THE LAW SOCIETY
OF NEW SOUTH WALES

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17 September 2015

Workplace Relations Framework
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

By email: workplace.relations@pc.gov.au

Dear Sir/Madam

Productivity Commission Draft Report – Workplace Relations Framework

I write on behalf of the Employment Committee of the Law Society of NSW ("Committee") which is responsible for representing the Law Society on employment law issues. The Committee supports the Law Council of Australia's submission and provides further comments below.

DRAFT RECOMMENDATION 3.1

The Australian Government should amend the *Fair Work Act 2009* (Cth) to establish a Minimum Standards Division as part of the Fair Work Commission. This Division would have responsibility for minimum wages and modern awards. All other functions of the Fair Work Commission should remain in a Tribunal Division.

The Committee does not consider the case for change has been made out. Apart from some generalised complaints there is no evidence that the current system, whereby specialist personnel are already appointed to participate in the setting the minimum wage, is not working. It is important that those members who determine wage matters are not separate from those determining the industrial matters that otherwise are part of the workload of the Fair Work Commission ("FWC"). The current system enables a flow of knowledge of employer and employee concerns from the ordinary FWC members to the specialist personnel. A decision to split the FWC into separate divisions will greatly diminish this flow of knowledge and is not supported.

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DRAFT RECOMMENDATION 3.2

The Australian Government should amend s. 629 of the Fair Work Act 2009 (Cth) to stipulate that new appointments of the President, Vice Presidents, Deputy Presidents and Commissioners of the Fair Work Commission be for periods of five years, with the possibility of reappointment at the end of this period, subject to a merit-based performance review undertaken jointly by an independent expert appointment panel and (excepting with regard to their own appointment) the President.

The Committee does not consider that the case for changes to the composition of the FWC has been made out. It does not support the proposal that members of the FWC be subject to 5 year terms of appointment. It also does not support the proposed performance reviews. The Committee is concerned that the proposed changes may detract from the independence of the FWC.

DRAFT RECOMMENDATION 5.1

The Australian Government should either provide the Fair Work Commission with greater discretion to consider unfair dismissal applications 'on the papers', prior to commencement of conciliation; or alternatively, introduce more merit focused conciliation processes.

The Committee does not support any changes to the FWC's powers to dismiss an application "on the papers". The Committee notes that the FWC currently has jurisdiction to deal with matters without holding a hearing. Section 399 of the FWA provides:

> **Section 399 Hearings**
>
> (1) The FWC must not hold a hearing in relation to a matter arising under this Part unless the FWC considers it appropriate to do so, taking into account:
> (a) the views of the parties to the matter; and
> (b) whether a hearing would be the most effective and efficient way to resolve the matter.
> (2) If the FWC holds a hearing in relation to a matter arising under this Part, it may decide not to hold the hearing in relation to parts of the matter.
> (3) The FWC may decide at any time (including before, during or after conducting a conference in relation to a matter) to hold a hearing in relation to the matter.

The Committee's view is that the power to dismiss an application without proceeding to a hearing should be exercised cautiously (as it currently is). This is important where applicants are unrepresented. In those circumstances applicants may incorrectly complete an application or fail to emphasise salient facts. The power to dismiss applications without a hearing needs to be exercised cautiously.

While the Committee supports any proposal that would assist the parties in resolving an application by conciliation, it doubts that changes to the FWA will assist any conciliation to focus on the merits of the application. The Committee's view is that currently conciliation focuses firmly on the merits of the application. Currently, conciliators will hear from the parties as to their respective positions and assertions. During the exchange of views, and earlier in considering the written material supplied by the parties, each party has the opportunity to consider the strengths and weaknesses of their respective case

DRAFT RECOMMENDATION 5.2 (PART)
The Australian Government should change the penalty regime for unfair dismissal cases so that:
• an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct

The Committee does not support this recommendation. Dismissal on the basis of persistent underperformance and serious misconduct is likely to be regarded as a "fair dismissal" under the FWA provided that, in the case of underperformance, the employer has warned the employee about the consequence of continued underperformance.

