Inquiry into corporate evasion of the Fair Work Act

Legal Aid NSW submission to the Senate Education and Employment References Committee

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Legal Aid NEW SOUTH WALES

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, housing, employment, social security and access to essential social services. The Civil Law Division has a specialist employment law team that provides information, advice, minor assistance and representation for workers in NSW. More information on Legal Aid NSW employment law related services is set out in Appendix 1 to this document.

Legal Aid NSW welcomes the opportunity to provide a submission to the Senate Inquiry into Corporate Evasion of the Fair Work Act.

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Introduction

Legal Aid NSW's employment law services

Legal Aid NSW provides information, legal advice, minor assistance and representation to vulnerable workers in NSW. Many of these workers have been underpaid, or otherwise exploited in the workplace. As such, Legal Aid NSW is well placed to comment on the incidence of, and trends in, corporate evasion of the *Fair Work Act 2009* (Cth) (**FW Act**), which we have observed through our advice and casework services.

Legal Aid NSW's priority clients include workers who are:

- migrant workers, including former refugees and workers exploited on student, holiday and sponsored work visas
- casual/temporary workers and labour hire workers
- workers with disabilities
- workers with poor literacy
- Indigenous workers
- younger workers (in their teens and early 20s) and workers over 55
- workers who live in regional and remote areas, where there are high levels of unemployment and social disadvantage
- pregnant workers and workers with caring responsibilities
- workers who have been the victim of unlawful exploitation.

The focus of our submission

Legal Aid NSW will address the following Terms of Reference in this submission:

e) the avoidance of redundancy entitlements by labour hire companies

f) the effectiveness of protections afforded to labour hire employees from unfair dismissal

h) the extent to which companies avoid their obligations under the FW Act by engaging workers on visas

i) whether the National Employment Standards and modern awards act as an effective 'floor' for wages and conditions and the extent to which companies enter into arrangements that avoid those obligations.

Legal Aid NSW will also address the effectiveness of protections afforded to labour hire employees from breaches of the general protections provisions of the FW Act, as a 'related matter' pursuant to term (l) of the Committee's reference.

The avoidance of redundancy entitlements by labour hire companies (ToR – e)

Use of labour hire employees can be an effective way for employers to avoid paying redundancy entitlements. An employee of a labour hire company will often work at the direction of the host, so that the labour hire employee is indistinguishable from an employee of the employer. However, if the labour hire employee's assignment ends due to a downturn in the host's business, the labour hire employee will not be entitled to a redundancy payment. Even in circumstances where the labour hire has for years performed identical work to an employee of the host, the labour hire employee will not be entitled to a redundancy payment under s119 of the FW Act because he or she has not been made redundant from his or her employer, the labour hire company.

The principles relating to redundancy found in ss 119 and 389 of the FW Act apply to permanent employees of labour hire employees as they do to permanent employees of any other employer to whom the FW Act applies. This means that in most circumstances the labour hire company will be required to consult with an employee about the redundancy[1] and has an obligation to consider redeploying the employee.[2] A labour hire company may have few, or no other contracts for services so redeployment options may be limited. Further, Legal Aid NSW observes that a large number of labour hire employees are employed on a casual basis. Casual employees are not entitled to a redundancy payment in the event of being made redundant.[3]

Case Study: Labour hire - Redundancy

Anna was employed by a labour hire company to work as an Executive Assistant to the new Chief Financial Officer of an energy company. Anna and her boss started at the energy company on the same day. Anna has worked at the energy company for six years. Anna is a casual employee of the energy company. Anna is paid $48 per hour but is not paid annual leave and does not accrue sick leave.

Anna's boss is made redundant. Anna's boss receives four week's pay in lieu of notice of the termination of his employment and 11 weeks redundancy pay. Anna is given one week's notice that her assignment at the energy company will end. Anna does not receive a redundancy payment. Anna has not received any other work from the labour hire company since her assignment at the energy company ended.

[1] Section 389(1)(b) FW Act.
[2] Section 389(2) FW Act.
[3] Section 123(1)(c) FW Act.

