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SENATE

EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION
REFERENCES COMMITTEE

Reference: Unfair dismissal policy in the small business sector

MONDAY, 2 MAY 2005

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SENATE
EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION
REFERENCES COMMITTEE

Monday, 2 May 2005

Members: Senator Crossin (*Chair*), Senator Barnett (*Deputy Chair*), Senators Jacinta Collins, Kirk, Stott Despoja and Troeth

Substitute members: Senator Murray for Senator Stott Despoja

Participating members: Senators Abetz, Bartlett, Boswell, Buckland, George Campbell, Carr, Chapman, Cherry, Colbeck, Coonan, Denman, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fifield, Forshaw, Harradine, Humphries, Hutchins, Johnston, Knowles, Lightfoot, Ludwig, Mackay, Marshall, Mason, McGauran, McLucas, Moore, Nettle, O'Brien, Payne, Robert Ray, Santoro, Sherry, Stephens, Watson, Webber and Wong

Senators in attendance: Senators Barnett, Crossin, George Campbell, Marshall and Murray

Terms of reference for the inquiry:

To inquire into and report on:

- (a) (i) The international experience concerning:
 - (A) unfair dismissal laws; and
 - (B) the relationship between unfair dismissal laws and employment growth in the small business sector,
 - (ii) the provisions of federal and state unfair dismissal laws and the extent to which they adversely impact on small businesses, including:
 - (A) the number of applications against small businesses in each year since 1 July 1995 under federal and state unfair dismissal laws, and
 - (B) the total number of businesses, small businesses and employees that are subject to federal and state unfair dismissal laws;
 - (iii) evidence cited by the Government that exempting small business from federal unfair dismissal laws will create 77 000 jobs in Australia (or any other figure previously cited),
 - (iv) the relationship, if any, between previous changes to Australian unfair dismissal laws and employment growth in Australia,
 - (v) the extent to which previously reported small business concerns with unfair dismissal laws related to survey questions which were misleading, incomplete or inaccurate,
 - (vi) the extent to which small businesses rate concerns with unfair dismissal laws against concerns on other matters that impact negatively on successfully managing a small business, and
 - (vii) the extent to which small businesses are provided with current, reliable and easily accessible information and advice on federal and state unfair dismissal laws; and
- (b) to recommend policies, procedures and mechanisms that could be established to reduce the perceived negative impacts that unfair dismissal laws may have on employers, without adversely affecting the rights of employees.

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

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Committee met at 10.04 a.m.**OSLINGTON, Dr Paul, Private capacity**

CHAIR—I declare open this public hearing of the inquiry into unfair dismissal laws. On 7 December 2004 the Senate referred to this committee an inquiry into unfair dismissal laws. The main issue before the committee is the relationship between the federal unfair dismissal laws and employment growth in the small business sector and the validity of evidence which is the basis of the government's claim that 77,000 jobs will be created in the small business sector. The inquiry is being conducted with the added consideration of the [Workplace Relations Amendment \(Fair Dismissal Reform\) Bill 2004](#), which was referred by the Senate on 17 March 2005. The committee is particularly interested in the general policy underlying the regulation of small business employment, as well as the particulars of the bill.

I remind all witnesses that in giving evidence they are protected by parliamentary privilege. This gives special rights and immunities to people who appear before committees. People must be able to give evidence to committees without prejudice to themselves, and any act which disadvantages a witness as a result of evidence given before the Senate or any of its committees is treated as a breach of privilege. I welcome our first witness from the School of Business at the Australian Defence Force Academy, Dr Oslington.

Dr Oslington—I am appearing as an individual. I am not representing the University of New South Wales or the Defence Force Academy.

CHAIR—The committee prefers all evidence to be taken in public, but if you have any part of your evidence, or all of your evidence, that you would like to give us in confidence or in camera you can make a request of this committee to do that and we will try and facilitate that request. Your submission is No. 14, and we have it before us. Are there any changes or additions you need to make to that?

Dr Oslington—No. David asked me if I would give him a copy of the article that was published in the *Financial Review* as a submission. I do not have any other documents to present.

CHAIR—Would you like to start by giving us an opening statement and then we will go to questions.

Dr Oslington—I would like to begin by acknowledging the support of the Australian Research Council. What I am reporting on today is work that we are doing as part of a large project funded by the ARC and the university. I would also like to acknowledge the contribution of Benoit Freyens, a PhD student working on the project. Much of this research is still in progress, and the articles that are reporting on the theoretical modelling and the data that we have will probably come out later this year or early next year, depending on how quickly the project gets tidied up.

From an economic point of view, more stringent unfair dismissal provisions increase firing costs, and the key question is the impact of this on employment and wages. Going to the standard sort of model we would have in economics of firms' hiring and firing behaviour, a firm

will fire a worker if the wage exceeds the value of the output the worker produces. The wage is going to be paid into the future, the worker is going to be producing output into the future and so we are looking at anticipated outputs and anticipated wages discounted back to get some sort of present value.

If we have more stringent unfair dismissal provisions, then there is the cost of firing. A firm will now only fire a worker if the sum of the wage and those firing costs exceeds the value of the output produced by the worker. I think everyone who has worked in the area agrees that more stringent unfair dismissal provisions will slow down adjustment, so they will reduce hiring in upswings and they will reduce firing in downswings.

A lot of people outside the area, I think, are surprised that most of the theoretical modelling is ambiguous on the effects of more stringent firing provisions on average employment. It is not the case that it is automatic and obvious. The impact of these costs in a theoretical model depends on all sorts of things. The cyclical nature of the economy, the speed of the upswings and the downswings, the firm's technology, how the firm's product is priced and all sorts of things like that affect the impact on average employment. It could be positive, it could be negative.

It is very important to recognise that, and the point about the ambiguity of the effect on average employment is particularly made in what is probably the classic paper in academic literature by Bentolila and Bertola which is mentioned in the *Financial Review* article that is a submission to the inquiry.

As well as impacts on average employment, more stringent unfair dismissal provisions will impact wages. If workers are harder to fire, that allows workers to either work less hard or to push up their wages for the same level of effort. Higher firing costs also impact the pattern of employment, increasing casualisation and the use of overtime. One thing that the committee should pay particular attention to is the impact on the long-term unemployed and on workers who have a pretty hard time in the labour force anyway. If you have workers who are risky to take on, unfair dismissal provisions are going to cause employers to discriminate against those sorts of workers.

That is all theory. There is an enormous amount of theoretical work in the literature. I have done a little bit of that, there has been a fair bit of work done in the US and there has been a lot of work done in Europe. There are big debates in Europe about how their labour market performance is linked to the fairly heavy regulation of the those labour markets. But there is virtually no empirical work in this area. There are a few studies that are trying to disentangle the impact of higher firing costs on employment by looking at aggregate employment data, tying it up to some sort of a measure of firing costs. It is such a high-level application that there is virtually nothing that we can draw out of those studies. I talk about some of the studies in the submission, particularly that of a guy at Stanford, Ed Lazear, who has done some work constructing indices of the stringency of firing provisions and trying to tie these up to different countries' labour market performance. Again, it is too general to be able to say very much.

The third sort of data that is around in this area is opinion surveys. You have had a few of these presented in the past, I think, and they certainly float around the public debate. Most of the opinion surveys have been financed by organisations that are arguing that the unfair dismissal

provisions are a big problem for firms and have a large adverse impact on employment. My view is that they are not terribly reliable.

If there is a survey funded by an organisation that has an interest in this issue, and it is fairly obvious that the findings are going to be used to lobby et cetera, and you ring up and ask the business, ‘Do you think that changing the legislation will have an impact on your behaviour in hiring and firing?’ the obvious answer is yes. I think these opinion surveys have proved little more than that the people they are interviewing in the businesses are not completely thick and are able to pick up the required answer without difficulty. I think it is quite staggering that the percentages are not higher for businesses that are saying that these changes will have a huge impact on employment.

What we are trying to do in our project is to get beyond opinion surveys, and I think it is fair to say that there are some opinion surveys on the other side. I understand that you are speaking to the people from Charles Sturt tomorrow. They are very much on the other side of the political debate and their opinion surveys are coming up with quite different numbers to some of those that have been funded by ACCI. Our approach is to get away from opinion surveys altogether and try to work out what the actual costs of hiring and firing are. It is actually a bigger project than the unfair dismissal provisions. It is about labour market regulation generally and its impact on wages and employment.

We have done a lot of work over the last couple of years, including two very large surveys, one in conjunction with the Australian Human Resources Institute and another one late last year, where we had data on approximately 1,000 firms that was provided by firms across different industries, encompassing workers in lots of different occupations.

We have firms where it is not challenged; we have firms where it has been settled, where it has been arbitrated by the commission. It is a fairly rich dataset. What we are trying to do is get data on the actual costs of hiring and firing and then plug that data into a model of a profit maximising firm. That will give us estimated impacts of the unfair dismissal provisions on employment, and we can get employment by sector and occupation. That is the point we will be at at the end of the year.

We have some preliminary results. The article in the *Financial Review* last year was based on a forum we ran for the Economic Society, where we had a lot of the organisations involved in this together and we reported on our preliminary numbers on the size of these costs and some speculations on what the overall impact was, although at that stage we did not have firm numbers. We still do not have firm numbers for the impact on employment. I do not have a number that I can quote that stacks up against something like that 77,000 figure that we have constructed out of some of the opinion survey responses. I might leave it there. I am happy to answer questions on the project and on our findings thus far.

CHAIR—Do you have an indication of what your current research is finding, if you are in a position to be able to report any initial outcomes?

Dr Oslington—At the stage we are at at the moment, we have figures on the levels of the costs but we have not done any of the second stage of the project, which is plugging those numbers on the levels of the costs into a model to generate an impact on employment by sector.

We can generate it by firm size as well. We can pull out small business from our overall sample and do simulations with that. But, as I said, I do not have a number that would stack up against the 77,000. We could probably do that if Ben and I and the others involved in the project dropped some of our other things and concentrated on it for the next month, but contemporary universities are places where there are lots of other things to do besides research, including filling out forms for DEST and the increasingly bloated university bureaucracies.

CHAIR—Given that there is now an onus of proof on the employee to prove that the dismissal has been unfair, is your research showing you that that is quite a large cost to the employers? When I look at the table of dismissals over previous years compared to the numbers that are actually taken before the commission, those numbers are quite low in relative numbers. Is the cost of defending an unfair dismissal something that is being figured as an issue by small business in your work?

Dr Oslington—Remember we are not doing opinion surveys; we are just collecting data on the costs of various sorts of fires. We have some preliminary numbers on the costs of firing a worker if it is not challenged. We have data on costs of firing a worker if it is settled out of court, and some numbers for the smaller proportion of our survey, which is where it does go before the commission and is arbitrated. I am happy to give you those numbers. They are preliminary, but we are finding that in both surveys—and the surveys were done with completely different samples, completely different methodologies; one was telephone, one was interview and questionnaire based—the numbers are remarkably similar. I think for the first case where it was not challenged, the firing costs were around seven per cent of annual labour costs, which is a pretty tiny number. In the telephone survey it was nine per cent, so that is some indication to us that the numbers, even though preliminary, are fairly reliable. Where it is settled out of court, it is around 20 per cent in one survey and 18 per cent in the other survey. That is a percentage of the annual labour costs. In the third case, which is kind of the upper bound, where it is going to arbitration, some of these cases will be lost by the employer, some of them will be won by the employer. Here we have 40 per cent in the more detailed survey, the face to face and questionnaire based survey, and a lower figure for the telephone survey of 19 per cent of the annual labour costs.

I have to say that even if you are looking at the upper end of the numbers we are getting from the surveys, the costs are not huge. Sure, there is a distribution, and there are outliers where the costs are massive, but in general I think I would have to say that if we are looking at 42 per cent—which is the biggest number we have for a mean from any of the surveys of annual labour costs—the cost is not a huge number.

CHAIR—There is an article in today's *Australian* that is suggesting that the government is possibly moving to scrap the power for deciding unfair dismissal claims from the commission and moving it to the Federal Magistrates Court. Do you have a view about whether that would be a satisfactory way to go in terms of dealing with the unfair dismissal claims produced by organisations such as ACCI or whether moving it to the Magistrates Court will be an added cost or an added burden on small business?

Dr Oslington—I do not think there is anything in our research which really would shed light on that.

CHAIR—Do you think it would be an increased cost for employers if the claims were moved to the Magistrates Court?

Dr Oslington—Without knowing the details of the proposal to put it to the Magistrates Court, I really could not give any sort of sensible opinion on whether it is going to increase or decrease costs. Ultimately I think our work is about how large are these costs under the existing system and then with those estimates of the costs, using economic modelling, what is going to be their impact on things like average employment, on wages, on turnover rates et cetera. We are not really focusing on that; we are not really providing answers to that detailed question about the institutional arrangements.

CHAIR—Then would your initial research lead to a conclusion that, if the costs are relatively low, which is what you are putting to us, that would lead to an increase in employment?

Dr Oslington—Any cost, whether it is high or low, is going to affect firms' employment behaviour. The key question we would like to have an answer to—but at this stage of research we do not—is the actual numbers of jobs that will be created by some sort of marginal change in these costs.

CHAIR—Your research to date is not sufficiently progressed to be able to do that?

Dr Oslington—If we had to come up with a number for a particular purpose, we could probably do so in a month if we shelved some other things, but in the normal course of our project now, that stage is on at the moment and we will have some numbers later in the year that will probably be published in preliminary form and then out in the economic journal literature, with a bit of a lag after that. I think it is an unfortunate thing that getting beyond the quick and dirty opinion surveys, or something like that, is a large, complex and time-consuming project. It is a pity that we are not another year further down the track with it, but that is just the way it is.

Senator MURRAY—Before I begin, I wonder, David, if I could give the committee some documents, because I will be referring to them during this questioning. The first is a schedule of the federal unfair dismissal cases for WA. The second is a set comparing the features of federal and state termination laws. I must qualify that because I see that recently South Australia had a new act passed, and that may alter that a little. Of course, there is a set for the witness. Each one of those is in sets, David.

