ELC Employment Law Centre of WA (Inc)
Working for WA Workers

REVIEW OF THE *FAIR WORK ACT 2009* (CTH)

SUBMISSION BY THE EMPLOYMENT LAW CENTRE OF WA

February 2012

Contents

1. Introduction

1. The Employment Law Centre of Western Australia (Inc) (**ELCWA**)[1] welcomes the opportunity to make a submission to the Fair Work Act Review.

2. ELCWA is a community legal centre which specialises in employment law. It is the only free and not for profit legal service in Western Australia offering employment law advice, assistance and representation. Each year ELCWA provides advice and assistance to over 4,500 non-union employees in Western Australia.

2. Overview

3. The *Fair Work Act 2009* (Cth) (**Fair Work Act**) has now been in force for more than two years. The Fair Work Act, as enacted, is very similar to the Fair Work Bill 2008 (Cth) (**Fair Work Bill**), which was released for public comment in late 2008.

4. In our submission on the Fair Work Bill, ELCWA supported and welcomed the overhaul of the previous "Work Choices" legislation with the aim of establishing a workplace relations system that would provide adequate protection of employees in Australia. In particular, ELCWA welcomed:

   - method of payment and payment deduction protections (ss323-327);
   - equal remuneration protections (ss302-306);
   - the introduction of uncapped carer's leave (s96);
   - the introduction of an "adverse action" class of protection (ss340-342);
   - inclusion within the federal regime of state legislation concerning claims for the enforcement of employment contracts (s27(2)(o)); and
   - the increased scope of basic protections effected by the National Employment Standards (ss59-123).

5. ELCWA, however, did express concerns that certain elements of the Fair Work Bill did not sufficiently protect vulnerable workers, noting the following issues:

   - 7 day limitation period for unfair dismissal claims;
   - 6 and 12 month qualifying period for unfair dismissal claims;
   - potential for the Fair Dismissal Code for small businesses to be subject to varying and unintended interpretations;
   - dismissal deemed to be fair where a police report has been made against the dismissed employee; and
   - absence of a federal denial of contractual benefits claim.

[1] www.elcwa.org.au

6. ELCWA maintains its view that there are many positive elements in the Fair Work Act (such as those set out in paragraph 4 above) and it is a much more balanced piece of legislation than the Work Choices legislation. However there are nonetheless some issues with the way that the Fair Work Act operates which, in our view, should be addressed.

7. The overarching object of the Fair Work Act is to provide a balanced framework for cooperative and productive workplace relations that promote national economic prosperity and social inclusion for all.[2]

8. ELCWA has observed that there a number of key areas of the Fair Work Act which do not operate consistently with the objects of the Act. In particular, ELCWA wishes to highlight the following areas which, in our view, are in need of reform:

   (a) unfair dismissal claims;

      (i) the 14 day limitation period;

      (ii) the way in which out of time applications are dealt with;

      (iii) the qualifying periods of 6 months and 12 months;

      (iv) exclusion of casual employees;

      (v) potential exclusion of labour hire workers; and

      (vi) limited appeal rights; and

   (b) institutional framework and compliance regime;

      (i) lack of accessibility;

      (ii) formality; and

      (iii) enforcement difficulties.

9. ELCWA has structured this submission having regard to the Panel's Terms of Reference and the policy underlying the establishment of the Fair Work system. Responses to the Terms of Reference are provided in section 3.

10. ELCWA has also considered the questions posed by the Panel when preparing this Submission. Responses to the Panel's questions are provided in section 4.

11. We note that this submission focuses on those areas that are of principal concern and relevance to ELCWA and does not attempt to respond to each of the Terms of Reference, nor does it attempt to answer all of the Panel's questions.

12. A summary of ELC's recommendations is provided in section 5.

[2] Fair Work Act s 3.

3. Responses to the Terms of Reference

3.1 Genuine unfair dismissal protection

13. The development and implementation of new unfair dismissal laws by the government was based on a policy of developing a simpler unfair dismissal system which would balance the rights of employees to be protected from unfair dismissal, with the need of employers to manage their workforce and to ensure a faster, less costly, and less complex process for all.[3] It was also apparent that the government wished there to be a greater emphasis on reinstatement as opposed to compensation.[4]

14. ELCWA submits that the 14 day limitation period, qualifying periods and exclusion of casual employees from unfair dismissal protection operate to exclude many vulnerable workers and diminish the ability of the Fair Work Act to provide genuine protection against unfair dismissal.

3.1.1 14 day limitation period

15. Under section 394 of the Fair Work Act a person who has been dismissed only has 14 days within which to lodge an unfair dismissal claim. Previously under the *Workplace Relations Act 1996* (Cth) (**Workplace Relations Act**), the limitation period was 21 days.

16. At the time, ELCWA urged the government not to reduce the already short 21 day limitation period for unfair dismissal claims under the WR Act.[5]

17. Having seen the Fair Work Act in operation for some two and a half years now, ELCWA has found that large numbers of employees are being prevented from making unfair dismissal claims merely because they are outside the 14 day limitation period.

18. In the 2011 calendar year, at least 88 callers who sought advice from ELCWA on unfair dismissal under the Fair Work Act contacted us after the 14 day limitation period had already expired. There were also many clients who contacted ELCWA on the last day of the 14 day limitation period.

19. These statistics only represent vulnerable employees from Western Australia who specifically sought out, and were able to obtain, assistance from ELCWA. ELCWA does not provide assistance to employees who are above a certain income threshold, or who are members of a union, for instance.

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[3] Explanatory Memorandum to the Fair Work Bill, p.5; Orr, G. and Tham, J.C., "Fair Process in Unfair Dismissal Claims: Changing Landscape under the Fair Work Act", (2010) 17 AJ Admin L 199.
[4] Explanatory Memorandum to the Fair Work Bill, p.ii.
[5] EM to the Fair Work Bill, item r222, p.xlvii.

20. If statistics were gathered for all employees across the country, regardless of income, union membership and which service provider they contacted for assistance (if any), then it is likely that the number of employees who were prevented from making unfair dismissal claims would be significantly higher – perhaps in the hundreds or thousands.

21. ELCWA is of the view that the Fair Work Act does not achieve its goal of genuine unfair dismissal protection when large numbers of employees are prevented from making unfair dismissal merely by virtue of the 14 day limitation period.

