 32 per cent of 750 Sydney, Melbourne and Brisbane companies surveyed had been the subject of an unfair dismissal claim in the previous 12 months. Nine per cent of companies said that they had deferred employing permanent staff or employed fewer permanent staff as a direct result of the introduction of unfair dismissal provisions contained in the *Industrial Relations Reform Act 1993*.[4]

1.9 A May 1998 survey found that out of 1,200 large and medium sized businesses surveyed in Sydney, Melbourne and Brisbane, 31 per cent had been subject to an unfair dismissal claim during the previous 12 months, 17 per cent of companies had reduced their hiring of permanent staff as a result of unfair dismissal legislation.

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1 Alison Morehead *et al*., *Changes at Work. The 1995 Australian Workplace Industrial Relations Survey*, 1997, pp 305-306.

2 The Morgan and Banks Jobs Index defines small business as having 30 or fewer employees.

3 The Morgan and Banks Job Index, 1996, p 6.

4 Recruitment Solutions, 'Media Backgrounder. Dismissal laws hit 32 pc of companies', *Unfair Dismissal Compendium*, November 1998, pp 15-16.

National Institute of Labour Studies - Trends in Staff Selection and Recruitment (1997)

1.10 A number of factors affect the staff selection and recruitment practices used by businesses: business size, the industry involved, the extent of unionisation and the state of the labour market. Business size is important for a number of reasons. First, people in charge of recruiting in small businesses are likely to have other responsibilities and are therefore unlikely to be able to spend as much time as specialised personnel in larger firms. Secondly, because selecting the wrong staff can be more costly for small businesses, methods for recruiting staff are more likely to reduce uncertainty and cost less, for example, employee referrals. Small businesses may also have a greater chance of filling vacancies from the local labour market and can thus use more informal methods of staff selection and recruitment.[5]

1.11 Most companies interviewed (during the study into trends in staff selection and recruitment) about the impact of government regulations and legislation on the hiring process nominated unfair dismissal laws and Equal Employment Opportunity (EEO) legislation as having an effect, but that 'any effects were of only marginal importance'.[6]

1.12 The report concluded that government regulations and legislation, especially unfair dismissal and EEO laws, 'have given rise to, at most, only modest constraints on hiring decisions.'[7] The authors of the report acknowledged, however, that their sample of companies interviewed included predominantly large firms, which may have accounted for the findings.[8]

1.13 A survey was also conducted of businesses that had recruited for a vacancy during the previous 12 months. The survey included more small business firms than those interviewed. Attitudes towards the unfair dismissal laws were more negative than those obtained from interviews. Some 48 per cent of businesses surveyed stated that unfair dismissal laws in place at the time of the survey had influenced their decision to hire to 'a large extent' or 'to a very large extent'. The report found that 'the more the firm was concerned about the effect of unfair dismissal laws, the less likely it was to hire additional employees.'[9]

Tasmanian Chamber of Commerce and Industry (1997 and 1998)

1.14 In this survey, unfair dismissal legislation ranked eleventh in response to the question 'how important do you consider each of the following issues for small business?'. The top four issues were lack of taxation reform, lack of population growth, lack of demand and workers compensation. Unfair dismissal was considered a critical problem by 34 per cent

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5 National Institute of Labour Studies, *Trends in Staff Selection and Recruitment*, Melbourne, May 1997, pp 7-8.

6 National Institute of Labour Studies, *Trends in Staff Selection and Recruitment*, Melbourne, May 1997, p 47.

7 National Institute of Labour Studies, *Trends in Staff Selection and Recruitment*, Melbourne, May 1997, p 60.

8 National Institute of Labour Studies, *Trends in Staff Selection and Recruitment*, Melbourne, May 1997, p 47.

9 National Institute of Labour Studies, *Trends in Staff Selection and Recruitment*, Melbourne, May 1997, pp 68-69.

of respondents and a major problem by 22 per cent. Seven per cent considered that it was not a problem.[10]

1.15 In August 1998, the *Survey of Tasmanian Business Priorities for the Next State Government 1998*, found that of 22 economic, taxation, industrial relations and employees, government and general issues, unfair dismissals ranked seventh when asked how much the issues were considered an impediment to the growth of the respondent's business. Twenty six per cent of respondents considered unfair dismissals to be a critical problem, with 14 per cent of respondents seeing it as a major problem.[11]

Yellow Pages Small Business Index Surveys (1997 and 1998)

1.16 The August 1997 Yellow Pages Small Business Index surveyed 1,200 small businesses with 19 or fewer employees and covered the period May to July 1997. A survey of businesses with fewer than 16 employees returned comparable results. Of those surveyed, 69 per cent of business proprietors reported impediments to taking on new employees.

1.17 In response to specific questions on unfair dismissal legislation, 79 per cent of small business proprietors considered that small business would be better off if they were exempt from unfair dismissal laws. Thirty three per cent of small businesses indicated that they would have hired new employees if they had been exempt from unfair dismissal laws during 1996 and 1997. Sixty four per cent stated that an exemption would not have affected the number of employees they would have recruited. Of those who said they would have recruited new staff, 48 per cent indicated that they would have hire one more employee, and 36 per cent indicated that they would have recruited two new employees.

1.18 Fifty eight per cent of respondents indicated that recruitment would not be affected if they were exempted from unfair dismissal laws in the following year. Of those who responded that recruitment would be affected, 58 per cent indicated that they would take on one new employee, and 32 per cent indicated that they would take on two new employees.

1.19 Three per cent of businesses surveyed indicated that they had experienced an unfair dismissal claim since 1996. Of those that had experienced an unfair dismissal claim, the problems caused by the claim included the cost of the settlement (55 per cent), the time and location of the hearings (29 per cent), stress (25 per cent) and costs to business in lost time (25 per cent).[12]

1.20 The May 1998 Yellow Pages Small Business Index, which covered the period February to April 1998, found that 63 per cent of respondents considered that there were impediments to hiring new employees. Of these, 42 per cent cited lack of work as the main barrier to taking in new staff. Cost of employing (17 per cent) and employment conditions (13 per cent) were also referred to. In response to an unprompted question on the most

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10 Tasmanian Chamber of Commerce and Industry, 'Tasmanian Small Business Priorities Survey', June 1997 (extract) in *Unfair Dismissal Compendium*, November 1998, pp 32-36.

