

In relation to Fair Work Commission Matter: U2016/14484 - 3rd March 2017 & Appeal: C2017/2237 - 28th August 2017 - Stephen Fitzgerald v Woolworths Ltd.

## 'Shadow lawyers' barred from advising on Fair Work Commission cases



Law Council president Fiona McLeod says a new Fair Work ruling raises "serious access to justice issues" and has called for immediate reform. Andrew Meares



by [David Marin-Guzman](#)

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A new ruling that bars lawyers from providing legal advice in Fair Work cases has triggered a fierce backlash from the legal profession and sparked calls for reform.

Law firms say the "outrageous" and "unfair" decision of the Fair Work Commission (FWC) goes against the fundamental right to legal advice and will lead to absurd situations and unnecessary red tape.

The workplace tribunal has long prohibited lawyers advocating at hearings so as to maintain an accessible, informal and low-cost jurisdiction, with parties required to seek permission if they want to be legally represented.

But a full bench has now dramatically extended the default prohibition to any legal advice at all, in and out of the hearing room, after finding law firm Sparke Helmore was acting as a "shadow lawyer" to supermarket giant Woolworths without permission.

"The full bench says, in effect, that you can't get any help or advice from your lawyer about how to defend the case from the moment the FWC application is lodged," said Clayton Utz workplace partner Graham Smith.

Mr Smith said the ruling was an "outrageous and unfair infringement of what many citizens regard as a fundamental right to obtain legal advice and assistance once a claim has been made against you."

## **'Catch 22'**

He said the decision invited all sorts of absurd and "Catch 22" situations.

"The decision seems to lead to the absurdity that if you are required by FWC to make a submission about why you need legal representation you would not be permitted to obtain legal advice and assistance in preparing that submission."

Mr Smith said the decision is "arguably wrong" because it stretched the notion of legal representation to include advice.

"Even advice under legal professional privilege is barred. Which is extraordinary."

Woolworths originally lost its bid for Sparke Helmore to represent it in an unfair dismissal case. Instead, the firm's senior associate Ian Bennett sat beside the supermarket's human resources specialist in the hearing, offered advice and prepared statements.

After Woolworths won the case, it pursued the ex-employee for \$26,000 in legal billings. The employee cried foul and sought relief from the full bench.

Considering section 596 of the Fair Work Act, the bench found the prohibition went beyond mere courtroom advocacy and captured "all aspects of representation" involving the commission after an application was lodged.

"While it may be too much to say that Mr Bennett's true role was that of the 'puppet master'... he certainly had a significant role in the presentation of Woolworths' case," the bench said.

"The practice of parties using 'shadow lawyers' which has apparently developed to the extent that it involves lawyers engaged by a party in a matter attending and being involved in the conduct of a hearing without actually engaging in oral advocacy,

should not we consider be regarded as falling outside the scope of operation of s596."

Sources from top tier law firms, who declined to be named, said the case was "deeply impractical" and parties would have to deal with the ramifications on a daily basis.

## **Urgent reform needed: Law Council**

The Law Council, which has long pushed for reform of section 596, is calling for the "immediate" amendment of the provision to ensure parties to matters before the FWC can seek legal assistance when they need it.

Fiona McLeod SC, the council's president, said the decision "raises serious access to justice concerns".

"This provision, as now understood following the decision in this case, will not only impact large organisations such as Woolworths, but will unfairly and unnecessarily prevent individuals and small businesses from accessing assistance in matters before the Fair Work Commission."

She said Fair Work matters can have "significant ramifications for a person's livelihood or business and often relate to complex legal questions beyond the expertise of most people".

K&L Gates partner Steven Amendola said he understood the bench's reasoning but the consequence was "ridiculous".

"There's this obsession with not having lawyers involved in matters because therefore it makes things more efficient or somehow less formal and then you can get a decision like this."

A spokesman for Woolworths said it was "currently reviewing both the decision and next steps".