The effectiveness of any protections afforded to labour hire employees from unfair dismissal (ToR – f)

Labour hire employees are not adequately protected by unfair dismissal laws and are significantly more vulnerable to unfair treatment than direct employees of the host. Labour hire employees have very limited access to unfair dismissal remedies when their assignment with the host comes to an end, despite this often resulting in the end of steady work that they may have been doing for many years. We considered these and other challenges posed by labour hire arrangements in our submission to the Productivity Commission Inquiry into the Workplace Relations Framework.[4]

Unfair dismissal rights against the host

While it is often the host that determines when an assignment will end, labour hire employees cannot make an unfair dismissal claim against the host, unless it is established that the host is the employee's true employer.[5] Australian courts have not adopted the concept of joint employment, which recognises two or more unrelated entities as the employers of a worker and subjects all employer entities to labour regulation including responsibility for dismissal. The current approach in Australia is to determine which of the labour hire firm or the host is the true employer.[6] Under standard labour hire arrangements the labour hire firm is considered the employer.[7]

A host company can remove a labour hire employee from their workplace for any reason aside from a discriminatory reason.[8] The host does not have to give the labour hire employees warnings about poor performance or an opportunity to comment on why their assignment should not conclude.[9]

However, where an employee was first employed by a labour hire company and subsequently employed directly by the host, the labour hire employee may be considered to be a 'transferring employee' for the purposes of the FW Act.[10] If a labour hire employee is a transferring employee, the employee's period of service with the labour hire company

[4] Legal Aid NSW, Submission to the Productivity Commission Inquiry into the Workplace Relations Framework Issues Papers March 2015 http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0015/21903/Legal-Aid-NSW-Submission-to-the-Productivity-Commission-on-Workplace-Relations-March-2015.pdf at [107] – [110].
[5] *FP Group Pty Ltd v Tooheys Pty Ltd* [2013] FWCFB 9605, *Beazley v Visy Paper Pty Ltd trading as Visy Recycling* [2012] *FWA* 5136, *Chidiac v Woolworths* [2016] FWC 1395.
[6] *FP Group Pty Ltd v Tooheys Pty Ltd* [2013] FWCFB 9605.
[7] See for example *Barnard v Energy Developments Ltd* [2016] FWC 4207, *Chidiac v Woolworths* [2016] FWC 1395, *Cresp v Nissan Casting Plant (Australia) Pty Ltd* [2016] FWC 3845, *Barnard v Energy Developments Ltd* [2016] FWC 4207.
[8] Federal and state discrimination laws protect workers under a contract for services against discrimination: *Racial Discrimination Act 1975* (Cth) s15, *Sex Discrimination Act 1984* (Cth) s16, *Disability Discrimination 1992* (Cth) s17, *Age Discrimination Act 2004* (Cth) s20.
[9] See for example *Kool v Adecco Industrial Pty Ltd* [2016] FWC 925.
[10] FW Act, s311.

is counted when determining the employee's length of service for the purpose of determining eligibility to lodge an unfair dismissal claim.[11]

Unfair dismissal rights against the labour hire company

Employees of labour hire companies can make unfair dismissal claims against their employers. However, employees of labour hire firms face some particular challenges to exercising their rights.

Some labour hire employees are engaged by the labour hire company on a casual basis or for a fixed term or task. Contracts of engagement may include express terms that the availability of ongoing work is reliant on third parties. Casual employees are only protected from unfair dismissal where the employee was engaged on a regular and systematic basis and had a reasonable expectation of ongoing work.[12] Some employees of labour hire companies are not regular and systematic casuals and so are not protected from unfair dismissal.

