Neither Simple nor Fair — Restricting Legal Representation before Fair Work Australia

Mark Mourell and Craig Cameron

Fair Work Australia is the Commonwealth Government’s proposed ‘one-stop shop’ for employment relations matters. An important feature of FWA is its unfair dismissal jurisdiction, which is supposedly designed to deliver a simpler, faster and less costly process by restricting legal representation of parties before FWA and instituting a mixed ‘inquisitorial-adversarial’ model of dispute resolution. This study examines whether restricting legal representation achieves the primary goal of Labor’s substantive workplace relations reforms — fairness — by reference to three key elements: legal truth, costs and efficiency. Following this examination, the article finds that imposing further restrictions on legal representation undermines fairness because it creates an imbalance between costs, legal truth and efficiency. The article recommends that, subject to minor amendments aimed at improving the unfair dismissal process, the present statutory treatment of legal representation should remain.

Introduction

The Fair Work Bill 2008 (Cth) (FW Bill) contains the Rudd Labor Government’s substantive workplace relations reforms. Two key components of these reforms are the establishment of Fair Work Australia (FWA), a ‘one-stop shop’ for employment relations matters, and a new ‘inquisitorial-adversarial’ unfair dismissal regime which confers jurisdiction on FWA. The proposed unfair dismissal system is designed to deliver a simpler, faster and less costly unfair dismissal process, but includes changes to legal representation. Initially, Labor intimated that legal representation would be prohibited. Some writers criticised the proposed prohibition on legal representation, particularly from the standpoint of natural justice. Labor has retreated from its initial position on legal representation, particularly from the standpoint of natural justice. Labor has retreated from its initial position on legal representation. Under the FW Bill, FWA may grant permission for a person to be legally represented in unfair dismissal cases, but includes changes to legal representation.
prescribed circumstances.\(^5\) It is unclear how FWA will exercise this discretion. Will FWA impose additional restrictions on legal representation, thereby facilitating Labor’s aim to keep lawyers out of the unfair dismissal process,\(^6\) or will it maintain the status quo under the Workplace Relations Act 1996 (Cth) (WR Act)?

This study questions whether imposing further restrictions on legal representation under the proposed unfair dismissal regime will promote fairness. The first section provides a brief history of legal representation in the unfair dismissal jurisdiction of the Australian Industrial Relations Commission (AIRC). This is followed by an outline of the proposed unfair dismissal process before FWA. The next section defines the primary goal of the substantive workplace reforms — fairness\(^7\) — and identifies costs, legal truth and efficiency (the fairness elements) as appropriate elements to measure fairness in relation to additional limits on legal representation. Then, the article draws on the political and academic debate surrounding legal representation in the Administrative Review Tribunal (ART) — a failed attempt by the former Howard Government to amalgamate four review tribunals — based on the fairness elements identified earlier. In the following section, the authors draw on their own experiences as legal representatives to assess the impact of restricting legal representation on three aspects of the proposed unfair dismissal process: FWA's predominantly inquisitorial system; the discretionary application of dispute resolution mechanisms; and the unrepresented litigant. This section also reveals that the fairness elements identified above may conflict. The authors then claim that the achievement of fairness is at best a difficult balancing act between the competing interests of parties. Imposing additional restrictions on legal representation will not achieve fairness in unfair dismissal matters because it creates an imbalance between costs, legal truth and efficiency. The article concludes with some recommendations to improve the Labor Government’s new unfair dismissal process.

**Brief History of Legal Representation in the AIRC Jurisdiction**

Given that unfair dismissal claims could not be made in the AIRC until 1994,\(^8\) legal representation in the commission’s unfair dismissal jurisdiction has a

---


\(^5\) FW Bill cl 596.


\(^8\) Industrial Relations Act 1988 (Cth) s 170DE, as amended by the Industrial Relations Reform Act 1993 (Cth).
brief history. Under s 42(3) of the Industrial Relations Act 1988, a party could be legally represented (ie, by counsel, a solicitor, or agent) if the AIRC granted leave and:

- all parties consented;9 or
- the AIRC was satisfied that, having regard to the subject-matter of the proceeding, there were special circumstances that made it desirable that the parties be represented;10 or
- the AIRC was satisfied that the party could only be adequately represented by a solicitor, counsel or agent.11

Section 42 was subsequently retained in the Coalition Government’s 1996 legislative changes that resulted in the WR Act, and it remained unchanged until the Work Choices amendments took effect in 2006.12 The present rules, contained in s 100 of the WR Act, require the commission to consider various matters in deciding whether to grant leave for representation. The presence or absence of express consent to the representation by all parties determines the matters which apply.13 A summary of these matters is set out in Table A:

Table A: Representation

<table>
<thead>
<tr>
<th>WR Act provisions</th>
<th>Matters examined by AIRC in deciding whether to grant leave</th>
<th>Express consent of parties</th>
<th>No express consent of parties</th>
</tr>
</thead>
<tbody>
<tr>
<td>100(5)(a)</td>
<td>Representation by counsel, solicitor or agent would assist the party to bring the best case possible</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>100(5)(b)</td>
<td>Capacity of the particular counsel, solicitor or agent to represent the party</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>100(5)(c)</td>
<td>Capacity of the particular counsel, solicitor or agent to assist the Commission in performing its functions under WR Act</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>100(6)(b)</td>
<td>Complexity of the factual and legal issues relating to the proceeding</td>
<td>X</td>
<td>✓</td>
</tr>
<tr>
<td>100(6)(c)</td>
<td>Special circumstances that make it desirable that the party be represented</td>
<td>X</td>
<td>✓</td>
</tr>
</tbody>
</table>

Few reported cases have addressed the issue of legal representation in unfair dismissal cases.14 The leading authority is Visser v Teekay Shipping (Australia) Pty Ltd, which involved an appeal by the applicant employee against the commission’s decision to grant leave to the respondent to be

---

9 Industrial Relations Act 1988 (Cth) s 42(3)(a).
10 Ibid, s 42(3)(b).
11 Ibid, s 42(3)(c).
12 Workplace Relations Amendment (Work Choices) Act 2005 (Cth).
13 WR Act ss 100(3)–(6).
14 See, eg, Visser v Teekay Shipping (Australia) Pty Ltd (unreported, AIRC, Williams SDP, Cartwright ADP and Larkin C, PR953984, 8 August 2004); Yolande v Anglican Homes Inc (unreported, AIRC, McCarthy DP, PR946048, 23 April 2004).
The Full Bench noted that in the unfair dismissal context, when individual rights are concerned:

It has become almost a formality that leave to be represented by counsel, solicitor or agent be granted to a party in such matters. Indeed, a Full Bench has observed that ‘in the normal course of events an ordinary s 170CE applicant would be allowed legal representation pursuant to s 42(3)(c)’. A similar observation, in our view, may well be made in respect to respondents to s 170CE applications, particularly when matters of jurisdiction are at issue.

