Submissions in response to the Paid agents and the Fair Work Commission consultation paper.

Name: Garry Dircks
Phone: 0419 154 026

PREAMBLE

1. Firstly, I would like to say I appreciate the opportunity to have some input into this issue, which could potentially affect me, my business and people I would likely represent in the future.

2. I have had the opportunity and privilege to appear in industrial tribunals since 1986, initially while working for a major trade union, and then from 1998, under the banner of Just Relations Consultants.

3. It is clear how this matter has come about with the apparent appalling behaviour by an organisation that purports to represent clients in the Commission in unfair dismissal claims. The predatory billing behaviour and taking actions without instructions from the client in question points to a probable system of exploitative behaviour and improper behaviour. One consequence of a party doing that is it has the potential to tar us all with the same brush.

4. For those of us who attempt to keep a good reputation, and to conscientiously represent clients, that has a potentially harmful outcome that is undeserved.

5. One matter that has to always be borne in mind is, if there are any substantial changes, how that is going to affect this sort of people we represent seeking relief under the Act. As noted in the ACCC media statement[1], people making applications are often "*at a low point in their lives after losing their job*".

6. That is, it is of course preferable that any changes do not in effect make things potentially worse for the potential applicant.

[1] Footnote [31] A media statement accompanying the notice said: '*We are very concerned that it appears some clients of Unfair Dismissals Direct, who were at a low point in their lives after losing their job were not paid the settlement balance owing to them*'.

7. The position of paid agents in unfair dismissal matters when representing dismissed employees has frankly been a lower cost and lower risk alternative to law firms, given the uncertainty in outcomes and the limit on outcomes that are practically available. If money is no object people tend to go for lawyers.

8. My perspective on that is that our clients generally do quite well out of our services both in a basic financial outcome sense and also because we provide a smooth and reassuring carriage of their cases. It needs to be also borne in mind how daunting and stressful people find making and prosecuting an application without experienced guidance and assistance.

9. The feedback we get is that clients overwhelmingly are assisted through what is often a difficult period of their life in a competent and compassionate manner.

10. I think there are things that may be able to be implemented to deal with rogue operators that do not involve 'throwing the baby out with the bathwater'.

11. One suggestion we would make is that where there are concerns with a representative, the Commission could bring on cases initially to an in-person Directions Hearing before the administrative conciliation process takes place (similar process to what I recall occurred in the Melbourne Magistrates Court and IR Court of Australia). Requiring the representative to front up and provide some justification for the case at the outset may discourage overseas based operators (if that is a concern) and/or unmeritorious claims.

12. Context: In my earlier role I would, from time to time, be dealing with industrial relations consultants, as well as employer staff, employer organisation officials and lawyers representing those employers. The industrial relations consultants tended to have a more practical approach to dealing with issues, than, say, lawyers typically did.

13. Therefore, I certainly had no negative view towards industrial relations consultants.

14. When I left the union and started doing consulting work, it turned out that a significant amount of the work I was doing was representing dismissed employees in unfair dismissal matters, which I had a lot of experience in already. (I also provide services to employers and have represented employers in matters in the FWC and predecessor including unfair dismissals, disputes and enterprise bargaining.)

15. Most of our clients are not union members and so, other than going to an IR Consultant, would have to engage lawyers if they were not comfortable to represent themselves in a claim.

16. A lot of the changes that have resulted in the problems highlighted in the significant recent case, I think, have come about due to changes since 1999. Back then it would have been unusual for a consultant to take on cases other than in their own capital city or state. Putting to one side the country-based cases, most metro cases were subject to conciliation with staff conciliators in person (e.g. in Nauru House, Melbourne on a single floor where there were a number of conference rooms). It was common, if not unavoidable, for there to be contact between representatives (be they consultants, lawyers, or unions). The normal sort of chitchat (including with the conciliators) would mean that you usually knew how other people operated, and perhaps if anyone was regarded as operating in a dodgy manner. For example, it was generally known who had a very low threshold for a "win" as the trigger for charging fees.

