

Welcome



As you are all aware the Society hosts a number of educational events each year as well as networking get-togethers. What a great start to the work day for those of us who attended the IRSQ Annual Breakfast event for IR and HR practitioners on February 17th at the Pullman. Attendees represented law firms, unions, both the Fair Work and Queensland Industrial Relations Commission, academics and employers/employee practitioners.

Of course it is fair to say that the event was both popular and successful due to the skill of our speaker, the Honourable Justice Glenn Martin. We laughed whilst we pondered the cumulative effect of legislative amendments to the Industrial Relations Act, in terms of weight and interpretation! It is always a pleasure to have our Patron at an event and I am looking forward to our Patron's Lunch to be held later this year.

The Education events that the Society present provide an opportunity for all practitioners, no matter which side of the Tribunal table they sit, to experience a range of viewpoints from experts in the field. I would encourage you to make contact with us, our details are on the IRSQ website, if you have an area of interest you would like us to consider for future events.

It is only March and yet so much activity is occurring, we are still waiting for the release of the review into the Industrial Relations Act, there is a review of the WorkCover Medical Certificate being conducted by the Workers' Compensation Regulator, the Public Service Commission continues to review Directives under their auspice and I encourage you to read the interesting decision recently published in the Fair Work jurisdiction relating to Casuals participation in ballots.

I hope to see you again at the Twilight Event.

Jo McConnell
IRSQ President

Events

2016 IRSQ Annual Breakfast: Observations of the Year Ahead



The IRSQ's events for 2016 kicked off to a wonderful start with over 130 professionals from the IR, HR & Legal sectors gathering at the Pullman King George Square Hotel on 17 February 2016 for the Annual Breakfast.

Enticed, no doubt, by the well-respected guest speaker, Justice Glenn Martin, President of the Industrial Court of Queensland and Queensland Industrial Relations Commission and the Society's new patron, attendees were keen to hear His Honour's observations about the year which lies ahead for both the State and Federal IR landscapes. And, they were not disappointed!

Justice Martin commenced his address with a brief journey through the evolution of the IR jurisdictions and his observations of the exponential growth of the regulatory framework (and the alarming rate of "page-inflation"!) in the sector. In his characteristically insightful and witty style, Justice Martin also addressed the outcomes and likely consequences of the Productivity Commission Review and the report of the Royal Commission into Trade Unions, provided his thoughts on impending policy directions in the upcoming Federal election, entertained us with suggestions for navigating the media attention and the sensational jargon likely to



plague the sector in an election year, updated us on developments in the State IR jurisdiction and the QIRC and left practitioners with useful tips for appearing before Industrial Commissions and Tribunals.

However, the highlight of Justice Martin's speech was his biblically-themed parody on how a policy comes to life, which left the audience both rolling in laughter and reflecting on its ironic truth. So for those of you who missed it (and the many of you who requested a copy), here is an extract:



Finally, I have often wondered how some management plans come to be policy and I was recently alerted to the biblical foundation for this process.

Deputy President O'Connor, who is a great bible reader found it in the seldom read Book of Overtime. It reads:

In the Beginning was the Plan.

And then came the Assumptions.

And the Assumptions were without form.

And the Plan was completely without substance, and the darkness was upon the face of the workers, and they spoke among themselves, saying:

"It is a crock of shite and it stinketh."

And the workers went unto the Supervisors and sayeth:

"It is a pile of dung and none may abide the odour thereof."

And the Supervisors went unto their Managers and sayeth unto them:

"It is a container of excrement and it is very strong, such that none may abide by it."

And the Managers went unto their Directors and sayeth:

"It is a vessel of fertiliser, and none may abide its strength."

And the Directors spoke among themselves, saying one to another:

"It contains that which aids plant growth, and it is very strong."

And the Directors went unto the CEO and sayeth unto him:

"It promotes growth and is very powerful."

And the CEO went unto the Chairman and sayeth unto him:

"This new plan will actively promote the growth and efficiency of this Organisation, and in these areas in particular."

And the Chairman looked upon the Plan, and saw that it was good, and the Plan became Policy.

Special thanks to the IRSQ organising committee, Cameron Armstrong from Essential Experiences, and the event sponsor Slater & Gordon, for their support of this successful event.

**By Vaishi Raja
Employee Representative
IRSQ Management Committee**



Five Minutes With...

