MAKING RIGHTS REALITY: THE ROLE OF COURTS IN ASSISTING VULNERABLE HOSPITALITY WORKERS TO BRIDGE THE GAP BETWEEN RIGHTS POSSESSION AND ENFORCEMENT

Stephen Bajraszewski
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*Stephen Bajraszewski BA(MC) is a JD student at Melbourne Law School. This paper states the law as at June 2013.
Introduction

It is beyond doubt that despite the existence of legislated minimum employment entitlements in Australia, many businesses employing vulnerable workers fail to provide these entitlements to their employees. Apart from undermining the most basic function of employment legislation as a safety net for these employees, such breaches serve to further cement the social and economic disadvantage experienced by the workers affected, most of whom feel helpless to enforce their rights.

Whilst the presence of legislated minimum standards is essential to overcoming this disadvantage, the mere presence of such rights is an incomplete mechanism for ensuring employees enjoy the benefits intended for them by the legislature. In practice, there are a host of other forces which act to determine whether employees can enforce their legal employment rights consistently and in a timely and cost effective manner. For already vulnerable workers, these factors can operate to erect large barriers hindering employee efforts to enforce these rights, obstacles seemingly impossible for these workers to surmount.

In addressing this issue, this paper has three broad aims. Firstly, it will discuss how these forces operate as barriers to rights enforceability in the specific context of the hospitality industry, where workers reliant on minimum entitlements experience high levels of vulnerability to employer exploitation. Secondly, by drawing on recent Federal Circuit Court cases involving hospitality employers found in breach of their basic statutory obligations, this paper will discuss the attitudes expressed by the courts as representatives of the legal system towards employer conduct in the context of employee vulnerability, and the court’s attempts to assist employees bridge this enforcement gap. Finally, this analysis will seek to identify limitations of the court’s attempts to assist rights enforcement and consider alternative approaches available to the court that may be more effective achieving this goal.

Section One: Regulation of the Hospitality Industry in Australia

Before investigating the legal, social and economic conditions contributing to the gap between the possession and the realisation rights for hospitality workers, it is first useful to understand the legal instruments regulating hospitality employment in Australia and the major employment rights contained within these instruments.

(i) Sources of Rights

Under Australian law, the major sources of rights in an employment relationship are:

a) Minimum entitlements, the most important of which are contained within Modern Awards. Which Award applies to a given worker depends on the industry classification of the worker. In addition, there are additional minimum standards (National-Employment-Standards) prescribed by the Fair Work Act 2009 (Cth) (‘the Act’), however the basic entitlements most relevant to this analysis (minimum rate of pay and overtime payment) are contained within Awards.

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b) **Enterprise-level agreements** between the employer and employees dealing with matters covered in the applicable Award. If an enterprise agreement is approved by the Fair Work Commission, the applicable Award will cease to operate for the employees covered by the agreement.²


c) **Contract of employment** between employer and individual employee.

In reality, Modern Awards will be the primary source of employment entitlements for the majority of hospitality employees. Approximately 75% of hospitality workers are award-reliant compared to the national average across all workplaces of around 15%.³ The Fair Work Ombudsman estimates that along with retail trade, hospitality is the most award-reliant industry.⁴ The high proportion of temporary and casual workers created by the seasonal nature of demand in the industry⁵ also means formal contracts of employment will be rare. Therefore the entitlements contained in Modern Awards will form the focus of this paper.

Hospitality businesses include restaurants, cafes and catering operations. Which Modern Award applies to a particular employee depends on the exact characteristics of its employer’s operations. The *Restaurant Industry Award 2010* (‘Restaurant Award’) covers most types of restaurants and cafes, whilst the *Hospitality Industry (General) Award 2010* (‘Hospitality Award’) covers most catering operations. The major exceptions to this are that restaurants operated in connection with an accommodation business are covered by the Hospitality Award,⁶ and catering operations run by a restaurant business are covered by the Restaurant Award.⁷ Thus, determining the award applicable requires determining the employer’s principal business.

Minimum wage rates are set according to the employee’s classification. The Modern Awards relevant here first divide employees according to the basic nature of the work they perform, such as food and beverage, kitchen, administrative. Then, within these categories each employee is assigned a ‘grade’ based on the complexity of the work they perform, their seniority and the degree of training they have undertaken. It is the responsibility of employers to accurately classify their employees based on these criteria and pay them the rate applicable to this classification.⁸

(ii) **Breaches and Enforcement Procedures**

Modern Awards have statutory force under the Act and thus a breach of a Modern Award by an employer amounts to the breach of a civil remedy provision under the

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² *Fair Work Act 2009 (Act) s 57.*
³ Australian Hotels Association, Submission No 10 to Productivity Commission, *Default Superannuation Funds in Modern Awards*, 4 April 2012, 4.
⁶ *Restaurant Industry Award 2010* (Cth), cl 4.8(i).
⁷ *Hospitality Industry (General) Award 2010* (Cth), cl 4.1(g).
⁸ See *Hospitality Industry (General) Award 2010* (Cth), cl 20 and *Restaurant Industry Award 2010* (Cth), cl 20.
Employees who believe their employer has breached a Modern Award by failing to pay them minimum entitlements can complain to the Fair Work Ombudsman who is given powers under the Act to deal with disputes administratively. After receiving a complaint and completing initial investigation, the Ombudsman will typically attempt to settle the dispute initially via mediation. Failing this, the Ombudsman has the power to conduct further investigations and issue compliance notices, enforceable undertakings and infringement notices equivalent to a small fine.

The Ombudsman can also choose to take the matter to the Federal Court or Federal Circuit Court. These courts can make any order they consider appropriate to resolve the dispute, including an injunction, compensation of an employee affected or reinstatement of an employee. The court can also impose a fine as punishment for the breach payable to either the Commonwealth or any other person or organisation.

