



CATHOLIC COMMISSION
FOR EMPLOYMENT RELATIONS
SUBMISSION TO THE PRODUCTIVITY COMMISSION INQUIRY INTO
THE WORKPLACE RELATIONS FRAMEWORK
MARCH 2015

EXECUTIVE SUMMARY

The context of the Catholic Commission for Employment Relations (CCER) submission is to provide a perspective on some key elements of the workplace relations framework and *Fair Work Act 2009* (FW Act) based on the principles of Catholic social teaching, balanced with the mindfulness that our members are employers who need to run viable businesses so that they can continue to serve the community.

CCER advises and represents the interests of Catholic employers in NSW and the ACT on a broad range of employment relations and human resource issues. The Australian Catholic Council for Employment Relations (ACCER) has long publically advocated on behalf of low paid employees and their families and in particular, that work which pays a decent wage will promote proper care of children, family stability and social inclusion, in accordance with Catholic social teaching. Furthermore, this advocacy is informed by the Catholic Church's experience as a major employer, with over 180,000 employees in health, aged care, education, welfare and administration across Australia.

The application of Catholic social teaching to work and the employment relations framework has been extensively considered by the Australian Catholic Bishops Conference. In its 2005 Statement the Bishops outlined key principles including that: governments are responsible for integrating economic growth and social justice to ensure proper balance between the rights of employers and workers; workers are entitled to just wages that support a family; minimum conditions should be protected from unfair bargaining and workers' family responsibilities should be properly recognised; workers should have security of employment and redress against arbitrary dismissal; and workers have rights to advance their interests through unions.

Consistent with Catholic social teaching CCER strongly supports a safety net of fair and equitable conditions with particular focus on just minimum wages and fair compensation for working unsociable hours.

CCER supports the payment of minimum wages - what may be termed a '*living wage*'- that enable a worker and their family to achieve a decent standard of living, not wages merely sufficient to avoid poverty. As advocated by ACCER, minimum wages should be fixed by reference to community living standards to meet the needs of a family (couple or sole parent with two children) not a single person.

CCER is greatly concerned at the increasing inadequacy of the existing safety net and the growing levels of inequality and poverty for the approximately one-fifth of Australian minimum wage dependent employees.

The wages of these workers are falling behind community wide average wage movements. Alarmingly, the fall in the relative value of minimum wages has caused rising poverty among low paid workers – the '*working poor*' – and has not been matched by increases in family and tax transfers.

Labour market flexibility does not require the reduction of wages and other basic conditions of employment, which would impose the burden of economic adjustment on low paid and vulnerable workers. Other strategies are required to increase productivity such as skill development and targeted support to assist the unemployed.

In CCER's view, the award safety net is no impediment to productivity and cooperative workplace relations and provides fair protections for the welfare, health and safety of workers. Employers cite fair and affordable rates of pay, simplicity, and certainty as reasons for award reliance. Awards also play a critical role in guiding pay and conditions for non-award reliant employers and employees. The 4-year review process undertaken by the Fair Work Commission (FWC) provides the flexibility to ensure that awards remain relevant and responsive to economic and community change.

The Catholic Church has rejected previous legislative and other attempts to abolish penalty rates due to concerns about the negative impact on the incomes of vulnerable workers and the detrimental impact of unsocial working hours on rest, recreation, and family time.

Around one third of Australian workers are required to work weekends and regularly miss important family engagements, social occasions and sporting events. Rest, recreation and family time is valued and work in unsociable hours precludes workers from these opportunities.

There is no reliable evidence or economic analysis that removing penalty rates will boost employment and job creation in cases put before the FWC to date. Further, minimum wage earners and their families who rely on penalty rates to make ends meet would be disproportionately affected by reductions.

CCER accepts that a wide range of work in unsocial hours is, and will continue to be, necessary to meet the community's economic and social needs. In our view, a penalty should continue to be paid for the family time that is sacrificed by those workers. While penalty rates cannot remedy the negative impacts of working unsociable hours, they can provide fair and just compensation for some of them.

There is sufficient flexibility within the existing industrial regulatory framework to respond to changes in the business environment. The FWC is already well placed to consider evidence of the impacts of penalty rates during the upcoming four-year review of modern awards.

CCER regularly acts as a bargaining representative for members in enterprise agreement negotiations. The highly prescriptive procedural and compliance requirements from the outset of bargaining to applying to the FWC for approval are problematic, particularly when acting for multiple employers. This, combined with a lack of discretion for the FWC to rectify certain trivial defects, can and has resulted in absurd results for employers, employees, and representatives with regard to the notice of employee representational rights.

There are numerous examples of trivial defects or errors that have resulted in agreements being dismissed by FWC, such as innocuous covering emails or letters sent in good faith or additional material (not inappropriate or unlawful) attached to a valid notice by a stapler.

CCER proposes that the FW Act should be amended to empower the FWC, where apparent defects have been identified in the content and form of the notice, to take into account factors such as the severity of the defects and whether they had a real or likely adverse impact on the parties or adversely influenced the conduct or outcome of bargaining.

The Productivity Commission may also consider more effective and contemporary ways of informing employees of their representational rights, possibly through better use of technology, rather than paper based forms.

CCER supports general protections against unlawful adverse action such as discrimination, victimisation and anti-bullying measures. However, we are concerned that when a third party arbitrator becomes prematurely involved in a workplace dispute, tensions escalate, positions become entrenched, and it can become increasingly difficult to salvage the working relationship.

The number of individual disputes lodged with the FWC that occur while the employment relationship remains on foot (non-dismissal adverse action and bullying matters) is increasing. Further, some data suggests that many of these complaints are really about workplace conflicts such as personality conflicts, clashes in inter-personal styles and organisational issues.

CCER's aim is to ensure adequate measures have been sufficiently explored to resolve disputes at the local level to achieve more positive, productive, efficient and fair outcomes for the parties involved.

To this end, CCER proposes the introduction of a threshold test for non-dismissal complaints that requires the applicant to demonstrate they have taken reasonable steps at the workplace level to resolve their dispute before lodging their claim with the FWC. Such a step would be comparable with model dispute resolution requirements.

Other proposals are to refer bullying claims to the relevant work, health, and safety regulator for an initial risk assessment and to consider the introduction of alternative dispute resolution (ADR) processes such as mediation or restorative justice conferencing as an option prior to or, as an alternative to, a conference held by the FWC.

CCER strongly supports the right of redress for genuine unfair dismissal. However, our concern is when applicant claims lack substance, are meritless, do not have reasonable prospects, are vexatious or instigated for the purpose of settlement and yet, for commercial reasons, employers still pay *'go-away money'*.

While no statistics on merits are available, CCER believes a not insignificant proportion of the 80% of cases settled at conciliation are meritless. In our view, the problem is compounded by the ease of filing a claim, the guarantee of conciliation which is often focused on settlement irrespective of merit and jurisdictional objections (the *'free-kick'* at settlement), and the no costs jurisdiction (generally).

CCER proposes that the Productivity Commission consider the introduction of a preliminary merit based assessment process on the papers prior to the FWC listing a conciliation and/or redesigning a more merit-based conciliation process to reduce meritless applications.

CCER supports the general protections framework as necessary for protecting workers from victimisation for exercising their lawful workplace rights. However, due to inconsistency in the case law there is currently a significant lack of clarity surrounding the workplace right of a person who *'is able to make a complaint or inquiry...in relation to his or her employment'*.

Complaints in workplaces range from formally lodged complaints and grievances to trivial comments made in passing, however there is uncertainty about when a matter is a *'complaint or inquiry'* for the purposes of the FW Act.

Improved clarity will assist employers to understand their liability and appropriately manage their risks. CCER proposes the Productivity Commission consider amendments to the FW Act to clarify that the complainant must hold a genuine belief in the merit of their complaint, must properly communicate it to their employer, and that it must be sufficiently related to the complainant's own employment.

INTRODUCTION

Catholic Commission for Employment Relations

The Catholic Commission for Employment Relations (CCER) is a not for profit organisation established by the Bishops of New South Wales (NSW) and the Australian Capital Territory (ACT) to advise and represent the interests of Catholic employers in NSW and the ACT on a broad range of employment relations and human resource issues. CCER is committed to promoting effective employment relations to create workplaces of innovation and excellence, imbued with dignity and justice, consistent with Catholic social teaching.

CCER provides our Catholic member organisations with a range of services including agreement making, mediation and dispute resolution, representation before tribunals and investigations, advice on compliance with workplace legislation and the management of all employment relations matters. CCER also advocates on behalf of its members within the context of Catholic social teaching.

CCER works with employers across a number of sectors: Catholic independent and systemic schools; social services agencies, including aged care, disability support, health facilities and children's services; and religious congregations, parishes, chanceries and other Diocesan employers across NSW and the ACT.

CCER's members represent a diverse range of employers across these sectors and all operate within increasingly complex and challenging environments. Typically, our workplaces comprise:

- Independent Catholic schools with multi employer enterprise agreements separately covering teachers and support staff;
- Catholic systemic schools that fall within the 11 Dioceses of NSW and the ACT with single interest employer enterprise agreements separately covering principals, teachers and support staff and early childhood services typically reliant on the relevant modern awards;
- Social services, health, aged care, disability support and children's services providers mostly reliant on the relevant modern awards, although some of the larger employers have enterprise agreements in place; and
- Parishes, Dioceses & religious institutes comprising small employers typically reliant on the relevant modern award or often award free.

Key challenges for the education sector include implementation of the '*Great Teaching Inspired Learning*' reform initiatives such as new teacher accreditation requirements linked to national professional standards, and funding pressures.

In the social services sector, challenges include compliance with government driven reforms, including the person centred approach, that aim to improve the quality of care, protection and inclusion in aged care, disability support, children's services and community services, and to support the transition to the National Disability Insurance Scheme.

In religious congregations, parishes and chanceries, employers are typically small and under resourced in terms of human resource expertise.

Catholic Social Teaching and Work

Work, in its broadest sense is not just employment and occupies a central position in Catholic social teaching as the fair and just treatment of workers is an essential requirement of a society based on social justice. The Catholic Church's central concerns, in solidarity with the poor, are unemployment, poverty and inequality.

In Pope John Paul II's 1981 encyclical *Laborem Exercens*, the relationship between the Gospel message and social justice in the workplace is brought together:

....The Church is firmly committed to this cause, for she considers it her mission, her service, a proof of her fidelity to Christ, so that she can truly be the "Church of the poor." And the "poor" appear under various forms; they appear in various places and at various times; in many cases they appear as a result of the violation of the dignity of human work: either because the opportunities for human work are limited as a result of the scourge of unemployment, or because a low value is put on work and the rights that flow from it, especially the right to a just wage and to the personal security of the worker and his or her family. (Laborem Exercens, 8)

The application of Catholic social teaching to work and the employment relations framework has been extensively considered by the Australian Catholic Bishops Conference and its agency the Australian Catholic Council for Employment Relations (ACCER). Part of ACCER's mandate is to advocate policies on work and the employment relationship, based on Catholic social teaching.

In November 2005 the Australian Catholic Bishops Conference published a Statement on aspects of the then proposed Work Choices legislation. The basis of the Bishops' Statement is Catholic social teaching on work, the employment relationship and the role of governments. The Statement outlines some key workplace relations principles, which were further enunciated by ACCER in 2007 in *Workplace Relations: A Catholic Perspective*.

Role of governments

Governments have a responsibility to promote employment and to ensure that the basic needs of workers and their families are met through fair minimum standards. Catholic social teaching recognises and supports a proper balance between the rights and responsibilities of employers and workers. The terms of employment cannot be left wholly to the marketplace.

Minimum wage

Workers are entitled to a wage that allows them to live a fulfilling life and to meet their family obligations. A central part of Catholic social teaching is that the worker is entitled to a just wage for the work performed and that the wage should be at least sufficient to support the worker and the worker's dependants.

Minimum conditions and protection from unfair agreements

Catholic social teaching is concerned with equitable remuneration and conditions of employment and with the protection of workers who are vulnerable and at risk of pressure to agree to an unjust arrangement when dealing with employers who have superior bargaining power. Safety net conditions such as overtime rates, penalty rates and rest breaks should be

appropriately protected and workers especially the poor and vulnerable should not be placed in a situation where they will be required to bargain away some of their entitlements.

Family responsibilities and work

Catholic social teaching deals with rights that relate to what is referred to as the work/life balance. The principal aspects of this balance are the right to adequate rest, protection against onerous working hours and the proper recognition of the worker's family responsibilities.

Security of employment

Workers should have substantial security of employment and appropriate redress against arbitrary or unwarranted dismissal. This is not to say that an employer is required to employ a worker for whom there is no work, or no suitable work, or that a worker should not be dismissed if his or her conduct or work performance justifies dismissal.

Right to participate in unions

Workers should be able to cooperate so that they can advance their mutual interests and participate freely in unions. Catholic social teaching encourages and promotes union membership and participation because of the role that unions can play in advancing the interests of workers in the workplace and in society as a whole. Workers are entitled to exercise their right of freedom of association to protect and pursue their common interests. Consistent with freedom of association, the State should also ensure that workers are not coerced to join, or not to join, a union.

Further, the Bishops' make the point that:

Our experience emphasises the importance that employment, fair remuneration and job security play in providing a decent life for workers and their families. They are particularly important for those who have limited job prospects and who are vulnerable to economic change. It is not morally acceptable to reduce the scourge of unemployment or underemployment by allowing the wages and conditions of those who are employed to fall below the level needed by workers to sustain a decent standard of living.

