IRSQ Industrial Relations Society of Queensland

The IR Advocate

May / June 2016

Your Professional Association

Welcome

Don't be alarmed but we are nearly mid-year!

Of course that also means we are approaching everyone's favourite annual event, the **Patron's Lunch**. The date is set so place that in your calendars and make sure you register as this year will prove to be impressive as always.

We are very pleased to have The Honourable Grace Grace MP, Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs as the guest speaker, and the topic will appeal to all industrial practitioner's, member or not, watch for the flyer with further details.

One of the benefits of being a member of the Industrial Relations Society Committee is that you bear witness to the generosity of many who share a common interest. The Society has members who email and ask when we will deliver our Advocacy in the Commission course, members who ask how they can get more involved, firms who donate towards events, sponsors who support our activities in many ways, venues who demonstrate flexibility to meet our purposes and individuals who spend many hours to collaborate and participate in their own time to continue these not insignificant, well regarded and professionally presented industrial relations events.

Queensland has always forged their own direction as an Industrial Relations Society, we continue to do so and with strong support from Commissioners, both state and federal, and our academic organisations. We are a non-partisan Society and proudly so, the history of the Society reflects this in the membership of the Committees over time. I recently reviewed minutes from a December 1996 meeting reporting on the Patron's Luncheon to be held in May 1997. That year the Patron was listed as Commissioner Glenys Fisher, and notably included the following as Committee members, Peter Garske, Geoff Wilson, Peter Norrie, Sam Sciacca and John Martin. I am sure you will recognise at least one of these names, and certainly for me it affirmed my belief that a few can pursue something amazing for many.

I want to take this opportunity to acknowledge the efforts and contribution of all Committee members and Patrons, past and present, thank you. I hope to continue to bring our history to you, by the way who recalls the Unions Vs Employers Cricket matches?

I hope to see you at our Workplace Investigations and Patrons Lunch events.

Jo McConnell
IRSQ President

Upcoming

Patron's Lunch

The IRSQ are pleased to announce that **The Honourable Grace Grace MP**, Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs is our guest speaker at this year's Patron's Lunch.

Minister Grace will be discussing the current review of the Queensland industrial relations system and the Legislative Reform Reference Group report - and potential impacts for both the public and private sector.

Date: Friday, 15 July 2016

Time: 12pm for 12.30pm

Venue: Brisbane Convention and Exhibition Centre Southbank

Register online here

Cost:

Members per person	$140
Non-members per person	$175
Table of Ten per table	$1,200

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Upcoming

ALERA National Conference

WORK – Then, Now & What's Next!

The biennial ALERA Conference (proudly hosted by the Industrial Relations Society of New South Wales) is to be held right on the imposing and beautiful Pier One Sydney Harbour, The Rocks, under Sydney Harbour Bridge during Sydney's fantastic Vivid Festival.

The objectives of the Australian Labour and Employment Relations Association (ALERA), are to foster discussion, research, education and publication within the field of Industrial Relations.

The theme of the conference is **WORK – Then, Now & What's Next**. You will hear an impressive and inspiring range of speakers including politicians, academics, corporate leaders, unionists, judiciary and professional advocates and counsel who will cover a diverse range of industrial and employment related issues, with a specific eye to the future of work and employment relationships.

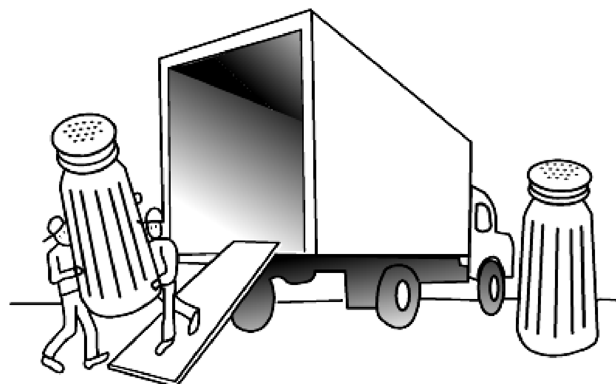
Date: 26 – 28 May 2016

Time: See conference **program**

Venue: Pier One Sydney Harbour
The Rocks, Sydney

Register online here

Movers & Shakers



The Movers and the Shakers

Jonathon Hadley has moved from DibbsBarker to Gadens as a partner.