11 Tasmanian Chamber of Commerce and Industry, 'Survey of Tasmanian Business Priorities for the Next State Government 1998', August 1998 (extract) in *Unfair Dismissal Compendium*, November 1998, pp 111-115.

12 Yellow Pages Small Business Index, August 1997 (extract), in *Unfair Dismissal Compendium*, November 1998, pp 37-40.

important issues that Government should be addressing to assist small business, 38 per cent nominated taxation/tax reform. Changes to unfair dismissal laws (6 per cent) ranked sixth behind making it cheaper to employ (13 per cent), reducing red tape (13 per cent), providing concessions for small business (10 per cent) and less book work (eight per cent).

1.21 With respect to the prompted question asking respondents to list 12 policy initiatives in order of importance to their business, 'changes to unfair dismissal laws' was ranked between 'somewhat important' and 'very important', along with helping small business to get suitable finance, reducing the power of unions and the introduction of a goods and services tax.[13]

1.22 According to the August 1998 Yellow Pages Small Business Index, which covered the period May, June, July 1998, there was little or no employment growth in the sector, and unfair dismissal laws ranked eighth with six per cent of small business proprietors citing it as an issue of importance.[14] Economic conditions and tax reform issues were uppermost in the minds of small entrepreneurs.

South Australian Employers' Chamber of Commerce and Industry (1998)

1.23 Although the South Australian survey is methodologically confusing, with the number of respondents varying from question to question, it does provide a picture of the effects of the unfair dismissal laws in one state. Slightly more than half of the respondents were satisfied with the outcome of conciliation, and less than half of the businesses which had dismissed an employee hired a replacement. Of those businesses which did hire replacement staff, 25 per cent used casual labour and others introduced fixed contracts and probationary periods. Out of 100 respondents who did not hire a replacement employee, 52 per cent said they were deterred by the prospect of an unfair dismissal claim.

1.24 Out of 141 responses, 113 or 80 per cent felt at risk from unfair dismissal claims. Ninety five out of 129 businesses responded that they would hire new employees if access to unfair dismissals were restricted. Of 87 businesses, 67 or 77 per cent stated that they would hire new employees if small business (less than 15 employees) were exempted from the unfair dismissal laws. In response to the question, 'do you hire contract or temporary staff, ie labour hire employees to avoid unfair dismissal issues?', out of 137 respondents, 63 or 46 per cent stated 'yes' and 54 per cent stated 'no'.[15]

Queensland Chamber of Commerce and Industry (1998)

1.25 Of the top ten concerns identified by 400 Queensland businesses in 1998, frequency and complexity of changes to tax laws and rules ranked first, with 85 per cent of respondents considering the matter to be of critical concern.[16] The second ranked concern was level of

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13 Yellow Pages Small Business Index, May 1998 (extract), in *Unfair Dismissal Compendium*, November 1998, pp 93-95.

14 Yellow Pages Small Business Index, August 1998 (extract), in *Unfair Dismissal Compendium*, November 1998, pp 116-119.

15 South Australian Employers' Chamber of Commerce & Industry, 'Unfair Dismissal Survey Results, (1998) in *Unfair Dismissal Compendium*, November 1998, pp 98-100.

16 Queensland Chamber of Commerce and Industry, *Pre-Federal Election Survey. Queensland Results*, July 1998, p 9.

taxation and the third was unfair dismissal legislation (ranked sixth in 1996). Seventy eight per cent of respondents considered unfair dismissal legislation of critical importance. Queensland legislation exempts small businesses of fewer than 15 employees from unfair dismissal provisions. The survey was conducted at a time when the Queensland Government was proposing to repeal the legislation to bring the states into line with Commonwealth legislation. Survey results indicated that unfair dismissal legislation was a concern to business regardless of size.

Australian Business Chamber (1998)

1.26 Approximately 1,000 responses, with an average of 950 responses per question, to an Australian Business questionnaire form the basis of the Australian Business Chamber's July 1998 pre-election survey. Sixty two per cent of the sample comprised businesses of up to and including 20 employees. Ninety six per cent of businesses sampled came from NSW or the ACT. Of the businesses sampled, approximately half were from the Sydney metropolitan area and the remainder from non-Sydney NSW (not including ACT firms).

1.27 Overall, the three top business problem areas (out of 69 areas) related to taxation, that is, frequency and complexity of changes to tax laws and rules, level of taxation and cost of compliance with the tax system. The fourth ranked problem area was unfair dismissals legislation, which was the highest ranked labour relations issue ahead of workers compensation payments (rank 11), redundancy and termination payments (rank 23) and employee productivity (rank 24). Specifically, unfair dismissal legislation was ranked sixth for businesses of 20 employees or less, seventh for businesses with between 21 and 99 employees, and fourteenth for businesses of 100 or more employees.[17]

Australian Chamber of Commerce and Industry (1998)

1.28 Prior to the 1998 federal election, the Australian Chamber of Commerce and Industry surveyed businesses to determine matters of concern to them at the time of the survey. Issues of general importance but not of importance to the specific firm at that time, respondents were asked to give the issue a low ranking. Some 4,200 businesses responded to the survey. Out of 71 issues nominated by ACCI, the ten most important areas needing change included, in order, the frequency and complexity of changes to federal tax laws and rules, the level of taxation, compliance costs of the tax system, the complexity of government regulations, cost of compliance with government regulations and absence of an internationally competitive tax system. The area of unfair dismissals was ranked seventh in order of importance. For firms with 19 or fewer employees, unfair dismissals ranked fourth in the list of ten most important issues behind the frequency and complexity of changes to federal tax laws and rules, the level of taxation and debit taxes.[18]

1.29 The ACCI in an overview of its survey stated:

> [Unfair dismissals] has been and remains an issue of the most crucial importance, and not just for business. …

17 Australian Business Chamber, 'Australian Business Pre-Election Survey', July 1998 in *Unfair Dismissal Compendium*, November 1998, pp 106-110.

