Australian Chamber of Commerce and Industry

Submission to Federal Government Review of Unfair Dismissal Laws

July 1998

ACCI Submission to Department of Workplace Relations and Small Business Review of Federal Unfair Dismissal Provisions

Introduction

Since the introduction of federal unfair dismissal provisions in 1993 ACCI has been concerned about the need to ensure that the provisions operate as intended, to provide a protection in genuine matters, and that they do not operate in an unbalanced way. The 1993 provisions have been repeatedly amended because of operational problems that were occurring.

ACCI Attitude to the *Workplace Relations Act* 1996

ACCI welcomed the 1996 amendments because they included important new safeguards introduced in an attempt to more closely focus the provisions on genuine claims of unfair dismissal. This refocussing included:

. focussing the federal Act more closely on the very long State experience of such legislation, for example by the reference in the Act to the 'fair go all round' principle, the use of an 'active' conciliation function, the statutory tests used for the unfair dismissal, and in other respects.

. use of the Australian Industrial Relations Commission rather than a Court as the determinative tribunal, to provide a less legalistic and more pragmatic assessment of the merits of particular matters;

. measures to discourage purely speculative claims, through for example a filing fee, requirements on the tribunal in conciliation to express a view on the relative strengths of each party's case and to enable it to make recommendations, provision for order of costs where a party should have settled;

. measures to assist small business, including requirements that the effects on the viability of a business be taken into account in assessing amounts of compensation;

. removal of the requirement to have regard to the overly prescriptive ILO *Recommendation on Termination of Employment,* which contributed to the emphasis on formal compliance with procedural requirements rather than weighing up the overall merits of a termination;

. strong attempts to co-operate with, rather than to simply override State unfair dismissal systems, for example by providing federal award parties with access to State unfair dismissal procedures if that is provided for in the State legislation.

Problems for Small Businesses

The preliminary results for the latest *ACCI Pre-Election Survey* have just been released. The survey included a question on the extent of concern amongst business about unfair dismissal laws, and the results were:

. unfair dismissals were ranked 9th out of 71 issues raising concern amongst all business, with only tax and Government regulation ranking above it in the extent of concern. This confirms the last pre-election survey conducted by ACCI (in early 1996), in which unfair dismissals ranked 8th out of 57 issues of concern to business;

. the issue is a much more important issue for small business than for large, with firms with between 1-19 employees ranking the unfair dismissals issue as follows:

critical: 47.6%
large: 21.9%
moderate: 16%
small: 8.4%
none: 6.1%

Table 1: Preliminary Results of the 1998 ACCI Pre-Election Survey

Unfair Dismissals	1-19 Empees	20-99 Empees	100-99 Empees	1,000 plus Empees
Critical	47.6%	46.4%	35.9%	22%
Large	21.9%	33.1%	30.3%	38%
Moderate	16%	12.9%	16.2%	24%
Small	8.4%	5.5%	14.1%	14%
None	6.1%	2.1%	3.4%	2%

Even though the issue is more critical for small business than for medium or large, the issue is still one of importance for all sizes of business.

At this stage over 3,000 responses have been received, and ACCI expects to receive about 5,000 responses.

Unfair dismissal claims therefore continue to be a major disincentive for small business decisions to employ. Many small businesses, having been through an unfair dismissal claim, even only to conciliation stage, do not replace the employee dismissed as they fear further claims in future. This puts additional pressure on remaining employees required to carry the additional workload. The effect is that small businesses no longer in many cases are prepared to *'give people a go'*, fearing an unfair dismissal claim if things do not work out. Those who might otherwise be given a chance in a small business are denied an opportunity as employers fear they may be too difficult to dismiss. For example, where an employer is not sure whether they wish to keep on a probationary employee, they will often err on the side of caution and dismiss them in order to avoid the possibility of an unfair dismissal claim in the future.

