

**TWELVE MONTH REVIEW OF  
FEDERAL UNFAIR DISMISSAL PROVISIONS**

**REPORT BY THE DEPARTMENT OF EMPLOYMENT,  
WORKPLACE RELATIONS AND SMALL BUSINESS**

**INCLUDING FEDERAL GOVERNMENT  
RESPONSES TO THE REVIEW**

**December 1998**

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## *Executive summary of Government responses to the review*

### Exclusion of small business employees

- The Government has made a commitment to introduce a small business exclusion in respect of new employees (other than apprentices and trainees). The Government believes that this measure will largely overcome the disincentive which the existing law has created amongst small business in hiring new employees. The Government considers this measure to be a job-creation initiative. The Government also has a clear mandate to do so. There is no doubt that unfair dismissal laws have a differential impact on small businesses, and that that impact is substantial, and that the application of unfair dismissal laws on small business affects small business hiring intentions. The Government is convinced that implementation of a small business exclusion will lead to increased employment opportunities, and that this increase provides the necessary justification for the proposed change in the unfair dismissal rights of new employees (other than apprentices and trainees) of small businesses.

### Exclusion of employees engaged for a probationary or qualifying period

- The Government is committed to introduction of greater certainty and fairness in this area, through a six month qualifying period for access to the federal unfair dismissal remedy. A six month period is a more appropriate balance between the interests of employers and employees and would be likely to lessen the jurisdictional litigation arising out of the existing law. This will also complement the Government's small business exclusion, by assisting in partially redressing the employment disincentive which unfair dismissal laws provide to medium and larger businesses.
- The Government considers that six, rather than twelve, months is the appropriate qualifying period. The Government notes that the possibility of a longer probationary period being agreed or otherwise determined in advance, for a particular employment relationship, will remain open. Such a probation period will continue to exclude the employee from termination remedies, where the period is reasonable in the circumstances of the particular employment.

### The filing fee

- The Government is committed to increasing the filing fee to \$100. This is important not only to discouraging frivolous claims but also to ensure that hearings of genuine claims are not delayed by the lodgment of speculative proceedings. The fewer speculative proceedings filed, the more likely it is that genuinely aggrieved employees will be able to access a hearing in a jurisdiction which all parties agree is highly time-sensitive. The Government also has a mandate to do so. This will be one contribution to further discouragement of vexatious claims. The requirement for a filing fee is appropriate, as a contribution to the costs of providing the unfair dismissal jurisdiction. The existing scope for waiver, in cases of serious hardship, prevents any inappropriate discouragement of meritorious claims, and the Government will maintain this provision, which has worked well to date.
- The Government will keep under review the operation of the provision for refund in the event of sufficiently early discontinuance. This makes allowance for applications who

have made a genuine mistake in lodging a claim, and encourages early settlement. The Government notes that costs would be available against a claim which is vexatious or without reasonable cause, even if it is withdrawn. However, the provision for refund should not contribute to prolongation of matters which should be discontinued.

#### Orders for payment of costs

- The Government is committed to taking further measures to discourage inappropriate applications. The Government will consider further the suggestions made in submissions in relation to additional scope for costs orders, in consultation with affected parties. In doing so, the Government will take into account the industrial character of the jurisdiction.

#### Access to legal services and the use of contingency fees

- The Government considers that the unfair dismissal system should not require parties to be legally represented, but decisions on legal representation should be a matter for each party, subject to the requirement for leave of the Commission. The Government does not consider it necessary or appropriate to provide special assistance, or make unsuccessful employer respondents contribute to a fund for the representation of employees.
- The Government is committed to taking further measures to discourage inappropriate applications. The Government will consider further the suggestions made in submissions in relation to restrictions on access to contingency fees in unfair dismissal matters, in consultation with affected parties. One aspect noted by the Government is the concern of employers and small businesses about the increasing likelihood of inappropriate or speculative applications arising from legal practitioners operating on a 'pay if you win' basis, or lawyers or other service providers inappropriately advertising the ease of access to the unfair dismissal jurisdiction.

#### Exclusion of employees engaged for a specified period

- The Government notes the absence of evidence that there is any significant increase in use of employment for a specified period because of the exclusion. The Government considers that the current safeguard against termination during a contract for a specified period, where an employee was engaged in that way with a substantial purpose of avoiding unfair dismissal obligations, is a sufficient safeguard for employees. The use of contracts for a specified period does have legitimate business purposes and it would not be appropriate to create additional employer obligations where a specified period is expiring. There are aspects of the restrictive interpretation of this exclusion which may justify its rewording to cover the range of contractual circumstances envisaged by the Parliamentary intention.

#### Exclusion of apprentices

- The Government's commitments to a small business exclusion and a six month qualifying period include specific commitments that the existing rights of apprentices and trainees will not be affected by these measures.

### Applications for extension of time to apply

- The nature of the jurisdiction and the principal remedy sought (re-employment) means that it must remain time-sensitive, with only limited capacity to obtain extensions of time. The Government does not consider that any changes to these provisions are required at this time. Decisions of tribunals will, however, be kept under review to ensure that the statutory policy objectives are generally being met.

### Effectiveness of conciliation

- The Government is not convinced at this stage that it is appropriate to introduce a specific requirement for a written record of the Commission's assessment of the merits of an application. There are, however, some precedents in State jurisdictions which may provide a basis for legislative amendment. This issue is more appropriately considered in the context of Government policy to implement the concept of mediation as a recognised form of dispute-resolution in the Workplace Relations Act.

### Constructive dismissal

- The Government is concerned that the credibility of the unfair dismissal jurisdiction could be eroded where the statutory intention is expanded beyond what was contemplated when the jurisdiction was first established by policy-makers. Decisions by courts to expand the notion of 'constructive dismissal' have altered the policy balance originally created between the rights of employers and employees. It remains the Government's view that the unfair dismissal provisions should continue to operate only in relation to termination at the initiative of the employer. While it is preferable for the interpretation of this concept to be determined by tribunals, the Government is concerned at the apparent widening of the concept and differing interpretations on similar facts. Without finally determining the matter, the Government is prepared to consider sensible proposals for some clearer legislative recognition of the original statutory intention.

### Remuneration-based limits on access to jurisdiction and compensation

- The Government notes the Commission's comments that amendment in this area might assist in the less complex administration of the jurisdiction. The Government confirms the intention that a broad definition of remuneration, including allowances, should be applied for the purposes of this exclusion. The Government will refer to the Australian Industrial Registry for its consideration the suggestion that additional advice might be able to be provided to applicants in relation to the jurisdictional restrictions.

### ***Background, terms of reference and conduct of the review***

Concern about the effect of unfair dismissal laws on small business was raised in the 1996 report of the Small Business Deregulation Taskforce, *Time for Business*. At the time that report was written, the Coalition Government's proposals for amendments to the former federal unfair dismissal provisions had been debated in Parliament, but had not yet come into effect – the report of the Taskforce noted that it was too early to assess whether the amendments had led to the amelioration of these effects.

The new unfair dismissal provisions of the *Workplace Relations Act 1996* commenced on 31 December 1996. The new provisions were based on the principle of a 'fair go all round': they were intended to provide employees with access to a fair and simple process of challenging dismissals, and to recognize the importance, but not inviolability, of the right of the employer to manage his or her own business.

In *More Time for Business*, its response to the report of the Small Business Deregulation Taskforce, the Government undertook to review the first twelve months operation of the unfair dismissal provisions of the *Workplace Relations Act 1996*. This document is the report of that review.

### *Terms of reference*

The terms of reference for the review were:

To assess the impact of the Federal unfair dismissal arrangements which commenced on 31 December 1996 (particularly, but not only, on small businesses) and whether those arrangements have operated as intended, that is:

- whether the new arrangements are fair to both employee and employer;
- whether they provide a fair and simple process of appeal;
- whether legal costs have been minimised; and
- whether frivolous and malicious claims have been discouraged.

In particular, the review should examine the operation of the \$50 lodgment fee for applications to the Australian Industrial Relations Commission, and whether the safeguard provision in subregulation 30B(2) of the *Workplace Relations Regulations* (which limits the exclusion of employees engaged for a specified period or specified task) has given an appropriate level of protection to employees.

