Conference paper

From interest to rights: The work of Fair Work Australia

Paper for the 9th Annual Workforce Conference
Melbourne, 22 November 2010

Jennifer Acton
Senior Deputy President, Fair Work Australia

Introduction

Fair Work Australia is the fifth emanation of Australia’s national industrial relations institution. Its jurisdiction extends to maintaining a safety net of modern award wages and conditions, facilitating enterprise bargaining, supervising the taking of industrial action, approving enterprise agreements, settling industrial disputes, granting remedies for unfair dismissal, regulating industrial organisations and determining appeals. Its jurisdiction concerns interest-based and rights-based matters. Within the framework of the Fair Work Act 2009 (Cth) (Fair Work Act), the tribunal considers the interests of the parties in order to create rights and privately arbitrates rights’ disputes.

The work of the tribunal is performed by members of the former Australian Industrial Relations Commission (AIRC), some totally new appointments to the tribunal, and some members who have both been and are members of state industrial tribunals. Fair Work Australia staff provide administrative support to the tribunal.

In the first 12 months of its operation, Fair Work Australia received almost 45,000 applications. However, much of its work is not reliant on an application being made to the tribunal and some 35% of the applications to Fair Work Australia were for the termination of individual agreements, such as former Australian Workplace Agreements.

An appreciation of Fair Work Australia’s substantive work in 2009–10 can be gained by considering the work it performed under six broad headings—Award modernisation, the Annual Wage Review, Bargaining, Agreements, Disputes and Unfair dismissals.

Award modernisation

Until 1 January 2010, a six to seven member Full Bench of Fair Work Australia/AIRC dual appointees was heavily involved in the task commenced in April 2008 by the AIRC of making 122 modern awards to replace the nearly 1,600 industrial awards previously created by Federal and State industrial tribunals. At times other members of Fair Work Australia/AIRC were also involved in providing reports to the Full Bench on issues raised by the parties regarding the making of individual modern awards. The Award Modernisation Full Bench was also supported by a team of Fair Work Australia staff.

Subsequently the tribunal was concerned with determining some 200 applications to vary a modern award. Fair Work Australia also undertook its functions of modernising enterprise awards, establishing processes to deal with Division 2B State awards and terminating transitional instruments replaced by modern awards. These functions continue.
Annual wage reviews

The Annual Wage Review of 2009–10 was undertaken by the Minimum Wage Panel of Fair Work Australia between March and June 2010. It was concentrated and time consuming work. The minimum wage panel comprised the President, three other full-time members and three part-time members of Fair Work Australia. The panel consulted with interested parties in May 2010 and received written submissions from a wide range of parties. Fair Work Australia staff, in consultation with representatives from peak industrial organisations and Federal, State and Territory governments, oversaw a program of research reports for use in the Annual Wage Review. Fair Work Australia’s decision in the Annual Wage Review granting a $26 per week increase in minimum wages was handed down on 3 June 2010.

Other functions

The award modernisation and annual wage review functions of Fair Work Australia actually involved relatively few applications. Most of the applications to the tribunal in 2009–10, setting aside the around 16,000 applications for the termination of individual agreements, concerned bargaining, agreements, disputes and unfair dismissals, as Figure 1 shows.

Figure 1: Applications by major categories, 2009/10

<table>
<thead>
<tr>
<th>Category</th>
<th>Approximate No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bargaining</td>
<td>2,100</td>
</tr>
<tr>
<td>Agreements</td>
<td>7,700²</td>
</tr>
<tr>
<td>Disputes</td>
<td>3,400</td>
</tr>
<tr>
<td>Unfair dismissals</td>
<td>11,500</td>
</tr>
</tbody>
</table>

Turning then to these major categories:

Bargaining

There were around 2,100 applications associated with bargaining between an employer and their employees for a statutory agreement.

Of these 2,100 applications, about 1,200 were for or concerned with protected industrial action ballot orders, with the vast majority of those being granted. The majority of the applications were in the metals and manufacturing and educational services industries.

Some 500 of the applications were for Fair Work Australia to deal with a dispute that bargaining representatives were not able to resolve about a proposed statutory agreement. Most of those bargaining disputes were conciliated, there being less than 10 decisions issued on them. Another 300 of the applications concerned bargaining orders (121), majority support determinations (111), scope orders (48) or single interest employer authorisations (30). The applications for a single interest employer authorisation were granted, but only about 10–20% of the other applications required determination.

