NEW SOUTH WALES GOVERNMENT SUBMISSION TO THE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION REFERENCES COMMITTEE

INQUIRY INTO UNFAIR DISMISSAL POLICY IN THE SMALL BUSINESS SECTOR

11 MARCH 2005

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Executive summary

Issues surrounding unfair dismissal have been referred to the Senate Employment, Workplace Relations and Education Committee for consideration of the question whether there is any connection between the presence of unfair dismissal legislation and employment growth. The Committee also requests submissions on the nexus between the presence of unfair dismissal laws and a negative impact on the ability to run a small business.

It is the submission of the NSW Government that there is no relationship between the presence of such laws and employment growth. It is submitted that the available research which seeks to draw such a connection is deeply flawed and therefore unreliable as a point of reference for the development of federal unfair dismissal legislation. In particular the NSW Government draws the Committee's attention to the many and widely recognised faults in the Melbourne Institute of Applied Economics and Social Science study *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses.* It is this research that the Federal Government relies on in its claim that unfair dismissal exemptions for small businesses will create 77,000 jobs. This submission examines this research in some detail.

NSW unfair dismissal legislation is aimed in part at fulfilling the principle of a 'fair go all round' for employers and employees. Section 3(a) of the *Industrial Relations Act 1996* (the NSW Act) provides the first object of the legislation, namely to provide a framework for the conduct of industrial relations that is fair and just. The NSW Government submits that the aims of the current unfair dismissal bill before the Senate (the *Workplace Relations Amendment (Fair Dismissal Reform) Bill*) are neither fair nor just, in the main because it provides for a discriminatory unfair dismissal regime based on the size of the employer.

Federal legislation currently under consideration would legislatively enshrine differing standards for different employees. Employees whose employer employs 20 or more employees would have significantly greater rights than those who work for smaller businesses. No policy rationale behind this proposal has ever been effectively communicated by the Federal Government apart from unfounded statements about the employment growth that would ensue upon granting exemptions to small businesses.

While it is conceded by the NSW Government that small business employees might still have access to the federal unlawful termination jurisdiction, this jurisdiction falls within the domain of the Federal Court and is difficult and expensive to access. The NSW jurisdiction provides for an informal, inexpensive unfair dismissal process for private sector employees.

The NSW Government submits that small business employees are more likely to be lower paid and more vulnerable than those of larger businesses. Proposals which would effectively enable an employer to terminate employment at will and without providing any valid reason are strongly rejected. Accordingly there is no justification for exempting these already vulnerable employees from a basic form of employment protection.

Introduction

1. The NSW Government submission strongly advocates against the enactment of any federal legislation that would deny access to the unfair dismissal jurisdiction for small business employees.

2. More people are employed in small businesses than in any other business category. In 2000-01, 1,083,400 people worked in NSW small businesses. This was 33.2% of all the people working in small businesses in Australia and again was more than in any other State. In summary, 47.9% of people who work in NSW businesses are in small businesses[1]. 34% of small businesses in NSW are in regional locations.

3. In 2000-01, in NSW, the sectors which had the highest employment in small business were property and business services (213,600 people, or 19.7%, of all small business employment), retail trade (185,900, or 17.2%) and construction (179,100, or 16.5%).

4. It is submitted that the effects of such an exclusion to such a high proportion of employees in key industries will be overwhelmingly negative. The exclusion of small business employees from the jurisdiction would seem to suggest:

1) that small business employers will not be under the same obligation as their counterparts in larger businesses to take account of principles of fairness in relation to the dismissal of their employees, and

2) that small business employees should not have the same employment rights as those who work for larger businesses.

[1] ABS: Small Business in Australia 2001 [Catalogue No. 1321.0])

5. The bill that has led to the inquiry by the Committee would create a discriminatory and two-tiered system. A more effective way of restricting the burden on small business in the unfair dismissal jurisdiction would be to make the procedure quicker and more cost effective whilst providing small business education and advisory services. Such services and accompanying education seminars are routinely conducted by the NSW Office of Industrial Relations, within the Department of Commerce, with great success.

6. The exclusionary aspect of the bill also puts small business employers at a distinct disadvantage in attracting quality employees. Job seekers will understand that they will have less rights working for a small business. If they cannot expect fair treatment from a small business employer, they are likely to avoid looking for work with such employers.

7. Further, if the policy rationale for this legislation were correct, that the existence of unfair dismissal is an impediment to employment growth, then the enactment of the bill in question would also have a negative impact on employment. Businesses with fewer than 20 employees would be less likely to take on more employees for fear of being exposed to an unfair dismissal application once they hit the arbitrary figure of 20. While the NSW Government wholly rejects the Commonwealth's line of argument, if it were true it would effectively mean that unfair dismissal exclusions for small businesses would both impede **and** encourage employment. Clearly such a scenario is impossible.

8. While it is conceded that the actual number of employers in the 15-20 employees range may not be large, there will nevertheless be an impact on all small business employers. Such legislation will encourage the mindset that it is preferable not to expand the number of employees because of exposure to unfair dismissal legislation.

9. When available research and academic work on the relationship between employment protection legislation and unemployment is examined, and when consideration is given to the practical realities of such an exclusion,

it is apparent that there is no justification for excluding certain classes of employees from the unfair dismissal jurisdiction.

10. It is also questionable whether small businesses per se are any less capable, financially or operationally, of dealing with an unfair dismissal application. There is certainly no inherent reason why such businesses, many of which would be highly profitable, should be any less capable of dealing fairly with their employees. To the extent that they require any special assistance, that can be readily provided by appropriate information and advisory programs. In any case, it is the firm view of the NSW Government that it is not justifiable to refuse procedural workplace fairness to employees based on the size of the business that they work for.

11. The NSW Government also submits that, on the basis of the research on which the Federal Government relies, as well as other research on issues of concern to small business, there is no reason to believe that unfair dismissal is of greater concern to business owners than taxation or superannuation or any other regulatory provisions which governments, democratically elected, decide are necessary to properly provide for a fair and modern society.

Structure of the NSW Government submission

12. This submission is structured to address each of the terms of reference but additionally will introduce commentary on the practical effects of excluding small business employees and placing unfair dismissal issues within the broader context of federal industrial relations policy. Each term of reference will be addressed separately.

13. The submission will demonstrate that:

- There is no connection between the presence of unfair dismissal legislation and employment levels.

- There is no reliable international evidence that shows such a connection.
- The number of businesses involved in unfair dismissal proceedings is so small as to not warrant reducing employee access to the jurisdiction.
- The NSW Government provides thorough termination and recruitment education services to small businesses that inform employers on their rights and responsibilities to employees. This education strategy plays a major role in keeping the number of unfair dismissal applications low.
- The NSW Industrial Relations Commission ensures the quick and efficient processing of unfair dismissal applications that minimise disruption to the workplace and keep costs low.