18 Australian Chamber of Commerce and Industry, 'ACCI Review', August 1998, Number 43 in *Unfair Dismissal Compendium*, November 1998, pp 120-123.

> …Small business will remain reluctant to employ so long as the present system remains unchanged. Anyone serious about lowering unemployment permanently will recognise how important for labour market growth amending the unfair dismissal legislation is, particularly as it applies to the small business community.[19]

St George Bank/State Chamber of Commerce – NSW Survey (1997 and 1998)

1.30 Sixty eight per cent of respondents indicated that they were aware that most small businesses in New South Wales were still subject to state unfair dismissal laws despite federal industrial relations reforms. Fifty six per cent of businesses indicated that the prospect of unfair dismissal claims discouraged businesses like theirs from adding staff.[20]

1.31 A survey of 700 New South Wales businesses conducted by the St George Bank and the New South Wales State Chamber of Commerce in March 1998, found that 42 per cent of businesses considered that the prospect of an unfair dismissal claim was a deterrent to employing additional staff. Of the one third of businesses who had experienced an unfair dismissal claim, 51 per cent felt that the unfair dismissal laws were a deterrent to employment.[21]

Micro Business Consultative Group (1998)

1.32 Micro businesses are defined as business owned or operated independently with fewer than five employees. The Micro Business Consultative Group was established in June 1996 to provide advice to the Minister for Small Business and Consumer Affairs on policy options for the development of micro businesses in Australia. In February 1998, the Consultative Group presented the report *Under the Microscope. Micro Businesses in Australia* to the Minister.

1.33 The Consultative Group's Report states:

> Another key concern for micro businesses is the legislation associated with the dismissal of employees…
>
> Unfair dismissal laws have dampened employment growth in micro businesses. Unfair dismissal claims can impose a considerable strain on micro businesses. Indeed, we believe that there is strong resistance in many micro businesses to employing more people for fear of potential claims.[22]

1.34 The Consultative Group recommended that the Government should continue to seek the exclusion of small business from unfair dismissal provisions of the Workplace Relations Act.

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19 Australian Chamber of Commerce and Industry, 'ACCI Review', August 1998, Number 43 in *Unfair Dismissal Compendium*, November 1998, pp 123-124.

20 St George Bank/State Chamber of Commerce-NSW Survey of Business Expectations, March-June1997 (extract), p 11.

21 State Chamber of Commerce (NSW), 'Media Release. Small Business Confirms Unfair Dismissal Fears', 22 March 1998 in *Unfair Dismissal Compendium*, November 1998, p 90.

22 Micro Business Consultative Group, 'Under the Microscope. Micro Businesses in Australia', February 1998 in *Unfair Dismissal Compendium*, November 1998, pp 76-80.

Council of Small Business Organisations of Australia (1998)

1.35 In a radio interview in March 1998, Chief Executive of the Council of Small Business Organisations of Australia, Mr Rob Bastian, stated in response to questions about the impact of unfair dismissal laws on employment in small business:

> …I am arguing, and I think COSBOA is arguing that the issue is not with the employees currently in business, it is that it is our belief that the million firms out there could stretch and probably take on, even if you got one in twenty, that's what fifty thousand jobs.[23]

PayService (1998)

1.36 Author of the book, *How to Protect you Business from Unfair Dismissal and Sexual Harassment Claims*, and principal of a Queensland company specialising in establishing staff hiring and payroll systems, PayService, Mr Lawrence Richards has referred to a survey claiming more than 94 per cent of businesses do not comply with new industrial law regulations, with almost half of the businesses in some industries having to pay fines and costs associated with unfair dismissal claims during 1997.[24]

Is small business differentially affected?

1.37 Australia Business, in its submission, lists various factors which result in small businesses being more adversely affected by unfair dismissal laws:

- absence of dedicated or specialist human resource staff
- lack of in-house expertise in the area
- small business employment policies and practices are 'often somewhat unrefined if at all existent'
- management of employment relationships usually handled by owner or a generalist manager
- owner's/managers attention diverted from business when an unfair dismissal claim is lodged and business may suffer because owners would not normally delegate operational requirements
- small businesses which need to defend an unfair dismissal claim often have to engage external representation which is an additional cost burden to the business
- an owner may have to close the business in order to attend or prepare for conciliation or arbitration with respect to unfair dismissal.[25]

1.38 In endorsing the differential treatment of small business with respect to unfair dismissal law, the South Australian Government outlined some of the reasons which support the 'special burden' carried by small business in defending unfair dismissal claims. These

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23 Interview with COSBOA's Chief Executive, Mr Rob Bastian, 2RN Peter Thompson, 5 March 1998.

24 Newsletter Information Services, 'Discrimination Alert', Issue 72, 29 September 1998, in *Unfair Dismissal Compendium*, November 1998, p 152.

25 Submissions Vol 1, Submission 6, Australian Business, pp 93-94.

include the proportion of small business earnings compared to large businesses required to defend an unfair dismissal claim, the time and costs associated with the employer and other employees required to attend arbitration proceedings, and, because of greater resources and personnel, the ability of larger businesses to conduct 'ideal human resource management'.[26]

1.39 One of the difficulties in analysing the impact of industrial relations legislation on small business is the difference in definitions of 'small business'. There has been some criticism of the Government's definition of 'small business' as businesses with 15 or fewer people. The criticisms relate in part to the fact that the Australian Bureau of Statistics defines small business as those with fewer than 20 employees. Small businesses may also be distinguished on the basis of whether they are stand-alone workplaces or part of a larger organisation.[27] The 1995 Australian Workplace Industrial Relations Survey excludes from its definition of small business, bank branches, small public sector workplaces, businesses which have more than one site with a small number of employees at each location, for example, a chain of small butcher's shops, and not-for-profit making workplaces. The survey also distinguished between small businesses comprising 5 to 10 employees and those comprising 11 to 19 employees. The Government, in its Workplace Relations (Unfair Dismissals) Bill has defined small business as those employing 15 or fewer people.[28] Although an arbitrary number, it has a basis in industrial relations jurisprudence. It is the arbitrary figure determined by the Australian Conciliation and Arbitration Commission in the 1984 Job Protection Test Case on termination, change and redundancy which small business was exempted from certain requirements of that decision. It is also an identified small business cut-off adopted by the Wran Government in the Employment Protection Act 1982 (NSW).

