WESTERN COMMUNITY LEGAL CENTRE
SUBMISSION TO
VICTORIAN INQUIRY INTO LABOUR HIRE INDUSTRY AND INSECURE WORK

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Summary of recommendations

Newly arrived and refugee workers face high levels of exploitation:

- The Victorian Government should recognise that the exploitation of newly arrived and refugee workers in Victoria is widespread **(page 23)**.
- Recognising the impact that such exploitation has on all workers, the Government should urgently take steps to assist workers who have experienced exploitation and prevent further exploitation occurring in the future **(page 23)**.

Newly arrived and refugee workers require assistance and support to enforce their workplace rights, including targeted education:

- Newly arrived and refugee workers require targeted, face-to-face education programs to understand and enforce their rights at work **(page 44)**.
    - The Victorian Government should establish a fund to provide targeted education programs for vulnerable workers. Such program should include:
        - Direct education programs for community members;
        - Train the trainer programs for community leaders;
        - Education programs for community workers in key organisations working with newly arrived communities; and
        - Other programs delivered in accordance with best practice education approaches

Government agencies must be more accessible:

- The Victorian Government should call on agencies to develop cultural responsiveness frameworks to ensure newly arrived and refugee clients can access services. Such frameworks should (**page 48**):
    - 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, and in a variety of formats;
    - participate in (and help resource) specifically targeted education and engagement programs run in partnership with community organisations; and
    - employ dedicated staff with speciality expertise in assisting migrant workers (ideally multilingual) to provide practical face-to-face assistance.
- Recognising that increasing accessibility will require increased time and contact with communities, agencies should be given additional resources to enhance the accessibility of their services to migrant workers (**page 48**).
- The Victorian Government should call upon the Federal Government to expand the FWO's enforcement powers, in particular to allow the FWO to compel parties to attend mediation and make binding recommendations in respect of very small claims (**page 48**).
- The Victorian Government should set up a statutory agency to assist culturally and linguistically diverse workers to enforce their workplace rights (**page 48**).

Need to establish Employment Law Hubs for migrant workers:

- The Victorian Government should establish a dedicated fund to establish community-based employment law hubs for migrant workers **(page 51)**.
- The hubs would deliver three components:
    - coordination and delivery of an employment law service to provide legal advice and assistance to newly arrived and refugee workers who have a problem at work, and facilitating referrals to mainstream agencies where appropriate;
    - coordination and delivery of a Community Legal Education program; and
    - pursuing strategic policy and law reform objectives arising out of casework and CLE programs.
- The fund should provide long-term, recurrent funding to enable hubs to build relationships with communities and agencies over time.

Labour hire licensing and joint employment:

- The Victorian Government should call upon the Federal Government to amend the Fair Work Act to incorporate the concept of joint employment and/or vicarious liability. This could be done by **(page 61)**:
    - adopting a definition of "employer" as posited by Thai or Dowling;
    - adopting the notion of vicarious liability as found in ss 109 and 110 of the Equal Opportunity Act;
    - incorporating an equivalent provision to s 21 of the Equal Opportunity Act; or
    - at a minimum, the general protections provisions should be expanded to cover workers in labour hire relationships.
- The Victorian Government should introduce a licensing scheme for labour hire providers. Such a scheme should contain the following features:
    - Payment of a bond and annual license fee to the Victorian Government to operate a labour hire company in Victoria
    - Threshold capital requirement to operate a labour hire company in Victoria
    - Core requirements for license holders and related parties, including a fit and proper person test, ongoing minimum capital requirements, reporting obligations and importantly, compliance with workplace laws
    - Dedicated and well-resourced compliance unit
    - Third parties including unions, individuals and community organisations have standing to bring actions for non-compliance. Such actions should be able to be taken in a low-cost forum such as the Victorian Civil and Administrative Tribunal, or a dedicated specialist tribunal
    - Mandatory workplace rights and entitlements training

Independent contracting, dependent contracting, sham contracting:

- A statutory definition of independent contractor should be introduced. It should include a presumption that a worker is an employee **(page 66)**.

- 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 **(page 66)**.
- Employers and principals should have a positive obligation to ensure they classify their workers appropriately. There should be no recklessness/lack of knowledge defence **(page 68)**.
- Principals should be required to submit a statement explaining the nature of the contracting relationship.
- More rigorous tests should apply before an ABN is given to an individual.

Labour supply chains and franchises:

- The Victorian Government should investigate state-based measures and call on the Federal Government to expand outworker protections under the Fair Work Act to other industries such as horticulture and food, distribution, retail, hospitality, cleaning, security, construction and other industries where workers at the bottom of the chain are vulnerable to exploitation **(page 72)**.
- The Victorian Government should call on the Federal Government to amend the Fair Work Act such that franchisors can be held accountable for breaches by franchisees in respect of underpayments and unlawful termination of employment **(page 74)**.

Temporary migrant workers:

- The Victorian Government should call on the Federal Government to amend the Fair Work Act to state that it applies to all workers **(page 76)**.
- Migrant workers who have been trafficked or subjected to exploitation, should be permitted to remain in Australia for at least as long as, they are pursuing civil remedies of compensation from the employer or if they are involved in any Fair Work processes.
- Workers should not face deportation unless there is a serious breach of their visa conditions.
- Commonwealth, State and Territory anti-discrimination laws should be amended to explicitly prohibit discrimination based on migrant status (including temporary migrant status) **(page 21)**.

1. Introduction

In a refugee settlement context, employment has been recognised as one of four vital components necessary for successful settlement, along with housing, education and health.[1] However, newly arrived and refugee communities face significant barriers and disadvantage in the labour market.

The Western Community Legal Centre (**WCLC**) Employment Law Project (**Project**) seeks to improve employment outcomes for newly arrived and refugee communities in Melbourne's Western suburbs. Informed by a period of consultation and research,[2] the Project is currently delivering two linked programs: a pilot legal advice and referral service (**Employment Law Service**); and a community education program (**CLE**). One of the outcomes of the Project will be a report that documents key employment issues and recommendations, supported by evidence gathered throughout the Project to date.

WCLC welcomes the opportunity to make this submission to the Inquiry. Our work as a community legal centre in Melbourne's Western suburbs, and particularly through the Employment Law Service, offers valuable insight into the working experiences of newly arrived and refugee workers in Victoria. Our submission also includes case studies of the clients we have worked with through the Employment Law Service over the past 15 months.

The Project's final report is due in mid-2016. We would welcome the opportunity to provide further information and evidence throughout the course of this Inquiry, and share the report once it is finalised.

1.1 About Western Community Legal Centre

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.

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 across the West. 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.

WCLC has a long history of working with newly arrived communities. Over the past five years, more than 53% of our clients spoke a language other than English as their first language. Approximately one quarter of our clients are newly arrived (having arrived in Australia in the last five years) and our refugee service in Footscray alone has seen approximately 700 clients in the past five years.

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[1] Alistair Ager and Alison Strang, *Understanding Integration: A Conceptual Framework*, Journal of Refugee Studies (2008) 21(2) page 170.

[2] A preliminary report documenting the initial findings from the consultation stage can be accessed at our website: Catherine Dow, Employment is the Heart of Successful Settlement: http://footscrayclc.org.au/images/stories/Footscray_CLC_Employment_Law_Project_-_Preliminary_Report.pdf (**Preliminary Report**).

WCLC has developed specialty advisory services and education programs that address the particular legal and social problems that newly arrived and refugee communities encounter. For example, we have explored the experiences of newly arrived communities in relation to the courts, housing, energy and telecommunications markets in recent years.[3]

1.1.1 The Employment Law Project

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

This 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 were urgently required for refugees and recently arrived communities.[4]

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.

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

1.1.2 Employment Law Service

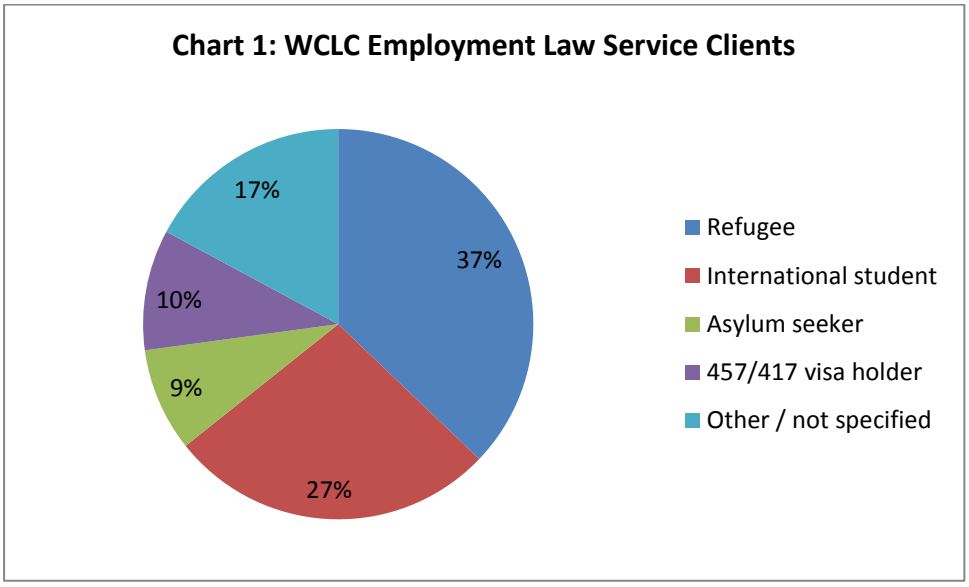
The pilot Employment Law Service provides free employment law advice, referral, casework and advocacy to clients from refugee or newly arrived communities who live, work or study in the Western suburbs of Melbourne.

Over 15 months, the 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.

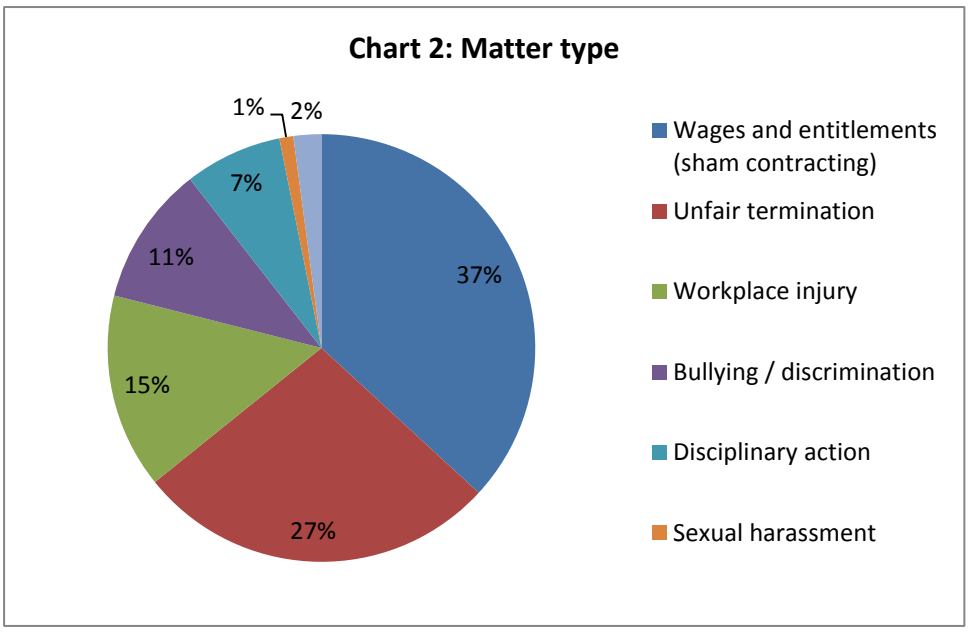
Our clients have come from over 26 different countries. As set out in Chart 1, as at February this year our largest group of clients were refugees, while the second largest cohort of clients arrived in Australia as international students. The Centre also advised some asylum

[3] Reports are available on our website: http://www.footscrayclc.org.au/brochures-publications/.
[4] http://www.footscrayclc.org.au/images/stories/Footscray_CLC_Employment_Law_Project_-_Preliminary_Report.pdf.

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.[5]



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.[6] Underpayments (including sham contracting) are the most frequently reported problem, followed by unfair termination, workplace injury, discrimination and bullying. However, 'unfair terminations' often contained aspects of discriminatory and/or bullying behaviour. Clients commonly present with more than one legal problem.



[5] Some long-term migrants can have similar experiences and characteristics to newly arrived clients depending on their isolation and integration into wider society.
[6] As at February 2015. We plan to include more comprehensive statistics in our final report.

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.

1.1.3 Community Legal Education Program

To date the Project has delivered over 50 community legal education (**CLE**) presentations to community members, community workers and community leaders. CLEs have been delivered to more than 500 people, and evaluation surveys were completed by over 350 individuals.

The Project has also engaged six part time community leaders from refugee and newly arrived communities to participate in a Train the Trainer Program. Supported by the Helen Macpherson Smith Trust and Victorian Women's Trust, the Program offered comprehensive training in employment law and key services, assisting participants to develop and distribute CLE sessions to their communities in the West.

These initiatives are discussed in more detail **below**.

2 Newly arrived and refugee workers face high levels of exploitation

What experience or evidence can you provide of insecure work in Victoria? What form of working arrangements give rise to this? Which industries and regions does it occur in?

