

Neither simple nor fair – prohibiting legal representation before Fair Work Australia

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Introduction

The Rudd Labor government will shortly be releasing an exposure draft of its substantive workplace relations reforms for public comment.¹ 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” 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,² but includes a prohibition on legal representation.³ Some writers have criticised the prohibition on legal representation,⁴ particularly from the standpoint of natural justice. Forsyth et al questions whether the inquisitorial process, combined with the denial of a parties’ right to legal representation, will “allow the parties respective positions in unfair dismissal cases to be tested in accordance with the principles of natural justice”.⁵

This paper questions whether the prohibition of legal representation under the proposed unfair dismissal regime will promote fairness. Part I provides a brief history of legal representation in the Australian Industrial Relations Commission’s (“AIRC”) unfair dismissal jurisdiction. Part II outlines the proposed unfair dismissal process before FWA. Part III defines the primary goal of the substantive workplace reforms - fairness⁶ - and identifies costs, justice and efficiency (“the fairness elements”) as appropriate elements to measure fairness in relation to a prohibition on legal representation. Part IV 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

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¹ Gillard noted that “a substantial workplace relations reform Bill will be introduced into Parliament later this year” - J Gillard, *National Industrial Relations Summit, Speech - 20th August 2008*, <<http://www.alp.org.au/media/0808/speewr200.php>> (accessed 25 August 2008); Australian Labor Party, *Forward with Fairness – Policy Implementation Plan*, August 2007, p 8, <http://www.alp.org.au/download/now/070828_dp_forward_with_fairness___policy_implementation_plan.pdf> (accessed 14 June 2008) (exposure draft released for public comment in 2008/2009).

² Australian Labor Party, *Forward with Fairness: Labor’s plan for fairer and more productive Australian workplaces*, April 2007, p 3, <<http://www.alp.org.au/download/now/forwardwithfairness.pdf>> (accessed 14 June 2008).

³ C Emerson, Fair plan for firms, *Weekend Australian*, 1 September 2007, p 20; see also Australian Labor Party, above n 1, at 18.

⁴ B Williamson, ‘Questions of Fairness: Can Fair Work Australia deal with Unfair and Unlawful Dismissal Applications?’ (2008) 46(4) *Law Society Journal* 61; P Stafford, *Legal expert says lawyers should not be banned from unfair dismissal cases*, The Briefing, 12 June 2008, <<http://www.smartcompany.com.au/Free-Articles/The-Briefing/20080612-Legal-expert-says-lawyers-should-not-be-banned-from-unfair-dismissal-cases.html>> (accessed 14 June 2008) (reporting on comments made by Murray Wilcox QC in *The Economics and Labour Relations Review*); S Scott, ‘IR Advisor says ban on lawyers is unfair’, *Australian Financial Review*, 12 June 2008, p 6 (reporting on comments made by Murray Wilcox QC).

⁵ A Forsyth, B Creighton, V Gostencnik and T Sharard, *Transition to Forward with Fairness: Labor’s Reform Agenda*, Thomson Lawbook Co, Sydney, 2008, p 239.

⁶ Gillard, above n 1.

identified in Part III. The impact of preventing legal representation with respect to FWA's inquisitorial system, the fusion of conciliation and arbitration functions and the unrepresented litigant are assessed in Part V and the conflicting nature of the fairness elements are revealed. The authors draw on their own experiences as legal representatives in this Part. In Part VI, the authors conclude that any prohibition on legal representation will not promote fairness and the present rules governing legal representation in the *Workplace Relations Act 1996 (Cth)* ("WRA") are acceptable. Brief recommendations are made to improve the unfair dismissal process.

It may be that the Commonwealth government's exposure draft permits legal representation, but this does not make the paper redundant. Rather this paper may be viewed either as a response to any criticism of a "political back flip" on the topic of legal representation, or as an urgent call for the Commonwealth government to reconsider the ban on legal representation before the reform Bill is introduced into parliament at the end of this year. Irrespective of the government's plans, the authors' position is that the achievement of fairness is at best a difficult balancing act between the rival interests of parties and a prohibition on legal representation will not achieve fairness in unfair dismissal matters because it strikes an imbalance between costs, justice and efficiency.

Part I: Brief History of Legal representation in the AIRC jurisdiction

Given that unfair dismissal was not available in the AIRC until 1994,⁷ legal representation in the commission's unfair dismissal jurisdiction has a brief history. Under section 42(3) of the *Industrial Relations Act 1994 (Cth)*, a party could be legally represented (i.e. by counsel or a solicitor) if the AIRC granted leave and:

- all parties provided consent;⁸ 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;⁹ or
- the AIRC was satisfied that the party could only be adequately represented by a solicitor, counsel or agent.¹⁰

Section 42 was subsequently adopted by the *Workplace Relations Act 1996 (Cth)* ("WRA") and it remained unchanged until the Work Choices amendments to the WRA in 2006. The present rules, contained in section 100 of the WRA, require the Commission to consider various matters in deciding whether to grant leave for representation. The presence or absence of express consent by all parties to the representation determines the matters which apply.¹¹ A summary of these matters is set out in Table A:

⁷ Industrial Relations Reform Act 1993 (Cth) s 170DE.

⁸ Industrial Relations Act 1994 (Cth) s 42(3)(a).

⁹ Ibid s 42(3)(b).

¹⁰ Ibid s 42(3)(c).

¹¹ WRA ss 100(3) – 100(6).

