Improving protections of employees' wages and entitlements

Legal Aid NSW submission to the Attorney-General's Department Industrial Relations Consultation

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW has significant expertise in the area of employment law. Grants of legal aid are available for such matters.

This submission draws on the casework experience of our civil lawyers in providing these services.

Legal Aid NSW welcomes the opportunity to make a submission to the Attorney-General's Department in the Industrial Relations Consultation. Should you require any further information, please contact

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Introduction

Legal Aid NSW welcomes the opportunity to provide a submission to the Attorney-General's Department on the discussion paper *Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance.* Our submission addresses the questions in the discussion paper.

Current approach to determining penalties

What level of further increase to the existing civil penalty regime in the Fair Work Act could best generate compliance with workplace laws?

Over the past five years, Legal Aid NSW has provided employment law advice to over 3000 disadvantaged workers.

In the 2014/2015 and 2015/2016 financial years, underpayment of wages was the second most common employment law issue about which our clients sought advice (behind unfair dismissal). In the 2016/2017 and 2017/2018 financial years, underpayment of wages was the most common employment law issue about which our clients sought advice. In the 2018/2019 financial year, underpayment of wages was again the second most common employment law issue about which our clients sought advice (behind unfair dismissal).

Legal Aid NSW regularly provides advice to clients who have been substantially underpaid. In many instances, these clients have not been provided with pay slips or have been issued pay slips that do not comply with the Fair Work Regulations. Frequently, such clients also have difficulty obtaining access to their employee records, often because their employer has not kept the required records.

Increased penalties are one of the deterrent measures necessary to generate increased employer compliance with workplace law. Legal Aid NSW welcomes the Government's in-principle acceptance of the Migrant Workers' Taskforce recommendation that the level of penalties for breach of wage exploitation related provisions should be increased, to be more in line with those in other areas of regulation, particularly consumer laws. We submit that a substantial increase in penalties is necessary to improve compliance with workplace laws.

What are some alternative ways to calculate maximum penalties? For example, by reference to business size or the size of the underpayment or some measure of culpability or fault.

Anecdotally, Legal Aid NSW observes that smaller employers are more likely than larger employers to underpay wages and contravene the record keeping requirements of the *Fair Work Act 2009* (Cth) (**Fair Work Act**). Legal Aid NSW has seen employees of small business underpaid by very large amounts.

Where appropriate, the court already takes into account the circumstances of the particular employer, including its size and financial position, when fixing the quantum of a civil penalty in underpayment matters.

Legal Aid NSW does not support a move to mandate the calculation of maximum penalties to be expressly linked to business size. Such an approach would not serve to promote compliance among the many small businesses we observe contravening the law in respect of their employees' pay and entitlements. Further, the harm to an underpaid employee does not change according to the size of the contravening employer.

We consider that concepts of fault and culpability are also already considered by the court when determining the quantum of civil penalty in each case. Courts assess the objective seriousness of the contravention in question, including the extent to which it was deliberate, covert or reckless, and whether it was isolated or systemic.

Overall, Legal Aid NSW submits that the approach of the current regulatory framework in which the court exercises discretion in determining the proportion of the maximum penalty for each contravention is appropriate. We consider that changes in other areas (such as enforcement) are likely to have a greater deterrent effect.

Should penalties for multiple instances of underpayment across a workforce and over time continue to be 'grouped' by 'civil penalty provision', rather than by reference to the number of affected employees, period of the underpayments, or some other measure?

As previously noted, Legal Aid NSW continues to provide advice to many employees of smaller businesses who have been underpaid. We observe that often, the contravention of numerous different minimum standards in relation to a single employee is indicative of an employer who has a flagrant disregard for industrial laws, rather than one who has simply made a mistake. This would seem to be supported by the fact that a large proportion of the litigation conducted by the Fair Work Ombudsman (**FWO**) relates to contraventions in respect of small numbers of affected employees.

Likewise, in our experience, the period over which an underpayment has occurred is not necessarily reflective of the objective seriousness of the contravention. An employee can be grossly underpaid over a relatively short period and suffer acute financial hardship in that period.

We do not support the introduction of a system in which penalties are 'grouped' by reference to the number of affected employees or period of underpayment. Legal Aid NSW considers that the current 'grouping' of civil penalty provisions is largely appropriate.

Have the amendments effected by the Protecting Vulnerable Workers Act, coupled with the FWO's education, compliance and enforcement activities, influenced employer behaviour? In what way?

Has the new 'serious contravention' category of the Fair Work Act had, or is it likely to have, a sufficient deterrent effect?

As noted above, Legal Aid NSW continues to see very large numbers of workers who have been underpaid. The number of clients seeking advice from Legal Aid NSW about underpayment of wages has not decreased since the *Fair Work (Protecting Vulnerable Workers) Act 2017* (Cth) amendments, or as a result of any increased activity from the FWO. However, it may take some time for the change in the law to effect a change in employer behaviour.