### *Conduct of the review*

The Department of Workplace Relations and Small Business, as it then was, wrote to a number of key organisations advising them of the review, and inviting them to respond to the terms of reference. Enclosed with the letter was a Discussion Paper prepared by the Department about the first 12 months operation of the unfair dismissal provisions of the *Workplace Relations Act 1996*. The organisations to whom the Department wrote were: the Australian Chamber of Commerce and Industry, the Australian Council of Trade Unions, the Business Council of Australia, the Coalition of Small Business Organisations of Australia. The Department also invited each organisation to seek the input of its members or affiliates in preparing submissions.

Given the integral role played by the Australian Industrial Relations Commission in administering the operation of the unfair dismissal provisions, the Department also wrote to the President of the Australian Industrial Relations Commission, the Honourable Justice Giudice.

The Honourable Peter Reith MP, Minister for Workplace Relations and Small Business, as he then was, also wrote to Senator Andrew Murray of the Australian Democrats to invite his submission.

A list of persons and organisations that made submissions to the review is at Appendix A.

### *Issues raised by Discussion Paper and submissions to the review*

#### **1. Exclusion of small business employees**

The issue of whether there should be an exemption in respect of small business attracted a lot of attention in the submissions. The implementation of an exemption for small business from the operation of the unfair dismissal provisions was supported by the ACCI, but opposed by the ACTU, APESMA, Job Watch, and Senator Murray.

#### *The extent of employer concern about the operation of the unfair dismissal laws*

To demonstrate the extent of employer concern, the ACCI quoted preliminary results from the 1998 ACCI Pre-Election Survey, based on 3,000 responses to the survey. Of issues raising concern amongst business (irrespective of size), unfair dismissals was ranked 9<sup>th</sup> out of 71. Of those survey respondents employing 1-19 employees, 47.6% ranked unfair dismissals as a 'critical' issue, with a further 21.9% ranking it as a 'large' issue.

The submission of Senator Murray disputed the real extent of employer concern.

The ACTU's submission referred to the 'conflicting' nature of the evidence as to the small business perception of the effect of unfair dismissal laws on recruitment. The submission stated that:

...much of this concern has been generated by media publicity for attacks on the legislation. While it is hardly surprising that a high proportion of small businesses respond negatively to the legislation when asked about it directly, or say that they would be better off without it (and presumably a great deal of other regulation) this does not mean that there is necessarily a link between hiring and the provisions.

'Unfair Dismissal – Impact on Business and Hiring Intentions', released by the Minister for Employment, Workplace Relations and Small Business in November 1998, presented a collection of material justifying the Government's measures to exempt small business from the federal unfair dismissal provisions and provide for a six month qualifying period for new employees. The collection presented evidence from the following surveys, reports and statements: Morgan and Banks (1996), Recruitment Solutions (1997 and 1998), NSW Chamber of Commerce (1997 and 1998), National Institute of Labour Studies (1997), Tasmanian Chamber of Commerce and Industry (1997 and 1998), Yellow Pages Small Business Index Surveys (1997 and 1998), Micro Business Consultative Group (1998), Council of Small Business Organisations of Australia (1998), South Australian Employers' Chamber of Commerce and Industry (1998), Queensland Chamber of Commerce and Industry (1998), Australian Business Chamber (1998), PayService (1998), and Australian Chamber of Commerce and Industry (1998).

These surveys, reports and statements make plain the extent of employer and small business concern about unfair dismissal laws.

*Whether the unfair dismissal laws have a disproportionate effect on small business*

In 1996, the Small Business Deregulation Task Force, chaired by Mr Charlie Bell, was established with a charter to examine the impact of regulation on small business, over a six month time-frame, and with the expertise to advise Government on that impact. In its report, *Time for Business* (the Bell Report), the Task Force said:

Small business supports the proposed changes to the unfair dismissal laws, but needs reassurance that the Government will respond if the changes do not deliver the desired outcomes. (p. 5)

Small business is highly critical of the Commonwealth unfair dismissal laws which commenced in 1994: 'these regulations are considered to be the final nail in the coffin for a segment of the society that has now felt besieged for more than a decade'. Small business is cautiously optimistic about the Government's proposals to amend the unfair dismissal laws, and the sector will not change its attitudes unless better outcomes result from the new arrangements. (p. 50)

As part of the Prime Minister's response to the Bell Report (24 March 1997), *More Time for Business*, the Government undertook to exclude from the operation of the federal unfair dismissal provisions new employees of small business with 15 or fewer employees until they had completed 12 months continuous service. The exclusion was proposed on the basis that:

Responding to unfair dismissal claims involves a disproportionate burden on small business in terms of personnel administration procedures, representation at hearings and lost opportunities while defending claims. Businesses with 15 or fewer employees typically do not have a separate managerial structure, in effect replacing the formal processes of larger businesses with extensive day-to-day interaction between the proprietor and his or her staff. Lack of time and resources for elaborate staff management processes means any proceedings are likely to be disproportionately complex because of the employer's need to rely on oral evidence instead of documents. The new arrangements will substantially reduce these disproportionate burdens on small businesses. (*More Time for Business*, p. 30)

The ACTU's submission, while agreeing that small businesses do not have the managerial and personnel resources of larger organisations, stated that this does not provide '...adequate justification for removing significant employment rights from employees'. Its submission stated that all employers, irrespective of size, should adopt fair and clear procedures in dealing with employees, in order to minimise the risk of unfair dismissal claims.

It is noted that there is no dispute that applications under any unfair dismissal laws have a more adverse impact on small businesses than on medium and larger businesses.

This distinction had previously been recognised by policy-makers, in the context of termination of employment, in the *Employment Protection Act 1982* (NSW), and in the 1984 Termination, Change and Redundancy Test Case of the then Australian Conciliation and Arbitration Commission, both of which had more restricted application to businesses of less than 15 employees.

### *Whether the implementation of an exclusion will lead to an increase in employment*

The ACCI's submission stated that the prospect of unfair dismissal claims continues to operate as a disincentive to small business employment, noting that '[m]any 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'.

In ACCI's view, this is in part because small businesses are disproportionately affected by the procedural aspects of defending an unfair dismissal claim, in that the proprietor of the business is usually personally involved in information-gathering, seeking legal advice, attending conciliation conferences and arbitration hearings.

Conversely, Senator Murray stated that '...there is no empirical evidence to suggest that job creation will result from exempting small business from the Federal Unfair Dismissal laws', citing the decline in the number of federal unfair dismissal applications since the new federal unfair dismissal provisions came into effect. Senator Murray's submission stated that small business employment is increasing, despite the absence of an exclusion from unfair dismissal laws.

The ACTU's submission, citing *Small Business Employment* (Revesz J and Lattimore R, Industry Commission, August 1997), noted that although '...the small business employment share is growing at the expense of large business, it cannot be inferred that this is due to job creation by small business'.

Since the release of the Discussion Paper, the Coalition released its workplace relations election policy, *More Jobs, Better Pay*, which included a commitment to introduce a small business unfair dismissal exclusion, which would not affect existing rights of apprentices or trainees. The Government has emphasised the assessment by the Council of Small Business Organisations of Australia that the exclusion of small business employees from unfair dismissal laws would result in the creation of 50,000 new jobs.

### Recommendation

The Government should note that the changes made in 1996 have not alleviated the concerns of small business about the impact of unfair dismissal laws upon them.

### Government response

The Government has made a commitment to introduce a small business exclusion in respect of new employees (other than apprentices and trainees). The Government believes that this measure will largely overcome the disincentive which the existing law has created amongst small business in hiring new employees. The Government considers this measure to be a job-creation initiative. The Government also has a clear mandate to do so. There is no doubt that unfair dismissal laws have a differential impact on small businesses, and that that impact is substantial, and that the application of unfair dismissal laws on small business affects small business hiring intentions. The Government is convinced that implementation of a small business exclusion will lead to increased employment opportunities, and that this increase provides the necessary justification for the proposed change in the unfair dismissal rights of new employees (other than apprentices and trainees) of small businesses.

## 2. Exclusion of employees engaged for a probationary or qualifying period

Paragraph 30B(1)(c) of the Regulations excludes an employee serving a period of probation or qualifying period, the duration or maximum duration of which is determined in advance, and three months or less, or otherwise reasonable given the nature and circumstances of the employment from the termination of employment provisions of the Act. The Commission has upheld probationary periods in excess of three months where their duration or maximum duration is determined in advance and otherwise reasonable given the nature and circumstances of the employment.

