

7. PROTECTION

7.1 HIRING

ACCI POLICY PRINCIPLES:

ACCI has long emphasised the priority the workplace relations system must give to employment as a precondition for establishing workplace relations rights and obligations.

ACCI supports the concept of hiring on a non-discriminatory basis.

POLICY AUDIT & ANALYSIS:

- There is a substantial link between the nature and operation of the workplace relations system and decisions to employ new staff.
- The emphasis on employment in the objects of the *Workplace Relations Act 1996* is fundamental. However this object has been given too little weight by tribunals in their decision-making processes. Greater emphasis needs to be given to the rights of those seeking employment, and those seeking to employ, and not just a narrower focus on the rights of those in employment.
- Employers must retain the freedom to hire staff on a strictly merit basis. Such capacity was restricted by preference clauses in awards, which have now been removed. The removal of preference clauses helped achieve a significant ACCI policy objective.
- The workplace relations system must seek to contain labour costs so as to not discourage hiring. This could be achieved through the Employment Regulation Standard (Section 2).
- The workplace relations system must not restrict the kinds of contract of employment that employers and employees wish to enter into.
- There should be sufficient flexibility and incentives to enable employers and employees to enter into mutually beneficial workplace arrangements. A workplace relations system that is overly rigid in these respects discourages hiring.
- Workplace relations regulations that force changes to the nature of the employees' contract of employment (eg from a casual contract of employment to a full-time contract of employment) are onerous and inherently discourage hiring. Freedom to contract on a mutually agreed basis should be a fundamental principle of any workplace relations system.
- Concessional rates of pay for junior staff and trainees must be retained.
- Consideration could be given to the Australian Industrial Relations Commission adopting an employment and unemployment target similar to the inflation target adopted by the Reserve Bank.
- There should be no restriction on employers' ability to hire besides that of complying with the law.
- Employers should not be forced to hire particular employees due to their membership or non-membership of an industrial association.
- Anti-discrimination legislation should encourage hiring on merit and should not be so complex or prescriptive that it discourages

hiring. Employer obligations must be clear and balanced.

- The workplace relations system should facilitate the school-to-work transition, and the welfare to work transition.
- The award system must be consistent with the traineeship system and in particular facilitate options under *New Apprenticeships*.
- All awards should contain appropriate junior rates of pay.
- Key issues in hiring include balanced unfair dismissal provisions. An important part of achieving and keeping this balance includes appropriate exemptions for probationary

employees and casual employees. Regulation 30B(1)(c) excluded employees serving a probationary or qualifying period if the duration of the period is determined in advance and is either 3 months or less or if more than 3 months, is reasonable having regard to the nature and circumstances of employment. It has now been replaced by federal legislation that has a more certain effect in providing for a 3-month qualifying period before federal unfair dismissal action could be taken by a new employee.

- Exemptions from the unfair dismissal provisions of the *Workplace Relations Act 1996* in the form of qualifying periods should be retained.

RECOMMENDATIONS:

Objective 1: The workplace relations system should facilitate job creation and the hiring of employees.

Objective 2: The decision to hire should always be the decision of the employer.

Objective 3: The award system must support probationary employment, junior employment and trainees.

7.2 UNFAIR DISMISSAL

ACCI POLICY PRINCIPLES:

ACCI supports the existence of a statutory remedy for unfair dismissal within strict boundaries.

ACCI has contributed extensively to the debate concerning reform of unfair dismissal provisions in the Workplace Relations Act 1996 over several years and has supported various bills aimed at reform and improvement of the current unfair dismissals framework.

POLICY AUDIT & ANALYSIS:

- The passage of the *Workplace Relations Act 1996* delivered an improved legislative framework with respect to unfair dismissals. In particular the notion of a 'fair go all round' placed less emphasis on requirements to satisfy procedural fairness and more emphasis on fairness in toto.
- The Federal Government and Parliament has invested considerable resources into reviewing and seeking to improve the functioning of the unfair dismissal system. Federal government initiatives include the introduction of legislative reform to improve the functioning of the unfair dismissal system.
- Useful improvements to the unfair dismissal system were introduced with the successful passage in August 2001 of the *Workplace Relations (Termination of Employment) Bill 2001*, including a requirement for the AIRC to take into account the absence of dedicated human resource specialists, restrictions on extensions of time to file dismissal claims and other measures aimed at producing a more balanced unfair dismissals system.
- The unfair dismissal system remains an unreasonable burden on employers and does not reflect an appropriate balance of interests. Its subjective, costly and litigious character creates uncertainty in the mind of employers when facing the necessary decisions to discipline and/or terminate staff.
- The unfair dismissal system needs to be periodically reviewed to ensure that it does not act in a counterproductive manner against the interests of employers and employees.
- The cost to employers and number of unfair dismissal applications must be monitored, and steps taken to reduce the process and procedural burdens.
- The behaviour of agents acting on behalf of applicants must be monitored to ensure that it is both ethical and supportive of a good workplace relations system.
- ACCI's proposals for unfair dismissal reform released in April 2002 (see below) should be adopted by federal and state governments and all political parties.
- We need to avoid entrenching an unfair dismissal system which encourages any dismissed employee to 'try their luck' at receiving financial compensation for dismissal.
- There should be financial risk for both parties, not just employers, in an unfair dismissal application.
- There should be greater scope for claims to be awarded against applicants where the application is deemed to be vexatious.