1.40 Small businesses have also been defined as businesses with 30 or fewer employees. Watson and Everett, in their 1996 article 'Do Small Businesses Have High Failure Rates?', noted that over the years a variety of criteria have been used to define 'small business.' Some definitions include:

- total worth;
- relative size within industry;
- number of employees;
- value of products;
- annual sales or receipts;
- net worth.

1.41 In the UK, a committee on small firms concluded that 'a small business could not be satisfactorily defined in terms of employment, turnover, output, or any other arbitrary single

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26 Submissions Vol 3, Submission 13, South Australian Department for Administrative and Information Services, pp 3-4.

27 This latter distinction is used in the 1995 Australian Industrial Relations Survey.

28 Alison Morehead *et al*., *Changes at Work. The 1995 Australian Workplace Industrial Relations Survey*, 1997, p 300.

quantity.'[29]The committee used, instead, characteristics that distinguished a small business from a large business, including:

- market share;
- personalised management by owner(s); and
- independence from the influence of any large enterprise in making decisions.[30]

1.42 In Australia in the early 1970s, the Wiltshire Committee defined a small business as:

> a business in which one or two persons are required to make all the critical management decisions: finance, accounting, personnel, purchasing, processing or servicing, marketing, selling, without the aid of internal specialists and with specific knowledge in only one or two functional areas.[31]

1.43 J.S. Ang in the 1991 article 'Small Business Uniqueness and the Theory of Financial Management' suggested the following as characteristic of small businesses:

- having no publicly-traded securities;
- owners having undiversified personal portfolios;
- limited liability is absent or ineffective;
- first-generation owners are entrepreneurial and prone to risk-taking;
- the management team is incomplete;
- the business experiences the high cost of market and institutional imperfections;
- relationships with stakeholders are less formal; and
- the business has a high degree of flexibility in designing compensation schemes.[32]

1.44 Another definition of small business was proposed by Osteryoung and Newman in 1993 and included the following characteristics:

- no public negotiability of common stock, and
- owners personally guaranteeing any existing or any planned financing.[33]

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29 P. Ganguly, Ed. *UK Small Business Statistics and International Comparisons*, London, 1985, quoted in John Watson and Jim E. Everett, 'Do Small Businesses Have High Failure Rates?', *Journal of Small Business Management*, Vol 34/4, October 1996, p 46.

30 John Watson and Jim E. Everett, 'Do Small Businesses Have High Failure Rates?', *Journal of Small Business Management*, Vol 34/4, October 1996, p 46.

31 Wiltshire Committee, *Report of the Committee on Small Business*, Canberra, 1971, quoted in John Watson and Jim E. Everett, 'Do Small Businesses Have High Failure Rates?', *Journal of Small Business Management*, Vol 34/4, October 1996, p 46.

32 John Watson and Jim E. Everett, 'Do Small Businesses Have High Failure Rates?', *Journal of Small Business Management*, Vol 34/4, October 1996, p 46.

33 John Watson and Jim E. Everett, 'Do Small Businesses Have High Failure Rates?', *Journal of Small Business Management*, Vol 34/4, October 1996, p 47.

1.45 More recently, in its 1997 report *Finding a balance: towards fair trading in Australia*, the House of Representatives Standing Committee on Industry, Science and Technology defined small businesses as:

- being independently owned and managed;
- being closely controlled by owner/managers who also contribute most, if not all, of the operating capital; and
- having the principal decision making functions resting with the owner/managers.

1.46 The committee added, as a functional addition, a size component which it stated should not 'overshadow' the aforementioned definition—non-manufacturing organisations employing fewer than 20 people, and manufacturing organisations employing fewer than 100 people.[34]

1.47 In its submission, the Department of Workplace Relations and Small Business outlined the justification for the Government's definition of small business rather than the one used by the Australian Bureau of Statistics. The Department advised that the use of the ABS definition of small business would have included a significant number of businesses that would not be unduly burdened by a requirement to defend unfair dismissal claims.[35]

1.48 In a submission to an earlier inquiry, the Department drew on domestic and international precedents for treating small businesses differently from other businesses, including:

- the *Employment Protection Act 1982* (NSW) which exempts businesses with fewer than 15 employees from giving notice of intention to terminate an employee's employment;
- the 1984 Termination, Change and Redundancy Test Case in which the former Australian Conciliation and Arbitration Commission exempted employers with fewer than 15 employees from severance and redundancy pay provisions;
- the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* excludes employers with fewer than 100 employees from the operation of the Act;
- in Austria, unfair dismissal legislation does not apply to employers with fewer than five permanent employees;
- different penalties apply to small businesses for breaching relevant legislation in France;
- unfair dismissal laws only apply to employers with more than 10 employees in Germany; and

34 House of Representatives Standing Committee on Industry, Science and Technology, *Finding a balance: towards fair trading in Australia*, Canberra, 1997, p 2.

35 Submissions Vol 3, Submission 19, Department of Employment, Workplace Relations and Small Business, p 85.

- in Great Britain, while specific size of business is not expressly stated, tribunals are required to take account of size and administrative resources of employers in termination of employment cases, and unfair dismissal protection period is two years.[36]

1.49 One of the difficulties associated with the different definitions of small business is the problems associated with comparing surveys which have questioned businesses of varying sizes. The Committee notes that while this is a methodological issue, the concerns conveyed by the surveys portray a general and consistently expressed concern about unfair dismissal laws in the small business sector.

1.50 Concern was raised at the possibility that larger companies would restructure themselves into several smaller organisations employing fewer than 15 employees in order to take advantage of the proposed small business exemption.[37] While this may be theoretically possible, the Committee believes that insufficient material was presented to substantiate such a fear. For example, no evidence was presented that employers had used such devices to avoid existing legislation or awards with an employee cut off. The Committee believes that any evidence of this practice evolving should be dealt with through other legislative avenues.

