THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: JD:gl:Employment:586727
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16 February 2012

Dr John Edwards
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and the Honourable Michael Moore
The Fair Work Review Panel
Department of Education, Employment and Workplace Relations
GPO Box 9880
CANBERRA ACT 2601

Email: fairworkactreview@deewr.gov.au

Dear Panel

Re: Fair Work Act Review

I am writing to you at the request of the Law Society's Employment Law Committee ("Committee").

The Committee has considered the issues raised by the *Fair Work Act Review Background Paper* ("Background Paper") released by the Panel in January 2012, and has chosen to confine its response to 11 of the suggested questions in Attachment B, being questions it regards as within its members' areas of expertise. The Committee also recommends a separate review of the costs provisions under the *Fair Work Act* ("FW Act").

The Committee responds, using the same numbering as set out in Attachment B of the Background Paper, as follows:

Question 9: Is the Safety Net simpler, more streamlined and easier to read and apply than the previous arrangements?

No. The Safety Net since 1 January 2010 has consisted of the ten National Employment Standards ("NES") together with the minimum conditions contained in the modern awards. Prior to that period the Safety Net consisted of the five elements of the Australian Fair Pay and Conditions Standard together with a plethora of Federal instruments the most significant being pre-reform awards, transitional awards, notional agreements preserving State awards and State preserved agreements. In the period before 26 March 2006 the Safety Net comprised of either a State or Federal award together with statutory leave entitlements.

It is not the number of elements to the Safety Net that mar its simplicity. Rather it is the transitional arrangements that attend it. The following example, considering the wages for a person making clothing (a low paid occupation), who has been employed prior to 1 January 2010 illustrates the complexity of the current system.

Firstly, it is necessary to identify the modern award which covers the work performed. In this case the employee will be covered by the Textile, Clothing, Footwear and Associated Industries Award 2010 as this occupation falls within the description of the industry as referred to in that award.

Secondly, Schedule A of the award requires a consideration as to whether there was any difference in money or percentage terms between provision in a relevant transitional minimum wage instrument and the modern award and to apply specified portions of a transitional amount as an adjustment. In other words it must be determined whether the employer was covered by a Federal instrument, or a State instrument. The rate of pay in the instrument must be then compared to that in the modern award and if there is a difference the amount adjusted.

The transitional provisions operate until 2014. Given an employee has six years in which to commence an underpayment of wages claim it can be anticipated that the effect of the transitional provisions will last until 2020.

The period between 26 March 2006 and 1 January 2010 is similarly complex. In that period the complexity was created by the removal of State instruments that applied to constitutional corporations into the Federal system.

It is only the period before 26 March 2006 that the Safety Net could be easily determined by reference to either the relevant State or Federal instrument.

Question 15: How could the operation of the Safety Net be improved, consistent with the objects of the *Fair Work Act* and the Government's policy objective to provide a fair and enforceable set of minimum entitlements?

There are two matters that could improve the Safety Net.

a. Firstly all of the elements of the NES could become civil remedy provisions (currently Division 4 is not enforceable); and

b. Secondly Division 5 could clarify how an employee's balance of personal/carer's leave is reduced when leave is taken. An issue has arisen where employees work days of different lengths that are then averaged to produce the 38 hour week. In the matter of *Textile, Clothing and Footwear Union of Australia, NSW, SA Tasmania Branch v Kimberly-Clark Australia Pty Ltd* (C2011/3851) employees worked shifts of both 7.6 hours and 11.4 hours. If a day's leave is taken, is 7.6 hours deducted or 11.4 when the shift was 11.4 hours and the employee accrued 76 hours per annum? Whilst there is a binding decision for this agreement the NES should clarify the situation.

Question 28: What has been the impact on employers, employees and their representatives of the changes to the agreement approval processes [under the FW Act]?

