4 Reform the Adverse Action provisions

The adverse action provisions of the FW Act create serious and escalating challenges for employers through excessive risk exposure and the costs of managing unmeritorious claims. The provisions also place significant pressure on the Federal Court system due to the failure of the FWC to effectively manage growing numbers of claims at conciliation.

The Adverse Action provisions were introduced by the former Labor Government in 2009 as a vast and unjustified extension of employee protections that existed under previous Australian workplace laws. The provisions appear to have no economic or social purpose, outside of creating a growing field of litigation. Adverse Action claims have become very attractive to applicants due to the unlimited compensation, difficulty in defending a claim and orders that can be made by the courts.

> *The number of general protections applications involving dismissal increased by 10 per cent, to 4,117 in 2017–18 from 3,729 in 2016–17[2].*

The growing number of Adverse Action claims can be attributed to the unlimited cap on compensation and the financial and reputational cost of defending claims leaving employers with no choice but to pay significant financial settlement sums regardless of whether the claim holds any merit. The nebulous concepts of "workplace rights" and "adverse action" make proactive compliance difficult to achieve. Legitimate performance management is also more regularly challenged. Employers are exposed to claims up to six years from when an action is alleged to have occurred. Defending claims is extremely difficult.

It is necessary that the FWC appropriately deal with Adverse Action claims as intended under the FW Act. This would see matters resolved at the FWC level instead of seeing vexatious claims reach the costly court jurisdiction and forcing employers to pay settlements.

THE EMPLOYER EXPERIENCE — EXPOSURE TO VEXATIOUS CLAIMS

In a 2018 survey of resources and energy employers, 53% reported some exposure to the Adverse Action provisions. 86% said the potential for unlimited compensation and the reverse onus of proof would lead them to seek settlement of any claim, regardless of merit.

Several AMMA members have received claims from former employees claiming they were dismissed due to their union involvement, when they were dismissed for performance issues. There is a growing sense that the Adverse Action provisions are being strategically preferred to unfair dismissal due to the higher chance of monetary settlement.

An AMMA member received an Adverse Action claim from a former employee, almost a year after their resignation, claiming they resigned due to unfair treatment from their line manager. The claim was found to be baseless, with the former employee "fishing for a payout".

Recommendations:

Legislative reform could focus on these areas:

- Clearly define how exercising a "workplace right" applies in relation to Adverse Action claims and amend the FW Act to introduce exclusions for complaints that are frivolous and vexatious.
- Introduce a high income threshold for General Protections claims as well as a cap on the compensation that can be awarded.
- Introduce a "genuine reasons" defence to relieve risk and uncertainty for employers seeking to undertake appropriate and genuine employee performance management.
- Cease outsourcing Adverse Action claims to public servant conciliators and allocate all Adverse Action claims to the appropriately qualified statutory-appointed tribunal members.
- Remove the reverse onus of proof for Adverse Action claims and the additional protections covering anti-discrimination (more than adequately covered by anti-discrimination laws).

[2] Annual Report 2017-18, June 2018 (released 18 September 2018), Fair Work Commission. Retrieved from fwc.gov.au.