Submission

to the Senate Select Committee on Job Security

Kingsford Legal Centre
and Redfern Legal Centre

21 April 2021

UNSW Kingsford Legal Centre

Redfern Legal Centre

Acknowledgments 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.

Attribution

This submission can be attributed to Kingsford Legal Centre and Redfern Legal Centre.

Contributors include Emma Golledge, Sean Bowes, Tess Deegan, Sharmilla Bargon, Regina Featherstone, David Hofierka and Sean Stimson.

Thanks to Gilbert + Tobin and Kristina Main for their assistance.

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 legal@unsw.edu.au.

This report is endorsed by Community Legal Centres NSW.

Publication

We consent to this submission being published by the Senate Select Committee on Job Security. For all case studies in this feedback, names and identifying information have been changed to protect confidentiality.

1 WEstjustice Community Legal Centre, Migrant Employment Legal Service and Redfern Legal Centre International Student Service, Submission No 47 to the Senate Standing Committee 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>.

About Us

Kingsford Legal Centre

Kingsford Legal Centre (**KLC**) has provided free legal advice, casework and community legal education to our local community in south-east Sydney since 1981. We are part of the UNSW Law & Justice Faculty and provide clinical legal education to over 500 of its students each year.

We have extensive experience in providing legal help to people with employment law issues, including many people in insecure employment. In the 2019-20 financial year, we gave 494 legal advices and provided intensive assistance with 104 employment law matters.

We also have a specialist, state-wide Discrimination Law Clinic and Sexual Harassment Legal Service, and often provide legal help to people who have experienced discrimination and sexual harassment at work.

Redfern Legal Centre

Redfern Legal Centre (**RLC**) is an independent, non-profit, community-based legal organisation with a particular focus on human rights and social justice. Our specialist areas of work are employment, discrimination, tenancy, domestic violence, credit and debt, and complaints about police and other governmental agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

In the 2019-20 financial year, we gave 510 legal advices and provided intensive assistance with 109 employment law matters.

RLC runs the International Student Legal Service NSW (ISLS) which provides free legal advice and advocacy to all international students enrolled to study in NSW, including those completing their studies from offshore. ISLS provides legal advice across almost all areas of law.

KLC and RLC are both part of the Migrant Employment Legal Service (**MELS**), addressing the exploitation of migrant workers in NSW.[2]

[2] MELS is a joint initiative of the Inner City Legal Centre, Kingsford Legal Centre, Marrickville Legal Centre and Redfern Legal Centre.

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Introduction

KLC and RLC welcome the opportunity to make these submissions to the Senate Committee on Job Security (**the Inquiry**).

Based on evidence drawn from our areas of focus and expertise, our submission focuses on the terms of reference as they apply to our client base of vulnerable workers: young people, women, Aboriginal and Torres Strait Islander people, people with a disability, and migrant workers - refugees, asylum seekers, international students, temporary visa holders and other newly-arrived migrants.

Our clients are disproportionately impacted by insecure or precarious employment and are especially vulnerable and require special consideration to ensure they are protected from workplace exploitation in Australia. We have identified that existing industrial relations and migration systems do little to protect workers through our work with these clients. The law is not responding adequately to the needs of workers.

Our services are in a unique position to comment upon the impact of insecure or precarious employment on workers, including some of the most vulnerable workers in the community. Our services support law reform measures that respond and address these underlying causes and remove the structures that lead to exploitation.

Recommendations

1	As an overarching recommendation, Australian governments should pursue law and policy reform to maximise access to secure employment, and ensure that all workers receive strong legal protections, regardless of the nature of their employment.
2	Casual workers should accrue leave on a pro rata basis in a similar way to part-time workers.
3	The Australian Government should ensure an enforceable right for long term casual workers to be offered ongoing employment, including by amending section 66M(5) of the Fair Work Act 2009 (Cth) to prevent parties from opting out of arbitration in disputes about casual conversion.
4	There should be strict limits on how long a worker can be employed on fixed-term contracts before they must be offered an ongoing role.
5	The government should reinforce the job security of workers in ongoing roles by strengthening protections against redundancies and stand-downs that are not genuine and/or are used to evade employer obligations.
6	The government should take action to ensure all workers receive correct superannuation payments, including by: • strengthening the Australian Taxation Office's ability to take proactive action to increase compliance with superannuation obligations; and • establishing a legal avenue for workers to take independent action to recover owed superannuation. The government should also provide financial assistance to workers on visas as recommended below.
7	The government should provide financial support to all people in Australia experiencing crisis or severe financial hardship, including by extending eligibility for Centrelink payments to people on temporary visas.
8	The government should amend the *Fair Work Act 2009* (Cth) 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 2017* (Cth).
9	The Australian Government should recognise income security, housing security and dignity in retirement as human rights to be guaranteed to all people in Australia.
10	The government should increase the rate of the JobSeeker payment to $80 a day.
11	The Australian Government should advocate, including through National Cabinet, for State and Territory governments to extend COVID-19 protections for people who rent their homes.
12	The government should significantly increase the superannuation guarantee. The government should also take action to strengthen the superannuation system as recommended above.
13	A new wage theft process should be established with a focus on the simple and swift facilitation of individual wage recovery via conciliation, consent arbitration and enforceable orders, based on an applicant-led model for bringing unfair dismissal claims at the Fair Work Commission.
14	The limit of the small claims jurisdiction of the Fair Work Division of the Federal Circuit Court of Australia should be increased from $20,000 to $50,000 and applicants should be able to bring proceedings against accessories and claim penalties.
15	Community Legal Centres should be provided additional funding to increase representation services to workers in insecure or precarious employment.
16	Establish an effective labour-hire licensing regime to more effectively regulate employers.

17	The government should introduce independent scrutiny and education by the Australian Business Register 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 contractor/employee multi-factor test before an ABN is issued; • Applicants who are individuals should be required to engage with a screening process that provides education about the differences between contractors and employees (and their respective entitlements) and information about taxation and workplace injury.
18	The Fair Work Commission should have the power to regulate arrangements for the engagement of on-demand gig workers, and make binding determinations providing for safe working conditions, adequate remuneration, income security, job security, collective bargaining rights and adequate dispute resolution and enforcement for all workers. The enforcement of any such awards and orders should provide supply chain accountability where sub-contractors engage on-demand workers.
19	The eligibility requirements of the Fair Entitlement Guarantee should be expanded to include all workers, including temporary visa holders. Further, the Fair Entitlements Guarantee should include employees with a court order where a company has been deregistered.
20	The government should provide recurrent funding to CLCs to coordinate and deliver 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.
21	The Department of Home Affairs should stop holding migrant workers strictly liable for breaches of visa work conditions and instead adopt a proportionate system of penalties for visa breaches such as issuing a Ministerial direction under s 499 of the *Migration Act 1958* (Cth) in the form of a decision-making protocol for the department to use to issue workers with a warning or an administrative fine or civil penalty instead of having their visas cancelled.
22	The government should 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.
23	The assurance protocol between the Fair Work Ombudsman and the Department of Home Affairs should be strengthened to provide stronger protection from visa cancellation for workers with genuine exploitation complaints and publicised in more detail to remove ambiguity about when the assurance can or cannot be relied upon.
24	The Department of Home Affairs assurance protocol should be extended to underpayment claims progressed through the courts.
25	The Department of Home Affairs 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, including sexual harassment or discrimination or (b) the worker has been stood down due to the COVID- 19 pandemic.
26	The *Migration Act 1958* (Cth) should be amended to ensure that only employers who can demonstrate compliance with the law can employ working holidaymakers.
27	The Australian Border Force should initiate more enforcement activities for employer breaches of migration law, such as clawbacks of sponsorship costs or income paid to workers.
28	Australian governments should ensure that the default position is for government workers to be securely employed.
29	Australian governments should use their purchasing power to prioritise business with organisations that engage in positive employment practices, such as organisations that securely employ their workers.