Social justice

The Statement concludes that the integration of economic growth and social justice is a fundamental obligation of government. It is vitally important as a matter of social justice that the burden of adjustment is not borne disproportionately by one part of the community, in particular the low paid and vulnerable workers. Changes must be pursued in ways that are fair and equitable to society as a whole.¹

In its detailed consideration of workplace relations from a Catholic perspective, ACCER notes that the Catholic Church's teachings recognise and support a proper balance between the rights and responsibilities of employers and workers.

.....jobs alone are not sufficient to achieve social justice. There must be more, including the rights to adequate wages and job security.....there are other rights that flow from the

¹ [2005] Australian Catholic Bishops Conference, *The Bishops' Statement of 25 November 2005*

*performance of work; such as the rights to protection against unfair bargains, participation in unions, adequate rest and leisure, decent work and safe working conditions.*²

ACCER has long publically advocated on behalf of low paid employees and their families and in particular, that work which pays a decent wage will promote proper care of children, family stability and social inclusion, in accordance with Catholic social teaching.³ Furthermore, this advocacy is informed by the Catholic Church's experience as a major employer, with over 180,000 employees in health, aged care, education, welfare and administration across Australia.

The context of CCER's submission is to provide a perspective on some key elements of the workplace relations framework based on the principles of Catholic social teaching, also balanced with the mindfulness that our members are employers who need to run viable businesses so that they can continue to serve the community.

In particular, this submission focuses on five key areas:

- Support for a safety net of fair and equitable conditions with particular focus on just minimum wages and fair compensation for working unsociable hours
- Concerns with prescriptive procedural requirements for agreement making
- Managing individual disputes to maintain the employment relationship
- Improved responses to dismissal applications
- Improved clarity in general protections – the workplace right to make a 'complaint or inquiry'.

² [2007] ACCER *Workplace Relations: A Catholic Perspective*

³ [2013] ACCER *Submission to Fair Work Commission Annual Wage Review 2013-2014*

PART ONE

SUPPORT FOR A SAFETY NET OF FAIR AND EQUITABLE CONDITIONS

Consistent with the Catholic Church's principles of equity, fairness and justice, CCER supports a workplace relations framework that provides a safety net of fair and equitable pay and conditions. Such a safety net comprises just minimum wages that keep workers and their families out of poverty; decent conditions including adequate rest and reasonable hours of work; and fair compensation for the impacts of working unsociable hours on family life.

Minimum wages and the award wage safety net

Support for a 'living wage' that meets family needs

Approximately 20% of employees are 'award only' or 'safety net dependent' workers, that is, they rely on their terms and conditions prescribed in an award, with about 1,860,700 employees receiving the minimum wage prescribed by awards only.⁴ They are mostly employed on lower paid award classifications and typically have no capacity to bargain above the safety net, relying instead on annual minimum wage adjustments.

The safety net is often influential in determining outcomes for other employees, including lower paid workers, who are able to bargain either collectively or individually for better wages and conditions, and especially so for those who have wages and benefits only slightly above the award.

The Catholic Church through ACCER is an active advocate in the Annual Wage Review on behalf of low paid workers and their families. The review is conducted by the FWC, which is required to set a 'safety net of fair minimum wages' through the National Minimum Wage (NMW) and award rates of pay. The FWC is required to consider economic and other factors, including 'relative living standards and the needs of the low paid' and to promote social inclusion.

The Bishops' Statement calls for '*workers to be entitled to a wage that allows them to live a fulfilling life and to meet their family obligations*' and calls for '*the provision of a fair safety net by reference to the living standards generally prevailing in Australia; the needs of employees and their families; and the proper assessment of the impact of taxes and welfare support payments*'.

This reflects a central part of Catholic social teaching that a full time unskilled worker is entitled to a just wage for work performed *at least* sufficient to support a worker and the worker's dependents. This standard is widely accepted by the community. ACCER advocates that the minimum wage necessary may be termed a '*living wage*' that enables a family to achieve a decent standard of living, not merely a wage that avoids poverty. A living wage is a wage fixed by reference to relative community living standards to meet the needs of a family, whether a couple with children or sole parents, not the needs of a single person.⁵

⁴ [2014] ABS, *Employee Earnings and Hours, Australia, May 2014*, 6306.0

⁵ [2014] ACCER, *After a century the minimum wage system abandons families*, Briefing Paper

In ACCER's view, this approach is consistent with the principle established in the 1907 'Harvester' decision, still relevant and important today, that recognises the setting of minimum wages needs to take into account the interests of a worker's dependent children. However, a more contemporary version of the Harvester formula, that does not distinguish on the basis of a male breadwinner, can be applied to ensure fairness and reflect modern family structures.⁶

A living wage is necessary because of its critical importance to families and society and to avoid the social exclusion that arises from inequality. Employment in work, which pays a living wage, will promote the proper care of children, family stability, social inclusion, and cohesion.

Existing minimum wages are inadequate and inequality is growing

The Productivity Commission's Safety Nets paper canvasses views that there is no longer a rationale for the minimum wage in contemporary Australia or that minimum wages may be set too high and sufficiently large increases have negative effects on employment, particularly for low skilled workers.

CCER is greatly concerned at these suggestions in light of evidence that the current minima are increasingly inadequate to support workers and their families and that inequality is growing.

In submissions to the Annual Wage Review over the past decade, ACCER has expressed concern at the increasing inadequacy of the existing safety net and the growing levels of inequality and poverty for minimum wage dependent employees. The NMW and other low wage rates have become poverty wages for low-income working families, affecting the approximately one-fifth of Australian workers who only receive the minimum wage rates set by law.⁷

While only 2% of workers are employed on the NMW, the large majority of safety net workers who are mostly in the lower wage award classifications are falling behind community wide average wage movements. While average weekly ordinary time earnings (AWOTE) have increased by 80% in the 13 years prior to November 2013, the NMW has only increased by 55.4% over the same period. Percentage declines of similar magnitude have also occurred in award minimum rates relative to AWOTE.⁸

Similarly, the fall in the relative value of minimum wages has caused working families to fall below rising poverty lines becoming, in effect, the '*working poor*'. ACCER has calculated that over the ten years to January 2014 a NMW dependent family of four fell from 3.3% below, to 10% below, the 60% relative poverty line (determined by reference to ABS median disposable income measures).⁹

Poverty is rising among low paid workers with the Australian Council of Social Services reporting that 20.5% of those living in poverty were in a household where there was at least

⁶ [2014] ACCER *After a century the minimum wage system abandons families* , Briefing Paper (pp11-13)

⁷ [2014] ACCER *Working Australia, 2014: wages, families and poverty*

⁸ [2014] Lawrence B, *Wage justice and the challenge of globalisation :a Catholic perspective*, Geshar journal, The Council of Christians and Jews Victoria Inc

⁹ [2014] ACCER *After a century the minimum wage system abandons families* , Briefing Paper (p 51)

one full time worker, 13.5% a part time worker and 5.9% were unemployed (ACOSS 2012).¹⁰ Evidence that low paid workers and their children are living in poverty was accepted by the FWC in its 2013 decision '*Low-paid employment appears to contribute more to the total numbers in poverty than does unemployment*'.¹¹

The Catholic Church supports the proper assessment of the impact of taxes and welfare support payments in determining a fair safety net. However despite the large increases in family payments over past decades, the fall in minimum wages relative to AWOTE experienced by the low paid has not been matched by increases in family and tax transfers. Even with the addition of social security measures, safety net wages are increasingly inadequate for a worker with family dependents. Future changes to tighten the social security safety net, such as those proposed but not yet enacted in the 2014-2015 Budget, will further affect the adequacy of minimum wages.

Of further concern is that in its 2014 Annual Wage Review decision the FWC decided that the '*appropriate reference household for the purposes of setting minimum wages is the single person household*'.¹² This is the first time that the minimum wage has been set on a basis appropriate for a single worker with no dependents and excludes from consideration the needs of workers with family responsibilities. It is of particular concern that existing safety net wages already inadequate for families are now determined to be suitable for a single worker. A safety net designed for single workers cannot be a safety net for a worker with family responsibilities, whether sole parents or partnered.

In ACCER's view, this approach will only entrench further disadvantage and undermine family life for low paid working families. ACCER has given notice to the FWC that it will challenge the 'single worker' decision in the 2015 Annual Wage Review.¹³

Abolition or reduction of minimum wages is not supported

In light of the inadequacy of the existing safety net for the reasons outlined above, the removal or reduction of minimum wages cannot be supported. To the contrary, the NMW and lower safety net pay rates should be increased to meet the needs of the low paid and remain relevant in a contemporary social context.

In our view, labour market flexibility does not require the reduction of wages and other basic conditions of employment. A labour market policy that reduces wages and other basic conditions of employment would impose the burden of economic adjustment on low paid and vulnerable workers.

While measures to promote greater employment are of critical importance, CCER rejects the notion that wage levels should be reduced to maintain global competitiveness or job opportunities. Other strategies are required to increase productivity such as skill development and targeted support to assist the unemployed. As the Australian Bishops' Committee for Industrial Affairs has said:

Every family has the right to sufficient income through work. Workers have the right to just minimum wages and to just and safe working conditions. ... The provision of more work

¹⁰ [2012] Australian Council of Social Services, *Poverty in Australia* ACOSS Paper 194 [page 24]

¹¹ [2013] FWC 4000 *Annual Wage Review 2012-13*, paragraph [408]

¹² [2014] FWC 3500 *Annual Wage Review 2013-14*, paragraphs [38], [365] and [373]

¹³ [2014] ACCER *After a century the minimum wage system abandons families*

*opportunities does not, however, by itself justify reducing below a just level, the wages of those already in jobs.*¹⁴

There is no evidence that reducing wages would improve productivity. In fact, there have been substantial increases in labour productivity since 2000 illustrated by increases in the *ABS Index of Gross Domestic Product* per hour worked of 20.1% over the 13 years to December 2013 (Lawrence 2014).¹⁵ Further, the recent *Australian Workplace Relations Study* (AWRS) data compiled from employer responses shows that 85% believe that workforce productivity is either the same as the previous financial year (2012-2013) or higher.¹⁶

In our view, there is an important and real need for the continuing role of the NMW and minimum wages as the floor for pay rates. A cut in real wages of low paid workers would cause a fall in the living standards of safety net-dependent workers and their families and others who have their wages linked in some way to safety net rates. Many of these workers and their families are already living in poverty and do not have a decent standard of living.

Wage justice and fair employment are not just about productivity but are critical measures of a society's commitment to providing work and decent incomes, alleviating poverty, promoting social inclusion and protecting those who are disadvantaged.

Safety net no impediment to productivity and cooperative workplace relations

In addition to the wages safety net, CCER supports the safety net of minimum terms and conditions provided for in the National Employment Standards (NES) and modern awards. We recognise that minor modifications may be appropriate to clarify some aspects of the NES and are supportive of the four-yearly process to review modern awards.

Typically, awards include requirements for meal breaks, rest periods, minimum breaks between shifts, restrictions on excessive overtime and the like. They may be seen by some as impediments to productivity gains, but they are, in CCER's view, fair protections of the welfare and, sometimes, the health and safety of workers. They are not onerous, provide sufficient rest for workers and assist productivity.

In CCER's view, poor health and safety arrangements may be an impediment to productivity levels. Award provisions designed to improve the work/life balance and family friendly provisions may prevent an employer from directing its workers in the way that it would prefer. However, the removal of these kinds of award protections would have a detrimental effect on many of those workers with little or no bargaining power without any corresponding increases in productivity, efficiency, or employee satisfaction.

Following the detailed award modernisation process, award provisions are tailored to meet the needs of particular industries, occupations or enterprises and should not be reduced to a 'one size fits all' approach'. In CCER's view, awards should remain an important safety net and effective floor for collective bargaining. As well as protecting the rights of employees, awards provide certainty for employers in determining what conditions to apply as well as a 'level playing field' for organisations competing in the same industries.

¹⁴ [1993] Australian Bishops' Committee for Industrial Affairs, *Industrial Relations – The Guiding Principles* (p 2)

¹⁵ [2014] Lawrence, B *Working Australia 2014: wages, family and poverty* ACCER (p44)

¹⁶ [2015] AWRS, *First Findings Report*, Fair Work Commission

For example, health care and social services is one of the five industries that accounts for the highest proportion of award-reliant employees in the ABS EEH 2012 survey.¹⁷ The high degree of award reliance among CCER members in social services enables those employers competing for government contracts to focus on the quality of service delivery and their relationships with clients, rather than on reducing labour costs by cutting wages and conditions. Competition based on reduction of award standards is not an issue of productivity or efficiency, but one of costs in which workers' standard of living is at risk.

Key reasons for award usage was canvassed in the *Award Reliance Survey* commissioned by the FWC, which found the main reasons cited by employers for paying exactly the award rates of pay was because they felt awards provided fair and appropriate remuneration, were a good indicator of the 'going rate', and were affordable. Not wanting to pay more, simplicity and certainty, and common industry practice were also key reasons. The survey also found that awards are used for the basis of setting pay rates for other employees, not just those on minimum rates including by non award-reliant organisations.¹⁸

The relationship between minimum rates of pay and over-award/agreement rates of pay is explored in further research, which identified a positive association between award and agreement increases in certain industries. The research found '*awards can shape the wage determination process and wage outcomes*' and particularly in parts of the labour market paying below median wages.¹⁹

Among enterprises that only used awards to set pay for their employees, almost half (47%) indicated that they did not have an enterprise agreement in place because award rates and conditions were adequate. This was also the most commonly cited reason for enterprises with a mix of award and individual arrangements (33%).²⁰

Awards remain relevant and play an important role in guiding pay and conditions for a large number of employers and employees including those who do not rely on awards to determine their exact rates of pay.

The four-yearly Modern Award Review process provides the flexibility to ensure that awards are responsive to the changes in the economy and keep pace with community standards of what constitutes a fair minimum safety net and provides a transparent process that enables the relevant parties to make submissions on the operation of individual awards.

