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Paid agents and the Fair Work Commission

Options paper

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Paid agents and the Fair Work Commission

This paper presents potential options for the Commission to manage challenging paid agent conduct and outlines a consultation process to consider those options.



Introduction

- [1] A lawyer or paid agent can represent parties in matters before the Fair Work Commission (Commission). They must receive permission according to s.596(2) of the *Fair Work Act 2009* ('the Act) and the *Fair Work Commission Rules 2013* (FWC Rules).
- [2] 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 their legal service board if they fail to meet those standards. Paid agents are not regulated and have no minimum requirements for conduct, experience or qualifications.
- [3] While many paid agents are competent professionals, from time-to-time Members and staff see paid agents engage in conduct 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 complain to the Commission about the paid agents conduct or practices. This paper refers to this as 'challenging paid agent conduct'.
- [4] This paper presents potential options for the Commission to manage challenging paid agent conduct and outlines a consultation process to consider those options.

Background

When paid agents can appear in proceedings under the Act

- [5] There are various ways a paid agent can represent a person in a matter before the Commission for example by engaging with the Commission and:
 - completing forms
 - providing guidance (but not legal advice)
 - drafting submissions.
- [6] A paid agent must receive permission from the Commission before they can represent a person at a conference or hearing before a Member in unfair dismissal (UD) and general protections (GP) applications. Staff conciliators conduct conciliations in UD and GP cases. Paid agents require permission to participate in GP staff conciliations, but not in UD staff conciliations. The majority of challenging paid agent conduct occurs in conciliations and conferences. A detailed overview of the legislative framework relating to paid agents, including extracts from the Act and FWC rules is available at **Annexure A**.
- [7] The Member or staff conciliator decides whether to grant permission for a paid agent to represent a person. They will consider the requirements in s.596(2) of the Act. If they are satisfied that one or more of the requirements in s.596(2) is met, they must consider whether in all of the circumstances, they should



exercise the discretion to grant permission to the party to be represented.¹ A decision to grant or refuse permission can be appealed, save where it is made by a Full Bench.

[8] The FWC Rules provide that, save where a direction is given under subrule 12(3), a person may be represented by a lawyer or paid agent in a staff conciliation of a UD application without the Commission's permission,² and staff do not have the power to refuse a person permission to be represented as staff UD conciliations are a voluntary administrative process that is not held under a delegation of the Commission's functions.

[9] Staff GP conferences are held under a delegation of the Commission's functions. This includes a delegation of the power to grant permission under s.596(2) of the Act for a person to be represented in a conference by a lawyer or paid agent (the GP Delegation).

[10] A decision whether to grant permission in accordance with s.592(2) is a two-step process. As explained by the Federal Court in *Warrell v Fair Work Australia* [2013] FCA 291 (*Warrell*):

- for the first step, 'permission may be granted "only if" one or other of the requirements in s 596(2) is satisfied'; 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

[11] While *Warrell* recognises that permission for a particular paid agent to represent a person might be refused even where one or more of the criteria in s.596(2)(a) – (c) are satisfied, this does not appear to occur in practice at all in staff conferences and there are no published decisions to that effect by a Member. Generally, decisions regarding permission by Members for representation are addressed through the case management process and are not published.

[12] While paid agents can (subject to permission requirements) represent parties in proceedings before the Commission, this does not extend to proceedings under the Act brought in the Federal Court of Australia (FCA) or the Federal Circuit and Family Court of Australia (FCFCA). In such proceedings, unless the Court has given leave, an individual may be self-represented or represented by a lawyer and a corporation must be represented by a lawyer, but no provision is made for representation by paid agents.⁴ In nearly all occasions

¹ See, for example, *Warrell v Fair Work Australia* [2013] FCA 291, 233 IR [24]; *Asciano Services Pty Ltd v Hadfield* [2015] FWCFB 2618 [19]; *Calleri v Swinburne University of Technology* [2017] FWCFB 4187 [36], *Kaur v Hartley Lifecare Incorporated* [2020] FWCFB 6434 [21].

