

Submission to the Fair Work Commission's consultation on Paid Agents

Executive Summary

- The Victorian Legal Services Board and Commissioner (**VLSB+C**) thanks the Fair Work Commission (**FWC**) for the opportunity to comment on its consultation on Paid Agents.
- The VLSB+C's submission offers insights into the issues the VLSB+C observes when consumers complain about paid agents, namely:
 - lack of consumer clarity regarding the role of a paid agent;
 - the VLSB+C's limited ability to address their complaints about paid agents;
 - difficulties in applying the law and regulatory processes on unqualified legal practice to the conduct of paid agents; and
 - issues arising from the lack of a dedicated regulator for paid agents.
- The VLSB+C welcomes and supports the FWC taking steps to increase consumer autonomy and understanding of the role of paid agents, and improve the consumer experience with paid agents, including as envisaged by Table 5, Option 4 of its [Options Paper](#) (**Options Paper**).

Introduction

The Victorian Legal Services Board (**Board**) and the Victorian Legal Services Commissioner (**Commissioner**) are the independent statutory authorities responsible for regulating Victoria's legal profession under the *Legal Profession Uniform Law (Uniform Law)*¹. Both authorities are accountable to the Victorian Parliament and effectively operate as one body, the VLSB+C.

The VLSB+C welcomes the opportunity to comment on the FWC's consultation on Paid Agents. The VLSB+C acknowledges the options the FWC has presented in its Options Paper and supports options which increase consumer decision-making and protect consumers from harm.

The VLSB+C's submission explains the Uniform Law's regulatory framework and how that intersects with section 596 of the *Fair Work Act 2009 (Cth)* (**FW Act**), before offering observations on the challenges the VLSB+C experiences in addressing a paid agent's conduct when consumers complain to the VLSB+C.

VLSB+C's regulatory framework

On 1 July 2015, the Uniform Law commenced in Victoria and New South Wales, establishing a common 'uniform' framework for regulation across both states. On 1 July 2022, Western Australia joined the uniform framework. One of the main objectives of the Uniform Law is to provide and promote inter-jurisdictional consistency in the regulation of legal practitioners.

Although the VLSB+C operate effectively as one body, each is allocated separate regulatory functions under the Application Act.

¹ Which is in Schedule 1 to the [Legal Profession Uniform Law Application Act 2014 \(Vic\)](#) (**Application Act**).

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The Commissioner is an independent statutory office holder appointed by the Governor in Council, on the Attorney-General's recommendation. The Commissioner is also the CEO to the Board. The Commissioner's key role is to receive and handle complaints about the conduct of lawyers by members of the community, and to initiate her own complaints regarding a lawyer's conduct.

More relevantly, the Board is responsible for a broad range of regulatory functions, including, among others:

- licensing of lawyers;
- maintaining the Victorian legal profession register and register of disciplinary action; and
- investigating and prosecuting breaches of the Application Act and the Uniform Law.

The Board exercises functions under the Application Act and the Uniform Law, with the objectives of, among others, effective regulation of the legal profession, maintenance of professional legal standards, public trust and confidence in the legal profession in Victoria, and protection of consumers of legal services.

Unqualified legal practice

A primary function of the Board in protecting consumers of legal services is to investigate and prosecute unqualified legal practice.² One of the objectives in carrying out these functions is ensuring, in the interests of the administration of justice, that legal work is carried out only by those who are properly qualified to do so.³ The VLSB+C recognises section 596 of the FW Act expressly permits a person to be represented by a paid agent in a matter before the FWC, with the FWC's permission. However, as will be discussed, paid agents present challenges for the Board when considering whether a paid agent may or may not have engaged in unqualified legal practice.

Section 10(1) of the Uniform Law prohibits an entity, which includes an individual, from engaging in legal practice, unless it is a qualified entity. A 'qualified entity' is defined in section 6 of the Uniform Law and includes an Australian lawyer with a current Australian practising certificate⁴. The maximum penalty for a contravention of this section is two years imprisonment and/or a fine in the amount of 250 penalty units (set at \$48,077.50 as of 1 July 2023)⁵.

Section 11(1) of the Uniform Law prohibits an entity, including an individual, from advertising or representing, or doing anything that states or implies that it is entitled to engage in legal practice, unless it is qualified to do so. The maximum penalty for a contravention of this section is a fine in the amount of 250 penalty units (set at \$48,077.50 as of 1 July 2023).

Both engaging in unqualified legal practice and representing an entitlement to engage in legal practice while unqualified are criminal offences⁶; a finding of guilt for either offence could result in a criminal conviction.

