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Our Ref: JC:ssh:1291907

4 May

The Hon. John Hatzistergos MLC
Attorney General
Level 36, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

By Facsimile: 9230 2139

Dear

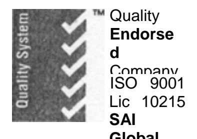
<u>RE: Industrial Relations Amendment (Jurisdiction</u> <u>of the</u> ***<u>Industrial Relations Commission) Bill 2009</u>***

I write to you, both in my capacity as President of the Law Society of New South Wales and Chair of the Society's Employment Law Committee, in relation to the above mentioned Bill currently before Parliament seeking to confer on the Industrial Relations Commission in court session the criminal and civil jurisdictions that are currently

I write this letter to you as a follow up to a meeting that I and a senior member of the Society's said Committee, Peter Punch, had with Mr Andrew Wilson from your Office and Ms Pia Brunner from the Office of the Minister for Finance Mr Tripodi, **on Thursday 30 April last.**

In that meeting Peter and I expressed to Andrew and Pia our serious concerns about a number of aspects of the Bill and what the Society believes will be the adverse consequences for cheap, quick and effective justice if it is enacted in its current form.

I summarise below in this letter the relevant matters that we raised at our recent meeting concerning the Bill and ask that the Government give them very serious consideration. Before detailing those matters I do wish to emphasise on behalf of the Society that it strongly supports appropriate initiatives that would ensure that the State's judicial resources in the industrial relations system are fully utilised. It is an undeniable fact that the revolutionary shift in workplace relations law to the Federal jurisdiction in recent years is not going to be reversed and thus it is important that the time and skills of judges and commissioners in New South Wales are fully applied for the benefit of the citizens of this State and the administration of justice.



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Having said that, I have to say that the Bill is one that the Society does not support in its current form, and our preference is that it be deferred while other alternatives are considered to take up the currently available time of State industrial judges and commissioners.

In summary our concerns **are as** follows.

1. We are concerned about the process involved with this Bill. There was no notice to or consultation with the Society about this major initiative before the Bill was introduced into the Parliament. While we accept that the Government is under no obligation to consult the Society we respectfully suggest that prior consultation with the profession would have allowed the Government to be appraised of some of the adverse or unintended consequences of the Bill's provisions if enacted without amendment. The Society's Employment Law Committee is comprised of a number of specialist and very experienced practitioners familiar with all the State's industrial relations jurisdictions, all of whom are in a position to assist the Government with determining whether **the Bill's initiatives are appropriate or need amendment before enactment.**

2. The Society has long supported the office of Chief Industrial Magistrate in this State - for over a century (and particularly since the time that Mr George Miller took up the office in 1987) it has been a specialist court that has provided the public and the profession with quality judicial service in this area of the law at reasonable speed and at much less cost than would be experienced through the use of the superior courts. The Society strongly opposed proposals to abolish the office when the then Fahey Government was proposing the then Industrial Relations Bill 1991, and lobbied strongly for its retention when the matter was under consideration prior to the enactment of the current Industrial Relations Act 1996. The office has continued to function very effectively since the appointment of the current incumbent, Mr **Greg Hart** (**previously a specialist industrial law solicitor). It is to be also** remembered that the Court exercises a plethora of jurisdictions under various **statutes**, **including Federal law, and the effect of the Bill would be to eradicate** this resource completely.

3. On the latter point relating to the current Court's Federal jurisdiction, there may be significant implications arising from the fact that pursuant to the Workplace Relations Act 1996 (Cth) the Chief Industrial Magistrates Court is a court of competent jurisdiction for pursuing breaches of Federal statutes **and instruments that regulate** work. That is, **a specialist**, **efficient and** inexpensive court will have been lost. This is particularly significant given the major changes federally whereby many previous State Awards have become NAPSAs (Notional Agreement Preserved State Award) since 27 March 2006. Although one could go to the Federal Court in these matters, the Chief **Industrial Magistrates** Court **was particularly well suited in hearing such cases in circumstances where federal and state employment laws intersected in a** very direct way.

