

Not **just** work.

Ending the exploitation of refugee
and migrant workers



WEstjustice Employment Law Project Final Report
Catherine Hemingway

WEstjustice

"Because of you, I will be powerful to help other people."

WEstjustice



I was born in war, I was raised in war, and I have fled war. But I was not born a refugee and I was not born an asylum seeker. "NO ONE WANTS TO BE A REFUGEE!" My personal story is not only mine but represents most refugees and asylum seekers who have similar stories as mine. This is what we have in common to share with all.

I left my country, Afghanistan, on my own when I was only 13 years old. I fled to Pakistan without family or friends with me. I settled in Pakistan and finished Year 12 in a high school specifically for refugees. But my personal circumstances in Pakistan forced me to leave for another country—Iran. However, having neither travel documents nor rights to stay, work or study in Iran I again was forced to go back to Afghanistan. Upon my return, I began to study at Kabul University where I was admitted to study Medicine, but it was during the Taliban regime, one of the darkest periods in our history. Because of that, I have never been able to complete my undergraduate degree. That very day—the day the Taliban stopped me and threatened me to death in front of Kabul University was the last day I saw my class fellows and friends.

My right to education was completely denied. My dream to complete higher education in my country still remains unfulfilled. I gave up on the option of education and began to work with humanitarian organisations in my country to give hope for people like myself.

It was the end of 2010, when I was once again forced to leave Afghanistan—this time, for good. I was working for an International Non-Government Organisation and later for the United Nations Development Program (UNDP) as Head of Policy Monitoring and Evaluation in Kabul. I had no other option but to leave because I was not only the victim of ethnic discrimination against Hazara, but also the unwanted 'villain' in the established cycle of corrupt governance. I was advocating for human rights, women's rights and further transparent governance in the national government. I was on TV in Kabul where I advocated for accountable governance in Afghanistan, raising an example of warlords' involvement in corruption. Yet, this turned out to be my last chance to publicly fight against them. Following that particular TV interview, I was constantly threatened to death, and had no other way but to leave my country, the only country in which I learned to walk, read, write, and speak for others for the better.

**No one
wants to be
a refugee.**

I chose a risky path because I chose to live. I left my dear country because I rejected the force of injustice. I travelled to Indonesia and then took the risk of my life by boat to Australia full of hope for the future in my eyes, but I arrived on the coast of Australia—only to discover another institutional incarceration.

It was not easy to be in an Australian detention centre for so many months, but it made me stronger as a person—to understand what it means to be an asylum seeker, what it means to be called by a boat number, and what it means to have no sense of hope for the future.

Yet, it was the 3rd November 2010, when a window of hope had opened to me. The moment I'll never forget—I was granted an Australian permanent protection visa. Entering a new country, completely new culture and lifestyle made me ponder where to start and how to shape my life. Completing higher education and promoting human rights for all has always been my first goal. As I made my way to Melbourne, I decided to study further. I believe setting goals in a new country and in a new environment is the key to success. I'll never forget the day I received an offer letter to study a Master's degree in International Development at RMIT University. It reminded me of the day I was stopped to enter the gate of Kabul University, by Taliban when my right to education was denied by Taliban. I re-gained my confidence and liberty to enjoy my basic human rights, and told myself "YES I CAN".

Afterwards, 2011 and 2012 in Melbourne were a very busy time for me, studying and working for AMES on a casual basis. Upon obtaining PR, I was an AMES client and a service receiver, but soon I became a staff member and a service provider. The first significant milestone I achieved in Melbourne was graduation from my Master's degree at RMIT University. The second milestone was achieved shortly after I graduated, when I applied for the fulltime position of Settlement Orientation Coordinator at AMES, which I continue to enjoy performing to this day.

Working in Australia, especially for a newly arrived person, is a critical challenge. In my country, securing employment was always difficult due to the lack of established employment regulations and other circumstances. In Australia, the newly arrived face employment challenges due primarily to language barriers, lack of required skills, lack of local experience and un-familiarity with new environment and laws. I believe, in order to overcome such challenges, it is vital to access the right services, to learn about employment regulations, to learn how to secure employment, how to protect your rights to employment and where to get assistance as required.

Even once the newly arrived have secured a job in a new environment, exploitation and access to legal assistance are another challenge. I believe such problems can be solved if new arrivals such as refugees and asylum seeker groups are referred to the right channels such as Community Legal Centres. For example, my friend from Afghanistan of asylum seeker refugee background here in Melbourne was significantly underpaid by his employer. But he approached Footscray Community Legal Centre (CLC) (now WEstjustice) to seek assistance and legal advice. He received appropriate legal assistance and consequently, he received his salary of around A\$ 2000. He was very happy with the outcome and cordially thanked the CLC for its great service. Now he always advises his friends going through similar situations to approach the CLC.

Currently I am working with refugees and asylum seekers, who are unfamiliar with their new rights to work in Australia, employment regulations, and accessing legal assistance. I have found that referring them to the right sources of services such as CLCs have always been a suitable, cost-effective approach that solves the very issue they're faced with.

What I share with you is my personal journey all the way from Kabul to Melbourne. As I shared all these in person, each time it made me stronger to challenge, to achieve, and to help others to identify their potential, to take advantage of their existing skills and knowledge and finally to achieve their personal and professional goals. My personal advice to my friends would be: believe in your capability, build your confidence and if you need assistance, try to knock on the right door. **NOTHING IS IMPOSSIBLE!**

Hameed Nida



Executive Summary

"Not being paid is a common problem."

THE PROBLEM OF EXPLOITATION

"Living in that hostel made me see a very different side of Australia, the dark and uncivilised side."

Employment is widely recognised as the most vital step for successful settlement in a new country. 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, while companies that do the right thing are disadvantaged. Exploitation not only damages individual workers, it also undermines the Australian workplace relations framework.

The problem of exploitation of migrant workers is well known. In the lead up to the 2016 Federal election, following the 7-Eleven wage scandal, both the Coalition and ALP made significant policy promises aimed at better protecting vulnerable workers. The Victorian Government recently held an Inquiry into the Labour Hire Industry and Insecure Work, the Senate Education and Employment References Committee has reported on temporary migrant worker exploitation, and in its recent report on workplace relations, the Productivity Commission acknowledged that migrant workers 'are more susceptible to substandard working conditions (such as being underpaid) than Australian citizens'. It is now time to act on these commitments and findings.

This report documents the working experiences of newly arrived and refugee workers in Melbourne's Western suburbs. It draws on surveys and extensive consultation with newly arrived and refugee workers, community leaders and staff at community organisations and agencies; as well as data and stories gathered through our pilot Employment Law Service and community education program. The report provides evidence-based recommendations for legal and policy reform. Recommendations are grouped into ten steps that stakeholders can take to eliminate exploitation. Many of our recommendations align with Federal Government policy and the recommendations of the Productivity Commission, Senate Education and Employment References Committee and Ethnic Communities Council of Victoria. The report is targeted at State and Federal governments, policy makers, regulators, commissions, courts, agencies and community organisations. We have strived to ensure that migrant voices are heard in this report and hope that they are now heard by others and acted upon to stop exploitation and benefit all Australians.



Community leaders, WEstjustice Train the Trainer Program.



TEN STEPS TO STOP EXPLOITATION

The reasons for exploitation are multi-faceted and include: marginalisation of the voices of migrant workers; limited access to decent work; low awareness of workplace rights and services; lack of effective access to mainstream services; absence of targeted community services; and the problem of ineffective laws and processes. The 10 steps address each of these problems in turn.

"Most people who I know they lose their jobs just because they're a refugee background or they don't speak English fluent and be underestimated for their work experience."

—Community leader

The exploitation of newly arrived and refugee workers in Victoria is widespread and current systems are failing to stop the problem. Targeted responses are urgently needed and should be designed and delivered with the involvement of target communities (page 49).

Over the past three years, WEstjustice has witnessed extensive abuse across numerous industries including food processing, hospitality, cleaning, construction, distribution, security and care work. We have seen disturbing cases of underpayment and non-payment of wages, including two workers paid one salary between them. Migrant workers also experience discrimination, frequently lose their jobs, and are routinely denied basic entitlements including superannuation. They experience bullying, are forced into sham contracts and work in unsafe jobs with high injury rates.

"Community members cannot get secure jobs. They accept any jobs they are offered."

—Community leader

It is more difficult for refugees and newly arrived migrants to find work. Reasons include discrimination, lack of Australian experience and failure to recognise qualifications. Once employment is secured, many workers are too afraid to challenge exploitative practices. To reduce exploitation, it must be easier to find and retain decent employment. State and Federal Governments should investigate and implement incentives to employ newly arrived and refugee workers, including tax concessions, affirmative action, an employer education campaign and employment and procurement policies (page 93).

"Because of not understanding employment law or their rights at work, they don't get paid properly... 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."

—Community leader

Newly arrived and refugee workers generally understand little or nothing about Australian employment laws and services. Targeted, face-to-face education programs enable workers to understand and enforce their rights by raising awareness and building connections between communities and services. Programs must be provided for community members, community leaders (Train the Trainer) and agency staff working with newly arrived communities. State and Federal Governments should establish a fund to provide these targeted education programs (page 101).

"Many in my community do not contact agencies. They are afraid, because many have had bad experiences with people in authority back home."

—Community leader

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. This includes dedicated staff, intake checklists, providing support to complete forms, outreach, education, and proactive compliance. Regulators must have sufficient funding and powers to address non-compliance and promote systemic reform (page 125).

"I knew I was right and should bring my case. People told me not to. My boss is very powerful. At times I was scared, I was not sure. But you stood beside me and so I kept going."

—WEstjustice client

There is significant unmet need for legal assistance, and often 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. A community-based 'one-stop-shop' hub can assist vulnerable workers to navigate the system and enforce their rights by: delivering targeted education; providing legal assistance; and liaising with government agencies, regulators and policy makers to tackle systemic problems. State and Federal Governments should establish a dedicated fund for community-based employment law hubs for migrant workers (page 135).

6

Improved laws and processes to stop wage theft

“Because of you, I will be powerful to help other people.”

—WEstjustice client

Underpayment of wages and/or entitlements is the single-most common problem that our clients present with. However, unnecessary barriers are preventing workers from enforcing meritorious wage claims. If employers fail to keep employee records as required by law, they should have to disprove an employee’s wage claim. Otherwise, employers are rewarded for breaking the law. To resolve claims quickly and avoid court, the Fair Work Ombudsman should have increased powers, including the power to determine claims. The Fair Entitlements Guarantee should be expanded or a wages insurance scheme introduced, along with measures to limit phoenix activity and unscrupulous jobactive provider behaviour (page 149).

7

Increased accountability in labour hire, supply chains and franchises

“The farm bus picked up the Cherry Tomato picking backpackers on the way back. The poor girls worked all day non-stop but they were only told that they earn 25~40 bucks for 9.5 hours work. Sounds terrible but the worse thing happened after that was we never got paid at all.”

—WEstjustice client

Newly arrived and refugee workers are frequently exploited in labour hire arrangements, by franchises and at the bottom of complex supply chains. Ways of working have changed, and our law has not kept up. Currently, big businesses benefit from the labour of newly arrived and refugee workers, but cannot be held accountable for unlawful conduct. The accessorial liability provisions of the Fair Work Act are not sufficient. To promote systemic compliance, laws must be amended to attribute greater vertical responsibility. This includes a labour hire licensing scheme and legislating for greater lead firm and franchisor accountability (page 165).

8

Laws and processes to eradicate sham contracting

“Clients don’t know their rights and what they should be paid. They are taking jobs and using ABNs without knowing what that means.”

—Community worker

Migrants and refugees 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. WEstjustice has seen sham contracting in numerous industries including construction, cleaning and administration work.

To stop sham contracting, a statutory definition should be introduced that presumes workers are employees. The incentive to engage in sham contracting can be removed by amending the Fair Work Act’s ‘recklessness/lack of knowledge defence’ and placing an obligation on employers to ensure they classify workers appropriately. 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 (page 187).

9

Reforms to stop discrimination, unfair and unsafe work

“One of my friends lost his fingers in meat factory few years ago. The incident happen due to poor workplace safety, and no proper induction/training at workplace.”

—Community member

Refugee and migrant workers often suffer significant physical, financial and emotional harm from discrimination, unsafe work and unfair dismissals. Law and policy reform is required, including:

- increasing VEOHRC/AHRC powers and resources to investigate and enforce breaches of anti-discrimination and unfair dismissal law;
- broader remedies; and
- fairer time limits (page 197).

10

Strategic measures to protect vulnerable sub-groups

“It means a world to know even though I cannot be there, I feel supported, and I am grateful for your help and continuous following up with my case.”

—WEstjustice client*

Temporary migrant workers, women, young people and students face additional challenges that must be addressed to eliminate exploitation. Reforms include: amending the Fair Work Act to state that it applies to all workers; creating a clear path to permanent residency; ensuring workers are not sent home before valid legal proceedings are concluded; and limiting visa cancellation to serious breaches of visa conditions to remove workers’ fear of being forced to leave Australia if they report exploitation (page 224). Measures for women (page 218) and young people (page 234) include outreach programs and targeted international student services at universities. Private Registered Training Organisations (page 230) must be more accountable. A Training Ombudsman is needed. Finally, further research is required—particularly for high risk industries, rural Victoria, the gig economy and young people (page 240).

* WEstjustice client who worked on a 457 visa and was unfairly dismissed. Because client was dismissed his visa was cancelled and he was sent home before legal proceedings finished.

THE EVIDENCE

WEstjustice is a community organisation that provides free legal assistance and financial counselling for the benefit of people who live, work or study in the City of Maribyrnong, Wyndham or Hobsons Bay, in Melbourne's Western Suburbs. We provide a range of legal services including legal information, advice and casework, duty lawyer services, community legal education, law reform, advocacy and community projects. The WEstjustice Employment Law Project has explored employment experiences and legal processes by:

Face-to-face consultation: we met with 39 individuals or groups from settlement agencies, community legal centres, Victoria Legal Aid, law firms, unions, universities, government agencies and other community organisations, as well as attending numerous network meetings.

Surveys: we received 105 surveys—33 from AMES Community Guides, seven from community workers and 65 from members of newly arrived and refugee communities.

Employment Law Service (ELS): WEstjustice has provided employment law advice and/or representation to over 200 clients from 30 different countries. Clients were mostly of refugee background, but also included international students, asylum seekers and subclass 457/working holiday visa holders. 77% of clients spoke a language other than English at home. 60% of our clients had lived in Australia for less than five years. Qualitative and quantitative data was collected throughout. As at September 2016, the ELS had successfully recovered or obtained orders for over \$120,000 in unpaid entitlements and over \$125,000 in compensation for unlawful termination. The ELS had also helped clients access WorkCover, keep their jobs and/or increase hours of work.

Community Education Program: As at September 2016, WEstjustice has delivered over 60 CLE presentations to over 600 community members. We also delivered a 10-day Train the Trainer program with community leaders and presented sessions for agency staff working with newly arrived communities. Evaluation and findings of each program are detailed in the report.

"ELS has successfully recovered or obtained orders for over \$120,000 in unpaid entitlements and over \$125,000 in compensation for unlawful termination."

**"We thank you
for your help...
Even just knowing
that we have your
support has given
us the courage to
pursue the matter."**

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RUSSELL STREET GATES
THESE GATES
WERE THE ENTRANCE TO THE
SUNSHINE HARVESTER WORKS
THE LARGEST FACTORY IN
AUSTRALIA AT THE TIME.
THEY WERE MADE IN 1922 BY
CHARLIE PIPPETT, A BLACKSMITH
EMPLOYED BY THE FIRM
PLAQUE RE-ERECTED IN 2009 BY S. & D. H. S.

Community leaders, Sunshine Harvester Factory gates, Sunshine.
Photo credit: Jessica Hogg

Recommendations

| Recommendation | Federal/State government | Regulators/Agencies/ Commissions/Courts |
|---|---|---|
| <p>ONE</p> <p>Migrant voices must be heard:</p> <p>The exploitation of newly arrived and refugee workers in Victoria is widespread. Current systems are failing to stop the abuse. Targeted responses are needed. All programs must be designed and delivered with the involvement of target communities (page 49).</p> | <p>Recognise that the exploitation of newly arrived and refugee workers in Victoria is widespread and that current systems are failing to stop the abuse.</p> <p>Recognising the impact that such exploitation has on all workers, urgently take steps to assist workers who have experienced exploitation and prevent further exploitation occurring in the future.</p> <p>Recognise the need for targeted services for vulnerable communities.</p> <p>All programs must be designed and delivered with the involvement of target communities.</p> | <p>Recognise that the exploitation of newly arrived and refugee workers in Victoria is widespread and that current systems are failing to stop the abuse.</p> <p>Recognising the impact that such exploitation has on all workers, urgently take steps to assist workers who have experienced exploitation and prevent further exploitation occurring in the future.</p> <p>Recognise the need for targeted services for vulnerable communities.</p> <p>All programs must be designed and delivered with the involvement of target communities.</p> |
| <p>TWO</p> <p>Diversity measures:</p> <p>Diversity must be increased in Australian workplaces. To reduce exploitation, measures must be introduced to ensure that newly arrived and refugee workers can find and retain sustainable employment (page 93).</p> | <p>Investigate and implement incentives to employ newly arrived and refugee workers, including:</p> <ul style="list-style-type: none"> • tax concessions for companies that meet diversity targets; • quotas or other affirmative action measures including a positive duty to recruit a diverse workforce; • requiring businesses to collect data and report on the diversity of their workplace; • assisting workers with qualifications to have qualifications recognised; • amending Government employment and procurement policies to set minimum standards for diversity; • targeted employment programs to provide training and ongoing support for newly arrived and refugee workers; and • a large-scale education campaign to raise awareness of the business case for diversity and inclusion. <p>Adopt a Secure Jobs Code to ensure that procurement policies encourage secure, just employment. Procurement policies should also set minimum diversity standards.</p> | <p>Amend employment and procurement policies to set minimum standards for diversity.</p> |

| Recommendation | Federal/State government | Regulators/Agencies/ Commissions/Courts |
|--|---|--|
| <p>THREE</p> <p>Targeted education:</p> <p>Newly arrived and refugee workers require targeted, face-to-face education programs to understand and enforce their rights at work. Programs must be provided for community members, community leaders (train the trainer) and staff working with newly arrived communities (page 101).</p> | <p>Should establish a fund to provide targeted education programs for vulnerable workers. Such programs should include:</p> <ol style="list-style-type: none"> 1. direct education programs for community members; 2. train the trainer programs for community leaders; 3. education programs for community workers in key organisations working with newly arrived communities; and 4. other programs delivered in accordance with best practice education approaches (for example online campaigns and updates to curriculum to include workplace rights training). | <p>Mainstream agencies should develop their own targeted resources and programs, but also administer funding for community organisations to distribute those resources and design and deliver essential face-to-face information sessions that align with local community needs.</p> |

| Recommendation | Federal/State government | Regulators/Agencies/ Commissions/Courts |
|---|---|--|
| <p>FOUR</p> <p>Active and accessible agencies:</p> <p>Migrant workers need better access to agencies and legal processes. Agencies and commissions must take further steps to ensure they are more accessible and responsive to newly arrived and refugee workers. Regulators must have sufficient funding and powers to address non-compliance and promote systemic reform (page 125).</p> <p>SEE ALSO: Wages and entitlements (step 6) and discrimination (step 9) sections.</p> | <p>State and Federal Governments should ensure that Federal and State based agencies take further steps to ensure that they are more accessible and responsive to newly arrived and refugee workers.</p> <p>Recognising that increasing accessibility will require increased time and contact with communities, agencies should be given additional resources to meet unmet need.</p> | <p>Agencies should develop cultural responsiveness frameworks to ensure newly arrived and refugee clients can access services.</p> <p>Such frameworks should:</p> <ul style="list-style-type: none"> • 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; • employ dedicated staff with 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 | Federal/State government | Regulators/Agencies/ Commissions/Courts |
|--|---|---|
| <p>FIVE</p> <p>Community-based employment law services:</p> <p>Newly arrived migrant and refugee workers require targeted community-based assistance to enforce their rights. Given the complex, multi-jurisdictional nature of the workplace relations framework, community-based 'one-stop-shop' hubs should be established to assist vulnerable workers to navigate the system and enforce their rights (page 137).</p> | <p>Establish a dedicated fund to establish community-based employment law hubs for migrant workers.</p> <p>The hubs would deliver three components:</p> <ol style="list-style-type: none"> 1. coordination and delivery of an employment law service to provide legal advice and assistance to newly arrived and refugee workers who have a problem at work, and facilitating referrals to mainstream agencies where appropriate; 2. coordination and delivery of Community Legal Education (CLE) programmes; and 3. pursuing strategic policy and law reform objectives arising out of casework and CLE programs, including liaising with government agencies, regulators and policy makers to tackle systemic problems of migrant worker exploitation. <p>The fund should provide long-term, recurrent funding to enable hubs to build relationships with communities and agencies over time.</p> | <p>FWO should allocate resources within the Community Engagement Grants Program (or other program) to fund employment law hubs for newly arrived and refugee workers. Such hubs could operate similarly to the Consumer Affairs Victoria (CAV) Specialist Services Program.</p> |

| Recommendation | Federal/State government | Regulators/Agencies/ Commissions/Courts |
|---|---|---|
| <p>SIX</p> <p>Improved laws and processes to stop wage theft (page 149).</p> | <p>The <i>Fair Work Act 2009</i> (Cth) (FW Act) should be amended such that if an employer fails to make or keep employment records, the onus falls upon them to disprove any wages claim brought by an employee. Further, the penalties for failure to keep or provide employee records should be increased.</p> <p>Expand Fair Work Ombudsman (FWO) enforcement powers and capacity, in particular:</p> <ul style="list-style-type: none"> to enable the FWO to assist all employees with meritorious claims, regardless of claim size; to enable the FWO to compel parties to attend mediation; to enable the FWO to make binding determinations; to enable the FWO to undertake stricter enforcement of existing statutory requirements to provide Employee Records and issue penalties. <p>A wages insurance scheme should be established (or the Fair Entitlements Guarantee (FEG) scheme expanded) to provide compensation to workers with meritorious claims who are unable to obtain back payment from their employers.</p> <p>Expand FEG to cover employees with a Court order where a company has been deregistered. Also expand FEG to temporary migrant workers.</p> <p>Measures must be taken to limit phoenix activity, including the introduction of director identity numbers and further information being required during the company registration process.</p> | <p>FWO should develop a pay calculations tool that calculates the entire amount owed to a client, rather than just providing the hourly rate.</p> <p>FWO should play a more active role in assisting with the detection and enforcement of unpaid superannuation.</p> <p>Jobactive providers must be required to have all wage subsidy agreements independently reviewed to ensure compliance with minimum entitlements.</p> <p>Jobactive provider contracts must require each provider to have a designated support worker for clients who have not been paid properly. That worker must assist clients to pursue underpayments claims, report unscrupulous behaviour to FWO and ensure that no further job seekers are referred to that employer until the employer can demonstrate they have taken steps to ensure compliance.</p> |

| Recommendation | Federal/State government |
|--|--|
| <p>SEVEN</p> <p>Increased accountability in labour hire, supply chains and franchises (page 165).</p> | <p>Undertake a review of fractured forms of employment (labour hire, supply chain, franchises, sham contracting) with a view to amending the FW Act to incorporate the concept of joint employment and/or vicarious liability. Such amendments should ensure that all who receive the benefits of being an "employer" are also required to comply with FW Act provisions relating to underpayments and termination.</p> <p>Amend the FW Act to introduce a concept of joint employment. Amendments could be achieved by:</p> <ol style="list-style-type: none"> adopting a definition of "employer" as posited by Thai or Dowling (preferred option); adopting the notion of vicarious liability as found in subsections 109 and 110 of the Equal Opportunity Act with limited exceptions (preferred option); incorporating an equivalent provision to section 21 of the Equal Opportunity Act; or at a minimum, the general protections provisions should be expanded to cover workers in labour hire relationships. <p>Introduce a licensing scheme for labour hire providers. Such a scheme should contain the following features:</p> <ul style="list-style-type: none"> payment of a bond and annual license fee to the Government to operate a labour hire company in Victoria; threshold capital requirement to operate a labour hire company in Victoria; core requirements for license holders and related parties, including a fit and proper person test, ongoing minimum capital requirements, reporting obligations and importantly, compliance with workplace laws; dedicated and well-resourced compliance unit; third parties including unions, individuals and community organisations have standing to bring actions for non-compliance. Such actions should be able to be taken in a low-cost forum such as the Victorian Civil and Administrative Tribunal, or a dedicated specialist tribunal; and mandatory workplace rights and entitlements training. <p>Amend the FW Act such that franchisors can be held accountable for breaches by franchisees in respect of underpayments and unlawful termination of employment.</p> <p>Expand outworker protections under the FW Act (and relevant state laws) to other industries such as horticulture and food, distribution, retail, hospitality, cleaning, security, construction and other industries where workers at the bottom of the supply chain are vulnerable to exploitation.</p> |

| Recommendation | Federal/State government |
|--|--|
| <p>EIGHT</p> <p>Laws and processes to eradicate sham contracting (page 187).</p> | <p>A statutory definition of employee should be introduced. It should include a presumption that a worker is an employee.</p> <p>Employers and principals should have a positive obligation to ensure they classify their workers appropriately. The recklessness/lack of knowledge defence should be abolished.</p> <p>Where principals do engage contractors, they should be required to submit a statement explaining the nature of the contracting relationship.</p> <p>More rigorous tests should apply before an ABN is given to an individual. 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.</p> |

| Recommendation | Federal/State government | Regulators/Agencies/Commissions /Courts |
|--|---|---|
| <p>NINE</p> <p>Reforms to stop discrimination, unfair and unsafe work practices:</p> <p>a. Dismissals (page 198)</p> | <p>Vulnerable workers require assistance to access unfair dismissal (UFD) and general protections (GP) processes. Recognising that the FWO does not provide assistance with UFD matters, and only limited assistance with GP applications, increased funding and resources for services which assist newly arrived and refugee communities to access FWC dispute resolution processes are required. Such assistance could be provided by employment law hubs (step 5 above).</p> <p>The limitation period for UFD and GP applications should be increased to 90 days. The exceptional circumstances that may be taken into account per subsections 366(2)(a)–(e) and 394(3)(a)–(f) of the FW Act should be broadened to require consideration of the particular circumstances of vulnerable workers. This should include a consideration of English language abilities, knowledge of legal rights and ability to access legal advice, including recognition of the barriers faced by refugee workers in particular.</p> <p>To encourage compliance with the Rules, late lodgement of an Employer Response should attract some penalty.</p> <p>Compensation for UFD should not be capped or limited to lost wages. Instead, the FW Act should be amended to ensure that remedies achieve the policy objective of preventing unfair dismissals and compensating harm. Remedies should include compensation for financial loss, hurt, humiliation and distress; remedies designed to achieve systemic reform such as training for employers; and penalties for egregious employer behaviour.</p> | |
| <p>b. Workplace injury (page 208)</p> | <p>Services must be funded to provide targeted education and assist vulnerable workers to complete Work Cover claim forms. Such assistance could be provided by employment law hubs (recommendation 5 above).</p> | <p>Targeted education is urgently required to inform workers about occupational health and safety, and their right to bring a WorkCover claim. See recommendations 3 and 4.</p> |

| Recommendation | Federal/State government | Regulators/Agencies/Commissions /Courts |
|---|--|---|
| <p>c. Discrimination and bullying (page 210)</p> | <p>Take urgent steps to reduce discrimination at work. Such steps should include:</p> <ul style="list-style-type: none"> expanding VEOHRC/AHRC powers and resources to enable the regulator to investigate and enforce breaches of the law; expanding the limited positive duties in anti-discrimination laws that require employers to take certain steps to prevent discrimination occurring; addressing the challenge of “proving” discrimination by amending the law to introduce a reverse onus of proof, similar to the general protections provisions of the FW Act. Complainants should be required to establish that they have a particular protected attribute and suffered unfavourable treatment. The employer should then be required to show that the unfavourable treatment was not because of the complainant’s attribute. This is fairer as the employer has access to its own internal records and evidence about decision making, while the employee does not; amending existing laws to require courts and tribunals to award remedies that promote systemic change; expanding existing reporting obligations to require companies to report publicly on diversity and anti-discrimination measures; and funding specialist legal services to provide free assistance to migrant workers experiencing discrimination at work as discussed in recommendation 5 above. | <p>See steps 3 and 4.</p> |
| <p>d. Sexual harassment (page 215)</p> | <p>Further research is required to establish the prevalence of sexual harassment experienced by newly arrived and refugee workers, and how to address this abuse.</p> | <p>Further research is required to establish the prevalence of sexual harassment experienced by newly arrived and refugee workers, and how to address this abuse.</p> |

| Recommendation | Federal/State government | Regulators/Agencies/Commissions /Courts |
|--|---|--|
| <p>TEN</p> <p>Targeted measures to protect vulnerable sub-groups:</p> <p>a. Women and the law (page 218)</p> | <p>In order to make education and legal services accessible to migrant and newly arrived women, agencies should be funded to deliver targeted outreach.</p> | <p>In order to make education and legal services accessible to migrant and newly arrived women, agencies should be funded to deliver targeted outreach.</p> |
| <p>b. Temporary visa holders (page 224)</p> | <p>The FW Act should be amended to state that it applies to all workers, regardless of immigration status.</p> <p>Migrant workers who have been trafficked or subjected to exploitation, should be permitted to remain in Australia for at least as long as they are pursuing valid legal action.</p> <p>Temporary migrant workers and their families should be given access to settlement services including the AMEP program.</p> <p>Workers should not face removal unless there is a serious breach of their visa conditions. Sections 116(1)(b) and 235 of the <i>Migration Act 1958</i> (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.</p> <p>All temporary migrant workers should gain access to permanent residence after they have spent eight years in Australia. Employers of 457 visa holders should be required to sponsor their employees for permanent residence after two years of employment.</p> | |
| <p>c. International students, apprentices, young people and work (page 234)</p> | <p>Further research should be undertaken to explore workplace exploitation and how best to target education and assistance for secondary school age students and apprentices.</p> | <p>Universities should fund an independent service to provide employment law advice and education to international students.</p> <p>Further research should be undertaken to explore workplace exploitation and how best to target education and assistance for secondary school age students and apprentices.</p> |

| Recommendation | Federal/State government | Regulators/Agencies/Commissions /Courts |
|--|---|---|
| <p>d. RTO and training scams (page 230)</p> | <p>The State and Federal Governments should continue to investigate and prosecute unscrupulous training organisations. Students affected should be compensated for lost time and money.</p> <p>An industry funded Training Ombudsman should be established to investigate and hear complaints made by students.</p> <p>Brokers, agents and commission-based sales should be banned.</p> <p>State and Federal governments must establish a fund for specialised employment service providers to provide targeted assistance to newly arrived and refugee jobseekers.</p> | |
| <p>e. Further research (page 240)</p> | <p>Further research into high-risk industries, jobactive provider and apprenticeship frameworks, regional Victoria, young people, the gig economy and strategic litigation opportunities is required. Funding should be provided to undertake this research.</p> | |

Glossary

| | |
|--------------------|---|
| ABN | Australian Business Number |
| AHRC | Australian Human Rights Commission |
| ALP | Australian Labor Party |
| AMEP | Adult Migrant English Program |
| CALD | Culturally and linguistically diverse |
| CLC | Community legal centre |
| CLE | Community legal education |
| ELS | WEstjustice Employment Law Service |
| FCC | Federal Circuit Court |
| FEG | Fair Entitlements Guarantee |
| FWC | Fair Work Commission |
| FWO | Fair Work Ombudsman |
| GP | General protections |
| HSSP | Humanitarian Settlement Services Program |
| Jobactive | Provides assistance to job seekers (Federal Government employment program) |
| LGA | Local Government Area |
| Project | WEstjustice Employment Law Project |
| SLPET | Settlement Language Pathways to Employment and Training |
| SRSS | Status Resolution Support Services |
| TtT Project | WEstjustice Train the Trainer Project |
| UFD | Unfair dismissal |
| VCAT | Victorian Civil and Administrative Tribunal |
| VEOHRC | Victorian Equal Opportunity and Human Rights Commission |
| VLA | Victoria Legal Aid |
| WEstjustice | Western Community Legal Centre |

Introduction

110 YEARS ON: THE HARVESTER DECISION AND WORKERS' RIGHTS IN THE WEST

The Western suburbs of Melbourne are home to a diverse range of new and emerging migrant communities. Arriving from a foreign country, many things are new—from education and health systems, to public transport, language and culture.

The Western suburbs of Melbourne are also home to the origins of Australia's minimum wage. On 8 November 1907, the Commonwealth Court of Conciliation and Arbitration considered the question of what constitutes a fair and reasonable wage. The case related to workers at the Harvester Factory in Sunshine. For the first time in Australia's history, Justice Higgins ruled that a fair wage should be determined by reference to the needs of workers, not the whim of the employer:

I cannot think of any other standard appropriate than the normal needs of the average employee, regarded as a human being living in a civilized community... I cannot think that an employer and a workman contract on an equal footing, or make a "fair" agreement as to wages, when the workman submits to work for a low wage to avoid starvation or pauperism (or something like it) for himself and his family; or that the agreement is "reasonable" if it does not carry a wage sufficient to ensure the workman food, shelter, clothing, frugal comfort, provision for evil days, etc., as well as reward for the special skill of an artisan if he is one.

The Sunshine Harvester Factory decision was historic, and marked the beginning of universal minimum employment standards in Australia. Importantly, Justice Higgins' decision is grounded in notions of a 'civilised community' and the needs of workers as human beings, not commodities.

For newly arrived communities in Australia, employment plays a vital role in successful settlement. However, as this Report will demonstrate, employment is hard to find and exploitation is rife. Over the past three years, WEstjustice has witnessed widespread abuse across numerous industries including hospitality, retail, construction, food processing and care work. We have seen disturbing cases of underpayment and non-payment of wages, including two workers paid one salary between them, and others paid as little as \$8 an hour. Many of our clients have been dismissed for asking about unpaid wages, or abused because of their race. Reform is urgently required.

The Harvester Factory gates still stand in Sunshine, and serve as an ongoing reminder to strive for a civilised community free from exploitation. This Report, and the WEstjustice Employment Law Project more broadly, strives for just that: successful employment outcomes for newly arrived and refugee workers, and diverse workplaces free from exploitation.

Sunshine Harvester Factory, 1941.
Image courtesy of Museum Victoria.

ABOUT WESTJUSTICE

Western Community Legal Centre (trading as WEstjustice) is a newly formed entity created from the amalgamation of Footscray Community Legal Centre Inc., Wyndham Legal Service Inc. and Western Suburbs Legal Service Inc.

WEstjustice is a community organisation that provides free legal assistance and financial counselling for the benefit of people who live, work or study in the City of Maribyrnong, Wyndham or Hobsons Bay, in Melbourne's Western Suburbs. We have offices in Werribee and Footscray as well as a youth legal branch in Sunshine and outreach across the West. WEstjustice provides a range of legal services including legal information, advice and casework, duty lawyer services, community legal education, law reform, advocacy and community projects.

WEstjustice has a long history of working with newly arrived communities. Over the past five years, more than 50% of our Footscray office clients spoke a language other than English as their first language. Approximately one quarter of our clients are newly arrived (having arrived in Australia in the last five years) and our refugee service in Footscray alone has seen approximately 700 clients in the past five years.

WEstjustice has developed specialty advisory services and education programs that address the particular legal and social problems that newly arrived and refugee communities encounter. For example, we have explored the experiences of newly arrived communities in relation to the courts, housing, energy and telecommunications markets in recent years.¹



Employment Law Project Preliminary Report launch, Feb 2014.

ABOUT THE EMPLOYMENT LAW PROJECT

The WEstjustice Employment Law Project (Project) seeks to improve employment outcomes for newly arrived and refugee communities in Melbourne's West.

The Project was first developed in response to unmet need identified through work with newly arrived and refugee communities in our generalist legal practice. At the time, WEstjustice did not provide employment law assistance.

The Project was designed and implemented in three stages:

Stage One (research and consultation):

A literature review, interviews, consultations and surveys were conducted in order to gain a better understanding of the working experiences of newly arrived and refugee communities in the West, available services, unmet community needs, and how WEstjustice could best address identified needs.

Stage Two (pilot programs):

Informed by Stage One, Stage Two featured the development and delivery of two pilot programs—an employment law service and community legal education (CLE) program.

Stage Three (report and advocacy):

Use of data and stories gathered throughout Stages One and Two to document working experiences, reflect on laws and legal processes, evaluate the pilot programs, prepare law reform submissions, participate in advocacy campaigns and produce this evidence-based Report.

¹ See, eg, Footscray Community Legal Centre, *Brochures/Publications* (2011) <<http://www.footscrayclc.org.au/brochures-publications/>>.

STAGE ONE: RESEARCH AND CONSULTATION

Unmet need for targeted employment law assistance was explored and documented in our preliminary report, *Employment is the heart of successful settlement: overview of preliminary findings* released in February 2014 (Preliminary Report). Based on over 100 surveys from community members and community workers, and numerous consultations and forums, the Preliminary Report documents high levels of exploitation and low levels of rights awareness among newly arrived and refugee workers in the West. The Preliminary Report found that face-to-face, targeted employment law services and community legal education programs were urgently required for refugees and recently arrived communities.²

Key findings in the Preliminary Report included that:

1. newly arrived and refugee communities have an extremely limited understanding of Australian employment laws and services;
2. it was common or somewhat common that newly arrived or refugee communities did not know where to get help if they had a problem—mainstream services are often inaccessible to newly arrived communities;
3. the impact of this lack of awareness and accessibility is that workers are exploited and cannot take action to enforce their rights;
4. face-to-face service was the preferred mode of education and legal advice; and
5. legal services and community legal education should be made accessible through targeted services.

Based on this feedback and information, we established a pilot Employment Law Service and CLE Program.

STAGE TWO: EMPLOYMENT LAW SERVICE

The WEstjustice pilot Employment Law Service (ELS) provides free employment-related legal information, advice, advocacy and referral to clients from refugee or newly arrived communities who live, work or study in the Western suburbs of Melbourne.

Designed in response to feedback gathered in Stage One of the Project, the ELS offers appointments during the day and evening. Appointments are face-to-face, with telephone or in-person interpreters available as required.

The ELS assists with legal issues that arise under employment or anti-discrimination laws including underpayment or non-payment of wages and entitlements, sham contracting, warnings, termination of employment, discrimination, bullying, sexual harassment, victimisation and workplace injury.

To date, the ELS has seen over 200 clients from 30 different countries. Clients were mostly of refugee background, but also included international students, asylum seekers, 457/working holiday visa holders and other migrant workers. The clients have come from a wide range of countries including Iran, Ethiopia, Sudan, South Sudan, Burma, Afghanistan, Eritrea, India, Pakistan, Sri Lanka, Vietnam and East Timor.

As at September 2016, the ELS had successfully recovered or obtained orders for over \$120,000 in unpaid wages and superannuation for clients. There are more cases underway. The ELS had also assisted numerous clients with claims regarding unfair termination, with over \$125,000 in compensation being recovered or ordered, as well as other outcomes that focus on assisting clients to find new work. The Centre has also helped clients keep their jobs and/or increase hours of work, by drafting letters and negotiating with employers. Many of our clients do not speak English, and would not have enforced their rights without our help.

STAGE TWO: CLE PROGRAM

To raise awareness of laws and services, and build trust with target communities, WEstjustice developed an employment law CLE program.

The program consisted of:

Information sessions for community members:

these sessions were provided upon request. We delivered sessions to a variety of formal and informal groups, including community organisations (for example at church group meetings or community meetings); English as Additional Language classes (in particular, employment-oriented programs including AMEP SLPET classes); and information sessions run by settlement agencies (for example, Rights and Responsibilities seminars or other organised programs). We have now delivered face-to-face community education to over 600 newly arrived and refugee community members.

Information sessions for community workers:

these sessions were targeted at agency staff who frequently assist newly arrived and refugee clients. The sessions sought to raise awareness of employment laws and services to enable workers to identify when their clients were experiencing an employment law issue and make appropriate referrals.

Train the trainer program: the WEstjustice Train the Trainer Program delivered a nine day training program in employment laws and services to six community leaders from newly arrived and refugee communities in Melbourne's Western Suburbs. The community leaders visited a number of key employment and anti-discrimination law agencies, including the Fair Work Ombudsman, the Fair Work Commission, the Victorian Equal Opportunity and Human Rights Commission and Victoria Legal Aid. Participants were supported to develop a community education presentation, which they delivered to their communities in a culturally appropriate and targeted way.

STAGE THREE: ADVOCACY

WEstjustice has used data, case-studies, observations and experiences gained through the pilot ELS and CLE program to produce a number of evidence-based submissions to law reform and other inquiries, including:

1. Victorian Government Inquiry into the Labour Hire Industry and Insecure Work (written submission and appearance at a hearing);
2. Productivity Commission Inquiry into the Workplace Relations Framework (three written submissions and appearance at a hearing);
3. Victorian Government Employment Programs Review (written submission);
4. Australian Human Rights Commission Supporting Working Parents: Pregnancy and Return to Work National Review (written submission and appearance at a consultation); and
5. Fair Work Commission Draft Practice Note—Fair Hearings (written comments).

We have also met with a number of stakeholders and politicians to discuss our findings. We plan to continue to expand upon our advocacy efforts with this Report, and hope that other organisations can also use our materials to affect positive change.

² Catherine (Dow) Hemingway, 'Employment is the Heart of Successful Settlement: Overview of Preliminary Findings' (Preliminary Report, Footscray Community Legal Centre, February 2014) <http://www.footscrayclc.org.au/images/stories/Footscray_CLC_Employment_Law_Project_-_Preliminary_Report.pdf>.

FUNDING

Very few generalist community legal centres provide employment law assistance. This is not due to a lack of need. In fact, employment assistance has been frequently recognised as a significant area of unmet legal need.³ However, employment law is a highly specialised area of law with short limitation periods, so generalist centres are not often able to provide assistance. Unfortunately, there is very little funding available for employment law services and existing services are struggling to meet demand with limited resources. In Victoria, Victoria Legal Aid (VLA) does not provide assistance for employment matters.⁴ Apart from the ELS, there are no other targeted employment law services for newly arrived communities in Victoria.

The Project has been managed by Catherine Hemingway, who worked 0.9 EFT for the majority of the Project. Catherine's position was funded internally by WEstjustice generalist funds. Funding from the Helen Macpherson Smith Trust and Victorian Women's Trust enabled WEstjustice to engage a Women's Outreach and Training Solicitor, Genevieve Auld, for six months. This funding also enabled us to engage six community leaders for the Train the Trainer Program. Recently, small grants from the National Union of Workers and AMES, along with a one-off Victorian Government grant and funding from the Melbourne Social Equity Institute, enabled WEstjustice to employ a full time Employment Project Solicitor for 12 months, Gabrielle Watson-Munro. WEstjustice gratefully acknowledges our funders, without whom the Project could not have functioned as it has. The Project currently has no ongoing funding. Without further funding, the pilot services will not continue.

METHODOLOGY

In Stage One of the Project, we sought to learn about:

1. key problems at work for newly arrived and refugee communities in the West;
2. what services are currently available; and
3. how WEstjustice (at the time Footscray Community Legal Centre) could best meet identified community needs for community education and an employment legal service.

We did this by undertaking a literature review, conducting semi-structured interviews with key stakeholders, and circulating surveys for community workers and community members. Project coordinator Catherine Hemingway met with 39 individuals or groups from settlement agencies, community legal centres, VLA, law firms, unions, universities, government agencies and other community organisations, as well as attending numerous network meetings. We received 105 surveys—33 from AMES Community Guides, seven from community workers and 65 from members of newly arrived and refugee communities. Many community member surveys were completed with the help of a bilingual assistant or case worker. Many newly arrived and refugee communities were represented, including participants from Afghanistan, Burma (including Burmese, Chin, Karen and Karenni communities), China, Ethiopia, India, Somalia, Sri Lanka, Sudan, Iran and Iraq.

Although findings from Stage One were reported in detail in our Preliminary Report, we also refer to key findings in this Report. As will be shown, Stage One findings are largely consistent with our findings from Stage Two.

In Stage Two of the Project, we implemented two pilot programs: the ELS and CLE program. For each client of the ELS, we recorded key statistical information on our intake form, including country of birth, year of arrival in Australia, visa status, employment problem(s) type(s) and employment industry. This data was entered into our client database (CLISIS). We draw on this de-identified quantitative statistical information throughout this Report. Further data, including a more detailed overview of problem type, outcomes and client feedback, was also collected in a "case summary" document throughout the Project. Where clients have signed a consent form, we have used de-identified qualitative data from the "case summary" document to prepare case-studies, client reflections and more in-depth analysis of common themes. Names and other key identifying information have been changed or removed to protect our clients.

Except where otherwise stated, statistical data about our casework service is based on information gathered in intake appointments for new clients between May 2013 and October 2015 (an 18 month period). We note that this period coincides with the opening of our service—therefore, there will be fewer appointments and outcomes recorded for this period than later periods. This is because it takes time for a service to become known in the community, and it takes time for matters to be dealt with in Court.

LIMITATIONS

This report is based on a literature review, stakeholder consultation, surveys and client data.

The findings are not drawn from a large sample size, particularly when considering particular visa types or industries. Our findings do not represent all issues or all newly arrived and refugee workers. We have attempted to be as rigorous as our resources allow, and our research is comprehensive, based locally on our observations and those of our colleagues in the community. This community partnership and relationship is the strength of the Report, as it enables us to share stories that may not otherwise be told.

³ Federation of Community Legal Centres, 'Putting the Law to Work: Meeting the Demand for Employment Law Assistance in Victoria' (Report, August 2014) <http://www.communitylaw.org.au/cb_pages/federation_reports.php>.

⁴ Apart from those involving discrimination that are eligible for assistance from the Equality Law Program.

Migrant voices must be heard

1



Community leader.

SETTLEMENT EXPERIENCE FOR NEW ARRIVALS —IMPORTANCE OF FINDING AND KEEPING WORK

IMPORTANCE OF EMPLOYMENT

Westjustice has observed widespread exploitation of newly arrived and refugee workers in the West. In this section, we consider the context and contributing factors that lead to exploitation and provide an introduction to the types of legal matters and clients that ELS has seen. This section also provides an overview of ELS outcomes, feedback and challenges.