22. We also note that it puts service providers such as ELCWA and other community legal centres (and presumably the Fair Work Ombudsman as well) under a great deal of pressure to ensure, wherever possible, that dismissed employees are not prevented from making unfair dismissal claims simply due to the limitation period.

23. ELCWA acknowledges that there is provision in the Fair Work Act for unfair dismissal claims to be accepted outside the 14 day limitation period. However, as will be discussed below in section 3.1.2, in practice, very few claims are accepted outside this period.

24. ELCWA recently surveyed a random selection of clients about their experiences in making unfair dismissal claims to Fair Work Australia (**FWA**). A sample of their comments is included below and provides insight into the various circumstances which can delay the filing of a claim:

    (a) "*I did not know where to get information or advice. I spoke to the Human Rights Commission first – I only spoke to FWA 19 days after the dismissal."*

    (b) *I was confused about when to lodge my claim. I was quite stressed. I had an offer to consider, and I had time pressure as well. I had a lot to think about and I still had to fill in the forms."*

    (c) *"There is a cooling off period before you realize what situation your [sic] in. You wouldn't want to be unfairly dismissed and miss out because you weren't aware. There are a lot of emotions involved."*

    (d) *"My dismissal was very abrupt, I was in shock and emotionally distressed. I think I was still in shock during the 14 days after dismissal and not able to think clearly."*

25. As the comments above highlight, many recently dismissed employees are not aware of their rights, do not know how to lodge an unfair dismissal claim or even who to go to for advice or assistance. Some employees are in such a state of shock at having been dismissed that they do not seek redress for an unfair dismissal for days, weeks and sometimes months after the dismissal. When dismissed employees finally do seek assistance, it may not be possible for them to obtain legal advice straight away.

26. These problems are further exacerbated where the employee is from a non-English speaking background, has literacy issues or a disability, is unfamiliar with the laws or the legal system, or is geographically isolated.

27. Further, as discussed in ELCWA's submission in relation to the Fair Work Bill, this limitation period is in stark contrast to most liberal democratic states, other than the United States.[6] The three most directly comparable jurisdictions, the UK, Canada and New Zealand, all provide 90 day limitation periods for unfair dismissal claims.

Jurisdiction	Section	Limitation period
Australia	**s 394(2)(a) of Fair Work Act**	**14 days**
UK	**s 111(2) of ERA[7]**	**3 months**
New Zealand	**s 114 of ERA[8]**	**90 days**
Canada	**s 240 of CLC[9]**	**90 days**
Sweden	**ss 40,41 of EPA[10]**	**14 to 28 days (for reinstatement)** **4 months (for damages)**
Germany	**ss 4,7 of PADA[11]**	**21 days**

28. The rationale for the shorter limitation period for unfair dismissal claims under the Fair Work Act was to encourage and facilitate a "quick resolution of claims and increase the feasibility of reinstatement as an option."[12]

[6] ELCWA submission on the Fair Work Bill, 8 January 2009, p.3.
[7] *Employment Rights Act 1996* (United Kingdom) s 111(2).
[8] *Employment Relations Act 2000* (New Zealand) s 114.
[9] *Canada Labour Code R.S.C. 1985* (Canada) s 240.
[10] *Employment Protection Act 1982:80* (Sweden) ss 40-41.
[11] *Protection Against Dismissal Act* (Germany) ss 4,7.
[12] Explanatory Memorandum to the Fair Work Bill, item r.222, p.xlvii.

29. However, it has been ELCWA's experience that the majority of employees who make unfair dismissal claims are not seeking reinstatement because they feel that the relationship with the employer has already broken down to too great an extent.

30. FWA statistics for the year 2010-2011 provide further evidence that reinstatement is often a remedy that is not sought nor appropriate in the context of unfair dismissal claims. For example, out of the 12,301 unfair dismissal claims which were finalised that year, 517 were finalised by a FWA decision with 151 decisions finding that the dismissal was unfair. On only 25 occasions was reinstatement ordered as opposed to 122 orders granting compensation.[13]

31. Further, we note that even where employees do make unfair dismissal claims within the 14 day limitation period, there is often a delay in the matter being resolved simply as a result of the FWA process.

32. The fact that reinstatement is often not sought and that there will likely be some delay in an unfair dismissal claim being dealt with as a result of the FWA process undermine the stated rationale for the 14 day limitation period.

33. In light of:

    (a) the large numbers of employees who are being prevented from making unfair dismissal claims merely because of the 14 day limitation period;

    (b) the burden it places on legal service providers to ensure, wherever possible, that employees are not prevented from making unfair dismissal claims simply because of the 14 day limitation period;

    (c) the difficulties faced by employees in making an unfair dismissal claim within 14 days, as discussed above;

    (d) the fact that in other jurisdictions, the limitation period for unfair dismissal claims is much longer – 90 days in the most directly comparable jurisdictions; and

    (e) the fact that the rationale for introducing the shorter limitation period is largely undermined by the evidence to date,

    ELCWA submits that it is undesirable to retain the 14 day limitation period for unfair dismissal claims.

34. ELCWA submits that the limitation period for unfair dismissal claims should be extended to 90 days, in line with other comparable jurisdictions.

> ***Recommendation 1***
>
> ***That the limitation period for unfair dismissal claims be extended to 90 days.***

[13] Fair Work Australia, 2010-2011 Annual Report. Available at: www.fwa.gov.au/index.cfm?pagename+aboutannual [accessed 23 January 2012].

3.1.2 Out of time applications

35. FWA may consider unfair dismissal claims, as well as general protections and unlawful termination claims, after the limitation period has expired.

36. However, for such an application to be made, FWA must be satisfied that exceptional circumstances exist, taking into account:

    (a) the reason for the delay;

    (b) whether the person first became aware of the dismissal after it had taken effect;

    (c) any action taken by the person to dispute the dismissal;

    (d) prejudice to the employer (including prejudice caused by the delay);

    (e) the merits of the application; and

    (f) fairness as between the person and other persons in a similar position.[14]

37. FWA has interpreted the test set out in section 394(3) of the Fair Work Act very narrowly, suggesting that it is a stricter test than that which previously applied under the Work Choices legislation.[15]

38. Indeed, in *Bernadette Shields v Warringarri Aboriginal Corporation* [2009] FWA 860, Senior Deputy President Kaufman noted that under the Fair Work Act, "exceptional" "evinces an intention that the hurdle for extensions of time is higher under the [Fair Work] Act than it was under the [Workplace Relations] Act."[16]

39. One of the justifications provided for the 14 day limitation period was that claims could be accepted out of time in appropriate circumstances. However, in practice, the strict interpretation of the "exceptional circumstances" test has meant that claims lodged outside the 14 day limitation period are rarely accepted.

