Queensland Law Society

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Office of the President

18 February 2021

Our ref: MC-LP

The Hon Grace Grace MP
Minister for Education, Minister for Industrial Relations and Minister for Racing
1 William Street
Brisbane QLD 4000

By email: [redacted]

Dear Minister

Queensland Employment Standards

We refer to our correspondence of 18 September 2020 where we recommended amendments to the Queensland Employment Standards in the *Industrial Relations Act 2016* (QLD) to address barriers some workers face in accessing termination entitlements.

Your response to this correspondence advised the matter would be reviewed after the election. We **enclose** a further copy of our letter for ease of reference and we look forward to hearing from you further on this issue.

Right to legal representation

Background

Similarly to the position under the *Industrial Relations Act 1999* (Qld), the *Industrial Relations Act 2016* (Qld) (**2016 Act**) sets out a range of circumstances where parties may, or may not, be represented by a legal practitioner. As with its predecessor Act, the provisions in the 2016 Act differ depending on the relevant jurisdiction and cause of action.

In that regard (and setting aside public service appeals):

- A party may be legally represented in the Industrial Court of Queensland if the Court gives leave, all parties consent, or the proceedings are for the prosecution of an offence.
- Legal representation before the Full Bench of the Queensland Industrial Relations Commission is subject only to the leave of the Full Bench.
- In respect of matters before single members of the QIRC, parties may be represented if:
    - all parties give consent;
    - the Commission gives leave (noting that such leave is only available in respect of general protections and unfair dismissal matters, claims for the amending or voiding of unfair contracts, and the registration and de-registration of industrial associations).
- In respect of matters before the Industrial Magistrates Court, parties may be represented if:
    - all parties consent;

- the matter is a prosecution for an offence; or
- the proceedings are brought personally by an employee to whom it was open to bring the same substantive proceeding in a court of competent jurisdiction other than the Federal Court.

The latter ground for legal representation recognises that the Industrial Magistrates Court is an eligible State or Territory Court, which shares jurisdiction with the Federal Circuit Court in respect of proceedings for breaches of the *Fair Work Act 2009* (Cth), where parties have a right to be legally represented throughout.

The bases for the granting of leave are set out in section 530(4) of the 2016 Act, and those bases are harmonised with those that deal with the right of the Fair Work Commission to grant leave in respect of matters before it.

In addition, parties are prohibited from being legally represented in respect of certified agreement arbitration proceedings, as well applications for the recovery of wages under section 475 of the 2016 Act (which relate to claims for $50,000 or less).

Causes of action where leave to be legally represented may be granted

The supplementary memorandum for the 2016 Act relevantly provided:

> "In regard to strengthening Queensland's industrial tribunals, the Bill:
>
> ...
>
> - amends legal representation arrangements to be the same as those in the Fair Work Commission which means representation by a lawyer or other paid agent in the commission is permitted based on how unfair it would be not to allow representation. Legal representation is not permitted in enterprise bargaining arbitration matters."

Although the bases for the granting of leave under the 2016 Act and the FW Act are the same, the categories of matters in respect of which leave may be granted is much more narrow. In particular, unless the parties consent, there is no capacity for a party to be represented by a legal practitioner in a general industrial dispute or anti-bullying proceeding (among other categories of matters).

That restriction is particularly acute in circumstances where:

- Section 529 of the 2016 Act enables parties to be represented by 'agents' without legal qualification who are not subject to any of the restrictions placed on members of the legal profession;
- The right to be represented by virtue of the consent of an opposing party is rarely triggered. Indeed, this basis for legal representation does not pay sufficient regard to the adversarial nature of proceedings before the QIRC; unrepresented parties, particularly those without prior experience with the justice system, routinely withhold consent in an attempt to gain a tactical advantage over their opponent, even where legal representation would significantly assist the Commission. Although, the Commission has the right to override such an approach in many cases, as referred to above, it does not have the capacity to do so in respect of all matters that go before it.

Public policy purpose in limiting legal representation

QLS understands that governments of both political persuasions have, over time, sought to place limits on the right of parties to be represented in respect of employment related matters

as a means of simplifying court and tribunal processes and to address perceptions that individual employees, in particular, may feel daunted by a perceived difference in 'fire power' as between respective sides to a proceeding.

However, QLS is not aware of any empirical evidence that would support the hypothesis that limiting legal representation in respect of employment matters leads to fairer, simpler or shorter proceedings. To the contrary, as stated above and in our previous advocacy, legal representation often allows a proceeding to proceed more smoothly and efficiently and, where a party is self-represented, enables that party, where appropriate, to be guided by the lawyers on the other side. Limitations on legal representation ignore the special obligations that legal practitioners owe to the Court.

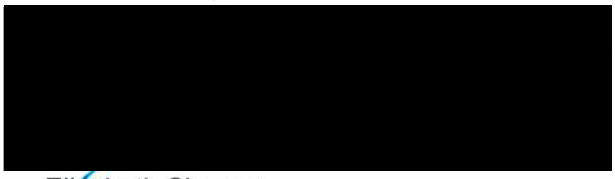
Long service leave entitlements

Finally, we have previously called for an investigation into the harmonisation of entitlements such as long service leave. We consider this is an issue that the Government ought to advocate on in its discussions with other state and territory governments.

We would be pleased to meet with you to discuss this issue, and any of the above issues, further.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Elizabeth Shearer
President

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18 September 2020

Our ref:KB-ILC

The Hon Grace Grace MP
Minister for Education and Minister for Industrial relations
1 William Street
Brisbane QLD 4000

By email: [redacted]

Dear Minister

Queensland Employment Standards

We wish to bring to your attention an issue with the application of the Queensland Employment Standards (**QES**) contained within the *Industrial Relations Act 2016* (QLD) (**IR Act**).

