

New unfair dismissal laws may find solicitors in conflict between their ability to balance defending themselves with their obligation to maintain legal professional privilege.



# Workplace Relations Amendments the pitfalls

by Mark Yorston and Frank Jones

Under “reforms” to the *Workplace Relations Amendment (Termination of Employment) Act* 2001 (the Act), where a practitioner has accepted uncritically the truthfulness of his or her client, that practitioner may find him or herself being fined.<sup>1</sup> This in turn may lead to a suggestion that the practitioner has not acted in a manner which was conducive to advancing the public interest in breach of s64(i) of the *Legal Practice Act* (Vic) 1996, raising the spectre of disciplinary proceedings under s137 of that Act.<sup>2</sup> Accordingly, the bar may be raised to a new level over which even experienced practitioners may find it difficult to jump.

## CIVIL PENALTIES

Section 40 of the Act amends Division 3 of Part IVA of the *Workplace Relations Act* 1996 by adding a new sub-division G entitled “Unmeritorious or speculative proceedings”.

Within this sub-division, s170HE provides that “the adviser must not encourage an employee to bring or an employer to defend an unfair termination application if:

- (a) on the facts that have been disclosed; or
- (b) on facts which ought reasonably to have been apparent to the adviser;

the adviser should have been or should have become aware that there was no reasonable prospect of either succeeding in the application or successfully defending the action.”

If, after the unfair termination application has been determined, dismissed or discontinued,<sup>3</sup> the opposing party or the Minister or Registrar or an applicable industry body wishes, that person or corporate entity may bring an application before the Federal Court<sup>4</sup> seeking an order under s170HI that the adviser be fined.<sup>5</sup>

The Court in determining such an application must have regard to:

- (a) the outcome of the application before the Australian Industrial Relations Commission (AIRC); and
- (b) the contents of any certificate issued by the AIRC under sub-sec 170CF(2) and, where applicable, sub-sec (4).<sup>6</sup>

While the first of those two factors will be self-evident, the issuing of the certificate itself may give rise to some difficulty as set out hereafter.

In order to make any claim for relief in respect of the termination of employment on the basis of any of the grounds set out in s170CE(1) of the *Workplace Relations Act*, an applicant must make an application,<sup>7</sup> attend a conciliation<sup>8</sup> and elect to proceed to arbitration.<sup>9</sup>

Section 170CF does not set out the manner in which a conciliation is to be conducted. However, in the AIRC’s information pamphlets it is noted that the conciliation is “not a trial or a mini-trial”, and that it is “informal and private”.

All practitioners recognise the benefits in attempting to resolve any dispute in a manner which allows the parties to participate in that resolution process at a time before costs have escalated (often to the point where costs themselves may inhibit the resolution of a matter).

The conciliation process, however, may of necessity involve the conciliator speaking to one legal adviser and/or his or her client privately and in circumstances where the product of that discussion is not communicated to the other adviser and/or his or her client.

In that circumstance, the conciliator may be in a better position than a party’s adviser to assess the relative strengths and weaknesses of a particular matter. On the basis of that knowledge, the conciliator may then issue a certificate which

might reflect that superior state of knowledge. The certificate may, in a circumstance where the conciliator has formed an adverse view of the prospects of success of the application, be accompanied by a request for further information which, if provided, will avoid a circumstance where the application is dismissed without further hearing. The fact remains that a certificate has been issued which comments adversely on the prospects of successfully bringing the application. It is that certificate which forms part of the basis of the Court's determination of whether the practitioner has acted improperly in permitting his or her client to continue in the prosecution of the application.

A further difficulty arises for the adviser and indeed for his or her client in that the conciliation is not necessarily conducted by a member of the AIRC.

It is clear that under s110(2) of the *Workplace Relations Act*, the procedures of the AIRC are, subject generally to the Act and the rules made thereunder, within the discretion of the AIRC.

Section 170CF(2)-(5) provides, however, that the process leading to the issuing of the certificate is to be carried out by the AIRC. Accordingly, if a conciliation has been carried out by a person who is not a member of the AIRC, then it would seem that when a certificate is issued, for it to have any validity it must be issued by the AIRC or a member thereof. That in turn would mean that the certificate was issued by a person who did not necessarily participate in the conciliation process.

While a more detailed consideration of these aspects than can be achieved in a brief article such as this may give the practitioner some comfort as to arguments which could be raised in the defence of any application before the court, an even more significant problem arises.<sup>10</sup>

Section 170HF(4) provides that nothing in sub-division G is to imply that for the purposes of an application under that section, the law relating to legal professional privilege is abrogated, or in any way affected.

The courts have long upheld the necessity and virtue of allowing legal professional privilege to exist, recognising the proper place it has to play in the administration of justice in our system.

The reader will recognise, however, the invidious position in which a practitioner facing an application of the type envisaged by this sub-division will be placed. He or she will be required to defend his or her actions without being able to disclose the full extent of the instructions which the practitioner received unless the client has waived privilege. One can easily imagine a situation where a client, for his or her own reasons, might decline to waive that privilege. In that circumstance, the practitioner may well be left in a situation where a proper explanation and defence exists but cannot be conveyed to the court without, by that act of communication, committing professional misconduct, thereby exposing the practitioner to disciplinary proceedings.

**POWER TO DISMISS**

Section 170CF(4)-(5) provides the AIRC with the power to dismiss an application if it forms a view that the application has no reasonable prospect of success.

It should be noted that the provision is silent as to the ability of the AIRC to deal, in a similar fashion, with a circumstance



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where the conciliator forms an unfavourable view of the prospects of an employer successfully defending an action.