What experience or evidence can you provide of the use – or misuse – of working visas in Victoria? Which industries and regions are they used in? What kinds of jobs do working visa holders obtain?

What experience or evidence can you provide of exploitation of vulnerable workers in Victoria? This could include working visa holders, young or older workers, workers from a non-English speaking background, women workers, workers with low levels of formal education, workers with a disability or other vulnerable workers.

2.1 Employment is essential for successful settlement

The Western suburbs of Melbourne are home to a diverse range of new and emerging communities. Arriving from a foreign country, many have experienced violence, torture or trauma and are now separated from family members and social connections. Many things are new – including language, public transport systems, schools and laws. Showing resilience and determination, community members seek to create a new life, and employment is consistently recognised as a vital step for successful settlement.[7]

[7]For example, a recent consultation in Melton with community members from Burma identified employment as the most important theme for successful settlement in Melton. Employment was also ranked as the most difficult goal to achieve: Natasha Wilton, Djerriwarrh Health Services, 'Investigating resettlement barriers with the Burmese Community in Melton: A Needs Assessment'; see also Alistair Ager and Alison Strang, *Understanding Integration: A Conceptual Framework*, Journal of Refugee Studies (2008) 21(2) 170.

When settling in a new country, sustainable employment provides financial stability[8] 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'.[9] As noted by the Refugee Council of Australia and many of our clients, many humanitarian entrants are also extremely driven to find and keep work in order to sponsor family reunion and/or provide financial support to family members waiting in refugee camps or other locations.

Labour market integration of CALD workers benefits not only migrants and refugees, but the broader community as a whole. High levels of unemployment;[10] exploitation of newly arrived workers; and an inability to enforce workplace rights means that Australia is missing out on needed skills and human capital benefits,[11] not to mention the numerous social and economic benefits an equitable, cohesive, vibrant and multicultural workplace, can bring for all workers.

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

2.2 However, communities face significant barriers to finding and maintaining sustainable employment

Australians of refugee background are more likely to experience difficulties obtaining employment. Once employed, they are more likely to be engaged in low income, precarious forms of work, and are particularly vulnerable to experiencing discrimination.[12] The high levels of unemployment and underemployment amongst migrants has been recognised in academic research[13] as well as by organisations working with migrant communities.

Our clients report that finding a job is extremely challenging for many newly arrived communities. In 2011, the Australian Bureau of Statistics found that 9.1% of Humanitarian

[8] Australian Bureau of Statistics, 'Labour Force Participation of Migrants', Australian Social Trends, 2006; Nic Price, 'Employment a path out of poverty for a Fitzroy refugee', *Melbourne Leader*, 11 October 2013.
[9] 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.
[10] Val Colic-Peisker and Farida Tilbury, 'Refugees and Employment: The effect of visible difference on discrimination', Final Report, Centre for Social and Community Research, Murdoch University, January 2007, 1.
[11] See for example, Graeme Hugo, 'Economic, social and civic contributions of first and second generation humanitarian entrants', <http://www.immi.gov.au/media/publications/research/_pdf/economic-social-civic-contributions-about-the-research2011.pdf>.
[12] Graeme Hugo, *Economic, Social and Civic Contributions of First and Second Generation Humanitarian Entrants: Final Report to Department of Immigration and Citizenship* (Department of Immigration and Citizenship, May 2011), 252; Val Colic-Peisker and Farida Tilbury, *Refugees and Employment: The Effect of Visible Difference on Discrimination* (Murdoch University, 2007), 14; VicHealth, *Preventing Race-Based Discrimination and Supporting Cultural Diversity in the Workplace* (2012), 13; Farida Fozdar and Silvia Torezani, 'Discrimination and Well-being: Perceptions of Refugees in Western Australia', *International Migration Review* (2008) 42 (1) 30, 40; Independent Inquiry into Insecure Work, *Lives on Hold: Unlocking the Potential of Australia's Workforce* (ACTU, 2012), 23.
[13] See, for example Val Colic-Peisker and Farida Tilbury, 'Refugees and Employment: The effect of visible difference on discrimination', Final Report, Centre for Social and Community Research, Murdoch University, January 2007, 1.

migrants in the labour force (actively looking and immediately available for work) were unemployed. The 9.1% unemployment rate of Humanitarian migrants is glaringly high when compared to the general unemployment rate (rated in 2011 at 5.3%).

In our Preliminary Report, we examined the factors contributing to high levels of exploitation experienced by newly arrived and refugee workers. Many of these factors also represent barriers to gaining access to sustainable employment. Factors include:[14]

- **Communication and language barriers:** Language or communication difficulties was identified as the most common workplace experience from the list provided. 64% of survey respondents said that language/communication difficulties were common or somewhat common, or that they or someone they knew had experienced this. We have seen many clients have their employment ended or threatened as a result of misunderstanding.
- **Low understanding of rights and services**: As discussed in detail **below**, both the literature and our findings strongly indicate that newly arrived and refugee communities have an extremely limited understanding of Australian employment laws and services. The impact of this lack of awareness is that workers are exploited and cannot take action to have their rights enforced, leading to unsustainable employment outcomes. Nearly two thirds of survey respondents reported that it was common or somewhat common that newly arrived or refugee communities do not understand Australian employment Laws. Similarly, when community workers and AMES Community Guides were asked how well newly arrived and refugee communities understood Australian employment laws, 88% said they do not understand at all or understand a little.
- **Discrimination in recruitment:** Discrimination in recruitment has been recognised as a major barrier preventing migrants and refugees from finding work. Many participants in our preliminary research reported discrimination in the recruitment stage. One community worker explained that for many young people from emerging communities it is difficult to get over the first hurdle of an online application, which often requires detailed written responses to questions such as 'your dream for the future', even if the job is for low-skilled industries. Another community worker told us about a young African man studying at university and looking for part time work. Although he was happy to do any sort of hospitality job, he was repeatedly told that his application was unsuccessful prior to the interview stage. When he did get an interview, he would get there and be told there is no job for him (after they saw him).
- **Lack of recognition of qualifications:** Many participants said it was difficult to have qualifications and experience recognised in Australia. Studies have shown that

[14] Catherine Dow, Employment is the Heart of Successful Settlement, <http://footscrayclc.org.au/images/stories/Footscray_CLC_Employment_Law_Project_-_Preliminary_Report.pdf> 13-18.

despite professional qualifications, many migrants and refugees are employed below their level of expertise.[15]

- **Cultural barriers, lack of networks and no Australian experience:** This was reported as a barrier to finding work, but also a contributing factor to exploitation of newly arrived workers. Without local experience or a reference, many workers find it immensely challenging to find work. As discussed below, cultural barriers also prevent some workers from accessing mainstream services.
- **Low income, precarious work:** Many newly arrived and refugee workers are engaged in precarious work, defined as 'work for remuneration characterised by uncertainty, low income, and limited social benefits and statutory entitlements'.[16] In 2011, 72% of Humanitarian stream migrants aged 15 and over had weekly incomes of less than $600. Survey respondents and interviewees reported that communities worked in a variety of low-paid, low-skilled or dangerous jobs including warehousing, factories, hospitality, meat processing, family day care, painting/tiling, taxi driving and cleaning. The work was characterised by casualisation and insecurity. There were also some professional and managerial positions, although these workers were in the minority.
- **Temporary migrant worker status:** several reports indicate that temporary migrant workers (including 457 visa holders,[17] international students[18] and working holiday visa holders[19]) are particularly vulnerable to exploitation due to the nature of their visa, dependence on employers and lack of knowledge of rights and responsibilities.[20] This was also raised in some face-to-face consultations. We have

[15] See for example, Ethnic Communities Council of Victoria Discussion Paper: Qualified but not recognised: http://www.eccv.org.au/library/ECCV_Discussion_Paper_-_Qualified_but_not_Recognised_2015_Final.pdf.
[16] Leah Vosko, 'Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment' (2010) 3.
[17] According to the Australian Manufacturing Workers Union, hundreds of foreign workers have been exploited under the 457 visa system ('Union says hundreds of workers have been taken advantage of by 457 visa rorts', ABC, 6 June 2013) and other unions have also reported abuse of 457 visa holders, including a number of workers told to return home after complaining about their rates of pay (ABC News, 'CFMEU says Hungarian workers on 457 visas told to go home after complaining about pay rates'. 10 November 2013). See also Velayutham, above n 41; Joo-Cheong Tham and Iain Campbell, 'Temporary Migrant Labour in Australia: the 457 Visa Scheme and Challenges for Labour Regulation', Centre for Employment and Labour Relations Law, University of Melbourne, Working Paper Number 50 (2011).
[18] Robertson writes that international students are technically 'legal but temporary, that is, resident aliens'. But due to the nature of their visas 'they often teeter on the edges of legality, with minor breaches in visa conditions, such as non-completion of courses or working over twenty hours a week, able to rapidly render them illegal and open to deportation': Shanthi Robertson, 'Cash cows, backdoor migrants, or activist citizens? International students, citizenship and rights in Australia' Ethnic and Racial Studies (2011). United Voice has written a report on the exploitation of international students in the office cleaning industry, reporting that there is a practice of exploiting international students in the cleaning industry, underpaying international student cleaners by up to $15,000 a year, including missing entitlements, through subcontracting arrangements: United Voice, 'A Dirty Business: The Exploitation of International Students in Melbourne's Office Cleaning Industry', 3.
[19] National Union of Workers, Better Jobs 4 Better Chicken: Poultry Industry, Discussion Paper (2011) 2.
[20] Selvaraj Velayutham, 'Precarious Experiences of Indians in Australia on 457 Temporary Visas', Economic and Labour Relations Review (2013) 24(3) 340, cited in Michael Janda, 'Australia's 457 'King of Visas' is a Road to Serfdom for Many Migrants,' ABCNews (online), 6 Sep 2013 <http://www.abc.net.au/news/2013-09-06/27king-of-visas27-a-road-to-serfdom-for-many/4941980>.

certainly witnessed significant exploitation of temporary migrant workers through our casework, with many clients enduring horrific exploitation due to fear of deportation, desperation to keep employment and family responsibilities. A number of case studies **below** provide powerful examples of some of what we have observed.

2.3 Once in employment, exploitation is widespread

Research shows that recently arrived and refugee communities in Australia are segmented in low skilled and casualised industries.[21] Our client data reflects this finding with clients working predominantly in food processing, hospitality, cleaning, warehousing & distribution and the child and aged care industries.

As documented in our Preliminary Report[22] and observed in our legal service, newly arrived communities often experience high levels of exploitation in the workplace. In particular, they experience discrimination, frequently lose their jobs, are underpaid and denied basic entitlements. They also experience bullying, are forced into sham contracts and work in unsafe jobs with high injury rates. WCLC has observed that our clients recognise the value of work in integrating and contributing to Australian society but often find themselves employed in situations that are below minimum legal working conditions.

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

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

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

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

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

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

"Unfair dismissal – a community member told me his story. In a food processing factory the night shift have to clean the machines. If they clean it within 5 hours they can have rest time.

[21] Val Colic-Peisker and Farida Tilbury, 'Employment Niches for Recent Refugees: Segmented Labour Market in Twenty-first Century Australia' (2006) 19(2) *Journal of Refugee Studies*.
[22] For an in-depth analysis and comments from community members and agency staff about types and frequency, please see our Preliminary Report (above n 2).

However, the boss asks them to do other jobs at the same time which means they don't have time to clean the machine properly, and they are then sacked when it is found to be not cleaned properly."

"Refugees have the language barrier that leads to misunderstanding, and if they don't have family they are isolated. They don't know about the assistance that is available so they continue to be isolated."
"They cannot look at websites as they don't speak English, and cannot write or read in their own language."

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

2.3.1 Unpaid wages and entitlements, and sham contracting

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

Underpayment of wages and/or entitlements is the single-most common problem that our clients present with at our service. As at February this year, wages and entitlements accounted for 37% of all matters. Many clients are completely unaware that there is a minimum wage and have never heard of penalty rates or a modern award. Clients who attended the Centre with underpayment issues were commonly also not being paid superannuation in accordance with minimum legal standards.

WCLC observed 2 common scenarios in the non-payment of wages:

- Employer would stop paying employee's wages altogether; and/or
- Employee was underpaid legal minimum wage/entitlements

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

The onerous nature of pursuing underpayment claims means that our clients would have been unable to seek repayment without assistance. The practical difficulty in pursing underpayment claims combined with a fear of an employer means that clients of refugee and recently arrived background are unlikely to recover wages without legal assistance.

WCLC has had numerous clients who were underpaid the legal minimum wage. There were instances where employees were being paid as little as $8 an hour. WCLC also saw multiple clients who were working more than 12 hours a day, 6-7 days a week and in one instance one wage being paid for the work of two clients.

There were also cases where clients were not being paid overtime or penalty rates.

As some community leaders recently commented:

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

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

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

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

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

The **below** case studies demonstrate some examples of types of matters we have observed:

CASE STUDY 1[23]

Martin and Wendy came to Australia on 457 visas. They were employed in the hospitality industry. They worked 6-7 days per week for 13-16 hours per day. When they started work they were told that because Wendy was the Principal visa holder, all pay would go to her, for both of them. Wendy was paid a salary of $55,000 per year, but received no overtime payments. Martin received no salary at all. When Martin and Wendy returned home for a visit to their families, they received an email saying their employment had ended due to misconduct, but they never received any warnings or complaints prior to this.