Establishing life in a foreign country presents many challenges including new languages, new community connections and new cultural, financial, health and education systems. Many migrants have experienced violence, torture or trauma and are now separated from family members and social connections. Showing resilience and determination, community members seek to create a new life, and employment is consistently recognised as a vital step for successful settlement.⁵

When settling in a new country, sustainable employment provides financial stability⁶ as well as 'social cohesion, self-esteem, independence, the ability to gain stable housing and more broadly, a greater sense of community belonging and well-being'.⁷ As noted by the Refugee Council of Australia and many of our clients, humanitarian entrants are often extremely driven to find and keep work in order to sponsor family reunion and/or provide financial support to family members waiting in refugee camps or other locations.

Successful labour market integration of culturally and linguistically diverse (CALD) workers benefits not only migrants and refugees, but the broader community as a whole. High levels of unemployment,⁸ exploitation of newly arrived workers and an inability to enforce workplace rights means that Australia is not only missing out on required skills and human capital benefits,⁹ but also on the numerous social and economic benefits an equitable, cohesive, vibrant and multicultural workplace can bring for all workers. By ensuring all workers' rights are protected, we also eliminate exploitation as a means of obtaining competitive advantage. Companies doing the right thing will no longer suffer a competitive disadvantage because unscrupulous others are willing to take advantage of those most vulnerable.

CALD communities face significant barriers to entering the labour market and maintaining sustainable employment, for reasons set out below. However, with targeted support, many of these barriers can be overcome.

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.

⁶ Nic Price, 'Employment a path out of poverty for a Fitzroy refugee', *Melbourne Leader* (Melbourne), 11 October 2013.

⁷ Federation of Ethnic Communities' Councils of Australia, 'Latest unemployment figures hide harsh realities for CALD workers' (Media Release, 16 August 2013). See also Deng Tor Deng and Fodia Andreou, 'Settlement Needs of Newly Arrived Migrant and Refugee Men: Brimbank & Maribyrnong', Migrant Resource Centre North West Region, March 2006.

⁸ Val Colic-Peisker and Farida Tilbury, 'Refugees and Employment: The Effect of Visible Difference on Discrimination' (Final Report, Centre for Social and Community Research Murdoch University, January 2007) 1.

⁹ See, eg, Graeme Hugo, 'Economic, Social and Civic Contributions of First and Second Generation Humanitarian Entrants' (Final Report to Department of Immigration and Citizenship, May 2011) xxiv - xxv <<http://www.border.gov.au/ReportsandPublications/Documents/research/economic-social-civic-contributions-about-the-research2011.pdf>>.

BARRIERS TO EMPLOYMENT

Australians of refugee background are more likely to experience difficulties obtaining employment. Once employed, they are more likely to be engaged in low income, precarious forms of work, and are particularly vulnerable to experiencing discrimination.¹⁰ The high levels of unemployment and underemployment amongst migrants has been recognised in academic research¹¹ as well as by organisations working with migrant communities.¹²

Our clients report that finding a job is extremely challenging. In 2011, the Australian Bureau of Statistics found that 9.1% of Humanitarian migrants in the labour force (actively looking and immediately available for work) were unemployed.¹³

This is significantly higher than the general unemployment rate of 4.9% for the same period.¹⁴

In our Preliminary Report, we examined the factors contributing to high levels of exploitation experienced by newly arrived and refugee workers.¹⁵ Many of these factors also represent barriers to gaining access to sustainable employment.

These findings are mirrored in our client data, discussed in further detail below.

Factors include:¹⁶

Communication and language barriers: in our community survey, language/communication difficulties were identified as the most common workplace problem from the list provided. 64% of survey respondents said that language/communication difficulties were common or somewhat common, or that they, or someone they knew, had experienced this. We have seen many clients whose employment has been terminated or threatened as a result of a misunderstanding. For example, one client was dismissed because he failed to provide the correct medical certificate after an extended period of unpaid leave—his employer had requested further information about his medical condition, but he did not understand the request and failed to provide the requisite information (which he had in his possession and would have willingly shared had he understood the request).

Low understanding of rights and services: both the literature and our findings strongly indicate that newly arrived and refugee communities have an extremely limited understanding of Australian employment laws and services. The impact of this lack of awareness is that workers are exploited and cannot take action to have their rights enforced, leading to unsustainable employment outcomes. Nearly two-thirds of survey respondents reported that it was common or somewhat common that newly arrived or refugee communities do not understand Australian employment laws. Similarly, when community workers and AMES Community Guides were asked how well newly arrived and refugee communities understood Australian employment laws, 88% said they do not understand at all or understand a little:

"Many have no idea of what rights and responsibilities they have—but would come and ask us for help—some continue to do so years later."¹⁷

Discrimination in recruitment: discrimination in recruitment has been recognised as a major barrier preventing migrants and refugees from finding work. Many participants in our preliminary research reported discrimination during recruitment. One community worker explained that for many young people from emerging communities it is difficult to get over the first hurdle of an online application, which often requires detailed written responses to questions such as 'your dream for the future', even if the job is for low-skilled industries. Another community worker told us about a young African man studying at university and looking for part time work. Although he was happy to do any sort of hospitality job, he was repeatedly told that his application was unsuccessful prior to the interview stage. When he did get an interview, he would get there and be told there was no job for him (after they saw him).

Lack of recognition of qualifications: many participants said it was difficult to have qualifications and experience recognised in Australia. Studies have shown that despite professional qualifications, many migrants and refugees are employed below their level of expertise:¹⁸

"I was a painter in Somalia, but have no Australian qualification and cannot find work."¹⁹

Cultural barriers, lack of networks and no Australian experience: this was reported as a barrier to finding work, but also a contributing factor to exploitation of newly arrived workers. Without local experience or a reference, many workers find it immensely challenging to find work. As discussed below, cultural barriers also prevent some workers from accessing mainstream services:

"Most people who I know they lose their jobs just because they're a refugee background or they don't speak English fluent and be underestimated for their experience work."²⁰

Low income, precarious work: many newly arrived and refugee workers are engaged in precarious work, defined as 'work for remuneration characterised by uncertainty, low income, and limited social benefits and statutory entitlements'.²¹ In 2011, 72% of Humanitarian stream migrants aged 15 and over had weekly incomes of less than \$600.²² Survey respondents and interviewees for the Preliminary Report reported that newly arrived and refugee communities worked in a variety of low-paid, low-skilled or dangerous jobs including warehousing, factories, hospitality, meat processing, family day care, painting/tiling, taxi driving and cleaning. The work was characterised by casualisation and insecurity. There were also some professional and managerial positions, although these workers were in the minority.

"Someone worked on casual basis due to a small language barrier got fired from job. As he was casual no supports were available for him."²³

¹⁰ Ibid, xxiv, 102–103, 138; Colic-Peisker, above n 8, 14; Brigid Trenerry, Hayley Franklin and Yin Paradies, 'Preventing Race-Based Discrimination and Supporting Cultural Diversity in the Workplace—An evidence review (Full Report, VicHealth, March 2012); Farida Fozdar and Silvia Torezani, 'Discrimination and Well-being: Perceptions of Refugees in Western Australia' (2008) 42 *International Migration Review* 30, 40; 'Lives on Hold: Unlocking the Potential of Australia's Workforce' (Report, ACTU Independent Inquiry into Insecure Work, 2012) 23.

¹¹ See, eg, Colic-Peisker, above n 8, 1.

¹² Dow, above n 2.

¹³ Australian Bureau Statistics, *Understanding Migrant Outcomes—Enhancing Value of Census Data, Australia, 2011* (5 November 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3417.0>Main%20Features22011?opendocument&tabname=Summary&prodno=3417.0&issue=2011&num=&view=>>>.

¹⁴ Australian Bureau of Statistics, *Australia's unemployment rate steady at 4.9 per cent in June 2011* (7 July 2011) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/6202.0Media%20Release!Jun%202011?opendocument&tabname=Summary&prodno=6202.0&issue=Jun%202011&num=&view=>>>.

¹⁵ See also, Settlement Council of Australia, 'Addressing Barriers to Employment' (Discussion Paper, July 2012).

¹⁶ Dow, above n 2, 13-18.

¹⁷ Survey, community worker, Dow, above n 2.

¹⁸ See, eg, Ethnic Communities Council of Victoria, 'Qualified but not recognised' (Discussion Paper, 2014) <http://www.eccv.org.au/library/ECCV_Discussion_Paper_-_Qualified_but_not_Recognised_2015_Final.pdf>.

¹⁹ Survey, community member, Dow, above n 2.

²⁰ Survey, AMES Community Guide, Dow, above n 2.

²¹ Leah Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford University Press, 2010) 3.

²² Australian Bureau Statistics, above n 13.

²³ Survey, Dow, above n 2.

Temporary migrant worker status: several reports indicate that temporary migrant workers (including 457 visa holders,²⁴ international students²⁵ and working holiday visa holders) are particularly vulnerable to exploitation due to the nature of their visa, dependence on employers and lack of knowledge of rights and responsibilities.²⁶ This was also raised in some face-to-face consultations. We have certainly witnessed significant exploitation of temporary migrant workers through our casework, with many clients enduring horrific exploitation due to fear of being forced to leave Australia, desperation to keep employment and family responsibilities. A number of case studies below provide powerful examples of what we have observed.

WEStjustice has observed that our clients recognise the value of work in integrating and contributing to Australian society. Our clients want to work, but often find themselves employed in situations that are below minimum legal working conditions.

Given that it is so difficult to find a job, once work is secured, many workers are too afraid or simply unable to challenge exploitative practices. Many workers provide financial support for their extended families, who may be living in poverty back home, or stranded in refugee camps. We frequently observed clients who felt immense responsibility for their families. The impact of job loss for newly arrived community members is extreme—with limited support networks and low prospects of re-employment, many clients have experienced significant health and wellbeing costs as a result of unemployment, including psychological issues and homelessness.

As a result, employers wield immense power and control over their workers, many of whom are desperate to retain employment of any kind, at any cost.

24 According to the Australian Manufacturing Workers Union, hundreds of foreign workers have been exploited under the 457 visa system—see 'Union says hundreds of workers have been taken advantage of by 457 visa holders', *ABC News* (online), 6 June 2013 <<http://www.abc.net.au/news/2013-06-06/hundreds-of-workers-taken-advantage-of-by-457-visa-holders/4736740>>. Other unions have also reported abuse of 457 visa holders, including a number of workers told to return home after complaining about their rates of pay—see 'CFMEU says Hungarian workers on 457 visas told to go home after complaining about pay rates', *ABC News* (online) 10 November 2013 <<http://www.abc.net.au/news/2013-11-10/457-workers-sent-home-after-pay-complaint-says-cfmeu/5081410>>. See also Selvaraj Velayutham, 'Precarious Experiences of Indians in Australia on 457 Temporary Visas', (2013) 24 *Economic and Labour Relations Review* 340, cited in Michael Janda, 'Australia's 457 'King of Visas' is a Road to Serfdom for Many Migrants', *ABC News* (online), 6 Sep 2013 <<http://www.abc.net.au/news/2013-09-06/27king-of-visas27-a-road-to-serfdom-for-many/4941980>>; Joo-Cheong Tham and Iain Campbell, 'Temporary Migrant Labour in Australia: the 457 Visa Scheme and Challenges for Labour Regulation' (Working Paper No 50, Centre for Employment and Labour Relations Law, University of Melbourne, 2011).

25 Shanthi Robertson writes that international students are technically 'legal but temporary, that is, resident aliens'. But due to the nature of their visas 'they often teeter on the edges of legality, with minor breaches in visa conditions, such as non-completion of courses or working over twenty hours a week, able to rapidly render them illegal and open to deportation'—see Shanti Robertson, 'Cash cows, backdoor migrants, or activist citizens? International students, citizenship and rights in Australia' (2011) 34 *Ethnic and Racial Studies* 2192. United Voice has undertaken research in relation to the exploitation of international students in the office cleaning industry, reporting that there is a practice of exploiting international students, including underpayments and failure to pay entitlements: 'A Dirty Business: The Exploitation of International Students in Melbourne's Office Cleaning Industry' (Report, United Voice, 2013) 3. See also 'Better Jobs 4 Better Chicken: Poultry Industry' (Discussion Paper, National Union of Workers, 2011) 2.

26 Velayutham, above n 24.

EXPLOITATION IS WIDESPREAD

Newly arrived communities experience high levels of exploitation in the workplace. Such exploitation is documented in our Preliminary Report,²⁷ demonstrated by research²⁸, and has been observed in our legal service. As the Productivity Commission recognised in its recent review of the workplace relations system, migrant workers 'are more susceptible to substandard working conditions (such as being underpaid) than Australian citizens', including 'lower wages, reduced entitlements and fewer protections than required by the Fair Work Act 2009 (Cth)'.²⁹ As our preliminary and casework findings show, workers experience significant discrimination, frequently lose their jobs, and are routinely underpaid and denied basic entitlements. They also experience bullying, are forced into sham contracts and work in unsafe jobs with high injury rates. In this section, we provide an overview of the client profile and legal issues seen in the ELS. Further details about specific legal issues and measures for reform are provided later in the report.

In a recent consultation with six community leaders from different new and emerging communities in Melbourne's West, participants were asked about employment problems that members of their community have experienced in Australia, and whether members of their community would find it easy to seek assistance with employment problems. Responses included the following:³⁰

"Not being paid is a common problem. People are scared of losing their jobs so they don't complain."

"Underpayment is a problem. There is often an English language barrier so people look for bosses who speak their language but they are often ripped off by their own community."

"Bullying and harassment—men don't want to admit they are being bullied, don't know who to turn to, if they say anything they will lose their job."

27 For an in-depth analysis and comments from community members and agency staff about types and frequency, see Dow, above n 2.

28 See, eg, Michael Janda, 'Australia's 457 'King of Visas' is a Road to Serfdom for Many Migrants', *ABC News* (online), 6 Sep 2013 <<http://www.abc.net.au/news/2013-09-06/27king-of-visas27-a-road-to-serfdom-for-many/4941980>>.

29 Productivity Commission, *Workplace Relations Framework*, Inquiry Report No 76 Volume 2 (30 November 2015), 915-916 <<http://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume2.pdf>>.

30 WEStjustice focus group with community leaders from Burma (Myanmar), Sudan, DRC Congo, India and Iran, February 2015.

"Factory work is the common type of job, and workplace injuries are common so often they can't keep their job long term."

"Even if they were a professional worker in their own country they are working in menial jobs in Australia, and they don't understand what they are meant to be doing or their rights so this compromises their safety."

"Unfair dismissal—a community member told me his story. In a food processing factory the night shift have to clean the machines. If they clean it within 5 hours they can have rest time. However, the boss asks them to do other jobs at the same time which means they don't have time to clean the machine properly, and they are then sacked when it is found to be not cleaned properly."

"Refugees have the language barrier that leads to misunderstanding, and if they don't have family they are isolated. They don't know about the assistance that is available so they continue to be isolated."

"They cannot look at websites as they don't speak English, and cannot write or read in their own language."

"Many in my community do not contact agencies. They are afraid, because many have had bad experiences with people in authority back home."

Several themes emerged from the consultation, including:

- 1. lack of rights awareness;**
- 2. barriers to connecting with information and services,** including fear (of authority and job loss) and limited language/literacy skills; and
- 3. high levels of exploitation** in a number of legal areas and across a number of industries.

These themes mirror those contained in the Preliminary Report, and once again emerge as key findings from our analysis of client data, as discussed below.

CLIENT PROFILE AND NATURE OF LEGAL ISSUES

NEWLY ARRIVED COMMUNITIES IN THE WESTERN SUBURBS OF MELBOURNE

Maribyrnong, Wyndham and Brimbank Councils have a high proportion of recently arrived³¹ and refugee communities living in their areas with 28.6%,³² 31%³³ and 19.6%³⁴ of their populations migrating to Australia between 2006 and 2011.³⁵ Recently arrived and/or refugee communities are highly concentrated in the suburbs of Footscray,³⁶ River Ward,³⁷ West Footscray,³⁸ Albion,³⁹ Sunshine,⁴⁰ Sydenham,⁴¹ Point Cook,⁴² Tarneit⁴³ and Truganina.⁴⁴

Demographic information on offshore humanitarian resettlement⁴⁵ in Australia from 2012–13⁴⁶ indicates a focus on resettlement of refugees born in Iraq, Afghanistan, Burma (Myanmar), Bhutan, the Democratic Republic of Congo, Iran, Somalia, Eritrea and Ethiopia.⁴⁷

In the Maribyrnong, Wyndham and Brimbank Council areas, census data⁴⁸ indicates there are communities originating from Sudan,⁴⁹ Burma (Myanmar),⁵⁰ Ethiopia,⁵¹ Somalia,⁵² Iraq,⁵³ Iran,⁵⁴ Eritrea,⁵⁵ and Afghanistan.⁵⁶

31 Recently arrived is defined here as arrival within the last 5 years, however see discussion below.

32 Australian Bureau of Statistics, Census of Population and Housing 2011, *Maribyrnong City—Overseas Arrivals* <<http://profile.id.com.au/maribyrnong/overseas-arrivals>>.

33 Australian Bureau of Statistics, Census of Population and Housing 2011, *City of Wyndham—Overseas Arrivals* <<http://profile.id.com.au/wyndham/overseas-arrivals>>.

34 Australian Bureau of Statistics, Census of Population and Housing 2011, *City of Brimbank—Overseas Arrivals* <<http://profile.id.com.au/brimbank/overseas-arrivals>>.

35 The average migration rate for recent arrivals between 2006 and 2011 in greater Melbourne is 23.2%, Australian Bureau of Statistics, *Maribyrnong City—Overseas Arrivals*, above n 32.

36 39.6% of Footscray residents arrived in Australia between 2006–2011, Australian Bureau of Statistics, Census of Population and Housing 2011, *Footscray—Overseas Arrivals* <<http://profile.id.com.au/maribyrnong/overseas-arrivals?WebID=110>>.

37 31.5% of the River Ward population arrived in Australia between 2006–2011, Australian Bureau of Statistics, Census of Population and Housing 2011, *River Ward—Overseas Arrivals* <<http://profile.id.com.au/maribyrnong/overseas-arrivals?WebID=180>>.

38 30% of the West Footscray population arrived in Australia between 2006–2011, Australian Bureau of Statistics, Census of Population and Housing 2011, *West Footscray—Overseas Arrivals* <<http://profile.id.com.au/maribyrnong/overseas-arrivals?WebID=160>>.

39 47.5% of Albion residents arrived in Australia between 2006–2011, Australian Bureau of Statistics, Census of Population and Housing 2011, *Albion—Overseas Arrivals* <<http://profile.id.com.au/brimbank/overseas-arrivals?WebID=110>>.

40 37.5% of Sunshine residents arrived in Australia between 2006–2011, Australian Bureau of Statistics, Census of Population and Housing 2011, *Sunshine—Overseas Arrivals* <<http://profile.id.com.au/brimbank/overseas-arrivals?WebID=260>>.

41 27.2% of Sydenham population arrived in Australia between 2006–2011, Australian Bureau of Statistics, Census of Population and Housing 2011, *Sydenham—Overseas Arrivals* <<http://profile.id.com.au/brimbank/overseas-arrivals?WebID=290>>.

42 35.3% of the population of Point Cook arrived in Australia between 2006–2011, Australian Bureau of Statistics, Census of Population and Housing 2011, *Point Cook—Overseas Arrivals* <<http://profile.id.com.au/wyndham/overseas-arrivals?WebID=120>>.

43 36.4% of the population of Tarneit arrived in Australia between 2006–2011, Australian Bureau of Statistics, Census of Population and Housing 2011, *Tarneit—Overseas Arrivals* <<http://profile.id.com.au/wyndham/overseas-arrivals?WebID=130>>.

44 37.1% of the population of Truganina arrived in Australia between 2005–2011, Australian Bureau of Statistics, Census of Population and Housing 2011, *Truganina—Overseas Arrivals* <<http://profile.id.com.au/wyndham/overseas-arrivals?WebID=320>>.

45 Note that there is a different demographic profile for onshore refugee applicants. For more information on this cohort in 2013–14 see Department of Immigration and Border Protection, *Australia's Humanitarian Program 2013–14*, <<http://www.border.gov.au/ReportsandPublications/Documents/statistics/humanitarian-statistics-2013-14.pdf#search=humanitarian%2Dstatistics%2D2013%2D14>>.

46 Note that there has been a similar humanitarian entrance resettlement profile since 2010. For more information about refugee settlement profiles for specific years see Department of Immigration and Border Protection Statistical Publications <<http://www.border.gov.au/about/reports-publications/research-statistics/statistics>>.

47 Department of Immigration and Border Protection, *Australia's Humanitarian Program 2013–14*, above n 45.

48 Data from 2011 Australian Census and does not reflect settlement between 2011 and 2015. However, Department of Immigration and Border Protection information on humanitarian resettlement in Victoria in 2012–13 indicates that the majority of groups being resettled originated from Afghanistan, Myanmar and Iraq. <<http://www.border.gov.au/ReportsandPublications/Documents/statistics/migration-australia-state-territories-2012-13.pdf#search=migration%2Daustralia%2Dstate%2Dterritories%2D2012%2D13>>.

49 0.8% (1,390) of Brimbank City Council born in Sudan <<http://profile.id.com.au/brimbank/birthplace>>; 0.3% (453) of Wyndham Council population born in Sudan <<http://profile.id.com.au/wyndham/birthplace>>; 0.3% (212) of Maribyrnong City Council born in Sudan <<http://profile.id.com.au/maribyrnong/birthplace>>, Australian Bureau of Statistics, Census of Population and Housing 2011.

50 0.4% (259) of Maribyrnong City Council population born in Burma; 0.3% (518) of Brimbank born in Burma and 0.6% (1,017) of Wyndham City Council born in Burma. See webpages above n 49.

51 0.6% (432) of Maribyrnong City Council population born in Ethiopia, 0.6% (625) of Brimbank City Council born in Ethiopia and 0.4% (689) of City of Wyndham population born in Ethiopia. See webpages above n 49.

52 0.3% (212) of Maribyrnong City Council population born in Somalia and 0.1% (174) of City of Wyndham population born in Somalia. See webpages above n 49.

53 0.3% (242) of Brimbank City Council population born in Iraq. See webpages above n 49.

54 0.2% (146) of Maribyrnong City Council population born in Iran. See webpages at above n 49.

55 0.2% (116) of Maribyrnong City Council population born in Eritrea. See webpages at above n 49.

56 0.1% (76) of Maribyrnong City Council population born in Afghanistan. See webpages at above n 49.



WEstjustice community development workers.

HOW THE EMPLOYMENT LAW SERVICE WORKS

The 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). Clients must live, work or study in the Western suburbs of Melbourne.

The ELS runs by appointment on Monday and Wednesday afternoons and Wednesday 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 four induction sessions, 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. The volunteers are rostered for one evening per month and are supervised by an Employment Project Solicitor from WEstjustice. Monday afternoon appointments are staffed by secondee lawyers from the Corrs Chambers Westgarth Workplace Relations team. Each of the pro bono lawyers has substantial experience practising in employment law, and not only offer excellent service to our clients, but provide WEstjustice staff with excellent mentoring and support. K&L Gates also provides the ELS with significant pro bono assistance, offering a 'phone a friend' service whereby WEstjustice staff can speak with a senior lawyer from the Labour, Employment and Workplace Safety team and obtain strategic guidance and advice about particular matters.

Recognising that the process of making an appointment can be daunting, clients are also able to drop-in on a Wednesday afternoon, where staff will try to assist them, or if there isn't capacity at the time, we will help the client to book a second appointment.

LEVEL OF ASSISTANCE PROVIDED

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.



Saiful worked as a cleaner. His boss was always late paying his wages. Saiful was called "a 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.



Community leaders visit Victoria Legal Aid.

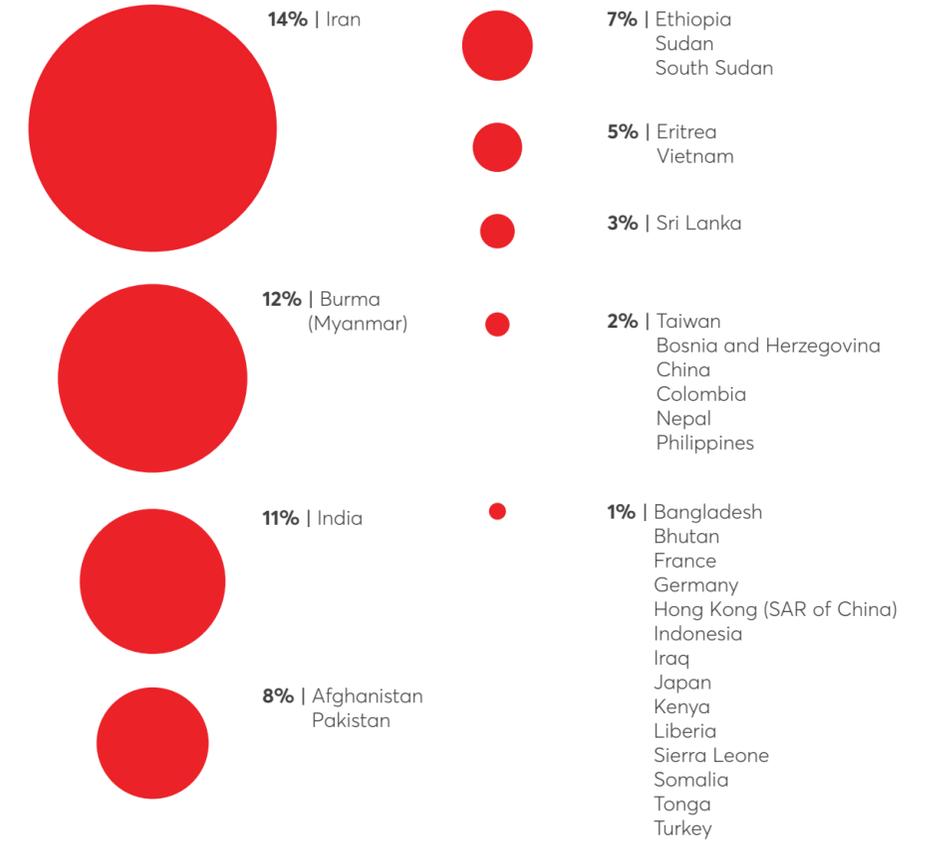
CLIENT PROFILE -EMPLOYMENT LAW SERVICE

GENDER AND COUNTRY OF BIRTH

Between May 2013 and October 2015, the ELS saw 130 clients from 30 different countries. 72% of our clients were male, and 28% were female. Consistent with information about the country of origin of humanitarian entrants granted refugee status in 2013-14, a significant proportion of clients came from Iran, Burma, Afghanistan, Ethiopia, Sudan and Eritrea. Over 80% of clients came from the following ten countries: Iran, Burma (Myanmar), India, Afghanistan, Pakistan, Ethiopia, Sudan, Eritrea, Vietnam and Sri Lanka.¹

The breadth of communities accessing the ELS is pleasing and, moreover, demonstrates widespread need for employment law assistance across all communities. While the result reflects recent settlement patterns more broadly in the West, it also supports our observation that engagement with agency workers, community leaders and bilingual community workers enables communities to access services. Throughout the Project we have consulted agency workers who have subsequently made referrals to the ELS. We have also built relationships with community members from numerous different communities through the engagement of community leaders. For example, our Centre has engaged community workers from Burma and Iran for a number of years. These workers play a vital role in connecting their communities to our service, as is reflected in the finding that clients from Iran and Burma accessed our service most frequently. Further, five out of six of the community leaders from our Train the Trainer program (see below) came from countries represented in the top ten countries of birth for clients.

Client country of origin may also have been influenced by the relationships WESTjustice has worked hard to develop with refugee and recently arrived communities. WESTjustice has relationships established through current and previous projects including the African Legal Service,² Burmese Legal Service,³ Burmese financial counselling service, the Vietnamese Legal Service⁴ and our ongoing refugee generalist clinics.



¹ For two clients, country of origin was not recorded. These results have been excluded from our calculations.
² Katie Fraser, 'Out of Africa and Into Court: The Legal Problems of African Refugees' (Report, Footscray Community Legal Centre 2009) <http://www.footscrayclc.org.au/images/stories/docs/Out_of_Africa_and_Into_Court.pdf>.
³ Anita Smith and Neng Boi, 'The Burmese Community And the Legal System—A Study in Confusion' (Report, Footscray Community Legal Centre August 2010) <http://footscrayclc.org.au/images/stories/docs/Burmese_Community_and_the_Legal_System.pdf>.
⁴ Ha Le, 'The Vietnamese Legal Service: An Analysis of the Needs of the Victorian-Vietnamese Community', (Report, Footscray Community Legal Centre, 2012) <http://www.footscrayclc.org.au/images/stories/Report_VL54.pdf>.

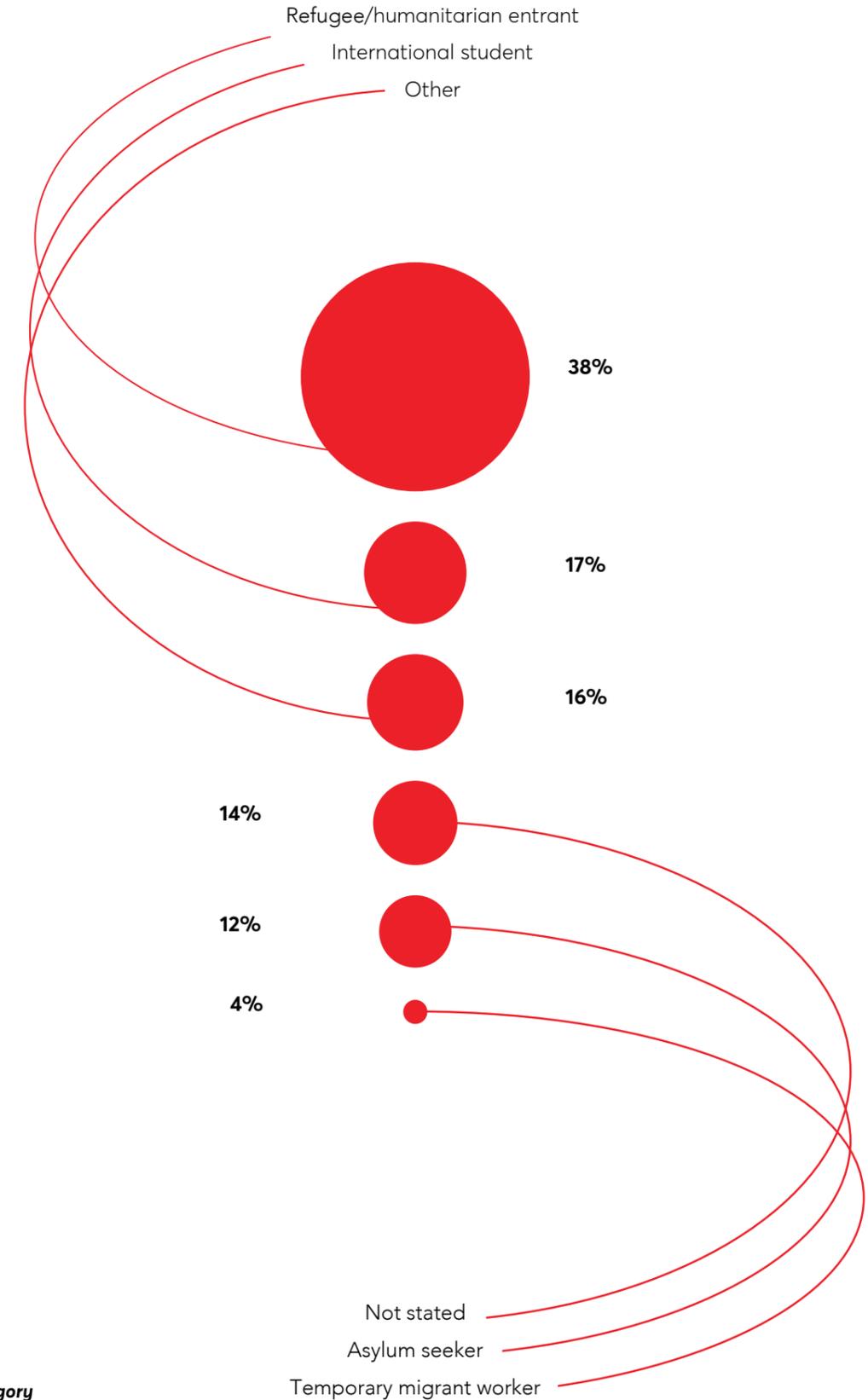
MODE OF ENTRY TO AUSTRALIA

The ELS is available for all newly arrived migrants and refugees who live, work or study in the Western suburbs of Melbourne.

We have seen a number of different types of visa holders, including:

- refugees: a person who has made a claim for asylum and the claim has been accepted;
- asylum seekers: a person who has applied for a refugee protection visa and is still waiting for a decision—there are different visas that an asylum seeker may hold;
- international students: a person who has a visa that allows them to study in Australia and work for up to 40 hours per fortnight during semester;
- subclass 417 working holiday visa holders: a young person (18–30 years old) who is able to stay in Australia for up to one year to work and holiday. A further stay of up to one year may be available if the person completes 88 days of specified work in a regional Australian area;⁶¹
- subclass 457 temporary work (skilled) visa holders: a person who has been sponsored by their employer to work for up to four years. Only workers with skills listed on the Skills Occupation List are able to access this visa; and
- family members: who have arrived via family reunification or other streams;
- Nearly 40% of clients seen by the ELS were refugees who had arrived on humanitarian visas. The second largest group of clients had arrived in Australia as international students (17%). The Centre also advised a number of asylum seekers and people on temporary work visas (including working holiday and subclass 457 visas). Unfortunately, 30% of clients were described as “other” or “not stated” for this question, which makes it difficult to conclusively determine the precise numbers. Also, a number of clients had changed visa status during their time in Australia. For example, while only 4% of clients were identified as arriving in Australia as temporary migrant workers, in a second intake question, 8% of workers were identified as currently holding a 457 or other temporary work visa.

⁶¹ Department of Immigration and Border Protection, Australian Government, Fact sheet—Working Holiday visa programme <<https://www.border.gov.au/about/corporate/information/fact-sheets/49whm>>.



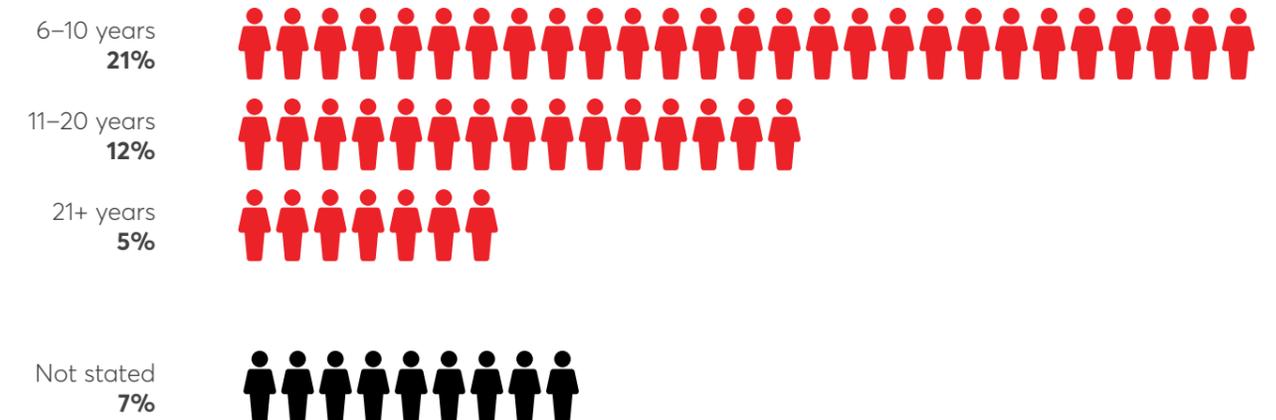
"I didn't think my time in Australia would be like this."

YEAR OF ARRIVAL IN AUSTRALIA AND ENGLISH LANGUAGE SKILLS

Between May 2014 and October 2015, 60% of our clients had lived in Australia for less than five years. 22% of clients had lived in Australia for the past 6–10 years, and 18% had been in Australia for longer than 10 years.⁶²



Above show the first 5 years in 1 year increments.



130 people
100%

⁶² These figures exclude the 6% of clients where year of arrival was not recorded.

**23% spoke
English at home
77% spoke
other languages**

**at least 29 different
languages were
spoken**

The ELS is targeted at newly arrived and refugee communities. In a settlement context, newly arrived is often defined as up to five years living in Australia. However, community workers have often expressed to us that five years is simply not enough time for community members to adjust to a new society and access mainstream services without assistance. WEstjustice recognises that many long-term migrants have similar experiences and characteristics to those of newly arrived community members. This is due to various factors including language skills, trauma, health considerations, isolation, ability to access support services and integration into wider society. Further, some migrants may take more than five years to find employment. For this reason, the ELS is available to all migrant workers who have arrived in Australia within the last ten years, or longer in some situations.

77% of clients spoke a language other than English at home. Of these clients, at least 29 different languages were spoken. The frequency at which different languages were spoken broadly reflects country of origin data, with the highest number of clients reporting that they spoke Persian /Farsi, Burmese or a Burmese ethnic group language, or one of several African languages including Tigrinya, Dinka, Amharic or Somali.

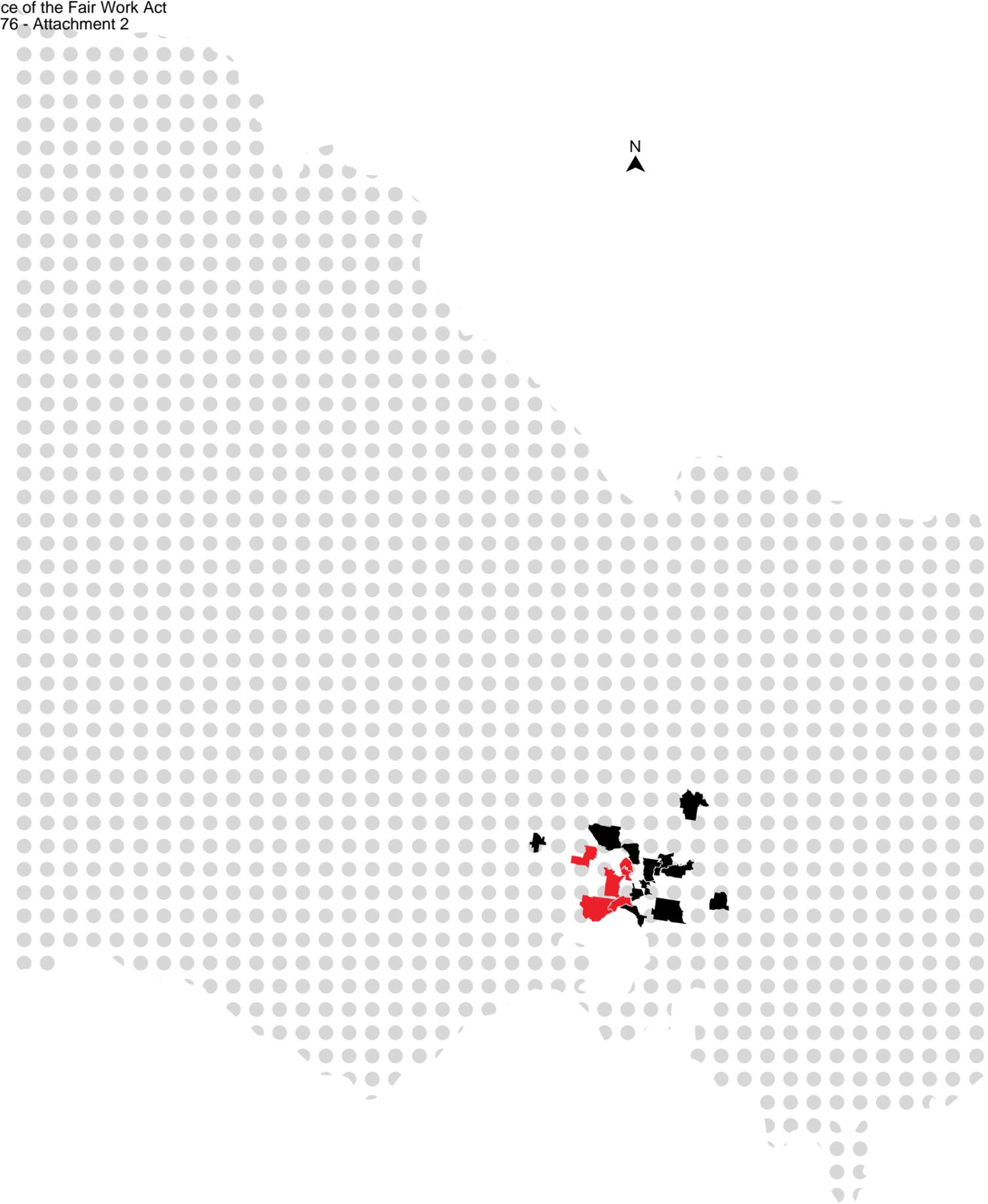
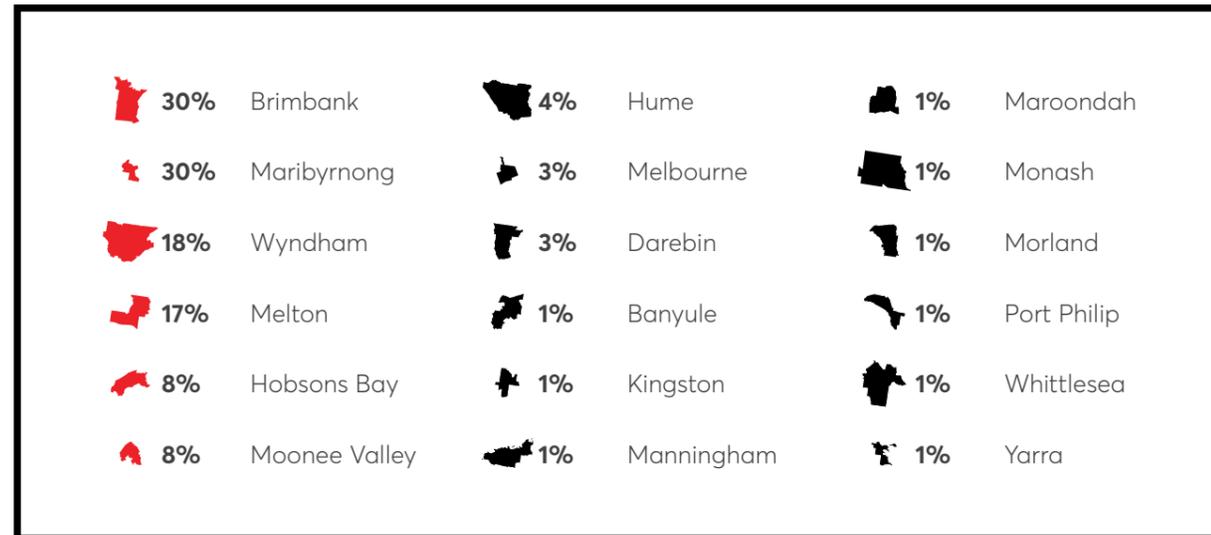
44% of clients were recorded as not speaking English well, or not speaking English at all. Interpreters were provided whenever a client requested assistance (interpreters are offered at intake), or whenever a lawyer required assistance to understand the client or ensure that advice was being understood. Around one third of clients required interpreters during intake, however an interpreter was often required for a larger number of clients after intake to provide legal advice or take further instructions. This is due to the fact that while some community members speak good conversational English, language assistance may be necessary where technical legal terms are used, or a client is under emotional stress.⁶³ This is particularly important during legal proceedings, where particular vocabulary and terminology may be used in a hearing that a party may not understand (even if their English language skills are good) or the anxiety associated with a mediation or hearing may affect an individual's command of their second (or third or other) language. For example, many clients reported how grateful they were to have interpreters present during Fair Work Commission or Federal Circuit Court proceedings, where, due to nerves and formal legal processes, language assistance is even more important. One client recounted how his mind went blank in mediation, and he could not understand any of the English being spoken. WEstjustice estimates that around half of our clients required interpreters at some stage of their matters.

⁶³ See, eg, Foundation House—The Victorian Foundation for Survivors of Torture, 'Promoting Refugee Health: A guide for doctors, nurses and other health care providers caring for people from refugee backgrounds', and 'Promoting the engagement of interpreters in Victorian health services', which provide further information regarding the importance of professional interpreters for refugee communities: <<http://refugeehealthnetwork.org.au/promoting-refugee-health-a-guide-for-doctors-nurses-and-other-health-care-providers-caring-for-people-from-refugee-backgrounds-3rd-ed/>> and <[http://www.mhima.org.au/pdfs/FHinterp_June2013_for_web\[1\].pdf](http://www.mhima.org.au/pdfs/FHinterp_June2013_for_web[1].pdf)>.

PLACE OF RESIDENCE

The ELS is available to clients who work, live or study in the Western Suburbs of Melbourne. 60% of clients came from the cities of Maribyrnong, Brimbank and Wyndham. This reflects the local government areas (LGAs) in which we conducted the most outreach, including attending network meetings and community education sessions. They are also the three LGAs where WEstjustice has offices and established networks. Melton, Moonee Valley and Hobsons Bay LGAs accounted for the place of residence for a further 25% of clients, with the remainder coming from other parts of Victoria.

Although we conducted outreach appointments in Wyndham and Brimbank whenever resources allowed, a number of clients travelled significant distances to attend appointments at the ELS, which is based in Footscray.