Section Two: Defining the gap between rights and reality for hospitality workers

(i) Problems inherent in statutory rights

The major limitation of statutory rights lies in the way they are framed. As Dickens identifies, statutory minimum employment entitlements are typically framed in a passive manner, proscribing conduct employers ‘must not’ engage in. Such laws operate on an assumption that employers will comply with these laws and thus place reliance on individual employees to assert and pursue their statutory rights if these entitlements are not provided. This can contribute to making it difficult for employees to enforce their rights. Firstly, framing rights as passive obligations helps create a perception that statutory minimum entitlements constitute a burden on employers to efficiently operating their business. The existence of this perception in Australia is evident from the outrage expressed by industry associations following the modest increase in the minimum wage in 2012 and 2013. Secondly, workers who lack the resources and knowledge necessary to pursue a claim against their employer for breach of these entitlements will often find it prohibitive to do so. As will be discussed in more detail

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9 Acts 45.
10 The role and powers of the Fair Work Ombudsman are detailed in Chapter 5 of the Act.
12 See s 715 (Enforceable undertakings) and s 716 (Compliance notices) of the Act.
13 Ibid, s 545(1).
14 Ibid, s545(2).
15 Ibid, s 546.
17 Ibid, 207.
below, the particular vulnerabilities of hospitality workers make them particularly likely to find themselves in this position.

**External factors**

There is a wide range of forces, external to legislative rights themselves, which act to widen the gap between the possession and realisation of employment rights. For vulnerable workers, these factors determine the employer’s capacity to exploit employees as well as ability of employees to protect themselves against exploitation attempts. Some of these factors are, to an extent, within the government’s control yet many others operate independent of legal and political forces.

The most influential of these factors in the context of the hospitality industry will be discussed below. These will then be considered in relation to Australian cases involving hospitality employees and the attitude exhibited by the court in identifying and attempting to overcome these factors will be evaluated.

(i) **Quality of enforcement regimes**

The quality of enforcement is the factor most directly within government control. State-funded enforcement is crucial, because as noted above, most vulnerable workers will be either unable or unwilling to pursue their employment rights individually. This makes a strong enforcement regime an indispensable tool for workers to realise their rights.

One role played by public enforcement is providing the threat of formal sanctions to deter employers from breaching their obligations. Without this threat, employers may consider the cost savings achieved from eschewing minimum standards to outweigh any risk of detection and resulting penalties. However, the effectiveness of this threat is typically limited by the resources available to enforcement bodies, as investigating and pursuing formal sanctions against non-compliant employers is generally an expensive process.

Recognising this problem, others have argued that, in addition, an effective public enforcement regime will also need to employ non-litigious and less-formal enforcement strategies under which ‘substantive ends are induced rather than commanded.’ Such methods seek to secure compliance by securing the co-operation of employers, employees and enforcement bodies. These strategies are also preventative in nature as opposed to reacting to breaches of the legislation. The desirability of such enforcement

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20 Helen Bewley and John Forth, ‘Vulnerability and adverse treatment in the workplace’ (Employment Relations Research Series 112, Department for Business Innovation and Skills, September 2010), 4.
21 Gleeson, above n 1, 670.
24 Hardy and Howe, above n 22, 310.
strategies fostering compliance through co-operation is recognised by the functions of
the Fair Work Ombudsman prescribed in the Act.

It should be noted that although the effectiveness of public enforcement strategies per
se is beyond the scope of this paper, a consideration of the role played by these bodies is
necessary to fully understand and evaluate the court’s role in addressing employee
disadvantage.

Other factors

Outside the enforcement regime, there are a host of additional factors impacting
employees’ ability to enforce their legislative entitlements. These fit broadly into two
categories. Firstly there are factors pertaining to the employer and industry in question.
Secondly there are factors characterising hospitality employees.

(i) Knowledge of employment rights

This is probably the most influential factor as it affects both employers and employees.

If employers are unaware of their obligations to employees, they will therefore be less
likely to meet these obligations. A lack of employer knowledge about rights has a
number of potential causes. One possible reason is that employment legislation may be
overly complicated such that there is potential confusion as to which minimum
standards apply to which employees and how to calculate the minimum rate of pay to
apply to a given worker.27 The large costs required to ensure compliance in the face of
complicated legislation or grey areas in the law, including obtaining legal advice and
setting up administrative systems to track employee hours and training is a further
disincentive to ensuring employees receive their entitlements.28 Another reason for
employer ignorance of obligations is the size and business experience of the proprietor.
Blackburn and Hart found that, in a UK context, cognisance of employee rights amongst
small firms was low compared to medium and larger businesses, and that employers
typically viewed the administrative and legal costs of ensuring compliance with
employment legislation to be a distraction from optimising their core profit-generating
activities.29 The nature of small firms means they are also more likely to eschew formal
systems of monitoring and supervision, meaning employees typically must raise
employment concerns directly with their manager or even the business owner, without
the buffer of human resources personnel.30

Equally, employees who are unsure of their entitlements will be less likely to be able to
perceive when they are being adversely treated and consequently less likely to take
action to enforce their rights.31 Lack of awareness is more likely where workers have
had little previous interaction with the employment laws operating in a particular

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28 Dickens, above n 16, 210.
29 Robert Blackburn and Mark Hart, ‘Ignorance is Bliss, Knowledge is Blight? Employment Rights and
Small Firms’ (Paper Presented at ISBA National Small Firms Policy and Research Conference), Hinkley,
November 2001, 16.
30 Paul Edwards, ‘Employment Rights and Small Firms’ in Linda Dickens (ed), Making Employment Rights
Effective (Hart Publishing, 2005), 144.
31 Bewley and Forth, above n 20, 3.
jurisdiction, something particularly likely to be the case amongst younger workers\textsuperscript{32} or workers recently migrated to Australia, especially those from non-English speaking backgrounds.\textsuperscript{33} Even where workers are aware of their rights, they may be ignorant of the remedies or dispute resolution procedures available to pursue them.\textsuperscript{34} Another potential reason for a lack of employee knowledge of employment rights is a lack of exposure to external actors in the workplace such as enforcement bodies and union representatives to communicate to employees about their rights and how to enforce them.\textsuperscript{35}

When this discussion is considered in the context of the hospitality industry, it is clear that a particular dearth of employment rights awareness is likely to exist amongst hospitality employers and employees.

In terms of employers, the hospitality industry in Australia is dominated by small businesses.\textsuperscript{36} This concentration is especially apparent in restaurants and cafes, where more than 95\% are small businesses. In addition, the industry is highly competitive as dining has risen in popularity, which means new enterprises operated by proprietors little business experience constantly enter this market.\textsuperscript{37} Small hospitality businesses also face more burdensome compliance costs relative to larger organisations as the latter enjoy much greater economies of scale in seeking legal advice and setting up employee administration and monitoring systems to ensure compliance than smaller enterprises.