Section 387 sets out the matters to be considered by the FWC:

> **Section 387 Criteria for considering harshness etc.**
> In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:
> (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
> (b) whether the person was notified of that reason; and
> (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
> (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
> (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
> (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
> (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
> (h) any other matters that the FWC considers relevant.

The Committee's view is that whether an employee was warned about any unsatisfactory performance is an important factor in determining whether a dismissal was fair and should not be excluded by amendment to the FWA. Further, if a finding that a dismissal was harsh, unjust or unreasonable is made by the FWC, the FWA sets out the remedies that the FWC may give (Division 4 Part 3-2 of the FWA). The Committee does not consider that there is justification for introducing limits or restrictions to the existing remedies or the criteria to be applied in determining an amount of compensation that should be ordered if a finding is made that the dismissal was harsh, unjust or unreasonable.

DRAFT RECOMMENDATION 5.2 (PART)
The Australian Government should change the penalty regime for unfair dismissal cases so that:

• procedural errors by an employer should not result in reinstatement or compensation for a former employee, but can, at the discretion of the Fair Work Commission, lead to either counselling and education of the employer, or financial penalties

The Committee does not support amending the FWA to give effect to this recommendation. The Committee notes the reference to the decision of the FWC in *Sheng He v Peacock Brothers & Wilson Lac v Peacock Brothers* (2013) FWC 7541. Each of the employees in that case had lengthy periods of employment; there was no evidence of any investigation by the employer at all and furthermore, not only were explanations from the employees not considered, they were not even sought. The Committee notes that, in any event, the compensation awarded to each applicant was modest.

Obviously undue emphasis on procedural matters could give rise to potential unfairness but the Committee's view is that the FWA does not place an undue emphasis on procedural matters. However, the removal of procedural errors as a relevant element in considering an unfair dismissal claim could result in situations where employees who are dismissed without any procedural fairness may be denied any recourse. The Committee supports the current "fair go all round" test, which assesses all factors involved in a dismissal.

DRAFT RECOMMENDATION 5.3
The Australian Government should remove the emphasis on reinstatement as the *primary* goal of the unfair dismissal provisions in the *Fair Work Act 2009* (Cth).

The Committee does not support this proposal. The Committee acknowledges that orders for reinstatement are only made in a small number of cases but remains of the view that reinstatement should remain as the primary remedy in claims for unfair dismissal. The availability of reinstatement is the major point of distinction between remedies available under the FWA and its predecessor legislation and those available under common law. The availability of reinstatement represents a significant protection against arbitrary terminations.

The Committee's view is that the emphasis on reinstatement is important in those cases that proceed to hearing. The FWC should consider reinstatement as a primary remedy as, in some cases, reinstatement will provide applicants who have been unfairly dismissed with the only appropriate remedy . This is particularly the case with the cap on compensation under s 392(5) and the current comparatively high levels of unemployment.

DRAFT RECOMMENDATION 5.4
Conditional on implementation of the other recommended changes to the unfair dismissal system within this report, the Australian Government should remove the (partial) reliance on the Small Business Fair Dismissal Code within the *Fair Work Act 2009* (Cth).

The Committee's view is that the Small Business Fair Dismissal Code can provide important guidance to small businesses who are considering termination of employees. If a small business properly considers and engages with the Code and checklist it will not provide a "false sense of security" but instead will provide useful guidance on the criteria and process to be followed in considering the termination of employees.

The Committee notes that the draft report envisages the provision of further targeted information and regulator engagement with small business before this recommendation is implemented.

DRAFT RECOMMENDATION 6.2
The Australian Government should modify s. 341 of the *Fair Work Act 2009* (Cth), which deals with the meaning and application of a workplace right.
• Modified provisions should more clearly define how the exercise of a workplace right applies in instances where the complaint or inquiry is indirectly related to the person's employment.
• The FW Act should also require that complaints are made in good faith; and that the Fair Work Commission must decide this via a preliminary interview with the complainant before the action can proceed and prior to the convening of any conference involving both parties.

