

VACC, MTA-NSW and MTA-SA Submission to the Productivity Commission Inquiry on the Workplace Relations Framework

13 March 2015



Introduction

This is a submission from the Victorian Automobile Chamber of Commerce (VACC), including the Tasmanian Automobile Chamber of Commerce (TACC), and its sister organisations: the Motor Trader's Association of New South Wales (MTA-NSW) and the Motor Trade Association of South Australia (MTA-SA).

The VACC is the peak body for the repair, service and retail sector of the automotive industry in Victoria and Tasmania. VACC represents over 5,000 members, primarily small businesses, which employ over 50,000 people and have an annual turnover of around \$50 billion.

In addition to VACC and TACC, our sister organisations, the Motor Trade Associations, also represent the automotive industry for their respective state. MTA-NSW currently has over 5,000 members across New South Wales. Additionally, MTA-SA represents and supports over 1,100 members across South Australia.

Our members range from new and used vehicle dealers (passenger, truck, commercial, motorcycles, recreational and farm machinery), repairers (mechanical, electrical, body and repair specialist, i.e. radiators and engines), vehicle servicing (service stations, vehicle washing, rental, windscreens), parts and component wholesale/retail and distribution and aftermarket manufacture (i.e. specialist vehicle, parts or component modification and/or manufacture), and recycling.

The automotive industry is largely made up of small businesses. Small businesses with between one and 19 employees comprise approximately 53% of all automotive businesses. About 35% (or 9,765 businesses) have an annual turnover of less than \$50,000. Medium to large business make up the remaining 6% in the automotive industry.

According to the Department of Industry, total employment for the automotive industry, which includes both the automotive manufacturing sector, and the automotive retail, service and repair sector account for a total of 315,300 as of the 2013/14 financial year. With the departure of the three passenger vehicle manufacturers, there will be further structural change in the industry, as importation of vehicles will be 100%, rather than the current level of importation at 80%. The departure of these manufacturers is estimated to affect more than 40,000 workers directly employed in automotive jobs in the industry.

Some sectors of the industry have seen rationalisation and consolidation, corresponding with reduced levels of employment. As a consequence, employment levels within the industry overall declined by 3,500 over the previous financial year. Nonetheless, the industry has been a consistent contributor to the nation's GDP at around 2.5% as of 2013/14.

Unemployment, underemployment and job creation

Hiring intentions of automotive employers

Apprenticeships are key towards facilitating more young people into achieving tangible employment outcomes. However, the significant downsizing of many businesses within the industry has led many employers to become reluctant in hiring new apprentices. According to the 2014 Auto Skills Australia (ASA) Environmental Scan (E-Scan) survey, the majority of automotive employers (53.2%) do not employ apprentices. Furthermore, only 30% of respondents indicate that they have a clear intention to hire at least one apprentice over the next 12 months.

The Australian workplace relations framework acts as a disincentive towards employers taking on apprentices. The E-Scan survey found that 87.8% of employers noted that rising labour costs were a moderate to significant issue for their business. This is further reflected in the ACCI 2015 National Red Tape Survey, which found that 73.6% of respondents considered the impact that government regulatory requirements have on their business is a moderate to significant negative impact. This is an increase of 9.2% since 2013.¹

According to the E-Scan, qualitative reports indicate that many employers are becoming increasingly frustrated over the many government regulations enforced on their businesses. Employers highlighted that regulations in the form of payroll taxes, workplace health and safety requirements, workplace insurance premiums and other policy-related requirements have had a detrimental effect towards businesses hiring new labour to expand. Again this is also reflected in the ACCI 2015 National Red Tape Survey, in which employers noted that excessive government compliance had resulted in less time spent towards improving in areas such as training.

The E-Scan notes that working longer hours and weekends with fewer staff has become the new business norm and greater productivity is sought from their existing skilled employees rather than recruiting new labour.

The 2014 VACC Auto Apprenticeship Survey of its Host Employers also reveals a decline in the hiring intentions of apprentices. Regarding the statement 'Would you be interested in hosting another apprentice from the program in the near future?', 78% answered 'Yes', 4% answered 'No' and '18%' answered 'Not sure.' This is a contrast to the same survey conducted in 2013, in which 87.95% answered 'Yes', 7.23% answered 'No', and 4.82% answered 'Not sure.' The noticeable decline in 'Yes' responses has resulted in a substantial increase in 'Not sure' answers. This further illustrates that businesses are becoming less confident in hiring new staff.

¹ ACCI 2015 National Red Tape Survey, <<http://www.acci.asn.au/getattachment/17fd0073-1f55-49c4-936b-c465ddde02d7/ACCI-2015-National-Red-Tape-Survey.aspx>>

Would you be interested in hosting another apprentice from the program in the near future?²

2013

Yes	87.95%
No	7.23%
Not sure	4.82%

2014

Yes	78.00%
No	4.00%
Not sure	18.00%

Tentativeness towards hiring new staff is further reflected in the ACCI Small Business Survey³ which reveals that although the small business Employment Indicator rose from 45.8 to 46.6 from the September quarter 2014 to the December quarter 2014, it continues to remain below the neutral 50 mark. The index has not been in positive territory since the March 2008 quarter.

The Survey also shows that the expected small business employment levels for March 2015 is 47.9. This is the third consecutive decline for the quarter.

