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SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

Inquiry into the

Workplace Relations Amendment (Termination of Employment) Bill 2002

Submission by the Department of Employment and Workplace Relations

February 2003

INTRODUCTION

The Workplace Relations Amendment (Termination of Employment) Bill 2002 (the Bill) was referred to the Senate Employment, Workplace Relations and Education Legislation Committee (the Committee) for consideration on 10 December 2002.

In inviting submissions the Committee indicated that the reasons for referral/principal issues for consideration were:

(a) the impact of the Bill on job security;

(b) the constitutional implications of the Bill;

(c) the development of the Bill and Commonwealth-State relations; and

(d) the impact of the Bill on procedures.

The Bill would amend the *Workplace Relations Act 1996* (the WR Act) to:

- extend the operation of the federal unfair dismissal system by making greater use of the corporations power in section 51(xx) of the Constitution (Schedule 1);
- improve the operation of federal unfair dismissal law as it impacts on small business (Schedule 2); and
- make a number of other improvements to the way the unfair dismissal laws operate (Schedule 3).

This submission has two parts. Schedule 1 is discussed in Part A. Improvements to the system proposed by Schedules 2 and 3 are discussed in Part B.

PART A – COVERING THE FIELD OF HARSH, UNJUST OR UNREASONABLE TERMINATION

OUTLINE

1.1 The unfair dismissal provisions contained in Part VIA, Division 3, Subdivision B of the *Workplace Relations Act 1996* (the WR Act) allow a dismissed employee to seek a remedy from the Australian Industrial Relations Commission (the Commission) on grounds that the dismissal was 'harsh, unjust or unreasonable' (that is, that the dismissal was unfair).

1.2 As the legislation now stands, many employees do not have access to this federal process and are left to seek relief in the various State tribunal jurisdictions. This is a result of the constitutional basis of the current provisions that cover:

- employees in constitutional corporations who are also federal award employees;
- Victorian employees;
- Commonwealth public sector employees;
- Territory employees; and
- federal award employees in selected areas covered by the Constitution's trade and commerce power
  - a 'federal award employee' means an employee any of whose terms and conditions of employment is governed by an award, a certified agreement, an AWA or an agreement made under the former provisions of the *Industrial Relations Act 1988* (refer to subsection 170CD(1)).

1.3 The current federal provisions also allow for the possibility that employees eligible to bring a claim under the federal law may be able to choose between alternative remedies in the federal and State jurisdictions, provided that they do not attempt to pursue more than one remedy.[1]

1.4 The amendments in Schedule 1 to the Bill would expand the federal unfair dismissal jurisdiction to cover all employees of constitutional corporations. In addition, the amendments would provide that employees in the federal unfair dismissal jurisdiction would only be able to pursue an unfair dismissal action in the federal system. As a result, the complexity and confusion of unfair dismissal regulation would be reduced because around 85 per cent of Australian employees and their employers would fall exclusively within the federal system.

POLICY RATIONALE

1.5 Over recent years, the Commonwealth Government has been exploring options for working towards a simpler, fairer workplace relations system based on a more unified and harmonised set of laws. It is the Government's view that a national economy needs a national workplace relations regulatory system. The Government considers that maintaining six separate industrial jurisdictions is not only inefficient, it is excessively complex and creates confusion and uncertainty for employees and employers alike. A more unified national workplace relations

[1] Sections 170HA, 170HB and 170HC.

system would, in the Government's opinion, lead to less complexity, lower costs and more certainty, with flow-on benefits for employment.

1.6 It is the Government's view that there are major advantages in moving towards a unified national system. It proposes to do so in a step-by-step approach. In this case, the Government proposes to ensure that workers and businesses operate, as far as is constitutionally possible, under one system of laws governing unfair dismissal.

1.7 Under the current arrangements, some employees, perhaps the most vulnerable, are likely to be confused by the complexity of multiple jurisdictions and may fail to seek redress or to lodge an application in time. As a result, injustices that the law has been established to rectify will go un-remedied.

1.8 Other problems created by the existence of multiple unfair dismissal jurisdictions include 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.[2] These unnecessary costs impact on the Government and on individual litigants.

1.9 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.

1.10 An additional important reason for the introduction of the Bill is the Government's view that the federal unfair dismissal laws are fairer and better balanced, and accordingly are less destructive of employment growth, than the State laws. Because of this commitment to employment growth, it is the Government's intention to provide for as many employees and employers to be in the federal unfair dismissal system as is reasonably possible.

1.11 It is estimated that the number of employees covered by the expanded system 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 Government hopes that in time, with the agreement of the States, the federal system could be further extended to also cover these employees. 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.

BACKGROUND

1.12 Prior to March 1994, federal termination of employment provisions were established by industrial awards and agreements.

1.13 The previous Labor Government introduced federal unfair dismissal legislation which came into effect in March 1994. This legislation gave effect to the International Labour Organisation's Termination of Employment Convention 1982, which Australia had ratified in

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

February 1993. The Commonwealth's external affairs power provided the constitutional basis for the legislation. The legislation applied to all employees, regardless of their award or agreement coverage.

1.14 Regulations made at the same time as the new provisions excluded certain classes of employee including casuals, fixed term employees and probationary employees.

1.15 The unfair dismissal scheme introduced by the previous Government was controversial. The definition of an unfair dismissal was criticised as being open to wide interpretation. Moreover, the initial burden of proof was on the employer to establish that there was a valid reason or reasons, connected with the employee's capacity or conduct, or based on the operational requirements of the employer's business. Small businesses in particular were apprehensive about their relatively scare human resource management capacity and the cost impact of the provisions.

1.16 From June 1994, the previous Government amended the provisions to exclude a wider range of workers, specifically non-award employees earning more than $60,000 per year. It also lessened the onus of proof on employers and capped compensation payments for successful applicants at six months' remuneration.

1.17 Two months after coming into office in 1996, the Coalition Government introduced the Workplace Relations and Other Legislation Amendment Bill 1996, which, amongst other things, amended the then unfair dismissal provisions to create a better balance between the interests of employers and employees. A new requirement was included for the Commission in handling unfair dismissal applications to accord a "fair go all round" to both employers and employees (subsection 170CA(2)).

1.18 The 1996 unfair dismissal provisions relied on a range of the Commonwealth's constitutional powers, including the corporations power and the interstate and overseas trade power.[3] Notably, the 1996 changes limited the use of the Commonwealth's corporations power to those employees of constitutional corporations who were also covered by Commonwealth industrial awards and agreements.

1.19 In late 1996 the Kennett Government referred many of Victoria's State industrial relations powers, including the power to regulate with regard to unfair dismissal, to the Commonwealth.

1.20 From 30 August 2001 more changes were made to the Commonwealth unfair dismissal laws in a further attempt to balance the rights of employers and employees. Changes provided by the amendments include:

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

[3] This followed the High Court's decision in *Victoria v Commonwealth* (1996) where it was held that certain aspects of the previous termination of employment laws were invalid as being beyond the scope of the relevant ILO Convention.

- 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 - 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.

1.21 The Government considers further reform of unfair dismissal laws is required, particularly with regard to the impact of unfair dismissal laws on small businesses.

1.22 The Bill would spread the federal dismissal system to around 85 per cent of employees and 60 per cent of employers. The Bill would also diminish the scope for uncertainty and confusion arising from the interaction of the federal and State jurisdictions for all constitutional corporations and their employees.

