Retail Motor Industry Submission to Senate Employment, Workplace Relations, Small Business and Education Legislation Committee Inquiry into Four Bills to Amend the Workplace Relations Act 1996:

. the Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000;

. the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000;

. the Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000;

. the Workplace Relations Amendment (Termination of Employment) Bill 2000.

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In relation to the current inquiry before the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, the Retail Motor Industry intends to submit a written submission only in relation to the Workplace Relations Amendment (Termination of Employment) Bill 2000.

VACC together with MTA NSW and MTA SA had made extensive written submissions to previous inquiries concerning the review of federal unfair dismissal provisions. The unfair dismissal provisions continue to be of significant concern to small business. Employers in the retail motor industry are largely small business and defending a claim of unfair dismissal is both costly and time consuming.

Employers in the retail motor industry are of the view that additional amendments to the Federal unfair dismissal provisions would directly alleviate the undue pressures on small business, including Australian business generally.

On review of the Workplace Relations Amendment (Termination of Employment) Bill 2000, the amendments contained address a number of the issues which were addressed in a previous submission of the Retail Motor Industry.

The issues of most concern to the Retail Motor Industry are:

1. High Number of Claims and Out of Time Applications
2. Exemptions Based on Remuneration
3. Lawyers/ Consultants
4. The Conciliation Conference and the Use of Contracted Conciliators by the Commission
5. Limited Access to Costs
6. Lack of Urgency
7. Striking Out Applications

A range of recommendations were contained in our submissions including support for the amendments contained in the Workplace Relations Amendment (More Jobs, Better Pay) Bill 1999.

The following amendments contained in the Workplace Relations Amendment (Termination of Employment) Bill are supported by the Retail Motor Industry:

- The requirement of the Commission to consider the size of the business in terms of any effect on the procedures in a termination
- Commission to dismiss the application where the applicant does not show for proceedings
- Removal of a genuine redundancy from unfair dismissal provisions
- Limitations to acceptance of out of time applications
- Review of the provisions relating to costs orders and their tests
- Exclusion of independent contractors form the unfair dismissal procedures
- Removal of a demotion from the definition of a termination of employment
- Introduction of an opportunity to make a motion to dismiss the application at any time during the proceedings
- Amendments to the section relating to issuing of certificates
- Exclusion of compensation for shock, humiliation, distress or other hurt caused by the termination.

- prevention of forum shopping and prevent applicant from making two applications in relation to the same termination of employment
- Disclosure of contingency payments and prohibition on advisers to encourage pursuit of unmeritorious claims.

The Retail Motor Industry is keen to make oral submissions at a further public hearing and look forward to presenting further case material in support of further reform of the federal unfair dismissal provisions.

Our previous submission to the Workplace Relations Amendment (More Jobs, Better Pay) Bill 1999 contained the following issues and commentary:

1. High Number of Claims and Out of Time Applications

The high number of claims particularly in Victoria is not an adequate reflection of the number of actual unfair dismissals. It cannot be assumed that the number of claims is an indication of the number of unfair dismissal claims. Very few matters eventuate to a hearing on merit. Admittedly matters that may be deemed unfair are in most cases settled at conciliation, and at times are due to the persistence of the respondent's advocate. However, the majority of matters, in our experience are settled at the insistence of the respondent due to the time and cost of defending a claim, despite their chance of success. The majority of claims against members in our opinion are not unfair dismissals.

The community generally assumes that the number of claims is an indication of the number of unfair dismissals. The community fails to recognise that the system allows any complainant to lodge a complaint regardless of its merit. Claims arise from even those employees that had genuinely resigned for the purpose of inconveniencing the employer or to try the system for "compensation."

The retail motor industry endorses the proposed new s.170CD, which limits the circumstances in which a dismissed employee can make an application for unfair or unlawful termination.

There are a substantial number of claims that are lodged out of time in the Australian Industrial Relations Commission. These claims are time consuming and costly to the business owner, as the claims proceed to conciliation unless, the respondent raises an intention to argue on the basis of jurisdiction. Jurisdiction arguments are becoming more difficult to argue as it appears that the Commission's view is that out of time applications should be allowed, unless there are exceptional circumstances that may dissuade the Commission. In very few circumstances, the Commission disallowed an extension of time.

