

Personal details

First name

Susan

Last name

Bastian

Organisation

Department of the Registrar, Western Australian Industrial Relations Commission

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 FCFCAs 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. Neutral

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)

Neutral

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

The Department of the Registrar, Western Australian Industrial Relations Commission (Department) provides administrative support and infrastructure to The Western Australian Industrial Relations Commission (WAIRC), the Industrial Magistrates Court of Western Australia (IMCWA) and the Western Australian Industrial Appeal Court (WAIAC). The Department welcomes the opportunity to make a submission to the Fair Work Commission (Commission) on the Paid agents and the Fair Work Commission consultation paper (Options Paper). The Department is well placed to make a submission to the Commission in response to the Options Paper due to similarity of issues experienced with challenging paid agent conduct and knowledge gained from working within the paid agent registration system that exists in Western Australia. If further information would assist, please do not hesitate to contact.

The Department makes the below comments in relation to Table 5.

Table 5, Option 1:

The Department supports the provision of a fact sheet.

The Department believes consideration should be given to including information about the following in the fact sheet: 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. Paid agents could also be required to disclose whether they will continue to act after the conciliation and provide a representation of anticipated future costs.

See comments on Table 5, Option 4 for related considerations.

Table 5, Option 4:

The Department supports, at the beginning of any conciliation, conference or hearing involving a paid agent, the Member or conciliator would explain that: representation is not required in Commission proceedings; the Commission is generally a no cost jurisdiction; and, if a monetary

settlement is agreed, the Commission's standard terms of settlement provide that the respondent will pay funds directly into the bank account on record held by the applicant.

The Department recommends further consideration be given to asking for the paid agent to confirm detailed current and anticipated costs arrangements with their client at the beginning of any conciliation, conference or hearing. This is due to the potential destabilising effect such a conversation could have on a party about to engage in a conciliation, conference or hearing process. Potential destabilising effects could be mitigated through: Prior notice to the party that such confirmation will be asked for. See comments on Table 5, Option 1 for related considerations; and, Outlining of options available to the party if they no longer feel comfortable to proceed with the current Commission listing, such as an adjournment to a later date.

Table 5, Option 7:

The Department supports the amendment of the Act to provide for the Commission to register paid agents and for this registration to require adherence to a code of conduct. See comments on Table 7, Option 10 for related considerations.

In the absence of legislative change, the Department supports a voluntary code of conduct and the Commission publishing the details of agents who have agreed to it on the website.

Table 5, Option 10:

The Department notes that the preparation and lodgment of forms, including Notices of Discontinuance, are a fundamental aspect of paid agent representation work. Given the fundamental nature of this work, the Department opposes amending the Fair Work Commission Rules to exclude paid agents from the filing of Notices of Discontinuance.

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

The Department makes the below comments in relation to options involving other agencies or organisations.

The Department supports the Commission's work to manage challenging paid agent conduct and notes the existence and impact of challenging paid agent conduct in the Western Australian jurisdiction. See for example *Shaun Maher v The Trustee for the Crocker Unit Trust (2019) WAIRC 00245 (Maher Case)*. Accordingly the Department supports a formal collaborative communication strategy be established between the Commission and the Department. This could take the form of a notification system to alert of challenging paid agent conduct when there is potential cross-

jurisdictional impact. This would be particularly relevant where the conduct may impact on the registration or continuing registration of a paid agent. See comments on Table 7, Option 10 for related considerations.

The Department encourages consideration be given to potential communication and notification options involving legal practice boards when a paid agent, or potential paid agent, is a disqualified person as defined in section 6(1) of the Legal Profession Uniform Law (WA). See comments on Table 7, Option 10 for related considerations.

The Department notes the Commission may wish to consider notifying relevant professional indemnity insurance entities when a paid agent engages in challenging conduct.

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

The Department makes the below comments in relation to Table 7, Option 10.

The Department strongly supports the option to provide a system for the Commission to register paid agents.

The Commission notes the Options Paper at [33] – [35] refers to the paid agent registration system that exists in Western Australia (WA System). For context and clarity, the Department provides the following particulars and commentary on the WA System:

Registration

It is advised that under the current system in Western Australia, the Registrar of the Western Australian Industrial Relations Commission, pursuant to section 112A of the Industrial Relations Act 1979 (WA) and regulation 6(1) of the Industrial Relations (Industrial Agents) Regulations 1997, is to grant an application for registration if the following two requirements are met:

1. There is no admission by the applicant of a criminal record for the last 10 years prior to making the application and no written objection has been lodged with the Registrar on the ground that the applicant is not a fit and proper person because of the criminal record of the applicant; and
2. The applicant produces evidence that the applicant holds professional indemnity insurance or other resources to provide professional indemnity insurance.

It should be noted that a person is disqualified from registration in the WA System if they are a disqualified person as defined in section 6(1) of the Legal Profession Uniform Law (WA). This disqualification criterion was introduced in 2022 to address circumstances previous where the WA System required the Registrar to register former legal practitioners struck off the roll of the Supreme Court of Western Australia if the forementioned two requirements were met. See comments on

Table 6, Options involving other agencies or organisations for related considerations.

The WA System has no registration requirements for an applicant to demonstrate they hold qualifications or experiences relevant to acting as a paid agent. Once registered in the WA System, a paid agent has standing to represent clients in the WAIRC, IMCWA and WAIAC. This is relevant, as noted at [21] in the Maher Case, because registration as a paid agent provides an agent ‘some level of credibility in the eyes of those who seek to be advised and represented on important matters relating to their employment, their businesses and their livelihoods. ... Because the industrial agent is registered under the Act, any person seeking advice or representation would be entitled to assume that such registration brings an indication of the quality of service.’ Given this, the Department notes the potential benefits of a paid agent registration system which prescribes demonstrated experience, knowledge, and fit and proper person test. The Department further notes that the legislative regime for the registration of paid agents in South Australia (SA System) appears to provide for this, particularly section 26(2)(a) of the Fair Work Act 1994 (SA) and regulation 6 of the Fair Work (Representation) Regulations 2009.

Continuing Registration

Registration has effect for five years and it is a condition of every registration that the paid agent is to comply with the code of conduct set out in Schedule 1 of the Industrial Relations (Industrial Agents) Regulations 1997. If a client of a paid agent lodges a written complaint with the Registrar, alleging that the paid agent may have failed to comply with the code of conduct, the Registrar is to conduct an inquiry into the complaint. If the Registrar makes a determination that there are reasonable grounds for the complaint, the Registrar’s only power is to attempt to resolve the complaint by conciliation. If the complaint is not resolved by conciliation, the complainant may initiate proceedings in the IMCWA before an Industrial Magistrate. If the Industrial Magistrate finds a paid agent failed to comply with the code of conduct, the Industrial Magistrate may reprimand the paid agent or cancel the paid agent’s registration and disqualify registration. The Department notes this process is lengthy and reactive in nature. The Department further notes there have been no matters in the WA System where this process has resulted in a paid agent’s registration being cancelled.

The Department notes, in contrast, that the SA System, pursuant to section 27 of the Fair Work Act 1994 (SA), allows the Registrar to inquire into the conduct of a paid agent to determine whether grounds for disciplinary action exist. Grounds consist of committing a breach of the code of conduct or the fit and proper person test. If grounds for disciplinary action exist, the Registrar can either suspend or cancel the paid agent’s registration. The Department notes this presents, on its face, as an efficient and proactive model of regulating the conduct of paid agents once registered.

Final thoughts

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

{Empty}

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

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

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