

PRODUCTIVITY COMMISSION INQUIRY INTO THE WORKPLACE RELATIONS FRAMEWORK

Legal Aid NSW Response to the Draft Report

2 October 2015

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Introduction

Legal Aid NSW has a substantial employment law practice and our comments on the Draft Report of the Productivity Commission (PC) Inquiry into the Workplace Relations Framework (Draft Report) are based on our extensive experience in advising, assisting and representing disadvantaged and vulnerable workers.

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This submission responds to chapters 5, 6, 9, 14, 20 and 21 of the Draft Report.

Chapter 5 – Unfair Dismissal

Comments on Draft Recommendations

The PC considers there is an “absence of an effective filter at the front end of the unfair dismissal claims process”¹ and recommends:

Draft Recommendation 5.1

The Australian Government should either provide the Fair Work Commission with greater discretion to consider unfair dismissal applications ‘on the papers’, prior to commencement of conciliation; or alternatively, introduce more merit focused conciliation processes.

Legal Aid NSW submits that to establish a filter at the front end of the unfair dismissal process would deny many disadvantage people access to justice. A front end filter could prevent a worker from being able to present all of his or her evidence, and then fully contest the arguments and evidence of the employer, before the merits of the worker’s claim is determined. The establishment of a filter seems to presume that a significant number of claims lack merit. There is little objective evidence to support such a presumption.

If the Fair Work Commission (FWC) is given a greater discretion to initially consider applications on the papers, Legal Aid NSW is concerned that many workers with poor literacy, poor English or poor education may be severely disadvantaged.

Legal Aid NSW supports a process where, if conciliation is unsuccessful, the conciliator provides the parties with a written merits advice. In adopting such a practice, it is important that the conciliator is impartial and advises both parties about the strengths and weaknesses of their claim and defence.

In providing merits advice, conciliators must be mindful of the power imbalance which often exists between employers and employees. Disadvantaged workers may be unable to present their claim as skilfully as their employer or their employer’s representative.

¹ Productivity Commission, Inquiry into Workplace Relations Framework, Draft Report at page 232.

The PC recommends:

Draft Recommendation 5.2

The Australian Government should change the penalty regime for unfair dismissal cases so that:

- an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct
- procedural errors by an employer should not result in reinstatement or compensation for a former employee, but can, at the discretion of the Fair Work Commission, lead to either counselling and education of the employer, or financial penalties.

Legal Aid NSW does not support this recommendation. Legal Aid NSW submits that section 392 of the *Fair Work Act 2009* (Cth) (FW Act) outlines an appropriate criteria for determining awards of compensation. The FWC's discretion to award compensation should not be limited.

Presently, if a worker has persistently underperformed or committed serious misconduct, yet the employer has failed to afford procedural fairness, this is reflected in the remedies ordered by the FWC. It is extremely unlikely in such circumstances that reinstatement will be ordered and any compensation is likely to be small. The FWC already has the discretion in section 392(3) of the FW Act to discount/reduce compensation where misconduct has occurred.

Procedural fairness is essential when a person is to be deprived of rights, property or income. The Australian legal system recognises this in countless situations. Given the potentially devastating impact of dismissal from employment, it is vitally important that procedures leading up to a dismissal are fair. Every worker ought to have at least the opportunity to answer allegations of misconduct and to address performance issues before dismissal.

If workers are prevented from seeking compensation or reinstatement for a procedurally unfair dismissal, there would be little incentive for employers to act in a procedurally fair manner.

The PC recommends:

Draft Recommendation 5.3

The Australian Government should remove the emphasis on reinstatement as the *primary* goal of the unfair dismissal provisions in the *Fair Work Act 2009* (Cth).

Legal Aid NSW does not oppose draft recommendation 5.3, provided the FWC still retains the discretion to order reinstatement in appropriate circumstances. Legal Aid NSW also notes that the FWC orders reinstatement in only a small number of matters each year.

Comments on Information Request

The PC seeks views on possible changes to lodgment fees for unfair dismissal claims.

Legal Aid NSW does not support any increase in lodgement fees and, in particular, any increase that is not means tested.

Workers making unfair dismissal claims are often in a precarious financial position following the termination of their employment. This situation is often exacerbated where employers have not paid statutory and award entitlements on termination.

In any event, it is essential that FWC retain its current processes for waiver and reimbursement of application fees.

Chapter 6 – The General Protections

Comments on Draft Recommendations

The PC recommends:

Draft Recommendation 6.2

The Australian Government should modify section 341 of the *Fair Work Act 2009 (Cth)*, which deals with the meaning and application of a workplace right.