40. ELCWA notes that since the Fair Work Act has been in operation there have been 127 cases in which FWA has considered whether an unfair dismissal case should be accepted outside the 14 day limitation period. Of those 127 out of time applications, FWA accepted just 40.

41. In many instances, the short limitation period, together with the strict application of the "exceptional circumstances" test, has had the effect of denying legal protection to those persons with a disability, who are of a non-English speaking background, who are in rural or remote areas, and/or who have taken steps to dispute their dismissal but have done so incorrectly. An example of how the strict "exceptional

[14] Fair Work Act s 394(3).
[15] See for example, *Robert Lim v Downer EDI Mining* [2009] FWA 457.
[16] *Bernadette Shields v Warringarri Aboriginal Corporation* [2009] FWA 860 at [4].

circumstances" test operates harshly against vulnerable workers is provided through Case study 1 below.

Case study 1

Mrs R is an Iranian immigrant to Australia. Her first language is Persian, she cannot speak English and she is of limited financial means.

On 29 July 2010, Mrs R and five other co-workers were dismissed from their positions as vegetable packers without any reason provided to them. Mrs R was dismissed by text message.

Mrs R unsuccessfully tried to contact her employer to dispute the dismissal. Mrs R sought advice from a community organisation within two weeks of her dismissal and was assisted in lodging a general protections claim.

Unfortunately, the general protections claim did not seem to fit Mrs R's circumstances. Subsequently, she was advised to contact a community legal centre and after speaking to a generalist community legal centre, she was then referred to ELCWA. After meeting with ELCWA, her first opportunity to obtain legal advice in relation to this matter, Mrs R immediately withdrew her general protections claim and lodged an unfair dismissal claim instead.

In our view, Mrs R clearly faced exceptional circumstances which hindered her ability to make an unfair dismissal claim within the 14 day time-frame.

However, her application for an extension of time was rejected by Commissioner Williams on the basis that each individual obstacle Mrs R faced did not constitute an "exceptional" circumstance.

ELCWA assisted Mrs R to lodge an appeal to the Full Bench of FWA, but the appeal was rejected on the grounds that it was not in the public interest to allow the appeal. (The public interest test for unfair dismissal appeals is discussed further in section 3.1.6 below.)

42. We note that there has also been some inconsistency in the outcomes of cases concerning whether out of time applications should be accepted. For instance, in some decisions it has been found[17] that lodging an out of time application due to having lodged an incorrect claim first (e.g. a general protections claim where the circumstances do not support that type of claim) does not warrant an extension of time, whereas in other cases this has been found to be an exceptional

[17] *Hasani v AIH Group t/a Trippas White* [2010] FWA 9640; *Chacko v Compass Group (Australia) Pty Ltd* [2010] FWA 7418.

circumstance.[18] Under the current case-law it is difficult to predict whether or not the prior lodgment of an incorrect application will warrant an extension of time.

43. ELCWA submits that, rather than relying on the "exceptional circumstances" test, it would be preferable for FWA simply to have discretion to allow out of time applications in appropriate circumstances, taking into account the factors set out in section 394(3) of the Fair Work Act.

> ***Recommendation 2***
>
> ***That there be no reference to "exceptional circumstances" in section 394(3) of the Fair Work Act but that FWA be given discretion to allow claims to be lodged outside the limitation period, taking into account the factors currently listed in that section.***

3.1.3 Qualifying periods

44. Currently an employee cannot bring an action for unfair dismissal if he or she has not completed the minimum period of employment (s382). Section 383 of the Fair Work Act defines the minimum period to be 6 months at the time of the dismissal, unless the employer is a small business employer, in which case a 12 month qualifying period applies.

45. The Explanatory Memorandum to the Fair Work Bill (**Explanatory Memorandum**) indicated that it was the government's intention to implement unfair dismissal laws that would protect employees whilst also protecting the ability of small businesses to effectively manage their workforce.[19] The extended qualifying period for small businesses appears to have been intended to protect small businesses from unfair dismissal claims. As ELCWA raised in its original submission on the Fair Work Bill, however, this leaves vulnerable employees open to exploitation by their employers.

46. It has been ELCWA's experience over the last two and a half years since the Fair Work Act has been in effect that these 6 month and 12 month qualifying periods exclude a large section of the workforce from making unfair dismissal claims.

47. In the 2011 calendar year, for instance, at least 163 callers who sought advice from ELCWA on unfair dismissal under the Fair Work Act were prevented from making a claim because they had not completed the relevant qualifying period. This represents more than 10% of callers who contacted ELCWA about unfair dismissal under the Fair Work Act last year.

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[18] *Hartig v Form 2000 Sheetmetal Pty Ltd* [2010] FWA 7836.
[19] Explanatory Memorandum, p.v.

48. As noted above in the context of ELCWA's other unfair dismissal statistics, these statistics only represent vulnerable employees from Western Australia who specifically sought out, and were able to obtain, assistance from ELCWA – the statistics for all employees nationally is likely to be significantly higher.

49. Clearly then, a significant number of employees are being prevented from making unfair dismissal claims as a result of these fairly arbitrary qualifying periods which exist in the Fair Work Act.

50. Case study 2 below also demonstrates the harsh effect that the unfair dismissal qualifying periods have on vulnerable employees.