The issue is that the QES notices of termination and redundancy do not apply to all employees subject to the IR Act.

Section 120 of the IR Act sets out the categories of employees that are not entitled to notice of termination under section 123.

Section 120(f) relevantly has the effect that an employee is not entitled to the minimum period of notice of termination prescribed under section 123 if:

(i) the employee is not subject to an applicable industrial instrument;

(ii) the employee is not a public service officer; and

(iii) the employee's annual wage is more than the *Fair Work Act 2009* (Cth) remuneration threshold.

An "applicable industrial instrument" is defined in section 14 to be a modern award, certified agreement or bargaining award or an arbitration determination.

Similarly, under section 125, an employee is not entitled to the minimum prescribed redundancy entitlements under section 126 of the IR Act if there is no "applicable industrial instrument" that applies to their employment.

This issue came to our attention recently as one of our members was involved in a matter where their client (an employee of a local council) was not subject to an "applicable industrial instrument" and therefore, despite having a number of years of continuous service, was not eligible for redundancy pay upon the termination of their employment due to redundancy. In this particular matter the Council was willing to pay the employee redundancy pay, but only if the employee executed a deed of release.

During consultation on the 2016 legislation, the Queensland Law Society, along with others, submitted that a broad compulsory requirement for minimum redundancy pay should be provided for (the submission to the Industrial Relations Legislation Reform Reference Group is **enclosed** and we refer you to page 5 of that submission). This was not taken up.

Queensland Employment Standards

In our submission we stated that:

> 3. *Termination of employment*
>
> 22. *The IR Act sets minimum redundancy entitlements for State system employees covered by awards or enterprise agreements. However, there appears to be no legislative entitlement to redundancy pay for State employees not covered by an award or enterprise agreement.*
>
> 23. *In contrast, the NES provides for minimum redundancy payments for all Federal system employees (with scope for awards, enterprise agreements and employment contracts to provide more generous entitlements if desired). For employees that had no entitlement to redundancy pay prior to 1 January 2010 (which is when the NES came into operation), their service for redundancy purposes is only counted from 1 January 2010.*
>
> 24. *The Society considers that award and enterprise agreement "free" employees in the State system should also enjoy the protection of a legislative minimum entitlement to redundancy pay. We recommend that the scale to be applied to such employees should be consistent with the QES.*
>
> 25. *To minimise the cost to business associated with the introduction of this new entitlement, it would be appropriate to consider similar transitional provisions to those contained in the FW Act (ie. That is, whilst the new entitlement would apply to all employees, for those employees who did not have an entitlement to redundancy pay prior to the date that the new provisions come into operation, their service for redundancy purposes would be limited to the period after the provisions come into operation).*

We submit that section 125 of the IR Act should be amended to remove the requirement that an employee be covered by an applicable industrial instrument in order to be eligible for redundancy entitlements.

In addition, the Society submits that consideration should be given to amending the relevant provisions of the IR Act so that section 120(f) does not apply to the entitlement to notice under section 123.

These amendments will create consistency across employment sectors and ensure that workers are able to access these entitlements.

We would be pleased to discuss these issues with you further and to review the drafting of any amendment considered.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Luke Murphy
President

Queensland Law Society

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21 October 2015

The Chair
Industrial Relations Legislative Reform Reference Group
C/- Office of Industrial Relations
PO Box 69
BRISBANE QLD 4001

By post and email: [redacted]

Dear Chair

Industrial Relations legislative reform

1. I refer to the review being undertaken by the Queensland Government of state industrial relations laws and tribunals. The Society notes the endorsed terms of reference for the review and makes the following submission to that review. The Society's submission has been prepared with the input of its industrial law and workers' compensation policy committees. The submission addresses, to the extent possible, a number of practical issues that members encounter in the state jurisdiction. The submission does not purport to address all matters raised in the issues papers for the review.

A. The regulation of industrial relations in Queensland

2. The Society supports the retention of industrial relations legislation at a state level comprising the basic elements of a system which is fair to all participants, namely:

   (a) a minimum legislative safety net of employee terms and conditions;

   (b) the existence of an "independent umpire" in the form of the Queensland Industrial Relations Commission ("the Commission") with broad functions of conciliation and arbitration;

   (c) broad access rights to the Commission in industrial dispute matters including termination of employment situations and other employer/employee disputes;

   (d) appropriate regulation of industrial organisations.

3. In recent years, the state has largely referred its private sector industrial powers to the Commonwealth and it has been primarily state and local government employees regulated by state industrial relations legislation. However, there may be a need for resumption of the private sector power in years to come, for instance if a federal government passed industrial relations legislation which was not reflective of the interests of the people of Queensland. State legislation should retain the flexibility to

handle such a resumption if it became necessary, with relatively minor amendment. There may be scope to simplify the state legislation but there is no reason to reject the underlying scheme of the legislation.

4. Even putting aside the possibility of a resumption of the private sector industrial power, the current basic legislative framework should be retained. The alternative is that industrial relations conciliation and arbitral powers and processes are effectively internalised through the Public Service Commission. Whilst it is desirable to encourage dispute resolution internally, there is a danger that internal appeal processes for instance will not be viewed as independent and that outcomes may be open to allegations of bias as well as not being accorded the respect which is currently given to Commission decisions.

5. Further the concept of "Westminster" government with its foundation stone of an independent public service can only be enhanced by allowing the parties broad access to an independent body for conciliation and arbitration purposes.