Extending liability

The extended liability provisions of the Fair Work Act help promote compliance with workplace laws and limit corporate avoidance of the Act. They also:

- Assist employees in recovering entitlements where their actual employer is not trading or has engaged in illegal phoenix behaviour.
- Help ensure that the controlling minds of entities involved in breaches of workplace laws are not immune from liability.

Do the existing arrangements adequately regulate the behaviour of lead firms/head contractors in relation to employees in their immediate supply chains?

The existing arrangements do not adequately regulate the behaviour of lead firms/head contractors in relation to employees in their immediate supply chain.

Lead firms and head contractors often derive economic benefit from the contravention of workplace laws in the form of lower labour costs and maximised financial return. Integrated supply chain systems enable lead firms and head contractors to avoid the legal proximity with workers, whilst at the same time enabling them to maintain effective commercial control over the work performed. This has the effect of insulating businesses at the top of the supply chain from liability to workers at the base.[1]

Legal Aid NSW lawyers regularly provide legal services to workers in contracting industries who are often underpaid, particularly in the security and cleaning services

[1] Richard Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships* (2012) 83.

industries. Some of these workers at the bottom of the supply chain have provided services to Commonwealth government agencies and prominent corporations.

Whilst the FWO has taken action to ensure compliance of lead firms for breaches of workplace laws, such as the supermarket trolley collection cases,[2] our lawyers' experience reflects a broader trend of non-compliance with workplace laws in supply chain systems.

The extended liability provisions, in their current form, set a high threshold for extending liability to lead firms and head contractors. It requires parties not directly responsible for the contravention to be at least 'knowingly concerned' in the contravention.[3] This can be difficult to establish when the lead firm or head contractor is many levels removed from the workers at the base of the supply chain.

The extended liability provisions should be expanded to specifically cover situations where businesses contract out services in a supply chain. This will promote compliance with workplace laws by encouraging lead firms and head contractors to ensure that entities further down the supply chain have adequately factored in compliance with workplace laws in their pricing.

Should actual knowledge of, or knowing involvement in, a contravention of a workplace law be the decisive factor in determining whether to extend liability to another person or company? If not, what level of knowledge or involvement would be appropriate? Would recklessness constitute a fair element to an offence of this type?

Legal Aid NSW considers that the level of knowledge required to extend liability under s 550 of the Fair Work Act is too onerous. In its current form, the provision requires the employee to prove the specific facts that establish actual knowledge of, or at least wilful blindness[4] to, specific contraventions of the Act. This can be especially hard in supply chain situations, or where the employee does not have sufficient knowledge about how the controlling mind of an employer corporation carries out their work.

In one case example, Legal Aid NSW represented an employee in a sham contracting and underpayment case. The employer was a medium sized entity. Our client knew that the directors were aware of what went on in their section of the employer's business, but he did not know *how* the directors had such knowledge. Our client did not know the precise facts of how those directors had actual knowledge and involvement in the essential matters constituting the contravention, such as the setting of rosters and pay rates. Our

[2] *Enforceable Undertaking between the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) and Coles Supermarkets Australia Pty Ltd*, 2014; *Proactive Compliance Deed between the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) and Woolworths Limited*.

[3] Fair Work Act, s 550.

[4] *Fair Work Ombudsman v Priority Matters Pty Ltd & Ors* (No 4) [2019] FCCA 56, [31]-[32].

client decided not to pursue the controlling minds of the company under the s 550 extended liability provisions because the level of knowledge required was too high.

Legal Aid NSW supports a lower level of knowledge or involvement for extended liability to that presently required by s 550 of the Fair Work Act. However, we have reservations as to whether recklessness constitutes a fair element to an offence of this part. This is because recklessness, as a legal principle, requires some element of actual knowledge of the relevant risk—in this case contravention of the Fair Work Act. It may still be difficult for employees to show that a controlling mind or lead contractor knew that there was a risk that their corporation or entities further down the supply chain may not be complying with workplace laws. Proving recklessness is itself a high bar, as our experience with the sham contracting provisions of the Fair Work Act (discussed below) has revealed.

Legal Aid NSW would welcome the opportunity to provide comments on any proposed legislative changes.

What degree of control over which aspects of a business is required before a business owner should be expected to check the compliance of contractors further down the supply chain?

No comment.

What are the risks and/or benefits of further extending the accessorial liability provisions to a broader range of business models, including where businesses contract out services?

Legal Aid NSW considers that there would be significant benefit to extending the accessorial liability provisions to a broader range of business models, including where businesses contract out services. These benefits include:

- Promoting compliance with workplace laws.
- Ensuring vulnerable workers enjoy the benefits of minimum employment standards.
- Assist workers to recover underpayment of wages and entitlements in situations where the direct employer may not have the ability to satisfy a judgment debt or has engaged in illegal phoenix activity.
- Assisting businesses that adhere to workplace laws to remain competitive, by ensuring that they are not undercut in the tendering processes by business operators that underpay workers as part of their business model.

