

**WORKPLACE RELATIONS FRAMEWORK INQUIRY**  
**WESTERN COMMUNITY LEGAL CENTRE**  
**THIRD SUBMISSION TO THE PRODUCTIVITY COMMISSION**

**October 2015**

Contact: Catherine Hemingway  
Employment Project Solicitor

## Contents

|  |           |
|--|-----------|
| <b>1. Introduction .....</b>   | <b>3</b>  |
| <b>2. Best Practice Approaches to Education .....</b>  | <b>3</b>  |
| 2.1 <i>Focus on education welcome .....</i>  | 3         |
| 2.2 <i>Overcoming barriers to education for migrant communities.....</i>   | 3         |
| 2.3 <i>Examples of best practice approaches .....</i>  | 5         |
| 2.3.1    Western Community Legal Centre (WCLC) Train the Trainer Project.....  | 5         |
| 2.3.2    What's the Law? Australian law for new arrivals .....   | 11        |
| 2.3.3    Victoria Legal Aid Legal Help Cards.....  | 12        |
| <b>3. Joint employment and alternative models to address liability in labour hire arrangements, supply chains and franchises.....</b>  | <b>14</b> |
| 3.1 <i>Joint employment is necessary to address new forms of working arrangements.....</i>   | 14        |
| 3.2 <i>Legislative reform is required to provide certainty .....</i>   | 15        |
| 3.3 <i>For labour hire arrangements, joint employment and licensing will improve compliance .....</i>                                  | 16        |
| 3.3.1    Example joint employment provisions .....   | 16        |
| 3.3.2:    Alternative approach: vicarious liability .....  | 18        |
| 3.3.3:    Alternative approach: expanding the definition of employee and employer to expressly refer to labour hire arrangements ..... | 19        |
| 3.3.4    A licensing scheme should be introduced for labour hire providers.....  | 20        |
| 3.4 <i>Without regulation, supply chains facilitate exploitation for those at the bottom.....</i>                                      | 21        |
| 3.4.1    Expansion of outworker protections to other industries would increase compliance .....  | 22        |
| 3.5 <i>Legislative reform is also necessary to prevent widespread exploitation in franchises .....</i>                                 | 24        |
| 3.6 <i>Lessons from Work, Health and Safety legislation .....</i>  | 26        |
| <b>4. Distribution of penalties and fines.....</b>   | <b>26</b> |
| 4.1 <i>Payment to workers as first priority .....</i>  | 26        |
| 4.2 <i>Cy-près doctrine should apply in situations where employee cannot be paid .....</i>   | 26        |
| 4.2.1    Example: Fire services levy monitor .....   | 27        |
| 4.2.2    Example: Consumer Action Law Centre .....   | 28        |

## 1. Introduction

Western Community Legal Centre (**WCLC**) is a newly formed entity created from the amalgamation of Footscray Community Legal Centre Inc., Wyndham Legal Service Inc. and Western Suburbs Legal Service Inc. After making two submissions to this Inquiry (the first as Footscray Community Legal Centre), we appeared at the Melbourne public hearing on 23 September 2015 (**Hearing**). Further to discussions at the hearing, we welcome this opportunity to provide further comments in respect of three matters:<sup>1</sup>

1. Best practice approaches to education;
2. Joint employment and alternative models to address liability in labour hire arrangements, supply chains and franchises; and
3. Distribution of fines and penalties.

## 2. Best Practice Approaches to Education

### 2.1 Focus on education welcome

As discussed in detail in our previous submissions,<sup>2</sup> raising awareness of employment laws and services<sup>3</sup> is a critical step in rights enforcement. For migrant communities, education programs must be appropriately targeted.

We commend the Fair Work Ombudsman (**FWO**) for developing a range of educational resources, including translated fact sheets and a community presentation package in a range of languages. Importantly, FWO Community Engagement Officers have been delivering face to face information sessions to communities. We have observed significant unmet need for face to face education services, and are not able to meet the frequent requests that we receive to provide face to face information to community groups.

FWO's resources should be seen as a foundation, with greater scope to increase access for newly arrived and refugee communities by providing sufficient resources to meet unmet need using best practice approaches to education.

### 2.2 Overcoming barriers to education for migrant communities

As noted in our previous submissions, language and literacy problems are barriers to access to justice.<sup>4</sup> Many of our clients cannot read or write English and many are illiterate in their own languages. This means that these communities will typically face a range of barriers to understanding the law and accessing assistance from the FWO and other services.

The language and concepts in employment law are often complex and arcane for speakers for whom English is their first language. This is amplified significantly for people with low levels of English.

---

<sup>1</sup> Western CLC would like to sincerely thank volunteers Franceska Leoncio and Phoebe Churches for their outstanding contributions researching and drafting this submission.

<sup>2</sup> See for example September 2015, pages 33-43.

<sup>3</sup> Including the Fair Work Ombudsman, Fair Work Commission and community legal centres.

<sup>4</sup> March 2015, pages 8-9; September 2015, page 9.

Accordingly practices and processes which place heavy reliance on written communication can be particularly daunting.

Where people have low levels of literacy (either in English or both in English and their first language), communication should be face to face, utilise images and multimedia, and ideally be delivered in communities' first language. Face to face education services also have the benefit of building trust and relationships between services and community members, an integral part of increasing the accessibility of services.

Based on a literature review and over 80 surveys of community members, community workers and community leaders from newly arrived and refugee communities, our Preliminary Report<sup>5</sup> found that the following features make community education effective:

- **Face-to-face & verbal:** provided face to face. Verbal as well as written information.
- **Client's language and community workers:** Using interpreters, community guides and bilingual community workers from relevant communities.
- **Visual materials and multimedia:** Use of pictures, visual aids (such as DVDs) or other multimedia (including community radio).
- **Information sessions, English classes and pre-arranged community meetings:** Delivering community education via information sessions or as part of English classes is effective, as is visiting existing community groups.
- **Clear language:** Using clear and simple language.
- **Key information only:** Outlining key concepts and where to go for further information/assistance.
- **Cultural awareness:** Ensuring presenter understands the community culture.
- **Convenient location:** Considering location of CLE and contacting existing organisations. As one community worker recommended: 'I think taking time to identify a number of community groups and associations that are already established and are meeting for a purpose on a regular basis. Request to be invited to talk about this issue which I think would be very popular within these communities.'
- **Practical and timely:** Providing information 'that is linked to outcomes', for example by facilitating employment in industries and workplaces where rights can be realised. Ensuring that workers receive the right amount of information at the right time so it is not abstract.
- **Developed in consultation with communities:** Ensuring that education is developed in consultation with community members and community workers, and responds to identified needs.

As one survey noted: '*Having bilingual workers from the clients' communities working and imparting knowledge to their own communities has been effective*'. Our Centre has used bilingual workers for many years, and found this to be an extremely valuable way of connecting our service with newly arrived communities.

---

<sup>5</sup> Catherine Dow, Employment is the Heart of Successful Settlement, [http://footscrayclc.org.au/images/stories/Footscray\\_CLC\\_Employment\\_Law\\_Project - Preliminary\\_Report.pdf](http://footscrayclc.org.au/images/stories/Footscray_CLC_Employment_Law_Project - Preliminary_Report.pdf), pages 23-26.

## 2.3 Examples of best practice approaches

The following are some examples of current best practice approaches targeting refugee and newly arrived communities. These approaches expressly attempt to address the above barriers.

Development of these approaches relies heavily on consultation with the target community.

