Industrial Relations and Other Legislation Amendment Bill 2022

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Office of the President

19 July 2022

Our ref: KB:ILC

Committee Secretary
Education, Employment and Training Committee
PARLIAMENT HOUSE QLD 4000
By email: eetc@parliament.qld.gov.au

Dear Committee Secretary

Industrial Relations and Other Legislation Amendment Bill 2022

We refer to the correspondence from Justice Davis, President of the Industrial Court of Queensland and the Queensland Industrial Relations Commission to the Minister for Education, Minister for Industrial Relations and Minister for Racing, the Honourable Grace Grace MP dated 22 June 2022 which has been listed as a submission to the inquiry into the Industrial Relations and Other Legislation Amendment Bill 2022 (**Bill**).

The Queensland Law Society (**QLS**) has long been concerned about the issues raised in Justice Davis' letter. We support his Honour's comments and agree that the *Industrial Relations Act 2016* (**IR Act**) should be amended as one means of addressing these issues.

QLS has already submitted to the inquiry that there are a number of adverse consequences resulting from the restrictions on the right to legal representation in the Queensland Industrial Relations Commission (**QIRC/Commission**). While there is a desire that the Commission is a place for individuals to represent themselves in industrial matters, the reality is that most individuals do not feel they are able to do this, for a variety of reasons. Most seek assistance, whether it be from a lawyer or registered organisation such as a union. We concur with Justice Davis that there are no issues arising from representation by registered organisations (either employer or employee groups).

Over time, assistance has also been sought from non-lawyer paid agents. Members of our Industrial Law Committee, who have been involved in matters where a non-lawyer paid agent is present, report instances of concern including where parties seem to be pressured into settlements by their representatives and agreeing to settlement sums that will likely be entirely or substantially exhausted by the fees they are charged. As referred to in his Honour's correspondence, there are also occasions where the agent withdraws from the party's matter and/or where they did not appear to have the requisite skills or knowledge of the law or process to effectively assist.

The consequences of such unscrupulous behaviour by these persons or groups are obviously severe for the individual involved and there is also a negative impact on the Commission and other party. Fundamentally, there is risk to the individual in engaging a non-lawyer advocate as they are not bound by any of the legal and ethical obligations that apply to members of the legal

profession, including obligations relating to costs disclosure and the holding of relevant insurances. Nor is there any qualification prerequisite that applies to such advocates.

These issues are unfortunately not unique to the Queensland jurisdiction. We **enclose** a submission to the Senate Select Committee on Job Security which details how these issues are present in the federal "Fair Work" jurisdiction too. The submission refers to action taken by the Australian Competition and Consumer Commission and a number of decisions of the Fair Work Commission (**FWC**) where this conduct has been called out and criticised.

Since this submission was made, other decisions of the FWC have also commented on these issues and as recently as last week, Deputy President Lake made comments concerning a particular lay representative in the matter of *Ms Fiona Howard v Uniting Care Health - [2022] FWC 1860 | Fair Work Commission* at paragraph [23].

Actions by lawyers

We note the reference in Justice Davis' letter to lawyers who appear to be involved in some of these advocacy groups. Any lawyer who breaches the conduct rules, their duties or other laws is able to be the subject of disciplinary action by the Legal Services Commission and their practising certificate could also be suspended or cancelled by QLS. There are significant consequences for a lawyer who makes misrepresentations to a court or commission.

QLS condemns any actions by lawyers (or persons holding themselves out to be lawyers) which are not in keeping with the requirements of the IR Act or their professional obligations.

Recommendations

QLS makes the following recommendations to address the issues raised by the QIRC and in this submission.

1. We strongly recommend the IR Act be amended to remove any limitations on the right to legal representation for all matters before the Industrial Court and Commission. As stated in our earlier submission, this will also assist parties and the Commission to conduct matters more efficiently and effectively.

2. There also needs to be sufficient funding for the legal assistance sector so that individuals who are unable to engage legal representation for financial reasons, are still able to obtain assistance from a qualified person who owes ethical and other duties.

