

ADR AND INDUSTRIAL TRIBUNALS: INNOVATIONS AND CHALLENGES IN RESOLVING INDIVIDUAL WORKPLACE GRIEVANCES

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This paper analyses the dispute resolution practices of the federal industrial tribunal in dealing with individual workplace grievances, and examines the way in which these practices are changing and evolving, particularly under contemporary pressures to find more informal and cost-effective methods of dispute resolution. It is based on interviews with past and present federal industrial tribunal members, and draws on their observations of changes and challenges in the dispute resolution methods for resolving individual workplace grievances. The paper concentrates on three principal areas. First, it evaluates whether changes in the legislative scheme have had an impact on conciliation as the dominant mode of dispute resolution. Secondly, it examines how the way in which the tribunal exercises its dispute resolution powers to deal with individual workplace grievances over unfair dismissals has changed in two significant respects. Fair Work Australia has appointed a significant number of qualified and experienced mediators to conduct conciliation conferences, instead of members of Fair Work Australia, and the primary method of conducting these conferences is now by telephone rather than in person. The final area of dispute resolution practices that this paper deals with is 'adverse action' claims brought under the general protections provisions of the Fair Work Act 2009 (Cth) and the challenges that arise for Fair Work Australia in seeking to resolve such disputes.

I INTRODUCTION

In recent years, a number of jurisdictions have established new administrative bodies, applying alternative dispute resolution ('ADR') techniques, for managing workplace disputes. In Canada, the United States, the United Kingdom, Ireland, and New Zealand governments have legislated to establish less adversarial forms of workplace dispute resolution designed to encourage more cooperative and productive workplace relations.¹ An important element of these changes has

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¹ Anthony Forsyth and Holly Smart, 'Third Party Intervention Reconsidered: Promoting Cooperative Workplace Relations in the New "Fair Work" System' (2009) 22(2) *Australian Journal of Labour Law* 117, 117–18.

been the introduction of more informal processes for the resolution of individual workplace grievances involving claims over workplace rights.

Australia has a long history dating back to 1904 (well before the 1970s and '80s when the term 'ADR' became popular)² of empowering a federal industrial relations tribunal, now called Fair Work Australia ('FWA'), to use conciliation and arbitration to prevent and settle industrial disputes. Up until the introduction of laws permitting individual employees to apply for a remedy for unfair or unlawful dismissal, federal industrial legislation was principally concerned with the regulation of collective industrial relations, and the federal tribunal's dispute resolution powers were concentrated on the settlement of collective industrial disputes, generally for the purposes of establishing industrial instruments determining wages and conditions of work.³

Australia has not escaped the global trend towards individualisation in employment relations in recent decades. Rates of union membership have declined steadily since the 1990s,⁴ so many more workers lack the support of a union in dealing with workplace grievances. Over the last two decades the legal framework within which the federal tribunal has exercised its dispute resolution functions has changed markedly.⁵ Since the introduction of the *Workplace Relations Act* in 1996, federal legislation has reflected an increasing focus on the workplace rights of individual employers and employees. Before 1996, the Australian Industrial Relations Commission ('AIRC') mainly exercised its powers of conciliation and arbitration in the settlement of interests disputes between unions and employer associations, with a view to making industrial awards setting new wages and conditions, or making orders to bring industry strikes to an end. The majority of dispute resolution matters now brought before FWA involve individual employment termination disputes, so that FWA has developed a case load much more like that of an employment tribunal, such as in the UK (although for constitutional reasons, FWA can exercise only administrative, and not judicial

2 See Hilary Astor and Christine M Chinkin, *Dispute Resolution in Australia* (Lexis Nexis Butterworths, 2nd ed, 2002) 3. For a specific discussion of alternative dispute resolution and industrial practices, see Therese MacDermott and Joellen Riley, 'Alternative Dispute Resolution and Individual Workplace Rights: The Evolving Role of Fair Work Australia' (2011) 53(5) *Journal of Industrial Relations* 718, 721–2.

3 See Justice Geoffrey Giudice, 'The Evolution of an Institution: The Transition from the Australian Industrial Relations Commission to Fair Work Australia' (2011) 53(5) *Journal of Industrial Relations* 556, 559. For a general survey of the significant evolution of the federal tribunal as a consequence of the enactment of the *Fair Work Act 2009* (Cth) see the collection of essays in vol 53(5) of the *Journal of Industrial Relations*. See generally MacDermott and Riley, above n 2 for a background paper on the legal changes that have led to the new practices discussed now in this article.

4 From August 2009 to August 2010, overall union density rates in Australia declined from 20 per cent to 18 per cent. See Australian Bureau of Statistics, 6310.0 — *Employee Earnings, Benefits and Trade Union Membership, Australia* (August 2010) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/6310.0Main+Features!August%202011?OpenDocument>>.

5 See Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed 2011) 93–115.

power).⁶ This paper focuses on the federal industrial tribunal's role in dealing with individual workplace grievances, and examines the way in which that role is evolving, particularly under contemporary pressure to find more informal and cost-effective methods. We will look — primarily based on the observations of FWA members — at the pivotal part that conciliation plays in seeking to resolve such grievances. We concentrate in this paper on the processes adopted by FWA, rather than on the developments in legal rules and principles.⁷

In looking at individual workplace grievances this paper will focus on FWA's jurisdiction to deal with unfair dismissal applications and general protection applications. Since 1993, the Commission has exercised a jurisdiction to deal with unfair dismissal applications by both conciliation and (if that fails) by arbitration. This jurisdiction has expanded considerably since the nationalisation of the Fair Work system, so the pressure to handle an increased case load has encouraged more informal processes (such as telephone conferencing). We also consider FWA's newer role in seeking to resolve 'general protections' applications through ADR processes, before these escalate to the Federal Court system.⁸ Although the AIRC was able to conciliate unlawful terminations in the past, FWA has now acquired a role as conciliator (but not arbitrator) of certain kinds of workplace grievances arising during employment. The paper does not deal with grievances that might be conciliated by FWA pursuant to a dispute resolution clause in an enterprise agreement.