1.51 It was also speculated that the introduction of the exemption for businesses employing fewer than 15 employees may actually provide a disincentive for small business to grow larger.[38] The Committee was not provided with any substantive material on which this speculation could be tested.

Unfair dismissal and job growth

1.52 The Government has stated that the current unfair dismissal laws are an impediment to job growth. This position is supported by small business and numerous surveys. Small business does not want to prevent employees who have a genuine grievance from pursuing claims against employers who have dismissed them. However, the fear of making a mistake when recruiting staff and then being faced with a costly and time-consuming unfair dismissal claim makes small business reluctant to take the risk; especially where such an action could financially cripple the small business such that its viability is adversely affected, or it is forced to close down.

1.53 In his submission, Mr Martin Willoughby-Thomas stated that the question of whether a relationship exists between the operation of unfair dismissal laws and hiring intentions by small business is not a useful one as most employers would claim that unfair dismissal laws are a disincentive to employing staff because 'if there are no barriers to termination, employers can engage employees on a speculative basis without the need for any real thought or planning as to whether an ongoing job exists or will materialise.' He suggests instead that it is more important to ask whether unfair dismissal laws are an impediment to the provision of long term jobs. He believes that '[g]iven the right to impose a three month

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36 Submission 7 (Department of Workplace Relations and Small Business) pp 16-17 in Senate Economics Legislation Committee, *Volume of Submissions*, October 1997

37 See for example, Submissions Vol 1, Submission 10, Justice Research Centre, p 164; Vol 2, Submission 12, Shop, Distributive & Allied Employees' Association, p 18; Vol 3, Submission 20, JOB WATCH, p 107. But see *Hansard*, 29 January 1999, p EWRSBE 19.

38 See for example, Submissions Vol 1, Submission 10, Justice Research Centre, pp 165-166; Vol 2, Submission 12, Shop, Distributive & Allied Employees' Association, p 18.

probationary period under the existing legislation,[39] no reasonable employer with a long term employment need could regard the unfair dismissal laws as an impediment.'[40]

1.54 The Shop, Distributive & Allied Employees' Association (SDA) argued that hiring intentions of employers are not linked to the unfair dismissal laws but are instead dependent on their 'business needs'. Rather than increasing employment, the exemption of small business from the unfair dismissal laws may have the opposite effect by creating 'conditions for a labour market where there is a greater turnover of employees (particularly if the employees are low skilled or semi-skilled)…'.

1.55 Referring to the retail sector, the SDA contends that:

> …a real likely outcome of any proposed liberalization of dismissal laws would be increased uncertainty for employees working in this sector…as it would allow for a greater casualization of the workforce and the hiring of cheaper, younger employees as a result of the adoption of a "churnover" policy by employers to dismiss the more experienced personnel in favor of cheaper and younger, entry level staff.[41]

1.56 However, this is extremely speculative with no supporting evidence from here or overseas.

Commonwealth versus State legislation

1.57 Department of Workplace Relations and Small Business statistics indicated that following the introduction of the *Workplace Relations Act 1996*, unfair dismissal claims fell 18 per cent. However, while applications under Commonwealth industrial laws fell by half during 1997, State unfair dismissal claims increased by almost fifty per cent. Some of this movement was anticipated due to the jurisdictional changes made by the 1996 Commonwealth Act. These statistics also suggest that changing the Commonwealth unfair dismissal laws will not in themselves protect small businesses from unfair dismissal claims made under state legislation, particularly as small business operates under a mixture of Commonwealth and State industrial law. Changes to Federal law do, however, provide momentum for complementary changes at a State level.

1.58 Committee members pressed witnesses about whether respondents to the surveys had been asked under which jurisdiction they operated. Most surveys did not distinguish between state and Commonwealth jurisdictions. It was claimed that the distinction was irrelevant as most small businesses were unaware of which particular unfair dismissal provisions applied to them. Small business concerns about unfair dismissal laws centred on the general principle rather the specific jurisdiction.[42] The Committee notes that the terms of reference relate to the Commonwealth unfair dismissal legislation only. The Committee

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39 Under regulation 30B(1) in Statutory Rules 1996 No. 307, certain classes of employees are excluded from the legislative requirements for termination of employment, including employees serving a period of probation which is less than 3 months, or where more than 3 months, is reasonable given the nature and circumstances of the employment.

40 Submissions Vol 1, Submission 11, Martin Willoughby-Thomas, Barrister & Solicitor, p 170.

41 Submissions Vol 2, Submission 12, Shop, Distributive & Allied Employees' Association, p 8.

42 See for example, *Hansard*, pp EWRSBE 2-3, 49 and 62.

acknowledges that while the concerns expressed about unfair dismissals cross the State/Commonwealth boundary, making it unhelpful to ask whether respondents to surveys were expressing their opinions about state or Commonwealth unfair dismissal laws, the difference in the actual number of claims filed under the respective jurisdictions is relevant when trying to determine the impact of the proposed changes to the Commonwealth unfair dismissal laws. It is understandable however, given the jurisdictional intervention by the Commonwealth in this area since 1993, that small businesses do not readily distinguish between the impact of an unfair dismissal claim under Commonwealth or State laws. This is particularly so given that both Commonwealth and State laws provide access to a jurisdiction, and it is the reality of access that makes small businesses, such as Mr Clive Tonkin who appeared before the Committee, to describe a new employee as a 'potential litigation'.

1.59 Evidence presented to the Committee suggested that the percentage of claims registered with the Commission, which shows a relatively small proportion of Commonwealth unfair dismissal cases, may not be a true reflection of the problem because of the number of cases settled prior to the conciliation and arbitration process. Various business representative organisations commented on the desire of many small business employers to settle quickly so as to avoid additional legal costs and time away from their businesses.[43]

1.60 The Committee notes that by introducing the exemption, the unfair dismissal remedy will be unavailable to employees, not on the basis of the merits of their claim, but on the size of the business in which they are employed. However, the essential basis upon which small business is more vulnerable than larger business to such claims is one based on size. Size is the best available proxy to take into account the resource restrictions available to small business in managing unfair dismissal claims. As noted earlier, size is specifically contemplated by the ILO Convention 158 as a basis for exclusion from this jurisdiction as enacted by the previous Government in its 1993 Act. Size is also a criteria adopted by industrial tribunals when exempting small business from certain termination of employment provisions in awards.