² Fair Work Commission Rules 2013, rule 12(2)(b).

³ *Warrell v Fair Work Australia* [2013] FCA 291, 233 IR [24] (original emphasis).

⁴ *Federal Circuit and Family Court of Australia Act 2021*, s.175 and *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021*, rule 9.04; *Federal Court Rules 2011*, rules 1,34 and 4.01.



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for a GP application that proceeds to a court application, this means that a paid agent representing the applicant before the Commission will be unable to represent that person for the court proceeding.

Proportion of applications before the Commission involving regular paid agents

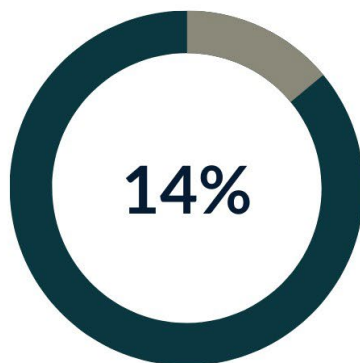
[13] Analysis of the Commission’s case management system identifies 8 paid agents who regularly appear in UD and GP matters. This paper will refer to these as ‘regular paid agents’.

[14] In the 2023 calendar year, those 8 regular paid agent organisations represented applicants in individual disputes approximately 2500 times, representing 14% of all UD matters and 14% of all GP matters.

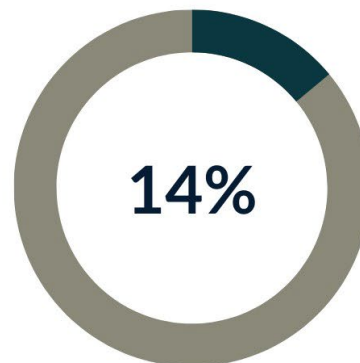
[15] In UD matters, almost half (47%) of applicants have some kind of representation. Where there is a representative in a UD matter, 30% of the time it is a regular paid agent.

[16] In GP matters, over half (59%) of applicants have some kind of representative. Where there is a representative in a GP matter, 23% of the time it is a regular paid agent.

Applicants represented by regular paid agents in individual disputes



14% of all UD matters



14% of all GP matters



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Frequency of applicant representation

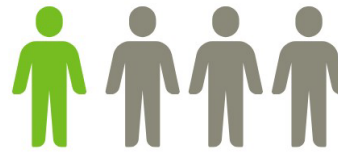
by lawyer, paid agent or union



Frequency of regular paid agents where an applicant had a representative



Regular paid agents represented applicants in $\frac{1}{3}$ (30%) of UD matters



Regular paid agents represented applicants in $\frac{1}{4}$ (23%) of GP matters

All data for the 2023 calendar year

Challenging paid agent conduct observed

[17] Challenging paid agent conduct has been observed from agents representing both applicants and respondents. However, most of the challenging conduct seen or complained about has involved paid agents that represent applicants. The challenging conduct can be grouped in 4 categories.



Table 1: Concerns about payment arrangements and fee structures

Concerns about payment arrangements and fee structures
The Applicant complains that they have not received part or all of their settlement monies.
The Applicant complains that they cannot contact their representative following settlement on a timely basis or at all.
The Applicant believes they have paid their FWC application fee to the paid agent.
The paid agent advises that they have irrevocable authority for settlement monies to be paid into their bank account, which the Applicant claims they were not aware of.
The Applicant is concerned about agreeing to an entirely non-monetary settlement because having their dismissal changed to a resignation would still be considered a win requiring them to pay fees. These fees can be in excess of \$3,000.

Table 2: Concerns about the quality of representation

Concerns about the quality of representation
In relation to GP applications: <ul style="list-style-type: none">• the application lodged by the paid agent does not explain the basis on which a breach of the general protections is alleged• in conference the paid agent is unable to explain the basis on which a breach of the general protections is alleged• the nexus between the exercised workplace right and the alleged adverse action is tenuous. For example, there might be significant time elapsed between these two factors• the GP application appears to have been lodged because the applicant would not be eligible to make a UD application, not because there is an alleged contravention of the general protections provisions.
The application is poorly drafted and does not reflect what the Applicant describes in conciliation.
The Applicant believes they have paid their FWC application fee to the paid agent.
The paid agent who represents the respondent in a UD matter, lodges the F3 response form on the morning of conciliation.
The Applicant claims they were told by their paid agent not to answer the conciliator's call for conciliation because the paid agent's fee for the conciliation had not been paid yet.