3. Pursuant to section 436 of the IR Act, the QIRC has a code of conduct that, among other matters, lists a variety of behavioural expectations of non-lawyer representatives. However, both the Code and IR Act are silent on the consequences of a breach of these expectations. We suggest consideration be given to amendments to the Code or legislation to provide for remedies for these breaches.

4. Our submission to the Select Committee called on the Government to take steps to investigate and address the consumer protection issues relating to the conduct and qualifications of paid non-lawyer advocates representing clients in Commonwealth,

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State and Territory employment and discrimination tribunals and commissions. In doing so, we advocated for State, Territory and Federal Governments to consult and work together to consider nationally consistent reform options.

Finally, we would like to thank the Committee for the opportunity to contribute to this inquiry. We also thank the Office of Industrial Relations for its engagement with QLS over the course of the Five-yearly review of the *Industrial Relations Act 2016* and the development of this legislation.

We would be pleased to provide any further information the Committee may require on these comments, our previous submission, as well as any other issues that have been raised by other submitters in their written submissions or that may be raised at the hearing.

Once published on the Committee's inquiry page, we will forward a copy of this correspondence to the Minster and to Justice Davis.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted].

Yours faithfully

Kara Thomson
President

Queensland Law Society

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Office of the President

1 September 2021

Our ref: LP-MC

Select Committee on Job Security
Department of the Senate
PO Box 6100
Canberra ACT 2600
By email: jobsecurity.sen@aph.gov.au

Dear Committee Secretary

Select Committee on Job Security

We refer to our submission dated 7 April 2021 which provided the Queensland Law Society's (**QLS**) policy reform proposals relevant to paragraphs (c) to (e) of the Committee's terms of reference.

Given that the submissions in respect of the Committee's inquiry remain open, we wish to take this opportunity to provide additional comment on matters relevant to paragraphs (e) and (h) of the terms of reference.

In short, these submissions deal with the importance of the Government taking steps to investigate and address the consumer protection issues relating to the conduct and qualifications of paid non-lawyer advocates who routinely represent clients in Commonwealth, as well as State and Territory, employment and discrimination tribunals and commissions.

The scope of the problem to be addressed

Non-lawyer advocates are not bound by any of the legal and ethical obligations that apply to members of the legal profession, including obligations relating to costs disclosure and the holding of relevant insurances. Nor is there any qualification prerequisite that apply to such advocates.

In negotiating settlements with applicants represented by paid non-lawyer advocates, QLS members have reported being concerned that, on occasions, applicants seem to be pressured into settlements by their representatives and agreeing to settlement sums that will likely be entirely or substantially exhausted by the fees they are charged. In addition, QLS members have raised concerns about whether particular advocates are physically based in Australia and, if not, whether the minimum statutory consumer protections that apply in Australia extend to their services.

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The bases for the QLS's concerns were also well articulated by the following warning issued in late 2020 by the Australian Competition and Consumer Commission (**ACCC**) in respect of one particular allegedly unscrupulous non-lawyer advocate:[1]

> '7 December 2020
>
> The ACCC has issued a public warning notice about the alleged conduct of Dismissals Direct Pty Ltd, trading as Unfair Dismissals Direct, a company that represented employees in unfair dismissal claims before the Fair Work Commission until earlier this year. Mr John Bingham is the sole director of Unfair Dismissals Direct.
>
> Unfair Dismissals Direct did not offer legal services, but acted as a paid agent on a 'no win, no fee' basis and deducted its fees from any final settlement for clients.
>
> From May 2018, the ACCC received complaints about Unfair Dismissals Direct, including from 18 consumers around Australia who complained that Unfair Dismissals Direct did not pay them their settlement monies, minus its fees, after their unfair dismissal claim was settled.
>
> The ACCC has reasonable grounds to suspect that Unfair Dismissals Direct may have engaged in misleading and deceptive conduct, and made false or misleading representations, by telling consumers that it would receive settlement monies on their behalf, deduct its professional fee and transfer the remaining balance to the client when, in some instances, Unfair Dismissals Direct kept the remaining balance.
>
> Unfair Dismissals Direct advertised its services online and offered potential clients a 'free confidential assessment'. Their contract with clients outlined fees which were to be deducted from any settlement paid into the companies' accounts after successful conclusion of their claim.
>
> "We are very concerned that it appears some clients of Unfair Dismissals Direct, who were at a low point in their lives after losing their job were not paid the settlement balance owing to them."
>
> "We are warning Australian consumers seeking representation for unfair dismissal claims to choose their representatives carefully," ACCC Commissioner Sarah Court said.
>
> "Consumers should do their research before signing any contract, including for unfair dismissal services. If a business is trying to pressure you into signing a contract quickly, without ample opportunity to review the contract, ask yourself why."
>
> The Public Warning Notice has been issued because the ACCC has reasonable grounds to suspect that the conduct by Unfair Dismissals Direct may constitute a contravention of sections 18 and/or 29 of the Australian Consumer Law, and the ACCC is satisfied that consumers have suffered detriment and it is in the public interest to issue the notice.

