Summary of Decision

13 March 2014

New South Wales Bar Association v

B. McAuliffe; Australian Taxation Office

C2013/7046

1. The issues for determination in this appeal concern the proper interpretation and application of s.596 of the *Fair Work Act 2009* (Cth) (the FW Act), which regulates when a party may be represented by a lawyer or paid agent in proceedings before the Commission.

2. Section 596 provides, relevantly, as follows (excluding statutory notes):

> **596 Representation by lawyers and paid agents**
>
> (1) Except as provided by subsection (3) or the procedural rules, a person may be represented in a matter before the FWC (including by making an application or submission to the FWC on behalf of the person) by a lawyer or paid agent only with the permission of the FWC.
>
> (2) The FWC may grant permission for a person to be represented by a lawyer or paid agent in a matter before the FWC only if:
>
> (a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
>
> (b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or
>
> (c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter..."

3. The proper interpretation of s.596 was the subject of consideration by the Federal Court (Flick J) in *Warrell v Walton*[1], in which the Court said:

> "[24] A decision to grant or refuse "*permission*" for a party to be represented by "*a lawyer*" pursuant to s 596 cannot be properly characterised as a mere procedural decision. It is a decision which may fundamentally change the dynamics and manner in which a hearing is conducted. It is apparent from the very terms of s 596 that a party "*in a matter before FWA*" must normally appear on his own behalf. That normal position may only be departed from where an application for permission has been made and resolved in accordance with law, namely where only one or other of the requirements imposed by s 596(2) have been taken into account and considered. The constraints imposed by s 596(2) upon the discretionary power to grant permission reinforce the legislative intent that the granting of permission is far from a mere "*formal*" act to be acceded to upon the mere making of a request. Even if a request for representation is made, permission may be granted "*only if*" one or other of the requirements in s 596(2) is satisfied. Even if one or other of those requirements is satisfied, the satisfaction of any requirement is but the condition precedent to the subsequence exercise of the discretion conferred by s 596(2): i.e., "*FWA may grant permission...*". The satisfaction of any of the

> requirements set forth in s 596(2)(a) to (c) thus need not of itself dictate that the discretion is automatically to be exercised in favour of granting "*permission*"."

4. The Appeal Bench accepted as correct the analysis of s.596 in paragraph [24] of *Warrell* and said that grant or refusal of permission to be represented by lawyers inconsistent with the requirements of s.596, as construed in *Warrell*, would constitute an error of law capable of consideration in a s.604 appeal.

5. In the decision subject to appeal the Commissioner had refused the ATO's application for permission to be represented by a barrister but granted permission to be represented by a solicitor. The Appeal Bench held that there were two errors in the Commissioner's decision. The first error was that the Commissioner did not decide the issue by reference to the statutory criteria in s.596. The Appeal Bench said (at [23]):

> "[The Commissioner's] reasons were concerned with the purported unfairness to Mr McAuliffe which would result from the ATO being granted permission to be represented by Mr Cross. However, to the extent that unfairness falls to be considered under the s.596(2) criteria, it is (under paragraphs (b) and (c)) unfairness to the party applying for permission to be represented by a lawyer or agent that is required to be considered. It may be accepted that fairness between the parties is required to be taken into account under paragraph (c), but only as relevant to the determinant criterion, namely whether "it would be unfair not to allow the person to be represented". Mr Cross made submissions which went to all three criteria in s.596(2), and those submissions as earlier stated included the contention that it would be unfair to the ATO to refuse the permission which was sought. The Commissioner's reasons do not disclose that those submissions were considered and it is apparent from the Commissioner's reasons that the issue of representation was not determined by reference to the s.596(2) criteria."

6. The second error concerned the Commissioner's decision to, in effect, grant the ATO permission to be represented by its solicitor but refuse it permission to be represented by counsel. The Appeal Bench said (at [24]):

> "In doing so, what the Commissioner did in substance was to select who, from the ATO's legal team, would represent it at the hearing. That was not a course authorised by s.596. The power conferred by s.596(2) is simply to "*grant permission for a person to be represented by a lawyer or paid agent in a matter*". Nothing in that language suggests that the power extends to the selection of which particular lawyer or paid agent will represent a party applying for permission. In the proceedings below, the duty of the Commissioner was either to grant or refuse permission for the ATO to be represented by a lawyer. It was not within the power conferred on the Commission to choose who that lawyer would be either by reference to the individual identity of the lawyer or by reference to whether the lawyer was a barrister or a solicitor. We do not consider that the power in s.596 was intended to interfere with a party's right to choose who its legal representative (or paid agent) would be if permission was to be granted."

7. The Appeal Bench also noted that the ATO advanced the proposition that, in the exercise of its power under s.596(2), the Commission could not even have regard to who the lawyer or paid agent representing a party would be if an application for permission was to be granted. This would mean, for example, that in a matter with some minor legal complexity the Commission could not in deciding whether to grant or refuse permission take into account that a party proposed to be represented by senior counsel, or that it could not have regard to the fact that a particular paid agent in relation to whom permission was sought had been the subject of adverse integrity findings in earlier Commission decisions. The Appeal Bench doubted the correctness of this submission, given that under s.596(2) and consistent with the

analysis in *Warrell* it remains for the Commission to exercise a general discretion as to the grant of permission once any of the criteria in s.596(2) have been satisfied. However, the Appeal Bench did not consider it appropriate to determine this issue in a definitive way because it is not necessary for the disposition of this appeal to do so and because there was no proper contradictor in the appeal on that issue.

8. Despite concluding that the decision was attended by error the Appeal Bench refused permission to appeal for the following reasons:

> "Although we have identified two respects in which we consider that the Decision was attended by error, it does not follow that the grant of permission to appeal necessarily follows. The mere demonstration of error, without more, may not be sufficient to attract the public interest and require the grant of permission to appeal.[2] Further, the lack of any useful result which would follow the upholding of an appeal on the basis of identified appellable error may lead to permission to appeal being refused.[3] In this appeal, the ATO has positively denied that it was prejudiced by the Decision, and both the Association and the ATO actively seek to avoid any order being made by us which would have any impact upon the course of the proceedings before the Commissioner. In that circumstance, it is clear that there would be no utility in us granting permission to appeal, upholding the appeal and setting aside the decision. Indeed, were we to do so, on one reading of *Warrell* that would cast doubt upon the jurisdictional foundation for the substantive decision which the Commissioner will ultimately be required to make. We have therefore decided to refuse permission to appeal."

[2014] FWCFB 1663

- ***This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.***

- ENDS -

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[1] [2013] FCA 291
[2] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 at [26]-[27]; *Lawrence v Coal & Allied Mining Services Pty Ltd t/a Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [28], affirmed on judicial review in *Coal & Allied Mining ServicesPty Ltd v Lawler* [2011] FCAFC 54
[3] See *Ferrymen Pty Ltd v Maritime Union of* Australia [2013] FWCFB 8025 at [48] and the decisions there cited.