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Dear Mr Harris

Inquiry into the Workplace Relations Framework - Draft Report

Thank you for the opportunity to provide feedback in relation to the Productivity Commission's Draft Report on the Workplace Relations Framework. Victoria Legal Aid (VLA) is a major provider of legal services to socially and economically disadvantaged Victorians. Our Equality Law team provides advice and representation to people who suffer adverse action in employment on the grounds of a protected attribute and the exercise or proposed exercise of a workplace right. In 2014-2015 the discrimination law services provided by VLA, which includes assistance with general protections claims under the Fair Work Act 2009 (FW Act), included 1,522 legal advices, 133 cases, 36 legal proceedings and 60 duty lawyer services.

VLA welcomes the Commission's commitment to ensuring strong protections for employees subject to disadvantage. However we do not support a cap on compensation for claims lodged under the general protections provisions. Although we support the Commission's recommendation for stronger protections for migrant workers we are concerned by the proposal to amend the FW Act to state that it does not apply to migrant workers working outside of their visa conditions. We are also concerned that the Draft Report fails to address other deficiencies and gaps in the FW Act, as identified in our submission to the Commission, dated 23 March 2015 (March submission). We reiterate our recommendations made in that submission and enclose a copy for the Commission's reference.

VLA does not support a cap on compensation for general protections claims

The Draft Report recommends introducing a cap on compensation claims lodged under Part 3-1 of the FW Act. Notably, the Draft Report recommends that dismissed employees seeking compensation above the cap should still be able to access the courts directly.

VLA opposes introducing a cap on compensation for claims lodged under the general protections provisions of the FW Act because of the impact that this would have on workers with claims of workplace discrimination, particularly under s351. The proposal is inconsistent



with federal discrimination law and jurisprudence, has the potential to discourage employers from complying with the FW Act and would impede access to justice for vulnerable workers.

Introducing a cap is inconsistent with federal discrimination law and jurisprudence

The general protections provisions provide important safeguards against adverse action, recognising that breaches can have severely detrimental impacts on workers that extend beyond a brief period of lost employment entitlements. This is particularly the case in respect of adverse action taken because of a protected attribute, such as race, disability, sex, age or pregnancy, in breach of s351. Many of our clients suffer lasting psychological injury as a result of discrimination, which is reflected in recent surveys by the Australian Human Rights Commission and VicHealth. For example, two thirds of women who experienced pregnancy discrimination reported that this had a negative impact on their mental health¹ and 22% did not return to the workforce compared to 14% of mothers who did not experience discrimination.² Similarly, two thirds of Indigenous Victorians who experienced 12 or more incidents of racism reported high or very high psychological distress.³ This damages the individual and their family, and also has direct costs for both business and the community.

Jackie's story:

"My son is now two years old, and I still feel the effects of the discrimination I experienced when I was pregnant. The sadness and anger has permeated every aspect of my life. It has affected me professionally, financially and socially. I feel like I have lost my confidence and my career."

Awards of compensation should adequately reflect the hurt and humiliation experienced by the claimant. In the recent Federal Court sexual harassment case of *Richardson v Oracle*,⁴ Justice Kenny undertook a thorough review of general damages payments in discrimination, sexual harassment and unlawful termination cases. That case saw the Federal Court reconsider the previously parsimonious payments for general damages in many of these cases. It did so on the basis that 'community standards now accord a higher value to compensation for pain and suffering and loss of enjoyment of life than before'.⁵ Justice Kenny noted that the range of general damages payments in the area 'has remained unchanged, notwithstanding that the community has generally gained a deeper appreciation of the experience of hurt and humiliation that victims ... experience and the value of loss of enjoyment of life occasioned by mental illness or distress caused by such conduct'.⁶

It would be inconsistent with the direction of current jurisprudence, which is increasingly recognising the inadequacy of low awards of compensation in this area, to impose a cap on compensation in general protections disputes before the FWC. Notably, state and federal

¹ Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report* (2014), 32.

² *Ibid*, 15.

³ VicHealth, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities* (2012).

⁴ [2014] FCAFC 82.

⁵ *Richardson v Oracle* [2014] FCAFC 82 at [96].

⁶ *Richardson v Oracle* [2014] FCAFC 82 at [117].

discrimination laws do not impose a cap on compensation. Imposing a cap would increase inconsistency between the FW Act and other discrimination jurisdictions.

A cap discourages employers from complying with the FW Act

To operate effectively the general protections provisions should provide a disincentive for employers from breaching the FW Act. Introducing a cap will remove this deterrent and adversely affect low income earners who are unlikely to have the resources to secure legal assistance and lodge a claim directly with the courts within the relevant timeframes.

A cap will not deter speculative or vexatious claims

It is suggested in the Draft Report that “[t]he lack of a cap may encourage some employees to press claims with little or no basis for essentially speculative reasons.”⁷ The FW Act provides a sufficient mechanism for dealing with claims that are instituted vexatiously or without reasonable cause. Under these provisions claimants can be exposed to an adverse costs order. For vexatious claimants who are undeterred by the risk of an adverse costs order, a compensation cap is also unlikely to present a disincentive.

Stronger protections for migrant workers

The Draft Report suggests that under current case law migrants working in breach of the *Migration Act 1958* (Cth) are not covered by the FW Act. The Draft Report refers to the unfair dismissal case of *Smallwood v Ergo Asia Pty Ltd* [2014] FWC 964 [14 February 2014], which suggested that an employment contract entered contrary to the Migration Act is ‘invalid and unenforceable’.

Workers in this situation are already vulnerable to exploitation because of their reluctance to complain for fear of deportation. In our experience, they are also often unfamiliar with workplace laws and their entitlements. Failing to provide any meaningful legal protection to these workers simply increases their vulnerability to unlawful actions by employers.

VLA submits that the FW Act should be amended to clarify that it does cover all migrant workers, irrespective of their visa status and conditions. This would provide an incentive for employers to comply with the FW Act, as well as for employees to complain when breaches occur.

VLA supports the proposal in the Draft Report for stronger fines for employers who exploit migrant workers. However there must be provision for this to be paid to the worker as compensation. To do otherwise would both fail to properly compensate the worker for being exploited and deter workers from reporting breaches and actively supporting prosecutions given the many risks involved in doing so, including unemployment, deportation and retribution. Our clients have experienced all of these consequences as a result of enforcing their employment rights.

Other gaps

As noted in our March submission there are a number of remaining gaps in the FW Act that require clarification and amendment. These include the following.

⁷ Draft Report, page 263.

- There is a lack of definition of key terms, such as 'discrimination' and 'disability'.
- There is inconsistency between general protections and discrimination law jurisprudence.
- The 21 day time limit in dismissal cases is inadequate for a person to access legal advice and assistance and sufficiently prepare their case.
- Sexual harassment and indirect discrimination is not explicitly prohibited.
- There is no explicit requirement to make reasonable adjustments.

We reiterate the recommendations contained in our March submission to address these deficiencies.

Please contact Dan Nicholson, Director Civil Justice Access and Equity
_____ if you have any queries.

Yours faithfully

BEVAN WARNER
Managing Director