



SUBMISSION

To the Attorney-General, Minister for Industrial Relations

Prepared by Springvale Monash Legal Service, with the contribution of students
from Monash Faculty of Law¹, for the

‘Improving protections of employees’ wages and entitlements: strengthening
penalties for non-compliance’ discussion paper



**SPRINGVALE MONASH
LEGAL SERVICE** Inc.

Celebrating 40 years of Working for Justice

¹ Annie Poulsen, Celeste Rebbechi, Christine Ng, Emily Jiang, Enoch Chan, Jake Hamilton, Michelle Lau, Raymond Zhang, Sarah Hult, Thu Thao Nguyen

Our organisation

Established in 1973, Springvale Monash Legal Service (SMLS) is a community legal centre that provides free legal advice, assistance, information and education to people experiencing disadvantage in our community. For all of our operation, we have located within the Local Government Area (LGA) of the City of Greater Dandenong. We have been addressing the needs of marginalised community members, the majority who reside within the City of Greater Dandenong and its surrounds. The City of Greater Dandenong is the second most culturally diverse municipality in Australia, and the most diverse in Victoria. People from over 150 different countries reside in Greater Dandenong and 60% of the residents were born overseas. It also has highest number of resettlements from newly-arrived migrants, refugees and asylum seekers in Victoria. Data from the 2011 Census revealed that Greater Dandenong was the second most disadvantaged LGA in Socio-Economic Indexes for Areas (SEIFA) ratings.

In 2019, in response to a growing population and community consultation, SMLS expanded and opened an office in the City of Casey, with outreach services across the South East. The City of Casey is 40km south east of Melbourne. It is Victoria's largest and fastest-growing municipality and the dominant growth area for south-eastern Melbourne.

SMLS operates a duty lawyer service at various courts in Victoria, including Dandenong Magistrates Court, the Children's Court and provides legal representation at courts and tribunals such as the Victorian Civil and Administrative Tribunal, Fair Work Commission, Federal Circuit Court, Family Court and VOCAT. For most of the 40 years in operation, SMLS has been running a clinical legal education program in conjunction with Monash University's Faculty of Law, whereby law students undertake a practical placement at the legal service as part of their undergraduate degree. Additionally, as a community legal centre, we offer legal assistance as well as an extensive community legal education program that is developed in response to feedback from the range of community engagement and community development activities that we are and have been involved in. For example SMLS has contributed to reforms in family violence laws and practices, access to civil procedure reforms, discrimination towards young community members in their use of public space and their interactions with the criminal justice system, as well as in highlighting the needs of refugees and asylum seekers, particularly unaccompanied humanitarian minors and women escaping family violence.

SMLS and Employment Law

SMLS recognises that there is an ongoing need within our local community for free employment law assistance for workers. The complexities and constantly shifting nature of employment law is often difficult for our clients to navigate, particularly for clients from CALD communities.

At SMLS we aim to empower clients to become better informed of their rights and of the legal avenues available to assert those rights.

We also understand that our clients may not always be in a position to self-help if, for example, a matter is complex or if a client is facing disadvantage due to factors such as limited English or disability. Some clients may feel intimidated by the employer and may not otherwise be willing to assert their rights in the absence of a legal advocate. We seek to redress these power imbalances by providing ongoing assistance which may include preparing applications to the Fair Work Commission and negotiating a settlement with employers.

Our employment law service may provide advice and assistance in relation to: Unfair treatment in the workplace or unfair dismissal, workplace bullying, discrimination, disputes regarding unpaid or underpaid wages, unpaid leave, redundancy, sham contracting and other entitlements.

In addition to our onsite Employment Law clinic, we operate a duty lawyer outreach service at the Fair Work Commission in partnership with Job Watch in response to ongoing need within our local community for free employment law assistance. We also deliver the International Students Work Rights Legal Clinic, in partnership with Study Melbourne, WEstjustice and Jobwatch.

Scope of Submission

We will answer the questions in the discussion paper where we feel we have the authority and expertise.

Civil penalties in the Fair Work Act

- What level of further increase to the existing civil penalty regime in the Fair Work Act could best generate 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.

The types of matters and numbers of clients seeking assistance at SMLS indicate that the penalty regime is not sufficiently deterring exploitation. Every year we have seen an increase of clients seeking assistance. A recent academic survey demonstrated that an overwhelming 50% of temporary migrant workers are poorly paid.² Recent cases of systemic underpayment have highlighted the ineffectiveness of existing punishments for employers.

In addition, employers often refuse to pay their ordered penalties, and refuse to pay what is owed to our clients. Research suggests that the current civil penalties regime is often incapable of preventing wage theft; for example, a FWO study showed that of 479 non-compliant employers that had previously been audited, 24% were still non-compliant with their monetary obligations.³ Our clients are often deterred from taking their matters to court given the expense, emotional burden and delay associated with court proceedings.

