



Fair Work
Commission

Paid Agents and the Fair Work Commission

Report and Recommendations

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Background

[1] A lawyer or paid agent can represent parties in matters before the Fair Work Commission (Commission). They must receive permission under s 596(2) of the *Fair Work Act 2009* (FW Act) and the *Fair Work Commission Rules 2024* (FWC Rules) unless ss 596(3) or (4) of the FW Act or r 13(1) of the FWC Rules applies.

[2] A decision whether to grant permission in accordance with s 592(2) is a two-step process. As explained by the Federal Court of Australia in *Warrell v Fair Work Australia*,¹ for the first step, ‘permission may be granted “only if” one or other of the requirements in s 596(2) is satisfied’² and, for the second step:

...[e]ven if one or other of those requirements is satisfied, the satisfaction of any requirement is but the condition precedent to the [subsequent] exercise of the discretion conferred by s 596(2): i.e., “FWA may grant permission...”. The satisfaction of any of the requirements set forth in s 596(2)(a) to (c) thus need not of itself dictate that the discretion is automatically to be exercised in favour of granting “permission”.³

[3] Paid agents are not lawyers, but they charge or receive a fee to represent a person in a matter before the Commission. Lawyers are regulated. They are required to be registered and are subject to professional conduct rules and codes of ethics and may be referred to the relevant regulatory body if they fail to meet those standards. Paid agents are not regulated and have no minimum requirements for conduct, experience or qualifications.

[4] In unfair dismissal (UD) matters, almost half (47 per cent) of applicants have some kind of representation. Where there is a representative in a UD matter, in 30 per cent of occasions it is one of a group of 8 paid agents who regularly appear in UD and general protections (GP) matters (regular paid agent). In GP matters, over half (59 per cent) of applicants have some kind of representative and where there is a representative in a GP matter, in 23 per cent of occasions it is a regular paid agent.

[5] While many paid agents are competent professionals, Members and staff sometimes experience conduct on the part of paid agents that may not be in the best interest of the paid agent’s client, may not assist the Commission to exercise its powers in a manner that is efficient or quick or may otherwise be concerning. At other times parties have complained to the Commission about the conduct or practices of paid agents.

[6] Concerns identified about paid agent conduct included concerns regarding:

- payment arrangements and fee structures;
- quality of representation;
- whether the paid agent is contactable;
- aggressive conduct towards conciliators;

¹ [2013] FCA 291, 233 IR 335.

² *Ibid* [24].

³ *Ibid* (emphasis in original).

- misleading clients to mistakenly believe that the paid agent is a part of the Commission or a legal representative;
- agents acting contrary to or without instructions; and
- other conduct during proceedings including ceasing to act in a way that prejudices their client.

[7] The Full Bench decision in *Howell v Elite Elevators Corporation Pty Ltd*⁴ of 22 December 2023, and the subsequent recommendation made by the President in the matter on 24 January 2024,⁵ exemplified instances of the above conduct on the part of one particular paid agent then frequently appearing in UD and GP matters before the Commission.

[8] As a result of complaints about and reports of such conduct, and the Full Bench decision and the recommendation identified above, a Paid Agents Working Group (working group) was established at the direction of the President in January 2024 to review the procedures applicable to the participation of paid agents in Commission proceedings. The working group consisted of three presidential members of the Commission and a number of senior staff.

[9] The objective of the working group was to identify measures aimed at ensuring that all paid agents appearing before the Commission:

- conduct themselves in an ethical and honest manner;
- act in the best interests of the parties they represent; and
- operate in accordance with standards that are broadly consistent with what would be expected of a lawyer in the same circumstances.

Consultation process

[10] The working group published an Options Paper on 7 March 2024 (options paper) and invited submissions in response from stakeholders on the paper. Written submissions were received until 21 March 2024. The working group received some requests for extensions to provide submissions, which were granted.

[11] The working group received 44 written submissions, which were published on the Commission's website. These submissions came from individual members of the community, paid agents, law firms, unions, community legal services, law societies, employer associations and other state and federal organisations.

[12] During April 2024, the working group held public, in-person consultations in Brisbane, Sydney, Melbourne and online (on request for any party who could not physically attend due to being in another State or Territory). Eighteen organisations participated in those consultation meetings.

[13] The working group also held meetings with the Western Australian Industrial Relations Commission (WAIRC), the Australian Competition and Consumer Commission (ACCC), the South

⁴ [2023] FWCFB 265.

⁵ [2024] FWC 206.

Australian Employment Tribunal (SAET), the Federal Court of Australia and the Federal Circuit and Family Court of Australia.

[14] The consultation process confirmed that many stakeholders had observed challenging paid agent conduct consistent with the observations made in the options paper. Some submissions raised additional concerns about paid agent conduct, including:

- the risk that paid agents may participate in unqualified legal practice;
- the failure of paid agents to not accurately represent that they are not a lawyer, and potentially engaging in misleading and deceptive conduct;
- persons who have been struck off the roll of legal practitioners acting as paid agents, potentially undermining the actions and intent of outcomes of regulatory bodies for the legal profession; and
- the practice of some paid agents to lodge ‘pro forma’ or ‘template’ applications which do not address the specific facts and circumstances of the matter.

