WEstjustice

Improving protections of employee's wages and entitlements: strengthening penalties for non-compliance

Submission by WEstjustice Community Legal Centre, October 2019

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1. Introduction

WEstjustice Community Legal Centre welcomes the opportunity to make this submission to the Attorney General's Department inquiry into the effectiveness of the current penalty framework in the *Fair Work Act 2009* (Cth) (**FW Act**).

In this submission, we refer to relevant WEstjustice submissions to previous inquiries and other reports by WEstjustice which contain more detailed background about our services, and which provide statistics and case studies, including:

(a) WEstjustice's submission into the Inquiry into the Victorian On-Demand Workforce;[1] and

(b) Not Just Work Report.[2]

We trust that the above publications will provide useful context to this submission.

2. Background to WEstjustice and the Employment Justice Program

WEstjustice is a community organisation that provides free legal help to people in the Western suburbs of Melbourne. Our offices are located in Footscray, Werribee and Sunshine, with a number of outreach services available in other locations.

The WEstjustice Employment Justice Program provides employment-related legal information, advice, advocacy and referrals to vulnerable workers, including those from a refugee or asylum seeker background, as well as to newly arrived migrants who are from a non-English speaking background, and young workers.

The Program seeks to improve employment outcomes for vulnerable workers including migrants, refugees and temporary visa holders. We do this by empowering vulnerable workers to understand enforce their workplace rights through the provision of tailored legal services, education, sector capacity building and advocacy for systemic reform. To date our service has recovered over $450,000 in unpaid entitlements or compensation, trained over 2000 community members, delivered five roll-outs of our award-winning Train the Trainer program, and participated in numerous law-reform inquiries and campaigns.

Based on evidence from our work, and extensive research and consultation, WEstjustice released the Not Just Work Report, outlining 10 key steps to stop the exploitation of migrant workers.[3]

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[1] Catherine Hemingway, February 2019, last accessed 23 October 2019 at: <https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/5315/5686/5228/WEstjustice.pdf>.
[2] Catherine Hemingway, Not Just Work: Ending the exploitation of refugee and migrant workers, 2016 (**Not Just Work report**).
[3] Ibid.

3. Scope of submission

This submission focuses on, and includes specific recommendations around, extension of liability and sham contracting provisions in the FW Act based on evidence from our work.

WEstjustice does not make specific recommendations in this submission with respect to the adequacy of FW Act's overall penalty framework itself. In general in our view there is strong evidence to support the need for the FW Act's penalties framework to be increased to further discourage employers and their responsible officers from breaching employment laws. However, in order to maximise compliance and enforcement, this should be done proportionally, taking into account the size of the employer.

In addition, we wish to point out that, in our view, increased penalties and extension of liability are just two ways of improving protections of employee's wages and entitlements. We consider that there are a number of other changes that need to happen concurrently to improve compliance with current employment laws that establish employee's wages and entitlements.

Finally, we have not commented on mechanisms to recover unpaid wages, and the adequacy of compliance and enforcement tools available to workplace regulators and the courts in this submission, as we note that these topics will be covered in a separate discussion paper.

4. Executive summary of submission and recommendations

In summary, this submission makes the following recommendations in response to the various discussion questions:

#	Recommendation	Paragraph reference
1	Franchisor provisions and the reverse onus of proof under the Fair Work Amendments (Protecting Vulnerable Workers) Act 2017 require further monitoring and evaluation to determine their effect on employer behaviour	5.1
2	Accessorial liability for people or companies involved in workplace contraventions should be extended to all relevant third parties	5.2
3	The requirement for actual knowledge should be removed and accessories should be required to take positive steps to ensure compliance	5.3
4	The FW Act's sham contracting provisions should include higher penalties and more onerous defences	5.4
5	Section 357(2) of the FW Act should be amended to remove the recklessness test, and replace it with one requiring employers to take reasonable steps to appropriately classify the nature of the employment of workers they engage	5.5

These recommendations are set out in detail in part 5 of this submission below. We have set out the drafting instructions in response to which our recommendations are made in Appendix 1.