Dr Oslington—Yes.

Senator MURRAY—The other item I would like the witness given, please, is question No. 50, where I had an answer to a set of questions from the Minister for Employment and Workplace Relations.

They were in sets originally, David. You should have them. Question 50, for the witness, please. I want you to, first, have a look at the federal unfair dismissal cases graph for Western Australia. You will see that in 1995 the federal unfair dismissal cases for Western Australia were 766; by 1996 they had risen to 1,849; and by 2003 they were down to 316. There were two sets of law changes which affected those figures: the first was the passage of the Workplace Relations Act and the second was some changes to the process which occurred after September

2001 and came into practice from 2003. You can see the effects of changes to the law on the incidence of unfair dismissal cases.

The second thing I want to refer you to as a witness is the features of federal and state termination laws. WA in comparison to the Commonwealth has probably the loosest of all state regimes. Their maximum period for after termination to apply is 28 days in comparison to others of 21 days; their salary cap is the highest; casuals automatically access unfair dismissal regimes from day one; they have no certificate issued if conciliation fails; and the penalty for disregarding assessment does not apply.

If you turn to question 50, page 2, you will see that the minister has advised us that the combined number for termination employment applications for Western Australia—federal and state—was 2,793 in 1996. It had dropped to 1,630 in 2003. There had been a lift in state numbers but not equivalent to the fall in federal numbers. So the overall drop in those years has been 1,163. You will also see that, of the 316 federal applications, the figure on page 4 of the minister's question indicates that 25 per cent of those are small businesses, so the total number of federal unfair dismissal applications in WA in 2003 would have been around 79.

Why do I take you through all of those figures? The government claims that there will be 77,000 jobs created from getting rid of federal unfair dismissal applications. If you want to do a rule of thumb, WA has the lowest unemployment rate in the country at present, I think, and it is about 10 per cent of national employment. Let us just be crude and say 77,000 jobs; 10 per cent is 7,700 jobs which will result from getting rid of 79 federal unfair dismissal applications for small business. It is a fairly crude transference, but you see the point I am making, Dr Oslington. Is there any conceivable evidence arising from your study which would indicate that in my state of Western Australia getting rid of federal unfair dismissal applications for less than 100 employees—of which, I might say, the stats indicate half would be found in favour of small business—would result in large-scale job creation, or any job creation, from that?

Dr Oslington—Firstly, the 77,000 number is not credible. The underlying numbers are coming from opinion surveys which are flawed and then there are some fairly bizarre transformations that are done on those opinion survey responses. I continue to be amazed that that 77,000 number is taken seriously in public debate.

Senator MURRAY—It is constantly repeated by National Party senators, for instance, in the chamber, so senior members of the government take it seriously.

Dr Oslington—This is a public policy issue where there is very little reliable data, so there are dodgy numbers like that—77,000—and there are a couple of others that float around as well.

Senator MURRAY—Let me take you to a second question, and it will relate to your answer. If you look at the features of federal and state termination laws, you will find that there are a number which constitute the prime reason for that drop in federal unfair dismissal applications. The commission is to consider the size of the business, which it does.

Dr Oslington—Yes.

Senator MURRAY—Penalties are applied against advocates for vexatious claims. There is a requirement to disclose contingency fee ambulance chasing. Claims are dismissed which have no prospect of success, and the commission must consider the size of the business and the skills of small business re HR matters. Of course, there is a 12-month exclusion for casuals and a three-month statutory default probationary period. I would suggest to you that, as an empirical scientist, if you look at that graph of mine, the relationship with law change—in other words, tightening the law so that process and cost issues are addressed—has such a material impact on the number of applications made under federal law that it seems self-evident to me that if the same were applied to state laws you would have a similar fall. The problem would then go away in terms of unfairness from the point of view of small business and only those cases which are genuinely valid and need to be progressed would remain. What do you say to the empirical data before you?

Dr Oslington—It is really outside the main focus of our research project, but from my general knowledge of the reforms they have been sensible and helpful. The data you present does seem pretty clear. I have not looked at what is behind this, but it certainly is consistent with the story of the changes to the legislation easing the burden on small business and getting rid of some of the ridiculous claims and reducing the cost to business of the claims that are made.

Senator MURRAY—When you gave your answer to the chair earlier, you were talking about surveys. I presume none of those surveys distinguished between respondents who had knowledge of state or federal systems; they were just answering unfair dismissals in the broad context.

Dr Oslington—I am not sure of the details of every survey that has been conducted. I know a significant number of respondents were unsure of what laws applied to them. People who were answering strongly that these laws had a huge impact on their employment decisions seemed remarkably ignorant of the details of the legislation or even the jurisdiction that they were part of.

Senator MURRAY—Before I desert the field, I will give you one last question. If you look at that graph on WA, if the case of the government is that massive job creation will result from a large drop in the number of federal unfair dismissal applications, surely when it free-fell after the 1996 changes, as you can see, there should have been a huge increase in Western Australian employment in 1997.

If you go to the employment figures you will find out that that was not the case. If you look at the Western Australian employment figures, you will find they have improved over a period of time as economic conditions have improved. The unfair dismissal application regime, as you can see there, from 1997 to 2003, 2004, 2005 has remained pretty static, except that the Western Australia state regime has become more favourable.

Dr Oslington—As I said in the opening remarks, it is notoriously difficult to try to disentangle forces like that from the aggregate data but there is no evidence of a spike in job creation or employment as a result of the large reduction in unfair dismissal claims there. Getting back to your first question, in what I think is a more satisfactory approach of looking at the microdata and then simulating from the microdata to numbers of jobs created, thus far there is

nothing in our work which is suggesting there are those huge employment effects; certainly nothing like that figure of 77,000 that is being bandied around.

Senator MURRAY—But here is microdata which shows an 82 per cent fall in federal unfair dismissal applications in Western Australia. There is no evidence of large employment effects.

Dr Oslington—This certainly is microdata, but when you are looking at overall employment there are so many things driving overall employment that it is very difficult to disentangle the effect of something like this from all the other forces that are going on. Our work is better because we are working at the individual firm level. We are getting data on individual firms' firing costs—on the costs of these cases and so forth. At the moment we are simulating the impact of those particular costs for particular firms on their hiring and firing behaviour.

Senator MURRAY—But this data confirms your findings. It confirms that there was no effect.

Dr Oslington—It is perfectly consistent with it. The fall there and the lack of any sort of spike in the aggregate employment numbers is perfectly consistent with the work we are doing.

Senator BARNETT—Dr Oslington, can I put to you a phrase and check if you are familiar with it before I ask some questions: 'Perceptions define reality in politics.' Have you heard of that phrase?

Dr Oslington—It sounds like something that floats around politics.

Senator BARNETT—Does it sound plausible and accurate to you?

Dr Oslington—You people are closest to the political process and in the best position to make those sorts of judgments.

Senator BARNETT—I put it to you that likewise in business, perceptions define the reality. You are aware of the large number of surveys that have been taken over many years with respect to the views of business and small business to the unfair dismissal laws and their adverse impact on their willingness to employ. In survey after survey, the perceptions and the results have demonstrated very clearly that they are an impediment to small business employment. Is that an accurate summation of the list of surveys that have been held over many years?

Dr Oslington—There have been surveys conducted and funded by business organisations that have a particular fairly well known position on this issue. All that those opinion surveys are really confirming is that the lobbying position of the businesses surveyed corresponds with the organisation that is funding the survey. I do not think the opinion surveys really tell us anything.

Senator BARNETT—You have put to the committee your views on certain theoretical models and you are doing your survey and coming to the conclusion of it. I had 13 years running my own small business before entering the Senate and I put it to you that the perceptions are, in fact, the reality. If there is a perception then that becomes a reality and it impacts on small business employment growth.

Dr Oslington—That is true; but, even if objectively the levels of these costs are quite small, if there is a fear out there amongst small business, that does matter. But we do not have any evidence. The opinion surveys are so clouded by other things that they are not really giving us evidence about businesses' true views on these things.

Senator BARNETT—We have two issues. We have the modelling and the theory and we have the statistics which Senator Murray has referred us to, which I am happy to come to shortly. We also have the practical reality that there is a view in the small business community that the unfair dismissal law is an impediment to growth.

Dr Oslington—Yes.

Senator BARNETT—I just want to have that knowledge accepted and on the table because they are two distinct and separate issues.

Dr Oslington—I do not have anything particular to add to that.

Senator BARNETT—Are you familiar with Don Harding's research that was commissioned by the department, I think in 2002? What is your response and professional opinion with respect to that research?

Dr Oslington—I know Don and he is a very good researcher, and the Melbourne Institute of Applied Economic and Social Research is a reputable organisation. Don's specialty is business cycles. They have conducted this research. The main limitation is the opinion polling methodology they have employed. I am not criticising Don's diligence or anything like that. It is just that opinion surveys are never going to tell you very much.

Senator BARNETT—Are you saying that the institute has had a history of credibility and high reputation and in this instance it was a one-off, not consistent with that? Or are you saying that the survey, because it was a survey, did not really have any merit?

Dr Oslington—One of the problems in this area is that there is very little serious research. It is not just in Australia. In Europe these issues are hotly debated as well. There is very little serious research. The only other study that is anything like what we are doing is something conducted with a sample of about 20 to 30 northern Italian manufacturing firms by a couple of guys from LSE. There is really no other hard survey evidence anywhere in the world. Don in his project does not have the three years and the staff that we have for our work. The sort of thing that we are attempting was just not a possibility for him, given his budget and time constraints. I can see why he went for the quick and dirty opinion survey.

Senator BARNETT—I know your analysis is not complete, but in your survey did you do any reviews of the views of small business with respect to the unfair dismissal laws?

Dr Oslington—Yes. The questionnaire we had and the interviews we had with firms do give us some of that. We were interested in their opinions and we have recorded those with the hard numbers. The key thing that is going to make a difference to the debate is the hard numbers.

Senator BARNETT—What were their opinions? Can you explain to the committee some of the responses to your survey?

Dr Oslington—We had a variety of opinions and we included large businesses and small businesses in the survey. There is certainly concern out there about the legislation. The people who are not commenting are probably not concerned. If you look at the sample of comments you are not getting an unbiased estimator of small business opinion.

Senator BARNETT—You said in your introduction that you were surprised by some of the surveys. You thought that the results might have been higher if you asked small business about the impact of unfair dismissals on their employment prospects. Is that consistent with your own survey? Did the survey that you undertook demonstrate that the concerns of small business were either equal to or higher than some of these other surveys that have been undertaken?

Dr Oslington—The comments that we received and discussions we have had with businesses show that it is reality; there is concern out there about the procedures for firing workers. It is one thing to be concerned; it is another thing to have it affect your behaviour in ways that are going to have a very large impact on Australia's unemployment problems.

Senator BARNETT—Did you ask the small businesses concerned, 'Has this affected your behaviour in terms of small business employment?'

Dr Oslington—That was one of the things we discussed with them, but the whole point of our research is to move beyond this 'We think it is, we think it isn't' stuff that has been the public debate and to get some hard numbers on what these costs actually are and then simulate, from those hard numbers, the employment and wage effects of changes in unfair dismissal provisions. The whole point of our study is to get away from that inconclusive, fairly pointless exchanging opinions on both sides of the debate.

Senator BARNETT—There are some that would not agree that they are pointless surveys, particularly for the business community, because they are seeking the views of their members and that is what they are entitled to do and, in fact, that is their job. With respect to Dr Robbins and Mr Voll from Charles Sturt University, are you familiar with that research, and what is your response to those studies?

Dr Oslington—Yes, that is a similar sort of methodology. It is with a whole lot of small firms in the local area. Their findings do contrast with some of the earlier surveys that have been conducted.

Senator BARNETT—Do you support their views or their findings?

Dr Oslington—Again, I think there are flaws. That sort of methodology is never going to tell us very much.

Senator BARNETT—I note in the statistics tabled from Senator Murray and the results from the department, in terms of New South Wales from 1996 to 2003, the termination of employment applications has not quite but almost doubled. I notice the figures for the 2003 calendar year did not include the Victorian statistics. Nevertheless, the state termination of employment

applications lodged in terms of the states has gone up from 6,748 to 8,299. Do you make any response to that?

Dr Oslington—I do not have anything in particular to say about that. They all have the numbers in front of them and different people will interpret them differently.

Senator BARNETT—Sure. Thank you.

Senator MARSHALL—I have a couple of questions about your costing structure. Before I start on that, in collecting the information you have gathered, did you get people responding who believed that the unfair dismissal laws meant you could not actually terminate someone's employment? I remember in a similar related piece of legislation that we did an inquiry into a couple of years back, in Melbourne there was a survey done which actually gave a large percentage of employers who thought that unfair dismissal laws meant that you could not terminate the employment of one of your employees.

Dr Oslington—I think, in our discussions and some of the comments we have in addition to the hard numbers, there is a lot of ignorance about the actual procedures and it would not surprise me if some employers had that view, but we did not come across it.

Senator MARSHALL—If that was their perception, that does not make it reality, does it?

Dr Oslington—No.

Senator MARSHALL—You do not think we should be legislating around reality based on perceptions? No, that is all right. The last time I heard that phrase that Senator Barnett put up was when I was told by the liquidator of Budget Rent A Car that Bob Ansett had it on the wall of his office. He had, 'Perception is reality.' In the marketing sense there may be an argument for that, but I am not sure. It is going to be a scary thought after July if we are going to be basing legislation on reality that derives from perceptions instead of facts, but I suppose that is where we are going.

Senator BARNETT—You have a very good sense of humour, Senator Marshall!

Senator MARSHALL—In terms of the costs work you are doing, particularly on firing, I am wondering how you intend to unravel the different sorts of firing. There are people that have genuinely been unfairly terminated. There are people that believe they may have been unfairly terminated because they were not offered any due process. There is, of course, probably the cheapest way of all, if legislation goes through, that the employer just terminates the employment and there does not have to be a fair go, there does not have to be procedural fairness. I would have thought people, at the very least, were entitled to know why they were being terminated and again, at the very least, given an opportunity to correct the behaviour or the performance, and to understand what is expected of them.

