

**QUEENSLAND INDUSTRIAL RELATIONS COMMISSION**

CITATION: *Together Queensland, Industrial Union of Employees v State of Queensland* [2018] QIRC 046

PARTIES: **Together Queensland, Industrial Union of Employees**  
(applicant)

v

**State of Queensland**  
(respondent)

CASE NO: B/2017/37

PROCEEDING: Application for declaration

DELIVERED ON: 11 April 2018

HEARING DATE: 20 February 2018

HEARD AT: Brisbane

MEMBER: O'Connor DP  
Swan DP  
Thompson IC

ORDER: **1. The application for a declaration is refused**

CATCHWORDS: INDUSTRIAL LAW – DECLARATION – LEGAL REPRESENTATION – where applicant seeks declaration that Crown Law is not permitted to represent another Public Sector Unit in a Chapter 6 matter – whether Crown Law can represent another Public Unit – whether a person employed by the State of Queensland may only represent the State if the person is employed in the Public Sector Unit relating to the dispute – meaning of "representation" in s 944(1) of the

*Industrial Relations Act 2016* – whether s 944(1) of the *Industrial Relations Act 2016* enables legal representation by a lawyer employed by the State of Queensland where the State of Queensland is a party to the proceedings – application refused.

LEGISLATION:

*Acts Interpretation Act 1954* (Qld)  
*Crown Proceedings Act 1980* (Qld) s 8, s 19  
*Industrial Relations Act 2016* (Qld) s 9, s 530, s 944  
*Public Service Act 2008* (Qld) s 11

CASES:

*Greguric v Department of Works, Queensland* [1988] 2 Qd R 545

*Queensland v Queensland Teachers Union of Employees* [2014] ICQ 12

*State of Queensland (Queensland Fire and Emergency Services) v United Firefighters' Union of Australia, Union of Employees, Queensland* [2015] ICQ 032

APPEARANCES:

Mr K. McKay of Together Queensland, Industrial Union of Employees, the applicant.

Mr C. J. Murdoch QC of counsel, instructed by Crown Law for the State of Queensland, the respondent.

### Reasons for Decision

- [1] This decision arises out of an application by Together Queensland, Industrial Union of Employees, seeking a declaration that Crown Law is not permitted to represent another Public Sector Unit in a matter relating to Chapter 6 of the *Industrial Relations Act 2016*, because of the operation of s 944 of the Act.
- [2] The decision requires a consideration s 944 and its interplay with s 530 of the Act. Section 944 deals with the representation of public sector units. Section 530 regulates legal representation, specifically, when a legal practitioner may appear in proceedings before an industrial tribunal.

- [3] The background to this application is said to arise out of an assertion made by Crown Law to the applicant in an email of 27 September 2017 wherein it was stated:

"I confirm that as previously advised it is the State's position that the effect of s 530(5)(a) of the *Industrial Relations Act* 2016 is that it entitles the State, as a party to proceedings, to be represented by a lawyer who is an employee of the State, as of right."

- [4] In short, the applicant's case is that the effect of s 944 is clear. They submit that when the State of Queensland is involved in an industrial cause, and the industrial cause applies to employees employed in a Public Sector Unit, the State can only be represented by the unit's chief executive, or an officer or employee authorised by the chief executive. The legislative purpose of s 944(2) is to enable the Chief Executive of the Public Sector Unit to directly instruct a lawyer where the Act permits.
- [5] The State of Queensland opposes the application by Together Queensland. In opposing this application the respondent submits that s 530 entitles the State to be represented by a lawyer who is an employee of the State, as of right.

#### **Does the Commission have the jurisdiction to grant the declaration sought?**

- [6] Before a declaration under s 463 of the Act can be made, the applicant must persuade the Full Bench that it has the jurisdiction to grant the declaration sought. Section 463(1) of the Act relevantly provides:

"The Commission may, on application by an entity mentioned in section 464, **make a declaration about an industrial matter.**"  
(emphasis added)

- [7] The applicant is an entity as mentioned in s 464 of the Act being an organisation of employees who may be directly affected by the declaration. The declaration must be about an industrial matter. An industrial matter is defined in s 9 of the Act and by reference to Schedule 1.
- [8] The parties have agreed that the subject matter of this application is an industrial matter as the declaration sought relates to the rights and privileges of an employer and therefore is an industrial matter for the purposes of s 9 of the Act.<sup>1</sup> Further, the parties agree that the subject matter of the declaration sought may directly affect the applicant.
- [9] The Full Bench accepts that it has the jurisdiction to make the declaration being sought.

#### **The Legislative Scheme**

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<sup>1</sup> See: s9(1)(a)(i) of the *Industrial Relations Act* 2016.

[10] Section 530 of the Act regulates the circumstances in which a lawyer may appear in proceedings before an industrial tribunal. Section 530 provides:

**"530 Legal representation**

(1) A party to proceedings, or a 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—the commission gives leave; or

...