Decisions of the Commission have also equated ‘probationary period’ with ‘qualifying period’. For instance, in *Hornby v Canberra Institute of Technology* (Print P9183, Duncan DP, 27 February 1998), the Commission held that a probationary period of 3.5 years in respect of a teacher engaged under the *Public Sector Management Act 1994* (ACT) (the PSM Act) was reasonable. As the applicant’s employment was terminated within this period, he was excluded from the termination of employment provision by virtue of s. 170CC(1)(b) of the *Workplace Relations Act 1996* (the ‘Act’). The Commission held that the period of probation was reasonable, on the basis that it reflected the unique nature of the teaching profession.

### *Deeming a period of probation for all new employees*

Where the period of probation has *not* been determined in advance, a probationary employee whose employment is terminated will be able to apply for a remedy. Alternatively, the period of probation may have been agreed in advance, but an applicant may still seek to argue that he or she is not excluded by subregulation 30B(1)(c). As a consequence of this legal uncertainty, the relevant employer may be subject to the expense and inconvenience of having to defend the jurisdictional claim, even where the agreed intention was that a probationary period was to exist.

A significant proportion of federal unfair dismissal cases involving alleged probationers involve argument about whether the probation was approved in advance of the employment. To avoid this, the submission of the ACCI supports amending the legislation or regulations to deem all new employees to be on probation for the first 12 months of their employment. Under the ACCI proposal, new employees would retain access to remedies in respect of unlawful termination during the probationary period.

### *Whether the period of probation provided for by the regulations is reasonable*

The ACTU’s submission argues that the effective deeming of a three month probation period as ‘reasonable’ has the effect of allowing unfair dismissals to occur in cases where a three month probation may not in fact be reasonable. In addition, the ACTU is concerned that in some cases probation is being set at an unreasonably high level, and accordingly recommends that consideration should be given to amending the regulations to provide for a maximum probation period of no more than six months.

The concerns of the ACTU in this regard are overstated. An employer respondent to a claim in respect of termination of employment wishing to argue that an employee is excluded on the basis of his or her probationary status in the case where the probation is greater than three

months is required to establish that the length of the probation was reasonable in the circumstances of the case.

In the context of an unfair dismissal claim, the Commission normally takes a cautious approach in determining whether a period of probation is reasonable in the particular circumstances of the case. In most cases, the Commission will find that a probation period in excess of six months will not be reasonable, particularly in the case of entry-level or junior employees. In so doing, the Commission is acting consistently with principles developed by the former Industrial Relations Court of Australia (IRCA) concerning reasonable length of probation. Whatever the ultimate outcome of proceedings, it is clear, however, that the discretion provided to the Commission to determine the 'reasonableness' of a probation period creates an additional avenue for litigation on a jurisdictional point within the unfair dismissal jurisdiction.

#### *Proposal in 'More Jobs, Better Pay'*

The Coalition Government's election policy, *More Jobs, Better Pay*, contained a commitment to amend the Workplace Relations Act to impose a threshold requirement of six months continuous employment with an employer before a new employee (other than an apprentice or trainee) is eligible to seek a remedy in respect of unfair dismissal.

#### Recommendation

The Government should note that there have been a significant number of cases before the AIRC in which the existence of a probation period, determined in advance, or the reasonableness of the probation period, has been questioned, and that these cases have created uncertainty as to the application of the probation period and involved parties in the cost and expense of litigation on this jurisdictional point.

The Government should note diametrically opposed submissions that probation periods of three months or longer may not be reasonable, alternatively that there should be a deemed probation period of 12 months for all employees.

#### Government response

The Government is committed to introduction of greater certainty and fairness in this area, through a six month qualifying period for access to the federal unfair dismissal remedy. A six month period is a more appropriate balance between the interests of employers and employees and would be likely to lessen the jurisdictional litigation arising out of the existing law. This will also complement the Government's small business exclusion, by assisting in partially redressing the employment disincentive which unfair dismissal laws provide to medium and larger businesses.

The Government considers that six, rather than twelve, months is the appropriate qualifying period. The Government notes that the possibility of a longer probationary period being agreed or otherwise determined in advance, for a particular employment relationship, will remain open. Such a probation period will continue to exclude the employee from termination remedies, where the period is reasonable in the circumstances of the particular employment.

### 3. The filing fee

Regulation 30BD of the Workplace Relations Regulations provides that a fee of \$50 is payable for lodgment of an application in the AIRC under s.170CE of the WRA. The fee can be waived by a Registrar of the AIRC on the ground of serious hardship. The fee is also subject to refund, where an application is discontinued at least 2 days before its first listing before the AIRC.

The Discussion Paper noted that the Australian Industrial Registry had provided statistics on the first twelve months operation of the \$50 lodgment fee. Out of 7,464 applications in respect of termination of employment:

- 402 (5%) were accompanied by an application to waive the filing fee on the ground of serious hardship;
- of these 402 applications, the fee was waived in 345 cases (86%); and
- there were 580 refunds of the filing fee (8% of cases where the fee was paid) as a result of early discontinuance of the relevant application.

The Discussion Paper also noted that the regulation providing for the lodgment fee was subject to a sunset clause – at the time of issuing the Discussion Paper, the regulation was to expire on 30 June 1998. A regulation was subsequently made to extend the sunset clause to 31 December 1998, to allow for completion of this review and consideration of the Government's response.

#### *Filing fee discouraging genuine claims (ACTU, Job Watch)*

The ACTU believes that the current filing fee, along with the threat of costs, is a cost that is deterring applicants with genuine claims from lodging applications.

In its submissions, Job Watch also puts forward the concern that the imposition of the \$50 filing fee can impede access to an unfair dismissal remedy. The organisation is of the view that there is not enough publicity about the waiver provisions which is preventing a significant number of worthy applicants from bringing claims.

#### *Level of filing fee (VACC, ACCI)*

The VACC supports continuation of a \$50 filing fee.

The ACCI suggested raising the filing fee to \$100 in order to further discourage frivolous and vexatious claims. The organisation is also of the view that increasing the filing fee will 'keep balance' in the system.

#### *Circumstances for waiver and refund (VACC, ACCI)*

The VACC puts forward the view that the filing fee should not be refunded where the applicant decides to discontinue their claim after a substantial period of time has passed. This

is on the basis that allowing refunds where there has been a late discontinuance may encourage vexatious applicants to prolong proceedings with impunity.

The ACCI recommends also tightening the waiver provisions to further discourage frivolous and vexatious claims being lodged.

### Recommendation

The Government's commitment in *More Jobs, Better Pay* to increasing the filing fee to \$100 but retaining the right of waiver for disadvantaged persons is noted. The Government should note differing views on the appropriateness of the current \$50 filing fee. The Government should also note that the operation of the waiver provision appears to have worked as an effective balance to the implementation of the filing fee.

### Government response

The Government is committed to increasing the filing fee to \$100. This is important not only to discouraging frivolous claims but also to ensure that hearings of genuine claims are not delayed by the lodgment of speculative proceedings. The fewer speculative proceedings filed, the more likely it is that genuinely aggrieved employees will be able to access a hearing in a jurisdiction which all parties agree is highly time-sensitive. The Government also has a mandate to do so. This will be one contribution to further discouragement of vexatious claims. The requirement for a filing fee is appropriate, as a contribution to the costs of providing the unfair dismissal jurisdiction. The existing scope for waiver, in cases of serious hardship, prevents any inappropriate discouragement of meritorious claims, and the Government will maintain this provision, which has worked well to date.

The Government will keep under review the operation of the provision for refund in the event of sufficiently early discontinuance. This makes allowance for applications who have made a genuine mistake in lodging a claim, and encourages early settlement. The Government notes that costs would be available against a claim which is vexatious or without reasonable cause, even if it is withdrawn. However, the provision for refund should not contribute to prolongation of matters which should be discontinued.

## **4. Orders for payment of costs**

Section 170CJ of the Act enables the Commission to order the payment of costs where it is satisfied that an application for a remedy was made vexatiously or without reasonable cause (s.170CJ(1)), or where a person has unreasonably failed to discontinue proceedings or agree to a settlement, after the Commission has begun arbitrating (s.170CJ(2)). The wording of s.170CJ(1) reflects s.347 of the Act, which provides that the Federal Court may not order the payment of costs in a matter under the Act (other than a matter under s.170CP), except where a party has instituted proceedings 'vexatiously' or 'without reasonable cause'.

The Discussion Paper noted five decisions in which the Commission ordered costs in favour of an employee, and eight decisions in which the Commission ordered costs in favour of an employer.

### *Costs not discouraging frivolous claims (VACC, ACCI, ACTU)*

As noted in the section on exclusion of non-award high income earners from the unfair dismissal jurisdiction, the VACC pointed out that applicants falling within this exclusion were nonetheless making claims on a regular basis.