Finding the right employees

1.61 A consistent theme in the evidence presented to the Committee is the number of surveys and small business employers who rely on 'word of mouth' with respect to concerns about the impact of the unfair dismissal laws. As a result, regardless of whether a small business operator has experienced an unfair dismissal claim, strong perceptions are built up in the minds of the small business employers that they may suffer the same fate. It is important that accurate information and guidance on employment regulations is provided to small businesses, and that best practice, as in other sectors of the economy, is promoted. Despite a wide range of industry based information and training initiatives over the years on unfair dismissal laws, the concerns of small business remains. The Committee believes that this is partly attributable to the fact that even where best practice human resources are used at the workplace, a claim can still be made and the consequent cost to small business and the vagaries of litigation arise.

1.62 The conciliation process can be used by the Commission to 'weed' out those claims that lack substance. However even in that process small business incurs cost. Where the Commission determines that the claim has some validity it is then up to the employer to

43 See for example, *Hansard*, pp EWRSBE 2, 4-5, 10, 18-19, 26, 27-28, 41.

decide whether to settle prior to arbitration or to pursue the defence of the claim through arbitration. The cost of continuing with such an action is a necessary cost to ensure that appropriate redress is available to injured parties. Rather than denying individuals the right to pursue an action based on cost, means should be provided to ensure that all parties, both employers and employees, where need can be established, have access to financial assistance to pursue their claims. Evidence presented by Messrs Clive and Bryce Tonkin to the Committee suggests that conciliation may not be achieving its aim and 'weeding out' insubstantial claims by dismissed employees, and this failure results in the awarding of unrealistic costs. Mr Clive Tonkin stated:

> …At one stage, the other parties had to leave the room to determine what claim they wished to put upon the company. Later, the commissioner went in to see them and he came back and said, `They're claiming six months pay or $30,000, whichever is the lesser.' My son just said, `But, Mr Commissioner, we have done nothing wrong.' And he said, `Mr Tonkin, I know that and you know that. But this man, the claimant, has been able to bring you to this conference,at that stage it was before the last changes,and he can take you right up to trial at no cost to himself. Mr Tonkin, it is now time for you to make a commercial decision.' And that is the truth of the matter.
>
> My son said, `But, sir, I have never been in this position before. What do I do? Would a further two weeks pay satisfy?' The commissioner turned to a representative that we had with us,not a legal man, just a chamber man,and said, `I have never heard of an ambit claim of six months coming back to two weeks.' He said, `No, neither have I.' He said to Bryce, `Can you give me some more? This is plea bargaining.' So Bryce said, `Sir, I have never been here before. You tell me.' The commissioner said, `Would you give me four weeks? Can I go in there and bargain for four weeks?' Bryce said, `Whatever it takes. Four weeks,I'm happy.'[44]

The six month probationary period

1.63 With respect to the proposed six month qualifying period should be adopted, Mr Martin Willoughby-Thomas stated that the current three month probationary period provides adequate protection for employers. He adds:

> An employee who has successfully completed a probationary period of three months should be entitled to expect some security and feel able to take on financial commitments. To allow an employee to be terminated after say five and a half months employment for no reason and through no fault of his/her own without any recourse (other than through the ordinary courts) hardly strikes a reasonable balance and merely panders to the employer who wants some continuity of employment but few legal risks and who thus rolls over the workforce every six months.[45]

1.64 However the Committee believes a longer qualifying period before an employee is eligible to make a claim would be likely to weed-out some of the more frivolous claims based on short term employment. A six month eligibility criteria with the one employer represents a fairer balance between the concerns of business (especially small business) and employees.

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44 *Hansard*, p EWRSBE 64.

45 Submissions Vol 1, Submission 11, Martin Willoughby-Thomas, Barrister & Solicitor, p 171.

Costs involved in unfair dismissal

1.65 The Committee received evidence that many employers settle unfair dismissal cases even when there was no merit in the case in order to avoid additional costs in both time and money to their businesses. The Committee also heard evidence that many employees did not pursue an unfair dismissal case because of the financial burden, particularly where they were unemployed at the time they would be required to pursue the claim. Data from the Australian Industrial Relations Commission indicates that only 7 per cent of unfair dismissal applications are arbitrated with the remaining 93 per cent settled or other wise resolved. [46]

1.66 In evidence to the Committee, Mr Grant Poulton from Australia Business Ltd stated:

> …I would estimates that at least three-quarters [of the cases dealt with by Australia Business during 1998] were settled without regard to question of merit, of relative strength. They were settled on the basis that…it was going to cost X dollars; it could be got out of for a figure somewhat less than X to settle it. Colloquially it is known as 'piss off' money. You get an awful lot of applicants who will try it on in the sure and certain knowledge that they will obtain something. And that is a reflection of a system which is distortionary.[47]

1.67 The Committee notes the criticisms levelled by witnesses at the current cost awarding arrangements. It notes that costs may only be awarded against employees where a claim is found to be frivolous or vexatious. The Committee notes that the legislation currently requires the Commission, when awarding costs against an employer, to take into account the impact of the order on the financial viability of the business. The Committee believes that there should be a greater onus on the Commission to establish at the conciliation stage the merits of a former employee's case. The Committee believes that costs should be awarded against an employee who loses a case, and that similar considerations to those contained under section 170CH of the Workplace Relations Act, be taken into account by the Commission when making an order in favour of an employer. The Committee believes that this too will provide a deterrent against frivolous claims.

1.68 The Committee notes concerns that employers may drag out an arbitration by presenting more witnesses to discourage employees from pursing their claim. However, the Committee believes that the Commission has a responsibility to conduct proceedings appropriately and should, from experience, be able to judge when either party is abusing the process. The Committee believes that the Commission should also be given the power to reprimand lawyers and law firms which it considers are recklessly engaging in 'contingency fee' cases which, if the Committee's previous recommendation is supported, could place an employee in the position of having to pay costs even though they may have engaged the lawyer on a 'no win, no fee' basis.

