Majority Report

1. The committee's consideration of provisions relating to unfair dismissal, which are the substance of the Workplace Relations Amendment (Termination of Employment) Bill 2002 ('the bill'), was its fourth such scrutiny of proposed legislation to implement this policy.[1] The Senate has failed to pass previous bills. It must be noted, however that the current bill is significantly different from its predecessors in that its legislative basis is the corporations power. For this reason, the committee took pains to elicit submissions from state governments and from several industrial legal academics with an interest in constitutional matters. In writing its report the committee has drawn on academic commentary on the merits of a unitary system of industrial relations, for the reason that this bill proposes a further shift in the legislative basis of the Workplace Relations Act away from the conciliation and arbitration power in the Constitution (section 51 (xxv)), toward the corporations power in section 51 (xx).

2. Specifically, this bill expands federal unfair dismissal laws in two ways. First, it extends the federal scheme to all employers of corporations as defined in section 4 of the *Workplace Relations Act 1996*, in accordance with section 51 (xx) of the Constitution. Second, the bill makes this expanded regime exclusive to the federal jurisdiction. Access to remedies under state industrial laws would no longer be available. This will serve to considerably reduce the incidence of 'forum shopping'.

The inquiry process

3. The current bill was introduced in the House of Representatives on 13 November 2002 and the debate adjourned at second reading. The Senate referred the provisions of the bill to the committee on 11 December 2002. The Committee conducted a public hearing on the bill in Melbourne on 24 February 2003. In preparing this report the committee has drawn on evidence it received at that hearing and on the 23 submissions received. Details of this evidence are to be found in appendices to this report.

4. The Selection of Bills Committee Report No 14 of 2002, 11 December 2002 set out the principal issues for consideration by this committee:

- The impact of the bill on job security.
- The constitutional implication of the bill
- The development of the bill and Commonwealth-state relations
- The impact of the bill on procedures.

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1 See the committee reports on the following bills: Workplace Relations Amendment (Unfair Dismissals) Bill 1998, February 1999; Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999, November 1999; and, Workplace Relations (Termination of Employment) Bill 2000, September 2000.

5. The committee has chosen to focus on two issues that are at the core of this legislation: the continuing need for exemption for small business from current onerous unfair employment termination provisions; and the new approach taken by the government to overcome constitutional hurdles in constructing a unitary unfair dismissal claim process for the majority of the workforce.

Unfair dismissal claims – a continuing vexation

6. The policy merits of the bill as they relate to improved prospects for employment in the small business sector have been dealt with in detail in previous reports of the committee on unfair dismissal legislation. It is acknowledged that there is continued controversy about the extent to which may be justified, the claims of business to be seriously impeded in its recruitment of employees by the threat of unfair dismissal claims. The committee majority notes that evidence of this factor as an impediment to recruitment is no less strong than it was in 1998 when the committee first looked at the problem. Recent research by Professor Don Harding of the Melbourne Institute of Applied Economic and Social Research, commissioned by the Department of Employment and Workplace Relations, and referred to in detail later in this report, is the latest of a number of surveys of business indicating very clearly the concerns of business about this issue. The committee considers in more detail the constitutional and procedural implications of the bill: those elements in which it breaks new ground in the Government's endeavours to simplify workplace relations law and thereby create employment growth.

7. Parliament has grappled for nearly ten years to make balanced laws to regulate the rights of both employees and employers in relation to termination of employment. The committee majority notes that only relatively minor changes have been agreed to in redressing the rights of employers to defend termination actions. The law is not as deficient as it was because of some improvements made. This bill is intended to ensure that a more even balance between competing interests is assured. It needs to be seen in a context of continued adaptation of the law to employment reality over nearly a decade. The original unfair dismissals provisions contained in 1994 amendments to the *Industrial Relations Act 1988* were amended soon after in response to employer complaints about the excessively wide scope of the legislation. The *Workplace Relations Act 1996* further amended these provisions to institute a more even balance between the rights of employers and employees. This, and successive legislative attempts to establish a more even balance have achieved only partial success.