> ***Case study 2***
>
> *Jane began work as an accounts manager in late July 2010. She worked hard at her job and often did additional hours. It wasn't always an easy place to work. Jane's supervisor was very moody and was verbally abusive towards her on at least one occasion. Nonetheless, Jane never made a complaint about her supervisor's behaviour.*
>
> *In early December 2010, Jane was asked to attend a meeting which she was told was a performance review. When she got to the meeting, however, she was dismissed. Jane asked for the reason for the dismissal and was told it was "performance" and that she should be doing more than her contract hours, even though she had been doing additional hours. Jane had not been told that her employer had any concerns about her performance, nor had she ever received any warning prior to this.*
>
> *Jane was not eligible to make an unfair dismissal claim because she had only worked for the employer for 5 ½ months.*

51. ELCWA submits that rather than there being a blanket exclusion preventing employees who have only worked for an employer for a particular period from making unfair dismissal claims, the employee's length of service should instead be something that FWA takes into account. This is how the unfair dismissal laws work in Western Australia.

52. Under the *Industrial Relations Act 1979* (WA), an employee is potentially eligible to make an unfair dismissal claim regardless of his or her length of service. However, the Western Australian Industrial Relations Commission, in determining if a dismissal is harsh, oppressive or unfair must have regard to whether the employee was dismissed during a period of probation or had been employed for less than three months.[20] In this way, the rights of employees to seek remedies where they

[20] *Industrial Relations Act 1979* (WA) s 23A(2).

have been unfairly dismissed are more appropriately balanced with the rights of employers to manage their workforces.

Recommendation 3

That the minimum period of employment be removed from the criteria for determining whether an employee is eligible to make an unfair dismissal claim.

Recommendation 4

That an employee's length of service be a relevant consideration in determining whether a dismissal is harsh, unjust or unreasonable.

3.1.4 Casual employees

53. In the same way that employees who have worked for less than 6 months or 12 months are ineligible to make unfair dismissal claims, so too are casual employees prevented from making unfair dismissal claims under the Fair Work Act.[21] This is so irrespective of the harshness or unreasonableness involved in the dismissal.

54. The only situation where a casual employee can make an unfair dismissal claim under the Fair Work Act is where the employee can demonstrate that he or she has worked on a regular or systematic basis and that he or she had a reasonable expectation of ongoing employment on a regular and systematic basis.[22] In other words, the employee must demonstrate that he or she is not a true casual employee, but rather a permanent employee.

55. Approximately 123 employees who considered themselves to be casual employees contacted ELC in 2011 about unfair dismissal under the federal system of laws. In other words, 123 employees who contacted ELC in 2011 were potentially affected by the statutory bar against casuals making unfair dismissal claims.

56. Under Western Australian legislation, casual employees are not excluded from making unfair dismissal claims. However, the Industrial Relations Commission may nonetheless, and often does, take into account the fact that the dismissed employee is a casual employee.[23]

[21] Fair Work Act s 384.
[22] Fair Work Act s 384.
[23] See e.g. *Brenzi v Marine Fire Security Pty Ltd* [2004] WAIR 12573; *Cumberbirch v Total Peripherals Pty Ltd* (1995) 75 WAIG 2862; *Despot v Valley View Restaurant & Function Centre* [2005] WAIRC 02601.

57. In our view, it is preferable for casual employees not to be automatically excluded from making unfair dismissal claims under the Fair Work Act but instead for their casual status to be something that FWA takes into account in determining whether the dismissal was unfair or not.

> ***Recommendation 5***
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> ***That casual employees not be automatically excluded from making unfair dismissal claims.***

> ***Recommendation 6***
>
> ***That the fact that an employee is a casual employee be a relevant consideration in determining whether a dismissal is harsh, unjust or unreasonable.***

3.1.5 Labour hire arrangements

58. Labour hire arrangements have become a more prevalent feature in the workforce in recent years. However, they potentially restrict the legal remedies that a worker is able to seek.

59. In a labour hire arrangement, a labour hire agency engages a worker (typically as a casual employee or as an independent contractor) and enters into a contract with another entity – termed the "host business" – to provide that worker's services to the host business. There is usually no contract between the worker and the host business. For this reason, the worker is generally not regarded as an employee of the host business.

60. Where a host business informs a worker that it no longer requires his or her services, this may not necessarily be viewed as a termination of the person's employment, particularly if he or she appears to remain an employee of the labour hire agency and it is a term of his or her employment with the labour hire agency that he or she can be assigned to different host businesses.[24]

61. This is a potentially significant limitation on the rights of labour hire workers to make claims such as unfair dismissal claims (and general protection claims) under the Fair Work Act, even where they have been treated very unfairly by the host business.

[24] See for example, *David Tse v Ready Workforce Pty Ltd* [2010] FWA 8751.

62. In ELCWA's view, unfair dismissal protections should be expressly extended to labour hire workers.

> ***Recommendation 7***
>
> ***That unfair dismissal protections be extended so that labour hire workers can make unfair dismissal claims against host businesses.***

3.1.6 Limited appeal rights

63. Where an employee or an employer wishes to appeal a decision relating to an unfair dismissal application, it is necessary to establish, not only that there was an error in the original decision, but also that it is in the public interest to allow the appeal. [25]

64. In our view, this requirement excludes many applicants from having their matters re-heard, even where the circumstances are such that the case arguably warrants re-hearing. Case study 1 above demonstrates this point.[26]

65. ELCWA submits that this requirement is overly restrictive, both for employees and employers. ELCWA is of the view that the "public interest" test should be removed from the provisions relating to unfair dismissal appeals.

> ***Recommendation 8***
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> ***That the provisions of the Fair Work Act relating to appeals in unfair dismissal matters be amended such that it is not necessary to establish that it is in the public interest to allow the appeal.***

[25] Fair Work Act s 400.
[26] Statistics from the FWA 2010-11 Annual Report also provide an illustration of the limited nature of the FWA appeal process. Of the 517 FWA decisions made in that year, 68 were appealed but only 28 per cent of these were upheld.

3.2 The institutional framework and compliance regime

66. Access to the FW system is quite restricted, as the discussion of the eligibility criteria for unfair dismissal protection demonstrates. ELCWA submits that FWA's procedural rules and the lack of enforcement of agreements reached at conciliation also limit the FW system's accessibility and ability to establish a regime of compliance.

3.2.1 Accessibility

67. ELCWA submits that there are a number of aspects of FWA's procedures which make it more difficult for people to access the protections under the Fair Work Act.

68. For instance, the language used in form F8 to lodge a general protections claim and in Form F9 (required to commence an unlawful termination claim) is very technical. For example, Form 8 requires an applicant to detail the "alleged contravention" of Part 3-1. Not only is "contravention" a technical term that would not be readily understood by large parts of the population, most applicants will not know which section of Part 3-1 of the Fair Work Act is relevant. This effectively presents a barrier for employees who do not have a tertiary education and cannot afford legal representation.