	Dec 2014	Mar 2015 (expected)
Small Businesses	46.9	47.9
All Businesses	47.4	49.2

VACC's automotive industry economic survey of its own membership base for the December 2014 quarter shows that employment levels have remained at historic lows over 2014 with a -16 net trend index. The survey also forecasts similar results for the next quarter, in which it notes that 67% of members believe that employment levels will remain the same, 22% of members believe that it will decrease and only 11% believe that employment levels will increase.⁴

Skill shortages in the automotive retail, service and repair industry

Skill shortages are a marked characteristic of the automotive retail, service and repair industry. ASA has conducted an analysis of non-metropolitan skills shortages within the industry that illustrates occupation skill shortages for each state out to 2020:

² As the survey is self-administered, results may reflect some biases and not be fully representative of VACC views

³ Australian Chamber of Commerce and Industry, 'ACCI Small Business Survey, December Quarter 2014', <<http://www.acci.asn.au/getattachment/d3885a5f-6317-4d17-bf38-a552ae63760e/ACCI-Small-Business-Survey---December-Quarter-2014.aspx>>

⁴ As the survey is self-administered, results may reflect some biases and not be fully representative of VACC views

NON-METROPOLITAN SKILL SHORTAGES BY STATE TO 2020

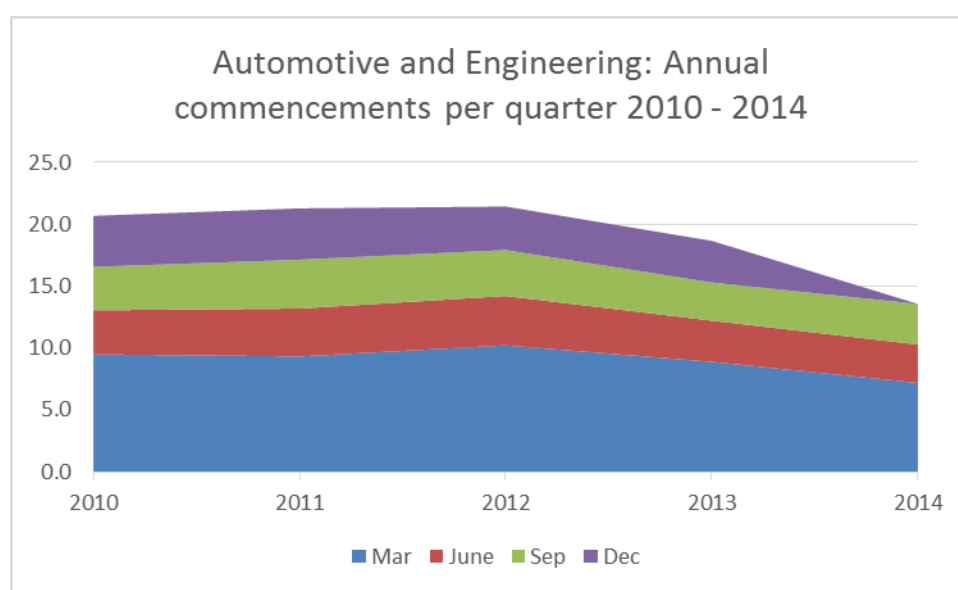
	NSW & ACT	VIC	QLD	SA	WA	TAS
Motor Mechanics (General)	1,273	1,150	1,000	817	1,000	100
Auto Electrician	210	190	200	115	130	15
Diesel Motor Mechanic	270	225	200	175	205	25
Motor cycle Mechanics	110	90	80	65	90	20
Small Engine Mechanic	150	130	140	125	100	18
Panelbeater	500	420	380	325	419	25
Vehicle Painter	375	298	212	174	252	25
Motor Vehicle Parts Interpreter	320	290	265	225	242	10
Motor Vehicle Salespersons	250	139	270	100	110	15

Apprenticeship and traineeship commencements

For the occupational (ANZSCO) group: automotive and engineering, there has been a consistent decline in apprenticeship and traineeship commencements for each March quarter⁵ since 2012⁶:

- March 2012 – 10,200
- March 2013 – 8,900
- March 2014 – 7,200

There has also been a decline in commencements for each quarter for automotive and engineering since 2012⁷:



This decline is not only seen within the automotive trades, but is also evident for all occupational (ANZSCO) groups:⁸

⁵ The March quarter is used as that is when the greatest concentration of apprenticeship and traineeship commencements occur.

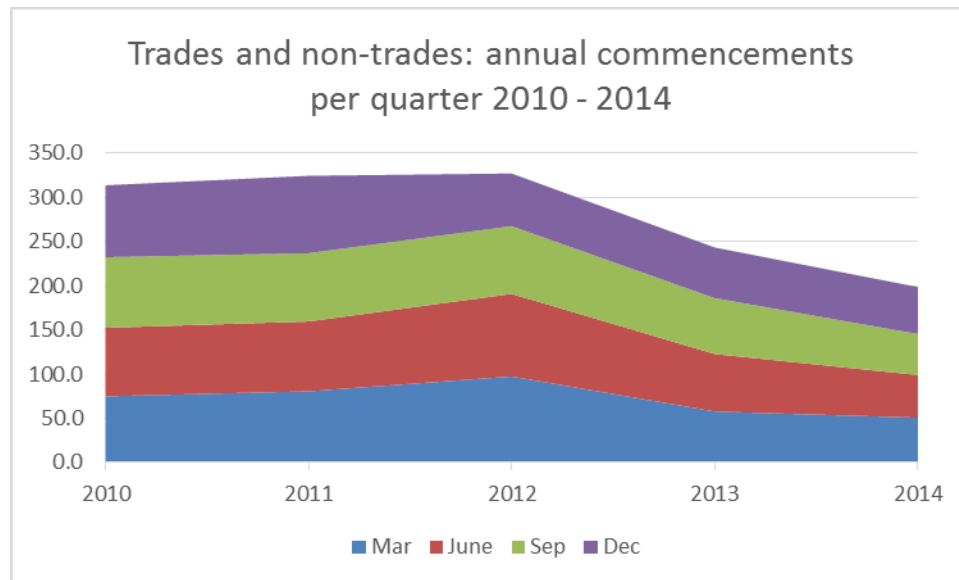
⁶ NCVER, Apprentice and Trainee Collection, June quarter 2014

⁷ Data for December quarter 2014 remains unknown

⁸ NCVER, Apprentice and Trainee Collection, September quarter 2014

- March 2012 – 102,600
- March 2013 – 69,700
- March 2014 – 61,600

There has also been a decline in commencements for each quarter for all trades and non-trades since 2012:⁹



Source: NCVER, Apprentice and Trainee Collection, September quarter

NCVER has released the Apprenticeships Early Trend Estimates for the December 2014 quarter which found an increase in apprenticeship commencements for that quarter. However, these results are probably an outlier and any suggestion that they mark an end to the decline remains premature until other data on apprenticeship commencements for future quarters are released.