The FWC will also examine seven common issues affecting all awards through a separate hearing and review process, including annual leave (such as cashing out); casual employment, part time employment (issues such as minimum engagement and rostering); and flexibility (issues such as time off in lieu of overtime).

The goal of increased productivity is not mutually exclusive with ensuring equity in the workplace. In CCER's view, equity will enhance a productive workplace culture where fair treatment leads to greater employee satisfaction and more cooperative workplace relations.

¹⁷ [2012] ABS, *Employee Earnings and Hours, Australia, May 2012* Catalogue no. 6306.0

¹⁸ [2013] Workplace Research Centre, USYD Business School, *Award Reliance*, Commissioned by FWC

¹⁹ [2013] Workplace Research Centre, USYD Business School, *Minimum wages and their role in the process and incentives to bargain*, Commissioned by FWC

²⁰ [2015] Fair Work Commission, *Australian Workplace Relations Study (AWRS)*

Working unsociable hours

No evidence removing penalty rates increases employment

The Catholic Church has rejected previous legislative and other attempts to abolish penalty rates due to concerns about the negative impact on the incomes of low paid, vulnerable workers and the detrimental impact of unsocial working hours on rest, recreation, and family time.

As the Productivity Commission issues paper notes, the stated rationale for changing penalty rates relies on the proposition that the concept of compensating employees by paying 'premium' rates for hours worked outside the standard Monday to Friday working week is outdated due to transition to a 24/7 economy, changing social norms and claims that weekends are no longer special days for rest, family and social time or religious observance.²¹

It is also claimed that penalty rates inhibit employers from engaging more employees on weekend shifts, or even operating their businesses at all, and their reduction would promote greater workplace participation, social inclusion and productivity.

It is the Church's view that the evidence does not support a case for change. There is no evidence or economic analysis that a reduction in penalty rates would increase employment and business turnover. This was apparent in the significant evidentiary gap identified by the FWC in the *2013 Transitional Review Penalty Rates Decision* in rejecting applications to reduce penalty in awards covering retail, fast food, food and beverage manufacturing, hair and beauty and hospitality workers. The FWC said:

*There is a significant 'evidentiary gap' in the cases put. It is particularly telling that there is no reliable evidence regarding the impact of the differing Sunday (or other) penalties when applied upon actual employer behaviour and practice..... There is also no reliable evidence about the impact of the existing differential Saturday and Sunday penalties upon employment patterns, operational decisions and business performance.*²²

The fact that some industries operate 24/7 should not disentitle workers to penalty rates for the working of unsocial hours. Penalty payments are paid for work in unsocial hours in seven day a week industries, such as health, aged care, policing, emergency services and private security. The fact that certain industries such as retail are changing due to consumer expectations does not support a claim that penalty rates should be reduced or removed.

Minimum wage earners will be disproportionately affected by reductions

CCER is concerned about the impact that any reductions in penalty rates would have on minimum wage earners and their families in light of evidence that while evening or weekend work provides flexibility for some workers, for a disproportionate number of employees working non-standard hours in precarious and low paid jobs, penalty rates help to protect their living standards.

In evidence provided to the 2012 Senate inquiry into a Bill to exempt restaurant and catering and retail businesses from paying penalty rates, the Department of Education, Employment

²¹ [2015] Productivity Commission Issues Paper 2 *Workplace Relations Framework: Safety Nets* [page 14]

²² [2013] FWCFB 1635 *Transitional Review Penalty Rates Decision* [para 234]

and Workplace Relations submitted the average casual non-managerial employee would lose income of \$58 (11%) a week in restaurants, \$47 (9%) in hospitality, \$37 (6%) in fast food and \$29 (6%) in retail, affecting some 200,000 typically award reliant and low paid employees.²³

Penalty rates are an inherent part of the existing award safety net, and any *'loss of penalty rates would have a major and often devastating impact on many low paid workers and their families. This will compound the situation where the National Minimum Wage and other award rates provide only poverty wages. Workers who rely on penalty rates to help make ends meet would be left without any compensation.'* Any reduction or removal of penalty rates will disproportionately affect low paid workers and their families who may need to work additional hours to receive the same income. This is unfair.²⁴

The choice to work unsocial hours is largely driven by the financial incentive of penalty rates with women, workers with combined household incomes below \$30,000 and rural and regional employees most financially vulnerable to their removal. The same research also indicates a large number of employees would stop working unsociable hours if penalties were removed.²⁵

Unsociable hours negatively affect family life and leisure

Weekend work has nearly trebled over the past 20 years, from 12 per cent of workers in 1993 to roughly a third today with 30% of single job holders and 60% of multiple job holders working weekdays and weekends.²⁶

Research indicates that compared to work at other unsociable times including night and evening shifts, weekend employment is associated with the most interference on family activities.²⁷ This interference encompasses family and leisure activities, because weekends are when most sports and recreation activities, church gatherings and civic and social events take place.

These events are important for rest, recuperation, and cementing social ties, which have positive effects on workers' health, well-being, and social inclusion. In particular, research suggests that shared leisure time is key to positive relationships and good family functioning with couples' shared leisure time important for marriage quality.²⁸ Weekends are the main opportunity to spend family time with children with Sunday retaining a special status as a day preserved for family.²⁹

Contemporary research provides further evidence of the cost of weekend work on family and leisure time. A 2014 University of New South Wales study found that weekend work is

²³ [2012] Department of Education, Employment and Workplace Relations Submission, *Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into Fair Work Amendment (Small Business –Penalty Rates Exemption) Bill 2012* [page 11]

²⁴ [2012] ACCER submission *Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into Fair Work Amendment (Small Business –Penalty Rates Exemption) Bill 2012* [page 15]

²⁵ [2014] Daly T, *Evenings, nights and weekends: working unsocial hours and penalty rates* Centre for Work + Life University of South Australia

²⁶ [2012] Australian Bureau of Statistics 6342.0 - *Working Time Arrangements, Australia*, November

²⁷ [2011] Martin, J. E., Wittmer, J. L.-S., & Lelchook, A. M, *Attitudes towards days worked where Sundays are scheduled*. Human Relations [pp 64, 901–926]

²⁸ [2007] Shepanski, P., & Diamond, M. *An unexpected tragedy: Evidence for the connection between working patterns and family breakdown in Australia* Sydney: Relationships Forum Australia

²⁹ [2005] Bittman, M, *Sunday working and family time* Labour & Industry [pp16, 59–83]

disruptive to leisure time spent with family and friends, with particular impacts on parents who work on Sundays losing time with their spouse and children. In most cases workers do not recoup this loss of prized weekend time at other times of the week.³⁰

CCER recognises that for some workers, such as students or carers, unsociable hours are convenient and desirable. The FWC also accepted in the Restaurant Award decision that for many of these workers, weekends will frequently be the time that they are available to and want to work.

However, in the same decision the FWC also recognised the particular impact of working on Sunday. The FWC rejected the general proposition that the level of disability for working on Sundays is no higher than that for Saturdays stating, *'The position has not changed since a Full Bench of the Australian Industrial Relations Commission considered this issue in 2003. Working on Sundays involves a loss of a day of family time and personal interaction upon which special emphasis is placed by Australian society'*.³¹

Loss of family time is of particular concern to the Church as identified by the Australian Catholic Bishops Conference:

*Time together as a family – for mutual care and relaxation – should be regarded as a right. Pope Benedict XVI refers to this right as the 'raw material' of life, which is essential for the loving attention of children, but which for many people seems ever more scarce and barely enough to meet individual needs. The demands of work have increased and placed real pressures on family time.*³²

Despite, or because of, the 24/7 economy, we live in a community and while the notion of the Sabbath may have lost currency in a secular world, there is a continued need for a day of rest, to play, to socialise, to worship.

It is CCER's view that a penalty should continue to be paid for the family time that is sacrificed by those workers who work at night or on weekends. While penalty rates cannot remedy the negative impacts of working unsociable hours, they can provide fair and just compensation for some of the detriment.

Support for regulating penalty rates on a case-by-case basis

Support for penalty rates is consistent with CCER's support for the explicit protection in the regulatory framework in section 134 (da) of the FW Act which requires the FWC to ensure that modern awards, together with National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions and take into account:

the need to provide additional remuneration for:

- (i) employees working overtime; or*
- (ii) employees working unsocial, irregular or unpredictable hours; or*
- (iii) employees working on weekends or public holidays; or*
- (iv) employees working shifts;*

³⁰ [2014] Craig, L *Weekend Work and Leisure Time With Family and Friends: Who Misses Out?* University of New South Wales, Social Policy Research Centre, Journal of Marriage and Family

³¹ [2014] FWBFB 1996 *Restaurant Industry Award - Appeal against decision* [2013] FWC 7840, para 154

³² [2012] Australian Catholic Bishops Conference *Social Justice Statement 2012 – 2013: The Gift of Family in Difficult Times*, page 4

This requirement ‘recognises the need to fairly compensate employees who work long, irregular, unsocial hours, or hours that could reasonably be expected to impact their work/life balance and enjoyment of life outside of work.’³³

CCER accepts, of course, that a wide range of work in unsocial hours is, and will continue to be, necessary to meet the community's economic and social needs. However, in our view, previous decisions and current deliberations by the FWC demonstrate that existing industrial mechanisms provide sufficient flexibility to respond to changes in the business environment without prejudicing the right to compensation for the impact of working unsociable hours.

Changes to industry working patterns over recent decades have resulted in changes in some awards to the ‘spread of ordinary hours’ clauses, which are the clauses that regulate the employer's ability to roster an employee for his or her ordinary time, for example in the *General Retail Industry Award 2010* to reflect substantial changes in shop trading hours.³⁴

The FWC has used its existing powers to consider penalty rates on an industry case-by-case basis evident in the decision to reduce the Sunday loading payable to certain casual employees under the *Restaurant Industry Award 2010*. The FWC accepted that the evidence filed demonstrated the special and peculiar characteristics of the industry's ‘transient and lower-skilled casual workforce’ meant that the Sunday penalty rate is higher than is required to attract them for work on that day.³⁵

The forthcoming Award Review penalty rates case will allow for an evidence-based approach to determining rates that provides for the involvement of the parties directly affected. A specially constituted full bench will hear the evidence of almost 200 witnesses over more than 100 hearing days concerning the impact of penalty rates in nine awards covering hospitality and retail employees.³⁶

Just as a ‘one-size fits all’ legislative approach to determine applicable rates is neither necessary nor desirable, nor is an approach that permits rates to be set by individual enterprises and determined by the market. The experience of Work Choices has shown that often individual employees, particularly the low-paid, have no real bargaining power to negotiate pay and conditions. The setting of payments for the evident disabilities associated with working unsociable hours should continue to be the function of the industrial arbitrator. In CCER's view, workers should continue to be compensated for the negative effects of working unsociable hours.

³³ [2013], Fair Work Amendment Bill Revised Explanatory Memorandum

³⁴ [2012] ACCER submission Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into Fair Work Amendment (Small Business –Penalty Rates Exemption) Bill 2012, page 8

³⁵ [2014] FWBFB 1996 Restaurant Industry Award – Appeal against decision [2013] FWC 7840

³⁶ [2014] FWC 9175 Statement – 4 yearly review of modern awards – Penalty rates (17 December 2014)

PART TWO

CONCERNS WITH PRESCRIPTIVE PROCEDURAL REQUIREMENTS FOR AGREEMENT MAKING

Support for enterprise bargaining

CCER is actively involved in the enterprise bargaining regime under the FW Act as a bargaining representative for employers, particularly in Catholic education in NSW and the ACT. We also regularly provide our members with advice and advocacy in matters connected with enterprise agreement making and compliance.

Consistent with Catholic social teaching, CCER supports the concept and purpose of the enterprise bargaining provisions of the FW Act. In our view, enterprise bargaining is consistent with the universal right to freedom of association and the right of employees to collectively bargain in relation to the terms and conditions of their employment, underpinned by the safety net, as discussed earlier in this submission. CCER also expresses our broad view that, despite difficulties from time to time when engaged in robust bargaining with unions on behalf of our members, we believe the good faith bargaining requirements as prescribed by s 228 of the FW Act are balanced and workable. In our experience, matters where parties seek redress by way of bargaining orders for conduct alleged to breach the good faith bargaining requirements are rare.

While agreeing with the principle of enterprise bargaining, CCER believes the compliance requirements associated with agreement making under the FW Act are too prescriptive and in some cases are onerous for employers. This compliance burden is more acutely felt in the context of bargaining involving large numbers of employers (either pursuant to a multi-enterprise agreement or single-enterprise agreement underpinned by a single interest employer authorisation).

Broadly, CCER would encourage the Productivity Commission to examine whether any of the existing compliance and administrative requirements associated with agreement making can be reduced or made less burdensome. Such changes in this area would be consistent with the objects expressed in s 171 of the FW Act, that among other things, the enterprise bargaining regime ensures a simple, flexible and fair framework, promotes productivity and that applications for approval are dealt with without delay.

Notice of employee representational rights

Rather than make an exhaustive submission commenting on all of the compliance aspects of agreement making, CCER wishes to limit this submission to the significant (albeit narrow) issue of the affects of the prescriptive requirements of s 174(1A) of the FW Act. This provision concerns the content and form of the notice of employee representational rights ('NoERR'), which must be issued in the form prescribed by the *Fair Work Regulations* within 14 days after the employer initiates or agrees to commence bargaining for an enterprise agreement (ss 173(3)).

s 174: Notice requirements

(1A) The notice must:

- (a) contain the content prescribed by the regulations; and
- (b) not contain any other content; and
- (c) be in the form prescribed by the regulations.

