

THE RECOVERY OF WAGES: LEGAL SERVICES AND ACCESS TO JUSTICE

CHRIS ARUP* AND CAROLYN SUTHERLAND**

A basic test of a labour law regime is the enforcement of minimum wage and other entitlements. This paper is concerned with the recovery of underpayments especially recovery of 'small' amounts by workers who are vulnerable in the marketplace. We gauge levels and quality of access to the legal information and advice which is necessary for workers to determine their legal entitlements. We also assess the level of services accessible to workers when they need assistance to pursue an underpayment claim within the mainstream civil justice system. In the context of the broader workplace relations reforms which are proposed within the federal sphere, we welcome the expansion of the enforcement agency, to be renamed the Office of the Fair Work Ombudsman, but argue in favour of retaining the existing support services.

I INTRODUCTION

This paper stresses the place for judicial legality in the meeting of obligations to pay, especially minimum rates payable to vulnerable workers. While recognising that other forms of legality (market and administrative legality) are likely to be more common to wage recovery, we argue that judicial legality is an essential component of a regulatory regime.¹ If judicial legality is to be a reality, it follows that workers must have access to legal information, advice and assistance. We make an assessment of access currently. We also point to legal services that should be maintained in any federal or state government reforms.

The article begins with the rationale for our focus on judicial legality, and explains the nature of our inquiry. We then assess the accessibility of the legal knowledge which is required to identify a worker's minimum wage entitlements. This section considers legal consciousness, information and advice. The next section outlines the nature of the legal assistance (and, in some cases, legal representation) which is provided by various legal service providers and other institutions in relation to underpayment claims. In particular, we focus on the role of legal practitioners, the Workplace Ombudsman ('WO'), and the Victorian Magistrates' and Federal

* Professor, Department of Business Law and Taxation, Monash University.

** Senior Lecturer, Department of Business Law and Taxation, Monash University. We would like to acknowledge the assistance of Marc Trabsky and Kathleen Mendan with research for this paper. The project has been supported with a small grant from the Victoria Law Foundation (SG184) and by the Faculty of Business and Economics at Monash University.

¹ We borrow the concept of legalities from Bronwen Morgan, *Social Citizenship in the Shadow of Competition: The Bureaucratic Politics of Regulatory Justification* (2003). But it is one used widely through sociolegal studies these days.

Magistrates Courts. Finally, we outline our conclusions and our recommendations for the continued operation of existing support services within a new Federal workplace relations system.

II BACKGROUND TO THE RESEARCH

What is an acceptable level of underpayment of wages and entitlements? What is a small amount of underpayment? As other employment law guarantees are relaxed, minimum wages have become central to wage earner welfare. Some Australian workers do receive income supplements from social security and other sources,² yet it is possible to work and be poor. And, while some work is better than none, there is social value also in legal obligations being observed. We tend to argue that, once public policy settles on a legal rate, as Australian law does, it should be paid when work is done.

So our inquiry starts from the premise that legally fixed rates should be respected. Yet underpayment is a fact. Research shows a history of underpayment³ and the size of the recoveries which the WO has recently obtained⁴ actually points up the currency of the problem. Underpayments go without remedy. In the regulatory space for recovery, factors such as ignorance, complexity, dishonesty, greed, capacity to pay, physical danger, jobs, relationships, transaction costs, and poverty all help to determine payment outcomes.

To conceptualise the possible approaches to enforcement of wages, we draw on the insights of regulatory studies. Regulatory studies have a loose, knowing, accommodating sense of how issues like payments are ordered and resolved. A theorist like Colin Scott will want to point out to us that regulation comes in non-state as well as state varieties, private as well as public, and non-law as well as law.⁵ This is useful, though sociolegal studies would work with a less narrow or formal sense of 'law', and here we shall acknowledge the varieties of regulation by contrasting three styles of 'legality': market, administrative and judicial legality.⁶

Within market legality, we would expect payments to be worked out between the parties, that is, the employer and the worker. Usually this means the employer

2 Some argue that payment is not a concern because the low paid generally come from well-off households. For a critique of that argument, see Helen Masterman-Smith and Barbara Pocock, *Living Low Paid: The Dark Side of Prosperous Australia* (2008) ch 2.

3 See Miles Goodwin and Glenda Maconachie, 'Unpaid Entitlement Recovery in the Federal Industrial Relations System: Strategy and Outcomes 1952-95' (2007) 49 *Journal of Industrial Relations* 523.

4 From 1 July 2007 to 30 April 2008, the WO recovered \$25 128 011 for 21 721 workers in total. See Workplace Ombudsman, *Submission of the Office of the Workplace Ombudsman* (2008) [4] Australian Industrial Relations Commission <http://www.airc.gov.au/awardmod/databases/general/submissions/wo_sub.pdf> at 14 April 2009.

5 Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post Regulatory State' in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (2004).

6 Morgan, above n 1.

pays the wages set by law (legislation, award, collective agreement) or, within that constraint, agreed with the worker. If the worker is underpaid, the matter is privately resolved. The parties might make their own use of a mediator. The worker might enlist the help of a family member, friend, workmate, union officer or professional representative (lawyer or other professional). The employer may (or may not) make good the payments. The worker might obtain a part-payment of the debt. Sometimes workers have to cut their losses and exit the workplace in search of a better employer. Some employers suffer from a bad reputation, while others keep operating for many years, underpaying new or vulnerable workers.

Within administrative legality, rates of pay might be worked out between the employer and worker but they are subject to the oversight of an administrative agency. As has been the practice with the 'fairness' test and 'no disadvantage' test, such oversight might be exercised over the agreement to pay wages by means of a reporting requirement and a screening process. Oversight might also be exercised at the point when wages are actually underpaid. Workers may bring complaints to the attention of the administrative agency or the agency conducts its own audits among employers. The agency operates by its own and any applicable government's compliance criteria regarding: (a) the circumstances in which it will become involved at all; (b) the type of intervention it will favour, including the help it will lend the worker to pursue the wages; and (c) whether it will pursue recovery in full. It might prosecute select cases, but overall the agency might favour voluntary compliance and informal dispute resolution.

Within judicial legality, payments are determined by the rules embodied in the law. Payments that fall short of the standards set in the rules are recovered under threat of proceedings before a tribunal or court. In most cases, the rules are respected. If payment is disputed or resisted, the tribunal or court adjudicates according to the rules. If it finds a contravention, it orders enforcement. The worker may bring proceedings independently. If she is not capable of doing so on her own, she will be provided with adequate professional representation to do so.

Within employment in Australia, much payment is determined by market legality (what the employers and workers can settle themselves privately, perhaps with the participation of a union) or by administrative legality (what the government agencies will insist that employers pay). But we argue that payment should not depend finally on generosity or power of the market, nor upon the rationalities and strategies that administrative agencies may be obliged to follow.⁷ Ultimately, it should depend on observance of the law, which we call judicial legality.

Why judicial legality? Between Teubner's three classic demands on regulation, effectiveness, responsiveness and coherence,⁸ judicial legality has one virtue over market and administrative legalities, the virtue of coherence. In theory, it

7 Here we take a lead from Joellen Riley, *Election 2007: Industrial Relations Policy* (2007) Australian Review of Public Affairs <<http://www.australianreview.net/digest/2007/election/riley.html>> at 14 April 2009.