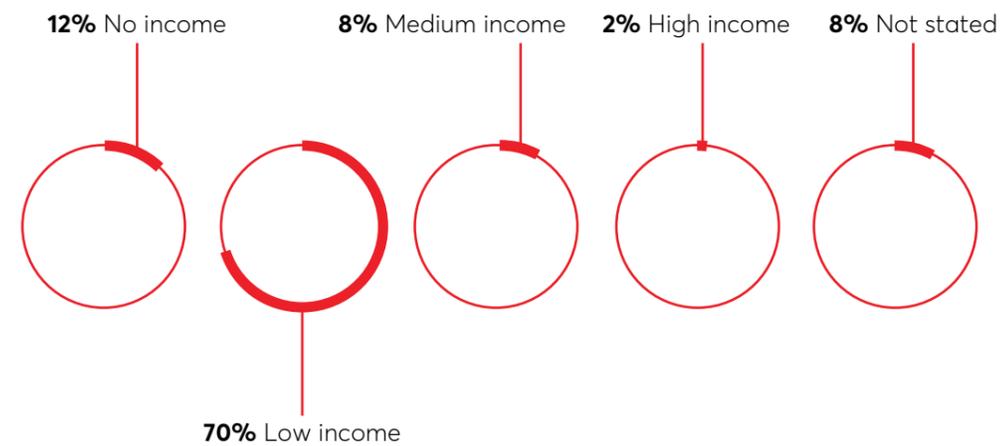
INCOME

Westjustice services are targeted at those most in need. In particular, we focus on vulnerable clients who would not be able to represent themselves, afford a private lawyer, or find assistance elsewhere. The ELS is no exception. 89% of clients were on a low income or no income at all when they came to the ELS for assistance.⁶⁴

Over half of our clients earned an income at the time they came to see us for advice. 23% of clients were receiving Centrelink payments and 14% reported they had no income at all, often as a result of recent job losses.

Of clients who were earning wages or receiving Centrelink, 87.5% earned a low income (less than \$600 per week), 10% earned a medium income (between \$600 and \$1000 per week) and only 2.5% were high income earners. High income earners (defined as earning above \$1000 per week) received minimal assistance from the ELS, and were referred to private law firms for assistance.

Current Income



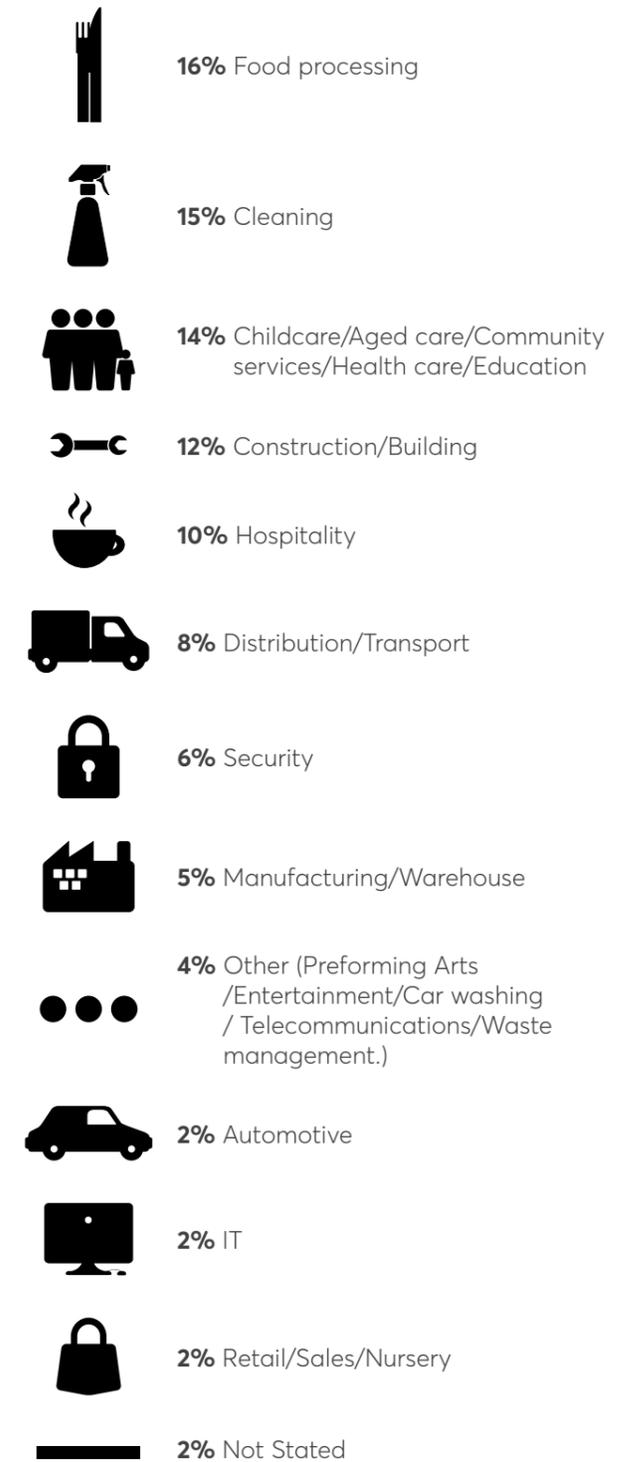
⁶⁴ This statistic excludes 8% of clients, where income was not recorded.

INDUSTRY

Research shows that newly arrived migrants and refugee communities in Australia are segmented in low skilled and casualised industries.⁶⁵ Westjustice client data reflects this finding with clients working predominantly in food processing, cleaning, construction, hospitality, distribution, security, manufacturing/warehousing and the community services/child and aged care industries.

A significant proportion of clients were engaged as contractors, casual staff, in part time positions or through labour hire arrangements. At their first appointment, 35% of clients reported that they were permanent employees, while 25% said they were casual and 16% independent contractors.

However, some clients were unsure and for others, the type of employment was wrongly identified (for example, they thought they were contractors but were really employees at law; or they considered themselves permanent, when they were engaged under a daily hire arrangement).⁶⁶

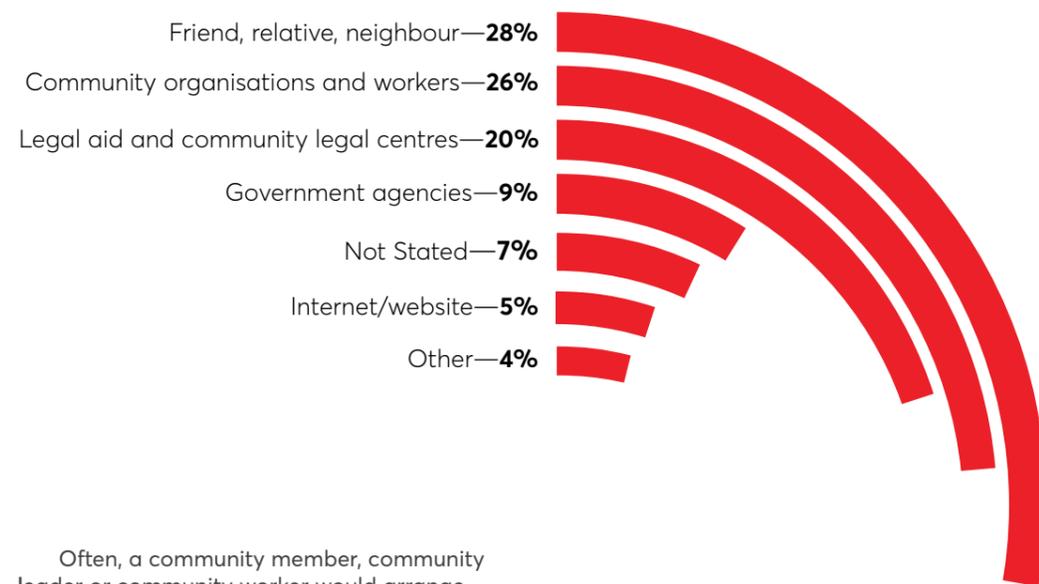


⁶⁵ Val Colic-Peisker and Farida Tilbury, 'Employment Niches for Recent Refugees: Segmented Labour Market in Twenty-first Century Australia' (2006) 19 *Journal of Refugee Studies* 203.

⁶⁶ Data was also difficult to interpret as one question with tick boxes was used to collect this information—for some clients, our intake worker had only ticked "part time" or "full time", without also selecting whether the client was a permanent employee, casual employee or contractor.

HOW DID CLIENTS FIND OUT ABOUT OUR SERVICE

Over half of our clients were referred to the ELS by a trusted community worker or by word of mouth, including referrals from friends, relatives, community leaders or neighbours. One in five clients found our service with assistance from another community legal centre or VLA. Around 9% of clients were referred to us by government agencies such as the FWO. Only 5% of clients found us using an internet search, or from our website.



Often, a community member, community leader or community worker would arrange an appointment and/or attend a client's first appointment with them. Often, our service would continue to involve a trusted case worker or support person throughout our engagement with a client. Many clients reported to us afterwards that they had never seen a lawyer before, and were extremely nervous about "complaining" about their working conditions.

As discussed below, newly arrived and refugee clients often face numerous barriers to accessing services. Consistent with the data, building relationships with trusted community members and organisations is an essential mechanism to ensure service accessibility.

"Over half of our clients were referred to the ELS by a trusted community worker or word of mouth."

NATURE OF LEGAL DISPUTES

TYPES OF LEGAL PROBLEM AND NUMBER OF PROBLEMS PER CLIENT

Underpayment of wages or entitlements is the most common problem that clients present with at our service. In the relevant period, nearly half of our clients received advice about sham contracting, underpayment or non-payment of their legal wage or other entitlements.

The second most common problem was termination of employment. Around one in five clients attended the service because they had lost their job.

Workplace injury, discrimination and bullying were also relatively common problems, with around 7–8% of clients seeking advice on these issues. Sexual harassment was less commonly reported.

These findings broadly reflect the observations in our Preliminary Report, where:

- 52% of survey respondents said that underpayments were common, somewhat common or that they or someone they knew was not paid enough;
- 38% of respondents indicated that not being paid regularly was common or somewhat common for newly arrived or refugee communities, or that they or someone they knew experienced this;
- 36% reported it was common or somewhat common to come in early or stay late at work without getting paid, and one third reported it was common or somewhat common to miss out on superannuation entitlements; and
- 55% of survey respondents identified that termination of employment was common, somewhat common or that they or someone they knew had experienced losing their job.

Interestingly, 47% of survey respondents reported that discrimination at work was common, somewhat common, or that they or someone they knew had experienced it. However, clients at the ELS did not seek advice on this issue as frequently as other legal problems. Possible reasons are discussed below.

The majority of clients presented with more than one legal problem relating to their employment. 62% of clients had two or more employment-law related issues, 23% had three or more issues, and 5% had four or more issues. Only one third of clients presented with one employment-related legal issue only. Many of our clients also presented with other associated legal and non-legal issues, including eviction and homelessness (due to loss of employment meaning that clients could no longer pay rent), problems paying bills and the need for material aid, criminal matters (for example, assault or sexual harassment in the workplace) and significant health problems, often arising in connection with employment (both psychological and physical). Whenever possible, we provided a warm referral to another lawyer at WEstjustice, or an external agency as appropriate. Over 120 referrals were made to community services or government agencies in the relevant period.

| Number of employment laws issues per client | 1 Issue | 2 Issues | 3 Issues | 4 Issues |
|---|---------|----------|----------|----------|
| Number of clients | 49 | 53 | 21 | 7 |



RECURRENT PROBLEMS IN PARTICULAR INDUSTRIES OR FOR PARTICULAR VISA HOLDERS

As noted above, the majority of our clients work in food processing, cleaning, construction, hospitality, distribution, security, manufacturing /warehousing and the community services/child and aged care industries. Although the sample sizes for each industry are small, the data reveals some trends.

For example, for clients in the cleaning industry, wages and entitlements issues were by far the most significant legal problem. In fact, 70% of clients presented at the ELS with underpayments or non-payment of wages or entitlements issues. 20% had experienced a workplace injury, 15% sought advice on bullying or discrimination, and only 5% contacted the service for issues relating to termination of employment.

Similarly, in the construction industry, wages and entitlements issues were overwhelmingly the biggest issue. 80% of clients from this industry received advice about underpayment of wages or entitlements, with at least half of our clients receiving advice about sham contracting. Unfortunately, clients often lacked sufficient information about their employers, making enforcement action impossible. Clients often presented at the ELS with only the first name of their employer and a mobile telephone number. Although we tried to assist clients to gather further information about the employer, without a company name or details, it was often impossible. One quarter of clients received advice for termination of employment, while only 7% of clients were advised on discrimination, bullying or workplace injury.

Wages and entitlements were also the most significant problem in the distribution/transport industry with 82% of clients seeking help in relation to these issues. In the hospitality industry, the most common problems were wages and entitlements (62% of clients were advised on this) and termination of employment (69% of clients). Only one client who worked in this industry received advice on discrimination or bullying.

In the food processing industry, there existed more variation in the prevalence of different legal issues—only one third of clients working in this industry received advice on wages and entitlements. 43% received advice on termination of employment, nearly one third of clients sought advice on workplace injury and around one quarter received advice on discrimination or bullying related issues. Most clients from the food processing industry worked in high-risk, repetitive cutting and packing jobs at meat factories, which accounts for the significantly high proportion of workplace injury inquiries.

Although this data suggests that wages and entitlements issues are not as widespread in the food processing industry, we note that the majority of our clients were engaged by large meat processing or labour hire companies with a stronger union presence, rather than workers engaged by smaller operators or employees working in other positions and locations, for example on farms picking fruit or vegetables. Anecdotally, we were informed by several community leaders and community workers that underpayment and non-payment of wages in these less-regulated areas is a significant issue. For example, one leader told us about community members picking mushrooms for as little as \$7 per hour, and another about market garden workers being paid \$10 an hour, or \$11 an hour if they were fast workers, or owned a car to pick up/drop off other workers. These stories are supported by numerous in-depth reports,⁶⁷ which expose widespread exploitation of workers in farms and in various labour hire arrangements in the food processing industry. When speaking with community leaders about the workers in this industry, we were told that many workers are extremely vulnerable and unlikely to approach our Centre for assistance without further outreach work. As noted in the conclusion of this report, this is an area for further investigation/work.

Similarly, there was a greater variety in the prevalence of different issues reported in the warehousing/manufacturing industry, with 62% of clients seeking advice on wages or entitlements, 75% seeking advice on termination of employment, one quarter of clients seeking help with workplace injury and one quarter receiving advice on discrimination or bullying. There was also a variety of issues reported in the security industry.

In the community services and care industries, wages and entitlements issues were also less commonly reported, with 28% of clients being advised on this issue. No clients sought advice on workplace injury in this industry. Instead, termination of employment (44% of clients) and discrimination /bullying (39% of clients) were significant issues.

Interestingly, asylum seekers and refugees encountered a broader variety of employment-related problems at work, while temporary migrant workers including international students received advice almost exclusively about wages and entitlements, and/or termination of employment.

⁶⁷ ABC, '7-11: The Price of Convenience', *Four Corners*, 30 August 2015; ABC, 'Slaving Away' *Four Corners*, 4 May 2015 <http://www.abc.net.au/4corners/archive_2015.htm>.

OUTCOMES

SERVICE ACHIEVEMENTS

The ELS opened in May 2013. As at September 2016 the ELS had seen over 200 clients and successfully recovered or obtained orders for over \$120,000 in unpaid entitlements and over \$125,000 in compensation for unlawful termination.

Between May 2013 and October 2015, we assisted 130 clients from 30 different countries, providing 162 advices and opening 45 cases. 52 clients received a one-off advice only appointment, while 78 clients received further appointments and/or ongoing assistance. Given that the ELS only opened at the start of the reporting period, we note that these outcomes are more limited than subsequent periods. This is because matters take time to progress/come before the Court/Commission, and there were no matters on foot at the beginning of the reporting period.

Key service achievements (May 2013–October 2015):

1. Recovery of wages and entitlements: over \$62,000

- WEstjustice helped 13 different clients to recover or obtain orders for payment of over \$62,000 in unpaid wages or entitlements;
- WEstjustice drafted letters of demand for 37 different clients. These letters include details of the client's employment, their minimum pay entitlements (e.g. details of the relevant Award or enterprise agreement and classification), calculations showing wages owed, and a demand for payment. For many clients, more than one letter of demand was written. For example, we often try to help clients negotiate directly with their employers as a first step. Commonly this would involve assisting a client to prepare speaking notes or a letter in their own name. If this fails, and the matter has sufficient merit, we would usually draft a letter on WEstjustice letterhead;
- WEstjustice drafted 11 complaints to FWO, six applications to the FCC (five of which were in the Small Claims division) and three applications to VCAT. We also assisted with one Work Cover claim;
- WEstjustice represented three clients at FWO mediations, and one client at an FCC mediation;
- WEstjustice assisted two clients to represent themselves at VCAT hearings, and two clients to represent themselves at the FCC. This was done by preparing extensive speaking notes and supporting documentation. All four claims were successful although unfortunately three employers have not complied with the orders (discussed below);
- WEstjustice assisted one client to make a Fair Entitlements Guarantee claim, which was also successful.

2. Compensation for unfair treatment: over \$107,000

- WEstjustice helped eight different clients to recover or obtain orders for payment of over \$86,000 in compensation for unfair dismissal matters. Three clients were represented by WEstjustice, one client was helped to self-represent, and others were ultimately assisted by a union, Job Watch or a on a pro bono basis by a law firm;
- WEstjustice helped four different clients to recover payment of over \$21,000 in compensation for general protections or discrimination-related matters. Three clients were represented by WEstjustice while one was able to self-advocate with our assistance;
- WEstjustice represented clients at four UFD conciliations and three general protections conciliations.

3. Helping clients find new work:

- in addition to financial compensation, if clients had lost their job WEstjustice also focused on outcomes to assist with finding new work;
- WEstjustice helped nine clients to obtain a statement of service or reference letter to use when applying for new work;
- WEstjustice assisted five clients to reach agreement with their employer that they had resigned from employment, rather than being dismissed. This is an important distinction for clients seeking new work. Often there would be an agreement reached with the employer around what would be said if a new potential employer called for a reference check;

4. Helping clients keep their jobs:

- WEstjustice advised a number of clients who were facing investigations or allegations of misconduct. WEstjustice helped at least two clients to keep their jobs, for example by facilitating a face-to-face meeting for the client to explain the situation with assistance from an interpreter;
- WEstjustice also assisted a number of clients with concerns around rostering and hours of work. WEstjustice helped at least one client to regain lost hours of employment. After working for over ten years and receiving certificates of excellence for her performance, the client suddenly had her shifts cut. Because the client was illiterate, WEstjustice helped to write two letters to the employer to request that the employee's usual hours be restored. The roster was promptly changed.

5. Referrals to other services:

- WEstjustice made over 120 referrals to government agencies and community services so that clients could receive further assistance from the appropriate agency. Many referrals were "warm" or "active", meaning that with the client's permission, we would call or draft a memorandum to the agency setting out key facts, assistance provided to date, and what further help was required.
- For some referrals, including many to the FWO, WEstjustice stayed actively involved in the client's matter. Referrals included:
 - 32 referrals to FWO, including complaints and general reports to the intelligence team for systemic issues;
 - 18 referrals to relevant unions, including warm referrals for union members and the provision of information about systemic issues;
 - eight referrals to the Law Institute of Victoria Referral Service;
 - six referrals to WorkSafe, three referrals to WorkCover Assist and nine referrals to private practitioners for workplace injury matters;
 - six referrals to housing services;
 - five internal referrals to financial counselling or other WEstjustice services;
 - five referrals to the Independent Contractors Hotline;
 - four referrals to JobWatch and six to other community legal centres;
 - four referrals to Victoria Legal Aid Equality Law team;
 - two referrals to the ATO; and
 - a number of referrals to community organisations including settlement agencies, the Asylum Seeker Resource Centre and health centres.

6. Helping clients resolve their legal issues:

- WEstjustice drafted correspondence for 51 different clients. This included correspondence with employers; warm referrals (to FWO, unions, VLA and other agencies); briefs to Counsel or Justice Connect seeking pro bono assistance; and correspondence with medical professionals and other support staff including caseworkers.

7. Working for systemic reform:

- WEstjustice made seven evidence-based written submissions to law reform and other inquiries, and appeared at two formal hearings and numerous consultations;
- WEstjustice regularly provided information and intelligence to regulators and unions to enable organisations to address broader issues of widespread employer non-compliance and systemic issues, including:
 - 32 referrals to FWO, including complaints and general reports to the intelligence team for systemic issues;
 - 18 referrals to relevant unions, including warm referrals for union members and the provision of information about systemic issues;
- WEstjustice encouraged clients to refer other employees with similar problems to the ELS. For three matters, WEstjustice provided assistance to numerous employees in one workplace with a view to changing employer behaviour and preventing further abuse.

Key outcomes from the complementary education program are discussed from [page 107](#).



WEstjustice staff present at the Productivity Commission Inquiry into the Workplace Relations Framework.

"Many in my community do not contact agencies. They are afraid, because many have had bad experiences with people in authority back home."

FEEDBACK ON THE SERVICE

Clients

Feedback was not sought systematically from clients. However, when clients or others provided feedback, it was noted in the case summary document. Many clients expressed sincere thanks for WEstjustice assistance, and many noted that they would not have been able to enforce their rights without our assistance.

Some examples are as follows:

"I couldn't do anything without you. Thank you so much".

"Words cannot say it. Thank you so much. I knew I was right and should bring my case. People told me not to. My boss is very powerful. At times I was scared, I was not sure. But you stood beside me and so I kept going. Even when I wasn't going to, I continued, because of you."

"I am very happy with the service", "The lawyers provide good advice", "I want to say thank you to Catherin. She did good job"

"I appreciate so much. Thank you. I appreciate. I cannot say how much. I wish you all the best and your family. You are good humans. I appreciate."

"Thank you for all people there at Footscray helping me. I'm happy. I didn't expect. Really I didn't. I am happy. The second language is too difficult. Thank you so much."

"We almost use 4 months to deal with the case, and communicate seven letters (i know you write letters... more than seven.) ... I am very grateful to you waste so much time for my case, especially "Letter Of Demand" (It is perfect letter between me). This case let me know their methods. I'm glad I did not choice to go to court. Anyways i just want to say Thank you so much... Because of you I will be powerful to help other people"

"We thank you for your help and support... Your advice and information you provided the team e.g. how to prepare the documentation, what to and what not to include in submission, the legality of the issues, the scope of the Fair Work Commission and Ombudsman's work are very valuable. Even just knowing that we have your support has given us the courage to pursue the matter."

"Let me thank you very much for your help in relation to resolving the recent matter about my employment wages... I am very glad to let you know that the matter has resolved successfully and he has paid the amount that I was supposed to get paid. ... It was a great help that I have received from CLC and I'm sure such types of help will certainly benefit your clients such as myself and those who have similar situation."

"It was a very exciting moment—over two thousand Australian Dollars just transferred into my bank account. "Salary plus Leave" was shown as transfer details. Finally, my former employer paid me fairly and legitimately. Thanks to Western Community Legal Centre for their support and professional help, without them it wouldn't be that easy.

I have worked for my former employer, which was a franchisee of a big retail brand (over 200 stores over Australia), for 11 weeks. Before I went for an interview, I assumed that they would understand the importance of following the Australian Employment Law. But things are not always easy. They told me that I was hired, but I need to go through the probation, which means no contract, no super, no leave and cash-in-hand for the first three months. They told me that's how it works here.

I was really appreciative to have professional volunteering help... I remembered I was a bit nervous when I first arrived, but everyone who works there was so friendly, positive, and loved what they do, hence I felt more relax. Catherine greeted me with her genuine and warm smile, and led me to a private room. She asked for all the possible details about the period of time I worked for my former employer. By discussing how many hours I worked a day, if my former employer expected me to work for him in a long term, Catherine helped me to sort out how much money he owed me. It was definitely a great idea to have WEstjustice's help instead of going straight to Fair Work Ombudsman, as I finally learnt how to calculate my minimum wage, my leave and got to know my rights.

Catherine helped me sending emails and registered letters to make my former employer understood that even he did something wrong, he can make it right. He firstly denied what he has done but in the end he finally realised that we had all the evidence to prove him wrong. The whole interactions were peaceful and polite, but also coherent and powerful.

I hope people who are still working off the books to know that they are not alone. There are so many ways to get help, all they need to do is to raise their hands. If you are the one I am talking about, pick up your phone and call your legal centre in your community now!"

Another community lawyer who accepted a warm referral noted how legal assistance at conciliation helped a client to find new work after being unfairly dismissed. He said the client was:

"happy with the outcome... his main concern was that he is getting interviews but not job offers because of his termination for serious misconduct so we have now hopefully cleaned up his resume so he should get a new job pretty soon."

Similarly, another client who WEstjustice assisted with an unfair dismissal matter was very happy with the outcome of a conciliation, which involved the employer providing a statement of service and retrospective resignation. She explained that this meant she could now apply for jobs with a clear conscience as she didn't want to lie.

Several clients thanked WEstjustice for trying to assist, even when no favourable outcome was achieved.

However, a number of clients noted their frustration with the legal system, and perceived it as failing to provide justice. This was particularly true in cases where discrimination was alleged, but no apology was forthcoming, and also in underpayment matters where an employer refused to pay or acknowledge a debt was owed, even when a court found in the client's favour.

Others discussed their hurt and surprise that employers would treat them in this way. One client stated: "I didn't think my time in Australia would be like this". Some clients wanted more help from WEstjustice, for example representation at hearings, which we were not always able to provide.



Card from WEstjustice client.

Volunteers

Feedback was also sought from volunteer lawyers and paralegals. When asked what the ELS does well, some responses included:

"So many underpayments. These people would probably never see their money but for the ELS. Some issues seem bigger or more 'sexy' but I think simply helping people get their entitlements and exercise their rights in this regard is the best thing the service does."

"The employment law service is really good at providing vulnerable immigrants with fast and reliable advice. For example, helping them meet the dates for lodging a unfair dismissal claim, or underpayments claim. It has also been useful for providing referrals, which newly arrived immigrants may not have known how to discover. After every client meeting I feel as if the clients are providing positive feedback, as they are so grateful and appreciate the assistance."

"I think the service ought to be expanded to reach other CLC's. The popularity of the service vindicates the experiment, and thus should be grown to meet the evident need in the community."

"The night service does a lot of things well. I think the quality of the permanent staff is amazing and clients are lucky to have such experienced lawyers assist them. I think more clients should be taken on by the service rather than being given self help advice. This is because there is a difference between being told how to do something and actually being able to do it. I realise there are practical limitations on how many people the service can take on as ongoing clients."

"I think the night service is doing a great job documenting the cases and their outcomes, which is really useful for future law reform work."

When asked for anonymous feedback on the volunteer night service lawyers, paralegals provided the following comments:

"I think the lawyers provide an excellent service. The way in which lawyers engage with clients, and advice given to volunteers is very good."

"I think the lawyers give good advice. However, I sometimes think they use "legal jargon" that the clients do not or may not understand. I think the lawyers could improve my explaining these more simply to clients and using basic terms and language rather than complicated legal terms."

"I have only volunteered for the day service, so interaction with the lawyers at night has not occurred however from gathering information and listening to the outcomes of some of the cases and their successes, I feel like the lawyers are achieving the goals set out by the service. Whether it is by giving brief advice at the induction which sometimes occurs, or take the matter to court, the benefits can be seen."

"From the perspective of a paralegal, the lawyers are always helpful, supportive, and accommodating with regards to work performed by myself. They are always a pleasure to work with. I feel the work they do for clients is excellent. The way they present themselves to clients is always appropriate."

"Every lawyer I have worked with has been thorough and professional, and approached their work with patience, empathy and good humour."

"I assume this question refers to the volunteer lawyers? I think they do a great job and it has been a privilege to work with some very skilled practitioners."

Feedback gathered from volunteers via a formal survey, and informally gathered throughout ELS operation has been invaluable in refining and improving ELS procedures, as well as informing training for future induction sessions.

SERVICE CHALLENGES AND KEY OBSERVATIONS

Reflecting on the case summaries, a number of key themes emerge. These themes are discussed throughout the Report, and we address concerns regarding particular laws and processes below. However, in short, some of the high level challenges /observations include:

Client fear: Clients frequently expressed a fear of contacting government agencies or institutions without WEstjustice support and assistance. Clients also expressed a fear of complaining to their employers, in case they lose their jobs or it affects their immigration status. Many clients chose not to take any action in their cases, despite WEstjustice advice that they had a good claim and we could represent them in pursuing it.

Client literacy and language barriers: Many clients were unable to act on our advice without significant support due to literacy and language barriers. For many clients, tasks such as filling out forms, drafting letters, calling employers, requesting medical certificates or calculating underpayments were simply impossible.

Lack of rights awareness: Many clients commented to us that they did not understand Australian employment law. Many clients came to our service for help with one issue (e.g. termination of employment), only to discover they had been significantly underpaid throughout their employment.

Lack of resources and available assistance: WEstjustice is one of the only face-to-face free employment law services in Victoria, and the only one targeted at newly arrived and refugee communities. We were acutely aware that if we were not able to assist, there was no-one else. For many clients, this meant that there was no way for them to enforce their rights if we did not help. However, our resources are extremely limited and we were often forced to turn away people who had meritorious claims.

Strict time frames: Some claims have a 21 day time limit. This placed extreme pressure on our service. The ELS often had a six week wait time for an appointment. Although we tried to prioritise dismissal-related matters, and always referred clients to Job Watch for interim assistance, some clients were not able to receive legal advice before their limitation period expired.

Serious and compounding issues: As noted above, many clients presented at the ELS with more than one legal issue. In fact, it was very common for clients to be experiencing numerous employment-law related issues, and also a number of related or unrelated legal and non-legal issues. Sometimes, for example, clients experienced homelessness or significant mental health issues as a consequence of their mistreatment at work. This is discussed further below.

Collaboration: Relationship-building and collaboration with community services and community leaders were key influencing factors in achieving positive service outcomes. Many clients were accompanied to their first appointment by a trusted caseworker or community leader, and over 70% of clients found our service as a result of word of mouth or referral from another community agency.

Racism: Clients often felt that racism and discrimination were the underlying reasons their mistreatment.

"Many clients felt that they were singled out for exploitation because they did not understand the law, could not speak English well or were not born in Australia."

IMPACTS OF EXPLOITATION

The impact of insecure work and exploitation on our clients is immense. Without financial security, isolated community members struggle to pay bills and buy food. Clients feel immense pressure to support families living in poverty and at refugee camps abroad. A number of our clients have experienced homelessness as a result of losing their job as they were no longer able to pay rent. As discussed below, in some cases, exploitative and discriminatory behaviour has caused significant psychological injuries.

The impact of employment law problems has been well documented. Discrimination at work causes significant financial, physical and emotional impacts. It also limits social cohesion, participation in society and successful settlement.⁶⁸ Frequently, employment law problems create further problems for workers. For example, research indicates that two thirds of Victorians with an employment problem will face adverse consequences as a result of their initial employment problem.⁶⁹ A recent Law and Justice Foundation survey found that 'not only did 5.9 per cent of Victorians have an employment law problem, but that the problem was not just contained to the employment relationship alone—it also had a negative impact across other areas of their lives. In this sense, employment problems tend to function as 'trigger' problems which cause other legal and non-legal problems to emerge.'⁷⁰

The negative flow-on effects of employment law problems makes it even more important to prevent exploitation and ensure workers have access to timely help. Many of our clients have experienced torture and trauma in their home country, or on their journey to Australia. It is simply unacceptable that abuse continues at work in Australia. One client described the experience of being bullied at work in Australia as worse than any other experience he had, including surviving a civil war in his country of origin.

Further, employment law problems such as discrimination at work have an adverse impact on the economy. As noted by the Victorian Equal Opportunity and Human Rights Commission, discrimination at work costs businesses in terms of high staff turnover, labour shortages and homogenous thinking which limits innovation. Indeed:⁷¹

One of the greatest costs arising from racial and religious discrimination in employment relates to loss of productivity, skills and innovation due to the underutilisation of talents and skills that migrants bring to the country.

Unfortunately, as discussed in the following section, many newly arrived and refugee clients are not able to enforce their rights for a number of reasons, and so the exploitation continues.

⁶⁸ Victorian Equal Opportunity and Human Rights Commission, 'Harnessing Diversity: Addressing racial and religious discrimination in employment', June 2008, 13, <<http://www.humanrightscommission.vic.gov.au/our-resources-and-publications/reports/item/174-harnessing-diversity-addressing-racial-and-religious-discrimination-in-employment-jun-2008>>.

⁶⁹ Richard Denniss, Josh Fear and Emily Millane, 'Justice for All: Giving Australians Greater Access to the Legal System' (Institute Paper No 8, Australia Institute, March 2012) 1 ('Australia Institute Survey') cited in Federation of Community Legal Centres, above n 3, 4.

⁷⁰ Federation of Community Legal Centres, above n 3, 4.

⁷¹ Victorian Equal Opportunity and Human Rights Commission, above n 68, 11.

BARRIERS TO RIGHTS ENFORCEMENT

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 worker with multiple employment issues, 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 considers why current responses are failing migrant and refugee communities, and the following sections suggest key steps to improve rights enforcement including targeted education; an active and accessible regulator; the establishment of community-based employment law services; and reform to laws and legal processes.

LIMITED UNDERSTANDING OF EMPLOYMENT LAWS AND INSTITUTIONS

"Most newly arrived people will not know the services available for them."⁷²

Newly arrived migrants and refugee communities have an extremely limited understanding of Australian employment laws and services. This means that many members of refugee or recently arrived communities are unable to identify that they have employment law related issues, do not know where to go for assistance and rely on identification and referral of these issues from community workers or friends and family.

Even when clients have arrived via skilled migration schemes (for example the temporary work (skilled) subclass 457 visa), we have found that workers possess a very low understanding of employment laws and services. For example, in Martin and Wendy's case study below, two clients were paid one salary between them for over 12 months. The clients explained that they had no idea their salary was unlawfully low—they did not know there was a minimum wage in Australia.

Often, communities have come from countries where there are many employment problems, few or no worker rights, and no agencies where aggrieved workers can seek help. In a consultation with community leaders, we heard about the legal systems they had experienced before coming to Australia:⁷³

"No union or organization exists to protect you."

"Agricultural workers have no rights, no wages, no safe living conditions, and are typically mistreated."

"Corruption, you get a job through your connections or a relative. There are no rights. No minimum wage."

"The job might be good but the working conditions are appalling, for example 1 toilet per 1000 workers."

"Must have 'connections' to be protected, there are laws but they are not worth the paper they are written on. Very lengthy legal processes."

Many newly arrived and refugee clients at our service present with little or no understanding of minimum laws and entitlements. At our community education presentations there is genuine surprise when we discuss the existence of the minimum wage.

⁷² Survey, community member, Dow, above n 2.

⁷³ WEstjustice focus group, above n 30.

REFUGEE BACKGROUND

In situations where community members are able to identify employment problems, there are further barriers that limit their ability to enforce their rights.

People of refugee background may have past experiences and cultural understandings of legal systems and authority figures⁷⁴ which deter them from seeking advice or enforcing their rights. As the Refugee Council of Australia notes:

Prior to arriving in Australia, refugees have often experienced years of persecution and injustices at the hands of corrupt government officials, police and bureaucracies. It is understandable, then, that many refugees arrive with a wariness of police and government bureaucracies and it takes time to rebuild trust and understanding.⁷⁵

As one community leader commented:

"Many in my community do not contact agencies. They are afraid, because many have had bad experiences with people in authority back home."

WEstjustice has observed that clients commonly misunderstand the confidential nature of legal advice, and that some clients express fear of retribution for both seeking legal assistance and in enforcing their rights. Client fear extended not only to engaging with an employer but to engaging with government agencies including the Fair Work Ombudsman. Many of the ELS's refugee clients accessed our service via trusted caseworkers or friends. Without the friend or caseworker arranging the appointment and attending the service with our client, it is unlikely that the appointment would have occurred.

⁷⁴ Refugee Council of Australia, *Legal Issues* (1 April 2011) <<https://www.refugeecouncil.org.au/getfacts/settlement/livinghere/legal-issues/>>.

⁷⁵ Ibid.

CULTURAL UNDERSTANDINGS OF LEGAL SYSTEMS

Our consultations with community leaders have highlighted that many recently arrived migrant and refugee communities have had adverse experiences with legal systems in their home countries.⁷⁶ In particular, community leaders mentioned that in their home countries, there was a distinction between laws on paper and laws that are enforced.

This concept of 'paper laws' means that community members may be less likely to pursue legal claims if they do not have past experience of laws being enforced. One community leader described that members of their community viewed legal problems as their 'fate,' illustrating the extent to which members felt unable to enforce their rights.

Participants discussed that, in the event laws were enforced, access to the justice system in their experience was limited to the rich and powerful.

⁷⁶ WEstjustice focus group, above n 30.

PRACTICAL BARRIERS TO SEEKING ASSISTANCE

Language and literacy problems are barriers to accessing justice. Many of our clients cannot read or write English and many are illiterate in their own languages. Given that many mainstream agencies focus on websites and factsheets to raise awareness, with their presumption of basic literacy, such resources are largely ineffective.

Further, the language and concepts in employment law are often complex and arcane for native English speakers. This is amplified significantly for people with low English language skills. Accordingly, practices and processes which place heavy reliance on written communication can be particularly daunting—this includes filling out a Fair Work Ombudsman complaint form, drafting a letter of demand, preparing and lodging an unfair dismissal form or bringing a small claim to the Federal Circuit Court.

Practical issues including difficulties in using a telephone advice line (including an inability to wait on hold for significant periods of time, or a lack of trust), accessing internet resources, finding appropriate interpreters⁷⁷ and travelling to appointments⁷⁸ also prevent individuals from enforcing their rights.

In our experience, and as confirmed by the literature, the mode of service delivery is an important factor. For example, telephone advice services are not always accessible for CALD communities:

Sole reliance on internet and telephone legal information and advice services may fall short of providing justice for all people... internet and telephone services can be ineffective modes of delivering legal assistance for people with low levels of legal capability. For example, as already noted, people with poor literacy or communication skills can have difficulty using legal information resources and websites, and other self-help strategies... In addition, several authors have noted that disadvantaged people in particular often fall into the category of those who may require high quality face-to-face advice in order to achieve beneficial legal resolution... Thus, legal hotline services should not be regarded as a stand-alone panacea...⁷⁹

Even if a newly arrived or refugee community member manages to contact a mainstream service for help, in the absence of further and ongoing targeted assistance, the initial contact is unlikely to elicit any meaningful outcomes. As noted above, receiving information from an Infoline about your correct rate of pay is meaningless if you cannot write a letter of demand or fill out a claim form to seek recompense for underpayments.

A TARGETED, MULTI-FACETED RESPONSE

In its recent report on the Workplace Relations Framework, the Productivity Commission acknowledged the importance of a targeted and multi-faceted response to address migrant worker exploitation:⁸⁰

Targeted, proportional and effective policies are required to reduce the exploitation of migrant workers. Employers' incentives to exploit migrants workers will be reduced by policies that make exploitative practices more detectable, less easy to initiate and more costly when discovered.

Because of the various factors contributing to migrants' vulnerabilities, no single policy will be able to effectively reduce exploitation. Rather, a suite of policies that target different aspects of migrant exploitation and are implemented in concert are likely to be more effective, particularly given that the policies may complement each other.

Indeed, there are a variety of targeted responses that need to be delivered to ensure migrant workers are able to understand and enforce their workplace rights. For the remainder of this report we focus on practical steps to improve employment outcomes for newly arrived and refugee communities in Victoria.

⁸⁰ Productivity Commission, above n 29.

RECOMMENDATION

State and Federal Governments should recognise that the exploitation of newly arrived and refugee workers in Victoria is widespread and that current systems are failing to stop the abuse.

Recognising the impact that such exploitation has on all workers, governments should urgently take steps to assist workers who have experienced exploitation and prevent further exploitation occurring in the future. Targeted responses are needed.

⁷⁷ Women's Legal Services NSW, 'A Long Way to Equal—An update of "Quarter Way to Equal: A report on barriers to access to legal services for migrant women"' (Report, July 2007) 31-32.

⁷⁸ Inability to travel can be due to geographic isolation, lack of public transport options and childcare responsibilities.

⁷⁹ Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Report, Law and Justice Foundation Report, August 2012) 215.

Diversity Measures

2

"A diverse workforce is a company's lifeblood, and diverse perspectives and approaches are the only means of solving complex and challenging business issues."⁸¹

Many of the issues identified above are attributable to the scarcity of alternative employment opportunities for newly arrived and refugee workers. This creates a power dynamic between the parties which renders employees particularly vulnerable to exploitation and abuse.

In order to reduce dependence on employers and increase employee agency, it is essential that measures to improve job opportunities for CALD workers are explored and taken. There is significant evidence to show that with appropriate programs, legislation and policy responses, diversity can be encouraged and sustainable employment can be achieved for newly arrived and refugee communities.

Importantly, diverse workplaces provide benefits to more than individual workers. There is significant evidence from Deloitte and others to show that diverse and inclusive workforces are more successful, and therefore better for all Australians.⁸²

Such diversity measures may include the following:



WEstjustice community education session.

TAX CONCESSIONS FOR COMPANIES THAT MEET DIVERSITY TARGETS

This approach has previously been proposed by the Australian Greens Party.⁸³

RECOGNITION OF QUALIFICATIONS ASSISTANCE

This would involve assisting workers with qualifications to have their skills recognised, as recommended by the Ethnic Communities Council of Victoria.⁸⁴

QUOTAS OR OTHER AFFIRMATIVE ACTION MEASURES

Measures could include a positive duty to recruit a diverse workforce. This approach has been extremely successful in Northern Ireland, where historically there was significant division between the employment opportunities of Catholics and Protestants. Northern Ireland implemented legislation in 1989 which 'requires employers to carry out regular reviews of their workforce composition to determine whether there is fair employment, and to undertake remedial action where required'.⁸⁵ The Equality Commission is empowered to identify companies that do not have sufficient diversity and work with them to develop agreements for improvement. The agreements may be voluntary or compulsory, and include 'process requirements and substantive requirements', including 'advertising, hiring, promotion, dismissal, and equal opportunities training', for example an agreement to use targeted advertising that welcomes applications from particular under-represented groups.⁸⁶ Although no quotas are permitted, a 2009 study found that:⁸⁷

Agreements were positively associated with improvements in fair employment, both those designed to improve Catholic representation and those designed to improve Protestant representation. Voluntary agreements proved to be more effective than the legally-enforceable Article 13 agreements...

Agreements were effective both in boosting employment and increasing shares in managerial /professional occupations—i.e. the gains were not restricted to workers in low skill occupations.

81 Juliet Bourke, Nicky Wakefield, Christie Smith, Heather Stockton, 'From diversity to inclusion: Move from compliance to diversity as a business strategy', 7 March 2014, <<http://dupress.deloitte.com/dup-us-en/focus/human-capital-trends/2014/hc-trends-2014-diversity-to-inclusion.html>>.

82 Deloitte Australia and Victorian Equal Opportunity and Human Rights Commission, 'Waiter, is that inclusion in my soup? A new recipe to improve business performance', November 2012, <<http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/reports/item/529-waiter-is-that-inclusion-in-my-soup-a-new-recipe-to-improve-business-performance-nov-2012>>.

83 Such an approach has previously been proposed by the Australian Greens Party – see Henrietta Cook, 'Greens to Demand Tax Credits for Victorian Businesses that Employ Migrants and Refugees', The Age (online), 4 December 2014 <<http://www.theage.com.au/victoria/victoria-state-election-2014/greens-to-demand-tax-credits-for-victorian-businesses-that-employ-migrants-and-refugees-20141203-11zjk4.html>>.

84 Ethnic Communities Council of Victoria, above n 18.

85 Christopher McCrudden et al, 'Affirmative Action without Quotas in Northern Ireland' (2009) 4 *The Equal Rights Review* 7, 7.

86 Ibid, 9.

87 Ibid, 11.

EMPLOYMENT AND PROCUREMENT POLICIES, DIVERSITY REPORTING

This approach could include amending government employment and procurement policies to set minimum standards for diversity, and requiring companies to collect data and report against diversity standards so as to create meaningful targets for employment of CALD workers. Importantly, any procurement policies must be properly monitored and enforced.⁸⁸

For example, in America, 'employers with federal contracts are required to file reports indicating "underutilization" of women or minorities and are then obliged to address this by making corrective efforts including the use of written goals and timetables. Contractors may be sued and barred from federal contracts if they are judged to be not pursuing affirmative action.'⁸⁹ It is generally agreed that 'the federal contractor programme as a whole has improved the proportions of African Americans and of women both in employment generally and in managerial posts specifically.'⁹⁰

In Australia, the Administrative Appeals Tribunal has a Workplace Diversity Plan which 'seeks to drive the principle into action and realisable employment targets'. As of June 2016, the AAT reported that 'of the APS employees in its workforce, at least 21% were born overseas, compared to the APS median of 14.4%'.⁹¹ Similarly, the Fair Work Commission Workplace Diversity Strategy seeks to increase recruitment and retention of CALD employees.⁹² Such practices, including minimum standards, could be mandated for all businesses, or at the very least, those with Government contracts.

Similarly, the DHS Gippsland Region Home and Community Care Culturally and Linguistically Diverse Plan⁹³ seeks to increase numbers of CALD staff and volunteers by:

supporting and mentoring new CALD staff/volunteers through training, group meetings, a buddy system, telephone contact and recognition awards; and

monitoring and reporting on the impact of the strategies deployed to increase CALD representation in the workforce.

To tackle unconscious bias, the Victorian Government has recently initiated an 18 month trial of blind recruiting, whereby personal details including name, age, gender and location are removed during the job application process.⁹⁴

We support each of these measures, as well as the National Union of Workers' recommendation that the Victorian Government should, through the Victorian Government Purchasing Board, adopt a Secure Jobs Code to ensure that the State's procurement policies work to encourage secure employment.⁹⁵ Such code should also set minimum diversity standards (as discussed above) and be adopted by the Federal Government and other states too.

88 John Howe, Andrew Newman, Tess Hardy, 'Submission to Independent Inquiry Into Insecure Work In Australia' (Centre for Employment and Labour Relations Law), 22-23.

89 McCrudden et al, above n 84, 8.

90 McCrudden et al, above n 84, 8.

91 Administrative Appeals Tribunal, *Workplace Diversity Plan 2016-17* (2016) <<http://www.aat.gov.au/about-the-aat/working-at-the-aat/workplace-diversity-plan-2016-17>>.

