Bills Digest
No. 95 2000–01

Workplace Relations Amendment (Unfair Dismissals) Bill 1998 [No.2]

ISSN 1328-8091

Inquiries

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2646.

Information and Research Services publications are available on the ParlInfo database.
On the Internet the Department of the Parliamentary Library can be found at:
http://www.aph.gov.au/library/

Published by the Department of the Parliamentary Library, 2001

INFORMATION AND RESEARCH SERVICES

Bills Digest
No. 95 2000–01

Workplace Relations Amendment (Unfair Dismissals) Bill 1998 [No.2]

Bob Bennett
Law and Bills Digest Group
28 February 2001

Contents

Workplace Relations Amendment (Unfair Dismissals) Bill 1998 [No.2]

Date Introduced: 29 November 2000

House: House of Representatives

Portfolio: Employment, Workplace Relations and Small Business

Commencement: On Royal Assent

Purpose

The Bill amends the principal Commonwealth industrial relations statute, the *Workplace Relations Act 1996*, to tighten access to remedies available under federal unfair dismissal laws.[1]

The proposed amendments:

- generally exempt small businesses with 15 or fewer employees from federal unfair dismissal laws, and
- provide that only employees (other than apprentices and designated trainees) who have been continuously engaged by the same employer for at least 6 months may access federal unfair dismissal remedies.

The Bill does not affect the scope of State unfair dismissal laws or federal laws dealing with *unlawful* dismissal.[2]

The Bill does not prejudice employees engaged before the proposed amendments come into effect.

Background

This Bill is identical to proposed legislation introduced into the House of Representatives on 12 November 1998 and defeated in the Senate 14 August 2000.

As it is now three months since the Senate rejected the Bill as initially presented, a second failure or refusal by the Senate to pass the Bill has the potential to trigger a simultaneous dissolution of both Houses under section 57 of the Constitution.

While for a variety of reasons, there is only a remote prospect of either an early election or a double dissolution, the following dates are of interest:

- latest possible date for a double dissolution election – 14 July 2001 (Parliament to be dissolved by 9 May 2001)
- latest possible date for a House of Representatives election – 12 January 2002
- earliest possible date for a half-Senate election – 1 July 2001
- latest possible date for a half-Senate election – 30 June 2002, and
- latest possible date for a joint election for half of the Senate and the House of Representatives – 12 January 2002.[3]

Other proposed laws

The Bill has a long and troubled history. As the then Minister for Workplace Relations, Hon Peter Reith,[4] noted at the time of the Bill's re-introduction, the proposed small business exemption has: 'been voted down in one form or another on eight occasions by the Labor Party and on five occasions by the [Australian] Democrats.'[5]

Bills Digest No.36 of 1998-99[6] summarises events prior to the Bill's initial presentation in late 1998.

Also relevant are two further legislative measures for amending federal unfair dismissal laws introduced during the current Parliament.

Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999

The More Jobs, Better Pay Bill was introduced into the House of Representatives on 30 June 1999 and contains a wide range of measures to amend the *Workplace Relations Act 1996*.

Schedule 7 to the More Jobs Better Pay Bill generally sought to reduce the scope of the federal termination of employment provisions. It would also have introduced new criteria in relation to the awarding of costs, have prevented multiple applications for relief and prohibited advisers to dismissed workers encouraging the pursuit of unmeritorious claims.

On 11 August 1999, prior to passage through the House of Representatives, the substance of the More Jobs, Better Pay Bill was referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee. That Committee tabled an extensive report on 29 November 1999.[7]

By early December 1999 it was apparent that this Bill would not pass the Senate.

The More Jobs, Better Pay Bill is still before the Senate but has not been considered since the tabling of the Employment, Workplace Relations, Small Business and Education Legislation Committee's Report.

Workplace Relations Amendment (Termination of Employment) Bill 2000

The Termination of Employment Bill 2000 was introduced in the House of Representatives on 27 June 2000. Like aspects of Schedule 7 to the More Pay, Better Jobs Bill 1999, the principal focus of the Termination of Employment Bill 2000 is the discouragement of 'unmeritorious' unfair dismissal claims.

A more detailed discussion of the Termination of Employment Bill 2000 appears in Bills Digest No.31 of 2000-01[8] and in the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee's Report tabled on 7 September 2000.[9]

Debate on the Second Reading of the Bill was adjourned in the Senate on 3 October 2000 and has not resumed.

