

WORKPLACE RELATIONS FRAMEWORK INQUIRY
WESTERN COMMUNITY LEGAL CENTRE
SUBMISSION TO THE PRODUCTIVITY COMMISSION

September 2015

Contact: Catherine Hemingway
Employment Project Solicitor
(03) 9689 8444
catherine@westernclc.org.au

Contents

1. Introduction.....	4
1.1 Update on the Employment Law Project	4
Employment Law Service	5
Community Legal Education Program.....	6
Project Report.....	6
2. Chapter 5: Unfair dismissal	6
2.1 Employment is essential for successful settlement in a new country	7
2.2 Consideration of UD applications ‘on the papers’ will result in injustice for newly arrived and refugee workers	8
2.2.1 Termination of employment is a common problem faced by our clients	8
2.2.2 Literacy problems are already a barrier to accessing justice	9
2.2.3 Procedural fairness means being heard	9
2.2.4 Furthering the intention of international law.....	10
2.2.5 ‘On the papers’ dismissals will have a chilling effect on access to justice	10
2.2.6 WCLC already faces significant resource constraints and this proposal would increase the strain	10
2.2.7 Merit focused conciliation is more appropriate and fair	11
2.3 Procedural errors should remain a central consideration in UD.....	11
2.3.1 Current UD laws limit penalties where process is the only breach	12
2.3.2 Employees must be given an opportunity to improve or explain.....	13
2.3.3 Procedural errors can have significant impacts on applicants	13
2.3.4 Enforcement of UD laws is an individual pursuit: removing compensation will undermine enforcement	14
2.4 The available remedies should be expanded	14
2.5 Reinstatement must remain the primary remedy	16
2.6 Lodgment fees should not be increased	17
2.6.1 Evidence from the UK shows that increased fees limit access to justice	17
2.6.2 The introduction of extra fees midway through a proceeding will put unfair pressure on vulnerable employees.....	18
2.6.3 Costs should not prevent access to justice	18
3. Chapter 6: The general protections	20
3.1 In order to meet the objects of the Act, there should be no cap on compensation.....	20
4. Chapter 17: The enterprise contract.....	23
Enterprise contract would exacerbate power imbalance for vulnerable workers	23
Other mechanisms already provide flexibility	23
Independent scrutiny required to protect vulnerable workers	24
5. Chapter 20: Alternative forms of employment	25

5.1	Lack of definition reduces access to justice for our clients	25
5.1.1	Sham Contracting is a significant problem for our clients	25
5.1.2	Legislative definition of ‘independent contractor’ would help to protect vulnerable workers	25
5.2	Ambiguity and jurisdictional concerns limit enforcement	27
5.3	Need for increased regulatory action and preventative measures	28
5.3.1	Need for targeted enforcement	28
5.3.2	Prevention and rights awareness	28
5.4	Principals, host agencies, franchisors must take responsibility for ensuring rights are protected.....	29
5.5	Approval of the reasonableness test for sham contracting	30
6.	Chapter 21: Migrant workers	32
6.1	Focus on migrant workers is welcome and necessary	32
6.2	Additional resources for audits and investigations essential.....	33
6.3	Supporting the audit/investigation work of the FWO.....	33
6.4	Education of migrant workers upon arrival to Australia (and beyond)	33
6.4.1	Timing of education and awareness raising activities	34
6.4.2	Community-based targeted education and resources	35
6.4.3	Example: WCLC Community Legal Education Program	37
6.4.4	Example: Empowering community leaders: the Project's 'Train-the-Trainer' program	38
6.4.5	Example: Collaboration with Fair Work Ombudsman Community Engagement Officers	42
6.4.6	Amendments to AMEP curriculum	42
6.4.7	Other methods of increasing awareness	43
6.5	Increased assistance by government agencies for migrant workers who have had their rights breached	43
6.6	Resourcing community organisations to work with government agencies to deliver better outcomes for migrant workers	46
6.7	Migration Act changes need to provide stronger disincentive to exploit illegal workers and allow exploited workers to recover unpaid wages	48
	All workers should be protected by minimum work standards.....	48
	Need to allow workers to remain in Australia until employers are prosecuted	49
	Need for services and further exploration around Australia, including in regional areas	50

1. Introduction

Western Community Legal Centre (**WCLC**) is a newly formed entity created from the amalgamation of Footscray Community Legal Centre Inc., Wyndham Legal Service Inc. and Western Suburbs Legal Service Inc. Further to our first submission to this Inquiry (as Footscray Community Legal Centre), we welcome the opportunity to provide further comments in response to the Commission's Draft Report (**Draft Report**).¹

WCLC provides free legal and associated services to people who live, work or study in the cities of Wyndham, Maribyrnong and Hobsons Bay, in Melbourne's Western suburbs. We have offices in Werribee and Footscray as well as a youth legal branch in Sunshine and outreach in Laverton. WCLC provides a range of legal services including legal information, advice and casework; duty lawyer services; community legal education; law reform; advocacy; and community projects.

Our services include specialised refugee, tenancy, motor vehicle accident, employment and family law clinics, as well as generalist services including a night service. We also provide financial counselling.

1.1 Update on the Employment Law Project

The WCLC Employment Law Project was first developed in response to unmet need identified through our extensive casework with newly arrived and refugee communities.

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

Key findings in the Report included that:

- Newly arrived and refugee communities have an extremely limited understanding of Australian employment laws and services. The impact of this lack of awareness is that workers are exploited and cannot take action to have their rights enforced;
- It was common or somewhat common for newly arrived or refugee communities to not know where to get help if they had a problem;
- Face to face service was the preferred mode of legal advice;
- Legal services and CLE should be made accessible through targeted services.

¹ Western CLC would like to sincerely thank our many volunteers who contributed greatly to researching and drafting this submission including Elise Tuffy, Jessica Dawson-Field, Genevieve Auld, Tarni Perkal and Kaitlin Ferris.

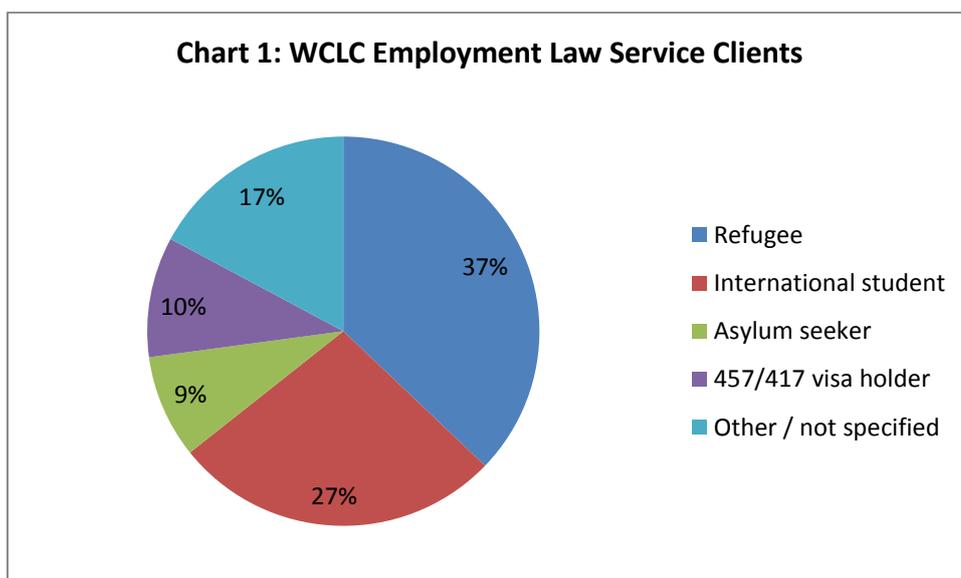
² http://www.footscrayclc.org.au/images/stories/Footscray_CLC_Employment_Law_Project_-_Preliminary_Report.pdf.

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

Employment Law Service

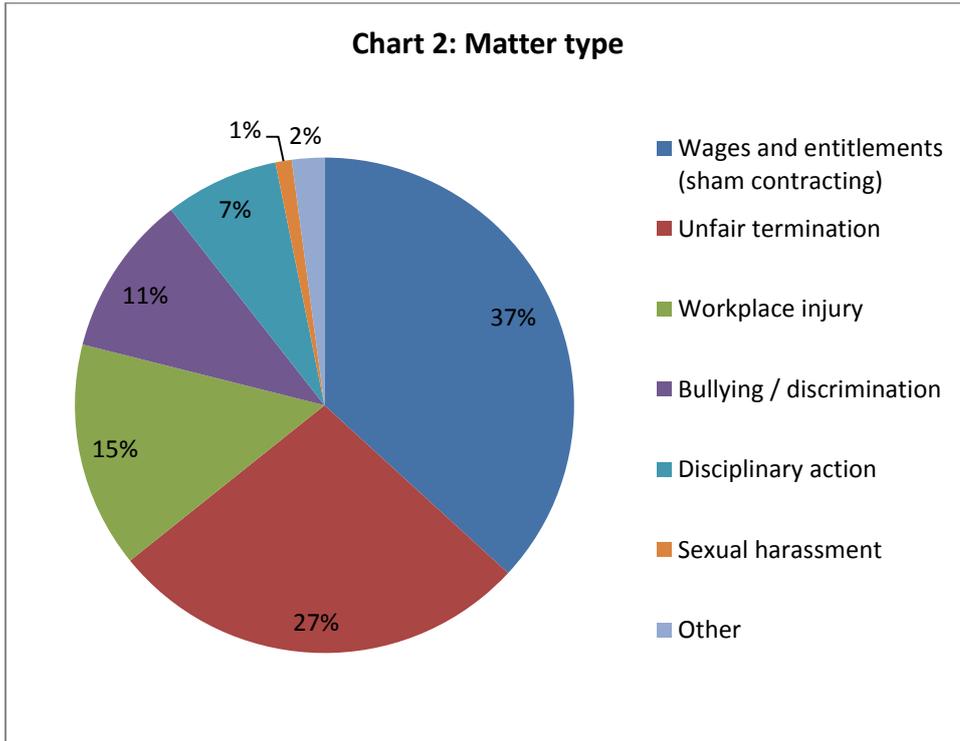
Over 15 months, our Employment Law Service has seen over 125 clients. We have successfully recovered over \$55,000 in unpaid wages, and \$30,000 in compensation for unfair terminations, as well as other outcomes that focus on assisting clients negotiate legal terms and conditions, find new work or keep their jobs. More cases are underway.