The process for approval has changed significantly since the *Workplace Relations Act 1996* ("WR Act") Forward with Fairness ("FWF") provisions. Under FWF, agreements were to be lodged with the Workplace Authority, a

non-tribunal Authority. The Workplace Authority could not and did not conduct hearings and had limited capacity for representatives to make submissions on the agreement approval process. Greenfield agreements and multiple business agreements lodged with the Workplace Authority would operate immediately from lodgement.

Agreements are now considered and approved by FWA. The matters to be considered by FWA are clearly set out in detail in sections 186-7 of the FW Act. These matters are set out in greater detail than was the case with sections 346K to R of the WR Act (FWF). The approval process at the Tribunal allows proper representation to take place. Parties are alerted to hearings of approval of agreements and can choose to appear. The process is more open and transparent, which again is more conducive to proper and meaningful representation.

The provisions governing agreements under the FW Act (section 190(4)) explicitly require the Tribunal to contact all relevant bargaining representatives. Again this allows representatives of the parties a proper opportunity to appear and make submissions in relation to the approval of an agreement.

Question 34: Does the new broader definition of transfer of business help to clarify when a transfer of business occurs?

The new definition of transfer of business found in section 311 of the FW Act provides a clearer and broader definition for employees and employers compared to the definition that previously applied. The confusion with the earlier definition ultimately led to the High Court decisions of *Amcor Limited v Construction Forestry Mining and Energy Union* [2005] HCA 10 and also *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [2005] HCA 9. The new definition sets out, in statutory form, the determinations made by the High Court in those cases.

Cases such as *Szybkowski v Monjon Australia Pty Ltd t/as Monjon Australia Pty Ltd* [2010] FWA 7321, *Osmond v NBS Transport (SA) Pty Ltd t/as NBS Transport* [2010] FWA 5076 and *Moore v Morrell Holdings Pty Ltd T/A Mr Rental* [2011] FWA 5727 demonstrate the commissioners of FWA now applying a methodical approach in applying the definition to the facts of the respective cases.

There is no doubt that a methodical approach to the task of determining if a transfer of business has occurred makes the task of employers, employees and their legal advisors easier in determining the likely outcome, should the matter proceed to hearing. This will ultimately lead to more cases being resolved prior to hearing (at least on this issue).

Whilst the definition contained in section 311 may be clearer, further thought as to whether the definition itself is appropriate may be required. This of course is a policy decision.

Question 40: Has the consolidation and streamlining of workplace protections into the general protections provisions made it easier for employers and employees to understand their rights and obligations?

The Committee does not wish to comment as to whether the general protections provided under the FW Act are sufficient protection or too burdensome on employers. This is a policy decision that requires input from the groups affected.

The FW Act has consolidated and streamlined the previous provisions relating to unlawful termination, freedom of association and other protections and incorporated them into Chapter 3 Part 3-1.

The "consolidation and streamlining" of the various protections into one part has made it easier, in the Committee's view, for employees and employers to understand their rights and obligations compared to the protections that the WR Act provided. Part 3-1 is set out in a coherent fashion that makes it easier to follow.

Despite being easier to understand than the WR Act, there is still a level of uncertainty in the scope of the general protections. The Committee is aware of some novel claims being brought by applicants. This may be part of the testing of the terms that is common when new legislation is introduced. As the terms continue to be reviewed through the judicial process, further clarification on the scope of the protections will be made. This is likely to result in greater understanding of the rights and obligations of the parties.

Question 41: Section 351 of the Fair Work Act proscribes discrimination "because of the person's" race, sex, etc. This provision appears in Part 3-1 Division 5. This Division is headed "Other Protections". Would section 351 and any related provisions be better placed in a Division dealing solely with discrimination?