A. The extent and nature of insecure or precarious employment in Australia

Even before the COVID-19 pandemic, only about half of employed Australians worked in a 'standard' job: a full-time permanent salaried role with entitlements like sick leave, annual leave, notice, and superannuation.[3] Half of employed Australians worked in positions characterised by one or more dimensions of insecurity: including casual and temporary jobs, part-time work, independent contractors, other forms of self-employment, and more recently 'gigs'.[4]

We give legal help to many people in insecure or precarious employment. This includes:

- People who have worked regular and systematic hours for years yet are labelled casual workers;
- People who have worked in the same role with the same company for years on back-to-back fixed-term contracts;
- People who have very little control over their work conditions yet are labelled independent contractors;
- People who are informally employed, with no written contract, who work for low pay and under poor conditions;
- People with visa restrictions, who are often paid less than Award wages by unscrupulous employers and therefore have to work in excess of their permissible working hours (as dictated by their visa type) solely in order to earn a living wage. Few of these workers report these unscrupulous employers due to fears of visa cancellation;
- People who are experiencing discrimination and sexual harassment in the workplace. These workers are often dismissed for complaining or leave their jobs due to mistreatment.

We reject, in the strongest possible terms, any suggestion that our clients generally have chosen insecure employment over secure employment for lifestyle reasons.

Our clients include some of the most marginalised people in Australia, who often have little to no opportunity to obtain secure employment in a competitive job market where secure jobs are becoming less and less common. Far from enjoying lifestyle benefits, our clients often do not earn enough in their insecure jobs to meet their needs and support their families. They may work multiple jobs, rely on Centrelink payments to supplement their work income or simply live in poverty. They are often deeply distressed by their work situation and express a desire for better conditions.

In some cases, workers have been unlawfully misclassified – for example, being told by their employer that they are a casual worker when the law would consider them permanent part-time. They either do not know that they can challenge their classification or fear retaliation if they do so. In other cases, their classification is perfectly legal under laws that do not adequately protect job security.

Workers who are insecurely employed have fewer legal rights and protections than workers who are securely employed. For example, casual workers generally do not have a right to paid leave, even when they are sick. Many have a low income and cannot afford to decline shifts or fear being offered fewer shifts if they do. The lack of paid sick leave for casual workers is a significant risk of insecure or precarious work exposed or exacerbated by the COVID-19 crisis. We elaborate upon this under the relevant Term of Reference below.

Separately from the pandemic, it is deeply concerning that a large and growing number of workers lack many of the rights that are traditionally associated with employment in Australia. Many of these rights could be provided to insecurely employed workers, without preventing non-permanent work in appropriate circumstances, such as circumstances where the work is truly short-term or occasional. For example, casual workers could accrue paid leave in a similar way to part-time workers, without the guarantee of ongoing work. This would significantly improve the situation for workers who are insecurely employed, while

[3] Dan Nahum and Jim Stanford, '2020 Year-End Labour Market Review: Insecure Work and the Covid-19 Pandemic' (Briefing Paper, The Australia Institute, December 2020) <https://apo.org.au/sites/default/files/resource-files/2020-12/apo-nid310244.pdf>.

[4] Ibid.

reducing incentives for employers to inappropriately avoid offering secure employment to workers.

Workers who are insecurely employed not only have fewer rights on paper – they also face additional barriers in enforcing their rights. For example:

- Casual workers who challenge their employer's conduct risk not being offered further shifts;
- Workers on fixed-term contracts risk not having their contracts renewed;
- Workers who are labelled independent contractors risk not being offered more work;
- Workers on employer-sponsored visas risk visa cancellation if they lose their jobs and may decide not to complain about exploitation, sexual harassment or discrimination as a result.

In some circumstances, retaliating against insecurely employed workers for asserting their rights will breach laws against adverse action or unfair dismissal. However, it is often extremely difficult to prove that retaliation has occurred in circumstances where the employer has no obligation to provide ongoing work. Faced with the risk of retaliation, the difficulty of proving their case and limited employment options, many workers simply accept the breach of their workplace rights.

We see the financial and emotional stress such breaches cause our clients, with flow-on effects for their housing, education, physical health and mental health. Based on our experience working with marginalised people, we consider it vital that everyone have access to secure employment, and that all workers receive strong legal protections, regardless of the nature of their employment.

Recommendation 1

As an overarching recommendation, Australian governments should pursue law and policy reform to maximise access to secure employment, and ensure that all workers receive strong legal protections, regardless of the nature of their employment.

Recommendation 2

Casual workers should accrue leave on a pro rata basis in a similar way to part-time workers.

Recommendation 3

The Australian Government should ensure an enforceable right for long term casual workers to be offered ongoing employment, including by amending section 66M(5) of the *Fair Work Act 2009* (Cth) to prevent parties from opting out of arbitration in disputes about casual conversion.

Recommendation 4

There should be strict limits on how long a worker can be employed on fixed-term contracts before they must be offered an ongoing role.

B. The risks of insecure or precarious work exposed or exacerbated by the Covid-19 crisis

The COVID-19 pandemic exacerbated many existing problems and issues in the employment market in Australia.[5] The economic shock of the pandemic imposed the greatest cost on those who already worked in relatively low-paid and insecure roles. Workers in insecure jobs, disproportionately including women, young workers and low-wage workers, lost employment eight times faster than those in permanent work.[6]

Those employees that did lose their jobs during the COVID-19 down-turn now earn less and experience greater job insecurity than before the pandemic.[7] Many of the jobs lost in the initial COVID-19 induced downturn have been 'replaced' in a surge of casual work, part time jobs and other forms of insecure work.[8]

Casual employment grew by over 400,000 positions between May and November 2020, which is the biggest expansion of casual employment in Australia's history.[9]

While the employment of workers over 35 years old has fully recovered to pre-pandemic employment levels, younger workers are still experiencing major job losses. Similarly, women's employment has not rebounded in the way it has for men's employment.[10]

Job insecurity itself contributed to the spread of COVID-19 in Australia. As noted above, casual workers do not have a right to paid sick leave. Many cannot afford to take leave without pay and fear not being offered further shifts if they do. As Julian Teicher and Bernadine Van Gramberg explain:

> "The problem is compounded by the fact that many casual and part-time workers need more than one job to make ends meet. This means that when they turn up to work despite being sick or waiting on test results, they are turning up sick to more than one workplace".[11]

Similar issues apply for many workers who are labelled "independent contractors" in the gig economy. Given these issues, it is unsurprising that insecure work was often linked to the spread of COVID-19.[12] This not only reflects a significant health risk for people who are insecurely employed, but also highlights how job insecurity increases the vulnerability of Australian society to health and economic risks.

The COVID-19 pandemic has illustrated how insecurity and precarity can affect all jobs in Australia, as even traditionally "secure" roles have become insecure. During the COVID-19 pandemic, we provided legal advice to many people in ongoing work who have been made redundant, had their pay and conditions cut or been stood-down. The jobs these workers lost to the pandemic encompassed full-time, part-time, casual and contract work and represented a wide array of different industries. In many cases, these job losses, and their ensuring impacts upon finances, housing, physical and mental health, and relationships, had a devastating impact on both the worker and their families.

Case study – redundancy strips rights

Mira* worked for a small retail business for more than 7 years. When COVID-19 hit, she asked her employer to consider applying for JobKeeper. Instead, her employer quickly decided to make most of the employees redundant. As it was a small business, Mira received no redundancy pay and was left without income to support her family. A few weeks later, her employer offered to re-hire Mira and all of her co-workers – as long as they agreed to return as casual workers.

** Names for all case studies have been changed*

Recommendation 5

The government should reinforce the job security of workers in ongoing roles by strengthening protections against redundancies and stand-downs that are not genuine and/or are used to evade employer obligations.

[5] Ibid.

[6] Ibid.

[7] Ibid.

[8] Ibid.

[9] Ibid.

[10] Ibid.

[11] Julian Teicher and Bernadine Van Gramberg, "'Far Too Many' Victorians Are Going to Work While Sick. Far Too Many Have No Choice", *The Conversation* (30 July 2020) <https://theconversation.com/far-too-many-victorians-are-going-to-work-while-sick-far-too-many-have-no-choice-143600>.