Small businesses often get caught on the more procedural aspects of the scheme. For example there have been instances of applications in cases of genuine redundancy, simply because alternative employment was not discussed, even though it was apparent that no alternative employment could be offered. Similarly there have been instances where an employee was given numerous verbal warnings but because no written warnings were given a claim was filed based on the fact that no written warnings were given.

Participation in such a proceeding is difficult for a small business because of the extent of the costs, which include:

. the proprietor collecting information, and seeking advice as to options, investigation in more detail of any issues that arise;

. the proprietor seeking advice from an employer association or solicitor;

. the proprietor attending preliminary conciliation conference(s), involving a minimum management time of several hours. This can involve substantial opportunity cost for the small business proprietor;

. the proprietor attending any settlement discussions outside conciliation conferences;

. defending a claim will often involve all employees of the business, and consequently the disruption caused by a claim will often be untenable for a small business proprietor to allow;

. the proprietor attending any arbitration hearings which may occur, which probably involves about 2 days more of hearing and preparation;

. the proprietor attending any appeal hearings which occur;

. additional staff of the business could be involved at various stages, which increases the cost.

There are good economic grounds for a small business proprietor seeking to quickly settle a matter, to ensure that these additional costs are not incurred, in some cases regardless of the merits of the case. Sometimes these claims are settled despite the claim being one which is clearly excluded from the operation of the Act.

Different considerations apply in relation to medium and large businesses, where leverage for a settlement can be gained through the

threat of adverse publicity. The high profile nature of some of these matters indicates that the threat of adverse publicity is often very real.

These business vulnerabilities are currently being exploited by some consultants and legal practitioners, and a legislative response to that exploitation would in ACCI's view be appropriate.

ACCI has also consistently argued that exempting small business from the unfair dismissal scheme would be a substantial boost to employment. This is no small issue in the current economic environment of unacceptably high unemployment levels.

One important issue to be addressed, therefore, is that of the future of the *Workplace Relations Amendment Bill* 1997, which sought to exempt employers of 15 employees or less from the unfair dismissal provisions of the federal *Workplace Relations Act* 1996. The exemption did not apply to existing employees, only to new employees, and did not exempt such businesses from the prohibitions on unlawful termination (eg. for discriminatory reasons, such as sex, race). The *Workplace Relations Amendment Bill* 1997 was rejected by the Senate, and reintroduced.

That Bill followed the disallowance by the Senate on 26 June 1997 of the federal Government's regulation which provided a 12 month exemption from the unfair dismissal laws for employers with 15 or less employees. It should be noted that the regulation would have introduced the same sort of regime recently introduced by the Blair Labour Government in the United Kingdom. The UK legislation provides that unfair dismissal legislation does not apply to any business, large or small, until a probationary period of 12 months has been completed. The incoming Blair Government legislated to reduce the probationary period from a period of 2 years to one of 1 year.

ACCI continues to support the complete exemption for small business which was sought to be introduced with the *Workplace Relations Amendment Bill* 1997 rejected by the Senate. ACCI's reasons for supporting special provision for small business are outlined above.

The Current Situation - The Problem of Contingency Fees and Solicitation of Claims by Employees

The thrust of these amendments have worked well. However, there is in ACCI's view a need for further changes. As with workers compensation and other systems, changes occur in the behaviour of the parties over time which can threaten the viability of an existing system, and which require the system to be rebalanced. One important change has occurred in recent years, which has it appears had a significantly deleterious effect on the operation of the system, and has substantially contributed to the gradual increase in numbers of applications which appear to be occurring.

Some firms of solicitors are promoting their services through advertising[1] and other means, offering contingency fees which they colloquially refer to as 'no win no fee', and are then using the need for small business in particular to quickly settle claims to extract compensation offers in the conciliation phase. It has to be emphasised that these compensation offers are being extracted regardless often of the merits of the case, and are based on the special cost pressures that these proceedings cause for small business.