No. It is the Committee's view that section 351 and any related provisions would not be better placed in a Division dealing solely with discrimination. This is primarily because section 351 is one of the protections afforded to employees and prospective employees at work. The FW Act Chapter 3 provides for the rights and responsibilities of employees, employers and organisations and section 351 "Discrimination" is included first in a number of "Other Protections" in Division 5. That division is logically placed after the other key divisions, Division 3 which provides for workplace rights and Division 4 which provides certain protections to persons engaging in industrial activities. The "Other Protections" are clearly identifiable as existing in addition to these protections. The organising principle of this part of the Act is to group those other important rights and protections in sections 351 to 356. The remedy available for a breach of section 351 is the same civil remedy (Part 4-1) that is available for breaches of the general protections. There is no evidence that the structure of the Act impedes the capacity of employees or prospective employees to avail themselves of section 351 because of its placement within the Act. The objects in section 3(e) of the Act are given force, in part, by section 351 and it is doubtful that there is any utility in placing section 351 in a separate division, whether within the same part or elsewhere. Indeed it is difficult to identify any benefit resulting from such an amendment.

Question 44: Are the procedures for dealing with unfair dismissal quick, flexible and informal and do they meet the needs of employers and employees? What is the impact of the changed processes upon the costs incurred by employers and employees?

Part 3-2 of the FW Act seeks to establish a framework for dealing with unfair dismissals to balance the need of business and the needs of employees through the use of quick, flexible and informal procedures (section 381). It provides remedies, if a dismissal is found to be unfair, with an emphasis on reinstatement (see section 381(1)(c)). Subject to limits on the scope of the operation of the Part, it is available to national system employers.

An employee has 14 days from the date the dismissal took effect to make the application to FWA, under section 394(2)(a). However, in exceptional circumstances, FWA has the discretion under section 394(2)(b) to accept an application that is lodged out of time. Consistent with the objectives of the Part, the provisions allow flexibility in relation to the procedures FWA may adopt when dealing with an unfair dismissal claim, after first determining that it has jurisdiction to deal with the matter (sections 396 to 399).

In determining whether a dismissal was harsh, unjust or unreasonable, FWA is required to take into account a number of matters specifically identified in section 387.

If the tribunal concludes that the person was unfairly dismissed, it may make an order for reinstatement, including reinstatement to an associated entity (section 391). Alternatively, if the tribunal considers that reinstatement is inappropriate, it may make an order requiring the employer to pay the employee an amount of compensation in lieu of reinstatement to the equivalent of six months remuneration, capped at a specific sum as per section 392. Subject to any right of appeal to the Full Bench (section 400), a person to whom an order applies must not contravene the order (section 405). If so, they may be subject to enforcement proceedings under Pt 4-1, including an injunction issued by the Federal Court of Australia or the Federal Magistrates' Court of Australia (see section 539(2), item 13 and section 545(2)(a)).

FWA has limited power to grant orders in respect of costs. The provisions are intended to ensure that "a fair go all round" is accorded to both the employer and the employee concerned (section 381(2)). As a note to s 381(2) indicates, the expression "fair go all round" was an expression used by Sheldon J, in R*e Loty and Holloway v Australian Workers Union* [1971] AR (NSW) 95 at 99.

It is important to recall, when reviewing procedures in the unfair dismissal jurisdiction, that an employee and employer involved in an unfair dismissal case before FWA must generally meet their own costs. FWA may order an employee or employer to bear some or all of the costs of the other party if the unfair dismissal application or response to it:-

- was frivolous, vexatious or made without reasonable cause; or
- had no reasonable prospect of success.

The Committee considers the current procedures to be effective, assisting with quick, flexible and informal resolution of disputes. However, it is the Committee's view that at least in relation to some matters, face-to-face conciliation conferences, rather than telephone conferences, may assist in the resolution of matters – as noted in the Committee's response to question 64. The Committee notes that the experience of practitioners overall is that telephone conciliation conferences are cost effective and prompt, with most matters being resolved through this procedure. Where matters are not resolved, there could be advantages, at least in some cases, for a face-to-face conciliation conference to be ordered with a member of FWA before the parties become irrevocably committed to the cost, delay and other disadvantages of a contested hearing.