The Full Bench’s observation, regarding the ‘formality’ of granting leave for legal representation, has not been tested following the Work Choices amendments. The Explanatory Memorandum to the Workplace Relations Amendment (Work Choices) Bill 2005 (Cth) does envisage a more active role for the AIRC. However this active role is not intended to limit a person’s right to legal representation, but rather empowers the AIRC to control the quality of representation by rejecting particular representatives who are incompetent and/or unhelpful to the commission in performing its functions. This role is also intended to achieve a ‘level playing field’ for parties to a proceeding presumably by ensuring that the party is appropriately represented.

The impetus for change came with the increasing use made by parties of agents to represent them. There is no restriction on who can act as an agent and, unlike legal representatives, no authority exists which regulates agent conduct.

In response, s 100(5) places additional responsibility on the AIRC to assess the ‘capacity’ of an agent and the assistance an agent can provide to the party’s case. Given the regulatory mechanisms in place for lawyers, including professional standards, discipline and training, and based on the authors’ own experiences as legal representatives before the AIRC, it is likely that leave will ordinarily be granted for legal representation, thus maintaining the apparent presumption in favour of legal representation. In contrast agents, particularly those with no experience before the AIRC, face greater scrutiny.

Unfair Dismissals under Labor’s Policy and the Fair Work Bill

The Rudd Government’s major workplace relations reforms, which include the unfair dismissal regime and the establishment of FW A, are contained in the FW Bill. At the time of writing, the FW Bill has passed the House of Representatives and is the subject of a Senate Committee inquiry. The issue of legal representation has been the subject of a number of submissions to the

15 Note that the appeal right to the Full Bench in relation to a decision relating to legal representation is no longer available pursuant to s 100(7) of the WR Act.
16 Re Colonial Weighing Australia Pty Ltd (unreported, AIRC, Watson SDP, Duncan DP and Hingley C, Print Q1048, 20 May 1998).
17 Visscher v Teekay Shipping (Australia) Pty Ltd (unreported, AIRC, Williams SDP, Cartwright ADP and Larkin C, PR953984, 8 August 2004) at [6].
19 Ibid.
20 Ibid, at [182] and [183], making reference to Oram v Derby Gem Pty Ltd (unreported, AIRC, Lawler VP, Kaufman SDP and Blair C, PR943675, 23 July 2004).
21 House of Representatives, above n 18, at [181] and [182].
inquiry and, depending on the recommendations of the committee, the FW Bill may yet be amended in the Senate. Prior to the FW Bill, two policy documents: Forward with Fairness — Labor’s Plan for fairer and more productive Australian Workplaces (released in April 2007) and Forward with Fairness — Policy Implementation Plan (released in August 2007) revealed the key elements of Labor’s proposed workplace relations reforms. The creation of FWA, its dispute resolution procedures and representation are three parts of the proposed unfair dismissal process which will form the basis of the critical analysis later in this article, and are discussed below.

**Fair Work Australia**

To commence unfair dismissal proceedings, an employee must file a claim with FWA within seven days after dismissal, a substantial change from the 21 days under the present legislation. This new rule aims to ensure that reinstatement in appropriate cases remains a viable option for both employer and employee. FWA will be a ‘one-stop shop’, replacing the workplace relations functions presently carried out by several agencies including the AIRC, Australian Fair Pay Commission, Workplace Authority and Workplace Ombudsman. On releasing Labor’s policy, the then Shadow Minister for Industrial Relations, Julia Gillard, proclaimed ‘what we want to have isn’t a central business district organisation with a big office tower in the city and lawyers running in and out’. FWA offices will be located in suburban and regional areas, closer to the modern workplace, with the aim of facilitating an efficient, effective and informal resolution of industrial issues.

**Unfair dismissal procedures**

The current two-tiered dispute resolution process involves conciliation, which explores the prospects for resolution, and then formal arbitration if conciliation is unsuccessful. Labor’s initial plans were to replace the present dispute resolution process with a single conference. Forsyth et al described this as a ‘fusion’ of the current conciliation and arbitration process. The FW

---

22 Australian Labor Party, above n 1.
23 Australian Labor Party, above n 2.
24 FW Bill cl 394(2)(a).
25 WR Act ss 643(14)–(15).
26 Australian Labor Party, above n 1.
29 Australian Labor Party, above n 1, p 19.
31 For further discussion, refer Forsyth et al, above n 4, at 328.
Bill does not provide for a mandatory single conference, instead conferring on
FWA substantial discretion with respect to dispute resolution.\(^{32}\) FWA must
conduct a conference or hold a hearing if an unfair dismissal matter involves
facts in dispute.\(^{33}\) An FWA member,\(^{34}\) or FWA staff with delegated authority
from the President of FWA, will be able to conduct the conference.\(^{35}\) FWA can
decide to hold a hearing at any time during the unfair dismissal process\(^{36}\)
provided that it considers the hearing is appropriate, taking into account the
parties’ views and whether a hearing would be the most effective and efficient
way to resolve the matter.\(^{37}\) This means that both conciliation and arbitration
become discretionary dispute resolution mechanisms. For example, FWA can:

- hold a conciliation conference (or conferences) in an attempt to
  resolve the dispute between the parties;
- hold an informal conference, with or without an opportunity to
  conciliate, and then make a final decision.\(^{38}\) This is akin to the ‘fused’
  arbitration and conciliation process under Labor’s initial plans;
- conduct a formal hearing without a conference;
- conduct a formal hearing before, during or after a conciliation
  conference or informal conference.