1. SMLS recommends increasing the civil penalties to promote compliance. SMLS recommends exploring options of calculating penalties in reference to business size, such as a percentage of business turnover.
2. SMLS recommends that not only should fines be imposed and directed to victims of wage theft, but any civil remedies ordered by the court should be treated the same way as the court treats a fine, that is that there can be criminal ramifications should the individual ignore or otherwise refuse to pay the monies owed to the employee.

² Bassina Farbenblum and Laurie Berg, 'Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia' (Report, Migrant Worker Justice Initiative, October 2018) 44.

³ Fair Work Ombudsman, *National Compliance Monitoring Campaign #2* (Report, November 2018) 7.

Extending liability

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

In their 2018 report, the FWO observed a correlation between a multiplicity of subcontracts and non-compliance with the FWA.⁴ Indeed, the very structure of supply chains allow affiliated companies to benefit from exploitative labour without bearing any responsibility.⁵ 93% of court actions commenced by Fair Work Commission (FWC) in 2016-17 included an involvement of an accessory.⁶ Currently, s550 FWA provides that a person who is 'knowingly involved in' a contravention of a civil remedy provision is taken to have contravened that provision.⁷ However, as argued by WEstJustice, s550 has a serious enforcement issues due to the onerous requirement of actual knowledge.⁸ In a fair and just society, systems and laws should be set up to protect all vulnerable workers, regardless of the structure of a business/company.

Current accessorial liability provisions are not adequate in regulating the behaviour of labour hire arrangements, and complex employment structures. Placing positive obligations on companies would improve wage theft in supply chains.⁹ Legislative support that enforces positive obligations on companies to take reasonable steps to investigate the labour conditions of their supply chain could extend the concept of accessorial liability and strengthen the enforcement of s550 of the FWA. This would enable companies that benefit from exploitative labour to be held accountable.

3. SMLS recommends amending section 550, placing a duty on persons to prevent breaches of the FW Act in their labour supply chains, and;
4. SMLS recommends including a requirement for companies to demonstrate positive steps taken to minimise risks and ensure compliance.
5. SMLS recommends requiring companies to take reasonable steps to prevent exploitation in supply chains
6. SMLS recommends amending section 550 so that if a person fails to rectify a contravention once they become aware of it, they are then involved in the contravention

⁴ Fair Work Ombudsman (Cth) *An inquiry into the procurement of cleaners in Tasmanian supermarkets* (2018), 15. <<https://www.fairwork.gov.au/reports/inquiry-into-the-procurement-of-cleaners-in-tasmanian-supermarkets>>

⁵ WEstjustice, *Inquiry into the Exploitation of General and Specialist Cleaners* (2018) p17.

⁶ Fair Work Ombudsman, *The Fair Work Ombudsman and Registered Organisations Commission Entry Annual Report 2016-2017* (2017) 22. <<https://www.fairwork.gov.au/annual-reports/annual-report-2016-17/02-fwo-performance-report/compliance-priorities/labour-procurement-and-supply-chain-practices>>

⁷ *Fair Work Act 2009* (Cth) s550.

⁸ WEstjustice, *Not Just Work: Ending the Exploitation of Refugees and Migrant Workers, Part 2* (2016) 171.

⁹ Richard Johnstone et al, *Beyond employment: the legal regulation of work relationships* (The Federation Press, 2012) 67.

Additional Recommendations

Limitation dates

Under the unfair dismissal provisions of the *Fair Work Act*, a person is dismissed if their employment has been terminated on the employer's initiative. An employee is unfairly dismissed if the dismissal was 'harsh, unjust or unreasonable', was not consistent with the Small Business Fair Dismissal Code (if it applies), or was not a case of genuine redundancy.¹⁰ All claims of unfair dismissal must be filed with Fair Work Commission (FWC) within 21 days of the termination of employment.

Clients at SMLS often face many complex issues. Frequently, they have been made vulnerable through poverty, mental illness, migration or trauma. We often find that our clients have no idea about limitation dates and sometimes take time to realise that they may require legal advice.

In addition, accessing free legal advice is difficult, as not many community legal centres practice employment law, and advice lines at Victoria Legal Aid and Jobwatch often require long periods on hold. In reality, it may be several weeks before a client can get an appointment for legal advice, unfairly excluding those who cannot afford a private lawyer from accessing justice.

7. SMLS recommends extending limitation dates, bringing them in line with other civil limitations to 3 or 6 years, to ensure vulnerable and disadvantaged workers who are unable to file a claim at FWC are not excluded from accessing justice.