(1B) When prescribing the content of the notice for the purposes of paragraph (1A)(a), the regulations must ensure that the notice complies with this section. (emphasis added)

We understand the intent of ss 174(1A), introduced in the *Fair Work Amendment Act 2012*, was in response to evidence of employers unacceptably modifying the content and form of the notices, resulting in employees being misinformed of their representational rights or associated processes: *Peabody Moorvale Pty Ltd*³⁷ ('Peabody') referring to Recommendation 19 of the '*Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*' ('the Review Report').

Lack of FWC discretion

While the intent to ensure employees are not uninformed or misrepresented is acknowledged, the problem identified through direct experience and from the case law on this point is that now the FWC has no discretion at all but to dismiss an application for approval of an enterprise agreement where it finds any defect with the NoERR, irrespective of how trivial, innocent or inconsequential the defect(s) may be.

This lack of discretion was confirmed by the Full Bench in *Peabody*:

[18] Subsection 174(1A) uses language in mandatory form and goes to some length to make it clear that there can be no departure from the content or form of the Notice prescribed in the Regulations. As mentioned earlier, s.174(1A) provides that a Notice must contain the prescribed content, must not contain any other content and must be in the form prescribed.

...

[46] In our view s.174(1A) is clear and unambiguous. There is simply no capacity to depart from the form and content of the notice template provided in the Regulations. A failure to comply with these provisions goes to invalidity.

Unlike the situation with other concerns the FWC may have with an application for approval of an enterprise agreement, where problems or defects can be remedied by way of undertakings, there is no such flexibility afforded to the FWC regarding the resolution of defects in the NoERR.

In a case in which CCER was the applicant, Commissioner McKenna in *Catholic Commission for Employment Relations through its Executive Director Anthony Farley*³⁸ ('CCER') highlighted the FWC's inability under the legislation to take into account the merits of a defect in a particular case. Also considered in this judgement was the affect of the increased level of prescription as a result of the amendments to s 174(1A) of the FW Act:

³⁷ [2014] FWCFB 2042 at [29]

³⁸ [2013] FWC 8686

[10] *Despite the submissions for the applicant, I would not accept that s.586 of the Act, dealing with correcting and amending any application or other document relating to a matter before the Commission, would be available to address the issues concerning the notices.*

[11] *The Act does not appear to allow discretion concerning the form and content of a notice of representational rights, given the word “must” in relation to the matters specified in subsections (a)-(c) of s.174(1A). If it seemed the Act allowed discretion in relation to the matter, I would exercise it; that is, the departure in the content of the notices of representational rights from the prescribed form might be considered to be something akin to a misnomer of no real consequence, rather than anything that, in a practical sense, alters the advice to employees of their rights in such respects.*

CCER’s concern on behalf of our members is that it is not efficient, productive or indeed fair on any of the parties, nor is it sound public policy, if an application to approve an enterprise agreement is dismissed only by reason of a trivial administrative defect with the NoERR, despite the time and resources invested, and of the benefits that flow as a result of, the following:

- The parties have concluded (often robust and/or lengthy) negotiations and in the majority of cases, all parties support the agreement reached;
- The concluded bargain results in employees being better off overall than they would otherwise be under any applicable modern award, or in the absence of renewal of a nominally expired agreement;
- The employer invests time and resources in arranging for, and facilitating, a consultation process for employees to be covered by the proposed agreement which complies with ss 180(5);
- The employer complies with its obligations in relation to circulation of the agreement and providing for the access period in accordance with ss 180(2)-(3);
- The employer arranges and pays for an independent organisation to conduct an electronic or paper based ballot; and
- The employees to be covered have taken time to participate in the ballot and approve the agreement by majority support.

FWC to exercise discretion on case-by-case basis

CCER believes that the legislation should allow the FWC to consider the merits of each case, and, where the defect in question is a ‘*misnomer of no real consequence*’ as described at [11] in *CCER*, waive the irregularity. Where a defect results in no real or likely adverse affect on any of the parties, and in no way can be said to materially influence or affect the outcome of the negotiations, an agreement should not be dismissed, forcing a new bargaining and voting regime which is onerous on employers, unions and employees.

Furthermore, an onerous compliance standard, easily breached, may offer a perverse incentive for employee bargaining representatives to agitate on a technicality for the dismissal of an agreement (despite the agreement being approved by the majority of employees to be covered).

Concerns from experience and case law

In the *Peabody* case, the Full Bench determined that an otherwise compliant NoERR was invalid because two further documents (those being bargaining representative nomination slips) were attached to the NoERR by a staple when the NoERR was issued to staff. While

the Full Bench confirmed at [84] that ss 174(1A) 'is not to be construed so as to preclude an employer from providing additional material to its employees at the same time as the Notice is given to them', in this case the deciding factor was that the other documents formed part of the NoERR because they were joined by a staple and because the employer disclosed them in the Form F17 Statutory Declaration and referred to them within this application collectively as the notice³⁹. As a consequence, the NoERR contained other content, and it was for that reason (not because of the substance of the additional content) it was held to be invalid:

*As the Notice includes 'other content' it does not comply with s.174(1A) and hence is invalid. The Notice did not appear to comply with the prescribed Notice in a number of other respects, however given our conclusion above it is unnecessary for us to deal with those matters.*⁴⁰

In *CCER*, cited above, the application for approval of an agreement to cover teachers in 12 Catholic independent schools, which was supported by employees and their representatives, was dismissed because a single NoERR at one school:

inadvertently did not include the name of the employer - with the result the notice issued by that particular school read "[Name of employer]" instead of inserting the name of the particular employer, albeit the notice was issued letterhead paper that named the school: at [13]

...

[14] The defect in this notice is seemingly minor in circumstances where, I accept, it would have been reasonably plain from the letterhead paper as to which school was giving notice. Nonetheless, the notice of representational rights issued to the employees of this particular school did not conform to the prescribed form in that it did not include the name of the employer.

In *New Town Toyota Pty Ltd*⁴¹, despite what was said at paragraph [84] of *Peabody* that additional material given at the same time of the NoERR should not be construed as forming part of the NoERR, an accompanying letter was found to form part of the NoERR, and on this basis the application was dismissed. It appears from the reasoning in paragraph [13] that the accompanying letter was said to form part of the NoERR because it was disclosed in the employer's F17 statutory declaration at the time approval was sought:

What was the Notice?

*[13] Both the letter and notice were given to employees at the same time. The content of the letter and the notice were intended to inform employees of their right to appoint a bargaining representative. The Notice was required to be attached to the employer's statutory declaration and in this case both the letter and the notice were attached. I find on the material before me that the combined documents were the Notice and consistent with the decision in *Peabody* because the Notice contains additional information the Notice is invalid and therefore the Agreement cannot be approved.*

In *Diamond Dell Pty Ltd ATF the Kez's Kitchen Trust*⁴², an otherwise compliant NoERR was held to be invalid, because the employer inserted additional material (copied in the extract

³⁹ *Catholic Commission for Employment Relations through its Executive Director Anthony Farley* [2013] FWC 8686 at [72]-[74] and [83].

⁴⁰ *Ibid* at [85].

⁴¹ [2014] FWC 7077.

⁴² [2014] FWC 9374.

below) which appeared to be done in good faith and for the purpose of providing additional information of an administrative nature only. It appears innocuous and in no way capable of misleading the employees to be covered by the proposed agreement. Notwithstanding this, because of the text below the application for approval of the agreement was dismissed:

"I am writing to inform you that Kez's Kitchen seeks to enter into discussions to make a new enterprise agreement with our staff. This is because the current enterprise agreement, Kez's Kitchen & National Union of Workers Enterprise Agreement 2011, will expire on 1 July 2014. We have contacted Dominic Melling of the NUW to advise him of our intention to negotiate a new enterprise agreement.

It is a legal requirement that the company provides you with written notice about your rights in the making of an enterprise agreement (Fair Work Act 2009, subsection 174 (6)). These are outlined in this letter.

...

What happens if the new Agreement isn't made?

*The terms and conditions of the Kez's Kitchen and National Union of Workers Enterprise Agreement 2011 will continue to apply and no employee shall suffer any reduction in their terms of employment.*⁴³

Proposals for consideration

1. Empower the FWC to exercise discretion

That the FW Act should be amended to empower the FWC to take into account the following factors when determining an application for approval of an enterprise agreement in circumstances where defects have been identified in the content and form of the NoERR:

- (a) The severity of the defect(s) - whether or not they are by nature trivial, minor or a misnomer;
- (b) Whether the employer intended to avoid their obligations under the FW Act, or to withhold or vary prescribed information concerning representational rights for employees to be covered by the proposed agreement. Alternatively, this could be phrased in a positive question, for example, did the employer act in good faith?
- (c) Whether the defect resulted in the employees being misled about their representational rights in any material sense
- (d) Whether or not the defect(s) had a real or likely adverse impact on the parties or adversely influenced the conduct or outcome of bargaining.

2. Effective use of IT to inform employees of NoERR

CCER does not advocate for the removal of any standard mechanism for accurately informing employees of their representational rights, and acknowledges the importance of a well informed workforce able to understand and make decisions with respect to their lawful rights, particularly on important issues such as enterprise bargaining. The Productivity Commission may however, consider more effective and contemporary ways of informing employees of their representational rights, possibly through better use of technology, rather than paper based forms.

⁴³ *Diamond Dell Pty Ltd ATF the Kez's Kitchen Trust* [2014] FWC 9374 at 4.

PART THREE

MANAGING INDIVIDUAL DISPUTES TO MAINTAIN THE EMPLOYMENT RELATIONSHIP

Individual workplace disputes

The industrial relations landscape has gradually shifted from a focus on the resolution of collective disputes to an increased focus on managing individual disputes. Over time the workplace relations legislative framework has been amended to codify general protections that protect workers from adverse action taken for unlawful reasons such as discrimination, coercion, victimisation or because they exercised a workplace right. This codification of protections for individual workers was increased by new FW Act provisions for the anti-bullying jurisdiction, which commenced in January 2014.

Consistent with the principles of equity and natural justice, CCER strongly supports a jurisdiction and framework that allows for employers and employees to make complaints to the FWC and seek redress from bullying, discrimination, victimisation and other unlawful adverse action. Such behaviours are unacceptable, detrimental to individuals and the wider workforce and hurt workplace productivity and performance.

However, CCER is concerned that, introducing a third party arbitrator in a workplace dispute between individuals prematurely, escalates tensions, causing positions to become entrenched, parties to become more polarised, and it becomes increasingly difficult to salvage the working relationship.

Further, we note concerns expressed by some employers that bullying claims remain ‘a *strategic lever*’ for employees to pursue various agendas including workplace change or to extract ‘*advantageous exit packages*’.⁴⁴ Alternatively, claims may be made to frustrate performance management processes or to support claims for workers compensation.⁴⁵

Because an application can be made by a current employee, the FWC is potentially drawn into a negotiation around how to repair or improve an employment relationship, and not simply about the terms on which that relationship might be severed (MacDermott and Riley 2012).⁴⁶

Given this, CCER makes some observations about the process of making and responding to individual non-dismissal complaints to the FWC, the complaints handling process of the FWC, and suggests some alternative options that could be further examined by the Productivity Commission, with the aim to ensure adequate measures have been sufficiently explored at the local level prior to a third party arbitrator becoming involved. Our focus is to achieve more positive, productive, efficient and fair outcomes for the parties involved in general protections (non-dismissal) and bullying claims, in light of and to protect, the ongoing employment relationship.

⁴⁴ [2015] <http://www.herbertsmithfreehills.com/insights/legal-briefings/looking-forward-key-workplace-relations-issues-in-2015>

⁴⁵ [2015] Kelly, J *Bullying umpire sits idle*, The Australian, 25 February 2015

⁴⁶ [2012] MacDermott T & Riley J, *ADR and industrial tribunals: innovations and challenges in resolving individual workplace grievances*, Monash University Law Review [Vol 38, no 2]

Number of non-dismissal disputes increasing

Under s 372 of the FW Act, an employee may make an application to the FWC to deal with a non-dismissal dispute where a breach of the general protections is alleged.

Under s 789FC of the FW Act, a worker who reasonably believes that he or she has been bullied at work may apply to the FWC for an order.

There are an increasing number of individual (non-dismissal) disputes lodged with the FWC:

- 779 general protections (non-dismissal contraventions) claims were made in 2013-2014. This is a significant 40% increase on the number of claims lodged the previous year (555 applications in 2012-2013);
- 701 applications were filed in the first 12 months of the anti-bullying jurisdiction in 2014, with a gradual increase in the number filed each month.⁴⁷

Both adverse action (non-dismissal) and bullying disputes lodged by employees occur while the employment relationship remains on foot as there is no jurisdiction for the FWC to deal with such claims if the employment relationship is terminated under either Chapter 3, Part 3-1, Division 8, Subdivision B (Other contraventions) or Part 6-4B (Workers bullied at work) although of course there are other jurisdictions under the FW Act.

General protections (non-dismissal) process

An application is made by the filing of Form F8C. The employer is given a copy of the application and 7 days to respond using the Form F8A.

The FWC deals with general protections (non-dismissal) applications by private conference in the first instance, but only if all the parties to the dispute agree to participate (s 374). CCER understands that these conferences are held by FWC members and not the specialist mediators that manage unfair dismissal matters. If disputes are not resolved in this process they can only be determined by the Federal Circuit Court or Federal Court if the applicant wishes to pursue the claim.

While it is open to a respondent not to agree to participate in a conference for a non-dismissal dispute, in CCER's experience our members will invariably agree to participate. Early resolution of the dispute is particularly important in light of the need to manage or repair the ongoing employment relationship before the relationship breaks down. The alternative prospect of delayed and expensive court proceedings is unlikely to enhance or even maintain a workable relationship in the interim.