Persons Affected

Small Business exemption

Access to federal unfair dismissal laws is already constrained.

First, the federal law only covers those classes of employee listed in section 170CB of the *Workplace Relations Act 1996*. Still further classes of worker are then excluded by regulation, such as high income earners, some temporary employees, some trainees and some contractors etc.

Principally this means that not even all federal award employees have access to these provisions. The main generic groups that do have access are:

- Commonwealth public sector workers
- employees who work in a federal Territory or in Victoria[10]
- persons employed under a federal award and who are employed by a 'constitutional corporation', and
- certain defined classes of worker principally engaged in inter-state and overseas trade and commerce.

('Constitutional corporations' are 'foreign corporations' and those domestically formed companies which are regarded as carrying on financial or trading activities within the meaning of section 51(xx) of the Australian Constitution.)

Specific exceptions contained in this Bill add to the list of statutory exclusions although it is worth noting that the Bill has been drafted to ensure that the existing rights of apprentices and trainees engaged under relevant training agreements are not further diminished.[11]

It is, however, unclear just how many workers are presently covered by federal unfair dismissal laws and indeed how many workers will be affected by the proposed small business exemption.[12]

In answer to Question on Notice (No.2940) from Mr Robert McClelland, Minister Reith in part responded:

> (2) It is not possible to specify the number of small businesses which would directly benefit from the Government's proposed exemption from unfair dismissal laws for small businesses as the operation of the provisions, according to the criteria outlined above, would depend on the details of the interrelationship between federal and State legislation, in each State, at the relevant time.[13]

As ABS figures can provide only a rough guide to the number of persons employed by small businesses that come within the federal unfair dismissal jurisdiction, some form of proxy measure must be used to estimate the number of workers or businesses likely to be affected by the Bill. This is because the ABS figures for small business include businesses with more than 15 employees and because the federal unfair dismissal law does not cover all small businesses. In any event, other measures are needed to 'get a handle' on the proposed legislation's present and future impact.

ABS data

The ABS definition of small business is different to that used in the Bill in that the former:

- excludes agricultural enterprises
- covers non-manufacturing industries employing fewer than 20 employees whereas the present Bill focuses in the broad on business with 15 employees or less.[14]

Using the ABS measure, there are about 1 051 000 private businesses in Australia, representing about 95 percent of all businesses and employing about 45 percent of the total non agricultural private sector workforce.[15]

The most recent ABS information lists 951 100 small non agricultural businesses providing employment for 3 119 600 persons. Of these, 527 800 small businesses employed workers other than the proprietor or their business partners. The number of employees working in these 'employing' small businesses (ie non agricultural businesses with fewer than 20 employees) is 2 161 800.[16]

The ABS has also recorded that about half of Australia's small businesses (with employees) are incorporated. There are a further 423 100 small businesses which are non

employing (eg sole proprietors or partnerships with no employees). The latter group is also largely unincorporated.[17]

At face value, these figures suggest that a significant number of workers may be covered by the Workplace Relations Act and therefore affected by the Bill. However, when account is taken of various existing statutory and regulatory exclusions, the number of businesses and employees affected shrinks considerably. For instance, all the unincorporated and non employing firms referred to above (except mostly those resident in Victoria or the Territories) will generally not be covered by federal unfair dismissal laws and hence are not affected by the Bill.

Other sources

The above estimates based on ABS data generally square with figures previously supplied by Mr Reith's Department for the period January to August 1998 showing that about 46 percent of a total of 11 074 unfair dismissal claims were lodged in the federal system. Earlier Departmental figures also show that only about 35 percent of *federal* claims lodged between December 1997 and September 1998 related to businesses employing fewer than 15 persons.

Making a best guess estimate from the available survey data, it is likely that less than 25 percent of Australian businesses will be affected by the proposed small business exemption. This is (again) because most businesses with fewer than 16 employees are unincorporated (ie sole traders and partnerships) and therefore not covered by federal unfair dismissal laws.