There are instances of solicitors not being properly prepared for conciliation, as they are appearing only to extract a settlement, instances of solicitors appearing without the applicant as they are otherwise engaged (eg. 'at work'), and without being fully instructed, and solicitors appearing with no knowledge of the area as they specialise in other areas (eg. family law). In some cases legal firms are charging up to $1,200 to represent an employee during the conciliation phase, and the cost of the legal representative is itself a hindrance to settlement of the claim. The matters are often resolved by the employer agreeing to pay legal costs as part of the settlement sum, often by way of direct payment to the solicitor's office. A 'lottery'

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[1]An example of an advertisement lodged by a prominent legal firm, headed 'No Win No Fee - Sacked' appeared in the Herald Sun of 10 September 1997, at p.3. It states in the body of the advertisement:

> 'If you boss has;
> . no good reason to sack you' or
> . never said you might lose your job, you can come to us for help. 'X Solicitor Firm', 'Experts in Employment Law'

mentality appears to exist in some legal firms, with solicitors simply answering that 'money' is being sought, without being able to name a figure or to detail how a particular proposed figure was arrived at.

Restriction of Access to Legal Practitioners During Conciliation Phase

One obvious response would be to restrict access to legal practitioners in the conciliation phase, the phase during which pressure is applied by legal practitioners and consultants. Another would be to restrict use of contingency fees in this area of legal practice, if it is possible to so restrict their use. Contingency fees are regulated through State and Territory legislation, but access to the tribunal could be conditional on certain approaches being taken to legal fees. *ACCI recommends that careful examination of these options be undertaken.*

The Availability of Costs Where Legal Practitioners Represent Employees

Another possible approach to the problem would be to provide the Commission with greater scope to award costs where legal representation is involved. The greater scope could be to allow costs to follow the result, the usual rule, or could be subject to special tests such as unnecessarily prolonging proceedings, use of contingency fees and other conduct to encourage claims to be made. Even where legal representation is not involved it would be appropriate to provide for costs to follow the result, or to follow the result 'in appropriate circumstances'.

Extension of Time Applications a Major Problem

ACCI submits that there are good grounds for restricting the ability of employees to seek extension of time within which to lodge application. ACCI submits that it would be appropriate to replace the current test of whether or not it would be unfair not to extend time [s.170CE(8)], with a test of exceptional circumstances.

The application of the current test as outlined in *Telstra-Network Technology Group v. Kornicki*, suggests that the Commission

determines whether there is an acceptable reason for the application being out of time, and if there is merit in the applicant's case, a set of tests which are relatively easy to meet. For example, in *Clark v. Ringwood Private Hospital*, the appeal bench [Ross VP., Drake DP and Deegan C.] overturned a decision of Watson SDP and granted an extension of time in circumstances where the application was 48 days late and the delay arose from the actions of the applicant's representative. The starting point for the Bench was that the out of time provision under s.170CE(8) was more generous to applicants than previously existed under s.170EA(3)(b). One second best option would therefore be to restore the earlier provision, which was simply a power to extend with no stated test.

The key amendments that are required are to ensure that the merit of the claim should not be a ground for extension, and that strong grounds, exceptional circumstances, should be required for extension.

In addition, the Commission should be expressly prevented from proceeding to hear merit arguments before it has issued an order granting an extension of time application, if the application is out of time.

The Filing Fee

ACCI considers that retention of a filing fee is essential. There are already pressures underway which are undermining the balance and effectiveness of the system, and removal of the filing fee would only damage the system further. It is necessary to maintain a stress on discouraging unwarranted claims, and this necessitates retention of a filing fee. In ACCI's submission the current level should be lifted from $50 to $100, in order to provide appropriate discouragement of speculative claims.

The statistics on the current approach being taken to the filing fee suggest that claims with merit are not being discouraged. Some 5 per cent of claimants request filing fee waiver, and 86 per cent of these claimants succeed, suggesting a relatively liberal approach to application of the waiver power, and certainly not a restrictive

approach that is having the effect of actively discouraging claims which have merit.