Our clients have come from over 26 different countries. As set out in Chart 1, as at February this year our largest group of clients are refugees, while the second largest cohort of clients arrived in Australia as international students. The Centre also advised some asylum seekers and people on temporary work visas (including working holiday and subclass 457 visas). The majority of clients arrived in Australia within the last 10 years. The Centre also provided advice on a discretionary basis to clients who were not newly arrived, dependent on the individual's vulnerability.³



The Employment Law Service has assisted clients with a wide range of matters. Chart 2 shows some of the most frequent issues that we have advised on. Underpayments (including sham contracting) are the most frequently reported problem, followed by unfair termination, workplace injury, discrimination and bullying. However, often 'unfair terminations' contained aspects of discriminatory and/or bullying behaviour. Clients commonly present with more than one legal problem.

³ Some long-term migrants can have similar experiences and characteristics to newly arrived clients depending on their isolation and integration into wider society.



Many of our clients do not understand Australian laws and processes, do not speak English, and would not have enforced their rights without our help.

Community Legal Education Program

We have also delivered CLE to over 500 community members, presented information sessions for community workers and coordinated a train-the-trainer program for community leaders (see section 6.4.4 below).

Project Report

Data and stories gathered throughout the pilot Employment Law Service and CLE Program will be presented in a Project Report. In our first submission to this Inquiry, we noted that the Project Report was due in October this year. However, due to funding limitations and ongoing demand for the Employment Law Service, we have not yet had capacity to prepare the Project Report. We now plan to launch the Project Report in early 2016.

1.2 Submission

WCLC welcomes the opportunity to make this submission in response to the Draft Report. WCLC's work as a community legal centre in Melbourne's Western suburbs, and particularly through the Employment Law Service, offers valuable insight into Australia's workplace relations system. The below material draws on this experience to make submissions in relation to specific aspects of the Draft Report. Our submission also includes case studies of the clients we have worked with through the Employment Law Service over the past 15 months.

2. Chapter 5: Unfair dismissal

2.1 Employment is essential for successful settlement in a new country

The unfair dismissal (UD) provisions of the *Fair Work Act 2009* (Cth) (**FW Act**) are extremely important to the clients of WCLC.

Our Preliminary Report provides some insight into the important role that employment plays for someone settling into Australian society:⁴

When settling in a new country, sustainable employment provides financial stability as well as ‘social cohesion, self-esteem, independence, the ability to gain stable housing and more broadly, a greater sense of community belonging and well-being.’

The benefits of sustainable employment flow on to the broader community, contributing to the local skills base; creating cohesive, vibrant and multicultural workplaces; and at a general level offering human capital as well as social and economic benefits.

However, at the time of publishing the Preliminary Report we heard of the challenges that newly arrived workers face. As one community leader said:⁵

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.

Our case work has reflected these findings. Approximately one third of client matters relate to termination of employment, often in unfair circumstances. 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 UD laws ensure that CALD workers are not dismissed unfairly.

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

CASE STUDY 1

Ali⁶ 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.

⁴ FECCA, ‘Latest unemployment figures hide harsh realities for CALD workers’ (Media Release, 16 August 2013); see also Deng Tor Deng and Fodia Andreou, ‘Settlement Needs of Newly Arrived Migrant and Refugee Men: Brimbank & Maribyrnong’, Migrant Resource Centre North West Region, March 2006, quoted in Preliminary Report, 4.

⁵ Preliminary Report, 6.

⁶ Please note that all names in our case studies have been changed.

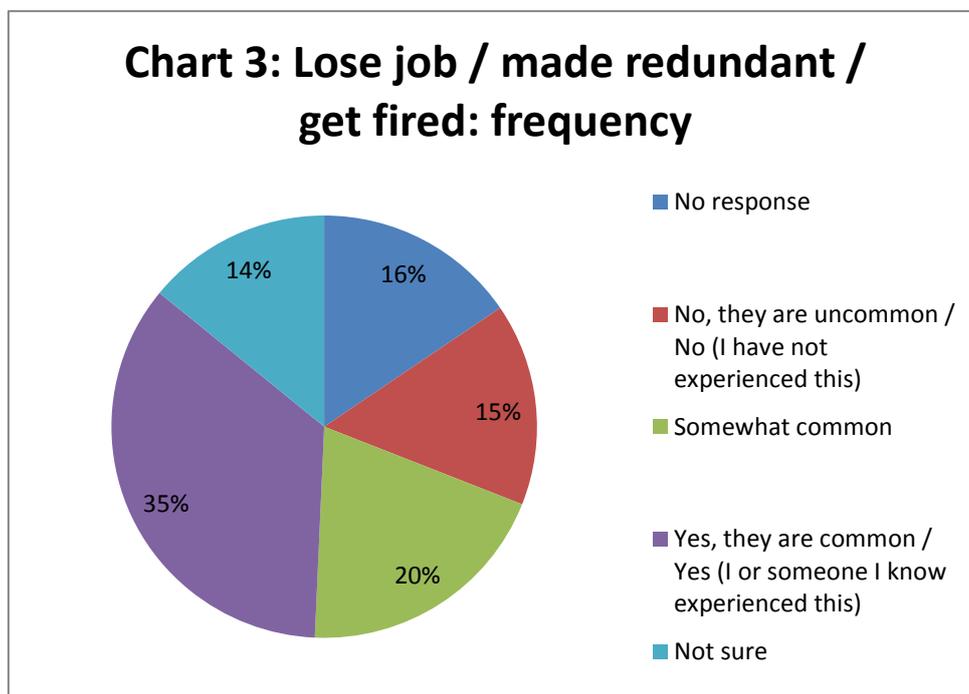
2.2 Consideration of UD applications ‘on the papers’ will result in injustice for newly arrived and refugee workers

DRAFT REPORT RECOMMENDATION 5.1: The Australian Government should either provide the Fair Work Commission with greater discretion to consider unfair dismissal applications ‘on the papers’, prior to commencement of conciliation; or alternatively, introduce more merit focused conciliation processes.

2.2.1 Termination of employment is a common problem faced by our clients

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 3 below).

The causes of such high job loss rates were not captured by this survey question, however our casework, interviews and other survey responses indicate that a combination of various 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, UD 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.’⁷



⁷ Preliminary Report, 6.

2.2.2 Literacy problems are already a barrier to accessing justice

Many of our clients cannot read or write English and many are illiterate in their own languages. Giving the Fair Work Commission (**FWC**) greater discretion to consider UD applications on the papers prior to commencement of conciliation is therefore likely to reduce our clients' ability to access justice. Many of our clients are unable to complete their own UD application forms and we have limited resources to 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. This means that many application forms may not disclose the story of an UD in an easily discernible fashion and it would be of great concern to us if such applications were dismissed because it appeared that they had little merit because of the way in which they were written.

2.2.3 Procedural fairness means being heard

A recent decision of the Full Bench of the FWC highlights the importance of allowing a party with a grievance to be heard in order to ensure procedural fairness. In *CFMEU v BHP Coal Pty Ltd* [2015] FWCFB 2020, the CFMEU wanted a matter to be heard while BHP said it could be dealt with on the papers. The Full Bench held that in order for a party to be afforded procedural fairness they are entitled to a hearing:⁸

Unfortunately the CFMEU was not given an opportunity to make oral submissions. We are satisfied this was a denial of procedural fairness and an appealable error. We are satisfied that it is in the public interest to grant leave to appeal. On the basis of that finding we have decided to quash the Order of Deputy President Asbury.

Consideration of applications on the papers limits the ability to test evidence. It does not give our clients an opportunity to explain their story, question their employer or have their credibility examined – such testing is particularly important considering that UD applications and responses often reveal vastly differing versions of events.

Further, under the current process, applicants do not get a chance to reply to an employer response until conciliation. Expecting a written reply from the applicant prior to a decision on the papers would place extra undue pressure on applicants, especially those with low literacy levels. Employers may fail to provide a response, or in our experience, provide a late response. As discussed in our first submission, 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. This puts our clients at a distinct disadvantage, which would only be amplified if the Commission also proceeded to determine a case without a right of reply or opportunity to test an employer's evidence.

Our clients may not even be in a position to indicate to the FWC whether they want a matter dealt with orally rather than on the papers. This may be due to language barriers or simply not understanding how the system works. In order to ensure that procedural fairness is maintained, we submit that matters should not be dealt with on the papers as a matter of course.

⁸ In *CFMEU v BHP Coal Pty Ltd* [2015] FWCFB 2020, [11].

2.2.4 Furthering the intention of international law

Article 8(1) of the ILO Convention 158, Termination of Employment Convention 1982 (**Convention**) relevantly provides that: 'A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.' If an applicant is not given the opportunity to articulate their case before an impartial body, this will limit the operation of this Convention right.

The UD provisions in the FW Act have their basis in the Convention and should be interpreted and implemented in line with it.

2.2.5 'On the papers' dismissals will have a chilling effect on access to justice

Increasing the ability of the FWC to dismiss applications on the papers could have a chilling effect on the ability of our clients to have recourse to an appeal mechanism where their paper applications might not disclose a readily identifiable cause of action. It would be unjust to deny a person access to an impartial appeal body because English is not their first language or they are unable to articulate themselves well in writing.

Further, it is often difficult to immediately ascertain the full nature of our clients' claims against employers in circumstances where they are required to interact with a system in a language that is not their own, where they may even be illiterate in their own language, or where they have a fear of authority. As such, we would be very concerned that clients who have a legitimate grievance to air or cases with merit would be dismissed before any merits assessment was undertaken.

As discussed **below**, WCLC is working to increase awareness of employment laws and services among newly arrived communities. Any changes which could limit access to justice (such as dismissal of cases on the papers or increased fees, which we discuss **below**) would significantly undermine rights awareness and enforcement. It is critical that in circumstances where people are aware of the rights, the system is designed so that they can access it and are able to enforce their legal entitlements.

2.2.6 WCLC already faces significant resource constraints and this proposal would increase the strain

A meaningful merits assessment of UD claims for CALD clients often needs to be done orally with the use of an interpreter. We have limited resources and can sometimes only advise an applicant of the high level issues to address in their application. We are not always able to draft their applications. As a result, we have seen applicants with meritorious claims fail to file their applications, or submit applications that do not fully articulate their claims. We assume that many applications from people who cannot express themselves well in written English would be dismissed on the papers, and this is unfair and discriminatory.

