The Case For Unfair Dismissal Reform: A Review Of The Evidence

W. Robbins and G. Voll, School of Business, Charles Sturt University

Abstract

Exemption of small business from the federal ‘unfair dismissal’ laws has been on the Coalition Government’s agenda since 1996 and with control of the Senate in July 2005 it is anticipated its reforms will be implemented in October. This paper examines the justification for such reform by analysing the Government’s evidence for its assertion that it inhibits job growth in the small business sector, detailing the incidence of ‘unfair dismissals’ generally and outlining what small business has said about ‘unfair dismissal’ legislation and processes by an examination of recent research on this issue. The paper also looks briefly at the practical processes and the personal human drama associated with ‘unfair dismissal’. This is set in the national and international context of Australia’s ILO obligations. The paper concludes that the justification used by the Government is not sustained by the evidence and indeed suggests that there is some evidence that job growth resulting from the reform might be negative. Future research is required to monitor the effects of the reform.

1. Introduction

The objective of this paper is simple: to evaluate the federal government’s justification for the exemption of small and medium businesses from the operation of unfair dismissal legislation in the light of recent research studies. In doing this the paper will examine the arguments put forward by the government in support of its job growth claims and provide the critique by a number of authors of the research on which the government relies. The incidence of unfair dismissal claims is outlined by an examination of Australian Industrial Relations Commission (AIRC) data, including broad outcomes of the claims. The views of small regional businesses are revealed by looking at the results of two regional small business surveys, including one which specifically focused on the issue of small business unfair dismissal incidence and exemption. Additionally, the results of an industry specific survey about unfair dismissal costs and perceptions are also provided. Finally, some qualitative research into the complexity of
the processes used to resolve unfair dismissal claims will be utilised to show that the government’s arguments that the process is ‘cumbersome’ and small business operators have to ‘become experts on employment law’ are not sustained. (Federal Government Media Release, 29 October 2003). To set the debate into the international context of Australia’s ILO obligations, the paper will begin with a brief history of ‘unfair dismissal’ legislation in Australia. 

When the research for this paper was conducted and the paper written, the government had since 1996 and up to early 2005 always argued for the exemption from unfair dismissal legislation to be for businesses with up to 20 employees. It was not until May 2005 that the government announced that the exemption would cover businesses with up to 100 employees. The authors assert that the essential arguments made in the paper apply equally for an exemption of businesses of 100 employees as for businesses of 20 employees.

2. International and National Context to Current Unfair Dismissal Legislation

The **Termination of Employment at the initiative of the Employer** ILO Convention No. 158 (1982) and the accompanying **Recommendation** have significantly influenced many legislatures throughout the world. They place restrictions on the freedom of the parties to regulate the terms of employment, thereby placing employees in a better position than had previously existed at common law. (Mahomed 2002). This Convention has led to legislation in Britain (Employment Rights Act 1996), New Zealand (Employment Relations Act 2000) and Canada (Canadian Labour Code RSC1985) to name but a few. In Australia, the Federal Parliament has had constitutional limitations in regard to legislation in this area until relatively recently, with the argument being that the Australian Industrial Relations Commission (AIRC) did not have the jurisdiction to order remedies for unfair dismissal. High Court decisions (Ranger Uranium Mines case (1987), 163 CLR 656, Fruehauf Trailers case (1988), AILR No. 426 and Wooldumpers case (1989), AILR No. 54) in recent years challenged this perception and these, together with the High Court’s decision in the Tasmanian Dams case 1983 (158 CLR 1), which made it clear that the Foreign Affairs and Corporations powers of the Constitution could form the basis of domestic legislation, led to the enactment of the **Industrial Relations Reform Act 1993**. (Creighton, 1997) This Act, for the first time in the federal jurisdiction, legislated for relief from unfair dismissal for employees, subject to a certain category of exclusions. So, it was not until the 1993 Act that the Federal government complied with ILO Convention 158 in the federal arena.

