Greg Reiffel: Tel: 0438 906 050 E-mail; greiffel@bigpond.net.au

Employee Relations News

Edition 45 **28 April 2016**

Greg Reiffel HR & IR Consulting

2016 marks my 30th anniversary of providing professional HR/IR and other related services to businesses across a number of industry sectors.

Check me out at: http://gregreiffelhrir.com/ or LinkedIn

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I also would greatly appreciate if you could pass this newsletter on to your business contacts. Thank you.

$3.7 Billion Unfair Dismissal industry

In this Edition:

Introduction

In this special report, I analyse the outcomes businesses face under Australia/Victoria's employment laws.

Australia is not a third world country and should not expect to compete with workers who are paid a pittance and work in conditions that would make the Dickensian era look like a paradise. The recent 7 Eleven saga of franchisees underpaying their workers is just the tip of the iceberg.

The bottom line, is that Australian workers are in genuine fear of losing their jobs to (eg) China/India or having to work through labour-hire firms on an "as required" basis or competing with foreign workers who enter through spurious "training" or other visas (cheap – can easily be taken advantage of, unlikely to join a union, and do not require the investment in apprenticeships/training).

Put bluntly, no matter what legislation is in place, unscrupulous employers will take advantage of employees – despite the efforts of government agencies – such as the Fair Work Ombudsman and, to a lesser extent.

There are numerous "on-costs" that effect labour costs in Australia (payroll tax being my biggest "bugbear").

In my last count there were more than 70 pieces of employment related legislation nation-wide. Add the various "codes" and this figure is sure to swell over the 100 mark, being overseen by multiple government agencies.

Whilst the ridiculously high payouts for discrimination claims hit the headlines, "unfair dismissals" seem to be employers' worst employment fear. With "stress claims" rising in the workers compensation area – despite total injury claims falling.

In the past, the Australian Industrial Relations Commission (AIRC) – the precursor to our current system was established "to resolve disputes that occurred over the borders of any one state" (or words to that effect).

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This federal body was set up to assist companies and its workers to resolve disputes in an atmosphere free of legal restraints and solemnities.

The system, whilst being far from perfect, was well understood by the so-called industrial relations club. That is the practitioners who understood the rules and (generally) played by them.

It was the era in which "employers got the unions they deserved" and as Clarrie O'Shea (1906–1988), was the Victorian State Secretary of the Australian Tramway & Motor Omnibus Union eloquently put it "all bosses are bastards". The inference being that bad bosses got bad (militant) unions.

Fast forward to the present time and there have been a small in number but major in changes to the industrial legislation (anybody remember "Work Choices"). The current Fair work Act 2009 on face value is a fair and innovative piece of workplace legislation.

Note: In Victoria, it is now okay for employees to "double-dip" by accepting a legal settlement in one jurisdiction (eg equal opportunity/accident compensation) and then prosecuting the same matter in another (eg VCAT).

It would now appear that with less disputation in the workplace, the "IR Club" has been replaced by the infamous "no-win no-fee (NWNF)" club. This "new" club owes its allegiance to no cause. It exists simply to make money from employers via their (often) naive clients. They are not new, but their usual past hunting ground was mainly workers compensation.

What *is* new is the ability for legal firms to advertise. And the NWNF brigade does this extremely effectively. They actively encourage employees who have dismissed from their employment to sue their ex-employer via the "unfair dismissal" system. If the "unfair dismissal" does not fit, then let's try "general protections/adverse action" or "unlawful/discrimination".

Google "no win no fee lawyers Melbourne" and get to choose from "about 172,000 results".

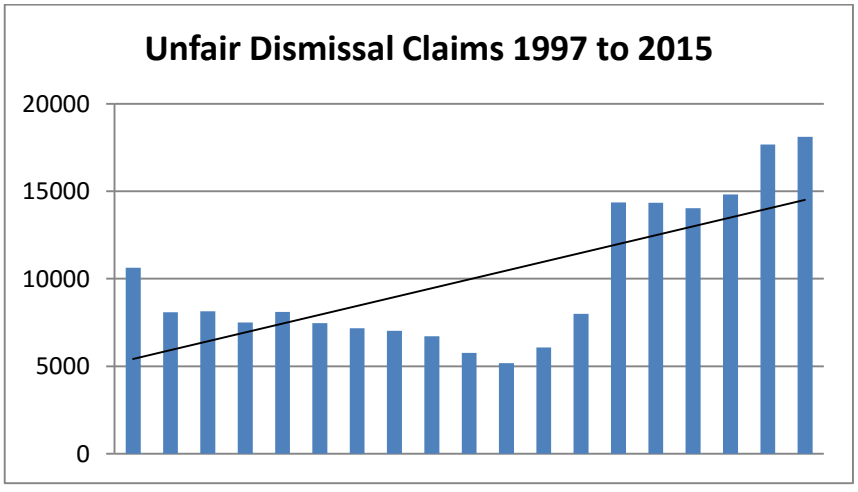
Unfair Dismissals

I read a report by the Commission some years ago that stated that the average settlement for an unfair dismissal at conciliation was $15,000 (that is, the average amount of money that an employer pays to the disgruntled employee to go away). How much the ex-employee sees is another matter – I've heard stories of fees charged by the NWNF of 75% of the settlement! All unions wanted were their monthly fees paid.

Let's face it; the number of reinstatements is miniscule eg 12 reinstatements out of 18,000 claims in 2014/2015.

NWNF lawyers work hard to ensure settlements (read: "Cashflow") make up 90% of all applications.

In extrapolating figures from 1 July 2001 to 30 June 2015 (yes I have been following this a while), I have used a multiplier effect of total claim cost of $20,000 per claim to the employer. Pretty conservative given the time and productivity loss and legal fees, etc.



