



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our Ref: Emp.law:DHas1571991

20 September 2018

The Hon Kelly O'Dwyer  
Minister for Jobs and Industrial Relations  
PO Box 6022  
House of Representatives  
Parliament House  
Canberra ACT 2600

By email: [Kelly.ODwyer.MP@aph.gov.au](mailto:Kelly.ODwyer.MP@aph.gov.au)

Dear Minister,

**Amendments to the *Fair Work Act 2009* (Cth) – The Right to Representation before the Fair Work Commission**

I refer to correspondence from the Law Council of Australia to the Hon Craig Laundy MP dated 10 May 2018 regarding s 596 of the *Fair Work Act 2009* (Cth) ("Fair Work Act") and the right to representation.

The Law Society of NSW supports the Law Council's advocacy on the right to representation in the Fair Work Commission ("the Commission"). The Law Society considers that s 596 of the Fair Work Act should be repealed or amended so that those who come before the Commission have a right to be represented by a lawyer or a paid agent.

The rationale behind s 596 of the Fair Work Act, as stated in the Explanatory Memorandum for the *Fair Work Bill 2009* (Cth), is that the Commission is intended to operate in an efficient, informal and non-adversarial manner, and "legal or other professional representation should not be necessary".<sup>1</sup> The Fair Work Act further states at s 577 that the Commission must perform its functions in a manner that is fair, just, quick, informal, and avoids unnecessary technicalities.

The Law Society submits that, rather than promoting efficient resolution of matters, denying parties the automatic right to legal representation can have the opposite effect. The Fair Work Act is a complex piece of legislation with prescriptive requirements and provisions. In the experience of our members, legal representation allows for the prompt identification of the relevant facts and legal questions to be determined, which supports the proper administration of justice. Self-represented parties, if they have not sought legal advice before their hearing, often arrive at the Commission underprepared and overwhelmed. This can result in delays in pre-trial procedures, increased time spent at hearing discussing irrelevant matters, a greater number of adjournments, and difficulties in advancing settlement discussions.

<sup>1</sup> Explanatory Memorandum, Fair Work Bill 2009 (Cth), 2291.

The Law Society's members have also advised that s 596 of the Fair Work Act can have a cost implication for parties appearing before the Commission. The question of right to representation is at times not resolved until immediately before a hearing. To prepare for a possible denial of representation, parties will often enlist legal representatives, at significant expense, to prepare detailed briefing notes for their reference, as well as retaining their legal representative for the day of the hearing. In addition to the potential for increased costs, uncertainty over whether permission for legal representation will be granted by the Commission gives rise to unnecessary stress and anxiety among parties.

Orders made by the Commission can have a substantial effect on the rights of employees and employers. Our members inform us that the Commission's discretion to deny a request for a party to be represented can leave a party exposed and vulnerable, which is exacerbated if the other party is able to retain legal representation.

We note that in their correspondence on this issue, the Law Council of Australia highlighted with concern a 2017 decision by the Full Bench of the Commission, *Fitzgerald v Woolworths* [2017] FWCFB 2797 ("*Fitzgerald v Woolworths*"), which expanded the circumstances where a party must seek the Commission's permission to obtain the assistance of their lawyer.

In the subsequent decision of *Ross Kennedy v Qantas Ground Services Pty Ltd* [2018] FWCFB 4319, the Full Bench of the Commission clarified that that a party "does not need the permission of the Commission to seek legal advice" but does need permission to be represented by a lawyer or paid agent. While this decision ameliorates some of the issues arising from *Fitzgerald v Woolworths*, it does not address our core concerns regarding the right to representation before the Commission. The Law Society therefore supports amendments to the Fair Work Act so that those who come before the Commission have an automatic right to be represented by a lawyer or a paid agent.

Thank you for considering this letter. Should you have any questions or require further information, please contact Andrew Small, Policy Lawyer on (02) 9926 0275 or email [Andrew.Small@lawsociety.com.au](mailto:Andrew.Small@lawsociety.com.au)

Yours sincerely,



Doug Humphreys OAM  
**President**