[12] See, eg, James Purtill, "Victoria Shows Coronavirus Is a Pandemic of Casual, Insecure Work", *Triple J* (27 July 2020) <https://www.abc.net.au/triplej/programs/hack/coronavirus-covid-19-outbreak-linked-to-casual-insecure-work/12496660>.

Case study – cutting hours not hair

Pinuccia had been working as a permanent part time assistant in a hair salon in Sydney. In March 2020, her employer issued her with a stand down letter cutting all of her hours.

Pinuccia came to a CLC for help and was advised that this had been an unlawful stand down. The CLC helped Pinuccia recover lost wages during the unlawful stand down in the Federal Circuit Court.

International Students and International Education

COVID-19 has significantly impacted the international education industry. This sector is Australia's third-largest export, with international students contributing $40 billion to the Australian economy in 2019. In 2020, this figure fell by $9 billion, resulting in significant redundancies within the education sector.[13] Those in insecure work are often the first to suffer the effects of such downturns: it has been estimated that up to 70% of university staff are in insecure, precarious jobs as either casual staff or short-term contractors, despite being long-serving employees of many years.[14]

For those international students who remain in Australia, the impact upon their studies, finances, health, and wellbeing was often severe. Among those students whose employment was impacted by the pandemic, many deferred their course of studies on compassionate or compelling grounds. Had these student workers been employed more securely, been eligible for support and crisis payments (including JobKeeper), and, in many cases, been paid correctly in the first place, the impact on the international education market would have been far less harsh. The COVID-19 pandemic has exacerbated the already well-known exploitations many of these student workers experience. This, in turn, has damaged Australia's reputation as an international education destination.

While the federal government granted temporary migrant workers access to up to $20,000 of their superannuation in an attempt to alleviate some of the financial impact caused by COVID-19, many of these workers had limited access to funds because their employers had not paid their superannuation entitlements correctly, if at all.

Additionally, many of these temporary migrants were unable to return to their home countries due to border closures and other international travel restrictions put in place to tackle the pandemic. This mixture of financial stress, job insecurity, and an inability to return home due to border closures has resulted in an even higher number of temporary migrant workers forced into working in the gig economy, not because they necessarily want the 'freedom' of choosing their own hours, but in order to try and survive.

Case Study – collaborative legal care

Sarah, an international student, was about to commence a new course of studies when COVID-19 struck. Like so many others, Sarah was stood down from her job as a result of the pandemic. As she was not eligible for government financial assistance, Sarah decided to put her studies on hold and return home.

Sarah found that airfares were suddenly far more expensive due to COVID-19, and she had to use the last of her savings to book a flight. Her flight was rescheduled twice and then cancelled, with the airline refusing to refund the cost of the airfare. Sarah had already vacated her rental property, and so this last-minute cancellation left Sarah without a place to live.

When Sarah approached a CLC for help, she was stranded in Australia, homeless, unemployed and financially destitute. As she had withdrawn from her studies, Sarah was also placed on a bridging visa. While she was grateful to be able to remain legally in Australia, this visa type precluded her from accessing many COVID-19 relief packages.

Sarah had been couch-surfing and was in desperate need of accommodation. We helped Sarah find a short-term accommodation solution while we worked on looking for longer-term solutions. We commenced engagement with the airline in an attempt to recover the airfare. We provided visa advice, and Sarah was able to regain her international student visa and re-enrol in a course of

13 Tim Dodd, 'Australia's education exports took a $9bn hit from Covid in 2020' The Australian (online, 16 February 2021) <https://www.theaustralian.com.au/higher-education/australias-education-exports-took-a-9bn-hit-from-covid-in-2020/news-story/45aacce5b926a19c16dd51187b9ecd6a>.

14 Frank Larkin et al. 'Impact of the pandemic on Australia's research workforce' (The Office of the Chief Scientist, Rapid Research Information Forum, 8 May 2020) <https://www.science.org.au/sites/default/files/rrif-covid19-research-workforce.pdf >; Connor Duffy 'Cashed-up university sector accused of hypocrisy over mass casualisation of workforce, job losses' ABC News (online, 17 July 2020) <https://www.abc.net.au/news/2020-07-17/university-casual-workforce-redundancies-dirty-secret/12462030>.

study. Sarah could then be placed on the early access list for the NSW Government COVID-19 crisis accommodation scheme for international students, and she had a safe place to stay for a number of months while she got back on her feet. Sarah continues to access food hampers from the food bank, Oz Harvest.

Recommendation 6

The government should take action to ensure all workers receive correct superannuation payments, including by:

- strengthening the Australian Taxation Office's ability to take proactive action to increase compliance with superannuation obligations; and
- establishing a legal avenue for workers to take independent action to recover owed superannuation.

The government should also provide financial assistance to workers on visas as recommended below.

C. Workplace and consumer trends and the associated impact on employment arrangements in sectors of the economy including the 'gig' and 'on-demand' economy

In Australia, the gig economy had a nine-fold increase between 2015 and 2019, capturing $6.3 billion dollars of consumer spending.[15] The impact of COVID-19 and various lockdowns across Australia created a further 40% increase in consumer spend on meal delivery in October 2020 compared to February 2020.[16]

The 'gig' economy is associated with companies like Uber, Deliveroo and Menulog and refers to the flexible, task-based contractor work performed by individuals, often through the assistance of online technology.

There has been a sharp increase in gig work performed by highly-skilled workers, including the information technology, education, university, media, journalism and creative sectors.[17] While casual, contract and gig economy work can indeed offer workers flexibility, research has long indicated that many workers accept this insecure work not because they choose to, but because they have to in order to survive.[18] This has a damaging effect on workers' health, relationships and financial security,[19] which in turn has a flow-on, negative effect throughout the economy, including within the support network of these workers.

> "People in these precarious fields of work describe their work as intense and demanding, but at the same time, unstable and insecure" - Erin Reid and Farnaz Ghaedipour[20]

During COVID-19, we saw many clients who had lost jobs in industries particularly hard hit by the pandemic, such as retail, cleaning, beauty, tourism and hospitality. Those clients' ineligible for JobKeeper (including many casual workers who had not been with their employer for long enough and some migrant workers) or Centrelink assistance (all

15 Actuaries Institute, 'The Rise of the Gig Economy and its Impact on the Australian Workforce' (Green Paper, December 2020) <https://actuaries.asn.au/Library/Miscellaneous/2020/GPGIGECONOMYWEB.pdf> 5.

16 Ibid, 6.

17 Sabra Lane and Claudia Long, 'Research jobs set to go as coronavirus takes hold throughout Australian universities' ABC News (online, 11 May 2020) <https://www.abc.net.au/news/2020-05-11/australia-research-workforce-facing-widespread-coronavirus-pain/12234704>; Erin Reid and Farnaz Ghaedipour 'Journalism jobs are precarious, financially insecure and require family support' The Conversation (online, 22 March 2021) <https://theconversation.com/journalism-jobs-are-precarious-financially-insecure-and-require-family-support-157012>.

18 Actuaries Institute, above n 15.

19 Jessica Stanhope and Philip Weinstein 'Organisational injustice from the COVID-19 pandemic: a hidden burden of disease' (2021) 141(1) Perspectives in Public Health 13.

20 Erin Reid and Famaz Ghaedipour, above n 17.

migrant workers) were often forced into gig and on-demand work.[21]

It is also likely that on-demand workers will find opportunities for this work dwindling.[22] While Australians' inability to travel and go out during the pandemic has bolstered the gig economy, as restrictions lift and change, consumer demand is expected to decrease, especially if the economy contracts and unemployment grows with the end of JobKeeper and the COVID19 supplement for welfare payments (including JobSeeker) at the end of March 2021.[23]

On the ground

During COVID-19, we attended Addi Road, a community organisation in Marrickville, Sydney, to speak to international students who were receiving food assistance. During those conversations, international students expressed sentiments that they were happy to accept $17 per hour "under an ABN", or as independent contractors, for work despite the risks to job security and insurance concerns because there were few other options.

