

**SENATE EMPLOYMENT, WORKPLACE RELATIONS,
SMALL BUSINESS AND EDUCATION LEGISLATION
COMMITTEE**

Workplace Relations Amendment (Unfair Dismissals) Bill 1998

MINORITY REPORT

SENATOR ANDREW MURRAY

Australian Democrats

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Minority Report: Senator Andrew Murray: Australian Democrats
Workplace Relations Amendment (Unfair Dismissals) Bill 1998

The Australian Democrats fully supported, and do still support, the relevant unfair dismissal provisions of the federal *Workplace Relations Act 1996*, introduced on 1 January 1997.

The politics

In March 1998 the Senate defeated the *Workplace Relations Amendment Bill 1997*, which was introduced despite previous assurances from the Prime Minister and the Minister for Workplace Relations that they would not discriminate against employees in this fashion. The political climate of the time meant that the Government wanted a double-dissolution trigger, to use for political pressure on the Senate. There is a strong suspicion that the Coalition introduced that particular bill to provoke the Senate to reject the Bill and achieve a double-dissolution trigger. They were successful in getting the trigger.

Having rediscovered the popularity of this unfair dismissal campaign with the business community at large, the Coalition continues to press the case. The question is, has the case for exempting small business from the federal unfair dismissals legislation improved?

Business motivations

All my interactions with business on this issue, either private or public, have convinced me that at the heart of business opposition to unfair dismissal laws – whether by small business, big business, or business organisations – is a basic and fundamental belief that employers should be able to hire and fire at will. Since this is their motive, facts such as there being only *twenty* federal small business unfair dismissal applications in South Australia for instance, are simply swept aside by South Australian employers and their organisations. If there were only *one* unfair dismissal application, in my view they would still oppose the law, because they oppose it in principle. That is why business is undeterred by facts which contradict their assertions.

A witness, Mr Moore, expressed this very view succinctly

Mr Moore - ...if an employer judges that the employment relationship is not working out, or that the business needs to reduce employment, it should be within his/her sole capacity to make a dismissal, subject to complying with any relevant terms of employment agreed with an employee (including as to notice) and to any relevant general legislation or common law.¹

The answer to such a proposition rests on the importance of work and employment to employees, and on the need to reinforce the rule of law, natural justice, and human rights in

¹ Des Moore, *The Case for Further Deregulation of the Labour Market*, Research paper prepared on behalf of contributing members of the Labour Minister's Council, November 1998, p.60.

employment relationships. Because of an underlying desire by business for power over employees it is important for democracies to regulate and monitor business interaction with their employees, and to temper business demands for excessive freedom to deal with employees just as they see fit.

The Democrats remain strongly of the opinion that the historical record and the current practice of employee termination by significant numbers of businesses is such that it remains necessary to provide an accessible and workable remedy, much quicker and cheaper than the Courts, to redress unacceptable dismissal behaviour.

Surveys

Surveys have played a large part in this debate. Some surveys indicate that there is no problem in the unfair dismissals area, or only a minor one.²

This is a debate riddled with perception, assertion, and anecdote. The facts are that in every jurisdiction except Victoria, *federal* unfair dismissal applications are very small in number. But perceptions rule the debate. A business perception that there is a major problem with federal unfair dismissals appears to have become reality. The perception creates the reality. The Coalition Government has avidly fuelled the perception. So have some employer organisations. In this perception the role played by those conducting surveys needs careful examination.³

How does one account for nearly every survey cited in evidence failing to follow sound methodological practice, instead asking loaded prompted questions? How does one account for the failure to ask the most basic of threshold questions – whether respondents fall under *federal* workplace relations legislation, (which is all the Senate can concern itself with), *or* Western Australian, South Australian, New South Wales, Tasmanian, or Queensland *state* industrial relations legislation (which the Senate can do absolutely nothing about)? How does one account for the failure to ask respondents if they know their rights and obligations under the *federal* law? Or given the way the law has changed in a few years, to ask respondents when incidents were supposed to have happened, and on what circumstances their opinions are based?

Senator MURRAY - In the state in which you are resident there are two sets of laws: the New South Wales state laws and the federal laws. With regard to a respondent who fell under New South Wales state legislation, would you regard a survey which asked them a question as having any validity with regard to federal law, if the federal law was fundamentally different from the New South Wales law?

Prof. HUNTER – It would certainly call into question the validity of that response. What you would have is a response that said, ‘Yes, I am bothered about unfair dismissal laws’, but it tells you absolutely nothing further about what kind of unfair dismissal law, which jurisdiction. It certainly does not mean that, if you remove the federal legislation, the problem would be resolved.

² Submission 10 Justice Research Centre page 5

³ See for instance *Dismissing the Unfair Dismissals Myth* Peter Waring and Alex de Ruyter University of Newcastle

Senator MURRAY - So you immediately should have a question mark over the validity of the responses of any survey which failed to ask the threshold question?

Prof. HUNTER - I think so, yes...

Prof. HUNTER - ...if, as our analysis would suggest, the fundamental issue here is not the actual impact of the laws but people's understanding of them, then an equally valid interpretation of a result like that is people really do not understand what they are covered by.

Senator MURRAY - Thank you. You were talking about leading and prompted questions. Would you describe that as typical of the techniques used in push polling?

Prof. HUNTER Yes, absolutely. That is characteristic of the technique of push polling.

Senator MURRAY - What do you believe push polling says about the integrity of organisations that use it?

Prof. HUNTER - I think it says that there is a particular end that they wish to achieve, and this is the means that they have used to achieve it.

Senator MURRAY - Would you describe it as manipulative?

Prof. HUNTER - In many circumstances, yes.⁴

Take a finding from the Tasmanian Chamber of Commerce's 1997 and 1998 surveys. Unfair dismissals were considered a critical problem by 34 per cent and a major problem by 22 per cent of respondents.⁵ The total number of *applications* under *federal* unfair dismissal law for small business in Tasmania in 1998 was 56⁶. (All business was 242). It is very difficult to accept that half of all small businesses in Tasmania consider *federal* unfair dismissal law a huge problem when the total number of applications filed is 56.

In the South Australian Employer's Chamber of Commerce and Industry 1998 survey 80 per cent of respondents felt at risk from unfair dismissal claims.⁷ The total number of *applications* under *federal* unfair dismissal law for small business in South Australia in 1998 was 20⁸. (All business was 284). It is very difficult to conceive of 80 per cent of South Australian small businesses being in fear of *federal* unfair dismissal laws when the total annual number of applications filed is 20.

It is regrettable that some large and small business supporters of the *Workplace Relations Amendment (Unfair Dismissals) Bill 1998* should be arguing for the Bill's right to sack small business employees unfairly, when the evidence is so strong that the federal laws are not oppressive on employers⁹. The surveys and evidence relied upon in support of the Bill's proposition often predate the Coalition's new Act, or rely on feelings provoked by the Coalition's campaign against its own laws. Most of all, the surveys invariably fail to distinguish between Federal and State laws. It is frequently the case that those who complain

⁴ Hansard pp EWRSBE 12-13 Prof Hunter Justice Research Centre

⁵ Tasmanian Chamber of Commerce and Industry 'Tasmanian Small Business Priorities Survey(s)' in *Unfair Dismissal Compendium* November 1998

⁶ See Table 1 Appendix 3 to this Minority Report

⁷ South Australian Employer's Chamber of Commerce and Industry 'Unfair Dismissal Survey Results' (1998) in *Unfair Dismissal Compendium* November 1998

⁸ See Table 1 Appendix 3 to this Minority Report

⁹ See Appendix 1 and Appendix 3 to this Minority Report

about unfair dismissal laws are subject to their State jurisdiction.¹⁰ The Federal law is simply not applicable to many of them.

It is also ironic that some small business groups and individuals argue for the right to sack workers unfairly, while rightly campaigning against big business' practices of treating them unfairly, particularly as tenants. The analogy between the employer/employee relationship, and between the landlord/tenant relationship, should not escape them.

Mr Ballard, Labour Relations Adviser to the Australian Chamber of Commerce and Industry, made a quite remarkable claim as to the high level of knowledge of business concerning federal unfair dismissal laws, and that surveys being used to justify changing the federal law should not concern themselves with the fact that respondents might be relating to quite different state laws.

With respect to ACCI survey material referenced in our submissions, ACCI expect that most Australian businesses have no choice but to be aware of the unfair dismissal regulations of the *Workplace Relations Act 1996*. There was no need to specifically ask as such in the surveys. Respondents were not asked which legislation they fell under, in our view that is a technicality not considered by small business owners when they are attacked by an unfair dismissal claim.¹¹

In that same letter from Mr Bollard it became clear that employer organisations themselves are not sure which unfair dismissals legislation small business fall under. As an example, from the quote below, it is left unclear whether they think Western Australian small business is 100 per cent or 70 per cent under state legislation.

CCIWA estimate that 70% of small business members would fall under State jurisdiction – 30% under Federal legislation.... Australian Retailers Association....in NSW, QLD, WA, SA, and TAS it is believed that all small businesses fall under state legislation.

In our view it is unrealistic to expect small business to know the provisions of federal law or state law, or even whether they fall under state or federal laws

Mr. GOLUZD - ...A lot of small businesses do not know what legislation they fall under.¹²

In the Hearing, it was sometimes unclear whether federal unfair dismissal for small business was a problem or not. The questioning had been to establish what exempting 20 federal small business unfair dismissal applications in South Australia would achieve.

