



# INQUIRY INTO THE VICTORIAN ON-DEMAND WORKFORCE

WESTJUSTICE SUBMISSION

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## CONTENTS

Executive summary.....	5
Table of Recommendations.....	11
Introduction.....	16
About WEstjustice and the Employment Law Program .....	16
WEstjustice legal service: on-demand workers.....	17
The extent and nature of the on-demand economy in Victoria.....	18
1. Improving Federal legal frameworks to protect vulnerable workers .....	22
A. Laws and processes to eradicate sham contracting.....	22
The problems .....	23
Presumption of employment relationship and express inclusion of dependent contractors.....	25
<b>Recommendation One: Introduce a reverse onus to provide minimum entitlements to all workers .....</b>	<b>27</b>
<b>Recommendation Two: Limit the current defence.....</b>	<b>27</b>
<b>Recommendation Three: Increase scrutiny at the time ABNs are given, and via ongoing enforcement .</b>	<b>28</b>
B. Ensure minimum entitlements for all vulnerable workers.....	29
<b>Recommendation Four: Minimum Entitlements Orders and Independent Contractor Status orders .....</b>	<b>29</b>
<b>Recommendation Five: Extend outworker protections to contract cleaners and other key industries...</b>	<b>29</b>
<b>Recommendation Six: Introduce industry wide bargaining .....</b>	<b>30</b>
C. Increased accountability in labour hire, supply chains and franchises .....	30
The problem .....	30
Current laws are insufficient .....	32
<b>Recommendation Seven: Extend liability to all relevant third parties.....</b>	<b>35</b>
<b>Recommendation Eight: Widen the definition of responsible franchisor entity.....</b>	<b>35</b>
<b>Recommendation Nine: Clarify liability of all relevant third parties .....</b>	<b>35</b>
<b>Recommendation 10: Clarify the ‘reasonable steps’ defence to ENCOURAGE compliance .....</b>	<b>36</b>
<b>Recommendation 11: Remove requirement for actual knowledge and require accessories to take positive steps to ensure compliance.....</b>	<b>36</b>
<b>Recommendation 12: Introduce a Federal Labour Hire Licensing scheme and ensure fair pay for insecure workers .....</b>	<b>36</b>

D. Other measures to stop wage theft & promote secure work.....	36
<b>Recommendation 13: Introduce a Wage Insurance Scheme .....</b>	<b>36</b>
<b>Recommendation 14: Amend the Migration Act to ensure vulnerable workers can complain with confidence.....</b>	<b>37</b>
E. Ensure all workers receive superannuation .....	39
<b>Recommendation 15: ensure workers receive superannuation owed to them.....</b>	<b>39</b>
F. Limit phoenix activity and stop punishing unlucky workers.....	39
<b>Recommendation 16: Introduce director identity numbers and compulsory insurance .....</b>	<b>40</b>
<b>Recommendation 17: Expand the FEG scheme to all workers.....</b>	<b>40</b>
2. Improving State legal frameworks to protect vulnerable workers.....	41
A. Expanded licensing scheme .....	41
<b>Recommendation 18: Expand licensing schemes to promote compliance and raise revenue .....</b>	<b>41</b>
B. Better workplace safety laws .....	43
<b>Recommendation 19: Improve workplace safety laws for the most vulnerable workers .....</b>	<b>44</b>
C. Procurement policies and industry codes .....	44
<b>Recommendation 20: Increase use of procurement policies, proactive compliance deeds and industry codes to improve compliance. ....</b>	<b>44</b>
D. Payroll tax incentives .....	45
<b>Recommendation 21: Payroll tax incentives .....</b>	<b>45</b>
3. Improving regulatory frameworks and access to education to ensure that laws are effectively enforced .....	46
A. Unmet need for employment law help .....	47
B. Access to community-based face-to-face legal assistance.....	48
Best practice community-based legal services.....	48
The WEstjustice Employment Law Service.....	51
Recommendation 22: Fund community legal centres to provide face-to-face legal assistance.....	52
C. Need for targeted education.....	52
Best practice education approaches .....	53
WEstjustice Education Program .....	53
<b>Recommendation 23: Fund targeted education programs for vulnerable workers.....</b>	<b>58</b>

<b>Recommendation 24: Specialist education programs to be incorporated into school and university induction programs for international and local students .....</b>	<b>58</b>
D. Introduce an office of the contractor and worker advocate.....	59
<b>Recommendation 25: Introduce an Office of the Contractor Advocate .....</b>	<b>59</b>
E. Better protection from discrimination at work .....	59
<b>Recommendation 26: Introduce a discrimination ombudsman or expand VEOHRC and/or WorkSafe powers to investigate and enforce breaches of anti-discrimination laws .....</b>	<b>60</b>
F. Existing agencies must be more accessible and responsive .....	61
What works well.....	62
Without help, workers cannot articulate complaints .....	63
Cultural responsiveness frameworks .....	63
<b>Recommendation 27: Agencies need to improve cultural responsiveness frameworks .....</b>	<b>64</b>
<b>Recommendation 28: Greater collaboration, resourcing and action to address the superannuation black hole .....</b>	<b>64</b>
Enhanced powers to aid efficient resolution avoid the need for court .....	64
WEstjustice’s recommendations to improve FWO’s enforcement powers .....	66
<b>Recommendation 29: Cost consequences for employers who refuse to engage with FWO and Assessment Notices for employers who refuse to engage or have unmeritorious claims .....</b>	<b>67</b>
Proactive compliance and more resourcing.....	67
<b>Recommendation 30: Increased resourcing and more proactive compliance required .....</b>	<b>68</b>
Conclusion .....	68
Appendix One: Compilation of WEstjustice’s drafting suggestions.....	69

## EXECUTIVE SUMMARY

WEstjustice Community Legal Centre welcomes the opportunity to make this submission to the Victorian Government Inquiry into the Victorian on-demand workforce (**Inquiry**).<sup>1</sup>

### WESTJUSTICE LEGAL SERVICE: ON-DEMAND WORKERS

WEstjustice has provided legal casework support to over 40 workers in the on-demand economy, including those in the passenger transport, food delivery, car-washing, distribution, construction and cleaning industries. The majority of our on-demand work clients have been international students, but we have also seen permanent migrants and refugees. In addition, we have learned about on-demand work through our education programs, and consultation with community workers and community leaders in our Peer Education Network.<sup>2</sup> They report that many refugee, asylum seeker and migrant workers in Melbourne working in the on-demand economy work for Uber and Uber Eats. Other community members work in the gig economy as interpreters, aged care workers, cleaners, babysitters, food or grocery delivery, or completing various jobs via platforms including Air Tasker.

The majority of our on-demand work clients were engaged as contractors, and received significantly less than the minimum wage, having regard to the number of hours worked. Some workers were paid as little as \$6 an hour.

Frequently, our clients had been injured at work, experienced discrimination and sexual harassment, and did not have access to workers' compensation payments or other entitlements or superannuation. They faced uncertainty about their legal status and rights and, despite being some of Victoria's most vulnerable workers, they received limited protection from the law and before coming to WEstjustice, limited access to assistance to enforce what rights they did have.

### THE EXTENT AND NATURE OF THE ON-DEMAND ECONOMY IN VICTORIA

Ways of working have changed and the law has not kept up. On-demand work provides immense opportunities for the communities WEstjustice works with given the low barriers to entry, and the flexibility such positions offer. However, as this submission demonstrates, there are considerable risks associated with the gig economy which, if left unaddressed, will result in the ongoing exploitation of those most vulnerable.

Young people are the demographic most likely to be employed using digital on-demand platforms,<sup>3</sup> and migrant communities are overrepresented in insecure work<sup>4</sup> arrangements, including on-demand work. Both communities are particularly vulnerable to exploitation due to a range of cultural, literacy, language and

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<sup>1</sup> We would like to acknowledge the generous assistance of WEstjustice volunteers in preparing this submission, and in particular Ella Trickey, Rachel Leibhaber, Marina Leikina, Deepa Travers, Jenny Forti and Jacqueline Parker.

<sup>2</sup> The WEstjustice Peer Education Network consists of community leaders and workers from community agencies who have completed our [Employment Law Train the Trainer program](#).

<sup>3</sup> Select Committee on the Future of Work and Workers, Parliament of Australia, *Hope is not a strategy – our shared responsibility for the future of work and workers* (2018)

<[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Future\\_of\\_Work\\_and\\_Workers/FutureofWork/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Work_and_Workers/FutureofWork/Report)> p 17.

<sup>4</sup> Ibid p 24.

practical factors. On-demand workers generally have lower wages than employees and are not entitled to the benefits afforded by secure work including superannuation, leave and access to WorkCover.<sup>5</sup>

Although we cannot comment on the extent of on-demand work in Victoria, in our experience, exploitation is rife.

Our clients are frequently engaged in sham arrangements and routinely underpaid or not paid at all. Of our cleaning clients,<sup>6</sup> one fifth have suffered a workplace injury and one in six workers complained of discrimination or bullying. Clients were paid as little as \$6 an hour, with some receiving no income at all. Some clients had been forced to pay for “training” or modifications to their property, and then left out of pocket and without a decent job. Work is insecure and frequently unsafe, and workers rarely receive superannuation or access to WorkCover when they are injured.

The impact of insecure work and exploitation on our clients is immense. Unfortunately, many vulnerable clients are not able to enforce their rights for a number of reasons, and so the exploitation continues. Workers generally have little knowledge of their rights or where to go for help. It is still unclear which laws apply to on-demand workers, and how they apply – and the onus is on the most vulnerable to prove their case. As discussed in Section 3, mainstream agencies including government regulators, Courts and Commissions are largely inaccessible to vulnerable workers, and community organisations are underfunded and overloaded.

On-demand work not only has negative impacts on exploited workers but also undermines the workplace relations framework – businesses who are using secure and properly paid forms of employment are being undercut by those who rely on sham contracting, exploitation and legal grey areas to obtain competitive advantage.

Many of our clients are working hard to provide significant service to leading businesses in Australia – some via direct engagement with on-demand platform companies, and others less directly by providing security, cleaning or distribution services for energy retailers, private schools, universities, stadiums, large franchise stores and offices – yet they are engaged on ABNs by unscrupulous individuals or companies, only paid for some of the hours they work, dismissed when they complained or were injured, and denied their minimum entitlements. Despite receiving the benefit of their labour, these lead firms cannot be held legally accountable for the exploitation, or at best the law is unclear. There is presently an insurmountable legal and ethical chasm: on one side stand the lead firms and on-demand companies, and on the other, an emerging sub-class of vulnerable workers, often working at night, alone, in insecure arrangements. Laws and services must be reformed to overcome this divide.

Our submission contains case studies and evidence-based recommendations for reform. All of the case studies in this submission are based on the experiences of our on-demand work clients,<sup>7</sup> but are also representative of our clients in other forms of insecure work. While the recommendations in this submission are specific to the terms of reference of this Inquiry, they will assist all vulnerable workers in Australia.

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<sup>5</sup> Igor Dosen & Michael Graham, “Labour rights in the gig economy – an explainer” (Research Note No.7, June 2018, Research & Inquiries Unit, Parliamentary Library & Information Service) p1.

<sup>6</sup> Note not all our cleaning clients form part of the on-demand workforce, and our data cannot confirm which clients are on-demand and which aren’t. In a sample of 35 cleaning clients from the past four years, we found: 75% received advice in relation to underpayment or non payment of wages; 31% received advice in relation to sham contracting; 20% received advice in relation to workplace injury; 20% received advice in relation to dismissal; and 17% received advice in relation to bullying and/or discrimination. Our clients’ cases were usually complex and multifaceted. Nearly two thirds of clients sought assistance for two or more legal issues, often spanning multiple jurisdictions.

<sup>7</sup> Note names have been changed in all case studies

## KEY RECOMMENDATIONS

In this Submission, we make **30 recommendations** to stop the exploitation of on-demand workers. In respect of the terms of reference our key recommendations are:

### 1. Improving federal legal frameworks that protect workers from harm

*WEstjustice recommends that the State Government call on the Federal Government to make the following amendments to the Fair Work Act 2009 (Cth) and other relevant Federal laws:*

- a. **To eradicate sham contracting, introduce a reverse onus that presumes all workers are employees not contractors (unless the principal/employer proves otherwise).** Our on-demand work clients are often purportedly engaged as contractors with ABNs when they are in fact employees. This means that they are denied the right to minimum pay and other employee entitlements. To remove the perverse incentive to engage in sham contracting, the law must be amended to provide all workers with the right to the minimum pay and entitlements, unless the employer/principal can show that the worker was genuinely running their own business.
- b. **To stop employers using complex business structures to avoid their legal obligations, the law must deem dependent contractors to be employees,** employer defences must be limited and more rigorous tests should be applied before an ABN is given to an individual. On the spot ABN inspection and assessment should also be increased.
- c. **Ensure minimum entitlements for all vulnerable workers.** In addition to the presumption of employment and an inclusive legal definition, a range of judicial, legislative and worker-led mechanisms are required to provide certainty, protect workers and allow flexibility to respond to a changing world of work:
  - a. **The Fair Work Commission (FWC) should be given the power to make Minimum Entitlements Orders and Independent Contractor Status Orders.** This 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 considered to be genuine contractors.
  - b. **Expand specific outworker protections to cover other key industries for vulnerable workers, and allow the addition of further industries by regulation.** This legislative response provides much-needed clarity and protection to vulnerable workers in supply chains, including contract cleaners, security workers and those in the community service sector. Provisions would deem all workers to be employees, enable workers to recover unpaid entitlements from indirectly responsible entities and require employers to comply with relevant codes that set out requirements in respect of monitoring and reporting.
  - c. **Introduce industry wide bargaining that covers all workers engaged in particular classes of work by particular classes of employer or in particular industries.** This worker-led response will enable unions and workers to improve minimum standards for the most vulnerable workers who may not clearly fit into standard employment categories, and remove the incentive to misclassify workers. It will also prevent a race to the bottom.
- d. **To increase accountability in supply chains, and ensure that franchisors, labour hire hosts, supply chain lead firms and directors take reasonable steps to prevent exploitation, expand the responsible franchisor/holding company provisions to cover all responsible third parties.** Ways of working have changed, and our law has not kept up. Currently, big businesses benefit from the

labour of vulnerable workers, but cannot be held accountable for unlawful conduct. Existing provisions of the FW Act are not sufficient. To promote systemic compliance, liability for franchisors and holding companies must be extended to cover all responsible entities, including lead firms in supply chains and labour hire hosts. **Big business must be required to take reasonable steps to stop exploitation – or else be held to account.** The law must stop rewarding companies who choose to be wilfully blind or inactive in the face of exploitation. The requirement for “significant” control must be removed. Labour hire licensing is also recommended.