Hospitality employees face similar constraints. In a study of young workers, McDonald et al found that 18\% of those surveyed were hospitality workers. Of these workers, more than 30\% had experienced problems with pay, strongly suggesting a lack of awareness of the most basic statutory entitlements amongst these employees. In addition, the vast majority of hospitality employees lack significant qualifications and training and are generally low paid, making them more reliant on minimum entitlements than employees in almost any other industry.\textsuperscript{38}

These conditions create a situation where employers tend to leave it up to employees to not only enforce their rights, but also determine whether those rights have been breached at all. At the same time, hospitality employees who do not possess the experience or resources to do this, tend to rely on employers to communicate these rights to them and ensure they are being provided. Even where employees have sufficient awareness of their rights to suspect they are being treated adversely, such treatment may be so common such that employees regard it as a normal feature of their working environment, and may even believe they are not entitled to statutory minima

\textsuperscript{33} 'Fair Work Ombudsman Cracks down on underpayment of foreign workers', Smart Company, Feb 2013.
\textsuperscript{34} McDonald et al, above n 32, 63.
\textsuperscript{36} Ibid, 482.
\textsuperscript{38} Caincross and Bulltjens, above n 35, 482.
due to the low-skilled nature of their work.\textsuperscript{39} The combination of these forces undoubtedly raises an almost insurmountable barrier for many employees to enjoy their entitlements.

(ii) \textit{Socio-economic status of employee}

There are many other socio-economic characteristics which if possessed by employees tend to further aggravate their vulnerability to exploitation within the employment relationship. One key such factor is the employee’s financial resources, which can affect the ability to enforce entitlements in two ways. Firstly, employees with limited financial assets will have a resulting limited capacity to access legal advice and dispute resolution processes. Even where employees can afford legal advice, employers will likely wield greater legal resources, which may either discourage employees from commencing action at all or force employees to settle their dispute for an amount less than they are legally entitled to.\textsuperscript{40} Although such employees can to look to state-funded enforcement bodies to pursue their claims, these bodies themselves have limited resources, allowing them to investigate only a fraction of complaints received.\textsuperscript{41} Secondly, employees facing financial constraints will inevitably be more dependent on their employer for continuing work to sustain a reasonable standard of living which makes them far less willing to incite a dispute.\textsuperscript{42}

Another factor often widening the gulf created by a lack of financial resources is employee’s job security. Employees with low job security, particularly casual employees, will be even more dependent on their employer for the provision of constant work.\textsuperscript{43} As discussed below, the cyclical nature of demand for hospitality services makes this a particular problem in hospitality employment. For these employees, the risks of potential adverse treatment from their employer following a complaint from a purposefully ignorant or hostile attitude to tangible discrimination such as a reduction in hours or even dismissal may be considered too great to warrant pursuing a claim, even if the employee is aware that entitlements are being ignored.\textsuperscript{44} If an employee is already uncertain about their rights, a hostile employer reaction to raising a concern is likely to make them feel even less certain about the veracity of their complaints and make it even more unlikely they will pursue enforcement.

(iii) \textit{Financial pressures on hospitality employers}

There is no doubt the extent to which employees can enjoy their basic entitlements is powerfully influenced by the economic health of the hospitality industry as well as the resulting financial priorities of hospitality employers.

\textsuperscript{40} Gleeson, above n 1, 670.
\textsuperscript{41} Monder Ram et al, ‘Informal employment, small firms and the national minimum wage’ (Report prepared for the low pay commission, Industrial Relations Research Unit, University of Warwick, September 2004), 9.
\textsuperscript{42} Bewely and Forth, above n 20, 9.
\textsuperscript{43} Ibid, 8.
\textsuperscript{44} Margaret Lee, ‘Regulating Enforcement of Workers’ Entitlements in Australia: The New Dimension of Individualisation’ (2006) 17 \textit{Labour and Industry} 1, 46-7.
The characteristics of the hospitality industry make it particularly difficult for employers to maintain a stable workforce and afford to pay worker entitlements. Firstly, demand for hospitality services is seasonal and fluctuates significantly throughout the year. The detrimental effects of this status for employees’ willingness to raise concerns with their employer have been identified above. Secondly, hospitality businesses generally experience highest demand and thus require most workers during weekends and holidays where penalty rates apply. This is aggravated by the fact most hospitality businesses are largely service-based, meaning that relative to other industries, labour costs are particularly burdensome (approximately 45% of total operating expenditure). It is unsurprising therefore that a study of UK small business employers found hospitality businesses typically suffer the largest financial impact following a rise in the minimum wage.

As touched on earlier, competition amongst hospitality businesses, particularly restaurants and cafes is another major barrier for employees. Demand for restaurants has been boosted in recent times following the popularity of reality television programs involving cooking and celebrity chefs. However, this has also caused a flurry of budding hospitality businesses to enter the market. In addition, as consumers have acquired greater food literacy, they have become more discerning. This has forced restaurants to spend money on higher quality and more expensive ingredients to effectively capture this demand. At the same time however, competitive pressures have kept the increases in menu items much lower than the resulting increased food supply costs. As a result, proprietors are much more likely to seek to preserve profit margins by reducing expenditure on employees’ wages and other entitlements. This means employers will either seek to cut staff, reduce employee hours, or pay staff even further below their statutory entitlements.

These problems are intensified when coupled with the fact that demand for restaurants and catering services are highly discretionary and thus highly susceptible to poor economic conditions. In Australia, the industry has struggled in recent years as disposable income levels and consumer sentiment have fallen, making people less willing to eat out. Such conditions have strongly contributed to many hospitality businesses going insolvent, with less than 7,000 of the 14,000 hospitality businesses entering the industry in 2007/8 remaining by mid-2011. However, there are signs of a

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45 Adam-Smith et al, above n 5, 31.
47 Restaurant and Catering Australia, Submission to Department of Justice and Attorney-General Office of Fair Work and Safe Work Queensland, 22 February 2013, 5.
49 Deloitte, 'Hospitality 2015: Game changers or spectators', June 2010, 61.
50 Whyte and Lucas, above n 22.
52 Restaurant and Catering Australia, above n 47, 5.
recent recovery, with Australian Bureau of Statistics data suggesting gross operating profits in the accommodation and food sector has risen almost 13% since 2011.\textsuperscript{53}

