THE EXPLOITATION OF GENERAL AND SPECIALIST CLEANERS WORKING IN RETAIL CHAINS FOR CONTRACTING OR SUBCONTRACTING CLEANING COMPANIES

WESTJUSTICE SUBMISSION TO THE SENATE EDUCATION AND EMPLOYMENT REFERENCES COMMITTEE

Contact: Catherine Hemingway
Policy Director (CALD & Employment)
Employment Practice Manager

July 2018

WESTERN COMMUNITY LEGAL CENTRE
Werribee Branch – Level 1, 8 Watton St, Werribee VIC 3030
Footscray Branch – Level 1, 72 Buckley St, Footscray VIC 3011
T (03) 9749 7720 F (03) 9749 8276
admin@westjustice.org.au
westjustice.org.au
ABN 72604181071 ACN 604181071

CONTENTS

Executive summary ... 5

About WEstjustice and the Employment Law Program ... 5

WEstjustice legal service: cleaners ... 5

Key recommendations ... 7

Table of Recommendations ... 9

Introduction ... 13

1. Improving frameworks to protect workers from harm ... 13

Increased accountability in labour hire, supply chains and franchises ... 14

The problem ... 14

Current laws are insufficient ... 16

Recommendation One: Extend liability to all relevant third parties ... 18

Recommendation Two: Widen the definition of responsible franchisor entity ... 19

Recommendation Three: Clarify liability of all relevant third parties ... 19

Recommendation Four: Clarify the 'reasonable steps' defence to incentivise compliance ... 19

Recommendation Five: Extend outworker protections to contract cleaners and other industries ... 20

Recommendation Six: Remove requirement for actual knowledge and require accessories to take positive steps to ensure compliance ... 20

Recommendation Seven: Introduce a Federal Labour Hire Licensing scheme and ensure fair pay for insecure workers ... 20

Laws and processes to eradicate sham contracting ... 21

The problem ... 21

Presumption of employment relationship ... 23

Recommendation Eight: Introduce a reverse onus to provide minimum entitlements to all workers ... 24

Recommendation Nine: Limit the current defence ... 24

Recommendation Ten: Increase scrutiny at the time ABNs are given, and via ongoing enforcement ... 25

Other measures to stop wage theft ... 25

Recommendation 11: Introduce a Wage Insurance Scheme ... 25

Recommendation 12: Amend the Migration Act to ensure vulnerable workers can complain with confidence 26

Recommendation 13: Increase use of procurement policies, proactive compliance deeds and industry codes to improve compliance. 27

2. Ensuring workers have adequate representation and knowledge of their rights 28

Unmet need for employment law help 29

Community-based face-to-face legal assistance 30

Best practice community-based legal services 30

The WEstjustice Employment Law Service 32

Recommendation 14: Fund community legal centres to provide face-to-face legal assistance 33

Targeted education 34

Best practice education approaches 34

WEstjustice Education Program 35

Recommendation 15: Fund targeted education programs for vulnerable workers 38

3. Facilitating compliance with relevant laws 39

What works well 39

Without help, workers cannot articulate complaints 40

Cultural responsiveness frameworks 40

Recommendation 16: Agencies need to improve cultural responsiveness frameworks 41

Superannuation 41

Recommendation 17: Greater collaboration, resourcing and action to address the superannuation black hole 41

Enhanced powers to aid efficient resolution avoid the need for court 41

WEstjustice's recommendations to improve FWO's enforcement powers 43

Recommendation 18: Cost consequences for employers who refuse to engage with FWO 44

Recommendation 19: Assessment Notices for employers who refuse to engage or have unmeritorious claims 44

Proactive compliance and more resourcing 44

Recommendation 20: Increased resourcing and more proactive compliance required 45

4. Addressing Phoenixing and pyramid subcontracting 46

Measures to limit phoenix activity 46

Recommendation 21: Introduce director identity numbers and compulsory insurance 46

Expanding the FEG Scheme 47

Recommendation 22: Expand the FEG scheme to all workers 47

Conclusion 47

Appendix One: Compilation of WEstjustice's drafting suggestions 48

EXECUTIVE SUMMARY

WEstjustice Community Legal Centre welcomes the opportunity to make this submission[1] to the Senate Education and Employment References Committee Inquiry into the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies (**Inquiry**). We are available to discuss these recommendations with the Committee if this would be of assistance.

ABOUT WESTJUSTICE AND THE EMPLOYMENT LAW PROGRAM

WEstjustice (www.westjustice.org.au) is a community organisation that provides free legal assistance and financial counselling to people in the western suburbs of Melbourne. We assist communities with a range of everyday legal problems, including tenancy, credit/debt, family law, family violence and employment-related matters. We also provide free community legal education, undertake law reform activities and work in partnership with our local communities to deliver innovative projects that build legal capacity and improve access to justice.

With a long history of working with migrant and refugee communities, in 2014 we identified a large unmet need for employment law assistance for these communities, who are particularly vulnerable to exploitation at work. In response, WEstjustice established the Employment Law Project, to explore the working experiences of migrant and refugee communities. In the first two years of operation, the Employment Law Project provided legal assistance to over 200 migrant workers from 30 different countries, successfully recovering or obtaining orders for over $120,000 in unpaid entitlements and over $125,000 in compensation for unlawful termination, and trained over 600 migrant workers, as well as leaders from migrant communities and professionals supporting these communities. Based on evidence from our work, and extensive research and consultation, WEstjustice released the Not Just Work Report,[2] which outlines 10 key steps to stop the exploitation of migrant workers.

Given continuing unmet need, WEstjustice now operates an ongoing Employment Law Program. The Program seeks to improve employment outcomes for migrants, refugees and temporary visa holders. We do this by empowering migrant and refugee communities to understand and enforce their workplace rights through the provision of tailored legal services, education, sector capacity building and advocacy for systemic reform.

WESTJUSTICE LEGAL SERVICE: CLEANERS

WEstjustice has provided significant casework support to workers in the contract cleaning industry. Of all clients seen by the employment law service (**ELS**) between 2014 and 2016, 15% of our clients were cleaners. As at 30 June 2018, 48% of the clients seen through the Study Melbourne International Student Work Rights Legal Service were working as cleaners.

In a sample of 35 cleaning clients from the past four years, we found:

- 75% received advice in relation to underpayment or non payment of wages;
- 31% received advice in relation to sham contracting;

---

1 We would like to acknowledge the generous assistance of WEstjustice volunteers in preparing this submission, and in particular Rosie Tran, for her outstanding research and editing assistance.
[2] Catherine Hemingway, 'Not Just Work: Ending the exploitation of refugee and migrant workers', WEstjustice Employment Law Project Final Report, available at <www.westjustice.org.au/publications/policy-reports-121>, last accessed 26 July 2018.

- 20% received advice in relation to workplace injury;
- 20% received advice in relation to dismissal; and
- 17% received advice in relation to bullying and/or discrimination.

Our clients' cases were usually complex and multifaceted. Nearly two thirds of clients sought assistance for two or more legal issues, often spanning multiple jurisdictions.

Exploitation is rife. Our cleaning clients are frequently engaged in sham arrangements and routinely underpaid. One fifth have suffered a workplace injury and one in six workers complained of discrimination or bullying. Clients were paid as little as $13 an hour, and some received no income at all. Some clients had been forced to pay for "training" and then left out of pocket and without a job.

Many clients are working hard to clean the properties of large companies – energy retailers, private schools, universities, stadiums, large franchise stores and offices – yet they are engaged on ABNs by dodgy individuals or companies, only paid for some of the hours they are worked, dismissed when they complained or were injured, and denied their minimum entitlements. Despite receiving the benefit of their labour, these lead firms – who hold so much power – cannot be held legally accountable for the exploitation. There is an insurmountable legal and ethical chasm: on one side stand the lead firms, with huge profits and clean working/retail environments; and on the other, the emerging sub-class of vulnerable workers, often working at night, in insecure arrangements, cleaning up after their exploiters. Laws and services must be reformed to overcome this divide.

Case study - Alina

Alina was an international student who worked night shifts cleaning the building of a major energy retailer. She had only recently arrived in Australia. This was her first job. She found the job through a friend, who saw an ad on gumtree. When she met Joe, her boss, he initially offered her $17 an hour but increased the offer to $20 an hour when Alina complained. When Alina started work she was given a 13 page "contract for services" document to sign. Yet despite the words in the contract, she was told what hours to work, given a uniform and provided with all tools and cleaning equipment. She worked in a team of other "contractors", all wearing the uniform of her boss' company. She wasn't allowed to delegate her work and certainly didn't feel like she was running her own business. Joe provided Alina with template invoices and told Alina she must get an ABN. Alina provided invoices and completed time sheets after each shift. When Alina had worked for several weeks and not received any payment since starting the job, she contacted her boss about the issue and was ultimately terminated for making enquiries about her pay.

Our submission contains case studies and evidence-based recommendations for reform. All of the case studies in this submission are based on the experiences of our cleaning clients,[3] but are also representative of our clients in other industries. While the recommendations in this submission are specific to the terms of reference of this Inquiry, they will assist all vulnerable workers in Australia.

[3] Note names have been changed in all case studies

KEY RECOMMENDATIONS

In this Submission, we make **22 recommendations** to stop the exploitation of contract cleaners. In respect of the terms of reference our key recommendations to stop the exploitation of contract cleaners are:

1. Improving frameworks that project workers from harm

a. **To increase accountability in supply chains, expand the responsible franchisor/holding company provisions to cover all responsible third parties.** Ways of working have changed, and our law has not kept up. Currently, big businesses benefit from the labour of cleaners, but cannot be held accountable for unlawful conduct. Existing provisions of the Fair Work Act are not sufficient. To promote systemic compliance, laws must be amended to attribute greater vertical responsibility. Instead of the current piecemeal approach, legislative reform must address all types of fissured employment, including supply chains and labour hire situations. Liability for franchisors and holding companies must be extended to cover all responsible entities, including lead firms in supply chains. The law must stop rewarding companies who choose to be wilfully blind or inactive in the face of exploitation. The requirement for "significant" control must be removed. Labour hire licensing is also recommended.

b. **To reduce exploitation, expand specific outworker protections to cover contract cleaners.** This includes provisions deeming all contract cleaners to be employees, enabling cleaners to recover payments from indirectly responsible entities and requiring employers to comply with a contract cleaning code that sets out requirements in respect of monitoring and reporting.

c. **To incentivise compliance, expand the accessorial liability provisions to require Directors and others to take positive steps to stop exploitation**. The accessorial liability provisions must also be strengthened by removing the requirement for actual knowledge and placing positive duties on Directors and others to take steps to rectify any breaches that do occur.

d. **To eradicate sham contracting, introduce a reverse onus that presumes all workers are employees not contractors (unless the principal/employer proves otherwise).** Our cleaning clients are often engaged as contractors with ABNs when they should actually be employees. This means that they are denied the right to minimum pay and other entitlements. To remove the perverse incentive to engage in sham contracting, the law must be amended to provide all workers with the right to the minimum pay and entitlements, unless the employer/principal can show that the worker was genuinely running their own business. In addition, more rigorous tests should be applied before an ABN is given to an individual. On the spot ABN inspection and assessment should also be increased.

e. **To stop wage theft, we also recommend introducing a wage insurance scheme and better protections for temporary visa holders.** This includes *Migration Act* amendments to ensure proportionate penalties which will facilitate enforcement by removing workers' fear of being forced to leave Australia if they report exploitation. Industry/government focused recommendations include the use of procurement policies, industry codes and proactive compliance deeds to promote best practice.

2. Ensuring workers have adequate representation and knowledge of their rights

a. **The Federal Government should establish a fund for community-based face-to-face legal assistance.** For vulnerable workers who are not yet union members and cannot afford a private lawyer, there is significant unmet need for legal assistance. Many matters are uneconomical for private firms to run, and workers cannot enforce their rights alone. With face-to-face support from a trusted community organisation, wages can be recovered, jobs saved and employers held to account. Yet funding for

tailored and comprehensive community-based employment services is scarce, especially for generalist community legal centres. The Federal Governments should urgently establish a dedicated fund for community-based employment services for vulnerable workers, including the provision of legal assistance and targeted education.

b. **The Federal Government should establish a fund to provide targeted education.** Newly arrived and refugee workers generally understand little or nothing about Australian employment laws and services. Due to cultural and language barriers, communities will rarely approach a service they do not trust, and cannot access or use "self help" materials on websites. Targeted, face-to-face education programs enable workers to understand and enforce their rights by raising awareness and importantly, building trusted connections between communities and services, including unions. Programs must be funded to provide community members, community leaders (Train the Trainer) and agency staff working with newly arrived communities. The Federal Government should establish a fund to provide these targeted education programs.

3. Facilitating compliance with relevant laws

a. **Agencies must be accessible and responsive to the needs of Australia's most vulnerable workers.** As a result of low rights awareness, language, literacy, cultural and practical barriers, our clients rarely contact mainstream agencies for help. Agencies and commissions must take further steps to ensure that they are more accessible and responsive. Importantly, to ensure wages claims are resolved efficiently and effectively without the need to go to Court, we recommend the expansion of the Fair Work Ombudsman's (**FWO**) powers to issue Assessment Notices.

4. Addressing phoenixing and pyramid subcontracting

a. **Introduce director identity number and compulsory insurance.** Many of our clients are unable to recover unpaid wages through no fault of their own. In some instances, an employer has provided false details, or has simply "disappeared". We have contacted employers on a number of occasions only to be provided with fake email addresses, fake postal addresses, and false promises of repayment. A significant problem for WEstjustice clients is the phenomenon of phoenix companies—whereby directors close down companies to avoid paying debts, and proceed to open a new company without penalty. The law must be amended to stop rewarding dodgy directors who make profits from repeated exploitation - including the introduction of director identity numbers. Directors should also be required to pay a compulsory insurance premium (similar to WorkCover) to fund the provision of community-based employment services and the Fair Entitlements Guarantee (**FEG**) scheme.
b. Expand the FEG scheme: Many of our clients, including international students, are not eligible for FEG purely due to their temporary visa status. This discrimination must be addressed – all workers should be able to access FEG.

Our proposals are set out in more detail below, and we have also compiled an overview of our drafting suggestions to achieve these changes in Appendix One: Compilation of WEstjustice's drafting suggestions (**Appendix One**).

We urgently need to reform our legal frameworks and enforcement processes.

