SENATE EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS AND EDUCATION LEGISLATION COMMITTEE

CONSIDERATION OF THE PROVISIONS OF THE WORKPLACE RELATIONS AMENDMENT (UNFAIR DISMISSALS) BILL 1998

FEBRUARY 1999

ISSN 1441-9890

This document was produced from camera-ready copy prepared by the secretariat of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee. The report was printed by the Senate Printing Unit, Parliament House, Canberra.

MEMBERS OF THE COMMITTEE

Chair:	Senator John Tierney (LP) NSW
Deputy Chair:	Senator Kim Carr (ALP) Vic
Members:	Senator Jacinta Collins (ALP) Vic
	Senator Jeannie Ferris (LP) SA
	Senator Natasha Stott-Despoja (AD) SA
	Senator Karen Synon (LP) Vic
Substitute Members:	Senator Crane (LP), WA, to substitute for Senator Synon and Senator Murray (AD), WA, to substitute for Senator Stott Despoja for matters relating to Workplace Relations and Small Business
Participating Members:	Senator Eric Abetz (LP) Tas
	Senator Lyn Allison (AD) Vic
	Senator Ron Boswell (NPA) Qld
	Senator Bob Brown (AG) Tas
	Senator the Hon David Brownhill (NPA) NSW
	Senator George Campbell (ALP) NSW
	Senator Mal Colston (Ind) Qld
	Senator the Hon John Faulkner (ALP) NSW
	Senator Brian Harradine (Ind) Tas
	Senator Stephen Hutchins (ALP) NSW
	Senator Kate Lundy (ALP) ACT
	Senator Dee Margetts (GWA) WA
	Senator Kerry O'Brien (ALP) Tas
	Senator the Hon Chris Schacht (ALP) SA
	Senator John Watson (LP) Tas

Inquiry staff:	John Carter (Secretary)
	Veronica Strkalj (Senior Research Officer)
Phone/Fax:	(02) 6277 3521/(02) 6277 5706
e-mail:	eet.sen@aph.gov.au

TABLE OF CONTENTS

CHAPTER ONE

INTRODUCTION

Progress and referral of the bill

1.1 Prior to the 1998 Federal Election, the Government released its workplace relations policy, *More Jobs, Better Pay*, in which it undertook to change the unfair dismissal laws by exempting small business from the existing legislation and introducing for new employees of all businesses a qualifying period before being able to make an unfair dismissal claim. The policy also stated that '[a] re-elected Coalition Government will have a fresh electoral mandate to implement this measure as a matter of high priority.' Following the election, this policy was incorporated in the Workplace Relations Amendment (Unfair Dismissals) Bill 1998, which was introduced into the House of Representatives on 12 November 1998. The bill was read a second time on 1 December 1998 and passed the House of Representatives without amendment on 2 December 1998.

1.2 On 2 December 1998, the Senate referred the provisions of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998 to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee for inquiry and report by 15 February 1999. The bill was introduced into the Senate on 3 December 1998 and the second reading debate adjourned on the same day.

Provisions and objectives of the bill

1.3 The purpose of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998 is to amend the *Workplace Relations Act 1996* to:

- require a 6 month qualifying period of employment before new employees (other than apprentices and trainees) can access an unfair dismissal remedy under the Act; and
- exclude new employees of small businesses (other than apprentices and trainees) of 15 or fewer employees from the unfair dismissal remedy under the Act.[1]

1.4 The bill would not affect the scope of unfair dismissal laws under state legislation or Commonwealth laws dealing with 'unlawful' dismissals. The bill would only affect employees (but not trainees or apprentices) hired after the date the Act comes into effect.[2]

1.5 Exemptions from unfair dismissal provisions are listed under section 170CC of the *Workplace Relations Act 1996*, with provision for further exemptions where certain criteria are met. The Government may exempt from the unfair dismissal provisions employees in relation to whom the operations of these provisions cause or would cause substantial problems due to their particular conditions of employment or the size and nature of the undertakings in which they are employed. The Government argued that on its analysis of the evidence before it, small businesses employing 15 or fewer people met the latter criteria for exemption from provisions relating to unfair dismissals. The Government stated that

---

1 Explanatory memorandum, p. 1.

2 Bills Digest No. 36 1998-99.

exempting small business from the unfair dismissal laws would promote jobs growth.[3] The decision to introduce a six month qualifying period was aimed at providing a 'fairer balance between the rights of employers and employees in this statutory cause of action' and to 'deter frivolous claims'.[4]

Background to the bill

1.6 In Australia, the small business sector has always been considered a job-creating area. It has been estimated that small business constitutes 97 per cent of all private sector businesses, 49 per cent of all non-agriculture private sector business employment and employs over 2.7 million people.[5]

1.7 Small businesses typically have five to 10 employees, with the principal owner present in the workplace, and are predominantly non-union.[6] Some 83 per cent of small businesses are non-unionised compared to 36 per cent of larger private sector workplaces and 26 per cent of all larger workplaces. The principal owner is more likely to be present in a non-unionised workplace. The majority of workers in the small business sector are full-time, with two-thirds of these being men. Women are more likely to be employed part-time and are twice as likely as men to be employed on a casual basis.

1.8 The first significant changes made to Commonwealth termination of employment legislation were incorporated in the *Industrial Relations Reform Act 1993*. It established a rights based system which extended termination of employment protection to all employees and established Commonwealth primacy over state-based systems with respect to termination of employment. Regulations made pursuant to the legislation excluded fixed term, casual and probationary employees, and specified classes of trainees. 1994 amendments to the Industrial Relations Act restricted access to the termination of employment provisions to employees earning $60,000 or less per annum and set an upper limit for compensation that could be awarded. The Keating Government used its regulation powers to exclude categories of employees from unfair dismissal laws on some five occasions between 1994 and 1996. The Keating Government used ILO Convention 158 as the basis for its unfair dismissal regime and incorporated that Convention in its legislation. That Convention (article 2(5)) provided for the exclusion from the application of the Convention 'limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them'. In addition, the onus of proof was transferred from the employer to the employee in establishing whether the grounds for dismissal were prohibited under the Act. Further changes were made to the legislation in 1996, which removed access to the termination of employment provisions in cases where there was an alternative under another relevant law, and required the Industrial Relations Court to take all circumstances of the case into account, so as not to focus on procedural fairness alone.

---

3 Second Reading Speech, 1 December 1998.

4 Second Reading Speech, 1 December 1998.

5 Alison Morehead *et al*., *Changes at Work. The 1995 Australian Workplace Industrial Relations Survey*, South Melbourne, 1997, p 299.

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

1.9 In 1996, the Howard Government introduced the Workplace Relations and Other Legislation Amendment Bill 1996, which removed the jurisdiction of the Industrial Relations Court to the Federal Court, reduced the jurisdiction of the federal tribunal to hear unfair dismissal cases, changed the statutory definition of 'fairness', created separate streams for the handling of unfair dismissal and unlawful dismissal cases, introduced a mandatory conciliation stage, increased the power of the Australian Industrial Relations Commission to award costs against employees if claims are found to be vexatious, and introduced a $50.00 filing fee. When the High Court ruled against the use of the external affairs power to cover all employees and override state systems in relation to unfair dismissal, the operation of the Commonwealth law was restricted to Commonwealth and Territory employees and employees covered by federal awards.

1.10 Regulations introduced in December 1996 excluded from the unfair dismissal remedy casuals who had not been engaged continuously for 12 months, employees on probation where the probationary period does not exceed three months and employees absent from work for medical reasons for a period of three months if not in receipt of paid sick leave. Further undertakings by the Government to the small business sector were included in July 1997 regulations in the form of an exclusion from unfair dismissal provisions of employees with less than 12 months continuous employment and who work for a small business of 15 or fewer employees. These regulations arose from the Government's response in March 1997 to the Bell Committee's Small Business Deregulation Task Force established in 1996. The regulations were disallowed by the Senate.

1.11 The Workplace Relations Amendment Bill 1997, proposing a permanent exemption for small business of 15 or fewer employees from unfair dismissal laws was introduced into the Senate in September 1997 and referred to the Senate Economics Legislation Committee for inquiry and report. The Government majority on the Committee recommended the passage of the bill with the Opposition and Australian Democrat members presenting dissenting reports. The Bill was defeated in the Senate in October 1997. A Bill with identical provisions to the Workplace Relations Amendment Bill 1997 was introduced into the Parliament in November 1997 and defeated in the Senate in March 1998.[7]

1.12 In introducing the present bill, the Government argued that it had a mandate to proceed with the proposed changes, because it had outlined them in its workplace relations policy, *More Jobs, Better Pay* during the election campaign. The Government argued that the fear of costs, not only of the settlement, but also stress, cost to business in lost time, disruption in working relationships and the cost of defending a claim, adversely affected small business employing intentions. The Government cited a number of surveys which supported its position on the exemption of small business from unfair dismissal laws, including the 1996 Morgan & Banks Survey, the April 1997 Recruitment Solutions Survey, the May 1997 NSW Chamber of Commerce and St George Bank Survey, the 1997 National Institute of Labour Studies report *Trends in Staff Selection and Recruitment*, the October and November 1997 Yellow Pages Small Business Index surveys and 1998 surveys by the NSW, South Australian and Queensland state chambers of commerce. A brief summary of the results of these and other surveys is outlined in the next chapter.

7 Bills Digest No. 36. 1998-99.

Unfair dismissals – the current law (Commonwealth)

1.13 The law relating to termination of employment is dealt with under Part VIA, Division 3 of the Workplace Relations Act 1996 (the Act).

1.14 The object of the division is, *inter alia*, to ensure that remedies for employees, whose termination of employment is determined to have been 'harsh, unjust or unreasonable' or 'unlawful', constitute a 'fair go for all' with respect to the employees and employers concerned.[8]

1.15 Applications for remedies for terminations, which are considered 'harsh, unjust or unreasonable', are dealt with under Part VIA, Division 3, Subdivision B of the Act. Subdivision B applies to employees who, prior to the termination, were:

- a Commonwealth public sector employee
- a Territory employee (or Victorian employee[9])
- a Federal award employee who was employed by a constitutional corporation[10]
- a Federal award employee who was a waterside worker, maritime employee or flight crew officer engaged in trade or commerce between the states, within a territory, between a state and territory, between two territories or between Australia and a place outside Australia.

1.16 Section 170CC provides that regulations made under the Act may exclude from the operation of Subdivision B, 'specified classes' of employees which are included in any of the following classes:

- employees engaged under contract for a specified time or task
- employees serving a qualifying or probationary period
- employees employed casually for a short period
- employees whose terms of employment included protection in respect of termination of employment
- employees in relation to whom the operations of these provisions cause or would cause substantial problems due to
    - their particular conditions of employment
    - the size and nature of the undertakings in which they are employed.

1.17 Employees may also be identified as a class of employees that may be excluded from the operation of these provisions if:

---

8 *Workplace Relations Act 1996*, section 170CA.

9 In late 1996, complementary laws were passed by the Victorian and Commonwealth Parliaments to transfer jurisdiction of various industrial relations matters from Victoria to the Commonwealth.

10 That is, 'foreign corporations' and domestically formed companies carrying on financial or trading activities within the meaning of section 51(xx) of the Constitution.

- the employees' remuneration immediately prior to termination was not wholly or partly based on commission or piece rates and the rate of remuneration applicable to the employee exceeds a rate specified in the regulations; or
- the employees' remuneration immediately prior to termination was based wholly or partly on commission or piece rates and the rate of remuneration taken to be applicable to the employee exceeds the rate specified in the regulations.

1.18 Under section 170CE(1)(a) of the Act, an employee whose employment has been terminated may apply to the Australian Industrial Relations Commission (AIRC) for relief on the grounds that the termination was 'harsh, unjust or unreasonable'.[11]

1.19 Except in specified circumstances[12], termination of employment on the basis of the following reasons would be treated as 'unlawful' termination and therefore would not fall within the scope of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998:

- temporary absence from work because of illness or injury[13]
- trade union membership or participation in trade union activities outside working hours or in working hours with the employer's consent
- non-membership of a trade union
- seeking to act, or having acted, as a representative of employees
- filing a complaint or participating in proceedings against an employer involving alleged violation of laws
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin
- refusing to negotiate, make, sign, extend, vary or terminate an Australian Workplace Agreement
- absence from work during maternity or other parental leave.[14]

1.20 Under section 170HB, an employee can not make an application under section 170CE in relation to the termination of employment if the employee has already commenced proceedings—and the proceedings have not been discontinued or have failed for want of jurisdiction—in respect of that termination under another provision of the Act, under

---

11 The section also provides other grounds for an employee to apply to the Commission for relief including cases where a termination of employment is unlawful (s.170CK), where the relevant authorities have not been notified when the employment of 15 or more employees is to be terminated (s.170CL), where sufficient notice has not been given—or, if notice has not been given, the employee has not been paid compensation or the employee has not engaged in serious misconduct (s.170CM)—or where a termination would be in contravention of a Commission order (s.170CN).

12 See *Workplace Relations Act 1996*, s.170CK(3) and(4).

13 Under 1996 regulations (Statutory Rules 1996, No. 307), employees may be lawfully dismissed if they have been absent from work for a continuous period of three months (or for more than three months in a period of 12 months) except when in receipt of paid sick leave.

14 *Workplace Relations Act 1996*, section 170CK(2).

another law of the Commonwealth or under a law of a state or territory alleging that the termination was harsh, unjust or unreasonable, for a reason other than a failure by the employer to provide a benefit to which the employee was entitled on the termination of employment.

1.21 On 17 December 1998, the Commonwealth Government announced its decision to introduce its unfair dismissal policy by the amendment of regulations made under s170CC(1) of the *Workplace Relations Act 1996.* [15] The Workplace Relations Amendment Regulations 1998 (No. 2) and (No. 3) were gazetted on 18 December and provided for small businesses of 15 or fewer employees to be excluded from the Commonwealth unfair dismissal legislation, for a six month qualifying period to be introduced during which time new employees do not have access to unfair dismissal provisions, and for the filing fee for a federal unfair dismissal application to be increased from $50 to $100 from 1 January 1999.[16]

1.22 In 1996, effective from 1997, Victoria 'transferred' its industrial jurisdiction to the Commonwealth. Termination provisions under the *Workplace Relations Act 1996* are administered by federal tribunals with respect to Victorian employers and employees.

1.23 The Northern Territory and Australian Capital Territory operate under Commonwealth legislation with respect to unfair dismissal laws.

