

Our ref: Industrial Relations Committee

22 February 2013

Director (Industrial Relations Policy)
Private Sector Industrial Relations
Office of Fair and Safe Work Queensland
Department of Justice and Attorney-General
GPO Box 69
Brisbane Qld 4001

By Post and Email to: IRreferral@justice.qld.gov.au

Dear Director

COMMENTS ON ISSUES PAPER - SHOULD QUEENSLAND MAINTAIN OR TERMINATE THE REFERRAL OF INDUSTRIAL RELATIONS JURISDICTION FOR THE UNINCORPORATED PRIVATE SECTOR TO THE COMMONWEALTH?

Queensland Law Society refers to the Attorney-General's letter of 21 December 2012 inviting the Society to make a submission in relation to this issues paper. We thank the Attorney for the opportunity and make the following short, practical comments.

We note that a number of recent reviews have highlighted business concerns about the impact that the *Fair Work Act 2009* and the referral of Queensland's jurisdiction for the unincorporated private sector has had on workplace flexibility and productivity. A number of particular concerns are set out at page three of the issues paper.

1. A single national industrial relations system benefits employers and employees

The Society considers it is desirable that all employers be subject to the one set of industrial laws. In this regard, a large number of the Society's members are sole traders or members of partnerships. The feedback that members of the Industrial Law Committee have received over several years is that having separate state and federal coverage of industrial relations is confusing of itself. This is also the feedback that committee members have received from their small business clients over the years, particularly from charitable organisations that have had to address the issue of whether the organisation is a 'trading corporation' for constitutional purposes.

2. The State should be cautious in undertaking any additional significant industrial relations reforms

Business in general and small business in particular has been subject to several waves of different laws in recent years, particularly since the 'federalisation' of industrial relations commenced with the 'Work Choices' amendments in March 2006. Those changes have, for

the most part, been structurally constructive in the Society's view as they are leading to a simple framework where all private sector employers (with the exception of Western Australia's unincorporated private sector) operate under the same set of laws. In our view, the business community is looking for stability in industrial relations arrangements and the State should approach any further significant reform cautiously.

One of the most significant practical difficulties with the several waves of legislation since 2006 has been the complexity of the transitional provisions guiding the way from the old to the new. Quite apart from any other issue, the transitional issues that would exist in terminating the current referral are likely to pose significant practical difficulties for small business.

3. There is no easy way of avoiding the issue of what is a “trading corporation”

Apart from the general uncertainty about the industrial laws and industrial instruments which would exist if the current referral was terminated, there would be no easy way of addressing the vexed issue of whether an entity that is not a sole trader or partnership is a constitutional corporation. Despite a number of judicial decisions, this issue is still a difficult subject for advice. This is particularly the case for employers who are charitable entities. The appropriate jurisdictional test would need to be considered further.

This also raises the issue of the artificial distinction between unincorporated and incorporated entities. Whilst a large number of small business employers choose to operate on the sole trader or partnership models, a significant number operate as corporate entities. It seems, on the face of it, to be an arbitrary and unfair distinction that a small business operating as a corporation is subject to one set of laws whilst another small business operating as a sole trader is subject to another set of laws. Conversely, a number of large businesses still operate along partnership lines, particularly professional businesses.

4. There would need to be significant advantages for both employers and employees if the jurisdiction was to be resumed

Given the issues outlined above, the Society considers that there would need to be very significant advantages for business and employees under the alternative state system in order to overcome these matters.

The industrial framework at a state and federal level has historically been very similar with the existence of a safety net of minimum terms and conditions set by legislation. This is supported by a more detailed award system with the responsibility of supervision resting with an industrial tribunal.

At the heart of most employer concerns is the cost of employing people and the complexity of administering legal obligations. These are largely a reflection of industrial award requirements rather than the legislation itself. Whilst we have not undertaken a side by side comparison of existing state awards with federal modern awards, our general observation is that the obligations of employers and entitlements of employees are not greatly different

between state awards and modern federal awards. To some extent, the concerns being raised by business are not new concerns.

At the very least, existing state awards would need to be significantly updated if they were to be again relied upon in a substantive manner. However, this may not address the core concerns of small business.

We suspect the reality is that a much more radical change to the system would need to occur for there to be a significant economic benefit for small business employers, with greater attention being given to the minimum safety net rather than to award obligations. This would have the effect of creating a simplified system for “small business” employers. However, this in turn may have significant practical ramifications for many employees, whose interests should also be considered.

The state legislation would also need to be revisited to ensure it achieves the goals of a resumption of jurisdiction. As an example, the state legislation still relies on the concept of probation as a jurisdictional issue for unfair dismissal claims, whereas a fixed minimum employment period is used in the federal legislation.

The resumption of state industrial coverage for unincorporated entities is also likely to require a significant investment of resources in the infrastructure required to run the system.

5. Concluding comments

Whilst there is some merit in the concept of a simplified industrial relations system for “small business”, the Society considers there is not a sufficiently compelling case for resumption of the industrial jurisdiction for the unincorporated private sector. The practical issues associated with a resumption and reorganisation of industrial relations for unincorporated entities, whilst they could no doubt be worked through, are significant. We recognise that a number of employers feel frustrated in particular with award complexities. However, the Society’s view is that these issues are best addressed within the current federalised system rather than by re-establishing a parallel industrial relations system.

Please contact our policy solicitor, Ms Raylene D’Cruz on (07) 3842 5884 or r.dacruz@qls.com.au or graduate policy solicitor Ms Jennifer Roan on (07) 3842 5885 or j.roan@qls.com.au for any inquiries.

Yours faithfully

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President