THE IMPACT OF LEGAL ARCHITECTURE, CONCILIATOR STYLE AND OTHER FACTORS ON THE SETTLEMENT OF UNFAIR DISMISSAL CLAIMS

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Volume 1 of 2
ABSTRACT

In March 1994 the Industrial Relations Reform Act 1993 (Cth) introduced major changes to the law relating to termination of employment.

As a consequence an employee could apply to the Industrial Relations Court of Australia for a remedy in respect of termination of his or her employment. The Court was obliged to refer such applications to the Australian Industrial Relations Commission for conciliation. In the period 30 March 1994 to 30 June 2000 64.7 per cent of claims were settled at conciliation.

This average settlement rate disguises substantial variation between the settlement rates of individual conciliators.

The essence of the study is an attempt to explain the observed variability in settlement rates. Why does one conciliator have a settlement rate of 27 per cent and another 90 per cent? Do differences in conciliator style explain the different settlement rates? Or is it a function of the legislative framework in existence at a particular time? Do the characteristics of the parties affect the likelihood of settlement? For example, are represented parties more likely to settle than the unrepresented? Questions such as these define the research problem and identify the terrain being examined.

The thesis is that the outcome of conciliation – whether the claim is settled or not – is determined by the context of the dispute and the conciliation process.
Parts B and C of the paper examine the influence of certain contextual and process issues on the settlement of unfair dismissal claims by conciliation. The focus of Part B is on the impact of the legal context in which conciliation occurs. It tests the proposition that legislative changes which affect the cost of litigation, the remedies available from arbitration and the probability of success, will influence whether or not a claim is settled at conciliation. The proposition is based on the economic theory of trial and settlement.

The impact of other contextual and process issues is considered in Part C. It is contended that conciliator style and experience and certain characteristics of the parties effect the split between settlement and arbitration.

The common thread linking Parts B and C of the paper is the economic theory of trial and settlement, as discussed in Chapter 3. The essence of this theory is that parties can be expected to settle if they believe that settlement will be more beneficial than the expected gain from litigation. Posner's (1998:607-615) settlement model is based on this theory.

The results of this study provide some further empirical support for the economic theory of trial and settlement. The theory and Posner's settlement model are of some assistance in predicting whether an unfair dismissal case will settle, but they will not successfully predict all such cases because economic factors are not the only factors at work.

The results in relation to the impact of conciliator style on settlement are also consistent with the existing research. Style (in terms of the extent of facilitative and
interventionist techniques) does matter. The study is inconclusive on the question of whether conciliator experience is positively associated with settlement.

The final chapter advances some suggestions about directions for future research.
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<th>Full Form</th>
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<tbody>
<tr>
<td>1995 Amendment Act</td>
<td>Industrial Relations and Other Legislation Amendment Act 1995</td>
</tr>
<tr>
<td>1999 Bill</td>
<td>Workplace Relations Amendment (More Jobs, Better Pay) Bill 1999</td>
</tr>
<tr>
<td>2000 Bill</td>
<td>Workplace Relations Amendment (Termination of Employment) Bill 2000</td>
</tr>
<tr>
<td>ABS</td>
<td>Australian Bureau of Statistics</td>
</tr>
<tr>
<td>ACAS</td>
<td>Advisory Conciliation and Arbitration Service</td>
</tr>
<tr>
<td>AIRC</td>
<td>Australian Industrial Relations Commission</td>
</tr>
<tr>
<td>Commission</td>
<td>Australian Industrial Relations Commission</td>
</tr>
<tr>
<td>IR Act</td>
<td>Industrial Relations Act 1988 (Cth)</td>
</tr>
<tr>
<td>IR Court</td>
<td>Industrial Relations Court of Australia</td>
</tr>
<tr>
<td>NADRAC</td>
<td>National Alternative Dispute Resolution Advisory Council</td>
</tr>
<tr>
<td>Reform Act</td>
<td>Industrial Relations Reform Act 1993 (Cth)</td>
</tr>
<tr>
<td>WR Act</td>
<td>Workplace Relations Act 1996 (Cth)</td>
</tr>
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<td>WROLA Act</td>
<td>Workplace Relations and Other Legislation Amendment Act 1996 (Cth)</td>
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CHAPTER 1 - INTRODUCTION

This study is an empirically based examination of the factors which contribute to the settlement by conciliation of unfair dismissal applications in the federal jurisdiction in Australia.

The thesis is that the outcome of conciliation – whether the claim is settled or not – is determined by the context of the dispute and the conciliation process. A contingent approach is adopted, drawing on the work of Bercovitch and Lamare (1993). This approach regards the outcome of conciliation as being dependent on a number of independent contextual and process factors.

Figure 1 describes the contingent approach adopted.

![Figure 1](image-url)
Chapter 1 - Introduction

The type of disputes in this study - unfair dismissal claims - is consistent. Hence the context issues consist of two clusters of variables:

- the characteristics of the parties; and
- the legal context.

The process of conciliation also consists of two clusters of variables:

- the experience of the conciliator; and
- the nature of the conciliation strategy.

The essence of the study is an attempt to explain the observed variability in settlement rates. Why does one conciliator have a settlement rate of 27 per cent and another 90 per cent? Do differences in conciliator style explain the different settlement rates? Or is it a function of the legislative framework in existence at a particular time? Do the characteristics of the parties affect the likelihood of settlement? For example, are represented parties more likely to settle than the unrepresented? Questions such as these define the research problem and identify the terrain being examined.

In terms of legislative context the Industrial Relations Reform Act 1993 (Cth) (the Reform Act) introduced major changes to the law relating to termination of employment. The Reform Act amended the Industrial Relations Act 1988 (the IR Act) by, among other things, inserting Division 3 of Part VIA dealing with termination of
employment. In this paper the provisions in Division 3 of Part VIA are referred to as the termination provisions.

The termination provisions came into operation on 30 March 1994 and as a consequence an employee could apply to the Industrial Relations Court of Australia (the IR Court) for a remedy in respect of termination of his or her employment. The IR Court was obliged to refer such applications to the Australian Industrial Relations Commission (the Commission) for conciliation. The Commission was required to enquire into the matter and try to help the parties reach a settlement by conciliation.

The termination provisions have changed over time. The relevant legislative history is set out in some detail in Chapter 4. Despite frequent amendment, a constant feature of the legislative framework has been the role of the Commission in attempting to settle claims by conciliation.

This thesis examines the factors which contribute to the settlement by conciliation of applications for a remedy, made pursuant to s 170EA of the IR Act, arising from termination of employment. Throughout this paper s 170EA applications are referred to as unfair dismissalal applications. Definitional issues associated with the terms ‘settlement’ and ‘conciliation’ are considered in Chapter 2.

As shown in Figure 2, there have been 44,530 claims for relief in respect of termination of employment in the period 28 March 1994 to 30 June 2000 (of which 41,804 were finalised by 30 June 2000). A relatively small proportion of the finalised
claims, about nine per cent, has been dealt with by arbitral or judicial determination, as shown by the calculation below:

\[
\frac{812 + 2868}{41,804} \times \frac{100}{1} = 8.8\%
\]

The distinction between arbitral and judicial determination is explained in Chapter 4.
### Disposition of Federal Termination of Employment Claims
30 March 1994 - 30 June 2000

<table>
<thead>
<tr>
<th>Total number of cases</th>
<th>Percentage of Finalised Claims</th>
<th>No. of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Dismissed at preliminary stage</td>
<td>1.9%</td>
<td>812</td>
</tr>
<tr>
<td>2. Withdrawn/discontinued before conciliation</td>
<td>15%</td>
<td>6,260</td>
</tr>
<tr>
<td>3. Settled by conciliation</td>
<td>58%</td>
<td>24,257</td>
</tr>
<tr>
<td>4. Lapsed/withdrawn/discontinued prior to orders</td>
<td>18.8%</td>
<td>7,861</td>
</tr>
<tr>
<td>5. Arbitral/judicial determinations on the merits</td>
<td>6.9%</td>
<td></td>
</tr>
<tr>
<td>6. Claims finalised</td>
<td>100.0%</td>
<td>41,804</td>
</tr>
<tr>
<td>7. Claims not yet finalised</td>
<td></td>
<td>2,726</td>
</tr>
</tbody>
</table>

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1. AIROC Records; Annual Report 1995-96 Industrial Relations Court of Australia at p44.
2. This figure differs from the one on the previous page as it does not include the matters which were dismissed at a preliminary stage.
Figure 2 also shows that some 64.7 per cent of claims which proceed to conciliation have been settled. This percentage is referred to in this paper as the settlement rate and is calculated as shown below:

\[
\frac{\text{cases settled at conciliation}}{\text{cases which proceeded to conciliation}} = \frac{24,257}{37,458} \times \frac{100}{1} = 64.7\%
\]

The settlement rate is the percentage of claims which settle at the conciliation stage. Claims settled by private negotiation between the parties prior to conciliation are excluded.

Claims which are withdrawn or discontinued after conciliation but prior to arbitral or judicial determination are also excluded. The conciliation process may have contributed to the settlement of some of these claims, but there is insufficient information available to enable any informed assessment of the number of such cases to be made.

The average settlement rate of 64.7 per cent disguises substantial variation between the settlement rates of individual conciliators, as can be seen from Chart 1 below.
The settlement rates of individual conciliators range from 28 to 90 per cent. The majority of conciliators have settlement rates of between 45 and 65 per cent.

The factors impacting on settlement are important because the split between trial and settlement has significant implications for resource allocation. Conciliation conferences typically take one hour or less. Information about the average duration of contested proceedings is relatively limited. Chart 2 is drawn from data collected by the IR Court.

See Appendix 1.
Chart 2 shows that in 39 per cent of contested claims arising out of a termination of employment the hearing of the matter took less than half a day. The majority (68 per cent) of such hearings were completed in one day or less. But in a significant proportion of contested matters (11 per cent) the hearing took more than two days.\(^5\)

In terms of the impact of the legal context in which conciliation occurs, the thesis is that legislative changes which affect:

- the cost of litigation;
- the remedies available from arbitration; and
- the probability of success.

\(^4\) See Appendix 2.
\(^5\) Note 4.
will influence the split between trial and settlement. This aspect of the thesis is examined in Part B of the paper.

The thesis posited is drawn from the economic theory of trial and settlement. Based on this theory Posner (1998:607-615) has developed a settlement model for predicting if litigation will occur in a given case:

If, \( PaA - C + S > PrA + C - S \), then the dispute will go to trial.

'\( A \)' is the estimated amount of the award if the plaintiff wins.

'\( Pa \)' is the probability of the plaintiff winning, as estimated by the plaintiff, and

'\( Pr \)' is the respondent's estimate of that probability.

'\( C \)' and '\( S \)' are the costs of each party of litigating the case and of settlement, respectively.

Applicants can be expected to settle if a settlement offer is greater than the applicant's net expected gain from litigating. Similarly a respondent will settle for an amount which is less than what they would expect to pay if the matter went to trial. At its core the settlement model amounts to a simple proposition - a party will not accept a settlement offer if they think they can do better by going to trial.

Posner's model and the economic theory of trial and settlement are discussed in Chapter 3.
Chapter 1 - Introduction

The legislative context or legal architecture within which unfair dismissal conciliations take place has changed significantly over time. These changes are important because they have the potential to impact on conciliator behaviour, the cost of litigation and the parties' perceptions of how litigation would resolve the claim.

The relevant legislative history is reviewed in Chapter 4. Chapter 5 places the legislative changes in the context of Posner's settlement model. It is apparent from this material that Posner's model would predict that the changes introduced by the Workplace Relations and Other Legislation Amendment Act 1996 (Cth) (the WROLA Act) would have had the most impact on the rate of settlement at conciliation. The actual settlement rate experience over time confirms the accuracy of this prediction.

The extent to which factors other than changes in legal architecture may explain the differences in settlement rates before and after the WROLA Act is considered in Chapter 6. The predicted impact of proposed amendments to the legislative framework are the subject of Chapter 7.

The impact of other context and process issues on settlement are considered in Part C of the paper. It is contended that conciliator style and experience and certain characteristics of the parties have an impact on settlement.

Some of the characteristics of the parties have the capacity to influence the remedies available from arbitration and hence, according to Posner's model, the split between

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6 An expression used by Galanter 1974.
trial and settlement. For example, the amount of compensation awarded to a successful applicant may be influenced by their pre-termination earnings and whether they have found another job.

In terms of conciliator behaviour much of the research to date has attempted to identify specific behaviours, or tactics and to organise them into categories or strategies (Kressel 1972; Kressel and Pruitt 1989; Lim and Carnevale 1990; McLaughlin et al 1991). For the purposes of this paper the most interesting area of mediation research concerns the relationship between mediator behaviour and case outcome.

In a 1985 review of the reported studies, Kressel and Pruitt concluded that these studies found either little association between mediator behaviour and case outcome (Hiltrop 1985; Thoennes and Pearson 1985) or no association at all (Carnevale and Pegnetter 1985; Shapiro et al 1985; Wall and Rude 1985). Kressel and Pruitt (1985) suggest a number of reasons for the failure to find such a relationship, including:

- the failure to focus on a narrower and more homogenous band of disputes;

- that researchers may have investigated too limited a set of mediator tactics. In this regard two of the papers that found no significant correlation between mediator behaviour and outcome did not include rapport building strategies (Shapiro et al 1985; Wall and Rude 1985); and
that mediator behaviour has been mainly measured by means of the retrospective accounts of mediators themselves or of those with whom they have worked. While useful, such accounts cannot fully substitute for direct observations of mediator activity.

The thesis strategy adopted seeks to address the deficiencies in the previous research identified by Kressel and Pruitt. Two points should be noted.

First, the thesis focuses on a narrower and more homogenous band of disputes than in some previous studies. The disputes to be examined are limited to applications in the federal jurisdiction by employees seeking a remedy or relief in respect of the termination of their employment.

Second, the methodology used involves a combination of the ethnographic and questionnaire methods.

A review of the relevant literature and the research methodology adopted is dealt with in Chapters 9 and 10.

Briefly put, the methodology adopted was as follows. Fifteen Commission members (referred to as conciliators in this paper) volunteered to participate in the study. To explore the extent to which certain characteristics of the parties had the potential to influence the propensity for settlement, a questionnaire was completed in respect of each conciliation conducted by each participating member. The questionnaire
captured information on a range of factors which may have influenced the outcome of the conciliation, for example:

- applicant details
  - age
  - occupational group
  - gross weekly wage
  - period of service
  - gender
  - is English the applicant's first language
  - has the applicant found another job

- employer details
  - business size
  - sector
  - is English the employer's first language

- representation
  - self represented
  - solicitor
  - union

The tactics and strategies of each of the Commission members participating in the study was analysed by both direct observation of the techniques they employed in actual conciliations and by interviewing each member. The style of each conciliator was classified on the basis of the techniques he or she adopted. The techniques used and the conciliator's general behaviour were assessed on two dimensions: facilitation and intervention.

Each of the conciliators was given a ranking reflecting the extent to which they were facilitative and interventionist:

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<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
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<tbody>
<tr>
<td>Facilitative</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interventionist</td>
<td></td>
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</tr>
</tbody>
</table>

The rankings are relative. A conciliator with a level 1 interventionist style is less interventionist than a conciliator with a level 2 style.
Chapter 1 - Introduction

Crosstabulation was used to determine if there was a relationship between the relevant context and process issues and the outcome of conciliation, that is whether or not the matter was settled at conciliation.

Part D contains a discussion of the results of Parts B and C and concludes by examining the implications of this paper for future research.
CHAPTER 2 – SETTLEMENT AND CONCILIATION: DEFINITIONAL ISSUES

2.1 What’s in a Name?

“What’s in a name? That which we call a rose
By any other name would smell as sweet”

This study is principally concerned with the identification of factors which contribute to the ‘settlement’ of unfair dismissal applications by ‘conciliation’. The terms settlement and conciliation both define the scope of the study and position it in the context of the relevant literature. It is important to understand what these terms mean.

2.2 Settlement not Resolution

The focus of the thesis is on factors which influence the ‘settlement’ of applications for relief in respect of termination of employment. The word ‘settlement’ is used for two reasons.

First, it is the language of the statute. Once an application for relief is lodged, the Commission is obliged to ‘attempt to settle the matter to which the application relates by conciliation’ (IR Act: s 170EB(1)).

Second, settlement implies a formal termination of the overt conflict between the parties. In the case of a s 170EA application for a remedy, settlement was effected by

7 Romeo and Juliet, Act 2, Scene 2.
the lodgment of a notice of discontinuance of the application. The applicant files the notice of discontinuance as part of an agreement between the parties.

It is not suggested that the settlement of a claim in this way means that the dispute has been resolved. The word settlement is used instead of resolution because it cannot always be said that a dispute which has been 'settled' has been resolved in the sense that the parties objectively accept that it has come to an end. It is worth noting here that the fact that the outcome of conciliation may be settlement does not necessarily distinguish the conciliation process from mediation. In relation to mediation Boulle (1996:8) argues that it is inaccurate and misleading to define it in terms of the resolution of disputes and he prefers to focus on decision-making. He suggests that, in essence, mediation is a form of assisted decision-making. This emphasis makes it clear that mediators do not impose binding decisions on the parties and leaves open the question of what is entailed in the assistance they provide.

It is not suggested that settlement is somehow a proxy measure of satisfaction or that settlement is of itself necessarily desirable. For many critics the notion of a negotiated settlement is jurisprudentially suspect because of the tendency to compromise important legal principles. For example, Condlin (1985) and Ludan (1989) criticise the 'lawlessness' of negotiated agreements that do not reflect the legal entitlements of the parties. Similarly, Fiss (1984) describes settlement as the civil analogue of plea bargaining where consent is often coerced and justice may not

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8 The Lewis and Legard (1998:112-113) study reports that in UK unfair dismissal cases settlement did not always address an applicant's emotional objectives.
be done. He expresses concern that alternatives to litigation may destroy an important function of formal adjudication:

_Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximise the ends of private parties, not simply to secure peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and Statutes: to interpret those values and to bring reality in accord with them._ (Fiss 1984:1085)

Similarly, Edwards urges caution so that alternative dispute resolution (ADR) does not become _'a tool for diminishing the judicial development of legal rights for the disadvantaged ... by diverting particular types of cases away from adjudication, we may stifle the development of law’_ (1986:679).

In the area of discrimination and human rights law, concern has been expressed that while processes such as conciliation provide an accessible and flexible form of dispute resolution, _'these processes may mean that areas of public concern and interest may be hidden from public scrutiny and response’_ (Human Rights and Equal Opportunity Commission 1999:para 13).
Thornton (1989:743) argues that the privatised nature of conciliation is contrary to feminist attempts to transcend the public/private line of demarcation and to expose the inequities and the hidden forms of domination within women's lives:

*Private ordering can only be detrimental to women; economic, social and psychological vulnerability all militate against the image of the equal bargaining situation which is presumed to be present in mediation for it to be a truly mutual agreement. Ignoring power relationships within the 'private' domain can only reproduce them.* (Bottomley 1985:179 cited in Thornton 1989:743-744).


*Relegating many problems to alternative forums is enormously beneficial to those in power. It takes the sharp edge off claims, diffusing them into generalized grievances to be worked out, harmoniously if possible, on a case-by-case basis. It is an excellent way of seeming to be doing something about intractable social problems while actually doing very little. It enables us to 'bury' claims in a mass of irrelevant detail. ADR, in short, is a powerful means of replicating current social arrangements and power distributions. Replication occurs because problems are not faced, responsibility is diffused, grievants are cooled out, while everyone leaves thinking something positive has been done.*
To others the mediation process is particularly suited to addressing and redressing power imbalances (e.g. Davis and Salem 1984:25). Roberts (1986), for example, argues that ADR has a limited but valuable role. While acknowledging the force of the critiques of ADR, he also stresses the possibilities it holds for escape from and resistance to state domination in its many forms.

Each aspect of the conciliation process has its advocates and detractors. For example Astor and Chinkin (1992:274) observe that the confidentiality of conciliation:

... can constitute an advantage for complainants, especially those who have complaints which are not easy to speak about in a public forum, or where public revelation itself may produce further discrimination.

... However the confidentiality of conciliation also has disadvantages. Respondents may admit unlawful organisational practice in private but decline or fail to take measures to remedy the situation. Their admission cannot be later used to effect much needed change since it was made in a confidential setting. The outcomes of conciliations cannot be used to demonstrate the possibility of success or the level of settlements, nor to encourage others to negotiate or make complaints about discrimination.

But the broader debate between the proponents and critics of ADR is not the subject of this thesis. The focus of the thesis is on the ‘settlement’ of unfair dismissal claims. It is accepted that ‘settlement’ is not always desirable and the failure to settle a
particular matter is not necessarily negative. This paper does not enter into the debate about whether 'settlement' is a desirable objective in itself.

2.3 Conciliation and Mediation - Just Semantics?

There is extensive debate about the differences and similarities between mediation and conciliation. Ingleby (1990) warns that the discussion of what is meant by alternative dispute resolution 'has the potential for legal practitioners and academics to produce the most sterile pedantry possible'. In a similar vein Boulle (1996:67) notes that debate about the similarities and differences between mediation and conciliation 'leaves gore on conference room floors'.

A number of commentators regard the terms conciliation and mediation as interchangeable on the basis that there are insufficient differences to justify different definitions. For example, Macken contends:

There seems to me to be little point in pursuing the now-stale argument over purported differences between 'conciliation' and 'mediation'. Nor is there any profit in arguing whether or not a 'mediation' ceases to be such if the parties require the mediator, in the end, to determine such fine points of difference. In the industrial arena, conciliation and mediation have long been largely interchangeable terms unless the parties have expressly defined mediation in a narrow sense in a particular case. (1997:160-161)

Others argue that usage determines meaning. As Riskin (1996:13) notes:

*It is too late for commentators or mediation organizations to tell practitioners who are widely recognized as mediators that they are not, in the same sense that it is too late for the Pizza Association of Naples, Italy to tell Dominos that it's product is not the genuine article.*

The National Alternative Dispute Resolution Advisory Council (NADRAC) distinguishes between mediation and conciliation, while recognising that there are a number of similarities between them. The similarities are:

- both are facilitative processes, as distinct from advisory or adjudicative processes;
- the key components are the same — identifying the disputed issues, developing options, considering alternatives and endeavouring to reach agreement;
- the mediator/conciliator is a neutral third party; and
- the mediator/conciliator may advise on or determine the process whereby resolution is attempted.
A later NADRAC publication (NADRAC 1999) notes that conciliation is similar to mediation, but that the conciliator:

- will be an expert or someone with special knowledge;
- may give expert advice or information; and
- may make suggestions about possible agreements.

The key difference between the NADRAC definitions of conciliation and mediation is the extent of the third party’s intervention in the dispute resolution process. A mediator has no advisory or determinative role in relation to the content of the dispute or the outcome of its resolution. By contrast, a conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role.

Before deciding if there is any substantive difference between mediation and conciliation we need to consider the definitions commonly used.

2.4 Defining Mediation

Boulle (1996) argues that there are two approaches to defining mediation. The first is the conceptualist approach. This involves defining the process of mediation in ideal terms. It emphasises certain values, principles and objectives.
The second is the descriptive approach. This approach defines mediation in terms of what actually happens in practice rather than in terms of an idealised concept or theory.

2.4.1 Conceptualist Definitions

The paradigm model of mediation is that it is really procedural. Mediators are neutral facilitators of decision making by parties to a dispute. A mediator's values do not intrude into the mediation. This model is reflected in the definition of mediation adopted by NADRA:

*Mediation is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.* (NADRA 1997:5)

One difficulty with conceptualist definitions generally is their tendency to use open-ended expressions such as 'neutral' or 'voluntary'. These terms are imprecise and

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12 For problems associated with the notion of neutrality see Astor 2000:Part I. These problems led to Astor (2000:Part II, 145) to propose: *'We should stop asking whether the mediator is neutral or not and instead ask what the mediator is doing to ensure that, to the maximum extent possible, the parties control the content and outcome of the dispute.'*
do not delineate mediation as a concept.\textsuperscript{13}

The notion of voluntariness illustrates this problem. Most commentators define mediation as a voluntary process (e.g. Adler 1990:78; Ingleby 1992:18). But defining mediation as a voluntary process is problematic. Voluntariness is often a matter of degree rather than of absolutes. For example, Moore (1986:6) defines mediation as a voluntary process, but acknowledges that there may be significant pressure on parties to try it. In many cases mediation will be neither completely voluntary nor completely mandatory, but will fall somewhere in between. As McEwan and Milburn (1993) point out there is little spontaneous demand for mediation and, where mediation is most used, parties generally experience at least some influence or pressure from a wider community to enter into the process.

Astor and Chinkin (1992:23-24) suggest that any sort of compulsion or encouragement to mediate from a person in authority compromises its consensual character. Consensuality is most likely to be compromised by some form of connection with the body empowered to adjudicate the dispute. Davis and Bader (1985) found that where parties are referred to mediation by a judge or registrar they often feel pressured to settle. The experience of community justice centres in New South Wales lends support to this view. The 1989-90 Annual Report of the NSW Community Justice Centres notes that 'in ... 91.1 per cent of cases referred by a magistrate, a mediation session was arranged'. Sixty two per cent of these cases resulted in a settlement being reached, a much higher rate than from any other

\textsuperscript{13} This criticism is not intended to diminish the value of conceptualist definitions from an educative point of view or from the perspective of describing a goal to be aimed at.
referral source. The Report observes that ‘this high rate of resolution of referrals from the Bench may be a product of the coercive nature of the referrals’ (NSWCJC 1990:15; also see McRobert 1991:95-96).

Even when a court or tribunal merely inquires about the possibility of mediation it can be said to lose its voluntary character if the parties feel pressured into responding positively in order to maintain the support of the court or tribunal (Ingleby 1993:443). Indeed Roberts (1983:148) argues that decision making on court premises can never be genuine mediation:

The very nature of mediation decision making, in which the essence is an outcome constructed by the parties in accordance with their own meanings and objectives, is incompatible with being incorporated in, and made auxiliary to, adjudication.

Some critics of alternative dispute resolution maintain that it is simply disguised coercion (Abel 1992). In the context of court sponsored mediation, ‘suggestions’ as to a basis for settlement are seen as having a quasi-adjudicative character ‘without judges and without the safeguards of the judicial process’ (Ingleby 1993:448; Freeman 1985:163-164).

Similar problems arise in relation to the role of the mediator. The paradigm model of mediation is that mediators are simply neutral facilitators of decision making by the parties and that the mediators’ values do not intrude into the mediation. The reality is that there are many styles of mediation, some of which are much more interventionist
than others. Wade (1998) argues that it is not possible to be an 'adviceless mediator' - all mediators give some advice. This may be a subtle process, for example gently raising doubts about the strength of a party's case.

In practice, mediators intervene more actively than conceptualist definitions would allow (e.g. Fulton 1989:75; Kolb 1983:23-25; Kurien 1995:52; Tillet 1991:12).

Mediator intervention is often a feature of industrial dispute mediation. Krislov, Mead and Goodman (1975:58) surveyed the attitudes of management and labour toward mediation in the United States, Great Britain and Ireland. The respondents in all three countries said that mediators made 'constructive suggestions to resolve the issues'. Mediators in the United States were rated as more aggressive than those in Ireland or Britain. American negotiators overwhelmingly reported that mediators 'vigorously pressed them for a solution of the issues'.

In the Australian context the Yallourn Energy dispute in February 2000 perhaps represents the high water mark of mediator intervention. In that dispute the Government appointed 'mediator' drafted a proposed settlement agreement and then publicly attacked one of the parties when it refused to accept his proposal.\footnote{See Rollins (2000) set out at Appendix 3.}
2.4.2 Descriptive Definitions

Boulle (1996:7-11) defines mediation in terms of a limited set of core elements which are common to most practices carried out in the name of mediation:

- it is a decision-making process;
- in which the parties are assisted by a third person, the mediator;
- who attempts to improve the process of decision-making; and
- to assist the parties reach an outcome to which each of them can assent.

Boulle (1996:9-10) also identifies a number of ‘variable’ features of mediation, some of which are:

- the degree to which the parties enter into it consensually, are influenced to participate or are compelled to take part by the legislature, courts or contract;
- the extent of the parties’ choice of mediator or mediators;
- the qualifications, expertise and skills of the mediator;
- the independence and neutrality of the mediator; and
- the extent and nature of the mediator’s interventions, particularly with respect to recommending, advising, influencing or persuading the parties.

He uses a ‘mediation abacus’ to represent some of the variable features of mediation. The beads on the abacus ‘symbolise the fact that there are many dimensions on each variable: the beads can be moved along the row and rest at any
point, as the circumstances dictate’ (Boulle 1996:10-11; Wade 1994). Similarly, Folberg and Taylor (1984) argue that the elements of mediation fall along a spectrum which defies strict definition. I use the abacus as a descriptive tool when discussing conciliation later in this chapter.

2.5 Defining Conciliation Generally

Defining conciliation is even more problematic than defining mediation as there is no accepted understanding of what constitutes conciliation (Astor and Chinkin 1992:61-64; Boulle 1996:67-68). A review of the literature suggests that three features are indicative of ‘conciliation’ (either separately or in combination):

- statutory context;
- interventionist third party role; and/or
- compulsion.

Each of these alleged features of conciliation is considered below.

2.5.1 Statutory Context

Sometimes the term conciliation is used to refer to dispute resolution in a statutory context (Astor and Chinkin 1992:64). Bryson (1990:137) defines conciliation as ‘mediation within a legal framework’, with the conciliator acting as ‘an advocate for the law while remaining impartial to the parties’. The contention is that the statutory context provides legal rules and standards which the conciliator is obliged to
advocate and therefore a conciliator is less ‘neutral’ than a mediator. Yet this is not necessarily a distinguishing feature of conciliation. Aubert (1963) argues that whenever a mediator intervenes in a dispute he or she will inevitably cause it to incline towards the application of objective norms.

In practice a distinction based on statutory context is unsustainable. Many statutes provide for ‘mediation’ or ‘counselling’ and in a number of cases the relevant court or tribunal can direct that parties attend.

An illustration of this is the development of mediation in the Federal Court. It was initially a voluntary option but the Court can now direct parties to enter into mediation (see generally Black 1996). An ‘Assisted Dispute Resolution’ program was established in 1987 based on the mediation of disputes by registrars of the Court. In 1991, the Courts (Mediation and Arbitration) Act 1991 (Cth) amended the Federal Court of Australia Act 1976 (Cth) by inserting s.53A. This section provided:

53A Subject to the Rules of Court, the Court may, with the consent of the parties to proceedings in the Court, by order refer the proceedings, or any part of them or any matter arising out of them, to a mediator or an arbitrator for mediation or arbitration as the case may be, in accordance with the Rules of Court. (emphasis added)

Order 72 of the Federal Court Rules came into effect on 1 January 1992. It provided a skeletal framework within which mediation and arbitration options could be developed. In 1995 the judges of the Court met to discuss proposals to the Court’s
practices and procedures and agreed that ADR should have an enlarged role in the Court. Specifically it was resolved that:

1. *The Court should develop a system to identify at an early stage those cases that may be suitable for referral to ADR;*

2. *The Court should have power to direct parties to mediate their dispute;*

3. *Steps should be taken to give the public and litigants information about the availability of ADR within the Court;*

4. *The Rules should be amended to allow for appeals to be referred to mediation before they are listed for hearing;*

5. *Mediators should be able to offer the highest level of skill in the field and to that end the Court should consider providing a career path for Court officers wishing to do mediation work and should provide them with the best training available in mediation and negotiation skills;*

6. *Resources should be allocated to provide properly designed and constructed accommodation for use in mediations and arbitrations.*

(Black 1997:144)

In April 1997 the *Law and Justice Legislation Amendment Act 1997* (Cth) amended s 53A of the *Federal Court of Australia Act 1976* (Cth) by providing that the Court
could refer matters to mediation with or without the consent of the parties (s 53A(1A)). As mentioned above many other statutes also provide for mediation and in some cases parties can be directed to attend.\(^{15}\)

The terms ‘mediation’ and ‘conciliation’ are used in statutes in what appears to be a random way. I have been unable to identify any instance where the statutory context would suggest a difference in approach between conciliation and mediation.

To the extent that any requirements are imposed on mediators operating in a statutory context, they are similar to those in s 102 of the \(\text{IR Act}\). Section 102 stated:

\(^{15}\) For example:
- s 16A \textit{Family Law Act} 1975 (Cth) – The Court must, if it considers it is in the best interest of the parties or their children to do so, direct or advise either or both parties to attend counselling.
- s 62B(2) \textit{Family Law Act} 1975 (Cth) – The Court must consider whether to advise parties seeking orders relating to children (Part VII orders) about counselling available through the Court or approved counselling organisations.
- s 79(9) \textit{Family Law Act} 1975 (Cth) – The Court shall not make orders relating to property disputes unless the parties have attended a conference relating to that dispute, unless the Court is satisfied that it is not practicable to require the parties to attend a conference or it is otherwise satisfied in the circumstances that it is appropriate to make such an order.
- O 10 r1(2)(l) \textit{Federal Court Rules} – Where it considers it appropriate, the Court may direct the parties to attend a case management conference.
- s 34(1) \textit{Land and Environment Court Act} 1979 (NSW) – Where proceedings are pending in Class 1 or 2 of the Court’s jurisdiction, the registrar shall, unless otherwise directed by the Chief Judge, arrange a conference between the parties to the proceedings or their representatives, to be presided over by a single assessor.
- s 68(1) \textit{Retail Leases Act} 1994 (NSW) – A retail tenancy dispute may not be the subject of proceedings before any court unless and until the Registrar has certified that mediation has failed or, the Court is satisfied that mediation under Part 8 is unlikely to resolve the dispute.
- s 8-11 \textit{Farm Debt Mediation Act} 1994 (NSW) – Mediation between a creditor and a farmer is compulsory except as provided for in the Act.
- s 61(1) \textit{Local Court Act} 1989 (NT) – The Court may, whether of its own motion or on the application of a party, order that a proceeding or part of it be referred to a pre-hearing, mediation or arbitration conference.
- s 27 \textit{Magistrates’ Court Act} 1991 (SA) – A Magistrate may, with or without the consent of the parties, and any other judicial officer or a registrar may, with the consent of the parties, appoint a mediator and refer an action or any issues arising in an action for mediation by the mediator.
- s 47A \textit{County Court Act} 1958 (Vic) – The court may, with or without the consent of the parties, refer the whole or part of a civil proceeding to mediation and arbitration.
- \textit{Supreme Court General Rules of Procedure in Civil Proceedings 1986 (Vic)} r50.07(1) – At any stage of a proceeding the Court may with or without the consent of any party order that the proceeding or any part of the proceedings be referred to a mediator.

(\textit{ALRC 1998:105; Redfern 1997})
(1) Where an industrial dispute is referred for conciliation, a member of the Commission shall do everything that appears to the member to be right and proper to assist the parties to agree on terms for the prevention or settlement of the industrial dispute.

(2) The action that may be taken by a member of the Commission under this section includes:

(a) arranging conferences of the parties or their representatives presided over by the member; and

(b) arranging for the parties or their representatives to confer among themselves at conferences at which the member is not present.

Similarly the Domestic Building Contracts and Tribunal Act 1995 (Vic) provides for a system of pre-tribunal mediation. The only direction provided to the mediators is in s 7(1)(a) which states that the mediator ‘is to attempt to achieve a negotiated settlement of the matter in respect of which the application has been made’.

Nor does the emphasis given to the process appear to be significant. The IR Act provided that the functions of the Commission were ‘to prevent and settle industrial disputes as far as possible by conciliation and, where necessary, by arbitration’ (ss 3(d) and 89). Conciliation was clearly intended to be the primary means by which the Commission was to prevent and settle disputes. But giving pre-eminence to an ADR process is not limited to statutes which refer to conciliation. The Native Title Act
1993 (Cth) provides that the primary function of the National Native Title Tribunal is to mediate contested native title applications. Subsection 72(1) and (2) of that Act provides that:

(1) If an application is accepted under section 63 and the Tribunal does not make a determination under section 70 or 71, the President must direct the holding of a conference of the parties or their representatives to help in resolving the matter.

(2) Any such conference must be presided over by a member.

2.5.2 Are Conciliators More Interventionist?

A number of commentators contend that it is the role of the third party which distinguishes conciliation from other processes, such as mediation. For example, Riekert (1990:33) argues that ‘the conciliator is expected to contribute his/her own views and opinions during the process’. Similarly, Thornton (1989:734) says:

While the conciliator is supposed to exercise a neutral role in the process of conciliation, he or she may be expected to shape the direction of the process to a greater degree than is the case with mediation.
These views are reflected in the NADRAC definition of conciliation, that is:

Conciliation is a process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement. (NADRAC 1997:7)

The key difference between the NADRAC definitions of conciliation and mediation is the extent of third party intervention in the process (see pp21-22 infra).

But as noted earlier practicing mediators intervene more actively than the conceptualist model of mediation would allow. Further, the extent to which conciliation is regarded as a more interventionist process than mediation may be a matter of context. To some extent the meanings of these terms can be regarded as culturally determined. There is no universal typology. In some countries conciliation is regarded as a less interventionist process than mediation. As a publication by the International Labour Office notes:
These [i.e. mediation and conciliation] are procedures whereby a third party provides assistance to the parties in the course of negotiations, or when negotiations have reached an impasse, with a view to helping them to reach an agreement. While in many countries these terms are interchangeable, in some countries a distinction is made between them according to the degree of initiative taken by the third party. Such distinction reflects the etymological origins of these terms: “conciliation” is derived from the Latin conciliare, meaning “to bring together” or “to unite in thought”, while “mediation” is derived from the Late Latin mediare, meaning “to occupy a middle position”. Thus, some systems of disputes settlement distinguish between conciliation as a procedure whereby the third party brings the parties together, encourages them to discuss their differences and assists them in developing their own proposed solutions, and mediation as a procedure in which the third party is more active in assisting the parties to find an acceptable solution, going so far as to submit his own proposals for settlement to the parties. (ILO 1980:15; also see Gladstone 1984:2)

Similarly, Mr James Powers, a Vice President of the US Federal Mediation and Conciliation Service, has observed:

While there are frequent efforts to distinguish between conciliation and mediation in the United States, there is no practical distinction and the terms are sometimes used interchangeably. In current usage and practice, the term ‘mediation’ is more commonly used to describe the work of the labor mediator.
One author defined conciliation as “… a mild form of intervention limited primarily to ‘use of one’s good offices’ to bringing the parties together, scheduling conferences, keeping the negotiators talking, facilitating and other procedural niceties …” while mediation is a more affirmative or proactive function. The mediator is thought to use positive tactics, even to making suggestions or even informal recommendations to one side or the other in spite of the fact that the mediator has no formal power or authority.

In final analysis, FMCS mediators makes no distinction between conciliation and mediation and view all these and other tactics as available to them in assisting the parties in reaching an agreement.” (Powers 1997:4)

The position in Britain is clearer, at least in theory. In its 1995 Annual Report, the Advisory Conciliation and Arbitration Service (ACAS) defines conciliation as ‘a voluntary process whereby employers, trade unions, and worker representatives, can be helped to reach mutually acceptable settlements of their disputes by an impartial and independent third party’. By contrast mediation is defined in the following terms:

*Mediation involves the third party making recommendations as a basis for settlement. ACAS will normally agree to arrange arbitration or mediation only when it has not been possible to produce a conciliated settlement.* (ACAS 1995:84)
John Hougham, the Chairman and Chief Executive of ACAS, has described mediation as a ‘half-way house’ between conciliation and arbitration: ‘the mediator proceeds by way of conciliation but in addition is prepared and expected to make his own formal proposals or recommendations’ (Hougham 1997:11). Similarly Dickens and Cockburn (1986:535) distinguish the two processes in the following terms:

Third-party services may be ranged on a continuum according to the extent to which the disputing parties themselves retain control over the outcome of the dispute. Conciliation aims to assist the parties reach their own settlement. The conciliator performs various roles – for example, catalyst, conveyor of information or sounding board ... but normally does not suggest or advocate independent solutions in the way a mediator does. Mediation is a more positive form of conciliation although in practice the line between the two processes is fluid.”

But as a matter of practice ACAS conciliators do seem to provide advice to unfair dismissal parties about the strengths and weaknesses of their case and about the prospects for success if the matter proceeded to a tribunal hearing (Dickens et al 1985:Table 6.6 on 156).

Yet, in other European countries such as Denmark (Jensen 1997), Finland (Tiitinen 1997) and Belgium (Rombouts 1997), conciliators have a more interventionist role, which may involve submitting a settlement proposal for the consideration of the disputing parties.
On 1 June 2000 a ‘Mediation Institute’ was established in Sweden. The Institute is empowered to require bargaining parties to participate in joint discussions and to appoint mediators in the event of a dispute.\textsuperscript{16} There do not appear to be any practical implications from the use of the word mediation, as opposed to conciliation, in this context. As Fahlbeck (2000:415) notes:

\begin{quote}
The words ‘mediation’ and ‘conciliation’ and related words are interchangeable in Swedish, there being no difference in meaning between them. However, the 2000 reform expressly omits the word ‘conciliation’ and its relatives from Swedish legal vocabulary. The reason is that the Swedish word for ‘conciliator’ (förlikningsman) has a gender biased undertone that the word for ‘mediator’ (medlare) has not. However, the linguistic change does not per se entail any change in actual or legal realities.
\end{quote}

Nor does an examination of Asian systems reveal any common approach. In China, ‘people’s conciliation’ is an officially acknowledged mode of conflict management of civil disputes. It can be highly interventionist. Xu (1994:332) claims that: ‘People’s conciliators are patient and unyielding. Once a dispute occurs and catches their attention, it is not easy to escape from their assistance until a final settlement is reached.’ Yet in Taiwan third party conciliation simply involves bringing the parties together without necessarily resorting to the law to find a solution, whereas mediation is ‘a system of using legal authorities or other third parties, following legal

\begin{flushright}
\end{flushright}
procedures, to investigate the causes of a dispute and assist the two sides in coming to a solution when they are unable to do so independently' (Lin 1997:5).

In practice the role adopted by the conciliator does not distinguish conciliation from mediation.

2.5.3 Compulsory

The third distinguishing characteristic of conciliation is said to be that it is compulsory, whereas mediation is not.

Conciliation in a statutory context often precedes more coercive processes, such as arbitration or adjudication. If agreement is not reached by conciliation or some other means then the dispute will be determined by an arbitrator or judicial officer. Conciliation in these circumstances is said to lack the voluntariness of the conceptualist definition of mediation – the parties have limited control over the process and the decision to submit to it (Ingleby 1993:443; Roberts 1983:148).

But there are a number of legislative examples of non-mandatory conciliation.\(^\text{17}\) Hence it cannot be said that conciliation is, by definition, always compulsory. Even where conciliation is not consensual - in the sense of participation based on mutual consent - it is consensual in a narrower sense. The conciliator does not have an

\(^{17}\) For example: *Courts Legislation and Mediation Amendment Act 1994* (NSW); *Administrative Appeal Tribunal Amendment Act 1993* (Cth); Federal Court Rules (Cth) O10 r1(2)(g); *Compensation Court Act 1984* (NSW) s.38D(1); *Conciliation – Health Care Complaints Act 1993* (NSW) Div 8, s.13(2).
adjudicative function and the parties have the ability to accept or reject particular options and to refuse to settle (Boule 1996:27).

2.6 Conciliation and the Industrial Relations Act 1988 (Cth)

In a later chapter I deal with the relevant statutory framework in more detail. For present purposes it is sufficient to note that during the time period which was the focus of the empirical part of this study (15 January to 30 December 1996), a person could lodge an unfair dismissal application with the Commission. Section 170EA(4) of the IR Act provided that such an application was to be treated by the Commission as ‘a request to attempt to settle the matter by conciliation’. In relation to the conciliation process itself, s 170EB provided that the Commission ‘must inquire into the matter’ and ‘try to help the parties … to agree on terms for settling the matter’.

Broadly speaking the IR Act invoked conciliation in two contexts:

- the prevention and settlement of industrial disputes; and
- the settlement of applications for relief arising from termination of employment.

In relation to industrial disputes, the IR Act provided for a system of compulsory conciliation and arbitration. Such a system had operated, in various guises, since 1904 when the Commonwealth Court of Conciliation and Arbitration was established by the Commonwealth Conciliation and Arbitration Act 1904. The Court exercised judicial and arbitral powers until it was reconstituted in 1956 following the judgment of the High Court in R v Kirby and others; Ex parte Boilermakers’ Society of Australia
The Court's role of preventing and settling disputes and making awards was transferred to the newly created Commonwealth Conciliation and Arbitration Commission (a predecessor of the current Commission). The judicial powers of interpretation and enforcement were retained by the renamed Commonwealth Industrial Court (now the Federal Court).

In 1985 the Report of the Committee of Review into Australian Industrial Relations Law and Systems (the Hancock Report, para 10.11) observed that a consistent thread in the operation of the then Commonwealth Conciliation and Arbitration Act 1904 was 'an attempt to emphasise both the role of conciliation and the desirability of dispute settlement without recourse to arbitration'. That approach continues to the present.