Placing the current federal unfair dismissal bill in context

14. It is important that the Committee understand current federal unfair dismissal proposals in the context of the broader Commonwealth strategy to take over parts, and eventually all, of the state industrial relations jurisdictions. The *Workplace Relations Amendment (Termination of Employment) Bill* 2002 sought to not only to give employers more protection from unfair dismissal applications by their employees, but it also sought, with the use of the constitutional corporations power, to largely eliminate the state unfair dismissal regimes.

15. The NSW Government made a detailed submission on that bill, urging the Committee to reject it on the grounds of fairness and that a case for overriding state legislation had not been made out.

16. In view of the fact that the Federal Minister for Employment and Workplace Relations, the Prime Minister and the Treasurer have all firmly stated the Commonwealth's intention to create a unitary system of industrial relations, the unfair dismissal bill and associated issues currently under consideration must be seen as precursors to the takeover of, at the very least, state unfair dismissal jurisdictions.

17. The Federal Government is already attempting to enact legislation that would override state right of entry legislation. It has attempted to legislate to define what types of industrial matters can be included in state awards and agreements. In this light it is undeniable that, if enacted, the discriminatory provisions of the current bill would be expanded to cover employees of incorporated entities who currently fall in the state jurisdiction, and to exclude such persons from access to the vastly superior provisions of that state system.

18. It must also be remembered that previous Commonwealth attempts to exclude small business employees from the unfair dismissal jurisdiction have

defined a small business somewhat differently. Initial bills aiming at such an exclusion defined a small business as one with less than 15 employees. More recently, federal unfair dismissal bills have redefined a small business as one with fewer than 20 employees. It appears that the definition of a small business, especially in relation to unfair dismissal and that business's ability to deal with an unfair dismissal application, is somewhat arbitrary. It raises the question as to whether the Commonwealth would be likely to change the definition of a small business to include ever greater numbers of employees, and thus exclude a much higher proportion of the workforce from employment protection. Ultimately, larger businesses may well also argue that they too should be exempt and that the unfair dismissal jurisdiction must be repealed in its entirety.

19. The NSW Government therefore emphasises to the Committee that the NSW jurisdiction provides an appropriate standard for unfair dismissal processes. NSW legislation provides a balance between the needs of employers and employees. The jurisdiction is easy to access, inexpensive, non-legalistic and fair. Applications are dealt with quickly and conciliation remains a very strong focus of the jurisdiction.

20. This inquiry examines the federal government's claim that unfair dismissal laws have an adverse effect on employment growth in the small business sector. The Federal Government has made this assertion on numerous occasions since 1996, usually in connection with the introduction of bills to amend the unfair dismissal jurisdiction. These bills include:

- The Workplace Relations Amendment Bill 1997
- The Workplace Relations Amendment Bill 1997 [No 2]
- The Workplace Relations Amendment (Unfair Dismissals) Bill 1998
- The Workplace Relations Amendment (Unfair Dismissals) Bill 1998 [No.2]
- The Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001

- The Workplace Relations Amendment (Fair Dismissal) Bill 2002
- The Workplace Relations Amendment (Fair Dismissal) Bill 2002 [No 2]
- The Workplace Relations Amendment (Termination of Employment) Bill 2002
- The Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004

21. The last bill on the list above is only the latest federal attempt to exclude small business employees from the unfair dismissal jurisdiction.

NSW unfair dismissal legislation

22. The NSW unfair dismissal jurisdiction, set out in Part 6 of Chapter 2 of the NSW *Industrial Relations Act 1996* (the NSW IR Act) and Part 3 of the *Industrial Relations (General) Regulation 2001* (the NSW Regulations), has remained relatively stable since it was enacted in 1996. Indeed it largely repeats the provisions established by an earlier government in the *Industrial Relations Act 1991.* The only substantial change to the jurisdiction came in 1997, when regulations were made excluding certain classes of employees from access to the jurisdiction.

23. Part 6 of Chapter 2 of the NSW IR Act (sections 83-90) sets out a simple and straightforward jurisdiction for the Industrial Relations Commission of NSW to determine applications alleging that a dismissal or threatened dismissal was or is harsh, unjust or unreasonable.

24. NSW unfair dismissal law is based on fairness, equity and the concept of a 'fair go all round'. Being able to seek compensation or reinstatement for an alleged unfair dismissal is a vital part of the industrial relations agenda. It ensures that employees who make legitimate requests in relation to remuneration, access to leave, or raise issues of concern (for example, health and safety issues or harassment issues) are not dismissed for doing so. The unfair dismissal provisions act as a deterrent to unacceptable employer conduct and act as a mechanism for ensuring that employees are not dismissed without reason and/or without notice.

Limits on who may apply

25. Section 83 of the NSW IR Act and the NSW Regulation currently set limits on who may apply for relief under the unfair dismissal jurisdiction. More specifically:

- all public sector employees and all award employees may apply (s83(1)(a))
- there is a remuneration cap for non-award employees (currently $90,400) (s83(1)(b))
- specific classes of employees are excluded - fixed term, probationary and short term casual employees (s83(2) and Reg 6)
- apprentices and trainees are excluded (s83(3))
- an application may be made by dismissed employee or union on behalf of dismissed employee (or employees) (s84(2) and 84(3)) and
- an application may be made in relation to either an actual dismissal or a threatened dismissal (s83(5)).

(ii) Time limits

26. Applications must be made within 21 days, but out of time applications may be accepted (s85).

(iii) Grounds

27. The following grounds must apply:

- That the dismissal was harsh, unreasonable or unjust (s84(1)).
- The Commission *may*, if appropriate, take into account (s88):
  - whether reasons were given
  - whether those reasons had a basis in fact and the applicant had an opportunity to defend or explain

- whether any warning of unsatisfactory performance was given
- the nature of applicant's duties
- whether the applicant requested reinstatement or re-employment, and
- other matters the Commission considers relevant.

(iv) Process

28. The Commission must first endeavour to settle the claim by conciliation but will arbitrate where conciliation is unsuccessful (ss 86 and 87).

(v) Remedies

29. The following remedies are available to the Commission:

- Reinstatement is the primary remedy (s89).
- If reinstatement is impracticable, the Commission may consider re-employment (to another suitable position) (s89(2)).
- If reinstatement or re-employment is ordered, the Commission may also order the payment of lost remuneration (s89(3)).
- If both reinstatement and re-employment are impracticable, the Commission may order compensation (s89(5)).
- Compensation is capped at the applicant's earnings during the six months before being dismissed (s89(5)).
- The applicant's attempts to mitigate by seeking alternative employment are to be taken into account in setting the amount of compensation (s89(6)).
- The application need not specify the nature of remedy sought and may seek compensation only – but this does not affect the

requirement that compensation is available *only* if the Commission considers that reinstatement or re-employment would be impracticable.

30. As can be seen from the above summary, the NSW unfair dismissal jurisdiction gives the NSW Industrial Relations Commission a broad discretion to consider a wide range of factors. Not only does the Commission consider the nature and length of employment, but it is also bound to take into account the operational requirements and the size of the business when considering whether there is a right to an unfair dismissal application (section 83(2)(e)). Conciliation is the compulsory first step in the resolution of the application which is a major influence on reducing costs to the parties involved.

