



SUBMISSION ON PAID AGENTS AND THE FAIR WORK COMMISSION

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Acknowledgements

We acknowledge the traditional custodians of the land on which we work across NSW. We recognise and pay respect to the Elders and communities of these lands, past, present and emerging.

Our vision for reconciliation is for a society in which Aboriginal and Torres Strait Islander people and other Australians live and work together with mutual respect and understanding, free from exploitation, discrimination and harassment, at their workplace and in their lives generally.

This land always was and always will be Aboriginal land.

Support

This submission is endorsed by Community Legal Centres NSW.



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1. Summary of Recommendations

- i. Provide information to parties using paid agents in writing about representation at the Fair Work Commission, and collect and analyse information about the use of paid agents in the Fair Work Commission by amendment of the application form;
- ii. Determine applications for leave to represent the parties prior to the conciliation, and provide referrals to pro bono legal assistance services in the event that leave is not granted;
- iii. Create and distribute to agents and parties a comprehensive practice note setting out how to deal with paid agents and issues of unqualified legal practice;
- iv. Amend section 596 of the *Fair Work Act 2009* (Cth) (**the Act**) to allow the Fair Work Commission to withdraw the grant of leave to be represented in circumstances where a paid agent acts inappropriately;
- v. Amend the practice of the Fair Work Commission to allow for a conciliation or listing to be postponed and referrals to pro bono legal assistance services be provided in circumstances where a grant of leave is withdrawn;

- vi. Increase funding to free community legal services such as Community Legal Centres so that they have the resources to take on more referrals from the Commission for disadvantaged Applicants;
- vii. Develop detailed and impactful community education strategies;
- viii. Provide referrals to pro bono organisations where an appropriate test case for costs orders against paid agents has been identified;
- ix. Create a Community Engagement Group and strengthen referral pathways for providers of pro bono legal assistance in circumstances of complaints about paid agent conduct;
- x. Make complaints to the Australian Competition & Consumer Commission and the Office of the Legal Services Commissioner for paid agent misconduct, and work with these organisations to ensure that consumers are being better protected; and
- xi. Seek legislative change to expand the considerations the Fair Work Commission can take into account when determining grant of leave for representation in the Fair Work Commission.
- xii. Seek regulatory change to register paid agents and provide resolution options for consumers impacted by the behaviour of paid agents.

2. Introduction: The Employment Rights Legal Centre and Redfern Legal Centre

Thank you for the opportunity to provide input to the Fair Work Commission’s Options Paper on Paid agents and the Fair Work Commission (the **Options Paper**).

The Employment Rights Legal Service (**ERLS**) is a joint initiative of Redfern Legal Centre (**RLC**), Inner City Legal Centre and Kingsford Legal Centre to provide clients across New South Wales with free employment law advice and representation. ERLS aims to address and remove the systemic barriers that prevent access to justice and allow for the exploitation of workers across New South Wales.

RLC is a non-profit community legal centre that provides access to justice. Established in 1977, RLC was the first community legal centre in NSW and the second in Australia. RLC provides free legal advice, legal services and education to people experiencing disadvantage in our local area and statewide. RLC works to create positive change through policy and law reform work to address inequalities in the legal system, policies and social practices that cause disadvantage. RLC specialist legal services focus on tenancy, credit, debt and consumer law, financial abuse, employment law, international students, First Nations justice, and police accountability, and provide outreach services including through a health justice partnership.

We provide effective and integrated free legal services that are client-focused, collaborative, non-discriminatory and responsive to changing community needs – to our local community as well as state-wide.

3. Our work in consumer and employment law

The ERLS is a specialist employment law service, and our lawyers have extensive experience providing advice to people with employment law issues, including workers who have been dismissed, bullied and sexually harassed and have recourse to the Fair Work Commission.

Since 1977, RLC has provided specialist assistance to people who have consumer law problems. In addition to RLC’s Credit and Debt practice which services the local community, we provide consumer law advice through our state-wide International Student Legal Service NSW, our local First Nations Justice practice and our Health Justice Partnership that provides legal services at Royal Prince Alfred Hospital and Sydney Dental Hospital.

