Attachment D

AMEND THE STATUTORY OBJECTS TO EXPRESS THE 'FAIR GO ALL ROUND' CONCEPT

There are a number of objects expressed in s170CA of the Act (the unfair dismissal provisions). Section 170CA(2) refers to the concept of a 'fair go all round'. It does not however explain that concept, other than a footnote reference to *Loty and Holloway (1971)*.

The 1996 Explanatory Memorandum stated that the purpose of the (then) 'fair go all round' amendments were:

> *" to provide industrial justice by giving due weight to:*
>
> - *the importance but not inviolability of the right of an employer to manage the employer's business;*
> - *the nature and quality of the work in question;*
> - *the circumstances surrounding the dismissal; and*
> - *the likely practical outcome if an order is made."*

It is proposed that these matters be expressed in the statutory objects by being specifically reflected in the language of s170CA(2).

The proposal will provide a more direct basis on which parties and members of the Commission can assess the overriding function of these provisions. To the extent that it may assist in providing some clearer guidance (if not consistency) in the operation of the system that would also be of benefit to employers and employees.

IMPROVE THE PROSPECTS OF RESOLUTION AT CONCILIATION CONFERENCES

Even following the commencement of the *Workplace Relations Amendment (Termination of Employment) Act 2001* there is no capacity in part VIA division 3 to dismiss or stay an application which is re-pressed after it has been settled by agreement. Section 170JE of the *Workplace Relations Act 1996* provides that s111(1)(g), which is the Commission's power to dismiss a matter or part of a matter, or to refrain from further hearing or from determining a dispute, does not apply to proceedings under part VIA.

The unfair dismissal jurisdiction has facilitated the opportunity for some law firms to charge excessive fees, and in some cases, extend a case regardless of merit. Experience has shown that lawyers usually charge between $800 and $1800 for the first conference alone. However, legal fees in excess of this amount sometimes occur.

Generally, any negotiated outcome is based on the legal expense incurred by the applicant regardless of merit. Applicants have no incentive to settle a matter unless their legal expenses are paid and they receive a level of "compensation". This means an employer rarely settles a matter for less than $3,000, even if the application has no merit. The Senate committee has been previously advised of this fact.

Some law firms have limited experience in the Industrial Relations Commission, or are not disciplined to settle matters expeditiously. In Victoria, for example, it is common that parties are unable to settle the

matter at the first conference, but rely on the second conference where a member of the Commission may be more proactive in settling the claim and issuing a certificate. Many applications presently filed are also incomplete – or multiple boxes ticked. The employee application form does not require sufficient detail of the claim. The Commission should not accept applications that are incomplete.

To overcome the problems that still exist at and prior to conciliation a requirement could be made for more particulars of the claim to be expressed prior to conciliation conferences especially in cases of represented applicants. Steps also need to be taken to ensure that tribunal members conducting initial conferences are encouraged to and have the power to make recommendations about the merits of claims. In this area, passive conciliation is not helpful either to settlement of matters or the minimisation of costs.

At or prior to conciliation hearings Commission members should be given greater discretion to dismiss applications. At present, there is no power to dismiss an application where settlement has been breached and little power to dismiss an application before any conciliation hearing if it is frivolous, vexatious, an excluded claim or outside of jurisdiction.

Consideration should also be given to an amendment which would provide that where an applicant fails to attend a hearing at the allocated time and after allowing for a reasonable waiting period for the applicant to be heard on the scheduled hearing day, the Commission should be permitted to dismiss the application.

In the situation where the applicant does not comply with directions issued by the Commission, the Commission is at times reluctant to dismiss a matter. Generally these matters are adjourned indefinitely pending further advice from the applicant as to whether they wish to pursue their claim. In these instances the Commission should dismiss the application.

Case Examples

A matter where settlement was reached in conciliation which involved payment by the member in exchange for a deed of release. The applicant subsequently declined to complete the deed of release and the matter has come back on. The Commission has no power to stay or dismiss the proceeding on the basis that the applicant has revoked his or her agreement. The matter is listed for hearing later this month.

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 new clerical employee. Due to the 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.

The Victorian Motor Car Traders Act prohibits employers from employing staff in a customer service capacity if they have had a prior serious conviction. 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 he 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 business 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 re-listed, in which time the member has incurred a further cost.

