INDUSTRIAL COURT OF QUEENSLAND

CITATION:	*Gilbert v Metro North Hospital Health Service & Ors* [2022] ICQ 35
PARTIES:	**MARGARET MARY GILBERT** (appellant) **v** **METRO NORTH HOSPITAL HEALTH SERVICE** (first respondent) **MICHELLE GARDNER** (second respondent) **STATE OF QUEENSLAND** (third respondent) **SILVIA SUMMERS** (fourth respondent) **QUEENSLAND NURSES AND MIDWIVES' UNION OF EMPLOYEES** (intervenor)
FILE NO/S:	C/2021/17
PROCEEDING:	Application
DELIVERED ON:	23 December 2022
HEARING DATE:	21 December 2022
MEMBER:	Davis J, President
ORDER/S:	**1. The hearing of the appeal be adjourned to be heard by a member of the Court other than the President.** **2. Costs are reserved.**
CATCHWORDS:	COURTS AND JUDGES - JUDGES - DISQUALIFICATION FOR INTEREST OR BIAS - REASONABLE APPREHENSION OF BIAS - where the appellant in an appeal alleged apprehended bias against the judge who heard and reserved judgment on the appeal - where the circumstances upon which the apprehension allegedly arises occurred or became apparent after the hearing of the appeal but before judgment - where the judge, prior to appointment, had been a member of the Australian Labor Party (ALP) - where the judge had assisted Peter Russo MLA in his 2015 campaign for the ALP in the Queensland general election - where the judge resigned membership of the ALP before being sworn in as a judge - where the ALP holds government in Queensland - where the appellant's claim was dismissed - where she appeals - where her appeal may depend on whether the Nurses Professional Association of Queensland (NPAQ) is either an "industrial association" or a "trade union" - where after the

hearing of the appeal, the government introduced a bill to effectively legislate that organisations such as the NPAQ are not an "industrial association" or a "trade union" - where the judge made a submission to the Minister for increased powers to regulate advocates before the Queensland Industrial Relations Commission (QIRC) - where amendments in response to that submission were proposed - whether the submission to the Minister gave rise to an apprehension of bias - whether the judge's former membership of the ALP and his association with Mr Russo MLA gave rise to an apprehension of bias - whether inquiry into the grounds of apprehension were prohibited by parliamentary privilege - exercise of discretion to disqualify

Associations Incorporation Act 1981
Industrial Relations Act 2016, s 278, s 279, s 282, s 285, s 295, s 412, s 435, s 436, s 529, s 530
Industrial Relations and Other Legislation Amendment Bill 2022
Legal Profession Act 2007
Parliament of Queensland Act 2001, s 8, s 9

CASES:

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337, followed
Erlgis v Buckley [2004] 2 Qd R 599, followed
Gas & Fuel Corporation Superannuation Fund & Ors v Saunders & Anor (1994) 123 ALR 323, followed
Gilbert v Metro North Hospital Health Service & Ors [2021] QIRC 255, related
GJT Earthmoving Pty Ltd v The Regulator under the Work Health and Safety Act 2011 [2022] ICQ 2, cited
GJT Earthmoving Pty Ltd v The Regulator under the Work Health and Safety Act 2011 (No 2) [2022] ICQ 008, cited
Johnson v Johnson (2000) 201 CLR 488, followed
Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70, followed
Pebble v Television New Zealand Ltd [1995] 1 AC 321, followed
R v Watson; Ex parte Armstrong (1976) 136 CLR 248, cited
Rowley v O'Chee [2000] 1 Qd R 207, followed

APPEARANCES:

The appellant appeared on her own behalf
A Duffy KC with E Shorten for the respondents
P McCafferty KC with C Massey for the Queensland Nurses and Midwives' Union of Employees, intervening
C Tessmann for the Speaker of the Legislative Assembly appearing *amicus curiae*

[1] The appellant, Ms Gilbert, filed an application seeking an order that I disqualify myself from delivering judgment in an appeal which I heard some time ago.

[2] Ms Gilbert is the President of the Nurses Professional Association of Queensland (NPAQ) which is an association incorporated under the *Associations Incorporation Act* 1981.

[3] Ms Gilbert claimed, in proceedings in the Queensland Industrial Relations Commission (QIRC), that she was the subject of adverse action[1] as a result of her involvement with NPAQ. Her application was dismissed by O'Connor VP.[2] She appealed. I heard her appeal and judgment is reserved.

[4] A central question, both below and on appeal, is as to the status of NPAQ. Put shortly, if NPAQ is an "industrial association"[3] or a "trade union",[4] then action taken against Ms Gilbert as a result of her activities with NPAQ could constitute adverse action. If not, they cannot.

[5] The present application was originally based upon three broad facts:

1. I sent a letter to the Honourable Grace Grace MP, Minister for Education, Minister for Industrial Relations and Minister for Racing on 22 June 2022 (my letter). I will respectfully refer to the Honourable Grace Grace MP as "the Minister" and I will return to the letter shortly.

2. I was a member of the Australian Labor Party (ALP) and was politically active before being appointed to the Supreme Court of Queensland on 16 October 2017.

3. There has been delay in delivering judgment on the appeal.

[6] Ms Gilbert's concerns are raised in her letter to me of 31 October 2022. I will replicate that in full:

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1 *Industrial Relations Act* 2016, Chapter 8, Part 1.
2 *Gilbert v Metro North Hospital Health Service & Ors* [2021] QIRC 255.
3 *Industrial Relations Act* 2016, ss 278(1)(b), 279, 282, 284, 285.
4 *Industrial Relations Act* 2016, s 295.

NPAQ
Nurses Professional
Association of Queensland

31 October 2022

The Hon Justice Davis
President of the Queensland Industrial Court

Dear Justice Davis,

RE: Industrial Relations and Other Legislation Amendment Bill 2022

As you are aware, there is a bill currently being debated before the Queensland Parliament which is effectively designed to outlaw my union.

As part of that debate, a number of members of the Government referred to my union as a "rogue union" and made other derogatory references to it. They also quoted your submission to the Parliamentary Committee in your position as President of the IRC, as some justification for some aspects of the bill.

There is a real danger that that will be perceived by some to have engaged you and your position in the contentious political debate.

Unfortunately, that is also the position my executive has come to.

Some of the comments referring to you are:

" "

Grace Grace:
In written submissions to this bill, the Hon. Justice Peter Davis, President of the Industrial Court of Queensland, and the Queensland Law Society stated that there is an urgent need for the regulation of agents who charge a fee to represent Queenslanders in the QIRC and Industrial Court and are not legal professionals.

James Lister:
I wonder whether the President of the Industrial Relations Commission, the Hon. Justice Peter Davis, is the same Peter Davis referred to in a speech in this House by the Labor member for Toohey thanking him for assisting him on his Labor Party campaign? The House could forgive us for being a little bit sceptical

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Thank you, Mr Deputy Speaker. It is clear that there is a massive opportunity for patronage here and for jobs for the friends of the union movement, which obviously is a payback from the government for funding its election campaigns and for giving them their jobs. This is sheer and utter corruption. This bill is a disgrace and this should be the title.

Grace Grace:
During the course of the committee's inquiry, Justice Davis identified examples of unscrupulous agents charging fees to provide representation in the Queensland Industrial Relations Commission and the Industrial Court. Justice Davis stated that in one recent matter before the commission an agent strongly suspected of charging fees simply did have the skill to advocate for the applicant. The claim lodged by the agent was baseless and came at the time and expense of the parties and the commission. Unfortunately, this has not been an isolated incident.

McCallum Bundamba:
In written submissions to this bill, the Hon. Justice Peter Davis, President of the Industrial Court of Queensland, and the Queensland Law Society stated that there is an urgent need for the regulation of agents who charge a fee to represent Queenslanders in the QIRC and Industrial Court and are not legal professionals. Justice Davis cited the example of a recent case in the Industrial Court in which an agent represented a party to the case but failed to advance the interests of the client because 'he simply did not have the skill to advocate for the applicant'. That is absolutely shameful. To combat this unscrupulous and predatory conduct, the bill clarifies the existing provisions in the IR Act which require the commission or court to grant leave to agents to represent people.

Kim Richards:
The NPAQ website is misleading. They are misleading their members because they cannot perform the services they are saying they can do on their website. That is absolutely misleading. We talk again about transparency and integrity and the services they know they can legally provide, and they are misleading their members. Mr Smith: Honest Queenslanders. Ms RICHARDS: Yes, honest Queenslanders. One of the other interesting submissions to the committee was from Justice Peter Davis, the president of the Industrial Court of Queensland. During our inquiry, he provided us with some correspondence. He outlined his concerns with regards to unscrupulous agents who are charging fees to provide representation in the Queensland Industrial Relations Commission and the Industrial Court.

