

# LEGAL REPRESENTATION IN THE FAIR WORK COMMISSION

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## I OVERVIEW

1. Last year, there were several cases in which legal representatives were refused permission to appear at the Fair Work Commission (**Commission**).<sup>1</sup> On 22 July 2013, following a number of these cases, the Commission introduced its Practice Note 2/2013 on the topic of Fair Hearings.<sup>2</sup> This Practice Note includes a number of key points relating to the representation of parties by lawyers and paid agents. Importantly, it imposes a new obligation on parties seeking representation in appeal hearings to identify in writing the reasons why permission should be granted having regard to the matters outlined in s 596(2) of the *Fair Work Act 2009* (Cth) (**FW Act**).<sup>3</sup> A similar procedure applies to parties seeking representation in unfair dismissal claims at first instance.<sup>4</sup>

## II FAIR HEARINGS

2. Whilst the Commission is not bound by the rules of evidence and procedure,<sup>5</sup> it is subject to the common law principles of procedural fairness.<sup>6</sup> Section 577 of the FW Act also provides that:

The FWC must perform its functions and exercise its powers in a manner that:

- (a) is fair and just; and
- (b) is quick, informal and avoids unnecessary technicalities; and
- (c) is open and transparent; and
- (d) promotes harmonious and cooperative workplace relations.

3. As Practice Note 2/2013 states:<sup>7</sup>

The provision of a fair hearing is at the very heart of the Commission's obligations to the parties who appear before it. A fair hearing involves the opportunity for all parties to put their case and to have that case determined impartially and according to law. Members of the Commission are bound to act "judicially" in the sense that they are obliged to provide procedural fairness and to determine matters impartially.

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<sup>1</sup> See for example, *Azzopardi v Serco Sodexo Defence Services Pty Limited* [2013] FWC 3405 and *G & S Fortunato Group Pty Ltd v J Straneri* [2013] FWCFB 4098.

<sup>2</sup> See attached.

<sup>3</sup> See *Practice Note 2/2013*, Fair Work Commission, at [47]. See also *Practice Note 1/2013 Appeal Proceedings*, Fair Work Commission.

<sup>4</sup> See *Practice Note 2/2013*, Fair Work Commission, at [49].

<sup>5</sup> See s 591 FW Act.

<sup>6</sup> See *Practice Note 2/2013*, Fair Work Commission, at [4].

<sup>7</sup> At [7].

4. Deciding when and how parties are to be represented is one of the Commission's important functions in ensuring the provision of a fair hearing. It is not necessary for a party to be represented by a lawyer or a paid agent in the Commission. Indeed, such representation requires the permission of the Commission in all matters that come before it whether for a conference or a hearing.<sup>8</sup>

### III LEGAL REPRESENTATION

5. Section 596(1) of the FW Act provides that a lawyer or paid agent may only represent a person with the permission of the Commission. Such permission may only be granted if, pursuant to s 596(2):
  - (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.
6. Section 12 of the FW Act defines "lawyer" to mean a person who is admitted to the legal profession by a Supreme Court of a State or Territory and "a paid agent" to mean an agent (other than a bargaining representative) who charges or receives a fee to represent a person in the matter.
7. Any one or all of the prescribed conditions outlined in s 596(2), but no others, may give rise to the Commission's power to exercise its discretion to grant permission to a person to be represented by a lawyer or a paid agent in any given case. Once invoked, such discretion should be exercised appropriately, having regard to the intention of the legislature and the pursuit of justice: *Chris Lekos v Zoological Parks and Gardens Board T/A Zoos Victoria* [2011] FWA 1520 at [33].
8. The Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) states:
  2291. FWA is intended to operate efficiently and informally and, where appropriate, in a non-adversarial manner. Persons dealing with FWA would generally represent themselves...
  2296. In granting permission, FWA would have regard to considerations of efficiency and fairness rather than merely the convenience and preference of the parties.
9. In addition, the Explanatory Memorandum contains the following commentary in its regulatory analysis section:

r.335. FWA will move away from formal, adversarial processes, with legal representation and intervening parties. There will also be a higher bar set for representation. Permission for representation will only be granted to parties (including the Minister) where it would enable the

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<sup>8</sup> Permission to appear is not required for conciliations at the Commission.

matter to be dealt with more efficiently or fairly...It is envisaged that in most cases legal representation will not be necessary.