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During the period 1 July 2001 to 30 June 2015 there have been **189,149** claims for unfair dismissal (note 2014 and 2015 include General Protection claims relating to unfair dismissals).

Multiplying that by $20,000 equates to **$3,782,980,000**. In the words of Arthur Daly: "Not a bad little earner".

Fact:
- 60.1% of all matters handled by the Fair Work Commission involved unfair dismissals.
- 33% lodged in Victoria.
- 25% lodged in NSW.

This is despite the current legislation limiting the appearances of legal representatives. However there is a continuing trend where the legal fraternity are being allowed into this jurisdiction because of the "complexity" of cases. If the case is too complex, find people who will make its simpler.

And to make matters worse, conciliations are now being undertaken over the phone. Employers and ex-employees are not required to attend any formal conciliation. It's all about efficiency. It's all about churn. The Commission has timelines to deal with these matters and this is the way of improving productivity!

The Commission is also focussing far too much (in my humble opinion) on the "procedural fairness" of a case (especially at conciliation) rather than the real reason why an employer got rid of the employee ("valid reason") to bludgeon employers into agreeing to "settle".

Bullying claims

"And, by the way, this is why the new Anti-Bullying law is doomed. Not because it is bad law, but because it provides zero succour to the NWNF fraternity".

Statistically, as the following table shows; from 150,000 web-hits, the FWC was required to make a decision on 60 (up from 21 the previous year):

In the 2014–15 reporting period the Commission:

- Received more than 150,000 unique website hits regarding anti-bullying.
- Dealt with more than 6300 telephone inquiries.
- Processed 694 applications.

Finalisation of matters	2013–14[4]	2014–15
Application withdrawn early in case management process[1]	59	185
Application withdrawn prior to proceedings[2]	34	122
Application resolved during the course of proceedings[3]	63	191
Application withdrawn after a conference or hearing and before decision	20	118
Application finalised by decision	21	60
Total	197	676

Discrimination

75% of all complaints to the Human Rights & Equal Opportunity Commission relate to employment. But the good(ish) news that these claims have almost halved since 1999.

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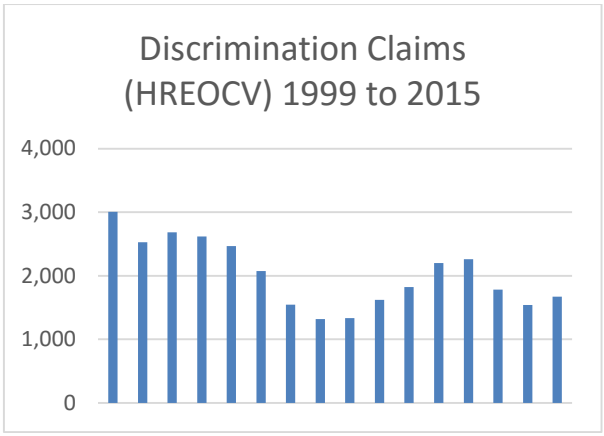
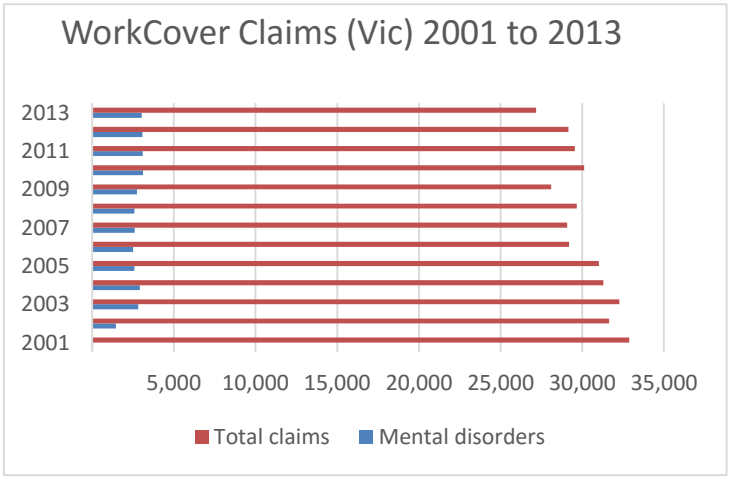


WorkCover claims

We would all agree that any workplace injury is not good. However, it would appear that the overall claims are reducing…

but mental health (stress) claims are steadily increasing from (a lowly) 53 claims in 2001 to 3,029 in 2013. On the percentage basis this is a rise from 0.1% to 11% of all WorkCover claims made.



How to make the No Win No Fee lawyers irrelevant

1. If you want employee loyalty and continuous high quality / high productivity, invest in a permanent workforce. Use casuals as a "top-up" only. Remember, there no such thing as a "permanent casual".

2. People are not robots: they get sick, have bad days, etc. Understand this. Having an Employee Assistance Program in place can also add value.

3. Hire right: ensure the person that you hire is suitable for the position (think: "square peg – round hole").

4. Ensure that you have written policies in place that set out your expectations in the above areas and make these part of your induction process.

5. If an employee is not performing to your requirements, act immediately and in a manner proportionate to the "crime".

6. AND above all, before dismissing an employee, get good advice from a person well versed in workplace legislation. That is, not your accountant or solicitor. In most cases a well-written "final warning" letter will prevent a successful "unfair dismissal" claim.

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Interesting article on "Employment myths – busted":

http://www.mondaq.com/article.asp?articleid=481300&email_access=on

Reminder:

Private sector employers with more than 100 people must submit an annual report to the Workplace Gender Equality Agency. I can provide assistance with this.

Until next time…

Greg Reiffel
Principal Consultant