VACC Submission to the Senate Employment, Workplace Relations and Education References Committee Inquiry into the package of Workplace Relations Amendment Bills for 2002.

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Introduction

The Victorian Automobile Chamber of Commerce (VACC) is a federally registered employer organisation, representing approximately 4,500 employers in the retail motor industry primarily across Victoria and Tasmania. Membership of the organisation includes motor vehicle dealers, farm machinery dealers, service stations, smash repair, motor cycles establishments, automotive and specialist repairers, commercial vehicle and component manufacture, tyre outlets, engine reconditioners and associated retail motor industry services such as towing and distribution.

More than 80% of VACC members have 10 or less employees. In Victoria approximately 80% of employees employed by members are covered by a federal award, whilst the remainder are covered by Schedule 1A of the Workplace Relations Act. In Tasmania of the 270 members 80% are covered by a federal award while the remainder have state award coverage.

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.

While the Senate has the task of principally addressing the Workplace Relations Amendment (Fair Termination) Bill and Workplace Relations Amendment (Fair Dismissal) Bill, VACC provides the following submission in support of further reform to the federal unfair dismissals jurisdiction and support for the provisions contained in the Fair Termination Bill.

The submission of the Australian Chamber of Commerce and Industry (ACCI) is endorsed by VACC. The proposals contained in the ACCI submission will in our view go a long way to alleviating existing burdens on business, regardless of size and in many cases the Commission or applicants. Rather than repeating the proposals contained in the ACCI submission, VACC's submission concentrates the issues regularly experienced by our member.

Unfair Dismissals and Small Business

The area of most concern to employers is not only the inconvenience, but the fear and distress associated with responding to a claim of unfair dismissal. Generally, the process of responding to an unfair dismissal claim intimidates small business employers, it is an area they have little experience. Consequently, there is a tendency to avoid a strong defence and agree to settle a claim. For many small business employers, the time taken to respond to a claim is burdensome and there is uncertainty in relation to the impact of the claim on the business and its employees. Employers are hesitant in many situations to dismiss an employee even where justified for fear of attracting an unfair dismissal claim.

When implementing a formal disciplinary procedure, there is no guarantee that an employer will avoid an unfair dismissal claim in the Commission. This has proved to be the case on numerous occasions, even where advice has been obtained from VACC. The ability to argue technical procedural issues is used to maximum advantage by solicitors and agents to justify an application for unfair dismissal. In addition, even though the "fair go all round" principle exists, arguments are often very technical in nature, which in effect deflect the nature of and constraint experienced by small business. For this reason, small businesses are uncertain whether the termination, despite their careful processes is likely to be considered harsh, unjust or unfair. Although the amendments introduced in August 2001 provided for the recognition of the size of a business and the absence of a human resource specialist, this requirement does not apply to unlawful claims. The amendment adds sub section (da) and (db) to 170CG (3)(d), ie the conditions for proceeding to arbitration to determine whether the termination was harsh, unjust or unreasonable.

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 and Australian business generally.

Our membership has examined the issue of exclusion of small business from the unfair dismissal jurisdiction. The view of VACC members is that the definition of small business is a contentious matter. Although predominantly our membership has less than 10 employees, those with employees in excess of 20 consider themselves small due to the structure of business. In addition, a serious concern is that the argument for exclusion taints the industry with the reputation that it wants to dismiss at will. Members have not been opposed to having reasonable procedures and reasonable protections for those genuinely unfairly dismissed, the question is often how reasonable are the "reasonable" procedures and how the claims are dealt with.

Clearly the processes contained in the Federal Workplace Relations Act and the approach taken by the Commission can be improved to reduce a number of concerns.

1. Representation

The unfair dismissal jurisdiction has provided the opportunity for some lawyers and agents to charge fees as they please, and in some cases delay a case regardless of merit. Experience has shown that lawyers and agents mainly charge between $800 – $1800 for the first conference alone. However, legal fees in excess of this amount are known to occur. The introduction of section 170CIA, i.e. disclosure of contingency fee arrangements, has had little effect on proceedings. While at times advocates are reluctant to provide that information, negotiated outcomes during a conciliation conference are not influenced by a fee arrangement.

