

# ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



## BENJAMIN LEGGE [2019] FWC 5456 & [2019] FWC 5874

**Fair Work Commission, Commissioner Hampton, 7 August 2019**

Whether a foster carer is a ‘worker’ for purposes of the Fair Work Act

**Key words: Bullying, Federal, Worker, Carer, Volunteer, Employee, Legal Representation**

1. Mr Benjamin Legge a foster carer for Barnados Australia applied to the Fair Work Commission (the Commission) under s.789FC of the *Fair Work Act 2009* (the *FW Act*) seeking a stop-bullying order. Barnardos Australia contends otherwise and claims that Mr Legge is not an employee or a volunteer worker as, amongst other matters, he does not perform work for it. There was no suggestion that Barnardos Australia was not a constitutional corporation, and thus subject to the Act.

### **Legal Representation**

2. The Commission was initially advised that both parties intended to be represented by lawyers. However, Mr Legge advised that he was not intending to be represented but Barnardos Australia confirmed its request for representation under s.596 of the *FW Act*. That request was opposed by Mr Legge.
3. It was common ground that the present matter involves legal complexity that satisfies the precondition set out in s.596(2)(a) of the *FW Act*. Although Mr Legge was not legally represented, he was intelligent, articulate and demonstrated capacity to advance his position. On balance the Commissioner decided to exercise his discretion to allow Barnados to be legally represented.

### **Worker**

4. Mr Legge could only be eligible to make this application if he is a “worker” within the meaning of s.789FC(2) of the *FW Act*. He contended that he is a worker in the form of a volunteer, or alternatively, as a subcontractor or outworker.
5. Barnardos Australia contended that Mr Legge is not an employee, outworker or a volunteer worker as, amongst other matters, he does not perform any work for Barnardos Australia.
6. Section 7 of the *WHS Act* provides as follows:

## **“7 Meaning of worker**

- (1) A person is a worker if the person carries out work in any capacity for a person conducting a business or undertaking, including work as:
- (a) an employee; or
  - (b) a contractor or subcontractor; or
  - (c) an employee of a contractor or subcontractor; or
  - (d) an employee of a labour hire company who has been assigned to work in the person’s business or undertaking; or
  - (e) an outworker; or
  - (f) an apprentice or trainee; or
  - (g) a student gaining work experience; or
  - (h) a volunteer; or
  - (i) a person of a prescribed class.”

7. Section 4 of the WHS Act includes the following definition of “volunteer”:

**““volunteer”** means a person who is acting on a voluntary basis (irrespective of whether the person receives out-of-pocket expenses).”

8. The term “outworker” is not defined in the WHS Act, but is defined in s.12 of the *FW Act* as:

**“outworker** means:

- (a) an employee who, for the purpose of the business of his or her employer, performs work at residential premises or at other premises that would not conventionally be regarded as being business premises;  
or
- (b) an individual who, for the purpose of a contract for the provision of services, performs work:
  - (i) in the textile, clothing or footwear industry; and

(ii) at residential premises or at other premises that would not conventionally be regarded as being business premises.”

9. Mr Legge contends that he is a worker as he performs work for Barnardos Australia. He acknowledged that Foster Carers undertake the duties of a parent in many ways and, within the home environment, exercise some degree of autonomy around regular “parental” decisions. However, he contends that there are key differences between Foster Caring and parenting such as attending case management meetings, seeking medication permissions and engagement with government agencies.

10. He also noted that:

- “Although Foster Carers may be approved by or on behalf of the Director-General (of the Community Services Directorate of the ACT Government), they are recruited, assessed, trained and supervised by Barnardos Australia.
- Foster Carers are required to act in accordance with the Carer Handbook issued to them by Barnardos Australia and a failure to do so may result in what he described as a performance management process.
- Foster Carers are also subject to annual reviews and other requirements beyond those provided by the Director-General.
- The requirements extend to matters such as the obligation to communicate travel plans, the requirement to permit Barnardos Australia to see the children at all times, the obligation to seek approval for ear piercing (of the child), the requirement to follow daily care responsibilities including going to bed times, pocket money, clothing and the like.
- Some of these, and other requirements such as a ban on smoking, are beyond those set by the Director-General, and are indicative of control being exercised by Barnardos Australia.” [32]

11. Barnardos Australia contended that there is no evidence for the Commission to find the existence of a contract of employment between the immediate parties. In particular, there is no evidence to establish the following two elements necessary to form a contract; being:

- an intention to create legal relations, and
- consideration.

12. Further, Barnardos Australia contends that its involvement in the work performed by Mr Legge arose out of the agreement between it and the Government of the ACT in respect of children in its care. Barnardos Australia contended that Mr Legge’s work as a Foster Carer is more closely akin to that of domestic work by a family member,

and it was not the intention of the Legislature that work of this kind would lead to finding that the person involved was a worker so as to be covered by the stop-bullying jurisdiction of the Commission.

13. The Commissioner found that Mr Legge was not an employee of Barnardos Australia, including as an outworker, and that he is not a subcontractor. Some of the necessary elements are not present. Further, the true nature of the relationship and the objective intention of the parties is that Mr Legge is to be a volunteer in his capacity as a Foster Carer.
14. This was not the end of the matter as the Commissioner said, “Mr Legge will be a worker for present purposes if I am satisfied that he is **performing work in any capacity** for Barnardos Australia. The category of workers in s.7(1) of the WHS Act includes that of a volunteer, and in any event, is not an exhaustive list and the elements involved; being the performance of work and that the work is done for the PCBU, are the two operative considerations in this matter.” [92]
15. The Commissioner acknowledged that Mr Legge held an authority to be a Foster Carer because he has been approved by the government’s Director-General. However, the wider context indicated that Mr Legge was performing work for Barnardos. This context included:
  - There is an agreement between Barnardos Australia and Mr Legge, which in practice is an essential part of Mr Legge being approved as a Foster Carer who is available to be assigned a child or young person for care by Barnardos Australia.
  - Mr Legge is covered by the public liability policy of Barnardos Australia (ACT Together).
  - The carer payments and reimbursements are made and approved by Barnardos Australia from its funding.
  - Barnardos Australia allocates the children or young people to Mr Legge
  - Barnardos Australia is a significant beneficiary of the work undertaken by Mr Legge and importantly, it is through the relationship between Barnardos Australia and Mr Legge that the work is performed
16. The Commissioner indicated that each set of facts needs to be considered separately by saying, “I have considered this issue only in the context of Mr Legge, and his relationship with Barnardos Australia under the auspices of the CYP Act and related arrangements and have not determined, as a matter of principle, whether Foster Carers are workers more generally. The statutory, contractual and practical circumstances of this case have been important and each case must be considered in its own jurisdictional context. The finding that Mr Legge is a worker for present purposes should not be confused with a finding that he is employed by Barnardos Australia or is anything other than a volunteer worker.” [100]

## IMPLICATIONS



Section 7 of the WHS Act was considered by the Full Bench in *Bibawi v Stepping Stone Clubhouse Inc t/a Stepping Stone & Others* and this decision follows the principles set out in that case. This decision cannot be blindly followed and an assessment of the facts and circumstances of the particular foster care will be required before the Act may apply.

## VIEW THE CASE



This case may be viewed at: <https://www.fwc.gov.au/documents/decisionssigned/html/2019fwc5874.htm>

First hearing case may be viewed at: <https://www.fwc.gov.au/documents/decisionssigned/html/2019fwc5456.htm>

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**Date of creation:** September 2019

**Number of case:** 2019-60

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