TABLE OF RECOMMENDATIONS

Objective	Current law/situation	WEstjustice's recommendations Also see Appendix One.
Increased accountability in franchises, labour hire, supply chains	• Franchisors and parent companies will be liable for a civil penalty, where there has been a contravention of certain civil remedy provisions and they knew or could reasonably be expected to have known that a contravention by the franchisee entity or subsidiary (either the body corporate or an officer) would occur or a contravention of the same or similar character was likely to occur. • Defence: Need to take reasonable steps to prevent the contravention.	To ensure that franchisors, labour hire hosts, supply chain lead firms and directors take reasonable steps to prevent exploitation, WEstjustice recommends: **Recommendation One: Extend liability to all relevant third parties** In addition to protecting workers in franchises and subsidiary companies, make supply chain entities and labour hire hosts responsible for the protection of workers' rights. **Recommendation Two: Widen the definition of responsible franchisor entity** Amend the proposed definition of responsible franchisor entity to ensure that all franchises are covered by removing the requirement for a significant degree of influence or control. **Recommendation Three: Clarify liability of all relevant third parties** Insert a provision to clarify that responsible franchisor entities, holding companies and other third party entities who contravene clause 558B should also be taken to have contravened the relevant provisions contravened by their franchisee entity/subsidiary/indirectly controlled entity. **Recommendation Four: Clarify the 'reasonable steps' defence to incentivise compliance** Ensure that the 'reasonable steps' defence incentivises proactive compliance, including by requiring independent monitoring and financially viable contracts. **Recommendation Five: Extend outworker protections to contact cleaners.** Extend outworker protections to contract cleaners, including deeming all contract cleaners to be employees, enabling cleaners to recover payments from indirectly responsible entities and requiring employers to comply with a contract cleaning code that sets out requirements in respect of monitoring and reporting. **Recommendation Six: Remove requirement for actual knowledge and require accessories to take positive steps to ensure compliance** Amend section 550 to require Directors and other accessories to take positive steps to ensure compliance within their business or undertaking. Ensure that failure to rectify a breach will also constitute involvement in a contravention. **Recommendation Seven: Introduce a Federal Labour Hire Licensing scheme and ensure fair pay for insecure workers**

Objective	Current law/situation	WEstjustice's recommendations Also see Appendix One.
Ensure laws and processes eradicate sham contracting	• A person must not misrepresent to an individual that a contract of employment is an independent contracting arrangement. • Defence: the employer did not know and was not reckless as to whether it was an employment or contracting arrangement.	To ensure that vulnerable workers receive minimum entitlements and can address sham contracting, WEstjustice recommends: **Recommendation Eight: Introduce a reverse onus to provide minimum entitlements to all workers.** To stop unscrupulous businesses using sham contracting as their business model, introduce a reverse onus which provides minimum entitlements to all workers, but enables principals a defence when they engage genuine contractors. **Recommendation Nine: Limit the current defence.** The recklessness/lack of knowledge defence for sham contracting should be removed, or at the very least, the defence should be expanded to ensure that employers are liable when they ought to have known their workers were employees. **Recommendation 10: Increase scrutiny at the time ABNs are given, and via ongoing enforcement** At the time an ABN is requested, applicants should be required to attend a face-to-face educational meeting to understand the differences between employees and contractors, and learn about insurance and taxation obligations. On the spot inspection and assessment by regulators should also be increased.
Introduce other measures to stop wage theft		To remove the incentive for employers to break the law and assist vulnerable workers to recover unpaid wages, WEstjustice recommends: **Recommendation 11: Introduce a Wage Insurance Scheme** Where employees cannot access their unpaid wages via available legal frameworks, an insurance scheme should be available. **Recommendation 12: Amend the Migration Act to ensure vulnerable workers can complain with confidence** Introduce proportionate penalties so that workers can complain without fear of being forced to leave Australia if they report exploitation. **Recommendation 13: Increase use of procurement policies, proactive compliance deeds and industry codes to improve compliance.** The Government should require demonstrated compliance with workplace laws and relevant industry codes in order to tender for government contracts.

Objective	Current law/situation	WEstjustice's recommendations Also see Appendix One.
Provide funding for community-based face-to-face legal assistance & education	Extremely limited funding for community legal centres under the FWO Community Engagement Grants Program. No recurrent funding for generalist community legal centres providing face-to-face employment law assistance and targeted education programs.	To ensure that vulnerable workers are aware of their rights and able to enforce them, WEstjustice recommends: **Recommendation 14: Fund community legal centres to provide face-to-face legal assistance** Without assistance, vulnerable workers cannot enforce their rights, and employers can exploit with impunity. Community legal centres are required to work alongside regulators and unions to provide additional support to vulnerable workers. The Government must provide recurrent funding for community legal centres to do this work, and address significant unmet need. **Recommendation 15: Fund targeted education programs for vulnerable workers** Tailored education programs are required to raise awareness of laws, and build trust and accessibility of services. The Government must establish a fund to deliver these programs to community members, community leaders and agency staff.
Ensure agencies are active & accessible	FWO has adopted numerous measures to target vulnerable groups and recently released a report on contract cleaners in Tasmania.	To ensure agencies are more accessible to vulnerable workers and wages claims are resolved efficiently and effectively without the need for Court, WEstjustice recommends: **Recommendation 16: Agencies need to improve cultural responsiveness frameworks** Including specific protocols and checklists for Infoline staff, engaging dedicated staff and participating in and resourcing education and engagement programs. **Recommendation 17: Greater collaboration, resourcing and action to address the superannuation black hole** FWO and the ATO need to be appropriately resourced to pursue unpaid superannuation claims, and community legal centres should be funded to assist. **Recommendation 18: Cost consequences for employers who refuse to engage with FWO** Make it clear that there will be costs consequences if an employer unreasonably refuses to participate in a matter before the FWO. **Recommendation 19: Assessment Notices for employers who refuse to engage** Where an employer refuses to participate in mediation, FWO should have the power to issue an Assessment Notice that sets out the FWO's findings as to the employee's entitlements. An applicant may then rely on the Assessment Notice in the court proceeding. Where the applicant has an Assessment Notice, the applicant is taken to be entitled to the amounts specified in the assessment notice unless the employer proves otherwise.

Objective	Current law/situation	WEstjustice's recommendations Also see Appendix One.
		Recommendation 20: Increased resourcing and more proactive compliance required Vulnerable workers are not always able to bring a complaint themselves. Agencies must be adequately resourced to identify systemic issues and respond proactively.
Address phoenixing	Recent Pricewaterhouse Coopers report commissioned by the Phoenix Taskforce estimates that workers are missing out on up to $300,000,000 in entitlements every year.	To stop dodgy directors from phoenixing to avoid paying their workers (and other debts), and assist workers who have been exploited, WEstjustice recommends: **Recommendation 21: Introduce director identity numbers and compulsory insurance** The law must be amended to stop rewarding dodgy directors who make profits from repeated exploitation - including the introduction of director identity numbers. Directors should also be required to pay a compulsory insurance premium (similar to WorkCover) to fund the provision of community-based employment services and the FEG scheme. **Recommendation 22: Expand the FEG scheme to all workers** Many of our clients, including international students, are not eligible for FEG purely due to their temporary visa status. This discrimination must be addressed – all workers should be able to access FEG.

INTRODUCTION

Based on extensive research, consultation and data gathered throughout the Employment Law Project, the WEstjustice Not Just Work Report[4] documents systemic and widespread exploitation of migrant workers across numerous industries.

Exploitation not only harms vulnerable workers but undermines the workplace relations framework: businesses that do the right thing are undercut by those breaking the law. Current systems are failing to stop the abuse.

The reasons for exploitation include:

- marginalisation of the voices of migrant workers;
- limited access to decent work (in 2011, the Australian Bureau of Statistics found that 9.1% of Humanitarian migrants in the labour force were unemployed, compared to 4.9% of the general population);
- low awareness of workplace rights and services (in a WEstjustice survey, 88% of community workers reported that newly arrived communities do not understand Australian employment laws at all or understand a little);
- lack of effective access to mainstream services (as one community leader notes, "many in my community do not contact agencies. They are afraid, because many have had bad experiences with people in authority back home");
- absence of targeted community services; and
- the problem of defective laws and processes.

The changes affected by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) (**Protecting Vulnerable Workers Amendments**) have gone some way to addressing our concerns. But so much remains to be done.

1. IMPROVING FRAMEWORKS TO PROTECT WORKERS FROM HARM

Establishing life in a foreign country presents many challenges including new languages, new community connections and new cultural, financial, health and education systems. Many of our refugee clients have experienced violence, torture or trauma, and our clients are often separated from family members and social connections.

Employment is widely recognised as the most vital step for successful settlement in a new country.[5] However, recently arrived migrant and refugee workers face many barriers. Finding employment is difficult. For those who do find work, exploitation is widespread. Exploited workers are not aware of their rights, and rarely access help to enforce the law. Temporary migrant workers, women and young people face additional barriers. Exploitation continues unabated and employers gain a competitive advantage by breaking the law,

[4] Catherine Hemingway, 'Not Just Work: Ending the exploitation of refugee and migrant workers', WEstjustice Employment Law Project Final Report, available at <www.westjustice.org.au/publications/policy-reports-121>.Ibid.

[5] A recent consultation in Melton with community members from Burma identified employment as the most important theme for successful settlement in Melton. Employment was also ranked as the most difficult goal to achieve. See Djerriwarrh Health Services, Investigating resettlement barriers with the Burmese Community in Melton: A Needs Assessment (2015). See also Alistair Ager and Alison Strang, 'Understanding Integration: A Conceptual Framework' (2008) 21 Journal of Refugee Studies 166, 170.

while companies that do the right thing are disadvantaged. Exploitation not only damages individual workers, it also undermines the Australian workplace relations framework.

It is essential that our legal frameworks incentivise compliance, and do not reward inaction or wilful blindness in the face of exploitation. WEstjustice recommends the following measures to improve frameworks to protect workers from harm:

INCREASED ACCOUNTABILITY IN LABOUR HIRE, SUPPLY CHAINS AND FRANCHISES

Underpayment (or non-payment) of wages and/or entitlements is the single-most common employment related problem that members of newly arrived and refugee communities present with at our service. Three quarters of our sample of cleaning clients received assistance with underpayment or non-payment of wages.

WEstjustice welcomes the Protecting Vulnerable Workers Amendments – in particular the introduction of a reverse onus where records have not been kept and the expansion of accountability to responsible franchisors and parent companies. However, without more measures and protections in place, many of our cleaning clients will remain without recourse.

This section sets out the case and sample drafting for extending the liability of franchisor entities and holding companies to all third party entities that benefit from an employee's labour. It also discusses strengthening the existing laws by expanding the definition of responsible franchisor entity, clarifying liability of all third parties that benefit from an employee's labour and clarifying the reasonable steps defence to incentivise proactive compliance.

THE PROBLEM

Many WEstjustice cleaning clients find themselves employed in positions at the bottom of complex supply chains, working for labour hire companies or in franchises, or engaged as contractors in sham arrangements. Each of these situations involves common features - often, there is more than one entity benefitting from the labour of our clients, and frequently at the top is a larger, profitable, and sometimes well-known company. We have seen some of the worst cases of exploitation occurring in these situations. Unfortunately, because of legislative shortcomings and challenges with enforcement, these arrangements often result in systemic exploitation and injustice for those most vulnerable workers.

Ways of working have changed, and our law has not kept up. At present, the *Fair Work Act 2009* (Cth) (**FW Act**) is largely focused on traditional employer/employee relationships as defined by common law. This framework fails to adequately regulate non-traditional working arrangements, for example, where there is more than one employing entity. In doing so, the law ignores the fact that 'it is not now uncommon for the employment relationship to be fragmented and for multiple organisations to be involved in shaping key working conditions.'[6]

This can lead to situations where although multiple organisations will benefit from the labour of one worker, only one can be held accountable under the FW Act. For example, in a labour hire arrangement, in addition to the labour hire agency, 'the client or host employer may receive the benefits of an employer by being able to control the agency labour (and their terms of engagement) and yet avoid any form of labour regulation

[6] Dr Tess Hardy, Submission No 62 to Senate Inquiry, *The impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders*, 8.

because it has no employment relationship with the labour.'[7] Although 'both of [these] entities enjoy the benefits of acting as an employer, one will unfairly circumvent labour regulation.'[8] We have seen this in situations where clients in labour hire arrangements, supply chains or franchises are left without a remedy against a host employer, principal or franchisor, who in many circumstances should be held, wholly or partly, responsible for the terms and conditions of the worker.

EXAMPLE: SUPPLY CHAINS

Supply chains involve sub-contracting arrangements whereby there are a number of interposing entities between the ultimate work provider and a worker. An example of a supply chain in the construction context is the engagement by a business operator of a principal contractor who engages a contractor firm, which engages a subcontractor.[9] It has been suggested that the 'very structure of the supply chain is conducive to worker exploitation,' as parties near the bottom of the supply chain tend to have low profit margins and experience intense competition.[10]

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

Case study – Jorgio

Jorgio is an international student working as a cleaner on weekends. He was employed by Betty as an independent contractor to clean a shopping centre. Betty directed Jorgio's work timetable and provided him with a uniform and cleaning equipment. Jorgio was underpaid by thousands of dollars. Jorgio came to WEstjustice because he had not been paid at all for 10 weeks' work. Before that, he had only been paid intermittently. Jorgio did not understand that there was a minimum wage, or that there was a difference between contractors and employees. Ultimately, Jorgio stopped working for Betty and was employed directly by the shopping centre as an employee.

With WEstjustice's assistance, Jorgio brought a claim against Betty, but despite winning his case at the Federal Circuit Court, Betty ignored the judgement and disappeared, and Jorgio remained unpaid.

In Jorgio's story, we see our client, who is the most vulnerable and least well-resourced in the chain, without any ability to pursue his lawful entitlements. In other cases, more than two companies profit from our client's labour without any responsibility for protecting their workplace rights. The responsible franchisor and holding company provisions do not cover supply chains, and the requirement to prove that these other companies were 'knowingly concerned in or party to the contravention' under section 550 accessorial liability provisions of the FW Act is too onerous to provide any meaningful assistance to enforce vulnerable workers rights. There should be a positive obligation on those higher in the supply chain to ensure workplace rights are protected.

SELF REGULATION INSUFFICIENT

Unfortunately, self-regulation and voluntary compliance is failing. For example, the FWO recently invited eight franchisor chief executives to enter into compliance partnerships with FWO, underpinned by proactive

---

[7] Craig Dowling, 'Joint Employment and Labour Hire Relationships – Victoria Legal Aid – Professional Legal Education', 5 October 2015, 1-2.
[8] Ibid.
[9] Richard Johnstone et al, *Beyond employment: the legal regulation of work relationships* (The Federation Press, 2012) 49.
[10] Ibid , 67.

compliance deeds. The initiative was openly supported by the Franchise Council of Australia. However, only one franchisor has engaged with the process, one franchisor refused to participate, and six franchisors ignored the FWO entirely.[11] To affect meaningful change, the law must be amended to remove incentives to exploit or ignore worker rights and instead ensure that directors, supply chain heads, franchisors and host companies are held accountable.