Generally, any negotiated outcome is based on the expense incurred for representation by the applicant regardless of merit. Applicants have no incentive to

settle a matter unless their expenses are paid and they receive a level of "compensation". This means an employer rarely settles a matter for less than $3000, even if the applicantion has no merit.

Some firms and agents have limited experience in the Industrial Relations Commission, or are disinclined to settle matters expeditiously. In Victoria, we find that we are unable to settle the matter at the first conference, but rely on the second conference where a member of the Commission adopts a proactive approach in order to settle the claim and will also issue a certificate. Many applications presently are also filed incomplete.

Case example
An employee that has been on four months authorised unpaid sick leave due to a personal illness lodged an unfair dismissal claim when a form (relating to ongoing sickness benefit allowance) from Centrelink was incorrectly completed by a clerical employee. Due to the employee's long absence, it was assumed by the clerk that the employee terminated his employment As soon as the error was noted, the employer sent to the employee's legal representative a letter explaining the error and confirming ongoing employment. The letter also confirmed that the employee was required to regularly submit medical certificates. A copy was also sent to the AIRC. A date for a conference is still pending.

Recommendation one
When applicants are represented, a letter of demand/ a brief summary of the claim should be forwarded or at least all applications must be properly completed with reasons for the claim. The Commission should not accept applications that are incomplete.

Recommendation two
To discourage the free rein of firms/ agents to charge fees what they like, we recommend a schedule of fees. A schedule will limit the pressure on small business to cover the exorbitant fee charged to applicants. The schedule will be helpful to parties and the Commission during conciliation and for arbitration. Further, this schedule should be subject to review.

2. Representation by Advocates/ Consultants

The prevalence of consultants/ advocates in the unfair dismissal jurisdiction is increasing. There are many that offer services who have no prior industrial relations experience. Their lack of knowledge frustrates the process for both the respondent and Commission. The behaviour of some of these consultants is also questionable. However, the Commission has no choice but to accept their appearances.

Case example
One consultant in Victoria regularly holds himself out as a lawyer, his current business name strongly suggests a relationship with the Federal Commission, he has operated his business from the Commission's meeting rooms (which are now locked) and has relocated his business to avoid paying settlement money to his clients. We have had his clients chasing us for the settlement money after the employer complied with the settlement terms. Recently he has tried to corner respondents, when the advocate is out of sight and hurled abuse across at the respondent's advocate during a conference.

Recommendation
We recommend that consultants/ advocates are registered, except those employed by registered industrial organisations. This will enable the Commission to deregister a consultant/ advocate where warranted. We recommend a system similar to the processes adopted by South Australia and Western Australia. Presently there is no recourse if an agent partakes in questionable practices, while lawyers and advocates for industrial associations are accountable to either their organisation or the Law Institute.

3. Serial litigants!

To demonstrate the ease to which complaints can be made in the unfair dismissal jurisdiction, we have examples where individuals have claimed unfair dismissal repeatedly.

In one case, the employee was disciplined for failing to properly clock on and off. The resignation resulted in a claim by the union that the applicant was victimised due to his union membership. The applicant was reinstated. The business was subsequently sold and he again resigned when he was being disciplined for breaching the mobile phone policy. The same union again alleged victimisation due to union membership.

In another case, the serial claimant was represented by the same legal firm. The claimant resigns employment and claims constructive dismissal after he is employed elsewhere.

Recommendation
The issue of constructive dismissal needs to be addressed and claimants should be expected to pay a higher filing rate, to discourage vexatious claims. Presently applicants have nothing to lose, as in most cases, employers will settle. Rarely do claimants lose the $50 filing fee, if they have to pay it at all (there are waivers if the applicant alleges that he/she suffers financial hardship). We recommend the fee become permanent at a reasonable rate and also be annually indexed. This will discourage vexatious claims. Applicants presently recoup the filing fee where the matter is resolved at first conference or before.