New Members

We welcome **Dale Blackmore** of Together, **Kerry Johnson** of Teys Australia, **Reece Heald** of Griffith University, **Lorin Booth** of Queensland Nurses Union and **Ray Kelly** of Independent Schools Qld.

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

IRSQ LinkedIn Group

Join now!!

The IRSQ has a LinkedIn Group so that members and IRSQ friends have another way to keep up to date with IRSQ news, event details and other information.

The Group will also be a forum for debate and discussion on IR related issues relevant to members and others in the profession. We invite you to join the Group and be an active participant in discussions. **Click here** to join the Group through or alternatively by searching for "**Industrial Relations Society of Queensland**" in the search box on LinkedIn.

Overpaid wages - Court of Appeal summarises options

By Stephen Mackie, Barrister at Law, Queensland Bar

Stephen Mackie is a Brisbane-based barrister specialising in industrial relations and employment law.

With thousands of workers paid every day, errors happen. Usually problems are sorted out by agreement, but what if no agreement can be reached? "Unpaid wages" has a clear cause of action, but what are the legal options to recover an overpayment?

The Queensland Court of Appeal, in *Comgroup Supplies Pty Ltd -v- Products for Industry Pty Ltd & Anor* [2016] QCA 88, recently provided a useful summary of the available avenues.

1. Misleading and deceptive conduct – s18 Australian Consumer Law

An employee or worker may be required to repay funds if they received them because they made a misleading or deceptive representation, such as providing inaccurate timesheets.

2. Tort of deceit

The tort of deceit is narrower than the ACL because it requires an intention to deceive. But unlike the ACL, it is not limited to representations made in "trade and commerce", so it may be a useful alternative cause of action.

3. Barnes -v- Addy - "knowing receipt" or "knowing assistance" in the breach of fiduciary duties

The famous two limbs of Barnes *-v- Addy* allow a principal (or employer) to recover funds from any person if (a) the funds left the principal (or employer) because someone, such as an employee, breached their fiduciary duties; and (b) the Defendant either engaged in "knowing assistance" or has "knowing receipt" of the funds.

What amounts to "knowledge" extends beyond actual knowledge, including (inter alia*)* "knowledge *of circumstances which would indicate the facts to an honest and reasonable man*".

4. Breach of contract

Although normally not available for most "overpaid wages" scenarios, breach of contract may occur if a party is contracted and paid to provide certain specific services but fails to do so.

5. Restitution for payment under a mistake of fact (Unjust Enrichment)

"Unjust enrichment" is a developing area of law, but will generally be available where money is paid due to a mistake of fact, and it would be inequitable for the person to retain the funds.

Comgroup at [55]-[60] helpfully discusses the "change of position defence", which is quite broad, but will generally apply if the recipient of the funds acted on good faith, and would be in a worse position if ordered to make restitution than if they had not received the funds at all.

Retiree Membership Status

At IRSQ we understand that our loyal Senior Patrons who are nearing retirement, still want to keep abreast of industry new and events.

We are proud to announce, IRSQ will be offering membership status with only a small membership fee to all retired patrons. Please contact IRSQ if you would like more information about our **Retiree Membership Status.**

Five Minutes With…

Minister Grace Grace MP

Minister for Employment and Industrial Relations, Minister for Multicultural Affairs, Minister for Racing & Member for Brisbane Central

Grace Grace is the Member for Brisbane Central and has lived in the electorate all her life. Grace was appointed Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs in December 2015. She has spent her working life fighting for a better quality of life for Queensland workers – and has also been a strong advocate for multiculturalism. During her career, Grace has had extensive Board experience with organisations including SunSuper, Jupiters Casino Community Benefit Fund, and Energex Limited.

How did you decide on your desired career path?

My parents, Sam and Connie, arrived in Australia from Sicily in the early 1950s and to support a large family, my father took on various jobs, including at a tannery where a severe industrial accident rendered him unable to work again. It is this background that I believe attracted me to my career in the union movement and my passion for occupational health and safety and workers compensation. My father's experience shaped my desire to fight for, improve and ensure safety in the workplace. My career as a politician was borne out of my almost 30-year career in the union movement representing Queensland workers and their families.