### 2.3.1 Western Community Legal Centre (WCLC) Train the Trainer Project

The WCLC Train the Trainer Project is part of the Employment Law Project's community education program. Run over nine days between February and April 2015, it offered comprehensive training in employment laws and services to six community leaders with strong connections to newly arrived and/or of refugee communities in Melbourne's western suburbs.

The community leaders visited a number of key employment and anti-discrimination law agencies, including the Fair Work Ombudsman, the Fair Work Commission, the Victorian Equal Opportunity and Human Rights Commission and Victoria Legal Aid.

Participants were supported to develop a community education presentation, which they then delivered to their communities in a culturally appropriate and targeted way. Participants now act as an important link between their communities and agencies by raising awareness that those affected by employment problems can get advice from agencies including Western CLC.

The Project developed and utilized a suite of education resources that target newly arrived and refugee communities. The resources aim to provide useful tools for agencies, educators, community leaders and others working with vulnerable communities to explain employment and anti-discrimination laws and services.

The resources are divided into six topics which relate to common legal issues we observe at our legal service:

- Wages and Other Entitlements
- Employees, Contractors and Sham Contracting
- Workplace safety
- Discrimination
- Sexual harassment & Bullying
- Unfair dismissal and Other Protections if your employment ends

The resources are:

- **A template PowerPoint presentation:** which provides key information about each of the six topics. The Community Leaders modified the presentation template for their individual information session. They included the employment law topics that would benefit their community. There is a template presentation available on our website for other organisations to use: [www.footscrayclc.org.au/train-the-trainer-project](http://www.footscrayclc.org.au/train-the-trainer-project)
- **Handouts:** A summary of employment law concepts and key employment law terms, also available on our website. Participants also received more in depth materials each week.
- **Six video clips (one relating to each topic):** Produced by Tandem Media, these videos are based on six common legal issues WCLC observed at our legal service. The scripts were reviewed at a workshop attended by English as additional language teachers, community education staff from Victoria Legal Aid, community workers from settlement agencies and youth services, and lawyers. View the video clips at [www.footscrayclc.org.au/train-the-trainer-project](http://www.footscrayclc.org.au/train-the-trainer-project).

- **Activities and question/answer sheets to accompany each video:** If used in a workshop, classroom or other group setting, the activities provide an opportunity for participants to work together and strengthen their understanding of employment and anti discrimination law in Australia. The materials are designed for high post-beginner to intermediate English as an additional language students.

The script and screen shots from the video on wages and other entitlements:

ANDREA

Jill!

JILL

Andrea! Hey! How are you?

ANDREA

Good. How's the new job?

JILL

Loving it. Six months, and they just gave me a promotion!

ANDREA

That's so exciting!

JILL

I know – what about you?

ANDREA

Still working in the kitchen at the pub.



JILL  
Is it good pay?

ANDREA  
Depends on whether it's a busy night.

JILL  
(concerned)  
Really?

ANDREA  
If they can't pay me much they give me a meal, so...

JILL  
(concerned)  
But a meal is *not* pay! Don't you have an hourly rate?

ANDREA  
If nobody comes in, how can they pay me?

JILL  
But they *have* to pay you the Award rate.

ANDREA  
They said they opted out of the Award...

JILL  
They can't do that. What about overtime?

ANDREA  
No.

JILL  
Penalty rates, for weekends?  
Holidays? Superannuation?

ANDREA  
I know it sounds bad... but they're really nice people.

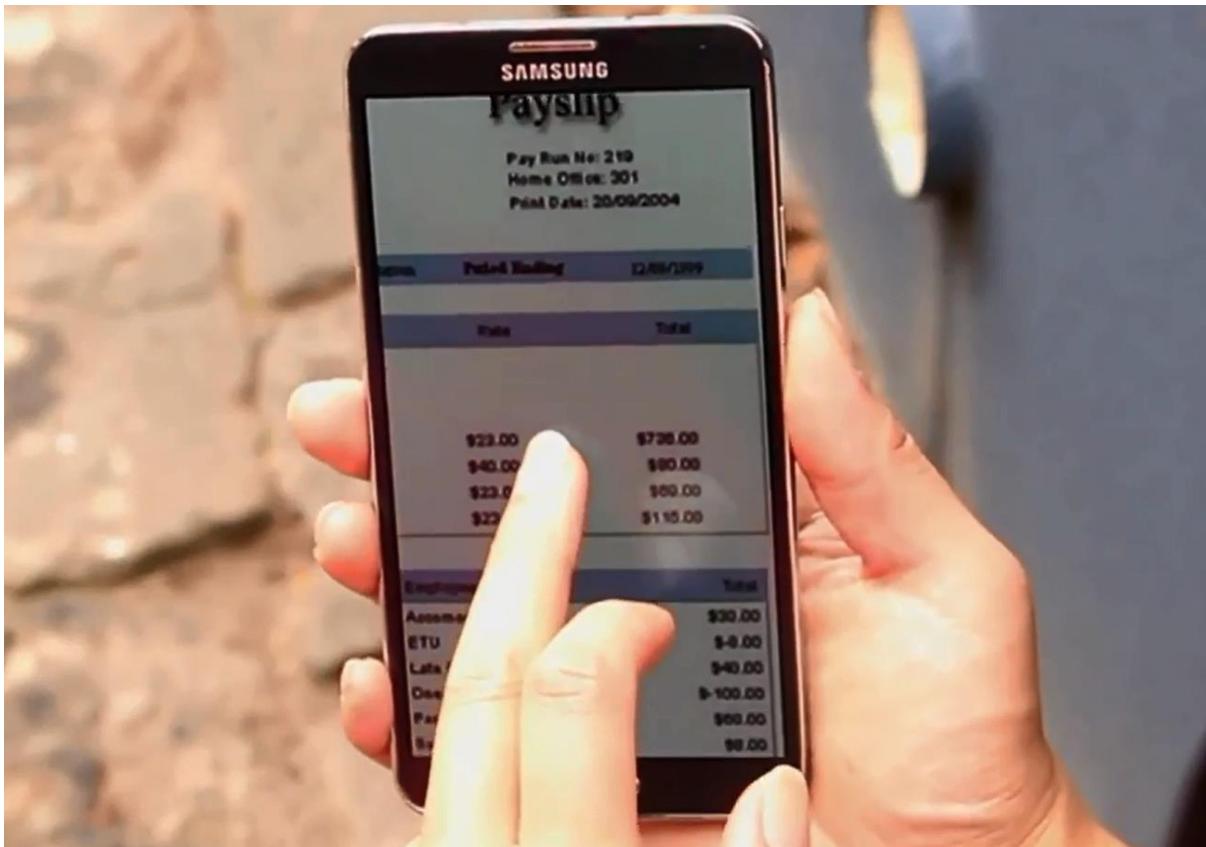
JILL  
(thinking, but with caution)  
Listen... do you have a pay slip I could have a look at?

ANDREA  
What's a pay slip?

JILL  
It's a document that you get every time you get paid. It sets out the hours you worked, your payment and how much you've been taxed. I get mine by email.

(showing Andrea an example on her phone)  
Look, I'll show you.





ANDREA

I don't get those.

JILL

You have rights in the workplace,  
you know! You should get some  
advice about your pay.

ANDREA

Who can I speak to?

JILL

There are legal services that can  
help for free - and they're  
confidential, so they're not going  
to tell your boss unless you want  
them to. And then later, if you  
feel like it, you could talk to  
your boss or you could get a lawyer  
to write a letter.