Senator Michaelia Cash

Minister for Employment, Minister for Women Minister Assisting the Prime Minister for the Public Service, Senator for Western Australia



Michaelia Cash was sworn in as the Minister for Women, Minister for Employment, and also the Minister Assisting the Prime Minister for the Public Service on 21 September 2015. She was the Assistant Minister for Immigration & Border Protection and Minister Assisting the Prime Minister for Women up until September

2015. Michaelia was first elected to the Senate for Western Australia in 2007.

How did you decide on your desired career path?

I was a lawyer at Freehills for 9 years. I love being presented with a problem and being challenged with a potential solution. In relation to my role as a Senator – I am a passionate Western Australian and to have the opportunity to represent my State in the Senate is an honour. My parents have also taught me that you can either talk about change or be part of the change process.

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

Elements of the Fair Work system are not conducive to businesses prospering. We also need to ensure that, where there are disincentives to employment in the system, we remove them.

As Minister for Employment, I am excited by the opportunity to assist employers and entrepreneurs to deliver economic growth and give businesses, especially small businesses the confidence to employ more people.

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

Elements of the Fair Work system that are not conducive to businesses prospering need to be changed. As a policy maker I am always cognisant of the fact that employers create jobs, governments don't. Government sets the framework in which business needs to operate and we must ensure that this framework is supportive of growth. We always recognise that you need a strong safety net for employees. At the end of the day, if you don't have well off employers, you don't have well off employees. Let's make the system work for both.

I am also committed to restoring law and order to the building and construction industry by reintroducing the Australian Building and Construction Commission, an effective regulator that enforces laws with meaningful penalties.

What do you most enjoy about your role as the Federal Minister for Employment and Minister for Women?

In my role as Federal Minister for Women I have the opportunity to drive policy and develop a clear path of practical measures to improve the safety of women and children at high risk of experiencing family and domestic violence. I firmly believe that women and their children should feel safe at home, safe online and safe on the streets and this is at the forefront of my mind at all times.

In my capacity as Minister for Employment I am committed to implementing policies to boost workforce participation and provide the innovation and confidence that the 21st century workforce requires.

Does it Pay to be a Woman?

Monica Cullinan and Zara Ward of Working Women Queensland



Monica Cullinan

Zara Ward

Monica Cullinan is an Industrial Officer with Working Women Queensland providing industrial advice, casework assistance and representation to vulnerable Queensland women on workplace matters. Zara Ward is a former Industrial Officer with Working Women Queensland and recent law graduate with extensive experience in Industrial Relations and employment law.

The workplace is a diverse, buoyant and challenging environment that fosters productivity for the betterment of society. Given its diversity, legislation has been drafted to support pay equity and equal opportunity to employees. These concepts are not new. They highlight our industrial relations history and the issues many have faced to achieve equality in the workplace. When faced with the question of “does it pay to be a woman?”, the average person would be expected to answer in the positive. On paper, the modern day woman appears to have it all. We are able to vote and have legislative protections to promote and secure equality. However, in reality, many modern working women continue to face inconceivable challenges in the workplace, especially in regards to pay equity. Statistics and reports are evidence that even today, women are still considered to be expendable. This article will explore the idea that pay equity is still a serious issue many modern women continue to face in the workplace.

Power Imbalances

In theory, with sufficient legislative protections, women should not be facing significant differences in earning capabilities, especially when compared to men. However, unfortunately, gender stereotypes, societal expectations and limited job opportunities prevent women from obtaining positions of influence. Women are often undervalued in the workplace, thus creating an obvious power imbalance, especially in our ability to negotiate. Traditionally, a higher level of education, such as a degree, was attained to allow a person to negotiate their worth in the workplace. However, it appears the level of education is not

enough to secure a high powered position. Further, in 2014, the Grattan Institute reported that a six per cent rise in female participation would increase the size of the Australian economy by around \$25 billion a year. These two agencies have highlighted the issue that women are not afforded the same opportunities in the workplace, and thus do not have the same economic freedom as men.

A 2015 report by the Workplace Gender Equality Agency (WGEA) revealed that 82.7% of CEOs, were held by men. The report also found that 34.2% of women aged between 18 - 24 were enrolled in a bachelor degree or higher, compared to 25% of men. The WGEA states that around 58% of Australia’s university graduates are women. However, only 67% of working aged women are in paid work, compared to 78% of men. The WGEA declared that Australia is failing to capture the substantial economic contribution tertiary educated women offer.

