

## Chapter 2

### Unfair dismissal and small business employment

It is hard to think of a public policy issue of such prominence where there is so little research to go on.<sup>1</sup>

I continue to be amazed that the 77,000 number is taken seriously in public debate.<sup>2</sup>

2.1 This chapter examines whether there is any empirical evidence to support a causal link between unfair dismissal laws and job creation in the small business sector. To this end, it tests the Government's primary claim that between 50,000 and 77,000 jobs would be created if small business was exempt from unfair dismissal laws. The committee notes that the Government had been making unsupported claims about job growth in the small business sector and unfair dismissal laws long before the estimate of 77,000 jobs was made by Dr Don Harding in October 2002. Drawing on the latest empirical findings from academic research and the views of other stakeholders presented to this inquiry, the committee finds that there is no evidence from Australia or overseas to support the Government's claim.

2.2 Most of the evidence to this inquiry was critical, and at times scathing, of the Government's approach to unfair dismissal policy. Concerns were raised about the likely effect of Government legislation to exempt small business from the unfair dismissal laws. The committee notes in particular a research project being undertaken at the Australian Defence Force Academy, the results of which are likely to make a valuable contribution to debate on unfair dismissal policy. While the project will not be completed until the second half of 2005 or early 2006, the preliminary findings suggest the Government's legislation will not achieve its stated purpose of creating large numbers of new jobs.

#### Testing Government claims about unfair dismissal laws and small business employment

2.3 The Government has made repeated attempts to amend the Workplace Relations Act (WR Act) or related regulations to exempt all employees in workplaces of less than 20 employees from federal unfair dismissal laws. The Government has argued that an exemption for small business from unfair dismissal laws is necessary because the laws deter small businesses from recruiting employees, and place a great burden and cost on small business.

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1 Dr Paul Oslington, *Submission 1*, p.1

2 Dr Paul Oslington, *Committee Hansard*, 2 May 2005, p.6

2.4 The 1996 Workplace Relations Act, which was passed through the Senate with the Democrats' support, implemented a 'fair go all round' approach for employers and workers, notwithstanding an attempt by the Council of Small Business Organisations of Australia (COSBOA) to obtain cross-party support to exempt small business.<sup>3</sup> The minister then responsible for industrial relations, Peter Reith, introduced the Workplace Relations Amendment (Unfair Dismissals) Bill in 1997 and 1998, arguing on each occasion that unfair dismissal laws prevented small businesses from employing more workers.<sup>4</sup> In 2002 the Government claimed that unfair dismissal laws 'cost' the economy 50,000 jobs.<sup>5</sup> The figure was increased to 77,000 in October 2003. The DEWR submission notes that the figure of 77,000 jobs refers to an estimate by Dr Don Harding, Melbourne Institute of Applied Economic and Social Research, which was included in research which DEWR commissioned in 2002. Dr Harding's research used the Yellow pages Business Index survey which involved 1802 telephone surveys with small and medium enterprises employing fewer than 200 employees.<sup>6</sup>

2.5 The committee notes that submissions from academic researchers and unions identified a lack of evidence to support the Government's claim that exempting small business from unfair dismissal laws will create 77,000 jobs. A number of submissions referred to the ruling of the full Federal Court in the *Hamzy* case (2001), which noted that there was no evidence of a relationship between unfair dismissal and employment growth, or a connection between the two. The Government's expert witness, Professor Mark Wooden, admitted that there was no empirical research to support the view that excluding classes of employees will result in higher employment.<sup>7</sup>

2.6 The committee believes that there continues to be no evidence of a causal link between unfair dismissal laws and employment growth in the small business sector. Flaws with the Harding research were examined in detail in the Labor senators' minority report on the Workplace Relations Amendment (Termination of Employment) Bill 2002. While the committee does not want to cover familiar ground, it notes in passing that Labor senators on that occasion stressed that a number of submissions: '...made scathing comment on the methodology of the Harding survey and, in a variety of ways, described the conclusions as badly flawed. Criticism was directed in particular at conclusions drawn about the effect of current laws on, first, the loss of employment, and second to the related issue of labour costs'.<sup>8</sup>