### Example slides from the PowerPoint:

When people apply for a job

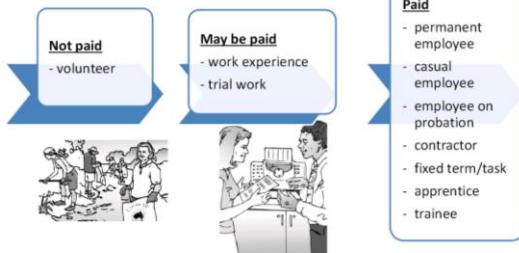


or when they start work they should

- ask if they are under an Award or an Enterprise Agreement;
- keep a copy of any documents they sign;
- take notes about any verbal agreements;
- keep a work diary



The right to be paid



### Handout:

Footscray Community Legal Centre Employment Law Project – handout  
Please note: these materials are educational resources. They are not intended to constitute legal advice and should not be relied upon as such. Last reviewed April 2015.

#### EMPLOYMENT LAW

##### Applying for a job and discrimination

You cannot be refused a job or treated unfairly at work because of your:

- age
- race or nationality
- sex or intersex status
- gender identity
- disability
- religious belief or activity
- political belief or activity
- sexual orientation or lawful sexual activity
- employment or industrial activity
- marital or relationship status
- pregnancy or breastfeeding
- parent or carer status
- physical features

You cannot be refused a job because one of your friends or relatives has one of the above characteristics.



##### Awards, enterprise agreements and contracts

Your rights and responsibilities at work are protected by:

- your contract of employment
- employment laws, such as the Fair Work System
- your award or enterprise agreement, if one covers you
- workplace policies and procedures



##### Remember, when you start work:

When you start work make sure you know if you are covered by an award or an enterprise agreement.

Make sure you understand an employment contract before you sign.

Make sure you ask for a copy of an employment contract.

Take notes about any verbal agreements. Keep a work diary.

##### Pay

Your pay is set by:

- your contract of employment
- employment laws
- your award or enterprise agreement

You should:

- receive at least the minimum wage
- receive all your wages in the form of money
- be paid monthly, fortnightly or weekly
- receive a payslip

### Should these workers be paid?



### Video: Wages and other entitlements

Scenario: Andrea talks to a friend about her work in a café, where she isn't being paid properly for the work she does.

Watch the video and answer these questions:

- Name three things that Andrea's employer is doing that may be against the law?
- What can Andrea do if she wants to find out about her legal pay rate?
- How could Andrea try to get any money that her employer owes her?

#### Footscray Community Legal Centre Employment Law Project – handout

Please note: these materials are educational resources. They are not intended to constitute legal advice and should not be relied upon as such. Last reviewed April 2015.

##### National Employment Standards

1. Maximum weekly hours of work = 38 hours + reasonable additional hours
2. Annual leave = 4 weeks (pro rata for part time)
3. Public holidays (provided you normally work on that day)
4. Notice of termination / redundancy pay
5. Right to request flexible working arrangements
6. Long Service Leave
7. Parental Leave
8. Personal / Carers / Compassionate Leave
9. Community Service Leave
10. Supply of Fair Work Information Statement



##### At work

- You must work safely.
- Your employer must provide a safe workplace.
- You have the right to join a union.
- You should be protected against bullying and sexual harassment.
- You should be protected against discrimination.
- You should be protected against victimisation.

##### Losing your job

- If you lose your job you should think about:
- Did you receive notice of termination or pay in lieu of notice?
  - Did you receive payment for accrued annual leave and long service leave?
  - Were you made redundant?
  - Were you given a good reason for being dismissed?
  - Were you given a chance to say why you shouldn't be dismissed?



##### Remember

- If you lose your job you should get advice because maybe you should be paid some money or get your job back. TIP: get advice quickly because there are time limits for making some claims

### WHERE TO GET HELP

Footscray Community Legal Centre can help with employment problems:



Community Legal Centre Inc  
72 Buckley Street, Footscray  
(03) 9689 4444

Other agencies can also help:

|   |              |
|---|--------------|
| Victoria Legal Aid                                      | 1300 792 387 |
| Victorian Equal Opportunity and Human Rights Commission | 1300 292 153 |
| Australian Human Rights Commission                      | 1300 656 419 |
| Fair Work Ombudsman                                     | 13 13 94     |
| Job Watch   | 9662 1933    |
| ACTU Help Desk  | 1300 486 466 |
| WorkSafe  | 1800 136 089 |

As set out in our second submission, feedback from the Train the Trainer program has been excellent. The **below** case study also demonstrates the impact of these targeted materials:

#### **CASE STUDY: IMPACT OF TARGETED MATERIALS & FACE TO FACE SUPPORT**

**A teacher from an English as Additional Language program provided the following feedback about the impact of the WCLC education resources. WCLC has also directly assisted clients that this teacher, and others from her community centre, have referred to our employment law service:**

I used the material from the Employment Law project - and in 6 weeks, we only got through two of the videos! They were fabulous, and the class did lots of related readings and role plays.

One of the students told me as a result of doing that project, she was able to ask her employer for her payslips. They had not given her any, and now she has all of them.

Another student had a boyfriend who sounded like he was in sham contracting. He had been told to get an ABN, and was working 6 am - 9 am on a casual basis and in a supervisory role, for \$15 an hour. She was able to give him the information about contacting the CLC, and that it was all confidential... I'm not sure if he followed up, but at least he has the information.

Another student is a bilingual worker in childcare. Even though we didn't get up to the discrimination videos, after studying the underpayment and sham contracting videos, she thought maybe she should talk to her boss about being treated unfairly at different centres. So she rang her boss and stated what had happened. The lady was most concerned and said she would talk to the workers involved, and then said, 'How long did you say you have been working with us?...' As a result, the student has been given a \$5 per hour pay rise as her employer realised they had not given her increments for experience. I don't know if they've backpaid her, but it's still a good outcome and she's very happy. She's especially happy that she was brave enough to talk to her boss.

And this same student has a neighbour who was working at a restaurant. The young girl is an international student and has to work to make ends meet. Her agreement had been to work at a casual basis at only \$15 p.h. When our student talked to her, they had told her she must work for \$8 ph. So she was able to pass on information about the CLC and the Fairwork Ombudsman's office. Again, I don't know whether she has done anything about this, but at least she knows what to do.

Some students which have a slightly lower level of English still seem a bit apprehensive to act on what they've been taught because they're still frightened of losing any jobs they do have. One of them has two sons working at factories. Although the work is casual, and he often works long hours, they're only paying him the minimum wage of \$17.29 an hour. It sounds like her other son is on the correct minimum wage for casuals. The workers have been told they're going to be moved to part-time, with no change in pay, so that's good. The son hasn't done anything about going to CLC even though his mother has told him what to do - maybe because he's always exhausted - working 12 hours a day on a lot of days. They also probably find it hard to believe they can get people to pay them more money.

### 2.3.2 What's the Law? Australian law for new arrivals

Another targeted resource that has received excellent feedback is Victoria Legal Aid's education kit: *What's the Law? Australian Law for New Arrivals*.<sup>6</sup> The VLA website explains that this free information kit provides information about:

*common legal problems that people newly arrived to Australia may encounter. The kit can be used by teachers, educators and community workers who work with migrants and refugees. It is designed to be used in English classes, but it can easily be used in other community education settings.*

*The kit includes 10 simple English stories, based on real life experiences, to engage new arrivals and help them:*

- *get simple information about common legal issues*
- *recognise and avoid legal problems*
- *know where to get free legal help if they need it*
- *build their English language skills.*

*What's in the kit*

*The kit covers the following topics:*

- *Australia's legal system*
- *Buying a car*
- *Car accident*
- *Centrelink*
- *Child protection and parenting*
- *Driving*
- *Family law*
- *Family violence*
- *Police*
- *Renting.*

*Each topic has:*

- *a video about common legal problems*
- *activity sheets to build students' comprehension and reinforce key messages*
- *answer sheets, including notes for teachers about how to use the kit.*

*You can order the kit, which includes a DVD of the videos. You can also download all the materials.*

Inspired by Footscray CLC's *Getting to know the law in my new country*, the VLA resource was evaluated in October 2013<sup>7</sup> and findings included that of those who used the resource:

---

<sup>6</sup> See <https://www.legalaid.vic.gov.au/about-us/community-education-and-projects/whats-law-australian-law-for-new-arrivals>.

