

Submission to the Inquiry into the Workplace Relations Framework

Unfair Dismissal

Ch. 3 “Institutions” of the Draft report p. 129 - 161

Ch. 5 “Unfair Dismissal” of the Draft Report p. 199- 240, and;

Part 4 of the Report’s Overview p. 27 - 28

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In view of the recommendations made in the Draft Report issues on 4 August 2015 by the Commission, I wish to make the following submission:

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

DRAFT RECOMMENDATION 3.2, 3.3, and 3.4:

- *stipulate that new appointments of the President, Vice Presidents, Deputy Presidents and Commissioners of the Fair Work Commission be for periods of five years, with the possibility of reappointment at the end of this period, subject to a merit-based performance review undertaken jointly by an independent expert appointment panel and the President*
- *independent expert appointment panel should be established by the Australian Government and state and territory governments and members of the appointment panel should not have had previous direct roles in industrial representation or advocacy*
- *a requirement for the Panel and the Minister for Employment respectively is that they be satisfied that a person recommended for appointment would be widely seen as having an unbiased and credible framework for reaching conclusions and determinations in relation to workplace relation matters or other relevant areas.*

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Disclaimer: The views presented in this submission are derived from 10 years of independent research on unfair dismissal policy in Australia and overseas. These views are my own and should not be assumed to represent the views of my employer, of those who have funded the research or of those who have collaborated to it.

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In Booth & Freyens (2014), we provided evidence (for dismissal arbitration) that the decisions of commissioners of the FWC (and predecessor bodies) are influenced by their ‘ideological’ background (colour of appointing political party, and having worked for a union or an employer association).

These results are hardly surprising; hundreds of law, economics and political science research papers have found significant effects of this nature in the decisions of judges, commissioners and arbiters in a wide range of legal contexts (and most prominently in the US – see Booth 2010).

In current work with Xiadong Gong from NATSEM (Freyens and Gong 2015), we analysed a much larger set of dismissal cases and confirmed the 2014 results. We fully tested for the randomisation of cases to commissioners and could find no particular pattern (across industry, occupation etc.). Randomised allocation of cases is of course a necessary condition for the results of any study of arbitrated cases to gain credibility and acceptance.

We also tested for the 50-50 hypothesis – the idea that only the most complex cases should reach a hearing and therefore the ‘ideology’ of a commissioner (or reforms such as WorkChoices and Fair Work) should play little to no role in decisions. We were able to test for and dismiss this hypothesis: a significant number of cases that reach arbitration are not knife-edge cases.

Our results suggest that the recommended propositions 3.2, 3.3 and 3.4 aimed at neutralising the role of appointing political-party and work background effects would improve on the current institutional design of the Commission, subject to a few caveats.

First, there is further work to do on our analysis; we are currently constructing an index of case complexity. By interacting this index with the decisions of commissioners we should be able to determine whether the ideological bias effects should be viewed as a weakening of judicial independence. After all, ‘something’ must decide knife-edge cases. If we observe that the background of a commissioner predicts decisions only in such 50-50 situations, then exercise of ideological discretion may not be a problem at all for judicial independence. If however, judicial discretion is exercised mostly in cases that are not highly complex, then we have an activism problem, and some of the recommendations of the Productivity Commission would gain much traction.

Second, tenure is a vital aspect of judicial independence, and it is doubtful that introducing fixed-term contracts for commissioner appointments (recommendation 3.2) will improve judicial independence. It is unclear either that a performance review mechanism, perhaps driven by peers, could improve judicial independence. The difficulty of conducting impartial and performance-revealing reviews has made this process increasingly controversial in the private sector, and it may well prove to lead to similar issues in the context of the FWC.

Recommendation 3.4 should be adopted as a matter of principle if we as a society care at all about judicial independence, but perhaps recommendation 3.3 goes too far in ruling out the appointment of candidate commissioners with a background of having worked for unions and employer associations. After all, it is often in such roles that the necessary experience required to formulate sharp and informed decisions is developed and accumulated. But there is certainly a sense that the current and past composition of the Commission has excessively rested on one-sided work backgrounds.

