



27 March 2015

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Dear Mr Perks

**Workplace Relations Framework 2015**

The Law Council of Australia welcomes the opportunity to respond to the Productivity Commission's Inquiry into the Workplace Relations Framework 2015.

Thank you for providing a brief extension of time in which to do so.

I am pleased to enclose a submission drafted for the Law Council by the Industrial Law Committee of the Federal Litigation and Dispute Resolution Section.

This submission includes contributions from counterpart committees through the Queensland Law Society and the Law Society of NSW.

The Law Council has considered a parallel submission from the Law Institute of Victoria (LIV), and endorses that submission. Likewise the LIV agrees with the content of this submission.

The Committee would welcome the opportunity to discuss the submission further..

Yours sincerely

**MARTYN HAGAN**  
**SECRETARY GENERAL**

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# Workplace Relations Framework

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## **Productivity Commission**

**27 March 2015**

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## Introduction

1. The Law Council of Australia welcomes the opportunity to comment on the issues papers released for the [Productivity Commission's inquiry into Australia's Workplace Relations Framework](#).
2. This submission has been drafted for the Law Council by the Industrial Law Committee in the Federal Litigation and Dispute Resolution Section, in consultation with counterpart committees within the state and territory Law Societies and Bar Associations who also contributed.
3. The Law Council of Australia is the peak national representative body of the Australian legal profession and represents over 60,000 legal practitioners nationwide. [Attachment A](#) outlines further details in this regard.

### **Fundamental change should be avoided.**

4. Leading commentators have spoken against the need for major changes to federal workplace relations legislation, placing emphasis on the value of stability.<sup>1</sup> Such comments have been made against a background in which there have been a series of very major changes to workplace relations legislation over the last two decades.<sup>2</sup>
5. Major changes come with costs. They create compliance costs for business, uncertainty for both employees and employers, and legal costs in seeking to understand the changes.
6. It is not in the public interest to start with a blank piece of paper. There are areas of detail that are appropriate to be changed but there is no justification for substantial change.

### **This submission**

7. This submission identifies the following areas where limited change would be beneficial:
  - a) To review and consolidate Commonwealth discrimination law provisions;
  - b) To introduce a statutory definition of an independent contractor;
  - c) To create a right for parties to be legally represented before the Fair Work Commission; and
  - d) To alter transfer of business provisions to the extent necessary to remove the current disincentive to incoming businesses offering employment to existing

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<sup>1</sup> As noted in the introduction to the Issues Papers (Issues Paper 1, page 2).

<sup>2</sup> These changes include: a) the shift from centralised wage fixing to enterprise bargaining started in 1992–93 with the *Industrial Relations Legislation Amendment Act 1992* (Cth) and the *Industrial Relations Reform Act 1993* (Cth); b) the introduction of statutory individual agreements (AWAs) by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth); c) the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), which, inter alia, removed the no-disadvantage test for certified agreements and created statutory minimum employment standards; and d) the *Fair Work Act 2009* (Cth) which maintained and extended legislated minimum employment standards, abolished AWAs and reintroduced a non-disadvantage test for enterprise agreements.

employees of the business whilst maintaining the right of employees to retain their existing conditions.

8. This submission also addresses two questions that arise from Issues Paper 5:
- a) How is the Fair Work Commission performing?; and in that regard,
  - b) Should the appellate function of the Fair Work Commission change in any way?

## **Avoid unnecessary prescription**

9. Before turning to specific matters, the Law Council identifies a broad concern that should inform the drafting of any future legislation.
10. An increasing feature of workplace relations legislation in recent decades has been a trend to prescribe in greater and greater detail when and how the industrial tribunal should engage in each of its tasks. Similarly, in respect of areas such as bargaining and industrial action, various and increasing prerequisites have been placed on parties that must be complied with in order for the action or the bargain to be valid. The latest proposals in that regard are to add further requirements on parties who are bargaining to ensure that they have bargained about productivity improvement or to include provisions to increase productivity in their enterprise agreements.<sup>3</sup>
11. It is one thing to include provisions to encourage certain outcomes, such as the listing matters that are to be taken into account. It is another to draft requirements that invalidate those if they have not been complied with.
12. Industrial tribunals, like courts, operate most effectively when they are granted a power and broad objects and within that remit are given the authority to exercise a broad discretion. In that manner the law does not ossify and is capable of dealing with new situations not contemplated at the time the legislation was drafted. Further, and equally importantly, the absence of extensive prescription and detailed prerequisites reduces the potential for parties to take legal points to delay or frustrate the exercise of power.<sup>4</sup> Industrial relations is at its worst when it is dominated by parties taking jurisdictional points. Such points often require one or two levels of review by the judiciary before they are determined, at which point the original industrial matter is then returned to the tribunal to be reconsidered, resulting in delay and costs which are inconsistent with the need to resolve industrial matters efficiently.