Law	Description	Express consent	No Express Consent
100(5)(a)	Representation by counsel, solicitor or agent would assist the party bring the best case possible	✓	✓
100(5)(b)	Capacity of the particular counsel, solicitor or agent to represent the party	✓	✓
100(5)(c)	Capacity of the particular counsel, solicitor or agent to assist the Commission in performing its functions under WRA	✓	✓
100(6)(b)	Complexity of the factual and legal issues relating to the proceeding		✓
100(6)(c)	Special circumstances that make it desirable that the party be represented		✓

Table A: Representation

Few reported cases have addressed the issue of legal representation in unfair dismissal cases.¹² The leading authority is *Visscher 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 legally represented.¹³ 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)".¹⁴ 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.¹⁵

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.¹⁶ This role is also intended to achieve a “level playing

¹² *Visscher v Teekay Shipping (Australia) Pty Ltd* FB of AIRC (Williams SDP, Cartwright ADP, Larkin C) (PR953984) 08/12/04; *Yolande v Anglican Homes Inc* AIRC (McCarthy DP) (PR946048) 23/04/04.

¹³ Note that the appeal right to the Full Bench is no longer available pursuant to section 100(7) of the WRA.

¹⁴ *Re Colonial Weighing Australia Pty Ltd* AIRC (Watson SDP, Duncan DP and Hingley C) (Q Print1048) (20/05/98).

¹⁵ *Visscher v Teekay Shipping (Australia) Pty Ltd* FB of AIRC (Williams SDP, Cartwright ADP, Larkin C) (PR953984) 08/12/04 at [6].

¹⁶ Explanatory Memorandum to the Workplace Relations Amendment (Work Choices) Bill 2005 (Cth), para 186, <<http://parlinfoweb.aph.gov.au/parlinfo/Repository/Legis/ems/Linked/02110502.pdf>> (accessed 15 September 2008).

field” for parties to a proceeding,¹⁷ presumably by ensuring that the party is appropriately represented.

The impetus for change came with representation by agents.¹⁸ There is no restriction on who can act as an agent and unlike legal representatives, no authority exists which regulates agent conduct.¹⁹ In response, section 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 a legal representative before the AIRC, it is likely that leave will ordinarily be granted for legal representation, thus maintaining the status quo. In contrast agents, particularly those with no experience before the AIRC, will face greater scrutiny.

Part II: Unfair Dismissals before FWA

The Rudd Labor government’s major workplace relations reforms, which include the unfair dismissal regime and establishment of Fair Work Australia, are currently being developed in consultation with various statutory and non-statutory bodies.²⁰ An exposure draft of the legislation is due for release by the end of 2008, with the proposed start date for Labor’s workplace relations system being 1 January 2010. At this stage, the government’s IR plans are contained in two documents: *Forward with Fairness – Labor’s Plan for fairer and more productive Australian Workplaces* (released in April 2007)²¹ and *Forward with Fairness – Policy Implementation Plan* (released in August 2007) (“Policy Implementation Plan”).²² The constitution of Fair Work Australia, its dispute resolution procedures and representation are three parts of the proposed unfair dismissal process which will form the basis of the critical analysis in Part V and are discussed below.

To commence proceedings, an employee must file a claim with Fair Work Australia within 7 days of dismissal, a substantial change from the 21 days²³ under the present legislation. This new rule aims to ensure that reinstatement in appropriate cases remains a viable option for both employer and employee.²⁴ FWA will be a “one-stop shop”, replacing the workplace relations functions presently carried out by the AIRC, Australian Fair Pay Commission, Workplace Authority and Workplace Ombudsman. On release of Labor’s IR plans, 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”.²⁵ FWA offices will be located in suburban and regional areas, closer to the modern workplace, with the aim of facilitating an efficient, effective and

¹⁷ Ibid.

¹⁸ Ibid at paras 182 and 183, making reference to *Oram v Derby Gem Pty Ltd* FB of AIRC (Lawler VP, Kaufman SDP and Blair C) (PR943675) (23/07/04).

¹⁹ Ibid at paras 181 and 182.

²⁰ For further discussion, refer Forsyth et al, above n 5, at 196-197.

²¹ Australian Labor Party, above n 2.

²² Australian Labor Party, above n 1.

²³ WRA ss 643(14) – (15).

²⁴ Australian Labor Party, above n 2.

²⁵ H Ewart, *ALP vows to replace IR Commission*, Australian Broadcasting Corporation Transcripts, 25 April 2007, <<http://www.abc.net.au/7.30/content/2007/s1906563.htm>> (accessed 15 June 2008).

informal resolution of industrial issues.²⁶ An example of informal resolution is supposedly FWA's ability to enter a workplace or other venue to conduct the final conference in an unfair dismissal matter following consultation with the parties.²⁷

The current two tiered dispute resolution process - conciliation which explores the prospects for resolution and then formal arbitration if conciliation is unsuccessful - will be replaced by a final conference. Forsyth et al describes this as a "fusion" of the current conciliation and arbitration process.²⁸ It is unclear whether the two functions will be fused – will there be an opportunity to conciliate before the FWA officer commences more intense fact gathering in order to make a final decision? Where will the emphasis lie – on mediation²⁹ or arbitration?³⁰ If FWA determines that the employee has been unfairly dismissed at this final conference, reinstatement will be the primary remedy, unless this would not be in the best interests of the employee or the employer's business, in which case compensation will be payable.³¹ This emphasis on reinstatement as the primary remedy is consistent with present legislation in which the AIRC makes a compensation order if reinstatement is an inappropriate remedy.³²

The proposed unfair dismissal process will incorporate an inquisitorial, as opposed to an adversarial, method of dispute resolution.³³ 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 responsibility of fact finder, that is, it does not ensure that both parties present all of the relevant evidence.³⁴ Thus failure to call all relevant evidence is not sufficient grounds to justify the AIRC granting leave to appeal.³⁵ However, the final conference before FWA will not be a formal hearing – there will be no written submissions or cross-examination,³⁶ nor does there appear to be any mechanism for pre-trial disclosure of witness statements. Parties will outline their positions and answer questions posed by a FWA decision-maker ("FWA officer"). The FWA officer will then be required to "reach a conclusion about whether the dismissal was unfair".³⁷ Consequently in removing the adversarial functions, FWA becomes responsible for identifying relevant facts, defining the issues in dispute and making a decision.