97 percent indicated that it was a useful tool to provide information about legal issues... The benefits of using the kit were identified as increasing the users' legal knowledge and their 'ability to recognise a legal problem and refer a client'. Once respondents used the kit, they were more likely to identify an 'increased confidence to teach legal issues' and the ability to 'meet requirements to provide legal education' as benefits, which were primary reasons for creating WTL.

Importantly, a further recent study has evaluated the effectiveness of a community legal education intervention using *What's the Law* materials:<sup>8</sup>

*The study asked whether there was a measurable difference between students' understandings of the legal issues associated with buying a car, borrowing money and seeking help, after they participate in a class on this topic.*

The utility of the education session was measured using quantitative data drawn from pre and post lesson surveys. Participants' mean score improved from 9.38 to 11.68.<sup>9</sup> The ANOVA found this to be a significant statistical improvement,<sup>10</sup> and the results 'show a measurable difference in participants' understandings of the legal issues'. Qualitative results reinforced these findings.

### 2.3.3 Victoria Legal Aid Legal Help Cards

An excellent example of a written resource is Victoria Legal Aid's Legal Help Card. These cards have been translated into 25 different languages, including new and emerging community languages, and can be ordered for free.<sup>11</sup> An example of the English card is **below**. The cards outline a range of common legal problems VLA may be able to assist with and give details for contacting the Legal Help phone line. The cards are small enough to fit in your wallet, and were developed in consultation with key stakeholders.

The Victorian Equal Opportunity and Human Rights Commission have developed some "Easy English" fact sheets that use images and plain English to explain laws.<sup>12</sup>

---

<sup>7</sup> See <http://www.nationallegalaid.org/assets/Whats-the-law/Whats-the-law-Evaluation.pdf>.

<sup>8</sup> "Does Community Legal Education work? Educating English language students about consumer contracts", Monica Ferrari, February 2015.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> See <https://www.legalaid.vic.gov.au/find-legal-answers/all-publications-and-resources>.

<sup>12</sup> See <http://www.humanrightscommission.vic.gov.au/index.php/news-and-events/item/1176-information-in-easy-english>.

Victoria Legal Aid Legal Help Cards: <https://www.legalaid.vic.gov.au/find-legal-answers/free-publications-and-resources/victoria-legal-aid-help-card-english>



The image shows two pages of Victoria Legal Aid's Legal Help Cards. The top page features sections for money worries, relationship breakdowns, and legal problem help, along with contact information and a logo. The bottom page features sections for fair treatment, police trouble, court issues, and free phone information, also with contact details and logos.

**I've got money worries**

- I'm unemployed and getting into debt
- I've got problems dealing with Centrelink
- I can't pay my rent and I'm being evicted

We can help you understand your rights and how the law works

**I am going through a relationship breakdown**

- I don't feel safe because of violence at home
- We can't work out where our children will live
- I need to know what the law says about child support and parenting

**More ways we can help**

Legal aid might be able to pay for a lawyer to help you, if you are on a low income or benefit

Call us to find out more

**Need help with your legal problems?**

Visit [www.legalaid.vic.gov.au](http://www.legalaid.vic.gov.au) for information on the law

Order our free booklets for help in understanding the law

**Getting fair treatment**

- The law and legal system can be very hard to understand on your own
- I've been discriminated against because of my disability
- I have a mental illness and want to understand my rights
- I'm a refugee and am confused about where to get help

**I've been arrested**

**I'm in trouble with the police**

What are my rights?

**I have to go to court**

- I don't understand what will happen
- I can't afford a lawyer
- Can Victoria Legal Aid help me?

**Free legal information over the phone**

1300 792 387

**Relationship breakdown**

**Trouble with the police**

**Getting fair treatment**

**Going to court**

**Money worries**

**Lawyers And Legal Services**

**Interpreter**

**NATIONAL RELAY SERVICE**

[www.legalaid.vic.gov.au](http://www.legalaid.vic.gov.au)

1300 792 387

Monday to Friday 8.45 am to 5.15 pm

Phone the Translating and Interpreting Service on 131 450 and ask to be put through to us

Use the National Relay Service to call us if you have a hearing or speech impairment

HLP-CO-ENG-0518

**Recommendation**

**Increased resources for best practice education programs for migrant workers including recurrent funding and expansion of the Train the Trainer program.**

### **3. Joint employment and alternative models to address liability in labour hire arrangements, supply chains and franchises**

We welcome the opportunity to make further submissions on the concept of joint employment and to provide recommendations on how this doctrine can be incorporated into Australian employment law.

While the concept of joint employment could be adopted in a number of areas in Australia's current workplace relations framework, from WCLC's perspective and for the purposes of these submissions, the two immediate areas of concern are underpayments (of wages and entitlements) and termination of employment.

In this part of our submission, we draw heavily on three papers **attached** to our submission:

- Dr Tess Hardy's submission to the Senate Inquiry into the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders (**Hardy Submission**); and
- Two papers by Craig Dowling, member of the Victorian Bar<sup>13</sup>.

#### **3.1 Joint employment is necessary to address new forms of working arrangements**

The need to embrace the concept of “joint employment” largely stems from the failure of the *Fair Work Act 2009* (Cth) (**Fair Work Act**) to address non-traditional working arrangements. The focus of the Fair Work Act on the traditional employer/employee relationship as defined by common law fails to recognise that ‘it is not now uncommon for the employment relationship to be fragmented and for multiple organisations to be involved in shaping key working conditions.’<sup>14</sup>

Indeed, it is often the case that multiple organisations will benefit from the labour of one worker, although only one will be held accountable under the Fair Work Act. For example, in a labour hire arrangement, in addition to the labour hire agency, ‘the client or host employer may receive the

<sup>13</sup> “Joint Employment and Labour Hire Relationships – Victoria Legal Aid – Professional Legal Education”, 5 October 2015 (**2015 Paper**); and “The concept of joint employment and the need for statutory reform”, Minor thesis submitted in fulfilment of the requirements of the degree of Master of Laws, 18 July 2008 (**Thesis**).

<sup>14</sup> Hardy Submission, page 8.

benefits of an employer by being able to control the agency labour (and their terms of engagement) and yet avoid any form of labour regulation because it has no employment relationship with the labour.<sup>15</sup> Although ‘both of [these] entities enjoy the benefits of acting as an employer, one will unfairly circumvent labour regulation.’<sup>16</sup> We have seen this in situations where clients in labour hire arrangements, supply chains or franchises are left without a remedy against a host employer, principal or franchise owner, who in many circumstances should be held, wholly or partly, responsible for the terms and conditions of the worker.

As set out in Dr Hardy’s Submission, Weil suggests that “fissured” forms of employment, being those with fragmented work structures, have arisen as a result of three related elements. First, the desire of lead firms to “increase revenue through focusing on core competencies”.<sup>17</sup> Second, lead firms’ desire “to reduce costs through shedding their role as the direct employer” and lastly, the maintenance of control whereby “the lead firm continues to perform an important and somewhat intrusive role in terms of creating and enforcing rigorous quality standards and detailed work practice requirements in relation to the provider companies”.<sup>18</sup> Although these commercial drivers may produce benefits for business and consumers, it is essential that commercial benefits are not made at the expense of workers. For this reason, labour regulation should be modernised to adapt to these various forms of employment and ensure the necessary protections are afforded to vulnerable workers.