Our specialist work places us in a unique position to understand the complexities of accessing justice, and to provide comment on the legal structures that lead to exploitation. Informed by our advice and casework, we undertake ongoing law reform work in an effort to better protect these workers.

4. Specific Comments on the Options Paper

We welcome the consideration of paid agents before the Fair Work Commission (**the Commission**). The ERLS and RLC are focused on the protection of employee and consumer rights; those who face dismissal or maltreatment at work are required to comply with short deadlines, lack of ongoing income and are particularly vulnerable to exploitation.

We recommend a multiple staged approach to address the action of paid agents. We recognise the efforts already taken by the Commission to protect consumers from paid agents who may be acting in an unfair, unprofessional and/or misleading manner. Paid agents continue to cause harm and consumers require further protection. Action needs to be taken not only at the Commission, but also through regulatory change to ensure that consumers are protected from opportunistic and exploitative paid agents.

In making our recommendations below, we have considered a range of factors, as well as steps that other agencies have taken. We have commented on the specific options set out in the Options Paper, and also made additional suggestions of possibilities to best protect consumers.

Section 596 of the Act allows parties to seek leave to be represented in any matters before the Commission, including sexual harassment disputes. The options paper largely addresses paid agents acting in unfair dismissal or general protection complaints. Workers that have experienced sexual harassment may have suffered trauma from their experience. We recommend additional protections are considered for workers bringing sexual harassment disputes in order to avoid retraumatising these Applicants.

4.1 Comment on concerns

In general, we share the concerns of the Commission set out in tables 1-4 of the Options Paper. In addition to those concerns, we have identified further issues based on our experience advising employees who had previously (or otherwise) been represented by paid agents.

We are concerned about the following paid agent practices:

Table 1: Concerns About Payment Arrangements and Fee Structures

- The Applicant is pressured to settle for a low settlement amount and not pursue a meritorious matter further at the Commission.

Table 2: Concerns about the quality of representation

- The paid agent is poorly prepared and fails to:
 - help the Applicant prepare for the unfair dismissal conciliation generally;
 - help the Applicant draft a personal statement to read at conciliation; and
 - send the employer's F3 response to the Applicant with sufficient time for the Applicant to review and prepare for conciliation.

Table 3: Concerns about contacting the paid agent

- The paid agent did not return calls or emails even up to the day before the conciliation conference, which led to an anxious Applicant attending the conciliation on her own, and then contacting our service for advice.

Table 4: Other concerns about paid agent behaviour

- Paid agent businesses that use the term “Fair Work” in their domain names and marketing, creating the inference they are affiliated with either the Commission, or the Fair Work Ombudsman or the Fair Work Act.
- Applicants hold the belief their paid agent is a lawyer. We hold concerns that this perception is based on deliberate actions taken by paid agents, that can be broadly classed into two categories: failing to accurately communicate with the public and their clients that they are not lawyers, and providing unqualified legal advice.

Failing to accurately represent that they are not lawyers.

- People may assume that only lawyers can represent someone in a legal process such as a Commission hearing. Paid agents do not always correct these assumptions and clarify that they are not lawyers. Further, paid agents publish misleading material on their websites and in their emails, for example:
 - The footer to their emails indicates that emails between a paid agent and an Applicant are confidential and ‘may be privileged’. Given that paid agents are not acting as lawyers, there appears to be no basis for asserting privilege and this representation contributes to the perception they are engaging in legal practice as lawyers.
 - Despite email footers indicating that paid agents will maintain confidentiality, this does not appear to be the case. In response to negative Google Reviews, paid agents appear to publicly share information about Applicants’ employment and dismissals.
 - On their websites, paid agent businesses refer to staff as ‘dismissal claims specialists’, ‘dismissal specialists’, ‘industrial relations consultants’, ‘industry experts’, ‘leading workplace experts’ and ‘workplace and discrimination representatives’. This leads to an inference that their employees are lawyers.
 - On a paid agent FAQ webpage, they answer the question ‘Are you a law firm providing legal representation’, they provide the following equivocal and potentially confusing response, “[paid agent] is not a law firm, we do not engage in legal practice, and do not provide legal advice or representation.
*Our experienced consultants provide industrial advice, dismissal claims lodgement and representation in employment disputes as industrial agents.
Many of our consultants have legal qualifications. We believe this sets us apart from the others. In most cases, a consultant with legal qualifications will have had some involvement in your case. Furthermore, our knowledge and expertise in employment litigation means that we are in a unique position to fight hard against employers, when those without such expertise could drop the case. One example of such circumstances is where an employer lodges a jurisdictional objection to a claim, or makes a costs application.”*
 - On a paid agent website, paid agents fail to clearly distinguish the business as not offering legal representation, stating “*the Fair Work Act 2009 (Cth) allows for a legal or paid representative to lodge the application on your behalf and represent you at the conciliation. This is the service that we provide at [paid agent business]. We do everything for you – starting from drafting your entire application to a Federal Court standard, making the lodgement fee with the Commission on your behalf and then finally, being your advocate during the conciliations so that you don’t have to do it yourself.*”