Section 89 of the IR Act provided that the function of the Commission was, among other things, to prevent and settle industrial disputes 'as far as possible' by conciliation and 'as a last resort' by arbitration. In Re Milk Processing and Cheese Etc Manufacturing Award 1964, the Full Court of the South Australian Industrial Court drew the following distinction between conciliation and arbitration:

Broadly speaking, the conciliatory process is aimed at bringing the parties involved therein to agreement whilst the arbitral process is aimed at determining issues between parties on which no agreement has been reached ....

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18 (1956) 94 CLR 254 affirmed by the Privy Council; (1957) 95 CLR 529.
19 (1978) AIIR 94.
Sections 100-105 and 119 of the *IR Act* dealt with aspects of the conciliation process in relation to the prevention and settlement of industrial disputes. The key points to note from these provisions are as follows:

- disputes are to be referred to conciliation where possible (s 100).

- where a dispute is referred for conciliation the conciliator *shall do everything that appears to the member to be right and proper to assist the parties to agree on terms for the prevention or settlement of the dispute* (s 102(1)).

- the actions that may be taken by a conciliator include:
  - arranging conferences of the parties or their representatives presided over by the conciliator; and
  - arranging for the parties or their representatives to confer among themselves at conferences at which the conciliator is not present (s 102(2));

- conciliation proceedings are private and confidential:
  - the conciliator cannot disclose anything said or done in the conciliation proceeding in relation to matters in dispute that remain unsettled (s 104(4));
- unless all parties agree evidence cannot be given, or statements made, that would disclose anything said or done in a conciliation proceeding in relation to matters in dispute that remain unsettled (s 104(5));

- conciliation is still available even after arbitration has commenced (s 103(2)).

- where a conciliator has exercised conciliation powers a party may object to the member exercising arbitral powers in respect of the same dispute (s 105).

- a party or person can be directed to attend a conciliation conference (s 119).

Conciliation in respect of termination of employment applications differs from industrial dispute conciliation in three ways.

First, industrial disputes are generally ‘group contests’ involving a union representing employees, on the one hand, and an employer or employers, often represented by an employer organisation, on the other. By contrast s 170EA termination applications were typically individual disputes, involving one employee and his or her former employer. In most cases a union was not involved.
Second, the organisation of industrial dispute work in the Commission is by ‘panels’. A group of industries is assigned to a panel of Commission members. This allows members to build up knowledge and expertise in those industries. Disputes in a particular industry will usually be dealt with by the same member or by the same small group of members within the relevant panel. Hence to some extent there is an ongoing relationship between the member and persons representing the unions and employers that regularly appear in the Commission. Termination of employment conciliations are quite different – they are randomly allocated and in the overwhelming majority of cases the conciliator has not seen the parties before and is unlikely to see them again.

Third, as I have noted, a party to an industrial dispute may object to a conciliator arbitrating any unresolved matters in which case the conciliator cannot exercise arbitration powers in respect of that dispute (s 105). In practice such objections are rarely taken and the member who conciliates will arbitrate if necessary. But this is not the case in termination of employment matters. As a matter of practice the conciliator does not arbitrate, unless requested to do so by both parties.

As we shall see in Chapter 10, different conciliators approach their task in different ways. The most common approach employed in termination of employment conciliations can be described in terms of the abacus on page 46.

The ‘beads’ on the abacus represent the point which best describes the observed behaviour of the conciliators. In some instances observed behaviour varied from conciliator to conciliator. The extent of conciliator intervention is a good illustration of
this. The hollow beads represent the range of observed conciliator behaviour, that is from low to high levels of intervention. In other instances all conciliations exhibited a common attribute - for example, entry was compulsory.
## The Unfair Dismissal Conciliation Abacus

<table>
<thead>
<tr>
<th>Consensual entry</th>
<th>Compulsory entry</th>
</tr>
</thead>
<tbody>
<tr>
<td>Party choice of conciliator</td>
<td>Conciliator imposed on parties</td>
</tr>
<tr>
<td>Independent, neutral conciliator</td>
<td>Conciliator an interested insider</td>
</tr>
<tr>
<td>Low intervention by conciliator</td>
<td>High intervention by conciliator</td>
</tr>
<tr>
<td>Non-evaluative conciliator</td>
<td>Evaluative conciliator</td>
</tr>
<tr>
<td>Outcome consensual</td>
<td>Conciliator influences outcome</td>
</tr>
<tr>
<td>Therapeutic/educational function</td>
<td>Settlement function only</td>
</tr>
<tr>
<td>High degree of confidentiality</td>
<td>Low degree of confidentiality</td>
</tr>
<tr>
<td>Rigid rules and procedures</td>
<td>Flexible rules and procedures</td>
</tr>
<tr>
<td>Agreement legally binding</td>
<td>Agreement not legally binding</td>
</tr>
<tr>
<td>Deals with past and future factors</td>
<td>Deals only with present issues</td>
</tr>
<tr>
<td>Co-facilitator</td>
<td>Sole facilitator</td>
</tr>
<tr>
<td>Variable physical settings and protocols</td>
<td>Fixed physical settings and protocols</td>
</tr>
<tr>
<td>No intake process with individuals</td>
<td>Lengthy intake process</td>
</tr>
<tr>
<td>No lawyers present</td>
<td>Lawyers necessarily present</td>
</tr>
<tr>
<td>Cooling off</td>
<td>No cooling off</td>
</tr>
<tr>
<td>No solutions suggested</td>
<td>Solutions suggested</td>
</tr>
<tr>
<td>Without prejudice meetings</td>
<td>Signed detailed agreements</td>
</tr>
<tr>
<td>Multiple meetings</td>
<td>Single meetings</td>
</tr>
<tr>
<td>Private meetings during process (caucus)</td>
<td>No private meetings during process</td>
</tr>
<tr>
<td>Two-party dispute</td>
<td>Multi-party dispute</td>
</tr>
<tr>
<td>Conciliator can change to arbitrator role</td>
<td>Conciliator must stay in single role</td>
</tr>
</tbody>
</table>

**Note:**
- ○ means that there are a range of observed behaviours
- ● indicates the general position
2.7 Is Conciliation a Form of Mediation?

The characteristics of conciliation can be influenced by the context in which it takes place. In this regard there are at least two points of difference between conciliation in the context of the IR Act and the conceptualist definition of mediation.

First, there is an element of compulsion in the conciliation process. Once an application for a remedy in respect of a termination of employment had been lodged it was treated by the Commission as ‘a request to attempt to settle the matter by conciliation’ (IR Act s 170EA(4)). Section 170EB provided that the Commission must inquire into the matter to which the application relates and try to help the parties to agree on terms for settling the matter. Invariably a conciliation conference was convened and the parties were expected to attend. It was not a case of both parties freely agreeing to approach a third party to undertake a mediation. Rather a termination of employment conciliation conference was generally convened without any reference to the wishes of the parties; nor was there any scope for the parties to select the conciliator. Conceptually at least mediation is a voluntary process. But as we have seen a voluntary/involuntary distinction is problematic.

The second point of difference is in relation to the role of the third party. As noted previously, a number of commentators regard the role of a conciliator as more interventionist than that of a mediator. For example, Renouf suggests that conciliation ‘implies a more active role for the third party, often involving persuasion of the clients. The conciliator is responsible to the clients and to the legal system.’ (1991:108)
But in practice the differences are more apparent than real. Practicing mediators intervene more actively than the conceptualist model of mediation would allow.

Nor does the relevant legislative history suggest that conciliation in the context of the *IR Act* was intended to mean something different from mediation.

The federal industrial relations system began in 1904 when the *Commonwealth Conciliation and Arbitration Act* 1904 became law. The reference to conciliation in both the title and body of that Act no doubt reflects its constitutional basis. Section 51(xxxv) of the Constitution provides that Parliament may make laws with respect to ‘conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State’.

Mitchell (1989) reviews the contending positions and presents a convincing case in support of the proposition that the origin of the legal form of conciliation and arbitration in Australia lies in the *Industrial Unions Bill* (SA) 1890. This bill was introduced by CC Kingston. Kingston later played a leading role in the decision to insert in the Federal Constitution a power to settle interstate industrial disputes by conciliation and arbitration. He drafted the *Conciliation and Arbitration Bill* presented to the Commonwealth Parliament in 1903 (La Nauze 1965:297).

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20 Others have argued the origins of the Australian system lie with the New Zealand *Industrial Conciliation and Arbitration Act* 1894, introduced by William Pember Reeves, the Minister for Labour at the time: Holt (1987:24-26) and Sinclair (1965:151-152).

21 South Australian Parliamentary Debates, 13th Parliament, First Session, 12 December 1890 at 2413.
A range of State based legislation preceded the Commonwealth Conciliation and Arbitration Act 1904.\textsuperscript{22} In a number of cases the State legislatures relied upon the experiences with conciliation and arbitration in other countries to support the introduction of these processes. Kingston's second reading speech with respect to the Conciliation Bill of 1891 (SA) refers to schemes operating in France, Belgium and a number of American states.\textsuperscript{23} The Report of the NSW Royal Commission on Strikes 1890-91 described the legislative schemes for dispute settlement operating in ten countries in a 'Conciliation Appendix'. There is no reference in either the legislative predecessors to the 1904 Commonwealth Act, or the dispute settlement schemes operating in other countries, to 'mediation'.

Boulle (1996:68) suggests that the use of the term conciliation in the Commonwealth Conciliation and Arbitration Act 1904 simply reflected the language of the time:

\begin{quote}
The term conciliation was originally encountered in the context of statute based systems of dispute settlement used in industrial, anti-discrimination and family disputes. At the time, the term mediation was not current.\textsuperscript{24}
\end{quote}

\textsuperscript{22} See appendix 4.
\textsuperscript{23} South Australian Parliamentary Debates 13th Parliament, Second Session, 5 November 1891: 1876-1879. The French Conseils de Prud-hommes were discussed in the debates on the Trade Disputes Conciliation and Arbitration Bill (NSW) 1892 and the Councils of Conciliation Bill (Vic) 1890: see New South Wales Parliamentary Debates, volume 57, 15 March 1892 at 6464-6467; and Victorian Parliamentary Debates, volume 64, 13 August 1890 at 1076 and 10 September 1890 at 1532.
\textsuperscript{24} Faulkes 1990 also notes that formal mediation programs are a relatively recent phenomenon.
It seems unlikely that in 1904 when Parliament passed legislation to establish a predecessor of the current Commission it intended ‘conciliation’ to mean something other than ‘mediation’.

More recently the conceptualist definition of mediation seems to be a factor motivating a number of legislative changes proposed in the *Workplace Relations Amendment (More Jobs, Better Pay) Bill 1999* (the *1999 Bill*). The 1999 Bill provides for three forms of dispute settlement, in addition to arbitration:

- **compulsory conciliation**: which is defined to mean conciliation under Pt VI (i.e. disputes about allowable matters, exceptional matters and demarcation), Pt VIA Div 3 (termination of employment applications) and s.170MX (after the termination of a bargaining period). In essence it is proposed that the Commission’s ‘traditional’ conciliation function be limited to those circumstances where the Commission also has power to determine the matters in dispute by arbitration.

- **voluntary conciliation**: is available at the request of both parties to a dispute in circumstances where one or more of the following matters is at issue between the parties:

  - negotiations in relation to a certified agreement;
  - a matter arising under an award, certified agreement or an Australian Workplace Agreement; or
  - an industrial dispute.
A request for the Commission to undertake voluntary conciliation must be signed by each of the parties and be accompanied by a $500 fee. Proposed s 88AD(4) provides that the Commission does not have power to compel a person to do anything when engaging in voluntary conciliation.

- **mediation**: schedule 5 of the 1999 Bill proposes the insertion of a new Part, Pt IVB, into the Workplace Relations Act 1996 (Cth) (the WR Act). The new Pt IVB provides for a single, national accreditation scheme for ‘workplace relations mediators’ and for the approval of mediation agencies which would, in turn, carry out the assessment and accreditation of mediators according to a set of competency standards to be determined. The Part also proposes to establish the office of the Mediation Advisor. The Mediation Advisor would oversee and facilitate the use of mediation to resolve workplace disputes by:

- establishing and maintaining a register of accredited workplace mediators;

- approving mediation agencies who will in turn accredit mediators;

- setting competency standards in consultation with the approved mediation agencies;

- promoting mediation by accredited mediators; and
- providing advice to employers, employees and organisations about using mediation to resolve workplace issues and differences.

The proposed objects of Pt IVB were, among other things, 'to encourage the use of voluntary mediation to resolve differences and issues that arise in relation to certain workplace relations matters covered by this Act' (proposed s 83C). Yet, as the Explanatory Memorandum notes, the new Part does not provide for the arrangements that parties may make for the use of mediation, its outcome or its cost. These matters would be resolved by the parties. Item 9 of schedule 4 to the 1999 Bill proposed to amend s 91 of the WR Act so that it would read:

In dealing with an industrial dispute, the Commission shall, where it appears practicable and appropriate, encourage the parties to agree on procedures for preventing and settling, by discussion and agreement, mediation and voluntary conciliation, further disputes between the parties or any of them, with a view to the agreed procedures being included in an award.

The underlined words are new. Similarly the bill proposed the insertion of a new section, s 170LZA, providing that the procedures in a certified agreement for preventing and settling disputes may either provide for mediation 'by persons other than the Commission' or empower the Commission to exercise voluntary conciliation.
Chapter 2 - What's in a Name? Conciliation and Settlement: Definitional Issues

One of the other references to mediation is in a proposed new object of the WR Act, in the following terms:

3(1)(hb) recognising that the facilitation of agreements at the workplace or enterprise level, and the resolution of certain industrial disputes and individual grievances may be dealt with effectively by voluntary mediation conducted separately from the Commission; ...

Two points emerge from the 1999 Bill. First, it is intended to introduce mediation as an alternative means of dispute settlement in awards and agreements. Second, mediation is intended to be conducted by private mediators, separately from the Commission. But what is not clear is the intended distinction between conciliation and mediation. The only distinction in the 1999 Bill relates to who carries out the function, not to the function itself. The terms 'mediation' and 'conciliation' are not defined.

Some insight into the intent can be gleaned from the background to the 1999 Bill. In August 1998 the relevant Minister released a discussion paper entitled 'Approaches to dispute resolution: a role for mediation?'. The paper draws a distinction between conciliation and mediation, in the following terms:

In its pure form, mediation is a process whereby an independent person is used to assist the parties in dispute to find a mutually acceptable solution to their differences. The mediator's role is to work systematically through the issues, help the parties identify possible solutions, and facilitate final agreement. Unlike a conciliator, the true mediator will guide the process of resolution, but not
advise the parties on the matters in dispute, its resolution, likely settlement terms, or likelihood of success at the next stage (if any). A mediator has no decision making powers ... it may be said that mediation would generally be a less interventionist form of dispute resolution than conciliation as usually undertaken by the AIRC. (Reith 1998:1)

This distinction between the two concepts is reflected in the second reading speech to the 1999 Bill where the Minister said: 'Mediation will provide an opportunity for a less interventionist and more informal alternative to the Commission's conciliation process'.

But these statements of intent have not been translated into the 1999 Bill. In terms of the role of the third party the only distinctions made are in respect of compulsory versus voluntary conciliation and it is difficult to distinguish voluntary conciliation as provided in the 1999 Bill from the conceptual model of mediation. The differences between compulsory and voluntary conciliation may be characterised as either procedural or related to the role of the conciliator.

The procedural differences, of which there are three, go to the circumstances in which conciliation takes place:

- voluntary conciliation requires the consent of the parties in dispute, compulsory conciliation does not (s 88AB(2)(b) and s 119);

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the boundaries between voluntary and compulsory conciliation are
delineated by the subject matters they cover (s 88AB(1), s 4(1) definition
of ‘compulsory conciliation’); and

- a $500 fee is prescribed in respect of voluntary conciliation (s 88AB(2)(d));
no fee is payable in respect of compulsory conciliation.

In terms of the role of the conciliator s 88AD(2)(a), relating to voluntary conciliation,
speaks of the conciliator arranging conferences at which they are ‘present’. By way of
contrast s 102, relating to compulsory conciliation, refers to conferences ‘presided
over’ by a member of the Commission. Given that a conciliator would usually be
expected to chair the conferences at which they are in attendance there does not
appear to be any substance to this distinction. Paragraph 4.27 of the Explanatory
Memorandum supports this view.²⁶

On one view of it compulsory conciliation may be seen as less interventionist than
voluntary conciliation. In carrying out compulsory conciliation a conciliator is enjoined
to ‘assist the parties to agree’, whereas in voluntary conciliation the conciliator is to
resolve the matter in dispute – no reference is made to the parties.

However, voluntary conciliation is directed at the resolution of the matter in dispute
whereas compulsory conciliation is about assisting the parties to agree on the terms
for the prevention and settlement of the dispute. As we have seen ‘settlement’ is a

²⁶ See Note 27.
narrower concept than ‘resolution’. But it would be straining the statutory language of the Bill to suggest that the new provisions are intended to usher in a new era of therapeutic conciliation; particularly in circumstances where the Explanatory Memorandum makes no such claim.\(^{27}\)

In conducting voluntary conciliation the Commission is to act in accordance with:

- any agreement between the parties about voluntary conciliation; and
- the terms of any relevant dispute settling clause (s.88AD(3)(c) and (d)).

No directly comparable provisions operate in respect of compulsory conciliation. The impact of proposed s 88AD(3)(c) and (d) is difficult to judge. Conceivably the parties could agree to circumscribe the role of the conciliator – for example the conciliator could be directed not to make any ‘suggestions’ in respect of the resolution of the matter in dispute. The terms of a dispute settlement clause could also seek to define the conciliator’s role – though I am not aware of any current clause that does so. A number of certified agreements and awards make provision for mediation in their

\(^{27}\) Paragraphs 425-427 of the explanatory memorandum are in the following terms:

"4.25 New section 88AD would set out the powers and procedures of the Commission when it is conciliating under new Part VA. The proposed section recognises that, when the Commission is engaged in voluntary conciliation, it should not have the same powers of compulsion that attach to compulsory conciliation.
4.26 Proposed subsection 88AD(1) would require the Commission to take the action that is appropriate to resolve the matter by conciliation. This indicates that the processes to be followed are not prescriptive and would depend on the wishes of the parties and the circumstances of the particular case. This general direction would operate subject to the remainder of subsection 88AD(2).
4.27 Proposed subsection 88AD(2) indicates two kinds of procedure that the Commission may use. These are arranging conferences at which the conciliator is present, and arranging for conferences between the parties themselves. These procedures are characteristic of conciliation by the Commission (see section 102)."
settlement of disputes procedures. But these references are limited to providing for mediation as a step in the process, they do not prescribe the role of the mediator.\footnote{For example, the Victorian Police Force (Police Administrative Officers) Agreement 1998 (V0351), clause 32 provides, as the third step in the settlement process, for a dispute to be submitted to the AIRC 'or an agreed mediator'. The University of Wollongong (Academic Staff) Enterprise Agreement 1995 (U0124) makes provision for mediation in its grievance resolution procedures for student and certain staff grievances. It specifies that the mediator must be 'agreed upon by the parties and chosen from a panel of accredited mediators' and 'must have attended an accredited course recognised by the University' (Schedule 5). The Phillip Morris Limited Operations Agreement 1996 (P0830) provides for mediation as part of its dispute resolution procedure (clause 15). If the parties cannot agree on a mediator, that agreement provides for the parties to request the AIRC to appoint a mediator. The Department of Senate Certified Agreement 1998-1999 (D0818) also makes provision for mediation (clause 12). The Dampier to Bunbury Natural Gas Pipeline – ASU Award 1997 (D0780), clause 27 provides for a dispute that is not resolved at an earlier stage to be referred to the AIRC or an 'agreed independent arbitrator or mediator'. Similarly, referral to the AIRC or an 'impartial mediator or arbitrator nominated by the parties and whose decision the parties have agreed to accept' is provided if earlier steps fail to resolve a dispute (clause 8) of the Steel -Tubing and Profiles – Tubemakers Somerton Pty Ltd Award 1996 (S1092). The Victorian Independent Schools (Interim) Award 1993 (clause 28) provides a further example. However, some awards use the term 'mediator' in reference to an arbitration process. For example, the National Jet Systems Pilots' Award 1995 (N0609) (clause 16) provides for the appointment of a 'mediator' to 'hear and determine' a dispute, and indicates that the mediator's 'determination will be final'. Similarly, the Metropolitan Water Supply Sewerage Award (M0303) (clause 45) allows for the appointment of a 'mediator' to resolve an issue 'by arbitration'. In these cases the reference to a 'mediator' seems to be intended to suggest an independent person other than a member of the AIRC.}

A potential distinction between the two processes concerns the exercise of power. Proposed s 88AD(4) provided that in the context of voluntary conciliation the Commission does not have power to compel a person to do anything. The relevant part of the Explanatory Memorandum states:

\textit{4.30 Proposed subsection 88AD(4) makes it clear that the compulsory powers and procedures of the Commission which are set out in Part VI (for example, in sections 111, 119 and 135) do not apply when the Commission is conciliating under new Part VA.}
No such limitation applies in respect of compulsory conciliation. But what does this mean in practice? The Commission’s powers in the context of compulsory conciliation are quite limited. It could conceivably order a secret ballot to ascertain the attitudes of the members of an organisation to the matter in dispute (s 135). But such orders are rare.  

Nor are compulsory conferences pursuant to s 119 a feature of the conciliation process. No such compulsory conferences have been convened in the last five years.  

Potentially s 111 provides a range of powers, including the power to:

- take evidence on oath or affirmation (s 111(1)(a));

- refer any matter to an expert (s 111(1)(n));

- summon persons to appear and compel the production of documents (s 111(1)(s)); and

- generally give all such directions as are necessary or expedient for the speedy and just hearing and determination of the dispute (s 111(1)(t)).

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29 Only 10 s 135 ballots were ordered in the five year period from June 1994 to June 1999. See the Annual Reports of the Australian Industrial Relations Commission for the years 1994/95, 1995/96, 1996/97, 1998/99.

Chapter 2 - What's in a Name? Conciliation and Settlement: Definitional Issues

But the use of these powers in practice is limited and may be constrained by the terms of a certified agreement binding on the parties to a particular dispute.31

In summary, the 1999 Bill does not define the terms 'mediation', 'voluntary conciliation' or 'compulsory conciliation'. Voluntary conciliation would appear to comply with the elements of conceptualist definition of mediation; but there is little practical difference between the role of the conciliator in voluntary versus compulsory conciliation.

To return to the question posed – Is conciliation a form of mediation? – the answer is a qualified yes. In terms of conceptualist definitions there may be a distinction between the two processes; but the conceptualist approach does not accord with reality. Even from a conceptualist perspective, conciliation is not a concept which has universally recognised features. To some extent its meaning is culturally determined. In terms of the legislative history of the WR Act, the evidence suggests that the use of the term conciliation is more likely to have been a historical accident rather than a conscious choice between two concepts. Nor do the changes proposed in the 1999 Bill point to any substantive difference between conciliation and mediation. I agree with the conclusion reached by Macken and Gregory:

Although from a purist point of view mediation and conciliation are different alternative dispute resolution tools, the procedural differences from the industrial relations perspective are more nominal than real. (1995:38)

31 See Community and Public Sector Union v Telstra Corporation Ltd, unreported, Print S7197, 20 June 2000 per Giudice P, Polites SDP, Watson SDP, Simmonds C and Gay C.
The next part of this paper - Part B - examines the impact of the legal context in which conciliation occurs. The thesis is that legislative change which affects the cost of litigation, the remedies available and the probability of success, will influence the split between trial and settlement.

The thesis posited is explained in the next chapter.
CHAPTER 3 – CONCILIATION IN THE SHADOW OF THE LAW

3.1 The General Proposition

On the surface there is to be a dichotomy between the adjudication of disputes and their resolution through negotiation. As Eisenberg observed:

… adjudication is conventionally perceived as a norm-bound process centred on the establishment of facts and the determination and application of principles, rules and precedents. Negotiation on the other hand is conventionally perceived as a relatively norm-free process centred on the transmutation of underlying bargaining strength into agreement by the exercise of power, horse-trading, threat and bluff. (1976:638)

Yet a number of theories rely on the premise that the expectations of the parties about probable trial outcomes play a major role in determining settlement outcomes.

The economic theory of trial and settlement\textsuperscript{32} posits that economically rational litigants make risk neutral or risk averse choices to maximise outcomes. In making

\textsuperscript{32} Promulgated by a number of prominent law and economics scholars such as Cooter and Rubinfeld (1989); Landes (1971), Posner (1998) and Shavell (1995).
these choices litigants take account of probable trial outcomes. Alexander (1991: 501-502) provides the following useful, non technical, overview of the model:

An economic model of how cases are settled has come to be generally accepted. In this model, the parties make decisions based on rational estimates of the expected economic value of the case, including the costs of litigation. Before trial, each side determines the expected value of the case by multiplying the amount of the expected judgment if the plaintiff wins by the estimated probability of a plaintiff's verdict. Each party makes its settlement decisions by comparing its expected economic position after a trial with its position if the settlement proposal is accepted, taking into account the costs of litigation and settlement.

Although there are many complex elaborations of the economic model of settlement, they all incorporate the basic assumption that settlement decisions are made by comparing the economic value of the offer to the economic value of going to trial. In these models, a settlement will be reached if, and only if, both parties perceive that it would leave them at least as well off as they would expect to be after trial.

Based on this theory, Posner (1998:607-615) has developed a settlement model for predicting if litigation will occur in a given case. Applicants can be expected to settle if a settlement offer is greater than the net expected gain from litigating. The net expected gain from litigation is the estimated award if successful, discounted by the probability of success minus litigation costs. Similarly respondents will settle if the
price of settlement is less than the expected loss if the matter is litigated. The respondents’ expected loss is the estimated award if unsuccessful discounted by the estimated probability of losing plus litigation costs. Shavell expresses the same idea in the following terms:

... the difference between the plaintiff’s expected judgment and the defendant’s expected judgment must exceed the sum of their trial costs for there to be a trial; otherwise they will settle to save trial costs. This makes sense, in that the two parties together will save the sum of their trial costs if they settle. (1995:11)

Posner’s model expresses this idea as an equation:

If, \( Pa \ A - C + S > Pr \ A + C - S \) then the dispute will go to trial.

‘\( A \)’ is the estimated amount of the award if the plaintiff wins.

‘\( Pa \)’ is the probability of the plaintiff winning, as estimated by the plaintiff, and

‘\( Pr \)’ is the respondent’s estimate of that probability.

‘\( C \)’ and ‘\( S \)’ are the costs of each party of litigating the case and of settlement, respectively.
The model assumes that both parties are risk neutral and that the stakes in the case, the costs of litigating and the costs of settlement are the same for both parties. It also assumes that parties behave in an economically rational way. Rationality in an economic sense is the ability and inclination to use instrumental reasoning. Further, as Posner (1998:8) has observed: ‘Rational people base their decisions on expectations of the future rather than on regrets about the past.’

Stripped of technical language the settlement model represents a simple idea. A party will not accept a settlement offer if they think they would get more out of going to trial. It is essentially a ‘money or the box’ proposition. To decide which choice to make, a party must consider their chances of winning at trial and how much they would be likely to get. The value of the ‘trial box’ is the probability of winning multiplied by the likely amount of any award minus the cost of the trial.

The ‘money or the box’ analogy can be used to explain how the ‘risk neutral’ assumption works. Assume the ‘money’ or settlement offer is $100, and the ‘box’ or trial is a 10 per cent chance of winning $1000. If a person was ‘risk neutral’ they would be ambivalent about whether they chose the money or the box. To such a person both options have the same value. But a ‘risk averse’ person would view the choice differently. They would prefer the certainty of the money over the chance of getting more money if they chose the box.
A simple example serves to illustrate Posner's model.

Suppose the applicant thinks he has a 90 percent chance of winning $10,000 but the respondent thinks the applicant only has a 60 percent chance. That is 'A' is $10,000, 'C' is $2,500, 'S' is $500, Pa is .9 and Pr is .6.

These values are then inserted into Posner's model:

\[
\text{If, } \text{Pa} A - C + S > \text{Pr} A + C - S \text{ then the dispute will go to trial}
\]

\[ (.9)\cdot10,000 - 2500 + 500 > (.6)\cdot10,000 + 2500 - 500 \]

\[ 9000 - 3000 > 6000 + 2000 \]

\[ 6000 > 8000 \]

As 6000 is not greater than 8000, litigation will not occur.

The plaintiff's minimum settlement price is $6,000 (using Pa A - C + S) and the respondent's maximum offer is $8,000 (being Pr A + C - S).

There is an area of overlap between the 'bottom line' positions of both parties - a settlement range. Such a range is a necessary condition for settlement as it means that there is a price at which both parties will conclude that settlement is in their own interests. It is sometimes referred to as a 'contract zone' (Coursey and Stanley
1988:162-163). The contract zone is the set of all settlement points that provide a better outcome for both parties than that expected if the dispute goes to trial.

A number of forces operate to produce a 'contract zone' including:

- if the parties have different expectations about the amount of the arbitrator's award, there may be settlement points that they believe will make them both better off;

- if risk aversion dominates the preferences of the parties, there will be some settlement that the parties prefer to the alternative uncertainty of arbitration; and

- any transaction costs associated with arbitration (such as legal fees) will generate a contract zone (see Farber and Katz 1979).

Related to the economic model is the proposition that negotiation takes place with a conception of how the particular dispute would be resolved if it was adjudicated. The surrounding legal environment influences settlement behaviour by its impact on the probability of the plaintiff winning, the estimated amount of the award if the plaintiff wins and the associated transaction costs. Mnookin and Kornhauser (1979) looked at the impact of legal architecture on bargaining behaviour when they examined the impact of the legal system on divorce negotiations and bargaining that occurs outside
of the courtroom. They saw the primary function of contemporary divorce law ‘not as imposing order from above, but rather as providing a framework within which divorcing couples can themselves determine their post-dissolution rights and responsibilities’ (1979:950).

According to Mnookin and Kornhauser the law creates ‘bargaining endowments’:

*Divorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum; they bargain in the shadow of the law. The legal rules governing alimony, child support, marital property, and custody give each parent certain claims based on what each would get if the case went to trial. In other words, the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips – an endowment of sorts.* (1979:950)

The impact of the legal architecture within which negotiation takes place may vary depending on the circumstances. There is some evidence to suggest that it may be greater where the parties are represented. In this regard Eisenberg (1976) explores the role of ‘affiliates’ in the dispute resolution process. In the context of unfair dismissal disputes, lawyers and representatives of employee and employer organisations are the most common type of ‘affiliate’. They are ‘professional affiliates’. Eisenberg describes the role of lawyers in these terms:

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33 Also see Eisenberg 1976.
Because a lawyer is both a personal advisor and a technical expert, each actor-disputant is likely to accept a settlement his lawyer recommends. Because of their training, and the fact that typically they become involved only when formal litigation is contemplated, lawyers are likely to negotiate on the basis of legal principles, rules and precedents. (1976:665-665)

Like bargaining generally, conciliation can be said to take place in ‘the shadow of the law’. The parties to a conciliation operate with a perception of how the legal system would resolve their dispute. This observation goes beyond simply taking into account the time and cost of a litigated settlement. As Menkel-Meadow (1983-84:790) argues: ‘Even though the eventual solution may be one of compromise within the bargaining range, this settlement is based on the presumed limits set by the courts.’

3.2 Criticisms of the Economic Model

The economic model of settlement (and the related ‘bargaining in the shadow of the law’ concept) has a number of advantages. As Alexander (1991:504) notes, it is ‘logically coherent and internally consistent, and it agrees with some of our basic intuitions about litigation’. But it is not without its critics. A number of commentators contend that the economic model is too simplistic. For example, Guthrie (1999) argues that, while the model illuminates much litigation behaviour, it ultimately fails to capture its complexity as it rests on a one dimensional view of human behaviour. Similarly, Gross and Syverud (1991) suggest that contextual and relational factors between the parties are far better predictors of outcomes than are legal endowments.
There is some substance to these criticisms. Posner's model assumes that parties apply instrumental reasoning in considering settlement. In other words show me the money! But instrumental factors are not the only factors at work. As McEwen and Milburn observe in respect of unfair dismissal claims in the United Kingdom:

... often much more is at stake than the substance of a claim when a party pursues a grievance ... The complainant's own credibility, integrity and sense of the rightness of the social order are at stake as well. (1993:27)

There are also parallels between the assumptions underlying Posner's model and the now largely discredited scientific management approach of the early 20th century. One of the core assumptions of the scientific management approach was that employee behaviour 'would be motivated by a rather crude individualistic calculus of costs and benefits' (Brown 1988:36).

As one game theorist put it: every negotiation consists of a rationality problem – how will the problem rationally be solved – compounded by an often irrational behaviour problem – can the parties behave strategically with each other to produce rational outcomes or will other 'noise' get in the way?34 'Noise' may be a particular problem in unfair dismissal disputes.

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In a qualitative study which involved, among other things, in-depth interviews with unfair dismissal applicants in Britain, Lewis and Legard (1998:28-29 and 30-32) concluded that the termination of their employment had left applicants with strong emotions: ‘bitterness, a sense of injustice, anger, despair and a desire for revenge against the employer’. The objectives described by applicants in pursuing their claim fell into two broad categories - emotional objectives and practical objectives. Individual applicants generally described a number of different objectives, often encompassing both categories.

Lewis and Legard (1998) noted that a strong sense of grievance motivated applicants to file their claim. They described a number of emotional objectives including:

- justice – in other words, the determination by a judicial body that they were in the right and the employer was wrong;
- forcing the employer to acknowledge an error;
- an opportunity to express their frustration and anger, preferably in public;
- causing embarrassment and bad publicity;
- seeing the employer publicly rebuked for their action by the tribunal; and
- causing inconvenience and expense to an employer.

Practical objectives were more instrumental in character – financial compensation, reinstatement or obtaining a reference to improve their employment prospects.
While Mnookin and Kornhauser emphasise the importance of the legal framework within which a dispute arises, they recognise that other factors also influence settlement. They conclude:

Individuals in a wide variety of contexts bargain in the shadow of the law ... In each of these contexts, the preferences of the parties, the entitlements created by law, transaction costs, attitudes toward risk and strategic behaviour will substantially affect negotiated outcomes. (1979:997)

Even economically ‘rational’ parties may not be focussed on the immediate costs and benefits of settling a claim. The incentive to litigate a claim may go beyond the benefits to the immediate parties.\textsuperscript{35} Large organisations and unions may have an incentive to take a particular unfair dismissal claim to trial for its precedent value and the attendant benefits in future litigation. But a small business owner and a non-union applicant may see little benefit in precedent creation. Galanter (1974) refers to the first category as ‘repeat players’ and the second as ‘one shotters’. I return to these terms in a later chapter.

Similarly, Menkel-Meadows’ study of 36 mediations conducted as part of a University of California - Los Angeles mediation clinic observed:

... settlement was considerably more difficult with institutional parties such as governmental agencies, insurance companies or very large landlords, often

\textsuperscript{35} Landes and Posner 1979.
because either the lawyer or the principal was unwilling to look at the specifics of individual cases but tended to treat each legal case as a single example of a larger problem. (1993:375)

Despite the identified weaknesses in Posner’s model it still provides a useful reference point for considering the potential impact of legislative change.

3.3 A Testable Hypothesis

The legislative context or legal architecture within which unfair dismissal conciliations take place has changed significantly over time. These changes are important because they have the potential to impact on conciliator behaviour, the cost of litigation and the parties’ perception of how litigation would resolve their dispute.

These changes also provide a rare opportunity for a longitudinal study of the impact of legal architecture on bargaining and to empirically test the economic theory of trial and settlement. Cooter, Marks and Mnookin (1982) have proposed a testable model of strategic behaviour which predicts how changes in observable variables influence the split between settlement and trial. Some of the predictions are set out in the table below:
By examining the changes in the unfair dismissal legislation and the rate of case settlement over time we can explore the relationship between legal architecture and bargaining/conciliator behaviour.

The thesis posited is that legislative changes which affect the cost of litigation, the remedies from arbitration, and the probability of success ('C', 'A', 'Pa' and 'Pr' in Posner's model) will influence the split between settlement and arbitration.

In the next chapter I review the relevant legislative history. The purpose of this review is to identify legislative changes that may change the variables which affect settlement rate. Chapter 5 places these legislative changes in the context of Posner's settlement model and Chapter 6 assesses the impact of the changes on settlement.
Proposed legislative changes and their predicted impact on settlement is discussed in Chapter 7. The conclusion in Chapter 8 summarises and discusses the results set out in the preceding chapters.
CHAPTER 4 — LEGISLATIVE HISTORY

4.1 Introduction

As noted in the previous chapter, the economic model of trial and settlement predicts that changes which affect either the probable outcome of arbitration or the costs associated with arbitration, will influence the split between settlement and trial. The settlement rate of federal unfair dismissal claims has varied over time. The thesis posited is that this variability is a consequence of the impact of legislative changes on both probable arbitral outcome and the cost of arbitration.

This chapter provides a chronological history of the federal unfair dismissal legislation. This review is necessary because it tells us about the extent of legislative change and when changes occurred affecting probable arbitral outcome and costs. In the next chapter this historical material is grouped thematically, rather than chronologically – for example, all of the changes dealing with the cost of arbitration are dealt with together.

The legislative history of the federal unfair dismissal provisions can be divided into four broad periods:

- The beginning – the Court rules;
- Capping compensation;
- Transition – consent arbitration and the hybrid system;
- End game – the rise of arbitration.
Industrial Relations Reform Act 1993 (Cth)  
Key Features

- operative 30 March 1994
- introduced statutory remedies for unlawful termination of employment (Div 3 Pt VIA)
- employer must provide procedural fairness before terminating an employee because of their conduct or performance (s 170DC)
- employer required to establish that there was a valid reason for termination connected with the employee's capacity or conduct or based on operational requirements (s 170DE)
- remedy of reinstatement or compensation. No limit on the amount of compensation which could be awarded (s 170EE)

The Industrial Relations Reform Act 1993 (Cth) (the Reform Act) introduced statutory remedies for unlawful termination of employment by the insertion of a new division, Division 3 of Part VIA, into the IR Act. The new termination provisions relied on the external affairs power to circumvent some of the constitutional limitations inherent in the use of the conciliation and arbitration power. The limitation associated with the use of the conciliation and arbitration power is the need to create an interstate industrial dispute that is about matters pertaining to the relationship between employers and employees. In the federal system three avenues had been used in an attempt to obtain redress for unfairly dismissed employees.

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Chapter 4 - Legislative History

The first and most common means of redress in practice, was for the parties to agree to accept a recommendation made by the Commission in respect of the matter. This practice was limited to the unionised sector of the economy and the recommendations made were unenforceable. There was also some doubt about the legal basis for the Commission to act in such a capacity. 37

Second, the Termination Change and Redundancy Case, 38 determined that federal awards could contain unfair dismissal clauses. These clauses prohibited employers from terminating the employment of an employee if the termination would be ‘harsh, unjust or unreasonable’. But the question of remedy was problematic. If the award was breached a monetary penalty could be imposed on the employer but no order of reinstatement or payment of compensation could be made. In Gregory v Phillip Morris Ltd 39 the Full Court of the Federal Court held that an unfair dismissal clause in an award was incorporated as a term of the employee’s contract of employment. Hence if an employee was terminated in contravention of the award, this gave rise, not only to a penalty for the award breach, but also to remedies in contract. But this approach was overruled by the High Court in Byrne v Australian Airlines Ltd. 40 In that

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37 In this regard Heerey J in National Union of Workers v Pacific Dunlop Tyres Pty Ltd (1992) 37 FCR 419 at 426-427 made the following comments concerning members of the Commission acting in the capacity of private arbitrators:

"The Act contains no indication that members of the Commission are required or permitted, as part of their official function, to act as private arbitrators. Therefore if, as the employer alleges, the parties in fact agreed that Munro J was to act as a private arbitrator, his Honour would have had to be aware of that agreement and consent to so act. Presumably he would receive payment for his services and would carry out the work in his spare time. He would thus probably need the consent of the Minister to engage in paid employment outside the duties of his office: see s 25(1) of the Act. ... Moreover, since notification of a dispute had been given under s 99 of the Act, Munro J had the statutory obligation under s 100 to deal with the dispute by conciliation or arbitration. This would be, to say the least, inconsistent with his Honour conducting at the same time a parallel private arbitration."

case the Court held that award terms were not automatically incorporated into the contract of employment (see Coulthard 1996).

The third avenue was by way of application to the Commission for an order of reinstatement as part of the settlement of the merits of an industrial dispute. But this course was not without its jurisdictional difficulties – for example there may not be an interstate dispute or the ambit in the relevant log of claims may not be sufficient to support an order of reinstatement of particular employees. In the late 1980s and early 1990s, the High Court took a broader view of the Commission's jurisdiction. As a result it was conceivable that an appropriately worded log of claims could be used to provide the Commission with jurisdiction to make reinstatement orders in settlement of an industrial dispute. But such an avenue remained relatively complex and as a matter of practicality, was only an option in the unionised sector (see McCarry 1997:80-83).

The amendment of the IR Act to insert Division 3 of Part VIA provided remedies for employees whose employment was terminated without a 'valid reason'. Employees were also to be given an opportunity to defend themselves against allegations relating to their conduct or performance (s 170DC).

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42 See Re Federated Storemen and Packers Union of Australia; Ex parte Wooldumpers (Victoria) Ltd (1989) 84 ALR 80.
44 A 'valid reason' is one which relates to the capacity or conduct of the employee or the operational requirements of the employer - s.170DE(1).
Section 170CC provided for the making of regulations to exclude certain classes of employees from specified provisions of Division 3, for example, probationary employees, casuals and employees engaged on a fixed term contract or to perform a specified task (see Pittard 1994:189-190). The extent to which these exclusions have changed over time is dealt with later in this chapter.

The termination provisions laid down new standards in respect of termination of employment. In a case dealing with these provisions Gray J said: 'They constitute a charter of rights for employees. They are directed towards the protection of the existing jobs of employees.' 45 The employee rights created by the new legislative scheme can be categorised as relating to either procedural or substantive fairness, as summarised in the diagram below (also see Pittard 1994:172).

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The IR Court was given exclusive jurisdiction to determine whether or not a termination of employment was unlawful. The IR Court could ‘make such orders as it thinks appropriate in order to put the employee in the same position (as nearly as can be done) as if the employment had not terminated’ (s 170EE(1)). The IR Court could order reinstatement (which included reinstatement in the employee’s former position or re-employment in another job on terms at least as favourable to the employee as the former job) and/or payment of compensation by the employer to the employee. Reinstatement was intended to be the primary remedy to a contravention of Division 3 of Part VIA (other than ss 170DB or 170DD).\footnote{See the joint judgment of Wilcox CJ and Keely J in Liddell v Lembke (t/as Cheryl’s Unisex Salon) (1994) 127 ALR 342 at 346.}
Section 170EE had the effect of placing the onus of proof on the employer. This section provided that the IR Court could make whatever orders it thought appropriate to remedy the effect of the unlawful termination. Subsection 170EE(1) stated that the IR Court could make such an order ‘unless satisfied that the termination of the employee’s employment contravened no provision of this Division’. Thus the onus was on the employer to show that the termination had not contravened Division 3 of Part VIA.

For present purposes the key statutory provisions were ss 170DC and 170DE.

Section 170DC provided that, before terminating an employee’s employment because of his or her conduct or performance, an employer must provide the employee with an opportunity to defend himself or herself against any allegations made, unless the employer could not reasonably be expected to give the employee such an opportunity.

In a number of judgments the IR Court clearly stated that s 170DC was more than a mere technical requirement, rather it provided employees with a valuable right. Moore J pointed out in Perrin v Des Taylor Pty Ltd (Perrin) that s 170DC had at least two purposes. First, it gave the employee the opportunity to demonstrate that the allegations were unfounded or they should not be viewed as reflecting on the employee’s capacity. Second, bringing the allegation to the employee’s attention provides an opportunity for the employee to attempt to persuade the employer that,

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while the allegation is of substance, there are factors that should persuade the employer not to terminate his or her employment. For example, there may be extenuating personal circumstances or the employee may give undertakings about future conduct.

What s 170DC required was that an opportunity be afforded to the employee for him or her to respond to criticism - referred to in s 170DC(a) as an opportunity to ‘defend himself or herself against the allegations’48 – before termination.

The amount of compensation awarded for a failure to provide procedural fairness before termination depended on:

- the severity of the breach (for example, some limited opportunity provided as opposed to no opportunity at all); and
- whether the provisions of procedural fairness would have made a difference in terms of the likelihood of the employee remaining in employment.

Where the Court thought that an employee’s long term prospects in the employment were dim, only nominal compensation was awarded as it was unlikely that the employee would have remained in the employment for very long in any event.