8. The *Workplace Relations Amendment (Termination of Employment) Act 2001* made further significant technical improvements. These amendments included provisions requiring that:

- new employees have to be employed for three months before they can bring claims;

- the Commission must take into account the different sizes of businesses when assessing whether dismissal procedures were reasonable;

- wider scope for costs to be awarded against parties who act unreasonably;

- penalty provisions for lawyers and advisers who encourage parties to make or defend unfair dismissal claims where there is no reasonable prospect of the claim or defence being successful, with penalties are up to $10,000 for a company and $2,000 for an individual;

- lawyers and advisers must now disclose if they are operating on a 'no win no pay' or contingency fee basis;

- the Commission can now dismiss a claim following an initial conciliation hearing if it has no reasonable prospect of success or if the dismissed employee fails to attend hearings or makes another application in respect of the same dismissal; and

- tighter rules apply for extensions of time for the lodgement of late applications and claims by demoted employees.

9. Important as these amendments have been, the Government believes that, on balance, the scales are still tipped unfairly against the interests of small businesses which were more vulnerable then medium and large businesses to the effects of the postulated legal action brought by aggrieved employees.

Supporting small business employment

10. The committee majority notes that the objective of workplace relations reform has, since 1996, been inextricably linked with employment growth and the right of individuals to seek employment unhampered by restrictive work practices. Over-regulation of work practices has been an historic legacy which has only recently begun to be addressed. The committee majority regards this bill as one of a number of important interlinking legislative measures which have been presented to Parliament in recent years challenging to a conservative work culture in serious need of transformation. There is some evidence, based on OECD reports, that work practice changes, in conjunction with economic measures, are ensuring improved levels of labour productivity. Success in some areas, however, continues to highlight deficiencies in others, and points the way to fresh targets in workplace relations reform.

The costs to small business

11. Research commissioned by DEWR in 2002 and conducted by the Melbourne Institute of Applied Economic and Social Research found that state and federal unfair dismissal laws cost small and medium businesses $1.3 billion each year.[2] There is

2 Submission No. 14, DEWR, p. 14

general agreement that the defence of an unfair dismissal claim places a relatively greater burden and cost on small businesses. They do not have the same ability as larger businesses to employ specialist staff to manage human resource issues like recruitment, termination and underperformance. Small businesses do not have the same financial resources to defend a claim or the staff to cover the owner-manager if he or she has to attend a hearing personally.

12. Professor Keith Hancock, otherwise critical of some aspects of the bill, concedes that there are 'economies of scale' in complying with the Act, and that small business is disadvantaged in regard to the absence of human resource personnel and because of the owners indispensability to operation during business hours.

> For large businesses, the incidence of claims of unfair dismissal may be relatively stable and predictable and can be factored into business decisions. For small business, there is a greater element of risk, and risk-averse employers will understandably perceive a disadvantage.[3]

13. The committee majority sees overwhelming evidence that the cost to small business in defending unfair dismissal claims is disproportionately high. A significant factor in these costs is the time spent by business owners away from work, and in many cases, the closure of the business during trading hours. Restaurant and Catering Australia has conducted surveys which indicate that up to 38 per cent of member businesses had defended an unfair dismissal claim in the previous three years, with the average cost of defending the claim being $3, 675 with an average absence away from the business by the manager-owner being 63 hours.[4]

14. Evidence has been received by the committee of many employers opting to settle out of court unfair dismissal claims that are vexatious or otherwise without merit so as to avoid additional costs in time and money. While recent amendments to the Act have reduced such incidences, that choice is still being made. ACCI has submitted that out of court settlements 'in the thousands of dollars' are still being made: a phenomenon which reveals the operation of a flawed system.[5]