As Stewart points out, FWA members may elect to operate the unfair
dismissal system as per the current two-tiered dispute resolution process or in
a way ‘that is virtually indistinguishable from the existing system’.\(^{39}\)

The proposed unfair dismissal process will also incorporate primarily an
inquisitorial, as opposed to an adversarial, method of dispute resolution.\(^{40}\) In
the present adversarial context, the parties to an unfair dismissal dispute
control the course of the litigation. They make submissions, produce evidence
and call and cross-examine witnesses. The AIRC is responsible for making the
decision but does not assume the responsibility of fact-finder; that is, it does
not ensure that both parties present all of the relevant evidence.\(^{41}\) Thus, failure
to call all relevant evidence is not a sufficient ground to justify the AIRC

\(^{32}\) FW Bill cl 590.
\(^{33}\) Ibid, cl 397.
\(^{34}\) Ibid, Pt 5-1 Div 5.
\(^{35}\) Ibid, subcl 625(1)(c).
\(^{36}\) Ibid, subcl 399(5).
\(^{37}\) Ibid, subcl 399(1).
\(^{38}\) House of Representatives, Commonwealth Parliament, Fair Work Bill 2008: Explanatory
    Memorandum, 2008, at [r 226]: ‘FWA will be able to make binding decisions following a
    conference.’
\(^{39}\) Workplace Express, ‘Streamlined and simplified’ unfair dismissal process doesn’t lock out
    29 November 2008).
\(^{40}\) A critique of the proposed inquisitorial system is beyond the scope of this study. For an
    excellent examination of the adversarial versus inquisitorial method, see W Zeidler,
    ‘Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory
    Inquisitorial Procedures in the Administrative Appeals Tribunal’ (1997) 4 Aust Jnl of Admin
    Law 61 at 62; H Stacy and M Lavarch (Eds), Beyond the Adversarial System, The Federation
    Press, Sydney, 1999; R Eggleston, ‘What is Wrong with the Adversary System?’ (1975) 49
    ALJ 428.
\(^{41}\) Ledington v University of the Sunshine Coast (unreported, AIRC, Hodder C, PR928685,
    13 March 2003).
granting leave to appeal against an unfair dismissal decision at first instance.\textsuperscript{42} In contrast, FWA will initially operate in an inquisitorial manner.\textsuperscript{43} For example FWA staff may gather information by phone, seek written information and convene conferences.\textsuperscript{44} But as with most legal systems, the proposed unfair dismissal system will still carry a mix of adversarial and inquisitorial functions.\textsuperscript{45} For example, there is scope for FWA members to require formal written submissions and cross-examination at conferences and/or hearings.\textsuperscript{46} Thus, the proposed system can be described as one point along a continuum between pure adversarial and pure inquisitorial.\textsuperscript{47} Despite this, the emphasis is clearly on resolving unfair dismissal disputes in a non-adversarial way.\textsuperscript{48} In moving away from adversarial processes, though, FWA will become responsible for identifying relevant facts, defining the issues in dispute and making a decision.

\begin{center}
\textbf{Representation}
\end{center}

Labor’s initial policy proposals intimated that legal representation would be prohibited in unfair dismissal matters.\textsuperscript{49} Prior to introducing the FW Bill into Parliament, the Minister for Employment and Workplace Relations, Julia Gillard, announced that legal representation would only be allowed in exceptional circumstances.\textsuperscript{50} However, those exceptional circumstances were not clarified at the time. Clause 596 of the FW Bill sets out the bases on which legal representation will be allowed before FWA. Unless FWA’s procedural rules provide otherwise, a person may only be legally represented with the permission of FWA.\textsuperscript{51} FWA will grant permission only if (emphasis added):

\begin{enumerate}
\item[(a)] it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
\item[(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
\item[(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.\textsuperscript{52}
\end{enumerate}

\begin{itemize}
\item[42] Uink v Department of Social Security (unreported, AIRC, Ross VP, Drake DP and Palmer C, Print Q5905, 24 December 1997); Parker v Office Interiors Pty Ltd (unreported, AIRC, Polites SDP, Watson SDP and Gay C, Print Q5712, 2 September 1998).
\item[43] Australian Labor Party, above n 1, p 20; House of Representatives, above n 38, at [r 215].
\item[44] House of Representatives, above n 38, at [r 215].
\item[46] House of Representatives, above n 38, at [r 216].
\item[48] House of Representatives, above n 38, Fig 2: Structure of Fair Work Australia, p lxxiv: ‘FWA will have broad powers to conduct matters and inform itself as it considers appropriate in an informal and non-adversarial way.’
\item[49] Emerson, above n 2, p 20; Australian Labor Party, above n 2, p 18.
\item[51] FW Bill subcl 596(1).
\item[52] Ibid, subcl 596(2).
\end{itemize}
There are five important observations to make about these new provisions. First, a person is deemed not to be represented by a lawyer if that lawyer is an employee or officer of the person, or of a union or employer association representing that person. A person is represented by a lawyer if the lawyer is admitted to the legal profession, irrespective of whether the lawyer currently holds a practising certificate. Second, the new provisions reflect the existing WR Act provisions to the extent that permission of the decision-maker to be legally represented is required. However, in contrast to the existing rules, the presence or absence of consent by the parties to be legally represented does not determine the matters which apply in granting permission. Third, the matters which go to the issue of permission are in absolute terms — no matters other than those outlined in (a) to (c) above can be relied on by FW A in exercising its discretion to permit legal representation. This is made clear by the reference to ‘only if’ in subcl 596(2). This differs from the language used in s 100 of the WR Act, under which the AIRC must only ‘have regard’ to the specified matters. Fourth, the President of FW A (following consultation with other FW A members) is empowered to make procedural rules concerning legal representation. Conceivably, the President could override the requirement of permission by establishing strict rules which reduce or expand the scope for legal representation in unfair dismissal matters.

The final observation is that the new provisions must be understood in their legislative context. The government maintains that the proposed unfair dismissal system is designed to minimise the need for legal representation. For example, the Explanatory Memorandum to the FW Bill states that there will be a ‘higher bar set for representation’. However this is not apparent from the text of the FW Bill. As Professor Andrew Stewart points out, the question of representation is being left to the discretion of FW A. This is a significant retreat from the government’s original view that unfair dismissal claims could be resolved without lawyers. It is still apparent, though, that Labor’s intention is to reverse the present practical presumption in favour of legal representation in unfair dismissal disputes. But will further restrictions on legal representation promote the government’s goal of achieving fairness for employees and employers? Before addressing this issue, a definition of ‘fairness’ is required.

53 Ibid, subcl 596(4).
54 Refer to the definition of ‘lawyer’ in FW Bill cl 12.
55 Refer WR Act, above n 13.
56 FW Bill cl 609. Note that a similar provision exists with respect to the Australian Industrial Relations Commission Rules 2007 (Cth), under s 124 of the WR Act.
57 FW Bill subcl 596(1).
58 K Rudd and J Gillard, above n 28; Australian Labor Party, above n 2, p 18; Department of Education, Employment and Workplace Relations, above n 6; House of Representatives, above n 38, at [r 339] and [r 2292].
59 House of Representatives, above n 38, at [r 335].
61 Gillard, above n 7.
Fairness — The Primary Goal of Reform

Fairness is the goal of the government’s workplace relations reforms, and the touchstone for the new unfair dismissal system. For example, the words ‘fair’, ‘fairness’, ‘unfair’ and ‘unfairly’ are mentioned on 100 occasions in the Policy Implementation Plan. The proposed unfair dismissal system is designed to achieve fairness by ensuring a faster, less costly and less complex process.\textsuperscript{62} While costs and efficiency are recurring themes, the notion of ‘justice’ is not used once in the Policy Implementation Plan, which demonstrates Labor’s emphasis on practical and not principled considerations to construct the concept of fairness. The preceding point raises three important issues which are not addressed in Labor’s policy proposals:

(1) What are the components of fairness?
(2) How are they defined? and
(3) What is the relationship, if any, among these components?