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48 See Lloyd v R.J. Gilbertson (Qld) Pty Ltd (1996) 68 IR 277.
Nicholson v Heaven & Earth Gallery Pty Ltd (Nicholson) was such a case and Wilcox CJ said:

If I had reached the question of compensation, I would have assessed it on the basis that the procedural irregularity deprived Mr Nicholson of a chance of retaining his employment. However, I would not have awarded him a large sum.\(^ {49} \)

Conversely, a substantial amount of compensation would be paid where – but for the s 170DC breach – the employee would have been likely to have been employed for a long time. In Perrin Moore J said:

The conduct of the respondent in contravening s.170DC resulted in the applicant losing employment that, apart from the contravention, he might have remained in for some period of time. …

In my opinion the applicant is entitled to a substantial and not nominal amount of compensation. He has been dismissed from employment of a type that he has generally been engaged in for 18 years in contravention of s 170DC. He is 51 years old. His salary was, on average, approximately $410.00 per week gross. Making some allowance for the possibility that the applicant would have been lawfully dismissed during the period following his termination because his work was unsatisfactory, I decide that the applicant should be awarded $9,500

\(^ {49} \) (1994) 126 ALR 233 at 247.
compensation for the loss of employment arising from the unlawful termination
and I so order.\textsuperscript{50}

The following general principles in relation to s 170DC can be extracted from the
decided cases:

\textbullet Section 170DC was not a mere technical requirement, but provided employees
with a valuable right. While the section did not require any particular formality
this did not mean that it is unimportant or capable of perfunctory satisfaction.\textsuperscript{51}

\textbullet The section was intended to be applied in a practical, common sense way to
ensure that the affected employee was treated fairly.\textsuperscript{52}

\textbullet A mere general exhortation to an employee as to the necessity for improved
performance, even when rather pointed, was not sufficient to satisfy the
requirements of s 170DC. There needed to be:

\textbullet an identification to the employee of the aspects of performance with which
the employer was unhappy (the ‘allegations’) and;

\textbullet an opportunity be afforded to the employee for him or her to respond to
the criticism (i.e. an opportunity to ‘defend himself or herself against the
allegations’).\textsuperscript{53}

\textsuperscript{50} Note 47 at 258-259.
\textsuperscript{51} Liddell v Lembke (t/as Cheryl’s Unisex Salon) (1994) 127 ALR 342; Nicholson v Heaven & Earth
\textsuperscript{52} Gibson v Bosmac Pty Ltd (1995) 60 IR 1; Johns v Gunns Limited (1995) 60 IR 258.
\textsuperscript{53} Note 46.
The second key provision was s 170DE, which stated:

(1) An employer must not terminate an employee’s employment unless there is a valid reason, or valid reasons, connected with the employee’s capacity or conduct or based on the operational requirements of the undertaking, establishment or service.

(2) A reason is not valid if, having regard to the employee’s capacity and conduct and those operational requirements, the termination is harsh, unjust or unreasonable. This subsection does not limit the cases where a reason may be taken not to be valid.

Section 170DE gave effect to Article 4 of the Termination of Employment Convention. This Convention provides that the employment of an employee shall not be terminated without a valid reason connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking, establishment or service.

To satisfy the requirements of s 170DE(1), an employer had to prove that, at the time of dismissal, the operational requirements of the undertaking provided proper grounds for termination. Two elements had to be established:

- a valid reason or reasons;
- which was connected with the employee’s capacity or conduct or based on the operational requirements of the undertaking, establishment or service.
Chapter 4 - Legislative History

It was not sufficient for an employer simply to show that he, she or it acted in the belief that the termination was based on operational requirements. There also had to be a valid reason for the termination.54

The IR Court held that a valid reason is one which is ‘sound, defensible or well founded’. It must be defensible or justifiable on an objective analysis of the relevant facts.55 A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s 170DE(1).56

Employer opposition to the new provisions led to a vigorous public debate and calls for legislative change.57

4.3 Phase 2: Capping Compensation

<table>
<thead>
<tr>
<th>Industrial Relations Amendment Act (No. 2) 1994 (Cth)</th>
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</thead>
<tbody>
<tr>
<td>Key Features</td>
</tr>
<tr>
<td>• operative 30 June 1994</td>
</tr>
<tr>
<td>• excluded employees not employed under award conditions whose wages exceeded a specified amount ($60,000 p.a. indexed)</td>
</tr>
<tr>
<td>• ceiling on compensation introduced (6 months remuneration)</td>
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<tr>
<td>• burden of proof altered, employer no longer required to prove that a termination did not contravene Div 3</td>
</tr>
</tbody>
</table>

57 See, for example, Davis 1994; Davis and Burton 1995; Hannan 1995; Johnston 1994; Thomas 1995.
After barely three months operation, the *Industrial Relations Amendment Act (No. 2) (1994)* (the *1994 Amendment Act*) was passed to amend Division 3 of Part VIA.

For present purposes three changes are worthy of note (see generally Pittard 1995):

- employees not employed under award conditions whose wages exceeded a specified amount ($60,000 per annum, subject to annual indexation) were excluded from key parts of the termination provisions;

- a ceiling was imposed on the amount of compensation which the Court could award. Previously the Court could make such orders as it thought ‘appropriate’. Subsection 170EE(3) was inserted to provide that the amount of compensation must not exceed:

  - in respect of any employee, the equivalent of six months remuneration,

  - in respect of an employee who is not employed under award conditions, $30,000 (subject to annual indexation);

- the burden of proof was altered. Previously s 170EE(1) effectively required an employer to prove that a termination of employment did not contravene the Division. Now the onus of proof under s 170DE was governed by s 170EDA(1), which provided:
(1) If an application under section 170EA alleges that a termination of employment of an employee contravened subsection 170DE(1):

(a) the termination is taken to have contravened subsection 170DE(1) unless the employer proves that, apart from subsection 170DE(2), there was a valid reason, or valid reasons, of a kind referred to in subsection 170DE(1); and

(b) if the employer so proves, the termination is nevertheless taken to have contravened subsection 170DE(1) if the applicant proves that, because of subsection 170DE(2), the reason or reasons proved by the employer were not valid.

In other words, where an application alleges that a termination was not for a valid reason, the onus lies on the employer to prove that there was a valid reason (para (a) of s 170EDA(1)). If it is contended that the termination was ‘harsh, unjust or unreasonable’ the onus is on the applicant.
4.4 Phase 3: Transition – Consent Arbitration and the Hybrid System

<p>| Industrial Relations and Other Legislation Amendment Act 1995 |</p>
<table>
<thead>
<tr>
<th>Key Features</th>
</tr>
</thead>
<tbody>
<tr>
<td>• operative 15 January 1996</td>
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<tr>
<td>• applications to commence in the Commission not the IR Court</td>
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<tr>
<td>• option of consent arbitration introduced</td>
</tr>
<tr>
<td>• alternative remedy requirements weakened</td>
</tr>
<tr>
<td>• IR Court and Commission required to consider all the circumstances of the case in determining remedy</td>
</tr>
</tbody>
</table>

The *Industrial Relations and Other Legislation Amendment Act 1995* (the 1995 *Amendment Act*) represented another attempt to address employer concerns about the unfair dismissal legislation.  

Four key amendments were made to the termination provisions:

- all applications would commence in the Commission, rather than the IR Court;
- the option of binding arbitration by the Commission would be available with the agreement of the parties (consent arbitration);

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the termination of employment provisions of the *IR Act* would not apply where there was an alternative available under another law that satisfied the requirements of the Termination of Employment Convention; and

the IR Court and the Commission would be required to consider all the circumstances of the case in deciding what remedy (if any) should be given.

### 4.4.1 Starting in the Commission

As a result of the *1995 Amendment Act*, an application for a remedy in respect of the termination of an employee's employment was to be lodged in the Commission (s 170EA(1)). Previously applications had been lodged in the IR Court and then referred to the Commission for conciliation.

When such an application was made the Commission was required to treat it as a request for the Commission to attempt to settle the matter by conciliation (s 170EA(4)).

Under the *Reform Act* the Commission could conciliate in respect of unlawful termination applications which were referred to it for that purpose by the Court (see s 170ED of the *IR Act*). This provision was repealed and a new section, s 170ED, was enacted to outline the conciliation process. Section 170EB stated:
(1) When an application is lodged with the Commission, the Commission must inquire into the matter to which the application relates and try to help the parties to the conciliation to agree on terms for settling the matter.

(2) If the Commission decides that the matter cannot be settled by conciliation, or further conciliation, within a reasonable period, the Commission must:

(a) inform the parties to the conciliation that it has so decided; and

(b) invite the parties to elect, by notice in writing given to the Commission, either at once or within a period specified by the Commission, to have the matter dealt with by consent arbitration.

(3) At any time during the conciliation of a matter, the parties to the conciliation may elect, by notice in writing given to the Commission, to have the matter to which the conciliation relates dealt with by consent arbitration, and, upon their so doing, the conciliation process ends.

(4) To avoid doubt, the Commission's functions under this section are additional to its other functions, and are not subject to any implied limitations arising from the existence of any of its other functions.
During the conciliation process s 170EB obliged the conciliator to:

- inquire into the matter to which the application relates; and
- try to help the parties to agree on terms for settling their dispute.

4.4.2 Consent Arbitration

If the conciliator decided that the matter could not be settled by conciliation within a reasonable period, it was obliged to:

... invite the parties to elect, by notice in writing given to the Commission, either at once or within a period specified by the Commission, to have the matter dealt with by consent arbitration. (s 170EB(2)(b))

The parties could elect to move to consent arbitration at any time during the conciliation process (ss 170EB(3)). Consent arbitration could only take place where both parties agreed. Either party could insist on having the matter determined by the IR Court (s 170ED).

As a matter of practice, parties were in fact given three options in the event that the claim did not settle by conciliation, namely: private arbitration, consent arbitration or referral to the IR Court. The first two options required the agreement of both parties. Referral to the IR Court was the default option in the absence of such an agreement.
Private arbitration was a non-statutory remedy. The conciliator generally explained to the parties that private arbitration had the following features:

- the conciliator or another Commission member would conduct the arbitration;
- there was no appeal; and
- reasons would not normally be given.

Private arbitration was often conducted immediately after the conclusion of the conciliation conference. It was designed to provide a quick and inexpensive remedy. It was best suited to those cases where the differences between the parties were narrow and hence the framework of an arbitrated outcome had been established. Parties who opted for private arbitration were required to enter into a deed under which they agreed to abide by the result.

In practice private arbitration was not widely used. Of the 14,101 applications lodged during the period 15 January to 31 December 1996 only 88 were settled by this means.\(^5^9\)

A decision by the parties to enter into the consent arbitration process constituted an agreement between the parties. The elements of such an agreement were that the parties would:

\(^5^9\) AIJC Registry unpublished figures.
submit the matter to consent arbitration;

- comply with any requirement of the Commission for the purpose of that arbitration; and

- comply with any award made by the Commission arising from the arbitration or from a subsequent appeal to a Full Bench of the Commission (s 170EC(1)).

If the parties elected to proceed to consent arbitration, that election could not be revoked, either unilaterally or by agreement.\(^{60}\)

On one view of it, the introduction of consent arbitration did no more than confirm what the parties could do previously. As a general proposition a person for whose benefit statutory provisions had been enacted was at liberty to waive their right to the performance of those duties.\(^ {61}\) There were exceptions to this proposition; that is:

- where its application would be contrary to public policy or to the provisions or general policy of the statute imposing the duty; or

- if the duties were imposed in the public interest.\(^ {62}\)

The validity of an agreement which ousts the statutory jurisdiction of a Court will depend on the policy and purposes of the jurisdiction in question.\(^ {63}\) In this regard, the right to continue proceedings for unlawful termination beyond the conciliation

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\(^{61}\) Commonwealth v Verwayen (1990) 95 ALR 321.


\(^{63}\) Felton v Mulligan 45 ALJR 525 at 531 per Windeyer J; Brooks v Burns Philp Trustee Co. Ltd (1969) 121 CLR 432.
phase is a personal right. Nothing in the IR Act specifically precluded parties from trying to resolve their dispute outside the procedures established under that Act.

Despite the fact that consent arbitration may have been available before the 1995 Amendment Act, the legislative recognition of this process had a number of advantages. Previously, if the parties to unlawful termination proceedings agreed to enter into private arbitration, they took themselves out of the statutory framework established by the IR Act. As a consequence any determination by a private arbitrator would not be appealable and enforcement may be problematic. A party to such proceedings would only have rights in contract created by the agreement to enter into private arbitration.\(^{64}\)

The new ‘consent arbitration’ provisions had an ancillary right of appeal and a mechanism to enforce any award made. The arbitration would be conducted without charge and by a member of the Commission. There is also some doubt about whether members of the Commission can, in the absence of legislative authority, act as private arbitrators.\(^{65}\)

4.4.3 Alternative Remedies

The third key change clarified the position where a state law provided an adequate alternative to the federal remedy. The former s 170EB provided:

\(^{64}\) See *Watson v Royal Selangor (Aust) Pty Ltd* unreported, IR Court, 4 July 1995 per Parkinson JR.

\(^{65}\) See Note 37.
The Court must decline to consider or determine an application under section 170EA if satisfied that there is available to the employee ... an adequate alternative remedy, in respect of the termination, under existing machinery that satisfies the requirement of the Termination of Employment Convention.

The nature of the test in s 170EB was dealt with by Keely J in Wylie v Carbide International Pty Ltd (Wylie)\(^{66}\) in which he accepted the following submission:

\[
\text{... before the Court declines to consider the application, it must be satisfied that (1) there is available to the employee an adequate alternative remedy ie adequate when compared with the remedy available under s 170EE of the Commonwealth Act as amended by Act No 97 of 1994; (2) that alternative remedy is available under existing machinery; and (3) that existing machinery satisfies the requirements of the Convention.}
\]

The Wylie formulation was adopted, expressly or impliedly, in subsequent cases.\(^{67}\) In practical terms, it meant that state laws were tested against both the Termination of Employment Convention and the provisions of Division 3 of Part VIA of the IR Act. This made it difficult for any state system to be considered ‘adequate’ even though it met the requirements of the Convention.

\(^{66}\) (1994) 55 IR 326 at 329.

\(^{67}\) See ASU v Gold Coast Community Options Association Inc (1994) 124 ALR 505; Liddell v Lembke (t/as Cheryl’s Unisex Salon) (1994) 127 ALR 342 in which the Full Court held that the provisions of the Industrial Relations Act 1991 (NSW) did not constitute an adequate alternative remedy; Fryar v Systems Services Pty Ltd (1995) 130 ALR 168 in which the IR Court held that the provisions under the Industrial Relations Act 1994 (SA) did not provide an adequate alternative remedy.
In the second reading speech on the 1995 Amendment Bill the Assistant Minister for Industrial Relations, Mr Johns, said that this aspect of the IR Act 'has operated more strictly than anticipated, so that only state laws which virtually replicate the federal legislation could be treated as alternative remedies' (Johns 1995:820-821).

The amendments provided that a state law would be taken to be an adequate alternative remedy where it required the relevant state tribunal to give effect to the Convention and gave it the necessary powers to do so (ss 170ED(4) and (5)).

4.4.4 Remedies and all of the Circumstances

The final key change required the IR Court, and the Commission (by virtue of s 170EC(4)), to have regard to ‘all of the circumstances of the case’ when:

- determining whether a termination is harsh, unjust or unreasonable (s 170DE(2)); and
- deciding whether to grant a remedy (s 170EE).

Prior to the amendments a number of judgments had expressed the view that, where there was a breach of subdivision B of Division 3 of Part VIA, the IR Court did not have an open discretion to refuse a remedy.68 The amendments were designed to

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68 Note 46 at 359-360 per Wilcox CJ and Keely J and at 368 per Gray J.
overcome the effect of these judgments. As the Assistant Minister said in this second reading speech:

The Act will be amended to make it clear that a breach of an employer's obligations will not automatically lead to a remedy. It has been suggested that remedies are given for breaches based only on procedural grounds without regard to the overall circumstances. Such a situation should not exist. For example, there should not be any guarantee of a remedy where the only defect in the employer's conduct has been some failure to provide procedural fairness and the employee's conduct warrants dismissal. To make it clear that this situation is not intended, the Court will be required to consider all the circumstances in deciding whether a remedy of reinstatement or compensation should be granted and, if so, what the remedy should be. (Johns 1995:821)

Pittard (1995:243) suggests that the amendment may have been introduced to placate some employers who were opposed to remedies for unlawful termination based on fairness and who perceived a bias in favour of employees in the manner in which claims were being determined.

The practical impact of the amendment is difficult to judge. In *Nicholson*, Wilcox CJ said:

The word "impracticable" requires and permits the Court to take into account all the circumstances of the case, relating to both the employer and the employee, and to evaluate the practicability of a reinstatement order in a commonsense
way. If a reinstatement order is likely to impose unacceptable problems or embarrassments, or seriously affect productivity, or harmony within the employer’s business, it may be “impracticable” to order reinstatement, notwithstanding that the job remains available. (emphasis added)\textsuperscript{69}

On the test propounded by Wilcox CJ it would seem that the Court was to have regard to all of the circumstances of the case (at least in relation to reinstatement) prior to the 1995 Amendment Act changes.\textsuperscript{70}

For completeness, it should be noted that the 1995 Amendment Act also amended the IR Court’s power to award costs. Under the Reform Act the Court’s inherent power to award costs was subject to s 347 which states:

(1) A party to a proceeding (including an appeal) in a matter arising under this Act shall not be ordered to pay costs incurred by any other party to the proceeding unless the first mentioned party instituted the proceeding vexatiously or without reasonable cause.

(2) In subsection (1):

‘costs’ includes all legal and professional costs and disbursements and expenses of witnesses.

\textsuperscript{69} Note 49 at 61.  
The 1995 Amendment Act inserted s 170EHA dealing with costs and unlawful termination proceedings. Section 170EHA provided:

(1) If, in relation to a matter referred to the Court under section 170ED, the Court is satisfied that a party to the proceeding has caused any other party to the proceeding to incur costs because of an unreasonable act or omission of the first mentioned party in connection with the conduct of the proceeding following the referral, the Court may order the first mentioned party to pay all or part of the costs incurred by that other party.

(2) This power is in addition to, and not in derogation from, any other power of the Court to award costs.

(3) In this section:

‘costs’ includes all legal and professional costs and disbursements and expenses of witnesses.

The 1995-96 IR Court Annual Report made the following observation about ss 347 and 170EHA:

The loser pays principle does not apply in the Industrial Relations Court of Australia. Section 347 of the Industrial Relations Act 1988 imposes limits on the Court’s power to award costs in industrial claims, including unlawful termination claims. ... s 170EHA was inserted on 15 January 1996 to deal especially with
costs in unlawful termination of employment cases. It provides that the Court may award costs against a party where it is satisfied that the party has caused costs to another party because of an unreasonable act or omission. ... The lack of a loser pays costs rule and the cap on the Court's power to award compensation continue to provide a considerable incentive to parties to limit their costs. From an employer's point of view, there is rarely any hope of recovering costs, even if the employer wins the case. For the employee, each dollar spent on legal costs must be deducted from any compensation the Court may award if the claim succeeds.

The introduction of s 170EHA into the IR Act appears to have had little impact on the incidence of costs orders. The IR Court seems to have treated the expressions 'without reasonable cause', in s 347(1), and 'an unreasonable act', in s 170EHA, as relevantly indistinguishable concepts.\(^{71}\) Accordingly, it was unlikely that s 170EHA affected the cost of litigating, as opposed to settling, an unfair dismissal claim.

\(^{71}\) See Rabel v Whitehorse City Council (1999) 89 IR 327; MacDonald v Queensland Justices & Community Legal Officers Association (Inc) (1998) 43 AILR 3-789.
4.5 Phase 4: End Game – The Rise of Arbitration

<table>
<thead>
<tr>
<th>Workplace Relations and Other Legislation Amendment Act 1996 (Cth)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Key Features</td>
</tr>
<tr>
<td>• operative date 31 December 1996</td>
</tr>
<tr>
<td>• coverage more restrictive</td>
</tr>
<tr>
<td>• conciliator to provide the parties with an assessment of the merits of any unresolved claim (s 170CF(2)(b))</td>
</tr>
<tr>
<td>• ‘harsh, unjust or unreasonable’ test transposes what were substantive rights to factors to be taken into account (s 170CG(3))</td>
</tr>
<tr>
<td>• remedies generally – range of new factors to be taken into account including the effect of an order on the viability of the employer's undertaking (s 170CH(2))</td>
</tr>
<tr>
<td>• ceiling on compensation reduced (s 170CH(8))</td>
</tr>
<tr>
<td>• approach to reinstatement amended (ss 170CH(3) and (9)); now requires consideration of the appropriateness of reinstatement</td>
</tr>
<tr>
<td>• Commission given power to award costs (s 170CJ)</td>
</tr>
<tr>
<td>• $50 filing fee</td>
</tr>
</tbody>
</table>

The previous amendments dampened but did not extinguish employer criticism of the termination provisions (see ACCI 1996:7).

The industrial relations policy of the Liberal-National Party Coalition (the Coalition), released before the March 1996 election, reflected the criticisms of employer organisations that the provisions remained ‘far too detailed, too prescriptive and too legalistic and hence a disincentive to employment’. The policy committed the Coalition to replacing the existing system with one based on the principle of a ‘fair go all round’, ‘to ensure a scheme which is fair to both employee and employer’.72 After

the election the Coalition Government implemented this aspect of its policy with the enactment by Parliament of the WROLA Act. Schedule 6 of the WROLA Act repealed most of the existing Division 3 introduced in 1994 and replaced it with a different set of provisions in a renamed Act, the Workplace Relations Act 1996 (Cth) (the WR Act).

A detailed review of these changes is beyond the scope of this paper (see Chapman 1997). For present purposes five changes are important:

- coverage;
- the conciliation process;
- ‘harsh, unjust or unreasonable’ terminations;
- remedies; and
- costs.

The key termination provision in the WR Act is s 170CE(1) which provides that an employee whose employment has been terminated by the employer may apply to the Commission for relief:

- on the ground that the termination was ‘harsh, unjust or unreasonable’;
- on the ground of an alleged contravention of ss 170CK, 170CL, 170CM or 170CN (these deal with termination for a prohibited reason; notification of the Commonwealth Employment Service of a proposed termination; notice of termination; and terminations in contravention of an order under s 170FA, respectively); or
any combination of those grounds.

The first ground can conveniently be referred to as the ‘unfair dismissal’ ground. The second ground relates to terminations which contravene certain statutory provisions – sometimes referred to as ‘unlawful termination’ grounds.

The distinction between ‘unfair dismissal’ and ‘unlawful termination’ is important because it determines who may apply for relief and the forum in which the claim is determined. Applications alleging unfair dismissal are determined by the Commission; applications alleging unlawful termination are determined by the Federal Court.

The difference in the forum reflects a distinction between arbitral and judicial power. Chapter III of the Australian Constitution, in particular ss 71 and 72, provides that the judicial power of the Commonwealth may only be vested in a court comprised of judges with tenured appointments. In *Boilermakers* the High Court held that a Chapter III court exercising judicial power could not also exercise non-judicial power.

In the federal system the Commission exercises ‘arbitral’ or ‘quasi-legislative functions’ of dispute settlement by conciliation and arbitration and the Federal Court enforces and interprets the Commission’s awards and orders. The distinction is between the creation of new legal rights and obligations (an arbitral function) and the enforcement of pre-existing legal rights (a judicial function).

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73 Note 18.
74 Subsequently upheld by the Privy Council, (1957) 95 CLR 529.
There is no clear definition of what constitutes judicial power.\textsuperscript{75} As a 'rough working guide' Creighton and Stewart (1994:78-79) contend that the Commission would be exceeding its power if it sought to enforce pre-existing legal rights rather than create new rights.

In the context of the termination of employment provisions, unlawful termination applications seek the enforcement of pre-existing legal rights; for example, not to be terminated on certain grounds (s 170CK) or without the prescribed notice (s 170CM).\textsuperscript{76} In arbitrating an unfair dismissal claim, the Commission makes a determination as to whether the termination was harsh, unjust or unreasonable. If such a determination is made, the Commission may create a right to reinstatement or compensation.\textsuperscript{76}


\textsuperscript{76} In Mine Management Pty Ltd v Construction, Forestry, Mining and Energy Union, Wilcox and Madgwick JJ observed that the nature of the arbitration undertaken by the Commission under Division 3 of Part VIA of the WR Act is not industrial arbitration. Their Honours said:

"[73] A breach by an employer of the obligation, impliedly created by Div 3, not to terminate employment harshly, unjustly or unreasonably may give rise to proceedings in the Commission to enforce rights which are quite unlike proceedings of the type with which the Commission (and its predecessors) has been traditionally involved, namely, proceedings to prevent and settle, by conciliation and arbitration, industrial disputes extending beyond the limits of a State. Proceedings under Div 3 involve the enforcement of individual rights by reference to past events. They involve a process of hearing and determination which is (at least) quasi-judicial in character. The Commission must ascertain what the relevant facts are and whether the established facts demonstrate contravention of the standard established by Div 3 and, if demonstrated, what the statutory remedy should be.

[74] The Act uses the word "arbitration" to describe the adjudication undertaken by the Commission under Div 3: see ss 170CG and 170CH. However, the use of that word does not mean the Commission's power under that Division is arbitration of the type referred to in s 51(xxxvi) of the Constitution. The word might have been adopted in order to signify that the Commission was not being invested with judicial power. The process of hearing and determination under Div 3 is not the same as the arbitral process which involves the Commission determining what quasi-legislative regime should regulate the future industrial relationship between an employer and its existing and future employees. The industrial arbitral power is primarily exercised, not for the purpose of vindicating rights having regard to past conduct, but rather to prevent or settle a dispute that may cause future difficulties or losses." 1989 (164 ALR 73 at 97. Also see Moore J in Blagojevich 2000 172 ALR 611 at 615.
As Creighton and Stewart (1994:78) note, there is often a fine line between judicial and arbitral power. Debate about the correctness of the distinction reflected in Div 3 of Pt VIA of the WR Act is beyond the scope of this thesis.

4.5.1 Coverage

The Reform Act provisions, even after the 1994 and 1995 Amendment Acts, applied to most employees who did not have access to an adequate remedy under the law of a State (Chapman 1997:101). The application of Division 3 in the WR Act is much narrower.

Section 170CB provides that, subject to exclusion by regulation under s 170CC, the substantive right not to have employment terminated in a harsh, unjust or unreasonable way only applies to certain categories of employees. The relevant categories include Commonwealth public servants, persons employed in a Territory other than Norfolk Island and Federal award employees who were employed by a constitutional corporation.

The effect of these changes was to significantly reduce the coverage of the federal termination provisions.

Section 492 of the Workplace Relations and Other Legislation Amendment Act (No. 2) 1996 (Cth) subsequently extended the operation of the termination of employment provisions to all employees in Victoria.77 The provisions have the same

77 See generally Kollmorgen 1997.
operation in Victoria as they do in the Territories. Legislation in New South Wales and Queensland has also been enacted to extend the operation of the federal provisions to all federal award employees.

The other substantive rights in Division 3 (e.g. those relating to unlawful termination) apply to all employees who are not excluded by regulation pursuant to s 170CC.

Section 170CC provides for the making of regulations to exclude certain classes of employees from specified provisions of Division 3. The Reform Act excluded similar classes of employees (see IR Act, ss 170CC and 170CD; IR Regulations 30B, 30BA, 30BB and 30BC) but a number of the regulations made pursuant to s 170CC are more restrictive than those made pursuant to the IR Act.

For example, in relation to probationary employees, new reg 30B(1)(c) excludes from the operation of the key provisions of Division 3:

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76 Workplace Relations and Other Legislation Amendment Bill (No. 2) 1996 (Cth) Explanatory Memorandum at 1.

79 In Moore v Newcastle City Council (1997) 77 IR 210 the NSW Industrial Relations Commission held that federal award employees who could not access the federal unfair dismissal provisions – for example, because their employers were not constitutional corporations – could not seek redress under the NSW Act. In 1998, s.90A was inserted into the Industrial Relations Act 1996 (NSW) enabling excluded federal award employees to access the federal unfair dismissal provisions (see ss.5(8) and (9) of the WR Act). Subsections 72(7) and (8) of the Industrial Relations Act 1999 (Qld) are in similar terms.

In Western Australia, a Full Bench of the WA Industrial Commission has declined to follow Moore’s case and held that it has jurisdiction under the Industrial Relations Act 1979 (WA) to grant a remedy for unfair dismissal to a federal award employee, subject to any inconsistency between the WA Act and the relevant Federal award (see Hull v City of Mandurah (1999) 79 WAIG 1874).
employees serving a period of probation or a qualifying period of employment of **three months or less**, provided the duration of the period or the maximum duration of the period is determined in advance; and

employees serving a period of **more than three months**, provided the duration of the period or the maximum duration of the period is determined in advance and is of **reasonable duration** having regard to the nature and circumstances of the employment.

The former regulation provided that in order to be excluded from the relevant provisions of the **IR Act all probationary periods had to be:**

- determined in advance; and
- reasonable, having regard to the nature and circumstances of the employment (reg 30B).

The effect of the new regulation is that the requirement that the probationary period be reasonable only applies to periods in excess of three months.

This change is potentially significant. Under the former provisions the test for **all** probation periods was whether the duration of the period was **'reasonable having regard to the nature and circumstances of the employment'**. In **Nicholson** Wilcox CJ
saying of the former reg 30B:

Probably the most important consideration, in determining what is a reasonable period, will be the nature of the job. In the case of a person employed to carry out repetitive duties under close supervision, a reasonable period may not extend beyond a week or two. ... The legislature has not prescribed the maximum extent of a reasonable period. It is not for me to do so. But I suspect that an employer will rarely be able to justify a period exceeding two or three months. (emphasis added)

If employers were to adopt a general practice of placing employees on a three month probation period then WR Regulation 30B(1)(c) would exclude a significant number of potential applicants. In 1995-96 some 15 percent of unlawful termination claims were filed by employees with less than three months service (IRCA 1996:27-28). The most recent ABS job mobility figures show that 30 per cent of persons who ‘ceased their last job involuntarily’ had been employed for less than three months.81

The exclusions applicable to a number of other classes of employees were also extended. For example, casual employees engaged for a ‘short period’ have always been excluded. But what constitutes a ‘short period’ has changed. New reg 30B(3) provides that a casual is taken to have been engaged for a ‘short period’ unless the employee has, among other things, been engaged for a sequence of engagements

for a period of at least 12 months. Under the former regulation the time period was six months.

The exclusion of employees engaged under contracts for a fixed period or fixed task has also been extended. Former reg 30B(1)(aa) excluded employees engaged under a contract of employment for a fixed period provided the fixed period was less than six months. New reg 30B(1)(a) removes the requirement that fixed term contracts be for a period of less than six months.

4.5.2 The Conciliation Process

Once an application is lodged it is referred to conciliation. Section 170CF deals with the conciliation process. Two of the new requirements in s 170CF are significant:

- the conciliator must provide the parties with his or her assessment of the merits of the application; and
- the conciliator may recommend that the applicant not pursue the application, whether or not also recommending other means of resolving the matter.

The impact of these changes on conciliator power is discussed in Chapter 6.
4.5.3 Harsh, Unjust or Unreasonable

The WR Act shifted the conceptual focus of the termination provisions. They were no longer concerned with the vindication of employee rights, the focus was now on the goal of providing a fair go all around.

Figure 4
The WR Act: A Shift in Conceptual Focus

<table>
<thead>
<tr>
<th>IR ACT</th>
<th>WR ACT</th>
</tr>
</thead>
</table>
| Vindication of employee rights based on substantive rights  
- termination must be for a valid reason;  
- procedural fairness must be given;  
- an employee cannot be lawfully terminated for a prohibited reason. | Balancing the interests of employers and employees.  
Conceptual goal of providing a ‘fair go all round’.  
Commission to decide, on balance, if the termination was harsh, unjust or unreasonable.  
Required to have regard to specified factors, but none are determinative. |

This shift in conceptual focus is evidence from a comparison of the relevant legislative provisions.

Under the WR Act, if conciliation fails to settle an application and a s 170CF(2) certificate has been issued, an applicant must make an election to either proceed to arbitration in the Commission or to begin proceedings in the Federal Court. As previously mentioned, ‘unfair dismissals’ are determined by the Commission and unlawful terminations are dealt with by the Federal Court.

In the period from 31 December 1996 to 30 June 1999, 3,978 s 170CF(2) certificates were issued; 3,888 of these (98 per cent) identified the unfair dismissal ground as an unresolved matter (AIRC Registry statistics).  

111
If an applicant elects to proceed to arbitration to determine whether the termination was ‘harsh, unjust or unreasonable’, the Commission may proceed to arbitrate the matter (s 170CG(1)). In determining whether a termination was ‘harsh, unjust or unreasonable’, s 170CG(3) requires the Commission to ‘have regard to’:

(a) whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer’s undertaking, establishment or service; and

(b) whether the employee was notified of that reason; and

(c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and

(d) if the termination related to unsatisfactory performance by the employee — whether the employee had been warned about that unsatisfactory performance before the termination; and

(e) any other matters that the Commission considers relevant.

The expression ‘have regard to’ has a generally accepted meaning in a context such as s 170CG(3). It requires the arbitrator to take the factors listed into account and to
give weight to them as fundamental elements in making his or her determination.\textsuperscript{82}

As Chapman (1997:91-92) points out, none of the considerations in s 170CG(3) is new in the sense that each was contained in the \textit{IR Act} (expressly or by implication). What is new is the transposition of what were substantive rights in the \textit{IR Act} to factors to which regard must be had in determining whether a termination was \textit{harsh, unjust or unreasonable} under the \textit{WR Act}. As Chapman suggests a failure by an employer to fulfil any one or more of the factors in s 170CG(3)(a)-(d) does not necessarily give rise to the conclusion that the termination was harsh, unjust or unreasonable. The decided cases from State jurisdictions with similar provisions and subsequent Commission decisions supports this assessment.\textsuperscript{83} The factors in s 170CG(3)(a)-(d) are relevant, but not necessarily determinative of a finding that a termination was \textit{‘harsh, unjust or unreasonable’}.

Section 170CG(3)(e) provides that the Commission must have regard to any other matter which it considers relevant. Conceivably this could enable an employer to

\textsuperscript{82} In \textit{R v Hunt; Ex parte Sean Investments Pty Ltd} (1979) 25 ALR 497 Mason J made the following observation at 504 about the expression, albeit in a different legislative context:

\textit{‘When sub-s (7) directs the Permanent Head to “have regard to” the costs, it requires him to take those costs into account and to give weight to them as a fundamental element in making his determination ... However, the sub section does not direct the Permanent Head to fix the scale of fees exclusively by reference to costs necessarily incurred and profit. The sub section is so generally expressed that it is not possible to say that he is confined to these two considerations. The Permanent Head is entitled to have regard to other considerations which show, or tend to show, that a scale of fees arrived at by reference to costs necessarily incurred, with or without a profit factor, is excessive or unreasonable.’} \textsuperscript{83}

advance a plea of financial hardship – a matter which would not have constituted a
defence under the IR Act. In *Liddell v Lembke (t/as Cheryl’s Unisex Salon) (Liddell)*,84
a Full Court of the IR Court considered a provision in similar terms (s.249 of the
Industrial Relations Act 1991 (NSW)) in deciding whether legislation in NSW provided
an adequate remedy within the meaning of s.170EB of the IR Act. The joint judgment
of Wilcox CJ and Keely J includes at 359:

> The New South Wales Commission … is merely empowered, “if appropriate”, to
take into account the six matters listed in s 249. One of these is para (f), “such
other matters as the Commission thinks relevant”. Whatever the limits of this
paragraph, it seems to enable the Commission to take into account matters that
clearly would not constitute a defence under the Commonwealth Act. For
example, it might be open to the Commission to take into account a plea of
financial hardship by an employer who has dismissed an employee in breach of
s 170DE or s 170DF.

In *Fryar v Systems Services Pty Ltd (Fryar)*,85 the IR Court drew a distinction
between state unfair dismissal systems – which have broadly the same
characteristics as the current WR Act – and the task performed by the Court under
the IR Act. The task given to the state tribunals was said to require them to consider
all of the circumstances of a dismissal and to decide whether, on balance, those
circumstances are such as to make the termination ‘harsh, unjust or unreasonable’.
The IR Court was said to exercise a ‘totally different function’.86 It was required to

84 (1994) 127 ALR 342.
86 Note 45 at 188 per Gray J.
determine whether a contravention of certain provisions had occurred. If such a contravention had occurred, it was required to proceed to deal with the question of remedy.

In this context, the IR Court observed that the IR Act provided a mechanism for the 'vindication of the rights of an unlawfully dismissed employee'. By contrast, unfair dismissal regimes merely empowered the tribunal 'to make reinstatement or compensation orders where it was of the opinion that the dismissal of the applicant was harsh, unjust or unreasonable'.

It is also important to note that s.170CA(2) provides some guidance to the interpretation of the harsh, unjust or unreasonable test by the use of the phrase 'fair go all round'. Section 170CA sets out the objects of Division 3 of Part VIA of the WR Act. In the context of a s.170CG arbitration, it is relevant to note that s 170CA(1)(b) states that one of the objects of the Division is 'to provide, if the conciliation process is unsuccessful, for recourse to arbitration or to a court depending on the grounds on which the conciliation was sought'. Section 170CA(2) provides:

\[
\text{The procedures and remedies referred to in paragraphs (1)(a) and (b), and in the manner of deciding on and working out such remedies, are intended to ensure that, in the consideration of an application in respect of a termination of}
\]

\[\text{Note 45 at 182 per Wilcox CJ and Beazley J.}\]
employment, a ‘fair go all round’ is accorded to both the employer and employee concerned.

In *Windsor Smith v Liu and others*\(^8^8\) a Full Bench of the Commission said:

> Under the Workplace Relations Act 1996 the principal question is whether the termination was harsh, unjust or unreasonable. In considering that question the Commission is to ensure that a “fair go all round” is accorded to both the employer and the employee concerned.

Whether there has been a ‘fair go all round’ is a matter which is relevant to the determination of whether the termination was harsh, unjust or unreasonable.\(^8^9\) It is not necessarily determinative,\(^9^0\) but it is a factor to be taken into account.

The Australian Chamber of Commerce and Industry (ACCI) viewed the ‘fair go all round’ approach as involving a ‘pragmatic assessment’ leading to a more balanced outcome, as opposed to what it described as the more rigid legalistic approach taken by the IR Court under the former *IR Act* (ACCI 1995:4-5).

Chapman (1997:94-95) suggests that the ‘fair go all round’ approach in conjunction with the statutory formula in s 170CG(3) will lead to a move away from concepts of

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\(^{8^8}\) *Windsor Smith v Liu and others*, unreported AIRC, (Giudice P, Polites SDP and Gay C), Print Q3462, 13 July 1998.

\(^{8^9}\) *Mollinger v National Jet Systems Pty Ltd*, AIRC unreported, AIRC (Ross VP), Print Q5911, 8 September 1998; upheld on appeal, unreported (Giudice P, Polites SDP and Gregor G), Print R3130, 18 March 1999.

\(^{9^0}\) See *Banh v Bridgestone TG Australia Pty Ltd*, unreported, AIRC (McIntyre VP, Duncan DP and Jones C), Print Q4039, 27 July 1998.
employee rights and towards notions of balancing interests of employers and employees. This proposition is supported by the judgment of Gray J in Fryar91:

... the present State Act, like their counterpart in New South Wales, operate in the realm of the "fair go all round". This well known phrase comes from the reasons for decision of the New South Wales Industrial Commission in Re Loty, and Holloway and Australian Workers' Union [1971] AR (NSW) 95 at 99. That is not a realm which this court inhabits. The provisions of Div 3 of Pt. VIA of the federal Act are not directed to achieving some balance between the interests of employers and employees in particular cases. They constitute a charter of rights for employees. They are directed towards the protection of the existing jobs of employees. Thus, once the court finds that a contravention has occurred it must proceed to deal with the question of remedies. If there is any discretion not to reinstate the employee in accordance with s 170EE(1)(a), it is a discretion of the most minimal kind. Only if reinstatement is impracticable is the court permitted to consider the question of compensation.

4.5.4 Remedy

Three points are relevant in respect of the remedies available under the WR Act. First, the calculation of the ceiling on the amount of compensation which may be awarded is different from that under the IR Act. Section 170EE(3)(a) of the IR Act provided that the amount of compensation must not exceed:

91 See Note 85.
... the amount of remuneration that would have been received by the employee in respect of the period of 6 months that immediately followed the day on which the termination took effect if the employer had not terminated the employment and the employee had continued to receive remuneration in respect of the employment at the rate at which he or she received remuneration immediately before the termination took effect; ...

In effect, the ceiling on the amount of compensation which could be awarded previously was six months remuneration based on the rate of remuneration the employee received immediately before the termination. Section 170CH(8) of the WR Act is different. It provides that the amount which may be awarded by the Commission in lieu of reinstatement is limited to the total amount of remuneration received by the employee in the six month period before the termination.\textsuperscript{92}

The WROLA Act altered this position slightly by providing that the ceiling was the remuneration received by the employee 'or to which the employee was entitled (whichever is higher)', in the six month period before the termination. The purpose of the later amendment was to deal with circumstances where an employer has been underpaying the employee in breach of the award, agreement or contract of employment.

The potential impact of the change in the method of calculating the compensation ceiling is considered in Chapter 6.

\textsuperscript{92} See regulation 30BE of the Workplace Relations Regulations in respect of cases where the employee was on leave without pay for all or part of the six month period.
Second, the terms of ss 170CH(3) and (6) (dealing with reinstatement) are different to the comparable provisions of the *IR Act*. Under s 170EE(2) of the *IR Act*, the IR Court and the Commission were required to consider whether reinstatement was *impracticable*. In *Liddell*, Gray J said at 368 that this meant that reinstatement is required if it can be done. This view represented the 'high water mark' of the Court's approach to reinstatement. In the same case, Wilcox CJ and Keely J said:

> Plainly, it was Parliament's intention that the primary remedy for unlawful termination should be reinstatement and that compensation should be available only where this was impracticable.

The precise meaning of "impracticable" in this context should be left to another day; the question is one of general importance and it was not fully argued in this case. But, although "impracticable" does not mean "impossible", it means more than inconvenient" or "difficult". The imposition of such a stringent limitation on the court's power to award compensation, rather than order reinstatement, is inconsistent with the notion that Parliament intended the court to have an open discretion whether to intervene at all.\(^{93}\)

The meaning of the word 'impracticable' was given further consideration by Wilcox CJ in *Nicholson*.\(^{94}\) He said:

\(^{93}\) Note 46 at 360.
\(^{94}\) Note 49 at 244.
It is important to note that Parliament stopped short of requiring that, for general compensation to be available, reinstatement be impossible. The word "impracticable" requires and permits the court to take into account all the circumstances of the case, relating to both the employer and the employee, and to evaluate the practicability of a reinstatement order in a commonsense way. If a reinstatement order is likely to impose unacceptable problems or embarrassments, or seriously affect productivity, or harmony within the employer's business, it may be "impracticable" to order reinstatement, notwithstanding that the job remains available.

This approach was followed by von Doussa J in Cox v South Australian Meat Corporation\textsuperscript{95} and by Beazley J in Izdes v LG Bennett & Co Pty Ltd t/as Alba Industries.\textsuperscript{96}

By way of contrast, ss 170CH(3) and (6) require a consideration of the appropriateness of reinstatement. In Australia Meat Holdings Pty Ltd v McLauchlan,\textsuperscript{97} a Full Bench of the Commission made the following observation about this change of terminology:

\begin{quote}
The fact that there is a difference in the language used in s.170CE(8) as compared to the former s.170EA(3)(b) is indicative of a legislative intention that a different approach be taken to the exercise of the discretion. ... In our view a
\end{quote}

\textsuperscript{95} (1995) 60 IR 293.
\textsuperscript{96} (1995) 61 IR 439.
\textsuperscript{97} (1998) 84 IR 1.
consideration of the appropriateness of reinstatement involves the assessment of a broader range of factors than practicability.

The difference between the words *impracticable* and *appropriate* suggests that reinstatement may be a less likely outcome under the *WR Act* than it was under the *IR Act*. I return to this point in Chapter 6.

The third point is about the factors to be taken into account in deciding whether to make an order providing for a remedy. Under the former s 170EE(1), the IR Court (and the Commission pursuant to s 170EC(4)) could grant a remedy if it considered it ‘appropriate in all the circumstances of the case’. In *Liddell* the IR Court said that an order for a remedy would ordinarily follow a finding that a termination of employment was unlawful.

Section 170CH of the *WR Act* is more prescriptive. It provides that the Commission must not make an order that provides for a remedy unless satisfied, having regard to all the circumstances of the case, that the remedy ordered is ‘appropriate’.

Section 170CH(2) prescribes the matters to which the Commission must have regard in deciding whether or not it is appropriate to make an order for a remedy. These matters are:

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98 Note 46 at 367-368 per Gray J and 359-360 per Wilcox CJ and Keely J.
• the effect of the order on the viability of the employer's undertaking, establishment or service;

• the length of the employee's service with the employer;

• the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated;

• the efforts of the employee (if any) to mitigate the loss suffered by the employee as a result of the termination; and

• any other matter that the Commission considers relevant.

A number of these factors were also relevant under the former s 170EE.