James Lister:
I was interested in the contribution that His Honour Justice Peter Davis made in his submission— his name has been trotted out a lot. When I talk about the industrial system I am, of course, talking about big business, big unions and big government—not the little guys. I wonder whether to complete this perfectly symmetrical plot, His Honour Justice Peter Davis is the same person who was reported in the Courier-Mail for being responsible for making sure that volunteers on election day were fed and watered, according to Mr Peter Russo the member for Toohey. It seems to me that this whole system is rotten. They are

happy to roll out the red carpet, then bung up the port holes for a Labor-appointed judge who is assisting in justifying this legislation, but they will not listen to the guys who are out here from the red union standing up for their own rights.

Jimmy Sullivan:
I also want to mention the issue raised by Justice Davis of the Supreme Court sitting as President of the QIRC. As the minister explained, the president of the QIRC said that there was a particular trend that is quite concerning, with the charging of fees for so-called agents. A procedural mechanism that was meant to ensure support from friends and others in the workplace has been misused by those who are seeking to inappropriately profit from it. Procedural fairness elements that are meant to make the QIRC a fair and friendly jurisdiction to access are being inappropriately used for private profit. I thank the minister and her department for bringing forward this legislation. The department and the minister's office have provided great support throughout this process. I thank the submitters throughout this process, including Justice Davis.

Shane King:
I want to quote from the NPAQ website— The Nurses' Professional Association of Queensland is an employee union which fights to protect you, not promote a political party ... Every membership dollar supports you, your workplace issues, provides professional indemnity insurance and legal backup for you. You get a better service for half the price. This is dangerously misleading which was proved last year when NPAQ could not represent its own member in the Queensland industrial relations court because it was not a union. It says it can, but it cannot. In fact, the QIRC in Vice-President O'Connor's decision found— In my view the NPAQ is not a 'trade union'. NPAQ's legal personality and corporate status are inconsistent with that of a typical 'trade union' and its history is not in any sense typical of a 'trade union'.

Grace Grace:
One of the misleading arguments which they repeated time and time again was to accuse unions of all sorts of actions. They should take that outside and see how far they get. They have absolutely no courage whatsoever. To come in here and talk like that is an absolute affront and they should all be ashamed of themselves. The same then goes for employer organisations that are equally covered under this bill and are supporting what is occurring in this bill. If they say it for the registered union of workers, they are saying it for the registered union of employers who face similar disruptive behaviour from a non-registered organisation. I heard a lot of them saying that they charge $400. How would they know what some of these organisations charge? What we hear from the commission is that as soon as a case needs to be taken—and a lot of them have been anti-vaxxer cases, and not one case has got up in the commission—they take the money, they outsource the advocacy and then those people go in and misrepresent the advocacy they are undertaking ***to the point that the president of the QIRC has written to me about the disgusting behaviour that is going on at the QIRC.***

The president of the QIRC wrote to me about the manner in which they are manoeuvring and who they are representing*. They have been saying, 'I'm not an agent.*

I'm not a lawyer. They're not instructing me as a lawyer.' It is ridiculous. I am fixing it up in the bill and I make absolutely no apologies for that.
" "

I also note the article in the paper over the weekend: https://www.couriermail.com.au/news/opinion/rotten-union-move-would-see-teachers-nurses-propping-up-labor/news-story/5d747138463e41e9716cba0aa1ec4431

As you are also aware, my matter is still awaiting a determination by you. The appeal hearing concluded in November 2021, almost 12 months ago.

I wrote to you recently to enquire as to the delay and you responded, effectively, that you would "soon turn your mind to it".

When you were appointed to the position of President of the IRC you publicly stated that no decision from a Commissioner should take longer than three months and that if any litigant was subjected to a delay in excess of that, then they should contact you.

Hence my letter of 30 September, one month ago.

As you are aware, the bill has been before Parliament for quite some time and has had committee hearings.

What has particularly concerned my executive in the last week is that, as part of parliamentary debate, it was revealed that the Labor Member for Toohey, Mr Russo, personally thanked you in parliament for the support of you and your wife in his political campaign.

So my members are now faced with the knowledge that you are personally connected to a member of a government that has embarked on a vitriolic campaign against my union and have used your name and your position as support for the legislation that is attempting to outlaw, as much as possible, my union.

Additionally, whilst describing us in extraordinarily defamatory terms the Government is proposing for the obvious administrative benefit of the Commission that we still be permitted to continue to represent those members who currently have matters before the Commission.

All of these facts, coupled with the extreme delay in the delivery of your decision in my matter whilst this bill has been before the Parliament, has led the executive to form the view that we have no other option than to ask you to recuse yourself from further consideration of the appeal.

We are not making an allegation that you are biased against us but we are concerned that our members may feel that that is the case.

In light of the matters I have outlined above, there is little we can say to dispel their concerns.

I appreciate this has placed you in an invidious position.

We are more than happy to have another judge deliver a decision by reference to the transcripts.

Yours sincerely,

Margaret Gilbert
President
Nurses' Professional Association of Queensland
E: margaret.gilbert@npaaservices.org.au

[7] Ms Gilbert's application specifies grounds as follows:

> "1. This matter was heard 12 months ago.
>
> 2. Not long following the appeal, amendments to the Industrial Relations Act were flagged for Parliament to consider with justification being to 'clarify the Gilbert matter' even though it was still subject to appeal.
>
> 3. His Honour made a submission[5] and corresponded with Parliament regarding the Industrial Relations and Other Amendment Bill.
>
> 4. I wrote to his Honour on 30 September 2022 expressing some concern that a decision was taking longer than 3 months and that delay in a decision could effectively render parts of this decision moot as legislation would amend sections of the Act that were being considered in this matter.
>
> 5. A month later, the Bill was debated in Parliament and his Honour's name was mentioned many times personally in the House.
>
> 6. Amendments to the Industrial Relations Act aimed at harming my union were justified by members of the Government by referencing his Honour's submission to the Parliamentary Committee conducting a review into the proposed Bill in a letter to Minister Grace.
>
> 7. His Honour's close connection with at least one member of the Government, Peter Russo was also mentioned in Parliament and engaged his role as President of the Industrial Court.

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5 A reference to "my letter"; the one to the Minister of 22 June 2022.

8. I note many members of the Government made offensive comments about my union and do not like the idea of my union competing with their unions. Many members in the house pointed out the financial link between the ALP and the unions as the real reason for the legislation that attempts to coerce my members back into the QNMU.

8. The Courier Mail has reported on ALP MP Mr Russo expressing gratitude for his Honour assisting his political campaign.

9. I then wrote to his Hon Peter Davis on 31 October asking him to recuse himself from this matter and have an alternative Supreme Court Judge deliver a decision on the transcripts.

10. I did not hear back so I wrote to the Chief Justice on 22 November asking to investigate the state of my matter.

11. In my letter I noted concern about the extreme delay in my decision and concern that the delay could be perceived as allowing legislation 'clarifying the matter' and diminishing my union to catch up to his Honour's decision so that no benefit should be given to my union if a favorable decision were to be handed down.

12. I am concerned the Government is aiming to interfere with this matter given the timing of the legislation and given the close connection his Honor has with members of the Government, it would be proper for an alternative Judge.

13. Due to credibility of witnesses not being an issue in question, on balance, having an alternative Justice would be favourable.

14. I have attached my letters of 30 September 2022, 31 October 2022 and 22 November 2022."

[8] Since the letter of 31 October 2022 was sent by Ms Gilbert, Mr N Ferrett KC was briefed on her behalf. He drafted written submissions upon which Ms Gilbert relied. Mr Ferrett did not appear on the application. Had Mr Ferrett appeared, I would have directed many questions to him about his written submissions. It was difficult for Ms Gilbert to present the arguments drawn by counsel. She did her best.

[9] No reliance is now made on statements made in Parliament. It is conceded by Ms Gilbert that statements made by third parties could not bear upon the issue of apprehended bias.

[10] No reliance is now made by Ms Gilbert on the fact that the delivery of judgment was delayed.

[11] The substantive argument now is:

1. A central issue in the appeal is whether NPAQ is:

   (a) an "industrial association"; and/or

(b) a "trade union".

2. That is a political issue to the extent that one side of politics advocates for maintenance of an industrial system only permitting registered organisations or bodies capable of being registered. NPAQ is neither.

