

# The 2023 Intensive Conference

“Staying ahead of  
the game”

Conference papers

## Staying Ahead of the Game: Conference Paper

### Fair Work and Small Claims for Underpayment of Wages: ADR expansion

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It is axiomatic that alternative dispute resolution underpins the workplace relations system: conciliation and arbitration have governed its evolution to a substantial extent<sup>1</sup> and these processes underpin the quotidian aspects of the operation of the Fair Work Commission.

It is also a jurisdiction where legal representation has been restricted<sup>2</sup> or excluded in the absence of leave being granted, a matter I will return to shortly.

This paper touches on a development that reinforces the use of alternative processes in underpayment of wages disputes at the same time as it reinforces the bias against lawyers in the *Fair Work Act, 2009 (Cth)* (FW Act).

All workplace relations lawyers need to come to grips with the provisions of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth)* (SJ Act). As one law firm states:

*The passage of the Act marks the most extensive industrial relations reform seen since the introduction of the Fair Work Act some 13 years ago, and the impact of this legislation is significant.*<sup>3</sup>

One aspect of the SJ Act is a change to the small claims process established by section 548 of the FW Act. These changes will take effect from 1 July 2023. The changes in Part 24 of the SJ Act increase the monetary cap on the amounts that can be awarded in small claims proceedings under the FW Act from \$20,000 to \$100,000. The SJ Act makes it clear that the monetary cap for small claims referred to in existing subsection 548 does not include any amount of interest that may be awarded under existing section 547.<sup>4</sup> There is also a change to the rule about costs in workplace relations matters: the SJ Act enables the court, in a small claims proceeding, to award a successful claimant any filing fees they paid to the court as costs, from the other party.

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<sup>1</sup> See s51(xxxv) Constitution, the conciliation and arbitration power. In 1993 the Keating Labor Government used the external affairs power to permit the inclusion of provisions that implemented international treaties or ILO Conventions and Recommendations. In 2006 the Howard Government passed the *Workplace Relations Amendment (Work Choices) Act (Cth)* where the primary source of Commonwealth power is the corporations power in s51(xx) Constitution.

<sup>2</sup> Set out in Mourell M and Cameron C *Neither Simple nor Fair – Restricting Legal Representation before Fair Work Australia* (2009) *Australian Journal of Labour Law* 51 and Salter A and Luck K *The restriction on legal representation before the Fair Work Commission: an end without means* *Employment Law Bulletin* July 2016 214. See s 596 *Fair Work Act, 2009 (Cth)* in relation for the seeking of permission to be represented by a lawyer or paid agent before the Fair Work Commission and Wilson J and Pender K *Enhancing or Denying Justice? Barriers to legal representation in the Fair Work Commission* <https://ballawyers.com.au/article/enhancing-or-denying-justice-barriers-to-legal-representation-in-the-fair-work-commission/>

<sup>3</sup> <https://www.herbertsmithfreehills.com/latest-thinking/the-australian-government-tables-secure-jobs-better-pay-bill-2022-what-it-means-for>

<sup>4</sup> This is an exception to the general rule as to costs under section 570 of the Fair Work Act

The rationale for these changes is set out in the Explanatory Memorandum for the Bill<sup>5</sup> thus:

*The small claims procedure provides the specified courts with the flexibility to dispose of small claims more simply, quickly and cheaply. For example, the court is not bound by any rules of evidence, and is also empowered to act in an informal manner and without regarding to legal forms and technicalities. The small claims procedure is available in the Federal Circuit and Family Court (Division 2) and state and territory magistrates' courts or their equivalent.*

*Increasing the small claims cap would expand access to the small claims procedure, enabling more claimants to benefit from its simpler, quicker and cheaper approach to dispute resolution.*<sup>6</sup>

As stated in the above extract, courts with jurisdiction in this context are a magistrates court or the Federal Circuit and Family Court of Australia.<sup>7</sup> Amounts recoverable through this procedure are in essence underpayment claims but are particularised in s548(1A)(a) FW Act as follows:

*An amount that an employer was required to pay to, or on behalf of, an employee:*

- *(i) under this Act or a fair work instrument; or*
- *(ii) because of a safety net contractual entitlement; or*
- *(iii) because of an entitlement of the employee arising under subsection 542(1).*

The seeking of a pecuniary penalty order under s546(1), a common occurrence with general protections claims, puts the claim outside of the ambit of the small claims procedure: s548(1)(a).

These changes are a mixed blessing. Currently, where employees bring claims through the usual court processes employers often settle those claims for a higher amount as employees seek for their own legal costs to be met. It seems that employers are likely to encounter an increase in underpayment claims through the small claims procedure. But at the same time, employers may incur reduced costs especially where they have in-house personnel who are familiar with the law around payroll issues.

Employers may be able to be represented by a lawyer where leave is granted by the court. In *Al Jorany v AHG Services (WA) Pty Ltd*<sup>8</sup> Kendall J summarised the factors that a Court

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<sup>5</sup> [https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6941\\_ems\\_d310a6ae-0ff2-4129-bc25-32c2bf274f86/upload\\_pdf/JC007910.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6941_ems_d310a6ae-0ff2-4129-bc25-32c2bf274f86/upload_pdf/JC007910.pdf;fileType=application%2Fpdf)

<sup>6</sup> Id paras 1091 and 1092

<sup>7</sup> See Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021 Division 30.4 regarding the conduct of small claims proceedings in the Fair Work Division of that court.

<sup>8</sup> [2019] FCCA 2598

would usually consider to be relevant in determining if leave ought to be granted for a party to be represented by a lawyer. These factors are not definitive:

- “the objects and purposes of the Small Claims Division and also of this Court to provide quick, informal and just resolutions of disputes without undue technicality;
- the complexity of the matters that arise on the face of the application, be it factual or legal, and whether a lawyer by reason of their training and expertise, might be of assistance to the Court;
- the familiarity, and competence, of the proposed legal representatives to provide assistance to the Court on the complexities or technicalities that arise;
- whether the party seeking leave to be represented has an in-house lawyer or employee capable of conducting the matter satisfactorily; and
- whether the other party (here the applicant) is represented by a lawyer and any prejudice or unfairness the other party may suffer if leave is granted.”<sup>9</sup>

In the particular case the apparent legal complexity before the court warranted leave being granted.<sup>10</sup> These factors have also been subsequently adopted<sup>11</sup> and would appear to be a useful guide when discussing potential representation with clients.

The use of resources in this frame of reference appears wasted. In my view, legal representation should be a right and the provisions of s548 and 596 of the FW Act changed. But for the present, staying ahead of the game means being aware of the change in small claims under the SJ Act as well as its other far-reaching provisions.<sup>12</sup>

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<sup>9</sup> Id at para 9

<sup>10</sup> Id para 25

<sup>11</sup> *Evans v Oxford Shop P/L* [2020] FCCA 2730

<sup>12</sup> For those regularly dealing with the Fair Work Commission this summary is a useful starting point: <https://www.fwc.gov.au/about-us/secure-jobs-better-pay-act-whats-changing>

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