Answers to these questions will enable the authors to test whether the potential restriction on legal representation promotes fairness.

For the purpose of this study, fairness \((F)\) has three components: legal truth, costs and efficiency (fairness elements). The fairness elements are derived from Labor’s arguments supporting the proposed unfair dismissal model and Davies’ discussion of fairness in the Australian civil justice system.\textsuperscript{63} Legal Truth \((LT)\) requires the decision-maker to identify the true facts and apply the correct law to the facts to arrive at a decision which is indisputable. Davies would describe this concept as the ‘perfect result’.\textsuperscript{64} Efficiency \((E)\) refers to the time period between the employee’s termination and resolution of the unfair dismissal application. The FWA unfair dismissal procedures will dictate this time period. Cost \((C)\) cannot be simply defined, because the employee and the employer incur a variety of costs during the unfair dismissal process. In addition to representation costs (ie, legal or otherwise) \((LC)\), the parties also incur opportunity costs \((OC)\) associated with their involvement in the unfair dismissal process. For example, an employee’s opportunity cost of preparing for and attending a conference before FWA may be conducting a job search, or the loss of income if the employee is required to take unpaid leave from their new employer. From the employer’s perspective, opportunity costs may involve the loss of productivity associated with employee witnesses being required to give evidence, initially perhaps to the employer, and then to FWA. The employee also incurs emotional costs \((EC)\) which are derived from two sources — the termination itself and the unfair dismissal process. Finally, FWA incurs public costs \((PC)\) in managing and resolving unfair dismissal claims.

The fairness elements discussed above may be represented by the following formula:

\[
F = LT + E + C (LC + OC + EC + PC)
\]

\textsuperscript{62} FW Bill subcl 381(1)(b); Australian Labor Party, above n 1, p 3; Australian Labor Party, above n 2, p 18.
\textsuperscript{63} G L Davies, ‘Fairness in a Predominantly Adversarial System’ in Stacy and Lavarch (Eds), above n 40, p 102.
\textsuperscript{64} Ibid, pp 107–8.
However, it would be a mistake to consider each of the fairness elements in isolation. Rather, fairness involves balancing legal truth, costs and efficiency. For example, Bedford and Creyke note that many tribunals must carry out their functions in a way which is ‘fair, just, economical, informal and quick’. The difficulty for the tribunal lies in weighing up these objectives. As Lindgren J stated in Sun Zhan Qui v Minister for Immigration and Ethnic Affairs with respect to the Migration Act 1958 (Cth):

First, the objectives referred to in subs 420(1) will often be inconsistent as between themselves. In particular, a mechanism of review that is ‘economical, informal and quick’ may well not be ‘fair’ and ‘just’.

Conversely, a system which yields the correct result (ie, legal truth) but at a cost which a party cannot afford or which is disproportionate to the amount involved in the case, may well be unfair. Thus, fairness cannot mean obtaining the legal truth with maximum efficiency and at minimal cost because the fairness elements themselves are interrelated. To achieve fairness, the unfair dismissal system must engage in a series of trade-offs, to strike an effective balance between costs, efficiency and legal truth.

In the next section of this article, the authors discuss the failed passage of the Administrative Review Tribunal Bill 2000 (Cth) (ART Bill). The academic and political debate surrounding restrictions on legal representation under the ART Bill is relevant in addressing the primary issue of this study for three reasons. First, the ART Bill justified the establishment of the ART (a ‘one-stop shop’ for federal merits review matters) and restrictions on legal representation on the same bases as the Rudd Government’s proposals for FWA and the unfair dismissal process. Second, the debate demonstrates that fairness in the legal system is indeed the balancing exercise discussed above. And third, the ART experience provides an insight into the arguments supporting legal representation in unfair dismissal matters.

The ART Experience

The ART Bill was introduced into Federal Parliament on 28 June 2000. The ART Bill adopted a key recommendation from the Administrative Review Council’s (ARC) Better Decisions report, namely, to replace a number of existing federal merits review tribunals with a single tribunal. Under the ART Bill, the ART would replace the Administrative Appeals Tribunal, the Social Security Appeals Tribunal, the Migration Review Tribunal and the Refugee Review Tribunal. Two objectives of the ART Bill were to ensure that the ART provided an accessible mechanism for reviewing decisions that was fair, just, economical, informal and quick, and to enable the tribunal to review decisions

65 See, eg, Administrative Appeals Tribunal Act 1975 (Cth) s 2A; Migration Act 1958 (Cth) s 420(1).
66 Bedford and Creyke, above n 47, at 33.
67 Sun Zhan Qui v Minister for Immigration and Ethnic Affairs [1997] FCA 324; BC9701669.
68 Davies, above n 63, at 109.
in a non-adversarial way. The focus on non-legalistic processes was designed to ‘minimise the need for legal representation’. Clause 105(1) of the ART Bill provided that legal representation was permitted, provided that the tribunal agreed and that representation was not prohibited by ART practice and procedure directions. Those practice and procedure directions could be established by the Minister for Social Security or the ART and could require the ART to take specified matters into account in deciding whether to agree or exclude legal representation in certain classes of cases. However, no practice and procedure directions were outlined at the time of the ART Bill.

The issue of legal representation before the ART was raised by a number of ministers during parliamentary debates. Julia Gillard, representing the Australian Labor Party (ALP) in opposition at the time, criticised the ART Bill’s abolition of the automatic right to legal representation. The ART Bill no longer made representation a right, or the ‘norm’, in tribunal matters. According to Gillard:

- there was a power imbalance between an unrepresented person and a government department represented by a public servant with experience before the tribunal;
- legal representation could neutralise the power imbalance through appropriate representation;
- based on her personal experience as a solicitor, more tribunal time was used to resolve matters involving unrepresented litigants, thus increasing costs and causing delays; and
- the involvement of legal representatives could often increase the number of matters settled, as the legal representative was knowledgeable about tribunal processes and could predict the litigants’ prospects of success.