The VACC also made a related criticism, that the conditions precedent to filing an application for costs require a matter to be too close to arbitration to deter many applicants from proceeding with a claim that is likely to be frivolous, at least until they are required whether to elect to go to arbitration. Therefore, small businesses still bear costs in defending claims and cannot take advantage of the protection that the threat of costs is supposed to afford.

The ACTU noted that the majority of cases where costs have been awarded against the applicant under s.170CJ(1) appear to have been based on the employee's knowledge of whether his/her application fell outside jurisdictional limits rather than on the basis of merit. Therefore, because the worthiness of the case has not been relevant to the question of costs, the ACTU raises doubt as to whether frivolous claims are actually being deterred.

### *Costs discouraging genuine claims (ACTU, Job Watch)*

Though the threat of costs may not have led to fewer frivolous claims, the ACTU firmly believes that the number of genuine claims has fallen because applicants fear being liable for costs, particularly under s.170CJ(2). The ACTU cite Foggo C in *Mainpoint Enterprises v Henderson* [Print P9204] as acknowledgment by the Commission that employers are using the threat of costs to pressure applicants into withdrawing claims.

Job Watch's submissions suggest that the threat of costs has been ineffective. The organisation maintains that respondents still prolong proceedings to 'cost out' applicants and persuade employees to withdraw their claims despite the possibility that they may be liable for costs under s.170CJ(2).

Enforcement of Commission orders and conciliated settlements were singled out for being particularly harsh on employees and creating disincentives to continue with claims. Job Watch pointed out that to enforce orders or agreements, applicants need to bring further proceedings, which they are often unable to afford.

### *Costs encouraging formal and legalistic process (ACTU, APESMA, ACCI)*

The ACTU had objections concerning access to costs in the unfair dismissal jurisdiction, saying that costs is responsible for a more complex and expensive system that discourages employees from pursuing remedies. The APESMA also objects to availability of costs in the unfair dismissal jurisdiction on the basis that it has encouraged the development of a more formal and legalistic process with reduced emphasis on finding practical solutions in claims. The APESMA's recommendation in this regard is to make the Commission a no-cost jurisdiction.

On the other hand, the ACCI's submissions as to costs centred on the possibility of using costs as a means of keeping intervention by lawyers at a minimum. As stated in the section

covering the impact of lawyers on the unfair dismissal process, the organisation believes that costs should be used as a tool to keep lawyer behaviour in check.

The ACCI suggested that the Commission should have greater scope to award costs where legal representation is involved per se, and particularly where the conduct of lawyers has resulted in proceedings being unnecessarily prolonged. Alternatively, implementation of the general rule applied in courts that costs should follow the result was suggested, though the ACCI did indicate that some limitations on the operation of the general rule in the AIRC's jurisdiction may be supported.

#### *Costs not available in case of appeal from the Commission's decision in respect of unfair dismissal*

Despite its having been decided outside the review period, the decision of the Full Bench of the Commission in *Lloyd v International Health and Beauty Aids Pty Ltd t/as Elly Lukas Beauty College* (Print Q5446, Ross VP, Watson SDP and Whelan C, 28 August 1998) is worthy of note.

In this case, the employer had withdrawn its appeal against a decision at first instance on the day before the appeal was due to be heard. The Full Bench of the Commission held that it did not have the power to order costs under either section 347 or section 170CJ of the Workplace Relations Act in respect of appeals from decisions made by the Commission in respect of unfair dismissal.

Appeals against Commission decisions in respect of termination of employment are made under section 45 of the Act. The Act does not provide for the power to award costs in respect of such appeals.

In this case, the applicant argued that the power to award costs under section 170CJ of the Act extended to the situation where a party had acted unreasonably in failing to discontinue the unfair dismissal matter before the Commission by lodging an appeal. The Commission found that this was not the case, and that the concept of 'discontinuance' referred to the matters being withdrawn before the Commission arbitrated upon them.

#### Recommendation

The Government's commitment in *More Jobs, Better Pay* to take further steps to amend the unfair dismissal laws to discourage claims by casual employees or frivolous and vexatious claims is noted. The Government should note diametrically opposed views that the present scope for costs orders is not sufficiently deterring frivolous claims, or that the present provisions are inappropriately discouraging genuine claims and encourage a legalistic process.

#### Government response

The Government is committed to taking further measures to discourage inappropriate applications. The Government will consider further the suggestions made in submissions in relation to additional scope for costs orders, in consultation with affected parties. In doing so, the Government will take into account the industrial character of the jurisdiction.

## 5. Access to legal services and the use of contingency fees

Section 42 of the WR Act provides for representation of a party to a proceeding before the Commission by counsel, a solicitor or an agent, but only by leave of the Commission.

### *Applicant access to the unfair dismissal system (Job Watch)*

In its submission, Job Watch contends that the current process for lodging an unfair dismissal claim requires an applicant to seek legal advice in order to have a realistic chance at successfully challenging termination. The structure and language of the *Workplace Relations Act 1996* (WR Act) and the difficult process involved in electing to proceed past conciliation were blamed for creating a need for legal advice in this type of action.

Job Watch also points out that proceedings can quickly cost out an applicant, particularly where the respondent challenges jurisdiction so that the applicant incurs legal fees upfront, prior to the merits of their case being heard. The submission does not acknowledge that costs are available where jurisdiction is challenged unreasonably, therefore it is not possible to conclude whether costs have been considered in this context or whether Job Watch believes the threat of costs is ineffective in these circumstances.

It appears that Job Watch regards the need for legal advice to bring termination of employment proceedings as objectionable because it forces an employee to challenge their termination by running up legal fees when he/she is often in less of a position to do so. It therefore follows that Job Watch's suggested solution is to make funding available for the provision of legal services in this area. The recommendation appears to favour the establishment of community legal centres like Job Watch to provide free legal advice and advocacy on a 'no win-no fee' basis. It was also suggested that funding be obtained through a surcharge on unsuccessful respondents and an employer filing fee.

### *Procurement tactics used by the legal profession (VACC, ACCI)*

Both the VACC and ACCI expressed concerns about the increasing presence of lawyers during proceedings, particularly pre-arbitration. The issues raised by both seemed to focus on unnecessary interference by the legal profession, brought about by a lack of familiarity with the system, that has resulted in the complaint handling process becoming overly legalistic.

The VACC cited the ability of law firms to advertise as a major reason behind the increasing popularity of legal representation (both for employers and employees) in unfair dismissal proceedings. The location of a firm close to the Australian Industrial Relations Commission in Melbourne was also identified as encouraging unnecessary legal representation, though this criticism was more for being anti-competitive than being contrary to the interests of the parties concerned or detrimental to the process generally.

The ACCI also claimed advertising encouraged increased involvement by the legal profession in unfair dismissal matters. The use of contingency fees (ie no win-no fee) to garner applicant work was noted as being particularly objectionable in this regard for encouraging applicants to continue proceedings rather than settle reasonably, because applicants were exposed to minimal financial risk by proceeding to arbitration.

The ACCI recommends that access to the tribunal be conditional on ‘certain approaches being taken to legal fees’, by which it appears that it is suggesting that contingency fees be prohibited in the Commission’s jurisdiction.

*Inappropriate behaviour by lawyers during conciliation (VACC, ACCI)*

The VACC mentioned in its submissions that often the lawyers engaged by applicants to appear in conciliation proceedings do not have either the appropriate attitude or adequate experience to facilitate a practical (and speedy) resolution to the claim.

The ACCI were also of the view that some solicitors are not adequately prepared for conciliation, either because they have not conducted sufficient research or have not been properly instructed by their clients. The ACCI also made the criticism that some solicitors conduct themselves during conciliation as if they are only present to extract a settlement from the other side and therefore do not treat the possibilities presented by conciliation seriously.

Both the VACC’s and ACCI’s suggestion to eliminate this problem was to limit access to representation during conciliation to minimise applicant costs and also lessen the incidence of legal intervention contrary to the parties’ interests.

*Effect of lawyers on settlement amounts (VACC, ACCI)*

The VACC raised concerns that settlement offers are higher than they should be because applicants are engaging lawyers, and incurring legal costs, pre-arbitration. As a result, some businesses wanting to settle these matters on a commercial basis are dissuaded from doing so, because to proceed to arbitration and have a finding made against them is a cheaper option.

The VACC recommended limiting legal representation to prevent ‘topping-up’ of settlement offers and encourage speedy resolution of claims, but did not put forward any suggestions as to how this could be done.