6. The Society recommends that, as far as possible, the state legislation remain consistent with the federal scheme so that there is limited scope for misunderstanding of their rights and obligations by all persons affected by the legislation.

7. The statement of objects is important in outlining the underlying purpose/s of the IR Act and should reflect the object of fairness between all parties in the system.

B. Local government

8. The Society acknowledges the complex issues facing the local government sector in the area of industrial relations.

9. To the extent that the functions of local government reflect services being provided to the public, the Society's view is that those functions are better regulated at a state level than within the federal industrial relations jurisdiction. As in the case of government owned corporations, where those functions have a trading character, they are more appropriately governed by federal legislation.

C. Consistency between state and federal legislation

Minimum employment standards

10. The Society sees benefit in further harmonisation of the Queensland Employment Standards (**QES**) and the National Employment Standards (**NES**). In particular, the Society supports the inclusion of the following NES conditions into the QES / *Industrial Relations Act 1999* (Qld) ("**IR Act**"):

    (a) an entitlement for employees to request flexible work arrangements;

(b) an entitlement for employees to take unpaid community service leave to undertake voluntary emergency management activities; and

(c) the provision of an information statement to new employees.

Flexible work arrangements

11. Under the NES:

(a) employees have an express right to request a change to their working arrangements (for example changes to hours or work location) to enable them to better manage or accommodate family or carer's responsibilities, disabilities, age and domestic abuse;

(b) requests can only be refused on reasonable business grounds;

(c) employers faced with such requests must provide a response within a stipulated period of time and give written reasons for rejecting any request;

(d) employers who fail to comply with the required timeframes or who fail to provide written reasons for refusing a request can be prosecuted and subject to a civil penalty;

(e) in some circumstances there is scope for the Fair Work Commission to hear disputes regarding whether an employer's reasons for refusing a request constitute reasonable business grounds.

12. Employees working under the IR Act have no such express right to request changes to their working arrangements. In circumstances where an employee possesses an attribute protected under State or Federal antidiscrimination legislation, the employee may be able to rely upon such laws to demonstrate that they have been discriminated against if their employer refuses a reasonable request to change their working arrangements.

13. The Society considers that the inclusion of an express right to request a change to working arrangements (akin to the entitlement under section 65 of the *Fair Work Act 2009* (Cth) (**"FW Act"**) would:

(a) be consistent with the objects of the IR Act (including the objects of preventing and eliminating discrimination and helping balance work and family life);

(b) improve participation in the workforce;

(c) strengthen the protections offered to employees under anti-discrimination legislation; and

(d) provide clearer guidance to employers on their obligations in relation to making adjustments for certain groups of employees.

14. Whilst we recognise that many employers in the Queensland State system are likely to already have in place policies which provide for flexible working arrangements, the

inclusion of an express right in the IR Act akin to that found in section 65 of the FW Act will offer better protection for employees.

Community service leave

15. Under the NES employees are entitled to unpaid leave to participate in voluntary emergency management activities (such as volunteer fire-fighting). There is no such entitlement under the IR Act.

16. The Society supports the inclusion of such an entitlement in the IR Act as a mechanism to:

    (a) improve participation in voluntary emergency management activities; and

    (b) provide protection to employees that engage in such activities.

Provision of an information statement to new employees

17. The Society supports the inclusion of a requirement to provide new employees with an information statement summarising their basic rights and entitlements under legislation, similar to the Fair Work Information Statement provided to federal system employees.

Long service leave

18. The Society supports the introduction of a federal long service leave scheme and/or increased consistency between state based schemes. The current situation where each State has different long service leave schemes creates a number of difficulties for businesses that operate in multiple states and employees that transfer from state to state. Such difficulties include:

    (a) confusion over which laws apply when an employee has worked in multiple jurisdictions;

    (b) disparity in entitlements depending on an employee's location; and

    (c) the additional administration and expense involved in keeping up to date with and applying multiple pieces of legislation.

19. The Society acknowledges that the creation of a single long service leave scheme would not be without its challenges particularly given the significant differences between the relevant laws in relation to the quantum of leave and the rules associated with continuity of service and the taking such leave.

20. To assist in moving towards harmonisation / a single scheme, consideration could be given to a two stage process whereby:

    (a) firstly the rules relating to long service leave (continuity of service, taking leave etc) are harmonised – with the current rules regarding accrual / quantum of leave being maintained; and

(b) secondly the accrual / quantum of leave is harmonised though a transitional process with appropriate grandfathering provisions to protect existing employees' entitlements.

21. The Society supports consistency between the FW Act provisions on transmission of business for transferring employees' NES entitlements and long service leave entitlements. Currently purchasing businesses face the prospect of having to recognise transferring employee's service for the purpose of long service leave entitlements in Queensland under the IR Act, whilst service based entitlements under the NES are not required to be recognised in certain circumstances (for example, annual leave can then be paid out by the vendor).

Termination of employment

22. The IR Act sets minimum redundancy entitlements for State system employees covered by awards or enterprise agreements. However, there appears to be no legislative entitlement to redundancy pay for State employees not covered by an award or enterprise agreement.

23. In contrast, the NES provides for minimum redundancy payments for all Federal system employees (with scope for awards, enterprise agreements and employment contracts to provide more generous entitlements if desired). For employees that had no entitlement to redundancy pay prior to 1 January 2010 (which is when the NES came into operation), their service for redundancy purposes is only counted from 1 January 2010.

24. The Society considers that award and enterprise agreement "free" employees in the State system should also enjoy the protection of a legislative minimum entitlement to redundancy pay. We recommend that the scale to be applied to such employees should be consistent with the QES.

