SUBMISSION TO THE SENATE SELECT COMMITTEE INQUIRY INTO TEMPORARY MIGRATION

JOINT SUBMISSION BY

KINGSFORD LEGAL CENTRE,

REDFERN LEGAL CENTRE INTERNATIONAL STUDENT SERVICE NSW and

MIGRANT EMPLOYMENT LEGAL SERVICE

30 JULY 2020

Acknowledgements of country

Kingsford Legal Centre acknowledges the Gadigal and Bidjigal Clans, the traditional custodians of the Sydney Coast. We pay respect to those Elders, past and present and thank them for allowing us to work and study on their lands.

Redfern Legal Centre acknowledges that we work on Aboriginal land, traditionally the home of the Gadigal people of the Eora nation.

The Migrant Employment Legal Service acknowledges the traditional custodians of the land on which we work.

Attribution

This submission can be attributed to Kingsford Legal Centre, Redfern Legal Centre International Student Service NSW and the Migrant Employment Legal Service.

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

If you have any questions about the present submission, please contact Emma Golledge (Director, Kingsford Legal Centre) at e.golledge@unsw.edu.au.

Publication

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

[1] WEstjustice Community Legal Centre, Migrant Employment Legal Service and Redfern Legal Centre International Student Service NSW, Submission No 47 to the Senate Standing Committees on Economics, Parliament of Australia, *Inquiry into the Unlawful Underpayment of Employees' Remuneration* (6 March 2020) <https://www.aph.gov.au/DocumentStore.ashx?id=08d67c31-a84f-4ce1-9b77-75c9efe461f3&subId=679267> (**Unlawful Underpayment Submission**).

Table of contents

1. Introduction **5**

2. Our services **6**

2.1 Kingsford Legal Centre (KLC) 6

2.2 Redfern Legal Centre International Student Service NSW (RLCISS) 6

2.3 Migrant Employment Legal Service (MELS) 6

3. Summary of recommendations **7**

4. Prevention of sham contracting **10**

4.1 The Australian Business Register should increase scrutiny at the time sole trader ABNs are issued to identify sham contracting at an early stage 12

4.2 Increase enforcement and education activities to stop sham contracting 13

5. Amending the *Migration Act 1958* (Cth) to ensure people who hold temporary visas can complain with confidence **14**

5.1 Students visa (subclass 500) (International Students) 16

5.2 Skilled visa (482) holders 17

5.3 People seeking asylum on bridging visas 18

6. Extension of liability and supply chain measures **19**

6.1 Accessorial liability for people or companies involved in workplace contraventions should be extended to all relevant third parties 19

6.2 Extend the definition of 'responsible franchisor' to increase the liability of franchisors for contraventions of workplace laws by franchisees 20

6.3 Clarify the liability of relevant third parties under the responsible franchisor and holding company provisions 22

6.4 Reasonable steps defence 22

6.5 Lower the bar for knowledge of contraventions 22

6.6 Creation of Federal Labour Hire Licensing Authority 23

7. The most effective means of redress for wage theft and other breaches of workplace rights and conditions **24**

7.1 Community legal centres at the forefront of redress efforts 24

7.2 Increase the effectiveness of the FWO 26

7.3 Fund the FWO adequately so they can proactively undertake recovery activities 28

7.4 Create a new Wage Theft Tribunal 29

7.5 Extend the Fair Entitlements Guarantee scheme 30

7.6 Introduce a wage insurance scheme 31

7.7 Create a rebuttable presumption that an employment relationship exists 31

7.8 Limit the current defence in the FW Act for misrepresenting an employment relationship 32

7.9 Create Minimum Entitlements Orders and Independent Contractor Status orders 33

7.10 Extension of outworker coverage to more at-risk industries 34
7.11 Introduce higher penalties in the FW Act 34
7.12 Introduce criminal penalties for wage theft and support marginalised workers with increased access to free legal help 35
7.13 Extend the higher penalties for 'serious contraventions' to cover sham contracting 36
7.14 Introduce a director identification number and compulsory insurance to limit phoenix activities 36
7.15 Ensure all workers can obtain superannuation and make superannuation part of the NES 36

Appendix 1 - Compilation of drafting suggestions 38

1. Introduction

On 6 March 2020, WEstjustice Community Legal Centre, the Migrant Employment Legal Service and Redfern Legal Centre International Student Service NSW made a submission to the Senate Standing Committee on Economics Inquiry into Unlawful Underpayment of Employees' Remuneration (**Unlawful Underpayment Submission**).[2] The Unlawful Underpayment Submission focused on wage theft against migrant workers, including people who hold temporary visas. It illustrated that:

> Unscrupulous employers target and exploit vulnerable workers, gaining commercial benefit from illegal practices that allow them to undercut businesses doing the right thing. Recently arrived migrant workers, including temporary visa holders, face additional barriers when trying to find work, accessing the legal system and enforcing their employment rights. Especially in the early period of their arrival, they are frequently engaged in low income, precarious forms of employment. Many migrant workers do not understand their working rights, or are not supported to enforce them. Many of our clients simply accept wage theft. They tell us they are unwilling to expose their visa position to pursue the recovery of wages and entitlements through a complicated and lengthy legal process with an uncertain outcome.[3]

The Unlawful Underpayment Submission made 37 recommendations for comprehensive workplace reform to address the multi-faceted causes of migrant worker exploitation.

Unfortunately, the issues raised by the Unlawful Underpayment Submission have not been addressed and have in fact gotten worse. People who hold temporary visas have been amongst those hit hardest by the COVID-19 pandemic, increasing their vulnerability to wage theft and other breaches of workplace rights and conditions.

People who hold temporary visas have been particularly marginalised by the Australian Government's decision to exclude them from the JobKeeper wage subsidy,[4] JobSeeker support payment (formerly known as the Newstart Allowance) and most other social security payments.

Our present submission addresses Term of Reference (e), 'the impact of wage theft, breaches of workplace rights and conditions, modern slavery and human trafficking on temporary migrants'. We note that WEstjustice, Springvale Monash Community Legal Centre and JobWatch Employment Rights Legal Centre are making a joint submission to the present inquiry and refer the Committee to their joint submission.

[2] Ibid.
[3] Ibid 7.
[4] People who hold temporary visas are not eligible for the JobKeeper payment unless they are a New Zealand citizen who held a Subclass 444 (Special Category) visa on 1 March 2020. Further conditions apply.

2. Our services

2.1 Kingsford Legal Centre (KLC)

KLC provides free legal advice, casework and community legal education to our local community in south-east Sydney.

KLC has a NSW state-wide Discrimination Law Clinic and a specialist Employment Law Clinic. We help provide the Migrant Employment Legal Service (MELS), addressing the exploitation of migrant workers in NSW.

KLC is part of the UNSW Sydney Law Faculty and provides clinical legal education to over 500 of its students each year. KLC has been part of the south-east Sydney community since July 1981.

2.2 Redfern Legal Centre International Student Service NSW (RLCISS)

Redfern Legal Centre (**RLC**) is an independent community legal centre providing access to justice for disadvantaged individuals in the Redfern area and across New South Wales. RLC runs the International Students Service NSW. The RLCISS is a specialist service catering exclusively to the 266,000 international students in NSW.

The RLCISS was established in 2011 and provides legal advice, advocacy and casework relating to the complex socio-legal problems impacting international students, alongside ongoing work in law reform and education. Working at the frontlines, the service is highly conscious of the concerns and issues impacting international students, which is vital when engaging with the wider Australian community, media, and government on behalf of students.

2.3 Migrant Employment Legal Service (MELS)

The MELS began in mid-2019 and is a joint initiative of Redfern Legal Centre, Marrickville Legal Centre, Inner City Legal Centre and Kingsford Legal Centre to provide migrants, temporary visa holders and culturally and linguistically diverse (**CALD**) clients across NSW with free employment law advice and representation. The MELS aims to address and remove the systemic barriers that allow for the exploitation of migrant workers across New South Wales.

3. Summary of recommendations

#	Recommendation	Page reference
1.	Increase scrutiny at the time ABNs are issued.	12
2.	Introduce more extensive education programs and targeted assistance to make sham contracting laws meaningful for people who hold temporary visas.	13
3.	Increase 'on-the-spot' inspection and assessment of industries at risk of sham contracting by regulators.	13
4.	Establish an Office of the Contractor Advocate to provide information to individual workers and businesses about whether they are independent contractors or employees, investigate and report on systemic non-compliance, and assist vulnerable workers to navigate local court, tribunals and other jurisdictions to recover minimum entitlements.	13
5.	Amend the Fair Work Act to state that it applies regardless of immigration status.	15
6.	Amend the Migration Act to provide bridging arrangements for temporary visa holders to pursue meritorious claims about wage theft or other breaches of workplace rights and conditions.	15
7.	Stop holding migrant workers strictly liable for breaches of visa work conditions.	16
8.	Strengthen the assurance protocol between the Fair Work Ombudsman and the Department of Home Affairs for exploited migrant workers and provide clarity of the extent of this protection. Extend protection to underpayment claims progressed through the courts.	16
9.	Remove the work condition on international students' visas.	17
10.	Formalise and publicise details of a visa amnesty to the 60 day limit for a temporary work (skilled) visa holder to find a new sponsor where (a) the worker raises allegations of workplace exploitation or (b) the worker has been stood down due to the COVID-19 pandemic.	18
11.	Reinstate the Status Resolution Support Service for all people seeking asylum in Australia.	18
12.	Extend the accessorial liability provisions to cover all relevant third parties, which may be achieved by adding to the responsible franchisor and holding company provisions.	20
13.	Broaden the existing definition of responsible franchisor entity and place the onus on the franchisor to show that they did not have the required level of influence and control.	21
14.	Clarify that responsible franchisor entities, holding companies and other responsible entities who contravene section 558B should also be taken to have contravened the relevant provisions contravened by their franchisee entity/subsidiary/indirectly controlled entity.	22
15.	Provide guidance about what constitutes 'reasonable steps' for a	22