LIMIT AUTOMATIC ACCESS TO ARBITRATION FOLLOWING CONCILIATION

The 2001 amendments went part of the way to address this issue, but the threshold test remains low. ACCI supported at the time the more rigorous test of requiring a "reasonably arguable case" to be made out. The 2001 amendments could be made more effective, for example, by requiring a pre arbitration conference to certify that the applicant has fully disclosed its case to the employer. This would have the benefit of preventing the 'ground being shifted' during the course of a hearing.

Currently, the *Workplace Relations Act* provides for the Commission to issue a certificate regarding the unsuccessful conciliation of the application, the merits of the matter and it may recommend that the applicant elect not to pursue a ground or grounds of the application. Essentially, the Act allows for applicants to elect to pursue a claim that is unmeritorious, vexatious and/or frivolous to arbitration, against the recommendation of the Commission. This creates an additional burden of costs on employers who are required to defend such a claim, even though it has already been indicated that it lacks merit.

Case Example

In ***Erico Morgado v. Arrowcrest Group Pty. Ltd*** Jones C. decided, of the "vexatious" concept, that *"the motive of the applicant in instituting the proceedings is an important factor, but the concept is not narrow. A proceeding could be said to be vexatious for example, where the predominant purpose sets out to harass, annoy or embarrass the other party…The fact also that there is an element of 'payback' in instituting proceedings does not necessarily mean that an applicant is not genuine in making a claim or of a failure to discontinue or settle proceedings*." It was, however decided that the *applicant did not make a vexatious claim as "…no matter how obvious it was felt that the Commission along with others, was being faced with and caught up in a situation of frustration and pure inconvenience (not without cost incidentally), and even just considering translator services, etc., the Commission is still not places with evidence, to consider that the applicant's case was ever diagnosed as being a complete "lost cause". Rather, it appears he received advice to the effect that he would have an extremely difficult road to hoe." In this matter, it was considered that full costs would not be awarded to the respondent to be paid by an applicant who proceeded to arbitration following the issue of a certificate at the conclusion of conciliation which stated "… that should the respondent be able to demonstrate that the misconduct occurred as alleged, then such would have justified the dismissal of the applicant and accordingly no intervention by the Commission would be warranted. On the other hand, whilst there may be some element of reservation as to the conduct of the applicant in the confrontation, a dismissal in the circumstances as alleged by the applicant would represent a disproportionate penalty…The parties are however aware of the true facts and should review their positions in light of these observations and consider whether their respective positions can be objectively demonstrated by way of evidence." Furthermore, the "applicant didn't comply with the Commission's directions. As well he changed representatives, he sought extensions of time for the filing of witness statements (subsequently granted by the Commission)."*

A TIGHTER TEST OF WHAT IS AN "UNFAIR DISMISSAL"

The current test is whether a dismissal was "harsh, unjust or unreasonable". The effect of this test is that a dismissal could be "just" or "reasonable" – even in objective terms – but if it is assessed as "harsh" then the employer is in breach of the Act and remedies follow.

The concepts of "harsh", "unjust" and "unreasonable' are overlapping concepts which involve a high degree of subjectivity and value judgement. It is futile for Commissioners and arbitrators to assess in a technical way the meaning of each of these words and seek to apply that technical meaning to the facts – because those words mean different things to different members of the Commission. The discussion by Commissioner Grainger of these concepts in the recent case of *Sykes v Heatley Pty Ltd* (6th February 2002) highlights the point. In that matter the Commissioner refers to differing definitions given to each of these words in an earlier case of *Rose v Telstra* and in the Macquarie dictionary.

In order to minimise the technical anomalies of the jurisdiction and to tighten (slightly) the statutory test it is recommended that the cause of action be based on the criteria of a dismissal being "harsh, unjust and unreasonable and not "harsh, unjust or unreasonable."

This proposal would eliminate the need for technical differentiation between these concepts.