## **Discrimination**

13. Part 3-1 of the *Fair Work Act 2009* (Cth) (the FWA) contains various protections, including in respect of discrimination. Section 351 provides:

### *351 Discrimination*

- (1) *An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual*

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<sup>3</sup> See Issue Paper 3, pages 5–6.

<sup>4</sup> In other words, it leads to industrial disputes falling into the 'bog of technicalities' identified in Issues Paper No 5, page 3.

*orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.*

*Note: This subsection is a civil remedy provision (see Part 4-1).*

*(2) However, subsection (1) does not apply to action that is:*

- (a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or*
- (b) taken because of the inherent requirements of the particular position concerned; or*
- (c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—taken:*
  - (i) in good faith; and*
  - (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.*

*(3) Each of the following is an anti-discrimination law:*

- (aa) the Age Discrimination Act 2004;*
- (ab) the Disability Discrimination Act 1992;*
- (ac) the Racial Discrimination Act 1975;*
- (ad) the Sex Discrimination Act 1984;*
- (a) the Anti-Discrimination Act 1977 of New South Wales;*
- (b) the Equal Opportunity Act 2010 of Victoria;*
- (c) the Anti-Discrimination Act 1991 of Queensland;*
- (d) the Equal Opportunity Act 1984 of Western Australia;*
- (e) the Equal Opportunity Act 1984 of South Australia;*
- (f) the Anti-Discrimination Act 1998 of Tasmania;*
- (g) the Discrimination Act 1991 of the Australian Capital Territory;*
- (h) the Anti-Discrimination Act of the Northern Territory.*

14. Read with the balance of Part 3-1, in particular s 342 (which defines 'adverse action'), s 351 proscribes, inter alia, action taken by an employer against an employee because of one of the listed discrimination grounds. Provisions found in other Commonwealth and State legislation, being the legislation listed in sub-s (3) also proscribe conduct of that nature.
15. Wherever there is legislative duplication, particularly where it is drafted in terms that are far from identical, complexity and uncertainty arises.
16. Currently the same conduct by an employer could give rise to proceedings under s 351 of the *Fair Work Act*, under the relevant Commonwealth discrimination Act or under a State discrimination Act. The Acts have different procedural requirements, lead to proceedings before different tribunals and ultimately before different courts, which need to apply different legislative tests, with the result that the same conduct can give rise to quite different outcomes.

17. The existence of overlapping jurisdictions can lead to forum shopping, as applicants seek the best outcome. Recently, for example, commentators have suggested that in light of the decision in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82, where a Full Court of the Federal Court of Australia reconsidered the previous cautious approach to awarding general damages for contraventions of the *Sex Discrimination Act 1984* (Cth), applicants should now consider using the provisions of that Act, rather than the alternatives.
18. Further, as noted, uncertainty arises because the various legislative provisions are not drafted in identical terms. In particular the word 'discrimination' in s 351 is not a defined term and that has given rise to legal controversy as to whether it contemplates only direct discrimination or also proscribes indirect discrimination.<sup>5</sup>
19. It would be appropriate for there to be a review of the various pieces of legislation from which remedies for discrimination lie with a view to avoiding inconsistent outcomes and procedure arising from the same alleged conduct. It would be appropriate to review whether legislative duplication is desirable or necessary, given the points raised above.

## **Contractors and sham contracting**

20. Issue paper 5 raises the question of whether there should be a statutory definition of a contractor so as to differentiate such workers from employees who have entitlements to minimum conditions.
21. There is no doubt that the test at common law is one that, albeit having evolved over years, remains complex and uncertain. The task of drafting a statutory definition would be significant and not one to be attempted by the faint-hearted. Nevertheless, this is an area where support can be given in principle to a statutory definition. If achievable, it would both provide greater certainty to businesses engaging true contractors, and provide appropriate protection to workers who might otherwise be engaged as contractors when they ought to be receiving the minimum employment standards. It would also create fairness for businesses, creating a 'level playing field' whereby they all engage workers on similar terms. Currently some businesses who employ workers and provide appropriate minimum conditions can be undercut by less scrupulous businesses who engage might 'contractors' to do the same work for below minimum wages and conditions. Finally, it would assist true contractors who might otherwise face obstacles or be prevented from their desired form of engagement because of concerns created by the current legal uncertainty.