3. I have a past political association with the ALP and Mr P Russo the Member for Toohey in particular.

4. It is said that, in my letter to the Minister:

(a) I advocated for a particular policy outcome;

(b) I do not in my letter canvass all contrary arguments to the policy that I am allegedly advocating;

(c) the subject matter of the letter concerns issues to be decided on the appeal.

5. It is submitted that, because of those factors, a fair-minded bystander would reasonably apprehend that an impartial mind might not be brought to bear on what are essentially questions of statutory interpretation.

[12] There are obvious problems with the submissions.

[13] The respondents oppose the application. The Queensland Nurses and Midwives' Union of Employees (QNMU), who intervened in the appeal by leave, made some submissions on the application, but those submissions were limited, as is their interest in the appeal.

Legal principles

[14] In *Ebner v Official Trustee in Bankruptcy*,[6] the High Court held that apprehended bias will disqualify a judge from a case "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide".[7]

[15] The test, the High Court held, requires the adoption of a two-step process:

> "First, it requires the identification of what is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits."[8]

[16] Ms Gilbert has, as already observed, expressly abandoned reliance upon what was said in Parliament. She mentioned, in her letter of 31 October 2022, comments made in a *Courier-Mail* article which was written by Mr Des Houghton. The question for my determination is not what a reasonable fair-minded person might think about the

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6 (2000) 205 CLR 337.
7 At [6].
8 At [8].

facts as described by a journalist. As Mason CJ and Brennan J (as his Honour then was) observed in *Laws v Australian Broadcasting Tribunal*:[9]

> "In assessing what the hypothetical reaction of a fair-minded observer would be, we must attribute to him or her knowledge of the actual circumstances of the case."[10] (emphasis added)

[17] In *Gas & Fuel Corporation Superannuation Fund & Ors v Saunders & Anor*,[11] the Full Court of the Federal Court held that it was necessary for a judge hearing an apprehended bias application to determine the facts upon which the fair-minded observer would form their opinion.

Background concerning the sending of my letter and the aftermath

[18] I was appointed President of the Industrial Court of Queensland (ICQ) and the Queensland Industrial Relations Commission (QIRC) in 2020. Section 412 of the *Industrial Relations Act* 2016 (the IR Act) defines the functions of the President as:

> "**412 Functions of the president**
>
> (1) The president has the functions given to the president under this Act or another Act.
>
> (2) The functions of the president include—
>
> (a) managing and administering the court, including deciding who constitutes the court for a proceeding; and
>
> (b) preparing and giving the annual report to the Minister under section 594.
>
> (3) The president has the power to do all things necessary or convenient to be done for the performance of the president's functions.
>
> (4) The president may delegate a function of the president to the vice-president or a deputy president (court)."

[19] Over my period as President, the Minster has sought my comment on amendments to the IR Act and other legislation, no doubt on the basis that I am responsible for "managing and administering the court".[12] I have a similar function in relation to the QIRC.[13] Section 436 is of relevance. It provides:

> "**436 Other functions of the president**
>
> The functions of the president in relation to the commission include—

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9 (1990) 170 CLR 70.
10 At 87.
11 (1994) 123 ALR 323.
12 Section 412.
13 Section 435.

(a) developing performance measures that apply to members of the commission in carrying out its functions; and

(b) developing a code of conduct for—

(i) members of the commission; and

(ii) persons appearing before the commission." (emphasis added)

[20] Section 436 recognises the role which a court or tribunal has in regulating advocates who appear before it.

[21] It is common for a minister to consult with the head of a court[14] about matters concerning the court. It is common for the head of a court[15] to raise with a minister matters of concern which might need to be legislatively addressed. Ms Gilbert accepted those propositions in argument.

[22] Section 530 of the IR Act concerns the representation of entities before the ICQ and the QIRC. At the time of my letter to the Minister, ss 529 and 530 provided:

"**529 Representation of parties generally**

(1) Subject to section 530A(4), in proceedings, a party to the proceedings, or a person ordered or permitted to appear or to be represented in the proceedings, may be represented by—

(a) an agent appointed in writing; or

(b) if the party or person is an organisation—an officer or member of the organisation.

(2) In this section—

proceedings—

(a) means proceedings under this Act or another Act being conducted by the court, the commission, an Industrial Magistrates Court or the registrar; and

(b) includes conciliation being conducted under part 3, division 4 or part 5, division 5A by a conciliator.

530 Legal representation

(1A) This section applies in relation to proceedings other than a proceeding for a public service appeal.

(1) A party to proceedings, or person ordered or permitted to appear or to be represented in the proceedings, may be represented by a lawyer only if—

(a) for proceedings in the court—

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14 Or other tribunal.

15 Or other tribunal.

(i) all parties consent; or

(ii) the court gives leave; or

(iii) the proceedings are for the prosecution of an offence; or

(b) for proceedings before the full bench—the full bench gives leave; or

(c) for proceedings before the commission, other than the full bench, under the *Anti-Discrimination Act 1991*—the commission gives leave; or

(d) for other proceedings before the commission, other than the full bench—

(i) all parties consent; or

(ii) for a proceeding relating to a matter under a relevant provision—the commission gives leave; or

(e) for proceedings before an Industrial Magistrates Court—

(i) all parties consent; or

(ii) both of the following apply—

(A) the proceedings relate to a matter that could have been brought before a court of competent jurisdiction other than an Industrial Magistrates Court; and

(B) an Industrial Magistrates Court gives leave; or

(iii) the proceedings are for the prosecution of an offence; or

(f) for proceedings before the registrar, including interlocutory proceedings—

(i) all parties consent; or

(ii) the registrar gives leave; or

(g) for proceedings before a conciliator—the conciliator gives leave.

(2) However, the person or party must not be represented by a lawyer—

(a) if the party is a negotiating party to arbitration proceedings before the full bench under chapter 4, part 3, division 2; or

(b) in proceedings before the commission under section 403 or 475; or

(c) in proceedings remitted to the Industrial Magistrates Court under section 404(2) or 475(2).

(3) Despite subsection (1), a party or person may be represented by a lawyer in making a written submission to the commission in relation to—

(a) the making or variation of a modern award under chapter 3; and

(b) the making of a general ruling about the Queensland minimum wage under section 458.

(4) An industrial tribunal may give leave under subsection (1) only if—

(a) it would enable the proceedings to be dealt with more efficiently, having regard to the complexity of the matter; or

(b) it would be unfair not to allow the party or person to be represented because the party or person is unable to represent itself, himself or herself; or

(c) it would be unfair not to allow the party or person to be represented having regard to fairness between the party or person, and other parties or persons in the proceedings.

Examples of when it may be unfair not to allow a party or person to be represented by a lawyer—

- a party is a small business and has no specialist human resources staff, while the other party is represented by an officer or employee of an industrial association or another person with experience in industrial relations advocacy
- a person is from a non-English speaking background or has difficulty reading or writing

(5) For this section, a party or person is taken not to be represented by a lawyer if the lawyer is—

(a) an employee or officer of the party or person; or

(b) an employee or officer of an entity representing the party or person, if the entity is—

(i) an organisation; or

(ii) an association of employers that is not registered under chapter 12; or

(iii) a State peak council.

(6) In proceedings before the Industrial Magistrates Court for the prosecution of an offence under subsection (1)(e), the person represented can not be awarded costs of the representation.

(7) In this section—

industrial tribunal means the Court of Appeal, court, full bench, commission or Industrial Magistrates Court.

proceedings—

(a) means proceedings under this Act or another Act being conducted by the court, the commission, an Industrial Magistrates Court or the registrar; and

(b) includes conciliation being conducted under part 3, division 4 or part 5, division 5A by a conciliator.

relevant provision, for a proceeding before the commission other than the full bench, means—

(a) chapter 8; or

(b) section 471; or

(c) chapter 12, part 2 or 16."

[23] Section 529(1)(a) gives a litigant the right to appoint an agent to represent them. When read with s 530, the intention is that the agent is a person other than a lawyer.

[24] Representation before Queensland Courts is generally through lawyers who are admitted to practice by the Supreme Court of a State and regulated by professional structures established by legislation.[16] Queensland lawyers have a right of appearance in most courts and tribunals.

[25] Section 530 embodies a policy that the QIRC is a "lay tribunal" and should not be the domain of lawyers. That necessarily raises questions as to the identity and competence of the advocates who appear and how they should be regulated.

