



21 December 2023

## Submission: Australian Human Rights Commission Amendment (Costs Protection) Bill 2023

### Acknowledgment of country

We acknowledge the Traditional Owners and Custodians of the lands on which we work, including the Wurundjeri people of the Kulin Nation and the Gadigal, Gamaragal and Bedegal people of the Eora Nation, and acknowledge the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We acknowledge that sovereignty was never ceded and we support the self-determination of Aboriginal and Torres Strait Islander peoples.

### Overview

The Migrant Justice Institute is a nonpartisan law and policy organisation dedicating to addressing exploitation of migrant workers and reducing structural barriers that impede access to justice.

We welcome the introduction of an equal access costs model to federal anti-discrimination laws in Australia, and strongly support the passage of the Australian Human Rights Commission (Costs Protection) Bill 2023 (Cth) (**Costs Protection Bill**) in its current form. We are proud to be part of the Power to Prevent Coalition that has advocated for this reform and congratulate the Government on introducing the Bill.

In early 2024 we will release a new report on the small claims process, *All Work No Pay*,<sup>1</sup> which will strongly encourage the Government to introduce similar amendments in relation to small claims brought under the *Fair Work Act 2009* (Cth).

### Summary of the proposed changes

Under the current 'costs follow the event' regime in federal anti-discrimination claims, while successful applicants will generally receive costs from unsuccessful respondents, unsuccessful

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<sup>1</sup> Migrant Justice Institute, *All Work No Pay* (forthcoming – see <https://www.migrantjustice.org/>).

applicants can be liable for both their own and the other party's costs. The Costs Protection Bill recognises that this risk of an adverse costs order is a significant barrier to accessing justice and may deter individuals, particularly vulnerable individuals, from commencing legal proceedings.<sup>2</sup> The Bill therefore seeks to amend the *Australian Human Rights Commission Act 1986* (Cth) to provide that the applicant must not be ordered by the court to pay costs incurred by another party to the proceedings.<sup>3</sup>

This is subject to four safeguards or exceptions:

1. If an applicant is successful but the applicant's unreasonable act or omission caused the applicant to incur costs, the court is not required to order the respondent to pay those costs (proposed subsection 46PSA(4)).

Further, an applicant may be ordered to pay another party's costs where:

2. The applicant instituted the proceedings vexatiously or without reasonable cause (proposed paragraph 46PSA(6)(a));
3. The applicant's unreasonable act or omission caused the other party to incur the costs (proposed paragraph 46PSA(6)(b)); or
4. The other party is a respondent who was successful in the proceedings; the respondent does not have a significant power advantage over the applicant; and the respondent does not have significant financial or other resources, relative to the applicant (proposed paragraph 46PSA(6)(c)).

The Respect@Work Report recommended the introduction of an equal access costs model with the second and third exceptions above, based on section 570 of the *Fair Work Act 2009* (Cth).<sup>4</sup> This Bill proposes a 'modified' equal access costs model that includes the additional fourth exception above, which seeks to '[balance] the interests of applicants and respondents in unlawful discrimination proceedings'.<sup>5</sup>

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<sup>2</sup> Explanatory Memorandum, Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth) 3.

<sup>3</sup> Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth) proposed subsection 46PSA(5).

<sup>4</sup> Australian Human Rights Commission, [Respect@Work: National Inquiry into Sexual Harassment in the Workplace \(Report, 2020\)](#) Recommendation 25.

<sup>5</sup> Explanatory Memorandum, Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth) 3.

## The need for equal access costs models in certain jurisdictions

### 1. Anti-discrimination law

As set out in the Power to Prevent Coalition Joint Statement, introducing an equal access costs model to federal anti-discrimination legislation will increase access to justice for individuals bringing claims of discrimination and sexual harassment. By removing the risk of an adverse costs order for individuals with genuine claims, the Bill eliminates a key barrier preventing those who experience discrimination or sexual harassment from enforcing their rights. As a result of the proposed reforms, individuals who bring successful claims will have their legal fees paid by the respondent and will no longer will have to deduct lawyers' fees from any court-ordered compensation they receive:

An equal access costs model, as proposed under the Bill, means that individuals who bring claims of discrimination and sexual harassment can recoup their legal costs if they are successful while being protected from having to pay legal costs if they are unsuccessful (except in limited circumstances). Legal costs in these types of cases can easily be in the hundreds of thousands of dollars and can bankrupt people. This has been a major barrier to people speaking up when harmed by discrimination or sexual harassment at work.