The financial strain experienced by hospitality businesses fosters what is best described as a ‘culture of non-compliance’ within the industry. Research conducted by Ram et al suggests in difficult trading conditions, operational and financial considerations tend to take priority over the employer’s sense of responsibility to comply with the law. Many employers who had chosen not to provide minimum entitlements to employees viewed these obligations as merely another level of bureaucracy which they had to negotiate in order to run their business profitably.\textsuperscript{54} Wage-level decisions tended to be taken by reference to what competitors paid their employees or what the business could afford rather than according to statutory rates.\textsuperscript{55} Some employers acknowledged and believed in the importance of complying with the law, yet still were content to justify their non-compliance as a result of their dire financial circumstances as well as the fact non-compliance with employment laws was rampant in the industry.\textsuperscript{56}

This culture of non-compliance raises significant barriers for employees in addition to those identified earlier. For one, it encourages employers to view their staff as exploitable resources. Although such an attitude may cause a degree of instability for employers due to the constant turnover of staff, this is a relatively lower concern in hospitality than other industries due to the fact most hospitality work requires low skills and only limited, if any, qualifications. Given this attitude, it is unsurprising that employee churn rates in hospitality are among the highest of all industries, estimated at approximately 30 per cent per annum.\textsuperscript{57} Embedded in this culture, employers perceive the law as irrelevant to their business operations and actively avoid informing themselves of their obligations even if they are aware those obligations exist.

It should be noted that it is not exclusively employers that shape this culture. Especially in hospitality, some workers do not mind the fact their statutory entitlements are not being met, due to benefits they receive from their job outside their hourly wage including tips from customers, free transport and even the social interaction with customers and fellow workers they experience at work.\textsuperscript{58} Although this dynamic is acknowledged, the focus of this paper is on the majority of hospitality workers who, if given the knowledge and resources to do so, would choose to actively fight against employer exploitation.

\textbf{Section Three: Method of Analysis}

\textit{(i) Rationale for method}

The above section has discussed the social, political and economic forces which most powerfully shape the extent to which hospitality employees are able to enjoy the benefit of their statutory entitlements. The analysis reveals that although hospitality workers

\textsuperscript{54} Ram et al, above n 43, 36.
\textsuperscript{55} Ibid.
\textsuperscript{56} Ibid, 37.
\textsuperscript{57} Deloitte, above n 35, 35.
\textsuperscript{58} Adam-Smith et al, above n 31, 38-39.
are more likely to be reliant on the enforceability of minimum entitlements than almost any other workers, these workers typically possess the lowest bargaining power and resources to enforce these entitlements.

The literature discussed very effectively describes how these factors influence hospitality employees’ ability to enforce their rights. These insights have been achieved predominantly via methods investigating the practical context of the employment relationship through surveys and interviews with employers and employees as well as economic analyses of the financial environment in which hospitality businesses operate. However, less attention has been paid to the awareness, attitude and response of the legal system to the disadvantages resulting from the operation of these factors. Therefore one aim of this analysis is to identify whether the legal system, with a focus on the court system, is aware of this gap and evaluate the means it adopts to overcome it. In addition, the majority of the literature discussed employer knowledge of and attitude towards their obligations in a UK employment law context. Therefore a second aim of this analysis is to gain further insight into the impact of these factors in an Australian context.

(ii) Method description

In order to examine the attitude and response of courts towards the vulnerability experienced by hospitality workers, this paper performs an analysis of six cases brought in the Federal Circuit Court by the Fair Work Ombudsman. Each case involves a restaurant/café or catering business defendant and in each case the dispute involves a failure by the employer to pay statutory minimum pay entitlements and overtime rates. In all but one of the cases, the employee’s rights are derived from a Modern Award as opposed to an enterprise agreement.

The cases will be analysed in relation to four key questions identified from the analysis above.

- Firstly, the extent to which the cases reveal the extent of employer knowledge of their obligations will be examined, along with the court's attitude towards any lack of knowledge found.

- Secondly, consideration will be given to whether, in setting penalties, the court takes account of the socio-economic conditions of hospitality employees and the resulting difficulties created in terms of employees being aware of and able to enforce their rights.

- Thirdly, the willingness of the court to mitigate penalties in consideration of the difficult operating conditions faced by the hospitality industry and the resulting financial difficulties faced by defendant employers.

- Fourthly, the nature of the penalties awarded will be considered and their effectiveness in assisting employees to bridge the enforcement gap will be analysed.

In examining each question, this paper will consider whether the court could alter its approach to better ensure employees can more consistently realise their statutory entitlements.
Section Four: Results and discussion

(i) Court’s assessment of employer’s knowledge of rights

Two main arguments were put by employers to justify lack of knowledge of their employment obligations. Most commonly, employers argued their failure to pay employees statutory entitlements was not deliberate but an innocent oversight. Some employers however claimed they were under a false impression of the law due to erroneous advice received from their legal or financial advisors.

‘Innocent Ignorance’

The court’s willingness to entertain these arguments varied between cases. In *FWO v Fed up Deli & Catering Pty Ltd* [2012], the court accepted the employer’s submission that the breaches in question were not deliberate but merely a failure to ‘properly understand or appreciate’ the employees’ entitlements amounting to ‘carelessness’.

Similarly, in *FWO v Chamdale Pty Ltd* [2011], which involved employees being incorrectly classified for the purposes of determining their minimum wage rates, the court again accepted employer testimony that this conduct was a genuine ‘mistake’.

In other cases, the court was less willing to believe employers were innocently ignorant of their obligations. Instead of simply accepting employer testimony, the court opted to further analyse the objective evidence surrounding employer behaviour to conclude the employer was in fact likely aware, or at least should have been aware of their obligations. For example, in *FWO v Trytell* [2012], the court noted that the fact the employer advertised for ‘casual’ positions indicated he should have understood what giving an employee such a status meant there is a 25% loading in their hourly rate of pay.

Similarly in *FWO v Turbo Café*, the court dismissed the employer’s claim to innocent ignorance by identifying the fact previous complaints had been made by employees, some of which were serious in nature, and yet the contraventions continued.

‘Reliance on professional advice’

However, the court was consistent in expressing little tolerance for employers who claimed failure to provide entitlements was due to the fact they relied on advice received from others. In *FWO v Stacborn Pty Ltd* [2012], the employer argued it had relied on advice from its local industry association assuring them they were compliant in paying employees.

Similarly, in *FWO v Trytell* the employer claimed it had relied on legal advice. However, in both cases the court stated that whilst gaining professional

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60 *Fair Work Ombudsman v Chamdale Pty Ltd* [2011] FMCA 1021, [10].

61 *Fair Work Ombudsman v Trytell* [2012] FMCA 100, [35].

62 *Fair Work Ombudsman v Turbo Café Point Cook Pty Ltd & Anor* [2012] FMCA 795, [27].