Senator MURRAY –why are 20 applications in South Australia a big issue?
Ms PARSONS – They are not, and it must be recalled that we are speaking here on behalf of a national organisation. South Australia clearly has that reduced number

¹⁰ Such as Submission N0.5 Tonkin's Car Audio Pty Ltd

¹¹ Letter to the Committee 22 January 1999

¹² Hansard EWRsBE 2 Jack Goluzd GM Workplace Relations, Australian Business Ltd

because of a simpler and perhaps more effective system of dealing with unfair dismissals.¹³

In 1998 the total number of federal unfair dismissal applications in South Australia was 284 (20 for small business), and was 971 for state unfair dismissal applications. The witness clearly accepts that 20 federal small business applications is not a problem, but believes the state system delivering 971 all business unfair dismissal applications is better than the federal one delivering 284 applications.

All witnesses seem agreed that the level of unfair dismissal disputes is far higher than the actual number who take the dispute to the Commission. Employers maintain that the chequebook often resolves the matter, and that they are oppressed by even the prospect of the unfair dismissal process. Employees on the other hand, apparently often walk away in disgust.

Mr RYAN - ...I have spoken to workers who I have been personally convinced had a watertight case that they should take to the Commission or to the Federal Court, either as an unfair dismissal or as an unlawful termination. Workers simply will not do it. Often their attitude is, 'I have seen the last of that so-and-so. I do not want to have any more to do with that business or that employer. I am prepared to get on with my life', and they will just walk away. I do not think that the average Australian is a litigious person by nature.

There is no way of knowing what the outcome in the Commission would have been in reality for those who pay up or those who walk away. The Senate cannot be expected to change laws which affect existing rights on the unquantified and unqualified numbers resolved outside the Commission. The Department of Workplace Relations has attempted to come up with a valid estimate of the numbers who fall outside the formal dispute system, and has failed.¹⁴

The Australian Retailers Association¹⁵ acknowledged that the problem of federal unfair dismissal was small, but the perception was big. The ARA has 10 000 members employing 640 000 people.

4.1.7 Collectively, the ARA's constituent bodies would handle about 700 unfair dismissal applications on behalf of members each year.

4.1.8 This only represents a small number of persons employed by the industry. But the effect on the perception of employers, particularly small employers, is immense.

Perhaps if the Government and business organisations spent less time beating the issue up, and more time concentrating on education and training, we might see perception and reality move closer together.

¹³ Hansard EWRSBE 26

¹⁴ Hansard EWRSBE 59

¹⁵ Submission No. 07 Australian Retailers Association pages 3 and 5

Statistics

All ABS statistics for small business are based on the definition of 20 employees and below, (and 100 for manufacturing small business.) Good statistics are therefore available for this definition of small business. The Coalition has chosen a small business definition of below 15 employees, and there is no statistical data base for this definition. Consequently it makes it virtually impossible to assess the numbers of employers and employees who nationally fall into this category. And there are no statistics whatsoever as to how many small businesses fall under the *federal* legislation, as distinct from the *five other state* industrial relations regimes.

In passing we should note that discriminating between classes of employees in this area of industrial relations is uncommon. Only Sri Lanka, Germany, Austria and the Republic of Korea limit protection against unfair dismissal according to the size of the business concerned.¹⁶

At my urging we now have statistics which indicate how many unfair dismissal applications have occurred under the Coalition's Act, which actually affect small business and not large business. The evidence we now have is that the majority (65 per cent) of unfair dismissal applications affect large business, and not small. More unfair dismissal applications are under state than federal jurisdictions.

Given that 65 per cent of claims are for big business, but small business employs more people than big business and has vastly more numbers of businesses than big business, it is clear that small business is actually under represented in unfair dismissal claims. Speculatively, this may be because employees in small business are largely not unionised, and lack the means to pursue claims. Alternatively it may mean those more personal relationships between owner/managers and their small business employees lessen the potential for dispute. Or there could be many other reasons. Speculation is however no substitute for objective research.

One witness believed the unfair dismissal laws encouraged the early resolution of claims.

The Union believes that the reason a number of unfair dismissals are dealt with at the enterprise successfully is because of current unfair dismissal laws.¹⁷

Evidence was given by other unions and employee representatives that the existing laws in fact favour the employer, and they opposed many of the changes brought in in 1997.

1998 federal unfair dismissal applications for all businesses, of which two-thirds affect large business, are down by 44 per cent on 1996, from 14 533 applications to 8186. Under their laws the states generated 8 742 unfair dismissal applications, up by 30 per cent on 1996. Federal small business unfair dismissal applications, are down in 1998 on 1996 from 4 505 applications to 2861, for Australia as a whole.

It is possible that some unfair dismissal applications have sought out the more favourable jurisdictions, moving from federal to state jurisdictions where they can. The argument that

¹⁶ Submission No. 10 Justice Research Centre page 6

¹⁷ Submission no. 23 Australian Liquor, Hospitality & Miscellaneous Workers Union (WA Branch)

the *Workplace Relations Act 1996* unfair dismissal provisions are fair to employers is contested by those who say that the statistical evidence for a heavy drop in numbers under federal law is confused where both federal and state jurisdictions prevail. However, where only federal law prevails it seems just as clear that the new laws have indeed restored a fair balance to the needs of employers and employees. There are three solely federal jurisdictions – the Australian Capital Territory, the Northern Territory, and Victoria. The fall in federal unfair dismissal applications in the five states where both state and federal laws operate was 67 per cent from 1998 on 1996. Similarly, from 1996 to 1998 federal unfair dismissal applications dropped by 51 per cent in the ACT and by 41 per cent in the Northern Territory. The aberration is Victoria. Victoria by contrast only dropped by 18 per cent.

Under questioning at the hearing into this bill neither the Department of Workplace Relations and Small Business, nor the Victorian Employer's Chamber of Commerce and Industry, could explain the aberration. VECCI did however give evidence that some legal firms in Victoria were pursuing a vigorously commercial and predatory approach to unfair dismissals, and had been drumming up business.

Mr Siekmann confirmed this view :

Fairness in the legislation is not the principal problem, the fairness of the legal system is.¹⁸

Exempting small business from unfair dismissal laws won't address the shortcomings of the legal system, but it will certainly increase unfairness to employees. If the legal system is a problem that is where the focus should be, not on the rights of employees.

VECCI also argue that unfair dismissal applications are increasing for 1998 versus 1997, but they do not apply a ratio of unfair dismissal application to numbers of employees and numbers of small businesses, which have both increased for 1998 over 1997, and 1997 over 1996.

The figures in Table 2 of Appendix 3 are of interest. Of 8 092 federal termination of employment applications lodged in 1997/8 78 per cent were settled by agreement. Of the remaining 774 contested Australia-wide, 282 were one class action. Of the remaining 493, 63 per cent were settled in favour of employers, and only 17 reinstatements were awarded. In 1998 53 per cent of cases finalised by the Commission were resolved in favour of the employers.

These figures do not represent a system in crisis, and one prejudicial to employers.

Jobs

Almost the entire stated Government motivation for this bill rests on their assertion that passing it will deliver 50 000 jobs. It is absolutely clear from countless statements on the record – that the Government believes that exempting small business from the *federal* laws,

¹⁸ Letter to Senator Jeannie Ferris from the Australian Small Business Association

not the state laws, will deliver 50 000 new jobs. That in their view, justifies attacking existing rights of Australian employees of small business. Only last week the Prime Minister again made the 50 000 jobs claim.

Mr. HOWARD – And you will have an opportunity over the next few weeks in the Senate to make a decision as to whether you are going to knock off our unfair dismissal regulation. Because, if you do that, you will destroy the job prospects of 50,000 Australians in small business.¹⁹

Since this notional 50 000 jobs benefit is entirely predicated on getting rid of *federal* unfair dismissal laws, it follows that any confusion of small business attitudes to *state* unfair dismissal laws has to be avoided, if this policy is to be justified. And since the Government wishes to take away rights, which is always a very serious matter, it also means that facts, not assertions, need to be established.

By now it is well established that that 50 000 jobs figure arose from an estimate²⁰ by Mr Rob Bastian of COSBOA, an influential small business organisation. It is also absolutely clear that Mr Bastian's estimate was based on getting rid of both federal *and* state unfair dismissals legislation, and required a whole range of other things to be done as well.

Senator MURRAY – Your estimate derives from a view of taking away unfair dismissal laws from state and federal legislation, doesn't it?

Mr BASTIAN – No. My estimate is based on a range of things which could be done to encourage small business to employ. A major irritant of this whole debate is that we are centring on unfair dismissals as the only measure which would encourage people to employ. That is not so. The fear that relates to unfair dismissals is a centrepiece in a range of employment disincentives.

Senator MURRAY – But you are talking about a million small businesses, aren't you?

Mr BASTIAN – I am talking about a million small enterprises, yes.

Senator MURRAY – And those million fall under either federal or state industrial relations legislation?

Mr BASTIAN – Yes.

Two things happened to Mr Bastian's figure. The Minister and Prime Minister latched onto it with alacrity, and then converted it into the consequence of getting rid of *federal* unfair dismissal legislation. Mr Bastian's figure has been inflated into a biblical maxim by the Minister for Workplace Relations and the Prime Minister.

