

## Submission

21 March 2024

President Justice Hatcher,  
Fair Work Commission  
By email to: [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au)

### Consultation Paid agents and the Fair Work Commission

Dear President Justice Hatcher,

NT Working Women's Centre thank you for the opportunity to contribute to the consultation regarding Paid agents and the Fair Work Commission.

#### Who is the NT Working Women's Centre

The NT Working Women's Centre (NTWWC) is a community based, not-for-profit organisation that provides free and confidential advice and support services on work-related matters to women and gender diverse people in the NT. Services commenced in 1994, and we operate across the NT from two offices in Darwin and Alice Springs.

The NTWWC works primarily with women who are not represented by a union, lawyer, or other advocate. Women who contact our Centre are often economically disadvantaged and work in precarious areas of employment. On average we have approximately 3,000 client contacts per year. NTWWC, assist women and gender diverse people; clients who often face challenges including intersectional barriers.

The NTWWC targets its services at NT workers who may fall into several categories of workplace vulnerabilities, for instance, who are Aboriginal and Torres Strait Islander (which represent 19% of our clients), culturally and linguistically diverse (CALD) (24% of our clients), trans women, workers who reside in regional and remote areas (52%) and those who live with a disability (22% of our clients).<sup>1</sup>

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<sup>1</sup> Statistics - 12 months to 30 June 2023

In addition, we provide community education on workplace rights and issues in addition to tailored training packages to workplaces on topics such as domestic family violence, bullying and sexual harassment.

We conduct research and project work on a range of issues that women experience in relation to work. These have included access to childcare, family friendly practices, the needs of Aboriginal and Torres Strait Islander working women, pregnancy and parental status discrimination, work/life balance, pay equity and the impact of domestic family violence on women workers and their workplaces. In conjunction with the National Alliance of Working Women's Centres, we provide expert advice to government on legal and policy reform.

**Option One:** 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:

- 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.

We agree with **option one**. However, from experience NTWWC has observed that our clients who were represented at conciliation achieved better outcomes than those who choose to self-represent.



In addition to this factsheet if an unrepresented party lodges an application to the Commission, they too should be given information about services that may be able to provide representation if the matter is not settled at conciliation.

**Option Two:** 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.

Regarding **option two** we require further information and clarification about the intent and outcome sought to be achieved by this proposal.

We do see merit in Applicants being represented at an earlier opportunity as it may increase the likelihood of settling at conciliation as the Applicant will be made aware of their options and rights, or at least have had the opportunity to obtain advice. Thus, they will be better placed to participate in this process.

In our experience, we have found in some instances, under the GP delegation that Members ask the respondents opinion prior to making decisions. We would suggest that any decisions made by Members should not rely on the respondent's consent. Furthermore, we recommend that members should be able to decide out of time jurisdictional objections based on submissions in the first instance as many unrepresented parties may not be aware the matter can be considered via papers. This approach would be similar to other jurisdictions such as the Australian Human Rights Commission and Northern Territory Anti-Discrimination Commission.

**Option Three:** 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.

We agree with **option three**. We believe that a consistent approach to how the Fair Work Commission handles representation requests would be beneficial. However, we are unsure as to why conciliators would be involved in issues such as permission to appear as permission is only required for 'formal proceedings.'



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

- explain that:
  - 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.

We agree with **option four**. However, we would ask that this be decided prior to conciliation rather than during. In addition, we would recommend that an information cover sheet be issued with the Notice of listing of the Conciliation in languages alerting Applicant's and Respondents to this. This would reduce the likelihood of an Applicant appearing without support and remove this decision from the conciliators. Furthermore, rather than the Fair Work Commission ascertaining whether they deem the fees to be appropriate we would recommend the introduction of a fee capping structure for any paid representatives. This approach would be similar to the *Federal Court and Family Court of Australia in which Family Law (Fees) Regulations 2022* (Cth) prescribes the fees to the Applicant.

**Option Five:** 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.

We agree with **option five**. We have found that it can be challenging for conciliators when parties to a conciliation do not act in a professional manner. Rather than limit this to just paid agents we believe that the conciliators should be empowered to issue warnings, cautions, time out and ultimately remove the



offending parties who use abusive, offensive language or intimidating behaviour. This approach would be similar to the process by which Community Justice Centres facilitate mediations by informing parties at the outset of rules relating to conduct.

We note that there have been recent changes to the Fair Work Commission Notice Listings to include provisions regarding unacceptable behaviour towards Commission staff however we believe that this should be extended to include all parties to the proceedings, and their representatives, in order to provide a fair and safe conciliatory process. **Case Study one** demonstrates the need for adequately trained and support conciliators, to deal with aggressive and unprofessional conduct.

### **Case Study One**

Erin submitted an unfair dismissal application to the Fair Work Commission.