Further, the 21 day timeframe for lodging an application is short.⁹ The waiting times our clients face are often longer than this and as such, they are sometimes forced to file applications which would be better drafted following comprehensive legal advice and assistance. Further, we only operate in a specific region and are unable to help all newly arrived migrants.

UD is an area in which the FWO provides limited 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. If the Commission was to recommend determinations on the papers, we submit that such a recommendation must also provide measures to mitigate disadvantage to CALD applicants (and other community members with low literacy levels), for example a service that transcribed applications (with interpreters) for those unable to write an application.

2.2.7 Merit focused conciliation is more appropriate and fair

We submit that the Commission's second option - a merit focussed conciliation process - is the most appropriate and fair way to ensure that all participants in the WR system are able to access justice. A merits based focus will allow applicants to tell their stories, hopefully in a forum that is conducive to free and frank disclosure of their grievances, in a way that cannot be achieved purely on the papers. We acknowledge that this may be time consuming and potentially costly, however we do not believe that such considerations outweigh the need to ensure that everyone in Australia can access UD remedies as and when necessary.

Recommendation

The FWC should introduce more merit focused conciliation processes which are accessible to people from CALD backgrounds. UD applications should not be decided 'on the papers' prior to commencement of conciliation.

2.3 Procedural errors should remain a central consideration in UD

DRAFT REPORT RECOMMENDATION 5.2: The Australian Government should change the penalty regime for unfair dismissal cases so that:

- *an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct (5.2a)*
- *procedural errors by an employer should not result in reinstatement or compensation for a former employee, but can, at the discretion of the Fair Work Commission, lead to either counselling and education of the employer, or financial penalties. (5.2b)*

⁹ As articulated in our first submission, we suggest that the limitation period for UD and general protections 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. Alternatively, resources should be provided to ensure that all newly arrived workers are aware of their rights, limitation periods and services that can assist; and targeted, free services should be adequately resourced to assist clients to prepare applications within the strict timeframes.

2.3.1 Current UD laws limit penalties where process is the only breach

We submit that the concerns that draft recommendation 5.2 seeks to address are already accounted for in existing FW Act provisions, particularly sections 387(a) and 392(c).

Draft recommendation 5.2a is adequately covered by section 387(a) of the FW Act which requires the FWC to consider whether there is a valid reason for dismissal. This is one of the factors the FWC must take into account when considering whether a dismissal is unfair. This subsection finds its basis in Article 4 of the Convention which provides that: ‘The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.’

Balancing this valid reason requirement against other considerations, including whether procedural requirements are met, is an exercise routinely performed by the FWC. The FWC has found in past cases that where there is a valid reason, a breach of process alone is not sufficient to constitute an unfair dismissal. For example in *Shane Adams v Tasmanian Freight Services Pty Ltd*,¹⁰ Deputy President Wells recently dismissed a UD application, despite procedural errors by the employer:¹¹

It is a fact that the requirements of procedural fairness as they pertain to Mr Adams’ dismissal were discharged in less than an exemplary manner by TasFreight. The procedural criteria provided in s.387 of the Act to establish a fair dismissal are not to be set aside lightly. It is a fine balance on all the circumstances of this case, that I have formed the view that such procedural deficiencies are insufficient in and of themselves to render the termination of Mr Adams’s employment harsh, unjust or unreasonable.

In respect of penalties, we submit that even if a dismissal is found to be unfair for procedural breaches, compensation is appropriately limited by section 392(2)(c), which states that the FWC must take into account the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed.

Therefore, even if a dismissal is found to be unfair for breach of process (for example an employee is summarily dismissed when there should have been a better investigation, or the employer failed to consult under an applicable modern award), an employee’s penalty will be limited to the amount of time it would have taken to comply with process. We submit that this is a fair balance of employer and employee rights –otherwise, employers will be free to ignore process requirements at the expense of lawful employee entitlements.

The proposed changes to the UD provisions to reflect 5.2a would have little utility in light of the above considerations.

¹⁰ [2015] FWC 5997.

¹¹ *Ibid* [58].

2.3.2 Employees must be given an opportunity to improve or explain

The provision of 'reasonable evidence' of persistent underperformance or serious misconduct alone is not the only relevant factor in assessing the fairness of a dismissal. Another consideration should be, and is, whether the employee has been informed of his or her shortcomings and given an opportunity to improve their performance or conduct. Draft recommendation 5.2a would operate to alleviate employers of their responsibility to manage employees. It could create a situation where an employer is aware of poor performance or conduct, gathers evidence of it, but does not disclose it to the employee or do anything to encourage or assist the employee to 'pick up their game'. This would have an adverse impact on our clients – many have recently arrived in Australia, are still familiarising themselves with laws and processes, and should not lose their jobs due to misunderstandings or miscommunication. The following Case Study provides an example.

CASE STUDY 2

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. WCLC assisted Abouk to complete an UD 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.

2.3.3 Procedural errors can have significant impacts on applicants

Procedural errors can have minor or major effects - we do not think it is appropriate to quarantine procedural errors from compensation. Removing the remedies of compensation and reinstatement will disproportionately undermine the rights of vulnerable workers, who are less able to demand procedural fairness, or complain when such fairness is denied. As noted above, many of our clients report being dismissed for misunderstandings. Marco's story demonstrates the importance of ensuring employers follow fair procedures, particularly for vulnerable CALD workers:

CASE STUDY 3

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. WCLC 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 WCLC - he had started back at work.. He was very happy to have his job back.

2.3.4 Enforcement of UD laws is an individual pursuit: removing compensation will undermine enforcement

By removing meaningful remedies for workers, employers are less likely to be deterred from breaching their obligations and more likely to disregard procedural fairness obligations. Given that FWO does not enforce UD, compliance with UD laws is largely enforced by individual employees and their representatives. If there are no meaningful remedies for the individual, enforcement is much less likely to be pursued, and compliance will diminish. In addition to reinstatement and compensation, the FWC should be empowered to order that an employer undergo counselling and face financial penalties.

2.4 The available remedies should be expanded

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 any remedy it sees fit. The following two case studies, as well as Case Study 6 below, provide examples of such types of cases:

CASE STUDY 4

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 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.

CASE STUDY 5

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 breaches, employee vulnerability and the impact of the behaviour on the employee. This final case study demonstrates an example where aggravated damages should have been ordered on the basis of egregious employer behaviour:

CASE STUDY 6

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 Jonohad to pay hundreds of dollars of cash back to him each fortnight after being paid. He also had to pay rent. Jono 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. Jono lost his dream to set up a life in Australia, and was punished for speaking up about his rights

In situations like those set out above, even if the maximum amount of compensation was ordered, in our view it is insufficient. There should be no cap on compensation. Given the great importance of employment (and reinstatement) to all workers, particularly our clients who depend on their employment to settle successfully in Australia, the remedies available to unfairly dismissed workers should be broadened.

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 in general protections **below**.

2.5 Reinstatement must remain the primary remedy

DRAFT REPORT RECOMMENDATION 5.3: The Australian Government should remove the emphasis on reinstatement as the primary goal of the unfair dismissal provisions in the Fair Work Act 2009 (Cth).

WCLC strongly opposes this draft recommendation. The primary focus of UD provisions is reinstatement. We do not believe that there is any reason why this focus should shift.¹² Simply because reinstatement is not a common outcome does not mean that it should lose its status as the primary remedy. We have already indicated the importance employment has to our clients and we strongly urge the PC not to formalise this draft recommendation.

Recommendations

1. **The penalty regime for UD should be changed such that section 392 requires the FWC to consider:**
 - a. **the impact of the employer's behaviour on an employee; and**
 - b. **the gravity of the employer's breach (e.g. whether an employer's behaviour is particularly unjust, improper or egregious)**
2. **The penalty regime for UD should be changed so that the FWC has discretion to order any remedy it considers appropriate in the circumstances, including reinstatement, compensation for employees (for economic loss and hurt and humiliation), counselling and education of the employer, and/or financial penalties.**
3. **Current UD laws provide adequate limitations on remedies for employees unfairly dismissed due to procedural errors. There should be no further limitations.**
4. **Reinstatement should remain the primary remedy**

¹² We note that Article 10 of the Convention discloses that the primary remedy for UD is reinstatement: If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.

2.6 Lodgment fees should not be increased

INFORMATION REQUEST: The Productivity Commission seeks further views on possible changes to lodgment fees for unfair dismissal claims.

There may be merit in considering a revised, two-tier approach to lodgment fees by:

- *increasing by a modest amount the fees for application lodgment, and tying the fee to income levels at the time of dismissal, such that higher income earners pay more to lodge applications; and/or*
- *introducing an additional fee for cases proceeding to arbitration to partly recover the substantial costs involved with conducting proceedings in the FWC.*

Further views are sought on the effectiveness of this approach, and its possible consequences for all parties.

2.6.1 Evidence from the UK shows that increased fees limit access to justice

WCLC is particularly concerned about proposed increases to fees for UD lodgement. Our clients have low incomes, or at the time they are seeking the assistance of the FWC to deal with an UD, no income. Any increase to UD application fees will have a serious chilling effect on our clients' ability to seek redress. Although we routinely assist our clients to complete applications for fee waiver, many vulnerable employees would not be aware of this option, and would be deterred by increased fees.

The escalation of fees in the UK provides an instructive example of how access to justice can be limited by financial barriers. According to a report by the Trade Union Congress "At what price justice? The impact of employment tribunal fees" (**TUC Report**), the cost of lodging a claim in an employment tribunal has risen to £1,200, while those seeking to recover unpaid wages or holiday pay have to pay up to £390.¹³

Provisional statistics published by the Ministry of Justice in March 2014 revealed that in the first full quarter following the introduction of fees the overall number of employment tribunal claims fell by 79 per cent.¹⁴

In a media release dated 16 June 2015, the Law Council of Australia set out concerns it has in relation to increased filing fees in the High Court, Federal Court, Family Court and Federal Circuit Court will further undermine access to justice:¹⁵

Many people on middle-to-low incomes may now find it simply too expensive to enforce their rights through the courts, which will undermine the rule of law and the proper administration of justice.

¹³ TUC Report, page2.

¹⁴ TUC Report, page3.

¹⁵ <http://www.lawcouncil.asn.au/lawcouncil/index.php/law-council-media/media-releases>.