Workplace right
The Committee does not support amendment to s 342(1)(c)(ii) of the FWA. The FWC and the courts presently decide the issue on a case by case basis. For example, in *Walsh v Greater Metropolitan Cemeteries Trust (No 2)* [2014] FCA 456 Bromberg J said [41]-[42]:

> The words "in relation to" are words of wide import. The use of that phrase in s341(1)(c)(ii) identifies that a relationship between the subject matter of the complaint and the complainant's employment is required. The nature of that relationship need not be direct and may be indirect: *Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697 at [61]-[64] (Katzmann J); *Shea v TRUenergy Services Pty Ltd (No 6)* [2014] FCA 271 at [631] (Dodds-Streeton J). I respectfully agree with Katzmann J's observation in *Pilbara* at [64] that if some limit on the broad language utilised in the phrase "in relation to his or her employment" is to be imposed, it needs to be "found in the nature and purpose of the legislation, which includes the protection of workplace rights".
>
> Where the subject matter of the complaint raises an issue with potential implications for the complainant's employment, it is likely that the requisite nexus will be satisfied: *Pilbara* at [69].

The courts should continue to interpret these provisions, as they do in other significant areas of contract law. The term "workplace right" is no different in nature than other terms contained in contracts. This approach is demonstrated by the recent decision in *Commonwealth Bank of Australia v Barker* [2014] HCA 32.

Furthermore, the Committee supports the findings of the 2012 FWA Review *Towards More Productive and Equitable Workplaces: An evaluation of the Fair Work legislation*:

> The Panel has not seen any evidence of a judicial interpretation of the general protections which infringes unjustly on an employer's right to initiate performance management processes against an underperforming employee. With time, the Panel believes a body of jurisprudence regarding the general protections will develop, which should provide employers and employees with greater certainty about the range of behaviour prohibited by the general protections". (McCallum, Moore and Edwards 2012)

It seems unlikely that the legislature would be able to capture all of the possible iterations of the test that the section could apply to, particularly in light of the beneficial nature of the legislation, while narrowing the scope of the current drafting to a degree that would justify the change. The Committee' view is that the current drafting of the section is sufficiently clear.

Good faith

It is very difficult for the Committee to envisage the type of process that would be able, in a procedurally fair and appropriate manner, to determine "good faith." To address the question prior to conciliation would invite, realistically, nothing less than a full hearing. If it were any less than a meaningful opportunity for both sides to put forward their views on the matter and have the chance to respond to the other's submissions, then any decision made would surely be contrary to the purpose of providing a just and fair process.

The forms generated by the FWC are user-friendly, intentionally short, and to the point. This is by design—the forms assist the respondent in any matter to address the allegations in a succinct manner without the assistance of a lawyer becoming necessary. It would be irregular for the FWC to issue an adverse certificate in a matter simply because the respondent was not able to plead its case adequately on the papers and needed to be able to explain it within the conciliation.

The conference is already a means for the FWC to let the parties know, in person, whether there may be a question about the validity of the claim. Given the consequences of the conciliation is the issuance of an s 368(3) certificate there is little to be gained by implementing an additional filter. Any such additional step will, in practice, significantly increase the compliance burden for all parties and have a negative impact on the "productivity" of the process.

Finally, the Committee notes that in *Shea v Energy Australia Services Pty Ltd* [2014] FCAFC 167 ("*Shea*") the Full Federal Court addressed the issue. It states:

> Considerable care needs to be exercised before implying into s 341 any constraint that would inhibit an employee's ability to freely exercise the important statutory right to make a "complaint". To too readily imply into the language of ss 340 and 341 the necessity for a complaint to be a "genuine" complaint, necessarily would be productive of argument about whether a "complaint" is bona fide and may serve to discourage those who may well have mixed motives for making a complaint. The expression or drafting of a "complaint" should not require the sophistication or knowledge of an experienced industrial lawyer or legal advice regarding whether it should in fact be made. Care should also be taken before construing the term "right" in s 341 in a manner which may have more far-reaching implications for the meaning of that term when it is employed elsewhere in the *Fair Work Act*. When considering the construction of these provisions, there is an obvious need to balance the legitimate interests of both employees and employers in a manner consistent with the objects of the Act as a whole and the objects of Part 3-1. [12] (emphasis added)

DRAFT RECOMMENDATION 6.3
The Australian Government should amend Part 3-1 of the Fair Work Act 2009 (Cth) to introduce exclusions for complaints that are frivolous and vexatious.