1.69 The costs of unfair dismissal cases are not only a concern for small business. In his submission, Mr Martin Willoughby-Thomas, barrister and solicitor in employment law and discrimination, notes that employees can only afford minimal representation, with few cases progressing beyond the conciliation stage, regardless of the merits of the case, as a result of a number of factors, including the three month probationary period, the cost of lodging a claim,

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46 Submissions Vol 1, Submission 6, Australian Business Ltd, pp 94-95.

47 *Hansard*, p EWRSBE 5.

the criteria used for reinstatement or compensation, the possibility of costs being awarded against the employee and the lower levels of compensation awarded by the Commission compared to those awarded under the former Industrial Relations Court.[48] Also, under the current legislation employees are required to pay a filing fee of $50.00 (the latest regulations have amended this to $100). For low income, recently dismissed employees this is already a financial burden although there is a workable system in place which provides a waiver of this fee in cases of financial hardship. In addition to the financial cost, a hearing process can be difficult for employees, in an environment which is unfamiliar and not necessarily empathetic. Each stage of the process can be lengthy before an arbitration outcome is reached.

1.70 The Committee notes that even if access to unfair dismissal laws is denied to employees of small business, they are still covered by contract law and may pursue a case of breach of contract in the courts which may prove more costly than the current unfair dismissal remedy. While the Committee acknowledges that this recourse is available, it does not believe that in recent experience the settlement costs of such claims would mirror the high amounts awarded in US cases. Employees excluded from the unfair dismissal jurisdiction may also have rights to unlawful termination proceedings under the Commonwealth Act.

Job security

1.71 Fears about the possibility of defending an unfair dismissal claim have been raised by small business. However, the proposed removal of right of access to the Commonwealth unfair dismissal remedy by small business employees may also increase feelings of job insecurity.

1.72 In his submission, Ms Des Moore, Director, Institute for Private Enterprise, referred to his research paper *The Case for Further Deregulation of the Labour Market* prepared on behalf of contributing members of the Labour Ministers' Council in November 1998. In this paper, Mr Des Moore states that despite widespread belief that job insecurity has increased, 'there is little direct, hard evidence to show that job insecurity has grown in practice.' The report states that:

> The OECD suggests that increased perceptions of job insecurity may be related to expectations of a greater loss when a job is lost (such as expectations that the alternative is a much lower quality job) and to the general economic performance of a country (job insecurity tending to be higher in countries with a poorer macro performance).[49]

1.73 Despite concerns about job security, OECD data shows that the average tenure of employees in Australia is approximately 6.5 years. Other studies show that, between the mid 1980s and the mid 1990s, there has been an increase in the length of time Australian men and women have remained in one job.

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48 Submissions Vol 1, Submission 11, Martin Willoughby-Thomas, Barrister & Solicitor, p 170.

49 Des Moore, *The Case for Further Deregulation of the Labour Market*, Research paper prepared on behalf of contributing members of the Labour Ministers' Council, November 1998, p 53.

1.74 Moore has suggested that some negative perceptions of job security can be linked to a delayed reaction to poor economic performance in the early 1990s, coupled with slow progress in reducing the unemployment rate. A recent International Social Science Survey for Australia indicated that in 1996-97 only 56 per cent of workers considered their job as 'very' or 'fairly' secure compared to 73 per cent of those surveyed in 1989-90.

1.75 Moore also refers to data that shows that job availability is greater than during most of the period since the 1950s. Despite increases in unemployment and part-time work, average annual hours worked has also only declined slightly since the 1970s, and the high proportion of people leaving their jobs voluntarily or accepting voluntary redundancies suggest that concerns about job security have been inflated.[50] Moore adds that '[t]he excessive media focus on down-sizings may have obscured the fact that job losses have been offset by job creation.'[51]

1.76 Moore argues that maintaining or increasing regulation of the labour market will not overcome perceptions of job insecurity. In addition to protecting those already employed, by making it harder for the unemployed to obtain a job, regulatory measures that make it 'harder and more costly to dismiss employees are likely to inhibit employers from adding to their workforce, thereby making it more difficult to reduce unemployment generally.' He continues:

> If the business sector is able to operate in an environment that is conducive to maintaining satisfactory rates of profit over the longer run, it is more likely, in turn, to have the confidence to increase and maintain employment levels through the inevitable turns in the business cycle. If it has comparative freedom to dismiss employees, that too will give it additional confidence to employ.[52]

1.77 Moore notes that while changes to unfair dismissal legislation in 1996 led to a reduction in claims under Commonwealth law, claims under State legislation increased by almost 50 per cent.

1.78 While acknowledging that employees should have the right to appeal their dismissal, Moore believes that it should not be the responsibility of an outside body, for example the AIRC, to determine whether a termination was 'harsh, unjust or unreasonable'. Moore states:

> Although the regulations imply that employers make dismissal decisions lightly, the reality is that in the great majority of cases employers will not part with an employee unless they perceive a genuine need to do so. In the last resort, it is employers who have to be responsible for making the decisions that they judge are necessary to operate the business on a profitable basis. Accordingly, just as it has come to be accepted that an employee is normally able to terminate on short notice without penalty, so, if an employer judges that the employment relationship is not working out, or that the business needs to reduce employment, it should be within his/her sole capacity to make a dismissal, subject to complying with any relevant

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50 Des Moore, *The Case for Further Deregulation of the Labour Market*, Research paper prepared on behalf of contributing members of the Labour Ministers' Council, November 1998, pp 55-56.

51 Des Moore, *The Case for Further Deregulation of the Labour Market*, Research paper prepared on behalf of contributing members of the Labour Ministers' Council, November 1998, pp 53-58.

52 Des Moore, *The Case for Further Deregulation of the Labour Market*, Research paper prepared on behalf of contributing members of the Labour Ministers' Council, November 1998, pp 58-59.