17. Most clients came to us as a result of referrals from various sources or from newspaper advertising. Some other operators would obtain clients through radio advertising.

18. Over the subsequent years, the conciliations for dismissals came to be conducted by telephone, which eliminated the need for personal attendance and opened up the possibility of people representing from afar.

19. A number of consultants wound up during the WorkChoices years where there were fewer potential clients - amongst other difficulties with the then system.

20. The more local form of advertising and referrals has been almost entirely replaced by digital marketing. This has opened up the ability for canny operators, with expertise in marketing and advertising, to potentially operate moneymaking ventures such as representation in unfair dismissals without necessarily a local presence or any particular expertise (if the MO is to go no further than conciliation). From the figures mentioned regarding regular consultants, it appears that we are very poor at the marketing side of things as we certainly do not have more than 200 cases per year at most.

~~21.~~ In relation to the practice of having a settlement paid to the representative, my impression is that this was not a general practice. (The first time I came across it was with one of the major labour law firms in a case where I was representing a small business employer in a VCAT discrimination matter about 20 years ago where the lawyer insisted that the payment be made to the lawfirm).

22. Our practice has been to follow the FWC settlement standard terms where the payment of any settlement is to the applicant and we bill the applicant after that. With that system there can be no complaint that the applicant is necessarily exploited.

23. There have been some instances where there has been an agreement to split the payment with part of the payment in relation to representation costs. We do not see there is necessarily any ethical problem there where the client agrees that part of the gross settlement is paid to the representative for the representation. But this is not common practice for us.

24. For the most part, we believe that the work done by most paid agents is carried out ethically and in the interests of the client. It is generally at a lower cost and involves a more practical approach than the obvious other major law firm option. We have had many many happy and grateful clients (including professional people). It is our firm view that many people will not seek out lawfirms because of the costs or the perceived costs. I think there was a study done at one stage by a senior member of the Commission to the effect that represented parties did better than non-represented parties.

25. We are also aware that some lawfirms are said not to take on unfair dismissal clients, unless the client is in the higher income bracket, where that would mean that the lawfirm has a reasonable expectation of a significant fee being earned.

26. We generally take on cases where there is an apparent or arguable case and a reasonable prospect of success. The flip side is that we will not take on cases that on the person's account of events would not succeed.

27. Where a case is potentially an unfair dismissal (in jurisdiction) or a general protections/adverse action case, we recommend unfair dismissal for practical reasons. From time to time, we do lodge general protections cases if the circumstances could lead to a successful outcome. If they do not settle, then we will attempt to refer the client to a competent law firm that could take the matter over.

28. From time to time we get calls from applicants who have settled their matters at conciliation while unrepresented and have settled for negligible or substandard settlements, and are seeking to re-agitate the cases.

29. This tells us that the unrepresented applicant is the weakest link in the chain, so to speak, and often will end up with a very poor outcome.

30. Therefore, measures that would discourage the possibility of representation by ethical paid agents would not be in the interests of employees generally.

Table 5:

1. **The Commission could provide parties with a fact sheet about representation in the Commission**
   See Option 1, Table 5 in paper for further detail

   [ ] Support
   [ ] Neutral
   [X] Oppose

Comments:
This option has 7 dot points: overall it has a negative bias to representation when representation in a general sense is in most cases in the applicant's interests, by in aggregate a better financial outcome, and less stressful process. If implemented it would have a tendency to discourage applicants from continuing with their cases.

Dot point 3: ***"an outline of typical terms that are included in settlement agreements and median settlement outcomes (either by typical weekly salary or dollar value)"***

(a) It is probable that this would be misunderstood and interpreted as probable outcome (when that is not the case). Our average outcomes routinely exceed the figures variously quoted by conciliators. Use of the Sprigg Formula has the caveat that it is then subject to review in the event the outcome is insufficient or excessive (per PR942856 *Smith & Kimball v Moore Paragon Australia Pty Ltd* at [32][2]). As stated above we often enough get callers who have agreed in the pressure cooker of self-representing in a conciliation to a settlement that may be objectively inadequate and that they later complain about and sometimes seek/wish to reagitate.