#	Recommendation	Page reference
	franchisor or holding company to avoid contraventions.	
16.	Remove the requirement to prove actual knowledge for accessorial liability and require Directors and other possible accessories to take positive steps to ensure compliance within their business or undertaking.	23
17.	Establish an effective labour-hire licensing regime to more effectively regulate employers, particularly of temporary migrant workers.	23
18.	The Government should provide recurrent funding for community legal centres to fight wage theft and other breaches of workplace rights and conditions.	26
19.	Cost consequences should be introduced for those employers that unreasonably refuse to participate in a matter before the Fair Work Ombudsman. The Ombudsman should be empowered to issue Assessment Notices that set out an employee's entitlements. Introduce a reverse onus of proof so that an applicant is taken to be entitled to the amount specified in an Assessment Notice unless an employer proves otherwise.	28
20.	Fund the Fair Work Ombudsman to identify, investigate, and carry out enforcement activities against employers that are underpaying workers, particularly migrant workers.	29
21.	Establish a new wage theft tribunal, facilitating individual wage recovery via mediation and enforceable orders, based on the applicant-led model for bringing unfair dismissal claims at the Fair Work Commission.	30
22.	Increase the jurisdictional limit of the small claims jurisdiction of the Fair Work Division of the Federal Circuit Court of Australia from $20,000 to $30,000.	30
23.	The Fair Entitlements Guarantee should be extended to include all workers, including migrant workers. Further, the Fair Entitlements Guarantee should include employees with a court order where a company has been deregistered.	31
24.	Introduce a Wage Insurance Scheme so that if employees cannot access their unpaid wages via available legal frameworks, the insurance scheme can provide them with cover.	31
25.	Create a presumption that an employment relationship exists instead of an independent contracting relationship.	32
26.	Make it unlawful to misrepresent an employment relationship or a proposed employment arrangement as an independent contracting arrangement where the employer could be reasonably expected to know otherwise.	33
27.	Give the Fair Work Commission the power to make Minimum Entitlements Orders and Independent Contractor Status Orders.	34
28.	Amend the Fair Work Act to introduce deeming provisions that extend employee protections to outworkers in high-risk industries.	34

#	Recommendation	Page reference
29.	Introduce higher penalties for more serious or systemic cases of underpaid employment entitlements.	34
30.	Introduce criminal penalties for wage theft, accompanied by mechanisms that address the underlying vulnerabilities that allow the workplace exploitation of people who hold temporary visa holders, as outlined in our other recommendations.	35
31.	Implement the Productivity Commission's recommendation to provide a funding injection of $200 million to the legal assistance sector.	35
32.	Amend sections 357, 358 and 359 of the Fair Work Act to introduce higher penalties for 'serious contraventions' of these provisions.	36
33.	Introduce director identity numbers to help address phoenix activity.	36
34.	Require Directors to pay a compulsory insurance premium (similar to WorkCover) to fund the provision of community-based employment services and the Fair Entitlements Guarantee scheme.	36
35.	Include superannuation as one of the National Employment Standards.	37
36.	Introduce a legislative mechanism to provide independent contractors with a way to pursue unpaid superannuation directly.	37
37.	Remove the minimum earnings threshold and minimum age restrictions from superannuation.	37

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

We have set out drafting suggestions in relation to our recommendations in Appendix 1 to this submission.

4. Prevention of sham contracting

Sham contracting refers to the practice of falsely labelling an employee as an 'independent contractor' with fewer rights and protections. In our experience, many employers are using sham contracting to exploit people who hold temporary visas. The exploitation of members of newly arrived and refugee communities through the use of sham contracting arrangements is rife.

In the on-demand economy, factors contributing to wage theft and other breaches of workplace rights and conditions include:

- Opportunities provided for sham contracting;
- Opportunities for characterising highly dependent workers as contractors;
- The relative ease for employers to be anonymous and unable to be held to account for underpayments;
- Unequal bargaining power between employees and employers; and
- Lack of access to free legal services and awareness of the ramifications of contracting.

Sham contracting is used as a core business practice throughout the cleaning, security, road transport and distribution, home and commercial maintenance (e.g. painters), and building and construction industries (e.g. tilers and traffic controllers), among others.[5] All too often, we have seen clients engaged as contractors in these industries, where the working relationship was actually one of employer-employee because:

- They were paid an hourly or daily rate;
- They wore a uniform to work;
- All equipment required for the job was provided by the employer;
- They worked for a single employer;
- They had little discretion over their day-to-day tasks and were tightly under the control of the employer;
- They were unable to subcontract; and
- They were unable to control the days, times or hours of their work.

We have seen instances of employers obtaining an Australian Business Number (**ABN**) on behalf of workers, and jobs being offered conditional upon having an ABN. There is often little, if any, choice in a worker's 'acceptance' of their position as a contractor. It is a cause for grave concern that people who hold temporary visas are often told by the person hiring them that, if they have an ABN, they are automatically a contractor or told they will not be paid unless they obtain an ABN.

[5] Our services have also assisted clients outside these key industries, including in the education, health and clerical sectors.

Case study – Alina*

Alina was an international student who worked night shifts cleaning the building of a major energy retailer. She had only recently arrived in Australia. This was her first job. She found the job through a friend, who saw an ad on gumtree. When she met Joe, her boss, he initially offered her $17 an hour but increased the offer to $20 an hour when Alina complained. When Alina started work she was given a 13 page 'contract for services' document to sign. Despite the words in the contract, she was told what hours to work, given a uniform and provided with all tools and cleaning equipment. She worked in a team of other 'contractors', all wearing the uniform of her boss' company. She wasn't allowed to delegate her work and certainly didn't feel like she was running her own business. Joe provided Alina with template invoices and told Alina she must get an ABN. Alina provided invoices and completed time sheets after each shift. When Alina had worked for several weeks and not received any payment since starting the job, she contacted her boss about the issue and was ultimately terminated for making enquiries about her pay.

** Names have been changed for confidentiality.*

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

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

The problems our clients face as a result of being falsely engaged as an independent contractor when in fact they are (or should be treated as) employees include:

- They do not receive minimum award wages or entitlements, including leave. Our clients are mostly people who are low paid, award-reliant workers.
- They rarely receive superannuation contributions. This is the case even though Superannuation Guarantee Ruling 2005/1 provides that they must receive superannuation contributions if they are engaged under a contract that is principally for labour.[6]
- Contractors are often required to arrange their own tax and may need to organise workers compensation insurance, however many vulnerable contractors are not aware that they need to do this, or how to do this. As employees they should not have to do either of these things (only their PAYG tax return).

Currently, in order for an individual to receive compensation for underpayment as a result of sham contracting, an individual must make a claim in the appropriate jurisdiction (the Federal Circuit Court or Federal Court of Australia) establishing:

- That they were an employee, and

[6] Australian Taxation Office, *Superannuation Guarantee: Who Is an Employee?,* SGR 2005/1, 23 February 2005 <https://www.ato.gov.au/law/view/document?DocID=SGR/SGR20051/NAT/ATO/00001>.

- Their appropriate award classification, rate of pay and underpayment.

Many of our clients are not aware that there is a difference between an employee and independent contractor, and asking the questions necessary to apply the multi-factor test can be difficult. Applying the multi-factor test and attempting to explain this to a marginalised worker, let alone convince an employer that their characterisation of their worker is incorrect is both a time and resource-intensive task. Many of our clients are so desperate for payment and put off by the complexity of the law that they often opt to accept their misclassification as an independent contractor and seek instead to enforce the non-payment of their contractor agreement in the relevant tribunal or court. The client is then left to 'accept' often lower claims than what would otherwise be a claim for underpaid wages and accrued entitlements such as annual leave. They may also forfeit their ability to bring other claims (e.g. for unfair dismissal or workers compensation).

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

4.1 The Australian Business Register should increase scrutiny at the time sole trader ABNs are issued to identify sham contracting at an early stage

We submit that there should be a greater focus on prevention of sham contracting. One way to achieve this is by introducing independent scrutiny and education at the time of applying for an ABN.[7] Proper consideration of all the facts and circumstances and the relevant test should be applied before an ABN is issued. In no circumstances should a principal be able to obtain an ABN on behalf of a worker. ABNs should not be issued after a short internet application.

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

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

Recommendation 1

Introduce independent scrutiny and education at the time that an application for an ABN is made, including:

- *Proper consideration of all the facts and circumstances and the application of the relevant multi-factor test before an ABN is issued;*
- *In no circumstances should a principal be able to obtain an ABN on behalf of a worker; and/or*
- *ABNs should not be issued to individuals after a short internet application, and applicants who are individuals should be required to attend a face-to-face interview*

[7] Catherine Hemingway, 'Not Just Work: Ending the Exploitation of Refugee and Migrant Workers' (Report, WEstjustice, 2016) <https://www.westjustice.org.au/cms_uploads/docs/westjustice-not-just-work-report-part-1.pdf> and <https://www.westjustice.org.au/cms_uploads/docs/westjustice-not-just-work-report-part-2-(1).pdf>.

with an information officer (with interpreters where required), where education about the differences between contractors and employees (and their respective entitlements) is provided. Information about taxation and workplace injury insurance should also be provided at this time.[8]

4.2 Increase enforcement and education activities to stop sham contracting

The pervasiveness of wage theft, and other breaches of workplace rights and conditions, requires community organisations and regulatory agencies equipped with sufficient resources to assist people who hold temporary visas to identify and pursue their complaints, investigate workplace complaints and to launch investigations into serial offenders. Targeted enforcement and audit action, especially in key industries where people who hold temporary visas are disproportionately represented, is an important part of this.

In particular, significantly more needs to be done to clarify the distinction between employees and contractors. Greater education and targeted assistance are urgently required to make sham contracting laws meaningful for people who hold temporary visas, who are often from CALD backgrounds.

Increased 'on-the-spot' inspection and assessment by regulators would greatly assist in this regard, as people who hold temporary visas cannot be expected to self-report in all circumstances. Further, our experience giving legal help to marginalised workers suggests that many principals 'disappear' when contacted formally after the event.