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3 *Federal Unfair Dismissals*, A briefing paper issued by senator Andrew Murray, September 2004, p.2

4 W.M. Robbins and G. Voll, 'Who's Being Unfair? A Survey of the Impact of Unfair Dismissal Laws on Small Regional Business', Charles Sturt University, 2004, pp.1-2

5 *ibid.*

6 DEWR, *Submission 11*, p.9

7 See , for example, NSW Government, *Submission 3*, p.26

8 Employment, Workplace Relations and Education Legislation Committee, Workplace Relations Amendment (Termination of Employment) Bill 2002, Labor Senators' Report, p.17

2.7 The evidence before the committee supported this conclusion. Dr Oslington told the committee that he continued to be amazed that the figure of 77,000 jobs was taken seriously in public debate. He argued that Dr Harding's reliance on opinion polling was a serious methodological flaw limiting the value of his research findings. While Dr Oslington understood why Dr Harding 'went for the quick and dirty opinion survey', given budget and time constraints, the only research that is going to make a difference to the debate is one which can produce the 'hard numbers'.<sup>9</sup> Likewise, a survey on the impact of unfair dismissal laws on regional small businesses by Robbins and Voll argued: 'It seems incredible that a government should rely on such minimal research and crudely simplistic job growth reasoning to justify such a significant change to employment in the small business sector'.<sup>10</sup> Another review of literature on unfair dismissal laws by Voll concluded:

The review of the research material available on the impact of unfair dismissal law on small business conducted by this paper points to an unambiguous conclusion: there is no significant evidence justifying the exemption of small business from this employment protection law.<sup>11</sup>

2.8 The ACTU submission examined at length the evidence on this issue and provided a critique of the methodology underpinning the Harding report. It concluded that there is no compelling evidence either in Australia or abroad that would justify relaxing the operation of unfair dismissal laws. The submission made two other useful comments. First, empirical studies are inconclusive regarding the effect of unfair dismissal laws on aggregate employment and unemployment and, second, evidence of a link between such laws and employment rates does not automatically convert to an argument that relaxing the laws will result in higher employment levels.

2.9 Contrary arguments were put by the Department of Employment and Workplace Relations (DEWR) and the Australian Chamber of Commerce and Industry (ACCI). Their submissions followed a familiar line. DEWR, for example, repeated the claim that unfair dismissal laws place a greater burden on small business than on larger businesses and that introducing a small business exemption would remove a significant barrier to employment growth in the small business sector.<sup>12</sup> The ACCI submission went to great lengths to underscore the consistent feedback that it receives from member organisations about the effect of federal unfair dismissal laws. It claimed that econometric and empirical challenges to small business surveys miss the point: 'The point is that based on research and feedback from small businesses, tens of thousands of employment decisions are made or not made in part because of

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9 Dr Paul Oslington, *Committee Hansard*, 2 May 2005, p.9

10 W.M. Robbins and G. Voll, 'Who's Being Unfair? A Survey of the Impact of Unfair Dismissal Laws on Small Regional Business', Charles Sturt University, 2004, p.2

11 Dr W. Robbins and G. Voll 'Justifying Unfair Dismissal Reform: A Review of the Evidence', School of Business, Charles Sturt University, June 2005, p.19

12 DEWR, *Submission 11*, pp.13-14

concern about unfair dismissal claims'.<sup>13</sup> The committee dismisses these familiar arguments.

2.10 DEWR's evidence at a public hearing was also unconvincing. Ms Miranda Pointon, an Assistant Secretary in the Strategic Policy Branch, claimed that the argument about lack of evidence is really an argument about a lack of consensus over the 'quantifiable impact' of unfair dismissal laws:

There is consistent and strong evidence across all of the different survey methodologies undertaken to examine this issue that supports a very strong correlation between perceptions about the difficulty of terminating staff for legitimate reasons and the decisions of employers to employ staff.<sup>14</sup>

2.11 The committee does not accept DEWR's argument that the perceptions of small business provide a strong empirical base from which to draw conclusions about the effect of unfair dismissal laws on small business employment. While the committee accepts that different methodologies and survey techniques have been the subject of much debate and that small business owners sometimes hold strong views about unfair dismissal laws, this does not demonstrate a causal link between those laws and employment by small business.

