SUBMISSION TO SELECT COMMITTEE ON TEMPORARY MIGRATION

WESTJUSTICE COMMUNITY LEGAL CENTRE

SPRINGVALE MONASH LEGAL SERVICE

JOBWATCH INC

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Acknowledgements

We acknowledge the traditional custodians of the land on which we work.

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This submission can be attributed to WEstjustice Community Legal Centre, Springvale Monash Legal Service and JobWatch Inc.

It draws heavily on the submission of WEstjustice Community Legal Centre, the Migrant Employment Legal Service and Redfern Legal Centre International Student Service NSW to the Senate Standing Committee on Economics Inquiry into Unlawful Underpayment of Employees' Remuneration.[1] That submission was authored by Liz Morgan (based on the work of Catherine Hemingway), Regina Featherstone and Sharmilla Bargon.

We note that the views expressed in this submission are those of WEstjustice Community Legal Centre, Springvale Monash Legal Service and JobWatch (who together deliver the International Students Work Rights Legal Service), not the Department of Jobs, Precincts and Regions.

Publication

We consent to this submission being published on the Senate Committee's webpage.

[1] Liz Morgan (2020) available at:
<https://www.westjustice.org.au/cms_uploads/docs/westjustice_mels_rlciss_clc_jointsubmission.pdf >

Table of contents

1. Introduction

WEstjustice Community Legal Centre (**WEstjustice**), Springvale Monash Legal Service (**SMLS**) and JobWatch welcome the opportunity to make this submission to the Senate Select Committee on Temporary Migration (**Inquiry**).

This inquiry has come at an important time – the COVID-19 pandemic has both highlighted and exacerbated the precarious situation of many workers on temporary visas. Our clients are delivering takeaway food and deep cleaning our schools – they are providing essential care work and stocking supermarket shelves. Yet despite making significant contributions to the Australian economy and society, temporary migrants frequently experience workplace exploitation and are largely excluded from the protection of many employment laws and social security benefits.

Despite the Migrant Workers' Taskforce's recommendation that the Fair Entitlements Guarantee (**FEG**) be expanded so as to include temporary visa holders, this has not yet been implemented. Accordingly, temporary visa holders who have lost their employment because of their employer's liquidation or bankruptcy continue to be barred from recovering their unpaid employment entitlements from the FEG scheme.

Based on the work of our individual employment law services and our collective involvement in the International Students' Work Rights Legal Service (**ISWRLS**), this submission documents breaches of workplace rights and conditions that international students experience, as well as the impact that these breaches have.

We provide evidence-based recommendations to reduce the exploitation of international students specifically, while also providing further recommendations to reduce work rights breaches for other temporary visa holders and vulnerable migrant workers more broadly. Recommendations are grouped according to four key themes:

- Improve compliance through targeted legal assistance and education;
- Remove legal barriers so temporary migrant workers can enforce their rights;
- Improve legal frameworks that protect workers from harm; and
- Improve regulatory frameworks to ensure that laws are effectively enforced.

We note that Kingsford Legal Centre, Redfern Legal Centre International Student Service NSW and the Migrant Employment Legal Service (**MELS**) have made a submission to the present inquiry and we refer the Committee to this submission.

The problem of migrant worker exploitation is complex and therefore the solutions are also necessarily wide-ranging. Based on evidence from our longstanding work with vulnerable workers and unique insights from working closely with our clients and local communities, this submission presents both compelling reasons for reform and a roadmap to get there.

1.1 WEstjustice's Employment and Discrimination Law Program (EDLP)

WEstjustice is a community legal centre that provides free legal help and financial counselling support to people living in the western suburbs of Melbourne. We service the legal needs in the West in a way that addresses the systemic nature of disadvantage. WEstjustice believes in a just and fair society where the law and its processes don't discriminate against vulnerable people, and where those in need have ready and easy access to quality legal education, information, advice and casework services.

The WEstjustice EDLP seeks to improve employment outcomes, community participation and social cohesion, and reduce disadvantage, for vulnerable workers including migrants, refugees, asylum seekers, international students, other temporary visa holders, young people and women who have experienced family violence. We do this by empowering target communities to understand and enforce their workplace rights through the provision of quality tailored legal education, advice and casework services, and by using evidence from this work to effect systemic policy or legislative change aimed at improving the lives of all workers.

To date our service has recovered over $500,000 in unpaid entitlements or compensation, trained over 2000 community members and agency staff, delivered seven roll-outs of our award-winning Train the Trainer program, and participated in numerous law-reform inquiries and campaigns.

Based on evidence from our work, and extensive research and consultation, WEstjustice released the Not Just Work Report (**Not Just Work**), outlining 10 key steps to stop the exploitation of migrant workers.[2]

1.2 Springvale Monash Legal Service (SMLS)

SMLS aims to empower and support members of the community to understand and make use of the law and the legal system to protect their rights and to increase their awareness of their legal responsibilities. High proportions of our clients are from culturally and linguistically diverse backgrounds and have limited access to the legal system due to language barriers, lack of formal education and financial disadvantage.

SMLS has locations throughout the City of greater Dandenong, the City of Casey and the Shire of Cardinia. SMLS recognises that there is an ongoing need within our local community for free employment law assistance for workers. The complexities and constantly shifting nature of employment law is often difficult for our clients to navigate, particularly for clients from CALD communities.

At SMLS we aim to empower clients to become better informed of their rights and of the legal avenues available to assert those rights. SMLS provides an employment law clinic, a community legal education program, and offers employment law youth education programs.

1.3 JobWatch Inc (JobWatch)

JobWatch is an employment rights, not-for-profit community legal centre. We are committed to improving the lives of workers, particularly the most vulnerable and disadvantaged.

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[2] Catherine Hemingway (2016) *Not Just Work: Ending the exploitation of refugee and migrant workers*, available at <https://www.westjustice.org.au/cms_uploads/docs/westjustice-not-just-work-report-part-1.pdf and https://www.westjustice.org.au/cms_uploads/docs/westjustice-not-just-work-report-part-2-(1).pdf> .

JobWatch is funded by the Office of the Fair Work Ombudsman, Victoria Legal Aid and the Victorian Government. We are a member of Community Legal Centres Australia and the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria, Queensland and Tasmania. Our centre provides the following services:

- Information and referrals to workers from Victoria, Queensland and Tasmania, via a free and confidential telephone information service (**TIS**);
- Community legal education, through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;
- Legal advice and representation for vulnerable and disadvantaged workers across all employment law jurisdictions in Victoria; and
- Law reform work aimed at promoting workplace justice and equity for all workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our TIS. To date we have collected more than 210,000 caller records with each record usually canvassing multiple workplace problems including, for example, contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time.

JobWatch currently responds to approximately 12,000 calls per year. The vast majority of our callers are not union members and cannot afford to get assistance from a private lawyer.

1.4 International Student Work Rights Legal Service (ISWRLS)

Individually, the WEstjustice EDLP, SMLS employment law service and JobWatch have assisted a wide range of temporary visa holders with employment law issues, including working holiday makers and asylum seekers.

Together, WEstjustice, SMLS and JobWatch deliver the ISWRLS. This submission focuses on our work with international students through this service, but is informed by our work with other vulnerable workers across Victoria (and Tasmania and Queensland for JobWatch).

2. Scope of submission

In this submission, we will focus primarily on the following Terms of Reference:

(e) the impact of wage theft, breaches of workplace rights and conditions, modern slavery and human trafficking on temporary migrants.

Our submission also touches on the following Terms of Reference:

(a) government policy settings, including their impact on the employment prospects and social cohesion of Australians;
(c) policy responses to challenges posed by temporary migration;
(f) any related matters.

Our submission does not comment in-depth on the following questions in the Terms of Reference:

(b) the impact of temporary skilled and unskilled migration on Australia's labour market;
(d) whether permanent migration offers better long-term benefits for Australia's economy, Australian workers and social cohesion.

Our submission contains case studies and evidence-based recommendations for reform. All of the case studies in this submission are based on the experiences of our international student clients (de-identified with names changed). While the recommendations in this submission are specific to the terms of reference of this Inquiry, and focus only on international students, they will assist temporary visa holders, and indeed, all vulnerable workers in Australia.

3. Summary of recommendations

In this submission, we outline the extent and impact of workplace exploitation on international students, as observed through our work at ISWRLS. Based on this work, we make the following recommendations:

1. Improving compliance through targeted legal assistance and education

Objective	Current law/situation	Recommendations (Also see Appendix One)
Increase funding for community-based legal assistance & education Page 22	Inadequate funding for community legal centres to provide targeted employment law assistance programs for temporary visa holders.	**Recommendation One: Increase funding for community legal centres to deliver dedicated employment law assistance to vulnerable workers, including temporary visa holders** Without legal assistance, vulnerable workers cannot enforce their work rights and employers can exploit with impunity. The Federal Government must provide recurrent funding for community legal centres with specialist employment law expertise to provide targeted employment law assistance and education programs for vulnerable workers, including temporary visa holders. **Recommendation Two: Develop a comprehensive worker rights education plan** Tailored education programs are required to raise awareness of laws, and build trust and accessibility of services. The Government must establish a fund to deliver these programs to community members, community leaders and agency staff. A comprehensive worker rights education plan should be developed so that temporary visa holders are given the right level of information about their work rights, at the right time (i.e. when they apply for a visa, on entry to Australia, when they fill in a Tax File Number declaration, when they apply for an ABN etc.) and in a language and format that they can understand. **Recommendation Three: Specialist education programs should be incorporated into school and university induction programs for international students.**

2. Removing legal barriers so temporary migrant workers can enforce their rights

Objective	Current law/situation	Recommendations (Also see Appendix One)
Remove ambiguities around 'work' and the impossible choice between work rights and possible visa cancellation Page 27	International students face a risk of visa cancellation if they have worked in excess of the hours allowed under condition 8105. This prevents many students from complaining about exploitation regardless of the circumstances. There are more proportionate ways of achieving the policy goal of ensuring primary focus on studies (minimum attendance requirements, and course results etc). There is also uncertainty around the meaning of 'work'.	**Recommendation Four: Amend the Migration Act to ensure vulnerable workers can complain with confidence.** Remove condition 8105 and amend the *Migration Act 1958* (Cth) (**Migration Act**) to introduce a proportionate system of penalties in relation to visa breaches **Recommendation Five: Amend the *Fair Work Act 2009* (Cth) (FW Act) to state that it applies to all workers, regardless of their visa or migration status** **Recommendation Six: Provide a bridging visa to ensure no worker is deported before bringing a valid claim.** 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 civil remedies from the employer or are involved in other legal processes regarding their employment. **Recommendation Seven: Strengthen the Fair Work Ombudsman Visa Assurance Protocol** **Recommendation Eight: Amend condition 8105 to clarify what counts as work**
To promote compliance and remove discrimination, give temporary visa holders a fair safety net Page 32	Despite paying taxes and performing work alongside Australian citizens, temporary migrant workers are excluded from many basic entitlements including access to the FEG and social security.	**Recommendation Nine: Extend income support to temporary migrant workers** **Recommendation 10: Expand the Fair Entitlements Guarantee to all workers** Many of our clients, including international students, are not eligible for FEG purely due to their temporary visa status. This discrimination must be addressed – all employees who reside in Australia and support the Australian economy should be able to access the FEG.

3. Improving legal frameworks that protect workers from harm

Objective	Current law/situation	Recommendations (Also see Appendix One)
Ensure laws and processes eradicate sham contracting Page 34	A person must not misrepresent to an individual that a contract of employment is an independent contracting arrangement. Defence: the employer did not know and was not reckless as to whether it was an employment or contracting arrangement.	**Recommendation 11: Introduce a reverse onus and inclusive definition to provide minimum entitlements to all workers. This definition must deem dependent contractors to be employees.** To stop unscrupulous businesses using sham contracting as their business model, introduce a reverse onus which provides minimum entitlements to all workers (including dependent contractors), but enables principals a defence when they engage genuine contractors. **Recommendation 12: Limit the current defence.** The recklessness/lack of knowledge defence for sham contracting should be removed, or at the very least, the defence should be expanded to ensure that employers are liable when they fail to take reasonable steps to determine whether their workers are employees. **Recommendation 13: Increase scrutiny at the time ABNs are given, and via ongoing enforcement.** At the time an ABN is requested, applicants should be required to attend a face-to-face educational meeting to understand the differences between employees and contractors, and learn about insurance and taxation obligations. On the spot inspection and assessment by regulators should also be increased.
Ensure minimum entitlements for all vulnerable workers Page 41	Individual workers can bring a sham contracting claim in the Federal Court or Federal Circuit Court, however the outcome of the case will be particular to those workers.	**Recommendation 14: The FWC should be given the power to make Minimum Entitlements Orders and Independent Contractor Status Orders.** This would enable the FWC to make a determination that certain classes of workers be treated as employees, and that protections in the FW Act, or an award or enterprise agreement apply; or alternatively, determine that certain workers are to be treated as genuine contractors. **Recommendation 15: Expand specific outworker protections to cover other key industries for vulnerable workers, and allow the addition of further industries by regulation.** Provisions would deem all workers in particular industries (including contract cleaners, security workers and those in the community service sector) to be employees, enable workers to recover unpaid entitlements from indirectly

Objective	Current law/situation	Recommendations (Also see Appendix One)
		responsible entities and require employers to comply with a relevant codes. **Recommendation 16: Introduce industry wide bargaining that covers all workers engaged in certain classes of work, by particular classes of employer, or in particular industries.**
Increased accountability in franchises, labour hire, supply chains Page 43	Franchisors and parent companies will be liable for a civil penalty, where there has been a contravention of certain civil remedy provisions and they knew or could reasonably be expected to have known that a contravention by the franchisee entity or subsidiary (either the body corporate or an officer) would occur or a contravention of the same or similar character was likely to occur. Defence: Need to take reasonable steps to prevent the contravention.	**Recommendation 17: Extend liability to all relevant third parties.** In addition to protecting workers in franchises and subsidiary companies, make supply chain entities and labour hire hosts responsible for the protection of workers' rights. **Recommendation 18: Widen the definition of responsible franchisor entity.** Amend the definition of responsible franchisor entity to ensure that all franchises are covered by removing the requirement for a significant degree of influence or control. **Recommendation 19: Clarify liability of all relevant third parties.** Insert a provision to clarify that responsible franchisor entities, holding companies and other third party entities who contravene clause 558B should also be taken to have contravened the relevant provisions contravened by their franchisee entity/subsidiary/indirectly controlled entity. **Recommendation 20: Clarify the 'reasonable steps' defence.** Ensure that the 'reasonable steps' defence incentivises proactive compliance, including by requiring independent monitoring and financially viable contracts. **Recommendation 21: Remove requirement for actual knowledge and require accessories to take positive steps to ensure compliance.** Amend section 550 to require directors and other accessories to take positive steps to ensure compliance within their business or undertaking. Ensure that failure to rectify a breach will also constitute involvement in a contravention. **Recommendation 22: Introduce a Federal Labour Hire Licensing scheme and ensure fair pay for insecure workers.**