- e. **To incentivise compliance, expand the accessorial liability provisions to require directors and others to take positive steps to stop exploitation.** The accessorial liability provisions must also be strengthened by removing the requirement for actual knowledge and placing positive duties on directors and others to take steps to rectify any breaches that do occur.
- f. **To stop wage theft, we also recommend introducing a wage insurance scheme and better protections for temporary visa holders.** This includes *Migration Act* amendments to remove workers’ fear of being forced to leave Australia if they report exploitation.
- g. **Ensure all workers can obtain superannuation** by making it part of the National Employment Standards, providing independent contractors with a legislative mechanism to pursue unpaid superannuation directly, and removing the minimum earnings threshold and minimum age restrictions.
- h. **Stop punishing unlucky workers – limit phoenix activity, introduce director identity numbers and compulsory insurance, and expand Fair Entitlements Guarantee (FEG).** Many of our clients are unable to recover unpaid wages through no fault of their own. In some instances, an employer has provided false details, or has simply “disappeared”. Many online platforms connect workers to employment but no formal business information or contact details are provided. We have contacted employers on a number of occasions only to be provided with fake email addresses, fake postal addresses, and false promises of repayment. The phenomenon of phoenix companies—whereby directors close down companies to avoid paying debts, and proceed to open a new company without penalty – is a significant problem for WEstjustice clients. The law must be amended to stop rewarding unscrupulous directors who make profits from repeated exploitation - including the introduction of director identity numbers. Directors should also be required to pay a compulsory insurance premium (similar to WorkCover) to help fund the provision of community-based employment services and the FEG scheme. Many of our clients, including international students, are not eligible for FEG purely due to their temporary visa status. This discrimination must be addressed: all workers supporting the Australian economy should be able to access FEG.

## 2. Improving State legal frameworks that protect workers from harm

***In addition to lobbying the Federal Government to adopt the above changes, it is recommended that the State Government take the following steps:***

- a. **Expand existing licensing schemes to promote compliance.** Building on its labour hire licensing legislation, the State Government should consider ways that it can regulate the on-demand economy through the use of licensing schemes. For example, the State should require on-demand companies in particular industries (including ride-share, contract cleaning, food delivery, flier distribution and community services), to hold licenses. The licenses would enable the State to regulate the number of operators in a particular industry, and ensure that companies are required to comply with relevant laws including employment, superannuation and workplace safety.



- b. **Improve workplace safety laws for the most vulnerable workers and stop on-demand companies from shirking responsibility.** Vulnerable on-demand workers must have access to safe work and WorkCover if they are injured. On-demand businesses must not undercut other businesses who rely on secure employment by gaining a competitive advantage through avoiding the payment of WorkCover premiums. The State Government must ensure that workplace safety laws require gig economy companies take responsibility for the safety of their workers. Current deeming provisions must be extended to clarify that certain on-demand workers are deemed to be working under a contract of service and entitled to WorkCover, and businesses must pay insurance.
- c. **Use procurement policies to improve minimum standards and promote compliance:** The State Government should review all procurement policies to ensure that tenders for Government work can only be submitted by businesses with an independently verified and demonstrated track record of compliance with workplace laws, and a demonstrated commitment to secure work and diversity targets. To be eligible, businesses must hold accreditation under any relevant schemes or industry codes (for example, for contract cleaners this would include the Cleaning Accountability Framework). Any procurement policies must be properly monitored and enforced. The Government should refuse to reimburse Victorian public sector staff for costs incurred in the use of on-demand platforms that do not comply with procurement policies, thus requiring staff to use alternative services.
- d. **The State Government should consider the provision of payroll tax incentives for businesses that can demonstrate compliance with laws and a commitment to secure work and diversity targets.**

### 3. Improving regulatory frameworks and access to education to ensure that laws are effectively enforced

- a. To ensure that vulnerable workers have adequate representation and knowledge of their rights, **the State Government should fund community legal centres to provide community-based face-to-face legal assistance.** For workers who are not yet union members and cannot afford a private lawyer, there is significant unmet need for legal assistance. Many matters are uneconomical for private firms to run, and workers cannot enforce their rights alone. With face-to-face support from a trusted community organisation, wages can be recovered, jobs saved and employers held to account. Yet funding for tailored and comprehensive community-based employment services is scarce, especially for generalist community legal centres. The State Government should urgently establish a dedicated fund for community-based employment services for vulnerable workers, including the provision of legal assistance and targeted education.
- b. **The State Government should also fund targeted education programs for vulnerable workers.** Vulnerable workers, including newly arrived and refugee workers, international students and young people, generally understand little or nothing about Australian employment laws and services. Due to cultural and language barriers, communities will rarely approach a service they do not trust, and cannot access or use “self help” materials on websites. Targeted, face-to-face education programs enable workers to understand and enforce their rights by raising awareness and importantly, building trusted connections between communities and services, including unions. Programs must be funded to provide education to community members, community leaders (Train the Trainer) and agency staff working with newly arrived communities. The Federal Government should establish a fund to provide these targeted education programs. **In addition, in recognition of the particular needs of young people and international students, the State Government must fund specific education programs in schools, TAFEs and universities for international and local students.** Such programs should be provided by community legal centres, unions or other suitably qualified community groups.
- c. **The State Government should also establish an Office of the Contractor Advocate.** The Advocate could 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 VCAT and other jurisdictions to recover minimum entitlements.

- d. **To stop discrimination and sexual harassment at work, the State Government should expand regulator powers to investigate and enforce anti-discrimination laws.** Workers who experience discrimination or sexual harassment have a range of legal options including making a complaint to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC). Each approach requires the complainant to make a written application and follow their case through. There is no proactive regulator who can run a case on behalf of a client, or gather intelligence and prosecute an employer. Given the power imbalances and lack of enforcement, there are few incentives for employers to take positive steps to reduce discrimination. The State Government should **introduce a Discrimination Ombudsman or increase the power and resources of the Victorian Equal Opportunity and Human Rights Commission or WorkSafe**, to allow for the investigation and enforcement of breaches of anti-discrimination laws, education campaigns and a focus on systemic change. The law should also be amended to require employers to take more positive steps to prevent discrimination and introduce a reverse onus of proof.
- e. **Existing agencies must be more accessible and responsive to the needs of Australia's most vulnerable workers.** As a result of low rights awareness, language, literacy, cultural and practical barriers, our clients rarely contact mainstream agencies for help. Agencies and commissions must take further steps to ensure that they are more accessible and responsive. Importantly, to ensure wages claims are resolved efficiently and effectively without the need to go to Court, we recommend the expansion of the Fair Work Ombudsman's (**FWO**) powers to issue Assessment Notices.

Our proposals are set out in more detail below, and we have also compiled an overview of our drafting suggestions to achieve these changes in Appendix One: Compilation of WEstjustice's drafting suggestions (**Appendix One**).

## TABLE OF RECOMMENDATIONS

Objective	Current law/situation	WEstjustice's recommendations (Also see Appendix One)
<b>1. Improving federal legal frameworks that protect workers from harm</b> <i>WEstjustice recommends that the State Government call on the Federal Government to make the following amendments to the Fair Work Act 2009 (Cth) and other relevant Federal laws:</i>		
<b>Ensure laws and processes eradicate sham contracting (page 22)</b>	<p>A person must not misrepresent to an individual that a contract of employment is an independent contracting arrangement.</p> <p>Defence: the employer did not know and was not reckless as to whether it was an employment or contracting arrangement.</p>	<p><b>Recommendation One: Introduce a reverse onus and inclusive definition to provide minimum entitlements to all workers. This definition must deem dependent contractors to be employees.</b></p> <p>To stop unscrupulous businesses using sham contracting as their business model, introduce a reverse onus which provides minimum entitlements to all workers (including dependent contractors), but enables principals a defence when they engage genuine contractors.</p> <p><b>Recommendation Two: Limit the current defence.</b></p> <p>The recklessness/lack of knowledge defence for sham contracting should be removed, or at the very least, the defence should be expanded to ensure that employers are liable when they fail to take reasonable steps to determine whether their workers are employees.</p> <p><b>Recommendation Three: Increase scrutiny at the time ABNs are given, and via ongoing enforcement.</b></p> <p>At the time an ABN is requested, applicants should be required to attend a face-to-face educational meeting to understand the differences between employees and contractors, and learn about insurance and taxation obligations. On the spot inspection and assessment by regulators should also be increased.</p>
<b>Ensure minimum entitlements for all vulnerable workers (page 29)</b>	<p>Individual workers can bring a sham contracting claim in the Federal Court or Federal Circuit Court, however the outcome of the case will be particular to those workers.</p>	<p><b>Recommendation Four: The FWC should be given the power to make Minimum Entitlements Orders and Independent Contractor Status Orders.</b></p> <p>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.</p> <p><b>Recommendation Five: Expand specific outworker protections to cover other key industries for vulnerable workers, and allow the addition of further industries by regulation.</b></p> <p>Provisions would deem all workers in particular industries (including contract cleaners, security workers and those in the community service sector) to be employees, enable workers to recover unpaid entitlements from indirectly responsible entities and require employers to comply with a relevant codes.</p> <p><b>Recommendation Six: Introduce industry wide bargaining</b></p>

Objective	Current law/situation	WEstjustice's recommendations (Also see Appendix One)
		<b>that covers all workers engaged in certain classes of work by particular classes of employer or in particular industries.</b>
<b>Increased accountability in franchises, labour hire, supply chains (page 30)</b>	<p>Franchisors and parent companies will be liable for a civil penalty, where there has been a contravention of certain civil remedy provisions and they knew or could reasonably be expected to have known that a contravention by the franchisee entity or subsidiary (either the body corporate or an officer) would occur or a contravention of the same or similar character was likely to occur.</p> <p>Defence: Need to take reasonable steps to prevent the contravention.</p>	<p><b>Recommendation Seven: Extend liability to all relevant third parties.</b> In addition to protecting workers in franchises and subsidiary companies, make supply chain entities and labour hire hosts responsible for the protection of workers' rights.</p> <p><b>Recommendation Eight: Widen the definition of responsible franchisor entity.</b> Amend the definition of responsible franchisor entity to ensure that all franchises are covered by removing the requirement for a significant degree of influence or control.</p> <p><b>Recommendation Nine: Clarify liability of all relevant third parties.</b> Insert a provision to clarify that responsible franchisor entities, holding companies and other third party entities who contravene clause 558B should also be taken to have contravened the relevant provisions contravened by their franchisee entity/subsidiary/indirectly controlled entity.</p> <p><b>Recommendation 10: Clarify the 'reasonable steps' defence.</b> Ensure that the 'reasonable steps' defence incentivises proactive compliance, including by requiring independent monitoring and financially viable contracts.</p> <p><b>Recommendation 11: Remove requirement for actual knowledge and require accessories to take positive steps to ensure compliance.</b> Amend section 550 to require directors and other accessories to take positive steps to ensure compliance within their business or undertaking. Ensure that failure to rectify a breach will also constitute involvement in a contravention.</p> <p><b>Recommendation 12: Introduce a Federal Labour Hire Licensing scheme and ensure fair pay for insecure workers.</b></p>
<b>Introduce other measures to stop wage theft (page 36)</b>		<p><b>Recommendation 13: Introduce a Wage Insurance Scheme.</b> Where employees cannot access their unpaid wages via available legal frameworks, an insurance scheme should be available.</p> <p><b>Recommendation 14: Amend the Migration Act to ensure vulnerable workers can complain with confidence.</b> Introduce proportionate penalties so that workers can complain without fear of being forced to leave Australia if they report exploitation.</p>
<b>Ensure all workers can obtain superannuation (page 39)</b>	Workers can alert the ATO if they have not received superannuation but have limited options to pursue superannuation independently.	<b>Recommendation 15: Ensure workers receive superannuation owed to them</b> by making it part of the National Employment Standards, providing independent contractors with a legislative mechanism to pursue unpaid superannuation directly and removing the minimum earnings threshold and minimum age restrictions.

Objective	Current law/situation	WEstjustice's recommendations (Also see Appendix One)
<b>Address phoenixing and make FEG fair (page 39)</b>	Recent Pricewaterhouse Coopers report commissioned by the Phoenix Taskforce estimates that workers are missing out on up to \$300,000,000 in entitlements every year.	<p><b>Recommendation 16: Introduce director identity numbers and compulsory insurance</b></p> <p>The law must be amended to stop rewarding dodgy directors who make profits from repeated exploitation - including the introduction of director identity numbers. Directors should also be required to pay a compulsory insurance premium (similar to WorkCover) to assist in funding the provision of community-based employment services and the FEG scheme.</p> <p><b>Recommendation 17: Expand the FEG scheme to all workers</b></p> <p>Many of our clients, including international students, are not eligible for FEG purely due to their temporary visa status. This discrimination must be addressed – all workers who support the Australian economy should be able to access FEG.</p>
<b>2. Improving state legal frameworks that protect workers from harm</b>  <i>In addition to lobbying the Federal Government to adopt the above changes, it is recommended that the State Government take the following steps:</i>		
<b>Expand existing licensing schemes to promote compliance (page 41)</b>	Labour hire licensing legislation	<p><b>Recommendation 18: Expand licensing schemes to promote compliance and raise revenue</b></p> <p>The State should require on-demand companies in particular industries (including ride-share, contract cleaning, food delivery, flier distribution and community services), to hold licenses. The licenses would enable the State to regulate the number of operators in a particular industry, and ensure that companies comply with relevant laws including employment, superannuation and workplace safety.</p>
<b>Ensure safe workplaces and insurance for on-demand workers (page 43)</b>	Workers are afforded some protection by WorkCover and OH&S laws – however the application of these laws to on-demand workers is unclear and workers usually pursue a TAC claim instead of WorkCover.	<p><b>Recommendation 19: Improve workplace safety laws for the most vulnerable workers and stop on-demand companies from shirking responsibility</b></p> <p>The State Government must ensure that workplace safety laws require gig economy companies take responsibility for the safety of their workers. Current deeming provisions must be extended to clarify that certain on-demand workers are deemed to be working under a contract of service and entitled to WorkCover, and companies must pay insurance.</p>
<b>Use procurement policies to promote compliance (page 44)</b>		<p><b>Recommendation 20: Increase use of procurement policies, proactive compliance deeds and industry codes to improve compliance.</b></p> <p>The Government should require demonstrated compliance with workplace laws and relevant industry codes in order to tender for government contracts.</p>
<b>Use payroll tax incentives to promote compliance (page 45)</b>		<p><b>Recommendation 21: Consider the provision of payroll tax incentives for businesses that can demonstrate compliance with laws and a commitment to secure work and diversity targets.</b></p>