This reform is a first for Australia in discrimination law. People will now be able to bring claims without the huge risk of having to pay the legal costs of the perpetrator, or the perpetrator's employer, should they lose. It also means that people who bring successful sexual harassment or discrimination claims will have their legal costs covered.

People not being able to enforce their rights has led many people to be silenced and perpetrators not being held to account. Long overdue, this change to how costs are considered in discrimination and sexual harassment claims will be another tool to address the endemic nature of sexual harassment documented in the Respect@Work Report.<sup>6</sup>

Our research shows that migrant workers rarely take action to enforce their legal rights at work.<sup>7</sup> In our view, the test introduced by the Costs Protection Bill is appropriate and balanced. It recognises and responds to an urgent need to improve access to justice for individuals, while introducing robust safeguards to prevent vexatious or unmeritorious claims proceeding (proposed paragraphs 46PSA(6)(a) and (b), as described above, in relation to unsuccessful applicants; as well as proposed

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<sup>6</sup> Power to Prevent Coalition, [Joint Statement](#) (December 2023).

<sup>7</sup> See, eg, Bassina Farbenblum and Laurie Berg, [Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia](#) (Migrant Justice Institute, 2018), which sets out our findings from a survey of over 4,000 migrant workers. Notably, our survey found that 9 out of 10 migrants who knew they were underpaid took no action.

subsection 46PSA(4), in relation to successful applicants).

We welcome the Costs Protection Bill and support its passage in full. However, we recommend that the Government consider one technical amendment to promote fairness as well as efficient hearings. We propose the inclusion of an additional provision such that a successful respondent may still be liable to pay for costs that an applicant incurs due to that respondent's unreasonable acts or omissions. As set out above, the Bill currently provides that an applicant (even if successful) can be liable for the respondent's costs where the applicant's unreasonable act or omission has caused the respondent to incur those costs, regardless of the outcome of the litigation. That is, a successful applicant may be required to pay some costs if they are found to have acted unreasonably. For clarity and consistency, the same exception should apply to successful respondents, who may equally cause an unsuccessful applicant to incur costs by an unreasonable act or omission.<sup>8</sup> This is necessary in the interests of fairness and to ensure safeguards and incentives apply equally to both parties (ie both parties are encouraged to act reasonably and to resolve matters as efficiently as possible).

#### **Recommendation 1: Pass the Costs Protection Bill in full**

The Costs Protection Bill should be passed.

#### **Recommendation 2: Consider a technical amendment to further deter unreasonable acts or omissions and promote fairness**

The Bill provides that an applicant whose claim is successful may nevertheless be required to pay a portion of the respondent's costs if the costs were incurred due to the applicant's unreasonable act or omission. The Government should consider the inclusion of an equivalent provision in relation to successful respondents whose unreasonable acts or omissions have caused the applicant to incur costs.

## **2. Employment law – 'small claims' for unpaid wages and entitlements**

In addition to passing the Costs Protection Bill, we call on the Government to consider introducing an equal access costs model in 'small claims' for wages and entitlements.

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<sup>8</sup> Note that where unsuccessful respondents cause successful applicants to incur costs as a result of their unreasonable act or omission, this is already covered by proposed subsection 46PSA(2) of the Bill, which requires respondents to pay the successful applicant's costs.

Under section 548 of the *Fair Work Act 2009* (Cth) (**FW Act**), an employee can bring a claim for unpaid wages and entitlements using the small claims procedure. In early 2024 we will release a new report on the small claims jurisdiction, *All Work No Pay*, which identifies a number of significant barriers preventing migrant workers from effectively using this process and recovering their unpaid wages.

One such barrier is the necessity for legal representation and assistance for migrant workers to pursue a claim. Legal representation of migrant workers in wage claims is limited, in part because the small claims division is a 'no-costs jurisdiction' in which each party bears their own legal costs, except in limited circumstances, such as if costs were incurred because one party instituted proceedings vexatiously or acted unreasonably.<sup>9</sup> This means that even if a worker succeeds in their claim, the costs that they incur to engage a private lawyer will likely exceed their compensation award for the wages they were owed. This is especially the case in the small claims jurisdiction, where there is no opportunity to seek or receive general damages or penalties, and legal fees are substantial because of the time required to calculate and pursue wage claims.

As a result, there is no financial incentive for private lawyers to support this essential enforcement work for vulnerable workers who generally cannot pay private legal fees. There is also no way for community legal service providers to recoup their costs when they assist workers to successfully recover the wages that the employer was required to pay under law. Those costs are generally covered by government funding for community legal centres (**CLCs**).