2.12 The committee believes that employment figures for small business during the operation of unfair dismissal laws contradict the Government's position. The figures would have to show a reduction in the level of employment by businesses which fall under federal laws. The evidence, however, shows an opposite trend. The committee notes that figures published on small business employment by the Parliamentary Library in September 2002 show that the annual average growth in small business employment between 1992 and 2001 was 2.3 per cent, or approximately 700,000 jobs.<sup>15</sup> Significantly, this period of sustained economic and employment growth coincided with the operation of the unfair dismissal laws. Contrary to Government rhetoric, there is no evidence that employment growth in the small business sector during this period was slowed by federal unfair dismissal laws. The New South Wales Government submission argued:

It is a matter of public record that Australia is experiencing its lowest unemployment rate in decades, notwithstanding the fact that unfair dismissal law still applies to small business. It is disingenuous for the Commonwealth to suggest that the unemployment rate would be even lower if small businesses were provided with an exemption from laws that apply to larger businesses. This is an unprovable assertion and should be disregarded as justification for discriminatory legislation.<sup>16</sup>

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13 ACCI, *Submission 7*, p.16

14 Ms Miranda Pointon, DEWR, *Committee Hansard*, 2 may 2005, p.39

15 *Small Business Employment*, Research Note No. 10, 2002-03, Parliamentary Library, 17 September 2002

16 NSW Government, *Submission 3*, p.36

2.13 Small business employment declined sharply after March 2001 'despite the best economic conditions for businesses in almost three years'. The decline coincided with the introduction of the Goods and Services Tax (GST) even though the economy continued to experience growth. The committee believes that anecdotal evidence supports the argument that the GST has affected growth in employment in the small business sector more than unfair dismissal laws.

2.14 The committee asked DEWR, on notice, to provide figures on whether the increase in termination of employment applications under state laws has effected small business employment, and whether the fall in termination applications under federal laws has resulted in employment growth in businesses operating under those laws. The department indicated that it would be 'very hard' to provide these figures 'because of the lack of evidence on the jurisdictional split' and the difficulty in isolating the effect of unfair dismissal laws by jurisdiction.<sup>17</sup> This confirms the committee's belief that the debate over dismissal laws suffers from a lack of data on their application at both federal and state levels.

### **Unfair dismissal laws and opinion surveys**

2.15 The critique of Dr Harding's research points to a larger problem with the current debate on unfair dismissal laws. Dr Oslington identified a lack of modelling and data about the effects of hiring and firing costs on employment as the fundamental problem. While there are many ways unfair dismissal laws can affect employment: '...it is not completely clear even in theory what the net impact will be. We need data to resolve the issue'.<sup>18</sup>

2.16 The most popular and regularly used method of measuring the impact of hiring and firing costs on small business employment is the opinion survey. According to Dr Oslington, the attraction of opinion surveys is that they are relatively quick and easy to conduct, with firms being asked whether firing costs matter to them and removing this cost would increase hiring. Opinion surveys only confirm that the lobbying position of the businesses surveyed corresponds with the organisation that is funding the survey:

Economists, being the rough and tough and hard to bluff people we are, question whether firm behaviour will match their stated opinions. If firms know their answers will be used to lobby for changes in unfair dismissal provisions there is an obvious incentive to overstate the impact of firing costs on their behaviour.<sup>19</sup>

2.17 Mr John Ryan of the Shop, Distributive and Allied Employees Association (SDA) described the trap of accepting uncritically findings of small business surveys conducted by employer associations:

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17 Ms Miranda Pointon, DEWR, *Committee Hansard*, 2 May 2005, p.38

18 Dr Paul Oslington, *Committee Hansard*, 2 May 2005, p.2

19 Dr Paul Oslington, *Submission 1*, p.2

If you push people on a particular issue, you can get them to form an opinion that accords with what you are pushing them to do. That is the trouble with the political debate. If the political debate is around an issue of ideology...people are pushed, and pushed constantly, to support a line. The employer organisations want this; they argue for it; they therefore keep saying it is bad. And, if they say it is bad, then, as Henny Penny said, the sky is falling.<sup>20</sup>

