

The Senate

Employment, Workplace Relations
and Education References Committee

Unfair dismissal and small business
employment

June 2005

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Membership of Committee

Members for this inquiry

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Senator Guy Barnett	LP, Tasmania	
Senator Andrew Murray	AD, Western Australia	
Senator George Campbell	ALP, New South Wales	
Senator Gavin Marshall	ALP, Victoria	

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Terms of Reference

(1) That the matter of unfair dismissal be referred to the Employment, Workplace Relations and Education References Committee for inquiry and report by 14 June 2005, with the following terms of reference:

(a) To examine:

(i) the international experience concerning:

(A) unfair dismissal laws, and

(B) the relationship between unfair dismissal laws and employment growth in the small business sector,

(ii) the provisions of federal and state unfair dismissal laws and the extent to which they adversely impact on small businesses, including:

(A) the number of applications against small businesses in each year since 1 July 1995 under federal and state unfair dismissal laws, and

(B) the total number of businesses, small businesses and employees that are subject to federal and state unfair dismissal laws,

(iii) evidence cited by the Government that exempting small business from federal unfair dismissal laws will create 77 000 jobs in Australia (or any other figure previously cited),

(iv) the relationship, if any, between previous changes to Australian unfair dismissal laws and employment growth in Australia,

(v) the extent to which previously reported small business concerns with unfair dismissal laws related to survey questions which were misleading, incomplete or inaccurate,

(vi) the extent to which small businesses rate concerns with unfair dismissal laws against concerns on other matters that impact negatively on successfully managing a small business, and

(vii) the extent to which small businesses are provided with current, reliable and easily accessible information and advice on federal and state unfair dismissal laws; and

(b) to recommend policies, procedures and mechanisms that could be established to reduce the perceived negative impacts that unfair dismissal laws may have on employers, without adversely affecting the rights of employees.

(2) That the committee be authorised, with the approval of the President, to commission independent research, as desirable or necessary, to investigate each of these terms of reference.

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Recommendations

Recommendation 1 page 31

The committee recommends to the Senate that the Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004 be rejected.

Recommendation 2 page 32

The committee recommends that the Government work with small business, unions and peak industry bodies to make unfair dismissal laws more effective by reducing the procedural complexity and cost to small business of the current unfair dismissal process.

Recommendation 3 page 32

The committee recommends that the Government make no further changes to unfair dismissal laws until an independent review has been conducted by experts selected from employee and union groups, employer groups and academics. The committee recommends that:

- the review examine the Government's policy on unfair dismissal and evidence used to support its legislation, relevant Senate committee reports which have addressed the issue of unfair dismissal, state government views and any other relevant sources; and
- findings of the review be presented to the Council of Australian Governments (COAG) with a request that it develop a set of common principles to guide future reform of unfair dismissal laws at the state and federal level.

Preface

The Coalition government's policy on unfair dismissal laws applying in the small business sector, and its attempts to implement this policy in numerous unsuccessful amendments to the *Workplace Relations Act 1996*, has been ground well raked over by the Employment, Workplace Relations and Education Legislation Committee.

It is now the turn of the EWRE References Committee to consider the basis of the Government's policy in more abstract terms, using the academic research that is available, as well as new data on termination of employment applications under state and federal jurisdictions. This report takes a fresh look at the Government's unfair dismissal policy, in particular its major claim that exempting small business from unfair dismissal laws will create 77,000 new jobs. The report's primary purpose is to consider whether there is any merit in the Government's argument: that unfair dismissal legislation is a worthwhile labour-market reform which would encourage both higher and more stable employment in the small business sector.

Small business is the largest employment sector. The committee's stance begins at a point which is close to the Government's concerns. There can be no dispute about the need to expand the small business sector and to increase its ability to absorb more labour and to increase its levels of profitability and productivity. Yet the research shows that small businesses are, in large measure, reluctant employers. They are not interested in growth for growth's sake. And without growth in the small to medium business sector, large-scale enterprises are unlikely to emerge.

The committee and the Government part company as soon as the evidence is reviewed. The committee believes that Government policy on unfair dismissal, in the light of inconclusive evidence, has its basis in an ideological position which has little relevance to the real problems that face small businesses. The claim made by the Government and employer groups about 77,000 small business jobs is unsupported on the evidence. This report shows conclusively that the claim is based on misinformation and wishful thinking rather than objective appraisal of the facts.

The committee's consideration of unfair dismissal policy has addressed in passing the Government's intention, as announced by the Prime Minister, to push ahead with a new package of industrial relations 'reforms', when it assumes control of the Senate on 1 July 2005. The committee believes strongly that the Government's intention to introduce an exemption for businesses with up to 100 employees represents an opportunity missed by the Government to improve the unfair dismissal system. It argues, and recommends accordingly, that the Government should not make any further changes to unfair dismissal laws until an independent review of Government policy has been conducted by experts. In the meantime, the Government should consider a number of sensible measures to improve and simplify procedures for unfair dismissal applications and to reduce costs for small businesses.

The subcommittee formed to deal with the inquiry into unfair dismissal and small business employment commends its report to the full committee.

Senator Trish Crossin
Chair

Report formally adopted by the
committee on 20 June 2005 for tabling

Chapter 1

Introduction and background to inquiry

1.1 The Senate referred this inquiry into unfair dismissal laws and small business employment to the Employment, Workplace Relations and Education References Committee on 7 December 2004, with a reporting date of 14 June 2005. The inquiry was conducted with the added consideration of the Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004, which was referred by the Senate on 17 March 2005.

- 1.2 The committee was asked to examine and report on the following matters:
- the international experience concerning unfair dismissal laws and the relationship between those laws and employment growth in the small business sector;
 - the extent to which federal and state unfair dismissal laws adversely impact on small businesses;
 - evidence cited by the Government that exempting small business from federal unfair dismissal laws will create 77,000 jobs in Australia,
 - the relationship, if any, between previous changes to Australian unfair dismissal laws and employment growth in Australia;
 - the extent to which small businesses rate concerns with unfair dismissal laws against other matters that effect running a small business;
 - policies, procedures and mechanisms to reduce the perceived negative effect negative effect of unfair dismissal laws, without affecting the rights of employees.

Conduct of the inquiry

1.3 The inquiry was advertised in the *Australian* and submissions were invited from relevant interest groups, organisations and individuals with an interest in federal and state unfair dismissal laws and the small business sector. Seventeen submissions were received, mainly from unions, peak industry groups and academic researchers. The Department of Employment and Workplace Relations and the New South Wales Government also made submissions. Public hearings were held in Melbourne and Canberra early in May 2005.

Background

1.4 Legislation to implement the Government's commitment to an unfair dismissal exemption for small business has been examined by the Employment, Workplace Relations and Education (EWRE) Legislation Committee on four previous

occasions.¹ The Government presented three major arguments in each of its attempts to legislate for a small business exemption from federal unfair dismissal laws:

- unfair dismissal is perceived to affect hiring intentions and job creation in the small business sector;
- the range of surveys and the period over which they have been conducted strongly suggests that such a link exists between unfair dismissal and small business hiring intentions; and
- introducing an exemption will remove one of the perceived barriers to employment growth in the small business sector.²

1.5 This is the first time the EWRE References Committee has examined issues surrounding unfair dismissal laws, especially the relationship between these laws and small business employment, including legislation which is currently before the Parliament. The committee notes that the Senate failed to pass all previous bills designed to implement the Government's policy of an exemption for small business.

1.6 The committee notes that the strong criticisms made in previous minority reports by Labor and Democrat senators as early as 1999 are particularly relevant to issues raised in evidence during this inquiry. The Labor senators' minority report on the Workplace Relations Amendment (Unfair Dismissal) Bill 1998 concluded that the various surveys and reports of concern about unfair dismissal laws by employer organisations did not establish any connection with jobs growth in the small business sector. It found that no independent report or analysis confirmed what the Government had claimed. The Labor senator's report on the Workplace Relations Amendment (Termination of Employment) Bill 2002 reached a similar conclusion. It found that:

- any connection between fear of unfair dismissal claims and the rate of overall small business employment is extremely tenuous; and
- the claim that without the unfair dismissal laws there would be 77,000 more people employed in small and medium sized firms must be regarded as absurd.

1.7 The Australian Democrats' minority report on the Unfair Dismissal Bill 1998 also found that a case had not been made for exempting small business from federal unfair dismissal laws. It argued that the proposed exemption introduces into the system considerable unfairness by upsetting the 'fair go all round' principle embedded into the WR Act:

1 See the committee reports on the following bills: Workplace Relations Amendment (Unfair Dismissals) Bill 1998, February 1999; Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999, November 1999; Workplace Relations (Termination of Employment) Bill 2000, September 2000; Workplace Relations Amendment (Termination of Employment) Bill 2002, March 2003.