Similar sentiments were expressed in the Senate, whose members from the ALP and the Australian Democrats ultimately blocked the passage of the ART Bill.

The academic debate surrounding the proposed restrictions on legal representation in the ART generated arguments similar to the political debate. Castles argued that administrative tribunal matters covered a complex body of common law and statutory law (eg, taxation, immigration, income support). A fair hearing was compromised, she maintained, if unrepresented applicants were unable to understand the legal requirements to prove their case. For example, an unrepresented litigant may not raise evidence which supports a

---

70 ART Bill subcl 3(c) and 3(d).
72 ART Bill cl 105(2).
75 Senate, above n 73, p 21844; Senate, Commonwealth Parliament, Parliamentary Debates, 26 February 2001, pp 21847–8 (A Bartlett) and p 21856 (B Greig).
legal requirement. Castles concluded that limiting representation was ‘akin to throwing the baby out with the bath water. It may result in a more streamlined and efficient system, but not in fairer decisions.’ Trimmer described the proposal as a presumption against legal representation. She noted that representation was ‘a means of redressing the power and resource imbalance in an appeal by the individual against the state’. Trimmer argued that without legal representatives to assist the ART in obtaining all relevant material and identifying the issues, delays in the hearing of an application would ensue. Again if the respondent was a corporate entity, from its perspective, legal representatives may be more economical given the opportunity costs in the entity’s personnel preparing and presenting its case.

The political and academic debate over the ART Bill revealed that any restriction on legal representation would not promote fairness because it created an imbalance between legal truth, costs and efficiency. A lack of legal representation could decrease legal costs but reduce the probability of obtaining the legal truth and affect efficiency. Drawing on the ART experience, the fairness of restricting legal representation in FWA will now be assessed by reference to three aspects of the proposed unfair dismissal process: the inquisitorial aspect; the unrepresented litigant; and the discretionary dispute resolution mechanisms of conciliation and arbitration.

**A Fairness Assessment of Restricting Legal Representation**

**The inquisitorial aspect**

The proposed inquisitorial aspect of resolving unfair dismissal disputes concentrates several functions in FWA. FWA will make initial inquiries, gather information and assess its relevance, define the issues in dispute and make a decision. Simply put, FWA controls the ‘pursuit of the truth’. Moreover, compared to their predecessors in the AIRC, an expanded skill set is required by FWA staff to resolve unfair dismissal claims. FWA staff must possess the ability to collect evidence (fact finding), identify its relevance (fact sorting) and then (in the case of FWA members) make a quick decision. These skills not only require appropriate training, but the process itself can be very time consuming. FWA gains a better knowledge of the parties’ respective legal positions through these activities, but at the potential cost of procedural efficiency and the public cost of additional resources.

In contrast, legal representatives could assist with FWA’s fact finding and fact sorting responsibilities. The Australian Law Reform Commission, in its assessment of federal tribunals, noted that trained representatives bring ‘significant additional resources to bear on tribunal decision-making, through

---

76 Castles, above n 73, at 183.
77 Ibid, at 184.
78 Trimmer, above n 73, at 21.
79 Ibid.
80 Ibid, at 22.
81 Ibid.
82 House of Representatives, above n 38, at [r 337].
83 Certoma, above n 47, at 289.
their expertise and the information they gather and present to the tribunal’. At the pre-conference or pre-hearing stage a lawyer, following consultation with the client and witnesses, can furnish FWA with what he or she considers are the relevant facts, issues and law in the matter. During conciliation or arbitration the legal representative, equipped with knowledge of the client’s case, can then assist FWA to elicit additional facts to ensure that all information is available for FWA’s consideration. For example in the Refugee Review Tribunal, which adopts an ‘inquisitorial’ model, the tribunal member will usually question the applicant and then ask the applicant’s representative whether there are any further questions the member should ask. While increasing legal costs, legal representation in an inquisitorial context may improve procedural efficiency, reduce public costs and improve the prospects of achieving the legal truth.

**Discretionary dispute resolution mechanisms**

FWA has the discretion to use conciliation in any unfair dismissal matter. This is a significant change, given the success of conciliation as a mandatory mechanism in resolving termination claims in both state and federal jurisdictions. Over the 10 year period from 1997–98 to 2006–07, the conciliation settlement rate in termination matters before the AIRC was between 69% and 77%. This does not include cases that were settled prior to conciliation. For example in 2006–07, 73% of matters were settled at conciliation, but 81% were finalised at or prior to conciliation. While the legal truth may be compromised, conciliation generally minimises procedural inefficiency and legal, opportunity, public and potentially emotional costs. This is done by bringing the parties together shortly after the employee lodges his or her claim; by the conciliator focusing on settlement as opposed to identifying the legal truth; by allocating a short time frame for the conference (typically one hour) and by the informal manner in which the conference is conducted. From a legal costs perspective, conciliation is a less time-consuming process for the parties’ lawyer than a final hearing. Typically, the lawyer will limit his or her time to gathering facts from the client, conducting a preliminary assessment of the client’s prospects of success, agreeing on a settlement strategy with the client, presenting the client’s version of events at the conference and facilitating settlement. Because the purpose of conciliation is to achieve a cost-effective resolution of the matter, it is less likely that the lawyer will prepare a detailed advice, gather evidence from witnesses and draft statements or brief counsel (all work associated with trial preparation).

---

87 This was in respect of all applications that were conciliated: see President of the Australian Industrial Relations Commission, *Annual Report* 2006–2007, p 11, at <http://www.airc.gov.au/about/annualreports.htm> (accessed 19 August 2008).
The government also suggests that the new unfair dismissal process will be faster, simpler and, by eliminating the incidence of ‘go away money’, less costly for employers. 89 ‘Go away money’ represents compensation paid by an employer to a former employee in settling an unfair dismissal claim, usually at the conciliation conference stage, irrespective of the former employee’s prospects of success at arbitration. By paying ‘go away money’, the employer avoids the legal and opportunity costs associated with arbitration and the risk of defeat in arbitration. However, there are two flawed assumptions in making conciliation a discretionary dispute resolution mechanism within a system which imposes additional restrictions on legal representation: first, ‘go away money’ produces an unfair outcome for employers, and second, preventing legal representation before FWA eliminates legal costs.