WCLC contends that accessorial liability under section 550 of the Fair Work Act does not go far enough as it only attributes liability in limited circumstances, where there is aiding, abetting, counselling or procurement or the accessory is “knowingly concerned”. It is contended that this sets a high bar to establish accessorial liability of the host employer or those at the apex of a supply chain or franchise. Hardy notes that there have only been a ‘handful’ of cases where section 550 has been used to argue that a separate corporation is ‘involved’ in a breach. Although not yet determined in a substantive proceeding, ‘court decisions which have dealt with similar accessorial liability provisions arising under other statutes suggest that the courts may well take a fairly restrictive approach to these questions.’<sup>19</sup> For these reasons, and others set out **below**, legislative reform is urgently required.

### 3.2 Legislative reform is required to provide certainty

The doctrine of joint employment originates from the United States of America. Although the definition of “joint employment” varies between different areas of employment law, at its narrowest, the doctrine of joint employment recognises that where two employers each exercise significant control over a worker and “co-determine” their terms of employment, both employers

---

<sup>15</sup> Dowling 2015 Paper, pages 1-2.

<sup>16</sup> Ibid, page 2.

<sup>17</sup> Hardy Submission, page 4.

<sup>18</sup> Ibid.

<sup>19</sup> Hardy Submission, page 10.

may be held to be the worker's employer.<sup>20</sup> Although recognised in America, this doctrine has not been wholly accepted as forming part of the common law in Australia.

There have been several decisions of the courts and tribunals which have suggested that there is scope in the Australian landscape for the concept of joint employment.<sup>21</sup> However, development in this area has been slow and, at present, it is far from certain that the doctrine of "joint employment" forms part of Australian law. Part of the reluctance to adopt the doctrine arises from concerns about how liability is to be apportioned once joint employment is recognised and also how to determine the relevant terms and conditions of the worker if more than one employer is identified.<sup>22</sup>

Accordingly, to provide certainty and to address the gap in the workplace relations system, statutory reform is necessary to effect any change in this space.

WCLC recognises that each form of non-traditional working arrangements may involve separate considerations and therefore may call for separate mechanisms for reform. Accordingly, we have divided our submissions and proposals into three separate sections: labour hire arrangements; supply chains and franchises.

### **3.3 For labour hire arrangements, joint employment and licensing will improve compliance**

The labour hire relationship is characterised by a worker who is engaged by a labour hire agency (the agency) and assigned to work for an organisation (host employer). In this triangular relationship, there is a contract between the agency and the host employer and a contract between the worker and the agency but there is no contract between the worker and the host employer. In these circumstances, in the context of the termination provisions of the Fair Work Act, such as unfair dismissal or general protections, and the underpayment provisions, the worker would not be able to seek relief against the host employer, unless the worker was able to be characterised as an "employee" of the employer, having regard to the usual indicia: *Stevens v Brodribb Sawmilling Co Pty Ltd*<sup>23, 24</sup>.

#### **3.3.1 Example joint employment provisions**

WCLC considers that, for the purposes of the unfair dismissal, general protections and the underpayments provisions of the Fair Work Act, if certain criteria are met, provisions deeming host employers as an employer of workers employed in a labour hire arrangement are the appropriate

---

<sup>20</sup> *National Labour Relations Act of 1935; National Labour Relations Board v Browning-Ferris Industries of Pennsylvania Inc* 691 F 2d 1117 (3<sup>rd</sup> Cir, 1982) at 1124.

<sup>21</sup> *Damevski v Giudice* (2003) 133 FCR 438; *Coghill v Indochine Resources Pty Ltd* [2015] FCA 377; *Fair Work Ombudsman v Eastern Colour Pty Ltd* [2011] FCA 803; *Morgan v Kittochside* (2002) 117 OR 152 at [72]-[75] and *Nguyen v ANT Contract Packers Pty Ltd* (2003) 128 IR 241. For a helpful summary of key cases, see Dowling 2015 Paper and Thesis.

<sup>22</sup> *Costello v Allstaff Industrial Personnel (SA) Pty Ltd* [2004] SAIRComm 13.

<sup>23</sup> (1986) 160 CLR 16.

<sup>24</sup> See - *Damevski v Giudice* (2003) 133 FCR 438 – where Court found that the host employer was the relevant employer.

mechanisms for capturing employees engaged in a labour hire arrangement. We recommend below two definitions which may be incorporated into the current definition of “employee”.

Pauline Thai, in her article “*Unfair Dismissal Protection for Labour Hire Workers? Implementing the Doctrine of Joint Employment in Australia*”<sup>25</sup> urges the adoption of the test enunciated in *Zheng v Liberty Apparel Co Inc*<sup>26</sup> for the purposes of the application of the unfair dismissal provisions. Under the *Zheng* test, the following factors are relevant for determining whether joint employment exists:

- Whether the client’s premises and equipment were used for the worker’s work;
- Whether the agency had a business that could or did shift as a unit from one client to another;
- The extent to which the worker performed a job that was integral to the client’s operation;
- Whether responsibility under the labour hire contracts could pass from one agency to another without material changes;
- The degree to which the client supervised the worker’s work;
- Whether the worker worked exclusively or predominantly for the client; and
- Any other factor deemed relevant.

In his Thesis, Dowling sought the following amendment to the definition of “employee” for the purposes of the dismissal protections and freedom of association protections provided for by the *Workplace Relations Act 1996* (Cth) to include a statement that:

**“employee” means:**

...

(2) An employee may be employed by two or more employers at the same time.

Dowling also suggested amendment to the definition of “employer” as follows:

**“employer” means:**

...

(2) Two or more persons may be joint employers of an employee where:

- (a) Those two or more persons exercise some control over the work or working conditions of the employee; and
- (b) the employee performs work which simultaneously benefits the two or more persons.

(3) In determining whether the two persons referred to in subsection (2) are joint employers the matters taken into account shall include:

- (a) The nature and degree of control of the employee by each person;
- (b) The right of each person, directly or indirectly, to engage, cease or otherwise modify the conditions of engagement of the employee;

---

<sup>25</sup> (2012) 21 *Australian Journal of Labour Law* 152.

<sup>26</sup> 355 F 3d 61 (2<sup>nd</sup> Cir, 2003).

- (c) The ability of each person to determine the rate of pay of the employee;
- (d) The place of work of the employee.

WCLC recommends that similar provisions be inserted into the Fair Work Act. If the Commission considers these provisions too broad, they could be limited to refer to underpayments and termination only.

In terms of relief for termination of employment, to overcome the issue of apportionment, Dowling proposes the notions of primary and secondary employers as follows:

#### **Remedies**

- (1) Subject to subsection (2) if the Commission [Court] considers it appropriate, the Commission [court] may make an order requiring the employer or employers to reinstate the employee by:
  - (a) *reappointing the employee to the position in which the employee was employed immediately before the termination; or*
  - (b) *appointing the employee to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination.*
- (2) If the Commission [Court] has determined that the employee is jointly employed by two or more employers and considers an order under subsection (1) appropriate the Commission shall:
  - (a) determine one of those persons to be the primary employer and the other or others the secondary employers taking into account:
    - (i) the right to engage and terminate the employee;
    - (ii) the responsibility to assign or place the employee;
    - (iii) the responsibility to pay and provide other terms and conditions of employment. and;
  - (b) Order the primary employer to reinstate the employee to the position in which the employee was employed immediately before the termination (or equivalent position); and
  - (c) Order the secondary employers to allow the employee to assume the position (or equivalent position) which the employee held immediately before the termination.

