

WEstjustice

30 March 2021

Select Committee on Job Security
Department of the Senate
PO Box 6100
Canberra ACT 2600

Dear Select Committee members

Job security in Melbourne's West

We are pleased to be able to make a submission to your inquiry based on the work of our Employment and Discrimination Law Program (**EDLP Program**) .

About WEstjustice and Melbourne's West

WEstjustice is a community legal centre providing services to people who live or work in Melbourne's West.

Melbourne's western suburbs encompass six local government areas and a population of approximately 900,000 people and is growing rapidly.¹ It is one of the most diverse regions in Australia with significant representations of communities from Asia, Africa and the Pacific Islands. It is also an area with high levels of casual and low income workers.²

WEstjustice's EDLP seeks to improve employment outcomes for vulnerable workers including migrants, refugees, temporary visa holders, young people and people who have experienced gender-based violence. We do this by empowering communities to understand and enforce their workplace rights through the provision of tailored legal services, education, sector capacity building and advocacy for systemic reform.

Our EDLP Program has conducted extensive research into the prevalence of work exploitation in Melbourne's West within industries known to use insecure labour as part of their business model.³ Our legal casework services are predominately provided to casual workers⁴ (incl. labour hire) in the food processing, cleaning, child/aged/community care, hospitality, security, and construction industries and 'contractors' (incl. 'on demand' or 'gig economy' workers) in the passenger transport, food delivery, car-washing, cleaning, distribution, and construction industries. The majority of our clients are migrant and refugee workers⁵, international students and young people – and through these services we have collected detailed data, case studies and a vivid picture of the negative socio-economic effects of insecure and precarious work on the lives of our most vulnerable community members.

¹ Department of Jobs, Precincts and Regions (Vic), 'Western Region', *Suburban Development* (Web Page, 5 April 2019) <<https://www.suburbandevelopment.vic.gov.au/regions/western-region>>.

² See for example Ben Schneiders 'A city divided – Covid-19 finds a weakness in Melbourne's social faultlines' *The Age* 07 August 2020 Accessed at <https://www.theage.com.au/national/victoria/a-city-divided-covid-19-finds-a-weakness-in-melbourne-s-social-faultlines-20200807-p55i2.html> - based on ABS and DHHS data.

³ Catherine Hemingway, *Not Just Work: ending the exploitation of migrant and refugee workers* (2016) WEstjustice, Melbourne. Report is available at: www.westjustice.org.au/legal-training >Policy Reports>Employment Law

⁴ Approximately 52% of our young clients and 46% of our international student clients are employed on a casual basis.

⁵ Our Migrant & Refugee Employment service is currently on hold due to lack of funding.

Key recommendations to increase job security

Over the last 7 years, WEstjustice has made numerous and extensive submissions on the effects of insecure and precarious employment on people’s lives, and the need for legislative and regulatory reform to protect vulnerable workers, to both Federal and State parliamentary inquiries.⁶ In particular, we draw your attention to two recent submissions:

- *Submission to the Inquiry into the Victorian On-Demand Workforce*, WEstjustice, February 2019 (hereafter **WJ On Demand Submission – see Appendix 1**)
- *Submission to the Senate Select Committee Inquire into Temporary Migration*, Joint submission by WEstjustice, Springvale Monash Legal Service and JobWatch, July 2020 (hereafter **WJ Temporary Migration Submission – see Appendix 2**)

We have **attached** these submissions for your reference. These submissions contain background information, case studies and data to support recommendations for reform that will better protect people who find themselves in insecure and precarious work, and ultimately lead to more secure employment for those who need it most.

Our 5 key recommendations for legislative reform and policy change to increase job security are:

Recommendation 1: Ensure Commonwealth laws and processes eradicate sham contracting

Issue	Solution
<p>Removing legislative incentives to rip off vulnerable workers is a simple and cost-effective way to reduce exploitation and increase job security by providing workers with a minimum level of wages and entitlements.</p> <p>In our experience, the exploitation of members of newly arrived and refugee communities and young people through the use of sham contracting arrangements is rife.</p> <p>Many of our clients are often purportedly engaged as contractors with ABNs when they are in fact employees. This means that they are denied the right to minimum pay and other employee entitlements.</p> <p>It has been noted that currently: <i>“The only legal risk facing an employer who misclassifies a worker is the risk that it may ultimately be required to shoulder an obligation it thought it had escaped.”</i>⁷</p> <p>The <i>Fair Work Act 2009</i> (Cth) needs to be amended to better protect vulnerable workers from sham contracting.</p>	<p>1(a) Introduce a statutory definition of employee into the Fair Work Act</p> <p>To eradicate sham contracting, introduce a reverse onus that presumes all workers are employees not contractors, unless the principal/employer proves otherwise.</p> <p>Providing all workers with the right to minimum pay and entitlements, unless the employer/principal can show that the worker was genuinely running their own business, will remove the perverse incentive for businesses to engage in sham contracting.</p> <p>1(b) Limit the current sham contracting defence</p> <p>The recklessness/lack of knowledge defence for sham contracting should be removed, or at the very least, the defence should be expanded to ensure that employers are liable when they fail to take reasonable steps to determine whether their workers are employees.</p>