Gender Pay Gap

The power imbalance within the workplace significantly affects the negotiating powers of women. This directly impacts on their earning capacity and contributes to the gender pay gap. In 2015, it was determined that there is a full-time average earning difference of \$248.20 per week between female and male wages.ⁱ This represents a staggering 17.9% full-time gender pay gap.ⁱⁱ It is hard to believe that in 2015, with such strong legislative protections in place, that there is such a considerable pay gap between female and male employees. Not only is there a significant pay gap, there are also other pay inequity ramifications faced by women in the workplace.

Consequences

It has been highlighted that the significant power imbalance between men and women in the workplace has a direct impact on a woman’s pay. Furthermore, there are flow-on consequences that seriously impact on a woman’s future financial security. A recent report by the WGEAⁱⁱⁱ found that the workplace power imbalance even transcends to the types of employment women hold. The report stated

ⁱhttps://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf
ⁱⁱhttps://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf

ⁱⁱⁱhttps://www.wgea.gov.au/sites/.../2014-15-WGEA_SCORECARD.pdf titled Australia’s gender equality scorecard

that in Australia, women represent approximately 69% of all part-time employees^{iv}. The Fair Work Ombudsman provides that a part-time employee works, on average, less than 38 hours per week on a regular basis.^v They are entitled to the same benefits as a full-time employee; however, they accrue on a pro-rata basis.^{vi} Given that a large proportion of women are in part-time work, they are often put in a predicament whereby their superannuation, accrual of entitlements and long term security are at risk. These are direct financial impacts of the pay equity issues women continue to face in the workplace. It should be noted that these challenges are not faced by all women. However, it highlights that there are serious consequences of not addressing the pay equity issues women face in the workplace.

Conclusion

This article was written to ask one simple question, does it pay to be a woman? Despite legislative protection, it appears that a woman's worth and a woman's work continue to be of little importance. One only needs to look at the power imbalance in our inability to negotiate, to understand the significant impact this creates on our pay. The fact that a majority of women are in part time work not only decreases our current earnings, it also effects long term financial security. It is therefore not surprising, that a study by NATSEM noted by WGEA suggests that 70% of the gender pay gap is "simply due to being female".^{vii} This highlights that we have a long way to go to secure pay equity for women.

So we put this to you

"Women are responsible for two-thirds of the work done worldwide, yet earn only 10 percent of the total income and own 1 percent of the property...So are we equals? Until the answer is yes, we must never stop asking." **Daniel Craig.**

Upcoming Events

Twilight Seminar

Compliance With Workplace Rights and Entitlements

Minimum employment terms and conditions and entitlements have been clearly spelt out under legislation and industrial instruments for over 7 years. Yet the problem of correct pay, classification, and the application of workplace and migration laws still creates headaches for business, recruitment agencies, labour-hire firms and employers.

Our key note speaker, Giri Silvaraman, Maurice Blackburn will be speaking on what could be Australia's most recent, significant employment scandal concerning the alleged exploitation of thousands of workers.

Dean Bloom, Assistant Director – Campaigns, Fair Work Ombudsman and other representatives will then lead an interactive ethical discussion addressing all sides of the issue. The emphasis will be on providing participants with case studies, the legislative framework and practical tools and information for ensuring compliance and minimising risk of disputes or penalties.

Date: Tuesday, 22 March

Time: From 4.30 pm for a 4.45 pm start

Venue: Hamilton Lounge
Brisbane City Hall
King George Square

Cost: \$75 member
\$85 non-member

Register online [here](#)

^{iv}https://www.wgea.gov.au/sites/default/files/Stats_at_a_Glance.pdf

^v<https://www.fairwork.gov.au/employee-entitlements/types-of-employees/casual-part-time-and-full-time/part-time-employees>

^{vi}<https://www.fairwork.gov.au/employee-entitlements/types-of-employees/casual-part-time-and-full-time/part-time-employees>

^{vii}https://www.wgea.gov.au/.../behind_the_gender_pay_gap_branded.pdf

Trade Union Royal Commission Findings – Care Needed to Ensure Focussed Debate

Wilhelm Harnisch, Chief Executive Officer of Master Builders Australia



Wilhelm Harnisch is the Chief Executive of Master Builders Australia, which is Australia's leading industry association representing the \$200 billion building and construction industry that directly employs over one million people. Wilhelm has been with Master Builders for 25 years.