RELIEVING THE BURDEN OF PROCEDURAL FAIRNESS BY MAKING THE REASON(S) FOR DISMISSAL THE PARAMOUNT CONSIDERATION

The procedural fairness obligations on employers are not clear, causing confusion among businesses. What is clear, as in the cases outlined below, is that where an employee has been fairly dismissed but for some minor procedural matters, the dismissal should stand as a valid, lawful and fair dismissal. While the circumstances surrounding dismissals might invetably be criticised as being less than perfect, it is a rare case indeed which does not disclose at least some procedural deficiencies of a purely technical nature.

In order to ensure that the legislation properly reflects this outcome, the Act should be amended to provide clear guidance to the Commission with a new statutory provision which indicates that 'the mere failure to accord procedural fairness in dismissing an employee shall not be sufficient to render a dismissal harsh, unjust or unreasonable". In this way the Commission would be required to give paramount consideration to the reasons for dismissal rather than strengths or weaknesses in the procedure for dismissal. Procedural issues would, however, remain relevant matters.

Case Examples

In Crozier and Palazzo Corporation Pty. Limited t/as Noble Park Storage and Transport, the question of whether the incorrect reason provided to an employee constituted a breach of procedural fairness was considered. The applicant, who was a sales representative, was terminated, given the reason that there was a "shortage of work". The respondent argued that they could not sustain the applicant's employment as his lack of sales had created a shortage of work. The applicant was said to be an experienced sales representative, with a proven ability to find new prospects in difficult market areas. Despite this, he made only one sale, to the value of $1300, in a period of 6 months employment with the respondent employer. In coming to their decision the full bench considered "As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provided them with an opportunity to respond to the reason identified….Where a termination of employment is related to unsatisfactory performance by the employee - as is the case here – the Commission must have regard to whether the employee had been warned about that unsatisfactory performance before termination…We find that Mr. Crozier was not warned about his unsatisfactory performance prior to his termination." The full bench concluded that "The result in this case turns on it own facts. In other circumstances the absence of procedural fairness evident in this case may lead to a conclusion that the termination was harsh, unjust or unreasonable."

In Fenton v. Swan Hill Aboriginal Co-Operative Ltd [1998] 1613 FCA, Finkelstein J considered whether the reason for the dismissal of the applicant was a valid reason and concluded "In this regard it does not matter that the stated reason is not the actual reason for dismissal. An employer may state a false reason for dismissal but that dismissal will nevertheless be lawful if the actual reason was "valid reason"".

In both cases the applicant employee's performance was raised with them on a number of occasions. In Fenton, Finkelstein, J. concluded "Ms. Fenton was well aware of the requirements that were imposed upon her in her position as an accommodation assistance programme social worker. She also knew of the importance of those obligations. She did not conform to them. I do not mean to suggest that Ms. Fenton wilfully failed to perform her duties although when it came to the misuse of the motor vehicle I rather think that she may have intentionally flouted the rules. Ms. Fenton was given ample warnings and no doubt had the counselling and advice of her union representative. Yet she persisted in continuing with the conduct about which many complaints had been made. There was no reason why the Co-operative was required to countenance this type of behaviour". Although the application was dismissed at the Federal Court level, it should not have been allowed to proceed to that level in the first place, and did so under the auspices of a breach of procedural fairness based upon the lack of a valid reason for termination of employment.

PREVENTING, SO FAR AS POSSIBLE, EXCLUDED EMPLOYEES FROM MAKING SIMILAR CLAIMS AGAINST THE EMPLOYER UNDER OTHER ACTS OR LAWS

Although the *Workplace Relations Act 1996 (s*170 HB) provides that a claim for harsh, unjust or unreasonable dismissal should not be made where an application is made in another jurisdiction employers are still faced with applications in multiple jurisdictions. For example, the Commission does not seem to dismiss matters where a claim for unlawful termination was made prior to a claim in the State equal opportunity tribunal. This means, employers are often faced with two applications in separate jurisdictions. Because a State tribunal may not hear an equal opportunity claim for many months, the employer faces the uncertainty as to which jurisdiction the argument will be advanced.

Further statutory amendments in this regard are required.

EXTEND THE QUALIFYING PERIOD TO THE FIRST SIX MONTHS OF EMPLOYMENT

The August 2001 amendments created the concept of a 3 month qualifying period before an employee is eligible to make an unfair dismissal claim against their employer. This amendment was most welcome, and provides greater certainty in relation to the employment of new staff. However, the three month period is still considered by employers to be too limited. ACCI supported a six month qualifying period during the 2001 debate, and continues to advocate that position.