- Providing unqualified legal advice.*
- In exchange for a fee, paid agents provide Applicants with advice relating to cause of action, prospects and expected compensation/remedy, as well as drafting and representation services. While paid agents do not expressly refer to themselves as lawyers, they are undertaking legal tasks and work. The Legal Profession Uniform Law (NSW) (**the Uniform Law**) prohibits an entity from engaging in legal practice in NSW unless it is a qualified entity. The Uniform Law defines ‘legal services’ as “*work done, or business transacted, in the ordinary course of legal practice*”. Case law provides useful guidance regarding, and examples of, conduct which amounts to engaging in legal practice. In *Cornall v Nagle*,¹ J D Phillips J stated “*If the public is to be adequately protected from those lacking relevant qualifications, then...the giving of legal advice professionally is, I think, to be regarded as exclusively the province of those properly trained in the law and having the necessary expertise.*” Paid agents who provide advice as to the legal character and prospects of litigation following an assessment of material supplied by a client would appear to be engaging in unqualified legal practice.² We are concerned that some paid agents acting before the Commission do so in breach of the Uniform Law.

4.2 Comment on options

In general, we believe that each of the options that the Commission has suggested could have a positive impact on consumers. However, they will have varying effect and priority should be given to those options that best protect consumers. The very short time frames in which Applicants need to lodge dismissal applications create pressure that restricts Applicants’ ability to obtain comprehensive advice and to explore their options for representation.

4.2.1 Table 5 – Option 1

We generally support this option. Further, we believe that there should be clarity in the form as to whether the representative is a lawyer, union representative or other paid agent. There are existing ways in which Consumers can take actions against union representatives or lawyers which do not currently exist for other paid agents. Information should be provided to those who are engaging with all types of representatives. We further recommend that data should be kept of the types of paid representatives appearing in the Commission.

There are restrictions on the effectiveness of this option. In many cases, information will be provided after an agreement has already been reached between the paid agent and the consumer. The consumer may be left in a position where they face breaching contracts and having to pay money if they withdraw instructions to the paid agent to act for them, as exists in many no-win no-fee contract arrangements. In addition, given that the paid agent is often submitting the application, it will be difficult to guarantee that the consumer obtains the information provided by the Commission as the paid agent may withhold it, so the information should be sent to the Applicant directly. The factsheet should also refer to free legal assistance options that may be available to the Applicant.

4.2.2 Table 5 – Option 2

¹ *Cornall v Nagle* [1995] 2 VR 188 at [210].

² *The Council of the Law Society of New South Wales v Australian Injury Helpline Limited and ORS* [2008] NSWSC 627.

We generally support this option, and further recommend that such action is supported by referral pathways to Community Legal Centres, Legal Aid, pro bono and low bono organisations for those consumers who are refused representation. To effectively protect consumers, we recommend where the consumer is refused representation that the Commission introduce a policy to ensure that the consumer can obtain free legal advice, by both providing a referral, and if necessary, an extension of time before the conciliation. We further recommend that more funding be provided to community legal centres in order to be able to assist Applicants referred to us by the Commission. We strongly support the expansion of criteria that can be considered for whether a lawyer or paid agent can represent the consumer, as set out in Table 7 – Option 11.

