

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

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Contact: Catherine Dow  
Employment Project Solicitor  
(03) 9689 8444  
[catherine@footscrayclc.org.au](mailto:catherine@footscrayclc.org.au)

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## 1. Introduction

Footscray Community Legal Centre Inc. (**FCLC**) commenced an Employment Law Project (**Project**) in July 2013. The Project seeks to improve the employment outcomes of newly arrived and refugee communities in the Western suburbs of Melbourne.<sup>1</sup>

### 1.1 About Footscray CLC

FCLC is a community organisation that provides free legal assistance and financial counselling for the benefit of people who live, work or study in the City of Maribyrnong, Victoria. Our Employment Law Project provides assistance to newly arrived and refugee clients across the western suburbs of Melbourne.

FCLC has a long history of working with newly arrived communities. Over the past five years, more than 53% of our clients spoke a language other than English as their first language. Approximately one quarter of our clients are newly arrived (having arrived in Australia in the last five years) and our refugee service alone has seen approximately 700 clients in the past five years.

FCLC has developed specialty advisory services and education programs that address the particular legal and social problems that newly arrived and refugee communities encounter. For example, we have explored the experiences of newly arrived communities in relation to the courts, housing, energy and telecommunications markets in recent years.<sup>2</sup>

### 1.2 The Employment Law Project

The Project seeks to improve employment outcomes for newly arrived and refugee communities in Melbourne's Western suburbs. Informed by a period of consultation and research (**Stage One**)<sup>3</sup>, the Project is currently delivering two linked programs: a pilot legal advice and referral service (**Employment Law Service**); and a community education program (**CLE**) (**Stage Two**).

One of the outcomes of the Project will be a report that documents key employment issues and recommendations, supported by evidence gathered in Stages One and Two (**Stage Three**).

The Project's final report is due in October 2015. We would welcome the opportunity to provide further information and evidence throughout the course of Inquiry, and share the report with the Commission once it is finalised.

#### 1.2.1 Pilot Employment Law Service for refugee and newly arrived clients

The pilot Employment Law Service provides employment law advice, referral, casework and advocacy to clients from refugee or newly arrived communities who reside in the Western suburbs of Melbourne.

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<sup>1</sup> We would like to thank the following volunteers and staff who helped prepare this submission: Jessica Dolan, Phoebe Churches, Rachel Hui, Rachel Liebhaber, Jessica Dawson-Field and Genevieve Auld.

<sup>2</sup> Reports are available on our website: <http://www.footscrayclc.org.au/brochures-publications/>.

<sup>3</sup> A preliminary report documenting the initial findings from Stage One can be accessed at our website: 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).

To date, we have assisted over 80 clients with a wide range of employment law related matters including underpayment or non-payment of wages and entitlements, termination of employment, sham contracting, discrimination, workplace injury, workplace investigations and bullying. The largest group of clients we have seen are refugees who arrived on humanitarian visas, while the second largest cohort arrived in Australia as international students. We have also advised some asylum seekers and people on temporary work visas (including working holiday and subclass 457 visas). The majority of our clients have arrived in Australia within the last 10 years.<sup>4</sup>

Most clients provided with legal assistance were born in Iran, Ethiopia, Sudan, Burma (Myanmar), Afghanistan and Eritrea. We also saw recently arrived communities born in India, Pakistan, Vietnam and Sri Lanka.

### **1.2.2 Pilot Community Education Program**

To date the Project has delivered over 30 community legal education (CLE) presentations to community members, community workers and community leaders. CLEs have been delivered to more than 400 people, and evaluation surveys were completed by 324 individuals.

The Project has also engaged six part time community leaders from refugee and newly arrived communities to participate in a Train the Trainer Program. Supported by the Helen Macpherson Smith Trust and Victorian Women's Trust, the Program offers comprehensive training in employment law and key services, assisting participants to develop and distribute community legal education sessions to their communities in the West.

## **2. Issues Paper 1: how to improve the wellbeing of the Australian community as a whole**

While the workplace relations framework is available to all employees, not all employees will have the same degree of need or reliance on the system. Neither will all employees have the same degree of access. Articulate employees, familiar with the Australian legal framework and confident in their own rights and skills may negotiate the system with relative ease. However, vulnerable employees who are most at risk of exploitation often face significant barriers to rights enforcement. It is these vulnerable workers, often in low-paid and insecure work, who have the greatest need for protection from a robust workplace relations system.

As set out below, newly arrived and refugee communities report high levels of exploitation in the workplace. However, due to unfamiliarity with rights and services and significant literacy, cultural and linguistic barriers, the workplace relations system remains largely inaccessible.

To function effectively, the workplace relations system requires appropriate regulatory and enforcement systems to assist workers who are unable to enforce their own rights. To reduce the social and economic costs associated with non-compliance and abuse of power, considerations for reform should be based on the need to improve access for the most vulnerable workers.

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<sup>4</sup> We also provide advice on a discretionary basis to clients who are not newly arrived dependent on the individual's vulnerability. Some long-term migrants can have similar experiences and characteristics to newly arrived depending on their isolation and integration into wider society.

## 2.1 Protecting vulnerable workers promotes wellbeing of all Australians

The Western suburbs of Melbourne are home to a diverse range of new and emerging communities. Arriving from a foreign country, many have experienced violence, torture or trauma and are now separated from family members and social connections. Many things are new – including language, public transport systems, schools and laws. Showing resilience and determination, community members seek to create a new life, and employment is consistently recognised as a vital step for successful settlement.<sup>5</sup>

When settling in a new country, sustainable employment provides financial stability<sup>6</sup> as well as ‘social cohesion, self-esteem, independence, the ability to gain stable housing and more broadly, a greater sense of community belonging and well-being’.<sup>7</sup>

This benefits not only migrants and refugees, but the broader community as a whole. High levels of unemployment amongst skilled refugees<sup>8</sup>, the denial of permission to work for some asylum seekers,<sup>9</sup> high levels of exploitation of newly arrived workers and an inability to enforce workplace rights means that Australia is missing out on needed skills and human capital benefits,<sup>10</sup> not to mention the numerous social and economic benefits an equitable, cohesive, vibrant and multicultural workplace, can bring for all workers.

## 2.2 Newly arrived and refugee workers face high levels of exploitation

Research shows that recently arrived and refugee communities in Australia are segmented in low skilled and casualised industries.<sup>11</sup> Our client data reflects this finding with clients working predominantly in food processing, hospitality, cleaning, warehousing & distribution and the child and aged care industries.