[26] By 22 June 2022,[17] I had sat on an appeal where a non-legally qualified agent had appeared for an appellant. That was *GJT Earthmoving Pty Ltd v The Regulator under the Work Health and Safety Act 2011*.[18] The agent was clearly incapable of representing the appellant. I was by that point also receiving expressions of concern from various Commissioners in relation to the performance of unqualified agents who were apparently charging fees to appear in the QIRC.

[27] Consistently with my functions as President, I thought it appropriate to send my letter, which I did on 22 June 2022, to address the issue. It is replicated in full below:

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16 *Legal Profession Act* 2007.
17 The date of my letter.
18 [2022] ICQ 2 at [14]-[26].

INDUSTRIAL COURT OF QUEENSLAND
QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

22 June 2022

The Honourable Grace Grace MP
Minister for Education, Minister for Industrial Relations
and Minister for Racing
PO Box 15033
CITY EAST QLD 4002

Dear Minister

I am receiving expressions of concern from Commissioners in relation to the operation of ss 529, 530 and 530A of the *Industrial Relations Act* 2016 (the IR Act). These provisions concern the representation of parties before the Commission.[1]

Policy considerations have arisen in the past as to the extent that lawyers should have a right of appearance in the Commission. The present issues though relate to other issues.

Sections 529, 530 and 530A of the IR Act provide, as relevant here, as follows:

> **"529 Representation of parties generally**
>
> (1) Subject to section 530A(4), in proceedings, a party to the proceedings, or a person ordered or permitted to appear or to be represented in the proceedings, may be represented by—
>
> (a) an agent appointed in writing; or
>
> (b) if the party or person is an organisation—an officer or member of the organisation.
>
> (2) In this section—
>
> ***proceedings***—
>
> (a) means proceedings under this Act or another Act being conducted by the court, the commission, an Industrial Magistrates Court or the registrar; and
>
> (b) includes conciliation being conducted under part 3, division 4 or part 5, division 5A by a conciliator.

[1] And also the Court.

The Hon Justice Peter Davis, President

Chambers:

530 Legal representation

(1A) This section applies in relation to proceedings other than a proceeding for a public service appeal.[2]

(1) A party to proceedings, or person ordered or permitted to appear or to be represented in the proceedings, may be represented by a lawyer only if—

(a) for proceedings in the court—

(i) all parties consent; or

(ii) the court gives leave; or

(iii) the proceedings are for the prosecution of an offence; or

(b) for proceedings before the full bench—the full bench gives leave; or

(c) for proceedings before the commission, other than the full bench, under the Anti-Discrimination Act 1991—the commission gives leave; or

(d) for other proceedings before the commission, other than the full bench—

(i) all parties consent; or

(ii) for a proceeding relating to a matter under a relevant provision[3]—the commission gives leave; or …[4]

(2) However, the person or party must not be represented by a lawyer—

(a) if the party is a negotiating party to arbitration proceedings before the full bench under chapter 4, part 3, division 2;[5] or

(b) in proceedings before the commission under section 403[6] or 475;[7] or

(c) in proceedings remitted to the Industrial Magistrates Court under section 404(2)[8] or 475(2).[9]

(3) Despite subsection (1), a party or person may be represented by a lawyer in making a written submission to the commission in relation to—

(a) the making or variation of a modern award under chapter 3; and

(b) the making of a general ruling about the Queensland minimum wage under section 458.

(4) An industrial tribunal may give leave under subsection (1) only if—

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2 As this is dealt with by s 530A.
3 "Relevant provision" is defined in s 530(7) but it is not necessary to go to the definition.
4 Subsections 530(1)(e), (f) and (g) concern proceedings before the Industrial Magistrates Court, the Registrar and a conciliator and are not relevant here.
5 Arbitration of collective bargaining.
6 Repayment of fees charged by private employment agents.
7 Recovery of unpaid wages and superannuation contributions.
8 Concerns private employment agent's fees.
9 Concerns unpaid wages.

(a) it would enable the proceedings to be dealt with more efficiently, having regard to the complexity of the matter; or

(b) it would be unfair not to allow the party or person to be represented because the party or person is unable to represent itself, himself or herself; or

(c) it would be unfair not to allow the party or person to be represented having regard to fairness between the party or person, and other parties or persons in the proceedings. …[10]

(5) For this section, a party or person is taken not to be represented by a lawyer if the lawyer is—

(a) an employee or officer of the party or person; or

(b) an employee or officer of an entity representing the party or person, if the entity is—

(i) an organisation; or

(ii) an association of employers that is not registered under chapter 12; or

(iii) a State peak council. …[11]

(7) In this section—

industrial tribunal means the Court of Appeal, court, full bench, commission or Industrial Magistrates Court.

proceedings—

(a) means proceedings under this Act or another Act being conducted by the court, the commission, an Industrial Magistrates Court or the registrar; and

(b) includes conciliation being conducted under part 3, division 4 or part 5, division 5A by a conciliator.

relevant provision, for a proceeding before the commission other than the full bench, means—

(a) chapter 8; or

(b) section 471; or

(c) chapter 12, part 2 or 16.

530A Representation—public service appeals

(1) This section applies in relation to a proceeding for a public service appeal.

(2) A party to the appeal may appear personally or by an agent.

(3) However, a party may not be represented by a person if—

(a) the party has instructed the person to act as the party's lawyer; and

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10 Legislative note removed.

11 Section 530(6) concerns prosecutions in the Industrial Magistrates Court.

(b) in acting as the party's lawyer, the person would be subject to the Legal Profession Act 2007.

(4) Also, a party to an appeal about a promotion decision may be represented by an agent only with the leave of the commission." (emphasis added)

Sections 529 and 530 concern representation in the Commission generally. Section 530A concerns public service appeals. I shall put s 530A to one side for a moment.

Sections 529 and 530 reflect clear policy and purpose. That is:

1. a party is entitled to be represented by an agent[12] or, if the party is an organisation by an officer or a member of the organisation;[13]

2. that "agent" may not be a lawyer unless the Court gives leave;[14]

3. the Commission may only give leave in limited circumstances,[15] but

4. no leave is required if the lawyer is an employee or officer of the party or is an employee or officer of an entity representing the party if the entity is, relevantly here, a union of employees or an association of employers.[16]

Some advocates employed by unions and employer groups have legal training and some do not. The difficulties being encountered do not concern industrial advocates from unions or from employer groups. They are well organised and represent their members well.

Unpaid agents also appear for parties. Citizens who litigate in the Commission or the Court often have a trusted friend or colleague who holds their respect and are enlisted to help. They may be a teacher, or a Justice of the Peace, or a long term government employee who brings general life skills to the aid of the party. The nature of the jurisdiction of the Commission and the Court lends itself to parties appearing through unpaid agents. There is no issue with these unpaid agents.

However, there are organisations who hold themselves out as firms of industrial advocates who are obviously charging citizens of Queensland fees to represent them. For example, there has been a case at the Commission[17] where a party had engaged "Supportah Ops". The party terminated their relationship with Supportah Ops who then claimed a lien over documents to secure fees owed to the firm.

In another case,[18] Supportah Australia Pty Ltd trading as "Industrial Relations Claims" filed a Form 33 Notice of Appointment of Agent specifying a person as "Mr Dryley-Collins" as "agent" of the party. When it was pointed out that Mr Dryley-Collins was a lawyer, the Commission was told that Mr Dryley-Collins' name was included "erroneously through administrative error, as Mr Miles Heffernan had been the lay advocate working on the file".

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12 Section 529(1)(a).
13 Section 529(1)(b).
14 Section 530(1)(a) (the Court) and s 530(1)(d) (the Commission).
15 Section 530(4).
16 Section 530(5); it is not necessary here to mention any "state peak council".
17 AD/2019/88.
18 *Richards v State of Queensland (Queensland Ambulance Service)* [2022] QIRC 159.

Presumably fees were being charged for the work done by Mr Dryley-Collins and by Mr Heffernan.

A similar situation arose in another case.[19] That was a Public Service appeal. Again, Supportah were involved. Mr Dryley-Collins had been appointed and when his status as a lawyer was pointed out, a further notice was filed nominating a lay advocate of an affiliated entity.[20]

Supportah posted on the internet a YouTube video titled "Filing a COVID vaccine mandate dismissal claim". The narrator is Mr Dryley-Collins and underneath his image are the words, "Stephen Dryley-Collins, Employer Lawyer". His image appears alongside the logo for Red Union Support Hub.

The video effectively seeks to drum up business for Supportah from persons who wish to file claims relating to dismissals founded on a failure to follow mandatory COVID vaccine directions. Therefore, a firm of industrial advocates (not lawyers) are advertising their services by the use of a video where a lawyer holding himself out as a lawyer is speaking and advising potential clients.