8 Teubner's 'regulatory trilemma'. See Gunther Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in Gunther Teubner (ed), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (1987).

guarantees full recovery of legal entitlements. Furthermore, if judicial legality is realisable, it will, within an enforcement pyramid,⁹ strengthen the hand of market and administrative legalities. But judicial legality is often neither effective in recovering underpayments nor responsive to workers' need to do so, when 'small' amounts of money are involved. So much so that some dismiss it as a regulatory response to underpayment.¹⁰ This is why commentators often stress reforms to market legality (the role of unions or other collective mechanisms)¹¹ or administrative legality.¹² However, it is unrealistic to expect unions or other organisations (like non-governmental organisations ('NGOs')) to counterbalance employer power in many sectors of the market. Furthermore, even when they are well-organised and efficient (like the WO), administrative agencies remain subject to government philosophies about regulation and the financing of their operations.¹³

Judicial legality is an essential component of civil justice and even, we might say, the rule of law in employment relations. But the effectiveness and responsiveness of judicial legality depend on access to justice. We are working with the principle that workers need legal services if they are to recover underpayments. Those services cover information, advice and assistance. Though it is to be regarded as the last resort, when other modes of dispute resolution fail, these services include legal representation in a hearing before an adjudicator. Our research gauges the scope of the services currently available; access to those services can be limited for a range of reasons. We have the benefit of both labour law and civil justice scholarship to guide our inquiries.

Our initial research has concentrated on materials about legal services that are in the public domain such as websites, booklets and reports. We are following it up by meeting with providers. The providers consist of specialist and community legal centres (eg Jobwatch), legal aid offices and private practitioners. We also appraise the administrative agencies (Workplace Authority and WO) and courts (the Federal Magistrates Court and Magistrates' Court of Victoria) in their roles as providers of legal services to workers, rather than their role as enforcers directly

9 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) 35. See also Janet Hope, Dianne Nicol and John Braithwaite, 'Regulatory Capitalism, Business Models and the Knowledge Economy' in John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (2008).

10 Margaret Lee, 'Regulating Enforcement of Workers' Entitlements in Australia: The New Dimension of Individualisation' (2006) 17 *Labour and Industry* 41, 57–8.

11 See, eg, Sean Cooney, John Howe and Jill Murray, 'Time and Money under Work Choices: Understanding the New *Workplace Relations Act* as a Scheme of Regulation' (2006) 29 *University of New South Wales Law Journal* 215.

12 Karen Wheelwright, 'Enforcement under Work Choices: Recent Developments' (2007) 13 *Employment Law Bulletin* 58; Tess Hardy, 'Changing of the Guard: Enforcement of Workplace Relations Laws Since Work Choices and Beyond' (Paper presented at the Australian Labour Law: From Work Choices to Fair Work Conference, Melbourne, 2–3 July 2008).

13 History shows this. See Laura Bennett, *The Implementation of Australian Labour Law: Industrial Relations, Politics and Law* (1994). Jill Murray thinks it is still current: Jill Murray, 'Work Choices and the Radical Revision of the Public Realm of Australian Statutory Labour Law' (2006) 35 *Industrial Law Journal* 343. See generally Bronwen Morgan (ed), *The Intersection of Rights and Regulation: New Directions in Sociological Scholarship* (2007).

of the federal legislative requirements. The research of legal services is focused within Victoria.

Our larger project endeavours to sort the multiple factors that determine payment outcomes. Access to legal services is certainly one factor. Ultimately, the project should place these services within the various social fields of employment and the interactions between employers, workers and regulators. In particular, it should take account of the characteristics of the fields in which workers are most vulnerable to underpayments. This research will reach down to sample the employers' and workers' own attitudes to underpayment and their experience of the civil justice system. We plan to conduct in-depth interviews with workers, employers, subcontractors, union officials and NGOs.¹⁴

III LEGAL KNOWLEDGE

A *Legal Consciousness*

We can hardly talk about whether services are accessible before we know the extent of legal need, the size of the underpayment problem. Those workers who do endeavour to find information or enlist advice and assistance are already expressing a need. They have taken an important step.¹⁵ In such research, the critical threshold question is the breadth and depth of the unmet need. We have indications from various sources that alert us to the problem: for example, Elizabeth Wynhausen's undercover investigative journalism with the low paid;¹⁶ Nyland and Marginson's interviews with international students;¹⁷ and lately the WO's audits of sectors such as retail, tourism and hospitality.¹⁸ It might seem a bigger problem in those societies where informal labour markets are well established. But several factors, including lighter employment regulation in Australia, bigger casual and international workforces, even, we might suggest, social fragmentation, give cause for concern.

14 There is a model for this research methodology in the work of Professor Anna Pollert and the London Metropolitan University Working Lives Research Institute. See the series of working papers Anna Pollert, 'The Unorganised Worker: Routes to Support and Views on Representation' Research Project (Economic and Social Research Council, 2003–5) <<http://www.workinglives.org/staff/former-staff-members/dr-anna-pollert.cfm>> at 14 April 2009.

15 William Felstiner, Richard Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming' (1980–81) 15 *Law and Society Review* 631.

16 Elizabeth Wynhausen, *Dirt Cheap: Life at the Wrong End of the Job Market* (2005).

17 Chris Nyland et al, *International Student-Workers in Australia: A New Vulnerable Workforce* (2008) Centre for the Study of Higher Education <http://www.cshe.unimelb.edu.au/people/staff_pages/Marginson/IntStu&WorkFeb2008.pdf> at 14 April 2009.

18 From 1 July 2007 to 30 April 2008, the WO recovered \$5 724 006 in unpaid entitlements for 8 391 workers as a result of targeted investigations: Workplace Ombudsman, above n 4. Retail, business services and hospitality revealed the most breaches. For earlier figures, see Workplace Ombudsman, *Annual Report 2006–07* (2007) <<http://www.wo.gov.au/asp/index.asp?sid=7407&page=fact-sheets-temp-pubview&cid=5371&id=765>> at 14 April 2009.

It is harder to be precise. In the United Kingdom, Hazel Genn's pioneering research, *Paths to Justice*, gave impetus to the systematic surveying of legal need.¹⁹ These surveys do not wait until people seek help. They pick up on those people who have a justiciable problem but do nothing about it. In 2007, the Law and Justice Foundation ran a pilot survey of legal need in three areas of NSW.²⁰ That random survey of the local adult populations found that 12 per cent of the respondents had experienced an employment problem in the previous year. Of this group, one-third reported that they had done nothing about it; more again had not taken up professional services. We look forward to the results of a state-wide survey later in 2008.

If we are to identify regulatory strategies to overcome this problem, including the provision of suitable services to the underpaid, the research should ask why some workers do nothing. The reasons are likely to vary. Some will be quite acceptable, but one will be that they do not think anything can be done. They might not think that they have any legal entitlement. Or realising they are being denied a legal entitlement, they hesitate to assert it. They can be worried about losing work or even about physical safety or residence in the country. Or they might feel the legal system will not be helpful: better to put the underpayment down to experience and move on (if possible) – exit then rather than voice.

Some public policy makers will argue that such workers are not necessarily going to be better off if legal wage rates are strictly enforced. But what conditions and whose interests should we regard as legitimate in deciding when to enforce the law? Administrative agencies face their own challenges detecting breaches in certain sectors of the labour market. But failure to enforce might have someone else's interests in mind. For example, Saskia Sassen's research finds that illegal work is less likely to be policed when employer need for labour is high.²¹ Making legal services available gives those affected greater choice over the conditions they will accept.

B Legal Information

Access to services begins with knowledge of the law. For example, surveys of workers in the United Kingdom have identified a very high level of awareness that there is a minimum wage. However, far fewer people know how much it is or how it applies.²² Likewise in Australia, we might expect the Work Choices mass media publicity to have heightened awareness that there are minimum standards. But much of the content was in very general terms reassuring people of the fairness of the system. How many people could nominate the Australian Fair Pay and

19 Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (1999).

20 Christine Coumarelos, Zhigang Wei and Albert Zhou, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas* (2006) Law and Justice Foundation <<http://www.lawfoundation.net.au/report/survey2006>> at 14 April 2009.

21 Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (1996).

22 Anna Pollert, 'The Unorganised Worker: The Decline in Collectivism and New Hurdles to Individual Employment Rights' (2005) 34 *Industrial Law Journal* 217, 222.

Conditions Standard ('AFPCS') and specifically the Federal Minimum Wage? Then that rate is the bare minimum, whereas the minimum for most people depends on the applicable Australian Pay and Classification Scale.