Who are the people who have influenced your career decisions?

Obviously my parents had a great influence on my career and I pay tribute to their hard work and dedication to their family, especially when times were tough. I inherited their values of hard work and diligence and I thank them for instilling in me the benefits of true family values.

Who do you admire greatly and why?

One of my favourite quotes is by Martin Luther King Jnr, the American civil rights leader who said "our lives begin to end the day we become silent about things that matter." I never intend to become silent about issues that matter for the electors of Brisbane Central or for the workers of Queensland and their families and I look forward to continuing to make a contribution in the best way I can.

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

Obviously, having healthy and safe workplaces is a burning passion of mine and I was proud that the Palaszczuk Government's election commitment to restore the rights of Queenslanders injured at work was delivered upon. We have also just completed the most comprehensive review of Queensland's industrial relations laws – the first significant review in 17 years. Since our laws were last reviewed, there have been significant changes to the Queensland's industrial relations landscape which the development of a national workplace relations system and the Queensland Government's referral of its private sector IR powers to the Commonwealth. As a result, Queensland's IR laws are now focussed almost exclusively on the state's public sector and local government workers and our legislation needs to reflect this. I look forward to introducing updated IR laws towards the end of 2016 that work for all parties and in the meantime, we will keep consulting stakeholders and the public to ensure Queensland's has modern, updated IR laws.

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What do you most enjoy about your role as Minister for Industrial Relations?

After an almost 30-year career in the union movement, including becoming the first female general secretary of the Queensland Council of Unions in 2000, it's no surprise to anyone that IR is my passion. I have lived it and breathed it for so long and being appointed Minister for Industrial Relations in the Palaszczuk Government is my dream job! I am proud to be responsible for IR laws that will make a real difference to working Queenslanders and their families and to be part of a government that knows and appreciates the importance of good IR laws and the dignity of work.

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

Most importantly, I was conscious of delivering on our election commitments which included:

- Restoring the rights of Queenslanders injured at work
- Honouring the real Labour Day and restoring the public holiday to the first Monday in May
- Work health and safety reforms – improving safety for Queenslanders at work by abolishing the 24 hour right of entry laws introduced by the Newman Government
- A fair and decent public sector wages policy
- Industrial relations legislative amendments
- A forum for workers and their families affected by a workplace fatality or serious injury

Obviously, some of these commitments had already been implemented before I was appointed IR Minister and I am committed to ensuring all of our IR commitments will be delivered in a fair and balanced manner.

Event Calendar

26-28 May - ALERA Conference (Sydney)

29 June - Workplace Investigations Seminar

15 July - IRSQ Patron's Lunch

August – Advocacy Course

21 October – Women in IR

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

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Are you meeting your minimum obligations?
Fair Work Ombudsman crackdown on the franchise industry

Heinz Lepahe and Bianca Mendelson of HWL Ebsworth

Heinz is a Partner is HWL Ebsworth's Brisbane Workplace Relations and Safety Team. Heinz is an experienced commercial lawyer who has worked in a diverse range of legal advisory capacities in the workplace relations and employment law practice area. Heinz also teaches Workplace Law to students enrolled in the School of Law undergraduate law degree course at Griffith University.

Bianca is a Solicitor in HWL Ebsworth's Brisbane Workplace Relations and Safety Team. Bianca has experience in workplace law with exposure to employment and industrial relations and has worked with a diverse range of clients from many different industries.

The franchise industry is now in the spotlight following recent allegations that the convenience store franchise 7-Eleven has engaged in mass underpayments of its employees.

On 31 August 2015, ABC's *Four Corners* aired a story about alleged systematic underpayment of minimum wages and employee entitlements by 7-Eleven franchisees.

The Fair Work Ombudsman (**FWO**) has announced that it has been investigating the underpayment issue for some time and previously conducted unannounced audits of twenty 7-Eleven stores in September 2014.

In addition, the Grill'd franchise network has also come to the attention of the FWO and investigations into employment compliance issues are continuing following a 20-year-old employee claiming in the Federal Court that she did not receive shift loadings she was entitled to and when she complained to her employer about this, her employment was terminated. Her claim in relation to the underpayments and her dismissal has subsequently been settled by way of what is reported to be a substantial payment to her by Grill'd.