2.18 An Australian Research Council (ARC) funded research project conducted by Dr Oslington at the Australian Defence Force Academy is now examining the hiring and firing costs of small and medium businesses, in a way which avoids the shortcomings of opinion surveys. The survey distinguishes between costs of retrenchment and the cost of dismissal, including cases which are uncontested, settled and which go to court. The survey data will be used to calibrate a dynamic labour demand model, generating estimates of the effect of various components of hiring and firing costs on employment. While the project is not expected to be completed until late 2005, the submission from Dr Oslington concluded that there is '...little evidence to support some of the claims of large impacts of firing costs on employment'.

2.19 Dr Oslington gave the committee an estimate of the cost to business of firing workers in cases which are not challenged; where they are settled out of court; and where they proceed to the Commission for arbitration. The research shows that in undefended cases costs are around seven to nine per cent of annual labour costs; where they are settled out of court the costs are between 18 and 20 per cent; and in arbitrated cases the costs are between 19 and 42 per cent. Dr Oslington told the committee that these figures do not represent a huge cost for employers:

I have to say that even if you are looking at the upper end of the numbers we are getting from the surveys, the costs are not huge. Sure, there is a distribution, and there are outliers where the costs are massive, but in general I think I would have to say that if you are looking at 42 per cent...the cost is not huge.<sup>21</sup>

### **Perception versus reality**

2.20 The committee is concerned by an argument raised in evidence by ACCI, and supported by Government senators on the committee, which first appeared in the Government senators' report on the Workplace Relations Amendment (Termination of Employment) Bill 2002. The report argued that while perceptions of disadvantage may be felt by business owners as a consequence of a lack of information, this does not alter the basic fact that many small business owners have some reason for either knowing, or believing, that the current laws relating to unfair dismissal impede them

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20 Mr John Ryan, SDA, *Committee Hansard*, 3 May 2005, p.50

21 Dr Paul Oslington, *Committee Hansard*, 2 May 2005, p.2

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from offering employment opportunities. The report concluded: 'Perception has become a reality requiring legislation to deal with the problem'.<sup>22</sup>

2.21 The issue of the perception of unfair dismissal laws held by small business and their effect on business confidence was also raised during this inquiry. The submission from ACCI touched on this issue by noting that the debate about small business employment is 'about perceptions, not models', and that '...so much of economics is reducible to sentiment, confidence and behaviour of individuals making decisions'.<sup>23</sup> The argument was put to several witnesses at a public hearing that 'perceptions define reality in politics' and that a negative perception of unfair dismissal laws by small business therefore impacts on small business employment growth: 'perceptions are, in fact, the reality'.<sup>24</sup>

2.22 The committee feels compelled to respond to these claims. The Government has not demonstrated why negative perceptions have affected the behaviour and decision-making of small business owners. The DEWR submission claimed that a 'strong perception' by small business operators that unfair dismissal laws make it difficult to shed staff 'in itself is sufficient to deter small businesses from employing more staff'.<sup>25</sup> DEWR did not explain why this should influence the Government's policy. Does the Government always respond to 'perceptions' that interest groups may have in order to formulate policy?

2.23 The committee believes that legislation to address the concerns of small business should only follow if the concerns are well-founded and based on the facts. This is often not the case in this instance. The perceptions of small business employers are sometimes based on ignorance fuelled by misinformation provided by employer associations. Research by Robbins and Voll found that government publicity regarding unfair dismissal laws has coloured small business perceptions rather than actual experience.<sup>26</sup> The New South Wales Lawyers Employment and Industrial Law Committee confirmed at a public hearing that employer perceptions of federal unfair dismissal laws are often the result of their experience with state unfair dismissal laws. The Industrial Law Committee confirmed that employers and employees are unlikely to be aware that the unfair dismissal laws were tightened in 1997 and again in 2002, and that the number of unfair dismissal applications in New South Wales under federal laws has fallen by 70 per cent.