What sort of publicity reaches the underpaid and informs them about their entitlements? Our research scrutinises both the content and medium of information. In theory, the services should be able to convey information in a neutral, 'matter of fact' manner. Giving advice, as we shall see below, is more interventionist; it puts a spin on the information. Pure legal information should not create dependence; it leaves the worker to make up her own mind. It may also avoid a particular problem peculiar to the law – the service provider engaging in the unqualified practice of law.²³

Most information is subjected to packaging and presentation.²⁴ Perhaps, this agency is necessary because access to information about wage rates runs up against the complexity of the law.²⁵ A basic challenge is to find out which instrument governs rates of pay.²⁶ The system has generated a multiplicity of instruments and allowed for switching between them. For example, to establish whether they are being paid their correct entitlements, workers need to know whether their employer is covered by the Federal workplace relations system and, if so, whether they are covered by an award (eg, pre-reform award, Victorian common rule award, or Notional Agreement Preserving State Award ('NAPSA')), or a workplace agreement (eg, Preserved State Agreement, Australian Workplace Agreement ('AWA'), Individual Transitional Employment Agreement ('ITEA') or collective workplace agreement), and/or an Australian Pay and Classification Scale, and/or a common law contract. Then workers must determine the rate which is mandated by the combined effect of these instruments. For some of these instruments, the rates are updated periodically. While it appears that the national workplace relations system proposed by the Rudd Government will be less complex than the existing system,²⁷ workers seeking to identify wage entitlements will nevertheless be required to face similar questions about the

23 See, eg, *Legal Profession Act 2004* (Vic) s 2.2.2.

24 Jeff Giddings and Michael Robertson, 'Large-Scale Map or A-Z? The Place for Self-Help Services in Legal Aid' (2003) 30 *Journal of Law and Society* 102.

25 See, eg, Transcript of Proceedings, *Bradford v Bennett and Jouning Pty Ltd* (Magistrates' Court of Victoria, Magistrate Hawkins, 31 May 2007); *Kelly v Fitzpatrick* (2007) 166 IR 14. Various surveys of employers undertaken since the commencement of Work Choices suggest that employers are finding it increasingly difficult to ascertain their legal obligations. See Office of the Workplace Rights Advocate, *The Inquiry into the Impact of the Federal Government's Work Choices Legislation on Workers and Employers in the Victorian Retail and Hospitality Industries Report* (2007) 119–21 (copy on file with the author).

26 See, eg, *Olsen v Wellard Feeds Pty Ltd* [2008] FMCA 320 (Unreported, Lucev FM, 14 March 2008), where Lucev FM agreed with the employer that the workplace inspector had incorrectly asserted that the Milling Industry – General Award 1999 applied to a mill manager.

27 See Andrew Stewart, *Submission to the Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work Bill 2008* (2008) 2 <http://www.aph.gov.au/Senate/Committee/eet_cte/fair_work/submissions.htm> at 13 July 2009. See also Andrew Stewart, 'A Simple Plan for Reform? The Problem of Complexity in Workplace Regulation' (2005) 31 *Australian Bulletin of Labour* 210.

coverage of the national system, and the application of (and interaction between) modern awards, enterprise agreements and common law contracts.

Recently, an extra source of uncertainty has been the allowance for certain wage entitlements such as penalty rates to be traded off against non-material benefits, subject to a fairness test. Under Work Choices, it generated a particular problem for payment recovery because the AWAs commenced operating on lodgement and employers were regularly required to provide back-pay if they subsequently failed the test.²⁸ The problem was compounded by the delay in assessing fairness and the backlog that built up. Staffing was a reason for the delay, but more substantive was the need to go back to the employers for further particulars regarding the nature of the trade-off, for example about the working hours arrangements put in place. While the new Government is abolishing AWAs, it too is attracted to the idea of individual flexibility clauses. Permitting this trade-off to be made in the individual case subject to a 'no disadvantage' test will generate uncertainty about entitlements.²⁹

Even if the legal instruments can be simplified, it is necessary to identify the best media for communicating useful information to workers. Recent research confirms that, despite greater access to information about the Work Choices workplace relations system, workers have been confused about their rights and entitlements,³⁰ and have found it difficult to identify information which is sufficiently specific to enable them to understand and pursue their entitlements.³¹ Similarly, employers reported that the information provided by Federal authorities about the Work Choices system was not helpful.³²

We should remember that some of these workers will be operating at one disadvantage or another, being uneducated, illiterate, transient, poor or new to the country. In choosing their medium of information, we find that the services rely increasingly on internet sites, at least as the initial point of contact. A worker might start with a hard copy information booklet,³³ a telephone call or attendance at an office, but usually this source is only accessible after a website visit. This

28 The extent of this problem has been reduced by the Labor Government's *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth) which requires the majority of agreements to be assessed against the 'no disadvantage test' before the agreements come into operation (the exception is agreements for new employees): See *Workplace Relations Act 1996* (Cth) s 347(1).

29 Workplace Ombudsman, above n 4. See Steven Scott, 'Fear of Loopholes in Awards Overhaul', *Australian Financial Review* (Melbourne), 12 June 2008.

30 See, eg, Queensland Industrial Relations Commission, *Final Report: Inquiry into the Impact of Work Choices on Queensland Workplaces, Employees and Employers: Volume 2* (2007) [118] <http://www.qirc.qld.gov.au/inquiry/workchoices/final_report/qirc%20final%20report_full%20version.pdf> at 14 April 2009.

31 See, eg, Santina Bertone et al, *Work Choices: The Victorian Experience: A Statewide Study Conducted by Job Watch in Conjunction with Victoria University and the University of Melbourne* (2007) 28; *Child Employment Principles Case 2007* [2007] NSWIR Comm 110 (Unreported, Wright J, President, Walton J, Vice-President, Schmidt J, Sams DP, Boland J and McLeay C, 22 May 2007).

32 Industrial Relations Commission of South Australia, *Inquiry into the Impact of Work Choices and the Independent Contractors Legislation on South Australian Workplaces, Employees and Employers, Report and Recommendations* (2007) 56.

33 See, eg, Jobwatch and Victoria Legal Aid, *People & Work* (6th ed, 2008) recommending a further booklet on recovery of wages.

initial contact is crucial. The payment legality will not be judicial unless the worker actually engages with the legal system.

Outside of public venues, internet access is still largely confined to middle class households. Then navigation of the sites demands several kinds of literacy. In some cases (more so for older workers, no doubt), computer literacy compounds difficulties reading legal texts. The sites we examined were often cluttered; workers were required to follow a series of links to additional pages, sometimes to other sites. Most sites offered only generic information about entitlements and procedures. Those that did contain information about rates for particular jobs (Workplace Authority, Australian Industrial Relations Commission, Australian Fair Pay Commission) required the worker to know the name of the instrument that governs their employment or at least to classify themselves in a relevant way. We feel that these sites would benefit from expert design services.

For vulnerable workers, other sources of information might give greater access. Such information needs to be both close and timely. It needs to be provided close to where they live and work and at critical moments when they experience a problem. One such source would be a written statement from the employer nominating the instrument that governs and details the applicable rate. We argue that this requirement would not only inform workers; it would alert employers to the risk they were about to underpay workers. Data collected by the former Office of the Employment Advocate ('OEA'), and by independent researchers, have confirmed that there are many examples in workplace agreements lodged with the OEA of terms which fall below minimum legal entitlements.³⁴ While the new Government's National Employment Standards will include a statement from the employer, it will not have this specificity.³⁵ Leaflets and pamphlets should be circulated: unions used to provide this information where they had entry rights, but who is to do so now that they have less presence: Centrelink, the Taxation Office, a dedicated service?³⁶

C Legal Advice

Such media can only do so much to reduce the complexity of the law. Information quickly becomes advice. Most workers have to rely on a third party to identify the governing instrument and the applicable rate. Then, once underpayment has been established, considering how to proceed with recovery (talk to the employer, enlist a representative, make a demand, settle a dispute, go to court) is largely a matter of advice. Advice can be factual, simply to nominate the court with

34 Carolyn Sutherland, 'Fair Agreements under Work Choices? A Closer Look at Bargaining Outcomes' (Paper presented at the 22nd Association of Industrial Relations Academics of Australia and New Zealand Conference, Melbourne, 6–8 February 2008) 8.