Recommendation 7

The government should provide financial support to all people in Australia experiencing crisis or severe financial hardship, including by extending eligibility for Centrelink payments to people on temporary visas.

Normalising poor employment conditions

The rise in the gig economy has adversely affected the employment landscape in Australia, standardising a culture of precarious work, underpayment and sparse entitlements. The growth in gig work and the on-demand economy has the potential to negatively impact rights and entitlements for all workers, both independent contractors and employees.[24]

The growth of the gig and on-demand economy has far-reaching impacts beyond rideshare and meal delivery services in an employment law context. The prevalence of these work types normalises the expectations employers have of vulnerable workers to work under sham contracting arrangements for amounts below the minimum Modern Award rates.

The gig economy introduces unfair competition for traditional employers who employ their workers by standards in line with the *Fair Work Act 2009* (Cth), giving these businesses the incentive to move to a contractor-based model of worker engagement.

The expansion of the on-demand or gig economy has seen an increase in traditional employers shifting liability and business risk associated with fluctuations in demand[25] onto workers classified as independent contractors through often complex, poorly drafted and unclear agreements. These workers suffer the brunt of this shift and no longer have the benefit of ongoing work, secure incomes, or fair pay and safety entitlements.[26]

Case study – understanding contracts

Shin is an elderly foreign migrant who lives in public housing. In order to obtain courier work, he was told by a contractor courier company to obtain a business name before being allowed to enter into a service agreement. The agreement classified Shin as an independent contractor and also acknowledged that Shin did not possess strong English skills. The agreement was poorly drafted, complex and confusing, and did not require Shin to obtain independent legal advice before he entered into it.

After Shin sustained a work injury from heavy lifting, the company accused Shin of terminating the agreement, which Shin denied, and refused to pay Shin for any of his work based on the terms of the agreement. It was only after he sought assistance from a CLC that the agreement terms were properly explained to him, including a clause stipulating that he could be charged an early termination fee of $2,000. Shin would have no choice but to initiate expensive and complex legal proceedings (and risk the other party filing a cross-claim) if he sought to recover payment or challenge the agreement.

21 Actuaries Institute, above n 15.

22 Ibid.

23 Steven Kennedy, 'Opening Statement' (Speech, Economics Legislation Committee, Department of the Treasury, 24 March 2021) <https://treasury.gov.au/speech/opening-statement-economics-legislation-committee-2021>.

24 Leonie Wood, 'It's Just a Gig: How the Gig Economy is Stealing Workers' Rights', Monash University (online, 15 May 2019) <https://www2.monash.edu/impact/articles/economy/its-simply-a-gig-how-the-gig-economy-stole-workers-rights/>.

25 Dan Nahum and Jim Stanford, above n 3.

26 Ibid.

Without adequate legal protections for gig and on-demand workers, more of these workers will be exploited as the sector grows. CLCs are well placed to assist these workers, but without legal avenues of recourse, we are unable to do so.

Insurance and the gig economy

The increase in the on-demand labour force has exposed many workers to health and safety risks, as these independent contractors are often not covered by the insurance of any employer.

Despite the law frequently requiring gig economy organisations and platforms to ensure workers have, or obtain, a certain minimum level of insurance cover, in many instances, there is no effective oversight to ensure this is done.

Rideshare platforms entice workers into signing up to their platform by promoting that workers will be fully insured and covered in the event of an accident. Many workers enter into agreements without a clear understanding of their rights and obligations. In many instances, these workers are not properly informed about or are ignorant of their insurance requirements and only find out they may not be covered for claims against them after an incident occurs. This situation becomes more complex when multiple parties are involved.

We see this in cases where third-party rental e-bikes or cars are used. People in such arrangements can find themselves stripped of their work and income after an accident and find it difficult to find out about and enforce their legal rights. These workers can be pursued for significant civil claims by multiple parties at times when they are their most vulnerable and experiencing severe financial hardship.

Such precarious and unstable work arrangements can also facilitate and lead people who feel they have no choice towards obtaining other forms of risky credit such as personal loans, credit cards, and payday loans to supplement their income and to support their families.

Case study – caught between a rock and hard place

Amir and his young family of four lived in low-income rental housing, where Amir was the sole breadwinner. Amir and his wife were on temporary visas, with limited English and a poor understanding of financial products.

Amir initially earned a limited and irregular income by undertaking rideshare shift work. He was kicked off the rideshare platform after a customer complaint and was not able to challenge this decision as there was no effective way to dispute the claim with the rideshare platform. As such, Amir supplemented his income with debt derived from a multitude of credit cards and payday loans. Each loan was approved with limited effort via an online application with no face-to-face or verbal interaction. Amir was able to apply for some of the credit by simply providing his past rideshare income despite no longer obtaining that income.

Amir's efforts to secure other work was unsuccessful. He was making the difficult choice between paying for rent and food for his children or servicing his spiralling debt obligations for 13 loans to lenders, which had risen to $40,000. The family faced homelessness as they were not eligible for government support.

What is evident is that gig economy work is often unstable and results in the underpayment of the minimum hourly rate (as set by the National Employment Standards), dangerous working conditions without adequate insurance or access to workers compensation or the protection of SafeWork NSW, and workers missing out on superannuation. For all of these reasons, protections for all workers must be strengthened as we recommend above.

Case study – low pay, little power

Fahad is an international student who was working in the gig economy as a delivery driver after he lost his long-standing casual job in hospitality due to COVID-19.

Several months into the job, Fahad was assaulted one evening by an angry restaurant owner when he arrived at a Sydney restaurant to pick up three separate deliveries. As one of the orders was delayed, the restaurant's owner demanded Fahad cancel the delayed delivery via the app. Fahad advised it was best the owner do this himself, as Fahad would attract a penalty from the platform for doing so. The restaurant owner became angry and demanded Fahad leave the restaurant. Fahad bent down to pick up his bag to leave, only for the restaurant owner to push Fahad, throw him to the ground, and punch him multiple times. Fahad sustained significant injuries and medical expenses and was left unable to work for several months.

With Fahad engaged as an independent contractor rather than an employee, he was not afforded the standard protections under WorkCover and Safe Work that employees are in a standard employment relationship (wherein the employer owes its employees a duty of care). Fahad had very little power in this dispute with the food delivery platform.

Recommendation 8

The government should amend the *Fair Work Act 2009* (Cth) 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 2017* (Cth).

D. The aspirations of Australians including income and housing security, and dignity in retirement

Income and housing security, and dignity in retirement, are not simply aspirations – they are human rights. While many human rights are relevant, we particularly note that everyone has the right to social security,[27] housing,[28] and an adequate standard of living,[29] and that older people are entitled to such rights without discrimination.[30] We also note that everyone has the right to work under just and favourable conditions.[31] The United Nations Committee on Economic, Social and Cultural Rights recognises that the increase in insecure work has contributed to insufficient protection of this right.[32]

Insecure or precarious work goes hand-in-hand with income insecurity, housing insecurity and a lack of dignity in retirement. Secure employment is one key factor in ensuring these rights for all Australians. In particular, employment is widely recognised as the most vital step for successful settlement in a new country.[33] However, refugees, asylum seekers, international students, temporary visa holders and other newly arrived migrants find themselves in a particularly vulnerable situation when they seek to enter the labour market in Australia. This vulnerability occurs due to language barriers and a lack of information about the law – but the evidence also shows that a combination of policy settings, laws, systems and structures contribute to widespread wage theft from migrant workers in Australia. Further, in our experience, many businesses in Australia are aware and take advantage of the vulnerable position of newly arrived migrant and refugee workers.[34]

Income security

People in insecure or precarious work often do not know what their income will be from one week to the next. They can earn enough to live on one week, then nothing at all the next. This can make it extremely difficult to budget or save for a rainy day. It can also create great difficulties with getting

[27] *International Covenant on Economic, Social and Cultural Rights* art 9.

[28] *International Covenant on Economic, Social and Cultural Rights* art 11.

[29] *International Covenant on Economic, Social and Cultural Rights* art 11.

[30] *International Covenant on Economic, Social and Cultural Rights* article 2(2).