We have already touched on the difficulty which may face the AIRC in issuing a certificate where the conciliation has not been carried out by a member of the AIRC and whether, in such a circumstance, it is able to be sufficiently "satisfied" to issue a certificate.

**First and second conciliation**

While no specific provision exists for the holding of more than one conciliation, an AIRC practice note<sup>11</sup> identifies that a second conciliation before a member of the AIRC can be requested.

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Obviously, if the second conciliation is held before a member, any potential difficulty with regard to the appropriate production of a certificate will be overcome.

This process will, of course, lead to an increase in costs and possible delay in the final resolution of the matter.

**Jurisdictional objection**

The new s170CEA facilitates the lodging of objections to jurisdiction. Provision is made for the hearing of such an objection as a preliminary point before any conciliation occurring, provided notice that the point is to be taken is given before the matter is referred to conciliation.

If the point is raised after the AIRC has commenced to deal with the matter, then the AIRC may deal with that point at any time convenient to it. In the writers' view, the conciliation process should be regarded as continuous, even if divided as it were between two separate attempts at conciliation.

**Fee disclosure**

The Act introduces a new requirement in s170CIA that a practitioner must disclose to the AIRC the financial basis on which the practitioner is undertaking work on behalf of the practitioner's client. It is difficult to see how the manner in which a practitioner is being paid could in any way be regarded as a relevant consideration to the matters which the AIRC is required to determine.

In the writers' view, this provision may be unconstitutional. A practical consideration of the effect of this section makes it difficult to see how it can be said to be relevant to the powers of the AIRC.<sup>12</sup> If the writers' view is correct then the matter ought to be resolved by the High Court.

**CONCLUSION**

1. In an effort to avoid the circumstances which have been outlined, it will be necessary for practitioners to be especially careful in taking instructions from their client in relation to any application for unfair dismissal.
2. Practitioners will also need to ensure that during the conciliation process any potential ambiguities are clarified with the conciliator during the course of the conciliation.
3. It may also be prudent for the practitioner to ask the conciliator whether any matters which may reflect adversely on a party's case have been communicated to the conciliator and not to that party. If the conciliator answers affirmatively without disclosing the detail of that communication, then an opportunity ought to be provided for the party to ask the other party directly the nature of that communication. If the other party refuses to disclose that particular communication, then that refusal ought to be noted in the AIRC's file.
4. It may also be prudent when completing a client service agreement to have the practitioner's client specifically agree that privilege will be waived in the event of an application under this sub-division being brought against the practitioner.
5. If counsel are briefed to appear on behalf of a party at the conciliation and the solicitor does not attend for the purpose of instructing counsel, the solicitor will need to ensure that the above matters have been dealt with adequately by counsel as it will not thereafter be open to the solicitor to

take any action against counsel in the event that some aspect is overlooked during counsel's appearance.

While it is clearly a matter for the AIRC and the Legislature to determine the future of these provisions it would, in the writers' view, be a significant step if the recent changes lead to a diminution in the effectiveness of the conciliation process generally and the benefits of the system of operation presently in use at the AIRC.<sup>13</sup> ■

**NOTES**

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1. Section 170(h)(i).
2. See the definition of "unsatisfactory conduct" in s137(b).
3. Section 170HF(3).
4. Section 170HF(1).
5. Section 170HI provides that the fine is to be an amount not greater than \$10,000 if the adviser is a body corporate or \$2000 if the adviser is not a body corporate.
6. Section 170HH.
7. Section 170CE(1).
8. Section 170CF.
9. Section 170CF(a).
10. The ability to delegate the functions of the AIRC to non-members may be open to question.
11. Practice Note – Victoria, 22 January 2002.
12. *Re Dingjan; ex parte Wagner* (1995) 183 CLR 323 per McHugh J at p368.
13. The statistical measure of the success of the conciliation process is, of itself, an adequate testament to the need to reinforce this process. See *Annual Report 2000-2001*, Australian Industrial Relations Commission – Work of the Commission, termination of employment matters.



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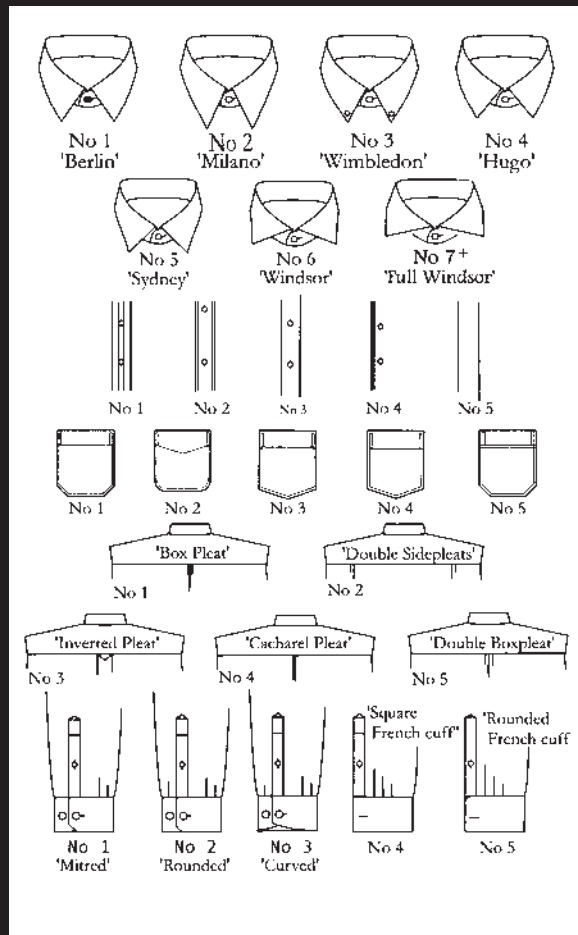
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