4. Redundancy

Claims relating to redundancy are currently filed in the unfair dismissal jurisdiction. Disputation should be restricted to an award breach, rather than a question of whether the process etc was harsh, unjust, unreasonable or unlawful. Valid terminations due to a down turn in business has resulted in complex hearings, as applicants through their representative are always capable of demonstrating a technical breach of the process. The current procedural processes required are always difficult, complex and onerous for small employers, due to the fact that the downturn is almost always obvious, the economic viability of the business depends on quick decisions and the owner operator cannot rely on external or specialist skills to implement a procedure that meets the current test.

Case example
One member made redundant 17 employees (27% of the workforce) due to operational requirements. Of all the redundancies, the only unfair dismissal claim was from the employee with 11 month's service. Redundancy packages were negotiated with the Termination Change and Redundancy (TCR) standards as a guide. Through a legal representative, a claim was lodged. During the conciliation conference, the conciliator strongly suggested that the company should offer the same entitlements as long-term employees, as defending the claim would cost the company. This case should not have attracted an unfair dismissal claim, as a proper process was implemented.

Case example
A small body repair business owned by an elderly member, made redundant his only employee due to the downturn in the business and due to his serious ill health. The downturn was obvious, as was the ill health of the owner. The business was wound up, creditors paid, but tax obligations were still outstanding. The unfair dismissal claim involved a conference, where the applicant through a legal representative argued for a compensation amount of approx six month's wages. The applicant failed to seek employment, despite an industry skills shortage. The matter was not

resolved and the applicant elected to proceed to arbitration.

Our member at this stage was receiving an aged pension, was nursing his ill wife (with cancer) between his hospital admissions and through his limited savings and pension allowance was repaying the tax debt. We requested a second conference with a member of the Commission, and reiterated the facts that the downturn was obvious, the applicant knew of his employers age and ill health. Further, that the owner had no assets to settle the matter. Despite this, the representative for the applicant argued that procedural fairness was not afforded the applicant and refused to withdraw the matter. Given the election to proceed to arbitration, we sought an adjournment due to a further hospital admission that was scheduled. The applicant's representative demanded access to the owner's personal documentation to assess his level of personal assets. The Commission adjourned the matter.

Eventually, the matter was brought on for arbitration despite a medical report which stated the elderly man was unfit to attend. The owner's two daughters, who had no interest or involvement in the business, agreed to pay from their own personal savings up to $1500 each, to settle the matter as they were concerned over the effect of the claim on both parents. The employee incurred a legal bill of more than $5000.

To add salt to the wound, the solicitor refused to sign the terms of settlement. We had to seek the assistance of the Commission to execute the terms of settlement.

Recommendation
Redundancies occur due to operational requirements of a business. The issue of redundancy is an allowable matter. Federal awards generally contain at least the standard TCR provisions. Therefore, the employer should be accountable for the application of the award provisions. This approach will reduce the complexity, time and cost if lawyers are excluded. A section 99 application is more appropriate, which will enable the Commission to make an appropriate order. This approach will permit the Commission to consider issues relating to size of business and process, without complex legal argument relating to procedure.

5. Double Jeopardy

Although the Federal Workplace Relations Act 1996, via S170 HB provides that a claim for harsh, unjust or unreasonable or unlawful termination should not be made where an application is made in another jurisdiction, small employers are still faced with applications in multiple jurisdictions.

The Commission does not dismiss matters where a claim for unlawful termination was made prior to a claim in the state Equal Opportunity Commission. This means,

employers are often faced with two applications in separate jurisdictions, and because the State Commission may not hear an equal opportunity claim for many months, the employer faces the uncertainty as to which jurisdiction the argument will be advanced.

Recommendation
Where an application is made in another jurisdiction, the Commission should refrain from registering the matter. In the event, a claim is made in another jurisdiction after lodging the unfair dismissal claim, the applicant should be required to immediately select which application will be pursued.