92 Fair Work Commission, *Workplace Diversity Strategy* (11 February 2016) <<https://www.fwc.gov.au/about-us/careers/workplace-diversity-strategy-2013-15>>.

93 Department of Human Services Gippsland Region, 'Home and Community Care Culturally and Linguistically Diverse Plan' (Report, March 2009) <<http://www.health.vic.gov.au/regions/gippsland/resources/Gippsland-HACC-CALD-Plan.pdf>>.

94 Miki Perkins, *Victorian government trials blind job applications to overcome hiring bias*, *The Age*, 20 May 2016, <<http://www.theage.com.au/victoria/victorian-government-trials-blind-job-applications-to-overcome-hiring-bias-20160519-goz8pf.html>>.

95 National Union of Workers, Submission No 91 to Economic, Development, Jobs, Transport and Resources, *Inquiry into Labour Hire and Insecure Work*, 2 February 2016, 21 <http://economicdevelopment.vic.gov.au/_data/assets/pdf_file/0005/1314635/Submission-NUW.pdf>.



Lunch.

TARGETED EMPLOYMENT PROGRAMS

There are 'a number of specifically targeted approaches and programs which can be effective' in assisting newly arrived and refugee workers to find and retain employment. Such approaches include specialised training, one-on-one mentoring, ongoing support after employment has commenced, case management and job search assistance.⁹⁶

For example, the Brotherhood of St Laurence (BSL) runs a number of targeted programs to assist asylum seekers and refugees to find and keep work. The BSL *Given the Chance for Asylum Seekers* program works with employers and jobseekers to assist clients to access the employment market. Importantly, the program is tailored to each individual jobseeker.⁹⁷

Jobseekers receive one-to-one assistance to create an employment pathway with a focus on developing new skills and renewing confidence. It is an early intervention, intensive support model that offers learning for other employment programs working with culturally and linguistically diverse people, and those at risk of disengaging.

The average cost of the Given the Chance program per participant is significantly less than other jobactive providers have to spend, however its outcomes are better—evaluation shows 'higher participation in education, training and employment'.⁹⁸

The BSL *Employment Pathways for Young Asylum Seekers* program helps young job seekers plan and achieve an employment pathway. Workshops cover various topics necessary to equip jobseekers with the skills to find work, including:⁹⁹

- understanding how to find work in Australia, and Australian workplace culture;
- how to plan a pathway through training and work experience;
- how to prepare and update a CV;
- where to look for work opportunities; and
- how to apply for training, work experience or jobs.

The BSL *Stepping Stones to Small Business* 'aims to educate migrant and refugee woman about money, and build an understanding of how to start a small business in Australia'.¹⁰⁰

Similarly, the *Youth Internships Initiative* run by the Maribyrnong and Moonee Valley Local Learning and Employment Network has delivered significant outcomes for marginalised young people in the West. Through the provision of a short management course, mentoring, internships and ongoing support, 77% of participants transitioned successfully into training or employment.¹⁰¹

The *Ucan2* program is run by Foundation House, Centre for Multicultural Youth and AMES. It 'supports the social inclusion of recently arrived young people of refugee background, aged 16–25 as they rebuild their lives which have often been disrupted by war and the refugee experience'.¹⁰² The program is delivered one day per week over 16 weeks and includes English language and work experience components. The program has delivered numerous successful outcomes including ongoing employment, improved emotional well-being and increased English capacity.¹⁰³

By increasing opportunities for sustainable employment for CALD communities, workers will be less likely to tolerate abysmal working conditions out of desperation. Exploitation will be reduced and society as a whole will benefit from diverse workplaces.

EDUCATION CAMPAIGNS

It is important to ensure that businesses understand the business case for diversity and inclusion. Unfortunately, discrimination in recruitment is rife, and businesses need to understand the risks and opportunities. Often, managers and decision-makers are not aware of their unconscious bias in recruitment, or may not understand how to promote diversity and inclusion in their workplace. A large-scale education campaign to raise awareness of the benefits of diversity is needed, along with accessible and practical guidance on how to achieve it.

RECOMMENDATION

State and Federal Governments should investigate and implement incentives for employers to hire newly arrived and refugee workers, including:

- tax concessions for companies that meet diversity targets;
- quotas or other affirmative action measures including a positive duty to recruit a diverse workforce;
- requiring businesses to collect data and report on the diversity of their workplace;
- assisting skilled workers to have qualifications recognised;
- amending government employment and procurement policies to set minimum standards for diversity;
- targeted employment programs to provide training and ongoing support for newly arrived and refugee workers;
- a large-scale education campaign to raise awareness of the business case for diversity and inclusion.

Federal and State governments should adopt a Secure Jobs Code to ensure that procurement policies encourage secure, just employment. Procurement policies should also set minimum diversity standards.

⁹⁶ Settlement Council of Australia, above n 15.

⁹⁷ Brotherhood of St Laurence, *Given the Chance for Asylum Seekers* (19 July 2016) <<https://www.bsl.org.au/services/work-and-learning/given-the-chance/given-the-chance-for-asylum-seekers/>>.

⁹⁸ Refugee Council of Australia, 'Economic, Civic and social Contributions of Refugees and Humanitarian Entrants: A Literature Review' (February 2010), 37.

⁹⁹ Brotherhood of St Laurence, *Employment Pathways for Young Asylum Seekers* (3 August 2016) <<https://www.bsl.org.au/services/refugees-immigration-multiculturalism/employment-pathways-young-asylum-seekers/>>.

¹⁰⁰ Brotherhood of St Laurence, *Stepping Stones to Small Business* (15 August 2016) <<https://www.bsl.org.au/services/refugees-immigration-multiculturalism/stepping-stones/>>.

¹⁰¹ Maribyrnong and Moonee Valley Local Learning and Employment Network, 'Youth Internships Initiative—an overview', 2016.

¹⁰² See also Settlement Council of Australia, 'Employment solutions: Case studies of good settlement in practice' (Discussion Paper), 5.

¹⁰³ Ibid.

Targeted education

3

Without targeted legal education for newly arrived and refugee workers, the workplace relations system will remain largely inaccessible. The importance of community education has been acknowledged by the Productivity Commission:¹⁰⁴

Increasing the amount and quality of information available to migrant workers on their workplace rights and entitlements should be part of a broader strategy to reduce the prevalence of exploitation. Not only are informed migrant workers less likely to accept substandard working conditions when these are offered, but they are also more likely to alert regulators once an employer begins to act exploitatively. Since the FWO mainly discovers instances of exploitation through complaints from workers, informing migrants can also increase the effectiveness of the regulator.

Education not only informs people about their rights at work and where they can access assistance with their employment issues, but 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 three years.

FACE-TO-FACE, TARGETED EDUCATION IS NECESSARY

"Access to services begins with knowledge of the law"¹⁰⁵

Without an understanding of your rights and responsibilities at work, you are less likely to perceive that you are being exploited, and are much less likely to seek help to enforce your rights.

Newly arrived migrant and refugee communities have a very limited understanding of Australian employment laws. To date, mainstream approaches have been largely unsuccessful in informing workers about their rights, and where they can find assistance with employment problems.

The FWO's education and advisory service is primarily delivered via its Infoline and web-based resources including its online learning portal.¹⁰⁶ Whilst these services are critical and increased online information is welcome, evidence suggests that telephone and internet services will not always reach migrant workers. The Productivity Commission has acknowledged that the information currently provided by FWO 'could be improved'.¹⁰⁷ Many of our clients are not able to use a computer, read a fact sheet or "google" search information that they require in order to self-advocate. As one community leader explains:¹⁰⁸

"They cannot look at websites as they don't speak English, and cannot write or read in their own language."

As noted in the Law and Justice Foundation Legal Needs Report, it is extremely important that legal information and education be targeted to specific communities:¹⁰⁹

One-size-fits-all education strategies tend to be less effective than strategies tailored to address the specific issues faced by particular people at particular times.

Education and assistance must be delivered via culturally sensitive services and through appropriate language translation services, with English as Additional Language (EAL) resources or services in relevant languages. While social media and internet advertising may work for some communities (for example, Iranian community leaders have suggested that in addition to meetings, online strategies in-language using social media may be effective for some community members),¹¹⁰ for other communities, only face-to-face education will be effective. To build a meaningful relationship, community education also needs to be 'maintained in a sustained rather than ad hoc way'.¹¹¹ The best way to ensure information is appropriately targeted is to consult with relevant communities, community workers, and EAL education professionals.

Importantly, education should be provided through the use of images, videos or new multimedia platforms. As the Women's Legal Service NSW has recognised, many migrant and refugee workers have low levels of literacy in their own first language and this forms yet another:¹¹²

barrier to accessing information about the Australian legal system and where to gain legal assistance. The focus of many services on translating relevant written legal information fails to adequately address the need for non-written information to be made available among migrant populations with low levels of literacy. A significant number of women in the [research] reported that translated information was not extremely helpful to them, especially where translations contain difficult or unfamiliar legal concepts.

Data collected for our Preliminary Report and throughout the pilot education program demonstrates the utility of face-to-face information sessions. When asked about the helpfulness of a face-to-face information service in clients' first language, 89% of survey respondents thought this would be very helpful or somewhat helpful. As set out below, feedback from our information sessions has been overwhelmingly positive, and demonstrates increased understanding of employment laws and services.

¹⁰⁵ Chris Arup and Carolyn Sutherland, 'The Recovery of Wages: Legal Services and Access to Justice', (2009) 35 *Monash University Law Review* 96, 101.

¹⁰⁶ Fair Work Ombudsman, Submission No 228 to Productivity Commission, *Inquiry into Australia's workplace relations framework*, 16 February 2015, 3 <http://www.pc.gov.au/_data/assets/pdf_file/0007/189439/sub0228-workplace-relations.pdf>.

¹⁰⁷ Productivity Commission, above n 29.

¹⁰⁸ WEstjustice focus group, above n 30.

¹⁰⁹ Coumarelos et al, above n 79, 213.

¹¹⁰ Similarly, the Fair Work Ombudsman has directed a targeted social media campaign at international students—see Productivity Commission, above n 29, 924.

¹¹¹ Women's Legal Services NSW, above n 77, 32.

¹¹² Ibid.

¹⁰⁴ Productivity Commission, above n 29.

TIMING, LOCATION AND IMPACT OF COMMUNITY EDUCATION

As well as ensuring that materials are appropriately targeted to the relevant community, it is essential to consider timing and method of distribution of resources. By addressing these issues, community education has been proven to have a significant impact in migrant communities.

Katie Fraser's 2011 report, 'Prevention is better than cure: Can education prevent refugees' legal problems?' (Fraser Report) examines the role of community legal education in preventing legal problems for newly arrived and refugee clients. The report found:¹¹³

- refugees could be assisted with legal problems if they are empowered to recognise a problem as a legal problem and then access legal services;
- it is fitting to provide newly-arrived refugees with legal information in the first few months after arrival in Australia; and
- greater involvement of community legal centres in the settlement sector has several potential benefits including the use of education and early intervention to prevent legal problems.

The timing of educational intervention is of utmost importance. In-language, basic information on employment rights and services should be provided when all migrants first arrive to cater for those who commence work promptly. This initial information should include free access to a work diary and/or phone app to enable workers to record key employment information, including hours of work.¹¹⁴ The diary and app should also include contact details of key services. More detailed information should be provided at later stages of the settlement process.

Different intervention points will also be necessary for different visa holders.

For example, under the Humanitarian Settlement Services Programme (HSSP), refugees receive casework assistance and support to set up their lives in a new country. Caseworkers 'familiarise and connect new arrivals to essential services including on arrival support; accommodation assistance; property induction; a start-up food and household goods package; assistance to register with Centrelink, Medicare, health services, banks, schools and English language classes; orientation to health, education, employment, laws and culture; and links into community and recreational programmes.'¹¹⁵ Refugees are also entitled to assistance with finding employment from jobactive providers, and 510 hours of English lessons through the Adult Migrant English Program (AMEP).¹¹⁶ Therefore, there are numerous opportunities to provide community education to refugees in a structured, familiar environment.

For this reason, we have targeted many of our information sessions at attendees of the AMEP Settlement Language Pathways to Employment and Training (SLPET) classes. This English as Additional Language class is focused on work readiness, and includes a work experience component. Attendees of this class are usually actively looking for work—therefore the information we provide is relevant and timely. We have also presented at information sessions hosted by settlement agencies that work closely with communities and community leaders to identify learning needs and deliver education in a safe and familiar space for communities.

However, temporary visa holders (including international students, asylum seekers and other migrant workers and their families) do not have access to the HSSP or AMEP. Therefore, educational resources must also be appropriately targeted to these communities, including via universities, the Status Resolution Support Services (SRSS) for asylum seekers, immigration processes and community groups and meetings. Such meetings may include church events, interest groups or weekend functions. These interventions provide invaluable opportunities to build trust with communities, and also provide information to vulnerable workers who may not be connected to settlement or other services. As noted in our Preliminary Report, practical and timely information is of critical importance. As one community worker noted, information should be provided 'that is linked to outcomes' and which ensures that workers receive the right amount of information at the right time, so it is not abstract.¹¹⁷

When targeted community education is delivered in a timely and relevant manner, the positive impact is evident. One example of a targeted resource that has received excellent feedback is Victoria Legal Aid's (VLA) education kit: What's the Law? Australian Law for New Arrivals.¹¹⁸ The VLA website explains that this free information kit provides information about:

common legal problems that people newly arrived to Australia may encounter. The kit can be used by teachers, educators and community workers who work with migrants and refugees. It is designed to be used in English classes, but it can easily be used in other community education settings.

The kit includes 10 simple English stories, based on real life experiences, to engage new arrivals and help them:

- get simple information about common legal issues;
- recognise and avoid legal problems;
- know where to get free legal help if they need it; and
- build their English language skills.

Each topic has:

- a video about common legal problems;
- activity sheets to build students' comprehension and reinforce key messages; and
- answer sheets, including notes for teachers about how to use the kit.

You can order the kit, which includes a DVD of the videos. The materials can also be downloaded.

The materials are largely used by EAL teachers as part of a structured learning environment. Inspired by WEStjustice's (then Footscray CLC) 'Getting to know the law in my new country', the VLA resource was evaluated in October 2013¹¹⁹ and findings included that of those who used the resource:

97 percent indicated that it was a useful tool to provide information about legal issues... The benefits of using the kit were identified as increasing the users' legal knowledge and their 'ability to recognise a legal problem and refer a client'. Once respondents used the kit, they were more likely to identify an 'increased confidence to teach legal issues' and the ability to 'meet requirements to provide legal education' as benefits, which were primary reasons for creating WTL.

Importantly, a further study has evaluated the effectiveness of a community legal education intervention using What's the Law materials. The study asked whether there was a measurable difference between students' understandings of the legal issues associated with buying a car, borrowing money and seeking help, after they participate in a class on this topic.¹²⁰

The utility of the education session was measured using quantitative data drawn from pre and post lesson surveys. Participants' mean score improved from 9.38 to 11.68.¹²¹ The ANOVA found this to be a significant statistical improvement,¹²² and the results 'show a measurable difference in participants' understandings of the legal issues'. Qualitative

results reinforced these findings.

¹¹³ Katie Fraser, 'Prevention is better than cure: Can education prevent refugees' legal problems?' (CLC Fellowship Report, Victoria Law Foundation, March 2011) 6-7.

¹¹⁴ As discussed below, gathering evidence to demonstrate hours of work is a significant barrier to rights enforcement in underpayment matters. For this reason, preventative measures should be taken to assist workers to record their hours of work.

¹¹⁵ Department of Health and Human Services, 'Refugee and asylum seeker settlement in Victoria: Frequently asked questions for key services and sector partners' (Fact Sheet, Victorian Government, July 2016) 7.

¹¹⁶ Ibid.

¹¹⁷ Dow, above n 2.

¹¹⁸ Victorian Legal Aid, *What's the law? Australian Law for New Arrivals* (23 February 2016) <<https://www.legalaid.vic.gov.au/find-legal-answers/free-publications-and-resources/whats-law-australian-law-for-new-arrivals-education-kit>>.

¹¹⁹ Monica Ferrari and Katie Fraser, 'Evaluation Report: assessing the value of *What's the Law? Australian law for new arrivals*' (Report, National Legal Aid, October 2013) 6, 25 <<http://www.nationallegalaid.org/assets/Whats-the-law/Whats-the-law-Evaluation.pdf>>.

¹²⁰ Monica Ferrari, *Does Community Legal Education work? Educating English language students about consumer contracts* (Thesis, RMIT University, February 2015) 9.

¹²¹ Ibid.

¹²² Ibid.

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,¹²³ 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:

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 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 COMMUNITY 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.

As discussed below, 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. WEStjustice recommends that similar programs be adopted and expanded across Australia.

PRESENTATIONS FOR COMMUNITY MEMBERS

To date, the CLE Program has delivered over 60 CLE presentations about employment laws and services to approximately 600 community members, community workers and community leaders.

Sessions for community members were largely delivered through English as Additional Language (EAL) classes, and at community meetings as requested by community members. Some sessions were delivered as part of settlement agency programs and at schools. Education materials were drafted by WEStjustice lawyers, and reviewed by EAL teachers and a law firm acting on a pro bono basis. Two different presentations were developed to cater for audiences of different English language abilities. For students with lower levels of English, a simpler presentation was prepared using more images and fewer words.

The presentations were designed to be interactive, with case studies where audience members were required to answer questions. Audience members were also given cards and were asked to organize different types of employees into categories depending on whether they would be paid for work done. Case studies and examples were developed and refined based on common issues arising at the casework service.

A vocabulary list of employment law terms and a summary of information was also developed. This information was provided in a short handout to participants, along with contact details for key agencies.

Content in the presentation included:

- an overview of employment law including the National Employment Standards, Awards, Enterprise Agreements and Employment Contracts;
- workplace policies and procedures;
- types of workers including casuals, permanent and independent contractors;
- the right to be paid and your right to a payslip;
- minimum pay rates and allowances, overtime and penalty rates;
- health and safety;
- sham contracting;
- discrimination;
- sexual harassment, bullying and victimization;
- unfair dismissal and general protections; and
- where to go to for help.

123 Dow, above n 2, 23-26.

Materials were reviewed and improved throughout the program, based on feedback from attendees. Part way through the program, videos were made and introduced (discussed in the train the trainer section below). Community presentations were largely delivered in English with the assistance of interpreters for some sessions. Presentations were evaluated through participant surveys. 372 surveys were collected in total.

The majority of participants attending the community sessions were humanitarian entrants, with 47% coming as refugees, and a further 20% through family reunion. 13% had arrived via family migration, while a small number had come on temporary work visas, or other types of visa. WEstjustice needs to consider how to better reach temporary migrant worker communities. Around 30% of attendees had been in Australia for one year or less, with 34% of attendees having been in Australia for 1–3 years. 18% had been in Australia for 3–5 years. Only 18% of attendees had been in Australia for more than five years. Attendees were most commonly from Myanmar, Vietnam, India, China, Thailand, Eritrea, Ethiopia, Iran, Indonesia and Bangladesh.

PARTICIPANT UNDERSTANDING OF EMPLOYMENT LAW IN AUSTRALIA

To ensure the presentations were appropriately tailored, WEstjustice tried to gain an understanding of participants' knowledge of employment laws and services prior to the presentation. Often, materials were sent to EAL teachers in advance, to enable teachers to undertake pre-teaching of key words and concepts.

We consistently found that CLE participants had a limited understanding of employment law in Australia prior to the presentations despite having some experience of working in Australia.

Some participants had some superficial knowledge of specific terms relating to their employment including familiarity with the words employee, independent contractor, permanent or casual employment.

Employees versus Independent contractors

Participant knowledge often extended to having heard of or possessing Australian Business Numbers (ABNs). However, participants were not aware of the meaning of these terms or how the distinctions in employment status impacted on their legal rights.

There was confusion about the working rights of independent contractors and a lack of awareness that independent contractors need to pay their own tax, superannuation and insurance.

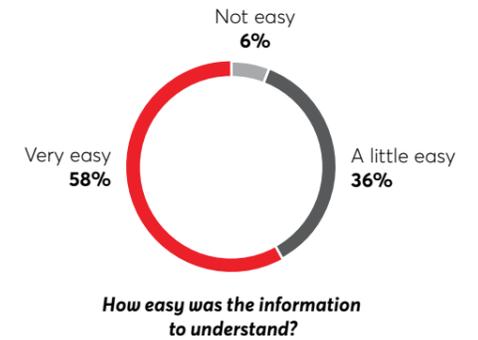
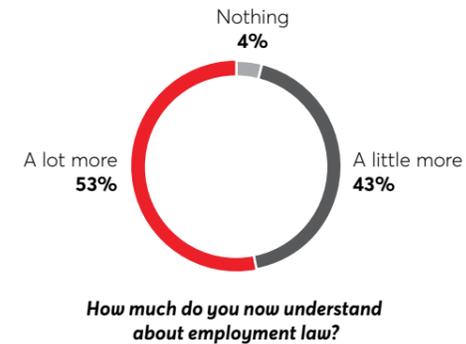
Minimum Rates of Pay

Participant feedback indicated that prior to the CLE session, there was limited understanding of minimum rates of pay and that the minimum rate of pay was set by the law and not by an employer. Feedback also indicated that prior to the presentation participants did not understand that casual and ongoing employees received different rates of pay and the reasons for this.

Limited awareness of services

WEstjustice observed that CLE participants had usually not heard of relevant government agencies like the Fair Work Commission, the Fair Work Ombudsman, WorkSafe and other relevant institutions including unions. This finding mirrored results from the Preliminary Report, which recorded very low levels of service recognition.¹²⁴

¹²⁴ Ibid.



EVALUATION

Feedback from the sessions was overwhelmingly positive. As a result of the CLE presentation about employment law, 96% of participants stated that they knew a little more or a lot more about employment law. 94% of participants found the information 'a little easy' or very easy to understand. As shown in the graph below, the evaluations found that 85% of participants surveyed stated that as a result of the CLE session they now knew where to go for help with an employment problem. Given evidence that many workers previously knew nothing about rights and services, these statistics demonstrate the success of the community sessions.

Feedback was also collected from teachers and/or community leaders who coordinated the session. Teachers/leaders were asked to evaluate how much the audience's understanding of workplace rights and responsibilities increased as a result of the seminar, whether information was presented in an easy to understand way and how confident they were that the audience would know where to go for help.

Teachers/leaders graded each of these queries on a scale of one to five, with one being the least effective, and five being the most effective. Teachers/leaders responded that the audience's understanding of workplace rights and responsibilities improved significantly (4 out of 5 average) as a result of the seminar. Correlation with feedback from participants was moderate to high, as students found their understanding improved either 'a little more' or 'a lot more'. Reasons for moderate to high correlation (rather than all high) could be because some students with low literacy did not understand the question.

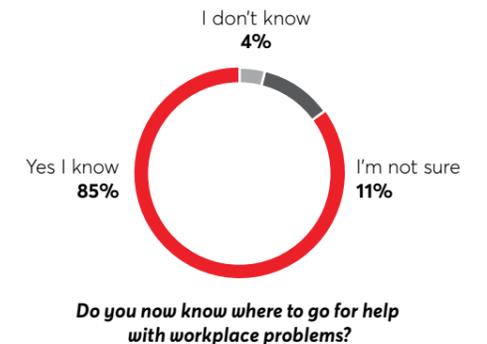
Teachers/community leaders responded that the information was presented in a way which was easy for the audience to understand. Correlation with students was moderate, as students found information mostly a 'little easy' or 'very easy' to understand. Once again, reasons for moderate correlation could be that some participants with low literacy did not understand the question. There was a strong correlation in rating between the teachers/community leaders (4.5 out of 5) and participants about confidence that people would know where to go for help.

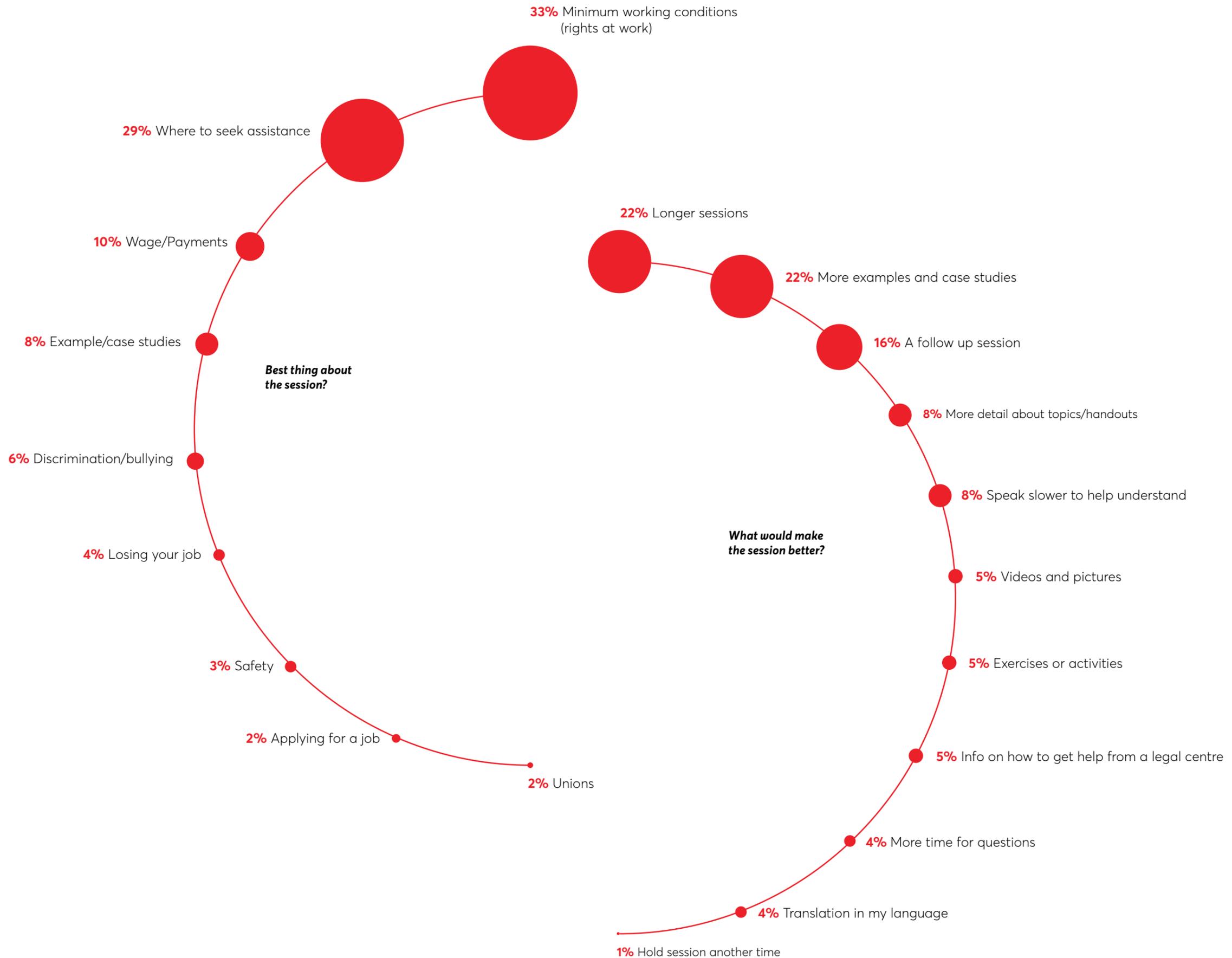
Teacher/community leader comments included:

"Clients had learned things they were unaware of. They were thankful some suggested if the workshop could be done again."

"Excellent ESL presentation—simple English and well paced."

"A very engaging presenter."





When community members were asked about the "best thing about the session", learning about rights at work and where to seek assistance were consistently mentioned.

Feedback on what would make the session better largely focused on longer sessions, more sessions, more examples, speaking slowly, use of multimedia and a request for more information:

The following responses illustrate a cross-section of feedback:

"The best thing about the employment law is get to know everyone have right at work."

"New legal terms like "sham contracting."

"About how much for the permanent and casual payment."

"The wage in different work type."

"It provides the legal wage standard and organisations we can ask for information and legal help."

"When you losing our job for wrong matter we can get help many places."

"The best thing I learn is job problem and talk to the community legal centre for help."

"I know about our rights (awards, enterprise agreements and contracts)."

"To make people know the right for both employment and employees."

PRESENTATIONS FOR COMMUNITY WORKERS

The WEStjustice CLE Program has also delivered information sessions to staff from agencies that work with newly arrived communities. This includes staff from settlement agencies, community health organisations, jobactive providers, EAL schools and other government and community organisations. These individuals have subsequently played a crucial role in helping clients to identify that they have a legal issue and make appropriate referrals to our service.

As noted in the Law and Justice Foundation report, Legal Australia-Wide Survey: Legal Need in Victoria, upskilling community workers can help improve legal outcomes for vulnerable clients:

Timely referral by non-legal professionals has the potential to substantially enhance early legal intervention and resolution. Early intervention can be critical in maximising outcomes and avoiding more complex problems.¹²⁵

In this regard, the importance of community workers and an effective referral network are critical to increasing awareness of workers' rights in Australia. Community workers play a central role in referring clients who may not know where or how to seek legal assistance. Community workers from target communities provide an essential link between services and community members.¹²⁶

Therefore, WEStjustice delivered a number of training sessions to community workers. These sessions provided:

- a basic overview of employment and discrimination laws; and
- information about government and community organisations that could help workers with a problem.

EVALUATION

Feedback from attendees at one information session for community workers shows that participants were very satisfied with the presentation. Participants were asked to rank their experience on a scale of one to five, with five being the most effective. 83% responded that their understanding of workplace rights and responsibilities had increased either four out of five or five out of five (with five being significantly improved). After attending the session, 100% of attendees knew where to refer clients with a problem at work:

Employment law presentation

| Area of presentation | Community partners responding with a rating of 4 or 5 |
|----------------------|---|
| Information | 89% |
| Format | 89% |
| Delivery | 89% |
| Activities | 95% |
| Overall | 89% |

83% How much has your understanding of workplace rights and responsibilities improved as a result of the seminar?

100% Do you know where to refer your clients if they have a question about their workplace rights?

When asked to suggest any ways to improve the presentation, 71% requested a longer or less rushed session. 29% requested more real scenarios and case studies.

When asked to comment on why they attended the session and how it may assist vulnerable workers, responses highlighted attendees' desire to be able to assist and refer clients to appropriate places for assistance:

"I have heard such stories but do not know the right organisation to refer to" City of Maribynong

"To learn more about employment law, to learn where to send people for referral" Coordinator

"Our service is often the first port of call for clients experiencing issues with employment. Its essential for us to be aware of the correct services to refer onto" Settlement support worker

"To learn more about employment law, and how I can get help for my clients about work rights" Project Officer

"Working with newly arrived refugees and asylum seekers who don't know their rights and often get pushed into employment theyre not ready for —great to know where to send them" EAL teacher

"As a job service provider we have a duty of care to look after our job seekers" Business development consultant

"I teach English to refugees and migrants who speak a different language, and they are often vulnerable" EAL teacher

Participants requested more information on sham contracting, discrimination, how to access community legal centres and workplace injury. General comments about the session included:

"Really worthwhile presentation. A list of people's names and where they are from will be helpful"

"Great speakers, well run workshop"

"Really informative session, excellent resources, and enjoyed the case studies"

"Very helpful to our clients"

Partly as a result of the information session, but also due to ongoing relationship building and engagement including attendance at network meetings and other events, WEStjustice has established relationships with community workers in settlement agencies, migrant service providers and NGOs. These relationships promote the Employment Law Service and foster warm referrals between agencies. Since the ELS opened, clients have been referred from a variety of agencies including New Hope Wyndham, Spectrum Migrant Resource Centre, AMES Footscray and AMES Werribee, Asylum Seeker Resource Centre and Foundation House. WEStjustice has also received referrals from the Fair Work Commission, Victorian Legal Aid and the FWO.

These community-based relationships and networks are critical in order to strengthen support networks and to address migrant workers' lack of awareness of workplace rights.

¹²⁵ Coumarelos, above n 79, 218.

¹²⁶ Dow, above n 2.

"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*

TRAIN THE TRAINER PROGRAM

The WEstjustice Train the Trainer Project (TtT Project) is the third part of the Employment Law Project's CLE program. It featured:

- the development of a suite of education resources for newly arrived communities, including six videos and a PowerPoint presentation;
- a training program for community leaders;
- a launch event for agency staff, where education resources were showcased, and community leaders demonstrated their skills; and
- a series of information sessions, delivered by the community leaders to their communities.

Community leaders are trusted sources of information in newly arrived and refugee communities. Bilingual community workers are an effective means of connecting vulnerable communities with community services. Utilising these principles, the TtT Project delivered a nine day training program in employment laws and services to six community leaders from newly arrived and refugee communities in Melbourne's Western Suburbs.

The community leaders visited a number of key employment and anti-discrimination law agencies, including the Fair Work Ombudsman (FWO), the Fair Work Commission (FWC), the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) and Victoria Legal Aid (VLA).

Participants were supported to develop a community education presentation, which they delivered to their communities in a culturally appropriate and targeted way. Participants now act as an important link between their communities and agencies by raising awareness that those affected by employment problems can get advice from agencies including WEstjustice.

The Project developed and utilized a suite of education resources that target newly arrived and refugee communities. The resources aim to provide useful tools for agencies, educators, community leaders and others working with vulnerable communities to explain employment and anti-discrimination laws and services. The materials are designed for high post-beginner to intermediate EAL students. They are freely available on our website.

The resources are divided into six topics which relate to common legal issues that we observe at our legal service:

- Wages and Other Entitlements
- Employees, Contractors and Sham Contracting
- Workplace safety
- Discrimination
- Sexual harassment and Bullying
- Unfair dismissal and Other Protections if your employment ends

The resources are:

- **A template PowerPoint presentation:** providing key information about each of the six topics. The Community Leaders modified the presentation template for their individual information session. They included the employment law topics that would benefit their community. There is a template presentation available on our website for other organisations to use: www.footscrayclc.org.au/train-the-trainer-project
- **Handouts:** A summary of employment law concepts and key employment law terms (also available on our website). Participants also received more in depth materials each week.
- **Six video clips (one relating to each topic):** Produced by Tandem Media, these videos are based on six common legal issues WEstjustice observed at our legal service. The scripts were reviewed at a workshop attended by English as additional language teachers, community education staff from Victoria Legal Aid, community workers from settlement agencies and youth services, and lawyers. View the video clips at www.footscrayclc.org.au/train-the-trainer-project.
- **Activities and question/answer sheets to accompany each video:** If used in a workshop, classroom or other group setting, the activities provide an opportunity for participants to work together and strengthen their understanding of employment and anti-discrimination law in Australia. The materials are designed for high post-beginner to intermediate English as an Additional Language students.

**This is the script and screen shot
from the video on wages and other entitlements:**

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.

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 really bad... but they are 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.



WEstjustice digital story.
Note: Resources which include handouts, videos and powerpoint presentations are available footscrayclc.org.au/train-the-trainer-project.

EVALUATION

Feedback from the leaders, external agencies who attended the launch event, and community members who attended information sessions has been overwhelmingly positive.

Feedback was gathered via:

- discussions with participants throughout the training course;
- evaluation forms completed by community leaders at the end of each training day and after their presentations;
- evaluation forms completed by attendees of the launch event; and
- evaluation forms completed by community members who attended the community sessions.¹²⁷

A video was also prepared showing detailed interviews with community leaders about their experiences.¹²⁸

Some comments from the leaders included:

"Train the Trainer program has helped me to understand the complexity of employment law issues in Australia. It was particularly relevant for me to understand how different organisations work to provide a comprehensive protections to workers in Australia."

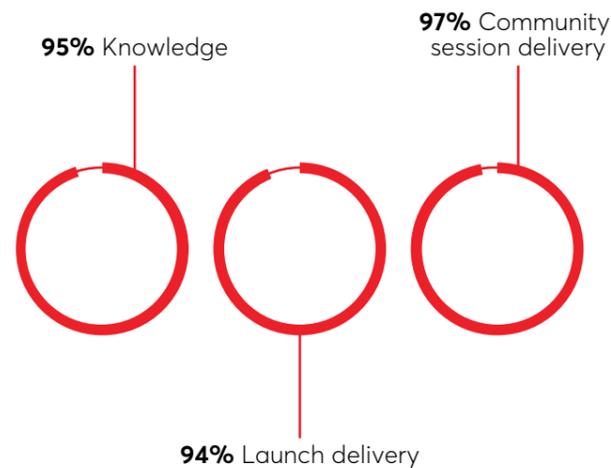
"Prior to the training I had some ideas about employment laws and services but now after the training I know more details and am confident that I can deliver the information sessions by myself and refer clients appropriately."

"I didn't have any knowledge and understanding of employment law before but I now have some knowledge about it and hope I can help the community how and where to get help."

"Train the Trainer program will help my community because they will know now who can help them with employment law issues, in English, and also in the language which they speak. The Community Leaders have the first-hand knowledge of the employment law problems faced by their community and also have the knowledge of the organisations that can help. They can confidently refer their community to those organisations. Having the knowledge of the employment law will empower the community and people will gain confidence in taking action when their employment rights are breached."

Launch event feedback:

At the launch event, each of the participants presented in a resources showcase. 95% of attendees thought the leaders' knowledge of employment laws was excellent or very good. 94% found their delivery excellent or very good. Importantly, 97% thought that the leaders would deliver an excellent or very good information session to their communities.



Comments from agency staff who attended the launch were as follows:

"The presentations were fabulous, the program is beneficial because it links services and clients."

"Excellent initiative to have presenters from the community."

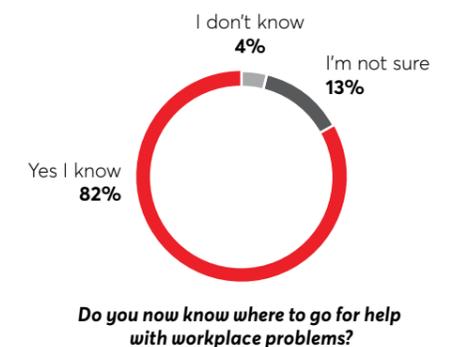
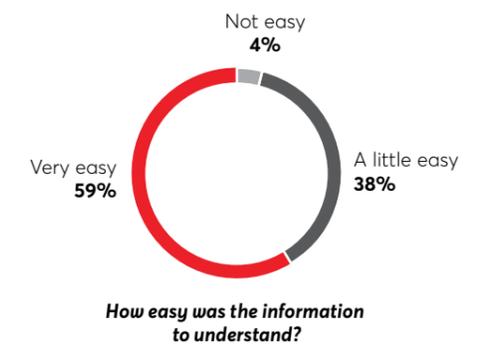
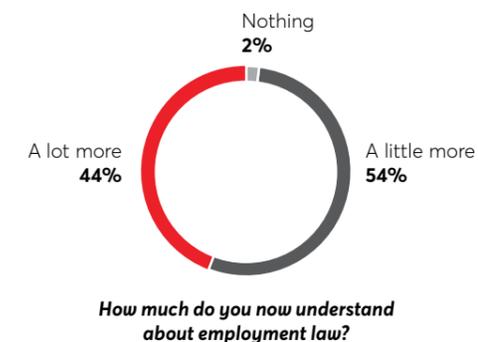
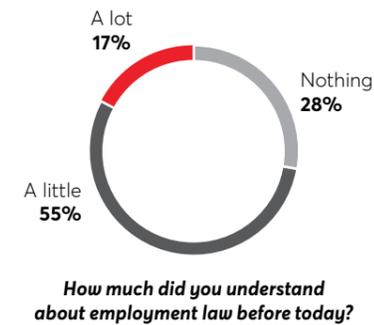
"Great presentation, this has been needed for sometime so its great to see this at grass roots level."

"Presentations were terrific, great to see everyone confidently providing advice."

"The Program is exactly what the community needs. It should be ongoing with additional support provided to the Community Leaders, as well as additional Community Leaders trained."

Community member feedback:

Importantly, feedback from community members who attended community leader presentations shows that their understanding and awareness has increased. Prior to the community information sessions, 83% of community members understood a little or nothing about employment law. After the information sessions, 98% of community members understood a little or a lot more about employment law, and 82% of community members know where to go for help if they have employment problems:



¹²⁷ For further details, please request a copy of the Train the Trainer Evaluation Report from WEstjustice.

¹²⁸ Footscray Community Legal Centre, Train the Trainer Project <www.footscrayclc.org.au/train-the-trainer-project>.

What was the best thing about the employment law session?

"Knowing that employees have rights and entitlements"

"Free service, interpreter"

"If you get bullied you can contact people who can help you"

"They made it easy for me to understand it better in my language"

"It has helped me to understand the employment law better than before"

"The information, phone numbers and pamphlets"

What would make the employment law session better?

"Conduct information sessions in Karenni language for parents who cannot speak English and Burmese"

"Explain with the real case study"

"Asking people about their work conditions, this would have connected the audience more"

"More training, as well as meeting with different communities of different backgrounds"

"Informing the community about the best ways to enter into the workplace"

How will the information from today help you?

"Will help the family"

"Will guide me to the best legal service centre"

"I can get help without worry and anxiety"

"Giving information to friends and colleagues"

"Will give information to young friends entering employment"

"I have new awareness of the law and it will stop discrimination and bullying"

"I know whom to approach now"

The Train the Trainer model has had many positive outcomes not least of which is the increased information sharing (of accurate information) within the community. Community leaders who participated in the Train the Trainer Project have told us that they have shared, and plan to share, employment law information with their community in a number of ways, including:

- community information sessions;
- client appointments in their workplace;
- at their church;
- at community events and functions;
- via telephone conversations;
- face-to-face meetings in their home;
- on community radio;
- social media (such as Facebook);
- local newspapers and community newsletters.

Evidence shows that leaders now act as an important link between their communities and agencies by raising awareness that those affected by employment problems can get advice from agencies including WEstjustice. Evidence also shows an increase in understanding of laws and services among target communities, as well as increased access of services.

The Train the Trainer model is an important mechanism to create strong support networks within migrant communities. By arming community leaders with knowledge of workplace rights in Australia, workplace issues may be resolved early and the levels of exploitation amongst migrant workers may be reduced.

The below case study demonstrates the impact of targeted materials, when used by EAL teachers in the classroom:

IMPACT OF TARGETED MATERIALS AND FACE-TO-FACE SUPPORT

A teacher from an English as Additional Language program provided the following feedback about the impact of the WEstjustice education resources. WEstjustice has also directly assisted clients that this teacher, and others from her community centre, have referred to our employment law service:

I used the material from the Employment Law project—and in 6 weeks, we only got through two of the videos! They were fabulous, and the class did lots of related readings and role plays.

One of the students told me as a result of doing that project, she was able to ask her employer for her payslips. They had not given her any, and now she has all of them.

Another student had a boyfriend who sounded like he was in sham contracting. He had been told to get an ABN, and was working 6 am–9 am on a casual basis and in a supervisory role, for \$15 an hour. She was able to give him the information about contacting the CLC, and that it was all confidential... I'm not sure if he followed up, but at least he has the information.

Another student is a bilingual worker in childcare. Even though we didn't get up to the discrimination videos, after studying the underpayment and sham contracting videos, she thought maybe she should talk to her boss about being treated unfairly at different centres. So she rang her boss and stated what had happened. The lady was most concerned and said she would talk to the workers involved, and then said, 'How long did you say you have been working with us?... As a result, the student has been given a \$5 per hour pay rise as her employer realised they had not given her increments for experience. I don't know if they've backpaid her, but it's still a good outcome and she's very happy. She's especially happy that she was brave enough to talk to her boss.

And this same student has a neighbour who was working at a restaurant. The young girl is an international student and has to work to make ends meet. Her agreement had been to work at a casual basis at only \$15 p.h. When our student talked to her, they had told her she must work for \$8 ph. So she was able to pass on information about the CLC and the Fairwork Ombudsman's office. Again, I don't know whether she has done anything about this, but at least she knows what to do.

Some students which have a slightly lower level of English still seem a bit apprehensive to act on what they've been taught because they're still frightened of losing any jobs they do have. One of them has two sons working at factories. Although the work is casual, and he often works long hours, they're only paying him the minimum wage of \$17.29 an hour. It sounds like her other son is on the correct minimum wage for casuals. The workers have been told they're going to be moved to part-time, with no change in pay, so that's good. The son hasn't done anything about going to CLC even though his mother has told him what to do - maybe because he's always exhausted - working 12 hours a day on a lot of days. They also probably find it hard to believe they can get people to pay them more money.

There is a further case study below (page 127) which demonstrates how training community leaders can benefit vulnerable communities. In this case study, a community leader connected a large group of vulnerable workers to WEstjustice and the FWO, resulting in over \$20,000 of wages being recovered.

OTHER METHODS OF INCREASING AWARENESS

There are many other methods of raising awareness of workers' rights. As stated above, we consider that the more approaches that are adopted, the greater the likelihood that information will reach those who need it most.

Other examples of alternative means to increase awareness include:

Amendments to curriculum for EAL learners: One such method is making information about Australian employment laws and services a compulsory component of the curriculum in English as Additional Language (EAL) courses, such as Settlement Language Pathways to Employment and Training and Adult Migrant English Program (AMEP) classes. In fact, one of the observations in the Fraser Report is that settlement agencies and AMEPs are 'well-placed to deliver legal and financial education to a large number of people in a systematic way'.¹²⁹

Phone app: developing a simple phone application that is translatable into languages other than English, containing basic information about key agencies such as the Fair Work Ombudsman, Fair Work Commission, the ATO and other key regulators (such as OHS regulators). Many attendees at our CLE sessions take a photo of the PowerPoint slides showing key service contact details. Therefore, the information could include brief descriptions of what the agency does and include contact details. This information could be written but also spoken/in video form. It could also include a function enabling workers to record their hours of work (we understand that FWO is currently developing an app that provides some of these features).

Public awareness campaigns: public awareness campaigns about systemic issues, delivered in languages other than English. Public awareness campaigns have been used by FWO, and in other countries to combat issues such as human trafficking.¹³⁰ Such campaigns could include social media and face-to-face approaches, depending on community need.

FUNDING

Unfortunately, WEstjustice receives more requests for CLE community presentations than we have capacity to deliver. Similarly, the 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 evidences 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. Such need will only increase over the coming months with communities moving to regions in attempts to find work that qualifies for their Safe Haven Enterprise Visas.