- Modified provisions should more clearly define how the exercise of a workplace right applies in instances where the complaint or inquiry is indirectly related to the person's employment.
- The *Fair Work Act 2009 (Cth)* should also require that complaints are made in good faith; and that the Fair Work Commission must decide this via a preliminary interview with the complainant before the action can proceed and prior to the convening of any conference involving both parties.

Legal Aid NSW agrees that it may be desirable to amend the FW Act to clarify the scope of the section 340 protection and section 341 definition. However, the law must not become unduly complex or technical. Workers with disability or poor language or literacy skills are least able to understand and comply with complex laws. For example, workers who cannot write English could not comply with a requirement that a workplace complaint be made in writing.

Any amendment to the General Protections provisions must not disproportionately impact on the ability of vulnerable workers to access the law.

Legal Aid NSW is concerned by the prospect of 'good faith' interviews. It is hard to conceive how such a process might fairly take place without considering and testing all available evidence. Legal Aid NSW is unaware of a requirement for a 'good faith' determination prior to an alternative dispute resolution process elsewhere in the justice system.

Legal Aid NSW is also concerned about who should make the 'good faith' determination. It would not be appropriate for an FWC conciliator to undertake the task. FWC conciliators do not occupy a statutory or judicial office and as employees of the FWC must maintain their independence. For this reason it is unclear how and where a worker could seek review of a 'good faith' determination by FWC conciliator.

An interview or similar process to enquire into the matter of 'good faith' before a matter proceeds to conciliation would create a hurdle for workers seeking to access the dispute resolution processes of the FWC. In our view workers and employers should be able to quickly and economically access the FWC to conciliate their disputes.

The proposed 'good faith' interview process seems designed to filter or deal with claims that lack merit. Legal Aid NSW considers that the costs provisions in the FW Act are sufficient to deter unmeritorious, unreasonable or vexatious claims.

The PC recommends:

Draft Recommendation 6.3

The Australian Government should amend Part 3-1 of the *Fair Work Act 2009 (Cth)* to introduce exclusions for complaints that are frivolous and vexatious.

Legal Aid NSW submits there is little objective evidence that many vexatious or frivolous General Protections claims are being made.

The FW Act and the rules of the Federal Court and Federal Circuit Court already contain provisions that adequately deal with frivolous and vexatious claims, as well as the costs which may be incurred in responding to frivolous and vexatious claims.

Section 370 of the FW Act provides that where a General Protections dismissal dispute cannot be resolved and the FWC considers that a subsequent court application would not have a reasonable prospect of success, the FWC must advise the parties accordingly. This provision also acts as a deterrent to applicants pursuing unmeritorious claims.

The PC recommends:

Draft Recommendation 6.4

The Australian Government should introduce a cap on compensation for claims lodged under Part 3-1 of the *Fair Work Act 2009 (Cth)*.

Legal Aid NSW does not support the introduction of a compensation cap. The General Protections should not be compared to unfair dismissal claims. General Protections claims deal with breaches of important protective provisions in the FW Act. It is therefore appropriate that applicants be compensated for their full loss occasioned by a breach. This reflects the importance of the protections and deters conduct in breach of the FW Act. An appropriate comparison of some of the General Protections provisions can be made with Federal anti-discrimination laws, where there is no cap on compensation.

Legal Aid NSW acknowledges the significant increase in the number of General Protections claims. However, this may be the consequences of many respondents, usually employers, disregarding the protections. An appropriate way to deal with this may be education of employers about their statutory obligations, rather than discouraging or limiting claims by capping compensation.

There are countless common law and statutory causes of action in the legal system where damages/compensation is assessed on the full loss of the plaintiff/applicant. There are no compelling reasons why the General Protections remedies should be any different. Limiting compensation on purely economic grounds has the effect of discounting and constraining workers' rights and their access to justice.

Chapter 9 – Variations from Uniform Minimum Wages

Comments on Draft Recommendations

The PC recommends:

Draft Recommendation 9.2

The Australian Government should commission a comprehensive review into Australia's apprenticeship and traineeship arrangements. The review should include, but not be limited to, an assessment of:

- the role of the current system within the broader set of arrangements for skill formation.
- the structure of awards for apprentices and trainees, including junior and adult training wages and the adoption of competency-based pay progression.
- the factors that affect the supply and demand for apprenticeships and traineeships, including the appropriate design and level of government, employer and employee incentives.