The Committee therefore suggests that when a matter has not been resolved by telephone conference, the conciliator should refer the matter to a commissioner of FWA for that member to determine whether, in all the circumstances of the case, it would be worthwhile to order the parties to participate in a face-to-face conciliation conference before a member of the Commission, prior to the matter being scheduled for hearing. Factors to be taken into account in making such a decision would include (without being exhaustive) the physical location of the parties, the ambit of the difference between the parties' positions as at the conclusion of the telephone conciliation conference, and the matters at stake (i.e whether the applicant seeks reinstatement or not, where prompt hearing is appropriate), compared to the costs and other disadvantages involved in a full hearing.

If a matter does become protracted, then very significant costs can be incurred by one or both parties in prosecuting or defending the case with little prospects of those costs or, any significant part of them, being recovered from the other party. The Committee suggests that this issue be included in the review of costs provisions in the FW Act suggested in the final section of this submission.

Question 49: Is the Small Business Fair Dismissal Code an effective tool in helping small business to understand their obligations and fairly dismiss employees?

Under section 385(c) a person is not "unfairly dismissed" if the dismissal was consistent with the Small Business Fair Dismissal Code ("Code"). FWA is required to consider whether the dismissal was consistent with the Code as an initial matter, prior to considering the merits of the case (section 396(c)). If so satisfied, it must dismiss the matter: *Re Industrial Automation Group Pty Ltd* [2010] FWAFB 8868 (2 December 2010, Kaufman SDP, Richards SDP, Hampton C) at [34].

The Code is an instrument made by declaration of the Minister under section 388(1). It is brief in its terms and is accompanied by a checklist to assist employers to determine whether they have complied with the Code. As its name suggests, the Code applies only to an employer engaged in a small business, as defined in section 23.

The Committee notes that under the Code it is fair for a small business employer to justify summary dismissal if the employer believes on *reasonable grounds* that the employee's conduct is sufficiently serious to justify summary dismissal. This seems to relieve the small business employer from the burden of proving, by way of evidence before FWA, that the employee engaged in such conduct. This should be contrasted with the test which applies to the

burden of proving a valid reason for the dismissal under section 387(a) FW Act.

In the Committee's view, the Code assists small businesses and aids employers in complying with their obligations under the FW Act.

Question 52: Is the process for applying for and conducting protected action ballots simpler under the new system?

The process for applying for and taking industrial action is more flexible and simpler under the FW Act than under the WR Act.

The FW Act does not contain the concept of a bargaining period as under the WR Act (sections 427 and 428 WR Act). It requires that parties be genuinely trying to reach an agreement in order to take protected industrial action instead. This has been held to mean that a union on behalf of employees can still seek a protected action ballot order, even if the employer is refusing to bargain (*JJ Richards and Sons v TWU* [2010] FWAFB 9963, which considered section 443(1)(b) FW Act).

Under the FW Act, employers cannot get a stay of a protected action ballot order (see section 606(3) FW Act) as they could under the WR Act (see section 120 WR Act) so that protected industrial action can continue despite an employer's challenge. This means that it is easier to take industrial action under the FW Act.

Employees can unilaterally seek an extension of the 30-day period in which to take protected industrial action for up to another 30 days (section 459(3) FW Act), whereas the consent of the employer was required under WR Act (section 478(3) WR Act). This also makes it easier for employees to take industrial action.

Under the FW Act, protection is not lost if unprotected persons join the industrial action although unprotected persons are then exposed to court orders. The agreement content may be broader because of the move away from prohibited content in the WR Act. Therefore, protected industrial action can potentially be taken about a broader range of matters.

In all the circumstances, the greater flexibility provided by the FWA Act makes taking industrial action a simpler process.

Question 64: Are the processes and procedures set out in the Fair Work Act that apply to FWA, the Federal Magistrates Court of Australia and to the Federal Court of Australia, appropriate having regard to the matters coming before it? What changes, if any, would you suggest?

The consolidation of processes and procedures set out in the FW Act for matters coming before FWA, the Federal Magistrates Court and the Federal Court have resulted in a streamlined process to form a more efficient system that allows matters to be dealt with in a more timely and simple manner.