Objective	Current law/situation	WEstjustice's recommendations (Also see Appendix One)
<b>3. Improving regulatory frameworks to ensure that laws are effectively enforced</b>		
<b>Provide funding for community-based face-to-face legal assistance &amp; education (page 46)</b>	Extremely limited funding for community legal centres under the FWO Community Engagement Grants Program. No recurrent funding for generalist community legal centres providing face-to-face employment law assistance and targeted education programs.	<p><b>Recommendation 22: Fund community legal centres to provide face-to-face legal assistance</b> Without assistance, vulnerable workers 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 vulnerable workers. The State Government must provide recurrent funding for community legal centres to do this work, and address significant unmet need.</p> <p><b>Recommendation 23: Fund targeted education programs for vulnerable workers</b> Tailored education programs are required to raise awareness of laws, and build trust and accessibility of services. The State Government must establish a fund to deliver these programs to community members, community leaders and agency staff.</p> <p><b>Recommendation 24: In recognition of the particular needs of young people and international students, the State Government must fund specific education programs in schools, TAFEs and universities for international and local students.</b></p>
<b>Ensure vulnerable contractors can enforce their rights and systemic issues are addressed (page 59)</b>	There are very limited services for vulnerable contractors	<p><b>Recommendation 25: The State Government should establish an Office of the Contractor Advocate.</b> The Office would provide information and guidance to individual workers and businesses and also investigate and report on systemic non-compliance.</p>
<b>Stop discrimination and sexual harassment at work for on-demand workers (page 59)</b>	The onus is on the complainant to bring a claim – there is no regulator with power to investigate and prosecute breaches of anti-discrimination laws.	<p><b>Recommendation 26: Introduce a discrimination ombudsman or expand VEOHRC and/or WorkSafe powers to investigate and enforce breaches of anti-discrimination laws. Amend existing legislation to require employers to take more positive steps to prevent discrimination and introduce a reverse onus of proof.</b> An appropriately resourced and empowered regulator would allow for the investigation and enforcement of breaches of anti-discrimination laws, education campaigns and a focus on systemic change. The law should also be amended to require employers to take more positive steps to prevent discrimination and introduce a reverse onus of proof.</p>
<b>Ensure agencies are active &amp; accessible (page 61)</b>	FWO has adopted numerous measures to target vulnerable groups. The Wage Inspectorate is newly established.	<p><b>Recommendation 27: Agencies need to improve cultural responsiveness frameworks</b> Including specific protocols and checklists for Infoline staff, engaging dedicated staff and participating in and resourcing education and engagement programs.</p> <p><b>Recommendation 28: Greater collaboration, resourcing and action to address the superannuation black hole</b></p>

Objective	Current law/situation	WEstjustice's recommendations (Also see Appendix One)
		<p>FWO and the ATO need to be appropriately resourced to pursue unpaid superannuation claims, and community legal centres should be funded to assist.</p> <p><b>Recommendation 29: Cost consequences for employers who refuse to engage with FWO and Assessment Notices for employers who refuse to engage or have unmeritorious claims</b></p> <p>Make it clear that there will be costs consequences if an employer unreasonably refuses to participate in a matter before the FWO. Where an employer refuses to participate in mediation, or mediation fails to resolve a dispute, FWO should have the power to issue an Assessment Notice that sets out the FWO's findings as to the employee's entitlements. An applicant may then rely on the Assessment Notice in the court proceeding. Where the applicant has an Assessment Notice, the applicant is taken to be entitled to the amounts specified in the assessment notice unless the employer proves otherwise. If the employer is unsuccessful at Court, costs should automatically be awarded against them.</p> <p><b>Recommendation 30: Increased resourcing and more proactive compliance required</b></p> <p>Vulnerable workers are not always able to bring a complaint themselves. Agencies must be adequately resourced to identify systemic issues and respond proactively.</p>

## INTRODUCTION

This submission seeks to address the terms of reference most relevant to the WEstjustice Employment Law Program, specifically:

- (a) The extent and nature of the on-demand economy in Victoria, for the purposes of considering its impact on both the Victorian labour market and Victorian economy more broadly, including but not limited to:
  - i. the legal or work status of persons working for, or with, businesses using on-line platforms;
  - ii. the application of workplace laws and instruments to those persons, including accident compensation, payroll or similar taxes, superannuation and health and safety laws;
  - iii. whether contracting or other arrangements are being used to avoid the application of workplace laws and other statutory obligations;
  - iv. the effectiveness of the enforcement of those laws.
- (b) In making recommendations, the Inquiry should have regard to matters including:
  - i. the capacity of existing legal and regulatory frameworks to protect the rights of vulnerable workers;
  - v. regulation in other Australian jurisdictions and in other countries;
  - vii. the limitations of Victoria's legislative powers over industrial relations and related matters and the capacity to regulate these matters; and
  - viii. the ability of any Victorian regulatory arrangements to operate effectively in the absence of a national approach.

## ABOUT WESTJUSTICE AND THE EMPLOYMENT LAW PROGRAM

WEstjustice ([www.westjustice.org.au](http://www.westjustice.org.au)) is a community organisation providing free legal help to people in the western suburbs of Melbourne. Our offices are located in Footscray, Werribee and Sunshine, with a number of outreach services.

We assist with a range of everyday legal problems including consumer disputes, credit and debt, family law and family violence, fines, motor vehicle accidents, tenancy, and employment related matters.

We also provide free community legal education, undertake law reform activities and work in partnership with local communities to deliver innovative projects that build legal capacity and improve access to justice.

With a long history of working with migrant and refugee communities, in 2014 we identified a large unmet need for employment law assistance for these communities, who are particularly vulnerable to exploitation at work. In response, WEstjustice established the Employment Law Project, which provided legal assistance to over 200 migrant workers from 30 different countries, successfully recovering or obtaining orders for over \$120 000 in unpaid entitlements and over \$125 000 in compensation for unlawful termination. We also trained over 600 migrant workers, as well as leaders from migrant communities and professionals supporting



these communities. Based on evidence from our work, and extensive research and consultation, WEstjustice released the [Not Just Work Report](#),<sup>8</sup> outlining 10 key steps to stop the exploitation of migrant workers.

Given continuing and unmet need, WEstjustice now operates an ongoing Employment Law Program. The Program seeks to improve employment outcomes for vulnerable workers including migrants, refugees, temporary visa holders and young people. We do this by empowering communities to understand and enforce their workplace rights through the provision of tailored legal services, education, sector capacity building and advocacy for systemic reform.

In addition to our migrant and refugee casework service, we also provide assistance to international students at the Study Melbourne International Students Work Rights Legal Service, and to school students and other young people through our School Lawyer Program and youth clinics.

To date, our service has recovered over \$400 000 in unpaid entitlements or compensation, trained over 1000 community members, delivered four roll-outs of our award-winning Train the Trainer program, and participated in numerous law-reform inquiries and campaigns.

#### WESTJUSTICE LEGAL SERVICE: ON-DEMAND WORKERS

WEstjustice has provided legal casework support to over 40 workers in the on-demand economy, including those in the passenger transport, food delivery, car-washing, distribution, construction and cleaning industries. The majority of our on-demand work clients have been international students, but we have also seen permanent migrants and refugees.

In addition, we have learned about on-demand work through our education programs, and consultation with community workers and community leaders in our Peer Education Network.<sup>9</sup> According to data from a survey of 11 community leaders from the WEstjustice Peer Education Network,<sup>10</sup> the majority of refugee, asylum seeker and migrant workers in Melbourne working in the on-demand economy work for Uber and Uber Eats.

Other community members work in the gig economy as interpreters, aged care workers, cleaners, babysitters, food or grocery delivery, or completing various jobs via platforms including Air Tasker.

The key problems faced by these workers were identified as:

- Low payment - not getting paid at least the minimum wage
- Not getting paid superannuation
- No WorkCover
- No insurance
- Safety risks – especially when driving at night with intoxicated passengers
- Safety risks for cyclists
- Discrimination from passengers or clients

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<sup>8</sup> Catherine Hemingway, 'Not Just Work: Ending the exploitation of refugee and migrant workers', WEstjustice Employment Law Project Final Report, available at <[www.westjustice.org.au/publications/policy-reports-121](http://www.westjustice.org.au/publications/policy-reports-121)>, last accessed 26 July 2018.

<sup>9</sup> The WEstjustice Peer Education Network consists of community leaders and workers from community agencies who have completed our Employment Law Train the Trainer program.

<sup>10</sup> Community leaders were from a range of communities including communities of Burma, Ethiopia, South Sudan, East Africa, Tibet, China and Iraq.

- Unpredictable and unreliable work patterns, with long waits for clients or no clients
- No sick leave, holiday pay, or other entitlements afforded to those in secure employment
- Being expected to make modifications to their vehicle at their own cost

There were also benefits identified with this kind of work, such as:

- Good for newly arrived immigrants who otherwise struggle to get jobs
- Easy to get work
- Flexible
- You can choose when you want to work and the area you want to work in

Our casework experiences mirror these survey findings. The vast majority of our on-demand work clients were engaged as contractors, and received significantly less than the minimum wage, with some workers paid as little as \$6 an hour. Our clients were frequently injured at work, experienced discrimination and sexual harassment, and did not receive WorkCover or other entitlements. They faced uncertainty about their legal status and rights and, despite being some of Victoria's most vulnerable workers, they received limited protection from the law and limited assistance to enforce what rights they did have.

#### THE EXTENT AND NATURE OF THE ON-DEMAND ECONOMY IN VICTORIA

*A few of my community members work in gig economy and it benefits for them to get job when it's really hard to get a job as newly arrived migrants. (Community leader)<sup>11</sup>*

*I shopped for customers and delivered groceries to their door steps. The pay depended on the amount of the shopping. There were no other entitlements or extra payments to cover things like parking fees. The work is flexible but not stable. Sometimes there would be no orders for a number of hours. If anything happened to me, the organisation would not compensate for the loss. I don't feel like this work is a job for adults who are looking for full-time employment... [T]hese workers are not well protected by the current laws. (Community leader)<sup>12</sup>*

Ways of working have changed and the law has not kept up.

As stated above, on-demand work provides immense opportunities for the communities WEstjustice works with – especially given the low barriers to entry, and the flexibility such positions offer. However, as this submission demonstrates, there are considerable risks which, if left unaddressed, will result in the ongoing exploitation of Victoria's most vulnerable workers.

Young people are the demographic most likely to be employed using digital on-demand platforms,<sup>13</sup> and migrant communities are overrepresented in insecure work<sup>14</sup> arrangements, including on-demand work. Both communities are particularly vulnerable to exploitation due to a range of cultural, literacy, language and practical factors. On-demand workers generally have lower wages than employees and miss out on many other benefits attached to secure work including superannuation, leave and access to WorkCover.<sup>15</sup>

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<sup>11</sup> Community leader, WEstjustice on-demand economy inquiry survey.

<sup>12</sup> Ibid

<sup>13</sup> Above n5, p 17 .

<sup>14</sup> Ibid p 24.

<sup>15</sup> Dosen & Graham, above n 7.

Although we cannot comment on the extent of on-demand work in Victoria, in our experience, exploitation is rife. Our clients are frequently engaged in sham arrangements and routinely underpaid or not paid at all. Of our cleaning clients,<sup>16</sup> one fifth have suffered a workplace injury and one in six workers complained of discrimination or bullying. Clients were paid as little as \$6 an hour, and some received no income at all. Some clients had been forced to pay for “training” or modifications to their property, and were then left out of pocket and without a decent job. Work is insecure and frequently unsafe, and workers rarely receive superannuation or access to WorkCover when they are injured.

Based on extensive research, consultation and data gathered throughout the Employment Law Project, the WEstjustice [Not Just Work Report](#)<sup>17</sup> documents systemic and widespread exploitation of migrant workers across numerous industries. The reasons for exploitation include:

- Marginalisation of the voices of migrant workers
- Limited access to decent work (in 2011, the Australian Bureau of Statistics found that 9.1% of Humanitarian migrants in the labour force were unemployed, compared to 4.9% of the general population)
- Low awareness of workplace rights and services (in a WEstjustice survey, 88% of community workers reported that newly arrived communities do not understand Australian employment laws at all or understand a little)
- Lack of effective access to mainstream services (as one community leader notes, “many in my community do not contact agencies. They are afraid, because many have had bad experiences with people in authority back home”)
- Absence of targeted community services, and
- The problem of defective laws and processes.

The impact of insecure work and exploitation on our clients is immense. A number of our clients have experienced homelessness as a result of losing their job. Our client files reveal that young, newly arrived and refugee workers are often subjected to distressing and humiliating treatment at work. Such treatment may be connected to attributes such as their country of birth, gender, ethnicity and refugee status.

In some cases, discriminatory behaviour has caused significant psychological injuries. Many of our clients have experienced torture and trauma in their home country, or on their journey to Australia. One client described the experience of being bullied at work in Australia worse than any other experience he had, including surviving a civil war in his country of origin.

Some clients notice that discriminatory behaviour escalates after media reports of terrorist events overseas. Other times, clients are tormented for being injured, or dismissed for asking about their workplace rights. Such treatment is unlawful and threatens a newly arrived person’s capacity for future work and successful settlement within the community.

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<sup>16</sup> Note not all our cleaning clients form part of the on-demand workforce, and our data cannot confirm which clients are on-demand and which aren’t. In a sample of 35 cleaning clients from the past four years, we found: 75% received advice in relation to underpayment or non-payment of wages; 31% received advice in relation to sham contracting; 20% received advice in relation to workplace injury; 20% received advice in relation to dismissal; and 17% received advice in relation to bullying and/or discrimination. Our clients’ cases were usually complex and multifaceted. Nearly two thirds of clients sought assistance for two or more legal issues, often spanning multiple jurisdictions.

<sup>17</sup> Hemingway, above n 11.

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

Unfortunately, many vulnerable clients are not able to enforce their rights for a number of reasons, and so the exploitation continues. Workers generally have little knowledge of their rights or where to go for help. It is still unclear how many laws apply to on-demand workers – and the onus is on the most vulnerable to prove their case. Mainstream agencies are largely inaccessible and community organisations are underfunded and overloaded.

Without regulation, on-demand work not only has negative impacts on exploited workers but also undermines the workplace relations framework – businesses who are using secure and properly paid forms of employment are being undercut by those who rely on sham contracting, exploitation and legal grey areas to obtain competitive advantage.

Many clients are working hard to provide significant service to leading businesses in Australia – some via direct engagement with on-demand platform companies, and others less directly by providing security, cleaning or distribution services for energy retailers, private schools, universities, stadiums, large franchise stores and offices – yet they are engaged on ABNs by unscrupulous individuals or companies, only paid for some of the hours they work, dismissed when they complained or were injured, and denied their minimum entitlements. Despite receiving the benefit of their labour, these lead firms – who hold so much power – cannot be held legally accountable for the exploitation, or at best the law is unclear. There is an insurmountable legal and ethical chasm: on one side stand the lead firms and on-demand companies, and on the other, an emerging sub-class of vulnerable workers, often working at night, alone, in insecure arrangements. Laws and services must be reformed to overcome this divide.

