



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EmploymentLawJEmv940429

17 March 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 – Workplace Relations Framework Inquiry

I write to you on behalf of the Law Society's Employment Law Committee ("Committee") to provide a submission to the Workplace Relations Framework Inquiry. The Committee represents the Society on employment law issues and includes experts drawn from the ranks of the Law Society's membership.

This submission addresses three matters:

- National consistency of long service leave entitlements
- The right to representation before the Fair Work Commission
- The availability of Benchbooks.

1. Long Service Leave – Reform of Division 9 of Part 2-2 of the *Fair Work Act 2009* (Cth)

Long service leave is now a standard employment entitlement in Australia and has been so since the 1950s. Despite this, eligibility for and entitlements to long service leave are not uniform. While most employees' entitlements are found in State law, some entitlements are contained in enterprise agreements, statutory instruments or delegated legislation, portability agreements in certain industries, or even in individual contracts.

Long service leave forms part of the ten National Employment Standards that are found in Part 2-2 of the *Fair Work Act 2009* (Cth) ("FW Act"). However, unlike most of the Standards to be found in this Part of the FW Act, the prescriptions in Division 9 of Part 2-2 preserve the different coverage of long service leave entitlements throughout the country.

The Committee submits there should be a nationally consistent set of rules for long service leave eligibility and entitlement, as is the case with annual leave. The Committee submits that the current arrangements do not contribute to efficiency and productivity, particularly for any employer that operates across State borders.

The application of one national set of rules could reduce the complexity which can accompany the calculation of entitlements upon the transfer of businesses, especially where that transfer is to an employer located in another State.

Additionally, if long service leave schemes were portable across an industry, this could facilitate labour mobility as employees would continue to accrue entitlements when they moved from one employer to another.

The Committee notes that the current arrangements were thoroughly canvassed in the *Report Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation (2012)*:

The preservation of state and territory laws is achieved through s. 29(2) of the FW Act, which has the effect that modern awards and enterprise agreements operate 'subject to' state or territory long service leave laws. The transitional NES provision in Part 2-2 Division 9 of the FW Act preserves award-derived long service leave entitlements, and applicable agreement-derived long service leave entitlements in circumstances where FWA determines that the relevant entitlements operated in more than one state or territory and, considered on an overall basis, are no less beneficial to an employee than a relevant state or territory long service leave entitlement.

The concerns raised about the current provisions generally centred on determining the entitlements of employees, given the various instruments and legislation from which the entitlement may be derived. This may be a particularly complex issue for companies operating across state borders. The issue is likely to involve additional administrative costs for employers and a consequent level of uncertainty as to whether entitlements have been correctly calculated for both employers and employees, although no submission sought to quantify the extent of any additional costs in this regard. The transitional arrangements were, however, designed to protect an employee's existing entitlements, which is clearly to the benefit of employees, albeit a cost-neutral one from their perspective. Concerns with the existing NES long service leave arrangements would be overcome by putting in place a simple national standard, as foreshadowed in *Forward with Fairness* and the NES discussion paper.

The Panel notes the significant concern of parties about the complexity and confusion surrounding the transitional arrangements currently in place, and also the advice of two state governments that the standardisation process appears to have stalled. (p 101: footnotes from quoted text omitted)

The Panel recommended as follows:

The Panel recommends that the Commonwealth, state and territory governments should expedite the development of a national long service leave standard with a view to introducing it by 1 January 2015. (p 102)

The Committee submits that the Productivity Commission should support the Panel's recommendation. The Committee also recommends that any standard provision should be a minimum standard only.

2. Representation before the Fair Work Commission

The Law Society has long supported the right to legal representation in courts and tribunals. The Committee submits that parties should have a right to legal representation before the Fair Work Commission ("FWC"). The Law Society's Rural Issues Committee endorses this point. Section 596 of the FW Act provides that a person must appear for themselves in any proceedings unless they are able to satisfy the FWC that they should be entitled to be represented by a lawyer or paid agent, and the FWC grants permission to the party to be represented by a solicitor or barrister.

Currently, lawyers need to obtain permission to appear before the FWC. The Committees are of the view that this rule should be changed to enhance the efficiency of the FWC's

processes. The benefits of legal representation can include prompt identification of the relevant facts and the legal questions to be determined. This would assist the FWC in ensuring that the proceedings run effectively and efficiently.

In practice, the Committee understands that applications for legal representation are often refused, including sometimes in circumstances where the other party has a legally trained advocate appearing as of right. That can occur because permission is not required for a corporation or registered organisation to be represented by one of its employees, even if they are legally qualified (s 596(4) of the FW Act). Given that the legislative requirement to seek leave is intended to make it easier for individuals to represent themselves, and perhaps to minimise any power imbalance between the parties, this result is anomalous.