The discussion is divided into three parts:

1. ***Conciliation as the dominant method of dispute resolution:*** Despite a number of different legislative schemes that have affected the circumstances in which the tribunal can exercise its dispute resolution functions, the ability of the federal tribunal to engage in conciliation to resolve conflict or disputes has remained a consistent feature over time. From its beginnings, the federal industrial tribunal has adopted an interventionist style of conciliation. This has not apparently changed in any significant respect with the development of a more extensive jurisdiction over individual grievances.
2. ***A new conciliation model for unfair dismissal applications:*** The restoration of unfair dismissal entitlements to all national system employees by the *Fair Work Act 2009* (Cth) ('*FW Act*') created the potential for an explosion of termination of employment claims at the federal level. Presently, all private

6 In *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, the High Court of Australia held that the 1904 legislation establishing the Commonwealth Court of Conciliation and Arbitration was unconstitutional because it permitted judicial and administrative power to be exercised by one body, contrary to the Australian Constitution. This decision was affirmed on appeal to the Privy Council in *A-G (Cth) v R* [1957] AC 288. See G Sawyer, 'The Separation of Powers in Australian Federalism' (1961) 35 *Australian Law Journal* 177.

7 See the collection of papers noted at above n 3 for commentary on the range of legal changes affecting FWA's jurisdiction.

8 See the *Fair Work Act 2009* (Cth) pt 3-1. This article provides only a brief explanation of the protections, as our concern is principally with dispute resolution processes rather than analysis of the legal doctrines. On the coverage and operation of the 'general protections' provisions see W B Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 557–74; MacDermott and Riley, above n 2, 725–8.

sector employers across Australia (with the exception only of unincorporated employers in Western Australia) are amenable to the federal unfair dismissal jurisdiction. In the first year of operation of the *FW Act* unfair dismissal provisions, approximately 11 500 applications were made.⁹ In response to these pressures, FWA has increased its use of telephone conferencing and engages trained mediators to deal with most conciliations, rather than assigning matters to the members of the tribunal, as was the practice prior to 2009. These developments are presented as ways of achieving greater efficiency, flexibility and cost effectiveness, however they raise the question of whether the loss of an opportunity for disputants to engage with each other face-to-face compromises the interactive nature of ADR.

3. **Resolving ‘general protections’ applications:** The *FW Act* has consolidated and enhanced a number of rights in its ‘general protections’ provisions, including rights to freedom of association, to the enjoyment of the benefit of industrial instruments, and protection from discriminatory treatment.¹⁰ While FWA is able to conciliate these applications, the ultimate power to adjudicate these disputes is vested in the Federal Court or Federal Magistrates Court. So whereas the conciliation of unfair dismissal applications occurs within the shadow of potential arbitration in a short time by the same body (FWA), conciliation of general protections occurs in the more remote shadow of potential court proceedings, which can occur only after considerable delay and expense. Many applicants find the prospect of proceeding to court too onerous and discontinue their complaints. In addition, the complexity of the statutory provisions and absence of a body of decided cases clarifying the provisions mean that the parameters for negotiation in conciliation are much less clear. Finally, the individual rights focus of the provisions means that many applications will involve individual employees (not unions) who may be unrepresented by professionally trained advocates. Many of these will be ‘one-shotters’, with little prior exposure to or experience of the industrial relations system.¹¹ Conciliation provides an important opportunity for them to understand their rights and their prospect for success, but it may in fact be their only viable avenue of recourse, given the difficulty they face in pursuing the matter further.

Our concern in addressing these themes is to reflect upon the way in which FWA — as an institution — is adapting to calls for more efficient and cost-effective resolution of workplace grievances. Whether fair or not, critics of the former AIRC alleged that its processes had become unnecessarily formal, technical and adversarial in nature, and that consequently, employers would pay ‘go away’ money to fend off unmeritorious claims, simply to avoid the costs and inconvenience of appearing before the Commission. Much of the rhetoric surrounding the

9 Jennifer Acton, ‘From Interests to Rights: The Work of Fair Work Australia’ (Paper presented at the 9th Annual Workforce Conference, Melbourne, 22 November 2010) 3.

10 For a full explanation of the general protections, see Creighton and Stewart, above n 8.

11 See Marc Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974–75) 9(1) *Law and Society Review* 95, 97.

Work Choices laws enacted in 2006 (but repealed following the 2007 federal election) concerned criticism of a supposed ‘industrial relations club’ entrenched in the former AIRC. The Work Choices solution was to attempt to facilitate the emergence of a new private industry in workplace mediation.¹² Although the Work Choices model dispute resolution processes favouring privately provided ADR were abandoned in the *FW Act*, there has been some accommodation of those views, if only in the form of the adoption of some new language in the legislation. The *FW Act* chooses to call some of these conciliations ‘conferences’ and the description of FWA’s dispute resolution powers (in s 595) refers also to ‘mediation’ and ‘making recommendations’.

In order to develop a better understanding of the way in which the dispute resolution practices of the federal industrial tribunal may have evolved, the authors conducted a small number of interviews with current and past members of the federal tribunal.¹³ The interviews were directed to ascertaining how dispute resolution practices may have changed under different legislative schemes, and how changes in the tribunal’s dispute resolution methods may have been influenced by general trends in alternative dispute resolution. Although our sample was small, it has enabled the views of some of those who are actually engaged in the dispute resolution processes of the tribunal to inform this research.

II CONCILIATION AS THE DOMINANT MODE OF DISPUTE RESOLUTION

A Early Industrial Conciliation

FWA has inherited its concept of conciliation from a long history of Australian industrial law and practice. Under the *Australian Constitution*, the Commonwealth’s power to legislate in the field of industrial relations was long considered to be restrained by the wording of s 51(xxxv), which stipulated that the Commonwealth had power to make laws for ‘conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State’. On the occasions when the High Court has considered the meaning of ‘conciliation’ (generally for the purposes of determining the validity of a federal enactment), it has been held that conciliation necessarily involves three parties. The disputants must be entitled to participate and be heard (this was affirmed in *Australian Railways Union v Victorian Railways Commissioners*),¹⁴

12 See Joellen Riley, ‘Workplace Dispute Resolution under the *Fair Work Act*: Is There a Role for Private Alternative Dispute Resolution Providers?’ (2009) 20(4) *Australasian Dispute Resolution Journal* 236–43.

13 Our study, which received Human Research Ethics approval through Macquarie University, involved digitally recorded interviews with six participants, each of whom had served on the Australian Industrial Relations Commission. At the time of the interviews (conducted in 2011) five had continued on as members of FWA, and one was then a member of a state based tribunal. The terms of approval for the interviews included a commitment to keep the names of interviewees confidential.