INCREASE THE FILING FEE TO $100

For reasons outlined in the body of this submission ACCI supports an increase in the filing fee from $50 to $100, together with the filing fee being made permanent and this fee being annually indexed. We note in this regard that a hardship waiver discretion continues to apply.

EXCLUDE UNFAIR DISMISSAL CLAIMS BASED ON GENUINE REDUNDANCY

Redundancy is a termination of employment of a different character from a performance based dismissal or a misconduct based dismissal. Yet this is not recognised by the unfair dismissal system. The law applies in the same way to terminations of fundamentally different characters.

Two problems are identified by employers with redundancy based claims – using the unfair dismissal process to challenge selection criteria, and using the unfair dismissal process to increase severance payments. The system should be tightened, at least to prevent the jurisdiction being used to top up severance payments.

This issue has a further practical dimension for small and medium businesses. When smaller businesses make an employee redundant it is usually an indication of a downturn in business conditions. That is the very time that a smaller business cannot afford to have managers and owners distracted from the business to deal with the cost and time requirements of defending an unfair dismissal claim. Valid terminations due to the downturn in small and medium businesses have resulted in

complex hearings, as applicants through their representative are often capable of demonstrating a technical breach of the process. To a smaller business a downturn is almost always obvious, and 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 tests. Whilst the August 2001 amendments are designed to assist smaller businesses, their limitation to having the size of a business taken into account in cases of "unsatisfactory performance" only does not include redundancy based dismissals. It should be amended to do so.

Case Examples

One business 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 months service. Redundancy packages were negotiated with the 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.

A small body repair business owned by an elderly employer made redundant his only employee due to the downturn in the business and 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 approximately six months wages. The applicant failed to seek employment, despite that the industry suffers from skills shortages. The matter was not resolved and the applicant elected to proceed to arbitration. Our member at this stage was an aged pensioner, was nursing his ill wife (with cancer) between his hospital admissions and through his limited savings and pension allowance was repaying the tax debt. A second conference with a member of the Commission was requested where it was reiterated that the facts underpinning the downturn were obvious, the applicant knew of his co-workers 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 option to proceed to arbitration, we sought an adjournment due to a further hospital admission that was scheduled. The representative demanded access to his 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.

LIMIT THE SCOPE FOR CONSTRUCTIVE DISMISSAL CLAIMS (THAT IS, RESIGNATION BASED CLAIMS)

Resignation based claims are an area of increasing concern to employers. They present extensive scope for abuse of the jurisdiction as the conduct of an employee alone (the act of resignation) can precipitate a legal claim against the employer, and do not depend on a decision of the employer (dismissal). It is also an area of the jurisdiction which has moved substantially away from the original statutory intent of federal (or State) unfair dismissal systems – and is capable of moving further through judicial activism.

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 concept of constructive dismissal should be limited to more closely accord with the circumstances where an employee has no option but to resign after receiving a resign or be dismissed ultimatum.

Case Examples

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.

A serial claimant was represented by the same legal firm. The claimant resigned employment and claimed constructive dismissal after he was employed elsewhere, in order to seek a monetary settlement.

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

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 and said he had enough. The Dealer Principal confirmed that was his choice. He said he would tender a written resignation and went across the showroom 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. 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 until the applicant complies with the directions.

REQUIRE THE CONSIDERATION OF BUSINESSES SIZE AND THE PRESENCE OF A HUMAN RESOURCE MANAGER TO APPLY TO ALL DISMISSALS, NOT JUST THOSE FOR "UNSATISFACTORY PERFORMANCE"

The August 2001 amendments made an important change – requiring the Commission to have regard to the size of an employers business and the presence or absence of a dedicated human resource manager when assessing whether a dismissal was harsh, unjust or unreasonable. However, the value of this amendment has been reduced by the fact that its wording refers only to dismissals for "unsatisfactory performance". This means that dismissals for non performance reasons (business restructuring, constructive dismissals, redundancies and arguably even misconduct) are not within the framework of this provision. It is difficult to conceive how or why that would have been intended, and it appears to be an oversight. A corrective amendment should be made.