A general protections (non-dismissal) application (and others) can be dismissed by the FWC if not made in accordance with the Act, or is frivolous, vexatious, or not likely to succeed (ss 587 (1)). After a conference, the FWC must advise the parties if they believe that the dispute would not have reasonable prospects of success if pursued in court (s 375).

⁴⁷ [2014] Fair Work Commission, *Delivering Public Value*, Annual Report 2013 – 14

Bullying claims process

An application is made by the filing of Form F72. The employer is given a copy of the application and 7 days to respond using the Form F73 as is any person named in the complaint using the Form F74.

The FWC must start dealing with a bullying claim within 14 days of lodgement. The FWC anti-bullying case management team 'triage' applications. The FWC will usually contact parties within 24 hours of the claim's lodgement and prioritise and assess whether a matter should be dealt with by a FWC member or referred to a qualified FWC mediator for phone mediation.

In most cases, matters have been referred to a FWC member and informal conferences conducted with the aim to '*stabilise the relationships and make future arrangements*'.⁴⁸

The FWC can refer the matter to the relevant workplace health and safety (WHS) regulator if appropriate,⁴⁹ although there is no data as to whether this has occurred in the matters dealt with to date. Where the circumstances indicate a significant risk, a FWC member may also hold a preliminary conference or urgent hearing for interim orders that the bullying stop.

Orders can only be made to prevent further bullying where the FWC is satisfied that bullying has occurred and where there is a risk that bullying behaviour could continue. While orders made in a successful claim cannot include a pecuniary amount, CCER is aware that some bullying matters have been settled by payment of monetary compensation.

Outcomes of the current process/approach

While CCER is supportive of the FWC's focus to resolve the matters in dispute and enable normal working relationships to continue, it is not clear that the process currently supports the maintenance of those relationships.

Bullying

CCER notes that in the first 12 months of 2014, of the total 527 bullying matters finalised, a significant number of applications were either withdrawn early in the FWC case management process (149) or prior to proceedings (90). In its Annual and Quarterly Reports, the FWC notes that this includes matters withdrawn prior to any FWC conference or mediation and includes matters where the applicant was satisfied with the response provided by the employer/respondent.

52 matters were mediated by qualified FWC mediators. Further, of the 56 bullying matters heard and determined by FWC members in 2014, 55 were dismissed and only one order was granted. Seven of those matters were dismissed because bullying at work was not found and 44 of those matters were dismissed under s 587, which provides for the FWC to dismiss applications not made in accordance with the FW Act, that are frivolous or vexatious, or where there are no reasonable prospects of success.

While it is early days in this jurisdiction and difficult to predict trends, these outcomes would appear to indicate that the matters in dispute in many of these claims were not because of

⁴⁸ Ibid [pp72-3]

⁴⁹ [2013] Revised Explanatory Memorandum, *Fair Work Amendment Bill* [117]

bullying behaviour (notwithstanding the belief may have been genuinely held by employees about their treatment). Rather they were claims arising from a workplace grievance such as an objection by an employee to being performance managed, a dispute about contractual entitlements, or interpersonal conflict between colleagues.

While obvious jurisdictional problems are identified by the FWC at the initial ‘triage’ and information gathering stage, this process does not deter the FWC’s ongoing management of claims that do not meet the definition of bullying, for example, claims that may be about a dysfunctional workplace relationship or conflict between parties.

CCER’s experience in the bullying jurisdiction is the current process is lengthy, resource intensive, and adversarial. In short, on current experience we do not think it serves its objective of maintaining the employment relationship, if anything it does the opposite. Notwithstanding the 14-day timeframe for the FWC to start dealing with a claim, anecdotally in CCER’s experience, timeframes for the matter to be listed for conciliation and if necessary hearing, are still moderately lengthy. Given this, we believe a more collaborative and less adversarial process (through other forms of alternative dispute resolution) may achieve better outcomes for all involved. It may also promote quicker resolution of matters.

General protections (non-dismissal) matters

There is limited data available about the outcomes of applications made under s 372, as these matters are not disaggregated from FWC’s data about dispute resolution matters more generally.

The median time from lodgement of general protections (non-dismissal) matters to the first conference held by FWC is 26 days for 50% of matters and 50 days for 90% of matters.⁵⁰

While not a criticism of the FWC’s handling of these types of matters, we observe that this is a relatively lengthy period between the applicant making the complaint and the conciliation of the matter by the FWC with the parties (where participation in a conference is agreed). This time lapse may further agitate the dispute compared to earlier opportunities.

In CCER’s view, some of these matters may well have resolved at the workplace level had the parties been required or encouraged to resolve the dispute locally in the first instance, potentially saving the employment relationship and saving FWC time and resources.

Currently no obligation to attempt to resolve disputes at local level first

Currently there is no obligation on a person making a bullying or general protections (non-dismissal) application to have raised or attempted to resolve the dispute at the workplace level in the first instance.

Bullying

Section 789FF of the Act requires the FWC, when making an order to stop bullying, to take into account any known outcomes of investigations into the matter (whether complete or not), or if there are any internal grievance procedures available to the worker to resolve a dispute or complaint. This approach is to enable the FWC to seek to ensure consistency with

⁵⁰ [2014] Fair Work Commission, *Delivering Public Value*, Annual Report 2013 – 14 [p37]

any action being taken by other bodies such as WHS regulators (although arguably there may be some overlap or duplication between jurisdictions, see below).

However, the FW Act does not require a worker to attempt to resolve the matter through an internal grievance procedure before lodging an anti-bullying claim. This lack of preliminary requirement was recently confirmed in a FWC decision by Commissioner Hampton:

*In terms of the timing of the AB application, there is no requirement under the FW Act that a complaint or allegation of bullying be made at the workplace prior to lodging the application. Although in many cases that course of action would be well advised, the fact that this has not occurred is only relevant at the point when the Commission considers whether an Order should be made. This arises under s.789FF (2) (b), and potentially s.789FF (2) (c) and (d), of the FW Act.*⁵¹

This lack of onus on a worker to raise a WHS concern or risk with the person conducting a business or undertaking (PCBU) appears inconsistent with the legal obligations of workers under WHS legislation, such as, complying with reasonable instructions to allow the PCBU to comply with the Act or cooperating with any reasonable policy or procedure of the PCBU relating to health or safety at the workplace that has been notified to workers.

General protections (non-dismissal) matters

Similarly, there is no provision in the FW Act that requires an applicant making a s 372 claim to have raised or attempted to resolve the issue at the workplace level in the first instance.

Model dispute resolution clauses

A requirement to raise and attempt to resolve a dispute at the local level is comparable with model dispute resolution clause requirements in awards and enterprise agreements. The FW Act requires every modern award to contain a dispute resolution term that provides a procedure for settling disputes about award or NES matters (s 146).

Generally, the clause provides for a process where in the first instance, the parties must attempt to resolve the matter at the workplace by discussions between the employee(s) and the relevant supervisor. Failing resolution, the matter is discussed in a timely manner in discussions with senior management. Where the dispute remains unresolved, the parties may jointly or individually refer the matter to the FWC.

In addition, s 737 provides that the regulations must prescribe a model term for dealing with disputes for enterprise agreements. The model term in Schedule 6.1 of the regulations is similar to the standard award clause.

Adversarial process can exacerbate dispute resolution

Bullying and general protection claims are often accompanied by intense emotional and psychological issues. Often effective resolution will require a focus on feelings and perceptions rather than a focus on fact-finding and litigation, particularly if the aim is to maintain productive employment and workplace relationships.

The FWC process can be confronting for the person(s) named in the complaint as a 'bully' or as having 'broken the law' (by taking unlawful adverse action) from the beginning of the

⁵¹ [2015] FWC 562 P.K. (AB2014/1415)

process, notwithstanding that the respondent's actions may ultimately be found to be lawful and/or reasonable management actions undertaken in a reasonable manner.

Where an employer is served with a formal claim by an employee commencing proceedings in the FWC, their reaction (which may be angry or disappointed) will often be to engage legal representation and commence the 'defence' to the claim rather than to focus on resolving the underlying issues to the dispute and preserving the employment relationship.

Not providing a mechanism for employees to seek to resolve the dispute at the workplace level also removes any onus on the individual to consider their own accountability in resolving the conflict.

Further, to enable the claim to be filed in the FWC, complaints may be 'constructed' by applicants to meet particular legal definitions, such as bullying, or adverse action, which deflects from the underlying workplace conflict.

Generally speaking, where matters go to a hearing the process is highly technical, often lengthy, 'wearing' on parties and creates a perception that getting the matter 'settled' is more important than the quality of the resolution and resolving the real concerns.⁵² This is consistent with CCER's experience in these types of matters conducted by the FWC, where the conciliation conference or hearing is often adversarial between the employer and employee trying to obtain a settlement rather than a round table approach to resolving the underlying conflict.

Litigation is also often focused on each party's '*rights at law*' rather than their mutual interests and cooperation. If the matter goes to hearing the litigation can be protracted, destructive and expensive and the goal becomes about winning not resolution or preserving the relationship.

While it is and should be a legitimate option for employees to lodge a formal complaint to the FWC, this is by its nature an adversarial process that is often not conducive to producing a positive outcome between two employees who have to continue to work together after one has complained about the other one.

Research shows that dealing with alleged bullying or adverse action claims early and informally produces better outcomes in terms of maintaining constructive and viable ongoing workplace relationships.

Mediation and other alternative dispute resolution (ADR) options

ADR includes mediation, conciliation, and assisted negotiation. There is a view that mediation is regarded as better able to deal with disputes involving ongoing relationships than other more adversarial forms of dispute resolution, and is more suitable than the alternatives when the complainant is still and wishes to remain employed.⁵³

CCER notes the research indicates mediation for bullying remains controversial. Some academics and practitioners advise against using mediation for bullying, due to power differences between the bully and their 'target'. However, others argue that mediation can be effective if the power dynamics are successfully addressed by focusing on improving the

⁵² [2009] Levine S, *Getting to Resolution, Turning conflict into Collaboration* [pp66-67]

⁵³ [2009] McLay L, *Workplace bullying: To mediate or not?* ADR Bulletin Vol 11, No 1, Article 1

quality of the relationship between those in dispute and addressing organisational risk factors.⁵⁴

Anecdotal evidence from the FWC however, indicates that for those applications that have been the subject of mediation, bullying behaviour was not occurring. Rather, the conflict was the result of other factors, for example, personality conflicts, clashes in inter-personal styles and organisational issues.⁵⁵

While this may be consistent with a view that bullying complaints should not be mediated, it also reflects the FWC's experience that a large proportion of complaints are not about bullying but about interpersonal conflict or other workplace concerns.

CCER notes that two notable recommendations of the Parliamentary Inquiry that did not receive government support in the enactment of the anti-bullying jurisdiction, included the development of a mediation service trial and an investigation referral service. While CCER recognises that perceived and actual bias, and variation in practice and skills, remain challenges for bullying mediations and investigations, there may be merit in further exploring access to such services.

Another ADR option that may be suited to some instances of workplace conflict is restorative justice conferencing. This is a facilitated, structured process that enables those affected by conflict to engage in a facilitated exchange about what has happened and how they have been affected. *'Participants benefit from the opportunity to say things to each other that they have either avoided saying or have said hurtfully rather than helpfully. The group then decides together what needs to be done to behave constructively towards each other, with the end result being a concrete behavioural agreement that can be implemented'*.⁵⁶

Bullying jurisdiction interaction with WHS regulation

To sustain a claim of bullying, the alleged behaviour must create a risk to health and safety, a causal link must exist between the behaviour and the risk, and the behaviour is a substantial risk factor (s 789FD).

While the jurisdiction is not intended to replace other mechanisms to deal with bullying such as WHS, it appears that inevitably there may be duplication between overlapping jurisdictions that cover risks to WHS.

The role of the WHS Regulator is to assess and investigate bullying complaints in accordance with their own compliance and prosecution policies, which may take into account risks to health and safety, and possible breaches of WHS legislation. WorkCover NSW's approach to dealing with bullying matters is outlined in their *Workplace Bullying Response – Service Standards*. Inspectors may contact a complainant for more information and follow up

⁵⁴ [2013] Jenkins M, *Preventing and Managing Workplace Bullying and Harassment: A Risk Management Approach*

⁵⁵ [2014] Commissioner AL Cribb, *To mediate or not? The Fair Work Commission's new anti-bullying jurisdiction* <http://www.slideshare.net/NationalMediationConference/tuesday-the-verandah-12201240commissioner-anna-lee-cribb>

⁵⁶ Proactive Resolutions <http://proactive-resolutions.com/products/reconcile-differences/>

with the workplace to assess the extent of compliance with WHS obligations.⁵⁷ Action may include issuing prohibition or improvement notices or prosecuting alleged offences.

CCER notes that in enacting the anti-bullying jurisdiction in the FW Act, '*WHS regulators should not perceive individual remedies as a replacement for penalties enforceable under WHS and criminal legislation. The amendments in Schedule 3 are not intended to preclude investigation and prosecutions under WHS and criminal law*'.⁵⁸

However, arguably there is scope for duplication. There may be merit in requiring the WHS regulator to undertake an initial risk assessment for bullying claims before they proceed to be dealt with by an FWC conciliator or FWC member.

Alternatively it may be possible to further tailor the WHS regulatory jurisdiction to provide a quick and cost-effective response or remedy to an individual complaint.

Pre-action requirements

Research into the effectiveness of pre-action schemes and obligations that encourage people to resolve their disputes before filing proceedings with a court or tribunal was undertaken in 2012.⁵⁹

The research shows that pre-action requirements are not intended as a hurdle that prevents people from accessing justice through the tribunal and court system but as a measure to support early and more effective dispute resolution.