(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).

...

(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] Section 944 of the Act deals with representation of a public sector unit in an industrial tribunal. The section provides:

**"944 Representation of public sector units**

- (1) A public sector unit, or a person in a public sector unit, who is concerned as an employer in an industrial cause must be represented in an industrial tribunal by
- (a) The unit's chief executive; or
  - (b) An officer or employee of the unit authorised by the chief executive.
- (2) This section does not limit another provision of this Act that allows the unit or person to be represented by a lawyer or agent."

[12] The *Acts Interpretation Act* 1954, schedule 1, states "public sector unit means – (a) department or party of a department; or (b) a public service office or part of a public service office". It is not in contention that Crown Law falls within the meaning of a Public Sector Unit.

[13] Industrial cause is widely defined in the Act and includes an industrial matter and an industrial dispute.<sup>2</sup> Industrial dispute means:

- " (a) dispute, including a threatened or probable dispute, about an industrial matter; or
- (b) a situation that is likely to give rise to a dispute about an industrial matter."<sup>3</sup>

**Does a Department have a legal personality?**

[14] With respect to most civil proceedings a claim by or against the Crown may be made and enforced by a proceeding by or against the Crown under the title the "State of Queensland".<sup>4</sup> Any document or other writing required to be served on the Crown for the

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<sup>2</sup> *Industrial Relations Act 2016* (Qld) Schedule 5.

<sup>3</sup> *Ibid.*

<sup>4</sup> Section 8, *Crown Proceedings Act* 1980.

purposes of or in connection with a proceeding by or against the Crown is required to be served on the Crown Solicitor.<sup>5</sup>

[15] Paragraphs 3 and 4 of the Agreed Statement of Facts provide:

" ...

3. A department is not a separate legal entity to the State of Queensland
4. A claim by or against a department is made and enforced by a proceeding by or against the State of Queensland."

[16] The fact that a government department is not a juristic entity and the employer of public servants is the State of Queensland was clearly set out in *Greguric v Department of Works, Queensland* where Williams J, with whom Connolly J agreed, wrote:

"Whilst government departments hold themselves out as the employers of public servants, and purport to deal as such with members of the public, it is not surprising that it is only a lawyer who can fathom the mysteries, realise that there is no such legal entity as a government department despite the representations it makes, and appreciate that the only legal entity is the State of Queensland. But even lawyers sometimes, quite understandably, fall into the error of believing that a government department purporting to "hire and fire" employees existed in law and was the relevant employer."<sup>6</sup>

[17] In a more recent decision of the President of the Industrial Court of Queensland, in *Queensland v Queensland Teachers Union of Employees*, Martin J wrote:

"The appellant has referred to itself in the proceedings in this Court and before the Commission as the Department of Education, Training and Employment ("DETE"). That is, no doubt, a convenient way to describe the "employer" but it is inaccurate. The Department is not an entity capable of employing anyone. The employing entity will be either the State of Queensland or, in some limited circumstances, the Director-General of the Department."<sup>7</sup>

### **Submissions**

[18] The applicant contends that the effect of s 944(2) of the Act is that the Commission does not have the power to enable a person employed by the State of Queensland to appear in a matter to represent the State unless: (i) the person is employed in the Public Sector Unit

<sup>5</sup> Section 19, *Crown Proceedings Act* 1980.

<sup>6</sup> [1988] 2 Qd R 545, 547-548. See also: *State of Queensland (Queensland Fire and Emergency Services) v United Firefighters' Union of Australia, Union of Employees, Queensland* [2015] ICQ 032, [12].

<sup>7</sup> [2014] ICQ 12, [2].

relating to the dispute; and (ii) they have been authorised to do so by the Chief Executive of the Public Sector Unit.

[19] The argument advanced by the applicant is that on a proper reading of s 944(2) where the State has a statutory right to be represented by a lawyer the provisions of s 944(1) do not restrict such a right. The respondent submits that the applicant's interpretation of the effect of s 944(2) is an incorrect and narrow restatement of the section. The respondent argues that notwithstanding s 944(1), s 944(2) permits another provision within the Act which allows the public sector unit to be legally represented. On the submission of the respondent s 530(5) of the Act is such a provision.

[20] Section 530(5) requires that the lawyer be an employee or officer of the party or person. Schedule 1 of the *Acts Interpretation Act* 1954 provides that an "officer" for the purposes of the public service is a reference to "public service officer". Section 8 of the *Public Service Act* 2008 defines "public service officer" as a person employed under the *Public Service Act* as a chief executive, a senior executive or an officer of another type.