UD remedies are relatively low. Between 1 July 2013 and 30 June 2014, half of all conciliated settlements involving compensation were for less than \$4000, while four out of five settled for less than \$8000. Where matters proceeded to hearing, half of successful applications granted compensation received less than \$15000. Higher fees will deter clients with meritorious cases – the effort involved in running a case will not be balanced by adequate compensation. We submit that by increasing fees, there is a significant risk that vulnerable workers will not enforce their rights under law.

2.6.2 The introduction of extra fees midway through a proceeding will put unfair pressure on vulnerable employees

Introducing extra fees prior to proceeding to arbitration will not improve the efficiency or effectiveness of outcomes. The emotional and financial cost of proceeding to arbitration already places significant pressure on vulnerable and low income applicants. We have seen many clients with strong cases accept lower settlement amounts to avoid the financial and emotional cost of proceeding. It is critical to avoid a situation in which clients can be put under extra pressure to settle a claim (with merit).

The FWC could take filing fees out of any amounts awarded in settlement of a UD matter. Following a merits based conciliation or arbitration, the FWC will be better placed to assess an applicant's financial situation.

Recommendation

There should be no changes to the current way in which filing fees are set. Nor should there be any further fees introduced prior to arbitration.

2.6.3 Costs should not prevent access to justice

Figure 5.7: Suggestion that if a matter is without sufficient merit, applicant may be advised that there may be cost implications

The UD system should remain a no cost jurisdiction whereby each party bears its own costs. Employees recently dismissed often face significant financial hardship. Several of our clients have experienced homelessness as a result of losing their job. Parties are protected from unreasonable behaviour under the FW Act provisions requiring costs on a finding that the application was vexatious or without reasonable cause, or that there are no reasonable prospects of success. This should remain the case.

Threatening costs implications, particularly in a matter which comes down to whose evidence is preferred, will likely have the effect of turning vulnerable employees away from the FWC. This goes against the spirit of the Convention and limits access to justice.

We refer to figure 5.7 and note our strong objection to the process outlined therein. Should it be adopted, we propose our own amendments thereto. Where figure 5.7 refers to applicants being

advised of costs implications we submit that the same should be said to respondents who put in a response that is 'without sufficient merit'.

Recommendation

The current costs system should remain. No further cost implications should be introduced.

3. Chapter 6: The general protections

3.1 In order to meet the objects of the FW Act, there should be no cap on compensation.

DRAFT REPORT RECOMMENDATION 6.4: The Australian Government should introduce a cap on compensation for claims lodged under Part 3-1 of the Fair Work Act 2009 (Cth).

Our client files reveal that newly arrived and refugee workers are often subjected to distressing and humiliating treatment at work. Such treatment may be connected to attributes such as their country of birth, ethnicity and refugee status. Some clients notice that this discriminatory behaviour escalates after media reports of terrorist events overseas. Other times, clients are tormented for being injured, or dismissed for asking about their workplace rights. Such treatment is unlawful and threatens a newly arrived person's capacity for future work and successful settlement within the community.

In some cases, discriminatory behaviour has caused significant psychological injuries. 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. No cap on compensation should be introduced.

The following examples demonstrate the treatment some of our clients have reported:

CASE STUDY 7

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 any more.

CASE STUDY 8

Saiful worked as a cleaner. His boss was always late paying his wages. Saiful was called "dirty Indian" and directed to clean in unsafe places. Whenever Saiful asked about when he would be paid, his boss always promised he would be paid "soon". When Saiful said that he was going to a lawyer, he was fired.

A cap on compensation would mean that for the worst kinds of treatment, where injuries have been most severe, employers will get away lightly, and the law will not provide a means for vulnerable applicants to be placed in the same position they were in before the unlawful behaviour occurred.

By placing a cap on compensation, there is also a risk that our laws will trivialise discriminatory and unlawful behaviour. This in turn will undermine the role of general protections laws in combating unlawful discrimination at a systemic level and fostering a cultural shift away from bigotry and exploitation. Such a shift would be contrary to the objects of the FW Act.

Importantly, the objects and Explanatory Memorandum (**EM**) relating to this Part acknowledge broad aims. The EM states:¹⁶

This is a key part of this Bill that ensures fairness and representation at the workplace by recognising the right to freedom of association and preventing discrimination and other unfair treatment.

The objects (set out in section 336 of the FW Act) state an intention to protect workplace rights and provide protection from workplace discrimination. Importantly, the objects also state that general protections laws seek to:

provide effective relief for persons who have suffered discrimination, victimisation or have been adversely affected as a result of contravention of this Part.

A cap on compensation for claims lodged under Part 3-1 would undermine the regime by limiting the capacity for both systemic change and the granting of effective relief commensurate with the extent of adverse effects suffered by applicants.

We strongly submit that no cap should be introduced. Instead, the provisions should remain unchanged, and 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* and agree:¹⁷

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 example 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.

¹⁶ Explanatory Memorandum, Fair Work Bill 2008 (Cth) [1333].

¹⁷ See <http://www.humanrightscommission.vic.gov.au/index.php/component/k2/item/699-karan-v-hotondo-building-pty-ltd-%E2%80%93-nov-2013>, pages 58 – 59.

In our experience, with assistance from an accessible legal service, the face to face nature of conciliation can be an informal and cost effective way to resolve disputes without recourse to a formal hearing. However, a compensation cap may discourage plaintiffs from pursuing a claim to a conciliation where there is little prospect of receiving damages commensurate to their suffering.

Further, a cap on damages may encourage discriminatory behaviour from employers, as there is little prospect of enforcement and no threat of costly damages to discourage such behaviour. 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, the general protections laws should deliver strong systemic outcomes to improve conditions at work and eradicate unlawful discrimination.

4. Chapter 17: The enterprise contract

Information request

The Productivity Commission seeks information on the costs (including compliance costs) and benefits of an enterprise contract to employers, employees and to regulatory agencies. Particular areas that the Commission seeks information on are:

- *additional evidence on the potential gap in contract arrangements between individual arrangements (broadly defined) and enterprise agreements*
- *the extent to which the enterprise contract would be a suitable addition to the current suite of employment arrangements, how it could fill the gap identified, and specific examples of where and how it could be utilised*
- *clauses that could be included in the template arrangement*
- *possible periods of operation and termination*
- *the advantages and disadvantages of the proposed opt in and opt out arrangements.*

In addition, the Productivity Commission invites participants' views on the possible compliance and implementation arrangements suggested in this chapter, such as their impact on employers, employees and regulatory agencies.

4.1 Enterprise contract would exacerbate power imbalance for vulnerable workers

As noted in our first submission, without minimum working conditions and wages contained in Awards and the FW Act, refugee and recently arrived communities have no realistic prospect of negotiating or enforcing equitable working conditions on their own.¹⁸ We are concerned by the proposed introduction of an enterprise contract. We submit that without independent scrutiny, such a contract is likely to erode minimum terms and conditions for vulnerable workers, and further exacerbate power imbalances.

As stated in the Draft Report, enterprise contract type arrangements are likely to occur in small businesses, in absence of an enterprise agreement. It is likely these workplaces will be less unionised, and workers will not have a collective voice to advocate on their behalf. Given the inherent power imbalance that exists in the employment relationship, even workers with a strong command of English and solid understanding of laws are at a disadvantage without a collective voice. This disadvantage is dramatically compounded for migrant and refugee workers, who are unlikely to say no to their employers.

4.2 Other mechanisms already provide flexibility

There is no need for an enterprise contract. Awards themselves already provide for individual flexibility. For example, we refer to clause 7 of the General Retail Industry Award 2010. This

¹⁸ PAGE10.

standard flexibility clause allows for an employer and individual employee to agree to vary certain award terms. It is not unreasonable that an employer seek agreement from each employee if a variation is to be made. Further, the Award itself contains some significant internal flexibility. For example, clause 28 provides for numerous permutations and combinations of hours of work. Another example is the facilitative provision, whereby collective agreement to vary awards is made possible.¹⁹

Given such flexibility is already available, there is no need for a further complicating level of regulation. Our clients, as well as many small business owners, would likely find the introduction of another tier of regulation confusing and burdensome.

4.3 Independent scrutiny required to protect vulnerable workers

If enterprise contracts must be recommended, it is essential that they are subject to independent scrutiny and a fair process.

For enterprise agreements, the FW Act provides safeguards to ensure a fair process and promote awareness among workers. For example, there is an obligation to inform employees about the effect of the agreement, taking into account the needs of certain employees, including young employees or those from non-English speaking backgrounds. Similar protections must be in place, otherwise employees will miss out on the valuable opportunity not only to shape their terms and conditions of employment, but to also understand how they will operate and what they mean.

Our clients are vulnerable and desperate for work – it is highly unlikely that they will opt out of an enterprise contract in any circumstances, but especially without an understanding of Australian laws. Therefore, we submit that enterprise contracts must be subject to independent scrutiny before commencement, to ensure they meet minimum standards.

Recommendation

Enterprise contracts should not be introduced. If they are introduced, they must be subject to independent scrutiny prior to becoming operational.

¹⁹ See for example, clause 8 of the Road Transport and Distribution Award 2010.

5. Chapter 20: Alternative forms of employment

5.1 Lack of definition reduces access to justice for our clients

5.1.1 Sham Contracting is a significant problem for our clients

WCLC welcomes the Commission's focus on sham contracting in the Draft Report. In our experience, sham contracting is used systematically as a core business practice throughout the construction, cleaning and distribution/transport industries. We have observed that sham contracting commonly takes place through complex sub-contracting and supply chain arrangements with multiple intermediaries between the original employer and the 'independent contractor'. Conversely, 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.

CASE STUDY 9

Lin came to Australia as a refugee. This was her first job in Australia. She worked as 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 hourly wage.

CASE STUDY 10

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 to visit his family he would not be paid and would not get future shifts.

5.1.2 Legislative definition of 'independent contractor' would help to protect vulnerable workers

WCLC recommends a statutory definition of independent contractor that incorporates the common law 'multi-factor' test.

WCLC recognises issues associated with a legislative definition raised in submissions (including subjective assessments by regulators, the inability of a legislative definition to keep pace with workplace developments, and the fact that loopholes will be found and exploited). However, we

believe that these issues are present in the common law test without the benefit to the community of a statutory definition. Currently, regulators and statutory agencies make decisions based on their interpretation of case law, which would continue under a statutory definition. Judicial interpretation is itself bound by precedent, and not always able to keep pace.