15. Professor Andrew Stewart believes this to be a problem with both federal and state unfair dismissal laws. Professor Stewart claims that both surveys and anecdotal evidence suggest that many claimants with marginal cases walk away with settlements paid by employers who cannot be bothered with the time and expense of disputing the case. As the law stands, it almost always makes commercial sense to settle, often at much less cost.[6]

16. The expense of defending an unfair dismissal claim may also significantly affect business earnings, with the result that many small business employers are

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3 Submission No. 1, Professor Keith Hancock, p. 3

4 Submission No. 8, Restaurant and Catering Australia, p. 6

5 Submission No. 16, ACCI, p. 7

6 Submission No. 9, Professor Andrew Stewart, p. 7

reluctant to defend even unmeritorious unfair dismissal claims, preferring instead to settle the claim as quickly and cheaply as possible. The expense is two fold – the need for legal or other representation and time lost attending hearings. In very many cases such litigation would have the effect of curtailing the hours of operation of a business. The Government has argued this point consistently in all debates relating to unfair dismissal legislation.

17. The National Farmers Federation has advised the committee of the particular problems faced by primary producers embroiled in unfair dismissal cases. Agricultural businesses find it difficult to set aside contingency funds for unfair dismissal compensation or to defend legal actions owing to the seasonal nature of agriculture and the higher degree of unpredictability in regard to profit margins. The factors peculiar to agriculture put the plight of primary producers in the especially 'hard basket'[7].

18. ACCI have also described how the inhibiting tendency of the unfair dismissal laws can affect the efficiency of businesses:

> There is also a different – but related aspect to the connection between unfair dismissal laws and employment. Unfair dismissal laws (depending on their content) can also operate as a disincentive to terminate a non-performing employee, and replace that employee with a more satisfactory staff member. In this way unfair dismissal laws operate as a brake on business efficiency, rather than employment *per se*. From an employers perspective, that is no less important a consideration. Nor is this a valid basis to argue that unfair dismissal laws protect job security. Retaining under performing employees does no good to the overall job security of the remaining staff, nor the capacity of the Australian economy to generate jobs.[8]

19. The committee majority agrees with the logic of the argument presented by ACCI. The committee heard evidence of the efforts made by DEST to provide both comprehensive and effective education and training programs on small business management. While it does not dismiss arguments for the need for even more more training and mentoring for small business owners, it does not accept that small business owners want a change in the law to mask their managerial inadequacies, as is often claimed by the bill's detractors.

Differential employment rules for small business

20. The relatively onerous cost to small business of defending unfair dismissal claims, or of paying off vexatious claimants, highlights the need for differential employment rules for small business. The committee heard evidence bearing upon business size as a justification for differential employment rules. Opposition party senators took the line that employees of small businesses were disadvantaged by

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7 Submission No. 18, National Farmers Federation, p. 9

8 ACCI, op. cit., p. 7

concessions made to small business with regard to unfair dismissal clauses in the bill. The committee majority draws attention to evidence given by ACCI in regard to the circumstances of small businesses and their limited capacity to respond to personnel management problems. As the committee heard:

> … the distinction on size comes down to the fact that, when you look at this jurisdiction, it is about employees' rights as against employers' businesses. You have to qualify rights by reference to the real environment in which they are sought to be exercised. Those rights are exercised against a particular business. Smaller businesses are in a more vulnerable position when it comes to both pre-termination issues and post-termination issues.
>
> Pre termination, smaller businesses are less likely to have the internal resources to be able to go through the formal processes that our unfair dismissal cases indicate are necessary to establish a fair dismissal according to law, because workplace relationships are much more informal in small business. The business proprietors themselves individually have to not only work in the business but also deal at large with all of the regulatory issues that arise. So, whilst there is a differential in terms of the rights between larger businesses and smaller businesses when you talk about cut-offs, that is because there are different business profiles in which those rights are sought to be exercised.
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> Post termination, smaller businesses again have fewer resources to defend matters. If you are having to pull perhaps your one supervisor out of a shop to go down to the unfair dismissal jurisdiction to defend the claim and explain inadequate performance and the like, that has massive implications for the operation of your business over that period of time, whereas one manager coming out of a larger business may have much less impact on the business.[9]