Twelve month review of federal unfair dismissal provisions

1.24 The termination of employment provisions set out in Part VIA, Division 3 of the *Workplace Relations Act 1996* (the Act), reflect the changes made to the previous unfair dismissal laws and commenced on 31 December 1996. Prior to the introduction of these changes, a Small Business Deregulation Taskforce presented its report *Time for Business* to the Commonwealth Government. In its response, *More Time for Business*, the Government undertook to review the new unfair dismissal provisions of the Workplace Relations Act 12 months after their introduction. This review was published in December 1998.

1.25 In relation to small business, the Review recommended that the Government note that the 1996 changes to the law had 'not alleviated the concerns of small business about the impact of unfair dismissal laws upon them.' In its response the Government referred to its commitment to exempt small business from the operation of the unfair dismissal laws. It reiterated its view that the proposed measure was a job creation initiative and that it had a mandate to introduce the changes.

1.26 The Review also drew the Government's attention to cases where the validity of probationary periods determined in advance were questioned at the AIRC, which had created uncertainty with respect to the application of probationary periods. The Review also noted that there were conflicting views on the reasonableness of establishing an extended probationary period for all employees. The Government responded by claiming that the

15 *Unfair Dismissal Laws Implemented through Regulation*, Media Release, The Hon Peter Reith, MP, Minister for Employment, Workplace Relations and Small Business, 17 December 1998.

16 Cf. Statutory Rules 1998 No. 338 and Statutory Rules 1998 No. 353.

proposed six month qualifying period for access to the Commonwealth unfair dismissal remedy would introduce 'greater certainty and fairness in this area'.[17]

The Committee's current inquiry

1.27 The Committee advertised its inquiry on Saturday, 5 December 1998. The Committee received 24 submissions and held one public hearing in Canberra on Friday, 29 January 1999. Details of submissions received and witnesses who appeared at the hearing are listed at Appendix 1.

Acknowledgment

1.28 The Committee would like to thank departmental officers, and those organisations and individuals that were able to provide submissions or appear at the public hearing. The Committee would also like to thank Mr Stephen O'Neill from the Department of the Parliamentary Library for advice provided on unfair dismissal laws.

17 Department of Employment, Workplace Relations and Small Business, *Twelve Month Review of Federal Unfair Dismissal Provisions* (including Federal Government Responses to the Review), December 1998.

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.

---

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

---

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

---

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

---

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.

---

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

---

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

---

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]

---

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

---

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

---

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.

---

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,

---

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.

---

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

---

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.
>
> 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.

---

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

APPENDIX 1

LIST OF SUBMISSIONS AND WITNESSES

List of submissions

01 Institute for Private Enterprise, SOUTH YARRA, VIC, Mr Des Moore

02 Jarol Pty Ltd, ROZELLE, NSW, Mr Rocco Falcomata

03 Michael Taliangis & Associates, PANORAMA, SA, Mr Michael J Taliangis

04 Australian Chamber of Commerce and Industry, MELBOURNE, VIC, Mr Reg Hamilton

05 Tonkin's Car Audio Pty Ltd, ADELAIDE, SA, Mr Clive Tonkin

06 Australian Business Ltd, NORTH SYDNEY, NSW, Mr Jack Goluzd

07 Australian Retailers Association, MELBOURNE, VIC, Mr Mark Diserio

08 MAS Mediation & Advocacy Services, MELBOURNE, VIC, Mr Gary Bowman

09 Business Council of Australia, MELBOURNE, VIC, Mr David Buckingham

10 Justice Research Centre, SYDNEY, NSW, Associate Professor Rosemary Hunter

11 Martin Willoughby-Thomas Barrister & Solicitor, FITZROY, VIC, Mr Martin Willoughby-Thomas

12 Shop Distributive & Allied Employees' Association, MELBOURNE, VIC, Mr Joe De Bruyn

13 Workplace Relations Policy Division Workplace Services

Department for Administrative and Information Services, ADELAIDE, SA, Ms Mary Jo Fisher

14 Illawarra Business Chamber, WOLLONGONG, NSW, Mr John Roach

15 Newcastle & Hunter Business Chamber, NEWCASTLE WEST, NSW, Mr David Simmons

16 National Federation of Independent Business Inc, CIVIC SQUARE, ACT, Mr John Farrell

17 Victorian Employers' Chamber of Commerce and Industry, HAWTHORN, VIC, Mr David Gregory

18 Australian Liquor, Hospitality and Miscellaneous Workers Union, HAYMARKET, NSW, Mr Jeff Lawrence

19 Department of Employment, Workplace Relations and Small Business, CANBERRA, ACT, Dr Peter Shergold

20 Job Watch Inc, CARLTON, VIC, Ms Wendy Tobin

21 Chamber of Commerce and Industry Western Australia, EAST PERTH, WA, Mr B D Williams

22 Australian Council of Trade Unions , CARLTON SOUTH, VIC, Mr Tim Pallas

23 Australian Liquor, Hospitality & Miscellaneous Workers Union (WA Branch), SUBIACO, WA, Ms Helen Creed

24 Australian Small Business Association, ADELAIDE, SA, Mr Peter Siekmann

List of witnesses who attendend the public hearing in Canberra, 29 January 1999

ANDERSON, Mr Alex, Assistant Secretary, Legal Policy Branch, Department of Employment, Workplace Relations and Small Business

BALLARD, Mr Mathew, Labour Relations Adviser, Australian Chamber of Commerce and Industry

BASTIAN, Mr Robert Andrew, Chief Executive, Council of Small Business Organisations of Australia

BOWMAN, Mr Gary Charles, Proprietor, MAS Mediation and Advocacy Services

CONNOLLY, Ms Elizabeth, Legal Spokesperson, Australian Small Business Association

DENVIR, Mr Frank John

DISERIO, Mr Mark Vincent, Manager, Human Resource Services, Victoria Division, Australian Retailers Association

FARRELL, Mr John Edward, ACT President, National Federation of Independent Business

GOLUZD, Mr Jack, General Manager, Workplace Relations, Australian Business Ltd

GREGORY, Mr David Bruce, Manager, Workplace Relations Policy, Victorian Employers' Chamber of Commerce and Industry

HUNTER, Associate Professor Rosemary Claire, Principal Researcher, Justice Research Centre

KATES, Dr Steven Ian, Chief Economist, Australian Chamber of Commerce and Industry

LEAHY, Mr Barry, Group Manager, Workplace Relations Policy Group, Department of Employment, Workplace Relations and Small Business

MALONEY, Mr Clement Frank

PALLAS, Mr Tim, Assistant Secretary, Australian Council of Trade Unions

PARSONS, Ms Jo, Spokesperson on Industrial Relations, Australian Small Business Association

POULTON, Mr Grant, Senior Policy Analyst, Australian Business Ltd

REHN, Ms Kerry Ann, Assistant Secretary, Workplace Relations, ACT Team, Department of Employment, Workplace Relations and Small Business

RONFELDT, Mr Paul, Doctoral Student, Department of Industrial Relations, University of Sydney

RYAN, Mr John, National Industrial Officer, Shop, Distributive and Allied Employees' Association

SIEKMANN, Mr Peter, National President, Australian Small Business Association

SWANCOTT, Mr Neal, National Industrial Officer, Australian Liquor, Hospitality and Miscellaneous Workers Union

TONKIN, Mr Bryce Keith, Managing Director, Tonkin's Car Audio Pty Ltd

TONKIN, Mr Clive Keith, Director and Owner, Tonkin's Car Audio Pty Ltd

YILMAZ, Mrs Leyla, Manager, Industrial Relations, Victorian Automobile Chamber of Commerce

Workplace Relations Amendment (Unfair Dismissals) Bill 1998

Opposition Minority Report

February 1999

Minority Senate Report into the *Workplace Relations Amendment (Unfair Dismissals) Bill 1998*

Labor Minority Senators believe that the proposal in the Workplace Relations Amendment Bill (Unfair Dismissals) Bill 1998 to:

- Require a 6 month qualifying period of employment before new employees (other that apprentices and trainees) can access an unfair dismissal remedy under the Act; and

- Exclude new employees of small business (other than apprentices and trainees) of 15 or fewer employees from the unfair dismissal remedy under the act,

is seriously flawed and its introduction is not supported by credible evidence.

History
In 1996 the Government introduced the Workplace Relations and Amendment Act which amended the previous Labor Government's unfair dismissal laws.
Regulations to exclude access to the unfair dismissal laws by employees with less than 12 months continuous employment and those who worked for a business of 15 or fewer employees were introduced by the Government in July 1997.

The Senate disallowed these regulations.

The Workplace Relations Amendment Bill 1997, proposing a permanent exemption for small business of 15 or fewer employees from the unfair dismissal laws was introduced into the Senate in September 1997 and referred to the Senate Economics Legislation Committee for inquiry and report.

Minority Labor and Democrat Committee members presented dissenting reports recommending that the Bill not be passed.

The Bill was defeated in the Senate in October 1997.

A further bill with identical provisions was introduced into Parliament in November 1997 and defeated in the Senate in March 1998.

On the 12th November 1998 the Government introduced the Workplace Relations Amendment (Unfair Dismissal Bill) 1998 into the House of Representatives.

On the second of December 1998 the Senate referred this Bill to the Senate Employment Workplace Relations, Small Business Education Legislation Committee for examination.

The measures proposed in the Bill were contained in the Workplace Relations Amendment Regulations 1998 (no 2) (SR No 338 of 1998) which was gazetted on the 18th December 1998.

Labor Senators have serious concerns about the Minister's actions in introducing these regulations particularly when the legislation bill had been referred to the Committee for inquiry.

Mr Reiths " Evidence"

In his second reading speech Mr Reith spoke of the evidence to support the small business exclusion. He claimed:

" *Senators who spoke against the previous bill to introduce the Small Business exclusion said there was insufficient evidence of the need of the Bill and its benefits. There was plenty of evidence but they would not allow themselves to be convinced.*

That evidence included the Morgan and Banks' 1996 survey, the April 1997 Recruitment solutions survey, and the May 1997 New South Wales Chamber of Commerce and St George Bank survey. The Council of small Business Organisations of Australia said that small business would create 50,000 jobs if the Bill was passed….

Then there was the Yellow Pages Small Business Index Survey conducted in October and November 1997 and further surveys conducted in March 1998 and July 1998 by the New South Wales, South Australian and Queensland Chambers.

These surveys, and others like them, make completely plain the importance which business attaches to this issue."

The difficulty for Mr Reith is that his claims do not stand up to close analysis. An examination of the evidence he cites indicates that he has either selectively chosen statistics which buttress his case, has relied on surveys with dubious methodology, relied on guesses or simply ignored data which he views as not helpful to his case.

Mr Reith has then directed his own Department to follow his example. This has placed the Department in an invidious situation of having to ignore definitive unbiased surveys such as its own AWIRS 95 survey, which contradict the Ministers rhetoric.

The Minister has also further compromised officers of his own Department by directing that they present his selected witnesses from small business to a hearing by the Committee on this Bill as part of its own submission to the Committee. The inappropriateness of this directive was demonstrated when one of the witnesses testified about a case that is currently before the Australian Industrial Relations Commission.

This matter has been referred to the procedures committee with the respect to the Minister's lack of regard for due process and his disregard for appropriate convention.

A Review of the Current Law

In considering the proposed amendments to the Governments own unfair dismissal laws it is worth considering the changes that the Howard Government made to the previous Labor Governments Unfair Dismissal Laws.

What has fundamentally changed since the amendment of the former Labor Governments legislation is the onus of proof from the employer to the employee in unfair dismissal cases.

With the introduction of the unfair dismissal provisions of the Workplace Relations Act 1996 the onus of proof placed upon the employee to prove that they have been subjected to unfair, harsh or unjust treatment in the dismissal process.

This is a significant and fundamental change.

Unfair dismissal hearings are now heard in the Industrial Relations Commission instead of the Federal Court, which reduces costs to the applicant. However costs may be awarded against the employee if it is considered that the claim was vexatious or frivolous.

The Government introduced an application fee of $50 as a disincentive to spurious or frivolous claims. Additionally the Commission is required when assessing an unfair dismissal claim not only to assess whether an employee has been dealt with unjustly or harshly but whether or not the employer is able to viably deal with any costs or award of damages in lieu of reinstatement

Accordingly you could, as an employee, have a scenario where the Commission recognises that you have been unfairly and unjustly dealt with by your employer but you are unable to seek appropriate restitution due to the financial viability of the employer.

Procedural fairness is no longer a mandatory requirement, probationary employees are excluded from access to the unfair dismissal legislation and casual employees cannot access the legislation until they have been employed for a 12 month period. Also those on term contracts are denied access to the unfair dismissal laws.

It is our view that the existing legislation favours employers with respect to unfair dismissal with the ancillary effect of encouraging small businesses to put employees on limited term contracts.

Our position

Labor Senators will not support the Bill

We have in our previous minority report stated our objections and dealt with arguments put forward to amend the unfair dismissal provisions of the Workplace Relations Act 1996. None of these concerns have been adequately addressed in spite of Minister Reith's rhetoric.

Core Concerns

In arguing against the bill Labor Senators categorise their concerns in 3 core areas. Indeed we would restate our concerns as we have done in our previous minority report.

1. ***Our concern remains that the Bill contravenes the Prime Ministers key commitment to the Australian people when he claimed that under his Government employees would not be worse off under his government's industrial relations legislation.***

2. ***Our concern remains that the exemption is unfair.***

3. ***Our concern remains that the exemption is unnecessary.***

Core Concerns

1. That the Amendment remains a breach of the Prime Minister's key commitment to the Australian people when he claimed that under his Government employees would not be worse off.

We have consistently seen past evidence of the Government reneging on election commitments and on core and non-core promises.

The Government first introduced changes to its unfair dismissal laws, by Regulation, in April 1997. This action completely contradicted the public position of the Coalition cited in an article in the Sydney Morning Herald on the 20th February 1996 where a small business exemption was explicitly ruled out:

" *The Coalition has flatly ruled out any exemption for small business in its redrafted unfair dismissal laws, despite a plea that the sector should not be subject to the same treatment as ' the big end of town'. The author of the policy, the Opposition's industrial relations spokesman, Mr Peter Reith, said the redrafted system would not contain any exemptions"*

In the lead up to the 1996 election Peter Reith publicly promised that all employees would have access to appeal against unfair dismissal:

" *Look, our position's very clear. If you've been unfairly dealt with at work, you should have a right of appeal."* (ABC daybreak, 28 February 1996)

This commitment was reflected in the Coalitions pre – election policy "Better Pay for Better Work" which stated:

"The Coalition believes that employees should have access to a fair and simple process of appeal against dismissal – based on the principle of a ' Fair Go All Round" (18th February 1996)

The most damning piece of evidence with respect to the Governments breach of its commitments comes in Senator Andrew Murray's October 1997 Minority Report on the unfair dismissal law amendment. In this report Senator Murray states:

" Prior to the 1996 Election, the Coalition promised to replace Labor's Laws with a 'fair go all round for' for employers and employees. While little detail was provided, 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.