Further, we make the following additional recommendations which are related to the subject matter of the Attorney General's Department inquiry but which do not correspond directly to the discussion questions raised in the call for submission:

#	Recommendation	Paragraph reference
6	The definition of 'responsible franchisor' should be extended to increase the liability of franchisors for contraventions of workplace laws by franchisees	6.1
7	The liability of relevant third parties under the responsible franchisor and holding company provisions should be clarified	6.2
8	The 'reasonable steps' defence for franchisors and holding companies should be clarified	6.3
9	A reverse onus creating a presumption that an employment relationship exists should be introduced to ensure minimum entitlements for all workers and to require principals to prove that contractors are operating their own business	6.4
10	The Australian Business Register should increase scrutiny at the time sole trader ABNs are issued to identify sham contracting at an early stage	6.5
11	Enforcement and education activities should be increased to prevent sham contracting arrangements, particularly for CALD communities	6.6

Finally, we also recommend some other changes that would assist to deal with 'wage theft', focusing on (but not limited to):

- Supporting community organisations to deliver employment law education and services
- Introducing a wage insurance scheme
- Making superannuation part of the National Employment Standards (**NES**) and removing the minimum earnings threshold and minimum age restrictions to help ensure all workers receive superannuation
- Introducing a director identification number and compulsory insurance to limit phoenix activities, and
- Extending the Fair Entitlements Guarantee (**FEG**) scheme.

We do not provide detailed commentary on these recommendation in this submission, as we have focussed on recommendations most relevant to the specific questions in the discussion paper around the adequacy of the penalty framework. However, more detail can be found on each of these recommendations in WEstjustice's submission into the Inquiry into the Victorian On-Demand Workforce.[4]

[4] Catherine Hemingway, February 2019, last accessed 23 October 2019 at: <https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/5315/5686/5228/WEstjustice.pdf>.

5. Submission

5.1 Franchisor provisions and the reverse onus of proof under the Fair Work Amendments (Protecting Vulnerable Workers) Act 2017 require further monitoring and evaluation to determine their effect on employer behaviour

Discussion question:
Have the amendments effected by the Protecting Vulnerable Workers Act, coupled with the FWO's education, compliance and enforcement activities, and influenced employer behaviour? In what way?

WEstjustice welcomed and is in strong support of the amendments effected by the *Fair Work Amendments (Protecting Vulnerable Workers) Act 2017* (**Protecting Vulnerable Workers Act**), however we consider that it is too early to determine whether or not the amendments have influenced employer behaviour, and suggest that further monitoring and evaluation of enforcement outcomes over time are required to gauge the effectiveness of the new provisions.

Notwithstanding the above, we make the following brief comments based on our recent experiences with clients in our Employment Justice Program:

(a) **Franchisor provisions**

The provisions that extend liability for breaches of workplace laws to franchisors have greatly improved our ability to resolve issues on behalf of workers of franchisees.

In two recent cases, these provisions allowed us achieve a positive outcome for our client internally within the franchise network without needing to involve the Fair Work Ombudsman (**FWO**) or to issue court proceedings.

Previously, franchisors were largely able to deny responsibility for breaches by franchisees which significantly affected our ability to assist our clients to enforce their rights.

(b) **Reverse onus of proof**

While we are yet to test it in a court setting, the introduction of the reverse onus of proof in underpayment matters has proved to be an effective bargaining chip in negotiating with employers.

In addition to empowering workers to more easily recover their employment entitlements, the ability to resolve underpayment disputes at an earlier stage has a number of flow-through benefits such as reducing congestion in the court system and at the FWO, and freeing up capacity at community legal services such as WEstjustice.

Recommendation 1

Franchisor provisions and the reverse onus of proof under the Protecting Vulnerable Workers Act require further monitoring and evaluation to determine their effect on employer behaviour.

5.2 Accessorial liability for people or companies involved in workplace contraventions should be extended to all relevant third parties

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

Background

Supply chains often involve sub-contracting arrangements whereby there are a number of interposing entities between the ultimate work provider and a worker. It has been suggested that the 'very structure of the supply chain is conducive to worker exploitation,' as parties near the bottom of the supply chain tend to have low profit margins and experience intense competition.[5]

Many of our clients find themselves at the bottom of long and complex supply chains, riddled with sham arrangements. Often, the entity at the top is a large, profitable, well-known company. We have also seen significant exploitation arising from multi-tiered subcontracting arrangements.[6]

Our view

WEstjustice considers that the introduction of current framework for accessorial liability under section 550 of the FW Act for those involved in workplace contraventions was an extremely positive step towards ensuring workers are not prevented from enforcing their rights due complex supply chain arrangements or corporate structures of employers.

However, we consider that the accessorial liability provisions do not go far enough to adequately regulate the behaviour of lead firms, head contractors, or other employments structures such as labour-hire arrangements.

Recommendation 2

WEstjustice recommends that the accessorial liability provisions be extended to cover all relevant third parties, which may be achieved by adding to the responsible franchisor and holding company provisions.