4. A further effect of the Bill if enacted is that the small claims jurisdiction of the court (that allowed claims to be processed expeditiously and without legal representation) would now have to be exercised by a Judge of the Commission in Court Session, which does not seem to the Society to be an appropriate allocation of Judges' time.

5. The point is **also made** that the current incumbent of the office of Chief **Industrial Magistrate is a specialist industrial** lawyer who **it would appear from this initiative will be assigned to the general** bench of **Magistrates, thus resulting in** his special skill **and experience being lost to the public.**

6. **But possibly the most serious difficulty that the Bill possesses is the eradication of the current arrangement whereby the Chief Industrial Magistrate**'s **jurisdiction over prosecutions under the Occupational Health and**
Safety Act 2000 (**NSW) is limited to the imposition of a $55,000.00 fine. If the Bill is enacted in its current form then all such prosecutions would have to be brought before the Commission in Court Session. The main**

   (i) In proceedings in such matters before the Court Session, **the maximum fine is** $**550,000.00 for a first offence ($825,000 for subsequent offences), so the great risk** (**and some would certainty**) **is that less serious matters previously prosecuted before the Magistrate within his $55,000 jurisdictional limit (e.g. hand injury in an unguarded machine) will suddenly be amenable to the maximum fine level available in the Court Session**. The Court **Session would not be able to take into account the previous regime if it was**

   (ii) Prosecutions before the Magistrate have had another significant advantage for the public (**particularly employers**) - **the costs incurred in a prosecution were quite limited (except in long contested trials**), **in that most prosecutions resulted in guilty pleas presented by solicitors and the costs awarded to the prosecution against the Defendant who pleaded guilty were relatively small (i.e. in a routine plea of guilty the prosecution's costs would be in the range of $3**,**000 to** $**4,000**). **In matters in the Court costs are awarded on a party/ party basis. By way of simple example, a routine** "**hand in an unguarded machine**" **case before the Magistrate might attract a fine of $15**,**000 for a first offence plus an order for costs of $3,000**, **plus the Defendant's own costs probably using a solicitor advocate**; **the same case before the Court Session would carry a huge risk of a much larger fine**, **costs to the prosecution of at least $15,000 on a party/party basis**, **plus the Defendant's own costs of engaging**

   (iii) Yet another advantage of the Magistrate's **court in these matters is expedition - the processes before the Magistrate facilitates speedy hearings**, **including short plea presentations** (**half an hour or often less) and even ex tempore decisions. The Magistrate has more similarities to a** "**traffic court**" **than a superior court**, **for obvious reasons. Those processes are understandably not a characteristic of**

   (iv) It is appreciated that currently the prosecuting authority is filing many matters before the Magistrate, **but that policy could change at any time, so the problems we have identified do need in our view to**

7. **It is suggested that if the Government does wish to pursue this initiative then it must give consideration to establishing** "**classes**" **of offences in OH&S prosecutions**, **so that the penalty and costs regime before the Magistrate can still be maintained in substance.**

However, the Society's view is that rather than the Government pursuing this Bill at this time it be deferred for at least three months, for the following

(i) Some recent retirements, plus practical measures taken by the Government already in redeploying some of the judicial members to other full or part time roles, has reduced the problem of under utilised judicial members, at least in the short term;

(ii) The under utilisation of Commissioners could be reduced in the short term by appointing those that are legally qualified to acting judicial positions (e.g. industrial magistrates);

(iii) The final shape of the Federal workplace relations system, and the probably shape of the OH&S Harmonisation project will become clearer in this time, allowing further consideration of the Bill in that

(iv) The Society will be submitting to the Government in a week or so a set of suggestions, which I have already partly foreshadowed to you on an informal basis, for the transfer of various disparate State "employment related" jurisdictions to a court/tribunal including the industrial judges and commissioners (e.g. all employment law matters now brought in the District Court, the jurisdictions of the Government and Related Employees Appeal Tribunal and the Transport Accident Boards, and possibly the jurisdiction of the Equal Opportunity Tribunal in relation to employment matters).

Myself and other members of the Society are available to discuss this correspondence with you and/or your officers on short notice.

Yours sincerely

Joseph Catanzariti
President

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