The data above exemplifies the currently fragile nature of the labour economy. With the unemployment rate at 6.3% and youth unemployment at 13.9% as of February 2015,¹⁰ the Government must take into account business conditions when implementing any changes towards the workplace relations system.

Recommendations:

- 1. That issues such as hiring intentions and practices, skill shortages, apprenticeship and traineeship commencements and business confidence be taken into consideration when any changes are made to the workplace relations system and any wage increases awarded in annual wage reviews.**
- 2. That employers be adequately incentivised to employ, rather than unnecessarily hampered through over regulation and regressive State payroll systems.**

⁹ Ibid

¹⁰ ABS, Labour Force, cat. no. 6202.0

Fair and equitable pay and conditions for employers

Annual leave loading on termination

Section 90(1) of the *Fair Work Act 2009* (the Act) makes it clear that the payment for annual leave is at the 'base rate of pay'. Section 90(2) of the Act indicates that upon termination an employee is paid what he would have been paid if he or she had taken the leave while working. It is our view that section 90 prescribes the payment applicable for an employee covered by the National Employment Standards (NES). Modern awards such as the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (VMRSR Award), provide for the payment of an annual leave loading when leave is taken. But clause 29.8 of the VMRSR Award determines that the leave loading is not paid on untaken leave paid out on termination. The VMRSR Award also provides a different and more beneficial payment than the 'base rate of pay' under the NES for annual leave when leave is taken during employment (see clause 29.7 of the VMRSR Award).

Unfortunately, since 2011 the Fair Work Ombudsman (FWO) has taken the view that the NES under section 90 requires the payment of the annual leave loading on untaken leave on termination. This is a departure from the accepted position over the history of award coverage in the vehicle industry and other industries since the introduction of the annual leave loading as a general award provision. The FWO has not attempted to prosecute any employers leaving it to individual employees to make any claims in a local court. However, the recent Federal Court case of *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union* (No 2) [2015] FCA 136 agreed with the FWO's opinion.

This new Federal Court decision imposes a further substantial cost input on businesses, particularly small businesses. The decision, if not corrected by legislation, makes a mockery of the award modernisation principles which led to the introduction of modern awards on 1 January 2010. The original award modernisation request in June 2008 specified that it was not the intention of the award modernisation process to increase costs to employers.

The introduction of the NES on the same date as modern awards commenced operating directly contradicts the intention of the award modernisation request in section 90(2) of the Act by adding an additional obligation to pay for annual leave loading when an employee is not physically taking annual leave.

The 2012 expert panel review of the Act recommended amending section 90 to provide that annual leave loading is not payable on termination unless otherwise stated in a modern award or enterprise agreement. However, the previous government did not accept the expert panel's recommendation. This is an unsatisfactory position and the matter should be cleared up with an appropriate notation in the legislation.

Recommendation: That a formal note be included at the end of section 90 of the Act as follows:

"Note: Section 90 does not prescribe conditions in relation to the payment or non-payment of the annual leave loading applicable under a modern award, enterprise agreement or a WR Act instrument."

Annual leave and an employee's failure to provide adequate notice of resignation

Clause 17.2 of the VMRSR Award provides that, where an employee fails to give the required notice, the employer may withhold an amount not exceeding the amount the employee would have been paid for working that notice period from any monies due to the employee on termination. The FWO's position on section 90 of the Act purports to reduce the effectiveness of clause 17.2, by preventing an employer from withholding the period of notice not worked out from an employee's annual leave. As annual leave is often the only entitlement due to an employee on termination, this interpretation leaves employers with little to no ability to protect their businesses during employee transition periods by enforcing resignation notice periods.

The FWO is very efficient at investigating underpayment claims where an employer has not paid the required statutory notice periods on termination. An employer has no recourse to a similar process where an employee walks out, not honouring their statutory obligation to work the prescribed notice period, leaving a business in the lurch by requiring them to recruit a replacement with no notice.

Recommendation: That a new section 90(3) be inserted as follows:

"If, where an employee resigns their employment and fails to give the required notice as prescribed in an award or as otherwise agreed in writing with the employer, the employer will be entitled to withhold from the employee's outstanding annual leave an amount equivalent to the shortfall in notice given by the employee and calculated at the employee's actual rate of pay."

Notice of termination

Section 117(1) of the Act should be amended to ensure that the notice period must be worked out by the employee except where section 117(2) applies to the termination. These sections require an employer to provide an employee with written notice of the termination and a minimum period of notice or pay in lieu of notice.

In relation to the notice requirements upon employees, most modern awards refer to the NES and apply reciprocal obligations on employees. We are finding that many employees are providing notice during a period of annual leave or personal leave and not returning to work, or providing notice just before arranged annual leave or taking personal leave and including this period of leave to meet the notice requirement. Section 117 of the Act should make it clear that an employee must work out their notice period and equally the employer must provide work for the employee for the period of notice, unless otherwise agreed.

Recommendation: That at the end of section 117(1) of the Act, the following be inserted:

"Unless otherwise agreed between the parties, or by shorter notice accepted by the employer, once notice of termination is provided such notice must be worked out by the employee and exclude any period of annual leave or personal leave. Where such notice is given during a period of absence on annual leave or personal leave, the required period of notice under subsection (3) will commence from the end of the period of annual leave or personal leave."

Frustration of the employment contract

The requirement to provide notice or pay in lieu of notice under section 117 of the Act does not exclude circumstances where, through no fault of the employer, an employee's contract of employment comes to an end. Often this is due to incarceration or a conviction for driving under the influence of alcohol, leading to the loss of various driver related licences. In most cases for such employees, especially in the vehicle industry, they can no longer fulfil the inherent requirements of the employee's contract of employment and at common law the contract has come to an end as a result of frustration of contract. Unfortunately, there is no clear exclusion of the requirement on the employer to provide notice or pay in lieu of notice.

