



THE LAW SOCIETY  
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THE VOICE OF THE SOUTH AUSTRALIAN LEGAL PROFESSION

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Level 10, Terrace Towers, 178 North Terrace, Adelaide SA 5000

12 March 2015

RP;rjp

Workplace Relations Inquiry  
Productivity Commission  
GPO Box 1428  
CANBERRA CITY 2601

via Email: [workplace.relations@pc.gov.au](mailto:workplace.relations@pc.gov.au)

Dear Sir/Madam

**Inquiry into the Workplace Relations Framework**

I refer to the Inquiry into the Australian workplace relations framework being undertaken by the Productivity Commission at the request of the Treasurer, Mr Hockey.

The Society appreciates the opportunity to consider the Commission's Issues Papers of 22 January 2015 ("the CIP") and provides the following comments.

***Introduction***

1. The Society notes that the CIP raises a number of issues across the entire workplace and industrial framework of Australia, of both a legal and an economic nature. We make two preliminary points in relation to the breadth of the CIP:
  - 1.1 First, it is difficult for the Society to engage in much of the detail of the issues paper at this preliminary stage of the Inquiry. We would expect to provide more thorough analysis following the release of the draft report as it is difficult to provide considered analysis to general questions, particularly as the Society wishes to bring a degree of legal rigour to any submissions it makes; and
  - 1.2 Second, we note that the CIP generally conflates economic and legal issues. Whilst on occasions such integration between economic and legal analysis is appropriate that is not necessarily always the case. The Society submits that the Commission should not ignore the complex legal issues that will invariably arise from the broader economic and social analysis that appears to guide the matters identified in the issues papers. To not expose those matters to sufficient legal analysis may result in unintended outcomes for employers and employees. Looking at the workplace system at a global economic and social level can ignore the legal implications on the management of the day-to-day legal relationships of employers and employees. The

Society may consider it appropriate to provide further analysis following the release of the draft report.

2. Given the general nature of the CIP, and in the context of the observations made above, at this stage, the Society makes limited submissions relating to aspects of proceedings which currently take place in the Commission ("the Commission") and where there is the potential of overlap of proceedings in other jurisdictions.

### **Representation in the Commission**

3. The Society considers that legal practitioners ought to have an automatic right of audience in the Commission. In the alternative any restriction in representation should be limited to circumstances where there is a finding that in circumstances of only one party seeking representation, that the unrepresented party would be severely prejudiced in the conduct of proceedings.
4. The effect of s596 of the *Fair Work Act 2009* (Cth) ("FWA") is that it is not possible for a party to be legally represented before the Commission without the Commission's permission. That section provides:

- (1) *Except as provided by subsection (3) or the procedural rules, a person may be represented in a matter before FWA (including by making an application or submission to FWA on behalf of the person) by a lawyer or paid agent only with the permission of FWA.*
- (2) *FWA may grant permission for a person to be represented by a lawyer or paid agent in a matter before FWA only 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.*

*Note: Circumstances in which FWA might grant permission for a person to be represented by a lawyer or paid agent include the following:*

- a) *where a person is from a non-English speaking background or has difficulty reading or writing;*
- b) *where a small business is a party to a matter and has no specialist human resources staff while the other party is represented by an officer or employee of an industrial association or another person with experience in workplace relations advocacy.*
- (3) *FWA's permission is not required for a person to be represented by a lawyer or paid agent in making a written submission under Part 2-3 or 2-6 (which deal with modern awards and minimum wages).*

*(4) For the purposes of this section, a person is taken not to be represented by a lawyer or paid agent if the lawyer or paid agent:*

- a) is an employee or officer of the person; or*
- b) is an employee or officer of:*
  - (i) an organisation; or*
  - (ii) an association of employers that is not registered under the Fair Work (Registered Organisations) Act 2009 ; or*
  - (iii) a peak council; or*
  - (iv) a bargaining representative that is representing the person; or*
- c) is a bargaining representative.*

5. It is the experience of legal practitioners, who are members of the Society, that self-represented parties, regardless of whether they be claimants or respondents, employers or employees, arrive at the Commission underprepared, overwhelmed and without any clear sense of the issues to be determined and the manner in which those issues shall be determined. This results in many hearings before the Commission taking longer and being conducted less efficiently than would otherwise be the case. This is caused by the following factors, inter alia
  - 5.1 Increased time spent at hearings discussing irrelevant matters and a less targeted approach to the actual issues to be determined
  - 5.2 more adjournments and other delays in pre-trial procedures
  - 5.3 extra expense having to be incurred by the opposing party due to the above matters, and the more general difficulties caused by an unrepresented party, such as difficulties corresponding with that party and responding to poorly drafted pleadings and statements
  - 5.4 a self-represented litigant's general lack of experience and understanding can impede settlement discussions due to a self-represented party not understanding or appreciating the respective strengths of each party's case and the costs and burden of a contested hearing.
  - 5.5 the failure, in some instances, for a self-represented party not to be able to identify and address relevant matters.
  - 5.6 the inability, in some instances, of a self-represented party to identify a relevant complex issue which, if identified, could result under the current provision, in an order allowing legal representation.
6. Ensuring that parties have representation, where they desire it, can assist at hearings and the conduct of the case more generally by
  - 6.1 ensuring that relevant matters and only relevant matters are raised at the hearing