[31] *International Covenant on Economic, Social and Cultural Rights* articles 6-7.

[32] United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)* (27 April 2016) [3].

[33] A consultation in Melton with community members from Burma identified employment as the most important theme for successful settlement in Melton. Employment was also ranked as the most difficult goal to achieve. See Djerriwarrh Health Services, 'Investigating resettlement barriers with the Burmese Community in Melton: A Needs Assessment' (2015). See also Alistair Ager and Alison Strang, 'Understanding Integration: A Conceptual Framework' (2008) 21 Journal of Refugee Studies 166, 170.

34 Westjustice Community Legal Centre, the MELS and RLC International Student Service NSW, Submission to the Senate Standing Committee on Economics Inquiry into Unlawful Underpayment of Employees' Remuneration, March 2020.

income support from Centrelink, as Centrelink makes inaccurate assumptions about a person's overall income based on particular periods of time. This played a major role in the robodebt scandal, with Centrelink assuming that many of the people against whom it raised debts were earning money "in equal, consistent amounts each fortnight".[35] In a high-profile court case, the Australian Government agreed to refund and "zero" robodebts worth around $720 million, and a settlement has been agreed (subject to court approval) for a further $112 million in compensation.[36] While this reflects specific issues with the robodebt scheme, it also highlights legal, financial and reputational risks for the Australian Government in applying harsh welfare policies to a job market in which millions of people are unable to find secure work.

Income insecurity has grown together with job insecurity during the COVID-19 pandemic. It has been worsened by inadequate government support for people who have been unemployed or in insecure work. For example, preventable job losses occurred as a result of the government's decision to exclude casual workers from the JobKeeper payment unless they had worked with the same employer for 12 months, and to exclude workers on temporary visas from the JobKeeper payment unless they were from New Zealand. We are deeply concerned by the government's decision to end the JobKeeper payment while the pandemic continues, and to effectively cut the JobSeeker rate to $44 a day.[37]

Housing security

Australia's housing affordability crisis is well-documented. In 2017, the United Nations Committee on Economic, Social and Cultural Rights expressed concern about Australia's "persistent shortage of affordable housing",[38] following the Special Rapporteur on Housing's finding that "Australia has failed to implement the human right to adequate housing".[39] People in insecure or precarious work often struggle to pay rent, let alone think about buying a house. Their housing can easily be jeopardised by the loss of work in an insecure job, a rent increase or unexpected expense.

Housing insecurity has been a major issue during the COVID-19 pandemic, with a spike in renters seeking help about terminations of tenancy and evictions.[40] We are deeply concerned by the weakening of COVID-19 protections for people who rent their homes, as has occurred in NSW.[41]

Dignity in retirement

The Australian Government's Retirement Income Review unsurprisingly found that people who own their home tend to experience better outcomes in retirement than people who rent.[42] Job, income and housing insecurity while working can readily become poverty in retirement. We give legal help to many older people who are living in poverty.

We are also deeply concerned by the impact of insecure work on the opportunity for marginalised people to accrue superannuation for retirement. Workers who are paid less than $450 a month are not guaranteed superannuation payments.[43] For other workers, the superannuation guarantee has been frozen at 9.5% since 2014 (due to increase to 10% on 1 July 2021).[44] These factors contribute to unequal and inadequate levels of superannuation for marginalised people. For example, women are more likely than men to be employed as casual workers,[45]

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35 Gordon Legal, "Robodebt Class Action Settlement Frequently Asked Questions" <https://gordonlegal.com.au/robodebt-class-action/robodebt-settlement-faqs/#settlefifteen>.

36 Ibid.

37 Australian Council of Social Service, "A Grim Day as Millions Plunged Further into Poverty" (1 April 2021) <https://www.acoss.org.au/media-releases/?media_release=a-grim-day-as-millions-plunged-further-into-poverty>.

38 United Nations Committee on Economic, Social and Cultural Rights, Concluding Observations on the Fifth Periodic Report of Australia (11 July 2017) <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW9RFfyUl9z%2bWiZSaFYknZJM8n7iN4SZy%2fi2TYG0x1sMHnePqntrg1j%2bRxFraISW9l9d3gJzsDnyoeuGPbj2ogJgEH8Gna%2brQNWWlNZ3v1djd> [41].

39 Miloon Kothari, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living (UN Doc A/HRC/4/18/Add.2, 11 May 2007) 2.

40 Tenants' Union of NSW, Supporting Renters Through the Pandemic: NSW Renters' Experience in the Private Rental Market during the COVID19 Health Crisis (Report, 2 September 2020) 11-14 <https://files.tenants.org.au/policy/202009_TUNSW_Supporting_renters_through_pandemic.pdf>.

41 NSW Government Fair Trading, "Residential Tenancy Moratorium – Transitional Measures" <https://www.fairtrading.nsw.gov.au/resource-library/publications/coronavirus-covid-19/property/moratorium#:~:text=The%20temporary%20tenancy%20moratorium%20introduced,month%20transitional%20period%20has%20begun.>

42 Australian Government, Retirement Income Review (Final Report, July 2020).

43 Fair Work Ombudsman, "Tax and Superannuation" <https://www.fairwork.gov.au/pay/tax-and-superannuation>.

44 Davie Mach, "Superannuation Guarantee and Rate Changes: Key Things for Employees to Know" (10 March 2021) <https://www.canstar.com.au/superannuation/super-guarantee-rate-changes/>

45 Tanya Carney and Jim Standford, "The Dimensions of Insecure Work: A Factbook" (The Australia Institute, 29 May 2018 <https://d3n8a8pro7vhmx.cloudfront.net/theausinstitute/pages/2807/attachments/original/1528337971/Insecure_Work_Factbook.pdf?1528337971>.

and on average retire with $90,000 less superannuation than men.[46]

These issues have been worsened by inadequate government support during the COVID-19 pandemic, which has forced vulnerable people to access their superannuation early. More than 3.4 million people in Australia withdrew more than $36 billion from their superannuation early, with more than 700,000 people completely emptying their superannuation accounts.[47] [48]

Recommendation 9

The Australian Government should recognise income and housing security, and dignity in retirement, as human rights to be guaranteed to all people in Australia.

Recommendation 10

The government should increase the rate of the JobSeeker payment to $80 a day.

Recommendation 11

The Australian Government should advocate, including through National Cabinet, for State and Territory governments to extend COVID-19 protections for people who rent their homes.

Recommendation 12

The government should significantly increase the superannuation guarantee.

The government should also take action to strengthen the superannuation system as recommended above.

E. The effectiveness, application and enforcement of existing laws, regulations, the industrial relations system and other relevant policies

Our current industrial relation system does not adequately support workers in insecure or precarious employment.

One key issue for these workers is underpayment or the non-payment of wages and employment entitlements. This is the single-most common employment-related problem that clients present with at our employment law services.

In our frontline work, we have identified that the industrial relations legal framework and systems are not effective in preventing wage theft for vulnerable workers. Due to pronounced power disparities between employers and vulnerable workers, our current employment laws provide different tiers of access to enforcement mechanisms.

Burden on applicants

Considerable structural inequalities currently limit the ability of workers to complain and pursue complaints against offending employers. The legal pathways to wage recovery are costly, require significant effort and are risky for a workers' continued employment, reputation and references, and migrant worker's visa status. The onus lies with the vulnerable worker to seek redress. There is no current, effective pathway providing access to justice for individual workers to recover their wages that is timely, affordable and easy to understand.

Unscrupulous employers are able to rely on worker inaction in seeking legal advice about their rights at work or bringing legal claims.

Small claims process

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 with limited education and of culturally and linguistically diverse

[46] Australian NGO Coalition, Australia's Compliance with the Convention on the Elimination of All Forms of Discrimination against Women (Submission to the United Nations Committee on the Elimination of All Forms of Discrimination against Women, 2018) 9 <https://www.klc.unsw.edu.au/sites/default/files/documents/CEDAW%20Shadow%20report%20-%20Final%2014.6.18.pdf>.

