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### **Submission to the Workplace Relations Framework Productivity Commission**

#### **Introduction**

This is a submission on the productivity and economic consequences of the *Fair Work Act 2009* in so far as it affects the rights conferred upon the employees in the General Protections and Unfair Dismissal divisions of the Act.

McDonald Murholme is the leading employment law firm for employees based in Victoria with 20 years of experience. It probably has made more claims under the Act than any other law firm in Victoria during that time. The submission is based on its view which is independent. McDonald Murholme is not a union firm nor an employer representative.

The *Fair Work Act 2009* has in our view many valuable attributes to preserve employment. It sets standards which are reasonable for employers and employees to meet.

By these means, it achieves the primary goals of the first *Conciliation and Arbitration Act 1904* to provide an orderly Industrial Relations system and a high standard of living for Australians who want to work. Over the past 111 years, Australia has become a highly desirable place to live, a key international trader and respected on the world stage. At McDonald Murholme, we believe that a sound Industrial Relations framework with clearly defined rights for individuals, not just unions and employers, is essential. Only this will ensure these attributes continue.

We recognise that even the most highly paid employees of companies who act as the employer are themselves obviously employees. It is often forgotten that an overwhelmingly large number of working Australians are employees. Therefore it is fair to say that all working Australians need a protective Industrial Relations system – the current act provides this. With this in mind, we raise the following concerns:

#### **1. Job security**

Job security is provided in the current Act which allows persons to be dismissed essentially following a fair process and for a valid reason. It prohibits wrongful dismissal for reasons which are unacceptable in Australia because they offend Australian values (what might be called 'anti-social' conduct by an employer). Australia needs to support a diverse multi-cultural society where everyone willing to work is given that opportunity. Persons are protected from dismissal where

they have attributes unrelated to their work performance/gender, carer responsibilities, age, race, colour, or creed. Further it protects individuals for other values they hold dear including political opinion. It is well accepted that the old saying “I disagree with your opinion but I will defend your right to express it”, goes to the heart of an Australian democracy. McDonald Murholme supported the Federal Court case of *The Federal Court in Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27 which demonstrates this. Continuing on, employees should be free to join a union and not suffer adverse consequences. Employers certainly are better off when members of Australian Chamber of Commerce of Employer Federation. Employers are not disgraced for doing so, however employees are.

Job security must also be protected for persons exercising an employment right. For example employees ought to speak up and not be sacked for doing so if being underpaid or asked to work without pay or to raise safety issues. The current Act allows employees who are still employed to make an application to the Fair Work Commission, this is a vital requirement. Obviously preventing an employee from protecting their job security until after they have been dismissed is an oxymoron. Prior to the *Fair Work Act 2009*, this in practice was the situation. Employees were rarely reinstated and were often ridiculed by being offered what the Howard Government Ministers called “piss off” or “go away money”. This results in employees and their families being forced to turn to Government welfare when they could be adequately employed were it not for the wrongful conduct of an employer. Such an employer could cover its tracks with such a payment. The tax payers are at large left to pick up the cost of the wrongful conduct, loss of income and damage to the employee.

It is inequitable to force an employee to face the choice of “it’s my way or the highway” when facing wrongful conduct by an employer when resort to an independent workplace tribunal should be available to sort out a problem through conciliation. It harms the Australian economy if “my way or the highway” is the only option (see below).

## **2. Economy sustainability and progress**

It serves no public or private interest when an employee is wrongfully dismissed. We have observed that mistreated employees place unexpected and unnecessary demands on the welfare system – this is demonstrated when healthy people become very unwell due to the stress caused from their workplace issues. There is a flow on effect into family relationships affecting partners, children or parents. Family relationships often deteriorate or are fractured due to financial stress from unemployment. The actual economic cost all round should be researched and calculated by the Commission.

Should the wrongfully dismissed employee be a pregnant mother, made redundant when she announces her pregnancy, she would not be able to normally find a job in the short term and the pressure on her, the unborn child, and her partner is often very harmful. It can have direct adverse financial consequences for not merely the family requiring increased medical attention but a flow on effect to the economy. Demand for social security payments has increased. The demands for more bureaucratic administration while at the same time reducing the disposable income/expenditure of the family has direct adverse consequences.

Similarly should the wrongfully dismissed employee be over 55 (who has given long term loyal service to a company), the prospects of reemployment are poor and premature retirement often

results. The economic consequence of this is all too obvious for the country and the effects on the individual and her/his family pointedly harmful.

Should the wrongfully dismissed employee be young and inexperienced but striving, the wrongful dismissal is not only a burden on the tax payer through Centrelink payments but demoralising to the individual who can become cynical or worse about the opportunities in the Australian economy. Good people can leave our shores taking their skill and knowledge with them merely because of the unlawful conduct of one bad employer.

### **3. Sub-contractors**

Sub-contractors are often used to provide a valuable workforce accessible to employers for a specific commitment/contract. They are often in a weaker bargaining position. Clearly they need protection against anti-social conduct by companies. In this respect the current Act provides some protection under the General Protections provisions. This is appropriate and valid given that in many respects this represents employees or be it a different type of employee. There is a need to protect them as referred in the *Owner Drivers and Forestry Contractors Act 2005* (Vic). We believe that McDonald Murholme was the first firm to use the Act and get a valuable outcome to protect a family member against what might be seen as an abusive power by a multi-national as demonstrated in the *A D A Cartage Pty Ltd v Holcim (Australia) Pty Ltd* (Occupational and Business Regulation) [2010] VCAT 1771 (1 November 2010) case.

All of these are direct Productivity Commission issues. They can be directly addressed by maintaining the existing Act without amendment. This Act is still in its infancy and its contribution to upholding a more productive working environment will grow over time.

We are happy to further discuss our concerns if required.

Kind regards,  
Alan J. McDonald  
Managing Director  
McDonald Murholme