

Improved laws and processes to stop wage theft

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TYPES OF EXPLOITATION

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

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

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

As some community leaders commented:

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

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

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

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

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

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

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

JOSEPH

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

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

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

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

MARTIN AND WENDY¹⁷⁰

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

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

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

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

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

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

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

BILL

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

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

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

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

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

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

5. Employer requires payment for a job:

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

HIEN

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

LUN

Lun wanted to find work as a cleaner. He agreed to pay Mr T's company \$10,500 for training. Mr T promised Lun that he would receive training in general cleaning and carpet cleaning. Lun paid Mr T \$10,500 and completed 10 days' of unpaid training with Mr T—the training involved watching and learning from Mr T. After 10 days' of "training", Lun was told that there was no work for him. Lun received a refund of \$7000 but was told that the company would keep \$3000 for "training costs".

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

ENFORCEMENT CHALLENGES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁷⁴ Liberal Party of Australia, above n 134.

¹⁷⁵ Productivity Commission, above n 29, 928.

FWO MUST HAVE GREATER POWERS TO RESOLVE CLAIMS

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

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

For example, at present, employers cannot be compelled to attend FWO mediations. Compulsory mediation (where employers are compelled to attend) would greatly improve the efficient resolution of complaints and avoid the expense and delay of unnecessary court actions for small underpayments matters.

In pursuing underpayment claims, the ELS usually sends a letter of demand to the employer. We routinely find that employers ignore this correspondence. For some cases, we have found that assistance from the FWO to investigate and mediate disputes has meant that employers are more likely to participate in settlement negotiations.

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

SUMIT

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

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

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

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

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

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

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

Similarly to the Financial Ombudsman Service (FOS), the Applicant should be able to determine whether or not they accept the binding determination. If they do not accept it, they retain the option of proceeding to Court.

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

The FOS allocates a case owner to each matter within its jurisdiction. The case owner reviews the file and contacts each of the parties to clarify issues/request further information. The case owner will try and assist parties to resolve their issue, but if agreement cannot be reached, FOS has the power to make a binding determination. As the FOS website explains:¹⁷⁸

The Ombudsman or Panel will take into account all information provided by the parties during our investigation of the dispute, the law, any applicable industry codes of practice, as well as good industry practice...

A Determination is a final decision on the merits of a dispute. There is no further "appeal" or review process within the Financial Ombudsman Service. An Applicant has the right to accept or reject the Determination within 30 days of receiving it (or within any additional time we have allowed). If the Applicant accepts the Determination, then it is binding on both parties. If the Applicant does not accept the Determination, it is not binding on the [Financial Service Provider] FSP and the Applicant may take any other available action against the FSP, including action in the courts.

Depending on the matter, it will either be determined by the Ombudsman, or by a panel of three decision makers chaired by an Ombudsman. WEstjustice calls for a review of current FWO powers and processes, and recommends that powers be expanded to enable such determinations. This recommendation echoes the Senate Education and Employment References Committee's call for an independent review of the resources and powers of the FWO.¹⁷⁹

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

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

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

¹⁷⁶ Productivity Commission, above n 29, 928.

¹⁷⁷ Liberal Party of Australia, above n 134.

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

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

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

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

Many of our clients are unable to recover unpaid wages through no fault of their own. In some instances, an employer has provided false details, or has simply "disappeared". We have contacted employers on a number of occasions only to be provided with fake email addresses, fake postal addresses, and false promises of repayment.

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

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

In situations where an employee is simply unable to pursue a debt, we suggest a wages compensation scheme should be implemented to cover their losses. Such a fund could be available to all workers; or by application for those who are particularly vulnerable. The scheme could be funded by employer premiums, similar to the WorkCover scheme and/or penalties obtained by the Fair Work Ombudsman for breaches of the FW Act.

Examples of other similar schemes include:

- WorkCover, for workplace injury—an insurance scheme where all employers pay a premium;
- Motor Car Traders Guarantee Fund—funded by motor car traders' licensing fees, for consumers who have suffered loss where the trader has failed to comply with the Motor Car Traders Act 1986;¹⁸³
- Victorian Property Fund—funded by estate agent fees, fines and penalties, and interest—provides compensation for 'misused or misappropriated trust money or property'.¹⁸⁴
- In California, the CLEAN Carwash coalition successfully lobbied for specific legislation for car wash companies. The law requires all car wash companies to register with the Department, but 'no car wash can register or renew its registration (as required annually) unless it has obtained a surety bond of at least US\$150,000. The purpose of the bond requirement is to ensure that workers who are not paid in accordance with the law can be compensated if their employer disappears or is otherwise unable to pay wages or benefits owed to the employees. The legislation creates an exception to the bond requirement, however, for car washes that are party to collective bargaining agreements'.¹⁸⁵

Phoenix companies:

A significant problem is the phenomenon of phoenix companies—whereby directors close down companies to avoid paying debts, then open a new company without penalty. It is estimated that such phoenix activity results in lost employee entitlements of between \$191,253,476.00 and \$655,202,019.00 every year.¹⁸⁶ Helen Anderson suggests numerous measures to address phoenix activity, including the introduction of a director identity number (which requires directors to establish their identity using 100 points of identity proof and enables regulators to track suspicious activity more easily) and improvements to the company registration process to enable ASIC to gather more information at the time a company is formed.¹⁸⁷ WEstjustice supports these recommendations.

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

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

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

¹⁸³ Consumer Affairs Victoria, State Government of Victoria (2016) <<https://www.consumer.vic.gov.au/about-us/who-we-are-and-what-we-do/funds-we-administer/motor-car-traders-guarantee-fund>>.

¹⁸⁴ Consumer Affairs Victoria, State Government of Victoria (2016) <<https://www.consumer.vic.gov.au/about-us/who-we-are-and-what-we-do/funds-we-administer/victorian-property-fund>>.

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

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

¹⁸⁷ *Ibid*, 263-267.

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

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

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

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

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

MANSUR

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

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

SAM

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

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

PRACTICAL HELP WITH CALCULATIONS

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

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

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

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

SUPERANNUATION

Finally, WEstjustice recommends that the Federal Government and FWO urgently address the issue of unpaid superannuation. It is estimated that unremitted superannuation is in the hundreds of millions of dollars.¹⁸⁹ As argued by Helen Anderson and Tess Hardy, we agree that 'more should be done to improve the detection and recovery of non-payments because of the importance of superannuation to both employees and the government.' As Anderson and Hardy state, any model of enforcement that shifts the policing of unpaid superannuation to employees is flawed.¹⁹⁰ While the ATO is primarily responsible, the FWO 'is well placed to supplement the efforts of the ATO, and should be encouraged, and appropriately resourced, to do so.'¹⁹¹

RECOMMENDATION

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

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

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

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

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

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

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

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

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

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

190 Ibid.

191 Ibid, 194.

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

**Increased accountability in labour hire,
supply chains and franchises**

7

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

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

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

There is one unifying principle for systemic reform: nobody should benefit from the exploitation of vulnerable workers and anybody who does benefit, should be held accountable. The law must respond to new ways of working. Unfortunately, self-regulation and voluntary compliance is failing. For example, the Fair Work Ombudsman recently invited eight franchisor chief executives to enter into compliance partnerships with FWO, underpinned by proactive compliance deeds. The initiative was openly supported of the Franchise Council of Australia. However, only one franchisor has engaged with the process, one franchisor refused to participate, and six franchisors ignored the FWO entirely.¹⁹² To affect meaningful change, the law must be amended to remove incentives to exploit or ignore worker rights and instead ensure that directors, supply chain heads, franchisors and host companies are held accountable.

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

LABOUR HIRE

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

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

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

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

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

For example:

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

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



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

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

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

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

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

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

SUPPLY CHAINS

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

Supply chains involve sub-contracting arrangements whereby there are a number of interposing entities between the ultimate work provider and a worker. An example of a supply chain in the construction context is the engagement by a business operator of a principal contractor who engages a contractor firm, which engages a subcontractor.¹⁹⁴ It has been suggested that the 'very structure of the supply chain is conducive to worker exploitation', as parties near the bottom of the supply chain tend to have low profit margins and experience intense competition.¹⁹⁵

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

HAMID

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

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

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

FRANCHISES

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

We have observed exploitation in franchise models. For example:

SALLY

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

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

MASAKO

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

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

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

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

¹⁹⁵ *Ibid.*, 67.

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

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

CURRENT LEGISLATIVE FRAMEWORK IS INADEQUATE

NEW FORMS OF WORKING ARRANGEMENTS

As employment practices change, law reform must keep up with the challenges and issues that this creates for employees. At present, the FW Act is largely focused on traditional employer/employee relationships as defined by common law. This framework fails to adequately regulate non-traditional working arrangements, for example, where there is more than one employing entity. In doing so, the law ignores the fact that 'it is not now uncommon for the employment relationship to be fragmented and for multiple organisations to be involved in shaping key working conditions.'¹⁹⁸

This can lead to situations where although multiple organisations will benefit from the labour of one worker, only one can be held accountable under the FW Act. For example, in a labour hire arrangement, in addition to the labour hire agency, 'the client or host employer may receive the benefits of an employer by being able to control the agency labour (and their terms of engagement) and yet avoid any form of labour regulation because it has no employment relationship with the labour.'¹⁹⁹ Although 'both of [these] entities enjoy the benefits of acting as an employer, one will unfairly circumvent labour regulation.'²⁰⁰ We have seen this in situations where clients in labour hire arrangements, supply chains or franchises are left without a remedy against a host employer, principal or franchisor who benefitted from their labour and, who in many circumstances should be held, wholly or partly, responsible for the terms and conditions of employment of the worker.

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

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

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

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

200 Ibid.

201 Hardy, above n 198, 4.

202 Ibid.

ACCESSORIAL LIABILITY

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

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

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

Involvement in contravention treated in same way as actual contravention

1. A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.
2. A person is involved in a contravention of a civil remedy provision if, and only if, the person:
 - a. has aided, abetted, counselled or procured the contravention; or
 - b. has induced the contravention, whether by threats or promises or otherwise; or
 - c. has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
 - d. has conspired with others to effect the contravention.

As can be seen, section 550 only attributes liability in limited circumstances, including where there is aiding, abetting, counselling or procurement or the accessory is "knowingly concerned". The requirement of actual knowledge is an extremely high bar to establish accessorial liability of the host employer or those at the apex of a supply chain or franchise. Although FWO may be able to rely on previous warnings or compliance notices issued to particular companies or individuals to show knowledge in some cases, for others, it is often unobtainable. Indeed, by requiring actual knowledge, section 550 serves to reward corporations who deliberately remain uninformed about the conduct of others in their supply chain/business model. The law should not reward those who turn a blind eye to exploitation—especially those who are directly benefitting from the exploitation.

Although the FWO has recently used section 550 with some success,²⁰⁶ Hardy notes that there have only been a 'handful' of cases where section 550 has been used to argue that a separate corporation is 'involved' in a breach. Although not yet determined in a substantive proceeding, 'court decisions which have dealt with similar accessorial liability provisions arising under other statutes suggest that the courts may well take a fairly restrictive approach to these questions.'²⁰⁷ The Senate Education and Employment References Committee has called for an independent review of the utility of the accessorial liability provisions in the FW Act.²⁰⁸

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

Options for legislative reform are below.

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

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

205 *Costello v Allstaff Industrial Personnel (SA) Pty Ltd* [2004] SAIRComm 13.

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

207 Hardy, above n 198, 10.

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

REFORM OPTIONS

JOINT EMPLOYMENT INTRODUCED TO FAIR WORK ACT

WEstjustice considers that, for the purposes of the unfair dismissal, general protections and underpayments provisions of the FW Act, deeming provisions should extend responsibility to other employer-like entities. That is, if certain criteria are met, host employers/franchisors/head contractors/lead firms will be deemed to be an employer of workers employed in a labour hire arrangement, supply chain or franchise. This means that more than one employment entity could be found jointly and severally liable for any underpayments (including sham contracting) or unfair treatment at work. Of the three options, this is the preferred option most likely to bring about the desired policy objective— to reduce exploitation for vulnerable workers.

We consider below two definitions which may be incorporated into the current definition of "employee".

Pauline Thai, in her article "Unfair Dismissal Protection for Labour Hire Workers? Implementing the Doctrine of Joint Employment in Australia"²⁰⁹ urges the adoption of the test enunciated in *Zheng v Liberty Apparel Co Inc*²¹⁰ for unfair dismissal matters. Under the Zheng test, the following factors are relevant for determining whether joint employment exists:

- whether the host employer's premises and equipment were used for the worker's work;
- whether the agency had a business that could or did shift as a unit from one host to another;
- the extent to which the worker performed a job that was integral to the host's operation;
- whether responsibility under the labour hire contracts could pass from one agency to another without material changes;
- the degree to which the host employer supervised the worker's work;
- whether the worker worked exclusively or predominantly for the host employer; and
- any other factor deemed relevant.

Thai's list is helpful, but targeted specifically at labour hire workers who are unfairly dismissed. In his Thesis,²¹¹ Dowling provides a broader reform option, proposing the following amendment to the definition of "employee"²¹² to include a statement that:

"employee" means:

1. *An employee may be employed by two or more employers at the same time.*

Dowling also suggested amendments to the definition of "employer" as follows:

"employer" means:

2. *Two or more persons may be joint employers of an employee where:*

- a. *those two or more persons exercise some control over the work or working conditions of the employee; and*
- b. *the employee performs work which simultaneously benefits the two or more persons.*

3. *Determining whether the two persons referred to in subsection (2) are joint employers the matters taken into account shall include:*

- a. *the nature and degree of control of the employee by each person;*
- b. *the right of each person, directly or indirectly, to engage, cease or otherwise modify the conditions of engagement of the employee;*
- c. *the ability of each person to determine the rate of pay of the employee; and*
- d. *the place of work of the employee.*

We recommend that the Federal Government undertake a review of joint employment principles with a view to similar provisions being inserted into the FW Act. We suggest that further to Dowling's proposed amendments, franchisors and supply chain heads should also be expressly deemed to be "employers" for the purposes of underpayment of wages/entitlements.

In terms of relief for termination of employment, to overcome the issue of apportionment, Dowling proposes the notions of primary and secondary employers as follows:

Remedies

1. *Subject to subsection (2) if the Commission [Court] considers it appropriate, the Commission [Court] may make an order requiring the employer or employers to reinstate the employee by:*
 - a. *reappointing the employee to the position in which the employee was employed immediately before the termination; or*
 - b. *appointing the employee to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination.*

2. *If the Commission [Court] has determined that the employee is jointly employed by two or more employers and considers an order under subsection (1) appropriate the Commission shall:*

- a. *determine one of those persons to be the primary employer and the other or others the secondary employers taking into account:*
 - i. *the right to engage and terminate the employee;*
 - ii. *the responsibility to assign or place the employee;*
 - iii. *the responsibility to pay and provide other terms and conditions of employment; and*
- b. *order the primary employer to reinstate the employee to the position in which the employee was employed immediately before the termination (or equivalent position); and*
- c. *order the secondary employers to allow the employee to assume the position (or equivalent position) which the employee held immediately before the termination.*

Noting Dowling's Thesis pre-dates the FW Act, we suggest that these provisions could be adapted to suit the language and wording of the FW Act, and also include reference to apportionment of compensation.

²¹¹ Craig Dowling, 'The concept of joint employment and the need for statutory reform' (Minor thesis submitted in fulfilment of the requirements of the degree of Master of Laws, 18 July 2008). See also Dowling, above n 199.

²¹² This amendment was suggested for the purposes of the dismissal protections and freedom of association protections provided for by the *Workplace Relations Act 1996* (Cth).

²⁰⁹ (2012) 21 *Australian Journal of Labour Law* 152.

²¹⁰ 355 F 3d 61 (2nd Cir, 2003).

VICARIOUS LIABILITY

Alternatively, it may be possible to amend the FW Act such that an additional “employer” or host could be held vicariously liable for breaches of the “first” employer. Such provisions could be modelled on sections 109 and 110 of the Equal Opportunity Act 2010 (Vic), which provide that:

109. Vicarious liability of employers and principals

If a person in the course of employment or while acting as an agent—

- a. contravenes a provision of Part 4 or 6 or this Part; or*
- b. engages in any conduct that would, if engaged in by the person's employer or principal, contravene a provision of Part 4 or 6 or this Part—*

both the person and the employer or principal must be taken to have contravened the provision and a person may bring a dispute to the Commission for dispute resolution or make an application to the Tribunal against either or both of them.

110. Exception to vicarious liability

An employer or principal is not vicariously liable for a contravention of a provision of Part 4 or 6 or this Part by an employee or agent if the employer or principal proves, on the balance of probabilities, that the employer or principal took reasonable precautions to prevent the employee or agent contravening this Act.

We submit that these provisions could be adopted as a model for imposing liability on labour hire agencies for contraventions by the host employer unless reasonable precautions are taken by the agency to prevent the host employer's contravention. Similarly, this model could impose liability on principals in a supply chain and franchisors. This would place a positive obligation on all parties benefiting from the labour of a worker to ensure that workplace rights are protected. We submit that although this option is not as broad-ranging as the first, it would still have a significant impact on ensuring compliance, so long as the exception provision remained sufficiently limited to require host employers/franchisors/supply chain heads to take proactive steps to ensure compliance.