[47] Australian Council of Trade Unions, "$36 Billion Stripped From Retirement Savings Revealed by APRA" (Media Release, 9 February 2021) <https://www.actu.org.au/actu-media/media-releases/2021/36-billion-stripped-from-retirement-savings-revealed-by-apra>.

backgrounds can still be prohibitively complicated. Claims in this division are also capped at $20,000, and employers cannot be ordered to pay penalties.

Our services have found that even accessing the small claim procedure can be an overwhelming limited process. At best, after months of stress and effort, applicants get what they should have been paid in the first place. Employers are not held accountable for underpaying their workers by being found subject to civil penalties and are not compelled to pay other workers correctly going forward.

Lengthy court proceedings

The Migrant Worker's Taskforce 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.[49] 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 migrant workers, the short-term nature of employment itself is a barrier to solving wage theft. Our services have found that migrant workers 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.

Recommendation 13

A new wage theft process should be established with a focus on the simple and swift facilitation of individual wage recovery via conciliation, consent arbitration and enforceable orders, based on an applicant-led model for bringing unfair dismissal claims at the Fair Work Commission.

Recommendation 14

The limit of the small claims jurisdiction of the Fair Work Division of the Federal Circuit Court of Australia should be increased from $20,000 to $50,000 and applicants should be able to bring proceedings against accessories and claim penalties.

Limited access to advocacy

There are limited services available to help workers with their legal problems at work, or more generally. The Fair Work Ombudsman (**FWO**) undertakes strategic litigation with the possibility of impacting the conditions of many workers: it commenced 54 matters in court in 2019-20.[50] The FWO is concerned with overall workplace compliance and is not an advocate for complainants.[51]

Workers may obtain advice from their local community legal centre (**CLC**), their union or the FWO. The capacity of the CLC sector to advise and represent workers in underpayment complaints is limited. CLCs provide an important service to workers in insecure or precarious employment who are not union members and are less likely to contact the FWO.

Recommendation 15

Community Legal Centres should be provided additional funding to increase representation services to workers in insecure or precarious employment.

Labour hire

Many workers are retained under labour-hire agreements, which gives employers access to a flexible workforce that can meet the seasonal demands for increased labour. In our experience, labour-hire engagement leads to insecure or precarious employment by creating complex operating systems that make it harder to ensure employer compliance with the law. Unscrupulous labour-hire operators use these systems as a tool to avoid paying workers properly and other employee protections.

A federal labour-hire licensing scheme should be established and ensure fair pay for labour-hire employees. We recommend that this regime should operate across all industries and that the scheme be designed with effective mechanisms to address non-compliance.

[49] Commonwealth of Australia, Report of the Migrant Workers' Taskforce (March 2019) <https://www.ag.gov.au/industrial-relations/industrial-relations-publications/Documents/mwt_final_report.pdf> 14.

[50] Fair Work Ombudsman, Annual Report, (18 September 2020) <https://www.transparency.gov.au/annual-reports/fair-work-ombudsman-and-registered-organisations-commission-entity/reporting-year/2019-20-21>.

[51] Fair Work Ombudsman, 'Our Purpose', Fair Work Ombudsman (Web Page) <https://www.fairwork.gov.au/about-us/our-purpose>.

Case Study – Caught off guard by true employer

Arham is an international student who was employed as a casual security guard by a labour-hire company. He was paid a flat rate of $16 per hour until he got a raise to $17. He worked at a number of host company sites. Arham believed that the host company was his employer because he interviewed with them, received day-to-day instructions from them and wore their uniform. The conditions at work were terrible: Arham once worked a 70-hour stretch with only an hour off between shifts. He was failing his studies and was suffering from poor mental health. After requesting a more permanent roster, Arham was dismissed.

Under the relevant modern award, he should have been paid $24.86 an hour. Arham had been underpaid almost $100,000 in underpaid wages and superannuation.

Arham took his underpayment complaint to the Fair Work Ombudsman, but because the host company denied that he was their employee and the labour-hire company refused to participate, the Fair Work Ombudsman closed the matter.

A CLC filed an underpayment claim for Arham in the Federal Court of Australia. The labour-hire company evaded service, and the host company attended a mediation. Despite maintaining that the host company was not Arham's employer, the matter settled favourably for Arham. After coming to the CLC, this matter took more than two years to resolve.

Recommendation 16

The government should establish an effective labour-hire licensing regime to more effectively regulate employers.

Sham contracting

In the on-demand economy, sham contracts allow "employers" to act anonymously and avoid the application of workplace laws and the payments of employee entitlements. 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.[52]

For many vulnerable workers, including those with poor English comprehension, often the only requirement to enter into these arrangements is to provide an easily obtained ABN. Such agreements are often found to contain unfair and unconscionable terms that put workers at a significant disadvantage.

When our clients are paid as independent contractors when they should be treated as employees, they do not receive minimum award wages or entitlements, including leave and superannuation contributions.[53] Contractors are often required to arrange their own tax and may need to organise workers compensation insurance and other insurances, however many vulnerable contractors are not aware that they need to do this or how to do this.

[52] WCLC, MELS and RLC, above n 34, 19.

[53] 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.

Case Study – the insurance blind spot

John was driving for a major rideshare platform and was just about to finish a long shift when he was involved in a major accident where it was unclear who was at fault. The accident badly damaged both cars involved, including the rental car he was driving that was sourced through the assistance of the rideshare platform.

John had not taken out his own insurance as he was made to believe the rental car company would cover him. He recalls signing up to rideshare platform online without speaking to anyone and submitted all the checks, and was not asked to obtain or verify any insurance.

After the accident, John called the rideshare platform to inform them about the accident but did not receive any assistance, and they cancelled his account. Despite paying a $1,000 excess to the car rental company a day after the crash, John received no assistance from the rental company.

After receiving a civil court claim from the lawyer claiming damage for the other car involved, he was told by the rental car company they would try to negotiate with the other party, after which he did not hear back from them.

After a number of months, when a sheriff with a writ for the levy of property attended John's public housing residence, John first found out that a judgment had been made against him by the owner of the other car for approximately $30,000.

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 both that they were an employee and then that they were underpaid. They must first apply a multifactorial test to establish that they are not an independent contractor and then go on to set out their appropriate award classification, rate of pay and quantify their underpayment. This is a complex position to demonstrate and both a time and resource-intensive task.[54]

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.

As such agreements are typically viewed as business-to-business relations, if there is a dispute, many workers find out that they don't have the benefit of streamlined legal recourse such as in an employment relationship setting. Usually, the only option for the worker to try to enforce their rights is to undertake costly legal proceedings, dealing with complex legal arguments through courts and tribunals that have not been developed to assist vulnerable workers for these types of arrangements. Further, the client is left to 'accept' often lower claims over 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).[55]

In order for marginalised workers to enforce their rights more efficiently, we recommend above introducing a statutory presumption that an employment relationship exists. We propose 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 suggest 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.'[56]

The definition is precise and clear, and allows scope for genuine contractors to engage as such. We have proposed above 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. In addition, we propose changes to the ABN system to reduce sham contracting.

54 WCLC, MELS and RLC, above n 34, 19.

55 Ibid.

56 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>.

Recommendation 17

The government should introduce independent scrutiny and education by the Australian Business Register 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 contractor/employee multi-factor test before an ABN is issued;
- Applicants who are individuals should be required to engage with a screening process that provides education about the differences between contractors and employees (and their respective entitlements) and information about taxation and workplace injury.

Independent contractors

Multiple rideshare and food delivery workers have initiated legal claims to test the boundaries of the employee/contractor distinction to preserve their entitlements as employees. Extensive judicial commentary has developed the multifactorial test as it applies to these applicants. In response, on-demand and gig economy platforms have unilaterally honed and amended their terms of service and engagement to assert that these workers are unequivocally independent contractors.[57] [58]

An unintended downside to this legal analysis and clarification of independent contractors' status is that we now have a burgeoning industry of workers with little to no bargaining power and very few legal remedies, entitlements, and protections. The *Fair Work Act 2009* (Cth) offers limited protections to gig and on-demand economy workers. The reality of true independent contractor work is that there is a significant imbalance between service providers and contractors.