The Committee has some suggestions for changes. For example, telephone mediations, although popular under the FW Act and occurring with great frequency, are not always the most productive way of resolving an issue. Face to face contact must not be underestimated as a means of achieving results especially when parties are seeking compromise.

Question 65: Does the consolidation of workplace relations institutions provide more easily accessible services and information to users of the national workplace relations system?

On a basic level, the consolidation of workplace relations institutions has streamlined the information available to users into a more accessible and user-friendly form. Generally, as a starting point and as a result of the general consolidation of workplace institutions both at a national and at State levels, there is only one website (the FWA website) that a practitioner needs to visit in order to access relevant information. This website provides information, for example, on most if not all issues arising under the FW Act, and contains, among other things, copies of agreements, awards, glossaries and other explanatory material. Generally, this makes it easier to locate information and reduces time spent on legal research.

However, although the information has been streamlined, the consolidation of workplace institutions by itself does not necessarily result in more easily accessible services. This is an ongoing challenge that requires continuous attention to, and funding of, the resources available online, both from FWA and from the Fair Work Ombudsmen. Over the counter information is still highly important as is face to face advice and the continued operation of advice lines. Care must be taken to ensure that the consolidation of workplace relations institutions does not result in over simplification and the decline of services available. In NSW there is currently a shared arrangement with inspectors from the former Office of Industrial Relations working in conjunction with the Fair Work Ombudsmen to provide information. This arrangement is for a specified time period and is relied upon by employees and small businesses. Despite the consolidation of workplace relations institutions, the Committee recommends a continued commitment of funds and programs to these sources of information.

Additional submission regarding costs and the FW Act

The FW Act places very considerable limitations upon the power of FWA and courts exercising judicial power under the FW Act to order that a party to proceedings under the FW Act pay all or any part of the legal costs incurred by another or other parties to any such proceedings. As to FWA, these limitations are set out in section 611 (noting that separate powers in relation to costs orders against legal practitioners and paid agents are provided for in sections 376, 401 and 780), and as to courts exercising federal jurisdiction under section 570 (noting also powers for orders against the Commonwealth and a State or Territory under sections 569 and 569A).

As is well known to practitioners in this field, the substantive provisions, namely sections 570 and 611, severely limit the circumstances in which cost orders may be made either by FWA or Federal courts, such that cost orders are in essence only available in circumstances of serious fault by one party. The normal legal principle that applies in most civil courts in Australia, that costs follow the event and result in the successful party being entitled to recover most or a substantial portion of that party's legal costs from the losing party, has been absent from Federal industrial legislation.

That state of affairs reflects a very long standing legislative policy that in matters arising under Federal industrial legislation any party wishing to utilise the services of a lawyer would bear the responsibility of meeting that lawyer's fees except in limited and indeed extreme circumstances. The Panel members will be well aware that in practice, costs orders have rarely been made in matters under Federal industrial legislation.

The Committee is concerned generally that the complexity of Federal industrial legislation is such that this policy has the potential to work injustice in many cases. However the Committee does not propose in the context of this necessarily limited Review of the Act to make a detailed submission addressing the question of whether this legislative policy should be reviewed and either revoked or modified. A comprehensive review of that policy would clearly need extensive consideration and consultation with interested parties, which the Committee would regard as in the public interest.

In the context of the current Review however, the Committee notes the decision (not subject to appeal) of Federal Magistrate Lloyd Jones in *Vong v Sika Australia Pty Limited* [2011] FMCA 276. This decision was concerned with the remedies to be afforded the applicant, Mr Vong, bearing in mind an earlier judgment by the Federal Magistrate finding that Mr Vong had been unlawfully dismissed (see [2010] FMCA 1021). While the applicable legislative provisions were those under the WR Act) (Mr Vong having been dismissed in June 2009, shortly prior to the commencement of the FW Act), the provisions of the FW Act in relation to general protections matters and remedies for contravention of them are relevantly the same. The Committee invites the Panel to peruse the decision of the Federal Magistrate, particularly paragraphs 15 to 18.