2 See, for example, Workplace Relations Amendment (Unfair Dismissals) Bill 1998, February 1999, p.28

The Coalition's majority report, and indeed the Coalition at large, have failed to make a case on three fundamental counts: That the *Workplace Relations Act 1996* is not effective in restricting federal unfair dismissal claims to the minimum consistent with equity and natural justice; that the Bill's passage will create jobs; and that the public good resulting from significant job creation would be greater than the public evil consequent to giving a discriminatory right to a sector of employers to sack workers unfairly.³

1.8 Although the EWRE Legislation Committee has been dealing intermittently with unfair dismissal laws for a number of years, this committee believes that at no time has the Government demonstrated that major problems with federal and state unfair dismissal laws required legislation to amend the Workplace Relations Act. This report examines the latest empirical evidence to question claims by the Government about the relationship between unfair dismissal laws and small business employment. Specifically, the report questions two claims which have been made by the Government repeatedly in its public relations campaign to win support for unfair dismissal legislation. The first claim is that unfair dismissal laws are a serious deterrent to the hiring intentions of small businesses and have resulted in the loss of 77,000 small business jobs which would otherwise have been created in the absence of those laws. The second claim is that unfair dismissal laws place a disproportionate burden on small business by imposing high compliance costs which should appropriately be borne only by medium and larger businesses.

Main issues

1.9 The *Workplace Relations Act 1996* includes provisions for both unfair dismissal and unlawful termination. Unfair dismissal occurs when the employee's dismissal is 'harsh, unjust or unreasonable'.⁴ In determining if this has been the case, the Commission must have regard to a number of factors including:

- whether there was a valid reason for the termination and whether the employee was notified of that reason;
- whether the employee was given an opportunity to respond;
- if the termination related to unsatisfactory performance by the employee and whether the employee had previously been warned about that unsatisfactory performance; and
- the degree to which the size of the employer's business, or the absence of dedicated human resource management specialists, may have had an impact on termination procedures.⁵

3 Workplace Relations Amendment (Unfair Dismissal) Bill 1998, Minority Report, Australian Democrats, February 1999, p.62

4 Section 170CG(1)(b)

5 Australian Industrial Relations Commission, *Termination of Employment – General Information*, p.4

1.10 Employees who are eligible to make a claim for unfair dismissal must have been covered by a federal award or agreement and whose employer is a constitutional corporation; or employed in interstate or overseas trade or commerce as a waterside worker, maritime employee or flight crew officer; or a Commonwealth public sector employee; or employed in Victoria or in a territory.⁶

1.11 Unlawful termination occurs if the termination is based on one or more of a number of reasons listed under the WR Act. These include a failure to meet the required notice provisions (s.170CM) and reasons concerning alleged discrimination (s.170CK). All employees nationally are eligible to apply.⁷

1.12 At the heart of the committee's concerns is the Government's latest attempt to change unfair dismissal laws without any empirical evidence showing that legislation is needed. The committee notes that the Government's reasons for pushing ahead with legislation to reform federal unfair dismissal laws are not new. Such evidence as the Government provides should be examined rigorously against empirical data. Evidence indicates that debate about unfair dismissal policy has often been driven by rhetoric and misinformation rather than objective appraisal of the facts. The committee challenges the logic behind the Government's claims that a significant number of jobs will be created by exempting small business from unfair dismissal laws. It notes that previous Government senators' reports assert that unfair dismissal laws are perceived to affect hiring intentions and job creation in the small business sector. The argument is then taken further that, notwithstanding disputes over survey methodology, there is a link between unfair dismissal laws and small business hiring intentions. The committee accepts that negative perceptions of federal and state unfair dismissal laws do exist in the small business community. However, it rejects the logic behind the Government's claim which equates to the argument that if you say something often enough people will actually believe you.

1.13 Chapter 2 of this report challenges the Government's position using the latest evidence from Australia and abroad. While many of the arguments in submissions cover familiar ground, the committee is assisted by some new data on unfair dismissal cases under federal and state jurisdictions. The committee finds that assertions by the Government and employer groups about the effect of unfair dismissal laws on employment growth in the small business sector are not based on any empirical evidence. The committee notes that uncertainty and confusion which has clouded debate on unfair dismissal will continue in the absence of research data on the effect of firing costs on employment in small and medium-sized businesses. This inquiry has demonstrated that evidence needed to move the debate beyond what one witness described as the 'fairly pointless exchanging of opinions'⁸ does not exist.

6 *ibid.*, p.6

7 *ibid.*, p.7

8 Dr Paul Oslington, *Committee Hansard*, 2 May 2005, p.10

1.14 The committee has examined as part of its terms of reference the Government's Workplace Relations (Fair Dismissal Reform) Bill 2004. Chapter 3 examines evidence which raised concerns about the unintended consequences of the bill and highlights the Government's failure to provide a clear policy rationale for its legislation. The committee looked to other evidence on the adverse effects of state and federal unfair dismissal laws on small businesses. It shows that unfair dismissal claims are not a significant impost on small business. This challenges the claim by employer groups that dismissal litigation is costly, damaging and unsatisfactory for small business.⁹ The committee notes a small business survey by Robbins and Voll which shows a low incidence of unfair dismissal claims. It also challenges assertions of widespread dissatisfaction with the outcome of cases and dispels myths about the level of compensation paid to employees. The committee believes that employer groups have overstated the argument that the small number of unfair dismissal cases represents the 'tip of the iceberg'.

1.15 Chapter 4 presents the committee's major findings and recommendations. They reflect the committee's firm opposition to the Government's Fair Dismissal Reform Bill. The Committee believes that the Government's heavy-handed approach to unfair dismissal is not the answer to the problems facing small business. The bill withdraws the protection of the law from employees based on the size of the business in which they work, something which the committee opposes as a matter of principle. The committee prefers that a range of constructive measures be implemented to improve the current unfair dismissal process, and that an independent expert review of unfair dismissal be conducted before any legislative proposal on this issue is considered by the Parliament.

The future of unfair dismissal laws

1.16 Reconsideration of unfair dismissal policy in the context of small business employment is important because this inquiry will be the committee's last attempt to examine this issue before the Coalition parties assume control of the Senate from 1 July 2005. The committee's concerns about the future direction of federal unfair dismissal laws were heightened towards the end of the inquiry when, on 26 May 2005, the Prime Minister announced to the Parliament the Government's intention to introduce legislation to overhaul the workplace relations system, including unfair dismissal laws. The committee is concerned that any proposed law to give effect to the unfair dismissal policy announced by the Prime Minister will apply only to companies that employ more than 100 people. The committee is alarmed that this will result in up to four million workers having no remedy for unfair dismissal.

1.17 The Prime Minister referred to the unfair dismissal laws introduced in 1993 as 'job destroying' and as having 'held back employment'. He claimed that exempting small businesses with up to 100 employees 'will generate jobs in small and medium businesses, the engine room of the Australian economy'. The committee notes that the

9 ACCI, *Submission 7*, p.11

statement did not mention how many jobs the proposal will create or any evidence that current unfair dismissal laws have hindered small business employment. The statement is also contradicted by the significant growth in employment which has occurred over the period 1996 to 2005. The committee believes that a D&B National Business Expectations survey supports its conclusion that the Government's unfair dismissal policy is without foundation. The May 2005 survey included 1200 business owners and senior executives representing the major industry sectors. When questioned specifically about the unfair dismissal component of the industrial relations reforms announced by the Prime Minister, more than 80 per cent of businesses said that changes foreshadowed would have little or no impact on their intention to employ new staff.¹⁰

10 D&B National Business Expectations, Survey, June 2005, pp.2, 15

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.¹

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

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.

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.³ 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.⁴ In 2002 the Government claimed that unfair dismissal laws 'cost' the economy 50,000 jobs.⁵ 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.⁶

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.⁷

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'.⁸

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'.⁹ 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'.¹⁰ 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.¹¹

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.¹² 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

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'.¹³ 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.¹⁴

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.¹⁵ 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.¹⁶

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.¹⁷ 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'.¹⁸

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.¹⁹

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:

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.²⁰

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.²¹

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

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

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

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

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'.²³ 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'.²⁴

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'.²⁵ 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.²⁶ 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.

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.²⁷

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.²⁸ 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'.²⁹ 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.