The pressing question has moved on from whether a worker is an employee or an independent contractor. We now have to consider how to protect these workers from workplace exploitation.

While the gig economy has developed novel ways of using technology and engaging workers, legal protections have lagged behind these developments, leaving independent contractors exposed to health and safety risks and significant underpayment compared to the national minimum hourly rate.

"Just as systems of labour law evolved throughout the industrial era to ensure that those who profit from the work of others meet certain obligations to provide decent wages and working conditions, so should our general commercial laws develop to ensure that the business structures enabled by digital technology do not permit unregulated exploitation of precarious workers" - Professor Joellen Riley Munton

Recommendation 18

The Fair Work Commission should have the power to regulate arrangements for the engagement of on-demand gig workers, and make binding determinations providing for safe working conditions, adequate remuneration, income security, job security, collective bargaining rights and adequate dispute resolution and enforcement for all workers. The enforcement of any such awards and orders should provide supply chain accountability where sub-contractors engage on-demand workers.

One way to do this is to establish an FWC jurisdiction to regulate the engagement of on-demand gig workers, regardless of those workers' status or how those workers are engaged. In a similar way that the FWC sets minimum rates of pay in modern awards, this jurisdiction would provide workers with a mechanism to scrutinise pay rates, and if necessary, mandate these minimum rates of pay. That regulatory scheme should give the FWC the power to inquire into and make orders that provide safe working conditions, adequate remuneration, income security, job security, collective bargaining rights and adequate dispute resolution and enforcement for all workers. Enforcement provisions should provide for supply chain accountability where sub-contractors engage on-demand workers.

[57] Employment Law Centre of WA, Submission to the Industrial Relations Consultation, Improving protections of employees' wages and entitlements: Strengthening penalties for non-compliance (25 October 2019).

[58] WCLC, MELS and RLC, above n 34, 45.

Fair Entitlements Guarantee

The Fair Entitlements Guarantee (**FEG**) provides employees with up to 13 weeks of unpaid wages and other entitlements (notice, redundancy, annual leave and long service leave) if an employer becomes insolvent before entitlements are paid. Migrant workers and international students are not able to access the FEG.[59] We can see no principled basis for this, given that all migrant workers pay income tax.

The shortfalls of the FEG's effectiveness became clear during the COVID-19 pandemic. We had numerous migrant worker clients ask us for advice where they had been working for businesses that became insolvent during this time. Due to their visa status, these workers were unable to secure any unpaid entitlements through the FEG.

'Illegal phoenix activity' has also limited the ability of our clients to access the FEG. This is the practice of businesses deregistering or entering liquidation before paying owed entitlements to staff and re-emerging as a new entity that cannot be legally pursued. It estimated to cost $1,660 million to the Australian government each year, with the expected loss to employees in such situations being estimated between $31 million to $298 million.[60] Phoenixing is all too common in the building, cleaning, cafés and restaurants, horticulture, and childcare services industries.[61]

We echo the Migrant Worker's Taskforce's recommendations that FEG should be extended to include all workers, including migrant workers and the FEG should include employees with a court order where a company has been deregistered.[62]

Case Study – Unfair entitlements guaranteed

Szymon worked as a chef for a catering company but was stood down without pay during COVID-19. Szymon initially thought this was no problem as he had ten weeks of annual leave saved up. He asked his employer to take the leave to get him through the tough times. The employer advised Szymon that they did not have enough funds to pay him his annual leave, and they were 'going bust'.

Owing to the work restrictions on his 482 sponsorship, Szymon could not seek alternative employment in fear of jeopardising his Permanent Residency application. He could not return to his home country due to high costs and could not access welfare benefits. He was destitute but willing to work in any role, such as casually at a supermarket, just to pay rent and buy food, but could not due to his visa conditions.

If the business did proceed to bankruptcy, Szymon would never access his annual leave through the FEG as he is not a citizen or permanent resident.

Recommendation 19

The eligibility requirements of the Fair Entitlement Guarantee should be expanded to include all workers, including temporary visa holders. Further, the Fair Entitlements Guarantee should include employees with a court order where a company has been deregistered.

Knowledge of workplace rights

The current industrial relations system of laws, regulations and processes can only operate effectively if both workers and employers understand their rights and obligations. In our experience, many of our client base know very little of how much they should be paid, their leave entitlements, the services and resources available to help, and what is involved in wage recovery proceedings. It is well established that international students, for instance,

[59] *Fair Entitlements Guarantee Act 2012* (Cth), pt II div 1 sub-div A para 10(1)(g). Special category visa holders are New Zealanders.

[60] Australian Taxation Office, 'The Economic Impact of Potential Illegal Phoenix Activity', *Australian Taxation Office* (Web Page, 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/>.

[61] Ibid.

[62] WCLC, MELS and RLC, above n 34, 41.

do not approach the FWO for assistance because they are not aware of the FWO and its services; they do not know how to contact FWO; and are reluctant to complain for fear of adverse consequences.[63]

Recommendation 20

The government should provide recurrent funding to CLCs to coordinate and deliver 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.

Visa condition issues

Certain visa conditions create insecure or precarious employment.

Strict liability for breaches of visa conditions

Where visa outcomes are linked to work performance and compliance, there remains an insurmountable risk to the migrant worker – strict liability for breaches of visa conditions resulting in removal or permanent bans from Australia by the Department of Home Affairs (**DHA**).[64]

For migrant workers, visa cancellation can only be revoked if the worker can establish that there was no breach or that the breach was due to 'exceptional circumstances' beyond their control.65 There is a high evidentiary bar to establish exceptional circumstances.

Case Study

Lee was an international student and was very careful about not working more than 40 hours a fortnight at a takeaway restaurant while her university was in session. When she complained about being paid $17, instead of $26.76, her manager told her that she better not "push this", and if Lee took legal action, he insinuated that he would change the timesheets to make it look like she had been working more than 40 hours and get her deported. While Lee was upset at being underpaid, her priority was her visa. She did not want to risk wasting the $150,000 she had already spent on her studies for a $7,000 wages claim.

If a migrant worker breaches conditions of their visa, the DHA does not have the discretion to impose an alternate penalty, such as a warning or the imposition of a civil penalty.

The severeness of the penalty for visa breach acts as a structural incentive for an employer to coerce a temporary visa worker into breaching a condition of their visa in order to gain leverage over the worker.[66] When faced with the threat of such sanctions, it is understandable that many of our clients stay silent and do not take legal action to recover underpaid wages and entitlements.

In order to allow migrant workers to stay in Australia and access legal protections against workplace exploitation, the DHA should introduce a more nuanced approach to visa breaches and cancellations.

Recommendation 21

The Department of Home Affairs should stop holding migrant workers strictly liable for breaches of visa work conditions and instead adopt a proportionate system of penalties for visa breaches such as issuing a Ministerial direction under s 499 of the *Migration Act 1958* (Cth) in the form of a decision-making protocol for the department to use to issue workers with a warning or an administrative fine or civil penalty instead of having their visas cancelled.

[63] Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and George Tan, 'International Students and the Fair Work Ombudsman Report' (Fair Work Ombudsman, 2017) <https://www.fairwork.gov.au/ArticleDocuments/1160/International-students-and-the-fair-work-ombudsman-report.pdf.aspx?Embed=Y>.

[64] *Migration Act 1958* (Cth), s 116.

[65] *Migration Act 1958* (Cth), ss 137K-137L; *Education Services for Overseas Students Act 2000* (Cth), s 20.

[66] RLC and KLC direct observations and Senate Standing Committees on Education and Employment, Parliament of Australia, *A National Disgrace: the Exploitation of Temporary Work Visa Holders* (Report, March 2016). <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Report>.

Wage theft is rife among international students' employers; 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 are subject to visa condition 8105, which prohibits them from working more than 40 hours per fortnight when their course is in session. This visa condition can cause multiple issues for international students working in the gig economy; effective pay rates for food delivery riders has been calculated to be as low as $6.67 per hour.[67] Further, the nature of gig and on-demand work often sees an individual waiting long periods between jobs. This "downtime" counts towards the 40-hour work limit threshold. Many of our clients have reported that they are working more than the 40 hours allowed because they are so severely underpaid they could not 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 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.