Objective	Current law/situation	Recommendations (Also see Appendix One)
Introduce other measures to stop wage theft Page 50		**Recommendation 23: Introduce a Wage Insurance Scheme.** Where employees cannot access their unpaid wages via available legal frameworks, an insurance scheme should be available.
Ensure all workers can obtain superannuation Page 51	Workers can alert the ATO if they have not received superannuation but have limited options to pursue superannuation independently.	**Recommendation 24: Ensure workers receive superannuation owed to them** by making it part of the National Employment Standards, providing independent contractors with a legislative mechanism to pursue unpaid superannuation directly and removing the minimum earnings threshold and minimum age restrictions.
Expand existing licensing schemes to promote compliance Page 51	State based labour hire licensing legislation	**Recommendation 25: The Federal Government should call on the States to expand licensing schemes to promote compliance and raise revenue** The State should require on-demand companies in particular industries (including ride-share, contract cleaning, food delivery, flier distribution and community services), to hold licenses. The licenses would enable the State to regulate the number of operators in a particular industry, and ensure that companies comply with relevant laws including employment, superannuation and workplace safety.
Ensure safe workplaces and insurance for on-demand workers Page 43	Workers are afforded some protection by WorkCover and OH&S laws – however the application of these laws to on-demand workers is unclear and workers usually pursue a TAC claim instead of WorkCover.	**Recommendation 26: The Federal Government should call on the States to improve workplace safety laws for the most vulnerable workers and stop on-demand companies from shirking responsibility** The State Governments must ensure that workplace safety laws require gig economy companies take responsibility for the safety of their workers. Current deeming provisions must be extended to clarify that certain on-demand workers are deemed to be working under a contract of service and entitled to WorkCover, and companies must pay insurance.
Use procurement policies to promote compliance Page 54		**Recommendation 27: Increase use of procurement policies, proactive compliance deeds and industry codes to improve compliance.** The Government should require demonstrated compliance with workplace laws and relevant industry codes in order to tender for government contracts.
Use tax incentives to promote compliance Page 54		**Recommendation 28: Consider the provision of tax incentives for businesses that can demonstrate compliance with laws and a commitment to secure work and diversity targets.**

4. Improving regulatory frameworks to ensure that laws are effectively enforced

Objective	Current law/situation	Recommendations (Also see Appendix One)
Ensure vulnerable contractors can enforce their rights and systemic issues are addressed Page 56	There are very limited services for vulnerable contractors	**Recommendation 29: The Government should establish an Office of the Contractor Advocate.** The Office would provide information and guidance to individual workers and businesses and also investigate and report on systemic non-compliance.
Stop discrimination and sexual harassment at work for on-demand workers Page 57	The onus is on the complainant to bring a claim – there is no regulator with power to investigate and prosecute breaches of anti-discrimination laws.	**Recommendation 30: Introduce a discrimination ombudsman or expand AHRC powers to investigate and enforce breaches of anti-discrimination laws. Amend existing legislation to require employers to take more positive steps to prevent discrimination and introduce a reverse onus of proof.** An appropriately resourced and empowered regulator would allow for the investigation and enforcement of breaches of anti-discrimination laws, education campaigns and a focus on systemic change. The law should also be amended to require employers to take more positive steps to prevent discrimination and introduce a reverse onus of proof.
Ensure agencies are active & accessible Page 59	FWO has adopted numerous measures to target vulnerable groups. The Victorian Wage Inspectorate is newly established.	**Recommendation 31: Agencies need to improve cultural responsiveness frameworks** Including specific protocols and checklists for Infoline staff, engaging dedicated staff and participating in and resourcing education and engagement programs. **Recommendation 32: Greater collaboration, resourcing and action to address the superannuation black hole** FWO and the ATO need to be appropriately resourced to pursue unpaid superannuation claims, and community legal centres should be funded to assist. **Recommendation 33: Cost consequences for employers who refuse to engage with FWO and Assessment Notices for employers who refuse to engage or have unmeritorious claims** Make it clear that there will be costs consequences if an employer unreasonably

Objective	Current law/situation	Recommendations (Also see Appendix One)
		refuses to participate in a matter before the FWO. Where an employer refuses to participate in mediation, or mediation fails to resolve a dispute, FWO should have the power to issue an Assessment Notice that sets out the FWO's findings as to the employee's entitlements. An applicant may then rely on the Assessment Notice in the court proceeding. Where the applicant has an Assessment Notice, the applicant is taken to be entitled to the amounts specified in the assessment notice unless the employer proves otherwise. If the employer is unsuccessful at Court, costs should automatically be awarded against them. **Recommendation 34: Increased resourcing and more proactive compliance required** Vulnerable workers are not always able to bring a complaint themselves. Agencies must be adequately resourced to identify systemic issues and respond proactively.
Make wage and entitlement recovery quicker, simpler and fairer Page 66	Individuals can bring a claim to the Federal Court, Federal Circuit Court or Magistrates Court but it is complex and takes a long time	**Recommendation 35: Establish a new wage theft tribunal and/or make current court processes quicker and simpler**

These recommendations are set out in detail in our full submission below.

4. International Student Work Rights Legal Service Victoria: Improving compliance through targeted legal assistance and education

4.1 Introduction

Recent research has confirmed that wage theft is endemic within the international student population in Australia.[3] This research is confirmed by our practical experience of providing legal services to international students at the ISWRLS based in Melbourne.

For the last two and a half years SMLS, WEstjustice and JobWatch have partnered to deliver targeted employment law services to international students (subclass 500) as part of the ISWRLS. Through our involvement in the ISWRLS we have developed an intimate understanding of employment law and related legal issues facing international students, along with identifying the value of providing targeted free legal services.

It is well known that young people and culturally and linguistically diverse communities face significant barriers to accessing decent work, obtaining legal help and achieving rights enforcement. These barriers include a fear of authority, language barriers, low rights awareness, misunderstanding about the role of regulators and lawyers, limited options for help, limitations with the law, and fear of loss of employment. Without targeted assistance from a trusted service, vulnerable workers will rarely seek help or take action to enforce their rights, and even then, further obstacles remain.[4] International students often sit in the intersection of these vulnerable cohorts – and in addition, they face further challenges caused as a result of the precariousness that comes with temporary visa status. The result is high levels of exploitation and widespread impunity for employers that do the wrong thing.

4.2 Experiences of the ISWRLS clients

From 1 January 2018 until about 30 June 2020, ISWRLS in Victoria has provided direct legal assistance to around 445 international students, the majority of these students were from Colombia, Brazil, India and Chile and China. There was nearly an even split of client's identifying as female (52%) and male (48%), with the largest cohort of clients being around 30 years old.

a) Low paid, precarious work

Our clients are largely concentrated in low-skilled, low-paid industries with precarious working arrangements. For those who reported breaches of work rights and conditions, 41% worked in accommodation, cafes or restaurants, 23% in other services including cleaning, 9% in construction, 5% in retail and 4% in education and training including many for education institutions and agents. Over 65% of our clients were casuals or independent contractors without access to paid leave and limited or no protection against dismissal, with this figure increasing to 72% in accommodation, cafes or restaurants. Our clients are often at the bottom of long supply chains, in labour hire arrangements or other situations of extreme power imbalance. They are also in the some of the industries most affected in the COVID-19 pandemic.

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[3] Farbenblum B & Berg L (2020) *International Students and Wage Theft in Australia*, available at: <https://static1.squarespace.com/static/593f6d9fe4fcb5c458624206/t/5ef01b321f1bd30702bfcae4/1592793915138/Wage+Theft+and+International+Students+2020.pdf>

[4] See for example, Hemingway, *Not Just Work*, above n 5 and WEstjustice and Social Ventures Australia (2018) *School Lawyer Program Framework*, available at <https://www.westjustice.org.au/cms_uploads/docs/westjustice--school-lawyer-program-framework-2018.pdf>

Case study – Irini

Irini came to Australia as an international student and worked as a driver for a ride-hailing company. She was engaged as an independent contractor. Although Irini did not have a car, she was able to rent one from a company that had a contract with the ride-hailing company.

One night when Irini was working, she received a job to pick up a group of male passengers. When Irini arrived the men were noticeably intoxicated. While Irini was driving, one of the men started to climb through the sunroof of the car, causing significant damage. Irini stopped the car and the man jumped out. At this stage all the men, except for one, got out. The man that stayed began to sexually harass Irini, saying things to her like 'do you want to kiss me?' which made Irini feel very uncomfortable.

Irini reported the incident to the company she worked for. They refused to cover the full cost of fixing the car, leaving her with a considerable debt to pay. Instead, they offered her a small amount of money on the condition that she would make no further attempts to claim money from them. The company also refused to take any steps to identify the passengers who damaged the car and sexually harassed her.

WE advised Irini that, unfortunately as an independent contractor, her rights against the company were uncertain. WE suggested that, alternatively, Irini could pursue the men responsible for damaging the car to pay for the repair. However, this would require identifying them. Irini has since been in contact with the police to try to identify the men but the process has been very slow. Months have passed and Irini has not been able to find out the identities of the men.

Exploitation is rife. Our clients are frequently engaged in sham arrangements and routinely underpaid. One in seven clients had lost their job and one in 12 had been injured at work. Clients were paid as little as $6 an hour, and some received no income at all. Some clients had been forced to pay for "training" or an "internship" and then left out of pocket and without a job. Many clients experienced multiple types of breaches concurrently with each client reporting an average of 3 issues.

b) Wage theft, sham contracting and unpaid entitlements

The most common legal problem is wage theft, including wage recovery issues (70%), unpaid entitlements (48%), unpaid superannuation (26%), unpaid trial work (3%) and unlawful deductions (3%). Approximately 30% of clients reported being paid cash in hand, which in our experience often correlates to underpayment of wages and entitlements and/or a failure to provide payslips. Also of concern was that around 3% of clients reported debts to their employer and around another 3% reported an unlawful requirement to spend money.

Case study - Batsa

Batsa came to Australia in 2018 and found a job through an ad on Gumtree to wash and dry cars.

Batsa was hired by a man named Paul. Paul would pick Batsa up from the train station and drive him to various well-known car dealerships where he would hand wash and dry cars after business hours. The agreed pay was a flat rate of $15 an hour. Sometimes Batsa would work until 2.00am and he would have to walk home from wherever Paul had dropped him off. One night when Paul had organised to meet Batsa, he never showed up. After that night Batsa was unable to contact Paul at all. Batsa received no payment for the hours he worked.

Case study – Maria

Maria arrived in Australia on a student visa to study hospitality. As part of her course she was required to complete 400 hours of work per semester in the hospitality industry. She found a job as a casual sandwich maker/waitress at a café. She agreed to work for $18 per hour on a cash-in-hand basis initially but after one week she asked to be put 'on the books' as she needed to show pay slips to her course provider to prove her hours. During her employment Maria only received one pay slip and it contained incorrect information. After Maria resigned, the owner withheld her wages, claiming that she had not given enough notice. JobWatch advised Maria that she had been underpaid during her employment, that her employer had failed to make the requisite superannuation contributions and that the employer had failed to provide her with accurate pay slips. We filed an application in the Small Claims division of the Federal Circuit Court on Maria's behalf. The employer paid the outstanding wages and superannuation before the hearing date.

Case study - Hana

Hana is a young woman from South East Asia who is living and working in Victoria on a student visa. She worked as a kitchen hand/waitress in a restaurant for two years, working 6 days a week and up to 12 hours a day. She was paid $400 a month in cash. The owner of the restaurant was not only her boss but also her landlord and her education agent, as he managed her studies and rented a room to her. He told her he was deducting money for her rent and her studies from her wages, but he never gave her any invoices for the fees, there was no written tenancy agreement and he did not provide her with pay slips, so she could not check what money was owed for what. We are currently assisting Hana with a claim in respect of alleged breaches of the *Fair Work Act 2009* (Cth).

Around 22% of clients presented with issues of sham contracting, 11% with independent contractor issues, 6% with breach of contract issues and 4% with accessorial liability matters.

c) Discrimination, sexual harassment, dismissal and other unfair treatment

Our clients were also discriminated against, treated unfairly and dismissed unlawfully. Around 12% of clients had an unfair dismissal issue and around 8% were advised on general protections claims (which may or may not relate to dismissal). Around 7% presented with concerns about bullying, 4% about discrimination, 2% about sexual harassment and 1% about victimisation.

Case study: Andrea

Andrea came to Australia as an international student. Andrea found an ad on Gumtree for a job distributing fliers for a painting and home improvement company. Andrea applied for the job and she was hired by a man named Tony. Tony told her that her pay would vary depending on how quickly she delivered the fliers.

The arrangement was that Tony would pick Andrea up from the station and drive her to different locations. One day when Tony was driving Andrea from the station he started to ask her personal questions and made some comments about her physical appearance. Tony then started to try and kiss her. Andrea felt scared and

uncomfortable so she got out of the car. Tony began to follow her in his car, so she ran until he was out of sight.

Andrea reported the sexual harassment to the police. She was never paid for the jobs she did for Tony. We helped Andrea write a complaint to the Fair Work Ombudsman. However, because Andrea only knew Tony's first name and had no other personal information, we were unable to take further action.

d) Unsafe work

Another key issue was safety with around 8% of clients needing information, advice or assistance with WorkCover and 7% with occupational health and safety concerns more broadly.

Case study – Ana
Ana came to Australia as an international student to study English. Ana was engaged as an independent contractor by a food courier company. Her pay would vary depending on the delivery, usually ranging from $6 to $8 per hour.

One day when Ana was making a delivery her bike was hit by a car. She was taken to hospital and required surgery for her injuries. The Transport Accident Commission (TAC) paid for Ana's operation. However, she was subsequently unable to work due to her injuries. Because Ana was engaged as an independent contractor it was unclear whether she would be able to access compensation through the WorkCover scheme.

We referred Ana to a no-win no-fee firm that has a specialist personal injury team for further advice and they opted to pursue her claim with the TAC.

4.3 Impact of breaches of work rights and conditions and on international students

The impact of wage theft and exploitation on our clients is immense.

A number of our clients have experienced homelessness as a result of losing their job. Our client files reveal that temporary migrant workers are often subjected to distressing and humiliating treatment at work. Such treatment may be connected to attributes such as their country of birth, disability, sexuality, sex or ethnicity. In some cases, discriminatory behaviour has caused significant psychological injuries. In other cases, underpayment or non-payment has left our clients in desperate financial situations.

Sadly, when asked about whether ISWRLS is needed or not, many clients responded with a resounding yes because they feel that they are deliberately and systematically being taken advantage of in Australia. As one client stated in our post casework survey:

> *'Because we are foreign people – don't know about the laws in Australia, many boss takes advantage.'*

Workplace exploitation not only has negative impacts on exploited workers but also undermines the workplace relations framework – businesses who are using secure and properly paid forms of employment are being undercut by those who rely on sham contracting, exploitation and legal grey areas to obtain competitive advantage.

Unfortunately, many vulnerable clients are not able to enforce their rights for a number of reasons, and so the exploitation continues. Workers generally have little knowledge of their rights or where to go for help. Mainstream agencies including government regulators, Courts and Commissions are largely inaccessible to vulnerable workers, and community organisations are underfunded and overloaded. Many international students are under considerable financial stress. They have trouble getting decent work and are at risk of losing their jobs if they complain about pay or conditions.

Case study: Alina

Alina was an international student who worked night shifts cleaning the building of a major energy retailer. She had only recently arrived in Australia. This was her first job. She found the job through a friend, who saw an ad on gumtree.