In *Kool v Adecco Industrial Pty Ltd,*[13] a casual employee of a labour hire company succeeded in making an unfair dismissal claim against her employer Adecco, a labour hire company. Ms Kool was removed from the host Nestle after working at Nestle for over two years. Adecco removed Ms Kool from Nestle without investigating the misconduct allegations against her. Further, Adecco offered Ms Kool only short term assignments that were different from her assignment at Nestle after her assignment at Nestle ended. The Fair Work Commission found that there was insufficient evidence to conclude that Ms Kool had signed a 'candidate declaration' acknowledging that placements could end at one hour's notice, or that she accepted those terms of employment. It was on this basis that the FWC distinguished Ms Kool's situation from other decisions.[14]

Whilst Ms Kool's unfair dismissal claim was successful, unfair dismissal applications lodged by casual employees of labour hire companies often fail. Casual labour hire employees are generally considered not to have been dismissed when an assignment ends if they are informed that they remain 'on the books' and may be offered other assignments.[15]

In *Pettifer v MODEC Management Services Pty Ltd*,[16] Mr Pettifer failed in his unfair dismissal claim against his employer, MODEC, a labour hire company. Mr Pettifer had worked for the host BHP Billiton Petroleum Inc (BHPB), for six years when BHPB directed MODEC to remove Mr Pettifer from the site following a near miss safety incident. MODEC indicated that it was surprised by BHPB's decision, and thought a written warning may have been appropriate. MODEC tried to find another role for Mr Pettifer but was unable to do so and so ultimately dismissed Mr Pettifer. MODEC stated that Mr Pettifer's dismissal

[11] *Burdziejko v ERGT Australia Pty Ltd* [2015] FWC 2308.
[12] Section 384(2) FW Act.
[13] [2016] FWC 925.
[14] *Kool v Adecco Industrial Pty Ltd* [2016] FWC 925.
[15] For example, *Bradford v Toll Personnel Pty Ltd T/A Toll Ipec* [2013] FWC 1062, *Shelton v Ultra NDT ATF The O & A Kavanagh Family Trust T/A Ultra NDT Pty Lt*d [2014] FWC 2646*, Beach v ATC Worksmart* [2015] FWC 6159
[16] *Donald Pettifer v MODEC Management Services Pty Ltd* [2016] FWCFB 5243.

was not due to his conduct or performance, but occurred due to the contract between MODEC and BHPB. The Fair Work Commission noted that the contract between MODEC and BHPB obliged MODEC to remove an employee from the site if directed to do so by BHPB and found that Mr Pettifer's dismissal was not unfair because there was nothing in practical terms MODEC could do in the circumstances about BHPB's decision to remove Mr Pettifer from the site.

In *Dale v Hatch Pty Ltd*,[17] Ms Dale failed in her unfair dismissal claim against her employer Hatch, a labour hire company. Hatch is a consultancy business that provides engineering, construction and management services. Ms Dale was employed by Hatch to work as the Site and Administration Facilities Lead on a project being undertaken by Hatch's client, Anglo American Metallurgical Coal (AAMC). Ms Dale worked in this capacity for over two years. Hatch terminated Ms Dale's employment when AAMC indicated that it no longer required the services provided by Ms Dale.

The Full Bench of the Fair Work Commission accepted that an employment contract to perform work of an ongoing and generic nature for a third party client until the client no longer requires the work does not constitute employment for a specified task. However, Ms Dale's unfair dismissal application failed because Ms Dale understood that she was employed on the basis that her employment with Hatch would end when AAMC decided that it no longer required her services. The decision to abolish Ms Dale's role was not within Hatch's control and the termination of her employment accorded with the expectation of both parties.

Legal Aid NSW has observed that many labour hire employees are confused about their employment status and mistakenly believe that they are employed by the host. This lack of clarity regarding labour hire arrangements has been acknowledged by the Fair Work Commission, with Deputy President Ashbury stating that labour hire arrangements "can be a minefield for all concerned both in practical terms and in terms of rights and obligations arising under legislation, industrial instruments and contracts of employment."[18]

The current unfair dismissal regime leaves labour hire employees highly vulnerable to unfair treatment, with very little recourse. Legal Aid NSW considers that labour hire workers should benefit from the same protections under the FW Act as employees engaged directly by employers.[19]

Recommendation 1 - That consideration be given to amending the FW Act to permit labour hire employees to bring unfair dismissal claims against host firms where their assignment has been terminated in unfair circumstances.

