

SUBMISSION

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LEGAL REPRESENTATION IN THE FAIR WORK COMMISSION

A submission by the New South Wales Bar Association to the Productivity Commission Inquiry into the Workplace Relations Framework



NEW SOUTH WALES
BAR ASSOCIATION®

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Executive summary

These submissions relate to the ability of parties involved in proceedings before Fair Work Commission ('the commission') to be legally represented.

For the reasons outlined in these submissions, the New South Wales Bar Association recommends that the *Fair Work Act 2009* ('FW Act') be amended to permit any party to proceedings before the commission to be legally represented. Alternatively, the FW Act should be amended to eliminate any presumption against lawyers being permitted to participate in proceedings before the commission.

The issue of legal representation has assumed greater importance in light of the recent decisions of the Full Bench of the commission which found that the FW Act contains a presumption against lawyers being permitted to participate in the process and refused to allow legal representation on that basis.

The limitation on legal representation of parties in proceedings in the commission is giving rise to inefficiencies; increased costs for parties, duplication in work in preparing for cases, and uncertainty about the process.

Other relevant factors and considerations are as follows:

- (a) The Fair Work Commission has wide-ranging powers and orders made by the commission can have a very substantial effect on the rights of employers and employees;

- (b) The FW Act is a complex piece of legislation, with prescriptive requirements and provisions. Lawyers provide a helpful resource in ensuring that the commission has regard to, and applies, the correct legal principles to applying the FW Act in relation to their clients;
- (c) There have been matters in which one party has been refused permission to be legally represented yet the other party has been represented by a highly experienced industrial advocate, for instance, an officer of a registered organisation, such as a union. This has resulted in an inherent unfairness as between the parties in respect to the conduct of the proceedings;
- (d) A further consequence is that representation in the commission may become dominated by unpaid representatives who are not subject to the same strict rules of professional conduct and regulatory supervision as Australian lawyers;
- (e) There are variable practices and approaches as between members of the commission to determining questions of legal representation. Often, the matter is not resolved until immediately prior to the commencement of the hearing. As a consequence, there is uncertainty and unnecessary further 'stress' on parties; and
- (f) Hearings involving unrepresented parties also tend to be protracted and inefficient, with unnecessary anxiety being created for the party which is forced to engage in advocacy.

The issue of legal representation in proceedings in the commission could be simply remedied by a minor amendment to s 596 of the FW Act, as outlined in the final section of these submissions.

Introduction

The Bar Association is concerned about the incidence of lawyers being refused permission to appear in proceedings in the commission. In particular, increasingly the commission has been operating on the basis of a presumption against lawyers being permitted to participate in the process. This in turn gives rise to other concerns relating to the conduct of proceedings, fairness as between the parties, and the proper application of the applicable

legal principles in the resolution of matters and factual contests.

For the reasons outlined below, the Bar Association recommends that the FW Act be amended to permit any party to proceedings before the commission to be represented by the representative of their choice (including an Australian lawyer). Alternatively, the FW Act should be amended to eliminate any presumption against Australian lawyers being permitted to participate in proceedings before the commission. As a further alternative, s 596(2) can impose equal requirements on any representation of a party without distinction of whether or not they are a lawyer.

Current Framework under the FW Act

Presently, a party requires the permission of the commission before it can be legally represented.

Section 596 of the FW Act gives a discretionary power to the commission to allow legal representation where one or more of the requirements in s 596(2) is satisfied.

Section 596(2) provides that the commission may grant permission for a person to be represented by a lawyer 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.

As noted by the Federal Court in *Warrell v Walton* [2013] FCA 291, '(A) decision to grant or refuse 'permission' for a party to be represented by 'a lawyer' pursuant to s 596 cannot be properly characterised as a mere procedural decision. It is a decision which may fundamentally change the dynamics and manner in which a hearing is conducted...'¹. This consequence, coupled with the substantive rights and obligations of parties which can be affected by decisions of the commission, make the issue of legal representation in the commission an important matter.

Further, the issue has assumed greater importance in light of the commission determining matters on the basis of a presumption against lawyers being permitted to participate in the process.

Most recently, the Full Bench of the commission in *King v Patrick Projects Pty Ltd* [2015] FWCFB 2679 denied the respondent permission to be legally represented. In reaching that conclusion, the Full Bench referred to, as the proper approach, the view expressed by Flick J in *Warrell v Walton* [2013] FCA 291 at [25] that:

[25] The appearance of lawyers to represent the interests of parties to a hearing runs the very real risk that what was intended by the legislature to be an informal procedure will be burdened by unnecessary formality. The legislative desire for informality and a predisposition to parties not being represented by lawyers emerges, if not from the terms of s 596, from the terms of the Explanatory Memorandum to the *Fair Work Bill 2008 (Cth)*...