CASE STUDY 2

Jono worked on a 457 visa and lived at the employer's premises. The employer didn't want to pay Jono the minimum wage required under law. He said that Jono had to pay hundreds of dollars of cash back to him each fortnight after being paid. 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

[23] Please note that the names in all case studies have been changed.

CASE STUDY 3

Bill client was working in the hospitality industry and was paid $11 an hour. When Bill told his employer that he was going to make a complaint about the underpayment, he was fired. WCLC drafted a letter of demand on the client's behalf. After negotiation, the employer agreed to pay the outstanding legal entitlements and $2000 was recovered.

CASE STUDY 4

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

2.3.2 Unfair termination of employment

At the time of publishing the Preliminary Report we heard of the challenges that newly arrived workers face regarding termination of employment. As one community leader said:[24]

> *"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 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 5

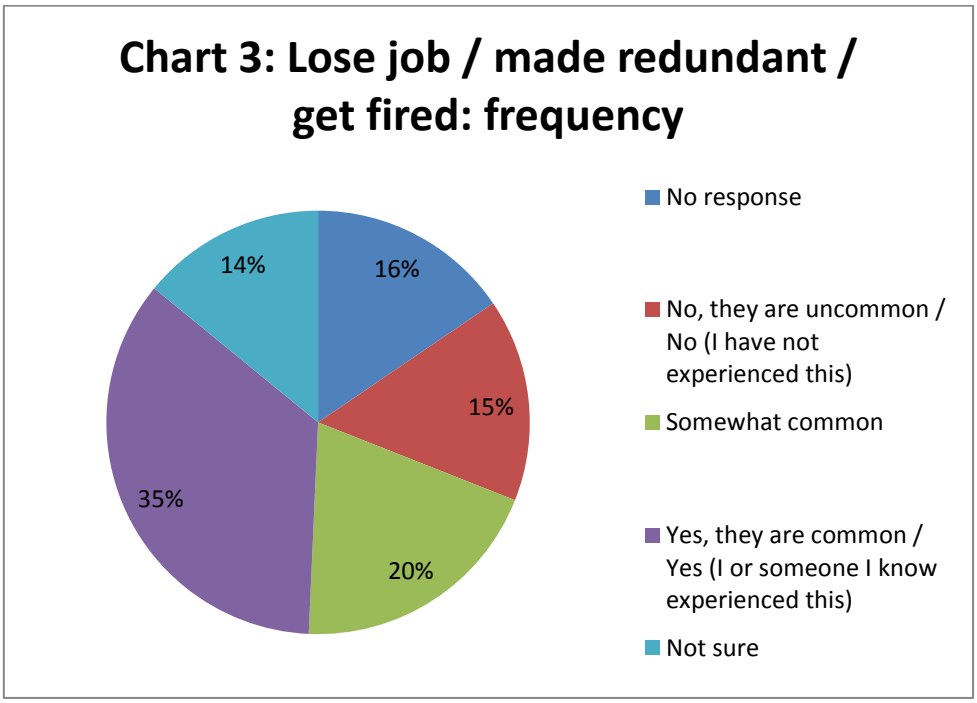
Ali was a refugee from Afghanistan working in a factory. His mother and children were living back home and he was supporting them, as well as his brother's family and children. He was dismissed after taking a number of periods of sick leave. All he wanted was his job back. He was distraught that he wasn't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

[24] Preliminary Report, 6.

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, unfair dismissal and discrimination. As one community worker explained,

> *"Most people who I know they lose their jobs just because they're a refugee background or they don't speak English fluent and be underestimated for their experience work."*[25]



Many of our clients cannot read or write English and many are illiterate in their own languages. If eligible to bring a claim for unfair dismissal or general protections, many of our clients are unable to complete their own 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. Further, the 21 day timeframe for lodging an application is too short.[26] The

[25] Preliminary Report, 6.

[26] 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

waiting times our clients face for an appointment at our service are often longer than 21 days. Therefore, clients are sometimes forced to file applications, which would be better drafted following comprehensive legal advice and assistance, or even worse, are not able to file a claim at all, despite having meritorious claims. Further, we only operate in a specific region and are unable to help all newly arrived migrants.

Unfair termination is an area in which the Fair Work Ombudsman (**FWO**) provides no 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. In addition to examples already provided, the case studies **below** demonstrate an example of some of the types of unfair terminations our Centre has learned of:

CASE STUDY 6

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.

CASE STUDY 7

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.

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.

CASE STUDY 8

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.

2.3.3 Bullying, discrimination and sexual harassment

Bullying and discrimination are frequently reported problems at casework appointments. While these issues aren't necessarily linked, in the clients that the Centre saw there was often a correlation. Recently arrived and refugee communities working experiences are often affected by their visible difference, with colleagues imputing behaviours, attitudes and characteristics on this basis. Clients were discriminated against on the basis of their race, religion and refugee background. Discrimination was often overt and direct in its nature.

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

CASE STUDY 9

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 10

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.

Case Study 9 above demonstrates just one example of horrific discrimination connected with refugee status. Our client was tormented for being a 'boat person', and ultimately, the effect of the discriminatory behaviour was such that our client was no longer able to work. We have also seen numerous clients treated less favourably because of their temporary migrant worker status, including in recruitment.

In this regard, we endorse the supplementary submission of Associate Professor Joo Cheong Tham to the Inquiry of the Senate Education and Employment References Committee into 'The impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders', where he recommends that:

> "Commonwealth, State and Territory anti-discrimination laws should be amended to explicitly prohibit discrimination based on migrant status (including temporary migrant status)."

Recommendation

Commonwealth, State and Territory anti-discrimination laws should be amended to explicitly prohibit discrimination based on migrant status (including temporary migrant status).

Stories from community leaders echo our casework experiences:

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

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

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

> *"The information today will definitely benefit my community, particularly those who work. Since most of them have very little English language skills there is a lack of understanding about work place contracts, rules and procedures, often being dismissed or voluntarily resigning due to receiving warnings"*

The Centre has not received many client complaints of sexual harassment. However, this issue is frequently raised by community leaders and in community education presentations. As some community leaders told us:

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

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

2.3.4 Workplace injury

As noted in our Preliminary Report, workplace injury is common among newly arrived and refugee workers, and very few people are aware of their rights to bring a claim.

This observation has been mirrored in our casework, with 15% of casework enquiries at February 2015 relating to injury. WCLC saw 14 clients who had been injured badly at work and required medical treatment. Several clients had no knowledge of the Work Cover system, and subsequent to their accident their employer had not made a Work Cover claim on their behalf, nor informed them of their right to bring a claim.

As one community leader notes:

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

Recently arrived and refugee communities are highly vulnerable to having a workplace injury due to their prevalence in manual and industrial work. In particular, the Centre noticed a pattern of clients who had sustained injuries working in the food processing industry.

CASE STUDY 11

Paw is a refugee who attended the Centre with a severe workplace injury that meant she required specialist medical attention and was unable to work for over a month following the workplace injury. The accident was not reported in the workplace, and the Paw was told by her supervisor to tell medical staff that the accident occurred at home. Paw reported being threatened by a supervisor with losing her job if she were to make a WorkCover claim. WCLC assisted the client to make a claim and Paw was paid weekly incapacity payments for over 2 months and assisted to return to work with modified duties.

2.3.5 Women

WCLC has considered the experiences of women from newly arrived and refugee communities. Recognising that experiences differ greatly from woman to woman, and that there are differences between and within communities, some general themes emerge.

WCLC conducted a focus group of 6 male and female community leaders on the issues faced by recently arrived and refugee women working in Australia. Responses focused on the difficulty in navigating the often conflicting expectations and value on female participation in the labour market in Australia and in their home communities.

Community leaders outlined the following issues in their communities:

- Women are not the breadwinner, it is seen as a choice to have a job and women are still expected to complete their home duties. Women do not receive support at home and are viewed as "bad women" (by their community) if career and not family focused.
- Employers (in Australia) won't understand the women's struggle (between home and work).

- Women are exhausted working full time as worker, mum, and wife.
- It is difficult for the men to adjust to Australian environment. For example the mother is always expected to take time off work if children are ill but then she gets in trouble for having too many sick days.
- Women (in our community) don't work. They're looking after the children. Their husbands don't recognize women's work at home.

Some further comments:

- *"Women in my community have common problems where they are not aware of the right that they can ask for flexible work arrangements. This information will help them to ask for flexible work hours if they are a parent or a carer"*
- *"In my community sexual harassment occurs to women"*
- *"Working in my community I find that women don't want to share their sexual harassment experiences, are not aware of the law and don't understand what constitutes sexual harassment or bullying"*

Further details on types and extent of exploitation will be available in our final report.

Recommendation

The Victorian Government should recognise that the exploitation of newly arrived and refugee workers in Victoria is widespread.

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

3 Impact of insecure work and exploitation

What are the effects of insecure work on Victorian workers, including their family life, community involvement, housing and financial arrangements?

Do workers experiencing insecure work desire more ongoing working arrangements, and if so, of what kind? What barriers do you encounter in obtaining more secure working arrangements?

As discussed above, the impact of insecure work and exploitation on our clients is immense. A number of our clients have experienced homelessness as a result of losing their job. Our client files reveal that 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.

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. One client described the experience of being bullied at work in Australia than worse than any other experience he had, including surviving a civil war in his country of origin.

Some clients notice that 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.

It is essential that our workplace relations framework prevents further abuse upon arrival, enables vulnerable workers to enforce their rights, and provides for adequate compensation for applicants when such abuse occurs.

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

4 Newly arrived and refugee workers require assistance and support to enforce their workplace rights

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

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

4.1 Communities face numerous barriers to accessing mainstream services

4.1.1 Limited understanding of employment laws and institutions as a barrier to rights enforcement

Literature[27], a WCLC survey[28], our casework and CLE experience indicates that newly arrived and refugee communities have an extremely limited understanding of Australian employment laws and services. This means that many members of refugee or recently arrived communities are unable to identify that they have employment law related issues, do not know where to go for assistance and rely on identification and referral of these issues from community workers or friends and family.

Often, communities have come from countries where there are many employment problems, few or no worker rights, and no agencies where aggrieved workers can seek help.

[27] Selvaraj Velayutham, 'Precarious Experiences of Indians in Australia on 457 Temporary Visas', *Economic and Labour Relations Review* (2013) 24(3) 340, cited in Michael Janda, 'Australia's 457 'King of Visas' is a Road to Serfdom for Many Migrants,' ABCNews (online), 6 Sep 2013 <http://www.abc.net.au/news/2013-09-06/27king-of-visas27-a-road-to-serfdom-for- many/4941980>.

[28] Nearly 2/3 of survey respondents reported that it was common or somewhat common that newly arrived or refugee communities do not understand Australian employment laws. For further information see our Preliminary Report, above n 2.

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."*

Many newly arrived and refugee clients at our service present with little or no understanding of minimum laws and entitlements. At our CLE presentations, there are invariably raised eyebrows or comments when we talk about the minimum wage.

4.1.2 Refugee background as a barrier to rights enforcement

In situations where community members are able to identify employment problems, there are further barriers that limit the ability of refugee and recently arrived communities to enforce their rights.

People of refugee background may have past experiences and cultural understandings of legal systems and authority figures,[29] which deter them from seeking advice or enforcing their rights. As the Refugee Council of Australia notes:

> *Prior to arriving in Australia, refugees have often experienced years of persecution and injustices at the hands of corrupt government officials, police and bureaucracies. It is understandable, then, that many refugees arrive with a wariness of police and government bureaucracies and it takes time to rebuild trust and understanding.*[30]

WCLC has observed that clients commonly misunderstand the confidential nature of legal advice, and that some clients express fear of retribution in both seeking legal assistance and in enforcing their rights. Client fear extended not only to engaging with an employer but with engaging with government agencies including the Fair Work Ombudsman. Many of WCLC's refugee clients access services via trusted caseworkers or friends.

4.1.3 Cultural understandings of legal systems as a barrier to rights enforcement

A focus group with community leaders from Burma (Myanmar), Sudan, DRC Congo, India and Iran highlighted that many recently arrived and refugee communities have had adverse experiences with legal systems in their home countries. In particular, community leaders

[29] Refugee Council of Australia, *Legal and Financial Issues Fact Sheet*, http://www.refugeecouncil.org.au/f/smt-l&f.php
[30] Ibid.

mentioned that in their home countries there was a distinction between laws on paper and laws that are enforced.

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

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

4.1.4 Practical barriers to seeking assistance

Practical issues including proficiency in English, difficulties in using a telephone advice line,[31] accessing internet resources, finding appropriate interpreters[32] and travelling to appointments[33] also prevent individuals from enforcing their rights.

Language and literacy problems are barriers to access to justice.[34] Many of our clients cannot read or write English and many are illiterate in their own languages. Given that many mainstream agencies focus on websites and factsheets to raise awareness, such resources are largely ineffective.

Further, the language and concepts in employment law are often complex and arcane for speakers for whom English is their first language. This is amplified significantly for people with low levels of English. Accordingly practices and processes which place heavy reliance on written communication can be particularly daunting.