[17] [2016] FWCFC 922.
[18] *Kool v Adecco Industrial Pty Ltd* [2016] FWC 925, at 46.
[19] We also note that because of the nature of labour hire work, labour hire employees are less likely to benefit from the casual conversion clauses that exist in some awards. See See Victorian Inquiry into the Labour Hire Industry and Insecure Work 31 August 2016 http://economicdevelopment.vic.gov.au/__data/assets/pdf_file/0016/1390111/IRV-Inquiry-Final-Report-.pdf [3.2.3] page 96.

The extent to which companies avoid their obligations under the FW Act by engaging workers on visas (ToR - h)

A significant number of Legal Aid NSW's clients are in Australia while on temporary visas. Many of these clients report that they have experienced workplace exploitation, and have been underpaid their statutory entitlements. Such clients are generally on one of three visas categories: student visas, working holiday visas or 457 skilled migration visas.

Workers on student visas

In our experience, workers on student visas are vulnerable to exploitation in employment as they have limited work rights and have often come to Australia to work rather than to study. These clients will often have poor or very limited English language skills and limited economic resources available to them. Our clients report being paid in cash, under the award rate and without penalty rates. Because our clients have sometimes worked in breach of their visa conditions, they are susceptible to threats of being reported to the Department of Immigration and Border Protection (**DIBP**). Many of these workers are concentrated in certain industries such as retail, food manufacturing, hospitality, construction and cleaning.

Many genuine overseas students face the economic pressure of having to support themselves in Australia. These students arrive in Australia believing that they will be able to survive by obtaining part time employment in accordance with their visa conditions. Their need to meet their living expenses and pay hefty course fees mean that these students become desperate and agree to wages and conditions that are exploitative.

> ***Case Study: Student visa***
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> Bambang is from Indonesia. He is in Australia on a student visa and works in Sydney in a factory. Bambang's employer is a food manufacturer. All the workers in the factory are on student visas. The workers routinely work in excess of 50 hours per week, doing shift work and weekend work, in breach of their visa conditions. The workers are paid the minimum hourly wage for the work. No shift penalties, over-time or casual loading is paid to the workers. All the workers are underpaid and scared that the employer will report them to DIBP and that they will be deported if they complain about their conditions.

Workers on working holiday visas

Legal Aid NSW sees many young people on working holidays who have been underpaid by their employer. They report non-payment of their wages, as well as bullying, which can be particularly challenging when the young person is working in a remote location. Legal Aid NSW finds many of these visiting young people are exploited while working in the hospitality, agriculture, retail and construction industries. We know from our practice experience that non-payment of short term employees is a business model for some small businesses.

Case Study: Working holiday visa

Alessandro is from Italy. He is in Australia on a working holiday. He is 28 years old and has limited English. Alessandro cannot afford not to work and found a job through an internet site, 'Gumtree'. The job was for a kitchen hand in an Italian restaurant in the northern suburbs of Sydney. Alessandro contacted Paolo, the contact from the ad, and was offered the job. Paolo told Alessandro the name of the restaurant and how to get there. Alessandro worked six nights from 4pm until midnight in the kitchen, including a Sunday night. Paolo told Alessandro that pay week was the following week. Alessandro worked another 5 nights the following week. Alessandro asked Paolo again about when he would be paid his wages. Paolo summarily dismissed Alessandro without any pay. Alessandro does not know Paolo's surname. He was not asked to sign a contract of any kind. He was not paid and did not get pay slips. The internet advertisement did not identify the name of the employer, only Paolo. A search of the business name showed it was registered to a different person than Paolo, someone who Alessandro had not met and did not know. Alessandro was not able to commence a small claim because he could not identify the legal entity that employed him.

Workers on sponsored work visas

Legal Aid NSW sees many clients on sponsored work arrangements. That is, their right to be in Australia is contingent upon them continuing to work for the sponsoring employer. These clients report that they are exploited by the employer because of this inherent power imbalance in the employment relationship.