Under this approach, in addition to protecting workers in franchises and subsidiary companies, supply chains and labour hire hosts would also be responsible for the

[5] Richard Johnstone et al, *Beyond employment: the legal regulation of work relationships* (The Federation Press, 2012) 49.
[6] Ibid 67.

protection of workers' rights. The law should provide protection and redress for all vulnerable workers, regardless of the business structure set up. It should equally hold all businesses to account if they receive the benefit of someone's labour, regardless of how they structure their affairs in an attempt to shirk responsibility.

To achieve this, WEstjustice suggest that new subsections 558A(3) and 558B(2A) be inserted into the FW Act to define responsible supply chain entities, and extend responsibility to them. A person will be a responsible supply chain entity if:

> *there is a chain or series of 2 or more arrangements for the supply or production of goods or services performed by a person (the worker); and*
>
> *(a) the person is a party to any of the arrangements in the chain or series and has influence or control over the worker's affairs or the person who employs or engages the worker; or*
>
> *(b) the person is the recipient or beneficiary of the goods supplied or produced or services performed by the worker*

Like responsible franchisors, responsible supply chain entities will be responsible for a breach where they knew or could reasonably have been expected to know that a breach would occur in their supply chain, and they failed to take reasonable steps to prevent it. It is intended that these provisions be broad enough to capture other arrangements for the supply of labour, including labour hire arrangements.

For further details and example drafting see Appendix 1.

We refer also to our other recommendations in relation to the responsible franchisor and holding company provisions in paragraph 6 of this submission below.

Case study - Batsa

Batsa came to Australia in 2018 and found a job through an ad on Gumtree to wash and dry cars.

Batsa was hired by a man named Paul. Paul would pick Batsa up from the train station and drive him to various well-known car dealerships where he would hand wash and dry cars after business hours. The agreed pay was a flat rate of $15 an hour. Sometimes Batsa would work until 2.00am and he would have to walk home from wherever Paul had dropped him off. One night when Paul had organised to meet Batsa, he never showed up. After that night Batsa was unable to contact Paul at all. Batsa received no payment for the hours he worked.

5.3 The requirement for actual knowledge should be removed and accessories should be required to take positive steps to ensure compliance

Discussion question reference:
Should actual knowledge of, or knowing involvement in, a contravention of a workplace law be the decisive factor in determining whether to extend liability to another person or company? If not, what level of knowledge or involvement would be appropriate? Would recklessness constitute a fair element to an offence of this type?

Our view

WEstjustice considers that the requirement of actual knowledge is an extremely high bar to establish assessorial liability of the host employer or those at the apex of a supply chain or franchise, and should not be a decisive factor in determining whether to extend liability to another person or company.

Although the FWO may be able to rely on previous warnings or compliance notices issued to particular companies or individuals to show knowledge in some cases, for others, it is often unobtainable. Vulnerable workers who speak little English and work night shift in a franchise or do delivery work at the bottom of a supply chain rarely have the ability to prove what the head office or controlling minds of the organisation actually know – in fact it is impossible for them.

By requiring actual knowledge, section 550 serves to reward corporations who deliberately remain uninformed about the conduct of others in their supply chain/business model. The law should not reward those who turn a blind eye to exploitation – especially those who are directly benefitting from the exploitation and in a position to take reasonable steps to stop it.

Further, the accessorial liability provisions have been interpreted such that an accessory must be aware of the contravention at the time it occurs. This rewards those accessories who fail to address unlawful behaviour once they are aware of it – for example, a director who discovers a breach after it has occurred, and then fails to take steps to rectify any underpayment or other problem, will not be held liable.

This is extremely problematic for our clients. When we have clients who are significantly underpaid, we often send a detailed letter of demand. This letter sets out details of the alleged underpayment, including a copy of relevant award provisions and our calculations. Unless section 550 is broadened to capture "failure to rectify" type situations, in a no-cost jurisdiction there is little legal incentive for accessories to respond to our letters and fix their unlawful activity.

The recent case of *FWO v Hu (No 2)* [2018] FCA 1034 (12 July 2018) is a shocking example of the limits of the current provisions. In this case, the Federal Court found significant underpayments of workers on a mushroom farm. Mushroom pickers had been required to pick over 28.58 kilograms of mushrooms just to receive minimum entitlements – a requirement that no worker could achieve. The Court found 329 Award breaches. Although the labour hire company HRS Country and its director Ms Hu were found liable, neither the mushroom farm nor its sole director Mr Marland

were found to be involved in the breaches. Although the Court found that Mr Marland knew that HRS Country were paying the workers $0.80 per kilo, and knew that this was inadequate for a casual employee, there was no evidence to show that Mr Marland was aware of the contraventions at the time they occurred (i.e. when the contracts were entered into between the workers and HRS Country).