35 Fair Work Bill 2008 (Cth) pt 2–2 div 12. Since writing the article, the Commonwealth Parliament has passed the final version of the Bill, on the statute books as the *Fair Work Act 2009* (Cth).

36 For ideas from abroad, see United Kingdom, Low Pay Commission, *National Minimum Wage*, Report Cm 7333 (2008) 107; Trades Union Congress Commission on Vulnerable Employment, *Hard Work, Hidden Lives*, Full Report (2008) 65.

jurisdiction, for example, but it usually means gauging prospects, recommending a strategy. Proceeding involves a calculus: comparing the amount at stake with the costs of proceeding and the risks of losing.³⁷ The calculus affects how far the worker is prepared to take the case. On the other hand, the employer will also make that calculus and conclude in some cases that the threat of action is not credible and the worker is unlikely to persist with the claim. The decision to initiate a legal claim for a low amount of money will be a hard one; similarly, to proceed with a claim for a large amount rather than settle out of court.

As well as the legal merits of the case, factors to be taken into account include evidentiary requirements (onus and standard of proof, documentary demands such as timesheets and payslips), procedural hurdles (identifying the right forum, pleading and filing formalities, alternative dispute resolution ('ADR'), waiting times in the court lists, knowing the adjudicator) and legal costs (court fees, upfront payments to lawyers and, where they apply, cost penalties for losing). Generally these factors are loaded against the worker who must carry the claim against the employer.

In addition, we should note that losing a case, and even winning, can have emotional as well as financial costs. For a worker, a key consideration is the value of the relationship with the employer. The calculus is more than a rational monetary equation. Sociolegal studies put this more subtly than economics: these contextual social factors³⁸ influence what the worker will see as 'the good case'.

Do workers have access to such advice? We gauge accessibility from three angles: availability, expertise and role. Basic access depends on the services being visible, local and informal. It also depends on timing, as the neighbourhood community legal services appreciated when they opened up after ordinary working hours as drop-in centres. Research would suggest that timing is even more critical than this: for some workers who do not plan, it is best to locate the service where the problem arises or crystallises for them – for example, at Centrelink or a charity, where they might go for assistance after losing their job.³⁹ Otherwise, they will let go. Having to search out the location of a service and make an appointment discourages some. Each referral also means that some will drop out. We are interested in how these referrals take place: are the workers made to go away and find the next agency or are they given a contact or even connected directly on the telephone, for instance?

37 Again a classic study is given us by Hazel Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (1987).

38 See Catherine Albiston, 'The Rule of Law and the Litigation Process: The Paradox of Losing by Winning' (1999) 33 *Law and Society Review* 869.

39 They are additionally important because legal problems often come in clusters: the client will report one urgent problem such as an injury, loss of housing or difficulty obtaining social security payments and this problem will be connected with loss of a job and entitlements. See Pascoe Pleasance et al, 'Multiple Justiciable Problems: Common Clusters and Their Social and Demographic Indicators' (2004) 1 *Journal of Empirical Legal Studies* 301. See generally Legal Services Commission, *LSRC Research Paper Series* (2001) Legal Services Research Centre <<http://www.lsrc.org.uk/publications.htm>> at 14 April 2009.

Referral drawbacks make the Labor Government's proposal for a 'one-stop shop' attractive.⁴⁰ But availability has to be set against expertise. Some of the local services find the law complex too. They need to cover so many areas of law, unless they happen to have a resident expert in employment law, that they will defer to the specialist services. But most of these specialist services do not have shop-front premises where workers can walk in off the street to see an advisor or make an appointment to do so. Some, such as the Australian Fair Pay Commission, do not give advice at all. Of those that do, Jobwatch, the Victorian Workplace Rights Advocate⁴¹ and the Workplace Authority, all have their offices in central business district ('CBD') office blocks. They rely heavily on telephone lines to provide services. The same is true of Victoria Legal Aid, even though it does have suburban and regional country offices as well as Melbourne CBD headquarters. The exception may be the WO which has 26 offices in metropolitan and regional locations.

The telephone services are a key link in the services chain. Their availability depends on the load they can handle and these services are currently dealing with thousands of inquiries each year. When a worker makes contact, it also depends on the quality of communication. Where, for example, issues are complex and the worker is vague, she may be asked to go back and collect information from another source (including the identity of the governing instrument). It matters whether the worker is assigned a contact or has to start again from scratch.

Building the expertise of the officers who staff the lines is a challenge too. Such advice depends on close knowledge of law and legal processes but also demands great attention to the circumstances of the particular case.⁴² Some of the lines are staffed by lawyers. But this complement of professionals is expensive to staff and continuity must also be maintained if experience is to be built in the employment area. Then role comes into play. Specialist paralegals can be very useful (just as union officers were), but giving legal advice is part of the practice of law and only limited exceptions are allowed to this monopoly.⁴³ The relationship is an ethical one too, requiring a standard of care to be observed and independence to be maintained in the provision of advice. Some services say they will not give workers 'advice' as opposed to information. They will refer workers on to legal

40 'Fair Work Australia will be accessible to all Australian employers and employees. There will be offices in suburbs and regional centres and workplace visits will be available to provide further convenience. There will no longer be a need to contact different helplines and deal with separate agencies about workplace matters': Kevin Rudd and Julia Gillard, *Forward with Fairness: Labor's Plan for Fairer and More Productive Workplaces* (2007) [17] Australian Labor Party <<http://www.alp.org.au/download/now/forwardwithfairness.pdf>> at 14 April 2009. See also Kevin Rudd and Julia Gillard, *Forward with Fairness – Policy Implementation Plan* (2007) Australian Labor Party <http://www.alp.org.au/download/now/070828_dp_forward_with_fairness_policy_implementation_plan.pdf> at 14 April 2009.

41 Note that on 2 December 2008, the Victorian Government tabled the Workplace Rights Advocate (Repeal) Bill 2008 (Cth) to abolish the Office of the Advocate on the basis that it was 'no longer needed': Explanatory Memorandum, Workplace Rights Advocate (Repeal) Bill 2008 (Vic) cl 3. The *Workplace Rights Advocate (Repeal) Act 2009* (Vic) received royal assent on 10 June 2009.

42 See Peter Gahan, *WorkChoices & Workplace Rights in Victoria: Evidence from the Workplace Rights Information Line* (2006) Business Victoria – Office of the Workplace Rights Advocate <http://www.business.vic.gov.au/busvicwr/_assets/main/lib60148/wpra_infoline.pdf> at 14 April 2009.

43 *Legal Profession Act 2004* (Vic) s 2.2.2.

practitioners and advice becomes assistance. We find that the caseload of the Jobwatch lawyers is critical here. If their assistance is not available, the common response is to refer workers to the administrative agency, the WO. The WO is not a legal representative and this switch brings administrative legality to the fore. If the case does not fit with its responsibilities, the WO may refer the worker to someone else or leave her to her own devices.⁴⁴

IV LEGAL ASSISTANCE/ACTION

Legal action is the crucial final component to judicial legality, even if it is to be taken sparingly. It has to be a credible threat if underpayments are to be recovered and legal processes are to act as a deterrent. As legal advice would suggest, there are often good reasons why legal action is not pursued. But the lack of legal assistance and representation is not one of them. Legal action can involve making a claim on an employer, negotiating and settling a claim with the employer, initiating and conducting litigation, and appearing for a worker at a conference and a hearing. If a court makes an order in favour of a worker, it might have to be executed against the employer.

