

25 September 2015

Workplace Relations Framework
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

By email: workplace.relations@pc.gov.au

Dear Commissioner

Productivity Commission Workplace Relations Framework Inquiry Submission

Summary

The Justice Connect Self Representation Service (Service) welcomes the opportunity to make a submission in response to the Draft Report in relation to the Workplace Relations Framework (the **Draft Report**). Our submission is informed by our own casework and collaboration with community legal centres.

Given the specific focus of the Service on Fair Work matters in the Federal Court and Federal Circuit Court, this submission addresses recommendations from the Draft Report which relate directly to our clients' experience.

We have had the opportunity to review the submission of Kingsford Legal Centre, a community legal centre which also provides employment law assistance to people experiencing disadvantage. We endorse the submission of Kingsford Legal Centre, in particular its responses to Draft Recommendations 3.5, 6.4, and 21.1.

About Justice Connect and the Self Representation Service

Justice Connect is an independent not-for-profit organisation based in Melbourne and Sydney. It was formed when the Public Interest Law Clearing House NSW (established in 1992) and Public Interest Law Clearing House Victoria (established in 1994) merged on 1 July 2013. Justice Connect provides access to justice to people experiencing disadvantage and the community organisations that support them, by connecting them with lawyers who will assist them for free. We also provide training and support for pro bono lawyers and community organisations and, in some circumstances, our lawyers provide legal advice directly to clients.

The Service provides unrepresented clients who are experiencing disadvantage with legal advice and assistance by facilitating free appointments with pro bono solicitors. Operating in the Federal Court and Federal Circuit Court jurisdictions in NSW, Victoria, the ACT and

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Tasmania, the Service is funded by the Commonwealth Attorney-General's Department and assists with Fair Work matters, such as general protections and unpaid entitlements disputes.

The Service helps clients who seek to pursue their matters through the Federal Court of Australia or the Federal Circuit Court, who have generally exhausted their ability to do this through the Fair Work Ombudsman or the Fair Work Commission. From when the Service began expanding into employment law on 24 November 2014 to date, it has provided legal advice in respect of 170 discrete employment law matters. The Service is in a unique position to observe the effects of laws dealing with workplace relations on individuals experiencing disadvantage.

We are pleased to provide our response to a number of Draft Recommendations that are particularly relevant to the Service's operations.

Draft Recommendation 6.2 – General Protections

The Australian Government should modify s. 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 FW Act 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.*

Draft Recommendation 6.3 – General Protections

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.

The Service is concerned that any redefinition of how a workplace right applies where the complaint or inquiry is indirectly related to the person's employment may unnecessarily restrict the operation of the provision. Similarly, redefinition of the provision to require that the complaint or inquiry upon which the action is based be made to a body with the power to action that complaint or deal with the inquiry (as has been suggested in some submissions) may result in otherwise meritorious claims being denied access to this jurisdiction. The provisions relating to 'workplace rights' provide an important protection to workers. Restricting either the types of complaints/inquiries or the bodies to whom these complaints/inquiries can be made in order to form the basis of a complaint/inquiry reduces the scope and effectiveness of these provisions.

Our Service has seen a number of clients who have had adverse action taken against them after making complaints or inquiries in relation to their (or others') employment which were made to supervisors, colleagues, labour hire hosts or other third parties. Any restriction of the operation of the jurisdiction may mean that this type of adverse action is not able to be remedied.

Case study: Complaint in relation to other employee's health and safety

John commenced work with Labour Hire Stars Pty Ltd and was contracted to work with ABC Constructions as a roadside construction worker. On one of his first shifts, John was asked to dig a hole using heavy machinery in a location where there were underground electrical lines.

John had some experience in workplace health and safety and felt that what he was being asked to do was unsafe. He mentioned this to his site supervisor, who was an employee of ABC Constructions.

On Monday, John was advised by Labour Hire Stars Pty Ltd that he was no longer required to attend for work with ABC Constructions and that Labour Hire Stars Pty Ltd had no more contracting work for him at that time. The company refused to provide him with a reason and never gave him any more work.

The above example illustrates the need for a broad definition of complaint/inquiry to ensure the protection of workers making complaints/inquiries to a broad range of people. The Service also has seen clients who have made complaints in relation to colleague's health and safety and have been subjected to adverse action as a result. Any narrowing of the scope of the operation of this provision may limit the ability of employees facing circumstances like these to seek redress.

Similarly, the Service is opposed to restricting the definition of 'workplace right' by creating a requirement that any complaint be made in 'good faith' (Draft Recommendation 6.2) or creating an exclusion in relation to complaints made vexatiously or frivolously (Draft Recommendation 6.3). In our view, this may have detrimental consequences for applicants without access to legal assistance.