We welcome the amendment introduced by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) which permits a successful applicant to recoup their filing fee from the respondent. As set out in the Explanatory Memorandum to that Act, the ability for a worker to 'apply to get any filing fees they have paid to the court back from the other party (as costs)' seeks to 'ensure they are not initially deterred from bringing small claims proceedings due to cost, and they keep more of any compensation that the court awards to them.'<sup>10</sup> However, building on international examples and the current Costs Protection Bill, we suggest that this must be extended to cover legal fees in addition to filing fees.

In the United States, in order to encourage workers' enforcement of their labour rights, the employer must pay a worker's attorney's fees and costs where the worker is successful, and if a worker is

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<sup>9</sup> *FW Act* s 570.

<sup>10</sup> Explanatory Memorandum, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth) [115].

unsuccessful, each party bears its own costs.<sup>11</sup>

An equal access costs model also currently exists in Australian whistleblower protection laws to allow individuals to recover their legal costs and ensure that individuals are not deterred from bringing proceedings by potential adverse costs orders.<sup>12</sup>

An equal access model in the small claims jurisdiction in Australia would enable far more vulnerable workers to pursue their legal entitlements and substantially improve access to justice.<sup>13</sup> Pursuing a claim would be worthwhile for more workers because they would retain the full amount of compensation (consisting of the wages they were owed in the first place) and would not need to deduct the costs of their legal representation from an award.

An equal access costs model could encourage more CLCs and migrant worker centres (**MWCs**) to represent migrant workers in resource-intensive wage claims because it would allow CLCs and MWCs to recoup a portion of the actual cost of their service via the use of conditional costs agreements.<sup>14</sup>

We understand that some CLCs use conditional costs agreements with their clients when litigation is anticipated. These agreements could include a provision stating that costs will only be payable if certain conditions are met e.g. the worker has a 'successful outcome' which can be defined to include a situation where the client obtains money from the other side as costs. It would also encourage private lawyers to represent workers in meritorious wage claims because workers would be able to pay private legal fees *and* retain the full amount of compensation.

The risk of mounting costs would also give workers and their representatives leverage in negotiations with recalcitrant employers. The risk of an adverse costs order would encourage the use of offers of compromise, and incentivise employers to settle a matter outside of court or in an alternative dispute resolution process (including if small claims could be brought in the Fair Work

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<sup>11</sup> *Fair Labour Standards Act of 1938*, 19 USC §216(b). In addition, in the D.C. area, cost shifting has been paired with statutorily enshrined lawyer fees. This approach has reportedly greatly improved access to justice for workers, creating financial incentives for lawyers to pursue cases, especially with smaller claims: see Matthew Fritz-Mauer, 'The Ragged Edge of Rugged Individualism: Wage Theft and the Personalization of Social Harm' (2021) 54(3) *University of Michigan Journal of Law Reform* 735, 762. See also Bassina Farbenblum and Laurie Berg, [Migrant Workers' Access to Justice for Wage Theft: A global study of promising initiatives](#), (Migrant Justice Institute, 2021), 31.

<sup>12</sup> Explanatory Memorandum, Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (Cth) 18; *Corporations Act 2001* (Cth) s 1317AH; *Public Interest Disclosure Act 2013* (Cth) s 18.

<sup>13</sup> See also Tess Hardy, [Submission 85](#) to the Senate Standing Committee on Economics, *Inquiry into Unlawful Underpayment of Employees' Remuneration Inquiry* (February 2020) [37].

<sup>14</sup> Based on the scale of costs used by the Federal Circuit and Family Court of Australia (FCFCOA), a bill of costs for a small claims matter involving a full day hearing is approximately \$15,000. See Schedule 2, FCFCOA (Division 2) (General Federal Law) Rules 2021(Cth).

Commission (**FWC**), which we propose in our forthcoming report)<sup>15</sup> if the worker's claim is likely to succeed in court.

We do not propose a costs-following-the event model where whichever party is unsuccessful pays the costs of both parties. For the same reasons as we support the Costs Protection Bill in anti-discrimination law, we are concerned that the financial risk of an adverse costs order (where they must pay the employer's legal costs) would prevent most vulnerable workers from taking action at all, even if the worker was confident of the merits of their claim.<sup>16</sup> At the same time, it is important to ensure this costs model does not open the floodgates to predatory lawyers pursuing unmeritorious cases, charging exorbitant fees, or stymying genuine negotiations, especially if the worker is too vulnerable to assess their case independently.