6. Claims without merit

Claims without merit are easily filed, and most often the employer requires the assistance of the Commission as the Conciliator lacks any power to finalise the matter. As applications are not always completed, it is sometimes found at the time of conciliation or before, that the application lacks jurisdiction. The requirement to provide details should identify these matters.

Case example
The Victorian Motor Car Traders Act prohibits employers from employing staff in a customer service capacity that have a prior serious convictions. An employee in a dealership had two vehicles stolen whilst he had a vehicle for demonstration purposes. The insurance claims for the value of the vehicle were denied when information was brought to the attention of the insurer (via a statement completed by the employee) that the employee was twice convicted of serious offences. The employer was advised of the outcome. The employer had no alternative, other than to terminate the employee after he was given ample opportunity to respond. The Conciliator was sympathetic and tried to encourage the applicant to settle. The matter will proceed to a further conference.

In this instance, the member offered to settle the claim in order to avoid a further listing of the matter. As the applicant did not agree to settle, the matter will be relisted, in which time the member has incurred a further cost.

Recommendation
All applications should be properly completed and additional information provided such as whether the applicant is subject to a period of probation, provide information on remuneration etc. The Registry should be given the ability to reject applications where the information is not provided, the application clearly lacks merit, or the application is not a claim of unfair termination. For instance claims for underpayment of wages should be referred to the department of Workplace Relations or the union that the applicant is a member of.

7. Resignations

Resignations that lead to claims of constructive dismissal are problematic and have become a common practice.

Case example
A receptionist in a dealership demanded from her employer a change in hours due to child care commitments. The employer agreed to the change of hours. Subsequently, she demanded a pay rise and when the employer refused, she resigned. In her claim she stated she was dismissed due to change in hours of work.

Fortunately, we had written evidence in her own hand writing requesting the change of hours. During the conference, this was produced and her lawyer although surprised, responded she was constructively dismissed. She is seeking six month's pay. The matter will proceed with a second conference.

Case example
A Finance and Insurance Manager with substantial experience in the industry was employed for 10 months. While being spoken to by the Dealer Principal about his attitude and conduct, he resigned. The Dealer Principal confirmed that was his choice. The employee said he would tender a written resignation and told another co-worker he resigned.

He left the building after verbally abusing the Dealer Principal.

When a written letter of resignation was not received, a letter confirming acceptance of the resignation was sent to the employee.

The unfair dismissal claim cited that he was not given notice, was seeking reinstatement and alleged the termination was harsh, unjust and unreasonable.

The matter was not resolved at conciliation and the applicant elected to proceed to arbitration. Directions were given in October 2001, regarding the filing and servicing of outline of submissions, witness statements and the list of authorities. VACC

complied with the directions by 17 January, 2002. The applicant did not comply nor has the solicitor responded to telephone calls to confirm whether the applicant is still legally represented. Copies of materials were also sent to the applicant. A Commissioner has adjourned the hearing date of 29 January until the applicant complies with the directions.

Recommendation
The onus of proof should be tightened in the Act, for the applicant to demonstrate that the termination is at the initiative of the employer. The number of applications alleging constructive dismissal represents a significant proportion of claims received by VACC members. The Act allows for a number of matters, which do not entitle the applicant to access the unfair dismissal jurisdiction. The issue of termination of employment at the initiative of the employer should be argued as a jurisdictional issue, when necessary.

Recommendation
The Commission has been dismissing applications when an applicant fails to appear at proceedings. The one issue that remains to be tightened is the situation where the Commission is reluctant to dismiss a matter, where the applicant does not comply with directions issued by the Commission, prior to hearings on contested claims. Generally these matters are adjourned indefinitely pending further advise from the applicant as to whether they wish to pursue their claim.

Further information

This submission was authorised by our Industrial Standing Committee and General Manager Industrial Relations and Training.

If further information is required please contact

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