⁶ For a full list please see: www.westjustice.org.au >Publications>Law Reform Submissions>Employment Law

⁷ Joellen Riley, ‘Regulatory responses to the blurring boundary between employment and self-employment: a view from the Antipodes’ *Recent Developments in Labour Law, Akademiai Kiado Rt*, 2013, 5.

Issue	Solution
	(For full details see WJ On Demand Submission , Recommendations 1-3, p. 22; WJ Temporary Migration Submission Recommendations 11-13, p. 34).

Recommendation 2: Increase accountability in franchises, labour hire, supply chains

Issue	Solution
<p>Many WEstjustice clients find themselves employed in insecure and precarious positions at the bottom of complex supply chains, working for labour hire companies or in franchises, or engaged as contractors in sham arrangements.</p> <p>Each of these situations involves common features - often, there is more than one entity benefitting from the labour of our clients, and frequently at the top is a larger, profitable, and sometimes well-known company. We have seen some of the worst cases of exploitation occurring in these situations.</p> <p>At present, the Fair Work Act is largely focused on traditional employer/employee relationships as defined by common law. This framework fails to adequately regulate non-traditional and emerging working arrangements, for example, where there is more than one employing entity.</p> <p>Currently, the only two ways to attribute responsibility to a third party under the Fair Work Act are via the responsible franchisor and holding company provisions in sections 558A-C, or the accessorial liability provisions in section 550. Both provisions are too narrow and place unrealistic burdens of proof on vulnerable workers. Importantly, the franchise and holding company provisions are too piecemeal and must be extended to cover other fissured forms of employment, including supply chains.</p>	<p>2(a) Extend liability in ss558A & 558B FW Act to all relevant third parties.</p> <p>In addition to franchises and subsidiary companies, make supply chain entities and labour hire hosts, responsible for the protection of workers' rights.</p> <p>2(b) Widen the definition of responsible franchisor entity in s 558B FW Act</p> <p>Amend the definition of 'responsible franchisor entity' to ensure that all franchises are covered by removing the requirement for a significant degree of influence or control.</p> <p>2(c) Clarify liability of all relevant third parties in s 558B FW Act</p> <p>Insert a provision to clarify that responsible franchisor entities, holding companies and other third party entities who contravene clause 558B should also be taken to have contravened the relevant provisions contravened by their franchisee entity/subsidiary/indirectly controlled entity.</p> <p>2(d) Clarify the 'reasonable steps' defence in s558B Fair Work Act</p> <p>Ensure that the 'reasonable steps' defence incentivises proactive compliance, including by requiring independent monitoring and financially viable contracts.</p> <p>2(e) Remove requirement for actual knowledge and require accessories to take positive steps to ensure compliance.</p> <p>Amend section 550 Fair Work Act to require directors and other accessories to take positive steps to ensure compliance within their business or undertaking. Ensure that failure to</p>

Issue	Solution
	<p>rectify a breach will also constitute involvement in a contravention.</p> <p>2(f) Introduce a Federal Labour Hire Licensing scheme and ensure fair pay for insecure workers.</p> <p>Establish a Federal labour hire licensing scheme and ensure fair pay for labour hire employees, as recommended in WEstjustice's Not Just Work report⁸</p> <p>(For full details see WJ On Demand Submission, Recommendations 7-12, p 30; WJ Temporary Migration Submission Recommendations 17-22, p. 40).</p>

Recommendation 3: Increase use of procurement policies, proactive compliance deeds and industry codes to improve compliance

Issue	Solution
<p>Given known negative socio-economic impacts of insecure and precarious work, the Federal Government should ensure it is leading the way in ensuring its procurement policies require companies wanting to tender for work to have a track record of compliance with workplace laws, and a demonstrated commitment to secure work and diversity targets.</p>	<p>3(a) The Government should require demonstrated compliance with workplace laws and relevant industry codes in order to tender for government contracts.</p> <p>Amend the Commonwealth Procurement Rules to ensure that tenders for Government work can only be submitted by companies certified under a new Secure Jobs Code scheme. Under the scheme, companies must be audited and obtain an independently verified record of compliance with workplace laws, and proven commitment to secure work and diversity targets, similar to the ACT's Secure Local Jobs Code and certification process.⁹</p> <p>3(b) The government should consider the provision of tax incentives for businesses that can demonstrate compliance with laws and a commitment to secure work and diversity targets.</p> <p>To promote secure work outside of the government contracting process, provide tax</p>