As documented in our Preliminary Report<sup>12</sup> and observed in our legal service, newly arrived communities often experience high levels of exploitation in the workplace. In particular, they experience discrimination, frequently lose their jobs, are underpaid and denied basic entitlements. They also experience bullying, are forced into sham contracts and work in unsafe jobs with high injury rates. FCLC has observed that our clients recognise the value of

<sup>5</sup>For example, a recent consultation in Melton with community members from Burma identified employment as the most important theme for successful settlement in Melton. Employment was also ranked as the most difficult goal to achieve: Natasha Wilton, Djerrirarrh Health Services, ‘Investigating resettlement barriers with the Burmese Community in Melton: A Needs Assessment’; see also Alistair Ager and Alison Strang, *Understanding Integration: A Conceptual Framework*, Journal of Refugee Studies (2008) 21(2) 170.

<sup>6</sup>Australian Bureau of Statistics, ‘Labour Force Participation of Migrants’, Australian Social Trends, 2006; Nic Price, ‘Employment a path out of poverty for a Fitzroy refugee’, *Melbourne Leader*, 11 October 2013.

<sup>7</sup>FECCA, ‘Latest unemployment figures hide harsh realities for CALD workers’ (Media Release, 16 August 2013); see also Deng Tor Deng and Fodia Andreou, ‘Settlement Needs of Newly Arrived Migrant and Refugee Men: Brimbank & Maribyrnong’, Migrant Resource Centre North West Region, March 2006.

<sup>8</sup>Val Colic-Peisker and Farida Tilbury, ‘Refugees and Employment: The effect of visible difference on discrimination’, Final Report, Centre for Social and Community Research, Murdoch University, January 2007, 1.

<sup>9</sup>Gwilym Croucher and Sophie Dutertre, The Right to Work for All Asylum-Seekers: Why Depriving Asylum-Seekers of Work Rights in Australia’s Loss, *The International Journal of Diversity in Organisations, Communities and Nations* (2007) 7(4) 241, 242. Not all asylum seekers have the right to work. Recently the non-renewal of asylum seeker visas has meant that people who have work, are losing their jobs: Melissa Townsend, ‘No bridging visa, no job: Life’s tough for Greater Dandenong asylum seekers and the welfare groups that support them’, *Dandenong Leader*, 28 January 2014. The Red Cross recommends that work rights be granted to asylum seekers living in community: Australian Red Cross, Inaugural Vulnerability Report: Inside the Process of Seeking Asylum in Australia.

<sup>10</sup>See for example, Graeme Hugo, ‘Economic, social and civic contributions of first and second generation humanitarian entrants’, [http://www.immi.gov.au/media/publications/research/\\_pdf/economic-social-civic-contributions-about-the-research2011.pdf](http://www.immi.gov.au/media/publications/research/_pdf/economic-social-civic-contributions-about-the-research2011.pdf).

<sup>11</sup>Val Colic-Peisker and Farida Tilbury, ‘Employment Niches for Recent Refugees: Segmented Labour Market in Twenty-first Century Australia’ (2006) 19(2) *Journal of Refugee Studies*.

<sup>12</sup>Dow, above n 3.

work in integrating and contributing to Australian society but often find themselves employed in situations that are below minimum legal working conditions.

## **2.3 Newly arrived and refugee workers require assistance and support to enforce their workplace rights**

Coupled with high levels of exploitation, recently arrived and refugee communities face multiple barriers that prevent them from accessing mainstream legal services and thus, enforcing their rights. These barriers relate to both their refugee background as well as to their recently arrived status, which limits their understanding of the Australian legal system.

### **2.3.1 Limited understanding of employment laws and institutions as a barrier to rights enforcement**

Both literature<sup>13</sup> and a FCLC survey<sup>14</sup> indicates that newly arrived and refugee communities have an extremely limited understanding of Australian laws and services. This means that many members of refugee or recently arrived communities are unable to identify that they have employment law related issues, do not know where to go for assistance and rely on identification and referral of these issues from community workers or friends and family.

### **2.3.2 Refugee background as a barrier to rights enforcement**

In situations where community members are able to identify employment problems there are barriers that limit the ability of refugee and recently arrived communities to enforce their rights.

People of refugee background may have past experiences and cultural understandings of legal systems and authority figures,<sup>15</sup> which deter them from seeking advice or enforcing their rights. As the Refugee Council of Australia notes:

*Prior to arriving in Australia, refugees have often experienced years of persecution and injustices at the hands of corrupt government officials, police and bureaucracies. It is understandable, then, that many refugees arrive with a wariness of police and government bureaucracies and it takes time to rebuild trust and understanding.*<sup>16</sup>

FCLC observed that clients commonly misunderstood the confidential nature of legal advice, and that some clients expressed fear of retribution in both seeking legal assistance and in enforcing their rights. Client fear extended not only to engaging with an employer but with engaging with government agencies including the Fair Work Ombudsman. Many of FCLC's refugee clients access services via trusted caseworkers or friends.

*Case study: the Karen and Karenni community as an example of refugee background as a barrier to seeking legal advice and the difficulties of integrating into the Australian workplace*

<sup>13</sup> Selvaraj Velayutham, 'Precarious Experiences of Indians in Australia on 457 Temporary Visas', *Economic and Labour Relations Review* (2013) 24(3) 340, cited in Michael Janda, 'Australia's 457 'King of Visas' is a Road to Serfdom for Many Migrants,' ABCNews (online), 6 Sep 2013 <<http://www.abc.net.au/news/2013-09-06/27king-of-visas27-a-road-to-serfdom-for-many/4941980>>.

<sup>14</sup> Nearly 2/3 of survey respondents reported that it was common or somewhat common that newly arrived or refugee communities do not understand Australian employment laws. For further information see Dow, above n 3.

<sup>15</sup> Refugee Council of Australia, *Legal and Financial Issues Fact Sheet*, <http://www.refugeecouncil.org.au/f/smt-l&f.php>

<sup>16</sup> Ibid.