The video raises all number of issues:

1. Who is making the representations? Is it Supportah Australia, or Red Union Support Hub?

2. Are Supportah Australia and Red Union Support Hub one and the same?

3. Mr Dryley-Collins refers to Supportah Australia as "the Union" but it is not a registered organisation under Chapter 12 of the IR Act.

4. Red Union Support Hub, NPAQ, TPAQ (also referred to in the video) are all not registered under Chapter 12 of the IR Act.

In a recent case in the Court, a Mr Richards[21] acted for a party appealing from a decision of the Vice President given in the Commission to confirm the issue of an improvement notice under the *Work Health and Safety Act* 2011. The party's interests were not being advanced by this gentleman who I assume was being paid. He simply did not have the skill to advocate for the applicant. He ultimately brought a baseless application seeking that I disqualify myself from hearing the matter.[22] When the prospect of Mr Richards paying the Regulator's costs himself of that application arose, Mr Richards withdrew.

The central problem is that there is a group of professional advocates who are clearly providing services of a legal nature who are completely unregulated.

It has long ago been recognised that government has a significant role to play in the regulation of the delivery of professional services to citizens. It is a consumer protection issue. Professions which are regulated by statute which include disciplinary regimes include:

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19 PSA/2022/416.

20 *QNurses First Inc t/a NPAQ*.

21 Not the Mr Richards in *Richards v State of Queensland (Queensland Ambulance Service)* [2022] QIRC 159.

22 *GJT Earthmoving Pty Ltd v The Regulator under the Work Health and Safety Act 2011 (No 2)* [2022] ICQ 8.

1. Doctors;[23]
2. Lawyers;
3. Engineers;
4. Pharmacists;
5. Psychologists;
6. Nurses; and
7. Chiropractors, to name but a few.

These issues are arising regularly and suggest an urgent need for some regulation of those who are charging fees to represent Queensland citizens in the Commission (and the Court) and who are not solicitors and/or barristers who have been given leave pursuant to s 530 of the IR Act. Consideration ought, in my respectful view, be given to legislation being passed prohibiting persons from charging fees as "industrial advocates" unless registered. A register can be kept and the legislation provide that there be qualifications for registration and a code of conduct and the prospect of disciplinary proceedings through QCAT in the event of complaints and breaches.

Section 530A throws up different issues. The section concerns representation in Public Service appeals.

Like s 530, s 530A provides that a party "may appear personally or by an agent".[24] Subsection (3) then prohibits certain persons from acting as a party's agent. However, that prohibition is framed by identifying the "agent" by reference to the nature of the instructions that have been given by the party to the appeal. The party to the appeal may not be represented by a person if "(a) the party has instructed the person to act as the party's lawyer".

Lawyers employed by these various firms are asserting that they have not been instructed "to act as the party's lawyer". They have been instructed "to act as the party's agent". Section 530A could easily be amended in order to overcome this nonsense, but, in my respectful opinion, a broader approach is required to regulate industrial advocates appearing in the Commission and the Court, as I have explained.

Could you please consider these issues.

Yours faithfully

Justice Peter Davis
President

[23] Through a national scheme of which Queensland is a part.
[24] Section 530A(2).

[28] Similar issues were raised by the Queensland Law Society (QLS) in a letter to a Senate Committee in September 2021. The letter is replicated below:

Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
[redacted] | F 07 3221 9329 | [redacted] | qls.com.a
Office of the President

1 September 2021

Our ref: LP-MC

Select Committee on Job Security
Department of the Senate
PO Box 6100
Canberra ACT 2600
By email: jobsecurity.sen@aph.gov.au

Dear Committee Secretary

Select Committee on Job Security

We refer to our submission dated 7 April 2021 which provided the Queensland Law Society's (**QLS**) policy reform proposals relevant to paragraphs (c) to (e) of the Committee's terms of reference.

Given that the submissions in respect of the Committee's inquiry remain open, we wish to take this opportunity to provide additional comment on matters relevant to paragraphs (e) and (h) of the terms of reference.

In short, these submissions deal with the importance of the Government taking steps to investigate and address the consumer protection issues relating to the conduct and qualifications of paid non-lawyer advocates who routinely represent clients in Commonwealth, as well as State and Territory, employment and discrimination tribunals and commissions.

The scope of the problem to be addressed

Non-lawyer advocates are not bound by any of the legal and ethical obligations that apply to members of the legal profession, including obligations relating to costs disclosure and the holding of relevant insurances. Nor is there any qualification prerequisite that apply to such advocates.

In negotiating settlements with applicants represented by paid non-lawyer advocates, QLS members have reported being concerned that, on occasions, applicants seem to be pressured into settlements by their representatives and agreeing to settlement sums that will likely be entirely or substantially exhausted by the fees they are charged. In addition, QLS members have raised concerns about whether particular advocates are physically based in Australia and, if not, whether the minimum statutory consumer protections that apply in Australia extend to their services.

The bases for the QLS's concerns were also well articulated by the following warning issued in late 2020 by the Australian Competition and Consumer Commission (**ACCC**) in respect of one particular allegedly unscrupulous non-lawyer advocate:[1]

> '7 December 2020
>
> The ACCC has issued a public warning notice about the alleged conduct of Dismissals Direct Pty Ltd, trading as Unfair Dismissals Direct, a company that represented employees in unfair dismissal claims before the Fair Work Commission until earlier this year. Mr John Bingham is the sole director of Unfair Dismissals Direct.
>
> Unfair Dismissals Direct did not offer legal services, but acted as a paid agent on a 'no win, no fee' basis and deducted its fees from any final settlement for clients.
>
> From May 2018, the ACCC received complaints about Unfair Dismissals Direct, including from 18 consumers around Australia who complained that Unfair Dismissals Direct did not pay them their settlement monies, minus its fees, after their unfair dismissal claim was settled.
>
> The ACCC has reasonable grounds to suspect that Unfair Dismissals Direct may have engaged in misleading and deceptive conduct, and made false or misleading representations, by telling consumers that it would receive settlement monies on their behalf, deduct its professional fee and transfer the remaining balance to the client when, in some instances, Unfair Dismissals Direct kept the remaining balance.
>
> Unfair Dismissals Direct advertised its services online and offered potential clients a 'free confidential assessment'. Their contract with clients outlined fees which were to be deducted from any settlement paid into the companies' accounts after successful conclusion of their claim.
>
> "We are very concerned that it appears some clients of Unfair Dismissals Direct, who were at a low point in their lives after losing their job were not paid the settlement balance owing to them."
>
> "We are warning Australian consumers seeking representation for unfair dismissal claims to choose their representatives carefully," ACCC Commissioner Sarah Court said.
>
> "Consumers should do their research before signing any contract, including for unfair dismissal services. If a business is trying to pressure you into signing a contract quickly, without ample opportunity to review the contract, ask yourself why."
>
> The Public Warning Notice has been issued because the ACCC has reasonable grounds to suspect that the conduct by Unfair Dismissals Direct may constitute a contravention of sections 18 and/or 29 of the Australian Consumer Law, and the ACCC is satisfied that consumers have suffered detriment and it is in the public interest to issue the notice.

[1] https://www.accc.gov.au/media-release/accc-issues-public-warning-notice-about-unfair-dismissals-direct.

The warning notice is available at Dismissals Direct Pty Ltd (also known as Unfair Dismissals Direct)

Advice for consumers seeking unfair dismissal representation

Individuals do not need to be represented at the Fair Work Commission, in fact almost half choose to represent themselves. Free and reliable information about the unfair dismissals process is available on the Fair Work Commission website.

Workers seeking to engage representation for unfair dismissal claims should read contracts carefully before engaging a representative to determine:

- what services will be provided;
- whether the contract limits their ability to keep negotiating for the best possible payout;
- how much the service costs; and
- whether the services are good value when compared to a potential payout.

Other tips include:

- Look for online reviews before signing up.
- Shop around – many representatives in the industry offer free consultations. Find the one that best suits your needs.
- Ask how any settlement money will be handled, will it be paid directly to you or the company?
    - At the Fair Work Commission, you are able to request that any settlement money will be paid to you directly
    - Lawyers are subject to strict legal obligations when handling client money. Commercial operators, who are not lawyers, are not subject to the same obligations.

Keep a copy of your contract and any associated terms and conditions.

If COVID restrictions allow, visit the offices of the representative before signing up.

QLS's concerns are also reflected in a public warning issued by the Fair Work Commission (**FWC**)[2] as to the conduct of a different non-lawyer advocate (i.e. not the same non-lawyer advocate referred to in the ACCC warning above), and how to distinguish between the FWC and persons who might seek to blur the lines between the FWC's operations, and their own.