The Commission has also accepted applications which were 44 days out of time (Stark v Primac Limited, Print QO401), 43 days out of time (Khan v Australia Post Corporation, Print Q2955), and 54 days out of time (Austin v Qantas Airway Limited, Print P7007).

In Kamsteeg v. Telstra Corporation Ltd [Print Q3902], the Commission accepted an application lodged 267 days out of time, on the basis that the applicant did not become aware of information relevant to his claim of unfair dismissal until after his termination.

Presently the period prescribed by the Workplace Relations Act 1996 (the Act) is 21 days. Despite the longer period prescribed, since the introduction of the current Act, the Commission has a more liberal view of accepting out of time applications. The longer period provided by the 1996 Act and the poor excuses provided by applicants mocks the fact that the provisions are intended to prescribe a time frame.

The retail motor industry comments on the proposed s. 170CE(8).

Recommendation

Section 170 CE (8) of the Act relates to the provisions enabling the Commission's discretion to accept out of time applications. This provision does need tightening to reduce acceptance of out of time applications. The 21 day period prescribed for lodgement should be adhered to.

The proposed new ss.170CE(8) and (8A) of the Workplace Relations Amendment (More Jobs, Better Pay) Bill 1999 ("Bill"), would only allow the Commission to accept a late application if "it would be equitable to do so". The following matters must be established before the Commission can be satisfied that it is equitable to accept the late application:

- the circumstances of late lodgment are exceptional; and
- there is an acceptable explanation for the delay in lodging; and
- the applicant took action "of any kind" to contest the termination within 21 days after the termination took effect; and
- prejudice would not be caused to the respondent by the accepting of the late application.

The new ss.170CE(8) and (8A) proposed by the Bill is unlikely to require the Commission to adjust its present view on accepting out of time applications.

We recommend an alternative form of words to replace the existing s.170CE(8) of the Act:

> *"**170CE(8) [Application out of time)**. The Commission shall not accept an application that is lodged out of time unless the applicant can demonstrate that extraordinary circumstances prevented the applicant from lodging the application within the time period prescribed by this Act."*

2. Exemptions Based on Remuneration

Applicants that earn in excess of the remuneration specified by the Regulations pursuant to s 170CC of the Act are not discouraged from lodging a claim nor are the

claims addressed on the basis of remuneration unless the respondent raises a jurisdiction argument. This requires the respondent to prepare and argue a proper case for the Commission to formally dismiss the matter. Respondents engage an advocate due to the complex argument. These matters are time consuming in terms of preparation for the advocate and often require witness evidence, all at the cost of the employer. On average these matters require one day in the Commission for a hearing.

Recommendation

A screening process should be introduced to minimise obvious claimants with remuneration in excess of the amount prescribed by the Regulations, without introducing an additional step in the process requiring the employer to attend the Commission. Applicants should also be advised that the Commission has power to award costs for claims that are vexatious or without reasonable cause, while also outlining factors taken into account for the determination of level of remuneration.

The "Form R18 - Application for relief in respect of termination of employment" could ask the applicant whether he or she was in receipt of remuneration prior to the termination that exceeded the jurisdictional limit (which is $69,200 from 1 July 1999). Applicants who earn in excess of the remuneration limit would, at first instance, have their application declined, subject to a right of review.

