Law Council
OF AUSTRALIA

Mr John Carter
Committee Secretary
Senate Education, Employment and Workplace Relations Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Email: eewr.sen@aph.gov.au

Dear Mr Carter,

INQUIRY INTO THE FAIR WORK BILL 2008

I am pleased to enclose a submission prepared by the Industrial Law Committee of the Law Council's Federal Litigation Section on the Inquiry into the Fair Work Bill 2008.

Due to time constraints, this submission has not been considered by the Directors of the Law Council of Australia.

Yours sincerely,

Bill Grant
Secretary-General

9 January 2009

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Inquiry into the Fair Work Bill 2008

Senate Education, Employment and Workplace Relations Committee

Submission by the Industrial Law Committee of the Federal Litigation Section of the Law Council of Australia

9 January 2009

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Legal Representation

"A Higher Bar"

1. The Explanatory Memorandum to the *Fair Work Bill 2008* refers to Fair Work Australia moving away from *'formal, adversarial processes, with legal representation.."* and to establishing a *' higher bar for representation'*, envisaging that *'in most cases legal representation will not be necessary'*[1]. It is also states that *"the need for legal representation before FWA will be minimised as there will be a move away from a third person 'intervening' in a proceeding towards a 'right to be heard'*[2]. In relation to small claims proceedings, it is stated that the Court will have a discretion to allow a person to be represented by a lawyer *'but in most cases this will not be necessary'* [3].

2. The 'higher bar' initiative represents a departure from the current provisions. This part of the Law Council's submission considers the current and proposed legislation, points to some anomalies in the proposed provisions and submits that remedial amendments are needed.

The Current Provisions

AIRC matters

3. The *Workplace Relations Act 1996* establishes a twofold process for legal representation before the Australia Industrial Relations Commission, depending on whether there is consent by parties to representation or not.

4. Where all parties have given express consent, the Australian Industrial Relations Commission may grant leave for representation[4] and must have regard to :

    a) *'whether being represented by counsel, solicitor or agent would assist the party concerned to bring the best case possible;*
    b) *the capacity of the particular counsel, solicitor or agent to represent the party concerned;*
    c) *the capacity of the particular counsel, solicitor or agent to assist the Commission in performing the Commission's functions under this Act*[5].

5. In addition (typically, where there is no consent by all parties) a party may apply to the Commission to be so represented. Again, the Commission may grant leave for the party to be represented[6], but must have regard to the following matters:

    a) *[the matters referred to above];*
    b) *the complexity of the factual and legal issues relating to the proceeding;*
    c) *whether there are special circumstances that make it desirable that the party concerned be represented by counsel, solicitor or agent;*
    d) *if the party applies to be represented by an agent--whether the agent is a person or body, or an officer or employee of a person or body, that is able to represent the interests of the party under a State or Territory industrial relations law*[7].

6. Where the Minister is a party to a proceeding before the Commission (other than in the capacity of employing authority), the Minister may be represented by counsel or solicitor or by another person

[1] par r 335 Regulatory Impact Statement, in the Explanatory Memorandum
[2] par 339 Regulatory Impact Statement, in the Explanatory Memorandum
[3] par 338 Regulatory Impact Statement, in the Explanatory Memorandum
[4] s 100 (3) *Workplace Relations Act 1996*
[5] s 100 (5) *Workplace Relations Act 1996*
[6] s 100 (4) *Workplace Relations Act 1996*
[7] s 100 (6) *Workplace Relations Act 1996*

authorised[8]. In such cases, other parties may be represented by counsel, solicitor or agent with leave of the Commission [9].

Small Claims Proceedings

7. In small claims proceedings, a person is not entitled to be represented by counsel or a solicitor unless the court permits it. If the court permits a party to be represented by counsel or solicitor, the court may, if it thinks fit, do so subject to conditions designed to ensure that no other party is unfairly disadvantaged[10].

The Proposed provisions

8. The *Fair Work Bill 2008* proposes to limit the circumstances in which parties may be represented by 'lawyers' or 'paid agents' when appearing before Fair Work Australia[11] and by 'lawyers' in small claims proceedings before a magistrates court or the Federal Magistrates Court[12].

Matters before Fair Work Australia

9. There is no equivalent, in the proposed laws, to the currently available 'consent' model for representation. Instead, in almost[13] all proceedings in Fair Work Australia, a person may be represented by a lawyer or paid agent only with the permission of FWA[14] and only if :

    a) "*it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or*
    b) *it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or*
    c) *it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter"*[15].

10. There is an exception for the purposes of making written submissions under Parts 2-3 or 2-6 (which deal with modern awards and minimum wages)[16]. In such cases, permission of Fair Work Australia is not required.