Recommendation: That section 123(1)(e) of the Act be renumbered as (f) and a new subsection (e) be included as follows:

“(e) an employee whose employment is terminated because of incarceration, loss of required motor vehicle or machinery licence where such licence is an inherent condition of employment, or where the contract of employment comes to an end by the inability of the employee to fulfil the employee's contract of employment.”

Small businesses

Paid no safe job leave

'Paid no safe job leave' under section 81A of the Act should be removed. This issue clearly discriminates against small business. Notwithstanding the impact on small business, such a requirement on any business is unfair. In the rare situation where a pregnant employee cannot work and the employer cannot find alternative safe work, section 81A(2) requires the employer to continue to pay the 'base rate of pay' wages to the employee for the period the employee cannot work in the role for which they were employed.

Section 81A prescribes an additional wage cost to an employer where no actual work is being performed. In cases where the employer has to engage someone else to do the employee's job, it causes an effective doubling up of wages. This type of payment is enough to eliminate the profit made by a small business in any week that this payment must be made. As there is potential for this type of absence to occur for many weeks on end, the payments can add up to a very large sum of money.

Case study

One member had an employee who was an apprentice spray painter. She became pregnant and informed her employer. Due to the risks inherent in working with the chemicals in spray painting (e.g. isocyanates), the employer was forced to pay 'no safe job pay' for the remainder of her pregnancy. The duration of the 'no safe job pay' was about 32 weeks. This is an unfair imposition on a small business.

Recommendations:

- 1. That sections 81A and 82 of the Act be deleted. Further consequential amendments need to be made to section 81 to give effect to this recommendation.**
- 2. If there is not a total deletion of these clauses, there should be a limitation of their operation on small businesses with less than 15 employees.**

Temporary absence due to illness or injury

Under section 772 of the Act, an employer must not terminate an employee's employment because the employee is temporarily absent from work because of illness or injury of a kind prescribed in the regulations.

Regulation 6.04(4) of the Fair Work Regulations, for the purposes of section 772 of the Act, states that "an illness or injury is not a prescribed kind of illness or injury if:

- (a) either:
 - (i) the employer's absence extends for more than 3 months; or
 - (ii) the total absences of the employee within a 12 month period, have been more than 3 months (whether based on a single illness or injury or separate illness or injuries); and
- (b) the employee is not on paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act for the duration of the absence."

This time period has caused a great deal of frustration for small businesses operating in the automotive industry. The staffing of a small business is structured around staff in specialised roles. If staff are on long term illness or injury, a small business does not generally have the capacity to move other staff into the position or recruit casual or part time staff to fill the role due to skills shortages in the industry. In the interim period pending the return of an employee from illness or injury, this provision has a real adverse impact on the operation of the business. Whilst we clearly recognise an employer's obligation to keep a role open for an employee who is using accrued personal leave, the period of absence on unpaid leave should be reduced for a small business.

Recommendation: The period of absence on unpaid personal leave due to illness or injury should be reduced to no more than a month in the case of a small business.

General protections

Our members are very concerned about the general protections provisions. We are seeing more claims in this area as awareness is raised. These provisions are so broad and subjective they create great uncertainty for employers. These provisions encourage vague, vexatious and ill-advised claims.

Case study

One claim related to section 341(1)(c) of the Act preventing the exercise of a workplace right in terms of making a complaint. In this claim the claimant was not legally represented and did not understand the legalities of the adverse action claim. This made it difficult to draft a response.

In this case, an employee was terminated during her probationary period but claimed the owner and his girlfriend did not like her and dismissed her after she allegedly complained to the Chief Financial Officer. The employer paid her a sum of 'go away money' to end the ordeal for the business.

Case study

In another case, an employee argued that the termination of her employment was due to the fact that no one liked her. She also said that people had been stealing from the employer. The employer had checked the video surveillance and found no evidence of the claim. The employer explained that the employee frequently used obscene language towards the other staff members and had called two of the other female employees particularly insulting names.

The case was discontinued at conciliation as the conciliator made it clear that the chances of success were extremely limited, however the employer still had to spend a significant amount of time and resources preparing documentation for the conciliation. Cases like these make employers feel that the 'system' has gone too far in protecting the interests of one party in a contractual employment situation.

Employers are also burdened with a reverse onus of proof in defending adverse action claims. This makes them extremely difficult to defend, particularly for small businesses that are less likely to maintain sufficient records.

It has been the experience of our organisations, with the exception of MTA South Australia, that some Fair Work Commission (FWC) conciliators use the reverse onus of proof requirement to persuade employers to settle matters by paying 'go away money' in conciliation conferences.

The adverse action claim should be removed from the Act and the previous unlawful termination provisions returned. The onus of proof should be changed to the applicant in unlawful termination cases.

Further, the general protections provisions are an unnecessary layer of regulation and provide yet another avenue for an employee to make a complaint, should another claim be unsuccessful. Employers are entitled to a level of certainty when a claim is dismissed.

Case study

In this case a difficult employee was dismissed because of poor work performance within the six month minimum period of employment. Because the employee was there for a limited time, no written warnings were provided. The employee was a member of a union. After she was dismissed she claimed she had a workers' compensation injury. This was investigated and the insurer declined the claim.

The union then approached the employer seeking to negotiate a settlement with the employer in respect to the termination in the form of a redundancy payout. The employer advised that they were prepared to make a four week payment to resolve the matter. The union rejected the offer and the employee decided to pursue an adverse action claim on the basis that the employee was dismissed for being a union member.

The matter was finally settled for four weeks' pay, which the employer paid to make the issue 'go away'.

Case Study

An employee claimed to be a qualified tradesperson with extensive experience. He talked of his knowledge and prior learning in an eloquent way but once employed used others to cover his skills inadequacies. He was engaged by the business at great cost and given support and training during and beyond the qualifying period.