*Our Outreach Legal Service at Wyndham Community Education Centre illustrates some of the issues in engaging with refugee communities who have previously faced persecution. Conversations with staff at Wyndham Community Education Centre and New Hope Werribee indicate that the Karen and Karenni communities are commonly employed in the meat industry.*

*Despite reports from settlement workers of widespread employment issues relating to underpayment and workplace injuries within the Karen and Karenni communities, community members were reluctant to seek legal advice from the outreach solicitor. As previously noted in a FCLC report, Burmese communities (Chin, Karen and Karenni) are reluctant to make complaints and there is distrust of authority figures including potentially a solicitor.*

*Feedback from community presentations and conversations with settlement workers indicated both a lack of basic understanding of the Australian legal system and a fear of adverse consequences through making a complaint. When clients from these backgrounds approached our Centre, their legal issues were often severely impacting on their lives, and could have been greatly assisted by earlier intervention.*

*FCLC observed that the low level of proficiency in English in the Burmese communities was a significant barrier to integration in the workplace and in enforcing minimum legal conditions. Multiple community members described that they received warnings at work for not notifying work that they were sick and unable to attend. Other community members would work many hours unpaid overtime because they were scared to leave.*

*FCLC had multiple clients from these communities who arrived at the Centre with piles of legal and governmental documents in English, which they were unable to read meaning that simple transactional interactions with government agencies were a source of fear.*

*One community member of refugee background lost their job and was not provided with a Centrelink Separation Certificate. The community member was scared of contacting Centrelink and getting in trouble for not having a Separation certificate. Subsequently, the community member had not been able to access Newstart payments despite being unemployed.*

### **2.3.3 Cultural understandings of legal systems as a barrier to rights enforcement**

A focus group with community leaders from Burma (Myanmar), Sudan, DRC Congo, India and Iran highlighted that many recently arrived and refugee communities have had adverse experiences with legal systems in their home countries. In particular, community leaders mentioned that in their home countries there was a distinction between laws on paper and laws that are enforced.

*This concept of 'paper laws' means that community members may be less likely to pursue legal claims if they do not have past experience of laws being enforced. One community leader described that community members in their community viewed legal problems as their 'fate,' illustrating the extent to which members were vulnerable and unable to enforce their rights.*



Participants discussed that, in the event laws were enforced, access to the justice system was limited to the rich and powerful.

### 2.3.4 Practical barriers to seeking assistance

Practical issues including proficiency in English, difficulties in using a telephone advice line,<sup>17</sup> accessing internet resources, finding appropriate interpreters<sup>18</sup> and travelling to appointments<sup>19</sup> also prevent individuals from enforcing their rights.

### 2.3.5 Need for targeted education and legal services

Without legal education and services to assist newly arrived and refugee workers, the workplace relations system will remain largely inaccessible.

As noted in the Law and Justice Foundation *Legal Needs Report*, it is extremely important that legal information and education be targeted to specific communities.<sup>20</sup>

Education and assistance must be delivered via culturally sensitive services and through appropriate language translation services or services in relevant languages. CLE also needs to be 'maintained in a sustained rather than ad hoc way'.<sup>21</sup> Through our CLE program to date, we have observed a significant improvement in rights awareness among participants. As a result of the CLE presentation about employment law, 53% of participants stated that they knew a little more with 45% stating that they knew a lot more about employment law. 89% of participants surveyed stated that as a result of the CLE session that they now knew where to go for help with an employment problem.

Once they are aware of workplace rights, newly arrived and refugee workers also require targeted assistance to enforce those rights. Academic literature<sup>22</sup> suggests that specialist face-to-face legal advice is the preferred model for individuals with poor literacy and language skills. This was mirrored in our Preliminary Report recommendations, which were based on a survey of community members.<sup>23</sup>

Without targeted assistance focused on relationships, collaboration and trust, the workplace relations framework will be largely inaccessible for newly arrived and refugee workers.

**Recommendation: To function effectively, the workplace relations system requires appropriate regulatory and enforcement systems to assist workers who are unable to enforce their own rights. Newly arrived and refugee workers require targeted assistance to enforce their workplace rights. This will improve the wellbeing of the Australian community as a whole.**

<sup>17</sup> Christine Coumarelos, Deborah Macout, Julie People, Hugh M. McDonald, Zhigang Wei, Reiny Iriana and Stephanie Ramsie, *Legal Needs Report*, (Law and Justice Foundation Report, August 2012), 209-210.

<sup>18</sup> Women's Legal Services NSW, *A Long Way to Equal - An update of "Quarter Way to Equal: A report on barriers to access to legal services for migrant women"* (Report, Women's Legal Services NSW, July 2007), 32.

<sup>19</sup> Inability to travel can be due to geographic isolation, lack of public transport options and childcare responsibilities.

<sup>20</sup> Coumarelos et al, above n 17, 208.

<sup>21</sup> Women's Legal Services NSW, above n 18, 32.

<sup>22</sup> Coumarelos et al, above n 17.

<sup>23</sup> FLC conducted a survey on preferred mode and usefulness of legal advice. 20 of 36 respondents stated that face-to-face legal advice preferred, 16 of 36 said face-to-face and a telephone service. No responses stated that a telephone service alone would be more helpful and accessible. See Dow above n 3, 22.

### 3. Issues paper 2 – NES and Awards

#### 3.1 Fair Work Information Statement should be provided in first language

As noted in **Section 2.3.1** above, newly arrived and refugee communities have a very limited understanding of Australian employment laws and services. This is partly due to practical barriers, including language barriers. By requiring that the Fair Work Information Statement be provided in employees' first language, the workplace relations system can better facilitate awareness of rights and services for vulnerable workers.

**Recommendation: Employers should be required to provide the Fair Work Information Statement in their employee's first language.**

#### 3.2 Importance of Awards and minimum wage for vulnerable workers

FCLC believes that the current role and design of Awards should be maintained, including the involvement of the Fair Work Commission in determining minimum conditions and wages. FCLC has observed the importance that a minimum wage has in the ability of refugee and recently arrived communities to obtain a liveable income. In the opinion of FCLC, without minimum working conditions and wages contained in Awards, refugee and recently arrived communities have no realistic prospect of negotiating or enforcing equitable working conditions on their own.

In the experience of FCLC, many clients who were minimum wage earners lived in low-income households. The reason for this low income household was often due to a combination of the client's employment type and being the sole income earner.<sup>24</sup> Clients from refugee and recently arrived communities are likely to remain in minimum wage employment and are unlikely to progress to higher wages<sup>25</sup> due to lack of English, Australian work experience as well as numerous other barriers discussed above. This means that for refugee and other communities, enforceable minimum working and wage conditions are essential in providing a safety net.

Surveys conducted by FCLC indicate that recently arrived and refugee communities know little about their employment rights and responsibilities, including the minimum wage. FCLC observed a significant amount of recently arrived and refugee community members who were paid below the minimum wage rate, particularly in the hospitality and cleaning industries.

*FCLC saw clients who were being paid between \$8 to \$12 an hour, were working 12-13 hours a day, 6-7 days a week and in one instance one wage being paid for the work of two clients.*

These clients were being underpaid the minimum wage both because they did not know about their minimum working conditions and because their vulnerability meant that they were unable to enforce their rights. The high prevalence of recently arrived and refugee communities being paid under the minimum wage in the current system indicates that these

<sup>24</sup> Many clients reported that they were financially supporting extended family members.