10. The test under s 596 of the FW Act is more stringent than that under the predecessor provision of s 100 of the *Workplace Relations Act 1996* (Cth): *Azzopardi v Serco Sodexo Defence Services Pty Limited* [2013] FWC 3405; *Chris Lekos v Zoological Parks and Gardens Board T/A Zoos Victoria* [2011] FWA 1520; *Rodney James Rogers v Hunter Valley Earthmoving Company Pty Ltd* [2009] FWA 572.
11. Ordinarily, if any one of the prescribed conditions in s 596(2) of the FW Act is found to be in existence, the discretion to give permission to represent a person will be exercised in favour of that person: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v UGL Resources Pty Limited (Project Aurora)* [2012] FWA 2966 at [8].
12. The method of verification of the prescribed conditions is an objective exercise although the conditions themselves may not in each case be verified as objective facts – “Reasonable minds will differ as to whether legal representation will result in added efficiency, whether a certain circumstance is unfair or not, or whether a person is unable to be represented effectively”: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v UGL Resources Pty Limited (Project Aurora)* [2012] FWA 2966 at [9].
13. In determining the existence of the prescribed conditions, the totality of the observed circumstances will be important as will the genuineness of any asserted belief that is said to be held. The belief that litigants might hold as to their ability to represent themselves effectively will need to be well grounded, but it is a notion that might travel widely in meaning – “A refusal to accommodate any such concerns or an expression of indifference to a declared state of personal belief (for example) may give rise to procedural fairness concerns”: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v UGL Resources Pty Limited (Project Aurora)* [2012] FWA 2966 at [20]-[22].
14. Importantly, a person is not considered to be represented by a lawyer or paid agent where that lawyer or paid agent:<sup>9</sup>
  - (a) is an employee or officer of the person;
  - (b) is an employee or officer of:
    - (i) an organisation;<sup>10</sup> or

<sup>9</sup> See s 596(4) FW Act.

<sup>10</sup> See *Gao v Citywide Service Solutions Pty Ltd* [2013] FCA 394 at [41]-[43] where Tracey J notes that permission to appear in the Commission was not required by a lawyer representing *Citywide Service Solutions Pty Ltd* given that he was an employee of the Australian Industry Group, an organisation registered under the *Fair Work (Registered Organisations) Act 2009* (Cth).

- (ii) an association of employers that is not registered under the Registered Organisations Act;<sup>11</sup> or
- (iii) a peak council; or
- (iv) a bargaining representative;  
that is representing the person; or
- (c) is a bargaining representative.

#### **IV RELEVANT CASES**

15. Whilst lawyers and paid agents must seek permission to appear in all conferences and hearings before the Commission, it is only in appeals and unfair dismissal claims at first instance that written submissions are required.<sup>12</sup> Submissions on permission to appear should focus on addressing the prescribed conditions in s 596(2) of the FW Act. Each case will turn on its facts, although a few key authorities provide useful guidance:

##### **Warrell v Walton [2013] FCA 291**

16. Mr Warrell appeared as a self-represented litigant in the Commission seeking an extension of time for the filing of his unfair dismissal application following the termination of his employment as a gardener with Bacto Laboratories Pty Ltd. Mr Warrell suffered from brain damage and experienced difficulties with reading and writing.
17. Relevantly, Mr Warrell's application for an extension of time was refused at first instance and his application for appeal to the Full Bench of the Commission, rejected. Ultimately, following a number of hearings, an application was made to the Federal Court seeking, *inter alia*, an order setting aside the decision of the Full Bench to refuse Mr Warrell permission to appeal.
18. Before the Federal Court, submissions were made on behalf of Mr Warrell that his hearing in the Commission was not fair and just by reason of Bacto Laboratories Pty Ltd having been impliedly granted permission to appear by a lawyer. It was submitted that the Full Bench, in refusing leave to appeal, had erred in concluding that Mr Warrell's hearing before the Senior Deputy President at first instance had been fair and just.
19. His Honour Justice Flick agreed with Mr Warrell, quashing the orders of the Full Bench and finding that it had failed to take into account:<sup>13</sup>
- the fact that Mr Warrell was functionally illiterate and brain damaged;

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<sup>11</sup> See *Pugliese v Paull* [2011] FMCA 95 where Lucev FM finds that whilst a non-lawyer employee of an unregistered organisation may appear in the Commission, there is no power to allow the appearance of a non-lawyer employee of an unregistered organisation in the Federal Circuit Court.