The 1993 Federal provisions made it unlawful to dismiss an employee unless there was a valid reason connected with the employee’s capacity
or conduct or based on the operational requirements of the undertaking, establishment or service; and a reason was not valid if the termination was harsh, unjust or unreasonable. The employer bore the onus of establishing a valid reason for termination; the onus then shifted to the employee to show that the dismissal was harsh, unjust or unreasonable. Further, an employee could not be dismissed without first being given the opportunity of defending the allegations unless the employer could not reasonably be expected to give the employee that opportunity. All applications for unlawful terminations went to the AIRC for conciliation and for arbitration by consent of the parties. Applications not settled in conciliation and not arbitrated by consent by the AIRC were sent to the newly established Industrial Relations Court of Australia, which had jurisdiction to make orders reinstating a dismissed employee and providing compensation either in addition to reinstatement or alternatively to it. An application to the Court was limited to persons employed under a federal award or, if award free, earning not more than $60,000 (adjusted annually for inflation). The cap on compensation was a maximum of 6 months salary for those employed under a federal award or $30,000 (adjusted annually for inflation) for non-award employees. The constitutional validity of the 1993 termination of employment provisions was challenged in the High Court and their validity was substantially upheld (Victoria v Commonwealth [Industrial Relations Act case], (1996) 187 CLR 416). The High Court held that it was a valid exercise of the Commonwealth’s external affairs power.

The Workplace Relations Act 1996 abolished the Industrial Relations Court of Australia and transferred the jurisdiction of the ‘unfair and unlawful dismissal’ provisions to the AIRC and/or the Federal Court but retained most of the remaining provisions, including the exclusions contained in the 1993 Act, which mirrored the exclusions in the ILO convention. (Chapman 1997). Section 170 CC (e) (ii) is the potential small business exclusion, but it appears that in practice the AIRC’s application of this exclusion did not meet the Government’s intention and hence the Government’s attempts at legislation to exempt small business (Pittard, 2002). The States’ unfair dismissal provisions (e.g. NSW IR Act 1996, Part 6) have the same exclusions, have the same application fee ($50) to make a claim and the same time provisions for making a claim as the federal system.

The essential difference between the provisions of the 1993 Act and the 1996 Act was that the 1993 Act provided for two criteria that could lead to the finding that the dismissal was ‘unfair’ and the employee could succeed by establishing either of the criteria, while the 1996 Act used the ‘a fair go all round’ principle. The two criteria were, firstly, that there had to be a valid reason for the dismissal and that the reason was not valid if the dismissal was harsh, unjust or unreasonable and, secondly, the process of dismissal had to be procedurally fair. The ‘a fair go all round’ principle of
the 1996 Act attempted to ensure that in all aspects of the dismissal both
the employee and the employer were accorded a ‘fair go’. The ‘fair go all
round’ principle came from the case *Re Loty v Australian Workers’ Union*
(1971 AR (NSW) 95) and was a principle that had essentially been adopted
in the State jurisdictions, particularly in NSW. The effect of the changes
brought about by the 1996 Act clearly made it easier for employers to
defend Federal unfair dismissal claims. The use of the ‘fair go all round’
principle aligned the federal legislation with the State legislation, so that
the process in both systems is now essentially the same.

The OECD, in comparing Australia’s unfair dismissal laws with those
of other OECD countries, noted that Australia’s laws are amongst the
least onerous for employers and that only four countries have less strict
protection against individual dismissal than Australia. Those countries
are USA, UK, Switzerland and Denmark. OECD estimates suggest that in
the UK 7.1 per cent of dismissals are taken before a court or tribunal, in
New Zealand 5.8 per cent are taken to mediation and 2 per cent to court, in
Ireland 3.5 per cent of dismissals end up before the Rights Commissioner,
but only 1.1 per cent of terminations are contested in Australia. (ACTU
2005)

3. The Government’s Arguments for Change to the
Unfair Dismissal Legislation and the Critique of those
Arguments

3.1 The Government’s Arguments

Since 1993 the Coalition parties have argued that the unfair dismissal
provisions of the *Industrial Relations Reform Act 1993* have had a negative
impact on small business. However, despite winning the 1996 election and
subsequently replacing the 1993 Act with the *Workplace Relations Act 1996*,
the Coalition was unable to remove existing unfair dismissal provisions due
to the opposition of the Senate. Consequently, Peter Reith, then Minister
responsible for industrial relations, introduced the *Workplace Relations
Amendment (Unfair Dismissals) Bill* in 1997 and again in 1998, arguing on
each occasion that unfair dismissal provisions prevented small businesses
from employing more workers. Minister Reith suggested that 50,000 more
jobs would be created if small business were exempted. (Hansard, House
of Representatives, 12 Nov 1998). To add support to his claim, Reith cited
studies conducted by the National Institute of Labour Studies (Harding
and Wooden 1997) and the Yellow Pages Small Business Index (1998),
although the figure of 50,000 was a guesstimate made by the Head of the
Council of Small Business of Australia, Mr Bob Bastian.