With respect to the first assumption, it is true that in many unfair dismissal cases, legal representatives advise their employer clients on a purely economic basis to settle before a final hearing. 90 But does this necessarily make the system unfair? For example, in the authors’ experience, an employer can incur legal and opportunity costs in the vicinity of $10,000 to $15,000 in defending an unfair dismissal claim up to and including arbitration. Despite a ruling at arbitration in the employer’s favour, the unsuccessful applicant is not liable to pay any of the employer’s opportunity costs and there is no guarantee that the applicant will be ordered to pay the employer’s legal costs because, unlike court jurisdictions, costs do not ‘follow the cause’ in unfair dismissal matters. 91 Further, the authors’ experience is that even if the AIRC makes a costs order, an employer can only expect to recover 45% to 70% of its legal costs and witness expenses based on the prescribed schedule of costs. 92

Suppose that the employer’s lawyer, who has technical and negotiation skills, assists in settling the claim for $4000 at the conciliation conference. Legal costs associated with taking initial instructions, preparing for and appearing at the conciliation conference, and drafting the settlement deed, may be in the order of $2000. The employer’s opportunity costs in dealing with the claim and attending the conciliation conference may be a further $1000 — bringing the total cost to the employer to $7000. The ‘go away money’ component of $4000 therefore may not obtain the legal truth because the legal truth may be that the dismissal was not harsh, unjust or unreasonable. The cost savings, however, are particularly clear if the employee would have proceeded to arbitration had he or she not accepted the offer of ‘go away money’.

Some employers place greater emphasis on pursuing the legal truth and are willing to defend the claim as a matter of principle irrespective of the costs. Other employers defend a claim to save future costs, their reasoning being that it sends a clear message to present employees that the employer does not pay ‘go away money’ in unfair dismissal matters. However, the majority of

89 Australian Labor Party, above n 2, p 18; Australian Labor Party, above n 1, p 20; Department of Education, Employment and Workplace Relations, above n 6.
91 WR Act ss 658 and 824.
92 Ibid, s 658(7) (definition of ‘costs’); Workplace Relations Regulations 2006 (Cth) cl 2.12.7 and Sch 7.
employers would settle because the ‘go away money’ is an efficient and cost-effective outcome which is in the company’s best interests. In summary, the payment of ‘go away’ money does not necessarily equate to fairness or unfairness. Further, lawyers can and do assist the employer client to make an informed decision about ‘go away money’ by advising the employer about costs, the prospects of successfully defending the claim and by applying their skills to settle the claim at or before the conciliation conference.

With respect to the second assumption, further restrictions on legal representation will not oust lawyers from unfair dismissal matters, but rather change the nature of legal work. Many lawyers and clients will act as co-producers of legal services. This practice is known as ‘unbundling’. Coined by US advocate, Forrest Mosten, unbundling is a task-orientated approach to legal services that looks upon the practice of law as a sequence of distinct activities (advice, discovery, research, drafting, negotiation, representation) ranging from a single task to full representation.

This practice is not foreign to industrial relations proceedings that prohibit legal representation. For example, parties in proceedings for the recovery of unpaid wages in Queensland cannot be legally represented. Yet lawyers do prepare statements of facts, case law summaries and settlement deeds on behalf of clients in preparation for a conciliation conference in relation to an unpaid wages claim.

Under the FW Bill, a litigant who fails to obtain permission for legal representation will, at a minimum, present their case before FWA and answer questions posed by an FWA member at an informal conference and/or hearing. Lawyers may perform a variety of tasks, such as providing legal advice on the client’s prospects; drafting the application for reinstatement (if representing the employee) and witness statements; preparing trial materials (such as responses to likely questions asked by the FWA member and a list of relevant authorities) and devising a hearing strategy. Importantly, the legal costs for these tasks are significant and may be avoided if conciliation, with its high settlement rate, is a separate stage of dispute resolution. Contrary to the government’s plans, the unfair dismissal system will not leave lawyers ‘out of the picture’. Rather the lawyer’s role will change to that of co-producer or ‘shadow representative’, assisting in the course of litigation from beyond the FWA proceeding. Thus, preventing a person from being legally represented before FWA may reduce, but not necessarily extinguish, their legal costs.

The unrepresented litigant

The authors expect that imposing additional restrictions on legal representation before FWA will also increase the number of unrepresented

95 Industrial Relations Act 1999 (Qld) s 319(2)(b).
96 Australian Labor Party, above n 2, p 18.
litigants, known as litigants in person (LIP), in unfair dismissal matters. It is difficult to gauge the extent of any increase in LIPs because the AIRC does not currently provide publicly available information about representation in termination matters. LIPs may act as co-producers with lawyers or industrial advocates during the unfair dismissal process, or they may act alone. Restricting legal representation deprives parties of the choice to appoint a legal representative during dispute resolution. The reality is that some litigants will be unrepresented irrespective of any restrictions because they cannot afford legal representation, cannot obtain Legal Aid, are not members of an industrial organisation or do not think representation is necessary. Nevertheless, the authors maintain that the proliferation of LIPs will undermine the fairness of the proposed unfair dismissal system in three ways:

(a) by exacerbating the power imbalance between employee and employer;
(b) by increasing public costs; and
(c) by requiring FWA to manage emotional costs.

Each of these elements will now be discussed in turn.

Power imbalance

The unfair dismissal provisions under the FW Bill regulate employers that are constitutional corporations. To be a constitutional corporation, the employer must be incorporated and be either a foreign corporation or a trading or financial corporation. The law recognises that the corporation is a legal person separate from its various participants (directors, shareholders, employees, creditors), and gives the corporation powers akin to a natural person. However, the corporation as separate legal entity is a fiction because the corporation requires agents acting on its behalf to exercise those powers. This fiction is one of the sources of the power imbalance between employer and employee. While the employee may be unrepresented at a conference or hearing, the corporate employer can select a representative, being a natural person within the corporation, to act on its behalf. According to Professor Stewart and Murray Wilcox QC, the chosen representative in larger corporations is likely to be a human resources manager with legal training and/or experience before the AIRC. As a consequence, the employer may receive an unfair advantage through its greater knowledge of and experience in unfair dismissal matters. The complexity of the factual and legal issues relating to the proceeding will determine the gravity of that power imbalance. That is why this factor is presently considered by the AIRC in granting parties leave to be legally represented.