He has extensive building industry experience, particularly in the area of economics, in both the public and private sectors.

Master Builders has intensively followed the debate and commentary following the release of Final Report of the Trade Union Royal Commission into Union Governance and Corruption. Much of this has centred on issues of corruption and illegal activity, with some even calling for the creation of a national anti-corruption body, such as a Federal ICAC.

While the focus on stamping out corruption is welcomed, Master Builders believes it risks misunderstanding the central thesis of the Royal Commission's findings and recommendations; that tougher measures must be enacted to stop the conduct and behaviours that allow corrupt and illegal activity to flourish in the first place.

The proposals contained in the Royal Commission's recommendations directly back the need for the re-establishment of the Australian Building and Construction Commission (ABCC) and the creation of a new Registered Organisations Commission (ROC). It is, therefore, important to understand the

intention of these two measures, the distinctions between them, and where the report findings fit in.

The re-establishment of the ABCC is an element which specific to the building and construction sector. The ABCC will be a 'tough cop on the beat' that aims to stamp out the ingrained unlawful behaviours, change industry culture, improve safety, and ensure the rule of law is observed on building and construction sites. The Myer Emporium and Little Creatures Brewery disputes are two well-known examples where this conduct has been on highly publicised display.

In broad terms, the proposed Registered Organisations Commission is intended to prevent the types of conduct witnessed in the widely publicised events involving the Health Services Union, such as the use of union funds for the personal benefit of union officials. It requires registered organisations to be more transparent and accountable, by requiring them to adopt governance standards akin to those applicable to companies and their directors.

However the ABCC and ROC are not, in amongst themselves, intended to be the silver bullet answer to stamping out corruption and illegal activity. Nor were they ever intended to be. Rather, they are measures that will address the unlawful behaviour and practices that allow corruption and illegal activity to flourish. Equally importantly, the ABCC and ROC are measures that will deliver significant benefits to the community, economy and members of registered organisations.

Master Builders has long argued for a return of the ABCC. The case for the restoration of the ABCC is overwhelming. The building and construction sector has been hindered by elements causing unlawful behaviour to become ingrained and institutionalised. Illegal picketing and blockades, obstruction of third parties, illegal entry to worksites, intimidation and assaults on employer representatives, the interruption of time critical processes like concrete pours, and illegal pressure on employers to pay union dues or employ union dictated site delegates or OHS representatives, are just some examples.





It is easy to see how these behaviours have become entrenched in the building and construction sector. Work undertaken is project based and building contractors must constantly tender for new work, an important part of which is ensuring a project is delivered on budget and on time. If a project

is delayed, or the costs blow out, the contractor will suffer financially, jeopardise their ability to get future work, or both. A construction project delivered on time and on budget are crucial to the success of all building contractors and, importantly, the client and the community.

This is not lost on building unions in the sector. Their role as a registered organisation gives them access to workplace laws which, unfortunately, can be used as tools to delay, or threaten to delay, the work on building sites. As such, these tools are regularly misused and exploited to extract favourable outcomes.

As a result, companies that are 'in favour' with unions are left in relative peace to deliver a project on time and on budget, and stand a better chance of getting future work. Those who fall out of favour, or resist pressure to adopt union demands, suffer the consequences.

The Heydon Royal Commission was the third of its type that focussed on the construction sector, in addition to numerous other inquiries and reports. An entire volume and a half of the Final Report (totalling over 1100 pages) was devoted to the sector and six of the final recommendations for law reform were specific to building and construction industry participants.

The Royal Commission report contained many case studies highlighting how unlawful behaviour allow corrupt behaviour to flourish. Examples include¹:

- Contractors being told they cannot get work in the ACT without having a union approved EBA;
- The use of WHS right of entry laws to enter worksites to pursue an industrial outcome;

- The threat of industrial action to force employers to pay union memberships for workers;
- Pressure to adopt enterprise agreements requiring business to make donations to 'charitable bodies' that funnelled money back to unions; and
- Allegations of bricklayers being told that the rate charged to lay a block was below that and needed to be the same as the rate set in the EBA, otherwise they wouldn't find work in the area ever again.

A superficial view is that the above examples are conduct that is unlawful and contrary to existing laws. In reality, Master Builders notes the bulk of this unlawful behaviour goes undetected. Contractors, in an effort to restore or maintain favour, succumb to union demands ranging from the use of an approved EBA to the payment of moneys to individuals.