Notwithstanding the Senate’s hostility and the criticism of its supporting
evidence (see the next section), the Coalition government persisted in its
attempts to repeal the unfair dismissal provisions until in March 2003, Tony Abbott, then the Minister responsible, berated the Senate for its obstinacy in rejecting the bill for what he claimed was the 27th time (Hansard. House of Representatives 6 March 2003). In his effort to gain Senate support he also claimed that unfair dismissal laws ‘cost’ the Australian economy 50,000 jobs (Hansard, House of Representatives, 21 February 2002). Minister Abbott’s claim was now based on an argument made by Kayoko Tsumori (2002) which cited surveys conducted by the Australian Chamber of Commerce and Industry (ACCI 2001) and the Certified Practising Accountants (CPA 2002).

While both these surveys made interesting if inconclusive findings the use made of them by Tsumori is problematic. The ACCI study suggested only that the majority of small businesses ‘might’ have hired more staff, while the CPA study found that only 5 per cent of respondents felt that unfair dismissal laws were an impediment to the hiring of new staff. In acknowledging the perception of respondents that this was a relatively unimportant issue, Tsumori (2002: 5) nevertheless extrapolated that ‘if only 5 per cent of small businesses employed just one extra person, over 50,000 jobs would have been created.’ Tsumori (2002) also states that employment protection deters both job destruction and job creation. Job destruction, it is argued, is inhibited by locking in employees in unsuitable jobs because employers cannot fire them and employees will not leave to go to more suitable jobs, and job creation is inhibited because employers are reluctant to hire because they cannot dismiss. Tsumori’s (2002) paper further asserts that, although the vast majority of unfair dismissal cases are settled at conciliation, the outcomes of cases that are arbitrated generally favour the employee.

The latest report that the government has relied on to argue that the unfair dismissal laws inhibit employment growth comes from Professor Don Harding of Melbourne University’s Institute of Applied Economic and Social Research. This report suggested that the exemption of small business from unfair dismissal laws would generate 77,000 jobs. (Harding 2004). A critique of the methodology of this report is outlined in the next section below.

The government’s argument then broadened a little when the Minister for Workplace Relations, Kevin Andrews, expressed the view that the procedures used to resolve unfair dismissals were ‘cumbersome’ and by implication too complex for the micro business owner/operator. In his view, the complexity of the law and procedures demanded that business operators ‘become experts on employment law’ (Federal Government Media Release, 29 Oct 2003).
3.2 Critique of the Government's Arguments

As Waring and De Ruyter (1999) have very clearly pointed out, neither the NILS study nor the Yellow Pages Small Business Index actually showed what Reith originally claimed. The 1997 NILS survey found that ‘size of firm was not statistically significant in explaining the firm’s reported attitude towards unfair dismissal laws’ (Harding and Wooden 1997, Appendix B). The Minister was therefore not justified in claiming that the Harding and Wooden report lent support to excluding small businesses from unfair dismissal law (Waring and De Ruyter 1999). The Yellow Pages Small Business Index (1998) showed that, though 59 per cent of small business proprietors believed that there were barriers to employing new employees, unfair dismissal legislation did not rate a specific mention. Again this survey did not support the Minister’s claims.

The calculation of 50,000 jobs prevented by the application of unfair dismissal law on small businesses was not based on any significant research. The Head of the Council of Small Business of Australia, Mr Bob Bastian, admitted that he estimated this figure at his desk without reference to any survey data (Hansard, House of Representatives, Emerson, 11 August 2004). In his defence, Bastian never claimed this was a scientific figure or that it was anything more than his opinion. Minister Reith’s original use of it, however, needs to be seen in a much more critical light. At no stage did the Minister ever concede or point out shortcomings with Bastian’s calculation. Perhaps this lack of a research based calculation encouraged the work of Tsumori.