Although there are differing definitions, most on-demand workers find work through an online platform, are engaged as independent contractors and are paid on a ‘per task’ basis.<sup>18</sup> We note that the focus of this Inquiry is on the extent and impact of the ‘digitally driven matching of workers to work in Victoria’.<sup>19</sup> WEstjustice has observed two different types of digitally driven on-demand structures.

The first is where digital platforms are used by an ‘employer’ entity and the platform plays an ongoing role in assigning/tracking work and receives benefits from ongoing work – for example, Uber and Foodora models. Irini’s story provides a powerful example:

#### **Case study – Irini**

*Irini came to Australia as an international student and worked as a driver for a ride-hailing company. She was engaged as an independent contractor. Although Irini did not have a car, she was able to rent one from a company that had a contract with the ride-hailing company.*

*One night when Irini was working, she received a job to pick up a group of male passengers. When Irini arrived the men were noticeably intoxicated. While Irini was driving, one of the men started to climb through the sunroof of the car, causing significant damage. Irini stopped the car and the man jumped out. At this stage all the men, except for one, got out. The man that stayed began to sexually harass Irini, saying things to her like ‘do you want to kiss me?’ which made Irini feel very uncomfortable.*

*Irini reported the incident to the company she worked for. They refused to cover the full cost of fixing the car, leaving her with a considerable debt to pay. Instead, they offered her a small amount of money on the*

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<sup>18</sup> Dosen & Graham, above n 7.

<sup>19</sup> Inquiry into the Victorian on-demand workforce – Background Paper, December 2018, p7.

*condition that she would make no further attempts to claim money from them. The company also refused to take any steps to identify the passengers who damaged the car and sexually harassed her.*

*WEstjustice advised Irini that, unfortunately as an independent contractor, her rights against the company were uncertain. WEstjustice suggested that, alternatively, Irini could pursue the men responsible for damaging the car to pay for the repair. However, this would require identifying them. Irini has since been in contact with the police to try to identify the men but the process has been very slow. Months have passed and Irini has not been able to find out the identities of the men.*

The second is where digital platforms are used by an ‘employer’ entity to connect with a worker initially, but after the initial connection is made, ongoing contact between the ‘employer’ and worker will occur via phone or over other digital platforms – for example, where a job is advertised on Gumtree, but then subsequent communication to arrange further ‘gigs’ is provided via WhatsApp or text message, such as Alina’s story.

#### **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. Yet 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.*

Many of our findings and recommendations address both of these structures, but there are some specific recommendations focussed on the first structure above as the platform company is intimately involved in ongoing arrangements and provision of work.

Our submission contains case studies and evidence-based recommendations for reform. All of the case studies in this submission are based on the experiences of our on-demand work clients,<sup>20</sup> but are also representative of our clients in other forms of insecure work. While the recommendations in this submission are specific to the terms of reference of this Inquiry, they will assist all vulnerable workers in Australia.

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<sup>20</sup> Note names have been changed in all case studies

## 1. IMPROVING FEDERAL LEGAL FRAMEWORKS TO PROTECT VULNERABLE WORKERS

Establishing life in a foreign country presents many challenges including new languages, new community connections and new cultural, financial, health and education systems. Many of our refugee clients have experienced violence, torture or trauma, and our clients are often separated from family members and social connections.

Employment is widely recognised as the most vital step for successful settlement in a new country.<sup>21</sup> However, recently arrived migrant and refugee workers face many barriers, and finding employment is difficult.

For those who do find work, exploitation is widespread. Exploited workers are not aware of their rights, and rarely access help to enforce the law. Temporary migrant workers, women and young people face additional barriers. Exploitation continues unabated and employers gain a competitive advantage by breaking the law, while companies that do the right thing are disadvantaged. Exploitation not only damages individual workers, it also undermines the Australian workplace relations framework.

It is essential that our legal frameworks incentivise compliance, and do not reward inaction or wilful blindness in the face of exploitation.

WEstjustice recommends the following measures to improve federal frameworks to protect vulnerable workers from harm. We recommend that the State Government call on the Federal Government to make these changes.

### A. LAWS AND PROCESSES TO ERADICATE SHAM CONTRACTING

Underpayment (or non-payment) of wages and/or entitlements is the single-most common employment-related problem that workers present with at our service. In the on-demand economy, factors contributing to underpayments include:

- Opportunities provided for sham contracting
- Opportunities for characterising highly dependent workers as contractors, and
- The relative ease for “employers” to be anonymous and unable to be held to account for underpayments.

It is our experience that sham contracting arrangements are being used to avoid the application of workplace laws and other statutory obligations.

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<sup>21</sup> A recent consultation in Melton with community members from Burma identified employment as the most important theme for successful settlement in Melton. Employment was also ranked as the most difficult goal to achieve. 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.

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## THE PROBLEMS

*“The only legal risk facing an employer who misclassifies a worker is the risk that it may ultimately be required to shoulder an obligation it thought it had escaped.”<sup>22</sup>*

Under Australian law, employees are treated very differently from independent contractors. Employees are afforded certain protections under the *Fair Work Act 2009* (Cth) (**FW Act**) including the right to a minimum wage, maximum hours of work, leave entitlements and protections from unfair dismissal. With limited exceptions (for example, some general protections provisions and anti-discrimination laws), independent contractors are largely excluded from the protections of the workplace relations framework.

Under the FW Act, it is unlawful to engage a worker as a contractor when they are in reality an employee (sham contracting). To determine whether a worker is running their own business (as a contractor), or in fact an employee, courts apply a multi-factor common law test. Considerations include whether the worker was required to wear a uniform, provided their own tools and equipment, was paid an hourly rate or paid to complete a task, could delegate work or was required to complete work personally, and the degree of control the employer exercised over the worker (e.g. hours of work, manner of work etc). The nature of any agreement/contract between the worker and boss is not determinative (that is, a written contract stating that an individual is an independent contractor does not necessarily mean the individual will be considered or classified as such at law).

The exploitation of members of newly arrived and refugee communities through the use of sham contracting arrangements is rife. In a WEstjustice survey, the following comments were provided by community workers who were asked a general question about common employment problems:<sup>23</sup>

*“Client was told they would only hire him if he had an ABN.”*

*“Clients don’t know their rights and what they should be paid. They are taking jobs and using ABNs without knowing what that means.”*

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

In our experience at the Employment Law Service (**ELS**), sham contracting is used as a core business practice throughout the cleaning, road transport and distribution, home and commercial maintenance (e.g. painters), and building and construction industries (e.g. tilers).<sup>24</sup> All too often WEstjustice has seen clients engaged as contractors in these industries whose working relationship was actually one of employer-employee:

- 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 were unable to subcontract

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<sup>22</sup> Joellen Riley, ‘Regulatory responses to the blurring boundary between employment and self-employment: a view from the Antipodes’ *Recent Developments in Labour Law, Akademai Kiado Rt*, 2013, 5.

<sup>23</sup> Catherine (Dow) Hemingway, ‘Employment is the Heart of Successful Settlement: Overview of Preliminary Findings’ (Preliminary Report, Footscray Community Legal Centre, February 2014), 12.

<sup>24</sup> WEstjustice has also assisted clients outside these key industries, including in the education and clerical sectors.

- They were unable to take leave.

For others, it was less clear, although obvious that the client was not running their own business.

WEstjustice has observed instances of employers obtaining ABNs for 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 our clients are often told by the person hiring them that, if they have an ABN, they are automatically a contractor or told they will not be paid unless they obtain an ABN.

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

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

### SHAM CONTRACTING RESULTS IN EXPLOITATION

The problems our clients face as a result of being falsely engaged as an independent contractor when in fact they are (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 doing unskilled or low-skilled labour
- 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,<sup>25</sup> and
- Contractors are often required to arrange their own tax and may need to organise workers compensation insurance, however many vulnerable contractors are not aware of how to do this.

Many of our clients are not aware that there is a difference between an employee and independent contractor, and asking the questions necessary to apply the multi-indicia test can be difficult. Applying the multi-factor test and attempting to explain this to a vulnerable 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' what would otherwise be an underpayment claim and a loss of accrued entitlements such as annual leave. They may also forfeit their ability to bring other claims (e.g. for unfair dismissal).

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

- That they were an employee, and
- Their appropriate award classification, rate of pay and underpayment.

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<sup>25</sup> Australian Taxation Office, *Superannuation guarantee: who is an employee?*, SGR 2005/1, 23 February 2005.



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

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 vulnerable individuals to take complex legal action just to obtain their minimum rights under the law.

For the above reasons, reform is urgently required.

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#### FURTHER CHALLENGE: DEPENDENT CONTRACTORS NOT PROTECTED

Unlike the obvious sham arrangements that many of our clients experience, some of our on-demand worker clients fall less clearly into the common law definition of employee.

In the recent FWC decision of *Kaseris v Rasier Pacific V.O.F.*,<sup>26</sup> Deputy President Gostencnik found that an Uber driver was not an employee at common law, and therefore was not entitled to bring an unfair dismissal claim.

The Deputy President considered the multi-factor common law test and concluded that it was ‘plainly the case that the relevant indicators of an employment relationship are absent in this case’.<sup>27</sup> However, and importantly, he noted that the common law approach developed long before the on-demand economy, and that the multi-factor test may be ‘outmoded in some senses’.

He talks of the possibility of the legislature refining the existing test:<sup>28</sup>

*The notion that the work-wages bargain is the minimum mutual obligation necessary for an employment relationship to exist, as well as the multi-factorial approach to distinguishing an employee from an independent contractor, developed and evolved at a time before the new “gig” or “sharing” economy. It may be that these notions are outmoded in some senses and are no longer reflective of our current economic circumstances. These notions take little or no account of revenue generation and revenue sharing as between participants, relative bargaining power, or the extent to which parties are captive of each other, in the sense of possessing realistic alternative pursuits or engaging in competition. Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy. But until then, the traditional available tests of employment will continue to be applied.*

WEstjustice submits that the current common law test is out of step with the reality of the nature of work today, and fails to provide adequate protection to vulnerable workers in the on-demand workforce. We recommend that the FW Act be amended to include a presumption of employment and an express inclusion of dependent contractors, as set out **below**.

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#### PRESUMPTION OF EMPLOYMENT RELATIONSHIP AND EXPRESS INCLUSION OF DEPENDENT CONTRACTORS

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

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<sup>26</sup> *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610.

<sup>27</sup> Ibid [67].

<sup>28</sup> Ibid [66].

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 of establishing a genuine contracting relationship away from vulnerable workers and onto the employer/principal. We recommend that a new section 357A be inserted into the FW Act as follows:

*(1) An individual who performs work for a person (the principal) under a contract with the principal is taken to be an employee (within the ordinary meaning of that expression) of the principal and the principal is taken to be the employer (within the ordinary meaning of that expression) of the individual for the purposes of this Act.*

*(2) Subsection (1) does not apply if the principal establishes that the individual is completing work for the principal as on the basis that the principal is a client or customer of a business genuinely carried on by the individual.*

*Note: When determining whether a business is genuinely carried on by an individual, relevant considerations include revenue generation and revenue sharing arrangements between participants, and the relative bargaining power of the parties.*

This definition is partly 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:<sup>29</sup>

*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.*

WEstjustice supports this recommendation: the definition is precise and clear, and allows scope for genuine contractors to be engaged as such.

The proposed definition also adopts wording from the *Employment Rights Act 1996* (UK) definition of 'worker'. As discussed in the Inquiry Background Paper, UK legislation provides for a third category of 'worker', in addition to employees and independent contractors. Workers are afforded some minimum entitlements, although less than employees.<sup>30</sup>

WEstjustice certainly sees value in extending certain minimum protections to all workers – however, we are concerned that the introduction of a third category of worker into the FW Act may only encourage employers to restructure their arrangements to fit more and more employees into the 'worker' category and reduce overall rights.

WEstjustice submits that it is preferable to expand the definition of employee to include dependent contractors (or 'workers' under the UK legislation). Our proposed drafting reflects this.

Alternatively, the ATO's superannuation eligibility test could be adopted more broadly. That is, if a worker is engaged under a contract wholly or principally for the person's physical labour, mental effort, or artistic effort,

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<sup>29</sup> Andrew Stewart and Cameron Roles, ABCC Inquiry into Sham Arrangements and the Use of Labour Hire in the Building and Construction Industry, 5.

<sup>30</sup> Dosen & Graham, above n 7 (Research Note No.7, June 2018, Research & Inquiries Unit, Parliamentary Library & Information Service) p10, citing C. Hall and W. Fussey (2018) 'Will employees and contractors survive in the gig economy?' New Zealand Law Society website, 29 March.

that person should be deemed to be an employee for all purposes. However, this definition may capture highly skilled individuals who are in fact operating genuine businesses as individuals rather than incorporating.

Our proposed definition would assist our clients 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.

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**RECOMMENDATION ONE: INTRODUCE A REVERSE ONUS TO PROVIDE MINIMUM ENTITLEMENTS TO ALL WORKERS**

To prevent unscrupulous businesses using sham contracting as their business model, and to provide fair protection to on-demand workers, WEstjustice recommends the insertion of a new section in the FW Act that provides all workers with the right to minimum entitlements, unless the employer/principal can establish the worker was genuinely running their own business.

The introduction of such a reverse onus will provide minimum entitlements to all dependent workers, but still enables principals a defence when they engage genuine contractors. Please see Appendix One for further details.

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**RECOMMENDATION TWO: LIMIT THE CURRENT DEFENCE**

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

Current provisions offer a defence to an employer which is broad and relatively easy to rely upon. 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.

Employers are often 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 in a position to positively assert that the relationship they are entering into with a worker is the correct one.

As such, WEstjustice supports Productivity Commission recommendation 25.1. At the very least, the current employer defences to the sham contracting provisions in the FW Act should be limited:

*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.*<sup>31</sup>

Ideally, there should be no defence for recklessness or lack of knowledge. As 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. For details please see Appendix One.

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### **RECOMMENDATION THREE: INCREASE SCRUTINY AT THE TIME ABNS ARE GIVEN, AND VIA ONGOING ENFORCEMENT**

WEstjustice submits that there should be a greater focus on the prevention of sham contracting.

As set out in the Not Just Work report, one way to achieve this is by introducing independent scrutiny and education at the time that an application for an ABN is made. This should include:

- Proper consideration of all the facts and circumstances and the relevant multi-factor test (or updated legal definition as proposed) 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 to individuals after a short internet application, and Applicants who are individuals 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 (and their respective entitlements) is provided. Information about taxation and workplace injury insurance should also be provided at this time.

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

Whether or not a statutory definition is adopted, more needs to be done to clarify the distinction between employees and contractors. This could be achieved by:

- Greater education and targeted assistance to make sham contracting laws meaningful for CALD workers, and
- Increased 'on-the-spot' inspection and assessment by regulators, as vulnerable workers cannot be expected self-report in all circumstances.

