

16 September 2015

Workplac Relation Inquiry
Productivit Commission
GP Bo 1428
Canberr AC 2601

KINGSFORD
LEGAL CENTRE

Dea Madam/Sir,

Kingsford Legal Centre () welcomes the opportunity to provide a submission to the Productivity Commission's Draft Report on the Workplace Relation Framework.

KLC is a community legal centre that has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas in Sydney since 1981. KLC provides general advice on a wide range of legal issues, and undertakes casework for clients, many of whom without our assistance would be unable to afford a lawyer. In 2014, KLC provided 1725 advices and opened 27 new cases.

KLC provides a specialist employment law service within our community legal centre. KLC has acted for a number of clients in unfair dismissal conciliation and arbitrations, general protection complaint (particularly in relation to workplace rights and discrimination) at the Fair Work Commission (FWC). KLC regularly acts for clients in discrimination matters at the Australian Human Rights Commission (AHRC) and Anti-Discrimination Board NSW. KLC also provides advice on a wide range of employment issues such as redundancy, disciplinary action, entitlements, and flexible work arrangements.

In addition to this work, KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

In 2014 KLC provided advice to 445 clients on employment law issues and 237 advices on discrimination matters (a substantial proportion of which related to discrimination in employment).

Of the clients that KLC advised in employment matters in 2014, 55% stated they earned \$40,000 or less annually; 81% of clients stated that they earned less than \$70,000 per annum. Of the 19% of clients earning over \$70,000 the majority were at risk of losing their job or were about to commence a period of unpaid or low paid leave, such as parental leave.

60% of clients were not born in Australia, with many speaking little or no English. 5% of our clients identified as being either Aboriginal or Torres Strait Islander. 14% of clients had a disability.

As seen in the statistics above, KLC's employment clinic services a predominantly low income and vulnerable sector of the community. Our experience suggests that in many cases, the existing workplace relations framework does not adequately protect the most vulnerable members of society, in particular in relation to preventing unfair dismissals and ensuring employees receive their correct entitlements.

Draft Recommendation 14.1

Draft Recommendation 14. – Sunday penalty rates that are no parity to overtime or shift work should be set at Saturday rates for the hospitality, entertainment, retail, restaurants and café industries.

Client survey on Sunday penalty rates

KLC conducted a survey of our clients between 1 August 2014 and 1 September 2015. We received 3 responses. Of the respondents, 43 work on Sunday and received penalty rates. Of the respondent working on Sundays, 61 work in industries that would be affected by this recommendation.

We asked the survey respondent whether working on Sunday has an impact on their life. Respondents identified time away from family and friends as their biggest concern:

- Fast food worker: a friend and all of my friends meet up on Sundays - I miss out on that. Also, my family did stuff together on Sunday and I can't join in. For instance, my cousin is getting married next weekend at the Central Coast and I can't go.*
- Bar Manager: I have been working Sundays for over 11 years - in that time I have missed literally hundreds of family events - soccer games, weddings, birthday parties, weekends away. I struggle to keep up friendships as most people meet up on weekends. Generally, I just miss out on hanging out with my wife and children.*

- Entertainment industry worker: I feel I often miss out on friends & family members' birthdays, baby showers, christenings & events. My partner works some weekends also so often we get only one day a month or every 2nd month to spend together. This does strain our relationship.
- Waiter: I have less time to spend with friends. Working on Sundays affects what we get to do on Saturday night.
- Barista: have less time to be social. This makes me feel left out.

We asked what the impact of reduced penalty rates would be on the respondents who work on Sundays, and received the following responses:

- My parents are low income earners - I started working at a young age so I could save up to earn the money for extra things I need like a good computer. If I lose Sunday rates I will have to pick up another shift during the week (I only earn \$10 an hour) - which will badly affect my studies.
- [It would have a] devastating impact. I earn minimum wage - Sunday penalty rates have helped me to purchase a house in Sydney - loss of them may mean I will have to sell it - I most definitely will struggle to pay my mortgage.
- Penalty rates help to balance the budget for families with children.
- It would not be worth it for me to work Sundays if I was earning the same rate as a weekday. I would try to work longer hours during the week so that I would not miss out on time with my partner, family & friends on the weekends.
- I wouldn't work if there were no penalty rates on Sunday.