Doesn't it really depend where we draw the line—as a minimum human dignity issue—as to what is the very least opportunity employers should be giving their employees? How do you unravel that? Different companies, depending on size, depending on a whole of range of things, or attitudes of the employer, will terminate people in many different ways.

Dr Oslington—We have been quite careful in our surveys to distinguish between redundancy—which we say is something to do with general economic conditions and it is not to do with the performance of that particular worker—and firing for cause. Within firing we have looked at three different cases. We have looked at the case where it is not disputed. We have looked at the case where it has settled before it goes to arbitration and the costs associated with that. We have looked at how much it is costing when it goes to arbitration, and we can split that up into whether they win or lose. There is a fair bit of detail in the work we are doing about how the costs vary depending on the outcome.

Senator MARSHALL—But it has to be cheaper. If I want to give someone a fair go and procedural fairness, that will take a process which, if I was the employer, will involve my time, will involve the time of the employee, and some paperwork may be a little bit more of assistance. But even as a minimum, to provide procedural fairness and a fair go costs more than simply saying, ‘I don’t like you; you’re out.’ It is never going to be a comparison in that sense, is it? Of course it is going to be cheaper if you can just simply sack people without process, without a fair go.

Dr Oslington—I think everyone agrees that more stringent unfair dismissal provisions increase the costs of firing. But the question we do not know very much about is how much a change in firing costs will affect employment and wages and the other sorts of labour market outcomes that we are interested in. That is where we are almost entirely ignorant. Those are the sorts of numbers we are generating in our project.

Senator MARSHALL—The other thing you hope to identify is where all this benevolent employment is going to be generated from. I think I heard Senator Abetz say, in answer to a question not long ago, that with the passing of these unfair dismissal laws there will be an overnight improvement of 50,000 jobs—overnight.

Senator BARNETT—Senator Marshall, can you validate that?

Senator MARSHALL—Yes, I—

Senator BARNETT—Was it ‘overnight’?

CHAIR—Senator Barnett, can you just let Senator Marshall finish?

Senator MARSHALL—I think he said ‘overnight’. If I have misrepresented him, I will apologise. It might have been ‘virtual overnight’ employment. But anyway, the point I am making is that, again, there was going to be this massive employment. But it always occurred to me that employers employed people to do a job that needed to be done and if the job needed to be done it was being done by an employed person, who is extra overtime or casual or part time. There is employment somewhere and the job is actually being done.

Dr Oslington—Yes.

Senator MARSHALL—By removing unfair dismissal laws, where is all this unmet work that in effect generates more employment? Will your study identify that?

Dr Oslington—One of the sadnesses is that the debate has gone on for a very long time and there has been a lot of exchange of opinion, and it would have been great if some piece of research had been commissioned fairly early on that had tried to get beyond it and to come up with the sort of number that really is the key thing for your committee, being the number of jobs that will be created or destroyed by this change in legislation. We, unfortunately, cannot give you that number at this stage of things. Whether it is Don or any of the other organisations around the country that work in labour market research, it would have been great if this whole process had been informed by a bit more than opinion surveys. A lot of time has been spent on this, with very little underlying data to go on. A lot of time has been spent on this, with very little underlying data to go on.

Senator MARSHALL—Again, from the information that you have been studying, do you think, if employers understood more about the concept of a fair go and procedural fairness and what were the minimum requirements and how to go about meeting them, that terminating people for misbehaviour or misconduct or poor performance is possible? It does not need to be time-consuming and expensive but there does need to be a process to go through. If better education was provided, do you think that would alleviate the perception that some employers have that unfair dismissal laws are a restriction to employment?

Dr Oslington—Maybe. It is really outside the focus of our research. I have views about a fair go and that type of thing on both sides, employers and employees, and all of us have views about that.

Senator MARSHALL—You mentioned that you thought there was a lot of ignorance coming through the information you were gathering.

Dr Oslington—Yes, there is. We have certainly in our responses come across a lot of ignorance of the legislation and procedures, but I guess what we are trying to do is answer the economic question of the impact on jobs of the changes, irrespective of issues about a fair go and proper process and that type of thing.

Senator GEORGE CAMPBELL—Dr Oslington, whilst I understand that your inquiry is looking essentially at the cost impacts of hiring and firing, or that is the result that you are trying to get, when you talked to small business did you canvass widely the variety of issues that small business is confronted with in terms of hiring and firing, or was your inquiry much narrower than that?

Dr Oslington—It was very narrow. We were trying to identify the costs, the components of those costs; how they varied across industries and occupations and different sized businesses. We were not doing a very general study about the factors affecting small business employment or anything like that.

Senator GEORGE CAMPBELL—But did those issues come out in the discussions that you had with small business?

Dr Oslington—Yes. In some of the comments, businesses are talking about other factors that are less important or more important than unfair dismissal provisions, but it wasn't the main focus of our study.

Senator GEORGE CAMPBELL—I will just take you to the previous report done by this committee into small business employment which was handed down in February 2003 and which looked at the surveys that you have referred to earlier by Yellow Pages—or Pacific Access I think is the company that did it—the CPA of Australia, and the Australian Chamber of Commerce and Industry. What the committee found was that there was a clear message from all of those surveys and from evidence presented to the committee that, while the factors that determine employment trends in the small business sector are complex, business growth was an essential precondition to employment. In fact, if the businesses were not growing, then this argument of ‘If you took away certain factors, it would lead to greater employment’ was a myth. Would you agree with that assessment?

Dr Oslington—Yes. Firms are only going to take on workers if the present value of the wage is less than the present value of the output of the worker, and if you have a business that is at idle or bad economic conditions, then nothing that you do to firing costs is going to make a great deal of difference to that. The unfair dismissal provisions are about the strength of that link between economic conditions and conditions in the firm, and jobs that are created or destroyed. Firing costs might be a barrier between the two in a growing economy. They might mean that you have a growing economy but not jobs growth, or something like that.

Senator GEORGE CAMPBELL—Essentially, if I am running a sandwich bar, I am employing two people, I am selling 50 sandwiches a day and the demand suddenly goes up to 100 sandwiches a day, then I am not going to worry about whether or not there are problems with employing another two people to meet that demand. I am going to meet the demand. Is that not the fact with all small business?

Dr Oslington—I think, in general terms, that is true, but the issues are a bit more complex than that.

Senator GEORGE CAMPBELL—But if demand suddenly increases, the initial response of the business is to meet that demand.

Dr Oslington—Yes, but a business might meet that demand through casuals or through overtime. The unfair dismissal provisions—the levels of hiring and firing costs, more generally—will affect the type of employee that the business takes on, the terms under which they are taken on and so forth.

Senator GEORGE CAMPBELL—Yes, I understand that side of it, but it certainly is a substantial factor in whether small business increases its employment levels.

Dr Oslington—That is the question we are trying to answer: how strong is the relationship? If a business is growing, then the level of firing costs is going to moderate the impact of that business growth on employment creation, and the question we are trying to answer is how strong is that link. One extreme is that firing costs make no difference whatsoever. The other extreme is that firing costs completely hamstring firms and, regardless of changes in their market condition, nothing happens to employment. The answer is obviously somewhere in between, and we are trying to work out how strong that link actually is.

Senator GEORGE CAMPBELL—In further evidence to that inquiry by Mr Brian Gibson from the University of Newcastle, he made this statement:

While business owners may express concern about issues such as employment it is unlikely that correcting the problems will result in significant changes in employment levels. The problems identified by small firms are undoubtedly identified in good faith. However while they may inhibit additional employment at the margin or encourage an alternate employment mix—

which is the full time/casual approach—

they are unlikely to overcome the capped growth approach to business operations that is so dominant in the sector. Even if all the apparent barriers to employment were removed, the vast majority of small firms in Australia would not actively pursue growth resulting in employment generation.

Did you come across anything in your discussions with small business to confirm that statement?

Dr Oslington—As I have said a few times, we are focusing on the numbers. Along the way we did have discussions with business owners. We did get some written responses and those responses were all over the place. Some were of that nature; some were quite different. I do not think you could say that our work confirms or disproves such an assertion.

Senator GEORGE CAMPBELL—I will not read it out because of the time, but there is a whole range of different areas identified in this report as to why small business is not employing government regulation—lack of skilled employees; lack of professional skills. A major finding of this inquiry is the fact that most small businesses do not possess the business skills to run the administration of their businesses. While they are pretty good at making the sandwiches, so to speak, or fixing the motor car, they are very poor in the area of actually doing the administration of the business, and that is a factor in terms of their capacity to grow their businesses. In fact, many small businesses simply will not grow. They tend not to grow; they tend to keep them at a level that they feel is manageable within their own skill sets. In your paper, you say your project will be completed later this year but that so far there is little evidence to support some of the claims of large impacts of firing costs of employment.

Dr Oslington—Yes, I think that is true. We are still doing the simulations but the evidence does not seem to point that way at the moment.

Senator GEORGE CAMPBELL—And is it also true—as I draw from your submission—that you believe the impact of the fair dismissal bill will be negligible in terms of increased employment in the small business sector?

Dr Oslington—Yes. As I said, we do not have a number. Our research is still in progress but that is our sense of it at the moment.

CHAIR—Dr Oslington, thank you very much for your submission and for making your time available to appear before the committee today. It is much appreciated.

Dr Oslington—Thank you.

[11.04 a.m.]

BOLTON, Ms Sally, Committee Member, New South Wales Young Lawyers Employment and Industrial Law Committee

FOSTER, Ms Megan, Committee Member, New South Wales Young Lawyers Employment and Industrial Law Committee

TAN, Ms Sue-ern, Committee Member, New South Wales Lawyers Employment and Industrial Law Committee

CHAIR—I welcome our next witnesses from the New South Wales Young Lawyers who join us today from Sydney via a phone link. The committee prefers all evidence to be given in public but we will consider a request for all or any of your evidence to be given in confidence or in camera and, if you wish to do that, you need to simply make a request to this committee and we will facilitate that. We have your submission before us which is No. 8. Before I ask you to make an opening statement, do you have any changes or amendments to your submission?

Ms Bolton—No, we do not.

CHAIR—Would you like to begin by giving us an opening statement, and then we will go to questioning.

Ms Bolton—Thank you, Senator. We would like to start by thanking you for the opportunity to participate in the inquiry. The New South Wales Young Lawyers Employment and IL Committee consists predominantly of lawyers within the first five years of practice or under the age of 35, who practise either exclusively or predominantly in the area of employment and industrial relations. We are also open to law students who have an interest in the area. That is a little bit about who we are. The committee's submission into your inquiry into the unfair dismissal policy in the small business sector focuses on the proposed legislative changes in the federal arena because of the impact that these changes will have on the dismissals in the small business area.

The committee sees a fair go all round as an admirable and important aspiration and goal of unfair dismissal laws. We recognise the burden placed on small business by the current unfair dismissal laws and we also recognise the concerns that small business face when grappling with underperforming employees or employees who simply do not fit into a small business in which they work. The committee also recognises that the concerns of small business employers may lead to hesitancy in hiring new employees.

It is our submission that the proposed solution to these concerns—the [Workplace Relations Amendment \(Fair Dismissal Reform\) Bill 2004](#)—is an inappropriate response. The bill addresses legitimate concerns of small business by erasing the rights of employees to fairness in the dismissal process and, in doing so, leaves all small business employees vulnerable to an arbitrary and unfair end to their employment. As lawyers, we often see employers who want to do the right thing, and it is our experience that most employers have good intentions. Nonetheless, we

often see some employees who have been dismissed from small business employers in grossly unfair circumstances.

The committee's written submissions make suggestions as to alternative strategies to address the burden that unfair dismissal laws place on small business. The key focus of these submissions is to increase the ability of small business employers to be aware of best practice strategies when faced with an employee whose employment they wish to terminate. We highlight that currently it is difficult for even vigilant small business employers to be aware of what they should do when managing poor performance or terminating the employment of an employee who is suspected of misconduct.

The committee sees small business employers who are unaware of even the most basic guidelines of what an employer should do to be fair to an employee departing the business, such as an employer not being aware that it is not appropriate or acceptable to withhold an employee's accrued annual leave or pay for work already performed in circumstances where employment has been terminated due to alleged theft or other such misconduct. As lawyers, we see it as basic that these are statutory entitlements and are not able to be used as leverage. But, understandably, an employer may assume that, if they believe the employee has stolen from the business, that money can be deducted from the employee's wages.

The committee has recently produced a *Know your entitlements* booklet for employees. A similar publication could also be produced for small business employers at little cost. We also suggest that such a publication could be distributed to small businesses upon registration as a cost-effective means to target most directly those who would benefit from such information. If an employer is aware of what to do before a problem arises, when faced with an employee with poor performance an employer will be less concerned about that employee initiating unfair dismissal proceedings, and also the potential for such action being brought would be reduced, with the added benefit for all involved of the unfairness having been prevented at the outset.

The committee also recommends that small business employees continue to be protected from extreme unfairness in the termination of their employment. In our submission we have also noted technical issues for the process of determining jurisdictional issues. We have proposed that the definition of 'small business' be 15 rather than 20 employees, or could be defined by the level of turnover of the company. We have also spoken about the need for parent entities to be accounted for in the definition of a small business and about limiting unfair dismissal laws to employees with more than 12 months employment in a small business. We welcome your questions about any of these matters or any other pressing issues that you have.

CHAIR—Thank you very much for that. We are going to start questions with Senator Murray.

Senator MURRAY—Hello to you up there in the sky! Did the committee fax to you two documents with respect to an answer to a question that I put to the minister and a comparative table of federal and state termination laws?

Ms Bolton—Yes, we received them this morning.

Senator MURRAY—I want you to turn to page 2 of the questions and answers from the minister. You will note that on page 2 for New South Wales the number of unfair dismissal

applications under the federal law fell from 4,290 to 1,270, a drop of 70 per cent. Did you see that?

Ms Bolton—Yes, we did.

Senator MURRAY—The number of state unfair dismissal applications rose from 2,186 to 4,083, an increase of 87 per cent. Did you see that?

