



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: JD:gl:Employment:657228
Direct line: 9926 0375

2 November 2012

The Hon. Justice Iain Ross AO
President
Fair Work Australia
Level 8, Terrace Tower
80 William Street
SYDNEY NSW 2000

Dear Justice Ross

I am writing on behalf of the Law Society's Employment Law Committee (Committee), regarding several matters concerning Fair Work Australia.

Benchmarking

The Committee welcomes the announcement regarding the introduction of benchmarking for the timely delivery of decisions by Fair Work Australia. Delays in the handing down of decisions by the Tribunal have been of concern to Committee members and their clients in the past and the Committee appreciates the steps being taken to address this issue.

Procedure for listing of unfair dismissal matters for arbitration

The Committee also wishes to raise with you concerns regarding the procedure adopted by Fair Work Australia for the allocation and listing of unfair dismissal matters for hearing.

The Committee understands that under the current arrangements, matters which have not settled at conciliation and which are to proceed to final arbitration are centrally managed by the Unfair Dismissals Team (UDT). The UDT issues a notice of listing to the parties with the date(s) for hearing along with a standard set of directions for the filing and service of evidence and other materials. Matters are then allocated to Tribunal members shortly before the scheduled hearing date. Whilst the Committee appreciates the potential efficiencies of such an approach, in its view the current administration of the system gives rise to a number of issues which are set out below.

1. Where the parties do not agree as to the appropriate venue at the conclusion of the conciliation conference, there is uncertainty as to where the hearing will take place. In these cases the UDT will on occasion simply allocate the matter to a venue. In the Committee's view, the choice of venue is an exercise of discretion and the venue should only be determined after both parties have had an opportunity to make any necessary submissions regarding the appropriate venue.

2. The listing of matters for hearing without reference to the availability of either the applicant or the respondent not uncommonly results in the dates allocated by the UDT being unsuitable to both parties. However requests to the UDT to have the dates changed are routinely refused, even where the requests are made by consent and in a timely matter following receipt of the notice of listing. Similarly, requests for variations in directions to accommodate the particular circumstances of a case (eg a longer timetable for the filing of evidence and additional days of hearing where there is anticipated to be a large number of witnesses and/or witness statements) have been summarily rejected by the UDT, even where there is a sound basis for the request and the request is made by consent.
3. The allocation of matters to Fair Work Australia members shortly before the scheduled hearing, in circumstances where the member is not available for some or all of the hearing dates is obviously problematic. This has led to revised notices of listing being issued at short notice by members, in some circumstances only days before the hearing, without prior notice or consultation with the parties. In some cases, the revised dates are unsuitable to both parties, requiring further amendments to listings.
4. There are delays in dealing with interlocutory matters, including for example in relation to the issue of orders for production of documents or requests for matters to be heard together, until a matter has been referred to a member (often only a week or two prior to the listed hearing dates). This creates considerable inconvenience and uncertainty for parties who need to have these matters resolved prior to the filing and service of evidence or well in advance of the hearing.

These issues often result in protracting the resolution of matters and additional legal costs to parties which could otherwise be avoided.

The Committee respectfully suggests that these issues could be remedied by Fair Work Australia consulting and communicating with parties prior to the listing of matters for hearing. Ideally parties could provide the Tribunal with consent directions and mutually available hearing dates, within parameters set by the Tribunal if necessary.

The Committee would be very happy to address any queries or to discuss any of the matters set out in this letter. The Law Society contact for this purpose is Ms Gabrielle Lea, Policy Lawyer, Employment Law Committee ((02) 9926 0375 or gabrielle.lea@lawsociety.com.au).

Yours sincerely



Justin Dowd
President