14 (1931) 44 CLR 319.

and there must also be a neutral third party overseeing the parties' negotiations to ensure that the public interest was served.¹⁵

The concept of conciliation originally adopted in Australian legislation necessarily involved the active participation of an impartial but knowledgeable conciliator. 'Conciliation connotes the intervention of a mediator with a view to bringing the parties to agreement'.¹⁶ The conciliator was appointed as a matter of compulsion and conciliation occurred in the very immediate shadow of compulsory arbitration, although most matters were dealt with by conciliation without the need to resort to arbitration. Until the enactment of laws permitting the conciliation and arbitration of individual termination of employment disputes, the practices of conciliation and arbitration developed in the context of attempts to settle collective industrial disputes between unions and associations of employers. Conciliators dealing with collective disputes developed expertise in particular industries, became familiar with the industrial parties in those industries, and so acquired a degree of authority that extended to the conciliation process. Although studies in the industrial context have shown that individual conciliators' styles may have varied,¹⁷ parties generally expected a robust approach. At a time when the tribunal had authority to move quickly to arbitration if conciliation failed, parties had every incentive to agree to a reasonable compromise in conciliation.

B Conciliation of Individual Unfair Dismissal Applications

The same approach to conciliation and arbitration was adopted when the Termination of Employment provisions were enacted in the *Workplace Relations Act 1996* (Cth) ('*WR Act*'), as it was in operation between 1997 and 2006. The objects clause in the *WR Act* s 170CA(1) stated that the principal object of these laws was to establish procedures for conciliation, and if conciliation failed, compulsory arbitration (in the case of unfair dismissal) or court determination (in the case of unlawful dismissal). The legislation distinguished between these two kinds of termination of employment, essentially for constitutional law reasons.¹⁸ Unlawful dismissal provisions were enacted by engaging the external affairs power in the *Constitution* s 51(xxix) and relying on the ILO *Termination of Employment Convention*.¹⁹ Grounds for an unlawful termination were those dealt with in the ILO Convention, including discriminatory dismissals (on the grounds of race, sex, disability, etc), dismissal for temporary absence for reasons of illness or injury and dismissals without providing a minimum notice period. Unfair dismissal

15 See *Federated Engine Drivers' and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* [No 3] (1913) 16 CLR 715. See also Ronald Clive McCallum, 'Reforming an Octogenarian: The Conciliation and Arbitration Act, the High Court and the Constitution' in Richard Blandy and John Niland (eds), *Alternatives to Arbitration* (Allen & Unwin, 1986) 298, 303.

16 Charles Patrick Mills et al, *Federal Industrial Law* (Butterworths, 5th ed, 1975) 23–5.

17 Iain James Kerr Ross, *The Impact of Legal Architecture, Conciliator Style and Other Factors on the Settlement of Unfair Dismissal Claims* (PhD Thesis, The University of Sydney, 2000).

18 See above n 8.

19 *Convention (No 158) Concerning Termination of Employment at the Initiative of the Employer*, opened for signature 22 June 1982, UNTS 1412 (entered into force 23 November 1985).

provisions were based on the labour power (s 51(xxxv)) and the corporations power (s 51(xx)), and protected employees from harsh, unjust or unreasonable dismissal, including terminations effected summarily, without first following fair procedures.²⁰ According to s 170CA(2), both procedures — conciliation and arbitration or determination — were to be exercised with the intention of ensuring a ‘fair go all round’ for both employers and employees. The legislative framework clearly provided that the conciliator, as well as the arbitrator, was charged with ensuring a fair and balanced outcome to the dispute. The conciliator was not envisaged merely as a facilitator of the parties’ own negotiations. The conciliator was expected to bring expert knowledge of the law and jurisprudence on these provisions, and to steer the parties towards a just solution.

Evidence of the intention that the conciliator should play an active role in assessing the merits of an application was apparent in the mandated process for dealing with applications. An individual complainant (or a union acting on an individual’s behalf) first made an application to the AIRC under s 170CE, and the Commission was obliged to attempt a settlement by conciliation under s 170CF. If conciliation failed, the Commission was obliged under s 170CF to issue a certificate to that effect, which also stated the Commission’s assessment of the merits and its own recommendations in respect of the matter. An applicant could then proceed to arbitration of an unfair dismissal, or to court determination of an unlawful termination, depending upon the grounds identified in the Commission’s certificate and the election by the applicant under s 170CFA. Unfair dismissal matters would go to arbitration by a Commission member, however parties could (if they chose) continue with further attempts at conciliation under s 170CG(2).

Records of the outcomes of applications demonstrate the significant influence of conciliation. According to the last annual report published before the Work Choices laws changed the *WR Act* termination of employment provisions, 38 428 termination of employment matters were settled by conciliation during the years of the pre-Work Choices *WR Act* (ie, between 1996 and 2006).²¹ A further 14 103 were unable to be settled by conciliation, so a certificate was issued. So about 73 per cent of matters were settled by conciliation, without the need to proceed further. Of the cases that progressed beyond initial conciliation, by far the greatest number (13 728) were certified as ‘harsh, unjust or unreasonable’ terminations. This suggests that initial conciliation is likely to have settled the unmeritorious or marginal claims. Of the applications going forward, 2354 lapsed (by the applicant electing not to proceed), 8523 applications were withdrawn, settled or discontinued between conciliation and arbitration, and only 2771 applications proceeded to arbitration. Of these, 1220 resulted in compensation orders, and only 260 resulted in reinstatement orders. Clearly, conciliation played the major

20 For commentary on the evolution of unfair dismissal laws see Anna Chapman, ‘Termination of Employment under the *Workplace Relations Act 1996* (Cth)’ (1997) 10(1) *Australian Journal of Labour Law* 89; Anna Chapman, ‘The Decline and Restoration of Unfair Dismissal Rights’ in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy*, (Federation Press, 2009) 207.

21 See Australian Industrial Relations Commission, *Annual Report of the President of the Australian Industrial Relations Commission* (1 July 2005–30 June 2006) 14–15.

role in dealing with these applications, despite the publicity often surrounding the few arbitrated matters.

Conciliation and arbitration of unfair dismissal matters was retained after the introduction of the Work Choices laws from 27 March 2006. Although this legislation took away the AIRC's role in compulsory conciliation and arbitration of collective industrial disputes, it maintained this role in respect of unfair dismissals. A new model dispute resolution process was introduced by pt 13 of the Act, but this process was not mandated for termination disputes. Part 13 applied to all manner of rights disputes that might arise under the *WR Act* (such as disputes over compliance with Australian Fair Pay and Conditions Standards, or over the application of an award or workplace agreement). It imposed obligations upon parties to attempt resolution at the workplace before progressing a complaint, and instituted a staged dispute resolution process that encouraged recourse to private mediation.²² Nevertheless, these processes did not supplant the customary conciliation and arbitration practices of the AIRC in respect of termination of employment applications.

