The Senate

Employment, Workplace Relations and Education Legislation Committee

Provisions of the Workplace Relations Amendment (Termination of Employment) Bill 2002

March 2003

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

Membership of the Committee

Members

Senator John Tierney	LP, New South Wales	Chair
Senator George Campbell	ALP, New South Wales	Deputy Chair
Senator Guy Barnett	LP, Tasmania	
Senator Kim Carr	ALP, Victoria	
Senator David Johnston	LP, Western Australia	
Senator Natasha Stott Despoja	AD, South Australia	

Substitute Members

Senator Andrew Murray	for Senator Stott Despoja – Workplace Relations
Senator John Cherry	for Senator Stott Despoja – Employment
Senator Lyn Allison	for Senator Stott Despoja – Schools and Training

Participating Members

Senator the Hon Eric Abetz	Senator Alan Ferguson	Senator Brett Mason
Senator the Hon Ronald Boswell	Senator Michael Forshaw	Senator Julian McGauran
Senator Geoff Buckland	Senator Brian Harradine	Senator Shayne Murphy
Senator Grant Chapman	Senator Len Harris	Senator Kerry Nettle
Senator John Cherry	Senator Steve Hutchins	Senator Marise Payne
Senator Jacinta Collins	Senator Sue Knowles	Senator Santo Santoro
Senator the Hon Helen Coonan	Senator Meg Lees	Senator the Hon Nick Sherry
Senator Trish Crossin	Senator Ross Lightfoot	Senator Ursula Stephens
Senator Alan Eggleston	Senator Joe Ludwig	Senator John Watson
Senator Chris Evans	Senator Gavin Marshall	Senator Ruth Webber
Senator the Hon John Faulkner		

Secretariat

Mr John Carter, Secretary
Ms Margaret Blood, Principal Research Officer
Ms Ruth Clark, Executive Assistant

Senate Employment, Workplace Relations and Education
Legislation Committee Secretariat
The Senate
Parliament House
Canberra ACT 2600
Phone: 02 6277 3520
Fax: 02 6277 5706
E-mail: eet.sen@aph.gov.au
Internet: www.aph.gov.au/senate_employment

Table of Contents

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.

---

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

---

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

---

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.
>
> 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.
>
> … 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:

---

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

---

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.

---

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

Labor Senators' Report

Labor senators on the committee oppose this legislation on three grounds. First, its provisions tip the balance in unfair dismissal claims in a way which undermines employee safeguards., because the use of the corporations power as a constitutional basis for the legislation will lead to legal uncertainties, and because the use of such power cannot, by itself, be regarded as anything more than a temporary expediency to secure limited and short-sighted legislative ends.

It should be noted that the bill will not achieve the government's stated aims. There will be no increase in jobs, the bill will actually increase the industrial relations costs borne by business because many who choose to use the state system will now be forced to operate in two systems, a unitary system will not result, and workers will be discouraged from working for small businesses because it offers them less security and fewer rights.

Minority reports of this committee (being those of Labor senators) have on three previous occasions dealt with issues centering on unfair dismissals, and the merits of making special concessions to the small business sector in regard to reducing to rights of employees. This report will deal only with new aspects of this issue which arise in this bill.

Unfair dismissal revisited

This committee has been dealing intermittently with unfair dismissal for years. As one submission stated:

> The Federal Government has failed to justify there is any problems with the operation or application of the current state unfair dismissal systems.[1]

Another constant theme in Government policy has been to place small business proprietors in a privileged position in regard to determining conditions of the employment they offer. While Labor senators acknowledge that small business has particular characteristics which affect employment practice, there has never been a strong case made for the proposition that employees in the small business sector should possess fewer rights and legal safeguards than people who work in other employment sectors. The inquiry by the references committee into small business employment, tabled in February 2003, found that the preoccupations of small business differed very little from those of large and medium business, having to do with business cycles, taxation, regulations and general economic conditions. Small business employs to the extent that business levels and business growth strategies determine. For reason that will be dealt with later, any connection between the fear of unfair dismissal claims and the rate of overall small business employment is extremely tenuous.

---

1 Submission No. 11, NSW Government, p. 3

Small business employment concessions

The committee received much evidence on the privileged treatment of small business that is proposed in this bill. The Government appears to believe that small businesses are especially sensitive to the 'burdens' imposed by this the Workplace Relations Act. Implicit in the Government's position is a presumption that small business proprietors may also be more prone to act in ways that provoke claims of unfair dismissal. This has never been conceded, although it is generally acknowledged that small businesses are usually without corporate management support. Labor senators believe that for an employee who is dismissed, the size of the business should not be the determinative factor. To argue otherwise is to argue for an inequality of rights. The Government claims that it seeks more 'balance' in the legislation than currently exists, but in arguing for differential legal rights for employees it will achieve the opposite outcome.

In opposing the concept of differential rights, Labor senators note the strong argument that small business may have compensating advantages that undermine any argument for concessional treatment in regard to employment laws. As one submission stated:

> There is a wide variety of forces at work that determine the 'make-up' of the economy between small and large business. Some of these favour large businesses and others small businesses. The oft-cited importance of small business in the overall economy is of itself evidence that by no means all advantages lie with bigness. If the unfair dismissal law is relatively disadvantageous to small business, this is but one of a myriad of factors operating on both sides. It is an aspect of the economic environment with which all businesses have to come to terms. There is no suggestion that large businesses should be compensated to offset advantages of small business, such as the close contact with customers that is possible for (say) small retailers and local plumbers.[2]

Labor senators consider this to be a 'balanced' description of the circumstances of small business in the context of the wider economy, and they commend this comment to the Government. They will continue to oppose this legislation for the reason that it is a response to false perceptions about the extent of the problem confronted by employers.

The Harding report

Critics of previous bills dealing with unfair dismissals have regarded survey results produced or commissioned by employer organisations showing high levels of concern and anxiety amongst small business proprietors to be highly questionable. The efforts that have been made to establish the veracity of such opinion have been listed in an appendix to this report, but can be regarded as having historic interest only.