"The Democrats prior to the election and since, supported the Coalition's policy direction. During the election campaign, ***COSBOA asked the Coalition, the Democrats and the ALP to support an exemption for small business and all three parties refused****, on the basis that it would breach the 'fair go all round' approach."*

Mr Reith has made much of his so-called mandate arising from the 1998 Federal Election campaign. In his second reading speech on the Bill he claimed:

" These initiatives were specifically outlined by the Coalition parties during the recent Federal Election campaign in our workplace relations policy, More Jobs, Better Pay. We have a specific electoral mandate to proceed with their implementation as a matter of priority. In regard to the small business exemption we have a fresh mandate, given the rejection by the Senate of similar proposals during the first term of the Howard Fisher Government."

The fallacy of the so called mandate is amply demonstrated by the fact that the Coalition obtained less than 50% of the vote for the House of Representatives and approximately 40% of the vote in the Senate.

The Government's amendments to the unfair dismissal laws clearly discriminate against workers of small business with 15 or less employees. It also clearly discriminates against those new employees on a six-month qualifying period.

These employees will be demonstrably worse off under the proposed legislation. It removes a substantial group of employee's rights to access appropriate protection from unfair dismissal. How then can the Government claim that workers are not worse off under this legislation and have been given a 'fair go all round'?

2) The Exemption Remains Unfair

As Labor Senators noted in the previous minority report the exemption is discriminatory, arbitrary and it will add to job insecurity. None of these issues have been addressed in the current Bill.

If anything the evidence to this inquiry has amplified the unfairness involved.

The case studies presented by the SDA highlight the unjust behaviour which will be allowed to occur without redress if this Bill succeeds.

Alternatively workers may be driven to high cost common law remedies such as those which have occurred in the United States recently. Such a recourse would involve high risk and high cost for both employers and employees.

Additionally we have seen the lengths that employers will go to create $2 shelf companies to avoid their obligations to workers. The waterfront dispute with Patricks is the most obvious example. An exemption set at 15 employees will encourage unscrupulous employers to structure their company arrangements to avoid their obligations to provide secure employment.

This is not a *" fair go all round."*

3.The Exemption Remains Unnecessary

The Government has provided much rhetoric as to why small business exemption to unfair dismissal laws is warranted. We contend that it is not necessary and that evidence that the government claims that supports a change is not credible.

There are three key reasons why the proposed small business exemption to the unfair dismissal laws is unnecessary.

1) **The Government has already amended the unfair dismissal law and had stated that no further change was necessary.**

2) **That those changes had already affected the unfair dismissal claims and had made further amendment unnecessary.**

3) **There is no credible evidence to suggest that the unfair dismissal law needs to be changed.**

We would now address these key reasons

1) **The Government has already amended the unfair dismissal law and had stated that no further change was necessary**.

As has canvassed previously Labor's unfair dismissal laws were extensively amended by the Government Workplace Relations Act and came into effect on the 1st January 1997.

Statements by John Howard such as:

" We have swept away Labor's jobs destroying unfair dismissal laws"
(Ministerial statement in response to Bell Report 24th March 1997)

and Peter Reith:

' We have delivered a workable system for dealing with unfair dismissal"
(Speech on return of the Bill from the Senate, 21st November 1996)

clearly demonstrated that the Government had not believed that the introduction of further amendment to the unfair dismissal law was warranted.

Additionally the Democrats certainly believed that an exemption for small business was unnecessary.

In his minority report in October 1997 when commenting on the unfair dismissal provisions of the Workplace Relations Amendment Bill 1997 Senator Andrew Murray commented:

" The Federal Government now has the law it wanted in these respects with only minimal changes. Indeed the new Federal law (WRA 1996) is even more attuned to the needs of small business than the pre- Brereton 1993 State laws. The Democrats have delivered what we think is a fairer balancing between the rights of employers and employees. To go further would be to create a new unfair dismissal problem in reverse – the same sort of situation which, in 1993, lead to the campaign for Federal laws on unfair dismissals in the first place"

Indeed when the Government introduced its first attempt to amend the unfair dismissal legislation in 1997 Senator Murray scathingly hypothesised in his minority report on the real motives of the Howard Government in putting forward the legislation:

" *It remains my belief that the Coalition introduced this single issue Bill encapsulating gross unfairness, to provoke the Senate to absolute rejection.*

"It remains my belief that this Bill was conceived to achieve a double dissolution trigger. And in that act of creation is exposed the Coalitions utter heartlessness. It would create job insecurity and arbitrarily discriminate against one to two million employees for a political end."

The Democrats quite rightly presumed that an exemption for small business was unnecessary.

Even a Government commissioned task force into small business concluded that the exemption for small business was unnecessary

The Bell Taskforce, chaired by Mr Clarie Bell concluded that an exemption was unnecessary. After an extensive and detailed report the only recommendation that the taskforce came up with in relation to unfair dismissal laws was that the unfair dismissal laws be reviewed after 12 months operation to ensure that it is delivering a more balanced and flexible approach for small business.

The Ministers subsequent review has been as limited and selective as the evidence and analysis presented to this and previous inquiries.

2) That changes had already affected the unfair dismissal claims and made further amendment unnecessary.

In its evidence to the Economics Legislation Committee which examined the 1997 Workplace Relations Bill the Department of Workplace Relations produced the following data in relation to the effect of the Governments amendments to the unfair dismissal laws.

" As a result of the amendments, there has been a significant decrease in the number of applications made under the federal unfair dismissal legislation. In the first 37 weeks there were 10,408 applications under the then Industrial Relations Act 1988;in the first 37 weeks of 1997(up to 12 September 1997) there were 4,801 applications under the Workplace Relations Act – that is a decrease by 54%. This decrease is not only the result of the change to the scope of the federal jurisdiction. Combined totals of Federal and State applications (excluding applications in Queensland, in either federal or state jurisdictions) decreased by 20%, for the period from January – July 1997 compared with January – July 1996.

More recent data has been provided by the Department of Workplace Relations and Small Business in its submission to the Employment, Workplace Relations, Small Business and Education Committee on the 21 January 1999.

" In the period 13 December 1996 to 31 December 1997, the first 12 months of operation of the provisions, 7,461 applications were filed. This represented a 49% reduction in claims compared with the same period in 1996. …..

From 1 January – 31 December 1998, there were 8,186 applications in respect of termination of employment in the federal jurisdiction. This represents a 44% decrease, compared to the same period in 1996."

This trend has assisted small business as the number of small business claims has remained in proportion to their share of the workforce during this decline.

3) There is no credible evidence to suggest that unfair dismissal laws need to be changed.

In their submission to the committee the Department of Workplace Relations and Small Business cited numerous surveys and other "credible" anecdotal and other data to support its case.

Examples of this selectiveness are detailed in the following surveys cited by the Department and in one surveyed it ignored.

Australian Workplace Industrial Relations Survey 1995

One point that astounded Labor minority members was the continued omission of data from the most comprehensive survey of employment – including small business ever conducted in Australia – the Australian Workplace Industrial Relations Survey 1995.

It is all the more extraordinary given that the AWIRS 95 specifically addresses the question whether the unfair dismissal laws prevented small business from employing new staff.

It is important to again note that this survey was conducted in 1995 when Labor's unfair dismissal laws were in operation and when unfair dismissal law had been targeted by the then Coalition in a major campaign.

In response to a survey which asked, *why haven't you recruited new employees?* 68% of businesses responded that they didn't need any more employees. 33% gave as their reason insufficient work, lack of demand for their product or low profitability.

Unfair dismissal law did not rate a mention but may have been a fraction of the 6% response of high employment costs.

Another survey in the AWIRS specifically asked small business
(categorised as businesses employing less than 20 employees) : *why haven't you recruited more employees?*

Again only 6% of respondents mentioned high employment costs. It must be assumed that a fraction of the respondents couldn't recruit more employees because of the unfair dismissal laws.

In a third AWIRS survey small businesses were asked: what, if any, significant efficiency change would you like to make at your workplace but are unable to?

The leading response, by 21% of small business, was to improve or change buildings and equipment.

Other leading responses were to improve technology (16%), change staff numbers (9%), increase productivity (7%), have an enterprise agreement (7%) , abolish penalty rates (7%) and other significant efficiency changes (20%).

The Response ' change unfair dismissal laws' was provided by only 6% of small business respondents.

The most relevant piece of AWIRS 95 survey evidence, that was unpublished, but was reported in an ACCIRT reference was a survey into reasons for not recruiting employees during the previous 12 months

66.2% of small business respondents indicated that they didn't need any more employees. 23% listed insufficient work as the main impediment.

Only 0.9% of respondents nominated that they had not recruited employees due to unfair dismissal legislation.

It is obvious why the Department did not refer to its own data. It demonstrates that there is no need to change the unfair dismissal law.

The Yellow Pages Small Business Index Surveys (1997 and 1998)

In its submission DEWRSB referred to the Yellow Pages Small Business Index surveys that were undertaken in 1997 /1998. The Department referred to one particular survey conducted from the 30th October 1997 to 12th November 1997 where specific questions were asked about unfair dismissal laws.

Whilst this yielded figures such as 79% respondents thought small business would be better off if they were exempted from unfair dismissal laws and 38% said they would recruit more employees if they were exempted from unfair dismissal laws the methodology of this survey has been called into question.

Associate Professor Rosemary Claire, Principle Researcher of the Justice Research Centre, raised concerns regarding the methodology utilised in the survey questions on unfair dismissal in this October 1997 Survey.

When appearing before the Committee inquiry into the 1998 Unfair Dismissal Bill Associate Professor Claire was asked to identify the flaw in the methodology of the question:

Would you be more likely to recruit more employees if you were exempted from current unfair dismissal laws?

This survey question was asked in the 1997 October Yellow Pages survey "

Associate Professor Claire responded:

" It is what we call in law a 'leading question.' A question that simply asks, ' would you be likely to recruit if you were exempt from the unfair dismissal laws?' is inevitably going to achieve a response which is very different from the response that you would get if you said, for example, " What would help you to hire people?'

That is a more open ended question which allows the respondent to take into account the range of factors that might be impacting on them rather than simply drawing attention to a single factor which is then presumed to be the only factor operating in this situation."

It is also instructive to note what data from Yellow Pages Surveys from May 1997 – November 1998.that was omitted by the DWRSB in its submission to the Committee. Information that the Department assessed was quite clearly detrimental to the Minister's case for amendment of the unfair dismissal law.

In the May 1997 Yellow Pages Survey in the section" The Prime Ministers Response to the Bell Task force, More Time for Business Statement". 37% of
Businesses surveyed were aware of the Statement. Of this 37%, 15% were aware of the unfair dismissal bill initiative."

In the May 1998 Survey in the area of "Small Business Issues", respondents were asked to rate the importance to their business prospects of 12(apparently unspecified) policy initiatives. A four-point level of importance scale was also used in conjunction with this question.

Unfair dismissal changes rated 7 out of 12 in priority with a mean rating of 2.68 on the Four Point importance scale.

Following this question small business proprietors were asked to nominate which of the 12 factors was the most important issue to them. 6% mentioned unfair dismissal laws.

In the August 1998 Survey under the category of "Small Business Issues" proprietors were asked what the most important small business issues were for government. 6% of respondents nominated unfair dismissal laws.

St George Bank / State Chamber of Commerce (NSW) Survey

Further evidence of the selective utilisation and interpretation of data manifested itself in the Departments submission to the Committee which cited a press release dated 22 March 1998 by the NSW Chamber of Commerce.

It appears that the Department chose to utilise the press release issued by the Chamber rather than analyse the data provided in the actual survey, which was conducted in December 1997.

In its evidence the Department claimed that it had not seen the actual survey when subjected to questions on this issue by Senator Jacinta Collins at the Committee hearing into the Unfair Dismissal Bill on the 29th January 1999:

Senator Collins asked:

" Are you aware of the fact that roughly 50% of the New South Wales Chamber of Commerce and Industry employers surveyed who responded positively to the question that they had experienced an unfair dismissal claim did not believe it affected their hiring intentions"

A Departmental Officer Mr Leahy responded:

" We do not have that information Senator"

Additionally the Department in its submission, when citing the NSW Chamber of Commerce press release claimed that 51% of small businesses surveyed stated that the current unfair dismissal laws were a deterrent to employing more staff.

In fact the actual data from the survey indicated that of the approx 32.5% of small business respondents that had been involved in an unfair dismissal case, only half confirmed that the current laws were a deterrent to new staff.

Unfortunately despite the Ministers claims with respect to evidence,
the Department neither sought nor claimed to provide a comprehensive discussion or analysis of all the survey material, research findings and points of view relevant to the subject matter of the Bill"

The references to surveys and related material included in the submission
were included for the purpose of explaining the Governments policy position."

Evidence Concerning the Proposed 6 Month Probationary Period

The only evidence before the Committee (which includes material from the SDA, ALHMWU and the ACTU not cited in the majority report), supports the view that the present legislation provides sufficient scope of flexibility and that there is no need to institutionalise a period of six months. Discretion on this matter should continue to reside with the AIRC.

Conclusion regarding evidence

There have been several surveys and reports of concern with unfair dismissal laws by organised employers but any correlations with jobs growth has not been established. No independent report or analysis confirms the Employer / Ministers claims.

Alongside the reports of organised employers seeking to have their responsibilities reduced stand in evidence the examples of workers who would lose their rights under this legislation and the lack of any credible correlation with a public gain such as increased employment that would justify such change.

We cannot agree with the majority logic at point 1.85 of their report which equates to the argument that if you say something often enough people will actually believe you.

We would suggest the Minister listen to Mr Bastian of COSBOA who pleaded for us to "*redefine the debate"*. The Government should focus on the real priorities of small business and discontinue this red herring which is inciting perceptions maintaining this debate.

Recommendation

We recommend that the bill not be passed.

Senator Jacinta Collins
ALP Senator for Victoria

Senator Kim Carr
ALP Senator for Victoria

SENATE EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS AND EDUCATION LEGISLATION COMMITTEE

Workplace Relations Amendment (Unfair Dismissals) Bill 1998

MINORITY REPORT

SENATOR ANDREW MURRAY

Australian Democrats

FEBRUARY 1999

Minority Report: Senator Andrew Murray: Australian Democrats

Workplace Relations Amendment (Unfair Dismissals) Bill 1998

The Australian Democrats fully supported, and do still support, the relevant unfair dismissal provisions of the federal *Workplace Relations Act 1996*, introduced on I January 1997.