The Work Choices laws made substantial changes to the eligibility rules for bringing unfair dismissal claims, but no significant changes to the process for progressing applications, beyond perhaps the introduction of *WR Act* s 648, which permitted the Commission to decide applications on the papers, without a hearing. The Work Choices laws overrode State industrial relations systems for all incorporated private sector employers. This had the potential to expand the federal Commission's jurisdiction considerably. On the other hand, Work Choices introduced an exemption for 'small business' employers, with a threshold of 100 employees, and also exempted any applications brought when an employer could show 'operational reasons' for the dismissal.²³ These changes had the effect of reducing the number of applications. In the final year of operation of the *WR Act*, there were a total of 7994 termination of employment applications to the AIRC.²⁴ Conciliation remained the principal mode of resolution of these matters. Of the applications conciliated, 75 per cent were settled by conciliation, and only 95 applications proceeded all the way to a concluded arbitration. Of those, 22 resulted in an order for compensation, and 14 resulted in reinstatement orders.

C Conciliation in the Fair Work Act

The *FW Act* continues to permit national system employees to bring an application for reinstatement or compensation in respect of an unfair dismissal (under pt 3-2 of the *FW Act*) and it also permits applications for the judicial determination of an unlawful dismissal complaint. However, unlawful dismissal complaints now fall under the general protections provisions in pt 3-1 of the Act. There is now a

22 See Riley, 'Workplace Dispute Resolution under the *Fair Work Act*', above n 12.

23 These contentious exclusions are explained in Anthony Forsyth, 'Australian Regulation of Economic Dismissals: Before, During and After "Work Choices"' (2008) 30(3) *Sydney Law Review* 506.

24 See Australian Industrial Relations Commission, *Annual Report of the President of the Australian Industrial Relations Commission* (1 July 2008 – 30 June 2009) 10–11.

clearer separation between these two kinds of complaints than there was in the former *WR Act*.

1 *Unfair Dismissal*

The objects of pt 3-2 (in *FW Act* s 381) no longer mention conciliation or arbitration. Rather, the objects are stated to be the establishment of ‘a framework for dealing with unfair dismissal that balances the needs of business (including small business) and the needs of employees’, and the establishment of procedures which are ‘quick, flexible and informal’. Like the former legislation, those procedures must be directed towards ensuring a ‘fair go all round’.²⁵

The *FW Act* provisions following these objects are considerably leaner than those in the former *WR Act*. There is very little prescription of process at all. Applicants must apply under s 394 to FWA, who must first determine whether the application meets threshold requirements of being brought within the 14 day time limit by a person entitled to make the application per s 396. There is no longer any compulsory conciliation. Indeed, the only mention of ‘conciliation’ comes in a section dealing generally with FWA’s dispute resolution powers (s 595), which states that FWA may deal with disputes by ‘mediation or conciliation’, or ‘by making a recommendation or expressing an opinion’. There is a requirement to hold a conference only in regard to unfair dismissal matters involving contested facts under s 397. If FWA does decide to hold a conference, it may exercise powers under s 592(1) to direct persons to attend, so to that extent, any conciliation that FWA chooses to order will be compulsory.

Most unfair dismissal applications are conciliated by the new cohort of professionally trained and employed mediators. According to a survey commissioned by FWA, more than 90 per cent of these conciliation conferences are now held by telephone.²⁶ The legislation no longer requires the issuing of any certificate following the conciliation. Generally, the FWA members deal only with jurisdictional issues and arbitrations now. Section 399 requires that FWA must not hold a hearing into the matter unless it considers a hearing to be appropriate taking into account the parties’ own views and whether a hearing would be the most efficient and effective means to resolve the matter.

2 *General Protections*

The unlawful termination provisions in the former *WR Act* now form part of the ‘general protections’ in pt 3-1 which recognise and protect a range of workplace rights.²⁷ The rights themselves are not all new. Almost all have migrated from other parts of the *WR Act*. For example, the freedom of association protections in pt 16 of the former *WR Act* are now to be found among the general protections. The general

25 See Chapman, ‘The Decline and Restoration of Unfair Dismissal Rights’, above n 20.

26 TNS Social Research, ‘Fair Work Australia Unfair Dismissal Conciliation Research Survey Results’ (Research Report, November 2010) 2. Telephone conferencing is discussed in Part III, below.

27 See Creighton and Stewart, above n 8.

protections are framed as a right not to suffer any ‘adverse action’ as a consequence of exercising some workplace right or exhibiting some protected characteristic.²⁸ So these complaints take over former claims that a termination of employment was unlawful because it was motivated by a discriminatory reason, or purported to punish a person for whistle-blowing, participating in industrial activity, or was for some other illegitimate reason. However it also includes disciplinary conduct short of dismissal if the employment relationship is still on foot.

A person whose employment is terminated has a right to apply to FWA to have the dispute dealt with by a compulsory conference under s 368. If the conference does not settle the matter FWA must issue a certificate under s 369, stating that attempts to resolve the dispute have been unsuccessful. If FWA has formed a view that the application would not have reasonable prospects of success before a relevant federal court, it must advise the parties accordingly under s 370. The certificate issued under s 369 is necessary before the applicant may proceed to bring court proceedings per s 371. Surprisingly, the conference is not compulsory if the person making the application has not been dismissed from their employment pursuant to s 372. However if parties agree to participate, FWA is empowered to hold a conference, and must advise the parties if it considers that a court application would not have a reasonable prospect of success under s 375. Presently, these conferences are all held by FWA members (and not by the employed professional mediators). As discussed in Part IV below, they are conducted in the knowledge that FWA itself has no jurisdiction to arbitrate the matter, and that parties who fail to settle at the conference will be left to contemplate whether to pursue proceedings before the Federal Court or Federal Magistrates Court.

3 The Preeminence of Conciliation

Notwithstanding the disappearance of the language of ‘conciliation’ from the *FW Act*, the lack of compulsion and the introduction of other dispute resolution options, the FWA members interviewed by the authors uniformly agreed that they continue to use a traditional form of conciliation when holding conferences in both unfair dismissal and general protections matters. In unfair dismissal matters, members continue to see their role as one of ‘guiding parties toward the light’²⁹ of a fair and balanced settlement. In both jurisdictions, they continue to play an active role in advising parties on the strengths and weaknesses of their case, although in the case of the general protections claims, members express greater reservation about the potential outcomes of court proceedings. The jurisprudence surrounding general protections suits is in an early stage of development, making the parameters of settlement less clear.³⁰

28 See Joellen Riley, ‘Adverse Action Claims under the *Fair Work Act 2009* (Cth): Some Lessons from the Early Cases’ (2011) 25(3) *Commercial Law Quarterly* 12.