Small Claims Proceedings

11. In small claims proceedings, under the Bill, a party may be represented by a lawyer only with leave of the relevant court [17]. Such leave may be given subject to conditions designed to ensure that no other party is unfairly disadvantaged[18]. This is similar to the current provisions of the *Workplace Relations Act 1996*, except that the definition of 'lawyer' (see below) will have the effect of expanding the range of persons excluded.

The definition of 'lawyer'

12. While the *Workplace Relations Act 1996* refers to '*counsel*' and '*solicitors*', the proposed legislation uses the term "*lawyer*". This term *'lawyer'* is very broadly defined. It means "*a person who is admitted to the*

[8] s 100 (12)
[9] s 100 (13)
[10] s 725 *Workplace Relations Act 1996*
[11] cl 596 *Fair Work Bill 2008*
[12] cl 548 (5)-(7) *Fair Work Bill 2008*
[13] there is an exception for written submissions under parts 2-3 or 2-6 : cl 596 (3)
[14] cl 596(1) *Fair Work Bill 2008*
[15] cl 596(2) *Fair Work Bill 2008*
[16] cl 596(3) *Fair Work Bill 2008*
[17] cl 548 (5) *Fair Work Bill 2008*
[18] cl 548(6) *Fair Work Bill 2008*

legal profession by a Supreme Court of a State or Territory "[19] and is intended to extend to all admitted lawyers, not just those who hold current practising certificates [20].

The exception made for some "lawyers"

13. However, a person is not taken to be represented by a lawyer if the lawyer is an employee or officer of the person, whether before the courts in small claims proceedings or before Fair Work Australia [21]. In addition, before Fair Work Australia, a person is not taken to be represented by a lawyer if the lawyer is an employee or officer of an organisation , peak council or a bargaining representative [22].

Problems and Issues to Consider

14. While the Law Council accepts that there are circumstances in which it might be appropriate for courts and tribunals to decide whether, and in what circumstances to permit involvement by legal practitioners, we consider that the proposed provisions, as currently drafted are too restrictive and, in addition, generate anomalies. The provisions may in fact inadvertently create problems and unfairly disadvantage certain parties, in such a way as to undermine the intent of the legislature.

Advantages of the 'Consent' model

15. We can see important advantages to parties and to the community in retention of a flexible 'consent' model for legal representation. It is a system which has worked well and does not give rise to unfairness.

16. In our experience, the Commission is likely to grant leave for legal representation where parties consent. It recognises the assistance which may be provided to the Commission. This model eases the process, in terms of promoting early crystallisation of issues and more efficient use of resources.

17. It also enables litigants who have used the services of a lawyer prior to litigation to continue to do so, rendering engagement with the litigation process less intimidating for them. The Explanatory Memorandum appears to acknowledge that pre-litigation consultation with lawyers is relatively routine[23] and we consider this is unlikely to change under the proposed regime, especially in view of the fact that new, untested industrial laws will have been introduced and there will be uncertainty about their operation. It is also important to bear in mind that these laws have the potential to affect person's rights in a direct and very material way.

18. We note the observation in the Explanatory Memorandum that Fair Work Australia would have regard to *"considerations of efficiency and fairness rather the merely the convenience and preference of the parties*" (emphasis added)[24]. However, it is difficult to separate the competing concepts, which in our view are not mutually exclusive. Both efficiency and fairness may be linked to the convenience and preference of the parties.

19. For example, the proposed provisions do not give due weight to the fact that in some cases, there could be circumstances in which the 'consent' model operates to the benefit of vulnerable parties. In each of the illustrative boxed examples which follow par 2296 of the Explanatory Memorandum, the relative strengths of the parties in 'application for representation' hypotheticals are a matter of common knowledge to all concerned. They do not, however, capture cases where

[19] cl 12 *Fair Work Bill 2008* – definition of 'lawyer'
[20] par 2169 Explanatory Memorandum
[21] cl 548 (7) *Fair Work Bill 2008* in the case of small claims, cl 596 (4)(a) in the case of Fair Work Australia
[22] cl 596(4)(b) and (c) *Fair Work Bill 2008*
[23] par 252 Regulatory Impact Statement in the Explanatory Memorandum
[24] par 2296 Explanatory Memorandum

individual litigants may have a disability or other condition which would impair their capacity to represent themselves, but which is not known to their opponent and which they do not wish their opponent to know. With a consent model, it is far more likely that such persons would be able to maintain their privacy and utilise the services of a lawyer without having to prove, publicly, why they might need such assistance. This is a particular consideration for individuals who are stressed and or/receiving psychiatric or similar care or who may have an undisclosed disability such as dyslexia, which might make participation in proceedings (for example, comprehending documents) problematic. While the current provisions still require due consideration of the factors set out in s 100 (5), we consider that there would be more chance of such persons being able to preserve some measure of dignity in the process.