SPECIFIC ISSUES RAISED BY THE COMMITTEE

(a) The impact of the bill on job security

1.23 The proposal to use the full extent of the corporations power will reduce the complexity and confusion of multiple unfair dismissal schemes. Through such reforms, the Government is seeking to ensure that the laws do not act as a disincentive to job creation, particularly in the small business sector. Small business is responsible for a large proportion of job growth in Australia[4] and increased employment in this sector will further improve the job prospects of Australian employees.

1.24 In addition, it is important to note that the proposed amendments would not reduce job security by making it easier for more employees to be unfairly dismissed. The Government contends that it is not easier under the current federal unfair dismissal laws than it is under State laws to dismiss employees unfairly. It is the Government's view, however, that the federal laws are better balanced and fairer than the State laws in that they are less likely to prevent an employer from being able to dismiss an employee where a valid reason for dismissal exists.

1.25 In addition, the Government recognises that good employees are highly valued by businesses and that such employees are not dismissed without sufficient reasons.

1.26 With these points in mind, it is the Government's belief that the expansion of the federal unfair dismissal system would increase the job security of Australian employees, including for those employees who would previously have been covered by State laws, by increasing the confidence of businesses, and small businesses in particular, to put on additional staff.

1.27 It is also important to note that higher levels of job security are likely to be generated in stronger economies with lower levels of unemployment.

[4] See detail provided at paragraphs 2.14 to 2.15 of this submission.

1.28 The Government has created an environment which has fostered high levels of job security through its economic policies, sound fiscal management and workplace relations reform. Between March 1996 and December 2002, national employment growth was 13.7 per cent or over 1.1 million jobs. Over the same period, the unemployment rate has fallen from 8.2 per cent to 6.2 per cent.

1.29 In addition, the rate of economic growth in Australia is amongst the highest in the OECD. In the year to the September quarter 2002 (which is the latest data available) the Australian economy grew by 3.7 per cent. The Commonwealth Treasury forecasts continued economic growth for 2002–03 of 3.0 per cent. This growth forecast would have been higher had it not been for the impact of the drought domestically and continued global economic weakness, particularly in the United States.

1.30 Under these economic conditions, Australian employees are enjoying very high levels of job security. According to the December 2002 JOB Futures/SAULWICK Employee Sentiment Survey, for example, 87 per cent of the 1,000 employees surveyed indicated that they felt secure in their current position.

(b) The Constitutional implications of the Bill

1.31 The unfair dismissal provisions of the WR Act are supported by a range of constitutional powers. Under the current arrangements, the use of the corporations power has been limited to federal award covered employees. However, there is no constitutional requirement for such a limitation.

1.32 This Bill seeks to establish a more nationally consistent system by using the full extent of the corporations power. It is estimated that under this expanded scheme, there would be an increase in the proportion of employees in the Commonwealth jurisdiction from around 50 per cent to around 85 per cent of all employees.

1.33 The introduction of a single unfair dismissal scheme covering around 85 per cent of all employees would represent a significant step towards achieving a uniform national unfair dismissal scheme.

1.34 The Australian Government Solicitor (AGS) has advised that the amendments proposed by Schedule 1 are constitutionally valid.

The corporations power

1.35 Section 51(xx) of the Constitution provides:

> *The Parliament shall ... have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.*

1.36 The corporations power has been widely used in the regulation of workplace relations in recent years.

1.37 Provision for agreements based on the corporations power was first made—by the previous Government—in the *Industrial Relations Reform Act 1993*. That Act continued to provide for certified agreements between employers and unions made under the conciliation and

arbitration power, but also made provision for enterprise flexibility agreements (EFAs) made directly between constitutional corporations and their employees.

1.38 In relation to agreement making based on the corporations power, the Hon J.T. Ludeke, QC, a former Deputy President of the Commission, notes:

> *... reliance on the corporations power in Pts VIB and VID has shown the way to shed the encumbrances that have been indispensable to reliance on the conciliation and arbitration power. No industrial dispute, as defined, is required. The contrast with the conventional procedures may be seen in the requirements of Div 3 of Part VIB...*[5]

1.39 Corporations-power-based certified agreements have been enthusiastically adopted by employers and employees. Over 80 per cent of current federal certified agreements are now made under Division 2 of Part VIB, while dispute-based certified agreements made under Division 3 account for fewer than 20 per cent of all certified agreements.[6]

1.40 This Bill would extend the use of the corporations power in workplace relations laws, but it does not represent a novel application of this power.

(c) The development of the Bill and Commonwealth–State relations

Development of the Bill

1.41 Over recent years the Commonwealth Government has been encouraging and informing public debate on the use of the Commonwealth's corporations power to support a simpler national workplace relations system. This process was commenced by the then Minister for Employment, Workplace Relations, and Small Business, the Hon Peter Reith MP, in an address to the National Press Club in March 1999, in which he raised for debate the merits of placing the workplace relations system on the different constitutional footing. The text of the address was circulated as a Ministerial discussion paper in April 1999 titled *Getting the outsiders inside – Towards a rational workplace relations system in Australia*.

1.42 In the course of 2000, Minister Reith, issued three more discussion papers on this issue in a series titled *Breaking the Gridlock; Towards a simpler national workplace relations system*. The papers in this series were *The case for change*, *A new structure* and *A focus on agreement making*. The thrust of the papers was on widening discussion and raising public awareness of the issues involved in moving towards a uniform set of workplace laws across the country. Officers of the Department of Employment, Workplace Relations and Small Business consulted with stakeholders in the preparation of these papers. A summit was held in November 2000 by the Business Council of Australia at which ideas for a simpler system based on the corporations power were extensively discussed.

1.43 Developments regarding the Commonwealth's consideration of the use of the corporations power to underpin a national workplace relations regulatory system, including the release of the three discussion papers, were brought to the attention of the Workplace Relations Ministers' Council in December 2000.

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[5] The Hon. J.T. Ludeke, QC, 'The Constitutional Foundation', in J. Colvin and G. Watson (eds.)., *The Workplace Relations Handbook: a Guide to the Workplace Relations Act 1996 (Cth),* Butterworths, Sydney, 1998, at page 35.
[6] These data have been provided from the DEWR Workplace Agreements Database.

1.44 Since the release of the discussion papers, the Minister for Employment and Workplace Relations has continued to promote further consideration of the corporations power proposal. For example, in May 2002, the Minister, in a speech to the Australian Food and Grocery Council, focused on the specific example of unfair dismissal laws as one relatively straightforward and practical example of how the corporations power could be used to create a uniform system of workplace relations regulation. In addition, DEWR has continued to maintain an internet site providing access to the discussion papers and other relevant documents. The Government has undertaken formal and informal consultation with small businesses on problems caused by the unfair dismissal provisions, including formal roundtable meetings throughout Australia.

1.45 There has been broad support for a simpler national workplace relations system; including from business and industry groups, union officials, politicians and academics. Examples of recent comments in support of a national system are at Appendix A.