21. The committee majority notes that most submissions from state governments and from some academics argued against the fairness of differential conditions for small business employees. This is a view that takes no account of the circumstances of small business. For instance, one of the long-standing grievances of small business is time taken with dealing with vexatious or otherwise unmeritorious claims of unfair dismissal: such claims abetted in the past by lawyers operating on a fee contingency basis. For this reason, Schedule 2 of the bill would allow the Australian Industrial Relations Commission (AIRC) to reject an unfair dismissal application without hold a hearing (the so-called 'on the papers' provision), thus allowing the Commission to remove from its caseload applications that are beyond its jurisdiction or which are frivolous or vexatious. The effect would be to free the Commission to deal with genuine claims. As the committee was told, there is no reason why a small business employer should be put to the cost and inconvenience of appearing at conciliation hearings before the Commission on an application which should not have been

9 Mr Peter Anderson, Australian Chamber of Commerce and Industry (ACCI), *Hansard*, Melbourne, 24 February 2003, p. 15

made.[10] The committee majority notes the advantage to small business in this provision, but can identify nothing in it which removes from small business an obligation on employers to abide by the unfair dismissal laws or take responsibility for any breaches of this law.

19. 22. ACCI reminded the committee that differential employment conditions existed in several areas of industrial law. For instance in provisions for maternity leave[11]. The DEWR submission also noted that small businesses were dealt with differently from larger businesses under the *Income Tax Assessment Act 1997* and *A New Tax System (Goods and Services Tax) Act 1999* and the *Privacy Act 1988.*

20. 23. DEWR also provided data from the Productivity Commission which illustrates the relative fragility of small business compared to larger businesses. For instance, small businesses have a lower survival rate, especially in the short term.[12]

Cumulative exit rates and survival rates, by size of business

Years of operation	Changes in ownership	Cessations	Total exists	Total survivals
Small businesses	%	%	%	%
1	2.1	7.5	9.6	90.4
2	3.9	14.3	18.3	81.7
5	7.4	27.4	34.9	65.1
10	11.8	43.5	55.3	44.7
15	13.5	52.1	65.6	34.3
Large businesses				
1	4.4	3.8	8.2	91.8
2	8.4	7.3	15.7	84.3
5	12.2	16.3	28.5	71.5
10	20.7	27.1	47.7	52.3
15	25.2	30.9	56.1	43.9

Small business perceptions of impediments to employment

24. Central to the Government's policy objectives to be pursued through this legislation is the expansion of employment opportunities in the small business sector. The committee majority regards the removal of impediments to employment as the

10 Mr James Smythe, DEWR, *Hansard*, op. cit., p. 35

11 ibid.

12 Submission No. 14, DEWR, p. 16, from Productivity Commission, *Business Failures and Change: an Australian Perspective,* p. 26

principal goal of this bill, and justifies the new approach taken by the Government. The committee majority understands that surveys of small business attitudes are liable to be questioned as to their statistical validity. It is aware that perceptions of disadvantage may be felt by business owners partly as a consequence of lack of information or through an inability to keep themselves reliably informed. This does not alter the basic fact that many small business owners have some reason for either knowing, or believing, that the currents laws relating to unfair dismissal impede them from offering employment opportunities. Perception has become a reality requiring legislation to deal with the problem.