Just how credible is this figure? Appendix 4 to this Minority Report, captured in Table 1 of Appendix 3, surely puts the Government's ludicrous assertions to rest. The Government claims that for every federal unfair dismissal application we get rid of in South Australia we will create 200 jobs, for every one in Queensland 102.2 jobs, in Western Australia 69.6 jobs, and in the ACT 4.8 jobs. So the same policy will have massively different effects depending on where you live. The Government's 50 000 jobs guess rests on no empirical research, no case studies, no international and domestic studies.

¹⁹ Hansard, Representatives, P2244 Wednesday 10 February 1999

²⁰ Hansard EWRSE 16

Again and again I have asked a simple question. There are 20 federal small business unfair dismissal applications in South Australia. How many jobs will be created by getting rid of those 20? No one can give an answer. Except for the Government – they say 4 000!

A witness to the hearing, who apart from methodologically unsound surveys (see earlier remarks), had no empirical backing for his job estimates either, added to the bizarre claims being made for the effects of this unfair dismissal exemption:

CHAIR – So there would be a fair probability that a figure like 55, 000 might be an understatement of the effects on unemployment?

Dr. KATES – Yes. I would say that, given the figures, we are looking at well over 100,000, possibly 200,000, jobs because of that.

Senator MURRAY – Getting rid of federal unfair dismissal legislation – 200,000 jobs?

Dr. KATES – We are talking about unfair dismissals in general.

Senator MURRAY – We are only talking about federal legislation here.²¹

Dr Kates did not agree with Fred Argy, former secretary of the Department of Labour, a former director of EPAC, President of the Economics Society, and a fellow of the ANU. In *Australia at the Cross Roads. Radical free market or a progressive liberalism?* page 97, Mr Argy wrote.

Australian employers already have considerable scope for organisational or functional flexibility under existing industrial relations legislation and any reforms designed to further increase their human resource management capability, e.g. by further award simplification or exemption from the unfair dismissal provisions, are likely to yield small economic returns relative to the social and quality of life costs.

How exempting 304 federal small business unfair dismissal applications in New South Wales, 79 in Western Australia, 56 in Tasmania, or 20 in South Australia would seriously address the problem of the unemployed in those states does not stand up to rigorous analysis.

In this period, how has small business employment fared anyway? Given a significant growth in small business employment in this period, can the Government or its supporters on this issue tell us how much better employment was because of the unfair dismissal changes from January 1997, or how much better it would have been if small business had been exempted? If they can't, it will be because their case rests on assertion.

²¹ Hansard EWR5BE 41 ACCI

Workers employed by Small and Large Businesses (000s)

Month	Small Business employment	Change	Large Business employment	Change
Nov 96	1947.3		3409.8	
Aug 98	2320.4	+373.1	3272.3	-137.5

Source: ABS6248.0

The extract below is from Appendix 4 to this Minority Report, is supplied by the Department of Workplace Relations, and gives an idea of job creation for Australia as a whole :

(3) Figures for the number of jobs created in each State and Territory in 1996 and 1997 (trend series annual averages) are as follows. (Source: ABS Labour Force Survey.)

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT	AUST
1996 '000	36.9	32.0	26.5	5.3	10.4	1.0	1.9	-1.9	112.5
%	1.3	1.6	1.8	0.8	1.3	0.5	2.3	-1.2	1.4
1997 '000	13.4	17.5	31.9	2.9	19.3	-6.8	1.9	1.6	80.7
	0.5	0.8	2.1	0.4	2.3	-3.4	2.2	1.1	1.0

There are a number of factors that contribute to the differences in labour market performance across the States and Territories. For example, the States and Territories generally rely on different industries for economic and employment growth. As such, any changes in policy or economic conditions which affect sectors in a non-uniform manner can be expected to have different impacts on employment. Similarly, characteristics such as population size and growth, natural attributes and climatic conditions also contribute to the differences in employment growth.

One witness put the problem that the Senate must address in a nutshell.

It is too great a risk to forego actual existing rights (which have a moral underpinning to them) based on a *hypothetical* premise that there might be an economic benefit.²²

Western Australia – a test case for jobs v unfair dismissal laws

In examining the case that the harm in destroying rights is justified by the good in creating significant numbers of jobs, we must question whether job creation would be at all affected by the unfair dismissal exemption. These are the facts available to us under unfair dismissal laws in Western Australia.

	1996	1998	
Total unfair dismissal applications	2793	1856	-34%
Total state unfair dismissal applications	918	1553	+69%
Total federal unfair dismissal applications	1875	303	-84%
Total federal small business applications	488	79	-84%

Total unfair dismissal applications are down 34 per cent in WA, federal unfair dismissal applications are down 84 per cent, and federal small business unfair dismissal applications only number 79.

Attached is a graph showing private sector employment in WA. There is nothing on that graph to show that any of the changes, more severe or less severe, to unfair dismissals law over the last decade have affected employment one iota – whether pre-1993, post 1993, or post 1996. That is because the main determinant of work in small business is economic conditions and opportunities, not unfair dismissal laws.

The Small Business Development Corporation annual report 1998 supplies some useful figures. There are 341 000 people employed in small business in Western Australia, 114 300 self-employed people or employers, and 226 700 employees. Growth in number of

²² Submission No. 12 Shop Distributive & Allied Employee's Association

employees has averaged 4.5 per cent annually for the last decade, well above the 3.6 per cent national average. It is economic conditions, which produce job growth, not unfair dismissal laws or the lack of them.

There are 106 300 small businesses in WA, 85 per cent of them employing less than five people. 79 federal small business applications are an incidence of 0.07 per cent. And as for them acting as a restraint on job creation - in the past two years the number of people employed in the small business sector has grown by 19 per cent.

Conclusion

Many of the employee relationship problems small business have continue to be those related to owner/manager skills, training and experience in managing people.²³

There do appear to be problems, which this bill does not address, concerning the Commission and its operation, as outlined in considered submissions such as that by VECCI.²⁴ There are also claims concerning the way the legal system is operating. It is in the interests of all parties concerned with unfair dismissals, if the Commission's processes are made as quick and inexpensive as is consistent with the needs of justice, and if the process of law does not become manipulative.

The small business exemption proposals upset the 'fair go all round' principle. The Democrats believe the federal 'fair go all round' laws provide a much fairer basis for determination of dismissal than the old law. The exemption proposal introduces considerable unfairness.

The excessively pro-worker, pro-union, cumbersome, process-driven and costly dismissal provisions of the former Act needed to be overhauled. They have been. The Federal Government now has the law it wanted in these respects with only minimal changes. Indeed, the new federal law is even more attuned to the needs of small business than the pre 1993 State laws, which small business seldom protested at.

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.

This issue is not about jobs. It is about what is fair and what is right. It is neither fair, right, nor necessary to give fewer rights to workers in small business versus those in other sectors. It is neither fair nor right to deny essential protection to employees against rogue employers. This is a human rights issue, and the Democrats will not agree to this bill.

²³ Submission No. 03 Mr Michael J Taliangis

²⁴ Submission No. 17 Victorian Employer's Chamber of Commerce and Industry

Recommendations

Recommendation 1.

The Australian Democrats do not support Recommendation 1 of the Coalition Majority Report, which supports the introduction of a universal six month qualifying or probationary period for employees under the federal *Workplace Relations Act 1996*. The Democrats are of the opinion that the present general maximum of three months remains appropriate. There may be specific instances with particularly complex businesses where a longer probationary period could be considered. In principle the Democrats would not oppose such discretion being given to the Commission, for awards and collective agreements, with the consent of all parties to the agreement.

Recommendation 2.

The Democrats do not support Recommendation 2 of the Coalition Majority Report, which supports discriminating against small business employees by exempting them from the unfair dismissal provisions of the federal *Workplace Relations Act 1996*.

Recommendation 3.

The Democrats do support Recommendation 3 of the Majority Report, which proposes better education on these matters.

Recommendation 4.

The Democrats urge the Government to actively campaign for harmonisation between state and federal unfair dismissal laws, with the latter as the template.

Recommendation 5.

With respect to costs and time issues, the Democrats believe that evidence provided by employer and employee organisations does indicate that there may be deliberate time wasting and cost pressure put on applicants or respondents for tactical reasons. The Democrats recommend that

- (a) a greater onus needs to be placed on the Commission to establish at the conciliation stage the merits of an employer or employee's case, and to provide preliminary advice accordingly. That might include a warning that in any subsequent award of costs, or decision as to orders, such preliminary advice might prejudice such costs or orders if the

parties ignore advice which is subsequently upheld, or if the matter is not settled by agreement within a reasonable but short period, or if the matter is subsequently contested, and lost by the party which ignores such advice.

(b) if either party, in the opinion of the Commission, is abusing the process, deliberately wasting time or deliberately applying cost pressures, the Commission should be given the power to award costs against that party's legal practitioners, or those advising the applicant or respondent, which should be specifically precluded from recovery from the client.

(c) cases being conducted on a 'no win, no fee, contingency' basis should be made a matter of public record.

(d) the Commission must have regard to disciplining any legal firm whose ethical approach is coloured by commercial predation.

Recommendation 6.