When she met Joe, her boss, he initially offered her $17 an hour but increased the offer to $20 an hour when Alina complained.

When Alina started work she was given a 13 page 'contract for services' document to sign. Despite the words in the contract, she was told what hours to work, given a uniform and provided with all tools and cleaning equipment. She worked in a team of other 'contractors', all wearing the uniform of her boss' company. She wasn't allowed to delegate her work and certainly didn't feel like she was running her own business. Joe provided Alina with template invoices and told Alina she must get an ABN. Alina provided invoices and completed time sheets after each shift.

When Alina had worked for several weeks and not received any payment since starting the job, she contacted her boss about the issue and was ultimately terminated for making enquiries about her pay.

4.4 ISWRLS outcomes

Workplace exploitation clearly has a negative impact on students' experience in Australia, including their studies, financial and emotional wellbeing. Importantly, access to targeted assistance can make a difference, as one ISWRLS client notes:

> *'We were living difficult moments in Melbourne, we were thinking to make a decision to go back to our country. But we got comfortable when we spoke the lawyer and she gave us a wonderful advice about that situation and how we need to avoid it.'*

Over the past two and a half years the ISWRLS has recovered in total nearly $350,000 for clients directly, including approximately:

- $324,991.47 in monies recovered for unpaid wages and entitlements and compensation for unfair treatment;
- $14,336.45 in debts and liability avoided.

In addition to these financial outcomes we have assisted individuals to get their jobs back and keep their jobs, receive statements of service, letters of reference or retrospective resignation to assist with getting new jobs and provided referrals for related and other issue assistance. We have made 113 legal referrals and 20 non legal referrals.

At a workplace and industry level we have helped to bring multiple workers together, and refer them to the Migrant Workers Centre for collective assistance. We have also reported 38

cases to the Fair Work Ombudsman. We have also assisted a number of clients with WorkCover claims and referrals.

Some feedback the service has received includes:

> *'The problem could not be solved without this legal help this would not have been possible.'*
>
> *'I appreciate your kind efforts towards me. Just using this means to say a very BIG THANKS. You're the best in your field of profession.'*
>
> *'Thank you so much … for all you have done for me. You are my angels of justice! I will spread my voice to promote you and your amazing job. Everybody, especially, immigrants should know about [you].'*
>
> *'I think that the best thing of the service is that the lawyer make you understand your rights. You feel like you are not just a number, you don't feel like anyone can use you. You can finally understand how the Australian jobs work. And what you can ask for the job you do. I am really satisfied with this service.'*

The CLC partners that run ISWRLS provide a complementary community legal education program that has delivered over 30 face-to-face and virtual sessions for hundreds of students, student leaders and ambassadors and to 'intermediaries' working with students from education institutions and other organisations. This includes training international students to deliver legal information, education and engagement as paid casual employees. In addition, we work with regulators, unions, academics, the broader community legal sector and other stakeholders, to build understanding of the work rights issues and capacity to help meet the legal needs of international students.

Through delivering the ISWRLS, we have identified that programs like this contribute to international students overall engagement by increasing their access to justice, ensuring they can afford to remain enrolled in their studies, and helping them to feel safe at work.

From the client survey feedback we have received, nearly all of the clients (between 98-100%) report that the service contributes to giving them a positive experience as an international student; that they felt well supported and heard; and would return to use the service and recommend the service to others.

Specifically they report that after seeing a lawyer they understand their work rights better; they feel better prepared for future jobs in Australia; and have improved their ability to enforce their rights and/or make informed decisions about work related matters (96-100%).

In addition, nearly all clients (between 96-100%) also report that the legal service was easy to access; and that an individual service (either virtual or face to face) was better than other ways of getting assistance (because they felt more confident and comfortable, can explain and ask questions properly, and more clear and helpful responses). As the clients have noted:

> *'I was very depressed at the time and I was grateful to have [the ISWRLS' lawyers] support.'*
>
> *'The services that were provided to me helped me to feel supported and that someone had my back. It was good to know that someone was working towards my best interests.'*

'[The ISWRLS lawyer] helped me when I was feeling low. It was a fantastic experience.'

'I always thank you for your help that can make me pass the difficult time.'

'It would be a good idea to make sure all students coming here knows about you. Like do a must for Institutions to inform students from the first day of class.'

'Thank you very much for this institution in Melbourne to assist international students. Originally, I was very helpless. In the face of salary deductions and sexual harassment at work, I did not have a good impression of this place in Melbourne. Fortunately, I saw Migrant workers centre on Facebook. I got the courage to contact the relevant departments, and…After talking with [a warm social worker] he helped me contact [the ISWRLS lawyer]. I am very grateful to them and helped me solve my difficulties and made me feel warm again in this city.'

'Thanks to this service I now have more knowledge about my labor rights and so I will not be threatened by an employer on the future.'

'Now I know the rules and regulations, I don't feel like I'm in a vulnerable or disadvantages position. I know that I can do something about it.'

'These guys are awesome!!!!! they helped me in one of the most tough times in life, I will never forget this help ever in life! thank you so much.'

'[Now] I feel that even being an international student I can be heard and defended, my wellness and rights are important. As well as, I feel that people cant take advantage of me because I can have the same rights that others.'

'The best Was I feel secure and valuable even been a student is good to see that people can help you and be patient with you when you are not a native speaker and also I think it is great you offer the interpreters.'

'What I best liked of the service is the level of professionalism!'

'Thank you so much for everything. The service was perfect. Frankie was great and made everything clear. When I was anxious or angry she helped me through it.'

'I like everything about this service, the staff is very friendly and professional.'

Many clients said they would tell their friends about it and are so happy a service like this exists. Without this service 25% of the clients reported that they would have not have gotten any help with their work rights problem.

4.5 Recommendation One: Increase funding for community legal centres to deliver dedicated employment law assistance to vulnerable workers, including temporary visa holders

Community legal centres need Commonwealth funding to support vulnerable workers (including temporary migrant workers) in a comprehensive and sustainable way. The ISWRLS in Victoria and Redfern Legal Centre International Student Service NSW are the only two services in Australia that run targeted international student work rights legal services. In addition, there is currently a Migrant Employment Law Service project in NSW, the Young Workers Centre in Victoria and South Australia, and on-campus community legal centres

provide assistance where possible. While the existing targeted services are excellent, they are piecemeal and the funding is short-term.

The most vulnerable workers often aren't unionised and are not able to access the necessary level of support they require from the Fair Work Ombudsman (**FWO**). Community legal centres are independent, trusted agencies, based in local communities that can provide support to vulnerable workers across a range of legal and non-legal issues in an effective way to improve employment outcomes and social cohesion, in partnership with local communities.

The Wage Theft Report indicated that migrant workers are interested in enforcing their employment rights.[5] Migrant workers, and particularly temporary visa holders face significant exploitation at work and there is significant unmet legal need for assistance. Due to funding limitations, WEstjustice has had to suspend its migrant and refugee employment law service. This means asylum seekers and other temporary visa holders can no longer access our targeted assistance.

There are limited services available to help migrant workers with their legal problems at work, or more generally. FWO commenced 35 matters in court in 2017-18.[6] Workers may obtain advice from their local community legal centre, their union or the FWO. The capacity of the community legal centre sector to advise and represent migrant workers in underpayment complaints is limited.[7] Reports indicate that migrant workers, including temporary visa holders, do not join their union, and that despite the FWO's significant efforts to engage with this cohort, relatively few contact the agency, through its Infoline or otherwise.[8]

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

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

There is inadequate funding available for employment law services. Existing services are struggling to meet demand with limited resources. Many community legal centres cannot meet demand for telephone assistance (even fewer receive casework support and the most vulnerable will not utilise a telephone service). Justice Connect, a community organisation that helps facilitate pro bono referrals, reports that employment law is one of the top four

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[5] In the context of taking action on wage theft. Farbenblum and Berg, above n 6, p7-8.
[6] Australian Government: Attorney General's Department, *Industrial Relations Consultation (website)* available at <https://www.ag.gov.au/Consultations/Pages/industrial-relations-consultation.aspx> p4.
[7] See Productivity Commission, *Access to Justice Arrangements* (Inquiry Report, vol 2, 5 September 2014) p734–6.
[8] Federation of Community Legal Centres, Putting the Law to Work: Meeting the Demand for Employment Law Assistance in Victoria (Report, August 2014).

problems that people request assistance for, however only around one fifth of matters receive much needed help.[9] 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.'[10]

Employment law is a highly specialised area of law with short limitation periods, Greater resources urgently need to be allocated to community legal centres with specialist employment law expertise to provide targeted employment law assistance and education programs for vulnerable workers, including temporary visa holders.

Case study: Saiful

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

Saiful spoke quite good English. At a night service appointment, he received assistance to draft a general protections application. Saiful was informed of the process, and encouraged to contact us once a conciliation was scheduled so that we could assist him to prepare. At the time, We 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 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.

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 in the light of the introduction of the Fair Work regime (Booth Report).[11] The Report highlights the importance of Community-Based Employment Advice Services for vulnerable workers:[12]

> *'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.'*

[9] Hemingway, above n 5, p139.
[10] Ibid.
[11] Anna Booth, 'Report of the review of community-based employment advice services', Report to the Fair Work Ombudsman, 30 September 2009.
[12] Ibid p14.

Without assistance, vulnerable workers cannot enforce their rights, and the employers who are doing the wrong thing are not held to account. Community legal centres with employment law expertise are necessary to work alongside regulators and unions to provide much needed support to workers on temporary visas.

Recommendation One: Increase funding for community legal centres to deliver dedicated employment law assistance to vulnerable workers, including temporary visa holders

The Government should increase funding for community legal centres to deliver dedicated employment law assistance to vulnerable workers, including temporary visa holders

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4.6 Recommendations Two and Three: Develop a comprehensive worker rights education plan that includes specialist education programs incorporated into school and university induction programs for international students

We regularly provide community legal education to temporary visa holders in relation to their work rights and, unsurprisingly, we find low levels of understanding of Australian workplace laws, and particularly worker rights.

Our legal education experience has made it clear that temporary visa holders often do not realise that the *Fair Work Act 2009* (Cth) (**FW Act**) and other workplace laws apply to them. This is sometimes because their employer has lied to them ("I have opted out of the award' "those laws don't apply to you because you are a visa holder"). On other occasions it is because the laws are different in other countries they have lived in ("The boss just decides to pay whatever he wants"). And occasionally it is because they have sought advice from well-meaning friends and family who have told them incorrect information about their rights.

Additionally, many of our clients are fearful that they had broken the law by accepting lower than award wages or cash in hand payments[13], whereas in these circumstances the wrong-doing was usually on the part of the employer.

There is a need for clarification and increased education of temporary visa holders about their workplace rights. In recognition of the particular needs of young people and international students, the Federal Government should fund specific education programs in schools, TAFEs and universities for international (and ideally local) students. Such programs should be provided by community legal centres, unions or other suitably qualified community groups.

Recommendation Two: Develop a comprehensive worker rights education plan

A comprehensive worker rights education plan should be developed so that temporary visa holders are given the right level of information about their work rights, at the right time (i.e. when they apply for a visa, on entry to Australia, when they fill in a Tax File Number declaration, when they apply for an ABN etc.) and in a language and format that they can understand.

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[13] Cash is legal tender and as long as the employee is complying with income reporting requirements for the Australian Taxation Office, they are not in breach of the law: https://www.ato.gov.au/individuals/working/working-as-an-employee/receiving-cash-for-work-you-do/ However, in our experience cash in hand payments are often an indicator of unlawful activity on the part of the employer – where PAYG tax, super and other entitlements are not being paid and payslips are often not provided.

Recommendation Three

Specialist education programs should be incorporated into school and university induction programs for international students.

5. Removing legal barriers so temporary migrant workers can enforce their rights

Despite the high monetary value and strong legal merit of some underpayment claims, many of our international student clients express a reluctance to proceed with legal action, despite accessing our help. Clients may be fearful of jeopardising their visa (as well as the chances of obtaining further visas if they are looking to stay in Australia); fear of losing their job and/or worry about further job prospects; and concerned about the time it will take to recover their wages.[14] This correlates strongly with the recently published research of the Migrant Worker Justice Initiative.[15]

In this section we recommend a range of legal amendments to remove structural barriers to rights enforcement. In particular we call on the Federal government to remove ambiguities around the definition of 'work' and to remove the impossible choice between work rights and possible visa cancellation.

5.1 Recommendations Four, Five and Six: Amend the *Migration Act 1958* (Cth) to ensure vulnerable workers can complain with confidence

International students on a subclass 500 or 574 student visa[16] are subject to visa condition 8105,[17] which prohibits them from working more than 40 hours per fortnight when their course is in session (Work Limitation). If an international student is found to have breached this condition, the Department of Home Affairs (DHA) may cancel their visa.[18]

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 the Work Limitation, inadvertently or accidentally. As a result, clients do not pursue their claims and employers take advantage.

We saw one 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.

International student clients tell us that unscrupulous employers have threatened to fire them if they don't work hours which are in breach of their visa conditions. Other employers threaten to report fabricated or minor breaches of work conditions to the DHA to silence international student complaints about underpayments and stop our clients from taking legal action to enforce their legal rights.

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. If the employment visa condition 8105 was removed, international students would be able to work in the same way as local students. These students would not need to risk breaching their visas in order to support themselves

[14] In general an underpayment matter will often go on for 4-6 months (to achieve a private settlement) and in April 2020, the small claims list in the Fair Work Division of the Federal Circuit Court were listing underpayment matters for May 2021 (i.e. a 12 month wait time).
[15] See n 6 above
[16] We have only considered subclass 500 (student) visa in this report, for visa applications made after 1 July 2016.
[17] *Migrations Regulations 1994* (Cth) (**Migration Regulations**) sch 8 cl 8105.
[18] Migration Act s 116.

financially. Other conditions on their visas would ensure that students focus on the object of their visa: their studies. These conditions require students to attend 80% of their classes, and achieve satisfactory course results.[19]

The elimination of condition 8105 would also remove an obstacle to international students taking legal action against wage theft. Employers would no longer be able to use the threat of visa cancellation over international students who complain of such conduct at work as a way of avoiding liability for wage theft.

It is unfair and disproportionate for an exploited international student to face deportation 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. If condition 8150 is not removed, it is likely international students will continue to not report their experiences of work exploitation.

Alternatively, as suggested by Associate Professor Joo-Cheong Tham,[20] visa cancellation should only apply in situations where there has been a serious breach of a visa. This avoids situations where workers may be disproportionately punished for a minor breach, and remove the significant disincentive to report unlawful employer behaviour. As Joo-Cheong explains:

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

We support this recommendation.

Recommendation Four

Amend the Migration Regulations 1994 (Cth) to remove condition 8105, which currently requires international students to limit their work hours to 40 hours per fortnight when their course is in session.

In addition, 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; and a proportionate system of administrative

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[19] Migration Regulations, sch 8 cl 8202.
[20] Associate Professor Joo-Cheong Tham, Supplementary submission to the inquiry of the Senate Education and Employment References Committee into 'The impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders', available at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Submissions>, last accessed 29 July 2020.

fines and/or civil penalties should apply to other breaches.