4.2.3 Table 5 – Option 3

We encourage and support a collaborative approach to dealing with paid agents that are causing harm to consumers. Collaboration, information sharing, and a consistent and predictable response are all positive goals, and we recommend that the Commission formalises a process for sharing this information. We further recommend that the Commission publishes a more detailed practice note to dealing with paid agents. This would have additional benefits of consumer and community education. In addition, a more fulsome practice note could be used by those acting against paid agents who are acting inappropriately, and in advocacy for systemic change. We support the introduction of a practice note highlighting conduct which may amount to unqualified legal practice and steps consumers can take if their paid agents have engaged in such conduct. We recommend such a practice note be provided to paid agents and their clients in all Commission processes. The practice note should further clarify the circumstances in which Commissioners will intervene.

4.2.4 Table 5 – Option 4

While we would not oppose the Member or conciliator providing such information, we have serious concerns that this intervention may be too late. There is also a lack of clarity around what would happen if the Member or conciliator was unsatisfied with response of the paid agent. If a paid agent provides information that raises concerns for a Member or conciliator, we recommend the following:

- amending s.596 of the Act, as set out in Table 7- Option 11 to include the Commission being able to resile from their initial grant of permission for a person to be represented by a paid agent; and
- the conciliation is postponed allowing the consumer to obtain assistance from a community legal centre or other pro bono legal assistance organisation before the conciliation proceeds.

4.2.5 Table 5 – Option 5

Please see the response to Table 5 – Option 3.

4.2.6 Table 5 – Option 6

We support community education and the dissemination of further information, including information about the harms to consumers that paid agents can cause. However, if community education is a primary aim, Option 6 will not be sufficient as a single approach. Information is already available on the Commission website about paid agents. We recommend the Commission develop more far-reaching, detailed community education strategies.

4.2.7 Table 5 – Option 7

We have experience assisting consumers covered by voluntary codes of conduct and in providing

feedback on voluntary codes and standards in the consumer space. Unfortunately, voluntary codes of conduct are rarely sufficient to protect consumers. There are minimal options for recourse or sanction in circumstances where subscribers fail to comply with codes of conduct. An example is Buy Now Pay Later organisations; as the voluntary code of conduct introduced in 2021 was not strong enough to protect consumers sufficiently, draft Federal legislation has been recently introduced to, amongst other regulation, provide a complaints pathway for consumers through the Australian Financial Complaints Authority.

From [21] to [25] in this Options Paper, the Commission has detailed efforts made to address challenging paid agent conduct, and further indicated that paid agent behaviour has not improved even when issues are raised. We have concerns that a voluntary code of conduct would have a similar effect. In addition, publishing the names and details of agents will lead to consumers believing that those agents are being endorsed, even in circumstances where it is stated otherwise. This could cause increased risk of harm to consumers.

If a code of conduct is introduced, compliance with this code should be a requirement for appearance in the Commission. We recommend the code provides for strong punitive action for any breach. We also recommend that it is incorporated into paid agents' contracts for service, meaning clients would have contractual recourse if their paid agent does not comply with the code of conduct.

4.2.8 Table 5 – Option 8

We appreciate the potential systemic value in running an appropriate test case to test costs orders under s. 376 where an Applicant's dismissal matter had no reasonable prospects of success. In the event that this is pursued, the Commission should assist in ensuring that the consumer and the other party are referred to and supported by lawyers acting in their best interests and have significant experience in the area. Given that the Commission could not make orders on its own motion, we hold concerns that Respondents would also seek costs orders against the consumer.

4.2.9 Table 5 – Option 9

We support aligning the usual terms of settlement to provide only for payment directly to the Applicant's bank account. However, we have serious concerns that this may lead to Applicants being pressured to pay the amounts to paid agents to avoid debt recovery and litigation against them. We also have significant concerns that, in the event this approach is taken, paid agents will begin to address this by way of incorporation into their agreements to ensure they continue to receive the full amounts that Applicants receive through the Commission proceedings.

4.2.10 Table 5 – Option 10

While we are generally supportive of this option, in our view this will do little to address the damage that can be done by paid agents to consumers. The Commission has taken action to assist consumers when a Notice of Discontinuance has been filed against instructions.

