



Law Council  
OF AUSTRALIA

Office of the President

28 March 2024

The Hon Justice Adam Hatcher  
President  
Fair Work Commission  
GPO Box 1994  
MELBOURNE VIC 3001

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

Dear Justice Hatcher

### PAID AGENTS AND THE FAIR WORK COMMISSION

1. The Law Council is grateful for the opportunity to provide a submission to the Fair Work Commission (**Commission**) about the *Paid Agents and the Fair Work Commission Options Paper*.
2. This submission has been prepared with the assistance of the Industrial Law Committee of the Law Council's Federal Dispute Resolution Section, the Law Society of New South Wales (**LSNSW**), and the Law Society of the Australian Capital Territory (**LSACT**).

### Overarching comments

3. The Law Council shares the Commission's concerns about the conduct of some paid agents, which can be unhelpful to the efficient operation of Commission matters, and lead to poorer outcomes for parties. Members of the legal profession have identified instances of challenging paid agent conduct—consistent with that outlined in the Options Paper<sup>1</sup>—which should be addressed in a systemic manner. However, the Law Council notes that these instances are not necessarily representative of the entire paid agent cohort.
4. The Law Council also agrees that the majority of problematic conduct occurs in, or in relation to, conciliations and conferences in unfair dismissal and general protections applications.<sup>2</sup> Some members of the legal profession have also raised instances of inappropriate conduct occurring during the Enterprise Agreement Approval process, although the Law Council notes that this is beyond the scope of the current consultation.
5. The Law Council partially supports the proposed options requiring legislative change (see Table 7 in the Options Paper). The Law Council supports measures to introduce greater regulation of paid agents and articulation of minimum expected standards of conduct, supported by systems for registration, education and complaints.

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<sup>1</sup> Such challenging paid agent conduct is outlined at Tables 1-4 of the Options Paper.

<sup>2</sup> Options Paper, [6].

6. However, in relation to section 596 of the *Fair Work Act 2009* (Cth) (**FW Act**), the Law Council's position remains that parties in conferences and conciliations should have a general right to legal representation.<sup>3</sup> In the Law Council's view, it is not appropriate for the Commission to consider the 'capacity' of a lawyer to represent a particular party, to the extent that assessing the 'capacity' of a lawyer involves assessing their competence, given that the conduct of solicitors is already regulated under the *Legal Profession Uniform Law* (in New South Wales, Victoria and Western Australia) and other legal profession regulatory schemes. Despite this position, the Law Council agrees that there may be utility in amending section 596 to clarify that the Commission may take into consideration the competence of a particular paid agent to represent the person concerned, at least until an effective system of registration and regulation of paid agents is in place.
7. The Law Council also supports a number of the options identified in the Options Paper, which can be implemented internally by the Commission, or by other agencies or organisations.

### **Options involving proposals for legislative change**

#### Option 10 (registration of paid agents)

8. The Law Council agrees that introducing a system of registration for paid agents could assist in raising the overall standard of conduct of paid agents. The system could include professional standards and a code of conduct covering:
  - overarching duties to the Commission and to clients;
  - overarching standards of professionalism in the conduct of matters in the Commission, including in communications and dealings with other parties;
  - client engagement, including disclosure as to the terms of engagement;
  - appropriate requirements of the role, particularly regarding conferences and conciliations;
  - the management of documents and funds;
  - confidentiality; and
  - conflicts of interest.
9. A registration system could also mandate entry-level qualifications and continuing professional education requirements. Training required by the system could include issues such as an understanding of the relevant law and legal process, an understanding of the code of conduct, advocacy and negotiation skills, and skills in communicating with trauma-affected clients while minimising the risk of re-traumatisation.

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<sup>3</sup> It is a longstanding position of the Law Council that section 596 of the *Fair Work Act 2009* (Cth) should be amended to ensure the right to legal representation before the Fair Work Commission: see, eg, Law Council of Australia, [Right to representation before the Fair Work Commission](#) (Media Release, 7 November 2018); Law Council of Australia, Submission to Senate Education and Employment Legislation Committee, [Fair Work Amendment \(Supporting Australia's Jobs and Economic Recovery\) Bill 2020](#) (5 February 2021) [6]-[8]; Law Council of Australia, Submission to Senate Education and Employment Legislation Committee, [Fair Work Legislation Amendment \(Secure Jobs, Better Pay\) Bill 2022](#) (11 November 2022) [146]-[148]; Law Council of Australia, Submission to Senate Education and Employment Legislation Committee, [Fair Work Legislation Amendment \(Closing Loopholes\) Bill 2023](#) (27 October 2023) [57]-[58].

10. The Law Council suggests that a registration system will be most effective if it includes a body that has legislated regulatory functions. This could provide a mechanism for responding to complaints about paid agents and clear grounds for, and processes around, deregistration. In our view, it would be appropriate for such regulatory functions to be undertaken by an independent statutory body.
11. However, we also note that implementation of the measures included in Option 10 could take considerable time to implement; would be subject to government and parliamentary approval; and would be dependent on appropriate funding being provided to the organisation undertaking the regulatory function. In the interim, it would seem prudent to pursue the options in Tables 5 and 6 (subject to the comments below).