The FW Act should also be amended to clearly state that it applies to all workers, regardless of their immigration status. That is, temporary visa holder workers should be entitled to the same minimum employment standards and protections as all others working in Australia.[21] This includes undocumented migrant workers, or those working in breach of a visa condition.

If our laws fail 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 Tham[22] 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)[23] and Senate Education and Employment References Committee (Recommendation 23).[24]

Recommendation Five

The Fair Work Act 2009 (Cth) should be amended to state that it applies to all workers, regardless of their visa or migration status.

Some workers who have not breached any visa condition are deported or travel home prior to being able to seek justice. For example, if a worker is on a temporary skilled visa and loses

[21] 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.
[22] Joo Cheong Tham, Submission No 3 to 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.
[23] Productivity Commission Inquiry Report, Workplace Relations Framework: Volume 2 (2015) 931.
[24] Education and Employment References Committee, The Senate, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (March 2016).

their job in unfair circumstances, they have a limited time to find new employment. If they do not find another sponsor, they will be deported.

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).

We agree with the Senate Education and Employment References committee recommendation that:[25]

> *'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.'*

The Committee also recommends that the DIBP (now DHA) 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'.[26]

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.

Further recommendations are made **below** in respect of ensuring cases are heard in a timely manner to further assist temporary migrant workers to have their claims heard before returning overseas.

Recommendation Six

Provide a bridging visa to ensure no worker is deported before a valid claim is heard.

5.2 Recommendation Seven: Strengthen the Fair Work Ombudsman Visa Assurance Protocol

Currently, the FWO offers migrant workers like international students an 'assurance protocol' or 'amnesty' from visa cancellation for workers that have breached their work conditions, to support workers in coming forward to request assistance from the FWO and provide evidence or information about exploitation.[27] The assurance protocol has a number of detailed conditions and requires the FWO to share information about a client's breach of visa

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[25] Ibid, xii; 161.
[26] Ibid, xii; 258-260.
[27] Australian Government: Fair Work Ombudsman, *Visa Holders and Migrants* (Web Page) available at <https://www.fairwork.gov.au/find-help-for/visa-holders-and-migrants>.

conditions with the DHA in order for the DHA to give the client an exemption from cancelling their visa.

Our international student clients have told us that they are uncomfortable with the FWO sharing information with the DHA about them breaching visa conditions.[28] Other clients have concerns that they will not be protected against visa cancellation where they report workplace exploitation, but no action is taken by the FWO.[29] Many of our clients have expressed reluctance to report to the FWO without a guarantee or 'something in writing' that they will not have their visa cancelled.

Without more security and protection, many clients elect not to proceed with their complaints. This reward unscrupulous employers, who can target vulnerable international student workers and get away with illegal treatment time and time again.

Recommendation Seven

Amend the assurance protocol between the FWO and the DHA to provide stronger protection from visa cancellation for workers with genuine exploitation complaints

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5.3 Recommendation Eight: Amend Condition 8105 to clarify what counts as work

As discussed above, student visas are typically subject to Condition 8105, which provides as follows (the **Work Limitation**):

> *(1) Subject to subclause (2), the holder must not engage in work in Australia for more than 40 hours a fortnight during any fortnight when the holder's course of study or training is in session.*
>
> *(2) Subclause (1) does not apply:*
>
> > *(a) to work that was specified as a requirement of the course when the course particulars were entered in the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS); and*
> >
> > *(b) in relation to a student visa granted in relation to a masters degree by research or doctoral degree if the holder has commenced the masters degree by research or doctoral degree.*

Many international students undertake courses which include work placements or internships. However, while many of these placements may be registered on the CRICOS, the issue is that many courses (or the particulars of the work placements themselves) are not entered in the CRICOS, despite being genuine and legitimate education offerings by education providers.

As a result of the DHA current interpretation of the Work Limitation, many international students find themselves in the position where their unpaid work placement forms part of the Work Limitation.

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[28] Recommendations were made to the MWT that an information 'firewall' be created between the DHA and FWO to address the reluctance of migrant workers to report exploitation: The MWT Report, above n **Error! Bookmark not d efined.**, p51

[29] Ibid. The MWT has indicated that FWO and the DHA are conducting further analysis to consider whether visa holders participating in a broader range of FWO services can access the assurance protocol.

This may result in among the following adverse consequences:

- These students may have a significantly reduced ability to fund their living expenses and student fees in Australia, either because their further reduced working capabilities may make it more difficult to secure paid employment, because the placement may require 40 hours per fortnight of a student's time, or because a student may be too concerned about breaching their visa to choose to assume paid work. In consequence, this may impact the number of international students choosing to pursue their education in Australia if their course is likely to require a work placement component;
- Students may inadvertently breach their visas on the assumption that unpaid placements, the particulars of which have not been entered in the CRICOS, do not fall within the Work Limitation;
- As a result of being unable to undertake sufficient paid work in compliance with the Work Limitation, students may accept 'off the books' work with unscrupulous employers. This exposes them to higher risks of exploitation, including wage theft, sham contracting, blackmail, discrimination and/or sexual harassment.

The Department's current interpretation of the Work Limitation under the Migration Regulations[30] is not in alignment with:

- The definition of the term 'work' in the Migration Regulations and relevant case law;
- The intention behind the Work Limitation; nor
- The broader rationale and economic imperative of permitting international students to study in Australia.

For the reasons outlined above, it is our view that there is an urgent need for the DHA revise its position in relation to the Work Limitation and instead amend Condition 8105 2(a) such that the 40 hour restriction does not apply to:

> *'work that that is undertaken as a requirement of an education or training course, or otherwise attracts course credit in an education or training course…'*

Recommendation Eight

Amend Condition 8105 to clearly state that work that that is undertaken as a requirement of an education or training course, or otherwise attracts course credit in an education or training course, is clearly excluded from the 40 hour work limit. '

5.4 Recommendations Nine & Ten: Extend income support and the Fair Entitlements Guarantee to temporary migrant workers

The lack of a social security net or income support for temporary visa holders fuels work exploitation – the desperate need for work means that exploitation is rife and becomes accepted. While temporary visa holders contribute to the community and the economy and

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[30] As set out in the DHA *Provider Processing Update* (July 2018) available at < https://www.tiq.qld.gov.au/iet-strategy/student-visa-program-processing-update-for-education-providers/>

pay taxes, they are often excluded from the welfare schemes (like Medicare and JobKeeker) that these taxes pay for.

A related issue is the Fair Entitlements Guarantee (FEG) under the *Fair Entitlement Guarantee Act 2012* (Cth) (FEG Act). If an Australian citizen, permanent resident or New Zealand citizen employee has been employed by a company that has gone into liquidation, they are able to apply to the FEG to recover:

- Unpaid wages – up to 13 weeks;
- Unpaid annual leave and long service leave;
- Payment in lieu of notice—up to five weeks; and
- Redundancy pay—up to four weeks per full year of service.[31]

By way of contrast, temporary migrant workers are not eligible to access their entitlements under the FEG Act if they work for a company that goes into liquidation.[32] This is despite the fact that all temporary migrant workers pay income tax. We note that Recommendation 13 of the 2019 Report of the Migrant Worker Taskforce (MWT Report) supports the amendment of FEG to include migrant workers, but at the time of writing this has not been implemented.[33]

We refer to WEstjustice's 2017 submission to the Federal Government's *Review of the Fair Entitlements Guarantee (FEG) scheme to address corporate misuse of the Scheme*.[34] In this submission, WEstjustice recommends an expansion of the FEG scheme to cover workers that have meritorious claims and are unable to obtain back payment from their employers. In particular, WEstjustice recommends that the FEG scheme be expanded:

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

Directors should be required to pay a compulsory insurance premium (similar to WorkCover) to assist in funding the provision of community-based employment services and the expanded FEG scheme.

Recommendation Nine

The Federal Government should allow all temporary visa holders to access income support (e.g. JobSeeker) and access medical support (Medicare).

Recommendation 10

The FEG should be extended to include all employees, including migrant workers, and the FEG should extend to employees with a court order where a company has been deregistered.

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[31] Australian Government: Attorney General's Department, *Fair Entitlements Guarantee (FEG)*, (website) https://www.ag.gov.au/industrial-relations/fair-entitlements-guarantee/Pages/default.aspx.
[32] *Fair Entitlements Guarantee Act 2012* (Cth), Part 2 Division 1sub-division A para 10(1)(g). Special category visa holders are New Zealanders.
[33] Australian Government (2019) *Report of the Migrant Workers' Taskforce*, available at https://www.ag.gov.au/industrial-relations/industrial-relations-publications/Documents/mwt_final_report.pdf , p13.
[34] Available at <http://www.westjustice.org.au/cms_uploads/docs/westjustice-submission-to-the-feg-scheme-consultation.pdf>.

6. Improving legal frameworks that protect workers from harm

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

Recently arrived migrant workers face many barriers, and finding employment can be difficult. For those who do find work, exploitation is widespread. 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.

It is essential that our legal frameworks incentivise compliance, and do not reward inaction or wilful blindness in the face of exploitation.

We recommend the following measures to improve legal frameworks to protect vulnerable workers from harm.

6.1 Recommendations 11-13: Laws and processes to eradicate sham contracting

Underpayment (or non-payment) of wages and/or entitlements is the single-most common employment-related problem that international student workers present with at our service.

It is our experience that sham contracting arrangements are being used to avoid the application of workplace laws and other statutory obligations.

a) The problems

'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.'[35]

Under Australian law, employees are treated very differently from independent contractors. Employees are afforded certain protections under the FW Act including the right to a minimum wage, maximum hours of work, leave entitlements and protections from unfair dismissal. With limited exceptions (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 the individual will be considered or classified as such at law).

[35] Joellen Riley, 'Regulatory responses to the blurring boundary between employment and self-employment: a view from the Antipodes' *Recent Developments in Labour Law, Akademiai Kiado Rt*, 2013, 5.

The exploitation of international students through the use of sham contracting arrangements is rife – around one in every five students the ISWRLS saw was advised on sham contracting.

In our experience at ISWRLS, sham contracting is used as a core business practice throughout the cleaning, road transport and distribution, home and commercial maintenance (e.g. painters), and building and construction industries (e.g. tilers).[36] All too often we have seen clients engaged as contractors in these industries whose working relationship was actually one of employer-employee:

- They were paid an hourly or daily rate;
- They wore a uniform to work;
- All equipment required for the job was provided by the employer;
- They worked for a single employer;
- They were unable to subcontract; and/or
- They were unable to take leave.

For others, it was less clear, although obvious that the client was not running their own business.

We have observed instances of employers obtaining ABNs for workers, and 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. 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.

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

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

b) 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 (or should be treated as) employees include:

- They do not receive minimum award wages or entitlements, including leave. Our clients are mostly people who are low paid, award-reliant workers doing unskilled or low-skilled labour;
- They rarely receive superannuation contributions. This is the case even though Superannuation Guarantee Ruling 2005/1 provides that they must receive superannuation contributions if they are engaged under a contract that is principally for labour;[37] and

[36] WEstjustice has also assisted clients outside these key industries, including in the education and clerical sectors.
[37] Australian Taxation Office, *Superannuation guarantee: who is an employee*?, SGR 2005/1, 23 February 2005.

- 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. Applying the multi-factor test and attempting to explain this to a vulnerable worker, let alone convince an employer that their characterisation of their worker is incorrect is both a time and resource-intensive task. Many of our clients are so desperate for payment and put off by the complexity of the law that they often opt to accept their misclassification as an independent contractor and seek instead 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 (e.g. for unfair dismissal).

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 temporary visa holders 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.

Even if one client decides to take legal action to confirm their status as a genuine employee, any such decision is specific to that individual/business and cannot be applied more broadly. This leaves the onus on those most vulnerable individuals to take complex legal action just to obtain their minimum rights under the law.

For the above reasons, reform is urgently required.

c) Further challenge: dependent contractors not protected

Unlike the obvious sham arrangements that many of our clients experience, some of our on-demand worker clients fall less clearly into the common law definition of employee.

In the recent FWC decision of *Kaseris v Rasier Pacific V.O.F,*[38] Deputy President Gostencnik found that an Uber driver was not an employee at common law, and therefore was not entitled to bring an unfair dismissal claim.

The Deputy President considered the multi-factor common law test and concluded that it was 'plainly the case that the relevant indicators of an employment relationship are absent in this case'.[39] However, and importantly, he noted that the common law approach developed long before the on-demand economy, and that the multi-factor test may be 'outmoded in some senses'. He talks of the possibility of the legislature refining the existing test:[40]

[38] *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610.
[39] Ibid [67].
[40] Ibid [66].

The notion that the work-wages bargain is the minimum mutual obligation necessary for an employment relationship to exist, as well as the multi-factorial approach to distinguishing an employee from an independent contractor, developed and evolved at a time before the new "gig" or "sharing" economy. It may be that these notions are outmoded in some senses and are no longer reflective of our current economic circumstances. These notions take little or no account of revenue generation and revenue sharing as between participants, relative bargaining power, or the extent to which parties are captive of each other, in the sense of possessing realistic alternative pursuits or engaging in competition. Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy. But until then, the traditional available tests of employment will continue to be applied.

We submit that the current common law test is out of step with the reality of the nature of work today, and fails to provide adequate protection to vulnerable workers in the on-demand workforce. We recommend that the FW Act be amended to include a presumption of employment and an express inclusion of dependent contractors, as set out **below**.

Recommendation 11: Presumption of employment relationship and express inclusion of dependent contractors

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

> *(1) An individual who performs work for a person (the principal) under a contract with the principal is taken to be an employee (within the ordinary meaning of that expression) of the principal and the principal is taken to be the employer (within the ordinary meaning of that expression) of the individual for the purposes of this Act.*
>
> *(2) Subsection (1) does not apply if:*
>
> > *(a) the principal establishes that the individual is completing work for the principal as on the basis that the principal is a client or customer of a business genuinely carried on by the individual; or*
> >
> > *(b) the individual is on a vocational placement.*
>
> *Note: When determining whether a business is genuinely carried on by an individual, relevant considerations include revenue generation and revenue sharing arrangements between participants, and the relative bargaining power of the parties.*

This definition is partly based on Professor Andrew Stewart and Cameron Roles' Submission to the ABCC Inquiry into Sham Arrangements and the Use of Labour Hire in the Building and Construction Industry, where they propose that the term 'employee' should be redefined in a

way that would strictly limit independent contractor status to apply only to those workers who are genuinely running their own business:[41]

> *'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.'*

We support this recommendation: the definition is precise and clear, and allows scope for genuine contractors to be engaged as such.

The proposed definition also adopts wording from the *Employment Rights Act 1996* (UK) definition of 'worker'. As discussed in the Inquiry Background Paper, UK legislation provides for a third category of 'worker', in addition to employees and independent contractors. Workers are afforded some minimum entitlements, although less than employees.[42]

We certainly see value in extending certain minimum protections to all workers – however, we are concerned that the introduction of a third category of worker into the FW Act may only encourage employers to restructure their arrangements to fit more and more employees into the 'worker' category and reduce overall rights.

We submit that it is preferable to expand the definition of employee to include dependent contractors (or 'workers' under the UK legislation). Our proposed drafting reflects this.