The minimum salary for 457 visa holders is set by legislative instrument made under the Migration Regulations 1994.[20] Since 2013, the minimum salary for workers on a 457 visa has been $53,900. The Regulations also state that workers must not be required to contribute to the employer's cost of engaging a sponsored employee.[21]

Many workers we see on 457 visas are paid below the 457 minimum salary or are not otherwise properly compensated for the long, anti-social hours they work. Many workers on 457 visas also report breaches of the National Employment Standards (**NES**). Our clients also tell us that their employers threaten to terminate their employment and thus end their sponsorship unless they agree to work long hours for wages below the 457 visa worker minimum wage. Employees also report that their employers sometimes require them to return a portion of their wage to the employer to circumvent the employer's obligation to pay the employees the 457 minimum salary or to not require the employee to contribute to the sponsor's costs of employing him or her.

If a sponsor terminates a worker's employment, the worker only has 90 days to find an alternative sponsor. This is often not a sufficient amount of time, particularly where the sponsored worker does not possess skills that are genuinely in high demand by the market. This means that workers often remain in exploitative arrangements for fear of

[20] Migration Regulations 1994 (Cth) Specification of Income threshold & Annual Earnings IMMI 13/028
[21] Regulation 2.87 in *Migration Regulations 1994 (Cth)*.

having their employment terminated. Workers who are dismissed and who are forced to return to their home country because they cannot find alternative employment face practical difficulties in commencing wages and entitlements claims in Australian courts from overseas.

Recommendation 2 - That all individuals arriving in Australia on a work visa be given information about their minimum entitlements.

Recommendation 3 - That consideration be given to the establishment of a well-resourced, dedicated unit within the Fair Work Ombudsman to investigate claims of exploitation of workers on temporary visas with a brief to pursue unpaid entitlements of workers no longer resident in Australia.

The effectiveness of the National Employment Standards and modern awards as a 'floor' (ToR – i)

Legal Aid NSW observes that the NES and modern awards do not act as an effective 'floor' for wages and conditions. Legal Aid NSW sees clients whose employers have breached minimum wages and conditions provided by the NES and modern awards. Migrant workers are often particularly vulnerable to exploitation because they are on a visa or because of their language difficulties and/or low skills.

Case Study: Student Visa/Working Visa

Rosie is 28 years old. She is from the Philippines and was working in Australia on a student visa as an age and disability carer. Her employer then sponsored Rosie on a 457 visa. The sponsor advised DIBP that Rosie was in a different role to that of a carer, as carers are not on the Consolidated Sponsored Occupations List. Rosie was required to work as a carer from 6.00 am to 12.00 pm, seven days per week. In addition to being required to work excess hours, she was not paid award wages, shift loadings or over-time rates and her superannuation was not paid. The employer's entire workforce are on student or 457 visas. When Rosie complained the employer threatened not to assist her with her application for permanent residence. When Rosie contacted DIBP for help, DIBP told Rosie that she was in breach of her visa conditions and did not progress her complaint.

Legal Aid NSW observes that three common ways in which employers enter into arrangements to avoid the NES are by sham contracting, engaging employees as franchisees and directing employees to establish their own business. Engaging workers as independent contractors, franchisees or as a business means that the employer is no longer required to: pay the minimum wage, comply with the NES or comply with obligations under workers compensation law. The employer may also be able to avoid their obligations under superannuation law, depending on the manner in which the worker is engaged.

Sham contracting

Sham contracting occurs where a worker who is in substance an employee is engaged as an independent contractor. Sham contracting is unlawful under the FW Act. [22]

Legal Aid NSW observes that sham contracting is rife in low skilled and low paid industries. Sham arrangements are commonly found in cleaning and construction industries. However, we are now seeing low paid white collar workers like receptionists in doctors' surgeries who have been told to acquire an Australian Business Number and invoice their 'employer.'

There have been many cases setting out the indicia of an employment relationship compared to an independent contracting relationship.[23] Legal Aid NSW observes that employers, and their advisers, are aware of the jurisprudence and are becoming more sophisticated in their attempts to style what is in truth an employment relationship as an independent contracting relationship.

Workers will often be engaged under a written independent contracting agreement. The agreement often states that no employment relationship is created, that workers can outsource their job to anyone else and gives the employee a level of freedom in how to perform their job. When these workers come to Legal Aid NSW they tell us that because of the practical power imbalance between themselves and the 'employer' they did not really have the independence that their contract indicates that they have. Whilst the court will look at the substance and not the form of the relationship,[24] 'employers' are making the distinction between employment and independent contracting harder to draw.