<sup>25</sup> See Hugo above n 10, who discusses workforce participation and progression of first and second generation humanitarian entrants.

community members are unlikely to be in a position to negotiate their own working conditions. The result of a deregulated minimum wage is likely to be a system that is exploitative of refugee and recently arrived workers' labour.

**Recommendation: The safety net should not be reduced.**

## **4. Issues paper 4 – Unfair dismissal and general protections processes**

*Do Australia's unfair dismissal processes achieve their purpose, and if not, what reforms should be adopted, including alternatives (or complements) to unfair dismissal provisions?*

*In cases where employers are required to pay compensation in lieu of reinstatement, are the current arrangements for a cap on these payments suitable?*

*What are the impacts on employees of unfair dismissal, both personally and in terms of altered behaviours in workplaces?*

*What are the main sources of costs (including indirect costs), and how could these be reduced without undermining the fundamental goals of unfair dismissal legislation?*

*Do unfair dismissal actions disproportionately affect any particular group of employees (for example, by gender, ethnicity, geographical location, industry, union affiliation, occupation or business size)?*

*Do the general protections within the Fair Work Act 2009, and particularly the 'adverse action' provisions, afford adequate protections while also providing certainty and clarity to all parties?*

### **4.1 The importance of the unfair dismissal (UFD) and General Protections (GP) processes**

Around one third of our clients to date have had their employment terminated. Often, procedural fairness has not been followed. Our client files also show that many workers are subjected to distressing experiences at work. We have heard of many clients being tormented by colleagues regarding their country of birth, religion or the fact that they are refugees. They have been taunted and teased as "boat people" and "terrorists". These comments are unlawful and damaging, and in some cases have caused significant psychological injuries. The unfair dismissal and general protections within the Fair Work Act are therefore important, particularly in providing vulnerable workers who have faced adverse action or unfair dismissal an avenue for redress, and ensuring procedural fairness, particularly where cultural or language barriers apply. Given the often extreme power imbalance between employee and employer, our clients could not negotiate without legal protections. Further, by enforcing unfair dismissal and general protections laws, it is hoped that systemic reform may come about in the form of sustainable employment outcomes and a cultural shift away from such discriminatory behavior.

FCLC has had some exposure to UFD and GP processes, however our service has only been operating since May 2014. In our experience to date, the face to face nature of conciliation conferences can be an informal and cost-effective way to resolve disputes without recourse to a formal hearing in the Commission or at Court. We recommend that conciliation conferences be mandatory for non-dismissal general protections disputes as well. Over time we will have more observations to contribute.

#### **4.2 Access to UFD and GP processes is limited for newly arrived and refugee workers – assistance is required**

FCLC represents vulnerable, migrant workers with a limited command of English, scant knowledge of their employment rights or the legal system, and (if it were not for our service) little if any access to legal representation.

Due to this array of barriers, set out in more detail in **section 2.3** above, many newly arrived and refugee workers cannot access UFD or GP processes at all. For these vulnerable workers, UFD and GP processes are not achieving their purpose.

Firstly, FCLC has observed through our community education talks and Employment Law Service that many workers are not aware that they can bring an UFD or GP claim.

A large number of our clients, particularly those in low-paying jobs, have faced adverse action, including summary dismissal for exercising or proposing to exercise related rights. We have learned about clients being fired for seeking legal advice or inquiring about their salaries and entitlements, particularly in situations where they have been dramatically underpaid. These clients were not aware that their exercise of these rights fall under the ambit 'workplace rights' protected under the FWA, and often came to us seeking assistance only in relation to the underpayment matter.

Even if they become aware of this right, the ability to enforce it is limited. Many of our clients cannot write or speak in English. Many are illiterate in their own language. Therefore, even if a worker is aware of their ability to bring a claim, completing application forms and understanding correspondence from the Commission without assistance is impossible. For example, one worker who attended our Centre nearly had his unfair dismissal case discontinued after inadvertently filling out a Notice of Discontinuance form, not realising what it meant.

*A worker from a migrant, non-English speaking background presented at our service requesting advice after he was dismissed. A few weeks later, he returned to our office with his notice of listing for unfair dismissal. We explained the document was setting a time for conciliation and that he should attend. The client then showed us the form at the back of the notice, which he had already filled out, and explained that he intended to return the form shortly. This form was a Notice of Discontinuance. We explained that this form was to end his matter, and he should only fill out this form if he wanted to end his case. He was very grateful and thanked us for explaining the form, as he otherwise would have sent it in, inadvertently discontinuing his case.*

As noted in the CELRL Submission to the Fair Work Act Review on 17 February 2012, filling out an application form requires applicants to produce legal information and make legal judgments. It is our experience that although newly arrived and refugee clients can tell their story with assistance from an interpreter, it is largely impossible for clients to make these legal judgments and draft their own applications without help.

In addition to improving education around workplace rights and responsibilities, there is urgent need for assistance for vulnerable workers in order to facilitate access to UFD and GP processes. This will increase equity and efficiency. Claims will be better articulated and resolve more quickly.

This assistance is especially necessary for UFD and GP processes given that the Fair Work Ombudsman cannot provide assistance on these matters.

**Recommendation: Vulnerable workers require assistance to access unfair dismissal and general protections processes.**

#### **4.3 The limitation period for UFD and GP applications should be increased to 90 days. Circumstances and difficulties faced by vulnerable and migrant employees should be recognised when considering extending time limits for UFD and GP applications**

The time limit of 21 days from the date of dismissal is especially prohibitive for our clients. Even once clients become aware that there are legal protections prohibiting adverse action or termination of employment in a harsh, unjust or unreasonable manner, there is typically a further delay before they learn about our service. Accordingly by the time they seek advice about their dismissal, they are often out of time to lodge a claim.

The exceptional circumstances that may be taken into account when considering an extension of this time limit, per s 394(3)(a)-(f), are very narrow, and only allowed in rare circumstances. In our experience the Fair Work Commission applies the time limit strictly, and out of time applications are very rarely accepted.

The strict 21 day time limit also prevents our legal centre from assisting clients in disputes relating to dismissal due to our limited resources. Although FCLC tries to prioritise dismissal

claims, due to the limited funding and resources available to our Centre, FCLC is often unable to provide timely assistance to clients. New appointments often need to be booked as far as four or six weeks in advance. Because of this limited capacity and the limited capacity of other available services, it is impossible for some clients to lodge a claim within time.

Because of the necessity to use our stretched time and resources efficiently, FCLC has faced difficult decisions about whether to pursue an extension of time for unfair dismissal cases for some clients. FCLC has had clients who meet the criteria for unfair dismissal whom we have had to turn away because the unlikelihood of an extension of time being granted outweighs the time and resources that would be required to lodge a claim.