The bargaining-related applications required the tribunal to deal with issues such as:

- Operational restructuring during enterprise bargaining³, and

---

1 Includes applications made under the Fair Work Act 2009 (Cth), the Workplace Relations Act 1996 (Cth) or the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth).

2 Excludes applications to terminate individual agreements.

• Voting by employees on a proposed enterprise agreement without the consent of all bargaining representatives.

Agreements

There were also about 7,700 applications for the approval, variation or termination of statutory agreements between an employer and their employees made to Fair Work Australia. The vast majority of these were in the building and civil construction and metals and manufacturing industries. Many of these applications resulted in enterprise agreements being approved subject to undertakings from employers about their operation because the agreement did not otherwise meet the requirements for approval under the Fair Work Act. For example, the dispute settling term of the enterprise agreement may have failed to provide for the settlement of disputes in relation to the National Employment Standards (NES). Thereby requiring an undertaking from the employer that the term would also apply to disputes in relation to the NES.

Disputes

Of the around 3,400 dispute applications, some 1,550 were applications to deal with disputes in accordance with the dispute settling term of a statutory instrument. These rights-based disputes were mostly disputes over the application of the terms of a statutory agreement. For example, a dispute about the application of the redundancy provisions in an enterprise agreement in certain circumstances. The dispute settling term may have provided for Fair Work Australia to arbitrate the dispute, but many of the disputes were resolved by conciliation.

Another 1,550 or so of the 3,400 dispute applications concerned a dismissal in alleged contravention of the general protections provisions of the Fair Work Act 2009 (Cth) (Fair Work Act) or an alleged unlawful dismissal, and just over 250 were applications alleging a non-dismissal contravention of the general protections provisions. Fair Work Australia’s role in respect of applications concerning the general protections and unlawful dismissal provisions of the Fair Work Act is confined to conciliation.

Unfair dismissal applications

Some 11,500 of the substantive applications made to Fair Work Australia in 2009/10, or 40% of the substantive applications, were unfair dismissal applications.

Australia’s national industrial relations institution has had a substantive jurisdiction in respect of unfair dismissals since 1994. The Fair Work Act expanded the institution’s jurisdiction in a number of ways. The jurisdictional changes in respect of unfair dismissal applications made it likely there would be a substantial increase in the number of unfair dismissal applications made to Fair Work Australia. Further, the Fair Work Act removed the requirement for statutorily appointed members of the institution to conciliate unfair dismissal applications, or when conciliation fails to settle the matter, issue a certificate that all reasonable attempts to settle the application are likely to be unsuccessful. Conciliation, however, has long been a successful method of resolving termination of employment matters. As a result, Fair Work Australia decided it would adopt a new conciliation process for the unfair dismissal applications made to it under the Fair Work Act.

The new unfair dismissal conciliation process

Since 1 July 2009, conciliation of unfair dismissal applications by Fair Work Australia staff has been available to the parties to an application. To that end some 23 conciliators, experienced in dispute resolution and with a knowledge of workplace disputes, were employed as public servants by Fair Work Australia.

---

5 Regency Showerscreens and Wardrobes Pty Ltd v Construction, Forestry, Mining and Energy Union, [2010] FWAFB 6311
The conciliators are required to conduct up to three conciliations per day or 15 per week. About one and a half hours is allocated for each conciliation. Generally the conciliation takes place within 24 days of an unfair dismissal application being made to Fair Work Australia.

The conciliations are mostly conducted through a telephone conference involving the parties and the conciliator. In the first 12 months of Fair Work Australia’s operation, around 93% of the unfair dismissal application conciliations were conducted by telephone, about 7% were conducted in a face to face format with all involved in the one conference room and some were conducted using videoconferencing facilities. Parties may have a legal or other representative at the conciliation.