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

Furthermore, any education programs discussed **below** should address this issue and raise awareness among target communities. Finally, we note that, for genuine independent contractors, avenues for assistance with

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<sup>31</sup> Productivity Commission, Workplace Relations Framework, Inquiry Report No 76 Volume 2 (30 November 2015), 915-916, available at <<http://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume2.pdf>>, last accessed 26 July 2018.

underpayment matters are extremely limited. Such workers fall outside the remit of FWO and many community legal centres.

## **B. ENSURE MINIMUM ENTITLEMENTS FOR ALL VULNERABLE WORKERS**

In addition to the presumption of employment and an inclusive legal definition as recommended above, this section sets out the case for four further measures required to ensure minimum entitlements for all vulnerable workers. These measures combine judicial, legislative and worker-led mechanisms to provide certainty, protect workers and allow flexibility to respond to a changing world of work.

### **RECOMMENDATION FOUR: MINIMUM ENTITLEMENTS ORDERS AND INDEPENDENT CONTRACTOR STATUS ORDERS**

In addition to a broad but rebuttable presumption of employment, WEstjustice recommends that the 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 Bill introduced by Adam Bandt in 2018 – the *Fair Work Amendment (Making Australia More Equal) Bill 2018* (Cth). 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.

### **RECOMMENDATION FIVE: EXTEND OUTWORKER PROTECTIONS TO CONTRACT CLEANERS AND OTHER KEY INDUSTRIES**

Importantly, the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012* 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 TCF code that can impose important monitoring and reporting obligations including record keeping and reporting on compliance.

In addition to the above measures, we recommend extending the outworker protections in the FW Act to cover other key industries for vulnerable workers, and to include a general provision that allows the government to add further industries by way of regulation. This legislative response would provide much-needed clarity and protection to vulnerable workers in supply chains, including contract cleaners, security workers and those in the community service sector. The provisions would deem all workers to be employees, enable workers to recover unpaid entitlements from indirectly responsible entities and require employers to comply with a relevant codes that set out requirements in respect of monitoring and reporting.

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## RECOMMENDATION SIX: INTRODUCE INDUSTRY WIDE BARGAINING

*'We need associations for gig economy workers.'* (Community leader)<sup>32</sup>

Finally, we recommend the introduction of industry-wide bargaining that covers all workers engaged in particular classes of work by particular classes of employer or in particular industries. This worker-led response will enable unions and workers to improve minimum standards for the most vulnerable workers who may not clearly fit into standard employment categories, and remove the incentive to misclassify workers. It will also prevent a race to the bottom.

## C. INCREASED ACCOUNTABILITY IN LABOUR HIRE, SUPPLY CHAINS AND FRANCHISES

*'The gig economy places degrees of separation within the traditional employer/employee relationship and, with that, reduces responsibility.'*<sup>33</sup>

WEstjustice welcomes the changes effected by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) (**Vulnerable Workers Amendments**) – in particular the introduction of a reverse onus where records have not been kept and the expansion of accountability to responsible franchisors and parent companies. However, without more measures and protections in place, many of our clients will remain without recourse.

This section sets out the case and sample drafting for extending the liability of franchisor entities and holding companies to all third party entities that benefit from an employee's labour. These provisions would capture both on-demand companies who own and operate digital platforms (which is especially important until such entities are recognised as direct employers under the FW Act), as well as other companies who may benefit indirectly from on-demand labour. It also discusses strengthening the existing laws by expanding the definition of responsible franchisor entity, clarifying the liability of all third parties that benefit from an employee's labour and clarifying the reasonable steps defence to incentivise proactive compliance.

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## THE PROBLEM

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

At present, the FW Act is largely focused on traditional employer/employee relationships as defined by common law. This framework fails to adequately regulate non-traditional and emerging working arrangements, for example, where there is more than one employing entity. In doing so, the law ignores the fact that 'it is not now uncommon for the employment relationship to be fragmented and for multiple organisations to be involved in shaping key working conditions.'<sup>34</sup>

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<sup>32</sup> Community leader, WEstjustice on-demand economy inquiry consultation December 10 2018.

<sup>33</sup> Christie Hall and William Fussey, *Will employees and contractors survive in the gig economy?*, Lawtalk 916, 29 March 2018.

<sup>34</sup> Dr Tess Hardy, Submission No 62 to Senate Inquiry, *The impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders*, 8.

This can lead to situations where, although multiple organisations will benefit from the labour of one worker, only one can be held accountable under the FW Act. For example, in a labour hire arrangement, in addition to the labour hire agency, 'the client or host employer may receive the benefits of an employer by being able to control the agency labour (and their terms of engagement) and yet avoid any form of labour regulation because it has no employment relationship with the labour.'<sup>35</sup> Although 'both of [these] entities enjoy the benefits of acting as an employer, one will unfairly circumvent labour regulation.'<sup>36</sup> We have seen this in situations where clients in labour hire arrangements, supply chains or franchises are left without a remedy against a host employer, principal or franchisor, who in many circumstances should be held, wholly or partly, responsible for the terms and conditions of the worker.

#### EXAMPLE: SUPPLY CHAINS

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.<sup>37</sup> 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.<sup>38</sup>

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.

#### Case study - Batsa

*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 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.*

#### Case study – Jorgio

*Jorgio is an international student working as a cleaner on weekends. He was employed by Betty as an independent contractor to clean a shopping centre. Betty directed Jorgio's work timetable and provided him with a uniform and cleaning equipment. Jorgio was underpaid by thousands of dollars. Jorgio came to WEstjustice because he had not been paid at all for 10 weeks' work. Before that, he had only been paid intermittently. Jorgio did not understand that there was a minimum wage, or that there was a difference between contractors and employees. Ultimately, Jorgio stopped working for Betty and was employed directly by the shopping centre as an employee. With WEstjustice's assistance, Jorgio brought a claim against Betty but, despite winning his case at the Federal Circuit Court, Betty ignored the judgement and disappeared, and Jorgio remained unpaid.*

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<sup>35</sup> Craig Dowling, 'Joint Employment and Labour Hire Relationships – Victoria Legal Aid – Professional Legal Education', 5 October 2015, 1-2.

<sup>36</sup> Ibid.

<sup>37</sup> Richard Johnstone et al, *Beyond employment: the legal regulation of work relationships* (The Federation Press, 2012) 49.

<sup>38</sup> Ibid 67.

In Jorgio's story, we see our client, who is the most vulnerable and least well-resourced in the chain, without any ability to pursue his lawful entitlements. In other cases, more than two companies profit from our client's labour without any responsibility for protecting their workplace rights. The responsible franchisor and holding company provisions do not cover supply chains, and the requirement to prove that these other companies were 'knowingly concerned in or party to the contravention' under section 550 accessorial liability provisions of the FW Act is too onerous to provide any meaningful assistance to enforce vulnerable workers' rights. There should be a positive obligation on those higher in the supply chain to ensure workplace rights are protected.

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#### SELF-REGULATION INSUFFICIENT

Unfortunately, self-regulation and voluntary compliance is failing. For example, in 2016 the FWO invited eight franchisor chief executives to enter into compliance partnerships with FWO, underpinned by proactive compliance deeds. The initiative was openly supported by the Franchise Council of Australia. However, only one franchisor has engaged with the process, one franchisor refused to participate, and six franchisors ignored the FWO entirely.<sup>39</sup> To effect meaningful change, the law must be amended to remove incentives to exploit or ignore worker rights and instead ensure that directors, supply chain heads, franchisors and host companies are held accountable.

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#### CURRENT LAWS ARE INSUFFICIENT

Currently, the only two ways to attribute responsibility to a third party under the FW Act are via the responsible franchisor and holding company provisions in sections 558A-C, or the accessorial liability provisions in section 550. Both provisions are too narrow and place unrealistic burdens of proof on vulnerable workers. Importantly, the franchise and holding company provisions are too piecemeal and must be extended to cover other fissured forms of employment, including supply chains.

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#### RESPONSIBLE ENTITIES

The Vulnerable Workers Amendments inserted a Division 4A into the FW Act which attributes responsibility to responsible franchisor entities and holding companies for certain contraventions. Under these provisions, holding companies and responsible franchisor entities contravene the 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.

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'. This is too narrow and too onerous for workers, who often lack access to necessary documents and information. It is an unnecessarily difficult burden for vulnerable workers to prove, and it may discourage franchisors from taking an active role in promoting compliance in their franchises, instead rewarding those that take a hands-off approach, or 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

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<sup>39</sup> 'Franchisors spurning partnership proposals, says FWO', *Workplace Express*, 2 September 2016. Although there have been some further partnerships formed with franchises since this time, a review of published Proactive Compliance Deeds on the FWO website shows less than 20 companies in total have public agreements with FWO: see <<https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/compliance-partnerships/list-of-proactive-compliance-deeds>> last accessed 19 February 2019.



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 s558B(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 Vulnerable Workers Amendments as expressed in the *Fair Work Act (Protecting Vulnerable Workers)* Explanatory Memorandum, and needs to be clarified.

The problem is not limited to franchise situations only. Similar to franchisors, lead firms in supply chains (and all others in the chain) and labour hire hosts should be required to take reasonable steps to prevent exploitation. As noted in the FWO's recent report on contract cleaning, 'the FWO's experience is that multiple levels of subcontracting can create conditions which allow non-compliance to occur. The reasons for this include the pressures of multiple businesses taking a profit as additional subcontractors are added to the contracting chain, and the perceived ability to hide non-compliance within convoluted business structures.'<sup>40</sup> WEstjustice supports the recommendation of Dr Tess Hardy and Professor Andrew Stewart to the Senate Education and Employment References Committee *Inquiry into the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies* 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.'<sup>41</sup>

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 our clients, 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 the recommendation of Professor Andrew Stewart and Dr Tess Hardy that:<sup>42</sup>

*'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.'*

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<sup>40</sup> Fair Work Ombudsman, 'Inquiry into the procurement of cleaners in Tasmanian supermarkets report', February 2018, available at <<https://www.fairwork.gov.au/reports/inquiry-into-the-procurement-of-cleaners-in-tasmanian-supermarkets>>, last accessed 26 July 2018 ('FWO Report') '

<sup>41</sup> Professor Andrew Stewart and Dr Tess Hardy, Submission 8, *Inquiry into the exploitation of general and specialist cleaners in retail chains for contracting or subcontracting cleaning companies*, available at <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/ExploitationofCleaners/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ExploitationofCleaners/Submissions)>, last accessed 26 July 2018, 3.s

<sup>42</sup> Ibid.

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## ACCESSORIAL LIABILITY

The accessory liability provisions in section 550 of the FW Act are problematic.

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 accessory 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.

Vulnerable 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 to prove what the head office or controlling minds of the organisation actually know – in fact it is impossible for them. 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.

Furthermore, the 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 is extremely problematic for our clients. 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.

Although the FWO has used section 550 with some success,<sup>43</sup> Hardy notes that there have only been a “handful” of cases where section 550 has been used to argue that a separate corporation is “involved” in a breach. She notes that ‘court decisions which have dealt with similar accessory liability provisions arising under other statutes suggest that the courts may well take a fairly restrictive approach to these questions.’<sup>44</sup>

The recent case of *Fair Work Ombudsman v Hu (No 2)* [2018] FCA 1034 (12 July 2018) is a shocking 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).

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<sup>43</sup> For example, Joanna Howe explains how the FWO brought a claim against Coles for labour hire company Starlink’s treatment of trolley collectors. The FWO secured an enforceable undertaking with Coles in which it agreed to rectify underpayments. See Joanna Howe, Submission 109 to Economic, Development, Jobs, Transport and Resources, *Inquiry into Labour Hire and Insecure Work*, 2 February 2016

<[http://economicdevelopment.vic.gov.au/\\_data/assets/pdf\\_file/0007/1314619/Submission-Dr-Howe.pdf](http://economicdevelopment.vic.gov.au/_data/assets/pdf_file/0007/1314619/Submission-Dr-Howe.pdf)>.

<sup>44</sup> Hardy, above n 6, 10.

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**RECOMMENDATION SEVEN: EXTEND LIABILITY TO ALL RELEVANT THIRD PARTIES**

WEstjustice recommends that, in addition to protecting workers in franchises and subsidiary companies, supply chains and labour hire hosts should also be responsible for the protection of workers' rights. Instead of a piecemeal approach, the law should provide protection and redress for all vulnerable 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 in an attempt to shirk responsibility.

To achieve this WEstjustice suggest that new subsections 558A(3) and 558B(2A) be inserted into the FW Act to define responsible supply chain entities, and extend responsibility to them. A person will be a responsible supply chain entity if:

*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*

*(a) the person is 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*

*(b) the person is the recipient or beneficiary of the goods supplied or produced or services performed by the worker*

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 One.

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**RECOMMENDATION EIGHT: WIDEN THE DEFINITION OF RESPONSIBLE FRANCHISOR ENTITY**

WEstjustice also recommends broadening the existing definition of responsible franchisor entity to remove the threshold requirement to show a 'significant degree of influence or control.' We argue that workers should not have high burdens to bring a claim when the franchisors hold all the relevant documents and evidence to show their control over a franchisee. Instead, it should be for the franchisor to show that they had limited influence and control as part of a reasonable steps defence under subsection 558B(4).

We propose that subsection 558A(2)(b) be removed (or at least the reference to "significant" be deleted) to broaden the definition of responsible franchisor entity. The degree of control able to be exercised by a franchisor is already a relevant consideration when determining liability – see subsection 558B(4)(b) FW Act, which says that in determining whether a person took reasonable steps to prevent a contravention, the extent of control held by the franchisor is relevant. For details see Appendix One.

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**RECOMMENDATION NINE: CLARIFY LIABILITY OF ALL RELEVANT THIRD PARTIES**

For clarity, WEstjustice recommends the insertion of a provision 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.

As it is currently drafted, the responsible 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 7/11 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 can be easily clarified by a minor addition to the Act as set out in our drafting suggestions. For details please see Appendix One.

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**RECOMMENDATION 10: CLARIFY THE ‘REASONABLE STEPS’ DEFENCE TO ENCOURAGE COMPLIANCE**

At a minimum we suggest encouraging proactive compliance by including the examples provided for in paragraph 67 of the Vulnerable Works Bill Explanatory Memorandum as a legislative note into section 558B(4). It would also be useful to clarify situations 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 One.

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**RECOMMENDATION 11: REMOVE REQUIREMENT FOR ACTUAL KNOWLEDGE AND REQUIRE ACCESSORIES TO TAKE POSITIVE STEPS TO ENSURE COMPLIANCE**

Another key reform that we propose is to 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 One 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, 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.