In many ways, the Coalition's recent policy announcement most closely reflects this option. In their Policy to Protect Vulnerable Workers, the Coalition announced it will be:²¹³

Introducing new provisions that will apply to franchisors and parent companies who fail to deal with exploitation by their franchisees. The Fair Work Act will be amended to make franchisors and parent companies liable for breaches of the Act by their franchisees or subsidiaries in situations where they should reasonably have been aware of the breaches and could reasonably have taken action to prevent them from occurring. Franchisors who have taken reasonable steps to educate their franchisees, who are separate and independent businesses, about their workplace obligations and have assurance processes in place, will not be captured by these new provisions.

WEstjustice welcomes the Government's desire to 'capture franchisors and parent companies who fail to deal with exploitation by their franchisees'.²¹⁴ However, without careful drafting, there is a risk that such amendments will not bring about positive change, and will not go far enough to protect vulnerable workers. For example, it is essential that the Government outlines what will constitute “reasonable steps” and “assurance processes”—one line in a contract between the franchisor and franchisee should fall far short of the mark. A key incentive for franchisors and supply chain heads to ensure compliance within their business chain is to hold them equally liable for any breach, and exceptions to this joint liability should be limited (if any exceptions are provided at all).

One example of how this could be achieved was discussed by the Senate Education and Employment References Committee in their 2016 report on temporary migrant work. The Committee referred to Dr Tess Hardy's submission, as follows:²¹⁵

Dr Hardy outlined ways in which a degree of responsibility could be placed on the host firm. She cited the 2011 labour law reforms in Israel where direct responsibility for breaches of minimum employment standards in sectors such as cleaning and security was placed on the host firm, not as an employer, but as a guarantor.

The Act specified three factors used to determine whether the host firm would bear responsibility for the breaches of workplace law:

- a. whether the client has taken 'reasonable steps' to prevent any infringement of workers' rights by the contractor (i.e. labour hire provider), including by establishing a procedure whereby workers can bring complaints about the contractor directly to the client;*
- b. the client may avoid liability under the Act if they can show that they hired a 'certified wage-checker' to perform periodical checks of pay and made sure that any identified underpayments were promptly rectified;*
- c. the client will be automatically liable for any relevant underpayments of the agency worker where the client is found to have paid the contractor a contract price which falls below the minimum required by the Act.*

WEstjustice welcomes the opportunity to work with the Government in developing any draft legislation arising from this policy recommendation.

²¹³ Liberal Party of Australia, above n 134.

²¹⁴ Ibid.

²¹⁵ Hardy, above n 198.

FOR LABOUR HIRE: PROTECTION FOR "CONTRACT WORKERS"

It may be possible to ensure compliance by host employers using a similar mechanism to that contained in section 21 of the Equal Opportunity Act 2010 (Vic). Parties in labour hire arrangements are expressly regulated by section 21 of the Equal Opportunity Act 2010 (Vic), which provides that:

Discrimination against contract workers

1. *A principal must not discriminate against a contract worker:*
 - a. *in the terms on which the principal allows the contract worker to work; or*
 - b. *by not allowing the contract worker to work or continue to work; or*
 - c. *by denying or limiting access by the contract worker to any benefit connected with the work; or*
 - d. *by subjecting the contract worker to any other detriment.*
2. *Subsection (1) does not apply to anything done or omitted to be done by a principal in relation to a contract worker that would not contravene this Act if done or omitted to be done by the employer of that contract worker.*

The term "principal" is relevantly defined as 'a person who contracts with another person for work to be done by employees of the other person'.²¹⁶ The term "contract worker" is defined as 'a person who does work for a principal under a contract between the person's employer and the principal'.²¹⁷

Such definitions and terms could be inserted into relevant sections of the FW Act relating to underpayments and termination of employment. At a minimum, the concept of principal and contract worker should be inserted into the meaning of adverse action in section 342(1) of the FW Act. This relationship could then be made subject to the adverse action provisions to ensure workers are protected. The definition of adverse action should be amended to include the following:

Adverse action is taken by a principal against a contract worker if the principal: (a) dismisses the contract worker; (b) injures the contract worker in his or her employment; (c) alters the position of the contract worker to the contract worker's prejudice; or (d) discriminates between the contractor and other employees of the principal.

²¹⁶ Equal Opportunity Act 2010 (Vic) s 4.

²¹⁷ Equal Opportunity Act 2010 (Vic) s 4.

LABOUR HIRE LICENSING SCHEME

While joint employment will provide better redress for workers who are exploited and encourage those in power to be proactive about ensuring that rights are protected, a labour hire licensing scheme is a further measure to prevent the initial entry of unscrupulous employers to the labour hire market.

In the UK, the Gangmasters Licensing Authority operate a licensing scheme to regulate labour hire agencies in the fresh produce supply chain and horticulture industry.²¹⁸ It is an offence to operate a labour hire agency in these industries without a license. To obtain a license, companies must meet a number of standards. The Authority investigates license holders and also conducts inspections to ensure workers are being treated legally. If companies do not comply with the law, they can have their licenses revoked. It is an offence to operate without a license, or to enter into an arrangement with an unlicensed gangmaster.

As the Authority website notes, the benefits of licensing include:

Workers receive fair treatment, the pay, benefits and conditions they are entitled to.

Labour providers are not undercut by those who pay less than the minimum wage or avoid tax. Industry standards are raised.

Labour users can check their workers come from a legitimate provider and are informed if their labour provider's licence is revoked.

Consumers can be assured that their food has been picked and packed in an ethical environment. Illegal activities which lead to a loss of public revenue —income tax, VAT and NI—are reduced.

In her submission to the Senate Inquiry mentioned above, Dr Hardy provides a useful assessment of the labour hire licensing scheme in the UK. She concludes that the scheme:²¹⁹

represents a somewhat promising experiment in an industry which was plagued by problems of worker exploitation. It also provides a useful example of how a licensing regime, coupled with an increased focus on enforcement, has the potential to improve compliance amongst labour hire providers in sectors with high numbers of temporary foreign workers.

²¹⁸ Gangmasters Licensing Authority, *What we do* (2016) <<http://www.gla.gov.uk/who-we-are/what-we-do/>>.

²¹⁹ Hardy, above n 198, 21.

WEstjustice suggests that a labour hire licensing scheme should be introduced in Australia. We endorse the National Union of Workers (NUW) Victorian Labour Hire licensing model.²²⁰ As contained in the NUW submission to the Victorian Inquiry into Labour Hire and Insecure work, key features of the model should include:

- payment of a bond and annual license fee to the Victorian Government to operate a labour hire company in Victoria;
- threshold capital requirement to operate a labour hire company in Victoria;
- core requirements for license holders and related parties, including a fit and proper person test, ongoing minimum capital requirements, reporting obligations and importantly, compliance with workplace laws;
- dedicated and well-resourced compliance unit;
- third parties including unions, individuals and community organisations have standing to bring actions for non-compliance. Such actions should be able to be taken in a low-cost forum such as the Victorian Civil and Administrative Tribunal, or a dedicated specialist tribunal; and
- mandatory workplace rights and entitlements training.

We refer to above sections and suggest that any compliance unit and training must ensure that it is accessible to newly arrived and refugee communities.

Our recommendation mirrors that of the Senate Education and Employment References Committee, which recommends:²²¹

that a licensing regime for labour hire contractors be established with a requirement that a business can only use a licensed labour hire contractor to procure labour. There should be a public register of all labour hire contractors. Labour hire contractors must meet and be able to demonstrate compliance with all workplace, employment, tax, and superannuation laws in order to gain a license. In addition, labour hire contractors that use other labour hire contractors, including those located overseas, should be obliged to ensure that those subcontractors also hold a license.

²²⁰ National Union of Workers, above n 95.

²²¹ Education and Employment References Committee, above n 132, xiv, 163–173; 328–330. The ALP also adopted a policy of introducing a labour hire licensing scheme in the Federal election 2016: ALP Policy, *Protecting Rights at Work: Licensing Labour Hire*, 2016, <http://www.100positivepolicies.org.au/protecting_rights_at_work_licensing_labour_hire>.

RECOMMENDATION

The Federal Government should undertake a review of fractured forms of employment (labour hire, supply chain, franchises, sham contracting) with a view to amending the Fair Work Act to incorporate the concept of joint employment and/or vicarious liability.

Such amendments should ensure that all who receive the benefits of being an "employer" are also required to comply with Fair Work Act provisions relating to underpayments and termination. Amendments could be achieved by:

- adopting a definition of "employer" as posited by Thai or Dowling (preferred option);
- adopting the notion of vicarious liability as found in ss 109 and 110 of the Equal Opportunity Act with limited exceptions (preferred option);
- incorporating an equivalent provision to s 21 of the Equal Opportunity Act; or
- at a minimum, the general protections provisions should be expanded to cover workers in labour hire relationships.

The Federal and/or State governments should introduce a licensing scheme for labour hire providers. Such a scheme should contain the following features:

- payment of a bond and annual license fee to the Government to operate a labour hire company in Victoria;
- threshold capital requirement to operate a labour hire company in Victoria;
- core requirements for license holders and related parties, including a fit and proper person test, ongoing minimum capital requirements, reporting obligations and importantly, compliance with workplace laws;
- dedicated and well-resourced compliance unit;
- third parties including unions, individuals and community organisations have standing to bring actions for non-compliance. Such actions should be able to be taken in a low-cost forum such as the Victorian Civil and Administrative Tribunal, or a dedicated specialist tribunal; and
- mandatory workplace rights and entitlements training.

**"Anybody who
benefits from the
exploitation of
vulnerable workers
should be held
accountable."**

FOR SUPPLY CHAINS: EXPANSION OF OUTWORKER PROTECTIONS TO OTHER INDUSTRIES

For supply chains, further obligations should be introduced to encourage compliance.

In submissions made to the Senate Inquiry on the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders, Dr Hardy advocates for an expansion of current provisions relating to outworkers in the textile industries.²²²

The Textile, Clothing and Footwear (TCF) Industry responded to the problems associated with supplier chains by persuading governments to adopt a new regulatory model to protect vulnerable TCF contract workers. This resulted in an amendment to the Fair Work Act to include Part 6-4A—Special provisions about TCF outworkers. In the Explanatory Memorandum to the Bill, it was stated that:

*Research has consistently shown that outworkers in the TCF industry suffer from unique vulnerabilities as a result of their engaging employment in non-business premises. These vulnerabilities are often exacerbated by poor English language skills, lack of knowledge about the Australian legal system and low levels of Union membership in the industry.*²²³

Part 6-4A is 'designed to eliminate exploitation of outworkers in the textile, clothing and footwear industry, and to ensure that those outworkers are employed under secure, safe and fair systems of work'.²²⁴

'Outworkers', who are often classified as independent contractors, are treated as 'employees' for the purposes of the protective provisions of the FW Act and modern award system.²²⁵ Additionally, TCF outworkers have the right to bring a claim for workplace entitlements against an "indirectly responsible entity" and enjoy a reversal of the onus of proof onto the party served with the claim for recovery.

The relevant modern award, the *Textile, Clothing, Footwear and Associated Industries Award 2010* specifically regulates arrangements made between principals and others who have work undertaken on their behalf.²²⁶ The provisions are designed to ensure transparency at each level of the supply chain. The provisions require principals and those engaged by the principal to maintain certain records regarding the identification of the workers and the work performed by them. The Award also provides that principals must apply the National Employment Standards to the worker, whether or not the worker is an employee of the principal. There are also specific provisions regarding hours of work, work on weekends and public holidays, time standards, payment and stand down.

Various state governments have also passed specific outwork laws (including NSW²²⁷, South Australia²²⁸, Queensland²²⁹, Tasmania²³⁰ and Victoria²³¹). Tasmania, Victoria, South Australia, Queensland and NSW have provisions in relation to deeming. For example, section 4 of the Outworkers (Improved Protection) Act 2003 (Vic) provides that outworkers will always be classified as employees for the purposes of various state laws, including long service leave and occupational health and safety laws. The same states, excluding Tasmania, also have provisions relating to recovery of unpaid remuneration owed to outworkers. South Australia and NSW have mandatory codes of practice. Victoria retains the capacity to make a code but has not yet utilised these provisions.

WEstjustice submits that the existing protections under the FW Act afforded to TCF outworkers should be extended to other industries, such as horticulture and food, distribution, retail, hospitality, cleaning, security, construction and other industries where workers at the bottom of the chain are vulnerable to exploitation. At the very least, we recommend that enforceable codes of conduct be mandated for these industries to ensure that workers are protected at each level of the supply chain.

Another approach discussed by Dr Tess Hardy in submissions to the Senate Education and Employment References Committee relates to 'hot goods' provisions from the US. Such provisions 'have enabled the regulator in the US to enjoin or embargo the transportation or sale of goods, in the production of which, any employee was employed in violation of US labour laws'.²³² Such provisions provide strong economic incentives for parent companies to ensure outstanding entitlements are paid, 'because an enjoined party can seek relief by remedying any past violation of labour laws'.²³³

Importantly, Dr Hardy notes that these provisions:

*have enabled the regulator to bypass the direct employer and enrol companies higher in the supply chain which have a much stronger incentive to establish private monitoring arrangements in relation to subcontractors in order to show that they have fulfilled their relevant statutory duty.*²³⁴

The Senate Inquiry Report observed that:

*In light of these characteristics, Dr Hardy noted that a hot goods provision would provide lead firms, supermarkets, and fast food franchisors with 'a strong commercial incentive to rectify any relevant underpayments as quickly as possible in order to enable the supply' of products to continue without further delay.*²³⁵

RECOMMENDATION

The State and Federal Governments should expand outworker protections under the Fair Work Act 2009 (Cth) (and relevant state laws) to other industries such as horticulture and food, distribution, retail, hospitality, cleaning, security, construction and other industries where workers at the bottom of the chain are vulnerable to exploitation.

222 Hardy, above n 198.

223 Explanatory Memorandum, Fair Work Amendment (Textile, Clothing & Footwear Industry) Bill 2011 (Cth), 1.

224 Fair Work Act 2009 (Cth) s 789AC.

225 Fair Work Act 2009 (Cth) s 789BB.

226 Note that special provisions for outworkers have existed in federal awards for some decades. The current scheme broadly owes its origins to a 1987 decision by DP Riordan, as the Australian Conciliation and Arbitration Member in *Re Clothing Trades Award 1982* (1987) 19 IR 416.

227 Industrial Relations Act 1996 (NSW), Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW); NSW Ethical Clothing Extended Responsibility Scheme, made under Part 3 of the Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW).

228 *Fair Work Act 1994 (SA)*; *Fair Work (Clothing Outworker Code of Practice) Regulation 2007 (SA)*.

229 *Industrial Relations Act 1999 (Qld)*.

230 *Industrial Relations Act 1984 (Tas)*.

231 *Outworkers (Improved Protection) Act 2003 (Vic)*.

232 Dr Tess Hardy, answer to written question on notice following a public hearing on 24 September 2015 (received 18 January 2016).

233 *Ibid*.

234 Education and Employment References Committee, above n 132, 311.

235 *Ibid*.

FOR FRANCHISES: LEGISLATIVE REFORM AND UPDATED CODE

In the wake of the investigation into the 7-Eleven franchise, Australian Greens MP Adam Bandt introduced a Bill to Parliament to enable underpaid franchise employees to recover amounts from the franchisor's head office.

In a media release, Mr Bandt outlined his intentions for the legislation:²³⁶

Something is wrong with our system when the boss of 7-Eleven is a billionaire but its workers are getting paid under \$10 an hour and threatened with deportation. We've also heard reports that suggest this kind of widespread worker exploitation doesn't end with 7-Eleven.

If head offices can enter into franchise contracts then turn a blind eye to what happens in their stores, workers can get exploited... By allowing workers to claim any underpayments directly from head office, this law will help bring about a culture shift. Instead of leaving it to vulnerable workers to uphold the law through expensive legal action, head offices would take more responsibility for what goes on in the stores that carry their name.

The head office could still pursue the franchisee for the amount of any underpayment, but they'd have an extra incentive for ensuring the underpayment didn't happen in the first place.

The Bill²³⁷ did not progress beyond First Reading. However, importantly, it provided that in the event of an underpayment, the franchisor and any related body corporate of the franchisor 'are jointly and severally liable for the payment of the unpaid amount'.²³⁸ However, the franchisor or related body corporate are able to seek to recover any amount paid from the franchisee.²³⁹

As noted above, the Government has announced a policy to amend the FW Act to capture franchisors who fail to prevent exploitation. However, the language of the proposed reform suggests that a franchisor will only be liable where it failed to take reasonable steps to prevent the underpayment. As noted above, it is essential that reforms are meaningful and motivate franchisors to prevent exploitation. We suggest that making franchisors jointly liable for any underpayment will bring about greater compliance with the FW Act and minimum standards.

Alternatively, as proposed above, vicarious liability type provisions should be inserted into the FW Act, with very limited exceptions. Under ALP 2016 election policy, franchisors should be held accountable 'unless the franchisor can prove they could not have reasonably known or were not reasonably aware of the breaches'.²⁴⁰ This obligation is coupled with a proposed amendment to the Franchising Code of Conduct to require the franchisor to take reasonable steps to assist franchisees in compliance with labour standards under the Fair Work Act.