Tsumori’s estimation of employment growth was also 50,000 jobs, but as one leading small business academic researcher has shown, even the most basic analysis of employment and labour market growth statistics throws doubt on Tsumori’s assertions (Barrett 2003). An implied criticism was also made by the CPA (2003) in a study into small business policy development, when it concluded that policies seem to be made in the ‘absence of empirical evidence and research to support and evaluate policy positions’. In the case Hamzy v Tricon International Restaurants t/as KFC, the question of the link between unfair dismissal laws and jobs growth was examined in some detail, with Professor Mark Wooden being called as an expert witness. He was unable to confirm conclusively a link between these laws and employment growth (Howe 2002), while the Full Bench of the Federal Court concluded: ‘In the absence of any evidence about the matter, it seems to us the suggestion of a relationship between unfair dismissal laws and employment inhibition is unproven.’ (Hamzy (2001) at 70).

The further argument by Tsumori (2002) about both job destruction and job creation does not take into account: exclusions from unfair dismissal
laws of employees on probation, fixed term or specific task contracts and of casual employees; the requirement for the AIRC to take into account the size of the business; and the fact that unincorporated businesses are not covered by the legislation. As many small and micro businesses are not incorporated, federal unfair dismissal laws do not apply to them and therefore do not affect their employment decisions. The claim by Tsumori that the outcome of most ‘unfair dismissal’ claims favour employees’ claims is also quite misleading and is shown to be so in the next section on the incidence of unfair dismissal claims. An analysis of claims lodged with the AIRC in 2003-2004 shows that only 25 per cent of decisions favoured employees.

The methodology by Professor Harding has been widely criticised on two major aspects. First, the businesses surveyed about their intentions to employ were non-employing small business, rather than employing businesses. Secondly, Professor Harding asked businesses that were now non-employing, but had previously been employing businesses, whether unfair dismissal laws had any impact at all on their decision to reduce their staffing. If it did, it was extrapolated that it had an impact on the decision to reduce all their staffing, even if the impact might have been on only one employee where they previously had many more employees (Hansard, House of Representatives, Emerson, 11 August 2004). Harding’s methodology that arrived at a figure of 77,000 new jobs is flawed because it asked the wrong employers, while extrapolating the impact on one employee to all former employees is too far a leap to be credible. (ACTU 2005).

The impact on jobs growth has also been brought into question by a regional and a national survey. An examination of what influences small businesses to employ more staff in regional Australia found that, of 1,354 survey respondents, none identified unfair dismissal laws as a factor (Robbins, Murphy and Petzke 2004). Research released in July 2005 throws further doubt on the claim of employment growth resulting from the exemption of small and medium business from unfair dismissal legislation. The Dun and Bradstreet (2005) National Business Expectations Survey of 1200 business owners and senior executives found that 81 per cent would not alter their intention to hire more staff as a result of the Federal Government’s changes to unfair dismissal laws.

Finally, various Ministers have justified abolition of unfair dismissal laws on the basis that these are too complex and costly for small businesses. At no stage, however, has any previous or the current Minister cited evidence - survey or anecdotally based - to support this assertion. The research conducted by the authors represents the only study into this question of complexity and cost of procedure and the findings, outlined below, show
that the assertions made by Minister Andrews cannot be not sustained.

4. The Incidence of Unfair Dismissal Claims

One consideration that has never been cited by Coalition Ministers for Workplace Relations in support of their aim to remove unfair dismissal laws is the incidence of claims. This curious silence is deserving of some detailed examination. The AIRC is responsible for unfair dismissal claims in the federal sphere of industrial relations and its Annual Reports provides significant information on the extent of the problem of unfair dismissals. They provide detail on the cases handled by the AIRC in each year and how many claims are settled before conciliation, by conciliation or by arbitration or other means.

According to the Annual Report 2003 - 2004 of the AIRC the number of unfair dismissal claims brought before it in this year was 7,044. In contrast to the millions of employees covered directly and indirectly by the federal system of industrial relations, this would hardly suggest an enormous problem (ABS Labour Market Statistics, 2004. Cat 6106.0). Furthermore, there is no evidence to suggest the number of claims or the proportion of the workforce affected is increasing. According to the AIRC, there were 56,755 claims lodged with it between January 1997 and June 2004, and the annual number has been consistent. On average, only 7,567 claims are brought before the AIRC each year.

Although the AIRC's Annual Reports do not distinguish between large and small businesses, this number of claims does not suggest much of a problem for either the small or big business sectors. In fact, if all of the claims lodged were against small businesses this would mean fewer than one per cent of all small businesses were directly affected. On the other hand, Senator Murray in the recent Senate enquiry into unfair dismissal laws has estimated that 34 per cent of federal claims are from small business, and that in 2003 there were effectively 2371 claims from small business. (Hansard, Senate, May 2005). In any event, it is hard to see how the number of formal claims handled by the AIRC should alarm anyone in an economy the size of Australia's. This position is further supported by the OECD estimate that strongly suggests that the proportion of terminations that are the subject of claims of unfairness is low in Australia in comparison with other OECD nations. (ACTU, May 2005).