WEstjustice proposes that mainstream agencies develop their own targeted resources, but also provide funding for community organisations to distribute those resources and deliver essential face-to-face information sessions that align with community needs. We support the Productivity Commission's recommendation 29.1 that:¹³¹

The Department of Immigration and Border Protection and the Fair Work Ombudsman should improve the information available on their websites about migrant workers' workplace rights and conditions. They should also explore other ways of providing migrants with this information, ensuring that it is in easily accessible languages and formats.

We also support the Senate Education and Employment References Committee recommendation that:¹³²

the Department of Immigration and Border Protection provide funding on a submission basis for non-governmental organisations, registered employer organisations, trade unions, and advocates to provide information and education aimed specifically at improving the protection of the workplace rights of temporary migrant workers.

It is essential that education resources do not sit unused on a website, but adequate funding is allocated to ensure resources are distributed and available in community sessions, migrant resource centres, medical facilities and other locations visited by migrant workers.¹³³

RECOMMENDATION

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.

¹²⁹ Fraser, 'Prevention is better than cure', above n 113, 8.

¹³⁰ International Labour Organization, 'Protecting the rights of migrant workers: A shared responsibility' (Report, 2009) 8.

¹³¹ Productivity Commission, above n 29, 926.

¹³² Education and Employment References Committee, The Senate, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (March 2016) xiii; 272–276; 318–320.

¹³³ International Labour Organization, above n 130, 8

Active and accessible agencies

4

In addition to improving education around workplace rights and responsibilities, migrant workers urgently need better access to agencies and legal processes. This will increase equity and efficiency. Claims will be better articulated and resolved more quickly.

Currently, there are numerous government agencies that each assist with different employment problems. If you have been injured at work, you may contact WorkSafe. If you have been underpaid you may contact the Fair Work Ombudsman (FWO). If you have lost your job in unfair circumstances, you may contact the Fair Work Commission (FWC). If discrimination is involved, you may contact Victoria Legal Aid (VLA), the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) or the Australian Human Rights Commission. If you have experienced all of these things, you may need to contact all of these agencies. Although interpreters are offered, the level of assistance for vulnerable CALD workers varies between services.

On the whole, agencies are inaccessible to newly arrived and refugee communities. This is for various reasons discussed above including lack of rights awareness and language, literacy, cultural and practical barriers.

WHAT WORKS WELL

WEstjustice has worked closely with the FWC and FWO. This section focuses mostly on these two agencies. Between May 2013 and October 2015, WEstjustice referred 32 matters to FWO, and was involved in at least 15 matters that involved FWC conciliations or hearings. WEstjustice welcomes our collaborative relationship with both the FWC and FWO.

FWO

Our relationship with FWO has strengthened considerably as a result of our connection with the Community Engagement team. We have developed a successful warm referral system, and have also developed connections with members of the Overseas Workers Team, Education and newly formed Migrant Worker Taskforce teams. WEstjustice staff have benefitted from the opportunity to shadow FWO staff at the Federal Circuit Court, and FWO staff have attended and participated in a number of WEstjustice education initiatives.

These collaborations and referral pathways are resulting in impressive outcomes. For example, numerous clients have received assistance via our warm referral process, 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, FWO's recent participation in the WEstjustice Train the Trainer program has provided a number of community leaders with significantly improved awareness of FWO services. 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.

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. As noted above, our clients mostly work in low-skilled and high-risk industries, including food processing, hospitality, cleaning, warehousing and distribution and the child and aged care industries. Whenever possible and with our clients' consent we share intelligence with FWO about systemic breaches.

TRAIN THE TRAINER PROGRAM COLLABORATION SUCCESS

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.

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.

WEstjustice welcomes the Federal Coalition's commitment to increasing FWO enforcement powers and providing a \$20 million funding increase. In particular, we welcome the commitment to establish a Migrant Worker Taskforce to target employers who exploit migrant workers.¹³⁴ We would welcome the opportunity to work with members of the Taskforce and discuss our findings further.



WEstjustice Train the Trainer program: community leaders visiting the FWO.

¹³⁴ Liberal Party of Australia, Coalition's Policy to Protect Migrant Workers (10 August 2016) <<https://www.liberal.org.au/coalitions-policy-protect-vulnerable-workers>>.

FWC

Our collaborations with the FWC Engagement Team have delivered tangible benefits for newly arrived and refugee communities in the West. In particular, the FWC's involvement in the Train the Trainer program was extremely beneficial. The FWC allowed community leaders to observe an FWC conciliation and liaise with a Commissioner. Feedback from the leaders was that such experiences enabled them to better understand how the FWC operates, and will empower the leaders to assist community members to access FWC processes.

As discussed in the dismissals section below, it is helpful that the FWC provides assistance in the early stages of an application. For example, that the FWC attends to service of the original application is of great importance for our clients, who often find service extremely difficult and in some cases, unaffordable. We have observed a higher attendance rate for employers at FWC conciliations than FWO mediations.

Our staff and volunteers have benefitted from FWC education resources, including mock trials and the Benchbooks. This enables the ELS to provide better advice and resolve complaints more efficiently.

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. For example, FWO has an Overseas Workers team, had engaged Community Engagement Officers, and conducts targeted campaigns. 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.¹³⁵ 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.

These case studies provide examples:

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.

JOHN

John worked for a bakery and believed he was underpaid by around \$8000. He had evidence in his phone and diary to show the hours he had worked. He wasn't paid penalties or overtime, and his hourly rate was below-award. John's friend helped him lodge a complaint with the FWO. There was a mediation but the employer denied the underpayments. John came to WEstjustice asking for help. He showed us his documentation. A letter from FWO said that a Fair Work Inspector could assist John to pursue his case further and ask for this assistance if he'd like, but John doesn't speak English and didn't understand the invitation/offer of assistance. We helped John get back in contact with the FWO.

¹³⁵ Catherine Hemingway, Footscray Community Legal Centre, Submission No 143 to Productivity Commission, *Inquiry into Australia's workplace relations framework*, March 2015, 7-9.

CULTURAL RESPONSIVENESS FRAMEWORKS

One option to increase accessibility is for government agencies to undertake a comprehensive review of their cultural response plans, and create better cultural responsiveness frameworks and engagement guidelines.¹³⁶ Based on our experience and relevant research, we suggest that a cultural responsiveness framework should include the following actions:

- develop specific protocols and checklists for Infoline staff to identify newly arrived and refugee clients, and then assist them to articulate their claims (ideally, once identified, vulnerable workers would be referred to a specialist team within FWO who are equipped to work with CALD clients);
- provide information in a wider range of community languages including those spoken by newly arrived and refugee communities,¹³⁷ and in a variety of formats,¹³⁸ and ensure such resources are appropriately distributed to communities;
- participate in (and help resource) specifically targeted education and engagement programs run in partnership with community organisations;¹³⁹ and
- employ dedicated staff with speciality expertise in assisting migrant workers (ideally multilingual) to provide practical face-to-face assistance.

It is certainly within the mandate of many regulatory bodies and agencies to engage with the community and be accessible.

For example, section 576(2)(b) of the *Fair Work Act 2009* (Cth) (FW Act) provides that one of the FWC's functions is to provide assistance and advice about its functions and activities. The FWC Engagement Strategy sets out a range of strategies to enhance public engagement.¹⁴⁰

INTAKE CHECKLISTS AND SUPPORT

As the case studies demonstrate, we have witnessed a number of clients try to access help from FWO without support from a community lawyer. Too often, such attempts result in clients with meritorious claims having their cases closed without investigation. Similarly, we have witnessed clients who have been unable to fill out FWC application forms and hence, decided not to lodge a claim. Clients are often unaware of the laws, and do not know what facts or incidents may be relevant to a claim.

We recommend that all agencies introduce checklists and guides to ensure that vulnerable workers are identified and assisted to articulate their claims. For example, our intake form contains a list of practical questions about pay, hours worked, duties, language spoken at home, year of arrival in Australia and language proficiency. These are designed to identify how vulnerable a client is, and ensure that no employment law problems are missed due to the client's lack of awareness that a legal problem even exists. Where particular issues are raised via initial intake questions, further "Matter Specific Questionnaires" are designed to assist lawyers and paralegals obtain all relevant information and make a thorough assessment of the case.

EDUCATION PROGRAMS

As noted above, there is urgent need for targeted education programs to raise awareness of employment rights and services. Such education could be provided by FWO and FWC, or under the auspices of these bodies, and delivered by community organisations.

In order to ensure any new language resources are effectively utilised, it is essential that staff are engaged to educate communities, agencies and community leaders about the available resources and how to use them.



WEstjustice community information session.

¹³⁶ Other sectors have done work in this area, see, eg, Department of Health & Human Services, 'Cultural responsiveness framework, Guidelines for Victorian health services' <www.health.vic.gov.au/diversity/cald.htm>.

¹³⁷ Coumarelos et al, above n 79, 214.

¹³⁸ Women's Legal Services NSW, above n 77, 7.

¹³⁹ Fraser, 'Prevention is better than cure', above n 113, 51.

¹⁴⁰ Fair Work Commission, *Public Engagement* (22 February 2016) <<https://www.fwc.gov.au/creating-fair-workplaces/commission-engagement-strategy/public-engagement>>.

DEDICATED STAFF

To facilitate accessibility for vulnerable workers, greater targeted assistance is required throughout the dispute resolution process. For example, it would be useful for agencies to have dedicated staff who can assist vulnerable workers (including those with English as an additional language) to navigate processes and procedures. WEstjustice has assisted clients who cannot calculate their underpayment, cannot fill out a complaint form, do not know what an outline of submissions or a witness statement is, or who have been very afraid to contact the FWC or FWO for cultural reasons. The ability to make a warm referral to trained staff who can assist clients throughout their claim would increase the accessibility of agency processes. These staff could also work to build trust and relationships with vulnerable communities through community education and other community engagement activities.

As demonstrated in the Train the Trainer section above, engagement of multilingual staff and community leaders would also greatly improve access.

Training for all staff to increase awareness of CALD workers and their needs would also be beneficial. For example in 2004, the Family Court engaged in a program called the 'Living in Harmony Partnership: Families and the law in Australia'. The program aimed to 'develop and strengthen relationships between new and emerging communities and the Court', including by enabling Family Court personnel to gain knowledge about the life experiences of CALD communities; and was also intended to provide educational opportunities for members of CALD communities to learn about Australian family law.¹⁴¹

Diana Bryant, the Chief Justice of the FCA, reflected positively on the experience gained by Court personnel as a result of the partnership:

From the discussions I have had with Court personnel, I know that judicial officers and staff who have been involved in the Partnership have learnt a great deal. It can be quite humbling to learn of the experiences of some of our newer citizens, as I did at the graduation ceremonies held in Melbourne and Parramatta. Their lives have been extraordinarily different to the experiences of the great majority of Australians. Most have come as refugees and some have held senior positions in their countries of origin. The move to Australia has not been simple and when they arrive in Australia life can be anything but easy. Australian law is one of the factors confronting these communities. We take for granted the complexities of Australian law but for newcomers, it can seem overwhelming. Communities repeatedly spoke about the plethora of laws that apply to every day life and how confusing they found the division of Commonwealth-State jurisdictions. They often talked of feeling confronted or challenged by Australian law on an almost daily basis as they try to make new lives for themselves and their children. Their desire to understand it was strongly expressed.¹⁴²

The FWO has a dedicated Overseas Workers team, and has recently announced the formation of a new Migrant Worker Strategy and Engagement Branch. WEstjustice welcomes this initiative and the opportunity to work with this new team.

BETTER COLLABORATION

In addition to individual agency plans and processes, there should also be greater collaboration between key agencies. Community organisations, the Fair Work Commission, FWO, AHRC, VEOHRC and WorkSafe should work together to develop a cultural responsiveness plan and improved processes to facilitate warm referrals between services.

The Migrant Workers Campaign Steering Committee, a broad coalition of agencies and community organisations, has prepared a service map with a view to encouraging such processes.

PROACTIVE COMPLIANCE AND ENHANCED POWERS

"While addressing worker complaints is an important function of any labour inspectorate, there is concern that a focus on complaints at the expense of other detection methods fails to ensure that vulnerable workers are effectively protected."¹⁴³

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. As noted above, it is not appropriate to expect that all enforcement activity be initiated by those who are most vulnerable. Indeed, it is essential that agencies take proactive measures in key industries and locations where there is suspected widespread exploitation. Such measures should include inspection of records and actions to recover any discovered underpayments. FWO has undertaken such initiatives in the past, however¹⁴⁴ more extensive and regular initiatives are required.

Further, as discussed in the wages and entitlements section below, WEstjustice recommends that FWO be granted enhanced powers to compel parties to disclose information, attend mediation, and rectify small underpayment claims.

MORE RESOURCING

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:¹⁴⁵

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.

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.¹⁴⁶

WEstjustice commends the Coalition's recent policy announcement to increase FWO resourcing.¹⁴⁷

¹⁴¹ 'Families and the Law in Australia: The Family Court Working Together with New and Emerging Communities' (Report, Family Court of Australia and Australian Government Department of Immigration and Citizenship) 4, 7.

¹⁴² Ibid, 3.

¹⁴³ John Howe, Andrew Newman, Tess Hardy, above n 88, 7.

¹⁴⁴ See, eg, Fair Work Ombudsman, *Harvest Trail Campaign* <<https://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/national-campaigns/harvest-trail-campaign>>.

¹⁴⁵ Productivity Commission, above n 29, 927.

¹⁴⁶ Education and Employment References Committee, above n 132, xiv, 278–283; 327–328.

¹⁴⁷ Liberal Party of Australia, above n 134.



WEstjustice employment law service.
Photo credit: Jessica Hogg

RECOMMENDATION

Federal and State Governments should ensure that Federal and State based agencies take further steps to ensure they are more accessible and responsive to newly arrived and refugee workers.

State and Federal Governments should require agencies to develop cultural responsiveness frameworks to ensure newly arrived and refugee clients can access services. Such frameworks should:

- develop specific protocols and checklists for inoffice 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;
- 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.

Recognising that increasing accessibility will require increased time and contact with communities, agencies should be given additional resources to meet unmet need.

Community-based employment law services

5



WEstjustice volunteer.
Photo credit: Jessica Hogg

"Community and advocacy groups are often the resource of first resort for immigrants and can connect well-meaning policies, the enforcement agencies that implement them, and the population they seek to protect."¹⁴⁸

UNMET NEED FOR EMPLOYMENT LAW HELP

In 2012, the Law and Justice Foundation undertook a large study of unmet legal need in Australia. Among all Victorian respondents, 5.9 per cent identified that they had experienced an employment law problem in the past year. Similarly, an Australian Institute survey identified that 7 per cent of Australians had an employment law problem.¹⁴⁹ WEstjustice data suggests that this figure would be significantly higher for newly arrived and migrant workers.

Despite significant need for employment law services there are limited avenues for workers to get help with their problems. 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 noted above, it is largely inaccessible to newly arrived and refugee communities.

Very few generalist community legal centres provide employment law assistance. This is not due to a lack of need. However, employment law is a highly specialised area of law with short limitation periods, so generalist centres are often unable to allocate scarce resources to this area.

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, is unable to meet 57 per cent of demand for help. 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.¹⁵⁰ In Victoria, Legal Aid does not provide assistance with employment matters (except where discrimination is involved) and frequently refer matters to other services.¹⁵¹ 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'.¹⁵²

EMPLOYMENT LAW HUBS FOR MIGRANT WORKERS

Even if agencies are more active and accessible, newly arrived migrant and refugee workers will still require community-based assistance to enforce their rights. In this section, WEstjustice proposes the establishment of 'one-stop-shop' employment law hubs. These hubs will increase successful labour market integration and reduce disadvantage for migrant workers by providing a safe place to learn about rights and opportunities, and assistance to enforce rights in cases of breach. Hubs will also play a central role in liaising with government agencies and policy makers to tackle systemic problems of migrant worker exploitation.

¹⁴⁸ Shannon Gleeson, 'From Rights to Claims: The Role of Civil Society in Making Rights Real for Vulnerable Workers' (2009) *Law & Society Review* 43(3) 689-690.

¹⁴⁹ Federation of Community Legal Centres, above n 3, 4.

¹⁵⁰ Federation of Community Legal Centres, above n 3, 4.

¹⁵¹ Apart from those involving discrimination that are eligible for assistance from the Equality Law Program.

¹⁵² Federation of Community Legal Centres, above n 3, 4.

MULTI-JURISDICTIONAL LANDSCAPE MAKES ENFORCEMENT DIFFICULT

The piecemeal nature of the workplace relations landscape makes enforcement difficult. There are currently different jurisdictions and agencies for 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, particularly for vulnerable clients. This complexity also typically limits the capacity of generalist advice agencies such as generalist community legal centres to provide assistance.

For example, if a client is dismissed for a discriminatory reason (for example, they have been injured at work and complained because they were not paid properly), the client will need to decide whether to bring a general protections claim in the Fair Work Commission, an unfair dismissal claim in the Fair Work Commission, a wages claim in the Federal Circuit Court or Magistrates Court, a discrimination claim to the VEOHRC, AHRC or VCAT, a claim to WorkCover, a complaint to WorkSafe, or a combination of these. 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, the decrease in union membership has significant implications for monitoring and enforcement of workplace rights.¹⁵³

It is critical that targeted services exist to provide initial information and advice on matters such as choice of jurisdiction, as well as subsequent advocacy and support with navigating processes, completing paperwork and resolving disputes. 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—this can involve consideration of complex jurisdictional issues. Many clients faced with the requirement to prepare a letter of demand, 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.

As noted above, there is no doubt that many of our clients would be unable access the system to resolve claims without assistance to lodge relevant applications, and advocacy and other support at conferences and hearings.

COMMUNITY-BASED EMPLOYMENT ADVICE SERVICES CAN MEET THIS NEED

Community based employment advice services (in particular, community legal centres) are best placed to meet this need. As demonstrated in the outcomes section above (page 78), in a short time, WEstjustice has provided significant assistance to over 200 vulnerable clients, achieving meaningful results for minimum cost. Results include recovery of wages and compensation, job retention, education for future employment and referrals for further assistance.

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. Zara's case is one example:

ZARA

Zara worked on a 457 visa in a restaurant. She was directed to work 6–7 days per week, often for more than 12 hours each shift. However, she received no overtime or penalty rates. When Zara asked why her superannuation was not being paid, she was dismissed. Zara had taken photos of the log book where she wrote her hours of work.

Zara contacted the Fair Work Ombudsman for assistance, but FWO could not take Zara's matter further because Zara's boss supplied conflicting evidence.

WEstjustice spoke with other employees at the restaurant and confirmed Zara's story. WEstjustice then helped Zara to bring a claim in the Federal Circuit Court, with help from a Justice Connect pro bono barrister. Zara's boss threatened Zara, saying she was poor and weak and would never be able to do anything about the situation. WEstjustice supported Zara to continue with her claim and she recovered over \$20,000 in unpaid wages.

When more than one jurisdiction is involved, it is particularly important for a community organisation to assist:

AMAD

Amad worked as a labourer at a company that installed building products. He spoke limited English. Amad obtained his employment through a job agency that he had been referred to by Centrelink. Amad worked at the company for about five months but left employment because he had to constantly remind his employer to pay him. Amad was not paid at all for his final week of work. After he left employment, Amad made numerous, unsuccessful attempts to contact his former employer to demand payment. When his former employer was consistently unresponsive, Amad attended WEstjustice. WEstjustice was aware of the employer, who had underpaid other clients of the service.

WEstjustice made a warm referral to the Fair Work Ombudsman, where Amad and WEstjustice attended a mediation with his former employer who agreed to pay him his outstanding wages. However, his employer did not honour the settlement agreement and Amad returned to WEstjustice for help as FWO was not able to assist.

Through consultation with practitioners across different community organisations, WEstjustice advised Amad that the best course of action was to apply at the Magistrates Court for the Terms of Settlement to be enforced and obtained a barrister through Justice Connect to represent the client on a pro bono basis. Amad ultimately received payment.

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

¹⁵³ 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.

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

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: 'Engage new arrival communities to integrate in the Australia system, especially to understand Australian laws; keep support and provide information/services to refugee backgrounds for long term in order to collaborate with the Australian-first settlers as a community.'

Collaboration: Closely linked with the above point is the importance of collaborating 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, Inner West Settlement Advisory Committee 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).¹⁵⁴

The Booth Report describes the current employment advice landscape for vulnerable employees as presenting 'a confusing picture' if they are sent out alone on the 'referral roundabout'.¹⁵⁵ The Report highlights the importance of CBEAS for vulnerable workers:¹⁵⁶

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.

For example, while an FWO mediation may be regarded as a low impact and relatively informal type of alternative dispute resolution, it is extremely confronting for many of our clients. For example, one of our clients was visibly shaking at her mediation. She said she simply couldn't have done it without our assistance. This client made it clear that, had she been required to represent herself, she would have withdrawn the complaint.

¹⁵⁴ Anna Booth, 'Report to the Fair Work Ombudsman of a Review of Community-Based Employment Advice Services' (Report, Cosolve, 30 September 2009), 26 <<https://www.fairwork.gov.au/ArticleDocuments/716/Report%20of%20a%20Review%20of%20Community%20Bases%20Employment%20Advice%20Services.pdf.aspx?Embed=Y>>.

¹⁵⁵ Ibid, 25.

¹⁵⁶ Ibid, 2.

The Booth Report also stresses the utility of collaboration between government and CBEAS:¹⁵⁷

CBEAS are not 'underground' organisations that are distinct from the new workplace relations architecture. They are an essential link in the chain of maintaining employment standards. In practice they are treated as such by government bodies that regularly refer workers to them. Their interdependence within the system should be formally recognised and their visibility improved.

Indeed, CBEAS contribute to the effective and efficient functioning of the 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 to provide innovative solutions to social problems.¹⁵⁸ It has also recognised that employment law is a major gap in civil law assistance¹⁵⁹ 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.¹⁶⁰

In its recent 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'.¹⁶¹

¹⁵⁷ Ibid, 26.

¹⁵⁸ Productivity Commission, *Contribution of the Not-for-Profit Sector*, Research Report (January 2010).

¹⁵⁹ Productivity Commission, *Access to Justice Arrangements*, Inquiry Report Overview No 72 (5 September 2014) 30.

¹⁶⁰ Ibid, 2.

¹⁶¹ Productivity Commission, above n 29, 925.

Importantly, the Commission discussed the value of WEstjustice (then Western CLC) Employment Law Project in particular, noting that:¹⁶²

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 Productivity Commission recommended that 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'.¹⁶³

WEstjustice strongly supports this recommendation, and suggests that some of these increased resources should be directed towards successful community programs. Funding services like WEstjustice to provide legal assistance and community education such as the Train the Trainer program would also enable FWO to meet Productivity Commission recommendation 29.1 that FWO and the DIBP 'improve the information available on their websites about migrant workers' workplace rights and conditions' and 'explore other ways of providing migrants with this information, ensuring that it is in easily accessible languages and formats'.¹⁶⁴ It would also enable FWO to gather more effective intelligence on non-compliant employers, as WEstjustice regularly provides such information with the consent of clients who may not otherwise complain.

The work of CBEAS, including WEstjustice, clearly contributes to the efficiency of the workplace relations framework.¹⁶⁵ In addition to providing critical assistance to regulators and vulnerable workers, CBEAS provide a crucial triage or filtering function, advising clients with meritless claims or very poor prospects of success not to proceed.

¹⁶² Ibid.

¹⁶³ Ibid, 836.

¹⁶⁴ Ibid, 926.

¹⁶⁵ Productivity Commission, *Access to Justice Arrangements*, above n 159.

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.

CBEAS also promote the efficient passage of disputes through established dispute resolution pathways, and by assisting clients to access mainstream services. For example:

SAM

Sam is from South Sudan. He worked at a factory and was not paid the minimum wage. He is illiterate and does not speak much English. WEstjustice assisted Sam to calculate his underpayment and write a letter of demand. When this was not successful, they helped Sam fill out the FWO complaint form. Inspectors from the Overseas Workers team worked with Sam and WEstjustice, and helped Sam recover his wages.

We believe it is important to highlight the importance of this community-based work, which cannot continue without funding. We note that the CBEAS funding program has recently been replaced by the Fair Work Ombudsman Community Engagement Grants program.¹⁶⁶ We recommend that part of this program include dedicated funding for supporting newly arrived and refugee workers. However, given the significant and particular unmet needs of migrant workers, we further recommend that a separate and dedicated fund be established—similar to the Migrant Communities Employment Fund that was introduced by the Labor Government, and abandoned by the Federal Coalition Government in 2013. Such a fund should include tenders for the provision of targeted legal education and legal services for newly arrived and refugee workers.

¹⁶⁶ Department of Employment, Australian Government, 2016–17 Budget: *Employment Overview* (4 May 2016) <<https://www.employment.gov.au/2016-17-budget-employment-overview>>.

EMPLOYMENT LAW HUBS: A ONE STOP SHOP

In particular, we recommend the establishment of community-based employment law hubs for migrant workers.

These hubs would deliver three components:

- coordination and delivery of the Employment Law Service, providing legal advice and assistance to newly arrived and refugee workers who have a problem at work, and facilitating referrals to mainstream agencies where appropriate;
- coordination and delivery of a Community Legal Education program to newly arrived communities, including community leaders and community workers, to raise awareness of laws and services that can assist and prevent exploitation; and
- 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.

The WEstjustice Employment Law Service is a pilot program. Due to resource constraints, future operation of the service is not guaranteed and we are unable to meet current demand. Further, this targeted service is not available to many migrant workers outside our catchment area. We have received contact from workers and organisations around Australia expressing a need for similar services.

It is difficult for generalist community legal centres to provide assistance in all areas of law, particularly in specialist areas like employment law. Indeed, only a small number of CLCs across Australia have the expertise to provide employment law assistance. Funding for specialist areas such as employment is not always available from funds provided by State and Federal Attorneys General. In other specialty areas, funding is provided by other sources. For example, at WEstjustice specialist credit and tenancy services are funded by Consumer Affairs Victoria, and taxi driver legal services are funded by the Taxi Services Commission.

Therefore, the State and Federal Governments should establish a dedicated fund to adequately resource and roll out employment law hubs across Australia. Such hubs could operate as independent centres (similar to migrant worker centres in America)¹⁶⁷, or ideally, form part of (or work closely with) an existing community legal centre, so that clients can receive holistic assistance with other legal issues. We recommend the Consumer Affairs Victoria Specialist Services Program model below.

The recommendation to establish employment law hubs has also been made by the Ethnic Communities Council of Victoria:¹⁶⁸

ECCV consultation finds a need to fund existing and new targeted employment law services for migrant communities... ECCV support further investment in government departments to stop worker exploitation among migrant communities. ECCV also recommend establishing employment law hubs (to provide education, legal assistance and other services)

COLLABORATION WITH OTHER COMMUNITY BASED ORGANISATIONS

Importantly, the Employment Law Hubs would collaborate with other services currently working to assist newly arrived migrants and refugees. As discussed in the targeted education section above (presentations for community workers), staff at settlement agencies, churches and other community organisations play a critical role in the settlement process and are often the first point of contact for recently-arrived migrants. As WEstjustice Employment Law Service has done, it is essential that the Hubs provide education and training to staff in community organisations so that they can identify when their clients have an employment law issue, and make appropriate referrals.

¹⁶⁷ For example, the Workers Center New York runs "Know Your Rights" education workshops in both English and Spanish, and run campaigns for policy and law reform: *About* <<https://workerscentercny.org/about-2/>>.

¹⁶⁸ Ethnic Communities Council of Victoria, 'ECCV Pre-Budget 2016-17 Submission to Victorian Department of Treasury and Finance', February 2016, 8-9.

EXAMPLE FROM ANOTHER JURISDICTION: CONSUMER AFFAIRS VICTORIA SPECIALIST SERVICES PROGRAM

Consumer Affairs Victoria's (CAV) Specialist Services Program (SSP) recognises that community organisations play an important role in connecting vulnerable clients to mainstream services. The SSP provides funding to twelve community agencies that deliver the Consumer Advice and Advocacy Program (CAAP) and the Tenancy Advice and Advocacy Program (TAAP). The CAAP and TAAP provide face-to-face advice and assistance with consumer and tenancy matters, including proceedings before the Victorian Civil and Administrative Tribunal.

The programs reflect CAV's understanding that disadvantaged people who experience legal problems require targeted assistance to enforce their rights. While CAV operates as an impartial regulator, the funded community agencies play an active role in supporting clients and advocating on their behalf. The program recognises that vulnerable consumers and tenants require more intensive support than CAV's self-help models, and are more likely to seek help from a community agency.

Importantly, funded community agencies report regularly to CAV and share information about systemic issues and problems in the sector, which CAV can then respond to. Specialist agencies (such as the Consumer Action Law Centre) receive funding to provide training and support to other services delivering the programs Victoria-wide. This ensures consistent and high quality assistance is provided across the State by both specialist and generalist services.

RECOMMENDATION

State and Federal Governments should establish a dedicated fund to establish community-based employment law hubs for migrant workers.

The hubs would deliver three components:

- coordination and delivery of an employment law service to provide legal advice and assistance to newly arrived and refugee workers who have a problem at work, and facilitating referrals to mainstream agencies where appropriate;
- coordination and delivery of a community legal education program; and
- pursuing strategic policy and law reform objectives arising out of casework and CLE programs, including liaising with government agencies, regulators and policy makers to tackle systemic problems of migrant worker exploitation.

The fund should provide long-term, recurrent funding to enable hubs to build relationships with communities and agencies over time.



WEstjustice staff and community leaders.

Improved laws and processes to stop wage theft

6

TYPES OF EXPLOITATION

As detailed in our Preliminary Report, and demonstrated by our casework statistics, newly arrived and refugee communities are frequently underpaid (or not paid at all), miss out on basic award entitlements, and are engaged in sham contracting arrangements.

In our survey of over 100 newly arrived community members and community workers, 52% of survey respondents said that underpayments were common, somewhat common or that they or someone they knew was not paid enough. 38% of respondents indicated that not being paid regularly was common or somewhat common for newly arrived or refugee communities, or that they or someone they know experienced this. 36% reported it was common or somewhat common to come in early or stay late at work without getting paid, and one third reported it was common or somewhat common to miss out on superannuation entitlements. Widespread exploitation is also documented in numerous academic reviews.¹⁶⁹

Underpayment of wages and/or entitlements is the single-most common problem that our clients present with at the ELS. Between May 2014 and October 2015, 32% of all clients presented with a wages or entitlements problem. Many clients were completely unaware that there was a minimum wage and had never heard of penalty rates or a modern award. Clients who attended the Centre with underpayment issues were commonly also not being paid superannuation.

As some community leaders commented:

"Many of the newly arrived migrants and international students are not aware of their employment rights. Most of them work "cash-in-hand" where the employers easily bypass the minimum wages and entitlements. They work on trial for weeks and are not paid"

"A person from my community worked at a carwash and quit his job because he was nervous about damaging cars. The boss had told him that if the cars were damaged they would get a pay cut."

"A group of people from my community are farm workers. They are paid \$10/hr, well below the minimum wage. If they work fast or they pick up others in their car and bring them to work they are paid \$11/hr."

"Most of the newly arrived populations from the South-East Asian backgrounds advise that they have no idea what sham contracting means and how they can be tricked by their employer to work with an ABN despite being employees."

"Learning about sham contracting was great because few people know about it."

WEstjustice observed several common scenarios relating to non-payment of wages, demonstrated by the following case studies.

1. Employer would stop paying a worker's wages altogether, or fail to provide any payment at all:

J

Joseph worked as a truck driver and was not paid for a number of weeks work. He does not speak English. Joseph tried to negotiate with his employer, who refused to pay him. WEstjustice assisted Joseph to write a letter of demand, but there was no reply. WEstjustice then assisted Joseph to bring a claim in the Victorian Civil and Administrative Tribunal. He was successful and recovered all the money owing to him.

As discussed below, WEstjustice assisted several people engaged as "contractors", particularly in the construction, cleaning and distribution industries. These workers often received no payment at all for their work, or were grossly underpaid.

Often, when an employer intended to terminate someone's employment, they would not be paid for their final weeks of work.

2. Employer failed to pay legal minimum wage or entitlements:

M AND WENDY¹⁷⁰

Martin and Wendy came to Australia on 457 visas. They were employed in the hospitality industry. They worked 6–7 days per week for 13–16 hours per day. When they started work they were told that because Wendy was the Principal visa holder, all pay would go to her, for both of them. Wendy was paid a salary of \$55,000 per year, but received no overtime payments. Martin received no salary at all.

When Martin and Wendy returned home for a visit to their families, they received an email saying their employment had ended due to misconduct, but they never received any warnings or complaints prior to this.

WEstjustice has advised numerous clients who were paid less than the legal minimum wage. This included instances of employees being paid as little as \$8 an hour. WEstjustice also saw multiple clients who were working more than 12 hours a day, 6–7 days a week but were not paid penalty rates (for example, for working on the weekend) or overtime.

In some cases, employees received help from a jobactive service provider to find work. However, the agreements between the jobactive provider and the employer did not provide for the minimum wage, or alternatively, the employer failed to comply with the contract it had signed.

¹⁶⁹ For example, in a study of 1433 international students, Stephen Clibborn found that 60% of international students were paid below minimum wage; 35% were paid \$12 an hour or less; and half received no pay slip: David Marin-Guzman, *Study reveals 100% of Chinese waiters on student visas underpaid*, Workplace Insight <<http://sites.thomsonreuters.com.au/workplace/2016/02/15/study-reveals-100-of-chinese-waiters-on-student-visas-underpaid/>>.

¹⁷⁰ Please note that the names in all case studies have been changed.

3. Employer would punish an employee for making enquiries about their unpaid wages:

BILL

Bill was working in the hospitality industry and was paid \$11 an hour. When Bill told his employer that he was going to make a complaint about the underpayment, he was fired.

WEstjustice drafted a letter of demand on the client's behalf. After negotiation, the employer agreed to pay the outstanding legal entitlements and \$2000 was recovered.

Numerous clients accessed the ELS after their employment was terminated subsequent to their making enquiries regarding their unpaid wages.

4. Employer requires an employee to pay wages back in cash:

As set out in Jono's story below (page 228), some clients received their full legal entitlement by way of bank transfer, but were later required to go to an ATM with their employer, withdraw part of their wages, and pay it back to the employer.

Such arrangement provides an employer with a paper trail to prove correct wages were paid.

5. Employer requires payment for a job:

WEstjustice witnessed an emerging trend of clients who were required to pay a lump sum to their employer prior to obtaining a job. Such payment was sometimes disguised as "training costs", whereby clients undertook weeks of unpaid work as part of a "training course". Usually, such arrangements did not lead to ongoing employment, and clients were left financially worse off:

HIEN

Hien was a courier. Hien agreed to pay Mr A \$15,000 for an opportunity to work for Mr A's company. Hien and Mr A signed a written contract stating that Hien would receive at least \$2000 per week in wages. Hien was never paid \$2000 per week, and was rarely paid the agreed hourly rate. Hien was owed at least \$5000 and also lost the \$15,000. Hien approached WEstjustice when he found that he could not afford to hire a lawyer to assist him. Mr A is now repaying Hien in installments.

LUN

Lun wanted to find work as a cleaner. He agreed to pay Mr T's company \$10,500 for training. Mr T promised Lun that he would receive training in general cleaning and carpet cleaning. Lun paid Mr T \$10,500 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 for "training costs".

"Learning about sham contracting was great because few people know about it."

ENFORCEMENT CHALLENGES

The practical difficulties involved with pursuing underpayment claims, combined with fear of an employer and/or visa consequences means that clients of refugee and recently arrived backgrounds are unlikely to recover wages without legal assistance.

In order to pursue an underpayment claim, the Centre would commonly assist clients to calculate the extent of the underpayment in accordance with the applicable award/agreement, send a letter of demand, make a Fair Work Ombudsman complaint and then finally draft a Federal Circuit Court claim in meritorious cases.

As at September 2016, WEstjustice had helped to recover or obtain orders for over \$120,000 in wages and entitlements for approximately 25 clients. However, in many cases it was extremely difficult to progress claims, for a number of reasons:

- Clients did not have contact details for their employers. Many clients simply had a first name and a mobile telephone number for their boss, and did not know the name or ABN of the company they worked for. When clients worked on various sites without an office (for example a construction worker), it was impossible for WEstjustice to find the employer.
- Clients were rarely provided with written contracts of employment or payslips,¹⁷¹ meaning:
 - clients did not have written evidence to prove the hours they had worked (unless they had kept a diary of their work hours or had some other evidence such as rosters or Myki tickets); and
 - clients did not have sufficient evidence to show what they had been paid—often clients were paid in cash without any record, rendering it difficult to prove their claim.

- Employers often did not respond to correspondence from WEstjustice. Such correspondence included letters of demand and requests for employee records made in accordance with regulation 3.44 of the Fair Work Regulations 2009, notwithstanding that the failure to provide employee records is a civil remedy provision;
- the FWO were not able to assist clients. Due to their eligibility criteria, FWO will rarely assist clients with small claims who have not worked with their employers for long periods of time. Unfortunately, many of our clients had worked for their employers for less than two months, then left employment when they were not paid;
- where the FWO was able to assist, some employers declined to attend a scheduled mediation. Such mediations are not compulsory. If an employer failed to attend, clients had no option but to take their matter to Court, as the regulator does not have the power to make a binding decision;
- some employers failed to engage with legal proceedings, despite having documents served on them. For example, some employers did not come to scheduled hearings at VCAT or the Federal Circuit Court, and failed to comply with orders once they were made;
- some employer companies were deregistered after proceedings commenced or a judgment was entered, making it impossible to pursue any award in our client's favour;
- some employers forged employment records;
- our limited capacity meant that complicated underpayment calculations took time. Our client's limited legal capacity meant that they were often unable to assist with progressing their claim, leaving WEstjustice to undertake most of the work; and
- some clients did not want to proceed with meritorious claims for fear of being sent home if they were found to be in breach of their visa conditions (addressed in the temporary migrant worker section below).

In the following sections, we consider some measures to address the clear imbalance of power between underpaid workers and their employers.

REMOVE EMPLOYER INCENTIVE TO NEGLECT RECORD-KEEPING: REVERSE ONUS OF PROOF FOR WAGES DISPUTES

The current legislative framework rewards employers who fail to keep records. Without any employment records, it is extremely difficult for employees to prove what hours they have worked and what they were paid. Yet the evidentiary burden rests with workers to establish precisely these matters. This means that in the absence of legislative reform, there remains significant employer incentive to neglect record-keeping duties.

Currently, under section 535 of FW Act, employers are required to make and keep employee records for seven years. Under section 536, employers are required to provide employees with a payslip within one working day of making payment. Such payslips must contain particular information including employer name, gross amount of pay, net amount of pay, number of hours worked and any penalty rates or overtime.¹⁷² Both of these requirements are civil remedy provisions, meaning that an employer can be fined up to 30 penalty units, or \$27,000 (for a company) or \$5,400 (for an individual) per breach.

However, in WEstjustice's experience, employers regularly fail to keep any records at all. As a first step to resolve an underpayment claim, we typically ask the employer for a copy of employee records. Such a request is provided for in the Fair Work Regulations 2009, and employers are required to respond to a request by providing the records by post within 14 days (or by allowing records to be inspected on site within 3 days).¹⁷³

By obtaining employee records, we are able to calculate whether or not the correct rate of pay has been provided for the number of hours worked. Often a claim can be resolved quickly and easily at this point.

On many occasions, employers have ignored these requests, or stated that no records were kept. Unless the worker has kept a diary of their hours, or we can somehow otherwise establish their claim (for example, through rosters or phone records), it is extremely difficult to bring a claim. Indeed, the FWO will rarely assist a worker to pursue a claim without significant written documentation to prove their case.

WEstjustice questions why an employer should receive a direct advantage for breaking the law. We recommend that the FW Act be amended to insert a reverse onus of proof in relation to underpayment of wages and entitlements. That is, if an employer does not provide employee records to a worker, it should be assumed that the employee worked the hours and received the wages asserted by the employee, unless the employer can prove otherwise.

This does not cause significant disadvantage to employers, as those who abide by the law and keep employee records can easily discharge the onus by providing employee records. Alternatively, employers could disprove the onus by showing the alleged hours are incorrect—for example through the use of CCTV footage or rosters.

WEstjustice endorses the Federal Government's recent policy announcement that penalties will be increased for employers that fail to keep proper employment records.¹⁷⁴ This announcement aligns with the Productivity Commission's recent recommendation that penalties for keeping false or misleading documents should be increased.¹⁷⁵ Both of these measures are important—however without a reverse onus, our concern is that they will do little to enable workers to better enforce their rights.

¹⁷¹ This is a breach of the *Fair Work Act 2009* (Cth)—employers are required to provide payslips within one working day of paying an employee per section 536.

¹⁷² *Fair Work Regulations 2009* (Cth) reg 3.46.

¹⁷³ *Fair Work Regulations 2009* (Cth) reg 3.42.

¹⁷⁴ Liberal Party of Australia, above n 134.

¹⁷⁵ Productivity Commission, above n 29, 928.

FWO MUST HAVE GREATER POWERS TO RESOLVE CLAIMS

Greater resourcing and coercive powers of the FWO and other agencies would also enhance outcomes for the most vulnerable. This includes:

- FWO having the power to compel parties to give information and attend mediation;
- FWO having the resources and capacity to assist all clients with meritorious claims, regardless of claim size or employment length; and
- FWO having the power to make binding determinations.

For example, at present, employers cannot be compelled to attend FWO mediations. 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.

In pursuing underpayment claims, the ELS usually sends a letter of demand to the employer. 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, unfortunately it is common for employers to refuse to attend mediation with employees in cases on non-payment of wages. For many clients, this has meant that FWO has closed the file as FWO cannot compel attendance. For example:

S
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 him to complain to FWO. The employer did not attend mediation, and FWO advised Sumit that the next step would be a claim in the Federal Circuit Court —however they could not assist him to complete the relevant forms. There is no agency to assist Sumit write this application and 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, the FWO may refuse to schedule a 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 mediations, regardless of claim size, would avoid this scenario arising and greatly assist the timely resolution of disputes.

Further, as suggested by the Productivity Commission, FWO should have the power to compel parties to provide information.¹⁷⁶ WEstjustice welcome's the Government's recent policy announcement that it plans to give 'compulsory evidence gathering powers to the Fair Work Ombudsman (similar to those currently held by the ASIC, the ACCC, the ATO and other regulators).'¹⁷⁷

We also recommend enhanced FWO 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 —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, 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, FOS has the power to make a binding determination. As the FOS website explains:¹⁷⁸

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. 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.¹⁷⁹

Further, to promote the efficient resolution of disputes, WEstjustice is of the view that 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.

¹⁷⁸ Financial Ombudsman Service Australia, *Dispute resolution process in detail* (2016) <<https://www.fos.org.au/resolving-disputes/dispute-resolution-process-in-detail/>>.

¹⁷⁶ Productivity Commission, above n 29, 928.

¹⁷⁷ Liberal Party of Australia, above n 134.

¹⁷⁹ Education and Employment References Committee, above n 132, xiv, 278–283; 327–328.

FEG MUST BE EXPANDED OR ALTERNATIVELY, A WAGES INSURANCE SCHEME IS REQUIRED

"I can't believe it takes this long to be even nowhere near to getting your money back. But I'm really thankful for your efforts."

The above comment was made by a client who had taken his underpayments matter all the way through to a Small Claims hearing, which he had won. However, the employer did not comply with the order.

A number of WEstjustice clients found themselves in this situation. In some cases, employer companies were deregistered shortly after an order was made. In the absence of the appointment of a liquidator, these clients are not eligible for the Fair Entitlements Guarantee (FEG) scheme, and are left with a Court order but no effective means to enforce it.

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.

Several of our clients have brought claims to the Federal Circuit Court or VCAT at considerable personal expense. These clients have won their case, only to discover that the employing company has been deregistered, or the employer simply will not respond. Enforcement action is complex and often unmeritorious where companies no longer hold any assets.

Some workers can lodge a FEG claim. However, these are limited in that they are only available to citizens, holders of permanent visas or a special category visa (so international students and other temporary visa holders are excluded);¹⁸⁰ payments are limited;¹⁸¹ and eligibility only arises following an insolvency event (e.g. the appointment of a liquidator or an employer to become bankrupt).¹⁸²

In situations where an employee is simply unable to pursue a debt, we suggest a wages compensation scheme should be implemented to cover their losses. 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, similar to the WorkCover scheme and/or penalties obtained by the Fair Work Ombudsman 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;¹⁸³
- Victorian Property Fund—funded by estate agent fees, fines and penalties, and interest—provides compensation for 'misused or misappropriated trust money or property'.¹⁸⁴
- 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'.¹⁸⁵

Phoenix companies:

A significant problem 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.¹⁸⁶ 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.¹⁸⁷ WEstjustice supports these recommendations.

¹⁸⁰ Fair Entitlements Guarantee Act 2012 (Cth) s 10(1)(g).

¹⁸¹ Payments are limited to 13 weeks' unpaid wages, unpaid annual leave and long service leave, payment in lieu of notice up to five weeks, and redundancy pay up to four weeks per year of service: Department of Employment, Australian Government, *Fair Entitlements Guarantee (FEG)* <<https://www.employment.gov.au/fair-entitlements-guarantee-feg>>.

¹⁸² Fair Entitlements Guarantee Act 2012 (Cth) s 5.

¹⁸³ 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>>.

¹⁸⁴ 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/victorian-property-fund>>.

¹⁸⁵ Janice Fine, 'Alternative labour protection movements in the United States: Reshaping industrial relations?' (2015) *International Labour Review* 154(1), 20.

¹⁸⁶ Helen Anderson, 'Sunlight as the disinfectant for phoenix activity' (2016) 24 *C&SLJ* 257, 258.

¹⁸⁷ *Ibid*, 263-267.

"Most of them
[migrants and
international
students] work
"cash-in-hand"
where the employers
easily bypass the
minimum wages
and entitlements."