97 FW Bill subcl 14(a) (as part of the definition of 'national system employer') and cl 26 (exclusion of state and territory industrial laws with respect to national system employers and employees).
98 Ibid, cl 12; Commonwealth of Australia Constitution s 51(xx).
101 WR Act s 100(6)(b).
Two studies involving LIPs in employment-related matters further identify the nature of this power imbalance between employee and employer. First, Chapman and Mason studied a series of complaints in the NSW anti-discrimination jurisdiction, in which approximately half of the complaints involved paid work relationships. The respondents in the study tended to be represented by managers of a public or private business organisation, giving the business an advantage through its greater economic strength. Further, Mason and Chapman presumed that those managers representing the respondent business had expertise in dealing with conflicts with employees, another advantage.102 Meredith’s qualitative study of litigants in termination matters before the South Australian Industrial Relations Commission revealed that one of the four factors that employee applicants articulate as being associated with a fair process of their unfair dismissal claims, was being represented.103 In particular, some employee applicants commented on the physical presence of the employer across the table at a conciliation conference and their ability to confront the employee non-verbally, and thereby intimidate them.104 Given that conferences before FWA will be conducted informally, it is likely that LIPs will be exposed to similar emotional costs to those identified in Meredith’s study. In summary, legal representation corrects the power imbalance, provided it is available to both parties. Without legal representation, that imbalance may undermine fairness and can be exacerbated by the complexity of the matter and an employer’s greater informational resources, financial resources and physical presence.

Public costs

There is considerable literature addressing the resource impact of LIPs on adjudicators and administrative staff in a variety of jurisdictions. Recurring themes in studies of LIPs include:

(a) more personal contact with LIPs, thus occupying the time of staff;105
(b) requests for advice and assistance beyond the duties of administrative staff (eg, legal advice, preparation of documents);106
(c) inability to comply with court rules and procedures, and to properly complete court forms, thus impacting on case management;107
(d) placing judicial officers and court staff under high levels of stress;108

103 Meredith, above n 86, at 16.
104 Ibid, at 19.
106 Nicholson, above n 105; Gamble and Mohr, above n 105, para 2.56.
107 Nicholson, above n 105; Family Law Council, above n 105, para 2.56.
(c) lengthening disputes by raising irrelevant and ambiguous issues\(^\text{109}\) and requiring adjudicators to assist them in procedures (eg, cross-examination)\(^\text{110}\) — described as ‘managerial judging’ in the literature.\(^\text{111}\)

To the authors’ knowledge, there has been no specific study on the impact of LIPs in the AIRC. However, the AIA, as part of its report \textit{Litigants in Person Management Plans: Issues for Tribunals and Courts} did write to the AIRC about its experiences with LIPs. The AIRC commented that there was a rise in LIPs as a result of the introduction of the unfair dismissal jurisdiction and that typically problems arise from the LIPs’ lack of familiarity with relevant law, difficulty with language, prolixity and excess of emotion.\(^\text{112}\)

The literature reveals that LIPs shift costs from the private legal sphere to the public sphere and also increase public costs. In terms of shifting costs, the High Court in \textit{Cachia v Hanes}\(^\text{113}\) put it succinctly: ‘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.’\(^\text{114}\) In the FWA environment, unrepresented litigants will have substantial personal contact with FWA staff prior to a final decision. Advice and assistance about the law and legal procedure will likely be provided by FWA staff, not a lawyer. In terms of increasing public costs, the lawyer’s absence means that FWA will have little external assistance in gathering and identifying the relevant facts, issues in dispute and law. FWA therefore will probably need to spend considerable time and resources conducting these activities. Thus, restricting lawyers will not necessarily reduce the overall costs of the proposed unfair dismissal system and will also raise an important question of distributive justice. After all, why should public costs be incurred with respect to an LIP who may have, but for the restrictions, engaged a legal representative?

\textbf{Emotional costs}

Many employees have some form of emotional attachment to the workplace. The workplace has been described as a community, its rise as a source of community in the second half of the twentieth century coinciding with a decline in the traditional conception of ‘community’.\(^\text{115}\) Work offers more than ‘just a job’. Pocock noted during interviews with Australian employees that ‘many see the workplace as a place where they have laughs, fun and social

\(^{109}\) Gamble and Mohr, above n 105 (based on interviews with lawyers opposed to LIPs in the Federal Court).


\(^{113}\) (1994) 179 CLR 403; 120 ALR 385; [1994] HCA 14; BC9404608.

\(^{114}\) Ibid, at CLR 415 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ.

In her book *Married to the Job*, Philipson (a psychologist) draws on her patients’ experiences to explain this emotional attachment within the workplace community. The workplace, partly responsible for the decline in family and community life, provides an ‘emotional haven in an otherwise insecure and anomic world’.[117] Philipson found that the work setting, social relationships and the sense of identity with the employer were key ingredients of the emotional attachment.[118] Conversely, termination of employment can have a devastating impact on the employee. Termination not only represents the loss of a job, but also of an employee’s identity and relationships with colleagues that may not be replicated outside the workplace. Employees may experience feelings of betrayal, anger, sadness, denial and revenge. In some cases, the employer may provide (particularly in cases of redundancy), or the employee may seek, counselling to deal with their loss.

Lawyers can help manage the emotional aspects of termination for employees and, to a lesser extent, employers throughout the unfair dismissal process, by acting as dispassionate and rational representatives. A party’s ability to see his or her own case objectively is often impaired by proximity and emotional involvement.[119] At the initial client meeting, the lawyer typically takes instructions shortly after termination when the client’s emotional costs of termination are high. The lawyer is often the client’s emotional ‘sounding board’, while conducting the task of separating relevant from irrelevant facts provided by the client. While emotional costs are more prevalent in employees, they can apply equally to the employer, or its representatives. For example, one of the authors has previously represented an employer that terminated its manager on suspicion of fraud. No criminal charges were laid against the former manager, who filed an unfair dismissal application seeking compensation. The employer was angry that the police did not pursue the matter, was not prepared to compromise given that the employee had allegedly defrauded the employer and wanted its day in the commission to prove the police wrong. The author acknowledged the client’s frustration; listened to the client’s version of events; identified the relevant facts and advised the client of its prospects of success (which were limited); and assessed the likely compensation an industrial tribunal would order the client to pay, and the legal and opportunity costs associated with its defence. The ability of the author to manage the emotional costs with rational thinking ultimately led to a settlement which was cost-effective, both in terms of legal and opportunity costs. Thus, lawyer-client contact after the initial meeting can give the client an outlet to vent its frustration about the other party, and the lawyer an opportunity to redirect the client’s attention to the legal issues. At conciliation and arbitration, the lawyer acts as an emotional buffer between decision-maker and client should emotions rise during either proceeding. As one lawyer put it in the context of the ART Bill debate, lawyers are ‘in a better

---

116 Pocock, ibid, pp 52–3.
118 Ibid, pp 17–18.
119 Family Law Council, above n 105, para 1.51.
position to “hose down” angry clients and tell them to “sit down and shut up”.\footnote{M R Liverani, ‘Back to the Drawing Board for Tribunal Reformers: too many problems with proposed amalgamation’ (2001) 39(1) Law Society Jnl 67 at 68.}