The Senate Education and Employment References Committee has also recommended a review of the Franchising Code of Conduct as a possible means of imposing liability on franchisors.²⁴¹

The committee recommends that Treasury and the ACCC review the Franchising Code of Conduct (and if necessary competition law) with a view to assessing the respective responsibilities of franchisors and franchisees regarding compliance with workplace law and whether there is scope to impose some degree of responsibility on a franchisor and the merits or otherwise of so doing.

RECOMMENDATION

Building on its recent policy announcement, the Federal Government should amend the Fair Work Act 2009 (Cth) and Franchising Code of Conduct such that franchisors can be held accountable for breaches by franchisees in respect of underpayments and unlawful termination of employment.

²³⁶ Adam Bandt, 'Greens Move to Prevent Future 7-Eleven-Style Worker Exploitation' (Media Release, 15 September 2015).

²³⁷ Fair Work Amendment (Recovery of Unpaid Amounts for Franchisee Employees) Bill 2015 (Cth).

²³⁸ Ibid, s 789GD.

²³⁹ Ibid, s789GG.

²⁴⁰ ALP Policy, Protecting Rights at Work, 2016, <http://www.100positivepolicies.org.au/protecting_rights_at_work>.

²⁴¹ Education and Employment References Committee, above n 132, xiii, 264–265.

Laws and processes to eradicate
sham contracting

"The only legal risk facing an employer who misclassifies a worker is the risk that it may ultimately be required to shoulder an obligation it thought it had escaped."²⁴²

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

Under the FW Act, it is unlawful to engage a worker as a contractor when they are in reality an employee (sham contracting). To determine whether a worker is running their own business (as a contractor), or in fact an employee, courts apply a multi-factor common law test. Considerations include whether the worker was required to wear a uniform, provided their own tools and equipment, was paid an hourly rate or paid to complete a task, could delegate work or was required to complete work personally, and the degree of control the employer exercised over the worker (e.g. hours of work, manner of work etc).

The nature of any agreement/contract between the worker and boss is not determinative (that is, a written contract stating that an individual is an independent contractor does not necessarily mean they will be considered or classified as such at law).

²⁴² Joellen Riley, 'Regulatory responses to the blurring boundary between employment and self-employment: a view from the Antipodes' (Recent Developments in Labour Law, Akademai Kiado Rt, 2013), 5.

Among newly arrived and refugee communities, sham contracting is rife. In a WEstjustice survey, the following comments were provided by community workers who were asked a general question about common employment problems:²⁴³

"Client was told they would only hire him if he had an ABN."

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

"A lot of clients are told by employers they have to obtain ABNs even though it's not appropriate for the work they are doing."

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

WEstjustice has observed instances of employers obtaining ABNs for workers, and instances of jobs being offered, conditional upon having an ABN. There is often little if any choice in a worker's 'acceptance' of their position as a contractor. Often that type of engagement is the only one on offer and is made on a 'take it or leave it' basis. For someone desperate to make a start in a new country, the basic need to work and earn an income is often overshadowed by the terms and conditions under which the work is offered. This creates a power imbalance, and in many instances, principals take advantage of the vulnerability of potential workers in this situation.

We have observed that sham contracting can take place through complex sub-contracting and supply chain arrangements with multiple intermediaries between the original employer and the 'independent contractor'. It is an issue that disproportionately affects individuals with limited agency in the labour market. Some of our clients' experiences are set out in the following case studies:

²⁴³ Full details can be found at Dow, above n 2, 12.

LIN

Lin came to Australia as a refugee. This was her first job in Australia. She worked as a door-to-door sales person trying to sell safety equipment. She was given instructions on where to work, how and when. The boss agreed to pay \$60 per sale but no salary apart from this. After three full days of work (8am–5pm) Lin left her job. She had made one sale but was never paid for it despite providing her ABN and bank details. Lin came to see us about the \$60 payment, without any understanding of the differences between an independent contractor and employee, or the right to be paid an hourly wage.

BAO

Bao worked as an independent contractor delivery driver for a distribution company. He worked full time making deliveries for one host agency. He wore their uniform, was texted each night confirming work the next day, and had no control over hours or duties. Bao had a contract providing for subcontracting but in reality he was not able to delegate. He was paid by the hour and was not allowed to take days off, even with a medical certificate. Bao's boss kept several weeks pay 'in advance'. Bao was told if he went home (overseas) to visit his family he would not be paid and would not get future shifts.

SHAM CONTRACTING RESULTS IN EXPLOITATION

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

- they do not receive minimum award wages or entitlements, including leave. Our clients are mostly people who are low paid, award-reliant workers doing unskilled or low-skilled labour. They are performing the work of an employee, which should entitle them to the same rights and standards enjoyed by employees under the FW Act. Individuals who are ostensibly employees are therefore receiving less than their position ought to afford them. This creates serious issues for the labour market in terms of providing a competitive advantage to those companies that misclassify and underpay their workers.
- they rarely receive superannuation contributions. This is the case even though *Superannuation Guarantee Ruling 2005/1* provides that they must receive superannuation contributions if they are engaged under a contract that is principally for labour.²⁴⁴ A contract will be principally for labour if it is mainly for the person's labour, which may include:
 - physical labour;
 - mental effort; or
 - artistic effort.
- contractors are often required to arrange their own tax and may need to organise workers compensation insurance, however many vulnerable contractors are not aware of how to do this.

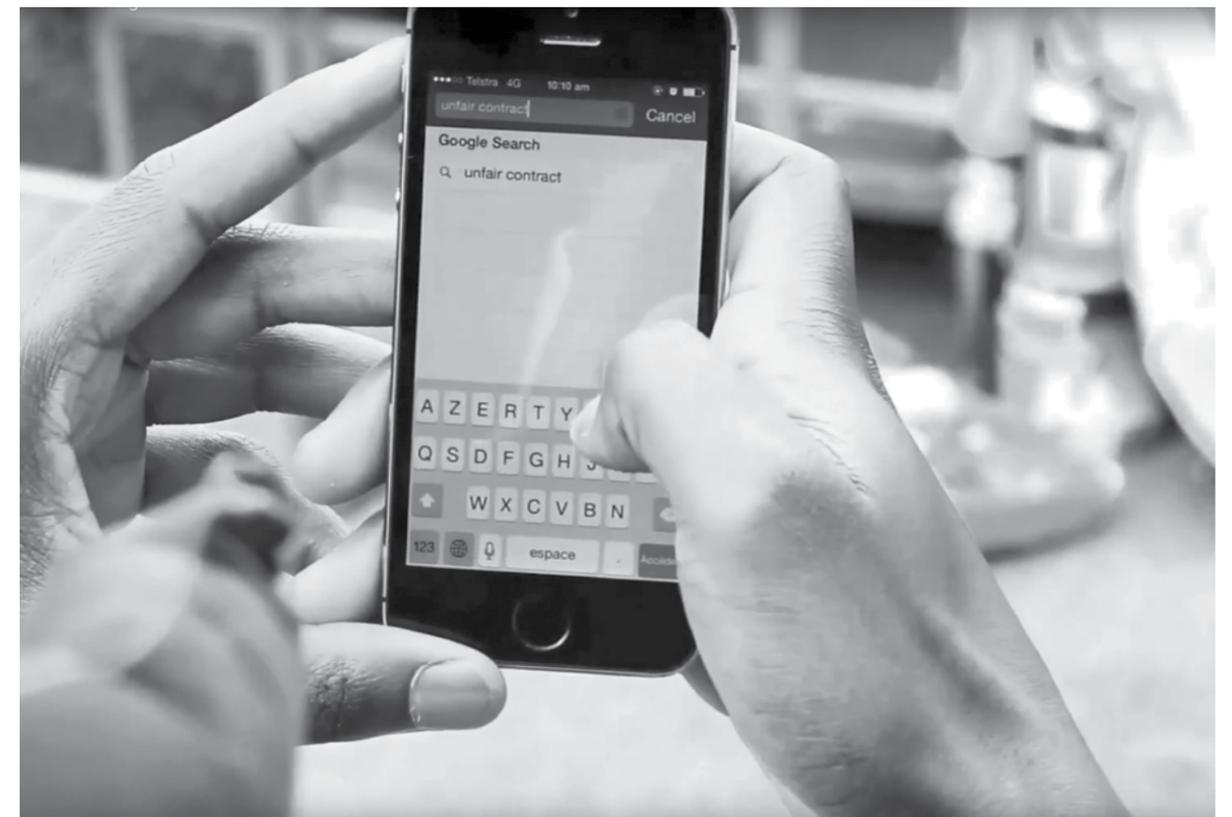
Many of our clients are not aware that there is a difference between an employee and independent contractor, and asking the questions necessary to apply the multi-indicia test can be difficult. It is a cause for grave concern that our clients are often told by the person hiring them that if they have an ABN they are automatically a contractor, or told they will not be paid unless they obtain an ABN.

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

Reform is urgently required. Indeed, the Senate Education and Employment References Committee has called for an independent review of the utility of sham contracting provisions.²⁴⁵

²⁴⁴ Australian Taxation Office, *Superannuation guarantee: who is an employee?*, SGR 2005/1, 23 February 2005.

²⁴⁵ Education and Employment References Committee, *above n 132*, xiv, 278–283; 327–328.



WEstjustice digital story.

A DEFINITION OF EMPLOYEE WOULD ASSIST

"Except perhaps in matters involving revenue authorities, a rational if unethical employer may consider it worth classifying a worker as a contractor, because the employer might make immediate savings and face only a remote risk that the employee would ultimately find reason to bring a grievance."²⁴⁶

Rather than applying the multi-factor test to each situation where there is doubt as to a worker's true status, a statutory definition would increase efficiency and certainty. This definition should include a presumption that a worker is an employee unless certain conditions are met. For example, in their Submission to the ABCC Inquiry into Sham Arrangements and the Use of Labour Hire in the Building and Construction Industry, Andrew Stewart and Cameron Roles proposed that the term 'employee' should be redefined in a way that would strictly limit independent contractor status to apply only to those workers who are genuinely running their own business.²⁴⁷

A person (the worker) who contracts to work for another is to be presumed to do so as an employee, unless it can be shown that the other party is a client or customer of a business genuinely carried on by the worker.²⁴⁸

They recommend that this definition could be included in any legislation which uses the term 'employee'. WEstjustice supports this recommendation: the definition is precise and clear, and allows scope for genuine contractors to engage as such.

Alternatively, the ATO's superannuation eligibility test could be adopted more broadly. That is, if a worker is engaged under a contract wholly or principally for the person's physical labour, mental effort, or artistic effort, that person should be deemed to be an employee for all purposes.²⁴⁹

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

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

It is unrealistic to expect that newly arrived and refugee workers will be able to prepare a claim that requires knowledge of a common law 'multi-factor' test. There is also a risk that if the complex multi-factor test is applied differently by the Court and workers are not found to be employees, they would have been better off making an application to VCAT as an independent contractor.

Unfortunately, the complex multi-factor test is preventing workers from pursuing their full entitlements. A statutory definition that presumes workers are employees affords many advantages: less time is used in applying a vague multi-factor test, there is greater likelihood of consistent outcomes, increased clarity for employers and employees, and there is much greater fairness for workers.

RECOMMENDATION

A statutory definition of employee should be introduced. It should include a presumption that a worker is an employee.

EMPLOYER DEFENCE SHOULD BE LIMITED

WEstjustice regards the current provisions in the FW Act as insufficient to discourage sham contracting.

The provisions of subsection 357(2) should be dramatically re-written. The subsection provides:

(2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:

- did not know; and*
- was not reckless as to whether;*

the contract was a contract of employment rather than a contract for services.

The provision offers a defence to an employer which is broad and relatively easy to rely upon.

Employers are in a far superior position to a worker in terms of resources and knowledge of the workplace relations system. They should have a duty to undertake the necessary consideration and assessment of whether or not a worker is an employee or independent contractor. They should be able to positively assert that the relationship they are entering into with a worker is the correct one.

As such, WEstjustice supports Productivity Commission recommendation 25.1 that:²⁵⁰

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

This recommendation, along with our recommendation to introduce a statutory definition of independent contracting, both formed part of ALP policies in the 2016 Federal election.²⁵¹

ONUS ON EMPLOYER TO DEMONSTRATE GENUINE CONTRACTING RELATIONSHIP

To increase compliance with sham contracting laws, WEstjustice also proposes the introduction of a requirement that a person who asserts that he or she is engaging an independent contractor must complete a document which is lodged with the Fair Work Commission (or appropriate State-based compliance unit) which includes details of the engagement and includes a statement by the principal setting out why he or she believes that the engagement:

- is properly one which establishes a relationship of contractor and principal; and
- the reasons why this is so, including the steps taken by the contractor to establish (b).

This document should be provided to the independent contractor, who would be able to rely on this evidence in a court or tribunal should there be a dispute as to whether the relationship was originally one of principal and contractor, or has subsequently lost such features.

A reverse onus should apply so that a worker can assert that he or she was actually an employee and the principal/employer should then be required to prove this was not the case. This would be a significant deterrent as it would require employers to be vigilant at the commencement of a relationship and to make proper inquiries and obtain appropriate professional advice. It would create an initial compliance burden on the employer, but there would be a valuable return for society in terms of less litigation and a quicker resolution of disputes. A court or tribunal could then apply an objective test to ascertain whether a reasonable person would have reached the same conclusion as the principal.

As noted above, the employer should not be able to rely on their own ignorance to defeat the legitimate claim of an employee wrongly classified as a contractor.

²⁴⁶ Joellen Riley, 'Regulatory responses to the blurring boundary between employment and self-employment: a view from the Antipodes' (Recent Developments in Labour Law, Akademai Kiado Rt, 2013), 5.

²⁴⁷ Andrew Stewart and Cameron Roles, Submission to the Australian Building and Construction Commissioner (ABCC), <<http://fwbc.gov.au/sites/default/files/Andrew%20Stewart%20and%20Cameron%20Roles%20-%20SCTR%20Submission.docx>>.

²⁴⁸ Ibid. See also, Cameron Roles and Andrew Stewart, 'The reach of labour regulation: Tackling sham contracting' (2012) *Australian Journal of Labour Law* 25, 258.

²⁴⁹ Australian Taxation Office, *Superannuation guarantee: who is an employee?*, SGR 2005/1, 23 February 2005.

²⁵⁰ Productivity Commission, above n 29, 815.

²⁵¹ Rights At Work, ALP Policy, 2016, <<http://www.alp.org.au/rightsatwork>>.

PREVENTATIVE MEASURES AT TIME ABN OBTAINED

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

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

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

NEED FOR INCREASED REGULATORY ACTION

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

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

Furthermore, any education programs discussed above should address this issue and raise awareness among target communities.

Finally, we note that for genuine independent contractors, avenues for assistance with underpayment matters are extremely limited. Such workers fall outside the remit of FWO and many community legal centres.

RECOMMENDATION

Employers and principals should have a positive obligation to ensure they classify their workers appropriately. There should be no recklessness/lack of knowledge defence.

Where principals do engage contractors, they should be required to submit a statement explaining the nature of the contracting relationship.

More rigorous tests should apply before an ABN is given to an individual. At the time an ABN is requested, applicants should be required to attend a face-to-face educational meeting to understand the differences between employees and contractors, and learn about insurance and taxation obligations.

**Reforms to stop discrimination, unfair
and unsafe work practices**

9

DISMISSALS

DISMISSALS ARE COMMON AND HAVE DISASTROUS IMPACTS

At the time of publishing the Preliminary Report we had heard of the challenges that newly arrived workers face regarding termination of employment. As one community leader said:²⁵²

"People from refugee backgrounds face discrimination at work, bullying, don't know their rights and often lose their jobs without being aware. No secure job."

The Preliminary Report shows that 55% of survey respondents identified that termination of employment was common, somewhat common or that they or someone they knew had experienced losing their job (see chart below).

Our case work has reflected these findings. Around 20% of our clients between May 2014 and October 2015 had their employment terminated. Often in such cases, the employee has not been treated with procedural fairness, or there were other unfair circumstances which lead to their termination.

Under the FW Act and anti-discrimination legislation, it is generally unlawful to dismiss a worker where to do so:

- is unfair (meaning harsh, unjust or unreasonable); and/or
- is discriminatory or for a prohibited reason (for example, because the worker made inquiries about their rate of pay or because of a worker's race or disability).

Unfortunately, WEstjustice has seen examples of each of the above factors forming the basis for terminating employment. Given the central importance of labour market integration for newly arrived communities, coupled with the significant barriers newly arrived and refugee workers face in accessing the labour market, it is extremely important that laws ensure that CALD workers are not dismissed unfairly.

The social and economic consequences of unfair dismissal are particularly severe for CALD workers. A number of our clients have experienced homelessness as a result of losing their jobs. The following case study provides an example:

ALI **A**

Ali was a refugee from Afghanistan working in a factory. His mother and children were living back home and he was supporting them, as well as his brother's family and children. He was dismissed after taking a number of periods of sick leave. All he wanted was his job back. He was distraught that he wasn't earning anything, and expressed how difficult it would be for him to find another job given his limited English skills. Ali had always received great feedback for his work. He had to borrow money from a friend to pay rent and food, and eventually had to move out of where he was living because he ran out of money.