25. Evidence from the Melbourne Institute research (referred to above) commissioned by DEWR, in which were surveyed some 1802 small and medium businesses with fewer than 200 employees, showed that dismissal laws contributed to the loss of about 77 000 jobs from businesses which used to employ staff and now no longer employ anyone (about 60,000 of these from small businesses with fewer than 20 employees). According to DEWR it is likely that the effect on jobs growth would appear to be larger than the estimate of 77,000 as the figures do not take into account jobs abolished by businesses which have reduced their workforce. Nor do they include jobs which would have been created if there were no unfair dismissal laws.[13]

26. The Melbourne Institute survey also showed that the most disadvantaged job seekers are most seriously affected by current unfair dismissal laws. It found that businesses were now less inclined to hire young people, the long-term unemployed, and those with lower levels of education, turning instead to casuals and others on fixed term contracts or longer probationary periods.[14]

27. The committee majority notes that all of the surveys done of small business attitudes to unfair dismissal have been criticised by opponents of government policy. Its attitude inclines toward the views expressed by ACCI when its representative gave evidence to the committee on the statistical validity of the Melbourne Institute survey:

> We think the Melbourne Institute work certainly does contribute to the debate. … One can always quibble at the edges about questions, methodology and assumptions that build into estimates, but it is independent research. It is the best independent research that has been conducted on the issues. It is research outside the vested interests of unions, employer organisations, lawyers and those associated with the jurisdiction. As we have read through the work, it does seem that the academics involved went to quite some lengths to try to come up with neutral questions and a methodology that was robust. In this area you are always going to have to make certain assumptions about cost impacts, but I do not think we should be preoccupied as to whether the methodology is exactly right, 10 per cent out, 10 per cent too far one way or the other, or 20 per cent too far one way or the other. It is within the ballpark, and I think it gives some frame of

13 Submission No. 14, DEWR, p. 14

14 ibid.

> reference for the committee to look at in terms of an independent academic analysis of the issue.
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> … I accept that there are always going to be arguments about methodology, but there is a thread of consistency in what the professor does say about the unfair dismissal laws. Leaving aside the actual figures that he uses or the actual number of jobs that he ultimately concludes, there is a thread of consistency between the business surveys and this work.[15]

28. The committee majority rejects the notion that surveys of small business attitudes to unfair dismissals are an insecure foundation for policy and legislation. The surveys have been too numerous and too consistent to be rejected as evidence of little value. An extensive summary of attitudinal evidence, attached to the submission from DEWR, is reproduced as an appendix to this report.

29. In summary, the committee majority reiterates its support for the bill's amendments to the Workplace Relations Act to reduce the current burden of unfairness on small business in their defence of claims against unfair dismissal. The committee majority has argued that the circumstances of small business warrant special consideration, and a measure of legislative protection. It affirms its view of the nexus between employment growth in the small business sector and the elimination of processes which are complex and encourage unmeritorious claims by some employees.

Toward a unitary industrial relations system

30. In recent years, the Government has been exploring options for working towards a simpler, fairer workplace relations system based on a more unified and nationally harmonised set of laws. This debate has been supported by a great many stakeholders in industry, notably the Australian Business Council, the Australian Industry Group and the Australian Chamber of Commerce and Industry. A unitary system of industrial relations has strong support among industrial and constitutional legal authorities, including authorities who have long supported the claims and interests of unions and employees. The committee consider that a that a national economy needs a national workplace relations regulatory system; that maintaining six separate industrial jurisdictions is not only inefficient, but excessively complex and known to create confusion and uncertainty for employees and employers alike. The committee majority considers that a more unified national workplace relations system would result in less complexity, more certainty and lower costs, with flow-on benefits for employment.

31. The committee majority notes the approval with which a former assistant director of the Business Council of Australia quoted Sir Anthony Mason's views on the need for a unitary industrial relations system:

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15 Mr Peter Anderson, *Hansard*, op. cit., pp. 16-17

> …we have a dual system of arbitration… that… has unnecessary complexity and technicality. A dual system of courts is awkward enough….But there is no justification for them in the world of industrial relations where speed and simplicity of dispute resolution are, or should be, of the essence. There is much to be said for the view that the Parliament should have powers over industrial relations generally.[16]

