IRSQ
Industrial Relations Society of Queensland

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President's Welcome

Congratulations on making it through another year! It has been a big one for the Society and our members. The Christmas break will be warmly welcomed by many.

Since the last edition of the Advocate the Society's events have continued with the second instalment of the 2019 Education series, this time dealing with written advocacy. Written advocacy is an essential skill for any industrial practitioner and I hope the Society will continue to provide development opportunities for our members in this area. The Society is immensely grateful to our speakers, Leanne Dearlove (Colin Biggers & Paisley), Paloma Cole (Maurice Blackburn) and Stephen Mackie of Counsel for their time in relation to this event.

Women in IR has continued its place in the Society's calendar as one of our most important events. This year, Minister Grace Grace, former Commissioner Glenys Fisher and Ms Louise Ferris (McCullough Robertson) gave up their time to speak to us about positive social change through IR. As I discussed in my opening remarks, Australia's history is rich with examples of positive social change through industrial relations and our three speakers at the event are prime examples of Queensland Women in IR contributing to that legacy.

As a result of the Women in IR event, and thanks to your generosity, the Society will be donating $1000.00 to the National Breast Cancer Foundation, to support the Foundation in its important work.

It's the time to reflect on the year (and decade) that has been and to turn our minds to what lies ahead. In 2020 I hope that the Society will continue to grow and maintain its position as one of Australia's peak industrial relations bodies. The Society will continue to engage in real-world development opportunities for members and, I hope, to continue to support our profession more generally.

I hope to see you all early in the New Year at the Society's Annual Breakfast to be held on Tuesday 18 February at the Hilton Hotel. It's shaping up to be another great event! To all my colleagues across the profession, have a very merry and safe festive season.

Nate Burke
President

"Costs Applications – A Timely Warning…" ?

By IRIQ Law

A recent decision of the Federal Circuit Court of Australia has confirmed the dangers inherent in employers bringing costs applications against employees alleging breaches of the general protections provisions of the *Fair Work Act 2009* (Cth) ('the Act'), even in circumstances where the employee's original general protections application has proved unsuccessful.

The 27 September 2019 decision of his Honour Judge Nicholas Manousaridis found that the employer, digital employment platform, Freelancer International, unreasonably pursued former Human Resources Manager Matthew O'Kane for costs in order to punish him for bringing his adverse action application under s340 of the Act.

In determining the original application, Judge Manousaridis made no order as to costs, but reserved to the parties liberty to apply for costs orders.

Subsequently, both Freelancer and its Chief Executive, Robert Matthew Barrie, sought costs against Mr O'Kane. Mr O'Kane filed a response in which he sought an order that the respondents (at first instance) pay his costs of the application for costs. This was on the basis that the seeking of costs by Freelancer and Mr Barrie constituted vexatious and unreasonable conduct by them.

The Court focused on s570 of the Act, specifically s570(2)(b), which provides that the Court may order a party to pay the other party's costs if "the party's unreasonable act or omission caused the other party to incur the costs".

His Honour said:

> *"it will be seen that the power to award the costs provided for by s.570(2) arises only if all of the following events are present:*
>
> *a) First, the party seeking an order for costs has incurred costs in the proceeding. This ordinarily requires the identification of some act or omission by that party that has led it to incur legal costs in the proceeding. It would be useful to describe these acts or omissions as "costs generating activities".*
>
> *b) Second, the costs generating activities were caused by the other party's act or omission.*
>
> c) *Third, the other party's act or omission that caused the costs generating activities was unreasonable."*

After considering detailed submissions and evidence, his Honour found Freelancer's claims for costs were unsupportable. Ultimately, Mr Barrie's

claims for costs were withdrawn by him after it became apparent that he had never actually been issued with a fee note in the matter.

Mr O'Kane's claims for costs were on the basis that Freelancer's/Mr Barrie's application for costs was made without reasonable cause or vexatiously, and that the "application for costs as a whole constituted an unreasonable act".

His Honour found that "Freelancer filed its application in a case for costs to punish Mr O'Kane". Indeed, his Honour commented further by saying, "More particularly, I find that Freelancer commenced this application…to punish Mr O'Kane because, or at least substantially because, he included Mr Barrie as a respondent in the proceeding".

While Counsel for Freelancer, Charles Waterstreet, sought to take some responsibility for its costs application, his Honour ultimately determined that "there is nothing to suggest that the application…was not drawn, filed, and served, in accordance with the instructions of the respondents".