Ms Bolton—Yes, we did.

Senator MURRAY—In the comparison of state and federal laws, you will see a number of headings which, in summary, indicate that the federal law is much tighter than the state law. Did you see that?

Ms Bolton—Yes.

Senator MURRAY—Do you have any commentary on those figures and what they mean with respect to this issue?

Ms Bolton—We do not think that these figures can necessarily be taken as an indication that the legislation is working better in one area or the other. There are a couple of reasons why you might see an increase in state applications rather than federal. It could simply be that, say we are lodging an application, we are not sure which award covers the particular employee's employment. In those sorts of circumstances we might file it in the New South Wales commission, because, if it turns out that it is better held in the federal commission, we can transfer it across quite easily.

Senator MURRAY—Are you saying to the committee that you can easily switch between the two jurisdictions?

Ms Bolton—You can make application if an unfair dismissal claim is lodged with the state commission and it is found that the correct jurisdiction is the federal commission. You will generally find that, if a claim was initially filed within the 21-day limit, that time period will be taken into account by the federal Industrial Relations Commission.

Senator MURRAY—But it must mean that both state and federal laws would apply to the same employee, mustn't it?

Ms Bolton—No. It means that one has been commenced incorrectly, in the wrong jurisdiction, and it has been sought to commence new proceedings in the correct jurisdiction. It does happen both ways—it first starts in the federal and then moves to the state—but you will generally find in New South Wales the majority of employees are under the state industrial relations system.

You will generally find that applications start in the state commission and then there is an argument over which is the correct jurisdiction, particularly if they come under a federal award, in which case there obviously has to be an application made in the federal jurisdiction. If the claim is made within the 21 days time limit in the state commission, we generally find that the federal commission will take that into consideration when new proceedings are commenced.

Senator MURRAY—So the drop of 3,020 in the federal jurisdiction for New South Wales and the increase of 1,897 in the state jurisdiction from 1996 to 2003 cannot be accounted for by simple jurisdiction switching.

Ms Bolton—No, of course not, but it indicates that there might be some fluidity happening there that is not necessarily a result of the nature of the legislation or the tightness of the legislation in the due jurisdiction. The size of the employer's business is relevant in New South Wales. It is merely relevant per case law as opposed to being enshrined in the legislation itself.

Senator GEORGE CAMPBELL—In relation to the figures in those tables, would there be a certain percentage of double counting of cases that may have been commenced in a state jurisdiction and have gone to the federal jurisdiction and vice versa?

Ms Bolton—It is possible. Say we lodge it in the New South Wales commission. Despite the fact that it might be better heard in the federal commission, the parties are nonetheless willing to conciliate it in the New South Wales commission and to see whether they can reach an agreement without the fuss and expense of going to the other commission and hearing the matter there.

Senator GEORGE CAMPBELL—I understand that. What I was more specifically asking was: if it is found that someone has made an application in the wrong jurisdiction and transfers it to the appropriate jurisdiction, would that result in some of the figures in those tables being double counted?

Ms Bolton—It may, and I think that is due to when the figures are counted. Is it purely on application lodgment, when you walk into the registry and lodge an unfair dismissal claim? If that is where the numbers are taken from then, yes, I would assume that there would be some double counting, but I would not think that it would be a large proportion.

Ms Tan—One of the things that these figures do not show is that a large number of the applications are often settled at the conciliation conference, which is usually within four to six weeks of the application being lodged. Very often they do not go to an arbitration and thus do not incur the full cost of that. That is not reflected in the figures that you have provided.

Senator MURRAY—I think I have the answer in your written submission, but can you confirm my impression that in your experience small business employers and small business employees rarely know whether they fall under federal or state jurisdiction.

Ms Bolton—Absolutely. I think that the primary concern when an individual walks into our offices is what jurisdiction we are looking at—both employers and employees—because often we find that an unfair dismissal may have been commenced in the wrong jurisdiction. The first issue always is to determine the jurisdiction, and there is a lack of understanding and a lack of knowledge about that. Particularly when you see media releases and so forth, such as this bill going forward, we get clients saying, 'I've got fewer than 15 employees, so therefore the laws will affect me.' You have to explain, 'No, they won't, because you are in a state jurisdiction; you are not a respondent to the federal award,' or, 'You are not a party to an employer association that is a respondent to the federal award.'

Senator MURRAY—As an example, if employers have a perception concerning unfair dismissals, that perception may, in fact, arise from their experience under state law, not under federal law. Is that correct?

Ms Bolton—Yes, I would say that is a fair assumption. The majority of employers that responded may have been through the state jurisdiction rather than the federal jurisdiction.

Senator MURRAY—Would it be fair to say that the people you have dealt with over the years, both employers and employees, would be unlikely to know that the Commonwealth legislation was strongly tightened up in 1997 and 2002 or that unfair dismissal applications in New South Wales under federal law have fallen by 70 per cent? They are unlikely to know that, are they?

Ms Foster—Yes, you are correct in that assumption.

Senator GEORGE CAMPBELL—Ms Foster, in relation to the individual employers that you deal with, do they have available to them, that you are aware of, any training courses or training material provided by the federal government or by the state government in New South Wales in respect of unfair dismissal laws?

Ms Foster—No, not in the sense of training materials. There are avenues by which such information can be obtained. There are large organisations that have their own training resources and access to employer associations. Small business employers would be unaware of where to obtain that information. We see that as the key issue today: access to information to both help employers to properly treat their employees and to follow correct practice and procedure and for employees to be able to obtain that elusive fair go all round.

Senator GEORGE CAMPBELL—Are you aware of any business organisations that provide training in this area?

Ms Tan—There are employer associations that obviously provide a service to their members, but the majority of those employer associations are for bigger organisations, not small businesses. We know of a small business employer association, but our understanding is that that is not necessarily very popular in terms of membership. The small business employers that I have encountered in unfair dismissal types of claims very often will get served with the application and then come straight to a lawyer for assistance. For example, there are employer associations like Australian Industry Group or Australian Business Ltd or clubs in New South Wales that tend to have membership of larger organisations rather than small business owners.

Senator GEORGE CAMPBELL—One of the recommendations you have made is to extend the period for 12 months or less in which the unfair dismissal provisions would not apply to employees. Doesn't that run foul of your more general argument, which I think is in your full submission, that even if you did that you are still creating two classes of employees?

Ms Bolton—Yes, it does, in a sense. However, we recognise that the government is particularly keen to narrow or limit the number of claims. Given that very strong intention, we considered that 12-month option to be the fairest way in which that limit could be imposed.

Senator GEORGE CAMPBELL—But you are not arguing that as your primary position, are you?

Ms Bolton—No, definitely not.

Senator BARNETT—Greetings from a former Victorian young lawyer. I know the important contribution that the young lawyers divisions make around the country, so thank you for your contribution today. In your opening statement you said you recognised the burden or impediment on small business growth of the current arrangements with respect to unfair dismissal laws. On what basis did you come to that conclusion?

Ms Bolton—Are you meaning that we recognise that employers may be hesitant to hire new employees because of fear about unfair dismissal?

Senator BARNETT—Yes.

Ms Bolton—That comment was made primarily because we had been talking to small business employer clients and socially with people who have small businesses. We stress that it is a concern based on a perception that they are liable for unfair dismissal if they fire someone. Some people even think that they are not allowed to fire anybody and if they do they will be faced with an unfair dismissal action. We recognise that there could be some hesitancy. However, we do not accept the government's assertion that unfair dismissal laws equal people not being hired, and certainly not something in the order of 70,000 people not being hired.

Senator BARNETT—Do you think it is in the order of any number, or you do not think it has any impact at all?

Ms Bolton—We think it might have a slight impact but we do not think it is an overriding one. We think it is one of many concerns that an employer may face. It is really hard to attribute any concrete number because it is only one of the factors involved.

Ms Tan—It is more of a case that it is a perception, so education would be a more appropriate way to address that problem, rather than a blanket restriction on any small business employee bringing a claim.

Senator BARNETT—Yes, I have noted your recommendation with regard to education and an information campaign. I can see some merit in that in terms of ensuring that the facts and the reality are made clear to small business employers and others. Are you familiar with the many surveys that have been done of small business employers by the chambers of commerce, small business employer associations, other independent groups—including the Melbourne Institute of Applied Economic and Social Research survey that they did on behalf of the department—all of which highlighted the detrimental effect on small businesses, as they saw it, of the unfair dismissal laws? Are you familiar with those surveys and reports?

Ms Bolton—I am not unfamiliar with the Melbourne one that you mentioned but we did do a fair bit of research of employer bodies. What we see is surveys which say, 'Are you concerned? Does this affect your decision to hire?' I know it is a bit of a tricky link because it is not necessarily a causative link but it is one of the considerations that small businesses have. I see

the common pattern of a causal link being assumed because there is a concern on one hand and a fear about hiring on the other hand. I do not think that causal link is necessarily made out. That is a common flaw in the surveys that I have seen.

Senator BARNETT—We have had a debate or an argument this morning with regard to ‘perception is reality’. I am making the point that we have had survey after survey which makes it very clear that the small business employers see the current arrangements as an impediment to small business growth. This is a fact; it is not a perception. It is their view and therefore impacts on their willingness to employ. That is the point that is probably being missed this morning. I am just making it again and seeking your response.

Ms Bolton—We agree. If it is a concern then it is going to affect the hiring process.

Senator BARNETT—In terms of the definition, I think you recommended ‘not more than 15 employees’ rather than the ‘less than 20 employees’. Can you outline to the committee your views in that regard? I know you have referred to it in your submission but I would like you to speak to that.

Ms Foster—The reason that we propose that 15 employees should be the number, rather than 20 employees, is that 15 has been the standard number that has been used across specifically the federal and New South Wales state industrial relations systems over roughly the past 20 years. You will note in our submissions we say that the definition of a small business as being 15 employees or less was introduced by the Australian Industrial Relations Commission’s predecessor in 1984 in a termination, change and redundancy case. This definition has been used since that time.

Most notably we see the legislation in New South Wales, particularly the Employment Protection Act, which refers to a definition of small business being 15 employees or less. We do not understand why that needs to be increased to 20 employees. In previous versions of this bill over the last year there have been 15 employees or less. In this latest release it has increased to 20 employees and we say that that is not appropriate. If there has to be a definition and it is based on numbers, it should be based on 15 employees or less.

Senator BARNETT—Finally, going back to the statistics referred to by Senator Murray and tabled here today, you will see that New South Wales has had an 87 per cent-odd increase from 1996 to 2003. In Tasmania, the state I come from, we have had the highest increase of all the states, a 145.6 per cent increase in the number of termination of employment applications under the state jurisdiction. Do you have a view as to why that increase is so substantial?

Ms Tan—Are you asking us to comment on the Tasmanian jurisdiction?

Senator BARNETT—Yes, the New South Wales increase of 87 per cent, and then if you would like to comment on the Tasmanian increase.

Ms Bolton—We are not really in a position to comment on the Tasmanian situation. I am not familiar with any parallels between the industrial relations environment or the employment environment in New South Wales and Tasmania.

Senator BARNETT—I think Senator Murray made the point earlier that you will see under the federal jurisdiction there has been a decrease of some 70 per cent and there has been an increase of 86.8 per cent. What is your analysis or view of those figures?

Ms Foster—It may be purely on the basis that there is less responsiveness to federal awards. You may find that employers are not opting to create their own awards in the federal system or the unions are perhaps pressing logs of claim in the state industrial relations system. If employers are not members of an association that is a respondent to a federal award, there will be an increase in the state's jurisdiction, purely due to responsiveness.

Senator BARNETT—Thank you for your contribution.

CHAIR—Ms Bolton, I have a couple of questions before you go. For some reason we seem to have been sidetracked this morning about perception being reality. Sometimes it seems that if we say it is going to create 77,000 jobs often enough, we will believe it in the end. Your paper says, though, that your committee has not found evidence that demonstrates a link between the concern about unfair dismissal laws and the failure of small business to hire a greater number of employees. Even though people might have an opinion that there is a link, you are telling us that, on the basis of any evidence or research you have done, that link is unjustified when the reality is applied.

Ms Bolton—We are not seeing a causative link. We are seeing an assumption that there is concern; therefore, that concern is leading to a decision not to hire. We also stress that this concern is based on ignorance. If people are more aware of what they need to do, not only will they be less concerned about the potential for an unfair dismissal claim but they will limit their exposure to an unfair dismissal claim because they will have ticked the box, which is effectively what they need to do to give someone a fair dismissal.

CHAIR—Your submission also says to us that it is important to find a balance and for the views of one party not to be adopted to the detriment of or by sacrificing the other party. It has also been put: why should 40,000 unemployed people be rescued from the unemployment queues at the cost of two million workers giving up their right to be treated fairly if they were dismissed? In your view, is it a crucial issue here that the notion of a fair go all round will be set aside?

Ms Bolton—Yes. We think it is important that, when you are looking at how many people might come in the door, you also look at how many people are going out the door and in what circumstances, and also remember the value of going to work and knowing that you have a job and that you will not be left without income at the end of the week for unfounded allegations against you or simply on the whim of your employer.

Ms Tan—I think that that is really reflected in our recommendation about including an extreme unfairness provision if there were to be a blanket prohibition against a small business employee bringing an unfair dismissal claim. I think that that notion of extreme unfairness in some way would address that balance problem.

CHAIR—Thank you very much for your time this morning. We certainly appreciate your submission and your availability to appear as witnesses before us this morning.

[11.38 a.m.]

NAISMITH, Ms Sharlene, Combined Community Legal Centres Group (NSW) Inc.; and Principal Solicitor, Shoalcoast Community Legal Centre

TUCKER, Ms Linda, Combined Community Legal Centres Group (NSW) Inc.; and Solicitor/Clinical Supervisor, Kingsford Legal Centre

CHAIR—I welcome our next witnesses from the Combined Community Legal Centres Group (NSW) Inc. Do you have any comments to make on the capacity in which you appear?

