



# Unfair Dismissal Experts

21 March 2024

## Submission to the 'Paid agents and the Fair Work Commission' options paper consultation

1. Unfair Dismissal Experts Pty Ltd (**UDE**) welcomes the Fair Work Commission's (the **Commission's**) establishment of the Paid Agents Working Group (**Working Group**) and the opportunity to make a submission to the Working Group's '*Paid agents and the Fair Work Commission*' options paper.

### Background

2. UDE's business is to represent applicants in unfair dismissal and general protections applications as a paid agent. By focusing on a narrow subset of claims, developing expertise in those claims, and prosecuting those claims at volume and as cost effectively for our clients as possible (including by carrying all the financial risk), UDE increases access to justice and enables more applicants to obtain redress from their former employers than would have otherwise.
3. UDE's '1800 UNFAIR' hotline receives a large number of calls from employees seeking information about their employment – many of these callers have not been dismissed and are seeking general advice, and of those that have been dismissed, only a small proportion of those callers ultimately become clients. UDE regularly receives feedback from callers that the information provided by UDE's hotline was helpful and that their enquiries were not addressed by the other services available if they were able to access them.
4. UDE considers that it plays a valuable role in the Australian industrial relations ecosystem and that its advantages include its well-known 1800 UNFAIR hotline, its high degree of specialisation, and the cost effective nature of its services enabled by its systems and automation. By way of juxtaposition, a generalist – such as a suburban solicitor – could handle conveyancing the first day, property the following day, and a general protections application on the third day, which would lead to fewer opportunities for cost efficiencies through economies of scale such as via process and automation.
5. Our market research indicates that our fees are substantially lower when compared with other paid agents or solicitors. Many of our clients have informed us they approached or had consultations with law firms prior to engaging us, but were unable to afford the costs of engaging their legal services.
6. We offer prospective clients a number of retainer options which include:
  - a) Up-front fee for service – where the financial risk lies with the applicant.
  - b) No Win No Fee (NWNF) – where the financial risk lies with UDE and UDE's fees (if any) are deducted from the financial settlement (if any). A non-financial settlement does not trigger a fee.
  - c) Hybrid of a) and b).
7. The reasons that people engage our representation are numerous. We are informed by many clients that, whilst they could lodge the claim on their own, they would prefer to not deal with their former employer directly, and that they believe the credibility of an established firm is more likely to lead to a favourable settlement. We firmly believe that many of our clients with meritorious claims would never

have lodged their claims but for the availability of UDE's services. In addition, a significant proportion of clients contact us after already having started the process and find it too technically or psychologically taxing to continue handling alone. It is also common that we hear from clients that they are intimidated by their former employers and have concerns about potential retaliation, or that they find the process complicated or overwhelming from an administrative point of view. In addition, a lack of computer literacy or a belief that they would be unable to handle the process themselves causes some applicants to avoid the process entirely if they were unable to access representation.

8. Furthermore, there is a gulf in bargaining power between the employer and the employee – particularly an employee who has been recently dismissed. Having the benefit of representation by an experienced paid agent such as UDE, or an experienced legal practitioner, ensures the employee is on an equal footing and has the best chance of achieving a favourable outcome.
9. In addition to ensuring meritorious claims are lodged which would not otherwise have been lodged thereby increasing access to justice, UDE's representation leads to better outcomes. While in many cases a highly competent conciliator can broker a strong settlement in conciliation in the absence of representation by a paid agent or legal practitioner, the conciliation represents only a part of the picture. First, there can be a variety of pre-conciliation conduct which occurs. This might include respondents making effective 'counter claims' against applicants in pre-conciliation correspondence – for example, that an alleged unpaid debt is owed, or that equipment has been damaged for which they seek recovery – in order to dissuade the applicant from proceeding further with their claim or settling on terms favourable to the respondent. Further, where a verbal agreement is reached at the conciliation, a variety of post-conciliation activities, including enforcement steps, are often necessary to ensure that respondents deliver. These activities are not undertaken by the Commission and can be difficult for applicants to manage on their own.
10. Second, for matters that do not settle at conciliation, we have observed respondents engage in forms of negotiation brinksmanship, or follow a certain playbook in dealing with claims before the Commission, which has the result that the matter would not have settled had the applicant represented themselves, and what led to a favourable settlement in the post-conciliation negotiations was the respondent considering in its calculus that UDE would take the matter to arbitration absent a reasonable settlement offer. Applicants who represent themselves are often not equipped to take matters to arbitration, as commercially astute respondents are aware. By this stage of the process, the Commission has ended its involvement in conciliating the matter, and its role includes sending notices and directions to lodge materials, which applicants often find overwhelming and are not equipped to comply with, putting respondents in a strong bargaining position in the absence of representation on behalf of the applicant. This power imbalance continues until the matter is determined by way of arbitration.
11. Accordingly, UDE as a paid agent:
  - a) plays a valuable role in the Australian industrial relations ecosystem;
  - b) fields a high volume of enquiries from employees to its hotline which otherwise might not have been fielded by the other services available;