The approaches vary between formal arrangements to self-help processes inserted within legislation which requires litigants to lodge a 'genuine steps' statement when commencing certain types of civil proceedings. The research indicates positive findings about the impact of pre-action requirements although it also showed there must be exceptions to any ADR referral or pre-action process. Further, the use of a facilitated process such as ADR or mediation requires qualified participants.

CCER notes that other jurisdictions provide for compulsory dispute resolution prior to filing an application. These alternative approaches may be useful to apply in the employment context, given the highly emotive nature of these disputes and personal and financial investment of the parties involved. For example:

- the *Family Law Act 1975* requires a person to obtain a certificate from a registered family dispute resolution practitioner before an application is filed for an order in relation to parenting arrangements for a child. The certificate will state whether the parties made a genuine effort to resolve their dispute or not. Parties who do not may be referred back from the court to the mediation process and/or be liable for the other party's costs. Exemptions apply in certain circumstances, for example, where there is significant risk of violence or abuse.⁶⁰

⁵⁷ WorkCover NSW <http://www.workcover.nsw.gov.au/health-and-safety/safety-topics-a-z/bullying/workplace-bullying-response-service-standards>

⁵⁸ [2013], Fair Work Amendment Bill Revised Explanatory Memorandum [92]

⁵⁹ [2012] Sourdin, T, *Exploring Civil Pre-action Requirements, Resolving Disputes Outside Courts*, Monash University

⁶⁰ Family Law Courts Australia

<http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Family+Law+Courts+publications/Compulsory+Family+Dispute+Resolution>

- section 40(1A) of the *Privacy Act 1988* disallows the Office of the Privacy Commissioner from investigating a complaint if the complainant did not complain to the respondent prior to making the complaint. This rule may be overridden if the Commissioner considers it inappropriate for the complainant to complain to the respondent.

The Productivity Commission has itself examined the potential for resolving more disputes through alternative dispute resolution without compromising fairness or equity.⁶¹

Proposals for consideration

Given all of the above, CCER suggests the Productivity Commission consider the following proposals:

1. Threshold test – local level resolution

Introduce a threshold test for workplace bullying and general protections (non-dismissal) complaints, requiring the applicant to demonstrate they have taken reasonable steps at the workplace level to resolve their grievance or dispute before lodging their claim with the FWC.

This approach could be implemented by introducing an obligation for applicants to demonstrate they have first discussed the matter in dispute with their supervisor, then with more senior management in a genuine attempt to resolve their dispute before lodging their claim with the FWC. This step may provide an opportunity for employers and employees to de-escalate and resolve disputes in house and in a more timely manner, with the potential to avoid formal claims and potential litigation.

The requirement to attempt to resolve at the workplace level could operate as a jurisdictional objection to the claim being conciliated by the FWC. The obligation could be further strengthened, for example, by including a specific object in the FW Act to encourage employers and employees who are parties to a dispute to seek to resolve it first at the workplace level.

CCER recognises there may be a need for exceptions here, for example, where there is a significant risk to health and safety, although in such circumstances the WHS regulator or the Police may also need to be involved as the conduct may be of a criminal nature.

2. Initial WHS risk assessment for bullying claims by the relevant WHS regulator

Require the WHS regulator to undertake an initial risk assessment for bullying claims before they proceed to be dealt with by a FWC conciliator or FWC member.

All claims could be referred by the FWC case management team to the WHS regulator in the first instance. If the regulator identified any risks to health and safety and/or breaches of WHS legislation by the PCBU, it may undertake further investigation of the complaint, or alternatively refer the matter back to the FWC.

⁶¹ [2014] Productivity Commission, *Access to Justice Arrangements*

3. Introduce ADR processes such as private mediation or restorative justice conferencing

Introduce ADR processes (such as private mediation or restorative justice conferencing) as an option prior to or as an alternative to a FWC conference for a bullying or general protections (non-dismissal) claim.

The parties could choose between referring a matter to a private ADR provider (with outcomes enforceable based on the agreement of the parties to enter into such a process) or to the FWC for assistance. This could be by way of access to a register of accredited workplace relations mediators or a referral service for accredited workplace investigators on rotation.

Parties could retain the right to bring FWC or Court proceedings in relation to a matter that was not settled in the ADR process. This could include a requirement for the mediator to provide a compliance certificate as to whether the parties genuinely tried to resolve the dispute and/or the prospects of success if a claim is progressed.

PART FOUR

IMPROVED RESPONSES TO DISMISSAL APPLICATIONS

Current dismissal outcomes

CCER regularly advises and advocates for Catholic employers in unfair dismissal and general protections claims brought under the FW Act. In accordance with Catholic social teaching, CCER strongly supports a right of redress for genuine unfair dismissal as a fundamental protection at the core of the Australian workplace relations framework.

As the majority of unfair dismissal and general protections claims are resolved through settlement between the parties, and a smaller number by discontinuance, only a small fraction of claims proceed to a formal hearing before the FWC (in the case of unfair dismissals) and to the Federal Circuit Court or Federal Court of Australia (in the case of general protections claims).

According to the *Fair Work Commission Annual Report 2013-14*, of the 14,797 unfair dismissal applications lodged⁶², only 367 (2.5%) were reported as finalised at arbitration (not including administrative dismissals and jurisdictional orders)⁶³. This is consistent with the historically small percentage of claims decided at a substantive arbitration hearing. For example, the *2007-08 Annual Report* of the Australian Industrial Relations Commission, reported just 1% of total lodgements of applications in termination of employment matters were finalised by an arbitrated order.⁶⁴

CCER believes that these statistics may indicate the balance between the interests of applicants and respondents and the objective of a '*fair go all round*' including for employers, as expressed in ss 381(2) of the FW Act (for unfair dismissals), is not being met.

'Go away money'

CCER's experience in representing employers in dismissal matters which vary greatly in terms of complexity, substance and merit, illustrates two consistent themes:

- (1) while the parties are afforded an opportunity to present their cases in writing prior to the conciliation and in relatively brief oral submissions, the substantial focus of the process is to facilitate, and in some circumstances actively and inappropriately encourage '*go away money*' by way of monetary settlement.
- (2) the practice of monetary settlement is in many cases disconnected with the merits of a claim, and is made for purely commercial reasons, notwithstanding the respective merits, or lack thereof, of the case.

CCER acknowledges that monetary settlement plays an important role in the efficient resolution of the bulk of claims, and this substantially reduces the private and public financial and social cost of litigation. Monetary settlement in appropriate cases, particularly where an applicant presents a strong case, or at least a case that has some objective prospects of success on its face value, is often a mutually beneficial result for all parties, including where

⁶² Fair Work Commission, *Annual Report 2013-14*, pp 39.

⁶³ Ibid at pp 42.

⁶⁴ Australian Industrial Relations Commission, *2007-08 Annual Report*, pp 10.

an applicant has lost their job without just cause and is often facing difficult financial and personal circumstances. For these reasons CCER is not opposed in principle to the practice of monetary settlement in cases that fall into the above categories.

The strong concern however, in the interests of fairness and justice for employers, is where monetary settlement is offered for purely commercial reasons, despite the fact the applicant's case as presented is without merit, has no reasonable prospects of success or is vexatious. These are the cases in which the pejorative term '*go-away money*' is apt, and we do not believe this represents fair and just outcomes for employer respondents.

Conciliation process needs change

CCER acknowledges the practical pressures of a high case load, however, in light of the above, we cannot agree with the sentiment and simplicity of the FWC's view in the 2013-14 *Annual Report*, that the '*conciliation process is a major success*':

Conciliation remained a highly effective resolution process for unfair dismissal applications, with a settlement rate of 79 per cent...

*The conciliation process is a major success. Its high resolution rate meant only 3,716 matters were required to proceed past conciliation, with only 8 per cent of matters requiring to be resolved by a decision or order at a conference or hearing.*⁶⁵

CCER submits that the problem of '*go-away money*' in the case of meritless claims is encouraged by a number of factors. A major contributing factor, as referred to above, is the design / format and focus of the conciliation process itself. While the extent and quality of the discourse about the respective merits of a case can differ depending on the conciliator, in many cases we have observed that merits are only referred to in passing, and this is not sufficient to avoid what in effect is a '*free-kick*' at settlement for the applicant.

Contributing to the problem is the lack of substance required by applicants in their applications. In many cases, employers have to respond to limited facts, lack of particulars and vague assertions. In these circumstances there does not appear to be any substantive push by the FWC to require applicants to legitimise their claims.

CCER submits that the high settlement rate of conciliations, while indicative of an efficient system, supports our contention that changes should be made to limit claims that are without merit. Based only on real-life experience and anecdotal accounts (as we understand data on merits are not kept for settled cases), it is reasonable to conclude that of the 79% of total cases settled at conciliation last financial year, a not insignificant proportion were meritless, without reasonable prospects of success, or vexatious. This presents a public policy problem.

Proposals for consideration

CCER has considered two potential solutions to address the public policy problem of '*go-away money*' for applications that are without merit. The problem identified may otherwise be described as a lack of a filter to reduce or eliminate meritless applications.

⁶⁵ Fair Work Commission, *Annual Report 2013-14*, pp 40.

As an opening disclaimer, CCER acknowledges there is no such thing as a perfect system and there are arguments against the proposals below. Where possible, we have briefly highlighted them to assist the public discussion.

One significant impact of both of the proposals outlined below is that by reducing meritless claims, it would allow additional time for the FWC to deal with legitimate applications. Broadly, the Productivity Commission should consider the competing values of a system that is efficient yet geared towards *'go-away money'*, compared to a system that takes longer but is arguably fairer on employers, and that has in place appropriate disincentives for meritless applicants.

A model flow chart has been provided for each of the proposals outlined below.

1. Introduce a preliminary merit based assessment process prior to listing a conciliation

At present, all claims irrespective of merit, are listed for conciliation as matter of course. The avenue for settlement is therefore immediately available.

In this proposal, the current Form F2 application and Form F3 employer response are retained, however the 7-day timeframe may be extended to 14 days to allow an employer to have sufficient time to prepare a response.

Each application then undergoes a preliminary assessment on the papers. If the application, taking into consideration the employer response, fails to demonstrate a prima facie case or the conciliator or FWC member is satisfied on the material before them, that the case is without sufficient merit, then they must summarily dismiss the application and write to the parties confirming this.

Where the application is not found to be lacking *'sufficient merit'*, the FWC then issues a listing for conciliation.

The main arguments against this proposal are concerns surrounding access to justice, particularly for unrepresented applicants of low socio-economic status or those who possess a disability. If in practice this results in otherwise valid claims being dismissed on the papers for lack of quality written expression, then this is not the intention and may require more detailed consideration. To offset the access to justice concerns, the availability of services to assist unrepresented applicants could be a further consideration.

2. Redesign a more merit-focused conciliation process

The second proposal is also designed to be a filter mechanism to discourage meritless claims, however this concept incorporates the conciliation into the initial assessment, rather than allowing applications to be struck out on the papers. This proposal would alleviate potential access to justice concerns surrounding the first proposal, as all applicants would have the opportunity to attend the conciliation.

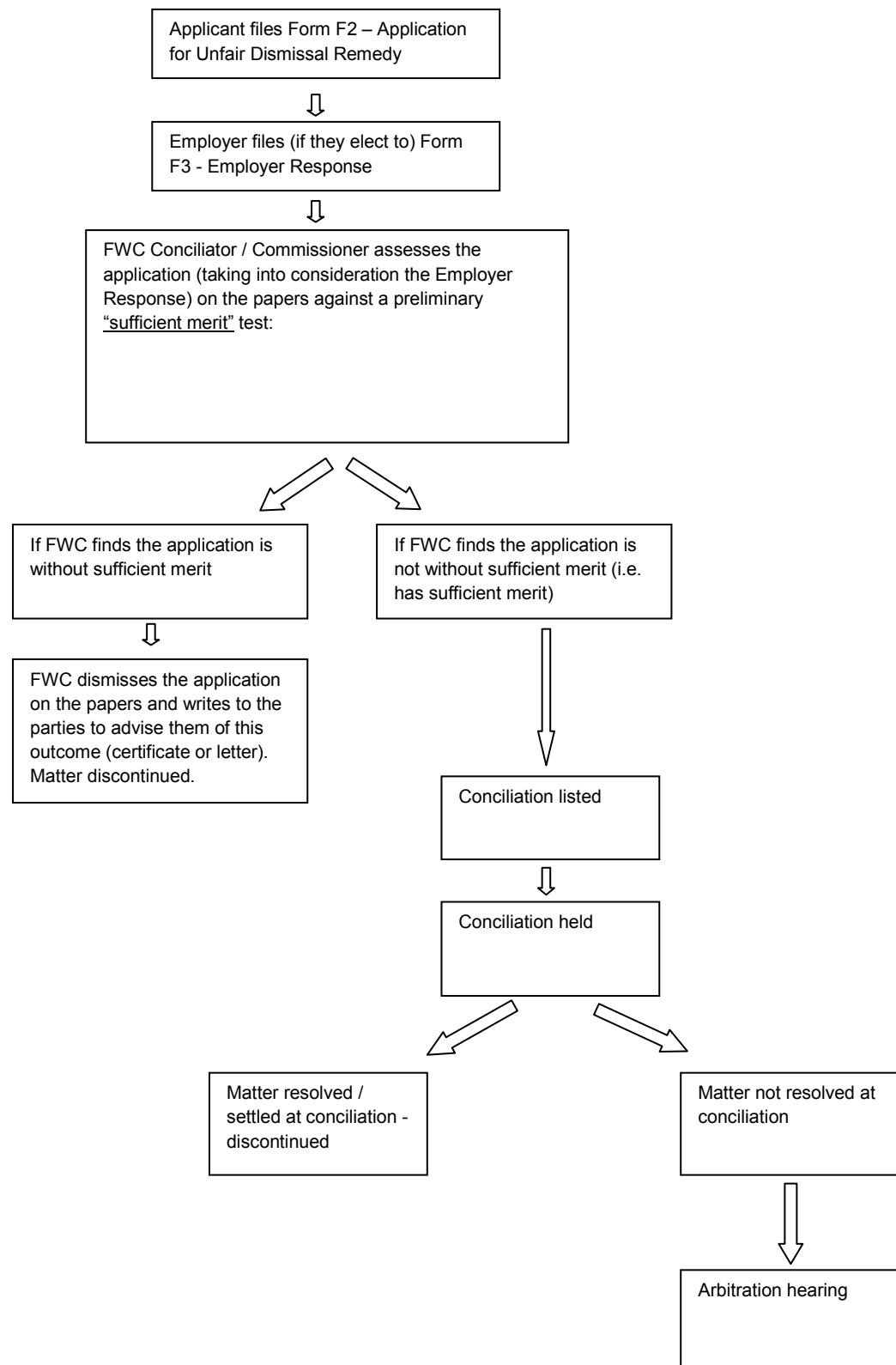
The conciliation format itself would require re-design to enable a greater assessment of merits that must be discussed during conciliation. After the merits have been adequately assessed in open discussion and in private conference, a discussion may be held surrounding potential settlement, presumably with some customary horse trading.

