Industrial Court of Queensland and Queensland Industrial Relations Commission An Update[1]

Justice Peter Davis[2]

I wish to cover a number of developments that are of importance to those practising in the Industrial Court of Queensland (the Court) or the Queensland Industrial Relations Commission (QIRC).

I must of course always start with the numbers.

Numbers

Let me start by putting some context around the numbers. Members of the Commission exercise powers and functions under many pieces of legislation including the *Industrial Relations Act* 2016 (IR Act), the *Workers' Compensation and Rehabilitation Act* 2003, the *Public Sector Act* 2022, the *Anti-Discrimination Act* 1991 (AD Act), the *Further Education and Training Act* 2014, the *Magistrates Courts Act* 1921, *Work Health and Safety* Act 2011, the *Human Rights Act* 2019 and the *Trading (Allowable Hours) Act* 1990. The expanded jurisdiction reflects more than public sector, local government and other bodies with State responsibilities – it now includes a jurisdiction over constitutional corporations, mainly under the *Anti-Discrimination Act* 1991 and the *Work Health and Safety Act* 2011.

The number of matters filed in the Commission for the period ending 30 June 2023 was 3,142, a slight decrease of 4.84% on the 2021/22 figure of 3,302. This can be attributed mainly to a decrease in the number of Public Sector Appeals filed due to the lifting of the health pandemic (ie, COVID).

A total of 512 Public Sector Appeals (PSA) were filed, this is a decrease of approximately 39.45% on the previous year filings of 846. This is an average decrease of approximately 73.21% across the various PSA appeal types. Fair Treatment decisions decreased by approximately 86%. Conversion decisions made up approximately 22% of the total PSA filings, with disciplinary decisions accounting for approximately 51%.

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1 A paper delivered to the Employment and Industrial Relations Conference 2023, Bar Association of Queensland, 26 and 27 August 2023.

2 Judge of the Supreme Court of Queensland, President of the Industrial Court of Queensland and the Queensland Industrial Relations Commission.

Reinstatement applications filed decreased by approximately 26.75% (167 filings) from 21/22 filings of 228, with Long Service Leave applications increasing approximately 22.5% from 720 in 21/22 to 882 to 30 June 2023. The increase is most likely attributable to the increase in the cost of living across Australia.

Matters filed in the Industrial Court increased from 29 in 21/22 to 48 as of 30 June, an increase of approximately 65%.

During 2022–23, the Court and Commission handed down 470 judgments in respect of 484 files (some files involve more than one judgment being delivered – eg, interlocutory decisions). This is a decrease of approximately 4%.

Disposal rates for the year under review were 3,237 matters. This is an increase of 69% compared to 21/22 of 1,915 matters.

There were a total of 1,810 listings as of 30 June of which 414 were substantive hearings.

The new amendments

The *Industrial Relations and Other Legislation Amendment Bill* 2022 (the Bill), introduced on 23 June 2022, was in response to the recommendations of the Five-year Review of Queensland's *Industrial Relations Act* 2016. The review was conducted by John Thompson (a retired Member of the QIRC) and Linda Lavarch (former Attorney-General for Queensland), with the Commission participating in consultation throughout the review process.

I do not propose to traverse all of the amendments to the IR Act but let me highlight some of the key changes:

- ***strengthen protections against workplace sexual harassment, including the addition of key provisions to the main purpose of the IR Act, as well as amending the definition of "industrial matter" to include sexual harassment and sex or gender-based harassment***

  The sexual harassment amendments provide protections and deterrents against sexual harassment and sex or gender-based harassment connected with employment by adding key provisions to the main purpose of the IR Act; and replacing existing definitions of "sexual harassment" and "discrimination" in the IR Act with those contained in the AD Act.

The definition of "industrial matter" in Schedule 1 has also been amended to include sexual harassment and sex or gender-based harassment facilitating access to orders and permit the Commission to exercise its general conciliation and arbitration powers for sexual harassment and sex or gender-based harassment complaints.

- ***ensure the primacy of registered employee and employer organisations by providing a scheme whereby only industrial organisations can seek and provide representation rights for employees and employers***

  The IR Act has been amended to provide clarity about the rights and responsibilities of employee and employer organisations registered under the IR Act to represent employees and employers. The Bill confirms that the rights and protections conferred upon these entities by the IR Act are limited to employee and employer organisations which are registered, or otherwise eligible for and seeking registration, under the IR Act. Registered organisations under the IR Act are subject to a range of accountability and transparency obligations including reporting to ensure they operate with rigour and integrity. The provisions clarify that an incorporated unregistered industrial association does not have the right to represent its members under the IR Act, and that the term "association" does not mean an entity with some distinct corporate personality from that of its individual members. The amendments are said to clarify the distinction between registered and unregistered bodies and the corresponding rights and obligations of such bodies and introduces penalties for the misrepresentation of an organisation's registration status under the IR Act.