²⁶ K Rudd and J Gillard, *Fair Work Australia – Doorstop Interview – 26 April 2007*, <<http://www.alp.org.au/media/0407/dsiirloo260.php>> (accessed 14 June 2008); K Rudd and J Gillard, *Federal Labor's New Independent Industrial Umpire: Fair Work Australia*, Media Statement, 26 April 2007, <<http://www.alp.org.au/media/0407/msirloo260.php>> (accessed 14 June 2008).

²⁷ Australian Labor Party, above n 2, at 19.

²⁸ For further discussion, refer Forsyth et al, above n 5, at 328.

²⁹ Which was suggested by Emerson, above n 3, at 20.

³⁰ For the purpose of this paper, the "fusion" label is accepted.

³¹ Australian Labor Party, above n 2, at 20.

³² WRA ss 654(3) and (7).

³³ A critique of the proposed inquisitorial system is beyond the scope of this paper. For an excellent analogy of the adversarial versus inquisitorial method, refer W Zeidler, 'Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure' (1981) 55 *ALJ* 390 at 391-392; For discussion of the adversary system in the context of tribunals refer T Thawley, 'Adversarial and Inquisitorial Procedures in the Administrative Appeals Tribunal' (1997) 4 *Australian Journal of Administrative Law* 61 at 62; For discussion of the adversarial versus inquisitorial debate refer H Stacy and M Lavarch (ed), *Beyond the Adversarial System*, The Federation Press, Sydney, 1999; For further reading refer to R Eggleston, 'What is Wrong with the Adversary System?' (1975) 49 *ALJ* 428.

³⁴ *Ledington v University of the Sunshine Coast* AIRC (Hodder C) (PR928685) (13/3/03).

³⁵ *Uink v Department of Social Security* FB of AIRC (Ross VP, Drake DP and Palmer C) (Print Q5905) (24/12/97); *Parker v Office Interiors Pty Ltd* FB of AIRC (Polites SDP, Watson SDP and Gay C) (Print Q5712) (02/09/98).

³⁶ Australian Labor Party, above n 2, at 20.

³⁷ *Ibid.*

With regards to representation, parties may have a representative or support person present,³⁸ but their role is passive in an inquisitorial system where the parties themselves must respond directly to questions from FWA. Whilst Labor initially claimed that “in most cases, lawyers will not be necessary”,³⁹ the Policy Implementation Plan clearly indicates that legal representation will be prohibited. According to Labor, the new unfair dismissal system leaves “lawyers out of the picture”.⁴⁰ But will a ban on lawyers promote Labor’s goal of achieving fairness for employers, employees and unions?⁴¹ Before addressing this issue, a definition of fairness is required.

Part III: Fairness - The Primary Goal of Reform

Fairness is the goal of the workplace relations reforms and 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.⁴² Whilst costs and efficiency are recurring themes, the word “justice” is not used once in the Policy Implementation Plan, which demonstrates the Labor government’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 IR plans. Answers to these questions will enable the authors to test whether the prohibition on legal representation promotes fairness:

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

Fairness (“F”), based on the proposed unfair dismissal model, incorporates three components: justice, costs and efficiency (“fairness elements”). Justice (“J”) involves discovery of the legal truth. To achieve justice, the decision-maker identifies the relevant facts, applies those facts to the law and arrives at the “correct” conclusion. This may be a narrow interpretation of justice,⁴³ but it is an interpretation commonly understood. 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, for the employee and the employer incurs a variety of costs during the unfair dismissal process. In addition to representation costs (i.e. legal or otherwise) (“LC”), the parties can also incur opportunity costs (“OC”). For both parties, these opportunity costs include the time in preparing for and attending the final conference before FWA. From the employer’s perspective, opportunity costs are also associated with employee witnesses being required to give evidence initially perhaps to the employer and/or to an FWA officer at the final conference. 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.

³⁸ Ibid.

³⁹ K Rudd and J Gillard, *Federal Labor’s New Independent Industrial Umpire: Fair Work Australia*, Media Statement, 26 April 2007, <<http://www.alp.org.au/media/0407/msirloo260.php>> (accessed 14 June 2008).

⁴⁰ Australian Labor Party, above n 1, at 18.

⁴¹ Gillard, above n 1.

⁴² Australian Labor Party, above n 2, at 3; Australian Labor Party, above n 1, at 18.

⁴³ GL Davies, ‘Fairness in a Predominantly Adversarial System’ in Stacy and Lavarch (ed), above n 3.

Thus, the following formula may be said to represent the fairness elements discussed above:

$$F = J + E + C (LC + OC + EC + PC)$$

However, it would be a mistake to consider each of the fairness elements in isolation. Rather, fairness involves balancing justice, costs and efficiency. For example, Bedford and Creyke note that many tribunals must carry out their functions in a way which is “fair, just, informal, economical and quick”.⁴⁴ The difficulty for the tribunal lies in weighing up these objectives.⁴⁵ As Lindgren J stated in *Sun Shan Qui v Minister for Immigration and Ethnic Affairs* with respect to the *Migration Act 1958 (Cth)*:

*First, the objectives referred to in [s]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’.*⁴⁶

Conversely, a system which yields the correct result (i.e. justice) but at a cost which a party cannot afford or which is disproportionate to the amount involved may well be unfair.⁴⁷ Thus, fairness cannot mean achieving justice 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 justice.