Under the former provisions lost remuneration was a fundamental element in the assessment of compensation (see s 170EE(3)), although it was not the only matter that might be considered. Under the IR Act the IR Court and the Commission (pursuant to s 170EC(4)) generally adopted a five step approach to the assessment of compensation:99

**Step 1:** Estimate the remuneration the employee would have received, or would have been likely to have received, if the employer had not terminated the employment.

---

**Step 2:** Deduct monies earned since termination. The failure of an applicant to mitigate his or her loss may lead to a reduction in the amount of compensation awarded.\(^{100}\)

**Step 3:** The remaining compensation amount is discounted for ‘contingencies’.

**Step 4:** The impact of taxation is calculated.\(^{101}\)

**Step 5:** The legislative cap on the amount of compensation is applied.

Under the former *IR Act*, the effect of an order on the viability of the employer’s undertaking was *not* a factor which was taken into account.\(^{102}\) This was because

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\(^{100}\) See *Bechara v Gregory Harrison Healey & Co* (1996) 65 IR 382 at 389 per Madgwick J, upheld on appeal but the question of mitigation was not argued. Counsel for the appellant said that he did not dispute, as a matter of general principle, the statement that there is a duty on an employee whose services have been terminated to mitigate his or her loss. Also see *Blanch v Tjuwanpa Resource Centre (Aboriginal Corporation)* (1996) 68 IR 140 and *Shorten v Australian Meat Holdings Pty Ltd* (1996) 70 IR 360 at 377-378. Contra: *Ferry v Minister for Health, WA* (1995) 64 IR 28, but this case was decided before the amendment of s.170EE(1) to insert the phrase ‘if the Court considers it appropriate in all the circumstances of the case’.

\(^{101}\) This process is explained in some detail in *Slika v JW Sanders Pty Limited* (1995) 67 IR 316. In essence it is a two stage approach:
- The compensation amount is deducted by the tax the applicant would have paid if he or she had not been terminated receiving the money as wages. This gives a net amount.
- The net amount is then increased by the amount of tax the applicant will be liable to pay on the compensation awarded by the Court or the Commission. Compensation awards are eligible termination payments within the definition contained in s.27A(1) of the *Income Tax Assessment Act* 1936 (Cth). This is because they are payments made in consequence of the termination of the employment of the taxpayer: *Atlas Tiles Ltd v Briers* (1978) 144 CLR 202 at 224; *Reseck v Federal Commissioner of Taxation* (1975) 133 CLR 45. Eligible termination payments may be tax free or may attract tax at special rates up to 30 per cent of the amount of the payment. The factors which govern the applicable rate include the age of the recipient, the source of the payment, and whether the payment exceeds a specified dollar threshold; see especially s.159A of the *Income Tax Assessment Act*. The tax payable on an award in a particular case will need to be determined having regard to these factors.

In *Slika* the practical consequence of this approach was that the compensation awarded was reduced by 28 per cent and the remainder was then increased by 15 per cent.

\(^{102}\) Note 44 at 359.
s 170EE(3) tended to focus attention on the circumstances of the employee. Indeed, the use of the word ‘compensation’ was consistent with an approach which focussed on the effect of the termination on the employee.\textsuperscript{103}

The WR Act does not refer to ‘compensation’ but rather speaks of an ‘amount … in lieu of reinstatement’ (s 170CH(6)) and the general approach is to balance the interests of employee and employer (see ‘fair go all round’ observations earlier).

4.5.5 Costs

The WROLA Act introduced a provision empowering the Commission to make an order for the payment of costs in an unfair dismissal case. In this context it is important to bear in mind that a statutory tribunal such as the Commission has no inherent powers of the type exercised by superior courts of record.\textsuperscript{104} Any power to award costs must be either expressly authorised or arise by necessary implication.\textsuperscript{105}

Prior to the amendment the Commission had no such power.

As noted previously the IR Act contained a general provision dealing with the question of costs in proceedings under the Act (s 347). But s 347 does not confer power to make an order for costs. Rather it imposes a limit on a power to award costs.

\begin{thebibliography}{99}
\bibitem{103} See Krupp-Geir v Open Family (Australia) Inc., unreported, IR Court, 6 February 1996 per Moore J.
\bibitem{104} Grassby v The Queen (1989) 168 CLR 1 at 15-16 per Dawson J, with whom Mason CJ, Brennan, Deane and Toohey JJ agreed.
\bibitem{105} Queensland Fish Board v Bunney; Ex parte Queensland Fish Board [1979] Qd.R 301 at 303 per Connolly J, with whom Wanstall CJ and Lucas J agreed; Crowe v Bennett; Ex parte Crowe [1993] 1 Qd.R 57; R v Mosely (1992) 28 NSWLR 735; R v Scott (1993) 42 FCR 1; and Caneveci v Taylor (1994) 55 IR 316.
\end{thebibliography}
that might arise elsewhere — for example in relation to proceedings in the Federal Court for the enforcement of an award or order.\textsuperscript{106}

The Commission's power to make an order for the payment of costs in termination of employment cases is in \textsection{} 170CJ of the \textsl{WR Act}.

\textsection{} 170CJ empowers the Commission to award costs in three circumstances:

\begin{itemize}
\item if the application has been made 'vexatiously or without reasonable cause' (\textsection{} 170CJ(1));
\item if the Commission has begun arbitrating a matter and a party has acted unreasonably in failing to discontinue the matter or agree to terms of settlement leading to discontinuance (\textsection{} 170CJ(2)); and
\item if a matter is discontinued after an election has been made to proceed to arbitration and the Commission is satisfied that the applicant acted unreasonably in failing to discontinue earlier (\textsection{} 170CJ(3)).
\end{itemize}

The meaning of this provision is dealt with in the next chapter.

\textsuperscript{106} See \textit{Lloyd v International Health \& Beauty Aids Pty Ltd (t/as Elly Lukas Beauty College)} (1998) 83 IR 458; \textit{Amalgamated Society of Carpenters and Joiners of Australia v John Parker}, unreported AIRC (Moore VP, Acton and Hall DP), Print K5699, 18 December 1992; overruled: \textit{Cape Lambert Services Pty Ltd v The Seamen's Union of Australia}, unreported AIRC (Peterson J, Polites DP and Smith C), Print H9985, 19 October 1989.
Section 170CJ(5) provides that a schedule of costs may be prescribed in relation to items of expenditure likely to be incurred in respect of an application to the Commission under s 170CE. No such schedule has been prescribed. As a matter of practice, the Commission has regard to the Federal Court costs scale in assessing costs under s 170CJ.\(^{107}\)

An appeal lies from a costs order.\(^{108}\)

**4.5.6 Other Changes**

Two other changes introduced by the *WROLA Act* or the associated regulations are worth a brief mention.

**First**, a number of amendments were made relating to the time limits within which an application for relief must be lodged.\(^{109}\)

**Second**, *WR* Regulation 30BD provides for the payment of a $50 fee for lodgment of an application for relief under s.170CE. The Registrar may waive the fee if satisfied that the applicant would suffer ‘serious hardship’ if required to pay it (reg 30BD(2)). No fee applied under the *IR Act*.

\(^{107}\) See *Lloyd v International Health and Beauty Aids Pty Ltd t/as Elly Lukas*, unreported, AIRC (Smith C), Print Q2225, 23 June 1998.


\(^{109}\) For a detailed analysis of the changes see *Telstra-Network Technology Group v Kornicki*, unreported AIRC (Ross VP, Watson SDP and Gay C), Print P3168, 22 July 1997.
4.6 Summary

Table 2 below summarises the key features of the legislative history of the unfair dismissal provisions.
Table 2

Legislative History of Federal Unfair Dismissal Provisions
Key Features

Phase 1: The Beginning – The Court Rules: *Industrial Relations Reform Act 1993* (Cth)
- operative 30 March 1994
- introduced statutory remedies for unlawful termination of employment (Div 3 Pt VIA)
- employer must provide procedural fairness before terminating an employee because of their conduct or performance (s 170DC)
- employer required to establish that there was a valid reason for termination connected with the employee's capacity or conduct or based on operational requirements (s 170DE)
- remedy of reinstatement or compensation. No limit on the amount of compensation which could be awarded (s 170EE)

Phase 2: Capping Compensation: *Industrial Relations Amendment Act (No. 2) 1994* (Cth)
- operative 30 June 1994
- excluded employees not employed under award conditions whose wages exceeded a specified amount ($60,000 p.a. indexed)
- ceiling on compensation introduced (6 months remuneration)
- burden of proof altered, employer no longer required to prove that a termination did not contravene Div 3

- operative 15 January 1996
- applications to commence in the Commission not the IR Court
- option of consent arbitration introduced
- alternative remedy requirements weakened
- IR Court and Commission required to consider all the circumstances of the case in determining remedy

- operative 31 December 1996
- coverage more restrictive
- conciliator to provide the parties with an assessment of the merits of any unresolved claim (s 170CF(2)(b))
- 'harsh, unjust or unreasonable' test transposes what were substantive rights to factors to be taken into account (s 170CG(3))
- remedies generally – range of new factors to be taken into account including the effect of an order on the viability of the employer's undertaking (s 170CH(2))
- ceiling on compensation reduced (s 170CH(8))
- approach to reinstatement amended (ss 170CH(3) and (6)); now requires consideration of the appropriateness of reinstatement
- Commission given power to award costs (s 170CJ)
- $50 filing fee
CHAPTER 5 – THE SETTLEMENT MODEL – A FRAMEWORK FOR ANALYSING LEGISLATIVE CHANGE

As noted in Chapter 3, Posner (1998:607-615) has developed a model for predicting if litigation will occur in a given case:

If \( Pa \times A - C + S > Pr \times A + C - S \), then the dispute will go to trial.

'A' is the estimated amount of the award if the plaintiff wins.

'Pa' is the probability of the applicant winning, as estimated by the applicant, and 'Pr' is the respondent’s estimate of that probability.

'C' and 'S' are the costs of each party of litigating the case and the costs associated with settlement respectively.

Legal architecture impacts on the variables in the model and hence it is expected that changes in the legislative framework will affect the prospects for settlement. The three variables which are susceptible to such changes are:

- Costs of litigation ('C')
- Award ('A')
- Probability of success (Pa; Pr)

The impact of legislative change on each of these variables is considered below.
5.1 The Costs of Litigation

As we shall see, transaction costs in unfair dismissal cases take a significant proportion of the amount awarded. This is symptomatic of cases where the maximum monetary result is relatively modest. A study of over 1600 cases in the United States by Trubek et al (1983:120-131) concluded that the smaller the case the less likely it is that the outcome will exceed the cost involved. In Federal Courts in the United States the plaintiff’s lawyers’ fees were over 40 per cent of the amount recovered in cases with recoveries under $10,000, and only five per cent of the recovery in cases over $50,000.

The magnitude of transaction costs, both actual and expected, can influence negotiations and the outcome of bargaining (Mnookin and Kornhauser 1979; Posner 1977). Transaction costs may take different forms – some financial and some emotional. The most obvious costs are associated with legal representation.

While there is no requirement for parties in federal unfair dismissal proceedings to be legally represented, there is some evidence to suggest that the lack of such representation may adversely affect outcomes.

Genn and Genn (1989) carried out a multiple regression analysis based on 550 UK industrial tribunal appeal hearings to determine the impact of representation. The majority of the cases examined related to unfair dismissal claims. They concluded that, where the applicant was unrepresented and the respondent was legally represented, the applicant’s probability of success fell from 30 to 10 per cent.
Similarly, if the applicant was legally represented and the respondent was unrepresented, the probability of the applicant succeeding increased from 30 to 48 per cent (Genn 1993:40).\textsuperscript{110}

In the Australian context, a study by Matruglio and McAllister (1999:48-49) on the impact of representation on the outcome of cases in the Federal Court concluded:

\textit{No significant difference was found between represented and unrepresented applicants so far as stage of disposal was concerned. There were however significant differences for case outcome. Basically, it was apparent that having representation and ‘winning’ were related. Fewer cases went in the applicant’s favour when the applicant was unrepresented.}

The above conclusion was supported by the table below:

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|}
\hline
Case Outcome & Represented & Unrepresented & & \\
& No. & % & No. & % & \\
\hline
withdrawn/abandoned & 125 & 21.8 & 12 & 16.2 & \\
decision in applicant’s favour & 83 & 14.5 & 4 & 5.4 & \\
decision in respondent’s favour & 198 & 34.6 & 44 & 59.5 & \\
between parties resolution & 162 & 28.3 & 14 & 18.9 & \\
other & 5 & 9 & - & - & \\
\hline
\end{tabular}
\caption{Federal Court of Australia: Case Outcome by Status of Applicant Representation}
\end{table}

\textsuperscript{110 In relation to first instance applications a similar pattern emerges: Dickens et al 1985 at 83-96.}
Table 3 shows that unrepresented applicants were successful in 5.4 per cent of cases, compared to represented applicants who had a 14.5 per cent success rate. In other contexts, the evidence also suggests that parties who are legally represented do better.\footnote{For example, Ross (1970) finds that automobile injury claimants represented by attorneys recover more frequently than unrepresented claimants; that among those who recover, represented claimants recover significantly more than do unrepresented claimants with comparable cases. Claimants represented by firms recovered considerably more than claimants represented by solo practitioners; those represented by negligence specialists recovered more than those represented by firm attorneys. Similarly, Mosier and Sobel (1973) find that represented tenants fare better in eviction cases than do unrepresented ones.} While representation may enhance an applicant’s prospects of success, it is not without cost.

The costs associated with unfair dismissal litigation fall into two categories:

- costs incurred by a party in pursuing or defending a claim (direct party costs); and
- in certain circumstances, an order for costs that may be made against a party (other party’s costs).

5.1.1 Direct Party Costs

Direct party costs include the costs associated with obtaining representation, disbursements and the opportunity costs associated with the preparation for, and attendance at, a hearing.
In October 1996, I conducted a costs survey of all parties who had elected to proceed to 'consent arbitration' in the period 15 January to 31 August 1996.\textsuperscript{112} Chart 3 summarises the survey results:

\textbf{Chart 3}\textsuperscript{113}

\begin{center}
\textbf{Results of Costs Survey of Consent Arbitration Parties}
\end{center}

\begin{center}
\begin{tikzpicture}
\begin{axis}[
    title={Costs Incurred},
    xlabel={Costs Incurred},
    ylabel={No. of Cases},
    xbar stacked,
    ybar stacked,
    ytick={0,2,4,6,8,10,12,14,16,18,20},
    yticklabels={0,2,4,6,8,10,12,14,16,18,20},
    xtick={0,500,1000,1500,2000,2500,3000,3500,4000,4500,5000,5500,6000,6500,7000,7500,8000,8500,9000,9500,10000,10500,11000,11500,12000,12500,13000,13500,14000,14500,15000},
    xticklabel style={anchor=mid},
    yticklabels={0,2,4,6,8,10,12,14,16,18,20},
    legend style={at={(0.5,-0.2)},anchor=north},
]

% Applicants

% Respondents

\end{axis}
\end{tikzpicture}
\end{center}

\begin{itemize}
    \item Legal
    \item Union
    \item Industrial Advocate
    \item Employer Organisation
    \item Unrepresented
\end{itemize}

Parties who were legally represented incurred higher costs than those with other forms of representation – such as representation by a union or employer organisation. Legally represented applicants incurred an average cost of $2500. The average cost in respect of all other forms of applicant representation was $1200. The comparable figures for respondents are $6500 and $5000 respectively. Some 40 per

\begin{itemize}
    \item A copy of the survey questionnaire is set out in Appendix 6 and the results are set out in Appendix 7.
    \item See Appendix 7.
\end{itemize}
cent of both applicants and respondents surveyed were legally represented. The extent of representation in the IR Court was broadly similar.\textsuperscript{114}

The survey cost estimates are indicative only and are likely to underestimate the direct party costs involved in the final determination of a claim by consent arbitration. This is because all of the parties who had elected to have their matter determined by consent arbitration in the period were surveyed. A significant number of these – about 45 per cent - settled prior to a decision being issued. The costs in the cases which settled would be expected to be less than those which proceeded to final arbitral decision, thus depressing the average estimated costs. In a UK study, Tremlett and Banerji (1994:54) found that there was a high degree of correlation between the stage at which a case was resolved and its cost. For employers, cases concluded at the conciliation stage had an average cost of just over £700 compared with those which went all the way to a tribunal hearing which had an average cost of £2200 (excluding any award).

The significance of these direct party costs is apparent when contrasted with the outcomes of those consent arbitrations which proceeded to final settlement during the same period. Some 55 per cent of applicants were successful in obtaining a remedy. Of these, 21 per cent were reinstated and the balance were awarded compensation in lieu of reinstatement. The average award of compensation at the time the survey was conducted was $3500 (see Appendix 8).

\textsuperscript{114} In its 1995-96 Annual Report the IR Court noted that of all unlawful termination cases finalised in 1995-96, 39 per cent of applicants were legally represented at the time of filing and 45 per cent at the time of finalisation. At the time employers received notice of an unlawful termination claim, 37 per cent indicated that they were not legally represented. Only 33 per cent had solicitors and 30 per cent indicated that an employer association would represent them (IR Court 1995-96:33-37).
Direct party costs are a significant proportion of the average award of compensation made to successful applicants. If a successful applicant was legally represented then their direct costs consumed about 70 per cent of the compensation awarded. These circumstances led the IR Court to observe, in its 1995-96 Annual Report, at 39:

*The lack of a user pays costs rule and the cap on the Court’s power to award compensation continue to provide a considerable incentive to parties to limit their costs … For the employee, each dollar spent on legal costs must be deducted from any compensation the Court may award if the claim succeeds.*

If the above values are inserted into Posner’s settlement model then the result is as follows:

\[ Pa (A - C + S) > Pr (A + C - S) \]

[Assuming Pa and Pr are the same, namely .55 representing the 55 per cent of the applicants who successfully obtain a remedy; the cost of arbitration is conservatively estimated to be $1200 for applicants and $5000 for respondents; and ‘S’ or settlement costs are zero]

\[ .55 (3500) - 1200 > .55 (3500) + 5000 \]
1925 – 1200 > 1925 + 5000

725 > 6925

Accordingly the settlement model would predict that litigation would not occur. This is confirmed by the general unfair dismissal experience. Fewer than nine per cent of all claims made since March 1994 have been litigated to finality. As noted in Chapter 4, the economic model focuses on short term instrumental factors. That some matters are litigated suggests that other factors may be operating.

5.1.2 Other Party Costs

The prospect of being required to pay the other party’s costs is also likely to make settlement more attractive. Section 170CJ(2) of the WR Act specifically impacts on bargaining behaviour by providing that costs may be ordered if, among other things, a party has acted unreasonably in failing to agree to terms of settlement that would lead to the matter being discontinued.

Not all conduct of a party is relevant to a consideration of whether the party has acted unreasonably within the meaning of s 170CJ(2). Costs may only be awarded if the Commission is satisfied that a party had ‘acted unreasonably in failing … to agree to terms of settlement’. That provision is not concerned as such with whether a party has acted unreasonably in the conduct of his, her or its case; for example, by the use
of delaying tactics. Such conduct will only be relevant if it bears upon the reasonableness of the party in failing to agree to terms of settlement.\textsuperscript{115}

One illustration of where such conduct was relevant was in \textit{Blagojevch v Kaplan Services Pty Ltd.}\textsuperscript{116} In that case the employer unsuccessfully sought to rely on documents that were, at best, misleading, or even falsified. The documents relied on were two letters which purported to show that the applicant had been warned about his performance and diary entries which supported the employer’s contention that the applicant was habitually late for work. The arbitrator rejected the respondent’s evidence, found for the applicant and awarded compensation. The applicant sought costs. The costs matter ultimately went to the Full Court of the Federal Court. The Court held that the Commission must determine whether an order for costs should be made based on the facts as found in the substantive arbitration. At the time when the settlement offer was made by the applicant and refused the employer knew that the applicant had not been given the warnings which it claimed had been given and also knew that the applicant had not arrived late for work on anything approaching the number of occasions which the employer alleged. These factors were relevant to the assessment of the reasonableness of the employer’s response to the applicant’s conduct. As Marshall and Lehane JJ put it:

\textit{Knowledge on the part of the employer as to the truth of matters alleged against the applicant and as to whether, as claimed, he had been warned should have been taken into account in assessing the reasonableness of the employer’s}\textsuperscript{115}

\textit{Blagojevch v Kaplan Services Pty Limited,} unreported AIRC (Judice P, Acton DP and Whelan C), Print R1274, 9 February 1999.

\textit{(2000) 172 ALR 622-623.}
response to the applicant's offer. The terms of the offer itself could have left the employer in no doubt that the truth of its account would be vigorously challenged. It may well be, of course, that the same conclusion will not always follow in cases where the Commission prefers the evidence of one party to that of another; it is not unreasonable to respond to an offer in the light of the offeree's genuine perception or recollection of events. But this, on the Commission's findings, was not such a case: it is implicit that false evidence had been deliberately given.

The question of what constitutes a settlement offer has also arisen for determination. In Seib v National Meat Supplies Pty Limited, the Commission held that the terms of an application may constitute an offer of settlement within the meaning of paragraph 170CJ(2)(b). Commissioner Raffaelli said:

... in this matter a term of settlement was apparent. That term of settlement was contained in the application made to the Commission. The applicant sought reinstatement and an amount in respect of the remuneration lost or likely to have been lost by the applicant because of the termination.

The question for the Commission is then whether or not the respondent has acted unreasonably in not settling the matter on the terms sought by the applicant.

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117 Unreported AIRC (Raffaelli C), Print R6243, 24 June 1999 at paragraphs 11-12.
Chapter 5 - The Settlement Model - A Framework For Analysing Legislative Change

In some ways s 170CJ(2)(b) of the WR Act is analogous to Federal rule 68 in the United States, except that it does not automatically allocate costs but rather provides jurisdiction to do so. To the extent that the two provisions are similar, the study by Coursey and Stanley (1988) discussed in Chapter 13 would suggest that the introduction of s 170CJ would increase the chance of settlement.

The potential impact of s 170CJ(2)(b) is illustrated by the following example drawn from Coursey and Stanley (1988:165). If the respondent makes an offer in an unfair dismissal case the applicant must chose to accept or reject the offer. Making such an offer increases the applicant’s transaction costs of arbitration, because he or she may be required to pay the respondent’s legal costs in addition to his or her own costs. As the expected gain from an arbitration falls the likelihood that the respondent’s offer is acceptable to the applicant rises – hence there is a higher probability of settlement. The converse also applies. If the applicant makes a settlement offer the respondent’s transaction costs increase.

The cost allocation mechanism in s 170CJ(2)(b) would also be expected to encourage respondents to make settlement offers – the higher the offer the lower the chance that the respondent will have to pay his or her legal costs. Making an offer shifts the expected costs to the applicant.

An analysis of the costs decisions in the period from 31 December 1996 (when the WROLA Act changes came into force) to 30 June 2000 shows that there have been
119 applications for costs under s 170CJ, of which 55 have been successful. One costs order was subsequently set aside by consent.\textsuperscript{118}

Of the remaining 54 cases in which a costs order was made, 29 were against applicants (54 per cent) and 25 were against respondents. In one case a costs order was made against the applicant’s legal representative.\textsuperscript{119} During the same period (31 December 1996 to 30 June 2000) 1172 applications were finalised by arbitration on the merits. Cost applications were made in about 10 per cent of arbitrated cases. A list of all cost decisions is set out at Appendix 9. An analysis of the decisions is set out at Appendix 10.

In most instances the determination of the quantum of costs to be paid is settled between the parties. In the absence of agreement the Commission determines the quantum and issues an appropriate order. In those cases where the Commission has issued an order the average amount awarded was about $4130 ($4195 in cases where the costs order was made against the applicant and $4045 where the order

\textsuperscript{118} Bethune and the CFMEU v Allbuilt Constructions Pty Ltd, unreported AIRC (Eames C), Print R1065, 25 January 1999 and Print R4452, 4 May 1999.

\textsuperscript{119} Drougas v Kay Street Nightclubs Pty Ltd, unreported AIRC (Blair C), Print Q7298, 7 October 1998. It should be noted that the order made was probably beyond power as it was not directed at a party to the proceedings but to a representative of a party. In McKenzie v Meran Rise Pty Ltd t/as Nu Force Security Services a Full Bench of the Commission said:

"The Commissioner's order for costs in this case was expressed to be against the applicant, Mr McKenzie, and against his solicitors, McDonald Murholme. During the course of the appeal we raised the issue of whether the Commission has power to award costs against a solicitor or other representative. The terms of s.170CJ(1) and (3) provide that in the circumstances with which they deal an order for costs may be made against an applicant whether it be a person or an organization. Section 170CJ(2) provides that in the circumstances set out an order for costs may be made against a party. There is no reference to a power to award costs against a representative. We doubt whether there is such a power unless it can be said to be a necessary incident of the power to award costs against a party. The matter was not fully explored in argument and since it is unnecessary that we decide the point we think it would be undesirable to do so." Unreported AIRC (Giudice P, Watson SDP and Whelan C) Print S4692, 7 April 2000 at para 20.

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was against the respondent). Details of the amounts awarded are set out in Appendix 11.

The prospect of having to pay costs puts applicants in a particularly invidious position. They may be unemployed, and even if they have found work they would usually have fewer financial resources than their former employer. As Gray J said in *Liddell* at 370:

> The prospect of being ordered to pay the costs of a proceeding is a daunting one for any employee; for a person whose employment has recently ceased, it is far more daunting. It is a possibility available in this court if the proceeding has been instituted vexatiously or without reasonable cause. Any circumstances wider than those in which an applicant might be ordered to pay costs will bear upon the adequacy of the remedy available to that applicant.\(^{120}\)

The prospect of being ordered to pay the costs of the other party must cast a long shadow over the conciliation process. As noted above the average costs order issued by the Commission is about $4130. For an applicant the risks of an adverse costs order must be weighed against the likely outcome of their claim if they are successful. The probability of a costs order being made against an applicant is relatively small – it has occurred in only 25 out of 1151 arbitrations (two per cent). But parties are unlikely to be aware of this statistic. It is the perception of risk which is important. The impact of an adverse costs order can best be assessed by comparing it with the likely

\(^{120}\) Note 84.
outcome of a contested claim. The disposition of claims in the period from the start of the WR Act on 31 December 1996 to 30 June 2000 is set out in Figure 5.
### Disposition of Federal Termination of Employment Claims
31 December 1996 - 30 June 2000

<table>
<thead>
<tr>
<th>Case Type</th>
<th>Percentage of Finalised Claims</th>
<th>No. of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Dismissed at preliminary stage</td>
<td>3.3%</td>
<td>829</td>
</tr>
<tr>
<td>2. Withdrawn/discontinued before conciliation</td>
<td>19.3%</td>
<td>4,815</td>
</tr>
<tr>
<td>3. Settled by conciliation</td>
<td>57.7%</td>
<td>14,399</td>
</tr>
<tr>
<td>4. Lapsed/withdrawn/discontinued prior to orders</td>
<td>14.4%</td>
<td>3,596</td>
</tr>
<tr>
<td>5. Arbitral/judicial determinations on the merits</td>
<td>5.3%</td>
<td>1,318</td>
</tr>
<tr>
<td>6. Claims finalised</td>
<td></td>
<td>24,957</td>
</tr>
<tr>
<td>7. Claims not yet finalised</td>
<td></td>
<td>2,026</td>
</tr>
</tbody>
</table>

(NIL)
Of the 1318 cases finalised by arbitral/judicial determination on the merits 98 per cent (1151) were dealt with by arbitration in the Commission. The results of the arbitral decisions are shown below:
Some 66 per cent of claims which went to arbitration were decided in the applicant’s favour. This result overstates the actual incidence of successful applicants because it is distorted by one decision which deals with 282 applications in respect of the same employer and same substratum of facts.\(^{121}\) If this decision is removed, the success rate falls to 52 per cent.

\(^{121}\) Re Gordonstone Coal Pty Ltd, unreported AIRC (Hingley C), Print P7786, 2 February 1998.
In the 742 cases in which compensation was awarded the average amount of compensation was $6379 (see Appendix 12). A successful applicant is unlikely to be reinstated. Reinstatement orders were only made in ten per cent of cases in which a termination was found to be harsh, unjust or unreasonable.

So, in terms of risk assessment, an applicant has a 52 per cent chance of succeeding in arbitration and is likely to receive $6379 in compensation. This must be balanced against them being unsuccessful and having a costs order made against them. As we have seen, an average costs order against an applicant is $4130 — a significant proportion (56 per cent) of the likely award in a successful arbitration.

If the applicant’s own costs are added to the equation and the applicant was represented by a solicitor or barrister (at an average cost of $2500 — assuming no increase since the 1996 survey was carried out) then it is immediately apparent why so few cases proceed to merits arbitration.
If the above values are inserted into Posner’s settlement model then result is:

$$P_a A - C + 5 > PrA + C - S$$

[Assuming $P_a$ and $Pr$ are the same, namely .52 representing the 52 per cent of applicants who successfully obtain a remedy; ‘$A$’ is $6379$; assume that ‘$C$’ is $2500$ for applicants and $6500$ for respondents (see Table 4) and ‘$S$’ is zero]

$$(.52) 6379 - 2500 > (.52) 6379 + 6500$$

$$3317 - 2500 > 3317 + 6500$$

$$817 > 9817$$

Admittedly this analysis assumes that the costs of settlement are zero, although in practice, parties will have incurred some costs prior to settlement. But neither does it take into account the risk of an adverse costs order which would increase the ‘$C$’ variable with a consequent reduction in the left hand side of the inequality and an increase in the right hand side.
The prospect of an adverse costs order also provides an incentive for respondents to settle, or at least to make an offer. A UK study of industrial tribunal cases concluded that the expense of a tribunal hearing was a significant causal factor in employers making settlement offers at the conciliation stage (Tremlett and Banerji:1994). Employers who made such offers were asked why they had done so. Forty three per cent said they had made an offer to avoid a tribunal hearing because of:

- the expense of attending one (25 per cent); or
- the time/hassle of it (13 per cent); or
- the desire to simply avoid a tribunal hearing ‘generally’ (5 per cent).

5.2 Award

Since the 1994 Reform Act the legislation has made provision for two types of remedy:

- reinstatement (including the power to award an amount in respect of lost earnings and to provide for continuity of service); and
- compensation.

But the factors to be taken into account in deciding whether to grant a remedy have changed over time:
Figure 6
Legislative Change and Remedies

Reform Act: General discretion – but view expressed that the Court did not have an open discretion to refuse a remedy in the event of a breach of the Act\textsuperscript{122}

1994 Amendment Act: Required to consider ‘all of the circumstances of the case’ when deciding whether to grant a remedy. Impact of change difficult to judge\textsuperscript{123}

WROLA Act: s 170CH more prescriptive. Requirement to consider the effect of the order on the viability of the employer’s undertaking a new factor – s 170CH(2)(a)\textsuperscript{124}

The factors which are relevant to reinstatement and compensation have also undergone legislative change and these are considered below.

5.2.1 Reinstatement

The IR Act gave a greater priority to reinstatement as the primary remedy for unfair dismissals than is the case under the WR Act. Under the IR Act, the IR Court and the Commission were required to consider whether reinstatement was ‘impracticable’ – if it was not then an order would be made reinstating the applicant. If reinstatement was impracticable, the focus would shift to compensation. The WROLA Act changed this test. Subsections 170CH(3) and (6) of the WR Act now require the Commission

\textsuperscript{122} Note 48 at 368.
\textsuperscript{123} See pp92-94 infra; Nicholson v Heaven & Earth Gallery Pty Ltd (1994) 126 ALR 233
\textsuperscript{124} Note 48 at 359.
to consider whether it is ‘appropriate’ to order reinstatement. This involves the assessment of a broader range of factors than practicability.

As mentioned in the previous chapter, the difference between the words ‘impracticable’ and ‘appropriate’ suggests that reinstatement may be a less likely outcome under the WR Act than it was under the IR Act. Table 5 below supports this contention.

<table>
<thead>
<tr>
<th>Table 5</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Comparison of Outcomes Pre-WR Act and under the WR Act</strong></td>
</tr>
<tr>
<td><strong>Cases in which the Applicant was Successful</strong></td>
</tr>
<tr>
<td><strong>IR Court</strong>&lt;sup&gt;(a)&lt;/sup&gt;</td>
</tr>
<tr>
<td><strong>Total number of decisions</strong></td>
</tr>
<tr>
<td><strong>Compensation ordered</strong></td>
</tr>
<tr>
<td>- number</td>
</tr>
<tr>
<td>- % decisions for applicants</td>
</tr>
<tr>
<td><strong>Reinstatement orders</strong></td>
</tr>
<tr>
<td>- number</td>
</tr>
<tr>
<td>- % decisions for applicants</td>
</tr>
<tr>
<td><strong>Other</strong></td>
</tr>
<tr>
<td>- number</td>
</tr>
<tr>
<td>- % decisions for applicants</td>
</tr>
</tbody>
</table>

Notes:
(a) IR Court Annual Reports 1994-95, 1995-96 and 1996-97.
(b) AIRC Registry figures.
(c) AIRC Registry figures.
(d) AIRC Registry figures.
(e) This may give an inaccurate picture as an additional 351 cases were dismissed on jurisdictional grounds at an earlier stage.

The table shows the outcomes of those cases in which the applicant was successful over the period from 30 March 1994 to 30 June 2000. Under the IR Act reinstatement
was awarded in 18 per cent of the cases in which the applicant was successful – this figure fell to ten per cent under the WR Act.

The recent disinclination to award reinstatement does not appear to be because the Commission rather than the IR Court now determines the vast majority of cases. In the period from 15 January to 31 December 1996, the Commission and the IR Court both determined claims under the same legal framework. The proportion of reinstatement orders made in respect of successful applicants was broadly the same – 18 per cent in the IR Court and 19 per cent in the Commission.

An alternative explanation may be that over time members of the Commission have become more disinclined to award reinstatement and that this trend is unrelated to changes in the legislative framework. Such a phenomena was observed by Dickens et al (1981) in relation to the UK industrial tribunal system. Despite the relevant statute giving increasing emphasis to reinstatement as a remedy it had declined each year as a proportion of successful outcomes and in 1979 was only ordered in 3.4 per cent of cases in which a remedy was granted. The authors present a convincing argument in support of the contention that the reason for such a trend lay not so much in the nature of the legislative framework as in the operation of the tribunal:

*The unfair dismissal law has moved quite far on the question of reinstatement since the introduction of statutory protection in 1971, but the tribunals have not moved with it.* (Dickens et al 1981: 169)
It may be that we are witnessing such a trend in Australia, but even if we are it seems unlikely that it would completely account for the sharp fall in proportion of reinstatement orders following the introduction of the WR Act.

5.2.2 Compensation

The second type of remedy is compensation. When the unfair dismissal provisions were first enacted compensation was 'at large'. Section 170EE(1) provided that the Court could 'make such orders as it thinks appropriate in order to put the employee in the same position (as nearly as can be done) as if the employment had not been terminated'.

The 1994 Amendment Act amended s.170EE by introducing limits on the amount of compensation that could be awarded.

The amended s 170EE placed two new limitations on the Court's power to award compensation:

- the Court could only award compensation if it first determined that reinstatement was 'impracticable'; and

- the amount of compensation which could be awarded was subject to a ceiling.
In the relevant second reading speech the Assistant Minister for Industrial Relations, The Honourable Mr Johns, described the compensation ceiling as follows:

\textit{Compensation that is awarded instead of reinstatement is to be limited to an amount not exceeding six months remuneration. For non-award employees, the compensation will be limited to an amount which does not exceed six months remuneration or $30,000, whichever is the lower. This amount will also be indexed annually by regulation to reflect increases in average weekly earnings.} (Johns 1994:1781)

Pittard (1994:190) suggests that these amendments were introduced 'in response to fears of excessive burdens which may be placed on employers in terms of financial claims'.

Prior to the insertion of the ceiling there was no limit to the amount of compensation which could be awarded. An employee who had been unlawfully terminated was prima facie to be put in the financial position he or she would have been in but for the unlawful termination.\textsuperscript{125} In circumstances where the Court formed the view that the employee would have stayed in his or her former job for a number of years the remuneration which would have been received could be substantial. Indeed at least one applicant had claimed compensation of $1,000,000.\textsuperscript{126}

Section 170EE(3) of the IR Act limited the amount of compensation payable to an award employee to an amount that would have been received by the employee 'in respect of the period of 6 months that immediately followed the day on which the termination took effect...'. The equivalent provision in s 170CH(8) of the WR Act limits the amount to the total amount of remuneration received by the employee in the six month period before the termination.

The change introduced by the WROLA Act effectively reduces the compensation ceiling for those applicants with less than six months service. For example, if an employee was unfairly dismissed after just three days service then the amount which could be awarded in lieu of reinstatement would be limited to three days remuneration – as was the case in Betts v Madafferi Haulage Pty Ltd.\textsuperscript{127} This is because s 170CH(8) bases the award ceiling on the amount of remuneration received by the employee in the six months prior to termination. Under the former s 170EE(3) compensation was capped at six months remuneration based on the rate of remuneration the employee received over the three days of the employment.

The difference in the calculation of the award ceiling is significant because of the number of applicants with less than six months service prior to the termination of their employment. The IR Court's Annual Reports for 1995-96 and 1996-97 record that a significant proportion of applicants had less than six months service prior to termination – 29 per cent and 26 per cent respectively (IR Court 1995-96:27-28;

\textsuperscript{127} Unreported AIRC (Smith C), Print P9303, 11 March 1998 and Print P9940, 9 April 1998.
1996-97:33-35). The most recent ABS figures show that 43 per cent of persons who 'ceased their last job involuntarily' had been employed for less than six months.\textsuperscript{128}

5.3 Probability of Success (P_a; P_r)

A party's perception of their chance of winning may be influenced by at least three types of legislative change:

\begin{itemize}
\item changes which remove a right or benefit from a party;
\item changes which confer a right or benefit which advantages the other parties prospects of success; and
\item changes which impact on mediator power.
\end{itemize}

Each type of change has occurred in the context of Federal unfair dismissal law.

5.3.1 Removing rights or benefits

Two changes are important in this context. They deal with:

- onus; and
- the validity of s.170DE(2).

Onus

Under the Reform Act the onus was on the employer to show that a termination of employment had not been in contravention of a provision of Division 3 of Part VIA. The 1994 Amendment Act altered the burden of proof. Previously s.170EE(1) had effectively placed the onus on the employer. The amendment provided that the onus of proof in respect of s 170DE was governed by s 170EDA(1). Section 170EDA(1) provided that the employer had the onus of establishing that the termination was for a ‘valid reason’ within the meaning of s 170DE(1). If it was contended that the termination was ‘harsh, unjust or unreasonable’ (s 170DE(2)), the onus was on the applicant (s 170EDA(1)(b)).

Questions of onus may well have a bearing on the disposition of a case. For example, in Warsame and Athanasiadis v Yarraville Textiles Pty Ltd a Full Bench of the Commission upheld an appeal where the member at first instance made an error in respect of which party bore the onus under s 170DE(1). On appeal the Commission said: ‘we are satisfied that the evidence in this case was not so
unequivocable that it could be said that the question of onus did not have any bearing on the Commissioner’s conclusion."129

Under the WR Act the applicant bears the onus of establishing that the termination of employment was ‘harsh, unjust or unreasonable’.

**Section 170DE(2) and the Impact of Judicial Determinations**

It is not just legislative change which affects the legal context in which unfair dismissals take place. Judicial interpretation of statutory provisions may also have an impact. A conservative or a liberal interpretation may influence a party’s perception of their likelihood of success.

The most obvious example of the impact of judicial power is where a particular statutory provision is struck down as being unconstitutional. In the context of the termination provisions, this occurred in *Victoria v The Commonwealth*130 (see generally Williams and Simpson 1997). In that case the High Court held, among other things, that two aspects of Division 3 of Part VIA were beyond power, namely the provision that a reason for termination was not a ‘valid reason’ if the termination was harsh, unjust or unreasonable (s 170DE(2)) and the related onus provision in s 170EDA(1)(b).

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129 Unreported AIRC (Ross VP, Watson SDP and Gay C), Print P4223, 19 August 1997 at 3.
The implied immunity doctrine was held to limit the operation of a number of other provisions (e.g. ss 170DE(1) and 170DG) in respect to the States as employers.

The implied immunity point only affected certain State government employees, but the invalidity of s 170DE(2) had a more general impact.

In normal circumstances the invalidity of s 170DE(2) could be expected to have a significant impact on Pa and Pr. It removed a potential avenue for challenging a termination of employment. But two factors weakened the impact of the High Court’s judgment.

First, the judgment was delivered on 4 September 1996. Four months later the legislative framework was recast by the implementation of the WROLA Act. After 31 December 1996 the invalidity of s 170DE(2) was largely a matter of historical interest only.

Second, after the High Court’s judgment a number of the judges of the IR Court expressed the view that a consideration of features similar to those contained in s 170DE(2) were to be imported into s 170DE(1). The effect of this was that, under s 170DE(1), a reason for termination could never be a valid reason if the employer did not have regard to the effect of the termination on the employee.\(^1\)

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\(^1\) See Nettlefold v Kym Smoker Pty Ltd (1996) 69 IR 370; Kerr v Jaroma Pty Ltd v Treasury Motor Lodge (1996) 70 IR 469 and Westen v Union des Assurances de Paris, unreported, IR Court, 17 December 1996 per Madgwick J.
Hence for a time the approach adopted by some judges of the IR Court rendered part of the High Court’s judgment nugatory. Ultimately the extended interpretation of s 170DE(1) was rejected by the Full Court of the Federal Court but well after the WR Act had come into operation.\(^{132}\)

5.3.2 Conferring rights or benefits

The WROLA Act significantly changed the basis for determining an application for relief by transposing what were substantive rights under the IR Act into factors which were to be taken into account in deciding whether a termination was ‘harsh, unjust or unreasonable’ under the WR Act.

The legislative focus shifted from providing a mechanism for the vindication of the rights of an unlawfully terminated employee, to the exercise of a discretion to grant a remedy in circumstances where a termination is found to be harsh, unjust or unreasonable. The introduction of the ‘fair go all round’ approach in conjunction with the new statutory formula in s 170CG(3) indicates a move away from concepts of

\(^{132}\) In Cosco Holdings Pty Ltd v Thu Thi Van Do Northrop J made the following observation about one of the cases which adopted the extended interpretation, at 114:

> “It is not necessary to refer to the other matters in Westen to justify the policy adopted in construing “valid reason” in s 170DE(1). In my opinion the conclusion in Westen is based on principles which are wrong for the reasons already expressed. Further, the conclusions are not based upon recognised processes of judicial method. The processes venture into those used in the legislative function. This Court should decline to adopt those processes.”

The joint judgment of Lindgren and Lehane JJ reached the same conclusion at 120:

> “… we support the view expressed by Northrop ACJ that, to the extent that such cases as Nettleton; Kerr and Westen hold that the word “valid” should be given a wider meaning, they should be overruled.”

The extended interpretation of valid reason was subsequently briefly resuscitated in Murdoch University v Mainsbridge, unreported, IR Court, 12 June 1998 per Ryan, Marshall and North JJ, before being finally extinguished in Qantas Airways Ltd v Cornwall (1998) 83 IR 802.
employee rights which pervaded the *IR Act*, towards notions of balancing the interests of employers and employees.\textsuperscript{133}

These changes advantaged employers in at least three ways:

- the statutory framework no longer gave employees legal rights not to be terminated without a valid reason, or without being provided with an opportunity to respond to any allegations, in circumstances where an employee’s conduct or capacity was at issue;

- s 170CG(3)(e) provides that the Commission must have regard to any other matter which it considers relevant. This raises the prospect of employers being able to advance defences which were not available under the *IR Act*;\textsuperscript{134} and

- even if it is decided that a termination of employment was ‘*harsh, unjust or unreasonable*’ it does not necessarily follow that the Commission will make an order for a remedy. Under the *IR Act* a remedy invariably followed a finding that a termination was unlawful.\textsuperscript{135}

\textsuperscript{133} Note 85 at 189 per Gray J.
\textsuperscript{134} Note 46 at 359.
\textsuperscript{135} Note 46 at 359-360 and 368.
5.3.3 Conciliator power and behaviour

The legal framework may also indirectly operate to impact on a party's perception of the likely outcome if the matter proceeded to arbitration both in terms of the probability of success and the likely award. Provisions which affect conciliator power or behaviour are particularly important in this regard.

The changes introduced by the WROLA Act may have impacted on the conciliation process in two ways.

First, the failure to settle an unfair termination claim in conciliation means that the claim will need to be determined by arbitration in the Commission. Previously parties had the option of consent arbitration in the Commission or adjudication in the IR Court. Consent arbitration required the agreement of both parties. As a consequence only about 20 per cent of cases which were not settled were dealt with by consent arbitration in the Commission. The WROLA Act significantly added to the Commission's workload and, as a consequence, peer pressure and self interest may have encouraged Commission members to more aggressively pursue a settlement in conciliation or to devote greater time and effort to facilitating such an outcome.