69. Additionally, the filing fee for a general protections claim that does not involve a dismissal or discrimination is currently $426 where it goes through the Federal Magistrates Court. This is simply unaffordable for many employees.

Recommendation 9

That the claim forms for unfair dismissal, general protections and unlawful termination claims be made easier to understand.

Where the forms require the applicant to identify which sections of the Fair Work Act have been breached, that the relevant sections of the Fair Work Act be provided together with the claim forms.

Recommendation 10

That the filing fee for adverse action claims that do not involve dismissal or discrimination be reduced so that the same fee applies to all general protections claims.

3.2.2 Formality

70. In the *Fair Work Act Review: Background Paper* and the Explanatory Memorandum, it was stated that one of the initial intentions of the FW legislation was to provide strong but simple protections against unfair dismissal.[27]

71. ELCWA submits that these protections are unfortunately not as simple or straightforward as they should be and there are a range of improvements that could be made.

72. Despite FWA not being bound by the rules of evidence, ELCWA has found that in practice FWA still requires a large degree of formality and document preparation once matters progress beyond conciliation.

73. For example, parties are often required to comply with formal directions and produce witness statements, statements of fact and submissions in relatively short time-frames, as illustrated in Case study 3 below.

> ***Case study 3***
>
> *Mrs J was subjected to sexual harassment by her boss. She wrote a letter to her boss complaining about his conduct and was dismissed on the spot. Mrs J commenced an unfair dismissal claim and had attended a conciliation hearing before she contacted ELCWA for assistance.*
>
> *Mrs J's claim was not resolved at conciliation and progressed to a formal hearing. Prior to the substantive hearing, Mrs J was directed to file a statement of facts, witness statements in support of the facts and other documentary material she wished to rely on within 7 days of the direction.*
>
> *The respondent employer had 14 days to provide its response to Mrs J's statement of facts and to provide the material it wished to rely on.*
>
> *Both parties were required to lodge an outline of submissions within 4 weeks of the directions hearing.*
>
> *Whilst Mrs J was very capable and diligent, she was still very daunted by the prospect of having to submit these documents because she did not understand what was required. She needed extensive assistance from ELCWA to lodge these documents within the required time-frame.*

74. The requirement that the parties in FWA proceedings lodge very formal documents such as those described above presents significant difficulties for self-represented litigants who generally do not have an understanding of these documents. In many

[27] *Fair Work Act Review: Background Paper,* January 2012, p.4; See also Explanatory Memorandum, p. 5.

instances, ELCWA has needed to explain to clients the purpose of these documents and complex concepts such as the difference between questions of fact and questions of law. It is very difficult for self-represented litigants to get assistance with this in order to lodge the documents within the required time-frames. It also puts pressure on the resources of service providers such as ELCWA to assist clients with preparing such formal and technical documents.

75. The high degree of formality and procedure required for FWA hearings does not give effect to the government's intention to develop a simpler unfair dismissal system which involves a less complex process for all. Given that in many instances both parties to a FWA matter are unrepresented, ELCWA questions the need for such a formal process.

76. ELCWA also notes that despite FWA's goal of being a forum for informal dispute resolution, conciliation is not mandatory for general protections claims that do not involve a dismissal. Rather, conciliation must be agreed to by both parties to the action. If the government is committed to the faster resolution of disputes by FWA, conciliation should be mandatory for all general protections claims (including those that do not involve a dismissal).

Recommendation 11

That FWA adopt less formal procedures when dealing with claims under the Fair Work Act.

For instance, where the parties are unrepresented and the claim proceeds beyond conciliation, ELCWA recommends that the parties not be required to file formal documents such as witness statements, statements of facts and written submissions, and especially not within short time-frames.

Recommendation 12

That conciliation be mandatory for all general protections claims, including those that do not involve a dismissal.

3.2.3 Enforcement requirements

77. ELCWA has noted that, whilst many claims are resolved at conciliation, some employees have found it difficult to enforce agreements reached with employers at conciliation. In several cases in which ELCWA has assisted, the parties have

reached agreement in conciliation but the employer has not honoured the agreement and has not paid the settlement amount. An illustration of this is provided in Case study 4 below.

Case study 4

In September 2009, Mr H lodged an unfair dismissal claim. Mr H was dismissed with immediate effect for no reason and did not receive any payment in lieu of notice. At a conciliation conference held on 12 November 2009, Mr H's employer agreed to pay to him four weeks' wages, which amounted to approximately $2,000, if Mr H discontinued his claim. This agreement was not put in writing other than an email from the FWA conciliator to the employer's solicitor confirming the acceptance of the settlement offer.

Mr H, with the assistance of ELCWA, began a breach of contract claim in the Western Australian Magistrates Court, seeking the settlement amount from his employer.

The Magistrates Court found in Mr H's favour and ordered that the employer pay the agreed amount. The employer still did not pay the judgment debt. Mr H was forced to commence enforcement proceedings in the Magistrates Court.

The employer finally paid the judgment debt in February 2012, approximately 2 ½ years after Mr H made the original unfair dismissal claim.

78. In our view, it is undesirable that employees such as Mr H above should have to go through multiple sets of proceedings simply to resolve an unfair dismissal claim. This clearly adds to the cost and amount of time and effort spent resolving the matter, not only for the parties themselves but also for the courts and tribunals involved.

79. ELCWA submits that where the parties reach an agreement in conciliation in FWA proceedings, this should be enforced in FWA. For instance, orders could be made immediately after conciliation, giving effect to the agreement reached at conciliation.

80. Alternatively, the Fair Work Act or the *Fair Work Australia Rules 2010* (Cth) could provide for agreements reached at conciliation to be recorded in writing and to be registrable with FWA, as is the case under the NSW anti-discrimination legislation. Where one of the parties breached the agreement, the other party could apply for FWA to issue an order to the same effect as the registered agreement.

Recommendation 13

That agreements reached between an employee and employer at conciliation be enforced in FWA.