The elimination of condition 8105 would remove an obstacle to international students taking legal action against wage theft. 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.

Recommendation 22

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.

Assurance protocol

The FWO has an 'assurance protocol' or 'amnesty' with the DHA that offers some protection for migrant workers from visa cancellation if they have breached their work conditions. This means that reporting an underpayment to FWO is sometimes the only suitable pathway for clients. Still, there is no certainty that FWO will investigate a particular complaint or that the client will get the benefit of the assurance protocol. This lack of certainty acts as a disincentive for workers from making complaints.

Recommendation 23

The assurance protocol between the Fair Work Ombudsman and the Department of Home Affairs should be strengthened to provide stronger protection from visa cancellation for workers with genuine exploitation complaints and publicised in more detail to remove ambiguity about when the assurance can or cannot be relied upon.

Recommendation 24

The Department of Home Affairs assurance protocol should be extended to underpayment claims progressed through the courts.

Tied to sponsored employer

Employees on Temporary Work (Skilled) visas may be professionals with a higher education level than other migrant workers, but they are still vulnerable to exploitation because their employer effectively determines their ability to live in Australia.

The 482 visa (and residual 457 visa) can be a pathway to permanent residency for visa holders if certain conditions are met. Their employer must agree to continue to sponsor the migrant, and the migrant must perform skilled work approved by the DHA.[68] If employment ends for whatever reason, these visa holders have only 60 days to obtain another sponsor or depart Australia.[69] 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

67 Transport Workers' Union, Submission to the Victorian Government, *Inquiry into Victorian On-demand Workforce* (20 February 2019).

68 *Migration Regulations 1994* (Cth) sch 8 visa condition 8607.

69 Department of Home Affairs, 'Check Visa Details and Conditions' *Department of Home Affairs: Immigration and Citizenship* (Web Page) <https://immi.homeaffairs.gov.au/visas/already-have-a-visa/check-visa-details-and-conditions/see-your-visa-conditions>.

commence work with the new employer until the new nomination has been approved.

Clients on 482 visas who have partially completed their three years of sponsored employment have reported staying with their employer despite being unfairly exploited or underpaid, because they do not want to jeopardise their permanent resident pathway and because they do not think they will be able to find another employer to sponsor them within the 60-day time limit.

Case Study

Anna was employed on a skilled work visa after migrating to Australia from South-East Asia. A few years into this role, Anna became eligible for permanent residency provided that her employer sponsored her.

When Anna asked about sponsorship, her boss said 'If I help you, what will I get in return?' He then asked Anna to accompany him on work trips and to be his 'booty call' on out of hours assignments. He also made unwelcome physical advances, created rumors and victimised her in the workplace. When Anna told him no, he responded by complaining about her work performance and terminating her employment. Even after this, Anna's boss asked if he would get sexual favours if he reemployed her.

Anna's boss withdrew the sponsorship and the Immigration Department refused her visa application. She lost her chance to become a permanent resident and stay in the country where she had built her life.

There was no way to complain about these issues through the visa and immigration process. Anna says now that 'there needs to be another pathway to allow access to justice for people who are exploited, without them having to worry about their visa being refused or cancelled. Immigration laws should be changed, particularly to prevent employers from abusing their power. Other considerations should be taken into account when granting permanent residency, including length of time in Australia and contribution to the community.'

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 breach their visa conditions. Further, while these visa holders are stood down and not being paid, their visa conditions prohibit them from working temporarily 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 complained of unpaid wages with the FWO. Formalising this practice and providing guidance on how this amnesty is applied would increase the visa holder's ability to find alternate work and seek redress without risking visa cancellation, removal, and future opportunities to live and work in Australia.

Recommendation 25

The Department of Home Affairs 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, including sexual harassment or discrimination or

(b) the worker has been stood down due to the COVID- 19 pandemic.

Some visa conditions create disincentives for employees from complaining about workplace exploitation, as they fear the negative visa ramifications of losing their job. This is not unique to subclass 482 visas and we also see such bondage in other visa subclasses. Holidaymaker visa holders (417/462 subclass) wishing to extend their stay in Australia by a year must satisfy a compulsory three- or six-month agricultural stint. To get this visa extension, workers often tolerate terrible exploitation and report 'slave-like conditions.

Recommendation 26

The *Migration Act 1958* (Cth) should be amended to ensure that only employers who can demonstrate compliance with the law can employ working holidaymakers.

Limited enforcement of employer migration obligations

Employers who sponsor 482 visa holders must pay them a minimum salary of at least $53,900.00. Our clients commonly report clawbacks where employers pay them correctly on payslips or through electronic transfer, but then a manager takes them to an ATM and forces them to withdraw cash and hand it over. This practice is not limited to 482 visa holders. We have seen clients similarly unlawfully underpaid under a modern award, having to repay sponsorship costs and even pay for the advertising of their own role to satisfy the government's genuine skills shortage requirement. The continuation of this practice effectively creates bonded labour and promotes the practice of underpayments and cash backs for the security of remaining on a sponsored visa.

All Australian employers have obligations under the *Migration Act 1958* (Cth), such as not employing a worker in breach of a work-related visa condition[70] and prohibitions on clawbacks. Employers need to take reasonable steps to verify that the person is allowed to work or the employer is in breach of these laws.

In response to breaches, the Australian Border Force (**ABF**) applies a tiered framework of compliance and enforcement tools according to the breaches' frequency and seriousness.[71] These tools include issuing administrative penalties, infringement notices, civil penalties and criminal penalties.

The ABF has been encouraged to increase its focus on non-compliant employers and sponsors.[72] Despite this, the Commonwealth Director of Public Prosecutions (CDPP) conducted no prosecutions against employers for breaches of offences in relation to work by migrant workers in 2019-2020.[73] There is limited enforcement of employer obligations by the ABP and CDPP for employers exploiting their employees under migration law.

Case Study – dodgy clawbacks

Josie arrived in Australia from the UK in 2018 on a temporary skilled visa. She started working full time for a communications company in February 2020. Josie's hours were cut during the pandemic, and her annual salary was reduced by 30%.

When Josie resigned, her employer asked her to pay back her visa costs despite this not being provided for in her contract. A CLC advised her that her employer is not entitled to seek reimbursement of visa nomination fees and charges and that her former employer could be sanctioned for seeking reimbursement.

The CLC helped Josie write to her former employer and refuse to pay the charges. She also asked to be reimbursed for the visa costs her former employer had reclaimed unlawfully. Her former employer responded and agreed to drop their unlawful claim and reimbursed the money she had paid already.

Recommendation 27

The Australian Border Force should initiate more enforcement activities for employer breaches of migration law, such as clawbacks of sponsorship costs or income paid to workers.

[70] *Migration Act 1958* (Cth) div 12 sub-div C.

[71] MWT Report, above n 48, 69.

[72] MWT Report, above n 48, 71.

[73] CDPP, *Prosecution Statistics* (Web Page, 2021) <https://www.cdpp.gov.au/statistics/prosecution-statistics>.

F. The interaction of government agencies and procurement policies with insecure work and the 'on-demand' economy

As of June 2020, Commonwealth, State, Territory and local governments in Australia employed more than 2 million people across a wide range of industries. This includes 246,000 employees in the Commonwealth government. As large and influential employers, Australian governments have significant potential to drive an increase in secure work by ensuring that the default position is for government workers to be securely employed. We encourage Australian governments to do this as model employers. Australian governments have significant purchasing power within the economy. They should use this purchasing power to prioritise business with organisations that engage in positive employment practices, beyond mere compliance with minimum legal standards - for example, by prioritising business with organisations that securely employ their workers.

Recommendation 28

Australian governments should ensure that the default position is for government workers to be securely employed.

Recommendation 29

Australian governments should use their purchasing power to prioritise business with organisations that engage in positive employment practices, such as organisations that securely employ their workers.

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