- 6.2 facilitating more effective witness statements and examination in chief / cross-examination that reduces hearing time
  - 6.3 higher quality legal submissions that aides the Commission and may assist the relevant Commissioner in coming to a decision and drafting reasons.
7. The matters raised at paragraph 5 still apply even where one party is represented and another party is not. Having at least one practitioner appearing at the hearing can greatly assist in ensuring that the hearing maintains direction and that relevant issues are identified and properly explored.
  8. Much of the perceived unfairness of one party being represented and the other party not being represented can be remedied by the Commissioner giving due allowance to the fact that one party is unrepresented.
  9. Whilst the paramount ethical duties of a solicitor are to the Court, to their client and to society more generally (in that order) those duties do not necessarily operate to unfairly detriment self-represented parties who may appear on the opposing side to a represented party. For example there is little benefit to a practitioner's client if a decision is overturned on appeal due to a failure of procedural fairness if the self-represented litigant was denied procedural fairness. Considerations such as these and the more general role a lawyer will play in ensuring a fair and efficient hearing may actually result, in certain cases, in an unrepresented litigant benefitting from their opponent being represented.
  10. In order to ensure an effective hearing it is often the case that a lawyer will assist an unrepresented party by clarifying matters for the unrepresented party. For example, it is not uncommon that where an unrepresented party is struggling to navigate their way through the documents that before the Commission a practitioner will refer them to relevant documents / parts of documents to ensure that the unrepresented party can follow the proceedings.
  11. Certain ethical obligations imposed on practitioners can operate to aid unrepresented parties. For example a practitioner's obligation to bring all relevant authorities to the attention of the Commission, whether those authorities be adverse or supportive of that practitioner's case, ensures that the self-represented party is also aware of the relevant authorities.
  12. Section 596 gives creates two significant anomalies.
    - 12.1 First, it is possible for an in-house lawyer to represent a party: s596(4)(a). This enables larger corporations and organisations to avoid the requirements of s596. This creates an inconsistency as smaller businesses who do not have their own in-house legal team must seek leave, which may be refused, to be represented;
    - 12.2 Secondly, the effect of s596(4)(b) is that lawyers who work for trade unions or other like organisations, or industrial advocates who are employed by such organisations,

may represent a worker whilst the employer is not automatically entitled to such representation. Creating an automatic right of audience would remove the potential for such unfairness.

### **The Avoidance of Multiplicity of Proceedings**

13. Presently, there are a number of potential claims that may arise from the workplace and where an employee may pursue a claim. Even where the potential claims are limited to matters within the scope of the Fair Work Act 2009, there are multiple potential courts and tribunals including the State based Industrial Courts, the Commission, the Federal Magistrates Court and the Federal Court of Australia. Sometimes proceedings are commenced in the Commission which conducts a conference and then, if the matter does not resolve, proceedings need to be instituted in a Federal Court. It would be preferable for reasons of convenience and cost saving if all such proceedings could be conducted in the one forum and from start to finish. Moreover, there are currently provisions in the Fair Work Act which requires an employee to effectively elect where there are potentially overlapping claims such as unlawful discrimination occurring in the workplace. Consideration should be given to allowing one Court or Tribunal to be able to deal with all claims made by an employee arising from a contract of employment.

### **Review of Orders**

14. Presently, complex legal issues arise in relation to applications seeking to review (including by way of judicial review), orders made by the Commission and its predecessors. This is an area which could and should be clarified.

### **Roping In With Respect to Federal Awards**

15. The concept of "roping in" with respect to a Federal Award is the subject of very little authority and the Society recommends that this be an area which should be codified in relation to the procedures to be followed. In particular, the procedure for service of documentation upon an employer sought to be roped into an Award, including what is required for satisfaction that the employer has been properly served and has had a reasonable opportunity to respond would be appropriately the subject of review.

### **The Role of the Fair Work Ombudsman**

16. The Society urges a review of the powers of the Fair Work Ombudsman and its ability to institute and prosecute proceedings against an employer even in circumstances where the subject matter has previously been the subject of proceedings between the relevant employee(s) and the employer and where a settlement has occurred and has been endorsed by way of order of the Commission. Employers and employees should be able to resolve claims and be confident that where agreement has been properly reached and is the subject of an order by a Tribunal that a statutory body such as a Fair Work Ombudsman cannot act in a manner inconsistent with the orders made. Otherwise the system operates so as to discourage parties resolving their differences by agreement.

### **Unfair Dismissal Remedy**

17. The Society recommends that the area of unfair dismissal remedy be reviewed noting
  - 17.1 currently there are restrictions in the matters which can be the subject of proceedings in the Commission (s382 FWA).
  - 17.2 although the primary remedy upon a finding of unfair dismissal is reinstatement (s390 FWA) the order is rarely made.

### **Contractual Arrangements and the Employer / Employee Relationship**

18. The Society notes the point made by some unions as recorded in the first bullet point on page 11 of the CIP and, without expressing a concluded view at this time as to what the outcome should be, agrees that it is appropriate to review the type of arrangement which can be the subject of proceedings and where the arrangement may not come within the current definition of an employer and employee relationship. The Society refers, for example, to the circumstances addressed by the Full Court of the Federal Court of Australia in the matter of *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104; [1991] FCA 87.

### **Conclusion**

19. The Society may seek to make further and expanded submissions upon the release of the Draft Report.
20. The Society supports ways to improve access to justice and approves of any measures that actually do so.

Yours sincerely

Rocco Perrotta  
PRESIDENT