Ms Tucker—I appear also as a representative of my employer, Kingsford Legal Centre, which is part of the University of New South Wales.

Ms Naismith—I am principal solicitor of Shoalcoast Community Legal Centre in Nowra, which services the areas of the Shoalhaven, the Eurobodalla and Bega Valley, right down to the Victorian border.

Ms Tucker—I should clarify my position at Kingsford. I run the employment law practice at Kingsford Legal Centre.

CHAIR—Thank you. The committee prefers that all evidence be given in public but we will consider any request for all or part of the evidence to be given in camera. Your submission, which we have received, has been numbered 10. We all have a copy of it. Just before you give us a brief opening statement, do you have any changes or additions you want to make to that?

Ms Tucker—I just need to make a slight amendment to the introductory paragraph. It is nothing substantive. In the second paragraph, the third line from the end, I have referred to the client base for community legal centres, that we ‘provide services to people on low incomes that are ineligible for legal aid’. That should have been ‘who may be ineligible for legal aid’.

Ms Naismith—I was simply going to add that the examples that are given in the following pages of actual cases are based on the notion that the corporation’s power will be used to infiltrate state employers, so a lot of the people that are in those examples would be currently under state law.

CHAIR—Thank you. To begin, would you like to make an opening statement and then we will go to questions.

Ms Tucker—I am currently the co-convenor of the Human Rights and Employment Law Committee of the Combined Community Legal Centres Group and Ms Naismith is the outgoing convenor. Both of us come from the perspective that we appear for and advise applicants, rather than employers, in employment law matters. The client profile of my clients at Kingsford would be people earning below \$50,000 a year, the majority from small employers. I could safely say that with these reforms either at the federal level, and depending on the extent to which they infiltrate state industrial relations, they will be significantly affected.

I want to also draw the committee's attention to the great resource that employment relations has in this country with the state and federal industrial relations commissions. Commissioners and their associates themselves are a valuable resource. They are well used to dealing with self-represented litigants on both sides. They have a duty to encourage conciliation, so we have this knowledgeable, experienced resource there to minimise the impacts on both parties in relation to unfair dismissal. To undermine that resource in any way will have a great impact on broader relations in the employment relationship. Those disputes are not going to go away and there needs to be recognition of the mutual obligations in the employment relationship. To me, there is no social or economic logic to the proposal of one side being able to unilaterally breach the employment contract and a vulnerable party not having recourse through a dedicated resource.

The main contribution that we would like to make, though, is to provide a coalface perspective of the likely impact on actual employees, based on our client base. I want to refer to a couple of the practical consequences apart from those in the submission—and I can perhaps do this later on in questioning—with regard to particularly the impact of employees subject to summary dismissal. I can perhaps refer to that later on.

CHAIR—Ms Naismith, is there anything you want to say as an opening statement?

Ms Naismith—My colleague has focused on some of the practical aspects. Whilst I was writing my sections of the submission, what really struck me was the more philosophical aspect—that is, what, in a modern civil society, we perceive the role of law to be. That is a fundamental issue that so often we forget to talk about. A real measure of a modern, civil society is how it manages to protect its vulnerable and disadvantaged, and I can tell you that every one of my clients is one of those people. The problem that we come across, of course, is when that role to protect competes with economic interests. In very few areas of law is that more apparent than in industrial relations, and that often causes quite polarised debates.

I make one reference to a speech given by Justice Kirby on the centenary of the Australian Industrial Relations Commission. His Honour basically said that you have two markers in industrial relations—two markers in the battleground, if you will; I do not really want to call it that but it is for lack of a better term. He said that the first marker is the force of global and regional economies and the creation of institutions of good governance that facilitate the efficient flows of capital and finance that drive the modern economy. The second marker is human rights. Where the balance is is always going to be a hot topic of debate. I do not see any balance in this proposal.

I see that this proposal places the role of law in the pursuit of economic interest and not in the pursuit of human rights or a basic idea that, if you have been wronged or if you feel you have been wronged, you should be able to seek some redress or look to a third party, an independent third party that can say you are either right or wrong about that. It is a fundamental right of a civil society for a person to be able to do that. That is all I have to say on that.

Senator BARNETT—In regard to the Combined Community Legal Centres, do you have funding from both the state and federal Australian governments these days? Is that how it works?

Ms Naismith—Yes, we do. Centres are different, according to the roles that they have. Mine, however, is a combination.

Ms Tucker—We are a combination as well, and we are also part of the University of New South Wales; we are distinct from a lot of the community legal centres.

Senator BARNETT—And how much contact would you have with the small business community?

Ms Tucker—In what way?

Senator BARNETT—Is it just directly by your clients or do you have contact in other ways?

Ms Tucker—For our centre, apart from through clients and interaction with employers in relation to actual disputes, we are involved in community legal education, where we try to have outreach education with regard to rights and responsibilities. Employers who may be involved in other community organisations as well would interact with us as a fellow community organisation.

Senator BARNETT—Ms Naismith?

Ms Naismith—My involvement would stem really only from meeting employers in conciliation. My parents run a company, but apart from my personal stuff, my work related involvement is strictly really about being a consumer myself and meeting small business employers in conciliation in both places, say like the Human Rights and Equal Opportunity Commission, Anti-Discrimination Board and the Industrial Relations Commission.

Senator BARNETT—Based on the feedback that you have from, in your case, Ms Naismith, the limited contact you have had with small business and, Ms Tucker, with your contact, what sort of feedback have you had from the small business community on the impact of the unfair dismissal laws, on their prospects for employment and its impediment to small business growth?

Ms Tucker—I cannot really assist you on that. That has not been raised in any way. Perhaps that is the sort of thing I can take on notice if it arises, if that is something the committee is interested in.

Senator BARNETT—That is fine. You may not have had much feedback on it. What about you, Ms Naismith?

Ms Naismith—No. The feedback that I would receive, though, is basically contempt towards having to be presented before a tribunal; certainly nothing directly in economic terms.

Senator BARNETT—Are you familiar with the reasonably large number of reports and surveys that have been conducted over many years with respect to the impediment to small business growth of the unfair dismissal laws?

Ms Tucker—No, I have not, and as part of this process I have obviously been reading through some of the other submissions, which have been helpful in talking about some of the studies. When you were discussing this before, it reminded me about the New South Wales government's submission to this committee and some of the reports they have referred to, so I am not aware of anything that has clarified the extent to which it is an impediment to employment. Obviously

these are submissions that are contra the reforms; they are referring to the OECD reports and so on that appear to show that it is not an issue. But I cannot say one way or the other and I have not seen the reports to which you are referring.

Senator BARNETT—The reports that I am referring to are numerous and the ones in particular from the small business community, the chambers of commerce and so forth, have all made it very clear that it is an obstacle and an impediment to small business growth. This is the view of their members and a view of the small business community. That is pretty much on the record and it has been said quite clearly and strongly in those terms over many years.

Ms Tucker—From the reports that I have looked at that refer to the low level of unemployment at the moment with our current unfair dismissal laws, when you look at it as an overview there does not appear to be that impediment, and I would have to say—and this is obviously only anecdotal—that it has never been referred to by employers, and I do deal with quite a few self-represented employers. That does involve direct interaction. I can honestly say it has never been raised, ‘I would not have hired people in the first place if I knew I was going to have to face this.’ As Ms Naismith says, you get a lot of other issues raised and it is not the happiest of interactions, but it has never been said, ‘Well, that’s it. I’m not going to employ people if I have to deal with this.’

Senator BARNETT—I can refer you, just for further interest, to page 151 of the *Small business employment* report of the Senate committee that was delivered in February 2003. It refers to Dr Don Harding’s research from the University of Melbourne, and it outlines there that in his view—not my view; his view—it translates into more than 70,000 job losses where unfair dismissal laws played a role, of which 60,000 jobs are in small business. The report also found that unfair dismissal laws cost small and medium businesses \$1.3 billion each year. I just draw that to your attention. That is part of the government senators’ report.

Ms Naismith—I am aware of the Don Harding research and I was listening this morning to Dr Oslington discussing that. I think there is a lot of time being spent on that today. I am not an economist and I am not coming from the perspective of small business, but I can say that if you ask any small business operator, ‘Is the GST an impediment to your process? Are workers comp premiums an impediment to your economic growth?’ they will all say ‘Yes’ to that, but that does not mean we scrap all of those laws. The same can be said about superannuation contributions and any other kind of relevant workplace related monetary issue that is government imposed.

I can tell you one example of a young girl who was in a small business and hurt her back. It was about five to six weeks before her employer would even put in a claim to allow her to go on to workers compensation because he did not want his premiums to rise. He wanted to pay her under the table for her injuries. People will always have economic concerns about government imposed law, but that does not justify scrapping them, particularly when you are feeding a misperception as well. Law serves a higher purpose than just making things easier financially for people—a much higher purpose.

Senator BARNETT—Yes. That example that you share with us is obviously a disappointing one. The other one is on page 150 of this report which talks about the Restaurant and Catering Association. They told the committee that they found that 38 per cent of their owners had defended an unfair dismissal claim at an average cost to the employer of 63 hours of their time

and \$3,675 in legal or settlement costs. These estimates translate into \$18.2 million direct costs and \$15.5 million indirect costs for the industry as a whole. What is your view on those costs of litigation? Does that sound consistent with your experience?

Ms Naismith—Restaurants and catering are fairly extreme examples because they have a very high staff turnover. People do not stay there as a career choice. Often it is students doing it as casualised workers or supporting what is not their primary income, so restaurants are a fairly extreme end of the spectrum, but even so—

Senator BARNETT—They probably would not think so.

Ms Naismith—they do have a high proportion of response rates to industrial actions.

Ms Tucker—The AHA is obviously a very regular respondent.

Ms Naismith—The Hotels Association is a very regular respondent in the commission, and one of the reasons for that does have to do with the fact that they have higher staff turnover and so forth, but in any event, those costs can be quelled by teaching people how to do things properly. When the GST came in, everyone was pretty afraid of that, but the government got up and said, ‘This is what you need to do to comply.’ There were community forums, and local accountants et cetera, and people were walked through the process. I do not see why that cannot happen in unfair dismissal related actions.’

Ms Tucker—And probably the restaurants and catering is a useful marker for this. Occupational health and safety: there is an absolute duty there for employers. If you asked restaurants, ‘Do you comply with all of your requirements under the relevant occupational health and safety legislation?’, I am sure they do not, but they would if they were pushed to it. There are massive costs there as well, but these are the duties that we are already referring to. There are all these duties and obligations. Why is unfair dismissal put to one side and not put alongside things that we consider important, like tax and health and safety?

Senator MURRAY—Have either of you conducted dismissal cases under common law obligations in the courts?

Ms Naismith—I have not, because this process of unfair dismissal is much cheaper and much more accessible for people to achieve results. Common law, of course, requires the intervention of the higher level courts—not so much higher level courts, but the costs follow the event and so forth. There is less capacity for conciliation and self-representation.

Senator MURRAY—The statement on page 7 of your submission in conclusion states:

Alleged breaches of common law obligations of employers may still give rise to legal action—

what you mean is if unfair dismissal is done away with—

but this may be more onerous for both parties given that parties will be conducted in a non-specialist and costs jurisdiction.

I assume that comment is based on your knowledge as practising lawyers—namely, that court proceedings take longer, are more difficult to access and are more costly. Is that accurate?

Ms Tucker—Extrapolating from other legal proceedings to running unfair dismissals through the local courts, you are immediately going into litigation. There would be procedures involved with preparation of documentation for litigation. That is immediately going into an adversarial process. As already mentioned, it is a costs jurisdiction. With all of that you could easily say you are flipping that onto unfair dismissal while at the moment you have a process where there is a duty to conciliate and there is no great evidentiary burden on either of the parties until you get to arbitration, which is the great minority of cases.

Senator MURRAY—There are two effects, aren't there? One is that if an unfair dismissal application was only made possible through common law access to the courts you would get that cost and time effect. The other is that the cost and time effect acts to inhibit redress of wrongs, doesn't it?

Ms Naismith—Absolutely.

Ms Tucker—We do not want to make too big a thing of that because it might be seen in some quarters as an advantage.

Senator MURRAY—Of course. I make the point deliberately because it has been said by advocates of this change that the people will still have access to the courts. But the courts in this country are not accessible to ordinary people.

Ms Naismith—That is absolutely correct. That is the reason why community legal centres exist. We are fairly underfunded anyway, so we cannot cope with demand. We are inevitably turning away a lot of people. One of the main aspects when I am giving telephone advice to a person over the phone is, 'Your remedy may well be in the equitable jurisdiction of the Supreme Court but it will cost you thousands of dollars to even get there.' It is a process of people giving up. One common law claim for breach of contract and damages flowing from that would cost 20 times one unfair dismissal and conciliation.

CHAIR—You may or may not have seen the article in today's *Australian* that suggests that the federal government is considering a proposal to hand unfair dismissal cases to the Federal Magistrates Court. What is your response to that?

Ms Tucker—I am sure the federal magistrates would be thrilled. They are fairly overburdened now, with taking asylum cases.

CHAIR—The article does say that it would certainly increase the workload and the burden on the Magistrates Court, but what about in terms of accessibility, following on from what Senator Murray was saying?

Ms Naismith—I would welcome something along that line if that were to be the last resort scenario. That is an entirely possible thing. My experience of the Federal Magistrates Court is family law related matters and I have to say there is really very little difference between standing before a federal magistrate and standing before a Federal Court judge.

CHAIR—But this is to not take unfair dismissal into the commission at all.

Ms Naismith—At all? So just referral and arbitration. If you are still going to have a process, you are better served having a process that is conducted by specialists and professionals. The conciliation role of the commission and the resources that those people represent, as Ms Tucker was saying earlier, is something you cannot put a price on.

Ms Tucker—And, of course, the Federal Court is a costs jurisdiction.

Senator MURRAY—I want to refer you to documents that have been given to you today. The document headed ‘Question no. 50’, which is answers from the minister to questions I put: I refer you to page 2, which shows that between 1996 and 2003 the number of termination of employment applications lodged in New South Wales under the federal jurisdiction fell by 70.4 per cent from 4,290 to 1,270. If I may give you an inappropriate compliment, I doubt either of you were practising in 1996 in this area, so I cannot get you to compare your experience under those.