JOBACTIVE PROVIDERS MUST PLAY A ROLE IN STOPPING THE RIP-OFFS

WEstjustice has observed a number of underpayments cases where clients have found employment with assistance from a jobactive provider (job services agency). Often, the provider will give the employer a wage subsidy agreement, and the employer will receive financial incentives to employ newly arrived or refugee workers.

Unfortunately, some such employers proceed to underpay their workers, yet still receive financial benefits from the jobactive providers. WEstjustice acknowledges that many jobactive providers work hard to find employment for their clients. However, there are limited resources and significant casework loads on individual workers.

In some instances, wage subsidy agreements do not meet minimum standards. This is simply unacceptable, in circumstances where the jobactive providers are complicit in the underpayment of vulnerable workers:

MANSUR **M**

Mansur worked at a recycling facility sorting different types of plastics. He obtained his job through a job services agency. He did not have a written employment contract. Mansur was not paid for two weeks' work. He visited WEstjustice for help. WEstjustice obtained the Wage Subsidy Agreement between the jobactive provider and employer, and noticed that the agreed rate of pay did not comply with minimum standards under the applicable Modern Award.

Jobactive providers must be required to subject all wage subsidy agreements to external review, to ensure compliance with minimum working entitlements. Further, providers must be properly funded to provide support to workers who are not paid properly. Employers must face serious consequences if they engage with jobactive providers then fail to provide minimum entitlements. Jobactive providers must be required to contact workers and offer assistance where they suspect wages are not being paid correctly. If they do not provide adequate assistance, or are found to be repeatedly referring clients to employers known to underpay staff (which we have seen), there must be a contractual penalty enforced by the Government or an appropriate agency. In the below example, the jobactive provider was clearly aware that an employer was non-compliant, however they did not contact our client, who continued to work for the employer without any remuneration for several weeks:

SAM **S**

Sam's jobactive provider found him a job as a butcher. Sam was paid half of the minimum wage. After some months, Sam's employer lost his wage subsidies because he was not providing proper records to the jobactive provider. Sam's boss didn't tell him what had happened—he let Sam continue working. Sam didn't get any pay at all for several weeks. When Sam asked why he wasn't being paid, the boss blamed the jobactive provider for failing to pay the wage subsidy.

Finally, WEstjustice also understands that many jobseekers are being referred to training programs that are inappropriate for their needs, and do not deliver employment outcomes. It is essential that jobactive providers undertake some due diligence before referring clients to training courses that are of substandard quality, or are otherwise irrelevant for clients.

PRACTICAL HELP WITH CALCULATIONS

As noted above, one of the greatest challenges for our clients is preparing their claim and determining their underpayment. Calculating underpayments is a complicated and time consuming exercise, and few of our clients can undertake this task alone.

For example, to calculate the amount someone is owed, it is necessary to determine the Award classification and base rate of pay, then add any penalty/overtime rates for hours worked at particular times, as well as considering breaks and any applicable allowances. In some cases overtime will be paid at a certain rate for the first two hours, then subsequently increase. Calculating these amounts over months or years of work is extremely difficult without advanced Excel or mathematic skills.

WEstjustice uses significant volunteer and paid staff resources calculating underpayments. Often these calculations take up numerous pages of complicated Excel spreadsheets. We frequently use the Pay and Conditions Tool (PACT) on the FWO website. This tool enables clients to calculate their rate of pay (including penalty rates). Clients receive a document stating their hourly rate—this provides an input for the calculations, but does not otherwise assist clients to determine the total amount owing to them taking into account overtime and other variables.

WEstjustice recommends that FWO develop a resource that enables clients to enter their hours of work, and receive a printout showing their hours worked, amount owed per shift, and total entitlement for all hours worked. For example, clients could name their job title, and then enter the date, start time, finish time and break time(s) for shifts, and the total amount owed would appear. This total entitlement figure could then be easily compared to payslips or bank statements to establish any underpayment. A copy of the printout could be provided to employers as a basis for negotiating underpaid wages (indeed WEstjustice routinely undertakes this exercise, but using our own spreadsheets). Such a program should enable clients to enter numerous shifts over weeks/months /years. The National Union of Workers has developed a resource like this to be for certain industries, and we consider this an invaluable resource for all workers in all industries.¹⁸⁸

SUPERANNUATION

Finally, 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.¹⁸⁹ 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.¹⁹⁰ 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.'¹⁹¹

RECOMMENDATION

The Fair Work Act 2009 (Cth) should be amended such that if an employer fails to make or keep employment records, the onus falls on the employer to disprove any wages claim brought by an employee. Further, the penalties for failure to keep or provide employee records should be increased.

The Federal Government should expand the FWO's enforcement powers and capacity, in particular:

- to enable the FWO to assist all employees with meritorious claims, regardless of claim size;
- to enable the FWO to compel parties to attend mediation;
- to enable the FWO to make binding determinations; and
- to provide the FWO with the necessary resources to undertake stricter enforcement of existing statutory requirements to provide employee records and issue penalties.

A wages insurance scheme should be established (or the FEG scheme expanded) to provide compensation to workers with meritorious claims who are unable to obtain back payment from their employers. FEG should at least be expanded to cover employees with a court order in circumstances where a company has been deregistered. FEG should also be accessible by temporary migrant workers.

Measures must be taken to limit phoenix activity, including the introduction of director identity numbers and further information being required at the company registration process.

Jobactive provider contracts must require each provider to have a designated support worker for clients who have not been paid properly. That worker must assist clients to pursue underpayments claims, report unscrupulous behaviour to FWO and ensure that no further job seekers are referred to that employer until the employer can demonstrate they have taken steps to ensure compliance.

Jobactive providers must be required to subject all wage subsidy agreements to review, to ensure compliance with minimum working entitlements.

FWO should develop a pay calculations tool that calculates the entire amount owed to a client, rather than just providing the hourly rate.

FWO should play a more active role in assisting with the detection and enforcement of unpaid superannuation

¹⁸⁹ 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.

¹⁹⁰ Ibid.

¹⁹¹ Ibid, 194.

¹⁸⁸ National Union of Workers, *Underpaid Tool* (8 July 2016) <<https://robbed.nuw.org.au/>>.

7
Increased accountability in labour hire,
supply chains and franchises

Many WEstjustice 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.

Apart from sham contracting, these working arrangements and issues were not discussed in the Preliminary Report. However, through casework at the ELS, the prevalence and gravity of exploitation became apparent.

There is one unifying principle for systemic reform: nobody should benefit from the exploitation of vulnerable workers and anybody who does benefit, should be held accountable. The law must respond to new ways of working. Unfortunately, self-regulation and voluntary compliance is failing. For example, the Fair Work Ombudsman recently invited eight franchisor chief executives to enter into compliance partnerships with FWO, underpinned by proactive compliance deeds. The initiative was openly supported of 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.¹⁹² 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.

**"Sometimes I feel
that it's worse than
a prison as we have
to pay money for
a bed."**

¹⁹² 'Franchisors spurning partnership proposals, says FWO', Workplace Express, 2 September 2016.

LABOUR HIRE

The labour hire relationship is characterised by a worker who is engaged by a labour hire agency (agency) and assigned to work for an organisation (host employer). This means that the worker is not employed directly by the place where they work. In this triangular relationship, there is a contract between the agency and the host employer, and a contract between the worker and the agency—but there is no contract between the worker and the host employer. In these circumstances, if a worker is unfairly dismissed or underpaid, the worker would not usually be entitled to seek relief against the host employer, unless the worker could be characterised as an “employee” of the host employer, having regard to the usual indicia.¹⁹³

For example, in a meat factory, the factory (host company) may pay a labour hire company to provide additional staff in times of high demand. These contractors would work at the meat factory, but their employer would be the labour hire company. Even though the meat factory may be run by a large well-resourced company, the labour hire company is responsible for the workers’ wages. If the labour hire company underpays its staff, the worker must pursue the labour hire company. Labour hire employees may work alongside other employees employed directly by the host company. In some workplaces, employees from numerous different employers, each with different terms and conditions could be performing exactly the same job at the same location.

WEstjustice has observed clients working under labour hire arrangements in a range of industries including food processing, cleaning, distribution and construction. These workers are generally paid low incomes and do not understand their rights at work, let alone the complex arrangements between host and labour supply agencies governing their employment.

We have observed a correlation between labour hire and insecure work, with many labour hire workers expressing to us a keen desire to become “permanent”. We heard one story of a worker in a warehouse who received a text message from a labour hire company every morning confirming he had work for the day for a period of seven years. This man longed for the stability and security of a permanent job, but was too afraid to request this.

Often, workers from labour hire agencies have fewer rights and worse entitlements than others in a workplace who are engaged directly by the host.

For example:

- we have observed a number of vulnerable workers being required to undertake medical tests prior to commencing work for a labour hire company. When the client is not given a job, they are also sent a “bill” and pursued for the cost of the medical tests;
- we have also reviewed a contract where an employee of a labour hire company was told that he would not be paid his wages or entitlements if the host did not pay the labour hire company. The client was dismissed, but not paid his notice entitlements because the labour hire company alleged that the host had not paid it.

As one client’s story demonstrates, labour hire arrangements can result in extreme forms of exploitation:

J
JOYCE

Living in that hostel made me see a very different side of Australia, the dark and uncivilised side. We can leave anytime but we were trapped there because they kept giving us reason to stay for another week. Sometimes I feel that it’s worse than a prison as we have to pay money for a bed, the hostel was a mess but no one cares and we have to beg very hard for a job...

They gave me a tomato picking job at the 3rd week. We waited for the bus from the farm to pick us up before 5 am. We were all nervous about where they will drive us to because they never really tell us anything about how much they’ll pay us, which farm will they take us to... All we know was working for this place allowed us to collect the 2nd year visa...

The machine started to move straight away once we all sit on our seats. You couldn’t stop picking or go the loo when the machine was running. They only gave us 2 five minutes break and 20 minutes lunch break for a 9.5-hour -shift. There was no toilet so we had to pee wherever we were. There were no sheds at all so some of the workers had hot stroke sometimes, also because we didn’t get chance to have a sip of water. As I remembered they said we earned 95 bucks each that day. The farm bus picked up the Cherry Tomato picking backpackers on the way back. The poor girls worked all day non-stop but they were only told that they earn 25-40 bucks for 9.5 hours work. Sounds terrible but the worse thing happened after that was we never got paid at all.

Nobody complained to Fair work. I guess we were all a bit scared to say anything or to fight too much. What if they do anything to us when we are in the middle of nowhere? The universal feeling we had was a mixture of confusion, anger, helpless and loss-of-dignity. It embarrassed me every time I think about the experience and I wish I have done something to reveal the ugly truth. In the end, I decided to stop pursuing the 2nd year visa and returned to the city. I wasn’t treated much better in the city either, I felt bad to say that. The Asian-run shops and restaurants were mostly offering 8 AUD~12AUD for an hour of work. They posted their recruiting ads on the Mandarin-speaking forums (such as Backpackers and Yeeyi), some of them didn’t include how much they pay you at all, some of them publically posted “12 AUD an hour”.

Unfortunately, this story is not unique. As evidenced through our casework and community consultations, these experiences are widespread.

¹⁹³ *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.
See also *Dameuski v Giudice* (2003) 133 FCR 438, where the Court found that the host employer was the relevant employer.

SUPPLY CHAINS

Without appropriate and robust regulation, supply chains can facilitate exploitation for those at the bottom.

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.¹⁹⁴ 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.¹⁹⁵

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:

H
HAMID

Hamid worked as a truck driver and delivery worker. He worked 6 or 7 days a week, usually 12–14 hours per day. Hamid was employed as an independent contractor by Sami. Sami was a contractor for another company, who was engaged by a large retail business. Hamid worked under an ABN but he had no control of work hours, where to go or how to do the work. He wore a uniform with the large company's logo. Hamid was not paid for his last two weeks of work so he came to see WEstjustice. We explained that Hamid had been underpaid by thousands of dollars as an employee. We assisted Hamid to make a complaint to the Fair Work Ombudsman (FWO), who investigated the matter and issued infringements and a notice of caution. However, unfortunately Sami had disappeared overseas and so no further action could be taken.

In Hamid's story, we see our client, who is the most vulnerable and least well-resourced in the supply chain, without any ability to pursue his lawful entitlements. At least two companies have profited from his labour without any responsibility for protecting his workplace rights. The requirement to prove that these other companies were 'knowingly concerned in or party to the contravention' under section 550 accessory liability provisions of the FW Act is too onerous to provide any meaningful assistance. There should be a positive obligation on those higher in the supply chain to ensure workplace rights are protected.

If a company is engaging labour, regardless of the way in which the labour is procured, that company must have a legal requirement to ensure that Australian employment laws, and other relevant laws, are being upheld. Complex and murky supply chain models or franchise agreements which aim to insulate the franchisor from franchisees should not be able to be manipulated to avoid liability.

FRANCHISES

Franchises are characterised by the licensing of intellectual property rights between franchise operators and retailers.

We have observed exploitation in franchise models. For example:

S
SALLY

Sally worked as a salesperson in a shop belonging to a large franchise chain. When she started, she was told that she would undergo a "probation" period for three months. She was paid a flat rate of \$100 per day, including weekend work. Sally worked full time, undertook training and met sales targets. When she discovered that she was not being paid legally, Sally quit her job.

WEstjustice assisted Sally to write a letter to the employer in her own name, setting out calculations of her lawful entitlements and seeking payment. The employer responded saying that Sally never worked at the shop—she was a volunteer and they had offered her the opportunity to learn new skills in case a job came up in the future. WEstjustice wrote a letter directly to the employer setting out the evidence that Sally was working for them. This included emails and text messages saying things like "you're working on Saturday", sales records for all staff that included Sally's name, and Myki travel records. The employer promptly paid Sally her entitlements.

M
MASAKO

Masako worked in an entry level position in a large franchise in the hospitality industry. She didn't speak any English and was grateful to have a job. Masako noticed she wasn't being paid for all the hours she worked. Her rosters and payslips did not show the same figures. Masako asked questions of her boss and was subsequently dismissed.

Franchising is regulated by the Franchising Code of Conduct, which is mandated by the Competition and Consumer (Industry Codes—Franchising) Regulation 2014. Under this Code, workers running franchises enjoy some measure of protection from withdrawal of their livelihood by capricious termination of their franchise contracts.¹⁹⁶ The Code imposes obligations in relation to disclosure, termination, rights to assign franchises and recently includes a duty of good faith. Given the Code already contains a mechanism for protective provisions regarding termination, WEstjustice contends that the Code should be expanded to provide for protection for employees of franchisees.

The recent uncovering of significant underpayments of wages by a number of retailers in the 7-Eleven franchise has drawn attention to problems which commonly arise in the franchise structure.¹⁹⁷ From these investigations, it is apparent that a major problem in the supply chain structure is that franchise operators are not accountable for the employees of its retailers.

¹⁹⁴ Richard Johnstone et al, *Beyond employment: the legal regulation of work relationships* (The Federation Press, 2012) 49.

¹⁹⁵ *Ibid.*, 67.

¹⁹⁶ *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* (Cth), sch 1, pt 3, div 5.

¹⁹⁷ Fair Work Ombudsman, '7-Eleven Franchisee admits doctoring records and underpaying workers to cut operating costs' (Media Release, 1 September 2015).

CURRENT LEGISLATIVE FRAMEWORK IS INADEQUATE

NEW FORMS OF WORKING ARRANGEMENTS

As employment practices change, law reform must keep up with the challenges and issues that this creates for employees. At present, the 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.'¹⁹⁸

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 because it has no employment relationship with the labour.'¹⁹⁹ Although 'both of [these] entities enjoy the benefits of acting as an employer, one will unfairly circumvent labour regulation.'²⁰⁰ 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 benefitted from their labour and, who in many circumstances should be held, wholly or partly, responsible for the terms and conditions of employment of the worker.

As set out in Dr Tess Hardy's submission to the Senate Inquiry into the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders (Hardy Submission), Weil suggests that "fissured" forms of employment, being those with fragmented work structures, have arisen as a result of three related elements. First, companies want to 'increase revenue through focusing on core competencies'.²⁰¹ Second, lead firms want 'to reduce costs through shedding their role as the direct employer'. Finally companies want control over the product without the responsibility for the employees making it—that is, 'the lead firm continues to perform an important and somewhat intrusive role in terms of creating and enforcing rigorous quality standards and detailed work practice requirements in relation to the provider companies'.²⁰²

Although these commercial drivers may produce benefits for business and consumers, it is essential that commercial benefits are not achieved at the expense of workers' rights. For this reason, labour regulation should be modernised to adapt to fissured forms of employment and ensure the necessary protections are afforded to vulnerable workers. For this reason, WEStjustice recommends that the FW Act be amended to introduce a concept of joint employment.

ACCESSORIAL LIABILITY

The doctrine of joint employment originates from the United States of America. Although the definition varies between different areas of employment law, at its narrowest, the doctrine recognises that where two employers each exercise significant control over a worker and "co-determine" their terms of employment, both employers may be held to be the worker's employer.²⁰³

Unlike America, this doctrine has not been accepted as law in Australia. There have been several decisions by courts and tribunals which have suggested that there is scope in the Australian landscape for the concept of joint employment.²⁰⁴ However, development in this area has been slow and, at present, it is far from certain that the doctrine of joint employment forms part of Australian law. Part of the judicial reluctance to adopt the doctrine arises from concerns about how liability is to be apportioned once joint employment is recognised and also how to determine the relevant terms and conditions of the worker if more than one employer is identified.²⁰⁵

Currently, the only way to attribute responsibility to a third party under the FW Act is via the accessorial liability provisions. Section 550 states:

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.
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.

As can be seen, 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 accessorial liability of the host employer or those at the apex of a supply chain or franchise. Although 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. Indeed, 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.

Although the FWO has recently used section 550 with some success,²⁰⁶ 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. Although not yet determined in a substantive proceeding, '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.'²⁰⁷ The Senate Education and Employment References Committee has called for an independent review of the utility of the accessorial liability provisions in the FW Act.²⁰⁸

Accordingly, to provide certainty and to address the gap in the workplace relations system, statutory reform is necessary to affect change. This will not only provide redress to vulnerable workers, it will give a strong incentive for host employers and supply chain heads to ensure that all workers in their business are treated fairly.

Options for legislative reform are below.

¹⁹⁸ 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.

¹⁹⁹ Craig Dowling, Joint Employment and Labour Hire Relationships—Victoria Legal Aid—Professional Legal Education, 5 October 2015, 1-2.

²⁰⁰ *Ibid.*

²⁰¹ Hardy, above n 198, 4.

²⁰² *Ibid.*

²⁰³ *National Labour Relations Act of 1935; National Labour Relations Board v Browning-Ferris Industries of Pennsylvania Inc* 691 F 2d 1117 (3rd Cir, 1982) at 1124.

²⁰⁴ *Dameuski v Giudice* (2003) 133 FCR 438; *Coghill v Indochine Resources Pty Ltd* [2015] FCA 377; *Fair Work Ombudsman v Eastern Colour Pty Ltd* [2011] FCA 803; *Morgan v Kittochside* (2002) 117 OR 152 at [72]-[75] and *Nguyen v ANT Contract Packers Pty Ltd* (2003) 128 IR 241. For a helpful summary of key cases, Dowling, above n 199.

²⁰⁵ *Costello v Allstaff Industrial Personnel (SA) Pty Ltd* [2004] SAIRComm 13.

²⁰⁶ For example, Joanna Howe explains how FWO brought a claim against Coles for labour hire company Starlink's treatment of trolley collectors. 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>.

²⁰⁷ Hardy, above n 198, 10.

²⁰⁸ Education and Employment References Committee, above n 132, xiv, 278–283; 327–328.

REFORM OPTIONS

JOINT EMPLOYMENT INTRODUCED TO FAIR WORK ACT

WEstjustice considers that, for the purposes of the unfair dismissal, general protections and underpayments provisions of the FW Act, deeming provisions should extend responsibility to other employer-like entities. That is, if certain criteria are met, host employers/franchisors/head contractors/lead firms will be deemed to be an employer of workers employed in a labour hire arrangement, supply chain or franchise. This means that more than one employment entity could be found jointly and severally liable for any underpayments (including sham contracting) or unfair treatment at work. Of the three options, this is the preferred option most likely to bring about the desired policy objective— to reduce exploitation for vulnerable workers.

We consider below two definitions which may be incorporated into the current definition of "employee".

Pauline Thai, in her article "Unfair Dismissal Protection for Labour Hire Workers? Implementing the Doctrine of Joint Employment in Australia"²⁰⁹ urges the adoption of the test enunciated in *Zheng v Liberty Apparel Co Inc*²¹⁰ for unfair dismissal matters. Under the Zheng test, the following factors are relevant for determining whether joint employment exists:

- whether the host employer's premises and equipment were used for the worker's work;
- whether the agency had a business that could or did shift as a unit from one host to another;
- the extent to which the worker performed a job that was integral to the host's operation;
- whether responsibility under the labour hire contracts could pass from one agency to another without material changes;
- the degree to which the host employer supervised the worker's work;
- whether the worker worked exclusively or predominantly for the host employer; and
- any other factor deemed relevant.

Thai's list is helpful, but targeted specifically at labour hire workers who are unfairly dismissed. In his Thesis,²¹¹ Dowling provides a broader reform option, proposing the following amendment to the definition of "employee"²¹² to include a statement that:

"employee" means:

1. *An employee may be employed by two or more employers at the same time.*

Dowling also suggested amendments to the definition of "employer" as follows:

"employer" means:

2. *Two or more persons may be joint employers of an employee where:*

- a. *those two or more persons exercise some control over the work or working conditions of the employee; and*
- b. *the employee performs work which simultaneously benefits the two or more persons.*

3. *Determining whether the two persons referred to in subsection (2) are joint employers the matters taken into account shall include:*

- a. *the nature and degree of control of the employee by each person;*
- b. *the right of each person, directly or indirectly, to engage, cease or otherwise modify the conditions of engagement of the employee;*
- c. *the ability of each person to determine the rate of pay of the employee; and*
- d. *the place of work of the employee.*

We recommend that the Federal Government undertake a review of joint employment principles with a view to similar provisions being inserted into the FW Act. We suggest that further to Dowling's proposed amendments, franchisors and supply chain heads should also be expressly deemed to be "employers" for the purposes of underpayment of wages/entitlements.

In terms of relief for termination of employment, to overcome the issue of apportionment, Dowling proposes the notions of primary and secondary employers as follows:

Remedies

1. *Subject to subsection (2) if the Commission [Court] considers it appropriate, the Commission [Court] may make an order requiring the employer or employers to reinstate the employee by:*
 - a. *reappointing the employee to the position in which the employee was employed immediately before the termination; or*
 - b. *appointing the employee to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination.*

2. *If the Commission [Court] has determined that the employee is jointly employed by two or more employers and considers an order under subsection (1) appropriate the Commission shall:*

- a. *determine one of those persons to be the primary employer and the other or others the secondary employers taking into account:*
 - i. *the right to engage and terminate the employee;*
 - ii. *the responsibility to assign or place the employee;*
 - iii. *the responsibility to pay and provide other terms and conditions of employment; and*
- b. *order the primary employer to reinstate the employee to the position in which the employee was employed immediately before the termination (or equivalent position); and*
- c. *order the secondary employers to allow the employee to assume the position (or equivalent position) which the employee held immediately before the termination.*

Noting Dowling's Thesis pre-dates the FW Act, we suggest that these provisions could be adapted to suit the language and wording of the FW Act, and also include reference to apportionment of compensation.

²¹¹ Craig Dowling, 'The concept of joint employment and the need for statutory reform' (Minor thesis submitted in fulfilment of the requirements of the degree of Master of Laws, 18 July 2008). See also Dowling, above n 199.

²¹² This amendment was suggested for the purposes of the dismissal protections and freedom of association protections provided for by the *Workplace Relations Act 1996* (Cth).

²⁰⁹ (2012) 21 *Australian Journal of Labour Law* 152.

²¹⁰ 355 F 3d 61 (2nd Cir, 2003).

VICARIOUS LIABILITY

Alternatively, it may be possible to amend the FW Act such that an additional “employer” or host could be held vicariously liable for breaches of the “first” employer. Such provisions could be modelled on sections 109 and 110 of the Equal Opportunity Act 2010 (Vic), which provide that:

109. Vicarious liability of employers and principals

If a person in the course of employment or while acting as an agent—

- a. contravenes a provision of Part 4 or 6 or this Part; or*
- b. engages in any conduct that would, if engaged in by the person's employer or principal, contravene a provision of Part 4 or 6 or this Part—*

both the person and the employer or principal must be taken to have contravened the provision and a person may bring a dispute to the Commission for dispute resolution or make an application to the Tribunal against either or both of them.

110. Exception to vicarious liability

An employer or principal is not vicariously liable for a contravention of a provision of Part 4 or 6 or this Part by an employee or agent if the employer or principal proves, on the balance of probabilities, that the employer or principal took reasonable precautions to prevent the employee or agent contravening this Act.

We submit that these provisions could be adopted as a model for imposing liability on labour hire agencies for contraventions by the host employer unless reasonable precautions are taken by the agency to prevent the host employer’s contravention. Similarly, this model could impose liability on principals in a supply chain and franchisors. This would place a positive obligation on all parties benefiting from the labour of a worker to ensure that workplace rights are protected. We submit that although this option is not as broad-ranging as the first, it would still have a significant impact on ensuring compliance, so long as the exception provision remained sufficiently limited to require host employers/franchisors/supply chain heads to take proactive steps to ensure compliance.

In many ways, the Coalition’s recent policy announcement most closely reflects this option. In their Policy to Protect Vulnerable Workers, the Coalition announced it will be:²¹³

Introducing new provisions that will apply to franchisors and parent companies who fail to deal with exploitation by their franchisees. The Fair Work Act will be amended to make franchisors and parent companies liable for breaches of the Act by their franchisees or subsidiaries in situations where they should reasonably have been aware of the breaches and could reasonably have taken action to prevent them from occurring. Franchisors who have taken reasonable steps to educate their franchisees, who are separate and independent businesses, about their workplace obligations and have assurance processes in place, will not be captured by these new provisions.

WEstjustice welcomes the Government’s desire to ‘capture franchisors and parent companies who fail to deal with exploitation by their franchisees’.²¹⁴ However, without careful drafting, there is a risk that such amendments will not bring about positive change, and will not go far enough to protect vulnerable workers. For example, it is essential that the Government outlines what will constitute “reasonable steps” and “assurance processes”—one line in a contract between the franchisor and franchisee should fall far short of the mark. A key incentive for franchisors and supply chain heads to ensure compliance within their business chain is to hold them equally liable for any breach, and exceptions to this joint liability should be limited (if any exceptions are provided at all).

One example of how this could be achieved was discussed by the Senate Education and Employment References Committee in their 2016 report on temporary migrant work. The Committee referred to Dr Tess Hardy’s submission, as follows:²¹⁵

Dr Hardy outlined ways in which a degree of responsibility could be placed on the host firm. She cited the 2011 labour law reforms in Israel where direct responsibility for breaches of minimum employment standards in sectors such as cleaning and security was placed on the host firm, not as an employer, but as a guarantor.

The Act specified three factors used to determine whether the host firm would bear responsibility for the breaches of workplace law:

- a. whether the client has taken ‘reasonable steps’ to prevent any infringement of workers’ rights by the contractor (i.e. labour hire provider), including by establishing a procedure whereby workers can bring complaints about the contractor directly to the client;*
- b. the client may avoid liability under the Act if they can show that they hired a ‘certified wage-checker’ to perform periodical checks of pay and made sure that any identified underpayments were promptly rectified;*
- c. the client will be automatically liable for any relevant underpayments of the agency worker where the client is found to have paid the contractor a contract price which falls below the minimum required by the Act.*

WEstjustice welcomes the opportunity to work with the Government in developing any draft legislation arising from this policy recommendation.

²¹³ Liberal Party of Australia, above n 134.

²¹⁴ Ibid.

²¹⁵ Hardy, above n 198.

FOR LABOUR HIRE: PROTECTION FOR "CONTRACT WORKERS"

It may be possible to ensure compliance by host employers using a similar mechanism to that contained in section 21 of the Equal Opportunity Act 2010 (Vic). Parties in labour hire arrangements are expressly regulated by section 21 of the Equal Opportunity Act 2010 (Vic), which provides that:

Discrimination against contract workers

1. *A principal must not discriminate against a contract worker:*
 - a. *in the terms on which the principal allows the contract worker to work; or*
 - b. *by not allowing the contract worker to work or continue to work; or*
 - c. *by denying or limiting access by the contract worker to any benefit connected with the work; or*
 - d. *by subjecting the contract worker to any other detriment.*
2. *Subsection (1) does not apply to anything done or omitted to be done by a principal in relation to a contract worker that would not contravene this Act if done or omitted to be done by the employer of that contract worker.*

The term "principal" is relevantly defined as 'a person who contracts with another person for work to be done by employees of the other person'.²¹⁶ The term "contract worker" is defined as 'a person who does work for a principal under a contract between the person's employer and the principal'.²¹⁷

Such definitions and terms could be inserted into relevant sections of the FW Act relating to underpayments and termination of employment. At a minimum, the concept of principal and contract worker should be inserted into the meaning of adverse action in section 342(1) of the FW Act. This relationship could then be made subject to the adverse action provisions to ensure workers are protected. The definition of adverse action should be amended to include the following:

Adverse action is taken by a principal against a contract worker if the principal: (a) dismisses the contract worker; (b) injures the contract worker in his or her employment; (c) alters the position of the contract worker to the contract worker's prejudice; or (d) discriminates between the contractor and other employees of the principal.

²¹⁶ Equal Opportunity Act 2010 (Vic) s 4.

²¹⁷ Equal Opportunity Act 2010 (Vic) s 4.

LABOUR HIRE LICENSING SCHEME

While joint employment will provide better redress for workers who are exploited and encourage those in power to be proactive about ensuring that rights are protected, a labour hire licensing scheme is a further measure to prevent the initial entry of unscrupulous employers to the labour hire market.

In the UK, the Gangmasters Licensing Authority operate a licensing scheme to regulate labour hire agencies in the fresh produce supply chain and horticulture industry.²¹⁸ It is an offence to operate a labour hire agency in these industries without a license. To obtain a license, companies must meet a number of standards. The Authority investigates license holders and also conducts inspections to ensure workers are being treated legally. If companies do not comply with the law, they can have their licenses revoked. It is an offence to operate without a license, or to enter into an arrangement with an unlicensed gangmaster.

As the Authority website notes, the benefits of licensing include:

Workers receive fair treatment, the pay, benefits and conditions they are entitled to.

Labour providers are not undercut by those who pay less than the minimum wage or avoid tax. Industry standards are raised.

Labour users can check their workers come from a legitimate provider and are informed if their labour provider's licence is revoked.

Consumers can be assured that their food has been picked and packed in an ethical environment. Illegal activities which lead to a loss of public revenue —income tax, VAT and NI—are reduced.

In her submission to the Senate Inquiry mentioned above, Dr Hardy provides a useful assessment of the labour hire licensing scheme in the UK. She concludes that the scheme:²¹⁹

represents a somewhat promising experiment in an industry which was plagued by problems of worker exploitation. It also provides a useful example of how a licensing regime, coupled with an increased focus on enforcement, has the potential to improve compliance amongst labour hire providers in sectors with high numbers of temporary foreign workers.

WEstjustice suggests that a labour hire licensing scheme should be introduced in Australia. We endorse the National Union of Workers (NUW) Victorian Labour Hire licensing model.²²⁰ As contained in the NUW submission to the Victorian Inquiry into Labour Hire and Insecure work, key features of the model should include:

- payment of a bond and annual license fee to the Victorian Government to operate a labour hire company in Victoria;
- threshold capital requirement to operate a labour hire company in Victoria;
- core requirements for license holders and related parties, including a fit and proper person test, ongoing minimum capital requirements, reporting obligations and importantly, compliance with workplace laws;
- dedicated and well-resourced compliance unit;
- third parties including unions, individuals and community organisations have standing to bring actions for non-compliance. Such actions should be able to be taken in a low-cost forum such as the Victorian Civil and Administrative Tribunal, or a dedicated specialist tribunal; and
- mandatory workplace rights and entitlements training.

We refer to above sections and suggest that any compliance unit and training must ensure that it is accessible to newly arrived and refugee communities.

Our recommendation mirrors that of the Senate Education and Employment References Committee, which recommends:²²¹

that a licensing regime for labour hire contractors be established with a requirement that a business can only use a licensed labour hire contractor to procure labour. There should be a public register of all labour hire contractors. Labour hire contractors must meet and be able to demonstrate compliance with all workplace, employment, tax, and superannuation laws in order to gain a license. In addition, labour hire contractors that use other labour hire contractors, including those located overseas, should be obliged to ensure that those subcontractors also hold a license.

²²⁰ National Union of Workers, above n 95.

²²¹ Education and Employment References Committee, above n 132, xiv, 163–173; 328–330. The ALP also adopted a policy of introducing a labour hire licensing scheme in the Federal election 2016: ALP Policy, Protecting Rights at Work: Licensing Labour Hire, 2016, <http://www.100positivepolicies.org.au/protecting_rights_at_work_licensing_labour_hire>.

²¹⁸ Gangmasters Licensing Authority, *What we do* (2016) <<http://www.gla.gov.uk/who-we-are/what-we-do/>>.

²¹⁹ Hardy, above n 198, 21.

RECOMMENDATION

The Federal Government should undertake a review of fractured forms of employment (labour hire, supply chain, franchises, sham contracting) with a view to amending the Fair Work Act to incorporate the concept of joint employment and/or vicarious liability.

Such amendments should ensure that all who receive the benefits of being an "employer" are also required to comply with Fair Work Act provisions relating to underpayments and termination. Amendments could be achieved by:

- adopting a definition of "employer" as posited by Thai or Dowling (preferred option);
- adopting the notion of vicarious liability as found in ss 109 and 110 of the Equal Opportunity Act with limited exceptions (preferred option);
- incorporating an equivalent provision to s 21 of the Equal Opportunity Act; or
- at a minimum, the general protections provisions should be expanded to cover workers in labour hire relationships.

The Federal and/or State governments should introduce a licensing scheme for labour hire providers. Such a scheme should contain the following features:

- payment of a bond and annual license fee to the Government to operate a labour hire company in Victoria;
- threshold capital requirement to operate a labour hire company in Victoria;
- core requirements for license holders and related parties, including a fit and proper person test, ongoing minimum capital requirements, reporting obligations and importantly, compliance with workplace laws;
- dedicated and well-resourced compliance unit;
- third parties including unions, individuals and community organisations have standing to bring actions for non-compliance. Such actions should be able to be taken in a low-cost forum such as the Victorian Civil and Administrative Tribunal, or a dedicated specialist tribunal; and
- mandatory workplace rights and entitlements training.

**"Anybody who
benefits from the
exploitation of
vulnerable workers
should be held
accountable."**

FOR SUPPLY CHAINS: EXPANSION OF OUTWORKER PROTECTIONS TO OTHER INDUSTRIES

For supply chains, further obligations should be introduced to encourage compliance.

In submissions made to the Senate Inquiry on the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders, Dr Hardy advocates for an expansion of current provisions relating to outworkers in the textile industries.²²²

The Textile, Clothing and Footwear (TCF) Industry responded to the problems associated with supplier chains by persuading governments to adopt a new regulatory model to protect vulnerable TCF contract workers. This resulted in an amendment to the Fair Work Act to include Part 6-4A—Special provisions about TCF outworkers. In the Explanatory Memorandum to the Bill, it was stated that:

*Research has consistently shown that outworkers in the TCF industry suffer from unique vulnerabilities as a result of their engaging employment in non-business premises. These vulnerabilities are often exacerbated by poor English language skills, lack of knowledge about the Australian legal system and low levels of Union membership in the industry.*²²³

Part 6-4A is 'designed to eliminate exploitation of outworkers in the textile, clothing and footwear industry, and to ensure that those outworkers are employed under secure, safe and fair systems of work'.²²⁴

'Outworkers', who are often classified as independent contractors, are treated as 'employees' for the purposes of the protective provisions of the FW Act and modern award system.²²⁵ Additionally, TCF outworkers have the right to bring a claim for workplace entitlements against an "indirectly responsible entity" and enjoy a reversal of the onus of proof onto the party served with the claim for recovery.

The relevant modern award, the *Textile, Clothing, Footwear and Associated Industries Award 2010* specifically regulates arrangements made between principals and others who have work undertaken on their behalf.²²⁶ The provisions are designed to ensure transparency at each level of the supply chain. The provisions require principals and those engaged by the principal to maintain certain records regarding the identification of the workers and the work performed by them. The Award also provides that principals must apply the National Employment Standards to the worker, whether or not the worker is an employee of the principal. There are also specific provisions regarding hours of work, work on weekends and public holidays, time standards, payment and stand down.

Various state governments have also passed specific outwork laws (including NSW²²⁷, South Australia²²⁸, Queensland²²⁹, Tasmania²³⁰ and Victoria²³¹). Tasmania, Victoria, South Australia, Queensland and NSW have provisions in relation to deeming. For example, section 4 of the Outworkers (Improved Protection) Act 2003 (Vic) provides that outworkers will always be classified as employees for the purposes of various state laws, including long service leave and occupational health and safety laws. The same states, excluding Tasmania, also have provisions relating to recovery of unpaid remuneration owed to outworkers. South Australia and NSW have mandatory codes of practice. Victoria retains the capacity to make a code but has not yet utilised these provisions.

WEstjustice submits that the existing protections under the FW Act afforded to TCF outworkers should be extended to other industries, such as horticulture and food, distribution, retail, hospitality, cleaning, security, construction and other industries where workers at the bottom of the chain are vulnerable to exploitation. At the very least, we recommend that enforceable codes of conduct be mandated for these industries to ensure that workers are protected at each level of the supply chain.

Another approach discussed by Dr Tess Hardy in submissions to the Senate Education and Employment References Committee relates to 'hot goods' provisions from the US. Such provisions 'have enabled the regulator in the US to enjoin or embargo the transportation or sale of goods, in the production of which, any employee was employed in violation of US labour laws'.²³² Such provisions provide strong economic incentives for parent companies to ensure outstanding entitlements are paid, 'because an enjoined party can seek relief by remedying any past violation of labour laws'.²³³

Importantly, Dr Hardy notes that these provisions:

*have enabled the regulator to bypass the direct employer and enrol companies higher in the supply chain which have a much stronger incentive to establish private monitoring arrangements in relation to subcontractors in order to show that they have fulfilled their relevant statutory duty.*²³⁴

The Senate Inquiry Report observed that:

*In light of these characteristics, Dr Hardy noted that a hot goods provision would provide lead firms, supermarkets, and fast food franchisors with 'a strong commercial incentive to rectify any relevant underpayments as quickly as possible in order to enable the supply' of products to continue without further delay.*²³⁵

RECOMMENDATION

The State and Federal Governments should expand outworker protections under the Fair Work Act 2009 (Cth) (and relevant state laws) to other industries such as horticulture and food, distribution, retail, hospitality, cleaning, security, construction and other industries where workers at the bottom of the chain are vulnerable to exploitation.

222 Hardy, above n 198.

223 Explanatory Memorandum, Fair Work Amendment (Textile, Clothing & Footwear Industry) Bill 2011 (Cth), 1.

224 Fair Work Act 2009 (Cth) s 789AC.

225 Fair Work Act 2009 (Cth) s 789BB.

226 Note that special provisions for outworkers have existed in federal awards for some decades. The current scheme broadly owes its origins to a 1987 decision by DP Riordan, as the Australian Conciliation and Arbitration Member in *Re Clothing Trades Award 1982* (1987) 19 IR 416.

227 Industrial Relations Act 1996 (NSW), Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW); NSW Ethical Clothing Extended Responsibility Scheme, made under Part 3 of the Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW).

228 *Fair Work Act 1994* (SA); *Fair Work (Clothing Outworker Code of Practice) Regulation 2007* (SA).

229 *Industrial Relations Act 1999* (Qld).

230 *Industrial Relations Act 1984* (Tas).

231 *Outworkers (Improved Protection) Act 2003* (Vic).

232 Dr Tess Hardy, answer to written question on notice following a public hearing on 24 September 2015 (received 18 January 2016).

233 *Ibid.*

234 Education and Employment References Committee, above n 132, 311.

235 *Ibid.*

FOR FRANCHISES: LEGISLATIVE REFORM AND UPDATED CODE

In the wake of the investigation into the 7-Eleven franchise, Australian Greens MP Adam Bandt introduced a Bill to Parliament to enable underpaid franchise employees to recover amounts from the franchisor's head office.

In a media release, Mr Bandt outlined his intentions for the legislation:²³⁶

Something is wrong with our system when the boss of 7-Eleven is a billionaire but its workers are getting paid under \$10 an hour and threatened with deportation. We've also heard reports that suggest this kind of widespread worker exploitation doesn't end with 7-Eleven.

If head offices can enter into franchise contracts then turn a blind eye to what happens in their stores, workers can get exploited... By allowing workers to claim any underpayments directly from head office, this law will help bring about a culture shift. Instead of leaving it to vulnerable workers to uphold the law through expensive legal action, head offices would take more responsibility for what goes on in the stores that carry their name.

The head office could still pursue the franchisee for the amount of any underpayment, but they'd have an extra incentive for ensuring the underpayment didn't happen in the first place.

The Bill²³⁷ did not progress beyond First Reading. However, importantly, it provided that in the event of an underpayment, the franchisor and any related body corporate of the franchisor 'are jointly and severally liable for the payment of the unpaid amount'.²³⁸ However, the franchisor or related body corporate are able to seek to recover any amount paid from the franchisee.²³⁹

As noted above, the Government has announced a policy to amend the FW Act to capture franchisors who fail to prevent exploitation. However, the language of the proposed reform suggests that a franchisor will only be liable where it failed to take reasonable steps to prevent the underpayment. As noted above, it is essential that reforms are meaningful and motivate franchisors to prevent exploitation. We suggest that making franchisors jointly liable for any underpayment will bring about greater compliance with the FW Act and minimum standards.

Alternatively, as proposed above, vicarious liability type provisions should be inserted into the FW Act, with very limited exceptions. Under ALP 2016 election policy, franchisors should be held accountable 'unless the franchisor can prove they could not have reasonably known or were not reasonably aware of the breaches'.²⁴⁰ This obligation is coupled with a proposed amendment to the Franchising Code of Conduct to require the franchisor to take reasonable steps to assist franchisees in compliance with labour standards under the Fair Work Act.

The Senate Education and Employment References Committee has also recommended a review of the Franchising Code of Conduct as a possible means of imposing liability on franchisors.²⁴¹

The committee recommends that Treasury and the ACCC review the Franchising Code of Conduct (and if necessary competition law) with a view to assessing the respective responsibilities of franchisors and franchisees regarding compliance with workplace law and whether there is scope to impose some degree of responsibility on a franchisor and the merits or otherwise of so doing.

RECOMMENDATION

Building on its recent policy announcement, the Federal Government should amend the Fair Work Act 2009 (Cth) and Franchising Code of Conduct such that franchisors can be held accountable for breaches by franchisees in respect of underpayments and unlawful termination of employment.

²³⁶ Adam Bandt, 'Greens Move to Prevent Future 7-Eleven-Style Worker Exploitation' (Media Release, 15 September 2015).

²³⁷ Fair Work Amendment (Recovery of Unpaid Amounts for Franchisee Employees) Bill 2015 (Cth).

²³⁸ Ibid, s 789GD.

²³⁹ Ibid, s789GG.

²⁴⁰ ALP Policy, Protecting Rights at Work, 2016, <http://www.100positivepolicies.org.au/protecting_rights_at_work>.

²⁴¹ Education and Employment References Committee, above n 132, xiii, 264–265.

**Laws and processes to eradicate
sham contracting**

"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."²⁴²

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).

²⁴² Joellen Riley, 'Regulatory responses to the blurring boundary between employment and self-employment: a view from the Antipodes' (Recent Developments in Labour Law, Akademai Kiado Rt, 2013), 5.

Among newly arrived and refugee communities, sham contracting is rife. In a WEstjustice survey, the following comments were provided by community workers who were asked a general question about common employment problems:²⁴³

"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 road transport and distribution services, the cleaning industry, 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.

WEstjustice has observed instances of employers obtaining ABNs for workers, 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'. It is an issue that disproportionately affects individuals with limited agency in the labour market. Some of our clients' experiences are set out in the following case studies:

²⁴³ Full details can be found at Dow, above n 2, 12.

LIN

Lin came to Australia as a refugee. This was her first job in Australia. She worked as a door-to-door sales person trying to sell safety equipment. She was given instructions on where to work, how and when. The boss agreed to pay \$60 per sale but no salary apart from this. After three full days of work (8am–5pm) Lin left her job. She had made one sale but was never paid for it despite providing her ABN and bank details. Lin came to see us about the \$60 payment, without any understanding of the differences between an independent contractor and employee, or the right to be paid an hourly wage.

BAO

Bao worked as an independent contractor delivery driver for a distribution company. He worked full time making deliveries for one host agency. He wore their uniform, was texted each night confirming work the next day, and had no control over hours or duties. Bao had a contract providing for subcontracting but in reality he was not able to delegate. He was paid by the hour and was not allowed to take days off, even with a medical certificate. Bao's boss kept several weeks pay 'in advance'. Bao was told if he went home (overseas) to visit his family he would not be paid and would not get future shifts.

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 are performing the work of an employee, which should entitle them to the same rights and standards enjoyed by employees under the FW Act. Individuals who are ostensibly employees are therefore receiving less than their position ought to afford them. This creates serious issues for the labour market in terms of providing a competitive advantage to those companies that misclassify and underpay their workers.
- 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.²⁴⁴ A contract will be principally for labour if it is mainly for the person's labour, which may include:
 - physical labour;
 - mental effort; or
 - artistic effort.
- 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.