His Honour concluded that Mr O'Kane should be awarded costs in the sum of $17,371.77 and that Freelancer should pay those costs, Mr Barrie having withdrawn his own application for costs early in the matter. The respondents' application in a case for costs was dismissed.

Lessons to be drawn from the case

Parties seeking to bring costs applications in the Fair Work Commission and/or the Fair Work Division of the Federal Circuit Court need to carefully examine the basis for any such application and ensure that it is not motivated by any intention to punish another party (even where the latter party's original application has proved unsuccessful).

The general rule that each party will bear their own costs remains a high threshold to surpass and an inherent danger exists that any costs application not meeting this threshold may see the party bringing the costs application penalised in costs themselves.

***O'Kane v Freelancer International Pty Ltd & Anor (No.3)* [2019] FCCA 2727 (27 September 2019)**

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1. *O'Kane v Freelancer International Pty Ltd & Anor (No.3)* [2019] FCCA 2727 (27 September 2019) at [7].
2. Op.cit. at [48].

The central problem is that, despite all the talk of how much 'we pride ourselves on putting our team first', the need to ensure staff are paid what they are owed apparently just didn't rate highly enough…I'm not saying the system is devoid of intricacies. But there are many other 'complex' dimensions to running a large business. Woolworths, for example, encompasses a thousand supermarkets and about 30 million customer transactions a week. The logistics of procurement, distribution and storage are immense. Imagine what it takes to keep track of use-by dates to comply with food safety regulations...If Woolworths can do that, it's hard to believe, with all the lawyers, accountants and professional advisers at its disposal, it couldn't ensure it complied with industrial relations laws."

Professor Anthony Forsyth, RMIT University

"Lately, we are seeing a disturbing number of large corporates publicly admitting that they have underpaid their staff. Some of these matters go back many years and several comprise millions of dollars owed to workers. This is simply not good enough,"… "I intend to take this issue up with Boards around the country, because frankly that is the level within organisations that should be taking an active leadership role on this issue, and seeking assurance about compliance from executive managers."

Fair Work Ombudsman Sandra Parker

"I do not accept that, merely because "organising' industrial action within the meaning of s 417(1) is different from being 'involved in' employees engaging in industrial action as provided for in s 550(1), the MUA's conduct in the present case involved two different courses of conduct. As the principal reasons disclose, the same facts founded my conclusions the MUA both organised industrial action and was involved in employees engaging in industrial action. In short, the acts which led me to find the MUA organised the industrial action also led me to find that the MUA was involved in employees engaging in the industrial action. It is difficult to conceive of a case in which a finding of 'organising' industrial action would not also necessarily prove being 'involved in' employees engaging in industrial action but for present purposes it is sufficient that the same acts resulted in two sources of liability. There was thus a single course of conduct by which the MUA organised industrial action and was involved in employees engaging in industrial action."

Judge J Jagot, *Fair Work Ombudsman v CFMMEU* [2019] FCA 1942 (21 November 2019)

"Whereas most laws and procedures speak of 'reprisals', or deliberate retaliation, our research identifies a new picture of the scale of adverse impacts experienced by many reporters. Indeed, even when not regarding themselves as having been treated badly, most reporters experience a range of negative consequences which it is the organisation's duty to try and prevent, minimise or manage...Around four in every five whistleblowers (81.6%) experienced at least one type of these informal repercussions, compared with one in two (48.8%) who experienced at least one type of formal repercussion. The fact that 25% of reporters in our total sample were describing the results of reporting in a previous organisation, not their current one (from which they obviously could not have yet been sacked), reinforces the significance of these data."

Clean as a Whistle - a five step guide to better whistleblowing policy in practice in business and government, Griffith University (https://www.whistlingwhiletheywork.edu.au/)

Women in IR Afternoon Tea

On Friday 18 October 2019, the IRSQ Women in Industrial Relations Annual Afternoon Tea was a massive success, following the growing tradition of strong and insightful speeches from leaders in the industrial relations field.

This year focused on, 'exploring the ability of legislation, case law and employer policies to instigate positive social change'.

The Hon Grace Grace MP, Minister for Industrial Relations and Education spoke about the legislative changes that the Queensland Government introduced providing for paid leave and rights to request flexible work arrangements for employees affected by domestic and family violence, and how this led the way for similar provisions in other jurisdictions. The Minister was inspired and incisive in her commentary on the impact of domestic and family violence, and how improvements in entitlements can improve workplace engagement.