If I turn you to page 4, you will see an estimate there of the total number of small businesses as a percentage of the number of applications lodged: 1,270 in 2003. The small business estimate is 27.6 per cent, which translates into 351 unfair dismissal applications in New South Wales, which constitutes a third of the country’s employment for small business. You can see, when you hear estimates quoted by Senator Barnett recorded in the last report, that the Restaurant and Catering Association claims that 30 per cent of their employees go through this process. That is absolute nonsense because the total number is 351. It is a very small number. I just want you to confirm from your experience: would you two have dealt with some of those 351 federal unfair dismissal applications for small business in New South Wales in 2003?

Ms Naismith—Quite possibly.

Senator MURRAY—Were they all people from restaurants and catering?

Ms Naismith—No. Defence.

Senator MURRAY—Isn’t that a surprise!

Ms Tucker—Yes. Not restaurants.

Ms Naismith—I have had a couple of hotel ones.

Ms Tucker—Pubs.

Senator MURRAY—Turning again to the figures on page 2, you will see that the number of state termination of employment applications lifted from 2,186 to 4,083. If you applied the same percentage of small business—and I do not know if you can or cannot, because I only have the federal figures—that would mean that there were 1,127 unfair dismissal applications for small business under the state law in New South Wales in 2003. Roughly three to one would be the relationship. In your experience is it a three to one kind of relationship between state applications and federal applications that are made through your agencies?

Ms Naismith—I certainly deal with many more state applications than federal.

Senator MURRAY—Does three to one sound about right?

Ms Naismith—It could even be more than that.

Ms Tucker—I would have to say the same.

Senator MURRAY—You think it is more than that?

Ms Tucker—The previous head of Employment Law Practice is now our principal solicitor. I happened to mention her, ‘At the moment I’ve got mostly state,’ and she said, ‘Well, I have mostly federal.’ It is just one of those things that happen. It would be very difficult to say, without following it to see how it pans out.

Senator MURRAY—You are at liberty to say no, because I am putting a request to you, not a committee demand, but could you take on notice to do a snapshot, for a period which is convenient to you, of applications made for unfair dismissals. Could you advise the committee, perhaps within a week, how many of those are state and how many are federal. If you are able to break them into small business and larger business that will be good, but I really just want to know the numbers because my view is that it is a state problem and not a federal problem.

Ms Tucker—So any sort up to current, or even though they are past years—

Senator MURRAY—It does not matter, any period as long as you tell us what the period is and as long as it is a representative snapshot. Obviously a week would be silly. I do not want to put you to too much administrative effort.

Ms Tucker—All right.

Senator MURRAY—The last question on notice: you have only just been given these documents from the committee but if, having looked at them in more detail, you have any further comments, would you advise the committee as well. That is all I have, Madam Chair.

CHAIR—Thank you.

Senator GEORGE CAMPBELL—Ms Tucker or Ms Naismith, do you have a record of the number of unfair dismissal cases that your organisation has dealt with on a yearly basis?

Ms Naismith—I have it with me.

Senator GEORGE CAMPBELL—Would you mind tabling it, or can you read it into the record?

Ms Naismith—It is a statistical profile of the problem types that have been presented to Shoalcoast Community Legal Centre since its first year of operation. We have been going just over five years, so we are quite new. In that time we have dealt with a total of 6,021 cases across

all areas of law that we deal in. The amount that represents unfair dismissal inquiries or cases is 150.

Senator GEORGE CAMPBELL—One hundred and fifty over a five-year period.

Ms Naismith—Yes.

Senator GEORGE CAMPBELL—And are those mainly employees who have come to you for assistance?

Ms Naismith—Yes, and they are not even open files of people who have applied to the commission either; a lot of those are just inquiries to find out whether there is anything they can do.

Senator GEORGE CAMPBELL—Whether they have a case or not?

Ms Naismith—Yes. We try and assist them to file an application if we think there are reasonable prospects of success but we do not always represent them, so I could not tell you the outcomes of some of those matters.

Senator GEORGE CAMPBELL—In the main would you know—you may not—if those are employees who are essentially engaged in non-union workplaces?

Ms Naismith—Yes.

Senator GEORGE CAMPBELL—There is no union representation.

Ms Naismith—Yes, primarily. There are very few people who come through who are union members and, if they are, they have generally gone to them first. I often ask whether or not the person is a member of the union. They either do not know what that means, they do not know what union applies to them, or I have even had some people say, ‘The boss did not sign me up,’ because they do not understand.

Senator GEORGE CAMPBELL—The process.

Ms Naismith—Yes.

Senator GEORGE CAMPBELL—Would you have general figures for your group across New South Wales?

Ms Tucker—I have been shown up here because I have not brought those figures in but I am happy to provide that, again perhaps when I am responding to Senator Murray.

Senator GEORGE CAMPBELL—Could you take it on notice.

Ms Tucker—I could get that.

Senator GEORGE CAMPBELL—Please.

Ms Naismith—For the whole state we would have to do our best.

Ms Tucker—We could check.

Senator GEORGE CAMPBELL—Yes.

Ms Tucker—We could sent out a request and get everyone to—

Senator GEORGE CAMPBELL—Could you take it on notice and provide us with whatever you can dig up in that area.

Ms Tucker—Yes.

Senator GEORGE CAMPBELL—In respect to the issue raised by Senator Murray and the relationship between federal and state applications, what has been your general experience in terms of both jurisdictions handling unfair dismissal inquiries? Is it a speedier or quicker process in the state jurisdiction than it is in the federal jurisdiction?

Ms Naismith—My experience is that it is quicker in state but most of mine have been state. The ones that I have dealt with in federal are still quite on par in terms of how quick they are, but my experience being mostly state, I probably could not answer that question with a great deal of commitment.

Ms Tucker—Yes, I would be the same. I have not dealt with federal cases recently. I have all state clients at the moment. It is a very quick and efficient process.

Senator GEORGE CAMPBELL—Is that driven primarily by the fact that most of the people who are coming to you are under common rule awards of the state jurisdiction, rather than federal awards?

Ms Tucker—Yes.

Senator GEORGE CAMPBELL—It has been driven by their award coverage rather than any selection of the jurisdiction.

Ms Naismith—Yes. There really is very limited selection. You are either state or federal, for the most part.

Senator GEORGE CAMPBELL—Right. You said in your evidence—and I agree with you—that if you are going to remove unfair dismissal provisions on the premise that that will lead to greater employment opportunities, then you are going to have to remove a lot of other restrictions also in employment by small business. This committee has done an inquiry into small business employment which Senator Barnett read in part—from the minority report of the government senators—in respect to Dr Harding’s evidence. I suggest you might have a look at that because there are a substantial number of recommendations, one of which is providing of information and training to small businesses in this area for which the government has

responsibility and, to my knowledge, has done nothing about providing in this area since that report was tabled. It also lists a whole range of other areas which small business said to us loomed larger for them in terms of an impediment to employment than did unfair dismissal.

Ms Naismith—Taxation, for example.

Senator GEORGE CAMPBELL—Taxation, government regulation, skilled labour. Given that we have now got unemployment down about five per cent, in my ex-union days I would have been strongly arguing to do away with the unfair dismissals if it meant 77,000 employees coming into the workforce. That level of demand quite frankly would have made it easy to argue wage cases and you would be pushing wages up on that basis. I do not hear the trade union movement arguing that sort of a case in respect to the removal of unfair dismissal provisions out of the legislation.

Ms Tucker—Coming back to the point you were just making about the education side of it, it is obviously not the ideal forum for parties to be educated by being brought to the Industrial Relations Commission—and I am speaking more from the state level but it is similar in the federal—but is very good, quick way to have your mind turned to obligations on both sides. We would advise our clients who are employees that they have obligations as well, even though they may not like their employer. There is a reality check for both sides and they get a very quick education on their obligations. The commissioners again serve that purpose. As I said, that is not ideal, but it is an amazing forum for people to realise that there are mutual obligations in the employment relationship.

Senator GEORGE CAMPBELL—There is another side to it and I wonder what experience you have had in this area. I have a friend who has a small business—runs a coffee shop—and she had an experience with unfair dismissal which she was not terribly happy with but she managed her way through it. She also had an experience with a workers compensation claim which horrified her in terms of the outcome because her premiums went up immediately—I think she said from \$1,200 to \$4,000—simply because she had the claim. That was on the basis of no proof as to who had liability under the New South Wales WorkCover laws. How many cases of those do you get?

Ms Naismith—Workers compensation?

Senator GEORGE CAMPBELL—Yes.

Ms Naismith—I do not do workers compensation at all but I am aware of it and when it relates an unfair dismissal then certainly I have some involvement in that because there are provisions under the New South Wales act for the protection of injured workers. Often the two are interactive in terms of a termination arising after an injury, or at least some harsh treatment arising after an injury. I am aware that premiums can more than double, and triple even, by one claim. That is just provisional liability accepted. I have not done many of them.

Senator GEORGE CAMPBELL—Is it common practice that the insurance companies have got a right to accept the liability irrespective of the views of the employer?

Ms Naismith—That is my understanding.

Ms Tucker—Yes.

Ms Naismith—They make up their own minds.

Senator GEORGE CAMPBELL—Despite the fact that it has a cost impact on the employer.

Ms Naismith—Yes, exactly, but I am not sure how much of that is related to workers compensation regulation and how much is related to insurance practice.

CHAIR—Thank you both for your submission and for appearing before us today. It is certainly much appreciated.

[12.17 p.m.]

POINTON, Ms Miranda Elizabeth, Assistant Secretary, Strategic Policy Branch, Department of Employment and Workplace Relations

PRIDMORE, Mr Brant Layton, Director, Working Arrangements Section, Strategic Policy Branch, Department of Employment and Workplace Relations

CHAIR—I welcome our next witnesses from the Department of Employment and Workplace Relations. We have your submission before us, which is numbered 11 for our purposes. Do you have any additions or alterations to that submission?

Ms Pointon—No, there were none.

CHAIR—Would you like to provide us with an opening statement and then we will go to questions.

Ms Pointon—Thank you for the opportunity to appear before the committee today. The issues raised in the terms of reference for this inquiry have been discussed by the committee a number of times in the past, particularly in the context of the government's proposal to exempt small business from the federal unfair dismissal laws. The department's submission, therefore, limits itself to updating information that has previously been presented. In particular, we note recent international developments in unfair dismissal laws, summarise the results of recent survey evidence bearing on the terms of reference, update relevant statistical estimates, describe the information on unfair dismissal laws currently provided to small business and assess various proposals to streamline the operation of existing laws.

We conclude that the exemption for small business contained in the Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004 currently before the House of Representatives constitutes an appropriate response to the problems that the existing unfair dismissal laws pose for small business.

CHAIR—Mr Pridmore, have you any opening statement at all?

Mr Pridmore—No.

Senator MURRAY—Do you agree with the statement that if there was just one unfair dismissal law applying throughout Australia there would be much less confusion about the terms and conditions under which unfair dismissal applications can be evaluated?

Ms Pointon—I think we would support that statement. There is a reasonable amount of evidence out there that, especially for small business, confusion about jurisdictional coverage is an issue.

Senator MURRAY—Do you agree with the statement that the changes to federal unfair dismissal law in the acts of 1996 and 2002 have been largely responsible for effectively halving the number of termination of employment applications under the federal jurisdiction?

Mr Pridmore—It is hard to know. We do not have direct survey evidence one way or the other. It seems likely, on the face of it, that some of the shrinkage in federal applications can be attributed to the narrower scope of the post 1996 legislation.

Senator MURRAY—Do you have the WA graph in front of you?

Mr Pridmore—Yes, I do.

Senator MURRAY—I thought your answer was a bit equivocal, so I will ask you to have a look at that WA graph. It seems to me there is a direct relationship between the application of the 1996 act and the precipitous fall in unfair dismissal applications. Would you agree?

Mr Pridmore—It is clear from that chart that it falls rapidly from November-December 1996 over the next year to about the end of 1997.

Senator MURRAY—I want to refer you next to the minister's answers to my question No. 50, which you have before you. I want you to look at page 2, where you will see that between 1996 and 2003 termination of employment applications lodged under the federal jurisdiction fell from 14,533 to 6,954, which was a fall of 52.2 per cent, and state applications increased from 6,748 to 8,299, which was an increase of 23 per cent. Do you have those figures?

Mr Pridmore—Yes.

Senator MURRAY—Given that it is difficult to separate out the effects of federal and state law, I want to refer you just to the ACT and the Northern Territory. You would agree that those are only affected by federal changes because there is no state jurisdiction. That is correct, isn't it?

Mr Pridmore—Yes.

Senator MURRAY—I want to turn you to the figures on pages 2 and 3. It indicates on page 2 that the ACT fell from 509 to 227 in the period covered, from 1996 to 2003, and from 396 to 240 for the Northern Territory, being falls of 55.4 per cent and 39.4 per cent respectively. It seems to indicate that it is quite difficult to forecast a set percentage fall, based on those two, but it is possible to claim that if the jurisdiction is tightened you will have a significant fall in the number of applications. That is correct, isn't it?

Mr Pridmore—I can only repeat what I said before. It is a little bit hard to know, just from the raw figures themselves, the reasons for the fall. We could take that on notice and see if there is any more evidence.

Senator MURRAY—You are going where I want to go. I want you to have a look at the figures in that third page, which indicate the percentages and the numbers that fell following the federal changes. They vary from a height of minus 83.1 per cent for Western Australia to as low

as minus 22.5 for Queensland. On notice, I ask you to give the committee some idea as to why there is such a variation in the impact of the federal law changes in the various states and territories and, similarly, with respect to the states.