Table 3: Concerns about contacting the paid agent

Concerns about contacting the paid agent
The paid agent does not respond to communications from the Commission.
The paid agent seeks an adjournment at the last minute (often without legitimate reason).
The paid agent does not attend the conciliation, conference or hearing without notice to the Applicant or Commission.
The Applicant complains that they cannot contact their representative prior to conciliation, or that they don't know who their representative is.
The Applicant complains that they cannot contact their representative following settlement.
The Applicant complains that they cannot contact their representative following staff conciliation and after the matter is referred on to a Member.

Table 4: Other concerns about paid agent behaviour

Other concerns about paid agent behaviour
The Applicant complains that they believed the paid agent is related to or a part of the Commission.
The paid agent behaves aggressively towards the conciliator.
The Applicant holds the belief that the paid agent is a lawyer when this is not the case.
The paid agent files a Notice of Discontinuance without instructions or contrary to instructions.
The paid agent ceases to act on the same day as the conciliation or just after the conciliation and in either situation the Applicant is left to run the substantive hearing alone.

The relationship between paid agents and clients

[18]As noted above, the majority of challenging paid agent conduct seen or complained about arises in UD and GP applications. From our experience, parties that engage paid agents to act for them are not legally sophisticated – they are individuals or small businesses without internal HR or legal resources for whom this might be their first adversarial court or tribunal proceeding. They may be distressed or vulnerable for a number of reasons, including for example, because they have recently lost their job, are young, or speak English as a second language.



[19]The Commission is not usually told how relationships between parties and paid agents commence; however it is likely that paid agents use internet advertising and search engine optimisation to attract clients and fee structures likely to appeal to people who are without income because they have lost their job. For example:

1. Google searches on the terms ‘unfair dismissal’ and ‘sacked from work’ include two paid agents in the top ten search results.
2. A desktop review of the websites of a number of paid agents that the Commission has received complaints about indicates that they offer free initial consultations and, in some cases, ‘no win, no fee’ arrangements.⁵

[20]The Commission usually doesn’t see the contract between a person and their paid agent. However, from time to time, the Commission is provided with information or documents relating to such a contract, either in the course of proceedings or in handling a complaint about a paid agent. Some common themes indicate that:

1. the terms of ‘No Win No Fee’ arrangements from some paid agents restrict what an applicant can do, including whether the applicant can communicate directly with the Commission,
2. applicants do not understand what constitutes a ‘win’ in a ‘No Win No Fee’ arrangement and when fees become payable for such a ‘win’. Examples include matters where the fees payable to the paid agent exceed or are the same as the settlement sum and fees might be payable even where no settlement payment is made at all but where the parties agreed solely to non-financial terms,
3. applicants are not aware of the type of claim that is being lodged on their behalf – just that a claim will be lodged with ‘a tribunal’, and
4. applicants are required to authorise the payment of settlement monies into the paid agents’ bank account. This bank account is not a regulated trust account (such as might be operated by a legal practitioner) and accordingly does not carry any protective trust account handling legal obligations.

Steps the Commission has previously taken to address challenging paid agent conduct

[21]The Commission has taken a number of steps to address challenging paid agent conduct over recent years.

[22]The Commission has referred information about complaints and parties with complaints to the Australian Competition and Consumer Commissioner (ACCC). On 4 December 2020, the ACCC issued a Public Warning Notice in relation to a paid agent. The Public Warning Notice warned the public that the ACCC had reasonable grounds to suspect that conduct of the paid agent may constitute a contravention of the Australian Consumer Law (ACL).⁶

⁵ See for example [2023] FWC 2078 at [7]-[8].

⁶ The corporate entity that was the subject of the Public Warning Notice no longer operates.



