

Wednesday, 13 March 2024

## **Paid Agents and the Fair Work Commission**

Paid Agent Working Group

[consultation@fwc.gov.au](mailto:consultation@fwc.gov.au)

### **SUBMISSION TO FWC OPTIONS PAPER ON PAID AGENTS**

1. In order to attend to the issue of challenging paid agent conduct at its roots, it is crucial that the Paid Agent Working Group identify the core causes of such misconduct and develop effective and efficient reforms to address these concerns. The possible options for responding to challenging paid agent conduct, outlined in the Options Paper, undertake this exact task by suggesting both internal and external proposals for reform.<sup>1</sup>
2. As one of the regular paid agents appearing before the Fair Work Commission ('FWC') in unfair dismissal and general protections matters, we support and endorse the proposals contained within the Options Paper. More specifically, we are of the opinion that such reforms have the potential to mitigate incidences of challenging paid agent conduct and encourage greater consistency in the behaviour and delivery of services of paid agents.

#### *A Options regarding Settlement*

3. We agree that the FWC's standard terms of settlement should only provide for payment of settlement sums directly to the applicant in the matter.<sup>2</sup> In fact, we have also received complaints from clients of other paid agents and representative bodies regarding the failure to pay settlement amounts owing to them.

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<sup>1</sup> Paid Agent Working Group, *Paid Agents and the Fair Work Commission* (Options Paper, 7 March 2024) ('Options Paper').

<sup>2</sup> *Ibid* 13.

4. Consequently, we have adopted into our own practice, the default method of settlement sums being paid directly into our clients' accounts, unless express authorisation for payment to us has been provided or such arrangements have been agreed to within the terms of settlement.

#### *B Concerns about the Quality of Representation*

5. As outlined in the Options Paper, the FWC has raised concerns regarding paid agents lodging unfair dismissal or general protections claims which are frivolous, vexatious and may be considered to be an abuse of process. More specifically, concerns have been raised regarding paid agents being unable to explain the basis upon which contraventions of the *Fair Work Act 2009* (Cth) ('the Act') have been alleged.<sup>3</sup>
6. In addition to Option 5, we suggest the implementation of a triaging system that is undertaken when applications are received by the FWC. Such a system would involve FWC staff perusing applications to ensure that they prima facie meet the applicable tests under the Act. Similar to the practices of various state Equal Opportunity and Anti-Discrimination Commissions, the FWC can then request the provision of further and better particulars from the applicant where the prima facie tests for unfair dismissal or general protections do not appear to have been met.
7. Such triaging processes could be implemented at minimal to no excess administrative costs as FWC staff are already reviewing applications to ensure that they have been appropriately filled in, signed and lodged. Consequently, dedicating some extra time to assess the claim against prima facie tests for contravention of the Act, will ultimately save the time and resources of the FWC by reducing the number of unsubstantiated claims which need to be heard. This proposed reform would seek to minimise the presence of cases that do not appear to have merit or prospect, while also maintaining and preserving the integrity of FWC processes.

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<sup>3</sup> Ibid 8.

### *C Paid Agents' Behaviour and Conduct*

8. We support the introduction and implementation of a voluntary code of conduct which paid agents could agree to undertake.<sup>4</sup> This will allow for greater consistency, especially across regular paid agents, and establish set standards and principles of behaviour to be abided by when appearing before the FWC. With respect to the removal of a paid agent from the website where they fail to act in a manner consistent with the code of conduct, we propose that the FWC also consider refusing leave for such paid agents to appear under s 596(2) of the Act.
9. In addition to this code, we also recommend that all paid agents, and particularly regular paid agents, be required to undertake a course in legal ethics, which is comparable to that administered as a part of the LLB program at Australian universities. CPD Interactive and the College of Law provide several online free-standing courses on legal ethics and ethical dilemmas involved in negotiation processes.<sup>5</sup> The FWC could implement a similar course into its remit which is either required to be undertaken pursuant to the code of conduct, or which all paid agents must have completed prior to appearing at a conference or hearing.
10. We submit that this would be consistent with President Hatcher's recent decision and the necessity expressed for paid agents to be upheld to a similar standard as lawyers when appearing in a representative capacity.<sup>6</sup> In combination with the code of conduct, mandatorily undertaking an ethics course would also deal with the issue of recalcitrant conduct during conciliations and abuse towards FWC staff.

### *D Disclosure of Costs Arrangements*

11. We are of the opinion that requiring paid agents to disclose their fee arrangements with the FWC would allow for greater transparency, consistency and avoid the issue of clients incurring undue costs.<sup>7</sup> We suggest that the FWC develop a standard form to be submitted alongside applications at the time of lodgement. This will enable disclosure of the cost arrangements at the outset of the matter and Conciliators or Deputy

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<sup>4</sup> Ibid 13.

<sup>5</sup> CPD Interactive and College of Law, 'Ethics', *CPD Interactive* <<https://cpdinteractive.com.au/ethics/>>.

<sup>6</sup> *Samuel Howell v Elite Elevators Corporation Pty Ltd* [2023] FWCFB 265.

<sup>7</sup> *Options Paper* (n 1) 12.

Presidents can then confirm these details, as well as seek confirmation of anticipated costs, at the time of the conciliation conference.

12. However, we would like to raise a matter for discussion with respect to whether the disclosure of No Win No Fee arrangements would, or would have the potential to, create undue prejudice adverse to the applicant. Our concern with such disclosure is that it may indicate to the opposing party that the applicant does not have the funds to pursue the matter further, which may have a prejudicial or detrimental effect on the prospects of settlement at conference.
13. Nevertheless, we maintain that ongoing disclosure of payment arrangements with the FWC alone will allow for greater transparency, consistency across paid agents, and mitigate incidences of challenging paid agent conduct in the form of charging excessive fees.

#### *E Seeking Leave to Appear*

14. Finally, with respect to Option 11 and consideration of the paid agent's capacity when exercising discretion under s 596 of the Act,<sup>8</sup> we submit that paid agents should be required to explain their practical assistance in the process when seeking leave to appear. This would ensure that paid agents are practically assisting the FWC in performing its functions and not acting as a hinderance to its processes. It will also maintain a degree of competence and attract the presence of greater sophistication when paid agents are representing their clients before the FWC.
15. However, the Options Paper suggests legislative amendments being made to s 596 of the Act, which would mirror s 100 of the *Workplace Relations Act 1996* (Cth).<sup>9</sup> One of the model provisions refers to decisions regarding the granting or refusal of leave, as being unavailable for appeal.<sup>10</sup> We raise this as a matter for discussion and query whether implementing a similar framework under the Act would undermine the effectiveness and applicability of principles of administrative law.

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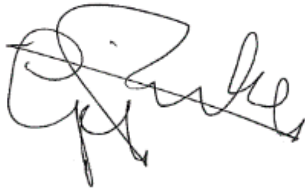
<sup>8</sup> Ibid 14.

<sup>9</sup> Ibid 16.

<sup>10</sup> *Workplace Relations Act 1996* (Cth) s 100(7).

16. Administrative law turns on the idea that no governing body, agency or administrative entity should be above the law and their decisions should remain subject to scrutiny and deliberation. The FWC is Australia's workplace relations tribunal and decisions regarding the refusal or granting of leave could be characterised as justiciable matters, made by an administrative decision-maker, which should be subject to appeal and judicial review due to the impact on clients. Although legislation can seek to preclude the application of administrative law in this respect, we raise it as a point for contention when considering fairness, equality and access before the law.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Gary Pinchen', written in a cursive style.

**Gary Pinchen**

Principal

A Whole New Approach Pty Ltd