The FWO is currently prosecuting the franchisee of the 7-Eleven store in Blacktown, Sydney for allegedly paying employees $10.00 per hour, underpaying two employees a total of nearly $50,000.00 over two years and falsifying employee records.

In April 2011, the FWO successfully prosecuted the franchisee of the South Yarra and Geelong 7-Eleven stores. A Magistrate ordered the franchisee to repay over $85,000.00 in wages to six employees and fined the franchisee $150,000.00.

There is no doubt that most franchisors recognise that non-compliance issues such as these create a real risk of substantial damage to a franchise brand.

The *Four Corners* story reported that alleged underpayments and the falsifying of payroll records to show compliance with Award wage rates was widespread within the 7-Eleven system and potentially the franchise industry as a whole. *Four Corners* claimed it obtained internal 7-Eleven documents showing that nearly two-thirds of 7-Eleven franchisees were underpaying employees.

Four Corners alleged that this demonstrates that the underpayments were not the result of a handful of rogue franchisees, but that the 7-Eleven head office had knowledge of what was occurring and was complicit in it.

The report highlighted the "half pay scam" whereby employees on student visas, who are prohibited from working more than 20 hours per week due to visa constraints, would work 40-50 hours per week but only receive payment for 20 hours. Their payslip would also only show that they worked for and got paid for 20 hours in an attempt to cover up the wage fraud.

Many employees of 7-Eleven are foreign students or migrants in Australia on visas making them vulnerable to exploitation. The report interviewed 7-Eleven visa-holding employees who stated that they were threatened with deportation by their franchisee-employers if they tried to assert their workplace rights.

Other employees interviewed for the report alleged they were often paid a flat rate of $10.00 per hour without any penalty rates for weekends, public holidays or overnight shifts. This is despite the minimum hourly wage under the *General Retail Industry Modern Award 2010* for casual employees being $23.74 and between $25.64 and $37.98 on weekends.

Two days after the story aired, the Labor Opposition leader urged the Government to grant a visa amnesty to all alleged exploited employees who were prepared to come forward and give evidence.

Since the story aired, 7-Eleven has established an independent panel, headed by Allan Fels, the former head of the Australian Competition and Consumer Commission, to review franchise agreement terms and conditions and claims of underpayment. 7-Eleven said it wanted to make good any underpayments as soon as possible.

Further, Greens MP, Adam Bandt has prepared a Private Member's bill to be introduced into the federal parliament that would have a profound impact on the franchise industry. Amongst other things, the bill aims to amend the *Fair Work Act 2009* to make parent companies or franchisors more responsible for the behaviour of their franchisees particularly in relation to underpayment of wages.

Modern award compliance

This mass media and political attention on the franchise industry should remind all business owners (including franchisees) that they must understand which modern award or enterprise agreement applies to their business and ensure that they pay in accordance with the required minimum wages, penalty rates and other allowances. The ultimate responsibility for ensuring the payment of correct wages to employees and compliance with workplace laws falls on the franchisee as the employer.

Franchisees (and franchisors) cannot hide behind a lack of knowledge or experience with workplace laws or modern awards to explain or excuse non-compliance.

It is important that franchisees obtain independent legal advice. Franchisees cannot merely rely on advice from the franchisor. Previously, the FWO successfully prosecuted a fast food franchisee for underpayments totalling approximately $38,000.00 despite the franchisee being advised by the franchisor that it was paying in accordance with the relevant workplace agreement. As a consequence, the franchisee was ordered to repay the outstanding wages as well as a $30,000.00 penalty.

The allegations against 7-Eleven will likely affect the whole franchise industry. The FWO is now likely to focus more attention on franchised businesses that typically employ young people, overseas students on visas and migrant workers, such as the fast food industry, because of the inherent vulnerability of these employees.

The monetary penalties for breaching modern awards and enterprise agreements are high. Now is the time for franchisees to ensure that they understand which modern award and/or enterprise agreement applies to their business and to review their payroll to ensure compliance with the minimum wages and other employee entitlements set out in any applicable modern award/enterprise agreement. It is also critical that franchisors understand the modern award and enterprise agreement(s) that apply in their respective industries.