Recommendation 3

We recommend that section 550 of the FW Act be amended to remove the requirement to prove actual knowledge and require Directors and other possible accessories to take positive steps to ensure compliance within their business or undertaking.

In Appendix 1 we provide two suggested amendments: the first involves amending section 550 such that a person will be involved in a contravention if they knew or could reasonably be expected to have known that the contravention, or a contravention of the same or a similar character would or was likely to occur. Importantly, if a person fails to rectify a contravention once they become aware of it, they will also be involved in the contravention.

The second proposed amendment involves the insertion of a new section 550A, largely modelled on the model Work Health and Safety legislation, which places a primary duty on persons to prevent breaches of the FW Act, and requires officers to undertake due diligence.

Companies that do the right thing will already be taking these steps – however we intend for these changes to shift the burden of proof away from vulnerable workers and on to those shonky employers who currently act with impunity. Under our proposed provisions, they will now be forced to show what steps they have taken to minimise risks and ensure compliance.

5.4 The FW Act's sham contracting provisions should include higher penalties and more onerous defences

Discussion question reference:
Should there be a separate contravention for more serious or systemic cases of sham contracting that attracts higher penalties? If so, what should this look like?

Our view

It is our experience that sham contracting arrangements are being used to avoid the application of workplace laws and other statutory obligations:

> *"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".*[7]

[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.

The Protecting Vulnerable Workers Act did not introduce higher penalties for 'serious contraventions' of the FW Act's sham contracting provisions (found in section 357, 358 and 359). Unlike contraventions of other civil remedy provisions, contraventions of the sham contracting contraventions where the perpetrator does so knowingly or those that together form part of a systematic pattern of conduct do not attract higher penalties than one-off instances of sham contracting. It is unclear why those sections were omitted from the Protecting Vulnerable Workers Act.

Recommendation 4

We recommend the introduction of a separate contravention in the FW Act that attracts higher penalties for more serious or systemic cases of sham contracting. Row 11 of section 539(1) of the FW Act should be amended so that 'serious contraventions' of section 357(1), 358 and 359 can be pursued in court. This would result in the penalties being aligned to the new higher penalties for other 'serious contraventions', being $126,000 for an individual and $630,000 for a company.

Please see Appendix 1 for suggested drafting of this amendment.

5.5 Section 357(2) should be amended to remove the recklessness test, and replace it with one requiring employers to take reasonable steps to appropriately classify the nature of the employment of workers they engage

Discussion question reference:
Should the recklessness defence in subsection 357(2) of the FW Act be amended? If so, how?

Our view

Currently, section 357(2) offers a defence that may be used by an employer who is alleged to have misrepresented an employment relationship as an independent contractor relationship. Section 357(2) of the FW Act provides that:

> *(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 defence is broad and relatively easy to rely upon. Employers are often in a 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 in a position to positively assert that the relationship they are entering into with a worker is the correct one.

At the very least, the current employer defences to the sham contracting provisions in the FW Act should be limited.

However, in our view, there should ideally be no defence for recklessness or lack of knowledge. At a minimum, the law should be amended to ensure that employers are liable when they fail to take reasonable steps to determine a correct classification.

Recommendation 5

WEstjustice supports redrafting section 357(2) in accordance with recommendation 25.1 of the Productivity Commission Report, which states:[8]

> *The Australian Government should amend the FW Act to make it unlawful to misrepresent an employment relationship or a proposed employment arrangement as an independent contracting arrangement (under s. 357) where the employer could be reasonably expected to know otherwise.*

For suggested redrafting of section 357(2), please see Appendix 1.

6. Additional submissions and recommendations

In addition to the above recommendations, WEstjustice also submits and recommends in relation to the subject matter of the inquiry:

6.1 The definition of 'responsible franchisor' should be extended to increase the liability of franchisors for contraventions of workplace laws by franchisees

Background

Currently, other than the accessorial liability provisions in section 550, the only other ways to attribute responsibility to a third party under the FW Act are via the responsible franchisor and holding company provisions in sections 558A to 558C, which were introduced as part of the Vulnerable Workers Amendments.

Under these provisions, holding companies and responsible franchisor entities contravene the Act if they knew or could reasonably be expected to have known that a contravention (by a subsidiary or franchisee entity) would occur or was likely to occur.