PROVISION FOR A SCHEDULE OF LEGAL/REPRESENTATIVE FEES, AND PROVISION FOR COSTS ORDERS TO BE GENERALLY AVAILABLE AGAINST SOLICITORS, NOT JUST PARTIES

A common frustration of employers is that the cost structures of the system – in practice (but not theory) – often denies them the opportunity to defend their actions in a hearing, with the most pragmatic option being to settle cases that they often believe have little merit.

Employers are faced with the likelihood that they will bare the burden of significant cost even if they win, which can't be recovered in the majority of cases. Consequently they feel black-mailed into making unmeritorious settlements.

Conversely employees bear little risk of costs. Those who are unrepresented have little or nothing to lose, as is the case for union members and those with lawyers on a no win no fee basis.

Unless the system of costs is fundamentally changed this will continue to drive the behaviour of applicants and their representatives and the behaviour of respondents .

It is important to discourage exorbitant fees, and encourage responsible settlements not based upon exorbitant legal or consultancy fees. We recommend a schedule of fees be set. A schedule will limit the pressure on business to cover exorbitant legal fees charged to applicants.

Another approach is to consider a radical overhaul of the whole hearing process. Cases that are argued , whilst a minority of applications, do involve large cost burdens in part because they have evolved into major pieces of litigation involving days in court with all the appropriate preparation time etc in the background. If the hearing process was dramatically simplified this would also reduce the cost risk and so the settlement pressure would be less and therefore the attractions of making claims reduced.

Perhaps we could consider a proposal where there is a total review of the jurisdiction, including voluntary alternative dispute resolution options as being considered in the United Kingdom.

The issue of consultants in the jurisdiction is also important. The prevalence of consultants in unfair dismissals cases 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 employer and Commission. The behaviour of some consultants is also seriously questionable. The Commission has no choice but to accept their appearances.

Given the problem with consultants, some employer members (but not all) believe that consultants/advocates should be registered, except those employed by registered organisations. Such a proposal would enable the Commission to deregister a consultant/advocate where warranted. That system would be similar to the processes adopted in South Australia and Western Australia. ACCI raises that perspective for information, not as a specific recommendation.

The lack of access to costs is a serious problem. The test of unreasonably failing to agree to terms of settlement that could lead to discontinuance of the matter before the conclusion of arbitration is very high. It has been interpreted to mean that, as part of the test, an offer must remain open until the conclusion of the arbitration. As well, on the basis of *Fletcher and Manyallaluk Aboriginal Corporation,* offers which are made without prejudice cannot be taken into account in determining 'unreasonable failure'. Thus costs under this test are confined to the end of arbitration (and, similarly, costs for unreasonably failing to discontinue are confined to situations where the applicant discontinues after electing to proceed to arbitration). Further, the test depends on being able to show that the other party acted unreasonably in failing to agree to terms of settlement. The Court considered this requirement in *Blagojevch v Australian Industrial Relations Commission* [2000 FCA 483]. Moore J stated:

> *"I should refer to a matter which was adverted to in proceedings in this Court but not developed at any length by counsel for the applicant. Section 170CJ(2)(b) raises for consideration whether a party has 'acted unreasonably in failing ...to agree to terms of settlement…'. A 'failure to agree' comprehends not only the rejection of an offer of settlement but probably more. The section does not say 'refusal to agree to terms of settlement'. The expression 'failing to agree' describes a wider range of conduct than 'refusing to agree.' [para 22] His Honour then discusses what arises in the circumstances of an offer which is refused and there is no counter offer. He says this could give rise to an unreasonable failure to agree '...in some circumstances'. He continues :"Those circumstances might arise if the only real dispute between the parties the amount for which the matter might be settled." [para 22]*

Some of these problems have been overcome with the enactment of the *Workplace Relations Amendment (Termination of Employment) Act 2001*. Section 170CJ has been substantially amended. Costs are now available for unreasonably failing to agree to terms of settlement on the basis of a proceeding (rather than at the conclusion of arbitration). However, the

issue raised in *Blagojevch* has not been addressed. It seems likely that where one party is willing to negotiate the terms of re-employment and the other is willing to negotiate monetary terms of settlement, that neither party is likely to be acting unreasonably in failing to agree to terms of settlement.