CURRENT LAWS ARE INSUFFICIENT

Currently, the only two ways to attribute responsibility to a third party under the FW Act are via the responsible franchisor and holding company provisions in sections 558A-C, or the accessorial liability provisions in section 550. Both provisions are too narrow and place unrealistic burdens of proof on vulnerable workers. Importantly, the franchise and holding company provisions are too piecemeal and must be extended to cover other fissured forms of employment, including supply chains.

RESPONSIBLE ENTITIES

The Vulnerable Workers Amendments inserted a Division 4A into the FW Act which attributes responsibility to responsible franchisor entities and holding companies for certain contraventions. Under these provisions, holding companies and responsible franchisor entities contravene the Act if they knew or could reasonably be expected to have known that a contravention (by a subsidiary or franchisee entity) would occur or was likely to occur.

Sections 558A and 558B of the FW Act define “franchisee entity” and “responsible franchisor entity” and outline the responsibility of responsible franchisor entities and holding companies for certain contraventions. To hold a franchisor to account, the current definition of responsible franchisor entity requires a worker to show that the franchisor has a ‘significant degree of influence or control over the franchisee entity’s affairs’. This is too narrow and too onerous for workers, who often lack access to necessary documents and information. It is an unnecessarily difficult burden for vulnerable workers to prove, and it may discourage franchisors from taking an active role in promoting compliance in their franchises, instead rewarding those that take a hands-off approach, or structure their contracts in such a way as to distance themselves from their franchisees. This requirement is unnecessary because the degree of control able to be exercised by a franchisor is already a relevant consideration when determining liability under ss558B(4)(b).

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

In our experience, workers in supply chains and labour hire arrangements are frequently exploited. The problem is not limited to franchise situations only. Similar to franchisors, lead firms in supply chains (and all others in the chain) and labour hire hosts should be required to take reasonable steps to prevent exploitation. As noted in the FWO’s recent report on contract cleaning, ‘the FWO’s experience is that multiple levels of subcontracting can create conditions which allow non-compliance to occur. The reasons for this include the

---

[11] ‘Franchisors spurning partnership proposals, says FWO’, *Workplace Express,* 2 September 2016.

pressures of multiple businesses taking a profit as additional subcontractors are added to the contracting chain, and the perceived ability to hide non-compliance within convoluted business structures.'[12] WEstjustice supports Dr Tess Hardy and Professor Andrew Stewart's recommendation to this Inquiry that a broader test for secondary liability be introduced 'in terms that are sufficiently general to apply to any form of corporate or commercial arrangement, while retaining the safeguards in that provision to prevent regulatory overreach.'[13] However, for reasons outlined above, we note that the requirement for a 'significant degree of influence or control' as a threshold test may be problematic for our clients, especially in a supply chain context where a lead firm may turn a blind eye to exploitation and therefore not have/take "significant" control over shonky subcontractors. We suggest an alternative model below, whereby the degree of influence or control is relevant in determining whether reasonable steps were taken.

In any case, we also support Professor Andrew Stewart and Dr Tess Hardy's recommendation that:

> 'whether a person has significant influence or control over wages or employment conditions should be determined by reference to the substance and practical operation of arrangements for the performance of the relevant work.
>
> A person should be deemed to have significant influence or control if it sets or accepts a price for goods or services, or for the use of property, at a level that practically constrains the capacity of the relevant employer to comply with its obligations.'[14]

ACCESSORIAL LIABILITY

The accessorial liability provisions in section 550 are also problematic.

Section 550 only attributes liability in limited circumstances, including where there is aiding, abetting, counselling or procurement or the accessory is "knowingly concerned." The requirement of actual knowledge is an extremely high bar to establish assessorial liability of the host employer or those at the apex of a supply chain or franchise. Although the FWO may be able to rely on previous warnings or compliance notices issued to particular companies or individuals to show knowledge in some cases, for others, it is often unobtainable.

Vulnerable workers who speak little English and work night shift in a franchise or do delivery work at the bottom of a supply chain rarely have the ability prove what the head office or controlling minds of the organisation actually know – in fact it is impossible for them. By requiring actual knowledge, section 550 serves to reward corporations who deliberately remain uninformed about the conduct of others in their supply chain/business model. The law should not reward those who turn a blind eye to exploitation – especially those who are directly benefitting from the exploitation and in a position to take reasonable steps to stop it.

Furthermore, the provisions have been interpreted such that an accessory must be aware of the contravention at the time it occurs. This rewards those accessories who fail to address unlawful behaviour once they are

---

[12] Fair Work Ombudsman, 'Injury into the procurement of cleaners in Tasmanian supermarkets report', February 2018, available at <https://www.fairwork.gov.au/reports/inquiry-into-the-procurement-of-cleaners-in-tasmanian-supermarkets>, last accessed 26 July 2018 ('FWO Report') '

[13]Professor Andrew Stewart and Dr Tess Hardy, Submission 8, *Inquiry into the exploitation of general and specialist cleaner in retail chains for contracting or subcontracting cleaning companies,* available at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ExploitationofCleaners/Submissions>, last accessed 26 July 2018, 3.*s*

[14] Ibid.

aware of it – for example, a director who discovers a breach after it has occurred, and then fails to take steps to rectify any underpayment or other problem, will not be held liable.

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

Although the FWO has used section 550 with some success,[15] Hardy notes that there have only been a "handful" of cases where section 550 has been used to argue that a separate corporation is "involved" in a breach. She notes that 'court decisions which have dealt with similar accessorial liability provisions arising under other statutes suggest that the courts may well take a fairly restrictive approach to these questions.'[16]

The recent case of *Fair Work Ombudsman v Hu (No 2)* [2018] FCA 1034 (12 July 2018) is a shocking example of the limits of the current provisions. In this case, the Federal Court found significant underpayments of workers on a mushroom farm. Mushroom pickers had been required to pick over 28.58 kilograms of mushrooms just to receive minimum entitlements – a requirement that no worker could achieve. The Court found 329 Award breaches. Although the labour hire company HRS Country and its director Ms Hu were found liable, neither the mushroom farm nor its sole director Mr Marland were found to be involved in the breaches. Although the Court found that Mr Marland knew that HRS Country were paying the workers $0.80 per kilo, and knew that this was inadequate for a casual employee, there was no evidence to show that Mr Marland was aware of the contraventions at the time they occurred (i.e. when the contracts were entered into between the workers and HRS Country).

RECOMMENDATION ONE: EXTEND LIABILITY TO ALL RELEVANT THIRD PARTIES

WEstjustice recommends that in addition to protecting workers in franchises and subsidiary companies, supply chains and labour hire hosts should also be responsible for the protection of workers' rights. Instead of a piecemeal approach, the law should provide protection and redress for all vulnerable workers, regardless of the business structure set up. It should equally hold all businesses to account if they receive the benefit of someone's labour, regardless of how they structure their affairs in an attempt to shirk responsibility.

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

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

---

[15] For example, Joanna Howe explains how the FWO brought a claim against Coles for labour hire company Starlink's treatment of trolley collectors. The FWO secured an enforceable undertaking with Coles in which it agreed to rectify underpayments. See Joanna Howe, Submission 109 to Economic, Development, Jobs, Transport and Resources, *Inquiry into Labour Hire and Insecure Work*, 2 February 2016 <http://economicdevelopment.vic.gov.au/__data/assets/pdf_file/0007/1314619/Submission-Dr-Howe.pdf>.

[16] Hardy, above n 6, 10.

(b) the person is the recipient or beneficiary of the goods supplied or produced or services performed by the worker

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

For further details and example drafting see Appendix One.

RECOMMENDATION TWO: WIDEN THE DEFINITION OF RESPONSIBLE FRANCHISOR ENTITY

WEstjustice also recommends broadening the existing definition of responsible franchisor entity to remove the threshold requirement to show a 'significant degree of influence or control.' We argue that workers should not have high burdens to bring a claim when the franchisors hold all the relevant documents and evidence to show their control over a franchisee. Instead, it should be for the franchisor to show that they had limited influence and control as part of a reasonable steps defence under subsection558B(4).

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

RECOMMENDATION THREE: CLARIFY LIABILITY OF ALL RELEVANT THIRD PARTIES

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

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

RECOMMENDATION FOUR: CLARIFY THE 'REASONABLE STEPS' DEFENCE TO INCENTIVISE COMPLIANCE

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

RECOMMENDATION FIVE: EXTEND OUTWORKER PROTECTIONS TO CONTRACT CLEANERS AND OTHER INDUSTRIES

Given the extent of exploitation in the contract cleaning industry, in addition to the above measures, we recommend extending the outworker protections in the FW Act to contract cleaners and workers in other key industries where exploitation is rife, including food processing and distribution.

Importantly, the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012* inserted provisions into the FW Act that deem outworkers to be employees in certain circumstances. This eliminates the risk of employers utilising sham arrangements to cheat vulnerable workers out of minimum pay and conditions. The provisions also attribute liability to indirectly responsible entities – meaning that if there is an unpaid amount owing to an outworker, that worker can make a demand for payment from others in the supply chain. The provisions also provide for a TCF code that can impose important monitoring and reporting obligations including record keeping and reporting on compliance.

WEstjustice recommends extending these provisions to cover contract cleaners and workers in other high-risk industries.

RECOMMENDATION SIX: REMOVE REQUIREMENT FOR ACTUAL KNOWLEDGE AND REQUIRE ACCESSORIES TO TAKE POSITIVE STEPS TO ENSURE COMPLIANCE

Another key reform that we propose is to amend section 550 of the FW Act to remove the requirement to prove actual knowledge and require Directors and other possible accessories to take positive steps to ensure compliance within their business or undertaking. In Appendix One we provide two suggested amendments: the first involves amending section 550 such that a person will be involved in a contravention if they knew or could reasonably be expected to have known that the contravention, or a contravention of the same or a similar character would or was likely to occur. Importantly, if a person fails to rectify a contravention once they become aware of it, they will also be involved in the contravention.

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

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

RECOMMENDATION SEVEN: INTRODUCE A FEDERAL LABOUR HIRE LICENSING SCHEME AND ENSURE FAIR PAY FOR INSECURE WORKERS

WEstjustice welcomes the Federal Opposition's commitments to establish a Federal labour hire licensing scheme and ensure fair pay for labour hire employees, as recommended in the Not Just Work report.

LAWS AND PROCESSES TO ERADICATE SHAM CONTRACTING

THE PROBLEM

"The only legal risk facing an employer who misclassifies a worker is the risk that it may ultimately be required to shoulder an obligation it thought it had escaped."[17]

Under Australian law, employees are treated very differently to independent contractors. Employees are afforded various protections under the FW Act including the right to a minimum wage, maximum hours of work, leave entitlements and protections from unfair dismissal. With the exception of limited protections (for example, some general protections provisions and anti-discrimination laws), independent contractors are largely excluded from the protections of the workplace relations framework.

Under the FW Act, it is unlawful to engage a worker as a contractor when they are in reality an employee (sham contracting). To determine whether a worker is running their own business (as a contractor), or in fact an employee, courts apply a multi-factor common law test. Considerations include whether the worker was required to wear a uniform, provided their own tools and equipment, was paid an hourly rate or paid to complete a task, could delegate work or was required to complete work personally, and the degree of control the employer exercised over the worker (e.g. hours of work, manner of work etc). The nature of any agreement/contract between the worker and boss is not determinative (that is, a written contract stating that an individual is an independent contractor does not necessarily mean they will be considered or classified as such at law).

Among newly arrived and refugee communities, sham contracting is rife. This is especially so for our clients in the cleaning industry. In a WEstjustice survey, the following comments were provided by community workers who were asked a general question about common employment problems:[18]

> "Client was told they would only hire him if he had an ABN."
>
> "Clients don't know their rights and what they should be paid. They are taking jobs and using ABNs without knowing what that means."
>
> "A lot of clients are told by employers they have to obtain ABNs even though it's not appropriate for the work they are doing."

In our experience at the ELS, sham contracting is used systematically as a core business practice throughout the cleaning industry, as well as road transport and distribution services, the home and commercial maintenance industries (e.g. painters), and in the building and construction industry (e.g. tilers). WEstjustice has witnessed numerous clients working in these industries whose employment relationship was actually one of employer-employee. Clients were paid an hourly/daily rate, wore a uniform, had all equipment provided by the employer, worked for only one employer, were unable to take time off work and were unable to subcontract. We have also assisted clients in sham contracting arrangements outside of these key industries, including in the education and administration sectors.

---

[17] Joellen Riley, 'Regulatory responses to the blurring boundary between employment and self-employment: a view from the Antipodes' *Recent Developments in Labour Law, Akademiai Kiado Rt*, 2013, 5.
[18] Catherine (Dow) Hemingway, 'Employment is the Heart of Successful Settlement: Overview of Preliminary Findings' (Preliminary Report, Footscray Community Legal Centre, February 2014), 12.

WEstjustice has observed instances of employers obtaining ABNs for workers in the cleaning industry, and instances of jobs being offered, conditional upon having an ABN. There is often little if any choice in a worker's 'acceptance' of their position as a contractor. Often that type of engagement is the only one on offer and is made on a 'take it or leave it' basis.

For someone desperate to make a start in a new country, the basic need to work and earn an income is often overshadowed by the terms and conditions under which the work is offered. This creates a power imbalance, and in many instances, principals take advantage of the vulnerability of potential workers in this situation.

We have observed that sham contracting can take place through complex sub-contracting and supply chain arrangements with multiple intermediaries between the original employer and the 'independent contractor'. We have observed this the cleaning industry, as well as road transport and distribution services. It is an issue that disproportionately affects individuals with limited agency in the labour market. One of our clients' experiences are set out in the following case study:

Case study – Camila

Camila came to Australia from South America on a student visa. She worked as a cleaner for Diego and was asked to provide him with invoices at the end of each month in order to be paid. Camila was often paid late, or not at all for her work.

Camila came for assistance as she did not receive payment for an invoice from Diego. WEstjustice advised Camila that she may be engaged in a sham contract and explained to her the difference between an employee and a contractor. The lawyer further advised Camila about her entitlements as an employee and that her underpayments claim could be much more significant than the unpaid invoice. Camila asked WEstjustice to calculate her entitlements as an employee. In the meantime, Diego paid Camila for the outstanding invoice.

Through this process Camila became more aware of her rights, and so with WEstjustice's help, Camila made a complaint to the FWO to ensure that Diego will not exploit other workers in the same way she was.

SHAM CONTRACTING RESULTS IN EXPLOITATION

The problems our clients face as a result of being falsely engaged as an independent contractor when in fact they are employees include:

- they do not receive minimum award wages or entitlements, including leave. Our clients are mostly people who are low paid, award-reliant workers doing unskilled or low-skilled labour.
- they rarely receive superannuation contributions. This is the case even though Superannuation Guarantee Ruling 2005/1 provides that they must receive superannuation contributions if they are engaged under a contract that is principally for labour.[19]
- contractors are often required to arrange their own tax and may need to organise workers compensation insurance, however many vulnerable contractors are not aware of how to do this.