Practical examples of inappropriate conduct by non-lawyer advocates

The following case examples further demonstrate our concerns and the need for a comprehensive review to consider potential reform options relating to non-lawyer advocates:

(a) In *Charles v Hooper Family Trust t/a Barron River Towing*,[3] John Bingham, who was the subject of the subsequent ACCC warning referred to above, was responsible for the late filing of an unfair dismissal application. The evidence in support of an extension of time in that matter disclosed a troubling general practice on the part of Unfair Dismissal Direct by which they typically filed applications on behalf of their client without providing those

[2] https://www.fwc.gov.au/contact-us/complaints-feedback/complaints-about-lawyers-paid-agents
[3] [2018] FWC 2202 at [35]-[36].

applications in draft to their clients, and seeking their express instructions on those documents.

(b) *Scott v DFP Recruitment Services Pty Ltd*[4] concerned a further late lodgement of an unfair termination claim, and the dismissal of the claim following comprehensive failures by the non-lawyer paid agent in that case to meet basic directions issued by the Commission, and to respond to attempts made by the Commission to clarify the circumstances in which the original application was lodged.

(c) *Johnston v East Gippsland Real Estate Pty Ltd*[6] was another example of a basic error having been made by an employee of another paid agent, Unfair Dismissals Australia. In response to dissatisfaction with his representation by that agent, the relevant employee wrote to them 'I am not going to proceed any further with Unfair Dismissals Australia regarding the matter against LJ Hooker. You are welcome to phone me'. Without clarifying the meaning of the note, Unfair Dismissals Australia wrongly interpreted the email as an instruction to file a notice of discontinuance. The error was particularly egregious in circumstances where there was evidence that the applicant had forewarned Unfair Dismissals Australia that he would be seeking alternative representation.

(d) In *Simon Lewis v SGA (1994) Pty Ltd*,[5] Unfair Dismissals Australia was ordered to pay costs in an unfair dismissal matter following a 'reckless' failure on its part to provide its client with relevant supplementary statements filed by the respondent in the case.

Representation rights

The effect of the legislative schemes considered below is that there is significant scope for non-lawyer advocates/paid agents to represent and act for clients in proceedings before relevant commissions and tribunals. That is particularly so in respect of conciliations and mediation conferences, which are the forums at which the vast bulk of such claims are resolved. The wide opportunities that paid non-lawyer advocates have to represent clients underlines the critical need for consumer protection in this area.

Representation before the Fair Work Commission

Under section 596(2) of the *Fair Work Act 2009* (Cth) (**FW Act**) a person may be represented in the FWC by a paid agent only with the leave of the Commission. However, that section is qualified by section 596(1) and section 11 of the *Fair Work Commission Rules 2009* (Cth). The combined effect of those provisions is that:

(a) leave is not required for paid agents to represent applicants in conciliations of unfair dismissal or anti-bullying applications;

(b) leave is otherwise not required for paid agents to represent applicants in all steps associated with a proceeding other than those that require an appearance before the Commission;

(c) however, the Commission retains an over-arching discretion to direct that a person not be represented by a paid agent in respect of a matter before it. Notwithstanding the

[4] [2020] FWC 5682.
[5] [2019] FWC 5483.
[6] [2020] FWC 2229.

existence of this discretion, it is one that is rarely ever exercised in practice (not least because conciliations are run by Commission staff and not Commissioners).

The latest available FWC annual report (for the 2019/20 financial year)[7] states that 16,558 unfair dismissal applications were lodged in that year, and that there were 12,962 conciliation conferences held by FWC staff. There were 820 applications for stop bullying orders filed in the same period, although the report does not specify how many conferences were held in respect of such matters.

Representation before discrimination commissions

In Queensland, the Queensland Human Rights Commission (**QHRC**) is the body that has jurisdiction to deal with discrimination and sexual harassment complaints. Complaints that are not resolved, including through the direct assistance of the QHRC are referred to the Queensland Industrial Relations Commission (QIRC) (for employment-related matters) and the Queensland Civil and Administrative Tribunal (for all other discrimination and sexual harassment proceedings). In the 2019/20 financial year, the QHRC conciliated 264 disputes.[8]

Under section 163 of the *Anti-Discrimination Act 1991* (Qld), a person may be represented by another person at a conciliation conference with the permission of the Commission.[9] It is the experience of QLS members that the QHRC generally has a very permissive approach to allowing paid agents to represent applicants in conciliation conferences.

The Australian Human Rights Commission (**AHRC**) serves the same function for sexual harassment and discrimination complaints made under Commonwealth equal opportunity legislation. Conferences are generally a prerequisite to an applicant being able to pursue their claim through proceedings in either the Federal Court or the Federal Circuit Court. Under section 46PK of the *Australian Human Rights Commission Act 1986* (Cth), a person may only be represented at a conference with the permission of the presiding AHRC official. Again, the AHRC has routinely exhibited a permissive approach to representation by paid agents. In 2019/20, the AHRC undertook 1,432 conciliation processes.[10]

Extent of existing consumer protections

The consumer risks highlighted in this submission, and which have been recognised by the ACCC, are partly addressed in some Australian jurisdictions. For example, section 46PA of the AHRC Act prohibits a person who is not a legal practitioner from demanding or receiving a fee or reward, or any payment of expenses, for representing an applicant before the Federal Court

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[7] https://www.fwc.gov.au/documents/documents/annual_reports/ar2020/fwc-annual-report-2019-20.pdf.
[8] https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0010/28369/QHRC_AnnualReport2019-20.pdf.
[9] See to a similar effect, *Anti-Discrimination Act 1977* (NSW), s 91B and *Anti-Discrimination Act 1998* (Tas), s 75(3). No restrictions on representation apply under the equivalent Victorian or Norther Territory legislation. The South Australian equivalent (the *Equal Opportunity Act 1984* (SA)) only contemplates that legal representatives may appear in a conciliation before that State's discrimination commission (see s 95(6)). The ACT Human Rights Commission only has discretion to allow a person to be represented in the course of a conciliation where it is satisfied that the representation is likely to help the conciliation substantially (see *Human Rights Commission Act 2005* (ACT), s 57(3)).
[10] https://humanrights.gov.au/sites/default/files/2020-10/AHRC_AR_2019-20_Complaint_Stats_FINAL.pdf.

or Federal Circuit Court (but not before the AHRC in the course of a conciliation). Similar provisions are in place in New South Wales[11] and Western Australia.[12]

Otherwise, clients of paid non-lawyer agents have the benefit of the standard consumer protections provided for by the *Competition and Consumer Act 2010* (Cth) and State and Territory fair trading legislation. However, those protections require individuals to take reactive enforcement action, or rely on Commonwealth or State and Territory regulators to do so on their behalf. The former may be cost-prohibitive, and either option may be practically impossible because the non-lawyer advocate may be located outside of Australia.

Other protective measures

Additional examples of ways in which the roles of non-legal representatives have been dealt with are as follows:

(a) Pursuant to section 436 of the *Industrial Relations Act 2016* (Qld) (**IR Act**), the QIRC now has a code of conduct that, among other matters, lists a variety of behavioural expectations of non-lawyer representatives. However, the Code, and the IR Act, are silent on the consequences of a breach of these expectations.

(b) Western Australia has the most comprehensive scheme relating to the regulation of the conduct of non-legally qualified representatives. Under that scheme[13] non-union industrial agents must be registered to provide representation services within the State, they must have appropriate insurances in place, they must satisfy various other requirements for registration, and they must comply with the Code of Conduct contained in the *Industrial Relations (Industrial Agents) Regulation 1987* (WA) as a condition of continued registration. However, 'the legislation provides no scheme for the supervision of agents once they are registered or to deal with any whose registration ought to be subject to scrutiny and possibly cancelled'.[14]

Consideration of potential reforms

QLS recognises the value that some non-lawyer advocates provide for otherwise unrepresented litigants. That value also extends to assisting commissions and tribunals in carrying out their statutory functions. That is particularly so in respect of industrial advocates who are employed by trade unions or employer groups (and none of the concerns raised by QLS in this submission extend to that category of non-lawyer advocate). Notwithstanding these particular advocates, there is a need for reform to protect people (both individual workers and in some cases small business) from unqualified non-lawyer advocates charging fees for service.

QLS recognises that any reform options that are ultimately explored need to be the subject of the usual consultation processes. However, consideration by the Committee of this important issue will be a critical starting point to ensure that vulnerable persons are protected at difficult times in their lives.