Legal Aid NSW supports the review into Australia's apprenticeship and traineeship arrangements. In our experience, many employers do not comply with State laws that govern the relationship between employers and apprentices and trainees. We observe that sometimes employers do not enter into a training contracts with apprentices/trainees but pay workers apprentice/trainee wages, and do not use the dispute resolution mechanisms established by State law. Further, when a dispute arises, employers sometimes refuse to certify tasks completed by the worker which would allow the worker to progress his or her apprenticeship or training.

The payment of junior wages is age discrimination, albeit lawful discrimination. Legal Aid NSW considers that workers doing the same work should earn the same pay. Junior wages may also hinder the employment prospects of workers over 21 years of age. Employers may choose to hire younger workers to avoid paying full adult wages. Any review of wages should consider this systemic discrimination.

Comments on Information Request

In relation to variations from minimum wages:

The Productivity Commission seeks information on whether the structure of junior pay rates should be based on a model other than age, such as experience or competency, or some combination of these criteria.

Legal Aid NSW is concerned about the vagaries and potential misuses of competency/experience based assessment by employers to arrive at and set junior rates of pay. There is a potential for many employers to misunderstand and abuse the process.

Legal Aid NSW notes the difficulties that have arisen in applying employer conducted assessments to determine, for example, supported wage rates for workers with a disability.² In this regard Legal Aid NSW has seen workers with a disability being paid only a few dollars an hour for substantial work from which the employer profits significantly.

² *Nojin v Commonwealth of Australia* [2011] FCA 1066, *Nojin v Commonwealth of Australia* [2012] FCAFC 192.

Legal Aid NSW submits that statutory/award based minimum wages are possibly the only mechanism to ensure fair living wages for younger workers, who are particularly vulnerable.

Chapter 14 – Regulated weekend penalty rates for the hospitality, entertainment, retail, restaurant and café industries

Comments on Draft Recommendations

The PC recommends:

Draft Recommendation 14.1

Sunday penalty rates that are not part of overtime or shift work should be set at Saturday rates for the hospitality, entertainment, retail, restaurants and café industries.

Weekend penalty rates should be set to achieve greater consistency between the hospitality, entertainment, retail, restaurants and café industries, but without the expectation of a single rate across all of them.

Unless there is a clear rationale for departing from this principle, weekend penalty rates for casuals in these industries should be set so that they provide neutral incentives to employ casuals over permanent employees.

Draft recommendation 14.2

The Fair Work Commission should, as part of its current award review process, introduce new regulated penalty rates as set out in draft recommendation 14.1 in one step, but with one year's advance notice.

Legal Aid NSW does not support the reduction or abolition of penalty rates for any workers. We provided our views on the issues in our previous submission and the content of the Draft Report has not persuaded us to depart from its view.

Legal Aid NSW sees merit in greater consistency between of penalty rates between the hospitality, entertainment, retail, restaurants and café industries. However, we cannot support the recommendation that penalties should be reduced to Saturday rates for these workers.

Workers in the hospitality, entertainment, retail, restaurants and café industries are already low paid in comparison to other industries. These workers are often vulnerable young people, students and low skilled workers in unstable employment. Many workers Legal Aid NSW advises and represents tell us that Sunday penalty rates are vital to help them achieve a reasonable take home pay.

Legal Aid NSW does not support the view that a reduction of penalty rates in the hospitality, entertainment, retail, restaurants and café industries will allow businesses to increase opening hours. These industries are already profitable with businesses open for trading on Sundays.

Legal Aid NSW welcomes the proposal to retain the current weekend penalties for workers in health and other sectors.

However, we are concerned about the proposal to retain current penalty rates in some industries but not others. This could give rise to a situation where the work at unsociable hours of some workers is intrinsically more valuable than the work of others. This approach ignores the dignity of work performed by all workers who give up their weekends and family life to serve others, and hope to earn a fair living wage by doing so.

Chapter 20 - Alternative Forms of Employment

General Comments

Legal Aid NSW notes the PC's general comments regarding labour hire employees.

Legal Aid NSW disagrees that labour hire workers have full rights under the FW Act. Legal Aid NSW provided its views on this issues in its previous submission. It is unfortunate that the PC seems not to have considered the abuse of labour hire arrangements by employers, in many instances, to avoid the legal obligations of an employer.

Legal Aid NSW supports the proposal to narrow the current defence to sham contracting in section 357 FW Act, by replacing the 'recklessness' test with a 'reasonableness' test.

We submit it is appropriate for a defence to sham contracting to be limited to situations where an employer could not reasonably have been expected to know that a contract for services was an employment contract, rather than the current provisions, which allow employers to avoid liability for engaging in sham contracting by demonstrating that they did not know, and were not reckless as to whether the contract was a contract of employment and not a contract for services.