The politics

In March 1998 the Senate defeated the *Workplace Relations Amendment Bill 1997*, which was introduced despite previous assurances from the Prime Minister and the Minister for Workplace Relations that they would not discriminate against employees in this fashion. The political climate of the time meant that the Government wanted a double-dissolution trigger, to use for political pressure on the Senate. There is a strong suspicion that the Coalition introduced that particular bill to provoke the Senate to reject the Bill and achieve a double-dissolution trigger. They were successful in getting the trigger.

Having rediscovered the popularity of this unfair dismissal campaign with the business community at large, the Coalition continues to press the case. The question is, has the case for exempting small business from the federal unfair dismissals legislation improved?

Business motivations

All my interactions with business on this issue, either private or public, have convinced me that at the heart of business opposition to unfair dismissal laws – whether by small business, big business, or business organisations – is a basic and fundamental belief that employers should be able to hire and fire at will. Since this is their motive, facts such as there being only *twenty* federal small business unfair dismissal applications in South Australia for instance, are simply swept aside by South Australian employers and their organisations. If there were only *one* unfair dismissal application, in my view they would still oppose the law, because they oppose it in principle. That is why business is undeterred by facts which contradict their assertions.

A witness, Mr Moore, expressed this very view succinctly

> **Mr Moore -** ….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 terms of employment agreed with an employee (including as to notice) and to any relevant general legislation or common law.[1]

The answer to such a proposition rests on the importance of work and employment to employees, and on the need to reinforce the rule of law, natural justice, and human rights in

---

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

employment relationships. Because of an underlying desire by business for power over employees it is important for democracies to regulate and monitor business interaction with their employees, and to temper business demands for excessive freedom to deal with employees just as they see fit.

The Democrats remain strongly of the opinion that the historical record and the current practice of employee termination by significant numbers of businesses is such that it remains necessary to provide an accessible and workable remedy, much quicker and cheaper than the Courts, to redress unacceptable dismissal behaviour.

Surveys

Surveys have played a large part in this debate. Some surveys indicate that there is no problem in the unfair dismissals area, or only a minor one.[2]

This is a debate riddled with perception, assertion, and anecdote. The facts are that in every jurisdiction except Victoria, *federal* unfair dismissal applications are very small in number. But perceptions rule the debate. A business perception that there is a major problem with federal unfair dismissals appears to have become reality. The perception creates the reality. The Coalition Government has avidly fuelled the perception. So have some employer organisations. In this perception the role played by those conducting surveys needs careful examination.[3]

How does one account for nearly every survey cited in evidence failing to follow sound methodological practice, instead asking loaded prompted questions? How does one account for the failure to ask the most basic of threshold questions – whether respondents fall under *federal* workplace relations legislation, (which is all the Senate can concern itself with), *or* Western Australian, South Australian, New South Wales, Tasmanian, or Queensland *state* industrial relations legislation (which the Senate can do absolutely nothing about)? How does one account for the failure to ask respondents if they know their rights and obligations under the *federal* law? Or given the way the law has changed in a few years, to ask respondents when incidents were supposed to have happened, and on what circumstances their opinions are based?

> **Senator MURRAY** - In the state in which you are resident there are two sets of laws: the New South Wales state laws and the federal laws. With regard to a respondent who fell under New South Wales state legislation, would you regard a survey which asked them a question as having any validity with regard to federal law, if the federal law was fundamentally different from the New South Wales law?
> **Prof. HUNTER** – It would certainly call into question the validity of that response. What you would have is a response that said, 'Yes, I am bothered about unfair dismissal laws', but it tells you absolutely nothing further about what kind of unfair dismissal law, which jurisdiction. It certainly does not mean that, if you remove the federal legislation, the problem would be resolved.

---

[2] Submission 10 Justice Research Centre page 5

[3] See for instance *Dismissing the Unfair Dismissals Myth* Peter Waring and Alex de Ruyter University of Newcastle

> **Senator MURRAY** - So you immediately should have a question mark over the validity of the responses of any survey which failed to ask the threshold question?
> **Prof. HUNTER** – I think so, yes…
> **Prof. HUNTER** - …if, as our analysis would suggest, the fundamental issue here is not the actual impact of the laws but people's understanding of them, then an equally valid interpretation of a result like that is people really do not understand what they are covered by.
> **Senator MURRAY** – Thank you. You were talking about leading and prompted questions. Would you describe that as typical of the techniques used in push polling?
> **Prof. HUNTER** Yes, absolutely. That is characteristic of the technique of push polling.
> **Senator MURRAY** – What do you believe push polling says about the integrity of organisations that use it?
> **Prof. HUNTER** – I think it says that there is a particular end that they wish to achieve, and this is the means that they have used to achieve it.
> **Senator MURRAY** – Would you describe it as manipulative?
> **Prof. HUNTER** – In many circumstances, yes.[4]

Take a finding from the Tasmanian Chamber of Commerce's 1997 and 1998 surveys. Unfair dismissals were considered a critical problem by 34 per cent and a major problem by 22 per cent of respondents.[5] The total number of *applications* under *federal* unfair dismissal law for small business in Tasmania in 1998 was 56[6]. (All business was 242). It is very difficult to accept that half of all small businesses in Tasmania consider *federal* unfair dismissal law a huge problem when the total number of applications filed is 56.

In the South Australian Employer's Chamber of Commerce and Industry 1998 survey 80 per cent of respondents felt at risk from unfair dismissal claims.[7] The total number of *applications* under *federal* unfair dismissal law for small business in South Australia in 1998 was 20[8]. (All business was 284). It is very difficult to conceive of 80 per cent of South Australian small businesses being in fear of *federal* unfair dismissal laws when the total annual number of applications filed is 20.

It is regrettable that some large and small business supporters of the *Workplace Relations Amendment (Unfair Dismissals) Bill 1998* should be arguing for the Bill's right to sack small business employees unfairly, when the evidence is so strong that the federal laws are not oppressive on employers[9]. The surveys and evidence relied upon in support of the Bill's proposition often predate the Coalition's new Act, or rely on feelings provoked by the Coalition's campaign against its own laws. Most of all, the surveys invariably fail to distinguish between Federal and State laws. It is frequently the case that those who complain

---

[4] Hansard pp EWRSBE 12-13 Prof Hunter Justice Research Centre

[5] Tasmanian Chamber of Commerce and Industry 'Tasmanian Small Business Priorities Survey(s)' in *Unfair Dismissal Compendium* November 1998

[6] See Table 1 Appendix 3 to this Minority Report

[7] South Australian Employer's Chamber of Commerce and Industry 'Unfair Dismissal Survey Results' (1998) in *Unfair Dismissal Compendium* November 1998

[8] See Table 1 Appendix 3 to this Minority Report

[9] See Appendix 1 and Appendix 3 to this Minority Report

about unfair dismissal laws are subject to their State jurisdiction.[10] The Federal law is simply not applicable to many of them.

It is also ironic that some small business groups and individuals argue for the right to sack workers unfairly, while rightly campaigning against big business' practices of treating them unfairly, particularly as tenants. The analogy between the employer/employee relationship, and between the landlord/tenant relationship, should not escape them.

Mr Ballard, Labour Relations Adviser to the Australian Chamber of Commerce and Industry, made a quite remarkable claim as to the high level of knowledge of business concerning federal unfair dismissal laws, and that surveys being used to justify changing the federal law should not concern themselves with the fact that respondents might be relating to quite different state laws.

> With respect to ACCI survey material referenced in our submissions, ACCI expect that most Australian businesses have no choice but to be aware of the unfair dismissal regulations of the *Workplace Relations Act 1996*. There was no need to specifically ask as such in the surveys. Respondents were not asked which legislation they fell under, in our view that is a technicality not considered by small business owners when they are attacked by an unfair dismissal claim.[11]

In that same letter from Mr Bollard it became clear that employer organisations themselves are not sure which unfair dismissals legislation small business fall under. As an example, from the quote below, it is left unclear whether they think Western Australian small business is 100 per cent or 70 per cent under state legislation.

> CCIWA estimate that 70% of small business members would fall under State jurisdiction – 30% under Federal legislation…. Australian Retailers Association….in NSW, QLD, WA, SA, and TAS it is believed that all small businesses fall under state legislation.

In our view it is unrealistic to expect small business to know the provisions of federal law or state law, or even whether they fall under state or federal laws

> **Mr. GOLUZD -** …A lot of small businesses do not know what legislation they fall under.[12]

In the Hearing, it was sometimes unclear whether federal unfair dismissal for small business was a problem or not. The questioning had been to establish what exempting 20 federal small business unfair dismissal applications in South Australia would achieve.

> **Senator MURRAY** – ….why are 20 applications in South Australia a big issue?
> **Ms PARSONS** – They are not, and it must be recalled that we are speaking here on behalf of a national organisation. South Australia clearly has that reduced number

---

[10] Such as Submission N0.5 Tonkin's Car Audio Pty Ltd

[11] Letter to the Committee 22 January 1999

[12] Hansard EWRSBE 2 Jack Goluzd GM Workplace Relations, Australian Business Ltd

> because of a simpler and perhaps more effective system of dealing with unfair dismissals.[13]

In 1998 the total number of federal unfair dismissal applications in South Australia was 284 (20 for small business), and was 971 for state unfair dismissal applications. The witness clearly accepts that 20 federal small business applications is not a problem, but believes the state system delivering 971 all business unfair dismissal applications is better than the federal one delivering 284 applications.

All witnesses seem agreed that the level of unfair dismissal disputes is far higher than the actual number who take the dispute to the Commission. Employers maintain that the chequebook often resolves the matter, and that they are oppressed by even the prospect of the unfair dismissal process. Employees on the other hand, apparently often walk away in disgust.

> **Mr RYAN** - …I have spoken to workers who I have been personally convinced had a watertight case that they should take to the Commission or to the Federal Court, either as an unfair dismissal or as an unlawful termination. Workers simply will not do it. Often their attitude is, 'I have seen the last of that so-and-so. I do not want to have any more to do with that business or that employer. I am prepared to get on with my life', and they will just walk away. I do not think that the average Australian is a litigious person by nature.

There is no way of knowing what the outcome in the Commission would have been in reality for those who pay up or those who walk away. The Senate cannot be expected to change laws which affect existing rights on the unquantified and unqualified numbers resolved outside the Commission. The Department of Workplace Relations has attempted to come up with a valid estimate of the numbers who fall outside the formal dispute system, and has failed.[14]

The Australian Retailers Association[15] acknowledged that the problem of federal unfair dismissal was small, but the perception was big. The ARA has 10 000 members employing 640 000 people.

> 4.1.7 Collectively, the ARA's constituent bodies would handle about 700 unfair dismissal applications on behalf of members each year.
> 4.1.8 This only represents a small number of persons employed by the industry. But the effect on the perception of employers, particularly small employers, is immense.

Perhaps if the Government and business organisations spent less time beating the issue up, and more time concentrating on education and training, we might see perception and reality move closer together.

---

[13] Hansard EWRSBE 26

[14] Hansard EWRSBE 59

[15] Submission No. 07 Australian Retailers Association pages 3 and 5

Statistics

All ABS statistics for small business are based on the definition of 20 employees and below, (and I00 for manufacturing small business.) Good statistics are therefore available for this definition of small business. The Coalition has chosen a small business definition of below 15 employees, and there is no statistical data base for this definition. Consequently it makes it virtually impossible to assess the numbers of employers and employees who nationally fall into this category. And there are no statistics whatsoever as to how many small businesses fall under the *federal* legislation, as distinct from the *five other state* industrial relations regimes.

In passing we should note that discriminating between classes of employees in this area of industrial relations is uncommon. Only Sri Lanka, Germany, Austria and the Republic of Korea limit protection against unfair dismissal according to the size of the business concerned.[16]

At my urging we now have statistics which indicate how many unfair dismissal applications have occurred under the Coalition's Act, which actually affect small business and not large business. The evidence we now have is that the majority (65 per cent) of unfair dismissal applications affect large business, and not small. More unfair dismissal applications are under state than federal jurisdictions.

Given that 65 per cent of claims are for big business, but small business employs more people than big business and has vastly more numbers of businesses than big business, it is clear that small business is actually under represented in unfair dismissal claims. Speculatively, this may be because employees in small business are largely not unionised, and lack the means to pursue claims. Alternatively it may mean those more personal relationships between owner/managers and their small business employees lessen the potential for dispute. Or there could be many other reasons. Speculation is however no substitute for objective research.

One witness believed the unfair dismissal laws encouraged the early resolution of claims.

> The Union believes that the reason a number of unfair dismissals are dealt with at the enterprise successfully is because of current unfair dismissal laws.[17]

Evidence was given by other unions and employee representatives that the existing laws in fact favour the employer, and they opposed many of the changes brought in in 1997.

1998 federal unfair dismissal applications for all businesses, of which two-thirds affect large business, are down by 44 per cent on 1996, from 14 533 applications to 8186. Under their laws the states generated 8 742 unfair dismissal applications, up by 30 per cent on 1996. Federal small business unfair dismissal applications, are down in 1998 on 1996 from 4 505 applications to 2861, for Australia as a whole.

It is possible that some unfair dismissal applications have sought out the more favourable jurisdictions, moving from federal to state jurisdictions where they can. The argument that

---

[16] Submission No. 10 Justice Research Centre page 6

[17] Submission no. 23 Australian Liquor, Hospitality & Miscellaneous Workers Union (WA Branch)

the *Workplace Relations Act 1996* unfair dismissal provisions are fair to employers is contested by those who say that the statistical evidence for a heavy drop in numbers under federal law is confused where both federal and state jurisdictions prevail. However, where only federal law prevails it seems just as clear that the new laws have indeed restored a fair balance to the needs of employers and employees. There are three solely federal jurisdictions – the Australian Capital Territory, the Northern Territory, and Victoria. The fall in federal unfair dismissal applications in the five states where both state and federal laws operate was 67 per cent from 1998 on 1996. Similarly, from 1996 to 1998 federal unfair dismissal applications dropped by 51 per cent in the ACT and by 41 per cent in the Northern Territory. The aberration is Victoria. Victoria by contrast only dropped by 18 per cent.

Under questioning at the hearing into this bill neither the Department of Workplace Relations and Small Business, nor the Victorian Employer's Chamber of Commerce and Industry, could explain the aberration. VECCI did however give evidence that some legal firms in Victoria were pursuing a vigorously commercial and predatory approach to unfair dismissals, and had been drumming up business.

Mr Siekmann confirmed this view :

> Fairness in the legislation is not the principal problem, the fairness of the legal system is.[18]

Exempting small business from unfair dismissal laws won't address the shortcomings of the legal system, but it will certainly increase unfairness to employees. If the legal system is a problem that is where the focus should be, not on the rights of employees.