Today, public policy is sceptical of the virtues of litigation. The thinking is that the transaction and administrative costs of litigation exceed the benefits. A subset of this thinking is that lawyers complicate and aggravate disputes. The trend is to favour alternative dispute resolution – where lawyers are excluded from participation, except with leave of the court. Certainly, the parties will be urged to try to resolve the matter themselves before entering into litigation. For example, under the *Workplace Relations Act 1996* (Cth) (*WR Act*), workers and employers have been encouraged to follow a model dispute resolution procedure.⁴⁵ This procedure applies to disputes over rights such as disputes over entitlements payable under the AFPCS. This procedure can be characterised as market legality. The resolution is the parties' own; it is not imperative, if a breach arises, that compliance be made good as a matter of legal obligation.⁴⁶ This philosophy is evident even if administrative legality is brought to bear. For example, in the early stages of its engagement with a worker's complaint, the WO advises the worker to approach the employer herself. If that fails, it will write a letter to the employer

44 See below Part IVB.

45 *Workplace Relations Act 1996* (Cth) pt 13 div 2. The use of alternative dispute resolution was also encouraged by the financial subsidies provided by the Alternative Dispute Resolution Assistance Scheme. However, the scheme did not apply to underpayments of wages under the AFPCS. See Anthony Forsyth, 'Dispute Resolution under Work Choices: The First Year' (2007) 18 *Labour and Industry* 21.

46 The ADR process appears to remove any 'imposition of external values onto the disputants, as there is no requirement for the ADR contractor to advise the parties in relation to anything other than their own interests': Murray, above n 13, 354. This critique of mediation is developed in Joellen Riley, 'No Rights without Remedies: Labor's Industrial Relations Architecture and the Enforcement Gap' in Joellen Riley and Peter Sheldon (eds), *Remaking Australian Industrial Relations* (2008). On the roles and responsibilities of mediators, see generally Bernadine van Gramberg, *Managing Workplace Conflict: Alternative Dispute Resolution in Australia* (2006); Matthew Finkin, 'Privatization of Wrongful Dismissal Protection in Comparative Perspective' (2008) 37 *Industrial Law Journal* 149.

setting out the worker's claim. It is only after that, if the employer refuses to comply voluntarily or the worker continues to complain, that the WO takes a position on the legality of the entitlement and proceeds to obtain compliance with the *Act*.

If a dispute enters the judicial process through a private suit, the courts themselves may mandate participation in ADR. For example, the Magistrates' Court of Victoria conducts pre-trial conferences between the parties. In Victoria, in its review of civil justice, the Victorian Law Reform Commission has recommended pre-action protocols that would require plaintiffs to show they had tried ADR before initiating proceedings.⁴⁷ In the United Kingdom, Pollert is critical⁴⁸ of the statutory bars that are applied to access to the employment tribunals, if the worker has not followed such a route first. She finds it tough that the requirement is imposed when many more workers do not have the support of union organisation.⁴⁹ In its favour, the *WR Act* has made it clear that the model dispute resolution procedure does not prevent recourse to the courts.⁵⁰ In a similar vein, the WO's Guide points out that the worker can at any stage take her own action to recover outstanding wages, either independently or with the WO's assistance.⁵¹

A Legal Practitioners

Conceptually, the issue of legal representation is distinct from that of legal process and mode of dispute resolution. But they tend to get mixed up when policy makers say that processes will work better without lawyers. We think this conclusion should be approached with care.

The complexity of the law is one reason why lawyers are needed. For the recovery of small claims of underpayment, the Magistrates' Court of Victoria has established a procedure that is to operate without the participation of legal representatives. The Court makes a small claims kit available from its own website.⁵² But even before she gets to a hearing, the worker is likely to need assistance. The implementation of the kit involves some legal judgments the worker is unlikely to be able to make on her own. That might be as basic as identifying in law who her employer actually is.⁵³

A bar on legal representatives will not necessarily balance the parties. The large employer will often have expertise in-house, gaining the advantage of the repeat

47 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008).

48 Pollert, above n 22, 227.

49 Ibid.

50 *Workplace Relations Act 1996* (Cth) s 693.

51 Workplace Ombudsman, *Guide for Workers Handling Claims about Wages and Entitlements* (2009) <<http://www.wo.gov.au/data/portal/00007407/content/30744001183070709191.pdf>> at 14 April 2009.

52 See Magistrates' Court of Victoria, *Information to Assist You When Completing Small Claims Form 4a* (2007) <http://www.magistratescourt.vic.gov.au/wps/wcm/connect/Magistrates+Court/resources/file/ebf0654588c2ac/PD12007_Infosheet_Form_4a.pdf> at 14 April 2009.

53 See, eg, *Shacklock v Arnett and Lonah Pty Ltd* [2008] Magistrates' Court of Victoria (Unreported, Magistrate Chambers, 8 May 2008). See also Workplace Ombudsman, *Current Cases* (2008) <<http://www.wo.gov.au/asp/index.asp?sid=7407&page=legal-action-view&cid=5369&id=732>> at 14 April 2009.

player over the one-shotter.⁵⁴ It cannot be assumed that all employers will settle if they have a legal point to argue. Where ADR proceeds, the worker will sometimes find themselves at a disadvantage physically or emotionally. Some experienced researchers argue that the current policy undervalues lawyers.⁵⁵ The lawyer's participation can moderate proceedings and they can guide judicial officers through complexities of fact and law.

Do workers have access to lawyers? Some legal service providers will not represent the worker. At most, they will act as a 'friend' to coach and counsel them through the legal process.⁵⁶ This role is closer to information and advice but at the legal action stage the worker is said to be self-represented or a litigant in person. Unless they are operating pro bono, lawyers must be paid for their services. Funding must be found from a third party, if the worker cannot pay on a commercial fee for service basis. But legal aid is not available to meet the cost of a private practitioner in civil cases. Some years ago, the Commonwealth Government took a decision to concentrate its funding for private practitioners on assistance with criminal and family law matters. Matters arising under the *WR Act* are not covered, even though it is a major piece of Commonwealth legislation.⁵⁷ Nor has the State of Victoria chosen to fund private practitioners for civil claims, though claims for remuneration do still arise under the common law or pursuant to State legislation.

One of the reasons for withdrawing from civil legal aid is the allowance for conditional fee services. These services are also the subject of our research, though we do not expect there is much of a role for this kind of funding when the underpayment claims are small and costs cannot be recovered from the other side.⁵⁸ Conditional fees are more likely to activate a claim for damages for termination of employment (which might include a claim for arrears of wages).⁵⁹ Awards need to be big enough for the plaintiff to find the funds to pay her lawyers. In claims for underpayments under the *WR Act*, costs do not follow the event⁶⁰ – it is a 'no costs' jurisdiction. So the defendant will not be ordered to pay the plaintiff's costs. We will have to see if defendants customarily include something for costs when they settle out of court.

A 'no costs' jurisdiction means that costs penalties are not available to act as a deterrent to speculative claims. Consistent with the prevailing sentiment,

54 Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law and Society Review* 95, 114–6.

55 Rosemary Hunter, 'Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law' (2003) 30 *Journal of Law and Society* 156.

56 In the United Kingdom, such lawyers have been termed 'McKenzie Friends' after their approval in a case of that name: *McKenzie v McKenzie* [1970] 3 WLR 472.

57 Note, however, that a \$4000 grant is available from the Department of Employment and Workplace Relations for a worker to obtain legal advice on the merits of an unlawful termination claim.

58 But see Ben Schneiders, 'Student Sues for "Slavery": \$200 for 158 Hours Security Work', *The Age* (Melbourne), 7 July 2008 reporting action brought through Maurice Blackburn labour lawyers.

59 There is also scope for class actions where a workforce is denied its leave, redundancy and superannuation entitlements.