Former QIRC Commissioner Glenys Fisher gave candid insights into the role of QIRC and other tribunals in effecting positive change, and the important role the QIRC has played in shaping pay equity for working women in Queensland. Louise Ferris, Director – Human Relations at McCullough Robertson talked about some of the practical and genuine ways the firm has been positively influencing culture, diversity and recruitment that go beyond just having written policies.

All three guest speakers agreed that more needed to be done, and that everyone has a role to play in supporting reform.

The roof terrace of GOMA provided fabulous river and city views, much to the delight of attendees and guests. Over 150 people attended the event, with raffle proceeds on the day totalling $840. A donation of $1,000 will be made to the National Breast Cancer Foundation, funding research for the prevention and cure. Thank you to all who helped make this possible.

A very special thank you and shout out to our two event sponsors: Australian Super and Griffith University.

Changes to who is entitled to vote on an enterprise agreement

By Calum Woods and Lindsay Carroll, NRA Legal

Earlier this year, the Fair Work Commission struck down an enterprise agreement entered into between Kmart, the Shop, Distributive and Allied Employees' Association (SDA), the Australian Workers' Union (AWU), and more than 32,000 employees across Australia.

The agreement, which at the time was criticised by commentators for not allowing employees to nominate their choice of superannuation fund, contained a full suite of non-monetary benefits, such as a $450 upfront payment for existing employees (*pro rata* for part-time and casual), paid natural disaster leave, and 15 minute paid rest breaks–compared to 10 minutes under the *General Retail Industry Award 2010*.

However, all of these factors were largely ancillary compared to what Deputy President Mansini viewed as the greatest impediment to the approval of the agreement: whether Kmart was required to keep the "*roll of voters*" open until the last day that votes were able to be cast.

In aid of this, the Deputy President interpreted the elements of the *Fair Work Act 2009*, dealing with the requirement of an enterprise agreement to be "*genuinely agreed*," as pertaining to all employees who were covered by the agreement at the time when it was "*made*," even if they had only commenced work the day before voting closed.

On appeal of that decision, the Full Bench of the Commission rejected this interpretation, and has now, to some extent, clarified who is entitled to vote to approve an enterprise agreement.

Back-to-basics

The process of bargaining for an enterprise agreement has become extraordinary complex, beset by strict timeframes, compulsory terms, prohibited terms, and rules about who, when and how voting is to occur.

A basic chronology of bargaining for a single-enterprise non-greenfields agreement may look something like:

1. The employer initiates or agrees to bargain with its employees for an enterprise agreement;
2. The employer provides the employees with a 'Notice of employee representational rights' in the approved form;
3. The employer bargains with its employees and their bargaining representatives and prepares a proposed agreement;
4. The employer asks its employees to vote to approve the proposed agreement;
5. The employer provides a copy of the proposed agreement to its employees and explains the effect of any of its terms;
6. The voting opens, and the employees vote to approve the agreement;
7. The proposed agreement is lodged with the Fair Work Commission for approval.

The issue in Kmart's case arose between the time that the employer asked the employees to vote to approve the agreement, and the time when voting closed.

When does the "*roll of voters*" close?

On first instance, it was found that employees who had started work after Kmart had asked the employees to vote for the agreement were also eligible to cast a vote. Kmart, however closed the roll of voters some two days before the end of the voting period. As such, as many as 92 new employees who commenced while the polls were open may have been unable to cast of a vote.

Of particular interest, and a matter which will be returned to, is that all 92 employees were casual and did not work or attend training during the voting period.

The Full Bench, however did not agree with this interpretation. It was instead found that the relevant cohort of employees who may vote to approve an enterprise agreement is assessed at the end of the "*access period*." The "*access period*" is a period of seven clear days after the employer asks its employees to vote to approve the agreement, before voting is allowed to open. Ordinarily during this period, the employer will hold meetings to explain the terms of the proposed agreement and their impact.

In effect, if new employees commence immediately before polls open, they are entitled to vote to approve an enterprise agreement. However, if they started a day later, they must not be counted. This meant that 1,422 employees were erroneously included in the voting cohort–not including the 92 who were unable to cast a vote.