The effect of the decision of the Federal Magistrate is that, despite the severe limits on the power of the court to make a costs order as referred to above in this submission, the Court in effect made an order that the penalty imposed on the Respondent for its breach of the Act be paid not to the Applicant but to the Union that paid for his legal representation in the proceedings and because the Union had incurred the costs of that representation.

The Committee does not in this submission address the question of whether the power of the court to in effect order a "moiety" of the fine is appropriate or not. Nor does the Committee express a view as to the justice of the order made in this particular case. The question is whether it is appropriate for the policy of the Act to be in effect circumvented by the use of the power to direct payment of a penalty in these type of matters to a third party to reimburse legal costs incurred by that party.

The Committee believes that this decision demonstrates that the policy of the Act against the making of costs orders clearly needs to be revisited and perhaps modified. However, that is an issue for more detailed submission when these provisions are subject to review. The Committee submits that in light of this particular decision the Panel recommend that the Government establish a separate review of the costs provisions and policy in the FW Act to determine whether any changes are needed to ensure that costs restrictions do not amount to a barrier to the exercise of rights, or impose an unfair burden on respondents when cases are brought where the prospects of success are small.

The Committee has previously made submissions to the current and previous Federal Governments requesting such a review, but without any success. Copies of our previous submissions are attached. This Review, and the *Vong* decision, provides an opportunity for the Panel to support the Committee in its request that the current policy settings be properly reviewed.

The Committee appreciates the opportunity to participate in the Fair Work Act Review. If you have any questions arising from the Committee's comments above, please contact Gabrielle Lea on (02) 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours sincerely

Justin Dowd
President

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Our Ref: MT:LW:1267874

4 October 2007

The Hon Joe Hockey MP
Minister for Employment and Workplace Relations
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

Dear Minister

Re: Costs in Industrial Relations matters in the Federal Magistrate's Court

The Law Society's Employment Law Committee has requested that I write to you regarding the inadequacy of costs in employment law proceedings in the Federal Magistrate's Court (FMC).

The Committee consists of practitioners specialising in the area of employment law. The Committee monitors developments relevant to this area of practice for the assistance of the profession and the public.

Under the *Workplace Relations Act (Commonwealth)* (the *Act*) the FMC has, generally speaking, the same jurisdiction as the Federal Court. The FMC can impose penalties and grant injunctions in regard to the breaches of the *Act* including dealing with unlawful termination claims. The FMC also has jurisdiction regarding "unfair contracts" under the *Independent Contractors Act 2006 (Commonwealth)* (the *IC Act*).

The power of the FMC and the Federal Court to order costs under either of these two *Acts* is extremely limited.

Section 824 (1) of the *Act* restricts the Court's ability to order costs. The Court cannot make orders for payment of costs unless it forms the view that proceedings are "vexatious or without reasonable cause". The new clause departs from its predecessor former S347(1) in three main ways:

(1) Section 824 (1) does not specify the tribunals to which it applies.

(2) Section 824 (2) provides that a court may order a party to pay some or all of those costs if it is satisfied that a party to the proceedings, by an unreasonable act or omission, caused another party of the proceedings to incur loss in connection with those proceedings.

(3) Section 824 (3) codifies the concept of "costs" which includes all legal and professional costs and disbursements and expenses of witnesses.

Section 824 (1) does not apply to cases involving unlawful termination. Costs in relation to such proceedings are, however, restricted by s666 of *Act*. In relation to that Section it is to be noted that very recently a Full Court of the Federal Court, in *Goldman Sachs JBWere Services Pty Limited v Nikolich [2007] FCAFC 120* unanimously held that its statutory predecessor, on its proper construction, precluded costs orders being made in the Court's accrued jurisdiction in relation to claims (ie common law claims) made in conjunction with unlawful termination applications. The Full Court held that costs orders are available in appeal proceedings in such matters although it is unclear whether this applies in circumstances where the appeal includes grounds relating to the unlawful termination claim.

Clause 329 of the Registration and Accountability of Organisations Schedules (Schedule 1 to the *Act*) also restricts the availability of costs orders under the Schedule.