---

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

Labor senators note that the Government, having belatedly acknowledged the need to produce new and irrefutable evidence of the connection between employer fears of current unfair dismissal laws and their readiness to employ, has commissioned research intended to put the matter beyond doubt. The Government claims that the Melbourne Institute Report, the work of Don Harding, is final and authoritative evidence of the need for unfair dismissal legislation changes.

The methodology underpinning the Melbourne Institute report was several times described and defended by witnesses at the committee's Melbourne hearing. Questions put to employers asked what influence unfair dismissal had on their processes and practices in such a way as to suggest answer affirming some degree of influence. This approach was favoured because employers might otherwise overlook the issue. A number of submissions made scathing comment on the methodology of the Harding survey and, in a variety of ways, described the conclusions as badly flawed. Criticism was directed in particular at conclusions drawn about the effect of current laws on, first, the loss of employment, and second to the related issue of labour costs.

On the issue of employment loss, Labor senators note the evidence provided by the ACTU in identifying the flawed reasoning behind some of the report's conclusions:

> For example, employers with no employees, but who had previously employed staff, were asked if the unfair dismissal laws had played a part in their decision to reduce staff. Even with the leading question, only 11 per cent of employers said that this had been the case, with only 4.6 per cent saying that the laws were a major factor. In an extraordinary feat of reasoning, Harding concludes that the unfair dismissal laws caused the loss of 77,482 jobs.[3]

The ACTU submission then quotes from the report:

> Firms that previously had employees, but currently do not have employees, were asked what was the maximum number of people they had employed. Factoring this up to the population as a whole results in the conclusion that there were 77,482 job losses in which UFD laws played a part. Of these there were 34,812 job losses in which UFD laws played a major role, 17,100 job losses where UFD laws played a moderate role and 25,572 job losses where the laws played a minor role.[4]

Labor senators note the assumption that where a business once employed five people, and now has none, this reduction may be attributed not only to economic or trading circumstances, but to the existence of unfair dismissal laws. The claim that without the unfair dismissal laws there would be 77,000 more people employed in small and medium sized firms must be regarded as absurd. It is, as Professor Andrew Stewart

---

3 Submission No. 5, Australian Council of Trade Unions, p. 12

4 ibid.

has remarked in his submission describing this figure as 'an estimate based on a series of estimates' and a 'curious exercise providing a weak foundation' for Government pronouncements on the benefits of the legislation.[5]

It is also noted that the assumption underlying the Harding conclusion in relation to the employment cost of unfair dismissal laws rests on his view that employment levels are determined solely by labour costs. This has not been a view shared by the Australian Industrial Relations Commission. For Harding, as apparently for the Government, the economic rational for changes to unfair dismissal laws is as follows: reduced labour costs lead to higher employment; compliance with unfair dismissal laws represents a cost on labour; therefore, repealing unfair dismissal laws will lead to higher employment.[6] As the ACTU has pointed out, the same could be said about superannuation and occupational health and safety laws.[7]

On the issue of costs, criticism of the Harding methodology was made in the submission for the Government of Western Australia. This commentary sums up the views of Labor members of the committee.

> The main conclusion that unfair dismissal laws impose a cost of $1.3 billion is itself a statement based on what is described as 'opportunity cost'. Employers were asked to compare a situation where there were no unfair dismissal laws and to indicate the degree to which 'unfair dismissal laws increase my business costs'.
>
> Harding then took these 'reported costs' and 'factoring them up to the population of small and medium businesses yields an estimated $1329 million …'[8]. There are several defects with this methodology. Firstly, for example, it is not explained in the report what exactly "factoring them up" actually means and medium size businesses are also included in this calculation. Secondly, the figure reached appears to be based on the difference in casual and permanent rates of pay. Thirdly, it may also include the amounts expended by firms surveyed in responding to unfair dismissal claims made against them. However, whether this is the case is not clear from the report.
>
> It can therefore be properly concluded that this report announces a figure of $1.3 billion based on the presumption that if employers were not subject to unfair dismissal laws, they would employ all their casual labour force as permanent employees. However, this does not take into account other reasons for employing on a casual basis, such as to allow more flexibility to

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

6 Submission No. 5, ACTU, p. 15

7 ibid.

8 Harding, D. (2002) *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses, Melbourne Institute of Applied Economic and Social Research, University of Melbourne*, p. 19

> meet business needs and to simplify the administrative requirements in calculating wages and entitlements.[9]

Small business employment in perspective

While the onus of proof must always remain with those who desire to strip employees of legal rights to fairness, the references committee did conduct an inquiry into small business unemployment in 2002 which provided some insights into the relative importance of the issue to small business. The committee's findings on unfair dismissal were as follows:

> Consistent with survey rankings of small business concerns, unfair dismissal did not arise as a major issue during the inquiry: other issues such as the need for improved business management, problems with recruiting suitable employees, the compliance burden associated with the New Tax System and the total framework of employment obligations were far more prominent. Where unfair dismissal laws were raised as a concern, the main issues were a lack of understanding in how to dismiss staff consistent with the law, the costs and complexity of the current processes for determining claims and the uncertainty of outcomes.[10]

In its small business employment report the committee also pointed out that changes to the processes and requirements for unfair dismissal have made a difference. following the introduction of the *Workplace Relations Act 1996*, unfair dismissal cases in the Commonwealth jurisdiction fell from 14,499 for the twelve months ending 1996 to 8,631 for the twelve months ending September 1997; following changes to procedures and requirements in August 2001, the number of cases fell from 8,287 for the twelve months prior to September 2001 to 7,298 for the twelve months prior to September 2002.[11] The annual number of cases is now half of what it was six years ago. The Government has chosen not to be influenced by this trend. It is also selective in reading the evidence of its own research.