63 *Fair Work Ombudsman v Stacborn Pty Ltd T/As Eagle Boys Cessnock* [2012] FMCA 890, [44].

64 *Fair Work Ombudsman v Trytell* [2012] FMCA 100, [34].
advice is competent business practice, the employer cannot ‘hide’ behind such advice to avoid its obligations.\(^{65}\)

**Evaluation of the court’s approach**

As discussed earlier, in many situations, employer ignorance of their obligations will stem not from an isolated mistake, but rather a conscious decision by the employer not to inform itself of these obligations.\(^{66}\) Thus in these instances, the explanation for ignorance is not so much the employer’s capacity to discover their legal obligations but rather their attitude to the importance of these obligations. This means that even where an employer reports ignorance, this does not necessarily mean their breach is innocent. For example, In *FWO v Stacborn*, after being issued with a contravention letter by the Ombudsman, the employer failed to provide a plan to repay its employees despite ‘repeated requests’ and had repaid less than a quarter of outstanding amounts to employees in the two years between the letter being issued and the case being heard.\(^{67}\) Yet as identified above, employer testimony of its breach as an innocent mistake was accepted in this case. It is contended here that where employer conduct following an offence objectively indicates the employer does not intend to take its legal obligations seriously, employer testimony characterising their ignorance as innocent should not be accepted. Although the court was willing to analyse the employer’s objective behaviour in some of the cases examined, this analysis should be performed in all cases.

The negative implications of too readily accepting employer testimony for hospitality workers seeking to enforce their rights are clear. For one, doing so encourages employers to undertake practices designed to hide objective evidence suggesting their breaches were in fact deliberate, for example by failing to maintain adequate records of employee hours and not providing employees with payslips. This hinders employees’ ability to make claims against their employer, because, as acknowledged in *FWO v Taj Palace*, such records provide a crucial evidential tool to prove a claim.\(^{68}\) In addition, by doing so, the court implicitly incentivises employers to breach statutory requirements (keeping employment records and providing payslips to employees are obligations under the Act).\(^{69}\) Such behaviour also constitutes poor business practice for monitoring expenses, making it less likely employers will be aware of whether or not they can afford to pay their employees their full entitlements and may thus err on the side of not doing so. Thus if courts are to have an impact in breaking the culture of non-compliance amongst employers, more comprehensive consideration of the objective evidence indicating employer knowledge is critical.

Another aspect of the court’s approach open to question was how findings on the state of employer knowledge were used to affect the penalty awarded. In the cases where the breach was considered to be a result of innocent ignorance and a failure to investigate its changing obligations over time, the court identified this as a factor decreasing the

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\(^{65}\) *Fair Work Ombudsman v Stacborn Pty Ltd T/As Eagle Boys Cessnock* [2012] FMCA 890, [44].

\(^{66}\) Ram et al, above n 43, 36-7.

\(^{67}\) *Fair Work Ombudsman v Stacborn Pty Ltd T/As Eagle Boys Cessnock* [2012] FMCA 890, [46].

\(^{68}\) *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA 258, [44].

\(^{69}\) See *Fair Work Act 2009* (Cth), s 435 (obligation to keep employer records for 7 years) and s 436 (obligation to provide payslips).
penalty awarded.\(^{70}\) Although it would be clearly be unfair to punish employers for small or technical breaches, the cases examined involved multiple breaches of a host of Modern Award provisions. Such conduct indicated the employer had never seen nor ever considered the application of the Modern Award to its employees. In the context of an employment law system reliant on individuals to enforce their rights\(^{71}\), this acute lack of awareness of obligations should be seen as an aggravating rather than a mitigating factor on the quantum of penalty awarded. In addition, by rewarding employers who appear blissfully unaware of their employees’ entitlements, the court implicitly encourages employers unsure of their exact obligations to completely ignore these obligations to minimise potential liability for any breach. Thus in doing so, the court acts to actually reinforce, rather than help to undermine the ‘culture of non-compliance’ prevalent in the industry discussed earlier which acts as such a robust barrier to employees enforcing their rights.

(ii) Taking account of employee vulnerability

Identification of vulnerability and its impact on the ability to enforce rights

As identified earlier, the socio-economic characteristics of hospitality employees makes them particularly vulnerable to exploitation by their employer.

The cases indicated the court’s awareness of the fact these vulnerabilities aggravated the difficulties faced by employees in enforcing their rights. In *FWO v Taj Palace Tandoori Indian Restaurant Pty Ltd* [2012], which involved underpayment of an immigrant cook in a Indian restaurant, the court recognised the fact that the employee in question spoke very limited English and had no previous employment experience in Australia, which made it likely his ‘ability to understand and exercise his rights would have been hampered’.\(^ {72}\) In addition, as he had come from a country where working conditions were very poor, his ability to perceive whether he was being treated fairly under Australian employment laws was also limited.\(^ {73}\) In *FWO v Fed Up Deli*, the court highlighted the fact the employees in question were young apprentices unaware of their entitlements, as well as the fact that one of the employees had a learning disability. The court stated these circumstances meant not only that these employees were much more reliant on minimum entitlements than other workers, but also their ability to perceive when their employer failed to provide these entitlements was necessarily limited.\(^ {74}\) A further example was in *FWO v Chamdale*, where the court emphasised the inexperience and casual status of the workers involved as making them particularly vulnerable to exploitation.\(^ {75}\)

Evaluation of the court’s approach

The identification of the heightened vulnerability of the employees in question to exploitation is commendable in itself. This is because by doing so the court communicates to employers and the public that employees who possess particular

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\(^{71}\) Dickens, above n 16, 206.

\(^{72}\) *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA 258, [42].

\(^{73}\) Ibid, [40].