VECCI also argue that unfair dismissal applications are increasing for 1998 versus 1997, but they do not apply a ratio of unfair dismissal application to numbers of employees and numbers of small businesses, which have both increased for 1998 over 1997, and 1997 over 1996.

The figures in Table 2 of Appendix 3 are of interest. Of 8 092 federal termination of employment applications lodged in 1997/8 78 per cent were settled by agreement. Of the remaining 774 contested Australia-wide, 282 were one class action. Of the remaining 493, 63 per cent were settled in favour of employers, and only 17 reinstatements were awarded. In 1998 53 per cent of cases finalised by the Commission were resolved in favour of the employers.

These figures do not represent a system in crisis, and one prejudicial to employers.

Jobs

Almost the entire stated Government motivation for this bill rests on their assertion that passing it will deliver 50 000 jobs. It is absolutely clear from countless statements on the record – that the Government believes that exempting small business from the *federal* laws,

---

[18] Letter to Senator Jeannie Ferris from the Australian Small Business Association

not the state laws, will deliver 50 000 new jobs. That in their view, justifies attacking existing rights of Australian employees of small business.
Only last week the Prime Minister again made the 50 000 jobs claim.

> **Mr. HOWARD** – And you will have an opportunity over the next few weeks in the Senate to make a decision as to whether you are going to knock off our unfair dismissal regulation. Because, if you do that, you will destroy the job prospects of 50,000 Australians in small business.[19]

Since this notional 50 000 jobs benefit is entirely predicated on getting rid of *federal* unfair dismissal laws, it follows that any confusion of small business attitudes to *state* unfair dismissal laws has to be avoided, if this policy is to be justified. And since the Government wishes to take away rights, which is always a very serious matter, it also means that facts, not assertions, need to be established.

By now it is well established that that 50 000 jobs figure arose from an estimate[20] by Mr Rob Bastian of COSBOA, an influential small business organisation. It is also absolutely clear that Mr Bastian's estimate was based on getting rid of both federal *and* state unfair dismissals legislation, and required a whole range of other things to be done as well.

> **Senator MURRAY** – Your estimate derives from a view of taking away unfair dismissal laws from sate and federal legislation, doesn't it?
> **Mr BASTIAN** – No. My estimate is based on a range of things which could be done to encourage small business to employ. A major irritant of this whole debate is that we are centring on unfair dismissals as the only measure which would encourage people to employ. That is not so. The fear that relates to unfair dismissals is a centrepiece in a range of employment disincentives.
> **Senator MURRAY** – But you are talking about a million small businesses, aren't you?
> **Mr BASTIAN** – I am talking about a million small enterprises, yes.
> **Senator MURRAY** – And those million fall under either federal or state industrial relations legislation?
> **Mr BASTIAN** – Yes.

Two things happened to Mr Bastian's figure. The Minister and Prime Minister latched onto it with alacrity, and then converted it into the consequence of getting rid of *federal* unfair dismissal legislation. Mr Bastian's figure has been inflated into a biblical maxim by the Minister for Workplace Relations and the Prime Minister.

Just how credible is this figure? Appendix 4 to this Minority Report, captured in Table 1 of Appendix 3, surely puts the Government's ludicrous assertions to rest. The Government claims that for every federal unfair dismissal application we get rid of in South Australia we will create 200 jobs, for every one in Queensland 102.2 jobs, in Western Australia 69.6 jobs, and in the ACT 4.8 jobs. So the same policy will have massively different effects depending on where you live. The Government's 50 000 jobs guess rests on no empirical research, no case studies, no international and domestic studies.

---

[19] Hansard, Representatives, P2244 Wednesday 10 February 1999

[20] Hansard EWRSBE 16

Again and again I have asked a simple question. There are 20 federal small business unfair dismissal applications in South Australia. How many jobs will be created by getting rid of those 20? No one can give an answer. Except for the Government – they say 4 000!

A witness to the hearing, who apart from methodologically unsound surveys (see earlier remarks), had no empirical backing for his job estimates either, added to the bizarre claims being made for the effects of this unfair dismissal exemption:

> **CHAIR** – So there would be a fair probability that a figure like 55, 000 might be an understatement of the effects on unemployment?
> **Dr. KATES** – Yes. I would say that, given the figures, we are looking at well over 100,000, possibly 200,000, jobs because of that.
> **Senator MURRAY** – Getting rid of federal unfair dismissal legislation – 200,000 jobs?
> **Dr. KATES** – We are talking about unfair dismissals in general.
> **Senator MURRAY** – We are only talking about federal legislation here.[21]

Dr Kates did not agree with Fred Argy, former secretary of the Department of Labour, a former director of EPAC, President of the Economics Society, and a fellow of the ANU. In *Australia at the Cross Roads. Radical free market or a progressive liberalism?* page 97, Mr Argy wrote.

> Australian employers already have considerable scope for organisational or functional flexibility under existing industrial relations legislation and any reforms designed to further increase their human resource management capability, e.g. by further award simplification or exemption from the unfair dismissal provisions, are likely to yield small economic returns relative to the social and quality of life costs.

How exempting 304 federal small business unfair dismissal applications in New South Wales, 79 in Western Australia, 56 in Tasmania, or 20 in South Australia would seriously address the problem of the unemployed in those states does not stand up to rigorous analysis.

In this period, how has small business employment fared anyway? Given a significant growth in small business employment in this period, can the Government or its supporters on this issue tell us how much better employment was because of the unfair dismissal changes from January 1997, or how much better it would have been if small business had been exempted? If they can't, it will be because their case rests on assertion.

[21] Hansard EWRSBE 41 ACCI

Workers employed by Small and Large Businesses (000s)

Month	Small Business employment	Change	Large Business employment	Change
Nov 96	1947.3		3409.8	
Aug 98	2320.4	+373.1	3272.3	-137.5

Source: ABS6248.0

The extract below is from Appendix 4 to this Minority Report, is supplied by the Department of Workplace Relations, and gives an idea of job creation for Australia as a whole :

(3) Figures for the number of jobs created in each State and Territory in 1996 and 1997 (trend series annual averages) are as follows. (Source: ABS Labour Force Survey.)

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT	AUST
1996 '000	36.9	32.0	26.5	5.3	10.4	1.0	1.9	-1.9	112.5
%	1.3	1.6	1.8	0.8	1.3	0.5	2.3	-1.2	1.4
1997 '000	13.4	17.5	31.9	2.9	19.3	-6.8	1.9	1.6	80.7
	0.5	0.8	2.1	0.4	2.3	-3.4	2.2	1.1	1.0

There are a number of factors that contribute to the differences in labour market performance across the States and Territories. For example, the States and Territories generally rely on different industries for economic and employment growth. As such, any changes in policy or economic conditions which affect sectors in a non-uniform manner can be expected to have different impacts on employment. Similarly, characteristics such as population size and growth, natural attributes and climatic conditions also contribute to the differences in employment growth.

One witness put the problem that the Senate must address in a nutshell.

> It is too great a risk to forego actual existing rights (which have a moral underpinning to them) based on a *hypothetical* premise that there might be an economic benefit.[22]

Western Australia – a test case for jobs v unfair dismissal laws

In examining the case that the harm in destroying rights is justified by the good in creating significant numbers of jobs, we must question whether job creation would be at all affected by the unfair dismissal exemption. These are the facts available to us under unfair dismissal laws in Western Australia.

	1996	1998	
Total unfair dismissal applications	2793	1856	-34%
Total state unfair dismissal applications	918	1553	+69%
Total federal unfair dismissal applications	1875	303	-84%
Total federal small business applications	488	79	-84%

Total unfair dismissal applications are down 34 per cent in WA, federal unfair dismissal applications are down 84 per cent, and federal small business unfair dismissal applications only number 79.

Attached is a graph showing private sector employment in WA. There is nothing on that graph to show that any of the changes, more severe or less severe, to unfair dismissals law over the last decade have affected employment one iota – whether pre-1993, post 1993, or post 1996. That is because the main determinant of work in small business is economic conditions and opportunities, not unfair dismissal laws.

The Small Business Development Corporation annual report 1998 supplies some useful figures. There are 341 000 people employed in small business in Western Australia, 114 300 self-employed people or employers, and 226 700 employees. Growth in number of

[22] Submission No. 12 Shop Distributive & Allied Employee's Association

employees has averaged 4.5 per cent annually for the last decade, well above the 3.6 per cent national average. It is economic conditions, which produce job growth, not unfair dismissal laws or the lack of them.

There are 106 300 small businesses in WA, 85 per cent of them employing less than five people. 79 federal small business applications are an incidence of 0.07 per cent. And as for them acting as a restraint on job creation - in the past two years the number of people employed in the small business sector has grown by 19 per cent.

Conclusion

Many of the employee relationship problems small business have continue to be those related to owner/manager skills, training and experience in managing people.[23]

There do appear to be problems, which this bill does not address, concerning the Commission and its operation, as outlined in considered submissions such as that by VECCI.[24] There are also claims concerning the way the legal system is operating. It is in the interests of all parties concerned with unfair dismissals, if the Commission's processes are made as quick and inexpensive as is consistent with the needs of justice, and if the process of law does not become manipulative.

The small business exemption proposals upset the 'fair go all round' principle. The Democrats believe the federal 'fair go all round' laws provide a much fairer basis for determination of dismissal than the old law. The exemption proposal introduces considerable unfairness.

The excessively pro-worker, pro-union, cumbersome, process-driven and costly dismissal provisions of the former Act needed to be overhauled. They have been. The Federal Government now has the law it wanted in these respects with only minimal changes. Indeed, the new federal law is even more attuned to the needs of small business than the pre 1993 State laws, which small business seldom protested at.

The Coalition's Majority Report, and indeed the Coalition at large, have failed to make a case on three fundamental counts : that the *Workplace Relations Act 1996* is not effective in restricting federal unfair dismissal claims to the minimum consistent with equity and natural justice; that the Bill's passage will create jobs; and that the public good resulting from significant job creation would be greater than the public evil consequent to giving a discriminatory right to a sector of employers to sack workers unfairly.

This issue is not about jobs. It is about what is fair and what is right. It is neither fair, right, nor necessary to give fewer rights to workers in small business versus those in other sectors. It is neither fair nor right to deny essential protection to employees against rogue employers. This is a human rights issue, and the Democrats will not agree to this bill.

[23] Submission No. 03 Mr Michael J Taliangis

[24] Submission No. 17 Victorian Employer's Chamber of Commerce and Industry

Recommendations

Recommendation 1.

The Australian Democrats do not support Recommendation 1 of the Coalition Majority Report, which supports the introduction of a universal six month qualifying or probationary period for employees under the federal *Workplace Relations Act 1996*. The Democrats are of the opinion that the present general maximum of three months remains appropriate. There may be specific instances with particularly complex businesses where a longer probationary period could be considered. In principle the Democrats would not oppose such discretion being given to the Commission, for awards and collective agreements, with the consent of all parties to the agreement.

Recommendation 2.

The Democrats do not support Recommendation 2 of the Coalition Majority Report, which supports discriminating against small business employees by exempting them from the unfair dismissal provisions of the federal *Workplace Relations Act 1996*.

Recommendation 3.

The Democrats do support Recommendation 3 of the Majority Report, which proposes better education on these matters.

Recommendation 4.

The Democrats urge the Government to actively campaign for harmonisation between state and federal unfair dismissal laws, with the latter as the template.

Recommendation 5.

With respect to costs and time issues, the Democrats believe that evidence provided by employer and employee organisations does indicate that there may be deliberate time wasting and cost pressure put on applicants or respondents for tactical reasons. The Democrats recommend that

(a) a greater onus needs to be placed on the Commission to establish at the conciliation stage the merits of an employer or employee's case, and to provide preliminary advice accordingly. That might include a warning that in any subsequent award of costs, or decision as to orders, such preliminary advice might prejudice such costs or orders if the

parties ignore advice which is subsequently upheld, or if the matter is not settled by agreement within a reasonable but short period, or if the matter is subsequently contested, and lost by the party which ignores such advice.

(b) if either party, in the opinion of the Commission, is abusing the process, deliberately wasting time or deliberately applying cost pressures, the Commission should be given the power to award costs against that party's legal practitioners, or those advising the applicant or respondent, which should be specifically precluded from recovery from the client.

(c) cases being conducted on a 'no win, no fee, contingency' basis should be made a matter of public record.

(d) the Commission must have regard to disciplining any legal firm whose ethical approach is coloured by commercial predation.

Recommendation 6.

Employers have made a case that while they are subject to the full force of the law through the Commission for unfair dismissal, employees are not subject to the same legal force to fulfil their obligations to give due notice of their resignation, and to work out such notice, if so required. The Democrats recommend that this problem be subject to further examination by the Government, if it is found this is indeed a significant problem.

Recommendation 7.

Unfair dismissal disputes are apparently sometimes settled prior to even being recorded as applications to the Commission. If that is so, given that most applicants and respondents are likely to be ignorant of the provisions of unfair dismissals laws, it may be useful for the Government to consider whether it is practical to require legal firms to advise respondents that they should seek independent advice, and should consult the Commission on any threatened action.

APPENDIX 1

Unfair Dismissal Provisions in the *Workplace Relations Act 1996*

The key changes on unfair dismissal by the *Workplace Relations Act 1996* were:

1. **Change in Onus of Proof:** Instead of an employer having to prove they had a 'valid reason' for the dismissal, the employee now needs to prove the dismissal was unfair, harsh or unjust.

2. **Hearings to be in the Commission:** Instead of proceedings being in the Federal Court (with more costly representation and longer time lines), they are now heard and determined in the less formal Australian Industrial Relations Commission. The Commission is also required to deal with matters promptly with the minimum of technicality.

3. **Costs may be awarded against Employees:** If an employee proceeds with a frivolous or vexatious claim, they can now be liable for a costs order. The Commission will warn them if an application appears to be frivolous or vexatious.

4. **Application fee to apply:** A $50 application fee applies to employees, acting as a disincentive to 'speculative' applications. The fee is waived only if the employee is in financial difficulty.

5. **Viability of Employer taken into account in damages:** The Commission is required, among other things, to take into account the "viability of the employer" in deciding whether to award damages in lieu of reinstatement for termination. This means that if an award of damages would send a business to the wall and put other employees out of a job, it should not be made.

6. **Procedural Fairness not Mandatory Requirement:** The mandatory detailed requirements about warnings have been deleted from the Act. Procedural fairness might be something the Commission takes into account, but a fair dismissal cannot become unfair because of a technicality, as could happen under Labor's laws.

