



GREENWAY CHAMBERS

THE RIGHT TO REPRESENTATION BEFORE THE FAIR WORK COMMISSION

A PAPER PRESENTED AT THE LAW SOCIETY OF SOUTH AUSTRALIA
IN CONJUNCTION WITH THE LAW COUNCIL OF AUSTRALIA

ON 18 MAY 2018

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1. Section 596 of the *Fair Work Act 2009* requires a person to get permission from the Fair Work Commission to be represented by an external lawyer.
2. Until recently to be 'represented' was understood to mean to have a lawyer present your case at hearing. However in *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 a Full Bench held that a lawyer was not able to assist a party to present their case without permission. This has created uncertainty as to what can be done without permission and led to a situation where parties can (and are) litigating as to the extent to which the other can obtain legal assistance prior to a hearing.
3. The section needs to be amended. In a modern society the requirement that a person is only allowed to be represented by a lawyer with the permission of the Fair Work Commission is an anachronism born in an earlier era when few matters involved individual litigants or businesses. It is difficult to see any valid rationale to support such a limitation. It runs contrary to a general acceptance in the law (such as that pertaining to criminal proceedings or proceedings involving refugees), and in society more generally, that persons whose rights and obligations are affected or potentially adversely affected by a decision of a tribunal are entitled *as of right* to obtain legal assistance if they so wish.

A. CURRENT PROVISION: SECTION 596 OF THE *FAIR WORK ACT*

- 596(1) Except as provided by subsection (3) or the procedural rules, a **person may be represented in a matter before the FWC** (including by making an application or submission to the FWC on behalf of the person) by a lawyer or paid agent **only with the permission of the FWC.**
- (2) **The FWC may grant permission** for a person to be represented by a lawyer or paid agent in a matter before the FWC **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.

Note: Circumstances in which the FWC might grant permission for a person to be represented by a lawyer or paid agent include the following:

- (a) where a person is from a non-English speaking background or has difficulty reading or writing;
 - (b) where a small business is a party to a matter 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 workplace relations advocacy.
- (3) The FWC's permission is not required for a person to be represented by a lawyer or paid agent in making a written submission under Part 2-3 or 2-6 (which deal with modern awards and minimum wages).
- (4) For the purposes of this section, a person is taken not to be represented by a lawyer or paid agent if the lawyer or paid agent:
- (a) is an employee or officer of the person; or
 - (b) is an employee or officer of:
 - (i) an organisation; or
 - (ii) an association of employers that is not registered under the Registered Organisations Act; or
 - (iii) a peak council; or
 - (iv) a bargaining representative;
- that is representing the person; or
- (c) is a bargaining representative.

B. CURRENT PROCEDURAL RULE THAT ALLOWS SOME WORK TO BE DONE WITHOUT PERMISSION

Rule 12 (1) For subsection 596(1) of the Act, **a person may be represented** in a matter before the Commission by a lawyer or paid agent **for the following purposes:**

- (a) preparing a written application or written submission for the person in relation to the matter;

- (b) lodging with the Commission a written application, written submission or other document, on behalf of the person in relation to the matter;
 - (c) corresponding with the Commission on behalf of the person in relation to the matter;
 - (d) participating in a conciliation or mediation process conducted by a member of the staff of the Commission, whether or not under delegation, in relation to an application for an order to stop bullying made under section 789FC of the Act.
- (2) However, subrule (1) is subject to a direction by the Commission to the contrary in relation to the matter.
 - (3) To remove doubt, nothing in this rule is to be taken as permitting a lawyer or paid agent to represent a party in a conference or hearing before a Commission Member.

C. WHAT SECTION 596 MEANS

Leading Authority – Parties must appear on their own behalf unless they get permission

4. *Warrell v Watson* [2013] FCA 291 Flick J, Federal Court of Australia.

