INQUIRY INTO THE WORKPLACE RELATIONS FRAMEWORK

Prepared by: Michelle Whyte
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Contact:

Michelle Whyte, Policy Lawyer

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INTRODUCTION

The Law Institute of Victoria's (LIV) Workplace Relations Section welcomes the opportunity to provide comments to the Productivity Commission Inquiry into the Workplace Relations Framework Issues Paper.

The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 19,000 members. The LIV's Workplace Relations Section is comprised of lawyers representing employers, employees, unions, community legal centres and government bodies. As such, we are able to provide a broad and balanced range of perspectives to this inquiry.

The Section has a history of contributing to shaping effective workplace legislation. In 2008, the Section provided comments to the Senate Inquiry of the Fair Work Bill 2008 and subsequently has been actively involved in consultation regarding the operation of the *Fair Work Act 2009* (Cth) ('the Act') and the performance of the institutions.

The LIV is a constituent body of the Law Council of Australia (Law Council). The LIV has had the opportunity to review the draft submission to this inquiry prepared by the Law Council and endorses the Law Council's submission. The LIV shares the Law Council's concerns with costs and uncertainty with any major change to workplace relations legislation. The LIV also shares the LCA's view that parties should have the right to be legally represented before the Fair Work Commission.

In our submission, the LIV has commented on select issues raised in the inquiry which our members have indicated could be improved in the operation of the workplace relations framework.

5.2 HOW WELL ARE THE INSTITUTIONS WORKING?

Legal representation

1. LIV members have indicated that there are opportunities to improve the effectiveness and efficiencies of the institutions. The LIV has a long held concern regarding the restriction of legal representation at the Fair Work Commission (the Commission). The LIV submits that legal representation should be allowed as of right; that it streamlines the process; provides efficiency; and ensures the Commission can work effectively and with informed input on behalf of parties. Currently, the proper administration of justice is jeopardised by the onerous procedural requirements placed on parties seeking legal representation. These requirements add additional costs to the running of matters, as parties are required to prepare submissions in relation to the substantive issues, in addition to submissions on the issue of legal representation.

2. Legal representation under s 596 of the Act is at the discretion of the Commission. Currently s 596 of the Act provides that parties can only be represented by lawyers and paid agents at the Commission if:

   (a) It would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
   (b) It would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or
   (c) It would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

4. Parties are required to make an oral or written application seeking leave to be represented. This requirement is costly and unnecessary. It is also counterproductive to the aims of the Commission as matters will not necessarily run as efficiently and expeditiously as possible and the interests of justice may be affected.

5. In addition, the LIV acknowledges that the need to seek leave for every appearance in matters governed by the Fair Work Act (including appeals) is unnecessarily onerous and expensive for clients. Further, the LIV believes that it is unreasonable that further costs are incurred by clients where lawyers have to prepare briefing notes in advance for their clients to assist clients in the event that representation is denied and clients are required to present their own case before a Commissioner.

6. The LIV notes that, when the conciliation and arbitration system was established, it was premised on high membership of employer and employee associations. These bodies now have significantly less membership than in the past. Individuals and companies are electing to have legal representation, instead of that provided by an association, to such an extent that it is submitted lawyers should be given the right to appear to match those of associations. The Act should be amended to reflect this by allowing lawyers the right to appear.

7. In addition, the work of the Commission has changed significantly over the past 14 years or so. Fourteen years ago, 65% of the Commission's workload was collective disputes; now, 65% of its workload are individual disputes. The Commission is now, in effect, operating like a court for

individuals. The old system of employer and employee associations appearing by right based on full or high membership is no longer valid. The associations are no longer the centre of the system and the users now are predominantly individuals and employers. These "modern day" users of the system should have the right to choose their representation and for that chosen representative to have the right to appear.

8. Sections 596(a) and 596(b) are assessed by the subjective standard of the Commission which may not be consistent with the unrepresented party's view. An individual or a small business that has not previously been exposed to the Commission may consider a matter deemed by the Commission as routine, as extremely complex and may not be confident to represent themselves effectively This should be amended to allow the party seeking to be represented to determine if they do not feel they can represent themselves effectively or they find the matter complex.

9. Experienced advocates such as HR practitioners, corporate in-house lawyers, and industrial association representatives can appear at the Commission as a right where they are employed by the party involved in the dispute. The representative may have extensive experience appearing at the Commission and may be legally trained. Applications requesting legal representation in these situations have been refused. The provision negatively affects individuals and small business that do not have the same level of resources. Allowing lawyers to appear would fix these issues and provide for a level playing field.