Alternatively, rather than adjusting the current form used by the Commission, we recommend that the following definition be included in s.170CD(1):

> *"**Remuneration**" means all moneys and benefits provided to an employee by an employer, including but not limited to: base salary, commission, bonuses, allowances, employer superannuation contributions and the value of any non-cash benefits such as the use of a motor vehicle".*

After s.170CA(2), we recommend the following be included:

> *"**170CA(3) [Role of the Commission]**. The Commission shall, in the exercise of its powers under this Part, take steps at the earliest possible stage of proceedings:*
>
> *(a) to prevent employees who are excluded from the operation of specified parts of this Division from accessing those provisions;*
>
> *(b) to make applicants aware that the Commission may award costs against an applicant who:*
>
> *(i) institutes proceedings without reasonable cause; or*
> *(ii) causes costs to be incurred by the other party to a proceeding because of an unreasonable act or omission of the applicant in connection with the conduct of the proceeding; and*
> *to minimise the need for hearings before the Commission to determine the eligibility of applicants to institute proceedings under this Part."*
>
> *(c) to minimise the need for hearings before the Commission to determine the eligibility of applicants to institute proceedings under this Part."*

3. Lawyers/ Consultants

Increasingly applicants and employers are engaging lawyers and consultants. It is our experience that a number of lawyers and consultants fail to represent the best interests of their client. All too often the respondent and Commission are inconvenienced in time and cost due to the lack of understanding of the legislation or Commission's procedures. Although it is generally a "no cost" jurisdiction, employers in particular are bearing the cost through demand to pay the applicant's legal fees direct or to be factored into the settlement. Too often these representatives have unreasonable demands and rather than arbitrate, employers will settle to avoid additional costs in defending the claim.

Their fee structure is such that the longer time it takes to resolve the claim, that, it is in the interests of the lawyer/ consultant. High legal costs incurred by applicants, often leaves the applicant with a disproportionately small settlement compared to the amount paid by the respondent. The affect on respondents, is that settlement figures are generally no less than $2000. From our experience the legal fees range from $900 to $1500 for a conciliation conference.

It is not uncommon to find that lawyers/ consultants lack the urgency to resolve these matters expeditiously, nor consider the prospect of reinstatement. This concerns the employer organisations as any reasonable prospect of effective reinstatement is eroded by the attitude of the lawyer/ consultant.

Recommendation

The right of legal representation is not automatic, yet the right to legal representation generally, is not challenged by respondents as it would appear that respondents are denying reasonable representation. The Commission needs the power and guidance to make strong recommendations for settlement despite the cost of representation incurred by applicants. Conciliators fail even in their certificates to specify the prospect of success or failure of the claim. Methods for limiting the approach taken by those lawyers and consultants described requires further consideration.

The retail motor industry endorses the proposed new s. 170CIA and Subdivision G of the Bill.

4. The Conciliation Conference and the Use of Contracted Conciliators by the Commission

The conciliation conference is a useful opportunity for the parties, particularly for the applicant to air their grievance and consider settlement of the matter. The most successful of conferences are those conducted by members of the Commission or conciliators that properly address the issues relevant to merit between the parties, encourage discussion and settlement.

Conferences that are inadequate are those where individual bias is obvious, there is a lack of interest in the issues relevant to merit or where the parties are simply left to themselves. Moreover, the certificate that is issued often reflects this failure to

procure from the parties, relevant issues to make a preliminary opinion on the likely success or otherwise of the claim. The involvement of lawyers often becomes an issue for even the conciliator, as a number of conciliators encourage employers to consider the fee when settling the matter to ensure applicants are not out of pocket.

Conciliators whether members of the Commission or contracted are inconsistent in their approach during conciliation. The approach ranges from those that simply advise the parties of the intention of conciliation then leave the parties to their own devices, to those that properly encourage the parties to consider options to resolve the matter.

Further, it appears that there is no express power under the Act to enable persons, who are not appointed members of the Commission, to be contracted to conduct conciliation conferences.

Recommendation

Conciliators should be accountable for their role as conciliator, it also requires private criticism of a party that refuses to settle if unreasonable. Consistency in approach is preferred, including the making of recommendations for settlement, disregarding legal costs. The certificates issued must contain more information than *"It is not possible to make an assessment due to conflict in the factual position and the necessity to hear evidence."*

We recommend that s.170CF of the Act be amended to include the following:

170CF(4) [Role of the Commission] *The role of the Commission in a conciliation conference is:*

(a) to explain to the parties that the purpose of a conciliation conference is to identify matters in dispute and to attempt to reach a mutually agreed resolution of these matters;
(b) to conduct itself in a fair and impartial and consistent manner; and
(c) to make recommendations about settling the matters in dispute based on the merits of the case, and without regard to the likely costs to be incurred by the parties if no settlement is reached.