20. Further, rather than rendering the process more efficient, the proposed system would interpose a new step in the pre-hearing process because, in every case where lawyers might seek to be involved, Fair Work Australia would need to look at factors such as complexity and efficiency. The Commission does not currently need to consider 'complexity' as a factor if parties have consented to legal representation and there is no current obligation to consider 'efficiency'. It follows that the proposed provisions could needlessly inject an extra layer of delay and complication into the system and allow practical arguments on matters which are not the real issue for resolution.

21. We also note that cl 596(2) is expressed in an objective way; that is, it appears that leave for representation can only be granted if one of the specified criteria will be achieved. It would be difficult if not impossible for a member of Fair Work Australia to know in advance that any such outcome would be achieved (and this is partly recognised by cl 401 which provides that an order for costs may be made against a lawyer for whom leave has been granted under s.596). A better alternative would be for the section to require the FWA to have regard to those matters in determining whether to grant leave, as is the case in the present s.100 of the *Workplace Relations Act 1996*.

Unfair advantage to better resourced litigants

22. The expanded definition of 'lawyer', coupled with the preservation of the advantage to those who have the resources to employ 'lawyers' is unlikely, in our view, to achieve the goal of *"less formal, legalistic and adversarial'* processes[25], nor will it ensure that legal representation is *'not necessary'*[26]. Vulnerable parties, (including those with undisclosed disabilities as mentioned above) would suffer a particular disadvantage.

23. In our experience, it is common for officers or employees of industrial organisations (both employer and employee-based), human resources practitioners, company officers and other employees who routinely appear before industrial tribunals to have been admitted to practice at some stage in their careers and are thus "lawyers".

24. The net effect of the proposed law is that a substantial number of participants in the system will enjoy an unfair advantage, because they have the resources to employ 'lawyers' (as defined) and be able to utilise their services, to appear before Fair Work Australia and a court in a small claims proceeding, without having to obtain permission or leave, respectively.

25. Nor, it seems, will such persons need to disclose their qualifications. A party opposing them will therefore be subject to an automatic disadvantage, but neither that party nor, in some cases, the court or Fair Work Australia, will necessarily be aware of this and be able to address it in the context of requesting that they be afforded legal representation.

26. We consider that it should be incumbent upon those who come within the definition of 'lawyer', but who fall within cl 548 (7) or cl 596(4) to inform the court or Fair Work Australia (as the case

[25] par 328 Regulatory Impact Statement in the Explanatory Memorandum
[26] pars 335, 338 Regulatory Impact Statement in the Explanatory Memorandum

may be) of their status in advance, so that a decision as to legal representation may be made in full knowledge of the facts.

Submissions under Parts 2-3 or 2-6

27. It is not clear whether a lawyer who makes written submissions under Parts 2-3 or 2-6 might yet be denied leave to appear before Fair Work Australia, even if she or he needed no permission to make those submissions in the first place[27]. We consider that such a lawyer should have a right to appear. This is a matter which should be clarified.

Representation of the Minister

28. Finally, there does not appear to be an equivalent to s 100(12) of the *Workplace Relations Act 1996* enabling automatic representation for the Minister in certain circumstances. Should such a provision be reintroduced, we would recommend an equivalent to s 100(13), in relation to other parties' rights, as well.

Part 3-1, Division 3 – Workplace Rights

29. This Division introduces significant new rights capable of being exercised by employers, employees or industrial organisations to seek remedies wherever an adverse action is taken against the person because they have, *inter alia*, a "workplace right".

30. It is clear that the Division is intended to provide very broad rights, as noted in the Explanatory Memorandum: see for example [1384]. The Law Council, however, notes that the rights it will create may be even broader than that which was intended by reason of the wording of the relevant provisions.

31. That is because of a combination of the following matters:

    a) Most if not all employees (including employees of a small business) will have a "workplace right", such as being entitled to the benefit of a workplace law or workplace instrument.
    b) Adverse action includes a wide range of matters including injuring the employee in his or her employment and threatening to take such an action (and so would include, for example, a threatened dismissal).
    c) There is a power to obtain an interlocutory injunction: see cl 545(2).
    d) When seeking an injunction there is no requirement to have first taken proceedings before Fair Work Australia: see cl 371(1)(b).
    e) In any application for final relief a reverse onus of proof applies: see cl 361.
    f) There is no time limit for bringing such applications.

32. As drafted, most employees would be able to seek urgent interlocutory relief to prevent adverse action, such as threatened dismissal, before the Federal Court or Federal Magistrate's Court if they allege that the adverse action is for reasons including the fact that they have a workplace right. That injunction application would be heard in circumstances where the employee would say that at final hearing they would have the benefit of a reverse onus of proof. Such an application may be heard on an urgent ex parte basis (that is without the employer present). The balance of convenience will almost certainly be in favour of the order being granted, because a failure to issue the order would be said to irretrievably remove the capacity of the employee to later seek as final relief an order preventing the threatened conduct.