7. **Probationary Employees - excluded:** The new Act extends the number of probationary employees who cannot apply for unfair dismissal, allowing a full exemption for new employees in their first three months of employment.

8. **Casual Employees - exemption extended:** Casual employees cannot apply for unfair dismissal unless they have been employed for more than 12 months (formerly 6 months.)

9. **Specified Term Contracts - exemption excluded:** Employees employed on a specified term contract and dismissed at the end of that term in accordance with the contract, cannot apply for re-instatement (they could under Labor's law, if employed for longer than 6 months).

10. **State Systems re-instated:** The Federal system will not override State systems, and applies only to workers employed on Federal Awards and working for a corporation. The Federal Act also applies to all employees in Victoria and the Territories. This means most small business claims are now be dealt with by State Tribunals.

APPENDIX 2

How the Unfair Dismissal Laws Evolved

1993 to 1997...

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. There were few, if any, calls for the abolition of these essential workers' rights.

In 1993, Victoria's Kennett Coalition 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 Labor 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. Employers strongly opposed the provisions because of the change in onus. An unintended effect of the employers' high profile campaign was to massively raise worker awareness about their rights to challenge unfair dismissal, with a higher consequent increase in applications for reinstatement.

During the 1996 election, the Coalition promised to replace Labor's laws with a 'fair go all round' for employers and employees. While little detail was provided, 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.

The Democrats, prior to the election and since, supported the Coalition's policy direction. During the 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 and **all three parties refused** on the basis that it would breach the 'fair go all round' approach.

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

The unfair dismissal regime contained in the *Workplace Relations Act 1996* relies mostly on the corporation's power rather than the external affairs power, allowing the Act to avoid the procedural difficulties of the ILO Convention.

APPENDIX 3 : STATISTICS

Table 1 : The relationship between Government claims of job creation, and federal small business unfair dismissal applications

State	No. of all business unfair dismissal federal applications by state in 1998*	No. of small business unfair dismissal federal applications by state in 1998*	Government estimate of job creation from exempting federal small business #	Therefore no. of jobs created by exempting federal small business unfair dismissal claims
ACT	249	105	500	4.8
NSW	1381	304	16,500	54.3
NT	233	79	500	6.3
QLD	310	93	9,500	102.2
SA	284	20	4,000	200.0
TAS	242	56	1,000	17.9
VIC	5,184	2,125	12,500	5.9
WA	303	79	5,500	69.6
Total	8186	2861	50,000	17.5

- **Source: Minister for Workplace Relations has supplied total figures, and the percentage that is small business(letter to Senator Murray 21.1.99)*
- *# Refer Question With Notice No. 10 by Senator Murray Appendix 4.*

Table 2 : How unfair dismissal applications are processed

Processing

In 1996/97 (when these figures were last kept), 62 % of unfair dismissal claims trials were completed within one day, while 84 % of trials were completed within two days.

Total no. of federal termination of employment applications		
Lodged 1997/98		8,092
78 % settled by agreement		6,303
(eg withdrawn, settled or otherwise discontinued prior to conciliation or settled at conciliation and withdrawn, discontinued or otherwise settled after conciliation but prior to final orders.)		
Contested Federal cases in 1997/98 Australia-wide		**774**
(This figure includes 282 applications against Gordonstone Coal Management which were treated as one class action, and decided in favour of the employees.)		
Excluding Gordonstone Coal:		
Decided in favour of employers	63 %	311
Decided in favour of employees	37 %	182
Awarded reinstatement	2 %	17

1998 figures[25]

15 647 applications filed in the AIRC. Of those 2 236 (14%) were still pending for conciliation by the AIRC.

Of the remaining 13 411 (86%) applications :

- 427 (3%) of the applications had been dismissed at a preliminary stage on jurisdictional grounds
- 2483 (19%) had been withdrawn or otherwise discontinued prior to conciliation.
- 7 484 (56%) had been settled by conciliation.
- 3 017 (23%) had been unable to be settled at conciliation.

Of the 3 017 applications in which certificates had been issued, ie. matters unable to be settled at conciliation,

- 84 (3%) claimed unlawful termination only (to be heard by a court)
- 2 933 (97%) claimed unfair dismissal to be heard by the AIRC.

The overall balance of outcomes in cases finalised by the AIRC is

- 628 (53%) for the employer and 564 (47%) for the employee.

Table 3 : Total number of all business federal unfair dismissal applications under the federal Workplace Relations Act 1998 compared to 1996.

State/Territory	Jan-Dec 1996	Jan-Dec 1998	% plus/minus to 1996
NSW	4290	1381	(68)
QLD	512	310	(39)
SA	633	284	(55)
TAS	360	242	(33)
WA	1875	303	(84)
Sub-total	**7670**	**2520**	**(67)**
ACT	509	249	(51)
NT	396	233	(41)
VIC	5958	5184	(13)
Sub-total	**6863**	**5666**	**(17)**
TOTAL	**14533**	**8186**	**(44)**

Source: Minister for Workplace Relations and Small Business

[25] Submission No.19 Department of Employment, Workplace Relations and Small Business Fact Sheet

Table 4 : Total number of small business federal unfair dismissal applications under the federal Workplace Relations Act 1998 compared to 1996.

State/Territory	Jan-Dec 1996	Jan-Dec 1998
NSW	944	304
QLD	154	93
SA	44	20
TAS	83	56
WA	488	79
Sub-total	1713	552
ACT	214	105
NT	135	79
VIC	2443	2125
Sub-total	2792	2309
TOTAL	4505	2861

Source: Small Business as a percentage of total federal unfair dismissal applications supplied by the Minister for Workplace Relations and Small Business

Table 5 : Total number of all business state unfair dismissal applications under state laws 1998 compared to 1996.

State/Territory	**Jan-Dec 1996**	**Jan-Dec 1998**	**% plus/minus to 1996**
NSW	2186	4056	86
QLD	1932	1814	(6)
SA	1240	971	(12)
TAS	114	348	205
WA	918	1553	69
Sub-total	**6390**	**8742**	**37**
ACT	0	0	0
NT	0	0	0
VIC	358	0	0
Sub-total	**358**	**0**	**0**
TOTAL	**6748**	**8742**	**30**

Source: Minister for Workplace Relations and Small Business

Table 6 : Total number of federal and state unfair dismissal applications 1998 compared to 1996.

State/Territory	Jan-Dec 1996	Jan-Dec 1998	% plus/minus to 1996
NSW	6476	5437	(16)
QLD	2444	2124	(13)
SA	1873	1255	(33)
TAS	474	590	24
WA	2793	1856	(34)
Sub-total	**14060**	**11262**	**(20)**
ACT	509	249	(51)
NT	396	233	(41)
VIC	6316	5184	(18)
Sub-total	**7221**	**5666**	**(22)**
TOTAL	**21281**	**16928**	**(20)**

Source: Minister for Workplace Relations and Small Business

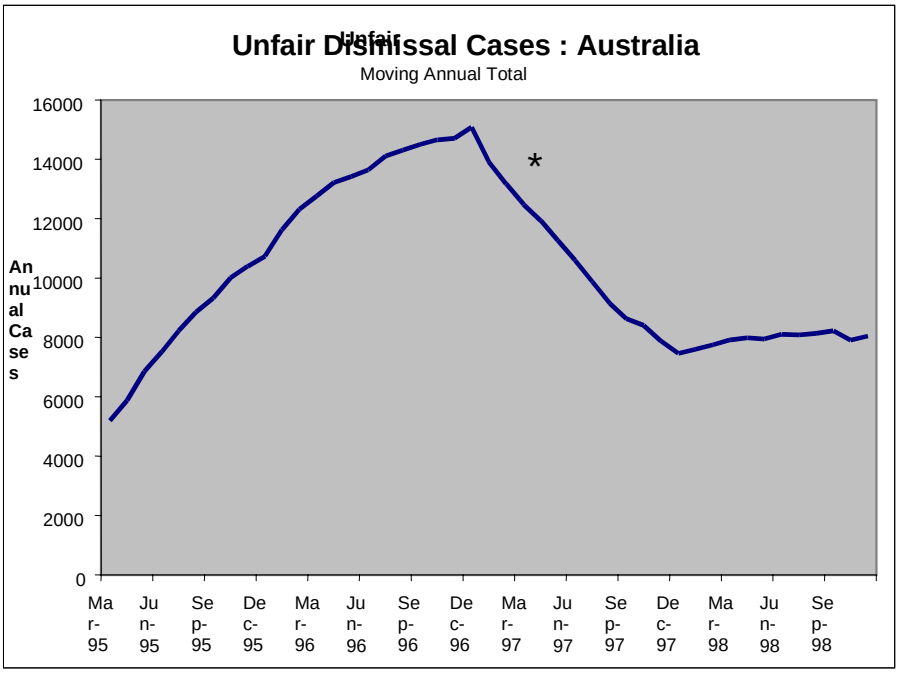
Unfair Dismissal Cases : Australia

Source:Department of Workplace Relations

*

	1998	1997	1996	1995	1994
Jan	492	354	1511	625	
Feb	709	551	1305	613	
March	708	547	1235	786	
April	666	592	1148	690	1
May	597	644	1298	1096	121
June	700	533	1207	986	330
July	687	712	1427	963	252
Aug	609	557	1282	1087	462
Sept	682	591	1120	924	440
Oct	661	979	1206	1049	373
Nov	744	611	1138	1087	703
Dec		791	1206	830	487
TOTAL	7255	7462	15083	10736	3169

* Workplace Relations Act 1996 commenced 1/1/97



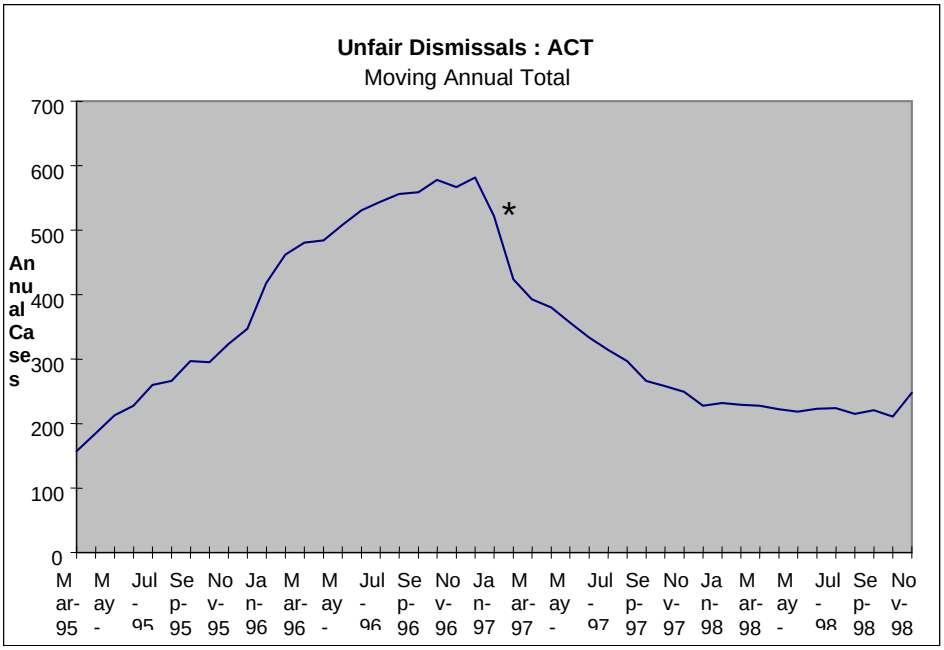
Moving Annual Total	
Mar-95	5193
Apr-95	5882
May-95	6857
Jun-95	7513
Jul-95	8224
Aug-95	8849
Sep-95	9333
Oct-95	10009
Nov-95	10393
Dec-95	10736
Jan-96	11622
Feb-96	12314
Mar-96	12763
Apr-96	13221
May-96	13423
Jun-96	13644
Jul-96	14108
Aug-96	14303
Sep-96	14499
Oct-96	14656
Nov-96	14707
Dec-96	15083
Jan-97	13926
Feb-97	13172
Mar-97	12484
Apr-97	11928
May-97	11274
Jun-97	10600
Jul-97	9885
Aug-97	9160
Sep-97	8631
Oct-97	8404
Nov-97	7877
Dec-97	7462
Jan-98	7600
Feb-98	7758
Mar-98	7919
Apr-98	7993
May-98	7946
Jun-98	8113
Jul-98	8088
Aug-98	8140
Sep-98	8231
Oct-98	7913
Nov-98	8046

Unfair Dismissal Cases : ACT

Source:Department of Workplace Relations

	1998	1997 *	1996	1995	1994
Jan	15	11	71	0	
Feb	21	24	44	46	
March	19	20	51	32	
April	12	18	31	28	0
May	25	29	52	28	0
June	26	21	45	22	7
July	27	26	45	32	0
Aug	12	21	38	26	20
Sept	24	18	49	46	15
Oct	25	32	40	21	23
Nov	24	22	31	42	14
Dec		18	39	24	0
TOTAL	230	260	536	347	79

* Workplace Relations Act 1996 commenced 1/1/97



Moving Annual Total

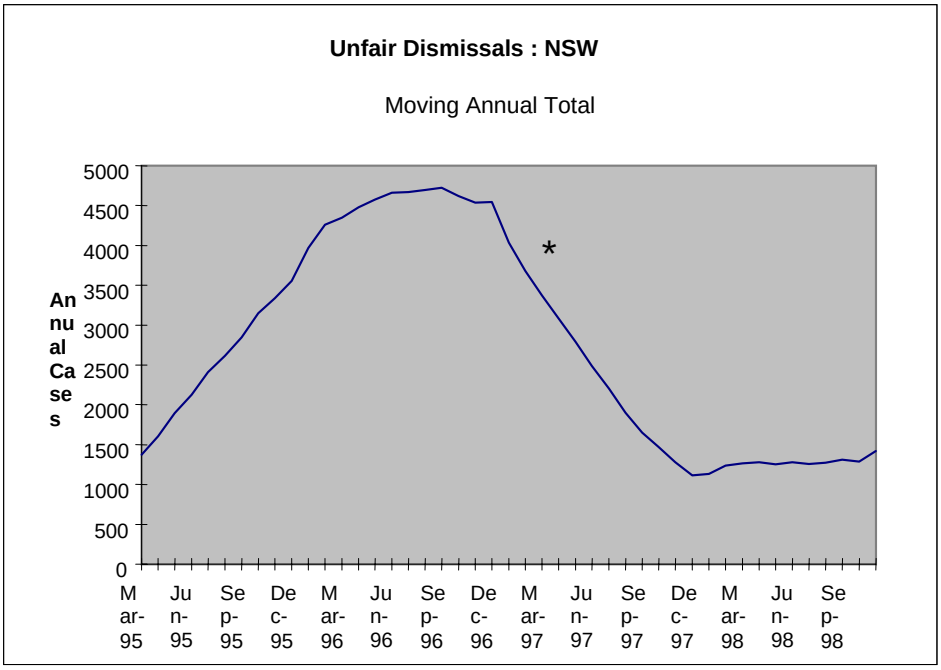
Mar-95	157
Apr-95	185
May-95	213
Jun-95	228
Jul-95	260
Aug-95	266
Sep-95	297
Oct-95	295
Nov-95	323
Dec-95	347
Jan-96	418
Feb-96	462
Mar-96	481
Apr-96	484
May-96	508
Jun-96	531
Jul-96	544
Aug-96	556
Sep-96	559
Oct-96	578
Nov-96	567
Dec-96	582
Jan-97	522
Feb-97	424
Mar-97	393
Apr-97	380
May-97	357
Jun-97	333
Jul-97	314
Aug-97	297
Sep-97	266
Oct-97	258
Nov-97	249
Dec-97	228
Jan-98	232
Feb-98	229
Mar-98	228
Apr-98	222
May-98	218
Jun-98	223
Jul-98	224
Aug-98	215
Sep-98	221
Oct-98	211
Nov-98	248