## **Right to be represented by a lawyer before the Fair Work Commission**

22. Given the broad-ranging powers of the Fair Work Commission, including powers that can affect the livelihood of individuals and businesses, there should be a right to be represented by a lawyer in such proceedings.
23. Under s 596 of the *Fair Work Act*, the default position is that a person must appear for themselves in any proceedings unless they are able to satisfy the Commission that they should be entitled to be represented by a lawyer or paid agent, and the

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<sup>5</sup> *Klein v MFESB* (2012) 208 FCR 178 at [88]–[102].

Commission grants permission to the party to be represented by a solicitor or barrister.

24. The provisions have a tendency to operate less favourably for individuals and small businesses before the Commission because leave is not required for a corporation or a registered organisation to be represented by one of their employees, even if they are legally qualified: s 596(4).
25. Applications are often refused, including sometimes in circumstances where the other party has a legally trained advocate appearing as of right (such as where a corporation is represented by one of its employees who is legally qualified).
26. Permission has been refused even in the case of an appeal: *G & S Fortunato Group Pty Limited v Stranieri* [2013] FWCFB 4098.
27. Given the important rights that are at issue in proceedings before the Fair Work Commission, there is no reason why the general principles concerning legal representation applicable to all citizens and parties in legal proceedings should not apply.
28. The current position, introduced in the *Fair Work Act* in 2009, is even more restrictive than that which pertained earlier when the industrial tribunal was largely limited to creating industry awards, and parties were invariably represented by employer associations and unions who in both cases employed experienced advocates.
29. Today the Commission deals with significant individual rights where individuals and companies, including small business entities, have to appear in matters that can have very significant effects on them and them alone. They include:
  - a) rights to maintain employment, which often involve associated issues concerning individual reputation (Parts 3–1 and 3–2 which deal with adverse action in unfair dismissal);
  - b) proceedings to prevent industrial action, that has the capacity to significantly affect the viability of a business (Part 3–3 which deals with industrial action);
  - c) the right of officers of organisations to enter an employer's or occupier's premises (Part 3–4, right of entry);
  - d) orders that can fundamentally affect the income of employees and corresponding costs of business (Parts 2–3, 2–4, 2–5, 2–7 and 2–8, which deal with the making of awards, the making of enterprise agreements, the making of workplace determinations, the making of equal remuneration orders and orders setting conditions upon a transfer of business).
30. In each of these areas the Commission has the power to make orders that can fundamentally affect an individual or a business in a far-reaching and ongoing manner. It is an anachronism that, in our modern society, a person does not have a right to be represented by a lawyer in such cases.
31. The reason previously given in support of the current legislative approach is the suggestion that lawyers will burden proceedings with unnecessary formality and promote an adversarial approach: *Warrell v Walton* [2013] FCA 291 at [25] citing the Explanatory Memorandum to the *Fair Work Bill 2008* at [2291]–[2292]. The suggestion is entirely unfounded for the following reasons:



- a) First, it relies on outdated notions of legal practice. Over the last 20 years legal practice has fundamentally changed with practitioners not only well versed in tribunal proceedings but trained and practised in alternative dispute resolution.
  - b) Second, it ignores the fact that a lawyer's primary duty is to the court including 'the speedy and efficient administration of justice': Mason CJ in *Giannarelli v Wraith* (1988) 165 CLR 543.
  - c) Third, it ignores the fact that the Commission is not bound by the rules of evidence and procedure and has a broad power to determine the conduct of its proceedings as it sees fit and, therefore, is well placed to deal with a particular situation 'burdening' the proceedings: Part 5–1, Div 3.
32. It is in fact entirely contrary to experience to proceed on the basis that lawyers will increase rather than decrease the length of a trial or its efficiency. As Mason CJ said in *Giannarelli v Wraith* (1988) 165 CLR 543:

*In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow.*

33. In *Applicant v Respondent* [2014] FWC 2860 at [18] Deputy President (DP) Sams of the Fair Work Commission said:

*Invariably, I have found the skills and expertise of an experienced industrial legal practitioner will be more of a help than a hindrance, particularly bearing in mind a legal practitioner's professional obligations to the Commission and the Courts.*

34. There may be situations where a party who cannot afford a lawyer may be disadvantaged. Courts and Tribunals face, on a daily basis, the difficult task that arises where one party is unrepresented by a legal practitioner. The Law Council believes that it is indisputable that Courts and Tribunals are routinely significantly assisted by legal representation for the opposing party in such circumstances. The answer therefore does not lie in requiring lawyers to seek permission to appear. At the very least the right to be represented by a lawyer should be the default position subject to a power to refuse that representation where the Commission considers there is no other way to overcome unfairness to another party who is not legally represented.
35. In *Applicant v Respondent* [2014] FWC 2860 DP Sams considered an application for one party to be legally represented when the other would not be so represented. At [21] he noted:

*In my view, balancing fairness between parties is as much a case of courtroom management, as it is a case of legislative mandate. With the greatly increased exposure of all courts and tribunals to self-represented litigants, with all of the 14 well known difficulties this brings, the appearance of a focused experienced and sympathetic legal practitioner is, more often than not, a welcome relief.*

*It is an odd situation that those who are legally trained to appear in such proceedings, and hold professional ethical duties to the tribunal, need*

*permission to appear, while in contrast in-house employees, including legally trained staff who do not hold a practising certificate, are not subject to professional disciplinary action for unethical behaviour, yet are entitled to appear as of right.*

36. Sir Anthony Mason AC, KBE, whilst Chief Justice of Australia made the following observation in *The State of the Judicature* (1994) 68 ALJ 125 at 127:

*. . . [T]he exclusion of lawyers neither enhances nor accelerates the course of justice. If my long experience of reading the transcripts of proceedings in the Industrial Relations Commission and its predecessor . . . has any lesson to offer, it is that the presentation of cases by non-lawyers does not lead to clarity and speedy hearings; on the contrary, it is more likely to lead to confusion and to long, drawn-out proceedings due to the failure of non-lawyers to identify the true issues clearly. No doubt lawyers are a nuisance – they habitually find unexpected defects in legislation and administrative and other decisions by those who exercise power. But that is no reason for excluding lawyers.*

37. There are no sound reasons why a person appearing in a hearing before the Fair Work Commission should not have a right to be represented by a lawyer if they so choose.

## **Transfer of business provisions**

38. The Fair Work Act Review Panel (**Panel**) report, 'Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation' dated 2 August 2012 (**Report**) considered the operation of the transfer of business provisions in Part 2 – 8 of the *Fair Work Act 2009* (**FW Act**) extensively<sup>6</sup>. The Panel found that the transfer of business provisions were generally working well. The Panel applauded the greater clarity provided by the statutory formulation of a 3-pronged test for when a transfer of business will occur, compared to the more complex 'business characterisation' test developed by the common law under the preceding legislation, which lacked a definition of when a 'succession, transmission or assignment' of a business or part of a business would occur. The Panel acknowledged that it had been suggested the FW Act provisions could discourage an employer taking on potentially transferring employees from an old employer, but observed there was little evidence produced in support of this contention, other than in relation to employees transferring within a corporate group of their own volition. The Panel said:

*In our view it is likely that the benefit to the new employer of experienced staff transferring to undertake the relevant work, balances out the potential concerns about transferring pay and conditions arrangements. It is not possible on the available evidence to draw a strong conclusion either way.<sup>7</sup>*

39. There is a concern that despite their undoubted benefits, the transfer of business provisions in Part 2-8 of the FW Act may well be having the unintended consequence of discouraging potential new employers from taking on transferring employees from the outgoing or old employer, particularly when the transfer of business provisions are read in conjunction with s 341(5) of the FW Act which provides as follows:

<sup>6</sup> See pages 201–208 of the Report

<sup>7</sup> 'Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation' page 207.

*341(5) Despite paragraph (1)(a), a prospective employer does not contravene subsection 340(1) if the prospective employer refuses to employ a prospective employee because the prospective employee would be entitled to the benefit of Part 2-8 (which deals with transfer of business).*

40. Given that any outsourcing situation involving transferring work and transferring employees comes within the ambit of the transfer of business provisions,<sup>8</sup> an incoming employer (say a cleaning company) may be subject to transfer of business were it to offer employment to (for example) the in-house cleaners previously employed by an entity in a completely different industry (say an insurance company) that happened to employ its own cleaners. True it is that the new employer could make application to the Fair Work Commission under Division 3 of Part 2-8 for orders that the insurance company's transferable instrument should not cover the cleaning company and any ex-insurance company employees it wished to take on to perform substantially the same work as they did previously. But to do so costs time and money, and the cases suggest that an application is unlikely to succeed without the support of the employees or the relevant union.<sup>9</sup>
41. In those circumstances, the incoming cleaning company may have an incentive to avoid offering employment to the in-house cleaners previously employed by the insurance company, most likely resulting in their retrenchment. This is particularly so when the incoming employer is made aware of its right to refuse to offer employment to the outgoing employers and employees if to do so would engage the transfer of business provisions.
42. In a recent case known to the authors, an incoming employer was in the position that, were they to offer transferring employees transferring work, they would be subject to the transfer of business provisions because they would have the benefit of tangible or intangible assets used in the outgoing employer's business in connection with the transferring work. The incoming employer could only afford to operate the business if it maintained its existing terms and conditions of employment for employees doing that work. The outgoing employer was covered by an enterprise agreement, under which its employees enjoyed terms and conditions that were superior to, and significantly more costly to the employer than those applicable to the incoming employer. Those costs can be significant factors in an outgoing employer ceasing to operate the business. In that case, the incoming employer chose not to offer employment to any of the outgoing employer's employees – once again, armed with the knowledge that it was perfectly lawful for them to avoid making offers in circumstances where to do so would engage the transfer of business provisions.
43. Whilst the common law<sup>10</sup> 'business characterisation' test had its complexities, it ensured that two disparate businesses would be more likely to maintain employment of employees as between the old and new employer, if the new employer was assured that due to the different character of their business, they would not be subject to compliance with the industrial instruments applying to the outgoing or old employer.
44. These concerns raise a question as to whether the combined effect of s 341(5) and Part 2-8 of the FW Act create an unintended consequence that should be addressed