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

> *Sole reliance on internet and telephone legal information and advice services may fall short of providing justice for all people… internet and telephone services can be ineffective modes of delivering legal assistance for people with low levels of legal capability. For example, as already noted, people with poor literacy or communication skills can have difficulty using legal information resources and websites, and other self help strategies… In addition, several authors have noted that disadvantaged people in particular often fall into the category of those who may require high quality face-to-face advice in order to achieve beneficial legal*

[31] 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), 209-210.
[32] 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), 32.
[33] Inability to travel can be due to geographic isolation, lack of public transport options and childcare responsibilities.
[34] March 2015, 8-9; September 2015, 9.

resolution… Thus, legal hotline services should not be regarded as a stand-alone panacea…[35]

Even if a newly arrived or refugee community member manages to contact a mainstream service for help, without further targeted assistance, it is unlikely to be of meaningful assistance.

4.2 Need for targeted education and legal services

Without legal education and services targeted to assist newly arrived and refugee workers, the workplace relations system will remain largely inaccessible.

4.2.1 Best practice approaches to targeted services

Based on a literature review and over 100 surveys of community members, community workers and community leaders from newly arrived and refugee communities, our Preliminary Report[36] found that the following features make targeted services effective:

- **Relationships and trust:** To be accessible, it is essential that community members feel safe and trust the service. This trust will build through nurturing relationships between the service and target communities, for example, by providing face-to-face community education, and attending local meetings and events. As one survey respondent noted, a key element of the relationship is its long-term, ongoing nature: *'Engage new arrival communities to integrate in the Australia system, especially to understand Australian laws; keep support and provide information/services to refugee backgrounds for long term in order to collaborate with the Australian-first settlers as a community.'*
- **Collaboration:** Closely linked with the above point is the importance of collaborating with other services that assist target communities, and other mainstream employment-related services. Fortunately, there are a number of networks (including the Wyndham Humanitarian Network, Inner West Settlement Advisory Committee and Maribyrnong Workers With Young People Network) that promote collaboration between service-providers in the West.
- **Consultation with relevant communities and agencies:** Involvement of the target group in planning and decision making is crucial.
- **Importance of community workers:** Community workers from target communities provide an essential link between services and community members. As one survey noted: *'Having bilingual workers from the clients' communities working and imparting knowledge to their own communities has been effective'* . Our Centre has used bilingual workers for many years, and found this to be an extremely valuable way of connecting our service with newly arrived communities.

We found that the following features make community education effective:

- **Face-to-face & verbal:** provided face to face. Verbal as well as written information.

[35] 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), 209-210.
[36] Catherine Dow, Employment is the Heart of Successful Settlement, <http://footscrayclc.org.au/images/stories/Footscray_CLC_Employment_Law_Project_-_Preliminary_Report.pdf>, 23-26.

- **Client's language and community workers:** Using interpreters, community guides and bilingual community workers from relevant communities.
- **Visual materials and multimedia:** Use of pictures, visual aids (such as DVDs) or other multimedia (including community radio).
- **Information sessions, English classes and pre-arranged community meetings:** Delivering community education via information sessions or as part of English classes is effective, as is visiting existing community groups.
- **Clear language:** Using clear and simple language.
- **Key information only:** Outlining key concepts and where to go for further information/assistance.
- **Cultural awareness:** Ensuring presenter understands the community culture.
- **Convenient location:** Considering location of CLE and contacting existing organisations. As one community worker recommended: 'I think taking time to identify a number of community groups and associations that are already established and are meeting for a purpose on a regular basis. Request to be invited to talk about this issue which I think would be very popular within these communities.'
- **Practical and timely:** Providing information 'that is linked to outcomes', for example by facilitating employment in industries and workplaces where rights can be realised. Ensuring that workers receive the right amount of information at the right time so it is not abstract.
- **Developed in consultation with communities:** Ensuring that education is developed in consultation with community members and community workers, and responds to identified needs.

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

4.2.2 Three key steps

There are a breadth of targeted services that need to be delivered to ensure migrant workers are efficiently and effectively able to understand and enforce their workplace rights. These measures include greater resourcing for regulatory bodies' audit/investigation processes, but also include better provision of information, training, targeted assistance for those whose rights have been breached, legislative change to better protect temporary migrant workers and enhanced enforcement powers for regulatory bodies.[37]

For the purpose of this Inquiry, we focus on three key steps to improve rights awareness and enforcement among newly arrived and refugee communities in Victoria:

1. The need for targeted education programs for community members, community leaders and agency staff working with newly arrived communities
2. The need for Government services to take further steps to ensure they are more accessible and responsive to newly arrived and refugee workers; and

[37] Please see our recent submissions to the Productivity Commission Inquiry in the Workplace Relations Framework for more detail.

3. Given the complex, multi-jurisdictional nature of the workplace relations framework, the need for a community-based 'one-stop-shop' starting point to assist vulnerable workers to navigate the system and enforce their rights.

In this context and for these reasons, WCLC recommends that the Victorian Government recognise the need for targeted services for vulnerable communities and take the following steps:

1. establish a fund to deliver targeted education programs for vulnerable workers;
2. call on Federal and State based agencies to take further steps to ensure they are more accessible and responsive to newly arrived and refugee workers; and
3. establish a fund to deliver community-based Employment Law Hubs.

4.3 Education of migrant workers

4.3.1 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:[38]

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

In our submission, the timing of educational intervention of is of utmost importance. In-language, basic information on employment 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 stages of the settlement process.

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 as not all newly arrived workers are entitled to participate in AMEP programs. Such meetings may include church events, interest groups or weekend functions. These interventions provide invaluable opportunities to build trust with communities, and also provide information to vulnerable workers who may not be connected to settlement or other services. As noted in our Preliminary Report, practical and timely information is of critical importance. As one

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

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.[39]

4.3.2 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.[40]

The FWO's education and advisory service is primarily delivered via its Infoline and web-based resources including its online learning portal.[41] Whilst these services are critical and increased online information is welcome, evidence suggests that telephone and internet services will not always reach migrant workers.

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:[42]

> *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'.[43]

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:[44]

> *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

[39] Preliminary Report, 24.
[40] Chris Arup and Carolyn Sutherland, 'The Recovery of Wages: Legal Services and Access to Justice', Monash University Law Review (2009) 35(1) 96, 101.
[41] FWO, Submission No. 228, at 3.
[42] 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), 208.
[43] 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), 32.
[44] Ibid.

respondents thought this would be very helpful or somewhat helpful. As set out below, feedback from our information sessions has been overwhelmingly positive.

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.

The following are some examples of approaches to targeting refugee and newly arrived communities. These approaches expressly attempt to address the above barriers. Development of these approaches relies heavily on consultation with the target community.

4.3.3 Example: WCLC Community Legal Education Program

Raising awareness of employment laws and services[45] is a critical step in rights enforcement. For migrant communities, education programs must be appropriately targeted.

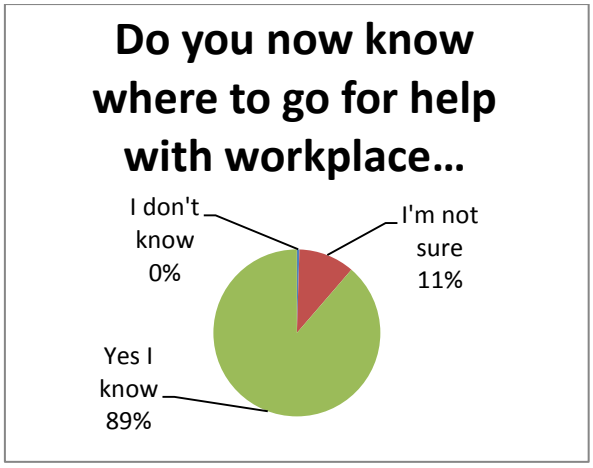
In response to the findings mentioned above regarding the importance of face-to-face, targeted employment law services and information, the WCLC has developed and implemented a Community Legal Education program (**CLE Program**) for the past 18 months. The Program has consisted of:

- 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 a result of the CLE presentation about employment law, 53% of participants stated that they knew a little more with 45% stating that they knew a lot more about employment law. 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.

[45] Including the Fair Work Ombudsman, Fair Work Commission and community legal centres.



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.*

Unfortunately, WCLC receives more requests for CLE talks than we have capacity to deliver. There are many groups waiting for information sessions.

The WCLC CLE Program has also delivered information sessions to staff from agencies that work with newly arrived communities. As noted in the Law and Justice Foundation report, *Legal Australia-Wide Survey: Legal Need in Victoria*:

> *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.*[46]

[46] 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, 213.

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.[47]

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.

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.

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.

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

The WCLC Train the Trainer Project is part of the Employment Law Project's CLE program.

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

The community leaders visited a number of key employment and anti-discrimination law agencies, including the Fair Work Ombudsman, 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.

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

[47] Preliminary Report, 21.

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 we observe at our legal service:

- Wages and Other Entitlements
- Employees, Contractors and Sham Contracting
- Workplace safety
- Discrimination
- Sexual harassment & Bullying
- Unfair dismissal and Other Protections if your 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. There is a template presentation available on our website for other organisations to use: www.footscrayclc.org.au/train-the-trainer-project
- **Handouts:** A summary of employment law concepts and key employment law terms, also available on our website. Participants also received more in depth materials each week.
- **Six video clips (one relating to each topic):** Produced by Tandem Media, these videos are based on six common legal issues WCLC observed at our legal service. The scripts were reviewed at a workshop attended by English as additional language teachers, community education staff from Victoria Legal Aid, community workers from settlement agencies and youth services, and lawyers. View the video clips at www.footscrayclc.org.au/train-the-trainer-project.
- **Activities and question/answer sheets to accompany each video:** If used in a workshop, classroom or other group setting, the activities provide an opportunity for participants to work together and strengthen their understanding of employment and anti discrimination law in Australia. The materials are designed for high post-beginner to intermediate English as an additional language students.

Here is the script and screen shots from the video on wages and other entitlements:

ANDREA
Jill!

JILL
Andrea! Hey! How are you?

ANDREA
Good. How's the new job?

JILL
Loving it. Six months, and they just gave me a promotion!

ANDREA
That's so exciting!

JILL
I know - what about you?

ANDREA
Still working in the kitchen at the pub.

JILL
Is it good pay?

ANDREA
Depends on whether it's a busy night.

JILL
(concerned)
Really?

ANDREA
If they can't pay me much they give me a meal, so...

JILL
(concerned)
But a meal is *not* pay! Don't you have an hourly rate?

ANDREA
If nobody comes in, how can they pay me?

JILL
But they *have* to pay you the Award rate.

ANDREA
They said they opted out of the Award...

JILL
They can't do that. What about overtime?

ANDREA
No.

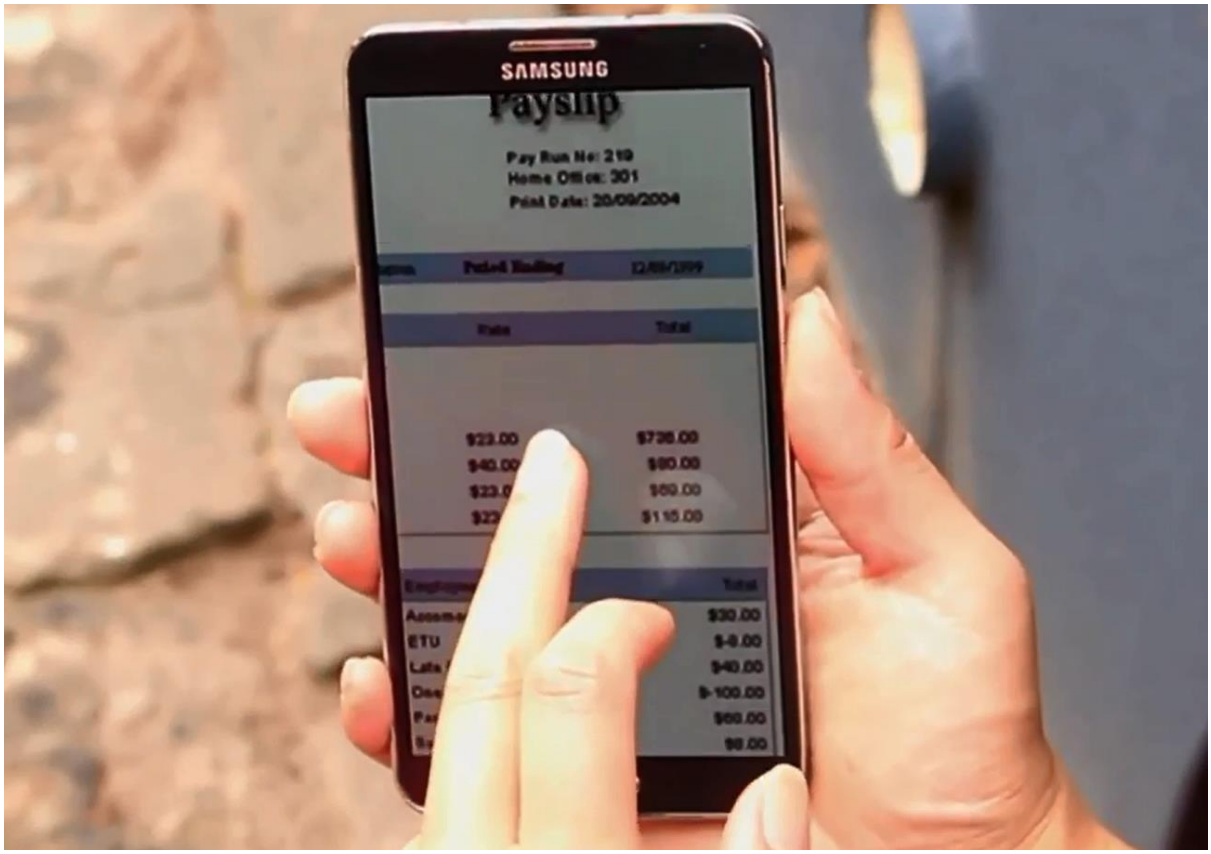
JILL
Penalty rates, for weekends? Holidays? Superannuation?