1.46 It has also been broadly recognised that the current system of multiple unfair dismissal jurisdictions is not ideal. For example, the National Secretary of the Australian Worker's Union, Mr Bill Shorten, said in a speech to an unfair dismissal conference in April 2002 that:

> *...At present we have a system of multiple courts and jurisdictions. Australia's state/federal system of government means an unfair dismissal could be heard in several jurisdictions. This is confusing for the parties involved, but it also means the outcome of similar cases is of very little predictive value. Our regulatory framework is overcomplicated and does not provide consistency of treatment or outcome.* [7]

1.47 Senator Andrew Murray, the Australian Democrats spokesman on Workplace Relations, at the same conference, agreed with the comments of Mr Shorten adding that:

> *The multiple systems that regulate industrial relations in Australia remain a major running sore. We need more convergence, not more divergence. There is no rational reason for six different approaches to major employment questions like termination of employment.'*

1.48 Other commentators who have raised concerns over the lack of consistency between federal and State unfair dismissal laws include the President of the Commission, the Hon Justice Geoffrey Guidice, who said, for example, in March 2000 that:

> *...there is a lack of uniformity between State and Federal unfair dismissal laws which no doubt creates uncertainty and perhaps expense for litigants, and as a matter of principle the lack of uniformity may be undesirable in itself. Even within the Federal system some types of termination of employment cases are heard in the Commission while others are heard by the Federal Court. In addition to their statutory rights employees also have access to a range of common law remedies which may be pursued in the civil courts, or in some cases in the Federal Court in conjunction with a statutory cause of action.* [8]

1.49 Such comments, and other feedback that has been received by the Government, have made it apparent that unfair dismissal regulation is an area of Australian industrial law in need of simplification. Such a conclusion is confirmed by research recently commissioned by DEWR.

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[7] The Australian Workers Union Conference, 'Unfair dismissal laws: Monster or mouse?' East Melbourne, 19 April 2002.

[8] Speech to Australian Chamber of Commerce and Industry Forum, 3 March 2000.

The Melbourne Institute of Applied Economic and Social Research at the Melbourne University found that around 30 per cent of small and medium businesses were unsure whether their employees were covered by federal or State unfair dismissal laws.[9]

1.50 The Bill was developed with the intention of addressing such concerns.

Commonwealth–State relations

1.51 The Committee of Review into Australian Industrial Relations Law and Systems (the Hancock Committee) conducted a major inquiry into the federal system between 1983 and 1985. One of the Committee's terms of reference required it to examine the extent to which federal and State industrial relations arrangements might better inter-relate. The Committee saw significant advantages in a unitary system of industrial relations 'whereby in either Australia as a whole or in any given State or Territory, the system of regulation was under the exclusive control of one authority.' But it came to the conclusion that moving to unitary or exclusive regulation was not practical in the short term. Instead, it advocated other options involving greater coordination between systems, through mechanisms such as dual appointments, closer contact and consultation between tribunals, and more uniformity of procedures and provisions.[10]

1.52 There have been a number of legislative initiatives to encourage a more cooperative approach, such as to allow joint sittings, concurrent appointments, regular meetings between federal and State tribunal and registry members to discuss matters of mutual concern, referral of industrial disputes between jurisdictions, and provisions to empower the Commission to refrain from dealing with a dispute which would be more properly dealt with by a State tribunal. Despite these, Creighton and Stewart concluded in 1990 that:

> *... much remains to be done on the cooperative front. While institutional arrangements such as joint sittings are to be welcomed, they barely scratch the surface of the inconvenience and expense caused to all parties in Australia by dual jurisdiction*.[11]

1.53 After reviewing the operation of the various legislative initiatives to promote federal/State cooperation, the same authors commented in 1994 that:

> *The marginal impact of these kinds of initiatives serves to highlight the inevitable tension between the State and federal systems. With the best will in the world, 'co-operative' arrangements cannot address the fundamental policy issue of whether it is necessary or appropriate that there should be shared responsibility between the Commonwealth and the States in the industrial context.*[12]

1.54 The effect of Schedule 1 of the Bill would be consistent with the recommendation of the Hancock Report. The Bill proposes that unfair dismissal matters would be heard predominantly in the federal jurisdiction. This expanded Commonwealth scheme would provide significant benefits for the majority of Australian employees and employers in terms of certainty of coverage and clarity and enforceability of the laws. Furthermore, the relatively low proportion of employees who would not be covered by the provisions of the Bill could be comprehended by

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[9] *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses*, Harding D, Melbourne Institute of Applied Economic and Social Research, October 2002, at page 9.
[10] *Australian Industrial Relations Law and Systems: Report of the Committee of Review*, vol. 2, 1985, at pages 270-295.
[11] B. Creighton and A. Stewart, *Labour Law: An Introduction*, 1st ed., Federation Press, 1990, at pages 93-94.
[12] B. Creighton and A. Stewart, *Labour Law: An Introduction,* Federation Press, Sydney, 2nd ed., 1994, at page 95.

a referral of power by the States to the Commonwealth with the result that unfair dismissal matters could exclusively be covered under the one scheme.

1.55 In addition, the Bill would also provide significant benefits for the States. It is the Government's view that reduction in jurisdictional uncertainty and confusion, and the broader application of the federal laws, would encourage higher employment and increased investment. In addition, there could be a significant reduction in the workloads of State industrial relations commissions.

1.56 Once the Bill is enacted, if termination of employment applications continue at their current rate, it is expected that the annual number of termination of employment applications lodged with the Commission would increase by up to around 5500, and that there would be a decrease of similar magnitude in the number of applications lodged in the State systems. The allocation of matters to members (including to concurrent appointees) is a matter for the respective Presidents of the Commission. However, an option for dealing with the increased workload of the Commission may be for concurrently appointed members of the Commission taking on additional federal unfair dismissal cases. Such an approach would recognise the fact that there would be a corresponding reduction in the workload of the State commissions.

1.57 The Minister for Employment and Workplace Relations has recently written to State and Territory Workplace Relations Ministers seeking their views on the scope for such an approach to be taken.

1.58 The States have been part of the wider debate on the merits of using the corporations power to support a consistent national workplace relations system. The only formal response from the States to the *Breaking the Gridlock* discussion papers came from the Queensland Government, which released its own discussion paper in response during November 2000. The Queensland discussion paper did not support the proposal for a unified system. The main issues raised by the Queensland Government were concerns over the capacity of the corporations power to support a national system, and concerns that the Commonwealth Government would use the corporations power to deregulate workplace relations.

1.59 These concerns are not relevant with regard to this Bill. It is not being claimed that an expanded unfair dismissal system would cover all employees and employers in Australia. The expanded jurisdiction would, however, provide increased certainty for all constitutional corporations and their employees. Furthermore, no employees would lose access to the federal unfair dismissal jurisdiction through the enactment of the Bill.

1.60 It is the Government's view that the federal unfair dismissal laws, which are based on the concept of a fair go all round, would provide significant benefits for Queensland and the other States with separate unfair dismissal systems, such as increases in employment and investment.

(d) The impact of the Bill on procedures

1.61 The amendments would expand the federal unfair dismissal jurisdiction to cover all employees of constitutional corporations. As a result, all Australian incorporated businesses, and employees of such businesses, would be subject to a single unfair dismissal system, regardless of industrial award or agreement coverage.

1.62 Under the current arrangements, it is estimated that almost 50 per cent of all employees are covered by the federal unfair dismissal system. The remaining employees are in either the

New South Wales, Queensland, South Australian, Western Australian or Tasmanian unfair dismissal jurisdictions. The federal provisions, however, allow for the possibility that employees eligible to bring a claim under the federal law may be able to choose between alternative remedies in the federal and State jurisdictions, provided that they do not attempt to pursue more than one remedy.

1.63 Some important differences exist between the Commonwealth unfair dismissal scheme and each of the State schemes. For example, there are eligibility differences in terms of casual employees, the period within which an application can be made and the income limit applicable to potential applicants. There are also differences in the level of application fee, the ability for costs to be awarded against the parties and the factors that the industrial tribunals must consider when handling the cases. In addition, the factors that tribunals must consider and the relative importance they are required to give to them in determining the fairness of a dismissal, whether relief is warranted and the form and level of such relief, vary depending upon the legislative framework and related case law that is being applied.