The absence of a legal representative, rather than the absence of legal knowledge, is a great emotional challenge to LIPs.\footnote{Australian Broadcasting Corporation, Do it Yourself Litigation — Lawyer Free Justice?, ABC Radio National — The Law Report Transcript, 20 October 1999, at <http://www.abc.net.au/rn/talks/8.30/lawrpt/istories/lr981020.htm> (accessed 24 May 2000).} Without legal representation, FWA will take on greater responsibility for managing a party’s emotional costs. The emphasis on speed in the proposed unfair dismissal system, for instance the requirement to file a claim within seven days after termination, means that the client’s emotions are less likely to subside prior to a conference or hearing. In the intervening period, FWA administrative staff are likely to have significant personal contact with the unrepresented employee. These employees will consume staff time and place staff under high levels of stress in having to manage the employee’s emotional costs of not only the termination, but also the unfair dismissal process. The absence of the lawyer as an emotional buffer at the conference or hearing means that the FWA member must perform the function of counsellor, in addition to its roles of fact finder, fact sorter and decision-maker. Additional time will be spent listening to, and then separating, the employee’s emotional issues surrounding the ‘injustice’ or ‘wrongs’ committed by the employer with the relevant legal issues in dispute. This delay undermines efficiency and increases public costs and both parties’ opportunity costs. An FWA member who spends time listening to and assisting with the management of an employees’ emotional costs at a conference or hearing may also raise employer perceptions of bias. This sense of injustice undermines fairness and, in some cases, may lead to an appeal if the decision goes against the employer, thereby generating further costs and inefficiency. The authors maintain, therefore, that in a predominantly inquisitorial system which restricts legal representation, an FWA conference or hearing is an inappropriate forum to address the parties’ emotional costs.

**Recommendations**

The last section of this article demonstrated that imposing further restrictions on legal representation fails the test of fairness espoused by the Rudd Government. While limiting legal representation is likely to reduce the parties’ legal costs, the existence of LIPs in a predominantly inquisitorial system — and without conciliation as a mandatory dispute resolution function — will increase public costs, create inefficiency and compromise the legal truth. Our primary recommendation therefore is that FWA members utilise their discretion to maintain the present practical presumption in favour of legal representation in unfair dismissal disputes, or that the government endorses such an approach. The WR Act may make the granting of leave for legal representation a formality (as outlined earlier in this article), but FWA could similarly retain the discretion to prevent legal representation by relying on a combination of the matters proposed in cl 596 of the FW Bill and presently...
prescribed in the WR Act. For example, the WR Act requires the AIRC to consider the lawyer’s capacity to assist the client and the commission. In the FWA context, FWA could rely on this factor to prohibit legal representation because of a lawyer’s previous case history of not cooperating with FWA in its fact-finding exercise. If representation rights are granted, the FW Bill deters lawyer conduct which would jeopardise fairness in another way. Clause 401 provides that if one party in unfair dismissal proceedings incurs costs because of an unreasonable act or omission by the other party’s legal representative, or that representative encourages their client to pursue unmeritorious or speculative proceedings, FWA can make an order requiring the representative to pay the first party’s costs.122

Three additional recommendations are proposed. The first recommendation is designed to promote transparency in the unfair dismissal process. Presently, employers intending to institute a collective workplace agreement or individual transitional employment agreement must provide employees with a prescribed information statement about the agreement, the steps involved in making the agreement and its operation.123 The provision of a ‘Fair Work Information Statement’ to employees about their rights and entitlements at work is also one of the 10 National Employment Standards which will constitute the minimum entitlements of all employees in the federal system from 1 January 2010. In a similar vein of transparency, employers should be required to provide employees with a ‘Termination Information Statement’ as soon as practicable following termination.124 The statement would include information about the FWA process, a summary of the unfair and unlawful termination laws, the employee’s options as to representation (e.g., industrial advocate, lawyer, legal aid) and contact details for FWA. Given that employees will only have seven days to lodge an unfair dismissal claim with FWA, the Termination Information Statement would facilitate a speedy resolution process by limiting the number of applications seeking an extension to file a claim. Simply put, ignorance of the law would be no excuse.

The second recommendation relates to promoting transparency in legal costs in the interests of fairness. The FW Bill could adopt provisions from the Family Law Rules 2004 (Cth) which require a lawyer, before each court event (e.g., conciliation, trial), to give the client and the other party a written notice of the client’s actual costs up to and including that event, estimated future costs and, if there is a trial, witness costs, trial costs and the estimated length of the trial.125 In addition, if an offer to settle is made or received during a family law property dispute, the lawyer is obliged to disclose the actual and future costs to their client so that the client can determine the net settlement amount.126 In the FWA environment, the parties would disclose to each other their actual and future costs prior to any conference or hearing, and the lawyer would make the same disclosure to their client should a settlement offer be made or received. The duty of disclosure would thus enable the parties to

122 This provision in the FW Bill is not entirely novel; see WR Act s 658(4).
123 WR Act s 340.
124 The authors note that the FW Bill requires, for the first time, notice of termination to be provided in writing; see cl 117.
126 Ibid, r 19.03.
make an informed decision about progressing with the unfair dismissal process.

The final recommendation addresses the number of LIPs who will inevitably participate in the new unfair dismissal system. LIPs will pose significant resource implications for FWA staff. It is recommended that FWA adopt a case officer model when one or both parties are unrepresented. The model would entail a dedicated track for unrepresented litigants managed by a case officer who is trained in managing LIP issues (as discussed above) and who can assist the FWA member in the fact finding and fact sorting exercises. Dewar et al note that a Family Court registry trialled a similar process of individual case management by a registry officer from inception of proceedings to appeal. The LIP received a business card from the registry officer and was encouraged to contact that person with any queries.127

**Conclusion**

Fairness is the touchstone of the Rudd Government’s workplace relations reforms. The Workplace Relations Minister has stated that the government is prepared to ‘iron out as many unintended consequences as it needs, in order to achieve our goal’.128 Imposing restrictions on legal representation will not achieve the goal of fairness because it does not strike an appropriate balance between legal truth, efficiency and costs. While this measure may reduce legal costs, it will not extinguish them and this study has demonstrated that in the proposed unfair dismissal environment, the lawyer’s absence has the capacity to negatively impact on legal truth, efficiency, public costs, opportunity costs and emotional costs. Ironically, the authors have adopted many of the arguments proffered by Labor in opposing restrictions on legal representation under the failed ART Bill. By retaining the present practical presumption in favour of legal representation and adopting minor amendments to the proposed unfair dismissal system, the government would be taking important steps towards achieving fairness.

---