Chapter 21 - Migrant Workers

Comments on Draft Recommendations

The PC recommends:

Draft recommendation 21.1

The Fair Work Ombudsman should be given additional resources for investigation and audits of employers suspected of underpaying migrant workers (including those in breach of the *Migration Act 1958* (Cth))

The *Migration Act* should be amended so that employers can be fined by at least the value of any unpaid wages and conditions to migrants working in breach of the *Migration Act*, in addition to the existing penalties under the Act.

Legal Aid NSW provides advice and assistance to many workers on various visas³ who are vulnerable in the workplace.

Legal Aid NSW submits that individuals working in breach of the *Migration Act 1958* (Cth) are amongst the most marginalised, vulnerable and economically disadvantaged workers in Australia. The power imbalance with the employer is often oppressive and may at times involve some level of coercion. For example, the worker may be told that if they do not work and endure the hours and conditions imposed upon them, the employer will report them to the Department of Immigration and Border Protection, which may detain and deport the worker.

Many individuals working in breach of their visa conditions are significantly underpaid, required to work excessive hours and are subjected to mistreatment, harassment and sometimes violence. It is a tragic reality that some of these workers are deceived and trafficked into Australia for the very purpose of gross exploitation. To punish workers in order to enforce the *Migration Act* may compound the grave injustices these workers have suffered.

³ In a one month period almost 20% of clients seeking employment law advice from Legal Aid NSW were on some form of visa.

Legal Aid NSW believes that well-resourced and widespread investigation of employers suspected of breaching the *Migration Act* is an appropriate way to deter breaches of the *Migration Act*. When illegal workers breach the *Migration Act*, investigation and consequences should focus on employers, in whose favour there is a huge power imbalance and profit.

Legal Aid NSW notes the recent exposure of ‘wage fraud’, breaches of the *Migration Act* and other illegal practices engaged in by ‘7/11’ franchisees. The ‘7/11’ circumstances highlight the difficulties faced by workers on student visas and their particular vulnerability to coercion and exploitation. Many of these students worked in breach of their visa restrictions for less than legal wages and were coerced into doing so.⁴

Legal Aid NSW does not support the PC’s view that the FW Act does not and should not apply to workers in breach of the *Migration Act*. The PC’s view is not supported by express provisions in, or obvious omissions from, the FW Act.⁵ Judicial decisions on the enforceability of the employment contracts of workers who breach immigration legislation are divergent.⁶ Enforceability is crucial to the rights of illegal workers to recover unpaid wages, be it under the FW Act, awards or a contract. We submit it would be open to an appellate court to uphold the validity of, and enforce, employment contracts where the worker is in breach of the *Migration Act*.

Given there is a view that the FW Act might not apply where the *Migration Act* has been breached, it is important to clarify and ensure the FW Act does apply to individuals working in breach of their visa conditions. Clarifying amendments could be limited and only go so far as is necessary to prevent a loop hole from being exploited by employers who may choose to employ individuals working outside of their visa conditions.

Legal Aid NSW notes that there is a tension between enforcing the *Migration Act* and enforcing workers’ rights. We acknowledge the difficulties but are of the view that the protections of the FW Act must not be undermined. The *Migration Act* should be enforced by investigating, and where appropriate, prosecuting employers who use their bargaining power to exploit illegal workers. This is preferable to denying illegal workers their wages.

Legal Aid NSW does not support any legislative measure that would expressly deny workers the wages they may earn in breach of the *Migration Act*. There are other non-monetary consequences for workers who breach the *Migration Act*.

Legal Aid NSW supports the recommendation to increase the penalties for employers in breach of the *Migration Act*. However, we do not support the proposal that the amount of wages underpaid to an illegal worker be retained by the Government. Such measures may only discourage exploited illegal workers from coming forward to complain about their treatment.

Conclusion

Legal Aid NSW looks forward to the Productivity Commission’s handing down its final report.

⁴ Adele Ferguson and Klaus Toft, K. 7-Elven - The Price of Convenience. Four Corners Program ABC 31 August 2015.

⁵ In the FW Act, the Federal Parliament expansively defined the coverage (or not) of the FW Act and chose not to exclude any type of *worker*, other than those properly covered by state industrial relations systems (in the absence of a referral of powers to the Federal system).

⁶ Laurie Berg, “Migrants at Work, Law’s precariousness at the Intersection of Immigration and Labour”, (Oxon and New York: Routledge, 2016), 171. see for example *Nonferral (NSW) Pty Ltd Taufia (1998) 43 NSWLR 312*.