\(^{75}\) *Fair Work Ombudsman v Chamdale Pty Ltd* [2011] FMCA 1021, [31].
vulnerabilities will find it much harder to understand and enforce their rights. However because these factors act to aggravate the losses which tend to be suffered by such employees, a powerful message to this effect with potential to change employer behaviour will only be sent if this heightened vulnerability is actually material in the penalties set by the court. The cases showed the court attempted to do this by linking the amplified vulnerability of the employees to a heightened need for general deterrence of such behaviour in the industry. For example, in *FWO v Turbo Café Point Cook Pty Ltd* [2012], the court stated that the purpose of the legislation is to provide a ‘safety net which ensures adequate minimum entitlements to employees, particularly those who are vulnerable or in low income roles’.76 Similarly, in *FWO v Taj Palace*, the court states that ‘ensuring compliance’ by employer with respect to vulnerable workers is ‘crucial to a just society and the avoidance of exploitation’.77

However by considering these characteristics only in relation to general deterrence, the court fails to adequately examine the extent to which in the case at hand, the employer in question took advantage of its employees’ vulnerability creating even greater barriers for employees to enforce their rights. In such scenarios there is a heightened need for penalties to reflect specific as well as general deterrence. Firstly, as identified earlier, when workers have low financial resources, not only are they reliant on minimum entitlements to maintain a decent standard of living as the court identifies, their ability to enforce their rights is necessarily limited by the their capacity to afford legal advice to determine if they have a claim and the amount they are owed.78 Secondly, where employees are particularly vulnerable, this makes it more likely their employer can ignore their complaints about underpayment or take adverse action against them for making such a complaint.79 In such cases it is clear the employer is actively taking advantage of the power imbalance caused by the employee’s particular vulnerabilities, and in such there is a need for a larger penalty to specifically deter the employer from doing so in the future.

In the cases examined, it appeared the court failed to perform this analysis on a consistent basis. In *FWO v Turbo Café*, the court does consider whether the employer took advantage of its employee’s particular vulnerability by discussing the significance of the fact that the employer ignored complaints from other employees about their minimum entitlements over a long period of time.80 This clearly indicated the employer felt it could get away with such behaviour by relying on the lack of resources possessed by employees to further pursue these complaints.

However in scenarios where employees had not previously complained, the court failed to investigate whether this was due to the fact employees felt too scared to complain to the employer due to fear of being dismissed or discriminated against. For example, in *FWO v Taj Palace*, the employee in question, who was sponsored by his employer on a 457 visa, was forced to work up to 71 hours per week for the same remuneration

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76 Fair Work Ombudsman v Turbo Café Point Cook Pty Ltd & Anor [2012] FMCA 795, [23].
77 Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor [2012] FMCA 258, [66].
78 Gleeson, above n 1, 670.
80 Fair Work Ombudsman v Turbo Café Point Cook Pty Ltd & Anor [2012] FMCA 795, [44].
regardless of his hours.81 Here, the employer was clearly dependant on his employer's continuing sponsorship to remain in Australia, something which makes it highly unlikely he would wish to create conflict with his employer for fear of this sponsorship being revoked. Yet the court failed to discuss this possibility. Similarly, in FWO v Chamdale, although the court identified the fact a large number of the employees were casually employed and also inexperienced in employment as young workers, it did not take the further step and infer from this that as a result, these employees, in reality, had little capacity to complain, as their employer could easily either terminate them or induce them to terminate by greatly reducing the casual shifts they were offered. Another reason employees in this case probably felt their ongoing employment was highly tenuous was the fact as inexperienced workers they possessed almost no skills and training, and would thus be considered easily replaceable by their employer. Where the court fails to comprehensively assess the full range of flow-on effects of employee vulnerability rather than simply identify the existence of this vulnerability, it is inevitably less able to implement measures to meaningfully assist employees to reduce this power imbalance.

(iii) Attitude to difficult trading conditions and financial difficulty

Inconsistent attitudes expressed

The attitude expressed by the court towards employers who attempted to excuse themselves from liability by arguing that they were a small and inexperienced business or that they were in severe financial difficulty at the time of the contravention was unclear if not contradictory.

On the one hand, business size was explicitly stated to be a factor for the court to take into account in setting a penalty following the principles set out in Mason v Harrington Corporation, which is applied in all cases examined.82 The rationale of this principle was discussed in FWO v Taj Palace, where the court stated that compared with large businesses with significant human resources, 'the practical reality [is] that there are numerous obligations upon businesses that must be juggled by small business operators around their primary day-to-day work in running the business'83 Further endorsement of this principle was found in FWO v Turbo Café, where the court stated that the size of the employer's business and any financial difficulties it may be experiencing must be weighed against the seriousness and deliberateness of the conduct and the need to impose meaningful and deterrent penalties.84

However, on the other hand, the court also made statements suggesting explicit disregard of the relevance of business size or financial position to determining employer liability. In FWO v Fed up Deli, the court states that ‘the small size of the business and the lack of dedicated HR personnel is not a particularly relevant matter’ and ‘no reductions should be afforded because of this.85 This stance is justified by the need to ensure compliance with minimum standards and not create an impression for

81 This was in clear breach of his Visa sponsorship agreement by his employer. See Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor [2012] FMCA 258, [42].
82 Mason v Harrington Corporation Pty Ltd t/as Pangea Restaurant and Bar [2007] FMCA 7, [24].
83 Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor [2012] FMCA 258, [49].
84 Fair Work Ombudsman v Turbo Café Point Cook Pty Ltd & Anor [2012] FMCA 795, [30].
employers that because of their small size or perilous financial circumstances they can breach an award.\textsuperscript{86} A similar statement is made in \textit{FWO v Stacborn}.\textsuperscript{87}

To resolve these seemingly conflicting statements, it is useful analyse the extent to which business size and financial situation was in reality taken into account in formulating the penalty awarded in the cases. The results suggest that, despite the statements above, the court tended to apply these considerations as mitigating the eventual penalty. In \textit{FWO v Chamdale}, in awarding a penalty of 20\% of the maximum available, the court stated that among the mitigating factors was the fact that ‘the Respondent’s business has suffered as a result of these matters and its financial position deteriorated’. In \textit{FWO v Taj Palace}, the court examined at length evidence of recent losses made by the company and the fact proprietors had to incur significant medical expenses to care for their disabled daughter. Although these circumstances were not eventually taken into account, this was due to a lack of evidence about the existence of these financial hardships rather than the lack of relevance of this consideration to the penalty awarded.\textsuperscript{88}

In cases where business size was not an explicitly identified as a mitigating factor, the court appeared to take it into account indirectly. For example, as discussed above, in \textit{FWO v Fed up Deli}, the court reduced the penalty awarded due to the fact the employer was ignorant of their obligations and failed to keep adequate records.\textsuperscript{89} In reality, these failures are merely symptoms of the fact that the employer was under financial strain and lacked the personnel required to manage its employees. The court also cites an overall consideration, that the penalty should not be ‘oppressive or crushing’ for the defendant employer\textsuperscript{90}, which clearly invites the court to consider whether the size of the penalty awarded may cause financial difficulties, such as making an employer insolvent or pacing them into administration. For example, in \textit{FWO v Stacborn} the court acknowledged the fact that the employer would not be able to pay back its employees via its ordinary trading revenue and was relying on the business being sold to pay these amounts. Using this overall consideration, the court chose to extend the amount of time available to the employer to pay back its employees so as to ensure it was not prematurely forced out of business.

