

Personal details

First name

Adam

Last name

Shepherd

Organisation

Cabrini Health

Options that could be implemented internally

The Commission could provide parties with a fact sheet about representation in the Commission Support

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
Neutral

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
Support

At the beginning of any conciliation, conference or hearing involving a paid agent, the Member or conciliator would provide information about representation and settlements at the Commission
Support

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

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
Neutral

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), and further examples of paid agent conduct the Commission receives complaints about
Support

Invite paid agents to voluntarily agree to a code of conduct, and publish the details of agents who have done so on the website.
Support

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)

Support

Align the Commission's usual terms of settlement to provide only for payment of settlement funds into a bank account belonging to the Applicant

Support

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

Neutral

Use the field below to make written submissions about internal options

I have quite frequently encountered unwinnable applications made by a paid agent (most recent of which being Sep 2023). In my most recent experience the paid agent had a very clear business model - put no effort into the F2; speak for approximately 5 mins at conciliation and then ask for 16 weeks to settle. I had to politely ask the paid agent to go back and explain their rationale because if they were expecting me to settle I at least had to understand what I'd done wrong? We very quickly settled at 2 weeks salary all of which went in fees to the paid agent. I had no doubt I would have been successful at arbitration but just the preparation - let alone appearances - would have cost me more than the equivalent of two weeks salary of the applicant. The paid agent knew this and was banking on it from the get-go. It was an unpleasant experience for the applicant who ended up with nothing more and was certainly not in his best interests.

The issue with the s376 costs order is I'd need to spend the money first and go through the hassle and time of finishing the dispute. I'm not going to go through all of that when I can pay 2 weeks to close it out immediately. Also I'd probably still be worse off with a costs order.

Options involving other agencies or organisations

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

Neutral

Refresh arrangements to refer complaints to the ACCC

Neutral

Use the field below to make written submissions about options involving other agencies or organisations

{Empty}

Options involving proposals for legislative change

Amend the Act to provide a system for the Commission to register paid agents

Oppose

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

Neutral

Use the field below to make written submissions about options involving legislative change

{Empty}

Final thoughts

Do you have any further suggestions you would like to put forward in response to the issues posed in the options paper?

Because I often have to arrange the payment of settlements I see how much the paid agent has charged their client because I arrange to split the payment between the agent and the applicant (as per the terms of the settlement). One at least two occasions the applicant has ended up worse off than if they had never been represented. This is because the settlement has basically consisted of the monetary entitlements I was going to pay the applicant anyway (notice in lieu, severance and accruals) with perhaps some additional low-cost benefits such as a good reference, non-disparagement, conversion of outsourcing service to dollar value or something similar negotiated by the paid agent. The paid agent wrote a number of adverse action letters (which look very similar to the ones they always send), attended a couple of meetings, submitted an application form and then charged their client \$5K (which is about the right price for the work performed) which it took out of the entitlements the applicant was already due and which were never going to be contested. This is so unfair to the applicant who was none the wiser. I didn't really think it was up to me to point out that they were being taken for a ride. I recommend that payment which has either already been offered by the respondent, or which had not yet been articulated but which was never going to be contested, be quarantined in settlement agreements and cannot be used in the calculation of fees for the paid agent. This could be easily brought about with the use of the standard form settlement agreement and requiring the paid agent to sign the agreement - or stand alone agreement between the paid agent and their client. This wouldn't necessarily fix the problem because the paid agent can invoice their client for work performed but they should not be able to take a cut from the entitlements which were never in question. The paid agent needs to earn their fee whilst not leaving their client worse off.

What has been your experience with paid agents and the Commission?

By way of background I have always represented large employers. I started off as a lawyer with a peak industry group and then moved in-house. I no longer practice law and am an ER Director with significant experience across a number of industries and many years attending FWC. There are many paid agents which do a great job and who I'd certainly have no issues in representing me and then there are those who you know just make things worse for their client.

Are there any other issues or considerations related to paid agents and the Commission you would like to raise?

As an aside the splitting of settlement amounts between the paid agent and the applicant should be stopped. Large employers have payroll systems which physically cannot pay money to a company so splitting the payment requires the paid agent to be set up in the procurement system as a supplier. Then everybody turns a blind eye to the fact that an invoice is paid to a service provider who never performed a service and who in fact was actively working against the interests of the respondent. It can lead to interesting conversations with internal audit. Not really a problem for FWC but another reason why large employers strongly support no bill splitting.

Additional content submitted - 12-03-2024

I forgot to add to my submission below that a solution to the paid agent making an application for an unwinnable matter is to impose a threshold - say two weeks pay – below which all settlement payouts go completely to the applicant and no invoice can be issued by the paid agent. Once again it would require a standard form signed by the paid agent (or an agreed code of conduct). A Business will typically pay up to 4-ish weeks salary to make a guaranteed must-win case go away because it's quicker and cheaper than winning at arbitration. The respondent will pay more as things become a bit greyer as articulated by the paid agent in the F2, at conciliation, correspondence and submissions etc. Even more if they detect fault. Sophisticated respondents try to avoid UFD arbitrations they might lose as reflected in the FWC stats.

We need to find a balance where a paid agent won't take on an unwinnable case because they won't be able to take anything from the applicant in the form of fees (ie the respondent offers 2 weeks go-away money) against genuinely drawing attention to the potential fault of the respondent and applying their expertise in getting something better for the applicant plus a fee on top for themselves.