This is where Master Builders believes the ABCC and ROC are important. If enacted, they will impose stricter obligations that will arrest the unlawful practices in the first place. It removes the incentive for corruption.

Master Builders contends that the ABCC will enforce a code that, amongst other things, prevents contractors from being pressured or coerced to make contributions to particular funds, use a particular EBA, make over-award payments or force workers to join the union. It requires contractors to notify the regulators when threats of industrial action are made, comply with Competition laws, and not pressure a subcontractor to adopt particular workplace arrangements.

Legislation enacting the ABCC will also increase the penalties for unlawful industrial action, ensuring that unions have serious financial consequences if they take a wildcat strike.

¹ Royal Commission into Trade Union Governance and Corruption, Final Report Volume 3, Part 6

Just as importantly, a re-established ABCC will bring significant benefits to the community and government. The types of unlawful conduct noted above, combined with restrictive and costly employment practices, cause construction costs to be up to 30 percent higher than they ordinarily would be.

Master Builders believes that this should be a major concern to all taxpayers given the significant cost of publicly funded community infrastructure, such as roads, schools, hospitals and care facilities. Construction costs in Australia are, at present, some of this highest in the world.

The ABCC was effective in its previous incarnation and that is why Master Builders back its return.

The extent of opposition from the labour movement to the ABCC, while expected, is often perplexing or hypocritical.

They argue that there should be 'one set of laws for all workers' yet also argue to maintain the special protections already in place for outworkers in the textile, clothing and footwear sector. They complain about the powers proposed for the ABCC to use when gathering information, yet these already exist in other agencies such as ASIC, ACCC, ATO and bodies such as Centrelink and Medicare.

They say that safety standards will be weakened, but ignore how the proposed legislation will contain a sector specific safety body to improve WHS on building sites. They oppose greater financial transparency and higher standards for union officials, yet are happy for the exact same standards to apply to employers and the rest of the business community.

They argue that the changes are unfairly targeted at unions and workers, but forget that employers and employer associations will be subject to the exact same rules. They argue that the police and other law enforcement agencies should have a greater role, but as Victorian

Police noted, *"it is clear that this issue cannot be resolved through an investigative response alone. What's needed is a more holistic regulatory approach, and significant cultural change with the [building and construction] industry."*²

The ROC will ensure that moneys received by registered organisations are properly accounted and not used for nefarious purposes. It means that monies extracted from employers, be it donations to union run charities or training funds, must be used for the purposes they are intended and that members' money cannot be misused for individual personal benefit.

In short, Master Builders believes that the ABCC and ROC will significantly increase the ability for unlawful behaviour to be identified and existing laws to be enforced. It has worked before, and it will work again. Concurrently, gaps in existing laws will be filled reduce the opportunity for malfeasance. These measures will reduce unlawful behaviour and vastly reduce the type of conduct that allows corruption and other illegal activity to flourish in the first place.

Ironically, none of the proposed laws will be of any consequence to those who are doing the right thing at the moment. Those who comply with the law will have nothing to fear. This, in itself, provides an interesting insight into the mindset of those opposing the changes and their current culture and practices.

Event Calendar

22 March - Twilight Event

May - Young Workplace Relations Professionals

26-28 May - ALERA Conference (Sydney)

June/July - IRSQ Patron's Lunch

October - Women in IR

TBA - Advocacy Course

Keep an eye out at:
www.irsq.asn.au

² Victoria Police's Response to the Discussion Paper Options for Law Reform, 19 May 2015, released by the Royal Commission into Trade Union Governance and Corruption, 10 September 2015

Notable Quotes

"In the digital age of an ever-advancing civilisation, technology has and will continue to evolve at a rapid pace. The rise of information systems and the development of collaborative technologies have brought manifold efficiencies including an abundance of new methods by which distance is overcome and 'meetings of the mind' may be facilitated. History is riddled with support for the notion that law that remains static invariably becomes archaic. Law that impedes innovation and is resistant to change has often been seen to result in injustice and inefficiency.

Fair Work Commission in the Full Bench Decision of *LCR Mining Group Pty Ltd v Construction, Forestry, Mining and Energy Union* [2016] FWCFB 400 (4 February 2016).

I am not satisfied that Mr Hafer was formally notified of the reason of his termination prior to his dismissal. Ensign should have met with Mr Hafer, formally advised him of the Santos test result and that it was proposing to terminate his employment and sought his response... Ensign admitted this failure [to provide an opportunity to respond] at the commencement of the hearing... [71] I have taken into account all submissions and evidence. Although there were procedural defects in the conduct of the termination meeting, in my view this did not affect the outcome of the termination.