Our view

The responsible franchisor and holding company provisions are too narrow and place unrealistic burdens of proof on vulnerable workers. Additionally, the provisions are too piecemeal and must be extended to cover other fissured forms of employment, including supply chains.

Sections 558A and 558B of the FW Act define "franchisee entity" and "responsible franchisor entity" and outline the responsibility of responsible franchisor entities and

[8] Productivity Commission, Workplace Relations Framework, Inquiry Report No 76 Volume 2 (30 November 2015), 915-916, available at<http://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relationsvolume2.pdf>, accessed 24 October 2019.

holding companies for certain contraventions. To hold a franchisor to account, the current definition of responsible franchisor entity requires a worker to show that the franchisor has a "significant degree of influence or control over the franchisee entity's affairs".

For workers, who often lack access to necessary documents and information, this is an unnecessarily difficult burden to overcome, and it may discourage franchisors from taking an active role in promoting compliance in their franchises, and instead would reward those that take a hands-off approach or who structure their contracts in such a way as to distance themselves from their franchisees. This requirement (that the franchisor be shown to have a significant degree of influence or control over the franchisee entity) is unnecessary because the degree of control able to be exercised by a franchisor is already a relevant consideration when determining liability under s558B(4)(b).

In addition, unlike section 550 of the FW Act (which deems that parties involved in a contravention of a provision are taken to have contravened that provision), it is not clear from the drafting that responsible franchisor entities and holding companies will be liable for the breaches of the franchisee entity or subsidiary. Rather, it appears that they may only be liable for breaching the new provisions. This seems contrary to the intention of the Vulnerable Workers Amendments as expressed in the Fair Work Act (Protecting Vulnerable Workers) Explanatory Memorandum, and needs to be clarified.

Recommendation 6

In addition to our recommendation in paragraph 5.2 above, WEstjustice also recommends broadening the existing definition of responsible franchisor entity to remove the threshold requirement to show a "significant degree of influence or control". We argue that workers should not have high burdens to bring a claim when the franchisors hold all the relevant documents and evidence to show their control over a franchisee. Instead, it should be for the franchisor to show that they had limited influence and control as part of a reasonable steps defence under subsection 558B(4).

Accordingly, we propose that subsection 558A(2)(b) be removed (or at least the reference to "significant" be deleted) to broaden the definition of responsible franchisor entity. The degree of control able to be exercised by a franchisor is already a relevant consideration when determining liability – see subsection 558B(4)(b) FW Act, which says that in determining whether a person took reasonable steps to prevent a contravention, the extent of control held by the franchisor is relevant.

For details see Appendix 1.

6.2 The liability of relevant third parties under the responsible franchisor and holding company provisions should be clarified

Recommendation 7

In addition to Recommendation 5, WEstjustice recommends the insertion of a new section 558AA to clarify that responsible franchisor entities, holding companies and other responsible entities who contravene section 558B should also be taken to have contravened the relevant provisions contravened by their franchisee entity/subsidiary/indirectly controlled entity.

As it is currently drafted, the responsible entity provisions do not appear to make franchisor entities or holding companies liable for the breaches of their franchises or subsidiaries, and merely introduced a new civil remedy provision for failing to prevent a contravention. This means that, under the current Act, it appears that workers at 7/11 could not pursue head office for their underpayments. They could only seek that the head office pays a penalty for breach of section 558B. This could be easily clarified by a minor addition to the Act as set out in our drafting suggestions.

For details please see Appendix 1.

6.3 The 'reasonable steps' defence for franchisors and holding companies should be clarified

Sections 558(3) and 558(4) of the FW Act create a defence for franchisors and holding companies where reasonable steps are taken to prevent a contravention by the franchisee entity or subsidiary of the same or a similar character.

Recommendation 8

At a minimum, WEstjustice recommends encouraging proactive compliance by including the examples provided for in paragraph 67 of the Vulnerable Works Bill Explanatory Memorandum as a legislative note into section 558B(4). It would also be useful to clarify situations where the reasonable steps defence will not apply – for example where a lead firm accepts a tender that cannot be successfully completed except by exploiting workers, or where a franchise agreement cannot be run at a profit without exploitation.

For details see Appendix 1.

6.4 A reverse onus creating a presumption that an employment relationship exists should be introduced to ensure minimum entitlements for all workers and to require principals to prove that contractors are operating their own business

As outlined at part 5.1(b) of our submission, the introduction in the Protecting Vulnerable Workers Act of a reverse onus of proof in relation to record-keeping failures appears promising. We consider that the same principles should be applied to compliance with sham contracting provisions.