Part IV of this paper will discuss the failed passage of the *Administrative Review Tribunal Bill 2000 (Cth)*. The academic and political debate surrounding restrictions on legal representation under this Bill is relevant in addressing the primary issue of this paper for three reasons. First, the Bill justified the establishment of the ART (a “one-stop stop” for federal merits review matters) and restrictions on legal representation on the same bases as the Rudd Labor 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 in Part III. Third, the ART experience provides an insight into the arguments supporting legal representation in unfair dismissal matters.

Part IV: The ART Experience

The *Administrative Review Tribunal Bill 2000 (Cth)* was introduced into parliament on 28 June 2000. The Bill adopted a key recommendation from the Administrative Review Council’s (ARC) Better Decisions report,⁴⁸ namely to replace a number of existing federal merits review tribunals with a single tribunal. Under the Bill, the Administrative Review Tribunal would replace the Administrative Appeals Tribunal, the Social Security Appeals Tribunal, the Migration Review Tribunal and the Refugee Review Tribunal. Two objectives of the Bill were to ensure the Tribunal provided an accessible mechanism for reviewing decisions that was fair, just,

⁴⁴ For example, Administrative Appeals Tribunal Act 1975 (Cth) s 2A; Migration Act 1958 (Cth) s 420(1).

⁴⁵ N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals*, AIJA, Melbourne, 2006, p 33.

⁴⁶ *Sun Shan Qui v Minister for Immigration and Ethnic Affairs* (unreported, Federal Court of Australia, 6 May 1997; per Lingren J).

⁴⁷ GL Davies, above n 43, at 109.

⁴⁸ Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39, AGPS, 1995.

economical, informal and quick and to enable the Tribunal to review decisions in a non-adversarial way.⁴⁹ The focus on non-legalistic processes was designed to “minimise the need for legal representation”.⁵⁰ Clause 105(1) 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 agree⁵¹ or exclude legal representation in certain classes of cases.⁵² However, no practice and procedure directions were outlined at the time of the Bill.

The issue of legal representation was raised by a number of ministers during parliamentary debates. Julia Gillard, representing the ALP in opposition at the time, criticised the ART Bill’s abolition of the automatic right to legal representation. The 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 neutralize 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.⁵³

Similar sentiments were expressed by the Senate, whose members from the ALP and the Australian Democrats ultimately blocked the passage of the ART Bill.⁵⁴

The academic debate surrounding the proposed restrictions on legal representation generated arguments similar to the political debate. Castles argued that Tribunal matters covered a complex body of common and statutory law (e.g. tax, 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, the unrepresented litigant may not raise evidence which supports a legal requirement.⁵⁵ 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”.⁵⁶ Trimmer described the proposal as a presumption against legal representation.⁵⁷ She noted that representation was “a means of redressing the power and resource imbalance in an appeal by the individual against the state”. She noted that without the assistance of legal representatives to the tribunal in obtaining all relevant material and identifying the issues, delays in the hearing of an application would ensue.⁵⁸ Again if the respondent was an

⁴⁹ Administrative Review Tribunal Bill 2000 (Cth) sub-clauses 3(c) and 3(d).

⁵⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2000, pp 18406-18407 (D Williams).

⁵¹ Administrative Review Tribunal Bill 2000 (Cth) cl 105(2).

⁵² Commonwealth, *Parliamentary Debates*, Senate, 26 February 2001, p 21844 (N Bolkus); M Castles, ‘Worse decisions? The Administrative Review Tribunal’ (2000) 25(4) *Alternative Law Journal* 180 at 183; A Trimmer, ‘Legal Representation’ (2000) 27 *AIAL Forum* 20 at 21.

⁵³ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2000, p 23761-23762 (J Gillard).

⁵⁴ Commonwealth, above n 52 at 21844; Commonwealth, *Parliamentary Debates*, Senate, 26 February 2001, pp 21847-21848 (A Bartlett); Commonwealth, *Parliamentary Debates*, Senate, 26 February 2001, p 21856 (B Greig).

⁵⁵ Castles, above n 52, at 183.

⁵⁶ *Ibid* at 184.

⁵⁷ Trimmer, above n 52, at 21.

⁵⁸ *Ibid* at 22.

entity, from its perspective, legal representatives may be more economical given the opportunity costs in the entity's personnel preparing and presenting its case.⁵⁹

Whilst the ART Bill proposed to restrict legal representation and not necessarily prohibit it altogether, the political and academic debate revealed that any restriction on legal representation would not promote fairness because it created an imbalance between justice, costs and efficiency. No legal representation could decrease legal costs, reduce the probability of justice and affect efficiency. The fairness of prohibiting legal representation is assessed in Part V by reference to three aspects of the proposed unfair dismissal process: the inquisitorial system; the unrepresented litigant; and the conciliation-arbitration "fusion" for resolving disputes.