1.64 One consequence of the current arrangements is that identical cases may be handled differently merely because they fall into different jurisdictions. The President of the Commission commented in a speech last year that such inconsistent application of unfair dismissal law diminishes public confidence in the courts and tribunals.[13] In addition, such complexity weakens efforts by government agencies and others to gather information about the operation of the schemes and to educate and inform businesses about how to handle and prevent unfair dismissal claims. For instance, surveys on attitudes to unfair dismissal laws have difficulty distinguishing whether or not respondents are covered by federal laws and whether the views expressed relate to the operation of federal laws.

1.65 Another consequence of the complexity of the overlapping jurisdictions is that it creates confusion for employers and employees. For example, many employees may not know the jurisdiction in which to lodge a claim or if, indeed, they are eligible to lodge a claim. This was recognised by this Committee during May 2002 in its report on the *Inquiry into the Provisions of Bills to Amend the Workplace Relations Act 1996*,[14] when it was found that many employers were unsure whether they were covered by federal or State dismissal laws. An indication of the magnitude of this confusion is provided by the report of the Melbourne Institute of Applied Economic and Social Research, which found that almost a third of small and medium businesses did not know whether they were covered by State or federal unfair dismissal laws

1.66 Some employees are likely to be confused by the complexity and may fail to seek redress or to lodge an application in time. In addition, as the President of the Commission has also pointed out, time in the courts and tribunals is taken up with jurisdictional questions, which imposes costs on the tribunals affected and thus on both Government and on the individual litigants.

1.67 To ensure the effective operation of the proposed arrangements and to avoid such confusion and complexity, the amendments would prevent employees within the scope of the federal unfair dismissal jurisdiction from accessing remedies under comparable State unfair dismissal schemes. Such a corporations-based scheme would provide significant benefits for the

[13] The Hon Justice Geoffrey Guidice, Speech to Australian Workers Union Conference, 'Unfair dismissal laws – A monster or a mouse?' East Melbourne, 19 April 2002.
[14] Which included the Workplace Relations Amendment (Fair Dismissal) Bill 2002.

majority of Australian employees and employers in terms of certainty of coverage and clarity and enforceability of the laws.

1.68 Under the proposal, the interaction of federal unfair dismissal law with other Commonwealth, State or Territory anti-discrimination laws and unlawful termination laws remains largely unaffected.

Impact on the number of federal termination of employment applications

1.69 The Commission reported that 7461 federal termination of employment applications were lodged during the 2001–2002 financial year. If the assumption is made that the number of federal unfair dismissal applications is directly proportional to the number of employees who are covered by federal unfair dismissal legislation, it is estimated that under the proposed legislation the number of federal unfair dismissal applications would increase by around 73 per cent. It is estimated that this would represent an increase in the number of federal unfair dismissal claims of up to 5500 claims per year.

1.70 This figure has been revised downward from the estimate provided when the Bill was introduced into the Parliament that there would be an annual increase of up to 6000 federal applications. The initial estimate was based on Commission figures for the 2000–2001 financial year, during which 8109 federal applications were lodged.

1.71 As the increase in the number of applications lodged in the federal system would be roughly equal to the reduction in the number of applications that would have been lodged in the State systems, the Bill is unlikely to result in any net increase in cost to the national economy.

PART B – IMPROVEMENTS TO THE UNFAIR DISMISSAL PROVISIONS

OUTLINE

2.1 In addition to extending the operation of the federal system, the Bill proposes improvements to the existing arrangements. Schedule 2 to the Bill would:

- extend the qualifying period that an employee of small business must serve before becoming eligible to make an unfair dismissal application, from 3 months to 6 months;[15]
- permit the Commission to dismiss an application made against small business without a hearing – that is 'on the papers' – if the application is beyond jurisdiction, or is frivolous, vexatious or lacking in substance;[16]
- halve the maximum amount of compensation payable to unfairly dismissed employees of small businesses;[17]
- require the Commission to take into account the size of an employer's business when determining compensation;[18] and
- introduce streamlined criteria that the Commission must consider in determining whether a dismissal from a small business is unfair.[19]

2.2 Schedule 3 to the Bill would:

- exclude access to remedies for unfair dismissal where an employer dismisses an employee on operational grounds, other than in exceptional circumstances;[20]
- require the Commission to have regard to the safety and welfare of other employees in assessing whether a dismissal was harsh, unjust or unreasonable;[21]
- require the Commission, when determining the quantum of compensation payable, to have regard to conduct by an employee which contributed to their dismissal;[22]
- require the Commission to take account of any income an employee who is to be reinstated may have earned since their dismissal, when making an order for back pay;[23] and
- emphasise that reinstatement is the primary remedy available under the WR Act.[24]

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[15] Schedule 2, item 3.
[16] Schedule 2, item 4.
[17] Schedule 2, items 8-13.
[18] Schedule 2, items 6-7.
[19] Schedule 2, item 5 – proposed paragraph 170CG(3A).
[20] Schedule 3, items 4,7-8.
[21] Schedule 3, items 3 and 6.
[22] Schedule 3, item 13 - proposed subsection 170CH(7A).
[23] Schedule 3, items 10 and 11.
[24] Schedule 3, item 9 – proposed subsection 170CH(2A).

POLICY RATIONALE

2.3 Since 1996, the Government has pursued a program of legislative amendment to the Commonwealth termination of employment provisions, as already highlighted in Part A of this submission. The Government amended the previous Government's termination of employment provisions with the enactment of the *Workplace Relations and Other Legislation Amendment Act 1996*. The object of these amendments was to ensure 'a fair go all round' by creating a better balance between the interests of employers and employees whilst, at the same time, encouraging job creation.

2.4 The *Workplace Relations Amendment (Termination of Employment) Act 2001* made further significant technical improvements. However, the Government believes that more needs to be done, because the current termination of employment provisions discourage employers from putting on more staff and hamper business growth which, in turn, harms the whole economy.

2.5 Research by the Melbourne Institute of Applied Economic and Social Research at the University of Melbourne, released in October last year, found that the laws have had a significant affect on small to medium businesses - imposing significant additional cost, affected their hiring policies, and making it difficult for the most vulnerable job seekers to find work.

2.6 The research, commissioned by the Department of Employment and Workplace Relations, surveyed some 1802 small and medium businesses with less than 200 employees. The survey was designed to avoid criticisms about the use of leading questions that have been levelled at previous surveys on small business attitudes. This was done by using screening questions to first establish the existence of an effect before asking about the magnitude or nature of the effect. The Institute found that State and Federal unfair dismissal laws cost small and medium businesses $1.3 billion each year.[25]

2.7 The research also 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).

2.8 However, the impact on jobs growth would appear to be greater than the estimates in paragraph 2.7, as the figures do not take into account jobs that have been lost by businesses which have reduced their workforce due to the laws, but still have employees. Nor do they include jobs which would have been created if there were no unfair dismissal laws.

2.9 The survey also showed that the laws impact negatively on the most disadvantaged job seekers. 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.

2.10 The Government believes that amendments in Schedules 2 and 3 to the Bill will significantly improve the operation of the unfair dismissal laws and significantly reduce their adverse affect on business growth and employment.

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[25] Harding, D., *The Effect of Unfair Dismissal Laws on Small and Medium Businesses*, Melbourne Institute of Applied Economic and Social Research, University of Melbourne, 2002, at page 19.

SCHEDULE 2 – TERMINATION APPLICATIONS AFFECTING SMALL BUSINESS

2.11 The Government believes that although the unfair dismissal laws impact on all businesses, they place a disproportionately heavy burden on small business. Government policy is to minimise the regulation of small business in order to alleviate its administrative burden. Further deregulation of small business arrangements would reduce costs, improve small business confidence and help maintain and augment small business employment growth.