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.³⁰ The Combined Community Legal Centres Group of NSW agreed, and argued for better information.³¹

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.³²

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

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.³³

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'.³⁴

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'.³⁵ 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

33 *ibid.*, para.37

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

35 ACCI, *Submission 7*, p.10

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.³⁶ The ACTU stressed that there is no evidence that changes to the law in Germany have had any effect on employment levels.³⁷ 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.³⁸ The ACTU submission concluded that there is no support within the international literature for a small business exemption from unfair dismissal laws.³⁹

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'.⁴⁰

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'.⁴¹

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

41 DEWR, *Submission 11*, p.7

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 1.60.⁴²

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

1996	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

2003	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

Chapter 3

The right to dismiss unfairly: the Government's 'fair dismissal' reform bill 2004

3.1 This chapter outlines the role of unfair dismissal laws, sets out the provisions of the Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004 and provides an analysis of the effect the provisions are likely to have, including those which might be unintended, and the necessity or otherwise of the amendments.

Unfair or unlawful?

3.2 Commonwealth legislation sets out the provisions in relation to unfair dismissal in Part VIA, Division 3 of the *Workplace Relations Act 1996*. The legislation, at section 170CB, distinguishes between terminations which may have been harsh, unjust or unreasonable (known as unfair dismissals), and those alleged to be unlawful. Provisions for unlawful dismissals are contained in section 170CK(2) of the Act. This section provides that an employee may not be dismissed for reasons based on such things as trade union membership, race, colour, sex, age, religion and pregnancy. The committee acknowledges that under the Government's proposed legislation, all employees will continue to enjoy existing protections in the WR Act against unlawful termination of employment by an employer. Employers will also be able to bring an application for unlawful termination under the WR Act where their employer has failed to provide the employee with the required period of notice (s.170CM) or has failed to notify the relevant authorities in the case of a redundancy (s.170CL).¹

3.3 Employees who believe they have been unlawfully dismissed may seek remedy through the Federal Court, which is a more costly and complex jurisdiction than for unfair dismissals, which are heard by the Australian Industrial Relations Commission (AIRC).

The purpose of unfair dismissal legislation

3.4 The Government's stated rationale for its proposed amendments is the creation of extra employment by small business uninhibited by unfair dismissal provisions.² In the second reading speech, the Minister for Employment and Workplace Relations, the Hon. Kevin Andrews MP, elaborated on the Government's reasoning for the amendments as follows:

1 Department of Employment and Workplace Relations, Answer to Question on Notice No.4, 17 June 2005

2 See, for example, DEWR, *Submission 11*, pp.1, 9

The current unfair dismissal laws place a disproportionate burden on small businesses. Most small businesses do not have human resource specialists to deal with unfair dismissal claims. Attending a commission hearing alone can require a small business owner to close for the day. The time and cost of defending a claim, even one without merit, can be substantial. In fact, according to a study by the Melbourne Institute of Applied Economic and Social Research, the cost to small and medium sized businesses of complying with unfair dismissal laws is at least \$1.3 billion a year. Many small businesses do not understand unfair dismissal laws. A survey by CPA Australia in March 2002 found that 27 per cent of small business owners thought that they were unable to dismiss an employee even if the employee was stealing from them, and 30 per cent of small business owners thought that employers always lost unfair dismissal cases.³

3.5 Given the well-founded criticism of the spuriousness of the Melbourne Institute's calculations, the committee gives no credence to the cost estimate in the Minister's speech.

3.6 The committee notes the introduction to Dr Jill Murray's submission, which states in part:

One of the functions of good government in a liberal, democratic system is to ensure that all citizens are protected from arbitrary or capricious actions which impinge on their liberty to conduct their lives, including their occupations, in relative peace and freedom.

3.7 The committee accepts that a role exists for unfair dismissal legislation, yet the important question is how to balance the rights and responsibilities of employers and employees. The committee believes strongly that the Government's proposed amendments tilt the balance in the employers' favour.

The provisions of the bill⁴

3.8 Item 2 inserts new subsections which stipulate that an unfair dismissal application may not be made where the employer, at the relevant time, employed fewer than 20 people. These include the employee who was dismissed and casual employees employed for more than 12 months, but not other casuals. Applications can be made by trainees under a registered training agreement and by apprentices. The Explanatory Memorandum notes that apprentices and trainees may still be excluded from making an unfair dismissal application on other grounds. The relevant time is defined as the time when the employer gave the employee notice of termination of employment, or the time when the employer terminated the employee's employment, whichever ever happened first.

3 The Hon. Kevin Andrews, *House Hansard*, 2 December 2004, p.2

4 Discussion of the provisions of the Bill is taken from Bills Digest 112, 2004-05, Parliamentary Library, Parliament of Australia, 11 February 2005

3.9 Item 3 requires the AIRC to make an order that an application is not valid, if it considers that the applicant was not entitled to make the application because of the small business exemption provided for under Item 2. The AIRC also holds the discretion not to have a hearing if making an order refusing a small business application, but if it does it must take into account the cost to the employer's business. The AIRC may also request further information before making an order, and the Commission is bound to consider any information received.

3.10 Item 4 specifies that a person covered by an order is not entitled to apply to have that order varied or stayed, and Item 5 provides that there will be no right to appeal to a full bench of the Commission against an order. Item 6 confirms that the amendments made by items 1 to 5 only apply to an unfair dismissal application relating to employment commenced by the applicant after the commencement of those items.

Consequences of the bill

3.11 Evidence presented to the committee suggests that a number of unintended consequences may result from the Government's amendments. A number of these have been discussed previously in Senate reports conducted as precursors to the current inquiry.⁵ In addition to the existing delineation between those employed under state and territory employment arrangements and those employed under federal arrangements, the bill proposes to create another distinction, between those who work in businesses or less than 20 people, and those who do not.

3.12 Many witnesses saw this as a negative development, and a number saw the possibility that businesses would be deliberately restructured so as to ensure that the number of employees falls and remains below the threshold of 20. The Shop Distributive and Allied Employees Association (SDA) submitted that it was not uncommon for businesses to operate through a number of legal entities, even though each entity is engaged in the same business for the same employer. Where employees are engaged by individual legal entities, the situation could arise where, even though a business employs thousands of employees, none of them enjoy unfair dismissal protection because the business is composed of a number of 'small businesses'.⁶ The SDA argued that:

It should be necessary [for the act to require that the AIRC] have regard to the number of employees of all related companies and associated entities under the Corporations Act, and to have regard to the number of employees employed by one or more employers who carry on a business project or undertaking as a joint venture or a common enterprise. If it's good enough to have groups of employers treated as being a single entity for the purposes of certification of [workplace] agreements, it should be good enough to

5 See, for example, Chapter 2, Report on the provisions of bills to amend the Workplace Relations Act 1996, May 2002

6 SDA, *Submission 4*, pp.3-4

apply the same rule to exempting employers from their requirements to pay redundancy pay.⁷

3.13 There are also problems with the notion of a business being classified small or otherwise at the 'relevant time'. The Centre for Employment and Labour Relations Law submission argued that the 'relevant time' is defined as that which the employer gives notice of termination of employment, or that which termination of employment occurs, whichever happens first. However, winners and losers would be created for reasons quite independent of the conduct or business needs of the enterprise. All workers would now enjoy protection under the unfair dismissal provisions, but should a number of employees subsequently resign, unfair dismissal protection would be withdrawn. The point was made that protection could ebb and flow on an almost daily basis, which the committee believes is inequitable.⁸

3.14 The committee is concerned that removing access to unfair dismissal will inevitably result in an increase in the number of applications before the Federal Court and other common law courts by aggrieved employees seeking remedy for unlawful dismissal. There is no doubt that both Federal and common law courts are significantly more time consuming and costly than other jurisdictions in which applications for unfair dismissal are currently being fought out. This is likely to have adverse consequences for both employers and employees.⁹

3.15 Some respondents argued that the Bill could destabilise business, primarily through the movement of staff into larger firms in order to enjoy unfair dismissal protection. This could diminish the pool of labour available to small business and potentially push up the cost of labour.¹⁰ While the committee queries whether the volume of movement would be sufficient to induce dramatic change in labour market dynamics, it acknowledges that a segment of the labour pool would be aware of the protections offered by larger employers, and would target them for employment. Should this occur, it would make worse an already well-documented difficulty for small business: locating and engaging quality staff.