We asked respondents if they would have to look for other work to supplement their income if Sunday penalty rates were reduced:

- I would try, but I don't think I would find one - Not much point as a young person because there aren't a lot of different types of work for us beyond retail and that are the industries you are going to cut the penalty rates for.
- I would try, but in my 50s, my job prospects are very limited.
- I would try to get other work, but I don't think it is likely I would be able to find other work.
- No, I would just stop working on Sundays.

Our view on draft recommendation 14.1

KLC strongly opposes draft recommendation 14.1. Traditionally, Sunday has been viewed as a day of rest, to spend time with family and friends. Penalty rates for working on Sundays reflect the impact working on Sunday has on social and family life.

Additionally, removing Sunday rate only in certain industries create a two-tiered system. Workers in the hospitality, entertainment, retail, restaurant and café industries are lower paid than many other professions. Workers in these professions are often unable to secure alternative employment. The characterisation of workers in these industries as 'transient' may be misleading, as many workers in these industries have remained with the same employer for many years, and older workers in particular may face difficulty changing jobs. A high proportion of employees in these industries are female. The recommendation fails to consider the disproportionate impact reducing penalty rates will have on women.

Penalty rates on Sunday often mean the difference for these workers in being able to afford necessities such as rent, groceries and electricity. Referring to other 'policy solutions' such as social security when discussing penalty rates fails to recognise the importance of the inherent dignity associated with being gainfully employed. It has long been recognised that participation in the workforce is central to a sense of self-worth and well-being.

Increase in demand for weekend services means that businesses that choose to trade on Sunday realise accompanying profit. Reducing penalty rates for employees who enable businesses to increase revenue fails to reflect the sacrifice made by these employees. In practice, workers are often not presented with a choice of working Sunday – many workers are hired in these industries on the basis that they will work weekends.

Draft recommendation 3.5 – The Australian Government should require that the Fair Work Commission publish more detailed information about conciliation outcomes and processes. In the medium term, it should also commission an independent performance review of the Fair Work Commission's conciliation processes, and the outcomes that result from these processes.

KLC supports draft recommendation 3.5. Currently, only limited information is available on Unfair Dismissal and General Protection conciliations at the FWC. Processes of conciliation can differ greatly, particularly in General Protections conferences when run by FWC Commissioners as opposed to staff conciliators. More information about conciliation processes may increase consistency across conciliations.

We suggest that the FWC should make available statistics on outcomes of conciliations, and types of settlements reached. For example, the Australian Human Rights Commission publishes a conciliation register, which provides information on the circumstances of matter and outcome reached in a de-identified manner¹. We suggest that the FWC publish a similar conciliation register. This would assist Applicants and Respondents to gauge possible conciliation outcomes and better prepare for conciliation.

¹ Australian Human Rights Commission conciliation register, available at <https://www.humanrights.gov.au/complaints/conciliation-register>

The FWC should also actively seek feedback from applicant and respondent parties' on their experience of conciliation and make the result publicly available in a de-identified manner. For example, sending out an electronic survey after conciliation to both parties or their legal representatives could enable the gathering of this information. This data could be used to identify any systemic issues in conciliation and to monitor conciliation outcomes. This feedback should be reviewed regularly to improve conciliation practices and feedback provided to individual conciliators about the how participants view the process.

That the FWC establish a conciliation register.

That the FWC actively seek feedback from parties and their representatives about their experiences of conciliation and incorporate this feedback into FWC processes.

Information request view on change to lodgement fee for unfair dismissal claims

KLC has a significant concern about the impact an increase in lodgement fees will have on restricting access to unfair dismissal remedies for applicants. Lodgement fees should not be increased.