170CF(5) [Persons to conduct conciliation conferences] *Conciliation conferences held pursuant to this section may only be conduced by persons who have been appointed as Commission members, or acting Commission members pursuant to Part II of this Act.*

Additionally, the Commission may incorporate a best practice approach to ensure the Commission's conciliators apply a consistent and effective approach to unfair dismissal conciliations.

5. Limited Access to Costs

Applications for costs pursuant to s 170 CJ can benefit employers faced with claims by applicants intending to simply inconvenience the employer by wasting their time. The provision does not encourage the applicant to settle or withdraw their claim promptly. Unfortunately, access to costs requires a determination or discontinuance of proceedings before an application for costs can be pursued. This process is time consuming for employers when faced with a claim that is vexatious or without reasonable cause. Employers expend a substantial period of time dealing with such claims, which would otherwise be better spent on the business. This means that in most cases, employers opt to settle on a financial basis to quickly put at an end to these claims.

Recommendation

Access to costs should be increased, for those that are in a like situation, even if not pursuing costs, can result in the other party to settle or withdraw.

The proposed legislative changes contained in s. 170CJ enables a party to apply for an order for costs in a number of circumstances.

The retail motor industry endorses the proposed changes to s. 170CJ of the Act.

6. Lack of Urgency

There are matters that take an excessively long period to conclude in the Commission, partly due to the workload, but also due to the lack of urgency on the part of some parties or conciliators. This is a concern, as the length of time taken for a listing has generally increased from 1 week to 2.5 months. The lack of urgency in dealing with claims also eliminates most chances of successfully reinstating the applicant in employment.

Recommendation

A provision in the Act relating to the requirement to expeditiously deal with unfair dismissal matters is required. A provision similar to previous provisions would benefit the parties and the Commission.

We recommend that after s.170CE(9) of the Act the following be included:

*"**170CE(10) [Dealing with applications quickly]** The Commission must deal with applications made under subsection (1), (2), (3) or (4) as quickly as practicable".*

7. Striking Out Application

An applicant in our view should have the onus of appearing for a conference or arbitration proceeding. Employers that defend the claim and appear find that the their time and the time of the Commission is wasted when the applicant does not show.

Recommendation

The FIC endorses the proposed new s.170CIB of the Bill. However, it is unclear whether this proposed section relates to all proceedings before the Commission in relation to an unfair dismissal or unlawful dismissal application, or whether it is limited to arbitration proceedings. We recommend that the following definition be included in s.170CIB:

> *"For the purposes of this section, the following proceedings are examples of a "proceeding" in respect of which the Commission may dismiss an application under s.170CE:*
>
> 1. *a "pre-conciliation" conference that parties are directed to attend by the Commission under paragraph 111(1)(t);*
> 2. *a proceeding for dismissal of an application under s.170CE on the ground that the application is outside jurisdiction;*
> 3. *conciliation proceedings under s.170CF;*
> 4. *arbitration proceedings under s.170CG;*
> 5. *an appeal to the Full Bench from an order of the Commission under s.170CH or a costs order under s.170CJ;*
> 6. *a proceeding concerning an application for costs by one party in respect of another party's application for costs.*
>
> *This list is not an exhaustive list."*

The Retail Motor Industry further supports the amendments contained in s. 170HBA, s. 170HD, s. 170HE.

The federal unfair dismissal provisions have a significant effect on the Retail Motor Industry, primarily because the industry comprises small business. In Victoria, a large number of claims are lodged by employers in the industry and it is not uncommon that employers will make a business decision to pay a sum simply to end the matter regardless of merit. This action exacerbates the problem, as the employer is then known to easily make a payment. The Retail Motor Industry recommends that the Senate Committee adopts and supports our comments in relation to the Workplace Relations Amendment (Termination of Employment) Bill 2000.