The Committee considers that the proposed restriction would unnecessarily change the nature of the informal process made available to applicants to resolve disputes with their employers and other relevant relationships, which is a comparatively cost effective alternative to litigation through the traditional means.

The Committee repeats its submissions in relation to recommendation 6.2 above regarding the relatively simple respondent forms, and the lack of a real need to have legal representation up until the point where a s 368(3) certificate is issued which

would tell the parties that it has been frivolous/vexatious or without good faith and the reasoning of the Full Court of the Federal Court in *Shea.*

DRAFT RECOMMENDATION 6.4 The Australian Government should introduce a cap on compensation for claims lodged under Part 3-1 of the Fair Work Act 2009 (Cth).

The rights protected by the general protections are valuable and centrally important to applicants. To impose a cap on the damages that would arise, for example, as a result of discrimination in the workplace on the ground of sex, would be out of step with the changing views of society – see in particular the recent Full Federal Court decision in *Richardson v Oracle Corporation Australia Pty Ltd (No 2)* [2014] FCAFC 139.

Applicants should be able to pursue claims made against employers regardless of the amount of money they earn. The fact that procedural fairness is not a statutory right for those "capped out" of the unfair dismissal jurisdiction has no relevance to the fair amount they should be paid in the event they suffer some adverse action or coercion in the course of their employment.

The fact that there are multiple options available to an individual who has been treated contrary to the law does not provide a justification for limiting those options on the basis that applicants may select between the more lucrative or procedurally approachable option. It has always been the case that an employee could, for example, elect to pursue a case in a State or Federal discrimination jurisdiction. It would be unwise for an applicant to fail to consider the relative ease and ability to achieve substantial damages in one jurisdiction over the other.

If an applicant has the right to make a general protections application, as well as an unfair dismissal application, then there are a number of considerations which may lead them to prefer one venue over the other. The absence of a compensation cap is but one factor to consider, and in our experience, is not determinative.

The administrative arguments made in the draft report are not compelling, and do not appear to be likely to improve in productivity.

Finally, the Committee submits that a cap on compensation would be contrary to;

- The objects of Part 3 of the Act which includes providing effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part. (see s.336(1)(d)), (**emphasis added**) and;

- the powers afforded to an appropriate court to make orders rectifying a contravention of the protections under Part 3.1 of the Act.(see s.545), which are unfettered.

DRAFT RECOMMENDATION 8.1

In making its annual national wage decision, the Fair Work Commission should broaden its analytical framework to systematically consider the risks of unexpected variations in economic circumstances on employment and the living standards of the low paid.

The draft report does not state what 'the risks of unexpected variations in economic circumstances on employment and the living standards of the low paid' might be nor how they would be calculated. From a legal perspective it is important for this indicia to be described especially as the FWC presently is required to take account of 'economic conditions, the outlook for employment growth and the needs and living standards of the low paid' (see Draft Report page 332).

The Committee is not clear on the benefits to be achieved by the Commission's recommendation, especially as there is no evidence of what the minimum wage rates in previous years would have been had the new principles been applied. Similarly, there is no indication of what would have been the minimum rates in different industries had an industry approach been followed.

DRAFT RECOMMENDATION 14.1
Sunday penalty rates that are not part of overtime or shift work should be set at Saturday rates for the hospitality, entertainment, retail restaurants and café industries.

Weekend penalty rates should be set to achieve greater consistency between the hospitality, entertainment, retail, restaurants and café industries, but without the expectation of a single rate across all of them.

Unless there is a clear rationale for departing from this principle, weekend penalty rates for casuals in these industries should be set so that they provide neutral incentives to employ casuals over permanent employees.