Another indicator of the seriousness or otherwise of unfair dismissals in an economy must be the manner in which claims have been dealt with by the AIRC. The government's argument has cited the complexity and cumbersome nature of the processes of settlement as a problem to small businesses (Federal Government Media Release, CCH 29 Oct 2003), but
this is not borne out by the figures provided in the AIRC Annual Reports. Since 1997 19 per cent of all claims before the AIRC were settled before conciliation and 55 per cent at conciliation. Settlement before any form of hearing can hardly be described as complex while conciliation itself, as the study by Voll (2005) indicates, is not particularly cumbersome or complex. Indeed, as a procedure of dispute settlement, the non-legalistic nature of conciliation would be reasonably familiar to most business operators. It would certainly be much less demanding in complexity and expensive formality than a civil law court, which Minister Abbott claimed would be the alternative process for resolving unfair dismissals under his government’s exemption proposal (Hansard. House of Representatives 21 February 2003). The government’s claim that current unfair dismissal procedures require small business operators to ‘become experts on employment law’ (Federal Government Media Release CCH 29 Oct 2003) also seems exaggerated, given the simplicity of argument found by Voll (2005) and given the complexity of the many other regulations, such as the GST, with which small business must conform (CPA 2003; Petzke & Murphy 2002).

Though an arbitration hearing in an unfair dismissal case can be considerably more complex and demanding, in practice arbitration is rare. In only about 6 per cent of cases in 2003 - 2004 did the claim progress to arbitration (AIRC Annual Report 2003-2004). An examination of the outcome of these arbitrated cases is also revealing. In 429 cases arbitrated on in 2003-2004, only 84 decisions imposed payment-in-lieu on the employer, 22 decisions imposed reinstatement, 77 cases were dismissed because they were out of time, 129 cases were dismissed on grounds of jurisdiction and 117 cases were dismissed on merit. Arbitral proceedings are clearly not stacked against employers, with employees being successful to some degree in only 25 per cent of the cases which go to arbitration.

5. The Unfair Dismissal Process

Much has been said about the nature of the process involved in the resolution of an unfair dismissal claim and particular emphasis has been placed on the difficulties that this presents to small business. In this section, the discussion will draw on the qualitative analysis of a number of case studies examined by Voll (2005). The qualitative nature of this research contrasts and complements the following quantitative analysis and underscores the point that an unfair dismissal claim has a very real human dimension. The six case studies conducted by Voll come from actual cases which arose and were dealt with in regional Australia, but space does not allow examples to be shown here. They are particularly useful in illustrating the sort of unfair dismissal claims that are commonly made, the jurisdictional problems (eg. ‘out of time’ applications or claims by casual
employees) that may arise and the outcomes that result. Although all of
the cases examined by Voll involved unfair dismissal claims conducted in
the NSW jurisdiction under the provisions of the NSW Industrial Relations
Act 1996 the point has already been well established that procedurally
(and in virtually every other way) the NSW and the federal systems are
identical.

Voll (2005) makes a number of broad observations from his case studies
which should be noted. Employees do not automatically lodge unfair
dismissal claims when they are dismissed. The reasons for this vary, but
include lack of knowledge about the system, a sense of powerlessness
or even acceptance of the reasons for the dismissal. Regionally located
small business employees find it quite difficult to obtain good advice
about dismissal procedure because, generally, the only avenues for this
sort of advice are a union (if the employee is a member) or a solicitor.
The latter is usually too expensive for the average employee, especially
if there is more than one hearing involved. The employees in the case
studies examined by Voll were not union members and this, given the low
level of unionisation in the small regional business sector, is an extremely
common situation (Robbins & Voll, 2002).