2.12 Since coming to office in 1996, the Government has tried to exempt small business from the unfair dismissal laws. Schedule 2 to the Bill will amend the WR Act to improve the operation of the federal unfair dismissal laws as they impact on businesses employing fewer than 20 employees.[26] But the Government is still pursuing its key policy of a total exemption for small businesses from the unfair dismissal laws via the Workplace Relations Amendment (Fair Dismissal) Bill 2002 [No. 2]. The Fair Dismissal Bill is currently before the Senate.

2.13 The measures in Schedule 2 would reduce the financial costs associated with unfair dismissal claims, increase certainty of outcomes and ensure that claims are resolved more quickly than is presently the case. The Government believes that improving the operation of the laws will have a positive impact on the decisions of small businesses not to take on additional employees. Increased employment by small business will improve the outlook for the Australian economy.

Particular needs of small business

2.14 The small business sector is responsible for generating a large proportion of jobs in Australia. In 2000-2001 there were 1,122,000 non-agricultural small businesses – that is, private sector businesses employing fewer than 20 people – operating in Australia. These businesses provide work for approximately 3.3 million people, or 47 per cent of the private sector workforce.[27] Approximately 2.3 million of these people were employees. The remaining one million were persons working in their own businesses, either as employers or on their own account.[28]

2.15 In the 17 year period to end of the financial year 2000-2001, the number of employees employed by small businesses has increased by 81 per cent, representing an annual growth rate of 3.6 per cent.[29] In comparison, the number of employees employed in all non-agricultural private sector businesses increased by 62.2 per cent over the same period, representing an annual growth rate of 2.9 per cent.[30]

2.16 However, the substantial economic contribution made by small businesses can sometimes mask the fragility of the sector. A consistent feature of small business is higher exit rates

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[26] This definition of small business is consistent with the definition used by the Australian Bureau of Statistics (ABS). The Bill would implement the Government's 2001 election policy commitment to exempt small businesses from unfair dismissal laws – *Choice and Reward in a Changing Workplace*, at page 29. See also the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001 and the Workplace Relations Amendment (Fair Dismissal) Bill 2002.

[27] Australian Bureau of Statistics, *Small Business in Australia 2001*, 2002, at page 7.

[28] ibid.

[29] ibid, at page 30. The 17 year period reflects the fact that the ABS report on small business only contains data going back to 1983-84.

[30] ibid.

compared to larger businesses.[31] For example, the cessation rates of small businesses within their first two years of operation are twice those of larger businesses.[32]

2.17 The greater susceptibility of small business to cessation, especially in the early stages of the business life cycle, justifies special measures aimed at ensuring their continued existence and profitability.

2.18 Providing different standards according to the size of the business is not a novel concept. Though the means of defining small businesses can vary, small businesses are already treated differently from larger businesses by a number of legislative schemes. For example:

- the *Income Tax Assessment Act 1997* provides exceptions and special rules for small business taxpayers, for example, in relation to depreciation of plant and eligibility for capital gains tax concessions;
- the *Fringe Benefits Tax Assessment Act 1986* exempts benefits related to small businesses providing car parking;
- the *A New Tax System (Goods and Services Tax) Act 1999* differentiates between small and larger businesses in relation to the registration threshold, the tax period, bases of accounting and electronic lodgement;

[31] Exit rates count both changes in ownership and cessations of business.

[32] Productivity Commission, *Business Failure and Change: An Australian Perspective*, 2000, at page 25. These statistics are illustrated in the following table which is reproduced from Table 2.7 at page 26 of the report:

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

- the *Privacy Act 1988* only applies to businesses with an annual turnover of $3 million or less, if they

    - are a health service provider; or

    - trading in personal information (e.g. buying or selling a mailing list); or

    - related to a business that is not a small business; or

    - a contractor that provides services under a Commonwealth contract.

  The Privacy Act also provides for the delayed application of the National Privacy Principles to small businesses covered by the Act.

2.19 The Australian Banking Industry Ombudsman Scheme also differentiates between small and larger businesses in relation to eligibility for the Ombudsman's support. Specifically, the ABIO can only receive complaints from individuals or small businesses where the amount in dispute is less than $150,000. It cannot investigate complaints from larger businesses.

Difficulties for small business

2.20 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 if they have to attend a hearing personally.

2.21 Material provided by a number of employer organisations and small business interest groups supports this view.

2.22 For example, the Victorian Automobile Chamber of Commerce told the Senate Inquiry into the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 that:

> *Small businesses such as those that we represent generally are employers who work their way up through the trades themselves. They run a small shop, perhaps a panel beating shop or something like that, where they are actually out there doing the work alongside their staff. There really is no-one there to run or manage the business while they are absent….*[33]

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

2.24 Australian Business Limited gave the following evidence to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee in 1999:

[33] Evidence to Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, Inquiry into the provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, 7 October 1999, at page 187 (Leyla Yilmaz).

Of the 248 matters that we dealt with [during 1998] I would estimate that at least three quarters were settled without regard to the question of merit, of relative strength. They were settled on the basis that – and it is good, commercial, pragmatic advice – it was going to cost X dollars; it could be got out of for a figure somewhat less than X so settle it.[34]

2.25 It has been suggested that the education of small businesses about procedural fairness requirements in dismissal procedures is a suitable alternative to amendments that specifically assist small businesses.

2.26 The Government recognises the value of educating the small business sector, recognising that small businesses operators may find the laws confusing. For example, in the recent Melbourne Institute report on the effect of unfair dismissals on small to medium businesses, almost one-third of businesses did not know whether they were covered by State or Commonwealth unfair dismissal laws, and therefore do not know what their legal obligations are.[35] However, the Government believes that, whilst worthwhile, education is an insufficient response. Both this Department and the Commission already provide information and education on federal employment termination law. The amendments proposed by Schedule 1 will further assist in reducing complexities. However such measures do not address the underlying reason for the difficulties, which is that the laws do not make adequate allowances for the particular circumstances and needs of small business.

Impact on employment growth

2.27 There is a clear perception among many small business owners that unfair dismissal laws make it very difficult to legitimately dismiss staff, even where performance is unsatisfactory or there is a downturn in business and the employer does not have enough work for its employees. While the evidence of the link between unfair dismissal laws and employment in the small business sector is drawn from attitudinal surveys, and the sample size and questionnaire design of these surveys differ, the majority of the findings indicate that small business employers would be more likely to employ new staff, and more likely to employ staff on a permanent basis, if they were not concerned about the prospect of unfair dismissal claims.

2.28 Much of this evidence was summarised in the Department's submission to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee's Inquiry into the provisions of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998. Rather than reproduce that evidence here, the Committee is referred to a summary of survey evidence at Appendix B. The most recent surveys support the earlier studies, and suggest that concerns about unfair dismissal claims continue to impact on small business staffing decisions.

2.29 In March 2002, CPA Australia released the results of its *Small Business Survey Program on Employment Issues*. CPA Australia surveyed 600 small businesses (defined as independently owned and operated businesses employing fewer than 20 employees) and 105 Certified Practicing Accountants (CPAs) drawn from CPA Australia's membership database. CPA Australia are key advisers to small business, their client base consisting predominantly of small business owners and decision makers. The survey was conducted by telephone and

[34] Evidence to Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, Inquiry into the provisions of the Workplace Relations Amendment (Unfair Dismissal) Bill 1998, 29 January 1999, at page 6 (Grant Poulton).
[35] *The Effect of Unfair Dismissal Laws on Small and Medium Businesses*, op. cit, at page 9 – Table 3.

participants were selected at random across all States and Territories and in both regional and metropolitan areas. The survey specifically dealt with the influence that various factors, including unfair dismissal laws, have on the hiring intentions of small businesses.