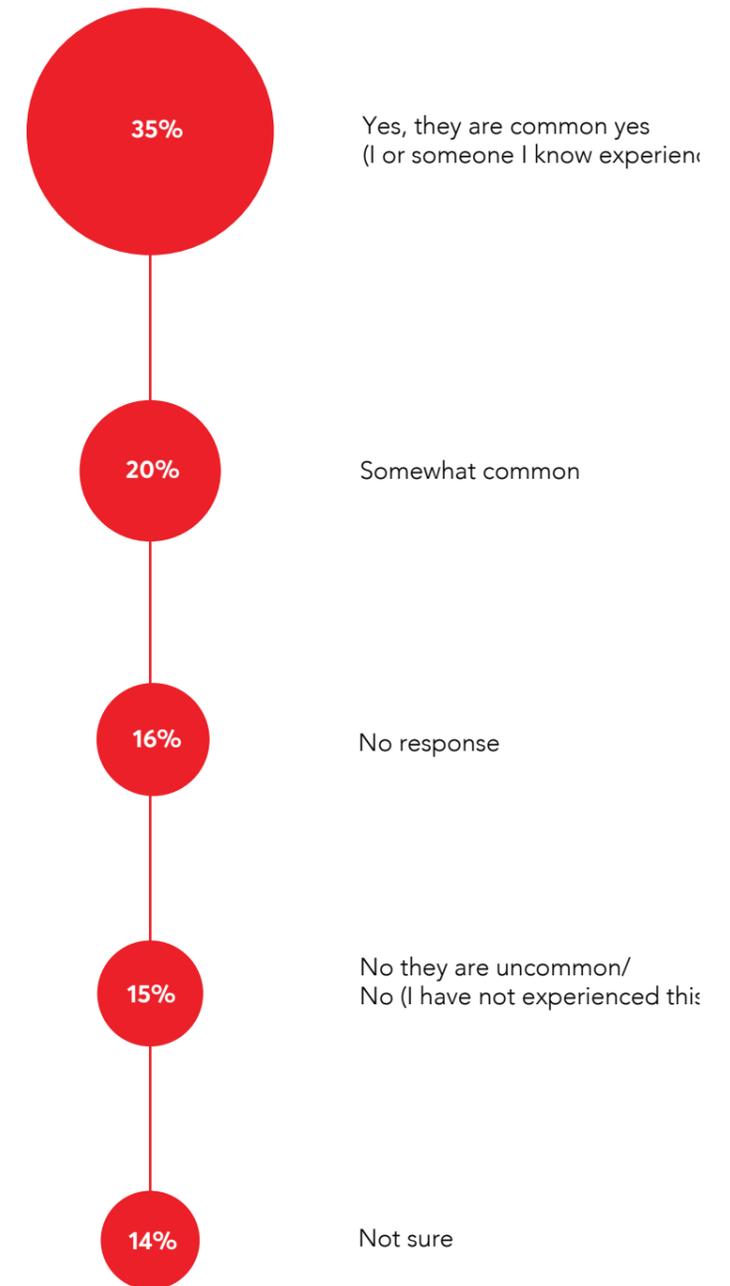
The causes of reported job loss rates were not captured by our Preliminary Report survey, however our casework, interviews and other survey responses indicate that a combination of factors are at play. These include the nature of the work many people from newly arrived communities undertake (insecure, highly casualised employment in low-paid industries), as well as other potentially preventable problems including dismissal relating to small communication breakdowns/misunderstandings, unfair dismissal and discrimination.

As one community worker explained:

"Most people who I know they lose their jobs just because they're a refugee background or they don't speak English fluent and be underestimated for their experience work."²⁵³

As another community leader noted:

"Since most of them have very little English language skills there is a lack of understanding about work place contracts, rules and procedures, often being dismissed or voluntarily resigning due to receiving warnings"



252 Dow, above n 2, 6.

253 Ibid.

Lose job/made redundant/get fired: frequency

Marco's story demonstrates the importance of unfair dismissal processes for ensuring procedural fairness is followed for vulnerable workers:

MARCO

Marco came to Australia as a refugee in 2012. He has worked in a food processing factory for over three years. Marco describes his work as his life and his passion. He has never had any trouble at work. One day, at the end of his shift, Marco received a letter advising him that there was an investigation into his alleged breach of employment contract. He was asked to respond to allegations of misconduct in writing but does not speak English. Marco was called into a meeting as part of the investigation but was not provided with an interpreter.

Marco came to the Employment Law Service distraught. His salary not only supported him, but his children and family back home. Marco denied all allegations. WEstjustice assisted Marco to write a letter requesting face-to-face meeting with an interpreter. Marco was given another meeting with an interpreter present and could explain his situation. The next week, Marco dropped in to WEstjustice—he had started back at work. He was very happy to have his job back.

The unfair dismissal (UFD) and general protections (GP) laws within the FW Act are extremely important, particularly in providing vulnerable employees with increased security and protection against arbitrary or discriminatory conduct. The provisions also provide an avenue for redress where the law is disregarded, and ensure procedural fairness, particularly where cultural or language barriers apply. Given the often extreme power imbalance between employee and employer, our clients could not negotiate without legal protections.

PROCESS—ADVANTAGES AND CHALLENGES

WESTJUSTICE EXPERIENCE

Between May 2013 and October 2015, WEstjustice helped eight different clients to recover or obtain orders for payment of over \$86,000 in compensation for unfair dismissal matters. Three clients were represented by WEstjustice, one client was helped to self-represent, and others were ultimately assisted by a union, Job Watch or a law firm acting on a pro bono capacity.

WEstjustice helped four different clients to recover payment of over \$21,000 in compensation for general protections or discrimination-related matters. Three clients were represented by WEstjustice while one was able to self-advocate with our assistance.

WEstjustice drafted eight UFD applications and five GP applications, and represented clients at four UFD conciliations and three general protections conciliations.

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

WHAT WORKS WELL

WEstjustice notes that matters are listed quickly and often proactively managed by FWC, which is positive. It is helpful and efficient that the FWC serves applications on the Respondent, for example. In other jurisdictions, fear and complications relating to service of documents has been sufficient to deter clients from making a claim.

WEstjustice has also found that when we have capacity to assist clients, face-to-face conciliation conferences are an efficient way to resolve most UFD and GP disputes.

LANGUAGE AND LITERACY BARRIERS LIMIT ACCESS

Unfair termination is an area in which the FWO provides no assistance. The FWC routinely refers clients to Job Watch or their nearest community legal centre for assistance. Without our resources and the resources of other community legal centres, many applicants would not be able to obtain any legal advice at all.

WEstjustice represents vulnerable, migrant workers with a limited command of English, scant knowledge of their employment rights or the legal system, and (if it were not for our service) little if any access to legal representation. Due to this array of barriers, many newly arrived and refugee workers cannot access UFD or GP processes at all. For these vulnerable workers, UFD and GP processes are not achieving their purpose.

Many of our clients, particularly those in low-paying jobs, have faced adverse action (including summary dismissal) for exercising or proposing to exercise workplace rights. For example, we have learned about clients being fired when they told their boss that they would see a lawyer, or when asking about salaries or entitlements, often in situations where clients have been dramatically underpaid, or not paid at all.

ISAAC

Isaac worked as a security guard. Despite working over 70 hours per week, he did not receive any overtime payments or penalty rates. His hourly rate of pay was below the applicable award. Isaac was usually paid monthly, however he noticed that he had not been paid for three weeks. Isaac sent numerous messages to his boss asking about his pay. After calling the director and attending his workplace to demand payment, he was fired.

Clients were generally unaware that UFD or GP laws existed, and that their exercise of these rights fall under the ambit of 'workplace rights' protected under the FW Act. Often, clients came to us seeking assistance only in relation to the underpayment matter or because they had lost their job. Even fewer clients were aware of the process for bringing GP or UFD claims, or the time limits involved.

Even in circumstances where these provisions are brought to their attention, the ability of migrants to enforce their rights accordingly is limited. Many of our clients cannot read or write English and many are illiterate in their own languages. Completing application forms and understanding correspondence from the Commission without assistance can be impossible. For example, one worker who attended our Centre nearly had his unfair dismissal case discontinued after inadvertently filling out a Notice of Discontinuance form, not realising what it meant:

SASH

Sash, a migrant, non-English speaking background presented at our service requesting advice after he was dismissed. A few weeks later, he returned to our office with his notice of listing for unfair dismissal. We explained the document was setting a time for conciliation and that he should attend. The client then showed us the form at the back of the notice, which he had already filled out, and explained that he intended to return the form shortly. This form was a Notice of Discontinuance. We explained that this form was to end his matter, and he should only fill out this form if he wanted to end his case. He was very grateful and thanked us for explaining the form, as he otherwise would have sent it in, inadvertently discontinuing his case.

As noted in the Centre for Employment and Labour Relations Law Submission to the Fair Work Act Review on 17 February 2012, filling out an application form requires applicants to produce legal information and make legal judgments. It is our experience that although newly arrived and refugee clients can tell their story with assistance from an interpreter and a caseworker, it is largely impossible for clients to make these legal judgments and draft their own applications without help. Often, community members find it difficult to recount their experiences in a chronological order, and do not understand the various documents within their possession, nor how they could be used to support their case. WEstjustice has experienced numerous client matters where correspondence is not provided until the second or third meeting, as clients simply did not realise that the documents were relevant.

In addition to improving education in relation to workplace rights and responsibilities, there is an urgent need for assistance for vulnerable workers in order to facilitate access to UFD and GP processes. This will increase equity and efficiency. Claims will be better articulated and resolved more quickly. For example, in Abouk's case:

ABOUK

Abouk worked in a warehouse. She was dismissed for alleged bullying and discrimination but denied that this behaviour had occurred. Due to a miscommunication, she had reported another colleague to a manager. Abouk was not given any warnings or opportunity to explain what had happened. WEstjustice assisted Abouk to complete an UFD application and fee waiver application. Eventually, Abouk received compensation, but more importantly for her, agreement that Abouk had resigned and a statement of service that would enable her to find another job quickly.

This support is especially necessary for UFD and GP processes given that the Fair Work Ombudsman cannot provide assistance in relation to these matters.

Unfortunately, we have limited resources and cannot assist all clients. We have had to turn clients away due to lack of capacity, and for many CALD clients there is no other assistance available.

RECOMMENDATION

Vulnerable workers require assistance to access unfair dismissal and general protections processes. Recognising that the FWO does not provide assistance with UFD, and only limited assistance with GP applications, increased funding and resources for services which assist newly arrived and refugee communities to access FWC dispute resolution processes are required. Such assistance could be provided by community based employment law services.

TIME LIMIT IS TOO SHORT

Currently, applicants must make an application for UFD or GP within 21 days of the date the dismissal takes effect. The FWC is only able to extend this time limit in exceptional circumstances.

The time limit of 21 days from the date of dismissal is especially prohibitive for our clients. Even once clients become aware that there are legal protections available to them, there is typically a further delay before they learn about the ELS. Even then, they may need to wait many weeks for an appointment. Although WEstjustice tries to prioritise dismissal claims, due to limited funding and resources, WEstjustice is not always able to provide timely assistance to clients. New appointments often need to be booked as far as four or six weeks in advance. Because of this limited capacity and the limited capacity of other available services, by the time clients receive advice about their dismissal, they can be out of time to lodge a claim.

This means that clients are sometimes forced to file applications, without legal advice and assistance, or even worse, are not able to file a claim at all, despite having meritorious claims.

For example:

SUE

Sue worked in a garment factory for many years. Her employment was suddenly terminated without reason. She contacted WEstjustice for an appointment. Because the appointment was some time away, the receptionist noted that some claims have a 21 day time limit, and recommended that Sue call an infoline for information before her appointment.

Sue received information about bringing an UFD claim, but was unsure how to fill out of the forms. She also wasn't sure how to pay for her application, and was too afraid to contact the FWC. By the time Sue presented for her appointment at WEstjustice, she was out of time. Sue had a strong case, and given her financial circumstances, could have sought a fee waiver from the FWC.

The exceptional circumstances that may be taken into account when considering an extension of the 21 day time limit (contained in subsections 394(3)(a)–(f) of the FW Act), are very narrow, and an extension of time is only permitted in rare circumstances. In our experience the Fair Work Commission applies the time limit strictly, and out of time applications are very rarely accepted.

Because of the necessity to use our stretched time and resources efficiently, WEstjustice has faced difficult decisions about whether to pursue an extension of time for UFD cases for some clients. WEstjustice has had clients who meet the criteria for UFD whom we have had to turn away because the unlikelihood of an extension of time being granted outweighs the time and resources that would be required to lodge a claim.

RECOMMENDATION

The limitation period for UFD and GP applications should be increased to 90 days. The exceptional circumstances that may be taken into account per ss 366(2)(a)–(e) and 394(3)(a)–(f) of the FW Act should be broadened to require consideration of the particular circumstances of vulnerable workers. This should include a consideration of English language abilities, knowledge of legal rights and ability to access legal advice, including recognition of the barriers faced by refugee workers in particular.

PENALTIES SHOULD BE PUT IN PLACE WHERE EMPLOYERS FAIL TO RESPOND

For some cases, WEstjustice has spent considerable time and resources following up employers for their employer response. Currently under the FW Act there are very limited circumstances where an Applicant can lodge out of time. However, there is no sanction for employers who fail to lodge an employer response outside of the seven day time limit set out in the Fair Work Commission Rules.

When an employer response is filed late, it puts unnecessary pressure on applicants and their representatives. In the experience of WEstjustice, the FWC may still expect applicants to attend listed conciliations with an employer respondent in circumstances where no employer response has been filed. This puts employee applicants at a distinct disadvantage as they are unable to adequately prepare or predict an employer response whereas the employer can rely on the information contained in the original application. Further, if an employee is required to seek an adjournment because the employer has failed to provide a response, this has significant financial impacts and may make reinstatement less likely.

RECOMMENDATION

To encourage compliance with the Fair Work Commission Rules, late lodgement of an Employer Response should attract some penalty.

REMEDIES

It is currently the case in relation to UFD matters that compensation can only be awarded for lost wages. If an employer's conduct has caused an employee injury, hurt or humiliation; and/or when an employer's behaviour is particularly unjust, improper or egregious, the FWC should have regard to this, and should have the discretion to order a broader range of remedies. Martin and Wendy's case above (page 151), along with Sam and Jono's (page 228) stories below provide examples of such types of case:

SAM

Sam is a refugee from Afghanistan. He travelled to Australia by boat, has spent time in a detention centre in solitary confinement and has a mental health condition. Sam experienced a long history of discrimination and bullying from his co-workers. He was taunted for his religious beliefs and people called him crazy. Despite complaining to his managers on numerous occasions, there was no action taken against his colleagues, and the behaviour continued. One day, he was indecently touched by one of the bullies. Sam pushed the worker away. He was dismissed for serious misconduct.

Currently, under section 392 of the FW Act, the FWC can take into account a number of factors when awarding compensation. These include: the length of the person's service with the employer, the amount of any income reasonably likely to be earned by the person, the effect of the order on the viability of the employer's enterprise, and any other matter it considers relevant when determining compensation. As such it is possible to argue that because an employee is unlikely to remain in employment for much longer, the remedy should be less. It does not matter whether the reason for employment coming to an end is employer misconduct. This perverse outcome could be mitigated by granting the FWC greater discretion and flexibility with UD remedies, and by directing the FWC to consider a greater range of factors when determining remedy, including hurt and humiliation, the gravity of the employer's breaches, employee vulnerability and the impact of the behaviour on the employee.

In situations like those set out above, even if the maximum amount of compensation was ordered, in our view it is insufficient. As such, we are of the view that there should be no cap on compensation.

This amendment would recognise and seek to avert the significant damage a dismissal can have on labour market integration, successfully starting a new life in Australia and future job opportunities. Such remedies should include compensation for hurt, humiliation and distress; remedies designed to achieve systemic reform such as training for employers; and penalties for egregious employer behaviour. We comment further on the use of remedies to address systemic issues below.

RECOMMENDATION

Compensation for UFD should not be capped or limited to lost wages. Instead, the FW Act should be amended to ensure that remedies achieve the policy objective of preventing unfair dismissals and compensating individuals who have suffered loss or harm. Remedies should include compensation for financial loss, hurt, humiliation and distress; and remedies designed to achieve systemic reform such as training for employers and penalties for egregious employer behaviour.



Westjustice volunteer training session.
Photo credit: Jessica Hagg

WORKPLACE INJURY

As noted in our Preliminary Report, workplace injury is common among newly arrived and refugee workers, and very few people are aware of their right to bring a claim. Over a third of survey respondents reported that injury at work was common/somewhat common, or that they or someone they knew had a workplace injury.²⁵⁴ As one community member explained:²⁵⁵

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

This observation has been mirrored in our casework, with 8% of casework enquiries at October 2015 relating to injury. WEstjustice has seen numerous clients who had been injured badly at work and required medical treatment. Several clients had no knowledge of the WorkCover system and the employer had not informed them of their right to bring a claim.