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

Recommendation 2

Introduce more extensive education programs and targeted assistance to make sham contracting laws meaningful for people who hold temporary visas.[9]

Recommendation 3

Increase 'on-the-spot' inspection and assessment of industries at risk of sham contracting by regulators.

Recommendation 4

Establish an Office of the Contractor Advocate to provide information to individual workers and businesses about whether they are independent contractors or employees, investigate and report on systemic non-compliance, and assist people who hold temporary visas to navigate local court, tribunals and other jurisdictions to recover their workplace entitlements.

[8] We have also made a related recommendation about Director Identification Numbers below at Recommendation 33.
[9] We have made a related recommendation about the utility of education and targeted legal assistance for vulnerable workers more broadly below at Recommendation 18.

5. Amending the *Migration Act 1958* (Cth) to ensure people who hold temporary visas can complain with confidence

Our experience giving legal help to people who hold temporary visas confirms the work of Berg and Farbenblum who conclude that, *'It is rational for most migrant workers to stay silent. The effort and risks of taking action aren't worth it, given the slim chance they'll get their wages back.'*[10]

We regularly deal with people who hold temporary visas who face serious exploitation at work but are constrained from taking legal action due to the risk of visa cancellation. International student clients tell us that unscrupulous employers have threatened to report actual or fabricated breaches of their work conditions to the Department of Home Affairs (**DHA**) to silence their complaints about wage theft and other breaches of workplace rights and conditions. Such threats are a significant deterrent for people who hold temporary visas against taking legal action to enforce their legal rights.

People who hold temporary visas risk visa cancellation and removal if they breach the work conditions on their visas. Clients have told us that they would take action against wage theft if the DHA could give them assurances that they would not have their visas cancelled for a first-time breach of their visas.

Case Study: Employer threatening employee with DHA complaint

Tamara was on a student visa and employed by Therapists Pty Ltd* as a physical therapist for people with disabilities. Tamara came to RLCISS when she was terminated by Therapists Pty Ltd after she asked why she hadn't been paid for 3 weeks. When Tamara met with the RLCISS team, it was also discovered that she was misclassified as a contractor when she was a casual employee and underpaid in accordance with a Modern Award.*

RLCISS assisted Tamara to make a general protections application to the Fair Work Commission and represented her at the conciliation conference. Tamara had good evidence of adverse action being taken against her in breach of the Fair Work Act in the form of a message firing Tamara because her boss 'did not want workers who are slack and complain about delayed salaries'. This boss also made veiled threats that she would report Tamara to the DHA for 'doing the wrong thing'. Tamara had always been very careful and never breached her work conditions and found the whole situation incredibly stressful and became quite depressed.

*Tamara settled for 11 weeks' wages. She was happy with this outcome as she had not been able to find appropriate work since her dismissal. *Names changed for confidentiality.*

Currently, the Fair Work Ombudsman (**FWO**) offers migrant workers an 'assurance protocol' or 'amnesty' from visa cancellation for workers who have breached their work conditions, to support workers in coming forward to request assistance from the FWO and provide evidence or information about exploitation.[11] The FWO has an arrangement with the DHA that a person's temporary visa will 'generally' not be cancelled if they:

[10] Dianne Nazaroff, *New Report Claims 'Broken System' Fails Migrant Workers Suffering Wage Theft* (29 October 2018) UNSW Sydney <https://newsroom.unsw.edu.au/news/social-affairs/new-report-claims-broken-system-fails-migrant-workers-suffering-wage-theft>.
[11] Fair Work Ombudsman, Australian Government, *Visa Holders and Migrants* (2020) <https://www.fairwork.gov.au/find-help-for/visa-holders-and-migrants>.

- were entitled to work;
- believe they have been exploited at work;
- have reported their circumstances to FWO; and
- actively assist FWO in an investigation.[12]

The migrant worker must commit to abide by visa conditions in the future and there must be no other basis to cancel the worker's visa.

Further details of the agreement between FWO and the DHA are unknown. The assurance protocol requires the FWO to share information about a client's breach of visa conditions with the DHA in order for the DHA to give the client an exemption from cancelling their visa. Our clients are uncomfortable with the FWO sharing this information.[13] Our clients often have concerns that they will not be protected against visa cancellation where they report workplace exploitation, but no action is taken by the FWO.[14] While, to our knowledge, none of our clients' visas have been cancelled due to making a report of exploitation to the FWO, many of our clients are understandably reluctant to report to the FWO without a guarantee or 'something in writing' that they will not have their visa cancelled.

Finally, we have seen a disturbing trend where clients have lost their jobs in unlawful circumstances, and then have been sent home prior to the conclusion of their legal proceedings. People who hold work visas requiring sponsorship – such as Temporary Work (Skilled) visa (subclass 457) or Temporary Skill Shortage visa (subclass 482) – are especially at risk of this situation. We note that the Senate Education and Employment References Committee has made a recommendation to review migration laws to allow temporary visa holders to pursue meritorious claims, which we support.[15]

In order to combat workers' fear of being forced to leave Australia if they report exploitation and to comprehensively deter migrant worker exploitation, it is necessary to address the conditions that allow for their mistreatment and stop them reporting it.

Recommendation 5

*The Fair Work Act 2008 (Cth) (**FW Act**) should be amended to state that it applies regardless of immigration status.*

Recommendation 6

Migration laws should be reviewed and amended to provide adequate bridging arrangements for temporary visa holders to pursue meritorious claims about wage theft or other breaches of workplace rights and conditions.

[12] Ibid.
[13] Recommendations were made to the Migrant Worker Taskforce (**MWT**) that an information 'firewall' be created between the DHA and FWO to address the reluctance of migrant workers to report exploitation: Migrant Workers' Taskforce, 'Report of the Migrant Workers' Taskforce' (March 2019) 51 <https://www.ag.gov.au/industrial-relations/industrial-relations-publications/Documents/mwt_final_report.pdf> (**MWT Report**).
[14] Ibid. The MWT has indicated that FWO and the DHA are conducting further analysis to consider whether visa holders participating in a broader range of FWO services can access the assurance protocol.
[15] Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (2016) xii, 161 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/~/media/Committees/eet_ctte/temporary_work_visa/report/report.pdf>.

Recommendation 7

*The Migration Act 1958 (Cth) (**Migration Act**) should be amended to introduce a proportionate system of penalties in relation to visa breaches - limiting visa cancellations to serious breaches of visa conditions. In particular, the DHA should stop holding migrant workers strictly liable for breaches of visa work conditions. A Ministerial direction should be issued under s 499 of the Migration Act in the form of a decision-making protocol for DHA to use to issue workers with a warning or an administrative fine/civil penalty instead of having their visas cancelled.*

Recommendation 8

Strengthen the assurance protocol between the FWO and the DHA to provide stronger protection from visa cancellation for workers with genuine exploitation complaints, and publicise the protocol in more detail to remove ambiguity about when the assurance can or cannot be relied upon. It should also be extended to workplace claims being progressed through the courts.

5.1 Students visa (subclass 500) (International Students)

Wage theft is rife among the employers of international students, who along with working holiday makers, make up 88% of Australia's migrant workforce.[16] We see many clients who have been underpaid or not paid their hourly rate, overtime, penalty rates, annual leave, shift loadings, holiday loading and under-classified in their role. In this way, many international students are being exploited in ways they are not even aware and it is not until they seek advice that they realise the extent of the underpayment. However, despite the high monetary value of some underpayment claims, many of our international student clients express a reluctance to proceed with their claims.

International students on a subclass 500 or 574 student visa[17] are subject to visa condition 8105,[18] which prohibits them from working more than 40 hours per fortnight when their course is in session. If an international student is found to have breached this condition, the DHA may cancel their visa.[19] Many of our clients have reported that they are working in excess of these hours *because* they are so severely underpaid they were not able to meet their basic living expenses.

If the employment visa condition 8105 was removed, international students would be able to work in the same way as local students. These students would not need to risk breaching their visas in order to support themselves financially. Other conditions on their visas would still require students to focus on the object of their visa: their studies. These conditions require students to attend 80% of their classes and achieve satisfactory course results.[20]

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

[16] Hemingway, above n 7.
[17] We have only considered subclass 500 (student) visas in this submission, for visa applications made after 1 July 2016.
[18] *Migrations Regulations 1994* (Cth) sch 8 cl 8105 (**Migration Regulations**).
[19] *Migration Act 1958* (Cth) s 116.
[20] Migration Regulations sch 8 cl 8202.

Recommendation 9

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

5.2 Skilled visa (482) holders

While employees on Temporary Work (Skilled) visas may be professionals with a higher level of education than other migrant workers, they are still vulnerable to exploitation. The Wage Theft Survey found that of all participants in the survey, 7% were on a Temporary Work (Skilled) visa, subclass 457 (now 482) when paid their lowest wage while working in Australia.[21] We consider that the onerous visa conditions specific to the 482 visa expose these visa holders to exploitation. The 482 visa (and residual 457 visa) holders are uniquely vulnerable because their ability to live in Australia is effectively determined by their employer.[22]

The 482 visa can be a pathway to permanent residency for visa holders if certain conditions are met. Many subclass 457 and 482 visa holders apply to become permanent residents through the Employer Nomination Scheme (subclass 186) visa program.[23] A migrant's ability to qualify for the subclass 186 permanent visa is conditional on an employer agreeing to continue to sponsor the migrant and the migrant performing skilled work that is approved by the DHA. The migrant must also satisfy other visa eligibility requirements, which includes a work experience requirement (that generally requires a migrant to work for the employer for 3 years), amongst other criteria.

482 visa holders must maintain full-time employment with their sponsoring employer[24] and should only work in the occupation that their sponsor has nominated them to perform. If employment ends for whatever reason, these visa holders have only 60 days to obtain another sponsor or depart Australia.[25] Further, if a subclass 482 visa holder wishes to change employers, the new proposed employer must be approved by the DHA as a sponsor and must seek DHA approval to nominate the visa holder to perform a nominated occupation. The visa holder cannot commence work with the new employer until the new nomination has been approved.