The ACCI also identified high applicant legal costs as a hindrance to settlement because they inflate settlement amounts. The organisation also pointed out that those employers offering to resolve claims prior to arbitration (particularly small business owners) were settling matters for higher amounts than merited by the circumstances of the case in order to avoid incurring legal costs of their own in arbitration.

Like the VACC, the ACCI also recommended limiting legal representation during conciliation as a reducing effect on settlement amounts.

Recommendation

The Government should note the differing views expressed in submissions on the impact of legal representation on unfair dismissal matters, and whether legal representation should be supported financially or restricted.

## **Government response**

The Government considers that the unfair dismissal system should not require parties to be legally represented, but decisions on legal representation should be a matter for each party, subject to the requirement for leave of the Commission. The Government does not consider it necessary or appropriate to provide special assistance, or make unsuccessful employer respondents contribute to a fund for the representation of employees.

The Government is committed to taking further measures to discourage inappropriate applications. The Government will consider further the suggestions made in submissions in relation to restrictions on access to contingency fees in unfair dismissal matters, in consultation with affected parties. One aspect noted by the Government is the concern of employers and small business about the increasing likelihood of inappropriate or speculative applications arising from legal practitioners operating on a 'pay if you win' basis, or lawyers or other service providers inappropriately advertising the ease of access to the unfair dismissal jurisdiction.

### **6. Exclusion of employees engaged for a specified period**

Regulation 30B of the Workplace Relations Regulations excludes from the unfair dismissal provisions any employee engaged under a contract of employment for a specified period. However, the exclusion does not apply where a substantial purpose of the engagement under a contract of that kind is, or was at the time of the employee's engagement, to avoid the employer's obligations under the termination of employment provisions.

Two decisions of the Commission (one of which was handed down outside the review period) have considered the issue of whether an employer engaged an employee under a contract for a specified period or for a specified task in order to avoid the operation of the termination of employment provisions. These are *Hart v Mildura Trading and Equipment* (Print P4440, Whelan C, 25 August 1997), and *Devisser v John and Pat Creed* (Print PQ0293, Watson SDP, 22 April 1998).

In both cases, the Commission held that the contracts under which the employees had been engaged were not for a specified period. As the exclusion in regulation 30B(1)(a) did not apply, it was not strictly necessary to consider the issue of whether the employer had engaged the employees on those contracts in order to avoid the operation of the termination of employment provisions of the WR Act. However, in *Devisser*, the Commission noted that had it been necessary to consider whether subregulation 30B(2) applied, it would have found that a substantial purpose for engagement under a contract of that kind was to avoid the operation of the provisions.

The issue of whether subregulation 30B(2) provides appropriate protection to fixed-term employees was discussed in the submission of the AEU. The AEU's submission stated that subregulation 30B(2) provides little practical protection, because it does not overcome the effect of s.170CD(1) (which defines termination of employment as 'termination at the initiative of the employer') and s.170CE(1), which provides that an application may only be made by a person whose employment has been terminated by their employer. In a case where an employee is employed under a contract for a specified period and that contract is not renewed upon its expiry, the employee's employment will have been terminated by

operation of law (on the date that the contract expired), not at the initiative of the employer. Unless the employee can prove that, despite the termination of the contract by the effluxion of time, the termination was actually at the initiative of the employer, the Commission will not have jurisdiction to deal with the application (and any arguments that the employee might wish to raise in relation to subregulation 30B(2)).

The AEU's submission suggested three recommendations to overcome this. These were expressed as alternatives. The first (and preferred) recommendation is:

...that the wording of ss. 170CE(1) and 170CD be varied to refer only to 'termination of employment' (ie. delete requirement that termination be 'by' or 'at the initiative of the employer'). Instead, the definition of 'termination of employment' should encompass 'the failure by an employer to offer further employment upon the expiry of a contract of a specified duration or for a specified task where a substantial purpose of the engagement under a contract of that kind is, or was at the time of engagement, to avoid the employer's obligations under Subdivision B, C, D or E of Division 3 of Part VIA of the Act.'

Alternatively, the AEU's submission recommends the deletion of paragraphs 30B(1)(a) and (b) of the Regulations. As a third alternative, if the exclusions are retained, then subregulation 30B(2) should also be retained.

The deletion of paragraphs 30B(1)(a) and (b) of the Regulations is also advocated by APESMA in its submission, on the basis that employers appear to be increasingly using this type of arrangement to avoid obligations under unfair dismissal legislation.

The expansion of the termination of employment provisions to cover all terminations of employment, not only those at the initiative of the employer, would substantially expand the jurisdiction, to an extent not required by international standards in this area. It would not be appropriate to expose employers to orders for reinstatement and compensation, or penalties, as a result of terminations not initiated by the employer, which would include terminations at the initiative of the employee and terminations by operation of law as well as terminations by mutual agreement (which includes, termination by operation of an agreed contract).

### Recommendation

The Government should note submissions that the exclusions of employees engaged for a specified period or specified task should be repealed, and that the unfair dismissal provisions should deem a failure to renew a contract to be a termination of employment at the initiative of the employer, in any case where a substantial purpose of engagement for a specified period or task was to avoid unfair dismissal obligations. Conversely, however, it should also be noted that tribunals have interpreted this exclusion in a relatively narrow fashion, thus giving it limited operation.

### Government response

The Government notes the absence of evidence that there is any significant increase in use of employment for a specified period because of the exclusion. The Government considers that the current safeguard against termination during a contract for a specified period, where an employee was engaged in that way with a substantial purpose of avoiding unfair dismissal

obligations, is a sufficient safeguard for employees. The use of contracts for a specified period does have legitimate business purposes and it would not be appropriate to create additional employer obligations where a specified period is expiring. There are aspects of the restrictive interpretation of this exclusion which may justify its rewording to cover the range of contractual circumstances envisaged by the Parliamentary intention.

## 7. Exclusion of apprentices

Paragraph 170CC(1)(a) of the WR Act provides that the Regulations may exclude from the operation of specified provisions of Division 3 specified classes of employees including employees engaged under a contract of employment for a specified period of time. Paragraph 30B(1)(a) of the Regulations provides that employees engaged under a contract of employment for a specified period of time are, for the purposes of subsection 170CC(1) of the WR Act, excluded from the operation of Subdivisions B, C, D, E and F of Division 3 of the WR Act.

The issue of whether an apprentice is an employee engaged under a contract of employment for a specified time was problematic until the decision of the Full Bench in *Qantas Airways Ltd v Fetz, Duhigg and Hennessy* (Q1482). In *Qantas*, the Full Bench held that three apprentices not offered continuing employment upon completion of their four year apprenticeships were apprentices engaged under a contract of employment for a specified period. Consequently, the apprentices were excluded by paragraph 30B(1)(a) from the relevant subdivisions of Division 3 of Part VIA of the WR Act.

ACCI submitted that apprentices should be specifically exempted from the unfair dismissal provisions in the same way that trainees are exempted on the basis that the effect of *Qantas* may exempt the apprentices anyway and the fact that both trainees and apprentices are, by their very nature, temporary employees. VACC called for more detail on the exclusion of apprentices from the unfair dismissal provisions citing the occurrence of applications following a state training authority's termination of apprentices' contracts or apprentices' reconsidering their agreement to terminate. VACC suggested that this situation will become more commonplace with the emergence of 'new apprenticeships' and the consequent variation to 'traditional apprenticeships'.

Job Watch submitted generally that too many categories of employees are rendered ineligible to make a claim in circumstances where their dismissal is otherwise unfair or unlawful. In respect of apprentices, Job Watch is of the view that, following *Qantas*, the WR Act should be amended to stipulate that apprentices are not employed pursuant to fixed-term contracts and are eligible to make an unfair dismissal claim provided that their employer has not repeatedly advised the apprentice that their employment would not continue beyond the term of the apprenticeship and their employer can prove the same. In respect of trainees excluded from the unfair dismissal provisions, Job Watch called for the removal of the exclusion. In the case of fixed-term traineeships, Job Watch accepts that measures such as a compensation cap on lost remuneration could address concerns regarding the removal of the exempt status of those trainees presently excluded from the unfair dismissal provisions.