With respect to the Full Bench, there is no logical connection between whether a person is represented by a lawyer and the formality of the proceedings. Lawyers operate within the rules of the forum in which they appear.

Further, in an appeal before a differently constituted Full Bench of the commission in *Asciano Services Pty Ltd v Zak Hadfield* [2015] FWCB 2618, the Bar Association sought leave to intervene in an appeal commenced by Asciano Services Pty Ltd (Asciano) from a decision of Commissioner Riordan in which the latter had refused permission for Asciano to be represented by an external lawyer pursuant to s 596 of the FW Act. Commissioner Riordan had refused permission for Asciano to be represented even though the Applicant, Mr Hadfield was being represented by his industrial union and by an experienced industrial advocate, the ARTBU, and the matter had been listed for a hearing over 4 days in which there would be a need to cross-examine witnesses.

On 21 April 2015, a Full Bench delivered its decision and refused Asciano permission to appeal and dismissed the appeal. The Full Bench considered that the appeal was not in the public interest.

The Full Bench reasoned that the primary decision maker had to engage in an evaluative exercise and that the task of making a determination under s 596(2) was akin to an exercise of discretion. The Full Bench noted that reasonable minds might differ about whether any of the criteria were

satisfied, but concluded that the decision made by the primary decision maker was reasonably available on the facts. Among other observations, the Full Bench noted that the matter could be decided in a 'Determinative Conference' instead of a 'formal hearing' given that Asciano would now be a self-represented litigant to whom informal procedures may be more suitable.

It is troubling that, in deciding the appeal, the Full Bench considered that Asciano could, as a self-represented litigant, seek to have the matter decided in a 'Determinative Conference' as opposed to a formal hearing. Such a Determinative Conference involves the primary decision maker conducting a conference in closed court and in an inquisitorial format without oral evidence or cross-examination and without the rules of evidence being strictly applied. It is troubling that the Full Bench would suggest that this would be an appropriate course (particularly in circumstances where the other party was to be represented by an experienced industrial advocate). However, such an approach may be a logical outcome of excluding parties from the right to be legally represented.

Substantive rights and obligations of parties affected

The Fair Work Commission has wide-ranging powers across many areas which impact on the rights and obligations of parties in connection with the employment relationship and also the conduct of business operations. For instance, the commission is able to:

- (a) Conciliate and arbitrate in respect of disputes relating to the application of the National Employment Standards contained in Part 2-2 of the FW Act;
- (b) Make orders relating to the making, and approval, of enterprise agreements and impose workplace determinations as to terms and conditions of employment at a workplace under Parts 2-4 and 2-5 respectively of the FW Act;
- (c) Make orders relating to good faith bargaining requirements and the taking of protected industrial action by parties in connection with enterprise bargaining;
- (d) Make orders relating to the reinstatement of employees and other remedies in relation to unfair

dismissal applications under Part 3-2 of the FW Act; and

- (e) Make orders relating to disputes arising under Part 6-2 of the FW Act, including in relation to the interpretation and application of enterprise agreement.

Therefore, orders made by the commission can have a very substantial effect on the rights of employers and employees.

To the extent that a party has a grievance in relation a decision of the commission, the right of appeal is limited under s 400 of the FW Act to matters which are in the public interest. Appeals from decisions relating to unfair dismissal applications are further limited to those matters in which there is a 'significant error of fact'. Given these limitations, the proceedings at first instance assume a greater importance in achieving a fair and just outcome and parties are entitled to the representation of their choice in dealing with such important matters affecting their rights.

Application of legal principles in resolving disputes and claims

Under s 577(a), the commission must perform its functions and exercises powers in a manner that is fair and just. In this context, it is worth noting the observation of Buchanan J in *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78, (Full Court), that:

[25] There is no doubt that members of FWA are (as were members of its statutory predecessors, the Commonwealth Conciliation and Arbitration Commission and the Australian Industrial Relations Commission (the AIRC)) bound to act 'judicially' in the sense that they are obliged to respect and apply traditional notions of procedural fairness and impartiality. ... However, it is an important aspect of the work of FWA, at all levels including on appeal (as it was of its statutory predecessors), that it is to proceed without unnecessary technicality and as informally as the circumstances of the case permit. FWA is not a court and its members are not judicial officers as such (although the President has the same status as a judge of this Court and some senior members of FWA retain an equivalent status from earlier statutory arrangements). It is not inappropriate to say that the members of FWA have a statutory mandate to get to the heart of matters as directly and effectively as possible.

In resolving disputes as to legal rights and obligations, the

commission generally applies the existing jurisprudence and applicable legal principles. Lawyers provide a helpful resource in ensuring that the commission has regard to, and applies, the correct legal principles. This is particularly important given that not all members of the commission have legal qualifications. While such members have considerable experience in relation to relevant industries and workplace matters, lawyers can play an important role in ensuring the attainment of fair and just outcomes in resolving the substantive rights and obligations of parties. In particular, lawyers can provide a valuable function in ensuring no errors of law occur and that the commission complies with the requirements of the FW Act.