29 This expression was used by one of the FWA interviewees.

30 Menkel Meadow, ‘Towards Another View of Legal Negotiation: The Structure of Problem Solving’ (1983–84) 31(4) *University of California Los Angeles Law Review* 754.

In the unfair dismissal context, the vast majority of applications are resolved by conciliation, or before the matter proceeds to arbitration.³¹ This 'success' in terms of settlement rates, is in part attributed to the role the conciliators play in giving the parties a realistic assessment of the strengths and weaknesses of their case, in indicating potential outcomes from arbitration if the matter does not settle, in focusing the parties' attention on options for resolving the matter, and in reality testing any proposed settlement. This can take place in a timely fashion, often only a matter of weeks after filing the application, and does not require the preparation of lengthy statements and supporting documentation. This speed and informality are important factors in facilitating resolution rather than entrenching acrimony between the parties. Finally, the fact that a matter is likely to be set down for arbitration within a relatively short time if the conciliation is not successful is also an important influence in encouraging parties to take the conciliation process seriously. Not all these factors are replicated for general protections applications. How this might impact on the resolution of those applications is discussed in Part IV.

III THE NEW CONCILIATION MODEL FOR UNFAIR DISMISSAL APPLICATIONS

Two principal changes have been made in dispute resolution processes applicable to unfair dismissal applications. First, conciliations are generally no longer conducted as face-to-face meetings, but usually as telephone conferences, with each party and their advisors participating by telephone. Secondly, conciliations are no longer conducted by statutorily appointed members of FWA, but are conducted by qualified FWA staff who are public servants.³² Each of these innovations will be examined in turn.

According to a number of our interviewees, a large part of the impetus for adopting this new conciliation model for unfair dismissal applications was the anticipated increase in volume of applications once the *FW Act* nationalised the system and removed certain jurisdictional limitations.³³ The FWA also carried with it other workload increases for FWA members in the enterprise bargaining area, and in arbitrating over issues that rise under dispute resolution clauses in agreements. A substantial increase in FWA members was unlikely, so FWA needed to consider other means of dealing with its increasing case load. If FWA members had continued as the primary conciliators of unfair dismissal applications, the time lines for its dealing with matters would have inevitably dragged out. The federal industrial tribunal practices have on the whole provided relatively quick access to dispute resolution, without incurring the costs of preparing and filing extensive statements and evidentiary materials. The adoption of a different model of

31 Fair Work Australia, *Annual Report of Fair Work Australia* (1 July 2010 – 30 June 2011) 12 shows that of the 14 897 applications made during that year, 83 per cent were finalised at or before conciliation.

32 Acton, 'From Interests to Rights', above n 9, 3–4.

33 See also Acton, 'From Interests to Rights', above n 9.

conciliation can be seen in part as a measure to maintain timely access to dispute resolution. The new conciliation model was also facilitated by the removal of the statutory requirement that a Member provide a certificate that indicated the unfair dismissal application had failed to settle at conciliation, before that application could progress to arbitration.³⁴

A Telephone Conciliations

FWA has now moved to telephone conferencing as the primary method for conducting conciliations of unfair dismissal applications. Our interviewees explained that this is not an entirely new practice, as FWA's predecessor, the AIRC, made use of such a system where the geographic location of parties and the limited availability of Commission members away from metropolitan areas made face-to-face meetings too difficult to facilitate. Telephone conciliations were also trialed by the AIRC for some unfair dismissal applications in Sydney and Melbourne in 2006.³⁵ Our interviews confirmed that what has been altered in the federal industrial arena is the establishment of telephone communication as the *primary* method of conciliating unfair dismissal applications since the commencement of the *FW Act*. Conciliators do maintain a discretion to hold face-to-face conferences where multiple parties are involved, and telephone conferencing is deemed inappropriate.

Telephone conciliations, as conducted by FWA, aim to provide a quick and cost effective form of dispute resolution that is relatively informal and accessible to the parties.³⁶ It retains the pivotal role of the conciliator, as a third party neutral, in assisting the parties to seek to resolve their dispute, where possible, by agreement. It follows the classic model of joint sessions in which the parties each give their version of the events and endeavour to find common ground on the identified issues, as well as private sessions in which the conciliator engages with each of the parties individually to encourage them to consider the strength and weaknesses of their claims. Conciliations are generally limited to a time slot of approximately one and a half hours, to enable conciliators to complete on average three conciliations a day.

As a dispute resolution process, telephone conciliations fall within the broad church of what is categorised as Online Dispute Resolution ('ODR'). ODR includes any 'processes where a substantial part, or all, of the communication in

34 Ibid 3.

35 Jennifer Acton, 'A New Model of Conciliation for High Volume Claims' (Paper presented at the National Mediation Conference, Adelaide, 2010) 3.

36 See Jennifer Acton, 'Fair Work Australia: An Accessible, Independent Umpire for Employment Matters' (2011) 53 *Journal of Industrial Relations* 578. One of the authors observed a telephone conference being conducted at FWA and listened to the contributions of the conciliator and the parties, with their consent. Further discussion also took place between the conciliator who conducted the telephone conference and the author in the absence of the parties.

the dispute resolution process takes place electronically.³⁷ ODR can take a variety of forms such as ‘unassisted and assisted negotiation, mediation and arbitration’³⁸ and can involve totally automated processes, as well as varying levels of human interaction.³⁹ Telephone conciliations share some but not all of the advantages and disadvantages of ODR. While they make use of available technology to enable the parties to communicate in a convenient, time efficient and cost effective manner, they do retain an interactive and ‘real time’ aspect that is absent in some other forms of ODR. Moreover there is a third party neutral, the conciliator, who is available simultaneously, and in the same medium, to both parties to assist with the resolution of the dispute.⁴⁰

What is absent in telephone conciliations is the personal interaction and visual clues that come from being present in the same space. The National Alternative Dispute Resolution Advisory Council (‘NADRAC’), in looking at online ADR services as part of its ‘Resolve to Resolve’ report in 2009, observed that:

ODR may not offer the same benefits as face to face interest-based processes where participants can reach a deeper understanding of the other person’s perspective, improve their relationships, and/or learn communication techniques that may help them resolve their own disputes in future without an ADR practitioner to assist.⁴¹

Telephone conciliations do not lack the human interaction that some automated dispute resolution processes do, but involve a different form of interaction; one without non-verbal cues such as facial expression, eye contact, and body language. As Gillieron states:

F2F obviously is the richest media since it allows the simultaneous perception of multiple cues. The telephone medium is less rich; while its feedback capacity is as fast as F2F, visual cues are unavailable so that the parties have to rely upon language content and audio cues to reach understanding. Written communication is the poorest communication medium since feedback is slow and cues are limited to what is written on paper.⁴²

This can affect the rapport that develops between the parties, which in turn may affect the parties’ capacity to engage in a genuine problem solving and interests based negotiation that is the foundation of the mediation model on which

37 See National Alternative Dispute Resolution Advisory Council, *Glossary of ADR Terms* <http://www.nadrac.gov.au/what_is_adr/GlossaryOfADRTerms/Pages/default.aspx>.