The Appeal Processes

ACCI was concerned during development of the system to restrict the extent of proceedings by ensuring that appeals were not frequent, or only infrequently successful. ACCI continues to believe that this is an important consideration.

Formal Objects for Conciliation or Mediation

It appears to ACCI that the nature of conciliation conducted varies by member of the Commission, having regard to factors such as time, and personal judgement. In some cases the conciliation does not appear to be particularly 'active', and some employers report that the Commission has essentially refused to perform a function of making an assessment of the merits of a case. Many certificates issued appear to state 'need to hear evidence', and even when an applicant has been advised that the case has no merit the certificate does not reflect this. In some cases the employer has to seek a second conciliation hearing before a certificate is issued in the appropriate terms, that can lead to a costs order.

It might be useful to spell out more fully the objectives of conciliation, by for example providing a set of objectives for conciliation which might include:

. the Commission shall endeavour to settle the dispute by conciliation or mediation;

. the Commission shall seek to ascertain the facts of the matter, and to acquaint each party with the strengths and weaknesses of their case, ie. the real nature of the merits of each case;

. the Commission shall do this either by meeting separately with each party from time to time, or by meeting together with both parties;

. the Commission shall following this process of ascertaining the facts of the matter indicate the Commission's assessment of the merits of the application;

. the Commission shall recommend that grounds which the Commission considers without merit shall not be pursued, and shall record its finding.

Constructive Termination

The concept of constructive termination has a role to play in unfair dismissal matters, but there are occasions on which such a concept appears to have been used to excess. ACCI would recommend consideration of a definition of constructive termination, which closely ties the concept to circumstances in which it is appropriate, ie. where there has been real duress or coercion of an employee to resign rather than be terminated.

Recognition of the Importance of Formal Disciplinary Codes in Formally Registered Enterprise Agreements

On 16 January 1997 ACCI wrote to the then Minister for Industrial Relations, in the following terms:

> *'Second, the issue of unfair dismissals should continue to be kept under review, in our view. An important ACCI objective has always been to reduce the extent of intervention in workplaces, and one change to the regulations which could assist this would be establish in the regulations a requirement on the Australian Industrial Relations Commission to have regard to compliance with formal disciplinary procedures contained in certified agreements.*
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> *The argument that these procedures may contain inappropriate provisions is I believe met by the fact that they would firstly be agreed through a process of discussion and agreement, and secondly by the fact that the requirement is only to have regard to them. Similarly, such a requirement would reinforce what we believe is desirable Commission practice. As a matter of practice*

the Commission should give strong weight to these disciplinary codes.

These codes are now not uncommon. It is also desirable to promote them, because they are often a means for better management of employee relations. I attach a number of these formally registered disciplinary codes for your information.'

These issues would appropriately be addressed in any review of the legislation undertaken by the Government.

The Exemptions

The regulations provide a system of exemptions which specifically exempt trainees, but do not specifically exempt apprentices. The effect of the recent AIRC *Qantas Decision*[2] may well be that nearly all apprenticeships are found to be fixed term in nature, because the contract of employment is based on an indenture for a fixed period of apprenticeship training. The Bench did in that decision reject the decision of Ross VP., that because an indentureship may be varied by statutory board, the apprenticeship is not for a fixed period of time. ACCI intervened in that case, and put a submission to this effect.

However, there seems to be little reason in principle to exempt trainees but not apprentices. Both forms of employment are by their very nature temporary. The regulation might appropriately be varied to exempt apprentices.

In addition it would in ACCI's view be appropriate to extend the exemption for probationers. In ACCI's submission all employees should be exempted from the unfair dismissal prohibitions, except for the prohibitions on discriminatory termination, for the first year of employment. This would be a big step towards removing the disincentive to employing new employees that unfair dismissal laws provide, and would act to assist businesses to overcome their concerns about taking a risk and taking on new staff. This would be in the interests of all.

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[2] Giudice J., President, Harrison SDP., Lawson C., Print Q1482, 9 June 1998