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. However, this definition may capture highly skilled individuals who are in fact operating genuine businesses as individuals rather than incorporating.

Our proposed definition would assist our clients to enforce their rights more efficiently, without inhibiting the ability of those who are genuinely independent to contract accordingly. 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. Please see Appendix One for further details.

Recommendation 11: Introduce a reverse onus to provide minimum entitlements to all workers

To prevent unscrupulous businesses using sham contracting as their business model, and to provide fair protection to on-demand workers, we recommend the insertion of a new section in the FW Act that provides all workers with the right to minimum entitlements, unless the employer/principal can establish the worker was genuinely running their own business.

The introduction of such a reverse onus will provide minimum entitlements to all dependent workers, but still enables principals a defence when they engage genuine contractors.

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[41] Andrew Stewart and Cameron Roles, ABCC Inquiry into Sham Arrangements and the Use of Labour Hire in the Building and Construction Industry, 5.
[42] Dosen & Graham (Research Note No.7, June 2018, Research & Inquiries Unit, Parliamentary Library & Information Service) p10, citing C. Hall and W. Fussey (2018) 'Will employees and contractors survive in the gig economy?' New Zealand Law Society website, 29 March.

Recommendation 12 Limit the current defence

We recommends the insertion of a new section in the FW Act that provides all workers with the right to minimum entitlements, unless the employer/principal can establish the worker was genuinely running their own business.

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

We regard the current provisions in the FW Act as insufficient to discourage sham contracting.

Current provisions offer a defence to an employer which is broad and relatively easy to rely upon. Section 357(2) of the FW Act provides that:

> *(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.*

Employers are often in a 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 in a position to positively assert that the relationship they are entering into with a worker is the correct one.

As such, we support Productivity Commission recommendation 25.1. At the very least, the current employer defences to the sham contracting provisions in the FW Act should be limited:[43]

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

Ideally, there should be no defence for recklessness or lack of knowledge. As a minimum, the law should be amended to ensure that employers are liable when they fail to take reasonable steps to determine a correct classification. For details please see Appendix One.

Recommendation 12 Limit the current defence
To prevent unscrupulous businesses using sham contracting as their business model, and to provide fair protection to on-demand workers, we recommend the insertion of a new section in the FW Act that provides all workers with the right to minimum entitlements, unless the employer/principal can establish the worker was genuinely running their own business.

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

Recommendation 13: Increase scrutiny at the time ABNs are given, and via ongoing enforcement

We also submit that there should be a greater focus on the prevention of sham contracting.

As set out in the Not Just Work report, one way to achieve this is by introducing independent scrutiny and education at the time that an application for an ABN is made. This should include:

- Proper consideration of all the facts and circumstances and the relevant multi-factor test (or updated legal definition as proposed) 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 to individuals after a short internet application; and Applicants who are individuals 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 (and their respective entitlements) is provided. Information about taxation and workplace injury insurance should also be provided at this time.

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

Whether or not a statutory definition is adopted, more needs to be done to clarify the distinction between employees and contractors. This could be achieved by:

- Greater education and targeted assistance to make sham contracting laws; and meaningful for international students and other temporary visa holder workers, and
- Increased 'on-the-spot' inspection and assessment by regulators, as vulnerable workers cannot be expected self-report in all circumstances.

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

Furthermore, any education programs discussed **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 13: Increase scrutiny at the time ABNs are given, and via ongoing enforcement

At the time an ABN is requested, applicants should be required to attend a face-to-face educational meeting to understand the differences between employees and contractors, and learn about insurance and taxation obligations. On the spot inspection and assessment by regulators should also be increased.

6.2 Recommendations 14-16: Ensure minimum entitlements for all vulnerable workers

In addition to the presumption of employment and an inclusive legal definition as recommended above, this section sets out the case for four further measures required to ensure minimum entitlements for all vulnerable workers. These measures combine judicial, legislative and worker-led mechanisms to provide certainty, protect workers and allow flexibility to respond to a changing world of work.

Recommendation 14: Minimum Entitlements Orders and Independent Contractor Status orders

In addition to a broad but rebuttable presumption of employment, we recommend that the FWC should be given the power to make Minimum Entitlements Orders and Independent Contractor Status Orders. This power would enable the FWC to make determinations that certain classes of workers are to be treated as employees, and that protections in the FW Act, or an award or enterprise agreement apply; or alternatively, that certain workers are to be treated as genuine contractors.

This recommendation is based on the Bill introduced by Adam Bandt in 2018 – the *Fair Work Amendment (Making Australia More Equal) Bill 2018* (Cth). This Bill sought to 'help ensure that all workers are entitled to minimum wages, terms and conditions that are no less than those applying to employees', and proposed the insertion of a new Part 6-4B into the FW Act. The new part would allow the FWC to make minimum entitlements orders in respect of one worker or a class of workers, and their constitutionally-covered businesses. It could make orders in relation to a particular industry or part of an industry or a particular kind of work.

Such a provision would provide both certainty – in that classes of workers or employers could ascertain their legal standing – and flexibility – such that the FWC would be able to 'modernise' the broad legislative definition by clarifying its application to new and emerging types of work.

Recommendation 14: The FWC should be given the power to make Minimum Entitlements Orders and Independent Contractor Status Orders.
This would enable the FWC to make a determination that certain classes of workers be treated as employees, and that protections in the FW Act, or an award or enterprise agreement apply; or alternatively, determine that certain workers are to be treated as genuine contractors.

Recommendation 15: Extend outworker protections to contract cleaners and other key industries

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

In addition to the above measures, we recommend extending the outworker protections in the FW Act to cover other key industries for vulnerable workers, and to include a general

provision that allows the government to add further industries by way of regulation. This legislative response would provide much-needed clarity and protection to vulnerable workers in supply chains, including contract cleaners, security workers and those in the community service sector. The provisions would deem all workers to be employees, enable workers to recover unpaid entitlements from indirectly responsible entities and require employers to comply with a relevant codes that set out requirements in respect of monitoring and reporting.

Recommendation 15: Expand specific outworker protections to cover other key industries for vulnerable workers, and allow the addition of further industries by regulation.
Provisions would deem all workers in particular industries (including contract cleaners, security workers and those in the community service sector) to be employees, enable workers to recover unpaid entitlements from indirectly responsible entities and require employers to comply with a relevant codes.

Recommendation 16: Introduce industry wide bargaining

'We need associations for gig economy workers.' (Community leader)[44]

Although the FW Act contains a framework to facilitate collective bargaining, there is a clear preference for single-enterprise agreements only. The objects of the FWA refer to 'an emphasis on enterprise-level collective bargaining'[45] and the objects of Part 2-4 refer to bargaining 'particularly at the enterprise level'.[46] Although the FWA provides for single-enterprise agreements and multi-enterprise agreements,[47] important protections and rights are only provided in relation to single-enterprise agreements, including the obligation to bargain in good faith[48] and the ability to take protected industrial action.[49]

We recommend the introduction of measures to promote industry-wide bargaining that covers all workers engaged in particular classes of work by particular classes of employer or in particular industries. This worker-led response will enable unions and workers to improve minimum standards for the most vulnerable workers who may not clearly fit into standard employment categories, and remove the incentive to misclassify workers. It will also prevent a race to the bottom.

Recommendation 16: Introduce industry wide bargaining that covers all workers engaged in certain classes of work, by particular classes of employer, or in particular industries.

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[44] Community leader, WEstjustice on-demand economy inquiry consultation December 10 2018.
[45] *Fair Work Act* (n 1) 3(f).
[46] Ibid 171(a).
[47] Ibid 12, 172(2).
[48] Unless a low-paid authorisation is in operation (which is rare): Ibid 229(2).
[49] Ibid 413(2).

6.3 Recommendations 17- 22: Increased accountability in labour hire, supply chains and franchises

We welcome the changes effected by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) (**Vulnerable Workers Amendments**) – in particular the introduction of a reverse onus where records have not been kept and the expansion of accountability to responsible franchisors and parent companies. However, without more measures and protections in place, many of our international student clients will remain without recourse.

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

a) The problem

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

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 and emerging 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.'[50]

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.'[51] Although 'both of [these] entities enjoy the benefits of acting as an employer, one will unfairly circumvent labour regulation.'[52] We have seen this in situations where clients in labour hire arrangements, supply chains or franchises are left without a remedy against a host employer, principal or franchisor, who in many circumstances should be held, wholly or partly, responsible for the terms and conditions of the worker.

b) Example: Supply chains

Supply chains involve sub-contracting arrangements whereby there are a number of interposing entities between the ultimate work provider and a worker. An example of a supply

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[50] 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.
[51] Craig Dowling, 'Joint Employment and Labour Hire Relationships – Victoria Legal Aid – Professional Legal Education', 5 October 2015, 1-2.
[52] Ibid.

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.[53] 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.[54]

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

Case study – Jorgio

Jorgio is an international student working as a cleaner on weekends. He was employed by Betty as an independent contractor to clean a shopping centre. Betty directed Jorgio's work timetable and provided him with a uniform and cleaning equipment. Jorgio was underpaid by thousands of dollars. Jorgio came to us because he had not been paid at all for 10 weeks' work. Before that, he had only been paid intermittently. Jorgio did not understand that there was a minimum wage, or that there was a difference between contractors and employees. Ultimately, Jorgio stopped working for Betty and was employed directly by the shopping centre as an employee. With our assistance, Jorgio brought a claim against Betty but, despite winning his case at the Federal Circuit Court, Betty ignored the judgement and disappeared, and Jorgio remained unpaid.

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

c) Self-regulation insufficient

Unfortunately, self-regulation and voluntary compliance is failing. For example, in 2016 the FWO invited eight franchisor chief executives to enter into compliance partnerships with FWO, underpinned by proactive compliance deeds. The initiative was openly supported by the Franchise Council of Australia. However, only one franchisor has engaged with the process, one franchisor refused to participate, and six franchisors ignored the FWO entirely.[55] To effect 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.

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[53] Richard Johnstone et al, Beyond employment: the legal regulation of work relationships (The Federation Press, 2012) 49.
[54] Ibid 67.
[55] 'Franchisors spurning partnership proposals, says FWO', *Workplace Express,* 2 September 2016. Although there have been some further partnerships formed with franchises since this time, a review of published Proactive Compliance Deeds on the FWO website shows less than 20 companies in total have public agreements with FWO: see <https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/compliance-partnerships/list-of-proactive-compliance-deeds> last accessed 19 February 2019.

d) Current laws are insufficient

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

e) Responsible entities

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

Sections 558A and 558B of the FW Act define "franchisee entity" and "responsible franchisor entity" and outline the responsibility of responsible franchisor entities and holding companies for certain contraventions. To hold a franchisor to account, the current definition of responsible franchisor entity requires a worker to show that the franchisor has a 'significant degree of influence or control over the franchisee entity's affairs'. This is too narrow and too onerous for workers, who often lack access to necessary documents and information. It is an unnecessarily difficult burden for vulnerable workers to prove, and it may discourage franchisors from taking an active role in promoting compliance in their franchises, instead rewarding those that take a hands-off approach, or structure their contracts in such a way as to distance themselves from their franchisees. This requirement (that the franchisor be shown to have a significant degree of influence or control over the franchisee entity) is unnecessary because the degree of control able to be exercised by a franchisor is already a relevant consideration when determining liability under s558B(4)(b).

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

The problem is not limited to franchise situations only. Similar to franchisors, lead firms in supply chains (and all others in the chain) and labour hire hosts should be required to take reasonable steps to prevent exploitation. As noted in the FWO's recent report on contract cleaning, 'the FWO's experience is that multiple levels of subcontracting can create conditions which allow non-compliance to occur. The reasons for this include the pressures of multiple businesses taking a profit as additional subcontractors are added to the contracting chain, and the perceived ability to hide non-compliance within convoluted business structures.'[56] We supports the recommendation of Dr Tess Hardy and Professor Andrew Stewart to the Senate Education and Employment References Committee *Inquiry into the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies* that a broader test for secondary liability be introduced 'in terms that are

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

sufficiently general to apply to any form of corporate or commercial arrangement, while retaining the safeguards in that provision to prevent regulatory overreach.'[57]

However, for reasons outlined above, we note that the requirement for a 'significant degree of influence or control' as a threshold test may be problematic for our clients, especially in a supply chain context where a lead firm may turn a blind eye to exploitation and therefore not have/take "significant" control over shonky subcontractors. We suggest an alternative model below, whereby the degree of influence or control is relevant in determining whether reasonable steps were taken.

In any case, we also support the recommendation of Professor Andrew Stewart and Dr Tess Hardy that:[58]

> *'whether a person has significant influence or control over wages or employment conditions should be determined by reference to the substance and practical operation of arrangements for the performance of the relevant work.'*

A person should be deemed to have significant influence or control if it sets or accepts a price for goods or services, or for the use of property, at a level that practically constrains the capacity of the relevant employer to comply with its obligations.

f) Accessorial liability

The accessorial liability provisions in section 550 of the FW Act are problematic.

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

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

Furthermore, the provisions have been interpreted such that an accessory must be aware of the contravention at the time it occurs. This rewards those accessories who fail to address unlawful behaviour once they are aware of it – for example, a director who discovers a breach after it has occurred, and then fails to take steps to rectify any underpayment or other problem, will not be held liable.

This is extremely problematic for our clients. When we have clients who are significantly underpaid, we often send a detailed letter of demand. This letter sets out details of the alleged underpayment, including a copy of relevant award provisions and our calculations.

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

[58] Ibid.

Unless section 550 is broadened to capture "failure to rectify" type situations, in a no-cost jurisdiction there is little legal incentive for accessories to respond to our letters and fix their unlawful activity.

Although the FWO has used section 550 with some success,[59] Hardy notes that there have only been a "handful" of cases where section 550 has been used to argue that a separate corporation is "involved" in a breach. She notes that 'court decisions which have dealt with similar accessorial liability provisions arising under other statutes suggest that the courts may well take a fairly restrictive approach to these questions.'[60]

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

Recommendation 17: Extend liability to all relevant third parties

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

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

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

Like responsible franchisors, responsible supply chain entities will be responsible for a breach where they knew or could reasonably have been expected to know that a breach would occur in their supply chain, and they failed to take reasonable steps to prevent it. It is intended that

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[59] For example, Joanna Howe explains how the FWO brought a claim against Coles for labour hire company Starlink's treatment of trolley collectors. The FWO secured an enforceable undertaking with Coles in which it agreed to rectify underpayments. See Joanna Howe, Submission 109 to Economic, Development, Jobs, Transport and Resources, *Inquiry into Labour Hire and Insecure Work*, 2 February 2016 <http://economicdevelopment.vic.gov.au/__data/assets/pdf_file/0007/1314619/Submission-Dr-Howe.pdf>.
[60] Hardy, above n 53, 10.

these provisions be broad enough to capture other arrangements for the supply of labour, including labour hire arrangements.

For further details and example drafting see Appendix One.

Recommendation 17: Extend liability to all relevant third parties.
In addition to protecting workers in franchises and subsidiary companies, make supply chain entities and labour hire hosts responsible for the protection of workers' rights.