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[11] *Anti-Discrimination Act 1977* (NSW), s 98.
[12] The *Equal Opportunity Act 1984* (WA), s 92 allows representation by non-lawyer agents (subject to leave) but prevents those agents from receiving or demanding pay for such services..
[13] See s 112A of the *Industrial Relations Act 1979* (WA),
[14] *Maher v The Trustee for the Croker Unit Trust* [2019] WAIRC 254 at [21].

Select Committee on Job Security

In examining these issues, we recommend that any reform should be implemented through, to the greatest extent possible, the use of the Commonwealth's legislative power so as to ensure a nationally consistent approach to this issue.

As a first step, and related to the issue non-lawyer advocates, we repeat our calls for:

- increased funding for the legal assistance sector so that individuals can access advice from qualified legal professionals, and legal representation irrespective of their financial situation; and
- reforms to allow legal representation as a right in all courts, commissions and tribunals.

As we wrote in our earlier submissions, we welcome the opportunity for continued consultation, including in the course of the Committee's public inquiry.

Please do not hesitate to contact our Senior Policy Solicitor, Kate Brodnik on [redacted] or [redacted] if you wish to discuss the content of this letter.

Yours faithfully

Elizabeth Shearer
President

[29] As the QLS letter shows, the issues raised by agents appearing in industrial tribunals has raised the concern of the Australian Competition and Consumer Commission.

[30] The *Industrial Relations and Other Legislation Amendment Bill* 2022 (the bill) was introduced into Parliament. The bill sought to prohibit organisations such as the NPAQ from the industrial relations system. The bill came before the Education, Employment and Training Committee (the Committee). The Committee sent a copy of my letter to the QLS. On 19 July 2022, the QLS wrote to the Committee. The letter replicated in full is:

Queensland Law Society

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GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
[redacted] | F 07 3221 9329 | [redacted] | qls.com.au
Office of the President

19 July 2022

Our ref: KB:ILC

Committee Secretary
Education, Employment and Training Committee
PARLIAMENT HOUSE QLD 4000
By email: eetc@parliament.qld.gov.au

Dear Committee Secretary

Industrial Relations and Other Legislation Amendment Bill 2022

We refer to the correspondence from Justice Davis, President of the Industrial Court of Queensland and the Queensland Industrial Relations Commission to the Minister for Education, Minister for Industrial Relations and Minister for Racing, the Honourable Grace Grace MP dated 22 June 2022 which has been listed as a submission to the inquiry into the Industrial Relations and Other Legislation Amendment Bill 2022 (**Bill**).

The Queensland Law Society (**QLS**) has long been concerned about the issues raised in Justice Davis' letter. We support his Honour's comments and agree that the *Industrial Relations Act 2016* (**IR Act**) should be amended as one means of addressing these issues.

QLS has already submitted to the inquiry that there are a number of adverse consequences resulting from the restrictions on the right to legal representation in the Queensland Industrial Relations Commission (**QIRC/Commission**). While there is a desire that the Commission is a place for individuals to represent themselves in industrial matters, the reality is that most individuals do not feel they are able to do this, for a variety of reasons. Most seek assistance, whether it be from a lawyer or registered organisation such as a union. We concur with Justice Davis that there are no issues arising from representation by registered organisations (either employer or employee groups).

Over time, assistance has also been sought from non-lawyer paid agents. Members of our Industrial Law Committee, who have been involved in matters where a non-lawyer paid agent is present, report instances of concern including where parties seem to be pressured into settlements by their representatives and agreeing to settlement sums that will likely be entirely or substantially exhausted by the fees they are charged. As referred to in his Honour's correspondence, there are also occasions where the agent withdraws from the party's matter and/or where they did not appear to have the requisite skills or knowledge of the law or process to effectively assist.

The consequences of such unscrupulous behaviour by these persons or groups are obviously severe for the individual involved and there is also a negative impact on the Commission and other party. Fundamentally, there is risk to the individual in engaging a non-lawyer advocate as they are not bound by any of the legal and ethical obligations that apply to members of the legal

profession, including obligations relating to costs disclosure and the holding of relevant insurances. Nor is there any qualification prerequisite that applies to such advocates.

These issues are unfortunately not unique to the Queensland jurisdiction. We **enclose** a submission to the Senate Select Committee on Job Security which details how these issues are present in the federal "Fair Work" jurisdiction too. The submission refers to action taken by the Australian Competition and Consumer Commission and a number of decisions of the Fair Work Commission (**FWC**) where this conduct has been called out and criticised.

Since this submission was made, other decisions of the FWC have also commented on these issues and as recently as last week, Deputy President Lake made comments concerning a particular lay representative in the matter of *Ms Fiona Howard v Uniting Care Health - [2022] FWC 1860 | Fair Work Commission* at paragraph [23].

Actions by lawyers

We note the reference in Justice Davis' letter to lawyers who appear to be involved in some of these advocacy groups. Any lawyer who breaches the conduct rules, their duties or other laws is able to be the subject of disciplinary action by the Legal Services Commission and their practising certificate could also be suspended or cancelled by QLS. There are significant consequences for a lawyer who makes misrepresentations to a court or commission.

QLS condemns any actions by lawyers (or persons holding themselves out to be lawyers) which are not in keeping with the requirements of the IR Act or their professional obligations.

Recommendations

QLS makes the following recommendations to address the issues raised by the QIRC and in this submission.

1. We strongly recommend the IR Act be amended to remove any limitations on the right to legal representation for all matters before the Industrial Court and Commission. As stated in our earlier submission, this will also assist parties and the Commission to conduct matters more efficiently and effectively.

2. There also needs to be sufficient funding for the legal assistance sector so that individuals who are unable to engage legal representation for financial reasons, are still able to obtain assistance from a qualified person who owes ethical and other duties.

3. Pursuant to section 436 of the IR Act, the QIRC has a code of conduct that, among other matters, lists a variety of behavioural expectations of non-lawyer representatives. However, both the Code and IR Act are silent on the consequences of a breach of these expectations. We suggest consideration be given to amendments to the Code or legislation to provide for remedies for these breaches.

4. Our submission to the Select Committee called on the Government to take steps to investigate and address the consumer protection issues relating to the conduct and qualifications of paid non-lawyer advocates representing clients in Commonwealth,

State and Territory employment and discrimination tribunals and commissions. In doing so, we advocated for State, Territory and Federal Governments to consult and work together to consider nationally consistent reform options.

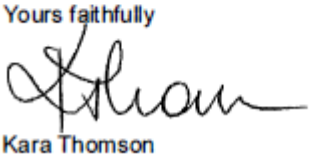
Finally, we would like to thank the Committee for the opportunity to contribute to this inquiry. We also thank the Office of Industrial Relations for its engagement with QLS over the course of the Five-yearly review of the *Industrial Relations Act 2016* and the development of this legislation.

We would be pleased to provide any further information the Committee may require on these comments, our previous submission, as well as any other issues that have been raised by other submitters in their written submissions or that may be raised at the hearing.

Once published on the Committee's inquiry page, we will forward a copy of this correspondence to the Minster and to Justice Davis.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted].

Yours faithfully



Kara Thomson
President

[31] The QLS letter of 19 July 2022 supports the views expressed in my letter.

[32] The Committee reported to the House in August 2022.

[33] The Second Reading Speech for the bill was made on 26 October 2022. Debate was heard on 26, 27 and 28 October 2022. Some of the passages are replicated in Ms Gilbert's letter of 31 October 2022. In due course, amendments were passed.

[34] As already observed, Ms Gilbert relies upon my past association with the ALP and Mr Russo. To establish that past association, Ms Gilbert relies on statements made in the Assembly by Mr Russo. However, the details of that past association are otherwise on the public record.

Application of the *Ebner* test

My past association with the ALP and Mr Russo

Identification of what is said to give rise to the apprehension

[35] It is the case, as I have previously disclosed,[19] that:

1. In 2014, I was the President of the Queensland Bar Association.

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[19] *GJT Earthmoving Pty Ltd v The Regulator under the Work Health and Safety Act 2011 (No 2)* [2022] ICQ 008.

2. I resigned as President in 2014 after the Liberal National Party government of the day appointed the Chief Magistrate, Timothy Carmody KC, as Chief Justice of Queensland.

3. In the 2015 State election, I was politically active supporting Mr Russo who was then the ALP candidate seeking election to the seat of Sunnybank.

4. My involvement with Mr Russo's election campaign included assisting him in fundraising for the 2015 election and supporting booth workers on election day.