ELCWA recommends that this be achieved through either of the following options:

(a) Orders be made immediately after conciliation, giving effect to the agreement reached at conciliation; or

(b) The agreement reached at conciliation be recorded in writing and be registrable with FWA. Where one of the parties breached the registered agreement, the other party would be able to apply to FWA to issue an order giving effect to the registered agreement.

4. Responses to Panel's questions

Question 1. Has the Fair Work Act created a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians? If so, how? If not, why not?

The Fair Work Act has generally created a balanced framework for cooperative and productive workplace relations. However, the unfair dismissal provisions of the Fair Work Act in particular do not achieve the right balance – they go too far in protecting businesses from unfair dismissal claims at the expense of protecting vulnerable employees. Many employees are prevented from seeking remedies where they have been unfairly dismissed – for instance, due to the 14 day limitation period, the 6 and 12 month qualifying periods, and where they are casuals. See the discussion under section 3.1 above.

Vulnerable employees who have been unfairly dismissed but who are prevented from seeking remedies under the Act are at risk of finding it very difficult to get back into the workforce. In this sense, the Fair Work Act does not promote social inclusion for all Australians.

Question 2. Can the Fair Work Act provide flexibility for businesses and is this being achieved? If so, how? If not, why not?

In our view, the Fair Work Act does provide flexibility for business – for example, through the use of Enterprise Agreements and Individual Flexibility Arrangements.

Question 4. Has the Fair Work Act facilitated flexible working arrangements to assist employees to balance their work and family responsibilities?

It is encouraging that section 65 of the Fair Work Act has introduced the right to request flexible working arrangements and that the employer can only refuse this request on reasonable business grounds. Unfortunately, however, this right to request flexible working arrangements is relatively toothless, given that no sanctions apply if the employer refuses the request for reasons other than reasonable business grounds.

This right is further limited because only employees who have completed 12 months of continuous service with their employer are entitled to make a request for flexible working arrangements.[28]

ELCWA is of the view that the right to request flexible working arrangements should be strengthened by introducing sanctions where the employer refuses the request other than on reasonable business grounds. Further, it should not be necessary for an employee to have completed 12 months' service before being able to request flexible working arrangements.

Recommendation 14

That the flexible working arrangements provisions of the Fair Work Act be amended such that:

(a) there are sanctions where the employer refuses a request for flexible working arrangements other than on reasonable business grounds; and

(b) it is not necessary for an employee to have completed 12 months' continuous service before being eligible to make a request for flexible working arrangements.

Question 5. Has the Fair Work Act's focus on enterprise level collective bargaining helped to achieve improved productivity and fairness?

In our view, enterprise level collective bargaining has helped to achieve fairness because it allows the employer and the employees to be on a more even playing field. The previous use of individual workplace agreements (such as under the Workplace Relations Act) put employees at too much of a disadvantage because of the difference in bargaining power.

Question 7. What has been the impact of the creation of a national workplace relations system for the private sector? What has been the impact of the system being constitutionally underpinned by referrals of subject matters/powers from the states as well as the corporations power of the Constitution?

[28] Fair Work Act s 65(2).

The fact that the Fair Work Act relies on the corporations power, in conjunction with the fact that Western Australia has not referred its powers to the Commonwealth, means that there is a dual system of employment laws in Western Australia. This can be very confusing for employees and they are often they are unsure about which laws apply to them.

It is particularly difficult to determine which laws apply where the employee is employed by an entity that is incorporated but it is not clear whether it engages in substantial or significant trading activities – e.g. incorporated not for profit entities and local government bodies. It is also especially difficult for *employees* (as opposed to employers) to determine whether their employers engage in substantial trading activities because this requires an analysis of all of the employer's activities and the proportion of the employer's activities which involve trading – frequently, this is information to which the employee does not have access.

Question 12. Are employees responsible for the care of young children using the right to request provisions under the National Employment Standards to negotiate flexible working arrangements or request additional unpaid parental leave in order to care for children? If not, why not?

Relatively few employees have reported to ELCWA that they have used the right to request provisions under the National Employment Standards to negotiate flexible working arrangements.

This may be attributable to the fact that only employees with continuous service of 12 months or more are eligible to make such a request. It might also be attributable to the fact that there are no sanctions where the employer refuses the request on grounds other than reasonable business grounds, as discussed above under Question 4.

Question 15. How could the operation of the safety net be improved, consistent with the objects of the Fair Work Act and the government's policy objective to provide a fair and enforceable set of minimum entitlements?

The operation of the safety net could be improved with greater enforcement of safety net entitlements. For instance, some of our clients have approached the Fair Work Ombudsman for assistance in enforcing safety net contractual entitlements and have been told that the Fair Work Ombudsman cannot assist because the entitlement is contractual. However, the Fair Work Ombudsman has jurisdiction to enforce safety net contractual entitlements under the Fair Work Act where there is a breach of the minimum conditions occurring.

See further our response to Question 67.

Question 18. Without examining particular content in modern awards (which is a matter to be dealt with in FWA's review of modern awards), what has been the impact on employers, employees and regulators of consolidating the large number of state and federal awards and transitional instruments that applied before the Fair Work Act and replacing them with significantly fewer modern awards made on a national basis?

In our view, the consolidation of awards and transitional instruments and replacement with fewer modern awards is a significant improvement. The modern awards are generally well-drafted and the consistency of provisions across modern awards makes them much easier to interpret.

Question 33. Have FWA's powers in relation to equal remuneration helped to ensure equal remuneration between men and women workers for work of equal or comparable value?

In ELCWA's view, FWA's powers have indeed gone some way to help to ensure equal remuneration between men and women workers for work of equal or comparable value. An example of this is the Equal Remuneration Case handed down in February 2012 ([2012] FWA 454).

Question 37. Do the general protections provisions provide adequate protection of employees' workplace rights, including the right to freedom of association and against workplace discrimination?

The general protections provisions do provide good protection of employees' workplace rights on the whole. However, there are some limitations.

For instance, in order for an employee to be protected under these provisions, there must be a "workplace right", as defined in the Act. In order to satisfy the definition of a "workplace right", the employee must have a right under a workplace law, workplace instrument, or be able to make a complaint or inquiry in relation to his or her employment.

The phrase "workplace instrument", which at first glance seems quite broad, is defined quite narrowly in section 12 of the Fair Work Act. It has been interpreted not to include

common law contracts – see *Barnett v Territory Insurance Office* [2011] FCA 968. Similarly, it is unlikely that "workplace instrument" includes workplace policies.