The figure of 25 percent is 'rubbery' and may indeed over-estimate the number of businesses affected by the 15 employee cut-off proposed in the Bill. Using the ABS definitions and figures, 83 percent of small businesses and 80 percent of all businesses have fewer than 5 employees.[18] This group, 'micro businesses', has relatively few employees but accounts for a high proportion of employment in the small business sector. It is also this same class of very small firms that employs a high proportion of workers employed by small business, ie about 50 percent.[19] It is also the group that employs 0–4 workers which is most unlikely to be incorporated and covered by a federal award and therefore outside the scope of the federal unfair dismissal regime. (For constitutional reasons, however, federal coverage of small and micro business will be higher in Victoria and the Territories and this will tend bolster the coverage.)

Guesstimates

So what does this all mean?

At one extreme, if one assumes that about a third of all small business employees come within the federal unfair dismissal jurisdiction, then the Bill *potentially* affects the job security entitlements of about 700 000 Australian workers. This would suggest that the proposed changes might have a quite dramatic effect.

Other figures suggest however, that the *actual* impact of any change would be much less pronounced.

Available figures suggest that if present trends continue that between 15 000 and 17 000 unfair dismissal claims will be lodged nationally in a full year. Of these, about 7 750 will come before the federal tribunal. Of the likely 7 750 federal claims, somewhere between 2000 and 2 500 will be made against employers employing fewer than 16 staff. As some of these claims could be picked up in four of the five surviving State systems,[20] the final impact of the proposed small business exemption may be fairly marginal.

Six Month Qualifying Period

This proposed exclusion does not affect persons already employed on the date that the proposed amendments come into effect. However, persons who presently would be able to access federal unfair dismissal remedies, but who start work or change employers after the Bill becomes a law, may be disadvantaged.

The qualifying period applies to all workers otherwise within federal jurisdiction, not just those employed by small business.

ABS *Labour Mobility* statistics show that about 1.5 million Australians change jobs every 12 months and just over 1 million will change employer. The same survey shows that in the 12 months to February 2000 there were 1.191 million job leavers.[21] An earlier survey in the same series recorded that over 185 000 employees left their jobs due to unsatisfactory working conditions.[22]

About 1.3 million of the 8.8 million persons in work as at February 2000 had been in their current job for less than 6 months.[23]

Unfair Dismissal Statistics

Government and independent estimates indicate that the fall in federal unfair dismissal claims that followed the enactment of the *Workplace Relations and Other Legislation Amendment Act 1996* (WROLA) has been sustained.

Early Government figures comparing the period January–August 1997 (under the Reith law) with the January–August 1996 period (under the last version of the Keating law) showed a national decline of about 20 percent in the number of unfair/unlawful dismissal applications lodged. Similarly, the number of applications in the federal jurisdiction fell from 9 864 in January–August 1996 to 4 492 in January–August 1997.[24]

Figures available when the present Bill was first introduced, comparing the first six months of 1998 with the first six months of 1996, showed that the general decline in

applications in the federal system had been sustained with a fall of about 46 percent over the comparable period in 1996.[25]

More recent data from Government and non-Government sources show a continuing decline in the number of unfair dismissal claims in the federal arena in the past four years from the peak in 1996.[26] The total number of unfair dismissal claims across Australia, ie including State jurisdictions, shows a steady trend well below the 1996 peak.

The percentage share of federal unfair dismissal claims made against small business also continues to be roughly proportional to the share of the workforce employed by firms with fewer than 15 employees.

Pros and Cons

Supporters of further changes to federal unfair dismissal laws would argue that changes:

- are necessary to ensure the continuing growth in employment in small business
- are consistent with the Government's stated policy which was fully canvassed prior to the 1996 and 1998 General Elections
- reflect special burdens carried by small business in defending unfair dismissal claims (Larger businesses have greater expertise for establishing recruitment and termination procedures whilst small business can find that just defending unfair claims places intolerable strains on their resources.)
- do not affect the rights of existing employees
- do not diminish the rights of apprentices or approved trainees
- do not extend to cases of alleged unlawful dismissal
- are consistent with exemptions available under the International Labour Organization's *Termination of Employment Convention 1982*
- mirror the precedents (for the size of businesses excluded) established by the Wran Government's *Employment Protection Act 1982* (NSW) and the decision of the then Australian Conciliation and Arbitration Commission in the 1984 Termination, Change and Redundancy Test Case
- are supported by the findings of the Senate Economics Legislation Committee Report on the Workplace Relations Bill 1997 and by surveys of small business, and
- were endorsed by the electorate at the 1998 General Election.