Case example

The company terminated an employee who had been incapacitated for over one year as a result of a non-work related injury. The employee was employed under a federal award and a certified agreement and the union made an application under the federal Act.

The employee was covered by a sickness and accident scheme which meant that his wages continued. The union took the view that, as a matter of principle, the company should not terminate an injured employee whilst the sickness and accident cover continued. It sought re-instatement, notwithstanding the employee was not fit for full duties.

The union declined to settle for money stating that the issue was one of principle. Following two conciliation conferences the matter was scheduled for arbitration.

During the period between conclusion of conciliation and commencement of arbitration, the company advertised for employees to do work of a kind done by the terminated employee. The terminated employee applied and was not successful.

The union notified a dispute under section 130 of the Industrial Relations Act 1996 (NSW) on the basis that the company had refused to employ the person. That Act includes in the definition of industrial matter '…the termination of employment of (or refusal to employ) any person or class of persons in any industry'. This notification was dealt with expeditiously by the NSW Commission with the Commissioner advising the union that it ran the risk of incurring a costs order. The union withdrew this notification.

The federal arbitration subsequently proceeded and following a reserved decision the Commission found in the company's favour. The costs of representation for the company were over $30,000 and it obviously incurred costs arising from management time, absence and preparation.

Case Example

In a recent decision of the Western Australian Court of Appeal, fines were imposed against a solicitor who attempted to extract a greater settlement and costs in an unfair dismissal matter were upheld. The applicant employee had instructed the solicitor to seek redress from a Canadian-based firm for an alleged unfair dismissal, and in so agreed to pay $500 for a letter of demand and, if that failed to resolve the issue, to pay $1000 for an opinion from an experienced London-based practitioner with a maximum budget, if approved, of $10,000. At no time did the client sign a costs agreement with the solicitor. The employer responded with an offer of $US25,000 to totally settle the matter. The solicitor responded with a further demand of $US49,000, a computer and scanner and $US4,900 costs. This demand was not agreed to by the client. The respondent company further offered a total of $US45,000 to settle the matter including $US4000 in costs, and the value of the printer and scanner, and a payment of $US35,000 for the client. This offer was withheld from the client by the solicitor and a further counter-offer by the solicitor was accepted and the respondent employer accepted this offer. The solicitors client, however disputed the costs amounts. The solicitor attempted to settle the costs amount for $2,000. The client terminated the instructions of the solicitor and engaged another solicitor. The original solicitor then submitted a bill for $4,154 to the client. The full court of the Western Australian Court of Appeal in ***Fanconi v Legal Practitioners Complaints Committee*** *decided that "that was conduct which was not directed to obtaining any benefit for the client, but can only have been intended to protect the practitioner's interest in respect of the excessive costs which he wished to claim. It is therefore my view that the appeal against the finding of unprofessional conduct cannot succeed". In doing so, the Full Court upheld the two year suspension, and also fined the solicitor $4,000 for his actions in this matter.*

DO NOT PERMIT EXTENSIONS OF TIME IN CASES OF FAILURE BY APPLICANT' REPRESENTATIVE

There are problems with the August 2001 amendments in relation to extensions of time. The tightening up which was intended may not have been achieved.

Anita Ryan v. Anglican Aged Care Services Group (U2001/6996) was one of the first matters to examine the new out of time provisions introduced into the *Workplace Relations Act*. The applicant lodged the application 11 days out of time citing 'representative error' as the reason for the delay. The applicant stated that at no time was she informed that their was a time frame for the lodgement of unfair dismissal applications. Under the principles established in *Brodie-Hanns v MTV Publishing Ltd (1995) 67 IR 298* the reason for the delay is one of five considerations given to applications made outside of the jurisdictional time frame. The other aspects of the applicant's case surrounded her claim for constructive dismissal, having claimed to have resigned under duress. She claimed that she sent a fax to the respondent withdrawing her resignation, and that this should demonstrate that she intended to contest the termination and establish the merits of her case. Although Ives DP found that there would be no prejudice to the employer in hearing the application, he refused the application on the matter of fairness stating "…that the Commission should not encourage late applications before it as to do so would be to put aside the prima facie position that the time limit should be complied with (*Brodie-Hanns*, at 299). It may be arguable that to do so might be unfair to applicants who have complied with the statutory time limit (*Brodie-Hanns*, at 301)".