Employers have made a case that while they are subject to the full force of the law through the Commission for unfair dismissal, employees are not subject to the same legal force to fulfil their obligations to give due notice of their resignation, and to work out such notice, if so required. The Democrats recommend that this problem be subject to further examination by the Government, if it is found this is indeed a significant problem.

Recommendation 7.

Unfair dismissal disputes are apparently sometimes settled prior to even being recorded as applications to the Commission. If that is so, given that most applicants and respondents are likely to be ignorant of the provisions of unfair dismissals laws, it may be useful for the Government to consider whether it is practical to require legal firms to advise respondents that they should seek independent advice, and should consult the Commission on any threatened action.

APPENDIX 1

Unfair Dismissal Provisions in the *Workplace Relations Act 1996*

The key changes on unfair dismissal by the *Workplace Relations Act 1996* were:

1. **Change in Onus of Proof:** Instead of an employer having to prove they had a ‘valid reason’ for the dismissal, the employee now needs to prove the dismissal was unfair, harsh or unjust.
2. **Hearings to be in the Commission:** Instead of proceedings being in the Federal Court (with more costly representation and longer time lines), they are now heard and determined in the less formal Australian Industrial Relations Commission. The Commission is also required to deal with matters promptly with the minimum of technicality.
3. **Costs may be awarded against Employees:** If an employee proceeds with a frivolous or vexatious claim, they can now be liable for a costs order. The Commission will warn them if an application appears to be frivolous or vexatious.
4. **Application fee to apply:** A \$50 application fee applies to employees, acting as a disincentive to ‘speculative’ applications. The fee is waived only if the employee is in financial difficulty.
5. **Viability of Employer taken into account in damages:** The Commission is required, among other things, to take into account the “viability of the employer” in deciding whether to award damages in lieu of reinstatement for termination. This means that if an award of damages would send a business to the wall and put other employees out of a job, it should not be made.
6. **Procedural Fairness not Mandatory Requirement:** The mandatory detailed requirements about warnings have been deleted from the Act. Procedural fairness might be something the Commission takes into account, but a fair dismissal cannot become unfair because of a technicality, as could happen under Labor’s laws.
7. **Probationary Employees - excluded:** The new Act extends the number of probationary employees who cannot apply for unfair dismissal, allowing a full exemption for new employees in their first three months of employment.
8. **Casual Employees - exemption extended:** Casual employees cannot apply for unfair dismissal unless they have been employed for more than 12 months (formerly 6 months.)
9. **Specified Term Contracts - exemption excluded:** Employees employed on a specified term contract and dismissed at the end of that term in accordance with the contract, cannot apply for re-instatement (they could under Labor’s law, if employed for longer than 6 months).
10. **State Systems re-instated:** The Federal system will not override State systems, and applies only to workers employed on Federal Awards and working for a corporation. The Federal Act also applies to all employees in Victoria and the Territories. This means most small business claims are now be dealt with by State Tribunals.

APPENDIX 2

How the Unfair Dismissal Laws Evolved

1993 to 1997...

Prior to 1993, State tribunals dealt with unfair dismissals, with workers having to show that a dismissal was harsh, unfair or unjust in order to obtain relief. There were few, if any, calls for the abolition of these essential workers' rights.

In 1993, Victoria's Kennett Coalition government moved to significantly lessen access and relief for unfair dismissal. In response, the Federal Labor government moved to override the Kennett legislation, using the external affairs power.

To access the external affairs power, the Federal Labor Government needed to stick very closely to the terms of the ILO Convention 158, which holds that an employer must have a "valid reason" for dismissing an employee. This introduced a large number of procedural requirements and a more complex jurisdiction than the old state laws. Employers strongly opposed the provisions because of the change in onus. An unintended effect of the employers' high profile campaign was to massively raise worker awareness about their rights to challenge unfair dismissal, with a higher consequent increase in applications for reinstatement.

During the 1996 election, the Coalition promised to replace Labor's laws with a 'fair go all round' for employers and employees. While little detail was provided, it was clear that all workers would have access to the regime, and that the test for unfair dismissal would be closer to the pre-1993 rules.

The Democrats, prior to the election and since, supported the Coalition's policy direction. During the election campaign, the Council of Small Business Organisations of Australia (COSBOA) asked the Coalition, the Democrats and the ALP to support an exemption for small business and **all three parties refused** on the basis that it would breach the 'fair go all round' approach.

The *Workplace Relations Act 1996* passed through the Senate with the Democrats support, implementing the 'fair go all round' approach.

The unfair dismissal regime contained in the *Workplace Relations Act 1996* relies mostly on the corporation's power rather than the external affairs power, allowing the Act to avoid the procedural difficulties of the ILO Convention.

APPENDIX 3 : STATISTICS

Table 1 : The relationship between Government claims of job creation, and federal small business unfair dismissal applications

State	No. of all business unfair dismissal federal applications by state in 1998*	No. of small business unfair dismissal federal applications by state in 1998*	Government estimate of job creation from exempting federal small business #	Therefore no. of jobs created by exempting federal small business unfair dismissal claims
ACT	249	105	500	4.8
NSW	1381	304	16,500	54.3
NT	233	79	500	6.3
QLD	310	93	9,500	102.2
SA	284	20	4,000	200.0
TAS	242	56	1,000	17.9
VIC	5,184	2,125	12,500	5.9
WA	303	79	5,500	69.6
Total	8186	2861	50,000	17.5

- **Source: Minister for Workplace Relations has supplied total figures, and the percentage that is small business(letter to Senator Murray 21.1.99)*
- *# Refer Question With Notice No. 10 by Senator Murray Appendix 4.*

Table 2 : How unfair dismissal applications are processed

Processing

In 1996/97 (when these figures were last kept), 62 % of unfair dismissal claims trials were completed within one day, while 84 % of trials were completed within two days.

Total no. of federal termination of employment applications

Lodged 1997/98		8,092
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78 % settled by agreement		6,303
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(eg withdrawn, settled or otherwise discontinued prior to conciliation or settled at conciliation and withdrawn, discontinued or otherwise settled after conciliation but prior to final orders.)

Contested Federal cases in 1997/98 Australia-wide		774
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(This figure includes 282 applications against Gordonstone

Coal Management which were treated as one class action, and decided in favour of the employees.)

Excluding Gordonstone Coal:

Decided in favour of employers	63 %	311
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Decided in favour of employees	37 %	182
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Awarded reinstatement	2 %	17
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1998 figures²⁵

15 647 applications filed in the AIRC. Of those 2 236 (14%) were still pending for conciliation by the AIRC.

Of the remaining 13 411 (86%) applications :

- 427 (3%) of the applications had been dismissed at a preliminary stage on jurisdictional grounds
- 2483 (19%) had been withdrawn or otherwise discontinued prior to conciliation.
- 7 484 (56%) had been settled by conciliation.
- 3 017 (23%) had been unable to be settled at conciliation.

Of the 3 017 applications in which certificates had been issued, ie. matters unable to be settled at conciliation,

- 84 (3%) claimed unlawful termination only (to be heard by a court)
- 2 933 (97%) claimed unfair dismissal to be heard by the AIRC.

The overall balance of outcomes in cases finalised by the AIRC is

- 628 (53%) for the employer and 564 (47%) for the employee.

Table 3 : Total number of all business federal unfair dismissal applications under the federal Workplace Relations Act 1998 compared to 1996.

State/Territory	Jan-Dec 1996	Jan-Dec 1998	% plus/minus to 1996
NSW	4290	1381	(68)
QLD	512	310	(39)
SA	633	284	(55)
TAS	360	242	(33)
WA	1875	303	(84)
Sub-total	7670	2520	(67)
ACT	509	249	(51)
NT	396	233	(41)
VIC	5958	5184	(13)
Sub-total	6863	5666	(17)
TOTAL	14533	8186	(44)

Source: Minister for Workplace Relations and Small Business

²⁵ Submission No.19 Department of Employment, Workplace Relations and Small Business Fact Sheet

Table 4 : Total number of small business federal unfair dismissal applications under the federal Workplace Relations Act 1998 compared to 1996.

State/Territory	Jan-Dec 1996	Jan-Dec 1998
NSW	944	304
QLD	154	93
SA	44	20
TAS	83	56
WA	488	79
Sub-total	1713	552
ACT	214	105
NT	135	79
VIC	2443	2125
Sub-total	2792	2309
TOTAL	4505	2861

Source: Small Business as a percentage of total federal unfair dismissal applications supplied by the Minister for Workplace Relations and Small Business

Table 5 : Total number of all business state unfair dismissal applications under state laws 1998 compared to 1996.