As the conciliations the Fair Work Australia staff conduct are voluntary, the parties to an application are at liberty to decide whether or not they want to participate in them. However, it is usually in the interests of a party to do so as it provides a quick, informal and efficient means of seeking to resolve an application in a timely manner. It is Fair Work Australia’s experience that nearly all parties are prepared to take part in the conciliation and most respondents are prepared to do so even if they have an unresolved jurisdictional objection to an unfair dismissal application. If a respondent seeks that their jurisdictional objection to an application be determined before conciliation, the application is allocated to a Fair Work Australia member to determine the objection.

In terms of process, once an unfair dismissal application is made to Fair Work Australia, the relevant respondent is notified in writing by Fair Work Australia of the fact an application has been made, provided with a copy of the application, a respondent response form and an information booklet on unfair dismissal claims and advised of the time and date for the conciliation of the application. The applicant is simultaneously advised by Fair Work Australia of the conciliation time and date. Professional interpreter services are also organised for the conciliation when required.

The conciliations generally proceed as follows:

- Opening statement of the conciliator,
- Opening statement by each party,
- Identification and exploration of major issues,
- Private sessions between a party and the conciliator,
- Negotiation, often shuttle negotiation, and
- Resolution and/or close.

The conciliators are trained to play a more activist role in the conciliation than would a ‘traditional’ mediator. They are expected to have detailed knowledge of the Fair Work Act and to keep up to date with relevant decisions of courts and tribunals. Their activist role may extend to such matters as reality testing a party’s position against relevant case law, or reality testing their proposed remedy against remedies available under the Fair Work Act. The conciliators recognise the need to deal with power imbalances between the parties and to be persistent in searching for a resolution.

The resolution of an unfair dismissal application through the new conciliation process may take a variety of forms, from reinstatement of the applicant to their former position with the respondent through to the applicant withdrawing their application.

An unfair dismissal application that does not resolve at the conciliation is typically listed before a Fair Work Australia member for the determination of any outstanding jurisdictional objections within about four weeks of the conciliation and for merits’ determination within some 8–12 weeks of the conciliation. With the notice of listing for the determination of the application, written directions are given for the parties to file with Fair Work Australia by specified dates the material on which they intend to rely at the jurisdictional or merits’ proceeding. Non-compliance proceedings are conducted by a Fair Work Australia member where a party fails to comply with the directions.
Statistical results on the new conciliation process

The statistical results in respect of the new conciliation process indicate that in 2009/10 about 84% of the unfair dismissal applications made under the Fair Work Act and conciliated by Fair Work Australia were resolved at the conciliation. Discontinuance of applications by employees prior to conciliation, together with the conciliation settlement rate and the post-conciliation discontinuance of applications, meant that just over 1% of such unfair dismissal applications were finalised by a jurisdictional determination of a Fair Work Australia member and less than 1% of such applications were finalised by a determination by a member as to the merits of the application.

Research into the new unfair dismissal conciliation process

(a) Research methodology

In early 2010, Fair Work Australia commissioned an external market research company, TNS Social Research, to conduct independent research into the experiences of applicants and respondents to unfair dismissal applications with Fair Work Australia’s administration of such applications, from their lodgment with Fair Work Australia to the conclusion of the new conciliation process. The research also examined the experiences of applicant and respondent representatives, including unions, employer associations and lawyers.

The research included purposeful qualitative interviews followed by a quantitative telephone survey of the parties and representatives involved in the conciliation of an unfair dismissal application between 1 February and 20 July 2010. Those interviewed for the qualitative research and the quantitative telephone survey were drawn from the 5,423 applicants, respondents and representatives who had previously consented to take part in the research. They included persons from metropolitan and regional areas across all states and territories of Australia.

The quantitative telephone survey was undertaken by Computer-Assisted Telephone Interviewing (CATI) and carried out by Lighthouse Data Collection on behalf of TNS Social Research. A total of 1,100 telephone interviews were completed involving 500 applicants, 500 respondents and 100 representatives, with each interview lasting an average of approximately 16 minutes. Quotas were used to ensure those interviewed formed a representative sample.

(b) Key findings from the independent research

The key findings from the independent research can be conveniently considered under four broad headings:

- Overall satisfaction with Fair Work Australia’s administration of unfair dismissal applications.
- Access to and information on unfair dismissal applications.
- The new conciliation process.
- The Fair Work Australia conciliators.

