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Our ref: SS:IR
Email: [redacted]

Employment Taskforce
Treasury
Langton Cres
Parkes ACT 2600

By email: [redacted]

Dear Employment Taskforce

Employment White Paper – Job security, fair pay and conditions

Thank you for the opportunity to provide feedback on the Employment White Paper. The Queensland Law Society (**QLS**) appreciates being consulted on this important paper.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

Executive Summary/Key Points:

- The *Fair Work Act 2009* (Cth) does not provide a general process for National Employment Standard employees to contest an employer's internal disciplinary action/process with the Fair Work Commission prior to dismissal on grounds such as procedural fairness, whether the investigation was appropriate, fair and reasonable, and whether the disciplinary action taken by the employer was proportionate to the conduct.
- This is a potential area for reform to improve job security and conditions for workers in Australia, as allowing an employee to contest an employer's internal disciplinary process may reduce unfair dismissal applications and give employees and employers more certainty in relation to the employer's disciplinary process.
- We suggest adopting a model similar to the Queensland Public Service Appeals model, under which a public service employee can contest a disciplinary process with regard to performance or conduct in the Queensland Industrial Relations Commission.

This submission relates to topic three of the Terms of Reference – job security, fair pair and conditions, including the role of workplace relations. This response has been compiled by the QLS Industrial Relations Law Committee, whose members have substantial expertise in this area.

Applications regarding internal disciplinary matters in the workplace

Overview

We submit a potential area of reform within the *Fair Work Act 2009* (Cth) (**Act**) is in regard to enabling National Employment Standard employees (**NES employees**) to contest an employer internal disciplinary action/process by lodging an application with the Fair Work Commission.

Employer internal disciplinary matters

In regard to employer internal disciplinary matters, the only potential courses of action currently available with the Fair Work Commission to an NES employee are via:

a. General Protections;[1]

b. a Stop Bullying Order;[2] or

c. dispute provisions of the NES employee's enterprise bargaining agreement, on the condition that the agreement provides the scope of disputing employer internal disciplinary matters at the workplace.

These potential courses of action have a narrow scope and do not permit (except if item (c) provides for such a ground) the NES employee to contest a disciplinary matter in terms of:

a. procedural fairness as whole;

b. appropriate, fair and reasonable investigation, such as if the allegations should have been substantiated; and

c. proportionality of the disciplinary action taken by the employer.

Currently, the only available avenue for raising such arguments is via an application for unfair dismissal[3] as evident by section 387 of the Act, which provides grounds for a dismissal that is harsh, unjust, or unreasonable such as:

a. *'whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person'*[4]; or

b. *'if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal'*[5];

This is problematic because these arguments can only be raised post-dismissal and not when the employee is being subject to disciplinary action by the employer. After dismissal, the employee would need to seek the remedy of reinstatement, which would take into account the

[1] *Fair Work Act 2009* (Cth), Part 3-1.
[2] *Fair Work Act 2009* (Cth), Part 6-4B.
[3] *Fair Work Act 2009* (Cth), Part 3-1.
[4] *Fair Work Act 2009* (Cth), Section 387 (c)
[5] *Fair Work Act 2009* (Cth), Section 387 (e).

key considerations of *Nguyen v Vietnamese Community in Australia*[6] with regard to whether reinstatement is appropriate, being:

a. further termination is 'almost certain', making reinstatement 'futile'; and/or

b. there has been a loss of trust and confidence such that it would not be feasible to re-establish the employment relationship.

Overall, an application for unfair dismissal is an extended process for an employee to undertake if they are attempting to remain in the same workplace, which carries the constant possibility and risk that they would be unsuccessful in returning to the workplace.

In addition, it is evident that individual matters in the Fair Work Commission should be considered as part of the Employment Taskforce's review, as the highest number of applications to the Commission in recent years were unfair dismissal applications.[7] These statistics are an important consideration as they highlight an alarming trend that suggests more could be done prior to dismissal to reduce the number of dismissals or post-dismissal disputes.

We suggest that permitting an NES employee to contest its employer's internal process of a disciplinary matter with the Fair Work Commission, and enabling the Commission to review the same, could potentially prevent the dismissal of their employment. It could also provide set standards for the employer to consider when conducting internal disciplinary action.

In the alternative, the potential process could validate the employer's approach to the internal disciplinary matter, especially when it has been reviewed by a third party, such as the Fair Work Commission. A decision of the Fair Work Commission about the matter could also potentially disincentivise an NES employee from filing an application for unfair dismissal, thereby potentially reducing unfair dismissal applications.

Proposed reform – Queensland Public Service Appeal Model

A potential model for this type of application is the Public Service Appeals (**PSA**) that are heard in the Queensland Industrial Relations Commission (**QIRC**).