DRAFT RECOMMENDATION 5.1:

providing the Fair Work Commission with greater discretion to consider unfair dismissal applications ‘on the papers’, prior to commencement of conciliation; or alternatively, introduce more merit focused conciliation processes.

Commentary: reducing unmeritorious caseload and the number of disputes releases public (judicial) resources that can be allocated to other important demands for justice.

- Additional screening (point 2, p.28, Overview): properly designed, this would make the system more efficient, and may enhance its credibility, especially amongst the business community. But this will also require a significant increase in the staffing resources of the FWC. Are the benefits worth the additional costs?
- Raising lodgement fees (point 3, p.28 Overview): this is a possibility but again it carries costs and benefits. Due to the risk/uncertain associated with FWC arbitration, raising fees may lead to deterring as many genuine cases as it deters frivolous ones. The main benefit of the system is to keep people off Federal courts, if the fees are income-rated, some high-income workers may switch to Federal courts action instead. Perhaps making fees income-rated but up to a (low) income threshold? Whether conciliation or arbitration is sought will often be difficult to state by claimants, as it depends on the attitude and resolve of the employers (an unknown at the time the case is lodged) as:

DRAFT RECOMMENDATION 5.2:

The Australian Government should change the penalty regime for unfair dismissal cases so that:

- ***an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct***
- ***procedural errors by an employer should not result in reinstatement or compensation for a former employee, but can, at the discretion of the Fair Work Commission, lead to either counselling and education of the employer, or financial penalties.***

Commentary: Few small businesses will see repeated action at the FWC. So perhaps a reasonable fixed penalty, similar to a traffic infringement notice would be enough to make them internalize the need to follow procedure, while at the same time not penalising them too much. Commissioners would have discretion to apply the fine (e.g. the firm had no resources to allocate to procedure) or not (e.g. justified summary dismissal where the firm could follow no other course).

There are natural benefits for firms (and for society) from following procedures (e.g. in presenting a more professional, documented and credible case in court) but if the PC's (sound) recommendation to move to a more substance-based decisions is adopted, a reasonable fine would be needed to make sure businesses do not start routinely ignoring procedures, as otherwise, there would certainly be some economic welfare lost along that path.

DRAFT RECOMMENDATION 5.3:

The Australian Government should remove the emphasis on reinstatement as the primary goal of the unfair dismissal provisions in the Fair Work Act 2009 (Cth)..

Commentary: This is a valid point, the Act is currently at odds with courtroom reality on this, and there is no reason to put this emphasis for *all* arbitrated cases, when it is in fact of use and applicability for a small minority of cases only.

DRAFT RECOMMENDATION 5.4:

Conditional on implementation of the other recommended changes to the unfair dismissal system within this report, the Australian Government should remove the (partial) reliance on the Small Business Fair Dismissal Code within the Fair Work Act 2009 (Cth).

Commentary: on p. 28 of its overview, the Commission notes “The basic premise of assisting small business to navigate the complexities of unfair dismissal legislation is reasonable, but the Code does not achieve that outcome and provides a false sense of security.” The Code does little more than remind small business owners of their (mostly) procedural obligations. It does not in any way exonerate business owners from procedural requirements, and simply ticking the boxes in the code is insufficient if the ticking itself is disputed by the other party. I note however that if recommendation 5.2 above is promoted and adopted, the Small Business Code puts emphasis on issues that become subsidiary to establishing a valid reason.

Minor comment: in its key points (on p.3 of overview), the Commission notes “The Fair Work Act 2009 (Cth) and sometimes the FWC can give too much weight to procedure and too little to substance, leading to compliance costs and, in some cases, poor outcomes

- an employee may engage in serious misconduct but *may receive considerable compensation* under unfair dismissal provisions due to procedural lapses by an employer.”

Commentary: the latter point (italicized) is perhaps put in an excessive form since compensation awarded through FWC arbitration never reaches amounts that could reasonably be viewed as considerable.

REFERENCES

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