Commissioner Pratt in [*Nicholas Hafer v Ensign Australia Pty Ltd T/A Ensign International Energy Services* 22 February 2016.](#)

"We are going to be close to bankruptcy if Uber doesn't raise the commission."

"So far the price cut results we've seen for drivers have been promising: over this past weekend drivers spent 39 per cent less time without a fare and as a result saw a 20 per cent increase in hourly earnings compared to two weekends before."

An Uber driver protesting and an Uber spokesperson in response, as Uber's new pricing model is introduced and drivers in New York protest

the changes. *"It is regrettable that NERRs which are similar in form and content might be treated differently by the Commission on different occasions..."*

Commissioner Cambridge in DP World Melbourne Limited dismissing an application for approval on an enterprise agreement on the basis the NRR was not issued in strict accordance with the requirements of the Act.

"For two years I have voted on principle in this place and have treated every piece of legislation on its merits... On Monday the government threw principle out the window. I have been served with the proverbial death warrant ... and my attitude and approach to legislation now has to be coloured by that."

Senator Bob Day withdrawing support for the Government's attempts to restore the ABCC legislation after legislation would be introduced for Senate Voting Reform.

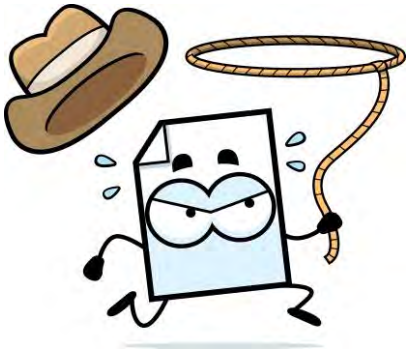
"The three unions met to discuss the challenges in their respective industries, the challenges facing working people and the challenges in our political environment... The unions are committed to strengthening their ties and working together across the Tasman to address those issues."

A spokesperson for the AMWU said on talks of a merger between United Voice and the AMWU that occurred at an ETU event (New Zealand's largest private sector Union).

Labor will increase the penalties for failing to pay workers properly and will seek the views of employers and their associations, workers and their unions on the scale of the proposed increase to ensure that the new penalties are an appropriate deterrent"

Labor Policy 'Protecting Rights at Work' Released on 1 February 2016

IR World Roundup



Recording Ripped Apart

An employee who entered the work premises after hours and contrary to explicit instructions has had his unfair dismissal application dismissed.

The worker who entered the premises and removed company property later made a secret recording of his employer. When the Employee attempted to submit this recording as evidence in his unfair dismissal application Commissioner Williams unleashed stating that an employee recording their employer is an *“act which strikes at the heart of the employment relationship shattering the trust and confidence necessary to maintain that relationship, an extreme impropriety, sneakiness that is abhorrent to ordinary persons, behaviour that is deceptive and purposefully misleading and finally as an action that displays an intention to entrap the employer.”*

Case: [Ferry v GHS Regional WA Pty Ltd \[2015\] FWC 8552 \(14 December 2015\)](#)

Employers Neutral? Full Bench tells em’ their dreamin’

The Full Bench of the FWC has overturned a decision by Commissioner Susan Booth who had determined that BHP Coal had unfairly dismissed an employee due to lack of procedural fairness because they had inclinations about the punishment before a response had been received.

The Full Bench held that:

“When an investigation reveals inappropriate conduct on the part of the employee it would be usual and proper for an employer to form a view about the significance of the findings to possible disciplinary action against those responsible and to provide the employee with an opportunity to respond to the allegations of misconduct. A detailed statement of allegations demonstrating the significance of the behaviour against performance and conduct expectations is procedurally fair and good management practice. The employer of course needs to retain an open mind and have regard to responses made by the employee. But applied in a common sense way, if serious misconduct is evident from the investigation, an employer cannot be expected to have no leanings or inclinations as to the likely sanction against the employee.”

Case: [BHP Coal Pty Ltd T/A BMA v Schmidt \[2016\] FWCFB 72 \(5 January 2016\)](#)



Volunteer works hard to obtain anti-bullying order but faces problem: Not a worker



The FWC has found that it does not have power to hear an anti-bullying application for a volunteer engaged at a community not-for-profit arts centre because they were not a ‘worker’ as defined by the *Fair Work Act*.