[21] The Agreed Statement of Facts relevantly provide:

- "7. Crown Law is a business unit of the Department of Justice and Attorney-General.
8. Persons who work within Crown Law are employed in the Department of Justice and Attorney-General and are public service employees for the purposes of the PS Act.
9. The chief executive of a department is, for the State, responsible for the employment of public service employees of that department (s11(1) of the PS Act). Each public service employee in a department is employed by the State of Queensland.
- ...
11. Persons who work within Crown Law and who are employed in the Department of Justice and Attorney-General, are employees of the State of Queensland. "

[22] In light of the Agreed Statement of Facts a lawyer who works in Crown Law is an employee for the purposes of s 530(5).<sup>8</sup>

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<sup>8</sup> *Public Service Act* 2008 (Qld), s8.

[23] It is accepted by the parties that a person who works within Crown Law and who is employed in the Department of Justice and Attorney-General is an employee of the State of Queensland.<sup>9</sup>

[24] The applicant argues that s 530(5) does not create a statutory right for a party to be represented by a lawyer, rather it contends that in certain circumstances a party or person shall not be regarded as being represented by a lawyer.

[25] The applicant further submits that s 530(5) acts like a deeming provision:

"[t]hat is, in certain circumstances a person who is a lawyer is not regarded as representing a party as a lawyer, therefore any provision of section of section [sic] 530 that either provides a right or a restriction for lawyers to represent a person or party is not applicable."<sup>10</sup>

[26] The respondent contends that s 530(5) allows a lawyer who is an employee or officer of the party to represent the party. It does so, on the respondent's submission, by removing the application of the limitations upon representation otherwise contained in s 530.

### **Conclusions**

[27] In our view, s 944 reflects the relationship between the chief executive of a department and their public service employees as set out in section 11 of the *Public Service Act 2008*. Section 11 provides:

**"11 Relationship between chief executives and their public service employees**

- (1) The chief executive of a department is, for the State, responsible for the employment of public service employees of that department.
- (2) The public service employees of a department are responsible to that department's chief executive in relation to their employment in that department."

[28] The effect of s 944 is to ensure the interests of the State of Queensland are protected in an industrial cause before an industrial tribunal. The section is, as submitted by the respondent, designed to ensure that someone who is proximate to the employment issue is available to give instructions and to take responsibility for the conduct of the matter.

[29] The use of the word "representation" in s 944 as contrasted with the use of the words "legal representation" in s 530 highlight a subtle but nevertheless important distinction.

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<sup>9</sup> Agreed Statement of Facts, [11].

<sup>10</sup> Applicant's written submissions, 31 January 2018, [31].

Section 944 assigns the responsibility for representing a public sector unit, or a person in a public sector unit who is concerned as an employer to the chief executive of that public sector unit or someone nominated by the chief executive. The use of the words "concerned as an employer" is used to identify which department is obliged to represent the interests of the State of Queensland.

- [30] Section 944(1) does not limit the respondent from being legally represented nor does it affect the State of Queensland as a party to the proceedings. Rather, s 944(2) allows the unit or person to be represented by a lawyer in circumstances where another provision of the Act allows the unit or person to be represented by a lawyer or agent.
- [31] Section 944(2) brings into play s 530 which specifically deals with legal representation of a party in proceedings under the *Industrial Relations Act*.
- [32] Section 530 permits representation in an industrial tribunal in various ways including: by right; and, in some circumstances by either consent or by leave. However, s 530(5) of the Act permits a category of lawyer as identified in s 530(a) and (b) to avoid the limitations on representation which would otherwise apply under s 530.
- [33] We accept the respondent's submission that s 944(2) enables s 530(5)(a) to operate to allow representation by a lawyer or agent notwithstanding the provisions of s 944(1).
- [34] The respondent argues, correctly in our view, that there is nothing within s 944 which contradicts or overrides the effect of s 530(5) of the Act.
- [35] Accepting that the State of Queensland is a party to the proceedings, the effect of s 530(5)(a) is to allow a lawyer employed by Crown Law being an employee of the State of Queensland to act as the legal representative.
- [36] Section 944 is not concerned with who is the employer or who is the party to the proceedings. Rather it is a provision which operates to identify who must represent a public sector unit that is "concerned as an employer".
- [37] Section 944(2) does not, as submitted by the applicant, restrict the circumstance to where the respondent has "...a statutory right to be represented by a lawyer". Rather, s 944(2) is a provision which permits s 530(5) to operate to allow representation by a lawyer notwithstanding s 944(1).
- [38] Section 530(5) permits a lawyer to appear in proceedings notwithstanding the restrictions contained in s 530. It does so because the party is "taken not to be represented" by a lawyer. The person is still an Australian Lawyer.<sup>11</sup> However, the restrictions on the right

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<sup>11</sup> *Legal Profession Act 2007* (Qld), s 5(1).

of appearance which would otherwise apply under s 530 do not have any application in circumstances where the person is an employee or officer of the party, in this case, the State of Queensland.

[39] The respondent as the employer may be represented by a lawyer who is an employee or an officer of the respondent including a lawyer who is an employee or officer in Crown Law.

[40] For the reasons given above, the application for a declaration must be refused.