The outcomes in unfair dismissal cases generally favour employers
as evidenced in the previous section from AIRC statistics. The level of
compensation awarded is usually relatively small (see later section on
‘What small business say about unfair dismissal’), while few employees
are reinstated, despite this being their major objective in most cases. The
reasons for dismissing employees are varied and will not simply be a
reflection of the honesty or productiveness of an individual employee. Voll
found that dismissal was occasioned by motives as varied as wanting to
switch a new person into the job, to reduce staffing levels, to avoid meeting
legal employment obligations or simply personal whim. In all of the cases
examined by Voll, proper disciplinary and dismissal procedures were not
followed, even though some of the employers had written procedures. Voll
found that most cases do not proceed beyond the conciliation stage and
are settled during conciliation hearings or shortly thereafter. This means
that employers usually do not require representation as the process is
informal and not complex. Furthermore, employers generally have little
to fear, either financially or otherwise, from unfair dismissal claims even
if the employee has been dismissed ‘unfairly’. Voll’s case studies suggest
that, even where employers act arbitrarily and unfairly, the consequences
in terms of time and money spent in defending claims are minimal.

Another useful measure of the impact of this issue is the level of
compensation to employees and/or procedural costs. These do not form
part of the AIRC reporting, but Robbins and Voll (2004) have again made
the only estimates of the costs incurred by small businesses in unfair dismissal cases. While these are presented in more detail in the next section, it is more than apparent that the typical procedural costs in an unfair dismissal case are not great and cannot be viewed as an unreasonable burden on small businesses.

6. **What does Small Business say about Unfair Dismissal Law?**

As stated earlier, there has been very little research into how the small business sector views the current unfair dismissal legislation or how it has experienced the unfair dismissal process (see ACCI 2001; CPA 2002). The most detailed research into small business attitudes to the legislation comes from the Robbins and Voll (2004) survey into regional small business conducted in 2003. This survey contacted 2,700 small businesses by telephone in the Albury-Wodonga region and resulted in a response from 594 regional small businesses to an extensive 57 question survey. The survey asked the respondents about their knowledge of the current unfair dismissal legislation, the number of employees that they had dismissed in the last 5 years, the number of unfair dismissal claims they had in the same period, where the claims were lodged, the resources that they had used (both time and money) on these claims and their level of satisfaction with the outcomes of these claims. They were also asked how fair the current unfair dismissal legislation is for small business and whether they thought that small business should be exempt from the current legislation. Finally, they were asked what the most important factor was that influenced their decision to hire or not to hire extra staff.

The results of this survey showed that about 80 per cent of respondents had some knowledge of the legislation, 40 per cent of businesses had formal procedures for the termination of employees but only 17 per cent had dismissed any employees in the past five years. Of those who had dismissed employees, only 17 per cent - 2.9 per cent of all respondents - were subsequently confronted with unfair dismissal claims. The majority of employers (53 per cent) represented themselves in the proceedings and 60 per cent of respondents were satisfied with the outcomes of the process. In contrast, more than 97 per cent of the total small business respondents had no first hand experience of an unfair dismissal claim, and this would help explain why 48 per cent of total respondents thought that the current legislation was unfair to small business, with 33 per cent unsure and 16 per cent thinking that it was fair. On the other hand, despite the high percentage who perceived the legislation as unfair, 37 per cent thought that small businesses should be exempt from the legislation while 38 per cent thought that they should not. In other words, while nearly half thought the legislation unfair, there was no clear support for the exemption of
small businesses. Finally, the most important factor that influenced their decision to hire or not to hire new staff was workload/turnover (49 per cent) followed by cost/viability of the business (15 per cent) and getting the right person (13 per cent). In keeping with the CPA results, this regional survey found unfair dismissal legislation was a factor for 5.5 per cent of respondents.

The survey also asked respondents to estimate the costs of the unfair dismissal process in terms of time, compensation and other costs. For those who had dealt with unfair dismissal claims, answers on time commitments ranged from 10 hours to 500 hours over the past five years, although the median was 15 hours. The cost of compensation to employees ranged from nil to $5,000, with the median being $2,000 over the past 5 years. In terms of other costs, answers ranged from $200 to $10,000, with the median cost being $1,000. There is no evidence from these results that unfair dismissals are a financial burden on small businesses. Indeed 60 per cent of the respondents to these answers were happy with the outcomes achieved and costs incurred.