[15] The consultation process also made clear that there are many competent and ethical paid agents who provide a valuable contribution to the efficient resolution of disputes in the Australian industrial relations system. Many paid agent stakeholders wanted to ensure a targeted approach was taken rather than implementing measures that impacted all paid agents disproportionately.

Massey & Ors v Brighter Access Ltd & Ors

[16] On 23 August 2024, a Full Bench of the Commission issued a decision (*Jane Massey & Ors v Brighter Access Ltd & Ors*⁶) which determined applications in 46 UD and GP matters for representation by a paid agent, Employee Claims Pty Ltd trading as Employee Dismissals (ED). In its decision, the Full Bench made findings concerning ED’s conduct, which included:

- Misleading conduct such as making false assertions that ED had reversed more than 1000 dismissals for employees around Australia, or that the Commission would determine certain matters in circumstances where the Commission’s statutory role was confined to mediation or conciliation, or that ED could certify that claims were not frivolous or vexatious and enjoyed reasonable prospects of success.
- Unethical conduct, such as
 - asserting a ‘No Win No Fee Guarantee’ to clients, in circumstances where the ‘Guarantee’ was couched in terms that required seven conditions to be met resulting in employees often not receiving any payment despite reaching a settlement;
 - pressuring employees to act promptly, within 24 hours, despite the 21-day time periods for the filing of UD and GP applications prescribed by the FW Act;
 - accepting signed costs agreements from employees returned in a relatively short time (on one occasion in less than a minute) despite their length (seven pages)

⁶ [2024] FWCFB 353.

and complexity, which costs agreements included an irrevocable authority for ED to receive any settlement funds by electronic transfer to a bank account held by ED;

- applying a pro-forma approach to the completion of applications that failed to consider the unique circumstances of a particular case, resulting in poor or misleading advice as to prospects and inadequate assessment or prosecution of claims;
 - non-payment of fees leading to the dismissal of applications for UD remedies or GP claims;
 - failing to file notices of discontinuance when matters settled; and
- inadequate client communication such as ambiguity around the scope of work to be covered by the fee paid, lack of communication leading to delays and confusion in proceedings or simply not responding to correspondence from clients, other parties and/or the Commission.

[17] The Full Bench ultimately declined to grant permission for ED to represent the applicants as a consequence of its findings about ED's conduct. The Full Bench noted that a different view might be reached if the parties sought to be represented by other paid agents or lawyers.

[18] The working group has taken into account the findings in the Full Bench's decision.

Recommendations for action

[19] The options paper identified a number of reform proposals. The working group recommends that the Commission implement options 2, 3, 4, 6, 9 and 11. In addition, it also recommends the implementation of additional outcomes following submissions from stakeholders. The working group's recommendations are as follows.

Recommendation 1 – Members and conciliators (where applicable under the delegation of GP conciliation powers to staff members) will determine applications under s 596 for representation by a paid agent prior to any conciliation, conference or hearing.

[20] The Commission's National Practice Leader for Unfair Dismissal and General Protections (NPL) will work with the Commission's Dispute Resolution and Support Services Branch to put in place arrangements for the implementation. These arrangements are likely to include:

- allocating matters to Members to determine procedural issues, including permission to appear, prior to further allocation through UP and GP case management processes (including staff conciliation);
- for matters allocated directly to a Member for ongoing case management, the Member will determine permission in the ordinary course; and

- the establishment of a dedicated group of experienced conciliators to be primarily tasked with dealing with any paid agents who have been identified as the subject of repeated complaints to the Commission to provide appropriate advice to the NPL.

[21] Submissions from stakeholders indicated broad support for this option.

[22] The Commission will implement more frequent internal consultation between staff conciliators, associates, Members and the NPL to ensure emerging issues are identified and consistent case management processes are implemented.

[23] The Commission will also consider if there is a suitable way to log and respond to internal reports of challenging paid agent conduct between work areas for external referral, where appropriate.

Recommendation 2 – Disclosure of costs arrangements at the commencement of conciliation processes

[24] The Commission will implement a process whereby prior to, or at the commencement of, any conciliation in a UD or GP matter, lawyers and paid agents will be required to disclose to their client and the Commission only (on a strictly confidential and without prejudice basis, with a copy to their own client) an estimate of existing and anticipated costs and the arrangements with the client for the payment of costs. This model will be broadly commensurate with the approach taken for mediation in the Federal Court of Australia.

[25] The Commission will also develop a plain language checklist, declaration or form for use in matters with paid agents to confirm that they have provided key information related to seeking permission to represent and any terms of settlement reached in the Commission, existing fee arrangements, intention to continue to act after conciliation, and incurred and anticipated future costs, among other items. If the form is not filed, the conciliator or Member may either refuse permission or run through the questions at the commencement of a conciliation/conference.

Recommendation 3 – Enhancement of information about representation on the Commission’s website

[26] Noting the observations by stakeholders during consultation that persons engaging a paid agent may not clearly understand the distinction between a paid agent and lawyer, the Commission will take steps to update its existing resources, and develop new resources, designed to support parties who wish to have or are considering representation by a paid agent.