The references committee noted from the evidence that there was a serious unaddressed need for personnel management skills in the small business sector. The committee noted that small business concerns about unfair dismissal indicated the need for more training and support, including clear information materials on hiring staff and the dismissal process disseminated through the small business network. The committee agreed that proposals for providing a simplified and cheaper process for resolving unfair dismissal claims also had merit.

Employer organisations (whose information is apparently accepted without question by the Government) often refer to particular instances of employee recalcitrance or of the disruption of business as a result of employers having to attend tribunal or court

---

9 Submission No. 20, Government of Western Australia, p. 10

10 EWRE References Committee, *Small Business Employment*, February 2003, p. 135

11 Data from the Department of Employment and Workplace Relations provided to Senator Andrew Murray.

cases. Labor senators do not deny that such problems have arisen from time to time, and point to 2001 amendments to the Workplace Relations Act which have served to eliminate misuse of the unfair dismissal provisions. What was presumably an acceptable balance of rights two years ago has now become a burdensome imposition on business.

Labor senators do not believe that the problems presumed by the Government to exist have any basis in fact. If anything, the situation has improved as the importance of sound management practice, for the sake of profits, is gradually affecting the thinking of the wide spectrum of small business proprietors. For such employers the looming problem is the shortage of skilled labour, rather than fears of vexatious litigation by employees.

Use of the corporations power

The major new element to this bill is the use of the corporations power (section 51(xx)) of the Constitution to override state legislation. Over a number of years several planks of the Constitution have been used to underpin industrial relations laws. It has been recognised for some time that the use of the corporations power in such cases as this legislation presents certain difficulties, most obviously that around 20 per cent of employers cannot be covered because they are not employed by constitutional corporations. The bill as it stands is both a limited and blunt instrument of legislation. It leaves a small but significant group of workers beyond its ambit, and it creates legal complications in cases where current state legislation covers regulatory matters affecting unfair dismissal. It is a measure of the Government's preoccupation with short-term political goals that it has persisted with measures demanded by its industry supporters, but which will create legal and administrative difficulties for them over the long term.

This view is widely supported in submissions from the states, which are naturally affronted by the Commonwealth's attempts to override properly functioning laws enacted in state parliaments. The Government asserts, without explanation or justification, that the proposed Commonwealth legislation will be 'better balanced' than current state laws which, according to the Explanatory Memorandum contain 'inequalities', which are not identified.

Several state submissions expressed strong opposition to any attempt by the Commonwealth to make overriding legislation without consultation with the states, especially in attempting to graft federal laws onto state systems. The bill before the committee shows all the signs of failure to deal cooperatively with the states. It also shows that the complexities and confusions that the Government alleges to arise from having conflicting and overlapping jurisdictions would be made even worse if this bill were to pass. The submission from the Queensland Government points out that far from resulting in improved legislation, as the Government claims, the bill establishes:

- two different sets of federal laws and procedures governing unfair dismissal matters, depending on the size of the respondent;

- different federal and state unfair dismissal regimes for incorporated and unincorporated entities;

- different federal and state unfair dismissal regimes for incorporated entities, depending on whether they meet the definition of a 'constitutional corporation';

- concurrent but separate federal and state jurisdiction over different aspects of workplace relations in the one business, for example a federal regime governing a business' unfair dismissals and a state regime governing workplace harassment and industrial disputes; and

- concurrent but separate federal and state jurisdiction over different aspects of the one employee's claim (for example, the federal regime for unfair dismissal and the state regime for insufficient notice or unpaid entitlements).[12]

Therefore, a state award employee of a constitutional corporation with a claim for unfair dismissal and withholding of wages would need to lodge claims in both federal and state jurisdictions, one for the unfair dismissal component, and the other for the wages component.[13] Employers, who complain now about time wasted in court under the current law will find the regime proposed under this bill to be even more onerous.

The arguments of state governments are supported by Professor Andrew Stewart. In his submission, Stewart make it clear that while he has always supported the principle of unitary industrial relations laws, he is opposed the proposal in this bill on the following grounds.

The first is that they seek to override state unfair dismissal laws in favour of a federal regime that is inferior in both design and operation. Second, the proposed amendments would not in fact contribute to the goal of simplifying the coverage of federal and state labour laws. Third, and most importantly, the predominant effect of the amendments will be to reduce the overall national coverage of unfair dismissal laws and exclude many workers who currently have access to a remedy from being able to challenge their dismissal. Labor members of the committee believe that Stewart's argument needs to be reported in some detail.

On the point of the defective design of this bill, Stewart points to the inordinate complexity of the Workplace Relations Act, its attendant regulations, and the unduly prescriptive nature of its provisions. Further to this, Stewart writes about the provisions of the Act:

---

12 Submission No. 21, Government of Queensland, pp. 8-9

13 ibid.

> They are very hard for ordinary workers or managers to understand, necessitating legal advice for even the simplest procedures. Instead of simply empowering the Australian Industrial Relations Commission (AIRC) to deal with certain claims and providing broad guidance as to how to do so, as most State laws do, the legislation seeks to regulate each step of the process in ever-increasing detail. As is generally the way when Parliament tries to anticipate and counter every eventuality, this level of detail simply creates potential gaps and uncertainties for litigants and their lawyers to exploit.[14]

Stewart's second point, on the false claim of simplifying the coverage of federal and state labour laws, makes it clear that while matters would be simplified for some employers, it would also take many employers who are currently covered solely or predominantly by state awards or agreements and expose them to the federal system, with all its added complexity and cost, for unfair dismissal purposes. If the Government had been serious about simplifying the coverage of labour laws it could, according to Stewart, have extended the federal unfair dismissal system to cover all employees covered by federal awards and agreements, not just those employed by constitutional corporations, and confined the state systems to workers who are either covered by state instruments or award-free.