**Recommendation: The limitation period for UFD and GP applications should be increased to 90 days. The exceptional circumstances that may be taken into account per ss 366(2)(a)-(e) and 394(3)(a)-(f) of the FW Act should be broadened to require consideration of the particular circumstances of vulnerable workers. This should include a consideration of English language abilities, knowledge of legal rights and ability to access legal advice, including recognition of the barriers faced by refugee workers in particular.**

#### **4.4 Penalties should be put in place where employers fail to respond**

For some cases, FCLC has spent considerable time and resources following up employers for their employer response. Currently under the Fair Work Act there are very limited circumstances where an Applicant can lodge out of time. However, there is no sanction for employers who fail to lodge an employer response outside of the seven day time limit set out in the Fair Work Commission Rules.

When an employer response is filed late, it puts unnecessary pressure on applicants and their representatives. In the experience of FCLC, the FWC may still expect applicants to attend listed conciliations with an employer respondent in circumstances where no employer response has been filed. This puts employee applicants at a distinct disadvantage as they're unable to adequately prepare or predict an employer response whereas the employer has all the information contained in the original application to rely on. Further, if an employee is required to seek an adjournment because the employer has failed to provide a response, this has significant financial impacts and may make reinstatement less likely.

**Recommendation: to encourage compliance with the Rules, late lodgement of an Employer Response should attract some penalty**

## 5. Issues paper 5 – Institutions

As the Productivity Commission's 2014 Report *Access to Justice Arrangements* makes clear,<sup>26</sup> improvements to the functioning and accessibility of the civil justice system has wide ranging community benefits:

*A well-functioning civil justice system protects individuals and businesses from infringement of their legal rights by others. The ability of individuals to enforce their rights can have profound impacts on a person's wellbeing and quality of life... a well-functioning civil justice system serves more than just private interests — it promotes social order, and communicates and reinforces civic values and norms. A well-functioning system also gives people the confidence to enter into business relationships, to enter into contracts, and to invest. This, in turn, contributes to Australia's economic performance.<sup>27</sup>*

Improving the accessibility and functions of the FWC and FWO is critical to extending these broad benefits to the community.

### 5.1 The Fair Work Commission and the Fair Work Ombudsman dispute resolution processes

***How effective are the FWO and FWC in dispute resolution between parties? What, if any, changes should they make to their processes and roles in this area?***

Overall, there remain significant barriers for many vulnerable workers to access and navigate the FWO and FWC regimes. As noted in **section 2.3.1** above, a substantial proportion of newly arrived and refugee communities have little or no awareness of their employment rights. Even those who can adequately frame their complaint may be overwhelmed by the sheer complexity of systems and options.

For this reason it is critical that there are targeted services to provide information and advice on matters such as choice of jurisdiction, as well as subsequent advocacy and support with resolving disputes. Our clients generally require active assistance from making a complaint through to mediations, and formally settling their dispute. The imbalance of power inherent in many of these disputes makes independent assistance for vulnerable workers crucial for efficient resolutions.

#### 5.1.1 Fair Work Commission

##### 5.1.1.1 *What currently works well*

FCLC notes that matters are listed quickly and often proactively managed by FWC, which is positive. FCLC has found that when we have capacity to assist clients, face to face conciliation conferences are an efficient way to resolve unfair dismissal disputes and general protections disputes.

Our staff and volunteers have benefitted from FWC education resources, including mock trials and the Benchbooks. This enables our Service to provide better advice and resolve complaints more efficiently.

<sup>26</sup> Productivity Commission Inquiry Report Volume 1, *Access to Justice Arrangements* (2014).

<sup>27</sup> *Ibid*, 6.



#### 5.1.1.2 *What could be improved: language and accessibility*

FCLC notes that there is a need to improve accessibility for our clients, particularly through raising awareness of the role of the FWC; and the provision of information and assistance in more languages. Without targeted assistance, any dispute resolution procedure will be ineffective for vulnerable workers.

Section 576(2)(b) of the FWA provides that one of the FWC's functions is to provide assistance and advice about its functions and activities. The *FWC Engagement Strategy* sets out a range of strategies to enhance public engagement.<sup>28</sup> FCLC welcomes the opportunity to continue to work collaboratively with the FWC to achieve this in relation to newly arrived and refugee communities. Most recently, FWC has worked collaboratively with FCLC to deliver training to community leaders as part of the Footscray CLC train the trainer program. More targeted initiatives like this are required.

Furthermore, greater targeted assistance is required throughout the dispute resolution process, to facilitate accessibility for vulnerable workers. It would be useful for the FWC to have dedicated staff who can assist clients with English as an additional language to navigate the FWC's processes and procedures. For example, FCLC has had clients who do not know what an outline of submissions or a witness statement is, or who have been very afraid to contact the FWC for cultural reasons. The ability to make a warm referral to trained staff would increase the accessibility of FWC processes. These staff could also work to build trust and relationships with vulnerable communities through community education and other community engagement activities.

We note that the FWC fact sheets are currently provided in only Arabic, Chinese, Greek, Indonesian, Spanish and Vietnamese and that the FWC website can be translated into some community languages. However, for many clients from newly emerging communities, the only language support available is through the Translating and Interpreting Service (TIS). Additionally the information on how to access TIS is only English.

FCLC has observed that the FWC is starting to utilise online smart forms and we hope that they can be translated into a wide variety of community languages including those spoken by newly arrived and refugee groups. The facility for literate workers to fill in forms in their own language could be extremely beneficial and further open up the services of the FWC. A tool which could then translate the documents into English would also be useful.

However, in order to ensure any new language resources are effectively utilised, it is essential that staff are engaged to educate communities about the resources available and how to use them.

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<sup>28</sup> FWC engagement strategy, <https://www.fwc.gov.au/creating-fair-workplaces/commission-engagement-strategy/public-engagement>.



**Recommendations:**

- **Provision of information in a wider variety of community languages, including those spoken by newly arrived and refugee communities;**
- **Two way translation of Smart Forms – both in a variety of community languages and back into English.**
- **Dedicated staff at FWC who can assist complainants for whom English is an additional language.**

**5.1.1.3** *What could be improved: greater resourcing of targeted services*

As noted above, there is no doubt that many of our clients would be unable access the system to resolve General Protections and Unfair Dismissal claims without assistance to apply and advocacy at conferences and hearings.

At the initiation of an application, clients need assistance with the completion of the relevant forms. There can be complex jurisdictional issues to consider. Many clients faced with the requirement to prepare an application, outline of submissions or witness statements would be locked out of the system without often extensive assistance.