The PSA process and grounds to file an application are outlined within:

a. Chapter 7 of the *Public Service Act 2008* (Qld)[8]; and

b. Chapter 11, Part 6, Division 4 of the *Industrial Relations Act 2016* (Qld).

Process

The process of the PSA with the QIRC is by way of review,[9] which is decided on the material that was before the decision maker,[10] but can take into consideration further material if it deems it appropriate to do so in the circumstances.[11]

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[6] [2014] FWCFB 7198.
[7] Fair Work Commission Annual Report 2019/20 at page 17; Fair Work Commission Annual Report 2020/21 at page 59; Fair Work Commission Annual Report 2020/21 at page 58.
[8] *Public Service Act 2008* (Qld) is set to be repealed; however, similar provisions will be contained in Chapter 3, Part 10 of the Public Sector Bill 2022.
[9] *Industrial Relations Act 2016* (Qld), section 562B.
[10] Ibid at section 562B (4)(a)
[11] Ibid at section 562B (4)(b).

The Commissioner reviewing the PSA can either (in the context of disciplinary matters):

a. confirm the decision of the decision-maker;

b. set the decision aside and return to the decision maker with directions; or

c. set the decision aside and replace it with another decision.[12]

In our view, a similar application process should be considered for NES employees, with similar or the same powers outlined above given to the Fair Work Commission when considering applications about internal disciplinary matters in the workplace.

Further, as evident by the case law, the matters are heard on the papers before the Commission with no conference/mediation before the hearing is conducted. Overall, it is an administrative law type process that could be incorporated into the Act and run by the Fair Work Commission.

Grounds for a PSA

It is also submitted that the grounds of the PSA, as outlined within section 194 of the *Public Service Act 2008* (Qld), should be considered as an example or model for similar provisions in the Act. The notable relevant grounds for the proposed reform are the following:

a. Section 194(b):

> ...
>
> *a decision under a disciplinary law to discipline –*
>
> *(i) a person (other than by termination of employment), including the action taken in disciplining the person; or*
>
> *(ii) a former public service employee by way of a disciplinary declaration made under section 188A, including if the disciplinary action that would have been taken was termination of employment;*

b. Section 194(ba):

> ....
>
> *a decision of the commission chief executive under section 88IA to give a direction about rectifying a defect in the procedural aspects of the handling of a work performance matter, to the extent the direction affects the employee the subject of the work performance matter;*

c. Section 194(eb):

> ...
>
> *a decision a public service employee believes is unfair and unreasonable (a fair treatment decision);*
>
> ...

These grounds permit a public service employee to contest a disciplinary process with regard to performance or conduct. Such process could be incorporated into the Act, but taking into consideration disciplinary policy and procedures rather than a certain law (unless there has

[12] Ibid at section 562C (1) (c).

been codification) to that extent. Paragraph (c) above provides broad flexibility to outline why a decision/process by the employer is unfair and unreasonable.

For example, previous decisions of the QIRC have been:

a. allegations being determined by the QIRC as unsubstantiated and returned back to the decision maker;[13]

b. all allegations be unsubstantiated and that the decision for disciplinary action be revoked;[14]

c. disciplinary findings were found to be fair and reasonable;[15] and

d. the disciplinary action was appropriate and proportionate in the circumstances.[16]

This brief snapshot of decisions is evidence that the PSA process does provide an employee the opportunity to contest an employer internal disciplinary matter; and can validate the employer's course of action in the matter.

In the context of the Act, we suggest clauses similar to those outlined in section 194 of the *Public Service Act 2008* (Qld) could be included in relation to NES employees, taking into consideration that most disciplinary processes are guided by internal policies and procedures. In any event, the Fair Work Commission could consider the matter on similar grounds and if needed, consider the internal policies and procedures of the employer.

Additionally, similar to other applications before the Fair Work Commission, the right to make an application could be subject to limitations for small businesses, e.g., only employees of medium to large sized businesses with more than the threshold number of employees (e.g., 100), would be eligible to make an application.

Overall, we submit job security and conditions for workers in Australia could be improved by implementing a pre-dismissal process similar to the PSA model for a potentially aggrieved NES employee to contest part of an employer's internal disciplinary process relating to conduct and/or performance. This type of process is likely to reduce the number of unfair dismissals, or at least the number of unfair dismissal applications before the Fair Work Commission, and give employees and employers more certainty in relation to the employer's disciplinary process.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted]

Yours faithfully

[redacted]

Kara Thomson
President

[13] *Downie v State of Queensland (Queensland Health)* [2021] QIRC 185.
[14] *Jelacic v State of Queensland (Queensland Fire and Emergency Services)* [2021] QIRC 384.
[15] *Borkowski v State of Queensland (Queensland Corrective Services)* [2021] QIRC 330.
[16] *Narbeth v State of Queensland (Queensland Health)* [2021] QIRC 400.