Recommendation 9

To prevent unscrupulous businesses using sham contracting as their business model, WEstjustice recommends the insertion of a new section in the FW Act that provides all workers with the right to minimum entitlements, unless the employer/principal can establish the worker was genuinely running their own business.

This approach has been adopted in California, US, with the recent introduction of section 2750.3 of the Californian Labor Code. Section 2750.3 states:

> *(a) (1) For purposes of the provisions of this code and the Unemployment Insurance Code, and for the wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:*
>
> > *(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.*
> >
> > *(B) The person performs work that is outside the usual course of the hiring entity's business.*
> >
> > *(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.*

The introduction of such a reverse onus will provide minimum entitlements to all dependent workers, but still provides principals with a straightforward defence when they engage genuine contractors.

We could use the approach adopted in the Californian Code, or please see Appendix 1 for an alternative drafting suggestion.

6.5 The Australian Business Register should increase scrutiny at the time sole trader ABNs are issued to identify sham contracting at an early stage

Recommendation 10

WEstjustice recommends turning a greater focus to prevention of sham contracting, as well as penalisation.

As set out in the Not Just Work report, one way to achieve this is by introducing independent scrutiny and education at the time that an application for an ABN is made, including that:

(a) Proper consideration of all the facts and circumstances and the application of the relevant multi-factor test before an ABN is issued;

(b) In no circumstances should a principal be able to obtain an ABN on behalf of a worker; and/or

(c) ABNs should not be issued to individuals after a short internet application, and applicants who are individuals should be required to attend a face-to-face interview with an information officer (with interpreters where required), where education about the differences between contractors and employees (and their respective entitlements) is provided. Information about taxation and workplace injury insurance should also be provided at this time.

WEstjustice acknowledges that this procedural change would increase costs and compliance obligations. However, these are outweighed by the need to offer protection to all workers and maintain the integrity the workplace relations framework by removing incentives to engage in sham contracting.

6.6 Increase enforcement and education activities to prevent sham contracting arrangements, particularly for CALD communities

The complexity of sham contracting requires community organisations and regulatory agencies equipped with sufficient resources to assist vulnerable workers to articulate and pursue their complaints, investigate complaints made about sham contracting and to launch investigations into serial offenders. Targeted enforcement and audit action, especially in key industries (including construction, cleaning services and courier/distribution workers) is an important part of this.

Recommendation 11

WEstjustice considers that more needs to be done to clarify the distinction between employees and contractors in the community. This could be achieved by, for example:

(a) Greater education and targeted assistance to make sham contracting laws meaningful for CALD workers; and

(b) Increased 'on-the-spot' inspection and assessment of industries at risk of sham contracting by regulators, as vulnerable workers cannot be expected to self-report in all circumstances.

Finally, we note that, for genuine independent contractors, avenues for assistance with underpayment matters are extremely limited. Such workers fall outside the remit of FWO and many community legal centres, and consideration needs to be given to the best way to support them to understand and enforce their rights and responsibilities. In WEstjustice's submission into the Inquiry into the Victorian On-Demand Workforce,[9] we recommended a State based Office of the Contractor Advocate be established to provide information to individual workers and businesses about whether they are independent contractors or employees, investigate and report on systemic non-compliance, and assist vulnerable workers to navigate VCAT and other jurisdictions to recover minimum entitlements.

[9] Catherine Hemingway, February 2019, last accessed 23 October 2019 at: <https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/5315/5686/5228/WEstjustice.pdf>.

7. Conclusion

It is essential that our workplace relations framework protects those most at risk of exploitation. We believe our recommendations will strengthen legal frameworks and processes to ensure that all workers can access fair pay and decent work, and that unscrupulous employers can be held to account.

We thank the Attorney General's Department for considering these important issues and for providing us with the opportunity to put forward this submission and its recommendations.