Recommendation 18: Widen the definition of responsible franchisor entity

We also recommend broadening the existing definition of responsible franchisor entity to remove the threshold requirement to show a 'significant degree of influence or control.' We argue that workers should not have high burdens to bring a claim when the franchisors hold all the relevant documents and evidence to show their control over a franchisee. Instead, it should be for the franchisor to show that they had limited influence and control as part of a reasonable steps defence under subsection 558B(4).

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

Recommendation 18: Widen the definition of responsible franchisor entity.
Amend the definition of responsible franchisor entity to ensure that all franchises are covered by removing the requirement for a significant degree of influence or control.

Recommendation 19: Clarify liability of all relevant third parties

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

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

Recommendation 19: Clarify liability of all relevant third parties.
Insert a provision to clarify that responsible franchisor entities, holding companies and other third party entities who contravene clause 558B should also be taken to have contravened the relevant provisions contravened by their franchisee entity/subsidiary/indirectly controlled entity.

Recommendation 20: Clarify the 'reasonable steps' defence to encourage compliance

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

Recommendation 20: Clarify the 'reasonable steps' defence.
Ensure that the 'reasonable steps' defence incentivises proactive compliance, including by requiring independent monitoring and financially viable contracts.

Recommendation 21: Remove requirement for actual knowledge and require accessories to take positive steps to ensure compliance

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

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

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

Recommendation 21: Remove requirement for actual knowledge and require accessories to take positive steps to ensure compliance.
Amend section 550 to require directors and other accessories to take positive steps to ensure compliance within their business or undertaking. Ensure that failure to rectify a breach will also constitute involvement in a contravention.

Recommendation 22: Introduce a Federal Labour Hire Licensing scheme and ensure fair pay for insecure workers

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

Recommendation 22: Introduce a Federal Labour Hire Licensing scheme and ensure fair pay for insecure workers.

6.4 Recommendation 23: Introduce a Wage Insurance Scheme

Case study - Vili

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

Where employees cannot access their unpaid wages via available legal frameworks due to employer insolvency or an employer being uncontactable, an insurance scheme should be available.

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

Examples of other similar schemes include:

- WorkCover, for workplace injury —an insurance scheme where all employers pay a premium;
- Motor Car Traders Guarantee Fund—funded by motor car traders' licensing fees, for consumers who have suffered loss where the trader has failed to comply with the Motor Car Traders Act 1986;[61]
- Victorian Property Fund—funded by estate agent fees, fines and penalties, and interest —provides compensation for 'misused or misappropriated trust money or property;'[62] and
- 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.[63]

[61] Consumer Affairs Victoria, State Government of Victoria (2016) https://www.consumer.vic.gov.au/about-us/who-we-are-and-what -we-do/funds-we-administer/motor-car-traders-guarantee-fund, last accessed 26 July 2018.
[62] Consumer Affairs Victoria, State Government of Victoria (2016) < https://www.consumer.vic.gov.au/housing/buying-and-selling-property/compensation-claims>, last accessed 26 July 2018.
[63] Janice Fine, 'Alternative labour protection movements in the United States: Reshaping industrial relations?' (2015) *International Labour Review* 154(1), 20.

Recommendation 23: Introduce a Wage Insurance Scheme.
Where employees cannot access their unpaid wages via available legal frameworks, an insurance scheme should be available.

6.5 Recommendation 24: Ensure all workers receive superannuation

At least one quarter of the ISWRLS clients to date have a legal question relating to superannuation or not being paid superannuation. Very few international student clients receive the superannuation owed to them, while others miss out on an entitlement to be paid superannuation, as they do not meet the minimum earnings threshold. This is particularly true for international student workers, who cannot work full time hours.

For those with unpaid superannuation, there are often limited avenues for redress. A worker can make a complaint to the Australian Tax Office, which may or may not be pursued. Once a complaint is made, avenues are limited for a client to pursue their claim themselves. If superannuation is referred to in an applicable Award, the employee may be able to include superannuation as part of any claim for other unpaid wages or entitlements – but orders are not always made in respect of superannuation. In addition to disadvantaging the most vulnerable, as noted Dosen and Graham above, this has significant impacts on the Australian economy and social security system.

We recommend that the Government ensure all employees can obtain superannuation owed to them by making it part of the National Employment Standards. This will provide employees with a direct mechanism to pursue their own claims. In addition to providing a mechanism for employees, the Federal Government should provide independent contractors with a legislative mechanism to pursue unpaid superannuation directly. To ensure all workers can obtain superannuation, regardless of age or hours worked, we further recommend that the minimum earnings threshold and minimum age restrictions be removed.

Recommendation 24: Ensure workers receive superannuation owed to them *by making it part of the National Employment Standards, providing independent contractors with a legislative mechanism to pursue unpaid superannuation directly and removing the minimum earnings threshold and minimum age restrictions*

6.6 Recommendation 25: Expanded existing licensing schemes to promote compliance

Building on its labour hire licensing legislation and hire car industry reforms,[64] State Governments should consider ways that it can regulate the on-demand economy through the use of licensing schemes.

The State Government should require on-demand companies in particular industries (including passenger transport, contract cleaning, food delivery, flier distribution, car wash and community services), to hold licenses. The licenses would enable the State to regulate the operators in a particular industry, and ensure that companies are required to comply with relevant laws including employment, superannuation and workplace safety.

We recommend that the licensing scheme contain the following features:[65]

[64] See <https://transport.vic.gov.au/Getting-around/Taxis-hire-car-and-ridesharing/Industry-reforms> last accessed 20 February 2019.
[65] Many of these recommendations are adopted from the National Union of Workers proposed Victorian Labour Hire

- To operate a business in particular on-demand industries (for example, flyer distributors), or to provide a platform for the provision of on-demand services (for example, Uber), businesses/individuals must first obtain a license;
- To obtain a license, the holder must:
    - Pay a bond and annual fee to the State Government
    - Meet threshold capital requirements to ensure an ability to pay workers and insurance
    - Meet a fit and proper person test and ongoing reporting obligations
    - Demonstrate compliance with minimum workplace (and consumer) safety standards
    - Agree to participate and be bound by determinations of VCAT or a dedicated tribunal in respect of non-compliance, and
    - Fund and participate in mandatory workplace rights and entitlements training for the license holder, workers and general community, as determined by the Victorian Government/compliance unit.
- The license holder will receive a license number, and this number must be published on all job advertisements and correspondence between workers and the business. The license number should be traceable on a publicly accessible website and provide up-to-date names and contact details for the business/individuals engaging the workers;
- Importantly, like the Victorian labour hire legislation, the on-demand licensing scheme should Impose penalties on those who engage unlicensed providers, as well as the providers themselves. This would incentivise larger businesses to avoid unscrupulous businesses;
- The scheme should be regulated by a dedicated and well resourced compliance unit.
- Third parties, including unions and community legal centres, should have standing to bring actions for non-compliance – either at a low cost forum such as VCAT, or a dedicated tribunal; and
- An education program regarding the scheme must be delivered for community members, business and online platforms like Gumtree. The program would encourage workers to request a license number if it is not displayed – and report businesses that do not display a number.

The **above** proposed scheme would enable a client like Andrea to seek redress as she could find Tony via his license number (see case study above in 4.2c).

We acknowledge that the Victorian Government has introduced some reforms to the taxi and hire car industry via the *Commercial Passenger Vehicle Industry Act 2017* (Vic) and *Commercial Passenger Vehicle Industry Amendment (Further Reforms) Act 2017* (Vic). and recommend that the effectiveness of these laws, particularly in respect of workplace and consumer safety, complaints handling and compliance with workplace laws, could be reviewed as part of the development of a licensing scheme.[66]

Licensing model. See: <https://djpr.vic.gov.au/inquiry-into-the-labour-hire-industry/submissions> last accessed 20 February 2019.

[66] A different model for consideration can be found in America, where New York City created a licensing scheme for rideshare drivers in August 2018. As an article in the Conversation describes, the new law: *'creates a new licence for "high-volume for-hire service" – that's companies serving over 10,000 trips a day. The licence is accompanied by new regulatory powers given to the Taxi and Limousine Commission, including a one-year moratorium on new licences. This is a significant development in an already crowded market, and a first step in addressing concerns about traffic congestion and driver waiting times. Most significantly, the commission will set minimum payments for drivers operating under the new high-volume licence, and potentially implement minimum payments for existing licences. Technically, this is not minimum wage legislation. However the introduction of regulation of the number of vehicles and of a minimum payment is a significant shift. It could end the current race to the bottom. At the moment, rideshare companies are competing with each other by saturating the market. They are hiring as many new drivers*

Although such licensing schemes may serve to heighten barriers for entry into on-demand work (which is a recognised advantage for migrant and young workers who otherwise find it hard to find work), we consider that the improved protections and conditions outweigh the possibilities of increasing the difficulty of gaining employment.

Recommendation 25: The Federal Government should call on the States to expand licensing schemes to promote compliance and raise revenue
The State should require on-demand companies in particular industries (including ride-share, contract cleaning, food delivery, flier distribution and community services), to hold licenses. The licenses would enable the State to regulate the number of operators in a particular industry, and ensure that companies comply with relevant laws including employment, superannuation and workplace safety.

6.7 Recommendation 26: Better workplace safety laws

'Work is not safe – some drivers refuse to work Friday or Saturday nights because of intoxicated passengers.' (Community leader)[67]

'No safety concerns, for example no safety cameras on car.' (Community leader)[68]

Many of our international student clients perform work in the on-demand industry. Our casework and consultations reveal that on-demand work is often unsafe and isolated. In addition to Irini's story above, Ana's story provides another powerful example (see case study above in 4.2d).

Unfortunately, it is not clear whether existing provisions of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (**WIRCA**) cover on-demand workers.

If a worker has suffered an injury arising out of or in the course of employment, they are entitled to compensation under the section 39(1) of WIRCA. There are four categories of workers under the Act:

1. Those under a contract of service or apprenticeship;
2. Those who are deemed to be working under a contract of service;
3. Those who are deemed to be workers;
4. Some volunteers.

Schedule 1 sets out numerous categories of persons deemed to be workers for the purposes of WIRCA. For example, there are specific provisions protecting door to door sellers (ss.5) and timber contractors (ss.6). Unfortunately, the specific category for 'drivers carrying passengers for reward' (ss.7) is limited to bailment arrangements, and it is not clear whether the broader protection for contractors (ss.9) would apply to on-demand workers.[69]

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as they can, reducing the commission they pay to drivers and mechanically limiting the "surge" price periods when rides are more expensive because of high demand. With fewer drivers on the road and a minimum price, drivers might actually be able to start making a decent living. It might also lead to a shift to competition on quality of service rather than quantity and price, benefitting the customer.' See Emmanuel Josserand and Sarah Kaine, *People power is finally making the gig economy fairer*, The Conversation, 10 August 2018.

[67] Community leader, WEstjustice on-demand economy inquiry consultation, December 10 2018.

[68] Community leader, WEstjustice on-demand economy inquiry survey.

[69] While the argument could be made with the right client (if they derive 80% of their income from one platform only), subsection (1)(c) is unclear in its reference to the services being provided by the "same individual". This subsection is usually applied in the context of 80% of the totality of the particular service being performed by the same individual – e.g. a builder outsources 80% of the scaffolding work to the one individual and at least 80% of that individual's gross income is derived from that contractual arrangement.

Hence, many workers involved in traffic accidents are advised to pursue TAC claims instead.

This is not satisfactory. Firstly, workers who are not injured in traffic accidents will not have access to TAC. Secondly, employing entities are shirking their insurance obligations in light of legislative uncertainty. It is not fair that such companies gain a competitive advantage by denying their dependent workers access to much-needed entitlements.

Instead, it is recommended that the Federal Government call on State Governments to take steps to ensure all workers are provided with access to workers' compensation arrangements. Specific deeming provisions for certain classes of on-demand workers would be an important start. Platform companies would then have to extend their WorkCover insurance policies to include all of their on-demand workforce.

On-demand platform companies must also be required to take further steps to promote workplace safety and protect on-demand workers from harm. Section 21 of the *Occupational Health and Safety Act 2004* (Vic) requires employers to provide and maintain a working environment that is safe and without risks to health, so far as is reasonably practicable. This obligation extends to independent contractors, who are deemed to be employees (ss.21(3)). It is essential that such obligations are appropriately enforced.

We call on the Federal Government to work with State Governments to improve workplace safety laws for the most vulnerable workers and stop on-demand companies from shirking responsibility. Vulnerable on-demand workers must have access to safe work and WorkCover if they are injured. On-demand companies must not undercut other businesses who rely on secure employment by gaining a competitive advantage through avoiding the payment of WorkCover premiums. The State Government must ensure that workplace safety laws require gig economy companies take responsibility for the safety of their workers. Current deeming provisions must be extended to clarify that certain on-demand workers are deemed to be working under a contract of service and entitled to WorkCover, and companies must pay insurance.

Recommendation 26: The Federal Government should call on the States to improve workplace safety laws for the most vulnerable workers and stop on-demand companies from shirking responsibility
State Governments must ensure that workplace safety laws require gig economy companies take responsibility for the safety of their workers. Current deeming provisions must be extended to clarify that certain on-demand workers are deemed to be working under a contract of service and entitled to WorkCover, and companies must pay insurance.

6.8 Recommendations 27 and 28: Procurement policies, industry codes and tax incentives

We encourages the Federal Government to use procurement policies to improve minimum standards and promote compliance.

We recommend that the Government review all procurement policies to ensure that tenders for Government work can only be submitted by companies with an independently verified and demonstrated track record of compliance with workplace laws, and a demonstrated commitment to secure work and diversity targets.

We note that private schemes like the Cleaning Accountability Framework can provide a useful mechanism to promote compliance within industries, along with proactive compliance deeds that require retailers to monitor their supply chains and rectify underpayments. We therefore recommend that the Federal Government review all procurement policies to ensure

that tenders for Government work can only be submitted by companies that hold accreditation under any relevant schemes.

Importantly, we consider that any procurement policies must be properly monitored and enforced.[70] This includes a requirement for independent verification which measures performance against objective standards.

We commend the ACT's Secure Local Jobs Code and certification process in this regard. Since January 2019, the ACT Government has required that contractors tendering for construction, cleaning, security or traffic management work meet particular Code Standards and have a Secure Local Jobs Code Certificate. For work over $25,000 in value, contractors must also have a Labour Relations, Training and Workplace Equity Plan. Importantly, to obtain Code certification, businesses must engage an approved auditor.[71]

Finally, the Government should refuse to reimburse staff for costs incurred in the use of on-demand platforms that do not comply with procurement policies, thus requiring staff to use alternative services.

Recommendation 27: Increase use of procurement policies, proactive compliance deeds and industry codes to improve compliance.
The Government should require demonstrated compliance with workplace laws and relevant industry codes in order to tender for government contracts.

Recommendation 28: Consider the provision of tax incentives for businesses that can demonstrate compliance with laws and a commitment to secure work and diversity targets.

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

[71] Available at <https://www.procurement.act.gov.au/secureloca jobs>,last accessed 18 February 2019.

7. Improving regulatory frameworks to ensure that laws are effectively enforced

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 Worker

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

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

Building on section 5, this section sets out our further recommendations to ensure workers have adequate representation and knowledge of their rights, and that laws are efficiently and effectively enforced.