If you look at the states, although the average change was 23 per cent, it is as high as 145.6 per cent in Tasmania, admittedly off a low base, all the way down to minus 21 per cent in South Australia. I will ignore Victoria because of the shift in jurisdiction. I would like to know if the department has some idea as to why those numbers shifted around as they did. Also on notice, I want you to equate those shifts to movements in employment over that time. Take the ACT and the Northern Territory. I assume, based on national figures, that there would have been a significant increase in employment from 1996 to 2003. So the ratio of unfair dismissal applications to employment would have widened even more than these figures show. You follow what I am saying, don't you?

Mr Pridmore—Yes.

Senator MURRAY—I would like you, with respect to the federal and state figures and the combined figures, to give us some view as to the employment effects at the same time that that was happening. Would you agree to do that?

Ms Pointon—We will take that on notice.

Senator MURRAY—Thank you. Where I am going to with that is this: are either of you economists?

Ms Pointon—Yes.

Senator MURRAY—You would appreciate that the belief—the faith—that getting rid of federal unfair dismissal applications will produce 77,000 jobs should mean, if that were true, that in the period that federal unfair dismissal applications fell there would have been a greater increase in employment by businesses which were under federal law than by businesses which were under state law, where in fact the termination of employment applications grew. It is a straight econometric view of that fairy, and you would understand exactly what I am saying. I would like you, if you could, on notice—because it is a difficult argument to conduct in this environment—to indicate whether the increase in termination of employment applications under the state regimes had a negative effect on employment under state enterprises and whether the decrease of termination of employment applications under federal regimes resulted in a greater increase in employment in organisations under the federal jurisdiction.

Ms Pointon—I suspect that will be very hard to do, because of the lack of evidence on the jurisdictional split coverage by jurisdictions and being able to isolate the unfair dismissal impact, but we can have a look at that.

Senator MURRAY—Thank you. I suspect that your answer is accurate and that what you will be able to do is to come back to us and say, 'There is a lack of evidence,' which in fact is what bedevils this entire area. I will leave it there.

Senator BARNETT—Thank you for your submission. We have heard arguments this morning that there is no causative link between the unfair dismissal laws and job creation. Notwithstanding that, we have evidence in your submission referring to Don Harding's report and numerous other reports. What is your response to the argument that there is no evidence of a link between the two?

Ms Pointon—The argument around lack of evidence is based more on a lack of consensus—with actually coming up with a quantifiable impact—than a lack of evidence. There is consistent and strong evidence across all of the different survey methodologies undertaken to examine this issue that supports a very strong correlation between perceptions about the difficulty of terminating staff for legitimate reasons and the decisions of employers to employ staff. While the impact of that on actual employment decisions is difficult to quantify, that that is actually the correlation and that it does have an employment effect seems very consistent across the various studies undertaken.

Senator BARNETT—That is backed up on page 5 of your submission by the ACCI pre-election survey, where they found almost 73 per cent of small businesses nominated unfair dismissal as a major or moderate concern, and it is backed up in the census business index survey of August 2004, again referred to in your submission. You made reference to the Charles Sturt University February 04 submission and numerous other independent surveys. Do they all back up your views?

Ms Pointon—They do.

Senator BARNETT—We have not had much discussion today about the international experience. Do you think the international experience supports the efforts in terms of the unfair dismissal legislation as we have it? You made reference to the German experience. Can you elaborate on that?

Ms Pointon—We are yet to receive quantifiable data on the outcome of Germany's changed legislative regime, but the fact that they have returned to previous levels of exemption for small business from unfair dismissal laws to promote employment specifically with the view to increasing the rapidity of employment growth to be able to respond to changed economic conditions—that they dropped their threshold of exemption from 10 to five and have returned to an exemption of 10—is strong evidence that Germany feels that exposing small business to these types of regimes is a strong employment disincentive and for businesses to be able to respond to economic circumstances the way to increase employment is to reintroduce the exemption that they previously had in place.

Senator BARNETT—I want to turn to the statistics on page 7 of your submission. Senator Murray referred to the department's answer to a question in the Senate. His figure for 2003 was 6,954, which correlates to yours in terms of the total termination of employment applications lodged. Then you have the latest figures for 2004, being 7,046. Do you see that on page 7 of your submission?

Ms Pointon—I have that here. What was the question?

Senator BARNETT—I am drawing your attention to these termination of employment applications. You have from 1997 to 2004. In 2004 do you see the figure 7,046?

Ms Pointon—Yes.

Senator BARNETT—For 1997 to 2000 you have a total of 24,144. Do you know what the figure was in 1997? Do you have that with you?

Mr Pridmore—Sorry, we do not have an annual breakdown for that bracket of years. We can take that on notice.

Senator BARNETT—That is fine. The figure that was discussed this morning, as tabled by the department, was 14,533 under the federal jurisdiction.

Mr Pridmore—In 1996?

Senator BARNETT—Yes. I am asking again, perhaps from another angle, whether you think the reason for the considerable drop in the number of terminations under the federal jurisdiction might be, in part at least, because of the tightening of the arrangements or the criteria relating to unfair dismissals, particularly the 1996—

Mr Pridmore—That is very likely. I am not aware of any before and after survey evidence which is going to establish that conclusively, but it certainly seems very likely on the face of it.

Senator BARNETT—We have had quite a bit of debate today about Dr Harding's survey which was commissioned by the department. Do you have anything further to add or do you still back the report and the veracity of that survey and his study?

Ms Pointon—We most certainly continue to support the evidence of that research, principally as it is part of a body of consistent research. As I said earlier, while the methodologies vary and the quantifiable numbers vary, the evidence is entirely consistent with the perceptions of the difficulty and costs of dealing with unfair dismissal cases do have an employment impact.

Senator BARNETT—What is your view as to the view that has been put this morning by some of the participants or witnesses that there should be a fair go for all and that if you pass this legislation it will be unfair on the employees and they will miss out on their basic rights, their fundamental rights, and their freedoms under employment law? What is your view of that argument?

Ms Pointon—There is nothing in the proposed amendments that remove employees' rights to unlawful termination of employment. There is most certainly no suggestion at all that employees should be exempted from requirements that protect them from discrimination on a wide range of specified grounds. When it comes to the employees of small business firms, then emphasis is on the ability to be able to promote employment for these employees employed in that sector and the potential for employees to be employed in the small business sector.

Senator BARNETT—Can you elaborate a bit further in terms of the protections that the employees will have and maintain under this so-called new regime, or under the continuing

regime? Can you outline that—and, if that is too difficult, take it on notice—so that it makes it clear to this committee that there is a comprehensive protection regime that is in place for employees.

Ms Pointon—I will just hand to Brant for that one.

Mr Pridmore—The unlawful termination regime prohibits employees from being dismissed on a wide range of grounds and I will refer you to those. Those grounds include temporary absence from work because of illness or injury; trade union membership or participation in trade union activities, and nonmembership of a trade union representing other employees; the filing of a complaint or involvement in proceedings against an employer involving a breach of the law; discriminatory grounds such as race, sex, colour, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; refusing to negotiate in connection with make, sign, extend, vary or terminate an Australian workplace agreement; absence from work during maternity leave or other parental leave and temporary absence from work because of the carrying out of a voluntary emergency management activity—which is firefighting and other similar things.

Senator BARNETT—What is your source?

Mr Pridmore—This is an internal summary, but these grounds are set out in the Workplace Relations Act.

Senator BARNETT—Just to cut it short, because I know timing is tight, is it possible for the department to summarise that and table it or take that on notice and provide it to the committee in terms of a summary version? There is a view which has been put that, in fact, pretty much all the protection that has been available to small business employees is being removed entirely and this perception is sadly misconceived and there is a misrepresentation of the facts. I would like it if the department could put that together.

Ms Pointon—We will provide that material.

Senator BARNETT—That would be appreciated. Finally, it was referred to earlier by Senator Campbell that the government does not have any public information or education campaigns that are relevant to small business employees—and indeed, small business employers—in terms of the employment arrangements between the two. But you have referred, on page 11 of your submission at point 56 of your submission, to the continuing public information and education campaign. I would like you to elaborate on those so that we can get some clarity before the committee with respect to that argument. It is points 56 and 57 on page 11 of your submission.

Ms Pointon—Providing additional information on those we might take on notice. That was the information we had there, which actually is just an update on previous material. It might be useful for us to provide a comprehensive list of the information that we provide, because they are very extensive services to small businesses, very particularly targeted to small businesses being able to access the information at a time when the small businesses need the information and in ways that are suitable for small business to get the information. We would like to provide a more fulsome discussion of that on notice.

CHAIR—Can you give us a breakdown of the amount of money you have spent advertising?

Ms Pointon—I would have to take that on notice.

CHAIR—I understand that. I would like that over the last five years, on a year by year basis.

Senator BARNETT—In what respect, Chair?

CHAIR—I would like to know how much out of your budget you have spent perhaps producing materials that would highlight to small business what the unfair dismissal laws currently are, where they might get information or assistance about that in comparison, say, to perhaps us asking Finance and Admin to tell us how much they have spent promoting and advertising the impact of the GST. How much have you spent on promoting access to unfair dismissal laws and their understanding?

Ms Pointon—We will take that on notice.

Senator GEORGE CAMPBELL—Just in respect to that, I think you do make the point somewhere in your submission that further information to small business would be pointless because they do not have the time to absorb the information or study it. That makes the point in itself. I want to come back to a couple of other issues which follow on from some of the questions raised by Senator Murray. When were the unfair dismissal provisions put into the federal act?

Mr Pridmore—Essentially, the current provisions were in the 1996 act that established the Workplace Relations Act and that came into force at the end of 1996.

Senator GEORGE CAMPBELL—Yes, but the provision for unfair dismissal claims to be dealt with in the federal jurisdiction were introduced when? In 1993 or 1994?

Mr Pridmore—1993, I believe.

Ms Pointon—The 1993 reform bill.

Senator GEORGE CAMPBELL—They would have taken effect about 1994?

Mr Pridmore—I would need to check that.

Senator GEORGE CAMPBELL—Around about that time.

Mr Pridmore—Yes.

Senator MURRAY—For the assistance of the senator, the first figures came through in April 1994.

Senator GEORGE CAMPBELL—I thought that would have been the case. When those provisions were put in the federal act, did all of the other jurisdictions have unfair dismissal provisions currently existing at that time?

Mr Pridmore—I would need to take that on notice. I am not sure about every other jurisdiction. We can find out for you.

Senator GEORGE CAMPBELL—Can you take that on notice. I am pretty sure that New South Wales did; Queensland certainly did; Western Australia certainly did; Tasmania I am not sure of because they had the old wages board system. I am not too sure when they introduced their IR act. It would have been around about that period. Similarly, Victoria had an old wages board system, so I am not too sure about that. The majority of the jurisdictions I think would have had unfair dismissal provisions in place at that point in time. The argument that is being presented to us by the government and which your paper essentially goes to is that it is necessary to amend these unfair dismissal laws because it is an impediment to small business employing. Isn't that correct?

Ms Pointon—Yes.

Senator GEORGE CAMPBELL—Why then do you think employment in small business actually grew by 2.3 per cent a year from 1990 right through till 2001?

Ms Pointon—Because the unfair dismissal regime is a single factor that impacts on employment decisions and employment levels. The general level of economic activity, viability, the availability of staff, a whole range of other factors impact on the employment levels.

Senator GEORGE CAMPBELL—Economic conditions would also be a factor.

Ms Pointon—Very much so. One of the problems with quantifying this is trying to isolate the effect of a single element in businesses' employing ability and decisions is difficult.

Senator GEORGE CAMPBELL—Ms Pointon, in a research note from the parliamentary library they say:

But the trend in small business employment has turned downward from March 2001—

and there has been a decline since that point in time—

despite the best economic conditions for businesses in almost three years.

What would you attribute that to?

Ms Pointon—I would have to take that on notice.

Senator GEORGE CAMPBELL—Take that on notice and perhaps you can give us an answer to it. In this inquiry conducted by this committee back in 2002, which resulted in a report being tabled in February 2003, there was a range of issues that were raised by small business as impediments to employing more employees. In fact, the overwhelming evidence given by most

small business proprietors related to the GST and to a range of other factors. Very few related to unfair dismissals being a major impediment. Outlined in the report is the range of issues that were raised with us with respect to impediments to small business taking on additional employees. What other legislation has been introduced by the government to remove those impediments, other than the legislation in respect to unfair dismissals?

Mr Pridmore—That would extend outside our portfolio. To provide any answer we would need to take that on notice, obviously.

Senator GEORGE CAMPBELL—Are you aware of any other legislation being introduced by the government to address the range of impediments that have been identified as impediments to small business taking on additional employees, other than the unfair dismissal provisions?

Ms Pointon—We do have a list that relates to how the legislation treats small business to take into account the different circumstances of small business.

Senator GEORGE CAMPBELL—That is the impact statements.

Ms Pointon—We do not have those broken down, isolated by employment impacts.

Senator GEORGE CAMPBELL—But the question I am asking is: are you aware of any specific legislation being introduced by the government to remove those impediments that have been identified as prohibiting small business taking on additional employees, other than the unfair dismissal legislation?

Ms Pointon—We would have to take that on notice.

Senator GEORGE CAMPBELL—Does that mean you are not aware?

Ms Pointon—That means I am not aware at the moment. The employment side of the department is not an area where I work, so I would need to follow that up for you.

Senator GEORGE CAMPBELL—Isn't it true, Ms Pointon, that there is no hard evidence as to any causative link between the unfair dismissal legislation and employment by small business?

Ms Pointon—I would say, drawing from the very wide range of research material that has used a range of methodologies to examine small business employment decisions and the impact of the unfair dismissal regime on that, that there is a very strong relationship established.

Senator GEORGE CAMPBELL—There is a lot of opinion polling but there is no hard analysis evidence that there is a causative link.

Ms Pointon—In our discussions with the Australian Bureau of Statistics that informed our development of the Don Harding study, they advised us that the most rigorous data that we could obtain on the impacts of the unfair dismissal laws on employment would be to use the methodology that was adopted by the Don Harding research.

Senator GEORGE CAMPBELL—But the CPA have done analyses and some other people have done analyses. Why didn't you take those into account as well?

Ms Pointon—My understanding is that we have reviewed all the survey evidence and research on the subject.