10. Further, workplace law is lengthy and complex and subject to constant change. There are now a significant number of lawyers who practice solely in the workplace relation area. The LIV provides Accredited Specialisation in Workplace Relations. The demand for these services has been driven by the complexity of the legislation, regulations, forms and procedures and the constantly changing legislative landscape. This growing number of workplace relations lawyers demonstrates the demand in this area and its complexity. Allowing lawyers in private practice to represent the clients who have chosen them is fair and reasonable and merely reflects the development of this area to the complex state it is now in.

11. The Fair Work Commission has a statutory obligation as expressed in s.577 of the Fair Work Act to perform its functions and exercise its powers in a manner that is fair and just; is quick, informal and avoids unnecessary technicalities; is open and transparent; and promotes harmonious and cooperative workplace relations. These goals should not compromise the supervening requirement for fairness and what should be the "right" to be represented. The absence of formality and the technical requirements of the rules of evidence do not displace procedural fairness. More specifically:

    (a) Legal representation does not necessarily formalise hearings, but rather can have the positive effect of identifying the proper issues and confining the hearing to the proper issues in dispute.
    (b) Legal representation allow matters to be dealt with expeditiously. The LIV believes that preventing a party from having legal representation in a hearing can cause anxiety for the party who is reliant on their lawyer for advice and may be less confident to settle. This could make the conference or hearing an inefficient waste of time and money for all the parties. The fact that a party has elected to be represented by a lawyer means they are, or believe they are, not the appropriate person to be representing themselves or their company in the Commission. It should be the user's choice whether they want to be represented by lawyers, not the Commission's.

12. Denial of legal representation can provide unfair outcomes where there is an imbalance of power between the parties; eg an employee could be opposed by an experienced HR practitioner or a small business operator or HR practitioner may be opposed by an experienced union official – neither of whom requires permission to appear.)

13. In the case of *Benjamin Crank v Live to Dance Pty Ltd,*[1] Deputy President Hamilton recognised the need and importance of legal representation when he stated that:

> *"There were three advocates for the applicant, these being the applicant and two family members, and two for the respondent, the two owner/managers. One witness was called by both sides. There were numerous overlapping witness statements for some witnesses. Written submissions and the presentation of submissions were somewhat disorganised. This and other matters made the task of the Commission somewhat difficult, as it often is when the parties are not represented by counsel or paid agent."*

14. The issue of the inefficiencies of self-represented litigants has been acknowledged by the Commission in its strategic planning document for 2014 – 2015[2]. The Commission highlights the need to assist self-represented litigants by providing staff to assist applicants in identifying issues in their applications that may require legal advice. However, problems may arise if tribunals become too involved in assisting parties, as procedural fairness requires tribunals to be fair to all parties to any dispute. Procedural fairness also requires impartiality, both in fact and appearance. Accordingly, tribunal members and officers must be careful that offers of assistance do not appear to extend to advocacy. It also acknowledges the complexities for applicants in this jurisdiction.

15. The Productivity Commission has previously highlighted the difficulties and inefficiencies with self-represented litigants in their Access to Justice Report released on 5 September 2014. In the report the Productivity Commission looked at the benefit and costs of representation in tribunals and stated that "representation can assist parties who cannot adequately promote their own interest or when facing an opponent who is a business professional or an in house lawyer."[3]

16. The LIV notes that a large number of matters at the Commission are unfair dismissal claims and that these claims proceed initially by informal phone conciliation where lawyers have the right to appear without seeking leave of the Commission. This is because this informal conciliation is not a procedure governed by the Fair Work Act. Currently informal phone conciliation has a 79% success rate. A possible contributing factor in the success of this phone conciliation in unfair dismissal claims could be legal representatives having an automatic right to appear and putting parties in a better position to understand, negotiate and settle claims. The parties are fully informed around the issues in dispute, as well as prospects of success, and have their representative of choice present and working for them. This provides the parties with confidence concerning the process, their rights and in reaching a settlement.

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[1] [2013] FWC 3540.
[2] Fair Work Commission, *Future Directions 2014-2015; continuing the change program,* 2.
[3] Productivity Commission, *Access to Justice Arrangements,* Report No.72 (2014) 368.

17. In this regard, the Commission cannot function effectively without the assistance of lawyers. We recommend that the Act be amended to remove the requirement for legal practitioners to seek leave to appear at the Commission.

