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CC:

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Subject: consultation paper

Dear Minister,

Thank you for the opportunity to engage in this consultation process. I believe that the current proposals can be further supported by some additional practical measures such as:

Specific proposals on the consultation document

1. enabling for streaming of employment rights cases into 'test case' streams for fast tracking so as to avoid the current system clogging due to lack of clarity in pay cut cases. Claimants should be advised that their cases will not be progressed through the system, until an outcome is reached on a particular principle.
2. In all cases, (but especially where a dispute spans dispute of right and dispute of interest) preliminary ADR hearing should be held at an early stage (within 2 months of the claim being lodged) to clarify the issues in dispute between the parties and where possible, reach agreement). The preliminary ADR hearing should be conducted by a relevant specialist in the area (e.g equality, collective, rights commissioners) .

Following the ADR process, the claimant should then be required to elect whether or not to pursue a claim of right or interest, and under what legislation they are proceeding. If the event that the claimant fails to elect within strict time limits (and I am suggesting maximum 28 days here), then the dispute is deemed withdrawn . Once election is made, the case progresses into the relevant arbitration channel. There should be a single step arbitration body, with the right of appeal.

The existing election/objection route should be abolished.

- 3.Respondents should be required to lodge standard jurisdictional objections to claims of rights (on points such as time limits,

exclusions etc) in writing within 28 days of a claimant's election. This would provide a process to eliminate cases which may be without merit on an early basis. Such cases can then be listed for determination before a relevant officer at an early stage and weeded out of the system early. If necessary, a hearing can be arranged on the preliminary issues (which can be by teleconference) but the officer would have discretion to determine whether this was necessary.

Whilst it may not be constitutionally possible to prevent a respondent from raising a jurisdictional objection at a later stage if it is not notified at the early stage, it is likely to be welcomed and utilised by employers as a way of avoiding a need for a full hearing.

4. The time limits for lodging claims should be shortened for all post termination cases to a much reduced period without affecting the existing 6- 12 month time limit for employees who have disputes of rights and remain within employment. Too often employers are left waiting for the end of the sixth month, even where the intent to take a claim is obvious from the date of termination. This, together in the delay in getting hearings, means that my clients are waiting up to two years for an EAT hearing with the further delay in finalising hearings/outcomes. This frustrates and penalises good employer conduct and encourages poor management conduct because employers adopt a defeatist attitude.

I believe, if possible, a 3 and 3 month period would be more equitable in cases for post termination relief. Where the employment relationship continues, the existing time limits are sensible and facilitate direct resolution.

I believe that the current 'reasonable' test for extensions should be clarified and if possible, a single test adopted. The preventative test in the UD legislation whilst more restrictive, is much clearer and easier to advise on.

Other general proposals

1. Small business exemption from unfair dismissals

Creating a general principle of exclusions from unfair dismissal for small businesses with less than e.g. 5 employees or a specified turnover level. This exclusion only to apply if the employer can demonstrate that:

- it has a written contract of employment in place which is compliant with statutory minimum legislation terms; and
- it can demonstrate in writing compliance with a code of practice on small business dismissals

Again, a decision is made 'on the papers' by a relevant officer without the need for hearing. If necessary, a telephone conference can be held to clarify any points on the papers.

If the employer fails to demonstrate compliance on the papers, the matter is listed through the normal process. I believe such a process would reduce cost and remove the fear associated with creating employment for many small business people, thereby encouraging job creation. Such an approach has been successfully adopted by the Australian Federal Government. Whilst I can understand that there may be public policy issues with such an exemption, I believe we can encourage good practice and job creation in small business, without penalising the majority of small business employers for the bad behaviour of a minority.

2. Transparency and predictability in decision making

Improved publication of decisions of the various bodies, as well as increasing the requirement for such bodies (especially rights commissioners) to be consistent and transparent in their decision making in rights based cases. If a clear body of caselaw is readily available to professionals, together with improved requirements for consistency and transparency in exercising decision making, we would have a more transparent and accessible system and reduce the need for hearings. To support such a system,

- a new codified employment rights legislation should be produced.
- The final legal arbiter should also be granted the power to award costs against advisers and/or claimants who pursue frivolous or vexacious claims and/or defences.

3. Increased use of telephone or video conferencing for preliminary points, hearings etc. This will reduce costs. Increased use of telephone interpreters in situations where non english speaking people are involved. These systems are used extensively in Australia without diminishing individual's rights.