7.1 Recommendation 29: Introduce an office of the contractor and worker advocate

Currently, there are few or no services to assist vulnerable contractors. For our clients who don't speak any English, it is impossible to fill out a VCAT claim form without assistance. As noted above, very few community organisations provide assistance to vulnerable contractors – and the government-funded Independent Contractor Hotline no longer operates.

The Federal Government should establish an Office of the Contractor Advocate. The Advocate could provide information to individual workers and businesses about whether they are independent contractors or employees, investigate and report on systemic non-compliance, and assist vulnerable workers to navigate VCAT (or other appropriate forum in other states and territories) and other jurisdictions to recover minimum entitlements.

The Advocate could investigate the barriers that vulnerable contractors face to accessing jurisdictions like VCAT, and make recommendations to address this.

The Advocate could also investigate and recommend better regulation of websites like Gumtree, and work with such platforms to better protect workers' rights.

Recommendation 29: The Government should establish an Office of the Contractor Advocate.
The Office would provide information and guidance to individual workers and businesses and also investigate and report on systemic non-compliance.

7.2 Recommendations 30: Better protection from discrimination at work

International students often experience significant physical, financial and emotional harm from discrimination, sexual harassment, unsafe work and unfair dismissals. Based on the experience of our clients, women are more likely to be exploited by employers and experience discrimination at work, but are less likely to pursue discrimination claims.

Although discrimination was commonly reported in consultations for WEstjustice's Preliminary Report[72] and women's outreach project,[73] this issue was not observed as frequently in our casework service. Only 4% of ISWRLS clients received advice on discrimination.

Clients may believe they cannot "prove" their case, or experience low awareness of Australian laws, fear of legal processes and authority, and/or the deep pain that reliving traumatic events can evoke. 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.[74]

There are practical considerations to low enforcement – many of the women we encountered had recently given birth or were pregnant. One of our clients with a newborn cancelled her appointment – it was simply too difficult. We were in and out of Court at the time another client's baby was due – the strength and courage that it takes to pursue a case in such circumstances is incredible. Clients also faced family and community pressure to discontinue claims.

Workers who experience discrimination have a range of legal options including making a complaint to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC).[75]

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[72] 47% of survey respondents reported that discrimination at work was common, somewhat common, or that they or someone they knew had experienced it: 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>, 8 (**Preliminary Report**).

[73] With financial support from the Victorian Women's Trust, WEstjustice explored the working experiences of women from newly arrived and refugee communities. In addition to analysing client data from our legal service, we engaged with various women's groups, including sewing groups, financial literacy classes and playgroups. At these meetings we shared information about workplace rights and respons bilities, and heard from women about their experiences at work. We heard similar stories over and over – a lady who had found work at a laundry, and 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. Another lady, employed as a casual, promised her job back after taking time off to have her second child, and refused a job upon return. Women who never received a job interview until they anglicised their names, or who were warmly invited to an interview only to be told the position was taken when they saw her hijab.

[74] According to VicHealth, '[t]here is a strong relationship between exposure to discrimination and poor mental health': VicHealth, 'More than tolerance: Embracing Diversity for Health', (Summary Report, 2007), 11-12.

[75] Other options include the Australian Human Rights Commission (AHRC), Victorian Civil and Administrative Tribunal or the Fair Work Commission.

Each approach requires the complainant to make a written application and follow their case through. There is no proactive regulator who can run a case on behalf of a client,[76] or gather intelligence and prosecute an employer. Given the power imbalances and lack of enforcement, there are few incentives for employers to take positive steps to reduce discrimination.

We submit that the power and resources of the Australian Human Rights Commission (**AHRC**) and/or the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) and/or WorkSafe should be enhanced, and/or a Discrimination Ombudsman Office be established, to allow for the investigation and enforcement of breaches of anti-discrimination and sexual harassment laws.

In the UK, US and some Canadian jurisdictions, the regulator can provide advice and direct support to complainants. We consider that the VEOHRC (and AHRC) should have the power to assist clients with meritorious claims and run strategic litigation to promote compliance, just as the FWO can stand in the shoes of an applicant and prosecute a company directly. Like the FWO, mediation and enforcement could be delivered by separate teams within the VEOHRC and AHRC, which we consider appropriate, given their specific expertise in anti-discrimination conciliation.

In addition to the problem of the complaints-based model, current remedies in anti-discrimination law often do not address the problem of discrimination. Most claims settle for financial compensation, without addressing the problem of discrimination itself – meaning businesses do not make any meaningful change.

The introduction of a discrimination ombudsman (operating as part of a strengthened VEOHRC/WorkSafe/AHRC) would assist in addressing the fundamental causes of discrimination and sexual harassment as experienced by women in the workforce. Expanding the powers and resources of the VEOHRC and the AHRC would also assist in addressing the discrimination faced by migrant and refugee women in the course of their employment, or their exposure to the Australian labor market more broadly.

We consider that the implementation of a well-resourced regulator with widespread enforcement powers would 'counter the deep pocket/repeat player advantage enjoyed by some respondents'.[77] It could promote systemic change within problem workplaces, by:

- Undertaking own-motion investigations and prosecutions;
- Promoting and seeking systemic remedies (including workplace training and compliance audits);
- Running powerful education campaigns; and
- Championing the benefits of diverse workplaces free from exploitation.

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[76] The Fair Work Ombudsman does have a general protections team however it has only brought a small number of prosecutions. Victoria Legal Aid has an equality law program that provides invaluable assistance to vulnerable clients with discrimination claims – but still this places responsibility on an individual to bring a claim. The Victorian Equal Opportunity and Human Rights Commission has limited powers 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).

[77] Beth Gaze and Rosemary Hunter: Access to justice for discrimination complainants: courts and legal representation (2009) 32 UNSW Law Journal 699, 699.

A discrimination ombudsman could also support sexual harassment workplace claims; in light of the AHRC's recently released report on the extremely low levels of reporting sexual harassment incidents.[78]

In addition to the introduction of a new regulator, we submit that the government can play a further role in reducing discrimination at work. Such steps should include:

- 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 (as proposed); and
- Funding targeted education campaigns for newly arrived and refugee workers, and
- Funding specialist legal services to provide free assistance to migrant workers experiencing discrimination at work.

Recommendation 30: Introduce a discrimination ombudsman or expand AHRC powers to investigate and enforce breaches of anti-discrimination laws. Amend existing legislation to require employers to take more positive steps to prevent discrimination and introduce a reverse onus of proof.
An appropriately resourced and empowered regulator would allow for the investigation and enforcement of breaches of anti-discrimination laws, education campaigns and a focus on systemic change. The law should also be amended to require employers to take more positive steps to prevent discrimination and introduce a reverse onus of proof.

7.3 Recommendations 31-34: Existing agencies must be more accessible and responsive

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

We have assisted many clients who were turned away from FWO and were unable to enforce their rights without support. For example:

Case study – Pavel

Pavel is a newly arrived refugee. He does not speak much English and cannot write. He got his first job as a cleaner. He often worked 12 or 14 hour shifts but was only paid for five

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[78] 47% of survey respondents reported that discrimination at work was common, somewhat common, or that they or someone they knew had experienced it: Preliminary Report, 8.

hours' work each shift. He was also paid below the minimum pay rate. Pavel came to us 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.

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

a) What works well

As set out in the Not Just Work report (chapter 4), key agencies including the FWO and FWC are taking several positive steps to ensure compliance with relevant laws. For example, numerous clients have received assistance via our warm referral process with FWO, whereby CLC 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. We are pleased this process was reinstated after a short period of abandonment.

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

Case study – Cleaners benefit from Employment Justice Train the Trainer program

We 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 us at a familiar meeting place. Our 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 our staff and volunteers to complete complaint forms, as the workers did not speak English. FWO then liaised with the relevant employer and ultimately over $20,000 in unpaid wages was recovered for numerous vulnerable community members. The workers said they would never have made a complaint without help from their community leader.

Of particular benefit to international students and other temporary visa holders are the systemic outcomes flowing from investigations and FWO's ability to look at industry wide issues. Whenever possible and with our clients' consent we share intelligence with FWO about systemic breaches.

In such situations, FWO's power to audit workplaces in an own motion investigation capacity removes the onus from individual complainants who are vulnerable, and enables systemic change across workplaces. Through the warm referral process, we have been able to bring matters to FWO's attention and FWO has used the information provided as part of broader investigations. Such actions enable FWO and community legal centres 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 us 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.

b) Without help, workers cannot articulate complaints

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

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

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

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

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

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

c) Cultural responsiveness frameworks

As set out in the Not Just Work Report, agencies must take steps to improve their cultural responsiveness and accessibility.[79] Such frameworks should:

- Develop specific protocols and checklists for frontline staff to identify newly arrived and refugee clients and assist them to articulate their claims;

[79] Hemingway, above n 5, 26.

- Provide frontline staff with adequate training and resources to be able to better identify and assist clients who experience sham contracting;
- 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.

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

Recommendation 31: Agencies need to improve cultural responsiveness frameworks
Including specific protocols and checklists for Infoline staff, engaging dedicated staff and participating in and resourcing education and engagement programs.

Recommendation 32: Greater collaboration, resourcing and action to address the superannuation black hole

Agencies should also play a more active role in assisting with the detection and enforcement of unpaid superannuation. As discussed above, very few of our on-demand workforce clients receive any superannuation, and we found it extremely difficult to assist clients to obtain their minimum entitlements.

We recommend that the Federal Government and FWO urgently address the issue of unpaid superannuation. It is estimated that unremitted superannuation is in the hundreds of millions of dollars. As argued by Helen Anderson and Tess Hardy, we agree that 'more should be done to improve the detection and recovery of non-payments because of the importance of superannuation to both employees and the government.' As Anderson and Hardy state, any model of enforcement that shifts the policing of unpaid superannuation to employees is flawed.' While the ATO is primarily responsible, the FWO 'is well placed to supplement the efforts of the ATO, and should be encouraged, and appropriately resourced, to do so.'[80] Community legal centres should be funded to deliver on the ground education to communities, refer clients to appropriate agencies, and assist clients to navigate any enforcement processes.

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

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[80] 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.

Recommendation 32: Greater collaboration, resourcing and action to address the superannuation black hole
FWO and the ATO need to be appropriately resourced to pursue unpaid superannuation claims, and community legal centres should be funded to assist.

d) Enhanced powers to aid efficient resolution avoid the need for court

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

At present, employers cannot be compelled to attend FWO mediations. When pursuing underpayment claims, we usually send a letter of demand to the employer setting out our calculations and the amount owed. We routinely find that employers ignore this correspondence. For some cases, we have found that assistance from the FWO to investigate and mediate disputes has meant that employers are more likely to participate in settlement negotiations.

However, in our experience, it is unfortunately common for employers to refuse to attend mediation with employees in cases of non-payment of wages. For many clients, this has meant that the FWO has closed the file.

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

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

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

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

Like the Australian Financial Complaints Authority (**AFCA**), the Applicant should be able to determine whether or not they accept the binding determination. If they do not accept it, they retain the option of proceeding to Court. Importantly, the FWO should also be empowered to

hold individual directors jointly and severally liable for any amount owing, including penalties. Again, this will act as an incentive to resolve disputes sooner.

The ACFA, like FWO, is an independent and impartial ombudsman service. In the first instance, AFCA usually refers the matter to the relevant financial firm. If this does not resolve the issue, AFCA will review the file and contact each of the parties to clarify issues/request further information. AFCA will try and assist parties to resolve their issue, but if agreement cannot be reached, the AFCA has the power to make a binding determination. As the AFCA website explains, if informal approaches are unsuccessful:[81]

> *'we may then use more formal methods, where we may provide a preliminary assessment about the merits of your complaint, or we may make a decision (called a determination). If we make a determination that is in your favour and you accept it, the financial firm is required to comply with the determination and any remedy that we award.'*

The FWO's structure is different from that of the AFCA (which is membership-based). Although FWO could be empowered to make a determination, there needs to be a basis on which to oblige the employer to abide by any such determination.[82] There are several options for addressing this issue:

- All license schemes (including the on-demand workforce license schemes recommended **above**, and any existing labour hire license schemes) should require license holders to agree to be bound by FWO determinations; and
- The Federal Government could amend the FW Act such that if a case proceeded to Court because an employer failed to comply with a FWO determination, there would be a reverse onus (where an employer is required to disprove any determination), and automatic cost consequences if the Court finds in the employee's favour (see recommendation 29 **below**).

We call for a review of current FWO powers and processes, and recommends that powers be expanded to enable such determinations and wherever possible, make them binding on employers. This recommendation echoes the Senate Education and Employment References Committee's call for an independent review of the resources and powers of the FWO.[83]

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

e) Recommendations to improve FWO's enforcement powers

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

In addition, in the event that the employer nevertheless refuses to participate in a mediation, or mediation fails, it is proposed that the FWO issue an Assessment Notice that sets out the FWO's findings as to the employee's entitlements. An applicant may then rely on the

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[81] See <https://www.afca.org.au/what-to-expect/consumers/>, last accessed 20 February 2019.
[82] Making binding determinations as to legal entitlements is the role of the judiciary rather than the executive.
[83] Education and Employment References Committee, The Senate, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (March 2016), xiv, 278–283; 327–328.

Assessment Notice in the court proceeding. Where the applicant has an Assessment Notice, the applicant is taken to be entitled to the amounts specified in the Assessment Notice unless the employer proves otherwise.

Recommendation 33: Cost consequences for employers who refuse to engage with FWO and Assessment Notices for employers who refuse to engage or have unmeritorious claims

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

Further, where an employer refuses to participate in mediation, or where mediation fails, we recommend that FWO have the power to issue an Assessment Notice that sets out the FWO's findings as to the employee's entitlements. An applicant may then rely on the Assessment Notice in the court proceeding. Where the applicant has an Assessment Notice, the applicant is taken to be entitled to the amounts specified in the assessment notice unless the employer proves otherwise. If the employer does not prove otherwise, there should be an automatic award of costs against the employer.

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

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

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

Finally, we recommend that all license schemes (including the on-demand workforce license schemes recommended **above**, and any existing labour hire license schemes) should require license holders to agree to be bound by FWO Assessment Notices.

Recommendation 33: Cost consequences for employers who refuse to engage with FWO and Assessment Notices for employers who refuse to engage or have unmeritorious claims
Make it clear that there will be costs consequences if an employer unreasonably refuses to participate in a matter before the FWO. Where an employer refuses to participate in mediation, or mediation fails to resolve a dispute, FWO should have the power to issue an Assessment Notice that sets out the FWO's findings as to the employee's entitlements. An applicant may then rely on the Assessment Notice in the court proceeding. Where the applicant has an Assessment Notice, the applicant is taken to be entitled to the amounts specified in the assessment notice unless the employer proves otherwise. If the employer is unsuccessful at Court, costs should automatically be awarded against them.

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f) Proactive compliance and more resourcing

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

It is essential that agencies take proactive measures in key industries and locations where there is suspected widespread exploitation – like contract cleaning. Such measures should include inspection of records and actions to recover any discovered underpayments. FWO has undertaken such initiatives in the past,[84] however more extensive and regular initiatives are required.