5. Prior to my appointment as a judge of the Supreme Court of Queensland on 16 October 2017, I was a member of the ALP. Before being sworn in as a judge, I resigned my membership of the ALP and I am not now a member of the ALP or any other political party. I have not, either directly or indirectly, been involved in any political activity since being sworn in as a judge other than exercising my democratic right to vote in various elections.

[36] Mr Russo is married to the Honourable Kerri Mellifont, a Judge of the Supreme Court of Queensland. Mr Russo is a lawyer. I have attended various professional functions where Mr Russo has been present. I have otherwise had no contact with him since being sworn in as a judge.

What is the logical connection between my former association with the ALP and Mr Russo and the apprehension that I might decide Ms Gilbert's appeal otherwise than on its merits?

[37] On 12 March 2022, I was mentioned in a *Courier-Mail* article entitled, "Long arm of Queensland Labor Inc: Court of Comrades". The article was an editorial style piece identifying judicial officers who had some past connections with the ALP. That article prompted an application that I disqualify myself from hearing a particular case. In dismissing that application, I wrote:

> "[17] Society is governed by laws. Judges are lawyers. Lawyers study the workings of society. As educated people interested in the workings of society, many, and in my experience most, lawyers hold some political views. Many are politically active in varying degrees. Of course those political views vary.
>
> [18] The Honourable James Thomas AM, formerly a judge of the Court of Appeal of Queensland, in his highly respected text *Judicial Ethics in Australia*, Third Edition, LexisNexis, Butterworths 2009, says this of a judge's political connections:
>
> > 'After appointment a judge should not be an active member of any political party, should not fraternise with those in the echelons of political power and should not actively support causes which produce partisan reaction in the community. It would be improper for a judge to participate in a political party convention. As the divorce from political partisanship needs to be complete, a judge should resign from membership of any party. Continued silent membership could be seen as clandestine support."

> [19] There is nothing prohibiting a person with political affiliations taking judicial office. Chief Justice Latham, Chief Justice Barwick and Justice Murphy were all Commonwealth Attorneys-General and all three sat on the High Court. Wanstall CJ and Connolly J both held seats in the Queensland Legislative Assembly before being appointed to the Supreme Court. There are persons who have held seats in the Commonwealth Parliament and have gone on to be appointed to the Federal Court. Examples exist from both sides of politics; Bowen CJ and Kerr J for instance. Justice Elliot Johnston was a communist activist and later a successful judge of the Supreme Court of South Australia. All no doubt heard many cases where the government which appointed them was a party.
>
> [20] All judges are ultimately appointed by the Executive and some come from occupations within the government itself, eg Crown prosecutors, Solicitors General. This has never been seen to suggest they should not hear cases concerning the government."[20]

[38] I have taken the oath of office as a judge of the Supreme Court of Queensland and a judge of this Court and the QIRC. I have had no association with the ALP and no relevant association with Mr Russo since being appointed a judge in 2017. The appeal principally concerns questions of statutory construction. No reasonable, fair-minded person would think that I would decide the appeal otherwise than on its merits based on my previous political affiliations and activity.

My letter of 22 June 2022

[39] My letter:

1. was submitted to the Committee by the Minister;
2. was accepted by the Committee as part of its process;
3. was considered by the Committee;
4. is the subject of certification pursuant to s 55 of the *Parliament of Queensland Act* 2001 (POQ Act) that the letter was presented or submitted to the Committee and published under the authority of the Committee on 18 July 2022;
5. is referred to in the report of the Committee;
6. was referred to by various members during the debate in the Assembly on the bill.

[40] Section 8 of the POQ Act provides:

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[20] *GJT Earthmoving Pty Ltd v The Regulator under the Work Health and Safety Act 2011 (No 2)* [2022] ICQ 008.

> "**8 Assembly proceedings can not be impeached or questioned**
>
> (1) The freedom of speech and debates or proceedings in the Assembly can not be impeached or questioned in any court or place out of the Assembly.
>
> (2) To remove doubt, it is declared that subsection (1) is intended to have the same effect as article 9 of the Bill of Rights (1688) had in relation to the Assembly immediately before the commencement of the subsection." (emphasis added)

[41] Section 9 defines "proceedings in the Assembly" as, relevantly here:

> "**9 Meaning of proceedings in the Assembly**
>
> (1) ***Proceedings in the Assembly*** include all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the Assembly or a committee.
>
> (2) Without limiting subsection (1), ***proceedings in the Assembly*** include—
>
> (a) giving evidence before the Assembly, a committee or an inquiry; and
>
> (b) evidence given before the Assembly, a committee or an inquiry; and
>
> (c) presenting or submitting a document to the Assembly, a committee or an inquiry; and
>
> (d) a document tabled in, or presented or submitted to, the Assembly, a committee or an inquiry; and
>
> (e) preparing a document for the purposes of, or incidental to, transacting business mentioned in paragraph (a) or (c); and
>
> (f) preparing, making or publishing a document (including a report) under the authority of the Assembly or a committee; and
>
> (g) a document (including a report) prepared, made or published under the authority of the Assembly or a committee. …" (emphasis added)

[42] The Committee is a committee for the purposes of s 8 of the POQ Act. The Committee's investigations and report are "proceedings in the Assembly". So are the debates upon the Second Reading Speech on the bill.

[43] In order to understand the significance of my letter to the present application, it is necessary to:

1. analyse the letter;

2. place it in the context of certain background facts;

3. analyse the Committee report;

4. analyse the debates on the bill;

5. place those analyses in context with the appeal.

[44] That squarely raises questions of parliamentary privilege and whether such analyses question or impeach the proceedings in the Assembly.

[45] Mere proof of the fact that something has been delivered to the Committee or said in the Assembly is not a breach of parliamentary privilege.[21] However, here, much more is required. It is necessary to comment on the meaning of the letter and the impact that has on the fair-minded individual to assess any apprehension of bias. That exercise, if taken against statements by the members of the Committee and members of the Assembly, may at least "question" those proceedings.[22]

[46] It was submitted by the respondents that parliamentary privilege would operate so as to prevent Ms Gilbert from relying on the contents of the letter and, therefore, that aspect of her application which relies upon the letter simply fails.

[47] Ms Gilbert seeks to rely on the letter as raising an apprehension of bias. The letter has been the subject of proceedings in the Assembly and, to that extent, is therefore in the public domain. Parliamentary privilege prevents Ms Gilbert developing her submission, prevents the respondents from developing a response to it, and prevents me from properly disposing of the application.

[48] That leads to a very unsatisfactory outcome. It is a fundamental hallmark of judicial power that the power is exercised independently and impartially. As observed in *Johnson v Johnson*,[23] following *R v Watson; Ex parte Armstrong*,[24] public confidence in the outcome of judicial proceedings cannot be assured unless the decision is taken, and seen to be taken, independently and impartially.

[49] Here, a question has arisen that any exercise of the power may be affected by apprehended bias, but that issue cannot be resolved because of restrictions placed on the Court by the existence of parliamentary privilege over much of the relevant material. The case involves a clash between two fundamental concepts: the necessity for judicial power to be exercised impartially, and to be seen to be exercised impartially, and the immunity of the parliamentary process from judicial scrutiny.

[50] It follows then that any decision is potentially, in the public eyes, tainted by unresolved allegations of an apprehension of bias, no matter how weak those allegations obviously are.

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21 *Pebble v Television New Zealand Ltd* [1995] 1 AC 321.

22 *Rowley v O'Chee* [2000] 1 Qd R 207 at 222-223, *Erglis v Buckley* [2004] 2 Qd R 599 at [83]-[85].

23 (2000) 201 CLR 488.

24 (1976) 136 CLR 248 at 263.

Conclusions

[51] For reasons already explained, no reasonable apprehension of bias arises as a result of my former political activities or affiliations.

[52] For the reasons I have explained, it is not possible to make positive findings in relation to any apprehension of bias which might arise as a result of my letter of 22 June 2022. It is obviously undesirable for me to decide the appeal without being able to firstly resolve the allegations of an apprehension of bias.

[53] In the circumstances, it is appropriate that I do not decide the appeal.

[54] Ms Gilbert, in her letter of 31 October 2022, indicated that the case ought to be determined on the material tendered to me and on a transcript of the appeal hearing before me. That may be possible. However, it is best to leave those procedural questions to the member of the Court who ultimately determines the appeal.

[55] Costs of the application ought to be reserved to the final determination of the appeal.

Orders

1. The hearing of the appeal be adjourned to be heard by a member of the Court other than the President.

2. Costs are reserved.