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<sup>8</sup> Section 311(4).

<sup>9</sup> See discussion at page 204-205 of the Report.

<sup>10</sup> *PP Consultants Pty Limited v Finance Sector Union of Australia* (2001) 201 CLR 648, 655.

– that being a disincentive for the incoming or new employer to offer employment to the employees of the outgoing or old employer.

## **National employment standards**

45. Issues Paper 2 discusses s 90 – payment for annual leave. An ongoing issue requiring legislative clarification is whether accrued annual leave paid out on termination attracts any annual leave loading payable under an award.
46. The Law Council recommends that this issue be clarified.
47. In relation to s 97 – taking paid personal/carer's leave, employees are not entitled to take annual leave to attend routine/scheduled medical appointments (including those related to pregnancy). It is often difficult for employees working Monday to Friday to make medical appointments outside of working hours. In such circumstances employees may need to take leave without pay or annual leave in order to attend such appointments.
48. The Law Council recommends expanding the circumstances in which personal/carer's leave can be taken to include for the purposes of attending scheduled medical appointments (including those relating to pregnancy).

## **Individual flexibility arrangements**

49. Issues Paper 3 deals with individual flexibility arrangements (IFAs). Currently IFAs are of little practical value because they are essentially informal in nature. The following points are deterrents to their use:
  - They can only be made between an employer and an existing employee and cannot be offered by an employer to prospective employees or agreed on prior to the employment commencing.
  - The IFA must meet the genuine individual needs of the employer and the individual employee – usually the need is on the part of the employer or employee, not both and it can be difficult to establish what is a true individual genuine need. The example given by the Fair Work Ombudsman of the type of provision envisaged by an IFA is of the parent who needs to leave work early on a particular day or days to coach their son's football team. Another example is the ability of an employee to bank RDOs rather than take them regularly so they can be taken during school holiday periods. These are examples of a genuine individual need by an employee. IFAs have some value in this type of scenario.
50. The Law Council's view is that IFAs should generally result in the employee being better off overall than if the IFA had not been agreed to – this is most easily demonstrated by the employee receiving a greater payment than would otherwise be the case. It is more difficult to meet this test using non financial means.
51. The IFA can be terminated on 13 weeks notice by either party. Whilst this is a longer notice period than was formerly the case, it has the effect of giving little certainty to either party.
52. It appears that:
  - there must either be a clear non-financial or financial benefit to an employee to meet this test; and

- IFAs can clearly be used for minor award variations but it is less certain whether major departures from award conditions would be valid.
53. One of the Law Council's constituent bodies, the Queensland Law Society, suggests that an additional matter in the National Employment Standards in relation to workplace flexibility ought to be addressed. The Law Council suggests that this issue warrants further consideration.
  54. Section 65 of the Fair Work Act confers an express right on various categories of employees to seek changes to their working arrangements. Under those provisions an employer may only refuse a request on reasonable business grounds.
  55. At present there is limited scope for an employee to challenge a decision by their employer to refuse a request made under s 65 and limited mechanisms by which an employer can be called to account for the reasons behind their decisions.
  56. By virtue of subsection 739(2) of the Fair Work Act, the Fair Work Commission only has jurisdiction to resolve disputes arising under s 65 if the parties have agreed under an enterprise agreement, contract of employment or other written agreement for the Commission to deal with the dispute. As such, in situations where a modern award or enterprise agreement merely incorporates the model flexibility term, jurisdiction is not likely to be conferred on the Commission.
  57. As a result, in many circumstances, an employee not satisfied that the reasons promulgated by their employer constitute "reasonable business grounds " would need to look to formal proceedings under the General Protections provisions in the Fair Work Act or under Anti-Discrimination legislation if they wished to seek a review of the decision.
  58. The above situation makes it difficult for employees to enforce their rights under s 65 in a manner than preserves the employment relationship.
  59. The Law Council recommends that consideration be given to amending the Act to confer jurisdiction on the Commission to review decisions under s 65.