3.16 Dr Jill Murray highlighted the negative effects of the amendments:

Granting employers a blank cheque to dismiss at any time, without natural justice, for any reason, is likely to have an adverse impact on the economic stability of small businesses. For example, workers who have ideas which contribute to the more efficient running of the business, or have concerns about current safety procedures, are unlikely to speak up. One unintended consequence of this proposed law may be the stagnation of small and

7 *ibid.*, p.5

8 Centre for Employment and Labour Relations Law, University of Melbourne, *Submission 15*, p.16

9 *ibid.*, p.16. See also Ms Sharlene Naismith, *Committee Hansard*, 2 May 2005, p.28

10 Jobwatch, *Submission 5*, p.3

medium businesses, and the growth of a 'yes person' culture in this part of the labour market, to the detriment of the Australian economy as a whole.¹¹

3.17 Dr Murray reminded the committee that the effect of removing unfair dismissal protections is not to restore the right of employers to dismiss, as has always been their right, but to enable employers to dismiss *unfairly*:

We are talking about the right to dismiss unfairly. In other words, small business is not being stopped from dismissing people...they can have confidence that they can dismiss fairly at any point. That is not the problem to them. That is not what the act is about. What they are seeking, as I understand it, through their advocacy groups, is the right to dismiss unfairly. My reason for coming before the committee is that I do not think that is a law the Australian Parliament should pass.¹²

Is change needed?

3.18 A number of witnesses questioned the need to reform the existing unfair dismissal system. The ACTU considered that taxation, occupational health and safety, and insurance are more or a burden for small business than employment issues. Citing a recent Sensis Business Survey, the ACTU claimed that finding quality staff was the highest concern for small business, followed by a lack of work/sales, competition, cash flows and rising costs.¹³ The ACTU also reported that only about half of small businesses believed there are any barriers to employment in the current business context and, of those who did, the leading factor was lack of work.¹⁴ The ACTU argued that this finding supports the contention that businesses only take on staff when work exists to support them, and not when constraints such as unfair dismissal are relaxed. Similar findings were reported by the ACTU from independent surveys, and from its own polling.

3.19 A survey conducted by Robbins and Voll in 2003 in the Albury-Wodonga region found that while 48 per cent of respondents considered the unfair dismissal provisions unfair, 97 per cent had never experienced an unfair dismissal claim. Thirty seven per cent of respondents considered that small business should be exempt from provisions, while 38 per cent did not. Finally, the most important factor reported in deciding whether to hire more staff was workload/turnover (49 per cent), followed by the cost/viability of the business (15 per cent).¹⁵

11 Dr Jill Murray, *Submission 1*, p.1

12 Dr Jill Murray, *Committee Hansard*, 3 May 2005, p.7

13 ACTU, *Submission 12*, para. 122, citing Sensis Business Index – small and medium enterprises, February 2005

14 ACTU, *Submission 12*, para. 123

15 Dr Robbins and G. Voll, *Submission 13*, p.13, drawn from Robbins and Voll, 'Who's Being Unfair? A Survey on the Impact of Unfair Dismissal Laws on Small Regional Business', Charles Sturt University, 2004

3.20 ACCI argued that there are a number of reasons why businesses might not consistently rank unfair dismissal as a chief concern. These include the notion that small business owners tend to focus on one problem at a time and have difficulty in seeing the 'big picture' for the purposes of completing surveys. ACCI also suggest that, while unfair dismissal laws continue to be a problem, there is a sense in which small business has learned to cope and that this is reflected in unfair dismissal's less consistent appearance in survey data.¹⁶ This also confirms how negative advocacy from the Government and employer organisations can directly affect employer sentiment. The committee believes that a strong negative advocacy campaign by employer groups and the then Opposition between 1993 and 1996 created an environment in which the operation of unfair dismissal laws was never going to be judged dispassionately.

3.21 It is in this context that the committee does not believe that the amendments are really necessary. Small business would benefit more from reforms in areas they consider a higher priority than from legislation to provide an exemption to the unfair dismissal process.

The incidence of unfair dismissal claims

3.22 The Government has argued that unfair dismissal provisions are too burdensome and that small business operators must devote inordinate amounts of time and energy complying with their requirements.¹⁷ Evidence presented to this and previous Senate inquiries does not support this claim.

3.23 Dr Murray agreed with the evidence, and argued that:

The current arrangements in the Act provide a cheap, informal and user-friendly process: employers and employees may deal with [a] disputed dismissal without the need to pay for lawyers, and the vast majority of matters are settled at the conciliation phase. Only a small minority of cases proceed to arbitration by the AIRC or determination by the Federal Court.¹⁸

3.24 While a discussion of the number of unfair dismissal applications tells only part of the story, it is illustrative. The committee heard that in 2003-04, the Australian Industrial Relations Commission received 7044 claims, and that the annual number is consistent.¹⁹ Dr Robbins and Mr Voll's analysis found that, even if small business were to make up all these claims, less than 1 per cent of the sector would have been affected. Their analysis goes on to suggest that:

16 ACCI, *Submission 7*, p.25

17 See, for example, Senator John Tierney, AAP News release, 29 October 2003

18 Dr Jill Murray, *Submission 1*, p.1

19 This is the total number of claims, from both small and other businesses

There is no evidence that the number of formal claims handled by the AIRC should alarm anyone in an economy the size of Australia's.²⁰

3.25 Robbins and Voll conclude:

...the AIRC data on unfair dismissal claims makes it clear [that] there are not large numbers of claims, conciliation resolves almost 75% of all claims while the more complex process, arbitration occurs in only 6% of claims. In addition, the results achieved at arbitration are much more often in favour of employers than employees.

3.26 ACCI suggested that a drop in the number of matters being brought before the Commission does not necessarily lessen the concerns of small business. ACCI argued that the number of claims does not vary the impacts on individuals and enterprises who are the subject of a claim.²¹ The committee believes that a decline in the number of claims can only be characterised as a positive development, and questions ACCI's logic that a drop in claims does not represent a drop in net costs, financial or otherwise, to business.

3.27 ACCI argued that the number of claims officially lodged represents only 'the tip of the iceberg'. ACCI pointed out that, before employees are dismissed, employers often go to extreme lengths to 'salvage' an employment relationship. ACCI argued that such measures involve costs, such as those associated with managing underperformance, compliance with procedural fairness requirements, and cases where employees have been 'paid off' in the hope that they will not pursue formal claims.²² The ACTU pointed out that unfair dismissal legislation aims to promote internal management of risk through better employee relations, including recruitment, selection and performance management. The ACTU argued that, if such measures have been taken, both employer and employee are better for it. The ACTU could see no evidence to support the argument that businesses are pre-empting unmeritorious claims through the payment of 'hush money'.²³

3.28 The committee did not receive sufficient evidence about the relative difficulty of employers in responding to an unfair dismissal claim to come to a firm conclusion. However, ACCI reported that its members found unfair dismissal processes onerous:

Compliance with fair dismissal obligations (and in particular following the constantly evolving technical and legal niceties of procedural fairness) is a practical impossibility for such a proportion of small businesses as to render it an inappropriate and disproportionate burden.²⁴

20 Dr Robbins and G. Voll, *Submission 13*, p.10

21 ACCI, *Submission 7*, p.12

22 *ibid.*, p.12

23 ACTU, *Submission 12*, para. 80

24 ACCI, *Submission 7*, p.32

3.29 This view was disputed, but the widespread lack of knowledge in relation to unfair dismissal by both employers and employees was considered unhelpful.²⁵ Research undertaken by Voll found that:

Regionally located small business employees find it quite difficult to obtain good advice about dismissal because generally, the only avenues for this sort of advice are unions (if the employee is a member) or a solicitor. The latter is usually too expensive...[and] the employees in the case studies examined by Voll were not union members and this, given the low level of unionisation in the small regional business sector, is an extremely common situation.²⁶

3.30 As to the difficulty for employees, the evidence was patchy, and the committee has reached no conclusions. Ms Gabrielle Marchetti from Jobwatch observed:

Not only do employers win many cases but it is also important to bear in mind that during the conciliation process, which is the process at which the majority of cases are resolved, often employees walk away feeling that they have got the raw end of the deal, because they have basically decided it is going to be too difficult, too costly and too time consuming for them to go on to arbitration. They would rather have some compensation than none, so they are more likely to settle for a pitiful sum of money.²⁷

3.31 The ACCI submission countenanced the possibility that, in some minds, unfair dismissal is being invoked as a proxy for daily human-resource related challenges faced by employers in the course of running their businesses.²⁸

The costs of an unfair dismissal claim

3.32 The committee received some evidence of the direct costs to small business of defending an unfair dismissal claim. Robbins and Voll submitted that, from their Albury-Wodonga survey, median compensation payment to former employees is \$2000, and of other costs, the median is \$1000. They concluded that:

There is no evidence from these results that unfair dismissals are a financial burden on small businesses. Indeed 60% of the respondents to these answers were happy with the outcomes achieved and costs incurred.²⁹