38 National Alternative Dispute Resolution Advisory Council, ‘The Resolve to Resolve — Embracing ADR to Improve Access to Justice in the Federal Jurisdiction’ (A Report to the Attorney-General, September 2009) 72.

39 See David Allen Larson, ‘Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR’ (2006) 21 *Ohio State Journal on Dispute Resolution* 629.

40 David Spencer and Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook, 2nd ed, 2009) 550 [11.10].

41 National Alternative Dispute Resolution Advisory Council, ‘The Resolve to Resolve’, above n 38, 75 [5.62].

42 Phillippe Gillieron, ‘From Face-to-Face to Screen-to-Screen: Real Hope or True fallacy?’ (2008) 23 *Ohio State Journal on Dispute Resolution* 301, 328 (citations omitted).

conciliation is based.⁴³ Building trust and rapport in the process and between the parties are key aspects of seeking to achieve resolution by agreement.⁴⁴ The medium of telephone communication puts a greater responsibility on the conciliator to work at building that trust and rapport, and to pick up on verbal cues in the absence of the opportunity to observe non-verbal communication.

The relationship that the telephone conciliator builds with the parties in the context of unfair dismissal conciliation is short lived. Unlike the conciliation of collective industrial disputes where the industrial parties may have regular interactions with a member of FWA, here the application is likely to be a one-off event, with an individual applicant without prior experience nor likely to be a repeat player.⁴⁵ Therefore the need to establish a good basis for an on-going relationship may be less critical.

An alternative argument is that the absence of face-to-face interactions may be less confronting and more empowering for some parties. For example, where a party might feel there is a power imbalance, the absence of non-verbal confirmation of this situation may lessen the power imbalance and make the telephone a more comfortable medium of communication for that party.⁴⁶ It is also important to keep in mind that not all parties in conciliation have the skills or capacity to engage in a problem solving approach that is based on principled or interest based negotiation. Particularly where reinstatement is not a viable option, some parties will simply approach it as an adversarial bargaining negotiation in which the parties inch towards a mid-point compromise on the amount of potential compensation payable.

Many agencies and tribunals are looking at ways to make their processes more accessible and cost effective, by minimising the disruption to participants' lives and delaying the preparation of lengthy statements and materials until absolutely necessary. Inevitably some will turn to different forms of technology to facilitate this. The new telephone conciliation model has been developed to deal with a high volume of cases. Not all of these will be vigorously pursuing reinstatement. Some will simply be seeking a relatively modest amount of compensation within the statutory cap. In terms of what Sanders and Golberg call 'fitting the forum to the fuss',⁴⁷ one can see the rationale behind FWA's choice of telephone conciliation as an appropriate medium for the type of disputes involved and for the type of outcomes that are available to the parties. The use of telephone conferencing as the preferred method for conducting conciliations of unfair dismissal applications, subject to its appropriateness in the circumstances, is to a degree an inevitable

43 See *ibid* 326–7; Laura Klaming, Jelle van Veenan and Ronald Leenes, 'I Want the Opposite of What You Want: Reducing Fixed-Pie Perceptions in Online Negotiations' [2009] *Journal of Dispute Resolution* 139, 139.

44 Gillieron, above n 42, 338.

45 See Galanter, above n 11.

46 Samantha Hardy, 'Online Mediation: Internet Dispute Resolution' (1998) 9 *Australian Dispute Resolution Journal* 216.

47 Frank E A Sander and Stephen B Goldberg, 'Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure' (1994) 10 *Negotiation Journal* 49.

institutional response to the need to implement more informal and cost-effective methods of dispute resolution.

It is also early days for this model, and FWA has indicated a willingness to review the processes. FWA has plans to improve the technology it is using, by implementing a system using Skype-type technology.⁴⁸ Although not currently proposed, this type of technology may open up the possibility in the future of using webcam technology to allow some visual input, which is lacking in the process compared to face-to-face interactions.

Finally, although face-to-face contact and the opportunity to 'eyeball' participants might be the preference of some; people now entering the workforce are a generation of 'digital natives'. For the digital native worker, online delivery of dispute resolution may not be such a challenging prospect, and developing trust and rapport without face-to-face contact may not necessarily be so problematic.⁴⁹

B Change in Conciliation Personnel

A number of points can be made in relation to the change in personnel for conciliating unfair dismissal applications. First, this role is now being performed in a context where conciliation is voluntary, albeit one that is taken up by most employers and employees. Secondly, appointments of this nature follow the trend of other agencies that use dedicated staff rather than statutory office holders to conduct dispute resolution, for example in the case of human rights or workers compensation claims. Thirdly, the designated personnel are recruited for their dispute resolution skills, but our interviewees explained that FWA also conducts its own training seminars for conciliators in the institution's interventionist tradition, and conciliators are encouraged to maintain that activist role previously undertaken by Commission members.⁵⁰ Despite the fact that they may have been recruited from disparate areas, staff are expected to develop detailed knowledge of the jurisdiction to engage in such an activist role.

A factor in the effectiveness of industrial conciliation has always been that the process is undertaken by a person with detailed knowledge of workplace rights and practices, and knowledge of other settlements and awards. FWA members are also seen as deriving added authority through the panel system and their consequent familiarity with the industry.⁵¹ As Provis observed:

The arbitration system has continually established and maintained standards which tribunal members refer to when they are acting as

48 Skype is a form of video-conferencing which can be managed from any personal computer.

49 David A Larson, 'Online Dispute Resolution: Do You Know Where Your Children Are?' (2003) 19 *Negotiation Journal* 199.