31. The then Department of Industrial Relations conducted detailed research on unfair dismissal applications in 2002[2]. This research found that approximately 95 per cent of all applications are settled before they proceed to formal arbitration. This research provides evidence that the NSW jurisdiction is more than capable of providing an inexpensive and timely unfair dismissal process.

Federal legislation

32. Federal legislation sets out the provisions in relation to unfair dismissal in Part VIA, Division 3 of the *Workplace Relations Act 1996* (the WR Act). In contrast to NSW legislation, the WR Act distinguishes between terminations which may have been harsh, unjust or unreasonable (known as 'unfair dismissals') and those alleged to be unlawful. Provisions for unlawful terminations are contained in section 170CK(2) of the *Workplace Relations Act*. This section provides that an employee may not be terminated on the grounds of:

[2] Internal Departmental research, compiled with the assistance of the NSW Industrial Relations Commission, July 2002.

- a temporary absence from work due to illness or injury
- trade union membership and/or participation in trade union activities
- non-membership of a trade union
- acting as a representative of employees
- filing a complaint against an employer involving alleged violation of laws or regulations
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin
- refusing to negotiate or participate in an Australian Workplace Agreement
- absence from work during maternity leave or parental leave or
- temporary absence from work due to participation in voluntary emergency management activities.

33. Employees who believe that they have been unlawfully dismissed may seek remedies through the Federal Court, which is a more costly and complex jurisdiction that for unfair dismissals which are heard by the Australian Industrial Relations Commission. The *Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004* does not seek to remove the unlawful termination provisions of the *Workplace Relations Act*, however it does seek to remove the access to harsh, unjust or unreasonable terminations contained in section 170CB, for employees of small businesses.

34. The key elements of the harsh, unjust or unreasonable termination provisions of the WR Act are as follows:

(i) Who may apply

- Commonwealth public sector employees
- Territory employees
- Federal award employees who are employed by a constitutional corporation

- Federal award employees who are a waterside worker, maritime worker or flight crew officer, employed in the course of, or in relation to, trade or commerce between Australian and a place outside Australia, between the States, within a Territory, between a State and a Territory, or between two Territories.

35. However the following groups of employees are excluded from seeking unfair dismissal claims under section 170CB(1):

- a worker employed under a contract for a specified period of time
- a worker employed under a contract for a specified task
- an employee serving a probation where the probation does not exceed three months except in reasonable circumstances
- a casual employee who has not been engaged on a regular or systematic basis for at least 12 months
- a trainee
- an employee who is not employed under an award but whose remuneration (which may be wholly or partially based on a commission or piece rates) does not exceed the specified amount as noted in the Regulations.

(ii) Time Limits

36. Applications must be made within 21 days after an employee is given notice of decision to terminate their employment under section 170CE(7A).

(iii) Grounds

37. According to section 170CG(3) in determining whether a dismissal was harsh, unjust or unreasonable, the Commission must have regard to:

- whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's business, and
- whether the employee was notified of that reason, and
- whether the employee was given an opportunity to respond to that reason, and
- whether the employee had been warned about their unsatisfactory performance before the termination, and
- the degree to which the size of the employer's business would be likely to impact on the procedures followed in effecting the termination, and
- the degree to which the absence of a dedicated human resource management specialists in the business would be likely to impact on the procedures followed in the termination, and
- any other matters that the Commissions considers relevant.

(iv) Process

38. Under section 170CF(1) the Commission must attempt conciliation before issuing a certificate for arbitration.

(v) Remedies

39. Pursuant to section 170CH the Commission can order reinstatement or re-employment in a different position that is no less favourable on terms and conditions than the employee's original position. If reinstatement is not possible, the Commission may order compensation up to six month worth of pay for the employee (under section 170CH(8)).

40. As is apparent from the above the federal provisions for unfair dismissals are far more complex than corresponding NSW legislation. The division between unlawful dismissals and unfair dismissals may also lead to confusion and difficulty in lodging necessary applications. The weakness of

the unlawful termination provisions has been noted on numerous occasions, including by Senator Jacinta Collins who suggested that:

> *In the discussions I have had with colleagues who deal with these matters, they have advised me that unlawful termination is extremely difficult to use. Cases either go before the Magistrate's Court or the Federal Court and, whilst the test is on the balance of probabilities, in this matter as well as in relation to unfair dismissal, there is much less discretion with unlawful termination than there is with fairness.* [3]

41. The exclusion of small business employees from the unfair dismissal provisions will result in inequity and, for those employees who do meet the grounds for unlawful termination, difficulty and complexity in dealing with the system. On these grounds alone the NSW government does not support the exclusion of small business employees from the protection of unfair dismissal laws.

[3] Senate, *Hansard,* 15 September 2003, p. 15085.

The terms of reference

42. This section of the submission will individually address the terms of reference that the Committee has prescribed.

(1)(a)(i)(A) International experience concerning unfair dismissal laws

43. The importance of fairness and equity in the employment relationship is internationally recognised. The principal international bodies which provide detailed commentary on international industrial regulation, the International Labour Organisation (ILO) and the Office for Economic Co-operation and Development (OCED), have long recognised the importance and impact of legislation which prescribes the terms and conditions of both employment and termination.

44. The OECD has found that countries which have higher employment protection experience less terminations during periods of economic downturns[4]. The OECD suggests that this leads to greater job security and may result in productivity increases and employee preparedness to undergo further training, thereby positively influencing 'aggregate employment and economic efficiency'[5]. While the OECD has also suggested that strong employment protection may reduce the employment of workers on permanent contracts and reduce a firm's ability to respond to changes in its environment, it has concluded that the 'overall impact [of employment protection legislation] on aggregate unemployment is unclear, both in economic theory and in the empirical evidence'[6].

[4] OECD, *Employment Protection: The Costs and Benefits of Greater Job Security,* Policy Brief, September 2004.
[5] Ibid.
[6] Ibid.

45. An examination of employment protection legislation of OECD member nations demonstrates that many nations have recognised the need for employees to have access to redress for terminations which may be unfair[7]. The OECD has created an index to measure the strictness of the employment protection legislation of its member nations. This index has been created based on three different forms of employment protection:

- Regulation on temporary forms of employment.
- Specific requirements for collective dismissal.
- Protection of regular workers against (individual) dismissal.

46. According to the 2003 index, Australia was considered to have a relatively low level of employment protection[8]. Countries with high levels of employment protection legislation were found to only permit termination:

> *when the employer can demonstrate the worker's lack of integrity or actions prejudicial to the company's interests (such as negligence, imprudence, or disobedience). Redundancy or poor performance are normally not legal grounds for dismissal.*[9]

47. It is undeniable, based on the OECD research, that Australia's current unfair dismissal laws, both in the state and federal jurisdictions, are far more moderate and give far more discretion to employers and the relevant tribunal than many other countries.