Companies that do the right thing will already be taking these steps – however we intend for these changes to shift the burden of proof away from vulnerable workers and on to shonky employers who currently act with impunity. Under our proposed provisions, they will now be forced to show what steps they have taken to minimise risks and ensure compliance.

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**RECOMMENDATION 12: INTRODUCE A FEDERAL LABOUR HIRE LICENSING SCHEME AND ENSURE FAIR PAY FOR INSECURE WORKERS**

WEstjustice welcomes the Federal Opposition’s commitments to establish a Federal labour hire licensing scheme and ensure fair pay for labour hire employees, as recommended in the Not Just Work report.

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**D. OTHER MEASURES TO STOP WAGE THEFT & PROMOTE SECURE WORK**

The Not Just Work report sets out multiple recommendations to improve laws and processes and stop wage theft in Part 6. Relevantly for this Inquiry we highlight the following:

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**RECOMMENDATION 13: INTRODUCE A WAGE INSURANCE SCHEME**

Where employees cannot access their unpaid wages via available legal frameworks due to employer insolvency or an employer being uncontactable, an insurance scheme should be available.

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

Examples of other similar schemes include:

- WorkCover, for workplace injury—an insurance scheme where all employers pay a premium
- Motor Car Traders Guarantee Fund—funded by motor car traders' licensing fees, for consumers who have suffered loss where the trader has failed to comply with the Motor Car Traders Act 1986<sup>45</sup>
- Victorian Property Fund—funded by estate agent fees, fines and penalties, and interest —provides compensation for 'misused or misappropriated trust money or property'<sup>46</sup>
- In California, the CLEAN Carwash coalition successfully lobbied for specific legislation for car wash companies. The law requires all car wash companies to register with the Department, but 'no car wash can register or renew its registration (as required annually) unless it has obtained a surety bond of at least US\$150,000. The purpose of the bond requirement is to ensure that workers who are not paid in accordance with the law can be compensated if their employer disappears or is otherwise unable to pay wages or benefits owed to the employees. The legislation creates an exception to the bond requirement, however, for car washes that are party to collective bargaining agreements.<sup>47</sup>

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#### **RECOMMENDATION 14: AMEND THE MIGRATION ACT TO ENSURE VULNERABLE WORKERS CAN COMPLAIN WITH CONFIDENCE**

WEstjustice recommends that the Federal Government take immediate steps to protect vulnerable workers on temporary visas.

The Australian Government's Migrant Workers' Taskforce announced in February 2017 that, where temporary visa holders with a work entitlement attached to their visa may have been exploited and they have reported their circumstances to the FWO, the Department of Home Affairs (**Home Affairs**) will generally not cancel a visa, detain or remove those individuals from Australia, providing the visa holder commits to abiding by visa conditions in the future; and there is no other basis for visa cancellation (such as on national security, character, health or fraud grounds).<sup>48</sup>

This agreement between Home Affairs and FWO has been published on FWO's website,<sup>49</sup> and has otherwise been communicated by the government. While this is a positive development, alone it is insufficient to reassure vulnerable migrant workers on temporary visas that it is safe to come forward and report exploitation to the FWO.

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<sup>45</sup> Consumer Affairs Victoria, State Government of Victoria (2016) <https://www.consumer.vic.gov.au/about-us/who-we-are-and-what-we-do/funds-we-administer/motor-car-traders-guarantee-fund>, last accessed 26 July 2018.

<sup>46</sup> Consumer Affairs Victoria, State Government of Victoria (2016) < <https://www.consumer.vic.gov.au/housing/buying-and-selling-property/compensation-claims> >, last accessed 26 July 2018.

<sup>47</sup> Janice Fine, 'Alternative labour protection movements in the United States: Reshaping industrial relations?' (2015) *International Labour Review* 154(1), 20.

<sup>48</sup> Professor Allan Fels AO, *Chair's Public Statement February 2017*, Migrant Worker Taskforce, Australian Government Department of Employment, available at <<https://www.employment.gov.au/chairs-public-statement-february-2017>>, last accessed 26 July 2018.

<sup>49</sup> Available at <<https://www.fairwork.gov.au/find-help-for/visa-holders-and-migrants>>, last accessed 26 July 2018.

The [Not Just Work Report](#)<sup>50</sup> makes multiple suggestions that would protect vulnerable migrant workers on temporary visas, including the following legislative changes:

- The FW Act should be amended to state that it applies to all workers, regardless of immigration status; and
- The *Migration Act 1958* (Cth) should also be amended to introduce a proportionate system of penalties in relation to visa breaches (as discussed below).

WEstjustice sees clients requesting help for significant underpayment issues and other unlawful treatment in the workplace who have also breached a term of their visa, inadvertently or accidentally. This breach gives rise to the risk of being forced to depart Australia. As a result, clients do not pursue their claims and employers use their employees' fear of repercussions to their advantage.

For example, international students are generally only permitted to work a maximum of 40 hours per fortnight during semester. If they are found to breach a term of their visa (for example, by working for one extra hour), their visa may be cancelled and the worker commits a strict liability offence. WEstjustice saw a client who worked for one extra hour in breach of his 40 hour limit, on one occasion. However, the risk of visa cancellation was still real—and he did not pursue his employer, who owed him thousands of dollars.

It is unfair and disproportionate for an exploited international student to face removal for infringing their visa restrictions in a minor way, for example by working an additional few hours. Indeed, if they were paid properly, such additional hours are unlikely to be necessary in the first place. While the FWO Assurance Protocol is welcome, it is not a guarantee, and some clients remain frightened to come forward.

As suggested by Associate Professor Joo-Cheong Tham,<sup>51</sup> visa cancellation should only apply in situations where there has been a serious breach of a visa. This avoids situations where workers may be disproportionately punished for a minor breach, and remove the significant disincentive to report unlawful employer behaviour. WEstjustice supports this recommendation. As Joo-Cheong explains:

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

*Recommendation...*

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

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<sup>50</sup> Hemingway, above n4, pp 224–299.

<sup>51</sup> Associate Professor Joo-Cheong Tham, Supplementary submission to the inquiry of the Senate Education and Employment References Committee into 'The impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders', available at <[https://www.apf.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/temporary\\_work\\_visa/Submissions](https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Submissions)>, last accessed 26 July 2018.

## E. ENSURE ALL WORKERS RECEIVE SUPERANNUATION

Very few WEstjustice employment law clients receive the superannuation owed to them, while others miss out on an entitlement to be paid superannuation, as they do not meet the minimum earnings threshold. This is particularly true of on-demand workers, who usually do not work full time hours.

### RECOMMENDATION 15: ENSURE WORKERS RECEIVE SUPERANNUATION OWED TO THEM

*Current trends show that with an increase in the number of workers in the gig economy, there will be an increase in the amount of labour provided with little to no superannuation contributions paid. Lower or no contributions for workers in the gig economy will equate to lower superannuation balances at retirement, reducing the efficacy of the superannuation system as a whole.*

*There are further considerations regarding superannuation—for example, most workers only hold life insurance cover through superannuation. If current trends continue, a larger proportion of workers will be left without life insurance cover and increasing underinsurance. This could result in a consequential burden on Australia's social security system.<sup>52</sup>*

For those with unpaid superannuation, there are often 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 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 in respect of superannuation. In addition to disadvantaging the most vulnerable, as noted Dosen and Graham above, this has significant impacts on the Australian economy and social security system.

WEstjustice recommends that the Government ensure all employees can obtain superannuation owed to them by making it part of the National Employment Standards. 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. To ensure all workers can obtain superannuation, regardless of age or hours worked, we further recommend that the minimum earnings threshold and minimum age restrictions be removed.

## F. LIMIT PHOENIX ACTIVITY AND STOP PUNISHING UNLUCKY WORKERS

It is unconscionable for a worker to be punished, simply because their employer has acted unlawfully. WEstjustice sees that more must be done to address unlawful phoenix activity, including the expansion of the FEG scheme to cover all workers.

### Case study - Vili

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

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<sup>52</sup> Dosen & Graham, above n8, p7-8.



Phoenix companies are a significant problem for WEstjustice clients - directors close down companies to avoid paying debts, then open a new company without penalty. It is estimated that such phoenix activity results in lost employee entitlements of between \$191,253,476.00 and \$655,202,019.00 every year.<sup>53</sup>

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.<sup>54</sup> WEstjustice supports these recommendations and also refers the Inquiry to the detailed joint Melbourne and Monash University Report released in February 2017: *'Phoenix Activity: Recommendations on detection, disruption and enforcement'*.<sup>55</sup>

In addition to the introduction of director identification numbers, WEstjustice recommends the introduction of compulsory director insurance, to assist with funding community legal centres and an expanded FEG program as recommended in this submission.

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#### **RECOMMENDATION 16: INTRODUCE DIRECTOR IDENTITY NUMBERS AND COMPULSORY INSURANCE**

WEstjustice recommends that the law be amended to stop rewarding those who make profits from repeated exploitation by introducing director identity numbers. Further, directors should also be required to pay a compulsory insurance premium (similar to WorkCover) to help fund the provision of community-based employment services and the FEG scheme.

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#### **RECOMMENDATION 17: EXPAND THE FEG SCHEME TO ALL WORKERS**

In our recent submission to the *Reforms to address corporate misuse of the Fair Entitlements Guarantee Scheme*, WEstjustice recommended 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, we recommend that the FEG scheme be expanded:<sup>56</sup>

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

Many of our clients, including international students, are not eligible for FEG purely due to their temporary visa status. This discrimination must be addressed. Further, the scheme should cover employees with a Court order where a company has been deregistered.

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<sup>53</sup> Helen Anderson, 'Sunlight as the disinfectant for phoenix activity' (2016) 24 *Company and Securities Law Journal* 257, 258.

<sup>54</sup> Ibid, 263-267.

<sup>55</sup> See e.g. Professor Helen Anderson, Professor Ian Ramsay, Professor Michelle Welsh and Mr Jasper Hedges, Research Fellow, *Phoenix Activity: Recommendations on detection, disruption and enforcement*, February 2017, Melbourne University and Monash University, available at < <http://law.unimelb.edu.au/centres/cclsr/research/major-research-projects/regulating-fraudulent-phoenix-activity> >, last accessed 26 July 2018.

<sup>56</sup> Available at <[http://www.westjustice.org.au/cms\\_uploads/docs/westjustice-submission-to-the-feg-scheme-consultation.pdf](http://www.westjustice.org.au/cms_uploads/docs/westjustice-submission-to-the-feg-scheme-consultation.pdf)>, last accessed 26 July 2018.



## 2. IMPROVING STATE LEGAL FRAMEWORKS TO PROTECT VULNERABLE WORKERS

### A. EXPANDED LICENSING SCHEME

Building on its labour hire licensing legislation and hire car industry reforms,<sup>57</sup> the State Government should consider ways that it can regulate the on-demand economy through the use of licensing schemes.

#### **RECOMMENDATION 18: EXPAND LICENSING SCHEMES TO PROMOTE COMPLIANCE AND RAISE REVENUE**

The State Government should require on-demand companies in particular industries (including passenger transport, contract cleaning, food delivery, flier distribution, car wash and community services), to hold licenses. The licenses would enable the State to regulate the operators in a particular industry, and ensure that companies are required to comply with relevant laws including employment, superannuation and workplace safety.

WEstjustice recommends that the licensing scheme contain the following features:<sup>58</sup>

- To operate a business in particular on-demand industries (for example, flyer distributors), or to provide a platform for the provision of on-demand services (for example, Uber), businesses/individuals must first obtain a license.
- To obtain a license, the holder must:
  - Pay a bond and annual fee to the Victorian Government
  - Meet threshold capital requirements to ensure an ability to pay workers and insurance
  - Meet a fit and proper person test and ongoing reporting obligations
  - Demonstrate compliance with minimum workplace (and consumer) safety standards
  - Agree to participate and be bound by determinations of VCAT or a dedicated tribunal in respect of non-compliance, and
  - Fund and participate in mandatory workplace rights and entitlements training for the license holder, workers and general community, as determined by the Victorian Government/compliance unit.
- The license holder will receive a license number, and this number must be published on all job advertisements and correspondence between workers and the business. The license number should be traceable on a publicly accessible website and provide up-to-date names and contact details for the business/individuals engaging the workers.
- Importantly, like the Victorian labour hire legislation, the on-demand licensing scheme should impose penalties on those who engage unlicensed providers, as well as the providers themselves. This would incentivise larger businesses to avoid unscrupulous businesses.
- The scheme should be regulated by a dedicated and well resourced compliance unit.
- Third parties, including unions and community legal centres, should have standing to bring actions for non-compliance – either at a low cost forum such as VCAT, or a dedicated tribunal.

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<sup>57</sup> See <<https://transport.vic.gov.au/Getting-around/Taxis-hire-car-and-ridesharing/Industry-reforms>> last accessed 20 February 2019.

<sup>58</sup> Many of these recommendations are adopted from the National Union of Workers proposed Victorian Labour Hire Licensing model. See: <<https://djpr.vic.gov.au/inquiry-into-the-labour-hire-industry/submissions>> last accessed 20 February 2019.

- An education program regarding the scheme must be delivered for community members, business and online platforms like Gumtree. The program would encourage workers to request a license number if it is not displayed – and report businesses that do not display a number.

The **above** proposed scheme would enable a client like Andrea to seek redress as she could find Tony via his license number:

#### Case study - Andrea

Andrea came to Australia as an international student. Andrea found an ad on Gumtree for a job distributing fliers for a painting and home improvement company. Andrea applied for the job and she was hired by a man named Tony. Tony told her that her pay would vary depending on how quickly she delivered the fliers.

The arrangement was that Tony would pick Andrea up from the station and drive her to different locations. One day when Tony was driving Andrea from the station he started to ask her personal questions and made some comments about her physical appearance. Tony then started to try and kiss her. Andrea felt scared and uncomfortable so she got out of the car. Tony began to follow her in his car, so she ran until he was out of sight.

Andrea reported the sexual harassment to the police. She was never paid for the jobs she did for Tony. WEstjustice helped Andrea write a complaint to the Fair Work Ombudsman. However, because Andrea only knew Tony's first name and had no other personal information, WEstjustice was unable to take further action.

WEstjustice acknowledges that the Victorian Government has introduced some reforms to the taxi and hire car industry via the *Commercial Passenger Vehicle Industry Act 2017* (Vic) and *Commercial Passenger Vehicle Industry Amendment (Further Reforms) Act 2017* (Vic). WEstjustice recommends that the effectiveness of these laws, particularly in respect of workplace and consumer safety, complaints handling and compliance with workplace laws, could be reviewed as part of the development of a licensing scheme.<sup>59</sup>

Although such licensing schemes may serve to heighten barriers for entry into on-demand work (which is a recognised advantage for migrant and young workers who otherwise find it hard to find work), WEstjustice considers that the improved protections and conditions outweigh the possibilities of increasing the difficulty of gaining employment.