These visa conditions create disincentives for employees from complaining about conditions at work, as they fear the negative visa ramifications of losing their job, leaving employers to act with impunity. Our clients on 482 visas who have partially completed their three years of sponsored employment have reported staying with their employer despite being unfairly

[21] Laurie Berg and Bassina Farbenblum, 'Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey' (Report, November 2017) 19 <https://www.mwji.org/highlights/2017/11/14/report-released-wage-theft-in-australia-findings-of-the-national-temporary-migrant-work-survey#:~:text=Key%20findings%20include%3A,in%20which%20temporary%20migrants%20work.>.
[22] Senate Standing Committees on Education and Employment, Parliament of Australia (2016) *The Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders* ch 6 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Report/c06>.
[23] Department of Home Affairs, Australian Government, *Temporary Skill Shortage Visa (Subclass 482): Labour Agreement Stream* (17 July 2020) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-skill-shortage-482/labour-agreement-stream#Eligibility; Department of Home Affairs, Australian Government, *Employer Nomination Scheme (Subclass 186): Temporary Residence Transition Stream* (17 March 2020) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/employer-nomination-scheme-186/temporary-residence-transition-stream>.
[24] Migration Regulations sch 8 visa condition 8607.
[25] Department of Home Affairs, Australian Government, *Check Visa Details and Conditions: Temporary Skill Shortage (Subclass 482) – Labour Agreement* (26 February 2020) <https://immi.homeaffairs.gov.au/visas/already-have-a-visa/check-visa-details-and-conditions/see-your-visa-conditions?product=482-67#>.

exploited or underpaid, due to the requirements for receiving a permanent pathway, and the 60 day time limit restricting their ability to secure another employer.

Compliance with these visa conditions has created unique vulnerabilities for subclass 482 visa holders stood down during the COVID-19 pandemic. If such an employee is stood down for more than 60 days, they will be in breach of their visa conditions. Further, while these visa holders are stood down and not being paid, the conditions on their visa prohibit them from working for another employer, for example, by stacking shelves at a supermarket.

Our understanding is that, in practice, the DHA does not enforce the 60 day limit in instances where the visa holder has lodged a complaint of unpaid wages with the Fair Work Ombudsman (**FWO**). Further, in response to the COVID-19 pandemic, the DHA has indicated that visa holders who are stood down for over 60 days will maintain visa validity.[26] DHA has not issued further formal policy guidance about either of these concessions. Formalising DHA flexibility to visa validity and providing guidance when it will be applied would increase the visa holder's ability to find alternate work and seek redress without risking visa cancellation, removal and any future opportunities to live and work in Australia.

Recommendation 10

The DHA should formalise and publicise details of a visa amnesty to the 60 day limit for a temporary work (skilled) visa holder to find a new sponsor where (a) the worker raises allegations of workplace exploitation or (b) the worker has been stood down due to the COVID-19 pandemic.

5.3 People seeking asylum on bridging visas

Because of the precarious nature of their situation in Australia, many of our clients who are seeking asylum or who hold temporary protection visas have reported that they have found getting work extremely difficult, and when they do get work it is often in insecure, unsafe, low-paid or under-paid jobs. Our clients advise us they must stay in these jobs 'just to survive'. Many have reported being underpaid and forced to work in exploitative conditions, but they do not speak up or take action for fear of jeopardising their job or their visa application.

This situation was made worse by the government decision to make cuts to the Status Resolution Support Service (SRSS) for the most vulnerable cohort of boat arrival asylum seekers – which has meant that many asylum seekers no longer have access to counselling, subsidised medication or income support. For those asylum seekers on bridging visas their access to sustained employment is therefore critical for general subsistence with work rights, entitlements and safety becoming secondary considerations.

Recommendation 11

Reinstate the Status Resolution Support Services payment for all people seeking asylum in Australia.

[26] The Hon David Coleman MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, 'Coronavirus and Temporary Visa holders' (Media Release, 4 April 2020) <https://minister.homeaffairs.gov.au/davidcoleman/Pages/Coronavirus-and-Temporary-Visa-holders.aspx>.

6. Extension of liability and supply chain measures

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.[27] It has been suggested that the 'very structure of the supply chain is conducive to worker exploitation,' as parties near the bottom of the supply chain tend to have low profit margins and experience intense competition.[28]

Many of our clients find themselves at the bottom of long and complex supply chains, riddled with sham arrangements. Often, the entity at the top is a large, profitable, well-known company. We have also seen significant exploitation arising from multi-tiered subcontracting arrangements.[29] Extension of liability and supply chain measures should be introduced to combat wage theft and other breaches of workplace rights and conditions.

6.1 Accessorial liability for people or companies involved in workplace contraventions should be extended to all relevant third parties

The introduction of the current framework for accessorial liability under section 550 of the FW Act for those involved in workplace contraventions was a positive step towards ensuring workers are not prevented from enforcing their rights due to complex supply chain arrangements or the corporate structures of employers.

However, the accessorial liability provisions do not go far enough to adequately regulate the behaviour of lead firms, head contractors, or other employment structures such as labour-hire arrangements.

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

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

Case study – disappearing employers

Batsa came to Australia in 2018 and found a job through an ad on Gumtree to wash and dry cars. Batsa was hired by a man named Paul. Paul would pick Batsa up from the train station and drive him to various well-known car dealerships where he would hand wash and dry cars

[27] Richard Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships* (The Federation Press, 2012) 49.
[28] Ibid 49.
[29] Ibid 67.

after business hours. The agreed pay was a flat rate of $15 an hour. Sometimes Batsa would work until 2.00am and he would have to walk home from wherever Paul had dropped him off. One night when Paul had organised to meet Batsa, he never showed up. After that night Batsa was unable to contact Paul at all. Batsa received no payment for the hours he worked.

Recommendation 12

Extend the accessorial liability provisions to cover all relevant third parties, which may be achieved by adding to the responsible franchisor and holding company provisions.

Under this approach, in addition to protecting workers in franchises and subsidiary companies, supply chains and labour hire hosts would also be responsible for the protection of workers' rights. The law should provide protection and redress for all workers, regardless of the business structure set up. It should equally hold all businesses to account if they receive the benefit of someone's labour, regardless of how they structure their affairs.

To achieve this, new subsections 558A(3) and 558B(2A) should be inserted into the FW Act to define responsible supply chain entities and extend responsibility to them.

Like responsible franchisors, responsible supply chain entities will be responsible for a breach where they knew or could reasonably have been expected to know that a breach would occur in their supply chain, and they failed to take reasonable steps to prevent it. It is intended that these provisions be broad enough to capture other arrangements for the supply of labour, including labour hire arrangements.

For further details and example drafting see Appendix 1.

6.2 Extend the definition of 'responsible franchisor' to increase the liability of franchisors for contraventions of workplace laws by franchisees

Currently, other than the accessorial liability provisions in section 550, the only other ways to attribute responsibility to a third party under the FW Act are via the responsible franchisor and holding company provisions in sections 558A to 558C, which were introduced as part of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) (**Protecting Vulnerable Workers Act**).

Under these provisions, holding companies and responsible franchisor entities contravene the FW Act if they knew or could reasonably be expected to have known that a contravention (by a subsidiary or franchisee entity) would occur or was likely to occur.

The responsible franchisor and holding company provisions are too narrow and place unrealistic burdens of proof on marginalised workers. Additionally, the provisions are too piecemeal and must be extended to cover other fissured forms of employment, including supply chains.

Sections 558A and 558B of the FW Act define 'franchisee entity' and 'responsible franchisor entity' and outline the responsibility of responsible franchisor entities and holding companies for certain contraventions. To hold a franchisor to account, the current definition of responsible franchisor entity requires a worker to show that the franchisor has a 'significant degree of influence or control over the franchisee entity's affairs'.

For workers, who often lack access to necessary documents and information, this is an unnecessarily difficult burden to overcome. It may discourage franchisors from taking an active

role in promoting compliance in their franchises, and instead would reward those that take a hands-off approach or who structure their contracts in such a way as to distance themselves from their franchisees. This requirement (that the franchisor be shown to have a significant degree of influence or control over the franchisee entity) is unnecessary because the degree of control able to be exercised by a franchisor is already a relevant consideration when determining liability under section 558B(4)(b).

In addition, unlike section 550 of the FW Act (which deems that parties involved in a contravention of a provision are taken to have contravened that provision), it is not clear from the drafting that responsible franchisor entities and holding companies will be liable for the breaches of the franchisee entity or subsidiary. Rather, it appears that they may only be liable for breaching the new provisions. This seems contrary to the intention of the Protecting Vulnerable Workers Act as expressed in the explanatory memorandum to the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (**Protecting Vulnerable Workers Bill**),[30] and needs to be clarified.

We support Dr Tess Hardy and Professor Andrew Stewart's recommendation to 'the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies' inquiry that a broader test for secondary liability be introduced *'in terms that are sufficiently general to apply to any form of corporate or commercial arrangement, while retaining the safeguards in that provision to prevent regulatory overreach.'*[31] However, for reasons outlined above, we note that the requirement for a 'significant degree of influence or control' as a threshold test may be problematic for marginalised workers, especially in a supply chain context where a lead firm may turn a blind eye to exploitation and therefore not have/take 'significant' control over shonky subcontractors. We suggest an alternative model below, whereby the degree of influence or control is relevant in determining whether reasonable steps were taken.

In any case, we also support Professor Andrew Stewart and Dr Tess Hardy's recommendation that:

> *'whether a person has significant influence or control over wages or employment conditions should be determined by reference to the substance and practical operation of arrangements for the performance of the relevant work.*
>
> *A person should be deemed to have significant influence or control if it sets or accepts a price for goods or services, or for the use of property, at a level that practically constrains the capacity of the relevant employer to comply with its obligations.'*[32]

Recommendation 13

Broaden the existing definition of responsible franchisor entity to remove the threshold requirement to show a 'significant degree of influence or control'. The onus should be on the franchisor to show that they had limited influence and control as part of a reasonable steps defence under subsection 558B(4) of the FW Act.