We draw the committee's attention to the principles of granting extensions of time outlined under the previous Act by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen* (3 FCR 344 @ 349). The Hunter Valley principles had the effect of not generally allowing extensions where representative error was the cause of delay. At 351 in *Hunter Valley* Wilcox J said:

> *"First, although the fact that the relevant failure is the fault of the solicitor for a party rather then the party himself does not in itself amount to sufficient cause to excuse the delay "the blamelessness of the claimant and the responsibility of his solicitor is very material."*

We would recommend that a statutory provision be inserted to make it clear that, *inter alia* representative error does not of itself constitute an acceptable explanation of delay.

COMMISSION TO CONDUCT ITS HEARINGS EXPEDITIOUSLY

An amendment containing a clear statutory direction would be of value, particularly given the increasing use of legal practitioners and the tendency of practitioners to contribute to the delay in dealing with matters expeditiously.

DISMISSED EMPLOYEE HAS A STATUTORY OBLIGATION TO MITIGATE LOSS AND DECLARE ALL EARNINGS, AND PRIOR TO REINSTATEMENT AND BACK WAGES ORDER IS TO BE DISCOUNTED BY THE EARNINGS, REDUNDANCY PAY, SOCIAL WELFARE PAYMENTS OR WORKERS COMPENSATION PAYMENTS THEY ARE ENTITLED TO KEEP

The Commonwealth unfair dismissal system should not provide any basis for double counting of monies received by an employee who obtains a reinstatement remedy. These matters are currently considered on a case by case basis, with the potential for more inconsistency to arise in decision making. Establishing a clear statutory direction is recommended.

ORDERS FOR PAYMENT OF COMPENSATION NOT TO INCLUDE NON ECONOMIC LOSS (PAIN, SUFFERING, HURT FEELINGS)

Although section 170CH of the *Workplace Relations Act* does not specifically define compensation for non-economic loss, the full bench of the Australian Industrial Relations Commission decided that this does not restrict the ordering of compensation on the grounds of shock, humiliation and distress in *Coms 21 Limited [Print S3571]*. The employer appealed against the decision of Lawson C that awarded $4,000 to each of five employees whose termination was found to be harsh, unjust and unreasonable on the basis that "… that the relevant legislation does not permit compensation for shock, humiliation and distress".

In quashing the appeal, the full bench arrived at their decision by stating: "The Act contains provisions prescribing the manner in which compensation is to be calculated, notably s.170CH(7). A careful reading of those provisions does not suggest that there is an equivalence between an order for lost remuneration pursuant to s. 170CH(4)(b) and compensation pursuant to s.170CH(6). The legislation has fixed a monetary upper limit on the latter (ss.170CH(8) and (9)) but not on the former. In addition, the language of ss.170CH(6) and (7) does not suggest that the class of damage for which compensation might be ordered should be limited to loss of remuneration. Section 170CH(7) specifies the circumstances which the Commission must have regard to in determining an amount of compensation. Only two of the circumstances, those specified in ss.170CH(7)(c) and (d), relate to lost remuneration. This suggests that loss of other kinds may be compensated for. Indeed, the opening words of the sub- section require the Commission to take all of the circumstances into account. It is also relevant that prior to the passage of the current Act there was a power to award compensation for shock, humiliation and distress."

The full bench considered the construction of s.170CH(6) of the Workplace Relations Act as relevant to consideration of ordering non-economic based damages.

The full bench decided that this section of the Act was not limited to loss of income in the termination of employment, but "should construe to mean only that where the Commission considers that reinstatement is inappropriate it may make an order for compensation as an alternative remedy. We do not think that such a construction does an violence to the

ordinary meaning of the words used. We reject the submission that the terms of s.170CH(6) do not permit the Commission to order compensation for shock, humiliation and distress".

In light of this interpretation of s.170CH of the *Workplace Relations Act*, it appears necessary to remove subsection (e) from 170CH(2), which allows the Commission to take into account any other matters it considers relevant and to address the construction of 170CH(6) to limit to economic loss the damages applicable when reinstatement is inappropriate.