In *Qantas*, the Full Bench, in reaching its decision that apprenticeships were for a specified period (thereby excluding apprentices from the relevant subdivisions of Division 3 of Pt VIA of the WR Act by virtue of paragraph 30B(1)(a) of the Regulations), acknowledged that

although the term of an apprenticeship may be varied, suspended or cancelled by the relevant legislation (in this case, the NSW legislation), the possibility and likelihood of such intervention served to emphasise that so far as the contracts are concerned, the term of the apprenticeships in the instant case was specified at four years. In this regard, the Full Bench relied on the letter of appointment each apprentice received, their indenture, the relevant NSW Act governing the apprenticeships in question, and the relevant award.

The decision of the Full Bench in *Qantas* has clarified the exempt status of employees engaged under a contract of employment for a specified period of time from the unfair dismissal provisions of the WR Act.

### Recommendation

The Government should note the submission that apprentices should be specifically exempted in the same way as trainees, and the converse view that apprentices and trainees should not be excluded for any reason.

### Government response

The Government's commitments to a small business exclusion and a six month qualifying period include specific commitments that the existing rights of apprentices and trainees will not be affected by these measures.

## **8. Applications for extension of time to apply**

Subsection 170CE(7) of the Act states that an application for a remedy under subsection 170CE(1) must be lodged within 21 days after the day on which the termination took effect. Subsection 170CE(8) provides that the Commission may accept an application out of time if it considers that it would be unfair not to do so. The Discussion Paper noted that the operation of the former, and current, provisions was considered by a Full Bench of the Commission in *Telstra - Network Technology Group v Kornicki* (Print P3168), and the principles set down in the *Telstra* decision were applied in *Austin v Qantas Airways Limited* (Print P4317) and further discussed in *Clark v Ringwood Private Hospital* (Print P5279).

ACCI submitted that the current test under s.170CE(8) is too lenient on out of time applications, and accordingly sought the replacement of the current test with one of 'exceptional circumstances'. In ACCI's view, 'exceptional circumstances' would involve an applicant establishing 'strong grounds' beyond the simple merits of each case and a requirement that the Commission issue orders granting an extension of time prior to hearing merit arguments from the parties. In the alternative, ACCI submitted that a restoration of the requirements of s.170EA(3)(b) of the former Act is in order.

VACC submitted that the Commission's acceptance of out of time claims has become so commonplace that many respondents do not bother challenging out of time applications. Of those respondents who do challenge out of time applications, VACC noted instances where respondents have been criticised by the Commission for wasting the Commission's time. VACC is concerned by other instances where applicants have satisfied the Commission that an application should be accepted on grounds akin to poor excuses. VACC noted the

considerable burden borne by small businesses by the Commission's readiness to accept out of time applications and supports a time limit that is enforceable within reason.

As a related issue, Job Watch submitted that the 21 day time limitation imposed by subsection 170CE(8) on applications is too restrictive. Job Watch proposes the extension of the limitation to at least 60 days to reflect its experience that dismissed employees may not begin to deal with their predicament until a few weeks after their dismissal. Job Watch submitted that a 60 day limitation would not be unreasonable especially when compared with the 12 month limitation period set under the Victorian Equal Opportunity legislation.

In the *Telstra* decision, the Full Bench commented that the change in language from the former s.170EA to the new s.170CE indicated a different approach was to be taken in the exercise of the discretion. In particular, considerations of fairness towards the applicant were central to the exercise of the discretion (the Full Bench considered the objects of Pt VIA Div 3 to be relevant when considering the principles applicable to the exercise of the Commission's discretion under s.170CE(8) and, particularly, s.170CA(2) which states that the intention of the procedures and remedies in relation to termination of employment to ensure that a 'fair go all round' is accorded to both employer and employee). Further, the Full Bench determined that s.170CE(8) was intended to convey a more generous approach to applicants than that which prevailed under the former s.170EA(3)(b). However, '[t]he prima facie position is that the legislative time limit should be complied with and an applicant seeking to pursue an application lodged out of time must persuade the Commission to exercise the discretion in s.170CE(8) in their favour'. The central consideration was whether it would be unfair to the applicant not to accept the application.

### Recommendation

The Government should note the view that the current provision makes extensions of time too readily available, and the contrary view that the period in which applications would automatically be received should be extended from 21 days to 60 days.

### Government response

The nature of the jurisdiction and the principal remedy sought (re-employment) means that it must remain time-sensitive, with only limited capacity to obtain extensions of time. The Government does not consider that any changes to these provisions are required at this time. Decisions of tribunals will, however, be kept under review to ensure that the statutory policy objectives are generally being met.

## **9. Effectiveness of conciliation**

### *Quality of conciliation (Mediation & Advocacy Services)*

In its submission, Mediation & Advocacy Services (M&AS) put forward its concern that there may be a perception of inconsistency in how cases are treated at the conciliation stage because conciliators are given a great deal of autonomy in handling applications. The organisation agrees that there is merit in having a flexible process. However, they suggest that feedback from participants in the process should be sought and considered and outcomes

should be monitored so that parties can be assured the treatment of their matter is not heavily dependent upon which conciliator they are allocated.

M&AS also comment that their experience has been that the majority of conciliators are male and do not come from a wide range of age groups. Though not identified as causing problems in particular matters, M&AS is concerned that there may be a lack of input from the wider community into the conciliation process generally. They also put forward the view that most conciliators coming within a set profile may be affecting the perception of parties outside the profile that their issues and concerns are not being fully addressed.

*Commission's indication of its assessment of the merits of an application not able to be settled by conciliation*

When an application for relief in relation to the termination of employment of an employee on the ground that the termination was harsh, unjust or unreasonable is lodged with the Commission, the Commission must attempt to settle the matter by conciliation (s.170CF(1)). If the Commission is satisfied that all reasonable attempts to settle the matter by conciliation are, or are likely to be, unsuccessful so far as concerns at least one ground of the application, the Commission must issue a certificate in writing stating that it is so satisfied in respect of that ground or each such ground (s.170CF(2)(a)); must indicate to the parties the Commission's assessment of the merits of the application in so far as it relates to that ground or to each such ground (s.170CF(2)(b)); and if the Commission thinks fit, may recommend that the applicant elect not to pursue a ground or rounds of the application (whether or not also recommending other means of resolving the matter) (s.170CF(2)(c)).

ACCI submitted that conciliation conferences require objectives to be more fully set out to ensure that Commissioners are uniformly proactive in assessing the merits of applications and in advising the parties of such merits. ACCI cites instances where Commissioners have failed to issue conciliation certificates in a form appropriate to enable costs orders being determined at a later stage and failed to specify on the certificate that a case was without merit even though such an assessment had been made to the parties during conciliation. In respect of obtaining conciliation certificates in a form appropriate to enable costs orders being determined at a later stage, ACCI cites instances where employers have had to convene a second conciliation conference to obtain the appropriate notation from a Commissioner on certificates in order to make an application for costs.

VACC submitted that mediators/conciliators who are not members of the Commission but who are rostered on to participate in conciliation conferences are unable to issue conciliation certificates and must refer unresolved matters to conciliation before a Commissioner. Such practices constitute a further procedural step which is particularly financially burdensome on small businesses. VACC praises the practice in the Tasmanian unfair dismissal system which involves the Registrar in exploring settlement options with the parties prior to conciliation. VACC concedes, however, that parties unwilling to explore settlement options prior to arbitration can unilaterally frustrate the attempts of the Commission in this respect.

Paragraph 170CF(2)(b) appears to impose a mandatory obligation on the Commission to indicate to the parties the Commission's assessment of the merits of each application. However, this view has been tempered by a decision of the Full Bench in the *Appeal by Fisher & Paykel Manufacturing Pty Ltd* (P1109). In *Fisher & Paykel*, a conciliation conference was convened in respect of an application lodged under Pt VIA Div 3 and a

certificate under s.170CF(2) was issued stating that all reasonable attempts to settle the matter by conciliation had been, and were likely to be, unsuccessful. However, the certificate failed to provide an assessment of the merits of the ground in the application and the employer sought leave to appeal to the Full Bench of the Commission to enforce its interpretation of s.170CF(2)(b) that the Commission must indicate its assessment of the merits of an application in a certificate. The Full bench held that to construe s.170CF(2)(b) as imposing an obligation on the Commission to provide the parties with an assessment of the merits of the application in every case would lead to great inconvenience. For example, resolutions of evidentiary conflict between the parties at the conciliation stage would require a conciliator to hear all the evidence before being able to make a proper assessment of the merits for a certificate. The Full Bench expressed its concern that to construe s.170CF(2)(b) as imposing a mandatory obligation on the Commission risked turning conciliation into a mini-trial; would significantly increase the cost of proceedings (as parties would be required to lead evidence in both conciliation and again in arbitration); and would prove inconsistent with the intention of Pt VIA Div 3, as stated by the Minister in the second reading speech to the *Workplace Relations and Other Legislation Amendment Bill 1996* to 'ensure legalism is minimised'.