The Committee is aware that permission has been refused even in the case of an appeal: *G & S Fortunato Group Pty Limited v Stranieri* (2013) FWCFB 4098.

In each of the following areas the FWC has the power to make orders that can affect an individual or a business in a significant way:

- rights to maintain employment (Parts 3–1 and 3–2 of the FW Act which deal with adverse action in unfair dismissal)
- proceedings to prevent industrial action, which have the capacity to significantly affect the viability of a business (Part 3–3 of the FW Act which deals with industrial action)
- the right of officers of organisations to enter an employer's or occupier's premises (Part 3–4 of the FW Act, right of entry)
- 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 of the FW Act, 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).

Presently under the FW Act, lawyers may be engaged by a client to provide advice in relation to an unfair dismissal claim, prepare the application, attend a conciliation on behalf of the client and prepare for a hearing/conference.

The client has no certainty that on the day of the hearing/conference, the lawyer they have engaged, who has already undertaken a substantial amount of work, will be able to carry the matter through to its conclusion. Presently, a lawyer must make representations to the FWC that the client wishes to be represented for a number of reasons, usually because the client has never represented themselves before a court or tribunal, is unfamiliar with the process and there are complex legal issues to be resolved. The FWC has the discretion to deny this request. This can leave the client exposed and vulnerable. Because a lawyer is uncertain of the FWC's decision, in addition to the usual preparation for hearing undertaken by lawyers, the lawyer must also prepare material in a way which is easily understood by the client in the event the client must represent themselves. A hearing conducted in this way creates unnecessary stress for the client as well as additional expenses associated with the dual preparation.

The Rural Issues Committee notes that in rural and remote areas, in addition to issues associated with the need to prepare for both represented and unrepresented hearings, many clients can be a long distance from a FWC office. Where a local lawyer is engaged in a FWC matter by these clients significant travel costs can be incurred, without any certainty that the lawyer's application for permission to appear will be granted.

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.

His Honour's observations are entirely consistent with the experience of our Committee members when they have been present in proceedings in the FWC (and its predecessors) where there are one or more unrepresented parties. The FWC member's task of conducting the proceeding is perhaps inevitably, however well-educated the unrepresented party might be, complicated and lengthened by the need to make sure the unrepresented parties understand the process. This will include what will be required of them, how they are to behave, what form of questions they may ask, whether they need or should consider seeking an adjournment. The FWC member will also have to distil the person's case as well as ensure that the unrepresented party is allowed to present their perspective, so the litigant can be satisfied (as can an appeal bench) they have put their case.

The FWC has very helpfully included a film and introductory materials on its website, so that unrepresented parties are more likely to come to the FWC with some awareness of the process. However, that information does not prevent the inefficiencies and delays that unrepresented parties can cause in FWC proceedings.

Finally, the Committee notes that the Productivity Commission is concerned with public policy being formed in the absence of quantitative analysis of such policy. In the present case, lawyers are inhibited (and sometimes excluded) from appearing on the assumption that the participation of lawyers in FWC proceedings adds to the cost and complexity of the proceedings. There is a growing body of opinion that self-represented litigants impose significant costs on courts and tribunals. The available evidence, however, is incomplete (Richardson, Sourdin, & Wallace Australian Centre for Judicial Innovation, *Self-Represented Litigants – Gathering Useful Information Final Report* (June 1992)).

The Committee recommends the amendment of the FW Act to give every party the right to have a lawyer appear for them in any contested hearing.

3. Making Benchbooks more available

Apart from the FWC Benchbooks, in the Committee's view there are few publications available to assist in relation to procedural issues relating to employment law. As an example, underpayment claims in the Local Court have specific employment law implications that, in the Committee's view are not thoroughly considered in the resources provided. The Benchbook approach is very useful for litigants, as well as any members of the judiciary who may not have specific employment law expertise. Benchbooks provide a more continuous narrative through a particular legal process rather than just case management tips and court rules.

The Committee submits that the following steps would result in a more efficient and approachable jurisdiction generally:



- Review existing Benchbook materials with a view to publish, and create more in a broader range of areas;
- Maintain the consistency and quality of Benchbooks by encouraging lawyers with specific sector expertise to draft/ edit sections of the Benchbooks; and
- Identify metrics that can help identify those areas of law in which a new Benchbook would best serve the public interests of the court system.

If you require any further information on this submission please contact Michelle Vaughan, Legal Policy Officer,

Yours sincerely

John F Eades
President