60 *Workplace Relations Act 1996* (Cth) s 824: costs only where proceeding instituted vexatiously etc.

governments are very concerned about the generation of nuisance claims. In the unfair dismissal jurisdiction, costs rules deter lawyers from running such claims.⁶¹ In our jurisdiction, costs can be awarded in the case of vexatious claims or claims instituted without reasonable cause.⁶² But on the whole, we would say that practitioners are unlikely to pursue underpayment claims unless they have a reasonable chance of success – perhaps the larger specialist firms have more scope to offset their risks by running a higher volume of cases.⁶³

Instead, we suggest the bigger danger is that workers will be denied their rights to recover small amounts because their legal costs are prohibitive. In this regard, we note the limited role that penalties play in funding meritorious claims for back payments. Penalties may be ordered for breach of the provisions of the *WR Act*. The penalties exist primarily for regulatory purposes to encourage compliance with the *Act*.⁶⁴ If the worker were to obtain the penalty, it could be used to pay for the legal representative. These penalties can be quite substantial, having been increased in 2004⁶⁵ to a maximum of \$33 000 per contravention for a body corporate⁶⁶ (up from \$10 000) and to a maximum of \$6600 for an individual (up from \$2200).⁶⁷ They can easily exceed the amount of underpayment.⁶⁸

It appears that the worker may seek to be paid any applicable penalty (rather than the penalty being paid into consolidated revenue) to offset legal costs.⁶⁹ Unions have certainly sought to be paid penalties, where they have had standing to represent workers, and the courts have been willing to order that substantial penalties be paid to unions to encourage them to police the legislation.⁷⁰ Nevertheless, the need to reimburse unions for their costs is not a factor which will be taken into account by the courts in determining whether a penalty should

61 *Workplace Relations Act 1996* (Cth) s 658.

62 See, eg, *Olsen v Wellard Feeds Pty Ltd (No 2)* [2008] FMCA 447 (Unreported, Lucev FM, 11 April 2008).

63 See the UK research in Rachel Atkinson and Robin White, 'Personal Injury Litigation, Conditional Fees and After-the-Event Insurance' (2000) 19 *Civil Justice Quarterly* 118.

64 Wheelwright, above n 12; Hardy, above n 12.

65 *Workplace Relations Amendment (Codification of Contempt Offences) Act 2004* (Cth).

66 *Workplace Relations Act 1996* (Cth) s 719(4)(b).

67 *Workplace Relations Act 1996* (Cth) s 719(4)(a).

68 For example, in *McIver v Healey* [2008] FCA 425 (Unreported, Marshall J, 7 April 2008) the employer breached eight terms of the award in relation to 41 employees: the total underpayment was \$18 405, but the Federal Court imposed a penalty of \$70 000. See also Transcript of Proceedings, *Dekic v Xidis Pty Ltd* (Magistrates' Court, Magistrate Hawkins, 20 December 2007): Magistrate Hawkins imposed a penalty of \$25 000 with respect to underpayments totalling \$3523. Similarly, in *McAlary-Smith v Australian Ophthalmic Supplies Pty Ltd* [2007] Magistrates' Court No T02953710 (Unreported, Magistrate Hawkins, 19 April 2007) 12: Magistrate Hawkins identified underpayments totalling \$17 564 and imposed a penalty of \$88 000. However, it was reduced to \$66 000 on appeal: *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560.

69 This will not be relevant to small claim proceedings where legal representation is usually barred.

70 See *Northern Territory Education Industry Union v Central Queensland University* [2008] FCA 481 (Unreported, Logan J, 11 April 2008) where the Federal Court ordered that a penalty of \$6600 be paid to the union; and *LHMU v Plancor Pty Ltd* [2008] SAIRC 7 (Unreported, Industrial Magistrate R E Hardy, 8 February 2008) where the Industrial Relations Court of South Australia ordered the employer to pay penalties of \$2000 to the worker, \$4000 to the union and \$13 000 to the Commonwealth. However, it was reversed on appeal: *Plancor Pty Ltd v LHMU* [2008] FCAFC 170 (Unreported, Gray, Branson and Lander JJ, 8 October 2008).

be ordered, due to the legislative prohibition on costs orders. It is only after the courts have determined that a penalty is warranted that the penalty may then be allocated to a union in recognition of their enforcement efforts.⁷¹

For vulnerable workers being paid low wages, it would seem that publicly funded legal assistance is required. The main provider is the specialist service Jobwatch. When they happen to have some in-house expertise, the community legal centres and the Legal Aid offices may assist a case. Private practitioners are occasionally drawn in to lend assistance pro bono. But this provision is by no means systematic. Jobwatch is therefore a vital ingredient in the survival of judicial legality. It receives funding principally from the State Government through Workforce Victoria. Currently it has a complement of four caseload lawyers. It applies strict merits, means and public interest criteria to the cases it takes on, largely cases identified by its telephone service. It would be detrimental to judicial legality if its funding was withdrawn or its role was reduced, because the State (and the Commonwealth) thought that all underpayment cases could be resolved through a 'one-stop shop' in the new Fair Work Australia legislation.⁷²

B Workplace Ombudsman

Our research includes the role of the WO as a provider of legal services to workers. As the agent of administrative legality, the WO does make it clear to workers that: 'The inspectors do not represent or act on behalf of you or the employer. Inspectors are impartial officers whose job is to ensure that industrial laws are properly observed'.⁷³ Nevertheless, the WO's regulatory practice bears a complex relation to the worker's rights to recover her wages.

The WO's website carries a clear guide to how it handles claims about wages and entitlements.⁷⁴ That guide sets out five stages to obtaining assistance from the WO. In stage one, the worker approaches the employer. The WO says that in most cases it will require the worker to attempt to resolve the matter directly with the employer before it will intervene. The WO offers the worker a sample letter to send to the employer.⁷⁵ In stage two, the worker fills out a wages and conditions claim form for the WO. That form is detailed. It requires factual information from the worker about his/her remuneration, including the applicable instrument, if

71 *CEPU v Telstra Corporation Ltd* [2007] FCA 1607 (Unreported, Gordon J, 24 October 2007) [18]–[19]. A search on the Austlii website of all claims for penalties under s 719 of the *WR Act* in the Federal Courts and Federal Magistrates Courts reveals that none of these claims was brought by privately represented individuals, suggesting that the prospect of a substantial penalty is not a sufficient incentive for workers to bear the costs of pursuing a claim in these jurisdictions.

72 See Rudd and Gillard, *Forward with Fairness: Labor's Plan for Fairer and More Productive Workplaces*, above n 40.

73 Workplace Ombudsman, above n 51, 3.

74 See generally Workplace Ombudsman, *Complaint Handling* (2007) <<http://www.wo.gov.au/asp/index.asp?sid=7407&page=complaints-view&cid=5315&id=760>> at 14 April 2009.

75 *Ibid.* The WO does recognise that it may not always be appropriate, for example, if the worker genuinely feels their job is at risk. Inspectors may intervene directly and issue breach notices to an employer.

known.⁷⁶ In stage three, the WO will write to the employer to outline the worker's claims. The employer will be given 14 days to resolve the claims with the worker. Then, at stage four, workplace inspectors conduct formal investigations of the claims. Where an inspector believes that he/she can *prove* a claim, the employer will be requested to pay the full entitlement. If payment is not made, the WO may consider prosecuting the employer. Stage five is court action.

At a Senate Estimates hearing in 2008, the WO indicated that:

probably 47 per cent of the matters would be resolved through voluntary compliance. ... The other 53 per cent of matters would require an inspector to undertake more detailed work, and of course that more detailed work ranges from fairly low level activity which gets the matter finished through to of course the full court matter.⁷⁷

In the period before the inspectors conduct a formal investigation, a critical issue is whether the WO 'accepts' the settlement that the employer and worker reach. That settlement is likely to involve an agreement in which the employer undertakes to pay the worker a sum of money and the worker releases the employer from any further claims.