Part V: A fairness assessment of prohibiting legal representation

Inquisitorial System

The proposed inquisitorial system of resolving unfair dismissal matters concentrates several functions in FWA. The FWA officer (solely or with the assistance of a colleague) will collect evidence and determine its relevance, define the issues in dispute and make a decision. Simply put, FWA controls the "pursuit of the truth".⁶⁰ As with most legal systems, it is likely that the proposed unfair dismissal system will carry a mix of adversary and inquisitorial functions.⁶¹ For example, parties may be required to submit witness statements and/or a list of documents they consider relevant to the dispute before the final conference. Thus, the proposed system can be described as one point along a continuum between pure adversarial and pure inquisitorial.⁶²

Moreover, an expanded skill set is required by FWA officers to resolve unfair dismissal claims compared to their predecessors in the AIRC. The FWA officer must possess the ability to collect ("fact finding") and then identify relevant evidence ("fact sorting") in addition to decision-making skills. Not only is this a skill, but a time consuming exercise. The FWA officer gains a better knowledge of the parties' respective legal positions through these activities, but at the cost of procedural efficiency and the public cost of additional resources. Alternatively if FWA's power to collect evidence is unduly restricted in an effort to reduce public costs or improve efficiency justice may then be compromised and the parties' opportunity costs increased. In addition, at what point will FWA be obliged to start the fact finding exercise – from the date the employee files the application or from the final conference date? The latter scenario would likely increase the length of a final conference attended by both parties as the FWA officer gathers the facts and may, in particular circumstances, require an adjournment so that the officer can obtain additional information that one or both parties failed to produce on the day. Further, a limitation on pre-conference fact finding, combined with the prohibition on formal written submissions, would deny the FWA officer any prior knowledge about the parties' respective legal positions. This too would increase both the time taken and the cost.

⁵⁹ Ibid.

⁶⁰ GL Certoma, 'The Accusatory System v The Inquisitorial System: Procedural Truth v Fact' (1982) 56 *ALJ* 288 at 289.

⁶¹ Thawley, above n 33, at 62; see also P Johnston, 'Recent Developments concerning Tribunals in Australia' (1996) 24 *Federal Law Review* 323 at 340.

⁶² Bedford et al, above n 45, at 5; Certoma, above n 60, at 291; S Bronitt and H Mares, 'The History and Theory of the Adversarial and Inquisitorial Systems of Law' (2004) 16(3) *LegalDate* 1 at 2.

Legal representatives would assist greatly with the FWA's fact finding and fact sorting responsibilities. The ALRC, in its assessment of federal tribunals, noted that trained representatives bring "significant additional resources to bear on tribunal decision making, through their expertise and the information they gather and present to the tribunal".⁶³ At the pre-conference stage a lawyer, following consultation with the client and witnesses, can furnish the FWA with what he or she considers the relevant facts, issues and law in the matter. At the conference stage the legal representative, equipped with knowledge of the client's case, can then assist the FWA officer 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.⁶⁴ Whilst increasing legal costs, legal representation in an inquisitorial context will tend to improve procedural efficiency, reduce the parties' opportunity costs and public costs and improve the prospects of achieving justice.

The conciliation-arbitration fusion

The final conference will remove conciliation as a stand alone element of the dispute resolution process in unfair dismissal matters. This is a significant change, given the success of conciliation in resolving termination claims in both State and Federal jurisdictions.⁶⁵ In a 10 year period from 1997-98 to 2006-07, the conciliation settlement rate in termination matters before the AIRC was between 69% and 77%.⁶⁶ This does not include cases that were settled prior to conciliation – for example in 2006-2007, 73% of matters were settled at conciliation, but 81% were finalised at or prior to conciliation.⁶⁷ Whilst justice may be compromised, conciliation generally minimises inefficiency and legal, opportunity, public and potentially emotional costs by bringing the parties together shortly after the employee lodges his or her claim; by the conciliator's focus on settlement as opposed to identifying the legal truth; by allocating a short time frame for the conference (typically 1 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.

The Rudd Labor government suggests that the new unfair dismissal process is faster, simpler and by eliminating the incidence of "go away money", less costly.⁶⁸ "Go away money" represents

⁶³ Australian Law Reform Commission, *Federal Tribunal Proceedings*, ALRC Issues Paper No. 24, 1998, para 5.68.

⁶⁴ A Rose, 'The Adversarial Model and the Administrative Tribunal' (1999) 4 *TJR* 101 at 113.

⁶⁵ In state jurisdictions refer President of the Industrial Court of Queensland, *Annual Report 2006-2007*, <http://www.qirc.qld.gov.au/aboutus/a_report/a_report_2007.pdf> (accessed 15 September 2008); F Meredith, 'Alternative Dispute Resolution in an Industrial Tribunal: Conciliation of Unfair Dismissal Disputes in South Australia' (2001) 14 *AJLL* 1.

⁶⁶ This was in respect of all applications that were conciliated.

⁶⁷ President of the Australian Industrial Relations Commission, *Annual Report 2006-2007*, pp 10-11, <<http://www.airc.gov.au/about/annualreports.htm>> (accessed 19 August 2008).

⁶⁸ Australian Labor Party, above n 1, at 18; Australian Labor Party, above n 2, at 20.

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 about a fused conciliation-arbitration unfair dismissal process that prohibits legal representation: First, "go away money" produces an unfair outcome for employers and second, prohibiting legal representation 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.⁶⁹ But does this necessarily make the system unfair? For example, suppose an employer is likely to incur legal and opportunity costs of \$10,000 to \$15,000 in defending an unfair dismissal claim. Despite a ruling at trial 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.⁷⁰ Further, the writers' 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.⁷¹ Suppose that the employer's lawyer, who has technical and negotiation skills, settles the claim for \$4,000 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 \$2,000. The employer's opportunity costs, being time spent in dealing with the claim and attending the conciliation conference may be a further \$500. \$6,500 is the total cost to the employer.