For most low and middle-income people, lodgement fees act as a barrier to access to justice. An increase in the lodgement fee for an unfair dismissal claim is likely to result in potential applicants, particularly vulnerable workers, no longer being able to make a claim and challenge the circumstances of their dismissal. We are particularly concerned to see paid employees in industries where practices do not comply with the law will not challenge their dismissal, allowing such practices to continue to flourish. In our experience, the vulnerable employee who has a potential unfair dismissal claim also often has significant entitlement claims. If simply an employee is not being paid the minimum wage, any increase in lodgement fees will increase their inability to challenge their dismissal and unlawful practices will continue.

Employees who are dismissed usually face a great financial strain and uncertainty about their income. Applicants who have recently experienced dismissal often have yet to find new employment and often struggle to pay for basic necessities such as groceries, electricity and rent. Any increase in the application fee may act as a disincentive to applicants to lodge their claims.

Although applicants may apply for a fee waiver by filling out a FWC form, this form often requires extensive financial detail, and it is often difficult to complete for an applicant without access to the internet or those applicants who have limited English. Employees often do not have time to complete this form with the tight 2-day deadline, and well after their application form.

That the lodgement fee for unfair dismissal claims should not be increased.

Draft Recommendation 5.1

Draft Recommendation 5.1 The Australian Government should either provide the FWC with greater discretion to consider unfair dismissal applications 'on the papers' prior to commencement of conciliation; or alternatively, introduce more merit focused conciliation processes.

1) People did not get legal advice before lodging claims

KLC strongly opposes draft recommendation 5.1. Unfair dismissal law is complex, and applicants often have little or no understanding of how to best frame their unfair dismissal claims. The 21 day time limit for lodging applications and minimum employment periods already pose significant barriers to applicants bringing an unfair dismissal claim. The limited availability of free legal assistance in employment law often means that applicants are unable to get legal advice before lodging an unfair dismissal claim. This means that although applicants may have a strong case, they may be unable to frame their claim under the law. In our view, an additional restriction to lodging unfair dismissal claims is unjustified.

In our view, any process which determines applications 'on the papers' will discriminate against vulnerable and marginalised workers who face the largest barriers completing the forms. Many migrant workers, people with limited English proficiency, people who cannot read or write or have very low literacy and people with a disability find it difficult to complete the forms and will often be unable to best frame their application with reference to the law. In our experience, these workers are the most susceptible to exploitation by employers and unfair dismissal. Any decision 'on the papers' would likely impose significant disadvantage on these vulnerable persons, and would effectively restrict their right to bring an unfair dismissal claim and access remedies. This would result in unfair dismissal operating only as a remedy for people who are able to navigate the system, rather than as a way of protecting vulnerable workers from unlawful and unfair practices. This would potentially move many types of industries where we know workers are routinely dismissed for attempting to enforce their rights from the scrutiny of the FWC.

Annie worked as a cleaner in a hotel for over 5 years. Annie speaks Bahasa, and cannot speak much English. One day, Annie's boss fired her, without giving her a reason. She had no performance issues in the role.

Annie did not know her rights as an employee. It was only when a community worker told her that she might have an unfair dismissal claim that Annie sought legal advice. She called her local community legal centre to get advice, but they were booked out for the next two weeks. They told her about the 21 day time limit and she lodged a form before getting legal advice. When Annie saw the lawyer with an interpreter, the lawyer explained to her that she thought Annie had a strong case, but that Annie's application form was not detailed enough, and did not make clear why the dismissal was unfair. The lawyer helped Annie amend her application, and Annie got written reference and compensation at the conciliation.

2) Conciliation conference facilitates resolutions

Conciliation is a form of alternative dispute resolution, aimed at encouraging discussion between the parties in order to reach an agreement. The success of any conciliation is normally dependent on the willingness of the parties to negotiate and settle. In our experience, whether an unfair dismissal claim has merit is a key factor in the existing unfair dismissal conciliation processes. FWC conciliators will provide information on what unfair dismissal is under the law, allowing parties to self-assess the merits of their case. Additionally, in conciliation, parties may discuss what their views are on the merits of the matter. The merit of the matter informs any offers and counter-offers made by the parties, and whether any settlement is reached at conciliation. If a Respondent party does not believe that a unfair dismissal claim has merit, the matter discussed at the conciliation.

Any additional change to conciliation processes is likely to decrease the efficiency of the process, and subject the parties to additional legal costs and delay.