ANDREA
I know it sounds bad... but they're really nice people.

JILL
(thinking, but with caution)
Listen... do you have a pay slip I could have a look at?

ANDREA
What's a pay slip?

JILL
It's a document that you get every time you get paid. It sets out the hours you worked, your payment and how much you've been taxed. I get mine by email.
(showing Andrea an example on her phone)
Look, I'll show you.



ANDREA
I don't get those.

JILL
You have rights in the workplace, you know! You should get some advice about your pay.

ANDREA
Who can I speak to?

JILL
There are legal services that can help for free - and they're confidential, so they're not going to tell your boss unless you want them to. And then later, if you feel like it, you could talk to your boss or you could get a lawyer to write a letter.

Example slides from the PowerPoint:

When people apply for a job

or when they start work they should

- **ask** if they are under an Award or an Enterprise Agreement;
- **keep a copy** of any documents they sign;
- **take notes** about any verbal agreements;
- keep a **work diary**

Should these workers be paid?


fixed term / task/ period


casual employee


volunteer


contractor


apprentice


employee on probation


trial worker


trainee


permanent employee


work experience

The right to be paid

Not paid
- volunteer

May be paid
- work experience
- trial work

Paid
- permanent employee
- casual employee
- employee on probation
- contractor
- fixed term/task
- apprentice
- trainee

Video: Wages and other entitlements

Scenario: Andrea talks to a friend about her work in a café, where she isn't being paid properly for the work she does.

Watch the video and answer these questions:

- Name three things that Andrea's employer is doing that may be against the law?
- What can Andrea do if she wants to find out about her legal pay rate?
- How could Andrea try to get any money that her employer owes her?

Handout:

Footscray Community Legal Centre Employment Law Project – handout

Please note: these materials are educational resources. They are not intended to constitute legal advice and should not be relied upon as such. Last reviewed April 2015.

EMPLOYMENT LAW

Applying for a job and discrimination

You cannot be refused a job or treated unfairly at work because of your:
- age
- race or nationality
- sex or intersex status
- gender identity
- disability
- religious belief or activity
- political belief or activity
- sexual orientation or lawful sexual activity
- employment or industrial activity
- marital or relationship status
- pregnancy or breastfeeding
- parent or carer status
- physical features

You cannot be refused a job because one of your friends of relatives has one of the above characteristics.

Awards, enterprise agreements and contracts

Your rights and responsibilities at work are protected by:
- your contract of employment
- employment laws, such as the Fair Work System
- your award or enterprise agreement, if one covers you
- workplace policies and procedures

Remember, when you start work:

When you start work make sure you know if you are covered by an award or an enterprise agreement.

Make sure you understand an employment contract before you sign.

Make sure you ask for a copy of an employment contract.

Take notes about any verbal agreements. Keep a work diary.

Pay

Your pay is set by:
- your contract of employment
- employment laws
- your award or enterprise agreement

You should:
- receive **at least** the minimum wage
- receive all your wages in the form of money
- be paid monthly, fortnightly or weekly
- receive a payslip

Footscray Community Legal Centre Employment Law Project – handout

Please note: these materials are educational resources. They are not intended to constitute legal advice and should not be relied upon as such. Last reviewed April 2015.

National Employment Standards

1. Maximum weekly hours of work = 38 hours + reasonable additional hours
2. Annual leave = 4 weeks (pro rata for part time)
3. Public holidays (provided you normally work on that day)
4. Notice of termination / redundancy pay
5. Right to request flexible working arrangements
6. Long Service Leave
7. Parental Leave
8. Personal / Carers / Compassionate Leave
9. Community Service Leave
10. Supply of Fair Work Information Statement

At work

- You must work safely.
- Your employer must provide a safe workplace.
- You have the right to join a union.
- You should be protected against bullying and sexual harassment.
- You should be protected against discrimination.
- You should be protected against victimisation.

Losing your job

If you lose your job you should think about:
- Did you receive notice of termination or pay in lieu of notice?
- Did you receive payment for accrued annual leave and long service leave?
- Were you made redundant?
- Were you given a good reason for being dismissed?
- Were you given a chance to say why you shouldn't be dismissed?

Remember

- If you lose your job you should get advice because maybe you should be paid some money or get your job back. **TIP:** get advice quickly because there are time limits for making some claims

WHERE TO GET HELP

Footscray Community Legal Centre can help you with employment problems:

Footscray Community Legal Centre Inc
72 Buckley Street, Footscray
(03) 9689 8444

Interpreter

Other agencies can also help:

Victoria Legal Aid	1300 792 387
Victorian Equal Opportunity and Human Rights Commission	1300 292 153
Australian Human Rights Commission	1300 656 419
Fair Work Ombudsman	13 13 94
Job Watch	9662 1933
ACTU Help Desk	1300 486 466
WorkSafe	1800 136 089

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

From the leaders:

> *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:

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

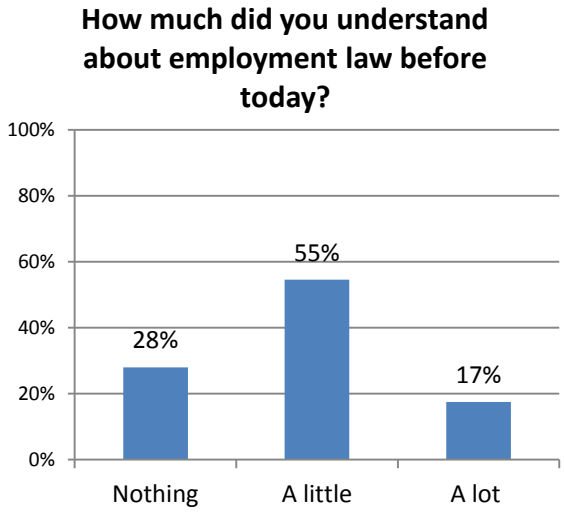
Excellent initiative to have presenters from the community.

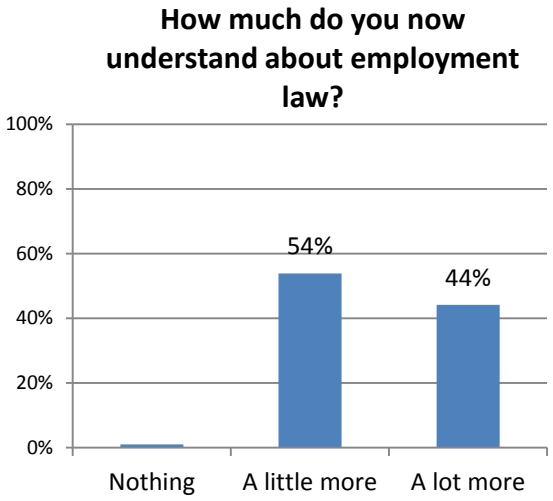
Great presentation, this has been needed for sometime so its great to see this at grass roots level.

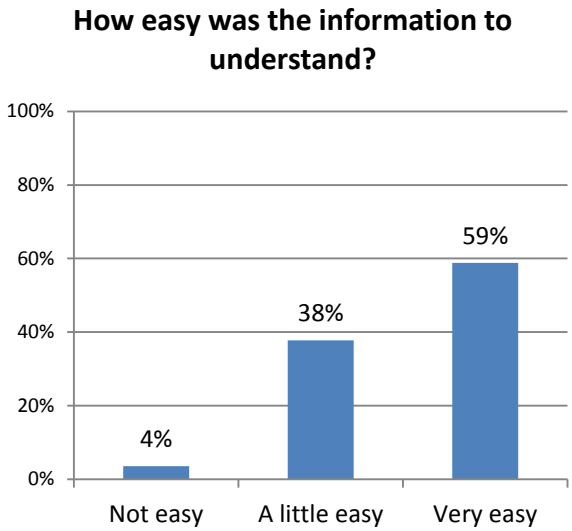
Presentations were terrific, great to see everyone confidently providing advice.

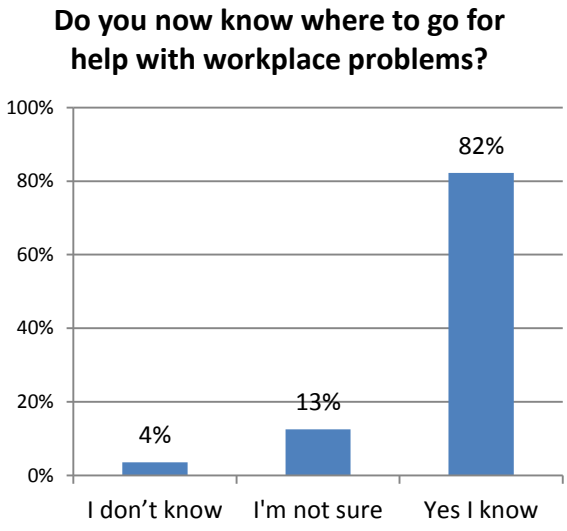
The Program is exactly what the community needs. It should be ongoing with additional support provided to the Community Leaders, as well as additional Community Leaders trained.

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









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"

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

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

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

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.

The **below** case study also demonstrates the impact of these targeted materials:

CASE STUDY: IMPACT OF TARGETED MATERIALS & FACE TO FACE SUPPORT

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

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

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

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

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

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

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

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

Recommendation

Newly arrived and refugee workers require targeted, face-to-face education programs to understand and enforce their rights at work.

The Victorian Government should establish a fund to provide targeted education programs for vulnerable workers. Such program should include:

1) **Direct education programs for community members;**
2) **Train the trainer programs for community leaders;**
3) **Education programs for community workers in key organisations working with newly arrived communities; and**
4) **Other programs delivered in accordance with best practice education approaches**

4.3.5 Other methods of increasing awareness

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

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

(a) **Amendments to curriculum for EAL learners:** One such method is making information about Australian employment laws and services a compulsory component of the curriculum in English as Additional Language (**EAL**) courses, such as Settlement Language Pathways to Employment and Training and Adult Migrant English Program (**AMEP**) classes. In fact, one of the observations in the Fraser Report is that settlement agencies and AMEPs are "well-placed to deliver legal and financial education to a large number of people in a systematic way".[48]

(b) **Phone app:** developing a simple phone application that is translatable into languages other than English, containing basic information about key agencies such as the Fair Work Ombudsman, Fair Work Commission, the ATO and other key regulators (such as OHS regulators). Many attendees at our CLE sessions take a photo of the PowerPoint slides showing key service contact details. Therefore, the information could include brief descriptions of what the agency does and include contact details. This information could be written but also spoken/in video form.

(c) **Public awareness campaigns:** 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;[49] and

(d) **Funding to distribute resources:** ensuring that adequate resources about workers' rights are available in migrant resource centres, medical facilities and other locations visited by migrant workers.[50]

[48] Victoria Law Foundation (Katie Fraser), *Prevention is better than cure: Can education prevent refugees' legal problems?*, March 2011, 8.
[49] ILO, *Protecting the rights of migrant workers: A shared responsibility*, 2009, 8.

4.4 Government agencies must be more accessible

In addition to improving education around workplace rights and responsibilities, there is urgent need for assistance for vulnerable workers in order to facilitate access to legal processes. This will increase equity and efficiency. Claims will be better articulated and resolve more quickly.

Many clients may intuitively feel they have been treated unfairly, but due to barriers outlined above, have no idea how to frame their complaint to the FWO. WCLC has found prior to presenting at our Service, some clients have initiated a complaint with an agency like the FWO but due to ignorance of their rights and the elements required to establish their claim, complaints may be closed due to lacking sufficient detail.

In other situations clients have presented to our service seeking assistance with one matter (e.g. missing a week of pay), only to discover far more extensive underpayment due to an incorrect hourly rate, lack of annual leave entitlements or superannuation issues.

In our experience mainstream agencies like the FWO have not been able to provide the assistance required to explore or assist the client to identify further issues and articulate the full extent of their complaints. Only the issues correctly identified and evidenced by the complainant will be pursued.

Without direct assistance many newly arrived and refugee clients who have had their workplace rights breached will not be able to enforce them.[51] Even if workers learn enough to know that something is wrong, and manage to contact an agency, without ongoing assistance, they are often unable to achieve justice.

These case studies provide examples:

CASE STUDY 12

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.

[50] ILO, *Protecting the rights of migrant workers: A shared responsibility*, 2009, 8.
[51] See Footscray CLC's first submission to the Productivity Commission Inquiry into the Workplace Relations Framework, 7-9.

