SUBMISSION OF EMPLOYEE DISMISSALS TO PAID AGENT WORKING GROUP

OPTIONS PAPER DATED 7 MARCH 2024

Employee Dismissals is an industrial relations consultancy which solely assists employees who have been dismissed or who are otherwise experiencing issues in the workplace. It has represented employees as their paid agent before the Fair Work Commission in over 1,000 unfair dismissal and general protections disputes since 2020. We are pleased to provide our submission in response to the Options Paper dated 7 March 2024 released by the Fair Work Commission (**Commission**) (**Options Paper**).

These submissions are not intended to provide an exhaustive response to the materials raised in the Options Paper but are intended to provide a summary of key points which may be further explored at the time of any in-person consultation sessions foreshadowed by the Commission in the Options Paper.

Employee Dismissals believes lawyers and paid agents should adhere to appropriate standards of conduct when representing clients before the Commission. However, Employee Dismissals believes in the fundamental right of a dismissed employee to decide which representative they wish to represent them, and the terms on which such representation will occur.

Employee Dismissals vehemently opposes the introduction of reforms which are likely to have the effect of placing particular clients at a disadvantage in their dealings with their former employer, simply because the Commission takes issue with the conduct of the particular paid agent chosen by the client to represent them. Employee Dismissals further opposes any reforms that render the provision of "No Win No Fee" arrangements unviable, have the practical result of increasing the cost of representation (or increasing the quantum of fees payable upfront by the client at the outset of a matter) because this would have the effect of disadvantaging low-income employees who are the most substantial beneficiaries of such fee arrangements.

Employee Dismissals further considers that it is not for the Commission to determine whether an employee should have the right to have their case brought before the Commission, or the terms on which such a case should be brought. Particularly given the recent decision of the High Court of Australia in *Transport Workers Union v Qantas Airways Limited*, which clarified that the scope of the general protections provisions

contained in Part 3-1 of the *Fair Work Act 2009* (Cth.) (**Act**) applies not only to workplace rights currently enjoyed by employees, but also to workplace rights that may be enjoyed at a future point in time. Whilst Employee Dismissals appreciates that some members of the Commission may be concerned about the increased workload associated with an increase in the volume of claims brought, it is not for the Commission to form a view that a case should not have been brought. For many of our clients, the opportunity to have their dismissal reversed to a retrospective resignation represents a key objective to instructing us to bring a claim against their former employer. Employee Dismissals is successful in achieving this objective in most claims that resolve by agreement at a conference. In the event that reforms are introduced which have the practical effect of increasing the cost of representation, limiting access to "no win no fee" arrangements, or increasing the proportion of representation fees that paid agents need to charge upfront at the outset of the engagement, it will be vulnerable low-income employees who will be disproportionately impacted by such reforms, because they may not receive the guidance they need to bring a claim (or, pertinently, the correct type of claim) before the Commission, are less likely to be in a position to pay the cost of their representation upfront at the outset, and may therefore be denied the opportunity to bring their case before the Commission (which, based on the statistics held by Employee Dismissals, the most probable result being that they will have their dismissal reversed into a resignation and would be able to walk into a job interview and disclose resignation as the reason for the cessation of their employment – potentially making it easier for them to secure alternative employment).

The Options Paper refers to solicitors' conduct rules and could be interpreted as giving rise to a suggestion that paid agents could be regulated in a manner identical to lawyers. Employee Dismissals makes a pertinent point in this regard: if paid agents are regulated in the same way that lawyers are regulated, it must be expected that paid agents like Employee Dismissals will start to charge like lawyers. A practical example exists in the average fees charged to clients by Employee Dismissals. In 2023, the average fee revenue received by Employee Dismissals per claim lodged in the Fair Work Commission was less than $1,500 (inclusive of GST). All clients who were represented by Employee Dismissals before the Commission in 2003 were engaged with the potential benefit of a "No Win No Fee Guarantee". It is our belief that few lawyers would be prepared to accept an engagement from a dismissed employee on such terms; the anecdotal evidence received from our clients suggests that most lawyers seek to charge more than $3,000 to represent a client to the point of a conciliation conference, most request payment of such fees upfront into their trust account, and few lawyers offer an engagement with "no win no fee" arrangements. Whilst it may be accepted that lawyers are subject to more onerous regulations than paid agents, it should also be accepted that the pricing model adopted by lawyers for their services do, at least in part,

represent the cost of a “one size fits all” regulatory approach which arguably results in higher fees being charged to clients, thus diminishing access to justice.

Employee Dismissals is committed to providing accessible representation for dismissed employees, particularly those on low incomes. Many of these employees would not have brought a claim before the Commission if we had not offered to represent them on the terms so offered. For example, we regularly hear clients telling us that they telephoned the Commission who informed them that they were not eligible to bring a claim. However, upon consulting with Employee Dismissals, this advice was promptly identified as having been incorrect and that a claim could potential be brought as a general protections dispute or, if outside the time limit prescribed by section 394 of the Act, an anti-discrimination claim pursuant to state or territory legislation. These clients may not have brought a claim had they not had the benefit of a free initial consultation with Employee Dismissals, but instead relied upon representations made by an officer of the Commission, to their detriment. The result would have been a dismissal recorded on their personnel file pursuant to the Fair Work Regulations for a period of at least six years following the date their termination took effect, with the resultant impact on their re-employment prospects.