State/Territory	Jan-Dec 1996	Jan-Dec 1998	% plus/minus to 1996
NSW	2186	4056	86
QLD	1932	1814	(6)
SA	1240	971	(12)
TAS	114	348	205
WA	918	1553	69
Sub-total	6390	8742	37
ACT	0	0	0
NT	0	0	0
VIC	358	0	0
Sub-total	358	0	0
TOTAL	6748	8742	30

Source: Minister for Workplace Relations and Small Business

**Table 6 : Total number of federal and state unfair dismissal applications
1998 compared to 1996.**

State/Territory	Jan-Dec 1996	Jan-Dec 1998	% plus/minus to 1996
NSW	6476	5437	(16)
QLD	2444	2124	(13)
SA	1873	1255	(33)
TAS	474	590	24
WA	2793	1856	(34)
Sub-total	14060	11262	(20)
ACT	509	249	(51)
NT	396	233	(41)
VIC	6316	5184	(18)
Sub-total	7221	5666	(22)
TOTAL	21281	16928	(20)

Source: Minister for Workplace Relations and Small Business

Unfair Dismissal Cases : Australia

Source: Department of Workplace Relations

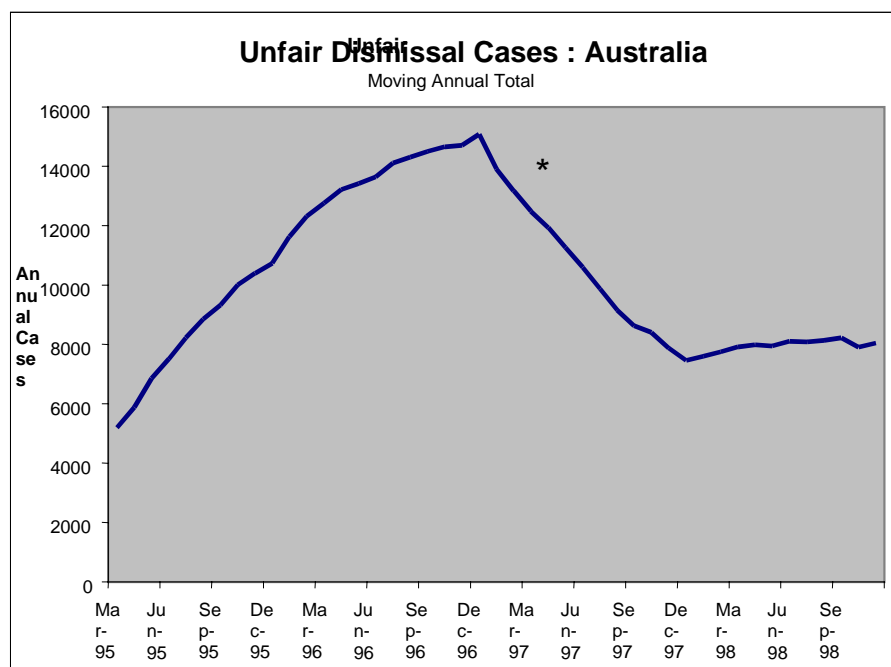
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	1998	1997	1996	1995	1994
Jan	492	354	1511	625	
Feb	709	551	1305	613	
March	708	547	1235	786	
April	666	592	1148	690	1
May	597	644	1298	1096	121
June	700	533	1207	986	330
July	687	712	1427	963	252
Aug	609	557	1282	1087	462
Sept	682	591	1120	924	440
Oct	661	979	1206	1049	373
Nov	744	611	1138	1087	703
Dec		791	1206	830	487
TOTAL	7255	7462	15083	10736	3169

* Workplace Relations Act 1996 commenced 1/1/97

Moving Annual Total

Mar-95	5193
Apr-95	5882
May-95	6857
Jun-95	7513
Jul-95	8224
Aug-95	8849
Sep-95	9333
Oct-95	10009
Nov-95	10393
Dec-95	10736
Jan-96	11622
Feb-96	12314
Mar-96	12763
Apr-96	13221
May-96	13423
Jun-96	13644
Jul-96	14108
Aug-96	14303
Sep-96	14499
Oct-96	14656
Nov-96	14707
Dec-96	15083
Jan-97	13926
Feb-97	13172
Mar-97	12484
Apr-97	11928
May-97	11274
Jun-97	10600
Jul-97	9885
Aug-97	9160
Sep-97	8631
Oct-97	8404
Nov-97	7877
Dec-97	7462
Jan-98	7600
Feb-98	7758
Mar-98	7919
Apr-98	7993
May-98	7946
Jun-98	8113
Jul-98	8088
Aug-98	8140
Sep-98	8231
Oct-98	7913
Nov-98	8046



Unfair Dismissal Cases : ACT

Source: Department of Workplace Relations

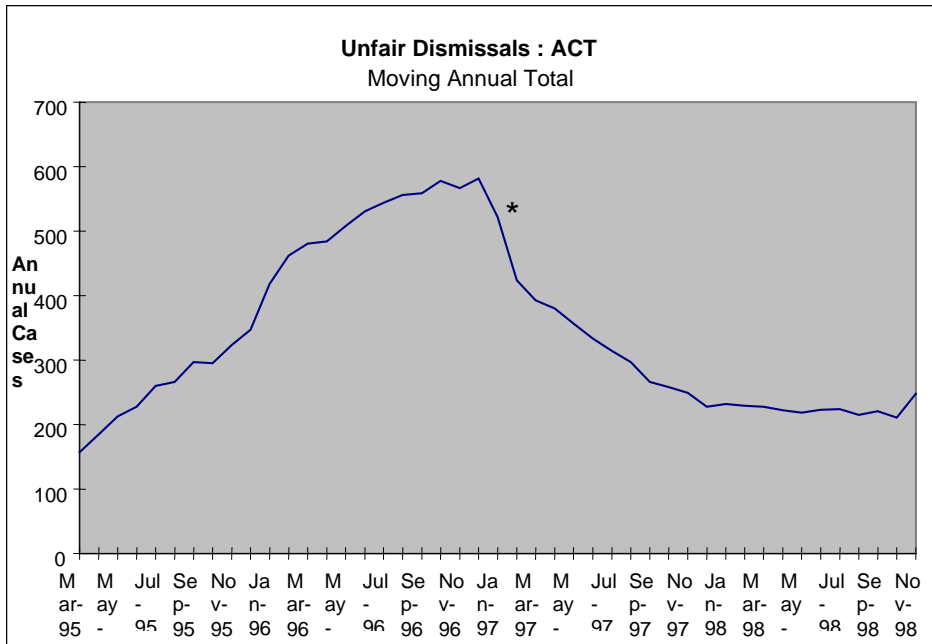
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	1998	1997	1996	1995	1994
Jan	15	11	71	0	
Feb	21	24	44	46	
March	19	20	51	32	
April	12	18	31	28	0
May	25	29	52	28	0
June	26	21	45	22	7
July	27	26	45	32	0
Aug	12	21	38	26	20
Sept	24	18	49	46	15
Oct	25	32	40	21	23
Nov	24	22	31	42	14
Dec		18	39	24	0
TOTAL	230	260	536	347	79

* Workplace Relations Act 1996 commenced 1/1/97

Moving Annual Total

Mar-95	157
Apr-95	185
May-95	213
Jun-95	228
Jul-95	260
Aug-95	266
Sep-95	297
Oct-95	295
Nov-95	323
Dec-95	347
Jan-96	418
Feb-96	462
Mar-96	481
Apr-96	484
May-96	508
Jun-96	531
Jul-96	544
Aug-96	556
Sep-96	559
Oct-96	578
Nov-96	567
Dec-96	582
Jan-97	522
Feb-97	424
Mar-97	393
Apr-97	380
May-97	357
Jun-97	333
Jul-97	314
Aug-97	297
Sep-97	266
Oct-97	258
Nov-97	249
Dec-97	228
Jan-98	232
Feb-98	229
Mar-98	228
Apr-98	222
May-98	218
Jun-98	223
Jul-98	224
Aug-98	215
Sep-98	221
Oct-98	211
Nov-98	248



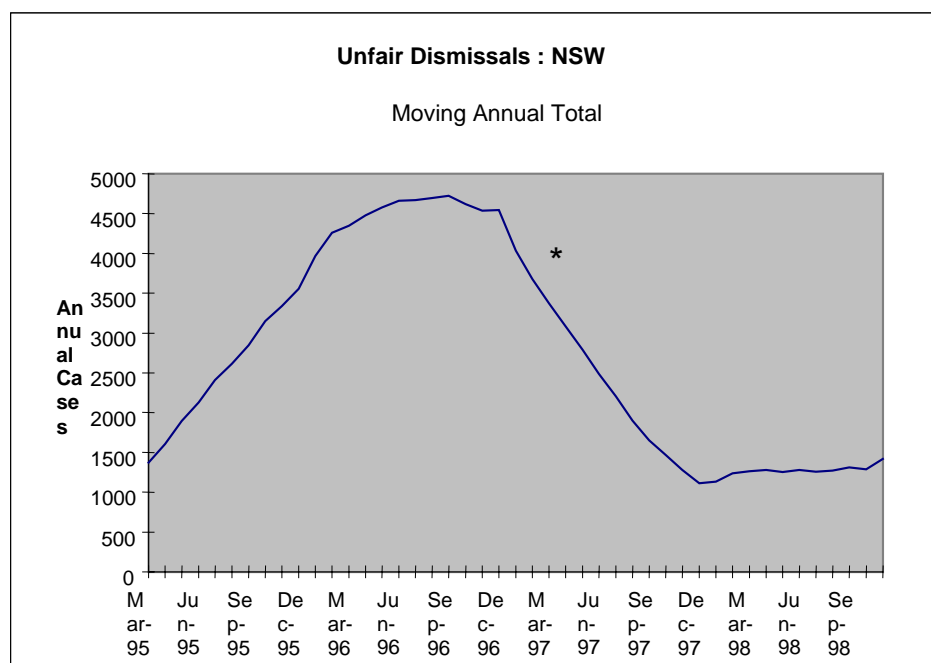
Unfair Dismissal Cases : NSW

Source: Department of Workplace Relations

*

	1998	1997	1996	1995	1994
Jan	76	57	571	160	
Feb	178	78	433	139	
March	124	93	397	309	
April	88	75	366	234	0
May	109	133	410	316	26
June	96	72	371	286	55
July	82	102	386	376	95
Aug	93	78	382	356	149
Sept	126	82	333	305	74
Oct	85	107	286	392	90
Nov	205	100	288	369	183
Dec		158	324	314	92
TOTAL	1262	1135	4547	3556	764