Case Study: Sham contracting

Majid has worked at an optometrist's shop for seven years. He works regular hours from 9.00 am to 5.00 pm. He does not accrue sick leave or annual leave. However, if Majid is sick and will not be attending work, he is required to contact his boss and tell him that he won't be at work. No one at Majid's workplace wears a uniform. Majid did not supply any of his own equipment. Every day, Majid's boss tells him what work he should do. Majid is paid $30 per hour. Majid has an ABN and every month he gives his boss an invoice for the work he performed that month.

One day, Majid's boss sacks him on the spot. Majid received no warnings and does not know why he was sacked. Majid received no notice that his job was going to end and did not receive any pay in lieu of notice. Majid was not paid pro rata long service leave. Majid is angry about being dismissed and tells his boss that he is going to lodge an unfair dismissal claim. Majid's boss tells Majid that he is an independent contractor and

[22] See FW Act, ss357, 358, 359.
[23] For example *Hollis v Vabu* (2001) 207 CLR 21, *Stevens v Brodribb Sawmilling* (1986) 160 CLR 16
[24] *On Call Interpreters and Translators Agency Pty Ltd v. Commissioner of Taxation* (2011) 214 FCR 82.

that he cannot make an unfair dismissal claim and that he was not entitled to annual leave, sick leave, notice of the termination of his employment or long service leave.

Franchising

Workers often commence in an employment relationship and are then enticed by their employer to become a franchisee. These workers are usually promised substantial profits if they enter into the franchise agreement. However, often once the employee is transferred to franchisee, he or she does not earn even the minimum wage. This practice is prevalent in the fitness industry and has a disproportionate negative impact on young people.

Case Study: Employee told they are a franchisee

Bruce worked for a gym. Bruce was told he was a franchisee and that he had to pay $200 per week to enable him to work at the gym as a personal trainer. He had to wear the uniform of the gym, do the work the manager directed him to do, which included cleaning the toilets. Bruce's boss told him that he was unable to work elsewhere. Bruce's boss directed him to stay on the premises for 38 hours per week. Bruce did not receive even the minimum wage while he worked at the gym and was in fact regularly out of pocket each week. His income was to come from the customers he recruited to train with him within the gym minus the payment that he was obliged to make.

Set up a proprietary limited company

Legal Aid NSW is increasingly seeing situations where employees are requested or required by their employer to set up a proprietary limited company. Sometimes, the employee's company then employs other workers who are, in reality, working for the original employer in a kind of sham labour hire arrangement. Employees are generally unaware of the consequences of moving from an employment relationship as a natural person to incorporating a company and that entity engaging in a contract of services with another legal entity. These workers are also generally unaware of their obligations under the corporations law or as an employer.

Case Study: Employee told to set up Proprietary Limited Company

An illiterate employee was told by their employer to sign papers to set up a proprietary limited company. The employer arranged for the papers to be drafted and sent to the Australian Securities and Investments Commission (ASIC). The employer then paid this employee and a number of its other employees through this new company, controlled by the original employer. The workers were underpaid and other employee entitlements and statutory benefits were not paid.

Recommendation 4 – That ASIC produce simple publications in a number of community languages that describe what it means to work under an Australian Business Number or to incorporate a company. Individuals should not be able to obtain an ABN or incorporate a company without viewing the information.

The effectiveness of protections afforded to labour hire employees from a breach of their workplace rights (general protections) (ToR – l)

A labour hire employee has a limited ability to make complaints about unfair treatment by the host.[25] A host may end the assignment of an employee of a labour hire firm for improper reasons such as because the worker has family responsibilities, a workplace injury or because he or she exercises a workplace right such as complaining about bullying or work or health and safety practices. Whilst the employee may have rights against the host under discrimination law in these circumstances,[26] the employee of the labour hire company has limited recourse against the host under the FW Act.