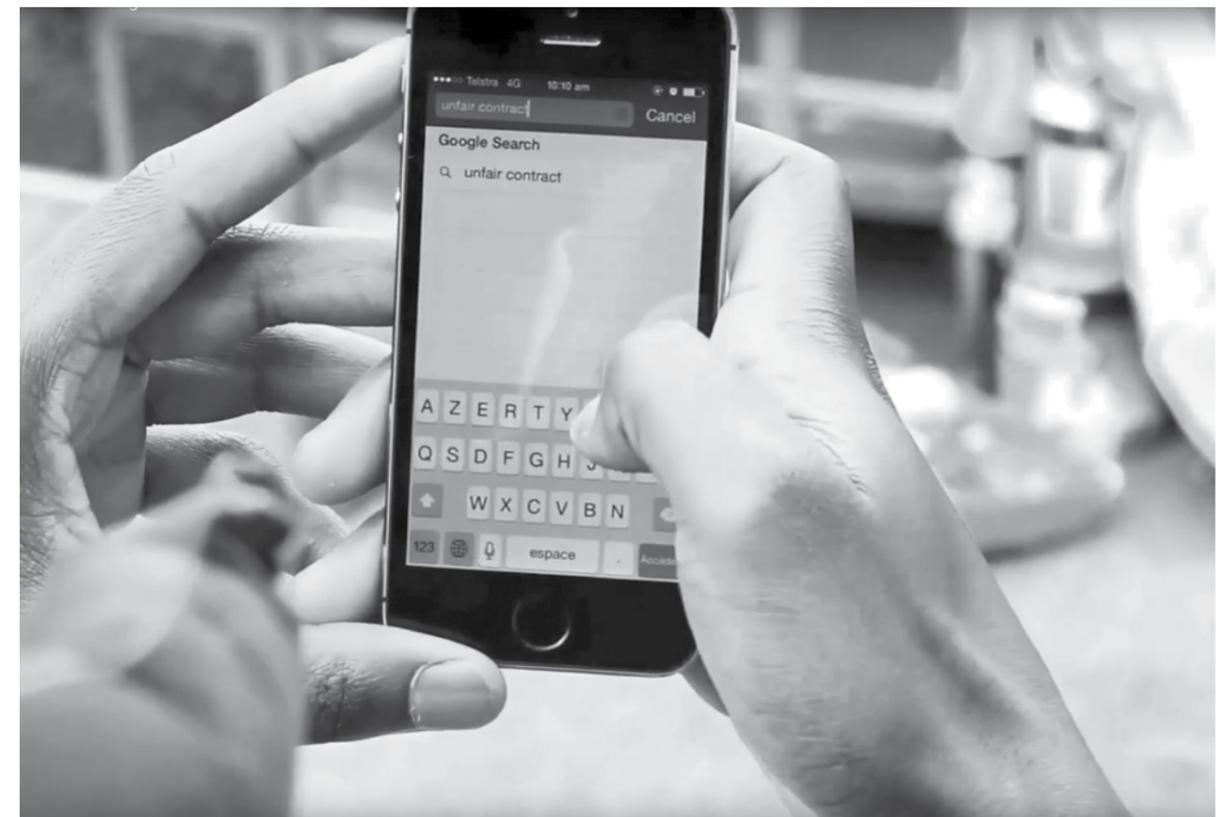
Many of our clients are not aware that there is a difference between an employee and independent contractor, and asking the questions necessary to apply the multi-indicia test can be difficult. It is a cause for grave concern that our clients are often told by the person hiring them that if they have 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 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 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. Indeed, the Senate Education and Employment References Committee has called for an independent review of the utility of sham contracting provisions.²⁴⁵

²⁴⁴ Australian Taxation Office, *Superannuation guarantee: who is an employee?*, SGR 2005/1, 23 February 2005.

²⁴⁵ Education and Employment References Committee, *above n 132*, xiv, 278–283; 327–328.



WEstjustice digital story.

A DEFINITION OF EMPLOYEE WOULD ASSIST

"Except perhaps in matters involving revenue authorities, a rational if unethical employer may consider it worth classifying a worker as a contractor, because the employer might make immediate savings and face only a remote risk that the employee would ultimately find reason to bring a grievance."²⁴⁶

Rather than applying the multi-factor test to each situation where there is doubt as to a worker's true status, a statutory definition would increase efficiency and certainty. This definition should include a presumption that a worker is an employee unless certain conditions are met. For example, in their Submission to the ABCC Inquiry into Sham Arrangements and the Use of Labour Hire in the Building and Construction Industry, Andrew Stewart and Cameron Roles proposed 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.²⁴⁷

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.²⁴⁸

They recommend that this definition could be included in any legislation which uses the term 'employee'. 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.²⁴⁹

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

A statutory definition of employee should be introduced. It should include a presumption that a worker is an employee.

EMPLOYER DEFENCE SHOULD BE LIMITED

WEstjustice regards the current provisions in the FW Act as insufficient to discourage sham contracting.

The provisions of subsection 357(2) should be dramatically re-written. The subsection provides:

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

- a. did not know; and*
- b. was not reckless as to whether;*

the contract was a contract of employment rather than a contract for services.

The provision offers 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 that:²⁵⁰

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.

This recommendation, along with our recommendation to introduce a statutory definition of independent contracting, both formed part of ALP policies in the 2016 Federal election.²⁵¹

ONUS ON EMPLOYER TO DEMONSTRATE GENUINE CONTRACTING RELATIONSHIP

To increase compliance with sham contracting laws, WEstjustice also proposes the introduction of a requirement that a person who asserts that he or she is engaging an independent contractor must complete a document which is lodged with the Fair Work Commission (or appropriate State-based compliance unit) which includes details of the engagement and includes a statement by the principal setting out why he or she believes that the engagement:

- a.** is properly one which establishes a relationship of contractor and principal; and
- b.** the reasons why this is so, including the steps taken by the contractor to establish (b).

This document should be provided to the independent contractor, who would be able to rely on this evidence in a court or tribunal should there be a dispute as to whether the relationship was originally one of principal and contractor, or has subsequently lost such features.

A reverse onus should apply so that a worker can assert that he or she was actually an employee and the principal/employer should then be required to prove this was not the case. This would be a significant deterrent as it would require employers to be vigilant at the commencement of a relationship and to make proper inquiries and obtain appropriate professional advice. It would create an initial compliance burden on the employer, but there would be a valuable return for society in terms of less litigation and a quicker resolution of disputes. A court or tribunal could then apply an objective test to ascertain whether a reasonable person would have reached the same conclusion as the principal.

As noted above, the employer should not be able to rely on their own ignorance to defeat the legitimate claim of an employee wrongly classified as a contractor.

²⁴⁶ Joellen Riley, 'Regulatory responses to the blurring boundary between employment and self-employment: a view from the Antipodes' (Recent Developments in Labour Law, Akademai Kiado Rt, 2013), 5.

²⁴⁷ Andrew Stewart and Cameron Roles, Submission to the Australian Building and Construction Commissioner (ABCC), <<http://fwbc.gov.au/sites/default/files/Andrew%20Stewart%20and%20Cameron%20Roles%20-%20SCRT%20Submission.docx>>.

²⁴⁸ Ibid. See also, Cameron Roles and Andrew Stewart, 'The reach of labour regulation: Tackling sham contracting' (2012) *Australian Journal of Labour Law* 25, 258.

²⁴⁹ Australian Taxation Office, *Superannuation guarantee: who is an employee?*, SGR 2005/1, 23 February 2005.

²⁵⁰ Productivity Commission, above n 29, 815.

²⁵¹ Rights At Work, ALP Policy, 2016, <<http://www.alp.org.au/rightsatwork>>.

PREVENTATIVE MEASURES AT TIME ABN OBTAINED

In addition to the above, WEstjustice submits that there should be a greater focus on prevention of sham contracting. 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.

NEED FOR INCREASED REGULATORY ACTION

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. 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 above 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.

RECOMMENDATION

Employers and principals should have a positive obligation to ensure they classify their workers appropriately. There should be no recklessness/lack of knowledge defence.

Where principals do engage contractors, they should be required to submit a statement explaining the nature of the contracting relationship.

More rigorous tests should apply before an ABN is given to an individual. 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.

**Reforms to stop discrimination, unfair
and unsafe work practices**

9

DISMISSALS

DISMISSALS ARE COMMON AND HAVE DISASTROUS IMPACTS

At the time of publishing the Preliminary Report we had heard of the challenges that newly arrived workers face regarding termination of employment. As one community leader said:²⁵²

"People from refugee backgrounds face discrimination at work, bullying, don't know their rights and often lose their jobs without being aware. No secure job."

The Preliminary Report shows that 55% of survey respondents identified that termination of employment was common, somewhat common or that they or someone they knew had experienced losing their job (see chart below).

Our case work has reflected these findings. Around 20% of our clients between May 2014 and October 2015 had their employment terminated. Often in such cases, the employee has not been treated with procedural fairness, or there were other unfair circumstances which lead to their termination.

Under the FW Act and anti-discrimination legislation, it is generally unlawful to dismiss a worker where to do so:

- is unfair (meaning harsh, unjust or unreasonable); and/or
- is discriminatory or for a prohibited reason (for example, because the worker made inquiries about their rate of pay or because of a worker's race or disability).

Unfortunately, WEstjustice has seen examples of each of the above factors forming the basis for terminating employment. Given the central importance of labour market integration for newly arrived communities, coupled with the significant barriers newly arrived and refugee workers face in accessing the labour market, it is extremely important that laws ensure that CALD workers are not dismissed unfairly.

The social and economic consequences of unfair dismissal are particularly severe for CALD workers. A number of our clients have experienced homelessness as a result of losing their jobs. The following case study provides an example:

ALI **A**

Ali was a refugee from Afghanistan working in a factory. His mother and children were living back home and he was supporting them, as well as his brother's family and children. He was dismissed after taking a number of periods of sick leave. All he wanted was his job back. He was distraught that he wasn't earning anything, and expressed how difficult it would be for him to find another job given his limited English skills. Ali had always received great feedback for his work. He had to borrow money from a friend to pay rent and food, and eventually had to move out of where he was living because he ran out of money.

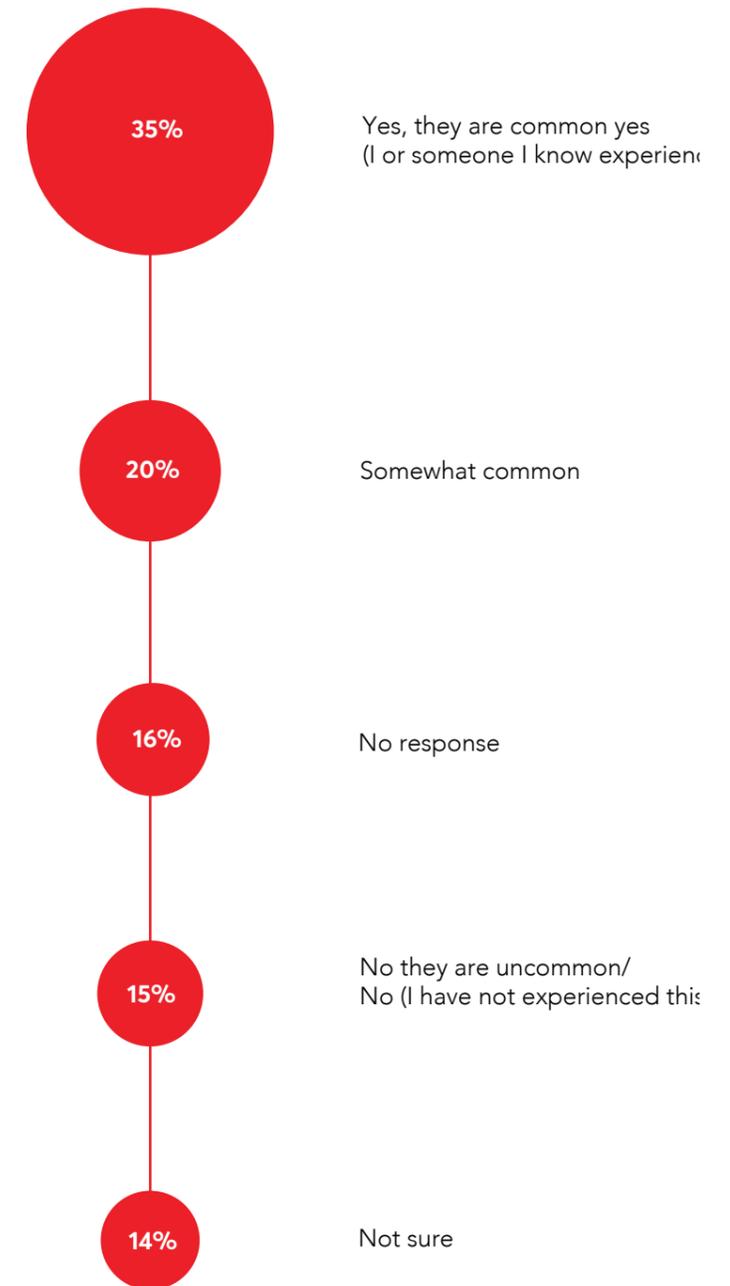
The causes of reported job loss rates were not captured by our Preliminary Report survey, however our casework, interviews and other survey responses indicate that a combination of factors are at play. These include the nature of the work many people from newly arrived communities undertake (insecure, highly casualised employment in low-paid industries), as well as other potentially preventable problems including dismissal relating to small communication breakdowns/misunderstandings, unfair dismissal and discrimination.

As one community worker explained:

"Most people who I know they lose their jobs just because they're a refugee background or they don't speak English fluent and be underestimated for their experience work."²⁵³

As another community leader noted:

"Since most of them have very little English language skills there is a lack of understanding about work place contracts, rules and procedures, often being dismissed or voluntarily resigning due to receiving warnings"



252 Dow, above n 2, 6.

253 Ibid.

Lose job/made redundant/get fired: frequency

Marco's story demonstrates the importance of unfair dismissal processes for ensuring procedural fairness is followed for vulnerable workers:

MARCO

Marco came to Australia as a refugee in 2012. He has worked in a food processing factory for over three years. Marco describes his work as his life and his passion. He has never had any trouble at work. One day, at the end of his shift, Marco received a letter advising him that there was an investigation into his alleged breach of employment contract. He was asked to respond to allegations of misconduct in writing but does not speak English. Marco was called into a meeting as part of the investigation but was not provided with an interpreter.

Marco came to the Employment Law Service distraught. His salary not only supported him, but his children and family back home. Marco denied all allegations. WEstjustice assisted Marco to write a letter requesting face-to-face meeting with an interpreter. Marco was given another meeting with an interpreter present and could explain his situation. The next week, Marco dropped in to WEstjustice—he had started back at work. He was very happy to have his job back.

The unfair dismissal (UFD) and general protections (GP) laws within the FW Act are extremely important, particularly in providing vulnerable employees with increased security and protection against arbitrary or discriminatory conduct. The provisions also provide an avenue for redress where the law is disregarded, and ensure procedural fairness, particularly where cultural or language barriers apply. Given the often extreme power imbalance between employee and employer, our clients could not negotiate without legal protections.

PROCESS—ADVANTAGES AND CHALLENGES

WESTJUSTICE EXPERIENCE

Between May 2013 and October 2015, WEstjustice helped eight different clients to recover or obtain orders for payment of over \$86,000 in compensation for unfair dismissal matters. Three clients were represented by WEstjustice, one client was helped to self-represent, and others were ultimately assisted by a union, Job Watch or a law firm acting on a pro bono capacity.

WEstjustice helped four different clients to recover payment of over \$21,000 in compensation for general protections or discrimination-related matters. Three clients were represented by WEstjustice while one was able to self-advocate with our assistance.

WEstjustice drafted eight UFD applications and five GP applications, and represented clients at four UFD conciliations and three general protections conciliations.

In addition to financial compensation, where clients had lost their jobs, WEstjustice also focused on outcomes to assist with finding new work. WEstjustice helped nine clients to obtain a statement of service or reference letter for clients to use when applying for new work. WEstjustice assisted five clients to reach agreement with their employer that they had resigned from employment, rather than being dismissed. This is an important distinction for clients seeking new work. Often there would be an agreement reached with the employer around what would be said if a new potential employer called for a reference check.

WHAT WORKS WELL

WEstjustice notes that matters are listed quickly and often proactively managed by FWC, which is positive. It is helpful and efficient that the FWC serves applications on the Respondent, for example. In other jurisdictions, fear and complications relating to service of documents has been sufficient to deter clients from making a claim.

WEstjustice has also found that when we have capacity to assist clients, face-to-face conciliation conferences are an efficient way to resolve most UFD and GP disputes.

LANGUAGE AND LITERACY BARRIERS LIMIT ACCESS

Unfair termination is an area in which the FWO provides no assistance. The FWC routinely refers clients to Job Watch or their nearest community legal centre for assistance. Without our resources and the resources of other community legal centres, many applicants would not be able to obtain any legal advice at all.

WEstjustice represents vulnerable, migrant workers with a limited command of English, scant knowledge of their employment rights or the legal system, and (if it were not for our service) little if any access to legal representation. Due to this array of barriers, many newly arrived and refugee workers cannot access UFD or GP processes at all. For these vulnerable workers, UFD and GP processes are not achieving their purpose.

Many of our clients, particularly those in low-paying jobs, have faced adverse action (including summary dismissal) for exercising or proposing to exercise workplace rights. For example, we have learned about clients being fired when they told their boss that they would see a lawyer, or when asking about salaries or entitlements, often in situations where clients have been dramatically underpaid, or not paid at all.

ISAAC

Isaac worked as a security guard. Despite working over 70 hours per week, he did not receive any overtime payments or penalty rates. His hourly rate of pay was below the applicable award. Isaac was usually paid monthly, however he noticed that he had not been paid for three weeks. Isaac sent numerous messages to his boss asking about his pay. After calling the director and attending his workplace to demand payment, he was fired.

Clients were generally unaware that UFD or GP laws existed, and that their exercise of these rights fall under the ambit of 'workplace rights' protected under the FW Act. Often, clients came to us seeking assistance only in relation to the underpayment matter or because they had lost their job. Even fewer clients were aware of the process for bringing GP or UFD claims, or the time limits involved.

Even in circumstances where these provisions are brought to their attention, the ability of migrants to enforce their rights accordingly is limited. Many of our clients cannot read or write English and many are illiterate in their own languages. Completing application forms and understanding correspondence from the Commission without assistance can be impossible. For example, one worker who attended our Centre nearly had his unfair dismissal case discontinued after inadvertently filling out a Notice of Discontinuance form, not realising what it meant:

SASH

Sash, a migrant, non-English speaking background presented at our service requesting advice after he was dismissed. A few weeks later, he returned to our office with his notice of listing for unfair dismissal. We explained the document was setting a time for conciliation and that he should attend. The client then showed us the form at the back of the notice, which he had already filled out, and explained that he intended to return the form shortly. This form was a Notice of Discontinuance. We explained that this form was to end his matter, and he should only fill out this form if he wanted to end his case. He was very grateful and thanked us for explaining the form, as he otherwise would have sent it in, inadvertently discontinuing his case.

As noted in the Centre for Employment and Labour Relations Law Submission to the Fair Work Act Review on 17 February 2012, filling out an application form requires applicants to produce legal information and make legal judgments. It is our experience that although newly arrived and refugee clients can tell their story with assistance from an interpreter and a caseworker, it is largely impossible for clients to make these legal judgments and draft their own applications without help. Often, community members find it difficult to recount their experiences in a chronological order, and do not understand the various documents within their possession, nor how they could be used to support their case. WEstjustice has experienced numerous client matters where correspondence is not provided until the second or third meeting, as clients simply did not realise that the documents were relevant.

In addition to improving education in relation to workplace rights and responsibilities, there is urgent need for assistance for vulnerable workers in order to facilitate access to UFD and GP processes. This will increase equity and efficiency. Claims will be better articulated and resolved more quickly. For example, in Abouk's case:

ABOUK

Abouk worked in a warehouse. She was dismissed for alleged bullying and discrimination but denied that this behaviour had occurred. Due to a miscommunication, she had reported another colleague to a manager. Abouk was not given any warnings or opportunity to explain what had happened. WEstjustice assisted Abouk to complete an UFD application and fee waiver application. Eventually, Abouk received compensation, but more importantly for her, agreement that Abouk had resigned and a statement of service that would enable her to find another job quickly.

This support is especially necessary for UFD and GP processes given that the Fair Work Ombudsman cannot provide assistance in relation to these matters.

Unfortunately, we have limited resources and cannot assist all clients. We have had to turn clients away due to lack of capacity, and for many CALD clients there is no other assistance available.

RECOMMENDATION

Vulnerable workers require assistance to access unfair dismissal and general protections processes. Recognising that the FWO does not provide assistance with UFD, and only limited assistance with GP applications, increased funding and resources for services which assist newly arrived and refugee communities to access FWC dispute resolution processes are required. Such assistance could be provided by community based employment law services.

TIME LIMIT IS TOO SHORT

Currently, applicants must make an application for UFD or GP within 21 days of the date the dismissal takes effect. The FWC is only able to extend this time limit in exceptional circumstances.

The time limit of 21 days from the date of dismissal is especially prohibitive for our clients. Even once clients become aware that there are legal protections available to them, there is typically a further delay before they learn about the ELS. Even then, they may need to wait many weeks for an appointment. Although WEstjustice tries to prioritise dismissal claims, due to limited funding and resources, WEstjustice is not always able to provide timely assistance to clients. New appointments often need to be booked as far as four or six weeks in advance. Because of this limited capacity and the limited capacity of other available services, by the time clients receive advice about their dismissal, they can be out of time to lodge a claim.

This means that clients are sometimes forced to file applications, without legal advice and assistance, or even worse, are not able to file a claim at all, despite having meritorious claims.

For example:

SUE

Sue worked in a garment factory for many years. Her employment was suddenly terminated without reason. She contacted WEstjustice for an appointment. Because the appointment was some time away, the receptionist noted that some claims have a 21 day time limit, and recommended that Sue call an infoline for information before her appointment.

Sue received information about bringing an UFD claim, but was unsure how to fill out of the forms. She also wasn't sure how to pay for her application, and was too afraid to contact the FWC. By the time Sue presented for her appointment at WEstjustice, she was out of time. Sue had a strong case, and given her financial circumstances, could have sought a fee waiver from the FWC.

The exceptional circumstances that may be taken into account when considering an extension of the 21 day time limit (contained in subsections 394(3)(a)-(f) of the FW Act), are very narrow, and an extension of time is only permitted in rare circumstances. In our experience the Fair Work Commission applies the time limit strictly, and out of time applications are very rarely accepted.

Because of the necessity to use our stretched time and resources efficiently, WEstjustice has faced difficult decisions about whether to pursue an extension of time for UFD cases for some clients. WEstjustice has had clients who meet the criteria for UFD whom we have had to turn away because the unlikelihood of an extension of time being granted outweighs the time and resources that would be required to lodge a claim.

RECOMMENDATION

The limitation period for UFD and GP applications should be increased to 90 days. The exceptional circumstances that may be taken into account per ss 366(2)(a)-(e) and 394(3)(a)-(f) of the FW Act should be broadened to require consideration of the particular circumstances of vulnerable workers. This should include a consideration of English language abilities, knowledge of legal rights and ability to access legal advice, including recognition of the barriers faced by refugee workers in particular.

PENALTIES SHOULD BE PUT IN PLACE WHERE EMPLOYERS FAIL TO RESPOND

For some cases, WEstjustice has spent considerable time and resources following up employers for their employer response. Currently under the FW Act there are very limited circumstances where an Applicant can lodge out of time. However, there is no sanction for employers who fail to lodge an employer response outside of the seven day time limit set out in the Fair Work Commission Rules.

When an employer response is filed late, it puts unnecessary pressure on applicants and their representatives. In the experience of WEstjustice, the FWC may still expect applicants to attend listed conciliations with an employer respondent in circumstances where no employer response has been filed. This puts employee applicants at a distinct disadvantage as they are unable to adequately prepare or predict an employer response whereas the employer can rely on the information contained in the original application. Further, if an employee is required to seek an adjournment because the employer has failed to provide a response, this has significant financial impacts and may make reinstatement less likely.

RECOMMENDATION

To encourage compliance with the Fair Work Commission Rules, late lodgement of an Employer Response should attract some penalty.

REMEDIES

It is currently the case in relation to UFD matters that compensation can only be awarded for lost wages. If an employer's conduct has caused an employee injury, hurt or humiliation; and/or when an employer's behaviour is particularly unjust, improper or egregious, the FWC should have regard to this, and should have the discretion to order a broader range of remedies. Martin and Wendy's case above (page 151), along with Sam and Jono's (page 228) stories below provide examples of such types of case:

SAM

Sam is a refugee from Afghanistan. He travelled to Australia by boat, has spent time in a detention centre in solitary confinement and has a mental health condition. Sam experienced a long history of discrimination and bullying from his co-workers. He was taunted for his religious beliefs and people called him crazy. Despite complaining to his managers on numerous occasions, there was no action taken against his colleagues, and the behaviour continued. One day, he was indecently touched by one of the bullies. Sam pushed the worker away. He was dismissed for serious misconduct.

Currently, under section 392 of the FW Act, the FWC can take into account a number of factors when awarding compensation. These include: the length of the person's service with the employer, the amount of any income reasonably likely to be earned by the person, the effect of the order on the viability of the employer's enterprise, and any other matter it considers relevant when determining compensation. As such it is possible to argue that because an employee is unlikely to remain in employment for much longer, the remedy should be less. It does not matter whether the reason for employment coming to an end is employer misconduct. This perverse outcome could be mitigated by granting the FWC greater discretion and flexibility with UD remedies, and by directing the FWC to consider a greater range of factors when determining remedy, including hurt and humiliation, the gravity of the employer's breaches, employee vulnerability and the impact of the behaviour on the employee.

In situations like those set out above, even if the maximum amount of compensation was ordered, in our view it is insufficient. As such, we are of the view that there should be no cap on compensation.

This amendment would recognise and seek to avert the significant damage a dismissal can have on labour market integration, successfully starting a new life in Australia and future job opportunities. Such remedies should include compensation for hurt, humiliation and distress; remedies designed to achieve systemic reform such as training for employers; and penalties for egregious employer behaviour. We comment further on the use of remedies to address systemic issues below.

RECOMMENDATION

Compensation for UFD should not be capped or limited to lost wages. Instead, the FW Act should be amended to ensure that remedies achieve the policy objective of preventing unfair dismissals and compensating individuals who have suffered loss or harm. Remedies should include compensation for financial loss, hurt, humiliation and distress; and remedies designed to achieve systemic reform such as training for employers and penalties for egregious employer behaviour.



Westjustice volunteer training session.
Photo credit: Jessica Hagg

WORKPLACE INJURY

As noted in our Preliminary Report, workplace injury is common among newly arrived and refugee workers, and very few people are aware of their right to bring a claim. Over a third of survey respondents reported that injury at work was common/somewhat common, or that they or someone they knew had a workplace injury.²⁵⁴ As one community member explained:²⁵⁵

"One of my friend lost his fingers in meat factory few years ago. The incident happen due to poor workplace safety, and no proper induction/training at workplace."

This observation has been mirrored in our casework, with 8% of casework enquiries at October 2015 relating to injury. WEstjustice has seen numerous clients who had been injured badly at work and required medical treatment. Several clients had no knowledge of the WorkCover system and the employer had not informed them of their right to bring a claim.

In some cases, clients had been dismissed following their injury, particularly where employers were unwilling to accommodate modified duties or a period of personal leave, notwithstanding medical certificates requiring these steps to be taken. Sadly, some clients resigned from their work because the employer refused to provide modified duties, and they were in too much pain to work. As a result, several clients were living with significant injuries, no income, and limited future employment prospects. Commonly, workers were threatened with dismissal if they made a WorkCover claim:

PAW

Paw is a refugee who attended the Centre with a severe workplace injury that meant she required specialist medical attention and was unable to work for over a month following the injury. The accident was not reported in the workplace, and Paw was told by her supervisor to tell medical staff that the accident occurred at home. Paw reported being threatened by a supervisor with losing her job if she were to make a WorkCover claim.

WEstjustice assisted the client to make a claim and Paw was paid weekly payments for over 2 months and assisted to return to work with modified duties.

²⁵⁴ Ibid, 11.

²⁵⁵ Survey, community member, ibid.

CHIT

Chit worked in a meat factory and injured his shoulder at work. His doctor told him he was only allowed to do light duties and gave him a medical certificate. Chit's supervisor ignored the certificate, and directed Chit to undertake his normal duties. Chit was afraid, and so he continued to work. His shoulder injury got worse and his doctor told him that he could not work at all. Chit told his supervisor and his supervisor told him he could not have any time off work. Chit resigned because he didn't know what else to do.

One case worker informed us about a client who was told to clean a machine while it was still running. The machine was designed to peel and cut vegetables. As a result of following the instruction, he lost his thumb. The company apologized for the loss and offered the client an amount of compensation to "settle" the matter. The company told the worker to go home, saying that they were quiet at the moment and they would call when busy again. Many workers were called back once it was busy again, but not this worker. Ultimately, with the help of the case worker and union, the worker was able to obtain the compensation they were entitled to.

As one community leader notes:

"Making a WorkCover claim is taboo in my community. This session gives me the confidence to say that it is OK to make a claim. Workers entitlements around injury are a mystery to my community so this information will be helpful"

Recently arrived and refugee communities are highly vulnerable to having a workplace injury due to lack of rights awareness, language barriers, fear of questioning/complaining and their participation in high risk industries, including manual and industrial work. In particular, the Centre noticed a pattern of clients who had sustained injuries working in the food processing industry. Many of these clients were illiterate and unable to complete forms without significant help.

Safe Work Australia recently found that migrant and refugee workers are more likely to be killed or injured at work than other employees. The report notes that injury rates are increasing, and regulators must do more:²⁵⁶

The increasing incidence of workplace injuries and fatalities involving at-risk migrant workers is almost certain... It is important that Safe Work Australia, workplace health and safety regulators and workers' compensation authorities quickly build capacity and put in place measures to address... risks for at-risk migrant workers for now and into the future.

Although there are several no-win no-fee personal injury firms willing to assist clients with serious injuries, few private firms will assist clients at the early stage of their case. This means that many vulnerable workers with serious injuries are left without access to their lawful entitlements.²⁵⁷ WorkSafe and the Victorian Government must take urgent steps to improve access to WorkCover. This includes funding services to:

1. provide targeted education; and
2. assist workers to complete forms.

WorkSafe must also ensure that it uses interpreters when contacting clients who speak a language other than English—WEstjustice has seen clients missing meetings due to language misunderstandings.

Where workers do manage to access the system, WorkCover provides appropriate and necessary financial support. Education and assistance to facilitate this access is therefore urgently required. More work must also occur with employers, to prevent further serious injuries occurring in the future.

²⁵⁶ Nick Toscano, 'Fears over rise in migrant workers killed, injured in industrial accidents', The Age, 27 August 2016, <<http://www.theage.com.au/business/workplace-relations/sharp-rise-in-migrant-workers-killed-maimed-in-industrial-accidents-20160825-gr117u.html>>.

²⁵⁷ Fortunately, some firms like Maurice Blackburn provide early assistance to our vulnerable clients via a warm referral process.

RECOMMENDATION

Targeted education is urgently required to inform workers about occupational health and safety, and their right to bring a WorkCover claim.

Services must be funded to assist vulnerable workers to complete WorkCover claim forms.

BULLYING AND DISCRIMINATION

Our client files reveal that newly arrived and refugee workers are often subjected to distressing and humiliating treatment at work. Such treatment may be directly or indirectly connected to attributes such as their country of birth, ethnicity and refugee status. Clients have been taunted and teased as “boat people”, “black pigs” and “terrorists”. Some clients reported that this discriminatory behaviour escalated after media reports of terrorist events overseas. At other times, clients were tormented for being injured, or dismissed for asking about their workplace rights. Community members reported discrimination at all times of the employment relationship—from recruitment (e.g. being refused work based on their foreign-sounding name, or country of origin) to dismissal (e.g. being unfairly blamed for mistakes at work because of their accent/language).

Bullying and discrimination were frequently reported problems at ELS casework appointments. 7% of clients received advice on bullying, and 8% received advice about discrimination. Discrimination on the grounds of race and religion were most commonly reported, while disability discrimination and pregnancy discrimination were also reported by some clients. While discrimination and bullying aren't necessarily linked, in the cases of clients who accessed the ELS, there was often a correlation.

The following case study demonstrates the terrible treatment some of our clients have reported:

FATIH

Fatih is a young man who got his first job in Australia working in a distribution company. He got along well with his colleagues until they found out that he was an asylum seeker and had come to Australia by boat. After this time, he was mercilessly taunted, called “boat person”, sworn at, given bad and dangerous jobs and excluded from social events. Fatih was deeply affected by this behaviour and sought counselling. After some time, he developed a shoulder injury. This resulted in further ridicule, and eventually he was not able to work anymore.

Stories from community leaders echo our casework experiences:

“Most common problem in my community is bullying and their biggest concern is they will lose their jobs if they speak up. I am surprised that there are laws that protect a worker's job if they report bullying”

“Bullying is a big issue. After the training I will have knowledge of issues and when a member comes I'll be able to provide information and if they want to go further I can refer them”

“A worker was treated badly by a co-worker. The co-worker used to tell him to do jobs for him. One day he was asked to empty the rubbish bin and move it somewhere. In order to avoid conflict he just did as he was told by his co-worker. After he brought back the bin and moved it, the co-worker picked up the bin and threw it on the floor. The worker could not speak English very well.”

Interestingly, in our Preliminary Report and anecdotally, discrimination was reported as occurring much more frequently than what was observed in our casework service. As is reflected in the literature,²⁵⁸ discrimination was commonly identified in interviews and surveys as a serious issue—both when trying to obtain work, and once people found a job. 47% of survey respondents reported that discrimination at work was common, somewhat common, or that they or someone they knew had experienced it.²⁵⁹ However, less than one in ten ELS clients received advice on discrimination. Although we cannot be certain of the reason for this discrepancy, it may be partly attributable to workers' belief that they cannot “prove” their case, a lack of understanding of Australian laws, or the deep pain that reliving traumatic events can evoke. Many clients also described a general feeling that newly arrived workers were treated less favourably, but could not provide specific examples.

Indeed, many clients expressed a deep concern that nothing would change the discriminatory treatment, and they didn't have enough “proof” that they were being discriminated against. Without access to employer records/emails/practices the burden of proof is extremely difficult. Some clients were too fearful to pursue their claim, or found themselves deeply upset sharing their experience with a lawyer, and unable to proceed. Clients much more readily pursued underpayments claims than discrimination-related matters—we expect that this may be because wages claims are easier to quantify and articulate.

Many clients suffered significant psychological injuries as a result of discriminatory behaviour at work—and such injuries may have prevented others from seeking legal assistance. According to VicHealth, “[t]here is a strong relationship between exposure to discrimination and poor mental health”.²⁶⁰ The stories we have heard confirmed the devastating impacts of discrimination, and the significant health impacts that problems at work can cause. Fatih's story above demonstrates just one example of terrible discrimination connected with refugee status. Our client was tormented for being a ‘boat person’, and ultimately, the effect of the discriminatory behaviour was such a severe psychological injury that our client was no longer able to work. Fatih attended his first appointment at the ELS with a trusted case worker, and without such support we doubt Fatih would have reached our service.

In addition to significant health impacts, discrimination has adverse impacts for successful settlement in Australia. One community worker spoke about how discrimination is ‘bigger than a word’ for many refugees, feeding into a whole history of denial of rights and having to flee one's country in order to survive.²⁶¹ Such discriminatory treatment is unlawful and threatens a newly arrived person's capacity for future work and successful settlement within the community.

Many of our clients have experienced torture and trauma in their home country, or on their journey to Australia. It is essential that our workplace relations framework prevents further abuse upon arrival, and provides for adequate compensation for applicants when such abuse occurs.

²⁵⁸ Colic-Peisker, above n 8, 18-21; VicHealth, ‘More than tolerance: Embracing Diversity for Health’, (Summary Report, 2007) 32.

²⁵⁹ Dow, above n 2, 8.

²⁶⁰ VicHealth, above n 258, 11-12.

²⁶¹ AMES Community Guide, AMES Community Guide Professional Development Day, 21 November 2013.

SOLE RELIANCE ON INDIVIDUAL ENFORCEMENT IS PROBLEMATIC

As noted above, employment laws and services are largely inaccessible for newly arrived and refugee workers. For vulnerable workers who have faced discrimination or bullying, such access is even more limited given the nature and impact of the abuse.

Under the current system, workers who experience bullying (repeated, unreasonable conduct that causes a significant risk to health and safety) can make an application for a stop bullying order in the Fair Work Commission. This order does not provide compensation and can only be made if the person remains working for the employer (which is rarely the case for our clients).

For workers who experience discrimination, there are a range of options including making a complaint to the Victorian Equal Opportunity and Human Rights Commission, the Australian Human Rights Commission, Victorian Civil and Administrative Tribunal or the Fair Work Commission.

Each of these approaches requires a written application, made by the complainant. There is no proactive regulator who can run a case on behalf of a client²⁶² and few incentives for employers to take positive steps to reduce discrimination.

As Allen acknowledges, the 'individual enforcement model... is passive, retrospective and reactive. The law does not pre-empt discriminatory behaviour; rather, it offers a resolution after the fact, and there is no obligation for employers or service providers to take anticipatory action to address policies or practices that could disadvantage certain groups.'²⁶³

Often, there are also significant 'power and resource imbalances' between the client and their employer.²⁶⁴ In order to address this imbalance and stop discrimination, a multi-faceted response is required.

²⁶² The Fair Work Ombudsman does have a general protections team however in our experience it is only able to assist a small number of clients. Victoria Legal Aid does have an equality law program that provides invaluable assistance to some vulnerable clients with discrimination claims. The Victorian Equal Opportunity and Human Rights Commission has power to investigate matters that are serious in nature, relating to a group of persons and cannot reasonably be expected to be resolved by dispute resolution (section 127, *Equal Opportunity Act 2010* (Vic)). However, the powers of VEOHRC are significantly less than those of FWO, which include promoting compliance with the FW Act 'including by providing education, assistance and advice to employees, employers...', monitoring compliance, inquiring into and investigating 'any act or practice that may be contrary' to the FW Act, and commencing proceedings in Court to enforce the FW Act (section 682, FW Act).

²⁶³ Dominique Allen, *Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria* (2009) 18 Griffith Law Review 778, 796.

²⁶⁴ Beth Gaze and Rosemary Hunter: *Access to justice for discrimination complainants: courts and legal representation* (2009) 32 UNSW Law Journal 699.

REMEDIES MUST PROMOTE SYSTEMIC CHANGE

Where our clients already have so many barriers to enforcing their rights, when they manage to make an application, it is immensely important that the law facilitates meaningful outcomes commensurate with the gravity of rogue employer behaviour. In addition to unlimited compensation, general protections and discrimination laws should deliver strong systemic outcomes to improve conditions at work and eradicate unlawful discrimination.

The uncapped and flexible nature of possible remedies should be utilised to address systemic change. We refer to the submissions of the Victorian Equal Opportunity and Human Rights Commission in the case of Mahendra Karan v Hotondo Building Pty Ltd with which we strongly agree:²⁶⁵

Orders to address systemic discrimination would be particularly relevant, for example in circumstances where the Tribunal found evidence of a culture of discriminatory conduct at the workplace, evidence of ongoing and sustained discrimination against the Applicant, or evidence that the Respondent did not have in place workplace policies or training which set out for its employees appropriate workplace behaviour and their responsibilities in relation to eliminating discrimination, sexual harassment, and victimisation.

The Commission provides examples of remedies including training for all staff involved in unlawful conduct, requiring an employer to implement a workplace policy, and recommending the employer request the Commission conduct a compliance review of existing policies.

²⁶⁵ Victorian Equal Opportunity and Human Rights Commission, Submission in *Karan v Hotondo Building Pty Ltd A249/2012*, 18 November 2013, 58–59.

TARGETED ASSISTANCE AND REGULATOR INVOLVEMENT

As documented above, targeted assistance is urgently required to ensure that workers are aware of anti-discrimination and bullying laws, and able to access services to assist.

In addition, Gaze and Hunter propose a number of ways to make a 'more level playing field':²⁶⁶

- **access to alternative dispute resolution:**²⁶⁷ in the hope of achieving outcomes without need for formal legal processes;
- **increased agency assistance:** an appropriately resourced regulator with greater enforcement powers would 'counter the deep pocket/ repeat player advantage enjoyed by some respondents'.²⁶⁸ In the UK, US and some Canadian jurisdictions, the regulator can give advice and provide direct support to complainants. Just as the Fair Work Ombudsman in Australia can stand in the shoes of an applicant, and prosecute a company directly, the VEOHRC and AHRC should have the power to assist clients with meritorious claims and run strategic litigation to promote compliance. Allen notes that in the UK, 'conciliation is separate from the equality commission, so the equality commission can advise and assist complainants and engage in strategic enforcement of anti-discrimination law'.²⁶⁹ We suggest that like the FWO, mediation and enforcement could be delivered by separate teams within the VEOHRC/AHRC. This is particularly appropriate as VEOHRC/AHRC has specific expertise in anti-discrimination matters;
- **'free or low cost legal representation':** in their paper, Gaze and Hunter find that represented clients have better outcomes.²⁷⁰ However, unfortunately, many of the most vulnerable clients will not be able to access available services for reasons outlined above; and
- **working to make hearing process more accessible:** through operating 'more inquisitorially than adversarially', for example.²⁷¹

WEstjustice endorses these suggestions.

²⁶⁶ Gaze, above n 264, 699.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ Allen, above n 263, 778.

²⁷⁰ Gaze, above n 264, 701.

²⁷¹ Ibid.

RECOMMENDATION

WEstjustice calls on the Federal and State governments to take urgent steps to reduce discrimination at work. Such steps should include:

Expanding VEOHRC/AHRC powers and resources to enable the regulator to investigate and enforce breaches of the law.

Expanding the limited positive duties in anti-discrimination laws that require employers to take certain steps to prevent discrimination occurring.

Addressing the challenge of "proving" discrimination by amending the law to introduce a reverse onus of proof, similar to the general protections provisions of the Fair Work Act 2009 (Cth). Complainants should be required to establish that they have a particular protected attribute and suffered unfavourable treatment. The employer should then be required to show that the unfavourable treatment was not because of the complainant's attribute. This is fairer as the employer has access to its own internal records and evidence about decision making, while the employee does not.

Amending existing laws to require courts and tribunals to award remedies that promote systemic change.

Expanding existing reporting obligations to require companies to report publicly on diversity and anti-discrimination measures.

Expanding incentives to increase diversity in workplaces as discussed above.

Funding targeted education campaigns for newly arrived and refugee workers.

Funding specialist legal services to provide free assistance to migrant workers experiencing discrimination at work.

SEXUAL HARASSMENT

The Centre has not received many client complaints of sexual harassment. However, this issue is frequently raised by community leaders and also participants in community education presentations.

As some community leaders told us:

"Working in my community I find that women don't want to share their sexual harassment experiences, are not aware of the law and don't understand what constitutes sexual harassment or bullying"

"A guy at a factory grabbed a girl on the bottom. The girl started laughing because she didn't know it was abuse or her rights under law here. At the end of the day I spoke to her and she said it was a joke, and I said no joke, no joke."

"A manager at a health facility told his team that he wanted to experience what it is like to be a patient. The female staff were asked to give him a bed, give him a shower. One worker volunteered to give the shower, and was affected because she saw him naked. Later the worker complained and a legal case was started."

Of the clients that contacted our Centre for assistance with sexual harassment, none decided to pursue their claims, despite meritorious cases and WEstjustice offers of assistance. Some clients reported that it was simply too much to recount their story, and that they were suffering psychological issues as a result of the harassment, and worried that pursuing a case would have an adverse impact on their health.

**Strategic measures to protect
vulnerable sub-groups**

10

Within the spectrum of refugees, permanent migrants, asylum seekers and temporary migrant workers, there are a number of vulnerable sub-groups. Some of these groups, and their particular needs, are considered below.

WOMEN AND THE LAW

*"Migrant women with low levels of English face similar disadvantages to migrant men on entering the labour market. In addition the face similar disadvantages to Australian born women... This puts migrant women at a double disadvantage in terms of competing for work in Australia."*²⁷²

*"In countries around the world, women have a documented disadvantage in earned income relative to men. The ILO reports that women earn 20–30% less than men worldwide. The causes for this difference are varied, but they are linked to labor market segregation, in which women and men tend to predominate in distinct fields, and the phenomenon of the glass ceiling, in which women are clustered in the lower rungs of the employment ladder. Wage based discrimination—when work of equal and comparable value is treated differently... is a major factor as well... Women migrant workers often find that their wages are lower than both those of men who have crossed borders for work, and of native-born women in their country of work."*²⁷³

Recently arrived and refugee women are vulnerable to exploitation in the labour market due to the coalescence and intersection²⁷⁴ of multiple forces including gender, race and recently arrived and or refugee status. These forces impact on the ability of recently arrived and refugee women to enforce minimum working conditions. In a recent study by AMES, women were found to be 'much less likely to be in the labour force compared to men. Those who were working were almost twice as likely as men to be earning less than \$15 per hour despite working permanent and full time positions as often as men.'²⁷⁵

Between May 2014 and October 2015, the majority of our female clients came from India, Ethiopia, Burma, Vietnam, Sudan, Sri Lanka and Taiwan. Generally, our female clients had been in Australia for longer than our male clients, with around one third having lived in Australia for less than five years, one third having been in Australia for six to ten years, and another third having been in Australia for more than ten years. Research suggests that women from recently arrived and refugee communities are less likely to be working than men from these communities. If women are employed, it is more likely that they will become employed five or more years after settlement in Australia. As the Victorian Office of Multicultural Affairs notes, 'in the context of migration, women generally bear the responsibility for setting up the house and caring for family after arrival. As such, the act of migration itself often results in an escalation in women's roles as wives or mothers to the extent that women's careers and employment status are often considered secondary to those of men.'²⁷⁶

Similar to the ELS's overall statistics, the greatest cohort of female clients came to Australia as refugees or humanitarian entrants (44%). 17% came as international students, 11% were temporary migrant workers and 8% were asylum seekers. 80% had a low or no income, 11% had a medium income. There were no high income earners reported. One in five female clients required an interpreter.