Sham contracting

Should there be a separate contravention for more serious or systematic cases of sham contracting that attracts higher penalties? If so, what should this look like?

Sham contracting leads to many adverse social and economic problems such as tax avoidance, underpayment of workers, loss of superannuation and placing workers in risky situations without adequate workers compensation insurance.

Legal Aid NSW supports a separate contravention for more serious and systematic cases of sham contracting, including where:

- The sham contracting arrangement results in a significant underpayment for a worker.
- The sham contracting arrangement involves more than one worker and has the effect of denying them payment for penalties, casual loadings or overtime rates.
- An employer requires a worker to obtain an Australian Business Number (**ABN**) before they are hired, in circumstances where that worker did not already have an ABN.
- Where workers are exposed to health and safety risks without adequate workers compensation insurance in place.

Should the recklessness defence in subsection 357(2) of the Fair Work Act be amended? If so how?

Legal Aid NSW supports the amendment of the recklessness defence in subsection 357(2) of the Fair Work Act, but law reform in this area should not be limited to such an amendment.

Unlike in work, health and safety law, there are no provisions which deem a worker to be an employee. There are no statutory definitions of employee or contractor and the common law 'multi factor' test is complex and ill-suited to the realities of the modern economy. The requirement to balance the various factual indicia leads to disagreement in the application of the test by judicial or administrative decision makers, and makes it hard for practitioners to predict how a worker will be assessed.[5]

Because there is no presumption that a worker is an employee, the onus lies with the worker to prove that they are an employee and not an independent contractor. This can be especially hard for unrepresented litigants, particularly vulnerable workers.

[5] Andrew Stewart et al, *Creighton & Stewart's Labour Law* (2016) [8.29].

The multi-factor test fails to deal adequately with the realities of the gig economy. Many workers in the gig economy exercise some level of control over the hours they work and/or have multiple clients. Yet, in most cases, they cannot truly be said to be running an enterprise of their own.

For example, and not surprisingly, the Fair Work Commission has found when applying the multi-factor test, that Uber drivers are not employees[6] whilst Foodora delivery riders are employees.[7] The Commission has found that a driver engaged by Uber Eats was not an employee, though that decision is subject to an appeal.[8]

Legal Aid NSW lawyers have also noticed a growing trend in sham contracting whereby the worker is required to establish a corporation before being given work. Such arrangements are not new and make it extremely difficult for the worker to prove the existence of an employment relationship because another legal entity exists between them and the ultimate recipient of their services. In the most egregious cases, the disguised employer or their accountants arrange for the creation of corporate entities for the worker.[9] The multi-factor test does not adequately respond to this growing trend.

The 2017 Senate Inquiry into Corporate Avoidance of the Fair Work Act[10] recommended that sham contracting be made a strict liability offence. Legal Aid NSW supports this idea, as it would treat sham contracting like other contraventions of the Fair Work Act, such as failing to provide employees with pay slips.

Making sham contracting a strict liability offence is unlikely to substantially increase litigation. Workers in sham contracting situations are often underpaid, so they may end up in court anyway. Also, contravention of s 357 of the Fair Work Act can only result in civil penalty orders. There is no direct monetary compensation available for contravention of this section, as there would be, for example, with failure to pay annual leave upon termination (though it is possible for a court to order that the penalty be paid to the employee). The Small Claims Division of the Federal Circuit Court of Australia does not have jurisdiction to impose civil penalties for contraventions of the Fair Work Act, so this would mean that most unrepresented litigants and people with claims under $20,000 are unlikely to seek orders for the imposition of civil penalties under this section.

Whilst liability may be strict, the civil penalty regime under the Fair Work Act allows for considerable judicial discretion in the imposition of penalties. The range of penalties available are sufficiently flexible to accommodate the varying degrees of culpability of the person or entity engaged in a sham contracting arrangement. For example, a person who was careless as to whether they engaged someone as an employee or contractor and that engagement did not result in an underpayment of wages, might attract a penalty on the

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[6] *Michail Kaseris v Raiser Pacific V.O.F* [2017] FWC 6610.

[7] *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.

[8] *Amita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd T/A Uber Eats* [2019] FWC 5008.

[9] *Vannea v Royal Bay International Pty Ltd* [2014] FWC 6416.

[10] Senate Education and Employment References Committee, Parliament of Australia, *Corporate Avoidance of the Fair Work Act 2009* (2017) 83.

lower end of the scale. By contrast, a person that engaged a large number of workers for a considerable period of time and avoided paying them penalties for overtime and weekend work, would expect to receive a penalty on the higher end of the scale.