Many of our clients are not aware that there is a difference between an employee and independent contractor, and asking the questions necessary to apply the multi-indicia test can be difficult. It is a cause for

[19] Australian Taxation Office, Superannuation guarantee: who is an employee?, SGR 2005/1, 23 February 2005.

grave concern that our clients are often told by the person hiring them that if they have an ABN they are automatically a contractor or told they will not be paid unless they obtain an ABN.

In many circumstances we find that in reality it is exceedingly difficult to resolve the initial problem of correctly identifying a worker as an employee. Applying the multi-factor test and attempting to explain this to a vulnerable worker, let alone convince an employer that their characterisation of their worker is incorrect is both a time and resource-intensive task. Many of our clients are so desperate for payment and put-off by the complexity of the law that they often opt to accept their misclassification as an independent contractor and seek to enforce the non-payment of their contractor agreement in the relevant tribunal or court. The client is then left to 'accept' what would otherwise be an underpayment claim and a loss of accrued entitlements such as annual leave. They may also forfeit their ability to bring other claims for unfair dismissal. Reform is urgently required.

PRESUMPTION OF EMPLOYMENT RELATIONSHIP

Removing legislative incentives to rip off vulnerable workers is a simple and cost-effective way to reduce exploitation. We recommend that rather than applying the multi-factor test to each situation where there is doubt as to a worker's true status, a statutory presumption would increase efficiency and certainty. This definition should assume that all workers are employees, unless proven otherwise. Importantly, our proposed amendment shifts the onus off vulnerable workers and onto an employer/principal to establish a genuine contracting relationship. We recommend that a new section 357A be inserted as follows:

> *(1) Regardless of whether an individual is engaged and treated as an employee under a contract of service or an independent contractor under a contract for services, that individual is taken to be an employee (within the ordinary meaning of that expression) for the purposes of this Act.*
>
> *(2) Subsection (1) does not apply if it can be established that the individual was completing work for a client or customer of a business genuinely carried on by the individual.*

This definition is partly based on Professor Andrew Stewart and Cameron Roles' Submission to the ABCC Inquiry into Sham Arrangements and the Use of Labour Hire in the Building and Construction Industry, where they propose that the term 'employee' should be redefined in a way that would strictly limit independent contractor status to apply only to those workers who are genuinely running their own business:

> *A person (the worker) who contracts to work for another is to be presumed to do so as an employee, unless it can be shown that the other party is a client or customer of a business genuinely carried on by the worker.*

WEstjustice supports this recommendation: the definition is precise and clear, and allows scope for genuine contractors to engage as such.

Alternatively, the ATO's superannuation eligibility test could be adopted more broadly. That is, if a worker is engaged under a contract wholly or principally for the person's physical labour, mental effort, or artistic effort, that person should be deemed to be an employee for all purposes.

A definition similar to those outlined above would assist our clients to enforce their rights more efficiently, without inhibiting the ability of those who are genuinely independent to contract accordingly. Currently, in order for an individual to receive compensation for underpayment as a result of sham contracting, an individual must make a claim in the appropriate jurisdiction (the Federal Circuit Court or Federal Court of Australia) establishing:

- that they were an employee; and
- their appropriate award classification, rate of pay and underpayment.

It is unrealistic to expect that newly arrived and refugee workers will be able to prepare a claim that requires knowledge of a common law 'multi-factor' test. There is also a risk that if the complex multi-factor test is applied differently by the Court and workers are not found to be employees, they would have been better off making an application to VCAT as an independent contractor. Unfortunately, the complex multi-factor test is preventing workers from pursuing their full entitlements. A statutory definition that presumes workers are employees affords many advantages: less time is used in applying a vague multi-factor test, there is greater likelihood of consistent outcomes, increased clarity for employers and employees, and there is much greater fairness for workers.

RECOMMENDATION EIGHT: INTRODUCE A REVERSE ONUS TO PROVIDE MINIMUM ENTITLEMENTS TO ALL WORKERS

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

The introduction of such a reverse onus will provide minimum entitlements to all employees, but still enables principals a defence when they engage genuine contractors. For details see Appendix One.

RECOMMENDATION NINE: LIMIT THE CURRENT DEFENCE.

WEstjustice regards the current provisions in the FW Act as insufficient to discourage sham contracting. The provisions offer a defence to an employer which is broad and relatively easy to rely upon. Employers are in a far superior position to a worker in terms of resources and knowledge of the workplace relations system. They should have a duty to undertake the necessary consideration and assessment of whether or not a worker is an employee or independent contractor. They should be able to positively assert that the relationship they are entering into with a worker is the correct one.

As such, WEstjustice supports Productivity Commission recommendation 25.1. At the very least, the current employer defences to the sham contracting provisions should be limited:[20]

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

Ideally, there should be no recklessness/lack of knowledge defence. However, at the very least, the law should be amended to ensure that employers are liable when they ought to have known. For details see Appendix One.

---

[20] Productivity Commission, Workplace Relations Framework, Inquiry Report No 76 Volume 2 (30 November 2015), 915-916, available at<http://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume2.pdf>, last accessed 26 July 2018.

RECOMMENDATION TEN: INCREASE SCRUTINY AT THE TIME ABNS ARE GIVEN, AND VIA ONGOING ENFORCEMENT

In addition to the above, WEstjustice submits that there should be a greater focus on prevention of sham contracting. As set out in the Not Just Work report, one way to achieve this is by introducing independent scrutiny and education at the time of applying for an ABN. Proper consideration of all the facts and circumstances and the relevant test should be applied before an ABN is issued. In no circumstances should a principal be able to obtain an ABN on behalf of a worker. ABNs should not be issued after a short internet application.

Instead, applicants should be required to attend a face-to-face interview with an information officer (with interpreters where required), where education about the differences between contractors and employees is provided. Information about taxation and workplace injury insurance should also be provided at this time.

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

Whether or not a statutory definition is adopted, significantly more needs to be done to clarify the distinction between employees and contractors. Greater education and targeted assistance is urgently required to make sham contracting laws meaningful for CALD workers. Increased 'on-the-spot' inspection and assessment by regulators would greatly assist in this regard, as vulnerable workers cannot be expected self-report in all circumstances. Further, WEstjustice experience suggests that many principals "disappear" when contacted formally after the event.

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

Furthermore, any education programs discussed **below** should address this issue and raise awareness among target communities. Finally, we note that for genuine independent contractors, avenues for assistance with underpayment matters are extremely limited. Such workers fall outside the remit of FWO and many community legal centres.

OTHER MEASURES TO STOP WAGE THEFT

The Not Just Work report sets out multiple recommendations to improve laws and processes and stop wage theft in Part 6. Relevantly for this inquiry we draw the Committee's attention to the following:

RECOMMENDATION 11: INTRODUCE A WAGE INSURANCE SCHEME

Where employees cannot access their unpaid wages via available legal frameworks, an insurance scheme should be available.

Such a fund could be available to all workers; or by application for those who are particularly vulnerable. The scheme could be funded by employer premiums (or compulsory Director's insurance recommended below), similar to the WorkCover scheme and/or penalties obtained by the FWO for breaches of the FW Act.

Examples of other similar schemes include:

- WorkCover, for workplace injury —an insurance scheme where all employers pay a premium;
- Motor Car Traders Guarantee Fund—funded by motor car traders' licensing fees, for consumers who have suffered loss where the trader has failed to comply with the Motor Car Traders Act 1986;[21]
- Victorian Property Fund—funded by estate agent fees, fines and penalties, and interest —provides compensation for 'misused or misappropriated trust money or property;'[22]
- In California, the CLEAN Carwash coalition successfully lobbied for specific legislation for car wash companies. The law requires all car wash companies to register with the Department, but 'no car wash can register or renew its registration (as required annually) unless it has obtained a surety bond of at least US$150,000. The purpose of the bond requirement is to ensure that workers who are not paid in accordance with the law can be compensated if their employer disappears or is otherwise unable to pay wages or benefits owed to the employees. The legislation creates an exception to the bond requirement, however, for car washes that are party to collective bargaining agreements.[23]

RECOMMENDATION 12: AMEND THE MIGRATION ACT TO ENSURE VULNERABLE WORKERS CAN COMPLAIN WITH CONFIDENCE

In order to reduce exploitation in the cleaning industry, WEstjustice recommends that the Government take immediate steps to protect vulnerable workers on temporary visas. The Australian Government's Migrant Worker Taskforce announced in February 2017 that where temporary visa holders with a work entitlement attached to their visa may have been exploited and they have reported their circumstances to the FWO, the Department of Home Affairs (**DHA**) will generally not cancel a visa, detain or remove those individuals from Australia, providing: the visa holder commits to abiding by visa conditions in the future; and there is no other basis for visa cancellation (such as on national security, character, health or fraud grounds).[24] This agreement between DHA and FWO has now been published on FWO's website,[25] and will hopefully be widely communicated by the government.

While this is a positive development, alone it will not be sufficient to reassure vulnerable migrant workers on temporary visas that it is safe to come forward and report exploitation to the FWO without further legislative and other reform. The Not Just Work Report[26] makes multiple suggestions that would protect vulnerable migrant workers on temporary visas, including the following legislative changes:

- The FW Act should be amended to state that it applies to all workers, regardless of immigration status, and
- The *Migration Act 1958* (Cth) should also be amended to introduce a proportionate system of penalties in relation to visa breaches.

---

[21] Consumer Affairs Victoria, State Government of Victoria (2016) https://www.consumer.vic.gov.au/about-us/who-we-are-and-what -we-do/funds-we-administer/motor-car-traders-guarantee-fund, last accessed 26 July 2018.
[22] Consumer Affairs Victoria, State Government of Victoria (2016) < https://www.consumer.vic.gov.au/housing/buying-and-selling-property/compensation-claims>, last accessed 26 July 2018.
[23] Janice Fine, 'Alternative labour protection movements in the United States: Reshaping industrial relations?' (2015) *International Labour Review* 154(1), 20.
[24] Professor Allan Fels AO, *Chair's Public Statement February 2017,* Migrant Worker Taskforce, Australian Government Department of Employment, available at <https://www.employment.gov.au/chairs-public-statement-february-2017>, last accessed 26 July 2018.
[25] Available at <https://www.fairwork.gov.au/find-help-for/visa-holders-and-migrants>, last accessed 26 July 2018.
[26] Hemingway, above n4, pp 224–299.

We have had numerous clients in the cleaning industry visit our service to request help for significant underpayment issues and other unlawful treatment. However, some clients may have breached a term of their visa, inadvertently or accidentally. This breach gives rise to the risk of being removed, that is forced to depart Australia. As a result, clients do not pursue their claims and employers take advantage. For example, international students are generally only permitted to work a maximum of 40 hours per fortnight during semester. If they are found to breach a term of their visa (for example, by working for one extra hour), their visa may be cancelled and the worker commits a strict liability offence. We saw a client who worked for one extra hour in breach of his 40 hour limit, on one occasion. However, the risk of visa cancellation was still real—and he did not pursue his employer, who owed him thousands of dollars.

It is unfair and disproportionate for an exploited international student to face removal for infringing their visa restrictions in a minor way, for example by working an additional few hours. Indeed, if they were paid properly, such additional hours are unlikely to be necessary in the first place. While the FWO Protocol is welcome, it is not a guarantee, and some clients remain frightened to come forward.

As suggested by Associate Professor Joo-Cheong Tham,[27] visa cancellation should only apply in situations where there has been a serious breach of a visa. This avoids situations where workers may be disproportionately punished for a minor breach, and remove the significant disincentive to report unlawful employer behaviour. As Joo-Cheong explains:

> *"These draconian penalties strengthens the hand of employers who seek to abuse temporary migrant workers and therefore, contributes to the compliance gap (as illustrated by the 7-Eleven case). They are also grossly disproportionate and unfair. Criminal offences and the prospect of visa cancellation should be reserved for situations involving serious visa breaches. For other breaches, administrative fines and/or civil penalties should apply. These reforms would strike a far better balance between protecting the integrity of the visa system and ensuring fairness to temporary migrant worker.*
>
> *Recommendation…*
>
> - *sections 116(1)(b) and 235 of the Migration Act 1958 (Cth) should be amended so as to only apply to serious breaches of visas;*
> - *a proportionate system of administrative fines and/or civil penalties should apply to other breaches."*

WEstjustice supports this recommendation.

RECOMMENDATION 13: INCREASE USE OF PROCUREMENT POLICIES, PROACTIVE COMPLIANCE DEEDS AND INDUSTRY CODES TO IMPROVE COMPLIANCE.

WEstjustice notes that private schemes like the Cleaning Accountability Framework can provide a useful mechanism to promote compliance within industries, along with proactive compliance deeds that require retailers to monitor their supply chains and rectify underpayments. We recommend that the Federal Government review all procurement policies to ensure that tenders for Government work can only be submitted by companies with an independently verified and demonstrated track record of compliance, and that to be eligible, businesses must hold accreditation under any relevant schemes, including the Cleaning Accountability Framework.

[27] Associate Professor Joo-Cheong Tham, Supplementary submission to the inquiry of the Senate Education and Employment References Committee into 'The impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders', available at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Submissions>, last accessed 26 July 2018.

2. ENSURING WORKERS HAVE ADEQUATE REPRESENTATION AND KNOWLEDGE OF THEIR RIGHTS

> *In Burma, people get a job based on monthly wages. No matter how many hours they work, no matter how many days per week they work, they don't get paid extra. Not getting paid for overtime and penalties. There is no compensation if injured. You are fired if you make complain or speak out the truth.*
>
> *In Australia, most of the people from my community are farmers, not literate or educate. As a result community members cannot get secure jobs. They accept any jobs they are offered. Usually they get a job which doesn't require any qualification; only require hard working, such as meat factory, cleaning. They sign the paper without understanding what are in terms and policy. Because of not understanding employment law or their rights at work, they don't get paid properly. For example, I know many cleaners are working night shift cash in hand for 14$ an hour and they only get paid for four hour even if they work all night. If they are injured at work they don't know they have the right to get compensation or claim.*
>
> *If they have a problem at work, people go for information to community leaders. They don't contact government agency for help with problems because they are scared, have language barriers and think that they will lose their jobs. They think that they cannot get a job in the future because of making complaint against the boss.*
>
> *I think the train the trainer program is the best way to help my community understand the law. Because whenever the community members have a problem, they come to leaders. If the community leader has knowledge about the laws and services, they can guide the community member where to get help and advice also, the Western Community Legal Centre. To look on a website or fill out a complaint form is very complicated. My community doesn't have capacity to do this alone. They need help. Here the service is face to face, and one on one. This is important because this Centre has been working with the community, now they have confidence to come here. This is a first step for the community to get help.*
>
> *Neng Boi – community leader and WEstjustice Community Worker*

Coupled with high levels of exploitation, recently arrived and refugee communities face multiple barriers that prevent them from accessing mainstream legal services and thus, enforcing their rights at work. Low levels of rights awareness, language, literacy, cultural understandings and practical considerations all form critical barriers to accessing mainstream employment services.