Assertive mediator behaviour has been found to be more prevalent in circumstances where a mediator's own interests are at stake (Susskind and Ozawa 1985; Touval and Zartman 1985) or when the mediator is exposed to institutional pressure to avoid the costs of adjudication (Wall and Rude 1985). Third parties are more likely to act in an adjudicative manner if they are under pressure to dispose of the case (Carnevale
McGillicuddy et al (1987:111) suggest that the extent to which a mediator has an inherent interest in a dispute is a key moderating variable in determining the extent of mediator involvement:

"Disputants and mediators apparently behaved quite differently when they expected another person to intervene if agreement was not reached ... If there is no inherent interest, as is true for most mediators, who are simply fulfilling a role, the expectation that somebody else may take over appears to erode motivation."

Mediator assertiveness has been positively linked to successful case outcomes (see Chapter 9).

Second, the link between the power to award costs and the conciliation process significantly increases conciliator power and hence the capacity to influence the parties' attitude to settlement.

Section 170CF(2) provides that, if the Commission is satisfied that all reasonable attempts to settle the matter by conciliation are, or are likely to be, unsuccessful so far as concerns at least one ground referred to in the application, it is to do three things:

- issue a certificate in writing stating that it is so satisfied;
- indicate to the parties the Commission's assessment of the merits; and
if the Commission thinks fit, recommend that the applicant elect not to pursue
the matter.

In *Kumar v Fisher & Paykel Manufacturing Ltd (Kumar)*\textsuperscript{136} a Full Bench of the
Commission concluded that the proper construction of s 170CF(2)(b) is that ‘the
Commission is to provide the parties with an assessment of the merits of the
application where it is practicable to do so’.

While the Commission did not regard the provision of an assessment as mandatory,
it did say that it was ‘clearly desirable for an affirmative assessment to be provided
wherever practicable’\textsuperscript{137} It also acknowledged that a ‘conditional form of assessment’
would be appropriate in most cases of evidentiary conflict. Such an assessment
expresses a view about the merits of the application which is said to be dependent
on the Commission accepting the evidence led by one of the parties on a particular
issue.

The conduct of a party in the conciliation process and the s 170CF(2)(b) assessment
may be relevant in subsequent costs proceedings. As we have seen, s 170CJ sets
out the circumstances in which the Commission may make an order for costs against
a party. These circumstances include where a party has acted unreasonably in failing
to:

\textsuperscript{136} (1997) 74 IR 212.
\textsuperscript{137} Note 135 at 217.
discontinue the matter; or

agree to terms of settlement that could lead to the discontinuance of the matter (ss 170CJ(2)(b)).

An adverse assessment in s 170CF(2)(b) may lead to an order for costs being made against the applicant. As Bacon C observed in Cooms v Australian Meat Holdings Pty Ltd at 3:

The scheme of Division 3 of Part VIA the Act is that the conciliation stage has (at least) two functions. The primary one is to resolve the matter by agreement. The second, in the event the matter is not so resolved, is that the Commission provide an assessment so that the parties (particularly applicants) have an independent view as to the likely outcome of the application (on each of its grounds). The certificate is not merely a ticket for passage to the next stage of the process. The legislation provides a more fundamental role for the certificate because of the compulsion that it include an assessment of the merits of each ground on which the application is made. Clearly the assessment is to provide guidance to the parties. Parties who ignore adverse assessments in certificates do so knowing that the peril that they are likely to face is a claim for costs. When such claims are made the existence of an adverse assessment in the certificate is a factor to which the Commission must attach considerable weight.138

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138 Unreported, Print P2337, 26 June 1997.
An adverse conciliator assessment has been a factor in a number of decisions in which costs have been awarded against the applicant. But an adverse assessment will not necessarily mean that an applicant’s failure to discontinue was unreasonable. In Telstra Corporation Limited v Bingham a Full Bench of the Commission dealt with an appeal from a refusal to order costs. The s 170CF(2)(b) certificate stated:

Not having the benefit of sworn evidence, but on the assessment of the material before me, I believe that the application has little chance of success.

The Full Bench concluded that the view expressed in the certificate, unfavourable as it was to Ms Bingham, did not, in all the circumstances, make Ms Bingham’s failure to discontinue unreasonable.

In a number of cases a neutral assessment has allowed an applicant to successfully resist an application for costs. In such circumstances it has been held that the applicant had not acted unreasonably in failing to discontinue the matter. For

139 McDonald v Melbourne Precast Concrete Panels Pty Ltd, unreported AIRC (Watson SDP), Print P8754, 11 February 1998; unreported AIRC (Drake DP), Print Q1255, 16 June 1998; Coltex Shoes Pty Ltd v Anna Fioni Shoes v Goussis, unreported AIRC (Polites SDP), Print P9427, 17 March 1998; Godfrey Hirst Pty Ltd v Collari, unreported AIRC (Blair C), Print P9643, 24 March 1998; Bull v Miltern Sales Pty Ltd v Castle Group Canberra, unreported AIRC (Lawson C), Print Q0948, 18 May 1998; Frews Wholesale Meats v Stagno, unreported AIRC (Whelan C), Print Q2972, 7 July 1998; Stagno v Frews Wholesale Meats (1998) 84 IR 270; Dean v Pragomena Pty Ltd t/a Sunshine Chiropractic Health Centre, unreported AIRC (Tolley C), Print Q3876, 30 July 1998.

140 Unreported AIRC (McIntyre VP, Coleman DP and Laing C), Print Q3987, 27 July 1998.

141 Fletcher v Manyallaluk Aboriginal Corporation, unreported AIRC (Eames C), Print P5234, 24 September 1997; Young v Commercial Systems Australia Pty Ltd unreported AIRC (Frawley C), Print P7286, 16 December 1997; Williams and Community and Public Sector Union v Department of Employment, Education, Training and Youth Affairs, unreported AIRC (Eames C), Print P9071, 25 February 1998; Meaney v Master Builders Construction and Housing Association of ACT, unreported AIRC (Foggo C), Print Q1887, 15 June 1998; Humash v Conrock Industries Pty Ltd, unreported AIRC (Holmes C), Print Q4350, 5 August 1998; Truffitt v Cameron Construction, unreported AIRC (Holmes C), Print Q4551, 6 August 1998; Demenna v Coynes Transport Pty Ltd, unreported AIRC (Simmonds C), Print R4357, 29 April 1999.
example, in *Coltex Shoes Pty Ltd t/as Anna Fiori Shoes v Goussis*\(^{142}\), Polites SDP said at 4:

> I have also had regard to the certificate issued by Gay C in relation to the matter following conciliation. That certificate made it plain that the Commissioner having conducted the conciliation was not in a position to make an assessment as to the merits of the case without hearing the evidence. Receiving an assessment of that type which would not necessarily have induced Mr Goussis to seek settlement of the matter.

The conduct of a party in the conciliation process may also be relevant to the question of costs. For example the failure to attend a conciliation conference has been held to be relevant to the determination of a costs application. In *Betts v Madafferi Haulage Pty Ltd*\(^{143}\) Smith C said at 2-3:

> ... the role of conciliation can not be underestimated. The process is a valuable one and must be taken seriously. The objective is to genuinely seek to avoid arbitration, not to behave in a manner which effectively threatens the cost of arbitration as an inducement to abandon an application. This is not to say that parties will reach agreement and that they are not entitled to refuse to reach agreement. However, the purpose of issuing certificates is to allow parties to pause and consider the prospects before proceeding to arbitration. This is clearly the scheme of the WPRA. It would be perverse if a party were able to

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\(^{142}\) Print P9427, 17 March 1998.

\(^{143}\) Print P9940, 9 April 1998.
defeat an application for costs as a consequence of a refusal to attendconciliation and thereby avoid a possible adverse certificate. It follows, in my view, that the failure to attend a conciliation conference impacts upon any question of costs.

The failure to abide by a settlement arising out of a conciliation conference has also been held to be a factor relevant to the determination of a s 170CJ(2) costs application.\textsuperscript{144}

These linkages between the conciliation process and the determination of applications for costs mean that parties ignore at their peril a conciliator's 'suggestions' as to an appropriate settlement or his or her observations about the strengths and weaknesses of each side's case.

Increasing conciliator power may be associated with more conciliatory disputant behaviour and more interventionist conciliator behaviour. A study by McGillicuddy, Welston and Pruitt (1987) tested the impact on behaviour of three models of third party intervention: straight mediation; mediation/arbitration (same) and mediation/arbitration (different). In the second model, the third party mediated and then arbitrated any unresolved matters. The results showed that:

\textsuperscript{144} Barnes v Silver Partners Pty Ltd trading as Academic and Commerce Immigration Referral Centre, unreported A IRC (Tolley C), Print R3600, 7 April 1999.
Under med/arb (same), disputants showed less hostile behaviour and ... were also more conciliatory ... than under straight mediation, making more new proposals and exhibiting a trend toward more concession making ... 

The mediators used heavier tactics in med/arb (same), more often threatening to terminate the session or arguing for a particular proposal. (McGillicuddy et al 1987:110)

5.4 Summary

The foregoing analysis suggests that the changes introduced by the WROLA Act would have had the most impact on the rate of settlement at conciliation. A summary of the relevant changes is set out on page 169.

In terms of the thesis posited in Chapter 3, the WROLA Act changes impacted on the variables in Posner’s settlement model by reducing the probability of success (\(P_a/P_{r1}\)), increasing the transaction costs of an arbitration (\('C'^1\)) and diminishing the value of the outcome of arbitration for applicants (\('A'^1\)). Hence the economic model would predict that the settlement rate at conciliation under the WR Act would be greater than under the pre-WR Act legislative framework. In the next chapter I set out the settlement rate experience over time and relate this to the relevant legislative changes.
<table>
<thead>
<tr>
<th>Coverage:</th>
<th>Before WROLA Act</th>
<th>After WROLA Act</th>
<th>Impact of WROLA Act on Posner's Variables</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>General with some exclusions.</td>
<td>Limited classes of employee only. Previous exclusion expanded.</td>
<td>Reduces the probability of success. (Pa/Pr↓)</td>
</tr>
<tr>
<td>Role of the Commission</td>
<td>All applications referred to conciliation. AIRC consent arbitration only.</td>
<td>Conciliator required to give the parties an assessment of the merits of any unresolved claim. Adverse assessment may lead to subsequent costs order – increasing conciliator power. AIRC determines all unresolved unfair dismissal applications.</td>
<td>Increased conciliator power may result in more conciliatory behaviour by parties and more intervention by conciliator. May operate to reduce parties perception of success. (Pa/Pr↓)</td>
</tr>
<tr>
<td>Key Test (Pa/Pr):</td>
<td>• valid reason (s 170DE) • procedural fairness (s 170DC) Provided a mechanism for the 'vindication of the rights of an unlawfully dismissed employee'.</td>
<td>'harsh, unjust or unreasonable' test – having regard to a range of factors (s 170CG(3)) including 'fair go all round' (s 170CA(2)). Move away from concepts of employee rights towards balancing the interests of employees and employers.</td>
<td>Reduces the probability of success. (Pa/Pr↓)</td>
</tr>
<tr>
<td>Remedies: ('A')</td>
<td>Remedy followed breach – reinstatement unless impracticable then compensation subject to a ceiling of six months remuneration</td>
<td>More open discretion to refuse a remedy even if the termination was harsh, unjust or unreasonable. Reinstatement if appropriate, if not compensation. Ceiling on compensation reduced – remuneration earned in the six months prior to termination.</td>
<td>Value of the outcome of a trial for applicant’s reduced ('A'↓)</td>
</tr>
<tr>
<td>Costs: ('C')</td>
<td>Court had a very limited power to award costs (s 347). Commission had no power to award costs.</td>
<td>Commission given power to award costs in three circumstances: - application made vexatiously or without reasonable cause; - party acted unreasonably in failing to discontinue or agree on terms of settlement; - matter discontinued and party acted unreasonably in failing to discontinue at an earlier time.</td>
<td>The transaction costs of trial are increased. ('C' ↑)</td>
</tr>
</tbody>
</table>
CHAPTER 6 – LEGISLATIVE CHANGE AND SETTLEMENT

In Chapter 4 the legislative history of the termination provisions was divided into four broad periods:

• The Beginning: The Court Rules (30 March – 29 June 1994)
• Capping Compensation (30 June 1994 – 14 January 1996)
• Transition (15 January – 30 December 1996)
• End Game (31 December 1996 – 30 June 2000)

This chapter describes and analyses the settlement rates associated with each of these four periods.

Table 7 sets out the settlement rates associated with each period of legislative change. In this context the settlement rate equals:

\[
\frac{\text{Number of claims settled at conciliation}}{\text{Number settled at conciliation} + \text{number not settled at conciliation}} \times \frac{100}{1}
\]
Table 7

Comparative Settlement Data
30 March 1994 – 30 June 1999

<table>
<thead>
<tr>
<th></th>
<th>Period 1</th>
<th>Period 2</th>
<th>Period 3</th>
<th>Period 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applications finalised</td>
<td>452</td>
<td>13997</td>
<td>14089</td>
<td>25,804</td>
</tr>
<tr>
<td>• Dismissed at preliminary stage prior to conciliation</td>
<td>*</td>
<td>*</td>
<td>*</td>
<td>829</td>
</tr>
<tr>
<td>• Withdrawn/not referred to AIRC(\equiv)</td>
<td>315</td>
<td>2484</td>
<td>2675</td>
<td>4815</td>
</tr>
<tr>
<td>• Settled at conciliation</td>
<td>67</td>
<td>6473</td>
<td>6387</td>
<td>14,399</td>
</tr>
<tr>
<td>• Not settled at conciliation</td>
<td>70</td>
<td>5040</td>
<td>5027</td>
<td>5761</td>
</tr>
<tr>
<td>Settlement rate</td>
<td>48.9%</td>
<td>56.2%</td>
<td>56.0%</td>
<td>71.2%</td>
</tr>
</tbody>
</table>

Notes:
* No matters were dismissed at a preliminary stage during periods 1 and 2 because the legislation required that an application be referred to conciliation in the Commission prior to the determination of any threshold jurisdictional points by the Court. The practice altered under the WR Act (Period 3). A respondent could elect to have an extension of time application or a jurisdictional objection determined prior to the matter being referred to conciliation.

\(\equiv\) Between 30 March 1994 and 14 January 1996 the AIRC only conciliated applications which were referred to it by the IR Court, not all applications were referred.

Table 7 shows that there is some difference between the settlement rates in periods 1 and 2 and little difference between periods 2 and 3 (56.22 per cent versus 55.95 per cent). The difference in the settlement rate between period 1 and the subsequent periods may be because compensation was ‘at large’ during this period. The most significant increase in settlement rate is between periods 3 and 4. The latter period covers the operation of the WR Act. The differences in the settlement rates before and after the commencement of the WR Act are shown graphically below:
The increase in the settlement rate under the WR Act is even more significant than it appears in the chart because it is associated with the introduction of a filing fee. As Chapman (1997:106) suggests, the requirement to pay a fee 'is likely to discourage some claims that lack foundation and are mischievous [and] ... will undoubtedly also prevent some employees (who may now be unemployed) from making an application in circumstances of a genuine and strong claim'.

Factors other than changes in legal architecture may explain the differences in settlement rates before and after the commencement of the WR Act. Two such factors are:

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145 See Table 7.
Chapter 6 - Legislative Change and Settlement

- changes in applicant or respondent characteristics; and
- personnel changes amongst the conciliators.

The first factor may impact on settlement in a number of ways. For example, if gender impacts on settlement and male applicants are more likely to settle than their female applicants then an increase in the proportion of male applicants will increase the overall settlement rate.

Unfortunately applicant and respondent characteristics have not been consistently recorded over the period. Some material was collected by the IR Court but it generally relates only to the period before the commencement of the WR Act. Three things emerge from this data.

First, there were no significant changes in the age and gender of applicants over time. In its 1997-98 Annual Report the IR Court noted:

Over the three years since 1994-95 the age and sex profile of applicants has not changed suggesting that neither sex nor age is a factor influencing the propensity of a person to make a claim. (IR Court 1996-97:33)

Second, there was a change in the duration of an applicant's employment prior to termination. In 1994-95 nearly half of all applicants were terminated in the first 12 months of employment (IR Court 1994-95, Fig 4.6:49). The comparable figures for 1995-96 and 1996-97 were 45 and 40 per cent respectively (IR Court 1997-98:33-34).
But even if this trend continued – that is the average duration of applicants' pre-termination employment increased – that would not be expected to increase the settlement rate.\textsuperscript{146}

As we shall see in Chapter 11 there is no discernable relationship between duration of employment prior to termination and settlement at conciliation.

Third, there have been changes in representation. In 1994-95 half of all applicants were represented by a solicitor. In 1995-96 the proportion of applicants who were legally represented had increased to 61 per cent (IR Court 1996-97:36-37).

But to the extent that this trend continued in the period after the start of the \textit{WR Act} (and if we assume that those applicants who said they were represented by a solicitor were in fact represented at the conciliation conference) it would not explain the increase in the settlement rate from 56 per cent (pre-\textit{WR Act}) to 71 per cent (post-\textit{WR Act}), shown in Chart 6.

The crosstabulations set out in Chapter 11 show that the proportion of matters which were settled was substantially higher when both the applicant and the respondent were \textit{not} represented (76 per cent) than for other combinations of representation. The combination with the smallest proportion of matters settled was when the applicant was legally represented and the employer was self-represented (54 per

\textsuperscript{146} Indeed the IR Court’s 1996-97 Annual Report suggests that the converse would be expected: ‘Workers employed for less than 12 months may be more likely to settle at conciliation than other applicants’ (IR Court 1996-97:34).
cent). So if the proportion of applicants who were legally represented increased we would expect the average settlement rate to fall, not increase.

The limited data available does not support the view that changes in applicant or respondent characteristics explained the increase in settlement rate after the start of the WR Act.

The second factor – personnel changes amongst the conciliators – may impact on settlement if there was a workload shift towards those with a higher settlement rate.

There were personnel changes during the relevant period. Since the commencement of the WR Act, eleven Commission members have resigned, retired or died. But this would not have increased the overall settlement rate as these members generally had an above average settlement rate. Indeed the average settlement rate of these eleven members was 58.8 per cent - above the average for the pre-WR Act period (56 per cent).

Fifty two conciliators undertook unfair dismissal conciliations both before and after the introduction of the WR Act. Some 38 of the 52 conciliators concerned (73 per cent) increased their settlement rate in the period after the start of the WR Act, as shown in Chart 7. The average settlement rate of all these conciliators increased from 55.7 per cent (pre-WR Act) to 69.6 per cent (post-WR Act), which is consistent with the general change in settlement rates shown in Chart 7.
If the WR Act had no impact, other things being equal, we would expect a conciliator’s settlement rate to remain the same. Chart 7 shows that for a substantial majority of conciliators this was not the case. Indeed the results are more significant than the chart suggests. The settlement rates for two of the conciliators (identified on the chart in green) show a sharp fall in settlements after the WR Act came into force. This is contrary to the general trend shown in Chart 7. But the results for these two conciliators are anomalous in that they include a number of claims that relate to the same employer and the same facts. If these claims are combined and treated as one matter then the settlement rate for one of the conciliators increased since the WR Act came into operation (from 33 to 52 per cent). The settlement rate of the other conciliator only decreased slightly (from 61 to 56 per cent). Hence, in reality, three out of every four conciliators increased their settlement rate after the start of the WR

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147 See Appendix 14.
Act. The settlement rates for the remaining conciliators either remained static or fell slightly.

The evidence does not support the view that factors other than changes in legal architecture explain the difference in settlement rates before and after the commencement of the WR Act.

The settlement rate experience over time supports the conclusion that legislative changes which affect the cost of litigation, the remedies from arbitration, and the probability of success (‘C’, ‘A’, ‘Pa’ and ‘Pr’ in Posner’s model) do influence the split between settlement and arbitration.

The impact of the changes introduced by the WROLA Act goes beyond the increase in the settlement rate. The proportion of claims which are withdrawn, discontinued or have lapsed outside of conciliation also increased.

In the pre-WR Act period (28 March 1994 – 31 December 1996), 9.6 per cent of all claims were the subject of judicial or arbitral determination. Since the WROLA Act changes, only 8.2 per cent of claims have been so determined. This suggests that more applicants have now concluded that the transaction costs associated with pursuing a claim are not worth the potential outcome.
CHAPTER 7 — FUTURE SHOCK — THE WORKPLACE RELATIONS LEGISLATION AMENDMENT (MORE JOBS, BETTER PAY) BILL 1999

On 30 June 1999 the Minister for Workplace Relations and Small Business introduced the 1999 Bill. The 1999 Bill proposed a number of amendments to Division 3 of Part VIA of the WR Act. In his second reading speech, the Minister made the following remarks in relation to those parts of the 1999 Bill which dealt with termination of employment:

_The burden on employers, especially small and medium businesses, of unfair dismissal applications will be further eased through reforms to discourage speculative and unmeritorious claims and introduce greater rigour into their processing. Access to costs will be widened, contingency fees disclosed and the Commission will be required, at the conciliation stage, to make a recommendation as to the appropriate settlement or discontinuance of the matter, having regard to the merits of the case. Constructive dismissal claims, where employees resign but claim unfair dismissal, will be tightened._ (Reith 1999:9)

On the basis of the analysis in Chapters 5 and 6, at least two of the changes proposed in the 1999 Bill would be likely to significantly impact on the split between trial and settlement.

The first relates to s 170CF(2)(b). It will be recalled that this provision requires the conciliator to provide the parties with an assessment of the merits of the application,
where it is practicable to do so.\textsuperscript{148}

The 1999 Bill proposed the repeal of s 170CF(2)(b) and its replacement with a provision that, in the event that an unfair dismissal claim is not settled, the conciliator must indicate whether he or she considers, on the balance of probabilities, that the claim is likely to succeed. In respect of unresolved unlawful termination claims the position remains as it is at present.

The full significance of the proposed amendment can be appreciated when regard is had to the proposed changes to s 170CFA.\textsuperscript{149} These changes set out the circumstances in which a claim can proceed to arbitration.

The proposed s 170CFA provides that an application can only proceed to arbitration if the applicant has elected to proceed to arbitration. Such an election can only be made if, among other things, the conciliator has issued a certificate stating that on the balance of probabilities the claim is likely to succeed.

Two points can be made about these proposed changes:

\begin{itemize}
\item They would have the effect of legislatively overruling Kumar. In that case the Commission read down the requirement to provide an assessment of the merits by, in effect, inserting the qualifying words ‘where practicable to do so’. The
\end{itemize}

\textsuperscript{148} Note 124.

\textsuperscript{149} See Items 13-22 of Schedule 7 of the 1999 Bill; a comparison of the current s.170CFA and the proposed s.170CFA is set out in Appendix 15.
Commission's reasons for adopting such an approach are apparent from the following extract at 216:

If s 170CF(2)(b) is construed as imposing an obligation on the Commission to provide the parties to an application for relief in respect of termination of employment with an assessment of the merits of that application in every case then it would lead to great inconvenience. A practical example serves to illustrate this point.

In a particular case the question of whether or not the application will be successful may be dependent on the resolution of an evidentiary conflict between the parties In such circumstances the conciliator would generally not be able to properly assess whether or not the applicant would be successful without having the opportunity to hear the evidence in question.

The MTIA acknowledged the difficulty such cases provided for conciliators but argued that the Commission had wide powers at its discretion to compel the production of evidence or to summons witnesses [see ss 170JE, 110 and 111]...

In our view the process suggested by the MTIA is inconsistent with the scheme of Div 3 of Pt VIA of the Act. Parliament could not have intended the conciliation process envisaged by s 170CF to take on the features of a mini trial. Such an outcome would significantly increase the cost of proceedings as parties would be obliged to lead evidence both in
conciliation and in any subsequent arbitration. Indeed it would mean that a conciliation conference would take on the features of an arbitration hearing. Such an approach cannot be said to promote a fair and simple process of appeal against dismissal or to ensure that legalism is minimised.\textsuperscript{150}

If the proposed amendment was made, an assessment would have to be provided in every case. The failure to provide a positive assessment would prevent an application from proceeding to arbitration.

\begin{itemize}
\item An adverse certificate has the effect of dismissing the application with effect from the date of the certificate (s 170CFA(1A)). This represents a significant increase in mediator power.
\end{itemize}

The assessment is to be made having regard to ‘all matters before the Commission for the purpose of the conciliation’. Given that the conciliator is to be given arbitral power to dismiss the application, it is highly likely that during the conciliation proceedings parties will seek to lead evidence and advance arguments in support of their respective positions. The failure of the applicant to do so may result in the application being summarily dismissed.

The conciliation conference will take on the features of a mini-trial with the attendant consequences, including additional cost, alluded to in \textit{Kumar}. In this

\textsuperscript{150} Note 126.
regard it needs to be remembered that the conciliator is required to state whether, on the balance of probabilities, the application is likely to succeed - the standard of proof is the same as that applied in a s 170CG arbitration on the merits.

Conciliators are bound to accord the parties procedural fairness.\textsuperscript{151} In circumstances where the conciliator has the power to dismiss the application it is difficult to see how a conciliator could lawfully prevent a party from adducing relevant evidence during the conciliation proceedings.

The second key change relates to the power to award costs in s 170CJ of the \textit{WR Act}. This power has been interpreted as not to include a power to order costs in either an appeal from a s 170CH order or in a costs application itself.\textsuperscript{152} The \textit{1999 Bill} proposes that these limitations be removed. Item 29 of Schedule 7 of the \textit{1999 Bill} seeks to add a subsection at the end of s 170CJ to make it clear that the power to award costs does apply to, among other things, appeals, costs applications and conciliation proceedings. This change significantly expands the scope of the power to order costs.

In addition to expanding the range of proceedings in respect of which costs orders may be made, the \textit{1999 Bill} proposes two further changes:

\textsuperscript{151} \textit{Koppen v The Commissioner for Community Relations} (1986) EOC 92-173.

\textsuperscript{152} \textit{Lloyd v International Health & Beauty Aids Pty Ltd t/as Elly Lukas Beauty College} unreported, AIRC (Smith C), Print Q2225, 23 June 1998; \textit{Van Duc Duong v Crown Limited}, unreported AIRC (Munro J, MacBean SDP and Tolley C), Print R6818, 5 July 1999.
s 170CJ(1) is to be amended to remove the ‘vexatious or without reasonable cause’ ground upon which costs may be awarded and replace it with ‘where it should have been reasonably apparent ... that there was not a substantial prospect of success in relation to the application or proceeding’. This change is unlikely to have much impact. In deciding whether an application had been instituted ‘without reasonable cause’ the Commission has adopted the test of whether, upon the facts apparent to the applicant at the time of instituting the proceeding, there was no substantial prospect of success.\textsuperscript{153}

Adding a further basis upon which costs may be awarded; that is, if the Commission is satisfied that a party caused costs to be incurred by the other party because of the first party’s unreasonable act or omission in connection with the conduct of the proceeding.

A comparison of the current and proposed s 170CJ is set out in Appendix 15.

A final point needs to be made in relation to costs. Item 30 of Schedule 7 of the 1999 Bill proposes the insertion of a new section, s 170CJA, which empowers the Commission to order an applicant to give security for the payment of costs that may be awarded against the applicant. If such security is not given the Commission may order that the application be dismissed (s 170CJA(4)).

\textsuperscript{153} Note 108.
A number of other changes proposed in the 1999 Bill may also impact on the settlement rate at conciliation. These changes are essentially pro-respondent and would impact on the $Pa$ and $Pr$ variables in Posner’s settlement model, discussed in previous chapters.

One example serves to illustrate this point.

Under the current s 170CE(8) the Commission may accept an application that is lodged out of time if it considers that it ‘would be unfair not to do so’. The approach to extension of time applications under s 170CE(8) was considered in *Telstra-Network Technology Group v Kornicki* (*Kornicki*) in which the Commission said:

*The prima facie position is that the legislative time limit should be complied with and an applicant seeking to pursue an application lodged out of time must persuade the Commission to exercise the discretion in s.170CE(8) in their favour.*

*The central consideration in determining whether or not an out of time application should be accepted is whether it would be unfair to the applicant not to extend the time limit. We note that such a consideration necessarily involves the exercise of a general discretion. The following guidelines may assist in determining whether it would be unfair not to grant an application to extend time:*
A. Primary consideration should be given to two factors:

- Is there an acceptable explanation for the delay? It would generally not be unfair to refuse to accept an application lodged out of time where no acceptable explanation for the delay exists: Alonzo v. Harvey Norman-Fyshwick [print P0319, 21 April 1997 per Ross VP, Watson DP and Gay C]. However, consistent with the view of Brooking J in Dix v. Crimes Compensation Tribunal, while the existence of an acceptable explanation for the delay is relevant to the exercise of the discretion under s.170CE(8), it is not a condition precedent to the exercise of that discretion; and

- The merits of the substantive application. If the application has no merit then it would not be unfair to refuse to extend the time period for lodgment. However we wish to emphasise that a consideration of the merits of the substantive application for relief in the context of an extension of time application does not require a detailed analysis of the substantive merits. It would be sufficient for the applicant to establish that the substantive application was not without merit.

B. Depending on the circumstances of a particular case the provision of a ‘fair go all round’ may also allow regard to be had to the following considerations:

- Whether the applicant actively contested the decision to terminate his or her employment prior to lodging the application for relief; and
Prejudice to the respondent caused by the delay in filing the application.

We note however that these considerations are very much secondary in nature and are, of themselves, unlikely to be determinative of an application.\(^{154}\)

Item 10 of Schedule 7 of the 1999 Bill proposes the repeal of s 170CE(8) and the insertion of the following:

(8) The Commission may accept an application that is lodged out of time only if the Commission is satisfied that it would be equitable to accept the application.

(8A) The Commission can only be satisfied that it would be equitable to accept the application if the applicant establishes that:

(a) the circumstances of the late lodgment are exceptional; and

(b) there is an acceptable explanation for the delay in lodging the application; and

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\(^{154}\) Unreported AIRC (Ross VP, Watson SDP and Gay C), Print P3168, 22 July 1997 at 10-11.
(c) the applicant took action of any kind to contest the termination of his or her termination within 21 days after the day the termination took effect; and

(d) prejudice would not be caused to the respondent by the accepting of the late application.

There are five key differences between the Kornicki approach and that proposed by ss 170CE(8) and (8A):

- a broad general discretion is replaced by a discretion which can only be exercised in certain defined circumstances;

- the current test is changed from requiring an assessment of whether ‘it would be unfair not to do so’ to whether ‘it would be equitable to accept the application’. The current test focuses on the impact on the applicant of not accepting the late application. The proposed test suggests a balancing of the interests of the applicant and respondent;

- the factors in proposed s 170CE(8A) are cumulative – each must be established before the Commission may grant an extension of time. The Kornicki approach is more flexible;

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155 Note 152 at 10.
• the merits of the substantive application are not a factor under proposed s 170CE(8A) but are relevant in the Kornicki approach; and

• proposed s 170CE(8A) imposes an additional requirement – that the circumstances of the late lodgment are ‘exceptional’.

If the amendments are implemented there can be little doubt that they will operate to reduce the number of successful extension of time applications.

Other examples of proposed changes embodied in the 1999 Bill which would affect the likelihood of a claim succeeding at arbitration are:

- reducing the coverage of the scheme by tightening the circumstances in which a resignation can be deemed to be a termination at the initiative of the employer;\(^{156}\)

- narrowing the circumstances in which a termination can be found to be ‘harsh, unjust or unreasonable’ by excluding cases whether the employment of an employee or group of employees was on the ground, or included the ground, of the operational requirements of the employer’s undertaking establishment or service (proposed s 170CG(4));

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\(^{156}\) Compare Stubbs v Austar Entertainment Pty Ltd and proposed s 170CDA. Also note that in the past attempts to exclude employees employed by small business from the scope of Division 3 of Part VIA have been unsuccessful. The Workplace Relations Amendment (Unfair Dismissals) 1998 Bill contained such a provision, it was rejected by the Senate on 14 August 1999.
adding to the range of factors to which the Commission must have regard in a
s 170CG arbitration the following:

(da) the degree to which the size of the employer's undertaking,
establishment or service would be likely to impact on the procedures
followed in effecting the termination.

If the changes proposed in the 1999 Bill were implemented it is likely that the
settlement rate at conciliation will increase further.

To date the passage of the 1999 Bill has been blocked by the combined opposition of
the Labor Party and the Australian Democrats in the Senate. The termination of
employment provisions from the 1999 Bill were subsequently reintroduced in similar
terms in the Workplace Relations Amendment (Termination of Employment) Bill 2000
(the 2000 Bill). The 2000 Bill was passed by the House of Representatives on
7 September 2000 and was introduced into the Senate on 3 October 2000. At the
time of writing the 2000 Bill had not been the subject of debate in the Senate.

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158 In some respects the 2000 Bill is more 'moderate'. The 1999 Bill provided that an adverse
conciliator certificate would have the effect of dismissing the application (s.170CFA(1A). The 2000
Bill provides that where the Commission has indicated, on the balance of probabilities, that the
applicant's claim is unlikely to succeed, the Commission must invite the applicant to provide further
information in support of their claim and must consider any further material filed before the claim is
dismissed (ss 170CF(3), (4) and (5)).
CHAPTER 8 – SUMMARY OF PART B

The economic theory of trial and settlement predicts that changes which affect either the probable outcome of arbitration or the costs associated with arbitration, will influence the split between settlement and trial. Based on this theory, Posner has developed a settlement model for predicting if litigation will occur in a given case.

Posner’s model and the economic theory of trial and settlement are discussed in Chapter 3.

The legislative context or legal architecture within which unfair dismissal conciliations take place has changed significantly over time. These changes are important because they have the potential to impact on conciliator behaviour, the cost of litigation and the parties perception of how litigation would resolve the claim.

The relevant legislative history was reviewed in Chapter 4. Chapter 5 placed the legislative changes in the context of Posner’s settlement model. It is apparent from this material that Posner’s model would predict that, of these changes, those introduced by the WROLA Act have had the most impact on the rate of settlement at conciliation. The actual settlement rate experience over time confirms the accuracy of this prediction.

Before the WR Act (the name of which was introduced by the WROLA Act) the average settlement rate at conciliation was 56 per cent. After the WR Act the settlement rate increased to 71 per cent.
That factors, other than changes in legal architecture, may explain the differences in settlement rates before and after the \textit{WR Act} is considered, and rejected, in Chapter 6.

I conclude that the settlement rate experience over time supports the thesis that legislative changes which affect the cost of litigation, the remedies available from arbitration, and the probabilities of success (‘C’, ‘A’, ‘Pa’ and ‘Pr’ in Posner’s model) influence the split between settlement and arbitration.

The impact on settlement of the changes in the \textit{1999 Bill} is considered in Chapter 7. I argue that, based on the analysis in Chapters 5 and 6, the changes proposed in the \textit{1999 Bill} are likely to significantly impact on the split between trial and settlement. I predict that, if the proposed changes are implemented, it is likely that the settlement rate at conciliation will increase further.

The impact of legal architecture raises a number of important policy issues. Legislative change has had the effect of:

- reducing the scope and quantum of the remedies available;
- shifting the legislative focus from providing a mechanism for the vindication of the rights of an unlawfully terminated employee to an exercise of discretion to grant a remedy in circumstances where a termination is found to be harsh, unjust or unreasonable; and
- increasing the transaction costs of litigation.
The *WROLA Act* sharply reduced the net expected gain from unfair dismissal litigation. As a consequence, the settlement rate at conciliation increased from 56 to 71 per cent. The proportion of claims which proceed to arbitral or judicial determination has fallen. Before the *WR Act* about 9.3 per cent of claims were the subject of judicial or arbitral determination.\(^{159}\) Under the *WR Act* this proportion has fallen to 8.2 percent.\(^{160}\)

While the effect of this decline in the number of adjudications raises a number of important issues they are beyond the scope of this thesis. The question being considered is whether legal architecture impacts on bargaining behaviour and hence the probability of settlement. The simple answer is yes it does.

This conclusion has important implications for the next part of the thesis – the examination of the impact of other contextual and process issues on settlement. In order to properly assess the impact of these other factors, the legislative framework must be constant. If the legal architecture changes, it may act as a confounding factor and make it difficult to assess whether other things, such as the characteristics of the parties, have an independent impact on settlement. These issues are explored in Part C.

\(^{159}\) See Appendix 17.

\(^{160}\) See Table 4 on 145.
PART C: PARTY CHARACTERISTICS AND THE CONCILIATOR

The Impact on Settlement

CHAPTER 9 – OTHER FACTORS AND SETTLEMENT

9.1 Introduction

As mentioned in Chapter 1, the thesis posited is that the question of whether or not an unfair dismissal claim is settled at conciliation is determined by the context of the dispute and the conciliation process. It is contended that the outcome of conciliation is dependent on a number of independent contextual and process factors. The contingency approach adopted is represented by the figure below:

Figure 7

A Contingency Framework for Unfair Dismissal Conciliations

Context

Process

Outcome

1. Nature of the parties
2. Nature of the dispute
3. Legal context

1. Conciliator experience
2. Conciliator strategy

1. Settlement
2. No Settlement

193
In this study the contextual factors are:

- the characteristics of each party; and
- the legislative framework within which the conciliation takes place.

In examining the impact of the conciliation process on settlement, two variables are considered:

- the behaviour of the conciliator during the conciliation conference; and
- the experience of the conciliator.

Part B explored the impact of legal context on settlement. Based on changes in settlement rate experience over time I concluded that legislative changes which affect the cost of litigation, the remedies available from arbitration and the probabilities of success, influence the split between settlement and arbitration.

The focus of this Part is on the other context and process issues. To remove the confounding effect of changes in legal architecture, the conciliations examined all took place during a period in which the relevant legal framework did not change – that is, between 15 January and 30 December 1996. The number of applications lodged in this period, and what happened to those applications, is set out in Table 8 below:
### Table 8

**Disposition of Federal Claims**  
**15 January - 30 December 1996**

<table>
<thead>
<tr>
<th>Description</th>
<th>No. of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applications lodged</td>
<td>14,101</td>
</tr>
<tr>
<td>1. Withdrawn/discontinued before conciliation</td>
<td>2,675</td>
</tr>
<tr>
<td></td>
<td>11,426</td>
</tr>
<tr>
<td>2. Settled by conciliation</td>
<td>6,387</td>
</tr>
<tr>
<td></td>
<td>5,039</td>
</tr>
<tr>
<td>3. Referred for determination</td>
<td></td>
</tr>
<tr>
<td>- to the Court</td>
<td>4,308</td>
</tr>
<tr>
<td>- to consent arbitration</td>
<td>731</td>
</tr>
<tr>
<td></td>
<td>NIL</td>
</tr>
</tbody>
</table>

The average settlement rate during this period was 55.9 per cent:

\[
\frac{\text{claims settled at conciliation}}{\text{cases which proceeded to conciliation}} = \frac{6387}{11,426} \times \frac{100}{1} = 55.9\%
\]

As with previous periods the average disguised substantial variation between the settlement rates of individual conciliators, as can be seen from Chart 8 below.
The settlement rates of individual conciliators ranged from 28 to 86 per cent.

This part of the thesis seeks to explain these variations.

9.2 Party Characteristics and Settlement

The thesis is that certain characteristics of the parties to an unfair dismissal claim will influence whether or not the claim settles at conciliation. The selection of which characteristics might be relevant was influenced by four sources:

- general mediation research literature;
- discussions with conciliators;
- the economic theory of trial and settlement; and

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161 See Appendix 13 and 18.
the results of a 1992 survey of UK industrial tribunal applications (Tremlett and Banerji 1994).

The Tremlett and Banerji survey covers a sample of applications made to the UK industrial tribunal system between April 1990 and March 1991. The UK’s tribunal jurisdiction covers individual employment disputes over unfair dismissal, deductions from wages (i.e. Wages Act matters) and discrimination on the grounds of sex, race or disability. The majority (albeit a declining proportion) of claims to industrial tribunals relate to unfair dismissal (Knight and Latreille 2000:533). The survey consisted of interviews with 1990 employers respondent to industrial tribunal applications and 537 individuals who made such applications. The employer interviews covered each of the jurisdictional areas, while the individual applicant interviews related to the first two areas mentioned (i.e. unfair dismissal and wages claims). I refer to some of the survey results later in this chapter.

Using a combination of the four sources referred to the following factors were identified as having a potential impact on settlement:

- applicant details
  - gross weekly wage
  - period of service
  - has the applicant found another job
Chapter 9 - Other Factors and Settlement

- occupational group
- age
- gender
- ethnic background

- employer details
  - business size
  - private or public sector
  - ethnic background

- mode of representation

- miscellaneous
  - have the parties discussed the matter prior to the conciliation conference
  - the reason for the dismissal

The rationale behind the selection of each of these factors is dealt with below.

9.2.1 The Applicant - Economic Factors

The economic theory of trial and settlement posits that economically rational litigants make risk neutral or risk averse choices to maximise outcomes. In making these choices litigants take probable trial outcomes into account. Based on this theory

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See generally Chapter 3.
applicants can be expected to settle if a settlement offer is greater than the net expected gain from litigating. The net expected gain from litigation is the estimated award if successful, discounted by the probability of success minus litigation costs. Similarly respondents will settle if the price is less than the expected loss if the matter is litigated. The respondents’ expected loss is the estimated award if unsuccessful discounted by the estimated probability of losing plus litigation costs.

Some applicant characteristics may impact on the amount of the estimated award if successful. In the period under consideration (15 January to 30 December 1996) the amount of compensation awarded to successful applicants was influenced by a number of factors including:

- lost remuneration (i.e. the remuneration the applicant would have received, or would have been likely to have received, if the employer had not terminated the employment); and
- the statutory ceiling on the amount of compensation which could be awarded.\(^{163}\)

Lost remuneration is usually calculated by first estimating how long the employee would have remained in his or her employment but for their unfair dismissal.\(^{164}\) An applicant’s length of service is relevant to the assessment of how long he or she would have remained in their employment. The longer an applicant’s service the

\(^{163}\) See generally Chapter 4.
\(^{164}\) Ellawala v Australian Postal Commission, unreported AIRC (Ross VP, Williams SDP and Gay C), Print S5109, 17 April 2000 paragraph 34.
more likely they would have remained in their employment for some years and hence the greater their lost remuneration.\textsuperscript{165}

The assessment of lost remuneration is also subject to a deduction for monies earned since termination. If an applicant obtained other employment say six weeks after their termination, the extent of their lost remuneration is six weeks pay.\textsuperscript{166} Hence whether or not the applicant has found another job may impact on his or her net expected gain from litigation and thus on his or her propensity to settle.

The statutory ceiling on compensation is also relevant. During the period under consideration compensation was capped at six months remuneration. The level of compensation awarded was a function of the applicant's pre-termination remuneration. An applicant whose remuneration was $30,000 per annum could only receive a maximum of $15,000 in compensation compared to a statutory maximum of $25,000 for someone on $50,000 per annum. Hence, an applicant's pre-termination earnings may influence settlement. The expected gain from litigation for a low paid applicant will be less than for a high paid applicant. Similarly, for a low paid applicant the costs associated with pursuing a claim to trial are likely to be a substantial proportion of the estimated award if successful.

A person of limited means is also more likely to be risk averse (Markowitz 1952) and to favour settlement over the uncertainty of litigation. Earnings may serve as a proxy

\textsuperscript{165} For example see Shorten v Australian Meat Holdings Pty Ltd, (1996) 70 IR 360.
\textsuperscript{166} Assuming that the new job pays at least as well as the old.
for resources and the extent of a parties resources can influence their predisposition to settlement. Indeed this is the basis of Fiss’s (1984) criticism of the economic model of litigation which treats settlement as the anticipated outcome of the trial. Fiss (1984:1076) contends that ‘settlement is also a function of the resources available to each party to finance the litigation’.

ABS statistics also suggest a relationship between occupation and length of service and level of earnings. For example, in February 1996 managers and administrators had spent an average of 11.8 years in their current job, compared to labourers and related workers who averaged 5.6 years service.\(^{167}\) In the same month managers and administrators earned $1125.80 per week compared to $557.70 earned by labourers and related workers.\(^{168}\)

The above discussion suggests that four applicant characteristics may influence the likelihood of settlement:

- gross weekly wage (low paid applicants would have a higher propensity to settle than high paid applicants);

- period of service (the likelihood of settlement could be expected to reduce as length of service increases);


whether the applicant has found another job (if the applicant has found alternative employment the case would be more likely to settle); and

- the applicant’s occupation.

The relevance of the above considerations was confirmed in informal discussions with Commission conciliators. In particular, most conciliators emphasised the importance of whether the applicant had found another job. Obtaining new employment was felt to increase the likelihood of settlement. As well as reducing the expected gain from litigation (and hence the incentive to litigate) there were said to be psychological and practical considerations which favoured settlement. A number of conciliators expressed the view that an applicant who had found another job wanted to put the termination of their previous employment behind them. As a practical matter pursuing a case to trial may be more difficult once the applicant had started a new job. Obtaining time off from a new employer for case preparation and to attend hearings associated with the termination of your previous employment may be problematic.