25. To minimise the cost to business associated with the introduction of this new entitlement, it would be appropriate to consider similar transitional provisions to those contained in the FW Act (ie. That is, whilst the new entitlement would apply to all employees, for those employees who did not have an entitlement to redundancy pay prior to the date that the new provisions come into operation, their service for redundancy purposes would be limited to the period after the provisions come into operation).

Time and wages records

26. Under the IR Act employers are required to keep certain records regarding their employees. The IR Act also contains provisions regarding access to and inspection of such records.

27. Whilst authorised industrial officers may inspect time and wages records relating to particular employees at any time (upon providing appropriate notice), employees themselves are restricted to accessing their own records once per year. In addition,

employees have no entitlement to obtain a copy of such record as the provision of a copy is at the employer's discretion.

28. The Society considers that the restrictions on employee access to their own time and wages records are unfair and unreasonable on the basis that they limit an employee's ability to:

    (a) confirm that the records kept in relation to their employment are accurate;

    (b) check their accrued leave entitlements;

    (c) seek advice on compliance issues and/or commence proceedings in relation to non-compliance by their employer in relation to wages and associated matters.

29. In addition, it would appear to be unfair that an industrial officer has greater ability to access an employee's records than the employee does themselves.

30. The Society recommends that s.375 of the IR Act be amended to reflect the employee access provisions under regulation 3.42 of the *Fair Work Act Regulations 2009* (Cth). Such provisions essentially enable an employee to inspect and obtain copies of their records at any time upon request to their employer.

Penalties for a breach of an enterprise agreement or award

31. Currently, the process for an employee to take action against an employer who has breached an industrial instrument under the IR Act is very complicated. It essentially requires the matter to be prosecuted under the *Justices Act* for a breach of section 670 of the IR Act – a form of criminal prosecution in the Magistrates Court. This type of prosecution is undertaken very rarely.

32. Under the FW Act, an employee can apply for civil penalties against an employer (and individuals involved in a contravention) for a breach of an industrial instrument (ss 45, 50 and 539 of the FW Act). The Society would support consistency between the State system and the FW Act in having a simpler system for a state system employee to take action for breach of an industrial instrument by an employer.

D. Issues relating to tribunals

Independence of the Commission

33. The Commission has a significant role to play in ensuring that there is a "fair go all round" for all participants in the industrial relations system.

34. As the IR Act currently stands, industrial commissioners are appointed on tenure or on a fixed term basis of at least 1 year and may be appointed on a full time or part time basis *(s.259 Industrial Relations Act 1999 (Qld)*. Commissioners may hold dual appointments *(s.306 Industrial Relations Act 1999 (Qld)*.

35. In New South Wales, industrial commissioners may be appointed on an acting basis for a period not exceeding 12 months (*s.2 Sch2 Industrial Relations Act 1996 (NSW)*) and may hold dual state and federal appointments *(s.206 Industrial Relations Act*

1996 (NSW)). In South Australia, the ability exists for acting commissioners to be appointed for a period of up to 6 months (*s.35 Fair Work Act 1994 (SA)).* In Western Australia, it appears the power to appoint acting commissioners is limited to situations where a member is unable (or expected to be unable) to attend to their duties (*s.17 Industrial Relations Act 1979 (WA)).* Commissioners may also hold dual state and federal appointments (*s.14A Industrial Relations Act 1979 (WA)).* In Tasmania, industrial commissioners are appointed for a term of up to 7 years (*s.6 Industrial Relations Act 1984 (Tas))* whilst acting commissioners may be appointed where a member is unable to attend to their duties (*s.10(2) Industrial Relations Act 1984 (Tas)).* An acting appointment can be renewed. The Minister may also appoint additional commissioners for such period as the Minister may determine to perform a particular function (*s.10A Industrial Relations Act 1984 (Tas)).*

36. In the Society's submission, independence can really only be ensured by providing tenure to Commission members (subject to statutory retirement age provisions). There is a risk of a perception of bias on the part of the government of the day where members are appointed for fixed terms or on an acting basis. The system of dual appointments to the federal and state industrial relations commissions has worked well in the past.

37. The Society supports the appointment of acting or part time commissioners but considers this should be subject to restricted in terms of the total period of time a commissioner can be appointed on an acting or fixed term basis (albeit with the ability to extend this time to complete a particular task). These comments also apply in relation to deputy presidents of the Commission.

38. The Society supports the current qualification requirements for members of the Commission. The Society supports the continued practice of a Supreme Court judge as President of the Industrial Court.

39. The central role of the Commission as the independent umpire in the industrial system should be preserved. By way of example, the current ability under the Act for the chief executive to appoint an administrator to an industrial organisation in certain circumstances should be subject to application to and approval by the Commission (s.636O).

Legal representation

40. The industrial relations jurisdiction is relatively unique in that there exists:

    (a) a body of skilled lay industrial advocates whether acting as private consultants or employed by industrial organisations; and

    (b) qualified and experienced lawyers with advocacy skills, not currently admitted to practise, employed by industrial organisations.

41. Both groups have historically been able to appear without leave before the Commission. That remains the case under the current Act *(s.319 Industrial Relations Act 1999 (Qld)).*

Industrial Relations legislative reform

42. The current provisions of the IR Act are restrictive of the right of lawyers to appear before the Commission. Lawyer means an Australian lawyer within the meaning of the *Legal Profession Act 2007 (Qld)* (Schedule 1 *Acts Interpretation Act 1954 (Qld)*. Under the *Legal Profession Act 2007 (Qld)* (s.5(1)), the term is defined to mean a person admitted to the legal profession.