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[23]The Commission has:

- published information on its website with tips about how to choose a lawyer or paid agent⁷;
- information about how to complain about a lawyer or paid agent⁸; and
- named a particular paid agent that had been the subject of numerous complaints, for a period.

[24]This information is likely to be useful if viewed prior to a person engaging a paid agent, but there is no guarantee that this will occur. Parties may engage a paid agent without viewing the Commission's website at all or only view the website after things have escalated to the point where they wish to make a complaint about their paid agent.

National Practice Leaders and the General Manager have written to paid agents about their administrative practices and complaints the Commission has received from their clients. Anecdotally, these letters result in a short-term improvement to conduct but no long-term change.

[25]The Executive Director, Client Services Delivery Branch, has written to a paid agent about the Commission's expectations of the standard of their behaviour towards Commission staff.

Possible options for responding to challenging paid agent conduct

[26]The table below identifies a number of options for responding to challenging paid agent conduct. The options take into consideration that parties who seek paid agent assistance may be vulnerable and may not understand that they will have to represent themselves if they are refused permission to be represented.

⁷ [Tips to choose a lawyer or paid agent](#), Fair Work Commission, accessed 19 February 2024.

⁸ [Complain about a lawyer or paid agent](#), Fair Work Commission, accessed 19 February 2024.



Table 5: Options that could be implemented internally

Option No.	Option description
1	<p>Check application and response forms to identify where a lawyer or paid agent is named. Where they are, the parties would be provided with a fact sheet about representation in the Commission. This could include:</p> <ul style="list-style-type: none">• that there is no requirement to be represented in Commission matters• information about when permission to be represented is required, so that the party understands they may need to be prepared to represent themselves if permission is refused• an outline of typical terms that are included in settlement agreements and median settlement outcomes (either by typical weekly salary or dollar value)• examples of conduct that the Commission has received complaints about, regarding paid agents• information on how to make a complaint regarding a paid agent or legal representative to relevant agencies• for GP applications, information about representation if the matter does not resolve and a court application is made• information about the circumstances in which costs orders can be made against parties, lawyers and paid agents.
2	<p>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.</p>
3	<p>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.</p>
4	<p>At the beginning of any conciliation, conference or hearing involving a paid agent, the Member or conciliator would:</p> <ul style="list-style-type: none">• explain that:<ul style="list-style-type: none">○ representation is not required in Commission proceedings○ the Commission is generally a no cost jurisdiction○ 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.
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.
6	Update current pages on the Commission’s website about representation by paid agents to add: <ul style="list-style-type: none"> • what happens if a matter does not resolve and proceeds to court (i.e. no representation by paid agents in the FCA or FCFA as of right) • further examples of paid agent conduct the Commission receives complaints about.
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. The website would make clear that the Commission does not endorse these paid agents, nor check or regulate compliance with the code, just that they have agreed to behave in a manner consistent with the code of conduct. Administrative processes would need to be developed to consider complaints about failure to follow the code of conduct, including when the Commission would remove a paid agent from the website.
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).
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. See [27]-[29] for further detail.
10	Amend the Fair Work Commission Rules to stipulate that Notices of Discontinuance may only be filed by Applicants or their legal representatives.

Table 6: Options involving other agencies or organisations

Option No.	Option description
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.
11	Refresh arrangements to refer complaints to the ACCC. See [30]-[32] for further detail.



Table 7: Options involving proposals for legislative change (noting any change is a matter for Parliament)

Option No.	Option description
10	Amend the Act to provide a system for the Commission to register paid agents. See [33]-[35] for further detail.
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 for further detail.

Terms of settlement

[27]Staff conciliators use template terms of settlement. There are two templates for UD matters and one for GP matters. Members may also use the standard terms, although practices may vary between chambers.

[28]In respect of where settlement monies are to be paid:

- The UD usual terms of settlement previously provided:

The Respondent will pay this amount by electronic funds transfer to the Applicant’s nominated account.