48. The OECD indicates that the majority of member countries have legislated conditions for fair, unfair and unlawful dismissals. The Termination of Employment Convention 158, of 1982, recognises that the termination of an employee should not occur 'unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the

[7] Ibid.
[8] OECD, *Employment Protection: The Costs and Benefits of Greater Job Security,* Policy Brief, September 2004.
[9] OECD, *Employment Protection: The Costs and Benefits of Greater Job Security,* Policy Brief, September 2004, Table 3.

operational requirements of the undertaking, establishment or service'. [10] The ILO also recognises that a terminated worker should have the opportunity to respond to allegations made against them and to appeal to an impartial body regarding their dismissal[11].

(1)(a)(i)(B) International experience concerning the relationship between unfair dismissal laws and employment growth in the small business sector

49. The research conducted by the OECD and the ILO has not specifically addressed whether or not a relationship exists between unfair dismissal laws and employment growth in the small business sector. Consistent with most research in this field both bodies have been unable to prove a link between such laws and the rate of unemployment.

50. However the OECD has provided the unemployment figures for 27 of its member countries[12]. On average, the unemployment rate for countries with strict employment protection provisions and those with minimal employment protection provisions appear to be the same, approximately 7.9%. This implies that there is no connection between employment protection and unemployment rates. This figure also suggests that there may be other economic and social factors which impact on employment and unemployment trends, rather than merely the employment protection legislation of a particular country.

51. It is important to note that Australia's current official unemployment rate is approximately five per cent, which is significantly lower than the average identified by the OECD. Australia enjoys such low unemployment concurrently with its present longstanding unfair dismissal systems.

[10] ILO, *C158 Termination of Employment Convention 1982,* Article 4, Geneva.
[11] ILO, *C158 Termination of Employment Convention 1982,* Article 8, Geneva.
[12] OECD, *OECD Employment Outlook*, 2004, Statistical Annex, Table A.

52. Additionally, attempting to locate data on small businesses for international comparison could prove to be methodically difficult. Different countries have differing business classifications, in particular in relation to what a 'small' business is. This was noted by Mark Roberts in his study of 15 OECD countries and their levels of employment protection. In this research Roberts defined a small business as being an independent and non-subsidiary entity employing fewer than two hundred employees[13]. This definition is significantly different from that which is currently adopted by the Commonwealth government which defines small businesses as having less than twenty employees.

53. Furthermore, Roberts also suggests that are two main limitations on the use of international data regarding employment security. Firstly he suggests that the effects and rationale of employment protection laws will differ across countries due to the difficulty in incorporating the national context into empirical comparisons[14]. In addition he recognises that it is often difficult to determine the extent of employment protection particularly when it is negotiated through industry practice or in collective agreements[15].

54. These restrictions must be considered when comparing international research data with the Australian experience.

[13] Mark Roberts, *Employment Protection Systems: A Fifteen Country Comparative Study,* University of Melbourne, 2003.
[14] Ibid.
[15] Ibid.

(1)(a)(ii) The provisions of federal and state unfair dismissal and the extent adversely impact on small business, including:

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

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

55. There is simply no evidence available to conclude that federal or state unfair dismissal laws impact adversely on small business or the likelihood that they will employ more staff if such laws were to be removed. The Melbourne Institute of Applied Economics and Social Studies research, on which the Federal Government largely relies to allege a connection between unfair dismissal legislation and employment growth, has been widely discredited. This research is critiqued in detail under the NSW Government response to term of reference 1(a)(iii), below.

56. The NSW Industrial Relations Commission monitors the number of unfair dismissal claims that it receives on a monthly basis. However, the Commission does not detail the size of employers who are involved in unfair dismissal applications. Consequently no reliable statistical data is available on the number of unfair dismissal claims lodged against small businesses in the NSW jurisdiction.

57. Nonetheless it is important to note that the number of unfair dismissal claims lodged against employers in Australia every year is extremely minimal. Approximately only 1.2% of businesses in Australia face an unfair dismissal claim[16]. The Liquor, Hospitality and Miscellaneous Workers Union has estimated that, based on an analysis of ABS and DEWRSB data from 1997-

[16] Statistics on number of unfair dismissal claims lodged by AIRC and state Commissions during 2003/4 and 2002/3, complied by NSW Office of Industrial Relations.

2001, only 0.3% of small business were exposed to an unfair dismissal claim during this period[17]. This is an insignificant number and clearly shows that the perceived concern over unfair dismissal laws has been greatly exaggerated by the federal government and employer groups.

(1)(a)(iii) Evidence cited by the federal government that exempting small business from unfair dismissal laws will create 77 000 jobs (or any other figure previously cited)

58. The Federal Government has introduced numerous pieces of legislation since 1996 advocating for a reduction in the protection and coverage of unfair dismissal laws. The government has suggested that the introduction of such legislation will act as an employment incentive to small business and will create 77,000 new jobs. The Federal Government's primary justification for this assertion is that there is a close relationship between access to the unfair dismissal jurisdiction and employment levels.

59. In *Hamzy v Tricon International Restaurants trading as KFC* (2001) FCA 1589, the Federal Court ruled on this issue the first time. The Full Federal Court noted that no investigation had been undertaken on any relationship between unfair dismissal and employment growth and that there was no evidence of a connection between the two.

46. In evidence to the Federal Court in *Hamzy*, Professor Mark Wooden, Professorial Fellow with the Melbourne Institute of Applied Economic and Social Research at the University of Melbourne, and a witness for the Federal Government intervening in the case, admitted that at that time there had been no empirical research to support the view that excluding classes of employees will result in higher employment.

[17] LHMU calculation, based on ABS and DEWRSB data, 1997-2001, see http://www.lhmu.org.au/lhmu/news/580.html.

Federal Government commissioned research

47. Presumably in response to the lack of evidence described in *Hamzy*, the Department of Employment and Workplace Relations commissioned a report on the effect of unfair dismissal laws on small and medium sized businesses[18]. The report claims that compliance with unfair dismissal legislation costs business $1.3 billion per year and the economy more than 77,000 jobs per year.

49. The Federal Government has relied heavily on this research as evidence of the link between access to the jurisdiction and employment, especially in relation to small business.

50. However a number of problems with the research have been identified, rendering the report ineffective as persuasive evidence of a causal link between unfair dismissal exemptions and increased employment.

Business awareness of industrial legislation

51. A key finding in the survey was that 30.7 percent of respondents were not aware whether they were covered by state or federal unfair dismissal laws[19]. This clearly discredits the report's claim that 23.3 percent of respondents considered unfair dismissal laws to be a major influence on business operations[20]. It is difficult to believe that businesses that do not know which law applies can adequately assess the impact of that law.