Fair Work Ombudsman

The FWO ordinarily mediates underpayments claims when early intervention mechanisms fail.¹¹ A trained and neutral mediator leads discussions between the employer and employee to redress grievances and reach an outcome, such as payment of wages. However, there are challenges to successful mediation. Mediation itself often fails to take place, as employers can decline to attend. Even if mediation occurs, FWO's decision is not binding, leaving clients with one final recourse: taking their matter to Court.¹² However, our clients are often unwilling or unable to take their matters to court, given the expense, emotional burden and delay associated with court proceedings. SMLS therefore recommends that the FWO be given greater powers to better resolve underpayments claims, for example, like those exercised by the Australian Financial Complaints Authority scheme ('AFCA'). The AFCA's powers include obtaining information for making determinations, requiring attendance at conciliation, and making binding determinations.¹³ Furthermore, the FWO should be empowered to make determinations regardless of the employer's attendance. This would incentivise employer compliance and further the purpose of the FWO, whilst also providing a much-needed reliable recourse for clients.

8. SMLS recommends that the FWO be empowered to obtain information for making determinations at conciliation

¹⁰ *Fair Work Act 2009* (Cth) s 385.

¹¹ Assisted dispute resolution services', *Fair Work Ombudsman* (Web page) <<https://www.fairwork.gov.au/annual-reports/annual-report-2017-18>>.

¹² Claims under \$20,000 are made to the Fair Work Small Claims Division: r 45.11 *Federal Circuit Rules 2001* (Cth).

¹³ 30 *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth) s 1054A.

9. SMLS recommends that attendance at conciliation is mandatory, and that the FWO is able to make determinations regardless of the employer's attendance
10. We also recommend that the FWO be able to make binding determinations
11. In addition, much like the way that assets can be seized, sold and put towards compensation to victims in other crimes, the FWO or other bodies should have the power to seize and sell assets to compensate victims of wage theft in proven cases, where the victim has not been adequately compensated.

Definition and Statutory Presumption of Employee

Employers commonly commit wage theft through misclassification of employees as contractors - this is known as 'sham contracting'.¹⁴ Workers in these situations bear the burden of proving they are an employee, as there is no statutory presumption that workers are employees until proven otherwise.¹⁵

In conjunction with a statutory presumption of employee status, additional support could be provided by ensuring that legislation such as the FWA contains a clear definition of both 'employee' and 'contractor'. Currently, an individual's employment status is determined by the court through the common law 'multi-factor test'.¹⁶ This test is complicated and ambiguous, and leaves employees with little clarity as to what their employment status and legal entitlements are.¹⁷ Having a clear legislative definition of employee would make it harder for employers to defend their behaviour through lack of knowledge,¹⁸ and make it easier for employees who think they are being exploited to assess their employment status and their entitlements.¹⁹

12. SMLS recommends that a statutory presumption of employee should be created to deter unscrupulous employers, and remove the burden from mistreated employees to prove their employee status.²⁰
13. SMLS recommends the Fair Work Act be amended to include a clear, legal definition of employee.

¹⁴ 'Independent Contractors', *Fair Work Ombudsman* (Web page, Page Reference Number 2799) <<https://www.fairwork.gov.au/find-help-for/independent-contractors#sham-contracting>>; See also *Fair Work Act 2009* s 357.

¹⁵ National Union of Workers, 'Submission to the Senate Education and Employment Committee' *Inquiry into Incidence and Trends of Corporate Avoidance of the Fair Work Act 2009* (Submission 198) 4 ('*NUW Submission 198*').

¹⁶ *NUW Submission 198* (n 22). See also 'Employee or Contractor?: Deciding between an employee or contractor', *CPA Australia* (Fact Sheet) 2-3 <https://www.cpaustralia.com.au/~/_media/corporate/allfiles/document/professional-resources/practice-management/employee-versus-contractor-factsheet.pdf?la=en>, and 'How to determine if a worker is an employee or an independent contractor', *Australian Building and Construction Commission* (Web Page) <<https://www.abcc.gov.au/resources/fact-sheets/independent-contractors/how-determine-if-worker-employee-or-independent-contractor>>.

¹⁷ Maurice Blackburn, 'Submission to the Victorian Inquiry into the Labour Hire Industry and Insecure Work', December 2015, 15, cited in Maurice Blackburn, 'Submission to the Education and Employment References Committee', *Inquiry into Incidence and Trends of Corporate Avoidance of the Fair Work Act 2009* (Submission 157) November 2018, 8 ('*Maurice Blackburn Submission 157*').

¹⁸ *Director of the Fair Work Building Industry Inspectorate v Bavco Pty Ltd (No 2)* [2014] FCCA 2712, cited in *Maurice Blackburn Submission 157*, 8.

¹⁹ *Maurice Blackburn Submission 157*

²⁰ *NUW Submission 198*