# THE LAST WORD …

**Schmahkritik,** (n) (German), 20th century; abusive criticism.

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As this edition of *Workplace Review* goes to press we are coming to the end of a very long election campaign. Election campaigns have long since been a competition of ideas or plans for the future of the nation. Slogans or three- to four-word tag lines repeated *ad nauseam* have become the major parties' *lingua franca* of campaigning. Please don't expect elections to reveal novel, well thought-out policies. Such, need to be the stuff discussed over cheese and cheap wine and by twenty dollars-an-hour focus groups before an unveiling. Modern electioneering is devoid of new ideas and reduced to beauty parades, controlled meetings *a la* North Korea, gaffes, "gotcha" moments and, alas, *schmahkritik.*

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The noun *intern* in the *New Shorter Oxford English* Dictionary has two definitions pertaining to workers: **1**. A recent medical graduate, resident and working under supervision in a hospital as part of his or her training. Chiefly N. American. L19; and, **2.** A person in any profession gaining practical experience under supervision. Chiefly N. American. E 20.

Unfortunately, in recent times the word has gained currency and an excuse in Australia to engage school leavers or recent graduates under the guise of training to perform work and to gain experience for no wages or payment well below minimum rates. Work experience for high school students whereby for a few days they are present at a workplace to observe work being performed or to act as supernumeraries is common and generally does not attract payment. However, anecdotally, young workers called interns seem to be working for weeks if not months performing actual work or fee-earning tasks for employers for no or little money. A particular area of concern relates to recent law graduates' requirement to have many weeks of Practical Legal Training (PLT) signed-off prior to admission as a lawyer. Some periods of PLT are unpaid even though work is being performed or the client is being charged for the task being performed. Such activities beyond pure training should be paid work. The Law Societies of the States and the Fair Work Ombudsman (FWO) should have close regard to such exploitation.

The FWO has already been successful in other industries where people wanting to build a profile on a CV or get a toe-hold in an industry get attracted by unpaid internships. The definition of "employee" in the *Fair Work Act 2009* (Cth) does not include someone on "vocational training". However, once the training ceases and productive work for the employer takes over a serious breach of the Act may take place. Big fines and orders for underpayment will be made. See *Fair Work Ombudsman v Crocmedia Pty Ltd* [2015] FCCA 140 and *Fair Work Ombudsman v AIMG BQ Pty Ltd* [2016] FCCA 1024.

One could also envisage, were a legal practitioner to engage in exploitative employment practices of a law student or newly minted lawyer, that a finding of professional misconduct might follow.

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I have two complaints about the operation of the *Fair Work Act* (the Act) which the next government of whatever persuasion ought to redress. One relates to costs, and the other to legal representation before the Fair Work Commission (FWC).

There are two provisions in the Act dealing with costs orders. One pertaining to proceedings arising under the Act in Federal, State or Territory courts, s 570, and one for proceedings before the FWC, s 611.The sections are not expressed exactly in the same terms but similarly do not permit the awarding of costs against a party save for the institution of proceedings vexatiously or without reasonable cause or permitting to be done an unreasonable act. Similar provisions on costs in the FWC and its predecessor tribunals have been around since before RJL Hawke blew the froth of his first Emu Bitter. In proceedings before the FWC such a costs regime is appropriate. However, the provision with respect to judicial proceedings in courts has a real tendency to work an injustice against exploited and

 

vulnerable workers. The usual kinds of judicial proceedings arising under the Act have been for award wages and conditions and statutory leave enforcement. With few workers members of trade unions and with the Fair Work Ombudsman not having either the resources or the will to take on small matters, many such cases will not be pursued. If a real contest arises in relation to an alleged unpaid entitlement of $10K to $20K the costs of the proceedings may well be subsumed in the verdict for the underpayment ordered. In such circumstances a lawyer acting ethically and transparently with a client needs to advise the marginal return such a suit might engender. Wage and leave enforcement proceedings were grist for the mill in what used to be the busy Chief Industrial Magistrate's Court wherein "costs followed the event". Moreover, applicants in important and complex cases before the Federal Circuit Court and the Federal Court in proceedings arising under the Act can be run ragged by respondents with deep pockets. Not much "fair" in the eponymously named statute about that.

My next bugaboo under the Act relates to legal representation before the FWC. Restrictions on the use of lawyers in proceedings, save for those who are employees or officers of registered organisations, peak councils or who are bargaining representatives, are to be found in s 596 of the Act. Permission to appear based upon discretionary grounds of efficiency, complexity, and fairness has generally been granted by the FWC and its predecessor tribunals. This was the position prior to Justice Flick's decision in *Warrell v Walton* [2013] FCA 291 (*Warrell*). *Warrell* complies with the adage that "hard cases make bad law". *Warrell* was an unfair dismissal claim brought before the FWC. The applicant was self-represented and was said to be "functionally illiterate and brain damaged". The employer was represented by a lawyer whose application to appear as a lawyer and the permission for it was impliedly granted without regard to the reasons required by s 596(2).The applicant was cross-examined by a lawyer and the applicant, without the skill and training of a lawyer, had to cross-examine the respondent's witness. The applicant lost at first instance and on appeal to the Full Bench of the FWC. The proceedings then came before the Federal Court on an Originating Application seeking to set aside the decision of the Full Bench. The application was successful. Its success was because the court noted the lack of reasons for granting permission for the employer to be represented by a lawyer and because the proceedings were thereafter not conducted on a "fair and just" basis.

Justice Flick stated at [25]:

> "The appearance of lawyers to represent the interests of parties to a hearing runs the very real risk that what was intended by the legislature to be an informal procedure will be burdened by unnecessary formality."

That has not been my almost four decades long experience of appearing in industrial tribunals. Some cases do not require lawyers in the FWC, however, I am in firm agreement with what Deputy President Sams said in *Applicant v Respondent* [2014] FWC 2860 that in most cases of any complexity, the presence of lawyers acting in the case would make the matter run more efficiently.

The focus on the reasons required by s 596(2) has led to some bizarre results, for example, when one Commissioner refused permission for a party's barrister appearing because the other side "only" had a solicitor acting. What has happened is another layer of procedure and costs has been added to proceedings. A party wishing a lawyer to appear needs to make a prior written application spelling out the basis as to why permission ought be granted, which application can be opposed by the other side in writing. Perhaps s 596 needs to be liberally re-worded.

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In the previous piece I referred to the adage "Hard cases make bad law". In the anti-trust case brought during the first term of President Theodore Roosevelt, *Northern Securities Co v United States* 193 US 197 at 400-401, Justice Oliver Wendell Holmes, Jr (in dissent) (1904) said:

> "Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic

pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

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The UK App *Legal Cheek* recently recorded a few entries in a law-themed poetry quiz. My two favourite entries are as follows:

"*O Romeo, Romeo! wherefore art thou*
*Romeo*
*Persons stepping onto this balcony do so at their own risk*"
By Chris Dale #barristerpoetry;

"*Two roads diverged in a wood,and I took the one less travelled by,*
*Which the defendant owed a statutory duty to maintain*."
By Nigel Poole QC #barristerpoetry

*Jeffrey Phillips SC*
*Denman Chambers, Sydney*

 