52. In addition 62.6 percent of businesses were unaware of recent changes to federal unfair dismissal laws which purported to make the unfair dismissal system work better for small business[21]. Again, it is difficult to argue

[18] Don Harding, Assistant Director (Economic Performance) at the Melbourne Institute of Applied Economic and Social Research, *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses,* 29 October 2002.
[19] Ibid, page 9.
[20] Ibid page 13.
[21] Ibid, page 10.

that businesses which are unaware of important changes to unfair dismissal laws can determine their impact.

53. The contradictions inherent in the survey responses suggest that respondents have given negative answers based on their entrenched views about unfair dismissal, rather than any detailed understanding of the legislation. Given this, the research questions should have been more carefully worded to avoid leading the respondents. Greater examination of this misleading nature of the survey questions will occur later in this submission.

Unfair dismissal legislation and employment

54. The Federal Government commissioned research claims that unfair dismissal laws have contributed to the loss of 77,482 jobs[22]. This estimate is based on a question that leads respondents to answer the extent unfair dismissal laws were a factor in the decision to reduce employment.

55. For almost 90 percent of the respondents, unfair dismissals laws were not reported as having *any* influence on decisions to reduce employee numbers.

56. Of the 1,802 respondents, 377 businesses reported that they currently had no employees. Of these 377, 158 businesses used to have one or more employees. Of these 158 businesses that no longer have any employees, only 42 (or 11.1 per cent, Table 25, page 23) stated that unfair dismissal laws had some role in their decision to reduce the number of employees to zero. It is important to understand that *only* these 158 businesses who had reduced their number of employees to zero were asked the extent to which unfair dismissal laws played some role in this decision. Based on the staffing experiences of these 42 businesses who stated that unfair dismissal played

[22] Don Harding, Assistant Director (Economic Performance) at the Melbourne Institute of Applied Economic and Social Research, *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses,* 29 October 2002, Page 23.

some role in their decision to reduce employee numbers, the quoted figure of 77842 job losses is extrapolated.

57. This estimate is based on the survey responses of only 42 businesses. There are more than one million businesses in Australia. An estimate based on such a small sample of respondents is meaningless and should not be used to inform the development of Commonwealth legislation.

The cost to business of unfair dismissal laws

58. In addition to claims about the number of jobs that would be created if small businesses were exempted from unfair dismissal laws, the report also claims that state and Federal unfair dismissal laws cost small and medium businesses $1.3 billion each year[23]. The report states that this figure is at the lower end of the scale and is probably much higher.

59. The costs that the report claims are incurred by business as a result of unfair dismissal laws fluctuate dramatically. Table 21 of the report refers to the estimated total costs 'in time and money of complying with the law and reducing your businesses' potential for exposure to unfair dismissal claims', by industry and size of business.

60. The table indicates that for manufacturing businesses employing between one and five employees, the cost of dealing with unfair dismissal legislation is $17.2 million per year. On the other hand the research indicates that transport businesses with between one and five employees incur a cost of $40.7 million due to unfair dismissal laws.

61. Both industries have very similar levels of employment, according to the research, but wildly differing costs incurred by unfair dismissal legislation.

[23] Don Harding, Assistant Director (Economic Performance) at the Melbourne Institute of Applied Economic and Social Research, *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses,* 29 October 2002, Page 19.

62. The research provides another contradiction in this regard. In retail trade businesses with between one and five employees there are, as measured by this report, 237,900 employees. In communications businesses in the same size classification, there are 274,229 employees in Australia. However the cost differential in relation to unfair dismissal is massive, it being $48.8 million for retail against $158.9 million for communications. This would seem to defy any rational analysis. There is no consistency in the survey results.

Submission of the NSW Government on this research

63. It is suggested that the huge variation in estimates of the costs of unfair dismissal may arise from a misunderstanding on the part of the respondents as to what they were being asked to quantify. It is likely that those who estimated a higher cost might have been including the costs of rehiring and retraining employees to fill positions, and not just costs directly associated with unfair dismissal as such.

64. The cost estimates are calculated across six business sizes in 10 industry sectors. However they are, according to the survey report, reliable estimates in only 25 of these 60 sectors. The other 35 unreliable estimates which, the survey itself cautions, 'should be treated with great care'[24] due to small sample sizes are nonetheless used to calculate total cost impositions across all industry sectors and inform the quoted figure of $1.3 billion. In fact, the research report says that every estimate of the cost to businesses with over 50 employees should 'be treated with great care'. With respect, an estimate of a $1.3 billion cost to business on such grounds and with such small sample sizes should be disregarded.

Comments in conclusion on the relationship between unfair dismissal legislation and employment

[24] Don Harding, Assistant Director (Economic Performance) at the Melbourne Institute of Applied Economic and Social Research, *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses,* 29 October 2002, Page 21.

65. As mentioned in the Government commissioned research, the July 2002 Yellow Pages Survey of Small and Medium Sized Businesses found that only 5.6 percent of firms mentioned either employment conditions/unfair dismissal/industrial relations/safety and health as factors preventing an employer from taking on new employees[25]. In the 1995 AWIRS 1.4 percent of respondents specifically mentioned unfair dismissal laws as impediments to hiring staff[26].

66. Peter Waring and Alex DeRuyter, in their reputable study on unfair dismissal, note the fact that after federal unfair dismissal legislation was first introduced by the Keating Government in 1993, there was strong employment growth in the period 1993/94 to 1996/97[27]. They also refer to the Howard Government taking credit for the creation of 300,000 jobs in its first term of office, despite the presence of unfair dismissal laws for small business.

67. Unfair dismissal is therefore a marginal, but nevertheless important, concern for small business. With some irony, Waring and DeRuyter note that greater concerns for small business have been, as recorded in earlier surveys, superannuation and taxation. However these concerns have not led to exemptions from paying tax or the superannuation levy.

68. There can be no doubt that there will be some business costs associated with unfair dismissal legislation, as there are in complying with a range of taxation and superannuation legislation. Prof Andrew Stewart recognises and notes that most regulations incur some degree of compliance costs. He argues however that 'the question is whether the costs are kept within reason, and can in any event be justified by the benefits'[28]. However it

[25] Don Harding, Assistant Director (Economic Performance) at the Melbourne Institute of Applied Economic and Social Research, *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses,* 29 October 2002, Page 5.
[26] A Morehead, M Steele, M Alexander, K Stephen & L Duffin. *1995 Australian Workplace Industrial Relations Survey* (AWIRS 95)
[27] Peter Waring and Alex DeRuyter, 'Dismissing the Unfair Dismissal Myth', *Australian Bulletin of Labour,* Vol 25, September 1999.
[28] Prof Andrew Stewart, *Submission to the Senate Employment, Workplace Relations and Education Committee* on the *Workplace Relations Amendment (Termination of Employment) Bill 2002*, Flinders University, 14 February 2003.

is not unreasonable to expect business to bear such costs, when the object is to ensure fair treatment of employees.

69. The NSW Government submits that the Melbourne Institute research should be largely disregarded and most certainly not used to justify unreasonable unfair dismissal legislation.