Subsection 558A(2)(b) of the FW Act should be removed (or at least the reference to 'significant' be deleted) to broaden the definition of responsible franchisor entity.

[30] Explanatory Memorandum, *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Cth) 6.
[31] Andrew Stewart and Tess Hardy, Submission No 8 to Senate Standing Committees on Education and Employment, *Inquiry into the Exploitation of General and Specialist Cleaners in Retail Chains for Contracting or Subcontracting Cleaning Companies* <https://www.aph.gov.au/DocumentStore.ashx?id=5e0afca6-d112-49a9-abbc-2a31c027cc27&subId=613290> 3.
[32] Ibid.

For details see Appendix 1.

6.3 Clarify the liability of relevant third parties under the responsible franchisor and holding company provisions

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

Recommendation 14

Insert a new section 558AA into the FW Act to clarify that responsible franchisor entities, holding companies and other responsible entities who contravene section 558B should also be taken to have contravened the relevant provisions contravened by their franchisee entity/subsidiary/indirectly controlled entity.

For details please see Appendix 1.

6.4 Reasonable steps defence

The 'reasonable steps' defence for franchisors and holding companies should be clarified.

Sections 558(3) and 558(4) of the FW Act create a defence for franchisors and holding companies where reasonable steps are taken to prevent a contravention by the franchisee entity or subsidiary of the same or a similar character.

Recommendation 15

Encourage proactive compliance by providing guidance about what constitutes 'reasonable steps' for a business to avoid contraventions by including the examples provided for in paragraph 67 of the Vulnerable Workers Bill Explanatory Memorandum as a legislative note into section 558B(4) of the FW Act. In addition, a legislative note should be used to clarify where the reasonable steps defence will not apply – for example, where a lead firm accepts a tender that cannot be successfully completed except by exploiting workers, or where a franchise agreement cannot be run at a profit without exploitation.

For details see Appendix 1.

6.5 Lower the bar for knowledge of contraventions

We consider that the requirement of actual knowledge is a prohibitively high bar to establish assessorial liability of the host employer or those at the apex of a supply chain or franchise, and should not be a decisive factor in determining whether to extend liability to another person or company.

The accessorial liability provisions have been interpreted such that an accessory must be aware of the contravention at the time it occurs. This rewards those accessories who fail to address

unlawful behaviour once they are aware of it – for example, a director who discovers a breach after it has occurred, and then fails to take steps to rectify any underpayment or other problem, will not be held liable.

This knowledge requirement is problematic for marginalised workers. When we have clients who are significantly underpaid, we often send a detailed letter of demand. This letter sets out details of the alleged underpayment, including a copy of relevant award provisions and our calculations. Unless section 550 is broadened to capture 'failure to rectify' type situations, in a no-cost jurisdiction there is little legal incentive for accessories to respond to our letters and fix their unlawful activity.

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

Recommendation 16

Amend section 550 of the FW Act to remove the requirement to prove actual knowledge and require Directors and other possible accessories to take positive steps to ensure compliance within their business or undertaking.

In Appendix 1 we provide two suggested amendments: the first involves amending section 550 such that a person will be involved in a contravention if they knew or could reasonably be expected to have known that the contravention, or a contravention of the same or a similar character would or was likely to occur. Importantly, if a person fails to rectify a contravention once they become aware of it, they will also be involved in the contravention.

The second proposed amendment involves the insertion of a new section 550A, largely modelled on the model Work Health and Safety legislation, which places a primary duty on persons to prevent breaches of the FW Act, and requires officers to undertake due diligence.

6.6 Creation of Federal Labour Hire Licensing Authority

A federal labour hire licensing scheme should be established, as recommended in the Not Just Work Report,[33] and ensure fair pay for labour hire employees. We recommend that this regime be given a broad remit (i.e. across all industries) and that the scheme be designed with effective mechanisms to address non-compliance.

Recommendation 17

Establish an effective labour-hire licensing regime to more effectively regulate employers, particularly of temporary migrant workers.

[33] Hemingway, above n 7.

7. The most effective means of redress for wage theft and other breaches of workplace rights and conditions

7.1 Community legal centres at the forefront of redress efforts

The Wage Theft Report indicated that migrant workers are interested in enforcing their employment rights.[34] Due to vulnerability to visa cancellation because of work conditions on their visas, many migrant workers require legal assistance to take any action against such conduct.

There are limited services available to help migrant workers with their legal problems at work, or more generally. FWO commenced 35 matters in court in 2017-18.[35] Workers may obtain advice from their local community legal centre, their union or the FWO. The capacity of the community legal sector to advise and represent migrant workers in underpayment complaints is limited.[36] Reports indicate that migrant workers tend not to join their union, and that despite the FWO's significant efforts to engage with this cohort, relatively few contact the agency, through its Infoline or otherwise.[37]

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

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

Unfortunately, there is very little funding available for employment law services. Existing services are struggling to meet demand with limited resources. Many community legal centres cannot meet demand for telephone assistance (even fewer receive casework support and the

[34] In the context of taking action on wage theft. Bassina Farbenblum and Laurie Berg, 'Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia' (Report, October 2018) 7–8 <https://static1.squarespace.com/static/593f6d9fe4fcb5c458624206/t/5bd26f620d9297e70989b27a/1540517748798/Wage+theft+in+Silence+Report.pdf>.
[35] Attorney-General's Department, Australian Government, 'Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance' (Discussion Paper, September 2019) 3 <https://www.ag.gov.au/sites/default/files/2020-03/strengthening-penalties-for-non-compliance-discussion-paper.pdf>.
[36] See Productivity Commission, *Access to Justice Arrangements* (Inquiry Report, vol 2, 5 September 2014) 734–6 <https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume2.pdf>.
[37] Federation of Community Legal Centres Victoria, 'Putting the Law to Work: Meeting the Demand for Employment Law Assistance in Victoria' (Report, August 2014) <https://d3n8a8pro7vhmx.cloudfront.net/fclc/pages/153/attachments/original/1520486636/putting_the_law_to_work_report_web_final.pdf?1520486636>.

most vulnerable tend not to use a telephone service). Justice Connect, a community organisation that helps facilitate pro bono referrals, reports that employment law is one of the top four problems that people request assistance for, however only around one fifth of matters receive much needed help.[38] As observed in a Report by the Federation of Community Legal Centres, 'there is a significant gap between the need and demand for assistance and the services that are currently available.'[39]

Despite being best placed to provide face-to-face comprehensive assistance embedded in the community, very few generalist community legal centres provide employment law services. This is not due to a lack of need. Employment law is a highly specialised area of law with short limitation periods, and there is no recurrent funding for generalist centres to do this work. This means that centres are often unable to allocate scarce resources to this area.

> ***Case study – CLCs helping migrant workers***
>
> *Saiful worked as a cleaner. His boss was always late paying his wages. Saiful was called 'dirty Indian' and directed to clean in unsafe places. Whenever Saiful asked about his unpaid wages, his boss always promised he would be paid 'soon'. When Saiful sent a text message saying he was going to a lawyer to get advice about his unpaid wages, he was fired.*
>
> *Saiful spoke quite good English. At a community legal centre night service appointment, he received assistance to draft a general protections application. Saiful was informed of the process, and encouraged to contact the community legal centre once a conciliation was scheduled so that the centre could assist him to prepare. At the time, the centre did not have capacity to represent Saiful.*
>
> *Saiful attended the conciliation unrepresented and received a paltry settlement offer. Without advice, Saiful did not know what to do. He refused the offer, and despite the centre offering to assist with next steps, took no further steps to pursue his claim. Saiful was ultimately unable to pursue his matter, despite having a very strong general protections claim.*

The value of community organisations in assisting vulnerable workers has been widely recognised. In 2009 the FWO conducted a review of the need for and provision of Community-Based Employment Advice Services in the light of the introduction of the Fair Work regime (**Booth Report**).[40] The Report highlights the importance of Community-Based Employment Advice Services for marginalised workers:

> *Workers who are trade union members can go to their union, workers who can afford to do so can go to a lawyer and workers who are confident and capable can use the information provided by the government body to look after themselves. However, this leaves a significant group of workers with nowhere to go in the absence of community-based services.*
>
> *These are the workers who because of their industry or occupation, employment status or personal characteristics are also more likely to be vulnerable to exploitation at work.*

[38] Hemingway, above n 7, 139.
[39] Federation of Community Legal Centres Victoria, above n 37, 5.
[40] Anna Booth, 'Report of a Review of Community-Based Employment Advice Services' (Report to the Fair Work Ombudsman, 30 September 2009) <https://www.fairwork.gov.au/ArticleDocuments/716/report-of-a-review-of-community-based-employment-advice-services.pdf.aspx>.

They experience a 'double whammy' of vulnerability at work and an inability to assert their rights.[41]

Without assistance, people who hold temporary visas cannot enforce their rights, and employers can exploit with impunity. Community legal centres are required to work alongside regulators and unions to provide additional support to people who hold temporary visas. However, there is no recurrent funding for generalist centres to do this work, and significant unmet need.

Recommendation 18

The Government should provide recurrent funding for community legal centres to deliver the following:

- *Legal service: face to face, comprehensive legal advice and assistance to marginalised workers who have a problem at work, and referrals to mainstream agencies where appropriate;*
- *Education program: coordination and delivery of a tailored Community Legal Education program to marginalised workers, including community leaders and community workers, to raise awareness of laws and services that can assist and prevent exploitation, including:*
    - *Direct education programs for community members;*
    - *Train the trainer programs for community leaders; and*
    - *Education programs for community workers in key organisations working with newly arrived communities.*
- *Systemic change: 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.*

7.2 Increase the effectiveness of the FWO

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

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

[41] Ibid 14.