In some cases, clients had been dismissed following their injury, particularly where employers were unwilling to accommodate modified duties or a period of personal leave, notwithstanding medical certificates requiring these steps to be taken. Sadly, some clients resigned from their work because the employer refused to provide modified duties, and they were in too much pain to work. As a result, several clients were living with significant injuries, no income, and limited future employment prospects. Commonly, workers were threatened with dismissal if they made a WorkCover claim:

PAW

Paw is a refugee who attended the Centre with a severe workplace injury that meant she required specialist medical attention and was unable to work for over a month following the injury. The accident was not reported in the workplace, and Paw was told by her supervisor to tell medical staff that the accident occurred at home. Paw reported being threatened by a supervisor with losing her job if she were to make a WorkCover claim.

WEstjustice assisted the client to make a claim and Paw was paid weekly payments for over 2 months and assisted to return to work with modified duties.

CHIT

Chit worked in a meat factory and injured his shoulder at work. His doctor told him he was only allowed to do light duties and gave him a medical certificate. Chit's supervisor ignored the certificate, and directed Chit to undertake his normal duties. Chit was afraid, and so he continued to work. His shoulder injury got worse and his doctor told him that he could not work at all. Chit told his supervisor and his supervisor told him he could not have any time off work. Chit resigned because he didn't know what else to do.

One case worker informed us about a client who was told to clean a machine while it was still running. The machine was designed to peel and cut vegetables. As a result of following the instruction, he lost his thumb. The company apologized for the loss and offered the client an amount of compensation to "settle" the matter. The company told the worker to go home, saying that they were quiet at the moment and they would call when busy again. Many workers were called back once it was busy again, but not this worker. Ultimately, with the help of the case worker and union, the worker was able to obtain the compensation they were entitled to.

As one community leader notes:

"Making a WorkCover claim is taboo in my community. This session gives me the confidence to say that it is OK to make a claim. Workers entitlements around injury are a mystery to my community so this information will be helpful"

Recently arrived and refugee communities are highly vulnerable to having a workplace injury due to lack of rights awareness, language barriers, fear of questioning/complaining and their participation in high risk industries, including manual and industrial work. In particular, the Centre noticed a pattern of clients who had sustained injuries working in the food processing industry. Many of these clients were illiterate and unable to complete forms without significant help.

Safe Work Australia recently found that migrant and refugee workers are more likely to be killed or injured at work than other employees. The report notes that injury rates are increasing, and regulators must do more:²⁵⁶

The increasing incidence of workplace injuries and fatalities involving at-risk migrant workers is almost certain... It is important that Safe Work Australia, workplace health and safety regulators and workers' compensation authorities quickly build capacity and put in place measures to address... risks for at-risk migrant workers for now and into the future.

Although there are several no-win no-fee personal injury firms willing to assist clients with serious injuries, few private firms will assist clients at the early stage of their case. This means that many vulnerable workers with serious injuries are left without access to their lawful entitlements.²⁵⁷ WorkSafe and the Victorian Government must take urgent steps to improve access to WorkCover. This includes funding services to:

1. provide targeted education; and
2. assist workers to complete forms.

WorkSafe must also ensure that it uses interpreters when contacting clients who speak a language other than English—WEstjustice has seen clients missing meetings due to language misunderstandings.

Where workers do manage to access the system, WorkCover provides appropriate and necessary financial support. Education and assistance to facilitate this access is therefore urgently required. More work must also occur with employers, to prevent further serious injuries occurring in the future.

RECOMMENDATION

Targeted education is urgently required to inform workers about occupational health and safety, and their right to bring a WorkCover claim.

Services must be funded to assist vulnerable workers to complete WorkCover claim forms.

254 Ibid, 11.

255 Survey, community member, ibid.

256 Nick Toscano, 'Fears over rise in migrant workers killed, injured in industrial accidents', The Age, 27 August 2016, <<http://www.theage.com.au/business/workplace-relations/sharp-rise-in-migrant-workers-killed-maimed-in-industrial-accidents-20160825-gr117u.html>>.

257 Fortunately, some firms like Maurice Blackburn provide early assistance to our vulnerable clients via a warm referral process.

BULLYING AND DISCRIMINATION

Our client files reveal that newly arrived and refugee workers are often subjected to distressing and humiliating treatment at work. Such treatment may be directly or indirectly connected to attributes such as their country of birth, ethnicity and refugee status. Clients have been taunted and teased as “boat people”, “black pigs” and “terrorists”. Some clients reported that this discriminatory behaviour escalated after media reports of terrorist events overseas. At other times, clients were tormented for being injured, or dismissed for asking about their workplace rights. Community members reported discrimination at all times of the employment relationship—from recruitment (e.g. being refused work based on their foreign-sounding name, or country of origin) to dismissal (e.g. being unfairly blamed for mistakes at work because of their accent/language).

Bullying and discrimination were frequently reported problems at ELS casework appointments. 7% of clients received advice on bullying, and 8% received advice about discrimination. Discrimination on the grounds of race and religion were most commonly reported, while disability discrimination and pregnancy discrimination were also reported by some clients. While discrimination and bullying aren't necessarily linked, in the cases of clients who accessed the ELS, there was often a correlation.

The following case study demonstrates the terrible treatment some of our clients have reported:

FATIH

Fatih is a young man who got his first job in Australia working in a distribution company. He got along well with his colleagues until they found out that he was an asylum seeker and had come to Australia by boat. After this time, he was mercilessly taunted, called “boat person”, sworn at, given bad and dangerous jobs and excluded from social events. Fatih was deeply affected by this behaviour and sought counselling. After some time, he developed a shoulder injury. This resulted in further ridicule, and eventually he was not able to work anymore.

Stories from community leaders echo our casework experiences:

“Most common problem in my community is bullying and their biggest concern is they will lose their jobs if they speak up. I am surprised that there are laws that protect a worker's job if they report bullying”

“Bullying is a big issue. After the training I will have knowledge of issues and when a member comes I'll be able to provide information and if they want to go further I can refer them”

“A worker was treated badly by a co-worker. The co-worker used to tell him to do jobs for him. One day he was asked to empty the rubbish bin and move it somewhere. In order to avoid conflict he just did as he was told by his co-worker. After he brought back the bin and moved it, the co-worker picked up the bin and threw it on the floor. The worker could not speak English very well.”

Interestingly, in our Preliminary Report and anecdotally, discrimination was reported as occurring much more frequently than what was observed in our casework service. As is reflected in the literature,²⁵⁸ discrimination was commonly identified in interviews and surveys as a serious issue—both when trying to obtain work, and once people found a job. 47% of survey respondents reported that discrimination at work was common, somewhat common, or that they or someone they knew had experienced it.²⁵⁹ However, less than one in ten ELS clients received advice on discrimination. Although we cannot be certain of the reason for this discrepancy, it may be partly attributable to workers' belief that they cannot “prove” their case, a lack of understanding of Australian laws, or the deep pain that reliving traumatic events can evoke. Many clients also described a general feeling that newly arrived workers were treated less favourably, but could not provide specific examples.

Indeed, many clients expressed a deep concern that nothing would change the discriminatory treatment, and they didn't have enough “proof” that they were being discriminated against. Without access to employer records/emails/practices the burden of proof is extremely difficult. Some clients were too fearful to pursue their claim, or found themselves deeply upset sharing their experience with a lawyer, and unable to proceed. Clients much more readily pursued underpayments claims than discrimination-related matters—we expect that this may be because wages claims are easier to quantify and articulate.

Many clients suffered significant psychological injuries as a result of discriminatory behaviour at work—and such injuries may have prevented others from seeking legal assistance. According to VicHealth, “[t]here is a strong relationship between exposure to discrimination and poor mental health”.²⁶⁰ The stories we have heard confirmed the devastating impacts of discrimination, and the significant health impacts that problems at work can cause. Fatih's story above demonstrates just one example of terrible discrimination connected with refugee status. Our client was tormented for being a ‘boat person’, and ultimately, the effect of the discriminatory behaviour was such a severe psychological injury that our client was no longer able to work. Fatih attended his first appointment at the ELS with a trusted case worker, and without such support we doubt Fatih would have reached our service.

In addition to significant health impacts, discrimination has adverse impacts for successful settlement in Australia. One community worker spoke about how discrimination is ‘bigger than a word’ for many refugees, feeding into a whole history of denial of rights and having to flee one's country in order to survive.²⁶¹ Such discriminatory treatment is unlawful and threatens a newly arrived person's capacity for future work and successful settlement within the community.

Many of our clients have experienced torture and trauma in their home country, or on their journey to Australia. It is essential that our workplace relations framework prevents further abuse upon arrival, and provides for adequate compensation for applicants when such abuse occurs.

²⁵⁸ Colic-Peisker, above n 8, 18-21; VicHealth, ‘More than tolerance: Embracing Diversity for Health’, (Summary Report, 2007) 32.

²⁵⁹ Dow, above n 2, 8.

²⁶⁰ VicHealth, above n 258, 11-12.

²⁶¹ AMES Community Guide, AMES Community Guide Professional Development Day, 21 November 2013.

SOLE RELIANCE ON INDIVIDUAL ENFORCEMENT IS PROBLEMATIC

As noted above, employment laws and services are largely inaccessible for newly arrived and refugee workers. For vulnerable workers who have faced discrimination or bullying, such access is even more limited given the nature and impact of the abuse.

Under the current system, workers who experience bullying (repeated, unreasonable conduct that causes a significant risk to health and safety) can make an application for a stop bullying order in the Fair Work Commission. This order does not provide compensation and can only be made if the person remains working for the employer (which is rarely the case for our clients).

For workers who experience discrimination, there are a range of options including making a complaint to the Victorian Equal Opportunity and Human Rights Commission, the Australian Human Rights Commission, Victorian Civil and Administrative Tribunal or the Fair Work Commission.

Each of these approaches requires a written application, made by the complainant. There is no proactive regulator who can run a case on behalf of a client²⁶² and few incentives for employers to take positive steps to reduce discrimination.

As Allen acknowledges, the 'individual enforcement model... is passive, retrospective and reactive. The law does not pre-empt discriminatory behaviour; rather, it offers a resolution after the fact, and there is no obligation for employers or service providers to take anticipatory action to address policies or practices that could disadvantage certain groups.'²⁶³

Often, there are also significant 'power and resource imbalances' between the client and their employer.²⁶⁴ In order to address this imbalance and stop discrimination, a multi-faceted response is required.

²⁶² The Fair Work Ombudsman does have a general protections team however in our experience it is only able to assist a small number of clients. Victoria Legal Aid does have an equality law program that provides invaluable assistance to some vulnerable clients with discrimination claims. The Victorian Equal Opportunity and Human Rights Commission has power to investigate matters that are serious in nature, relating to a group of persons and cannot reasonably be expected to be resolved by dispute resolution (section 127, *Equal Opportunity Act 2010* (Vic)). However, the powers of VEOHRC are significantly less than those of FWO, which include promoting compliance with the FW Act 'including by providing education, assistance and advice to employees, employers...', monitoring compliance, inquiring into and investigating 'any act or practice that may be contrary' to the FW Act, and commencing proceedings in Court to enforce the FW Act (section 682, FW Act).

²⁶³ Dominique Allen, *Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria* (2009) 18 *Griffith Law Review* 778, 796.

²⁶⁴ Beth Gaze and Rosemary Hunter: *Access to justice for discrimination complainants: courts and legal representation* (2009) 32 *UNSW Law Journal* 699.

REMEDIES MUST PROMOTE SYSTEMIC CHANGE

Where our clients already have so many barriers to enforcing their rights, when they manage to make an application, it is immensely important that the law facilitates meaningful outcomes commensurate with the gravity of rogue employer behaviour. In addition to unlimited compensation, general protections and discrimination laws should deliver strong systemic outcomes to improve conditions at work and eradicate unlawful discrimination.

The uncapped and flexible nature of possible remedies should be utilised to address systemic change. We refer to the submissions of the Victorian Equal Opportunity and Human Rights Commission in the case of *Mahendra Karan v Hotondo Building Pty Ltd* with which we strongly agree:²⁶⁵

Orders to address systemic discrimination would be particularly relevant, for example in circumstances where the Tribunal found evidence of a culture of discriminatory conduct at the workplace, evidence of ongoing and sustained discrimination against the Applicant, or evidence that the Respondent did not have in place workplace policies or training which set out for its employees appropriate workplace behaviour and their responsibilities in relation to eliminating discrimination, sexual harassment, and victimisation.

The Commission provides examples of remedies including training for all staff involved in unlawful conduct, requiring an employer to implement a workplace policy, and recommending the employer request the Commission conduct a compliance review of existing policies.

²⁶⁵ Victorian Equal Opportunity and Human Rights Commission, *Submission in Karan v Hotondo Building Pty Ltd A249/2012*, 18 November 2013, 58–59.

TARGETED ASSISTANCE AND REGULATOR INVOLVEMENT

As documented above, targeted assistance is urgently required to ensure that workers are aware of anti-discrimination and bullying laws, and able to access services to assist.

In addition, Gaze and Hunter propose a number of ways to make a 'more level playing field':²⁶⁶

- **access to alternative dispute resolution:**²⁶⁷ in the hope of achieving outcomes without need for formal legal processes;
- **increased agency assistance:** an appropriately resourced regulator with greater enforcement powers would 'counter the deep pocket/repeat player advantage enjoyed by some respondents'.²⁶⁸ In the UK, US and some Canadian jurisdictions, the regulator can give advice and provide direct support to complainants. Just as the Fair Work Ombudsman in Australia can stand in the shoes of an applicant, and prosecute a company directly, the VEOHRC and AHRC should have the power to assist clients with meritorious claims and run strategic litigation to promote compliance. Allen notes that in the UK, 'conciliation is separate from the equality commission, so the equality commission can advise and assist complainants and engage in strategic enforcement of anti-discrimination law'.²⁶⁹ We suggest that like the FWO, mediation and enforcement could be delivered by separate teams within the VEOHRC/AHRC. This is particularly appropriate as VEOHRC/AHRC has specific expertise in anti-discrimination matters;
- **'free or low cost legal representation':** in their paper, Gaze and Hunter find that represented clients have better outcomes.²⁷⁰ However, unfortunately, many of the most vulnerable clients will not be able to access available services for reasons outlined above; and
- **working to make hearing process more accessible:** through operating 'more inquisitorially than adversarially', for example.²⁷¹

WEstjustice endorses these suggestions.

²⁶⁶ Gaze, above n 264, 699.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ Allen, above n 263, 778.

²⁷⁰ Gaze, above n 264, 701.

²⁷¹ Ibid.

RECOMMENDATION

WEstjustice calls on the Federal and State governments to take urgent steps to reduce discrimination at work. Such steps should include:

Expanding VEOHRC/AHRC powers and resources to enable the regulator to investigate and enforce breaches of the law.

Expanding the limited positive duties in anti-discrimination laws that require employers to take certain steps to prevent discrimination occurring.

Addressing the challenge of "proving" discrimination by amending the law to introduce a reverse onus of proof, similar to the general protections provisions of the Fair Work Act 2009 (Cth). Complainants should be required to establish that they have a particular protected attribute and suffered unfavourable treatment. The employer should then be required to show that the unfavourable treatment was not because of the complainant's attribute. This is fairer as the employer has access to its own internal records and evidence about decision making, while the employee does not.

Amending existing laws to require courts and tribunals to award remedies that promote systemic change.

Expanding existing reporting obligations to require companies to report publicly on diversity and anti-discrimination measures.

Expanding incentives to increase diversity in workplaces as discussed above.

Funding targeted education campaigns for newly arrived and refugee workers.

Funding specialist legal services to provide free assistance to migrant workers experiencing discrimination at work.

SEXUAL HARASSMENT

The Centre has not received many client complaints of sexual harassment. However, this issue is frequently raised by community leaders and also participants in community education presentations.

As some community leaders told us:

"Working in my community I find that women don't want to share their sexual harassment experiences, are not aware of the law and don't understand what constitutes sexual harassment or bullying"

"A guy at a factory grabbed a girl on the bottom. The girl started laughing because she didn't know it was abuse or her rights under law here. At the end of the day I spoke to her and she said it was a joke, and I said no joke, no joke."

"A manager at a health facility told his team that he wanted to experience what it is like to be a patient. The female staff were asked to give him a bed, give him a shower. One worker volunteered to give the shower, and was affected because she saw him naked. Later the worker complained and a legal case was started."

Of the clients that contacted our Centre for assistance with sexual harassment, none decided to pursue their claims, despite meritorious cases and WEstjustice offers of assistance. Some clients reported that it was simply too much to recount their story, and that they were suffering psychological issues as a result of the harassment, and worried that pursuing a case would have an adverse impact on their health.

**Strategic measures to protect
vulnerable sub-groups**

10

Within the spectrum of refugees, permanent migrants, asylum seekers and temporary migrant workers, there are a number of vulnerable sub-groups. Some of these groups, and their particular needs, are considered below.