This will enable the parties to still turn their minds to settlement, however this will be done in the context of a more robust discussion of merits and in the knowledge that the parties will receive the conciliator's opinion on merits soon after the conciliation. If settlement is reached, the matter discontinues and no forthcoming written opinion is received from the FWC.

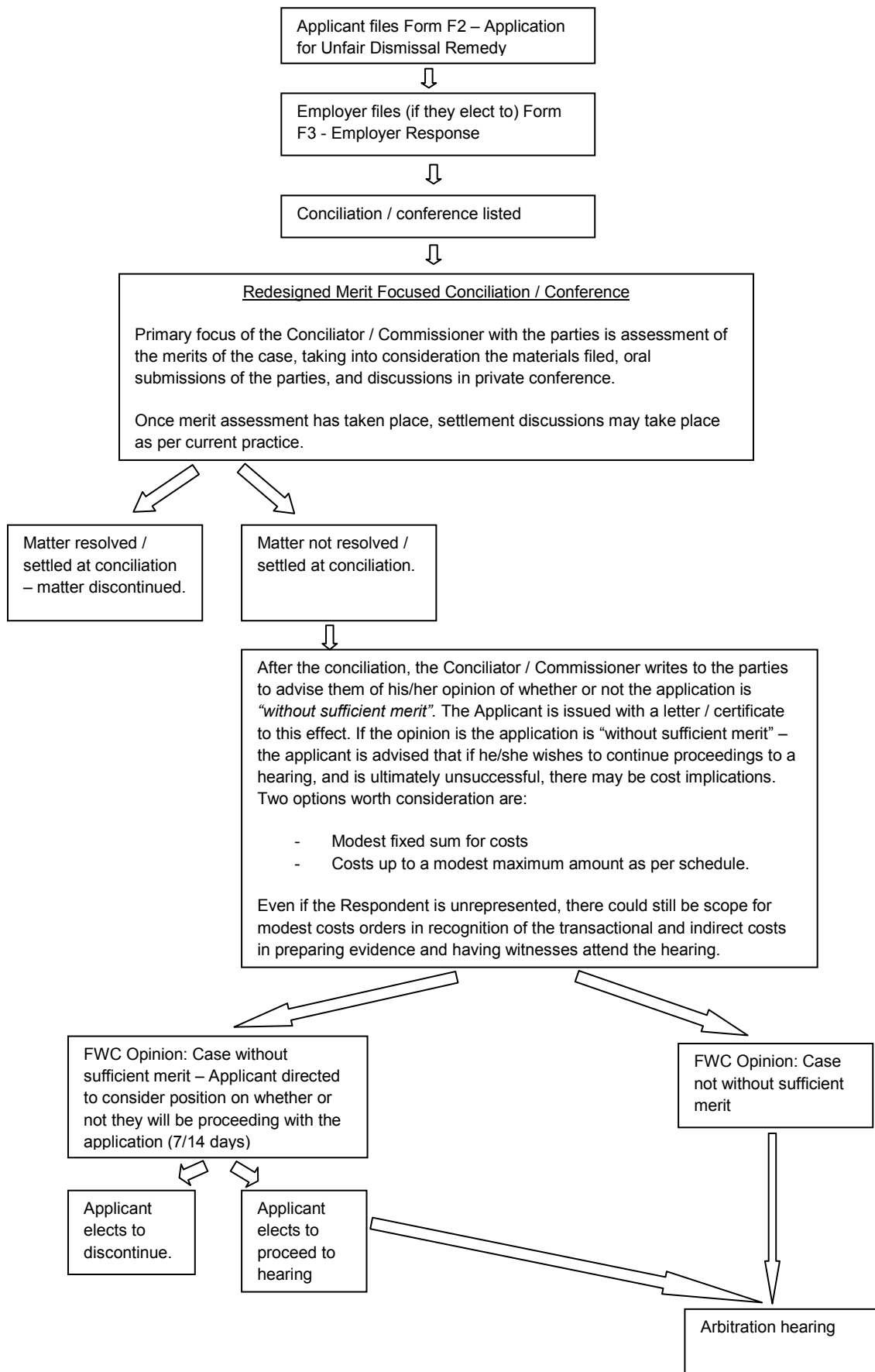
Where the matter is unresolved at the conciliation, the conciliator or FWC member is required to write to the parties expressing their opinion on whether or not the claim is '*without sufficient merit*'. If in the opinion of the conciliator, on the basis of the material available to him or her, the claim is without sufficient merit, the applicant will still be given an opportunity to proceed to a formal hearing (as the conciliation is not intended to be a hearing by another name). However, if the applicant is advised after the more robust assessment process that their claim is without sufficient merit, yet they still elect to proceed to hearing and are unsuccessful, modest cost implications may follow, either as a fixed sum or up to a cap.

This mechanism would in part compensate an employer for time, resources and cost of preparing for and attending a hearing, which the applicant proceeded with against the opinion of the FWC. It would act as a disincentive to proceeding with fruitless claims, and it would also provide employers with more leverage at the conciliation because some may wish to wait for the conciliator's opinion on the merits before considering settlement options.

Proposal 1 – Introduce a preliminary FWC merit-based assessment process



Proposal 2 – Redesigned Merit Focused Conciliation Process



PART FIVE

IMPROVED CLARITY IN THE GENERAL PROTECTIONS PROVISIONS – THE PROTECTED WORKPLACE RIGHT OF BEING ABLE TO MAKE A ‘COMPLAINT OR INQUIRY’

Support for the object and purpose of the General Protections

The ‘general protections’ provisions contained within Part 3-1 of the FW Act provide a range of fundamental workplace protections, including the protection of employees (and other parties including employers and contractors) from suffering victimisation or retribution in the workplace because they have exercised, have proposed to exercise, or have proposed not to exercise, their lawful workplace rights as prescribed in ss 341(1) of the FW Act.

The general protections provisions play an important role in promoting fair and just workplaces where basic rights are respected. However, where the scope of some protections is ambiguous and lacks clarity, it makes it difficult for employees and employers to know when the protection is available and to put safeguards in place to ensure compliance.

Lack of clarity about the complaint or inquiry right

Sub-section 341(1) (c) (ii) of the FW Act prescribes a protection where an employee “*is able to make a complaint or inquiry...if the person is an employee--in relation to his or her employment*” (“the complaint or inquiry right”).

However case law indicates there is ambiguity around the application of this provision. In *Bartolo v Doutta Galla Aged Services Ltd (No. 2)*⁶⁶, Whelan J stated:

*There is little authority on what constitutes a complaint within the meaning of s.341(1)(c) of the Act. Any discussion of the provision appears mainly to have been in the context of s.341(1)(c)(i) of the Act and in relation to the question of to whom a complaint or inquiry could be made in order to attract the provision. Section 341(1)(c)(ii) of the Act is not restricted by any requirement as to whom the complaint or inquiry is made, but only by the requirement that the complaint or inquiry be in relation to the employee’s employment.*⁶⁷

In *Evans v Trilab Pty Ltd*⁶⁸, Lucev J provided an extensive summary of the authorities concerning the meaning and scope of the complaint or inquiry right, including the meaning of “*is able to*” (see [16]-[26]) and “*in relation to*” (see [27]-[38]) and concluded that there is uncertainty and a divergence in approach in different cases.⁶⁹

In the first instance decision in *Shea v TRUenergy Services Pty Ltd (No 6)*⁷⁰, Dodds-Streeton J stated at [599]:

Section 341(1)(c)(ii) has not yet been the subject of extensive judicial consideration. The relatively few decided cases, discussed above, leave unaddressed many significant aspects

⁶⁶ [2015] FCCA 345.

⁶⁷ Ibid at [104].

⁶⁸ [2014] FCCA 2464.

⁶⁹ Ibid at [61].

⁷⁰ [2014] FCA 271.

of the meaning of a complaint that an employee is able to make in relation to his or her employment.

At present, there is no superior appellate authority on the correct interpretation of the complaint or inquiry right. On appeal of the *Shea* case, the Full Court of the Federal Court in *Shea v EnergyAustralia Services Pty Ltd*⁷¹ had an opportunity to consider whether the approach of Dodds-Streeton J (discussed in further detail below) was correct. However, the Full Court did not deem it necessary to determine the correct construction of the complaint or inquiry right because it was satisfied that the reasons in that case for taking the adverse action did not include the appellant exercising any alleged workplace rights:

13. *Notwithstanding the fundamental importance of ss 340 and 341 to the scheme of protection established by the Fair Work Act, questions regarding their construction and application do not need to be now resolved. These fundamental questions of statutory construction have, to date, received limited judicial attention: eg. Jones v Queensland Tertiary Admissions Centre Ltd (No 2) [2010] FCA 399, (2010) 186 FCR 22 at [55]–[57], [84] per Collier J. Indeed, it was contended by both parties on appeal that the ambit of the term “complaint” (as employed in the Fair Work Act) had not been previously considered.*⁷²
15. *For the reasons below, Ms Shea failed to demonstrate that her Honour erred in finding that none of her alleged complaints were a substantial and operative factor in EnergyAustralia’s decision to make her position redundant. Accordingly, it is not necessary to decide whether her Honour was correct to find that a complainant has to hold a genuine belief in the matter of the subject of complaint for the purposes of ss 340 and 341.*⁷³

Specific areas of ambiguity / uncertainty

The areas of ambiguity and uncertainty around the complaint or inquiry right are listed below, and are also discussed separately in more detail in this Part:

1. Whether an employee making a complaint needs to hold a genuine belief in its merits in order for the complaint or inquiry to fall within the definition in s 341(1)(c)(ii) of the FW Act.
2. “Complaint or inquiry” is not defined in the FW Act or in the *Fair Work Regulations 2009*, nor is it comprehensively analysed in the Explanatory Memorandum to the *Fair Work Bill 2009*. As a consequence:
 - (a) There is no test or qualification regarding the substance or content of a complaint for it to constitute a ‘complaint’ within the meaning of the FW Act. This is referred to below as the ‘lack of a substance test’;
 - (b) The FW Act does not define how the complaint or inquiry right must be exercised. Consequently, there is a lack of clarity as to whether the complaint needs to be properly communicated to the employer, or for the employee to demonstrate that they reasonably intended for the employer to take significant steps in response to it. In other words, there is uncertainty as to whether a complainant needs to

⁷¹ [2014] FCAFC 167.

⁷² Ibid at [13].

⁷³ Ibid at [15].

reasonably put the employer on notice that they have actually exercised the right to make a complaint. This is referred to below as the ‘lack of a requirement to properly communicate the complaint’.

3. There is uncertainty as to the meaning of a complaint or inquiry that is ‘*in relation to his or her employment*’. There is a divergence in the case law on this point, and consequently it is unclear whether the protection is limited to complaints directly related to the complainant’s own employment, and if not, the extent to which a complaint may be indirectly ‘*in relation to*’ the complainant’s employment.
4. Whether the meaning of the words ‘*is able to*’ in ss 341(1) of the FW Act, means there are certain circumstances in which an employee is not able to make a complaint or inquiry that attracts the protection.
5. Whether ‘*complaint or inquiry*’ is one cumulative workplace right with a single meaning, or whether they constitute two distinct workplace rights with their own scope and meaning.

1. Whether the complainant must hold a genuine belief in the substance of their complaint

CCER supports the interpretation of Dodds-Streeton J in the *Shea* case, that a complainant must hold a genuine belief in the truthfulness and merit of their own complaint in order for such a complaint to attract the protection of the FW Act.

In CCER’s view a requirement for a complaint to be genuine is necessary. Allowing otherwise increases the risk of the FWC receiving claims for complaints that are vexatious, malicious, knowingly false or constitute an abuse of process.

We note that we do not advocate that the complaint itself needs to be factually proven for the protection to apply. We recognise such a restriction may act as a disincentive for employees to raise concerns they feel are legitimate and genuine, and therefore would be inconsistent with the objects of the general protections. This important qualification was expressed in *Shea* at [619]:

The relevant object of the provision is to protect employees from retribution in the form of adverse action because they have exercised a workplace right by making a complaint in relation to their employment, rather than to protect employees who have proved, or are able to prove, that the grievance or accusation is justified or meritorious. Were it otherwise, the protection afforded by the provision would be largely illusory, as persons would be vulnerable to retribution for making a complaint unless, and perhaps until, their case could subsequently, by some unspecified means, be proved or found valid.