⁸ See n. 3

⁹ <https://www.procurement.act.gov.au/supplying-to-act-government/securelocaljobs>

Issue	Solution
	<p>incentives for all businesses that voluntarily obtain Secure Jobs Code certification.</p> <p>(For full details see WJ On Demand Submission, Recommendation 20, p 44; WJ Temporary Migration Submission Recommendations 27-28, p. 55).</p>

Recommendation 4: Work with State Governments to improve workplace safety law for vulnerable workers – particularly ‘contractors’ and those working in the gig economy

Issue	Solution
<p>For many so called ‘contractors’ and workers in the Victorian gig-economy, it can be unclear whether state workplace safety laws and state workers compensation schemes apply to them.</p> <p>People in insecure work need to know that they can still access and income to pay their rent, utilities and basic family expenses, as well as their medical expenses if they are injured at work.</p>	<p>4(a) We call on the Federal Government to work with State Governments to improve workplace safety laws for the most vulnerable workers and stop on-demand companies from shirking responsibility.</p> <p>Vulnerable on-demand workers must have access to safe work and workers compensation if they are injured. On-demand companies must not undercut other businesses who rely on secure employment by gaining a competitive advantage through avoiding the payment of workers compensation premiums.</p> <p>State governments must ensure that workplace safety laws require gig economy companies take responsibility for the safety of their workers. Current deeming provisions must be extended to clarify that certain on-demand workers are deemed to be working under a contract of service and entitled to workers compensation, and companies must pay insurance.</p> <p>(For full details see WJ On Demand Submission, Recommendation 19, p 43; WJ Temporary Migration Submission Recommendations 26, p. 54).</p>

Recommendation 5: Increase funding for community-based legal assistance & education

Issue	Solution
<p>There is inadequate funding for community legal centres to provide targeted employment law assistance programs for people who are in insecure and precarious employment.</p> <p>Without legal assistance, vulnerable workers cannot enforce their work rights and employers can exploit with impunity.</p> <p>Without legal education, many workers in insecure and precarious employment do not know their work rights and responsibilities, how to enforce them and where to go if they need help.</p>	<p>5(a) Increase funding for community legal centres to deliver dedicated employment law assistance to vulnerable workers, including temporary visa holders</p> <p>The Federal Government must provide recurrent funding for community legal centres to provide targeted employment law assistance and education programs for vulnerable workers. This work can complement and enhance the work of government regulators and relevant courts and tribunals</p> <p>5(b) Develop a comprehensive worker rights education plan</p> <p>Tailored education programs are required to raise awareness of laws, and build trust and accessibility of services. The Government must establish a fund to deliver these programs to community members, community leaders and agency staff.</p> <p>A comprehensive worker rights education plan should be developed so that temporary visa holders are given the right level of information about their work rights, at the right time (i.e. when they apply for a visa, on entry to Australia, when they fill in a Tax File Number declaration, when they apply for an ABN etc.) and in a language and format that they can understand.</p> <p>Specialist education programs should be incorporated into school and university induction programs so all young people are aware of their basic work rights and the key indicators of work exploitation.</p> <p>(For full details see WJ On Demand Submission, Recommendation 22-24, p 46; WJ Temporary Migration Submission Recommendations 1-3, p. 22).</p>

In addition to these 5 recommendations – we have read the submission of our colleagues at Springvale Monash Legal Service and endorse the recommendations contained in their submission to this inquiry.

Conclusion

Community legal centres provide vital legal and education services to some of Australia's most vulnerable workers, including young people, women experiencing family violence and newly arrived migrant and refugee communities.¹⁰

The COVID-19 pandemic has had a significant and disproportionate impact on many of our clients, and served to expose the limitations of our workplace relations system, particularly for those in insecure and precarious work.

The recommendations we have made are geared towards strengthening protections for workers in insecure employment thereby improving opportunities for all people in Australia to enjoy a decent living and contribute to Australia's economic recovery post the pandemic.

Yours sincerely,

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WEstjustice

[based on work by Catherine Hemingway and Tarni Perkal, Co-Directors of Employment and Discrimination Law Program, WEstjustice]

¹⁰ See our further joint submission with Springvale Monash Legal Service and JobWatch regarding the recommendations of the Report of the Inquiry into the Victorian On-Demand Workforce (Further On Demand Submission) available at: https://www.westjustice.org.au/cms_uploads/docs/201013-wj-smls-jw+-velwg-submission--on-demand-inquiry-recommendations.pdf