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22 Employment, Workplace Relations and Education Legislation Committee, Workplace Relations Amendment (Termination of Employment) Bill 2002, Majority Report, p.8

23 ACCI, *Submission 7*, p.15

24 *Committee Hansard*, 2 May 2005, p.8

25 DEWR, *Submission 11*, p.8

26 W.M. Robbins and G. Voll, 'Who's Being Unfair? A Survey of the Impact of Unfair Dismissal Laws on Small Regional Business', Charles Sturt University, 2004, p.9

2.24 Additional evidence from the New South Wales Lawyers Employment and Industrial Law Committee supports the proposition that small business employers are ignorant of the laws relating to unlawful termination. It also shows that employers and employees are unaware of the difference between unfair dismissal and unlawful termination laws, and it is likely that many have not even heard of unlawful termination laws:

Small business employers are often ignorant of obligations placed on them by laws relating to the termination of employees, including that it is not acceptable to withhold a person's accrued annual leave in circumstances of summary dismissal, and that it's not acceptable to withhold accrued annual leave or wages or work already performed in order to convince an employee to sign a 'release' or deed of release.<sup>27</sup>

2.25 Following this theme further, the ACTU submission referred to a CPA small business survey in 2002 which found that 30 per cent of small business operators believed employers always lose unfair dismissal claims, 28 per cent think they cannot dismiss staff if their business is struggling, and 27 per cent believe they cannot dismiss staff if they are stealing from the business. The ACTU concluded that not only does this level of misunderstanding taint the reliability of employer surveys, it suggests that industry associations are partly to blame for some of the erroneous understandings of unfair dismissal laws amongst operators of small businesses.<sup>28</sup> The level of ignorance of unfair dismissal laws by small business employers was identified by other witnesses as a major area of concern.

2.26 The committee has a more conventional view on the proper basis for legislation, believing that laws are made for the common good rather than for the benefit of sectional interests. The theory is that the public good of job creation justifies the private harm of reducing employee protections. Job creation is not supported by the evidence, so we are left with opinion. The committee notes the view of Mr John Ryan, SDA, who argued that public opinion by itself is not a suitable vehicle for making good legislation or determining good public policy. Public opinion is often poorly informed because '...the mere presence of public opinion in attitude surveys...is not necessarily a proper measure of whether or not there is any relevance in the underlying issues that should be addressed'.<sup>29</sup> The committee believes the Government should not be legislating to amend the WR Act when it can be demonstrated that negative perceptions held by small business operators are often misperceptions. Even if it could be shown that the hiring intentions of small business employers were affected by a negative perception of unfair dismissal laws, this would not by itself make a strong case for legislation to overturn those laws. A causal link between the two would have to be demonstrated.

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27 New South Wales Lawyers Employment and Industrial Law Committee, Answer to Question on Notice, 15 June 2005

28 ACTU, Submission 12, para.154

29 Mr John Ryan, SDA, *Committee Hansard*, 3 May 2005, p.41



2.27 The committee accepts the view of many witnesses that there are easier and more beneficial ways to change the attitudes of small business towards the unfair dismissal laws. A number of witnesses were open to the idea that new and more effective information dissemination was possible, although it is hard to imagine why the Government would promote such a policy. The NSW Young Lawyers took the view that a better understanding of what constitutes unfair dismissal, and the process of making a claim, was possible and would greatly assist the small business sector to adopt and implement a procedurally and substantively fair dismissal process, and reduce negative perceptions of unfair dismissal laws.<sup>30</sup> The Combined Community Legal Centres Group of NSW agreed, and argued for better information.<sup>31</sup>

2.28 The committee acknowledges the reservations of DEWR and ACCI about the effectiveness of public education campaigns for small business. However, it disagrees with their conclusion that businesses are well enough informed and that more effort is therefore not needed. The committee refers to evidence that small business employers and employees are often ignorant of the detail of federal and state law, and that this results in longer, more expensive and less constructive outcomes for both parties. The committee believes more effort should be put into educating employers and their workforce about the unfair dismissal laws. Unfair dismissal should be treated no differently to other areas of policy which require effective communication strategies, such as those provided on tax law, superannuation choice and worker entitlements.