Perhaps the most glaring omission in the bill, in the view of Labor senators, is the exclusion of many workers who now have access to a remedy for unfair dismissal from being unable to challenge their dismissal. This is a limitation in the use of the corporations powers which does not appear to concern the Government unduly. When Labor senators refer to the corporations power as a 'blunt instrument' it is in such matters that the truth of this observation can be made. It goes further than this as Stewart has observed. Exclusions under federal laws apply more widely than under most state laws, and many workers will be effectively deprived of a right to challenge their dismissal.

> Accordingly it is highly misleading for the Minister to claim, as he does in his second reading speech for the Bill, that 'the percentage of employees covered by Federal unfair dismissal provisions should rise from about 50 per cent to about 85 per cent'. Many of those employees would be 'covered', yes, but only to the extent of denying them a remedy against unfair dismissal![15]

The Government's proposal to overcome this anomaly is that the states should transfer powers to enable the Commonwealth to cover the field. That would require a degree of cordiality and compromise which does not appear likely given the lack of consultation that has marked Commonwealth-state relations in the field of industrial relations over the past seven years.

---

14 Submission No. 9, op.cit., pp. 2-3

15 ibid.

On the issue of Commonwealth-state consultation, the views of the Australian Chamber of Commerce and Industry are of interest to the committee and should be instructive for the Government. ACCI, in common with other employer organisations, has favoured the introduction of a unitary industrial relations system. It has been acknowledged on all sides of the argument that the required constitutional rearrangements present a formidable obstacle to this change, and the use by the Commonwealth of other 'heads of power' upon which to frame legislation present the kinds of difficulties which Labor senators have identified in this report.

ACCI has acknowledged all of these difficulties in its report, but its proposal for an orderly process of change is particularly noteworthy in the context of this inquiry:

> The case for moving toward a harmonised national workplace relations system could be assessed in a nine-step orderly development phase. The objective would need to focus on exploring the concept with the maximum possible bipartisan national support, and in a constructive non-political manner. An open-minded approach would need to be adopted, particularly by governments (federal and state), with a recognition by all parties of the legitimate role each jurisdiction has historical (sic) had and currently exercises in the system. The initial focus would have to be on confidence building and an objective analysis of options and models for change, without requiring any interested party to commit a position or formulate definitive policy during the development phase. At the end of the day, the content of the system will determine whether it has acceptance by employer and employee interests.[16]

This statement from ACCI echoes to some degree comments made by industrial legal academic Professor Ron McCallum, who has argued that if a robust national industrial relations mechanism is to be created, governments must refrain from seeking short-term political advantages. They should instead focus on long-term consultative strategies for bringing about a robust national labour law regime.[17]

It may be said that the ideas expressed both by ACCI and by Professor McCallum suggest an idealistic way forward, but in recognising the stubborn existence of entrenched political interests they cannot be regarded as naïve. While ACCI may be regarded as a special interest group with axes of its own to grind, it also represents a strong community view that progress and fair dealing are unlikely to derive from entrenched positions and ideological campaigns, which have been the characteristics of Government policies over seven years. If the Government does not heed advice from the Senate, it should at least listen to its industry supporters.

---

16 ACCI, *Modern Workplace: Modern Future, A Blueprint for the Australian Workplace Relations System 2002-2010*, November 2002, p. 41

17 Professor Ron McCallum, Business Council of Australia: Industrial Relations Forum Proceedings, Melbourne, 17 November 2000, p. 15

Conclusion

Labor senators regard this bill as implementing a basically flawed policy of creating two classes of employees: those who work for small business, and those in more privileged employment sectors. This is fundamentally wrong in a country with perhaps the strongest tradition of legally entrenched fairness and equity practices anywhere in the world. This flaw is compounded by the use of a constitutional power which will have the effect of creating legal confusion. In the view of Labor senators, this is one of the least defensible amendments to the Workplace Relations Act which the committee has so far had to deal with.

Labor senators **recommend** the Senate oppose this bill in its entirety.

Senator George Campbell **Senator Kim Carr**

Australian Democrats' Report

Inquiry into Workplace Relations Amendment (Termination of Employment) Bill 2002

The provisions covering termination of employment in the *Workplace Relations Act* (WRA) include provisions concerning unlawful and unfair dismissals, and have been the subject of intense political and policy debate for the past decade.

As the Majority Report indicates, these matters have been the subject of several previous Bills and previous inquiries.[1]

In my capacity as Workplace Relations Spokesperson for the Australian Democrats I have provided substantial Minorities for a number of these Reports, so will not seek to repeat their arguments here, since those Reports are readily available from the Committee. For any researcher interested in the unfair dismissal area, there are also extensive remarks from me over the years, on the Hansard record.

The appendices to this Minority Report provide some useful statistical data on unfair dismissals.

These comments would normally constitute Supplementary Remarks rather than a Minority Report because while we have a number of criticisms of elements of the Bill, the Australian Democrats support the central proposition of the Bill, to extend coverage of the Federal WRA.

However the Coalition Majority once again perpetuates a view on unfair dismissals' economic and employment effects for which there is still little hard evidence. We do not agree with the Majority view.

Our criticisms of a number of items in the Bill go to attempts to yet again reduce rights of certain employees, and to reduce the discretion of the Australian Industrial Relations Commission (AIRC).

Second step toward a Unitary Industrial Relations System

The first step towards a unitary industrial relations system was a major one – the referral of the Victorian system to the Commonwealth from 1997. With that referral also came a category of several hundred thousand Victorian employees under inferior employment conditions under the State law of the time. This category of workers were put under Schedule 1A of the WRA.

To its shame, the Coalition has refused to date to transition Schedule 1A workers across to the full benefits of the WRA. I look forward to the day the Federal

---

1 For instance, see the Employment, Workplace Relations and Education Legislation Committee's reports on the following bills: Workplace Relations Amendment (Unfair Dismissals) Bill 1998, February 1999; Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999, November 1999; and, Workplace Relations (Termination of Employment) Bill 2000, September 2000.

Government will be successfully pressured to do so by a Victorian Labor Government that for the first time now controls both houses.