> terms of employment agreed with an employee (including as to notice) and to any relevant general legislation or common law.[53]

1.79 Moore argues that while there is little evidence that job tenure and retention rates would fall in a deregulated Australian labour market, '[e]ven if deregulation did result in an increase in job turnover, the likelihood is that job availability (as reflected in the proportion of the working age population employed) would increase.'[54] He adds:

> The likely increase in job availability would come about partly from employers' enhanced capacity to manage staff numbers and/or to negotiate reductions in remuneration if business conditions deteriorate. This would encourage employers to risk taking on additional employees and/or retain them in dips during the business cycle. It is a myth that a deregulated market would lead to employers to use their bargaining power to reduce employment and the conditions of employment. Employers need employees to operate businesses profitably and they compete with other employers for their services.[55]

1.80 Other evidence presented to the Committee suggested that the introduction of the Government's proposed changes would result in a 'churnover' policy where employees will be hired and then dismissed within the six month qualifying period.[56] The Committee notes Mr Bastian's comments with respect to the potential for 'churnover' employment practices:

> Mr Bastian,I will just latch on to the churning term. Churning is not an issue that small business wants…Changing staff is no great pleasure in a small business. So this whole philosophy within Labor's mind that small business will turn over staff to make a quid,a thousand dollars here or a couple of thousand dollars there,I find hard to contend with. It certainly does not apply to my own entity. My business is more worried about keeping stable staff and making a profit than it is about this constant retraining, rebedding and re-educating of staff. It is just a major drain on a person. So this churning thing is not something that small business likes.
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> In small hospitality areas, there does seem to be a churning. I think we could do with some more numbers on this. Young people are very fluid these days. They change jobs very quickly. They want to move around. As much of the churning at that level of employment comes from the employee as it does from the employer.[57]

1.81 While noting the argument that employers may dismiss long term staff and take on cheaper new staff, the Committee is persuaded that the costs and disruptions associated with the principles of a 'churnover' approach to employment make it an unlikely scenario for most small businesses.

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53 Des Moore, *The Case for Further Deregulation of the Labour Market*, Research paper prepared on behalf of contributing members of the Labour Ministers' Council, November 1998, p 60.

54 Des Moore, *The Case for Further Deregulation of the Labour Market*, Research paper prepared on behalf of contributing members of the Labour Ministers' Council, November 1998, pp 79-80.

55 Des Moore, *The Case for Further Deregulation of the Labour Market*, Research paper prepared on behalf of contributing members of the Labour Ministers' Council, November 1998, p 80.

56 See for example, Submissions Vol 1, Submission 10, Justice Research Centre, p 167, Vol 2, Shop, Distributive & Allied Employees' Association, p 8, Submission 22, ACTU, p 7.

57 *Hansard*, p EWRSBE 24.

Witnesses accompanying the department

1.82 Some members of the Committee expressed concern at the decision of the department to bring along non-departmental witnesses to appear with its representatives at the public hearing. The Committee acknowledges that, in the tight timeframe available, no individual small business operators were scheduled to appear, but notes that small business organisations had been invited.

1.83 The Committee notes that the Department believed that it would be helpful for the Committee to hear from business people who had had 'direct first-hand experience' with unfair dismissal laws, and had invited four small business operators to appear with departmental officials. The Committee notes the objections raised by non-government members of the Committee to this arrangement. However, given the terms of reference of the Committee, including the requirement to examine whether support exists within the small business community for the passage of the Bill, the presence of small business proprietors was of benefit in assessing the claims and counter claims about survey, statistical and anecdotal material. For example Mr Clive and Bryce Tonkin and Mr Clem Maloney indicated that their employment decisions in 1999 would be affected by the continued operation of unfair dismissal laws.

Conclusion

1.84 There has been no dispute that unfair dismissal is perceived to affect hiring intentions and job creation in the small business sector, although there may be disagreement about the degree to which unfair dismissal laws can be considered to be a factor.

1.85 The cause of this disagreement results in part from doubts about the methodology adopted in many surveys used to support the assertion that low job growth is linked to unfair dismissal laws. Notwithstanding debate about survey methodology, the range of surveys and the period over which they have been conducted strongly suggests that such a link exists between unfair dismissal and small business hiring intentions.

1.86 The Committee acknowledges that perceptions can be extremely important in the job market, and accepts the view that introducing the exemption will remove one of the perceived barriers to employment growth in the small business sector.

1.87 The Committee supports the need for the introduction of a six month qualifying period of employment. This provides a better balance between the interests of employers and employees in this jurisdiction. The Committee encourages employer representative organisations to disseminate advice on best practice in personnel management to all businesses and organise appropriate training as required.

1.88 In the past, working conditions and employer/employee relations have necessitated the introduction of protective measures for employees. Achieving a balance between the rights and needs of both employers and employees is difficult. What is needed, therefore, is a flexible regulatory environment which permits the easing of controls when improvements in business confidence are needed, but which can react quickly to safeguard workers' rights when employees are disadvantaged, but not be counterproductive and cut jobs or new job opportunities.

1.89 The current economic and workplace environment is one which requires job growth and increased productivity. While changes to unfair dismissal legislation is only one step

towards improving business confidence and employment, it may nonetheless eliminate one of the obstacles to job growth in the small business sector in Australia.

1.90 The Parliament has to make legislative decisions based on a 'best fit' principle. It is impossible to cater for all possibilities, and it is important that extreme cases do not compromise the passage of workable legislation. Extreme cases can be presented for both sides of the unfair dismissal debate. While these cases are real, they are exceptional and legislation cannot be expected to deal with all of them. However, the Committee believes that it is possible to address some of the concerns raised in evidence to this inquiry through other legislative and non-legislative avenues.

1.91 The Committee concludes that the concerns of small business need to be addressed, even though some of the survey results may be questioned. The Committee believes that a balance can be struck in the legislation between the needs of the employers and the rights of workers. The Committee makes the following recommendations:

Recommendation 1

1.92 The Committee supports the introduction of the six month qualifying period.

Recommendation 2

1.93 The Committee supports the introduction of the small business exemption.

Recommendation 3

1.94 The Committee recommends that industry organisations continue to prepare a simple but comprehensive factual information guide for small business employers and employees on their rights and obligations under unfair dismissal provisions, including the distinction between state and federal legislation.

Senator John Tierney Senator Jeannie Ferris Senator Winston Crane

Chair