Accordingly, the Full Bench in *Fisher & Paykel* considered that although the use of affirmative words such as 'must' in relation to a function have been held to impose *prima facie* an obligation to exercise that function, the context in which the word appears was also important. The Full Bench concluded that where injustice or great inconvenience would follow the strict compliance with a provision, the courts have been reluctant to hold that the provision imposes an obligation, even if it is couched in mandatory terms (for example, *Re Davis* (1947) 75 CLR 409). The Full Bench expressed the view that the proper construction of s.170CF(2)(b) was that although it was desirable for the Commission to provide an assessment of the merits of the application in every case, the Commission was only bound to do so where it was practicable to do so.

It is noted that the practice of indicating an assessment of the merits of the case is also provided for under State legislation. In particular, s.107(3) of the *Industrial and Employee Relations Act 1994* (SA) requires the Industrial Relations Commission of South Australia to provide its assessment of the merits at the point at which a certificate is issued that a matter cannot be settled by conciliation.

### Recommendation

The Government should note the views expressed on improving the effectiveness of conciliation, and the proposal that the Commission should be required to commit to writing its indication to the parties of its assessment of the merits of an application which is not able to be settled by conciliation.

### Government response

The Government is not convinced at this stage that it is appropriate to introduce a specific requirement for a written record of the Commission's assessment of the merits of an application. There are, however, some precedents in State jurisdictions which may provide a basis for legislative amendment. This issue is more appropriately considered in the context of Government policy to implement the concept of mediation as a recognised form of dispute-resolution in the Workplace Relations Act.

## 10. Constructive dismissal

The WR Act requires that in order for an employee to succeed in a claim under Div 3 of Pt VIA of the WR Act, it must be established that the termination was a termination at the initiative of the employer. Accordingly, ‘constructive dismissal’ has arisen as a jurisdictional issue to characterise an employee’s departure from employment as a dismissal or termination at the initiative of the employer, for the purpose of access to remedies under Pt VIA of the WR Act. Constructive dismissal has been found to have occurred in cases of forced resignation; fundamental unilateral variation to employee’s terms and conditions of employment; breach of a fundamental term of the contract of employment; or where an employee has been ‘squeezed out’ of employment. For the purposes of the following submissions, it is important to note that there is no definition of constructive dismissal or reference to constructive dismissal in the WR Act. Securing a definition of the concept at common law is also complicated because ‘constructive dismissal’ is not a discrete, common law principle but rather a feature of repudiation in contract law.

ACCI seeks to curtail the inappropriate pleading of constructive dismissal in termination of employment cases by imposing a definition restricting the plea to instances where there has been ‘real duress or coercion’ of an employee by an employer to resign. As a related issue, Job Watch called on the categories of employees able to claim constructive dismissal to be broadened and supports its submission by reference to a case it was involved in where a casual employee was ‘constructively dismissed’ following a sexual assault by her employer.

Constructive dismissal and the phrase ‘termination at the initiative of the employer’ was considered at some length in *Mohazab v Dick Smith Electronics Pty Ltd (No.2)* (1995) 62 IR 200, a leading decision of the Full Court of the Industrial Relations Court of Australia. In *Mohazab*, the Full Court (at 205) stated that

the phrase ‘termination at the initiative of the employer’ involves a termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship ... [a]n important feature is that the act of the employer results directly or consequentially in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have remained in the employment relationship.

Despite such seemingly clear pronouncements of the law in respect of what constitutes a ‘termination at the initiative of the employer’ and thereby constructive dismissal, it is a fair criticism that there has been a lack of uniformity in the approach of various industrial commissions and courts and indeed some confusion as to the meaning of ‘constructive dismissal’ to date.

### Recommendation

The Government should note diametrically opposed views on restricting or broadening the scope to establish termination at the initiative of the employer by constructive dismissal.

## **Government response**

The Government is concerned that the credibility of the unfair dismissal jurisdiction could be eroded where the statutory intention is expanded beyond what was contemplated when the jurisdiction was first established by policy-makers. Decisions by courts to expand the notion of ‘constructive dismissal’ have altered the policy balance originally created between the rights of employers and employees. It remains the Government’s view that the unfair dismissal provisions should continue to operate only in relation to termination at the initiative of the employer. While it is preferable for the interpretation of this concept to be determined by tribunals, the Government is concerned at the apparent widening of the concept and differing interpretations on similar facts. Without finally determining the matter, the Government is prepared to consider sensible proposals for some clearer legislative recognition of the original statutory intention.

### **11. Remuneration-based limits on access to jurisdiction and compensation**

#### *Objections to an exclusion based on rate of remuneration (Job Watch, APESMA, ACTU)*

Before looking at the problems associated with this particular exclusion, it is worth noting Job Watch’s submission, which makes the point that exclusions are mere technical grounds for ineligibility unrelated to the merits of any claim. Therefore, in its view, such exclusions are objectionable as they allow otherwise worthy cases to escape Commission scrutiny.

Job Watch stated that the exclusions from the termination of employment provisions are too wide-ranging, resulting in a system that is unfair to employees. The organisation does not specifically criticise the exclusion for non-award employees who earn above the maximum rate of remuneration (though it emphasises the vulnerable position of casual employees and probationers) but employees earning above the remuneration limit seem to fall within the groups unfairly excluded, in Job Watch’s view.

The APESMA severely criticises the exclusion based on remuneration received by employees. The remuneration limit has resulted in the exclusion of many of the APESMA’s members from the unfair dismissal jurisdiction of the Commission as, based on the APESMA’s statistics, 52% of professional engineers and 59% of computer professionals have salary packages above \$68,000.

The APESMA has the view that there is little reason why such employees should be excluded from the termination of employment provisions. The organisation points out that the *Termination of Employment Convention 1982, (No 158)* does not single out this group for possible exclusion, unlike employees engaged for a specified period/task, probationers or short-term casual employees, and suggests that therefore the federal Government may be in breach of its international obligations by having an exclusion based on employee remuneration.

However, the *travaux preparatoire* of the ILO’s *Termination of Employment Convention, 1982* do indicate that managerial employees were envisaged as being a group in respect of which ‘special problems of a substantial nature might arise’. Australia’s first report to the ILO on its implementation of ILO C158, in 1995, explained that the remuneration limit was included to exclude these employees.

The APESMA's preferred response to this issue would be removal of the exclusion based on rate of remuneration altogether. Alternatively, the association suggested raising the remuneration limit to \$120,000 so that r.30B(1)(f) has less widespread effect. No calculations for this figure were provided.

The ACTU submissions endorse APESMA's views on this matter.

#### *Applicants within the exclusion lodging claims (VACC)*

The VACC commented that applications by employees earning above the remuneration limit are a regular occurrence. Such applications result in a significant waste of resources for all parties involved, but particularly for employers who must go to hearing in order to have the matter struck out for want of jurisdiction.

The VACC identified these types of applications as being particularly harmful for small businesses, as the cost of defending unfair dismissal claims can be as onerous as any decisions made against them. The ACCI also made this observation when saying that small business owners will often settle unfair dismissal claims quickly, even where there is a possibility that a particular claim may be outside jurisdiction, because of the legal costs involved (this submission is discussed more in the section on small business).

In order to reduce the incidence of applications by employees who exceed the remuneration limit, the VACC recommended that the Commission should provide better advice to applicants on jurisdictional restrictions in unfair dismissal matters. The organisation also suggested that the Commission require more information from employees at the application stage to help them identify *any* exclusions that might apply at an early stage of proceedings.

The VACC does not mention that costs may be awarded against an applicant who exceeds the maximum rate of remuneration for lodging a claim that is 'without reasonable cause'. It is not possible to determine whether this is because the VACC believes the threat of costs is ineffective or because the effect of costs was not considered. Given the number of cases where an applicant exceeded the remuneration limit and was ordered to pay costs to the respondent (discussed further in the specific section on costs), the Commission may already be trying to minimise the incidence of this type of application of their own volition. If so, these efforts are commendable but it may be worth considering increasing the scope for costs in this area formally to ensure that cases are treated in a uniform manner.

#### *Formula for determining remuneration too unwieldy (ACTU, AIRC)*

The ACTU put forward the view that the change from a jurisdictional limit based on wages to one dependent on remuneration has resulted in the unwarranted exclusion of employees earning modest amounts from the termination of employment provisions.