This Bill is the second step towards a unitary industrial relations system, using the unlikely field of unfair dismissals to significantly increase the coverage of federal law.

There is an odd contradiction in seeking to extend the coverage of Federal law on unfair dismissals, while simultaneously proposing to exempt small business from unfair dismissal law through the (again Senate-rejected) *Workplace Relations Amendment (Fair Dismissal) Bill [No 2]*.

Such an inconsistent approach is easily understood when we remember that the sole purpose of the latter Bill is political, to provide an easy double-dissolution trigger.

The Democrats consider it important that the Commonwealth attempt to procure some commonality across industrial relations jurisdictions as a first step to a uniform system. In this sense, we welcome the Government's decision to attempt to double the coverage[2] of their unfair dismissal provisions, and halve the coverage of the states. It will be helpful to have more commonality in this area.

There are areas of policy and jurisdiction the States no longer have sensible involvement in. After seventy plus years we finally got a unitary system of trade practices law. After one hundred years states rights and vested interests finally gave way to one unitary financial system for Australia. Although the process was messy in execution we have a unitary system in corporations law.

The same shift is necessary in industrial relations.

As far back as seventeen years ago, the Hancock review of Australia's IR system called for a complete overhaul, and pointed to the desirability of a unitary system. Like his predecessor Minister Reith, Minister Abbott has signalled the Coalition's support for a unitary system, and that is to the good.

We need one industrial relations system not six. We have a small population, yet we have nine governments and a ridiculous overlap of laws and regulations. There are areas of the economy that genuinely require a single national approach. Like finance, corporations or trade practice law, labour law is one of those areas.

Globalisation and the information revolution have created competitive pressures that require us as a nation to be as nimble as possible in adapting to changing circumstances.

It will be a difficult task but it is time we moved toward a national system of industrial regulation that will do away with unnecessary replications, conflicts and complexity.

The Australian Democrats negotiated the passage of the WRA with the Coalition Government in 1996. We supported the referral of Victoria's State industrial relations powers to the Commonwealth. We supported subsequent amendments to the WRA in 2001 affecting termination of employment.

---

2 Minister Abbott Second Reading Speech: "*This 'cover the field' provision means that the percentage of employees covered by Federal unfair dismissal provisions should increase from about 50 per cent to about 85 per cent and that the number of workers covered by unfair dismissal provisions should increase from about 4 million to about 7 million.*"

It is logical for us to back the extension of provisions we already support that will double the coverage of Federal unfair dismissal provisions, and halve the coverage of the States. It will be helpful to have more commonality in this area. Given the great confusion evident by employees and employers over which system they fall into, and the provisions that apply to them, the case is strong for more uniformity.

This is not to argue that a more unified system would solve all problems. But how much better off has Victoria been with one system, not two.

There are just too many conflicting workplace laws, too many courts, tribunals and agencies regulating industrial relations. Too many vested interests, too many fee takers and rent seekers.

We agree the most effective way to get a single IR system would be by referral of powers to the Commonwealth by the States. Victoria successfully did that with Democrat support. But further referrals are presently unlikely.

Apart from the attractions of efficiency and simplicity, a unitary system would mean that all Australians, employers and employees alike, would have the same industrial relations rights and obligations, regardless of where they live.

The Democrats consider a unitary system would have three prime motivations.

First, it would achieve common human rights across Australia – at present they differ.

The second motivation is economic. Common easily administered rules and laws make for more efficient, competitive and productive enterprises.

And thirdly, it would facilitate more comprehensive coverage for workers. There have been estimates of up to 800,000 employees not covered by federal or state awards or agreements.

The Bill cannot go as far as it needs to. Constitutional limitations prevent complete coverage. As we have stated earlier[3] the Democrats are concerned that relying on the Corporations power alone will still leave large chunks of employees working for non incorporated business, many of these small business, with no protection from State or Federal laws.

The Democrats acknowledge concerns raised during this inquiry that some employees such as short-term casuals, those on fixed term or task contracts, and 'high-earning' non-award workers and trainees, who in some States are able to challenge their dismissal, would not be covered by the Federal system.

For instance, casuals are excluded for 12 months in the Commonwealth (including Victoria, ACT, and the NT) and Queensland jurisdictions, for 6 months in New South Wales and South Australia, and there is no exclusion in WA and Tasmania.

Due to a lack of available statistics we do not know how many employees within these categories do actually currently utilise the state laws and therefore it is difficult to estimate how many employees would in fact be disadvantaged.

---

3 Senator Andrew Murray: *A Unitary Industrial Relations System: Unfinished Business of the 20th Century?* Speech to Business Council of Australia, Melbourne 17 November 2000, pg. 6.

Balanced against those considerations, on the plus side is that the Bill will capture a potentially very large number of individuals currently not covered. For instance, as pointed out in the Bills Digest[4]

> the Bill is likely to provide an unfair dismissal redress for employees of incorporated businesses for which neither federal nor state awards are binding. The former employees of One.Tel were employed under non-award circumstances…The Bill will provide a termination jurisdiction to this growing sector of the workforce.

Unfair dismissal laws for Small Business

The Coalition Government have repeatedly sought to justify its attempts to exempt small business from unfair dismissal laws by arguing that they deter small business from recruiting employees, and place a greater burden and cost on small business.

In other words that taking away the rights of a little over 2000 annual Federal small business employees' applications for relief from unfair dismissal is justified by job creation and cost savings.

In the Majority Report at para 12 page 4 - they use an excerpt from Professor Hancock's submission to support their view that small business are disadvantaged because of economies of scale. Professor Hancock did indeed say this but then went on to say at page 3 that there are other considerations:

> There are a wide variety of forces at work that determine the 'make-up' of the economy between small and large business. Some of these favour large business and others small business.... It (unfair dismissal) is an aspect of the economic environment which all business have to come to terms with.

