

Personal details

First name

John

Last name

Theodorsen

Organisation

Theodorsen Industrial Relations

Options that could be implemented internally

The Commission could provide parties with a fact sheet about representation in the Commission Support

Members and conciliators (where applicable under the GP delegation) could determine applications under s. 596 prior to any conciliation, conference or hearing involving a paid agent Support

Members and conciliators collaborate and share information about their experiences in proceedings with paid agents to promote a consistent and predictable response to issues such as permission to appear Support

At the beginning of any conciliation, conference or hearing involving a paid agent, the Member or conciliator would provide information about representation and settlements at the Commission Support

At the beginning of any conciliation, conference or hearing involving a paid agent, the Member or conciliator would: ask the paid agent to confirm, to the client and the Commission only, for their client's benefit what their payment arrangement with the client is, including fees incurred to date and the anticipated costs of the next stage of the proceedings (if a paid agent would continue to act), and to confirm if the fee structures will change should permission to appear not be granted Neutral

A dedicated group of experienced conciliators could take on all conciliations involving paid agents that have repeatedly been the subject of complaints about challenging behaviour to ensure consistency in approach Support

Update current pages on the Commission's website about representation by paid agents to add: what happens if a matter does not resolve and proceeds to court (i.e. no representation by paid agents in the FCA or FCFA as of right), and further examples of paid agent conduct the Commission receives complaints about Support

Invite paid agents to voluntarily agree to a code of conduct, and publish the details of agents who have done so on the website. Support

Identify an appropriate test case to consider costs orders under s.376 where the paid agent has submitted a GP or UD application where it should have been reasonably apparent that the applicant had no reasonable prospect of success in the dispute (noting that this would require an application to be made by the other party – the Commission could not make such orders on its own motion)

Oppose

Align the Commission's usual terms of settlement to provide only for payment of settlement funds into a bank account belonging to the Applicant

Support

Amend the Fair Work Commission Rules to stipulate that Notices of Discontinuance may only be filed by Applicants or their legal representatives

Oppose

Use the field below to make written submissions about internal options

My firm is a registered industrial agent under the Western Australian legislation. Paid agents can play a useful role in supporting parties who do not have the means to engage a lawyer, but only if they are competent, maintain high ethical standards and ensure their fees are transparent and reasonable.

Legitimate concerns have been raised in the Fair Work Commission and the WA Industrial Relations Commission concerning the conduct of some agents. I believe the concerns are such that legislation regulating paid agents is an appropriate response. Nonetheless, I support most of the internal options as an alternative or supplement to regulation, except:

- I am not sure that a test case would do more than restate the existing legal principles concerning costs, and it could be an expensive and time-consuming exercise
- a detailed discussion of fee arrangements at the start of conferences and hearings may be cumbersome, and there may be a more efficient way to ensure that agents properly disclose the basis of their fees and estimated costs
- experience suggests that leaving it to the applicant to file a Notice of Discontinuance may result in such notices not being filed in many cases, causing inconvenience to the Commission and the other party.

Options involving other agencies or organisations

Establish a referral arrangement with Community Legal Centres or other pro bono legal services to provide advice to applicants that claim they have not received settlement monies

Support

Refresh arrangements to refer complaints to the ACCC

Support

Use the field below to make written submissions about options involving other agencies or organisations

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Options involving proposals for legislative change

Amend the Act to provide a system for the Commission to register paid agents

Support

Amend s.596 of the Act to make clear that the Commission can take into consideration the capacity of the particular lawyer or paid agent to represent the person concerned

Neutral

Use the field below to make written submissions about options involving legislative change

For the reasons mentioned earlier, legislation providing for the registration of paid agents would be a positive step.

The Western Australian legislation provides a useful starting point for consideration. However, there is a potential gap in the WA legislation in that although there is a mandatory Code of Conduct, there is no effective scheme to enforce compliance (the problem of a lack of supervision was noted by Scott CC in *Maher v Trustee for The Croker Unit Trust* [2019] WAIRC 245 at [21]).

To be effective, a registration system should allow Members of the Commission and other affected parties to refer a complaint concerning an agent's conduct and provide a disciplinary process with appropriate sanctions, including deregistration in the case of serious misconduct.

As to the proposed amendment to s 596 of the Act, it may be cumbersome to require the Commission to consider the capacity of a lawyer or paid agent to represent a person in each case. It might be preferable to develop registration criteria that ensure that agents appearing before the Commission have a basic level of competence.

Final thoughts

Do you have any further suggestions you would like to put forward in response to the issues posed in the options paper?

As discussed earlier, legislation providing a system for the registration of agents could effectively address concerns about their conduct in Commission proceedings and enhance protection for clients. The regulatory framework should include an effective system for making and investigating complaints and appropriate disciplinary sanctions for misconduct.

What has been your experience with paid agents and the Commission?

I have appeared in Commission matters as a paid agent. Other agents and legal practitioners I have encountered have generally been competent and courteous. In my experience, only a small minority of agents (and one or two legal practitioners) have misunderstood the Commission's processes or failed to appreciate the relevant facts and issues, which has made proceedings more drawn-out and stressful than they need to be.

Are there any other issues or considerations related to paid agents and the Commission you would like to raise?

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