The WO has a carefully elaborated litigation policy ('the Policy').⁷⁸ Litigation is geared to a strategy to secure compliance with the *Act*.⁷⁹ The Policy indicates that discretion will be exercised. There must be sufficient evidence to prosecute the case and it must be in the public interest to do so. Usually, the WO will not determine that litigation is in the public interest where small claims are involved (for less than \$5000),⁸⁰ though the WO may still proceed in select cases if, for example, the underpayment is in respect of a vulnerable worker or the employer is a repeat wrongdoer.⁸¹

The WO may be satisfied with an undertaking from the employer. As part of the undertaking, the employer must remedy the contravention of the *Act*. The Policy says that an aggravating factor, justifying prosecution where the underpayment is less than \$5000, is that the employer has 'reneged on an agreed payment plan and refused or impeded all other attempts at voluntary compliance'.⁸² Where the WO does prosecute, it may consider breach bargaining proposals from the employer. They include acceptance of a lesser number of breaches, but the Policy says that,

76 Workplace Ombudsman, *Wages & Conditions Claim Form* (2009) <<http://www.wo.gov.au/data/portal/00007407/content/17341001217295259764.pdf>> at 14 April 2009.

77 Official Committee Hansard, *Senate Standing Committee on Education, Employment and Workplace Relations Estimates*, 21 February 2008, 101 (Mr Nicholas Paul Wilson) <<http://www.aph.gov.au/hansard/senate/committee/S10644.pdf>> at 14 April 2009.

78 Workplace Ombudsman, *Guidance Note 1: Litigation Policy of the Office of the Workplace Ombudsman* (2009) <<http://www.wo.gov.au/data/portal/00007407/content/94111001196051899657.pdf>> at 14 April 2009.

79 Ibid 5, 8. This reflects the WO's functions in s 166B of the *Workplace Relations Act 1996* (Cth).

80 Workplace Ombudsman, above n 78, 12. Before tax, \$5000 constitutes some 20 per cent of a minimum wage of worker's yearly pay, or over 10 weeks' worth, but only if the worker is in full-time employment for the whole year.

81 Ibid.

82 Ibid 13.

if the bargaining might affect the substantive interests of the worker, the WO will consult her.⁸³

As an active regulator of compliance, the WO has been an improvement on its predecessors. In pursuit of administrative legality, its operation has been efficient and purposeful. It would be deleterious if it was scaled down or lost its identity within a composite Fair Work Australia. Its role is vital where workers will not obtain legal services of their own, not the least where they will not seek them in the first place. Nonetheless, the WO's own policy makes it clear that its prosecutions are selective: the best characterisation of its approach is the cost effective use of limited funding to maximise compliance. It will not proceed in all cases where underpayment is evident.⁸⁴

Necessarily, the WO's proceedings will be governed by an administrative rationality. It is true that, unlike its predecessor, the Office of Workplace Services, the WO's office was placed on an independent statutory footing. But it remains subject to the directions of the Minister.⁸⁵ The inspectors refer decisions to prosecute to the WO senior executive for consent.⁸⁶ In addition, litigation must remain consistent with the Government-wide Legal Services Direction.⁸⁷ Also, whatever its own professional inclinations, we expect that the WO will be subjected to political scrutiny and even lobbying from time to time regarding its intensity of activity⁸⁸ and even the pursuit of individual investigations.⁸⁹

Under the Rudd Government's 'Fair Work' reforms, the WO will be renamed the 'Fair Work Ombudsman'⁹⁰ ('FWO') and the enforcement powers of Fair Work Inspectors will be expanded.⁹¹ While the Office of the FWO will remain an 'independent and separate statutory agency',⁹² the Government anticipates that the Office's 'day-to-day operations will be practically integrated with [Fair Work

83 Ibid 18.

84 However, we have found some instances of WO prosecutions involving small amounts (eg \$2000). See, eg, for Transcript of Proceedings, *Bradford v Bennett and Jouning Pty Ltd* (Magistrates' Court of Victoria, Magistrate Hawkins, 31 May 2007).

85 *Workplace Relations Act 1996* (Cth) ss 150C, 166C.

86 The WO has directed that litigation not be initiated where, in his opinion or the opinion of a Senior Executive Service officer, the litigation is in respect of a 'trivial or minor' offence: *Direction to Workplace Inspectors 2007* (Cth), Legislative Instrument F2007L02341. See also Hardy, above n 12.

87 According to the *Legal Services Directions 2005* (Cth) reg 4.7 issued by the Attorney-General under s 55ZF of the *Judiciary Act 1903* (Cth), the WO must not (except in urgent circumstances) commence litigation unless it has received written legal advice from an external legal provider indicating that there are reasonable grounds for starting proceedings. See also Hardy, above n 12.

88 See, eg, Workplace Express, *WO Rejects State/Territory Claims about Complaints Handling: Serco Sodexo Accused of Duress; \$66 000 Penalty for Motel Underpayment; and More* (2007) <http://www.workplaceexpress.com.au/index.php?keyword=&searchto_Day=21&searchto_Month=08&searchto_Year=2007&sub_search=9> at 14 April 2009.

89 See the questioning by Senator Abetz of the WO in the Senate, above n 77, 101–3. See also the Australian Workers Union query reported in Stephen Scott, 'Workers Unhappy with Inquiry Delay', *Australian Financial Review* (Melbourne), 2 July 2008, 11.

90 Fair Work Bill 2008 (Cth) pt 5–2.

91 Fair Work Bill 2008 (Cth) pt 5–2 div 3 subdiv C.

92 Explanatory Memorandum, Fair Work Bill 2008 (Cth) r 332, lxvii.

Australia]'.⁹³ One of the benefits of this integration will be the flow of information from Fair Work Australia to the FWO.⁹⁴

C Magistrates' Courts

Finally, how much can the courts themselves compensate for lack of legal assistance and representation when the worker is inept? Both the Federal Magistrates Court and the Magistrates' Court of Victoria have jurisdiction to order recovery of wages.⁹⁵ If the claim alleges a breach of an award, workplace agreement (AWA or certain collective agreements), order of the Australian Industrial Relations Commission or the AFPCS, it is a federal matter under the *WR Act*. The *Act* invests the Magistrates' Court of Victoria with this federal jurisdiction. However, if the contract wage rate was actually higher (for example 'over-award') than the statutorily-based rate that is applicable, the full recovery of wages will have to be based on a civil breach of contract common law claim. The Federal Magistrates Court has jurisdiction to hear breach of contract claims that are associated with claims under the *Act*.⁹⁶

The WO brings prosecutions for penalties under the *Act* in the Federal Court and Federal Magistrates Court. In the majority of these cases, it also seeks an order for payment of wages. The WO brings some of its prosecutions in the Magistrates' Court of Victoria. Where the worker brings her own action, the proceedings tend to be in the State Court.

It is possible to see the courts as service providers. The State Court has taken steps to accommodate the making of small claims, which are defined as claims up to a maximum of \$10 000.⁹⁷ As noted above, the State Court's website carries the form for such a claim accompanied by a guide for completing it. The Court has written the website guide for the layperson, who might be self-representing.⁹⁸ The Magistrates' Court of Victoria *Annual Report 2006–07* says that the Court has developed 'user friendly' forms primarily to assist unrepresented litigants.⁹⁹ In contrast, the Federal Magistrates Court uses an undifferentiated application form for general federal law.¹⁰⁰

While the design in the State Court is accessible, the claim requires the worker to produce legal information and make legal judgments. In particular, the worker must decide whether she is making: (a) a civil contract of employment claim, (b) a

93 Ibid.

94 Ibid r 342, lxxi.

95 *Workplace Relations Act 1996* (Cth) s 717.

96 *Federal Magistrates Act 1999* (Cth) s 18.

97 *Workplace Relations Regulations 2006* (Cth) reg 2.14.2 prescribes a limit of \$10 000 with respect to recovery of small claims under an award, industrial instrument, the AFPCS, or an order of the AIRC, whilst *Workplace Relations Act 1996* (Cth) s 725(2)(a) sets the maximum limit at \$5000 for other types of small claims.