<sup>12</sup> *Practice Note 2/2013*, Fair Work Commission, at [47] & [49].

<sup>13</sup> *Warrell v Walton* [2013] FCA 291 at [22].

- the failure on the part of the Senior Deputy President to make findings of fact relevant to her apparent conclusion that the requirements imposed by s 596(2) had been satisfied; and
- the manifest advantages that Bacto Laboratories would have in cross-examining Mr Warrell and the manifest difficulties confronting Mr Warrell in his questioning of Mr Carter.

20. His Honour concluded that:<sup>14</sup>

The unfairness to Mr Warrell had its roots in the failure at the outset on the part of the Senior Deputy President to apparently consider the terms of s 596(2) and the potential prejudice thereafter experienced by Mr Warrell in being effectively cross-examined by a lawyer. Having granted permission for Mr Butterfield to appear, the “*damage was done*”.

21. His Honour further stated that:<sup>15</sup>

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.

**Azzopardi v Serco Sodexo Defence Services Pty Limited [2013] FWC 3405**

22. Mr Azzopardi applied to the Commission for an unfair dismissal remedy against his former employer, Serco Sodexo Defence Services Pty Limited (**Serco**). Mr Azzopardi objected to Serco being legally represented by Ashurst Australia. In considering whether permission to be legally represented should be granted, Commissioner Cambridge found that:

- The matter was not of sufficient complexity that it would be dealt with more efficiently with the assistance of legal representatives.<sup>16</sup> Although there was a significant volume of material across a considerable period of time to be examined in relation to the circumstances of the employee’s termination, the matters for consideration involved questions that routinely required determination in unfair dismissal proceedings;<sup>17</sup> and
- The fact that a person may be required to be both witness and advocate is not relevant to the issue of whether that person can represent himself, herself or itself effectively.<sup>18</sup>

23. Commissioner Cambridge said that:<sup>19</sup>

Importantly, if permission for legal representation for the employer was granted, something of an imbalance would emerge whereby it would be represented by a lawyer while the applicant would be

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<sup>14</sup> Ibid at [23].

<sup>15</sup> Ibid at [25].

<sup>16</sup> See also *Urbanski v MSS Security Pty Ltd* [2012] FWA 1789 at [8] where Bartel DP finds that although legal representation would allow the matter to be dealt with more efficiently, a lack of complexity meant that permission should be declined.

<sup>17</sup> *Azzopardi v Serco Sodexo Defence Services Pty Limited* [2013] FWC 3405 at [13]-[15].

<sup>18</sup> Ibid at [16]-[18].

<sup>19</sup> Ibid at [20].

self represented. The resultant imbalance would create great potential for the absence of a fair and just Hearing as was identified by the Federal Court Judgment in the Warrell case.

**G & S Fortunato Group Pty Ltd v J Straneri [2013] FWCFB 4098**

24. G & S Fortunato Group Pty Ltd (**Fortunato Group**) appealed against a decision granting an extension of time to Mr Straneri for the lodgement of his application for an unfair dismissal remedy. At the commencement of the appeal proceedings, counsel for Fortunato Group was refused leave to appear, the Full Bench noting in its decision that:<sup>20</sup>

We declined to grant permission to appear. There is no particular complexity about the appeal and we were not persuaded that granting permission ‘would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter’. Nor are the matters in paragraphs s 596(2)(b) and (c) enlivened in the circumstances of this matter.

We also observe that just because the proceeding is an appeal it ought not be assumed that the Commission will permit a party to be represented by a lawyer or paid agent. As Flick J observed in *Warrell v Fair Work Australia*:

“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.”

**Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v UGL Resources Pty Limited (Project Aurora) [2012] FWA 2966**

25. The Commission convened a conference to deal with a dispute between the *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CPSU)* and UGL Resources Pty Limited (**UGL**).
26. Mr Copeland of Copeland Workplace Law sought leave to appear on behalf of UGL at the conference. Mr Copeland had earlier indicated that he intended to raise a number of jurisdictional objections to the CPSU’s dispute application. Senior Deputy President Richards, in granting permission to appear to Mr Copeland, held that:<sup>21</sup>

It appears to me that where the Respondent (in this case) seeks to agitate a jurisdictional issue then it would follow that representation by a lawyer would be a reasonable course. Jurisdictional issues by their nature are prospectively complex in their own right, and/or else may require a degree of familiarity with court and tribunal jurisprudence or authorities.

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*G & S Fortunato Group Pty Ltd v Straneri* [2013] FWCFB 4098 at [9]-[10].

<sup>21</sup>

*Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v UGL Resources Pty Limited (Project Aurora)* [2012] FWA 2966 at [23]. See also *O’Grady v Royal Flying Doctor Service of Australia* [2010] FWA 1143 at [29] where Leary DP draws a distinction between a “simple factual contest” (such as that in *Rodgers v Hunter Valley Earth Moving Company Pty Ltd* [2009] FWA 572 at [14]) and the determination of a jurisdictional issue.

27. On the issue of complexity, the Senior Deputy President continued:<sup>22</sup>

I add that it is not always apparent that a particular issue in dispute is so self-evidently straightforward so as to be free of any risk of escalation in its degree of complexity. This is particularly so where a conference may be a preliminary step towards an arbitral procedure, or where the conduct of the parties in the course of a conference may lead to arbitration being pressed. All processes being contiguous, in the circumstances observed it may be prudent in aid of efficiency in the wider prospective conduct of the matter to grant permission to appear to a lawyer at the preliminary stage. (footnote omitted)

28. On the issue of whether the respondent could represent itself effectively, Senior Deputy President Richards found that an Acting Human Resources Manager was insufficiently experienced in representing her employer's interests and/or did not possess the full range of responsibilities applicable to the permanently appointed Human Resources Manager. Senior Deputy President Richards said:<sup>23</sup>

It appears, then, that 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 that 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"...In this definitional context, it might not be unusual for a person to be unable to represent himself, herself or itself "effectively".

**Chris Lekos v Zoological Parks and Gardens Board T/A Zoos Victoria [2011] FWA 1520**

29. Zoos Victoria applied to the Tribunal for permission to be represented by a lawyer in an unfair dismissal claim. Permission was refused, Commissioner Lewin holding that:

- No unfairness would ensue from denying the respondent permission to appear where the applicant was self-represented;<sup>24</sup>
- The respondent was well resourced, was a member of the Australian Industry Group, had a Human Resources Director and a Senior Human Resource Advisor and was capable of representing itself;<sup>25</sup>
- No jurisdictional issues arose and there was little fundamental conflict concerning the central historical narrative of the circumstances leading to the termination of the applicant's employment,<sup>26</sup> and

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<sup>22</sup> *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v UGL Resources Pty Limited (Project Aurora)* [2012] FWA 2966 at [26].

<sup>23</sup> *Ibid* at [16] & [17].

<sup>24</sup> *Chris Lekos v Zoological Parks and Gardens Board T/A Zoos Victoria* [2011] FWA 1520 at [34].

<sup>25</sup> *Ibid* at [35].

<sup>26</sup> *Ibid* at [39].

- Considerations of convenience, such as counsel's involvement in the preparation of the respondent's case, are not relevant to the issue of efficiency.<sup>27</sup>

To grant permission on the basis of a consideration of convenience would cut against the grain on the statutory provisions and not be in accord with the legislative intention clearly evident in the new statutory provisions and the extrinsic materials. It would follow, if this consideration were sufficient to determine an application of this kind, that wherever a lawyer or paid agent was engaged to prepare a case for an applicant or a respondent in a matter before the Tribunal, permission would have to be granted as a matter of course. The effect of this approach would be to remove the discretion of the Tribunal so that parties could determine that they would be represented by lawyers or paid agents whenever they chose to involve such persons in the preparation of matters before the Tribunal as a matter of convenience, by submissions that their choice of doing so governed the greater efficiency with which the Tribunal would be able to deal with any matter before it regardless of any lack of relevant complexity in the matter.