NT Working Women's Centre attended as her representative and the owner of the business and their HR representative attended the conciliation. The HR Representative continually interrupted and spoke over the Applicant, NT Working Women's Centre and the conciliator during the process.

Unfortunately, the conciliator was limited as to how they could prevent this behaviour which impacted the negotiations.

**Option Six:** Update current pages on the Commission's website about representation by paid agents to add:

- what happens if a matter does not resolve and proceeds to court (i.e. no representation by paid agents in the FCA or FCFA as of right)
- further examples of paid agent conduct the Commission receives complaints about.

**Option Seven:** 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.





We do not consider that **options six and seven** go far enough. We believe that a voluntary code of conduct and more available information is not sufficient to prevent Applicants from being taken advantage of. Please also refer to our comments below for option thirteen and fourteen.

**Option Eight:** 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).

Regarding **option eight**, we would require further information and clarification as to the intent and operation of this proposal.

**Option Nine:** 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.

We agree with **option nine**. However, this proposal could be extended to require all deeds be drafted by the Commission where matters have settled at conciliation to ensure consistency of approach, especially where the parties are unrepresented. This would align with other jurisdictions such as the Northern Territory Anti-Discrimination Commission and the Northern Territory Civil and Administrative Tribunal.

### Case Study Two

Tina settled her unfair dismissal matter at conciliation.

NT Working Women Centre asked the conciliator to draft the deed as part of the settlement. The respondent representative advised that there was an internal policy that all deeds are drafted by the Employer. As the respondent representative had not attended a conciliation previously, we questioned whether they were aware of usual terms of the deeds, to which they replied they were.

The conciliator agreed with the Respondents drafting the Deed of Settlement. This resulted in lots of time spent assisting the Employer's internal representative to draft a suitable Deed fit for purpose.





**Option Ten:** Amend the Fair Work Commission Rules to stipulate that Notices of Discontinuance may only be filed by Applicants or their legal representatives.

We disagree with **option ten**. This proposal would cause problems for our staff who attend the Fair Work Commission as specialist industrial officers and advocates. Many of our clients have limited reliable access to computer, printers, phones and wifi which would prevent them from filing their own documentation. Additionally, as we are not a legal centre we do not currently employ legal representatives.

If the Fair Work Commission proceeds with this proposal it may prevent working women's centre and unions from lodging Notices of Discontinuance. The below **Case Studies (three and four)** demonstrates that if either matters settle at conciliation, we would not be in a position to assist the client with discontinuing the proceedings as is the course now.

#### **Case Study Three**

Moira had submitted a general protection application to the Fair Work Commission.

NT Working Women's Centre submitted all her subsequent documents and liaised with the Commission regarding her matter as she was in a remote part of the Northern Territory with limited reliable access to computer, phone, wifi and printers.

#### **Case Study Four**

Danielle is dyslexic and needs assistance applying to the Commission for unfair dismissal.

NT Working Women's Centre is working to assist Danielle with her application and, as such, will be submitting all the documentation on her behalf.

**Option 11:** 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.

We agree with **option eleven**. However, we note that your proposal is only regarding advice and not representation similar to the current workplace advice service. It would be more beneficial for





arrangements to include organisations who would be prepared to assist free of cost. We note that currently the only organisations with locations in the Northern Territory who are a part of the current service are - Bowden McCormack Lawyers + Advisers, De Silva Hebron Barristers & Solicitors, EL Legal Pty Ltd and HWL Ebsworth. Furthermore, if the Commission proceeds to our additional proposal outlined in **option one**, from the beginning Applicants will have a list of free service providers to choose from.

**Option 12:** Refresh arrangements to refer complaints to the ACCC. See [30]-[32] for further detail.

We agree with **option twelve**. Whilst this may be beneficial in the interim, we would prefer if there was legislative changes as proposed by **option thirteen**.

**Option 13:** Amend the Act to provide a system for the Commission to register paid agents. See [33]-[35] for further detail.

We would endorse **option thirteen** for the Commission to register paid agents. We believe that this would enable them to discipline and prohibit repeat offenders whose unprofessional conduct breaches a professional code of conduct. After considering section 112A of the *Industrial Relations Act 1979 (WA)* we would agree that the Fair Work Commission should take a similar approach.

**Option 14:** 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.

Regarding **option fourteen** we do not agree with this proposal as it may be going too far. We note that *Industrial Relations Act 1979 (WA)* does not consider the capacity of the representative.

To conclude, as the Fair Work Commission was designed for self-represented litigants, the only way to ensure that they are not disadvantaged by unscrupulous paid agents is to provide additional information as covered above, including options for alternative advice/representation. In addition, we support registration and some form of regulation with consequences for breaches by paid agents.

Please do not hesitate to let us know should you have any questions or require further information.