[24] 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. **It is apparent from the very terms of s 596 that a party “in a matter before FWA” must normally appear on his own behalf. That normal position may only be departed from where an application for permission has been made and resolved in accordance with law**, namely where only one or other of the requirements imposed by s 596(2) have been taken into account and considered. The constraints imposed by s 596(2) upon the discretionary power to grant permission reinforce the legislative intent that **the granting of permission is far from a mere “formal” act to be acceded to upon the mere making of a request**. Even if a request for representation is made, permission may be granted “only if” one or other of the requirements in s 596(2) is satisfied. Even if one or other of those requirements is satisfied, the satisfaction of any requirement is but the condition precedent to the subsequent exercise of the discretion conferred by s 596(2): i.e., “FWA may grant permission...”. The satisfaction of any of the requirements set forth in s 596(2)(a) to (c) thus need not of itself dictate that the discretion is automatically to be exercised in favour of granting “permission”.

Full Bench Authority – Parties must get permission to get any legal assistance in respect of a matter - not just for courtroom advocacy

5. *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797, VP Hatcher, DP Dean, Cmr Wilson

[44] ... we consider that s.596 is not confined to permission for courtroom advocacy, and indeed appears to have been drafted in a way that is deliberately distinct from the predecessor provisions and was intended to put beyond doubt that all aspects of representation in connection with a matter were to be encompassed. The only relevant limitation on the scope of representation identifiable in s.596(1) is that it must be in a matter *before the FWC*. That would naturally exclude legal and agency services provided in relation to a justiciable controversy under the FW Act before an application to the Commission is made, and would probably also exclude the provision of legal advice to a party, *inter partes* dealings and other activities which do not involve interaction with the Commission itself even after an application is made to the Commission.

6. Earlier the Bench had identified 'representation' to equate to the work of a barrister, namely:

- “(a) appearing as an advocate;
- (b) preparing to appear as an advocate;
- (c) negotiating for a client with an opponent to compromise a case;
- (d) representing a client in a mediation or arbitration or other method of alternative dispute resolution;
- (e) giving legal advice;
- (f) preparing or advising on documents to be used by a client or by others in relation to the client’s case or other affairs;
- (g) carrying out work properly incidental to the kinds of work referred to in (a)-(f); and
- (h) such other work as is from time to time commonly carried out by barristers.”

7. It would seem that the Bench was of the view that each of those categories of work, if conducted in connection with a matter before the Commission, require permission, other than to the extent Rule 12 permits such work to be done without permission. That presumably means permission is required before: drafting statements of evidence; advising as to the witnesses to be called; advising as to the issues to be addressed in submissions; preparing draft cross-examination notes; or preparing draft oral submissions; since none of those actions are currently addressed by Rule 12.

8. Given the statutory obligation to first obtain permission, a question arises as to whether a lawyer would be acting contrary to their statutorily imposed ethical obligations if they undertook such tasks without having first obtained the required permission. It has been suggested it might amount to unsatisfactory professional conduct for a lawyer to act in a manner that was knowingly contrary to a statutory obligation.

D. THE TYPES OF ORDERS THE COMMISSION CAN MAKE AGAINST A PERSON, WITHOUT THAT PERSON HAVING A RIGHT TO LEGAL REPRESENTATION

9. The Commission can make:
 - a. Orders to maintain employment or award compensation for termination of employment (Parts 3–1, 3–2 and 6–4 which deal with adverse action, unfair dismissal and termination of employment).
 - b. Orders to prevent industrial action, that has the capacity to significantly affect the viability of a business (Part 3–3 which deals with industrial action).
 - c. Orders concerning the right of officers of organisations to enter an employer's or occupier's premises (Part 3–4, right of entry).
 - d. Orders that can fundamentally affect the income of employees and corresponding costs of business (Parts 2–3, 2–4, 2–5, 2–7 and 2–8, which deal with the making of awards, the making and termination of enterprise agreements, the making of workplace determinations, the making of equal remuneration orders and orders setting conditions upon a transfer of business).
 - e. Orders relieving an employer of the obligation to make redundancy payments (s 120).
 - f. Orders to permit employees to be stood down (Part 3-5);
 - g. Costs orders (s611).