**Recommendation: Provision of increased funding and resources for services which assist newly arrived and refugee communities to access the FWC dispute resolution processes.**

**5.1.2 Fair Work Ombudsman**

**5.1.2.1** *What Currently Works Well*

FCLC welcomes our collaborative relationship with the FWO which has increased noticeably since our connection with the Community Engagement team and appointment of Community Engagement Officers. These collaborations and cross referrals are seeing impressive outcomes already and there is room to continue to build on this. For example, FWO's recent participation in the Footscray CLC train the trainer program has provided a number of community leaders with significantly improved awareness of FWO services. This information will be shared with several newly arrived communities across the West.

Of particular importance are the systemic outcomes flowing from investigations and FWO's ability to look at industry wide issues. As noted above, our clients mostly work in vulnerable industries, including food processing, hospitality, cleaning, warehousing and distribution and the child and aged care industries.

FWO's power to audit workplaces in an own motion investigation capacity removes the onus from individual complainants who are vulnerable, and enables systemic change across workplaces. Through the warm referral process, we have been able to bring matters to FWO's attention and FWO has used the information provided as part of broader investigations.

Many clients have also benefited greatly from FWO's individual complaint process, where as a result of mediation or other inspector action, clients have been able to enforce their rights in a timely and cost effective way.

**5.1.2.2 *What could be improved: language and accessibility***

As with the FWC, more information in a wider range of languages, coupled with education initiatives to show communities how to access relevant resources, would increase awareness of and access to FWO dispute resolution processes.

Many clients intuitively feel they have been treated unfairly, but due to barriers outlined above, have no idea how to frame their complaint to the FWO. FCLC has found prior to presenting at our Service, some clients have initiated a complaint with the FWO about one aspect of their problem unaware that there are associated issues. In our experience the FWO has not been able to provide the assistance required to explore or assist the client to identify further issues and articulate the full extent of their complaints.

**5.1.2.3 *What could be improved: once clients are in the system***

Similarly, in some cases clients successfully lodge a complaint, however due to ignorance of their rights and the elements required to establish their claim, complaints may be closed due to lacking sufficient detail. Our service has assisted clients to have their cases reopened and subsequently settled after it had initially been closed by FWO.

*One client came to see us complaining that he had missed out on two weeks' pay. His complaint had been closed by the FWO, however he had in fact been underpaid significantly in respect of his hourly rate and number of hours of work paid for each shift. We assisted our client to better articulate his complaint to FWO. The case was re-opened and successfully mediated.*

In other situations clients have presented to our service seeking assistance with one matter (e.g. missing a week of pay), only to discover far more extensive underpayment due to an incorrect hourly rate, lack of annual leave entitlements or superannuation issues.

From our experience, it seems that the FWO does not have capacity to check, advise or enquire further regarding the substantive or additional issues once a complaint has been lodged. Only the issues correctly identified and evidenced by the complainant will be pursued. Vulnerable complainants who contact the FWO require targeted assistance to effectively articulate their complaints. Further resources should be provided to equip FWO to assist vulnerable workers articulate their complaint and enforce their rights, for example through the allocation of specially trained staff to assist with the complaints process, and the use of checklists/further enquires to assist workers to identify all aspects of their complaint.

**5.2.1.4 *What could be improved: increased enforcement powers***

Greater resourcing and coercive powers of the FWO would enhance outcomes for the most vulnerable. For example, compulsory mediation (where employers are compelled

to attend) would greatly improve the efficient resolution of complaints and avoid the expense and delay of unnecessary court actions.

Underpayment of wages and entitlements is a very common issue for our clients. In pursuing underpayment claims, our Service usually sends a letter of demand to the employer. We routinely find that employers ignore our letters of demand. For some cases, we have found that assistance from the FWO to investigate and mediate disputes has meant that employers are more likely to participate in settlement negotiations.

However, in the experience of FCLC, unfortunately it is common for employers to not agree to attend mediation with employees in cases on non-payment of wages. For many clients, this has meant that FWO has closed the file as FWO cannot compel attendance. In order for an employee to then recover unpaid wages, an individual has to start proceedings in Court. This process is costly and time consuming. We submit that compulsory mediations would greatly assist the timely resolution of disputes. We also recommend consideration of enhanced FWO powers to make binding recommendations where mediation is unsuccessful for particularly small claims (for example, with a value of less than \$2000), to further facilitate cost-effective and efficient resolution of entitlements disputes.

Further, to promote efficient resolution of disputes, FCLC is of the view that stronger enforcement by the FWO of the existing FWA provisions relating to the provision of employee records, including the seeking of penalties, would promote greater compliance and more efficient resolution of disputes. We understand that significant resources are required to make this possible, but would emphasise the importance of effective enforcement of laws.

**Recommendations:**

- **Greater powers for FWO to compel parties to attend mediation and make binding recommendations in respect of very small claims.**
- **Stricter enforcement of existing statutory requirements to provide Employee Records and issue penalties.**
- **Provision of information in a wider variety of community languages, including those spoken by newly arrived and refugee communities;**
- **Dedicated staff at FWO who can assist complainants for whom English is an additional language.**

## **5.2 Changes to functions and jurisdiction**

*Should there be any changes to the functions, spread of responsibility or jurisdiction, structure and governance of, and processes used by the various WR institutions?*

As noted above, there is urgent need for independent assistance for vulnerable workers, particularly in respect of unfair dismissal and general protections matters, where FWO is not currently able to assist. There is also need for greater targeted assistance in respect of articulating and pursuing FWO complaints

Furthermore, the piecemeal nature of the workplace relations landscape makes enforcement difficult for vulnerable workers. The different jurisdictions and agencies for enforcement of workplace safety, entitlements, unfair dismissal, general protections, superannuation and discrimination make choice of jurisdiction and case management extremely challenging, particularly for vulnerable clients. This complexity also typically limits the capacity of generalist advice agencies such as Community Legal Centres to provide assistance in these jurisdictions.

#### 4.5 Importance of Community Based Employment Advice Services

***Are any additional institutions required: or could functions be more effectively performed by other institutions outside the WR framework?***

In 2009 the FWO conducted a review of the need for and provision of Community-Based Employment Advice Services (CBEAS) in the light of the introduction of the Fair Work regime (Booth Report)<sup>29</sup>

The Booth Report describes the current employment advice landscape for vulnerable employees as presenting ‘a confusing picture’ if they are sent out alone on the “referral roundabout”.<sup>30</sup> The Report highlights the importance of CBEAS for vulnerable workers:

*There is a significant group of workers with nowhere to go in the absence of community-based services. These are the workers who because of their industry or occupation, employment status or personal characteristics are also more likely to be vulnerable to exploitation at work. They experience a ‘double whammy’ of vulnerability at work and an inability to assert their rights.<sup>31</sup>*

For example, FWO mediation, while it may be regarded as a low impact and relatively informal type of alternative dispute resolution, is extremely confronting for many of our clients.

