



THE LAW SOCIETY
OF NEW SOUTH WALES

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Dr James Popple
Chief Executive Officer
Law Council of Australia
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By email: john.farrell@lawcouncil.au; natalie.cooper@lawcouncil.au

Dear Dr Popple,

Paid agents and the Fair Work Commission

Thank you for the opportunity to contribute to a Law Council submission providing feedback on the Fair Work Commission's (**FWC**) Paid Agents and the Fair Work Commission Options Paper. The Law Society's Employment Law Committee contributed to this submission.

Law Society members share the FWC's concerns about the conduct of some paid agents in FWC matters, which can be unhelpful to the efficient operation of FWC matters, and lead to poorer outcomes for parties. Our members are aware of instances of poor conduct, consistent with that reported to the FWC, noting however that it is not necessarily representative of the entire cohort. We also agree that the majority of problematic conduct occurs in, or in relation to, conciliations and conferences in unfair dismissal and general protections applications.

We partially support the proposed options those requiring legislative change (see Table 7 in the Options Paper). We support measures to introduce greater regulation of paid agents and articulation of minimum expected standards of conduct, supported by systems for registration, education and complaints.

However, as regards s 596 of the *Fair Work Act 2009* (Cth) (**FW Act**), our position remains that parties in FWC conferences and conciliations should have a general right to legal representation. In our view, it is not appropriate for the FWC 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. However, there may be utility in amending s 596 to clarify that the FWC 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.

We would also support a number of the options identified in the Options Paper that can be implemented internally, or by other agencies of organisations.

Options involving proposals for legislative change

Option 10 (registration of paid agents)

The Law Society 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 regarding:

- overarching duties to the FWC and to clients;
- overarching standards of professionalism in the conduct of matters in the FWC, 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.

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.

We suggest a registration system will be most effective if it includes a body which 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 an independent statutory body.

Option 11 (amendment of s 596)

Representation by lawyers

The Law Society's longstanding position is that a person should not need to seek leave under s 596 of the FW Act to be legally represented in FWC conferences and conciliations. Our experience is that, 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.

Further, as noted above, pursuant to the Legal Profession Uniform Law, there is already an established infrastructure for registration and regulation to ensure that lawyers represent their clients competently and ethically. There are also established pathways for complaint and redress, where appropriate, in instances where a solicitor's conduct is called into question.

For these reasons, we would not support an amendment to s 596 that enables the FWC to consider a lawyer's 'capacity'.

Representation by paid agents

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

We suggest such an amendment would be more effective if accompanied by measures to strengthen referral pathways from the FWC 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.

A system of registration and regulation for paid agents, as outlined above, would ideally strengthen the skills and capacity of paid agents, so that over time the need for a discretion to refuse leave since capacity may lessen. We suggest any amendment to s 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)

This is supported, as in our view it would help to inform all parties about their rights regarding representation.

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

This is supported. 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.

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

We would generally encourage information sharing between FWC members or conciliators, and the promotion of consistent responses to issues of representation.

Option 4 (member or conciliator informs parties about representation)

The proposal to give parties legal or procedural information at conferences, conciliations and hearings is supported. However, we do not support requiring the clients of paid agents to disclose the terms of their engagement with the paid agent to the FWC, as it is a private contractual matter. It would be more appropriate to inform the client of the usual terms of engagement.

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

This is not supported, as we are concerned it may be unfair to parties in FWC matters overall to disrupt the current system of matter allocation based on workload and case management.

Option 6 (update the FWC website)

This is supported as a means of providing parties with accurate legal and procedural information about the FWC.

Option 7 (voluntary code of conduct)

As noted above, a code of conduct could improve the overall standard of performance of paid agents. Whether such a code was voluntary or mandatory would depend on the matters contained in the code, and other means of enforcement under any proposed regulatory system.

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

We would support 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.

Option 9 (usual terms of settlement to provide for payment of settlement funds directly to party)
This is supported, with the proviso that paid agents are not permitted to require that their client subsequently provide written directions to pay to the other party or their representative.

Option 10 (notice of discontinuance only to be filed by a party or their legal representative)
In our view, the issue of paid agents filing a Notice of Discontinuance without instructions would be better addressed in the context of a code of conduct, as discussed above.

Table 6 - Options involving other agencies or organisations

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

This option is not opposed. As outlined above in our response to Option 11 regarding legislative change, we suggest 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.

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

This is not opposed, as part of a broader system of regulation of paid agents.

We look forward to the opportunity to provide further comment on any proposed measures in due course. Any questions in relation to this letter should be directed to Sue Hunt, Senior Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,



Brett McGrath
President