43. Since the referral of the state's private sector industrial powers to the Commonwealth, the reality is that the parties in the Queensland Industrial Relations Commisslon will be either the State in one of its many forms, a local government and their employees and a state registered union. The State and local governments often have the advantage of being represented by employees experienced in industrial relations, particularly in matters involving hearings. Employees who are union members will usually have the benefit of experienced union staff to represent them. These employees may even have legal qualifications and indeed be past admitted practitioners. However, those employees who are not union members or who do not wish to engage their union for representation purposes are effectively denied the benefit of representation when those opposite are effectively provided with that benefit. The group of employees who are not union members (by choice) is significant.

44. Our members have reported that they are regularly consulted by employees who:

    (a) are disgruntled with their union and do not wish to engage a union to represent them; or

    (b) have not previously been a union member, but upon seeking assistance in an industrial matter from their union and then seeking to become a member, are advised that the union cannot assist with matters which arose before their membership commenced.

45. It is no answer to this issue to say that employees should have joined a union earlier. Wisdom in retrospect is of little use in the present.

46. Whilst there is provision for legal representation by consent in a number of instances, it is a not uncommon tactical step for an objection to be made to legal representation where the other party has the benefit of experienced industrial representatives. It is also sometimes the case that what occurs in practice (and this is particularly the case in the Fair Work Commission at the moment) is that a lawyer is refused permission to appear but remains in court to effectively coach their client and feed their client with information and questions to put in the case. In the Society's view, this situation can give rise to the worst of both worlds. It is difficult for a lawyer to perform their duties properly in trying to coach a client, often at the last moment, to effectively represent their case. It is also has the effect of slowing down the proceedings whilst the Commission allows the party in question time to speak and confer with their lawyer to assist them in presenting their case, often in real time in a hearing. The suggestion that lawyers can still play an effective role in this manner does not withstand scrutiny.

47. The principle that the Commission is a layperson's jurisdiction does not, in the Society's submission, reflect the practical reality of representation in this jurisdiction and the need for a hearing to determine whether legal representation should be allowed is in itself a deterrent to such applications given their time and cost and uncertainty of outcome. The result is an effective deprivation in many instances of a level playing field between parties in the Commission.

48. In making these submissions, no criticism is made of the manner in which the Commission deals with leave applications. Rather, it is the restrictive nature of the requirements themselves which, in the Society's submission, are outdated and inappropriate. Further, the current requirements of s.319(2) are needlessly complex and a simple provision of the type that exists at a federal level would be preferable in practice.

49. In the Fair Work Commission, this issue has been addressed to the extent that both lawyers and paid agents can only appear in the Commission by permission *(s.596 Fair Work Act 2009 (Cth))*. A short list of factors for the Commission to consider in seeking leave is contained in the legislation.

50. It should also be noted that there is no consistent approach at a state or territory level in Australia to the issue of legal representation in industrial tribunals. Several jurisdictions allow legal representation to a varying degree.

51. The current provisions of the IR Act do not, in the Society's submission, address the core issue of unfairness which exists between a party who is refused representation by a lawyer and a party who has the benefit of a skilled lay advocate who does not require leave to appear (whether a private agent or an employee of an industrial organisation or organisation generally). This has the same potential to cause an imbalance in the presentation of the cases of the parties that is the heart of the concern about lawyers having a right of appearance. Any concerns about "ambulance chasers" entering the field can, in the Society's submission, be addressed by retention of the general rule that each party bears their own costs in proceedings before the Commission.

52. Lawyers have a long history of providing constructive assistance to the Commission, not least in the simplification and efficient handling of matters. Given the quite technical nature of employment and industrial law in this modern age, there is no practical reason for the effective exclusion of legal representation in a large number of matters that come before the Commission, particularly unfair dismissal claims. In addition, lawyers are required to meet professional standards and are able to be held to account before the Legal Services Commission in the event of unprofessional conduct and professional misconduct. There is also the benefit to clients of a system of professional indemnity insurance which allows clients to seek redress in the event of professional negligence by their lawyer. These standards and avenues of

complaint and redress do not exist in respect of lay advocates or employees of industrial organisations.

53. Any criticism that the involvement of lawyers only serves to unnecessarily complicate proceedings applies equally, in the Society's submission, to representatives in general and it is suggested that there is little concrete evidence behind such a criticism.

54. In fact, research conducted into the issues surrounding self-represented litigants suggests that the absence of lawyers leads to longer proceedings (in addition to poor outcomes for self-represented litigants). In a Monash University review of the available literature in relation to Self-Represented Litigants (**"SRLs"**)[i], the following conclusions relevant to this issue were noted:

- Matters involving SRLs are more likely to be withdrawn, settled, or abandoned.
- Matters where parties are fully represented may be more likely to be resolved by negotiation and the chances of settlement increased proportionate to the level of representation.
- A judicial officer may be more likely to be required to spend time explaining court procedures, rules of evidence and issue identification. In the case of registry staff more time may need to be spent explaining processes and assisting with the filling out and lodging of court forms.
- Working with SRLs can increase the pressure on the judicial officer to ensure justice is served through the provision of assistance and information. SRLs are thought to increase the workload of the court or tribunal. In the Administrative Appeals Tribunal, registry staff reportedly spent twice as much time helping SRLs.
- Trials involving SRLs take longer than those involving legal representation.
- SRLs may be less likely to be successful in their claim than represented litigants and are more likely to have their matter dismissed, discontinued or have costs awarded against them.