- The UD exhaustive terms of settlement and the GP usual terms of settlement previously provided:

The dollar amount specified in these terms of settlement will be paid by the Respondent by electronic funds transfer into the Applicant’s nominated financial account / by cheque sent to the Applicant’s residential address /[insert method] [delete whichever is not applicable].

[29]While the terms of any settlement are a matter to be agreed between the parties, to assist in addressing concerns about paid agents requiring settlement monies to be paid into their account and then not passing these on to the Applicant, the Commission’s usual terms of settlement have been amended and aligned to provide that payment must be made into a bank account belonging to the Applicant. If the parties wish to negotiate something different, that is open to them, but the Commission may not assist in drafting an alternative term about payment into a paid agents’ bank account, or may not assist further with the preparation of terms. The Commission will seek to discuss the impact of this term on paid agents and legal representatives.

Referral to the ACCC, or State or Territory equivalents

[30]Complaints received from parties about some paid agents indicate confusion about the paid agents’ terms of engagement – particularly around when fees are payable, when clients will receive settlement funds, and what constitutes a ‘win’ in a ‘no win, no fee’ arrangement. Such conduct may contravene provisions of the ACL (Schedule 2 to the *Competition and Consumer Act 2010*) – including:



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1. s.18, which deals with misleading or deceptive conduct
2. s.21, which deals with unconscionable conduct in connection with goods or services
3. s.29, which deals with false or misleading representations about goods or services.

[31]As noted above, the ACCC has previously issued a Public Warning Notice about a paid agent following complaints the paid agent was not transferring money to its clients following conciliation at the Fair Work Commission.⁹ The notice said the ACCC had ‘...reasonable grounds to suspect that the conduct of *Unfair Dismissals Direct* may constitute a contravention of sections 18(1) and/or 29(1)(g) of the ACL, by representing that it would receive settlement monies on a consumer’s behalf, deduct its professional fees and transfer the remaining balance to the consumer when in some instances *Unfair Dismissals Direct* did not transfer the remaining balance to consumers...’¹⁰. 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’.

[32]The Commission could establish a refreshed arrangement for referring complaints about paid agents, particularly in relation to fee arrangements and representations about the quality of services, to the ACCC or State or Territory equivalent consumer trading agencies. Having regard to the Commission’s privacy obligations, this could be done in a number of ways:

1. an informal referral process through which complainants are provided information about how to contact the ACCC themselves; or
2. by the Commission providing information to the ACCC with the complainant’s consent; or
3. by the Commission providing information to the ACCC as authorised by the President under s.655 of the Act.

Registration of paid agents

[33]As noted above, there are no minimum requirements or standards for a paid agent appearing in proceedings before the Commission. Paid agents are not bound by any professional standards. This might be addressed through an amendment to the Act to establish a registration system similar to that which applies in Western Australia, noting that such a system would require additional resourcing to implement and maintain.

[34]Under the *Industrial Relations Act 1979* (WA IR Act), a party to proceedings may appear in person or be represented by an agent or a legal practitioner.

[35]Section 112A of the WA IR Act provides for the WA Industrial Relations Commission to register industrial agents. To appear in certain proceedings under the WA IR Act, a person must be a legal practitioner or

⁹ [ACCC issues public warning notice about *Unfair Dismissals Direct*](#), Australian Competition and Consumer Commission, accessed 19 February 2024.



registered industrial agent. The *Industrial Relations (Industrial Agents) Regulations 1997* (IR Regulations) set out:

1. how an application for registration may be made
2. the circumstances in which registration may be refused
3. requirements that industrial agents must meet to maintain registration, including that they maintain professional indemnity insurance and comply with a code of conduct set out in the IR Regulations
4. complaint handling processes for complaints about industrial agents and when an agent's registration may be cancelled or the agent disqualified from being an agent.

Possible amendments to s.596 and s.609 of the Act

[36] There is some uncertainty regarding whether, and to what extent, the competence of a particular representative can be considered when determining whether to grant permission for a paid agent to represent someone. Legislative amendment might be sought to clarify or expand the circumstances where the competence of the particular representative is a factor that the Commission can consider. This change might be modelled on s.100 of the *Workplace Relations Act 1996* (WR Act) as at May 2009 (reproduced at Annexure B).