There are strategies and procedures that franchisors should consider and implement to help detect non-compliance by their franchisees with their employer obligations. A failure to take action on these issues in a timely manner can lead to not only prosecution proceedings and heavy penalties being imposed, but also significant brand damage in the market.

Important disclaimer: The material contained in this publication is of a general nature only and is based on the law as at 17 September 2015. It is not, nor is intended to be, legal advice. If you wish to take any action based on the content of this publication we recommend that you seek professional advice.

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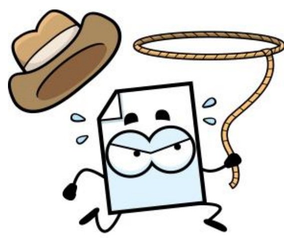
IR World Roundup



Agreement's Third Ballot Given a 'Yes' by Full Bench

After employees voted up an Agreement on the third ballot attempt – less than two weeks after the second ballot and with the Agreement substantially unchanged – the Fair Work Commission upheld the process and approved the Agreement.

Appealing the decision to the FWC Full Bench, the Transport Workers' Union of Australia ('**TWU**') argued that the Company had misled employees by suggesting that the Union endorsed a 'yes' vote. The TWU also argued that the good faith bargaining requirements had not been met due to the Agreement remaining substantially unchanged since the previous ballot (less than two weeks earlier) and therefore proper negotiations had not occurred, and the timing of the ballot being held in school holidays when, the TWU argued, many of the employees would not be able to vote.

The Full Bench dismissed the appeal. It held that the employer's notices to employees, whilst having the potential to mislead, were factually correct, and in any event the TWU had the capacity to provide messages to its employees.

Case: *Transport Workers' Union of Australia v Transit (NSW) Services Pty Ltd t/a Transit Systems [2016] FWCFB 997*

Fraudulent WorkCover Claim Costs Employee $180,000

The Fair Work Commission Full Bench found that Holden's sacking of a long-serving employee for dishonestly claiming workers' compensation was fair, despite the employee losing his entitlement to a redundancy payment of up to $180,000.

The worker, Mr Harvey, had been declared by treating doctors as being totally unfit for work. However, Holden's covert surveillance footage subsequently captured Mr Harvey undertaking a range of manual labour activities, including stepping in and out of a trench, hammering, sawing and lifting and carrying cable.

Holden suspended the employee on full pay while it conducted an investigation and during meetings provided him with video footage and gave him the opportunity to respond to the allegations. Holden later summarily dismissed him. In finding that the dismissal was not unfair, SDP O'Callaghan said:

> *"Mr Harvey's actions defrauded Holden and placed himself at the risk of aggravation of his previous injuries… Mr Harvey's actions in July 2015 meant that Holden would have had a legitimate basis for doubting any future advice he provided with respect to his workers compensation standing and would thus very likely have had to have deployed surveillance in the future. That loss of trust was Mr Harvey's doing and was fundamental to maintenance of the employment relationship."*

Case: *Harvey v GM Holden Ltd [2016] FWC 804*

Full Bench Says Previous Full Bench Decision was "Wrong"

FWC Full Bench ruled that child protection legislation does not force employers to dismiss teachers charged with indecent assault against minors, as a previous Full Bench held, but only stops them from performing "child-related work".

A previous FWC Full Bench decision in *Sydney CEO v Mahoney* held that all NSW employers had no choice but to dismiss a teacher charged with certain criminal offences, as the NSW legislation rendered it "impermissible" to be employed whilst being charged. A five-member Full Bench comprising of President Iain Ross, Vice President Adam Hatcher, Deputy President Reg Hamilton and Commissioners Michael Roberts and Leigh Johns, found that decision was "wrong".

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The legislation in question, the *Child Protection (Working with Children) Act 2012 (NSW)*, prevents a "disqualified person" from obtaining a clearance for child-related work. A disqualified person includes a person convicted of a certain offence, or whom charges are pending for a certain offence.

The Full Bench found that this did not prevent the worker from being employed as a teacher generally, as the employer Catholic Education Office argued, but that it only prevented a teacher from engaging "in" child-related work. Therefore, any termination of a teacher in these circumstances will mean a termination at the initiative of the employer, and an unfair dismissal application will not automatically be restricted.