Noting Dowling's Thesis pre-dates the Fair Work Act, we submit that these provisions could be adapted to suit the language and wording of the Fair Work Act, and include reference to apportionment of compensation as well.

#### **3.3.2: Alternative approach: vicarious liability**

In the alternative, it may be possible to amend the Fair Work Act such that a second “employer” or host could be held vicariously liable for breaches of the “first”. Such provisions could be modelled on sections 109 and 110 of the *Equal Opportunity Act 2010* (Vic), which provide that:

## **109. Vicarious liability of employers and principals**

If a person in the course of employment or while acting as an agent—

- (a) contravenes a provision of Part 4 or 6 or this Part; or
- (b) engages in any conduct that would, if engaged in by the person's employer or principal, contravene a provision of Part 4 or 6 or this Part—

both the person and the employer or principal must be taken to have contravened the provision and a person may bring a dispute to the Commission for dispute resolution or make an application to the Tribunal against either or both of them.

## **110. Exception to vicarious liability**

An employer or principal is not vicariously liable for a contravention of a provision of Part 4 or 6 or this Part by an employee or agent if the employer or principal proves, on the balance of probabilities, that the employer or principal took reasonable precautions to prevent the employee or agent contravening this Act.

We submit that these provisions could be used as a model for imposing liability on host employers for contraventions of the first employer unless reasonable precautions are taken by the host employer to prevent the first employer's contravention. Similarly, this model could impose liability on principals in a supply chain and franchisors. This would place a positive obligation on all parties benefiting from the labour of a worker to ensure that workplace rights are protected. We submit that this would have a significant impact on ensuring compliance.

### **3.3.3: Alternative approach: expanding the definition of employee and employer to expressly refer to labour hire arrangements**

It may be possible to ensure compliance by host employers using a similar mechanism to that contained in section 21 of the *Equal Opportunity Act 2010* (Vic). Parties in labour hire arrangements are expressly regulated by section 21 of the *Equal Opportunity Act 2010* (Vic), which provides that:

#### **Discrimination against contract workers**

- (1) A principal must not discriminate against a contract worker -
  - (a) in the terms on which the principal allows the contract worker to work; or
  - (b) by not allowing the contract worker to work or continue to work; or
  - (c) by denying or limiting access by the contract worker to any benefit connected with the work; or
  - (d) by subjecting the contract worker to any other detriment.

(2) Subsection (1) does not apply to anything done or omitted to be done by a principal in relation to a contract worker that would not contravene this Act if done or omitted to be done by the employer of that contract worker.

The term “principal” is relevantly defined as “a person who contracts with another person for work to be done by employees of the other person”.<sup>27</sup> The term “contract worker” is defined as “a person who does work for a principal under a contract between the person's employer and the principal”.<sup>28</sup>

Such definitions and terms could be inserted into relevant sections of the Fair Work Act relating to underpayments and termination of employment. At a minimum, the concept of principal and contract worker should be inserted into the meaning of adverse action in s 342(1) of the Fair Work Act. This relationship could then be covered by the adverse action provisions to ensure workers are protected. The definition of adverse action should be amended to include the following:

Adverse action is taken by a principal against a contract worker if the principal (a) dismisses the contract worker; or (b) injures the contract worker in his or her employment (c) alters the position of the contract worker to the contract worker's prejudice; or discriminates between the contractor and other employees of the principal.

### **3.3.4 A licensing scheme should be introduced for labour hire providers.**

In her submission, Dr Hardy provides a useful assessment of the labour hire licensing scheme in the UK. She concludes that the scheme:<sup>29</sup>

represents a somewhat promising experiment in an industry which was plagued by problems of worker exploitation. It also provides a useful example of how a licensing regime, coupled with an increased focus on enforcement, has the potential to improve compliance amongst labour hire providers in sectors with high numbers of temporary foreign workers.

#### **Recommendation**

**The Fair Work Act should be amended to incorporate the concept of joint employment and/or vicarious liability. This could be done by:**

- 1) adopting a definition of “employer” as posited by Thai or Dowling,
- 2) adopting the notion of vicarious liability as found in ss 109 and 110 of the Equal Opportunity Act;
- 3) incorporating an equivalent provision to s 21 of the Equal Opportunity Act; or
- 4) at a minimum, the general protections provisions should be expanded to cover workers in labour hire relationships.

**This will ensure that all who receive the benefits of being an “employer” are also required to comply with Fair Work Act provisions relating to underpayments and termination.**

**A licensing scheme should be introduced for labour hire providers.**

<sup>27</sup> *Equal Opportunity Act 2010 (Vic)*, s 4.

<sup>28</sup> Ibid.

<sup>29</sup> Hardy Submission, page 21.

### 3.4 Without regulation, supply chains facilitate exploitation for those at the bottom

Supply chains involve sub-contracting arrangements whereby there are a number of interposing entities between the ultimate work provider and a worker. An example of a supply chain in the construction context is the engagement by a business operator of a principal contractor who engages a contractor firm, which engages a subcontractor.<sup>30</sup> It has been suggested that the “very structure of the supply chain is conducive to worker exploitation” due to parties near the bottom of the supply chain having low profit margins and experiencing intense competition.<sup>31</sup>

Many of our clients find themselves at the bottom of long and complex supply chains, riddled with sham arrangements. Often, the entity at the top is a large, profitable, well known company. These chains result in exploitation and injustice for those most vulnerable.

#### **CASE STUDY: SUPPLY CHAINS AND SHAM CONTRACTING**

**Hamid worked as a truck driver and delivery worker. He worked 6 or 7 days a week, usually 12-14 hours per day. Hamid was employed as an independent contractor by Sami. Sami was a contractor for another company, who was engaged by a large retail business. Hamid worked under an ABN but he had no control of work hours, where to go or how to do the work. He wore a uniform with the large company's logo. Hamid was not paid for his last two weeks of work so he came to see WCLC. We explained that Hamid had been underpaid by thousands of dollars as an employee. We assisted Hamid to make a complaint to the Fair Work Ombudsman (FWO), who investigated the matter and issued infringements and a notice of caution. However, unfortunately Sami had disappeared overseas and so no further action could be taken.**

In Hamid’s story, we see our client, who is the most vulnerable and least well-resourced in the chain, without any ability to pursue his lawful entitlements. At least two companies have profited from his labour without any responsibility for protecting his workplace rights. The requirement to prove these other companies were “knowingly concerned in or party to the contravention” under section 550 accessorial liability provisions is too onerous to provide any meaningful assistance. There should be a positive obligation on those higher in the supply chain to ensure workplace rights are protected.

<sup>30</sup> Johnstone, McCrystal, Nossal, Quinlan, Rawling and Riley, “Beyond employment: the legal regulation of work relationships” (The Federation Press, 2012), p. 49.

<sup>31</sup> Ibid, 67.