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<sup>59</sup> A different model for consideration can be found in America, where New York City created a licensing scheme for rideshare drivers in August 2018. As an article in the Conversation describes, the new law: *'creates a new licence for "high-volume for-hire service" – that's companies serving over 10,000 trips a day. The licence is accompanied by new regulatory powers given to the Taxi and Limousine Commission, including a one-year moratorium on new licences. This is a significant development in an already crowded market, and a first step in addressing concerns about traffic congestion and driver waiting times. Most significantly, the commission will set minimum payments for drivers operating under the new high-volume licence, and potentially implement minimum payments for existing licences. Technically, this is not minimum wage legislation. However the introduction of regulation of the number of vehicles and of a minimum payment is a significant shift. It could end the current race to the bottom. At the moment, rideshare companies are competing with each other by saturating the market. They are hiring as many new drivers as they can, reducing the commission they pay to drivers and mechanically limiting the "surge" price periods when rides are more expensive because of high demand. With fewer drivers on the road and a minimum price, drivers might actually be able to start making a decent living. It might also lead to a shift to competition on quality of service rather than quantity and price, benefitting the customer.'* See Emmanuel Josserand and Sarah Kaine, *People power is finally making the gig economy fairer*, The Conversation, 10 August 2018.

## B. BETTER WORKPLACE SAFETY LAWS

*'Work is not safe – some drivers refuse to work Friday or Saturday nights because of intoxicated passengers.'* (Community leader)<sup>60</sup>

*'No safety concerns, for example no safety cameras on car.'* (Community leader)<sup>61</sup>

Our casework and consultations reveal that on-demand work is often unsafe and isolated. In addition to Irini's story above, Ana's story provides another powerful example:

### Case study – Ana

Ana came to Australia as an international student to study English. Ana was engaged as an independent contractor by a food courier company. Her pay would vary depending on the delivery, usually ranging from \$6 to \$8.

One day when Ana was making a delivery her bike was hit by a car. She was taken to hospital and required surgery for her injuries. The Transport Accident Commission (TAC) paid for Ana's operation. However, she was subsequently unable to work due to her injuries. Because Ana was engaged as an independent contractor it was unclear whether she would be able to access compensation through the WorkCover scheme.

WEstjustice referred Ana to a no-win no-fee firm that has a specialist personal injury team for further advice and they opted to pursue her claim with the TAC.

Unfortunately, it is not clear whether existing provisions of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (**WIRCA**) cover on-demand workers.

If a worker has suffered an injury arising out of or in the course of employment, they are entitled to compensation under the section 39(1) of WIRCA. There are four categories of workers under the Act:

1. Those under a contract of service or apprenticeship;
2. Those who are deemed to be working under a contract of service;
3. Those who are deemed to be workers;
4. Some volunteers.

Schedule 1 sets out numerous categories of persons deemed to be workers for the purposes of WIRCA. For example, there are specific provisions protecting door to door sellers (ss.5) and timber contractors (ss.6). Unfortunately, the specific category for 'drivers carrying passengers for reward' (ss.7) is limited to bailment arrangements, and it is not clear whether the broader protection for contractors (ss.9) would apply to on-demand workers.<sup>62</sup>

Hence, many workers involved in traffic accidents are advised to pursue TAC claims instead.

This is not satisfactory. Firstly, workers who are not injured in traffic accidents will not have access to TAC. Secondly, employing entities are shirking their insurance obligations in light of legislative uncertainty. It is not

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<sup>60</sup> Community leader, WEstjustice on-demand economy inquiry consultation, December 10 2018.

<sup>61</sup> Community leader, WEstjustice on-demand economy inquiry survey.

<sup>62</sup> While the argument could be made with the right client (if they derive 80% of their income from one platform only), subsection (1)(c) is unclear in its reference to the services being provided by the "same individual". This subsection is usually applied in the context of 80% of the totality of the particular service being performed by the same individual – e.g. a builder outsources 80% of the scaffolding work to the one individual and at least 80% of that individual's gross income is derived from that contractual arrangement.

fair that such companies gain a competitive advantage by denying their dependent workers access to much-needed entitlements.

Instead, it is recommended that the State Government take steps to ensure all workers are provided with access to workers' compensation arrangements. Specific deeming provisions for certain classes of on-demand workers would be an important start. Platform companies would then have to extend their WorkCover insurance policies to include all of their on-demand workforce.

On-demand platform companies must also be required to take further steps to promote workplace safety and protect on-demand workers from harm. Section 21 of the *Occupational Health and Safety Act 2004* (Vic) requires employers to provide and maintain a working environment that is safe and without risks to health, so far as is reasonably practicable. This obligation extends to independent contractors, who are deemed to be employees (ss.21(3)). It is essential that such obligations are appropriately enforced.

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**RECOMMENDATION 19: IMPROVE WORKPLACE SAFETY LAWS FOR THE MOST VULNERABLE WORKERS**

WEstjustice calls on the State Government to improve workplace safety laws for the most vulnerable workers and stop on-demand companies from shirking responsibility. Vulnerable on-demand workers must have access to safe work and WorkCover if they are injured. On-demand companies must not undercut other businesses who rely on secure employment by gaining a competitive advantage through avoiding the payment of WorkCover premiums. The State Government must ensure that workplace safety laws require gig economy companies take responsibility for the safety of their workers. Current deeming provisions must be extended to clarify that certain on-demand workers are deemed to be working under a contract of service and entitled to WorkCover, and companies must pay insurance.

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**C. PROCUREMENT POLICIES AND INDUSTRY CODES**

WEstjustice encourages the State Government to use procurement policies to improve minimum standards and promote compliance.

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**RECOMMENDATION 20: INCREASE USE OF PROCUREMENT POLICIES, PROACTIVE COMPLIANCE DEEDS AND INDUSTRY CODES TO IMPROVE COMPLIANCE.**

WEstjustice recommends that the Government review all procurement policies to ensure that tenders for Government work can only be submitted by companies with an independently verified and demonstrated track record of compliance with workplace laws, and a demonstrated commitment to secure work and diversity targets.

WEstjustice notes that private schemes like the Cleaning Accountability Framework can provide a useful mechanism to promote compliance within industries, along with proactive compliance deeds that require retailers to monitor their supply chains and rectify underpayments. We therefore recommend that the State Government review all procurement policies to ensure that tenders for Government work can only be submitted by companies that hold accreditation under any relevant schemes.

Importantly, we consider that any procurement policies must be properly monitored and enforced.<sup>63</sup> This includes a requirement for independent verification which measures performance against objective standards.

We commend the ACT's Secure Local Jobs Code and certification process in this regard. Since January this year, the ACT Government has required that contractors tendering for construction, cleaning, security or traffic management work meet particular Code Standards and have a Secure Local Jobs Code Certificate. For work over \$25,000 in value, contractors must also have a Labour Relations, Training and Workplace Equity Plan. Importantly, to obtain Code certification, businesses must engage an approved auditor.<sup>64</sup>

Finally, the Government should refuse to reimburse staff for costs incurred in the use of on-demand platforms that do not comply with procurement policies, thus requiring staff to use alternative services.

#### D. PAYROLL TAX INCENTIVES

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##### **RECOMMENDATION 21: PAYROLL TAX INCENTIVES**

The State Government should also consider the provision of payroll tax incentives for businesses that can demonstrate compliance with laws and a commitment to secure work.

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<sup>63</sup> John Howe, Andrew Newman, Tess Hardy, 'Submission to Independent Inquiry Into Insecure Work In Australia' (Centre for Employment and Labour Relations Law), 22-23.

<sup>64</sup> Available at <<https://www.procurement.act.gov.au/securelocaljobs>>, last accessed 18 February 2019.

### 3. IMPROVING REGULATORY FRAMEWORKS AND ACCESS TO EDUCATION TO ENSURE THAT LAWS ARE EFFECTIVELY ENFORCED

*In Burma, people get a job based on monthly wages. No matter how many hours they work, no matter how many days per week they work, they don't get paid extra. Not getting paid for overtime and penalties. There is no compensation if injured. You are fired if you make complain or speak out the truth.*

*In Australia, most of the people from my community are farmers, not literate or educate. As a result community members cannot get secure jobs. They accept any jobs they are offered. Usually they get a job which doesn't require any qualification; only require hard working, such as meat factory, cleaning. They sign the paper without understanding what are in terms and policy. Because of not understanding employment law or their rights at work, they don't get paid properly. For example, I know many cleaners are working night shift cash in hand for 14\$ an hour and they only get paid for four hour even if they work all night. If they are injured at work they don't know they have the right to get compensation or claim.*

*If they have a problem at work, people go for information to community leaders. They don't contact government agency for help with problems because they are scared, have language barriers and think that they will lose their jobs. They think that they cannot get a job in the future because of making complaint against the boss.*

*I think the train the trainer program is the best way to help my community understand the law. Because whenever the community members have a problem, they come to leaders. If the community leader has knowledge about the laws and services, they can guide the community member where to get help and advice also, the Western Community Legal Centre. To look on a website or fill out a complaint form is very complicated. My community doesn't have capacity to do this alone. They need help. Here the service is face to face, and one on one. This is important because this Centre has been working with the community, now they have confidence to come here. This is a first step for the community to get help.*

*Neng Boi – community leader and WEstjustice Community Worker*

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

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

## A. UNMET NEED FOR EMPLOYMENT LAW HELP

### Case study - Saiful

*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 WEstjustice night service appointment, he received assistance to draft a general protections application. Saiful was informed of the process, and encouraged to contact WEstjustice once a conciliation was scheduled so that we could assist him to prepare. At the time, WEstjustice 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 WEstjustice 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.*

In 2012, the Law and Justice Foundation undertook a large study of unmet legal need in Australia. Among all Victorian respondents, 5.9% identified that they had experienced an employment law problem in the past year. Similarly, an Australian Institute survey identified that 7% of Australians had an employment law problem.<sup>65</sup> WEstjustice data suggests that this figure would be significantly higher for newly arrived and migrant workers.

The complex and multijurisdictional nature of the workplace relations landscape means that without assistance from an expert, enforcement is impossible for many vulnerable workers, particularly those in sham contracting arrangements. 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 extremely challenging. Some claims carry a costs risk (i.e. 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). Furthermore, a decrease in union membership has significant implications for monitoring and enforcement of workplace rights.<sup>66</sup>

Our clients generally require active assistance from the time of making a complaint through to mediations, and formally settling their dispute. At the initiation of an application, clients require assistance with the completion of the relevant forms and calculations. Many clients faced with the requirement to calculate underpayments and prepare a letter of demand, let alone a Court application, outline of submissions or witness statement would be locked out of the system without extensive assistance. The imbalance of power inherent in many of these disputes makes independent assistance for vulnerable workers crucial.

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 Fair Work Ombudsman can offer limited assistance

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<sup>65</sup> Hemingway, above n 4, 87.

<sup>66</sup> Ingrid Landau, Sean Cooney, Tess Hardy and John Howe, ‘Trade Unions and the Enforcement of Minimum Employment Standards in Australia (Research Report, January 2014), 8.

for unpaid wages and entitlements, as discussed **below**, both FWO and other mainstream agencies, with their focus on telephone-based self-help models of assistance, are largely inaccessible to vulnerable on-demand workers, 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. JobWatch, a community legal centre specialising in employment matters, cannot meet 57% of demand for telephone assistance (even fewer receive casework support and the most vulnerable will not utilise 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.<sup>67</sup> In Victoria, Legal Aid does not provide assistance with employment matters (except where discrimination is involved) and frequently refer matters to other services. Apart from the ELS, there are no other targeted employment law services for newly arrived communities in Victoria. 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.'<sup>68</sup>

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.

Even fewer community organisations provide assistance to vulnerable contractors – and the government-funded Independent Contractor Hotline no longer operates.

This means that vulnerable workers in the on-demand workforce are simply unable to find out about their entitlements, or take action to enforce their rights.

## B. ACCESS TO COMMUNITY-BASED FACE-TO-FACE LEGAL ASSISTANCE

### BEST PRACTICE COMMUNITY-BASED LEGAL SERVICES

There is a strong consensus that community-based employment services are required to provide sustained direct engagement with communities and a link between communities and government agencies. Yet there is a lack of resources being directed towards funding these services that play a crucial role in providing meaningful access to justice and achieving positive systemic change.

To stop exploitation, all vulnerable workers, and in particular, those in the on-demand workforce, require access to best practice community-based legal education and services.

For example, given FWO's strict eligibility criteria for ongoing assistance, many workers with unpaid entitlements are left to self-advocate. For newly arrived workers, this is often impossible. WEstjustice has assisted many clients who were turned away from FWO and were unable to enforce their rights without support. For example:

#### Case study – Pavel

*Pavel is a newly arrived refugee. He does not speak much English and cannot write. He got his first job as a cleaner. He often worked 12 or 14 hour shifts but was only paid for five hours' work each shift. He was also*

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<sup>67</sup> Hemingway, above n 4, 139.

<sup>68</sup> Ibid.



*paid below the minimum pay rate. Pavel came to WEstjustice because he had not been paid his last two weeks' pay. A community worker had tried to assist Pavel to complain to the Fair Work Ombudsman, but because they didn't know what to complain about, the complaint was closed.*

*WEstjustice helped Pavel make a new complaint to the Fair Work Ombudsman and negotiated with his employer to receive back payment. WEstjustice later learned that Pavel assisted two of his friends to negotiate back pay and legal pay rates going forward.*

Pavel's case study illuminates the importance of ongoing legal assistance from a community agency. It was only through ongoing contact and case management from WEstjustice that Pavel was able to attend mediation through the Fair Work Ombudsman and ultimately receive payment. WEstjustice is accessible for vulnerable workers for a number of reasons, as identified in our preliminary report:

- **Relationships and trust:** To be accessible, it is essential that community members feel safe and trust the service. Trusting relationships have been built between the service and target communities in a number of ways, including for example, by providing face-to-face community education, and attending local meetings and events. As one survey respondent noted, a key element of the relationship is its long-term, ongoing nature.
- **Collaboration:** It is essential to collaborate with other services that assist target communities, and other mainstream employment-related services. Fortunately, there are a number of networks (including the Wyndham Humanitarian Network and Maribyrnong Workers With Young People Network) that promote collaboration between service providers in the West.
- **Consultation with relevant communities and agencies:** Involvement of the target group in planning and decision making is crucial. This was undertaken in the first stage of the Project, and on an ongoing basis through gathering client and community feedback.
- **Importance of community workers:** Community workers from target communities provide an essential link between services and community members. As one survey noted: 'Having bilingual workers from the clients' communities working and imparting knowledge to their own communities has been effective'. Our Centre has used bilingual workers for many years, and found this to be an extremely valuable way of connecting our service with newly arrived communities.