The "go away money" of \$4,000 may not achieve justice because the legal truth may be that the dismissal was not harsh, unjust or unreasonable. Some employers place greater emphasis on justice and are willing to defend the claim as a matter of principle irrespective of the costs. Some employers defend a claim to save future costs, their reasoning being that it sends a clear message to present employees that the employer is one of principle and does not pay "go away money" in unfair dismissal matters. However, the majority of employers would settle because the "go away money" is an efficient and cost effective outcome, an outcome which is in the company's best interests. In summary, the incidence of "go away" money does not necessarily equate to unfairness. Further, lawyers can and do assist the employer client make an informed decision about "go away money" by advising the employer about costs and 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, the prohibition on legal representation at the final conference will not oust lawyers from unfair dismissal matters, but rather change the nature of legal work.⁷² Many lawyers and clients will act as co-producers of legal services. This practice is

⁶⁹ S Price quoted in J Smith, 'The changing regime of unfair dismissal', *Inside Retailing Magazine*, <<http://www.insideretailing.com.au/articles-page.aspx?articleType=ArticleView&articleId=2434>> (accessed 14 June 2008).

⁷⁰ WRA ss 658 and 824.

⁷¹ WRA s 658(7) (definition of costs); Workplace Relations Regulations 2006 (Cth) cl 2.12.7 and sch 7 (schedule of costs).

⁷² G Jolly quoted in Z Lyon, 'Labor's proposed unfair dismissal regime not escaping criticism' *Lawyers Weekly Online*, 6 December 2007, <http://www.lawyersweekly.com.au/articles/Labor-8217-s-proposed-unfair-dismissal-regime-not-escaping-criticism_z138340.htm> (accessed 14 June 2008).

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.⁷³ 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.⁷⁴ Yet lawyers do prepare statements of facts, case law summaries and settlement deeds on behalf of clients in preparation for the conciliation conference of an unpaid wages claim.

In contrast under the proposed legislation, the final conference may provide the parties with an opportunity to conciliate, but their case must be prepared on the assumption that a FWA officer will make the final decision. At a minimum, the litigants will be presenting the case before FWA and answering questions posed by a FWA officer. Lawyers may perform a variety of tasks such as provide legal advice on the client’s prospects; draft the application for reinstatement (if representing the employee) and witness statements; prepare trial materials (such as responses to likely questions asked by the FWA officer and list of relevant authorities) and devise a hearing strategy. Importantly, these legal costs are significant and may be avoided if conciliation, with its high settlement rate, is a separate forum of dispute resolution. Contrary to Labor’s plans, the unfair dismissal system will not leave lawyers “out of the picture”.⁷⁵ 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 prohibiting legal representation may reduce, but not necessarily extinguish, a client’s legal costs.

Unrepresented Litigant

Prohibiting legal representation before FWA will also increase the number of unrepresented litigants, known as Litigants in Person (“LIP”), in unfair dismissal matters. It is difficult to gauge the extent of any increase because the AIRC does not provide publicly available information about representation in termination matters at present. LIPs may act as co-producers with lawyers or industrial advocates during the unfair dismissal process or act alone. A prohibition on legal representation deprives parties of the choice to appoint a legal representative at the final conference. The reality is that some litigants will be unrepresented irrespective of any prohibition 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 proliferation of LIPs will undermine the fairness of the proposed unfair dismissal system in three ways:

- (a) exacerbate the power imbalance between employee and employer;
- (b) increase public costs; and
- (c) require the FWA officer to manage emotional costs.

Each of these elements will be discussed in turn.

Power imbalance

⁷³ M Millemann, N Gilfrich & R Granat, *Rethinking the Full-Service Representational Model: A Maryland Experiment*, <http://www.equaljustice.org/ethics/fulserv.htm> (accessed 24 December 2000).

⁷⁴ Industrial Relations Act 1999 (Qld) s 319(2)(b).

⁷⁵ Australian Labor Party, above n 1, at 18.

The unfair dismissal provisions under the *Workplace Relations Act 1996 (Cth)* (“WRA”) regulate employers that are constitutional corporations.⁷⁶ To be a constitutional corporation, the employer must be incorporated and either a foreign corporation or a trading or financial corporation.⁷⁷ 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.⁷⁸ 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 the source of the power imbalance between employer and employee. Whilst the employee is unrepresented at the final conference, the corporate employer can select a representative, being a natural person within the corporation, to act on its behalf. According to Professor Andrew Stewart and retired Federal Court judge 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.⁷⁹ As a consequence, the employer receives 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.⁸⁰ It is a recognition that parties are in most need of representation in cases entailing complex factual and/or legal issues.

Two studies involving LIPs in employment related matters identify the nature of this power imbalance between employee and employer. First, Chapman and Mason studied a series of complaints in the NSW discrimination jurisdiction, in which approximately half the complaints involved paid work relationships. The respondents to claims 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.⁸¹ 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 their assessment of a fair unfair dismissal process was being represented.⁸² 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.⁸³ Given that the final conference before FWA will be conducted informally, it is likely that LIPs will be exposed to similar emotional costs as those identified in Meredith’s study. In summary, the right to legal representation corrects a power imbalance which may otherwise undermine justice, an imbalance which is exacerbated by the complexity of the matter, and in which the employer has greater informational resources, financial resources and a physical presence that can increase an employee’s emotional costs.

⁷⁶ WRA s 6(1).

⁷⁷ WRA s 4; Australian Constitution s 51(xx).

⁷⁸ Corporations Act 2001 (Cth) s 124; *Salomon v Salomon & Co Ltd* [1897] AC 22; *Lee v Lee’s Air Farming Ltd* [1961] AC 12.

⁷⁹ Scott, above n 5. at p 6; Workplace Express, *Unfair dismissal plans will have to change, Labor ‘agnostic’ on unions, says Stewart*, 25 August 2008, <<http://www.workplaceexpress.com.au>> (accessed 31 August 2008).

⁸⁰ WRA s 100(6)(b).