By international standards, Australia has a relatively relaxed regime of worker protection; a factor identified by the OECD as resulting in consistent increases in the level of economic growth. Nonetheless, the OECD has also commented that further industrial relations reform would be enhanced by the 'harmonisation of federal and state legislation', not only to reduce regulatory costs for businesses and governments, but also to avoid reforms of the federal system being rolled back at the state level. The OECD also identifies scope for reducing the disincentives on small businesses to hire workers which arise from unfair dismissal legislation.[17]

32. It is estimated that the number of employees covered under amendments proposed in this bill would increase from approximately 3.9 million to around 6.8 million. Around 15 per cent of employees, mostly working in unincorporated small businesses would remain covered by state unfair dismissal systems. The Minister for Employment and Workplace Relations has written to state workplace relations ministers asking them to refer legislative power to the Commonwealth to establish a uniform national unfair dismissal system. Apart from the practical logic of such an arrangement, this proposal also recognizes that it may no longer be cost-effective for states to maintain their own tribunal processes with such a diminished workload.[18]

33. The committee majority concurs with the Government's view that there are major advantages in moving towards a unified national system in a step-by-step approach. It is highly unlikely that any agreement on the transfer of state powers, much less a constitutional amendment, could be effected in anything less than 'the long term'. Yet the Government has the responsibility to take what expedient short-term measures it can to ensure that workers and businesses operate efficiently and productively. That means, as far as is constitutionally possible, one system of laws governing unfair dismissal.

34. The gradual expansion of Commonwealth powers, which has been a notable feature of constitutional evolution since 1920[19] should not leave Parliament complacent about the significance of any new legislation which extends Commonwealth powers. Without exception the submissions from state governments

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16 Mr Colin Thatcher, *A Unitary Industrial Relations System: Unfinished Business of the 20th Century*? Industrial Relations Forum Proceedings, Melbourne, 17 October 2000, p. 6

17 OECD, *Economic Survey: Australia*, March 2003, p. 82

18 Mr James Smythe, *Hansard*, op. cit., p. 30

19 The Engineers Case, decided by the High Court in that year, is widely regarded as a landmark case in the extension of Commonwealth powers into what was hitherto regarded as a matter of state jurisdiction. That particular power was the conciliation and arbitration power.

oppose the passage of this bill because it is seen as an incursion on state powers. It is probably seen as 'altering the federal balance', although it is unlikely that many members of this Parliament see this concept as having much contemporary relevance. The committee notes the submission from Professor George Williams in regard to this issue, which it quotes at length:

> … it is clearly the responsibility of the federal Parliament to enact laws for national needs. Our economy does not consist of discreet and insular sectors of commerce within each State or even within Australia, but exists within a world of global markets that creates competition and interdependence with the economies of other nations. In order to compete effectively on a global scale given our small population and geographical location, Australia requires national laws on issues ranging from industrial relations to consumer protection and trade practices. Australian businesses operating in different States are less likely to be competitive if they must comply with different, and possibly conflicting, standards across our nine law-making jurisdictions. It can also be more difficult and costly for employees to enforce their rights where more than one set of laws apply (particularly where, as a result of the High Court decision in *Re Wakim; Ex parte McNally* (*Cross-vesting Case*) (1999) 198 CLR 511, their claims under federal and State law might not be heard in the same federal court). As a matter of policy, a national unfair dismissal regime, or indeed a national industrial relations regime, can be justified. This has been accepted in the analogous area of corporations law, where a national scheme has operated for over a decade. Furthermore, if there is to be a national scheme, it makes sense for this to be the only scheme to apply to a particular claim. Hence, any national scheme should be exclusive.
>
> In addition, I cannot see any reason of principle why the federal Parliament should not rely upon its full range of constitutional powers to regulate industrial relations matters (although it may wish instead to create a national co-operative scheme with the States and territories). There is no reason why the federal Parliament should be limited to using its power in section 51(xxxv) of the Constitution over 'Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'. In seeking to enact a national regime, it makes sense for the Commonwealth to rely upon the full range of its legislative powers from that over external affairs to that over corporations.[20]

35. The committee understands that states will consider a joint appeal to the High Court in order to test the constitutional validity of this legislation. Evidence before the committee suggests the strong probability that a constitutional challenge is unlikely to succeed. While the committee will not speculate about any legal outcome, it further notes the views of Professor George Williams that the High Court has tended to take a broad view of Commonwealth powers, in particular the corporations power, in recent times.