There continues to be no hard evidence to support the view that unfair dismissal laws have an adverse effect on overall employment levels. If there were an effect we would expect to see some correlation between the introduction or variation of unfair dismissal laws and employment rate. The experiment under Queensland State laws, when their then Coalition government introduced an exemption for small business, had no evident effect on job creation.

The Majority Report refers to the new study by Don Harding of the Melbourne Institute of Applied Economic and Social Research, entitled *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses*, which the government are using to support their case that unfair dismissal laws place a greater burden and cost on small business.

The Democrats have a number of concerns with this study (commissioned specifically by the Government), including:

- It does not compare the human resource management practices (recruitment, contract, and performance procedures) of those who stated that unfair dismissal laws have no influence on the operation of the business; and

4 O'Neill, S (2003) Workplace Relations Amendment (Termination of Employment) Bill 2002, Bills Digest No. 91 2002-2003.

- it asked the respondent to 'estimate' the costs to business of unfair dismissal laws; the resulting figure was then aggregated by Harding to provide a total estimate in compliance costs for small business.

As an example at para 25, page 8 - The calculations for job loss is based on a very small number of firms, which are given a false sense of significance. Yes there were 1802 businesses surveyed but there were only 158 businesses who answered this question, 17 of which said that UFD had a major influence on a firm's decision to reduce employees; 10 of which said that UFD had a moderate influence on firms decision to reduce employees; and 14 of which said that UFD had a minor influence on the firm's decision to reduce employees.

Yet the authors have aggregated these three responses and then multiplied them to the rest of the small business population to get the figure of 77,000. There is a real danger of exaggeration through this technique.

More importantly, the fact that unfair dismissal laws - laws which encourage good human resource and management practices - impose compliance costs upon business is not, as Professor Andrew Stewart[5] points out, a reason in itself for abolishing or weakening them.

The Majority has incorrectly quoted and misrepresented Stewart's point (para 15, page 5) - he does not say, *'as the law stands'* he says *'as it stand'* and then Stewart goes on to later say that *'this is simply the reality of any litigation system'*.

It is worth quoting Dr Barrett at some length.[6] She was referring to the KFC[7] case:

> The expert witness for the Minister for Workplace Relations – Professor Mark Wooden – was unable to show there was any evidence to support Tony Abbott's claim that unfair dismissal legislation inhibited small business employment growth…under cross examination he said 'there certainly hasn't been any direct research on the effect of introducing unfair dismissal laws'…Furthermore, Professor Wooden agreed with the statement that 'the existence or non-existence of unfair dismissal legislation has very little to do with the growth of employment and that it is dictated by economic factors.

The Government Majority in the Committee asserts that because small business *perceive* the unfair dismissal laws an impediment that it justifies abolishing them.

Economics aside, the Democrats fundamentally have concerns with reducing the rights of employees employed by small business, on human rights and equity grounds.

---

5 Submission, Professor Andrew Stewart p. 6.

6 Dr Rowena Barrett, Director Family and Small Business Research Unit, Faculty of Business and Economics, Monash University: *Small Business and Unfair Dismissal* The Journal of Industrial Relations March 2003

7 Hamzy v Tricon International Restaurants t/a KFC and ors (2001) FCA 1589.

Additional Amendments – Schedule 3

The Bill has proposed a number of measures to reduce employee protections under the law. No real case has been made for a number of these. For instance, in line with our test of fairness the Democrats will not support:

- the proposed reduction in the maximum amount of compensation that can be awarded to applicants dismissed from small business;
- an increase in the qualifying period with the employer before an employee of a small business can make a claim for unfair dismissal;
- proposed changes to some of the criteria that the Commission must consider in determining whether a dismissal is unfair, especially when it reduces the discretion of the Commission.

The Democrats will be proposing amendments at the Committee stage of the Bill. We will not be supporting items in the Bill that we consider unfair and reductionist in nature.

The Democrats are always wary of attempts to limit the AIRC's discretionary powers and will need to consider items affecting their powers closely.

Senator Andrew Murray

Attachment 1

Table: Features of Federal and State termination laws

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

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

Note:

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

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

The following websites have been referred to in this update

http://www.airc.gov.au/termination/practice/home.html
http://www.dir.nsw.gov.au/workplace/practice/endemp/unfair.html
http://www.wageline.qld.gov.au/dismissal/index.htm#unfair
http://www.industrialcourt.sa.gov.au/frameset.php?location=07
http://www.wairc.wa.gov.au/
http://www.justice.tas.gov.au/oir/eir_guide/page8.htm#unfair

Prepared by Steve O'Neill; Information Research Service
Parliamentary Library Canberra; as at: 29/08/02

Attachment 2

Federal Unfair Dismissal Cases

Australia: Federal Unfair Dismissal Cases					
		Annual Reduction/Growth		Small Business [2]	
Date [1]	Annual total	Number	%	%	Number
11/96	14707	-	-	-	-
11/97	7897	(6810)	(46.3)	-	-
11/98	8046	149	1.9	40	3218
11/99	7678	(368)	(4.6)	27	2073
11/00	7747	69	0.9	38	2944
11/01	8188	441	5.7	38	3111
11/02	7227	(961)	(11.7)	30	2168

Note: [1]Latest available figures.

[2]Estimate from the Australian Industrial Registry returns - small business as a percentage of total employer responses received.

Attachment 3

Other Relevant Statistics

Number of employing non-farm small businesses	539 900
Number of non-employing non-farm small businesses	582 100
Total[8]	1 122 000
Number of employing non-farm small businesses	539 900
Number of agriculture, forestry & fishing small businesses	111 200[9]
Number of employees in non-farm small businesses	2 269 400[10]
Number of employees in agriculture, forestry & fishing small businesses	173 200[11]

Note: The data can be very confusing. For instance Dr Rowena Barrett, Director Family and Small Business Research Unit, Faculty of Business and Economics, Monash University: *Small Business and Unfair Dismissal* The Journal of Industrial Relations March 2003 – in Table 1 using ABS (2000:6) – comes up with a figure of

3 259 100 employees in private firms with less than 20 employees.