#### Option 11 (amendment of s 596)

##### *Representation by lawyers*

12. The Law Council's longstanding position is that a person should not need to seek leave under section 596 of the FW Act to be legally represented in Commission matters, including conferences and conciliations. Rather than acting as an impediment to the swift and efficient resolution of employment related claims, legal representation allows for the prompt identification of the relevant facts and legal questions to be determined, which supports the proper administration of justice. A lack of legal representation can result in delays in pre-trial procedures, increased time spent at hearing discussing irrelevant matters, a greater number of adjournments, and difficulties in advancing settlement discussions.
13. Further, as noted above, pursuant to the legal profession regulatory schemes in place across Australia, there is already an established infrastructure for registration and regulation to ensure that lawyers represent their clients competently and ethically. The holding of a current practising certificate should be a sufficient indicator of a lawyer's competence. There are also established pathways for complaint and redress, where appropriate, in instances where a solicitor's conduct is called into question.
14. The Commission's consultation process is directed to potential options to assist the Commission 'to manage challenging paid agent conduct'. The concerns raised in the Options Paper do not relate to the conduct of lawyers and the Law Council would regard it as inappropriate for the Commission to recommend legislative reform that would unnecessarily increase regulation and potentially further limit the ability of parties to access their lawyer of choice.
15. For these reasons, the Law Council does not support amendment to section 596 that would enable the Commission to consider a lawyer's 'capacity'.

##### *Representation by paid agents*

16. In the event that no other system for regulating paid agents is developed, it may be appropriate to amend section 596 of the FW Act to clarify the Commission's discretion to refuse leave for a paid agent to represent a particular party on the basis of the paid agent's competency to do so. The Law Council agrees that subsections 100(5)–(6) of the *Workplace Relations Act 1996* (Cth) provide an appropriate model for the amendment, insofar as they apply to paid agents.

17. Such an amendment would be more effective if accompanied by measures to strengthen referral pathways from the Commission to services provided by private lawyers, the legal assistance sector and, where eligible, pro bono legal assistance providers. This would provide confidence that, where permission for a paid agent to represent their client is refused, the client need not be left unrepresented.
18. A system of registration and regulation for paid agents, as outlined above, should strengthen the skills and capacity of paid agents, so that over time the need for a discretion to refuse leave since capacity may lessen. On this basis, any amendment to section 596 should be reviewed after a suitable period to assess its operation and whether it continues to meet the objects of the FW Act.

### **Options that could be implemented internally**

#### Option 1 (fact sheet about representation in the FWC)

19. Option 1 would place an obligation on the Commission to provide specific information to persons represented by a lawyer or a paid agent. This would be done by checking the application and response forms to identify where a lawyer or paid agent is named. The Commission already provides a range of information to the public via its website, including in relation to legal help and representation. Providing additional information to applicants who choose to be represented promotes greater transparency, empowers applicants to understand their rights and options, and allows them to make informed decisions about their case.
20. However, given that the legal profession is already well regulated, and the underlying policy aim is about responding to challenging paid agent behaviour, the Law Council suggests that Option 1 should be limited to the provision of relevant information only to applicants who are represented by paid agents.

#### Option 2 (determine s 596 applications prior to any conciliation, conference or hearing involving a paid agent)

21. Option 2 proposes that Commission Members and conciliators (where applicable under the General Protections delegation) could determine applications under section 596 of the FW Act prior to any conciliation, conference or hearing involving a paid agent.
22. While in practice, the question of representation can be addressed through prior directions hearings, there is no formal process in place for it to be determined before the conciliation, conference or hearing occurs. As a result, in many matters it is necessary for the lawyer or paid agent to prepare not only on the basis that permission will be granted for them to appear and advocate on behalf of their client, but also on the basis that no permission will be granted, and that the client will need to represent themselves. This can cause unnecessary cost and anxiety for clients until the issue of permission is determined, possibly as late as at the commencement of the conference, conciliation or hearing. The Law Council, therefore, supports section 596 applications being determined prior to any conciliation, conference or hearing involving a paid agent.

#### Option 3 (members and conciliators share experiences to develop a common approach to paid agents)

23. The Law Council would generally encourage information sharing between Commission members or conciliators, and the promotion of consistent responses to issues of representation.