The ACTU's solution in this regard was to adopt the APESMA's suggestion to remove the exclusion or, in the alternative, raise the remuneration limit to \$120,000.

Giudice J of the Commission raised the point that the current definition of 'rate of remuneration' was particularly harsh for non-award employees working in remote areas as all allowances were included in assessments. In *Bell v McArthur River Mining Pty Ltd* (Print

P9036, Munro J, SDP MacBean, Hoffman C, 3 July 1998), the Full Bench reluctantly held that off-site living allowances formed part of the applicant's remuneration so that it exceeded the maximum amount determined by the Workplace Relations Regulations.

The Full Bench referred to the different formulations of the exclusion for non-award high income earners in the former *Industrial Relations Act 1988* and the *Workplace Relations Act 1996*. It found that there was case authority for restricting the definition of remuneration to monetary wages, and that nothing in the explanatory memorandum to the *Workplace Relations and Other Legislation Amendment Act 1996* suggested that an extended meaning was intended. However, the Commission felt compelled to follow earlier Full Bench decisions that opted for a more inclusive definition of remuneration.

In the last paragraph of the judgement, the Full Bench explicitly stated that this exclusionary test is problematic as it is open to interpretations that could reflect unsound law or policy. The Full Bench recommended that 'administration of the jurisdiction in a less complex way, less prone to anomaly, might be greatly assisted by either legislative amendment or, perhaps a review of the relevant regulations'.

#### *Compensation remedies should have no remuneration limit (Job Watch)*

Job Watch objected to the limit on compensation for unfair dismissal claims being set at the previous six months' salary. The organisation alleges that this limit is particularly harsh on employees in precarious employment and is deterring genuine claims, as many applicants believe they will not receive adequate compensation for bringing a successful action.

Job Watch is of the view that the law in this area should mirror the common law approach of putting the injured party to a contract in the same position had the breach not occurred. To this end, the organisation recommends abolishing the six month wage limit on compensation, limiting the Commission's discretion to award compensation only in relation to lost remuneration and giving the Commission power to award other types of damages (eg compensation for non-pecuniary loss).

It is noted that the significance of this issue is reduced by the Government's commitment to introduction of a six month qualifying period.

#### *Lack of compensation for pain and suffering (M&AS)*

In their submissions, M&AS raised the Commission's inability to award compensation for pain and suffering as being potentially unfair on applicants. The organisation appears to be of the view that dismissed employees who are subjected to bad treatment from employers during the termination process should be entitled to non-pecuniary damages.

#### Recommendation

The Government should note the calls for removal or increase of the remuneration-based limit on access by non-award employees to the jurisdiction, and the suggestion by the Commission that consideration be given to changing the provision with a view to its simplification.

### **Government response**

The Government notes the Commission's comments that amendment in this area might assist in the less complex administration of the jurisdiction. The Government confirms the intention that a broad definition of remuneration, including allowances, should be applied for the purposes of this exclusion. The Government will refer to the Australian Industrial Registry for its consideration the suggestion that additional advice might be able to be provided to applicants in relation to the jurisdictional restrictions.

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## *Appendices*

### **A. List of persons and organisations making submissions to the review**

Australian Chamber of Commerce and Industry

Australian Council of Trade Unions

Australian Education Union

The Association of Professional Engineers, Scientists and Managers, Australia

Mr Gary Bowman, MAS Mediation & Advocacy Services

Job Watch Inc.

The Honourable Justice Giudice, President, Australian Industrial Relations Commission

Senator Andrew Murray, on behalf of the Australian Democrats

Victorian Automobile Chamber of Commerce

## **B. Abbreviations**

ABS	Australian Bureau of Statistics
ACCI	Australian Chamber of Commerce and Industry
the Act	the <i>Workplace Relations Act 1996</i>
ACTU	Australian Council of Trade Unions
AIRC	Australian Industrial Relations Commission
AEU	Australian Education Union
APESMA	The Association of Professional Engineers, Scientists and Managers, Australia
AWIRS	Australian Workplace Industrial Relations Survey
the Commission	Australian Industrial Relations Commission
IRCA	Industrial Relations Court of Australia
Job Watch	Job Watch Inc.
M&AS	Mr Gary Bowman, MAS Mediation & Advocacy Services
VACC	Victorian Automobile Chamber of Commerce
the WR Act	the <i>Workplace Relations Act 1996</i>

### C. Overview of the current federal unfair dismissal provisions

Subject to certain exclusions (set out below), the federal unfair dismissal jurisdiction (under Subdivision B of Division 3 of Part VIA of the Act) applies in relation to the dismissal of: an employee covered by a Federal award or agreement, who was employed by a constitutional corporation, or was employed in relation to interstate or overseas trade or commerce as a waterside worker, maritime employee or flight crew officer; a Commonwealth public sector employee; and an employee in a Territory. (Section 492 of the Act provides for the additional operation of all aspects of Division 3 of Part VIA of the Act in relation to the dismissal of an employee in Victoria.)

#### Excluded employees

The following employees are wholly excluded from the operation of the termination of employment provisions of the Act, including the unfair dismissal provisions: an employee engaged under a contract of employment for a specified period of time or for a specified task, unless a substantial purpose of engagement under a contract of that kind was to avoid the employer's obligations under the termination provisions; an employee serving a period of probation or qualifying period, the duration or maximum duration of which is determined in advance, and three months or less, or otherwise reasonable given the nature and circumstances of the employment; a casual employee engaged for a short period - that is, an employee not engaged on a regular and systematic basis for a period of at least 12 months, and having a reasonable expectation of continuing employment; a trainee whose employment under a National Training Wage traineeship or approved traineeship (as defined in section 170X) is for a specified period or is, for any other reason, limited to the duration of the agreement; an employee not employed under award conditions whose remuneration exceeds \$68,000 per year (or that amount as affected by indexation). (The exclusions in relation to employees engaged under a contract for a specified period of time or for a specified task do not apply where the substantial purpose of the engagement under a contract of that kind is, or was at the time of the employee's engagement, to avoid the employer's obligations under the termination of employment provisions.) (Members of the Australian Federal Police are also specifically excluded in respect of any termination of employment in accordance with section 26F of the *Australian Federal Police Act 1979*.)

Where an employee claims dismissal was harsh, unjust or unreasonable, or breached one of the requirements for a lawful termination, and is within the scope of the relevant jurisdiction, the employee may apply to the Commission for the claim to be dealt with. There is a \$50 filing fee. The Commission must endeavour to conciliate the claim. If conciliation is unable to settle all grounds of the claim, the Commission is required to give the parties an indication of its assessment of the merits of the application in respect of the grounds not settled. The Commission may recommend that an applicant elect not to pursue a ground, or grounds, of the application.

Applicants are then required to make an election as to whether to pursue any grounds of their applications which have not been settled at conciliation, and where relevant, which grounds and in which forum.

If an election to continue with an *unfair dismissal* claim is made, the Commission arbitrates on the claim. It is required to decide simply whether a dismissal was harsh, unjust or unreasonable. In making its decision, it is required to take into account all relevant factors,

including: whether there was a valid reason for the dismissal, concerning the capacity or conduct of the employee or the operational requirements of the employer's business; whether the reason for the dismissal had been given to the applicant; whether the applicant had been given an opportunity to respond to any reason related to the applicant's capacity or conduct; and whether there was any warning as to unsatisfactory performance.

Where the Commission determines that a dismissal was harsh, unjust or unreasonable, it is required, when considering whether to make any order for a remedy at all, not to make an order for a remedy unless the remedy is appropriate having regard to all the circumstances of the case including: the length of the employee's service; the remuneration that the employee would have received if not for the termination; the efforts of the employee to mitigate any loss; and the effect on the viability of the employer's business of any order made.

The Commission is able to reinstate an employee to his or her former position in the business, or to a similar position, and make orders in relation to pay foregone. If a reinstatement order would be inappropriate, the Commission can instead order an amount of compensation that it thinks is fair. An amount of compensation cannot exceed the amount received by the employee in the six months immediately preceding the termination, or the amount of \$34,000 as indexed under the regulations, whichever is lower.

The Commission can award costs against a party in respect of proceedings which are vexatious or made without reasonable cause. The Commission is also able to award costs against a party in circumstances where a hearing proceeds beyond conciliation to arbitration, and the Commission is satisfied that it was unreasonable for the party not to settle or discontinue the claim.

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