Productivity Commission Review:

Australia's Workplace Relations Framework

Submission of Minter Ellison in relation to Issues Paper 4, 'General protections and ‘adverse action’

13 March 2015

SUBMISSION BY MINTER ELLISON IN RELATION TO

ISSUES PAPER NO.4: 'GENERAL PROTECTIONS AND 'ADVERSE ACTION'

1. Introduction

1.1 Minter Ellison is a national law firm with offices in Brisbane, Sydney, Canberra, Perth and Melbourne and an associated office in Adelaide. We have a leading practice in employment and industrial relations law, with 15 partners and over 80 lawyers specialising in the area.

1.2 Our clients include many of Australia's leading companies in all sectors of the economy.

1.3 As part of this, we have extensive experience in defending adverse action claims and are well placed to provide a *'real world'*, practical critique of the operation of the laws – as opposed to the theory and the objectives sought to be achieved (which the practice often diverges from).

1.4 However, due to confidentiality obligations, we are restricted in the supporting evidence can provide. The confidentiality obligations arise not only from client confidentiality – but also from the fact that many of these claims are settled on a confidential basis and/or never become public.

2. General Observations on the Adverse Action Laws

2.1 We start by making some general observations about the practical operation of the adverse action laws.

(a) In our experience, applicant lawyers are filing extensive claims, both in the Fair Work Commission and in the Courts – making multiple allegations of adverse action and multiple assertions of workplace rights which, when multiplied together, can mean that there are more than 50 or even 100 separate breaches alleged.

An example of this is *Vucina v Hewlett-Packard Australia Pty Ltd* [2011] FMCA 891, where Federal Magistrate Smith described the Applicant's claim as a '*40 page document with 110 paragraphs, containing innumerable causes of action pleaded separately and in a rolled-up fashion.*'

For example, in one recent claim, the outline of the claim to the Fair Work Commission (which is principally for the purpose of conciliation) was nearly 10,000 words.

This significantly increases the legal costs for both employer and employee – although, as we come to below, applicant lawyers commonly seek that employers pay their costs as part of a settlement.

There is no real utility in such extensive claims – particularly in the Fair Work Commission, where the object is to determine if the parties are able to settle the matter and a brief outline of the case is all that is required.

(b) In our experience, the reverse onus is being misused. The fact that there is a reverse onus is being used to make assertions of contravention where there is no logical (or actual) connection between alleged adverse action and alleged motivation. While ultimately these allegations will ultimately fail, they can significantly add to the costs of defending a claim.

(c) Individual managers are being targeted and joined as personal respondents – raising the spectre of personal liability, fines and reputational damage. This can create great stress for individuals and often appears to be done primarily for tactical reasons (that is, to maximise the pressure to settle claims).

In extreme cases, solicitors are being joined as personal respondents. One example (which resulted in costs orders being made against the applicant's lawyers) is Ryan v Primesafe [2015] FCA 8 (21 January 2015)

(d) Settlements are often much higher than warranted by the merits of the claim, particularly because of the costs of defending a claim.

Notwithstanding the costs limitations in the Act, applicant lawyers routinely seek a payment of legal costs as part of a settlement. With some firms, those costs can be very high because of the practice of filing extensive claims – even when the only proceedings which have been filed are those in the Fair Work Commission.

2.2 This has an economic and productivity related impact in a series of ways including:

(a) the legal costs involved;

(b) the lost management time;

(c) settlement costs;

(d) the capacity for employees to frustrate legitimate performance management.

3. Submissions

3.1 We make the following submissions in relation to ways in which the operation of the adverse action laws could be improved, made more coherent with other laws and more consistent with the objectives of the Act – in particular, ensuring flexibility for employers while protecting employees from unfair treatment.

3.2 In making these submissions, we acknowledge that there is an important and legitimate role for the protections which the adverse action provisions provide. However, in our view, there is a need for a greater balance between the rights of employers and employees.

Submission	Reasons
The same limitations on compensation should apply as provided by the unfair dismissal laws	The unfair dismissal laws: • limit compensation to (broadly speaking) 6 months remuneration or half the annual high income threshold (whichever is lower) (section 392(5)); • exclude compensation for shock, distress and humiliation (section 392(4)); • provide for discounting of compensation where the employee has engaged in misconduct (section 392(3)).

Submission	Reasons
	It is important to appreciate that reinstatement (with back pay) is also a remedy – which ensures employees are properly protected (section 391). The limits on compensations were not always a part of the federal unfair dismissal laws. At the time the laws commenced operation in 1994, they provided for uncapped compensation. See section 170EE of the *Industrial Relations Act 1988* (as inserted by the *Industrial Relations Reform Act 1993* (Cth)) and as replaced by section 8 of the *Industrial Relations Amendment Act (No. 2) 1994* (Cth). This change would provide greater coherence and introduce a greater balance between the rights of employee and employer. Employees would remain protected because reinstatement (with back pay) and injunctions would continue to be available. It would also encourage a more cost effective dealing with claims. In this regard, it should discourage the practice of filing extensive claims – particularly at the Fair Work Commission stage.
Similar limitations should apply in relation to access to the adverse action provisions as apply to the unfair dismissal laws	Amongst other things, access to the unfair dismissal laws is limited to employees who earn less than the high income threshold (presently $133,000 per annum) or who are covered by an industrial instrument. Similar limitations should apply to the adverse action provisions. It is interesting to note that the federal unfair dismissal laws originally applied to all employees, regardless of income. A few months after the laws commenced, the Government amended the legislation to exclude high income earners from access to unfair dismissal laws. In the second reading speech, the Minister explained this as follows *'The exclusion of high income earners who are not covered by awards is intended to ensure that the Court's resources are fully available to address matters involving the lower paid and non-managerial employees who constitute the vast majority of the Australian workforce*.' See Senate Hansard, Monday, 20 June 1994 at p.1737 and also the *Industrial Relations Reform Act 1993* (Cth) and section 170CD as inserted by section 6 of the *Industrial Relations Amendment Bill (No. 2) Act* (Cth). For similar reasons, the New South Wales Government limited the access to the unfair contracts laws to employees earning under $200,000 per annum. See section 108A of the *Industrial Relations Act 1996* (NSW), as inserted by the *Industrial Relations Amendment (Unfair Contracts) Bill 2002*. Amongst other things, the second reading speech said *'In recent times the unfair contracts jurisdiction has been used by highly paid employees as a way to hit the jackpot and obtain compensation after the termination of their employment. The Industrial Relations Commission of New South Wales has awarded benefits on termination to these former highly paid executives which are much more than what an ordinary worker can expect to achieve in the unfair*