- c) ensures that a greater number of meritorious claims are lodged to the Commission, increasing access to justice; and
- d) for the claims that would have been lodged by applicants themselves absent the availability of UDE's services, helps ensure that those applicants receive better outcomes.

12. However, UDE also recognises that, as a class, paid agents are not regulated like legal practitioners and, following the unconscionable and 'challenging paid agent conduct' observed by specific paid agents, in the absence of an enforcement body such as the one applicable to legal practitioners, steps by the Commission are needed, and welcomed, to address the challenging conduct of those particular bad actors.

### Responses to the Commission's options

13. In responding to each of the Commission's options for consultation, a theme of UDE's submissions is that the Commission ought to strike at the root of the issue – which is particular bad actor paid agents engaging in unconscionable or 'challenging paid agent conduct' – rather than seeking to impose new obligations on the entire industry of paid agents as a means to address that issue. Paid agents have represented applicants in Australian industrial relations tribunals for decades – indeed, the earliest reference to 'agent' we have identified is in the *Commonwealth Conciliation and Arbitration Act 1904*.

14. Accordingly, UDE submits that the Commission ought to adopt a precise – or surgical – instrument to tackle the issue rather than a blunt instrument which can have unintended consequences, such as decreasing the retainer options available for potential applicants, increasing fees for representation by paid agents, and harming the class of potential applicants most benefitting from those retainer arrangements.

15. UDE makes the following submissions in respect of the Commission's proposals:

Option	Commission's proposal	UDE's submission
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.</p> <p>This could include:</p> <ul style="list-style-type: none"> <li>• that there is no requirement to be represented in Commission matters</li> <li>• information about when permission to be represented is required, so that the party understands</li> </ul>	<p>As a general principle, UDE welcomes the Commission providing applicants, and potential applicants with more information – and, in particular, more accessible information. UDE has welcomed the Commission's transition to plain language and simplified communications.</p> <p>In respect of any fact sheet, if the Commission intends to make reference to challenging paid agent conduct, UDE submits that the fact sheet should specify whether such conduct has been observed from the specific paid agent they have engaged.</p> <p>UDE considers it unfair that its clients should receive warnings from the Commission about 'challenging paid agent conduct' when those warnings do not</p>

	<p>they may need to be prepared to represent themselves if permission is refused</p> <ul style="list-style-type: none"> <li>• an outline of typical terms that are included in settlement agreements and median settlement outcomes (either by typical weekly salary or dollar value)</li> <li>• examples of conduct that the Commission has received complaints about, regarding paid agents</li> <li>• information on how to make a complaint regarding a paid agent or legal representative to relevant agencies</li> <li>• for GP applications, information about representation if the matter does not resolve and a court application is made</li> <li>• information about the circumstances in which costs orders can be made against parties, lawyers and paid agents.</li> </ul>	<p>pertain to UDE.</p> <p>If the Commission intends to pursue the fact sheet route, perhaps there should be multiple versions of the fact sheet – one version sent if the Commission has received complaints about the paid agent engaged by the applicant, and another more generic version.</p> <p>While UDE has not been the subject of any complaints to its knowledge of the type referenced in the consultation, as a matter of procedural fairness, parties alleged to have engaged in challenging conduct should be afforded natural justice and have an opportunity to have the complaints put to them, remedy the situation and address the complaints. UDE is committed to taking any and all steps to address any concerns should they exist.</p>
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>	<p>UDE supports this option.</p> <p>For paid agents in respect of whom the Commission has observed unconscionable conduct or ‘challenging paid agent conduct’ as defined in the consultation, UDE submits that the bar for the Commission granting them permission to represent an applicant should be substantially higher until those issues are rectified. It is analogous to a reverse onus for impugned paid agents who must persuade the Commission they have addressed its</p>