Under Section 17 of the *IC Act*, the FMC has only a limited power for costs in relation to proceedings for a review of a services contract.

A party to a proceeding (including an appeal) arising under Part 3 cannot be made to pay costs to another party unless the proceedings were instituted vexatiously or without reasonable cause. The effect of this provision ensures that in most applications under the *IC Act* the respective parties will be required to bear their own legal costs.

Federal Magistrate's Court Rules 2001

Part 21 of the FMC Rules establishes the rules in relation to party/party costs. Unless the Court otherwise orders, the appropriate scale for a party/party costs order (other than bankruptcy) is the event-based scale in Schedule 1 of the FMC Rules.

The FMC facts sheet on Costs states that the FMC has a general discretion to depart from the event-based scale and order that a specific amount of costs be paid. In these situations, the Magistrate may assess costs by using the court rules of the Federal Court or another method for determining the amount of costs.

The Federal Court's Rules in relation to costs are of the traditional type, i.e. specific amounts for particular attendances.

The Committee believes that more consideration should be given by the Government to the circumstances in which costs orders can be made in workplace relations matters, and also to how much of actual costs may be recovered by a successful party in such proceedings. The Committee takes that view because it believes that the current provisions applicable in Federal courts and tribunals in such matters do not appear to have a coherent and consistent basis and, in their current form, may give rise to access to justice issues.

For example:

(i) While proceedings under the Workplace Relations Act do not attract costs orders except in very limited (and indeed extreme) circumstances, employment related matters arising under other Federal statutes, such as the *Trade Practices Act 1974* (Cth) or the *Sex Discrimination Act 1984* (Cth) (to name just two) do allow costs orders to be made on a "costs follow the event" (ie virtually automatic) basis.

(ii) In the Federal Court's accrued jurisdiction, costs orders are not available where contract or other common law claims are attached to an unlawful termination claim(except in the very limited circumstances prescribed by Section 666 of the *Workplace Relations Act 1996* (Cth). That limitation does not appear to apply in relation to appeal proceedings arising out of such proceedings although the position with regard to an appeal relating to the unlawful termination claim is unclear (see Nikolich).

(iii) Where proceedings can be commenced in either the Federal Court or FMC, a successful party's costs orders are likely to be significantly different in value.

(iv) Where costs orders are available as of course in the FMC/Federal courts in employment related matters, nevertheless, the costs regimes in place are not generally of a party/party nature, but of a much more limited effect – whereas equivalent proceedings in State courts (for example, proceedings before the Industrial Court of New South Wales under the *Industrial Relations Act 1996* (NSW)) involve costs orders on the traditional "party/party" basis (and even in extreme cases, on an indemnity cost basis.

There does not seem to the Committee to be any relevant basis for such different costs regimes to apply to employment related matters depending on whether they arise under the *Workplace Relations Act* or not, or under Federal law or not.

The Committee is aware that there are different perspectives about costs issues amongst the various stakeholders in the area of workplace relations, but the Committee believes that there needs to be thorough review of the relevant issues to ensure a coherent and just approach for all parties involved in civil proceedings arising out of employment relationships, or those relationships governed by the Independent *Contractors Act 2006* (Cth). The Committee notes that some aspects of the debate in this area are commented upon by Black CJ in the recent Full Court decision in *Nikolich* (infra), but a more thoroughgoing consideration of the matter than that available to his Honour is justified and indeed supported by the rulings made on costs in that case.

In the Committee's view, the fundamental changes in workplace law that have occurred in the Federal jurisdiction since March 2006 make it timely for such a review to be undertaken.