In his Second Reading Speech introducing the Workplace Relations Bill 1997 [No.2], Minister Reith referred to a number of surveys of business groups supporting further changes to unfair dismissal laws. He endorsed claims that the Bill's passage would spur job creation. For instance, he drew attention to a questionnaire on unfair dismissal in the Yellow Pages Small Business Index Survey conducted from 30 October 1997 to 12 November 1997, and noted:

> This is the largest economic survey of small business in Australia, it focuses specifically on small business with 19 or fewer employees. Approximately 1,200 randomly selected proprietors of small business were covered by the survey.
>
> In this survey, 79 percent of proprietors thought that business would be better off if they were exempted from unfair dismissal laws. 33 percent of small business reported that they would have been more likely to recruit new employees if they had been exempted from unfair dismissal laws in 1996 and 1997. And 38 percent of small businesses reported that they would be more likely to recruit new employees if they were exempted from the current unfair dismissal laws. [27]

In his Second Reading Speech for the present Bill, Minister Reith again was able to draw on substantial business support. He again highlighted survey evidence pointing to strongly held perceptions that the law requires further amendment along the lines being pursued here.

Departmental figures for the period 31 December 1996 to 30 October 1998 also tend to suggest that a significant proportion of unfair dismissal claims are made against small business (about 35 percent) and that a not insubstantial portion of total claims were made without a reasonable expectation of success.[28]

Critics of the proposed exemptions argue that the changes are unfair, unnecessary and at odds with Australia's obligations at international law.

Inequitable?

The principal argument going to the fairness of the changes is that they leave a significant section of the workforce without basic protections enjoyed by workers employed by medium to large businesses (including workers in comparable jobs).

Further, it may be argued that proposed changes to unfair dismissal laws will only have a marginal impact on the viability of most small businesses. Insufficient capital, poor management, government red tape such as the Business Activity Statement (BAS), general inexperience and predatory conduct by competitors are arguably more pressing problems for small business (and indeed for the job prospects of persons employed by small firms).

Critics of the proposals might argue that all employers should take reasonable care in selecting staff and that workers should not be dismissed capriciously. Arguably, these are sound generic business principles that should apply to all firms irrespective of their size.

Similarly, the Bill readily accepts that an action for unfair dismissal may harm the employer, but underplays the likely effect on the worker of losing his or her job.

Excluding some businesses from the federal law *a priori* ousts the jurisdiction of third parties that may be able to resolve the matter by conciliation. This is not only likely to produce unfair results but is also bad industrial relations practice.

The Bill assumes that size is a universal proxy for profitability or capacity to pay. This need not be so. The Bill (in effect) says that in every instance where the employer is a small business, the business is not as well placed to carry the costs of a breakdown in the employment relationship as the dismissed worker.

The Bill may encourage some employers to create artificial business entities to avoid the law by reducing the nominal size of their workforce below the statutory threshold.

With continuing high levels of unemployment, the removal of access to unfair dismissal remedies further enhances the already considerable bargaining power of many employers. This, it may also be argued, undermines the basis for genuine/free collective agreement making.

To the extent that the provision does actually advantage small businesses, it gives them an unfair competitive edge over other businesses (including those that may employ as few as 16 workers).

Unnecessary?

It is arguable that the various changes enacted since 1994 redress any legislated bias against employers.

Spurious actions are now less of a problem for all businesses as there has been a marked decline in the number of claims in recent years.

Critics of the present proposals might also argue that changes to the general law have not only reduced levels of litigation, but have also lowered the risk to all employers of being subject to an adverse finding. Relevant factors include:

- the 'fair go all round test' formalised under WROLA reduces the importance of procedural fairness in determining cases and to some degree lessens the attendant requirements for excessive record keeping (etc) by employers in connection with the dismissal process

- remedies of reinstatement or (capped) compensation are no longer available to a dismissed worker *as of right* even where the termination is found to be harsh, unjust or unreasonable. The Australian Industrial Relations Commission (AIRC), in making an order of compensation, must have regard, among other things, to the effect that the order may have on the viability of the employer's business [section 170CH(7)]

- as the present Government has claimed, introducing a filing fee and extending the AIRC's capacity to award costs appears to have gone some way to shielding employers – small and large – from unreasonable claims, and

- the extension of the former legislation's exclusions in respect of casual, fixed-term and probationary employees also works to the advantage of some employers (including, of course, small businesses).