This means that where an employer takes adverse action against an employee because he or she has exercised a right under a common law contract or workplace policy (as opposed to an enterprise agreement or an award, for instance), that employee will not be protected under the Fair Work Act. For instance, where an employee is dismissed for asserting a contractual right to overtime, he or she would not be protected by the general protections provisions of the Fair Work Act.

In our view, the definition of "workplace instrument" should be broadened to include a common law contract or a workplace policy. It is very important that the general protections provisions offer adequate protection to employees, particularly if no amendments are made to the existing provisions on unfair dismissal, given the extensive exclusions for unfair dismissal.

Recommendation 15

That the definition of "workplace instrument" in section 12 of the Fair Work Act be extended to include common law contracts and workplace policies.

Another limitation of the general protections provisions is that labour hire workers are not necessarily protected. See further above in section 3.1.5 and below under Question 38.

Question 38. Do the [general protections] provisions provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of the general protections?

On the whole, the general protections provisions do provide a good statutory regime for relief from discrimination, victimisation and so forth.

However, there is doubt about whether labour hire workers can access these protections, as discussed above in section 3.1.5. In our view, the general protections provisions of the Fair Work Act should state expressly that a labour hire worker is protected from adverse action by a host business.

Recommendation 16

That section 342 of the Fair Work Act be amended such that labour hire workers are able to make general protections claims against host businesses.

Question 39. Should dismissed employees be able to invoke the general protection provisions to challenge their termination without any time limit on making an application? If so, why, and if not, why not?

In our view, it would be impractical to have no limitation period at all for general protections claims, particularly where an employee is seeking reinstatement. If a limitation period for general protections claims involving dismissal is retained, we are of the view that it would be preferable for it to be longer than 60 days, ideally 90 days – consistent with our recommendation that the limitation period for unfair dismissal claims be 90 days. It might also be appropriate for the limitation period to be longer where the employee is seeking compensation rather than reinstatement.

Recommendation 17

That the limitation period for general protections claims involving dismissal be extended to 90 days.

Question 40. Has the consolidation and streamlining of workplace protections into the general protections provisions made it easier for employers and employees to understand their rights and obligations? What impact has this had?

ELCWA has found that many employees are quite confused by the general protections provisions of the Fair Work Act and do not find it easy to understand their rights under those provisions.

ELCWA also notes that where employees are potentially eligible to make both an unfair dismissal claim and a general protections claim, it is often very difficult for them to determine which claim is likely to be better in their circumstances. Employees in this situation are unable to make both claims – the Fair Work Act provides that they must

choose one.[29] We consider it undesirable that employees are required to decide up-front which claim to make and are then wedded to that claim, particularly where they have not sought prior legal advice.

Case study 1 above demonstrates the difficulties vulnerable workers face in trying to understand the general protections claims and the serious consequences of choosing the wrong claim.

ELCWA is of the view that it would be preferable if employees were not forced to choose between unfair dismissal and general protections claims. ELCWA submits that it would be more appropriate if there were only one form for both unfair dismissal and general protection claims where it was possible to argue each a breach of the general protections provisions and the unfair dismissal provisions in the alternative.

Obviously this would require unfair dismissal and adverse action claims to be subject to the same process. In this regard, ELCWA submits that general protections claims would be more streamlined and accessible if they were dealt with by FWA after conciliation (rather than general protections claims needing to go to the Federal Magistrates Court or the Federal Court).

Recommendation 18

That employees be able to lodge one claim form with FWA, setting out breaches of the general protections provisions and the unfair dismissal provisions in the alternative.

Recommendation 19

That general protections claims be dealt with in FWA for the entire process (rather than proceeding to the Federal Magistrates Court or Federal Court if conciliation is unsuccessful).

Question 42. Do the unfair dismissal provisions balance the needs of business and employees' right to protection from unfair dismissal?

In ELCWA's view, the unfair dismissal provisions have not achieved the right balance in terms of protecting employees from unfair dismissal. For instance, the 14 day limitation period, the qualifying periods and the exclusion for casuals preclude many employees

29 Fair Work Act ss 725,727-729.

from making unfair dismissal claims who, in our view, should be entitled to unfair dismissal protection. See further our discussion under section 3.1 above.

Question 43. Consistent with the Government policy objectives, does the Fair Work Act provide genuine unfair dismissal protection? If so, how, if not, why not?

In our view, the Fair Work Act does not provide genuine unfair dismissal protection due to the many exclusions. Please refer to our discussion under 3.1 above.

Question 44. Are the procedures for dealing with unfair dismissal quick, flexible and informal and do they meet the needs of employers and employees? What is the impact of the changed processes upon the costs incurred by employers and employees?

The emphasis on conciliation in unfair dismissal does make the process more quick, flexible and informal. However, if the parties are unable to resolve the matter at conciliation, the process becomes quite formal, as outlined in section 3.2 above. This does not meet the needs of employees – many employees have reported feeling very overwhelmed and confused by the process.

Question 45. Has the ability of FWA to deal with unfair dismissal claims in a more informal manner improved the experience for participants?

Refer to our response to Question 44 and discussion under section 3.2 above.

Question 46. What has been the impact of the introduction of qualifying employment periods before an employee is eligible to make a claim for unfair dismissal? Has the 12 month (small businesses) and 6 month (larger businesses) qualifying period provided clearer guidance to employers and sufficient time for employers to assess the suitability of an employee for a role?

The introduction of the 6 and 12 month qualifying periods has prevented a large number of employees from making unfair dismissal claims, even where they have been dismissed in very unfair circumstances. The right balance has not been struck here.

Refer to our discussion in section 3.1.3.

Question 47. Is FWA's emphasis on telephone conciliation in unfair dismissal matters desirable? If so, why, if not, why not?

Some of ELCWA's clients have reported that they have been quite happy with the telephone format for various reasons – for instance, they are not required to face the employer, and they find it more informal and less intimidating.

However, other clients have said that they would have preferred to see the employer face-to-face. We also find that it is sometimes easier to communicate with people in-person, especially where they are from non-English speaking backgrounds and an interpreter is required.

ELCWA is of the view that there is nothing inherently wrong with an emphasis on telephone conciliation. However, should either party wish for the conciliation to be held in person instead, that request should be accommodated.