Another recent survey (Chalk, 2004) of a sample of members of the Motor Traders Association (MTA) asked the respondents for their views on exemption of small businesses (fewer than 20 employees) from unfair dismissal laws, the costs of compliance and the cost of unfair dismissal claims. The sample consisted of 76 per cent of employers with 1-20 employees and 22 per cent with more than 20 employees. Twenty-one per cent of respondents had experienced unfair dismissal claims in the past 5 years and of those claims 18 per cent were settled prior to conciliation, 68 per cent were settled at conciliation and 14 per cent were arbitrated. Sixty-seven per cent of respondents settled on terms that they had expected, 25 per cent on terms worse than they had expected and 8 per cent on terms better than they had expected. The most interesting aspect of the survey, however, was an estimation of possible job growth in this employment sector. While 39 per cent of respondents stated that they would be inclined to employ more staff if small business were exempted, 54 per cent of respondents stated that they would keep their staff levels under the exemption threshold; and while this would not be significant for businesses with a low number of employees (10 or fewer), 30 per cent of these respondents were larger businesses employing more than 20 employees. The conclusion drawn as a result was that a small business exemption may not generate more jobs overall because of the potential job destruction involved in trying to achieve and stay under the 20 employee threshold. The government has since extended the proposed exemption threshold to 100 employees, and whilst this has not been tested by research, the same principle of employers wanting to stay under the threshold or reducing employees to achieve the exemption threshold may still apply.
A final piece of quantitative research which adds insight to the issue of small business and unfair dismissal arose from a project focused on a quite different purpose. In 2004 a survey of employment in the Albury/Wodonga region generated insight into factors which impacted on the decision of employers to employ staff (Robbins, Murphy and Petzke 2004). From the 1,354 responses to this aspect of the survey questionnaire, it was found that the three most important concerns held by businesses, having an impact on employment, were Business Operating Issues, Government Regulation and Staffing. Business Operating Issues were identified by 27 per cent of respondents; these included such things as cash flow, demand, suppliers, transport etc. Regulation by government was identified as the major issue by 22 per cent of respondents, who they specifically cited concern over compliance with GST, occupational health and safety and licensing arrangements. Staffing was a broad issue identified by 18 per cent of respondents, but the issues covered by this included the level of wages, training and, in the vast majority of responses, concern over recruitment of qualified staff. Not one business out of 1,354 respondents identified unfair dismissal laws as an issue of concern. Indeed, the most common staffing problem was how to attract and retain staff, not to dismiss them. The absence of any reference to unfair dismissal law by any of these survey respondents should be given greater significance because this was not a survey about unfair dismissal. Any research project which is explicitly concerned with unfair dismissal will to some extent heighten sensitivity toward that issue. In other words there will be a 'Hawthorne' effect (Cooper and Schindler 2003). Given the publicity surrounding the government’s concern regarding the impact of unfair dismissal laws on small businesses, it seems curious that, when left to their own assessment, small business operators did not identify this issue.

A final area of research relevant to the evaluation of the impact of unfair dismissal laws on businesses is the experience overseas. Significant qualitative case study research in the UK, inquiring about the factors influencing the incidence or otherwise of unfair dismissal cases in three industrial sectors (hotels and catering, road transport and engineering) was unable to point to a simple variable which might readily explain the incidence of contested unfair dismissal claims among the sample companies. Procedure and procedural approach, managerial style, respect among employees and consistent application of normative standards shared with employees seemed to be important. The researchers also made some interesting comparisons with earlier research, and confirmed that the unfair dismissal legislation and actual experience of unfair dismissal claims in small firms had been an important stimulus to the introduction (and amendment) of formal disciplinary procedures. The substantial hostility to the introduction of such formal procedures reported in earlier research was not evident, however, after 25 years of unfair dismissal
legislation. The conclusion was that the legislation and the emphasis given to procedural matters by tribunals had helped bring about attitudinal change. (Goodman et al, 1998). This research supports the ACTU argument put to the Senate enquiry into unfair dismissal laws - that these laws promote better procedures, communications and training for both employers and employees at the workplace. (ACTU, 2005).

7. Conclusions

This paper has used the most prominent and significant of recent research studies into the impact of unfair dismissal laws on small business in an effort to evaluate the claims and objectives of the federal government’s reform agenda. The two most consistent arguments put by the government are that unfair dismissal laws inhibit jobs growth in the small business sector and that the processes used to resolve unfair dismissal claims are cumbersome and too complex. As critics such as Waring and De Ruyter (1999), Pittard (2002), Barrett (2003) and the ACTU (2005) have shown, however, there is no clear link between employment and unfair dismissals and the calculations offered by the government do not stand up to scrutiny. Indeed, this was also the opinion of the Federal Court. The surveys by Robbins and Voll (2004) and Robbins, Murphy and Petzke (2004) also found that, on the whole, small businesses did not share the governments’ conviction of an employment link.