3.33 It is generally agreed that costs associated with termination would rise in proportion to the strictness of unfair dismissal provisions.³⁰

25 See, for example, Dr Jill Murray, *Submission 1*, p.1

26 Dr Robbins and G. Voll, *Submission 13*, p.15, drawn from G. Voll, 'Case Studies in Unfair Dismissal Process', University of Sydney, 2005

27 Ms Gabrielle Marchetti, *Committee Hansard*, 3 May 2005, p.37

28 ACCI, *Submission 7*, p.26

29 Dr Robbins and Mr Voll, *Submission 13*, p.13

Measures already in place

3.34 In addition to establishing small business' top priorities, there is another important element in considering whether legislation is needed. That is, in the absence of the reform, are other options available which will deliver similar benefits to those promised by the reform? While the Government claims that unfair dismissal provisions place undue constraints on small business owners and hamper employment, respondents such as the Centre for Employment and Labour Relations Law at the University of Melbourne pointed out that a range of workers are already excluded from the unfair dismissal provisions, giving employers ample opportunity to employ staff and enjoy the 'benefits' being offered by the bill. Classes of employee excluded include workers on fixed-term contracts, those engaged to perform specified tasks, and many casual employees. Indeed, the express rationale for making these exclusions was at least in part to provide flexibility for employers in how they engage labour.³¹ Nor is it the case that dismissed employees are encouraged to lodge claims regardless of merit. DEWR made the point that the AIRC already has the power to impose costs on a vexatious claimant, a significant power acting to restrict abuse of unfair dismissal provisions.³²

Reforms to unfair dismissal procedures

3.35 The committee believes that if the Government was serious about trying to improve the unfair dismissal system it would focus on improving and simplifying the procedures involved for unfair dismissal applications, and reducing the costs for small businesses. The committee believes the Government should seriously consider sensible procedural improvements to the unfair dismissal system, including that:

- the Australian Industrial Relations Commission (AIRC) conduct conciliation conferences at the convenience of small business;
- telephone conferencing be used whenever possible to assist small businesses who have difficulty attending hearings in person;
- the AIRC be allowed to order costs against applicants who pursue speculative or vexatious claims;
- the AIRC be required by legislation to deal with unfair dismissal applications in a timely fashion; and
- small businesses be provided with better information to assist them and their workforce to understand their obligations about termination of employment.

30 See, for example, Dr Paul Oslington, *Committee Hansard*, 2 May 2005, p.12

31 Centre for Employment and Labour Relations Law, University of Melbourne, *Submission 15*, p.13

32 s170CJ and s347 Workplace Relations Act 1996, cited in DEWR, *Submission 11*, p.13

3.36 A number of similar practical measures to improve the current unfair dismissal system were touched on by several submissions. The ACTU submission, for example, argued that procedural reform is necessary to provide assistance to small businesses and to ensure that employees are treated fairly. It suggested that representation of parties in conciliation proceedings should occur only where it assists with the just and expeditious resolution of the matter; agents appearing in unfair dismissal proceedings should be a registered industrial agents; and applications for financial compensation should only be accepted in circumstances which prevent reinstatement. The ACTU also suggested that it would be helpful for unions to make a single application on behalf of a number of employees who have been dismissed at the same time or for related reasons.³³

33 ACTU, *Submission 12*, para.166

Chapter 4

Findings and recommendations

4.1 The committee finds that there is no empirical evidence or research to support the Government's claim that exempting small business from unfair dismissal laws will create 77,000 jobs. The proposition at the heart of this argument is breathtaking for its lack of logic and empirical support. A review of the evidence shows conclusively that the claims made by the Government and employer groups are fuelled by misinformation and wishful thinking rather than objective appraisal of the facts. Accurate analysis of the unfair dismissal issue is complicated by the lack of authoritative data pertaining to almost all unfair dismissal matters. Data relating to financial and other costs associated with unfair dismissal claims and employers' knowledge of and adherence to principles of procedural fairness are examples of where the committee has had to rely on opinions and surveys of variable quality to arrive at a conclusion.

4.2 The committee strongly opposes the Fair Dismissal Reform Bill. The bill is unfair because it withdraws the protection of the law from employees based on the size of the business in which they work. The bill's primary purpose is to enable employers to dismiss workers *unfairly*. It provides that employees of small businesses may be dismissed in circumstances which a court would find to be unfair, but which leaves them with no redress. The committee cannot accept legislation which undermines the 'fair go all round' principle which is enshrined in the Workplace Relations Act. The key issue in this debate is not about jobs, as the Government claims. It is about what is fair and right for employers and workers. The committee believes it is not fair to give fewer rights to workers in small business than workers in larger enterprises. Nor is it right to deny essential protection to employees against rogue employers.

4.3 The committee believes that the bill is grounded in an ideological position which has little relevance to the real problems that face small businesses. Evidence to this inquiry showed conclusively that the decision of small business operators to hire and fire is influenced by a range of factors other than unfair dismissal, including the state and profitability of the business, taxation arrangements and general economic conditions. The committee believes strongly that the Government's legislation is not an appropriate response to the problems facing small businesses, including their negative perceptions of unfair dismissal laws. The committee believes that a more constructive approach would involve the Government making sensible procedural reforms to simplify and improve the unfair dismissal process and to reduce costs for small businesses.

Recommendation 1

The committee recommends to the Senate that the Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004 be rejected.

Recommendation 2

The committee recommends that the Government work with small business, unions and peak industry bodies to make unfair dismissal laws more effective by reducing the procedural complexity and cost to small business of the current unfair dismissal process.

Recommendation 3

The committee recommends that the Government make no further changes to unfair dismissal laws until an independent review has been conducted by experts selected from employee and union groups, employer groups and academics. The committee recommends that:

- **the review examine the Government's policy on unfair dismissal and evidence used to support its legislation, relevant Senate committee reports which have addressed the issue of unfair dismissal, state government views and any other relevant sources; and**
- **findings of the review be presented to the Council of Australian Governments (COAG) with a request that it develop a set of common principles to guide future reform of unfair dismissal laws at the state and federal level.**

Senator Trish Crossin
Chair

Senator Andrew Murray

Government Senators' Report

Government senators on the committee reject the findings of the majority report. The Opposition's argument that the Government's position is without foundation is misleading and ultimately futile. The Government's position is overwhelmingly supported by small business and by numerous surveys which show that small business employers are concerned about the impact of the unfair dismissal laws on employment growth. The Opposition's stance shows the extent to which it has lost touch with the concerns of small business operators.

Government senators cannot stress enough the significant role that small business plays in the Australian economy and society. Small business accounts for 96 per cent of all businesses in the private sector, or nearly 1.2 million businesses in total. Roughly 80 per cent of these are micro-businesses which employ fewer than five workers. Significantly, small business provides employment for over three million people and accounts for one-third of Australia's GDP.¹

The Government has stated repeatedly that the current unfair dismissal laws are an impediment to job growth in the small business sector. It has tried on more than 40 occasions to provide an exemption for small business from unfair dismissal laws. Yet each attempt has been blocked by the Opposition and minor parties in the Senate. There is no question that the Government's return to office in October 2004 provided it with a fresh mandate to implement its unfair dismissal policy. The people of Australia have a right to expect the passage of the Government's Fair Dismissal Reform Bill through the Parliament.

Small business confidence

Government senators believe that perceptions can be extremely important in the job market, and accept the view that introducing a small business exemption from unfair dismissal laws will remove one of the perceived barriers to employment growth. At the heart of this debate is the effect of unfair dismissal laws on the confidence of small business employers, an issue which the majority report chose to ignore. Government senators stress that confidence plays a key role in small business planning and action, especially in relation to investment decisions and the hiring of new staff. One witness representing the Victorian Automobile Chamber of Commerce stated that under the current unfair dismissal system employers lack the confidence to engage additional employees: '...rather than engaging additional employees, employers themselves are simply working longer hours or family members are encouraged to work longer hours'.²

1 Employment, Workplace Relations and Education References Committee, *Small Business Employment*, February 2003, p.2

2 Mrs Leyla Yilmaz, *Committee Hansard*, 3 May 2005, p.21

The erosion of small business confidence resulting from the unfair dismissal laws is also related directly to the ability or willingness of employers to dismiss staff. It was pointed out by the Australian Chamber of Commerce and Industry that unfair dismissal laws 'hamstring' employers by discouraging them from making dismissals: 'It is making small business employers retain people within businesses where otherwise the proper and prudent course would be not to retain them...'.³ This is why the figures on state and federal unfair dismissal applications referred to in the majority report are not necessarily representative of the picture they try to present. Again, small business has been pointing out for some time that official figures on unfair dismissal cases only show the 'tip of the iceberg'; that is, they only refer to claims where litigation has commenced. The figures conceal cases which do not involve litigation but which impose significant financial and operational costs on small business employers.⁴

Small business employment

The main objective of Government policy on unfair dismissal is the expansion of employment opportunities in the small business sector. The removal of impediments to employment is the principal goal of legislation currently before the Parliament. Government senators believe it strikes the right balance between the needs of employers and the rights of workers. The provisions of the Workplace Relations Act which protect workers from unlawful termination will remain in force. The relevant section of the Act provides that an employee may not be terminated on a number of grounds such as race, colour, sexual preference, absence from work during maternity leave or parental leave, and membership of a trade union (see attachment).