The complex, multi-jurisdictional nature of laws governing work also contributes to the problem – for a non-English speaking underpaid worker with an injury who has been unfairly dismissed, there are a myriad of agencies that may assist with part of the problem, but no 'one-stop shop' to provide a culturally appropriate and accessible service and guide vulnerable workers through the quagmire of legal and non-legal options available to them. For many of the most vulnerable workers, there will be no assistance at all. This section sets out our recommendations to ensure workers have adequate representation and knowledge of their rights.

UNMET NEED FOR EMPLOYMENT LAW HELP

Case study - Saiful

Saiful worked as a cleaner. His boss was always late paying his wages. Saiful was called "dirty Indian" and directed to clean in unsafe places. Whenever Saiful asked about his unpaid wages, his boss always promised he would be paid "soon". When Saiful sent a text message saying he was going to a lawyer to get advice about his unpaid wages, he was fired.

Saiful spoke quite good English. At a WEstjustice night service appointment, he received assistance to draft a general protections application. Saiful was informed of the process, and encouraged to contact WEstjustice once a conciliation was scheduled so that we could assist him to prepare. At the time, WEstjustice did not have capacity to represent Saiful.

Saiful attended the conciliation unrepresented and received a paltry settlement offer. Without advice, Saiful did not know what to do. He refused the offer, and despite WEstjustice offering to assist with next steps, took no further steps to pursue his claim. Saiful was ultimately unable to pursue his matter, despite having a very strong general protections claim.

In 2012, the Law and Justice Foundation undertook a large study of unmet legal need in Australia. Among all Victorian respondents, 5.9% identified that they had experienced an employment law problem in the past year. Similarly, an Australian Institute survey identified that 7% of Australians had an employment law problem.[28] WEstjustice data suggests that this figure would be significantly higher for newly arrived and migrant workers.

The piecemeal and multijurisdictional nature of the workplace relations landscape means that without assistance from an expert, enforcement is impossible for many vulnerable workers. There are currently different jurisdictions and agencies for the enforcement of workplace safety, wages and entitlements, unfair dismissal, general protections, superannuation and discrimination laws. This makes choice of jurisdiction and case management extremely challenging. Some claims carry a costs risk (meaning if you lose your case, you may be ordered to pay the other side's legal costs), some claims prohibit other claims being made, and each claim has different processes and different limitation periods (for example, only 21 days to bring an unfair dismissal claim, but up to six years for an underpayment of wages claim). Furthermore, a decrease in union membership has significant implications for monitoring and enforcement of workplace rights.[29]

Our clients generally require active assistance from the time of making a complaint through to mediations, and formally settling their dispute. At the initiation of an application, clients require assistance with the completion of the relevant forms and calculations. Many clients faced with the requirement to calculate underpayments and prepare a letter of demand, let alone a Court application, outline of submissions or witness statement would be locked out of the system without extensive assistance. The imbalance of power inherent in many of these disputes makes independent assistance for vulnerable workers crucial.

Despite significant need for employment law services there are limited avenues for workers to get help with their problems. Given the amount of time required to prepare and run underpayment and other employment matters, few private firms offer employment law advice on a no win no fee basis. Therefore, for low income earners, private legal assistance is not an option. While the Fair Work Ombudsman can offer limited assistance for unpaid wages and entitlements, as discussed **below**, both FWO and other mainstream agencies, with their focus on telephone-based self-help models of assistance, are largely inaccessible to newly arrived and refugee communities, and do not provide enough ongoing support.

---

[28] Hemingway, above n 4, 87.
[29] Ingrid Landau, Sean Cooney, Tess Hardy and John Howe, 'Trade Unions and the Enforcement of Minimum Employment Standards in Australia (Research Report, January 2014), 8.

Unfortunately, there is very little funding available for employment law services. Existing services are struggling to meet demand with limited resources. JobWatch, a community legal centre specialising in employment matters, cannot meet 57% of demand for telephone assistance (even fewer receive casework support and the most vulnerable will not utilise a telephone service). Justice Connect, a community organisation that helps facilitate pro bono referrals, reports that employment law is one of the top four problems that people request assistance for, however only around one fifth of matters receive much needed help.[30] In Victoria, Legal Aid does not provide assistance with employment matters (except where discrimination is involved) and frequently refer matters to other services. Apart from the ELS, there are no other targeted employment law services for newly arrived communities in Victoria. As observed in a Report by the Federation of Community Legal Centres, 'there is a significant gap between the need and demand for assistance and the services that are currently available.'[31]

Despite being best placed to provide face-to-face comprehensive assistance embedded in the community, very few generalist community legal centres provide employment law services. This is not due to a lack of need. Employment law is a highly specialised area of law with short limitation periods, and there is no recurrent funding for generalist centres to do this work. This means that centres are often unable to allocate scarce resources to this area.

COMMUNITY-BASED FACE-TO-FACE LEGAL ASSISTANCE

BEST PRACTICE COMMUNITY-BASED LEGAL SERVICES

There is a strong consensus that community-based employment services are required to provide sustained direct engagement with communities and a link between communities and government agencies. Yet there is a lack of resources being directed towards funding these services that play a crucial role in providing meaningful access to justice and achieving positive systemic change.

For example, given FWO's strict eligibility criteria for ongoing assistance, many workers with unpaid entitlements are left to self-advocate. For newly arrived workers, this is often impossible. WEstjustice has assisted many clients who were turned away from FWO and were unable to enforce their rights without support. For example:

Case study – Pavel

Pavel is a newly arrived refugee. He does not speak much English and cannot write. He got his first job as a cleaner. He often worked 12 or 14 hour shifts but was only paid for five hours' work each shift. He was also paid below the minimum pay rate. Pavel came to WEstjustice because he had not been paid his last two weeks' pay. A community worker had tried to assist Pavel to complain to the Fair Work Ombudsman, but because they didn't know what to complain about, the complaint was closed.

WEstjustice helped Pavel make a new complaint to the Fair Work Ombudsman and negotiated with his employer to receive back payment. WEstjustice later learned that Pavel assisted two of his friends to negotiate back pay and legal pay rates going forward.

Pavel's case study illuminates the importance of ongoing legal assistance from a community agency.
It was only through ongoing contact and case management from WEstjustice that Pavel was able to attend mediation through the Fair Work Ombudsman and ultimately receive payment.

---

[30] Hemingway, above n 4, 139.
[31] Ibid.

WEstjustice is accessible for vulnerable migrant workers for a number of reasons, as identified in our preliminary report:

- **Relationships and trust:** To be accessible, it is essential that community members feel safe and trust the service. Trusting relationships have been built between the service and target communities in a number of ways, including for example, by providing face-to-face community education, and attending local meetings and events. As one survey respondent noted, a key element of the relationship is its long-term, ongoing nature.
- **Collaboration:** It is essential to collaborate with other services that assist target communities, and other mainstream employment-related services. Fortunately, there are a number of networks (including the Wyndham Humanitarian Network and Maribyrnong Workers With Young People Network) that promote collaboration between service providers in the West.
- **Consultation with relevant communities and agencies:** Involvement of the target group in planning and decision making is crucial. This was undertaken in the first stage of the Project, and on an ongoing basis through gathering client and community feedback.
- **Importance of community workers:** Community workers from target communities provide an essential link between services and community members. As one survey noted: 'Having bilingual workers from the clients' communities working and imparting knowledge to their own communities has been effective'. Our Centre has used bilingual workers for many years, and found this to be an extremely valuable way of connecting our service with newly arrived communities.

The value of community organisations in assisting vulnerable workers has been widely recognised. In 2009 the FWO conducted a review of the need for and provision of Community-Based Employment Advice Services (**CBEAS**) in the light of the introduction of the Fair Work regime (**Booth Report**).[32] The Report highlights the importance of CBEAS for vulnerable workers:

> *Workers who are trade union members can go to their union, workers who can afford to do so can go to a lawyer and workers who are confident and capable can use the information provided by the government body to look after themselves. However, this leaves a significant group of workers with nowhere to go in the absence of community-based services.*
>
> *These are the workers who because of their industry or occupation, employment status or personal characteristics are also more likely to be vulnerable to exploitation at work. They experience a 'double whammy' of vulnerability at work and an inability to assert their rights.*[33]

Booth recognises that CBEAS contribute to the effective and efficient functioning of workplace relations systems by:

- providing critical assistance to a vulnerable group who would otherwise be unable to understand or enforce their workplace rights;
- filtering disputes by advising clients on the legal merits of their claims;
- increasing the focus on early intervention and assisting clients to resolve issues at an early stage;
- promoting the efficient passage of disputes through the workplace relations dispute resolution pathways;
- development of legal precedent through strategic litigation; and
- collecting information about systemic issues for vulnerable groups and providing this information to regulators and others.

The Productivity Commission has also recognised that community organisations have strong potential

---

[32] Anna Booth, 'Report of the review of community-based employment advice services', *Report to the Fair Work* Ombudsman, 30 September 2009.
[33] Ibid, 14.

to provide innovative solutions to social problems.[34] It has also recognised that employment law is a major gap in civil law assistance which can have serious consequences, and that efficient, government funded legal assistance services generate net benefits to the community. The Commission has acknowledged that more resourcing is required. In its Report on the Workplace Relations Framework Inquiry, the Productivity Commission specifically acknowledged the vulnerability of migrant workers and the important role that community organisations play in providing information and promoting compliance with employment laws. The Commission recognised the 'credibility these [community] organisations have within the community, their sensitivity to established cultural or community attitudes and their separation from government'.[35]

Importantly, the Commission discussed the value of WEstjustice (then Western CLC) Employment Law Project in particular, noting that: [36]

> *Community organisations often have a broader remit than just ensuring compliance with employment law. For instance, apart from providing legal advice, the Western Community Legal Centre also runs a legal education program for vulnerable workers, which includes information sessions to community members about their workplace rights, and training programs to assist people to distribute legal education within their community (sub. DR329). In this way, these organisations also can likely direct migrant workers to alternative employment opportunities or government support programs.*

The work of Community Legal Centres, including WEstjustice, clearly contributes to the efficiency of the workplace relations framework. In addition to providing critical assistance to regulators and vulnerable workers, we provide a crucial triage or filtering function, advising clients with meritless claims or very poor prospects of success not to proceed.

Similarly, WEstjustice's support and advocacy often assists clients to settle their disputes by negotiation, thus increasing efficiency and reducing costs by avoiding unnecessary reliance on proceedings advancing to court. We routinely undertake calculations and assist clients to resolve issues with their employers by way of a letter of demand. We have been successful in assisting many clients during this early stage in the legal process. We also promote the efficient passage of disputes through established dispute resolution pathways, and by assisting clients to access mainstream services.

THE WESTJUSTICE EMPLOYMENT LAW SERVICE

The WEstjustice Employment Law Program seeks to improve employment outcomes for migrants, refugees and temporary visa holders. We do this by empowering migrant and refugee communities to understand and enforce their workplace rights through the provision of tailored legal services, education, sector capacity building and advocacy for systemic reform.

Our key services include:

- **Tailored legal services:** an employment law legal service that provides comprehensive assistance to newly arrived and refugee clients (including an International Student Work Rights Legal Service delivered in partnership with Study Melbourne), including face to face legal advice and representation (**ELS**);
- **Education:** an education program targeted at informing newly arrived and refugee communities about employment and anti-discrimination laws and increasing accessibility of relevant services (**Education Program**); and

[34] Productivity Commission, 'Workplace Relations Framework', Productivity Commission Inquiry Report, Vol 2, No 76, 30 November 2015.
[35] Ibid, 925.
[36] Ibid, 925.

- **Advocacy:** we work closely with target communities, through our ELS and Education Program, to identify systemic employment related issues and advocate for change, including improvements to laws and processes and liaison with key stakeholders.

Our ELS provides free employment-related legal information, advice, advocacy and referral to refugees, asylum seekers, international students, temporary visa holders and other newly arrived migrants (who are from a non-English speaking background and have lived in Australia for less than 10 years). Apart from our International Students Work Rights Legal Service (which operates out of Study Melbourne and is for all international students), clients must live, work or study in the Western suburbs of Melbourne.

The ELS runs by appointment on Monday and Wednesday afternoons and Thursday evenings. Our Wednesday evening service is staffed by volunteer lawyers and paralegals. All lawyers have experience practising in employment law and are well equipped to provide specialist advice in this area. All volunteers are required to complete an induction program, which cover various aspects of how the service operates, as well as substantive legal topics (e.g. choice of jurisdiction) and training in other important areas including self-care and best practice approaches to working with newly arrived and refugee clients.

We seek to provide meaningful assistance to each client, and tailor our level of assistance depending on the client's needs and ability to self-advocate, the merit of the case and our resources. When working with clients who have limited or no literacy in their own language or English, simply advising someone of their right to lodge a claim will be of limited utility. If you cannot write in English, you cannot fill out a claim form without assistance. For this reason, our intake and follow up appointments are longer—usually one to three hours in length, per client. At these appointments, where a client lacks capacity to self-advocate, our volunteer lawyers attempt to assist clients to prepare an application or other correspondence as appropriate. WEstjustice staff then provide follow-up support and assistance as needed, although this is necessarily dependent on our capacity.

For the vast majority of our clients, additional assistance beyond one appointment is necessary. Between May 2013 and October 2015, the ELS provided 162 advices and opened 45 cases for 130 clients. 52 clients received a one-off advice only appointment, while 78 clients received further appointments and/or ongoing assistance. For many clients who received one-off advice, further assistance was needed, but there were no available resources. Sadly, we learned of poor outcomes for some meritorious cases, in part due to lack of ongoing legal assistance.

Of the 30 files that were opened and closed between May 2013 and October 2015, half of all cases required more than 20 hours work. One third of cases required 6–20 hours work, and around 15% of cases involved less than six hours work. Several advice-only files also required more than 20 hours work. Even our clients who received a one-off advice only appointment still received an average of approximately three hours face-to-face assistance from a lawyer.

RECOMMENDATION 14: FUND COMMUNITY LEGAL CENTRES TO PROVIDE FACE-TO-FACE LEGAL ASSISTANCE

Without assistance, vulnerable workers cannot enforce their rights, and employers can exploit with impunity. Community legal centres are required to work alongside regulators and unions to provide additional support to vulnerable workers. However, there is no recurrent funding for generalist centres to do this work, and significant unmet need.