The Committee considers that the current modern awards review process operates effectively to determine the evidentiary merit of any variations to weekend penalty rates under modern awards on an industry case-by-case basis. Any mandated outcome, such as the proposed policy changes to the regulated weekend penalty rates covering the hospitality, entertainment, retail, restaurants and café industries, represents a significant departure from the role of the FWC as the independent umpire on award determination and the balance between fairness and flexibility that underlies the modern award objectives.[1]

Currently, the modern awards objective provides that "the Fair Work Commission must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions",[2] which includes the need for additional remuneration for working unsocial hours or weekends.[3] It is the Committee's view that the FWC should continue to determine issues such as penalty rates through the current modern award review process, on an industry case-by-case basis, through evidence based proceedings in which all affected interests can be heard. In order to assist the FWC, it is clear that further

[1] *Fair Work Act Amendment Act 2013* (Cth),Modern Awards Objective, s.134(1).
[2] *Fair Work Act Amendment Act 2013* (Cth),Modern Awards Objective, s.134(1).
[3] *Fair Work Act Amendment Act 2013* (Cth),Modern Awards Objective, s.134(1)(da).

research is required to provide reliable evidence and economic analysis about the impact of the existing differential Saturday and Sunday penalties upon employment patterns, operational decisions and business performance.

The Committee is unable to support recommendation 14.1.

DRAFT RECOMMENDATION 14.2
The Fair Work Commission should, as part of its current award review process, introduce new regulated penalty rates as set out in draft recommendation 14.1 in one step, but with one year's advance notice.

The Committee is of the view that any changes to weekend penalty rates, including any timeframe for the introduction of any change to weekend penalty rates on existing and future employees, is more properly undertaken during the current award review process by the FWC and should be considered on an industry case-by-case basis, through evidence based proceedings in which all affected interests can be heard.

The Committee notes that a proposed one-year advance notice period is unlikely to alleviate concerns raised in relation to the impact of weekend penalty rate changes on existing vulnerable employees.[4]

Chapter 20
INFORMATION REQUEST
The Productivity Commission seeks feedback on the extent to which unpaid internships have become more commonplace across the economy, whether any growth in such arrangements has led to problems rather than opportunities, as well as the potential remedies to any specific issues.

Unpaid work in the legal services industry

The Committee is aware that unpaid work exists in the legal services industry. The Committee understands that some young admitted lawyers have reported working for a number of months without pay, sometimes based on the promise of paid work at a point in the future, but often without a level of certainty. In some circumstances, the Committee is aware of reports that young admitted lawyers' unpaid work has also been billed to clients.

A recent examination of the College of Law online jobs noticeboard found that approximately 60% of the roles advertised were unpaid positions in private practice; 5% of the advertised positions were unpaid roles in community legal centres and 35% were paid positions.[5] In June 2015 it was reported that a legal services provider in South Australia advertised 'job' opportunities for junior lawyers who were required to pay up to $22,000.00.[6]

[4] [2015], Productivity Commission, Workplace Relations Framework, draft report, Overview p505;
[5] https://www.collaw.edu.au/careers/ The College of Law is the school of professional practice for lawyers in Australia and New Zealand.
[6] *Law firm Adlawgroup asking junior lawyers to pay $22,000 for job; Fair Work Ombudsman investigating*, Bridget Brennan, ABC News, 24 June 2015

The Committee is aware that there are legitimate internships, which are educational and primarily involve observation. There are also requirements for College of Law students to undertake mandatory legal work (Practical Legal Training or PLT) as part of their curriculum and admission requirements. Students in these courses are required to undertake productive supervised legal work. It is important that this work stream is not put at risk.

The matter is complex. The Committee recommends studies be conducted to obtain substantive data regarding the prevalence of unpaid work by admitted lawyers within the legal profession and unpaid work in other industries.

The Committee appreciates the opportunity to contribute to the Law Council's submission. If you have any queries please contact Michelle Vaughan, policy lawyer for the Committee

Yours sincerely,

John F Eades
President