CASE STUDY 13

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

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

However, there is a need to reform mainstream agency processes further to make them more accessible. The following case study provides another 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 the 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 the FWO.

-

CASE STUDY 15

Sumit cannot read or write in his own language, or in English. He worked as a cleaner and was engaged in a sham contracting arrangement. Sumit had never heard of the difference between contractors and employees, nor was he aware of minimum wages. We assisted Sumit to calculate his underpayment, and write a letter of demand to his former employer. Sumit could not have done this without assistance, and no government agencies can help with these tasks.

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

One option is to recommend that government agencies undertake a comprehensive review of their cultural response plans, and create cultural responsiveness framework guidelines for employment services.[52] Based on our experience and relevant research, we 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,[53] and in a variety of formats;[54]
- participate in (and help resource) specifically targeted education and engagement programs run in partnership with community organisations;[55] and
- employ dedicated staff with speciality expertise in assisting migrant workers (ideally multilingual) to provide practical face-to-face assistance.

There should also be greater collaboration between key agencies including community organisations, the Fair Work Commission, FWO, AHRC, VEOHRC, WorkSafe etc to work together to develop a cultural responsiveness plan and/or processes to facilitate warm referrals between services.

Furthermore, greater targeted assistance is required throughout the dispute resolution process, to facilitate accessibility for vulnerable workers. It would be useful for agencies to have dedicated staff who can assist vulnerable workers (for example, those with English as an additional language) to navigate processes and procedures.

WCLC has had clients who do not know what an outline of submissions or a witness statement is, or who have been very afraid to contact the FWC for cultural reasons. The ability to make a warm referral to trained staff would increase the accessibility of FWC processes. These staff could also work to build trust and relationships with vulnerable communities through community education and other community engagement activities.

Greater resourcing and coercive powers of the FWO and other agencies would enhance outcomes for the most vulnerable. For example, compulsory mediation (where employers are compelled to attend) would greatly improve the efficient resolution of complaints and avoid the expense and delay of unnecessary court actions for small underpayments matters. These issues are explored further in our recent submission to the Productivity Commission Inquiry into the Workplace Relations Framework.

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[52] 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>.

[53] 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.

[54] 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), 32.

[55] 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> 51.

Alternatively, the Victorian Government should set up a statutory agency to assist culturally and linguistically diverse workers to navigate the complex system of organisations available to enforce workplace rights. Such an agency could be similar to the Workplace Rights Advocate established under the Victorian Labor Government in 2005.

Recommendation

- **The Victorian Government should call on agencies to develop cultural responsiveness frameworks to ensure newly arrived and refugee clients can access services. Such frameworks should:**
  - **develop specific protocols and checklists for 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, and in a variety of formats;**
  - **participate in (and help resource) specifically targeted education and engagement programs run in partnership with community organisations; and**
  - **employ dedicated staff with speciality expertise in assisting migrant workers (ideally multilingual) to provide practical face-to-face assistance.**
- **Recognising that increasing accessibility will require increased time and contact with communities, agencies should be given additional resources to enhance the accessibility of their services to migrant workers**
- **The Victorian Government should call upon the Federal Government to expand the FWO's enforcement powers, in particular to allow the FWO to compel parties to attend mediation and make binding recommendations in respect of very small claims**
- **The Victorian Government should set up a statutory agency to assist culturally and linguistically diverse workers to enforce their workplace rights.**

4.5 The Victorian Government should establish employment law hubs for migrant workers

4.5.1 Multi-jurisdictional landscape breeds unmet legal need

The piecemeal nature of the workplace relations landscape makes enforcement difficult. The plethora of different jurisdictions and agencies for enforcement of workplace safety, entitlements, unfair dismissal, general protections, superannuation and discrimination laws makes choice of jurisdiction and case management extremely challenging, particularly for vulnerable clients. This complexity also typically limits the capacity of generalist advice agencies such as generalist community legal centres to provide assistance in these jurisdictions.

It is critical that there are targeted services to provide information and advice on matters such as choice of jurisdiction, as well as subsequent advocacy and support with resolving disputes. Our clients generally require active assistance from making a complaint through to mediations, and formally settling their dispute. At the initiation of an application, clients need assistance with the completion of the relevant forms. There can be complex jurisdictional issues to consider. Many clients faced with the requirement to prepare an application, outline of submissions or witness statements would be locked out of the system

without extensive assistance. The imbalance of power inherent in many of these disputes makes independent assistance for vulnerable workers crucial for efficient resolutions.

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

4.5.2 Community-Based Employment Advice Services can meet this need

In 2009 the FWO conducted a review of the need for and provision of Community-Based Employment Advice Services (**CBEAS**) in the light of the introduction of the Fair Work regime (**Booth Report**) [56]

The Booth Report describes the current employment advice landscape for vulnerable employees as presenting 'a confusing picture' if they are sent out alone on the "referral roundabout".[57] The Report highlights the importance of CBEAS for vulnerable workers:

> *There is a significant group of workers with nowhere to go in the absence of community-based services. These are the workers who because of their industry or occupation, employment status or personal characteristics are also more likely to be vulnerable to exploitation at work. They experience a 'double whammy' of vulnerability at work and an inability to assert their rights.*[58]

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

The Booth Report also stresses the utility of collaboration between government and CBEAS, allowing systemic issues not otherwise pursued:

> *CBEAS are not 'underground' organisations that are distinct from the new workplace relations architecture. They are an essential link in the chain of maintaining employment standards. In practice they are treated as such by government bodies that regularly refer workers to them. However, the interdependence within the system should be formally recognised and their visibility improved.*[59]

Indeed, CBEAS contribute to the effective and efficient functioning of the workplace relations systems by:

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[56] Anna Booth, *Report to the Fair Work Ombudsman of a Review of Community-Based Employment Advice Services* (Cosolve, 30 September 2009) https://www.fairwork.gov.au/ArticleDocuments/716/Report%20of%20a%20Review%20of%20Community%20Bases%20Employment%20Advice%20Services.pdf.aspx?Embed=Y, 26.
[57] Ibid, 25.
[58] Ibid, *2.*
[59] Ibid, 26.

- providing critical assistance to a vulnerable group who would otherwise by unable to understand or enforce their workplace rights
- filtering disputes by advising clients on the legal merits of their claims
- increasing the focus on early intervention and assisting clients resolve issues at an early stage
- promoting the efficient passage of disputes through the workplace relations dispute resolution pathways, and
- collecting information about systemic issues for vulnerable groups.

The Productivity Commission has previously recognised that community organisations have strong potential to provide innovative solutions to social problems.[60] It has also recognised that employment law is a major gap in civil law assistance[61] 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.[62]

The work of CBEAS, including WCLC, clearly contributes to the efficiency of the functions of the WR framework.[63] In addition to the critical assistance to vulnerable workers in effectively utilising the workplace relations system described above, CBEAS provide a crucial triage or filtering function, advising clients with meritless claims or very poor prospects of success not to proceed.

In other respects, WCLC's support and advocacy to assist clients settling their disputes by negotiation increases efficiency and reduces costs by avoiding unnecessary reliance on proceedings advancing to court. We routinely undertake calculations and assist clients to resolve issues with their employers by way of letter of demand. We have been successful in assisting many clients during this early stage in the legal process. CBEAS also promote the efficient passage of disputes through established dispute resolution pathways, and by assisting clients to access mainstream services. For example:

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 government agencies and CBEAS. The kind of methods discussed in

[60] *Contribution of the Not-for-Profit Sector, Productivity Commission Research Report,* January 2010.
[61] *Access to Justice Arrangements, Productivity Commission Inquiry Report Overview*, no. 72. September 2014, 30.
[62] Ibid, 2.
[63] See for example, Productivity Commission Inquiry Report Volume 1, *Access to Justice Arrangements* (2014).

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.'[64] We also welcome the possibility of secondments to assist us to meet overwhelming demand. In addition, we strongly support a model where the governments or government agencies directly fund CBEAS – both those with a general focus and specific programs within a general service.

4.5.3 Employment law hubs: a one-stop shop

In particular, we recommend the establishment of community-based employment law hubs for migrant workers. These hubs would deliver three components:

- coordination and delivery of the Employment Law Service, providing legal advice and assistance to newly arrived and refugee workers who have a problem at work, and facilitating referrals to mainstream agencies where appropriate;
- coordination and delivery of a Community Legal Education program to newly arrived communities, community leaders and community workers, to raise awareness of laws and services that can assist and prevent exploitation; and
- pursuing strategic policy and law reform objectives arising from casework and education programs, including consultation with key stakeholders to raise awareness of migrant worker experiences and to promote legal and policy change.

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

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

Therefore, the Victorian Government should establish a dedicated fund to adequately resource and roll out employment law hubs across Victoria.

Recommendation

The Victorian Government should establish a dedicated fund to establish community-based employment law hubs for migrant workers.

[64] 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>.

The hubs would deliver three components:

- **coordination and delivery of an employment law service to provide legal advice and assistance to newly arrived and refugee workers who have a problem at work, and facilitating referrals to mainstream agencies where appropriate;**
- **coordination and delivery of a Community Legal Education program; and**
- **pursuing strategic policy and law reform objectives arising out of casework and CLE programs.**

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

5 Labour Hire

To what extent is labour hire used in Victoria? In which industries and regions is it most prevalent?

What do labour hire suppliers in Victoria look like (e.g. size, sectors they operate in, local or part of national/multinational business)?

How are labour hire workers generally engaged? To what extent are they engaged as employees? Or as independent contractors?

What working conditions do labour hire workers typically have? What differences are there, if any, between the conditions of direct employees of a host organization and labour hire workers?

To what extent is accommodation provided by labour hire companies to workers, and what is its nature and cost?

In what ways do hosts typically use labour hire workers? Are they used to supplement or to replace ongoing workforces or direct employees?

Does the use of labour hire impact the availability of apprenticeships and traineeships?

To what extent do hosts inquire into the labour practices of labour hire suppliers? Should this occur?

Is there evidence of labour hire being used to evade workplace laws and other legal obligations?

What role do labour hire companies play in supply chains for the provision of goods and services? Do other actors in those supply chains have responsibilities towards labour hire workers, whom they do not directly engage?

Does the use of labour hire arrangements lead to positive outcomes for Victorian workers, businesses and the broader community? What problems does it create?

What would be the impact of a statutory licensing scheme for labour hire operators in Victoria, including requirements for licensees to comply with minimum standards for the fair treatment of workers?

5.1 Labour hire and newly arrived communities

WCLC has observed clients working under labour hire arrangements in a range of industries including food processing, cleaning, distribution and construction. Workers are generally on

low incomes and do not understand their rights at work, let alone the complex arrangements between host and labour supply agencies governing their employment.

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

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

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

CASE STUDY 16

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

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

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

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

Unfortunately, this story is not unique. As demonstrated by recent Four Corners television programs, and evidenced through our casework and community consultations, these experiences are widespread. In this submission, we explore a number of measures to limit such offensive and appalling treatment arising through labour hire, sham contracting, supply chain and franchise arrangements.

5.2 Joint employment is necessary to address new forms of working arrangements

Based on our observations of labour hire relationships, we recommend that the Victorian Government investigate ways to introduce concepts of joint employment into the workplace relations framework.

While the concept of joint employment could be adopted in a number of areas in Australia's current workplace relations framework, from WCLC's perspective and for the purposes of these submissions, the two immediate areas of concern are underpayments (of wages and entitlements) and termination of employment.

The need to embrace the concept of "joint employment" largely stems from the failure of the *Fair Work Act 2009* (Cth) (**Fair Work Act**) to address non-traditional working arrangements. The focus of the Fair Work Act on the traditional employer/employee relationship as defined by common law fails to recognise that 'it is not now uncommon for the employment relationship to be fragmented and for multiple organisations to be involved in shaping key working conditions.'[65]

Indeed, it is often the case that multiple organisations will benefit from the labour of one worker, although only one will be held accountable under the Fair Work Act. For example, in a labour hire arrangement, in addition to the labour hire agency, 'the client or host employer may receive the benefits of an employer by being able to control the agency labour (and their terms of engagement) and yet avoid any form of labour regulation because it has no employment relationship with the labour.'[66] Although 'both of [these] entities enjoy the benefits of acting as an employer, one will unfairly circumvent labour regulation.'[67] We have seen this in situations where clients in labour hire arrangements, supply chains or franchises are left without a remedy against a host employer, principal or franchise owner, who in many circumstances should be held, wholly or partly, responsible for the terms and conditions of the worker.

As set out in Dr Tess Hardy's submission to the Senate Inquiry into the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders (**Hardy Submission**), Weil suggests that "fissured" forms of employment, being those with fragmented work structures, have arisen as a result of three related elements. First, the desire of lead firms to "increase revenue through focusing on core

[65] Hardy Submission, page 8.
[66] Dowling 2015 Paper, pages 1-2.
[67] Ibid, page 2.

competencies".[68] Second, lead firms' desire "to reduce costs through shedding their role as the direct employer" and lastly, the maintenance of control whereby "the lead firm continues to perform an important and somewhat intrusive role in terms of creating and enforcing rigorous quality standards and detailed work practice requirements in relation to the provider companies".[69] Although these commercial drivers may produce benefits for business and consumers, it is essential that commercial benefits are not made at the expense of workers. For this reason, labour regulation should be modernised to adapt to these various forms of employment and ensure the necessary protections are afforded to vulnerable workers.