[37] Section 100 of the WR Act provided that a party to a proceeding before the AIRC could be represented by counsel, a solicitor or an agent, subject to the AIRC granting leave to the party. The factors the AIRC had to have regard to in deciding whether to grant leave depended on whether all parties had given express consent to representation or not. In all cases, the AIRC had to have regard to:

1. whether being represented by counsel, solicitor or agent would assist the party concerned to bring the best case possible,¹¹
2. the capacity of the particular counsel, solicitor or agent to represent the party concerned,¹² and
3. the capacity of the particular counsel, solicitor or agent to assist the AIRC in performing its functions under the WR Act.¹³

[38] Where the parties had not given express consent to the party being represented, the AIRC also had to have regard to:

1. the complexity of the factual and legal issues relating to the proceeding,¹⁴

¹¹ *Workplace Relations Act 1996*, s.100(5)(a).

¹² *Workplace Relations Act 1996*, s.100(5)(b).

¹³ *Workplace Relations Act 1996*, s.100(5)(c).

¹⁴ *Workplace Relations Act 1996*, s.100(6)(a).



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2. whether there were special circumstances that made it desirable that the party concerned be represented by counsel, solicitor or agent,¹⁵ and
3. if the party applied to be represented by an agent—whether the agent was a person or body, or an officer or employee of a person or body, that was able to represent the interests of the party under a State or Territory industrial relations law.¹⁶

[39]A decision to grant or refuse leave to be represented could not be appealed.¹⁷

[40]The Explanatory Memorandum to the *Workplace Relations Amendment (Work Choices) Bill 2005* said that these provisions were not intended to limit a party's ability to be represented before the AIRC generally, but to ensure the AIRC has some control over who comes before it, that parties are represented only by persons who can assist them and the AIRC, and that the AIRC plays a role in achieving a 'level playing field' for parties to a proceeding.¹⁸

[41]In summary, s.100 of the WR Act was similar to s.596 of the Act in the following respects:

1. representation was allowed only with permission
2. unless the parties consented to representation, the AIRC had to consider a range of considerations of similar specificity and complexity to those the Commission must consider under s.596(2), and
3. as of right, an organisation or other person could be represented by its employees, officers, peak councils etc.

[42]However, s.100 of the WR Act also differed from s.596 of the Act in some important respects, including:

1. the AIRC was required to consider fewer and less complex considerations if the parties consented to representation
2. in all circumstances the AIRC was required to consider the capacity of the particular representative to represent the party concerned and to assist the AIRC, and
3. grant of leave or refusal to grant leave could not be appealed.

¹⁵ *Workplace Relations Act 1996*, s.100(6)(b).

¹⁶ *Workplace Relations Act 1996*, s.100(6)(c).

¹⁷ *Workplace Relations Act 1996*, s.100(7).

¹⁸ Explanatory Memorandum to the *Workplace Relations Amendment (Work Choices) Bill 2005* at 186. Available at https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r2465_ems_66c6c7e2-1c06-4074-8a4c-dca341dfe1fb/upload_pdf/74998.pdf;fileType=application%2Fpdf.



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Consultation process

[43]The Commission will undertake an external consultation process in relation to the options posed in this paper. Information on the consultation process will be on the Commission’s website, and we will actively seek contributions from a range of stakeholders, including: paid agents, community legal centres, unions, working women’s centres, employer associations, peak bodies, law societies, bar associations, consumer advocacy groups, and relevant Commonwealth agencies such as the Australian Competition and Consumer Commission and the Fair Work Ombudsman.

Consultation timeline

Action	Date
Paper released for public consultation – submissions invited via online form on Commission website or to consultation@fwc.gov.au	7 March 2024
Submissions close	21 March 2024
Submissions published on Commission website	25 March 2024
Public consultations on options paper held (other locations will be considered on request)	2 April 2024 - Brisbane 3 April 2024 - Sydney 10 April 2024 - Melbourne
Outcomes of consultation circulated and published on Commission website	10 May 2024



Annexure A: Legislative framework

[44] The *Fair Work Act 2009* (the Act) provides for when a person may be represented by a lawyer or paid agent in a matter before the Commission.