55. A comprehensive review of New Zealand jurisdictions[ii] by the Ministry of Justice found that:

- "...key informants said that self-represented litigants face the same main difficulty – they often do not understand court process and procedures. This sentiment was repeated by the self-represented Family Court litigants. This leads them to make mistakes such as presenting irrelevant and excessive material, not being aware of their options when making pleas (criminal summary jurisdiction), and in the family jurisdiction making errors when filing and writing documents (supporting international findings)"; and
- "Their lack of understanding of the law and court processes is believed to increase hearing times (and also case progression in the Family Court) because court staff, lawyers, judges and prosecution have to guide the litigants through the process and spend more time explaining procedure". (both quotes page 12 of the report)

56. In addition, research by Michael Robertson and Jeff Giddings published in the Melbourne University Law Review[iii] concludes that personality and attitude have a

significant impact on the effectiveness and outcomes of self-represented litigants. The research shows that people who lack confidence and are disengaged perform poorly in the role of self-represented litigant, meaning that individual personality traits can lead to injustices. This is a particularly concerning result in the context of Industrial relations tribunals, given the inherent imbalance in power between employer and employee, and is an acute problem where a litigant has been the victim of workplace bullying.

57. Although only three research papers are referred to here, the consistent feedback from research in this area-and from courts and tribunals in all jurisdictions-is that self-represented litigants engender longer hearings, greater calls on the resources of the courts and poor outcomes for themselves. In those circumstances, the interests of justice suggest that parties be allowed legal representation as of right.

58. There may also be benefits to improving the level of information available to self-represented parties appearing in the Commission. The Fair Work Commission has published a number of guides and benchbooks which are potentially of great use to persons involved in Commission matters. There is much to be said for similar publications at a state level (noting the resources requirements involved in creating such publications). However, in the same way that providing a person with a detailed instruction booklet and examples about how to drive a car does not mean the person can instantly drive, merely providing detailed information (even expressed in relatively lay terms) does not mean that self-represented persons can adequately represent their interests. It is the case that self-represented persons sometimes find it difficult to conduct their cases because of emotional issues and their lack of familiarity with Commission processes.

59. The Society recommends that:

(a) parties should be allowed the freedom of the representation they wish, subject to overriding discretion in the Commission to refuse any party representation (of any nature) taking into account the fairness of the situation;

(b) in the alternative, legal representation could be a rebuttable presumption, being as of right unless a party objected (with the objecting party having the onus of proving that legal representation should not be granted);

(c) in the alternative, leave to appear be required for any person (whether admitted to practise or not) with a legal qualification;

(d) in the alternative, a similar system to that which exists at a federal level be implemented, namely that lawyers and paid agents require leave to appear in all matters according to the fairness and efficiency of the matter.

Workers' compensation

60. The Society submits it is essential claimants' and employers' rights to appeal to an independent judicial commission from both the initial insurer's decision and the Regulator's review decision be maintained.

61. The Society considers there is nothing to be gained by removing the right of appeal to an independent tribunal. To do so would compromise the belief that justice is best served through independent decision making, free of political influence and based on

evidence given under oath, and subject to cross examination. The maintenance of these rights should not be negotiable and reinforces public confidence in the decision.

62. The Society considers there are seven issues to address to improve the current functioning of the Commission's handling of Workers' Compensation Statutory Appeals under the *Workers' Compensation and Rehabilitation Act 2003.*

Conciliation conferences (s.552A conference)

63. Currently directions are often made for conferences to be held within a short period of time after filing a Notice of Appeal (generally 2 months). The parties are rarely prepared or in a position to discuss the claim meaningfully. As a result, the process is one that is of little benefit and only serves to increase legal costs which can be particularly detrimental to the claimant.

64. The Society considers that a s.552A conference should only be convened after:

(a) full disclosure (see point 2 below) of all relevant documents; and

(b) parties have certified their readiness for conference (not trial), consistent with the *Motor Accident Insurance Act 1994* and *Personal Injuries Proceedings Act.*

65. Further, a failure to genuinely participate in the conference or comply with disclosure obligations should have costs consequences.

Proper mechanism for disclosure

66. Currently, the Regulator is not required nor permitted to obtain documents directly from the employer, even documents directly relevant to the claim that may determine an issue in dispute. Instead, the claimant is required to serve a Notice of Non-Party Disclosure on the employer and there is limited scope for a claimant to challenge disclosure provided in response to the Notice.

67. The Society submits the following changes should be made:

(a) an employer, even when not a party to an appeal, be compelled to make appropriate and adequate disclosure; and

(b) When proper disclosure has not been made, costs sanctions be imposed.

Costs

68. Currently, a successful party recovers costs on the basis of the Magistrates Court Scale - Scale (E). Scale (E) is inadequate and parties are significantly out of pocket for having their rights upheld.

69. The Society submits that a successful party's costs should be recovered on the District Court Scale to ensure successful claimants are not out of pocket for legal expenses and more careful consideration is given before unmeritorious claims are pursued due to greater adverse costs consequences.

Allocation of trial dates

70. Currently trial dates are allocated at the initial Directions hearing, before any disclosure occurs and before any conference is convened. Trial dates should be allocated once more informed consideration has been given to all available evidence. Parties cannot consider important evidentiary details, such as the number of witnesses required, until all evidence available is disclosed.

71. The Society submits that following the Conciliation Conference a second Directions Hearing occur at which directions up to Trial including trial dates are made. This will avoid part heard trials which currently delay the allocation of dates and lead to increased cost and delays.

Obtaining transcripts

72. Currently a transcript takes two to three weeks to obtain. Consistent with both the District and Supreme Court practices, transcripts should be available at the end of each hearing day.

73. The Society recommends changes to ensure transcripts are available the day of a hearing.

Commissioners and legal qualifications

74. The Society submits that legal qualifications and experience as a practicing legal professional in a litigation practice would assist in exercising Judicial responsibility. Although many current commissioners show legal qualification and experience are not essential, it is the Society's preferred position.