\textbf{Evaluation of the court’s approach}

These results clearly indicate the court’s willingness to take into account the financial and resource constraints faced by small hospitality businesses in meeting their employment obligations. However it is questionable whether it is appropriate for the court to take on this role for the purposes of enhancing employees’ ability to enforce their rights. In one sense by doing so the court makes the law more reflective of the societal realities faced by these businesses. This may foster a more co-operative relationship between enforcement actors including the courts and public enforcement


\textsuperscript{87} \textit{Fair Work Ombudsman v Stacborn Pty Ltd T/As Eagle Boys Cessnock} [2012] FMCA 890, [70].

\textsuperscript{88} \textit{Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor} [2012] FMCA 258, [75].

\textsuperscript{89} \textit{Fair Work Ombudsman v Fed Up Deli & Catering Pty Ltd (in Liquidation) & Anor} [2012] FMCA 738, [56].

\textsuperscript{90} This principle was cited in \textit{Kelly v Fitzpatrick} [2007] FCA 374, [30] and is cited in many of the cases used. For example see \textit{Fair Work Ombudsman v Fed Up Deli & Catering Pty Ltd (in Liquidation) &Anor} [2012] FMCA 738, [76].
agencies and employers themselves, which in turn can incentivise employers to pay greater attention to employee entitlements. However, as discussed earlier, studies have consistently demonstrated that for many hospitality employers, market conditions and competitor behaviour operate as stronger influences on wage-level decisions than any feeling of moral compulsion to comply with the law felt by employers.\textsuperscript{91} Given the bleak economic prospects for the industry for the short-term, this attitude is likely to be particularly prevalent. Thus, to best assist employees’ efforts to enforce their rights, the court must use its position to combat such employer attitudes and present the law as a force exercising greater command on the consciousness of employers considering attempting to avoid their obligations in favour of pursuing profitability.

In assessing the penalties awarded in these cases, the final part of this section considers means in which this may be achieved, whilst simultaneously facilitating co-operative relations between enforcement actors and employers.

(iv) \textit{Expressing compliance goals through remedies}

Through the nature and magnitude of its orders, the court will exercise its power to change employer behaviour even more powerfully than it is able to do through the propositions made in judgements themselves. This is because these orders can compel particular conduct from the employer and thus have the most tangible impact in the defendant employer’s workplace and the most visible impact for other employers.

Given the potential impact of these orders on enhancing the ability of employees to enforce their rights, the cases revealed the court’s approach to achieving this aim was highly limited.

The major shortcoming was that in all cases, the order granted was a pecuniary penalty only, calculated as a percentage of the maximum penalty available for the number of contraventions committed by weighing the presence of the factors in \textit{Mason}.\textsuperscript{92} This approach was consistently used despite the fact that there is no obligation for the court to do so. In fact the Act clearly contemplates that there will be many scenarios where monetary orders will not be appropriate or effective, giving the court a very broad power to ‘make any order it considers appropriate’.\textsuperscript{93}

There are three reasons why exclusive recourse to pecuniary penalties fails to effectively communicate the court’s desire to secure ongoing employer compliance and assist to drive change in employer behaviour in doing so.

Firstly, the court attempts to arbitrarily assign a monetary amount through the process of weighing the \textit{Mason} factors. This is objectionable because most of these factors, such as whether the employer exhibited contrition or whether corrective action had been taken cannot be measured in a tangible economic sense. The court then attempts to consider whether the penalty arrived at through this weighing process is a ‘proportionate’ response to the breach.\textsuperscript{94} It is not suggested here that the court is not competent to determine an appropriate pecuniary penalty through such a process, commonly utilised in other areas of the law, including in determining penalties under

\textsuperscript{91} Ram et al, above n 43, 36.
\textsuperscript{92} Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant and Bar [2007] FMCA 7.
\textsuperscript{93} Fair Work Act 2009, above n 2, s 545.
\textsuperscript{94} Fair Work Ombudsman v Turbo Café Point Cook Pty Ltd & Anor [2012] FMCA 795, [50].
the Corporations Act 2001 (Cth)\(^{95}\) and the Competition and Consumer Act 2010 (Cth).\(^{96}\) However it is contended that adopting this method in this context is a poor tool for communicating the importance of the rights of vulnerable workers and assisting their enforcement. Both the defendant employer and employers in general in considering the penalty will have little visibility on what amount of the penalty awarded is aimed at addressing the factors exhibited in employer behaviour identified by the court as warranting a remedy. It is therefore also unclear what portion of the penalty reflects the need for general deterrence.

Secondly, another problem in exclusively granting pecuniary orders is that these penalties are not necessarily appropriate to address the underlying conditions which contribute to employer breaches and ensure the treatment of these conditions to prevent future breaches. For example, in the case of a failure to keep employee records it is much more likely that requiring the employer to fund the implementation of a records-keeping system and cover the cost of the public enforcement body to monitor this system on an ongoing basis would be effective to address this symptom in the longer term than a fine. In fact, a monetary penalty may drain the resources the employer would otherwise have spent in addressing this problem.

It is clear the court is cognisant of the importance of addressing the underlying causes of breaches to drive change in employer behaviour. In all the cases, the court assessed the extent to which the employer had taken corrective action as a determinant of the size of the penalty awarded. For example in FWO v Taj Palace, the court noted with disappointment the absence of any new systems in the employer’s business to ensure future compliance but applauded the fact the employer had sought legal advice to clarify its obligations.\(^{97}\) However, by not making a direct attempt to change the specific shortcomings in employer behaviour through the remedies ordered, the court weakened its ability to empower employees to enjoy their rights on an ongoing basis.

A final problem with pecuniary orders is that such orders may harm affected employees’ attempts to recoup underpayments where the employer is insolvent or in severe financial difficulty. In most cases examined, the penalty awarded was approximately equivalent to\(^{98}\) or even greater than\(^{99}\) the amount owed by the employer to employees. In FWO v Stacborn, the court recognised this difficulty by ruling the employer had twelve months to pay the penalty, but had to pay back its employees within three months.\(^{100}\) However the court ignored this issue in FWO v Fed up Deli, awarding a large penalty despite acknowledging the fact the employer was insolvent and as a result employees were unlikely to ever receive their entitlements owed.\(^{101}\) By placing such a large financial burden on struggling employers, many of whom claim they already cannot afford to pay their employees adequately, courts create a clear disincentive for employees to come forward with their claims knowing they may in fact lose their jobs due to the crippling size of the penalties awarded.