### **International evidence**

2.29 The committee's terms of reference refer specifically to consideration of international experience concerning unfair dismissal laws and the relationship between those laws and employment growth in the small business sector. The most useful evidence relating to international experience was provided by the ACTU in its submission and in oral evidence at a public hearing in Melbourne. The ACTU referred to an index developed by the OECD which measures certain elements of employment protection legislation (EPL). The index provides a quantitative measurement of the effect of EPL on employment and unemployment across nations. It measures the procedural requirements for dismissal and unfair dismissal, redundancy and retrenchment pay, special measures for terminations of groups of employees, and regulations governing the use of fixed term employment.<sup>32</sup>

2.30 The OECD index provides the committee with a yardstick against which the strictness of Australia's unfair dismissal laws can be assessed. The index includes four measures relating to dismissal: the definition of unfair dismissal, the trial period before eligibility arises, the compensation payable to an employee with 20 years tenure, and the extent of reinstatement as a remedy. The ACTU submitted that when

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30 NSW Young Lawyers, *Submission 8*, p.4

31 Combined Community Legal Centres Group (NSW), *Submission 10*, p.3

32 ACTU, *Submission 12*, paras 12-13

measured against each of these benchmarks, Australia's unfair dismissal laws are significantly less onerous upon employers than in most comparable nations. The index shows only four nations, the United States, the United Kingdom, Switzerland and Denmark, with less strict protection. Twenty countries were rated as having more costly unfair dismissal provisions than Australia. The ACTU concluded:

Nothing in the design of unfair dismissal provisions overseas invites a conclusion that Australia's unfair dismissal provisions require relaxation, whether through the introduction of a small business exemption or otherwise.<sup>33</sup>

2.31 The committee also notes an OECD Economic Survey published in February 2005 which referred to previous OECD studies which have consistently ranked Australia as one of the countries with the least restrictive employment protection legislation. This is another way of saying that Australia's industrial relations system is employment friendly, a position which disputes the stance taken by the Government.

2.32 The OECD has found that countries which have strong employment protection laws experience fewer terminations during periods of economic downturn, resulting in better job security and productivity increases. While the OECD found that strong employment protection may reduce the employment of workers on permanent contracts and a firm's ability to respond to changes in its environment: 'the overall impact [of employment protection legislation] on aggregate unemployment is unclear, both in economic theory and in the empirical evidence'.<sup>34</sup>

2.33 The committee is puzzled by ACCI's indifference to international comparisons. The ACCI submission questioned the apparent premise of this term of reference by suggesting that international comparisons are of no value. However, the ACCI submission offered an opinion on the effect of unfair dismissal laws operating in Germany and the Netherlands, noting that the substantial international academic debate led by the OECD is based on a complex area of comparative research. The section of ACCI's submission which addressed the international experience concluded on an emphatic note: 'There is an academic and econometric understanding that relative imposts of employment protection laws at the national level do impact on employment and employment opportunities'.<sup>35</sup> The committee does not accept that the submission included any convincing evidence to support this claim.

2.34 ACCI provided the committee with two documents from the European Industrial Relations Observatory Online which relate to Germany's experience with unfair dismissal laws. The first document describes the findings of a survey which allegedly shows that statutory protection against dismissal is harmful to small firms. The second document describes how Germany changed its laws on protection against

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33 *ibid.*, para.37

34 NSW Government, *Submission 3*, p.21

35 ACCI, *Submission 7*, p.10

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dismissal in 2003. It was claimed that the research validates equivalent research undertaken in Australia which suggests that unfair dismissal laws are detrimental to small business employment.

2.35 The committee disputes the relevance of this evidence and the conclusions reached by ACCI. The committee notes that Germany's laws are very different from those applying in Australia. Employees who were employed before the changes came into effect on 1 January 2004 retain their statutory protection under German law. Employers who do not comply with certain arrangements, such as contributing for twelve months to the unemployment insurance scheme, are unable to access the exemptions.<sup>36</sup> The ACTU stressed that there is no evidence that changes to the law in Germany have had any effect on employment levels.<sup>37</sup> The committee believes that caution must be exercised when making comparisons between the unfair dismissal laws of countries with different industrial relations systems, as is demonstrated by the OECD index previously referred to. The committee draws no firm conclusions from other countries' experience with introducing small business exemptions from unfair dismissal laws. Only a handful of countries, including Germany, Austria, Bangladesh and South Korea have introduced an exemption and there is insufficient evidence of any job creation from these few examples.