We also acknowledge concerns raised in the draft report that:²⁰

Without a set of characteristics common to all independent contractors, the development of a definition to accurately categorise workers becomes less feasible. Were one implemented, it could lead to classification errors... The current common law approach avoids the above pitfalls. Since they can examine the entirety of the relationship, judges are in a position to assess the aspects of an arrangement that are most indicative of its true nature. And since this may vary from contracting relationship to contracting relationship, they have the flexibility to change the importance they place on these aspects on a case by case basis.

However, we submit that there are broad legislative definitions available that would provide greater certainty, but are also flexible enough to respond to different contracting arrangements. Such a broad definition would maintain judicial oversight and incorporate the multi-factor test when required.

WCLC believes that a statutory definition would assist in with enforcement in cases where of sham contracting was identified. In the Draft Report, the Commission stated that 'it is not clear the extent to which the prevalence of sham contracting reflects uncertainty in the definition'.²¹ We submit that there are numerous factors contributing to the high levels of sham contracting in newly arrived and refugee workers. These include employers seeking to avoid minimum entitlements, and a lack of understanding of law around who is an employee, who is an independent contractor, and what the differences mean. Community workers have told us:²²

'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'.

Having presented numerous information sessions to newly arrived workers, we have experienced firsthand the extreme challenge of explaining the elements of the multi-factor test to English as Additional Language speakers. We submit that a simple definition as set out **below** would be easier to understand and therefore, could prevent sham contracting situations from occurring.

²⁰ Draft Report, page726-727

²¹ Draft Report, page725

²² Preliminary Report, page12.

Furthermore, as discussed in 5.2 **below**, currently our independent contractor clients face a difficult choice of jurisdiction to recover underpayments. A clear definition would better protect vulnerable workers who could choose to pursue entitlements owed as an employee with more certainty.

We agree with the Draft Report finding that '[s]ham contracting disproportionately affects vulnerable workers who are at risk of exploitation or who have little bargaining power.'²³ As noted in our first submission, in order to protect vulnerable workers, any definition should include a presumption that a worker is an employee unless certain conditions are met. For example, Stewart and Roles' proposed definition:²⁴

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.

Recommendation

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

5.2 Ambiguity and jurisdictional concerns limit enforcement

WCLC has observed that in the absence of a statutory definition our clients have limited individual enforcement options. Throughout the distribution/transport industry, our clients are routinely paid an hourly rate, work for one employer, wear a uniform and have rostered working hours. Despite these clients clearly being employees according to the 'multi-factor' test, enforcement of sham contracting and unpaid wages remains extremely difficult in these cases.

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:

- 1 That they were an employee; and
- 2 Their appropriate award classification and rate of pay.

As sham contracting disproportionately affects people of recently arrived and refugee background, it is unrealistic to expect that they will be able to prepare a claim that requires knowledge of a common law 'multi-factor' test.

There is also a risk that if workers are not found to be employees, they will then have to re-start a lengthy process and make an application to VCAT as an independent contractor. We see many

²³ Draft Report, page 721

²⁴ Andrew Stewart and Cameron Roles, Submission to the ABCC Inquiry into Sham Arrangements and the Use of Labour Hire in the Building and Construction Industry, <http://fwbc.gov.au/sites/default/files/Andrew%20Stewart%20and%20Cameron%20Roles%20-%20SCRT%20Submission.docx>, 5.

'independent contractors' who are really employees, and who are dramatically underpaid according to the applicable award, even if paid in accordance with the 'independent contractor' agreement.

This risk has resulted in many of our clients opting to pursue monies owed as contractors (pursuant to their sham contractor agreements) in VCAT, and abandoning their entitlement to be paid a minimum wage and other entitlements. This means that even if successful at VCAT, they receive less than the minimum wages and entitlements owed to them as employees.

Therefore, we submit that the Federal Court of Australia and Federal Circuit Court of Australia should have jurisdiction to hear unpaid wages cases for contractors who believe they are an employees at law, even if found not to be. Otherwise there is a disincentive to bring claim as employee, and sham contracting is allowed to continue.

Recommendation

The jurisdiction of the Federal Court/Federal Circuit Court should be expanded so that a worker who considers themselves an employee at law can have their unpaid wages dispute heard, even if they are ultimately found to be a contractor.

5.3 Need for increased regulatory action and preventative measures

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.

5.3.1 Need for targeted enforcement

WCLC 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 by FWO, especially in key industries (including construction, cleaning services and courier/distribution workers) is an important part of this.

5.3.2 Prevention and rights awareness

We also submit that there should be a greater focus on prevention of sham contracting by introducing independent scrutiny and education at the time of applying for an ABN. This could include a short face to face interview with an information officer from the FWO, for example. This would prevent employers obtaining ABNs for workers without explaining anything to them, as we have seen occur on many occasions.

5.4 Principals, host agencies, franchisors must take responsibility for ensuring rights are protected

Many of our clients find themselves at the bottom of long and complex supply chains. Often, the entity at the top is a large, profitable, well known company. These chains result in exploitation and injustice for those most vulnerable. For example, the following Case Study shows the exploitation we have witnessed in franchises:

CASE STUDY 11

Joyce 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. Joyce worked full time, undertook training and met sales targets. When she discovered that she was not being paid legally, Joyce quit her job.

WCLC assisted Joyce 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 Joyce 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. WCLC wrote a letter directly to the employer setting out the evidence that Joyce 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 Joyce’s name, and Myki travel records. The employer promptly paid Joyce her entitlements.

We have also seen significant exploitation arising from multi-tiered subcontracting arrangements:

CASE STUDY 12

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 WCLC. 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 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 these other companies were “knowingly concerned in or party to the contravention” under section 550 accessorial liability provisions 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.

WCLC urges the Commission to consider borrowing from US law and recommend that the concept of 'joint employment' be introduced into Australian law. A good discussion of this concept can be found in a recent article by Dr Tess Hardy.²⁵

Under the concept of joint employment, the head company (for example the company at the top of the supply chain or the franchisor) may be held to jointly employ the employees of the entities further down the chain, or of the franchisee. These 'bigger' entities may be held vicariously or jointly liable for any breaches of employment law. This would prevent the bigger entities from distancing themselves from breaches of employment law where these companies hold sway down the chain or over the franchisees.

The recognition of joint employment would assist with the current deficiencies with the accessorial liability provisions in section 550 of the Fair Work Act. It would also dispense with the need for an applicant to prove 'true employer' status.²⁶ Those who exert power would no longer be able to hide behind the actions of others.

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 such that case studies like those set out above occur.

Recommendation

The FW Act should be amended to include joint employment. Principals, host agencies and franchisors must take responsibility for ensuring rights are protected in their supply chains.

5.5 Approval of the reasonableness test for sham contracting

WCLC approves of the recommendation to recalibrate the test from 'recklessness' to 'reasonableness.' WCLC concurs with the Productivity Commission's assessment that the 'the status quo weakens incentives of businesses to avoid sham contracting.'

In our experience, the prevalence of sham contracting in the construction, cleaning and distribution/transport industries is compounded by the practices of sophisticated employers with significant market share who have the ability to influence industry wide practice. These companies engage in sham contracting at an arm's length distance by subcontracting to a third party who engages individuals to be independent contractors. However, the 'independent contractor' is often required to wear the company's uniform, is bound by the company's policy and reports directly to the company. That industry leaders – who are setting industry wide benchmarks- are engaged in

²⁵ See <http://www.theage.com.au/comment/why-franchise-businesses-seem-to-breed-poor-working-conditions-20150831-gjbf9v.html>.

²⁶ See for example *Fair Work Ombudsman v Eastern Colour Pty Ltd (No 2)* [2014] FCA 55, *FP Group Pty Ltd v Tooheys Pty Ltd* [2013] FWCFB 9605.

these practices is indicative that the status quo does not offer sufficient disincentive to sham contracting.

Recommendation

WCLC supports the Commission's draft recommendation to recalibrate the test from 'recklessness' to 'reasonableness.'

6. Chapter 21: Migrant workers

6.1 Focus on migrant workers is welcome and necessary

Draft Report Recommendation 21.1: The Fair Work Ombudsman should be given additional resources for investigation and audits of employers suspected of underpaying migrant workers (including those in breach of the Migration Act 1958 (Cth)). (21.1a)

The Migration Act should be amended so that employers can be fined by at least the value of any unpaid wages and conditions to migrants working in breach of the Migration Act, in addition to the existing penalties under the Act. (21.1b)

As a specialist service working exclusively with newly arrived and refugee clients, we welcome the opportunity to work with the Commission to improve labour market integration and successful employment outcomes for migrant workers. As noted above, sustainable employment plays a central role in facilitating settlement in a new country. Further, by ensuring that the rights and entitlements of the most vulnerable workers are enforced, we can ensure that minimum terms and conditions are provided to all workers and avoid situations where employers gain competitive advantage through exploitation.

We welcome the Commission specifically considering and addressing the needs of migrant workers as an especially vulnerable group. Our research and casework supports the Draft Report's finding that migrants are more likely to experience exploitation due to low levels of rights awareness, limited English language skills, cultural barriers and lack of support networks.²⁷

However, we would urge the Commission to consider expanding the recommendations around migrant workers to specifically recognise:

- the breadth of services that need to be delivered to ensure migrant workers are efficiently and effectively able to understand and enforce their workplace rights (not just audit/investigations but also information, training, targeted assistance for those whose rights have been breached along with enhanced enforcement powers);
- the need for government services to ensure they are accessible and responsive to newly arrived and refugee workers; and
- that the most efficient and effective way to deliver these services is with government agencies working together, in conjunction with community organisations. This requires additional resources for community organisations as well as the FWO.

In addition, we briefly note that the Commission's proposed changes to the Migration Act are insufficient. In our view, all workers should have a right to minimum entitlements and be able to recover unpaid wages. As well as recognising the objectives of the Fair Work Act, such an approach

²⁷ Report, at 741.

will promote enforcement and provide stronger disincentives for employers seeking to hire and exploit illegal workers.

6.2 Additional resources for audits and investigations essential

We have previously commented on the importance of FWO investigations and industry wide campaigns. Importantly, FWO's power to audit workplaces in an own motion investigation capacity removes the onus from individual complainants who are vulnerable, and enables systemic change across workplaces.²⁸ We therefore commend the Commission for recommending that the FWO should be given additional resources for investigation and audits of employers suspected of underpaying migrant workers (Draft Recommendation 21.1a).