**Dr Dmitri Gramotnev v Queensland University of Technology [2011] FWA FB 1446**

30. The Queensland University of Technology (**QUT**) sought permission to be represented in an appeal brought by Dr Gramotnev against a decision of Commissioner Spencer rejecting his unfair dismissal claim. Dr Gramotnev was not represented on appeal. The Full Bench granted QUT permission to have legal representation stating that:<sup>28</sup>

Representation is common in appeal proceedings. In our view the complexity of issues which will inevitably arise means that the matter is likely to be dealt with more efficiently if one or both parties are legally represented. We also consider that the absence of relevant experience within QUT supports the conclusion that a party wishing to be legally represented should be permitted to be so represented. We note also that the parties were legally represented before the Commissioner. It is incongruous that legal representation be denied for the appeal proceedings based on the decision of one party not to continue to be represented.

**Flinders Operating Services Pty Ltd T/A Alinta Energy v Australian Municipal, Administrative, Clerical and Services Union; Association of Professional Engineers; Scientists and Managers Australia [2010] FWA 4821**

31. Alinta Energy sought good faith bargaining orders against a number of unions. Mr Bakewell from EMA Consulting Pty Ltd sought permission to appear and represent Alinta Energy pursuant to s 596 of the FW Act. Commissioner Hampton granted permission on the following bases:

- (1) The matter would be dealt with more efficiently for the purposes of s 596(2)(a) of the FW Act because:

<sup>27</sup> Ibid at [41].

<sup>28</sup> *Dr Dmitri Gramotnev v Queensland University of Technology* [2011] FWA FB 1446 at [8].

- it was complex and involved the consideration of multiple applications canvassing a number of key aspects of the Act some of which had not been extensively considered by Fair Work Australia;<sup>29</sup>
  - although Alinta Energy had Human Resources and other management expertise, those personnel were themselves due to give evidence and be cross-examined;<sup>30</sup>
  - there were multiple witnesses to be called;<sup>31</sup> and
  - the unions were represented by an experienced advocate from the Australian Services Union.<sup>32</sup>
- (2) It would be unfair not to allow the person to be represented for the purposes of s 596(2)(b) of the FW Act because:
- the alternative advocate for the employer, namely its Human Resources representative or other personnel, would be challenged under cross-examination and issues of credit could arise.

**Rodney James Rodgers v Hunter Valley Earth Moving Company Pty Ltd [2009] FWA 572**

32. Freehills was refused leave to appear on behalf of Hunter Valley Earth Moving Company when the Construction, Forestry, Mining and Energy Union objected to such representation on behalf of Mr Rodgers. Refusing permission to appear, Commissioner Harrison stated.<sup>33</sup>

In this matter I am aware that Mr Endacott appearing for the Applicant is not legally qualified, albeit he is an experienced advocate. I am also familiar with Mr McCowan's history of industrial advocacy in the coal industry, having been previously assigned to the industry for several years.

Without prejudicing the merits or otherwise of the substantive application, on my reading of the submissions and witness statements I am of the opinion that this is not a matter which requires forensic cross-examination or is of a complex nature. I note that the Applicant admits to engaging in

<sup>29</sup> *Flinders Operating Services Pty Ltd T/A Alinta Energy v Australian Municipal, Administrative, Clerical and Services Union; Association of Professional Engineers; Scientists and Managers Australia* [2010] FWA 4821 at [24].

<sup>30</sup> *Ibid* at [25].

<sup>31</sup> *Ibid* at [25].

<sup>32</sup> *Ibid* at [25]. See also *Hoklas v Richmond Grove Wines t/a Orlando* [2012] FWA 4011 where O'Callaghan SDP treated the applicant's representation by a "legally trained and qualified industrial officer of a substantial union" as relevant to the granting of external legal representation to an employer, despite the employer's internal personnel including an in house lawyer, albeit with "limited workplace relations experience" at [3] & [12]-[13].

<sup>33</sup> *Rodney James Rodgers v Hunter Valley Earth Moving Company Pty Ltd* [2009] FWA 572 at [13]-[14]. Compare *Flood v Aviation Ground Handling Pty Ltd* [2011] FWA3013 at [22] where the granting of legal representation was held to allow for the more efficient resolution of the factual dispute between the parties.

the behavior which gave rise to his termination. In my view this matter is a relatively simple factual contest.