The draft recommendation 5.1 should not be implemented.

If draft recommendation 5.1 is implemented, there should be an accompanying increase in the funding to the legal assistance sector in order to ensure each applicant has access to free legal advice to allow them to properly frame their unfair dismissal claim.

Draft Recommendation 5.2

Draft Recommendation 5.2 – The Government should change the penalty regime for unfair dismissal cases so that an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct, procedural errors by an employer should not result in reinstatement or compensation by a former employee, but can, at the discretion of the FWC, lead to either counselling and education of the employer, or financial penalties.

Strong unfair dismissal laws are required to ensure the rights of employees to fair treatment, and to address the power imbalance in the employer-employee relationship. The impact of unfair dismissal on employees is significant. Many of our clients who have been unfairly dismissed suffer financial, psychological and family stress as a result of losing their job. Employees we see who have been unfairly dismissed face problems maintaining their housing, fall into credit card debt and struggle to meet essential expenses. Often the remedies available through unfair dismissal do not adequately reflect the devastating effect of unfair dismissal on employees. It can take employees a significant amount of time to recover their position following a unfair dismissal.

In our experience, the unfair dismissal law does not impose a high regulator burden on employers for the following reasons:

- The 2 week cap on compensation, and compensation only for economic loss and no damages mean that settlement amounts are generally low;

- in many cases, our client requires non-economic remedies to settle unfair dismissal matters, including an apology or statement of service which help the former employee work on and lessen the impact of the economic and social security system
- the small business fair dismissal code provides a broad exemption for small businesses from unfair dismissal laws;
- the strict enforcement of the 2 day time limit for lodgement promotes speedy resolution and a matter of practicality reduce the number of applications made;
- the lack of a legal obligation on employees to mitigate their losses by looking for new work, and a failure to mitigate impact of inability to recover money in any action;
- the eligibility criteria for making an unfair dismissal application strictly limit the availability of this action to employees and
- the majority of unfair dismissal matters settle at conciliation at the FWC, which is a free process and where employer can appear without legal representation.²

Procedural fairness is a central tenet of the law, and in employment law, recognises the inherent power imbalance that exists between employer and employees. Employers have a responsibility to understand their obligations under industrial relations laws and have the resources available to do so. There is an abundance of publicly available material for employers on their legal obligations in relation to the hiring and dismissal of employees. If an employer fails to adhere to procedural requirements in dismissing an employee, this can compound the harsh, unjust or unreasonable nature of the dismissal.

Even if an employee has engaged in serious misconduct, if they were not dismissed in accordance with procedural requirements, they should retain a right to lodge a claim. In our experience, a small procedural error in itself will not lead to a weak unfair dismissal claim succeeding. Procedural errors need to be significant and go to issues such as unfairness to provide a basis for a claim under the law. KLC does not view serious misconduct dismissals based on minor procedural errors as being strong cases with merit. Unfair dismissal law is based on taking a holistic view of the circumstances surrounding the dismissal, including the validity of reasons for dismissal, any performance issues, the applicant's conduct, and the process by which the applicant was dismissed. Removing the procedural element removes the disincentive for employers to obey workplace laws and fails to keep a proper balance in terms of the employee's right to procedural fairness.

We also note that in our experience, unscrupulous employers have dismissed employees without a valid reason by claiming serious misconduct has occurred. Any removal of protection for employees in these areas is likely to result in unjust outcomes.

Tim worked as a personal assistant for a small business employer for 3 years. He conducted work phone calls on his personal mobile, with a verbal agreement that the company would pay his phone bill with the company credit card.

² 79% of unfair dismissal matters settle at conciliation at the Fair Work Commission – see Fair Work Commission, Annual Report 2013-2014, accessed at https://www.fwc.gov.au/documents/documents/annual_reports/fwc-ar-2014-web.pdf

One day when he went into work, Tim was told he was dismissed for serious misconduct for using the company credit card to pay his phone bill. The company alleged Tim had obtained financial advantage by dishonestly using the company credit card for personal expenses. Tim was very upset as he had followed directions based on the agreement for the company to pay his phone bill.