Whilst the *Fair Work Act* defines a ‘Worker’ (which refers to the Workplace Health & Safety legislation) as a volunteer the qualification is that it does not apply to a person volunteering with a wholly ‘volunteer association’ with no employees (whether incorporated or not).

Whilst the Commission found that there was some benefit derived by some artists (being a reduced Commission on artwork sold by the gallery) it was found that the Applicant was not a worker for the purposes of the Act.

Case: [McDonald \[2016\] FWC 300 \(15 January 2016\)](#)

DP World NRR Rejected by FWC

The FWC has rejected an application for an Enterprise Agreement on the basis the employer printed the Notice of Representational Rights (NRR) on Company letterhead.

Whilst there was nothing wrong with the words on the NRR itself, Commissioner Ian Cambridge noted that there is “simply no capacity to depart from the form and content of the notice template provided in the regulations.”

Despite the company letter head being a ‘minor departure’ the Commissioner said he had no choice but to reject the Applications for an enterprise agreements.



Case: [DP World Melbourne Limited \[2016\] FWC 386 \(19 January 2016\)](#)

Labor Policy:

A Labor government has promised to ‘crack-down’ on unscrupulous employers who are willing to exploit workers.

In summary, the plan will:

- Crack down on the underpayment of workers, with increased penalties for employers who deliberately and systemically avoid paying their employees properly;
- Ramping up protections for workers from sham contracting (changing the definition so that if a reasonable person would think someone is an employee, then the person must be treated as an employee, with access to workplace entitlements);
- Giving the Fair Work Ombudsman the powers and resources to pursue employers who liquidate their companies in order to avoid paying the money they owe their workers; and
- Introducing reforms to ensure that temporary overseas workers are not being exploited and underpaid and that there is a level playing field for all workers in Australia (increasing penalties to 2 years imprisonment or a fine of up to \$43,200 for a natural person, or a fine of up to \$216,000 for a corporation.)

Labor asserts the current penalties (\$10,800 per breach for a natural person or \$54,000 for a corporation) are not enough and seek to allow the court to impose a penalty that is the higher of:

- three times the amount of the underpayment; or
- \$216,000 for an individual and \$1,080,000 for a body corporate.

Additionally, where an employer intentionally rips of a worker Labor is proposing a penalty in the order of \$43,200 or 2 years imprisonment for an individual or \$216,000 for a body corporate.

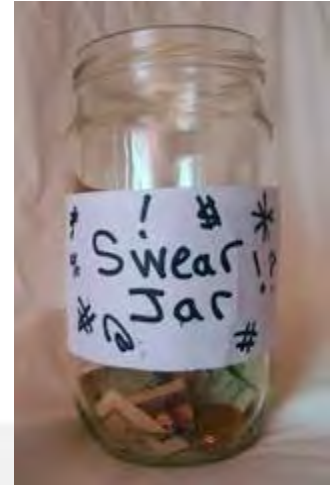
Labor also proposes that Courts have the power to disqualify Directors in conjunction with these higher penalties

Fair dismissal for foul language: Employee f*%ked up

Despite there being a culture of swearing at the workplace, Deputy President Anne Gooley found that an employee who had been previously warned about his language was not unfairly dismissed after abusing his supervisor.

It particularly hinged on the intention behind the swearing, as the Applicant “did more than swear. Mr Horner verbally abused his supervisor.” Further, as the Applicant had been previously warned of such inappropriate behaviour the dismissal could not be construed as unfair.

Case: [Horner v Kailis Bros Pty Ltd \[2016\] FWC 145 \(8 January 2016\)](#)





Who would've thought: A meeting doesn't have to be face-to-face

The Full Bench of the FWC has held that a meeting does not have to be 'face-to-face' for the good faith bargaining requirements to be met under the *Fair Work Act*.

In overturning a decision by newly appointed Commissioner Saunders who found that "the ordinary meaning of 'meeting' requires the participants in the meeting to be present in person" the Full Bench held that, for the purpose of good faith bargaining under the Fair Work Act, a 'meeting of the minds' was the intention behind the legislation.