Given the complex, multi-jurisdictional nature of labour regulation in Australia and the limits on the FWO's jurisdiction, to achieve successful employment outcomes for all migrant and refugee workers, it is not sufficient to rely on regulatory involvement and enforcement alone.

Recommendation

WCLC supports the Commission's draft recommendation that Fair Work Ombudsman should be given additional resources for investigation and audits of employers suspected of underpaying migrant workers.

6.3 Supporting the audit/investigation work of the FWO

We submit that in order to maximise the efficiency of audits and investigations by FWO, and to boost enforcement outcomes, it is also critical that resources are available for:

1. Education – to raise awareness of laws and services (note further details below at 6.4);
2. Assistance – when workers wish to make a complaint (further details below at 6.5); and
3. Community organisations – who efficiently and effectively link vulnerable workers to key services and provide assistance where FWO has no jurisdiction (further details below at 6.6).

6.4 Education of migrant workers upon arrival to Australia (and beyond)

Many organisations, including the FWO, place great significance on education as a vital means of solving workplace relations issues before they arise.²⁹

We strongly agree that raising awareness is a critical step in rights enforcement and commend the Commission's observation that:³⁰

²⁸ WCLC, Submission No. 143 at page 17.

²⁹ FWO, Submission No. 228, at page 3.

³⁰ PC Report, at page 746.

...more should be done to ensure new migrant workers are aware of their workplace rights and entitlements upon arrival to Australia or approval of their visa, as this reduces the likelihood of them accepting substandard working conditions.

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

"No union or organization exists to protect you".

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

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

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

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

Based on surveys and consultations with community members, community workers and community leaders, our Preliminary Report found that specialist education services targeting refugee and newly arrived communities are the most effective form of service delivery.³¹ This targeted education should be delivered face to face and with appropriate language assistance. Such education is vital not only to inform workers of their rights and responsibilities at work, but also to promote services that can assist, and importantly, build trust and relationships with target communities. Such education must be provided in a variety of ways and at appropriate intervention points during the settlement journey.

6.4.1 Timing of education and awareness raising activities

The 2011 report, *'Prevention is better than cure: Can education prevent refugees' legal problems?'* (**Fraser Report**) examines the role of community legal education in preventing legal problems for newly arrived and refugee clients. The report found:³²

- refugees could be assisted with legal problems if they are empowered to recognise a problem as a legal problem and then access legal services;
- it is fitting to provide newly-arrived refugees with legal information in the first few months after arrival in Australia; and

³¹ Footscray Community Legal Centre, *Overview of Preliminary Findings*, February 2014, page 21.

³² Victoria Law Foundation (Katie Fraser), *Prevention is better than cure: Can education prevent refugees' legal problems?*, March 2011, pp 6-7.

- greater involvement of CLCs in the settlement sector has several potential benefits including the possible use of education and early intervention to prevent legal problems.

In our submission, the timing of educational intervention is of utmost importance. In-language, basic information on rights and services should be provided when migrants first arrive, to cater for those who find or commence work promptly. More detailed information should be provided at later points, and further on in the settlement process. For many refugees arriving in Australia there is much to learn – from connecting with Centrelink, enrolling in schools, navigating public transport systems, and recovering from trauma and torture. Therefore, further information and education opportunities must be available at later points when people have the requisite capacity to attend to further considerations like employment rights. For example, we have targeted many of our information sessions at attendees of the AMEP Settlement Language Pathways to Employment & Training (**SLPET**) classes. This English as Additional Language class is focused on work readiness, and includes a work experience component. Attendees of this class are usually actively looking for work – therefore the information we provide is relevant and timely.

It is also important to provide information to community groups and meetings on request – for example, at church meetings or weekend functions. These interventions provide invaluable opportunities to build trust with communities, and also provide information to vulnerable workers who may not be connected to settlement or other services. As noted in our Preliminary Report, practical and timely information is of critical importance. As one community worker noted, information should be provided ‘that is linked to outcomes’ and which ensures that workers receive the right amount of information at the right time, so it is not abstract.³³

6.4.2 Community-based targeted education and resources

‘Access to services begins with knowledge of the law’ – without an understanding of your rights and responsibilities at work, you are less likely to perceive that you are being exploited, and are much less likely to seek help to enforce your rights.³⁴

The FWO's education and advisory service is primarily delivered via its Infoline and web-based resources including its online learning portal.³⁵ Whilst these services are critical and increased online information is welcome, evidence suggests that telephone and internet services will not always reach migrant workers.

There is strong evidence to suggest that face-to-face assistance and advocacy is essential to provide a service to refugee clients and that without targeted assistance focused on relationships, collaboration and trust, legal services and judicial bodies are often inaccessible to refugee and newly arrived communities.³⁶

³³ Footscray Community Legal Centre, *Overview of Preliminary Findings*, February 2014, page 24.

³⁴ Chris Arup and Carolyn Sutherland, ‘The Recovery of Wages: Legal Services and Access to Justice’, *Monash University Law Review* (2009) 35(1) 96, 101.

³⁵ FWO, Submission No. 228, at page3.

³⁶ Footscray Community Legal Centre, *Supporting Working Parents: Pregnancy and Return to Work National Review*, January 2014, page 4.

This also applies to education services. As noted in the Law and Justice Foundation Legal Needs Report, it is extremely important that legal information and education be targeted to specific communities:³⁷

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

Education and assistance must be delivered via culturally sensitive services and through appropriate language translation services, with English as Additional Language resources or services in relevant languages. Community Legal Education also needs to be 'maintained in a sustained rather than ad hoc way'.³⁸

Importantly, education should be provided with the use of new multimedia platforms. As the Women's Legal Service NSW has recognised, many migrant and refugee workers have low levels of literacy in their own first language and this forms yet another:³⁹

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

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

In this context, we submit that while the need for adequate resourcing for the FWO should not be understated, targeted, community-based education resources are critical to achieving the desired outcome of raising awareness of workers' rights amongst migrant and refugee workers.

Further, as discussed **below**, education of community workers to help them identify when their clients' have a legal issue and make appropriate referrals, is also essential and best delivered by a community agency with strong community connections and an established network.

Recommendation

Newly arrived and refugee workers require targeted, face-to-face assistance to adequately raise awareness and to enforce migrant workers' rights.

³⁷ Christine Coumarelos, Deborah Macout, Julie People, Hugh M. McDonald, Zhigang Wei, Reiny Iriana and Stephanie Ramsie, Legal Needs Report, (Law and Justice Foundation Report, August 2012), page 208.

³⁸ Women's Legal Services NSW, A Long Way to Equal - An update of "Quarter Way to Equal: A report on barriers to access to legal services for migrant women" (Report, Women's Legal Services NSW, July 2007), page 32.

³⁹ Women's Legal Services NSW, A Long Way to Equal - An update of "Quarter Way to Equal: A report on barriers to access to legal services for migrant women" (Report, Women's Legal Services NSW, July 2007), page 32.

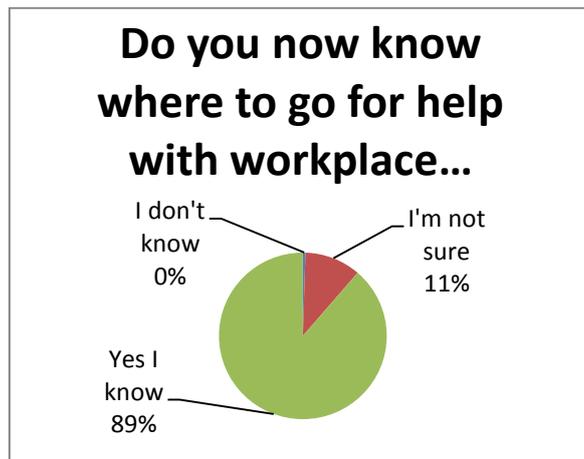
Example: WCLC Community Legal Education Program

In response to the finding mentioned above regarding the importance of face-to-face, targeted employment law services and information, the WCLC has developed and implemented a Community Legal Education program (**CLE Program**) for the past 18 months. The Program has consisted of:

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

The Program has delivered around 50 CLE presentations about employment laws and services to approximately 500 community members, community workers and community leaders.

Community member presentations were delivered in English with the assistance of interpreters for some sessions. Presentations were evaluated through participant surveys. As shown in the graph below, as at February this year, the evaluations found that 89% of participants surveyed stated that as a result of the CLE session they now knew where to go for help with an employment problem.



Feedback from the sessions was overwhelmingly positive. The following responses illustrate a cross-section of feedback:

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

New legal terms like 'sham contracting'.

About how much for the permanent and casual payment.

The wage in different work type.

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

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

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

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

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

In our submission, the success of the Project's CLE program evidences that additional funding and resources ought to be made available for the delivery of regular sessions to community groups who may not have access to information and other services to raise awareness about employment law issues.

Example: Empowering community leaders: the Project's 'Train-the-Trainer' program

Over nine days between February and April 2015, the 'Train the Trainer' project (**TtT Project**) offered comprehensive training in employment laws and services to six Community Education Officers, assisting participants to develop and distribute community legal education to their communities in the West.

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

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

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

From the trainers:

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

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

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

Train the Trainer program will help my community because they will know now who can help them with employment law issues, in English, and also in the language which they speak. The Community Leaders have the first-hand knowledge of the employment law problems faced

by their community and also have the knowledge of the organisations that can help. They can confidently refer their community to those organisations. Having the knowledge of the employment law will empower the community and people will gain confidence in taking action when their employment rights are breached.

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



Community Leaders

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

Excellent initiative to have presenters from the community.

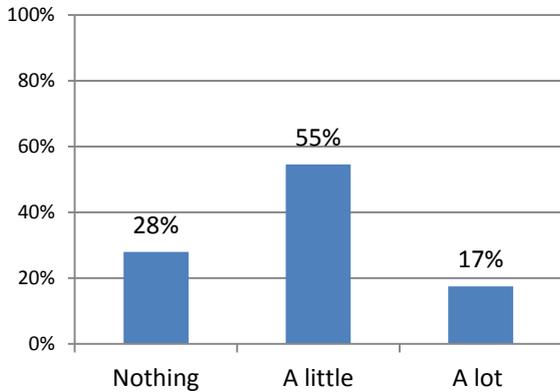
Great presentation, this has been needed for sometime so its great to see this at grass roots level.