The Full Bench noted that even if all 1,422 employees had voted against the proposed agreement, it would still have been approved by an overwhelming majority, with the actual final votes being 21,191 in favour, 1,919 against and 8,929 abstaining.

Are casual employees entitled to vote to approve an enterprise agreement?

In Kmart's case, two-thirds of its workforce were engaged on a casual basis. In determining the voting cohort, Kmart allowed any casual employees "*on its books*" to cast a vote. The approach requires that any employees who were employed "*at the time*" when the employer requested its employees to vote to approve the agreement are entitled to cast a vote. Until now, this required casual employees to perform work around the time when the request was made–although even this has proved problematic in cases such as new enterprises.

In the decision on first instance, the Deputy President provided commentary on the nature of casual employment, finding that casual employees who worked either during the voting period or the "*access period*" were eligible to cast a vote. As such, the Deputy President considered that Kmart "*cast the net too wide*," however that given the final result, this did not affect the outcome.

The Full Bench cast doubt on that interpretation, however did not go so far as to clarify the correct approach. This was substantially because even if this interpretation was correct, given that none of the 92 employees performed work during the voting period, they should not have been counted in any event.

It seems then, that there is still no clear guidance on when a casual employee needs to perform work to be eligible to cast of vote. It is clear that merely being "*on the books*" will not entitle a casual employee to cast a vote, however the Full Bench did not go so far as to confirm that they must perform work during the "*access period*."

Changes moving forward

This case makes clear that who is eligible to cast a vote to approve an enterprise agreement is a point-in-time assessment, and does not change over the life of the voting period. Perhaps most interesting of all, the Full Bench's commentary around either interpretation not changing the end result departs from what has been up until now, a matter of strict interpretation of the requirements of the *Fair Work Act 2009*.

And on the issue of superannuation? The Full Bench affirmed that in the retail industry at least, employees should (most of the time) have a choice of fund.

5 minutes with Glenys Fisher

Glenys commenced work in the State Department of Labour Relations, initially as a graduate Clerk and then as a Research Assistant.

Glenys was then appointed as an Industrial Officer with the Queensland Professional Officers' Association in I 981. She later became a Research Officer and was appointed as the Chief Industrial Officer in 1988 where she advocated major work value cases on behalf of such membership groups as Senior Medical staff employed in Public Hospitals and the public service and Dietitian/Nutritionists.

In February 1990, Glenys was the first woman and the youngest person to be appointed as a Commissioner with the QIRC. During her tenure, Glenys undertook two pay equity investigations at the direction of the State Government and presided over three pay equity cases. Because of this work, she was invited to appear before the Inquiry being conducted by the House of Representatives Standing Committee on Employment and Workplace Relations into Pay Equity.

Glenys has been a member of the Industrial Relations Society for more than 30 years, She has served on the Committee and has been its Patron. She was honoured to be awarded Life Membership by the Society in 2016.

How did you decide on your career path?

When I finished year 12, I didn't have any specific career in mind. I had the opportunity to undertake a Bachelor of Arts degree at UQ and intended to explore subjects of interest to see where I ended up. During my degree I enjoyed studying a number of industrial relations related subjects across various departments.

My first "real" job after finishing Uni was with the State Department of Labour Relations. During my employment there, I started studying the Graduate Diploma in Industrial Relations and was given an opportunity in the Research section of the Department. After 12 months, I applied, and was selected, for an Industrial Relations Officer position with the Qld Professional Officers' Association. It was more a case of one thing leading to another rather than making any specific career decisions.

When you started in your role, what did you set out to achieve and why?

When I was appointed as an Industrial Commissioner, very few women were employed in industrial relations let alone in senior positions. At my swearing in ceremony I said I hoped I could be a role model for women in or aspiring to enter industrial relations. While I don't claim credit for the number of women now practising in industrial relations, it is very satisfying to see so many women working at all levels in the field. As the first woman appointed to the QIRC, it is also pleasing to see that the Tribunal currently has equal numbers of men and women Members. So much has changed in 30 years.

Who do you admire and why?

I admire industrial staff, whether of unions, employer organisations, councils or government departments who have committed their careers to industrial relations. I have found that career industrial relations practitioners are dedicated to their organisations and members (in the case of industrial organisations) and to developing relationships with their counterparts. They are engaged year after year on challenging work, often involving regular conflict and with little personal reward except for knowing they are helping to make a difference. Such practitioners are worth acknowledging.