2.30 Key findings of the survey were that:

> *Almost a third of small businesses believe that they cannot dismiss staff, even if their business is struggling or the employee is stealing from them, under the unfair dismissal laws. The same number of businesses believe that employers always lose unfair dismissal cases if a dispute arises. Only 58 percent of small businesses are confident they know how to dismiss staff under the legislation and of these only 30 percent are very confident. Sixty-two percent of small business and 81 percent of accountants believe that unfair dismissal laws require them to follow a complex process.*[36]

2.31 The researchers commented that 'these perceptions are as much a barrier to employment as the operation of the law' and went on to suggest that more needs to be done to educate small business employers. As noted in this submission, however, small business concerns persist despite educational initiatives.

2.32 The CPA Australia survey also found that small businesses were employing more casuals and contractors despite a belief that they were not as valuable to their business as permanent employees. The reasons for hiring casuals over permanent employees included varying business income and work, and to reduce costs. However, 30 percent of small business respondents and 44 per cent of CPAs cited a desire to avoid unfair dismissal issues as a reason for employing casuals.

2.33 These findings are consistent with the 2002 Melbourne Institute of Applied Economic and Social Research's report.

2.34 The measures contained in Schedule 2 of the Bill would not entirely relieve small business of this burden, and the full exemption for small business from the federal unfair dismissal laws remains a Government priority. However, these amendments would build upon the changes made in August 2001 by the Termination of Employment Act and go some way to reassuring small businesses that they will get a fair go from unfair dismissal laws.

SCHEDULE 3 – OTHER AMENDMENTS RELATING TO TERMINATION OF EMPLOYMENT

2.35 Schedule 3 to the Bill contains provisions which would amend the WR Act to make a number of general improvements and correct a number of anomalies in the way the Federal unfair dismissal laws operate. For example, employers in genuine redundancy situations have lost their case on the grounds of procedural unfairness even where the Commission has acknowledged the validity of the operational grounds and the redundancy selection process itself has not been found to be unfair.[37] Also, cases where employees have been sacked for endangering other workers have been lost because the Commission failed to give sufficient weight to this kind of circumstance.

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[36] CPA Australia, *Small Business Survey Program: Employment Issues*, March 2002, at page 4.
[37] See for example *Ly Kung Lao v Australian Tie Company* (2002) [Print PR919424], Holmes C.

2.36 These amendments would also further implement the concept of 'a fair go all round' by making a number of technical changes that will ensure applicants obtain no greater benefit from a claim than restoration of the status quo.

SPECIFIC ISSUES RAISED BY THE COMMITTEE

(a) The impact of the bill on job security

2.37 Job security is essentially an employee's perception that they will remain employed in the future. In many instances, this perception would relate to employment with their current employer, but may also include the degree of confidence in finding alternate employment.

2.38 Measures contained in Schedules 2 and 3 of the Bill will assist in providing greater job security by reducing some of the difficulties faced by employers, particularly those in small business, when dealing with the unfair dismissal laws, thereby giving employers greater confidence to increase and maintain higher staffing levels.

2.39 The amendments proposed in Schedules 2 and 3 of the Bill will provide employers with greater certainty and confidence to make employment decisions. This improves job security for employees.

2.40 By addressing some of the factors that act as a disincentive to employment for businesses, and particularly small businesses, the Bill will impact positively on the demand for labour. Any measures which increase the willingness of business to recruit new staff can only add to the perception of a strong labour market and thereby strengthen the expectation of employees that alternate employment opportunities are obtainable.

2.41 Examples of amendments that will impact directly on employer hiring intentions are:

- extending the qualifying period that an employee must serve before becoming eligible to make an unfair dismissal application, from 3 months to 6 months for employees of small businesses;

- introducing a provision to exclude access to remedies for unfair dismissal where an employer dismisses an employee on operational grounds, other than in exceptional circumstances.

Extension of the qualifying period of employment

2.42 For small business employers, the Bill will extend the qualifying period from 3 months to 6 months. This qualifying period must be served before an employee is entitled to make an unfair dismissal claim.[38] Importantly, the qualifying period does not prevent an employee from pursuing an unlawful termination remedy where, for example, the employee was dismissed on discriminatory grounds, including sex, race, membership or non-membership of a union, age, disability and religion (section 170CK), or was dismissed without notice or pay in lieu of notice (section 170CM).

2.43 Differential treatment of small businesses in this respect is justified given the greater burden placed on small businesses by the unfair dismissal laws. Giving small business employers a longer period in which to determine a new employee's suitability for a position, taking account of the lack of resources for recruitment and training, allows small businesses

[38] Subsection 170CE(5A).

more time in which to address performance issues and to afford training to get an unsuited new employee up to speed.

2.44 As small business owners tend to have more limited financial options when compared with larger businesses, they are more vulnerable to the economic cycle, particularly in the start-up phase.[39] As the Yellow Pages *Business Index – Small and Medium Enterprises* quarterly survey shows, cash flow is a prime concern for small to medium enterprises.[40] This financial vulnerability means there is little flexibility within small business to bear unexpected costs associated with defending or settling unfair dismissal claims.

2.45 In this respect, a longer qualifying period would remove some of the risk felt by small business when making employment decisions because it reduces some of the uncertainty that accompanies having to anticipate future staffing needs relative to future market fluctuations.

2.46 The amendment also assists job security by providing a small business employee with a greater opportunity to attune skills to the competencies required in the position.

Limit claims where dismissal due to operational reasons

2.47 Schedule 3 to the Bill will also make amendments in relation to dismissals on operational grounds, with application to all employers. The Government believes the WR Act currently does not provide sufficient protection to employers who genuinely need to effect mass redundancies for operational reasons. In its submission to the Senate Inquiry into the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, the Australian Industry Group stated:

> *The existing provisions impose a heavy burden on an employer which needs to restructure its workforce, by requiring it not only to justify the business case for the restructure, but also its selection of particular individuals for retrenchment……these are matters pertaining to operational aspects of the business. Where operational grounds can be established, the employer should have the discretion to make and finalise selection without the prospect of reversal by the Australian Industrial Relations Commission….*[41]

2.48 Schedule 3 of the Bill will amend the termination of employment provisions to preclude the possibility of a genuine redundancy becoming an unfair dismissal. A new subsection will provide that where a termination of employment occurs because of operational requirements, the termination will not be harsh, unjust or unreasonable unless the circumstances are exceptional. An example of such circumstances might be where an employer, faced with the need to reduce employee numbers for operational reasons, adopts an unfair process for selecting the employees that are to be made redundant.

2.49 The amendment would provide more certainty for employers where they no longer have ongoing work for employees. The amendments will allow employers to focus on their core business during a downturn, instead of needing to defend an unfair dismissal claim. This will be especially important for small and medium businesses.

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[39] A *Yellow Pages – Small Business Index Report* 'Attitudes to Banks and Other Financial Institutions' (November 1999, at page 2) cites lack of bank lending as a consistent concern of small business in response to quarterly Yellow Pages surveys.
[40] Yellow Pages, *Business Index – Small and Medium Enterprises*, November 2002, at pages 13-15.
[41] Submission 392, Volume 14,at page 3091.