One of our clients was visibly shaking at her mediation. She said she simply couldn’t have done it without our assistance. This client made it clear that, had she been required to represent herself, she would have withdrawn the complaint. This was for a telephone based mediation. Face to face mediation is likely to be even more arduous.

The Booth Report also stresses the utility of collaboration between government and CBEAS, allowing systemic issues not otherwise pursued.

<sup>29</sup> Anna Booth, *Report to the Fair Work Ombudsman of a Review of Community-Based Employment Advice Services* (Cosolve, 30 September 2009)

<https://www.fairwork.gov.au/ArticleDocuments/716/Report%20of%20a%20Review%20of%20Community%20Bases%20Employment%20Advice%20Services.pdf.aspx?Embed=Y>, 26.

<sup>30</sup> *Ibid*, 25.

<sup>31</sup> *Ibid*, 2.

*CBEAS are not 'underground' organisations that are distinct from the new workplace relations architecture. They are an essential link in the chain of maintaining employment standards. In practice they are treated as such by government bodies that regularly refer workers to them. However, the interdependence within the system should be formally recognised and their visibility improved.<sup>32</sup>*

The work of CBEAS, including FCLC, clearly contributes to the efficiency of the functions of the WR framework.<sup>33</sup> In addition to the critical assistance to vulnerable workers in accessing and effectively utilising the workplace relations system described above, CBEAS provide a crucial triage or filtering function, advising clients with meritless claims or very poor prospects of success not to proceed.

In other respects, FCLC's support and advocacy to assist clients settling their disputes by negotiation increases efficiency and reduces costs by avoiding unnecessary reliance on proceedings advancing to court. CBEAS also promote the efficient passage of disputes through established dispute resolution pathways.

**Recommendation: Provision of greater resourcing for targeted Community Based Employment Advice Services will promote accessible and efficient dispute resolution processes.**

## 6. Issues paper 5 – Independent contractors & sham contracting

*Are there any concerns about the WR system as it applies to independent contractors?*

### 6.1 Vulnerability of independent contractors

Independent contractors are excluded from most of the aspects of the workplace relations system which otherwise apply to employees. For example, independent contractors are not entitled to a minimum wage, are unable to withhold their labour in order to increase their terms and conditions of employment, cannot seek relief from unfair termination of their contract for service and they have no rights to leave such as personal/carer's leave or annual leave.

### 6.2 Sham contracting is rife among newly arrived and refugee communities

In the vast majority cases in which FCLC has assisted, workers who have been engaged under a contract for service (that is, they have purportedly been engaged as an independent contractor) have not in fact been independent. We have found that for all intents and purposes they are dependent contractors, the relationship they have with the person who has engaged them is more akin to or identical to an employment relationship, and they are unable to determine any of their own terms and conditions of engagement. When the multi-factor test is applied to determine whether they are independent contractors or

<sup>32</sup> Ibid, 26.

<sup>33</sup> See for example, Productivity Commission Inquiry Report Volume 1, *Access to Justice Arrangements* (2014).

employees, in the vast majority circumstances we have found that they really are employees are under the law.

Our experiences demonstrate that sham contracting is rife. It is particularly prevalent in road transport and delivery services, the cleaning industry, the home and commercial maintenance industries (e.g. painters), and in the building and construction industry (e.g. tilers). FCLC saw numerous clients working in these industries whose employment relationship was actually one of employer-employee. Clients were paid an hourly rate, wore a uniform, had all equipment provided by the employer, worked for only one employer, were unable to take time off work and were unable to subcontract.

In an FCLC survey, the following comments were provided to FCLC by various community workers who were not prompted to give these responses as they were not directly asked about sham contracting.<sup>34</sup>

‘Client was told they would only hire him if he had an ABN.’

‘Clients don’t know their rights and what they should be paid. They are taking jobs and using ABNs without knowing what that means.’

‘A lot of clients are told by employers they have to obtain ABNs even though it’s not appropriate for the work they are doing.’

FCLC has seen instances of employers obtaining ABNs for workers, and instances of jobs being offered conditional upon having an ABN. There is often little if any choice in a worker’s ‘acceptance’ of position as a contractor. Often that type of engagement is the only one on offer and is made on a take it or leave it basis. For someone desperate to make a start in a new country the basic need to work and earn an income is often overshadowed by the terms and conditions under which the work is offered. This is often something that principals take advantage of.

### 6.3 Sham contracting results in exploitation

The problems our clients face as a result of being falsely engaged as an independent contractor when in fact they are employees include:

- Our clients are not receiving minimum award wages or the national minimum wage. Our clients are mostly people who are low paid, award-reliant workers doing unskilled or low-skilled labour. The fact that they are doing the work of an employee which should at least provide them with the security of the basic minima (the NES, award or national minimum wages) and are not creates a dangerous precedent. People who are ostensibly employees are receiving less than they should. This creates serious issues for the labour market in terms of not only our clients but employers and principals who in an effort to compete with those in breach of the law feel that they must also undercut the minimum protections. There should be absolutely no ability to pay a person less than the national or award minimum wage for labour performed. Likewise, a person performing labour should

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<sup>34</sup> Full details can be found at Dow, above n 3, 12.

be provided with all rights, entitlements and protections, afforded to an employee under the FW Act, an award, or other industrial or health and safety legislation. Labour standards should not be able to be contracted out of simply by labelling something that which it is not.

- Our clients are rarely receiving superannuation contributions. This is the case even though Superannuation Guarantee Ruling 2005/1 provides that they must receive superannuation contributions if they are engaged under a contract that is principally for labour.<sup>35</sup> A contract will be principally for labour if it is mainly for the person's labour, which may include:
  - physical labour
  - mental effort, or
  - artistic effort.

The ATO provides that a contract may be considered wholly or principally for labour, if the contractor:

- is remunerated wholly or principally for their personal labour and skills,
- must perform the contract work personally, and
- is paid by reference to hours worked rather than completion of the contract.

If the contract is made with someone other than the person who will actually be providing the labour, there is no employer-employee relationship.

Many of our clients are not even aware that there is a difference between an employee and independent contractor and asking the questions necessary to apply the multi-indicia test can be difficult. It is very concerning to us that our clients are often told by the person hiring them that if they have an ABN they are automatically a contractor.

In many circumstances we find that in reality it is exceedingly difficult to resolve the initial problem of correctly labelling the worker as an employee. Applying the multi-factor test and trying to convince a belligerent employer is a time and resource consuming task. Many of our clients are so desperate for payment that they often opt to accept their misclassification as an independent contractor and seek to enforce the non-payment of their contractor agreement in the relevant tribunal (e.g. VCAT) or court. The client then is left to 'accept' what would otherwise be an underpayment claim and a loss of accrued entitlements such as annual leave. They may also forfeit their ability to bring other claims for unfair dismissal.