- ***ensure workers have access to prevailing employment standards***

  The Queensland Employment Standards (QES) have been updated to ensure personal and parental leave provisions of the IR Act are aligned with prevailing federal standards. This includes the provision of evidence for taking leave, flexibility in how unpaid parental leave is taken including in cases of stillbirth, increasing the age limit for a child from 5 to 16 years of age for the purposes of adoption-related leave or cultural parent leave, and removing language that implies gendered divisions in parental care.

- ***Independent Couriers (to commence on proclamation)***

  Insertion of a new Chapter 10A with regards to independent couriers to introduce minimum entitlements and conditions, including the ability to create collectively negotiated agreements.

- ***updates to the collective bargaining framework ensuring access to arbitration by a single Commissioner during bargaining negotiations, as well as enhancing equal remuneration in the collective bargaining provisions***

  A new section 179A (Constitution of Commission for Arbitration proceedings) was inserted to provide that where the negotiating parties to a bargaining instrument request the assistance of the QIRC to reach agreement and the matter has subsequently been conciliated, with the conciliating member being satisfied that the parties are unlikely to reach agreement in further conciliation or all of the negotiating parties may apply to the commission for arbitration of the matter, the full bench of the QIRC must arbitrate the matter. The new section 179A also provides that the full bench may refer arbitration of the matter to a commissioner sitting alone with the consent of all the negotiating parties.

- ***clarifying when an agent can represent a person or party in proceedings before industrial tribunals and in public service appeals***

  Section 529 of the IR Act was amended to include the conditions an industrial tribunal may consider before granting leave to agents seeking to represent parties. Persons who charge fees, or an officer acting for an entity that is not an organisation but purports to represent the industrial interests of employees or employers, are excluded from appearing as an agent.

  Leave may be granted for an agent only if it would enable the proceedings to be dealt with more efficiently, having regard to the complexity of the matter, or it would be unfair not to allow the party to be represented.

  The definition of 'industrial tribunal' was amended to ensure that the new provisions apply to all relevant jurisdictions overseeing industrial proceedings.

  Section 530A (2) to (4) (Representation - public service appeals) was inserted to clarify that parties in public service appeals may appear personally or by an agent under section 529. It further specifies that lawyers may not represent parties in these types of proceedings unless they are employees or officers of the party, or employees or officers of an organisation representing a party.

  A transitional provision through section 1102 (Existing appointment of agent to represent party or person in proceedings) clarifies that agents appointed prior to

commencement (3 November 2022) and whose proceedings have not ended will have the previous section 529 provision apply to their circumstances.

New members

Last year, Deputy President Hartigan was welcomed as a presidential member of the QIRC and therefore a member of the Court. Her appointment was warmly received by the Court, the QIRC, the profession and other court users. Deputy President Hartigan's appointment assists greatly with initiatives that have been taken in the management of the business of the Court and the QIRC over the last couple of years. I will address that a little later.

The QIRC has been one member short since the retirement of Industrial Commissioner Thompson towards the end of 2020. I have been informed that situation is being addressed and, indeed, two further Commissioners (a total of three appointments) are to be appointed. The government has, as you no doubt know, called for expressions of interest for the three positions. That process closed on 11 August, and we are expecting an announcement very soon.

State wage case

The State wage case has traditionally been conducted on the basis that the QIRC follows the national wage case. Indeed, in the 2014 State wage case,[3] a principle was stated to the effect that unless there are good reasons to depart from the determination of the national wage case, the QIRC is obliged to adopt the national determinations. That principle has been followed ever since.

Australia has a national economy which is largely centrally, that is nationally, regulated. This is so because the Commonwealth controls many of the economic fundamentals. In turn, that is so because of our constitutional arrangements and policies adopted over many decades which have led to some of the most significant decisions of the High Court. An older example is the uniform tax cases[4] and a more modern example is Work Choices.[5] Those cases effectively put the Commonwealth in control of income tax and industrial relations.

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3 *Declaration of General Ruling (State Wage Case) 2014* [2014] QIRC 129 at [12] and [13] and see *Declaration of General Ruling (State Wage Case) 2022* [2022] QIRC 340 at [52]-[66].

4 *South Australia v Commonwealth* (1942) 65 CLR 373, *Victoria v Commonwealth* (1957) 99 CLR 575.

5 *New South Wales v Commonwealth* (2006) 229 CLR 1.

However, there are significant differences between the Commonwealth industrial relations system and the State system. For example, a relatively low proportion of employees who fall under the Commonwealth scheme are subject to enterprise bargains. A very large proportion of State and local government employees in Queensland are the subject of enterprise bargains.