Appendix 1 - Compilation of WEstjustice drafting suggestions

Type of change	Section	WEstjustice's drafting suggestions
Recommendation 2 and 6		
Insert new sub section	558A(3)	**558A Meaning of franchisee entity, and responsible franchisor entity and responsible supply chain entity** (1) A person is a ***franchisee entity*** of a franchise if: (a) the person is a franchisee (including a subfranchisee) in relation to the franchise; and (b) the business conducted by the person under the franchise is substantially or materially associated with intellectual property relating to the franchise. (2) A person is a ***responsible franchisor entity*** for a franchisee entity of a franchise if: (a) the person is a franchisor (including a subfranchisor) in relation to the franchise; and (b) the person has ~~a significant degree of~~ influence or control over the franchisee entity's affairs. (3) A person is a responsible supply chain entity if there is a chain or series of 2 or more arrangements for the supply or production of goods or services performed by a person (the worker); and (a) the person is a party to any of the arrangements in the chain or series and has influence or control over the worker's affairs or the person who employs or engages the worker; or (b) the person is the recipient or beneficiary of the goods supplied or produced or services performed by the worker. ***Note that minor amendments will also need to be made to 558B(3), 558C and in Part 7 – application and transitional provisions. We do not provide drafting instructions for these minor amendments.***
Recommendation 3		
Repeal and substitute	550	**Involvement in contravention treated in same way as actual contravention** (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision. Note: If a person (the ***involved person***) is taken under this subsection to have contravened a civil remedy provision, the involved person's contravention may

Type of change	Section	WEstjustice's drafting suggestions
		be a serious contravention (see subsection 557A(5A)). Serious contraventions attract higher maximum penalties (see subsection 539(2)). (2) A person is ***involved in*** a contravention of a civil remedy provision if, and only if, the person: (a) has aided, abetted, counselled or procured the contravention; or (b) has induced the contravention, whether by threats or promises or otherwise; or (c) has been in any way, by act or omission, directly or indirectly~~,~~ ~~knowingly~~ concerned in or party to the contravention; or (d) has conspired with others to effect the contravention. (3) For the purposes of paragraph (2)(c), a person is concerned in a contravention if they: (a) knew; or (b) could reasonably be expected to have known, that the contravention, or a contravention of the same or a similar character would or was likely to occur; or (c) became aware of a contravention after it occurred, and failed to take reasonable steps to rectify the contravention. (4) For the purposes of paragraph 3(b), a person will not be taken to be reasonably expected to have known that the contravention, or a contravention of the same or a similar character would or was likely to occur if, as at the time of the contravention, the person had taken reasonable steps to prevent a contravention of the same or a similar character. (5) For the purposes of subsection (4), in determining whether a person took reasonable steps to prevent a contravention of the same or a similar character, a court may have regard to all relevant matters, including the following: (a) the size and resources of the person; (b) the extent to which the person had the ability to influence or control the contravening person's conduct in relation to the contravention or a contravention of the same or a similar character; (c) any action the person took directed towards ensuring that the contravening person had a reasonable knowledge and understanding of the requirements under this Act; (d) the person's arrangements (if any) for assessing the contravening person's compliance with this Act;

Type of change	Section	WEstjustice's drafting suggestions
		(e) the person's arrangements (if any) for receiving and addressing possible complaints about alleged underpayments or other alleged contraventions of this Act; (f) the extent to which the person's arrangements (whether legal or otherwise) with the contravening person encourage or require the contravening person to comply with this Act or any other workplace law.
Insert new section	550A	**Primary duty of care** (1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, compliance with this Act in respect of: (a) workers engaged, or caused to be engaged by the person; and (b) workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking. (2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that compliance with this Act in respect of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking. (3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable: - ***[insert any further specific requirements here]*** Meaning of worker (4) A person is a worker if the person carries out work in any capacity for a person conducting a business or undertaking, including work as: (a) an employee; or (b) a contractor or subcontractor; or (c) an employee of a contractor or subcontractor; or (d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or (e) an outworker; or (f) an apprentice or trainee; or (g) a student gaining work experience; or (h) a volunteer; or (i) a person of a prescribed class. What is reasonably practicable

Type of change	Section	WEstjustice's drafting suggestions
		(5) In this Act, ***reasonably practicable***, in relation to a duty to ensure compliance with this Act, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring compliance, taking into account and weighing up all relevant matters including: (a) the likelihood of the risk concerned occurring; and (b) the degree of harm that might result from the risk; and (c) what the person concerned knows, or ought reasonably to know, about: (i) the risk; and (ii) ways of eliminating or minimising the risk; and (d) the availability and suitability of ways to eliminate or minimise the risk; and (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk. Person may have more than 1 duty (6) A person can have more than 1 duty by virtue of being in more than 1 class of duty holder. More than 1 person can have a duty (7) More than 1 person can concurrently have the same duty. (8) Each duty holder must comply with that duty to the standard required by this Act even if another duty holder has the same duty. (9) If more than 1 person has a duty for the same matter, each person: (a) retains responsibility for the person's duty in relation to the matter; and (b) must discharge the person's duty to the extent to which the person has the capacity to influence and control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity. Management of risks (10) A duty imposed on a person to ensure compliance with this Act requires the person: (a) to eliminate risks to compliance, so far as is reasonably practicable; and (b) if it is not reasonably practicable to eliminate risks to compliance, to minimise those risks so far as is reasonably practicable.