The labour hire company may not have a contract with other employers and so may not be able to offer the employee other work after the host has directed that the employee is removed from the host's site. Alternatively the labour hire company may 'blacklist' the employee because of the host's request to remove the worker from its site. In these circumstances, the employee may remain 'on the books' of the labour hire company but never be offered further work. Employees in this situation have limited ability to bring a general protections claim against the host, and for the reasons outlined in response to term of reference (e) above, limited rights to bring an unfair dismissal claim.

Case Study: Labour hire and general protections

Marcus works in a mine. He is a tradesman and does shift work at the mine, living on site in the weeks he is rostered on. He is not employed by the mine but by a large labour hire company. Marcus was concerned about some of the WHS practices and raised his concerns about WHS with his manager. Marcus saw no follow up from his initial complaint and he raised his safety concerns again. Marcus went on leave for two weeks. The evening before Marcus was due back at the mine he was contacted by phone by the labour hire employer and advised the host would not have him back on site. The labour hire company does not have an alternative placement for Marcus.

[25] See Victorian Inquiry into the Labour Hire Industry and Insecure Work 31 August 2016 http://economicdevelopment.vic.gov.au/__data/assets/pdf_file/0016/1390111/IRV-Inquiry-Final-Report-.pdf [3.4.3].
[26] See footnote 8 above.

Recommendation 5 - That consideration be given to amending section 342 of the FW Act to clarify that a general protections claim can be brought by a labour hire employee against the host.

Appendix 1: Legal Aid NSW Employment Law Services

Overview

Legal Aid NSW assists some of the most vulnerable workers with their employment related legal problems. We provide workers with advice, assistance and representation.

Many of our clients are at risk of long term unemployment – an outcome that we aim to prevent. The vulnerable workers we give ongoing assistance to and represent include:

- migrant workers, including former refugees and workers exploited on student, holiday and sponsored work visas
- casual/temporary workers and labour hire workers
- workers with disabilities
- workers with very poor literacy
- Indigenous workers
- younger workers (in their teens and early 20s) and workers over 55
- workers who live in regional and remote areas, where there are high levels of unemployment and relative poverty
- pregnant workers
- workers who have been the victim of unlawful exploitation.

The level of assistance and representation we provide depends on the application of our policies and guidelines.

Our services

In accordance with our policies, grants of legal aid for litigation are available for the following types of matters:

- unfair dismissal proceedings in the Fair Work Commission
- unfair work contract proceedings in the Federal Circuit Court or the Federal Court
- recovery of unpaid wages and entitlements in excess of $20,000 in the Federal Circuit Court or the Chief Industrial Magistrates Court of NSW
- proceedings for contravention of the general protections found in the Fair Work Act.

Grants of aid are subject to a range of eligibility policies including the application of a means and merit test. In addition, for most matters, the worker must be at 'social disadvantage' in order to be granted aid.

Where for policy reasons a grant of aid is not available, we may provide some limited assistance and representation (in accordance with guidelines and discretions) where the worker is vulnerable and the matter has significant merit.

Our advice sessions (clinics) at Head Office in Haymarket and throughout NSW are open to any worker who needs initial advice. This advice service is currently not means tested.

Service objectives

The fundamental objective of employment law services provided by Legal Aid NSW is to assist workers at risk of unemployment and its consequences, namely social exclusion and serious economic hardship. We seek to provide our services on an early intervention basis and to utilise dispute resolution processes such as conciliation. Wherever possible, we strive for outcomes that will allow workers to remain in employment or assist them back into the workforce as soon as possible.

We also pursue strategic litigation where there are systemic breaches of the law and where public interest issues arise.

Recent service data

During 2015/16, Legal Aid NSW provided employment law advice on 3422 occasions. During the same period we provided legal assistance on 1093 occasions. Assistance in a significant number of matters has included advocacy at Fair Work Commission conciliations.

Information resources

Legal Aid NSW has developed a number of plain language employment law fact sheets and publications targeted at vulnerable workers, alerting them to unlawful employer practices and informing workers of their rights. These include:

- Ripped Off? Your rights about unpaid wages and entitlements at work – produced jointly with the Far West Community Legal Centre
- Employment Problems: Spot the Signs
- Your workplace rights during natural disasters and emergencies.

These publications are available in print form and on our website: www.legalaid.nsw.gov.au.