We believe it is inappropriate to make preliminary assessments of claims on this basis for a number of reasons. First, given the imposition of strict time limits, applicants may not have had the opportunity at that early stage to obtain legal advice on how to present and clearly articulate the complaint/inquiry that forms the basis of the claim. This could result in meritorious claims being excluded by the Fair Work Commission and counter the objectives of the Fair Work regime.

Second, an assessment of whether a complaint/inquiry is vexatious or frivolous or not made in good faith before the assessment of the substantive claim will result in increased delays in the resolution of employment disputes. Such an assessment will require significant evidence, legal argument and resources. The suggested requirement (Draft Recommendation 6.2) that an applicant participate in an interview with the Fair Work Commission prior to the convening

of a conference imposes an additional, unwarranted burden on the applicant and the Fair Work Commission.

A broad view of what constitutes a complaint/inquiry for the purposes of s341(1)(c)(ii) is required to enable the capture of the wide range of conduct that the provision should protect. Complaints/inquires made to colleagues, complaints/inquiries made in relation to the employment of others, complaints/inquiries made in relation to general safety issues that may affect the public or others are all examples of conduct that should not result in adverse action. A narrow interpretation of the provision would mean that if an employee was subjected to adverse action for making one of these legitimate complaints/inquiries, they would have no recourse under the general protections provisions. In our view, substantial injustice may arise by narrowing the operation of this provision.

Draft Recommendation 6.4 – General Protections

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

The Service disagrees with the proposal to introduce a cap on compensation for General Protections claims.

Anecdotal evidence from our casework informs our view that compensation amounts achieved in this jurisdiction are generally already below community expectations. In our experience, applicants who have experienced adverse action for a prohibited reason expect a higher level of compensation than is usually awarded in this jurisdiction. Our Service is often involved in reducing our client's expectations in relation to likely compensation for general protections matters.

In addition, in our view the unrestricted limit on compensation plays an important role in deterring prohibited treatment of workers in Australia.

Part 3-1 of the Fair Work Act 2009 (Cth) deals with a broad range of conduct in the workplace that represents some of the more egregious breaches of the rights the community expects to be afforded at work. For example, Part 3-1 provides redress to employees whose employment was adversely affected for discriminatory reasons such as their age, gender or race. Introducing a cap on the compensation available in this jurisdiction would unnecessarily restrict the ability of the Fair Work Commission and the courts to reflect community standards in relation to this type of conduct and impose harsher penalties on employers who engage in conduct in breach of the general protections provisions. Community standards in relation to racism, sexism and homophobia, for example, are changing in such a way that the community expects that adverse action taken against employees for reasons such as these should be punished severely. The imposition of harsh penalties for conduct such as this reflects the community's growing awareness of these issues and the increased desire to see them eradicated from Australian workplaces.

In our view, placing a cap on the compensation available to applicants in this jurisdiction is unwarranted and fails to reflect ever hardening community attitudes against conduct in breach

of the general protections regime. The community expects the courts to punish this type of behaviour with severe financial penalties and for victims to be appropriately compensated. Any restriction on the Fair Work Commission or the courts' ability to reflect the community's changing values is unwarranted.

Furthermore, some submissions to the Inquiry suggest that placing a cap on general protections compensation will reduce instances of 'forum shopping' in matters involving dismissal. These submissions suggest that because compensation is uncapped in the general protections jurisdiction, some applicants choose to access this jurisdiction over the unfair dismissal jurisdiction, where compensation is capped. In our view, these submissions are misconceived. In our experience, when applicants are determining whether to lodge a general protections claim or an unfair dismissal claim the most common considerations are whether the facts of the potential claim fit within the elements required to be established in making a successful claim and whether the jurisdictional requirements for an unfair dismissal claim have been met (e.g. length of tenure with the employer).

Further, if a cap is introduced for general protections claims in order to prevent 'forum shopping', the cap must be set at, or below, the cap for unfair dismissal matters in order to discourage 'forum shopping' in favour of the general protections jurisdiction. Since it is generally accepted that an unfair dismissal is easier for an applicant to make out than a general protections claim, introduction of the cap would encourage rather than deter 'forum shopping' in that all applicants with a dismissal matter would choose to access the unfair dismissal regime. Placing a cap on general protections compensation will not end 'forum shopping', but rather shift the burden to the unfair dismissal jurisdiction.

There are inherent difficulties in calculating the appropriate quantum for any proposed cap. For example:

- Would the cap be referable to income (like the unfair dismissal cap)? If so, we are concerned that it may lead to the situation whereby high earning applicants would be entitled to higher levels of compensation than lower earning applicants who were subjected to the same adverse action for the same prohibited reason. For instance, two employees both subjected to the same adverse action because of discrimination due to their race may be entitled to different levels of compensation – a clearly undesirable outcome.
- Would the cap be set at different levels according to the breach alleged? The general protections regime applies to a broad range of undesirable conduct. As such, an arbitrary cap on compensation that applies to the whole jurisdiction is, in our view, inappropriate.