CHAIR—Can you table for us any advice you received from the Australian Bureau of Statistics on that?

Ms Pointon—We could take that on notice.

Senator BARNETT—Ms Pointon, you were answering a question from Senator Campbell and I think you were about to refer to another survey.

Ms Pointon—Yes, the one done by the Defence Force Academy—Paul Oslington's research. It does go into a range of problems and issues around various research methodologies to quantify the impact of this. That work particularly goes through the difficulty of actually quantifying it and raises some of the limitations and strengths of different methodologies in looking into this issue. Different methodologies have different strengths and weaknesses. The strongest basis is relying on a range of evidence using a range of methodologies and looking at the consistency of outcomes between those various studies.

Senator GEORGE CAMPBELL—I thought Dr Oslington's evidence this morning effectively dismissed the Harding research. Also in his submissions he said that there is little evidence to support the claims of large impacts of firing costs on employment. He argues, 'It's difficult to see anything other than a minimal impact on employment by this bill.' His argument is in direct contrast to your argument.

Ms Pointon—Many of the points he makes are very consistent. He does believe that fewer workers will be hired in regimes that have the pilot thresholds of standards in relation to unfair dismissal. His work to date, which is not completed by any means, as far as I know—so it is preliminary work by Paul Oslington—is very much at the level of principle, rather than the level of what he has been able to determine as a basis of his studies: that fewer workers will be hired in economic upturns and fewer workers will be fired in economic downturns.

He is definitely talking about a strong employment impact resulting from unfair dismissal regimes and the level of onerousness associated with those regimes. They very much impede the ability of business to respond to economic upturns and downturns, and tend to flatten employment responses across various cycles because of that. A number of his findings in principle are very consistent with the arguments that the government has been making in relation to unfair dismissal.

Senator GEORGE CAMPBELL—I understand what you are saying, that his research is not completed, but it is a pity you were not here to hear him this morning because, in fact, that is not what he argued this morning. He argued the opposite. The assumptions that you are drawing—

Senator BARNETT—Well, that is not—

CHAIR—Senator Barnett, let Senator Campbell finish.

Senator BARNETT—He is making an allegation that is not entirely accurate.

CHAIR—You asked your questions without interruption, so let him ask his questions.

Senator BARNETT—I am correcting the record.

Senator MURRAY—The record will speak for itself and I suggest you read the transcript of this morning because I specifically asked him about those two points and I am relating to you his answer.

Ms Pointon—Our material is most probably based on his last publicly available material. As I said, his work is still progressing. These were the statements he was making at that time. I could only say that, between the material we were working off and now, his position may have developed.

Senator GEORGE CAMPBELL—May I suggest you have a look at the transcript of this morning's evidence. You may find he has put a different perspective on it from the one that you have just elucidated.

CHAIR—Ms Pointon, on Dr Harding's findings, where he telephoned 1,802 interviews and found that only 11 per cent reported the laws played some role in a decision relating to the employment of their workers, the figure of 11.1 per cent tells me that that is only around 190 recipients out of the 1,800 interviewed. When you looked at this research, did you not make an analysis yourself as to whether or not an outcome such as that would be credible?

Mr Pridmore—We have not conducted independent statistical analysis of Dr Harding's report.

CHAIR—So when you got his report you took it at face value?

Mr Pridmore—That is what we hired him and his expertise to do. I am not a statistician. I just comment that a sample of 1,800 if you are trying to identify a yes/no response, asking a yes/no question, is a much larger sample than you use for political opinion polls, for instance; almost twice the size, so it is probably not a sample size issue.

CHAIR—I would have thought that only 11 per cent actually reporting that the laws affected their ability to employ people is a fairly low percentage response out of that number.

Ms Pointon—What we have done with the Harding research is looked at it in the context of all the other research on the issue. On the quantifiable employment impacts we have pulled back from supporting any particular numbers in relation to that; rather, the direction of the employment impact that is supported consistently across the research.

CHAIR—Ms Pointon, where he comes to a conclusion that 77,842 jobs would be created, you are saying there is no endorsement of this magical number of 77,000 now?

Ms Pointon—We are saying that the study did not estimate the impact on employment of exempting small business with fewer than 20 employees; that the study did not estimate the impact of changed legislation. The study covered businesses with fewer than 200 employees. That does not match the legislation.

CHAIR—Where does the figure of 77,000 come from?

Ms Pointon—The 77,000 figure includes jobs lost as estimated by Don Harding in which unfair dismissals played a role, either minor or major, and it does not attempt to distinguish between the attitudes related to state and federal laws.

CHAIR—How did he arrive at the figure?

Ms Pointon—I am not familiar with that.

Mr Pridmore—The detailed methodology is set out in his report. It was survey based. As Ms Pointon said, Dr Harding did not distinguish between the impact of federal and state unfair dismissal laws. He asked about unfair dismissal laws as a whole. Also, his population was businesses employing fewer than 200 employees rather than fewer than 20 employees, as is proposed in the legislation. The 77,000 figure is a broader estimate, I suppose, than an estimate of the number of jobs that might be created if the current legislative proposal were enacted.

CHAIR—If we had people quoting to us that 77,000 jobs would be created, you would say that that was an unreasonable figure to be continually quoting as an impact of these laws and the changes?

Ms Pointon—It is not unreasonable. It is a figure based on evidence. It is one of a range of figures that have been put forward. What we have said is that it is difficult to actually confidently quantify the employment outcome. There are a range of surveys with a range of estimates about what employment impacts might be. It would be impossible to be 100 per cent accurate on exact numbers. They are estimates.

CHAIR—Ms Pointon, the department's seems to be the only submission we have received that actually lends any credence to the work done by Professor Harding and continually relies on it quite heavily, and yet some of the quotes throughout a number of submissions say that misleading questions were used, doubtful assumptions were made and there is flawed reasoning in reaching the figures.

Senator BARNETT—Chair, I would just draw your attention to the number of submissions that do refer—

CHAIR—Excuse me, Senator Barnett, I am in the middle of a question here.

Senator BARNETT—You have made a statement which is not accurate, Chair.

CHAIR—Thank you.

Senator BARNETT—Can we correct the record?

CHAIR—I am quoting from submissions, so would you like me to finish my question?

Senator BARNETT—You have said it has not been referred to.

CHAIR—You have had your chance.

Senator BARNETT—It has been referred to in a number of other submissions.

CHAIR—Ms Pointon, as I said to you, a number of submissions allege the use of misleading questions, making doubtful assumptions and flawed reasoning in reaching those figures. Given that there is such a bevy of evidence that has come into this committee severely criticising that research—we had someone appearing before us this morning—why is it that you include that as part of your reasoning as to why these laws need to be changed?

Ms Pointon—The findings of the Don Harding research are very consistent with the body of research that is available in the area, as I said earlier, using a range of methodologies and a range of approaches. The most robust way to approach this is the directional consistency between the findings, not the exact quantifiable numbers quoted.

Senator GEORGE CAMPBELL—Of course, Voll came up with similar figures and they came off the top of the head. They did not do any research. The minister then indexed it for the CPI. I suppose that is a methodology too but it had no scientific basis.

CHAIR—In the pre-election survey conducted by ACCI, or the Sensis Business Index survey, what is the analysis in terms of restrictions on their businesses of, say, occupational health and safety laws or compliance with the GST or BA statements? Do we know what percentage of those small businesses had problems in complying with those laws?

Ms Pointon—I would not know offhand, Senator.

CHAIR—Has your area or DEWR made an attempt to provide any comparison there?

Mr Pridmore—Our submission, as you have seen, only includes a shortish summary of some headline results from those five recent surveys. We can certainly take your question on notice and provide you with some more context about the range of subject matter that those surveys covered.

CHAIR—Ms Pointon, you said in your opening statement that you believe that changing these laws was an appropriate response. Why is it appropriate? What empirical evidence leads you to that conclusion?

Ms Pointon—The strong evidence that the existing laws act as a strong and persistent disincentive to employment by the small business sector and the extent to which other mechanisms such as the provision of information have delivered what they are likely to deliver in relation to alleviating the impact on small business, and that a range of options other than exempting small business have been considered and been evaluated as not delivering actual solutions to small business perceptions of the impediments to employment.

CHAIR—Who has done that work?

Ms Pointon—That has been through a range of Senate committee reports in relation to—

CHAIR—But who specifically has done that work that leads you to make that statement? What research have you got that leads you to make that statement?

Ms Pointon—I will get back to you. I will take that on notice. My understanding is that has been drawn from previous Senate inquiry reports, so I will confirm that for you and get back to you.

Senator MARSHALL—Are the reports themselves available?

Ms Pointon—Yes. I would have to take that question on notice, but my understanding is that information came from previous reports.

Senator MARSHALL—Perception is reality gone mad, isn't it?

Ms Pointon—Therefore, the appropriate way to encourage employment growth and remove this impediment is to exempt small business from the unfair dismissal legislation.

CHAIR—It was put to us this morning that one of the reasons why it is quite difficult to make an assessment about what impedes small business and the growth of small business is that there are many interrelating factors and that you cannot isolate one factor as against others. Would you concur with that statement?

Ms Pointon—I say that the various factors make it very hard to quantify the impact of different variables on decisions, but there is very strong and consistent evidence that this is a barrier to employment in the small business area.

CHAIR—It was put to us this morning that you need to look at compliance in other laws, the international market, the cost of product, the cost of labour, the cost of hiring and the cost of firing. You yourself, in your answers to us, one minute suggest that the unfair dismissal law changes are a significant barrier and the next minute you are telling us that there is a whole range of issues here that need to be taken into consideration. I am finding it very hard to get some concise, convincing reasons from you as to what leads you to your conclusions. In the last paragraph in your submission you say:

Exempting small businesses from unfair dismissal laws would appear—

not categorically is there evidence and research to show us most definitely—

to be the most effective way to address this significant barrier to employment growth in the small business sector.

There must be other barriers to employment growth that also need addressing.

Ms Pointon—What you are asking for is a whole-of-government, cross-portfolio response that the workplace relations area of DEWR would not be equipped to answer.

CHAIR—Why do you believe only one area in relation to small business is being looked at or exempted?

Ms Pointon—What we are looking at is an area within our portfolio responsibility that the minister has an ability to influence rather than a whole-of-government response to employment. It involves a range of areas. I am only here today to talk about this particular area.

Senator BARNETT—Chair, I would like the opportunity for you to correct the record, and I am happy to make that—

Senator MARSHALL—Is that a point of order?

Senator BARNETT—Yes, it is a point of order.

CHAIR—What is your point of order, Senator Barnett?

Senator BARNETT—The point of order, Chair, is that you said that the department's was the only submission that referred to the University of Melbourne Don Harding report, and I put it to you that a range of other submissions referred to the Harding study, including ACCI, AIG and a number of other business submissions. I ask that that be clarified and the record corrected.

CHAIR—I do not believe that I need to correct the record. Nearly all of the submissions make reference to the Harding research. You, as the lead agency responsible for this legislation, seem to be single-mindedly focused on that issue. You have presented evidence to us today and your evidence conclusively relies on that research.

Senator BARNETT—But, Chair, you said—

CHAIR—Thank you, Senator Barnett. We are going to Senator Marshall now.

Senator BARNETT—that the department's was the only submission made, and that is not correct.

CHAIR—Senator Marshall has questions now, thank you.

Senator MARSHALL—After this legislation passes and comes into law, which inevitably will happen after July, what is the department going to do to measure the growth in overnight employment rates that the government ministers have claimed this legislation will deliver to ensure the veracity of the claims the department and the ministers have been making for years now?

Ms Pointon—We say that isolating the employment impact of the unfair dismissal laws is something that is not able to be done, and nothing in that would change post the introduction of the legislation in being able to isolate the single variable, given the very wide range of economic variables that impact on employment levels. But we will of course continue to monitor employment levels in Australia.

Senator MARSHALL—Senator Abetz said, in answer to a question without notice on 10 March this year:

Reforms like removing the unfair dismissal laws that could create up to 75,000 extra jobs overnight.

That is what the minister that represents the Minister for Workplace Relations in the Senate has claimed to the Senate. You have just said that that cannot be right.

Ms Pointon—No, I am not saying that it cannot be right. I am saying that quantifiably proving employment impacts isolated to a single variable in the scope of economic impacts on employment would make it very hard to provide evidence that was incontrovertible.

Senator MARSHALL—Surely we could see a 75,000 job improvement overnight.

Senator GEORGE CAMPBELL—77,000.

Senator MARSHALL—Senator Abetz only claimed 75,000, unfortunately. He has allowed himself a 2,000 margin of error. Surely we could see that overnight. It would not be hard to put in place some processes that capture that information, would it?

Ms Pointon—We will continue to monitor employment levels. But, as I said, nothing will change in being able to particularly quantify the employment impact of a single change in the range of economic variables.

Senator MARSHALL—But could it be done?

Ms Pointon—I do not think so.

Senator MARSHALL—The department could not put anything in place to measure a 75,000 growth in employment overnight?

Ms Pointon—We could take on notice the ability of developing an econometric model that might be able to estimate it, but I do not think that is something that we—

Senator MARSHALL—No, take that on notice, because that would be useful information. I suspect that this legislation will pass the Senate and become law at some point in time. It would be useful to know whether all the rhetoric and nonsense talked about in relation to this has any basis in fact.

Senator MURRAY—I have one question on notice. If you refer to the minister's response to question No. 50, on page 4 is the estimate of the small business percentage of number of termination of employment applications lodged, totalling 34 per cent. Given the estimates provided by ministers of the Crown to the Senate, which they have not corrected on the record and therefore stand, could you please break up the expected creation of jobs in percentage terms for each of the states and territories arising from the exemption of small business from federal unfair dismissal law. As a pointer, I indicate to you that in Tasmania there are less than 20 unfair dismissal applications per year. I would be very interested, with respect to Senator Abetz's and

Senator Barnett's state, just how many jobs are going to be created by getting rid of less than 20 federal unfair dismissal applications in Tasmania in particular.

CHAIR—Thank you very much.

Committee adjourned at 1.14 p.m.