The Government should provide recurrent funding for community legal centres to deliver the following:

- **Legal service:** face to face, comprehensive legal advice and assistance to vulnerable workers who have a problem at work, and referrals to mainstream agencies where appropriate;
- **Education program:** coordination and delivery of a tailored Community Legal Education program to vulnerable workers, including community leaders and community workers, to raise awareness of laws and services that can assist and prevent exploitation; and
- **Systemic change:** pursuing strategic policy and law reform objectives arising from casework and education programs, including consultation with key stakeholders to raise awareness of migrant worker experiences and to promote legal and policy change.

TARGETED EDUCATION

CASE STUDY: LUN

Lun wanted to find work as a cleaner. He agreed to pay Mr T's company $10,500.00 for training. Mr T promised Lun that he would receive training in general cleaning and carpet cleaning. Lun paid Mr T $10,500.00 and completed 10 days' of unpaid training with Mr T – the training involved watching and learning from Mr T. After 10 days' of "training", Lun was told that there was no work for him. Lun received a refund of $7000 but was told that the company would keep $3000.00 for "training costs".

Without targeted legal education for newly arrived and refugee workers, the workplace relations system will remain largely inaccessible. Education not only informs people about their rights at work and where they can find help, but also empowers communities to enforce their rights by building relationships and trust between vulnerable workers and services that can assist. In this section, we discuss best practice approaches to education for migrant and refugee communities, and demonstrate the value of targeted programs delivered by WEstjustice over the past four years. Further details can be found in our Not Just Work Report, and on our website.

BEST PRACTICE EDUCATION APPROACHES

Any education program should adopt best practice education approaches to ensure that it is accessible and useful for target communities. Based on feedback from over 50 community presentations, a literature review, and over 300 surveys of community members, community workers and community leaders from newly arrived and refugee communities, we found that the following features make targeted education effective:[37]

- **Face-to-face and verbal:** Information provided face-to-face, both verbally as well as in writing.
- **Client's language and community workers:** Using interpreters, community guides and bilingual community workers from relevant communities.
- **Visual materials and multimedia:** Use of pictures, visual aids (such as DVDs) or other multimedia (including community radio).
- **Information sessions, English classes and pre-arranged community meetings:** Delivering community education via information sessions or as part of English classes is effective, as is visiting existing community groups.
- **Clear language:** Using clear and simple language.
- **Key information only:** Outlining key concepts and where to go for further information/assistance.
- **Cultural awareness:** Ensuring presenter understands the community culture.
- **Convenient location**: Considering location of CLE and contacting existing organisations. As one community worker recommended: 'I think taking time to identify a number of community groups and associations that are already established and are meeting for a purpose on a regular basis. Request to be invited to talk about this issue which I think would be very popular within these communities.'
- **Practical and timely:** Providing information 'that is linked to outcomes', for example by facilitating employment in industries and workplaces where rights can be realised. Ensuring that workers receive

[37] Hemingway, above n 18, 23-26.

the right amount of information at the right time so it is not abstract. Understanding audiences' level of understanding and targeting information at the appropriate level.

- **Developed in consultation with communities:** Ensuring that education is developed in consultation with community members and community workers, and responds to identified needs. There is strong evidence to suggest that face-to-face assistance and advocacy is essential to provide a service to refugee clients, and that without targeted assistance focused on relationships, collaboration and trust, government employment services are often inaccessible to refugee and newly arrived communities.

WESTJUSTICE EDUCATION PROGRAM

Raising awareness of employment laws and services is a critical step in rights enforcement. In response to community feedback regarding the importance of face-to-face, targeted employment law services and information, WEstjustice developed and implemented a Community Legal Education Program (**CLE Program**), commencing May 2014.

The CLE Program has consisted of:

- information sessions for community members (delivered at a variety of locations including English as Additional Language classes, community meetings, settlement agencies and schools);
- information sessions for community workers (to enable staff to identify when their clients have an employment law issue and make appropriate referrals); and
- the Train the Trainer Project, working with community leaders.

We have developed numerous resources including template PowerPoint presentations, activity sheets and educational videos especially tailored for English as Additional Language students. Please visit our website for access to these resources.[38] Some example images and scripts from one video are below:

```
              ANDREA
Jill!

              JILL
Andrea! Hey! How are you?

              ANDREA
Good. How's the new job?

              JILL
Loving it. Six months, and they
just gave me a promotion!

              ANDREA
That's so exciting!

              JILL
I know – what about you?

              ANDREA
Still working in the kitchen at the
pub.
```

38 See: <http://www.westjustice.org.au/community-development-and-law-reform/community-legal-education/newly-arrived-and-refugee-employment-law-140> last accessed 26 July 2018.

JILL
Is it good pay?

ANDREA
Depends on whether it's a busy night.

JILL
(concerned)
Really?

ANDREA
If they can't pay me much they give me a meal, so...

JILL
(concerned)
But a meal is *not* pay! Don't you have an hourly rate?

ANDREA
If nobody comes in, how can they pay me?

JILL
But they *have* to pay you the Award rate.

ANDREA
They said they opted out of the Award...

JILL
They can't do that. What about overtime?

ANDREA
No.

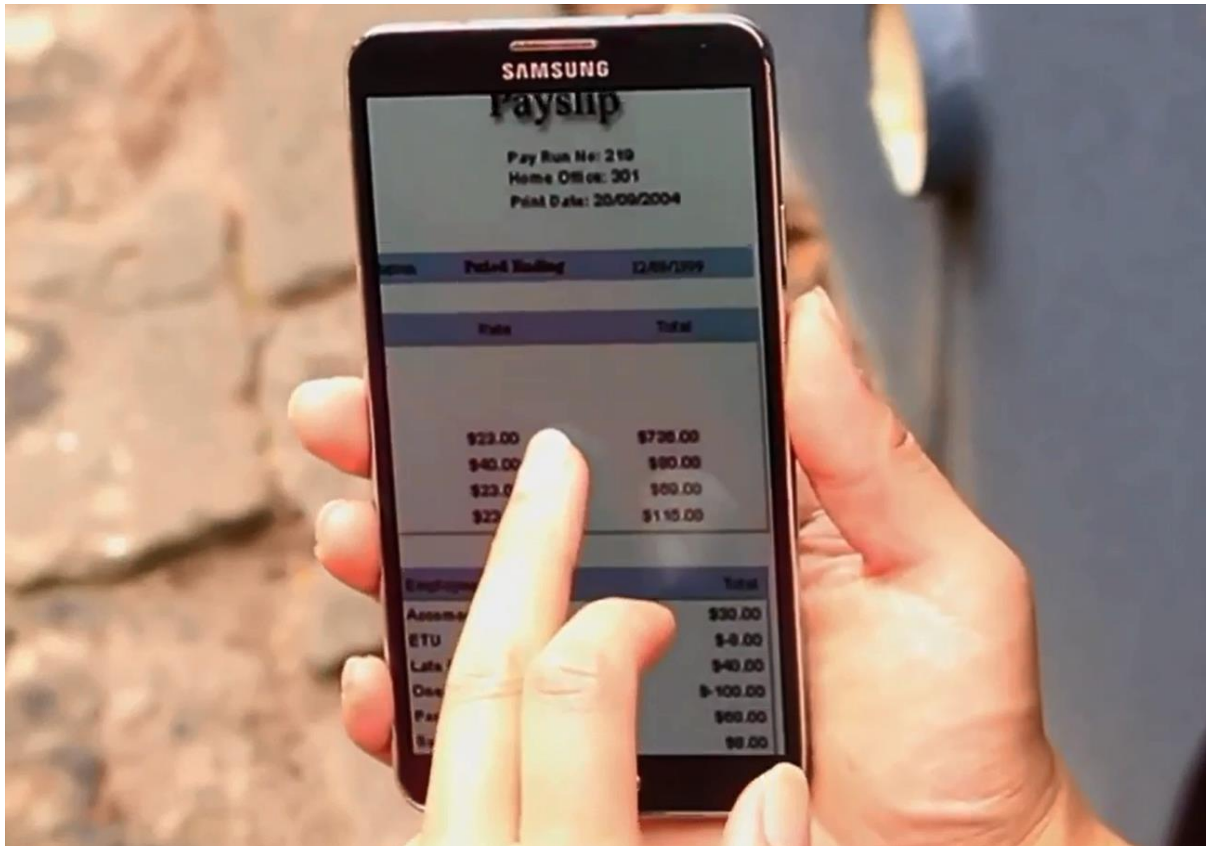
JILL
Penalty rates, for weekends? Holidays? Superannuation?

ANDREA
I know it sounds bad... but they're really nice people.

JILL
(thinking, but with caution)
Listen... do you have a pay slip I could have a look at?

ANDREA
What's a pay slip?

JILL
It's a document that you get every time you get paid. It sets out the hours you worked, your payment and how much you've been taxed. I get mine by email.
(showing Andrea an example on her phone)
Look, I'll show you.



ANDREA
I don’t get those.

JILL
You have rights in the workplace, you know! You should get some advice about your pay.

ANDREA
Who can I speak to?

JILL
There are legal services that can help for free – and they’re confidential, so they’re not going to tell your boss unless you want them to. And then later, if you feel like it, you could talk to your boss or you could get a lawyer to write a letter.

As discussed in detail in the Not Just Work Report (chapter 3), each of these programs has been evaluated, and results indicate that the CLE Program has dramatically increased migrant worker understanding of laws and access to services. For example, after attending a WEstjustice information session, 89% of participants surveyed stated that as a result of the CLE session they now knew where to go for help with an employment problem.

Unfortunately, WEstjustice receives more requests for CLE community presentations than we have capacity to deliver. Similarly, the pilot Train the Trainer program received applications from more than five times the number of community leaders than there were places in the program. The success of the Project's CLE program shows that additional funding and resources ought to be made available for the delivery of regular sessions to community groups who may not otherwise have access to information and other services to raise awareness about employment law issues.

Such education programs are urgently required not only in the Western Suburbs of Melbourne, but elsewhere in metropolitan and regional Victoria. WEstjustice has already received requests to deliver education in Albury and Nhill. Regional programs are especially necessary given the concentration of migrant workers in food processing industries in regional towns.

WEstjustice recommends that similar programs be adopted and expanded across Australia.
Recognising that newly arrived and refugee workers require targeted, face-to-face education programs to understand and enforce their rights at work, Governments should establish a fund to provide targeted education programs for vulnerable workers. Such programs should include:

- direct education programs for community members;
- train the trainer programs for community leaders;
- education programs for community workers in key organisations working with newly arrived communities; and
- other programs delivered in accordance with best practice education approaches.

WEstjustice proposes that mainstream agencies develop their own targeted resources and programs, but also provide funding for community organisations to distribute those resources and design and deliver essential face-to-face information sessions that align with local community needs.

RECOMMENDATION 15: FUND TARGETED EDUCATION PROGRAMS FOR VULNERABLE WORKERS

Tailored education programs are required to raise awareness of laws and build trust and accessibility of services. The Government should establish a fund to provide targeted education programs for vulnerable workers. Such program should include:

- Direct education programs for community members;
- Train the trainer programs for community leaders;
- Education programs for community workers in key organisations working with newly arrived communities; and
- Other programs delivered in accordance with best practice education approaches

In particular, we recommend funding community legal centres to develop and deliver these programs.

3. FACILITATING COMPLIANCE WITH RELEVANT LAWS

Newly arrived and migrant workers are particularly vulnerable. Yet, as a result of low rights awareness, language, literacy, cultural and practical barriers, newly arrived workers rarely contact mainstream agencies for help. When they do make contact, meaningful assistance is needed. Agencies and commissions must take further steps to ensure that they are more accessible and responsive. Particularly relevant for this Inquiry, this includes regulators having sufficient funding and powers to address non-compliance and promote systemic reform. In order to make any enhanced enforcement powers effective FWO will require additional resources.

WHAT WORKS WELL

As set out in the Not Just Work report (chapter 4), key agencies including the FWO and FWC are taking several positive steps to ensure compliance with relevant laws. For example, numerous clients have received assistance via our warm referral process with FWO, whereby WEstjustice staff assist vulnerable workers to articulate their claims, then prepare a case summary which is sent directly to a FWO staff member with experience in migrant worker issues.

Further, agencies' participation in the WEstjustice Train the Trainer program has provided a number of community leaders with significantly improved awareness of services. For example, community leaders were able to visit FWO's Infoline centre and gain first-hand information about how FWO works. Information about FWO has now been shared with several newly arrived communities across the West. This collaboration recently resulted in a group of extremely vulnerable clients receiving assistance they would never have received otherwise.

Case study – cleaners benefit from the WEstjustice Train the Trainer program

WEstjustice received a phone call from a community leader who had recently completed the Train the Trainer Program. The leader had been approached by numerous community members who all worked for one employer. They felt concerned that they had been underpaid. The workers spoke no English and were very afraid about complaining—they did not want to lose their jobs. The trusted community leader arranged a meeting with WEstjustice at a familiar meeting place. WEstjustice lawyers attended, and advised the community members that it appeared there had been an underpayment. The lawyers gave information and advice about the minimum wage, and also the role of FWO. After building trust with the workers, and explaining the options moving forward, the workers agreed to meet with a FWO inspector and explain their situation. Another meeting was arranged. At this meeting, around 10 workers were assisted by WEstjustice staff and volunteers to complete complaint forms, as the workers did not speak English. FWO then liaised with the relevant employer and ultimately over $20,000 in unpaid wages was recovered for numerous vulnerable community members. The workers said they would never have made a complaint without help from their community leader.

Of particular benefit to newly arrived and refugee communities are the systemic outcomes flowing from investigations and FWO's ability to look at industry wide issues. Whenever possible and with our clients' consent we share intelligence with FWO about systemic breaches.

In such situations, FWO's power to audit workplaces in an own motion investigation capacity removes the onus from individual complainants who are vulnerable, and enables systemic change across workplaces. Through the warm referral process, we have been able to bring matters to FWO's attention and FWO has used the information provided as part of broader investigations. Such actions enable FWO and WEstjustice to assist other vulnerable workers who haven't been able to complain directly.

Many clients have also benefited directly from FWO's individual complaint process, where as a result of mediation or other inspector action, with assistance from WEstjustice and FWO, clients have been able to enforce their rights in a supported and cost-effective way. We have had a number of cases resolve favourably

for our clients at the FWO mediation stage. Unfortunately, before FWO's involvement, the employers were not willing to respond to our letters of demand. As noted in the wage theft section below, we submit that with increased powers and capacity, FWO would be better able to resolve complaints at this early stage.

WITHOUT HELP, WORKERS CANNOT ARTICULATE COMPLAINTS

WEstjustice recognises that numerous government agencies including the FWC and FWO have undertaken work to target services at newly arrived communities. However, as demonstrated by the prevalence and persistence of the employment problems faced by these communities, it is evident that further action is required.