(i) Overall satisfaction

The independent research suggests that overall satisfaction with Fair Work Australia’s administration of unfair dismissal applications is high with, as Figure 2 shows, 86% of applicants, 82% of respondents and 87% of representatives reporting that they were satisfied or extremely satisfied with the service provided by Fair Work Australia.

---

6 Fair Work Australia Unfair Dismissal Conciliation Research Survey Results, TNS Social Research, November 2010.
(ii) Access and information

In finding out about and preparing for the conciliation of an unfair dismissal application, the most commonly accessed information sources are written information from Fair Work Australia and the Fair Work Australia website. As Figure 3 shows, applicants (83%) and respondents (76%) were most likely to access written information from Fair Work Australia, while representatives (92%) were most likely to access the Fair Work Australia website.

Figure 3: Types of information accessed about the new conciliation process

(iii) The new conciliation process

The new conciliation process has been well received by most participants. Figure 4 shows that 78% of applicants, 81% of respondents and 58% of representatives agreed or strongly agreed the conciliation of an unfair dismissal application by telephone conference works well, with about 6% of participants in each category neither agreeing nor disagreeing that the telephone medium works well.
Further, some 86% of applicants and 88% of respondents considered having the conciliation over the telephone was convenient and cost effective. While 72% of applicants and 59% of respondents reported that having the conciliation over the telephone was more comfortable than being in the same room with the other party. The vast majority of participants said the conciliation allowed them to put their or their client’s point of view across.

**Figure 4: Telephone conciliations**

(iv) The Fair Work Australia conciliators

The overall ratings for the conciliators are also high with, as Figure 5 shows, 86% of applicants, 89% of respondents and 92% of representatives being satisfied or extremely satisfied with the conciliator for the unfair dismissal application in which they were involved.

**Figure 5: Satisfaction with the conciliators**
As one respondent to an unfair dismissal application said in the qualitative research:

‘The conciliator, he was really good in that he just stuck to the point and asked really relevant questions. He certainly never made me—and I would think that he would never have made them—feel as though ... we were awful or that either party had done something so terribly wrong, which was great. He was very, very quick in terms of just cutting to the point and then we had one-on-one conversations with him and then he’d go back to them and back to us. I just liked that he was just really straight up about it all, so I felt very comfortable explaining things to him.’ (Respondent, unrepresented)

An applicant said of the conciliator they experienced:

‘She was very friendly, very professional, very respectful to everyone. She wasn’t ... it wasn’t like she was taking sides. Obviously she was there as a neutral party and she did that very well. But yeah, just very friendly, very, very calm tone throughout the whole thing, was very respectful.’ (Applicant, represented)

Figure 6 sets out the participants’ views about aspects of the role of the conciliators. The research shows that:

- Most participants (78% of applicants, 73% of respondents and 83% of representatives) agreed or strongly agreed the conciliator assisted them or their client by outlining the strengths and weaknesses of their case.

- In the large majority of cases (85% of applicants, 87% of respondents and 93% of representatives) there was agreement or strong agreement the conciliator explained the pros and cons of settling or not settling the unfair dismissal application.

- Around 75% of applicants and respondents agreed or strongly agreed the conciliator helped them think through their options and terms of settlement.

**Figure 6: Conciliators’ role**
A representative of an applicant, during the qualitative research, concluded that:

‘[the] Conciliators are all pretty good, they’ve all got plenty of background and training. You don’t always agree with them but they’re a pretty professional lot.’ (Representative, applicants)

Conclusion

Fair Work Australia’s work in 2009/10 under the Fair Work Act, Workplace Relations Act 1996 (Cth), the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) and the Fair Work (Registered Organisations) Act 2009 (Cth) involved the alternative dispute resolution of parties’ interests to create or remove rights. However, the tribunal also undertook a significant body of work in the alternative dispute resolution of disputes between the parties over their existing rights.

In the former category was the tribunal’s work on award modernisation, the annual wage review, bargaining, agreements and unfair dismissals. In the latter category was its work in respect of the general protections and unlawful dismissal provisions of the Fair Work Act and under statutorily approved industrial agreements.

The workplace relations jurisdiction of Fair Work Australia is diverse, but the tribunal finalises much of its case load, from interests to rights, by conciliation without recourse to arbitration.