[27] cl 596(4) *Fair Work Bill 2008*

33. This legislative approach can be contrasted to the proposed unfair dismissal proceedings which are drafted with the intention of allowing for a streamlined and simplified process, minimising legal technicalities.

34. There is thus, an entirely separate source of relief being provided in respect of dismissal or threatened dismissal in the Courts, which is not consistent with the specific unfair dismissal protection provided.

35. Another example of a potentially unforeseen aspect in the drafting is that an employer can seek relief, including interlocutory injunctions, against employees taking industrial action if that industrial action is being taken because the employer is covered by an industrial law or instrument. As drafted the bill does not exclude such proceedings even if the industrial action is protected industrial action. This can be contrasted with the action of an employer standing down an employee: see cl 342(4). Further, pursuant to cl 343 if a union organised industrial action against an employer because the employer was proposing to apply a workplace instrument in a particular manner (perhaps because of the dispute as to the improper interpretation of a workplace instrument) then again injunctive relief could be sought. In both cases a reverse onus of proof applies.

36. These matters are raised because it is not clear to the Law Council whether it is intended that there be such a significant increase in the capacity of parties to take legal proceedings in respect of employment and industrial disputes that previously would have been dealt with pursuant to dispute resolution procedures in agreements. The Law Council seeks to point out what may be unintended consequences of the proposed legislation.

National Employment Standards and Personal Leave

What the NES says

37. In summary the entitlement to personal leave under the Fair Work Bill is to 10 days personal leave, that:

    a) accrues according to the employee's ordinary hours of work; and
    b) is paid at the employee's base rate of pay for the employee's ordinary hours of work during the period the employee takes paid personal/carer's leave.[28]

38. Section 99 of the Bill requires that the employer must pay the employee for a period of paid personal leave the employee takes at the employee's base rate of pay for the employee's ordinary hours of work in the period.

39. Under the NES, ordinary hours of work for a full time employee cannot be more than 38 hours per week (event though maximum weekly hours of work are 38 hours plus reasonable additional hours). Modern award or 'enterprise agreement' or a contract of employment could also not provide for more than 38 hours per week as ordinary hours.

40. The 38 hour week can be averaged in limited circumstances. However the NES provides that under an averaging arrangement, the ordinary hours of work are still 38 hours and any greater hours worked in a particular week over the averaging period are additional hours.

[28] The base rate of pay is defined in section 16 to mean the pay payable to the employee for his ordinary hours of work excluding incentive based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and any other separately identifiable amounts.

41. Accordingly, the ordinary hours of work for the purpose of working out the personal leave entitlement for a full time employee can never be higher than 38 hours per week.

Issue

42. Problematically, the Bill does not define daily hours notwithstanding that personal leave is an entitlement expressed as 10 days not in hours. The issue then arises, what are an employee's daily hours?

43. Although the NES does not set ordinary hours on a daily basis, a modern award can. It is therefore possible that a new modern award could contain a definition of ordinary hours for leave purposes which caps the daily hours at 7.6 hours per day. This would resolve the issue of what is a 'day' for personal leave purposes.

44. However, there are some employees who will not be covered by a modern award and of course, modern awards do not specify daily hours, as this is not a mandatory requirement for modern award terms.

Possible Interpretations

45. Having regard to the following factors, one interpretation available is that one day for the purpose of payment for the personal leave entitlement is 7.6 hours:

    a) ordinary hours per week are capped at 38 (even in an averaging arrangement);
    b) personal leave accrues on the basis of 38 ordinary hours per week; and
    c) the personal leave entitlement is to 10 days,

46. An alternative interpretation is that if the employee was rostered to work 10 hours on a day that he takes personal leave, he would be paid for the 10 hours providing that the 10 hours did not include any overtime hours. If this is right, it is possible that an employee would not in fact have 10 days leave if they took sick leave on days in which they worked more than 7.6 ordinary hours on a regular basis.

47. However, this is inconsistent with the provision which provides that the employee is entitled to 10 **days** personal leave per year and accrues according to ordinary hours of work, which are expressed on a weekly basis and which can never exceed 38 hours per week.

What is required

To remedy the problem, the NES should either:

    a) clarify what ordinary hours per day are for personal leave purposes by setting them as 7.6 hours per day, accepting that a modern award may deal with the issue differently; or
    b) express the personal leave entitlement as an entitlement to a certain number of hours of personal leave per annum and not in days.

Annual Leave

48. It should be noted that similar difficulties arise in respect of annual leave.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.