- There should be grounds for dismissal of applications where applications are found to be without merit.
 - No progress has been made on harmonisation or standardisation of unfair dismissal legislation between the various state jurisdictions and the federal jurisdiction. This could be progressed by a variety of means including complementary state and federal legislation.
 - The 12-month qualifying period for casual employees being eligible to commence federal unfair dismissal claims should be maintained on a permanent basis. These exemptions in federal laws should be reflected in State unfair dismissal laws.
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SUMMARY OF ACCI UNFAIR DISMISSAL REFORM PROPOSALS 2002

1. Amend statutory objects to express the 'fair go all round' concept.
2. Improve the prospects of resolution at conciliation conferences.
3. Limit automatic access to arbitration following conciliation.
4. A tighter test of what is an "unfair dismissal".
5. Relieving the burden of procedural fairness by making the reason(s) for dismissal the paramount consideration.
6. Preventing, so far as possible, excluded employees from making similar claims against the employer under other Acts or laws.
7. Extending the qualifying period to the first six months of employment.
8. Increasing the filing fee to \$100.
9. Exempting unfair dismissal claims based on genuine redundancy.
10. Limiting the scope for constructive dismissal claims (that is, resignation based claims).
11. Requiring the consideration of business size and the presence/absence of a human resource manager to apply to all dismissals, not just those for "unsatisfactory performance".
12. Providing a schedule of legal/representative fees, and providing for costs orders to be generally available against solicitors, not just parties.
13. Not permitting extensions of time in cases of failure by an applicant' representative.
14. Requiring the Commission to conduct its hearings expeditiously.
15. Requiring a dismissed employee to have a statutory obligation to mitigate loss and declare all earnings, and require reinstatement and back wages orders to be discounted by the earnings, redundancy pay, social welfare payments or workers compensation payments the employee is entitled to keep.
16. Orders for payment of compensation not to include non-economic loss (pain, suffering, hurt feelings).
17. For smaller businesses, if no full exemption is provided, then:
 - Longer qualifying period for small business (9 or 12 months).
 - Lesser procedural requirements (valid reason plus opportunity to explain).
 - Family members to be excluded from claims.
 - Flexibility in the time and location of conferences.

RECOMMENDATIONS:

Objective 1: The burden of unfair dismissal legislation on employers must be eased as a matter of urgency. The unfair dismissal provisions of the *Workplace Relations Act 1996* must then be periodically reviewed.

Objective 2: The unfair dismissal system should actively discourage a litigation mentality.

Objective 3: Subject to improvements being made easing the burden on employers, harmonisation of unfair dismissal laws should be progressed.

7.3 TERMINATION OF EMPLOYMENT

ACCI POLICY PRINCIPLES:

The right of employers to lawfully terminate employment without undue third party interference is a fundamental industrial right that must be recognised and protected.

POLICY AUDIT & ANALYSIS:

- Decisions to terminate as well as create employment are a necessary and legitimate function of business and an unavoidable characteristic of any workplace relations system.
- The *Workplace Relations Act 1996* provides for minimum notice periods for termination. It also renders termination of employment unlawful on the following grounds: temporary absence from work due to illness or injury, union membership, participation in union activities outside work hours with consent, non-membership of unions, seeking office or acting or having acted as an employee representative, filing a complaint or participating in proceedings against the employer, termination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, refusing to negotiate in connection with an AWA, absence during maternity or other parental leave.
- There are exemptions from these provisions where the reason for termination is based on the inherent requirement of a position, or, if an employee is employed in connection with a religious institution, where termination is in good faith to avoid injury to religious susceptibilities.
- Benefits payable to employees on termination should be restricted to ensure that the cost of termination is not damagingly onerous to employers.
- Approaches to anti-discrimination in particular must be practical, effective and not excessive.
- A variety of laws potentially impact on the termination decisions of employers. These laws should not become so complex that it is almost impossible for employers to know whether or not they are within their rights, or what steps they need to take, in order to terminate an employee lawfully where merited.