Lastly, and on a slightly different tack, it is arguable that the alleged mischief created by the *Industrial Relations Reform Act 1993* (including that done to small business) was always overstated. It will be recalled that employers claimed that:

- the legislation encouraged too many claims, many of which were 'try-ons' and simply unjustifiable, representing increased pressure in terms of legal costs and time on employers, [29] and

- the law cost jobs (the Executive Director of the NSW Employers Federation, Garry Brack, was reported as suggesting that the anecdotal evidence indicated that the unfair dismissal laws may have dissuaded Australia's small business from creating an extra 100 000 to 200 000 jobs).[30]

Such claims, by their nature, are easily made but not so readily tested. Similarly, surveys of business attitudes to the law may say more about business perceptions and aspirations than they do about the actual effect of the legislation.

In its *1995-1996 Annual Report*, the Industrial Relations Court of Australia provided a detailed critique of many of the employer criticisms of the previous law. The Report provides the statistical support for the claims of Chief Justice Wilcox during the 1996 Election campaign that the then law was generally 'working well' and that the main problem was the bad conduct and sloppy human resource management practices of some employers. Comments in the Industrial Relations Court's *1995-96 Annual Report* include the following:

- the controversy was fuelled by a degree of deliberate misrepresentation

- the previous Government did not make a major effort to explain and justify the new laws, hence public perceptions were able to be unfairly swayed

- in 1994–95 only 928 (or 12 percent) of the finalised cases were resolved either at or after trial with the corresponding figures for 1995–96 being 1605 and 15.8 percent (ie most cases did not come to trial)

- from late 1995 onwards, the total number of unfair dismissal applications represented only about 2 percent of total involuntary terminations

- employers had a good success rate under the old law

- contrary to some suggestions, people who bring unfair dismissal claims represent a fairly normal cross-section of the workforce
- although ABS figures show that 91.7 percent of employers have fewer than 20 employees, a survey of employers involved in unfair dismissals showed that only 33 percent of respondents were small businesses (had fewer than 20 employees), ie small business is under-represented in unfair dismissal actions,[31] and
- the median amount of compensation awarded was $6 000.00 and the average cost of defending a claim less than $5 000.00.[32]

Subject to the important qualification that legitimate concerns exist about the threatened or improper use of the remedy as a bargaining tactic, what emerges from the Industrial Relations Court of Australia's findings is that the 'problems' caused by the 1993 legislation may have been exaggerated. Again, this not to deny the strength of some of the anecdotal evidence cited by employers and employer organisations.

The Court's early identification of the apparent under-representation of small businesses in termination matters coming before the tribunals is particularly interesting in the context of the Bill as are its reported findings on the processing of claims under the old and new laws.

In its *Annual Report* for 1996-97, the Industrial Relations Court of Australia highlighted major outcomes in the federal jurisdiction as follows:

- 74 percent of unfair dismissal claims cases were settled by agreement
- 75 percent of cases were finalised within six months, 99 percent within 12 months
- 62 percent of trials were completed in one day, 84 percent within two days
- 58 percent of contested cases were decided in favour of the employee, 42 percent favouring the employer
- reinstatement of the employee was ordered in 7.5 percent of contested cases, and
- the median amount of compensation awarded was around $6 000.[33]

These findings, of course, should be considered alongside more recent data collected by the Department of Employment, Workplace Relations and Small Business.

Lastly, those who argue the changes are largely unnecessary might also suggest that as a fraction of labour market turnover/job separations, the proportion of unfair dismissal claims is quite small (see above).

International Obligations

Australia ratified the ILO Convention on the Termination of Employment, 1982 (Convention No.158) on 26 February 1993.

Having ratified such a Convention, the Commonwealth undertakes to ensure that Australian domestic law and practice remain in conformity with the terms of (what is in effect) the treaty and with the relevant international jurisprudence.

There may need to be some further consideration of whether the proposed exemption for small businesses from the unfair dismissal laws is at odds with Convention No.158.