The [Legal Profession Uniform Law General Rules 2015 \(Uniform Rules\)](#) exempt certain classes of individuals from the prohibition in section 10(1) of the Uniform Law. This includes, for example, a licensed conveyancer engaging in conveyancing work⁷. This does not include paid agents acting in accordance with section 596 of the FW Act.

When considering what, if any, enforcement action to take against an individual who may have contravened either of sections 10(1) and/or 11(1) of the Uniform Law, the Board considers its [Compliance and Enforcement Policy](#), which requires that the Board respond to misbehaviour proportionately and efficiently. The Board employs the full range of enforcement tools available to it, including from education-based responses to initiating legal proceedings.

² Uniform Law, section 14.

³ Uniform Law, section 9(a).

⁴ Uniform Law, section 6 (definition of 'qualified entity' para (a)).

⁵ See [Penalties and Values, Department of Justice and Community Safety](#).

⁶ Uniform Law, section 451.

⁷ Uniform Rules, rule 10(1)(a).

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Our submission – overview

Where consumers contact the Board regarding their interactions with a paid agent (who is often an unqualified entity because they are usually not Australian legal practitioners), the Board has been assisted by the FWC's publications⁸ in understanding how and when a paid agent may represent a person before the FWC pursuant to section 596 of the FW Act.

In the past year alone, in relation to the conduct of a paid agent, the Board—

- (a) has closed three matters; and
- (b) currently has six open matters.

In the course of those matters, the Board has not taken enforcement action through court proceedings. However, in one matter we wrote to the paid agent:

- (a) expressing our concerns they may have breached the prohibitions on engaging in unqualified legal practice; and
- (b) requesting they immediately cease-and-desist from engaging in the impugned conduct or else they may be subject to enforcement action taken by the Board.

One common theme amongst these files is that consumers have misunderstood their paid agent to be a registered lawyer. Another is that they have a complaint about the quality of services they have received from their paid agent because they mistakenly believe the Board is the relevant regulatory body.

Preliminary enquiries are made to determine whether the paid agent is an Australian legal practitioner (i.e., do they appear on the VLSB+C's register of Victorian legal practitioners or equivalent registers maintained by interstate legal profession regulators). If not, the matter is typically referred to the Unqualified Legal Practice team for assessment.

These matters raise several concerns for the Board, including:

- (a) a paid agent may have committed the offence(s) of unqualified legal practice (that is, in breach of sections 10(1) and/or 11(1) of the Uniform Law, as discussed above);
- (b) it appears consumers lack basic information about the role of paid agents including:
 - (i) whether their paid agent holds any legal qualifications or is currently licensed to practise law;
 - (ii) whether a paid agent needs to hold any legal qualifications or a licence to practise law;
 - (iii) precisely what work a paid agent may carry out; and
 - (iv) what body they may complain to about the services provided by a paid agent.
- (c) if consumer concerns are not addressed, public trust and confidence in the legal profession could be undermined.

Challenging paid agent conduct observed by the VLSB+C

Status of a paid agent

The Options Paper describes various categories of challenging paid agent conduct. In addition to those categories, it appears to the Board that consumers are unclear as to the status of paid agents. This includes both the:

- (a) fact that a paid agent does not need to be a legal practitioner; and
- (b) scope of work they are permitted to carry out in the FWC, whether they are a legal practitioner.

⁸ See [Practice Note: Lawyers and Paid Agents; Unfair Dismissals Bench Book – Representation by Lawyers and Paid Agents; and Representatives and the rules they must follow](#).

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The Board acknowledges the benefits of, and supports, the FWC taking steps to ensure consumers are given clear and comprehensive information about paid agents. Ideally, this would occur *at the outset* of any FWC process and be easily accessible.

In respect of Table 5, Option 4 of the Options Paper, the Board agrees there is merit in the FWC being proactive in educating consumers and empowering them to have frank discussions about the role of their paid agent and what services they can offer. This would assist consumers to make informed decisions about whether to proceed with a paid agent's services or seek independent advice from an Australian legal practitioner.

This should minimise consumer confusion and clarify the scope of assistance they can receive from a paid agent if they choose to be represented by one.