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

70. There have been numerous changes to unfair dismissal legislation in the NSW jurisdiction since 1940, however in substance there has always been provision in legislation for dealing with the dismissal of employees.

71. The *Industrial Arbitration Act 1940* recognised that some terminations could be classed as unjust or unfair in response to which an application could be made to the NSW Commission by the union of which the employee was a member of or qualified to be a member.

72. In 1978 section 20A was inserted into the Industrial Arbitration Act. This section verified the Commissioner's power to order reinstatement and ensured that reinstatement was considered to be an 'industrial issue'.

73. In 1991 The Coalition Government amended the Industrial Arbitration Act 1940 by way of the *Industrial Arbitration (Unfair Dismissals) Amendment Act 1991* which created an unfair dismissal jurisdiction that gave access to employees under awards and agreements, without the need for representation by a union. In addition the Commission could, for the first time, order compensation where reinstatement or re-employment was impracticable.

74. The *Industrial Relations Act 1991* commenced in 1992 and repealed the *Industrial Arbitration Act*. The unfair dismissal provisions in the *Industrial Relations Act 1991* were largely based on those in the 1991 *Amendment Act* (as above). They applied to employees under awards or agreements and employees of the Crown. Applications could be made by an individual or by a union on behalf of an individual.

75. The *Industrial Relations Act 1996* repealed the *Industrial Relations Act 1991.* This Act extended the coverage of unfair dismissal laws to include all public sector employees and all other employees, except an employee not covered by an award or agreement whose annual remuneration is greater than a prescribed amount (currently $90,400). The Act also increased the number of exclusions including fixed term or fixed project employees, probationary employees, short term casuals, apprentices and trainees.

Employment growth and unfair dismissal

76. As already noted in this submission, the Federal Government has repeatedly asserted that a relationship exists between unfair dismissal laws and employment growth. As a result the Commonwealth has suggested that a reduction in the coverage of unfair dismissal laws will enhance employment. However such a relationship has not been proven and much research appears to contradict this view. The terms of reference request comment on any relationship between changes to unfair dismissal legislation and employment growth or lack thereof.

77. The aforementioned Commonwealth assertions were noted by Senator Murray during debate on the *Workplace Relations Amendment (Fair Termination) Bill* 2002. Senator Murray provided statistics on the number of unfair dismissal claims lodged in Western Australia and total employment in that state between August 2002 and August 2003. He noted that 'it [total employment] goes up from 958,000 to 972,000 and unemployment falls and yet the number of applications under federal law for unfair dismissal remain

the same'.[29] Senator Murray continued by providing statistics from Victoria for the same period which also indicated that employment had increased and that unemployment had fallen. As Murray notes:

> *Here you have job creation, a fall in unemployment rate and yet there is this extraordinary claim that it is solely a consequence of federal unfair dismissal application law that we cannot make any headway in these areas.*[30]

78. Waring and DeRuyter[31] come to a similar conclusion in their study of 600,000 job-seekers in 1995 and 1996. Waring and DeRuyter monitored whether or not these job-seekers found positions and if so, the size of the business that they were working for. These job-seekers were searching for work during the time the unfair dismissal provisions of the federal *Industrial Relations Reform Act 1993* were in force. They concluded that 'there has been no shortage of job creation in the immediate years following the enactment of the Brereton unfair dismissal provisions'.[32]

79. Waring and DeRuyter also discovered that 27.6% of the positions located by the job-seekers were in businesses with less than 10 employees leading them to state that 'there appears to be little evidence to suggest that unfair dismissal legislation regulations have significantly retarded aggregated job creation in small business'[33].

80. Researchers Burgess, Lee and O'Brien[34] have also examined the employment and unemployment figures prevailing over the course of changes to unfair dismissal legislation. They observed that the unemployment rate has remained below 6 per cent for 2003-04 and that this is the 11th consecutive

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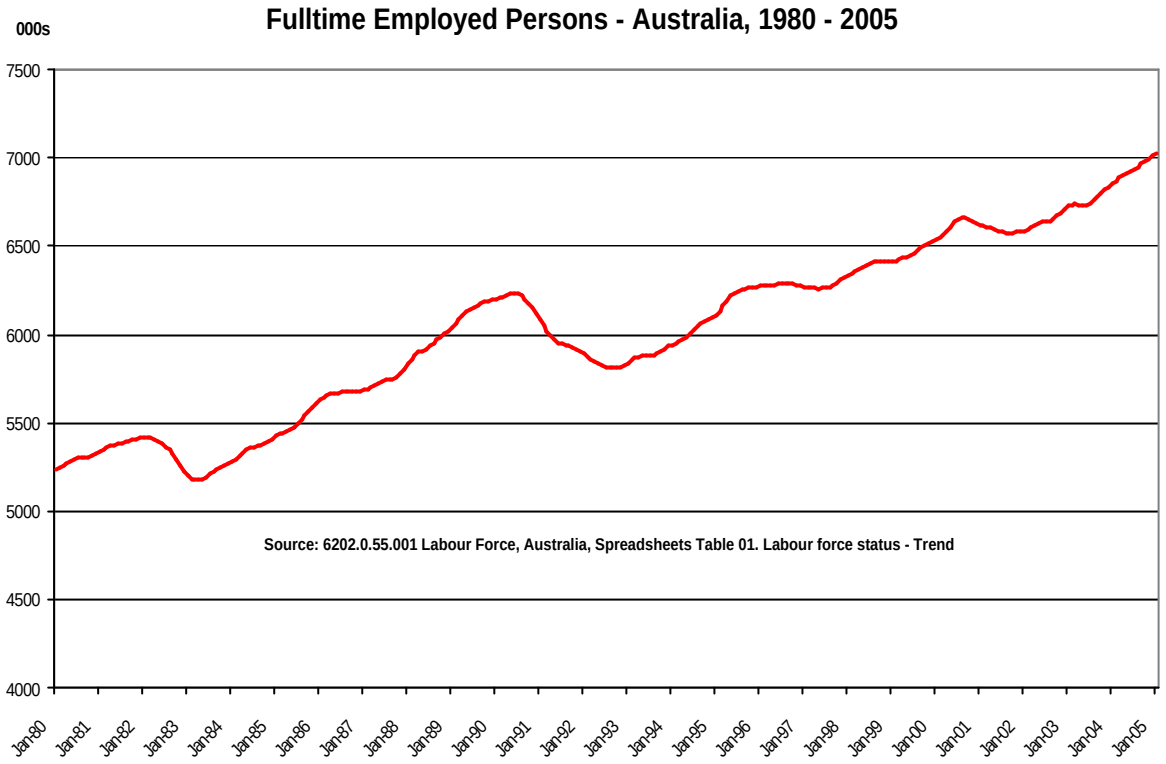
[29] Senate, *Hansard,* 15 September 2003, p. 15083.
[30] Senate, *Hansard,* 15 September 2003, p. 15083.
[31] Peter Waring and Alex DeRuyter, 'Dismissing the Unfair Dismissal Myth', *Australian Bulletin of Labour,* Vol 25, September 1999.
[32] Peter Waring and Alex DeRuyter, 'Dismissing the Unfair Dismissal Myth', *Australian Bulletin of Labour,* Vol 25, September 1999, p. 261.
[33] Ibid.
[34] J Burgess, J Lee and M O'Brien, 'The Australian labour market in 2003', *Journal of Industrial Relations,* June 2004 quoted in Steve O'Neill from Economics, Commerce and Industrial Relations Section, *Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004,* Bills Digest, Parliamentary Library, no 112, 2004-05.

year in which unemployment has declined. Further they observe that almost two million new jobs have been created from 1992-93 to 2004 resulting in a sharp decline in the unemployment rate. The researchers also note that the majority of the new jobs created were of a full-time nature.