9.2.2 The Applicant - Other Factors

Three other applicant characteristics may also impact on settlement:

- age;
- gender; and
- whether English was their first language.
Chapter 9 - Other Factors and Settlement

Age

The age of the applicant may impact on settlement in three ways. First, length of service is likely to increase with age. Statistics collected by the Australian Bureau of Statistics (the ABS) suggest that there is a relationship between job mobility (defined as a change of job) and age, as shown by Chart 9 below:

![Chart 9: Job Mobility and Age](image)

As job mobility reduces with age we would expect length of service to increase with age.

The likelihood of settlement is expected to reduce as the length of the applicant's service with the respondent increases (see pp199-200 infra).

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Second, risk profile is likely to change with age. Traditional economic theory assumes that people are either ‘risk neutral’, meaning that they would be indifferent between having a ten per cent chance of winning $1000 versus having $100, or they are ‘risk adverse’, meaning that they prefer sure things - they would take the $100. Generally speaking older applicants would be expected to be more risk adverse than younger applicants. Hence we would expect the likelihood of settlement to increase with the applicant’s age.

The third consideration relates to the likelihood of the applicant finding another job. The available ABS statistics suggest that the average duration of unemployment increases with age, as shown in Table 9 below:

<table>
<thead>
<tr>
<th>Unemployed Persons : Duration of Unemployment by Age</th>
<th>Age Group (Years)</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 1996</td>
<td>15-19</td>
</tr>
<tr>
<td>Average Duration of Unemployment (weeks)</td>
<td>21.2</td>
</tr>
<tr>
<td>Median Duration of Unemployment (weeks)</td>
<td>8</td>
</tr>
</tbody>
</table>

The older the worker the longer it takes to find new employment after job loss and obtaining new employment would be expected to increase the likelihood of settlement.

---

Of the three ways in which age may impact on settlement the first and third suggest that younger applicants would be more likely to settle than older applicants. The second consideration suggests that the converse is the case.

**Gender**

There are numerous studies exploring the issue of gender difference in conflict management style (see generally Leitch 1986/87; Stamato 1992). Some find that males are more dominating and less compromising than females (e.g. Rahim 1983), others conclude that females tend to use a more compromising and passive style of conflict management (e.g. Shockley-Zalabak and Morley 1984). Some studies report no real differences in how males and females handle conflict situations (e.g. Rubin and Brown 1997; Bell, Chafetz and Horn 1982). In their 1992 review of the relevant literature Carnevale and Pruitt (1992:571) concluded that the studies on gender differences are inconsistent and the theoretical conception underlying such differences is unclear.

To the extent that gender differences exist they may manifest themselves in the conciliation process. Leitch (1986/87:169) suggests that men and women enter mediation with different world views that affect the way they negotiate.

There is also some evidence to suggest that men and women approach mediation with different expectations. Men go to mediation because they think they can get a better deal, women go to avoid conflict (Beer and Stief 1985 cited in Leitch 1986/87). This is consistent with research by Pearson, Thoennes and Vanderkooi (1982) contrasting individuals willing to mediate custody and visitation issues with those
would prefer to litigate. Pearson et al found that women were predisposed to mediate because mediation appeared less remote and impersonal than the court system. For men the decision to mediate was largely a function of their perceived chances of winning in the adversarial process. On the whole the men who were willing to mediate were less optimistic about their changes if the case proceeded to trial.

The Tremlett and Banerji (1994:27) survey of UK unfair dismissal cases found that female applicants were more likely to settle their cases before reaching a tribunal hearing (51 per cent compared to 44 per cent of male applicants).

Three particular factors suggest that female applicants would be more likely to settle than male applicants. The first is relative earnings. Labour market segmentation has operated to depress female earnings. A disproportionate number of female employees are employed in low wage occupations.
### Table 10

**Occupation and Gender**  
**February 1996**

<table>
<thead>
<tr>
<th>Occupational Group</th>
<th>Male</th>
<th></th>
<th>Female</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No. '000</td>
<td>% of all male employees</td>
<td>No. '000</td>
<td>% of all female employees</td>
</tr>
<tr>
<td>1. Managers &amp; Administrators</td>
<td>673.9</td>
<td>14.3</td>
<td>224.1</td>
<td>6.3</td>
</tr>
<tr>
<td>2. Professionals</td>
<td>661.6</td>
<td>14.0</td>
<td>502.4</td>
<td>14.2</td>
</tr>
<tr>
<td>3. Para-professionals</td>
<td>236.3</td>
<td>5.6</td>
<td>230.9</td>
<td>6.5</td>
</tr>
<tr>
<td>4. Tradespersons</td>
<td>1081.4</td>
<td>22.9</td>
<td>127.1</td>
<td>3.6</td>
</tr>
<tr>
<td>5. Clerks</td>
<td>295.3</td>
<td>6.2</td>
<td>1065.9</td>
<td>30.1</td>
</tr>
<tr>
<td>6. Salespersons &amp; personal service workers</td>
<td>482.4</td>
<td>10.2</td>
<td>897.8</td>
<td>25.4</td>
</tr>
<tr>
<td>7. Plant &amp; machine operators</td>
<td>502.2</td>
<td>10.6</td>
<td>70.1</td>
<td>2.0</td>
</tr>
<tr>
<td>8. Labourers &amp; related workers</td>
<td>792.7</td>
<td>16.8</td>
<td>420.2</td>
<td>11.9</td>
</tr>
</tbody>
</table>

In 1996 the occupational group with the highest average weekly total earnings was managers and administrators ($1125.80). Some 14.3 per cent of male employees are managers and administrators compared with 6.3 per cent of female employees. The occupational groups with the lowest average weekly total earnings were clerical, sales and personal service workers ($557.50). Female employees predominate in these occupational groupings.

Even within the same occupation group the earnings of female employees are less than those of male employees, as shown by Chart 10 below:

---


The second factor which may increase the likelihood of settlement amongst female applicants is that they are more likely to obtain new employment than male applicants.

Table 11

<table>
<thead>
<tr>
<th>Duration of Unemployment by Age and Gender</th>
<th>Median Duration of Unemployment (weeks)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age Group (years)</td>
<td>Males</td>
</tr>
<tr>
<td>15-19</td>
<td>8</td>
</tr>
<tr>
<td>20-24</td>
<td>13</td>
</tr>
<tr>
<td>25-34</td>
<td>26</td>
</tr>
<tr>
<td>35-54</td>
<td>28</td>
</tr>
<tr>
<td>Total</td>
<td><strong>21</strong></td>
</tr>
</tbody>
</table>

173 Note 168.
As Table 11 shows, females are more successful at finding new employment after a job loss than males. The median duration of female unemployment is 11 weeks compared to 21 weeks for males.

The final factor is length of service.

An ABS survey conducted in February 1996 revealed that a higher proportion of males than females had been in their current job for 10 years or more (27 and 18 per cent respectively). The results of the survey are summarised in the chart below:

![Chart 11](image)

**Chart 11**

<table>
<thead>
<tr>
<th>Gender and Duration of Current Job</th>
<th>February 1996</th>
</tr>
</thead>
</table>

Note 167.

Note 167 at p201.
In summary, relative to male employees, female employees are:

- paid less;
- more likely to find new employment after losing their job; and
- have less service.

Each of these factors suggests that female applicants would be more likely to settle.

*Ethnic Background*

The 1992 research review by Carnevale and Pruitt (1992:570) suggests that cultural differences in negotiation behaviour and in preferences among dispute resolution procedures may affect the prospects for settlement by mediation. This proposition was subjected to some empirical examination by Tremlett and Banerji (1994). Their survey records some differences in settlement behaviour based on the ethnic background of the applicant, as shown in Table 12 below:

<table>
<thead>
<tr>
<th>Table 12</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ethnicity of Applicants by Outcome</td>
</tr>
<tr>
<td>Tremlett and Banerji (1994: Table 4.10 at 27)</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Claim settled before hearing</td>
</tr>
<tr>
<td>---</td>
</tr>
<tr>
<td>46</td>
</tr>
<tr>
<td>Claim withdrawn before hearing</td>
</tr>
</tbody>
</table>

Asian applicants were slightly less likely to settle their claims before reaching a tribunal hearing but were more likely to withdraw their claim prior to hearing.
The observed differences in settlement may also be the result of communication difficulties. If an applicant is unable to fully comprehend what is being said in conciliation we would expect some deterioration in the effectiveness of the conciliator’s techniques. On this basis if a party (either an applicant or a respondent) was from a non-English speaking background we would expect the probability of settlement at conciliation to decease.

9.2.3 The Respondent - Does Size Matter?

The size of an employer’s business - measured by the number of persons employed - may have an impact on the employer’s approach to mediation and to settlement. Large enterprises may expect to face other unfair dismissal claims in the future. The prospect of such future litigation may provide an incentive to take a particular claim to arbitration for its precedent value and attendant benefits for future litigation. But a small business operator without an expectation of similar litigation in the future may have little interest in creating precedent for subsequent cases.

Galanter (1974) would regard large enterprises as ‘repeat players’ and small businesses as ‘one shotters’. A ‘one shotter’ has only occasional recourse to the courts whereas a ‘repeat player’ may engage in many similar cases over time. The objectives of ‘one shotters’ and ‘repeat players’ differ in ways that may affect their behaviour in conciliation.

‘One shotters’ have high stakes in the tangible outcome of a particular case and are unlikely to try to obtain changes in the legal norms governing the system. They will be willing to trade off the possibility of creating a favourable precedent for tangible gain.
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For a small business the costs involved, both monetary and in terms of management time, in proceeding to arbitration would be substantial relative to the business's resources. This would be particularly so for the one person operation. Such businesses would not expect to be involved in similar cases in the future and hence may be indifferent to the precedent created by either settling or litigating a particular claim. These factors may predispose small businesses to settle, even when they have a reasonable prospect of winning if the matter was arbitrated.

‘Repeat players’ are different. They have had and anticipate repeated litigation. ‘Repeat players’ have low stakes in the outcome of any case and have the resources to pursue their long term interests. Since they expect to litigate again ‘repeat players’ can elect to litigate those cases which they regard as most likely to produce favourable precedent. Anything that would favourably influence the outcome of future cases would be considered to be a worthwhile result. A large business may also be concerned about ‘opening the floodgate’ to similar claims if they settle in a particular case.

In terms of empirical evidence the Tremlett and Banerji (1994) survey suggests that employment size impacts on settlement. No significant differences in settlement rates were found in establishments with up to 500 employees; but claims brought involving establishments with 500 or more employees were less likely to be settled before hearing (37 per cent compared with 47 per cent of claims involving establishments with fewer than 500 employees) (Tremlett and Banerji 1994: 26, Table 4.8).

This study tests the hypothesis that establishment size is correlated to settlement. It is predicted that the bigger the business the less likely the parties will be to settle.
9.2.4 The Respondent - Is Settlement a Public or a Private Thing?

In the Tremlett and Banerji (1994:25) survey 48 per cent of those bringing claims against private sector organisations settled before reaching a tribunal hearing compared with 38 per cent of those bringing claims against public sector organisations.

There may be a number of reasons for such a phenomenon. A public sector organisation may be more concerned about the precedent effect of setting a particular case than an organisation in the private sector. Or its decision making structures may inhibit negotiator flexibility.\textsuperscript{176} Establishment size also varies by sector. Callus et al (1991:24) made the following observation based on the 1989-1990 Australian Workplace Industrial Relations Survey:

\begin{quote}
... while the public sector accounted for only 13 percent of workplaces, it was a relatively large employer, accounting for 33 percent of all employees covered by this survey. Private sector workplaces make up 92 percent of workplaces with fewer than twenty employees. This proportion decreases with workplace employment size with fewer than half the workplaces with 500 or more employees being in the private sector. The average size of private sector workplaces was twenty seven employees, less than a third of the public sector average of eighty eight.
\end{quote}

\begin{footnotesize}\textsuperscript{176} Sector has been shown to produce different patterns of industrial relations, see Morehead et al (1997) and Millward et al (1986).\end{footnotesize}
Establishment size would be expected to influence settlement. Small businesses are more likely to settle than large.

These factors suggest that settlement rates will be higher in cases involving private sector respondents than in those in the public sector.

9.2.5 Representation

As noted in Chapter 5 there is some evidence to suggest that the lack of legal representation in unfair dismissal proceedings may adversely affect a party’s prospects of success in arbitration.

A party to a federal unfair dismissal application may be self represented or chose to be represented by counsel, solicitor or agent; or by a union or employer organisation of which they are a member.\textsuperscript{177} In practice agents are rarely used but it is quite common for parties to be legally represented. In the conciliations surveyed in this study, 46 per cent of applicants and 34 per cent of respondents were legally represented. These results are consistent with the pattern of representation in all unfair dismissal claims filed at the time the survey was conducted as shown by Table 13 below:

\textsuperscript{177} Section 42 of the WR Act, substantially the same provision operated under the IR Act. Technically a party may only be represented by counsel, solicitor or agent if granted leave by the Commission. In practice leave is usually granted in unfair dismissal matters.
Table 13

Unfair Dismissal Claims Filed 1995 - 1996
Legal Representation of Parties at Commencement of Proceedings\textsuperscript{178}

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Applicants</td>
<td>3393</td>
<td>3752</td>
<td>1893</td>
</tr>
<tr>
<td></td>
<td>38%</td>
<td>42%</td>
<td>21%</td>
</tr>
<tr>
<td>Respondents</td>
<td>3105</td>
<td>2802</td>
<td>2485</td>
</tr>
<tr>
<td></td>
<td>37%</td>
<td>33%</td>
<td>30%</td>
</tr>
</tbody>
</table>

In any particular matter a number of combinations of representation options are possible:

\begin{itemize}
  \item Applicant - self represented / Employer - self represented
  \item Applicant - self represented / Employer - solicitor, counsel or agent
  \item Applicant - self represented / Employer - employer organisation
  \item Applicant - solicitor, counsel or agent / Employer - self represented
  \item Applicant - solicitor, counsel or agent / Employer - solicitor, counsel or agent
  \item Applicant - solicitor, counsel or agent / Employer - employer organisation
  \item Applicant - union / Employer - self represented
  \item Applicant - union / Employer - solicitor, counsel or agent
  \item Applicant - union / Employer - employer organisation
\end{itemize}

\textsuperscript{178} Industrial Relations Court of Australia Annual Report 1995 - 96 at 32 and 35. The Commission does not collect data on representation.
Chapter 9 - Other Factors and Settlement

As well as influencing the outcome of an arbitration, particular combinations of representation options may impact on settlement. For example legal representation may be positively associated with settlement. Korobokin and Guthrie (1997) rely on experimental evidence to support their contention that lawyers are less subject to 'irrational' psychological phenomena than their clients and therefore may be able to encourage their clients to enter into settlements that might not be reached without such assistance.  

But not all researchers support the proposition that lawyers facilitate settlement. Sternlight (1999:320) notes that lawyers have economic incentives which differ from those of their clients and that this distinction may lead lawyers to oppose settlement:

Economists and others ... have long realised that attorneys who are paid by the hour have at least short term interest in prolonging the dispute, and thereby maximising their fee, rather than allowing a settlement to kill the goose that is laying the golden eggs.

The results of the Tremlett and Banerji (1994:48) survey support this view. They concluded that ‘...those applicants who used a private solicitor/barrister were much more likely to actually go to a tribunal hearing than those who sought advice elsewhere’.

\[179\] Also see Croson and Mnookin (1997), summarising an experiment conforming their hypothesis that the users of lawyers as agents may enhance clients' reliance on a cooperative approach; similar arguments are advanced in Croson and Mnookin (1994).
Representatives who are repeat players may also be more likely to engage in ‘co-operative bargaining’ during the conciliation process due to the ongoing and repetitive nature of their interactions. There is some evidence to suggest that their orientation is towards settlement (Ingleby 1990:52). Eisenberg (1976:664) refers to such representatives as ‘paired affiliates’ and suggests that they are:

... likely to find themselves allied with each other as well as with the disputants, because of their relative emotional detachment, their interest in resolving the dispute, and in some cases their shared professional values.

Condlan (1992) goes further and suggests that the ‘move towards cooperativeness’ extends beyond behaviour to a substantive commitment to being ‘fair’ or adhering to ‘authoritative substantive norms’.

In the unfair dismissal context ‘paired affiliates’ may exist in circumstances where both parties are legally represented and the representatives have a past history of dealing with one another. Such a relationship may also exist where the parties are represented by a union and an employer organisation.

The Tremlett and Banerji (1994:24) survey examined outcomes by trade union membership but unfortunately did not match this data with cases where the employer was represented by an employer organisation. Cases involving applicants who were members of a trade union were less likely to be settled before reaching a tribunal hearing than cases involving non union members (40 per cent compared to 49 per cent). The applicants surveyed were also asked if their union had been involved in their case. When the answers to this question are taken into consideration the
differences between union and non-union applicants are reduced. Among those applicants who reported that they were union members, and that their union was involved in their case, 46 per cent settled before reaching a tribunal hearing, compared with 49 per cent of non-union members.

In considering the potential impact of representation on settlement I informally canvassed the views of Commission conciliators. No general consensus emerged regarding the impact of legal representation. The most commonly expressed view was that it depended on the representative - some assisted settlement and some did not.

Lack of representation may also impact on settlement. In circumstances where neither party is represented the role of the conciliator becomes more important. The conciliator is usually the sole repository of information about the ‘norms’ of the system, for example the likely delay before the matter is listed for hearing and the likely outcome if the claim proceeded to arbitration. If the parties are unrepresented the conciliator’s expertise will be unchallenged - increasing conciliator power and, potentially, the likelihood of settlement.

The thesis posited is that of the available combinations of representation options, settlement will be more likely when:

- both parties are represented; or
- both parties are unrepresented.
In the first category there is the potential that the representatives are ‘repeat players’ with each other and in the second enhanced conciliator power may be a factor.

9.2.6 Miscellaneous Matters

Two other situational factors were identified as having a potential impact on settlement:

- whether the parties had discussed the matter prior to the conciliation conference; and
- reasons for the dismissal.

The first factor arose out of informal discussions with Commission conciliators; a number of whom encouraged parties to meet and discuss their dispute prior to the conciliation conference. The conciliator’s who used this technique believed that it assisted in the settlement of the dispute.

The reasons for the termination of the applicant’s employment may also affect the prospects of settlement. Hiltrop (1985) observed a difference in the settlement of industrial disputes depending on the issue in dispute.
Table 14

Settlement Rate as a Function of Issue
Hiltrop (1985: Table 2, 88)

<table>
<thead>
<tr>
<th>Type of Issue</th>
<th>% Settled</th>
<th>No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pay and other terms and conditions of employment</td>
<td>73</td>
<td>104</td>
</tr>
<tr>
<td>Union recognition</td>
<td>33</td>
<td>72</td>
</tr>
<tr>
<td>Discipline/dismissal</td>
<td>55</td>
<td>31</td>
</tr>
<tr>
<td>Demarcation</td>
<td>67</td>
<td>3</td>
</tr>
<tr>
<td>Redundancy</td>
<td>48</td>
<td>23</td>
</tr>
<tr>
<td>Other trade union matters</td>
<td>67</td>
<td>27</td>
</tr>
</tbody>
</table>

Issues involving matters of principle - such as union recognition - had a much lower rate of settlement than monetary issues, such as pay (33 versus 73 per cent).

In the unfair dismissal context terminations due to fighting or abusive language may also involve matters of principle - for example the implementation of the employer's policy mandating termination of employment for such conduct. Terminations due to misconduct may also generate considerable interpersonal hostility between the parties which may make dispute resolution more difficult (Gerhart and Drotning 1980; Ross, Fischer, Baker and Buchholz 1997). The research literature suggests that mediation is more effective when the issues do not involve general principle and when conflict is moderate. As conflict increases, the prospects of settlement diminish.\(^{180}\)

9.3 The Conciliation Process

Part of the thesis posited is the prediction that conciliator style and the experience of the conciliator will influence the split between settlement and arbitration.

\(^{180}\) See the studies reviewed by Wall and Lynn 1992:174.
9.3.1 Does Style Matter?

For present purposes the most interesting area of mediation research concerns the relationship between mediator behaviour and case outcome.

In a 1985 review of the reported studies Kressel and Pruitt concluded that the studies at that time found either little (Hiltrop 1985; Thoennes and Pearson 1985) or no significant association (Carnevale and Pegnetter 1985; Shapiro et al 1985; Wall and Rude 1985) between mediator behaviour and case outcome. Kressel and Pruitt (1985) suggested a number of reasons for the failure to find such a relationship, including:

- the failure to focus on a narrower and more homogenous band of disputes;

- researchers may have investigated too limited a set of mediator tactics. In this regard two of the papers that found no significant correlation between mediator behaviour and outcome (Shapiro et al 1985; Wall and Rude 1985) did not include rapport building strategies; and

- mediator behaviour has been mainly measured by means of the retrospective accounts of mediators themselves or of those with whom they have worked. While useful, such accounts cannot fully substitute for direct observations of mediator activity.
But subsequent research does provide some limited evidence of a linkage between particular mediation styles and behaviours and successful outcomes, for example:

- *controlling the communication between the parties by the use of the caucus*: Hilltop (1989) reports that such efforts are positively related to settlement in the mediation of industrial disputes.

- *structuring the issue agenda and assisting the parties to establish priorities*: Pruitt et al (1991) and Lim and Carnevale (1990) found that such a technique led to greater short term success. Pruitt (1981) also found that mediators can arrange the agenda so that early agreements on simple issues produced momentum for achieving an agreement on later more difficult issues.

- *control over the process*: Lim and Carnevale (1990) found that this was positively associated with settlement in a variety of disputes.

- *a friendly style of mediation*: Ross et al (1990) reported that this technique was effective regardless of the time pressure on the disputants.

Conversely, Brett et al (1986) found no significant relationship between a mediator's style and their overall rate of settlement; but style was significantly related to the type of settlements achieved.
Chapter 9 - Other Factors and Settlement

Two particular types of conciliator techniques are the subject of this paper:

- rapport building; and
- assertive or interventionist techniques.

Rapport building is designed to improve acceptance of mediation by establishing trust in the mediator and confidence in the mediation process. Several studies have shown that trust in the mediator is an important predictor of settlement (Carnevale and Pegnetter 1985; Pruitt et al 1989). Zubek et al (1992) found that mediator empathy was positively correlated with settlement.

Kressel and Pruitt (1989) suggest that one of the ways that mediators can effectively facilitate conflict resolution is ‘rapport building’. Two methods of ‘rapport building’ are:

- projecting an image of expertise which enhances the mediator’s perceived credibility and legitimacy (Kolb 1985); and

- demonstrating empathy with the parties through verbal and non verbal expressions of concern for their welfare, understanding of their situation and acceptance of their emotional reactions (Kressel 1972).

Empathy in this context refers to demonstrations of concern and perspective taking, for example verbally and/or non verbally demonstrating concern for the welfare of

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one or both of the parties and the ability to understand and accurately interpret their thoughts and emotions as evidenced by the reactions of the parties.

Research into the effectiveness of aggressive or interventionist mediation techniques is not so unequivocal. Zubek et al (1992) found that ‘pushing the parties’ had no relationship with settlement or other measures of short term success such as goal achievement or satisfaction with the agreement reached. Gerhart and Drotning (1980) noted that in many circumstances mediator intensity is viewed by negotiators as undesirable.

But a number of the studies reviewed by Kressel and Pruitt (1985) and Carnevale and Pruitt (1992) provide at least qualified support for the proposition that mediator assertiveness increases the likelihood of settlement. Hiltrop (1985) used data collected from 260 mediation cases conducted by the British Advisory, Conciliation and Arbitration Service (ACAS) to examine how certain mediator techniques and situational factors influenced the outcome of a mediation.

Hiltrop (1985:84) summarises his findings in these terms:

... salary disputes and nonsalary disputes each have their own effective approaches. On the basis of observations and the associated explanations the mediators provided for their activities, aggressive tactics, such as threatening to quit or suggesting arbitration, appear to be associated with settlement in nonsalary disputes but with nonsettlement in salary disputes. Somewhat along the same lines, making proposals and threatening to quit contributed to settlement in strike cases but failed to affect the outcomes of the process in
nonstrike cases. Analysis of the parties' attitudes in each category of dispute suggests that differences in willingness to compromise may provide the most compelling explanation for this divergence in effective approaches to mediation.

Similarly, Kochan and Jick (1978:225) concluded that '[t]he use of aggressive strategies was significantly correlated with the movement in bargaining and holding back concessions but fell short of significance with the probability of settlement'.

After reviewing these and other studies, Carnevale and Pruitt (1992:565) concluded that the effectiveness of an active mediator strategy was contingent on the dispute circumstances. Such a strategy was useful where there is high conflict intensity but is counterproductive when conflict intensity is low.

This study tests the hypothesis that conciliator style is correlated to settlement. In particular it is predicted that rapport building strategies and assertive or interventionist conciliator techniques will be positively associated with settlement.

9.3.2 Does Experience Count?

Kessler (1978) argues that more experienced mediators tend to be perceived by disputants as being credible and instilling trust - hence they are more likely to facilitate a settlement than an inexperienced mediator. Projecting an image of expertise is also said to enhance the mediators perceived credibility and legitimacy (Kolb 1985).
Previous research has generally supported these contentions. Mediator experience, usually measured by the number of years working as a mediator, has been found to be a significant determinant of settlement. The more experienced the mediator the more likely the parties are to settle (Kochan and Jick 1978; Carnevale and Pegnetter 1985). Similarly, Pearson, Thoennes and Vanderkooi (1987) found that more experienced divorce mediators obtained higher quality settlements. In the Australian context Bartlett (1993) found that of the cases in the Spring 1992 Victorian Supreme Court ‘Mediation Offensive’ which did not settle, 26 per cent were dealt with by a ‘trained’ mediator and 74 per cent were dealt with by ‘untrained’ mediators.

But the evidence is not all one way. Zubek et al (1992) found that mediator experience was not positively related to short term success. The measures of short term success used were: reaching agreement, goal achievement and immediate satisfaction with the agreement and the conduct of the hearing. They also found that:

... professing expertise was negatively related to short-term success. Contrary to expectations, cases in which mediators talked extensively about their expertise were less likely to reach agreement and had lower levels of satisfaction with the way the hearing had been conducted.\textsuperscript{182}

Similarly, in their evaluation of the October 1991 ‘Settlement Week’ in New South Wales, Chinkin and Dewdeny (1992:116) concluded:

\textsuperscript{182} Zubek et al (1992) at 562.
A higher proportion of less experienced mediators (45 per cent) who had not mediated or who had mediated in no more than ten cases, had achieved a settlement rate of between 75 per cent and 100 per cent of their Settlement Week cases compared to 33 per cent of the more experienced mediators, some of whom had mediated in several hundred cases.

No difference was noted in the lower settlement rates. For example:

- a settlement rate of between 60 per cent and 74 per cent was achieved by 22 per cent of less experienced and 22 per cent of more experienced mediators; and

- a settlement rate of between 30 per cent and 50 per cent was achieved by 33 per cent and 30 per cent of more experienced and less experienced mediators respectively.

Whether such findings are significant can only be determined by further evaluative research on larger samples. As noted earlier, cases anticipated to be difficult were assigned to more experienced mediators, a factor which may have affected the settlement rate of these mediators.”

This study tests the hypothesis that conciliator expertise is positively associated with settlement.
9.4 Summary - A Testable Hypothesis

It is argued that whether or not an unfair dismissal claim settles at conciliation is determined by the context of the dispute and the conciliation process. The predicted impact of particular factors is summarised in the table below:
### Table 15

**Independent Variables and Settlement Predictions**

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Affect on the Probability of Settlement ((P_s))</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A. Contextual factors</strong></td>
<td></td>
</tr>
<tr>
<td>1. Applicant</td>
<td></td>
</tr>
<tr>
<td>&gt; remuneration</td>
<td>(\text{low pay} \rightarrow \uparrow P_s)</td>
</tr>
<tr>
<td>&gt; period of service</td>
<td>(\uparrow \text{service} \uparrow P_s)</td>
</tr>
<tr>
<td>&gt; new job</td>
<td>(\text{new job} \rightarrow \uparrow P_s)</td>
</tr>
<tr>
<td>&gt; occupational group</td>
<td>(\text{high status} \rightarrow \downarrow P_s)</td>
</tr>
<tr>
<td>&gt; age</td>
<td>(\downarrow \text{age} \uparrow P_s)</td>
</tr>
<tr>
<td>&gt; gender</td>
<td>(\sigma \uparrow P_s)</td>
</tr>
<tr>
<td>&gt; ethnic background</td>
<td>(\text{non-English} \downarrow P_s)</td>
</tr>
<tr>
<td>2. Employer</td>
<td></td>
</tr>
<tr>
<td>&gt; size</td>
<td>(\uparrow \text{size} \downarrow P_s)</td>
</tr>
<tr>
<td>&gt; sector</td>
<td>(\text{private} \uparrow P_s)</td>
</tr>
<tr>
<td>&gt; ethnic background</td>
<td>(\text{non-English} \downarrow P_s)</td>
</tr>
<tr>
<td>3. Mode of representation</td>
<td>(\text{both rep/both unrep} \rightarrow \uparrow P_s)</td>
</tr>
<tr>
<td>4. Miscellaneous</td>
<td></td>
</tr>
<tr>
<td>&gt; prior discussions</td>
<td>(\text{prior} \rightarrow \uparrow P_s)</td>
</tr>
<tr>
<td>&gt; reasons for dismissal</td>
<td>(\uparrow \text{hostility/principle} \rightarrow \downarrow P_s)</td>
</tr>
<tr>
<td><strong>B. Process factors</strong></td>
<td></td>
</tr>
<tr>
<td>1. Mediator style</td>
<td></td>
</tr>
<tr>
<td>&gt; rapport building/facilitation</td>
<td>(\uparrow \text{trust} \rightarrow \uparrow P_s)</td>
</tr>
<tr>
<td>&gt; active/interventionist</td>
<td>(\uparrow \text{intervention} \rightarrow \uparrow P_s)</td>
</tr>
<tr>
<td>2. Mediator experience</td>
<td>(\uparrow \text{exp.} \rightarrow \uparrow P_s)</td>
</tr>
</tbody>
</table>

The next chapter deals with the methodology chosen to test the above propositions.
CHAPTER 10 - METHODOLOGY

10.1 Introduction

The previous chapter identified a number of contextual and process variables which were predicted to affect the probability of settlement at conciliation. This chapter explains the methodology used to test those predictions.

The contextual variables identified in Chapter 9 seek to describe the parties, their representatives and the dispute. In statistical terms these variables are called ‘independent variables’. Independent variables often serve as the hypothesised causes of any changes in the values of a dependent variable (Cooksey 1997:7). In this study the dependent variable is the settlement of an unfair dismissal claim at conciliation. The focal point is the impact of each of the independent variables on settlement.

A mix of ethnographic and survey techniques were used to test if there was a relationship between the independent variables and settlement.

10.2 Party Characteristics and Settlement

Commission conciliators were asked to volunteer to participate in the project. Some 14 conciliators volunteered. Each conciliator was asked to complete a questionnaire for each unfair dismissal conciliation they conducted in the six month period from
March to August 1996. The questionnaire captures information about each of the independent variables we are interested in, namely:

- applicant details
  - age
  - occupational group
  - gross weekly wage
  - period of service
  - gender
  - is English the applicant’s first language
  - has the applicant found another job

- employer details
  - business size
  - sector
  - is English the respondent’s first language

- representation
  - applicant/employer (self represented/solicitor/union/other)

- miscellaneous
  - have the parties discussed the matter prior to the conciliation conference
  - reasons given for the dismissal
The questionnaire had to be kept as simple as possible to maximise completed returns. A copy of the questionnaire used is set out at Appendix 19. The independent variables were then crosstabulated with the dependent variable, settlement. Crosstabulation is a way of ordering data to show how many cases there are in a particular category. The output from this process and its interpretation is explained in the next chapter.

The completed questionnaires were checked against the conciliations conducted by each participating conciliator. In three instances questionnaires were completed in less than 95 per cent of the conciliations conducted. The questionnaires supplied by these three conciliators were not analysed because of doubts about the representativeness of the material provided.

Some 1029 questionnaires were completed and analysed. A case processing summary is set out in Appendix 20.

10.3 The Conciliation Process

The process variables proved to be more difficult to capture. The hypothesis is that conciliator experience and style influence settlement.

10.3.1 Does Experience Count?

In Chapter 9, I predicted that conciliator expertise was positively related to settlement. The measurement of conciliator experience is itself problematic. Some studies on mediator experience use the number of years working as a mediator as a
proxy for experience (e.g. Kochan and Jick 1978) and others use the number of prior mediations conducted (Zubeck et al 1992). Neither measure is totally satisfactory. Experience can also be a function of the type and intensity of the disputes mediated, not just their frequency.

The conciliations examined in this study took place between March and August 1996. The experience of the each particular conciliator (in years) is taken to be the time from their appointment to the Commission until 1 June 1996, which is roughly the midpoint in the period being studied. The range of conciliator experience is reflected in the chart below.

![Chart 12](image)

It is accepted that the measure of experience adopted has its limitations, but it is the best available. The number of prior conciliations conducted by each conciliator is not accurately recorded, nor is the extent of their conciliation experience prior to their appointment to the Commission.
10.3.2  Style and Settlement

Testing the impact of mediator style on settlement is more problematic. The methodologies used in other studies provides some assistance in this regard. Much of the research on mediator behaviour has attempted to identify specific behaviours or 'tactics' and to organise them into categories or 'strategies' (Kressel 1972; Pruitt and Kressel 1985; Lim and Carnevale 1990; McLaughlin et al 1991; Wall 1981; Touval and Zartman 1985). The methodology used in this study to characterise mediator behaviour draws on this work and that of Kolb (1983).

Kolb used an ethnographic approach to observe mediators using various techniques. The study consisted of approximately 400 hours of systematic observation of four federal and five state mediators as they assisted in the negotiation of sixteen disputes - six federal and ten state. The disputes involved a wide variety of issues. On the basis of her observations Kolb concluded that the mediators could be allocated into two groups, called 'Dealmakers' and 'Orchestrators', based on of their preferred mediation techniques.

The 'Dealmakers' - primarily state and local mediators working with public sector disputes - appeared actively involved in formulating the package ultimately offered for settlement. They used caucusing (i.e. meeting with each party separately) to provide a rationale for the opponent's position. They frequently offered their opinions and often made substantive suggestions or recommendations including making threats. In essence 'Dealmakers' attempted to control the process and the content of the negotiations.
Chapter 10 - Methodology

The 'Orchestrators' - primarily Federal Mediation and Conciliation Service mediators working with private-sector disputes - appeared to take a more passive role in mediation. They preferred that the disputants handle the negotiations themselves with only limited guidance from the mediator. While they offered strategic suggestions e.g. an opinion on whether one side should make a concession at that time, they did not seek to propose a solution. These mediators did not attempt to use threats or incentives to provide the disputants with any additional motivation to settle the conflict.

Kolb's pioneering work is a useful contribution to the examination of mediator techniques. It does however have some limitations. In particular several factors were allowed to vary, including the type of dispute encountered (e.g. salary versus working conditions) and the relative bargaining power of the parties in the specific cases handled in the study. For example, the Reed School Committee case was a public sector dispute where the union had minimal bargaining leverage and the employer had budgetary constraints. The central issue was salary and the mediator was disappointed by the minimal progress made on the issues in dispute (Kolb 1983:33). This can be contrasted with two of the cases where management made significant concessions - Albion Broadcasting and Alfred Corporation - where the union had made a credible threat of strike action (Kolb 1983:166-167). As a consequence it is difficult to determine if the variation in individual styles was due to the mediator's preferences or to variations in the type of case each mediator handled.
Nor did Kolb attempt to draw any linkage between mediator technique and mediator effectiveness. Her conclusions on this point are limited to the following statement:

*The dispute domain is well defined and preformulated prior to mediation. The issues that will be negotiated tend to follow a more or less standard litany, with changes confined to the margins of the contract. And given the interdependent relationship between employers and employees, settlement of disputes is largely preordained. The labor mediator work in this highly structured context, and therefore his domain of discretion or influence over the issues negotiated and the substantive outcomes is circumscribed and limited.*

*Within this narrow domain of activity, mediators carve out their strategic roles. They are creative roles, in that they allow the mediators to perform in situations where their control and authority are minimal. Orchestrators and dealmakers each in their limited ways do seem to assist the parties to disputes to reach an agreement, either by providing a forum for the pros to work with their committees or highlighting the elements of a viable deal. This is certainly a contribution.* (Kolb 1983:174)

More recently Riskin (1996) has used a ‘grid’ of mediator orientations to attempt to describe what mediators do. Mediators were described by reference to two related characteristics, each of which appears along a continuum. The first continuum concerns the goals of the mediation - it measures the scope of the problem or problems that the mediation seeks to address or resolve. At one end of this continuum sit narrow problems, such as how much one party should pay the other. At
the other end lie very broad problems, such as how to improve the conditions in a given community or industry.

The second continuum concerns the mediator’s activities. It measures the strategies and techniques that the mediator employs. One end of this continuum contains strategies and techniques that facilitate the parties’ negotiation at the other end lie strategies and techniques that tend to evaluate matters that are important to the mediation.

Riskin (1996:23-24) describes this continuum in these terms:

At one end of this continuum are strategies and techniques that evaluate issues important to the dispute or transaction. At the extreme of this evaluative end of the continuum fall behaviors intended to direct some or all of the outcomes of the mediation. At the other end of this continuum are beliefs and behaviors that
facilitate the parties' negotiation. At the extreme of this facilitative end is conduct intended simply to allow the parties to communicate with and understand one another.

The mediator who evaluates assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement - based on law, industry practice or technology - and that she is qualified to give such guidance by virtue of her training, experience, and objectivity.

The mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. Accordingly, the parties can develop better solutions than any the mediator might create. Thus, the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.
Riskin combines these concepts in a 'grid' of mediator orientations:

![Figure 9: Mediator Orientations]

The typology of 'facilitative' and 'evaluative' mediation derive from Riskin's work and the distinction has been the subject of considerable controversy about the nature of mediation. For example, Kovach and Love (1996:2-3) contend that 'evaluative mediation' is an oxymoron:

"An essential characteristic of mediation is facilitated negotiation ... Mediators should encourage parties to evaluate suggested options and alternatives and"

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183 See generally Stulberg 1997.
the viability of potential agreements. Mediators also should encourage parties
to get outside advice, opinions and evaluations from appropriate experts. But
mediators should not do these things themselves.

‘Evaluative’ mediation is an oxymoron. It jeopardizes neutrality because a
mediator’s assessment invariably favours one side over the other. Additionally,
evaluative activities discourage understanding between and problem solving by
the parties. Instead, mediator evaluation tends to perpetuate or create an
adversarial climate. Parties try to persuade the neutral of their positions using
confrontational and argumentative approaches. In some cases, the party whose
position the mediator disfavoured will simply leave the process.

While the debate about the nature of mediation is important, it is beyond the scope of
this paper (see Chapter 2).

A study commissioned by ACAS in 1998 (Lewis and Legard 1998) also confirmed the
existence of different styles of conciliation among conciliators. A distinction was
drawn between officers whose intervention is limited to passing messages between
the parties about their desire to settle and about offers and counter-offers, and those
whose style involves more actively highlighting the strengths and weaknesses of the
case and the advantages of settlement. These different approaches were described
as ‘reactive’ and ‘proactive’ or ‘administrative’ and ‘analytical’.

A more proactive approach involved ‘highlighting the advantages of settling,
discussing the strengths and weaknesses of the case, seeking and passing
information that might influence assessment of the case, identifying where there is
common ground between the two sides and where there remains conflict, playing devil's advocate by challenging assessment of the case, and being creating in suggesting ways of resolving the case without a hearing' (Lewis and Legard 1998:89). This study is referred to in more detail in the next chapter.

Both Kolb and Riskin use a typology to attempt to describe what mediators do, rather than the effect of what they do. The focus of this study is on the extent to which mediator behaviour influences settlement. That question was considered by Brett et al (1986) who drew on the work of Kolb and others in an attempt to assess the affect of mediator style on outcome. Unlike Kolb who observed all the mediators in action in all cases, Brett et al relied on data reported routinely by mediators following each of the mediation conferences. The standardised reports covered such areas as:

- the duration of the conference;
- the number of people attending;
- how the conference ended;
- if there was a settlement, the nature of the settlement.

Mediators were also observed during conferences and mediators' opinions about the tactics they used and thought were effective were discussed.

In contrast to Kolb's study Brett et al identified four different mediation styles:

i. **Dealmaking** - the mediator keeps the parties together, offers a prediction on the results of arbitration, and suggests a specific compromise. This style was associated with the compromise type settlement.
ii. *Shuttle diplomacy* - the mediator separates the parties and shuttles back and forth between them, developing in the process a concrete settlement. This approach, too, resulted in compromises.

iii. *Pushing the company* - the mediator spends most of his or her time with the company, and privately predicts the outcome of the grievance at arbitration. This strategy most frequently resulted in the company granting the grievance.

iv. *Pushing on the union* - the mediator spends most of his or her time with the union, and private predicts the outcome of the grievance at arbitration. This strategy resulted in either a compromise settlement or in the union withdrawing the grievance.

Despite style differences the mediators did not vary significantly in terms of their effectiveness. All achieved a settlement rate in the range of 79 to 90 per cent. On this basis it was concluded that there was no significant relationship between mediator style and the rate of settlement. However it was noted mediator style was significantly related to the *type of settlement* achieved in each case.

Mediator 'style' - whether 'dealmaking' or 'shuttle diplomacy' - is simply a shorthand way of describing the strategies, techniques or tactics used by a particular mediator. The number of observed mediation tactics is extensive. In his review of the literature Wall (1981) identified over 100 such tactics. Kressel and Pruitt (1985, 1989) identify three basic types of tactics: reflexive, substantive and contextual. Reflexive tactics (e.g. developing rapport with the parties) set the stage for the mediation of the issues in dispute. The substantive tactics (e.g. suggesting specific concessions) deal directly
with the issues in dispute. *Contextual tactics* (e.g. pointing out the common interests of the disputants) assist the parties to find their own solution.

A number of studies have attempted to assess the effectiveness of particular mediation tactics. For example, Kochan and Jick (1978:240) developed an ‘*Aggressiveness of the Mediator Index*’ based on the extent to which the mediator relied on the following strategies in trying to resolve the dispute:

- trying to change the expectations of one or both of the parties;
- trying to make one or both of the parties face reality;
- making substantive suggestions for compromise to the parties;
- pressing the parties hard to make compromises;
- helping one or both of the parties move off a position they had become committed to earlier in bargaining; and
- helping one or both the parties save face.

Such strategies were found to be significantly correlated with movement in bargaining positions, but not with the probability of settlement.

Later, Hiltrop (1985:86) identified 13 strategies used by ACAS mediators in a sample of industrial disputes:

1. *Act as a communication link between the parties.*
2. *Suggest solutions.*
3. *Discuss the strengths and weaknesses of a party’s bargaining position in a closed meeting.*
4. Make procedural arrangements (e.g., arrange the bargaining agenda, decide the location of meetings).

5. Suggest to refer all or some of the issues for settlement to fact-finding/arbitration.

6. Help one or both parties retreat “gracefully” from an earlier position.

7. Threaten to quit if no progress is made in the negotiations.

8. Synchronize the making of mutual concessions.

9. Assist the negotiators in their relationships with constituents.

10. Reduce emotional tensions between the parties.

11. Arrange preliminary meetings with the parties separately to explore the issues in dispute and the attitudes of the parties.

12. Arrange joint negotiation sessions under the chairmanship of the mediator.

13. Separate the parties and deal with each party separately in closed meetings.

Hiltrop (1985) refers to items 2, 5, 6, 7 and 8 as directive intervention techniques. Such techniques were found to be effective in non-salary disputes but not in salary disputes.

How then to categorize the ‘style’ of the conciliators who took part in this study?

In order to get some understanding of the range of tactics used I observed eight unfair dismissal conciliations, each conducted by a different conciliator. It became immediately apparent that the conciliators could not be neatly compartmentalised into particular style categories such as ‘deal makers’ or ‘orchestrators’. Differences in
style were clearly evident, but they took place along a continuum rather than at each end.

As discussed in Chapter 9, the hypothesis is that rapport building and the use of assertive or interventionist tactics are positively related to settlement. There was considerable variation between the conciliators on these two dimensions. To test the hypothesis each conciliator was given a ranking on each of these dimensions:

<table>
<thead>
<tr>
<th></th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facilitative</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interventionist</td>
<td></td>
<td></td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

A likert type interval scale was used to indicate the degree to which a particular conciliator possessed the characteristic which is of interest (Cooksey 1997:111). The scale is a relative one. For example, a mediator with a level 1 interventionist style is less interventionist than a mediator with a level 2 style.