8 Source: Small Business in Australia 2001 (ABS Cat No 1321.0)

9 James Smythe: Chief Counsel Workplace Relations Policy and Legal Group; Supplementary Evidence to the Committee

10 Source: Small Business in Australia 2001 (ABS Cat No 1321.0)

11 James Smythe: Chief Counsel Workplace Relations Policy and Legal Group; Supplementary Evidence to the Committee

Appendix 1

List of submissions

No.	Submission from
1	Professor Keith Hancock (Flinders University)
2	Professor George Williams (UNSW)
3	Shop Distributive and Allied Employees' Association
4	Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales
5	Australian Council of Trade Union
6	Australian Nursing Federation
7	Job Watch Inc
8	Restaurant and Catering Australia
9	Professor Andrew Stewart (Flinders University)
10	Independent Education Union of Australia
11	NSW Government
12	State Public Services Federation Group of CPSU
13	Australian Industry Group
14	Department of Employment and Workplace Relations
15	Association of Professional Engineers, Scientists and Managers, Australia; Managers and Professionals Association and Professional Officers Association, Vic

No.	Submission from
16	Australian Chamber of Commerce and Industry
17	Council of Small Business Organisations of Australia Ltd
18	National Farmers' Federation
19	Australian Manufacturing Workers' Union
20	Government of Western Australia
21	Queensland Government
22	Tasmanian Government
23	Labor Council of NSW

Appendix 2

Hearings and Witnesses

Melbourne, Monday, 24 February 2003

JobWatch

Mr Ben Redford, Solicitor

Australian Chamber of Commerce and Industry (ACCI)

Mr Peter Anderson, Director – Workplace Policy
Mr Chris Harris, ACCI Workplace Relations Adviser

Ai Group

Mr Stephen Smith, Director, National Industrial Relations
Mr Peter Nolan, Director-Workplace Relations

ACTU

Ms Linda Rubinstein, Senior Industrial Officer

Labor Council of New South Wales

Mr Mark Lennon, Assistant Secretary

Department of Employment and Workplace Relations

Mr James Smythe, Chief Counsel, Workplace Relations Policy and Legal Group
Mr Rex Hoy, Group Manager, Workplace Relations Policy and Legal Group
Mr Alex Anderson, Assistant Secretary, Strategic Policy Branch, Workplace Relations Policy and Legal Group

Appendix 3

Additional information

Date:	From:
	Public hearing – Monday, 24 February 2003 - Melbourne
5 March 2003	Australian Industry Group – answers to questions on notice
10 March 2003	Department of Employment and Workplace Relations - answers to questions on notice

Appendix 4

Summary of attitudinal evidence[1]

A summary of attitudinal evidence demonstrating the need for differential treatment of small businesses in relation to unfair dismissal:

- A Morgan and Banks survey conducted during 1996 (when the previous Government's laws were in force) indicated that 16.4% of businesses with less than 30 employees had been adversely affected in their intentions to hire people by the federal unfair dismissal laws.

- A survey released by Recruitment Solutions on 10 April 1997 indicated that almost 9% of businesses had employed fewer permanent staff, or deferred plans to employ permanent staff, as a direct consequence of the unfair dismissal laws.

- In a survey conducted by the New South Wales Chamber of Commerce with St George Bank in May 1997, 56% of businesses said that the prospect of unfair dismissal claims had discouraged them from recruiting additional staff to their businesses.

- 'Trends in Staff Selection and Recruitment', a Department of Employment, Education, Training and Youth Affairs-commissioned report compiled by the National Institute of Labour Studies and published in May 1997, found that unfair dismissal laws 'strongly influence' hiring decisions, on the basis of survey and statistical data.

  – Further comments on this report were provided by one of the editors, Dr Mark Wooden, for an article in the *Financial Review* on 27 March 1998. Mr Wooden stated that 48% of employers had claimed unfair dismissal legislation influenced their hiring decisions either to a 'large' or a 'very large' extent.

- In June 1997, the Tasmanian Chamber of Commerce and Industry conducted a survey in which it asked businesses with between 1 to 20 employees to rank 58 issues in terms of their relative importance. Unfair dismissal was rated 11th, with 70% of respondents rating it as at least a 'large' problem.

- The Yellow Pages Small Business Index Survey is the largest economic survey of small businesses in Australia, covering approximately 1,200 randomly selected proprietors of small businesses. The survey conducted from 23 July 1997 to 5 August 1997 asked respondents to nominate the barriers to employing new employees. The cost of employment was the second most popular response, with 18% of those respondents who believed there were barriers to hiring new staff citing this reason.

---

1 Taken from Department of Employment and Workplace Relations' Submission No: 14, Annex B

- The Yellow Pages Small Business Index Survey conducted from 30 October 1997 to 12 November 1997 contained specific questions in relation to the effect of unfair dismissal laws. The answers to these queries indicated:

  – 79% thought small businesses would be better off if they were exempted from unfair dismissal laws;

  – 33% reported that they would have been more likely to recruit new employees if they had been exempted from unfair dismissal laws in 1996 and 1997; and

  – 38% reported that they would be more likely to recruit new employees if they were exempted from the current unfair dismissal laws.

- In February 1998, the Micro Business Consultative Group published its report. In its report, the group stated that 'unfair dismissal laws have dampened employment growth in micro businesses. Indeed, we believe there's strong resistance from many micro businesses to employing more people for fear of potential claims.'

- On 5 March 1998, in an interview on Radio National's AM program, Mr Rob Bastian, then of the Council of Small Business Organisations of Australia (COSBOA) estimated 50,000 jobs would be created if small business exemption was introduced. Mr Bastian's estimate was based on 1 in 20 small businesses hiring an extra person if such businesses were excluded from the unfair dismissal laws, which he believed was a conservative assessment.