Timing of decisions

75. Currently some decisions remain outstanding in excess of 6 months. Where a claimant is pursuing a common law damages claim delay while awaiting determination of an issue by the Commission has significant detrimental financial impact.

76. The Society strongly recommends the implementation of timeframes for decision making.

77. Further, the Society submits the Appeal process for an unassessed injury included in a common law Notice of Claim be removed and the issue be determined at the trial of the common law claim, removing delay and minimizing legal costs.

E. Statutory support for a Westminster-style model of public sector employment

78. In the Society's submission, the concept of "Westminster" government with its foundation stone of an independent public service can only be enhanced by allowing the parties broad access to an independent body for conciliation and arbitration purposes. The importance of members of the Commission being perceived as independent has been addressed above.

Industrial Relations legislative reform

79. In addition, he power of the government of the day to effectively change significant industrial rules in relation to the public service, other than by the proper process of legislation or regulation, should be minimised and the parliamentary process respected.

80. In the Society's view, the government of the day should not have the power to overrule industrial instruments having statutory force, namely industrial awards and agreements, by use of ministerial directives or other executive direction. The use of executive direction in this regard undermines the central tenets of due industrial process and fairness to the parties involved in the industrial relationship.

F. Contemporary and emerging issues

Workplace bullying

81. The issue of workplace bullying has recently been the subject of a detailed inquiry and report by the House Standing Committee on Education and Employment of the Commonwealth Parliament. Its report entitled *Workplace bullying "We just want it to stop"* was tabled on 26 November 2012. We refer in particular to Chapter 6 of that report dealing with enforcement and remedies. As a result of the recommendations of that report, the *Fair Work Act 2009 ((Cth)* was amended to provide individual workers with an avenue to seek the assistance of the Fair Work Commission in conciliating complaints of workplace bullying and, ultimately, giving the Commission the proactive power to make orders to stop workplace bullying from continuing.

82. In the Society's view, the anti-bullying amendments to the *Fair Work Act* have significantly addressed the historical lack of a direct external legal mechanism to address bullying in the workplace. The jurisdiction focuses on practical steps to stop bullying from continuing and facilitating ongoing productive workplace relationships. It is a proactive jurisdiction and the Fair Work Commission does not have the power to make orders of compensation under this jurisdiction.

83. According to information released by the Fair Work Commission, there has not been a flood of applications and the Fair Work Commission has approached applications before it in a measured way, with a focus on conciliating matters where possible before proceeding to hearing. In the Society's view, these new laws have been a valuable step forward in enhancing workplace relationships and productivity.

84. However, the laws only extend to entities within the jurisdictional competence of the Commonwealth. Non constitutional corporations are excluded from coverage, as is the state public sector and local government sector. People working for these entities do not currently have any dedicated external legal avenues available to address workplace bullying in their workplaces. There is a significant gap in the laws in relation to unincorporated businesses which usually means small business. It is often these businesses that lack the skills in appropriately dealing with workplace bullying internally.

85. We add that these laws do not just benefit workers, but are also likely to be of benefit to employers in providing independent assistance in difficult workplace situations.

86. In the Society's submission, there is much value to be gained in introducing laws at a state level which reflect the federal anti-bullying regime.

87. An issue has been raised as to whether adequate processes already exist to address workplace bullying under work health and safety laws and the existing internal processes of the Queensland Public Service. In the Society's view, there are limitations on the role played by Workplace Health and Safety Queensland as a public agency and the generality of the internal processes available to address these matters.

88. As the law currently stands, persons the subject of workplace bullying have the following primary avenues recourse:

    (a) endeavour to deal with the matter informally or formally using internal complaint avenues (which often suffer from the perception of bias);

    (b) make complaint to Workplace Health and Safety Queensland;

    (c) make application to WorkCover Queensland for statutory benefits arising out of a workplace injury and potentially take common law action for negligence against their employer.

89. The Society supports the position that where possible, internal avenues should be given an opportunity to resolve workplace bullying issues. However, these avenues are often ineffective. It remains the case that some private sector employers refuse to acknowledge the existence of workplace bullying or give lip service to the concept. Informal or formal internal avenues are also likely to be of little assistance where the claim of bullying is made against the employer themselves. The issue of bullying arises not only in respect of conduct by co-workers but also in respect of the conduct of managers, particularly in the form of unjustified and unconscionable performance management or disciplinary action.

90. Workplace Health and Safety Queensland performs much good work but its approach in this area is largely educational and aimed at helping employers with their systems. Given the resource issues which all government agencies suffer from, it would be well-nigh impossible for WHS Qld to effectively undertake a "policeman" role in this area. The fact that there have been no prosecutions in this area is demonstrative of the limitations upon a public agency in addressing workplace bullying issues.

91. Employees often feel they have little choice than to remove themselves from the workplace and use the WorkCover avenue to indirectly address their complaints. Absence from the workplace can hardly be beneficial to resolving the issues at the heart of a workplace bullying situation. We have seen no evidence to suggest that

there is much success in attempts at rehabilitation through the WorkCover process as a result of a workplace bullying caused injury. It has the effect of shifting the problem to an avenue that is not a "real time" method of preventing continuing injury. In the Society's submission, the lack of an individual right to address workplace bullying indirectly contributes to increased costs in the WorkCover system and reduces workplace productivity.