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

> ***Case study – migrant workers approaching FWO***
>
> *Sumit cannot read or write in his own language, or in English. He worked as a cleaner and was engaged in a sham contracting arrangement. Sumit had never heard of the difference between contractors and employees, nor was he aware of the minimum wage.*
>
> *A community legal centre 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 the centre assisted Sumit to complain to the FWO. The employer did not attend mediation, and the 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. The community legal centre helped Sumit to write the application.*

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

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

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

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

The Applicant should be able to determine whether or not they accept the binding determination. If they do not accept it, they retain the option of proceeding to Court. Importantly, the FWO should also be empowered to hold individual directors jointly and severally liable for any amount owing, including penalties. Again, this will act as an incentive to resolve disputes sooner.

We call for a review of current FWO powers and processes, and recommend that powers be expanded to enable such determinations. This recommendation echoes the Senate Education and Employment References Committee's call for an independent review of the resources and powers of the FWO.[42]

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

Recommendation 19

Cost consequences should be introduced for employers that unreasonably refuse to participate in a matter before the FWO by amending s.570(2)(c)(i) of the FW Act to refer to matters before the FWO as well as the FWC, and by amending s.682 of the FW Act in relation to Functions of the FWO. For details see Appendix One.

FWO should be empowered to issue an Assessment Notice that sets out the FWO's findings as to an employee's entitlements where an employer refuses to participate in mediation. An applicant may then rely on the Assessment Notice in court proceedings. Where the applicant has an Assessment Notice, amend the FW Act to introduce a reverse onus of proof so that the applicant is taken to be entitled to the amount specified in an Assessment Notice unless an employer proves otherwise.

For details see Appendix 1.

7.3 Fund the FWO adequately so they can proactively undertake recovery activities

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

It is essential that agencies take proactive measures in key industries and locations where there is suspected widespread exploitation. Such measures should include inspection of records and actions to recover any discovered underpayments. FWO has undertaken such initiatives in the past,[43] and more extensive and regular initiatives would be beneficial.

We recognise the difficulties in changing industry-wide underpayment practices. In 2017-2018, FWO made the hospitality industry, an industry in which people who hold temporary visas are disproportionately represented, a key focus of their compliance operations.[44] In doing so, FWO secured a 56% increase in court ordered penalties for this period.[45] We encourage and support the industry focused crackdown on non-compliance and recommend it be extended to other

[42] Senate Education and Employment References Committee, above n 15, xiv, 278–283, 327–328.
[43] Fair Work Ombudsman, Australian Government, 'An Inquiry into the Procurement of Cleaners in Tasmanian Supermarkets' (February 2018) <https://www.fairwork.gov.au/reports/inquiry-into-the-procurement-of-cleaners-in-tasmanian-supermarkets/download-pdf>.
[44] Fair Work Ombudsman, Australian Government, 'National Compliance Monitoring Campaign #2' (November 2018) <https://www.fairwork.gov.au/ArticleDocuments/714/national-compliance-monitoring-campaign-report-number-2.pdf.aspx>.
[45] Ibid.

industries in which people who hold temporary visas are disproportionately represented, including horticulture and retail. We appreciate that without increased funding, the FWO is not able to implement all of our recommendations. Greater resourcing and coercive powers of the FWO and other agencies would enhance outcomes for the most vulnerable. We echo recommendation 29.2 of the Productivity Commission in its report on the Workplace Relations Framework:

> *'The Australian Government should give the Fair Work Ombudsman additional resources to identify, investigate, and carry out enforcement activities against employers that are underpaying workers, particularly migrant workers.'*[46]

Recommendation 20

FWO should receive additional funding to identify, investigate, and carry out enforcement activities against employers that are underpaying workers, particularly migrant workers.

7.4 Create a new Wage Theft Tribunal

We support efforts to help employees bring wage recovery action against their employer and initiatives to facilitate cultural change so that employers will stop underpaying workers. The legal pathways to wage recovery are costly, require significant effort and are often risky for the visa status of temporary migrant workers.[47] There is no current, effective pathway providing access to justice for people who hold temporary visas to recover their wages that is timely, affordable and easy to understand.

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

The 2019 Report of the Migrant Worker Taskforce (**MWT Report**) indicates that in 2016-2017 the average small claims matter in the Fair Work Division of the Federal Circuit Court took 4.3 months from lodgement to finalisation.[48] The 2017-2018 Federal Circuit Court Report estimates the median time for trial in the general division is 15.2 months, a figure not specific to the Fair Work Division. For working holiday makers who complete a 6 month farm stay, the wait required to pursue a claim, particularly in the General Division, may extend past the length of their stay.

We have found that people who hold temporary visas sometimes do not initiate legal proceedings because they know they will not be in the country long enough to see the end of their court process. Legal proceedings are too long to allow them to recover their underpaid entitlements.

Our lawyers and volunteers regularly spend days calculating how much a single client has been underpaid. Our services do not have the capacity to represent every client that we advise, and

[46] Productivity Commission, Australian Government, 'Workplace Relations Framework', (Inquiry Report No 76, vol 2, 30 November 2015) <http://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume2.pdf> 925–926.
[47] Farbenblum and Berg, above n 34, 6.
[48] MWT Report, above n 13, 94.

so some clients calculate their underpayment, prepare and file their matters themselves, with varying levels of success.

Due to visa concerns and the assurance protocol between FWO and the DHA, (see section 5 above) the only suitable pathway for some people who hold temporary visas to pursue is a FWO complaint. However, that is not always an avenue for the individual recovery of wages. The FWO is concerned with overall workplace compliance and is not an advocate for complainants.[49] FWO cannot guarantee the recovery of wages, disincentivising workers from making complaints. The Wage Theft Survey states that *'for every 100 underpaid migrant workers, only three went to the Fair Work Ombudsman. Of those, well over half recovered nothing.*'[50]

Recommendation 21

Establish a new wage theft tribunal, facilitating individual wage recovery via mediation and enforceable orders, based on the applicant-led model for bringing unfair dismissal claims at the Fair Work Commission.

Recommendation 22

Increase the jurisdictional limit of the small claims jurisdiction of the Fair Work Division of the Federal Circuit Court of Australia from $20,000 to $30,000.

7.5 Extend the Fair Entitlements Guarantee scheme

Even when people who hold temporary visas do decide to initiate legal action, they sometimes then face the significant problem of their employers entering into liquidation before entitlements are recovered. Sometimes these businesses then re-emerge as new entities that cannot be legally pursued. Such behaviour is known as 'illegal phoenix activity' and is estimated to cost $1,660 million to the Australian Government each year.[51] The cost to employees in owed wages and entitlements is estimated to be between $31 million to $298 million.[52] Phoenixing is all too common in the building, cleaning, cafés and restaurants, horticulture, and childcare services industries,[53] all areas that rely heavily on the labour of people who hold temporary visas.

If an Australian citizen, permanent resident or New Zealand citizen employee has been employed by one of these companies, they are able to apply to the Fair Entitlements Guarantee (**FEG**) to recover:

- unpaid wages – up to 13 weeks;
- unpaid annual leave and long service leave;
- payment in lieu of notice—up to five weeks; and
- redundancy pay—up to four weeks per full year of service.[54]

[49] Fair Work Ombudsman, Australian Government, *Our Purpose* (2020) <https://www.fairwork.gov.au/about-us/our-purpose>.
[50] Nazaroff, above n 10.
[51] Australian Tax Office, Australian Government, *The Economic Impact of Potential Illegal Phoenix Activity* (16 July 2018) <https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/The-economic-impact-of-potential-illegal-phoenix-activity/>.
[52] Ibid.
[53] Ibid.
[54] Attorney General's Department, Australian Government, *Fair Entitlements Guarantee (FEG)* (2020) <https://www.ag.gov.au/industrial-relations/fair-entitlements-guarantee/Pages/default.aspx>.

People who hold temporary visas are not eligible for the FEG unless they are from New Zealand.[55] We can identify no principled basis for this, given that all migrant workers pay income tax (including working holiday makers who earn below $37,000 taxed at 15%). Recommendation 13 in the MWT Report supports the amendment of FEG to include migrant workers but at the time of writing this has not been implemented.[56]

We refer to WEstjustice's 2017 submission to the Federal Government's *Review of the Fair Entitlements Guarantee (FEG) scheme to address corporate misuse of the Scheme*.[57] In this submission, WEstjustice recommends an expansion of the FEG scheme to cover workers that have meritorious claims and are unable to obtain back payment from their employers. In particular, WEstjustice recommends that the FEG scheme be expanded:

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

Recommendation 23

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

7.6 Introduce a wage insurance scheme

Where employees cannot access their unpaid wages via available legal frameworks, an insurance scheme should be available.

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

Recommendation 24

Introduce a Wage Insurance Scheme so that if employees cannot access their unpaid wages via available legal frameworks, the insurance scheme can provide them with cover.

7.7 Create a rebuttable presumption that an employment relationship exists

A reverse onus creating a presumption that an employment relationship exists should be introduced to ensure minimum entitlements for all workers and to require principals to prove that contractors are operating their own business

Removing legislative incentives to rip off vulnerable workers is a simple and cost-effective way to reduce exploitation. We recommend that rather than applying the multi-factor test to each situation where there is doubt as to a worker's true status, a statutory presumption would increase efficiency and certainty. This definition should assume that all workers are employees, unless proven otherwise. Importantly, our proposed amendment shifts the onus off

[55] *Fair Entitlements Guarantee Act 2012* (Cth) s 10(1)(g).
[56] MWT Report, above n 13, 13.
[57] Tarni Perkal (WEstjustice), Submission to the Australian Government, *Reforms to Address Corporate Misuse of the FEG* <http://www.westjustice.org.au/cms_uploads/docs/westjustice-submission-to-the-feg-scheme-consultation.pdf>.

marginalised workers and onto an employer/principal to establish a genuine contracting relationship.

We recommend introducing a definition based on Professor Andrew Stewart and Cameron Roles' *Submission to the ABCC Inquiry into Sham Arrangements and the Use of Labour Hire in the Building and Construction Industry*, where they propose that the term 'employee' should be redefined in a way that would strictly limit independent contractor status to apply only to those workers who are genuinely running their own business:

'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.'[58]

The definition is precise and clear, and allows scope for genuine contractors to engage as such. We propose that this 'employee presumption' should be adopted in a similar way to the reverse onus of proof in relation to record-keeping in the Protecting Vulnerable Workers Act.