As correctly articulated in the Options Paper, paid agents must conduct their operations in line with the Australian Consumer Law (**ACL**). In this regard, paid agents are regulated by the Australian Competition and Consumer Commission (**ACCC**) which has a robust regulatory function and suite of investigative and enforcement powers available to it. The powers of the ACCC are complemented by the ability of dissatisfied consumers to bring a claim against a paid agent in the small claims jurisdiction of a court or tribunal in a State or Territory. For example, a consumer-trader “small claims” dispute can be brought in the New South Wales Civil and Administrative Tribunal and the Victorian Civil and Administrative Tribunal at a cost of less than $100 if the amount claimed in less than $3,000. Such filing fees can be further reduced or, in some cases, eliminated, upon the production of a valid health care card issued by Services Australia. Unlike members of the Commission, members of such tribunals have the necessary expertise and knowledge of the ACL to determine such disputes. For this reason, Employee Dismissals is of the view that it is not for the Commission to become involved in dealing with disputes between paid agents and their clients, because officers of the Commission are unlikely to have the necessary skills and expertise to do so effectively and efficiently. Rather, it is our view that a referral to the ACCC should take place in every matter in which a client makes a complaint about a paid agent, but only after full particulars of such complaint have been furnished to the paid agent concerned on a

reasonably contemporaneous basis, so that they can be afforded an opportunity to respond to and address the complaint.

Employee Dismissals has previously written to the Commission requesting the provision of details of complaints received about it, however the Commission declined this invitation. Employee Dismissals also invited the Commission to a meeting for the purpose of identifying and discussing any issues with a view to ascertaining the most appropriate way to address the same and move forward. This invitation was declined. To date, as one of the Commissions largest stakeholders representing a significant number of dismissed employees throughout Australia, officers of Employee Dismissals have not once met with officers of the Commission to discuss concerns which the Commission may have with Employee Dismissals and paid agents generally, and to cooperate with a view to addressing such concerns to the satisfaction of all parties. Employee Dismissals further holds the view that, rather than devoting resources into exploring the potential for the introduction of additional (and potentially resource-intensive) regulation of paid agents, it would have been more productive to sit down with paid agents such as Employee Dismissals to highlight the issues and ascertain an acceptable way forward.

We now provide a summary of Employee Dismissals' position with respect to each of the options raised in the Options Paper (collectively, the "options").

Option 1: Provision of a "fact sheet" to clients in circumstances where a lawyer or paid agent is named on the application

Employee Dismissals fully supports the implementation of Option 1 to the extent that a particular paid agent, or groups of paid agents, are not targeted or named by the Commission (referring to the fourth dot point in the Options Paper).

Paid agents should not be placed at a disadvantage compared to lawyers, and paid agents who (by, for example, reason of a higher volume of clients serviced) have a lower number of complaints about their conduct should not be targeted by the Commission. For example, a paid agent who represents 1,000 clients per year with 20 complaints equates to a 2% complaint rate. On the other hand, a paid agent who represents 100 clients per annum but in respect of which 20 complaints are received will have a 20% complaint rate. The paid agent with a 2% complaint rate should, in our respectful submission, not be targeted by the Commission simply because the number of complaints received is a higher numerical figure.

Option 2: Members and conciliators determining permission before a conciliation, conference or hearing

Employee Dismissals does not object to the implementation of Option 2 provided that the question is decided at the commencement of a conciliation, conference or hearing, and claims involving paid agents are not subject to unreasonable and unnecessary delays simply because a client has elected to be represented by a paid agent, or a particular paid agent and their case requires a separate listing to determine the issue of permission.

Employee Dismissals further submits that the power contained in section 596 of the Act was not intended to empower the Commission to decide who should represent a particular client but, rather, *whether* a client should be represented in a matter before the Commission. It is also dangerous to put a client at risk of unfairness as a result of their former employer being granted permission to be represented in the fact of a denial of permission for the employee to be represented by a paid agent, or a particular paid agent.

Option 3: Sharing of information

Employee Dismissals supports Option 3, provided that individual paid agents, or groups of paid agents, are not targeted (refer Option 2 above).

Option 4: Explanations at the commencement of a conference or hearing

Employee Dismissals supports Option 4, save and accept that such explanations should take place in private session, and fee arrangements are a matter between the paid agent and their client.

Employee Dismissals supports paid agents being provided with an opportunity at the commencement of a conference or hearing, to confirm with the client that they understand the applicable fee arrangements given various potential scenarios, and having the client confirm their understanding to the conciliator or member at the outset.

Option 5:

Employee Dismissals does not support the targeting of individual paid agents or groups of paid agents by the Commission, particularly in circumstances where the paid agent/s concerned have not been afforded an opportunity to respond to complaints, or to challenge the accuracy of the allegations which are the subject of the complaint.

Option 6:

Employee Dismissals supports the implementation of bullet point 1 of Option 6.

Employee Dismissals does not support the implementation of bullet point 2 of Option 6, because the implementation of the same may give rise to concerns in the minds of clients and actually give rise to complaints that may not have arisen.

Option 7:

Employee Dismissals supports the proposals in Option 7 as they pertain to a voluntary code of conduct.

Option 8: Costs applications

Employee Dismissals does not support the proposal contained in Option 8 as it considers that the Commission should not be encouraging the pursuit of costs orders against employees, lawyers or paid agents.

Option 9: Terms of Settlement

Employee Dismissals is strongly opposed to the amendment and this has resulted in an increase in the cost of representation to clients and is expected to result in increased litigation against clients, which is likely to result in the service of bankruptcy notices upon clients who do not pay their invoices.

Option 10: Notice of Discontinuance to be filed only by clients or legal representatives

Employee Dismissals fully supports the proposal outlined as Option 10