Unfair Dismissal Cases : NSW

Source:Department of Workplace Relations

	1998	1997 *	1996	1995	1994
Jan	76	57	571	160	
Feb	178	78	433	139	
March	124	93	397	309	
April	88	75	366	234	0
May	109	133	410	316	26
June	96	72	371	286	55
July	82	102	386	376	95
Aug	93	78	382	356	149
Sept	126	82	333	305	74
Oct	85	107	286	392	90
Nov	205	100	288	369	183
Dec		158	324	314	92
TOTAL	1262	1135	4547	3556	764

* Workplace Relations Act 1996 commenced 1/1/97



Moving Annual Total

Mar-95	1372
Apr-95	1606
May-95	1896
Jun-95	2127
Jul-95	2408
Aug-95	2615
Sep-95	2846
Oct-95	3148
Nov-95	3334
Dec-95	3556
Jan-96	3967
Feb-96	4261
Mar-96	4349
Apr-96	4481
May-96	4575
Jun-96	4660
Jul-96	4670
Aug-96	4696
Sep-96	4724
Oct-96	4618
Nov-96	4537
Dec-96	4547
Jan-97	4033
Feb-97	3678
Mar-97	3374
Apr-97	3083
May-97	2786
Jun-97	2487
Jul-97	2203
Aug-97	1899
Sep-97	1648
Oct-97	1469
Nov-97	1281
Dec-97	1115
Jan-98	1134
Feb-98	1234
Mar-98	1265
Apr-98	1278
May-98	1254
Jun-98	1278
Jul-98	1258
Aug-98	1273
Sep-98	1313
Oct-98	1285
Nov-98	1420

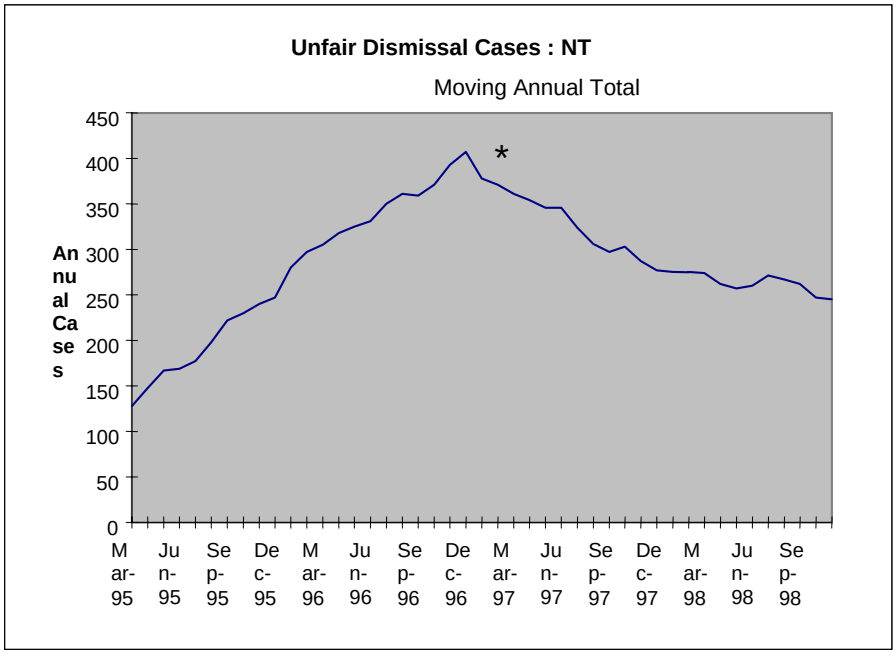
Unfair Dismissal Cases : NT

Source:Department of Workplace Relations

*

	1998	1997	1996	1995	1994
Jan	16	18	45	12	
Feb	24	24	33	16	
March	21	22	32	24	
April	14	26	33	20	0
May	17	22	30	23	4
June	24	21	21	15	13
July	27	16	38	19	11
Aug	13	17	35	24	3
Sept	14	19	28	30	6
Oct	23	36	30	18	10
Nov	25	29	45	23	13
Dec		27	37	23	16
TOTAL	218	277	407	247	76

* Workplace Relations Act 1996 commenced 1/1/97



Moving Annual Total

Mar-95	128
Apr-95	148
May-95	167
Jun-95	169
Jul-95	177
Aug-95	198
Sep-95	222
Oct-95	230
Nov-95	240
Dec-95	247
Jan-96	280
Feb-96	297
Mar-96	305
Apr-96	318
May-96	325
Jun-96	331
Jul-96	350
Aug-96	361
Sep-96	359
Oct-96	371
Nov-96	393
Dec-96	407
Jan-97	378
Feb-97	371
Mar-97	361
Apr-97	354
May-97	346
Jun-97	346
Jul-97	324
Aug-97	306
Sep-97	297
Oct-97	303
Nov-97	287
Dec-97	277
Jan-98	275
Feb-98	275
Mar-98	274
Apr-98	262
May-98	257
Jun-98	260
Jul-98	271
Aug-98	267
Sep-98	262
Oct-98	247
Nov-98	245

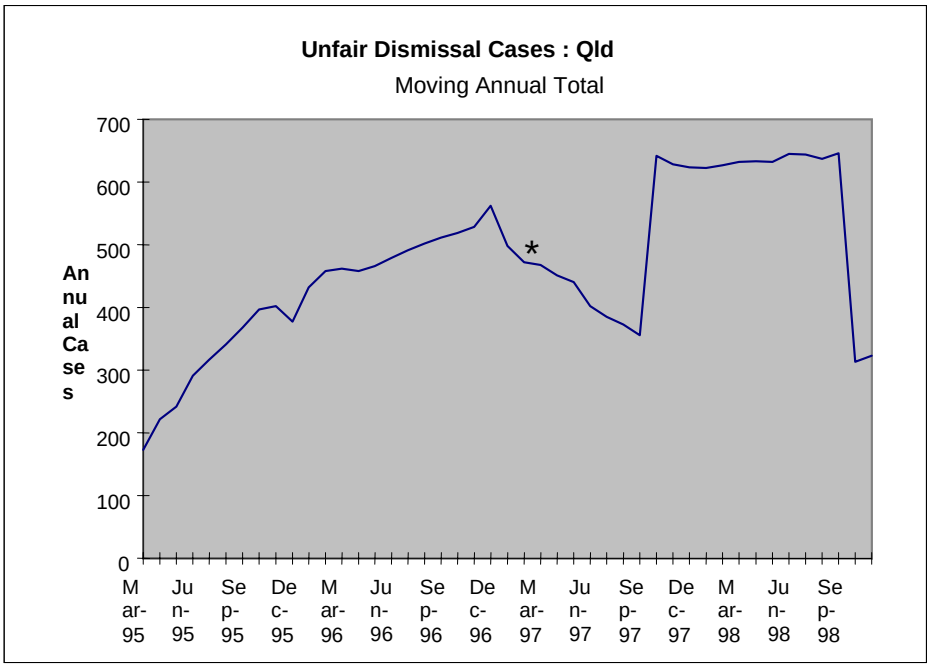
Unfair Dismissal Cases : Qld

Source:Department of Workplace Relations

*

	1998	1997	1996	1995	1994
Jan	21	22	86	31	
Feb	22	17	43	17	
March	32	27	31	27	
April	29	28	45	49	0
May	24	25	36	28	8
June	37	24	62	49	0
July	29	30	47	35	9
Aug	20	27	39	28	4
Sept	22	21	38	29	2
Oct	23	344	58	50	21
Nov	30	24	38	29	24
Dec		34	39	5	30
TOTAL	289	623	562	377	98

* Workplace Relations Act 1996 commenced 1/1/97



Moving Annual Total

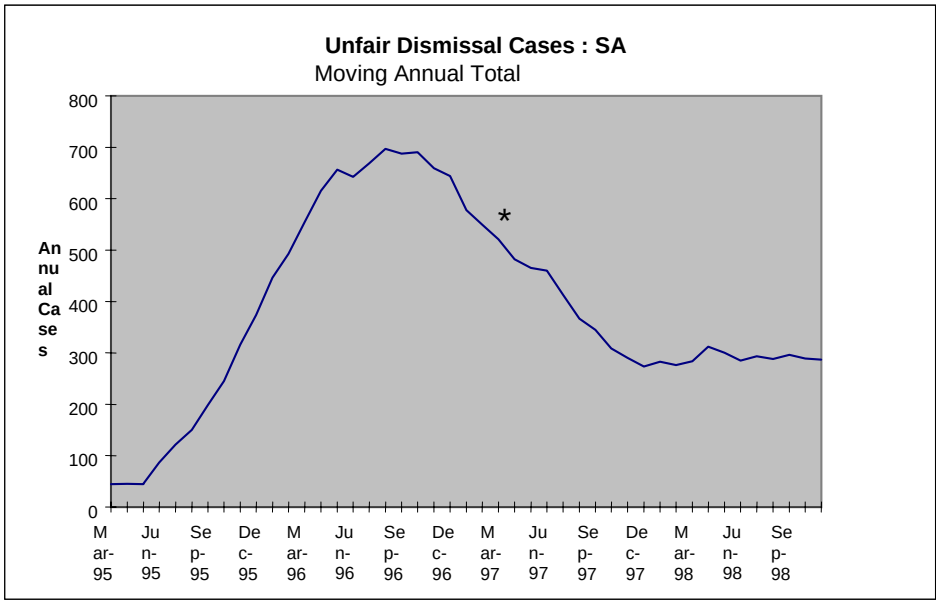
Mar-95	173
Apr-95	222
May-95	242
Jun-95	291
Jul-95	317
Aug-95	341
Sep-95	368
Oct-95	397
Nov-95	402
Dec-95	377
Jan-96	432
Feb-96	458
Mar-96	462
Apr-96	458
May-96	466
Jun-96	479
Jul-96	491
Aug-96	502
Sep-96	511
Oct-96	519
Nov-96	528
Dec-96	562
Jan-97	498
Feb-97	472
Mar-97	468
Apr-97	451
May-97	440
Jun-97	402
Jul-97	385
Aug-97	373
Sep-97	356
Oct-97	642
Nov-97	628
Dec-97	623
Jan-98	622
Feb-98	627
Mar-98	632
Apr-98	633
May-98	632
Jun-98	645
Jul-98	644
Aug-98	637
Sep-98	646
Oct-98	313
Nov-98	323

Unfair Dismissal Cases: SA

Source:Department of WkPlc. Relations

	1998 *	1997	1996	1995	1994
Jan	16	6	72	0	
Feb	13	20	48	1	
March	40	32	61	0	
April	51	23	62	1	0
May	18	30	47	6	6
June	21	36	41	55	13
July	26	18	65	38	4
Aug	13	18	65	37	8
Sept	30	21	42	52	3
Oct	17	21	58	55	9
Nov	16	22	40	71	0
Dec		26	43	58	0
TOTAL	261	273	644	374	43

* Workplace Relations Act 1996 commenced 1/1/97



Moving Annual Total	
Mar-95	44
Apr-95	45
May-95	45
Jun-95	87
Jul-95	121
Aug-95	150
Sep-95	199
Oct-95	245
Nov-95	316
Dec-95	374
Jan-96	446
Feb-96	493
Mar-96	554
Apr-96	615
May-96	656
Jun-96	642
Jul-96	669
Aug-96	697
Sep-96	687
Oct-96	690
Nov-96	659
Dec-96	644
Jan-97	578
Feb-97	550
Mar-97	521
Apr-97	482
May-97	465
Jun-97	460
Jul-97	413
Aug-97	366
Sep-97	345
Oct-97	308
Nov-97	290
Dec-97	273
Jan-98	283
Feb-98	276
Mar-98	284
Apr-98	312
May-98	300
Jun-98	285
Jul-98	293
Aug-98	288
Sep-98	296
Oct-98	289
Nov-98	287

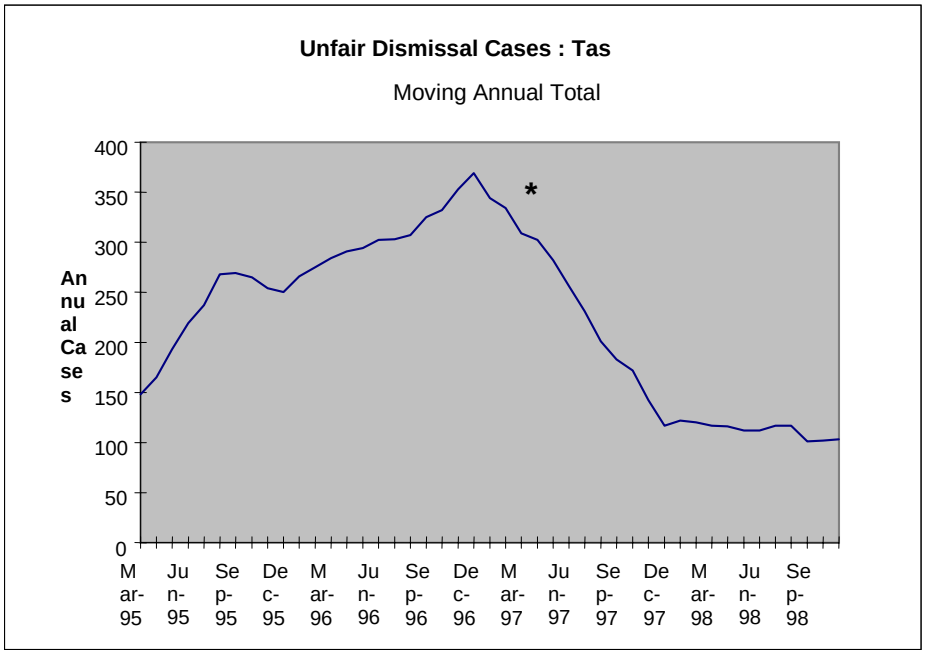
Unfair Dismissal Cases : Tas

Source:Department of Workplace Relations

*

	1998	1997	1996	1995	1994
Jan	8	3	28	12	
Feb	10	12	22	13	
March	4	7	32	23	
April	16	17	24	17	0
May	8	12	32	29	1
June	8	8	34	26	0
July	12	7	32	31	13
Aug	5	5	35	31	0
Sept	7	23	41	23	22
Oct	10	7	18	11	15
Nov	7	8	38	17	28
Dec		8	33	17	21
TOTAL	95	117	369	250	100