WOMEN AND THE LAW

*"Migrant women with low levels of English face similar disadvantages to migrant men on entering the labour market. In addition the face similar disadvantages to Australian born women... This puts migrant women at a double disadvantage in terms of competing for work in Australia."*²⁷²

*"In countries around the world, women have a documented disadvantage in earned income relative to men. The ILO reports that women earn 20–30% less than men worldwide. The causes for this difference are varied, but they are linked to labor market segregation, in which women and men tend to predominate in distinct fields, and the phenomenon of the glass ceiling, in which women are clustered in the lower rungs of the employment ladder. Wage based discrimination—when work of equal and comparable value is treated differently... is a major factor as well... Women migrant workers often find that their wages are lower than both those of men who have crossed borders for work, and of native-born women in their country of work."*²⁷³

Recently arrived and refugee women are vulnerable to exploitation in the labour market due to the coalescence and intersection²⁷⁴ of multiple forces including gender, race and recently arrived and or refugee status. These forces impact on the ability of recently arrived and refugee women to enforce minimum working conditions. In a recent study by AMES, women were found to be 'much less likely to be in the labour force compared to men. Those who were working were almost twice as likely as men to be earning less than \$15 per hour despite working permanent and full time positions as often as men.'²⁷⁵

Between May 2014 and October 2015, the majority of our female clients came from India, Ethiopia, Burma, Vietnam, Sudan, Sri Lanka and Taiwan. Generally, our female clients had been in Australia for longer than our male clients, with around one third having lived in Australia for less than five years, one third having been in Australia for six to ten years, and another third having been in Australia for more than ten years. Research suggests that women from recently arrived and refugee communities are less likely to be working than men from these communities. If women are employed, it is more likely that they will become employed five or more years after settlement in Australia. As the Victorian Office of Multicultural Affairs notes, 'in the context of migration, women generally bear the responsibility for setting up the house and caring for family after arrival. As such, the act of migration itself often results in an escalation in women's roles as wives or mothers to the extent that women's careers and employment status are often considered secondary to those of men.'²⁷⁶

Similar to the ELS's overall statistics, the greatest cohort of female clients came to Australia as refugees or humanitarian entrants (44%). 17% came as international students, 11% were temporary migrant workers and 8% were asylum seekers. 80% had a low or no income, 11% had a medium income. There were no high income earners reported. One in five female clients required an interpreter.

Female clients were predominantly engaged in childcare/aged care/community services/health care/education (39%), cleaning (22%), hospitality (14%) and food processing (8%) industries. This largely reflects broader patterns, where women migrant workers 'tend to be concentrated in the services sector and are clustered in women-specific jobs—both skilled and unskilled. Women migrants can be found in skilled positions such as nurses, teachers and secretaries, and unskilled positions such as domestic workers, entertainers and hotel employees'.²⁷⁷

Common problems seen at the ELS were largely similar between women and men, although a higher percentage of women had lost their jobs, and men were more likely to seek advice on workplace injury. 35% of clients had an issue with wages or entitlements, 29% had been dismissed, 10% sought advice on bullying, 8% were advised on discrimination and/or general protections. Only 4% of women received advice on workplace injury.

Women were rarely paid superannuation and required support and assistance to pursue their claims:

TERMINATION OF EMPLOYMENT AND NON-PAYMENT OF SUPERANNUATION

WEstjustice assisted one female client who was dismissed after making inquiries about unpaid wages. After initial legal advice, WEstjustice found that our client also had no superannuation paid during the course of her employment. WEstjustice helped our client to recover compensation and all unpaid superannuation payments amounting over \$4000.

RECOVERY OF UNDERPAYMENT OF WAGES

WEstjustice assisted one female client in recovering \$500 in unpaid wages and unpaid superannuation payments. WEstjustice represented this client at a Fair Work Ombudsman mediation with her former employer. The client was visibly shaking throughout the proceedings, and reluctant to speak to the employer even with the assistance of an interpreter—illustrating the effect of the power imbalance between our client and her boss. The client told WEstjustice that if we had not represented her she would have withdrawn her complaint. Prior to making a FWO complaint, the Centre wrote a letter of demand on the client's behalf.

272 Monica O'Dwyer and Stella Mulders, AMES Research and Policy Unit, 'Finding satisfying work: The experiences of recent migrants with low level English', 2015, 21.

273 Margaret L. Satterthwaite, *Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers* (2005) 8(1) *Yale Human Rights & Development Law Journal*, 36–37.

274 For discussion of intersection in relation to female migrant workers see Margaret L. Satterthwaite, 'Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers,' (2005) 8(1) *Yale Human Rights and Development Law Journal*.

275 O'Dwyer, above n 272, 20.

276 Victorian Office of Multicultural Affairs, quoted in Refugee Council of Australia, *Economic, Civic and Social Contributions of Refugees and Humanitarian Entrants: A literature review*, February 2010, 35.

277 Satterthwaite, above n 273, 36–37.

Women's stories

With financial support from the Victorian Women's Trust, WEStjustice took active steps to consider the experiences of women from newly arrived and refugee communities. In addition to analysing client data, WEStjustice contacted and successfully engaged with women's groups from specific communities including the Australian Vietnamese Women's Association and the Chin Women's Association Sewing groups. WEStjustice provided an overview of our services to both organisations and provided translated posters into Vietnamese and Chin for community members.

WEStjustice presented to the Chin Women's Sewing Group based at New Hope Footscray and gave an overview of employment law. WEStjustice also presented at a financial literacy course for women from Iran and Afghanistan at Spectrum Migrant Resource Centre, presented community legal education at various other women's meetings and attended multiple multicultural and recently arrived playgroups located in the Maribyrnong, Brimbank and Wyndham Councils.

RETURN TO WORK AND CASUAL EMPLOYMENT

WEStjustice spoke to one mother of 3 small children at a multicultural playgroup who had previously been working in Australia. The mother, who was of refugee background, commented that when she had left her job after the birth of her second child, her employer had promised her her job back. However, when she was ready to return to work her supervisor no longer worked at the organization, and as a casual employee she did not have a right to return to work.

Recognising that experiences differ greatly from woman to woman, and that there are differences between and within communities, some general themes emerge.

Recently arrived and refugee women find themselves in an Australian labour market that has entrenched gender inequalities. Difficulties facing women in Australia have been well documented and include the existing pay gap between men and women,²⁷⁸ discrimination, balancing caring or parental responsibilities, negotiating flexible working arrangements²⁷⁹ and returning to work after pregnancy.²⁸⁰ Societal attitudes and expectations of the role and status of women also impact on women's working experiences, as well as the value attributed to their work.

TERMINATION OF EMPLOYMENT AND CARING RESPONSIBILITIES

WEStjustice represented one female client who faced disciplinary conduct at work and whose employment was terminated after failing to follow a workplace policy and procedure. The client had made the mistake at work because she was preoccupied and worried about a sick child at home, demonstrating the impact that caring responsibilities can have on women's working lives.

WEStjustice met one client who had found work at a laundry. On her first day of work, she was told she did a great job and asked to come back early the next day. After telling her boss she could only come after dropping her child at school, she was told not to come back.

In adapting to the Australian labour market, recently arrived and refugee women also have to contend with notions of the status and value of women in the workforce in their home country.

PRESSURE FROM FAMILY TO NOT PURSUE RIGHTS

Gloria worked for a company for over five years. When she was due to return to work after a period of parental leave, she was told that she had abandoned her employment and no longer had a job. WEStjustice provided advice to Gloria about discrimination and unlawful termination. Gloria began negotiations with her employer. The employer made a paltry settlement offer, but Gloria felt that she had to accept it due to pressure from her husband to put the matter behind her. She said that she felt that "my husband doesn't want me to stand up for my rights". She wanted to continue with her case but it would be very difficult for her to do this without her husband's support. Gloria was worried that if she continued with the case against her husband's wishes, he would tell her parents she was trying to go against him because "she wants to prove she's stronger". Gloria ultimately persisted with negotiations for a short time, and managed to accept a better settlement offer. "This is what my community is like," she said.

WEStjustice conducted a focus group of two male and four female community leaders on the issues faced by recently arrived and refugee women working in Australia. Responses focused on the difficulty of navigating the often conflicting expectations and value of female participation in the labour market in Australia and in their home communities.

Community leaders outlined the following issues in their communities:

"Women are not the breadwinner, it is seen as a choice to have a job and women are still expected to complete their home duties. Women do not receive support at home and are viewed as "bad women" (by their community) if career and not family focused."

"Employers (in Australia) won't understand the women's struggle (between home and work)."

"Women are exhausted working full time as worker, mum, and wife."

"It is difficult for the men to adjust to Australian environment. For example the mother is always expected to take time off work if children are ill but then she gets in trouble for having too many sick days."

"Women (in our community) don't work. They're looking after the children. Their husbands don't recognize women's work at home."

"Women in my community have common problems where they are not aware of the right that they can ask for flexible work arrangements. This information will help them to ask for flexible work hours if they are a parent or a carer."

"In my community sexual harassment occurs to women."

"Working in my community I find that women don't want to share their sexual harassment experiences, are not aware of the law and don't understand what constitutes sexual harassment or bullying."

Focus group answers highlighted the difficulties of finding employment in countries of origin, and as a result, how workers were vulnerable to exploitation:

"It's really hard for them to get a job. To get a job or stay in job, have to give something (implied sexual favours)."

"Jobs are about who you know."

"Get a job through connections with government and military."

²⁷⁸ Workplace Gender Equality Agency, Australian Government, Gender pay gap statistics (March 2016) <https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf>.

²⁷⁹ Workplace Gender Equality Agency, Australian Government, Gender pay gap statistics (March 2016) <https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf>.

²⁸⁰ Australian Human Rights Commission, Supporting Working Parents: Pregnancy and Return to Work National Review (2014) <<https://www.humanrights.gov.au/our-work/sex-discrimination/publications/supporting-working-parents-pregnancy-and-return-work>>.

Many women in our community education talks were seeking work, but hadn't yet found employment. In addition to these challenges, when treated badly at work, our female clients often faced practical barriers to attending appointments, for example due to caring responsibilities:

CHILD CARE RESPONSIBILITIES AS A BARRIER TO SEEKING LEGAL ASSISTANCE

WEstjustice had one female client approach the Centre with an employment issue. The client also had a newborn child, and she later cancelled her appointment because she had to care for her child. She apologized on the phone, and said it was simply too difficult for her to spend the time getting legal advice.

It is essential that services be made accessible for women—for example by providing outreach appointments in safe places where women already go, and can bring their children.

WEstjustice found value in conducting women's focused outreach as a way to empower women from recently arrived and refugee communities to understand their employment law rights and responsibilities. While many of the women to whom WEstjustice provided CLE presentations may not be currently employed, employment law CLEs are useful for both future employment prospects and in understanding a husband, friend, sister or other community member's employment issues. WEstjustice observed female community members asked questions about their family members' employment situation and problems at work, and often attended appointments with their husband or partner.

Community networks are a key source of information and knowledge for recently arrived and refugee communities. Through outreach and community engagement work with women's focused groups and service providers, WEstjustice was able to reach and promote rights and services to a wide range of community members, including mothers, wives and grandparents.

WEstjustice found that women and children's groups and service providers are one of the key entry points for communicating and interacting with refugee and recently arrived families. This is particularly important in the case where husbands may be working and unable to attend CLE sessions during the day.

Women's focused outreach also enabled WEstjustice to gather more stories about women's experiences at work. This enabled us to include more of their stories and voices in this report and submissions.

In addition to targeted outreach, targeted programs to assist women to find work are also essential. Such programs should be designed in consultation with women, for example to accommodate childcare and other responsibilities.

RECOMMENDATION

In order to make education and legal services accessible to migrant and newly arrived women, agencies should be funded to deliver targeted outreach.

“Employers (in Australia) won’t understand the women’s struggle (between home and work).”

TEMPORARY VISA HOLDERS

"As the 457 visa celebrates its twentieth anniversary, temporary migration has become a significant, permanent and expanding feature of the Australian way of life. It may be a temporary migrant who picks the fruit and vegetables we eat, cuts and packs our raw meat, digs up our minerals, cleans our offices, makes our coffees, drives our taxis, prescribes our medicine, cares for our aged parents or serves our takeaway meals. The fees paid by international students help to keep our universities solvent and hold down tertiary education costs for domestic students."²⁸¹

Australia's migration program has changed dramatically. Traditionally centred on permanent migration, our temporary migration program has grown exponentially. It is estimated that temporary migrants now make up between eight and nine percent of our labour force.²⁸² This is four times higher than only ten years ago.²⁸³ Permanent migration is increasingly a 'two-step program'. That is, migrants arrive on a form of temporary visa, and seek permanent residence down the track.²⁸⁴

Temporary migrant workers are particularly vulnerable to exploitation. Unlike humanitarian entrants, for example, temporary workers do not have access to settlement services. These workers also tend to be more dependent on their employer, as often their ability to remain in Australia is linked to ongoing employment. In this section we focus on trends we observed for all temporary migrant workers including subclass 457 visa holders and international students. However, we address further issues relating specifically to international students in the next section.

There are a number of matters that must be addressed to ensure this group of workers is better protected.

FOCUS ON PENALTIES IS INSUFFICIENT

WEstjustice welcomes the Federal Government²⁸⁵ and Opposition's²⁸⁶ recent policy focus on migrant workers. In particular, we commend the Coalition's promise to increase FWO powers and resources, and the establishment of a Migrant Worker Taskforce. Both the Government and the Opposition have promised to increase penalties for employers who deliberately exploit their workers. However, we suggest that this response relies too heavily on penalties where existing penalties are not being exercised or tested for effectiveness. While creating a liability for unlawful conduct, penalties do not disrupt the power imbalance within exploitative employment arrangements, nor do they facilitate detection of unlawful conduct. As Heather Moore articulates, a focus on penalties alone will be largely ineffective.²⁸⁷

There are two problems with this approach. First, it rests on the false assumption that penalties and compliance alone are effective deterrents but does not account for the reliance on worker complaints to discover unlawful conduct. If workers have no confidence in our system to uphold their rights, there is little incentive to report to and cooperate with the watchdogs.

It appears penalties only breed more penalties. For example, legislation passed late last year introduced new civil penalties for paying for or receiving money for a visa outcome. While this legislation is meant to reduce exploitation, there are existing penalties within the Migration Act to address the exploitation of sponsored workers that were not used in the last financial year.

A balanced approach would feature increased penalties, but also focus on practical enforcement, which includes a proactive and well-resourced regulator promoting systemic compliance, and the creation of incentives and support to enable workers to come forward. For this reason, to ensure the protection of temporary migrant worker employment rights, a number of other measures (in addition to those already contained in the Report such as targeted enforcement²⁸⁸) are required in addition to increased penalties.

MORE EDUCATION REQUIRED

WEstjustice has witnessed numerous temporary visa holders with little or no understanding of Australian employment laws. For example, in Martin and Wendy's story above (**page 151**), two clients worked for over 18 months sharing one wage between them, without understanding that they were being grossly underpaid. Similarly, another client worked six or seven days a week for up to 16 hours a day. She had no understanding of penalty rates or overtime entitlements.

Because temporary migrant workers are not eligible for settlement services, there are few formalised channels for providing face-to-face information. Finding ways to deliver face-to-face education to this cohort is extremely important, and we suggest a train the trainer model could be effective. Details of WEstjustice's successful train the trainer pilot program are set out above.

Further, to prevent exploitation, temporary migrant workers and their families need access to settlement services, including casework support (to provide referrals and assistance where exploitation occurs), information about employment rights and responsibilities (to prevent exploitation), and English as additional language classes, where needed. As Peter Mares and the Migration Council of Australia explain, settlement services are an important means of facilitating integration and extending access to temporary migrants and their families will ensure greater consistency—migrants in the family stream and dependents of some skilled migrants already have access to these services.²⁸⁹

²⁸¹ Peter Mares, Not Quite Australian, *How Temporary Migration is Changing the Nation*, Text Publishing, 2016, 14-16.

²⁸² Ibid, 12-13.

²⁸³ Ibid.

²⁸⁴ Ibid, 14-16.

²⁸⁵ Liberal Party of Australia, above n 134.

²⁸⁶ Australian Labor Party, Rights at Work Policy: <<http://www.alp.org.au/rightsatwork>>, as at 10 August 2016.

²⁸⁷ Heather Moore, Comment: Too many Australians remain unaware slavery exists in the 'lucky country', SBS Online, 26 July 2016, <<http://www.sbs.com.au/news/article/2016/06/29/comment-too-many-australians-remain-unaware-slavery-exists-lucky-country>>.

²⁸⁸ We also agree with Dr Stephen Clibborn's submission that the 'FWO must be allocated sufficient funding to ensure effective enforcement of the FW Act for all vulnerable workers including undocumented immigrant workers. Funding should be sufficient to allow the FWO to continue its promising proactive strategic enforcement activities and still have sufficient resources for reactive enforcement in response to public referrals.' Dr Stephen Clibborn, The University of Sydney Business School, Submission No 26 to Productivity Commission, *Inquiry into Australia's workplace relations framework*, 16 February 2015, 3.

²⁸⁹ Migration Council of Australia, in Mares, above n 281, 305-307.

ALL WORKERS SHOULD BE PROTECTED BY MINIMUM WORK STANDARDS

The FW Act should be amended to clearly state that it applies to all workers, regardless of their immigration status. That is, all workers should be entitled to the same minimum employment standards and protections as all others working in Australia.²⁹⁰ This includes undocumented migrant workers, or those working in breach of a visa condition.

If it fails to provide the same rights to all workers, the workplace relations framework will perpetuate the current two tiered system, where vulnerable migrant workers are exploited and invisible.