50 Acton, 'From Interests to Rights', above n 9, 6.

51 Sarah Charlesworth, 'The Overlap of the Federal Sex Discrimination and Industrial Relations Jurisdictions: Intersections and Demarcations in Conciliation' (2003) 6 *Australian Journal of Labour Economics* 559, 567.

arbitrators or as conciliators, and the public nature of the arbitrated standards largely frees the conciliators from the need to rely on their individual judgment. The norms to be applied in conciliation are the same as the norms that have been formulated in arbitration. There is an overlap between the processes of conciliation and arbitration, which is furthered by the fact that the same individuals act as third parties in each process.⁵²

The federal statutory system for unfair dismissal has now been in place since the early 1990s. Although it has been the subject of regular statutory amendments, the broad norms and standards relating to the reasons for and circumstances of dismissals are fairly well established. A small number of cases are still arbitrated providing further guidance in the area. Conciliators of unfair dismissal applications can fairly confidently and competently work within those parameters, without the need themselves to be engaged in the arbitration process in order to help the parties evaluate the strengths and weakness of their case. The issue of having an established jurisprudence to work with distinguishes the area of unfair dismissal from that of general protections applications. In this context it is worth noting that FWA Members are still involved in the conciliation of the 'new' general protections applications, even when a dismissal is involved. Whether this function will be taken on by conciliation staff at some point in the future, when the parameters of that jurisdiction become clearer, remains to be seen.

The research undertaken on behalf of FWA on the new unfair dismissal model shows reasonable rates of satisfaction on the part of the participants.⁵³ However, one needs to keep in mind that few individuals have more than one unfair dismissal application in their working life. As a consequence, their capacity to compare their experience to that which existed previously is very limited.

IV RESOLVING 'GENERAL PROTECTIONS' APPLICATIONS

As explained earlier, not all of the rights that come within the general protections in pt 3-1 of the *FW Act* are new; many replicated the former protections from unlawful termination. Nevertheless, general protections applications do present some interesting points of distinction from unfair dismissal applications in terms of dispute resolution.

First, because an application can be made by a current employee, FWA is potentially drawn into a negotiation around how to repair or improve an employment relationship, and not simply about the terms on which that relationship might be severed (only the rare unfair dismissal cases in which an employee genuinely seeks reinstatement will involve such negotiations). For example, an applicant

52 Chris Provis, 'Mediation and Conciliation in Industrial Relations: Reflections from Australia' (1997) 21(4) *Labor Studies Journal* 81, 93.

53 According to the TNS Social Research Survey: TNS Social Research, above n 26, 5, some 78 per cent of applicants, 81 per cent of respondents, and 58 per cent of representatives agreed or strongly agreed that telephone conciliation worked well.

might raise an allegation that the employer has discriminated against the employee when determining discretionary bonuses, or when implementing a performance management scheme.

Secondly, although FWA provides conciliation of 'general protections' applications, it cannot arbitrate such applications and these must proceed to the Federal Court or Federal Magistrates Court for determination, in the event that they are not resolved. This replicates the disjunction that occurs with federal human rights applications, where the conciliation is offered by human rights agencies, but in the event that the matter is not settled, an applicant must commence Federal Court or Federal Magistrate Court proceedings. The conciliation of unfair dismissal applications has always operated in the shadow of the tribunal's capacity to arbitrate in the event that the matter is not resolved by conciliation. This is an important aspect of the effectiveness of the unfair dismissal regime, as parties are aware that if a matter does not settle, it will be promptly listed for arbitration, and that a hearing will take place within a relatively short period. The lack of a tight connection between the conciliation and determinative processes can weaken the ADR process as the parties may not feel any pressing need to resolve the issues while a determinative hearing is a distant prospect. In addition, the need to engage with a different institution, with the formality and costs of a court, may discourage applicants from taking the matter further, simply because they lack the resources and the legal representation to do so.⁵⁴

Thirdly, it would appear that general protections applications do not enjoy the high success rate of conciliations of unfair dismissal matters. A number of factors may contribute to this, including a lack of clear jurisprudence about the provisions and when they may be engaged, and a tendency for many individual applicants to be unrepresented (a problem noted by a number of interviewees), and therefore lacking experienced advice and assistance.

For applicants bringing complaints while they remain in employment, pursuing a complaint all the way to the Federal Court or Federal Magistrates Court is a forbidding prospect. Such proceedings are costly, take time to bring on and are difficult to run without professional representation.⁵⁵ Few individuals seeking to maintain their employment relationship are likely to pursue such proceedings. The cases decided in favour of current employees so far have tended to be brought with the support of a union.⁵⁶ For example, in *Australian Licensed Aircraft Engineers Association v Qantas Airways Ltd*,⁵⁷ the applicant was a union representing an aircraft engineer who had complained about underpayment of his benefits while on an overseas posting. The employer responded vindictively by suspending all

54 In the human rights context, see Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32 *University of New South Wales Law Journal* 699; Beth Gaze and Rosemary B Hunter, *Enforcing Human Rights: An Evaluation of the New Regime* (Themis Press, 2010).

55 See Chris Arup and Carolyn Sutherland, 'The Recovery of Wages: Legal Services and Access to Justice' (2009) 35(1) *Monash University Law Review* 96.

56 See Riley, 'Adverse Action Claims under the *Fair Work Act 2009* (Cth)', above n 28.

57 (2011) 201 IR 441.

international postings for all staff. This was held to be adverse action, taken for an illegitimate reason (being the employee's exercise of a workplace right).

Most cases have been brought by employees whose employment has been terminated, and who are seeking either reinstatement or some compensation. Of the successful cases, the most common are cases involving discrimination against a person because of trade union activities,⁵⁸ or because the worker was dismissed after making a claim in respect of a workplace injury.⁵⁹ These kinds of cases have a long jurisprudence to draw upon, because they follow upon previously litigated legislative provisions protecting freedom of association and protections for injured workers. In many cases however, applicants have failed to establish the essential element of an adverse action claim, ie, that the adverse treatment was suffered because of their exercise of some relevant workplace right, or because they exhibited some protected characteristic.⁶⁰ Applicants aggrieved by generally unfair treatment (commonly they allege some kind of unfair performance management process) have often failed to establish that this treatment was motivated by prohibited reasons.