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

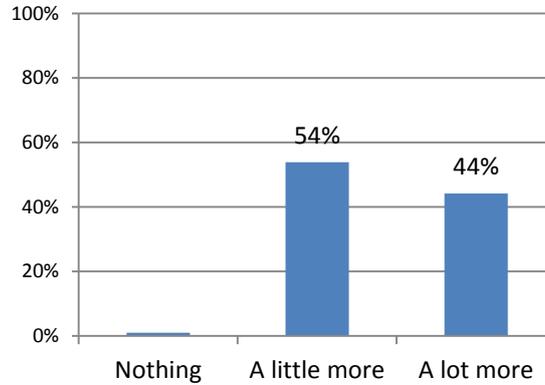
The Program is exactly what the community needs. It should be ongoing with additional support provided to the Community Leaders, as well as additional Community Leaders trained.

Importantly, feedback from community members shows that their understanding and awareness has increased:

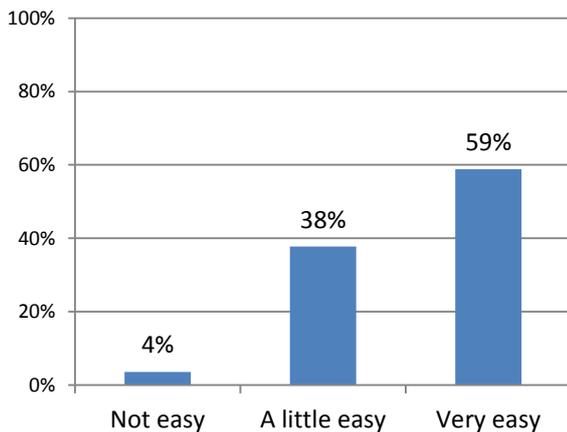
How much did you understand about employment law before today?



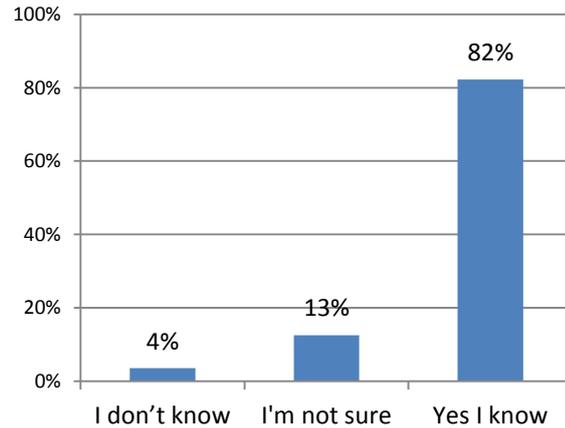
How much do you now understand about employment law?



How easy was the information to understand?



Do you now know where to go for help with workplace problems?



What was the best thing about the employment law session?

- “Knowing that employees have rights and entitlements”
- “Free service, interpreter”
- “If you get bullied you can contact people who can help you”
- “They made it easy for me to understand it better in my language”
- “It has helped me to understand the employment law better than before”
- “The information, phone numbers and pamphlets”
- “Discrimination”

What would make the employment law session better?

- “Conduct information sessions in Karenni language for parents who cannot speak English and Burmese”
- “Explain with the real case study”

- “Asking people about their work conditions, this would have connected the audience more”
- “More training, as well as meeting with different communities of different backgrounds”
- “Informing the community about the best ways to enter into the workplace”

How will the information from today help you?

- “Will help the family”
- “Will guide me to the best legal service centre”
- “I can get help without worry and anxiety”
- “Giving information to friends and colleagues”
- “Will give information to young friends entering employment”
- “I have new awareness of the law and it will stop discrimination and bullying”
- “I know whom to approach now”

As part of the TtT Project, a suite of education resources were developed that target newly arrived and refugee communities. The resources aim to provide useful tools for agencies, educators, community leaders and others working with vulnerable communities to explain employment and anti-discrimination laws and services. The materials are designed for high post-beginner to intermediate ESL (English as a second language) students. They are freely available on our website.

The resources are divided into six topics which relate to common legal issues identified in our casework:

- wages and other entitlements;
- employees, contractors and sham contracting;
- workplace safety;
- discrimination;
- sexual harassment and bullying;
- unfair dismissal and other entitlements when employment ends.

The resources are:

- A template PowerPoint presentation which provides key information about each of the six topics. The Community Leaders modified the presentation template for their individual information session. They included the employment law topics that would benefit their community.
- Handouts: A summary of employment law concepts, Key employment law terms
- Six video clips (one relating to each topic). View the video clips at www.footscrayclc.org.au/train-the-trainer-project
- Activities and question/answer sheets to accompany each video. If used in a workshop, classroom or other group setting, the activities provide an opportunity for participants to work together and strengthen their understanding of employment and anti-discrimination law in Australia.

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

- Community information session
- Client appointments in their workplace
- At their church
- At community events and functions
- Via telephone conversations
- Face to face meetings in their home
- On community radio
- Social media (such as Facebook)
- Local newspaper and Community newsletter

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

We are currently finalising an evaluation report regarding the TtT Project, and would be happy to provide a copy to the Commission if this would assist.

[Example: Collaboration with Fair Work Ombudsman Community Engagement Officers](#)

We welcome the launch of the FWO's program to foster new relationships with international student bodies and multicultural communities, and increase awareness of workplace rights and responsibilities.⁴⁰

As noted above and in our first submission, WCLC has worked closely with FWO to deliver a number of important outcomes for migrant workers. This has included referrals and collaborating on the delivery of the TtT Project. Our collaborative relationship with the FWO has increased noticeably since our connection with the Community Engagement team and appointment of Community Engagement Officers.⁴¹ We hope to build on this relationship through further collaborations.

6.4.4 Amendments to AMEP curriculum

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

One such method is making information about Australian employment laws and services a compulsory component of the curriculum in English as Additional Language (**EAL**) courses, such as

⁴⁰ FWO, Media Release: *Officers appointed to engage with multicultural communities on workplace rights, obligations* (<http://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/august-2015/20150813-community-engagement-officers-presser>).

⁴¹ WCLC, Submission No. 143.

Settlement Language Pathways to Employment and Training and Adult Migrant English Program (AMEP) classes. In fact, one of the observations in the Fraser Report is that settlement agencies and AMEPs are "well-placed to deliver legal and financial education to a large number of people in a systematic way".⁴²

6.4.5 Other methods of increasing awareness

Some other examples of alternative means of increasing awareness that could be considered include:

- (a) the FWO adopting a cultural responsiveness framework and guidelines similar to that developed by the Victorian Government (see **below**);⁴³
- (b) developing a simple phone application that is translatable into languages other than English, containing basic information about key agencies such as the Fair Work Ombudsman, Fair Work Commission, the ATO and other key regulators (such as OHS regulators). Many attendees at our CLE sessions take a photo of the PowerPoint slides showing key service contact details. Therefore, the information could include brief descriptions of what the agency does and include contact details. This information could be written but also spoken/in video form.
- (c) public awareness campaigns about systemic issues, delivered in languages other than English. Public awareness campaigns have been used in other countries to combat issues such as human trafficking;⁴⁴ and
- (d) ensuring that adequate resources about workers' rights are available in migrant resource centres.⁴⁵

Recommendation

Increased resources for targeted face to face education programs at appropriate intervention points. Recurrent funding and expansion of the Train the Trainer program.

6.5 Increased assistance by government agencies for migrant workers who have had their rights breached

Without direct assistance many newly arrived and refugee clients who have had their workplace rights breached will not be able to enforce them.⁴⁶ This case study provides one example:

⁴² Victoria Law Foundation (Katie Fraser), *Prevention is better than cure: Can education prevent refugees' legal problems?*, March 2011, page 8.

⁴³ Victorian Government, *Cultural responsiveness framework; Guidelines for Victorian health services*, 2011.

⁴⁴ ILO, *Protecting the rights of migrant workers: A shared responsibility*, 2009, page 8.

⁴⁵ ILO, *Protecting the rights of migrant workers: A shared responsibility*, 2009, page 8.

⁴⁶ See Footscray CLC's Productivity Commission Submission, in particular pages 7-9.

CASE STUDY 13

Pavel is a newly arrived refugee. He does not speak much English and cannot write. He got his first job as a cleaner. He often worked 12 or 14 hour shifts but was only paid for five hours' work each shift. He was also paid below the minimum pay rate. Pavel came to WCLC because he had not been paid his last two weeks' pay. A community worker had tried to assist Pavel to complain to the Fair Work Ombudsman, but because they didn't know what to complain about, the complaint was closed. WCLC helped Pavel make a new complaint to the Fair Work Ombudsman and negotiated with his employer to receive back payment. WCLC later learned that Pavel assisted two of his friends to negotiate back pay and legal pay rates going forward.

Our Preliminary Report found that many migrant workers face a number of barriers to accessing mainstream services. Migrant workers can be wary of police and government bodies, having previously been the subject of persecution and injustice at the hands of such agencies.⁴⁷ Other limitations exist including language barriers preventing the use of telephone services,⁴⁸ illiteracy, lack of awareness that services are available, and not having access to the internet.⁴⁹

WCLC recognises that both FWC and FWO have undertaken work to target services at newly arrived communities. For example, FWO has an Overseas Workers team, has engaged Community Engagement Officers, and conducts targeted campaigns.

However, there is a need to reform both the FWC and FWO's processes to make them more accessible. The following case study provides an example.

CASE STUDY 14

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

One option is to recommend that these government agencies undertake a comprehensive review of their cultural response plans, and create cultural responsiveness framework guidelines for

⁴⁷ Footscray Community Legal Centre, *Overview of Preliminary Findings*, February 2014, page 20.

⁴⁸ Ibid.

⁴⁹ Victoria Law Foundation (Katie Fraser), *Prevention is better than cure: Can education prevent refugees' legal problems?*, March 2011, pages, page 19.

employment services.⁵⁰ Based on our experience and relevant research, we would suggest that a cultural responsiveness framework include the following actions:

- develop specific protocols and checklists for Infoline staff to work through with newly arrived and refugee clients to assist them to articulate their claims;
- provide information in a wider variety of community languages including those spoken by newly arrived and refugee communities,⁵¹ and in a variety of formats;⁵²
- participate (and help resource) specifically targeted education and engagement programs run in partnership with community organisations;⁵³ and
- employ dedicated staff with speciality expertise in assisting migrant workers (with English as an additional language).