Three key safeguards would deter unmeritorious claims and protect both workers and employers, including smaller businesses, as reflected in the current Bill in relation to anti-discrimination claims.<sup>17</sup> First, the worker already risks a costs order against them if they bring a claim vexatiously or without reasonable cause.<sup>18</sup> Second, because lawyers would only be paid if the worker succeeds in their claim, the time and effort required to bring wage claims provide a natural disincentive for lawyers bringing claims with low prospects of success. Third, we recommend the *FW Act* be amended to allow a court to award costs against a legal representative or agent who has caused costs to be incurred by the opposing party because of an unreasonable act or omission, or where they encouraged an application that had no reasonable prospect of success. Similar provisions already exist under sections 376 and 780 of the *FW Act* in relation to claims brought to the FWC. This safeguard is especially important in respect of vulnerable migrant workers, who at times may not understand the proceedings due to language and other barriers.

An equal costs model can be established by amending the *FW Act*. One option is to amend section 570, which provides for costs when a party to a small claims proceeding acts vexatiously or unreasonably. A new sub-section could provide that (a) if a worker is successful in a small claims proceeding, their employer is required to pay the worker's legal fees in addition to their legal minimum entitlements, and (b) if a worker is unsuccessful in a small claims proceeding, both parties bear their own costs, except where the court is satisfied that a party has acted vexatiously or unreasonably (incorporating relevant elements of section 570 in relation to the exception).

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<sup>15</sup> Migrant Justice Institute, *All Work No Pay* (forthcoming – see <https://www.migrantjustice.org/>).

<sup>16</sup> As noted by Tess Hardy, one-way costs shifting can ensure that 'the prospect of having an adverse costs order awarded claimants does not inhibit access to justice': Tess Hardy, [Submission 85](#) to Senate Standing Committee on Economics, *Inquiry into Unlawful underpayment of employees' remuneration* (February 2020) 13.

<sup>17</sup> Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth) proposed paragraphs 46PSA(6)(a) and (b).

<sup>18</sup> *FW Act* paragraphs 570(2)(a) and (b).

A second option is to amend section 548 of the *FW Act* which allows the court to make a costs order for filing fees, as follows:

*Costs for filing fees and legal fees paid in relation to the proceedings*

*(10) If the court makes an order (the small claims order) mentioned in subsection (1) against a party to small claims proceedings, the court may make an order as to costs against the party for any filing fees paid to the court or legal fees paid by the party that applied for the small claims order.*

As currently drafted, however, the provision only provides the court with *discretion* to make a costs order, which may not provide sufficient certainty to incentivise private legal representation or encourage workers to proceed if they anticipate their legal costs will substantially reduce the value of the compensation award.

Nonetheless, the court retains a general discretion to depart from the fixed, event-based scale of costs set out in the court rules,<sup>19</sup> and to determine the ways which costs to which a party may be entitled are calculated.<sup>20</sup> We propose that this continue to apply under an equal access costs model. It may be appropriate in cases for the court to apply the scale of costs to determine the quantum of a costs order – for example, where an employer has been recalcitrant or unwilling to engage in settlement negotiations. It may be appropriate in other cases for the court to exercise its discretion to award a lower costs order than the scale of costs would otherwise provide – for example, where the quantum of underpayment is low and the matter was straightforward and resolved quickly.

### **Recommendation 3: Equal access costs for ‘small claims’ under the Fair Work Act**

The *FW Act* should be amended to apply an ‘equal access costs model’ to small claims. Section 570 should be amended to provide that (a) if a worker is successful in a small claims proceeding, their employer is required to pay the worker’s legal fees in addition to their legal minimum entitlements, and (b) if a worker is unsuccessful in a small claims proceeding, both parties bear their own costs, except where the court is satisfied that a party has acted vexatiously or unreasonably. To further disincentivise predatory lawyers bringing unmeritorious claims, an applicant’s lawyer/agent should also be subject to a costs order for unreasonable acts/omissions or bringing claims without reasonable prospects of success.

<sup>19</sup> FCFCOA (Division 2) (General Federal Law) Rules 2021 (Cth), Schedule 2.

<sup>20</sup> Rule 22.02(2) of the FCFCOA (Division 2) (General Federal Law) Rules 2021 (Cth) provides that the court may, when making an order for costs, set the amount of the costs or set the methods for calculation of the costs.



## Conclusion

Thank you for the opportunity to make this submission.

We would welcome the opportunity to discuss this submission with you.

Sincerely,

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