When his attitude changed the employer tried to work with him, but shifting him to more accountable work led to \$46,000 of rework in six months, major safety breaches and some evidence of underlying bullying of people from other cultures and female employees. When he was at risk of dismissal he orchestrated a political campaign with the aid of external support over issues that proved to be unfounded, resulting in an adverse action claim. After the employer and staff were criticised heavily by the applicant/other external parties involved, and conciliation failed, it was only during pre-trial orders that his lies about qualifications were clearly established.

Finally, it is unnecessary to have separate discrimination provisions in the general protections provisions. There is more than adequate protection against discrimination in employment in State and Federal anti-discrimination legislation. It is not necessary to provide this opportunity for forum shopping.

Recommendations: That the general protections provisions be removed and replaced with the former unlawful termination provisions. Further, that the ability to make discrimination claims be removed from the Act.

Alternatively, consideration should be given to ways of preventing politically motivated or non-meritorious claims progressing.

Unfair dismissal

There are several problems with the unfair dismissal system as it currently stands. These include overly complex procedural fairness requirements, lack of consistency and direction from FWC decisions, lack of relevant factors taken into account by the FWC, a Fair Dismissal Code that provides very little protection to small business and has not worked in the manner promised, the return of 'go away money', an unnecessarily complicated definition of 'genuine redundancy' and problems with the conciliation process.

Members feel that the balance has swung too far in favour of employees. The procedural fairness requirements in the unfair dismissal process have become so cumbersome that it makes it almost impossible for an employer to carry out a 'fair' termination process that would protect a business from an unfair dismissal claim. As a result, there is a failure in the Act to provide rights and obligations that are simple and straightforward to understand.

The range of factors the FWC can take into account makes it extremely difficult for an employer to know whether or not they have done the right thing. An individual's personal circumstances may be taken into account, meaning an employer is required to have knowledge of an employee's individual circumstances yet must tread carefully due to privacy, workplace health and safety and discrimination law obligations.

Due to the complexity and time required for a thorough disciplinary process, employees are setting up potential avenues for redress before they are terminated or seeking protection behind monthly medical certificates issued by medical practitioners for stress-related illness to frustrate a disciplinary/termination process.

Members are concerned that the range of prescribed factors that the FWC can take into account does not include matters that are relevant to them. For example, the impact of an employee's behaviour in the workplace is a very relevant factor in determining how to proceed with disciplinary action. We frequently have members advising us that they have no option but to dismiss an employee because keeping the employee on during the disciplinary process would be too detrimental to morale or health and safety of others in the workplace.

The concept of 'a fair go all round' is no longer used. The factors that the FWC may take into account do not include an assessment of the workplace to determine how the attitude, conduct, performance or behaviour of the dismissed employee impacted on other employees and productivity and efficiency. The FWC is not required, as part of the procedural fairness process, to consider whether these factors were relevant to the way an employee was dismissed. There is a need to look at the dismissed employee's performance on workplace efficiency and productivity and the impact on other employees. This should be given equal weighting to the dismissed employee's right to have the opportunity to respond to the issues raised by the employer. Small businesses do not have human resources staff to manage workplace issues 'on the spot'.

Unfortunately, 'go away money' in unfair dismissal claims has returned in exactly the same way as it had operated prior to Work Choices. Employers are now resigned to the fact that it is likely they will receive an unfair dismissal claim if they terminate an employee on performance and conduct grounds.

Members are also aware of the time and cost of legal proceedings should they wish to defend an unfair dismissal claim. The level of commitment and complexity required to prepare a case now has increased significantly since unfair dismissals came under the jurisdiction of the Australian Industrial Relations Commission in the 1990's.

Where an applicant does not comply with directions given by FWC members, members go out of their way to contact them and give them every opportunity to comply with directions. Meanwhile, the employer has to attend on all occasions at a substantial cost of time and money. Employers are not granted the same procedural fairness allocated to employees. FWC members allocated to a particular case should dismiss an application if an employee has not complied with directions unless the applicant can demonstrate satisfactory reasons as to why they have not complied.

The case studies below illustrate that employers will pay 'go away money' rather than go through the process of defending their right to terminate an employee. In our view, the objectives relating to fairness in the workplace are not being met.

Case study

An apprentice was dismissed after the owner of a business found his apprentice at the workplace on Good Friday with three of his friends. The apprentice and his friends were working on their cars and drinking alcohol. Two other employees were also on the premises however they were authorised to be there.

When the apprentice was asked to remove the vehicles, the apprentice swore at the owner and then on removing the last vehicle, he spun the wheels throwing up stones over the employer and his companions who were present. The apprentice also drove a vehicle off the property although he did not have a Victorian licence and spun the wheels again 100 metres from the business premises. The employee was dismissed.

The apprentice made an unfair dismissal claim and his defence was that other people were on the premises too. The matter was settled for four weeks' pay. The owner decided it would be too expensive and time consuming to go through a hearing.

Case study

In Victoria, a business cannot employ a person in a vehicle customer sales capacity under the Motor Car Traders Act 1986 if an employee has been convicted of a serious criminal offence. In order to comply with the Motor Car Traders Act, an employer must file a police record check within six weeks of the employee commencing employment. The employer cannot file the request without the consent of the employee.

The employer asked the employee to sign the required form on several occasions but the employee stalled. Due to the length of time taken to lodge the form and receive the police record, the employee had passed the six month minimum period of employment. The police record showed that the employee had been convicted of a serious offence as defined under the Act (unlawful assault).

The employer terminated the employee because he could not continue to employ him due to his criminal conviction based on the Motor Car Traders Act. The employee filed an unfair dismissal claim as he claimed he was terminated outside the six month qualifying period and the nature of the offence in the police record was not sufficient to warrant termination under the Motor Car Traders Act.

The claim was settled for two weeks' pay. The employer was not prepared to contest the claim due to the cost and time involved in running a case to hearing.