Our discussions with FWA members, and with advocates working in this field,⁶¹ suggest that many of these more tenuous claims may be initiated in the first instance because the applicant is not able to bring a claim in the unfair dismissal jurisdiction, but they still value access to the conciliation services of FWA. They may be excluded from the unfair dismissal jurisdiction because they are classified as high income earners,⁶² or they may be out of time to bring an unfair dismissal application. Applicants for unfair dismissal claims must file an application within 14 days of termination, whereas adverse action claims may be brought within 60 days of termination.⁶³ For an application fee of \$64.20, and the trouble of completing a very sparse application form with the bare allegations of the claim, the applicant is assured of an opportunity to attempt resolution of their complaint with the assistance of a member of FWA. Applicants whose employment has been terminated have a right to a conference; those who are still in employment do not, however practitioners suggest that employers are agreeing to attend initial conferences, possibly because a failure to do so may

58 See, eg, *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* (2011) 193 FCR 526; *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251, revd (2011) 191 FCR 212 (appeal allowed *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 (7 September 2012)).

59 See, eg, *Stephens v Australian Postal Corporation* (2011) 207 IR 405.

60 See, eg, *Ramos v Good Samaritan Industries (No 2)* [2011] FMCA 341; *Khiani v Australian Bureau of Statistics* (2010) 199 IR 281, affd [2011] FCAFC 109.

61 We have also drawn information from informal discussions with practising lawyers and advocates employed by unions and employer associations, with whom we have discussed these matters, particularly in Masters of Laws classes at Sydney Law School, and in a variety of professional seminars, including those organised by the Australian Labour Law Association. Given the confidentiality obligations of advocates, anecdotal evidence is often the best available evidence of practical litigation strategies.

62 *Fair Work Act 2009* (Cth) s 382 contains eligibility criteria for accessing this jurisdiction. Employees whose annual earnings exceed a threshold set by the *Fair Work Regulations 2009* (Cth) reg 3.05 (currently \$A123 300).

63 See *Fair Work Act 2009* (Cth) ss 394, 366.

influence a court subsequently hearing the matter to award some costs against the employer.⁶⁴ Our discussions with FWA members suggest that they take the same approach to dispute resolution in these cases. They adopt their usual processes for conciliation, as the expert and neutral party, although perhaps with less assurance that they will be able to predict an outcome for the parties should they decide to proceed to court.

FWA is obliged (under s 370) to advise the parties if they take the view that a court application would not have reasonable prospects of success. Members do not always make recommendations as to the merits of cases when conciliation fails, perhaps because they cannot speak with the same authority in these matters as they may in unfair dismissal matters. In unfair dismissal matters a FWA conciliator can warn parties of how the matter is likely to be perceived by a FWA member, who will arbitrate the matter in a short time. In general protections claims, they cannot reliably predict how a judge or magistrate may perceive the matter, in many months — perhaps more than a year's time — after the filing of affidavits and submissions by counsel. This is especially so because the jurisprudence in this field is relatively underdeveloped in matters not involving freedom of association or workplace injury. Many matters which fail to settle in a FWA conference also fail to proceed to litigation.

V CONCLUSION

The nature of employment relationships, and the importance of secure employment in most people's lives, necessitates effective, quick and affordable means for resolving grievances. Few employees earn enough to warrant the cost of litigation, and few can afford to remain out of work while waiting for the resolution of court proceedings. The traditional Australian model of conciliation followed by compulsory arbitration, which was originally adopted for the resolution of collective industrial disputes, has been adapted to meet contemporary needs for the resolution of individual employment disputes. The emphasis has been on a low cost and timely approach, which offers the parties access to ADR, in the form of conciliation, as a means of facilitating early resolution. That model has also come under pressure from a burgeoning case load in recent times. The adoption of telephone technology for unfair dismissal applications and the utilisation of conciliation staff rather than members of FWA is a direct response to the increasing number of applications being dealt with by FWA and to its concern that applications should be dealt with in a timely manner. There is a consistency between the traditional approach to conciliation and that being undertaken in telephone conferences. The conciliator is a neutral but expert third party, willing and able to offer assistance to the parties in seeking to resolve their disputes. In

64 *Fair Work Act 2009* (Cth) s 570 provides that parties in a *FW Act* proceeding must generally bear their own costs, whether or not they are successful in the proceedings. However, costs may be awarded against a party that has acted unreasonably, for example by refusing 'to participate in a matter before FWA'.

the unfair dismissal context, the conciliator can do this confident in the knowledge that if the parties are not able to settle the matter by agreement, a member of the same body will compulsorily arbitrate the matter within a relatively short timeframe. Because of the confidential nature of conciliation, it is not possible to comment accurately on the outcomes of the process. Reinstatement may be an outcome, although many unfair dismissal applications are resolved by settling the terms upon which the employment relationship will be severed, rather than on how to repair or restore that relationship.

In the general protections field however, the dynamic is clearly different. Conciliation of such applications by FWA is an option, but if this does not resolve the matter, FWA cannot arbitrate a solution. Where an application is not resolved by conciliation, an applicant is faced with the prospect of instituting expensive and time-consuming court proceedings, where financial resources and access to legal representation operate as a more immediate barrier than they do in ADR processes or in informal low-cost tribunal proceedings.⁶⁵ The daunting prospect of court proceedings creates pressure on applicants either to take whatever is on offer in the conciliation process or to discontinue the matter. In addition, the current uncertainty of the law in this area makes legal representation advisable if not essential, and makes more difficult any assessment of prospects for a favourable outcome.

On the other hand, FWA's new jurisdiction to hold conferences in general protections matters does enhance its role in the management of workplace grievances while the employment is still on foot, and allows FWA to play a role in discrimination claims that might otherwise have gone to other institutions. At one level, applicants can now access the conciliation provided by FWA to seek to resolve these issues in an accessible jurisdiction and in a timely manner. It also potentially involves FWA, in its conciliation role, working with parties to try and repair or improve their relationship where there has been no dismissal. However, in the event that conciliation is not successful, there are a range of barriers to the enforcement of such rights. Consequently, the conciliation offered by FWA may prove to be the only viable avenue for some applicants to pursue their workplace rights.

While the traditional role of the federal tribunal may have shifted from conciliating and arbitrating collective disputes to dealing with a greater number of individual grievances, its conciliation role has remained central to its dispute resolution practices. The 'activist' or 'interventionist' approach of the collective sphere has been transferred to the context of individual applications. More recently, the conciliation model has been modified in the unfair dismissal context to accommodate a large volume of applications, but the underlying approach to conciliation prevails. General protection applications also have conciliation as an early dispute resolution option, but the absence of a determinative function means that such applications do not have the effective shadow of pending arbitration

65 Above n 7.

that operates in the unfair dismissal context. As the law governing general protections becomes clearer, with the development of the court's jurisprudence, more settlements may emerge within these parameters. Nevertheless, settlements made only because applicants face insuperable barriers to pursuing a claim do not improve access to justice for individual applicants.