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20 Submission No. 2, Professor George Williams, pp. 1-2

Advantages of a single jurisdiction

36. The committee received a considerable amount of evidence about confusion resulting from the complexity of multiple jurisdictions. A high proportion of employers and employees are unaware of whether they come under state or federal awards. They do not know from which jurisdiction to seek redress or to which they should lodge an application. As a result, injustices that the law has been established to rectify go un-remedied.

37. The committee majority was most interested to note statistics, set out in the table below, obtained from DEWR showing the extent of employer confusion about whether their employees were covered by state or federal awards.

Unfair dismissal coverage of full-time workers based on their employers' perceptions of unfair dismissal jurisdictional coverage – Businesses with fewer than 20 full-time workers

Location	Mainly covered by Commonwealth law (% of full-time workers in State/Territory)	Mainly covered by State law (% of full-time workers in State/Territory)	Covered equally by State and Commonwealth law (% of full-time workers in State/Territory)	Don't know (% of full-time workers in State/Territory)
New South Wales	19.1	32.3	26.1	22.5
Victoria	23.6	24.6	27.5	24.6
Queensland	10.6	34.8	33.9	20.7
South Australia	12.1	33.6	34.2	20.2
Western Australia	4.7	31.8	24.8	38.6
Tasmania	17.9	34.5	21.3	26.3
Northern Territory	8.9	13.5	60.8	16.7
Australian Capital Territory	19.3	19.8	48.4	12.5
Australia	**17.1**	**30.3**	**28.8**	**23.8**

Source: Yellow Pages Business Index Survey, July 2002

38. It has been recommended to the committee by the Selection of Bills Committee that it look at the effect of the bill on procedures. There appears to be little doubt that all the effects are positive, especially if, as seems inevitable following the passage of this bill, the Government secures the referral of additional powers from the states to takeover all unfair dismissal cases. In his submission to the committee, Professor Keith Hancock cited the evidence of confusion among employers, and probably employees as well, as a telling justification for an extension of Commonwealth powers in regard to unfair dismissals. It would bring the added

advantage of developing consistent principles facilitated by the appeal procedures of the AIRC.[21]

39. The committee has been advised of other problems created by the existence of multiple unfair dismissal jurisdictions including that, from time to time, employers may be faced with the complexity of dealing with different unfair dismissal claims in different jurisdictions involving different procedural requirements and possible remedies. This can be the case even where the employer operates out of only one state. As the President of the Commission has pointed out, it is not always clear whether a particular jurisdiction is available and this means that there are cases in which unnecessary transaction costs arise because of jurisdictional uncertainties.[22] These unnecessary costs are an unfair burden on the Government and on individual litigants.[23]

40. The simplification of procedures promised under the new legislation appears to the committee majority to be a significant advantage. Under current arrangements, identical cases may be handled differently just because they fall in different jurisdictions. The inconsistent application of laws diminishes public confidence in judicial processes. Jurisdictional questions also appear to take up a considerable amount of court time, which is expensive.

41. The bill would provide a significant step towards a unified national workplace relations system. As a result, the complexity and confusion of unfair dismissal laws would be substantially reduced for the majority of Australian employees and employers.

42. The committee majority **recommends** that this bill be passed without amendment.

John Tierney

Chair

21 Submission No. 1, Professor Keith Hancock, p. 1

22 The Hon Justice Geoffrey Guidice, Speech to The Australian Workers Union Conference, *Unfair dismissal laws: Monster or mouse?* East Melbourne, 19 April 2002.

23 Submission No. 14, DEWR, p. 3