98 Magistrates' Court of Victoria, above n 52.

99 Magistrates' Court of Victoria, *Annual Report 2006–07*, 33.

100 Federal Magistrates Court, *General Federal Law Form* (2009).

claim for entitlements due under the *Act*, or (c) a small claim proceeding under the *Act*. The worker must nominate the instrument the employer has breached. The form is submitted to the Court, but the worker must also serve it on the employer. The website recognises the challenge and refers the worker for assistance: to Jobwatch or the Law Institute of Victoria, if it is a civil claim; or to the Work Choices Infoline, if it is a claim under the *Act*, such as a breach of an award. The small claim hearing is designed for the layperson too. The Chief Magistrate has assigned to the Industrial Division several magistrates with a background in employment law. The *WR Act* makes it clear that, in conducting the hearing, the Magistrate is not bound by any rules of evidence, may correct any mistake in an application, and can act in an informal manner. Furthermore, the cases do not necessarily demand adjudication. For instance in 2006–07, 50 per cent of cases in the Industrial Division were resolved at mediation by the judicial registrars of the Court.¹⁰¹

The Magistrates' Court is on the right track.¹⁰² Nonetheless, we must note that, for 2006–07, only 201 complaints were issued for the whole of the Industrial Division's jurisdiction (with 133 being finalised).¹⁰³ The Court's Annual Report says that the majority of these claims were in excess of \$10 000, with many up to and in excess of the jurisdictional limit for the Court overall (\$100 000). Such claims include claims for reasonable notice of termination. Most likely, they would be ordinary proceedings, with legal representation, such as claims from better paid white-collar workers whose employment has been wrongfully terminated. Some other cases would be prosecutions by the WO. There are now indications that the WO inspectors are issuing workers with the small claims 'kit' and acting as their (McKenzie) friends in some small claims proceedings. However, the Magistrates' Court figures for 2007–08 show only 195 complaints were issued and 129 finalised. Furthermore, where workers do obtain a judgment requiring payment, they may be faced with the difficulty of enforcing it against the employer.¹⁰⁴

The expansion of the small claims jurisdiction under the Fair Work Bill 2008 can only be beneficial to access. The Bill increases the monetary limit for small claims from \$10 000 to \$20 000 and confers the small claims jurisdiction on the Federal Magistrates Court in addition to State and Territory courts.¹⁰⁵ The new Government's emphasis is on informal, non-adversarial processes. The Explanatory Memorandum to the Bill states that 'the Court will have discretion to allow a person to be represented by a lawyer but in most cases this will not be necessary'.¹⁰⁶ No mention is made of the assistance that might be given to an unrepresented worker.

101 Magistrates' Court of Victoria, above n 99, 33.

102 Rudd and Gillard, above n 40.

103 Magistrates' Court of Victoria, above n 99, 32.

104 Magistrates' Court of Victoria, *Annual Report 2007–08*, 21.

105 Fair Work Bill 2008 (Cth) cl 548.

106 Explanatory Memorandum, Fair Work Bill 2008 (Cth) r 338, lxx. See also Fair Work Bill 2008 (Cth) cl 548(5)–(7).

V CONCLUSIONS AND RECOMMENDATIONS

Throughout this article, we have stressed the place of judicial legality to ensure employers meet their minimum obligations to pay wages to their workers. However, judicial legality will not be a realistic option for most workers if the legality is left to the market, that is, to the arrangements between employers and workers. Administrative legality may intervene but, for the agencies of administrative legality, the question is how much compromise to accept. If they are to be selective about when to prosecute, the risk is that some employers may use process, rather than merit, to limit their payment obligations, and some underpayments may go without remedy, even though they are substantial in proportion to a low paid worker's wage.

Our inquiries lead us to conclude that judicial legality is only a realistic option if workers have access to legal advice and assistance. Input at the initial stages of awareness and information is critical, otherwise vulnerable workers will not engage at all or they will fall away. Nonetheless, the complexities and vicissitudes are such that the worker will have to rely on the help of an expert third party. At the moment, when the services are fragmented, and much of the advice is of a very general nature, the pathways to that help are problematic. The Labor Government's proposal to create a 'one stop shop' in Fair Work Australia is welcome as an attempt to address this fragmentation. However, we are concerned that the establishment of this new institution should not lead to any reduction in the services which are currently provided by legal practitioners and the state courts.

We note that the Government's Fair Work Bill 2008 tends to de-emphasise the role of legal practitioners.¹⁰⁷ Where an underpayment claim is pursued within the small claims jurisdiction of the Federal Magistrates Court or State and Territory Courts, workers will therefore need to represent themselves or enlist the assistance of a non-lawyer. Paralegal helpers are often less expensive¹⁰⁸ and the thinking may be that their use will avoid the formality and adversarialism associated with the stereotypical lawyer. Nevertheless, there may be cases where legal representation would assist all the parties to resolve matters.¹⁰⁹ Given our belief in the importance of judicial legality in enforcing minimum wage entitlements, we argue that lawyers must continue to play an important role in civil justice for low paid workers. The immediate need is therefore a source of financing, whether from private or, more likely, public funds. If it is healthy for the profession to provide some services privately and pro bono, the main responsibility for funding legal services to vulnerable workers will fall on government and especially the Commonwealth

107 See Fair Work Bill 2008 (Cth) cl 548(5), 596.

108 Herbert Kritzer, 'The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World' (1999) 33 *Law and Society Review* 713.

109 Note the comments of Murray Wilcox, who has retired from the Federal Court, quoted in relation to the role of lawyers in Fair Work Australia proceedings in Stephen Scott, 'IR Advisor Says Ban on Lawyers Unfair', *Australian Financial Review* (Melbourne), 12 June 2008, 1. See further Murray Wilcox, 'Unfair Dismissal Cases' in Riley and Sheldon, above n 46.

which is the legislator of the obligations.¹¹⁰ But the Commonwealth also wants to 'manage' the system of workplace relations. In designing processes, it faces some conflict of interest. As well as providing workers with access to justice, it wants to be responsive to the needs of employers, especially to small business.

Once a place for independent representation is acknowledged, a deeper issue is how to ensure a complement or cadre of capable lawyers. Currently, the legal service positions in the community legal centres draw talented applicants.¹¹¹ But it is of concern how to develop and retain that expertise, given the pressures of the work and the relatively meagre pay they receive. At present, the approach to human resourcing is rough and ready. Government largely leaves it to the individuals to fend for themselves with some support from their own professional groups. If their place is to be respected, government should not just fund the services; it should develop a program to cultivate and support such public sector lawyers as well. We would also emphasise the role of the WO in promoting compliance with minimum standards, and providing formal and informal assistance to underpaid workers. We welcome the decision of the Rudd Government to retain the WO's successor, the Office of the FWO, as an independent statutory agency, separate from Fair Work Australia, and to expand the enforcement powers of Fair Work Inspectors. Nevertheless, our support for independent access to justice remains. To this end, we commend the expansion of the informal small claims procedure under the Fair Work Bill 2008, and argue in favour of retaining existing support services for workers seeking to recover underpayments. We look forward to undertaking further work to evaluate the effectiveness of these services within the new legal framework.

110 Christopher Arup, 'Pro Bono in the Post-Professional Spectrum of Legal Services' in Christopher Arup and Kathy Laster (eds), *For the Public Good: Pro Bono and the Legal Profession in Australia* (2001).

111 For possible reasons, at least based on the US experience, see Bryant Garth, 'Noblesse Oblige as an Alternative Career Strategy' (2004) 41 *Houston Law Review* 93. The sector relies heavily on women lawyers. See Ronit Dinovitzer and Bryant Garth, 'Lawyer Satisfaction in the Process of Structuring Legal Careers' (2007) 41 *Law and Society Review* 1.