## **V PROCEDURAL AND PRACTICAL MATTERS**

33. Since the introduction of the Commission's Practice Note 2/2013 on the topic of Fair Hearings, the Commission is including a paragraph in Directions for appeal hearings in the nature of the following:

Any party that wishes to apply for permission to be represented at the hearing of the appeal by a lawyer or paid agent shall file in the Commission and serve on the other party a document, not exceeding one A4 page in length, which identifies the lawyer or paid agent the subject of the application and the reasons why such permission should be granted having regard to the grounds in s 596(2) of the *Fair Work Act 2009*.

34. Any party wishing to object to an application for permission to appear as made in accordance with such a direction, will similarly be required to put the reasons for that objection in writing.

35. Directions for appeal hearings now also make the following notation:

If you wish to be represented by a lawyer or paid agent in this appeal, you will need to obtain permission under s 596 of the *Fair Work Act 2009*, and you should not proceed under the assumption that such permission will be granted. Where possible, applications for permission under s 596 will be determined on the papers, and the parties advised of the outcome, prior to the hearing of the appeal.

36. It seems that similar directions are being made in relation to unfair dismissal cases at first instance, although sometimes in a more informal manner by way of an email to the parties from Chambers.

37. It is relevant to note that the Commission may still grant permission to appear despite a representative's failure to lodge a Form F53 Notice of Representative Commencing to Act in accordance with the *Fair Work Commission Rules 2013*: see r11.<sup>34</sup>

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Reference should also be made to r12 which provides that a party to a proceeding before the Commission may be represented by a lawyer or paid agent for the purpose of preparing and/or lodging any written application or submission or corresponding with or lodging any document with the Commission. It also provides that a party may be represented by a lawyer or paid agent in a conciliation or mediation under the new anti-bullying provisions of the FW Act. Importantly, nothing in this rule is taken as permitting a lawyer or paid agent to represent a party in a conference or hearing. See also s 596(3) of the FW Act, which states that the FWC's permission is not required for a person to be represented by a lawyer or a paid agent in making written submissions about modern awards and minimum wages.

38. Importantly, even if one party expressly consents to the other party being represented by a lawyer or paid agent, that consideration is not one which arises under s 596 of the FW Act.<sup>35</sup> Parties must still be prepared to make submissions about why permission should be granted either in writing, as required by Practice Note 2/2013, or orally at the commencement of proceedings.
39. Where, pursuant to Practice Note 2/2013, parties have been requested to provide written submissions on permission to appear prior to hearing, the Commission will typically advise them of the outcome prior to the hearing or conference.
40. If however such notice has not been provided or submissions on permission to appear are to be made at the commencement of proceedings, a lawyer or paid agent should always, well in advance of the hearing or conference, prepare the client for the fact that permission may be declined.
41. In the event that permission to appear is refused, a lawyer or paid agent can seek an adjournment, although as Practice Note 2/2013 makes clear:<sup>36</sup>

Parties seeking to be represented in a conference or hearing should not assume that permission will be granted. Parties need to be prepared to proceed with a conference or hearing in the event that their representative is not permitted to appear. In the event that permission to be represented by a lawyer or paid agent is *not* granted the party may seek an adjournment, but whether an adjournment is granted will be a matter for the Member concerned and should not be assumed.

## VI CONCLUSION

42. It is the individual facts and circumstances of a case that largely determine whether permission to appear before the Commission is granted. Guidance on the factors relevant to the statutory test in s 596 of the FW Act can be sought from previous cases but each will turn on its own particulars. It is the responsibility of all lawyers and paid agents to prepare detailed and considered submissions on this threshold issue both in discharging their duty to the Commission and to their client – the right to appear should never be assumed.

7 March 2014

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<sup>35</sup> Also irrelevant to the statutory test are issues of assistance to the party seeking representation, the individual capacity of a representative to assist the person who seeks the relevant representation or special circumstances that make such representation desirable: *Chris Lekos v Zoological Parks and Gardens Board T/A Zoos Victoria* [2011] FWA 1520.

<sup>36</sup> At [50].