We are of the view that, regardless of the rights that flow from permission to work under the Migration Act, at the very heart of the employment relationship is the fundamental term of the employment contract. That fundamental term is that if an employee works, the employer pays wages; that is, the work-wages bargain. This, along with non-discrimination, are two of the most fundamental tenets of the employment relationship and should apply to all people, especially the most vulnerable in our society.

Similarly, we support the recommendation made by Associate Professor Joo Cheong Tham²⁹¹ to the inquiry of the Senate Education and Employment References Committee into 'The impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders':

The Migration Act 1958 (Cth) and the Fair Work Act 2009 (Cth) should be amended to explicitly state that:

- *visa breaches do not necessarily void contracts of employment; and*
- *the standards under the Fair Work Act apply even when there are visa breaches.*

Such an approach is also recommended by the Productivity Commission (Recommendation 29.4)²⁹² and Senate Education and Employment References Committee (Recommendation 23).²⁹³

REMOVAL/FEAR OF BEING SENT HOME: A BARRIER TO RIGHTS ENFORCEMENT

Fear of losing the right to stay in Australia frequently deters clients from reporting workplace exploitation. Actual removal prevents exploited workers from pursuing justice. Both situations mean that employers exploit temporary visa holders with impunity.

FEAR OF REMOVAL STOPS PEOPLE COMPLAINING

We have had numerous clients visit our service to request help for significant underpayment issues and other unlawful treatment. However, some clients may have breached a term of their visa, inadvertently or accidentally. This breach gives rise to the risk of being removed, that is forced to depart Australia. As a result, clients do not pursue their claims and employers take advantage. For example, international students are generally only permitted to work a maximum of 40 hours per fortnight during semester. If they are found to breach a term of their visa (for example, by working for one extra hour), their visa may be cancelled and the worker commits a strict liability offence.²⁹⁴ We saw a client who worked for one extra hour in breach of his 40 hour limit, on one occasion. However, the risk of visa cancellation was still real—and he did not pursue his employer, who owed him thousands of dollars.

We refer to an article by Adele Ferguson documenting the recent case of workers being exploited at 7-Eleven stores. Based on conversations with numerous workers, Ferguson found that granting amnesty is a central part of enabling workers to speak out about exploitation:²⁹⁵

The Australian Financial Review spoke to former and current workers from 7-Eleven and most said they were worried about participating in the program for fear head office or the franchisees would take their admissions of working more than 20 hours and secretly report them to the Department of Immigration... It is why Professor Fels, head office, and others need to appeal to the Abbott government to give all 7-Eleven workers amnesty while the internal and Fair Work investigations are taking place. If Amnesty isn't granted, hundreds, possibly thousands of workers will be too afraid to come forward, making the exercise a meaningless farce.

Our casework experience has been similar, with clients too fearful to take action. Often, employers are aware that an employee has breached their visa (even in a very minor way), and will expressly threaten to "report" the worker if they make a complaint about underpayment or non-payment of wages.

It is essential that exploited workers are encouraged to report illegal behaviour. Therefore, penalties for employees working in breach of their visa should be reconsidered in light of the public interest in deterring rogue employers.

It is unfair and disproportionate for an exploited international student to face removal for infringing their visa restrictions in a minor way, for example by working an additional few hours. Indeed, if they were paid properly, such additional hours are unlikely to be necessary in the first place. As suggested by Associate Professor Joo-Cheong Tham,²⁹⁶ visa cancellation should only apply in situations where there has been a serious breach of a visa. This avoids situations where workers may be disproportionately punished for a minor breach, and remove the significant disincentive to report unlawful employer behaviour. As Joo-Cheong explains:²⁹⁷

"These draconian penalties strengthens the hand of employers who seek to abuse temporary migrant workers and therefore, contributes to the compliance gap (as illustrated by the 7-Eleven case). They are also grossly disproportionate and unfair. Criminal offences and the prospect of visa cancellation should be reserved for situations involving serious visa breaches. For other breaches, administrative fines and/or civil penalties should apply. These reforms would strike a far better balance between protecting the integrity of the visa system and ensuring fairness to temporary migrant worker.

Recommendation...

- *sections 116(1)(b) and 235 of the Migration Act 1958 (Cth) should be amended so as to only apply to serious breaches of visas;*
- *a proportionate system of administrative fines and/or civil penalties should apply to other breaches."*

WEstjustice supports this recommendation, as does the Senate Education and Employment References Committee.²⁹⁸

290 Dr Stephen Clibborn, The University of Sydney Business School, Submission No 26 to Productivity Commission, *Inquiry into Australia's workplace relations framework*, 16 February 2015, 2.

291 Joo Cheong Tham, Submission No 3 to Senate Inquiry, *The impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders*, 29 April 2015.

292 Productivity Commission Inquiry Report, *Workplace Relations Framework: Volume 2* (2015) 931.

293 Education and Employment References Committee, above n 132.

294 See sections 116(1)(b) and 235 of the Migration Act 1958 (Cth) and Supplementary submission to the inquiry of the Senate Education and Employment References Committee into 'The impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders'.

295 Adele Ferguson, 'Amnesty sought for 7-Eleven's exploited workers' *The Australian Financial Review* (online), 6 September 2015, <<http://www.afr.com/business/retail/amnesty-needed-for-7elevens-migrant-workers-20150906-gjg3pq>>.

296 Supplementary submission to the inquiry of the Senate Education and Employment References Committee into 'The impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders'.

297 Ibid, 7.

298 Education and Employment References Committee, above n 132, 261.

REMOVAL STOPS PEOPLE PURSUING JUSTICE

Some workers who have not breached any visa condition are forced to depart Australia prior to being able to seek justice. For example, if a worker is on a subclass 457 visa and loses their job in unfair circumstances, they have a limited time to find new employment. If they do not find another sponsor, they will be removed from Australia.

We have seen a disturbing trend whereby clients have been sent home prior to the conclusion of civil proceedings they may be involved in (even when working legally).

Jono's story is one powerful example:

JONO

Jono worked on a 457 visa and lived at the employer's premises. The employer didn't want to pay Jono the minimum wage required under law. He said that Jono had to pay hundreds of dollars of cash back to him each fortnight after being paid. Jono also had to pay rent, worked overtime during the week and also worked on Saturdays. Sometimes on Sundays he worked at his boss' property, and on his holidays he was often directed to do cleaning jobs around his worksite. Jono was not paid for any overtime, weekend or holiday work.

When Jono said he would no longer pay the money back or work extra hours without pay, he was dismissed. Jono suffered anxiety and chest pain. He reports that he felt like a slave. Because his employment was terminated, his visa was cancelled and he was sent home. With help from WEstjustice, Jono was able to bring a successful claim for unfair dismissal, however he was sent home before the matter was completely resolved. Without WEstjustice Jono could not have pursued his case. Jono lost his dream to set up a life in Australia, and was punished for speaking up about his rights.

We agree with the Senate Education and Employment References committee recommendation that:²⁹⁹

the immigration program be reviewed and, if necessary, amended to provide adequate bridging arrangements for all temporary visa holders to pursue meritorious claims under workplace and occupational health and safety legislation.

Measures such as fast-track claims processes and the ability for summary dismissal of meritless claims could avoid any risk of abuse of such bridging visas.

The Committee also recommends that the DIBP review processes to ensure they are victim-centred and to ensure that victims of serious abuses 'are afforded an adequate opportunity in a safe and secure environment to report any offences committed against them'.³⁰⁰

Employers who engage employees in breach of their visa conditions should be severely punished. Not only are they abusing the employee, they are doing damage to the labour market more broadly and society as a whole suffers.

Employees who agree to provide evidence against their employers should be able to remain in Australia for the duration of any proceedings, and should receive amnesty from sanctions under immigration laws. As well as avoiding discrimination and injustice, such amendments will better achieve the policy aim of deterrence and compliance by encouraging employees to speak out about exploitation.

Without these changes, it is unlikely that some of the most vulnerable workers will come forward to enforce their rights.

299 Ibid, xii; 161.

300 Ibid, xii; 258-260.

DESIRE FOR PERMANENCY AND OBLIGATION TO PROVIDE IT

One way to address the dependency and vulnerability that comes with temporary visa status is to create a clear path to permanency for temporary migrant workers who have lived and contributed to Australia for a number of years. In his recent book *Not Quite Australian: How Temporary Migration Is Changing the Nation*, Peter Mares proposes that 'anyone who has lived in Australia lawfully and with work rights for a continuous period of eight years (or, allowing for reasonable absences, for at least eight of the past 10 years) qualifies for permanent residence'.³⁰¹ Mares argues that regardless of the type of visa held (with some exceptions—for example workers jailed for serious crimes), permanent residency should flow once a migrant has lived here for a fixed period of time. For young people, the qualifying time is less.

Importantly, Mares proposes that employers of subclass 457 visa holders should be required to sponsor their employees for permanent residence after two years. Currently, sponsorship is optional. Mares argues that two years is 'long enough to demonstrate that the temporary migrant is filling an ongoing gap in the enterprise and the labour market. It is also long enough for the employer to assess the worker's suitability.' If the employer refuses to sponsor the worker, the employer should not be able to recruit another temporary migrant worker to do similar work.³⁰² The majority of our 457 visa holder clients have been desperate to settle permanently in Australia. As a result, they have often put up with shocking abuse, too afraid to complain or unaware of their rights at law. WEstjustice strongly supports Mares' recommendations, which recognise the value of citizenship and the moral obligation that Australia owes to workers who have lived and worked in our community for extended periods of time.³⁰³

My proposal for an eight-year threshold acknowledges the reality of mobility in a globalised world, but aims to swing the policy pendulum away from a purely contractual approach to temporary migration, and back towards an assumption of migration-as-settlement as the basis for citizenship-based multicultural society.

301 Mares, above n 281, 303-304.

302 Ibid, 305-307.

303 Ibid.

RECOMMENDATION

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

Migrant workers who have been trafficked or subjected to exploitation, should be permitted to remain in Australia for at least as long as they are pursuing valid legal action.

Temporary migrant workers and their families should be given access to settlement services including the AMEP program.

Workers should not face removal from Australia unless there is a serious breach of their visa conditions. Sections 116(1)(b) and 235 of the Migration Act 1958 (Cth) should be amended so as to only apply to serious breaches of visas. A proportionate system of administrative fines and/or civil penalties should apply to other breaches.

All temporary migrant workers should gain access to permanent residence after they have spent eight years in Australia. Employers of 457 visa holders should be required to sponsor their employees for permanent residence after two years of employment.

REGISTERED TRAINING ORGANISATION SCAMS

WEstjustice has observed a concerning trend among newly arrived and refugee clients—increasingly, clients have come to the centre after being scammed by private training organisations.

Although the ELS does not provide advice on the operation of training organisations, WEstjustice is able to provide specialist consumer law assistance through our consumer and refugee clinics. The ELS referred numerous clients to these clinics, and collectively WEstjustice has heard of various scams whereby newly arrived and refugee communities are persuaded to complete a training course that is at the wrong level, is poor quality and/or does not lead to employment outcomes. Scams include private Registered Training Organisations (RTOs) signing up clients for courses and huge HELP debts without their informed consent, delivering substandard or irrelevant training, and falsely promising clients they will have employment at the end of training—but employment does not eventuate.

For example, Mia was targeted in a carpark by recruiters who offered her a “free laptop” because she was studying English. Mia accepted the offer, and later found herself enrolled in three courses, with a huge \$30,000 HELP debt. Mia had no idea she was even enrolled in any courses, and never attended training:

MIA

Mia was approached by a man in a supermarket carpark. He told her that she was entitled to a free laptop from the government to assist with her English studies. He asked for her address and told her that she would receive a free laptop in the post. He also asked her if she had any friends or family that would also like a free laptop and asked for their addresses.

A few days later, Mia was door-knocked by the same man. He told her that in order to get her free laptop she would have to provide her tax file number and a copy of her passport. She asked him if she would have any problems if she accepted the free laptop and he told her that she would not have any problems because she has a very low income. He asked her to sign many documents that she didn't understand and told her to make a phone call, which he coached her through to say yes or no. Mia felt too scared to ask the man to leave her home or tell him that she couldn't sign the documents.

A month later, the same man came to her house. Mia hid in her room and her daughter answered the door and said that she was not home. The man came back to her house later that day and told Mia she could have another free laptop. He told her that all she needed to do was sign a few documents and then they would give it to her today. After she signed the documents, she told them that she did not want them to come to her house again and that she didn't understand what was happening. They told her that she needed to study in the courses she had signed up for. She said she didn't know about the courses and that she couldn't study because she needed to look after her sick daughter. They told her that now she had to study.

Mia came to WEstjustice after receiving notices indicating that she had two VET FEE-HELP loans in her name for two separate diploma courses, totalling over \$20,000. She indicated that did not want to sign up for these courses, she had never attended any classes and that she had been receiving numerous phone calls from the college asking her to pay the money. WEstjustice assisted Mia to withdraw from the courses without penalty and have the debts waived.

WEstjustice has also heard reports of large groups of individuals being recruited from one community for a training course. Workers are promised a job at the end of the training. Individuals complete a course, but at the end, there is no employment. These individuals have now “wasted” one of only two government subsidised course commencements.³⁰⁴ The ELS assisted one client who had been engaged by an RTO to recruit members from her own community. The RTO never paid our client for her work.

The problems with unscrupulous registered and unregistered private training organisations are well documented, and WEstjustice is pleased that the Victorian Government has taken recent action to crack down on non-compliant operators.³⁰⁵ Community organisations are also taking action. For example, the Maribyrnong and Moonee Valley Local Learning Employment Network recently released a series of YouTube clips on how to choose a training provider.

WEstjustice recommends that such regulation and education continue, and that further community consultation is undertaken to identify and penalise rogue RTOs. Importantly, where students are ripped off, they should be compensated for lost time and money, and be allowed to enrol in further subsidised courses.

In addition to pursuing and penalising unscrupulous RTOs, both Commonwealth and State Governments need to ensure appropriate mechanisms are in place to assist affected students. In Mia's story above, WEstjustice wrote a letter of demand to the college requesting cancellation of Mia's enrolment and waiver of any debt. The college agreed to take all necessary steps to reverse the VET FEE-HELP debts. WEstjustice contacted the Department of Education and Training to seek confirmation of the college's actions, but failed to receive an answer in a reasonable time frame. As a result, WEstjustice lodged a complaint to the Commonwealth Ombudsman in relation to the Department's failure to provide a response in a reasonable time frame. Through the complaints process the Department confirmed that the college had reversed the two VET FEE-HELP debts, as requested, and these had not been recorded on our client's ATO record. However, it was ascertained that Mia had another VET FEE-HELP debt worth \$4000 recorded with the ATO from a different private training college. With the assistance of the Department, this debt was also remitted. Government Departments must be more proactive and responsive to affected students. WEstjustice should not have had cause to involve the Ombudsman to resolve Mia's case.

The Consumer Action Law Centre (CALC) has made powerful submissions in relation to RTOs. WEstjustice supports CALC's recommendations, in particular that an industry funded Ombudsman should be established to investigate and hear complaints made by students, and that brokers, agents and commission-based sales should be banned.³⁰⁶ In February 2016, Queensland established a Training Ombudsman to help stakeholders to 'navigate the complex VET sector'. The Ombudsman provides a 'free, confidential, and independent service to review and resolve enquiries and complaints from apprentices, trainees, students, employers and other stakeholders about the VET system'.³⁰⁷ WEstjustice recommends that Victoria follow Queensland's lead and establish an Ombudsman service in Victoria.

³⁰⁴ For details of government subsidies, see Victorian Government, Victorian Guarantee FAQs website: <http://www.education.vic.gov.au/training/learners/vet/Pages/fundingfaq.aspx>.

³⁰⁵ The Victorian Government recently terminated contracts of 18 unscrupulous RTOs: Students flee as crackdown hits dodgy private colleges, Henrietta Cook, The Age, 11 August 2016, page 3.

³⁰⁶ Consumer Action Law Centre, Submission responding to the "Redesigning VET FEE-HELP" discussion paper, 1 July 2016, <<http://consumeraction.org.au/redesigning-vet-fee-help-responding-discussion-paper/>>.

³⁰⁷ 'About the Training Ombudsman', Queensland Government website, <<http://www.qld.gov.au/education/training/training-ombudsman/pages/about-trainingombudsman.html>>.

It is important to note that WEstjustice has worked closely with a number of RTOs who provide excellent training to CALD jobseekers. In particular, centres like the Wyndham Community and Education Centre and AMES are experienced in working with newly arrived and refugee communities, and are able to deliver targeted education alongside other services for the community, including settlement services.

Unfortunately, in December 2013 the Migrant Communities Employment Fund, that promised \$6.6 million in funding for projects to help refugees and migrants prepare for and find work, was withdrawn. As the Settlement Council of Australia notes:³⁰⁸

Loss of these specialised employment service providers is seen by the settlement sector to have significant impacts on migrants and refugees ability to find appropriate employment.

RECOMMENDATION

State and Federal Governments should continue to investigate and prosecute unscrupulous training organisations. Students affected should be compensated for lost time and money.

An industry funded Training Ombudsman should be established to investigate and hear complaints made by students.

Brokers, agents and commission-based sales should be banned.