Many clients may intuitively feel that they have been treated unfairly, but due to the barriers outlined above, have no sense of who to contact, or how to frame their complaint. Even once workers are made aware of a service, and are comfortable enough to contact it, resource constraints or communication difficulties mean that they may not receive sufficient assistance to articulate their complaint.

WEstjustice has found that prior to presenting at the ELS, some clients have initiated a complaint with an agency like the FWO but due to ignorance of their rights and the elements required to establish their claim, complaints may be closed due to a lack of sufficient detail. In other situations clients have presented to our service seeking assistance with one matter (e.g. missing a week of pay), only to discover far more extensive underpayment issues due to an incorrect hourly rate, lack of annual leave entitlements or superannuation issues.

In our experience mainstream agencies like the FWO have not been able to provide the assistance required to explore or assist clients to identify further issues and articulate the full extent of their complaints. Only the issues correctly identified and evidenced by the complainant will be pursued. This means that vulnerable workers often cannot enforce their rights, and some of the worst forms of abuse are allowed to continue undetected.

Our clients generally require active assistance from making a complaint through to mediations, and formally settling their dispute. The imbalance of power inherent in many of these disputes makes independent assistance for vulnerable workers crucial for efficient resolutions. Without direct assistance many newly arrived and refugee clients who have had their workplace rights breached will not be able to enforce them.

Even if workers learn enough to know that something is wrong, and manage to contact an agency, without ongoing assistance, they are often unable to achieve justice. Pavel's story above is a clear example.

CULTURAL RESPONSIVENESS FRAMEWORKS

As set out in the Not Just Work Report, agencies must take steps to improve their cultural responsiveness and accessibility.[39] Such frameworks should:

- develop specific protocols and checklists for infoline staff to identify newly arrived and refugee clients and assist them to articulate their claims;
- provide information in a wider variety of community languages including those spoken by newly arrived and refugee communities, and in a variety of formats;
- participate in (and help resource) specifically targeted education and engagement programs run in partnership with community organisations;

[39] Hemingway, above n 1, 26.

- employ dedicated staff with speciality expertise in assisting migrant workers (ideally multilingual) to provide practical face-to-face assistance;
- ensure effective collaboration between agencies, and between agencies and community organisations; and
- undertake proactive compliance initiatives to achieve systemic reform in industries and areas where there is widespread exploitation of migrant workers.

RECOMMENDATION 16: AGENCIES NEED TO IMPROVE CULTURAL RESPONSIVENESS FRAMEWORKS

WEstjustice recommends that agencies increase their accessibility by improving cultural responsiveness frameworks. This includes developing specific protocols and checklists for Infoline staff, engaging dedicated staff and participating in and resourcing education and engagement programs.

SUPERANNUATION

Agencies should also play a more active role in assisting with the detection and enforcement of unpaid superannuation. Very few of our cleaning clients received any superannuation, and we found it extremely difficult to assist clients to obtain their minimum entitlements.

WEstjustice recommends that the Federal Government and FWO urgently address the issue of unpaid superannuation. It is estimated that unremitted superannuation is in the hundreds of millions of dollars. As argued by Helen Anderson and Tess Hardy, we agree that 'more should be done to improve the detection and recovery of non-payments because of the importance of superannuation to both employees and the government.' As Anderson and Hardy state, any model of enforcement that shifts the policing of unpaid superannuation to employees is flawed.' While the ATO is primarily responsible, the FWO 'is well placed to supplement the efforts of the ATO, and should be encouraged, and appropriately resourced, to do so.'[40] Community legal centres should be funded to deliver on the ground education to communities, refer clients to appropriate agencies, and assist clients to navigate any enforcement processes.

RECOMMENDATION 17: GREATER COLLABORATION, RESOURCING AND ACTION TO ADDRESS THE SUPERANNUATION BLACK HOLE

FWO and the ATO need to be appropriately resourced to pursue unpaid superannuation claims, and community legal centres should be funded to assist.

ENHANCED POWERS TO AID EFFICIENT RESOLUTION AVOID THE NEED FOR COURT

Currently, there are limited incentives for employers to resolve claims prior to court. This is especially the case for smaller companies, where fear of reputational damage is less significant. It is also the case for unscrupulous employers of newly arrived workers – these employers know that their workers lack the capacity to enforce their rights in court without help, and are unlikely to access assistance to take action.

At present, employers cannot be compelled to attend FWO mediations. When pursuing underpayment claims, WEstjustice usually sends a letter of demand to the employer setting out our calculations and the amount

---

[40] Helen Anderson and Tess Hardy, 'Who should be the super police? Detection and recovery of unremitted superannuation' (2014) 37(1) *UNSW Law Journal* 162, 162.

owed. We routinely find that employers ignore this correspondence. For some cases, we have found that assistance from the FWO to investigate and mediate disputes has meant that employers are more likely to participate in settlement negotiations.

However, in the experience of WEstjustice, it is unfortunately common for employers to refuse to attend mediation with employees in cases of non-payment of wages. For many clients, this has meant that the FWO has closed the file as the FWO cannot compel attendance. For example:

Case study – Sumit

Sumit cannot read or write in his own language, or in English. He worked as a cleaner and was engaged in a sham contracting arrangement. Sumit had never heard of the difference between contractors and employees, nor was he aware of the minimum wage.

We assisted Sumit to calculate his underpayment, and write a letter of demand to his former employer. Sumit could not have done this without assistance, and no government agencies can help with these tasks.

Sumit's employer did not respond, so we assisted Sumit to complain to the FWO. The employer did not attend mediation, and the FWO advised Sumit that the next step would be a claim in the Federal Circuit Court - however they could not assist Sumit to complete the relevant forms. There is no agency to assist Sumit write this application. He could not write it without help. WEstjustice helped Sumit to write the application.

Similarly, in cases where a client has worked for an employer for less than two months, FWO may refuse to schedule mediation, as the claim is considered too small. It is very difficult to explain to a client who has worked for two months without pay that they should have continued working for at least another month in order to receive help from the regulator.

In practice, failed mediations have the effect that an individual's only means of recourse is to start proceedings in court. This process is costly, time consuming, and confusing. Applications must be filled out and are best accompanied by an affidavit (a formal legal document that must be witnessed). The application must then be served on the Respondent. Where the Respondent is an individual, personal service is required. This means that vulnerable employees must find and face their employer, or hire a process server at a not-insignificant cost.

Compulsory mediation (where employers are compelled to attend) would greatly improve the efficient resolution of complaints and avoid the expense and delay of unnecessary court actions for small underpayments matters. There is currently no provision in the FW Act that obliges employers to attend mediations conducted by the FWO.

Ideally, the FWO would have powers to make binding determinations where mediation is unsuccessful, to further facilitate cost-effective and efficient resolution of entitlements disputes. For example, if an employer refuses to attend, the FWO should have the power to make an order in the Applicant's favour. This should similarly be the case in circumstances where there is a dispute – the FWO should be empowered to make a binding determination.

Similarly to the Financial Ombudsman Service (**FOS**), the Applicant should be able to determine whether or not they accept the binding determination. If they do not accept it, they retain the option of proceeding to Court. Importantly, the FWO should also be empowered to hold individual directors jointly and severally liable for any amount owing, including penalties. Again, this will act as an incentive to resolve disputes sooner.

The FOS allocates a case owner to each matter within its jurisdiction. The case owner reviews the file and contacts each of the parties to clarify issues/request further information. The case owner will try and assist parties to resolve their issue, but if agreement cannot be reached, the FOS has the power to make a binding determination. As the FOS website explains:[41]

> *The Ombudsman or Panel will take into account all information provided by the parties during our investigation of the dispute, the law, any applicable industry codes of practice, as well as good industry practice...*
>
> *A Determination is a final decision on the merits of a dispute. There is no further "appeal" or review process within the Financial Ombudsman Service. An Applicant has the right to accept or reject the Determination within 30 days of receiving it (or within any additional time we have allowed). If the Applicant accepts the Determination, then it is binding on both parties. If the Applicant does not accept the Determination, it is not binding on the [Financial Service Provider] FSP and the Applicant may take any other available action against the FSP, including action in the courts*.

Depending on the matter, it will either be determined by the Ombudsman, or by a panel of three decision makers chaired by an Ombudsman.

The FWO's structure is different from that of the FOS (which is membership-based) and it is unlikely that the same approach could be adopted as it would involve the FWO making binding determinations as to legal entitlements, which is the role of the judiciary rather than the executive.

WEstjustice calls for a review of current FWO powers and processes, and recommends that powers be expanded to enable such determinations. This recommendation echoes the Senate Education and Employment References Committee's call for an independent review of the resources and powers of the FWO.[42]

Further, stronger enforcement by the FWO of the existing FW Act provisions relating to the provision of employee records, including seeking penalties, would promote greater compliance and more efficient resolution of disputes. We understand that significant resources are required to facilitate this, but without more effective law enforcement, employers will continue to act with impunity.

WESTJUSTICE'S RECOMMENDATIONS TO IMPROVE FWO'S ENFORCEMENT POWERS

In order to increase the likelihood that matters will resolve earlier through employer attendance at mediations, it is proposed that it be made clear that there will be costs consequences if an employer unreasonably refuses to participate in a matter before the FWO.

In addition, in the event that the employer nevertheless refuses to participate in a mediation, it is proposed that the FWO issue an Assessment Notice that sets out the FWO's findings as to the employee's entitlements. An applicant may then rely on the Assessment Notice in the court proceeding. Where the applicant has an assessment notice, the applicant is taken to be entitled to the amounts specified in the assessment notice unless the employer proves otherwise.

---

[41] Financial Ombudsman Service Australia, *Dispute resolution process in detail* (2016), available at <https://www.fos.org.au/resolving-disputes/dispute-resolution-process-in-detail/>, last accessed 26 July 2018.

[42] Education and Employment References Committee, The Senate, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (March 2016), xiv, 278–283; 327–328.

RECOMMENDATION 18: COST CONSEQUENCES FOR EMPLOYERS WHO REFUSE TO ENGAGE WITH FWO

We propose to amend section 570(2)(c)(i) to refer to matters before the FWO as well as the FWC, and to amend section 682 in relation to Functions of the Ombudsman. This amendment will make it clear that there will be costs consequences if an employer unreasonably refuses to participate in a matter before the FWO. For details see Appendix One.

RECOMMENDATION 19: ASSESSMENT NOTICES FOR EMPLOYERS WHO REFUSE TO ENGAGE OR HAVE UNMERITORIOUS CLAIMS

Where an employer refuses to participate in mediation, we recommend that FWO have the power to issue an Assessment Notice that sets out the FWO's findings as to the employee's entitlements. An applicant may then rely on the Assessment Notice in the court proceeding. Where the applicant has an Assessment Notice, the applicant is taken to be entitled to the amounts specified in the assessment notice unless the employer proves otherwise.

To do this, we propose to include a new section 717A to provide for the issue of assessment notices that:

- applies where an employer has failed to attend a mediation conducted by the FWO and an inspector reasonably believes that a person has contravened one or more of the relevant provisions, and
- requires the notice to include certain information (see drafting suggestions).

We also propose to include a new section 557B in Division 4 of Part 4-1 that will have the effect of reversing the onus of proof where an applicant has an assessment notice. For details see Appendix One.

PROACTIVE COMPLIANCE AND MORE RESOURCING

Unfortunately, not all exploited workers are able or willing to take action against their employers. Even if clients are aware of their rights, many choose not to pursue matters further. Even after receiving advice that they have a strong claim, some WEstjustice clients decide not to pursue their claims, despite our offers of assistance. Often clients are afraid of their employers, afraid of losing their jobs, or afraid of bringing a claim for cultural reasons or community connections. It is not appropriate to expect that all enforcement activity be initiated by those who are most vulnerable.

It is essential that agencies take proactive measures in key industries and locations where there is suspected widespread exploitation – like contract cleaning. Such measures should include inspection of records and actions to recover any discovered underpayments. FWO has undertaken such initiatives in the past,[43] however more extensive and regular initiatives are required.

WEstjustice appreciates that without increased funding, FWO is not able to implement all of our recommendations. Greater resourcing and coercive powers of the FWO and other agencies would enhance outcomes for the most vulnerable. WEstjustice echoes recommendation 29.2 of the Productivity Commission in its recent report on the Workplace Relations Framework:

> *The Australian Government should give the Fair Work Ombudsman additional resources to identify, investigate, and carry out enforcement activities against employers that are underpaying workers, particularly migrant workers.*

---

[43] See FWO's Tasmanian Contract Cleaners Report, above n 12.

At the very least, an independent review of the resources and powers of the FWO should be undertaken, as recommended by the Senate Education and Employment References Committee.[44]

RECOMMENDATION 20: INCREASED RESOURCING AND MORE PROACTIVE COMPLIANCE REQUIRED

WEstjustice recommends more proactive compliance and increased resourcing of the FWO. Recognising that vulnerable workers are not always able to bring a complaint themselves, agencies must be adequately resourced to identify systemic issues and respond proactively.

[44] Education and Employment References Committee, above n 40.

4. ADDRESSING PHOENIXING AND PYRAMID SUBCONTRACTING

It is unconscionable that a worker should be punished, simply because their employer has acted unlawfully. In this section, we set out key recommendations to address unlawful phoenix activity and expand the FEG scheme to cover all workers.

This section identifies measures to address phoenixing and pyramid subcontracting, including measures to limit phoenix activity and expanding the FEG scheme.

MEASURES TO LIMIT PHOENIX ACTIVITY

Case study - Vili

Vili worked as independent contractor as cleaner for a subcontractor. He was not paid at all for four months work, and before that had only been paid sporadically. He accessed advice and was supported to assert his rights as an employee, winning in the FCC; however, the sole trader did not comply with the order, and the cost and length of time the enforcement options would take needed to be weighed against pursuing further action.

A significant problem for WEstjustice clients is the phenomenon of phoenix companies—whereby directors close down companies to avoid paying debts, then open a new company without penalty. It is estimated that such phoenix activity results in lost employee entitlements of between $191,253,476.00 and $655,202,019.00 every year.[45]

Helen Anderson suggests numerous measures to address phoenix activity, including the introduction of a director identity number (which requires directors to establish their identity using 100 points of identity proof and enables regulators to track suspicious activity more easily) and improvements to the company registration process to enable ASIC to gather more information at the time a company is formed.[46] WEstjustice supports these recommendations and also refers the Committee to the detailed joint Melbourne and Monash University Report released in February earlier this year*: 'Phoenix Activity: Recommendations on detection, disruption and enforcement'.*[47]

In addition to the introduction of director identification numbers, WEstjustice recommends the introduction of compulsory director insurance, to assist with funding community legal centres and an expanded FEG program as recommended in this submission.