Recommendation 20

That the use of telephone conciliation in unfair dismissal matters in FWA be retained, but where one of the parties requests that the conciliation be held in person, that request be accommodated.

Question 48. Are the remedies available in the case of an unfair dismissal appropriate?

ELCWA considers that the unfair dismissal remedies available under the Fair Work Act are generally appropriate. As noted above, however, despite the government's emphasis on reinstatement as the primary remedy, it is often not appropriate due to the relationship between the employee and the employer already having broken down.

We are also of the view that it is desirable to introduce pecuniary penalties (potentially payable to the employee or other party) as an additional unfair dismissal remedy, particularly if unfair dismissal claims and general protections claims are kept as two

separate claims. Pecuniary penalties are available as one of the remedies for general protections claims but are currently not available for unfair dismissal claims.

Obviously a pecuniary penalty would not be appropriate in every unfair dismissal case. However, some unfair dismissal cases involve quite deplorable conduct on the part of the employer. Case study 3 is an example of this. Further, as noted above, many employees who are eligible to make both unfair dismissal claims and general protections claims choose to make an unfair dismissal claim simply because they find unfair dismissal an easier concept to understand. In those circumstances, we submit that FWA should be able to order that a pecuniary penalty be paid, should it be appropriate in any given case.

Recommendation 21

That pecuniary penalties be available as a remedy for unfair dismissal claims.

Question 64. Are the processes and procedures set out in the Fair Work Act that apply to FWA, the Federal Magistrates Court of Australia and to the Federal Court of Australia appropriate having regard to the matters coming before it? What changes, if any, would you suggest?

Refer to section 3.2 above and to our answers to Questions 40, 44 and 47.

Question 66. Does the requirement for FWA to conduct and publish research relevant to minimum wages help to better inform parties who make submissions to the Minimum Wage Panel?

Yes, the publication of research does help in the preparation of submissions to the Minimum Wage Panel. It would be helpful if the research was released earlier if possible.

Question 67. Do the enhanced powers of Fair Work Ombudsman (FWO) inspectors assist in the expeditious resolution of matters under investigation?

Whilst ELCWA is encouraged by the enforcement action taken by the Fair Work Ombudsman to enforce employees' rights to date, there are a number of limitations in the enforcement of claims under the Fair Work Act.

For instance, the FWO Litigation Policy outlines various considerations which are taken into account when determining whether public interest dictates whether the FWO commence proceedings against an employer. One of these considerations includes whether a contravention involves underpayments of more than $5000. Only where special circumstances exist would a contravention involving underpayments of less than $5000 be regarded as in the public interest to pursue.[30] This is a significant limitation.

[30] Fair Work Ombudsman, GN 1 "FWO Litigation Policy", 2nd Edition, July 2011, p12.

5. Summary of recommendations

ELCWA recommends as follows:

1. ***That the limitation period for unfair dismissal claims be extended to 90 days.***

2. ***That there be no reference to "exceptional circumstances" in section 394(3) of the Fair Work Act but that FWA be given discretion to allow claims to be lodged outside the limitation period, taking into account the factors currently listed in that section.***

3. ***That the minimum period of employment be removed from the criteria for determining whether an employee is eligible to make an unfair dismissal claim.***

4. ***That an employee's length of service be a relevant consideration in determining whether a dismissal is harsh, unjust or unreasonable.***

5. ***That casual employees not be automatically excluded from making unfair dismissal claims.***

6. ***That the fact that an employee is a casual employee be a relevant consideration in determining whether a dismissal is harsh, unjust or unreasonable.***

7. ***That unfair dismissal protections be extended so that labour hire workers can make unfair dismissal claims against host businesses.***

8. ***That the provisions of the Fair Work Act relating to appeals in unfair dismissal matters be amended such that it is not necessary to establish that it is in the public interest to allow the appeal.***

9. ***That the claim forms for unfair dismissal, general protections and unlawful termination claims be made easier to understand.***

   Where the forms require the applicant to identify which sections of the Fair Work Act have been breached, that the relevant sections of the Fair Work Act be provided together with the claim forms.

10. ***That the filing fee for adverse action claims that do not involve dismissal or discrimination be reduced so that the same fee applies to all general protections claims.***

11. ***That FWA adopt less formal procedures when dealing with claims under the Fair Work Act.***

    For instance, where the parties are unrepresented and the claim proceeds beyond conciliation, ELCWA recommends that the parties not be required to file formal documents such as witness statements, statements of facts and written submissions, and especially not within short time-frames.

12. ***That conciliation be mandatory for all general protections claims, including those that do not involve a dismissal.***

13. ***That agreements reached between an employee and employer at conciliation be enforced in FWA.***

    ELCWA recommends that this be achieved through either of the following options:

    (a) ***Orders be made immediately after conciliation, giving effect to the agreement reached at conciliation; or***

    (b) ***The agreement reached at conciliation be recorded in writing and be registrable with FWA. Where one of the parties breached the registered agreement, the other party would be able to apply to FWA to issue an order giving effect to the registered agreement.***

14. ***That the flexible working arrangements provisions of the Fair Work Act be amended such that:***

    (a) ***there are sanctions where the employer refuses a request for flexible working arrangements other than on reasonable business grounds; and***

    (b) ***it is not necessary for an employee to have completed 12 months' continuous service before being eligible to make a request for flexible working arrangements.***

15. ***That the definition of "workplace instrument" in section 12 of the Fair Work Act be extended to include common law contracts and workplace policies.***

16. ***That section 342 of the Fair Work Act be amended such that labour hire workers are able to make general protections claims against host businesses.***

17. ***That the limitation period for general protections claims involving dismissal be extended to 90 days.***

18. ***That employees be able to lodge one claim form with FWA, setting out breaches of the general protections provisions and the unfair dismissal provisions in the alternative.***

19. ***That general protections claims be dealt with in FWA for the entire process (rather than proceeding to the Federal Magistrates Court or Federal Court if conciliation is unsuccessful).***

20. ***That the use of telephone conciliation in unfair dismissal matters in FWA be retained, but where one of the parties requests that the conciliation be held in person, that request be accommodated.***

21. That pecuniary penalties be available as a remedy for unfair dismissal claims.