Government senators believe that the majority report has used selective evidence and data to downplay the concerns of small business employers about the effect of the current unfair dismissal laws. A survey of 700 small and medium-sized companies conducted by the Australian Industry Group as recently as May 2005 found that over 90 per cent of respondents wanted exemptions for small business from unfair dismissal laws and 88 per cent wanted measures to discourage speculative unfair dismissal claims.⁵ This new evidence demonstrates that current unfair dismissal laws are a barrier to employment and that the cost to small business in defending unfair dismissal claims is disproportionately high.

The findings of this latest survey build on a series of small business surveys over recent years which reflect the same concerns of small business. Research commissioned by the Department of Employment and Workplace Relations in 2002 and conducted by the Melbourne Institute of Applied Economic and Social Research found that unfair dismissal laws had contributed to 77,000 job losses in small and

3 Mr Scott Barklamb, *Committee Hansard*, 3 May 2005, p.22

4 Australian Chamber of Commerce and Industry, *Submission 7*, p.12

5 The AiG survey is referred to in the *Age*, 4 June 2005, p.5

medium-sized businesses, and were costing those businesses \$1.3 billion each year. Government senators noted in 2003 that the Restaurant and Catering Association had found that 38 per cent of their owners had defended an unfair dismissal claim at an average cost to the employer of 63 hours of their time and \$3675 in legal costs. These estimates translate into \$18.2 million in direct costs and \$15.5 million in indirect costs to the industry as a whole.⁶ These costs apply a disproportionate and unreasonable burden on small business. There is no doubt that the cost to small business of complying with unfair dismissal laws warrant special consideration and a measure of legislative protection. This is why Government senators commend to the Senate the Fair Dismissal Reform Bill and legislation which may result from the industrial relations reforms announced by the Prime Minister on 26 May 2005.⁷

Government senators accept that many small businesses have reason to believe that current laws relating to unfair dismissal prevent them from employing people. Perceptions of disadvantage have become a reality for small business. The evidence from Australia and abroad shows a clear causal link between the perceptions of small business employers and their willingness to employ new staff. Surveys of Germany's experience with employment protection laws show that statutory protection against dismissal is harmful to small firms. Government senators note that the majority report on the Workplace Relations Amendment (Termination of Employment) Bill 2002 found that surveys of small business attitudes to unfair dismissal laws provide a secure foundation for Government policy and legislation. Surveys have been too numerous and their findings too consistent to be rejected by the Opposition as evidence of little or no value. They include the Australian Business Limited Business Priorities Survey of June 2004; Sensis Business Index Survey, August 2004; ACCI Pre-election Survey, September 2004; and the Executive Connection Survey of December 2004.

Government senators believe that providing more information to small business employers about the unfair dismissal laws in the belief that they can be better educated will not solve the problems facing small business. The Department of Employment and Workplace Relations made it clear to the committee at a public hearing that it already provides comprehensive education and information services to small business employers.⁸ While better training and information may be of some assistance, it cannot overcome the highly complex legal and human resource rules involved in unfair dismissal claims.

The need for a national industrial relations system

Government senators take this issue further and argue that the procedural changes recommended in the majority report are not sufficient to fix the problems which face

6 Government Senators' Reservations, *Small Business Employment*, Employment, Workplace Relations and Education References Committee, February 2003, p.150

7 Ministerial statement, workplace relations, *House Hansard*, 26 May 2005, pp.25-29

8 Ms Miranda Pointon, Department of Employment and Workplace Relations, *Committee Hansard*, 2 May 2005, p.41

small business. They only tinker at the edges of a system which is in need of an overhaul. Government senators accept the view of peak employer bodies that the time has come to look to the fundamental structural problems with the unfair dismissal system, not the window dressing of process and procedure. The figures on federal and state unfair dismissal applications referred to the majority report reinforce the need for a single industrial relations jurisdiction, rather than the current fragmented system. They show that the number of unfair dismissal cases in all state jurisdictions rose by 23 per cent in the seven years to 2003. This includes a staggering 145 per cent increase in the number of unfair dismissal cases in Tasmania under that state's industrial relations system. Yet, the number of unfair dismissal cases in the federal arena over the corresponding period fell by 52.2 per cent.

Government senators are particularly concerned by these disparate figures and note that different federal and state laws have resulted in an increase in jurisdiction hopping, or 'cherry picking', across the country. This is unsatisfactory for small business operators who require certainty and stability in the application of the law. They need to know that their decisions will be treated fairly and will not be dependent on the make-up of the Australian Industrial Relations Commission or how well lawyers are able to argue the technicalities of a case.

It follows that a more simple and fair workplace relations system based on a unified and nationally harmonised set of laws is required. Government senators believe the industrial relations system which was introduced in 1904 no longer serves the interests of small business. Maintaining six separate industrial jurisdictions is not only inefficient but excessively complex and costly for small business. The current system creates confusion and uncertainty for employers and employees alike. This is supported by surveys which show consistently that small business owners are often unaware of which jurisdiction, federal or state, they fall under. Government senators repeat their strong belief in the goal of a national industrial relations system which reflects the competitive national character of the Australian economy in 2005. This will do much to remove complexity and uncertainty under the current system, and provide small business operators with the confidence to hire new staff.

Senator Guy Barnett

Senator Judith Troeth

Attachment
Workplace Relations Act 1996

Employment not to be terminated on certain grounds

Section 170CK(2)

Except as provided by subsection (3) or (4), an employer must not terminate an employee's employment for any one or more of the following reasons, or for reasons including any one or more of the following reasons:

- (a) temporary absence from work because of illness or injury within the meaning of the regulations;
- (b) trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours;
- (c) non-membership of a trade union;
- (d) seeking office as, or acting or having acted in the capacity of, a representative of employees;
- (e) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- (f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- (g) refusing to negotiate in connection with, make, sign, extend, vary or terminate an AWA;
- (h) absence from work during maternity leave or other parental leave;
- (i) temporary absence from work because of the carrying out of a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.

Appendix 1

List of submissions

Sub No:	From:
1	Dr Jill Murray, Vic
2	Australian National Organisation of the Unemployed
3	NSW Government
4	Shop, Distributive and Allied Employees Association
5	Job Watch Inc
6	Western NSW Community Legal Centre
7	Australian Chamber of Commerce and Industry
8	NSW Young Lawyers
9	The Media, Entertainment and Arts Alliance
10	Combined Community Legal Centres Group (NSW) Inc
11	Department of Employment and Workplace Relations
12	Australian Council of Trade Unions
13	School of Business, Charles Sturt University
14	Dr Paul Oslington, ACT
15	Centre for Employment and Labour Relations Law
16	Professor Rowena Barrett, Vic
17	Mr Keith Hancock, SA

Appendix 2

Hearings and witnesses

Canberra, Monday, 2 May 2005

Dr Paul Oslington

New South Wales Young Lawyers Employment and Industrial Law Committee

Ms Megan Foster, *Committee Member*

Ms Sue-Ern Tan, *Committee Member*

Ms Sally Bolton, *Committee Member*

Combined Community Legal Centres Group (NSW)

Ms Linda Tucker, *Solicitor/Clinical Supervisor, Kingsford Legal Centre*

Ms Sharlene Naismith, *Principal Solicitor, Shoalcoast Community Legal Centre*

Department of Employment and Workplace Relations

Ms Miranda Pointon, *Assistant Secretary, Strategic Policy Branch*

Mr Brant Pridmore, *Director, Working Arrangements Section, Strategic Policy Branch*

Melbourne, Tuesday, 3 May 2005

Dr Jillian Murray

Australian Chamber of Commerce and Industry

Mr Scott Barklamb, *Manager, Workplace Relations*

Mr Christopher Harris, *Senior Adviser, Workplace Relations*

Mrs Leyla Yilmaz, *Manager, Industrial and Employee Relations, Victorian Automobile Chamber of Commerce*

Job Watch Inc.