SMALL BUSINESS SPECIFIC MEASURES (SHORT OF EXEMPTION)

Given the contentious nature of the proposal to exempt small business from the Commonwealth unfair dismissal laws when employing new employees, a number of lesser amendments could be made that take into account the circumstances faced by small businesses when considering dismissal of staff or dealing with unfair dismissal claims. These could include:

- Longer qualifying period for small business (9 or 12 months);
- Lesser procedural requirements (valid reason plus opportunity to explain);
- Family members to be excluded from claims;
- Flexibility in the time and location of conferences.

Currently, the practice of the Commission requires the attendance of respondent employers at the conciliation proceedings. This places additional burden on a small business owner, who may have to close their business and travel to attend a conciliation hearing. Currently, where respondent employers have not attended the Commission for conciliation hearings, the applicant's evidence has been accepted without question. The process needs to balance the commitments that small employers have to their businesses as well as their requirements to defend unfair dismissal proceedings.

Case Example

In Harry O'Gelsby v. Essendon Timber (U No. 33564 of 1999) the matter could not be settled at conciliation and as arbitration the respondent employer was not able to be represented as it had ceased trading. The non-appearance of the respondent at the arbitration was considered "non-compliance" by Williams SDP and the applicant's evidence was therefore accepted unchallenged. Williams SDP concluded "…in view of the content of the email message received by the Commission on the day before the hearing, it may well be that the respondent's business is not longer operating and that there is no position to which the applicant could in fact be reinstated… However, having regard to the matters referred to in s.170CH(1) of the WR Act, I consider that an order for payment of an amount in lieu of reinstatement is appropriate. There is no evidence that any order would affect the viability of the respondent." Furthermore, Williams SDP stated "There is no evidence that the applicant's employment by the respondent, if it had not been terminated when it was, would not have continued for some time" considering the respondent had notified the Commission that it had ceased trading, this was obviously not taken into consideration when the determination was made. The applicant was awarded the maximum compensation that applied. It should also be noted that the applicant was only employed with the respondent for a period of 7 weeks.

In Andrew Betts v. Madafferi Haulage Pty Ltd the respondent employer failed to attend the conciliation conference and was not prepared to proceed on the first day of arbitration. Smith C, in considering the application for costs decided "…I do not accept that a failure to attend a conciliation conference or be prepared to proceed to arbitration is not relevant in a consideration of costs…. It would be perverse if a party were able to defeat an application for costs as a consequence of a refusal to attend conciliation and thereby avoid a possible adverse certificate". The respondent's failure to appear at the conciliation is equivalent to not genuinely undertaking conciliation or an attempt to avoid arbitration.

In C. Iosefo v. Ausres Pty Ltd (t/a Australian Reservations) Lawson, C stated:

This is a damning case of the conduct by (an apparent) small business employer and its handling of the termination of a young employee without any regard to the fundamental courtesies and practices of an employment relationship. The evidence is damning of the respondent's attitude to employment generally and to the management style of Mr. Savva and his handling of employment/termination issues. It is clear that the Respondent acted without regard to the law and without regard to publicly-available information and/or readily-available advice. Even when properly served over a period of 3 months with Commission's notices which required the employer to respond or to

direct enquiries to named Registry officers, the Respondent ignored all matters arising from the substantive application. One can only assume in the absence of evidence to the contrary that the directors and officers of Ausres P/L (or its successor/related entities) deliberately chose to ignore lawful communications.

In this matter, the manager, Mr. Savva was purportedly overseas on business with another company, and Ausres P/L had been wound up. Furthermore, this matter points to the issues of ignorance of the small business employer generally when dealing with legalistic issues of the Commission. For these reasons, the processes adopted by the Commission must be simplified and take into consideration the specific needs and requirements of small business operators. This is also demonstrated by the disproportionately high number of unfair dismissal applications that are defended by small business employers. Small business employers (those with fewer than 15 employees) represent 34% of the total number of unfair dismissals in the statistics collected under the Workplace Relations Act monitor. It should also be noted that there has been an 11.6% overall increase in the number of unfair dismissal applications in the first half of 2001 compared to the same reporting period in 2000. This again increases the total number of small business employers that are subject to unfair dismissal proceedings.