### 3.4.1 Expansion of outworker protections to other industries would increase compliance

In submissions made to the Senate Inquiry on the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders, Dr Hardy advocates for an expansion of current provisions relating to outworkers in the textile industries.<sup>32</sup>

The Textile, Clothing and Footwear (TCF) Industry responded to the problems associated with supplier chains by persuading governments to adopt a new regulatory model to protect vulnerable textile, clothing and footwear contract workers. This resulted in an amendment to the Fair Work Act to include Part 6-4A – Special provisions about TCF outworkers. In the Explanatory Memorandum to the Bill, it was stated that:

Research has consistently shown that outworkers in the TCF industry suffer from unique vulnerabilities as a result of their engaging employment in non-business premises. These vulnerabilities are often exacerbated by poor English language skills, lack of knowledge about the Australian legal system and low levels of Union membership in the industry.<sup>33</sup>

Part 6-4A is “designed to eliminate exploitation of outworkers in the textile, clothing and footwear industry, and to ensure that those outworkers are employed under secure, safe and fair systems of work”.<sup>34</sup>

‘Outworkers’, who are often classified as independent contractors, are treated as ‘employees’ for the purposes of the protective provisions of the Fair Work Act and modern award system.<sup>35</sup> Additionally, TCF outworkers have the ‘right to bring a claim for workplace entitlements against an “indirectly responsible entity” and enjoy a reversal of the onus of proof onto the party served with the claim for recovery.

The relevant modern award, the Textile, Clothing, Footwear and Associated Industries Award 2010 specifically regulates arrangements made between principals and others who have work undertaken on their behalf.<sup>36</sup> The provisions are designed to ensure transparency at each level of the supply chain. The provisions require principals and those engaged by the principal to maintain certain records regarding the identification of the workers and the work performed by them. The Award also provides that principals must apply the National Employment Standards to the worker, whether or not the worker is an employee of the principal. There are also specific provisions regarding hours of work, work on weekends and public holidays, time standards and payment and stand down.

---

<sup>32</sup> Dr Tess Hardy, “Senate Inquiry: The impact of Australia’s temporary work visa programs on the Australian labour market and on the temporary work visa holders: Submission”

<sup>33</sup> Explanatory Memorandum to the *Fair Work Amendment (Textile, Clothing & Footwear Industry) Act 2012* (Cth), page 1.

<sup>34</sup> *Fair Work Act 2009* (Cth) s 789AC.

<sup>35</sup> *Ibid*, s 789BB.

<sup>36</sup> Note that special provisions for outworkers have existed in federal awards for some decades. The current scheme broadly owes its origins to a 1987 decision by DP Riordan [1987] IR 416.

Various state governments have also passed specific outwork laws in NSW<sup>37</sup>, South Australia<sup>38</sup>, Queensland<sup>39</sup>, Tasmania<sup>40</sup> and Victoria<sup>41</sup>. Tasmania, Victoria, South Australia, Queensland and NSW have provisions in relation to deeming. The same states, excluding Tasmania, also have provisions relating to recovery of unpaid remuneration owed to outworkers. South Australia and New South Wales have mandatory codes of practice. Victoria retains the capacity to make a code but has not yet utilised these provisions.

A similar model has been adopted in the transport industry. The Heavy Vehicle National Law (HVNL) and regulations commenced in the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Victoria on 10 February 2014. In addition to passing the HVNL, states and territories agreed to four regulations made under the national law. The Northern Territory and Western Australia have not commenced the HVNL at this time. Part of this regulation involves making corporate entities, directors, partners and managers accountable for the actions of people under their control. The laws define parties in the supply chain as any person with an influence and/or control in the transport chain and includes, but is not limited to:

- corporations, partnerships, unincorporated associations or other bodies corporate
- employers and company directors
- exporters/importers
- primary producers
- drivers (including a bus driver and an owner-driver)
- prime contractors of drivers
- the operator of a vehicle
- schedulers of goods or passengers for transport in or on a vehicle, and the scheduler of its driver
- consignors/consignees/receivers of the goods for transport
- loaders/unloaders of goods
- loading managers (the person who supervises loading/unloading, or manages the premises where this occurs).

WCLC submits that the existing protections under the Fair Work Act afforded to TCF outworkers should be extended to other industries, such as horticulture and food, distribution, retail, hospitality, cleaning, security, construction and other industries where workers at the bottom of the chain are vulnerable to exploitation. At the very least, we recommend that enforceable codes of conduct be mandated for these industries to ensure that protection for workers is imposed at each level of the supply chain.

---

<sup>37</sup> Industrial Relations Act 1996 (NSW), Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW); NSW Ethical Clothing Extended Responsibility Scheme.

<sup>38</sup> Fair Work Act 1994 (SA); Fair Work (Clothing Outworker Code of Practice) Regulation 2007 (SA).

<sup>39</sup> Industrial Relations Act 1999 (Qld).

<sup>40</sup> Industrial Relations Act 1984.

<sup>41</sup> Outworkers (Improved Protection) Act 2003 (Vic).

WCLC notes concerns raised by the Commission in the Draft Report regarding the possible restrictions the outworker provisions impose on ‘genuine contractors’. We do not consider this to be sufficient justification to change these provisions in any way. To consider that “genuine contractors” are restricted by the outworker provisions ignores the very reason that the provisions were first introduced. The provisions were initially introduced because Parliament recognised that sham contracting arrangements were prevalent in the TCF industry. According to the Minister’s Second Reading Speech, the provisions were designed to end “the artificial distinction by deeming contract outworkers in the TCF industry to be employees”.<sup>42</sup> There was an acknowledgement that outworkers, by their position in the TCF industry, are vulnerable to exploitation and should be protected, regardless of whether they are classified as contractors or employees.

Further, as part of the Post Implementation Review into the TCF amendments to the Fair Work Act, a number of interested parties have submitted that the provisions are performing as intended, are still relevant and needed and should be retained and that “any potential reduction in statutory outworker rights would be demonstrably counter productive to the goal of eliminating outworker exploitation in this country”.<sup>43</sup> In any event, there is no restriction on employers and workers negotiating contract terms that provide for above-Award conditions.

#### **Recommendation**

**Outworker protections under the Fair Work Act must remain and be expanded to other industries such as horticulture and food, distribution, retail, hospitality, cleaning, security, construction and other industries where workers at the bottom of the chain are vulnerable to exploitation.**

### **3.5 Legislative reform is also necessary to prevent widespread exploitation in franchises**

Franchises are characterised by the licensing of intellectual property rights between franchise operators and retailers.

Franchising is regulated by the *Franchising Code of Conduct*, which is mandated by the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014*. Under this Code, workers running the franchises enjoy some measure of protection from withdrawal of their livelihood by capricious termination of their franchise contracts.<sup>44</sup> The Code imposes obligations in relation to disclosure, termination, rights to assign franchises and recently includes a duty of good faith. Given the Code

<sup>42</sup> (Hansard) House of Representatives; Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2012; Second Reading Speech, 22 March 2012, p 3972.

<sup>43</sup> See submissions of the Textile Clothing and Footwear Union of Australia into the Post Implementation Review into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012, 16 May 2014.

<sup>44</sup> *Franchising Code of Conduct*, Div 5.

already contains a mechanism for protective provisions regarding termination, WCLC contends that the Code should be expanded to provide for protection for employees of franchises.

The recent uncovering of significant underpayments of wages by a number of retailers in the 7-Eleven franchise has drawn attention to problems which commonly arise in the franchise structure.<sup>45</sup> From these investigations, it is apparent that a major problem in the supplier chain structure is that there is a lack of accountability by the franchise operator for the employees of its retailers.

In the wake of the investigation into the 7-Eleven franchise, Greens MP Adam Bandt has announced plans to introduce a new bill to enable underpaid franchise employees to recover amounts from the franchisor's head office.

Currently, a full text draft of the bill is unavailable, but in a media release, Mr Bandt outlined his intentions for the legislation:

"Something is wrong with our system when the boss of 7-Eleven is a billionaire but its workers are getting paid under \$10 an hour and threatened with deportation. We've also heard reports that suggest this kind of widespread worker exploitation doesn't end with 7-Eleven.