In addition, both government agencies need to continue and expand their work with community based organisations that connect people to the right services, as well as their support for those community based organisations that provide direct assistance services (discussed more below). Furthermore the Fair Work Commission and FWO should work with other relevant agencies (including the AHRC, VEOHRC, WorkSafe etc) on a cultural responsiveness plan and/or processes to facilitate warm referrals between services.

Finally, to ensure the effectiveness of FWO's audits and investigations (to both rectify specific breaches and as a general deterrent) there is a need for:

- the FWO to more strictly enforce current requirements (like those around employment records); and
- for the FWO's enforcement powers to be expanded. Ideally, this would include power for FWO to compel parties to attend mediation and make binding recommendations in respect of very small claims.

Recommendation

- **FWO & FWC should develop a cultural responsiveness framework to ensure newly arrived and refugee clients can access services**
- **Recognising that increasing accessibility will require increased time and contact with communities, FWO & FWC should be given additional resources to enhance the accessibility of their services to migrant workers**
- **FWO enforcement powers should be expanded, in particular to allow the FWO to compel parties to attend mediation and make binding recommendations in respect of very small claims**

⁵⁰ Other sectors have done work in this area, for example see 'Cultural responsiveness framework, Guidelines for Victorian health services' at <www.health.vic.gov.au/diversity/cald.htm>.

⁵¹ Christine Coumarelos, Deborah Macout, Julie People, Hugh M. McDonald, Zhigang Wei, Reiny Iriana and Stephanie Ramsie, *Legal Needs Report*, (Law and Justice Foundation Report, August 2012), pp 209-210.

⁵² Women's Legal Services NSW, *A Long Way to Equal - An update of "Quarter Way to Equal: A report on barriers to access to legal services for migrant women"* (Report, Women's Legal Services NSW, July 2007), page32.

⁵³ Footscray Community Legal Centre, *Prevention is better than cure, Can education prevent refugee's legal problems?* (Report, WCLC, 2011) at <http://www.victorialawfoundation.org.au/sites/default/files/attachments/VLF%20-%20CLCReport_2009-2010.pdf> page51.

6.6 Resourcing community organisations to work with government agencies to deliver better outcomes for migrant workers

It is important to note that the FWO jurisdiction is limited – for example FWO cannot assist with terminations or address systemic issues. It is also clear that government agencies alone are not the most efficient and effective way of delivering services. The Productivity Commission has previously recognised that community organisations have strong potential to provide innovative solutions to social problems.⁵⁴ It has also recognised that employment law is a major gap in civil law assistance⁵⁵ and can have serious consequences, and that efficient government funded legal assistance services generate net benefits to the community and that more resourcing is required.⁵⁶

In addition, as we noted in our first submission, a report conducted by FWO also recognised the importance of Community-Based Employment Advice Services (**CBEAS**) in assisting to create an efficient functioning justice system for vulnerable workers.⁵⁷ We re-iterate that CBEAS' contribute to the effective and efficient functioning of the workplace relations systems by:

- providing critical assistance to a vulnerable group who would otherwise be unable to understand or enforce their workplace rights
- filtering disputes by advising client on the legal merits of their claims
- promoting the efficient passage of disputes through the workplace relations dispute resolution pathways, and
- collecting information about systemic issues for vulnerable groups.

An increased focus on early intervention, moving away from the complaints model, can be aided by funding community organisations to assist clients to recognise and articulate their concerns early in the process.

The Employment Law Service has facilitated the resolution of clients' matters without needing to raise a complaint with FWO. We routinely undertake calculations and assist clients to resolve issues with their employers by way of letter of demand. We have been successful in assisting many clients during this early stage in the legal process and we also advise clients who have little merit of this fact, so as to minimise utilising FWO resources with unmeritorious claims.

As noted in the Law and Justice Foundation report, *Legal Australia-Wide Survey: Legal Need in Victoria*:

⁵⁴ *Contribution of the Not-for-Profit Sector, Productivity Commission Research Report*, January 2010.

⁵⁵ *Access to Justice Arrangements, Productivity Commission Inquiry Report Overview*, no. 72. September 2014, page30.

⁵⁶ *Access to Justice Arrangements, Productivity Commission Inquiry Report Overview*, no. 72. September 2014, page2.

⁵⁷ Footscray CLC Productivity Commission Submission, March 2015, pp20-21; see also Anna Booth, *Report to the Fair Work Ombudsman of a Review of Community-Based Employment Advice Services* (Cosolve, 30 September 2009).

*Timely referral by non-legal professionals has the potential to substantially enhance early legal intervention and resolution. Early intervention can be critical in maximising outcomes and avoiding more complex problems.*⁵⁸

In this regard, the importance of community workers and an effective referral network are, in our submission, critical to increasing awareness of workers' rights in Australia. Community workers play a central role in referring clients who may not know where or how to seek legal assistance. Community workers from target communities provide an essential link between services and community members.⁵⁹

The WCLC has established relationships with community workers in settlement agencies, migrant service providers and NGOs to promote the Employment Law Service and to create referrals between agencies. Since the Service opened, clients have been referred from a variety of agencies including New Hope Wyndham, Spectrum Migrant Resource Centre, AMES Footscray and AMES Werribee, Asylum Seeker Resource Centre and Foundation House. The WCLC has also received referrals from the Fair Work Commission, Victorian Legal Aid and the FWO.

In our submission, these community-based relationships and networks are critical in order to strengthen support networks and to address migrant workers' lack of awareness of workplace rights.

There are a variety of ways that government agencies can work in conjunction with community organisations to deliver better outcomes. The following provides a practical example:

CASE STUDY 15

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

We want to highlight the importance of being able to continue this work, and believe that the kind of methods suggested by the *Report to the Fair Work Ombudsman of a Review of Community-Based Employment Advice Services* are a good starting point to formalise relationships between the FWO and CBEAS. The kind of methods discussed in the report include 'expanding information-sharing arrangements, by designating staff within the FWO and stakeholders to act as liaison points or by providing additional resources, including technical, financial or media assistance.'⁶⁰ We also welcome the possibility of secondments to assist us to meet overwhelming demand.

⁵⁸ Law and Justice Foundation (Christine Coumarelos, Deborah Macout, Julie People, Hugh M. McDonald, Zhigang Wei, Reiny Iriana and Stephanie Ramsie), *Legal Australia-Wide Survey: Legal Need in Victoria*, August 2012, page213.

⁵⁹ Footscray Community Legal Centre, *Overview of Preliminary Findings*, February 2014, page21.

⁶⁰ Melbourne University Centre for Employment and Labour Relations Law *Submission to the ACTU's Independent Inquiry into Insecure Work in Australia*, 17 at <www.actu.org.au/media/349495/centre-for-employment-and-labour-relations-law.pdf>.

In addition, we strongly support a model where the FWO directly funds CBEAS - both those with specific and general focus, or specific programs within a general service. State wide services such as Job Watch the Employment Law Centre of WA and Working Women's Centres play a vital role in assisting vulnerable workers. For the reasons we have already outlined we would urge funding some services/programs with a specific focus including specialist expertise in supporting migrant workers.

Recommendation

Increased funding and resources for community organisations, including community based employment advice services, which educate newly arrived and refugee communities about their workplace rights as and/or assist them to access the FWO complaints and the FWC dispute resolution processes

6.7 Migration Act changes need to provide stronger disincentive to exploit illegal workers and allow exploited workers to recover unpaid wages

We support the Commission's draft recommendation to increase sanctions against employers who breach the Migration Act (21.1b).

All workers should be protected by minimum work standards

However, we strongly disagree with the Commission's position that employees working illegally should not receive minimum entitlements under the FW Act. Although the common law position is that contracts entered into illegally are unenforceable, we encourage legislative reform to correct this in some circumstances. We submit that the FW Act should be amended to clearly state that undocumented migrant workers are entitled to the same terms and conditions as all others working in Australia.⁶¹ Furthermore, 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.

We refer to an article by Adele Ferguson documenting the recent case of workers being exploited at 7-Eleven shops. Based on conversations with numerous workers, Adele finds that granting amnesty is a central part of enabling workers to speak out about exploitation:⁶²

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,

⁶¹ See submission to the Productivity Commission by Dr Stephen Clibborn.

⁶² Adele Ferguson, Amnesty sought for 7-Eleven's exploited workers: <http://www.afr.com/business/retail/amnesty-needed-for-7elevens-migrant-workers-20150906-gjg3pq>.

possibly thousands of workers will be too afraid to come forward, making the exercise a meaningless farce.

It is essential that exploited workers are encouraged to report illegal behaviour. Therefore, laws should be amended such that penalties for employees working illegally should be removed in light of the public interest in stopping rogue employers. 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.'⁶³ Without providing 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 what rights 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.

Need to allow workers to remain in Australia until employers are prosecuted

We have seen a disturbing trend whereby clients have been sent home prior to the conclusion of civil proceedings they may be involved in (even when working legally). We agree with the FECCA and Salvation Army recommendation that:⁶⁴

Migrant workers who have been trafficked or subjected to significant exploitation, such as significant underpayment of wages, should be permitted to remain in Australia if, and for as long as, they are pursuing civil remedies of compensation from the employer or if they are involved in any Fair Work processes... Introduce a Civil Justice Stay Visa to provide a temporary bridging visa to those workers who wish to take their current employer to task in the courts or Fair Work tribunals. At the moment DIBP can end up unwittingly assisting exploitative employers by removing anyone who complains. Often the individuals are removed before any action or investigation for the purposes of legal proceedings can be conducted.

Employers who force employees to breach 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. We echo the recommendations that FECCA and the Salvation Army have already made to the Commission in this regard.

⁶³ Page 3.

⁶⁴ <http://fecca.org.au/wp-content/uploads/2015/09/ProductivityCommission-FECCATSA.pdf>, page 17.

Need for services and further exploration around Australia, including in regional areas

The WCLC Employment Law Service is a pilot program. Due to resource constraints, future operation of the service is not guaranteed. Further, this targeted service is not available to many migrant workers outside our catchment area and due to limited capacity. We have received contact from workers and organisations around Australia expressing need for similar services. This story, from one client, provides a small glimpse of practices in regional Victoria:

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".

Recommendation

The FW Act should be amended to clearly state that undocumented migrant workers are entitled to the same terms and conditions as all others working in Australia.

Migrant workers who have been trafficked or subjected to exploitation, such as significant underpayment of wages, should be permitted to remain in Australia if, and for as long as, they are pursuing civil remedies of compensation from the employer or if they are involved in any Fair Work processes.