General protections and workplace rights

92. In the Society's view, there is a case to be made for adopting at a state level the federal laws giving employees and others the ability to take legal action for breach of their workplace rights. This would extend beyond the mere ability to take legal action in respect of unfair or unlawful dismissal. The workplace rights jurisdiction of the Fair Work Commission has been a valuable right of recourse for persons, particularly where they are excluded from other action such as unfair dismissal. There has been no "floodgates" effect and the Fair Work Commission's decisions have, in the Society's view, been measured and appropriate. The introduction of such a jurisdiction would assist to bridge a gap which currently exists in Queensland's laws.

Contractor issues

93. There is an increasing blurring of the lines between employment and contracting in the modern workplace. This is particularly the case in the private sector as perceived employment obligations have become more onerous in recent years but is also the case in the public sector. Many tasks traditionally performed by employees are instead performed by contractors, ranging from cleaning to information technology to "project" work, the provision of medical services and garbage removal to name a few.

94. There is also an increasing trend for many contractors to take the form of small business, particularly sole traders and partnerships with an ABN, often without employees and also small private companies.

95. This blurring of the lines has created great difficulty in the practical assessment (in a legal context) of the distinction between the two and whilst the general test is easy to state (is the contractor operating their own independent business) it is less easy to objectively apply in a given case. This arises not only in the context of claims for wages and entitlements but also in the workers compensation sphere.

96. The reality is that whilst employees are provided with a minimum safety net of conditions and wages, contractors (and particularly small contractors) are often left in a situation of power imbalance where they see it as necessary to accept conditions which may be of a lesser nature than that accorded to employees. The complexity of applying the tests of differentiation is often a deterrent to sole traders in taking any legal action to address the issue through claiming employee entitlements.

97. Our members from time to time see clients who work as ABN contractors. A regular example is that of contract cleaners who are required by their contractors to be

engaged as ABN sole traders. Those contractors in turn have cleaning contracts with private customers or government customers. Those cleaners are often expected to work long hours for flat rates of pay and with little of the safety net of benefits which employees have. Whilst the cleaning industry is regularly featured, it is not alone. Our members have seen a number of instances in private industry of similar issues.

98. In so far as contractors and/or principals take the form of trading corporations, the ability to address these issues have largely been removed from the state jurisdiction under federal independent contractor legislation. That legislation is of relatively narrow operation. However, this still leaves a group of non-incorporated contractors who have relations with state and local government.

99. The industrial relations legislation should take into account the growth of small business contracting and the blurring of the historical distinction between employment and contracting. In particular, members of the Commission have significant experience in resolving workplace disputes of all types. Common issues often arise in both employment and contracting relationships and industrial commissioners are well placed to assist principals and contractors in resolving disputes without destruction of the legal relationship.

100. The Society supports the retention of the current power to amend or declare void contracts in s.276 of the IR Act which is effectively limited to small contractors. In the Society's submission, the force of the provision would be improved if the guiding principle of fairness for contractors were reflected in the objects of the IR Act.

101. The Society recommends that the Commission be provided with the express power to, by agreement of the parties, conciliate and arbitrate disputes between principals and small contractors subject to a threshold as to the value of the contract between the parties.

Increase in wages threshold for commencing employment claims under Part 5A of the Magistrates Court Act

102. Part 5A of the *Magistrates Courts Act 1921* provides a simplified process for low income employees to pursue common law claims for breaches of contracts of employment in the Magistrates Court. The object of that part is to reduce the cost of such proceedings by:

(a) prescribing lower court fees for the proceedings; and

(b) providing for awards of costs in limited circumstances; and

(c) allowing limited rights of representation; and

(d) providing for compulsory conciliation before the hearing of the proceedings.

103. The provision was introduced to assist low income employees with common law claims who are not able to bring those proceedings in the federal arena due to

jurisdictional limitations such as the absence of a contractual safety net entitlement. The provisions are restricted to common law claims for breach of contract.

104. These provisions have been of assistance to many employees since their introduction.

105. However, the annual wages threshold for commencing these proceedings has not been increased in recent years and does not reflect the remuneration threshold for commencing statutory unfair dismissal claims under federal law which over time has increased to $129,300.00. The threshold was fixed at $98,200 when the amendments were made to the legislation and was subsequently increased $101,300 by the *Magistrates Courts Regulation 2007*. It has remained unchanged since then.

106. In the Society's submission, it would be appropriate for the annual wages threshold for commencing the simplified claim process in the Magistrates Court to be increased to reflect the federal threshold for statutory unfair dismissal claims. It would also be appropriate for the limit to be subject to annual indexation in the Society's submission.

107. The standard court process is daunting for many litigants, particularly those that are self-represented and with limited means. Facilitating an increase in the threshold for participating in the simplified employment claims process would be a valuable step in enabling members of the public to have access to justice where there is no available mechanism at a federal level. This is particularly the case in light of recent decisions by the President of the Queensland Civil and Administrative Tribunal that the Tribunal has no jurisdiction in this area.

108. The Society trusts its submission is of assistance in the review process and is happy to discuss or clarify any issues arising out of the submission or the review generally.

Yours faithfully

[redacted]

Michael Fitzgerald
President

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[i] "Self-Represented Litigants-Literature Review", May 20, 2012 , E Richardson, T Sourdin and N Wallace, Australian Centre for Court and Justice System Innovation, Monash University http://www.monash.edu/__data/assets/pdf_file/0003/142068/self-rep-litigant-lit-review-accjsi-24-may-2012.pdf

[ii] Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions, Melissa Smith Esther Banbury Su-Wuen Ong, July 2009

[iii] Self-Advocates in Civil Legal Disputes: How personal and other factors influence the handling of their cases [2014] MelbULawRw 1; (2014) 38(1) Melbourne University Law Review 119