Tim lodged an unfair dismissal complaint, and was represented by KLC at the conciliation. We successfully argued that Tim did not engage in serious misconduct and a settlement was reached.

Draft Recommendation 5.3

Draft Recommendation 5.3 - The Australian Government should remove the emphasis on reinstatement as the primary goal of the unfair dismissal provisions under the Fair Work Act 2009 (Cth).

In our experience, many of our clients do not want reinstatement, due to a breakdown of employment relationship. However, for vulnerable applicants who are suffering great financial strain and have difficulty finding new work, reinstatement should be an available remedy in unfair dismissal matters. This reflects the economic importance of keeping applicants in employment. In reality, reinstatement is only ordered where it is practicable in the circumstances and is a viable option especially with very large employers where redeployment is a practicable solution.

Mei worked part-time as a customer service representative at a store. She was a single mother with a disabled daughter, and experienced great financial difficulty when she was dismissed without a valid reason due to a personality clash between her and her new manager. Mei needed a job close to home in order to care for her daughter. Her former employment had suited her needs, as she worked part time and was close to home. Mei wanted reinstatement as she felt she was unlikely to find comparable employment.

Draft Recommendation 5.4

Draft Recommendation 5.4 - Conditional on implementation of the other recommended changes to the unfair dismissal system within this report, the Australian Government should remove the reliance on the Small Business Fair Dismissal Code within the Fair Work Act 2009 (Cth).

The small business fair dismissal code offers broad exemption to small businesses from unfair dismissal laws, often to the detriment of employees who would otherwise be successful in an unfair dismissal action. Our view is that the small business fair dismissal code should be removed regardless of whether the other recommended changes in the report are implemented.

That draft recommendation 5.4 be implemented. This removal should not be contingent on other recommended changes to the unfair dismissal system within this report being adopted.

Draft Recommendation 6.2

The Australian Government should modify section 341 of the Fair Work Act 2009 (Cth). The FW Act should also require that complaints be made in good faith; and that the Fair Work Commission must decide this via a preliminary interview with the complainant before action can proceed prior to the convening of a conference involving both parties.

KLC opposes draft recommendation 6.2, as it imposes an additional burden on applicants and restricts access to the FWC. We note there is no accompanying requirement on employers to provide responses to applications in good faith. To our knowledge, no other jurisdiction poses such a requirement on applicants. It is unclear what criteria would be applied to assess whether the complaint is being made in good faith, and whether this decision would be open to appeal. Venturing into assessment of claims prior to conference conflicts with the aims of alternative dispute resolution procedures, which are not based on determinations, but on the parties resolving the matter through agreement. The FWC interviewing applicants before the convening of a conference will inevitably result in reduced efficiencies and delay in resolving matters. The time and resources used in assessing whether applications are made in good faith would be better used in convening conciliations.

We are also concerned that vulnerable workers, or workers without access to appropriate legal advice may not frame their claim strongly, or could focus on the wrong issues, raising an issue as to whether the application is made in good faith. It places an additional barrier to accessing a resolution mechanism for applicants which may deter them from pursuing a claim even if it has merit.

In our experience, applicants do make complaints in good faith. We do not represent applicants in matters without merit.

Draft Recommendation 6.3

Draft Recommendation 6.3 – Part 3-1 of the Fair Work Act be amended to introduce exclusions for complaints that are vexatious and frivolous

KLC's view is that this is unnecessary, particularly at the conference stage of the process. The Fair Work Act already has cost provisions in place. For example, section 375 of the Act already provides the FWC with the power to make costs orders against parties in general protections disputes if the party has made an unreasonable act or omission. Section 376 of the Act enables the FWC to make cost orders against lawyers or paid agents who pursue general protections dismissal and general protections non-dismissal disputes which have no reasonable prospect of success.

Section 57 of the Act enables the Court to deal with vexatious complaints raised under the Act through the power to impose costs orders. In general protections claims, unless the matter proceeds to a consent arbitration, the FWC does not decide whether or not a breach of general protections has occurred. Determining whether a complaint is vexatious or frivolous before a hearing is likely to be difficult, in the absence of evidence, submissions, legal arguments and perhaps legal representation. Our view is that should this

recommendation be adopted, it should only apply to the arbitration stage of proceedings at the FWC, not conferences.