Ms Gabrielle Marchetti, *Solicitor*

Shop, Distributive and Allied Employees Association

Mr John Ryan, *National Industrial Officer*

Australian Council of Trade Unions

Ms Sharan Burrow, *President*

Ms Cath Bowtell, *Industrial Officer*

Ms Donna Hristodoulidis, *Research Officer*

Mr Gerry Voll

Associate Professor Rowena Barrett

Appendix 3

Answers to questions on notice and additional information

Hearing: Canberra, Monday, 2 May 2005

Shoalcoast Community Legal Centre Inc
received: 19 May 2005

Answers to questions from Senators Murray and Campbell

NSW Young Lawyers
received: 15 June 2005

Answers to questions from Senator Murray

Department of Employment and Workplace Relations
received: 17 June 2005

Answers to questions

Additional information

Hearing: Melbourne, Tuesday, 3 May 2005

Mr Gerry Voll

Further submission regarding possible future research on post
legislation employment movements

Australian Chamber of Commerce and Industry

Laws on protection against dismissal and unemployment benefit
amended

Appendix 4

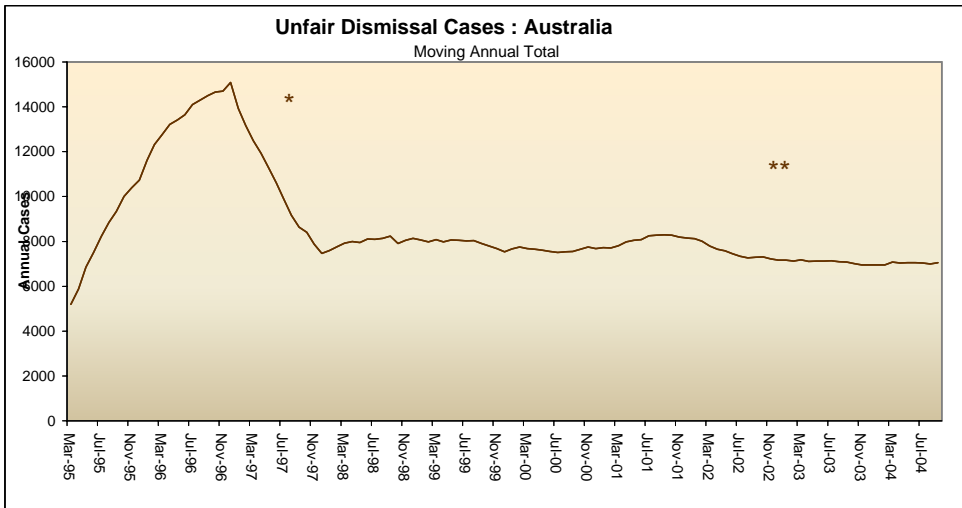
Federal Unfair Dismissal Cases

Unfair Dismissal Cases : Australia

Source: Department of Employment and Workplace Relations
*

	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994
Jan	492	488	540	581	535	418	492	354	1511	625	
Feb	567	581	572	680	705	618	709	551	1305	613	
March	731	598	649	866	755	820	708	547	1235	786	
April	580	622	564	705	535	563	666	592	1148	690	1
May	576	566	641	709	634	681	597	644	1298	1096	121
June	549	543	517	645	624	685	700	533	1207	986	330
July	659	667	667	785	615	658	687	712	1427	963	252
Aug	573	616	614	690	662	630	609	557	1282	1087	462
Sept	628	579	615	577	566	550	682	591	1120	924	440
Oct	0	623	633	620	635	539	661	979	1206	1049	373
Nov	0	485	568	652	736	634	744	611	1138	1087	703
Dec	0	586	634	647	678	745	882	791	1206	830	487
TOTAL	5355	6954	7214	8157	7680	7541	8137	7462	15083	10736	3169

* The Coalition's Workplace Relations Act commenced 1/1/97, and was passed after amendment by the Democrats.
** Changes to Unfair Dismissal process occurred from September 2001, after the Act was amended with Democrat support



Moving Annual Total													
Mar-95	5193	Oct-96	14656	May-98	7946	Dec-99	7541	Jul-01	8248	Feb-03	7120	Sep-04	7049
Apr-95	5882	Nov-96	14707	Jun-98	8113	Jan-00	7658	Aug-01	8276	Mar-03	7178		
May-95	6857	Dec-96	15083	Jul-98	8088	Feb-00	7745	Sep-01	8287	Apr-03	7103		
Jun-95	7513	Jan-97	13926	Aug-98	8140	Mar-00	7680	Oct-01	8272	May-03	7129		
Jul-95	8224	Feb-97	13172	Sep-98	8231	Apr-00	7652	Nov-01	8188	Jun-03	7129		
Aug-95	8849	Mar-97	12484	Oct-98	7913	May-00	7605	Dec-01	8157	Jul-03	7131		
Sep-95	9333	Apr-97	11928	Nov-98	8046	Jun-00	7544	Jan-02	8116	Aug-03	7095		
Oct-95	10009	May-97	11274	Dec-98	8137	Jul-00	7501	Feb-02	8008	Sep-03	7085		
Nov-95	10393	Jun-97	10600	Jan-99	8063	Aug-00	7533	Mar-02	7791	Oct-03	7002		
Dec-95	10736	Jul-97	9885	Feb-99	7972	Sep-00	7549	Apr-02	7650	Nov-03	6954		
Jan-96	11622	Aug-97	9160	Mar-99	8084	Oct-00	7645	May-02	7582	Dec-03	6954		
Feb-96	12314	Sep-97	8631	Apr-99	7981	Nov-00	7747	Jun-02	7454	Jan-04	6958		
Mar-96	12763	Oct-97	8404	May-99	8065	Dec-00	7680	Jul-02	7336	Feb-04	6944		
Apr-96	13221	Nov-97	7877	Jun-99	8050	Jan-01	7726	Aug-02	7260	Mar-04	7077		
May-96	13423	Dec-97	7462	Jul-99	8021	Feb-01	7701	Sep-02	7298	Apr-04	7035		
Jun-96	13644	Jan-98	7600	Aug-99	8042	Mar-01	7812	Oct-02	7311	May-04	7045		
Jul-96	14108	Feb-98	7758	Sep-99	7910	Apr-01	7982	Nov-02	7227	Jun-04	7051		
Aug-96	14303	Mar-98	7919	Oct-99	7788	May-01	8057	Dec-02	7162	Jul-04	7043		
Sep-96	14499	Apr-98	7993	Nov-99	7678	Jun-01	8078	Jan-03	7171	Aug-04	7000		

Appendix 5

Answers to Senator Murray's question on notice no.50



MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS

SENATE

Question No. 50

Senator Murray asked the Minister representing the Minister for Employment and Workplace Relations, upon notice, on 16 November 2004:

- (1) Can a table be provided of all unfair dismissal applications under federal and state law for the 1996 calendar year for each state and territory, showing the number of applications under federal law, state law, and the total.
- (2) Can a table be provided of all unfair dismissal applications under federal and state law for the 2003 calendar year for each of the states and territories, showing the number of applications under federal law, state law, and the total.
- (3) Can a table be provided showing the number and percentage change of applications for the 2003 calendar year against the 1996 calendar year for each of state and territory, broken down by whether the applications were lodged under federal or state law.
- (4) Can a breakdown be provided showing the same information shown in (1) to (3) above in relation to small business (classified as 20 or fewer employees).
- (5) Can an estimate be provided of the numbers of small businesses that fall under state and federal workplace relations law separately, for each state and territory.
- (6) Can an estimate be provided of the numbers of small business employees that fall under state and federal workplace relations law separately, for each state and territory.

Senator Abetz – The Minister for Employment and Workplace Relations has provided the following answer to the honourable senator's question:

- (1) The following table provides information on the number of termination of employment applications lodged under federal and state law for each state and territory for the 1996 calendar year.

State/Territory	Termination of employment applications lodged during the 1996 calendar year ¹		
	<i>Federal</i> ²	<i>State</i>	<i>Combined</i>
New South Wales	4290	2186	6476
Queensland	512	1932	2444
Western Australia	1875	918	2793
South Australia	633	1240	1873
Tasmania	360	114	474
Victoria	5958	358	6316
ACT ³	509	N/A	509
NT ³	396	N/A	396
Total	14,533	6748	21,281

Notes

1. Federal and state figures are based on calendar months, and incorporate estimates and interpolations where original data are not available. Official and unofficial sources are used.

2. Data collected on federal termination of employment applications do not differentiate between unfair dismissal and unlawful termination.

3. There are no separate territory unfair dismissal systems.

- (2) The following table provides information on the number of termination of employment applications lodged under federal and state law for each state and territory during the 2003 calendar year.