* Workplace Relations Act 1996 commenced 1/1/97



Moving Annual Total

Mar-95	1372
Apr-95	1606
May-95	1896
Jun-95	2127
Jul-95	2408
Aug-95	2615
Sep-95	2846
Oct-95	3148
Nov-95	3334
Dec-95	3556
Jan-96	3967
Feb-96	4261
Mar-96	4349
Apr-96	4481
May-96	4575
Jun-96	4660
Jul-96	4670
Aug-96	4696
Sep-96	4724
Oct-96	4618
Nov-96	4537
Dec-96	4547
Jan-97	4033
Feb-97	3678
Mar-97	3374
Apr-97	3083
May-97	2786
Jun-97	2487
Jul-97	2203
Aug-97	1899
Sep-97	1648
Oct-97	1469
Nov-97	1281
Dec-97	1115
Jan-98	1134
Feb-98	1234
Mar-98	1265
Apr-98	1278
May-98	1254
Jun-98	1278
Jul-98	1258
Aug-98	1273
Sep-98	1313
Oct-98	1285
Nov-98	1420

Unfair Dismissal Cases : NT

Source: Department of Workplace Relations

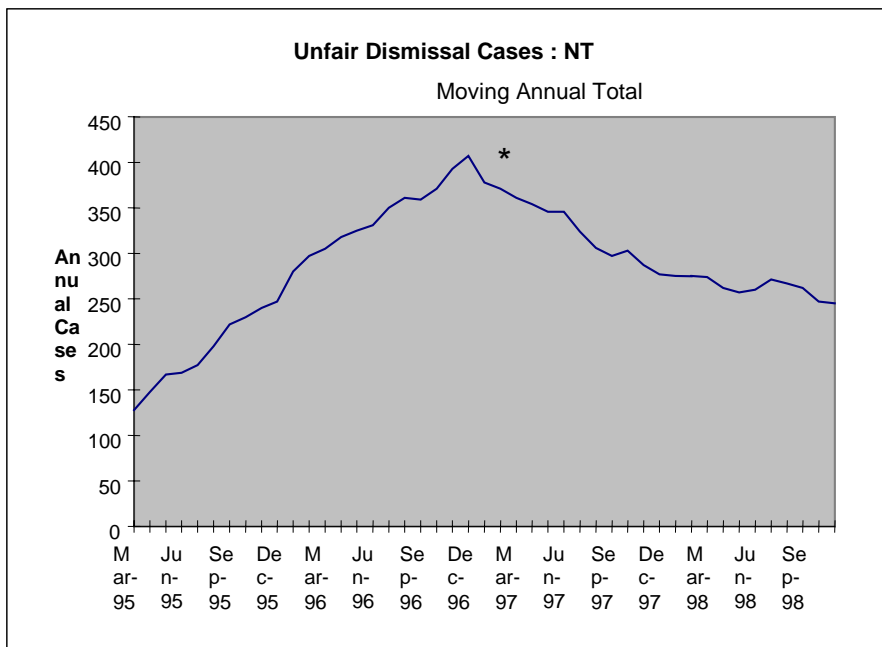
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	1998	1997	1996	1995	1994
Jan	16	18	45	12	
Feb	24	24	33	16	
March	21	22	32	24	
April	14	26	33	20	0
May	17	22	30	23	4
June	24	21	21	15	13
July	27	16	38	19	11
Aug	13	17	35	24	3
Sept	14	19	28	30	6
Oct	23	36	30	18	10
Nov	25	29	45	23	13
Dec		27	37	23	16
TOTAL	218	277	407	247	76

* Workplace Relations Act 1996 commenced 1/1/97

Moving Annual Total

Mar-95	128
Apr-95	148
May-95	167
Jun-95	169
Jul-95	177
Aug-95	198
Sep-95	222
Oct-95	230
Nov-95	240
Dec-95	247
Jan-96	280
Feb-96	297
Mar-96	305
Apr-96	318
May-96	325
Jun-96	331
Jul-96	350
Aug-96	361
Sep-96	359
Oct-96	371
Nov-96	393
Dec-96	407
Jan-97	378
Feb-97	371
Mar-97	361
Apr-97	354
May-97	346
Jun-97	346
Jul-97	324
Aug-97	306
Sep-97	297
Oct-97	303
Nov-97	287
Dec-97	277
Jan-98	275
Feb-98	275
Mar-98	274
Apr-98	262
May-98	257
Jun-98	260
Jul-98	271
Aug-98	267
Sep-98	262
Oct-98	247
Nov-98	245



Unfair Dismissal Cases : Qld

Source: Department of Workplace Relations

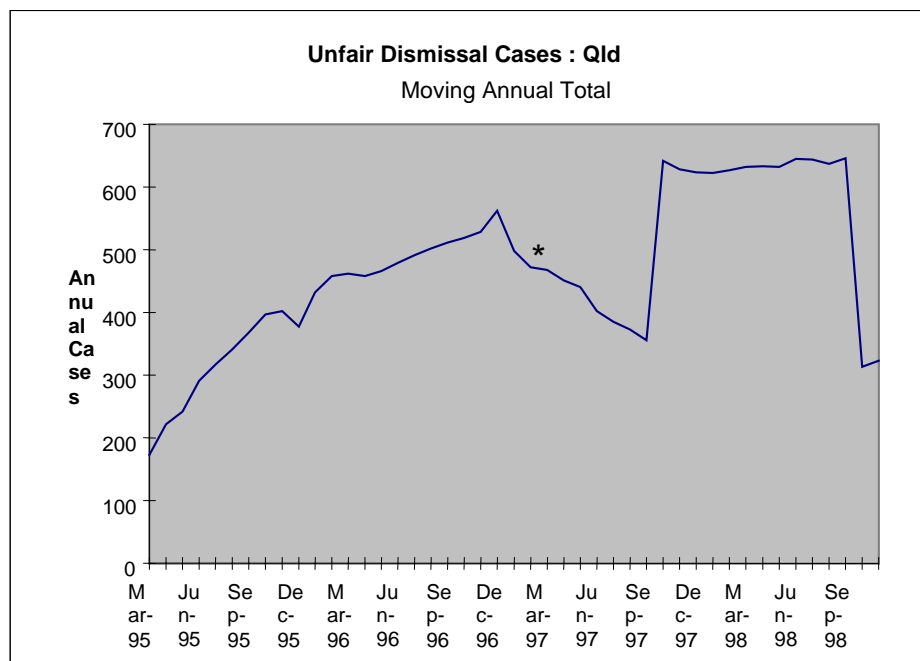
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	1998	1997	1996	1995	1994
Jan	21	22	86	31	
Feb	22	17	43	17	
March	32	27	31	27	
April	29	28	45	49	0
May	24	25	36	28	8
June	37	24	62	49	0
July	29	30	47	35	9
Aug	20	27	39	28	4
Sept	22	21	38	29	2
Oct	23	344	58	50	21
Nov	30	24	38	29	24
Dec		34	39	5	30
TOTAL	289	623	562	377	98

* Workplace Relations Act 1996 commenced 1/1/97

Moving Annual Total

Mar-95	173
Apr-95	222
May-95	242
Jun-95	291
Jul-95	317
Aug-95	341
Sep-95	368
Oct-95	397
Nov-95	402
Dec-95	377
Jan-96	432
Feb-96	458
Mar-96	462
Apr-96	458
May-96	466
Jun-96	479
Jul-96	491
Aug-96	502
Sep-96	511
Oct-96	519
Nov-96	528
Dec-96	562
Jan-97	498
Feb-97	472
Mar-97	468
Apr-97	451
May-97	440
Jun-97	402
Jul-97	385
Aug-97	373
Sep-97	356
Oct-97	642
Nov-97	628
Dec-97	623
Jan-98	622
Feb-98	627
Mar-98	632
Apr-98	633
May-98	632
Jun-98	645
Jul-98	644
Aug-98	637
Sep-98	646
Oct-98	313
Nov-98	323