  – However, on the basis of his evidence to the Senate inquiry into the Workplace Relations Amendment (Unfair Dismissals) Bill 1998, it appears that Mr Bastian's estimate of 50,000 jobs being created is based on the exemption of small business from both federal and State unfair dismissal laws.

  – It should be noted that it is not possible to determine how many small businesses are subject only to federal unfair dismissal laws, as opposed to those that are subject to only State unfair dismissal laws. Further, small businesses in many jurisdictions could be subject to both federal and State laws.

- On 22 March 1998, the NSW Chamber of Commerce issued a press release stating that 85% of small businesses nominated unfair dismissals as a key issue for businesses with 15 or fewer employees:

  – 42% of businesses surveyed claimed that the prospect of an unfair dismissal claim was a deterrent to employing more staff.

  – 51% of businesses surveyed stated that the unfair dismissal laws were a deterrent to employing more staff.

- In a survey conducted by the SA Employers' Chamber of Commerce and Industry over the period May to July 1998:

- 51.5% of respondents who had been subject to unfair dismissal claims had not hired replacement employees:
- 52% of respondents who had been subject to unfair dismissal claims and did not hire a replacement employee were deterred from hiring new staff because of the prospect of facing another unfair dismissal claim;
- 74% of all respondents claimed that they would hire new employees if employee access to unfair dismissal laws was restricted; and
- 77% of respondents with less than 15 employees indicated that they would hire more employees if exempted from unfair dismissal legislation.

- In a Queensland Chamber of Commerce and Industry survey conducted in July 1998, businesses were asked to rank 69 issues in order of importance. Unfair dismissal legislation placed third overall, receiving a rating of 80 out of a possible scale of 0 (of no concern) to 100 (critical concern) which was only five points behind the top rating issue of taxation changes.

- The Australian Business Chamber surveyed its members in July 1998. Using a similar grading system as the Queensland Chamber of Commerce, unfair dismissals placed fourth overall with a rating of 77 (the top three issues all related to tax). Survey results were also aggregated according to the number of employees employed by each respondent. Employers with between 0 and 20 employees comprised 62% of the respondents, and they ranked unfair dismissals as their sixth most important issue. Unfair dismissals ranked seventh for businesses with 21 to 99 employees and fourteenth for businesses with 100 or more employees.

- In an August 1998 survey conducted by the Tasmanian Chamber of Commerce and Industry, to identify relevant issues for a State election later that year, businesses ranked unfair dismissals seventh out of 28 areas identified. Rating the problem from 1 (critical) to 7 (not a problem), the majority of respondents who indicated that unfair dismissals was an impediment to business growth placed this issue at the top of the scale (i.e. gave a 1 rating).

- In its August 1998 newsletter, the Australian Chamber of Commerce and Industry (ACCI) ranked unfair dismissals as seventh in a list of 71 areas requiring change. The Chamber distributed a survey to businesses, asking them to identify current issues that directly affect their individual businesses. Unfair dismissal laws were found to be ‘an impediment to employment’, particularly permanent, full-time employment.

- The Chamber’s September 1998 newsletter reported that the survey results from businesses with 1-19 employees, viewed in isolation, showed that unfair dismissals remained a critical concern for this group of businesses, placing fourth out of 64 issues. The Chamber identified a causal connection between small businesses’ concerns about the unfair dismissal laws and reluctance to employ additional employees.

- Statistics from the 1995 Australian Workplace Industrial Relations Survey (AWIRS) have been used recently by the ACTU to show that less than 1% of small businesses

gave unfair dismissal laws as a reason for not hiring staff. But this evidence is not supported by the attitudinal data provided by the survey evidence discussed above.

- A 1998 survey of members of the Australian Chamber of Manufacturers, jointly conducted by the ACM and Deakin University surveyed 2000 firms with less than 300 staff. It noted that 'Unfair dismissal legislation and associated implications for the small business were … highlighted as employment deterrents.'

- In 2001, Sweeney Research, on behalf of the Victorian Trades Hall Council, conducted a survey of 400 small businesses. It found that 39 per cent of respondents said that unfair dismissal laws affected their businesses.

- In November 2001, ACCI released the results of a survey of affiliates, to which some 2,500 firms responded. The survey found that unfair dismissal laws were ranked as the fifth most important problem facing them.

- In March 2002, CPA Australia released its survey results for 600 small businesses and 105 Certified Practicing Accountants (CPAs). When asked to nominate for themselves the main impediment to hiring staff, five per cent of small business and 16 per cent of CPAs nominated unfair dismissal laws as a primary issue. Also, 30 per cent of small business respondents and 44 per cent of CPAs cited a desire to avoid unfair dismissal laws as a reason for employing casuals. The research also found that perceptions about unfair dismissal laws were as much of a barrier to employment as the laws themselves.

- In August 2002, the Centre for Independent Studies issued a short study entitled *Poor Laws (1) – The unfair dismissal laws and long-term unemployment*. This report re-examines international and Australian job research on job creation and employment protection and concludes that a possible explanation for Australia's relatively high unemployment problem is over-regulation of the labour market.

- DEWR has received the results of a survey designed by Mr Don Harding of the Melbourne Institute and undertaken by Yellow Pages examining employer attitudes to unfair dismissal laws. The survey involved 1802 telephone interviews with small and medium enterprises employing fewer than 200 employees. The results disclose that:

- the cost estimate to small to medium enterprises of complying with the unfair dismissal laws of $1.3 billion per year is more likely to result in lower employment and higher unemployment than in lower wages

- 11.1% of small to medium sized employers that don't have employees but previously did were influenced by the unfair dismissal laws in deciding to reduce the number of workers they employed. This translates to the loss of 77,482 jobs (with 35,000 of those in which unfair dismissal laws played a major role).

- many employers were confused by or unaware of jurisdictional issues associated with the operation of unfair dismissal laws

- about two-thirds of employers were unaware of changes to federal unfair dismissal laws made in August 2001.