We appreciate 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. We echoes recommendation 29.2 of the Productivity Commission in its report on the Workplace Relations Framework:

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

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.[85]

Recommendation 34: Increased resourcing and more proactive compliance required

We recommend more proactive compliance and increased resourcing of the FWO. Recognising that vulnerable workers, particularly those engaged in the on-demand workforce, are not always able to bring a complaint themselves, agencies must be adequately resourced to identify systemic issues and respond proactively.

Recommendation 34: Increased resourcing and more proactive compliance required
More proactive compliance and increased resourcing of the FWO. Vulnerable workers are not always able to bring a complaint themselves. Agencies must be adequately resourced to identify systemic issues and respond proactively.

7.4 Recommendation 35: Establish a new wage theft tribunal and/or make current court processes quicker and simpler

Our services support efforts to help employees bring wage recovery action against their employer and initiatives to facilitate cultural change so that employers will stop underpaying workers. The legal pathways to wage recovery are costly, require significant effort and are

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[84] See FWO's Tasmanian Contract Cleaners Report, above n 12.
[85] Education and Employment References Committee, above n 40.

risky for the migrant worker's visa status.[86] There is no current, effective pathway providing access to justice for individual migrant workers to recover their wages that is timely, affordable and easy to understand.

The small claims procedure in the Fair Work Division of the Federal Circuit Court has the benefit of a court process that is quicker, cheaper and more informal than regular court proceedings. However, the process of completing the relevant forms, performing complex underpayment calculations and self-representing in court for persons of CALD backgrounds can still be prohibitively complicated. Claims in this division are also capped at $20,000 and employers cannot be ordered to pay penalties.

The Migrant Worker Taskforce Report indicates that in 2016-2017 the average small claims matter in the Fair Work Division of the Federal Circuit Court took 4.3 months from lodgement to finalisation.[87] The 2017-2018 Federal Circuit Court Report estimates the median time for trial in the general division is 15.2 months, a figure not specific to the Fair Work Division. For working holiday makers who complete a 6 month farm stay, and many international students, the wait required to pursue a claim, particularly in the General Division, may extend past the length of their stay.

Our services have found that international students sometimes do not initiate legal proceedings because they know they will not be in the country long enough to see the end of their court process. Legal proceedings are too long to allow them to recover their underpaid entitlements.

Our lawyers and volunteers regularly spend days calculating how much a single client has been underpaid. Our services do not have the capacity to represent every client that we advise, and so some clients calculate their underpayment, prepare and file their matters themselves, with varying levels of success.

Due to visa concerns and the assurance protocol between FWO and the DHA, (see section **Error! Reference source not found.** above) the only suitable pathway for some of our clients t o pursue is a FWO complaint. However, that is not always an avenue for the individual recovery of wages. The FWO is concerned with overall workplace compliance and is not an advocate for complainants.[88]

FWO cannot guarantee the recovery of wages, disincentivising workers from making complaints. The Wage Theft Report states that *'for every 100 underpaid migrant workers, only three went to the Fair Work Ombudsman. Of those, well over half recovered nothing.'*[89]

We recommend establishing a new wage theft tribunal, facilitating individual wage recovery via mediation and enforceable orders, based on the applicant-led model for bringing unfair dismissal claims at the Fair Work Commission. We refer to Laurie Berg and Bassina Farenblum's submission to this inquiry on behalf of the Migrant Worker Justice Initiative (Submission 33), and note refer the Committee to recommendation 15 and in lieu of that recommendation 16. We support these recommendations.

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[86] Farbenblum and Berg, above n 6, p 6.
[87] Report of the Migrant Worker Taskforce (2019) available at <https://www.ag.gov.au/industrial-relations/publications/report-migrant-workers-taskforce>, p 94.
[88] Australian Government: *Fair Work Ombudsman, About us – Our Purpose* (website), <https://www.fairwork.gov.au/about-us/our-purpose>.
[89] Bassina Farbenblum and Laurie Berg, Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia (2018) available at < https://static1.squarespace.com/static/593f6d9fe4fcb5c458624206/t/5bd26f620d9297e70989b27a/1540517748798/Wage+theft+in+Silence+Report.pdf>.

Recommendation 35: Establish a new wage theft tribunal and/or make current court processes quicker and simpler

8. Conclusion

It is essential that our workplace relations framework protects those most at risk of exploitation – including temporary visa holders. We believe our recommendations will strengthen legal frameworks and processes to ensure that international students and other vulnerable workers can access fair pay and decent work.

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

9. Appendix One: Compilation of drafting suggestions

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

Sham contracting

Type of change	Section	Drafting suggestions
Amend existing provision	357	**357 Misrepresenting employment as independent contracting arrangement** (1) A person (the ***employer***) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor. Note: This subsection is a civil remedy provision (see Part 4-1). (2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer: (a) did not know; ~~and~~ (b) was not reckless as to whether; and (c) could not reasonably be expected to know that the contract was a contract of employment rather than a contract for services.
Insert new provision	357A	(1) An individual who performs work for a person (the principal) under a contract with the principal is taken to be an employee (within the ordinary meaning of that expression) of the principal and the principal is taken to be the employer (within the ordinary meaning of that expression) of the individual for the purposes of this Act. (2) Subsection (1) does not apply if: (a) the principal establishes that the individual is completing work for the principal as on the basis that the principal is a client or customer of a business genuinely carried on by the individual; or (b) the individual is on a vocational placement. Note: When determining whether a business is genuinely carried on by an individual, relevant considerations include revenue generation and revenue sharing arrangements between participants, and the relative bargaining power of the parties. See Recommendations 11 and 12 for background information.

Increased accountability in franchises, labour hire and supply chains
Division 4A – Responsibility of responsible franchisor entities and holding companies for certain contravention

Type of change	Section	Drafting suggestions
Insert new subsection	558AA	A person who is responsible for a contravention of a civil remedy provision is taken to have contravened that provision. See Recommendation 19 for background information.
Amend and insert new subsection	558A	**558A Meaning of franchisee entity, ~~and~~ responsible franchisor entity and responsible supply chain entity** (1) A person is a **franchisee entity** of a franchise if: (a) the person is a franchisee (including a subfranchisee) in relation to the franchise; and (b) the business conducted by the person under the franchise is substantially or materially associated with intellectual property relating to the franchise. (2) A person is a **responsible franchisor entity** for a franchisee entity of a franchise if: (a) the person is a franchisor (including a subfranchisor) in relation to the franchise; and (b) the person has ~~a significant degree of~~ influence or control over the franchisee entity's affairs. (3) A person is a responsible supply chain entity if there is a chain or series of 2 or more arrangements for the supply or production of goods or services performed by a person (the worker); and (a) the person is a party to any of the arrangements in the chain or series and has influence or control over the worker's affairs or the person who employs or engages the worker; or (b) the person is the recipient or beneficiary of the goods supplied or produced or services performed by the worker. See Recommendations 17 and 18 for background information. Note that minor amendments will also need to be made to 558B(3), 558C and in Part 7 – application and transitional provisions. We do not provide drafting instructions for these minor amendments.

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

		(i) the franchise; (ii) the body corporate or any subsidiary (within the meaning of the Corporations Act 2001) of the body corporate; or (iii) the person's supply chain arrangements as the case may be; (f) the extent to which the person's arrangements (whether legal or otherwise) with the contravening employer encourage or require the contravening employer to comply with this Act or any other workplace law. See Recommendation17 for background information.
Insert new legislative note	558B(4)	Note: Reasonable steps that franchisor entities, holding companies and indirectly responsible entities can take to show compliance with this provision may include: ensuring that the franchise agreement or other business arrangements require all parties to comply with workplace laws, providing all parties with a copy of the FWO's free Fair Work handbook, requiring all parties to cooperate with any audits by FWO, establishing a contact or phone number for employees to report any potential underpayment or other workplace law breaches and undertaking independent auditing. See Recommendation 20 for background information.

Increased accountability for accessories

Type of change	Section	Drafting suggestions
Repeal and substitute	550	**550 Involvement in contravention treated in same way as actual contravention** (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision. Note: If a person (the **involved person**) is taken under this subsection to have contravened a civil remedy provision, the involved person's contravention may be a serious contravention (see subsection 557A(5A)). Serious contraventions attract higher maximum penalties (see subsection 539(2)). (2) A person is **involved in** a contravention of a civil remedy provision if, and only if, the person: (a) has aided, abetted, counselled or procured the contravention; or (b) has induced the contravention, whether by threats or promises or otherwise; or (c) has been in any way, by act or omission, directly or indirectly~~, knowingly~~ concerned in or party to the contravention; or (d) has conspired with others to effect the contravention. (3) For the purposes of paragraph (2)(c), a person is concerned in a contravention if they: (a) knew; or (b) could reasonably be expected to have known, that the contravention, or a contravention of the same or a similar character would or was likely to occur; or (c) became aware of a contravention after it occurred, and failed to take reasonable steps to rectify the contravention. (4) For the purposes of paragraph 3(b), a person will not be taken to be reasonably expected to have known that the contravention, or a contravention of the same or a similar character would or was likely to occur if, as at the time of the contravention, the person had taken reasonable steps to prevent a contravention of the same or a similar character. (5) For the purposes of subsection (4), in determining whether a person took reasonable steps to prevent a contravention of the same or a similar character, a court may have regard to all relevant matters, including the following: (a) the size and resources of the person; (b) the extent to which the person had the ability to influence or control the contravening person's conduct

Type of change	Section	Drafting suggestions
		in relation to the contravention or a contravention of the same or a similar character; (c) any action the person took directed towards ensuring that the contravening person had a reasonable knowledge and understanding of the requirements under this Act; (d) the person's arrangements (if any) for assessing the contravening person's compliance with this Act; (e) the person's arrangements (if any) for receiving and addressing possible complaints about alleged underpayments or other alleged contraventions of this Act; (f) the extent to which the person's arrangements (whether legal or otherwise) with the contravening person encourage or require the contravening person to comply with this Act or any other workplace law. See Recommendation 21 for background.
Insert new section	550A	**Primary duty of care** (1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, compliance with this Act in respect of: (a) workers engaged, or caused to be engaged by the person; and (b) workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking. (2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that compliance with this Act in respect of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking. (3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable: - [insert any further specific requirements here] **Meaning of worker** (1) A person is a **worker** if the person carries out work in any capacity for a person conducting a business or undertaking, including work as: (a) an employee; or (b) a contractor or subcontractor; or (c) an employee of a contractor or subcontractor; or (d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or

Type of change	Section	Drafting suggestions
		(e) an outworker; or (f) an apprentice or trainee; or (g) a student gaining work experience; or (h) a volunteer; or (i) a person of a prescribed class. **What is reasonably practicable** **What is reasonably practicable in ensuring compliance** In this Act, **reasonably practicable**, in relation to a duty to ensure compliance with this Act, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring compliance, taking into account and weighing up all relevant matters including: (a) the likelihood of the risk concerned occurring; and (b) the degree of harm that might result from the risk; and (c) what the person concerned knows, or ought reasonably to know, about: (i) the risk; and (ii) ways of eliminating or minimising the risk; and (d) the availability and suitability of ways to eliminate or minimise the risk; and (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk. **Person may have more than 1 duty** A person can have more than 1 duty by virtue of being in more than 1 class of duty holder. **More than 1 person can have a duty** (1) More than 1 person can concurrently have the same duty. (2) Each duty holder must comply with that duty to the standard required by this Act even if another duty holder has the same duty. (3) If more than 1 person has a duty for the same matter, each person: (a) retains responsibility for the person's duty in relation to the matter; and (b) must discharge the person's duty to the extent to which the person has the capacity to influence and control the matter or would have had that capacity

Type of change	Section	Drafting suggestions
		but for an agreement or arrangement purporting to limit or remove that capacity. **Management of risks** A duty imposed on a person to ensure compliance with this Act requires the person: (a) to eliminate risks to compliance, so far as is reasonably practicable; and (b) if it is not reasonably practicable to eliminate risks to compliance, to minimise those risks so far as is reasonably practicable. **Duty of officers** (1) If a person conducting a business or undertaking has a duty or obligation under this Act, an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation. (2) The maximum penalty applicable for an offence relating to the duty of an officer under this section is the maximum penalty fixed for an officer of a person conducting a business or undertaking for that offence. (3) An officer of a person conducting a business or undertaking may be convicted or found guilty of an offence under this Act relating to a duty under this section whether or not the person conducting the business or undertaking has been convicted or found guilty of an offence under this Act relating to the duty or obligation. (5) In this section, **due diligence** includes taking reasonable steps: (a) to acquire and keep up-to-date knowledge of the obligations in this Act; and (b) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the risks associated with those operations; and (c) to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to compliance with this Act from work carried out as part of the conduct of the business or undertaking; and (d) to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding risks and responding in a timely way to that information; and

Type of change	Section	Drafting suggestions
		(e) to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act; and **Examples** For the purposes of paragraph (e), the duties or obligations under this Act of a person conducting a business or undertaking may include: • ensuring compliance with notices issued under this Act; • ensuring the provision of training and instruction to workers about workplace laws. (f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e). **Duty to consult with other duty holders** If more than one person has a duty in relation to the same matter under this Act, each person with the duty must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter. Note further drafting will be required for this section, but these are some examples for consideration. See Recommendation 21 for background.

Powers of the Fair Work Ombudsman

Type of change	Section	Drafting suggestions
Insert new section into FW Act	557B	(1) If in an application in relation to a contravention of a civil remedy provision referred to in subsection (2), the Fair Work Ombudsman has issued an assessment notice to the employer in relation to the applicant, it is presumed that the employer owes the amounts specified in the notice to the applicant, unless the employer proves otherwise. (2) The civil remedy provisions are the following: (a) subsection 44(1) (which deals with contraventions of the National Employment Standards); (b) section 45 (which deals with contraventions of modern awards); (c) section 50 (which deals with contraventions of enterprise agreements); (d) section 280 (which deals with contraventions of workplace determinations); (e) section 293 (which deals with contraventions of national minimum wage orders); and (f) section 305 (which deals with contraventions of equal remuneration orders). See Recommendation 29 for background information.
Amend FW Act	570(2)(c)(i)	At the end of section 570(2)(c)(i) add the words 'or the FWO, or failed to comply with an assessment notice' after 'FWC'. See Recommendation 29 for background information.
Insert new subsection	682	1(ca) make assessments of amounts owed by employers to employees. See Recommendation 29 for background information.
Insert new subsection	717A	**717A Assessment notices** (1) This section applies if: (a) an employer has by notice been invited to attend a conference conducted by the FWO; (b) the employer unreasonably refused to participate in that conference or the conference failed to resolve the dispute; and (c) the FWO reasonably believes that the employer has contravened one or more of the following: (i) a provision of the National Employment Standards; (ii) a term of a modern award; (iii) a term of an enterprise agreement; (iv) a term of a workplace determination; (v) a term of a national minimum wage order; (vi) a term of an equal remuneration order. (2) The FWO may give the employer a notice (assessment notice) that sets out:

Type of change	Section	Drafting suggestions
		(a) the name of the employer to whom the notice is given; (b) the name of the person in relation to whom the FWO reasonably believes the contravention has occurred; (c) brief details of the contravention; (d) the FWO's assessment of the amounts that the person referred to in paragraph (b) above is owed by the person referred to in paragraph (a) above; and (e) any other matters prescribed by the regulations. See Recommendation 29 for background information.