The relevant substantive provisions of Convention No.158 are articles 2(5) and 2(6).[34]

Article 2(5) provides:

> In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organizations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or *the size or the nature of the undertaking that employs them*. (emphasis added)

It is arguable that the broad exclusions from the Act contemplated by the Bill go beyond '…limited categories of employed persons in respect of which special problems of a substantive nature exist…' referred to in article 2(5) of the Convention. An exclusion exempting businesses in a particular industry engaging a relatively small number of workers would probably conform to the Convention. A more general provision may also conform but the chances of a conflict arising increase with the number of workers who are excluded. Much will turn on the intended effect of article 2(1) and how that clause is interpreted. The structure of article 2 suggests a broad reach for the Convention with limited exceptions only being allowed to the fundamental principle that the Convention 'applies to all branches of economic activity and to all employed persons'.[35]

Current ILO thinking seems to run counter to a restrictive view of article 2(5). The International Labour Conference Report of the 82nd Session (1995) instances only a handful of countries where unfair dismissal laws have limited application to firms with relatively few employees.[36] Of these, two of the four countries mentioned have enacted very limited exceptions. One applies to firms with 4 workers (Republic of Korea), the other to 6 workers (Germany). Austrian practice is tied to other legislation and Sri Lanka sets the bar at 15 workers.[37]

Lastly, Article 2(6) provides that:

> Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under article 22 of the Constitution of the International Labour Organization any categories which may have been excluded in

> pursuance of paragraphs 4 and 5 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

It has been argued that article 2(6) does not allow for subsequent exclusions once the first article 22 report has been made.[38] A leading commentator on industrial law, Breen Creighton, has noted that:

> Given that Australia submitted its first report on Convention No.158 in September 1995, this means that it would not now be permissible in terms of the Convention to adopt regulations under section 170CC(1)(d) or (e) to exclude categories of workers (for example those whose employers employed fewer than five employees) - even though it would have been quite in order to do so before the first report was submitted.[39]

For its part and as previously noted, the Government takes the view that its proposed changes conform with the Convention.

Main Provisions

The substance of the Bill is contained in the single item schedule.

Schedule 1 provides for the small business exemption by amending section 170CE of the Principal Act.

The new provision exempts employers from the unfair dismissal provisions of the *Workplace Relations Act 1996* in relation to any person engaged after the commencement of the proposed amendments where:

- that person was not an apprentice or a trainee, and
- the business employs no more than 15 persons.

The relevant time for calculating the threshold number of employees for jurisdictional purposes is either the time that notice was given by the employer to the dismissed worker or the time that the contract of employment ceases (whichever happens first).

In calculating the number of persons engaged by the employer at the time that notice is given or dismissal is effected, the dismissed worker is included. However, casual workers who are not engaged on 'a regular and systematic basis for a sequence of periods of employment of at least 12 months' are not included in the count.

Schedule 1 also prevents employees newly hired after the Bill is enacted from using the federal unfair dismissal regime until they have been engaged by their employer for a period of at least six months.

In relation to the 6 months qualifying period, the Act will only protect persons who have been engaged by the same employer for a 'continuous' period of 6 months. **New subsection 170CE(5A)** provides that what constitutes 'continuous service' will be defined by regulation.

As noted in the Explanatory Memorandum, the Bill seeks to maintain the existing rights of apprentices and certain trainees. The Bill does not, however, expand those rights by restoring access to the federal jurisdiction of those apprentices and trainees excluded by other provisions in the Act or the Regulations.

Endnotes

1 'Unfair dismissal' refers to those situations where the employer's conduct in bringing the employment relationship to an end can be characterised as 'harsh, unjust or unreasonable'. Actions for unfair dismissal are instituted in the Australian Industrial Relations Commission (AIRC) which under the present law must give weight to the interests of the employer and the dismissed worker in determining both the merits of the case and any remedy granted.

2 'Unlawful' (as opposed to 'unfair') dismissal includes dismissal for discriminatory reasons such as sexual preference, age, union membership and family responsibilities. It is also unlawful to dismiss a worker because they engaged in protected (lawful) industrial action in negotiating a new certified agreement or Australian Workplace Agreement. Allegations of unlawful dismissal are initiated in the AIRC. The Commission must seek to resolve a claim by conciliation before determining whether to refer it to the Federal Court of Australia.

3 Margaret Healy, 'When will it be? Timetables for Commonwealth Elections', Information and Research Services, *Research Note No.10 1998-99*.