Option 4 (member or conciliator informs parties about representation)

24. Option 4 would place an obligation on a Commission Member or conciliator to explain certain matters to an applicant before any conciliation, conference or hearing involving a paid agent. In addition, the paid agent would be asked to confirm the payment arrangements to the client and the Commission (for their client's benefit).
25. The Law Council supports the proposal to give parties legal or procedural information at conferences, conciliations and hearings. However, the Law Council has received mixed responses in relation to requiring payment arrangements to be disclosed. Should the Commission proceed to implement Option 4, the Law Council agrees with the limitation to paid agents only as members of the legal profession are already subject to costs disclosure requirements.
26. The LSNSW does not support requiring payment arrangements to be disclosed as it is a private contractual matter. In the LSNSW's view it would be more appropriate to inform the client of the usual terms of engagement.
27. Conversely, the LSACT notes that, in the ACT, law practices are required to disclose information about the cost of legal services and the rights of the client as per the *Legal Profession Act 2006 (ACT)* (similar requirements are imposed on legal practitioners in other jurisdictions). Therefore, the LSACT suggests that it is not unreasonable to expect paid agents to be subject to similar disclosure requirements, increasing transparency about the likely costs involved and again empowering the applicant to make informed decisions about proceeding with representation. The LSACT considers that Option 4 would likely bring to light any uncertain or questionable fee arrangements of paid agents. In such situations, it may be useful for the Commission to have internal procedures and guidance in place to enable appropriate intervention in such matters and support for the applicant.

Option 5 (experienced conciliators are dedicated to matters involving certain paid agents)

28. The Law Council does not express a view in relation to this option. However, we note concern that it may be unfair to parties in Commission matters overall to disrupt the current system of matter allocation based on workload and case management.

Option 6 (update the Commission's website)

29. The Law Council supports this option as a means of providing parties with accurate legal and procedural information about the Commission.

Option 7 (voluntary code of conduct)

30. Option 7 proposes a voluntary code of conduct for paid agents, with the Commission publishing a list of agents who have signed up to the code. The intention of this approach is to shed light on those agents who choose not to sign up to the code (which would then allow applicants to make their own decision about whether to engage a paid agent who is reluctant to agree to minimum behavioural standards).
31. The Law Council considers that a code of conduct could support self-regulation of paid agents (without government intervention) and, as noted above, promote best practice among paid agents, and consumer confidence in, the industry.

32. However, given that compliance would be voluntary, issues may still arise without adequate monitoring and enforcement to address inappropriate behaviour and manage complaints. Whether such a code should be voluntary or mandatory would depend on the matters contained in the code, and other means of enforcement under any proposed regulatory system. One way to strengthen the impact of the code would be to make it an explicit consideration for the purposes of section 596 decisions. It will be important that any voluntary code is developed in close consultation with relevant stakeholders.

Option 8 (identify a test case for cost orders under s 376)

33. Option 8 proposes the identification of an appropriate test case to consider costs orders under section 376, involving a paid agent, in circumstances where it should have been reasonably apparent that the applicant had no reasonable prospect of success in the dispute.
34. The Law Council generally supports this option on the condition that the other party makes the application of their own volition, on the basis that it is in their client's best interests.
35. It is also worth noting that 'no reasonable prospects' is a very low bar and that, therefore, the impact of any changes stemming from such a test case may be minimal.

Option 9 (usual terms of settlement to provide for payment of settlement funds directly to party)

36. The Law Council supports this option as it would apply to paid agents. In addition, paid agents should not be permitted to require that their client subsequently provide written directions to pay to the other party or their representative.
37. The Law Council seeks clarification from the Commission that implementation of Option 9 would apply to paid agents only. Given the regulation already in place in relation to costs arrangements, trust accounting and the like, the Law Council does not consider this reform necessary for the legal profession.

Option 10 (notice of discontinuance only to be filed by a party or their legal representative)

38. Option 10 proposes amending the *Fair Work Commission Rules 2013* (Cth) to stipulate that Notices of Discontinuance may only be filed by applicants or their legal representative.
39. The Law Council suggests that this option be nuanced to reflect that Notices of Discontinuance could be filed by applicants and lawyers, and paid agents who also provide proof of instructions from the applicant at the time of filing (with a requirement that such instructions need to have preceded filing, and not given afterwards with purported retrospective effect).
40. The Law Council also notes that this matter could be addressed in the context of a code of conduct.



## Options involving other agencies or organisations

### Option 10 (establish referral arrangement with legal aid and pro bono providers regarding payment of settlement monies)

41. Option 10 proposes the establishment of a referral arrangement with Community Legal Centres or other pro bono legal services to provide advice to applicants who claim they have not received settlement monies. The Law Council supports this. As outlined above in response to Option 11 regarding legislative change, the Law Council suggests strengthening referral pathways to the legal assistance sector and pro bono providers to provide access to representation as an alternative to representation by a paid agent. However, any proposal to increase the responsibilities and workload of community legal centres must be accompanied by additional resourcing.

### Option 11 (refresh arrangements to refer complaints to the ACCC)

42. Option 11 proposes arrangements for the referral of complaints to the Australian Competition and Consumer Commission or State and Territory equivalents. The Law Council does not oppose this as part of a broader system of regulation of paid agents. Such arrangements should be revisited periodically to ensure ongoing fitness for purpose.

## Contact

43. Please contact John Farrell, Executive Policy Lawyer, on (02) 6246 3714 or at [john.farrell@lawcouncil.au](mailto:john.farrell@lawcouncil.au) in the first instance, if you require further information or clarification.

Yours sincerely



**Greg McIntyre SC**  
**President**