Dodds-Streeton J described the qualification for the complaint to be genuine (which was not determined on appeal to the Full Court) as follows:

*the grievance, finding of fault or accusation must be genuinely held or considered valid by the complainant;*⁷⁴

Her Honour's reasoning surrounding this qualification was expressed at [620]-[623] as follows:

- 620. *It does not follow, however, that the making of false, baseless, unreasonable or contrived accusations of grave misconduct against fellow employees constitutes the making of a complaint that an employee is able to make in relation to his or her employment, and thus invokes the statutory prohibition on adverse action.*
- 621. *While the factual basis of a complaint need not be "true" or capable of ultimate substantiation, in my view, the grievance must at least be genuinely held and, where it takes the form of an accusation of fault, the complainant must believe it to be valid. There would otherwise be no real, but merely a spurious, grievance. The exercise of the workplace right constituted by the making of a complaint is not within the scope of statutory protection if it is made without good faith or for an ulterior purpose, extraneous to that for which the statutory protection was conferred.*
- 622. *The protection conferred by the provision is directed at workplace rights. When the relevant workplace right is the employee's ability to make a complaint in relation to his or her employment, to make a complaint not in order to communicate the stated grievance or accusation so that it may be appropriately considered and redressed, but to achieve some collateral advantage or objective, would not, in my opinion, invoke the statutory protection. No legitimate statutory objective would be achieved.*
- 623. *Accordingly, in my view, the complainant must hold a genuine belief in the truth of the matters communicated as a grievance or accusation. In the absence of such a belief (which may be difficult, albeit not impossible, to establish in the absence of some reasonable basis) the complaint would not be a genuine grievance or finding of fault.*

As stated above, CCER believes that a qualification that a complaint be genuine in order to attract protection is important to ensure the application of the provisions are clear and unambiguous and are consistent with the objects of the general protections.

2(a) Lack of a 'substance' test

In our experience, the nature and content of workplace complaints ranges from formally lodged complaints and grievances, to trivial comments made in passing, and everything in between.

However, it is not clear whether minor, trivial comments, sometimes made in passing, would constitute a '*complaint*' for the purposes of the FW Act.

In the *Shea* case, Dodds-Streeton J considered that a "complaint" for the purpose of the FW Act, needed to contain a '*grievance or accusation*'⁷⁵ although what matters is the substance of the complaint, not its form.⁷⁶

CCER believes that all parties would benefit from the term '*complaint*' being defined in the FW Act so that there is an objective test to ensure that the protection does not extend to comments in passing or made informally that do not contain a grievance or accusation. In the absence of some qualification or limitation, theoretically the most innocuous statements could constitute a protected complaint.

⁷⁴ *Shea v TRUenergy Services Pty Ltd (No 6)* [2014] FCA 271 at [29].

⁷⁵ *Ibid* at [622]-[624].

⁷⁶ *Ibid* at [627].

2(b) Lack of a requirement to properly communicate the complaint

Leading on from the above, employers need to be able to identify when a complaint received falls within the scope of ss 341(1)(c)(ii) of the FW Act, and where potential liability arises as a consequence.

To improve clarity around this, CCER supports the qualification stated by Dodds-Streeton J in *Shea*, that a complaint must be properly communicated to the employer in such a way that a reasonable person would consider that the employer was put on notice that it was required to take some form of significant or structured action in response to the complaint (for example, an investigation, a mediation, or at least a specific meeting to address the concerns):

*the proper purpose of making a complaint is giving notification of the grievance, accusation or finding of fault so that it may be, at least, received and, where appropriate, investigated or redressed*⁷⁷

...

*'Whether an employee has made a complaint is a matter of substance, not form, which should be determined in the light of all the relevant circumstances. It does not depend solely on the words used. An employee's communication of a grievance or accusation could amount to making a complaint within the meaning of s 341(1)(c)(ii) despite an express disavowal of any intention to complain if a reasonable observer would conclude from the employee's words and conduct in the circumstances (including the nature and gravity of the grievance or accusation) that he or she intended to bring the grievance to the employee's attention for consideration or other appropriate action.'*⁷⁸

Without such a qualification, it is possible that a complaint made to a colleague which is not brought to the attention of management, or not raised or relayed in full or with sufficient detail, may still be sufficient to attract the protection of the FW Act. This is problematic where an employer is effectively unaware that a workplace right is being exercised, yet such a right may still form the basis of an alleged claim of unlawful adverse action which the employer would be required to defend.

The need for some form of communication requirement, was considered although not determined, by the Full Bench of Fair Work Australia in *Nulty v Blue Star Group*⁷⁹. The Full Bench appeared to assume that for a 'complaint' to attract the protection of the FW Act it must be made to a 'responsible senior manager'.⁸⁰

(3) Clarity surrounding the meaning of 'in relation to his or her employment'

It is unclear whether Parliament intended to limit the complaint or inquiry right protection to making a complaint or inquiry in relation to a complainant's own employment, or whether the protection extends to complaints or inquiries that are unrelated or only indirectly related to the complainant's employment.

⁷⁷ *Shea v TRUenergy Services Pty Ltd (No 6)* [2014] FCA 271 at [29].

⁷⁸ *Ibid* at [627].

⁷⁹ [2011] FWA 975.

⁸⁰ *Ibid* at [49].

The case law appears to point towards a broader interpretation which includes complaints which are potentially indirectly related to the complainant's employment. In *Walsh v Greater Metropolitan Cemeteries Trust (No 2)*⁸¹ Bromberg J stated at [41]-[42]:

The words "in relation to" are words of wide import. The use of that phrase in s 341(1)(c)(ii) identifies that a relationship between the subject matter of the complaint and the complainant's employment is required. The nature of that relationship need not be direct and may be indirect: Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3) [2012] FCA 697 at [61]- [64] (Katzmann J); Shea v TRUenergy Services Pty Ltd (No 6) [2014] FCA 271 at [631] (Dodds-Streeton J). I respectfully agree with Katzmann J's observation in Pilbara at [64] that if some limit on the broad language utilised in the phrase "in relation to his or her employment" is to be imposed, it needs to be "found in the nature and purpose of the legislation, which includes the protection of workplace rights".

Where the subject matter of the complaint raises an issue with potential implications for the complainant's employment, it is likely that the requisite nexus will be satisfied: Pilbara at [69].

In *Heathcote v University of Sydney*⁸², the University's argument that a complaint about the way a manager handled a complaint raised by the complainant, as opposed to the substance of the complaint itself, was not in relation to the complainant's employment, was rejected on the basis that the complaint was nonetheless 'indirectly connected to his (the complainant's) employment.'⁸³

However, there is some inconsistency in the case law. The judgment of Marshall ACJ in *Rowland v Alfred Health* [2014] FCA 2, was considered and distinguished by Bromberg J in *Walsh*, who stated at [44]:

In determining the construction issue raised here, I have considered but have not been persuaded by GMCT's reliance upon Rowland v Alfred Health [2014] FCA 2. In that case, Marshall ACJ determined that a complaint made by a doctor about the competency of another doctor with whom he worked was not a complaint in relation to the complainant's employment. Whether the clinical competence of the doctor complained about had potential implications for the employment of the complainant is not a matter that appears to have been raised before or addressed by Marshall ACJ. His Honour does not appear to have been referred to Pilbara and did not have the benefit of Shea.⁸⁴

In *Evans v Trilab Pty Ltd*, Lucev J identified divergent approaches to whether or not a complaint is 'in relation to' a complainant's employment in the following cases:

The outcome in *Schneider Electric*, that no workplace right arises from the refusal to perform duties which were illegal or unlawful, also does not sit easily with the Federal Court's judgment in *Greater Metropolitan Cemeteries Trust (No. 2)* where the raising of a contract probity issue in relation to a supply contract, which if not raised might have reflected badly on the employee and caused her prejudice in her employment, was held to give rise to a workplace right under s.341(1)(c)(ii) of the *FW Act*.⁸⁵

⁸¹ [2014] FCA 456.

⁸² [2014] FCCA 613.

⁸³ Ibid at [55].

⁸⁴ *Walsh v Greater Metropolitan Cemeteries Trust (No 2)* [2014] FCA 456 at [44].

⁸⁵ *Evans v Trilab Pty Ltd* [2014] FCCA 2464 at [59].

Finally, the possibility that some limits apply to a complaint that is indirectly in relation to the complainant's employment, was left open by Katzmann J in *Construction, Forestry, Mining & Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)*⁸⁶:

*In my view, in s 341(1)(c)(ii) the requisite relationship between the complaint or inquiry with the employee's employment may be direct or indirect. No contrary indication may be gleaned from the context of the words or the drafting history. Mr Fernon SC, who appeared for the respondent, conceded that the words should be interpreted broadly, though he submitted they were not without limits. That qualification may be accepted but the limits are to be found in the nature and purpose of the legislation, which includes the protection of workplace rights.*⁸⁷

CCER does not oppose a relatively wide interpretation of 'in relation to' for complaints that are indirectly related to a complainant's employment, so that they fall within the complaint or inquiry right. However, we believe that the indirect connection must also have some limits to ensure that spurious complaints that have only a very remote connection are not protected.

In CCER's view, providing clearer parameters for when the indirect relationship applies will assist all parties and remains consistent with the statutory purpose of s 341(1)(c)(ii) of the FW Act. While 'in relation to' is not defined in the FW Act, the Explanatory Memorandum to the *Fair Work Bill 2009* contains at paragraph 1370, three illustrative examples of complaints or inquiries. All three of the examples provided are directly related to the complainant's own employment.

(4) Clarity surrounding the meaning of 'is able to'

There appears to be some uncertainty about the meaning of 'is able to' within s 341(1)(c)(ii) of the FW Act which CCER believes needs to be resolved to improve clarity. It is unclear whether the phrase 'is able to' means there are circumstances in which an employee is not able to make a protected complaint or inquiry. Do established workplace policies or procedures play a role in defining a complaint an employee is able to make? If a complaint must be genuine in order to be protected, perhaps this would answer the question, as a vexatious complaint would not be the type of complaint an employee is able to make for the purposes of the FW Act.

CCER believes that exploration and resolution of these questions would improve the clarity and effectiveness of the general protections provisions.

(5) Whether 'complaint or inquiry' is one right or two?

A final area in which further clarification is required to improve awareness of the general protections provisions, is whether a 'complaint or inquiry' is a single workplace right, as held in *Harrison v In Control Pty Ltd*⁸⁸, or two different workplace rights with distinct meanings.

In *Bartolo*, Whelan J rejected the applicant's contention that an email sent to an external provider seeking information about their capacity to conduct an IT investigation into an inappropriate email about the applicant was a 'complaint' for the purposes of s 341(1)(c)(ii) of the FW Act. However, the court inferred that the applicant may have exercised a right to

⁸⁶ [2012] FCA 697

⁸⁷ Ibid at [64].

⁸⁸ [2013] FMCA 149; cited in *Evans v Trilab Pty Ltd* [2014] FCCA 2464 at [17].

make an 'inquiry' in relation to his employment: 'At most, it may be said that the Applicant contacted STOPline to 'inquire' about their capacity to conduct an IT investigation'⁸⁹.

Another case where it was considered that an 'inquiry' may be a distinct workplace right from a 'complaint' was in *Murrihy v Betezy.com.au Pty Ltd*⁹⁰. Jessup J held that correspondence between an employee and her solicitor constituted an 'inquiry', rather than a 'complaint':

*'Further, to regard the seeking of legal advice as an "inquiry" within the meaning of para (c) is, in my view, a natural reading of the provision. I take the view, therefore, that the applicant's proposal, conveyed to Mr Kay on 20 September 2011, that she would seek legal advice was a proposal by her to make an inquiry in relation to her employment within the meaning of s 341(1)(c)(ii) of the FW Act.'*⁹¹

CCER believes it would be of assistance if the divergent case law on this point was clarified to enable a better understanding of the general protections provisions and of the rights and obligations of all parties under them.

Proposed amendments to the FW Act

CCER proposes that the complaint or inquiry right within the general protections of the FW Act be amended to provide greater clarity. CCER would support amendments to ss 341(1)(c)(ii) of the FW Act which are consistent with the approach of Dodds-Streeton J at paragraph [29] of the judgment in *Shea*, in which her Honour held as follows:

(a) a complaint is a communication which, whether expressly or implicitly, as a matter of substance, irrespective of the words used, conveys a grievance, a finding of fault or accusation;

(b) the grievance, finding of fault or accusation must be genuinely held or considered valid by the complainant;

(c) the grievance, finding of fault or accusation need not be substantiated, proved or ultimately established, but the exercise of the workplace right constituted by the making of the complaint must be in good faith and for a proper purpose;

(d) the proper purpose of making a complaint is giving notification of the grievance, accusation or finding of fault so that it may be, at least, received and, where appropriate, investigated or redressed. If a grievance or accusation is communicated in order to achieve some extraneous purpose unrelated to its notification, investigation or redress, it is not a complaint made in good faith for a proper purpose and is not within the ambit of s 341(1)(c)(ii);

(e) a complaint may be made not only to an external authority or party with the power to enforce or require compliance or redress, but may be made to persons including an employer, or to an investigator appointed by the employer;

(g) a complaint is limited to a grievance, finding of fault or accusation that satisfies the criteria in s 341(1)(c)(ii) and does not extend to other grievances merely because they are communicated contemporaneously or in association with the complaint. Nor does a complaint comprehend contemporaneous or associated conduct which is beyond what is reasonable for the communication of the grievance or accusation.

⁸⁹ *Bartolo v Douutta Galla Aged Services Ltd* (No. 2) [2015] FCCA 345 at [111]-[112].

⁹⁰ [2013] FCA 908.

⁹¹ *Ibid* at [143].