Each conciliator was given a ranking based on my direct observation of the tactics they employed in actual conciliations. The direct observation method was chosen because, as Esser and Marriott (1995:1532) note: ‘While self-reports are susceptible to inaccuracies due to memory and self-presentation biases, direct observation is not.’ Five observations were conducted for each conciliator in the study. A scoring sheet was completed for each observation (see Appendix 21).
To assess the extent of facilitation information was recorded about the following:

1. Venue
   - conference room format (+1 pt)
   - hearing room/conciliator distant (-1 pt)

2. Opening
   - explanation of the purpose of the conference (+1-3 pts)

3. Empathy
   - maintained eye contact (+1 pt)
   - body language (leans forward; engaged speaker) (+1 pt)
   - other expressions of concern and perspective taking (+1 pt)
   - abrupt/interrupted speakers (-1 pt)

4. Active listening and rephrasing (+1-3 pts)

5. Provided an opportunity for parties to have a say (+1-3 pts)

6. Identified issues and set agenda (+1-3 pts)

7. Controlled hostility and reduced emotional tension (+1-3 pts)

8. Use of caucuses (+1 pt)

A range of points was assigned to some of the items to attempt to capture differences in degree and emphasis.

The points assigned were totalled and an average calculated for all five observations. The facilitation points for each conciliator were compared and conciliators were given a relative ranking of between 1 and 5.
The conciliator with the lowest ranking for facilitation - the stranger - had a cold disinterested style. The opening observations were very limited (‘We all know why we are here, let’s get on with it’) and there was very little demonstrated concern for the welfare of one or both of the parties. The conference was held in a formal hearing room and the conciliator sat at the associate’s table while the parties sat at the bar table:

The associate’s table is slightly elevated and spatially removed from the bar table.

The parties were provided with a limited opportunity to put their respective points of view, but no opportunity was given to reply to what the other party put (‘I don’t want to get into the merits’). The conciliator frequently interrupted each party in an effort to have them focus on what the conciliator regarded as the salient facts.

Little time was spent in reflexive tactics. The conciliator moved very quickly to substantive tactics in which a settlement package was strongly recommended.
At the other end of the spectrum was the friend. The friend had a warm and caring style. A relaxed informal approach was adopted. The use of Christian names was encouraged. There were frequent verbal and non-verbal expressions of concern for the welfare of the parties. The friend understood the situation of each party and accepted their emotional reactions.

Each party had a full opportunity to tell their story. During this process the friend remained attentive, maintained eye contact and projected acceptance and understanding.

Most conciliators fell somewhere between the stranger and the friend.

The extent to which a conciliator was interventionist was assessed by assigning a score for each of the following:

1. Identified the weaknesses of each parties case (+1-3 pts)
2. Raise other settlements in similar cases (+1 pt)
3. Discussed the costs of continued disagreement relative to the likely outcome at arbitration (+1-3 pts)
4. Suggestion for settlement (+1-3 pts)
5. Strategic suggestions - advice on concession strategy or timing of responses (+1-3 pts)
6. Recommendation for resolution (+1-3 pts)
7. Threaten to quit if no progress made (+1-3 pts)
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As with the facilitation scoring sheet a range of points was assigned to some of the items to attempt to capture differences in degree and emphasis. For example, there are a number of ways of identifying the weaknesses in a parties case. The techniques used may range from raising gentle doubts - ‘That’s a novel point, I don’t think it’s been successfully argued as yet’ or ‘I haven’t seen all of the material but the case looks a little weak’ - to stronger propositions - ‘Your case doesn’t have a snowball’s chance in hell of succeeding!’.

The same method of relative ranking used to rank facilitation was used to rank intervention. Conciliators were given a relative ranking of between 1 and 5.

![Diagram: Umpire 1 to Player 5]

The Player

The *player* was actively and aggressively involved in pursuing a settlement. A robust assessment was made of the weaknesses of each parties case and of the costs involved in proceeding to arbitration. Detailed information was provided on the likely outcome of arbitration and the costs (both direct costs and in terms of the time commitment required) of not settling. The *player* made suggestions for settlement and offered strategic advice. A settlement package was recommended and pressure applied to each party - usually in a caucus - to accept.
The Umphire

The umphire was reluctant to get involved in the ‘game’; preferring to control the communication process rather than the outcome. To the extent that substantive tactics were used they were non-specific. Rather than providing detailed information on costs and outcomes the umphire was more likely to ask a party if they had ‘thought about how much it would cost them to take the case to arbitration’.

The style rankings for each of the conciliators in the study are set out below:

<table>
<thead>
<tr>
<th>Conciliator Code</th>
<th>Facilitation Score</th>
<th>Intervention Score</th>
<th>Combined Style Ranking</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2.00</td>
<td>4.00</td>
<td>6</td>
<td>111</td>
</tr>
<tr>
<td>2</td>
<td>2.00</td>
<td>2.00</td>
<td>5</td>
<td>146</td>
</tr>
<tr>
<td>3</td>
<td>4.00</td>
<td>5.00</td>
<td>9</td>
<td>170</td>
</tr>
<tr>
<td>4</td>
<td>2.00</td>
<td>3.00</td>
<td>5</td>
<td>57</td>
</tr>
<tr>
<td>5</td>
<td>3.00</td>
<td>4.00</td>
<td>7</td>
<td>138</td>
</tr>
<tr>
<td>6</td>
<td>3.00</td>
<td>3.00</td>
<td>6</td>
<td>63</td>
</tr>
<tr>
<td>7</td>
<td>3.00</td>
<td>3.00</td>
<td>6</td>
<td>88</td>
</tr>
<tr>
<td>8</td>
<td>4.00</td>
<td>4.00</td>
<td>8</td>
<td>109</td>
</tr>
<tr>
<td>9</td>
<td>5.00</td>
<td>1.00</td>
<td>6</td>
<td>25</td>
</tr>
<tr>
<td>10</td>
<td>3.00</td>
<td>2.00</td>
<td>5</td>
<td>122</td>
</tr>
</tbody>
</table>

The ‘style’ adopted by each conciliator was largely unchanged across each of the five observations. This is consistent with previous research. A number of researchers have suggested that most mediators operate from a predominant, presumptive or default orientation. Kressel et al (1994) made the following observation about the common characteristics of the mediator styles that they identified:
First, a mediator’s style tended to be consistent. A given mediator was likely to enact the same style from case to case, even in the face of considerably different issues or conflict dynamics. Second, mediator style appeared to operate below the level of conscious awareness; style was something mediators “did” without fully recognizing the underlying coherence or “logic” behind their style. Mediators were capable of articulating why they adopted the style they exhibited when their style was pointed out to them, but this took a conscious effort and the assistance of other team members. Finally, mediator style could be modified, but this too took explicit direction or “training”. Over the course of the project, and as a result of case conferencing, team members became more aware of their intrinsic stylistic inclinations and learned to shift to a more adaptive style where indicated.

Similarly, Kolb (1983:150) found that the process or style used by mediators is ‘more one of pattern and routine than it is creativity and innovation’.

The project began with 15 conciliators participating. Three were subsequently excluded because of discrepancies between the number of completed questionnaires and the number of conciliations conducted in the relevant period. Another conciliator was excluded during the observation phase of the project due to ‘measurement reactivity’. Measurement reactivity arises where subjects behave differently than they might normally because they know they are being observed (Graziano and Raulin 1989:121-122). In this instance, after one of the last observations, the conciliator remarked to me that they would not have persisted with the conference as long as they did but for the fact that I had been watching.
Chapter 10 - Methodology

The issue of 'measurement reactivity' also raises another weakness in the methodology adopted - the subjectivity of the style assessments. A more satisfactory approach would be to have the classification of mediator style carried out by two researchers acting independently. The mediator ranking would then be the mean of the two rankings. This was the approach adopted by Pruitt et al (1993). But given that the conciliators in my study resided in three different States the cost of adopting such a technique was prohibitive.

Some studies have coded the transcripts of mediation sessions to identify the extent of mediator intervention (see Donohue et al (1994)). But I could not employ a similar methodology because unfair dismissal conciliations are not recorded.

The use of a scoring sheet was an attempt to inject a greater degree of objectivity into the assessment process.

A check was made on assessment accuracy by crosstabulating 'facilitative ranking' with 'conference length'. If the rankings were accurate we would expect the conciliation conferences conducted by highly facilitative conciliators to be longer than those conducted by conciliators with a low facilitative ranking. The results of this crosstabulation are captured in the table below:
Table 17

<table>
<thead>
<tr>
<th>Length of Conference</th>
<th>Facilitative Ranking</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2 and 3 Ranking</td>
<td>4 and 5 Ranking</td>
<td></td>
</tr>
<tr>
<td></td>
<td>No. of cases</td>
<td>% of all cases</td>
<td>No. of cases</td>
</tr>
<tr>
<td>&lt;30 mins</td>
<td>54</td>
<td>7.9%</td>
<td>2</td>
</tr>
<tr>
<td>&gt;30 &lt;45 mins</td>
<td>140</td>
<td>20.5%</td>
<td>42</td>
</tr>
<tr>
<td>&gt;45 &lt;60 mins</td>
<td>220</td>
<td>32.3%</td>
<td>74</td>
</tr>
<tr>
<td>&gt;60 &lt;75 mins</td>
<td>64</td>
<td>9.4%</td>
<td>37</td>
</tr>
<tr>
<td>&gt;75 &lt;90 mins</td>
<td>100</td>
<td>14.7%</td>
<td>58</td>
</tr>
<tr>
<td>&gt;90 mins</td>
<td>104</td>
<td>15.2%</td>
<td>87</td>
</tr>
<tr>
<td></td>
<td>682</td>
<td>100.0%</td>
<td>300</td>
</tr>
</tbody>
</table>

The information in the table is set out graphically in the chart below:

Chart 13

Length of Conference by Conciliator Facilitative Ranking

---

184 Appendix 20, Table A34.
Chapter 10 - Methodology

These results support the accuracy of the facilitative style rankings. Most (85.5 per cent) of conciliation conferences conducted by low facilitation conciliators (i.e. those with a 2 or 3 ranking) went for less than 60 minutes. Conversely the conferences conducted by high facilitators (i.e. those with a 4 or 5 ranking) usually went for more than 60 minutes (60.7 per cent).

10.4 Conclusion

In the previous chapter (see page 221) reference was made to a review of reported studies by Kressel and Pruitt (1985) in which the authors suggested that the failure to find a relationship between mediator behaviour and case outcome in previous studies was a consequence of certain methodological flaws. The methodology adopted in this study addresses two of the deficiencies identified in that it focuses on a narrower and more homogenous band of disputes and it incorporates the direct observation of mediator activity.

The next chapter reports and discusses the results of the methodology adopted.
CHAPTER 11 – RESULTS AND DISCUSSION

11.1 Introduction and Crosstabulations

The previous chapter set out the methodology used to test whether there was a relationship between certain independent variables and the settlement of unfair dismissal applications at conciliation.

The statistical technique used is crosstabulation. Crosstabulation is a way of ordering data to show how many cases there are in a particular category. The result of a crosstabulation analysis is a table, sometimes referred to as a crosstabulation or contingency table. The best way of explaining the concept is by an example.

One of the independent variables we are interested in is the age of the applicant. In particular, we want to know whether the age of the applicant affects the likelihood of settlement. The crosstabulation table for settlement and age is set out below:

<table>
<thead>
<tr>
<th>WAS THE MATTER SETTLED? *AGE OF APPLICANT</th>
<th>Age of Applicant</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>&lt; 20 yrs</td>
</tr>
<tr>
<td>------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>No</td>
<td>Count</td>
</tr>
<tr>
<td>Expected Count</td>
<td>17.0</td>
</tr>
<tr>
<td>% within Age of Applicant</td>
<td>15.2%</td>
</tr>
<tr>
<td>Std. Residual</td>
<td>-2.4</td>
</tr>
<tr>
<td>Yes</td>
<td>Count</td>
</tr>
<tr>
<td>Expected Count</td>
<td>29.0</td>
</tr>
<tr>
<td>% within Age of Applicant</td>
<td>84.8%</td>
</tr>
<tr>
<td>Std. Residual</td>
<td>1.9</td>
</tr>
<tr>
<td>Total</td>
<td>Count</td>
</tr>
<tr>
<td>Expected Count</td>
<td>46.0</td>
</tr>
<tr>
<td>% within Age of Applicant</td>
<td>100.0%</td>
</tr>
</tbody>
</table>
Chapter 11 - Results and Discussion

This type of table is usually referred to as a standard two way crosstabulation table. Each of the 'cells' in the table show the count or number of cases falling into each of the category combinations. For example, in 84.8 per cent of cases where the applicant was aged 20 years or under, the matter was settled.

The marginal information shows the total number of cases in each row and column, and the percentage of the total that these figures represent. For example, the sample covers 1016 cases, of which 63.1 per cent were settled at conciliation.

To test whether there is a relationship between the age of the applicant and the likelihood of settlement the Statistical Package for the Social Sciences (SPSS) was used to generate a Pearson Chi-Square statistic. The chi-square test allows us to test statistically whether the differences we note in the sample between the expected count and the actual count are genuine differences or simply chance occurrences (SPSS 1997:13-7). In other words is the association between these two variables statistically significant. Cooksley (1997:105) explains how the test works, in the following way:

"Technically, chi-square tests whether or not two variables are independent of each other (ie, not associated) such that knowing the category of an observation on one variable tells us nothing about the category for that observation on the other variable. If the computed chi-square statistic is large enough in value, then the notion of independence can be rejected and we can conclude that the two variables are significantly associated. The chi-square test evaluates the size of the differences between the observed frequencies (counts) of category membership and the frequencies we would expect to see if the two
variables were, in fact, independent. Large differences will lead to large chi-square values and to greater likelihood of significance.

The chi-square statistic output for the settlement-age of applicant crosstabulation table is set out below:

<table>
<thead>
<tr>
<th>Was the matter settled?</th>
<th>Age of Applicant</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Value</td>
</tr>
<tr>
<td>Pearson Chi-Square</td>
<td>12.446</td>
</tr>
<tr>
<td>Likelihood Ratio</td>
<td>13.767</td>
</tr>
<tr>
<td>Linear-by-Linear Association</td>
<td>3.715</td>
</tr>
<tr>
<td>N of Valid Cases</td>
<td>1016</td>
</tr>
</tbody>
</table>

The value for Pearson's chi-square test statistic in this table is 12.446. This corresponds to a probability level, or $p$-value, of 0.014. It is usual to conclude that there is an association between two variables if the $p$-value is less than 0.05 (see Cooksley 1997:102-104). A probability of 0.05 corresponds to a 5 per cent chance of being wrong about there being an association between the two variables. In this example the probability level is less than 0.05 and hence we can conclude that there is a relationship between age and settlement.

The main advantage with the Pearson chi-square test is its simplicity and ease of interpretation. But the test can be biased if some of the cells in the contingency table have very small expected values (typically, less than 5) or very low observed counts (Cooksley 1997:107). The chi-square test is a test of independence, it can tell us if there is an association between the two crosstabulated variables but it doesn't provide much information about the strength of the association or its direction.
A full set of crosstabulation tables is set out at Appendix 20 and a summary of these results appears in Table 18 below.

<table>
<thead>
<tr>
<th>Settlement vs</th>
<th>Chi-square</th>
<th>Probability</th>
<th>Df</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross weekly wage</td>
<td>27.275</td>
<td>.000</td>
<td>6</td>
</tr>
<tr>
<td>Occupational group</td>
<td>11.899</td>
<td>.104</td>
<td>7</td>
</tr>
<tr>
<td>Period of service</td>
<td>5.543</td>
<td>.594</td>
<td>7</td>
</tr>
<tr>
<td>Found another job?</td>
<td>25.759</td>
<td>.000</td>
<td>1</td>
</tr>
<tr>
<td>Age of applicant</td>
<td>12.446</td>
<td>.014</td>
<td>4</td>
</tr>
<tr>
<td>Gender</td>
<td>.401</td>
<td>.527</td>
<td>1</td>
</tr>
<tr>
<td>English as a first language - Applicant</td>
<td>5.180</td>
<td>.023</td>
<td>1</td>
</tr>
<tr>
<td>English as a first language - Respondent</td>
<td>6.222</td>
<td>.430</td>
<td>1</td>
</tr>
<tr>
<td>Business size</td>
<td>25.911</td>
<td>.000</td>
<td>3</td>
</tr>
<tr>
<td>Business sector</td>
<td>9.755</td>
<td>.008</td>
<td>2</td>
</tr>
<tr>
<td>Reason for termination</td>
<td>14.267</td>
<td>.003</td>
<td>3</td>
</tr>
<tr>
<td>Applicant representation</td>
<td>14.568</td>
<td>.002</td>
<td>3</td>
</tr>
<tr>
<td>Employer representation</td>
<td>.561</td>
<td>.905</td>
<td>3</td>
</tr>
<tr>
<td>Combination of representation</td>
<td>25.896</td>
<td>.001</td>
<td>8</td>
</tr>
<tr>
<td>Preconciliation discussions</td>
<td>.122</td>
<td>.726</td>
<td>1</td>
</tr>
<tr>
<td>Duration of conciliation conference</td>
<td>29.247</td>
<td>.000</td>
<td>5</td>
</tr>
<tr>
<td>Conciliator experience</td>
<td>75.937</td>
<td>.000</td>
<td>3</td>
</tr>
<tr>
<td>Conciliator ranking - facilitative</td>
<td>111.394</td>
<td>.000</td>
<td>3</td>
</tr>
<tr>
<td>Conciliator ranking - intervention</td>
<td>127.188</td>
<td>.000</td>
<td>4</td>
</tr>
<tr>
<td>Style of conciliator - combined ranking</td>
<td>142.905</td>
<td>.000</td>
<td>5</td>
</tr>
</tbody>
</table>

To compare the probability values of two variables, to see which is more significant, we need to first look at the column headed Df. Df stands for degrees of freedom. The Df for any crosstabulation is a function of the number of rows and columns in the crosstabulation. For technical reasons only probability values with the same Df are directly comparable. If the Df is the same for two variables then the probability values can be compared. The variable with a lower probability value has a more significant relationship with settlement. If we have the same Df and the same probability value
then the chi-square statistics can be compared, with the larger value indicating a more significant relationship.

A number of these variables have the same $Df$ value and hence the significance of the association can be compared. The relationship between settlement and a facilitative style was more significant than the relationship between settlement and conciliator experience. Both these variables were more significantly associated with settlement than the reason for termination, applicant representation or business size. The size of the employer’s business had a more significant association with settlement than the nature of the applicant’s representation or the reason for termination.

Table 19 groups the significant independent variables by their $Df$. Within each group the relative strength of the association between the independent variable and settlement increases as the chi-square increases. For example, looking at those independent variables with a $Df$ of 4 it can be seen that an interventionist conciliator style has a more significant association with settlement than a facilitative conciliator style; and both are more significant than the age of the applicant.
Table 19

Chi-Square Results Grouped by Degrees of Freedom

<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>$P$ value</th>
<th>Chi-Square</th>
<th>Strength of Association</th>
</tr>
</thead>
<tbody>
<tr>
<td>Found another job? Applicant</td>
<td>.000</td>
<td>25.759</td>
<td></td>
</tr>
<tr>
<td>English as a first language - Applicant</td>
<td>.023</td>
<td>5.18</td>
<td></td>
</tr>
<tr>
<td>Df3</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Conciliator ranking - facilitative</td>
<td>.000</td>
<td>111.394</td>
<td></td>
</tr>
<tr>
<td>Conciliator experience</td>
<td>.000</td>
<td>75.937</td>
<td></td>
</tr>
<tr>
<td>Business size</td>
<td>.000</td>
<td>25.911</td>
<td></td>
</tr>
<tr>
<td>Applicant representation</td>
<td>.002</td>
<td>14.568</td>
<td></td>
</tr>
<tr>
<td>Reason for dismissal</td>
<td>.003</td>
<td>14.267</td>
<td></td>
</tr>
<tr>
<td>Df4</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Conciliator ranking - interventionist</td>
<td>.000</td>
<td>127.118</td>
<td></td>
</tr>
<tr>
<td>Age of Applicant</td>
<td>.014</td>
<td>12.446</td>
<td></td>
</tr>
<tr>
<td>Df5</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Style of Conciliator</td>
<td>.000</td>
<td>142.905</td>
<td></td>
</tr>
<tr>
<td>Duration of Conference</td>
<td>.000</td>
<td>29.247</td>
<td></td>
</tr>
</tbody>
</table>

The results suggest that there is an association between settlement and the following variables:

- Gross weekly wage
- Whether the applicant has found another job
- Age of the applicant
- Applicant ethnicity
- Business size
- Business sector
- Reason for termination
- Applicant representation
- Combination of representation
Chapter 11 - Results and Discussion

- Duration of conference
- Conciliator ranking – facilitative
- Conciliator ranking – interventionist
- Conciliator style

The crosstabulation results are generally consistent with the predictions made in the previous chapter, with six exceptions. No association was found between settlement and:

- occupational group
- period of service
- applicant gender
- respondent ethnicity
- respondent representation
- pre-conciliation discussions.

The results are broadly consistent with the 1998 ACAS study mentioned in the previous chapter (Lewis and Legard:1998). The ACAS study was an evaluation of the individual conciliation service provided to parties to industrial tribunal cases. In most tribunal jurisdictions ACAS has a statutory duty to promote voluntary settlement of cases. ACAS conciliation officers (Industrial Relations Officers or IROs) contact the parties on receiving details of cases from industrial tribunals. Parties are not obliged to use ACAS’s services, but ACAS can conciliate between the parties if both parties agree to their involvement.
The objectives of the study were to:

- provide a clear description of the process of conciliation as perceived by parties and representatives;
- to explore the impacts and outcomes of conciliation; and
- to explore perceptions of conciliation and its value.

In-depth interviews were held with the parties to unfair dismissal cases and their representatives to explore the role and influence of conciliation in individual cases. Focus groups with employers and representatives with wider experience of industrial tribunal cases were also held to explore conciliation at a broader level. The methodology involved:

- 15 interviews with applicants;
- 15 interviews with employers;
- 15 interviews with representatives;
- 2 group discussions with large employers who are involved in a number of tribunal cases each year; and
- 2 group discussions with representatives (one involving representatives who always or generally act for employers; one involving those who always or generally act for applicants).

The qualitative nature of the research techniques employed limits its value for comparative purposes but some of the observations made are relevant to this study. These will be discussed later in this chapter.
The results in respect of each independent variable are discussed below.

11.1.1 The Applicant - Economic Factors

**Gross Weekly Wage**

It was predicted that low paid applicants would have a higher propensity to settle than high paid applicants. The crosstabulation results show an association between earnings and settlement, but not entirely of the type predicted. The settlement rate within each earnings band is set out in the chart below:

![Chart 14](chart.png)

Chart 14

<table>
<thead>
<tr>
<th>Gross Weekly Wage ($)/week</th>
<th>Settlement Rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>≤500</td>
<td>70</td>
</tr>
<tr>
<td>&gt;500 ≤600</td>
<td>60</td>
</tr>
<tr>
<td>&gt;600 ≤700</td>
<td>50</td>
</tr>
<tr>
<td>&gt;700 ≤800</td>
<td>0</td>
</tr>
<tr>
<td>&gt;800 ≤900</td>
<td>90</td>
</tr>
<tr>
<td>&gt;900 ≤1000</td>
<td>70</td>
</tr>
</tbody>
</table>

185 Appendix 20, Table A1.
The average settlement rate among the 965 cases which recorded wage rate details was 64.4 per cent. Low paid employees (i.e. <$500/week) had an above average settlement rate (70 per cent), as previously predicted.

The settlement rate for employees in the middle wage bands (i.e. >$500 <$800 per week) was 55.9 per cent - significantly less than the average settlement rate of 64.4 per cent. This result is also consistent with the previous prediction.

The results for high paid applicants are more problematic. Those earning between $800 and $1000 per week had a settlement rate of 75 per cent, significantly above the average. This is contrary to the prediction in Chapter 9. I expected the likelihood of settlement to decrease with increased earnings. Two explanations may be advanced. The first relates to sample size. Only 71 of the 965 applicants in the sample had a gross weekly wage of between $800 and $1000. Because of the small proportion of applicants in the relevant category the results may not be representative of high paid applicants generally.

Second, a confounding factor may explain the results. Applicants earning between $800 and $1000 per week may have a characteristic which would dispose them towards settlement, such as a greater propensity to find alternative employment. As we shall see there is an association between settlement and whether the applicant has found another job. About 77 per cent of applicants who had found alternative employment settled, compared to 58.7 per cent of those who did not. If a

---

186 It should be noted that the average settlement rate will vary between independent variables because of variations in the number of questionnaires which recorded the relevant information.
disproportionate number of applicants earning between $800 and $1000/week had found alternative employment we would expect this group to have an above average settlement rate. To test this proposition applicant earnings was crosstabulated with whether the applicant had found another job. The results are summarised in the chart below:

![Chart 15](image)

Applicants earning between $800 and $1000 considerably were more likely to have found alternative employment than applicants in all other wage groups (29.6 per cent versus 23.4 per cent). Hence we would expect the settlement rate in this group to be higher.

The result for applicants earning in excess of $1000 per week is as predicted. These applicants only had a settlement rate of only 52.2 per cent.
Chapter 11 - Results and Discussion

As Chart 14 shows there is a substantial fall in the settlement rate between the last two income groups. Some 66.7 per cent of those in the $900 to $1000 band settled. The settlement rate drops sharply to about 52 per cent for the next income band. One explanation for the sharp decline may be the fact that at the relevant time s.170CD of the IR Act operated to exclude employees earning in excess of $64,000 per annum (or $1230 per week) from the jurisdiction. Employers would have less incentive to settle a case at conciliation in circumstances where they would have a high probability of successfully having the claim struck out.

**Occupational Group**

In Chapter 9 it was predicted that an applicant's occupation would influence the likelihood of settlement. The rationale for such a prediction was that occupation served as a proxy for length of service and level of earnings. Occupations such as managers and administrators were generally paid better and these employees remained with the one employer for longer than labourers. Hence it was thought that labourers would be more likely to settle than managers and administrators.

The results did not reveal any statistically significant association between occupation and settlement - at least not at the five per cent probability level. If this requirement were relaxed then it could be said that some association exists at the 15 per cent probability level. But this would mean that there was a 15 per cent chance of being wrong about there being an association between occupation and settlement.

\[167\] Appendix 20 Table A.2.
Chapter 11 - Results and Discussion

There is an association between occupation and earnings in the sample group (see Table A4 in Appendix 20). Relative to other occupational groups only a small proportion of managers and administrators, professionals and para-professionals are paid less than $500 per week, as shown in Chart 16 below.

![Chart 16](image)

As we have seen low paid applicants (i.e. those earning <$500 per week) had a higher settlement rate than applicants in the middle wage bands (70 versus 55.9 per cent).

To some extent the earnings - settlement association is reflected in the settlement rates experienced by the different occupational groups:

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188 Appendix 20 Table A4
The settlement rate among high status occupations (circled [ ]) is lower than for most other occupations. Only a small proportion of employees in these occupational groups were paid less than $500 per week.

The relatively high settlement rate for tradespersons (68 per cent versus 62.4 per cent for all other occupations)\textsuperscript{190} may be due to the fact that a significant proportion of such applicants had found alternative employment before participating in conciliation. As shown in Table A5 in Appendix 20, 33.7 per cent of tradespersons had found another job compared to only 22.8 per cent of the applicants in all other occupational groups.

\textsuperscript{189} See Appendix 20 Table A3.
\textsuperscript{190} Note 189.
Chapter 11 - Results and Discussion

**Period of Service**

The crosstabulation results do not reveal any association between the applicant's period of service and settlement.

![Chart 18](image)

**Period of Service and Settlement**

It was predicted that the likelihood of settlement would be expected to reduce as length of service increased. The basis for such a prediction was that an applicant's service was relevant to the assessment of compensation. While no statistically significant association was found there is some evidence to suggest that service may have a limited impact on settlement. The settlement rate of applicants with less than or equal to two years service was higher than for applicants with greater service (64 per cent versus 61 per cent).

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191 Appendix 20 Table A6.
Chapter 11 - Results and Discussion

The absence of a statistically significant association suggests that an applicant's assessment of their estimated award if successful may not be particularly sophisticated. Alternatively a confounding variable may explain the result.

Has the Applicant Found Another Job?

It was predicted that if an applicant had found alternative employment then they would be more likely to settle. Obtaining new employment reduced the applicant's expected gain from litigation and hence the incentive to litigate. There were also psychological and practical considerations which favoured settlement in such circumstances (see p202 infra).

As expected there was an association between settlement and whether the applicant had found another job.

Chart 19\textsuperscript{192}

Settlement by Found Another Job

\begin{tabular}{|l|c|}
\hline
New Job & 70.57 \\
No New Job & 64.67 \\
\hline
\end{tabular}

\textsuperscript{192} Appendix 20, Table A7
Chapter 11 - Results and Discussion

About 77 per cent of applicants who had found another job settled; compared to 58.7 per cent of those who did not.

11.1.2 The Applicant - Other Factors

Age

The results confirmed the prediction that younger applicants would be more likely to settle than older applicants. Applicants under 20 years of age had a settlement rate of 84.8 per cent, compared to a settlement rate of 62 per cent for all other age groups. In Chapter 9 two suggestions we made as why we expect a higher settlement rate among young applicants:

• less accrued service; and
• increased likelihood of finding alternative employment.

As we have seen there is no statistically significant association between length of service and settlement. Therefore we would not expect differences in length of service between age groups to account for the different settlement rate experience. The second factor provides a more convincing exploration of the age-settlement effect.

The crosstabulation results suggest an almost linear relationship between the age of the applicant and whether they had found another job.
Some 34.8 per cent of applicants under 20 years of age had found alternative employment compared to 23.3 per cent of all other applicants.

As we have seen applicants who have found another job are much more likely to settle than those who have not (77.2 per cent versus 58.7 per cent).

**Gender**

The absence of an association between the gender of the applicant and settlement is contrary to the prediction made in Chapter 9. As shown in the relevant crosstabulation set out in Table A11 in Appendix 20, 61.8 per cent of female applicants settled their claim at conciliation, compared to 63.7 per cent of male counterparts. On the basis of the literature we would expect the settlement for female applicants to be higher than that for male applicants.

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193 See Appendix 20 Table A9.
This result is particularly surprising given the other characteristics of the female applicants in the sample group, that is:

- 27.7 per cent of female applicants had found another job by the time the conciliation conference took place (compared to 21.4 per cent of male applicants),\(^{194}\) and
- 64.3 per cent of female applicants earned less than $500 per week compared to 44.8 per cent of male applicants.\(^{195}\)

Finding a new job and low pay are both positively related to settlement. On that basis alone we would expect a higher proportion of female applicants to settle relative to male applicants. But that was not the case.

The presence of a confounding factor may explain the absence of association between settlement and gender. Female applicants may be more likely than male applicants to have a characteristic which would dispose them against settlement. One such possibility is mode of representation. As we shall see applicants who were represented by solicitors generally had a lower settlement rate (59.6 per cent) than the average for all modes of representation (63.1 per cent).

Applicant gender and mode of representation were crosstabulated. The full results are set out in Appendix 20 at Table A14. For present purposes it is sufficient to note that some 47.2 per cent of female applicants were represented by a solicitor.

\(^{194}\) Appendix 20 Table A13.
\(^{195}\) Appendix 20 Table A12.
compared to 44.5 per cent of male applicants. This difference may partially explain the lower then predicted settlement rate for female applicants.

Interactions with other independent variables may also provide an explanation. This issue requires further examination and the application of statistical tools which are beyond my level of competence.

An alternative explanation may lie in the decision to initiate an application in the first place.

For the three years to 1997-98 about 65 per cent of applicants were male and 35 per cent female.\textsuperscript{196} The overall proportion of males to females in the Australian workforce at the relevant time was 57 to 43 per cent.\textsuperscript{197} If applicant gender had reflected the gender proportions in the workforce as a whole we would have expected fewer male applicants and more female applicants.

If male employees are more likely to be terminated than female employees that would explain the disproportionate number of male applicants. But that does not seem to be the case. Job mobility figures for males and females are about the same (24.2 per cent and 24.5 per cent respectively).\textsuperscript{198} Further the numbers of male and female employees who left their employment involuntarily in the period ending
February 1996 is proportionate to the gender distribution in the workforce as a whole.\textsuperscript{199}

This suggests that of all potential applicants, females are less likely to file an application for relief than males. It may be the case that those female employees who do file an application feel more strongly aggrieved than male applicants. If there is a relationship between increased feelings of distress and interpersonal hostility and gender then this may explain the results.

Another explanation may lie in what is being measured. The dependent variable is settlement \textit{at conciliation}. The question being asked is whether there is an association between the applicant's gender and whether or not the claim will be settled at conciliation. Claims which are unresolved at conciliation are often settled prior to hearing. It may be that a disproportionate number of claims by female applicants settle \textit{after} conciliation. Unfortunately there is no direct means of testing this proposition as the Commission does not routinely record the gender of an unfair dismissal applicant. An indirect method is available.

In the study sample 379 cases were not settled at conciliation. Thirty eight per cent of these cases involved female applicants. If the post-conciliation settlement rate did \textit{not} vary by gender then we would expect 38 per cent of the cases determined at arbitration to have female applicants. We do not know the gender of each applicant in the cases which proceeded to arbitration. But data on applicant gender is available

\textsuperscript{199} See Australian Bureau of Statistics, \textit{Labour Mobility Australia}. Canberra: ABS Cat. 6209 Table 9 on p20.
Chapter 11 - Results and Discussion

for the consent arbitrations which took place during the period from 15 January to 30 August 1996. This information is set out at Appendix 8. As the period involved covers part of the period during which the study sample was collected it provides a reasonable proxy for applicant gender in arbitrated cases. Appendix 8 shows that only 33 per cent of cases determined at arbitration had female applicants. This suggests that a higher proportion of female applicants than male applicants settled or discontinued *after conciliation* than male applicants.

The gender mix of arbitrated claims suggests that female applicants had a higher settlement rate than male applicants. This result is different to that in the study sample because ‘settlement’ is not limited to settlement at conciliation and includes post-conciliation settlements. More female applicants than male applicants settle, but not all settlements take place at conciliation.

The influence (if any) of applicant gender on settlement requires further research. The absence of the predicted association between gender and settlement at conciliation illustrates the fact that large sample quantitative methods may not adequately capture the complexity of the conciliation process.\(^{200}\)

\(^{200}\) A limitation recognised by a number of researchers, see Hiltrop 1985:95.
Chapter 11 - Results and Discussion

Ethnicity

The sample survey of applications made to the UK industrial tribunal system conducted by Tremlett and Banerji (1994) showed some differences in settlement behaviour based on the ethnic background of the applicant. Other research has suggested that cultural differences in negotiation behaviour and in preferences among dispute resolution procedures may affect the prospects for settlement by conciliation (Carnevale and Pruitt 1992:570).

In order to keep the questionnaire design simple ethnicity issues were limited to asking whether or not English was the applicant’s first language. It was predicted that the probability of settlement would decrease for persons whose first language was not English. The basis of this prediction was that a party from a non-English speaking background may be unable to fully comprehend what is being said in the conciliation conference and hence we would expect some deterioration in the effectiveness of the process.

There was an association between settlement and whether English was the applicant’s first language. The settlement rate where English was the applicant’s first language was 64.1 per cent, compared to a settlement rate of 53.1 per cent where it was not. This result is consistent with the earlier prediction.

More research is required on this issue before it can be concluded that comprehension problems accounted for the lower settlement rate. Whether a party’s first language is English is an imperfect proxy for comprehension. More detailed
questions would need to be asked or observations made of the applicant's level of comprehension during the conciliation process.

11.1.3 The Respondent

Size

As predicted there was an association between establishment size and settlement. Settlement was more likely in businesses employing fewer than 10 employees than in larger establishments, as shown in Chart 21 below:

Chart 21\textsuperscript{201}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{chart21}
\caption{Business Size and Settlement}
\end{figure}

\textsuperscript{201} Appendix 20 Table A19.
Some 73 per cent of cases involving small businesses (<10 employees) settled, compared to only 53.2 per cent of cases involving employers with more than 50 employees.

The Lewis and Legard (1998) study of ACAS conciliators identified different attitudes toward settlement as between small and large employers.

Smaller employers were ready to consider a settlement at an early stage in their case where they were concerned about the cost of legal advice, the pressure of conducting the case, and the stress, cost and inconvenience of attending a hearing. The general instinct of larger employers was to settle cases which were clearly flawed, to consider settlement where the outcome was unclear and to pursue a case to the tribunal if they thought they had a very high chance of success.

There was also a preparedness to consider an ‘economic’ or ‘commercial’ settlement. Given the likely cost and inconvenience of continuing with the case, employers were prepared to make an offer even in cases where they thought they were likely to succeed at the tribunal. But this approach was not universal:

*There were some indications of a more aggressive approach among the largest employers, those with a high public profile, and those with higher volumes of industrial tribunal cases. Their strategy seemed particularly influenced by concern to avoid employees believing that spurious tribunal applications would result in a financial settlement.* (Lewis and Legard 1998:57)
As predicted settlement rates were higher in cases involving private sector respondents than those in the public sector.

**Chart 22**

![Chart showing Business Sector and Settlement comparison between Public Sector and Private Sector.](image)

The settlement rate in private sector cases was 64.4 per cent compared to 43.8 per cent in the public sector. The most obvious explanation for this result is the difference in average establishment size between the public and private sectors (88 versus 27 employees: see pp213-214). But as only 6.2 per cent of the cases surveyed involved public sector employees the sample size may not be large enough to allow any conclusions to be drawn from the results.

Another explanation may lie in the fact that dismissals are comparatively rare in the public sector. Morehead et al (1997) report that based on the results of the 1995 Australian Workplace Industrial Relations Survey some 2.7 per cent of employees in

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202 Appendix 20 Table A20.
the private sector had their employment terminated by management in 1995 for reasons other than redundancy, compared to only 0.5 per cent in the public sector.\textsuperscript{203} Similarly in the UK Millward et al (1992) found that in 1990 52 per cent of managers in the private sector reported that at least one employee had been dismissed during the previous 12 months for reasons other than redundancy. The comparable figure for the public sector was only 21 per cent.

The relatively low rate of dismissals in the public sector may be because termination of employment is only used in the most serious cases and then only after an internal review procedure. If that is the case then we would expect such cases to be less likely to settle.

The level of management involved in the termination decision may also be a factor. The evidence from the 1995 Australian Workplace Industrial Relations Survey suggests that decisions about dismissals in the public sector are usually made by a higher level of management than is the case in the private sector. Managers surveyed were asked which of these statements best describes who would usually make decisions about dismissals:

203 Morehead et al 1997: Table 4.10 on 418.

A. A first line supervisor or line manager.
B. Employee relations’ manager and other managers jointly.
C. Employee relations’ manager at his/her own discretion.
D. Most senior workplace manager.
E. Other senior workplace manager.
F. Management at a higher level beyond this workplace.

G. Issue does not arise here.

The survey results, by sector, are set out in Table 20 below:

<table>
<thead>
<tr>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Sector</td>
</tr>
<tr>
<td>-------</td>
</tr>
<tr>
<td>Private</td>
</tr>
<tr>
<td>Public</td>
</tr>
</tbody>
</table>

In the public sector the most common response (43 per cent) was 'Management at a higher level beyond this workplace'. In the private sector these decisions were usually made by the most senior workplace manager. The involvement of a higher level of management in the dismissal decision may act to limit the flexibility of the person representing the employer in the conciliation conference. If that is the case then we would expect a lower settlement rate in the public sector.

**Ethnicity**

Contrary to the prediction made in Chapter 9 the crosstabulation results do not show any association between settlement and whether English was the respondent’s first language. The absence of the predicted association may be because whether the first language of the respondent is English is a very poor proxy for their level of comprehension. The question may have some value as a proxy for comprehension in

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respect of the applicants but may be less relevant in the case of the employers who would generally be expected to have a higher level of English comprehension.

Further, employers may be more likely to have prior experience of unfair dismissal cases and hence be more familiar with the conciliation process. The Tremlett and Banerji (1994:8-11) sample survey of UK industrial tribunal cases showed that in 27 per cent of unfair dismissal cases there had been a previous such case at the same workplace. But only two per cent of applicants had previously lodged an unfair dismissal case.205

11.1.4 The Parties - Miscellaneous

Reason for Termination

The questionnaire sought to identify the reason for the applicant’s termination by asking the conciliator to tick one of the following reasons:

☐ performance
☐ attitude
☐ fighting/abusive language
☐ other

205 There are no comparable Australian statistics available.
The results of the crosstabulation of reason given for termination and settlement is set out in the chart below:

![Chart 23](image)

As predicted there was an association between settlement and the reasons for termination. But the association was not of the type expected. It was predicted that terminations due to fighting or abusive language would be less likely to settle as they may involve matters of principle such as the implementation of the employer’s policy mandating termination of employment for such conduct. Terminations based on poor employee attitude were also thought to have less chance of settling because such disputes may have generated interpersonal hostility which would make resolution more difficult. (The results tell a different story. Contrary to the predicted outcome terminations due to fighting or abusive language had an above average settlement rate (73.3. per cent compared to the average of 62.9 per cent). Similarly, the

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206 Appendix 20 Table A22.
settlement rate where the reason for termination was poor attitude (67.1 per cent) was above average.

But these results do not necessarily invalidate the hypothesis advanced. The difficulty lies in the design of the questionnaire. Given the benefit of hindsight two problems are apparent.

The first is that the inclusion of the ‘other reason’ category without asking what the reason was does not provide any opportunity for further analysis. This is a significant flaw given that the ‘other reason’ option was selected in over half of all the cases in the sample. Cases where ‘other reason’ was selected had a below average settlement rate (57.6 per cent compared to the average of 62.9 per cent) but there is no way of finding out why this is the case.

The second problem is the use of ‘fighting or abusive language’ cases as a proxy for disputes involving an issue of principle; and ‘attitude’ cases as a proxy for high interpersonal hostility. Neither may be the case in every instance.

A better option would have been to directly record whether the dispute involved an issue of principle. Interpersonal hostility could also have been directly measured, perhaps by a likert type scale based on the conciliator’s observations during the conference, that is:

<table>
<thead>
<tr>
<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Neutral</th>
<th>Agree</th>
<th>Strongly Agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
</tbody>
</table>
Chapter 11 - Results and Discussion

Representation

It was predicted that settlement would be more likely when either:

- both parties were represented; or
- both parties were unrepresented.

The crosstabulation results confirm a relationship between representation and settlement:

![Chart 24](image)

Appendix 20 Table A25.
Chapter 11 - Results and Discussion

As predicted the settlement rate was substantially above average when both the applicant and the employer represented themselves (75.7 per cent compared to the average settlement rate of 62.4%).

Where the applicant was represented by a union the settlement rate was only 57 per cent.\textsuperscript{208} The combination with the lowest settlement rate was where the applicant was represented by a union and the employer was self represented. There may be a number of explanations for this result, unrelated to the question of representation as such. Union membership is more prevalent in larger workplaces as shown by Chart 25 below:

\begin{center}
\textbf{Chart 25}\textsuperscript{209}
\end{center}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{union_density Establishment size.png}
\caption{Union Density and Establishment Size}
\end{figure}

\textsuperscript{208} Appendix 20 Table A26.
\textsuperscript{209} Morehead et al (1997), Table A7.2 on p468.
In establishments employing between 5 and 19 persons only 20 per cent of employees belonged to a union compared to a union density of 72 per cent in establishments with more than 500 employees.

In the sample of cases used in this study 69.2 per cent of the cases where the applicant was represented by a union and the employer was self represented were in respect of a business with more than 50 employees. Only 53.2 per cent of cases involving employers with more than 50 employees settled. As we have seen there is an association between establishment size and settlement. The bigger the business the less likely the parties are to settle.

There may be two other explanations for the low settlement rate among applicants who were represented by a union.

The first relates to transaction costs. Posner’s settlement model predicts that as the transaction costs of litigation fall, settlement becomes less likely. The costs associated with union representation are less than for other forms of representation hence we would expect union representation to have a negative effect on settlement.

The second explanation may lie in the relatively low incidence of dismissals in the unionised workforce. Morehead et al (1997) found that the average annual dismissal rate was lower where there was a union presence at the workplace than if there was no union presence:

210 See Appendix 20, Table A26.
Table 21

Average Annual Dismissal Rate 1990 and 1995

<table>
<thead>
<tr>
<th></th>
<th>1990</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th>1995</th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>%</td>
<td>None</td>
<td>&lt;2</td>
<td>2-5</td>
<td>5-10</td>
<td>10+</td>
<td>%</td>
<td>None</td>
<td>&lt;2</td>
<td>2-5</td>
</tr>
<tr>
<td>Union and delegate presence</td>
<td>Mean</td>
<td>%</td>
<td>%</td>
<td>%</td>
<td>%</td>
<td>%</td>
<td>Mean</td>
<td>%</td>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>All workplaces</td>
<td>4.4</td>
<td>4.5</td>
<td>12</td>
<td>18</td>
<td>12</td>
<td>12</td>
<td>2.1</td>
<td>60</td>
<td>13</td>
<td>15</td>
</tr>
<tr>
<td>No union</td>
<td>8.2</td>
<td>31</td>
<td>4</td>
<td>22</td>
<td>17</td>
<td>26</td>
<td>3.8</td>
<td>48</td>
<td>8</td>
<td>22</td>
</tr>
<tr>
<td>Union, no delegate</td>
<td>5.3</td>
<td>43</td>
<td>7</td>
<td>20</td>
<td>14</td>
<td>15</td>
<td>2.3</td>
<td>58</td>
<td>12</td>
<td>17</td>
</tr>
<tr>
<td>Union and delegate</td>
<td>2.6</td>
<td>51</td>
<td>18</td>
<td>15</td>
<td>10</td>
<td>6</td>
<td>1.2</td>
<td>67</td>
<td>17</td>
<td>11</td>
</tr>
</tbody>
</table>

The dismissal rate in non-union workplaces was more than three times higher than in workplaces where there was a union and a delegate presence. (In 1990, 8.2 per cent versus 2.6 per cent; in 1995 3.8 per cent versus 1.2 per cent.)