[1] https://www.accc.gov.au/media-release/accc-issues-public-warning-notice-about-unfair-dismissals-direct.

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The warning notice is available at Dismissals Direct Pty Ltd (also known as Unfair Dismissals Direct)

Advice for consumers seeking unfair dismissal representation

Individuals do not need to be represented at the Fair Work Commission, in fact almost half choose to represent themselves. Free and reliable information about the unfair dismissals process is available on the Fair Work Commission website.

Workers seeking to engage representation for unfair dismissal claims should read contracts carefully before engaging a representative to determine:

- what services will be provided;
- whether the contract limits their ability to keep negotiating for the best possible payout;
- how much the service costs; and
- whether the services are good value when compared to a potential payout.

Other tips include:

- Look for online reviews before signing up.
- Shop around – many representatives in the industry offer free consultations. Find the one that best suits your needs.
- Ask how any settlement money will be handled, will it be paid directly to you or the company?
  - At the Fair Work Commission, you are able to request that any settlement money will be paid to you directly
  - Lawyers are subject to strict legal obligations when handling client money. Commercial operators, who are not lawyers, are not subject to the same obligations.

Keep a copy of your contract and any associated terms and conditions.

If COVID restrictions allow, visit the offices of the representative before signing up.

QLS's concerns are also reflected in a public warning issued by the Fair Work Commission (**FWC**)[2] as to the conduct of a different non-lawyer advocate (i.e. not the same non-lawyer advocate referred to in the ACCC warning above), and how to distinguish between the FWC and persons who might seek to blur the lines between the FWC's operations, and their own.

Practical examples of inappropriate conduct by non-lawyer advocates

The following case examples further demonstrate our concerns and the need for a comprehensive review to consider potential reform options relating to non-lawyer advocates:

(a) In *Charles v Hooper Family Trust t/a Barron River Towing*,[3] John Bingham, who was the subject of the subsequent ACCC warning referred to above, was responsible for the late filing of an unfair dismissal application. The evidence in support of an extension of time in that matter disclosed a troubling general practice on the part of Unfair Dismissal Direct by which they typically filed applications on behalf of their client without providing those

[2] https://www.fwc.gov.au/contact-us/complaints-feedback/complaints-about-lawyers-paid-agents
[3] [2018] FWC 2202 at [35]-[36].

applications in draft to their clients, and seeking their express instructions on those documents.

(b) *Scott v DFP Recruitment Services Pty Ltd*[4] concerned a further late lodgement of an unfair termination claim, and the dismissal of the claim following comprehensive failures by the non-lawyer paid agent in that case to meet basic directions issued by the Commission, and to respond to attempts made by the Commission to clarify the circumstances in which the original application was lodged.

(c) *Johnston v East Gippsland Real Estate Pty Ltd*[5] was another example of a basic error having been made by an employee of another paid agent, Unfair Dismissals Australia. In response to dissatisfaction with his representation by that agent, the relevant employee wrote to them 'I am not going to proceed any further with Unfair Dismissals Australia regarding the matter against LJ Hooker. You are welcome to phone me'. Without clarifying the meaning of the note, Unfair Dismissals Australia wrongly interpreted the email as an instruction to file a notice of discontinuance. The error was particularly egregious in circumstances where there was evidence that the applicant had forewarned Unfair Dismissals Australia that he would be seeking alternative representation.