[45] Section 596(1) of the Act prohibits a person being 'represented in a matter before the FWC' without permission of the Commission, subject to certain exceptions. Unless an exception applies, such permission may be granted only if one of the circumstances in s.596(2)(a)–(c) applies:

596 Representation by lawyers and paid agents

- (1) Except as provided by subsection (3) or the procedural rules, a person may be represented in a matter before the FWC (including by making an application or submission to the FWC on behalf of the person) by a lawyer or paid agent only with the permission of the FWC.
- (2) The FWC may grant permission for a person to be represented by a lawyer or paid agent in a matter before the FWC only if:
 - (a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
 - (b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or
 - (c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

Note: Circumstances in which the FWC might grant permission for a person to be represented by a lawyer or paid agent include the following:

- (a) where a person is from a non-English speaking background or has difficulty reading or writing;
 - (b) where a small business is a party to a matter and has no specialist human resources staff while the other party is represented by an officer or employee of an industrial association or another person with experience in workplace relations advocacy.
- (3) The FWC's permission is not required for a person to be represented by a lawyer or paid agent in making a written submission under Part 2-3 or 2-6 (which deal with modern awards and minimum wages).
 - (4) For the purposes of this section, a person is taken not to be represented by a lawyer or paid agent if
 - (a) is an employee or officer of the person; or
 - (b) is an employee or officer of:
 - (i) an organisation; or



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- (ii) an association of employers that is not registered under the Registered Organisations Act; or
- (iii) a peak council; or
- (iv) a bargaining representative;
that is representing the person; or
- (c) is a bargaining representative.

[46] Section 12 of the Act includes the following definitions:

lawyer means a person who is admitted to the legal profession by a Supreme Court of a State or Territory

paid agent, in relation to a matter before the FWC, means an agent (other than a bargaining representative) who charges or receives a fee to represent a person in the matter

[47] The exceptions to the requirement for permission in s.596(1) include where provided by the 'procedural rules'. Section 609 of the Act provides for the President, after consulting with other FWC Members, to make by legislative instrument procedural rules in relation to a range of matters, including 'the circumstances in which a lawyer or paid agent may make an application or submission to the FWC on behalf of a person who is entitled to make the application or submission'¹⁹.

[48] The *Fair Work Commission Rules 2013* are procedural rules made under s.609 of the Act. Rule 12 provides circumstances where permission is not required. Rule 12(1) has the effect that permission is required to be represented by a lawyer or paid agent participating in a conference or hearing, but is not required for other forms of representation. Rule 12(2) sets out particular circumstances where, despite rule 12(1), permission is not required.

12 Representation by lawyers and paid agents

- (1) For the purposes of subsection 596(1) of the Act, in any matter before the Commission, a person:
 - (a) must not, without the permission of the Commission, be represented in the matter by a lawyer or paid agent participating in a conference or hearing relating to the matter; but
 - (b) may otherwise, without the permission of the Commission, be represented by a lawyer or paid agent in the matter.

Note: See subsection 596(4) of the Act for when a person is taken not to be represented by a lawyer or paid agent for the purposes of that section.

- (2) Despite paragraph (1)(a), a person may, without the permission of the Commission, be represented in a matter by a lawyer or paid agent:

¹⁹ *Fair Work Act 2009*, s.609(2)(b).