		<p>concerns.</p> <p>UDE submits that section 596 permits the Commission to consider a variety of factors – including its previous dealings with that paid agent – and the Commission should not exercise its discretion so as to be blind to a paid agent’s previous conduct and complaints received about them.</p> <p>This determination should be conducted as soon as possible after the application is lodged by the impugned paid agent – well before the conciliation – so the applicant has an opportunity to discontinue their representation with the impugned agent and organise another representative or prepare to represent themselves.</p> <p>While this consultation is limited to paid agents, for completeness, the above approach also has merit for legal practitioners before the Commission.</p> <p>As noted, while UDE has not been the subject of any complaints to its knowledge of the type referenced in the consultation, as a matter of procedural fairness, parties alleged to have engaged in challenging conduct should be afforded natural justice and have an opportunity to have the complaints put to them, remedy the situation and address the complaints before being adversely impacted by the exercise of discretion under this option, and the exercise of discretion should be done consistently. UDE is committed to taking any and all steps to address any concerns should they exist.</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>	<p>UDE supports this option.</p> <p>The Commission should create a consistent and predictable set of rules to deal with paid agents who have engaged in unconscionable or ‘challenging paid agent conduct’.</p> <p>UDE considers that this would strike at the root of the issue – which is specific ‘bad actors’ – rather than seeking imposing new obligations on the entire</p>

		class of paid agents which would have unintended consequences.
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"> <li>• explain that: <ul style="list-style-type: none"> <li>○ representation is not required in Commission proceedings</li> <li>○ the Commission is generally a no cost jurisdiction</li> <li>○ 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</li> <li>○ 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.</li> </ul> </li> </ul> <p>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.</p>	<p>UDE has reservations with elements of this option.</p> <p>This option intermediates the Commission as a broker with respect to the retainer arrangement between the paid agent and its client. UDE submits that this is not the role of the Commission, and the issue of 'challenging paid agent' conduct is better addressed through the other options.</p> <p>UDE opposes the proposition that the Commission should encourage – whether by its standard terms or otherwise – the respondent to pay funds into the bank account on record held by the applicant in circumstances where the applicant has given a payment direction that the funds be paid to the paid agent. This is contrary to general principles of contract and privity, and could be seen as the Commission seeking to frustrate a payment direction agreed in good faith between the paid agent and its client in connection with a scope of works.</p> <p>UDE employs payment directions for administrative efficiency in recovering fees for No Win No Fee retainer arrangements, and this is reflected in its cost-effective and risk-free retainer options.</p> <p>If the Commission seeks to frustrate or discourage payment directions for the entire class of paid agents in response to a few bad actors, this is likely to result in retainer offers being either withdrawn or fees substantially increased to account for additional administration and bad debts. The No Win No Fee retainer option would need to be withdrawn entirely, or the fee increased substantially to account for:</p> <p>(a) the cost of individually seeking recovery for each matter (particularly for a high volume business focused on providing services as cost effectively as possible such as UDE), and</p> <p>(b) the bad debts that would result from the subset of</p>

		<p>clients who elect to not pay their invoice which would need to be subsidised by the remaining client base.</p> <p>This impact to the availability of NWNF retainer options in market would substantially reduce access to justice for the reasons set out in paragraphs 2 – 10. In UDE's experience, it is the same cohort of applicants – people who are impecunious or not adept at managing money – who can find themselves unfairly dismissed without the wherewithal to retain representation or even to pay the lodgment fee – who benefit most from UDE's risk-free NWNF arrangement as this option carries no financial risk or commitment from them – and who would be most negatively impacted, as a class, by the Commission seeking to discourage payment directions. But for the availability of UDE's risk-free NWNF retainer, this cohort of applicants would not have been willing or able to lodge a claim on their own either for the reasons set out in paragraph 6, or because they are not adept at managing their affairs more generally at the level required to navigate the complexity of the Commission and secure a favourable settlement against a commercially astute respondent. Once a favourable settlement is secured with the assistance of a competent representative however, this inability to manage money can be manifested in a failure to pay the invoice as, understandably, there can be more pressing debts to attend to.</p> <p>Therefore, while any proposal to discourage payment directions is well-intentioned and superficially appealing given the conduct observed by a few bad actors in the industry, UDE submits that the practical effect is that it would reduce access to justice and negatively impact – as a class – the cohort of applicants most benefitting from these arrangements. It would be an example of a blunt instrument having an unintended effect.</p>
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5	A dedicated group of experienced conciliators could take on all conciliations involving paid agents that have repeatedly been the subject of	UDE supports this option. This option is a good example of taking a targeted, surgical approach to the issue before considering more substantial changes.