2.36 There have been relatively few attempts to examine in a comparative context the relationship between unfair dismissal laws and employment growth in the small business sector. The ACTU drew the committee's attention to a 2004 study by the Institute for Employment Research (IER) on the effect of Germany's dismissal protection legislation on employment in small businesses. The study apparently found that the stringency of this legislation had no significant effect on labour turnover in small firms.<sup>38</sup> The ACTU submission concluded that there is no support within the international literature for a small business exemption from unfair dismissal laws.<sup>39</sup>

2.37 Additional evidence on the value of international comparisons was provided by Dr Oslington who told the committee that while there is a debate in Europe about how labour market performance is linked to the heavy regulation of those markets, virtually no empirical work has been done in this area. A few studies have attempted to disentangle the effect of higher firing costs on employment by looking at aggregate employment data; however: 'there is virtually nothing we can draw out of those studies'.<sup>40</sup>

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36 *ibid.*, p.49

37 Ms Sharan Burrow, ACTU, *Committee Hansard*, 3 May 2005, p.52

38 ACTU, *Submission 12*, paras 38-40

39 *ibid.*, para.72

40 *ibid.*, p.2

## Unfair dismissal applications under federal and state laws

2.38 An obstacle to the committee's attempt to assess the effect of unfair dismissal laws on small business employment is the existence of separate federal and state unfair dismissal laws and the absence of reliable and disaggregated figures on the number of applications made against small business under the various laws. The DEWR submission advised that it is not possible to provide a robust estimate of the number of small businesses that fall under federal workplace relations law. The Australian Bureau of Statistics has not published estimates of state and federal coverage since 1990 because the data is unreliable: '...many employers do not know whether their business is, or workers within their business are, covered by a state or federal industrial instrument'.<sup>41</sup>

2.39 The committee was assisted in this area by two sets of related figures on dismissal cases under federal and state laws. The first set of figures from DEWR show the number of federal unfair dismissal cases in Australia for each year between 1994 and 2004 (Appendix 4). They show that the number of cases fell from 15,083 in 1996 to 7462 in 1997. This dramatic fall coincided with the introduction of the Workplace Relations Act on 1 January 1997. The figure rises slightly to 8157 in 2001 before falling again to 5355 in 2004. The second set of figures from the Minister for Employment and Workplace Relations, the Hon. Mr Kevin Andrews MP, were provided in response to a Question on Notice from Senator Andrew Murray on 16 November 2004 (Appendix 5). They show, respectively, the number of termination of employment applications lodged under federal and state laws in 1996 and 2003, the number and percentage change in applications under federal and state laws made for 1996 compared with 2003, and the number of federal unfair dismissal applications lodged in 2003 with particular reference to small business.

2.40 The figures from Minister Andrews also show the fall in termination of employment applications lodged under federal laws between 1996 and 2003. They show a smaller increase in the number of applications lodged under state laws, from 6748 to 8299. The figures show that the number of federal and state applications combined fell from 21,281 to 15,252 between 1996 and 2003. This translates into a 52 per cent reduction in the number of federal application in 2003 compared with 1996, a 23 per cent increase in the number of state applications for the same years, and a 28 per cent reduction in federal and state applications combined in 1996 compared with 2003.

2.41 The committee makes a number of observations about these figures. It seems more than likely that changes to unfair dismissal laws introduced in 1996 with the WR Act, and further changes to unfair dismissal procedures introduced in 2001, are largely responsible for nearly halving the number of applications for termination of employment under the federal jurisdiction. The figures for Western Australia, for example, show a strong correlation between the introduction of the WR Act and a

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41 DEWR, *Submission 11*, p.7

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steady fall in unfair dismissal applications in that state, from 1875 in 1996 to 316 in 2003. Figures for the ACT and the Northern Territory, for which only federal laws apply, also indicate that a tightening of federal unfair dismissal laws is responsible for a sizeable fall in the number of unfair dismissal applications in the territories between 1996 and 2003.