E. HOW S596 IS APPLIED

Individuals can be refused permission to have a lawyer appear against a large corporation

10. *Guillemain v Woolworths Ltd* [2017] FWC 4236, 15 August 2017. Unfair dismissal application. Commissioner Harper-Greenwell determined to refuse permission to a warehouse team leader to be represented by an agent even though Woolworths was to be represented by their in-house HR/ IR managers/lawyers. That was despite the fact that neither party objected to the other being represented by an outside lawyer or agent and the employer contended that the matter was complex. The Commissioner's reasons included that that the applicant was 'articulate'.

(That Woolworths have the capacity to run complex proceedings using in-house staff is not in doubt: see *Yu Duo Lin v Woolworths Pty Ltd* [2017] FWCFB 3879 at [4], an appeal run for Woolworths by an in-house employee).

In contrast an individual can be given permission for a lawyer even though the employer is small, unrepresented and objects

11. *Trialonas v 3D Scaffolding Pty Ltd* [2017] FWC 3138.

Companies can get outside specialist workplace lawyers to appear for them against an unrepresented applicant without requiring permission, by being a member of an employer association

12. *Munro v Wilmar Australia Pty Ltd* [2017] FWC 2493 at [4]. Unfair dismissal application. Applicant unrepresented. Company represented by Special Counsel Maurice Swan of the Ai Group Workplace Lawyers, because the company is a member of the Ai Group.

Employers have to seek permission for lawyers to represent them against unions using in-house lawyers

13. *AMWU v Boeing Aerostructures Australia Pty Ltd* [2015] FWC 7600; *AMWU v BlueScope Steel (AIS) Pty Ltd* [2017] FWC 2583; *Broughton v Coca-Cola Amatil Ltd* [2017] FWC 2888; *Aged Care Services Australia Group Pty Ltd v HSU* [2017] FWCFB 2806; *MUA v Farstad Shipping (Indian Pacific) Pty Ltd* [2017] FWC 2650; *Downer EDI Rail Pty Ltd v ARTBIU* [2017] FWC 2725.

Permission for an employer to have a lawyer in a matter against a union is sometimes refused

14. *TCFU v Fastline Logistics Pty Ltd* [2015] FWC 7952; *AWU v Bradken Industries* [2015] FWC 2005.

Small employers are often refused permission to have external lawyer

15. *Application by EK* [2017] FWC 3448. Proceedings against two managers of company alleged to have bullied the applicant. Applicant unrepresented. Commissioner refused the company permission to be represented even though there would need to be cross-examination of the applicant.
16. *Felici v Ross Maddaluno Estate Agency Pty Ltd* [2015] FWC 4667. Unfair dismissal. Applicants had lawyers but said at the hearing neither side should be legally represented. Commissioner refused the employer the right to have a lawyer.
17. *De Marzi v 360 Gradi Pty Ltd t/a Gradi Pizzeria and Trattoria* [2017] FWC 2645. Unfair dismissal.
18. *Meredith v Peter MacCallum Cancer Centre* [2013] FWC 538. Unfair dismissal.
19. *Hodgson v Adapt Essential Services Pty Ltd* [2015] FWC 4439. Both sides had lawyers. Applicant said he would not use his lawyer at hearing. Employer refused permission to be represented by its lawyer at hearing.

Permission for an employer to be legally represented has been refused even in the case of an appeal

20. *G & S Fortunato Group Pty Limited v Stranieri* (2013) FWCFB 4098.

Yet the Commonwealth does not need permission to have its lawyers appear

21. *Gibbens v The Commonwealth of Australia (Department of Immigration and Border Protection)* [2017] FWCFB 2812, applied in *Knight v Commonwealth of Australia* [2017] FWCFB 3896. Full Bench determined that the Commonwealth does not need permission to be represented by solicitors from the AGS, as they can appear as of right, as they are employees of 'the person' who is the party to the proceedings (ie the Commonwealth).