(b) The use of median outcomes assumes a statistical knowledge that is likely to not be commonly held. A bell curve distribution would probably be more accurate but again assumes mathematical understanding that is not likely to be generally held. The use of median outcomes can build incorrect assumptions about outcome.

(c) Median outcomes are likely to be different for represented applicants compared to unrepresented applicants, where we believe that represented clients do better generally than those self-representing.

Dot point 4: "**examples of conduct that the Commission has received complaints about, regarding paid agents**"

A fact sheet that gives such examples about 'paid agents' as a group would be unfair to paid agents who have no complaints about them and who operate ethically; it may also implicitly signal that lawyers are to be preferred for representation. While lawyers are subject to their own regime regarding conduct, there is no basis to suggest that lawyers necessarily provide 'better' or more cost effective service.

Dot point 5 "**information on how to make a complaint regarding a paid agent or legal representative to relevant agencies**"

[2] If an application of the guidelines in *Sprigg* yields an amount which appears either clearly excessive or clearly inadequate, then the member should reassess any assumptions or intermediate conclusions made or reached in applying the guidelines so as to ensure that the level of compensation is in an amount that the member considers appropriate having regard "to all the circumstances of the case" including the matters listed in s.170CH(7) and subject to the `cap' provided for in s.170CH(8) and (9). In this context it should be borne in mind that the result yielded by an application of the *Sprigg* guidelines may vary greatly depending upon particular findings in relation to the various steps including, in particular, step one, which necessarily involves assessments as to future events that will often be problematic.

I am not sure how this is justified. At the relevant stage, the applicant is seeking to make a claim against his employer, and then they have been provided with information on how to make a complaint about paid agents and lawyers. This could add to the stress and confusion that applicants and potential applicants have.

Dot point 6 "**for GP applications, information about representation if the matter does not resolve and a court application is made"**

I do not think that is a significant issue. We can only speak for ourselves. This potential representation at court problem is made clear. The numbers of applications are not high (for us) and a majority seem to settle. We will try to refer on to competent legal representation where appropriate.

Dot point 7: "**information about the circumstances in which costs orders can be made against parties, lawyers and paid agents."**

The effect of this would be to add to parties' anxiety about proceeding with a case and probably to discourage applications proceeding. We believe that is not the role of the Commission to discourage applications before conciliation where the case may be indeed worthy of relief. Any such statement would need to draw attention to s611 – that the Commission is generally a cost free jurisdiction. It should never encourage meritless costs applications from any quarter.

2. **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
[ ] Neutral
[X] Oppose

Comments:

S 596 applies to lawyers *and* paid agents. The reference to paid agents but not lawyers again suggests a bias towards lawyers which may not be warranted. If the option applied to both lawyers and paid agents then this may add some efficiency.

3. **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**

[x] Support
[ ] Neutral
[ ] Oppose

Comments:

Putting aside the understandable potential for a person's reputation to be unfairly impugned without any potential defence, such collaboration seems sensible. A possible adjunct may be for conciliators or members to put agents on notice about concerns they have about their performance, so as to possibly avoid the situation where they are refused permission.

4. **At the beginning of any conciliation, conference or hearing involving a paid agent, the Member or conciliator would:**

• explain that:

o representation is not required in Commission proceedings

o the Commission is generally a no cost jurisdiction

o 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

• 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."

[ ] Support
[ ] Neutral

[x] Oppose

I have some concerns about this.

The process seems potentially tedious and may not be followed in practice.

I can see that it would potentially address the problem in the recent case in a heavy-handed way. Our preference would be that, if it were adopted, it applies to all represented parties, not just paid agents. As noted above I have had actual experience long ago where a labour law firm representing an employee in VCAT on a discrimination matter (where I was representing the employer) insisted that the settlement payment be made directly to the law firm. I rarely do dismissal cases representing employers and have not had a repeat of that situation. So, there is a basis for such an option to apply across the board.