WCLC contends that accessorial liability under section 550 of the Fair Work Act does not go far enough as it only attributes liability in limited circumstances, where there is aiding, abetting, counselling or procurement or the accessory is "knowingly concerned". It is contended that this sets a high bar to establish assessorial liability of the host employer or those at the apex of a supply chain or franchise. Hardy notes that there have only been a 'handful' of cases where section 550 has been used to argue that a separate corporation is 'involved' in a breach. Although not yet determined in a substantive proceeding, 'court decisions which have dealt with similar accessorial liability provisions arising under other statutes suggest that the courts may well take a fairly restrictive approach to these questions.'[70] For these reasons, and others set out **below**, legislative reform is urgently required.

5.3 Legislative reform is required to provide certainty

The doctrine of joint employment originates from the Unites States of America. Although the definition of "joint employment" varies between different areas of employment law, at its narrowest, the doctrine of joint employment recognises that where two employers each exercise significant control over a worker and "co-determine" their terms of employment, both employers may be held to be the worker's employer.[71] Although recognised in America, this doctrine has not been wholly accepted as forming part of the common law in Australia.

There have been several decisions of the courts and tribunals which have suggested that there is scope in the Australian landscape for the concept of joint employment.[72] However, development in this area has been slow and, at present, it is far from certain that the doctrine of "joint employment" forms part of Australian law. Part of the reluctance to adopt the doctrine arises from concerns about how liability is to be apportioned once joint

[68] Hardy Submission, page 4.
[69] Ibid.
[70] Hardy Submission, page 10.
[71] *National Labour Relations Act of 1935; National Labour Relations Board v Browning-Ferris Industries of Pennsylvania Inc* 691 F 2d 1117 (3rd Cir, 1982) at 1124.
[72] *Damevski v Giudice* (2003) 133 FCR 438; *Coghill v Indochine Resources Pty Ltd* [2015] FCA 377; *Fair Work Ombudsman v Eastern Colour Pty Ltd* [2011] FCA 803; *Morgan v Kittochside* (2002) 117 OR 152 at [72]-[75] and *Nguyen v ANT Contract Packers Pty Ltd* (2003) 128 IR 241. For a helpful summary of key cases, see Dowling 2015 Paper and Thesis.

employment is recognised and also how to determine the relevant terms and conditions of the worker if more than one employer is identified.[73]

Accordingly, to provide certainty and to address the gap in the workplace relations system, statutory reform is necessary to effect any change in this space.

WCLC recognises that each form of non-traditional working arrangements may involve separate considerations and therefore may call for separate mechanisms for reform. Accordingly, we have divided our submissions and proposals into three separate sections: labour hire arrangements; supply chains and franchises.

5.4 For labour hire arrangements, joint employment and licensing will improve compliance

The labour hire relationship is characterised by a worker who is engaged by a labour hire agency (the agency) and assigned to work for an organisation (host employer). In this triangular relationship, there is a contract between the agency and the host employer and a contract between the worker and the agency but there is no contract between the worker and the host employer. In these circumstances, in the context of the termination provisions of the Fair Work Act, such as unfair dismissal or general protections, and the underpayment provisions, the worker would not be able to seek relief against the host employer, unless the worker was able to be characterised as an "employee" of the employer, having regard to the usual indicia: *Stevens v Brodribb Sawmilling Co Pty Ltd*[74].[75]

5.4.1 Example: joint employment provisions

WCLC considers that, for the purposes of the unfair dismissal, general protections and the underpayments provisions of the Fair Work Act, if certain criteria are met, provisions deeming host employers as an employer of workers employed in a labour hire arrangement are the appropriate mechanisms for capturing employees engaged in a labour hire arrangement. We recommend below two definitions which may be incorporated into the current definition of "employee".

Pauline Thai, in her article "*Unfair Dismissal Protection for Labour Hire Workers? Implementing the Doctrine of Joint Employment in Australia*"[76]urges the adoption of the test enunciated in *Zheng v Liberty Apparel Co Inc*[77] for the purposes of the application of the unfair dismissal provisions. Under the *Zheng* test, the following factors are relevant for determining whether joint employment exists:

[73] *Costello v Allstaff Industrial Personnel (SA) Pty Ltd* [2004] SAIRComm 13.
[74] (1986) 160 CLR 16.
[75] See - *Damevski v Giudice* (2003) 133 FCR 438– where Court found that the host employer was the relevant employer.
[76] (2012) 21 *Australian Journal of Labour Law* 152.
[77] 355 F 3d 61 (2nd Cir, 2003).

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

In his Thesis,[78] Dowling sought the following amendment to the definition of "employee" for the purposes of the dismissal protections and freedom of association protections provided for by the *Workplace Relations Act 1996* (Cth) to include a statement that:

> ***"employee"*** means:
>
> …
>
> (2) An employee may be employed by two or more employers at the same time.

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

> ***"employer"*** means:
>
> …
>
> (2) Two or more persons may be joint employers of an employee where:
>
> (a) Those two or more persons exercise some control over the work or working conditions of the employee; and
>
> (b) the employee performs work which simultaneously benefits the two or more persons.
>
> (3) In determining whether the two persons referred to in subsection (2) are joint employers the matters taken into account shall include:
>
> (a) The nature and degree of control of the employee by each person;
>
> (b) The right of each person, directly or indirectly, to engage, cease or otherwise modify the conditions of engagement of the employee;
>
> (c) The ability of each person to determine the rate of pay of the employee;
>
> (d) The place of work of the employee.

WCLC recommends that similar provisions be inserted into the Fair Work Act and calls on the Victorian Government to advocate for such change.

[78] Craig Dowling, "The concept of joint employment and the need for statutory reform", Minor thesis submitted in fulfilment of the requirements of the degree of Master of Laws, 18 July 2008 (**Thesis**). See also "Joint Employment and Labour Hire Relationships – Victoria Legal Aid – Professional Legal Education", 5 October 2015 (**2015 Paper**).

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

> **Remedies**
>
> (1) Subject to subsection (2) if the Commission [Court] considers it appropriate, the Commission [court] may make an order requiring the employer or employers to reinstate the employee by:
>
> > *(a) reappointing the employee to the position in which the employee was employed immediately before the termination; or*
> >
> > *(b) appointing the employee to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination.*
>
> (2) If the Commission [Court] has determined that the employee is jointly employed by two or more employers and considers an order under subsection (1) appropriate the Commission shall:
>
> > (a) determine one of those persons to be the primary employer and the other or others the secondary employers taking into account:
> >
> > > (i) the right to engage and terminate the employee;
> > >
> > > (ii) the responsibility to assign or place the employee;
> > >
> > > (iii) the responsibility to pay and provide other terms and conditions of employment. and;
> >
> > (b) Order the primary employer to reinstate the employee to the position in which the employee was employed immediately before the termination (or equivalent position); and
> >
> > c) Order the secondary employers to allow the employee to assume the position (or equivalent position) which the employee held immediately before the termination.

Noting Dowling's Thesis pre-dates the Fair Work Act, we submit that these provisions could be adapted to suit the language and wording of the Fair Work Act, and include reference to apportionment of compensation as well.

5.4.2 Alternative approach: vicarious liability

In the alternative, it may be possible to amend the Fair Work Act such that a second "employer" or host could be held vicariously liable for breaches of the "first". Such provisions could be modelled on sections 109 and 110 of the *Equal Opportunity Act 2010* (Vic), which provide that:

109. Vicarious liability of employers and principals

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

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

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

110. Exception to vicarious liability

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

We submit that these provisions could be used as a model for imposing liability on host employers for contraventions of the first employer unless reasonable precautions are taken by the host employer to prevent the first employer's contravention. Similarly, this model could impose liability on principals in a supply chain and franchisors. This would place a positive obligation on all parties benefiting from the labour of a worker to ensure that workplace rights are protected. We submit that this would have a significant impact on ensuring compliance.

5.4.3 Alternative approach: expanding the definition of employee and employer to expressly refer to labour hire arrangements

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

Discrimination against contract workers

(1) A principal must not discriminate against a contract worker -
(a) in the terms on which the principal allows the contract worker to work; or
(b) by not allowing the contract worker to work or continue to work; or
(c) by denying or limiting access by the contract worker to any benefit connected with the work; or
(d) by subjecting the contract worker to any other detriment.

> (2) Subsection (1) does not apply to anything done or omitted to be done by a principal in relation to a contract worker that would not contravene this Act if done or omitted to be done by the employer of that contract worker.

The term "principal" is relevantly defined as "a person who contracts with another person for work to be done by employees of the other person".[79] The term "contract worker" is defined as "a person who does work for a principal under a contract between the person's employer and the principal".[80]

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

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

5.4.4 A licensing scheme should be introduced for labour hire providers

In her submission, Dr Hardy provides a useful assessment of the labour hire licensing scheme in the UK. She concludes that the scheme:[81]

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

WCLC endorses the National Union of Workers (NUW) Victorian Labour Hire licensing model. As contained in the NUW submission to this Inquiry, key features of the model should include:

- Payment of a bond and annual license fee to the Victorian Government to operate a labour hire company in Victoria
- Threshold capital requirement to operate a labour hire company in Victoria
- Core requirements for license holders and related parties, including a fit and proper person test, ongoing minimum capital requirements, reporting obligations and importantly, compliance with workplace laws
- Dedicated and well-resourced compliance unit

[79] *Equal Opportunity Act 2010* (Vic), s 4.
[80] Ibid.
[81] Hardy Submission, page 21.

- Third parties including unions, individuals and community organisations have standing to bring actions for non-compliance. Such actions should be able to be taken in a low-cost forum such as the Victorian Civil and Administrative Tribunal, or a dedicated specialist tribunal.
- Mandatory workplace rights and entitlements training

We refer to section 5 above and suggest that any compliance unit and training must ensure that it is accessible to newly arrived and refugee communities.

We also support the NUW's recommendation that the Victorian Government should, through the Victorian Government Purchasing Board, adopt a Secure Jobs Code to ensure that the State's procurement policies work to encourage secure employment.

Recommendation

The Victorian Government should call upon the Federal Government to amend the Fair Work Act to incorporate the concept of joint employment and/or vicarious liability. This could be done by:

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

This will ensure that all who receive the benefits of being an "employer" are also required to comply with Fair Work Act provisions relating to underpayments and termination.

The Victorian government should introduce a licensing scheme for labour hire providers. Such a scheme should contain the following features:

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

6 Independent contracting, dependent contracting and sham contracting

What experience or evidence can you provide of sham contracting?

WCLC welcomes the Victorian Government's focus on sham contracting in the Inquiry. In our experience, sham contracting is used systematically as a core business practice throughout the road transport and distribution services, the cleaning industry, the home and commercial maintenance industries (e.g. painters), and in the building and construction industry (e.g. tilers). WCLC saw numerous clients working in these industries whose employment relationship was actually one of employer-employee. Clients were paid an hourly rate, wore a uniform, had all equipment provided by the employer, worked for only one employer, were unable to take time off work and were unable to subcontract.

We have 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'. 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 17

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 18

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.

6.1 Sham contracting is rife among newly arrived and refugee communities

In the vast majority cases in which WCLC has assisted, workers who have been engaged under a contract for service (that is, they have purportedly been engaged as an independent contractor) have not in fact been independent. We have found that for all intents and

purposes they are dependent contractors – that is, the relationship they have with the person who has engaged them is more akin to or identical to an employment relationship, and they are unable to determine any of their own terms and conditions of engagement. When the multi-factor test is applied to determine whether they are independent contractors or employees, in the vast majority circumstances we have found that they really are employees are under the law.

In an WCLC survey, the following comments were provided to WCLC by various community workers who were not prompted to give these responses as they were not directly asked about sham contracting:[82]

> '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.'

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

6.2 Sham contracting results in exploitation

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

- Our clients are not receiving minimum award wages or the national minimum wage. Our clients are mostly people who are low paid, award-reliant workers doing unskilled or low-skilled labour. The fact that they are doing the work of an employee which should at least provide them with the security of the basic minima (the NES, award or national minimum wages) but they are not receiving this creates a dangerous precedent. People who are ostensibly employees are receiving less than they should. This creates serious issues for the labour market in terms of not only our clients but employers and principals who in an effort to compete with those in breach of the law feel that they must also undercut the minimum protections. There should be absolutely no ability to pay a person less than the national or award minimum wage for labour performed. Likewise, a person performing labour should be provided with all rights, entitlements and protections, afforded to an employee under the FW Act, an award, or other industrial or health and safety legislation.

[82] Full details can be found at Dow, above n 3, 12.

Labour standards should not be able to be contracted out of simply by labelling something that which it is not.

- Our clients are rarely receiving superannuation contributions. This is the case even though Superannuation Guarantee Ruling 2005/1 provides that they must receive superannuation contributions if they are engaged under a contract that is principally for labour.[83] A contract will be principally for labour if it is mainly for the person's labour, which may include:
    - physical labour
    - mental effort, or
    - artistic effort.

The ATO provides that a contract may be considered wholly or principally for labour, if the contractor:

- is remunerated wholly or principally for their personal labour and skills,
- must perform the contract work personally, and
- is paid by reference to hours worked rather than completion of the contract.

