

PRODUCTIVITY COMMISSION
WORKPLACE RELATIONS FRAMEWORK REVIEW

SUBMISSION BY
AUSTRALIAN CATHOLIC UNIVERSITY

18 September 2015

Australian Catholic University takes this opportunity to provide a submission to the Productivity Commission for consideration as part of its Review of the Fair Work Act, 2009. This submission focusses on one particular issue arising from the Productivity Commission's Draft Report released on 4 August 2015, namely the issues of the fees to be paid by applicants who lodge a claim of alleged unfair dismissal with the Fair Work Commission.

In Section 5.6 on page 231 of the draft Report, the Commission considers this matter and it has requested information as follows:

"There may be merit in considering a revised, two-tier approach to lodgment fees by:

- increasing by a modest amount the fees for application lodgment, and tying the fee to income levels at the time of dismissal, such that higher income earners pay more to lodge applications; and/or*
- introducing an additional fee for cases proceeding to arbitration to partly recover the substantial costs involved with conducting proceedings in the FWC.*

Further views are sought on the effectiveness of this approach, and its possible consequences for all parties.

INFORMATION REQUEST

The Productivity Commission seeks further views on possible changes to lodgment fees for unfair dismissal claims.

ACU considers that a substantial increase in the lodgment fees would be inequitable and act as a barrier for low paid workers to be able to access their rights in the Commission. While the University appreciates that an increase in fees could act as a deterrent to speculative claims that have no reasonable prospect of success; such an increase would also inevitably act as a deterrent to claims that would have a reasonable prospect of success if the applicant could afford to proceed with the matter to a conciliation and/or hearing. When access to justice is restricted to the wealthier then justice is denied.

The University considers that its position on this issue is consistent with the consideration of the Commission as shown in its Overview Statement:

- *Labour is not just an ordinary input. There are ethical and community norms about the way in which a country treats its employees.*
- *Without regulation, employees are likely to have much less bargaining power than employers, with adverse outcomes for their wages and conditions.*

In the alternative, on this issue Australian Catholic University supports the submission from Catholic Commission for Employment Relations (CCER). The CCER submission recommends two options that would create a more active filtering process based on merit for claims of alleged unfair dismissal (please see extract attached).

For the consideration of the Productivity Commission.

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Senior Employment Relations Officer
Australian Catholic University

Copy to: Mr Stuart Andrews, Australian Higher Education Industrial Association

Attachment 1: "CCER Submission"¹:

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.

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.

¹ Please see pages 34 – 36 of the CCER Submission dated March 2015

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."