81. In further support of this position, the employment growth figures in Australia also show a steady increase since 1980 despite the introduction of unfair dismissal laws in the federal jurisdiction and continuing presence in the state jurisdictions. Table 1 clearly shows the strong increase in total employment from 6,210,500 in January 1980 to 9,851,600 in January 2005. In addition Table 2 illustrates the growth in full-time employment over the same period. Again this graph shows a strong and sustained growth irrespective of changes to the unfair dismissal laws.



82. It is 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 businesses. 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 law.

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

83. As previously noted the Federal Government has often quoted research which implies that an exemption in unfair dismissal laws will create 77,000 new jobs. The NSW Government holds some grave concerns regarding the reliability of this research and the accuracy of the results obtained.

84. The report places great emphasis on suggestive lines of questioning in order to gain 'statistically valid' responses[35]. Other surveys like the Australian Workplace Industrial Relations Survey (AWIRS) and Yellow Pages surveys did not use 'suggestive' questioning and therefore yielded far fewer mentions of unfair dismissal[36].

85. It is important to bear in the mind the 'closed-end' nature of the questions asked and to consider the effect of this type of questioning on the results. For example, question 12a in the survey is worded thus:

> *Thinking about the processes and practices your business uses to recruit and select staff, manage its workforce; and manage staff whose performance is unsatisfactory – which of the following best describes the extent to which unfair dismissal laws influence the operation of your business?*

86. It could be argued that a preferable methodology would be, as has been the case in other surveys, to ask for issues that are important to business and then to probe further if unfair dismissal is mentioned. The leading nature of the questions has produced a response rate, in relation to unfair dismissal, that is nearly five times the rate in other surveys on this issue (AWIRS 95 and Yellow Pages surveys for example). Its reliability must therefore be questioned.

87. The accuracy of research results regarding the opinion of small business operators on unfair dismissal legislation was also discussed by Prof Stewart in his submission on the Workplace Relations Amendment (Termination of Employment) Bill 2002[37]. In this submission Stewart notes the negative publicity of unfair dismissal laws often promoted by employer groups and government. He suggests that such publicity is likely to lead to skewed survey results.

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[35] Don Harding, Assistant Director (Economic Performance) at the Melbourne Institute of Applied Economic and Social Research, *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses,* 29 October 2002, Page iii.
[36] ACIRRT, *Changes at work: the 1995 Australian Workplace Industrial Relations Survey*
[37] Prof Andrew Stewart, *Submission to the Senate Employment, Workplace Relations and Education Committee* on the *Workplace Relations Amendment (Termination of Employment) Bill 2002*, Flinders University, 14 February 2003.

(1)(a)(vi) The extent to which small businesses rate unfair dismissal concerns against concerns on other matters that impact negatively on successfully managing a small business

88. Numerous surveys have been conducted to measure the concerns of business owners on the various issues which impact on their business. These surveys have variously been funded by employer and industry associations and by universities. Overall these surveys indicate that businesses rate unfair dismissal costs lowly particularly in comparison to issues of taxation, superannuation and workers compensation.

89. The Victorian Employer's Chamber of Commerce and Industry (VECCI) conducted a Federal Election Issues Survey in June 2004. VECCI surveyed 493 businesses in both metropolitan and regional Victoria. Of the businesses surveyed 48.4 per cent were small businesses, employing less than 20 staff. These small businesses detailed the top 20 issues of concern.

90. Taxation, including the level of complexity and frequency of changes to tax rules, was the most primary concern of small businesses. This was followed by concerns regarding the cost of worker's compensation, superannuation, PAYG tax and recruiting employees with appropriate skills. Unfair dismissal legislation ranked only ninth on the list of issues of concern[38].

91. The results from the VECCI survey support earlier research findings from Charles Sturt University. The School of Business at Charles Sturt University conducted a survey of 600 small businesses in the Albury-Wodonga area[39]. The participants were questioned regarding the factors which influenced their decision to employ staff. The two most important factors identified by the respondents were workload and economic conditions.

92. Unfair dismissal laws was only a consideration for 5.5% of the survey participants. The businesses were further questioned on whether or not they

[38] VECCI, *Federal Election Issues Survey, 2004.*
[39] Bill Robbins and Gerry Voll, 'Small business and unfair dismissal: Who is being unfair?' *The Weekend Australian Financial Review*, November 20-21 2004, p. 63.

have been involved in an unfair dismissal claim in the five years prior to the survey. Of the respondents, only 2.9% indicated that they had been involved in an unfair dismissal claim.

93. The key researchers in the Albury-Wodonga survey, Bill Robbins and Gerry Voll questioned the businesses which had been involved in an unfair dismissal claim further. Of these businesses, 52.9% represented themselves in the unfair dismissal claim and 60% indicated that they were satisfied with the outcome. These respondents also indicated that they were not alarmed by the costs involved in the proceedings including compensation, costs and time spent defending the claim[40]. Robbins and Voll suggest, therefore, that these results indicate that the unfair dismissal process is not too complex or legalistic as has long been suggested by the federal government and small business employer groups.

94. As clearly demonstrated by these survey results, small businesses do not consider unfair dismissal legislation to be of major concern to their business and generally they do not consider unfair dismissal legislation as a factor in decisions to employ staff.

95. As demonstrated by the Albury-Wodonga survey, an insignificant number of small businesses have been involved in unfair dismissal cases. These results correspond with the survey results for medium and large size businesses who still rate taxation and the complexity of the taxation system as their main concern.

[40] Bill Robbins and Gerry Voll, 'Small business and unfair dismissal: Who is being unfair?' *The Weekend Australian Financial Review*, November 20-21 2004, p. 63.

(1)(a)(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

96. The provision of information on unfair dismissal laws is very important in ensuring that employers understand their rights and responsibilities regarding the hiring and dismissal of their staff.

97. The NSW government has in place numerous strategies to ensure that the small business community is adequately educated about their rights and responsibilities in employing and terminating staff. The NSW Office of Industrial Relations within the Department of Commerce regularly conducts seminars and training sessions on employment law in NSW, including the provision for legal termination of the employment relationship. These training sessions are regularly conducted in a large number of regional and metropolitan locations.