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\(^{95}\) Corporations Act 2001 (Cth), s 1317G.

\(^{96}\) Competition and Consumer Act 2010 (Cth) s 76.

\(^{97}\) Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor [2012] FMCA 258, [54].

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\(^{100}\) Fair Work Ombudsman v Stacborn Pty Ltd T/As Eagle Boys Cessnock [2012] FMCA 890, [73].

Reformulating penalties to enhance rights enforceability

The analysis above suggests that through by exclusively using pecuniary penalty orders, the court may be limiting its potential to enhance the ability for employers to enjoy their full entitlements in the long-term. Drawing on this finding, the final part of this paper examines more specifically how different types of non-pecuniary orders can operate to better bridge the enforcement gap and how courts can best incorporate such orders into their approach in underpayment cases.

As identified earlier, a major benefit of non-pecuniary orders is their potential to drive longer-term alterations in employer behaviour. Non-pecuniary measures can be targeted to have a structural or organisational impact, forcing the employer to address the shortcomings in their business practices. For example, ignorance of employment rights could be addressed by a variety of measures including requiring the breaching employer to attend compliance and training programs, requiring the employer to hire an additional employee responsible for maintaining employee records and monitoring compliance or requiring the employer to include in employee training sessions information about employee rights and entitlements specific to their role. For employers whose breaches are caused predominantly by inexperience in business operation and lack of awareness of employment obligations, such orders are likely to be particularly effective in inspiring better compliance practices within employer organisations.

Also, such an approach will likely be better received by employees themselves. Requiring employers to inform employees of their substantive rights through training and proscribing regular monitoring of employer record-keeping are clearly likely to empower employees to identify when their rights have been breached and take action on the basis of this knowledge. Even simple measures such as requiring an apology letter to be sent to affected employees and placing notices in the workplace advising how the complaint in question has been resolved can foster a more co-operative relationship between employers and employees. In such a setting, employees would clearly feel less concerned about being ignored or threatened with adverse consequences when raising wage-related concerns with their employer, disintegrating a large barrier to enforcement. Employers may in turn see additional resulting benefits as employees feel more secure in their employment and may respond by increasing their productivity and assisting the employer to train other staff, resulting in potential training and hiring cost savings for the employer.

The inclusion of non-pecuniary orders in court-awarded penalties would also be likely to better complement the efforts of the Fair Work Ombudsman to achieve compliance with minimum standards. Where breaches of the Act have been identified, the Ombudsman will typically seek enforceable undertakings from the employer as an alternative to litigation where this is considered the most efficient way to compensate employees for the loss caused by the breach. In contrast to the court’s orders, enforceable undertakings typically include a wide range of non-pecuniary orders, often

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102 Dickens, above n 16, 215.
103 Ram et al, above n 43, 39.
tailored specifically to address the needs of the employees in question. The use of these orders clearly suggests public enforcement authorities consider such measures as highly effective in securing a more favourable long-term outcome for employees by addressing the underlying causes of employer breaches. By reflecting the Ombudsman’s attitude in making orders, the court can not only increase visibility and acceptance of the benefits of non-pecuniary enforcement measures amongst employers generally, but also help encourage more harmonious and co-operative workplace relations between employers and the Ombudsman, which helps to fulfil a key aim of the enforcement regime.

It should be noted that this analysis certainly does not advocate the abandonment of pecuniary orders. Most cases requiring litigation involve employers who have shown a consistent lack of co-operation with enforcement bodies and a failure to rectify breaches after being alerted to them. In such scenarios, a pecuniary order in addition to non-pecuniary measures will often be required to create the specific deterrence necessary. However given the benefits discussed above, it is clear that the more widespread use of these orders is more likely to foster conditions which better support the long-term capacity of hospitality employees to enforce their rights.

**Conclusion**

The obstacles facing hospitality workers enforcing their rights in an industry beset by a culture of non-compliant employers are indeed significant, although they are not insurmountable. In order to dismantle barriers to enforcement, the complex interaction between the characteristics of employers and employees and the operating conditions of the hospitality industry in general which this paper has investigated in depth must be recognised, to allow solutions targeted at ameliorating the effect of these conditions for employees to gain maximum effectiveness.

This paper has also argued that due to their position at the apex of the enforcement system, courts have a crucial role to play in communicating to employers through both their judgments and remedies the importance of complying with statutory obligations, and implementing strategies to assist employees facing a large power imbalance relative to their employer to enforce these rights.

The cases analysed suggested that whilst courts at times undertook a critical analysis of the employer conduct and identified the manner in which this power imbalance created severe difficulties for employees in enforcing their rights, the court failed to do so consistently. This inevitably hampered the court’s ability to send an unequivocal message to employers that they could not evade their rights by deliberately ignoring their employment obligations or justifying their non-compliance in the poor financial

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105 Examples of enforceable undertakings include general measures such as requiring the employer to obtain workplace relations advice, establish a workplace relations training program and commission ongoing audits of the employer’s business as well as more specific measures including writing a letter of apology to employees affected, place a public notice in the workplace, mainstream media or social media detailing the breach and writing a employment relations handbook on the laws breached. For further information and to see recent undertakings obtained by the FWO, see <http://www.fairwork.gov.au/about-us/legal/pages/enforceable-undertakings.aspx>.

106 Acts 682(1)(a)(i).

107 Fair Work Ombudsman, above n 11, 33.
conditions facing their business. In addition, in awarding remedies, the court’s exclusive recourse to pecuniary measures tended to punish employers rather than seeking to empower employees affected by addressing the structural causes of employer conduct within the employment relationship. This paper suggests that by incorporating non-pecuniary measures into the orders made, courts could better assist employee to realise their rights in the longer-term.

This analysis also raises potential question for future research to gain an even deeper insight into how vulnerable workers can realise their statutory entitlements. For example, the benefits of non-pecuniary orders espoused will only materialise if appropriate non-pecuniary measures are prescribed in a given case. This will require further analysis of which such measures are likely to have the greatest impact on employer behaviour in different circumstances and provide the greatest empowerment for employees to enforce their rights.
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