State/Territory	Termination of employment applications lodged during the 2003 calendar year ¹		
	<i>Federal</i> ²	<i>State</i>	<i>Combined</i>
New South Wales	1270	4083	5353
Queensland	397	1642	2039
Western Australia ³	316	1314	1630
South Australia	153	980	1133
Tasmania	109	280	389
Victoria ⁴	4242	N/A	4242
ACT ⁴	227	N/A	227
NT ⁴	240	N/A	240
Total	6954	8299	15,253

Notes

1. Some figures in this table are based on records of monthly lodgements and may differ slightly from final annual figures.

2. Data collected on federal termination of employment applications do not differentiate between unfair dismissal and unlawful termination.

3. Western Australian state figures include both unfair dismissal applications and applications which combine claims of unfair dismissal and denial of contractual benefits.

4. There are no separate territory unfair dismissal systems, and there has been no separate Victorian unfair dismissal system since 1996.

- (3) The following table provides information on the number and percentage change in termination of employment applications for the 2003 calendar year against the 1996 calendar year.

State/Territory	Change in the number of termination of employment applications —1996 v 2003 calendar years ¹					
	<i>Federal</i> ²		<i>State</i>		<i>Combined</i>	
	<i>number</i>	<i>%</i>	<i>number</i>	<i>%</i>	<i>number</i>	<i>%</i>
New South Wales ³	-3020	-70.4	1897	86.8	-1123	-17.3
Queensland	-115	-22.5	-290	-15.0	-405	-16.6
Western Australia ⁴	-1559	-83.1	396	43.1	-1163	-41.6
South Australia	-480	-75.8	-260	-21.0	-740	-39.5
Tasmania	-251	-69.7	166	145.6	-85	-17.9
Victoria ⁵	-1716	-28.8	-358	-100.0	-2074	-32.8
ACT ⁵	-282	-55.4	N/A	N/A	-282	-55.4
NT ⁵	-156	-39.4	N/A	N/A	-156	-39.4
Total	-7579	-52.2	1551	23.0	-6028	-28.3

Notes

1. Federal and state figures are based on calendar months, and incorporate estimates and interpolations where original data are not available. Official and unofficial sources are used.
2. Data collected on federal termination of employment applications do not differentiate between unfair dismissal and unlawful termination.
3. Between 1996 and 2003, the number of unfair dismissal applications made in the NSW State jurisdiction increased substantially and the number of applications in NSW in the federal jurisdiction declined substantially. These shifts may be attributed to: the fact that applications in 1996 were made under the more expansive unfair dismissal provisions in the Industrial Relations Act 1988 rather than the more limited scheme in the Workplace Relations Act 1996, which did not come into effect until 31 December 1996; and the expansion in the NSW jurisdiction effected by the Industrial Relations Amendment (Federal Award Employees) Act 1998 (NSW).
4. Western Australian state figures include both unfair dismissal applications and applications which combine claims of unfair dismissal and denial of contractual benefits.
5. There are no separate territory unfair dismissal systems, and there has been no separate Victorian unfair dismissal system since 1996.

- (4) The Australian Industrial Registry (AIR) asks employers who are nominated as respondents in federal termination of employment matters a question relating to the size of their business. Around one third of such employers have responded to the AIR's question. The information collected by the AIR relates only to unfair dismissal applications under the federal Workplace Relations Act 1996, and has only been collected since 1 December 1997. As far as the Federal Government is aware, no state or territory is able to provide reliable data on the number of small businesses involved in unfair dismissal applications for the 1996 or 2003 calendar years. Therefore, it is not possible to provide tables for all small business unfair dismissal applications for the 1996 calendar year, small business unfair dismissal applications under federal and state law for the 2003 calendar year, or changes in the number of small business unfair dismissal applications between 1996 and 2003, as requested.

The following table provides information on federal unfair dismissal applications, broken down by the state and territory in which the application was lodged, for the 2003 calendar year. As not all employers involved in federal unfair dismissal matters responded to the AIR's request for information on employer size, the information in the table is considered indicative only. The number of employer respondents who provided information on employer size is included in the table.

	Federal unfair dismissal applications lodged during the 2003 calendar year^{1,2}			
Registry	Number of termination of employment applications lodged	Number of employer responses to AIR's question on employer size	Number of responses received from small businesses	Small business responses as a percentage of all responses received
New South Wales	1270	275	76	27.6
Queensland	397	186	29	15.6
Western Australia	316	64	16	25.0
South Australia	153	59	16	27.1
Tasmania	109	38	6	15.8
Victoria	4242	1353	524	38.7
ACT	227	53	18	34.0
NT	240	125	50	40.0
Total	6954	2153	735	34.1

Notes

1. The figures in this table are based on monthly lodgements and may differ slightly from final annual lodgement figures.
 2. Data collected on federal termination of employment applications do not differentiate between unfair dismissal and unlawful termination.
- (5) It is not possible to provide a reliable estimate of the numbers of small businesses that fall under state and federal workplace relations law separately for each state and territory.

A broad indication of the number of non-farm small business that fall under federal workplace relations law can be provided. Non-farm businesses exclude those in the agriculture, forestry and fishing industries.

Drawing upon a combination of data sources, the Department of Employment and Workplace Relations estimates that around one third of non-farm businesses with fewer than 20 employees have employees who are covered by federal awards, Australian Workplace Agreements or federal certified agreements, or are located in the Australian Capital Territory, the Northern Territory or the State of Victoria. It is not possible to break this figure down by state and territory.

The most recent estimate from the Australian Bureau of Statistics' publication *Small Business in Australia* [ABS cat. no. 1321.0] is that, in 2000–2001, there were 539,900 employing non-farm small businesses in Australia.

Based on these estimates, it is estimated that that around 180,000 non-farm small businesses fell under federal workplace relations law in 2000–2001.

- (6) Similarly, it is not possible to provide a reliable estimate of the numbers of small business employees that fall under state and federal workplace relations law separately for each state and territory.

A broad indication of the number of non-farm small business employees who fall under federal workplace relations law can be provided. Employees of non-farm small businesses are those small business employees who were are not employed by businesses in the agriculture, forestry and fishing industries.

The Department of Employment and Workplace Relations estimates that around 35 per cent of employees of non-farm businesses with fewer than 20 employees are covered by federal awards, Australian Workplace Agreements or federal certified agreements, or are employed by businesses located in the Australian Capital Territory, the Northern Territory or the State of Victoria. It is not possible to break this figure down by state and territory.

The most recent estimate from the Australian Bureau of Statistics' publication *Small Business in Australia* [ABS cat. no. 1321.0] was that, in 2000–2001, 2,269,400 employees were employed by Australian non-farm small businesses.

Based on these estimates, it is estimated that that around 795,000 employees of non-farm small business fell under federal workplace relations law in 2000–2001.

Appendix 6

Features of Federal and State termination laws

	Cmwth, Vic, ACT & NT	NSW	QLD	SA	WA	Tas
Employee able to apply for remedy?	Yes	Yes	Yes	Yes	Yes	Yes
Max time period after termination to apply	21 days	21 days (out of time applctns possible)	21 days	21 days	28 days (out of time applctns considered)	21 days
Salary cap	\$81 600 for 'non- award conditions' employees	\$81 500 and not covered by award	\$75 200	\$77 681 for non-award employees	\$90 000 for non award etc employees	
Filing Fee	\$50.00	\$50.00	\$48.00 unless union application	\$0.00	\$50.00	\$0.00
Casuals et al excluded, for what period?	12 months	6 months	12 months, except for invalid reasons	6 months	No	No
Statutory default probationary period	3 months	No 3 months (may be less)	3 months	No	3 mnths (but not blanket exclusion)	No
Conciliation before arbitration	Yes	Yes	Yes	Yes	Yes, Registrar may mediate	Yes
Certificate issued if conciliation fails?	Yes	No	Yes	Assessment made	No	No
Penalty for disregarding assessment?	Yes	No	No	Yes	No	No
Commission to consider size of business?	Yes					
Penalties against advocates for vexatious claims	Yes					
Requirement to disclose 'no win no fee'	Yes					
Dismiss claims which have no prospect of success?	Yes					
Consider size of business & skills of small business re HR matters	Yes					
Is salary compensation capped?	6 months remuneration. Limited to \$40,800 for 'non-award' employees	6 months remuneration	6 months average wage	6 months remuneration or \$38,800 which ever is greater	6 months remuneration	6 months ordinary pay

Note:

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

WA Provisions (August 2002) (Advice from Labour Relations Branch DCEP):

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

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