A downside to the option in my view is that it puts the focus unduly on financial relations between the applicant and representative when the focus in conciliation should be on properly articulating the merits and negotiating settlements.

An alternative might be for the Commission to seek in writing from paid agents what their fee arrangements are and whether there are any variations to that.

Otherwise, the suggestion at para 11 above is that an in-person directions hearing take place at the outset and some explanation be required as to the merits of the case.

I would support the option only if the same requirements are applied to all representatives.

5. **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**

[x] Support
[ ] Neutral
[ ] Oppose

I would support this.

6. **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 FCFCA as of right), and further examples of paid agent conduct the Commission receives complaints about**

The first "**what happens**" is fine. (This is always made clear to our clients.)

The second part would only be acceptable if it refers by name to the subject(s) of complaints and does not infer that this is applicable to all paid agents.

[ ] Support
[ ] Neutral
[x] Oppose

7. **Invite paid agents to voluntarily agree to a code of conduct, and publish the details of agents who have done so on the website.**
See Option 7, table 5 for further detail

[x] Support
[ ] Neutral
[ ] Oppose

8. **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)**

[ ] Support
[x] Neutral
[ ] Oppose

9. **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
[x] Neutral
[ ] Oppose

This is usual practice at the moment. However, there are some situations where the parties may choose to split payment with part payment to the applicant and part to the rep. This should not necessarily be prevented.

10 "**Amend the Fair Work Commission Rules to stipulate that Notices of Discontinuance may only be filed by Applicants or their legal representati*ves*."**

We don't support this.

There are circumstances where from time to time an applicant goes completely missing after receiving a settlement payment (usually to avoid paying their account). When they break off contact it is impossible to obtain instructions to discontinue. In those occasional circumstances I will liaise with the employer or their representative to get proof that the settlement payment has been paid and any other paperwork required has been provided. Once I am satisfied of this, I think it is appropriate to discontinue the case. If there was not that flexibility available, then there would be cases that are never discontinued due to the lack of diligence of the applicant.

We have commenced the practice of stating on a covering letter when we have obtained instructions to discontinue when I put in a Form F50.

There is no fundamental reason why lawyers would be permitted to discontinue an application but a paid agent would not be able to discontinue an application on behalf of the client.

The only case where I had to argue to have a Notice of Discontinuance reversed was (before Commissioner John Lewin) about 20 years ago. The applicant was originally a client of one of the big labour law firms. After conciliation, the applicant wanted to change to be represented by me. The lawyer concerned discontinued the applicant's case without instructions. We had to argue that it was not authorised and it was reinstated (I had to give sworn evidence and that sticks most in my mind). Therefore, it is not only paid agents who may sometimes lack scruples in relation to lodging discontinuances.

Table 6: Options involving other agencies or organisation

10 **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
[x] Neutral
[ ] Oppose

Comments: This would be unnecessary if the terms of settlement provided for payment to the applicant or a split payment.

11 **"Refresh arrangements to refer complaints to the ACCC. See [30]-[32] for further detail."**

[ ] Support
[x] Neutral
[ ] Oppose

Comments:

10. **Amend the Act to provide a system for the Commission to register paid agents**
See [33]-[35] of the paper for further detail

[x] Support
[ ] Neutral
[ ] Oppose

Comments:

The WA system of registration has 36 registered agents inclusive of employer organisations.
It raises the barrier-to-entry (i.e. a fee to join and requirement for PI insurance) and is underscored by the associated legislation which provides that agents abide by the 'Code of Conduct' and allows for exclusions.

11. **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**

See [36 onwards] of the paper for further detail

[x] Support
[ ] Neutral
[ ] Oppose

Comments:

This could be either in conjunction with or as an alternate to a full registration. Along with Code of Conduct. Parties should be able to make a case for the capacity to represent a party for payment.

Final thoughts:

Mine are set out above.