Case: *O'Connell v Catholic Education Office, Archdiocese of Sydney [2016] FWCFB 1752*

Enterprise Agreements – Casuals can vote

The FWC Full Bench held that casual employees were entitled to vote to approve an enterprise agreement, despite not working at the time the ballot was open.

At first instance, Commissioner Lee had found that the 19 casuals who voted to approve the agreement were not employed "at the time" and therefore he could not be satisfied that the agreement had been approved.

On appeal, the Full Bench stated that there was "no issue" about the Parliament's intent for enterprise agreements to be able to cover casual employees, but "the difficulty is ascertaining when a casual employee ought to be regarded as an employee 'employed at the time' within the meaning of s.181(1)."

The Full Bench stated that employees engaged by the employer for a project covered by the agreement "received an offer for ongoing employment on the project". It placed those who had accepted the offer on its payroll before the ballot commenced and allowed them to vote on the agreement.

The Full Bench said the employer's payroll records and the principal HR generalist's evidence indicated that the casuals accepted "ongoing employment" with the company and "as such they were employed by [the employer] at the time the agreement was made".

Case: *McDermott Australia Pty Ltd v The Australian Workers' Union and another [2016] FWCFB 2222 (19 April 2016)*

FIFO days off are not leave: Full Bench

In a crucial ruling for FIFO workers and their employers, the Full Bench found that the down days off work when a FIFO worker returns home is rest and recreation, and not "a form of regulated and approved leave".

The Full Bench said that the working arrangement of a FIFO worker is that they condense, for example, 5 weeks' work into a 4-week block, meaning that the extra week is rest and recreation.

At first instance, Commissioner Bissett found that an employer could not give notice of termination to a FIFO worker at the same time or instead of their week off.

> However, the Full Bench overturned the decision, and found that notice of termination can be concurrent with any rest and recreation time. The implication of the original decision was that employees should be paid-out for their rest and recreation time if it falls within notice of their termination. The Full Bench's decision effectively means that rest and recreation is akin to weekends and not a special kind of leave. *"Rest and recreation is properly characterised as the block of authorised non-work time which forms an integral part of the work cycle in which work is undertaken (and leisure time is taken)."*

Case: *Kentz (Australia) Pty Ltd v CEPU [2016] FWCFB 2019 (28 April 2016)*

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Notable Quotes

"An employee has a right to complain about their employment rights and their treatment at work. We do not live in a society where employees are prohibited from discussing their employment status or their treatment at work with others."

Commissioner Roe in case - *Vosper v Solibrooke Pty Ltd [2016] FWC 1168*

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"Everyone supports a safer heavy vehicle industry, but clearly the answer is not to put tens of thousands of owner-drivers off the road through a central wage fixing policy"

Senator Michaelia Cash, Minster for Employment, on the abolishment of the Road Safety Remuneration Tribunal.

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"On any reasonable measure that is an appalling record. It bespeaks an attitude by the CFMEU of ignoring, if not defying, the law and a willingness to contravene it as and when it chooses,"

Justice Richard White of the Federal Circuit Court, commenting on the history of the CFMEU in case - *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2016] FCA 413 (22 April 2015)*

"Neither Mr Bragdon nor Mr Kong could, nor in our view did, nor purported to, rely on the NSW WHS Act or Part 3-4 of the FW Act. At the time they attended to enter the site there was no discussion about why they were there, they merely asked to have a "look at the site". They were not asked why they wanted to do that and there was no discussion about safety, or either the NSW WHS Act, or the FW Act, nor any related topic. Disruptive and abusive as it clearly was once they entered the site, their conduct was outside those legal arrangements,"

Justices Bob Buchanan, **John Reeves** and **Mordy Bromberg** of the Federal Court in overturning convictions against CFMEU officials, including one who claimed to be the 'croc-hunter'.

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"Hi mate, just wondering if you are working. If you are, you're a f#! scab."*

Mr Treen, employee of Adelaide Services Alliance during industrial action, to another employee via text message.

Case: *Treen v Allwater - Adelaide Services Alliance [2016] FWC 2737 (2 May 2016)*

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Queensland Working Women's Service

General Member (Casual Appt)
Sarah Tilby, Workplace Relations Advisor
AMA Queensland

Student Representative
Vacant

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.