Some Commissioners have refused permission to appear even when both sides concur it is appropriate

22. *Hines v WSH Group Pty Ltd* [2016] FWC 3489, Commissioner Ryan; *Guillemain v Woolworths Ltd* [2017] FWC 4236, Commissioner Harper-Greenwell.

It gives rise to apparently inconsistent decisions

23. In *King v Patrick Projects Pty Ltd* [2015] FWC 1221 Commissioner Williams granted Patrick Projects permission to be represented by a lawyer or paid agent. In *King v Patrick Projects Pty Ltd* [2015] FWCFB 2679 a Full Bench including SDP Drake quashed the decision, finding that no case had been established to grant permission to appear. In the subsequent proceedings before SDP Drake her Honour granted permission to the employer to be legally represented: [2017] FWC 1583.
24. *Barkho v Dairy Country* [2015] FWC 8549. An unfair dismissal matter commenced before DP Hamilton who granted the employer permission to be represented by a lawyer. The matter commenced and then adjourned part-heard and was subsequently reallocated to Commissioner Ryan. Commissioner Ryan determined afresh the question of permission to appear. He refused permission for the employer to be legally represented, despite the employer having no employee with experience in advocacy. The decision does not identify any facts or circumstances that had changed since DP Hamilton had granted leave that strengthened the case against granting permission.
25. Different Commission Members express conflicting starting points to determine the issue. The following quote from Cmr Ryan's decision in *Barkho* illustrates the conflicting viewpoints of Sams DP and Commissioner Ryan:

[31] The observation by Sams DP in *Applicant v Respondent* that:

"[21] In my view, balancing fairness between parties is as much a case of courtroom management, as it is a case of legislative mandate. With the greatly increased exposure of all courts and tribunals to self-represented litigants, with all of the well known difficulties this brings, the appearance of a focused, experienced and sympathetic legal practitioner is, more often than not, a welcome relief."

can be countered with the observation that the presence of lawyers and paid agents as representatives of a party in a proceeding before the Commission can and often leads to more protracted and complex hearings. Lawyers and paid agents will often cross examine for the sake of ensuring

that they have covered every and any possible relevant issue so as comply with their obligation to their client.

It occupies a lot of Commission time that could be put to better use

26. Most decisions concerning applications under section 596 are determined without a written decision. There are more than 1000 written decisions that cite s 596 in the last 3 years.
27. There are a number of Full Bench appeals that deal with the question of whether permission to appear should have been granted. They include eg *Gibbens v The Commonwealth of Australia (Department of Immigration and Border Protection)* [2017] FWCFB 2812; *Knight v Commonwealth of Australia* [2017] FWCFB 3896; *King v Patrick Projects Pty Ltd* [2015] FWCB 2679; *Callychurn v ANZ Bank* [2015] FWCFB 5254; *Church v Eastern Health t/as Eastern Health Great Health and Wellbeing* [2014] FWCFB 810.
28. Recently the Commission has started to express the view that it can or should reconsider the question of permission to appear more than once in the course of hearing the same matter, which will multiply the amount of time and cost spent on this issue: *Caruana v Shace Toop Trading Trust* [2018] FWC 2231

A party can ask the Commission for a direction that the other party cannot get assistance from a lawyer to assist with drafting submissions and preparing for a hearing

29. *Stringfellow v CSIRO* [2018] FWC 1136 (following the decision in *Fitzgerald*).
30. In *Skada v Apple Pty Ltd* [2018] FWC 2696 Deputy President Anderson noted at [35] that while refusing Apple permission to be represented by an external lawyer, he had not made any order under Rule 12 preventing Apple from using that external lawyer for the purposes of preparation and lodgement of materials. Implicit in the comment was that it would have been open to the applicant to seek such a direction (an application which would lead to a further interlocutory hearing).
31. Professor Andrew Stewart anticipated this development, when he described the decision in *Fitzgerald* as having:

“... disturbed the settled understanding around representation and exposed the possibility of matters descending into a series of legal hearings to determine how to proceed efficiently and fairly – which is a contradiction in terms. ... It’s about as inefficient a process as you can imagine and highlights the urgent need for the entire matter to be clarified.”