As a further consideration, the FW Act is a complex piece of legislation, with prescriptive requirements relating to matters such as terms and conditions of employment, enterprise agreement bargaining, the interaction of different industrial instruments, remedies for breaches of industrial instruments, terminations of employment and so forth. It contains 800 sections.

In the above context, many workplaces require the assistance of lawyers and cannot reasonably be expected to navigate through the prescriptive provisions of the Act. Such assistance should also not be denied if an issue relating to the operation of the Act, or raised under the Act, is pursued before the commission.

A contrary approach impacts on the productivity of workplaces, and the costs associated with such compliance, including the need to have the knowledge and expertise to participate in proceedings in the commissions without assistance from lawyers.

Anomalous position as to fairness between parties

Members of the Bar Association have encountered matters in which one party has been refused permission to be legally represented yet the other party has been represented by, for instance, an officer of a registered organisation, such as a union. Often, such officers are legally trained and, in the least, experienced advocates who have appeared in proceedings before the commission and conducted cross-examination of witnesses.

In the above situation, the party which is not legally represented has been required to rely on internal officers

who are not necessarily experienced in advocacy before the commission and whose role does not have as a focus conducting proceedings before the commission. This has resulted in an inherent unfairness as between the parties in respect to the conduct of the proceedings.

Yet, the above position is permitted because permission is not required for a corporation or registered organisation to be represented by one of its employees, even if they are legally qualified.

Uncertainty in process and inefficiency

There are variable practices and approaches as between members to determining questions of legal representation. Often, the matter is not resolved until immediately prior to the commencement of the hearing.

As a consequence, parties are left to approach proceedings without any certainty as to the persons who will be conducting them. This gives rise to unnecessary cost and anxiety in preparing for proceedings in the commission.

Parties who wish to be legally represented have to plan for alternative contingencies in case they are denied their representation of choice. This may involve preparing their case with their preferred representative and also an internal officer or an individual who stands by to conduct the case in case leave is refused. This is despite the fact that the lawyer of choice may have advised in relation to the matter, prepared the relevant evidence and may be more informed in relation to the legal issues and evidence overall.

There is the further outcome that, on permission being refused on the day, the party has already incurred the cost of a lawyer preparing the evidence and the case, advising in relation to the matter and appearing at the commission. This creates an unnecessary cost for the party involved.

Such duplication is inefficient and contrary to the very objects, as articulated in s 577 of the FW Act, which the commission is required to abide by in performing its functions and exercising its powers under the FW Act.

Inefficiency and protraction in the conduct of proceedings

The situation of lawyers being refused permission to appear has the further consequence that the relevant parties denied their representative are likely to conduct their cases by referring to the lawyer who will often be present in the

hearing room.

In other words, a party will often refer to the lawyer for guidance in relation to the various processes involved in conducting a matter, including adducing evidence and making submissions. There will also be delays in considering requests for adjournments to allow parties to properly consider issues which may arise and seek advice.

This causes a hearing to be protracted and inefficient. It also creates unnecessary anxiety for the party which is forced to engage in advocacy, including against experienced advocates who are employed by registered organisations and do not require permission to appear.

Conclusion and proposed amendments

For the reasons outlined above, the Bar Association recommends that the FW Act be amended to permit any party to be legally represented.

The best legislative response would be to delete all words in s 596 after the words 'paid agent' in sub-section (1).

Alternatively, s 596 of the FW Act could be simply amended to remove the presumption against representation as follows:

596 Representation by lawyers and paid agents

(1) Except as provided by subsection (3) or the procedural rules, a person may be represented in a matter before FWC (including by making an application or submission to FWC on behalf of the person) by a lawyer or paid agent ~~only~~ with the permission of FWC.

(2) FWA may grant permission for a person to be represented by a lawyer or paid agent in a matter before FWA, including ~~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.

...

As an alternative approach, subsection 596(2) could be wholly deleted.

The above amendments (along with an explanatory memorandum clarifying the object of the amendments) will allow for the process to be consistent with the objects, as articulated in s 577 of the FW Act, which the commission is required to abide by. It will also assist in ensuring that the processes are properly conducted and fair and just outcomes are achieved having regard to the applicable legal principles in resolving matters of fact and law which arise in determining the substantive rights and obligations of parties.

Finally, the Bar Association also notes, and endorses, the submission of the Law Society of NSW to the Productivity Commission dated 17 March 2015. As noted in that submission, the involvement of lawyers, as a general observation, will only enhance the processes and the attainment of fair and just outcomes.

Endnotes

1. [2013] FCA 291 at [24]