Recommendations:

- 1. That consideration be given to introducing an all-round fairer and simpler set of principles to allow the FWC and all parties involved in an unfair dismissal application to deal with claims in a more expeditious and balanced way..***
- 2. That consideration be given to how payment of 'go away money' can be eliminated or reduced in unfair dismissal claims.***

Productivity, competitiveness and business investment

We have no submissions under this heading.

The ability of business and the labour market to respond appropriately to changing economic patterns of engagement in the labour market

Office of the Fair Work Ombudsman

The FWO has not been an entirely successful change. The role of award interpretation is more appropriately dealt with by the FWC, which has the experience and expertise to deal with award issues.

There is also concern that the FWO's staff are not sufficiently qualified or experienced in award interpretation and this creates the risk of uncertainty and confusion. Members are concerned that advice is given which does not take account of award custom and practice.

Recommendation: That award interpretation be handled by the FWC and the FWO concentrate on Award enforcement and education.

Four year review of modern awards

Due to the seemingly never ending reviews of awards which started in April 2008, the timing of future reviews must take into account the need for businesses to have adequate time to come to terms with the new awards and any revised conditions. Businesses, which have not had the chance to draw breath after coming to terms with the FWC Full Bench decision [2013] FWCFB 5411 on 23 August 2013 that awarded substantial wage increases and changes in conditions of employment for junior and adult apprentices, are now faced with potentially significant award changes as a result of another review.

Since the modern awards were introduced on 1 January 2010, the mid-term review which started in March 2012 ran into the four year review. Given the breadth of issues before numerous Full Benches in the current four year review, there will be little space between the completion of this four year review and the next one.

Recommendation: The four year period for the next award review should start from the time all modern awards have been finalised and varied, not from the date the review started.

The ability for employers to flexibly manage and engage with their employees

Encashment of annual leave

VACC and the Motor Trades Associations argued unsuccessfully for an award clause in the VMRSR Award allowing for encashment of annual leave during award modernisation. The problem with the lack of a provision in the VMRSR Award for encashment is that the NES only allows encashment where an award expressly provides for it or by an Enterprise Agreement for award covered employees.

Case study

In South Australia, an award regulated employee required encashment of annual leave for severe/financial reasons and the employer informed him that this cannot be done because he was not award free. Some employers are pressured into granting encashment of leave entitlements on the same terms as set out in sections 93 and 94 of the Act, which provide for cashing out of annual leave for award free employees. Such pressure includes threats of resignation where key employees can readily transfer to other skilled shortage employers.

Non award covered employees are able to arrange for encashment through a formal letter to their employer requesting encashment. There are safeguards such as the requirement to hold an amount of 20 days accrued leave.

The requirement for a small business to go through a formal enterprise agreement process to provide for encashment, which is almost always requested by the employee, is totally unrealistic and inequitable given non award employees may simply request encashment in writing. Encashment of annual leave at the request of *any* employee should be provided for in the Act, with the abovementioned safeguards. It should not be necessary to rely on an award provision or a provision in an enterprise agreement.

Recommendation: That sections 92 and 93 of the Act be deleted and section 94(1)-(4) of the Act be amended to apply to all employees, not just award free employees.

Individual flexibility agreements

Currently an employer cannot enter into an Individual Flexibility Agreement (IFA) prior to an employee being employed by the business or as a condition of employment. This is despite an employer being required to ensure that an employee is better off overall than if there was no IFA.

As an example in the VMRSR Award, vehicle salespersons are not subject to the provisions relating to 38 ordinary hours of work or overtime payments. There are special provisions for vehicle salespersons that provide that they work either a 5½ day week or 11 day fortnight for which they receive a retainer. The award provides the employer and the vehicle salesperson the opportunity to agree on a sales commission structure. The retainer/ commission structure gives the salesperson the best opportunity to maximise their earning potential, which often falls within the salary range of \$70,000 to \$100,000 or more.

Case study

One Victorian dealership has changed the hours of work arrangements in the VMRSR Award by introducing IFAs which have resulted in salespersons receiving an extra 21 days off each year. However, the inflexibility of the IFA provisions in the Act mean that a vehicle salesperson cannot be signed up under the same IFA until after they have started with the business.

The practical effect of this restriction means that although the business has put a special roster in place based on the revised hours of work arrangements in the IFAs, a new salesperson may disrupt that roster. A salesperson must commence their employment under the award not the IFA. If the employee does not sign an identical IFA once they commence their employment, this inflexibility has the potential to compromise the new working arrangements and make the roster ineffective and unworkable. This would be to the detriment of all salespersons in the workplace.

Further, either party can terminate an IFA with 28 days' notice under section 203(6). This means that a single employee can disrupt the flexibility introduced by giving notice to end their involvement. This has led to many businesses not bothering to use IFAs. Why go to the trouble of negotiating the terms of an IFA when they can be so easily overturned?

A better system would be if IFAs could be terminated only by agreement between the employer and employee, or failing agreement, by an application to the FWC. The FWC decision would have to take into account the impact on the employer's business of terminating an IFA.

Recommendation: That IFAs can be made prior to the commencement of employment, and that IFAs can only be terminated by agreement or by an application to the FWC.

Barriers to bargaining

Enterprise bargaining

The objectives of the Act set out in section 3 include "achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action".

There are also objectives set out in section 171 of the Act which apply specifically to Part 2-4 Enterprise Agreements. One objective is "to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits". The other objective is for the FWC to facilitate good faith bargaining and the making of enterprise agreements.

One would expect the "simple, flexible and fair framework" to rely on section 228 of the Act that sets out the good faith bargaining requirements. Both parties and their representatives are required to go through a process of organising and attending meetings, producing documentation and responding to each other's claims in a timely manner.

If, after the process has been concluded, the parties have failed to reach an agreement, a party or parties representing the employees can, through a secret ballot, opt to take protected industrial action.

Unfortunately, Unions have exploited the enterprise bargaining provisions in the Act, bypassing the objectives of good faith bargaining and delivery of productivity benefits.