It has been interpreted to mean that the Commission is required to engage in a task of assessing the particular capacity of potential advocates

32. In *CEPU v UGL Resources Pty Ltd* [2012] FWA 2966, Senior Deputy President Richards stated:

“...Before permission to be represented can be granted, a person must be unable to represent himself, herself or itself effectively, and

following the plain language definitions of the Macquarie Dictionary (Revised Third Edition) and the Australian Concise Oxford Dictionary (Third Edition), this means the person must be unable to represent himself, herself or itself in a manner that creates a “striking impression”, or which has an “impressive” effect or which is “powerful in effect”.

33. This asserted requirement, which arguably does not arise from the section itself, has been cited in recent cases as a barrier to permitting external representation. It requires an assessment of the quality and capacity of the person who might otherwise be the advocate.
34. In *Caruana v Shace Toop Trading Trust* [2018] FWC 2231 Deputy President Anderson stated that to be effectively represented a party “*is entitled to expect its representative to make a ‘striking impression’ or be ‘powerful in effect’*”: at [39]. Against that background he took into account evidence as to how effective the Company CEO might be as an advocate, noting amongst other matters that she was legally qualified but had only appeared in two cases on relatively simple matters: at [37]-[38].
35. This has led to a situation where in order to determine any application for leave to appear the capacity and effectiveness of those who may appear needs to be assessed by the Commission.

F. ALLOWING REPRESENTATION ASSISTS THE COMMISSION

36. As Mason CJ said in *Giannarelli v Wraith* (1988) 165 CLR 543:

In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow.

37. Sir Anthony Mason AC, KBE, whilst Chief Justice of Australia made the following observation in *The State of the Judicature* (1994) 68 ALJ 125 at 127:

. . . [T]he exclusion of lawyers neither enhances nor accelerates the course of justice. If my long experience of reading the transcripts of proceedings in the Industrial Relations Commission and its predecessor . . . has any lesson to offer, it is that the presentation of cases by non-lawyers does not lead to clarity and speedy hearings; on the contrary, it is more likely to lead to confusion and to long, drawn-out proceedings due to the failure of non-lawyers to identify the true issues clearly. No doubt lawyers are a nuisance – they habitually find unexpected defects in legislation and administrative and other decisions by those who exercise power. But that is no reason for excluding lawyers.

38. It is well known to the Bench that unrepresented litigants are often cause cases to take longer, as irrelevant issues are raised or relevant issues are raised inadequately. Ironically in the *Fitzgerald* case the Full Bench found the submissions of the unrepresented litigant to be:

. . . of little assistance in the determination of the appeal. They consisted to a large extent of dissertations about irrelevant matters, political commentary, semi-racist remarks and unsupported allegations made against Woolworths and its personnel.

39. In *Cachia v Hanes* (1994) 79 CLR 403 the High Court said at [22]:

Whilst the right of a litigant to appear in person is fundamental, it would be disregarding the obvious to fail to recognize that the presence of litigants in person in increasing numbers is creating a problem for the courts ... It would be mere pretence to regard the work done by most litigants in person in the preparation and conduct of their cases as the equivalent of work done by qualified legal representatives. All too frequently, the burden of ensuring that the necessary work of a litigant in person is done falls on the court administration or the court itself.

40. Where one side is not represented it is usually of great assistance to the Bench and the unrepresented party that the other side *is* represented. The observation of Zammit J in the recent Supreme Court of Victoria decision *Hingst v Construction Engineering (Aust) Ltd (No 3)* [2018] VSC 136 is a recent example:

15 The trial commenced on 27 November 2017 and ran for a total of 18 sitting days. This was a difficult and demanding task that the plaintiff undertook.