Additionally, we note that the risks of costs often acts as a disincentive to applicants pursuing meritorious matters.

Draft Recommendation 6.4

Draft Recommendation 6.4 – The Australian Government should introduce a cap on compensation for claims lodged under Part 3-1 of the Fair Work Act 2009 (Cth)

We believe that the absence of compensation caps for matters under Part 3-1 of the Fair Work Act is appropriate. Employees who have been subject to unlawful behaviour such as discrimination and dismissal for temporary absence often face ongoing distress, hurt and humiliation as a result of this behaviour, which is reflected in the current uncapped jurisdiction. This is also consistent with the operation of discrimination provisions in the federal jurisdiction, and this consistency should be maintained.

The judiciary has taken a restrained approach to the award of damages in general protection matters. Where an applicant is awarded compensation amounts, these amounts are generally low and represent both economic loss and damages, calculated in a reasonable and fair manner.

In our experience, applicants deciding between unfair dismissal and general protection claims do not base their decision of choice of claim on available compensation, but rather whether their case falls more clearly within one of these areas.

Draft Recommendation 21.1

Draft Recommendation 21.1 – The FWO should be given additional resources for investigation and audit of employers suspected of underpaying migrant workers.

The Migration Act should be amended so that employers can be fined by at least the value of any unpaid wages and conditions to migrants working in breach of the Migration Act, in addition to the existing penalties under the Act.

KLC recognise the importance of the Fair Work Ombudsman (FWO) in the workplace relation system. We support the recommendation that the FWO be given additional resources in relation to migrant workers. However, we believe that this extra resourcing should not be limited to migrant workers, but applied more broadly, to enable the FWO to provide complainants with substantive assistance to resolve their complaints.

In all cases where we have advised clients to complain to the FWO about significant underpayments and not being provided with payslips, and the FWO has conducted an investigation and established that a debt to the employee exists, the FWO has declined to take any enforcement action. Even when numerous clients working for the same employer have complained to the FWO about unlawful practices, the FWO has declined to exercise its prosecution function. Legal assistance services such as community legal centres are not

adequately resourced to be able to take on these cases. The result of this is that some employers continue to flaunt Fair Work laws and Awards as they believe that none of their staff will take them to court.

Sam worked as a baker, often working night shifts. Sam could only speak a little English so it was difficult for him to find a job. He began working as a baker 8 years ago and was paid only \$1 an hour for the entire period. Sam supervised and trained other staff, but was never paid allowances for this. Sometimes Sam was paid in cash, and sometimes he was paid via transfer to his bank account.

One day, Sam was talking to his friends about his job. They told him he should probably be earning more than \$14 an hour. Sam lodged a complaint with the Fair Work Ombudsman. Preliminary calculations indicated Sam was underpaid by over \$150,000. The Fair Work Ombudsman did not pursue the matter, saying that it was up to Sam to take his employer to court. Sam was unable to do this as he cannot speak English, couldn't understand the court process and couldn't afford a lawyer.

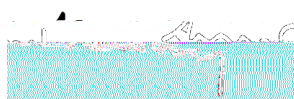
That the FWO be adequately resourced such that it can exercise its enforcement and prosecution functions more frequently.

A major obstacle to migrant workers complaining about unlawful treatment by employers is their visa conditions. Many migrant workers are forced by employers to work in hours in excess of what is permitted under the visa conditions. Workers can face penalties under the Migration Act 1958 (Cth) for breaching visa conditions, which means they are unlikely to raise complaints about employer's breaches of workplace laws with the FWO. This enables exploitative employers to breach the law without fear of being brought to the attention of regulatory bodies such as the FWO.

That the Australian Government provide an amnesty to migrant workers who report employers' breaches of the Fair Work Act 2009 (Cth), enterprise agreements and Awards.

Please contact us on (02) 9389 956 if you would like to discuss our submission further.

Your faithfully,
KINGSFORD LEGAL CENTRE



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