(d) In *Simon Lewis v SGA (1994) Pty Ltd*,[6] Unfair Dismissals Australia was ordered to pay costs in an unfair dismissal matter following a 'reckless' failure on its part to provide its client with relevant supplementary statements filed by the respondent in the case.

Representation rights

The effect of the legislative schemes considered below is that there is significant scope for non-lawyer advocates/paid agents to represent and act for clients in proceedings before relevant commissions and tribunals. That is particularly so in respect of conciliations and mediation conferences, which are the forums at which the vast bulk of such claims are resolved. The wide opportunities that paid non-lawyer advocates have to represent clients underlines the critical need for consumer protection in this area.

Representation before the Fair Work Commission

Under section 596(2) of the *Fair Work Act 2009* (Cth) (**FW Act**) a person may be represented in the FWC by a paid agent only with the leave of the Commission. However, that section is qualified by section 596(1) and section 11 of the *Fair Work Commission Rules 2009* (Cth). The combined effect of those provisions is that:

(a) leave is not required for paid agents to represent applicants in conciliations of unfair dismissal or anti-bullying applications;

(b) leave is otherwise not required for paid agents to represent applicants in all steps associated with a proceeding other than those that require an appearance before the Commission;

(c) however, the Commission retains an over-arching discretion to direct that a person not be represented by a paid agent in respect of a matter before it. Notwithstanding the

[4] [2020] FWC 5682.
[5] [2019] FWC 5483.
[6] [2020] FWC 2229.

existence of this discretion, it is one that is rarely ever exercised in practice (not least because conciliations are run by Commission staff and not Commissioners).

The latest available FWC annual report (for the 2019/20 financial year)[7] states that 16,558 unfair dismissal applications were lodged in that year, and that there were 12,962 conciliation conferences held by FWC staff. There were 820 applications for stop bullying orders filed in the same period, although the report does not specify how many conferences were held in respect of such matters.

Representation before discrimination commissions

In Queensland, the Queensland Human Rights Commission (**QHRC**) is the body that has jurisdiction to deal with discrimination and sexual harassment complaints. Complaints that are not resolved, including through the direct assistance of the QHRC are referred to the Queensland Industrial Relations Commission (QIRC) (for employment-related matters) and the Queensland Civil and Administrative Tribunal (for all other discrimination and sexual harassment proceedings). In the 2019/20 financial year, the QHRC conciliated 264 disputes.[8]

Under section 163 of the *Anti-Discrimination Act 1991* (Qld), a person may be represented by another person at a conciliation conference with the permission of the Commission.[9] It is the experience of QLS members that the QHRC generally has a very permissive approach to allowing paid agents to represent applicants in conciliation conferences.

The Australian Human Rights Commission (**AHRC**) serves the same function for sexual harassment and discrimination complaints made under Commonwealth equal opportunity legislation. Conferences are generally a prerequisite to an applicant being able to pursue their claim through proceedings in either the Federal Court or the Federal Circuit Court. Under section 46PK of the *Australian Human Rights Commission Act 1986* (Cth), a person may only be represented at a conference with the permission of the presiding AHRC official. Again, the AHRC has routinely exhibited a permissive approach to representation by paid agents. In 2019/20, the AHRC undertook 1,432 conciliation processes.[10]

Extent of existing consumer protections

The consumer risks highlighted in this submission, and which have been recognised by the ACCC, are partly addressed in some Australian jurisdictions. For example, section 46PA of the AHRC Act prohibits a person who is not a legal practitioner from demanding or receiving a fee or reward, or any payment of expenses, for representing an applicant before the Federal Court