There is also the new complication of s 459A of the *Industrial Relations Act* 2016. That provision is in these terms:

> "**459A Provision about general ruling for State wage case**
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> (1) This section applies if—
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> (a) the commission makes a general ruling under section 458(1)(a) that increases the wages payable to employees under 1 or more awards; and
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> (b) applying the increase to the wages payable to employees, or a class of employees, under a particular award would result in the wages payable to the employees under the award equalling or exceeding the wages payable to employees in relation to the same employment under—
>
> (i) a certified agreement or arbitration determination; or
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> (ii) a directive under the *Public Sector Act 2022*.
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> (2) Without limiting section 459(2), the ruling may provide that the increase does not apply to the wages payable to the employees, or the class of employees, under the award." (emphasis added)

The relevant directive states that where the application of State wage case increases would mean that an award rate exceeds the rate under an enterprise agreement, the award rate is payable. That applies notwithstanding that other benefits may flow to employees under a relevant enterprise agreement. The impact of the directive can be seen in *Together Queensland Industrial Union of Employees v State of Queensland (Queensland Corrective Services)*.[6]

Therefore, as well as making the general determinations necessary, the QIRC must then consider awards and enterprise bargains of employees who fall within s 459A.

The upshot of all this is that the State wage case will be a much more involved process than it has been in the past. Conferences have already been held and the parties are martialling evidence on the economic features which might distinguish Queensland's industrial system

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6 [2022] ICQ 6.

from the Commonwealth's. Hopefully, the deep dive into the State wage case this year will lead to some parameters being set for future years.

The business of the Court and the Commission

You may have noticed that over the last couple of years there has been a change in the way cases are being dealt with. In particular:

1. there have been more Full Benches of the QIRC sitting;

2. I have sat on many of them;

3. more cases in the Court have been heard by presidential members other than me.

This has all been a deliberate tactic.

The QIRC has a wide discretion to sit as a Full Bench.[7] If the President sits on a Full Bench, then an appeal lies directly to the Court of Appeal. Otherwise, appeals from commissioners sitting alone or a Full Bench where the President does not sit, go to the Court.[8]

There are matters which necessarily need to be expedited. They might be ones that raise complicated questions which have not been the subject of authority. They may be matters of general public importance. They may be matters of organisational importance which might have a broad effect upon a particular department or council or group of employees. Those matters tend to be the ones that could be the subject ultimately of appeal to the Court of Appeal.

It is undesirable with those types of matters that they be dealt with initially by a single commissioner, with inevitable delays in delivering judgment but where appeal is likely so that an appeal lies to the Court and then perhaps on further to the Court of Appeal.

Attempts are being made to triage those cases out, have them come before a Full Bench with me sitting and then have them determined as quickly as possible. That leaves the parties with an appeal to the Court of Appeal if they wish to pursue it, but instead of there being two steps within the QIRC/Court (initial determination by the QIRC and an appeal to the Court), there is only one; determination by the Full Bench.

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7 *Industrial Relations Act* 2016, s 486 and see generally *Together Queensland Industrial Union of Employees v Scales & Anor* [2021] QIRC 364.

8 *Industrial Relations Act* 2016, ss 554(1), 557, 557(5).

There is no obvious disadvantage to any party in that occurring because the President must sit on the Full Bench and if a single member decided the case, it would then go to the Court where the President or another judicial member sat.

Examples of cases where a Full Bench, with me sitting, include:

- *Brasell-Dellow & Ors v State of Queensland (Queensland Police Service) & Ors*.[9] That concerned a mandatory vaccination direction given by the Commissioner of Police.

- *Together Queensland Industrial Union of Employees v Scales & Anor (No 5)*.[10] There, the Together Union brought an application against the Director-General of a department seeking pecuniary penalty orders against him. It raised important questions as to the pecuniary penalty provisions of the *Industrial Relations Act* 2016. The decision to sit as a Full Bench was contested, see *Together Queensland Industrial Union of Employees v Scales & Anor*.[11]

- *Langerak v State of Queensland (Queensland Police Service)*.[12] That case explored the disciplinary procedures within the Queensland Police Service.

- *Mears v Vector Aerospace Australia Pty Ltd*.[13] There, various provisions of the *Industrial Relations Act* 2016 concerning the calculation of long service leave where an employee spent some of his service outside the jurisdiction were explored.

- *Cousins v State of Queensland (Queensland Police Service)*.[14] This was another case about the procedures adopted for police discipline.

- *Mackenzie v State of Queensland (Queensland Health)*.[15] That was another COVID case.

- *Together Queensland Industrial Union of Employees v State of Queensland (Queensland Police Service)*.[16] This a published case in a series of cases which resulted in a scope

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9 [2021] QIRC 356.
10 [2022] QIRC 225.
11 [2021] QIRC 364.
12 [2022] QIRC 327.
13 [2022] QIRC 348.
14 [2022] QIRC 491.
15 [2023] QIRC 121.
16 [2023] QIRC 141.