2.50 It is important to note, however, that two important protections are in place for employees:

- first, employees will still have a remedy for unlawful termination of employment under section 170CK of the WR Act if, for example, employees have been selected for redundancy on discriminatory grounds, such as trade union membership; and

- second, the amendments in Schedule 3 of the Bill will provide that 'exceptional circumstances' can still render unfair a termination of employment because of operational requirements. An example of exceptional circumstances might be where an unfair process for selecting employees for termination is adopted.[42]

Reinstatement

2.51 Schedule 3 to the Bill will also make amendments in relation to reinstatement, with application to all employers. Reinstatement is currently the primary remedy for unfair dismissal. Subsection 170CH(3) of the WR Act requires the Commission to consider making an order for reinstatement if it considers it appropriate. If the Commission considers reinstatement inappropriate, subsection 170CH(6) allows the Commission to make an order for compensation in lieu of reinstatement.

2.52 Schedule 3 to the Bill will amend the WR Act to further emphasise that reinstatement, rather than compensation, is the primary remedy in federal unfair dismissal claims, by specifying that the Commission must not make an order for compensation in lieu of reinstatement unless it has first considered whether reinstatement of the employee is appropriate.

2.53 This emphasis on reinstatement will provide greater job security to the benefit of both employees and employers. Employees benefit by returning to their previous positions and having the matter resolved quickly. Employers benefit by not having additional recruitment costs because the amendments will reduce the incentive for claims to be pursued purely for financial gain.

(b) The constitutional implications of the Bill

2.54 Measures in Schedules 2 and 3 will apply to the extent of the coverage of the unfair dismissal provisions generally. That is, if measures in Schedule 1 become law, the unfair dismissal provisions will apply to all constitutional corporations. The Department estimates that this will result in approximately 60 per cent of small businesses Australia-wide being coved by the federal unfair dismissal provisions.

(c) The development of the Bill and Commonwealth-State relations

2.55 None of the amendments contained in Schedules 2 and 3 of the Bill are directly relevant to this term of reference.

(d) The impact of the bill on procedures

2.56 Of relevance to this term of reference are the amendments to:

[42] An example of an exceptional circumstance might be where the employer has included discriminatory criteria in the selection process for redundancy, such as considering workers compensation claims made against the employer.

- permit the Commission to dismiss an application made against small business without a hearing – that is 'on the papers' – if the application is found to be beyond jurisdiction, or is frivolous, vexatious or lacking in substance;

- introduce streamlined criteria that the Commission must consider in determining whether a dismissal from a small business was unfair;

- require the Commission to have regard to the safety and welfare of other employees in assessing whether a dismissal was harsh, unjust or unreasonable;

- require the Commission to take account of any income an employee who is to be reinstated may have earned since their dismissal, when making an order for back pay;

- require the Commission to take into account the size of an employer's business when determining appropriate remedy;

- require the Commission, when determining the quantum of compensation payable, to have regard to conduct by an employee which contributed to their dismissal; and

- halve the maximum amount of compensation payable to employees dismissed from small businesses.

2.57 Some of these amendments will have a direct impact on actual Commission procedures, whereas other amendments will impact more broadly on the way the Commission handles unfair dismissal claims. The overall effect will be more streamlined procedures, greater clarity in relation to the factors to be taken into account, and the removal of unwarranted applications from the system, thereby freeing up resources of the Commission and enabling it to better assist applicants with genuine claims. This should also result in savings to the Commission and employers and employees.

Dismissal on the papers

2.58 For small business employers, Schedule 2 to the Bill would amend the WR Act to allow the Commission to reject an unfair dismissal application made against a small business without holding a hearing (dismissal 'on the papers'). Before exercising this power, the Commission must be satisfied that the application is beyond jurisdiction or because it is frivolous, vexatious or lacking in substance. Procedural fairness is guaranteed by the specific requirement that the Commission allow both parties the opportunity to provide further information before an order to dismiss is made.[43] Once an order by the Commission has been made, such an order will not be appealable.[44]

2.59 This amendment would have a beneficial impact on Commission procedures by providing the Commission with a power to deal with applications that are clearly out of jurisdiction or unmeritorious without the need for a hearing. This would free up the Commission to assist genuine applicants and concentrate on resolving genuine claims.

2.60 For small business employers this amendment would ensure a simple and inexpensive process for dealing with unmeritorious unfair dismissal applications. However, this amendment

[43] Schedule 2, item 4 – proposed paragraph 170CEC.
[44] Schedule 2, items 15-16.

in no way diminishes the onus on small business employers to abide by the unfair dismissal laws and take responsibility for any breaches of these laws.

2.61 The amendments would result in a cost saving to both the Commission and to small business employers and employees.

Safety and welfare of employees

2.62 Schedules 2 and 3 to the Bill would amend the factors that the Commission is required to consider in arbitrating unfair dismissal claims. Currently the Commission, in determining whether a termination by an employer is unfair, is required to consider the following:

a) whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service; and

b) whether the employee was notified of the reason; and

c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and

d) if the termination related to unsatisfactory performance by the employee – whether the employee had been warned about that unsatisfactory performance; and

da) the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and

db) the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and

e) any other matters that the Commission considers relevant.[45]

2.63 Schedule 3 to the Bill will amend the WR Act to provide that, in assessing whether there was a valid reason for termination, the Commission must consider any conduct of the employee that may have put at risk the safety or welfare of other workers. This amendment would emphasise the importance of the obligations that employers and employees have under the various occupational health and safety legislation to provide a safe place of work.

Special criteria for small business

2.64 Schedule 2 to the Bill will amend the WR Act to streamline the criteria that apply to applications against small businesses. In particular, the general power of the Commission to consider 'any other matter' will be removed.

2.65 By simplifying and stating all the criteria that the Commission must consider in determining whether a dismissal from a small business is unfair, both the Commission and employers will be assisted because the legislation will set out in clear terms all of the factors which a small business employer must address to ensure that a dismissal is fair.

[45] Subsection 170CG(3).

Unfair dismissal remedies

2.66 Schedules 2 and 3 also make several amendments that will affect Commission processes.

2.67 In making an order for lost remuneration where an employee is to be reinstated, the Commission is currently required to take into account any amount ordered by a court for failure by the employer to give notice on termination and reduce the amount it orders accordingly (subsection 170CH(5)). Schedule 3 will amend this provision to require the Commission to also take account of income earned by the employee from employment or other work during the period between dismissal and reinstatement, and the amount of any income reasonably likely to be earned by the employee during the period between the making of an order for reinstatement and the actual reinstatement. This amendment will apply to all applications and will prevent 'double dipping' by employees and ensure against windfall gains.

2.68 Schedule 3 will also amend the WR Act to require the Commission, once it has determined that reinstatement is not an appropriate remedy, to take account of any misconduct by the employee which contributed to the dismissal when assessing an appropriate amount of compensation. This amendment has general application irrespective of employer size. The Commission would be required to reduce the amount of compensation awarded to an employee by an appropriate proportion to reflect the contribution of the employee to the dismissal — for example, swearing may not justify dismissal in all circumstances, but the amendment would ensure that such conduct is taken into account in determining appropriate compensation. This amendment would ensure, in the interests of fairness and a proper balance between the parties, that employees who have partly contributed to their dismissal obtain no unwarranted benefit from an order of compensation in lieu of reinstatement.

2.69 Where the Commission determines that an order of compensation in lieu of reinstatement is appropriate, Schedule 2 will amend the WR Act to halve the maximum compensation cap for employees of small business from 6 months to 3 months for award or agreement-covered employees, and half the applicable indexed amount for employees not covered by an award or agreement.

2.70 As outlined above, unfair dismissal claims have a significant impact on small business, particularly in terms of their time and financial resources. The Melbourne Institute of Applied Economic and Social Research report found that Federal and State unfair dismissal laws impose extra costs of $1.3 billion a year on small and medium businesses.[46] Halving the maximum amount of compensation payable to employees dismissed from small business will lessen the financial burden on small businesses that results from compensation orders.