State and Federal governments must establish a fund for specialised employment service providers to provide targeted assistance to newly arrived and refugee jobseekers.

³⁰⁸ See also Settlement Council of Australia, 'Employment solutions: Case studies of good settlement in practice' (Discussion Paper), 3.



WEstjustice community education session.

INTERNATIONAL STUDENTS, APPRENTICES, YOUNG PEOPLE AND WORK

WEstjustice has learned about issues affecting young CALD workers through the ELS, community education presentations in schools, consultation with youth service providers and WEstjustice's generalist youth casework services. Young people from newly arrived and refugee backgrounds are at greater risk of leaving education earlier and experience a higher rate of unemployment.³⁰⁹ Young CALD workers face a double vulnerability: not only do they face the barriers experienced by CALD workers generally, further power imbalances emerge as a result of being young, including inexperience in the workplace, and the relative ages of employers and young workers.

Our findings mirror the literature: young CALD workers, including international students, experience high levels of exploitation. Our findings to date are preliminary, and as recommended below, further investigation is needed.

INTERNATIONAL STUDENTS

Higher education is Australia's third largest export industry.³¹⁰ Yet despite generating huge amounts of revenue, international students are frequently exploited at work, and receive little, if any, targeted assistance to enforce their rights. In a recent survey of 1400 international students, of those who were working, 60% were paid less than the minimum wage (\$17.29 per hour). 'Almost a third were paid \$12 or less with some paid as little as \$8 an hour. More than a third of the students had also felt threatened or unsafe at work.'³¹¹ Similarly, a study at Monash University and the University of Melbourne found that 58% of international students received below-minimum wages.³¹² Our clients reported similar abuse.

The ELS assisted 22 clients who were current student visa-holders or who had arrived in Australia as students from a total sample size of approximately 130 clients in the research period. This group includes 17 clients identifying as male and five as female. The majority of clients had come from India or Pakistan. At the time of advice five clients were working as independent contractors, three as casuals and seven were fixed term or ongoing employees. Newly arrived and refugee domestic students also attend the service—a key issue arising in relation to apprenticeships is outlined below.

It is apparent from our casework that international students are vulnerable to infringements of their workplace rights.

Common trends we observed include:

- 1. Employers threatening to report a breach of student visa conditions as a mechanism to prevent enforcement of workplace rights:**

AN
A

An is an international student who responded to an advertisement on Gumtree. She completed a week's work, but was not paid. When she tried to discuss it with her employer, the employer claimed she was in breach of her student visa, and refused to supply contact information so that she could not send an invoice.

We frequently observed employers threatening international students. Employers would tell students that they would do them in to the Immigration Department if they complained about missing wages. Regardless of whether the students had breached the 40 hour per fortnight work restriction or not, students were terrified to take action to enforce their rights.

This case study also demonstrates another trend—many clients struggled to invoice for work as an independent contractor, or struggled to pursue underpayments, due to limited knowledge of their employer's details. Many employers refused to provide information when asked.

- 2. Lack of knowledge of rights has resulted in many students entering agreements that constitute sham contracting or unfair contracts:**

Student visa-holders are often unaware of their workplace rights, particularly in relation to minimum wages and sham contracting.

AMELJA
A

Amelja is an international student working about five hours a week as a tutor under a twelve month contract. The contract stipulates a ten-week notice period for resignation, although her employer may terminate at any time. Also, Amelja has been told by her employer that she cannot leave the job, so she is afraid to give notice even though she feels desperate to leave.

J
J

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

- 3. Family and carer support networks may be overseas, which may adversely affect job security:**

For example a client with an injury returned home to access support, but was not re-employed when she returned.

- 4. Student visa-holders may experience fear in relation to asserting their workplace rights:**

Fear of employers, fear of visa cancellation and being forced to depart Australia, and fear of job loss were significant barriers for international students. Many students experienced diminished confidence to assert their rights if they relied on work to support themselves or family members, or experienced bullying and intimidation at work:

S
S

Sanjit was an international student visa-holder, but at the time of seeking advice was on a bridging visa. He was desperate for work and took a job as a labourer. He was paid a flat fee per shift regardless of hours worked, until his employer stopped paying him altogether. During his employment he was subjected to racial taunts, including insults written on his pay envelope and sent by text message, and was forced into work situations where he felt unsafe, such as working at height despite disclosing his fear.

³⁰⁹ Ethnic Communities Council of Victoria, above n 168, 7-8.

³¹⁰ Alexander Reilly, 'Protecting vulnerable migrant workers: The case of international students'(2012) *Australian Journal of Labour Law* 25, 182.

³¹¹ Stephen Clibborn, 'Visa amnesty needed for all victims', *The Age*, 9 September 2015, page 44.

³¹² Reilly, above n 310, 187.

5. Enforcement options may be limited due to the duration of a student visa:

Recourse to the FWC or VCAT takes time, and student visa-holders have a limited time in Australia. If employers refuse to comply with conciliated outcomes, or court orders take too long to enforce, the process can be rendered redundant in any event:

VILI

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

As recommended above, reforms to immigration law that limit visa cancellation to cases of serious visa breach would greatly assist vulnerable international students to enforce their rights and stop exploitation. Alternatively, the 40 hour work restriction could be removed altogether.³¹³ At the moment, many students are simply too fearful to bring a claim.

A further requirement is targeted independent legal assistance, as recommended below.

313 Mares, above n 281, 309-310.

DOMESTIC UNIVERSITY STUDENTS

Newly arrived or refugee domestic students are also vulnerable to underpayment issues, particularly if insufficient details are obtained from employers to enable the pursuit of claims:

ALEX

Alex is a student who found work on Gumtree. All work arrangements were made verbally and via mobile text messages. During his employment he was always paid around half of the amount he was owed. When he asked for his wages Alex's employer threatened him and then ignored his calls. The FWO also had insufficient information to pursue the employer for the underpayment.



Community leader.

APPRENTICESHIPS AND PRIVATE REGISTERED TRAINING ORGANISATIONS

In addition to issues surrounding RTOs discussed above, WEstjustice found that students undertaking apprenticeships through vocational education training packages offered by private RTOs may also be vulnerable to exploitation. Our clients were generally unaware of the requirements of an apprenticeship as set out in the National Code of Good Practice for Australian Apprenticeships, or their employer's obligations regarding training contracts³¹⁴ or Australian employment laws. Clients reported experiencing:

- underpayment or non-payment of wages and superannuation, and unlawful conditions, such as excessive work hours and no overtime payments;
- employer direction to undertake inappropriate tasks not related to the apprenticeship in breach of the requirement to provide training in accordance with an approved training scheme pursuant to 5.5.8(1)(a) of the Education and Training Reform Act 2006 (Vic);
- a lack of structured support or opportunities to develop the relevant knowledge and skills that they had agreed to by enrolling in an RTO course, in breach of the training and competency standard required in the Australian Qualifications Framework and the Standards for Registered Training Organisations 2015 (RTO Standards);
- no opportunity to participate in the development of their training plan and refusal to have sufficient time to attend the classes required for the certificate course in breach of s 5.5.8(1)(b) and s5.5.8(2) of the Education and Training Reform Act 2006 (Vic);
- no information about their rights to award wages, superannuation and pay slips;
- no information about the regulatory oversight by the Australian Skills Quality Authority, or the Victorian Registration and Qualifications Authority, which may enforce execution of an apprentice's training contract;
- no information regarding the right to complain to the Fair Work Ombudsman about employment matters.

THAN

Than is a young refugee working as a plumbing apprentice for a construction company. His first language is not English. Than's employment represented the practical component to a plumbing certification he was working towards through an RTO and he had obtained the employment through an employment service provider who he was referred to by the RTO. Than was required to work more than 20 hours of unpaid overtime each week, and was not paid the minimum wage. He did not receive other legal entitlements including annual leave, and he was told he could not attend his classes at the RTO. Than was not given the opportunity to properly develop the relevant skills for his apprenticeship—instead he was given menial tasks. He tried to speak to his RTO to access help to resolve his issues, but the RTO advised that they could not assist. Than eventually left his employment and is owed thousands of dollars of unpaid wages, not to mention the lost opportunity of completing his apprenticeship.

Our recommendation above regarding the establishment of an Ombudsman would greatly assist clients like Than. Further, WEstjustice recommends that RTOs be required to provide assistance to students affected by unscrupulous employers as part of their training course.

SCHOOL STUDENTS

WEstjustice has observed that school students frequently experience employment law issues. In mid-2015, WEstjustice launched its School Lawyer Project. The project is a two-year pilot created by lawyer Shorna Moore and social worker Renee Dowling. Our school lawyer, Vincent Shin, is based full-time at The Grange P12 College in Hoppers Crossing, but also attends the additional needs school Warringa Park School. WEstjustice provides holistic legal services for students and parents with a focus on prevention and early intervention. We also deliver legal education sessions on topics such as family violence, sexting, employment law and consent.

To date, numerous students have presented at the service seeking assistance with employment law matters. Further research is required to explore these issues, and determine how best to address the exploitation of young workers.

One possible response may include education programs in schools—for example the WEstjustice No Violence No Way community education program recently delivered interactive education in the form of short "plays" and discussion to over 2000 young people across 10 schools and youth organisations (including secondary schools, P-9 schools, alternative education VCAL schools, a young mum's group and young boys and girls programs at the Wyndham Youth Resource Centre). Feedback for the program so far has been extremely positive, with feedback from community workers including the following remarks:

"As a general remark, I think you guys ran the program quite well. Your actors are fantastic and you and Gill engaged with the students in a very friendly way—encouraging them to participate in the discussions. I deal with teenagers in abusive /violent and manipulative relationships almost everyday and I wish all senior school students got the opportunity to benefit from such a program."

"I feel it's been a great program, even if there isn't an initial increase in students seeking support for family violence, it's important information for them to be taught."

The Young Workers Centre is also doing important work in this area.

STUDENT ACCESS TO EDUCATION AND INDEPENDENT LEGAL ADVICE

"In most cases, the level of support international students receive is dismal when compared to the revenue that they generate for education."³¹⁵

Although international students and newly arrived and refugee domestic students may have a better command of English than other CALD clients, they still require targeted assistance to enforce their rights. Many students have never had a job, and are not experienced in negotiating pay and conditions. Many clients were unable to draft legal letters or applications to court, and relied on WEstjustice for significant practical and emotional support. It is apparent from the client group that students would benefit from greater access to legal advice.

Universities, schools and RTOs have a duty of care to their students. In the case of international students, universities obtain millions of dollars in fees from students. Given the abundant evidence of rife exploitation, WEstjustice calls on universities to respond by funding an independent service to provide employment law advice and education to students. This recommendation aligns with the Senate Education and Employment References Committee, which recommends that:³¹⁶

universities consider how best they might develop proactive information campaigns for temporary visa workers around workplace rights.

Further research must be undertaken to explore levels of workplace exploitation and how best to target education and assistance for secondary school age students and apprentices.

RECOMMENDATION

Further research into high-risk industries, jobactive provider and apprenticeship frameworks, regional Victoria, young people and strategic litigation opportunities is required.

Government funding should be provided to undertake this research.

³¹⁴ Training contracts must comply with the obligations in Part 5.5 of the Education and Training Reform Act 2006 (Vic).

³¹⁵ Mares, above n 281, 309-310.

³¹⁶ Education and Employment References Committee, above n 132, xii; 272-276; 318-320.

FOR FURTHER RESEARCH

This report draws on evidence gathered by one community legal centre over a three year period. With the resources available, WEstjustice could not explore every issue, nor could we examine all matters in sufficient detail. There is so much more to learn.

In addition to recommendations for further research above, WEstjustice identified the following areas that could improve labour market integration for newly arrived and refugee communities:

- in-depth investigations of certain high risk industries in the Western Suburbs of Melbourne (and across Australia)—in particular, industries where we have heard stories of exploitation, but have not seen any/many clients (for example market gardens/farm work);
- further investigation into the jobactive provider and apprenticeship frameworks and how they can better protect vulnerable workers;
- exploration of workplace experiences of newly arrived and refugee communities in regional Victoria, particularly given the likelihood of further relocation of communities to regional Victoria with the Safe Haven Enterprise Visas;
- exploration of the working experiences of young CALD people;
- exploration of the emerging gig economy where independent workers are engaged one-on-one, often online (for example, Uber); and
- consideration of strategic litigation opportunities to test the utility of current accessorial liability provisions and evidence requirements for wages and entitlements claims.

RECOMMENDATION

Further research into high-risk industries, jobactive provider and apprenticeship frameworks, regional Victoria, young people, the gig economy and strategic litigation opportunities is required.

Government funding should be provided to undertake this research.



Community leader.

Conclusion

"We have strived to ensure that migrant voices are heard in this report. We hope that these voices are now heard and acted upon."

"In the United States today, millions of workers, many of them new immigrants and people of color, are labouring on the very lowest rungs of metropolitan labor markets with weak prospects for improving the quality of their present positions or advancing to better jobs. It is unfortunate but true that ethnicity, race, and immigration status have enormous impact on the jobs they do, the compensation they receive, and the possibilities they have for redress when mistreated by employers."³¹⁷

The problem of workplace exploitation is complicated and widespread around the world. Factors driving non-compliance and low enforcement are myriad. There is no quick fix. A multi-faceted approach is required.

Yet there is one unifying principle for any step taken: ongoing consultation and engagement with newly arrived and refugee communities is essential. This includes collaboration with community organisations.

Without input from local communities, it is impossible to ensure that services and materials will work.

Without relationships and trust, it is unlikely that vulnerable communities will access a service or enforce their rights.

Throughout the Project, WEstjustice has worked closely with newly arrived and refugee communities. Each stage of the Project has been informed by community members, community leaders and community organisations.

We have strived to ensure that migrant voices are heard in this report. We hope that these voices are now heard and acted upon by governments, regulators, commissions, policy makers and agencies.

³¹⁷ Janice Fine, 'Worker Centers: Organizing Communities at the Edge of the Dream' (Cornell University Press, 2006), 1.

We are the REFUGEES of the World

—By Dr Melika Sheikh-Eldin

*We are from the jungles, from vast deserts,
high-mountains, deep valleys, extended
plains and bright skies*

*We are the children of the humble,
the generous, the brave, the kind, caring
people with bright hearts so white*

*We are from the cradle of civilizations,
its source of humanity, victimization,
exploitation, the beginning of colonization
and its demise*

*We are living proof of the world's
injustices, its battle fields, its political
games and sacrifice*

*We are the cries, we are the sorrows,
we are the suffering, but portrayed
as a symbol of despair and disguise*

*We are artists whose creativity, love
and passion for nature and a peaceful
world is reflected in our words, in our
dances in our songs in our laughs,
our melodies and our sighs*

*We are part of the global migrant history
a tale of shared experiences, of hope and
alienation, fear and acceptance—it is a
search for peace, prosperity and a better life*

*But also we are the challenge, we are the
hope, we are the future, a living testimony
of survival, resilience, of joy and of lifeWe
are against all violence, intolerance and
discrimination, we are for fairness, equality,
dignity and humanity and from the rubble
of injustices we rise and rise and rise*

We are the REFUGEES of the World

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Taboka Finn, Jessica Dolan, Elise Tuffy, Phoebe Churches, Melanie Schleiger and Katie Sweatman—six incredible women, friends and formidable employment lawyers who have gone above and beyond to assist me with the Employment Law Service, and the Project more generally—I have learned so much from each of you.

The lawyers in the Victoria Legal Aid Equality Law team other community legal centres for sharing experiences and resources—in particular Job Watch, the Consumer Action Law Centre and Springvale Monash Legal Service. The community legal sector provides access to justice to the most disadvantaged in our society using strategic, considered models of service delivery, and it is exciting to work together.

Joo-Cheong Tham and the team at the Centre for Employment and Labour Relations Law at the University of Melbourne, for your ongoing interest in the Project and for sharing your wisdom at various stages throughout. Joo-Cheong—thanks also for all your work reviewing this report and coordinating the Migrant Worker Campaign Steering Committee. Thanks also to the Melbourne Social Equity Institute for providing me with a Community Fellowship and the resources, space and environment to write this report. This project was jointly supported by MSEI and WEstjustice.

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AUTHOR BIOGRAPHY

Catherine (Dow) Hemingway is passionate about employment and anti-discrimination laws, advocacy, research and social justice. Catherine completed a double degree in Laws (Honours) and Arts (Media and Communications), Diploma in Music Performance and Certificate in Global Issues at Melbourne University in 2009. While studying, she volunteered as a Student Editorial Assistant for the Australian Journal of Labour Law, worked as an electorate officer and administrative assistant for the Australian Labour Law Association. She also volunteered for Friends of Kolkata, a small NGO working with an Indian NGO to provide support to women and children in India. After graduating, Catherine became Associate Editor of the Australian Journal of Labour Law and worked as a Research Assistant and then Research Fellow at the Centre for Employment and Labour Relations Law at Melbourne Law School.

After completing her practical legal training in 2011 as a graduate at Corrs Chambers Westgarth, Catherine settled in the Corrs Workplace Relations team. Catherine commenced work at WEStjustice (then Footscray Community Legal Centre) as Employment Project Solicitor in June 2013. She remains excited to be part of the Employment Law Project and WEStjustice more broadly.