98. These information sessions provide business operators with a clear understanding of their responsibilities and rights regarding termination and assist in ensuring that they are not involved in a termination of employment which results in an unfair dismissal claim. The emphasis is on good recruitment practices and developing workplace staffing policies that ensure that the best candidate is hired in the first place. This minimises the possibility that an employee will have to be counselled, warned or terminated and therefore possible exposure to an unfair dismissal application.

99. In 2004 The Office of Industrial Relations conducted a total of 126 small business education seminars covering areas as diverse as termination and recruitment, understanding NSW awards and managing employees. These seminars were conducted across the state including areas such as Orange and Gunnedah.

100. The seminars supplement the Office's compliance strategies through the provision of personal advice and assistance to employers. A total of 1315 small business operators and managers attended these seminars during 2004.

101. Information services provided by the Office of Industrial Relations, the Department of Employment and Workplace Relations and employer associations appear to have been successful. The Charles Sturt University research referred to earlier indicated that most small businesses understood the unfair dismissal legislation[41]. Further, the majority of small businesses did not consider that they should be exempt from unfair dismissal legislation.

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

102. As demonstrated throughout this submission, there are no demonstrated links between unfair dismissal and employment growth in the small business factor. Further, as indicated by numerous surveys, small business proprietors do not rank unfair dismissal legislation as a major cause of concern for their business or in their decision to hire additional staff. Nonetheless a perceived attitude amongst the business community exists that unfair dismissal laws are unfair and favour employees.

103. Obviously a more thorough study is required to determine whether a relationship exists between unfair dismissal laws and small business and the extent and ramifications of such a relationship. Better information and data collection from the state and federal industrial relations tribunals on the businesses involved and the outcomes of the cases would provide a more accurate picture of the number of unfair dismissal cases lodged.

[41] Bill Robbins and Gerry Voll, 'Small business and unfair dismissal: Who is being unfair?' *The Weekend Australian Financial Review*, November 20-21 2004, p. 63.

104. Furthermore the NSW Industrial Relations Commission has recently introduced new standards in relation to occupational health and safety and industrial matters. These time standards recognise that the disposition of cases is integral in assessing the effectiveness of case management strategies. As a consequence, the NSW Industrial Relations Commission is now required to finalise all unfair dismissal applications within 2 to 9 months from the date of application. These new time restrictions are designed to provide employers and employees with the best chance of resolving differences and maximising the chances for reinstatement. This increased efficiency of the NSW Industrial Relations Commission should ensure that any unfair dismissal claims are promptly resolved.

105. As a further means of reducing the negative view of unfair dismissal laws, it may be advisable for the federal government to improve the funding and resources available to the Australian Industrial Relations Commission. As noted in the AIRCs Annual Report for 2003/4 'there will be a significant gap between the funds provided by the Government… and the funds necessary for the provision of registry services to the Commission and the public'[42]. The Report continues to suggest 'that forecasts for later years indicate ongoing deficits of some magnitude' which will possibly result in a reduction of services in 2005 and 2006. Obviously such a lack of funding will result in poorer services to the community and may be compounding the negative perception of unfair dismissal laws. An increase in the funding and services provided by the AIRC may help alleviate some of the business community's concerns.

[42] AIRC, *Annual Report,* 2003-04.

Conclusion

106. The NSW Government submits to the Committee that there is no evidence, at either a national or international level, to suggest that there is any correlation between employment protection legislation and the level of employment.

107. OECD research, although it does not completely dismiss the possibility of an impact, confirms the lack of evidence in its comparative research on international unemployment rates and unfair dismissal legislation, and it has been further confirmed by domestic academic research findings.

108. This submission demonstrates that there is no connection that can be drawn between changes to unfair dismissal legislation and negative impacts on small business. While data is not currently collected in the NSW jurisdiction that indicates how many unfair dismissal applications are lodged against small business, it is submitted that the number of businesses directly affected by such an application is very small.

109. The NSW Government is firmly of the view that it is simplistic in the extreme to lay any blame for unemployment, or a lack of employment growth, at the feet of unfair dismissal legislation. There are undeniably a range of factors involved in determining the reason for un/employment such as:

- International, domestic and government investment in infrastructure and services.
- International commodity prices.
- International and domestic interest rates.
- The price of labour in competitor countries.

The NSW Government does not accept therefore that the existence of unfair dismissal legislation has any direct affect on employment levels.

110. Evidence cited by the Federal Government that an exemption from unfair dismissal laws for small business will create 77,000 new jobs is, in the submission of the NSW Government, based on research that has been widely discredited. This submission draws the Committee's attention to a number of flaws in the research methodology and findings. Further, the findings are inconsistent with other available research.

111. The style of questioning used in this research, leading questioning, is a method that provokes the respondents to provide preordained responses. Incredibly, this has been admitted by the designer of the survey. The Melbourne Institute research has a much higher response rate in relation to negative perceptions of unfair dismissal legislation than other surveys that request open-ended responses.

112. This submission draws the Committee's attention to the fact that a great deal of research on issues affecting small business actually places exposure to unfair dismissal applications as a relatively minor consideration for managers and owners. Issues of much greater significance are superannuation and taxation.

113. The NSW Government takes the position that many of the concerns expressed by small business operators and organisations can be addressed through the provision of information which will assist businesses in avoiding the dismissal of employees. The NSW Government has ensured that small business information needs are thoroughly addressed. The Office of Industrial Relations, within the Department of Commerce, provides a large number of seminars on a range of employment issues, including recruitment and termination issues.

114. Employment protection legislation is an important safeguard for employees. It ensures procedural fairness in the workplace and further that employees cannot have their employment terminated without notice or a valid reason. This is a basic and necessary right to ensure employment

relationships that are built around the clear principle of a 'fair go all round.' Such legislation is also consistent with ILO principles of fairness and equity at the workplace.

115. The NSW Government acknowledges that any business, either large or small, may be inconvenienced by having to deal with an unfair dismissal application. There may be legal costs, operational costs due to having to attend conferences and hearings and the stress of having to go through litigation. However these in themselves are no justification for removing the right of employees in small businesses to a fair hearing about the rights or wrongs or their dismissal. Employees face similar costs and often would be less likely to be able to afford them.

116. The NSW Government would be supportive of the commissioning of any independent research that might address the Committee's terms of reference. The NSW Government does however acknowledge that there has already been a great deal of research conducted on employment and unfair dismissal issues, and that this research should be given a great deal of weight. At present the question of unfair dismissal is so politically charged that research methodology should be carefully and strategically crafted to ensure unbiased and statistically relevant results.

117. In conclusion, the NSW Government submits to the Committee that if federal legislation as currently drafted were to be enacted, it would enshrine discrimination against small business employees, many of whom are already in vulnerable situations because of the casual nature of their employment, their family or migrant status or the fact that they are low-paid employees. Unfair dismissal law is internationally recognised as an important form of employment protection for these employees. Any attempt to further erode their conditions of employment should be viewed with a great deal of caution.