2.71 The overall impact of Schedules 2 and 3 on the Commission and its procedures will be a positive one. The Commission will be provided with greater direction in certain cases and, to a significant extent, will be relieved of the case load that arises from speculative and unwarranted claims.

[46] *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses*, op. cit., at page 17.

APPENDIX A

COMMENTS IN SUPPORT OF A UNITARY NATIONAL SYSTEM

Senator Andrew Murray, Australian Democrats spokesperson for Workplace Relations, Workplace Relations Amendment (Fair Dismissal) Bill 2002 [No. 2] Second Reading Debate, 5 February 2003

> *Above all, the confusion experienced by small business emanates from the fact that Australia is burdened with six different industrial relations systems and thus six different unfair dismissal jurisdictions. The Democrats consider it more important that the Commonwealth attempt to procure some commonality across these jurisdictions. It was with some pleasure that the Democrats noted that the government is going to attempt to widen the coverage of their unfair dismissal provisions. We think it is helpful to have commonality in this area.*

Senator Andrew Murray, Australian Democrats spokesperson for Workplace Relations, 'Content is the Key – Concept of Unitary Industrial Relations System Warrants Scrutiny,' Press Release, 9 May 2002

> *The concept of moving from six industrial relations systems to one is intuitively attractive to many. Inevitably the content will create many arguments.*
>
> *The Democrats would be surprised if there were not Labor supporters of a unitary industrial relations system. But my expectation is that Labor's close relationship with the unions will inhibit it from looking at this idea on its merits.*
>
> *The most effective way to get a single industrial relations system would be by referral of powers to the Commonwealth by the States.*

Bill Shorten, National Secretary, Australian Workers' Union, speech to 'Unfair Dismissal Laws – a Monster or a Mouse?' conference, 19 April 2002

> *…the Federal Government should focus its efforts on achieving uniform standards that are fair, consistent and accessible to Australians. At present we have a system of multiple courts and jurisdictions. Australia's state/federal system of government means an unfair dismissal could be heard in several jurisdictions. This is very confusing for the parties involved, but it also means the outcome of cases is of very little predictive value. Our regulatory framework is over-complicated and does not provide consistency of treatment or outcome.*
>
> *This could be fixed by having uniform national standards for hearing and dealing with unfair dismissals. The multiple state and federal jurisdictions would be enriched for all parties if there were common standards. Many employers operate across states and between state and federal standards. By having uniform standards any unfair advantage would be removed from the different parts of the business and completing businesses would enjoy uniform treatment.*

Senator Andrew Murray, Australian Democrats spokesperson for Workplace Relations, speech to 'Unfair Dismissal Laws – A Monster or a Mouse?' conference, 19 April 2002

> *I find myself in agreement with the Federal Secretary of the AWU, Bill Shorten, when he said to the National Press Club earlier this year that the existence of multiple jurisdictions creates confusion in our industrial system – confusion for employers and employees. That's certainly true on the issue of dismissal rights and law.*
>
> *Except for Victoria, which is under federal law, most small businesses unfair dismissal cases fall under state law. The multiple systems that regulate industrial relations in Australia remain a major running sore. We need more convergence, not more divergence. There is no rational reason for six different approaches to major employment questions like termination of employment.*

Justice Geoffrey Giudice, President of the Commission, speech to 'Unfair Dismissal Laws – A Monster or a Mouse?' conference, 19 April 2002

> *…it seems to me that there is a good deal of support amongst the parties to industrial relations and, I dare say it, at the political level as well, that there should be some rationalisation of our industrial relations system, meaning by that the various acts of the State and Federal parliaments and the courts and tribunals which administer and enforce those laws.*
>
> *…in relation to the remedy available to successful applicants, some legislative provisions place a greater emphasis than others upon the remedy of reinstatement. There is not a uniform approach to the assessment of any amount to be ordered in lieu of reinstatement….the precise nature of these differences in the rules applying to the various jurisdictions is not as important as the fact that the differences exist.*
>
> *…Consistency of treatment under the law is an important aspect of any society and of fundamental importance where the rights of individuals, even the livelihood of the individuals, are at stake. Employers must be familiar with their obligations under a range of Federal and State laws and, potentially, with the operations of the tribunals who administer the laws and the courts who enforce them. The laws are not uniform, the processes differ and the interaction between jurisdictions can be confusing and frustrating. If the law is seen to operate in an inconsistent way depending on the statutory regime governing the proceedings, that is not a good thing for either party nor is it in the public interest. Confidence in the tribunals, the courts and the law itself is diminished.*
>
> *…in relation to termination of employment specifically the number of courts and tribunals that could be involved is greater than in relation to industrial disputes generally. And of course there is the cost to the community of maintaining separate processes and institutions where operations are subject to a significant amount of overlap.*

Australian Business Limited, 'A Submission to Political Parties and Candidates for the 2001 Federal Election – ABL Business Priorities 2001,' September 2001

> *Australian Business Limited seeks a commitment to simpler, nationally consistent workplace legislation, particularly in the areas of unfair dismissals, union entry rights, employee records keeping, equal opportunity and privacy.*

The next Federal Government should ensure unfair dismissal provisions are equitable and balanced in their operations and consistent across all jurisdictions.

Stephen Smith, General Manager, National Industrial Relations, Australian Industry Group, 'A Unitary Industrial Relations System – Where there's a will, there's a way,' speech to NSW Industrial Relations Society Convention, 20 May 2001

A unitary industrial relations system is inherently logical. In contrast, our existing IR system defies logic.

For decades, Ai Group has supported the idea of a unitary industrial relations system. The current system is costly and inefficient for industry.

In my view, the legal complications associated with achieving a unitary system are overstated. As I said earlier, if there was a will, we would find a way. All of the options would need to be looked at….the Corporations Power Model – as outlined in Peter Reith's recent discussion papers should be considered.

Professor Andrew Stewart, 'Federal Labour Law and New Uses for the Corporations Power,' proceedings from the 8th Annual Labour Law Conference: Key Developments in Labour Law, 16 June 2000

…while the federal award system has assumed a much greater coverage than might have been expected by the framers of the arbitration power, its reach will always be limited if based only on that power. Since interstate disputes rarely occur spontaneously, federal award coverage is constantly dependent on unions manufacturing appropriate paper disputes….the result is a patchwork of regulation which causes particular inconvenience for employers who have workers covered by both federal and state instruments.

…using the corporations power as the basis for federal regulation, it is said to be possible for "a coherent national framework of minimum standards to be established for the conduct of workplace relations in corporations," thus ending (at least in those workplaces) dual federal/State regulation. Federal awards would be able to "operate on a common rule basis (applicable to all corporations) rather than the current respondency basis." They could also provide "a more secure safety net of conditions to be specified across the workforce (where employed by corporations) and into award-free areas, rather than simply be orders made within the ambit of prescribed disputes.

Justice Geoffrey Giudice, President of the Australian Industrial Relations Commission, speech to Australian Chamber of Commerce and Industry Forum, 3 March 2000

…there is a lack of uniformity between State and Federal unfair dismissal laws which no doubt creates uncertainty and perhaps expense for litigants, and as a matter of principle the lack of uniformity may be undesirable in itself. Even within the Federal system some types of termination of employment cases are heard in the Commission while others are heard by the Federal Court. In addition to their statutory rights employees also have access to a range of common law remedies which may be pursued in the civil courts, or in some cases in the Federal Court in conjunction with a statutory cause of action.

APPENDIX B

SUMMARY OF ATTITUDINAL EVIDENCE

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.

- 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.