Unfair Dismissal Cases: SA

Source: Department of WkPlc. Relations

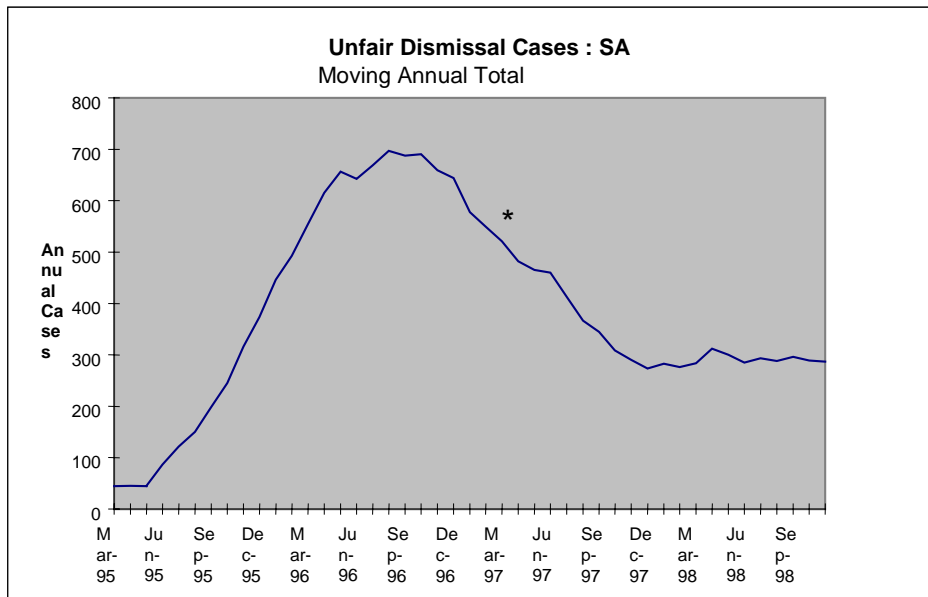
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	1998	1997	1996	1995	1994
Jan	16	6	72	0	
Feb	13	20	48	1	
March	40	32	61	0	
April	51	23	62	1	0
May	18	30	47	6	6
June	21	36	41	55	13
July	26	18	65	38	4
Aug	13	18	65	37	8
Sept	30	21	42	52	3
Oct	17	21	58	55	9
Nov	16	22	40	71	0
Dec		26	43	58	0
TOTAL	261	273	644	374	43

* Workplace Relations Act 1996 commenced 1/1/97

Moving Annual Total

Mar-95	44
Apr-95	45
May-95	45
Jun-95	87
Jul-95	121
Aug-95	150
Sep-95	199
Oct-95	245
Nov-95	316
Dec-95	374
Jan-96	446
Feb-96	493
Mar-96	554
Apr-96	615
May-96	656
Jun-96	642
Jul-96	669
Aug-96	697
Sep-96	687
Oct-96	690
Nov-96	659
Dec-96	644
Jan-97	578
Feb-97	550
Mar-97	521
Apr-97	482
May-97	465
Jun-97	460
Jul-97	413
Aug-97	366
Sep-97	345
Oct-97	308
Nov-97	290
Dec-97	273
Jan-98	283
Feb-98	276
Mar-98	284
Apr-98	312
May-98	300
Jun-98	285
Jul-98	293
Aug-98	288
Sep-98	296
Oct-98	289
Nov-98	287



Unfair Dismissal Cases : Tas

Source: Department of Workplace Relations

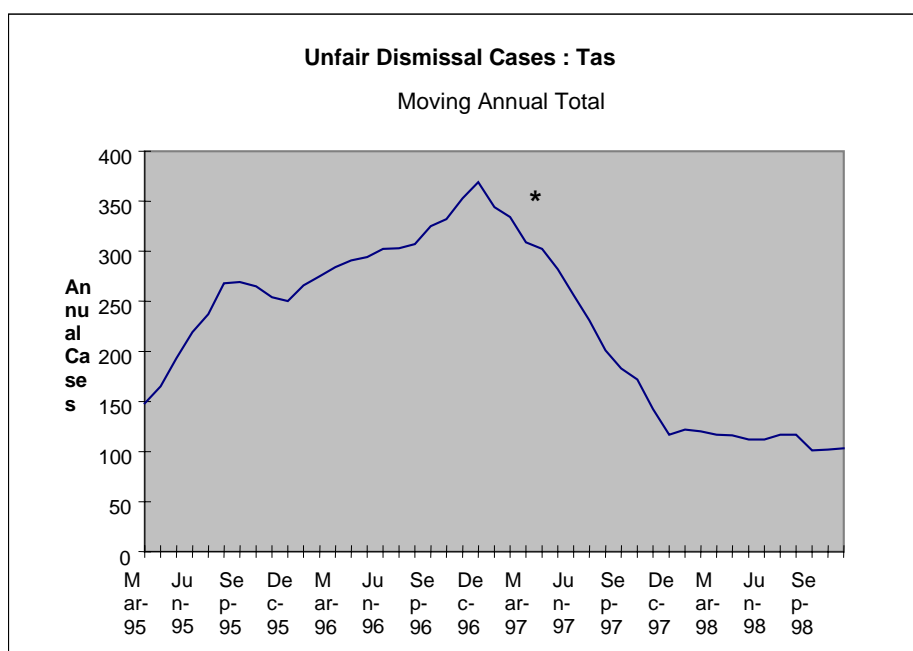
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	1998	1997	1996	1995	1994
Jan	8	3	28	12	
Feb	10	12	22	13	
March	4	7	32	23	
April	16	17	24	17	0
May	8	12	32	29	1
June	8	8	34	26	0
July	12	7	32	31	13
Aug	5	5	35	31	0
Sept	7	23	41	23	22
Oct	10	7	18	11	15
Nov	7	8	38	17	28
Dec		8	33	17	21
TOTAL	95	117	369	250	100

* Workplace Relations Act 1996 commenced 1/1/97

Moving Annual Total

Mar-95	148
Apr-95	165
May-95	193
Jun-95	219
Jul-95	237
Aug-95	268
Sep-95	269
Oct-95	265
Nov-95	254
Dec-95	250
Jan-96	266
Feb-96	275
Mar-96	284
Apr-96	291
May-96	294
Jun-96	302
Jul-96	303
Aug-96	307
Sep-96	325
Oct-96	332
Nov-96	353
Dec-96	369
Jan-97	344
Feb-97	334
Mar-97	309
Apr-97	302
May-97	282
Jun-97	256
Jul-97	231
Aug-97	201
Sep-97	183
Oct-97	172
Nov-97	142
Dec-97	117
Jan-98	122
Feb-98	120
Mar-98	117
Apr-98	116
May-98	112
Jun-98	112
Jul-98	117
Aug-98	117
Sep-98	101
Oct-98	102
Nov-98	103



Unfair Dismissal Cases : Victoria

Source: Department of Workplace Relations

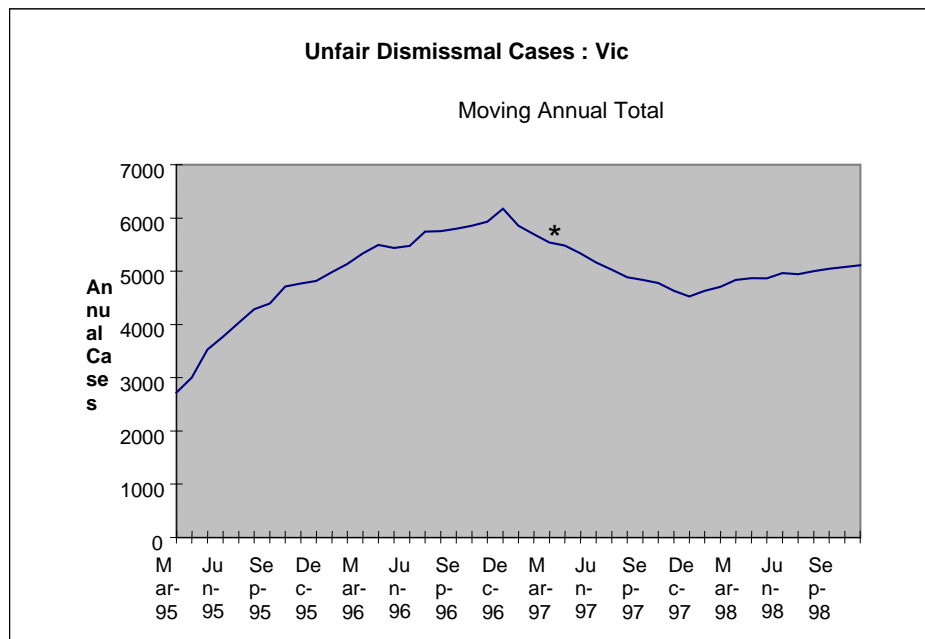
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	1998	1997	1996	1995	1994
Jan	326	219	534	371	
Feb	423	348	505	350	
March	452	323	481	287	
April	425	389	447	286	0
May	380	388	534	593	70
June	435	328	501	456	213
July	457	487	624	359	95
Aug	430	368	504	498	242
Sept	435	396	448	397	290
Oct	461	422	483	430	116
Nov	403	373	516	440	380
Dec		484	592	352	302
TOTAL	4627	4525	6169	4819	1708

* Workplace Relations Act 1996 commenced 1/1/97

Moving Annual Total

Mar-95	2716
Apr-95	3002
May-95	3525
Jun-95	3768
Jul-95	4032
Aug-95	4288
Sep-95	4395
Oct-95	4709
Nov-95	4769
Dec-95	4819
Jan-96	4982
Feb-96	5137
Mar-96	5331
Apr-96	5492
May-96	5433
Jun-96	5478
Jul-96	5743
Aug-96	5749
Sep-96	5800
Oct-96	5853
Nov-96	5928
Dec-96	6169
Jan-97	5854
Feb-97	5697
Mar-97	5539
Apr-97	5481
May-97	5335
Jun-97	5162
Jul-97	5025
Aug-97	4889
Sep-97	4837
Oct-97	4776
Nov-97	4633
Dec-97	4525
Jan-98	4632
Feb-98	4707
Mar-98	4836
Apr-98	4872
May-98	4864
Jun-98	4961
Jul-98	4941
Aug-98	5003
Sep-98	5042
Oct-98	5081
Nov-98	5111