	<p>complaints about challenging behaviour to ensure consistency in approach.</p>	<p>As noted, impugned paid agents should be afforded procedural fairness and the opportunity to address the alleged conduct prior to being subject to this process.</p>
6	<p>Update current pages on the Commission's website about representation by paid agents to add:</p> <ul style="list-style-type: none"> <li>• 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)</li> <li>• further examples of paid agent conduct the Commission receives complaints about</li> </ul>	<p>As a general principle, UDE welcomes the Commission providing applicants, and potential applicants with more information – and, in particular, more accessible information.</p> <p>As noted, references to paid agent misconduct or complaints should identify the parties complained about, and not tar the entire industry with the same brush.</p> <p>While UDE has not been the subject of any complaints to its knowledge of the type referenced in the consultation, as a matter of procedural fairness, parties complained about should be afforded natural justice and have an opportunity to have the complaints put to them, remedy the situation and address the complaints before being identified on the website. The entire industry of paid agents should not be tarred with the same brush as a few bad actors.</p>
7	<p>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.</p> <p>Administrative processes would need to be developed to consider complaints about failure to follow the code of conduct, including when the</p>	<p>UDE supports this option and would welcome agreeing to a code of conduct. UDE would welcome an invitation to provide feedback on matters which the Commission considers relevant for such a code.</p> <p>The code could also mandate reporting by the agents subject to the code as a form of enforcement.</p>

	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).	UDE supports this option.
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.	UDE supports the standard terms reflecting this standard position, but as noted above, submits that the Commission should not seek to effectively frustrate (or otherwise discourage) a payment direction agreed in good faith from being given effect to. For example, where the paid agent or applicant raises the payment direction at the conciliation and indicates an intention to codify the payment direction into the Commission’s usual terms by subsequent amendment once the usual terms are sent, and prior to execution by the applicant, this request should not be opposed by the Commission as it is a matter between the parties.
10	Amend the Fair Work Commission Rules to stipulate that Notices of Discontinuance may only be filed by Applicants or their legal representatives.	UDE supports this option. As an F50 can only be overturned by a court, if the Commission has observed F50s being lodged contrary to instructions, this is a reasonable response.

Table 6: Options involving other agencies or organisations

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	UDE supports this option.  UDE considers that this should also cover

	received settlement monies.	situations where a settlement is nominally reached at conciliation, but the respondent refuses to deliver on the agreement.
12	Refresh arrangements to refer complaints to the ACCC. See [30]-[32] for further detail.	UDE supports this option.

Table 7: Options involving other agencies or organisations

Option		
13	Amend the Act to provide a system for the Commission to register paid agents. See [33]-[35] for further detail.	UDE supports this option or other framework that vets paid agent organisations that appear before the Commission and establishes rules that govern their conduct. However, we encourage the Commission to minimise the compliance costs this would create.
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.	As noted above, as a matter of procedural fairness, parties alleged to have engaged certain conduct should be afforded natural justice and have an opportunity to have the complaints put to them, remedy the situation and address the complaints before being adversely impacted by the exercise of discretion under this option, and the exercise of discretion should be done consistently.

16. While UDE has generally indicated its support for many of the options proposed, UDE submits that rather than seek to implement all options at once, the Commission should consider a targeted and graduated approach: implement a few key low-cost targeted options, assess if the problem has been solved or persists, and if it persists then take further steps.

#### **Additional matters**

17. UDE also raises the following matters for consideration by the Commission:

##### Mandatory reporting of accounts upon request by the Commission

18. UDE holds a separate bank account where settlements are received which is segregated from our operating accounts. We recommend a rule which requires paid agents to disclose these accounts on request, or proactively, where the Commission reasonably believes that a paid agent has acted in a manner that is inconsistent with its agreement with its clients or any other rules.

##### Complaint handling by the Commission

19. We understand the Commission receives many complaints about paid agents which has prompted the formation of the Working Group. We have not been informed about any complaints about UDE's services. All paid agents should be afforded an opportunity to respond to any complaint in the event it is without merit as it has the ability to impact the paid agent's reputation with the Commission. We would recommend a process of transparency that affords natural justice to paid agents and allows them to respond to complaints and justify actions which may be in question. UDE values its reputation and is committed to taking any and all steps to address any concerns should any exist.

**Conclusion**

20. UDE would welcome the opportunity to discuss this submission further or provide any assistance to the Working Group as needed.

Yours sincerely,

Unfair Dismissal Experts Pty Ltd