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[7] https://www.fwc.gov.au/documents/documents/annual_reports/ar2020/fwc-annual-report-2019-20.pdf.
[8] https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0010/28369/QHRC_AnnualReport2019-20.pdf.
[9] See to a similar effect, *Anti-Discrimination Act 1977* (NSW), s 91B and *Anti-Discrimination Act 1998* (Tas), s 75(3). No restrictions on representation apply under the equivalent Victorian or Norther Territory legislation. The South Australian equivalent (the *Equal Opportunity Act 1984* (SA)) only contemplates that legal representatives may appear in a conciliation before that State's discrimination commission (see s 95(6)). The ACT Human Rights Commission only has discretion to allow a person to be represented in the course of a conciliation where it is satisfied that the representation is likely to help the conciliation substantially (see *Human Rights Commission Act 2005* (ACT), s 57(3)).
[10] https://humanrights.gov.au/sites/default/files/2020-10/AHRC_AR_2019-20_Complaint_Stats_FINAL.pdf.

or Federal Circuit Court (but not before the AHRC in the course of a conciliation). Similar provisions are in place in New South Wales[11] and Western Australia.[12]

Otherwise, clients of paid non-lawyer agents have the benefit of the standard consumer protections provided for by the *Competition and Consumer Act 2010* (Cth) and State and Territory fair trading legislation. However, those protections require individuals to take reactive enforcement action, or rely on Commonwealth or State and Territory regulators to do so on their behalf. The former may be cost-prohibitive, and either option may be practically impossible because the non-lawyer advocate may be located outside of Australia.

Other protective measures

Additional examples of ways in which the roles of non-legal representatives have been dealt with are as follows:

(a) Pursuant to section 436 of the *Industrial Relations Act 2016* (Qld) (**IR Act**), the QIRC now has a code of conduct that, among other matters, lists a variety of behavioural expectations of non-lawyer representatives. However, the Code, and the IR Act, are silent on the consequences of a breach of these expectations.

(b) Western Australia has the most comprehensive scheme relating to the regulation of the conduct of non-legally qualified representatives. Under that scheme[13] non-union industrial agents must be registered to provide representation services within the State, they must have appropriate insurances in place, they must satisfy various other requirements for registration, and they must comply with the Code of Conduct contained in the *Industrial Relations (Industrial Agents) Regulation 1987* (WA) as a condition of continued registration. However, 'the legislation provides no scheme for the supervision of agents once they are registered or to deal with any whose registration ought to be subject to scrutiny and possibly cancelled'.[14]

Consideration of potential reforms

QLS recognises the value that some non-lawyer advocates provide for otherwise unrepresented litigants. That value also extends to assisting commissions and tribunals in carrying out their statutory functions. That is particularly so in respect of industrial advocates who are employed by trade unions or employer groups (and none of the concerns raised by QLS in this submission extend to that category of non-lawyer advocate). Notwithstanding these particular advocates, there is a need for reform to protect people (both individual workers and in some cases small business) from unqualified non-lawyer advocates charging fees for service.

QLS recognises that any reform options that are ultimately explored need to be the subject of the usual consultation processes. However, consideration by the Committee of this important issue will be a critical starting point to ensure that vulnerable persons are protected at difficult times in their lives.

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[11] *Anti-Discrimination Act 1977* (NSW), s 98.
[12] The *Equal Opportunity Act 1984 (*WA), s 92 allows representation by non-lawyer agents (subject to leave) but prevents those agents from receiving or demanding pay for such services..
[13] See s 112A of the *Industrial Relations Act 1979* (WA),
[14] *Maher v The Trustee for the Croker Unit Trust* [2019] WAIRC 254 at [21].

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In examining these issues, we recommend that any reform should be implemented through, to the greatest extent possible, the use of the Commonwealth's legislative power so as to ensure a nationally consistent approach to this issue.

As a first step, and related to the issue non-lawyer advocates, we repeat our calls for:

- increased funding for the legal assistance sector so that individuals can access advice from qualified legal professionals, and legal representation irrespective of their financial situation; and
- reforms to allow legal representation as a right in all courts, commissions and tribunals.

As we wrote in our earlier submissions, we welcome the opportunity for continued consultation, including in the course of the Committee's public inquiry.

Please do not hesitate to contact our Senior Policy Solicitor, Kate Brodnik on [redacted] or [redacted] if you wish to discuss the content of this letter.

Yours faithfully

Elizabeth Shearer
President