Effectiveness of dispute resolution

18. Our members have identified issues that could be addressed in relation to dispute resolution between the parties in the unfair dismissal and the general protections claims.

19. In particular, we note the importance of parties being brought together in a facilitated discussion to determine the issues and potentially resolve the dispute. Subsection 592(4) of the *Fair Work Act 2009* provides that:

    At a conference, the Commission may:

    (a) Mediate or conciliate; or

    (b) Make a recommendation or express an opinion.

20. The majority of conferences proceed via conciliation. However feedback suggests that there is significant variation in the approaches adopted by the Commission's members as to how these conferences proceed both within and between the unfair dismissal process and the general protections process.

21. Some Commission members approach the conference by a traditional conciliation method and discuss the issues in dispute at length. Our members' experience is that such an approach maximises the prospect of the parties reaching a resolution of the matter and should be adopted in a more consistent manner.

22. The Committee recommends that consolidated and consistent dispute resolution processes be applied across the Commission's jurisdiction. In addition, it has been suggested that the Commission implement a pre-conciliation process similar to that utilised in the Federal Courts. That is, the parties be provided with pre-conciliation sheets that form a checklist of the types of matters parties must consider and (if relevant) discuss with their legal practitioners prior to conciliation. Legal practitioners should be required to provide a written estimate of costs to date and further costs likely to be incurred in proceeding to a trial (including the amount not likely to be recovered on any post-trial taxation) to assist their clients to understand the ramifications of failing to settle prior to trial.

    Each of these issues is dealt with in more detail below.

Conciliation - Unfair dismissal

23. Conciliation for unfair dismissal applications has been highly successful for the majority of matters. Informal phone conciliation has resulted in successful resolution in 79% of matters[4]. There is an opportunity for improvement where claims proceed past conciliation, and in situations where parties do not participate in the voluntary conciliation process.

[4] Fair Work Commission Annual Report 2013 -2014, 40.

24. One of our concerns is that, after a failed or non-compliant conciliation, the issues in dispute may be poorly defined / clarified. This results in the parties (or one party) having to prepare for a full hearing with the complexity and costs of addressing all the issues. This often includes preparing detailed submissions and witness statements, including on issues that are ultimately not in dispute, such as dates of employment. This wastes time and increases costs.

25. The LIV suggests that, following a failed conciliation, there could be a further process where the parties are bought together to prepare a statement of agreed facts, prior to the matter proceeding to the hearing process. With greater support from legal representatives, a more inquisitorial and informal approach could progress past conciliation (possibly a preliminary conference). This could help define the issues and may result in a more efficient and low cost resolution before the parties are forced to prepare for a full hearing.

Conciliation – General Protections

25. Unlike unfair dismissal claims, the general protections conference process does not provide for phone conciliation or the automatic right to legal representation. The conference process with general protections claims proceeds before a Commission member.

26. The LIV suggests that, to enhance the current process, the Commission member should have guidelines which include instructions to members on how to prepare the parties adequately at the commencement of the conference, including explaining what will happen if conciliation is unsuccessful. The following improvements could also be considered:

- More flexible timeframes including listing matters for at least two hours and providing for the possibility of extending the timeframe if it appears the matter is capable of resolution;
- The Commission to require the Respondent to adhere to the seven day time limit to provide the Employer Response (or at a minimum require the Response to be provided at least seven days prior to the conference) to allow the Applicant adequate time to review and consider the Respondent's position, ahead of the conference;
- The Application and Response and any accompanying documentation to be reviewed by the Commission member prior to the conference;
- Parties encouraged to actively participate in the conference by requiring each party to provide an opening summary of their case and an opportunity to reply to the other parties' submissions;
- An opportunity for private sessions facilitated by the Commission member; and
- An opportunity for parties to have private discussions with their representative before making an offer or counter-offer.

Orders for the production of documents

26. Currently a party can apply for an order requiring another party to the matter (or third party) to produce documents to the Commission. Despite this, there are no provisions permitting a supplying party to seek costs of compliance with the order to produce. In the case of third parties, this is particularly important, as they are unlikely to be intimately connected to the dispute. Similarly, there

is no provision for a party summonsed to attend to apply for reasonable costs to attend the conference or hearing, such as travel costs, lost wages and other costs associated with the attendance. The LIV suggests there should be provisions for limited recovery of costs in relation to orders for production of documents and orders for attendance.

Please contact Michelle Whyte if you would like to discuss further the issues raised in this submission.

Yours sincerely,

Katie Miller
President
Law Institute of Victoria