Similarly in the UK the report by Millward et al (1992 201-202) on the third Workplace Industrial Relations Survey in Britain found ‘a clear and positive relationship’ between union presence and the incidence of dismissals:

... taking all establishments together, those with no union recognition dismissed some two and a half times as many workers employed per thousand as did those where trade unions were recognized. This relationship held true for both the private and the public sectors. In private manufacturing, establishments with trade union recognition dismissed on average 16 workers per thousand employed, compared with 27 per thousand among establishments with no recognition. In private services the difference was no less pronounced:

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211 Morehead et al (1997), Table A4.10 at 418.
unionized establishments dismissed 13 per thousand employed, non-unionized some 25 per thousand.

As with the public sector, the relatively low rate of dismissals in the unionised sector may mean that termination of employment is only used in the most serious cases. If so we would expect the settlement rate to be lower.

In relation to legal representation the results are consistent with the Tremlett and Banerji (1994:48) survey. Applicants who were legally represented were less likely to settle (59.2 per cent compared for all other combinations of representation).

There is also some limited evidence to support the contention that ‘repeat players’ may be engaging in ‘co-operative bargaining’. We would expect such bargaining to take place when either both parties are legally represented or the applicant is represented by a union and the employer by an employer organisation. Both combinations resulted in a slightly higher settlement rate than the average for all other combinations (64.4 and 63.3 per cent respectively compared to 61.7 per cent for all other combinations). Perhaps a better way of testing the ‘co-operative bargaining’ thesis would have been to ask the representatives if they had had previous dealings with one another.
Chapter 11 - Results and Discussion

11.1.5 The Conciliation Process

Pre-Conciliation Discussions

In about 35 per cent of the cases in the sample the parties had discussed their dispute prior to the conciliation conference. But such prior discussions were not associated with settlement. In fact the cases in which the parties had prior discussions had a slightly lower settlement rate than those where no such discussions took place (62.1 per cent versus 63.3 per cent).

One explanation for the failure to find the predicted association may lie in the lack of any qualitative assessment of the prior discussion. Prior discussion may result in the resolution of a number of substantive issues in dispute, leaving only a limited number of matters to be resolved in conciliation. On the other hand, such discussions may be short, abusive and fruitless.

Future research should examine the 'quality' of the prior discussions, rather than simply recording whether they took place.

Duration of Conciliation Conference

As we saw in Chapter 9, there was an association between the duration of the conciliation conference and the extent to which the conciliator exhibited a facilitative style. Facilitation took time, hence the higher the conciliator's facilitation ranking the longer the average duration of the conference. To the extent that increased facilitation leads to increased settlement we would also expect to see an association
between the conference duration and settlement - the longer the conference the higher the settlement rate. The results are consistent with these observations.

Chart 26

There is an association between the duration of the conciliation conference and settlement. Generally speaking the longer the conference the higher the settlement rate. The results are also consistent with what we would expect from the informal observations of the conciliators themselves. A number of conciliators observed that the parties needed an opportunity to vent their anger and hurt: ‘They want to tell their story.’

\[212\] Appendix 20 Table A28.
It was predicted that conciliator experience would be positively associated with settlement and this has been reflected in the crosstabulation results.

The lowest average settlement rate was by the four conciliators with less than two years experience (an average of 54 per cent of matters settled). The one conciliator with more than 10 years experience had a settlement rate of 91.2 per cent.

But the results disguise considerable variation between conciliators within the same experience category. For example, Chart 28 shows the variation in settlement rates within two experience categories, less than two years and between two years and five years.

\[213\] Appendix 20 Table A30.
If experience were the predominant factor we would expect each of the more experienced conciliators to have a higher settlement rate than their less experienced colleagues. But that is not the case. One of the conciliators with less than two years experience had a settlement rate (57.7 per cent) which was greater than that of two more experienced conciliators (43.9 and 54.5 per cent).

The other factor which may be at work here is conciliator style. The table below suggests that there is a relationship between conciliator experience and the combined style ranking.
Table 22

Conciliator Experience, Style and Settlement

<table>
<thead>
<tr>
<th>Conciliator Code</th>
<th>Experience (Years)</th>
<th>Facilitation</th>
<th>Intervention</th>
<th>Combined</th>
<th>Settlement Rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>&lt;2</td>
<td>2</td>
<td>2</td>
<td>4</td>
<td>37</td>
</tr>
<tr>
<td>9</td>
<td>&lt;2</td>
<td>5</td>
<td>1</td>
<td>6</td>
<td>43.9</td>
</tr>
<tr>
<td>10</td>
<td>&lt;2</td>
<td>3</td>
<td>2</td>
<td>5</td>
<td>43.9</td>
</tr>
<tr>
<td>1</td>
<td>&lt;2</td>
<td>2</td>
<td>4</td>
<td>6</td>
<td>57.7</td>
</tr>
<tr>
<td>4</td>
<td>≥2 &lt;5</td>
<td>2</td>
<td>3</td>
<td>5</td>
<td>48.4</td>
</tr>
<tr>
<td>7</td>
<td>≥2 &lt;5</td>
<td>3</td>
<td>3</td>
<td>6</td>
<td>54.5</td>
</tr>
<tr>
<td>5</td>
<td>≥2 &lt;5</td>
<td>3</td>
<td>4</td>
<td>7</td>
<td>71.7</td>
</tr>
<tr>
<td>8</td>
<td>≥2 &lt;5</td>
<td>4</td>
<td>4</td>
<td>8</td>
<td>79.8</td>
</tr>
<tr>
<td>6</td>
<td>≥5 &lt;10</td>
<td>3</td>
<td>3</td>
<td>6</td>
<td>64.1</td>
</tr>
<tr>
<td>3</td>
<td>≥10</td>
<td>4</td>
<td>5</td>
<td>9</td>
<td>91.7</td>
</tr>
</tbody>
</table>

The average combined ranking generally increased with experience, as shown by Chart 29 below:

Chart 29

Combined Style Ranking and Conciliator Experience

<table>
<thead>
<tr>
<th>Conciliator Experience (years)</th>
<th>Average Style Ranking</th>
</tr>
</thead>
<tbody>
<tr>
<td>≤2</td>
<td>4</td>
</tr>
<tr>
<td>≥2 &lt;5</td>
<td>7</td>
</tr>
<tr>
<td>≥5 &lt;10</td>
<td>6</td>
</tr>
<tr>
<td>≥10</td>
<td>9</td>
</tr>
</tbody>
</table>
Chapter 11 - Results and Discussion

As we shall see there is a relationship between conciliator style and settlement - the higher the ranking on the combined style measure the higher the settlement rate. This does not mean that experience is irrelevant. It may well be that conciliators have adapted their style over time and tried different techniques in an effort to enhance their settlement rate but the evidence is inconclusive.

Conciliator Style

Conciliator style was measured on two dimensions: facilitative and interventionist. Each conciliator received a ranking from one to five on each dimension and a combined ranking which was the sum of their rankings on the two dimensions. The combined ranking was referred to as the conciliator's 'style'. It was predicted that the higher the ranking on each dimension the higher the settlement rate. The results were generally consistent with the prediction.

In terms of facilitation, settlement generally increased as the conciliator's ranking increased.
The settlement rate for conciliators with a 4 ranking for facilitation was 87 per cent, nearly double that of conciliators with a 1 ranking (46.2 per cent).

But surprisingly the settlement rate associated with a 5 ranking was only 44 per cent. Only one conciliator had a 5 ranking for facilitation. The same conciliator had a very low ranking on the interventionist dimension. As we shall see intervention is the more significant style characteristic in terms of its influence on settlement.

As the conciliator’s interventionist ranking increased so too did the settlement rate.

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214 Appendix 20 Table A31.
A conciliator with an interventionist ranking of one had half as many cases settle as a conciliator with a five ranking (44 per cent versus 91.2 per cent).

Unsurprisingly the combined ranking also showed a positive, almost linear, association with settlement.

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215 Appendix 20 Table A32.
216 Appendix 20 Table A33.
As the combined ranking increased so did the settlement rate. But which of the two composite dimensions (facilitation and intervention) has the more profound impact on settlement?

A combined conciliator style ranking of 6 may result from a number of combinations, such as:

- Intervention ranking 4 + facilitation ranking 2
- Intervention ranking 1 + facilitation ranking 5

To test which combination was the more potent, in terms of its impact on settlement, an additional crosstabulation was generated.

The results (see Table A35 in Appendix 20) generally support the view that an interventionist style is more positively associated with settlement than a facilitative style. In the conciliators studied there were four possible combinations of interventionist/facilitative ranking which give a combined score of 6. These are set out below:

Table 23

<table>
<thead>
<tr>
<th>Conciliator</th>
<th>Rankings</th>
<th>Settled/No. of Cases</th>
<th>% Settled</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>I4/F2</td>
<td>66/111</td>
<td>60%</td>
</tr>
<tr>
<td>B</td>
<td>I3/F3</td>
<td>89/151</td>
<td>59%</td>
</tr>
<tr>
<td>C</td>
<td>I2/F4</td>
<td>54/146</td>
<td>37%</td>
</tr>
<tr>
<td>D</td>
<td>I1/F5</td>
<td>11/25</td>
<td>44%</td>
</tr>
</tbody>
</table>
In circumstances where the interventionist ranking was more significant (i.e. conciliator A) the settlement rate was higher than where the facilitative ranking was the dominant factor (i.e. conciliators C and D).

These results are also consistent with the Lewis and Legard (1998) qualitative evaluation of ACAS conciliators. The authors make the following observations about the influence of conciliators on case outcomes:

*There were a number of circumstances where the ACAS officer's intervention was thought to have influenced the desire of one or both parties to settle, or the desire of the applicant to withdraw:*

- where, though highlighting the value of a conclusion of a case which avoided the trauma, cost or inconvenience of a tribunal, the officer had encouraged the party to consider withdrawing or settling:

  He was very conscientious ... and he kept saying to me all along "... I hope you're doing this for the right reasons ... It could be long, it could be drawn out ... they're going to ask you embarrassing questions".

  Applicant, no advice or representation, settled.

- where the ACAS officer's intervention resulted in a recognition by one party of the weakness of their case, and thus of the advantage of settling or withdrawing. This occurred, for example, in a case where the employer felt that he had followed the correct procedure in
making an employee redundant. The ACAS officer pointed out, however, that since the applicant had been on sick leave at the time, a tribunal could decide that he had been unfairly selected for redundancy. Similarly, in other cases, the IRO highlighted information that led to a re-evaluation of the value of settling;

- where the ACAS officer had clarified issues relating to legal procedure – for example, how unfair dismissal needs to be established. In one case, noted earlier, the officer explained to an employer who was owed money by the applicant that the tribunal would consider the applicant’s claim but had no jurisdiction to consider the employer’s potential claim against the applicant, which would need to be pursued in the country court.

This appeared particularly to influence smaller employers and applicants who had had little or no legal advice - among represented parties, it was generally the representative who was reported as having influenced the outcome in these ways. (Lewis and Legard 1998:106)

The study also reported that there was a perception among parties that cases which did not settle may have done so if there had been more effective intervention by the conciliator (Lewis and Legard 1998:110-111).

But it is important to bear in mind that the use of interventionist techniques is not of itself the primary determinant of settlement. It is the use of such techniques in
combination with facilitation which is associated with higher settlement rates. This point is supported by Table 24 below:

Table 24

<table>
<thead>
<tr>
<th>Conciliator Code</th>
<th>Interventionist Ranking</th>
<th>Facilitative Ranking</th>
<th>Settlement Rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>2</td>
<td>2</td>
<td>37.0</td>
</tr>
<tr>
<td>10</td>
<td>2</td>
<td>3</td>
<td>43.9</td>
</tr>
<tr>
<td>1</td>
<td>2</td>
<td>4</td>
<td>57.7</td>
</tr>
<tr>
<td>4</td>
<td>3</td>
<td>2</td>
<td>48.4</td>
</tr>
<tr>
<td>7</td>
<td>3</td>
<td>3</td>
<td>54.5</td>
</tr>
<tr>
<td>6</td>
<td>3</td>
<td>3</td>
<td>64.1</td>
</tr>
<tr>
<td>5</td>
<td>3</td>
<td>4</td>
<td>71.7</td>
</tr>
<tr>
<td>8</td>
<td>4</td>
<td>4</td>
<td>79.8</td>
</tr>
<tr>
<td>3</td>
<td>4</td>
<td>5</td>
<td>91.7</td>
</tr>
</tbody>
</table>

Table 24 groups conciliators with common interventionist style rankings. For example conciliators 1, 2 and 3 all have an interventionist ranking of 2. But the facilitation rankings of these conciliators ranges from 2 to 4. As the facilitation ranking increases so too does the settlement rate. Conciliator 1 has a facilitative ranking of 2 and a settlement rate of 37 per cent. Conciliator 3 has a facilitative ranking of 4 and a settlement rate of 57.7 per cent. The same pattern is evident for conciliators with a 3 and 4 interventionist ranking. The higher the facilitation ranking within each group the higher the settlement rate. This point is made by Chart 33 below:
These results confirm the importance of rapport building and the development of trust as a predictor of settlement.
CHAPTER 12 - SUMMARY OF PART C

There is a substantial variation between the settlement rates of individual conciliators. This Part sought to explain that variation. The focus was on the context and process issues which impact on settlement. The contextual factors examined relate to the characteristics of each of the parties. In terms of the impact of the conciliation process on settlement both the experience of the conciliator and the conciliator’s behaviour during the conciliation conference are examined.

The thesis is that certain characteristics of the parties to an unfair dismissal claim will influence whether or not the claim will settle at conclusion. In Chapter 9 particular characteristics were selected based on a literature review, the economic theory of trial and settlement and informal discussions with conciliators. It is also predicted that there will be an association between settlement and conciliator style and experience.

The predicted impact of particular factors is summarised in the table below:
<table>
<thead>
<tr>
<th>Table 25</th>
<th>Independent Variables and Settlement Predictions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Independent Variables</td>
</tr>
<tr>
<td>A.</td>
<td>Contextual factors</td>
</tr>
<tr>
<td></td>
<td>1. Applicant</td>
</tr>
<tr>
<td></td>
<td>• remuneration</td>
</tr>
<tr>
<td></td>
<td>• period of service</td>
</tr>
<tr>
<td></td>
<td>• new job</td>
</tr>
<tr>
<td></td>
<td>• occupational group</td>
</tr>
<tr>
<td></td>
<td>• age</td>
</tr>
<tr>
<td></td>
<td>• gender</td>
</tr>
<tr>
<td></td>
<td>• ethnic background</td>
</tr>
<tr>
<td></td>
<td>2. Employer</td>
</tr>
<tr>
<td></td>
<td>• size</td>
</tr>
<tr>
<td></td>
<td>• sector</td>
</tr>
<tr>
<td></td>
<td>• ethnic background</td>
</tr>
<tr>
<td></td>
<td>3. Mode of representation</td>
</tr>
<tr>
<td></td>
<td>4. Miscellaneous</td>
</tr>
<tr>
<td></td>
<td>• prior discussions</td>
</tr>
<tr>
<td></td>
<td>• reasons for dismissal</td>
</tr>
<tr>
<td>B.</td>
<td>Process factors</td>
</tr>
<tr>
<td></td>
<td>1. Mediator style</td>
</tr>
<tr>
<td></td>
<td>• rapport building/facilitation</td>
</tr>
<tr>
<td></td>
<td>• active/interventionist</td>
</tr>
<tr>
<td></td>
<td>2. Mediator experience</td>
</tr>
</tbody>
</table>

A questionnaire and direct observation methodology was adopted to test these predictions. This is dealt with in Chapter 10. Each of the 14 conciliators participating in the study was given a ranking based on my direct observation of the tactics they employed in actual conciliations. Five observations were conducted for each conciliator and a scoring sheet was completed for each observation. Each conciliator was given a ranking on two dimensions: facilitative and interventionist.
A likert type interval scale was used to indicate the degree to which a particular conciliator possessed the characteristic which is of interest. The accuracy of the ranking used was confirmed by crosstabulating ‘facilitative ranking’ with ‘conference time’. If the rankings were accurate we would expect the conciliation conferences conducted by highly facilitative conciliators to take longer than those conducted by conciliators with a lower facilitative ranking. The results supported the accuracy of the facilitative style rankings.

The independent variables were crosstabulated with the dependent variable, settlement. The crosstabulation results are discussed in Chapter 11. The results suggest that there is an association between settlement and the following variables:

- Gross weekly wage
- Whether the applicant has found another job
- Age of the applicant
- Applicant ethnicity
- Business size
- Business sector
- Reason for termination
- Applicant representation
- Combination of representation
- Duration of conference
• Conciliator ranking – facilitative
• Conciliator ranking – interventionist
• Conciliator style

The crosstabulation results are generally consistent with the predictions made in the previous chapter, with six exceptions. No association was found between settlement and:

• occupational group
• period of service
• applicant gender
• respondent ethnicity
• respondent representation
• pre-conciliation discussions.

An attempt is made to explain the absence of each predicted association and suggestions are made about improvements in the questionnaire methodology.

The next chapter seeks to integrate the results of Parts B and C and integrate those results to previous research. In the final chapter some suggestions are made about directions for future research.
CHAPTER 13 - CONCLUSION

13.1 Introduction

Parts B and C of the paper examined the influence of certain contextual and process issues on the settlement of unfair dismissal claims by conciliation. The focus of Part B was on the impact of the legal context in which conciliation occurs. It tested the proposition that legislative changes which affect the cost of litigation, the remedies available from arbitration and the probability of success, will influence whether or not a claim is settled at conciliation. The proposition is based on the economic theory of trial and settlement.

The impact of other contextual and process issues was considered in Part C. It was contended that conciliator style and experience and certain characteristics of the parties effect the split between settlement and arbitration.

This chapter seeks to integrate the results of Parts B and C and relate those results to previous research. In the next chapter some suggestions are made about directions for future research.
13.2 Posner's Model and the Economic Theory of Trial and Settlement

The common thread linking Parts B and C of the paper is the economic theory of trial and settlement, as discussed in Chapter 3. The essence of this theory is that parties can be expected to settle if they believe that settlement will be more beneficial than the expected gain from litigation. Posner's (1998:607-615) settlement model is based on this theory.

Part B considers the impact of the changes in the legislative context within which unfair dismissal conciliations have taken place in terms of the potential of these changes to impact on the elements of Posner's model and hence on settlement. The relevant legislative history is reviewed in Chapter 4. Chapter 5 places the legislative changes in the context of Posner's settlement model. The WROLA Act changes impacted on the variables in Posner's settlement model by reducing the probability of success (PaPr↓), increasing the transaction costs of an arbitration (C↑), and diminishing the value of the outcome of arbitration for applicants (A↓). A summary of the relevant changes is set out in Table 26 on the next page:
### Table 26

#### Before and After Commencement of WROLA Act

**Key Legislative Changes**

(Note: WROLA Act introduced the WR Act)

<table>
<thead>
<tr>
<th>Coverage:</th>
<th>Before WR Act</th>
<th>After WR Act</th>
<th>Impact of WR Act on Posner’s Variables</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>General with some exclusions.</td>
<td>Limited classes of employee only. Previous exclusions expanded.</td>
<td>Reduces the probability of success. (Pa/Pr↓)</td>
</tr>
</tbody>
</table>

**Role of the AIRC**

- All applications referred to conciliation.
- AIRC consent arbitration only.
- Conciliator required to give the parties an assessment of the merits of any unresolved claim. Adverse assessment may lead to subsequent costs order – increasing conciliator power. AIRC determines all unresolved unfair dismissal applications.
- Increased conciliator power may result in more conciliatory behaviour by parties and more intervention by conciliator. May operate to reduce parties perception of success. (Pa/Pr↓)

**Key Test (Pa/Pr):**

- valid reason (s 170DE)
- procedural fairness (s 170DC)
- Provided a mechanism for the ‘vindication of the rights of an unlawfully dismissed employee’.
- ‘harsh, unjust or unreasonable’ test – having regard to a range of factors (s 170CG(3)) including ‘fair go all round’ (s 170CA(2)). Move away from concepts of employee rights towards balancing the interests of employees and employers.

**Remedies: (A)**

- Remedy followed breach – reinstatement unless impracticable then compensation subject to a ceiling of six months remuneration
- More open discretion to refuse a remedy even if the termination was harsh, unjust or unreasonable. Reinstatement if appropriate, if not compensation. Ceiling on compensation reduced – remuneration earned in the six months prior to termination.

**Costs: (C)**

- Court had a very limited power to award costs (s 347).
- AIRC had no power to award costs.
- AIRC given power to award costs in three circumstances:
  - application made vexatiously or without reasonable cause;
  - party acted unreasonably in failing to discontinue or agree on terms of settlement;
  - matter discontinued and party acted unreasonably in failing to discontinue at an earlier time.

**Value of the outcome of a trial for applicant’s reduced (A’↓)**

**The transaction costs of trial are increased. (C’ ↑)**

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310
Given the nature of the legislative changes the economic model would predict that the settlement rate at conciliation under the *WR Act* would be greater than under the pre-*WR Act* legislative framework. The actual settlement rate experience over time confirms the accuracy of this prediction.

**Chart 34**

![Chart showing comparative settlement rates between Pre WR Act and Post WR Act from 30 March 1994 to 30 June 2000.](image)

Before the *WR Act* the average settlement rate at conciliation was 55.6 per cent. After the *WR Act* the settlement rate increased to 71.2 per cent.

The influence of factors, other than changes in legal architecture, which could have explained the differences in settlement rates before and after the *WR Act* were considered, and rejected, in Chapter 6.

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See Table 7.
It was concluded that the settlement rate experience over time supported the thesis that legislative changes which affect the cost of litigation, the remedies available from arbitration, and the probabilities of success ('C', 'A', 'Pa' and 'Pr' in Posner's model) influence the split between settlement and arbitration.

The impact of changes in legal architecture on the settlement rate in unfair dismissal claims raises a number of important policy issues. The changes introduced by the WR Act sharply reduced the net expected gain from unfair dismissal litigation. As a consequence the settlement rate at conciliation increased from 55.6 to 71.2 per cent. This may provide an illustration of Fiss's (1984) description of settlement as the civil analogue of plea bargaining, where consent is often coerced and justice may not be done. An applicant may have been unfairly dismissed, but is compelled to settle for less than his or her legal entitlements because the cost of litigating is greater than the likely award. As Fiss (1984:1085) puts it:

... when parties settle society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone.

In Chapter 2, I noted that for many critics the notion of a negotiated settlement was jurisprudentially suspect because of the tendency to compromise important legal principles. Edwards (1986:679) cautioned that settlement may stifle the development of the law by diverting particular types of cases away from adjudication. Arguably the WR Act has had such an impact. Not only has it contributed to an increase in the settlement rate at conciliation, there has been an overall decline in the proportion of claims which are adjudicated.
Before the WR Act about 9.3 per cent of claims were the subject of judicial or arbitral determination.\textsuperscript{218} Under the WR Act this proportion has fallen to 8.2 per cent.\textsuperscript{219}

While the effect of this decline in the number of adjudications raises a number of important issues they are beyond the scope of this thesis. The question being considered is whether legal architecture impacts on bargaining behaviour and hence the probability of settlement. The simple answer is yes it does.

Part C also tested the validity of Posner's model. The model assumes that economically rational litigants make risk neutral or risk averse choices to maximise outcomes. In deciding whether or not to settle, litigants take probable trial outcomes into account. In Chapter 9, I identified four applicant characteristics which may affect the amount awarded if the claim was successful and hence were predicted to influence the likelihood of settlement:

- gross weekly wage (low paid applicants would have a greater propensity to settle than high paid applicants);

- period of service (the likelihood of settlement could be expected to reduce as length of service increases);

- whether the applicant had found another job (if the applicant has found alternative employment the case would be more likely to settle); and

\textsuperscript{218} See Appendix 16.
\textsuperscript{219} See Table 5 on p150.
the applicant's occupation (because occupation serves as a proxy for length of service and level of earnings).

The results provide some support for the thesis that factors which affect probable trial outcomes also influence the propensity for settlement. The most pervasive factor was whether the applicant had found another job. The relevance of this factor to probable trial outcomes arises in the following way. The amount of compensation awarded to successful applicants is influenced by the remuneration the applicant would have received, or would have been likely to have received, if the employer had not terminated his or her employment (referred to as lost remuneration). The assessment of lost remuneration is subject to a deduction for monies earned since termination. If an applicant obtained other employment shortly after termination then the extent of his or her lost remuneration would be minimal. Hence whether or not the applicant has found another job may impact on his or her net expected gain from litigation and thus on his or her propensity to settle.

The crosstabulation results show a clear and positive association between settlement and whether the applicant had found another job. Applicants who had found alternative employment were much more likely to settle than those who had not (77.2 per cent versus 58.7 per cent).

Whether or not an applicant had found another job also explained a number of other crosstabulation results, such as the higher than expected settlement rate for applicants earning between $800 and $1000 per week. It was predicted that low paid applicants would have a higher propensity to settle than high paid applicants. This
was generally the case except that applicants earning between $800 and $1000 per week had a settlement rate of 75 per cent, significantly above the average of 64.4 per cent. The crosstabulation of applicant earnings with whether the applicant had found another job revealed that applicants earning between $800 and $1000 per week were more likely to have found other employment than applicants in all other earnings groups (29.6 per cent versus 23.4 per cent). Hence it would be expected that the settlement rate in this earnings band would be higher than might otherwise be predicted.

Similarly, the relatively high settlement rate for tradespersons (68 per cent versus 62.4 per cent for all other occupations) was explicable on the basis that a significant proportion of tradespersons had found alternative employment before they participated in conciliation (33.7 per cent of tradespersons had found another job compared to only 22.8 per cent of the applicants in all other occupational groups).

Finding alternative employment also provided an explanation for the above average settlement rate among applicants under 20 years of age (84.8 per cent compared to 62 per cent for all other age groups). The crosstabulation results suggest an almost linear relationship between the age of the applicant and whether he or she had found another job. Some 34.8 per cent of applicants under 20 years of age had found alternative employment compared to 23.3 per cent of applicants in all other age groups.

Not all of the factors which were predicted to affect probable trial outcomes were associated with settlement. The crosstabulation results did not reveal any statistically
significant association between occupation and settlement - at least not at the 5 per cent probability level. But the results were partially consistent with the economic theory of trial and settlement. The settlement rate among high status (and high income) occupations was lower than for most other occupations confirming the prediction that higher paid applicants would have less propensity to settle than lower paid applicants. Further, as mentioned earlier, the above average settlement rate for tradespersons was explicable on the basis that a significant proportion of tradespersons had found another job.

Contrary to the predicted result, no association was found between an applicant's period of service and settlement. It was predicted that the likelihood of settlement would be expected to reduce as length of service increased. The basis for such a prediction was that an applicant's service was relevant to the assessment of compensation. The failure to find the predicted association may be because an applicant's assessment of his or her estimated award if successful may not be particularly sophisticated. Alternatively a confounding factor may explain the result.

Despite these aberrations, the results provide some general support for the economic theory of trial and settlement. As such they are consistent with other empirical studies which have sought to test the validity of the theory and of Posner's settlement model. For example, there is some evidence to suggest that procedural rules governing the determination of a dispute may impact on settlement. Coursey and Stanley (1988) tested the impact of different cost allocation rules on the chances of settlement.

Three different sets of rules for allocating the costs of trials were compared:
the British system in which the loser pays the legal costs;

- the American system in which each party pays their own costs; and

- California law 998 and US Federal rule 68 in which a party who rejected a pretrial settlement offer pays the legal costs of the opponent if the judge's award is less than the pretrial offer.

The experimental evidence confirmed the theoretical prediction that the British system and US Federal rule 68 increase the chance of settlement compared with the American system, because they increase the cost of going to trial (the transaction costs 'C' in Posner's model). Similarly, Farber, Neale and Bazerman (1990:380) found that 'the direct costs of arbitration are positively related to the likelihood that negotiations will reach a negotiated resolution'.

Experimental studies suggest that the economic model cannot precisely explain the outcomes of bargaining, but that it does have some predictive value. Bargainer behaviour deviates from rationality in ways that limit the accuracy of the model. For example, the model predicts that settlement would only occur where there was a 'contract zone'. Yet Farber et al (1990:371) found that settlements were reached in 47.5 per cent of cases in which there was no contract zone. However, the settlement rate was significantly higher (81.3 per cent) in cases where there was a contract zone. The results supported the authors' conclusion that the economic model is

\[220\] The 'contract zone' is the area of overlap between the 'bottom line' positions of both parties.
useful in providing directional hypotheses but is too crude to provide precise predictions in particular cases (Farber et al 1990:377).

A number of other studies show that changing the rules associated with the arbitration mechanism can result in new patterns of labour-employer bargaining behaviour. For example, Subbarao (1978) investigated the impact of binding interest arbitration systems on negotiation process and outcomes. Four arbitration systems were used in several experiments with different scenarios. The features of the four systems used are:

- **final offer selection**: the arbitrator must base his or her award on one or the other of the parties' final package of offers;

- **last offer by issue**: the arbitrator makes an award by selecting, on each separate issue, one or the other of the parties' last offers;

- **open award**: the arbitrator makes an award on the unresolved issues without any regard to the parties' final positions;

- **compromise award**: the arbitrator makes an award by splitting the difference between the final positions of the parties.

The results suggested that the system selected affected the outcome at the end of bilateral negotiations. The lowest mean outcome was recorded by teams negotiating within the final offer selection system and the highest by teams negotiating within the
last offer by issue system. There was also a significant difference in the impact on negotiation behaviour between the final offer selection and last offer by issue systems. These results support the view that bargaining takes place with a conception of how the particular dispute would be resolved if it was adjudicated.

But a number of empirical studies seem to suggest that bargainers do not look to legal principles as the basis for resolving disputes. Condlin (1985) has relied on student negotiations to demonstrate the lack of appeal to law and principles in arguments made. Alexander (1991) has shown that securities litigation is often settled for economic and strategic reasons that bear no relationship to legal costs.

For present purposes, Alexander's study is the most interesting because it tracks actual bargaining behaviour. Condlin's analysis is preliminary and as he himself notes: 'Simulation data is interesting, but the reality of negotiation argument must be studied in its natural setting if it is to be understood.' (1985:136).

Alexander examined the outcomes in a sample of securities class actions in 1983. The cases involved claims by shareholders for damages suffered as a consequence of a misleading or fraudulent public offer document. The claims followed a sharp fall in the share prices of the relevant companies. The economic model would predict that the settlement outcome in each case would depend, to a significant extent, on the strength of the case on its merits since this is the major factor in determining both the likelihood of winning and the amount of a plaintiff's judgment.
The results did not support the theoretical prediction. The settlement outcomes of most of the sample cases fell into a range which was so narrow (between 23.5 and 27.5 per cent of the amount at stake) that it could be described as a flat rate, or alternatively the settlement outcome varied for reasons that could be explained by factors other than the merits.

Alexander's work is cited in support of the proposition that settlements do not track legal principles and that negotiators do not appeal to legal endowments when settling cases. Superficially this is so, but as Menkel-Meadow (1995:2677) notes, Alexander's work reveals that there is a logic to the settlement of securities class actions – most often economic, not legal, logic.

The observation of a flat rate settlement outcome in the type of cases examined is explicable in terms of economic theory. Alexander identified three features of these type of cases which are important in this regard.

First, the characteristics of securities class actions tend to increase risk aversion on the defendant's side. In evaluating risks, risk averse persons tend to assign too much weight to events that have a low probability of occurrence when the consequences of such events are very bad. For a party who is risk averse, settlement protects them against the possibility of an outcome at the extreme end of the range of possible outcomes.

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221 Menkel-Meadow 1995:2675.
In the securities class actions examined by Alexander, the potential damages ranged from $19 million to over $95 million, not including punitive damages. These amounts were high enough to threaten the continued existence of the companies concerned. Other defendants also have strong incentives to avoid a trial. Individual company directors and officers would face financial ruin in the event of an unfavourable verdict. They may also be sensitive to the damage to their reputation that a trial would cause. Outside directors are likely to be particularly unwilling to risk trial because their potential liability is vastly disproportionate to the economic benefit they receive from the company. Insurers also have an incentive to settle. They could be subject to a claim for bad faith refusal to settle, which if successful would make them liable for the entire amount of an adverse judgment, without regard to any policy limits.\textsuperscript{222}

\textbf{Second}, on the plaintiff's side the incentives to avoid a trial are equally strong. As a practical matter the lawyers make the litigation decisions in a class action. The lawyer has a direct economic interest in the litigation – the expected fee. That interest is not the same as the interest of the plaintiff class they represent. The contingency fee system in these cases provides strong incentives to resolve cases by settlement rather than trial. As Alexander notes:

\begin{quote}
\textit{in deciding whether to accept a settlement offer with a virtually guaranteed fee or go to trial, plaintiffs' attorneys must weigh the possibility that they will obtain a higher fee award after trial \ldots against the possibility of obtaining not just a lower fee, but no fee at all in the event of a defense verdict.} (1991:537)
\end{quote}

\textsuperscript{222} For example see \textit{Gray v Zurich Insurance Co.} (1986) 65 Cal. 2d 263.
Most plaintiff firms involved in securities class actions are quite small. The cases are complex and expensive to litigate. A firm must invest a considerable amount in each case, both in out of pocket expenses and in opportunity costs, before they achieve any recovery: ‘For most plaintiffs’ firms, taking even one large case to trial could seriously strain the firm’s resources’ (Alexander 1991:547).

The third unusual feature of securities class actions is the existence of insurance and indemnification. Alexander (1991:580) considers that these may be the most important factors in creating a system of settlements that do not reflect the merits. Directors and officers are usually insured for wrongful acts they commit in their capacity as directors and officers. Companies also indemnify their directors and officers for suits against them for actions taken in their corporate capacity, whether or not they are also covered by insurance.

Insurance and indemnification affect the economic risks faced by the defendants. It is not just a matter of how much money may be lost but whose money. Individual directors and officers can settle a case with other people’s money (that of the insurer and the company) but trial represents a risk; they may have to pay their legal costs and any award that is beyond the scope of their insurance and indemnity.

The factors that contribute to a flat settlement rate in securities class actions are acknowledged in the economic theory of settlement. The parties are each acting in a highly risk averse way in order to maximise the outcome from their perspective and
minimise the risk of an adverse outcome. The relevance of ‘bargaining endowments’ and legal principles are ‘overwhelmed’ by the economic interests of the parties.\(^{223}\)

The results of this study provide some further empirical support for the economic theory of trial and settlement. The theory and Posner’s settlement model are of some assistance in predicting whether an unfair dismissal case will settle, but they will not successfully predict whether all such cases will settle because economic factors are not the only factors at work. As noted in Chapter 3, the Lewis and Legard (1998) study of the UK unfair dismissal cases observed that a strong sense of grievance motivated applicants to file a claim and their objectives were emotional as well as financial. McEwen and Milburn (1993:27) echo these sentiments:

> ... often much more is at stake than the substance of a claim when a party pursues a grievance ... The complainant’s own credibility, integrity and sense of the rightness of the social order are at stake.

While the economic theory of trial and settlement provides a useful lens through which to view the settlement process, it only provides part of the answer to the puzzle of why certain unfair dismissal cases settle at conciliation. The impact of conciliator experience and style provide another part of the answer.

\(^{223}\) See generally Menkel-Meadow:1995.
13.3 Conciliator Experience and Style

Part of the thesis posited is that conciliator style and the experience of the conciliator will influence whether or not an unfair dismissal claim is settled at conciliation. To test this proposition conciliator style was measured on two dimensions - facilitation and intervention - based on my direct observation of the techniques they employed in actual conciliations. Each conciliator received a ranking from one to five on each dimension and a combined ranking which was the sum of their rankings on the two dimensions. The combined ranking was referred to as the conciliator’s ‘style’. It was predicted that the higher the ranking on each dimension, and on the combined ranking, the higher the settlement rate. The results were generally consistent with the prediction.

Settlement generally increased as the conciliators facilitation ranking increased. Conciliators with a four ranking had a settlement rate of 87 per cent, nearly double that of conciliators with a one ranking (46.2 per cent). The exception to this pattern was the one conciliator with a five ranking who had a settlement rate of only 44 per cent. This result was explicable on the basis that the same conciliator had a very low ranking on the interventionist dimension.

The same pattern was evident in relation to the use of interventionist techniques. As a conciliator’s interventionist ranking increased so did their settlement rate. A conciliator with an interventionist ranking of one had half as many cases settle as a conciliator with a five ranking (44 per cent versus 91.2 per cent).
Unsurprisingly, given the results on the two individual style dimensions, the combined style ranking showed a positive, almost linear association with settlement. As the combined ranking increased so did the settlement rate. Further analysis revealed that of the two dimensions an interventionist style was more positively associated with settlement than a facilitative style. But the use of interventionist techniques was not of itself the primary determinant of settlement. It is the use of such techniques in combination with facilitation which is associated with higher settlement rates.

These results are generally consistent with previous research. In this study the extent to which a conciliator was regarded as facilitative was dependent, in part, on the number of rapport building techniques they employed. Rapport building is designed to improve acceptance of conciliation by establishing trust in the conciliator and confidence in the process. Several studies have shown that trust in the mediator is an important predictor of settlement (Carnevale and Pegnetter 1985; Pruitt et al 1989). Kochan and Jick (1978:216) regarded the development of trust as central:

One of the most universalistic principles of mediation is that a mediator's first task in any dispute is to gain the trust and confidence of the parties . . . Unless the mediator is perceived by the parties to be trustworthy, the parties are likely to be unresponsive to later mediator tactics designed to influence their bargaining positions.

Similarly in relation to interventionist techniques, a number of studies have also provided at least qualified support for the proposition that mediator assertiveness (in this study this was reflected in the interventionist ranking of the conciliator) increases
the likelihood of settlement. For example, Wall and Rude (1991) conducted two studies of judicial mediation to explore the effect that the number of mediation techniques used and their assertiveness had on the settlement of civil cases. In the first study 900 state judges read a civil case in which the number of mediation techniques (two versus ten) and the assertiveness of the techniques (assertive versus nonassertive) were manipulated. The responses to the survey revealed that the perceived probability of settlement increased as more techniques were used and as the techniques used became more assertive. The second study - of one judge's mediations for one year (257 cases) - corroborated these findings. In his review of the relevant literature Kressel (1987:72) concludes that:

_The single most consistent finding revealed in the empirical literature is that the ability to produce settlements, at least in very intense conflicts, is associated with such highly aggressive mediator behaviours as threatening to quit, suggesting that arbitrators be called in and being highly active and directive._

The other part of the conciliation process thought to influence settlement was conciliator experience. As predicted the crosstabulation results revealed that conciliator experience was positively associated with settlement. The four conciliators with less than two years experience had the lowest average settlement rate (54 per cent).

Superficially the results support the contention that more experienced conciliators are more likely to achieve a settlement than inexperienced conciliators. Previous research has also generally supported this contention (e.g. Kochan and Jick 1978;
Carnevale and Pegnetter 1985; contra: Zubek et al 1992; Chinkin and Dewdney 1986). But the results fall short of providing unequivocal support for the proposition that conciliator experience is positively associated with settlement. Indeed the crosstabulation results disguised considerable variation in the settlement rates of conciliators within the same experience category. Further, if experience was the predominant factor associated with settlement, we would expect the more experienced conciliators to have a higher settlement rate than their less experienced colleagues. But that was not the case. One of the conciliators with less than two year's experience had a settlement rate (57.7 percent) which was significantly higher than that of two more experienced conciliators (43.9 and 54.5 percent).

It is suggested that the other factor which may be at work here is conciliator style. There is an association between style and experience. Generally speaking the more experienced a conciliator the higher his or her style ranking and hence the higher the settlement rate. But the results do not reveal whether the association between style and experience is causal or coincidental. Hence it is not known if conciliators have adapted their style over time and tried different techniques in an effort to enhance their settlement rate. Ultimately the results are inconclusive on the question of whether conciliator experience is positively associated with settlement. This issue, along with a number of others, needs further examination. In the next chapter a number of suggestions are made about future directions for research in this area.
CHAPTER 14 - SUGGESTIONS FOR FURTHER RESEARCH

It is perhaps an inevitable consequence of the desire to focus a thesis on a manageable number of issues that important issues are left untouched. Three main potential areas for further research arise out of this study and its necessarily narrow focus. 224

The first area for further research flows from the fact that the study has been principally concerned with the identification of factors which contribute to the settlement of unfair dismissal applications at conciliation. At the outset it was made clear that settlement was not seen as a proxy for satisfaction. Indeed the Lewis and Legard (1998:113) study of the conciliation by ACAS of industrial tribunal cases in the UK found that there was substantial applicant dissatisfaction with settlements in circumstances where:

- applicants had particularly wanted to have at tribunal hearing;
- the settlement was not thought to reflect the value of the claim; or
- the applicant felt that the conciliator had applied pressure on them to accept the settlement.

Similarly in child custody cases, Emery and Wyer (1987) found that, although parties were generally more satisfied with mediation compared to litigation, mothers who

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224 Some suggestions for modifications in questionnaire design and areas for further research (i.e. gender and settlement) were made in Chapter 12.
participated in mediation believed they won less and lost more and reported more depressed feelings than did mothers involved in litigation.

Settlement is a very limited measure of the success of a conciliation. As Chinkin and Dewdney (1992:114) note:

Criteria for success should not be limited to settlement rates, savings in litigation costs and time. Other important but not quantifiable criteria include the appropriateness and effectiveness of the mediation process in the eyes of clients and their legal representatives. It cannot be assumed that a settled case was the necessary consequence of a successful mediation.

Baruch Bush and Folger (1994) go further and argue that evaluative research should extend beyond looking at rates of settlement, levels of party satisfaction and quality of substantive outcomes and attempt to assess mediation's transformative impact.\(^{225}\)

It is suggested that further research be undertaken on the relationship between the conciliation process and a broad range of outcome measures including participant satisfaction and transformative impacts such as empowerment. In this context it is contended that a facilitative style is likely to be positively associated with participant satisfaction. This proposition is based on existing research which suggests that the absence of an opportunity to vent emotional concerns may contribute significantly to decreased participant satisfaction (Donohue, Drake and Roberto 1994:272).

\(^{225}\) Also see Brenner et all 2000.
In addition to focussing on settlement, the study design is limited to settlement at conciliation. But claims which are unresolved at conciliation are often settled prior to adjudication. The factors which lead to the settlement of a case after conciliation also merit further research.

The second suggested area for further research relates to the impact of legislative change. In Part B, I concluded that legal architecture impacts on bargaining behaviour and hence on the probability of settlement. The changes introduced by the WR Act sharply reduced the net expected gain from unfair dismissal litigation and, as a consequence, the settlement rate at conciliation increased from 55.6 to 71.2 per cent. Associated with this increase was an overall decline in the proportion of claims which are adjudicated. This raises an important issue about the potential for legislative change and settlement to stifle the development of the law by diverting particular types of cases away from adjudication (see Edwards 1986:679). This is an issue that warrants further research.

The final area in which further research is suggested relates to the conciliation process itself. One difficulty with large scale quantitative studies like the one undertaken in Part C is that they mask some of the complexity of the conciliation process. A number of aspects of that process warrant further research, perhaps using qualitative methods:

- Is the use of particular conciliator techniques contingent on certain context variables such as time pressure, the extent of common ground between the parties, the issues in dispute and inter party hostility? There is
considerable support for such a contingent approach to conciliator strategies in the literature (Kressel 1972; Carnevale and Pegnetter 1985; Carnevale 1986; Carnevale and Conlon 1988; Carnevale and Henry 1989).

- Is the effectiveness of a particular conciliation strategy contingent on contextual variables? For example, Carnevale and Pruitt (1992:565) concluded that the effectiveness of an ‘active’ mediator strategy was contingent on the dispute circumstances. Such a strategy was useful where there was a high conflict intensity but was counterproductive where conflict intensity was low.

- What role do legal representatives play in the conciliation process? The literature suggests a variety of potential roles, some positive and some negative (David and Scott 1994:133; Eisenberg 1976:664; Condlin 1992; Gilson and Mnookin 1994; Sternlight 1999; Wade 2000).

There can be little doubt that the conciliation process provides fertile ground for researchers. The results of this study cast some light on what takes place in the conciliation shadows but much more illumination is needed.

*The best that can be hoped for from the ending is that sooner or later it will arrive*

N.F. Simpson
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