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- (a) participating in a conference or hearing in relation to the following:
 - (i) a matter arising under Part 2-3 of the Act (modern awards);
 - (ii) a matter arising under Part 2-5 of the Act (workplace determinations);
 - (iii) a matter arising under Part 2-6 of the Act (minimum wages);
 - (iiia) a matter arising under Part 2-7 of the Act (equal remuneration);
 - (iv) a matter arising under section 510 or 512 of the Act (entry permits); and
 - (b) participating in a conference conducted by a member of the staff of the Commission, whether or not under delegation, in relation to the following:
 - (i)v an application under section 394 of the Act for an unfair dismissal remedy;
 - (ia) a sexual harassment FWC application;
 - (ii) an application under section 789FC of the Act for an order under section 789FF of the Act to stop bullying or sexual harassment.
- (3) Despite anything in this rule, the Commission may, in relation to a matter before the Commission, direct that a person is not to be represented in the matter by a lawyer or paid agent except with the permission of the Commission.
- (4) To avoid doubt, nothing in paragraph (2)(b) is to be taken as permitting a person to be represented in a matter by a lawyer or paid agent participating in a conference before a Commission Member in relation to a sexual harassment FWC application or an application under section 394 or 789FC of the Act without the permission of the Commission.

[49] Rule 12A requires that if a person proposes to be represented by a lawyer or paid agent in a matter before the Commission, and the participation requires permission under rule 12, the person must lodge a notice with the Commission that they will seek permission.

[50] The Commission's *Practice Note: Lawyers & paid agents*²⁰ provides procedural guidance about when a person must notify the Commission that a lawyer or paid agent acts for them and that they propose to seek the Commission's permission to be represented by a lawyer or paid agent.

²⁰ [Practice note: Lawyers & paid agents](#), Fair Work Commission, accessed 19 February 2024



Annexure B: Workplace Relations Act 1996 as at May 2008

Section 100 – Representation of parties before Commission

- (1) A party to a proceeding before the Commission may appear in person.
- (2) Subject to this and any other Act, a party to a proceeding before the Commission may be represented only as provided by this section.
- (3) A party (including an employing authority) may be represented by counsel, solicitor or agent if:
 - (a) all parties have given express consent to that representation; and
 - (b) the Commission grants leave for the party to be so represented.
- (4) A party (including an employing authority) may be represented by counsel, solicitor or agent if:
 - (a) the party applies to the Commission to be so represented; and
 - (b) the Commission grants leave for the party to be so represented.
- (5) In deciding whether or not to grant leave under subsection (3), the Commission must have regard to the following matters:
 - (a) whether being represented by counsel, solicitor or agent would assist the party concerned to bring the best case possible;
 - (b) the capacity of the particular counsel, solicitor or agent to represent the party concerned;
 - (c) the capacity of the particular counsel, solicitor or agent to assist the Commission in performing the Commission's functions under this Act.
- (6) In deciding whether or not to grant leave under subsection (4), the Commission must have regard to the following matters:

the matters referred to in paragraphs (5)(a), (b) and (c);

 - (b) the complexity of the factual and legal issues relating to the proceeding;
 - (c) whether there are special circumstances that make it desirable that the party concerned be represented by counsel, solicitor or agent;
 - (d) if the party applies to be represented by an agent--whether the agent is a person or body, or an officer or employee of a person or body, that is able to represent the interests of the party under a State or Territory industrial relations law.
- (7) An appeal to a Full Bench under section 120 may not be made in relation to a decision under subsection (3) or (4) to grant leave or not to grant leave.



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- (8) A party that is an organisation may be represented by:
- a member, officer or employee of the organisation; or
 - (b) an officer or employee of a peak council to which the organisation is affiliated.
- (9) An employing authority may be represented by a prescribed person.
- (10) Regulations made for the purposes of subsection (9) may prescribe different classes of persons in relation to different classes of proceedings.
- (11) A party other than an organisation or employing authority may be represented by:
- an officer or employee of the party; or
 - a member, officer or employee of an organisation of which the party is a member; or
 - an officer or employee of a peak council to which the party is affiliated; or
 - an officer or employee of a peak council to which an organisation or association of which the party is a member is affiliated; or
 - (e) a bargaining agent.
- (12) Where the Minister is a party (other than in the capacity of employing authority), the Minister may be represented by counsel or solicitor or by another person authorised for the purpose by the Minister.
- (13) Where the Minister is a party (other than in the capacity of employing authority), another party (including an employing authority) may, with the leave of the Commission, be represented by counsel, solicitor or agent.
- (14) In this section (other than paragraph (3)(a)): **party** includes an intervener.