If head offices can enter into franchise contracts then turn a blind eye to what happens in their stores, workers can get exploited... By allowing workers to claim any underpayments directly from head office, this law will help bring about a culture shift. Instead of leaving it to vulnerable workers to uphold the law through expensive legal action, head offices would take more responsibility for what goes on in the stores that carry their name.

The head office could still pursue the franchisee for the amount of any underpayment, but they'd have an extra incentive for ensuring the underpayment didn't happen in the first place."

The Bill will be introduced after the Commonwealth Parliament returns on 12 October.

WCLC supports legislative reform to ensure that franchisors can be held accountable for breaches by franchisees in respect of underpayments and unlawful termination of employment using the models outlined above.

#### **Recommendation**

**The Fair Work Act must be amended to provide that in some situations, franchisors can be held accountable for breaches by franchisees in respect of underpayments and unlawful termination of employment.**

<sup>45</sup> Fair Work Ombudsman, "7-Eleven Franchisee admits doctoring records and underpaying workers to cut operating costs" (Media Release, 1 September 2015).

### **3.6 Lessons from Work, Health and Safety legislation**

The duties contained in the Work, Health and Safety Acts apply widely to any ‘person conducting a business or undertaking.’ Additionally, ‘worker’ means ‘any person who carries out work in any capacity for a person conducting a business or undertaking.’ Arguably, these definitions are broad enough to capture each of the working arrangements set out above. However, as noted by Hardy, the broad application of this model, in particular the definition of ‘worker’ would constitute a very significant change if applied directly to the Fair Work system and therefore may not provide a realistic solution. Nevertheless, these wide reaching definitions operate as a useful example of the broadening of labour regulation beyond the traditional employer/employee relationship.

## **4. Distribution of penalties and fines**

### **4.1 Payment to workers as first priority**

We refer to the Commission’s Draft Report and in particular, draft recommendation 21 which provides:

*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.*

As noted in our second submission, we are of the view that, regardless of what rights and responsibilities flow from permission to work under the Migration Act, at the very heart of the employment relationship is the fundamental term of the employment contract. That fundamental term is that if an employee works, the employer pays wages. This, along with non-discrimination, are two of the most fundamental tenets of the employment relationship and should apply to all people, especially the most vulnerable in our society.

To maintain the integrity of the workplace relations framework, we submit that no employees should be excluded from the protections of the Fair Work Act. No employee in Australia should be denied an entitlement to minimum wages and conditions.

For this reason, we recommend that any unpaid wages and entitlements recovered from employers should be paid to the employee.

### **4.2 Cy-près doctrine should apply in situations where employee cannot be paid**

However, as noted by the Commission in the Hearing, at times it may not be possible to locate the employee, or group of employees, affected by a contravention.

We submit that in these circumstances, the cy-près doctrine should apply. Cy-près means ‘as close as possible’. Cy-près remedies have developed out of the law of trusts – the doctrine operated to confer the benefit of a trust which would otherwise fail on a closely related object or purpose.<sup>46</sup>

In a similar way, cy-près remedies have been used in Australia to distribute monetary remedies where all of the wronged parties would be impossible to locate. We understand that both ASIC and the ACCC have used the concept of cy-près in their compliance activities, as well as others. Some examples are provided **below**.

#### **4.2.1 Example: Fire services levy monitor**

In 2012-13, there was an over-collection of the fire services levy. As explained on the Fire Services Levy Monitor:<sup>47</sup>

*‘Over-collection’ of the insurance-based fire services levy (FSL) occurred where the amount of FSL an insurer obtained from property insurance policyholders in 2012–13 exceeded the amount the insurer was required by law to contribute to funding the Metropolitan Fire Brigade and Emergency Services Board (MFESB) and the Country Fire Authority (CFA) for 2012–13.*

*Over-collection occurred because insurers had to estimate the amount of FSL they were required to collect from policyholders for the financial year 2012–13.*

In situations where the over-collection amounts were very small or there were difficulties making refunds to customers, the insurance companies resolved their over-payments by making payment to organisations representing the interests of insurance consumers. These organisations were subjected to a due diligence process and signed memorandums of understanding before receiving funds:<sup>48</sup>

*Thirty-four companies have agreed to refund some or all of their FSL over-collection to customers. Approximately 39,000 customers will receive refunds under these agreed arrangements. Twenty-one companies with smaller over-collection amounts, smaller refund amounts per policy, or difficulties in paying refunds to intermediated customers, have agreed to resolve their over-collections through payments to designated organisations representing the interests of insurance consumers in Victoria...*

*The Monitor issued specific guidelines in March 2014 addressing the manner in which over-collection of FSL by insurance companies in relation to the 2012–13 financial year would be resolved. These guidelines (Resolution of insurers' over-collection of fire services levy in 2012–13) provided that where it would be infeasible to make refunds (such as difficulties caused by intermediation, or where very small amounts of refund were involved), the Monitor would allow the insurer to aggregate these refunds and make a payment to one or more organisations representing the interests of consumers of insurance in Victoria. The organisations were subjected to a due diligence process, including issues of governance and*

---

<sup>46</sup> See Michael Bryan, Vicki Vann, *Equity and Trusts in Australia* (2012), page 258.

<sup>47</sup> See <http://www.firelevymonitor.vic.gov.au/home/fsl+over-collection/>.

<sup>48</sup> See <http://www.firelevymonitor.vic.gov.au/home/fsl+over-collection/outcomes/>.

*financial management and accountability, before being designated as suitable to receive one or more aggregated payments. Seven organisations were designated, and they are listed below. Each of these had to enter into a Memorandum of Understanding with the Monitor, setting out the basis on which the monies had been received and the insurance related purposes to which the organisation must put the monies. These include research, education, advice, casework and public advocacy.*

The organisations who received the payments included community legal centres and other community organisations.

#### **4.2.2 Example: Consumer Action Law Centre**

Another example of the cy pres doctrine in Australia can be seen in a consumer law case brought against HFC Financial Services Limited. The case was brought by the Consumer Credit Legal Service in Victoria and resulted in compensation for ‘consumers at large’ under the doctrine of cy pres:<sup>49</sup>

*In the late 1980s, the Consumer Credit Legal Service in Victoria objected to the licensing of a large finance company on the ground that the company was engaging in dishonest and unfair selling practices in relation to consumer credit insurance.*

*The circumstances of the case made it impossible to identify (for the purpose of compensation) every single consumer who may have been wronged by the finance company.*

*The solution was to compensate consumers at large under the doctrine of cy pres. The cy pres solution resulted in the finance company paying \$2.25 million into a fund to establish a centre that would advocate for, and work in the interests of, Victorian consumers. Accordingly, the Consumer Law Centre Victoria (CLCV) was established in 1992.*

*The CLCV (which merged with CCLS to form Consumer Action in 2006) became a highly respected and influential voice in the consumer policy arena, both at a governmental level, and throughout the community generally. In 2001 it started a successful consumer litigation practice to further help it seek redress for disadvantaged consumers. This clearly demonstrates the benefits of being able to seek compensation for consumers under a cy pres mechanism.*

#### **Recommendation**

**Recovered wages and entitlements should be paid to the relevant employees. However, where such payment is impossible, recovered wages and entitlements should be paid to organisations representing the interests of vulnerable workers in accordance with the cy-pres doctrine.**

<sup>49</sup> See <http://consumeraction.org.au/wp-content/uploads/2014/11/Consumer-Action-Law-Centre-Submission-to-Competition-Policy-Review-Draft-Report-Nov-2014.pdf>. See also: <http://consumeraction.org.au/wp-content/uploads/2012/04/HFCDecision.pdf> and <http://consumeraction.org.au/resources/hfc-financial-services/>.