#### Individual arrangements outside enterprise agreements

60. The Commission has requested information about the relative importance of the common law and the FWA in establishing employment terms and conditions (by industry, skills and occupation).
61. An associated issue is the extent to which such individual agreements do, in practice, lead to more flexible working arrangements.
62. The Commission is also interested in understanding:
  - the extent to which the common law provides a legal 'safety net' for employees and employers if there are flaws or omissions in statutory employment law; and
  - whether there should be greater (or lesser) reliance on individual arrangements, and why should this be so.
63. One of the Law Council's constituent bodies, the Queensland Law Society, has prepared the following in response to that request for information. In the Society's view, the Act should provide or set out the minimum safety net for all employees (whether covered by an award, a common law agreement or enterprise bargaining agreement) and it currently does so.



64. The common law looks at what is reasonable in all the circumstances, particularly having regard to the employment relationship for those employees who are not covered by an award; this should not change.
65. However, it is the Society's position that common law employees should be able to more easily bring an action where a common law agreement has been breached. To that end, a means of bringing a common law claim for breach of an employment contract in a low cost jurisdiction should be facilitated, perhaps by an increase in the threshold as it relates to unfair dismissal claims.
66. Statutory and award/enterprise agreement based terms and conditions are practically much more important than the common law as it is easier for employees (and employers) to enforce such conditions by application to the Fair Work Commission or courts, with significant penalties acting as a deterrent to a breach in the first place.
67. The usual mechanisms for enforcing the common law is to apply to a court (usually a state Supreme Court) for injunctive relief or to sue for monetary compensation in a state civil court. These are not generally practical for either a small to medium size employer or an individual employee because of the cost (both to the party involved but also taking into account the risk of cost orders being made in the event of failure), time and uncertainty of outcome involved in such proceedings.
68. Accordingly, the common law provides only a limited safety net for either employees or employers. The common law is most often used by employers as a means to enforce post-employment restraint and confidentiality provisions in contracts or to seek to recover overpayments made to employees. From an employee perspective, the common law is most often used to recover damages for the implied term of "reasonable notice" where there is no specific contractually agreed period of notice of termination.
69. In essence, the main effect of common law actions is to set precedents via 'test cases' (e.g. the recent *Barker* case) but even these cases can generally only be run by parties with the means to litigate through the various courts, and so are of limited utility.
70. It is currently possible for an employee to use the simplified process available in the Federal Circuit Court to recover safety net contractual benefits where the claim is less than \$20,000, albeit that this process has some limitations (eg, it does not cover unpaid commissions).
71. In Queensland, the ability exists under Part VA of the *Magistrates Courts Act 1991* for an employee to bring a common law claim through a simplified process where the employee earns less than \$101,000 per annum. Whilst this is a useful mechanism, it has the effect of excluding a great many employees from the jurisdiction who earn more than the threshold remuneration. Such employees have no alternative than to use the standard civil court process to make their claims given that the Queensland Civil and Administrative Tribunal has ruled that it has no jurisdiction over employment related claims.
72. There is a limited ability under awards for parties to raise disputes with an independent umpire in relation to award matters. This option is also present in some enterprise agreements, although many enterprise agreements restrict the dispute resolution mechanism to matters arising under the agreement, rather than the employment in general.

73. Accordingly, the compulsory dispute resolution process is often of limited use in practical situations, particularly where an employee feels that an employer's performance management process has not been carried out fairly. There is generally no common law agreement about resolving such disputes and the employee is left to consider what adversarial forms of legal action may be available to them to address their concerns.
74. Most small to medium size employers and employees are unaware of potential mechanisms to resolve disputes and there is little readily available information or education available about these matters. Many small to medium size employers are not prepared to consider undertaking an informal or formal process to work through employee disputes which can lead to a dispute escalating to termination of employment. From an employee perspective, the lack of a culture of dispute resolution can lead to their considering other formal legal options such as applications to the Fair Work Commission to stop bullying, breach of general protections claims under the *Fair Work Act 2009* and also to the submission of workers compensation claims for psychological injuries. The breakdown in employment relations represents a significant impediment to productivity improvement.
75. Many of these drastic options could be avoided if there was a culture and system to allow employers and employees to work through a mediated system to address their disputes. However, there is also a need, particularly in the small to medium business sphere, for increased awareness of the benefits of dispute resolution short of termination of employment. There are significant potential benefits in addressing these matters both through increased education but also through an independent mediation process in the Commission or outside it.