Particular issues that the Committee believes need consideration are these:

(a) Should certain types of employment related proceedings be in effect "costs order free" or should there be some system to ensure that in all such matters parties are not denied justice simply because of the lack of availability of appropriate costs order;

(b) Should costs orders, where available, permit full cost recovery on the usual party/party in the normal course of events(or even the indemnity basis in extreme cases), and if not, why not;

(c) Should industrial tribunals have greater discretion to order costs, on a more routine basis, where not to do so would deny justice to the successful party;

(d) If costs orders are to be allowed in certain matters and not others, what is the appropriate basis and method for assessment of those costs where costs will be allowed;

(e) Should industrial tribunals have greater discretion to order costs, on a more routine basis, where not to do so would deny justice to the successful party.

(f) Should costs orders, where available, permit full cost recovery on the usual party/party in the normal course of events (or even the indemnity basis in extreme cases), and if not, why not.

The Committee is concerned that, in the future, the majority of employment matters will probably be heard in the FMC and an overwhelming number of matters will not be subject to costs orders. The effect could mean that difficult matters may not be run and in many instances access to justice may be denied.

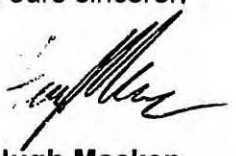
The Committee requests that consideration be given to a revision of the costs regime in the FMC to provide more powers to Magistrates to award costs than are currently available.

The Committee further requests that consideration be given to the adequacy of costs. The Committee is of the view that costs currently available are grossly inadequate.

The claims of employees are no longer pursued by industrial organisations. If individuals are unable to afford to employ a lawyer or lawyers are reluctant to take on a matter due to inadequacy of costs then the individual is potentially exposed.

I look forward to your response.

Yours sincerely



Hugh Macken
Senior Vice President

Australian Government
Department of Employment and Workplace Relations

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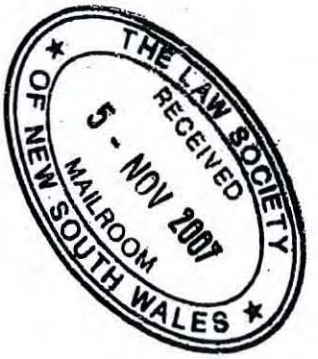

Mr Hugh Macken
Senior Vice President
The Law Society of New South Wales
170 Phillip Street
SYDNEY NSW 2000

Dear Mr Macken

Thank you for your letter of 4 October 2007 concerning the issue of costs in employment law proceedings in the Federal Magistrates Court. The Minister for Employment and Workplace Relations has referred your letter to the department and asked me to reply on his behalf.

With the recent announcement by the Prime Minister of the forthcoming election, the Government is in a 'caretaker role' and decisions are not taken, or advice given, that would bind an incoming government and limit its freedom of action.

Within this context, I ask you to please bring the issues raised in your letter to the Minister's attention after the election is finalised.

Once again, thank you for your letter.

Yours sincerely

Kate Waterhouse

Kate Waterhouse
A/g Assistant Secretary
Legal Policy Branch (4)
Workplace Relations Legal Group
31 October 2007

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Our Ref: HM:lxe(6426)

7 February 2008

The Hon Julia Gillard MP
Deputy Prime Minister
Minister for Education Employment and Workplace Relations
Parliament House
CANBERRA ACT 2600

Dear Deputy Prime Minister

I am writing to advocate early consideration of measures to entrench a more coherent and consistent costs regimes in employment law proceedings.

You may recall that this matter was raised in the Law Society's Federal Election Policy Priorities Statement (a copy of which is attached for reference) and that we briefly touched on the issue in our meeting prior to the election. I also attach a copy of correspondence to the previous government's Minister for Employment and Workplace Relations in which the issues were set out in detail.

In summary, the Law Society is concerned about the extreme limitations on the availability of costs under the *Workplace Relations Act* (as compared to the position under other Commonwealth statutes where the costs generally "follow the event"), the substantial differences in costs orders depending on whether a matter is commenced in the Federal Court or the Federal Magistrates Court, and the general exclusion of party/party costs in Federal Court or the Federal Magistrates Court proceedings. The situation would be greatly assisted by a thorough review of the availability and methods of determining costs across the full range of employment law matters.

We would very much welcome your early consideration of this proposal.

Yours sincerely

Hugh Macken
President