> order being made removing certain police employees from the government's core agreement. Orders have been made and reasons will be delivered soon. Scope orders are very rare and questions arose as to the applicability to the *Industrial Relations Act* 2016 of decisions made by the Fair Work Commission on very broadly similar provisions of the *Fair Work Act* 2009.

If parties consider that a case warrants being heard by a Full Bench, then that can certainly be raised. The procedure was considered in *Re Variation of Hospital and Health Service General Employees (Queensland Health) Award - State 2015*.[17]

The fact that more matters will be heard by a Full Bench does not diminish the role of the Court. There will still be many significant matters being determined by single commissioners sitting alone. Full Benches cannot, for practical purposes, be convened for matters that require the receipt of large amounts of evidence and the making of complicated factual findings. There are provisions whereby a Full Bench can delegate factual questions to a single commissioner, but that largely defeats the purpose of attempting to expedite a matter through use of the Full Bench.

Also, much of the work of the Court is very much the standard work of an intermediate court of appeal, notwithstanding that the appeal grounds are generally limited to errors of law or jurisdiction.[18] There are a large numbers of appeals in workers' compensation matters and appeals also come directly to the Court in criminal cases from the Industrial Magistrates Court.

The number of appeals has been rising and I suspect it will continue to do so. Not only are there more and more complicated matters coming through the QIRC, but when the new members are appointed, they will also generate more decisions and therefore more appeals.

We are now beyond the stage where I can sit on all, or even most of the appeals. That is especially so because I am trying to sit on Full Benches as I have explained.

Given the appointment of Deputy President Hartigan, there are now four presidential members of the Court and steps are being taken to spread the work as evenly as possible, although I suspect that that will take a little while to achieve.

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17 [2021] QIRC 103.

18 *Industrial Relations Act* 2016, s 557.

In summary, you can expect more Full Benches, me appearing on more of them and more appeals being done by presidential members other than me.

New amendments being requested

There are two problems with the appeal provisions in the *Industrial Relations Act* 2016 and the *Workers' Compensation and Rehabilitation Act* 2003.

Firstly, an appeal to the Court on a workers' compensation matter is final,[19] as explained in *Workers' Compensation Regulator v Glass*.[20] However, even though the Court is a superior court of record, it is one of limited jurisdiction and therefore its decisions fall within the supervisory jurisdiction of the Supreme Court of Queensland.[21]

That leads to a rather unsatisfactory situation where a single judge of the Supreme Court of Queensland has jurisdiction to judicially review the decision of the President of what is a specialised court, where the President is also a judge of the Supreme Court of Queensland. Any decision on review can then be appealed to the Court of Appeal.

Having a review system rather than a recognised avenue of appeal just isn't appropriate. Apart from the obvious, the decision on review is not precedent binding the Industrial Court. Therefore, in *Turay v Workers' Compensation Regulator*,[22] the Court refused to follow a decision of the Supreme Court on review.[23] That has led to two lines of authority at the same hierarchical level from two different courts.

The simple solution is to have an appeal in workers' compensation matters lie from the Industrial Court to the Court of Appeal.

Secondly, as I have already mentioned, an appeal from a Full Bench of the QIRC where I sit lies directly to the Court of Appeal, and if I don't sit, the appeal comes to the Court. Of course, I might not sit on the Court, but even if I did, there would then be an appeal from a Full Bench

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19 See s 561(4).

20 (2020) 4 QR 693.

21 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, *Harrison v President, Industrial Court* [2017] 1 Qd R 515 and *Turay v Workers' Compensation Regulator (No 2)* [2023] ICQ 019 at [56] following *Harkins Road Transport Pty Ltd v Transport Workers' Union of Australia, Union of Employees* [1999] QIC 20; 161 QGIG 108 and *NQEA Australia Pty Ltd v Dare (No 2), NQEA Australia Pty Ltd v Dare (No 3)* (2004) QGIG 17.

22 [2023] ICQ 013.

23 *Nutley v President, Industrial Court* [2019] 1 QR 354.

comprising of at least one presidential member (perhaps more) and commissioners to a single presidential member.

Courts generally operate on the basis that the head of jurisdiction is the first amongst equals. The head of jurisdiction has no additional judicial power but has executive functions. There is no appeal, for instance, from a judge of the Trial Division of the Supreme Court to the Chief Justice or the Senior Judge Administrator.

The system would work much better if there was an appeal directly to the Court of Appeal from any Full Bench where a presidential member is sitting, whether that is the President or the Vice President or a Deputy President.

These issues have been raised with government and no doubt will be considered in due course.