Enterprise bargaining as it was under Work Choices was criticised as failing to provide an equitable and balanced system of negotiation and effective registration of enterprise agreements. The system that operated prior to Work Choices was a fairer system. The parties had the opportunity to either negotiate agreements with a union and employees or between the company and its employees directly.

In addition, the Better Off Overall Test (BOOT) has also prevented employers from achieving workplace flexibility and productivity. The new BOOT has effectively taken productivity out of the equation in negotiating an enterprise agreement. This is contrary to the objectives at the beginning of the Act and in section 171.

There is no scope for an employer to negotiate flexible pay arrangements and working arrangements that suit the nature of the business. The 'no disadvantage test' that operated prior to 27 March 2006 provided employees with some scope for flexibility and productivity, but within defined parameters.

If there is a conflict as to whether employees want to negotiate an enterprise agreement, the matter should be determined as the first step by a majority support determination by the employees conducted by a secret ballot unless the workplace has an equally equitable system of voting on whether negotiation for an enterprise agreement should commence.

It should be a requirement that if a union has not engaged in good faith bargaining based on the steps set out in the Act or has not discussed productivity gains in a positive way during the good faith bargaining process, then the union should be precluded from taking protected action under the Act.

To ensure there is an orderly process for the negotiation of enterprise agreements, in terms of certainty over the representation of parties, union officials cannot be bargaining agent for employees outside their union coverage.

Many members would like to put in place Enterprise Agreements to meet basic issues arising in the workplace (e.g. cashing out of annual leave) but feel constrained due to the public approval process, the complexity of the enterprise bargaining process the time involved and potential involvement of unions in such a process or at the time of agreement renewal.

Provided agreements are approved based on the legislative requirements there is no good reason for such agreements to be displayed on a public website. Such agreements could be maintained by the Registry and the privacy of the company and its employees protected.

Another problem with the current enterprise bargaining process is the procedural arrangements required to cancel an enterprise agreement once it has been approved by the FWC. This was recently highlighted in the FWC decision *Metropolitan Fire and Emergency*

Board v United Firefighters Union of Australia [2014] FWC 7776 where, after 17 hearing days involving legal representation on both sides and 400 exhibits, an application for cancellation of an agreement was rejected. There is also a likelihood the decision will be appealed.

Enterprise agreements have over time become counterproductive for small and medium size businesses. Instead of being used by businesses to improve productivity and recognise employee contributions towards improved productivity, agreements have merely become an add-on to existing awards, which underpin most enterprise agreements. They provide no tangible benefits to the particular operating needs of a business. Once an agreement has been approved by the FWC, a business finds itself seemingly 'locked in perpetuity' to maintaining an agreement due to the stringent requirements attached to cancelling an agreement. A simpler method is needed to cover a situation where a business, faced with adverse economic or changed business operating arrangements, can make the necessary business changes due to changed circumstances.

Recommendations:

- 1. That protected industrial action should be precluded if a union has not obtained a majority support determination, conducted good faith bargaining and discussed productivity gains with the employer.**
- 2. Productivity offsets must be included in the good faith bargaining process. If not, then a union should be precluded from taking protected action under the Act.**
- 3. Union officials should not be able to act as a bargaining agent for employees outside their union's coverage.**
- 4. Consideration be given to a return to the previous system where an employer could negotiate with a union or directly with employees.**
- 5. Review the process and procedures, including the time prescribed, to approve an Enterprise Agreement as they are presently too complex for small to medium size businesses to consider using such agreements. This review should also aim to reduce the workload of FWC members and allow for private agreements between employers and employees.**
- 6. Finally, consideration should also be given to returning to a 'no disadvantage test' rather than the BOOT, which is too restrictive and prevents employers from achieving flexible arrangements appropriate to their workplace.**
- 7. A simpler cancellation process that takes account of changed economic or business operating circumstances.**

Red tape and the compliance burden for employers

Administration of paid parental leave

Under Part 2-2, Division 5 of the Act, employers are required to administer the payment of Paid Parental Leave (PPL) instalments to eligible employees. Having small businesses administer the Paid Parental Leave serves no real policy purpose and merely creates significant administrative burden that inhibits the productivity of small businesses.

The 2013 ACCI Pre-election survey found that 84.3% of businesses either agreed or strongly agreed that the Government should not require employers to be the paymaster for the Paid

Parental Leave scheme.¹¹ This is another unnecessary layer on top of an already very complicated workplace relation system. According to the ACCI National Red Tape Survey, March quarter 2014,¹² employee wages, conditions and superannuation is the second highest rated category for complexity, after workplace health and safety and workers compensation. Essentially, with regard to employee wages, conditions and superannuation, 51.4% of respondents rated it as being either very complex or extremely complex. These survey results illustrates that the great majority of businesses support removing this requirement to ease their compliance burden.

Recommendation: That the Federal Government should administer Paid Parental Leave rather than small businesses.

Mandatory reporting of gender-related issues

The requirement to conduct mandatory reporting of gender-related issues is administratively burdensome and has had little to no effect on the social and cultural factors that have led to male-domination of the automotive industry.

Additionally, reporting on non-managerial roles is needless as the wages for such roles are based on the VMRSR Award and enterprise agreements, both of which prescribe wages on a gender-neutral basis. Further, gender reporting requirements in their current state have become a significant compliance and cost burden among our members and has detrimentally affected the productivity of our members' businesses.

According to the 2015 ACCI National Red Tape Survey, record keeping was noted as the most expensive compliance activity, with 75.6% rating its cost as either 'very large' (33.2%) or 'somewhat large' (42.4%).¹³

Recommendation: That mandatory reporting of gender-reporting issues should be removed

Transfer of business

Part 2-8 of the Act allows for the transfer of certain instruments and protection of high-income employees. The transfer of certain instruments leads to restrictions of the ability of employers to purchase a business unencumbered.