The Full Bench, in words best left to speak for themselves, found that:

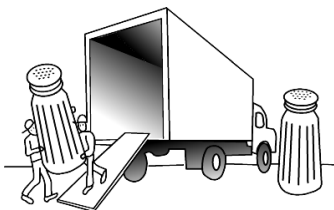
The object of the Act mandates cheap, quick and flexible processes and this necessitates that the law evolves in unison with technology if it is to remain relevant. This requires a reasonable and flexible approach to setting parameters that allow its users to capitalise on those technologies that increase access and deliver efficiency. The prevalence of electronic filing and service in the court system, e-discovery and hearings conducted by videoconference are all examples of the judicial system utilising technology in ways that decrease cost and increase access to justice, particularly for parties in remote areas. Indeed the Commission regularly utilises these

technologies to ensure its processes are as convenient, affordable and accessible as possible.

Similarly, the Commission must not close its eyes to the industrial realities that the Act seeks to regulate. To do so inevitably results in the creation of artificial constraints that do little more than add additional burdens to the already strained arena of industrial bargaining. Recognising that a 'meeting of the minds' can occur regardless of the specific technologies utilised in facilitating such a meeting is an essential aspect of ensuring that the objectives of the Act are realised in a practical and meaningful sense."

Case: [LCR Mining Group Pty Ltd v Construction, Forestry, Mining and Energy Union \[2016\] FWCFB 400 \(4 February 2016\)](#)

Movers & Shakers



The Movers and the Shakers

Rohan Hilton has moved to Queensland Division National Tertiary Education Union as an Industrial Officer.

Sarah Tilby is now working with AMA Queensland in the position of Workplace Relations Advisor.

Samantha Ramsay is now at Independent Education Union as a Member Services Officer.

Sharon Durham formerly with Queensland Health is now the Chief of Staff at Office of the Hon. Grace Grace MP.

Alana Elliot has transferred to HWL Ebsworth's Melbourne office and consequently has resigned from the Management Committee. She will be missed!

Alana Heffernan has transferred to Maurice Blackburn's Sydney office.

Peter Garske has resigned his position as the Chief Executive Officer (CEO) at Queensland Trucking Association Ltd. In honour of his 20 years of service at QTA and his long standing much appreciated support of IRSQ we have now termed the first question to be raised at an IRSQ Patrons lunch: "the Garske question".

New Members

We welcome **Ryan Haddrick** from John Jerrard Chambers, **Chris Graham** from MacDonnells Law, **Rohan May** from Ostwald Bros, **Samantha Ramsay** from Independent Education Union and **Corlia Roos, Chantel Putter** and **Martin Belfield** from **Master Builders Qld**.

If you have moved, been promoted or taken on a new challenge, email the Secretariat at irsq@irsq.asn.au

IRSQ Management Committee

Patron

The Honourable Justice Glenn Martin, President of the QIRC and Justice of the Supreme Court of Queensland

President

Jo McConnell, Director, Member Support
Together Queensland

Vice President (Employer)

Theresa Moltoni, Managing Director
IRIQ

Vice President (Union)

Thalia Edmonds, Industrial Advocate
Queensland Teachers Union

Vice President (Other)

Lydia Daly, Senior Associate
Dibbs Barker

Secretary

John Payne, Managing Director
Hall Payne Lawyers

Treasurer

Terrienne Redman

Employee Representative

Vaishi Raja, Industrial Officer/Lawyer
Independent Education Union (Qld and NT Branch)

Employee Representative

Vacant

Employer Representative and Past President

Joanna Minchinton, Employment Relations Manager
Queensland Hotels Association

Employer Representative

Faiyaz Devjee, HR/IR Manager
ECM Ltd

Legal Profession Representative (Casual Appt)

Kristin Ramsey, Associate Director
Hynes Legal

Government Representative (State)

Vacant

Government Representative (Commonwealth)

Nate Burke, Associate
Fair Work Commission

Tertiary Academic Representative

Vacant

General Member

Rohan Hilton, Industrial Officer
National Tertiary Education Union, Queensland Division

General Member

Kerriann Dear, Director
Queensland Working Women's Service

General Member (Casual Appt)

Sarah Tilby, Workplace Relations Advisor
AMA Queensland

Disclaimer and Feedback

The views expressed in this edition of the IR Advocate do not necessarily reflect the individual views of the IRSQ Management Committee and do not represent the collective stance of the IRSQ Society as a whole, which aims to be impartial. Feedback, suggestions and improvements, including material for upcoming editions can be emailed to the Editor, Theresa Moltoni at theresa.moltoni@iriq.com.au you can also follow us on our [Facebook page](#).