Unfair Dismissal Cases : WA

Source: Department of Workplace Relations

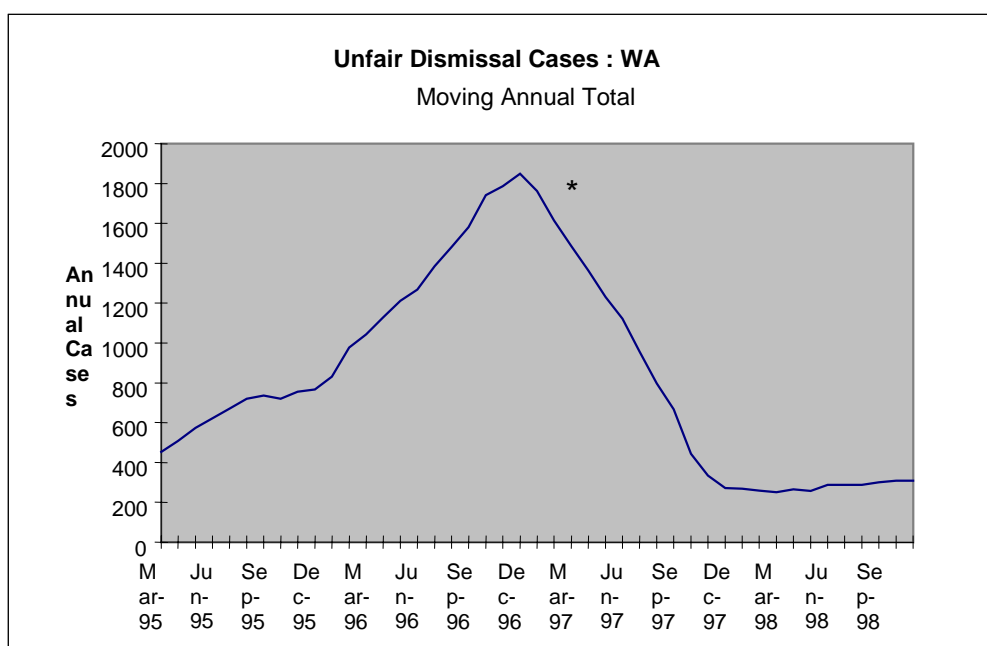
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	1998	1997	1996	1995	1994
Jan	14	18	104	39	
Feb	18	28	177	31	
March	16	23	150	84	
April	31	16	140	55	1
May	16	25	157	73	6
June	53	23	132	77	29
July	27	26	190	73	25
Aug	23	23	184	87	36
Sept	24	11	141	42	28
Oct	17	10	233	72	87
Nov	34	33	142	96	61
Dec		36	99	37	26
TOTAL	273	272	1849	766	299

* Workplace Relations Act 1996 commenced 1/1/97

Moving Annual Total

Mar-95	453
Apr-95	507
May-95	574
Jun-95	622
Jul-95	670
Aug-95	721
Sep-95	735
Oct-95	720
Nov-95	755
Dec-95	766
Jan-96	831
Feb-96	977
Mar-96	1043
Apr-96	1128
May-96	1212
Jun-96	1267
Jul-96	1384
Aug-96	1481
Sep-96	1580
Oct-96	1741
Nov-96	1787
Dec-96	1849
Jan-97	1763
Feb-97	1614
Mar-97	1487
Apr-97	1363
May-97	1231
Jun-97	1122
Jul-97	958
Aug-97	797
Sep-97	667
Oct-97	444
Nov-97	335
Dec-97	272
Jan-98	268
Feb-98	258
Mar-98	251
Apr-98	266
May-98	257
Jun-98	287
Jul-98	288
Aug-98	288
Sep-98	301
Oct-98	308
Nov-98	309



Appendix 4 – Question on Notice

MINISTER FOR EMPLOYMENT, WORKPLACE RELATIONS AND SMALL BUSINESS

SENATE

(Question No. 10)

Senator Murray asked the Minister representing the Minister for Employment, Workplace Relations and Small Business, upon notice, on 10 November 1998:

- (1) With reference to unfair dismissal claims under federal law, the annual report for 1996-97 of the Industrial Relations Court of Australia highlighted major outcomes in the federal jurisdiction as follows: (a) 74 per cent of unfair dismissal claims cases were settled by agreement; (b) 75 per cent of cases were finalised within 6 months and 99 per cent within 12 months; (c) 62 per cent of trials were completed in one day and 84 per cent within 2 days; (d) 58 per cent of contested cases were decided in favour of the employee, with 42 per cent in favour of the employer; (e) reinstatement of the employee was ordered in 7.5 per cent of contested cases; and (f) the median amount of compensation awarded was approximately \$6 000:

Can comparable information on unfair dismissal claims for the 1997-98 financial year be provided for the following Jurisdictions: (a) Federal; (b) New South Wales; (c) Queensland; (d) South Australia; (e) Tasmania; and (f) Western Australia.

- (2) With reference to the Council of Small Business Organisations of Australia's guess that 50 000 jobs would be created by exempting small business employers employing 15 or fewer employees from federal unfair dismissal laws: (a) how many of the estimated 50 000 jobs will be created in each state and territory; and (b) can the methodology and empirical data used to arrive at the jobs estimate creation in each jurisdiction be provided.
- (3) With reference to the answer to paragraph (1) of question on notice no. 1005 (Senate Hansard, 4 March 1998, p.421), for each of the jurisdictions outlined in the table provided, can numbers be given, accompanied by evidence and methodology for: (a) jobs created or lost as a result of increases or decreases in unfair dismissal applications; and (b) separate answers for federal, state and territory jurisdictions based on comparative 1996-97 data.

Senator Alston - The Minister for Employment Workplace Relations and Small Business has provided the following answer to the honourable senator's question:

- (1) Answers for each of the five State unfair dismissal regimes are unavailable. The 1997-8 Annual Report of the Australian Industrial Relations Commission contains some statistics in relation to resolution of unfair dismissal claims. However, the Australian Industrial Registry does not collect data on all of the subjects on which the Industrial Relations Court of Australia previously collected data. Therefore, statistics in relation to federal unfair dismissal claims can only be provided for parts (a), (d) and (e).
 - (a) There were 8 092 termination of employment applications lodged under the Workplace Relations Act 1996 in 1997-98. Of those applications, 6 303 (78 per cent) were settled by agreement (ie had been withdrawn, settled or otherwise discontinued prior to conciliation or settled at conciliation or withdrawn, discontinued or otherwise settled after conciliation but prior to final orders).
 - (d) There were 774 contested federal cases decided in 1997-98, with 311 (40 per cent) decided in favour of the employer and 463 (60 per cent) in favour of the employee. (It may be noted that 282 of the decisions in favour of the employee involved applications against Gordonstone Coal Management based on the same fact situation; if these 282 applications are treated as one class action, then 63 per cent of contested cases would have been decided in favour of the employer and 37 per cent in favour of the employee.)
 - (e) Reinstatement was awarded in only 17 (2 per cent) of the 774 contested federal cases.
- (2) The Chief Executive of the Council of Small Business Organisations Australia, Mr Rob Bastian, based his estimate that 50 000 jobs would be created if small businesses were exempt from federal unfair dismissal laws on the, in his view conservative, premise that 1 in 20 small businesses would hire at least one more employee if the exclusion was to come into force.

Applying this formula to the percentage of small businesses in each State or Territory (according to data published in Small Business in Australia 1997, ABS Cat No. 132 1.0), approximately 16 500 jobs would be created in NSW, 12 500 in VIC, 9 500 in QLD, 4 000 in SA, 5 500 in WA, 1000 in TAS and 500 each in the ACT and NT.

(3) Figures for the number of jobs created in each State and Territory in 1996 and 1997 (trend series annual averages) are as follows. (Source: ABS Labour Force Survey.)

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT	AUST
1996 '000	36.9	32.0	26.5	5.3	10.4	1.0	1.9	-1.9	112.5
%	1.3	1.6	1.8	0.8	1.3	0.5	2.3	-1.2	1.4
1997 '000	13.4	17.5	31.9	2.9	19.3	-6.8	1.9	1.6	80.7
	0.5	0.8	2.1	0.4	2.3	-3.4	2.2	1.1	1.0

There are a number of factors that contribute to the differences in labour market performance across the States and Territories. For example, the States and Territories generally rely on different industries for economic and employment growth. As such, any changes in policy or economic conditions which affect sectors in a non-uniform manner can be expected to have different impacts on employment. Similarly, characteristics such as population size and growth, natural attributes and climatic conditions also contribute to the differences in employment growth.

The reduction in the number of unfair dismissal applications indicates that progress has been made under the current legislation in discouraging inappropriate applications. This in itself would not be expected to create additional jobs in the small business sector. The Government considers that further change is required to recognise the particular circumstances of small businesses as well as to provide greater certainty for employers about the length of an employee's employment before that person can initiate an unfair dismissal application (no change is proposed in respect of unlawful dismissal applications). It is necessary to provide security for employers that they will not be subject to inappropriate applications. This is provided for in the Workplace Relations Amendment (Unfair Dismissals) Bill 1998, presently before the Parliament.

Senator Andrew Murray