⁸¹ A Chapman & G Mason, ‘Women, Sexual Preference and Discrimination Law: A Case Study of the NSW Jurisdiction’ (1999) 21 *SLR* 525 referred to in A Chapman, ‘Discrimination Complaint-Handling in NSW: The Paradox of Informal Dispute Resolution’ (2000) 22 *Sydney Law Review* 322 at 347.

⁸² Meredith, above n 65, at 16.

⁸³ *Ibid* at 19.

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;⁸⁴
- (b) requests for advice and assistance outside the administrative staff's scope (e.g. legal advice, preparation of documents);⁸⁵
- (c) inability to comply with court rules, procedures and properly complete court forms, thus impacting on case management;⁸⁶
- (d) placing judicial officers and court staff under high levels of stress;⁸⁷
- (e) lengthening disputes by raising irrelevant and ambiguous issues⁸⁸ and requiring adjudicators to assist them in procedures (e.g. cross-examination).⁸⁹ This has been described as “managerial judging” in the literature.⁹⁰

To the writers' knowledge, there has been no specific study on the impact of LIPs in the AIRC. However, the Australian Institute of Judicial Administration, as part of its report *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 of LIPs as a result of unfair dismissal and that typically problems arise from the LIPs lack of familiarity with relevant law, difficulty with language, prolixity and excess of emotion.⁹¹

The literature reveals that LIPs cause both a redistribution of costs from legal to public and an increase in public costs. In terms of redistribution, the High Court in *Cachia v Hanes*⁹² 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”.⁹³ In a FWA environment, unrepresented litigants will have substantial personal contact with FWA staff prior to the final conference, not a lawyer. 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 has no assistance in gathering and identifying the relevant facts, issues in dispute and law. This point was made previously in this Part under the “inquisitorial system”. FWA will spend considerable time and resources conducting these activities. Thus, prohibiting lawyers does not necessarily reduce the overall costs of the proposed unfair dismissal system and

⁸⁴ RD Nicholson, ‘Litigants in Person’ (2001) 5 *TJR* 181 at 199; Family Law Council, *Litigants in Person: A Report to the Attorney-General*, August 2000, para 2.31; H Gamble and R Mohr, *Litigants in person in the Federal Court of Australia and the Administrative Appeals Tribunal: a research note*, paper presented to the Australian Institute of Judicial Administration 16th Annual Conference, 4-6 September 1998.

⁸⁵ Nicholson, above n 84; Gamble et al, above n 84.

⁸⁶ Nicholson, above n 84; Family Law Council, above n 84, at para 2.56.

⁸⁷ J Dewar, B Smith and C Banks, *Litigants in Person in the Family Court of Australia*, Research Paper No. 20, Family Court of Australia, 2000.

⁸⁸ Gamble et al, above n 84 (based on interviews with opposing lawyers to LIP in the Federal Court).

⁸⁹ Stafford, above n 4 (reporting on comments made by Murray Wilcox QC in *The Economics and Labour Relations Review*); Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System*, Project No. 92, 1999, p 153.

⁹⁰ J Resnik, ‘Managerial Judges’ (1982) 96 *Harvard Law Review* 374 and ‘Managerial Judges: The Potential Costs’ (1985) 45 *Public Administration Review* 686.

⁹¹ Australian Institute of Judicial Administration Incorporated, *Litigants in Person Management Plans: issues for courts and tribunals*, Australian Institute of Judicial Administration, Carlton, 2001, Appendix 1.

⁹² (1994) 179 CLR 403.

⁹³ (1994) 179 CLR 403 at 415 (per Mason CJ, Brennan, Deane, Dawson and McHugh JJ).

raises an important issue of distributive justice – why should public costs be incurred with respect to a LIP who would have, but for the prohibition, engaged a legal representative?

Emotional costs

Many employees have some form of emotional attachment to the workplace. The workplace has been described as a community, its rise coinciding with a decline in the traditional conception of “community”.⁹⁴ 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 life”.⁹⁵ In her book *Married to the Job*, Dr 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”.⁹⁶ Philipson found that the work setting, social relationships and the sense of identity with the employer were key ingredients of the emotional attachment.⁹⁷ Conversely, termination of employment can have a devastating impact on the employee. Termination not only represents the loss of a job, but 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 manage the emotional aspects of termination for employees and, to a lesser extent, employers throughout the unfair dismissal process by acting as the dispassionate and rational representative. A party’s ability to see his or her own case objectively is often impaired by proximity and emotional involvement.⁹⁸ At the initial conference, the lawyer typically takes instructions shortly after termination when the client’s emotional costs of termination are high. The lawyer is the client’s emotional “sounding board” whilst conducting the task of separating relevant from irrelevant facts provided by the client. Whilst emotional costs are more prevalent in employees, they can apply to the employer (i.e. by their representatives). For example, the author previously represented an employer that terminated its manager on suspicion of fraud. However, no criminal charges were laid against the former employee 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), the likely compensation a Commission 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. Lawyer-client contact after the initial conference gives the client an outlet to vent its frustration about the other party and the lawyer an opportunity to redirect the client’s

⁹⁴ RD Putnam, *Bowling alone: the collapse and revival of American community*, Touchstone, New York, 2000; B Pocock, *The work-life collision: what work is doing to Australians and what we can do about it*, Federation Press, Sydney, 2003, pp 56 – 57.

⁹⁵ Ibid at pp 52-53.

⁹⁶ I Philipson, *Married to the Job: why we live to work and what we can do about it*, The Free Press, New York, 2002, p 117.

⁹⁷ Ibid at pp 17-18.