2.42 A comparison of the main features of federal and state unfair dismissal laws gives an indication of factors which may account for the drop in federal unfair dismissal applications after 1996 compared with the overall increase in unfair dismissal applications across the states (Appendix 6). Under federal laws, the Commission is required to consider the size of a business. Penalties are applied for vexatious claims; claims are dismissed which have no prospect of success; a twelve month exclusion for casuals and a three month statutory default probationary period apply; and, with regard to human resource issues, the Commission must consider the size and skills of a small business. The comparison shows that tightening of unfair dismissal provisions under the WR Act, which mainly addressed process and cost issues, had a material effect on the number of applications made under federal law. The committee believes that if the same or similar conditions were to apply consistently across state jurisdictions there would probably be a similar fall in the number of applications made under state law. It is likely that only genuinely valid cases would proceed to the state industrial commissions.

2.43 The figures also show that unfair dismissal applications are most often pursued under state laws, not federal laws, and that only approximately 34 per cent of employing small businesses fall under the federal laws. It is clear that most small business employees are covered by state not federal laws. This leads the committee to conclude that federal unfair dismissal legislation is not the major issue facing small businesses that the Government claims it to be, especially since most fall under state laws.

2.44 The committee notes that the figures from Minister Andrews on the number of federal unfair dismissal applications lodged in 2003 show that only an estimated 2371 applications, or 34.1 per cent of the total, are from the small business sector. If the figures are broken down by each state, it appears that for smaller states such as Tasmania there as few as 20 applications each year. Information provided by DEWR in response to a question taken on notice at a public hearing confirms that the relatively small number of unfair dismissal applications in the various jurisdictions does not represent a significant problem for the system. The following tables provided by the department set out, for 1996 and 2003, the number of federal and state unfair dismissal applications made in each state and territory. The tables also present the number of applications per 1000 employed persons in each state and territory. The figures show that in 1996 there were 2.55 applications per 1000 employed persons. The equivalent figure for 2003 has fallen to just 1.60.<sup>42</sup>

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42 Department of Employment and Workplace Relations, Answer to Question on Notice No.2, 17 June 2005

**Table 1: Federal and state unfair dismissal applications, 1996**

<b>1996</b>	Federal applications	State applications	Total applications	Employed persons (000)	Federal applications per 1000 employed persons	State applications per 1000 employed persons	Total applications per 1000 employed persons
NSW	4290	2186	6476	2804.3	1.53	0.78	2.31
Qld	512	1932	2444	1524.3	0.34	1.27	1.60
WA	1875	918	2793	837.3	2.24	1.10	3.34
SA	633	1240	1873	660.1	0.96	1.88	2.84
Tas	360	114	474	203.0	1.77	0.56	2.33
Vic	5958	358	6316	2090.8	2.85	0.17	3.02
ACT	509	0	509	155.2	3.28	0.00	3.28
NT	396	0	396	86.2	4.59	0.00	4.59
Total	14533	6748	21281	8361.2	1.74	0.81	2.55

**Table 2: Federal and state unfair dismissal applications, 2003**

<b>2003</b>	Federal applications	State applications	Total applications	Employed persons (000)	Federal applications per 1000 employed persons	State applications per 1000 employed persons	Total applications per 1000 employed persons
NSW	1270	4083	5353	3151.9	0.40	1.30	1.70
Qld	397	1642	2039	1799.2	0.22	0.91	1.13
WA	316	1314	1630	983.4	0.32	1.34	1.66
SA	153	980	1133	719.6	0.21	1.36	1.57
Tas	109	280	389	201.7	0.54	1.39	1.93
Vic	4242	0	4242	2383.7	1.78	0.00	1.78
ACT	227	0	227	171.0	1.33	0.00	1.33
NT	240	0	240	95.6	2.51	0.00	2.51
Total	6954	8299	15,253	9506.1	0.73	0.87	1.60