4 Minister for Workplace Relations from 11 March 1996 until 30 January 2001.

5 Hon Peter Reith, *Media Release*, 'Small Business Exemption from Unfair Dismissal Laws', 29 November 2000.

6 http://wopablue/library/pubs/bd/1998-99/99bd036.htm (current as at 25 February 2001)

7 Senate Employment, Workplace Relations, Small Business and Education Committee, 'Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999', *Report*, November 1999 see especially pages 29–32, 91–97, 337–358, and 396–397 for commentary on the Bill's unfair dismissal provisions.

8 http://www.aph.gov.au/library/pubs/bd/2000-01/01BD031.htm (current as at 25 February 2001)

9 Consideration of Provisions of the Workplace Relations Amendment (Termination of Employment) Bill 2000 together with 3 other related Bills. See especially pp 11-13, 22-30 and 52.

10 In late 1996 the Victorian and Commonwealth Governments passed complementary laws effectively transferring jurisdiction over a broad range of industrial matters to the Commonwealth – *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) and *Workplace Relations and Other Legislation Amendment Act (No.2) 1996* (Cwth). Termination of employment was one of those matters referred to the Commonwealth.

11 Hence, unincorporated bodies such as sole traders and partnerships are not presently subject to the federal unfair dismissal regime and will accordingly not need to rely on the proposed exemption. Many corporations not bound by federal awards will also not need to rely on the proposed exemption as they are not presently subject to federal unfair dismissal laws.

12 All businesses are potentially affected by restricting employee access to the federal unfair dismissal laws to those employed by the same firm for a continuous period of at least 6 months.

13 House of Representatives, *Hansard*, 15 July 1998, p. 6240.

14 ABS, Catalogue No. 1321.0, *Small Business in Australia 1999*, 23 May 2000.

15 Ibid, pp. 12 and 35.

16 Ibid, p. 12.

17 ABS, Catalogue No. 1321.0, *Small Business in Australia 1997*, 28 May 1998, pp. 10, 14 and 163. ABS, Catalogue No. 1321.0, *Small Business in Australia 1999*, 23 May 2000, p. 6.

18 ABS, Catalogue No. 1321.0, *Small Business in Australia 1997*, 28 May 1998, pp. 80–81.

19 Ibid. p. 81.

20 Queensland, South Australia, Queensland and Tasmania. Refer: Breen Creighton and Andrew Stewart, *Labour Law: an introduction*, 3rd edition, 2000, p. 329.

21 ABS, Catalogue No.6209, *Labour Mobility*, 12 October 2000.

22 ABS, Catalogue No. 6209, *Labour Mobility*, 30 July 1998.

23 ABS, Catalogue No.6209, *Labour Mobility*, 12 October 2000.

24. Answers provided to Senator Andrew Murray by Department of Workplace Relations and Small Business. See Australian Senate, *Consideration of the Legislation Referred to the Committee: Workplace Relations Amendment Bill 1997*, October 1997 Appendix 5.

25 Department of Employment, Workplace Relations and Small Business, *op cit*, 20 November 1998.

26 Department of Employment, Workplace Relations and Small Business, *Workplace Monitor*, June 2000. Figures cited by Senator Andrew Murray (Australian Democrats, WA), *Parliamentary Debates*, 14 August 2000, pp. 15035–15038.

27. House of Representatives, *Hansard*, 26 November 1997, p. 11009.

28 Department of Employment, Workplace Relations and Small Business figures 20 November 1998.

29. Bryan Noakes, President of the Australian Chamber of Commerce and Industry (ACCI), *Sydney Morning Herald*, 28 February 1996.

30. *Australian Financial Review*, 11 April 1995.

31 These figures appear still to be broadly correct.

32. See Report, especially pp. 5–6 and 41.

33. Back cover of *Annual Report*.

34. Pre-existing exemptions covering casual workers, probationary employees and fixed term employees come within Article 2 paragraph 2.

35 But again, this is an argument, not a concluded view. Other approaches to the interpretation of the Article would also need to be considered.

36 However, it may be noted, although this does not have a direct bearing on the intended effect of the relevant articles, that as at December 1997 only 28 of 174 ILO members had ratified Convention No.158.

37. ILO, *Protection Against Unjustified Dismissal*, Geneva, 1995, pp. 27–29.

38. Ibid, p. 30.

39. 'The Workplace Relations Act in International Perspective', *Australian Journal of Labour Law*, April 1997, pp. 31–49, at 42.