



Motor Trades Organisations

Paid agents and Fair Work Commission Options Paper

SUBMISSION ON BEHALF OF THE MOTOR TRADES ORGANISATIONS

1. This submission is filed on behalf of the Victorian Automotive Chamber of Commerce, the Motor Traders' Association of NSW, the Motor Trade Association of South Australia and Northern Territory, the Motor Trades Association of Queensland, and the Motor Trade Association of Western Australia, (collectively, the Motor Trades Organisations) with reference to the Paid agents and the Fair Work Commission Options Paper published by the Fair Work Commission's Paid Agent Working Group on 7 March 2024 ('Options Paper').
2. The Motor Trades Organisations ('MTO') welcomes the opportunity to make submissions in relation to the Options Paper, to share its experience with paid agents through its representation of its predominantly small business memberships in unfair dismissal and general protections in matters before the Fair Work Commission ('Commission').

Challenging paid agent conduct

3. The concerns outlined in Tables 1 – 3 of the Options Paper are reflective of MTO's experience with paid agents. The concerns outlined in Tables 2 and 3 are, in MTO's view, particularly common.
4. Whilst not limited to paid agents, MTO is particularly concerned by the current practice amongst applicant representatives of using general protections claims to run bogus unfair dismissal cases on behalf of clients that have not met the minimum qualifying employment period. Such general protections applications are invariably vague, incomplete, and made in a standard 'template' form. However, whilst not limited to paid agents, in MTO's experience, paid agents are exemplars of this practice – at least in part, as they currently have 'nothing to lose' by taking such an approach.
5. In addition to the adverse impact such litigation conduct has on their (primarily) applicant clients and the Commission, MTO notes that it also impacts on employer respondents, who are often small businesses. MTO is increasingly concerned by both the dishonest and aggressive conduct

displayed by a number of paid agents towards small business respondents and the Commission's staff in conciliation conferences. Whilst such unacceptable conduct is not representative of all paid agents, it is in MTO's view of sufficient regularity to justify the need for a comprehensive response.

6. As noted in Table 3 of the Options Paper, MTO is also concerned by the common practice of paid agents seeking adjournments at the last minute (often without legitimate reason) and not complying with the Commission's directions. MTO suggests that the willingness of Commission staff members to acquiesce to last minute adjournment requests made by paid agents, in contrast to the approach taken to adjournment requests made by respondents, may have inadvertently served to encourage this practice. MTO would therefore encourage adjournment requests to be treated on their merits for applicants to the same standard applied to respondents.

Possible options for responding to challenging paid agent conduct

7. In order to be effective, MTO believes that the options must result in the paid agent having something tangible 'to lose' for engaging in unacceptable conduct. Accordingly, MTO suggests that each of the following options outlined in Tables 5, 6 and 7 of the Options Paper should be strongly considered by the Commission:
 - Option 2: *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.*
 - Option 3: *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.*
 - Option 4: *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, what their payment arrangement with the client is ...*
 - Option 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 is reasonably apparent that the applicant has no reasonable prospect of success in the dispute ...*
 - Option 11 (Table 6): *Refresh arrangements to refer complaints to the ACCC...*
 - Option 10 (Table 7): *Amend the Act to provide a system for the Commission to register paid agents.*
 - Option 11 (Table 7): *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.*
8. Of these, MTO submits that options 10 and 11 (Table 7) are the most likely to be effective in addressing the issue.

Registration of paid agents

9. MTO would support an amendment to the Act to provide a system for the Commission to register paid agents in a manner akin to s.112A of the *Industrial Relations Act 1979* ('**WA IR Act**') and the *Industrial Relations (Industrial Agents) Regulations 1997* ('**IR Regulations**').
10. Specifically, MTO recommends that a paid agent (as defined by s.596 of the Act) be required to be registered with the Commission in order to act as a representative in unfair dismissal and general protections proceedings before the Commission.
11. MTO is supportive of the approach taken to the registration taken in the IR Regulations as outlined in [35] of the Options Paper. MTO further supports registration requirements that include a 'fit and proper person' test, professional indemnity insurance (or holding sufficient monies or other resources to provide professional indemnity) and compliance with a Code of Conduct, in terms similar to those provided in Schedule 1 of the IR Regulations.
12. However, MTO believes that it is important that such requirements enable any person to lodge a written complaint alleging that the industrial agent may have failed to comply with a requirement necessary to maintain registration, rather than limiting this to a client per r.12(2) of the IR Regulations.

Possible amendments to s.596 and s.609 of the Act

13. In addition to the implementation of Option 3, MTO would be supportive of minor amendments to s.596(2) to improve clarity in relation to the granting of permission to appear. As also referenced at [37] of the Options Paper, MTO suggests that perhaps the simplest way of addressing this concern is to amend s.596(2)(b) and (c) to be more reflective of s.100(5)(b) and (c) of the *Workplace Relations Act 1996*. That is, amend both s.596(2)(b) and (c) to clarify that the Commission's consideration is to whether it would be unfair not to allow the person to be represented *by that particular lawyer or paid agent*.
14. In relation to s.609, MTO recommends that the current r.12(2)(b)(i) of the *Fair Work Commission Rules 2013* be removed. In the alternative, r.12(3) should be amended to clarify that this direction extends to r.12(2)(b)(1) – i.e. a conference conducted by a member of the Commission, whether or not under delegation, in relation to an application under section 394 of the Act for an unfair dismissal remedy. MTO is concerned that unless such a change is made, any changes made to s.596 would have no effect on the ability for paid agents to represent in unfair dismissal conciliations. Accordingly, this would serve to move the problem to unfair dismissal conciliations, rather than fully addressing the issue.

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