Female clients were predominantly engaged in childcare/aged care/community services/health care/education (39%), cleaning (22%), hospitality (14%) and food processing (8%) industries. This largely reflects broader patterns, where women migrant workers 'tend to be concentrated in the services sector and are clustered in women-specific jobs—both skilled and unskilled. Women migrants can be found in skilled positions such as nurses, teachers and secretaries, and unskilled positions such as domestic workers, entertainers and hotel employees'.²⁷⁷

Common problems seen at the ELS were largely similar between women and men, although a higher percentage of women had lost their jobs, and men were more likely to seek advice on workplace injury. 35% of clients had an issue with wages or entitlements, 29% had been dismissed, 10% sought advice on bullying, 8% were advised on discrimination and/or general protections. Only 4% of women received advice on workplace injury.

Women were rarely paid superannuation and required support and assistance to pursue their claims:

TERMINATION OF EMPLOYMENT AND NON-PAYMENT OF SUPERANNUATION

WEstjustice assisted one female client who was dismissed after making inquiries about unpaid wages. After initial legal advice, WEstjustice found that our client also had no superannuation paid during the course of her employment. WEstjustice helped our client to recover compensation and all unpaid superannuation payments amounting over \$4000.

RECOVERY OF UNDERPAYMENT OF WAGES

WEstjustice assisted one female client in recovering \$500 in unpaid wages and unpaid superannuation payments. WEstjustice represented this client at a Fair Work Ombudsman mediation with her former employer. The client was visibly shaking throughout the proceedings, and reluctant to speak to the employer even with the assistance of an interpreter—illustrating the effect of the power imbalance between our client and her boss. The client told WEstjustice that if we had not represented her she would have withdrawn her complaint. Prior to making a FWO complaint, the Centre wrote a letter of demand on the client's behalf.

²⁷² Monica O'Dwyer and Stella Mulders, AMES Research and Policy Unit, 'Finding satisfying work: The experiences of recent migrants with low level English', 2015, 21.

²⁷³ Margaret L. Satterthwaite, *Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers* (2005) 8(1) *Yale Human Rights & Development Law Journal*, 36–37.

²⁷⁴ For discussion of intersection in relation to female migrant workers see Margaret L. Satterthwaite, 'Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers,' (2005) 8(1) *Yale Human Rights and Development Law Journal*.

²⁷⁵ O'Dwyer, above n 272, 20.

²⁷⁶ Victorian Office of Multicultural Affairs, quoted in Refugee Council of Australia, *Economic, Civic and Social Contributions of Refugees and Humanitarian Entrants: A literature review*, February 2010, 35.

²⁷⁷ Satterthwaite, above n 273, 36–37.

Women's stories

With financial support from the Victorian Women's Trust, WEstjustice took active steps to consider the experiences of women from newly arrived and refugee communities. In addition to analysing client data, WEstjustice contacted and successfully engaged with women's groups from specific communities including the Australian Vietnamese Women's Association and the Chin Women's Association Sewing groups. WEstjustice provided an overview of our services to both organisations and provided translated posters into Vietnamese and Chin for community members.

WEstjustice presented to the Chin Women's Sewing Group based at New Hope Footscray and gave an overview of employment law. WEstjustice also presented at a financial literacy course for women from Iran and Afghanistan at Spectrum Migrant Resource Centre, presented community legal education at various other women's meetings and attended multiple multicultural and recently arrived playgroups located in the Maribyrnong, Brimbank and Wyndham Councils.

RETURN TO WORK AND CASUAL EMPLOYMENT

WEstjustice spoke to one mother of 3 small children at a multicultural playgroup who had previously been working in Australia. The mother, who was of refugee background, commented that when she had left her job after the birth of her second child, her employer had promised her her job back. However, when she was ready to return to work her supervisor no longer worked at the organization, and as a casual employee she did not have a right to return to work.

Recognising that experiences differ greatly from woman to woman, and that there are differences between and within communities, some general themes emerge.

Recently arrived and refugee women find themselves in an Australian labour market that has entrenched gender inequalities. Difficulties facing women in Australia have been well documented and include the existing pay gap between men and women,²⁷⁸ discrimination, balancing caring or parental responsibilities, negotiating flexible working arrangements²⁷⁹ and returning to work after pregnancy.²⁸⁰ Societal attitudes and expectations of the role and status of women also impact on women's working experiences, as well as the value attributed to their work.

TERMINATION OF EMPLOYMENT AND CARING RESPONSIBILITIES

WEstjustice represented one female client who faced disciplinary conduct at work and whose employment was terminated after failing to follow a workplace policy and procedure. The client had made the mistake at work because she was preoccupied and worried about a sick child at home, demonstrating the impact that caring responsibilities can have on women's working lives.

WEstjustice met one client who had found work at a laundry. On her first day of work, she was told she did a great job and asked to come back early the next day. After telling her boss she could only come after dropping her child at school, she was told not to come back.

In adapting to the Australian labour market, recently arrived and refugee women also have to contend with notions of the status and value of women in the workforce in their home country.

PRESSURE FROM FAMILY TO NOT PURSUE RIGHTS

Gloria worked for a company for over five years. When she was due to return to work after a period of parental leave, she was told that she had abandoned her employment and no longer had a job. WEstjustice provided advice to Gloria about discrimination and unlawful termination. Gloria began negotiations with her employer. The employer made a paltry settlement offer, but Gloria felt that she had to accept it due to pressure from her husband to put the matter behind her. She said that she felt that "my husband doesn't want me to stand up for my rights". She wanted to continue with her case but it would be very difficult for her to do this without her husband's support. Gloria was worried that if she continued with the case against her husband's wishes, he would tell her parents she was trying to go against him because "she wants to prove she's stronger". Gloria ultimately persisted with negotiations for a short time, and managed to accept a better settlement offer. "This is what my community is like," she said.

WEstjustice conducted a focus group of two male and four female community leaders on the issues faced by recently arrived and refugee women working in Australia. Responses focused on the difficulty of navigating the often conflicting expectations and value of female participation in the labour market in Australia and in their home communities.

Community leaders outlined the following issues in their communities:

"Women are not the breadwinner, it is seen as a choice to have a job and women are still expected to complete their home duties. Women do not receive support at home and are viewed as "bad women" (by their community) if career and not family focused."

"Employers (in Australia) won't understand the women's struggle (between home and work)."

"Women are exhausted working full time as worker, mum, and wife."

"It is difficult for the men to adjust to Australian environment. For example the mother is always expected to take time off work if children are ill but then she gets in trouble for having too many sick days."

"Women (in our community) don't work. They're looking after the children. Their husbands don't recognize women's work at home."

"Women in my community have common problems where they are not aware of the right that they can ask for flexible work arrangements. This information will help them to ask for flexible work hours if they are a parent or a carer."

"In my community sexual harassment occurs to women."

"Working in my community I find that women don't want to share their sexual harassment experiences, are not aware of the law and don't understand what constitutes sexual harassment or bullying."

Focus group answers highlighted the difficulties of finding employment in countries of origin, and as a result, how workers were vulnerable to exploitation:

"It's really hard for them to get a job. To get a job or stay in job, have to give something (implied sexual favours)."

"Jobs are about who you know."

"Get a job through connections with government and military."

²⁷⁸ Workplace Gender Equality Agency, Australian Government, Gender pay gap statistics (March 2016) <https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf>.

²⁷⁹ Workplace Gender Equality Agency, Australian Government, Gender pay gap statistics (March 2016) <https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf>.

²⁸⁰ Australian Human Rights Commission, Supporting Working Parents: Pregnancy and Return to Work National Review (2014) <<https://www.humanrights.gov.au/our-work/sex-discrimination/publications/supporting-working-parents-pregnancy-and-return-work>>.

Many women in our community education talks were seeking work, but hadn't yet found employment. In addition to these challenges, when treated badly at work, our female clients often faced practical barriers to attending appointments, for example due to caring responsibilities:

CHILD CARE RESPONSIBILITIES AS A BARRIER TO SEEKING LEGAL ASSISTANCE

WEstjustice had one female client approach the Centre with an employment issue. The client also had a newborn child, and she later cancelled her appointment because she had to care for her child. She apologized on the phone, and said it was simply too difficult for her to spend the time getting legal advice.

It is essential that services be made accessible for women—for example by providing outreach appointments in safe places where women already go, and can bring their children.

WEstjustice found value in conducting women's focused outreach as a way to empower women from recently arrived and refugee communities to understand their employment law rights and responsibilities. While many of the women to whom WEstjustice provided CLE presentations may not be currently employed, employment law CLEs are useful for both future employment prospects and in understanding a husband, friend, sister or other community member's employment issues. WEstjustice observed female community members asked questions about their family members' employment situation and problems at work, and often attended appointments with their husband or partner.

Community networks are a key source of information and knowledge for recently arrived and refugee communities. Through outreach and community engagement work with women's focused groups and service providers, WEstjustice was able to reach and promote rights and services to a wide range of community members, including mothers, wives and grandparents.

WEstjustice found that women and children's groups and service providers are one of the key entry points for communicating and interacting with refugee and recently arrived families. This is particularly important in the case where husbands may be working and unable to attend CLE sessions during the day.

Women's focused outreach also enabled WEstjustice to gather more stories about women's experiences at work. This enabled us to include more of their stories and voices in this report and submissions.

In addition to targeted outreach, targeted programs to assist women to find work are also essential. Such programs should be designed in consultation with women, for example to accommodate childcare and other responsibilities.

RECOMMENDATION

In order to make education and legal services accessible to migrant and newly arrived women, agencies should be funded to deliver targeted outreach.

“Employers (in Australia) won’t understand the women’s struggle (between home and work).”

TEMPORARY VISA HOLDERS

"As the 457 visa celebrates its twentieth anniversary, temporary migration has become a significant, permanent and expanding feature of the Australian way of life. It may be a temporary migrant who picks the fruit and vegetables we eat, cuts and packs our raw meat, digs up our minerals, cleans our offices, makes our coffees, drives our taxis, prescribes our medicine, cares for our aged parents or serves our takeaway meals. The fees paid by international students help to keep our universities solvent and hold down tertiary education costs for domestic students."²⁸¹

Australia's migration program has changed dramatically. Traditionally centred on permanent migration, our temporary migration program has grown exponentially. It is estimated that temporary migrants now make up between eight and nine percent of our labour force.²⁸² This is four times higher than only ten years ago.²⁸³ Permanent migration is increasingly a 'two-step program'. That is, migrants arrive on a form of temporary visa, and seek permanent residence down the track.²⁸⁴

Temporary migrant workers are particularly vulnerable to exploitation. Unlike humanitarian entrants, for example, temporary workers do not have access to settlement services. These workers also tend to be more dependent on their employer, as often their ability to remain in Australia is linked to ongoing employment. In this section we focus on trends we observed for all temporary migrant workers including subclass 457 visa holders and international students. However, we address further issues relating specifically to international students in the next section.

There are a number of matters that must be addressed to ensure this group of workers is better protected.

FOCUS ON PENALTIES IS INSUFFICIENT

WEstjustice welcomes the Federal Government²⁸⁵ and Opposition's²⁸⁶ recent policy focus on migrant workers. In particular, we commend the Coalition's promise to increase FWO powers and resources, and the establishment of a Migrant Worker Taskforce. Both the Government and the Opposition have promised to increase penalties for employers who deliberately exploit their workers. However, we suggest that this response relies too heavily on penalties where existing penalties are not being exercised or tested for effectiveness. While creating a liability for unlawful conduct, penalties do not disrupt the power imbalance within exploitative employment arrangements, nor do they facilitate detection of unlawful conduct. As Heather Moore articulates, a focus on penalties alone will be largely ineffective.²⁸⁷

There are two problems with this approach. First, it rests on the false assumption that penalties and compliance alone are effective deterrents but does not account for the reliance on worker complaints to discover unlawful conduct. If workers have no confidence in our system to uphold their rights, there is little incentive to report to and cooperate with the watchdogs.

It appears penalties only breed more penalties. For example, legislation passed late last year introduced new civil penalties for paying for or receiving money for a visa outcome. While this legislation is meant to reduce exploitation, there are existing penalties within the Migration Act to address the exploitation of sponsored workers that were not used in the last financial year.

A balanced approach would feature increased penalties, but also focus on practical enforcement, which includes a proactive and well-resourced regulator promoting systemic compliance, and the creation of incentives and support to enable workers to come forward. For this reason, to ensure the protection of temporary migrant worker employment rights, a number of other measures (in addition to those already contained in the Report such as targeted enforcement²⁸⁸) are required in addition to increased penalties.

MORE EDUCATION REQUIRED

WEstjustice has witnessed numerous temporary visa holders with little or no understanding of Australian employment laws. For example, in Martin and Wendy's story above (**page 151**), two clients worked for over 18 months sharing one wage between them, without understanding that they were being grossly underpaid. Similarly, another client worked six or seven days a week for up to 16 hours a day. She had no understanding of penalty rates or overtime entitlements.

Because temporary migrant workers are not eligible for settlement services, there are few formalised channels for providing face-to-face information. Finding ways to deliver face-to-face education to this cohort is extremely important, and we suggest a train the trainer model could be effective. Details of WEstjustice's successful train the trainer pilot program are set out above.

Further, to prevent exploitation, temporary migrant workers and their families need access to settlement services, including casework support (to provide referrals and assistance where exploitation occurs), information about employment rights and responsibilities (to prevent exploitation), and English as additional language classes, where needed. As Peter Mares and the Migration Council of Australia explain, settlement services are an important means of facilitating integration and extending access to temporary migrants and their families will ensure greater consistency—migrants in the family stream and dependents of some skilled migrants already have access to these services.²⁸⁹

²⁸¹ Peter Mares, Not Quite Australian, *How Temporary Migration is Changing the Nation*, Text Publishing, 2016, 14-16.

²⁸² Ibid, 12-13.

²⁸³ Ibid.

²⁸⁴ Ibid, 14-16.

²⁸⁵ Liberal Party of Australia, above n 134.

²⁸⁶ Australian Labor Party, Rights at Work Policy: <<http://www.alp.org.au/rightsatwork>>, as at 10 August 2016.

²⁸⁷ Heather Moore, Comment: Too many Australians remain unaware slavery exists in the 'lucky country', SBS Online, 26 July 2016, <<http://www.sbs.com.au/news/article/2016/06/29/comment-too-many-australians-remain-unaware-slavery-exists-lucky-country>>.

²⁸⁸ We also agree with Dr Stephen Clibborn's submission that the 'FWO must be allocated sufficient funding to ensure effective enforcement of the FW Act for all vulnerable workers including undocumented immigrant workers. Funding should be sufficient to allow the FWO to continue its promising proactive strategic enforcement activities and still have sufficient resources for reactive enforcement in response to public referrals.' Dr Stephen Clibborn, The University of Sydney Business School, Submission No 26 to Productivity Commission, *Inquiry into Australia's workplace relations framework*, 16 February 2015, 3.

²⁸⁹ Migration Council of Australia, in Mares, above n 281, 305-307.

ALL WORKERS SHOULD BE PROTECTED BY MINIMUM WORK STANDARDS

The FW Act should be amended to clearly state that it applies to all workers, regardless of their immigration status. That is, all workers should be entitled to the same minimum employment standards and protections as all others working in Australia.²⁹⁰ This includes undocumented migrant workers, or those working in breach of a visa condition.

If it fails to provide the same rights to all workers, the workplace relations framework will perpetuate the current two tiered system, where vulnerable migrant workers are exploited and invisible.

We are of the view that, regardless of the rights that flow from permission to work under the Migration Act, at the very heart of the employment relationship is the fundamental term of the employment contract. That fundamental term is that if an employee works, the employer pays wages; that is, the work-wages bargain. This, along with non-discrimination, are two of the most fundamental tenets of the employment relationship and should apply to all people, especially the most vulnerable in our society.

Similarly, we support the recommendation made by Associate Professor Joo Cheong Tham²⁹¹ 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':

The Migration Act 1958 (Cth) and the Fair Work Act 2009 (Cth) should be amended to explicitly state that:

- *visa breaches do not necessarily void contracts of employment; and*
- *the standards under the Fair Work Act apply even when there are visa breaches.*

Such an approach is also recommended by the Productivity Commission (Recommendation 29.4)²⁹² and Senate Education and Employment References Committee (Recommendation 23).²⁹³

REMOVAL/FEAR OF BEING SENT HOME: A BARRIER TO RIGHTS ENFORCEMENT

Fear of losing the right to stay in Australia frequently deters clients from reporting workplace exploitation. Actual removal prevents exploited workers from pursuing justice. Both situations mean that employers exploit temporary visa holders with impunity.

FEAR OF REMOVAL STOPS PEOPLE COMPLAINING

We have had numerous clients 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.²⁹⁴ 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.

We refer to an article by Adele Ferguson documenting the recent case of workers being exploited at 7-Eleven stores. Based on conversations with numerous workers, Ferguson found that granting amnesty is a central part of enabling workers to speak out about exploitation:²⁹⁵

The Australian Financial Review spoke to former and current workers from 7-Eleven and most said they were worried about participating in the program for fear head office or the franchisees would take their admissions of working more than 20 hours and secretly report them to the Department of Immigration... It is why Professor Fels, head office, and others need to appeal to the Abbott government to give all 7-Eleven workers amnesty while the internal and Fair Work investigations are taking place. If Amnesty isn't granted, hundreds, possibly thousands of workers will be too afraid to come forward, making the exercise a meaningless farce.

Our casework experience has been similar, with clients too fearful to take action. Often, employers are aware that an employee has breached their visa (even in a very minor way), and will expressly threaten to "report" the worker if they make a complaint about underpayment or non-payment of wages.

It is essential that exploited workers are encouraged to report illegal behaviour. Therefore, penalties for employees working in breach of their visa should be reconsidered in light of the public interest in deterring rogue employers.

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. As suggested by Associate Professor Joo-Cheong Tham,²⁹⁶ 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:²⁹⁷

"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, as does the Senate Education and Employment References Committee.²⁹⁸

²⁹⁰ Dr Stephen Clibborn, The University of Sydney Business School, Submission No 26 to Productivity Commission, *Inquiry into Australia's workplace relations framework*, 16 February 2015, 2.

²⁹¹ Joo Cheong Tham, Submission No 3 to Senate Inquiry, *The impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders*, 29 April 2015.

²⁹² Productivity Commission Inquiry Report, *Workplace Relations Framework: Volume 2* (2015) 931.

²⁹³ Education and Employment References Committee, above n 132.

²⁹⁴ See sections 116(1)(b) and 235 of the Migration Act 1958 (Cth) and 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'.

²⁹⁵ Adele Ferguson, 'Amnesty sought for 7-Eleven's exploited workers' *The Australian Financial Review* (online), 6 September 2015, <<http://www.afr.com/business/retail/amnesty-needed-for-7elevens-migrant-workers-20150906-gjg3pq>>.

²⁹⁶ 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'.

²⁹⁷ *Ibid*, 7.

²⁹⁸ Education and Employment References Committee, above n 132, 261.

REMOVAL STOPS PEOPLE PURSUING JUSTICE

Some workers who have not breached any visa condition are forced to depart Australia prior to being able to seek justice. For example, if a worker is on a subclass 457 visa and loses their job in unfair circumstances, they have a limited time to find new employment. If they do not find another sponsor, they will be removed from Australia.

We have seen a disturbing trend whereby clients have been sent home prior to the conclusion of civil proceedings they may be involved in (even when working legally).

Jono's story is one powerful example:

JONO

Jono worked on a 457 visa and lived at the employer's premises. The employer didn't want to pay Jono the minimum wage required under law. He said that Jono had to pay hundreds of dollars of cash back to him each fortnight after being paid. Jono also had to pay rent, worked overtime during the week and also worked on Saturdays. Sometimes on Sundays he worked at his boss' property, and on his holidays he was often directed to do cleaning jobs around his worksite. Jono was not paid for any overtime, weekend or holiday work.

When Jono said he would no longer pay the money back or work extra hours without pay, he was dismissed. Jono suffered anxiety and chest pain. He reports that he felt like a slave. Because his employment was terminated, his visa was cancelled and he was sent home. With help from WEstjustice, Jono was able to bring a successful claim for unfair dismissal, however he was sent home before the matter was completely resolved. Without WEstjustice Jono could not have pursued his case. Jono lost his dream to set up a life in Australia, and was punished for speaking up about his rights.

We agree with the Senate Education and Employment References committee recommendation that:²⁹⁹

the immigration program be reviewed and, if necessary, amended to provide adequate bridging arrangements for all temporary visa holders to pursue meritorious claims under workplace and occupational health and safety legislation.

Measures such as fast-track claims processes and the ability for summary dismissal of meritless claims could avoid any risk of abuse of such bridging visas.

The Committee also recommends that the DIBP review processes to ensure they are victim-centred and to ensure that victims of serious abuses 'are afforded an adequate opportunity in a safe and secure environment to report any offences committed against them'.³⁰⁰

Employers who engage employees in breach of their visa conditions should be severely punished. Not only are they abusing the employee, they are doing damage to the labour market more broadly and society as a whole suffers.

Employees who agree to provide evidence against their employers should be able to remain in Australia for the duration of any proceedings, and should receive amnesty from sanctions under immigration laws. As well as avoiding discrimination and injustice, such amendments will better achieve the policy aim of deterrence and compliance by encouraging employees to speak out about exploitation.

Without these changes, it is unlikely that some of the most vulnerable workers will come forward to enforce their rights.

299 Ibid, xii; 161.

300 Ibid, xii; 258-260.

DESIRE FOR PERMANENCY AND OBLIGATION TO PROVIDE IT

One way to address the dependency and vulnerability that comes with temporary visa status is to create a clear path to permanency for temporary migrant workers who have lived and contributed to Australia for a number of years. In his recent book *Not Quite Australian: How Temporary Migration Is Changing the Nation*, Peter Mares proposes that 'anyone who has lived in Australia lawfully and with work rights for a continuous period of eight years (or, allowing for reasonable absences, for at least eight of the past 10 years) qualifies for permanent residence'.³⁰¹ Mares argues that regardless of the type of visa held (with some exceptions—for example workers jailed for serious crimes), permanent residency should flow once a migrant has lived here for a fixed period of time. For young people, the qualifying time is less.

Importantly, Mares proposes that employers of subclass 457 visa holders should be required to sponsor their employees for permanent residence after two years. Currently, sponsorship is optional. Mares argues that two years is 'long enough to demonstrate that the temporary migrant is filling an ongoing gap in the enterprise and the labour market. It is also long enough for the employer to assess the worker's suitability.' If the employer refuses to sponsor the worker, the employer should not be able to recruit another temporary migrant worker to do similar work.³⁰² The majority of our 457 visa holder clients have been desperate to settle permanently in Australia. As a result, they have often put up with shocking abuse, too afraid to complain or unaware of their rights at law. WEstjustice strongly supports Mares' recommendations, which recognise the value of citizenship and the moral obligation that Australia owes to workers who have lived and worked in our community for extended periods of time.³⁰³

My proposal for an eight-year threshold acknowledges the reality of mobility in a globalised world, but aims to swing the policy pendulum away from a purely contractual approach to temporary migration, and back towards an assumption of migration-as-settlement as the basis for citizenship-based multicultural society.

301 Mares, above n 281, 303-304.

302 Ibid, 305-307.

303 Ibid.

RECOMMENDATION

The Fair Work Act 2009 (Cth) should be amended to state that it applies to all workers, regardless of immigration status.

Migrant workers who have been trafficked or subjected to exploitation, should be permitted to remain in Australia for at least as long as they are pursuing valid legal action.

Temporary migrant workers and their families should be given access to settlement services including the AMEP program.

Workers should not face removal from Australia unless there is a serious breach of their visa conditions. 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.

All temporary migrant workers should gain access to permanent residence after they have spent eight years in Australia. Employers of 457 visa holders should be required to sponsor their employees for permanent residence after two years of employment.

REGISTERED TRAINING ORGANISATION SCAMS

WEstjustice has observed a concerning trend among newly arrived and refugee clients—increasingly, clients have come to the centre after being scammed by private training organisations.

Although the ELS does not provide advice on the operation of training organisations, WEstjustice is able to provide specialist consumer law assistance through our consumer and refugee clinics. The ELS referred numerous clients to these clinics, and collectively WEstjustice has heard of various scams whereby newly arrived and refugee communities are persuaded to complete a training course that is at the wrong level, is poor quality and/or does not lead to employment outcomes. Scams include private Registered Training Organisations (RTOs) signing up clients for courses and huge HELP debts without their informed consent, delivering substandard or irrelevant training, and falsely promising clients they will have employment at the end of training—but employment does not eventuate.

For example, Mia was targeted in a carpark by recruiters who offered her a “free laptop” because she was studying English. Mia accepted the offer, and later found herself enrolled in three courses, with a huge \$30,000 HELP debt. Mia had no idea she was even enrolled in any courses, and never attended training:

MIA

Mia was approached by a man in a supermarket carpark. He told her that she was entitled to a free laptop from the government to assist with her English studies. He asked for her address and told her that she would receive a free laptop in the post. He also asked her if she had any friends or family that would also like a free laptop and asked for their addresses.

A few days later, Mia was door-knocked by the same man. He told her that in order to get her free laptop she would have to provide her tax file number and a copy of her passport. She asked him if she would have any problems if she accepted the free laptop and he told her that she would not have any problems because she has a very low income. He asked her to sign many documents that she didn't understand and told her to make a phone call, which he coached her through to say yes or no. Mia felt too scared to ask the man to leave her home or tell him that she couldn't sign the documents.

A month later, the same man came to her house. Mia hid in her room and her daughter answered the door and said that she was not home. The man came back to her house later that day and told Mia she could have another free laptop. He told her that all she needed to do was sign a few documents and then they would give it to her today. After she signed the documents, she told them that she did not want them to come to her house again and that she didn't understand what was happening. They told her that she needed to study in the courses she had signed up for. She said she didn't know about the courses and that she couldn't study because she needed to look after her sick daughter. They told her that now she had to study.

Mia came to WEstjustice after receiving notices indicating that she had two VET FEE-HELP loans in her name for two separate diploma courses, totalling over \$20,000. She indicated that did not want to sign up for these courses, she had never attended any classes and that she had been receiving numerous phone calls from the college asking her to pay the money. WEstjustice assisted Mia to withdraw from the courses without penalty and have the debts waived.

WEstjustice has also heard reports of large groups of individuals being recruited from one community for a training course. Workers are promised a job at the end of the training. Individuals complete a course, but at the end, there is no employment. These individuals have now “wasted” one of only two government subsidised course commencements.³⁰⁴ The ELS assisted one client who had been engaged by an RTO to recruit members from her own community. The RTO never paid our client for her work.

The problems with unscrupulous registered and unregistered private training organisations are well documented, and WEstjustice is pleased that the Victorian Government has taken recent action to crack down on non-compliant operators.³⁰⁵ Community organisations are also taking action. For example, the Maribyrnong and Moonee Valley Local Learning Employment Network recently released a series of YouTube clips on how to choose a training provider.

WEstjustice recommends that such regulation and education continue, and that further community consultation is undertaken to identify and penalise rogue RTOs. Importantly, where students are ripped off, they should be compensated for lost time and money, and be allowed to enrol in further subsidised courses.

In addition to pursuing and penalising unscrupulous RTOs, both Commonwealth and State Governments need to ensure appropriate mechanisms are in place to assist affected students. In Mia's story above, WEstjustice wrote a letter of demand to the college requesting cancellation of Mia's enrolment and waiver of any debt. The college agreed to take all necessary steps to reverse the VET FEE-HELP debts. WEstjustice contacted the Department of Education and Training to seek confirmation of the college's actions, but failed to receive an answer in a reasonable time frame. As a result, WEstjustice lodged a complaint to the Commonwealth Ombudsman in relation to the Department's failure to provide a response in a reasonable time frame. Through the complaints process the Department confirmed that the college had reversed the two VET FEE-HELP debts, as requested, and these had not been recorded on our client's ATO record. However, it was ascertained that Mia had another VET FEE-HELP debt worth \$4000 recorded with the ATO from a different private training college. With the assistance of the Department, this debt was also remitted. Government Departments must be more proactive and responsive to affected students. WEstjustice should not have had cause to involve the Ombudsman to resolve Mia's case.

The Consumer Action Law Centre (CALC) has made powerful submissions in relation to RTOs. WEstjustice supports CALC's recommendations, in particular that an industry funded Ombudsman should be established to investigate and hear complaints made by students, and that brokers, agents and commission-based sales should be banned.³⁰⁶ In February 2016, Queensland established a Training Ombudsman to help stakeholders to 'navigate the complex VET sector'. The Ombudsman provides a 'free, confidential, and independent service to review and resolve enquiries and complaints from apprentices, trainees, students, employers and other stakeholders about the VET system'.³⁰⁷ WEstjustice recommends that Victoria follow Queensland's lead and establish an Ombudsman service in Victoria.

³⁰⁴ For details of government subsidies, see Victorian Government, Victorian Guarantee FAQs website: <http://www.education.vic.gov.au/training/learners/vet/Pages/fundingfaq.aspx>.

³⁰⁵ The Victorian Government recently terminated contracts of 18 unscrupulous RTOs: Students flee as crackdown hits dodgy private colleges, Henrietta Cook, The Age, 11 August 2016, page 3.

³⁰⁶ Consumer Action Law Centre, Submission responding to the "Redesigning VET FEE-HELP" discussion paper, 1 July 2016, <<http://consumeraction.org.au/redesigning-vet-fee-help-responding-discussion-paper/>>.

³⁰⁷ 'About the Training Ombudsman', Queensland Government website, <<http://www.qld.gov.au/education/training/training-ombudsman/pages/about-trainingombudsman.html>>.

It is important to note that WEstjustice has worked closely with a number of RTOs who provide excellent training to CALD jobseekers. In particular, centres like the Wyndham Community and Education Centre and AMES are experienced in working with newly arrived and refugee communities, and are able to deliver targeted education alongside other services for the community, including settlement services.

Unfortunately, in December 2013 the Migrant Communities Employment Fund, that promised \$6.6 million in funding for projects to help refugees and migrants prepare for and find work, was withdrawn. As the Settlement Council of Australia notes:³⁰⁸

Loss of these specialised employment service providers is seen by the settlement sector to have significant impacts on migrants and refugees ability to find appropriate employment.

RECOMMENDATION

State and Federal Governments should continue to investigate and prosecute unscrupulous training organisations. Students affected should be compensated for lost time and money.

An industry funded Training Ombudsman should be established to investigate and hear complaints made by students.

Brokers, agents and commission-based sales should be banned.

State and Federal governments must establish a fund for specialised employment service providers to provide targeted assistance to newly arrived and refugee jobseekers.

³⁰⁸ See also Settlement Council of Australia, 'Employment solutions: Case studies of good settlement in practice' (Discussion Paper), 3.



WEstjustice community education session.

INTERNATIONAL STUDENTS, APPRENTICES, YOUNG PEOPLE AND WORK

WEstjustice has learned about issues affecting young CALD workers through the ELS, community education presentations in schools, consultation with youth service providers and WEstjustice’s generalist youth casework services. Young people from newly arrived and refugee backgrounds are at greater risk of leaving education earlier and experience a higher rate of unemployment.³⁰⁹ Young CALD workers face a double vulnerability: not only do they face the barriers experienced by CALD workers generally, further power imbalances emerge as a result of being young, including inexperience in the workplace, and the relative ages of employers and young workers.

Our findings mirror the literature: young CALD workers, including international students, experience high levels of exploitation. Our findings to date are preliminary, and as recommended below, further investigation is needed.

INTERNATIONAL STUDENTS

Higher education is Australia’s third largest export industry.³¹⁰ Yet despite generating huge amounts of revenue, international students are frequently exploited at work, and receive little, if any, targeted assistance to enforce their rights. In a recent survey of 1400 international students, of those who were working, 60% were paid less than the minimum wage (\$17.29 per hour). ‘Almost a third were paid \$12 or less with some paid as little as \$8 an hour. More than a third of the students had also felt threatened or unsafe at work.’³¹¹ Similarly, a study at Monash University and the University of Melbourne found that 58% of international students received below-minimum wages.³¹² Our clients reported similar abuse.

The ELS assisted 22 clients who were current student visa-holders or who had arrived in Australia as students from a total sample size of approximately 130 clients in the research period. This group includes 17 clients identifying as male and five as female. The majority of clients had come from India or Pakistan. At the time of advice five clients were working as independent contractors, three as casuals and seven were fixed term or ongoing employees. Newly arrived and refugee domestic students also attend the service—a key issue arising in relation to apprenticeships is outlined below.

It is apparent from our casework that international students are vulnerable to infringements of their workplace rights.

Common trends we observed include:

1. Employers threatening to report a breach of student visa conditions as a mechanism to prevent enforcement of workplace rights:

AN
A

An is an international student who responded to an advertisement on Gumtree. She completed a week’s work, but was not paid. When she tried to discuss it with her employer, the employer claimed she was in breach of her student visa, and refused to supply contact information so that she could not send an invoice.

We frequently observed employers threatening international students. Employers would tell students that they would do them in to the Immigration Department if they complained about missing wages. Regardless of whether the students had breached the 40 hour per fortnight work restriction or not, students were terrified to take action to enforce their rights.

This case study also demonstrates another trend—many clients struggled to invoice for work as an independent contractor, or struggled to pursue underpayments, due to limited knowledge of their employer’s details. Many employers refused to provide information when asked.

2. Lack of knowledge of rights has resulted in many students entering agreements that constitute sham contracting or unfair contracts:

Student visa-holders are often unaware of their workplace rights, particularly in relation to minimum wages and sham contracting.

AMELJA
A

Amelja is an international student working about five hours a week as a tutor under a twelve month contract. The contract stipulates a ten-week notice period for resignation, although her employer may terminate at any time. Also, Amelja has been told by her employer that she cannot leave the job, so she is afraid to give notice even though she feels desperate to leave.

J
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. 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.

3. Family and carer support networks may be overseas, which may adversely affect job security:

For example a client with an injury returned home to access support, but was not re-employed when she returned.

4. Student visa-holders may experience fear in relation to asserting their workplace rights:

Fear of employers, fear of visa cancellation and being forced to depart Australia, and fear of job loss were significant barriers for international students. Many students experienced diminished confidence to assert their rights if they relied on work to support themselves or family members, or experienced bullying and intimidation at work:

S
SANJIT

Sanjit was an international student visa-holder, but at the time of seeking advice was on a bridging visa. He was desperate for work and took a job as a labourer. He was paid a flat fee per shift regardless of hours worked, until his employer stopped paying him altogether. During his employment he was subjected to racial taunts, including insults written on his pay envelope and sent by text message, and was forced into work situations where he felt unsafe, such as working at height despite disclosing his fear.

³⁰⁹ Ethnic Communities Council of Victoria, above n 168, 7-8.

³¹⁰ Alexander Reilly, ‘Protecting vulnerable migrant workers: The case of international students’(2012) *Australian Journal of Labour Law* 25, 182.

³¹¹ Stephen Clibborn, ‘Visa amnesty needed for all victims’, *The Age*, 9 September 2015, page 44.

³¹² Reilly, above n 310, 187.

5. Enforcement options may be limited due to the duration of a student visa:

Recourse to the FWC or VCAT takes time, and student visa-holders have a limited time in Australia. If employers refuse to comply with conciliated outcomes, or court orders take too long to enforce, the process can be rendered redundant in any event:

VILI

Vili, an international student, 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.

As recommended above, reforms to immigration law that limit visa cancellation to cases of serious visa breach would greatly assist vulnerable international students to enforce their rights and stop exploitation. Alternatively, the 40 hour work restriction could be removed altogether.³¹³ At the moment, many students are simply too fearful to bring a claim.

A further requirement is targeted independent legal assistance, as recommended below.

313 Mares, above n 281, 309-310.

DOMESTIC UNIVERSITY STUDENTS

Newly arrived or refugee domestic students are also vulnerable to underpayment issues, particularly if insufficient details are obtained from employers to enable the pursuit of claims:

ALEX

Alex is a student who found work on Gumtree. All work arrangements were made verbally and via mobile text messages. During his employment he was always paid around half of the amount he was owed. When he asked for his wages Alex's employer threatened him and then ignored his calls. The FWO also had insufficient information to pursue the employer for the underpayment.



Community leader.

APPRENTICESHIPS AND PRIVATE REGISTERED TRAINING ORGANISATIONS

In addition to issues surrounding RTOs discussed above, WEstjustice found that students undertaking apprenticeships through vocational education training packages offered by private RTOs may also be vulnerable to exploitation. Our clients were generally unaware of the requirements of an apprenticeship as set out in the National Code of Good Practice for Australian Apprenticeships, or their employer's obligations regarding training contracts³¹⁴ or Australian employment laws. Clients reported experiencing:

- underpayment or non-payment of wages and superannuation, and unlawful conditions, such as excessive work hours and no overtime payments;
- employer direction to undertake inappropriate tasks not related to the apprenticeship in breach of the requirement to provide training in accordance with an approved training scheme pursuant to 5.5.8(1)(a) of the Education and Training Reform Act 2006 (Vic);
- a lack of structured support or opportunities to develop the relevant knowledge and skills that they had agreed to by enrolling in an RTO course, in breach of the training and competency standard required in the Australian Qualifications Framework and the Standards for Registered Training Organisations 2015 (RTO Standards);
- no opportunity to participate in the development of their training plan and refusal to have sufficient time to attend the classes required for the certificate course in breach of s 5.5.8(1)(b) and s5.5.8(2) of the Education and Training Reform Act 2006 (Vic);
- no information about their rights to award wages, superannuation and pay slips;
- no information about the regulatory oversight by the Australian Skills Quality Authority, or the Victorian Registration and Qualifications Authority, which may enforce execution of an apprentice's training contract;
- no information regarding the right to complain to the Fair Work Ombudsman about employment matters.

THAN

Than is a young refugee working as a plumbing apprentice for a construction company. His first language is not English. Than's employment represented the practical component to a plumbing certification he was working towards through an RTO and he had obtained the employment through an employment service provider who he was referred to by the RTO. Than was required to work more than 20 hours of unpaid overtime each week, and was not paid the minimum wage. He did not receive other legal entitlements including annual leave, and he was told he could not attend his classes at the RTO. Than was not given the opportunity to properly develop the relevant skills for his apprenticeship—instead he was given menial tasks. He tried to speak to his RTO to access help to resolve his issues, but the RTO advised that they could not assist. Than eventually left his employment and is owed thousands of dollars of unpaid wages, not to mention the lost opportunity of completing his apprenticeship.

Our recommendation above regarding the establishment of an Ombudsman would greatly assist clients like Than. Further, WEstjustice recommends that RTOs be required to provide assistance to students affected by unscrupulous employers as part of their training course.

SCHOOL STUDENTS

WEstjustice has observed that school students frequently experience employment law issues. In mid-2015, WEstjustice launched its School Lawyer Project. The project is a two-year pilot created by lawyer Shorna Moore and social worker Renee Dowling. Our school lawyer, Vincent Shin, is based full-time at The Grange P12 College in Hoppers Crossing, but also attends the additional needs school Warringa Park School. WEstjustice provides holistic legal services for students and parents with a focus on prevention and early intervention. We also deliver legal education sessions on topics such as family violence, sexting, employment law and consent.

To date, numerous students have presented at the service seeking assistance with employment law matters. Further research is required to explore these issues, and determine how best to address the exploitation of young workers.

One possible response may include education programs in schools—for example the WEstjustice No Violence No Way community education program recently delivered interactive education in the form of short "plays" and discussion to over 2000 young people across 10 schools and youth organisations (including secondary schools, P-9 schools, alternative education VCAL schools, a young mum's group and young boys and girls programs at the Wyndham Youth Resource Centre). Feedback for the program so far has been extremely positive, with feedback from community workers including the following remarks:

"As a general remark, I think you guys ran the program quite well. Your actors are fantastic and you and Gill engaged with the students in a very friendly way—encouraging them to participate in the discussions. I deal with teenagers in abusive /violent and manipulative relationships almost everyday and I wish all senior school students got the opportunity to benefit from such a program."

"I feel it's been a great program, even if there isn't an initial increase in students seeking support for family violence, it's important information for them to be taught."

The Young Workers Centre is also doing important work in this area.

STUDENT ACCESS TO EDUCATION AND INDEPENDENT LEGAL ADVICE

*"In most cases, the level of support international students receive is dismal when compared to the revenue that they generate for education."*³¹⁵

Although international students and newly arrived and refugee domestic students may have a better command of English than other CALD clients, they still require targeted assistance to enforce their rights. Many students have never had a job, and are not experienced in negotiating pay and conditions. Many clients were unable to draft legal letters or applications to court, and relied on WEstjustice for significant practical and emotional support. It is apparent from the client group that students would benefit from greater access to legal advice.

Universities, schools and RTOs have a duty of care to their students. In the case of international students, universities obtain millions of dollars in fees from students. Given the abundant evidence of rife exploitation, WEstjustice calls on universities to respond by funding an independent service to provide employment law advice and education to students. This recommendation aligns with the Senate Education and Employment References Committee, which recommends that:³¹⁶

universities consider how best they might develop proactive information campaigns for temporary visa workers around workplace rights.

Further research must be undertaken to explore levels of workplace exploitation and how best to target education and assistance for secondary school age students and apprentices.

RECOMMENDATION

Further research into high-risk industries, jobactive provider and apprenticeship frameworks, regional Victoria, young people and strategic litigation opportunities is required.

Government funding should be provided to undertake this research.

³¹⁴ Training contracts must comply with the obligations in Part 5.5 of the Education and Training Reform Act 2006 (Vic).

³¹⁵ Mares, above n 281, 309-310.

³¹⁶ Education and Employment References Committee, above n 132, xii; 272-276; 318-320.

FOR FURTHER RESEARCH

This report draws on evidence gathered by one community legal centre over a three year period. With the resources available, WEstjustice could not explore every issue, nor could we examine all matters in sufficient detail. There is so much more to learn.

In addition to recommendations for further research above, WEstjustice identified the following areas that could improve labour market integration for newly arrived and refugee communities:

- in-depth investigations of certain high risk industries in the Western Suburbs of Melbourne (and across Australia)—in particular, industries where we have heard stories of exploitation, but have not seen any/many clients (for example market gardens/farm work);
- further investigation into the jobactive provider and apprenticeship frameworks and how they can better protect vulnerable workers;
- exploration of workplace experiences of newly arrived and refugee communities in regional Victoria, particularly given the likelihood of further relocation of communities to regional Victoria with the Safe Haven Enterprise Visas;
- exploration of the working experiences of young CALD people;
- exploration of the emerging gig economy where independent workers are engaged one-on-one, often online (for example, Uber); and
- consideration of strategic litigation opportunities to test the utility of current accessorial liability provisions and evidence requirements for wages and entitlements claims.

RECOMMENDATION

Further research into high-risk industries, jobactive provider and apprenticeship frameworks, regional Victoria, young people, the gig economy and strategic litigation opportunities is required.

Government funding should be provided to undertake this research.



Community leader.

Conclusion

"In the United States today, millions of workers, many of them new immigrants and people of color, are labouring on the very lowest rungs of metropolitan labor markets with weak prospects for improving the quality of their present positions or advancing to better jobs. It is unfortunate but true that ethnicity, race, and immigration status have enormous impact on the jobs they do, the compensation they receive, and the possibilities they have for redress when mistreated by employers."³¹⁷

The problem of workplace exploitation is complicated and widespread around the world. Factors driving non-compliance and low enforcement are myriad. There is no quick fix. A multi-faceted approach is required.

Yet there is one unifying principle for any step taken: ongoing consultation and engagement with newly arrived and refugee communities is essential. This includes collaboration with community organisations.

Without input from local communities, it is impossible to ensure that services and materials will work.

Without relationships and trust, it is unlikely that vulnerable communities will access a service or enforce their rights.

Throughout the Project, WEstjustice has worked closely with newly arrived and refugee communities. Each stage of the Project has been informed by community members, community leaders and community organisations.

We have strived to ensure that migrant voices are heard in this report. We hope that these voices are now heard and acted upon by governments, regulators, commissions, policy makers and agencies.

"We have strived to ensure that migrant voices are heard in this report. We hope that these voices are now heard and acted upon."

³¹⁷ Janice Fine, 'Worker Centers: Organizing Communities at the Edge of the Dream' (Cornell University Press, 2006), 1.

We are the REFUGEES of the World

—By Dr Melika Sheikh-Eldin

***We are from the jungles, from vast deserts,
high-mountains, deep valleys, extended
plains and bright skies***

***We are the children of the humble,
the generous, the brave, the kind, caring
people with bright hearts so white***

***We are from the cradle of civilizations,
its source of humanity, victimization,
exploitation, the beginning of colonization
and its demise***

***We are living proof of the world's
injustices, its battle fields, its political
games and sacrifice***

***We are the cries, we are the sorrows,
we are the suffering, but portrayed
as a symbol of despair and disguise***

***We are artists whose creativity, love
and passion for nature and a peaceful
world is reflected in our words, in our
dances in our songs in our laughs,
our melodies and our sighs***

***We are part of the global migrant history
a tale of shared experiences, of hope and
alienation, fear and acceptance—it is a
search for peace, prosperity and a better life***

***But also we are the challenge, we are the
hope, we are the future, a living testimony
of survival, resilience, of joy and of lifeWe
are against all violence, intolerance and
discrimination, we are for fairness, equality,
dignity and humanity and from the rubble
of injustices we rise and rise and rise***

We are the REFUGEES of the World

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AUTHOR BIOGRAPHY

Catherine (Dow) Hemingway is passionate about employment and anti-discrimination laws, advocacy, research and social justice. Catherine completed a double degree in Laws (Honours) and Arts (Media and Communications), Diploma in Music Performance and Certificate in Global Issues at Melbourne University in 2009. While studying, she volunteered as a Student Editorial Assistant for the Australian Journal of Labour Law, worked as an electorate officer and administrative assistant for the Australian Labour Law Association. She also volunteered for Friends of Kolkata, a small NGO working with an Indian NGO to provide support to women and children in India. After graduating, Catherine became Associate Editor of the Australian Journal of Labour Law and worked as a Research Assistant and then Research Fellow at the Centre for Employment and Labour Relations Law at Melbourne Law School.

After completing her practical legal training in 2011 as a graduate at Corrs Chambers Westgarth, Catherine settled in the Corrs Workplace Relations team. Catherine commenced work at WEStjustice (then Footscray Community Legal Centre) as Employment Project Solicitor in June 2013. She remains excited to be part of the Employment Law Project and WEStjustice more broadly.