## **How is the Fair Work Commission performing?**

76. Issues Paper 5 invites comment on how the Fair Work Commission is performing.
77. In the view of the Law Council the Fair Work Commission is to be commended for its innovative and positive steps to the benefit of those who appear before it.
78. The Commission has published a series of 'benchbooks' which in plain language provide clear but detailed guidance in respect of four key areas of jurisdiction: unfair dismissal, general protections, bullying and enterprise agreements. These publications, which have been referred to as 'bibles' have been widely praised as providing detailed practical information that is invaluable to unrepresented parties, but also of great assistance to practitioners.
79. The Commission has also commenced publishing practice notes, which describe standard procedures which have the advantage of both providing useful information to those appearing before it, and to standardise procedures that might otherwise vary from Member to Member.
80. The Commission is also to be commended for establishing and maintaining user groups through which it can obtain feedback from practitioners.
81. The Commission maintains targets and statistics against which it can be judged, and has a continuing change program, Future Directions, focussed on improving its performance.

82. More can be done, including achieving greater procedural uniformity. However overall the Commission is considered to be a very effective tribunal and one focussed on continual improvement.

## **Should the appellate function of the Fair Work Commission change in any way?**

83. Prior to the last election it was Liberal Party policy that if elected it would give "*active consideration to the creation of an independent appeal jurisdiction*" for the Fair Work Commission (FWC).<sup>11</sup> Subsequently there has been some advocacy to change to the appeal mechanisms<sup>12</sup>.
84. The current appeal mechanisms<sup>13</sup> have existed in essentially the same terms since 1988,<sup>14</sup> during which time the relevant legislation has otherwise been amended and re-enacted.<sup>15</sup>
85. The *Fair Work Act 2009* (Cth) provides that a person aggrieved by a FWC decision, other than a decision of a full bench or an expert panel, can apply to appeal the decision.<sup>16</sup>
86. Permission to appeal is required. It will be granted if the FWC is satisfied that it is in the public interest to do so.<sup>17</sup> The requirement for permission to appeal is not viewed by the profession as an inappropriate barrier, noting that permission is routinely granted in cases where there was error at first instance sufficient to warrant overturning the decision.
87. Appropriately, the appellate powers are exercisable only if there is error on the part of the primary-decision maker.<sup>18</sup>
88. FWC appeals are heard by a Full Bench comprised of at least three members not involved in the first instance decision, at least one of whom is the President, a Vice President or a Deputy President. In this regard appeal benches are formed in a manner similar to that adopted by the Federal Court of Australia (hereafter Federal Court), where any Judge of the Court can sit on appeal. That model can be contrasted to a model such as that adopted for the NSW Supreme Court, where appeals are heard only by those Judges who are appointed to the Court of Appeal. There does not appear to be evidence that in practice one model gives rise to decisions that are more or less likely to be found to be incorrect or more or less likely to be inconsistent with other appellate level decisions, when assessed against the other model.

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<sup>11</sup> Coalition's IR Policy

<sup>12</sup> Principally AMMA: see *New appeals body needed for consistent rulings: AMMA Workplace Express*, 14 February 2014.

<sup>13</sup> *Fair Work Act 2009* (Cth), Chapter 5, Part 5-1, Division 3, Subdivision E.

<sup>14</sup> *Industrial Relations Act 1988* (Cth), Act 86 of 1988, s45.

<sup>15</sup> Amongst other changes, the *Industrial Relations Act 1988* was extensively amended and renamed by the *Workplace Relations and Other Legislation Amendment Act 1996* and the *Workplace Relations (WorkChoices) Amendment Act 2005*, and then replaced by the *Fair Work Act 2009*.

<sup>16</sup> Section 604(1) of the *Fair Work Act 2009* (Cth)

<sup>17</sup> Section 604(2) of the *Fair Work Act 2009* (Cth)

<sup>18</sup> *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194: in that case the High Court considered the provisions of s45 of *Workplace Relations Act 1996* (Cth). The same approach is taken to the relevantly identical provisions in the current *Fair Work Act 2009*: see for example *Coal & Allied Services v Lawler* (2011) 192 FCR 98 at [51]



89. There are practical reasons why the Federal Court model might be more appropriate for a federal body, which by its nature must sit at various locations across Australia. A model under which there are only a small number of tribunal or court members able to form say a three member appeal bench could create practical difficulties for a federal body that needs to establish an appeal bench in each location, particularly for appeals which must be heard quickly (which can often be the case for industrial matters).