[27] The Commission will update content on its website about representation by paid agents to:

- clarify the distinction between paid agents and lawyers as representatives in the Commission, (the Commission will also conduct a review of the Form F53);⁷

⁷ See [‘Notify us that you have a representative, or that they plan to act for you \(Form F53\)’](#), Fair Work Commission (Web Page).

- provide guidance to paid agents and their clients about Commission expectations as a part of a practice note or fact sheet; and
- include a fact sheet for clients of paid agents and make this available on the website. The lodgement forms will require attestation by the client that a fact sheet was provided.

[28] The Commission will also update content on the website about representation by paid agents to:

- add further information about what happens if a matter does not resolve and proceeds to court (i.e. that there is no right to representation by paid agents in the Federal Court of Australia or Federal Circuit and Family Court of Australia);
- provide further examples of paid agent conduct and complaints that the Commission receives; and
- provide a fact sheet to explain how to make complaints to local Fair Trading Offices, the ACCC and the legal assistance sector concerning the conduct of paid agents.

Recommendation 4 – The Commission’s standard terms of settlement should provide only for the payment of the settlement amount into a bank account belonging to the applicant

[29] The Commission utilises standard terms of settlement in the conciliation of UD and GP matters. These terms of settlement are intended to facilitate an agreed outcome, but parties may agree to modify or replace the standard terms.

[30] In February 2024, the President of the Commission directed that the Commission’s standard terms of settlement in UD and GP matters be amended to indicate that the default position is that settlement sums should be paid into an account in the applicant’s name. This includes matters where the applicant is represented by a lawyer, paid agent or registered organisation. This will ensure that the applicant will receive the benefit of any agreed settlement sum. The payment of any costs owing by an applicant to a paid agent or lawyer will be a matter for them to arrange outside of the Commission’s conciliation process.

[31] This measure will be maintained following the conclusion of the consultation process. It remains open for an applicant and respondent to negotiate terms of settlement that depart from the Commission’s standard terms.

Recommendation 5 – Enhance referral arrangements with Community Legal Centres and other pro bono legal services

[32] The Commission notes the valuable contribution that the legal assistance sector has in the Commission’s jurisdiction and the Australian community more broadly. The Commission also acknowledges the work of partner organisations in the Workplace Advice Service in assisting parties in the first instance.⁸

⁸ [‘Legal advice from the Workplace Advice Service’](#), *Fair Work Commission* (Web Page).

[33] Many stakeholders, including those from the legal assistance sector, indicated their support to improve referral arrangements to address challenging paid agent conduct (taking into account the need for ongoing and adequate funding and limitations in the scope of services that may arise).

[34] The Commission will establish a Legal Assistance Sector stakeholder user group. This group will be a key liaison point through which the Commission will explore refreshing and strengthening our referral processes more generally in the legal assistance sector.

[35] The Commission will also update its website to include information about referrals in the legal assistance sector.

[36] Noting the significant level of interest from stakeholders following the release of the options paper and during the consultation process, the Commission will also engage in ongoing monitoring of the impact of any implemented measures and new issues arising from paid agent conduct, and will consult with affected stakeholders on an as-needed basis.

Registration of paid agents

[37] The above recommendations all involve measures which may be implemented internally by the Commission within the current framework of the FW Act and the FWC Rules. The working group has also concluded that a scheme of registration of paid agents would be the most effective long-term solution to challenging paid agent conduct. This option had broad support from stakeholders throughout the consultation process. However, it would require legislation in order to be implemented, and would need to be supported by a properly resourced regulatory body.

[38] Paid agents are registered and regulated by the SAET and the WAIRC in their respective jurisdictions. The working group notes the feedback from stakeholders in the consultation process, as well as representatives from the South Australian and Western Australian jurisdictions, that the SAET regulatory model may be the preferred approach in response to challenging paid agent conduct as observed by the Commission and its stakeholders.⁹

[39] Features of the SAET model that were seen as particularly desirable in the regulation of paid agents include:

- a 'fit and proper person' test, including exclusion of persons not entitled to practise as a legal practitioner due to being struck off the roll or because of other disciplinary action;
- the capacity for the tribunal to investigate possible breaches and deregister participants for breaches; and
- a Code of Conduct prescribed by the regulations that outlines specific duties of registered agents, including topics such as the management of trust monies, disclosure of the basis for calculating charges, confidentiality obligations, working in a timely fashion, appraising clients of developments, and prohibition of untruthful statements to the tribunal.¹⁰

⁹ See *Fair Work Act 1994 (SA)* ss 24–7 and *Fair Work (Representation) Regulations 2024 (SA)* ('SA FW Regulations') regs 5–7.

¹⁰ *SA FW Regulations* (n 9) sch 2.

Conclusion

[40] The working group is grateful to all stakeholders who provided submissions and participated in the consultation process.

[41] It is anticipated that the implementation of the recommendations set out above will commence shortly. The working group will monitor the impact of measures, and will continue to engage in consultation with stakeholders, with an aim to revisit the issues raised in the next 12 months.