## **6.4 A definition of independent contractor would assist**

### ***What are the advantages and disadvantages of creating a statutory definition of an independent contractor?***

Rather than applying the multi-factor test to each situation where there is doubt as to a worker's true status, it may be more efficient and would provide more certainty if a statutory definition was introduced. This definition should include a presumption that a worker is an employee unless certain conditions are met. For example, the ATO's superannuation eligibility test could be adopted more broadly. That is, if a worker is

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<sup>35</sup> Australian Government Tax Office, Superannuation Guarantee Ruling 2005/1, <http://law.ato.gov.au/pdf/pbr/sg2005-001.pdf>.

engaged under a contract that provides that more than half of the value of the contract is for the person's physical labour, mental effort, or artistic effort, that person should be deemed to be an employee for all purposes.

Alternatively, Andrew Stewart and Cameron Roles in their Submission to the ABCC Inquiry into Sham Arrangements and the Use of Labour Hire in the Building and Construction Industry proposed that the term 'employee' should be redefined in a way that would strictly limit independent contractor status to apply only to those workers who are genuinely running their own business:<sup>36</sup>

*A person (the worker) who contracts to work for another is to be presumed to do so as an employee, unless it can be shown that the other party is a client or customer of a business genuinely carried on by the worker.*<sup>37</sup>

They recommend that this definition could be included in any legislation which uses the term 'employee'.

One area in which problems may arise is where a principal/employer seeks to include a provision into the contract that provides that a worker can hire others to perform the work. The insertion of such a provision may be an attempt to obfuscate the reality of the relationship and it should not carry any weight in the consideration of whether a worker is an employee.

A definition similar to those outlined above would greatly assist our clients to enforce their rights more efficiently, without inhibiting the ability of those who are genuinely independent to contract accordingly. The advantages of such definitions are that there is less time used in the application of the multi-factor test, there is greater likelihood of consistent outcomes (recalling our previous submissions about the application of the test resulting in different outcomes) and there is much greater fairness for workers. In the application of the definition there should be a presumption from the commencement that a person is an employee.

The fairness consideration should weigh greatly in favour of workers in that in many cases their labour is the only thing they have to offer an employer or principal. If they are offering up their labour they should receive the minimum legislated and award derived entitlements to employees.

**Recommendation: a statutory definition of independent contractor should be introduced. It should include a presumption that a worker is an employee.**

<sup>36</sup> Andrew Stewart and Cameron Roles, *Submission to the ABCC Inquiry into Sham Arrangements and the Use of Labour Hire in the Building and Construction Industry*, <http://fwbc.gov.au/sites/default/files/Andrew%20Stewart%20and%20Cameron%20Roles%20-%20SCRT%20Submission.docx>.

<sup>37</sup> *Ibid*, 5.



## 6.5 Employers and principals need to take proactive steps to avoid sham contracting

FCLC regards the current provisions in the FWA insufficient to discourage sham contracting.

The provisions of subsection 357(2) should be dramatically re-written. The subsection provides:

(2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:

- (a) did not know; and
- (b) was not reckless as to whether;

the contract was a contract of employment rather than a contract for services.

The provision offers a defence to an employer which is broad and relatively easy to rely upon.

Employers are in a far superior position to a worker in terms of resources and knowledge of the workplace relations system. They should have a duty to undertake the necessary consideration and assessment of whether or not a worker is an employee or independent contractor. They should be able to positively assert that the relationship they are entering into with a worker is the correct one.

To increase compliance with sham contracting laws, FCLC proposes the introduction of a requirement that a person who asserts that he or she is engaging an independent contractor must complete a document which is lodged with the Fair Work Commission which includes details of the engagement and includes a statement by the principal setting out why he or she believes that the engagement:

- (i) is properly one which establishes a relationship of contractor and principal; and
- (ii) the reasons why this is so, including the steps taken by the contractor to establish (i).

This document should be provided to the independent contractor to be able to be used in a court or tribunal should there be a dispute as to whether the relationship was originally one of principal and contractor, or has subsequently lost such features. There should be a reverse onus applied so that a worker can assert that he or she was actually an employee and the principal/employer should then be required to prove this was not the case. This would be a significant deterrent as it would require employers to be vigilant at the commencement of a relationship and to make proper inquiries and obtain appropriate professional advice. It would create an initial compliance burden on the employer, but there would be a valuable return for society in terms of less litigation and a quicker resolution of disputes.

The employer should not be able to rely on lack of knowledge or be able to assert that he or she was not reckless in relation to gaining knowledge.

A court or tribunal can then apply an objective test to ascertain whether a reasonable person would have reached the same conclusion as the principal.

In addition to the above FCLC submits that it should be harder to obtain an ABN. In no circumstances should a principal be able to obtain an ABN on behalf of a worker. Proper consideration of all the facts and circumstances and the relevant test should be applied before an ABN is issued. ABNs should not be issued after a short internet application. FCLC acknowledges that this would increase costs and compliance obligations however these are outweighed by the need to offer protection to workers.

**Recommendations:**

- **Employers and principals should have a positive obligation to ensure they classify their workers appropriately. There should be no recklessness/lack of knowledge defence.**
- **Principals should be required to submit a statement explaining the nature of the contracting relationship**
- **More rigorous tests should apply before an ABN is given to an individual**

## **6.6 General protections should cover contractors who enquire about the terms of their engagement**

Independent contractors are able to access the general protections found in Division 3 of Part 3-1 of the FW Act. An independent contractor must not suffer adverse action if he or she has a workplace right, has/has not exercised a workplace right, or proposes to/not to exercise a workplace right.

Unlike employees, independent contractors are not protected from adverse action if they make a complaint or inquiry about the terms of their engagement. This is a key workplace right, the existence of which offers a great deal of protection for employees who find themselves the subject of adverse action if they for example make a complaint about the non-payment of superannuation, raise issues about safety at work, or inquire about their pay slips. The same protection should be afforded to independent contractors so that should they complain or make an inquiry with their principal they are able to rely on the same protections as employees. It would act as an effective deterrent to principals 'punishing' independent contractors who seek to resolve issues with the contracting arrangement at an early stage. It would prevent parties from having to rely on other avenues of redress in a tribunal (other than the Commission) or court.

**Recommendation: the Fair Work Act general protections provisions regarding complaints or enquiries should apply equally to contractors and employees**

## **7. Issues paper 5 - Superannuation**

Further to our submissions above, we wish to mention that we have observed that the non-payment of superannuation for vulnerable workers is a significant issue.