⁹⁸ Family Law Council, above n 84, at para 1.51.

attention to the legal issues. At conciliation and arbitration, the lawyer acts as an emotional buffer between decision-maker and client should emotions arise during either proceeding. As one lawyer put it in the context of the ART debate, lawyers are in a better position to “hose down” angry clients and tell them to “sit down and shut up”.⁹⁹

The absence of a legal representative and not the absence of legal knowledge is a great emotional challenge to LIPs.¹⁰⁰ Without legal representation, FWA will be responsible for managing the parties’ emotional costs. The emphasis on speed in the proposed unfair dismissal system, for instance the requirement to file a claim within 7 days of termination, means that the client’s emotional costs are less likely to subside prior to the final conference. In the period between termination and the final conference, FWA administrative staff are likely to have significant personal contact with the unrepresented employee, occupying FWA staff time and placing 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 final conference means that the FWA officer must perform the function of counsellor, in addition to its roles of fact finder 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. A FWA officer who spends time listening to and assisting with the management of an employees’ emotional costs at the final conference may also raise employer perceptions of bias. This sense of injustice undermines fairness and in some cases, may lead to an appeal (if there is such a mechanism in the proposed unfair dismissal system) if the decision goes against the employer, thereby generating further costs and inefficiency. It is maintained therefore that in this proposed inquisitorial system, the FWA final conference is an inappropriate forum to address the parties’ emotional costs.

Part VI: Recommendations

Part V demonstrated that the prohibition on legal representation fails the “fairness test”. Whilst the proposal is likely to reduce the parties’ legal costs, the existence of LIPs in an inquisitorial system without conciliation as a distinct dispute resolution function will increase public costs, create inefficiency and compromise justice. Our primary recommendation therefore is that the Rudd Labor government retains legal representation, and the present regulation of legal representation. The WRA may make the granting of leave for legal representation a formality (refer Part I), but FWA could similarly retain the discretion to prohibit legal representation on a number of grounds, including the lawyer’s capacity to assist the client and FWA. For example, FWA could prohibit legal representation because of a lawyer’s previous case history of not co-operating with FWA in its fact finding exercise. At present if representation rights are granted, the WRA deters lawyer conduct which would jeopardise fairness. Section 658(4) 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, the Commission can make an order requiring the representative to pay the first party’s costs. Further, a representative that pursues unmeritorious or

⁹⁹ MR Liverani, ‘Back to the Drawing Board for Tribunal Reformers: too many problems with proposed amalgamation’ (2001) 39(1) *Law Society Journal* 67 at 68.

¹⁰⁰ Australian Broadcasting Corporation, *Do it Yourself Litigation - Lawyer Free Justice?* ABC Radio National - The Law Report Transcript, 20 October 1999, <<http://www.abc.net.au/rn/talks/8.30/lawrpt/1stories/lr981020.htm>> (accessed 24 May 2000).

speculative proceedings is exposed to civil penalties.¹⁰¹ These provisions could be replicated, with modifications, in the proposed legislation.

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.¹⁰² 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 provide employees with a “Termination Information Statement” as soon as practicable following termination. 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 7 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 the legal cost element of the fairness equation. The WRA could adopt provisions from the *Family Law Rules 2004 (Cth)* which require the lawyer, before each court event (e.g. conciliation and 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.¹⁰³ In addition, if an offer to settle is made or received during the property case, the lawyer is obligated to disclose the actual and future costs to their client so that the client can determine the net settlement amount.¹⁰⁴ In the FWA environment, the parties would disclose to each other their actual and future costs prior to the final conference and the lawyer would make the same disclosure to their client should a settlement offer be made or received. The duty of disclosure thus enables parties to make an informed decision about progressing with the unfair dismissal process.

The final recommendation addresses the inevitable number of LIPs participating in the unfair dismissal system. With the fusion of conciliation and arbitration functions, LIPs will be required to prepare their case on the assumption that a FWA officer will make the final decision, irrespective of any opportunity the parties may be given to conciliate at the beginning of the conference. This has 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 in Part V above) and who can assist the FWA officer in the fact finding exercise. Dewar et al note that a Family Court registry trialled a similar process of individual management of a case by a registry officer from inception to appeal. The LIP received

¹⁰¹ WRA ss 676 and 679.

¹⁰² WRA s 340.

¹⁰³ Family Law Rules 2004 (Cth) r 19.04.

¹⁰⁴ Ibid r 19.03.

a business card from the registry officer and was encouraged to contact that person with any queries.¹⁰⁵

Conclusion

Fairness is the touchstone of the Rudd Labor government's workplace relations reforms. Julia Gillard has stated that the Commonwealth Government is prepared to "iron out as many unintended consequences as it needs in order to achieve our goal".¹⁰⁶ Prohibiting legal representation will not achieve the goal of fairness because it does not strike an appropriate balance among justice, efficiency and costs. Whilst this measure may reduce, it will not extinguish legal costs and this paper has demonstrated that in the proposed unfair dismissal environment, the lawyer's absence has the capacity to negatively impact justice, efficiency, public costs and emotional costs. Ironically, the authors have adopted many of the arguments proffered by Labor (including Julia Gillard) in opposing restrictions on legal representation under the failed ART Bill. We would maintain that by retaining legal representation and adopting minor amendments to the proposed unfair dismissal system, the Rudd Labor government would be taking important steps in passing the workplace reforms through its own fairness test.

¹⁰⁵ J Dewar, B Jerrard and F Bowd, 'Self-representing litigants: A Queensland perspective' (2002) 23 *The Queensland Lawyer* 65 at 75.

¹⁰⁶ J Gillard, *Fair Work Australia Summit Speech*, Fair Work Australia Summit, Sydney, 29 April 2008, <<http://mediacentre.dewr.gov.au/mediacentre/Gillard/Releases/FairWorkAustraliaSummit.htm>> (accessed 14 June 2008).