Submission	Reasons
	dismissal jurisdiction.'
There should be an express exemption for frivolous, vexatious, false or malicious complaints.	The Act extended the operation of the adverse action provisions to adverse action because an employee makes a complaint about their employment – that is an internal complaint. Previously, the laws applied only to complaints to external bodies. See section 341(1)(c). Practically speaking, this has significantly extended the operation of the laws. However, there is no exemption for complaints which are: • frivolous; • vexatious; • false; or • malicious. This type of exemption is part of (for example) the anti-victimisation provisions in the *Sex Discrimination Act 1984* (Cth) and the *Anti-Discrimination Act 1977* – both of which provide defences where allegations are false and not made in good faith. (section 94(3) of the SDA and section 50 of the ADA) There is clearly no legitimate reason to protect an employee who makes a false, vexatious or malicious complaint nor (it is submitted) a trivial one either.
A reasonable management actions defence	*'Reasonable management action'* forms the basis for exclusions to both the anti-bullying provisions and workers compensation legislation. See section 789FD(2) of the Act and, for example, section 11A of the *Workers Compensation Act 1987* (NSW). It is suggested that this would be an appropriate exclusion for the adverse action laws. In this regard, few, if any, rights in society are absolute – they need to be balanced against other rights. The adverse action provisions are, however, expressed in absolute terms. What if an employee makes so many complaints about their colleagues that the working relationship becomes untenable? Or makes a complaint, but in such an aggressive and excessive fashion that some action is warranted? Part of the way the law has dealt with this is in the way the employers motivations are characterised. For example, in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41, the majority of the High Court held that an employer did not contravene the adverse action provisions for dismissing an employee who waved a sign "*No principles SCABS No guts*" on a picket line. This was because of a finding of fact – that the decision maker was motivated by the fact that he regarded the sign as offensive, not by any lawful union activities or union offices held. Notably, two members of the High Court dissented.

Submission	Reasons
	However, this is a difficult distinction – not easy to apply in practice - and places a great emphasis on what was in the decision maker's mind. On the exact same facts, if the decision maker's motivation was only slightly different, the employer would be held to contravene the adverse action provisions. It would be more direct and clearer to simply recognise reasonable management actions as a defence. A reasonable management actions defence would provide greater coherence with other laws and would make the adverse action provisions become more practical and less technical. It would ensure that the laws were properly balanced between employees and employers.
Reconsideration of the reverse onus	The historical position was that there should be a reverse onus, because the employer's motive was uniquely within the employer's knowledge. In the modern age, problems of proving motivation are no longer anywhere near as acute – given the prevalence of emails and other forms of electronic communication. And many laws require the applicant to prove the motive of the respondent. In these circumstances, the laws should revert to the usual position that the applicant must prove their case. In our view, this position is reinforced by the misuse of the reverse onus. The fact that there is a reverse onus is being used to justify allegations of contravention where there is no logical connection between alleged adverse action and alleged motivation. These claims can only be made because of the reverse onus, as otherwise solicitors would be unable to certify claims had reasonable prospects of success. A possible half way house is to require that the applicant establish a prima facie case, whereupon the onus switches to the employer.
Individuals shouldn't be personal defendants where they are acting in the course of employment.	As noted above, individual managers are being targeted and joined as personal respondents – raising the spectre of personal liability, fines and reputational damage. This can create great stress for individuals and often appears to be done primarily for tactical reasons (that is, to maximise the pressure to settle claims). In extreme cases, solicitors are being joined as personal respondents. One example (which resulted in costs orders being made against the applicant's lawyers) is Ryan v Primesafe [2015] FCA 8 (21 January 2015) Especially given the broader reach of the laws, individuals managers should not be in fear of being prosecuted personally and fined. In difficult cases with aggressive employees or lawyers, this can have a *'freezing effect'* on management action – regardless of the merits of the case.
Interaction with workers compensation laws	There are limitations on compensation under state and federal workers' compensation laws. See, for example, sections 44 and 45 of

Submission	Reasons
	the *Safety, Rehabilitation and Compensation Act 1988* (Cth) and sections Part 5 of the *Workers Compensation Act 2007* (NSW). The adverse action provisions should not be able to be used to bypass limitations on damages for work related injuries. Accordingly, compensation should not be available for workplace injuries for which compensation would be available under workers compensation laws. This would not preclude other orders – such as reinstatement orders.

Minter Ellison

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