This paper also explored the importance of unfair dismissal laws to regional small business. The Robbins and Voll (2004) survey, for example, found that fewer than 3 per cent of respondents had any direct experience of an unfair dismissal dispute. The low incidence of claims found in this survey confirms the national figures and trends apparent from the Annual Reports of the AIRC and the figures generated by a Senate Inquiry (2005). The small number of claims made against small business operators was confirmed by Chalk (2004) in her study of members of the Motor Traders Association. She also found that, while there was a marginal link between employment growth and the exemption of small businesses from unfair dismissal law, there was just as distinct a possibility that employment levels might actually decline if small businesses were exempted.

We have examined the government’s claim that the processes of hearing and resolving unfair dismissal claims in the AIRC are complex and cumbersome. Robbins and Voll (2004) examined the complexity of proceedings and found that most regional small businesses chose to represent themselves (53 per cent) in any processes, although a significant number did seek advice from an employer association or a lawyer (67 per cent). The inference is clear: possibly armed with some advice, more than half of regional small business operators faced with a claim against them were confident enough
to represent themselves. Even if cost were a factor, it was not so great a concern as to inhibit this confidence. Given also that 60 per cent of those small businesses who had direct experience with an unfair dismissal claim expressed satisfaction with the outcome, it can be concluded that self-representation has generally proved effective. We have also reported insights into procedure through a summary of the qualitative research conducted by Voll (2005). The case studies outlined in that paper offer the sobering reminder that termination may very well be unfair to an individual employee. But, more pertinently, these case studies confirm that the processes of resolving unfair dismissal claims is not overly complex or demanding, and that the outcomes achieved are rarely likely to be as damaging to the employer as unemployment is to the employee.

The answer to whether or not the regional small business sector is happy with current unfair dismissal law is mixed. On the one hand, while 60 per cent of those regional small businesses with first hand experience of unfair dismissal claims were reasonably satisfied with the outcome of proceedings, 48 per cent of total survey respondents thought unfair dismissal laws were unfair to small business. One conclusion that could be drawn from this seeming contradiction is that publicity regarding unfair dismissal law has coloured regional small business perceptions rather than actual experience. Perceptions of unfairness, however, have not translated unequivocally into support for the government’s reform agenda: 38 per cent of regional small businesses think that they should not be exempted from the legislation, while 37 per cent think that they should. Some of the business operators may fear that the removal of such a basic employee right or protection would make employment in the small business sector less attractive (Robbins, Murphy and Petzke 2004).

The review of the research material available on the impact of unfair dismissal law on small business conducted by this paper points to an unambiguous conclusion: there is no significant evidence justifying the exemption of small and medium business from this employment protection law. Despite this lack of evidence, the Coalition federal government remains firmly determined to repeal unfair dismissal law for small and medium business. Indeed, the announcement that its amendments to the Workplace Relations Act 1996 will now apply to businesses employing up to 100 employees displays a stronger determination than ever. Interestingly, there seems to be no research into the impact of an exemption to this degree. Exempting these businesses, however, will most certainly reduce the rights and protections available to their employees while Australia’s commitment to ILO employment conventions will be further weakened.

While the implications seem significant and the justification seems weak, change is now almost certain. It is expected that the repeal of the unfair
dismissal law from small and medium businesses will occur some time in October. The debate is not apparently yet over, however. Already concerns are being expressed by some key pro-government Senators, while the Federal Treasurer, Peter Costello, has asked the obvious question: why not exempt all businesses? (Sydney Morning Herald, 26 July 2005). The creation of a divide between businesses and their workforces is always somewhat arbitrary and lines can be shifted. Will big business remain willing to shoulder the weight of unfair dismissal law? The Costello remarks may simply reflect government confidence, but they also present a new dimension to unfair dismissal research: the impact of unfair dismissal laws on big business should now be conducted. On the other hand, despite political realities, there is still a need for further and on-going research into the relationship between small business and unfair dismissal laws. Research along the lines suggested by Barrett (2003) should continue after exemption has been granted because the jobs growth argument of the government should be tested and monitored. Similarly, the concern that there might be negative job consequences also creates an essential need for on-going research. The seeming inevitability of change merely shifts and modifies the focus of our responsibility as researchers of employment relations.

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