If the contract is made with someone other than the person who will actually be providing the labour, there is no employer-employee relationship.

Many of our clients are not even aware that there is a difference between an employee and independent contractor and asking the questions necessary to apply the multi-indicia test can be difficult. It is very concerning to us that our clients are often told by the person hiring them that if they have an ABN they are automatically a contractor.

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

6.3 A definition of independent contractor would assist

Rather than applying the multi-factor test to each situation where there is doubt as to a worker's true status, it may be more efficient and would provide more certainty if a statutory definition was introduced. This definition should include a presumption that a worker is an employee unless certain conditions are met. For example, the ATO's superannuation eligibility test could be adopted more broadly. That is, if a worker is engaged under a contract that provides that more than half of the value of the contract is

[83] Australian Government Tax Office, Superannuation Guarantee Ruling 2005/1, http://law.ato.gov.au/pdf/pbr/sgr2005-001.pdf.

for the person's physical labour, mental effort, or artistic effort, that person should be deemed to be an employee for all purposes.

Alternatively, Andrew Stewart and Cameron Roles in their Submission to the ABCC Inquiry into Sham Arrangements and the Use of Labour Hire in the Building and Construction Industry proposed that the term 'employee' should be redefined in a way that would strictly limit independent contractor status to apply only to those workers who are genuinely running their own business:[84]

> *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.*[85]

They recommend that this definition could be included in any legislation which uses the term 'employee'.

One area in which problems may arise is where a principal/employer seeks to include a provision into the contract that provides that a worker can hire others to perform the work. The insertion of such a provision may be an attempt to obfuscate the reality of the relationship and it should not carry any weight in the consideration of whether a worker is an employee.

A definition similar to those outlined above would greatly assist our clients to enforce their rights more efficiently, without inhibiting the ability of those who are genuinely independent to contract accordingly. The advantages of such definitions are that there is less time used in the application of the multi-factor test, there is greater likelihood of consistent outcomes (recalling our previous submissions about the application of the test resulting in different outcomes) and there is much greater fairness for workers. In the application of the definition there should be a presumption from the commencement that a person is an employee.

The fairness consideration should weigh greatly in favour of workers in that in many cases their labour is the only thing they have to offer an employer or principal. If they are offering up their labour they should receive the minimum legislated and award derived entitlements to employees.

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.

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[84] 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.

[85] Ibid, 5.

Recommendation

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

6.3.1 Ambiguity and jurisdictional concerns limit enforcement

As noted above, WCLC has observed that in the absence of a statutory definition our clients have limited individual enforcement options. 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 '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.

Alternatively, VCAT should have jurisdiction to determine that a contractor is an employee at law, and order appropriate minimum wages under the applicable award or agreement.

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.

6.4 Employers and principals need to take proactive steps to avoid sham contracting

WCLC regards the current provisions in the FWA insufficient to discourage sham contracting.

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

> (2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:
>
> (a) did not know; and
>
> (b) was not reckless as to whether;
>
> the contract was a contract of employment rather than a contract for services.

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

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

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

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

This document should be provided to the independent contractor to be able to be used in a court or tribunal should there be a dispute as to whether the relationship was originally one of principal and contractor, or has subsequently lost such features. There should be a reverse onus applied so that a worker can assert that he or she was actually an employee and the principal/employer should then be required to prove this was not the case. This would be a significant deterrent as it would require employers to be vigilant at the commencement of a relationship and to make proper inquiries and obtain appropriate professional advice. It would

create an initial compliance burden on the employer, but there would be a valuable return for society in terms of less litigation and a quicker resolution of disputes.

The employer should not be able to rely on lack of knowledge or be able to assert that he or she was not reckless in relation to gaining knowledge.

A court or tribunal can then apply an objective test to ascertain whether a reasonable person would have reached the same conclusion as the principal.

In addition to the above WCLC submits that it should be harder to obtain an ABN. In no circumstances should a principal be able to obtain an ABN on behalf of a worker. Proper consideration of all the facts and circumstances and the relevant test should be applied before an ABN is issued. ABNs should not be issued after a short internet application. WCLC acknowledges that this would increase costs and compliance obligations however these are outweighed by the need to offer protection to workers.

Recommendation

- **Employers and principals should have a positive obligation to ensure they classify their workers appropriately. There should be no recklessness/lack of knowledge defence.**
- **Principals should be required to submit a statement explaining the nature of the contracting relationship.**
- **More rigorous tests should apply before an ABN is given to an individual.**

6.5 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.

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

6.5.2 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.

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

7 Complex labour supply chains and outsourcing

What experience or evidence can you provide regarding the use of phoenix activity, supply chains or franchising arrangements contributing to insecure work, the exploitation of vulnerable workers or unfairness for competing businesses?

7.1 Without regulation, supply chains facilitate exploitation for those at the bottom

Supply chains involve sub-contracting arrangements whereby there are a number of interposing entities between the ultimate work provider and a worker. An example of a supply chain in the construction context is the engagement by a business operator of a principal contractor who engages a contractor firm, which engages a subcontractor.[86] It has been suggested that the "very structure of the supply chain is conducive to worker exploitation" due to parties near the bottom of the supply chain having low profit margins and experiencing intense competition.[87]

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

CASE STUDY 19

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.

[86] Johnstone, McCrystal, Nossar, Quinlan, Rawling and Riley, "Beyond employment: the legal regulation of work relationships" (The Federation Press, 2012), 49.
[87] Ibid, 67.

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.

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 and below.

7.2 Expansion of outworker protections to other industries would increase compliance

In submissions made to the Senate Inquiry on the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders, Dr Hardy advocates for an expansion of current provisions relating to outworkers in the textile industries.[88]

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

> Research has consistently shown that outworkers in the TCF industry suffer from unique vulnerabilities as a result of their engaging employment in non-business premises. These vulnerabilities are often exacerbated by poor English language skills, lack of knowledge about the Australian legal system and low levels of Union membership in the industry.[89]

Part 6-4A is "designed to eliminate exploitation of outworkers in the textile, clothing and footwear industry, and to ensure that those outworkers are employed under secure, safe and fair systems of work".[90]

'Outworkers', who are often classified as independent contractors, are treated as 'employees' for the purposes of the protective provisions of the Fair Work Act and modern

[88] Dr Tess Hardy, "Senate Inquiry: The impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders: Submission"
[89] Explanatory Memorandum to the *Fair Work Amendment (Textile, Clothing & Footwear Industry) Act 2012* (Cth), page 1.
[90] *Fair Work Act 2009* (Cth) s 789AC.

award system.[91] Additionally, TCF outworkers have the 'right to bring a claim for workplace entitlements against an "indirectly responsible entity" and enjoy a reversal of the onus of proof onto the party served with the claim for recovery.

The relevant modern award, the Textile, Clothing, Footwear and Associated Industries Award 2010 specifically regulates arrangements made between principals and others who have work undertaken on their behalf.[92] The provisions are designed to ensure transparency at each level of the supply chain. The provisions require principals and those engaged by the principal to maintain certain records regarding the identification of the workers and the work performed by them. The Award also provides that principals must apply the National Employment Standards to the worker, whether or not the worker is an employee of the principal. There are also specific provisions regarding hours of work, work on weekends and public holidays, time standards, payment and stand down.

Various state governments have also passed specific outwork laws (including NSW[93], South Australia[94,] Queensland[95,] Tasmania[96] and Victoria[97]). Tasmania, Victoria, South Australia, Queensland and NSW have provisions in relation to deeming. The same states, excluding Tasmania, also have provisions relating to recovery of unpaid remuneration owed to outworkers. South Australia and New South Wales have mandatory codes of practice. Victoria retains the capacity to make a code but has not yet utilised these provisions.

A similar model has been adopted in the transport industry. The Heavy Vehicle National Law (**HVNL**) and regulations commenced in the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Victoria on 10 February 2014. In addition to passing the HVNL, states and territories agreed to four regulations made under the national law. The Northern Territory and Western Australia have not commenced the HVNL at this time. Part of this regulation involves making corporate entities, directors, partners and managers accountable for the actions of people under their control. The laws define parties in the supply chain as any person with an influence and/or control in the transport chain and includes, but is not limited to:

- corporations, partnerships, unincorporated associations or other bodies corporate
- employers and company directors
- exporters/importers
- primary producers
- drivers (including a bus driver and an owner-driver)
- prime contractors of drivers

[91] Ibid, s 789BB.
[92] Note that special provisions for outworkers have existed in federal awards for some decades. The current scheme broadly owes its origins to a 1987 decision by DP Riordan [1987] IR 416.
[93] *Industrial Relations Act 1996* (NSW), *Industrial Relations (Ethical Clothing Trades) Act 2001* (NSW); NSW Ethical Clothing Extended Responsibility Scheme.
[94] *Fair Work Act 1994* (SA); *Fair Work (Clothing Outworker Code of Practice) Regulation 2007* (SA).
[95] *Industrial Relations Act 199* (Qld).
[96] *Industrial Relations Act 1984.*
[97] *Outworkers (Improved Protection) Act 2003* (Vic).

- the operator of a vehicle
- schedulers of goods or passengers for transport in or on a vehicle, and the scheduler of its driver
- consignors/consignees/receivers of the goods for transport
- loaders/unloaders of goods
- loading managers (the person who supervises loading/unloading, or manages the premises where this occurs).

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

Recommendation

The Victorian Government should investigate state-based measures and call on the Federal Government to expand outworker protections under the Fair Work Act to other industries such as horticulture and food, distribution, retail, hospitality, cleaning, security, construction and other industries where workers at the bottom of the chain are vulnerable to exploitation.

8 Franchises

What experience or evidence can you provide regarding the use of phoenix activity, supply chains or franchising arrangements contributing to insecure work, the exploitation of vulnerable workers or unfairness for competing businesses?

8.1 Legislative reform is also necessary to prevent widespread exploitation in franchises

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

For example, the following case studies show the exploitation we have witnessed in franchises:

CASE STUDY 20

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.

CASE STUDY 21

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

Franchising is regulated by the *Franchising Code of Conduct*, which is mandated by the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014*. Under this Code, workers running franchises enjoy some measure of protection from withdrawal of their livelihood by capricious termination of their franchise contracts.[98] The Code imposes obligations in relation to disclosure, termination, rights to assign franchises and recently includes a duty of good faith. Given the Code already contains a mechanism for protective provisions regarding termination, WCLC contends that the Code should be expanded to provide for protection for employees of franchises.

The recent uncovering of significant underpayments of wages by a number of retailers in the 7-Eleven franchise has drawn attention to problems which commonly arise in the franchise structure.[99] From these investigations, it is apparent that a major problem in the supplier chain structure is that there is a lack of accountability by the franchise operator for the employees of its retailers.

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

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

> "Something is wrong with our system when the boss of 7-Eleven is a billionaire but its workers are getting paid under $10 an hour and threatened with

[98] *Franchising Code of Conduct,* Div 5.
[99] Fair Work Ombudsman, "7-Eleven Franchisee admits doctoring records and underpaying workers to cut operating costs" (Media Release, 1 September 2015).

deportation. We've also heard reports that suggest this kind of widespread worker exploitation doesn't end with 7-Eleven.

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

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

WCLC supports legislative reform to ensure that franchisors can be held accountable for breaches by franchisees in respect of underpayments and unlawful termination of employment using the models outlined above.

Recommendation

The Victorian Government should call on the Federal Government to amend the Fair Work Act such that franchisors can be held accountable for breaches by franchisees in respect of underpayments and unlawful termination of employment.

9 More needed for temporary migrant workers

As noted earlier in our submission, temporary migrant workers are particularly vulnerable to exploitation. There are a number of matters that must be addressed to ensure all Victorian workers are protected.

9.1 All workers should be protected by minimum work standards

We submit that the FW Act should be amended to clearly state that it applies to all workers. That is, all workers, including undocumented migrant workers, or those working in breach of their visas are entitled to the same terms and conditions as all others working in Australia.[100] 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

[100] See submission to the Productivity Commission Inquiry into the Workplace Relations Framework by Dr Stephen Clibborn.

that granting amnesty is a central part of enabling workers to speak out about exploitation:[101]

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

Our casework experience has been similar, with clients too fearful to take action. 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.'[102] 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.

9.2 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 to the Productivity Commission Workplace Relations Framework Inquiry that:[103]

> *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*

[101] Adele Ferguson, Amnesty sought for 7-Eleven's exploited workers: http://www.afr.com/business/retail/amnesty-needed-for-7elevens-migrant-workers-20150906-gjg3pq.
[102] Page 3.
[103] http://fecca.org.au/wp-content/uploads/2015/09/ProductivityCommission-FECCATSA.pdf, 17.

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.

Similarly, we support the recommendation made by Associate Professor Joo Cheong Tham[104] to the inquiry of the Senate Education and Employment References Committee into 'The impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders':

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

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

Employers who engage employees in 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.

9.3 Deportation should only occur for serious breaches

Closely linked to the above recommendation, we refer to submissions made by Associate Professor Joo-Cheong Tham[105] and support his recommendations that deportation should only apply to serious breaches of visas.

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

Recommendation

The Victorian Government should call on the Federal Government to amend the FW Act to state that it applies to all workers.

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

Workers should not face deportation unless there is a serious breach of their visa conditions.

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