This would assist marginalised workers to enforce their rights more efficiently, without inhibiting the ability of those who are genuinely independent to contract accordingly. A statutory definition that presumes workers are employees affords many advantages: less time is used in applying a vague multi-factor test, there is greater likelihood of consistent outcomes, increased clarity for employers and employees, and there is much greater fairness for workers.

Recommendation 25

Amend the FW Act to create the presumption that an employment relationship exists in a similar way to the reverse onus of proof in relation to record-keeping in the Protecting Vulnerable Workers Act.

7.8 Limit the current defence in the FW Act for misrepresenting an employment relationship

Currently, section 357(2) of the FW Act offers a defence that may be used by an employer who is alleged to have misrepresented an employment relationship as an independent contractor relationship. Section 357(2) of the FW Act provides that:

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

The current provisions in the FW Act are insufficient to discourage sham contracting. The provisions offer a defence to an employer which is broad and relatively easy to rely upon.

[58] Andrew Stewart and Cameron Roles, Submission to Australian Building and Construction Commission, Australian Government, *Inquiry into Sham Arrangements and the Use of Labour Hire in the Building and Construction Industry*, 13 <https://docs.employment.gov.au/sites/docs_employment/files/submissions/43456/stewartandroles_submissiontoabccshamcontractinginquiry.pdf>.

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

At the very least, the current employer defences to the sham contracting provisions in the FW Act should be limited. There should ideally be no defence for recklessness or lack of knowledge. At a minimum, the law should be amended to ensure that employers are liable when they fail to take reasonable steps to determine a correct classification.

Recommendation 25.1 of the Productivity Commission Report, states:

> *'The Australian Government should amend the FW Act to make it unlawful to misrepresent an employment relationship or a proposed employment arrangement as an independent contracting arrangement (under s. 357) where the employer could be reasonably expected to know otherwise.'*[59]

Recommendation 26

Amend section 357(2) of the FW Act to make it unlawful to misrepresent an employment relationship or a proposed employment arrangement as an independent contracting arrangement (under section 357) where the employer could be reasonably expected to know otherwise.

For suggested amendment of section 357(2), please see Appendix 1.

7.9 Create Minimum Entitlements Orders and Independent Contractor Status orders

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

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

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

[59] Productivity Commission, Australian Government, above n 46, 807–815.

Recommendation 27

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

7.10 Extension of outworker coverage to more at-risk industries

We recommend extending the outworker protections in the FW Act to contract cleaners and workers in other key industries where exploitation is rife, including food processing and distribution.

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

Recommendation 28

Amend the FW Act to introduce deeming provisions that extend employee protections to outworkers in high-risk industries.

7.11 Introduce higher penalties in the FW Act

We support introducing higher penalties for serious contraventions of the FW Act as set out below because such an amendment sends a strong message to employers that the exploitation of migrant workers, including people who hold temporary visas, is not acceptable. We do hold concerns that any increase in penalties under the FW Act is not enough, as it does not systematically address the causes and prevalence of wage theft and other breaches of workplace rights and conditions for people who hold temporary visas. The onus would still lie with the temporary migrant worker to seek redress and risk their personal visa status for the duration of any legal claim. Structural inequalities currently limit the ability of people who hold temporary visas to complain and pursue complaints against offending employers.

Recommendation 29

Introduce a separate contravention in the FW Act that attracts higher penalties for more serious or systemic cases of underpaid employment entitlements. Row 11 of section 539(1) of the FW Act should be amended so that 'serious contraventions' of sections 357(1), 358 and 359 can be pursued in court. This would result in the penalties being aligned to the new higher penalties for other 'serious contraventions', being $126,000 for an individual and $630,000 for a company.

Please see Appendix 1 for suggested drafting of this amendment.

7.12 Introduce criminal penalties for wage theft and support marginalised workers with increased access to free legal help

In its response to the MWT Report the Australian Government stated:

> *By adding criminal sanctions to the suite of penalties available to regulators for the most egregious forms of workplace conduct, the Government is sending a strong and unambiguous message to those employers who think they can get away with the exploitation of vulnerable employees*.[60]

We support the proposal to criminalise wage theft (**criminalisation reforms**) insofar as they encourage employers to maintain lawful workplace conditions and reduce opportunities to exploit marginalised workers.

However, introducing criminalisation reforms alone will not remove significant barriers for people who hold temporary visas or address the conditions that allow for their exploitation. We recommend a comprehensive approach to workforce regulation that addresses the multi-faceted causes of migrant worker exploitation in addition to the introduction of the criminalisation reforms. While any criminalisation reforms would send a clear message to employers that wage theft is unacceptable, the key issues for people who hold temporary visas would still be trying to get access to justice with the likelihood of resolve.

A major factor restricting access to justice for people who hold temporary visas is the chronic underfunding of the legal assistance sector. As a result of chronic underfunding, the legal assistance sector faces severe capacity restrictions, forcing organisations to make impossibly difficult decisions about who is given legal help and the scope of the help that is given. The impact of underfunding is compounded by the complexity of underpayment cases. Underpayment cases often require a relatively high level of professional help. The legal assistance sector must be adequately funded to provide that help. There is an urgent need to implement the Productivity Commission's recommendation to provide a funding injection of $200 million to the legal assistance sector.[61]

It has been suggested that any criminal investigation could postpone a civil pursuit of remedies.[62] If this is the case, we are concerned that the pursuit of criminal sanctions may act as a further deterrent for clients to seek redress. Criminal sanctions should not compromise the recovery of individual underpayments.

Recommendation 30

Introduce criminal penalties for wage theft, accompanied by mechanisms that address the underlying vulnerabilities that allow the workplace exploitation of people who hold temporary visas, as outlined in our other recommendations. These penalties should not create any impediment to individual wage recovery using the civil processes available.

Recommendation 31

Implement the Productivity Commission's recommendation to provide a funding injection of $200 million to the legal assistance sector.

[60] MWT Report, above n 13, 3.
[61] Productivity Commission, Australian Government, above n 36, 738–9.
[62] Dana McCauley, 'Employers Could Face Jail over Wage Theft under New Laws', *Sydney Morning Herald* (online), 24 July 2019 <https://www.smh.com.au/politics/federal/employers-could-face-jail-over-wage-theft-under-new-laws-20190724-p52ad5.html>.

7.13 Extend the higher penalties for 'serious contraventions' to cover sham contracting

The Protecting Vulnerable Workers Act did not introduce higher penalties for 'serious contraventions' of the FW Act's sham contracting provisions (found in sections 357, 358 and 359). Unlike contraventions of other civil remedy provisions, contraventions of the sham contracting contraventions, where the perpetrator does so knowingly or those that together form part of a systematic pattern of conduct, do not attract higher penalties than one-off instances of sham contracting. It is unclear why those sections were omitted from the Protecting Vulnerable Workers Act.

Recommendation 32

Amend sections 357, 358 and 359 of the FW Act to introduce higher penalties for 'serious contraventions' of these provisions.

7.14 Introduce a director identification number and compulsory insurance to limit phoenix activities

A significant problem for people who hold temporary visas is the phenomenon of phoenix companies—whereby directors close down companies to avoid paying debts, then open a new company without penalty. It is estimated that such phoenix activity results in lost employee entitlements of between $191,253,476 and $655,202,019 every year.[63]

Professor Helen Anderson suggests numerous measures to address phoenix activity, including the introduction of a director identity number (which requires directors to establish their identity using 100 points of identity proof and enables regulators to track suspicious activity more easily) and improvements to the company registration process to enable ASIC to gather more information at the time a company is formed.[64] We support these recommendations.[65]

Recommendation 33

The government should introduce director identity numbers to help address phoenix activity.

Recommendation 34

In addition to the introduction of director identification numbers, we recommend that directors should also be required to pay a compulsory insurance premium (similar to WorkCover) to fund the provision of community-based employment services and the FEG scheme.[66]

7.15 Ensure all workers can obtain superannuation and make superannuation part of the NES

For those with unpaid superannuation, there are limited avenues for redress. A worker can make a complaint to the Australian Tax Office, which may or may not be pursued. Once a complaint is made, avenues are limited for a client to pursue their claim themselves. If

[63] Helen Anderson, 'Sunlight as the Disinfectant for Phoenix Activity' (2016) 24 *Company and Securities Law Journal* 257, 258.
[64] Ibid 263–267.
[65] See further Helen Anderson et al, 'Phoenix Activity: Recommendations on Detection, Disruption and Enforcement', (Report, Melbourne Law School and Monash Business School, February 2017) <http://law.unimelb.edu.au/centres/cclsr/research/major-research-projects/regulating-fraudulent-phoenix-activity>.
[66] We have also made another recommendation in relation the FEG above at Recommendation 23.

superannuation is referred to in an applicable Award, the employee may be able to include superannuation as part of any claim for other unpaid wages or entitlements – but orders are not always made by the courts in respect of superannuation. In addition to disadvantaging the most marginalised, this has significant impacts on the Australian economy and social security system.[67]

Making superannuation part of the National Employment Standards (**NES**) and removing the minimum earnings threshold and minimum age restrictions to help ensure all workers receive superannuation. This will provide employees with a direct mechanism to pursue their own claims.

In addition to providing a mechanism for employees, the Federal Government should provide independent contractors with a legislative mechanism to pursue unpaid superannuation directly.

Agencies should also play a more active role in assisting with the detection and enforcement of unpaid superannuation. Many of our clients are not paid superannuation and there are only limited avenues for redress.