#### Full Bench hearings

90. According to FWC records in the financial year ending 30 June 2013, the FWC received 36,616 applications of which 143 were appeal applications (0.4%) arising from 11,673 published decisions and orders.<sup>19</sup> A subset of those was unfair dismissal matters: in 2012/13 there were 14,818 unfair dismissal applications, 660 decisions and 58 appeals.<sup>20</sup>
91. Full Bench hearings have proved in practice to be a robust mechanism for ensuring consistent decisions over time, and for determining any differences in approach amongst members of the FWC sitting at first instance.<sup>21</sup>
92. In the rare event of conflicting decisions at Full Bench level, the FWC President can, and does, constitute a Full Bench with more than three members to determine the issue.<sup>22</sup>

#### Review by the Federal Court

93. The Federal Court has a supervisory role over the FWC. It does not strictly hear appeals but rather has power to determine whether the FWC has fallen into jurisdictional error<sup>23</sup> in the sense of the FWC misunderstanding or exceeding its jurisdiction, or failing to properly exercise its jurisdiction. This is to be contrasted with the position where the FWC makes a mistake (even an error of law) within jurisdiction in which case the Federal Court cannot issue relief.<sup>24</sup>
94. The fact that the Federal Court exercises its power to quash decisions of the FWC and requires them to be re-determined does not of course reflect adversely on the quality of Full Bench decisions; it is the natural corollary of the existence of a superior Court. All courts other than the High Court have such orders made against their decisions from time to time.
95. There is a strong case to be made at the very least to retain the current approach to Federal Court review. It limits the circumstances by which a matter can be further 'appealed', giving greater certainty and finality.

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<sup>19</sup> Fair Work Commission, Australia's National Workplace Relations Tribunal, *Our Future Direction Annual Report 2012–13*, 6, 7, 43, 103.

<sup>20</sup> Fair Work Commission, Australia's National Workplace Relations Tribunal, *Our Future Direction Annual Report 2012–13*, 43 and 103.

<sup>21</sup> See for example, *McDonald's Australia Pty Ltd* [2010] FWAFFB 4602

<sup>22</sup> As occurred in *CFMEU v Queensland Bulk Handling Pty Limited* [2012] FWAFFB 7551.

<sup>23</sup> *Fair Work Act 2009* (Cth) s 563(b) and *Judiciary Act 1903* (Cth) s 39B. The Federal Court can only issue relief where FWC has fallen into jurisdictional error. That occurs where the FWC misconceived its role, misunderstood the nature of its jurisdiction, misconceived its duty, failed to apply itself to the relevant statutory test, or misunderstood the nature of the opinion it was to form: *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [31].

<sup>24</sup> See for example *Lambley v DP World Sydney Limited* [2013] FCA 4.

96. However, should there be a genuine concern over the nature or quality of the FWC appellate decisions, that concern could be addressed by broadening the jurisdiction of the Federal Court to permit the Court to hear appeals on an error of law.<sup>25</sup> Such a course could be adopted without altering the existing appellate structure and practice of the FWC.
97. A recent change in procedure in the Federal Court is for applications to quash an FWC decision to be heard by a single Judge, unless the decision in question was a decision made by a Full Bench including the President of FWC (who is also a Federal Court Judge). That change has had the effect of introducing a further level of appeal, as a decision from a single Judge can be appealed to a Full Federal Court and then, with leave, to the High Court. It would be preferable, and would enhance the status of the FWC, if the Federal Court reverted to constituting Full Courts to consider applications for judicial review.

#### Alternative appellate model

98. The proposition that the current appeal mechanisms be changed by creating a NSW Court of Appeal style appellate body within the FWC is not supported.
99. The standing of the FWC as an independent and impartial body applying the law as required of it under its governing statute is the paramount consideration.
100. The status of the FWC also depends upon the independence and impartiality of its Members being maintained and being seen to be maintained. The creation of a new appellate body, sitting above the current FWC, with freshly appointed members, could undermine the standing of the FWC and consequentially its effectiveness.
101. The Law Council identified similar concerns in its submission in 2012 in relation to the creation of two statutory Vice President positions in the *Fair Work Act 2009*<sup>26</sup>.

## **Conclusion**

102. Nothing has emerged in recent times to suggest a need to make substantive changes to the current appeal mechanisms. Should there be a view that a greater level of scrutiny is required, that can be achieved without creating a new appellate level body by granting to the Federal Court wider power to correct error.

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<sup>25</sup> See for example *Administrative Decisions (Judicial Review) Act 1977*, s 5(1)(f).

<sup>26</sup> Law Council of Australia, Submission to the Senate Education, Employment and Workplace Relations Legislation Commission on the *Fair Work Amendment Bill 2012*, 14 November 2012.

## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of over 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12-month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive are:

- Mr Duncan McConnel President
- Mr Stuart Clark, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Dr Christopher Kendall, Executive Member
- Mr Morry Bailes, Executive Member
- Mr Ian Brown, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.