4.2.11 Table 6 – Option 10

We support this approach. We also suggest that pro bono legal organisations and community legal centres receive referrals for matters (with consumer consent) that cause concern to Members and conciliators, in circumstances other than just consumers not receiving settlement money. We

welcome the opportunity to strengthen the relationships between the Commission and providers of pro bono legal assistance in relation to alternatives and assistance that can be provided to consumers in the Commission. We also recommend that the government provides increased funding to Community Legal Centres in order to act on these referrals.

We recommend creating a Community Engagement stakeholder user group. Similar existing user groups include the Small Business Reference Group and the Employment Termination User Group. Community Legal Centres with employment practices are members of similar groups with the Fair Work Ombudsman (the Community Engagement Group). Our clients are frequent users of Commission processes, and our solicitors often have unique insights about user groups with particular access to justice issues.

4.2.12 Table 6 – Option 11

We strongly support this action being taken. Protection of consumers should be of particular concern to the Commission and ACCC, and collaboration between the organisations should be encouraged. The ACCC should consider taking action against paid agents who are acting in ways that are in breach of Australian Consumer Law. These breaches may include unfair contract terms and providing services in breach of the consumer guarantee to do so with due care and skill.

In addition, the Commission should consider making complaints to the Office of the Legal Service Commissioner (NSW) or equivalent organisations in other states and territories in circumstances where there is concern that the paid agent has undertaken unqualified legal practice – for instance, where the paid agent has provided a determination of reasonable prospects of success, which many paid agents advertise that they do on their websites.

4.2.13 Table 7 – Option 10

We strongly support increased professional regulation of paid agents, including the creation of a register of paid agents and a complaints body to deal with complaints against paid agents. Current advertising by some paid agents is targeted at workers with limited knowledge of their rights, and low-income workers by offering free assessments. Paid agents currently have the opportunity to take advantage of those experiencing significant disadvantage. Consumers require legislative protection. It is important that consumers have a pathway to take steps against paid agents who act inappropriately, outside of the current options of informal dispute resolution or litigation for unfair contract terms, breach of contract or other claims under the Australian Consumer Law.

Imposing registration requirements on paid agents as described at [35] and introducing minimum standards will offer protection to consumers and provide an opportunity for recovery of settlement monies and/or fees paid by the consumer, compensation and other resolution options for complaints in the case of negative behaviour. The Commission will also benefit in the long term by reducing the risk of additional hearings associated with paid agent misconduct and lack of clarity by consumers around their rights and the responsibilities of paid agents.

We support the introduction of more stringent professional regulation of paid agents, in a similar way to the regulation of migration agents by the Office of Migration Agent Registration Authority. Paid agents should similarly be required to demonstrate core competencies, work in accordance with rules in a code of conduct, renew registration annually and maintain continuing professional development learnings. If these requirements are breached, paid agents should be sanctioned, including by suspending or cancelling their registration or banning them from reregistering.

4.2.14 Table 7 – Option 11

We agree that the competence of the potential non-lawyer paid agent should be considered a relevant factor in determining whether leave to represent should be granted. A key consideration should be the capacity of paid agents to assist the Commission and effectively represent clients in circumstances where they are not able to provide legal advice.

We recommend that any change goes further; for instance, in determining whether representation should be allowed, the New South Wales Civil and Administrative Tribunal in its Consumer and Commercial Division can consider:

- “a) whether the proposed representative has sufficient knowledge of the issues in dispute so as to be able to represent the party effectively before the Tribunal;*
- b) whether the proposed representative is able to deal fairly and honestly with the Tribunal and other persons involved in the proceedings;*
- c) whether the proposed representative has authority to bind the party; and*
- d) any other circumstances that the Tribunal considers relevant.”*

The considerations of fairness and honesty, as well a broad final consideration which can allow exclusion in the event of any other relevant information, such as past conduct, would effectively protect consumers in a way the WR Act wording cannot.

As flagged above, in accordance with s 596 of the Act, a person may be represented in any matters before the Commission, including sexual harassment disputes. When acting in matters involving sexual harassment, to avoid re-traumatising applicants, paid agents should be able to demonstrate training or experience in adopting a trauma informed approach.

We are happy to provide further comments on any of the above and we are able to speak with the Commission’s Paid Agents Working Group at your convenience.