Having to pay employees based on a range of different agreements is overly restrictive and a trap for some employers that are not aware of this requirement. The costs of such agreements often make a sale unviable. This restriction on the normal sale of a business is inappropriate and unnecessary. The requirement to seek orders from the FWC that such instruments will not transfer is impracticable for some businesses due to the exposure of the business to union intervention. Our experience is that orders are issued where an

¹¹ ACCI Pre-Election Survey, May 2013, <<http://www.acci.asn.au/getattachment/a75b19cc-d9b4-4cf6-9600-b6e7a6553ba6/ACCI-Pre-election-Survey-2013.aspx>>

¹² ACCI National Red Tape Survey, March quarter 2014, < <http://www.acci.asn.au/getattachment/3eb613a3-6e30-49ea-87ef-0fbd95e3738b/ACCI-National-Red-Tape-Survey---March-2014.aspx>>

¹³ ACCI National Red Tape Survey, March quarter 2014, < <http://www.acci.asn.au/getattachment/3eb613a3-6e30-49ea-87ef-0fbd95e3738b/ACCI-National-Red-Tape-Survey---March-2014.aspx>>

application is made so it seems unnecessary to require the application. In the circumstances this protection is not appropriate and should be removed.

These provisions are inconsistent with the objectives of the Act and fail to meet the objectives of Part 2-8, which are set out in section 309. These objectives are to provide a balance between the protection of employees' terms and conditions of employment and the interests of employers in running their enterprises efficiently.

As they currently stand, this Part does not allow employers to run their businesses efficiently. The acquisition of a business can become very complicated with a number of awards and enterprise agreements applying to different parts of the business. It also makes it very difficult for a business that wishes to buy another business to add to an already existing business. In these circumstances, there can be two or more different enterprise agreements applying to employees who do the same type of work.

It would be preferable to start with a clean slate, with terms and conditions to be derived from the NES, modern awards, and in time, a new enterprise agreement, should they wish to negotiate one.

In relation to high-income earners, this protection is not needed and only leads to such employees not being offered employment in the new business. If the employee is of crucial importance to a business, they can negotiate appropriate outcomes for themselves in any event.

Recommendation: That Part 2-8 of the Act be deleted.

Alternatively, that the transfer of business provisions be simplified so that employers can understand their obligations.

Meaning of 'genuine redundancy'

We propose the simplification of the definition of genuine redundancies. Our experience is that matters that are clearly genuine redundancies are becoming the subject of full arbitration proceedings due to technical breaches of s389 where shortcomings in the consultation process are tested. In *Jamil Maswan v Escada Textilvertrieb t/a ESCADA* [2011] FWA 4239, there was a breach of the consultation requirements on a redundancy matter. VP Watson rightly, in our view, dismissed the matter on the basis that, despite the technical breach, the redundancy would still have occurred regardless of the lack of consultation (paragraphs 41 and 42 of the decision).

Unfortunately, VP Watson's position has not been consistently applied by the FWC. In *UES (Int'l) Pty Ltd v Leevan Harvey* [2012] FWA 5241, the Full Bench of the FWC ordered the employer to pay its former employee two weeks' wages despite finding that the redundancy would have occurred even with the requisite consultation period. Many businesses undergoing necessary redundancies are struggling to survive and this process requirement places an additional burden on them entirely unrelated to whether the redundancies are appropriate to the business' circumstances. Furthermore, this position unfairly discriminates against small businesses who cannot afford the human resources staff to satisfy consultation requirements.

In a number of cases in the automotive industry, small businesses are told by their financial advisor that they have to close their business down immediately or with a short period of notice which does not allow adequate time for consultation based on existing award consultation procedures.

We propose that section 389(1)(b) of the Act should be deleted. This will allow for the removal of such technical breaches and ensure appropriate jurisdictional challenges may be made to minimise the cost of full arbitrations of such matters.

Recommendation: That section 389(1)(b) of the Act be deleted.

Cost orders against lawyers and paid agents

Some paid agents are operating on the basis of a 'no win no fee' basis. This means that applicants are not under any pressure to settle matters. This encourages matters to be settled based on 'go away money' and claims for unfair dismissal are made to advance what are essentially underpayment of wages claims that ought best be handled by the FWO.

Paid agents should be treated on a different basis to lawyers, as lawyers are subject to ethical rules and regulations enforced by the legal profession. There is a basis for a different approach for paid agents. Where a matter meets the requirement that there was "no reasonable prospect of success" and a paid agent has represented an applicant under section 401(1) of the Act, costs should be mandatory. As such, the requirement in section 401(1A) should not apply in relation to paid agents.

Recommendation: That the requirement in section 401(1A) should not apply to paid agents. Section 401 of the Act should be amended to provide that paid agents should be required to pay costs personally if there was "no reasonable prospects of success".

Industrial conflict and days lost due to industrial action

Right of entry

There is still some confusion about how union visits should proceed at a workplace. Consideration should be given to providing an employer with as much information as possible so they know what to expect.

The Act should be amended to require the union to specify in the Entry Notice, which must be given 24 hours prior to the meeting, the general purpose/nature of the visit, the date of the proposed visit and whether they will be attending either during an authorised rest break or the regular meal break.

Union permits should have a photograph identifying the union representative, similar to a drivers licence. Right of entry should be regulated under the Act and not be a permitted matter for variation through an Enterprise Agreement.

Unions are not limited in the number of right of entry permits that they can request for any one business. This can particularly effect small businesses, where a union can obtain regular

entry permits over a relatively short period of time. Employers are becoming increasingly frustrated with union officials requesting repeat visits to workplaces where there is no interest from employees who end up eating their lunch outside of their own lunchroom.

Recommendations:

- 1. That Entry Notices have the time of the proposed visit (either authorised rest break or regular meal break) and the general purpose/nature of the visit.***
- 2. That union permits have a photograph of the union official.***
- 3. The workplace lunch room is not the property of a union and the venue for a meeting should be based on an available meeting room to suit the business' operating requirements.***
- 4. That regulation of right of entry remain in the Act rather than through enterprise agreements.***
- 5. That the FWC give consideration when granting right of entry permits to the number of permits previously granted with respect to a business over a 12 month period.***

Appropriate scope for independent contracting

We have no submissions under this heading.