Type of change	Section	WEstjustice's drafting suggestions
		Duty of officers (11) If a person conducting a business or undertaking has a duty or obligation under this Act, an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation. (12) The maximum penalty applicable for an offence relating to the duty of an officer under this section is the maximum penalty fixed for an officer of a person conducting a business or undertaking for that offence. (13) An officer of a person conducting a business or undertaking may be convicted or found guilty of an offence under this Act relating to a duty under this section whether or not the person conducting the business or undertaking has been convicted or found guilty of an offence under this Act relating to the duty or obligation. (14) In this section, due diligence includes taking reasonable steps: (a) to acquire and keep up-to-date knowledge of the obligations in this Act; and (b) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the risks associated with those operations; and (c) to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to compliance with this Act from work carried out as part of the conduct of the business or undertaking; and (d) to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding risks and responding in a timely way to that information; and (e) to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act; and Examples For the purposes of paragraph (14)(e), the duties or obligations under this Act of a person conducting a business or undertaking may include: • ensuring compliance with notices issued under this Act; • ensuring the provision of training and instruction to workers about workplace laws. (f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).

<table>
<tr><th>Type of change</th><th>Section</th><th>WEstjustice's drafting suggestions</th></tr>
<tr><td></td><td></td><td>Duty to consult with other duty holders

(15) If more than one person has a duty in relation to the same matter under this Act, each person with the duty must, so far as is reasonably practicable, consult, co-operate and coordinate activities with all other persons who have a duty in relation to the same matter.

Note further drafting will be required for this section, but these are some examples for consideration.</td></tr>
<tr><td colspan="3">Recommendation 4</td></tr>
<tr><td>Amend existing section</td><td>Row 11, section 539(1)</td><td>
Part 3-1--General protections
<table>
<tr><td>11</td><td>340(1)
340(2)
343(1)
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349(1)
350(1)
350(2)
351(1)
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353(1)
354(1)
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357(1)
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369(3)</td><td>(a) a person affected by the contravention;

(b) an industrial association;

(c) an inspector</td><td>(a) the Federal Court;

(b) the Federal Circuit Court</td><td><u>for a serious contravention-- 600 penalty units; or</u>

60 penalty units</td></tr>
</table>
</td></tr>
<tr><td colspan="3">Recommendation 5</td></tr>
<tr><td>Amend existing provision</td><td>357</td><td>357 Misrepresenting employment as independent contracting arrangement

(1) A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.

Note: This subsection is a civil remedy provision (see Part 4-1).

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

(a) did not know; and

(b) <s>was not reckless as to whether; and</s> <u>could not reasonably be expected to know that</u> the contract was a contract of employment rather than a contract for services.</td></tr>
</table>

Type of change	Section	WEstjustice's drafting suggestions
Recommendation 7		
Insert new provision	558AA	A person who is responsible for a contravention of a civil remedy provision is taken to have contravened that provision. *Note: persons who are responsible for a contravention may include responsible franchisor entities, holding companies, franchisee entities, subsidiaries and other responsible entities.*
Recommendation 8		
Insert new legislative note	558B(4)	*Note: Reasonable steps that franchisor entities, holding companies and indirectly responsible entities can take to show compliance with this provision may include: ensuring that the franchise agreement or other business arrangements require all parties to comply with workplace laws, providing all parties with a copy of the FWO's free Fair Work handbook, requiring all parties to cooperate with any audits by FWO, establishing a contact or phone number for employees to report any potential underpayment or other workplace law breaches and undertaking independent auditing.*
Recommendation 8		
Insert new provision	357A	**357A Presumption of employment relationship** (1) An individual who performs work for a person (the ***principal***) under a contract with the principal is taken to be an employee (within the ordinary meaning of that expression) of the principal and the principal is taken to be the employer (within the ordinary meaning of that expression) of the individual for the purposes of this Act. (2) Subsection (1) does not apply if it can be established that the individual was completing work for a client or customer of a business genuinely carried on by the individual. Note: When determining whether a business is genuinely carried on by an individual, relevant considerations include revenue generation and revenue sharing arrangements between participants, and the relative bargaining power of the parties.