Limitations of the VLSB+C

The VLSB+C is limited in its ability to assist consumers and handle or investigate complaints about a paid agent. These limitations include:

- (a) The VLSB+C has no power to resolve disputes about a paid agent's fees. The Uniform Law sets out a detailed and closely regulated scheme to ensure that legal practitioners and law practices charge only fair and reasonable legal costs⁹. Those provisions do not necessarily apply to paid agents because they are not required to be Australian legal practitioners.
- (b) This has the consequence that when the VLSB+C receives complaints about a paid agent's costs and/or because the consumer feels the paid agent's work was poor, we are generally unable to assist. Instead, the VLSB+C is limited to:
 - (i) referring the consumer to an agency or organisation responsible for general consumer protection (such as Consumer Affairs Victoria);
 - (j) recommending the consumer to seek independent legal advice; and/or
 - (ii) referring the matter internally for an unqualified legal practice assessment (which does not address the cost or quality of the service the consumer received).
- (c) This also means that the Board cannot consider conduct which might not amount to unqualified legal practice but would raise serious disciplinary concerns if that conduct was engaged in by an Australian legal practitioner. For example, if it appears that the paid agent:
 - (i) does not have the necessary skills or competency for the relevant matter;
 - (ii) has not been diligent; and/or
 - (iii) has been discourteous to other parties or otherwise disrupted the smooth running of the matter.

Engaging in unqualified legal practice

When a paid agent's conduct is referred internally for an unqualified legal practice assessment, the Board considers the FWC's guidance, as well as FWC decisions and judicial authority on the interpretation of section 596 of the FW Act. The broad interpretation of section 596, in combination with complex and contentious common law tests for what

⁹ There are a range of minimum standards which legal practitioners and law practices must comply with in relation to legal costs (see generally Uniform Law Part 4.3). This includes requirements that legal costs must be fair and reasonable (Uniform Law section 172), the disclosure of legal costs (Uniform Law Part 4.3, Division 3), making of costs agreements (Uniform Law Part 4.3, Division 4), and billing (Uniform Law Part 4.3, Division 5). The failure to comply with cost disclosure obligations and charging more than a fair and reasonable amount of legal costs can amount to unsatisfactory professional conduct or professional misconduct (Uniform Law, sections 178(1)(d) and 298(d) respectively). Further, Australian legal practitioners must not engage in legal practice unless they hold professional indemnity insurance. Engaging in legal practice without insurance can carry a civil penalty of up to 100 penalty units (set at \$19,231 as of 1 July 2023) (Uniform Law, section 211).

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constitutes '*engaging in legal practice*' – which, in brief, require qualitative assessment not only of whether a person has done something—

- (a) usually done by a solicitor, and the person doing it in such a way as to justify the reasonable inference that the person *is* a solicitor; and/or
- (b) '*which, in order that the public may be adequately protected, is required to be done only by those who have the necessary training and expertise in the law*',¹⁰ but also exceptions to those tests where an expert carries out quasi-legal work in recognised areas of professional expertise¹¹—can raise ambiguities as to whether or not a paid agent may have engaged in unqualified legal practice.

Resolving these matters turns heavily on their individual facts.

Regulation of paid agents

As noted in the Options Paper, there is no specific regulator for paid agents, and they do not commit to any code of conduct, professional standards, or registration requirements. This places consumers in a vulnerable position. In particular:

- (a) the consumer may be unsure of what to expect from a paid agent; and
- (b) even though paid agents are remunerated for a “professional service”, the paid agent has no duty to act in their best interests or conduct their matter skilfully and efficiently.

In addition, consumers are unaware of this lack of oversight. Based on complaints received by the VLSB+C, we agree with the FWC's observation that affected consumers are often legally unsophisticated and/or in vulnerable circumstances.

Thank you for drawing our attention to the standing referral arrangement between the FWC and the Australian Competition and Consumer Commission (ACCC) regarding fee arrangements and representations about the quality of services. The Board supports effective referral pathways for consumers so that their complaints are handled by the best placed organisation or agency and welcomes any initiatives to build interagency relationships for this purpose.

However:

- (a) we are unclear about the ACCC's work to assist consumers with these issues (and would welcome learning more); and
- (b) we are conscious of the need to manage the consumer experience as they are passed between agencies and may experience delays and be asked to explain their complaint several times.

¹⁰ *Cornall v Nagle* [1995] VicRp 50; [1995] 2 VR 188.

¹¹ See *Felman v Law Institute of Victoria* [1998] 4 VR 324.

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Conclusion

We thank the FWC for the opportunity to comment and hope our comments will be considered. Mr David J Smith, Senior Lawyer – Intervention and Enforcement, would be pleased to discuss any aspect of this submission in further detail, or provide additional information if required. Mr Smith can be contacted by email at djsmith@lsbc.vic.gov.au or on (03) 9679 8097.

Yours faithfully,



Fiona McLeay
Board Commissioner & CEO