RECOMMENDATIONS:

Objective 1: The costs of termination ought not be so great that employees seek termination or employers retain non-performing staff.

Objective 2: There should be a high degree of certainty for employers when they seek to terminate staff in accordance with the law.

7.4 REDUNDANCY

ACCI POLICY PRINCIPLES:

Increases in existing award or legislative redundancy entitlements, or policy changes which will increase the scope of redundancy clauses, will be opposed.

POLICY AUDIT & ANALYSIS:

- Excessive redundancy obligations increase the cost of business restructuring. This is not a desirable workplace relations outcome. Restructuring is necessary for businesses to adapt and survive in a modern, dynamic, open economy.
- There should be no third party interference in the legitimate and genuine business decisions of employers to make employees redundant. In particular, there is a need to limit the scope for unjustified interference in such decisions.
- Federal awards currently provide a maximum of 8 weeks' severance pay in situations of redundancy.
- In 2002 the ACTU and affiliated unions made applications to industrial tribunals for substantial test case increases to the redundancy obligations of employers throughout the private sector, in the federal jurisdiction and in some state jurisdictions.
- Excessively high redundancy entitlements at all levels of employment have proved to be a burden for some businesses and have exacerbated insolvency situations and have also fuelled the 'unpaid entitlements' debate.
- Court decisions regarding outsourcing have also created a more problematic legal environment for employers with respect to redundancy.
- There should be greater education for employers on the risks of redundancy as a contingent liability.
- Measures to explore ways of reducing the redundancy burden should be explored.
- Reform of the law surrounding transmission of business will also have positive outcomes with respect to redundancy obligations.

RECOMMENDATIONS:

Objective 1: The workplace relations system should give full recognition to the fundamental right of an employer to restructure their business as necessary to meet commercial requirements and on-going business viability. Third parties should not be empowered to interfere in the making of genuine and lawful business decisions.

Objective 2: Redundancy costs should be minimised in order to not penalise the legitimacy of business restructuring nor compromise ongoing business viability.

7.5 EMPLOYEE ENTITLEMENTS

ACCI POLICY PRINCIPLES:

The obligation to pay employee entitlements that are due and payable is on the employer of the relevant employees. It is not an obligation that should arise before payments are due and payable. It is not an obligation that should be transferred to another employer.

ACCI supports the Federal Government's safety net scheme which guarantees a prescribed level of employee entitlements in situations of business insolvency (as now contained in the General Employee Entitlements and Redundancy (GEERS) scheme).

ACCI opposes the establishment of special entitlement funds, industry levies or compulsory insurance.

ACCI also opposes initiatives to place employees above secured creditors in situations of business insolvency.

POLICY AUDIT & ANALYSIS:

- Employers accept the obligations imposed by existing law to fully meet the obligations they have to their employees to pay entitlements in full as and when they fall due.
- The debate about the non-payment of employee entitlements in situations of insolvency where insufficient funds exist to pay all debts due must have regard to the fact that only a very small percentage of business insolvencies fall into this category.
- Policy responses to this issue should be proportionate to the actual extent of the problem, and should not impose obligations on third party employers which do not have liability for the debts due.
- It was not until 2000 that Australian governments in any jurisdiction tackled this issue in a substantial manner. The Federal Government's initial policy responses in 1999/2000 were ad hoc, a consequence in part of previous policy inaction and the lack of data which existed as to the actual nature of the problem.
- The establishment by the Federal Government in September 2001 of the General Employee Entitlements and Redundancy Scheme (GEERS) was a substantial and appropriate national policy response.
- It is not reasonable to expect that in every insolvency 100% of employees can be paid 100% of monies owed when their employer's business goes broke. There is no 100% guarantee that business will survive, nor a 100% guarantee that other persons owed money will receive their full entitlements.
- Plans to raise employees above secured creditors in the small number of situations of non payment of entitlements on insolvency have a range of negative implications that extend beyond the non compliant business, and prejudice the interests of employers more generally.

- Proposals to force employers to contribute to multi-employer schemes or funds for employee entitlements, are fundamentally flawed as they would seek to impose upon solvent businesses the liabilities and responsibilities of an insolvent employer.
- The implications of options to protect employee entitlements must be explored and publicised, and widely debated based on higher quality factual and statistical data.

RECOMMENDATIONS:

Objective 1: A more balanced and informed public debate on the issue of employee entitlements must be encouraged.

Objective 2: The GEERS scheme is a proportionate and appropriate policy response at a national level. It must be understood that the so-called guaranteeing of entitlements to employee creditors reduces the funds available to other creditors.