RECOMMENDATION 21: INTRODUCE DIRECTOR IDENTITY NUMBERS AND COMPULSORY INSURANCE

The law must be amended to stop rewarding dodgy directors who make profits from repeated exploitation. WEstjustice recommends the introduction of director identity numbers. Directors should also be required to

[45] Helen Anderson, 'Sunlight as the disinfectant for phoenix activity' (2016) 24 *Company and Securities Law Journal* 257, 258.
[46] Ibid, 263-267.
[47] See e.g. Professor Helen Anderson, Professor Ian Ramsay, Professor Michelle Welsh and Mr Jasper Hedges, Research Fellow, *Phoenix Activity: Recommendations on detection, disruption and enforcement*, February 2017, Melbourne University and Monash University, available at < http://law.unimelb.edu.au/centres/cclsr/research/major-research-projects/regulating-fraudulent-phoenix-activity>, last accessed 26 July 2018.

pay a compulsory insurance premium (similar to WorkCover) to fund the provision of community-based employment services and the FEG scheme.

EXPANDING THE FEG SCHEME

Finally, we refer to our recent submission to the *Reforms to address corporate misuse of the Fair Entitlements Guarantee Scheme.*[48] In this submission, WEstjustice recommends an expansion of the FEG scheme to cover workers that have meritorious claims and are unable to obtain back payment from their employers. In particular, we recommend that the FEG scheme be expanded:

- To cover employees with a Court order where a company has been deregistered, and
- To cover temporary migrant workers.

RECOMMENDATION 22: EXPAND THE FEG SCHEME TO ALL WORKERS

WEstjustice recommends expanding the FEG Scheme to all workers. Many of our clients, including international students, are not eligible for FEG purely due to their temporary visa status. This discrimination must be addressed – all workers should be able to access FEG. Further, the scheme should cover employees with a Court order where a company has been deregistered.

CONCLUSION

It is essential that our workplace relations framework protects those most at risk of exploitation. We believe our recommendations will strengthen legal frameworks and processes to ensure that contract cleaners can access fair pay and decent work.

We thank the Committee for considering this important issue and providing us with the opportunity to provide this submission.

[48] Available at <http://www.westjustice.org.au/cms_uploads/docs/westjustice-submission-to-the-feg-scheme-consultation.pdf>,last accessed 26 July 2018.

APPENDIX ONE: COMPILATION OF WESTJUSTICE'S DRAFTING SUGGESTIONS

Proposed changes to the *Fair Work Act 2009* (Cth) (changes are tracked via underline/strikethrough)

Part One: Increased accountability in franchises, labour hire and supply chains **Division 4A – Responsibility of responsible franchisor entities and holding companies for certain contraventions**		
Type of change	**Section**	**WEstjustice's drafting suggestions**
Insert new subsection	558AA	A person who is responsible for a contravention of a civil remedy provision is taken to have contravened that provision. See Recommendation Three for background information.
Amend and insert new subsection	558A	**558A Meaning of *franchisee entity*, ~~and~~ *responsible franchisor entity* and *responsible supply chain entity*** (1) A person is a ***franchisee entity*** of a franchise if: (a) the person is a franchisee (including a subfranchisee) in relation to the franchise; and (b) the business conducted by the person under the franchise is substantially or materially associated with intellectual property relating to the franchise. (2) A person is a ***responsible franchisor entity*** for a franchisee entity of a franchise if: (a) the person is a franchisor (including a subfranchisor) in relation to the franchise; and (b) the person has ~~a significant degree of~~ influence or control over the franchisee entity's affairs. (3) A person is a responsible supply chain entity if there is a chain or series of 2 or more arrangements for the supply or production of goods or services performed by a person (the worker); and (a) the person is a party to any of the arrangements in the chain or series and has influence or control over the worker's affairs or the person who employs or engages the worker; or (b) the person is the recipient or beneficiary of the goods supplied or produced or services performed by the worker. See Recommendations One and Two for background information. *Note that minor amendments will also need to be made to 558B(3), 558C and in Part 7 – application and transitional provisions. We do not provide drafting instructions for these minor amendments.*

Insert new subsection	558B(2A)	**558B Responsibility of responsible franchisor entities, ~~and~~ holding companies and responsible supply chain entities for certain contraventions** (2A) A person contravenes this subsection if: (a) an employer contravenes a civil remedy provision referred to in subsection (7) in relation to a worker; and (b) the person is a responsible supply chain entity for the worker; and (c) either a. the responsible supply chain entity or an officer (within the meaning of the Corporations Act 2001) of the responsible supply chain entity knew or could reasonably be expected to have known that the contravention by the employer would occur; or b. at the time of the contravention by the employer, the responsible supply chain entity or an officer (within the meaning of the Corporations Act 2001) of the responsible supply chain entity knew or could reasonably be expected to have known that a contravention by the employer of the same or a similar character was likely to occur. Note: This subsection is a civil remedy provision (see this Part). *Reasonable steps to prevent a contravention of the same or a similar character* (3) A person does not contravene subsection (1), ~~or~~ (2) or (2A) if, as at the time of the contravention referred to in paragraph (1)(a), ~~or~~ (2)(b) or (2A)(a), the person had taken reasonable steps to prevent a contravention by the franchisee entity or subsidiary of the same or a similar character. (4) For the purposes of subsection (3), in determining whether a person took reasonable steps to prevent a contravention by a franchisee entity or subsidiary (the ***contravening employer***) of the same or a similar character, a court may have regard to all relevant matters, including the following: (a) the size and resources of the franchise or body corporate (as the case may be); (b) the extent to which the person had the ability to influence or control the contravening employer's conduct in relation to the contravention referred to in paragraph (1)(a) or (2)(b) or a contravention of the same or a similar character; (c) any action the person took directed towards ensuring that the contravening employer had a reasonable knowledge and understanding of the requirements under the applicable provisions referred to in subsection (7); (d) the person's arrangements (if any) for assessing the contravening employer's compliance with the applicable provisions referred to in subsection (7);

		(e) the person’s arrangements (if any) for receiving and addressing possible complaints about alleged underpayments or other alleged contraventions of this Act within: (i) the franchise; (ii) the body corporate or any subsidiary (within the meaning of the *Corporations Act 2001*) of the body corporate; or (iii) the person’s supply chain arrangements as the case may be; (f) the extent to which the person’s arrangements (whether legal or otherwise) with the contravening employer encourage or require the contravening employer to comply with this Act or any other workplace law. See Recommendation One for background information.
Insert new legislative note	558B(4)	Note: Reasonable steps that franchisor entities, holding companies and indirectly responsible entities can take to show compliance with this provision may include: ensuring that the franchise agreement or other business arrangements require all parties to comply with workplace laws, providing all parties with a copy of the FWO’s free Fair Work handbook, requiring all parties to cooperate with any audits by FWO, establishing a contact or phone number for employees to report any potential underpayment or other workplace law breaches and undertaking independent auditing. See Recommendation Four for background information.

Part One: Increased accountability for accessories		
Type of change	**Section**	**WEstjustice’s drafting suggestions**
Repeal and substitute	550	**550 Involvement in contravention treated in same way as actual contravention** (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision. Note: If a person (the ***involved person***) is taken under this subsection to have contravened a civil remedy provision, the involved person’s contravention may be a serious contravention (see subsection 557A(5A)). Serious contraventions attract higher maximum penalties (see subsection 539(2)). (2) A person is ***involved in*** a contravention of a civil remedy provision if, and only if, the person: (a) has aided, abetted, counselled or procured the contravention; or

(b) has induced the contravention, whether by threats or promises or otherwise; or

(c) has been in any way, by act or omission, directly or indirectly~~, knowingly~~ concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention.

(3) For the purposes of subsection (2), a person is concerned in a contravention if they:

(a) knew; or
(b) could reasonably be expected to have known
that the contravention, or a contravention of the same or a similar character would or was likely to occur; or

(c) became aware of a contravention after it occurred, and failed to take reasonable steps to rectify the contravention.

(4) For the purposes of subsection (3)(b) only, a person does not contravene subsection (2)(c) if, as at the time of the contravention referred to in paragraph (2)(c), the person had taken reasonable steps to prevent a contravention of the same or a similar character.

(5) For the purposes of subsection (4), in determining whether a person took reasonable steps to prevent a contravention of the same or a similar character, a court may have regard to all relevant matters, including the following:

(a) the size and resources of the person;

(b) the extent to which the person had the ability to influence or control the contravening person's conduct in relation to the contravention referred to in paragraph (2)(c) or a contravention of the same or a similar character;

(c) any action the person took directed towards ensuring that the contravening person had a reasonable knowledge and understanding of the requirements under this Act;

(d) the person's arrangements (if any) for assessing the contravening person's compliance with this Act;

(e) the person's arrangements (if any) for receiving and addressing possible complaints about alleged underpayments or other alleged contraventions of this Act

(f) the extent to which the person's arrangements (whether legal or otherwise) with the contravening person encourage or require the contravening person to comply with this Act or any other workplace law.

See Recommendation Six for background.

| Insert new section | 550A | **Primary duty of care**

(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, compliance with this Act in respect of:

(a) workers engaged, or caused to be engaged by the person; and

(b) workers whose activities in carrying out work are influenced or directed by the person,

while the workers are at work in the business or undertaking.

(2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that compliance with this Act in respect of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

(3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable:

- [insert any further specific requirements here]

Meaning of *worker*

(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.

What is reasonably practicable

What is *reasonably practicable* in ensuring compliance

In this Act, ***reasonably practicable***, in relation to a duty to ensure compliance with this Act, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring compliance, taking into account and weighing up all relevant matters including:

(a) the likelihood of the risk concerned occurring; and |

		(b) the degree of harm that might result from the risk; and (c) what the person concerned knows, or ought reasonably to know, about: (i) the risk; and (ii) ways of eliminating or minimising the risk; and (d) the availability and suitability of ways to eliminate or minimise the risk; and (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk. **Person may have more than 1 duty** A person can have more than 1 duty by virtue of being in more than 1 class of duty holder. **More than 1 person can have a duty** (1) More than 1 person can concurrently have the same duty. (2) Each duty holder must comply with that duty to the standard required by this Act even if another duty holder has the same duty. (3) If more than 1 person has a duty for the same matter, each person: (a) retains responsibility for the person's duty in relation to the matter; and (b) must discharge the person's duty to the extent to which the person has the capacity to influence and control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity. **Management of risks** A duty imposed on a person to ensure compliance with this Act requires the person: (a) to eliminate risks to compliance, so far as is reasonably practicable; and (b) if it is not reasonably practicable to eliminate risks to compliance, to minimise those risks so far as is reasonably practicable. **Duty of officers** (1) If a person conducting a business or undertaking has a duty or obligation under this Act, an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation.

		(2) The maximum penalty applicable for an offence relating to the duty of an officer under this section is the maximum penalty fixed for an officer of a person conducting a business or undertaking for that offence. (3) An officer of a person conducting a business or undertaking may be convicted or found guilty of an offence under this Act relating to a duty under this section whether or not the person conducting the business or undertaking has been convicted or found guilty of an offence under this Act relating to the duty or obligation. (5) In this section, ***due diligence*** includes taking reasonable steps: (a) to acquire and keep up-to-date knowledge of the obligations in this Act; and (b) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the risks associated with those operations; and (c) to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to compliance with this Act from work carried out as part of the conduct of the business or undertaking; and (d) to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding risks and responding in a timely way to that information; and (e) to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act; and **Examples** For the purposes of paragraph (e), the duties or obligations under this Act of a person conducting a business or undertaking may include: • ensuring compliance with notices issued under this Act; • ensuring the provision of training and instruction to workers about workplace laws. (f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e). **Duty to consult with other duty holders** If more than one person has a duty in relation to the same matter under this Act, each person with the duty must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter.

		Note further drafting will be required for this section, but these are some examples for consideration. See Recommendation Six for background.

Part One: Sham contracting		
Type of change	**Section**	**WEstjustice's drafting suggestions**
Amend existing provision	357	**357 Misrepresenting employment as independent contracting arrangement** (1) A person (the ***employer***) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor. Note: This subsection is a civil remedy provision (see Part 4-1). (2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer: (a) did not know; ~~and~~ (b) was not reckless as to whether; and (c) could not reasonably be expected to know that the contract was a contract of employment rather than a contract for services.
Insert new provision	357A	(1) Regardless of whether an individual is engaged and treated as an employee under a contract of service or an independent contractor under a contract for services, that individual is taken to be an employee (within the ordinary meaning of that expression) for the purposes of this Act. (2) Subsection (1) does not apply if it can be established that the individual was completing work for a client or customer of a business genuinely carried on by the individual. See Recommendations 8 and 9 for background information.

Part Three: Powers of the Fair Work Ombudsman		
Type of change	**Section**	**WEstjustice's drafting suggestions**
Insert new section into FW Act	557B	(1) If in an application in relation to a contravention of a civil remedy provision referred to in subsection (2), the Fair Work Ombudsman has issued an assessment notice to the employer in relation to the applicant, it is presumed that the employer owes the amounts specified in the notice to the applicant, unless the employer proves otherwise. (2) The civil remedy provisions are the following: (a) subsection 44(1) (which deals with contraventions of the National Employment Standards); (b) section 45 (which deals with contraventions of modern awards); (c) section 50 (which deals with contraventions of enterprise agreements); (d) section 280 (which deals with contraventions of workplace determinations); (e) section 293 (which deals with contraventions of national minimum wage orders); and (f) section 305 (which deals with contraventions of equal remuneration orders). See Recommendation 19 for background information.
Amend FW Act	570(2)(c)(i)	At the end of section 570(2)(c)(i) and the words 'or the FWO' after 'FWC'. See Recommendation 18 for background information.
Insert new subsection	682	1(ca) make assessments of amounts owed by employers to employees. See Recommendation 19 for background information.
Insert new subsection	717A	**717A Assessment notices** (1) This section applies if: (a) an employer has by notice been invited to attend a conference conducted by the FWO; (b) the employer unreasonably refused to participate in that conference; and (c) the FWO reasonably believes that the employer has contravened one or more of the following: (i) a provision of the National Employment Standards; (ii) a term of a modern award; (iii) a term of an enterprise agreement; (iv) a term of a workplace determination; (v) a term of a national minimum wage order; (vi) a term of an equal remuneration order.

		(2) The FWO may give the employer a notice (assessment notice) that sets out: (a) the name of the employer to whom the notice is given; (b) the name of the person in relation to whom the FWO reasonably believes the contravention has occurred; (d) brief details of the contravention; (e) the FWO's assessment of the amounts that the person referred to in paragraph (c) above is owed by the person referred to in paragraph (a) above; and (e) any other matters prescribed by the regulations. See Recommendation 19 for background information.