16 It is appropriate to observe that the defendant's legal representatives, including counsel and instructing solicitors, provided assistance throughout the running of the trial. This benefited the plaintiff and ensured that the Court's time was used efficiently and unnecessary delay avoided.

41. The argument that to allow one side to be represented by an external lawyer will cause the other injustice was debunked as early as 1953 by Justice Wright of the Commonwealth Court of Conciliation and Arbitration Court in *The Waterside Workers Award 1936* (1953) 77 CAR 74 at 76

My approach to the question of representation by counsel is, I must confess, strongly influenced by the knowledge – expressly stated by them to have been shared by almost every Judge of this Court since its inception – that the work of the Court, and the attainment of its objects, are substantially assisted by the participation of advocates professionally trained in forensic skill. That applies, in my opinion, just as much to the marshalling of facts as to the elucidation of questions of law. In the present case, and in a great number in the past, a trade union representative has based his objection on the contention that Union officials are placed at a disadvantage in the Court by having to oppose lawyers; in my opinion, and according to my experience in this and other Courts, that is an untenable view which should have been abandoned long ago. In such circumstances this Court takes special care to ensure that lay advocates suffer no disability or disadvantage.

42. In the same vein, in *Applicant v Respondent* [2014] FWC 2860 at [18] Deputy President Sams of the Fair Work Commission said:

Invariably, I have found the skills and expertise of an experienced industrial legal practitioner will be more of a help than a hindrance, particularly

bearing in mind a legal practitioner's professional obligations to the Commission and the Courts.

43. Perversely those who are legally trained to appear in proceedings, and hold professional ethical duties to the tribunal, need permission to appear, while in contrast in-house employees, including legally trained staff who do not hold a practicing certificate, and non-qualified agents or friends who are not subject to professional disciplinary action for unethical behaviour, do not need to seek permission (although the Commission's capacity to determine how the proceedings are to be conducted may lead to the Commission not permitting the lay advocate to appear).

G. ALLOWING REPRESENTATION ASSISTS THE PARTIES

44. The Explanatory Memorandum to the Act states that 'persons dealing with the FWC would generally represent themselves', an assumption which presumably underpins the default position pursuant to s596.
45. This is not the case in practice. Matters before the Fair Work Commission are invariably adversarial involving oral evidence and submissions and often complex legal questions. Parties, unsurprisingly, do not generally represent themselves. They seek legal assistance. They incur that cost without knowing whether they will be able to use their lawyer at hearing.
46. Parties are usually quite concerned to hear that they will not know whether they will have to conduct the hearing themselves until close to the hearing, or at hearing, particularly where the other side (whether a union or a large employer) have in-house lawyers who will appear as of right.
47. While it is common for parties to be given permission to be legally represented, that is only after time and money has been spent on the preparation of material in support of an application, sometimes considerable time and money where applications are contested.
48. Section 596 provides criteria that must be considered. There is, however, no standard procedure that applies in relation to how applications to be legally represented are dealt with. Consequently, members take different approaches to the criteria which results in inconsistencies in outcomes and lack of certainty for parties about whether their lawyer will be able to appear.
49. The uncertainty over whether a party will be able to get permission for their lawyer or agent to appear has a tendency to undermine the confidence parties have in the Fair Work Commission.

H. FINAL OBSERVATION

50. The Fair Work Commission organises a pro bono scheme for litigants in person in unfair dismissal matters. It has a panel of solicitors that individual litigants are encouraged to access to obtain legal advice as to jurisdictional matters and also as to the merits of their claim.

51. The absurdity of the current system is demonstrated by the fact that lawyers who appear pro bono for a party as a result of that scheme have to seek permission to appear – and I am told that permission has on occasion been refused!

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(a Committee of the Law Council of Australia's
Federal Litigation and Dispute Resolution Section)

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