We recommend that the Federal Government and FWO urgently address the issue of unpaid superannuation. It is estimated that unremitted superannuation is in the hundreds of millions of dollars. As argued by Professor Helen Anderson and Dr Tess Hardy, we agree that *'more should be done to improve the detection and recovery of non-payments because of the importance of superannuation to both employees and the government*.' As Anderson and Hardy state, any model of enforcement that shifts the policing of unpaid superannuation to employees is flawed. While the ATO is primarily responsible, the FWO *'is well placed to supplement the efforts of the ATO, and should be encouraged, and appropriately resourced, to do so.*'[68] Community legal centres should be funded to deliver on-the-ground education to communities, refer clients to appropriate agencies, and assist clients to navigate any enforcement processes.

Recommendation 35

Superannuation should be included as one of the National Employment Standards.

Recommendation 36

A legislative mechanism to provide independent contractors with a way to pursue unpaid superannuation directly should be introduced.

Recommendation 37

Remove the minimum earnings threshold and minimum age restrictions from superannuation.

[67] Igor Dosen and Michael Graham, 'Labour Rights in the Gig Economy – An Explainer' (Research Note No 7, Research and Inquiries Unit, Parliamentary Library and Information Service, Parliament of Victoria, June 2018) 1 <https://www.parliament.vic.gov.au/publications/research-papers/send/36-research-papers/13869-labour-rights-in-the-gig-economy-an-explainer>.

[68] Helen Anderson and Tess Hardy, 'Who Should Be the Super Police? Detection and Recovery of Unremitted Superannuation' (2014) 37(1) *UNSW Law Journal* 162.

Appendix 1 - Compilation of drafting suggestions

Type of change	Section	Drafting suggestions
Recommendation 12 and 13		
Insert new sub section	558A(3)	**558A Meaning of franchisee entity, and responsible franchisor entity and responsible supply chain entity** (1) A person is a ***franchisee entity*** of a franchise if: (a) the person is a franchisee (including a subfranchisee) in relation to the franchise; and (b) the business conducted by the person under the franchise is substantially or materially associated with intellectual property relating to the franchise. (2) A person is a ***responsible franchisor entity*** for a franchisee entity of a franchise if: (a) the person is a franchisor (including a subfranchisor) in relation to the franchise; and (b) the person has ~~a significant degree of~~ influence or control over the franchisee entity's affairs. (3) A person is a responsible supply chain entity if: (a) there is a chain or series of 2 or more arrangements for the supply or production of goods or services performed by a person (the worker); and (b) the entity is: (i) a party to any of the arrangements in the chain or series and has influence or control over the worker's affairs or the person who employs or engages the worker; or (ii) operating for commercial gain and is the recipient or beneficiary of the goods supplied or produced or services performed by the worker. ***Note that minor amendments will also need to be made to ss 558B(3), 558C and in Part 7 – application and transitional provisions. We do not provide drafting instructions for these minor amendments.***

Type of change	Section	Drafting suggestions
Recommendation 14		
Insert new provision	558AA	A person who is responsible for a contravention of a civil remedy provision is taken to have contravened that provision. *Note: persons who are responsible for a contravention may include responsible franchisor entities, holding companies, franchisee entities, subsidiaries and other responsible entities.*
Recommendation 15		
Insert new legislative note	558B(4)	*Note: Reasonable steps that franchisor entities, holding companies and indirectly responsible entities can take to show compliance with this provision may include: ensuring that the franchise agreement or other business arrangements require all parties to comply with workplace laws, providing all parties with a copy of the FWO's free Fair Work handbook, requiring all parties to cooperate with any audits by FWO, establishing a contact or phone number for employees to report any potential underpayment or other workplace law breaches and undertaking independent auditing.*
Recommendation 16		
Repeal and substitute	550	**Involvement in contravention treated in same way as actual contravention** (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision. Note: If a person (the ***involved person***) is taken under this subsection to have contravened a civil remedy provision, the involved person's contravention may be a serious contravention (see subsection 557A(5A)). Serious contraventions attract higher maximum penalties (see subsection 539(2)). (2) A person is ***involved in*** a contravention of a civil remedy provision if, and only if, the person: (a) has aided, abetted, counselled or procured the contravention; or (b) has induced the contravention, whether by threats or promises or otherwise; or (c) has been in any way, by act or omission, directly or indirectly, ~~knowingly~~ concerned in or party to the contravention; or

Type of change	Section	Drafting suggestions
		(d) has conspired with others to effect the contravention. (3) For the purposes of paragraph (2)(c), a person is concerned in a contravention if they: (a) knew; or (b) could reasonably be expected to have known, that the contravention, or a contravention of the same or a similar character would or was likely to occur; or (c) became aware of a contravention after it occurred, and failed to take reasonable steps to rectify the contravention. (4) For the purposes of paragraph 3(b), a person will not be taken to be reasonably expected to have known that the contravention, or a contravention of the same or a similar character would or was likely to occur if, as at the time of the contravention, the person had taken reasonable steps to prevent a contravention of the same or a similar character. (5) For the purposes of subsection (4), in determining whether a person took reasonable steps to prevent a contravention of the same or a similar character, a court may have regard to all relevant matters, including the following: (a) the size and resources of the person; (b) the extent to which the person had the ability to influence or control the contravening person's conduct in relation to the contravention or a contravention of the same or a similar character; (c) any action the person took directed towards ensuring that the contravening person had a reasonable knowledge and understanding of the requirements under this Act; (d) the person's arrangements (if any) for assessing the contravening person's compliance with this Act; (e) the person's arrangements (if any) for receiving and addressing possible complaints about alleged underpayments or other alleged contraventions of this Act; (f) the extent to which the person's arrangements (whether legal or otherwise) with the contravening person encourage or require the contravening person to comply with this Act or any other workplace law.

Type of change	Section	Drafting suggestions
Insert new section	550A	**Primary duty of care** (1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, compliance with this Act in respect of: (a) workers engaged, or caused to be engaged by the person; and (b) workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking. (2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that compliance with this Act in respect of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking. (3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable: - ***[insert any further specific requirements here]*** Meaning of worker (4) A person is a worker if the person carries out work in any capacity for a person conducting a business or undertaking, including work as: (a) an employee; or (b) a contractor or subcontractor; or (c) an employee of a contractor or subcontractor; or (d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or (e) an outworker; or (f) an apprentice or trainee; or (g) a student gaining work experience; or (h) a volunteer; or (i) a person of a prescribed class. What is reasonably practicable (5) In this Act, ***reasonably practicable***, in relation to a duty to ensure compliance with this Act, means that which is, or was at

Type of change	Section	Drafting suggestions
		a particular time, reasonably able to be done in relation to ensuring compliance, taking into account and weighing up all relevant matters including: (a) the likelihood of the risk concerned occurring; and (b) the degree of harm that might result from the risk; and (c) what the person concerned knows, or ought reasonably to know, about: (i) the risk; and (ii) ways of eliminating or minimising the risk; and (d) the availability and suitability of ways to eliminate or minimise the risk; and (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk. Person may have more than 1 duty (6) A person can have more than 1 duty by virtue of being in more than 1 class of duty holder. More than 1 person can have a duty (7) More than 1 person can concurrently have the same duty. (8) Each duty holder must comply with that duty to the standard required by this Act even if another duty holder has the same duty. (9) If more than 1 person has a duty for the same matter, each person: (a) retains responsibility for the person's duty in relation to the matter; and (b) must discharge the person's duty to the extent to which the person has the capacity to influence and control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity. Management of risks

Type of change	Section	Drafting suggestions
		(10) A duty imposed on a person to ensure compliance with this Act requires the person: (a) to eliminate risks to compliance, so far as is reasonably practicable; and (b) if it is not reasonably practicable to eliminate risks to compliance, to minimise those risks so far as is reasonably practicable. Duty of officers (11) If a person conducting a business or undertaking has a duty or obligation under this Act, an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation. (12) The maximum penalty applicable for an offence relating to the duty of an officer under this section is the maximum penalty fixed for an officer of a person conducting a business or undertaking for that offence. (13) An officer of a person conducting a business or undertaking may be convicted or found guilty of an offence under this Act relating to a duty under this section whether or not the person conducting the business or undertaking has been convicted or found guilty of an offence under this Act relating to the duty or obligation. (14) In this section, due diligence includes taking reasonable steps: (a) to acquire and keep up-to-date knowledge of the obligations in this Act; and (b) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the risks associated with those operations; and (c) to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to compliance with this Act from work carried out as part of the conduct of the business or undertaking; and (d) to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding risks and responding in a timely way to that information; and

Type of change	Section	Drafting suggestions
		(e) to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act; and Examples For the purposes of paragraph (14)(e), the duties or obligations under this Act of a person conducting a business or undertaking may include: • ensuring compliance with notices issued under this Act; • ensuring the provision of training and instruction to workers about workplace laws. (f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e). Duty to consult with other duty holders (15) If more than one person has a duty in relation to the same matter under this Act, each person with the duty must, so far as is reasonably practicable, consult, co-operate and coordinate activities with all other persons who have a duty in relation to the same matter. ***Note further drafting will be required for this section, but these are some examples for consideration.***
Recommendation 26		
Amend existing provision	357	**357 Misrepresenting employment as independent contracting arrangement** (1) A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor. Note: This subsection is a civil remedy provision (see Part 4-1). (2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer: (a) did not know; and

<table>
<tr><th>Type of change</th><th>Section</th><th>Drafting suggestions</th></tr>
<tr><td></td><td></td><td>(b) ~~was not reckless as to whether; and~~ <u>could not reasonably be expected to know that</u> the contract was a contract of employment rather than a contract for services.</td></tr>
<tr><td colspan="3">Recommendations 29 and 32</td></tr>
<tr><td>Amend existing section</td><td>Row 11, section 539(1)</td><td>
Part 3-1--General protections
<table>
<tr><td>11</td><td>340(1)
340(2)
343(1)
344
345(1)
346
348
349(1)
350(1)
350(2)
351(1)
352
353(1)
354(1)
355
357(1)
358
359
369(3)</td><td>(a) a person affected by the contravention;

(b) an industrial association;

(c) an inspector</td><td>(a) the Federal Court;

(b) the Federal Circuit Court</td><td><u>for a serious contravention--600 penalty units; or</u>

60 penalty units</td></tr>
</table>
</td></tr>
</table>