Draft Recommendation 6.5 – General Protections

The Australian Government should amend Schedule 5.2 of the Fair Work Regulations 2009 (Cth) to require the Fair Work Commission to report more information about general protections matters. Adequate resourcing should be provided to the Fair Work Commission to improve its data collection and reporting processes in this area.

The Service agrees with the proposed recommendation that the Fair Work Commission should be required to report more information about general protections matters and should be better resourced to enable this. In particular, additional information relating to settlement outcomes would be beneficial, provided confidentiality is maintained.

The provision of more information by the Fair Work Commission (and resources to allow adequate publication of this information) in relation to general protections matters would enable disadvantaged and unrepresented litigants to be better informed about the claim they are making, the litigation process and the likelihood and quantum of any resulting compensation.

The Service acknowledges that the Fair Work Commission (and the Fair Work Ombudsman) already provide a significant amount of information in relation to general protections matters to the community. However, the provision of more information would improve the ability of the public to get a better understanding of the operation of the jurisdiction and allow applicants to be more realistic about the outcomes they seek. In our experience, our clients' knowledge of the operation of the jurisdiction is generally poor. For example, compensation amounts available in the jurisdiction are not well understood by unrepresented litigants and they are often disappointed by the low level of awards made for breaches of the general protections provisions.

The provision of more information by these bodies would also, in our submission, provide a deterrence to employers acting in breach of workplace laws. By detailing the penalties awarded for similar conduct, publication of more information in relation to the jurisdiction may raise awareness and increase compliance among employers.

The Service suggests additionally that the recommendation be broadened so as to include the provision of further information in relation to this jurisdiction from the Fair Work divisions of the Federal Circuit Court and the Federal Court of Australia, to enable a more fulsome assessment of the operation of the jurisdiction.

Draft Recommendation 21.1 – Migrant Workers

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.

The Service agrees with the proposal to provide the Fair Work Ombudsman with additional resources for investigations and audits in relation to migrant workers. The Service has extensive experience working with applicants in Fair Work matters who are from a migrant background and who have been underpaid or unpaid for work performed. Many of these migrant workers have sought the assistance of the Fair Work Ombudsman as an initial step and have been told that an investigation into the employer is not possible. In our view, complaints to the Fair Work Ombudsman result in investigations of employers far too

infrequently and the Fair Work Ombudsman should be given a significant increase in resources to address this issue.

Case study: FWO complaint does little to assist migrant worker

Rashida (not her real name) contacted the Service seeking assistance to lodge a small claim in the Federal Circuit Court. She spoke very little English and had been employed for three months in a dry cleaning business. During that time, she was treated very poorly and received only a fraction of her wages. Eventually, she left the job and sought help from the Fair Work Ombudsman to recover her unpaid entitlements.

The Fair Work Ombudsman advised Rashida that it could not investigate or prosecute the employer. Instead, the Fair Work Ombudsman arranged a conference between Rashida and her former employer. Her former employer participated in the conference, but refused to admit that Rashida was owed any money. Rashida left the conference feeling dejected and desperate for more help.

Rashida told the Self Representation Service that without its assistance she wouldn't have been able to make her claim and that several of her ex-co-workers are still working for the employer and continue to be underpaid. Meanwhile, the employer is not facing any investigation or adverse consequence in response to the illegal treatment of its workers.

Migrant workers represent one of the more vulnerable employee groups in Australia. They often lack language skills and a knowledge of the Australian legal system, meaning they are more likely to be targeted by opportunistic and exploitative employers. Their ability to investigate and prosecute claims for unpaid or underpaid entitlements is often severely limited and the inability of the Fair Work Ombudsman to shoulder this burden may result in these claims remaining unpursued. In our view, the ability of the Fair Work Ombudsman to investigate and prosecute employers who underpay their workers should be enhanced, both in relation issues relating to migrant workers and employees more generally.

In relation to the proposal to amend the Migration Act 1958 (Cth), the Service is supportive of any attempt to ensure that the vulnerability of migrant workers is recognised through the imposition of harsh financial penalties on employers found to be exploiting that vulnerability.

The Service also suggests that migrant worker's access to the Fair Work regime be improved by ensuring that undocumented migrant workers are entitled to all protections and minimum entitlements afforded under the Fair Work Act. In addition, the Service suggests creating an amnesty for illegal workers who have been exploited to make complaints to the appropriate body. The widespread underpayment and exploitation of migrant workers will remain an unresolved and underreported problem so long as migrant workers are unable to make legitimate complaints without fear of prosecution. Allowing exploited migrant workers to make complaints by providing such an amnesty will have a strong deterrent effect on exploiting employers.

Conclusion

The Service is grateful for the opportunity to submit our views for consideration as part of the Productivity Commission Inquiry. We would be pleased to discuss these issues in greater depth or provide further detail upon request.

Yours sincerely

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