* Workplace Relations Act 1996 commenced 1/1/97



Moving Annual Total	
Mar-95	148
Apr-95	165
May-95	193
Jun-95	219
Jul-95	237
Aug-95	268
Sep-95	269
Oct-95	265
Nov-95	254
Dec-95	250
Jan-96	266
Feb-96	275
Mar-96	284
Apr-96	291
May-96	294
Jun-96	302
Jul-96	303
Aug-96	307
Sep-96	325
Oct-96	332
Nov-96	353
Dec-96	369
Jan-97	344
Feb-97	334
Mar-97	309
Apr-97	302
May-97	282
Jun-97	256
Jul-97	231
Aug-97	201
Sep-97	183
Oct-97	172
Nov-97	142
Dec-97	117
Jan-98	122
Feb-98	120
Mar-98	117
Apr-98	116
May-98	112
Jun-98	112
Jul-98	117
Aug-98	117
Sep-98	101
Oct-98	102
Nov-98	103

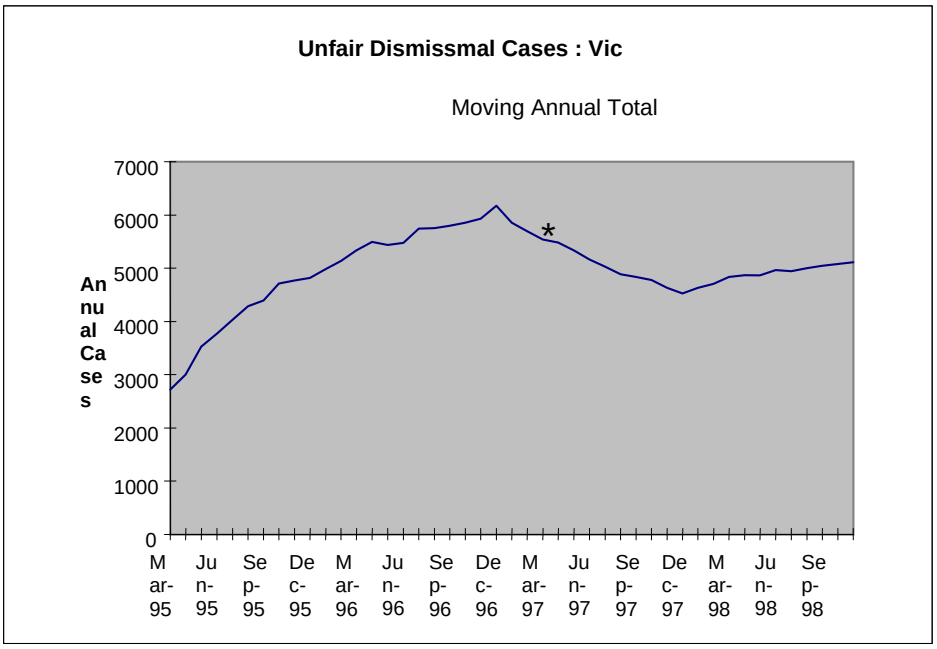
Unfair Dismissal Cases : Victoria

Source:Department of Workplace Relations

*

	1998	1997	1996	1995	1994
Jan	326	219	534	371	
Feb	423	348	505	350	
March	452	323	481	287	
April	425	389	447	286	0
May	380	388	534	593	70
June	435	328	501	456	213
July	457	487	624	359	95
Aug	430	368	504	498	242
Sept	435	396	448	397	290
Oct	461	422	483	430	116
Nov	403	373	516	440	380
Dec		484	592	352	302
TOTAL	4627	4525	6169	4819	1708

* Workplace Relations Act 1996 commenced 1/1/97



Moving Annual Total

Mar-95	2716
Apr-95	3002
May-95	3525
Jun-95	3768
Jul-95	4032
Aug-95	4288
Sep-95	4395
Oct-95	4709
Nov-95	4769
Dec-95	4819
Jan-96	4982
Feb-96	5137
Mar-96	5331
Apr-96	5492
May-96	5433
Jun-96	5478
Jul-96	5743
Aug-96	5749
Sep-96	5800
Oct-96	5853
Nov-96	5928
Dec-96	6169
Jan-97	5854
Feb-97	5697
Mar-97	5539
Apr-97	5481
May-97	5335
Jun-97	5162
Jul-97	5025
Aug-97	4889
Sep-97	4837
Oct-97	4776
Nov-97	4633
Dec-97	4525
Jan-98	4632
Feb-98	4707
Mar-98	4836
Apr-98	4872
May-98	4864
Jun-98	4961
Jul-98	4941
Aug-98	5003
Sep-98	5042
Oct-98	5081
Nov-98	5111

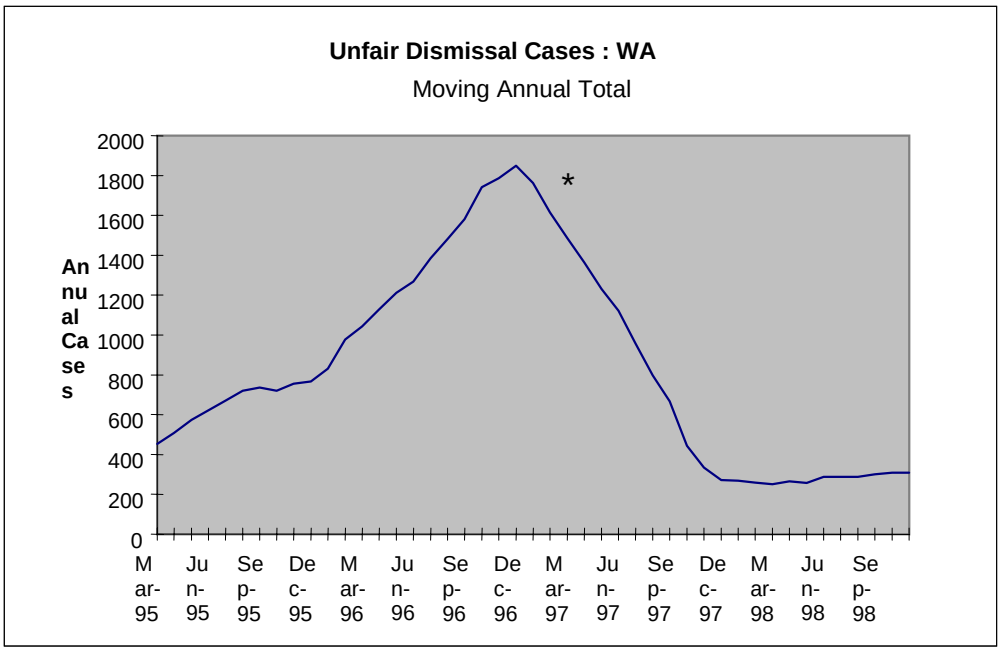
Unfair Dismissal Cases : WA

Source:Department of Workplace Relations

*

	1998	1997	1996	1995	1994
Jan	14	18	104	39	
Feb	18	28	177	31	
March	16	23	150	84	
April	31	16	140	55	1
May	16	25	157	73	6
June	53	23	132	77	29
July	27	26	190	73	25
Aug	23	23	184	87	36
Sept	24	11	141	42	28
Oct	17	10	233	72	87
Nov	34	33	142	96	61
Dec		36	99	37	26
TOTAL	273	272	1849	766	299

* Workplace Relations Act 1996 commenced 1/1/97



Moving Annual Total

Mar-95	453
Apr-95	507
May-95	574
Jun-95	622
Jul-95	670
Aug-95	721
Sep-95	735
Oct-95	720
Nov-95	755
Dec-95	766
Jan-96	831
Feb-96	977
Mar-96	1043
Apr-96	1128
May-96	1212
Jun-96	1267
Jul-96	1384
Aug-96	1481
Sep-96	1580
Oct-96	1741
Nov-96	1787
Dec-96	1849
Jan-97	1763
Feb-97	1614
Mar-97	1487
Apr-97	1363
May-97	1231
Jun-97	1122
Jul-97	958
Aug-97	797
Sep-97	667
Oct-97	444
Nov-97	335
Dec-97	272
Jan-98	268
Feb-98	258
Mar-98	251
Apr-98	266
May-98	257
Jun-98	287
Jul-98	288
Aug-98	288
Sep-98	301
Oct-98	308
Nov-98	309

Appendix 4 – Question on Notice

MINISTER FOR EMPLOYMENT, WORKPLACE RELATIONS AND SMALL BUSINESS

SENATE

(Question No. 10)

Senator Murray asked the Minister representing the Minister for Employment, Workplace Relations and Small Business, upon notice, on 10 November 1998:

(1) With reference to unfair dismissal claims under federal law, the annual report for 1996-97 of the Industrial Relations Court of Australia highlighted major outcomes in the federal jurisdiction as follows: (a) 74 per cent of unfair dismissal claims cases were settled by agreement; (b) 75 per cent of cases were finalised within 6 months and 99 per cent within 12 months; (c) 62 per cent of trials were completed in one day and 84 per cent within 2 days; (d) 58 per cent of contested cases were decided in favour of the employee, with 42 per cent in favour of the employer; (e) reinstatement of the employee was ordered in 7.5 per cent of contested cases; and (f) the median amount of compensation awarded was approximately $6 000:

    Can comparable information on unfair dismissal claims for the 1997-98 financial year be provided for the following Jurisdictions: (a) Federal; (b) New South Wales; (c) Queensland; (d) South Australia; (e) Tasmania; and (f) Western Australia.

(2) With reference to the Council of Small Business Organisations of Australia's guess that 50 000 jobs would be created by exempting small business employers employing 15 or fewer employees from federal unfair dismissal laws: (a) how many of the estimated 50 000 jobs will be created in each state and territory; and (b) can the methodology and empirical data used to arrive at the jobs estimate creation in each jurisdiction be provided.

(3) With reference to the answer to paragraph (1) of question on notice no. 1005 (Senate Hansard, 4 March 1998, p.421), for each of the jurisdictions outlined in the table provided, can numbers be given, accompanied by evidence and methodology for: (a) jobs created or lost as a result of increases or decreases in unfair dismissal applications; and (b) separate answers for federal, state and territory jurisdictions based on comparative 1996-97 data.

Senator Alston - The Minister for Employment Workplace Relations and Small Business has provided the following answer to the honourable senator's question:

(1) Answers for each of the five State unfair dismissal regimes are unavailable. The 1997-8 Annual Report of the Australian Industrial Relations Commission contains some statistics in relation to resolution of unfair dismissal claims. However, the Australian Industrial Registry does not collect data on all of the subjects on which the Industrial Relations Court of Australia previously collected data. Therefore, statistics in relation to federal unfair dismissal claims can only be provided for parts (a), (d) and (e).

(a) There were 8 092 termination of employment applications lodged under the Workplace Relations Act 1996 in 1997-98. Of those applications, 6 303 (78 per cent) were settled by agreement (ie had been withdrawn, settled or otherwise discontinued prior to conciliation or settled at conciliation or withdrawn, discontinued or otherwise settled after conciliation but prior to final orders).

(d) There were 774 contested federal cases decided in 1997-98, with 311 (40 per cent) decided in favour of the employer and 463 (60 per cent) in favour of the employee. (It may be noted that 282 of the decisions in favour of the employee involved applications against Gordonstone Coal Management based on the same fact situation; if these 282 applications are treated as one class action, then 63 per cent of contested cases would have been decided in favour of the employer and 37 per cent in favour of the employee.)

(e) Reinstatement was awarded in only 17 (2 per cent) of the 774 contested federal cases.

(2) The Chief Executive of the Council of Small Business Organisations Australia, Mr Rob Bastian, based his estimate that 50 000 jobs would be created if small businesses were exempt from federal unfair dismissal laws on the, in his view conservative, premise that 1 in 20 small businesses would hire at least one more employee if the exclusion was to come into force.

Applying this formula to the percentage of small businesses in each State or Territory (according to data published in Small Business in Australia 1997, ABS Cat No. 132 1.0), approximately 16 500 jobs would be created in NSW, 12 500 in VIC, 9 500 in QLD, 4 000 in SA, 5 500 in WA, 1000 in TAS and 500 each in the ACT and NT.

(3) Figures for the number of jobs created in each State and Territory in 1996 and 1997 (trend series annual averages) are as follows. (Source: ABS Labour Force Survey.)

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT	AUST
1996 '000	36.9	32.0	26.5	5.3	10.4	1.0	1.9	-1.9	112.5
%	1.3	1.6	1.8	0.8	1.3	0.5	2.3	-1.2	1.4
1997 '000	13.4	17.5	31.9	2.9	19.3	-6.8	1.9	1.6	80.7
	0.5	0.8	2.1	0.4	2.3	-3.4	2.2	1.1	1.0

There are a number of factors that contribute to the differences in labour market performance across the States and Territories. For example, the States and Territories generally rely on different industries for economic and employment growth. As such, any changes in policy or economic conditions which affect sectors in a non-uniform manner can be expected to have different impacts on employment. Similarly, characteristics such as population size and growth, natural attributes and climatic conditions also contribute to the differences in employment growth.

The reduction in the number of unfair dismissal applications indicates that progress has been made under the current legislation in discouraging inappropriate applications. This in itself would not be expected to create additional jobs in the small business sector. The Government considers that further change is required to recognise the particular circumstances of small businesses as well as to provide greater certainty for employers about the length of an employee's employment before that person can initiate an unfair dismissal application (no change is proposed in respect of unlawful dismissal applications). It is necessary to provide security for employers that they will not be subject to inappropriate applications. This is provided for in the Workplace Relations Amendment (Unfair Dismissals) Bill 1998, presently before the Parliament.

Senator Andrew Murray