I am also a fan of New Zealand Prime Minister, Jacinda Ardern, for saying that addressing the gender pay gap is a priority because it creates limitations for them and their families.

Who are the people who have influenced your career decisions?

Firstly, my Mother, who had seen an advertisement for the Graduate Diploma in Industrial Relations at the then Brisbane College of Industrial Relations and encouraged me to apply. Secondly, and perversely, is a senior public servant, with whom I worked in the Department of Labour Relations. That person regularly rejected my written work (and little from my [male] colleagues) despite it having been signed off by my section head and being consistent with views previously expressed. When the offer from the POA was made, I decided I couldn't remain in the Department even though I liked the work and my colleagues. Had I not made the move to the Union, I doubt I would have been appointed to the Industrial Commission.

What did you most enjoy about your role as Industrial Commissioner with the QIRC?

I was incredibly fortunate to travel around Queensland to visit a vast array of workplaces. This gave me experiences I never imagined having. For example, going underground at Mt Isa Mines, inspecting just about every prison in the State, "driving" a train, seeing child care centres, the operations of local councils, community services organisations and hospitals to name just a few. I also saw many beautiful parts of the State: Thursday Island, the islands of the Coast of Queensland as well as regional and remote centres. Best of all was meeting diverse employees and employers, and their representatives, who were, for the most part, focused on working to deliver fair and just outcomes.

I am also grateful for the opportunity to conduct pay equity inquiries which have delivered enduring legislative change in this State and positive outcomes for some predominantly female occupations with the potential to do so much more.

What do you consider to be the most important issues in industrial relations today?

Stagnant wages and increasing income inequality must be addressed by governments and employers as a matter of priority. Institutions such as Industrial Commissions and the Reserve Bank can only provide part of the solution.

The future of enterprise bargaining requires examination. Too many sectors and workplaces seem to have exhausted their capacity to bargain.

The changing nature of work is and will continue to challenge established laws and traditional industrial relations practices. An example is the gig economy. In addition, we are already witnessing the demand from new generations of workers for increasing flexibility in working hours and where they perform work.

An emerging issue is the impact of artificial intelligence. The care sectors and transport, with the rapid development of driverless vehicles spring immediately to mind. I wonder how much industrial relations planning is being done currently to cater for these significant changes to the way in which work will be performed and the loss of traditional jobs.

What's next for you?

I have recently joined the Board of a community services organisation, Communify, which delivers services including child care, homelessness and mental health support as well as NDIS and aged care packages. I also am joint coordinator of one of their services, the Free Range Library, which collects and distributes books to organisations supporting homeless and other disadvantaged people.

My husband, Tom, and I are enjoying travelling. We travelled to Antarctica and Easter Island earlier this year and are heading to Japan in November. Next year we are doing the transatlantic crossing. We have plans to visit many more amazing destinations.

I enjoy all forms of performing arts and regularly attend concerts and plays with friends. Catching up with former colleagues from across the IR spectrum provides opportunities to reminisce. Our legends grow greater with every gathering.

In between all of these activities, I try to exercise, joining the local PCYC, where I have met other active and engaged locals. My Mother, at 94, lives alone in the family house and, while still fiercely independent, requires support.

My resignation from the Commission has certainly delivered a full, entertaining and engaged life.

SOCIAL MEDIA

The Society is on Social Media!
You can like, post and **follow us on**

AGM & End of Year Celebrations


2020
EVENTS
IRSQ
THE BEST IS YET TO COME..
MARK YOUR DIARY FOR THIS IMPORTANT PROGRAM
IRSQ ANNUAL BREAKFAST
TUESDAY 18 FEBRUARY 2020
Hilton Brisbane
Save the Date for the first of IRSQ's many events for 2020!
Join us for breakfast with our guest speaker
The Honourable Justice Glenn Martin AM.
FURTHER DETAILS WILL BE PROVIDED TO MEMBERS SOON!
NOT AN IRSQ MEMBER?
Just email irsq@irsq.asn.au and ask us to
JOIN ME UP!

The Society welcomes:

If you have moved, been promoted or taken on a new challenge, email the Secretariat at irsq@irsq.asn.au for inclusion in the next edition!

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Feedback and contributions

Feedback, suggestions and improvements, including material for upcoming editions can be emailed to the Editor, Vaishi Rajanayagam at vraja@qieu.asn.au.

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