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 (CBEAS) in the light of the introduction of the Fair Work regime (**Booth Report**).<sup>69</sup> The Report highlights the importance of CBEAS for vulnerable workers:<sup>70</sup>

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

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<sup>69</sup> Anna Booth, 'Report of the review of community-based employment advice services', *Report to the Fair Work Ombudsman*, 30 September 2009.

<sup>70</sup> *Ibid*, 14.

Booth recognises that CBEAS contribute to the effective and efficient functioning of workplace relations systems by:

- Providing critical assistance to a vulnerable group who would otherwise be unable to understand or enforce their workplace rights
- Filtering disputes by advising clients on the legal merits of their claims
- Increasing the focus on early intervention and assisting clients to resolve issues at an early stage
- Promoting the efficient passage of disputes through the workplace relations dispute resolution pathways
- Development of legal precedent through strategic litigation, and
- Collecting information about systemic issues for vulnerable groups and providing this information to regulators and others.

The Productivity Commission has also recognised that community organisations have strong potential to provide innovative solutions to social problems.<sup>71</sup> It has also recognised that employment law is a major gap in civil law assistance which can have serious consequences, and that efficient, government funded legal assistance services generate net benefits to the community. The Commission has acknowledged that more resourcing is required. In its Report on the Workplace Relations Framework Inquiry, the Productivity Commission specifically acknowledged the vulnerability of migrant workers and the important role that community organisations play in providing information and promoting compliance with employment laws. The Commission recognised the ‘credibility these [community] organisations have within the community, their sensitivity to established cultural or community attitudes and their separation from government’.<sup>72</sup>

Importantly, the Commission discussed the value of the WEstjustice (then Western CLC) Employment Law Project in particular, noting that:<sup>73</sup>

*Community organisations often have a broader remit than just ensuring compliance with employment law. For instance, apart from providing legal advice, the Western Community Legal Centre also runs a legal education program for vulnerable workers, which includes information sessions to community members about their workplace rights, and training programs to assist people to distribute legal education within their community (sub. DR329). In this way, these organisations also can likely direct migrant workers to alternative employment opportunities or government support programs.*

The work of Community Legal Centres, including WEstjustice, clearly contributes to the efficiency of the workplace relations framework. In addition to providing critical assistance to regulators and vulnerable workers, we provide a crucial triage or filtering function, advising clients with meritless claims or very poor prospects of success not to proceed.

Similarly, WEstjustice’s support and advocacy often assists clients to settle their disputes by negotiation, thus increasing efficiency and reducing costs by avoiding unnecessary reliance on proceedings advancing to court.

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<sup>71</sup> Productivity Commission, ‘Workplace Relations Framework’, Productivity Commission Inquiry Report, Vol 2, No 76, 30 November 2015.

<sup>72</sup> Ibid, 925.

<sup>73</sup> Ibid, 925.

We routinely undertake calculations and assist clients to resolve issues with their employers by way of a letter of demand. We have been successful in assisting many clients during this early stage in the legal process.

Importantly, we do not turn away vulnerable contractors – instead we offer an intake appointment with a lawyer to determine whether the worker is engaged in a sham arrangement. Even if the worker is a genuine contractor, we provide some assistance to those workers who do not engage subcontractors, and would otherwise be unable to pursue their claims with assistance (for example due to language barriers).

We also promote the efficient passage of disputes through established dispute resolution pathways, and by assisting clients to access mainstream services.

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## THE WESTJUSTICE EMPLOYMENT LAW SERVICE

As mentioned earlier in this submission, the WEStjustice Employment Law Program seeks to improve employment outcomes for vulnerable workers including migrants, refugees, temporary visa holders and young people through tailored legal services, education, and advocacy.

Our key services include:

- **Tailored legal services:** an employment law legal service that provides comprehensive assistance to newly arrived and refugee clients (including an International Student Work Rights Legal Service delivered in partnership with Study Melbourne) and young people (via our School Lawyer Program and youth clinics), including face to face legal advice and representation (**ELS**)
- **Education:** an education program targeted at informing newly arrived and refugee communities about employment and anti-discrimination laws and increasing accessibility of relevant services (**Education Program**), and
- **Advocacy:** we work closely with target communities, through our ELS and Education Program, to identify systemic employment related issues and advocate for change, including improvements to laws and processes and liaison with key stakeholders.

Our ELS provides free employment-related legal information, advice, advocacy and referral to refugees, asylum seekers, international students, temporary visa holders and other newly arrived migrants (who are from a non-English speaking background and have lived in Australia for less than 10 years). Apart from our International Students Work Rights Legal Service (which operates out of Study Melbourne and is for all international students), clients must live, work or study in the Western suburbs of Melbourne.

The ELS runs by appointment on Monday and Wednesday during the day, and Thursday evenings. Our Thursday evening service is staffed by volunteer lawyers and paralegals. All lawyers have experience practising in employment law and are well equipped to provide specialist advice in this area. All volunteers are required to complete an induction program, which cover various aspects of how the service operates, as well as substantive legal topics (e.g. choice of jurisdiction) and training in other important areas including self-care and best practice approaches to working with newly arrived and refugee clients.

We seek to provide meaningful assistance to each client, and tailor our level of assistance depending on the client's needs and ability to self-advocate, the merit of the case and our resources. When working with clients who have limited or no literacy in their own language or English, simply advising someone of their right to lodge a claim will be of limited utility. If you cannot write in English, you cannot fill out a claim form without assistance. For this reason, our intake and follow up appointments are longer—usually one to three hours in length, per client. At these appointments, where a client lacks capacity to self-advocate, our volunteer lawyers attempt to assist clients to prepare an application or other correspondence as appropriate. WEStjustice staff then provide follow-up support and assistance as needed, although this is necessarily dependent on our capacity.

For the vast majority of our clients, additional assistance beyond one appointment is necessary. Between May 2013 and October 2015, the ELS provided 162 advices and opened 45 cases for 130 clients. 52 clients received a one-off advice only appointment, while 78 clients received further appointments and/or ongoing assistance. For many clients who received one-off advice, further assistance was needed, but there were no available resources. Sadly, we learned of poor outcomes for some meritorious cases, in part due to lack of ongoing legal assistance.

Of the 30 files that were opened and closed between May 2013 and October 2015, half of all cases required more than 20 hours work. One third of cases required 6–20 hours work, and around 15% of cases involved less than six hours work. Several advice-only files also required more than 20 hours work. Even our clients who received a one-off advice only appointment still received an average of approximately three hours face-to-face assistance from a lawyer.

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#### RECOMMENDATION 22: FUND COMMUNITY LEGAL CENTRES TO PROVIDE FACE-TO-FACE LEGAL ASSISTANCE

Without assistance, vulnerable on-demand workers cannot enforce their rights, and employers can exploit with impunity. Community legal centres are necessary in the community to work alongside regulators and unions to provide additional support to vulnerable workers. However, there is no recurrent funding for generalist centres to do this work, and significant unmet need.

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 vulnerable 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 vulnerable workers, including community leaders and community workers, to raise awareness of laws and services that can assist and prevent exploitation; and
- **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.

### C. NEED FOR TARGETED EDUCATION

#### Case study - Lun

*Lun wanted to find work as a cleaner. He agreed to pay Mr T's company \$10,500.00 for training. Mr T promised Lun that he would receive training in general cleaning and carpet cleaning. Lun paid Mr T \$10,500.00 and completed 10 days' of unpaid training with Mr T – the training involved watching and learning from Mr T. After 10 days' of "training", Lun was told that there was no work for him. Lun received a refund of \$7000 but was told that the company would keep \$3000.00 for "training costs".*

Without targeted legal education for newly arrived and refugee workers, the workplace relations system will remain largely inaccessible. Education not only informs people about their rights at work and where they can find help, but also empowers communities to enforce their rights by building relationships and trust between vulnerable workers and services that can assist. In this section, we discuss best practice approaches to education for migrant and refugee communities, and demonstrate the value of targeted programs delivered by WEstjustice over the past four years. Further details can be found in our Not Just Work Report, and on our website.

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## BEST PRACTICE EDUCATION APPROACHES

Any education program should adopt best practice education approaches to ensure that it is accessible and useful for target communities. Based on feedback from over 50 community presentations, a literature review, and over 300 surveys of community members, community workers and community leaders from newly arrived and refugee communities, we found that the following features make targeted education effective:<sup>74</sup>

- **Face-to-face and verbal:** Information provided face-to-face, both verbally as well as in writing
- **Client's language and community workers:** Using interpreters, community guides and bilingual community workers from relevant communities
- **Visual materials and multimedia:** Use of pictures, visual aids (such as DVDs) or other multimedia (including community radio)
- **Information sessions, English classes and pre-arranged community meetings:** Delivering community education via information sessions or as part of English classes is effective, as is visiting existing community groups
- **Clear language:** Using clear and simple language
- **Key information only:** Outlining key concepts and where to go for further information/assistance
- **Cultural awareness:** Ensuring presenter understands the community culture.
- **Convenient location:** Considering location of CLE and contacting existing organisations. As one community worker recommended: 'I think taking time to identify a number of community groups and associations that are already established and are meeting for a purpose on a regular basis. Request to be invited to talk about this issue which I think would be very popular within these communities.'
- **Practical and timely:** Providing information 'that is linked to outcomes', for example by facilitating employment in industries and workplaces where rights can be realised. Ensuring that workers receive the right amount of information at the right time so it is not abstract. Understanding audiences' level of understanding and targeting information at the appropriate level.
- **Developed in consultation with communities:** Ensuring that education is developed in consultation with community members and community workers, and responds to identified needs. There is strong evidence to suggest that face-to-face assistance and advocacy is essential to provide a service to refugee clients, and that without targeted assistance focused on relationships, collaboration and trust, government employment services are often inaccessible to refugee and newly arrived communities.

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## WESTJUSTICE EDUCATION PROGRAM

Raising awareness of employment laws and services is a critical step in rights enforcement. In response to community feedback regarding the importance of face-to-face, targeted employment law services and information, WEstjustice developed and implemented a Community Legal Education Program (**CLE Program**), commencing May 2014.

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<sup>74</sup> Hemingway, above n 18, 23-26.

The CLE Program has consisted of:

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

We have developed numerous resources including template PowerPoint presentations, activity sheets and educational videos especially tailored for English as Additional Language students. Please visit our website for access to these resources.<sup>75</sup> Some example images and scripts from one video are below:

Jill!

ANDREA

JILL  
Andrea! Hey! How are you?

ANDREA  
Good. How's the new job?

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

ANDREA  
That's so exciting!

JILL  
I know - what about you?

ANDREA  
Still working in the kitchen at the  
pub.

75 See: <<http://www.westjustice.org.au/community-development-and-law-reform/community-legal-education/newly-arrived-and-refugee-employment-law-140>> last accessed 26 July 2018.

JILL  
Is it good pay?

ANDREA  
Depends on whether it's a busy night.

JILL  
(concerned)  
Really?

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

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

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

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

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

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

ANDREA  
No.

JILL  
Penalty rates, for weekends? Holidays? Superannuation?

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

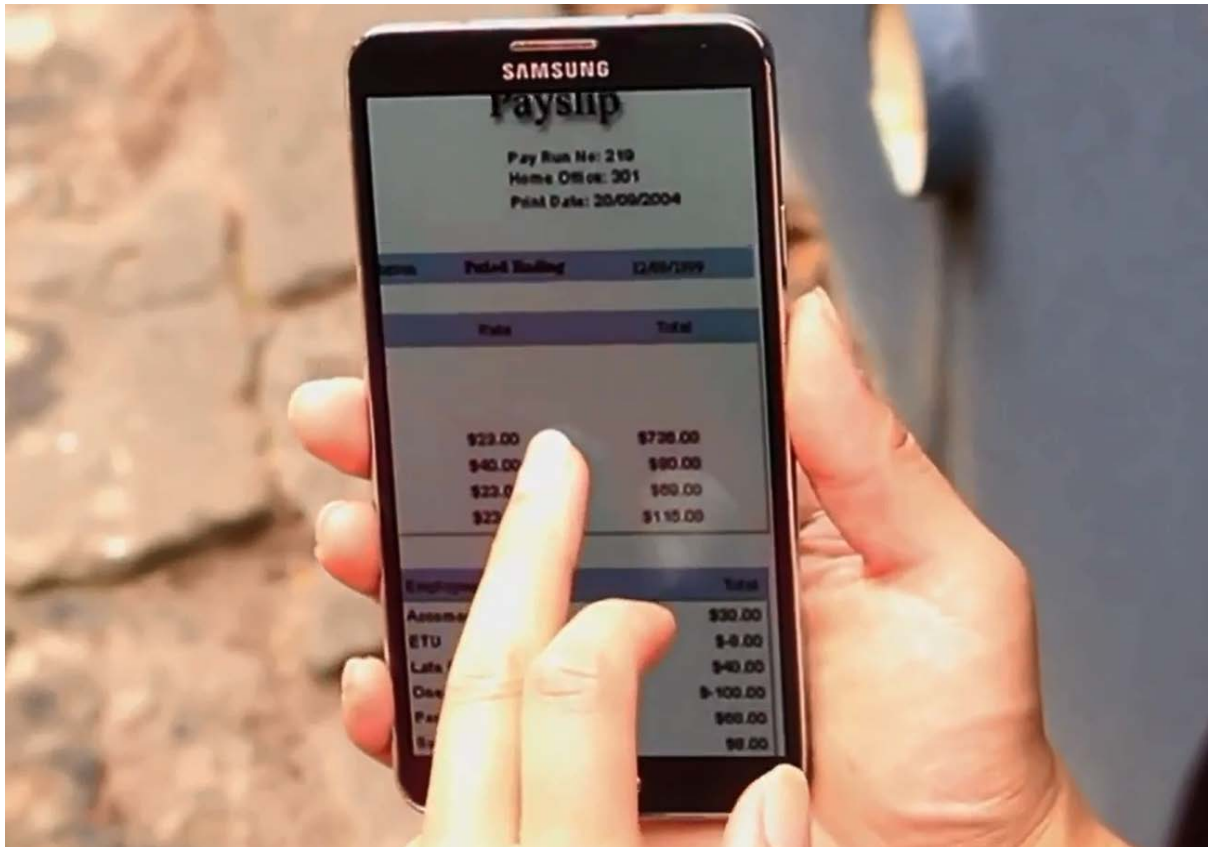
JILL  
(thinking, but with caution)  
Listen... do you have a pay slip I could have a look at?

ANDREA  
What's a pay slip?

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







ANDREA  
I don't get those.

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

ANDREA  
Who can I speak to?

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



As discussed in detail in the Not Just Work Report (chapter 3), each of these programs has been evaluated, and results indicate that the CLE Program has dramatically increased migrant worker understanding of laws and access to services. For example, after attending a WEstjustice information session, 89% of participants surveyed stated that as a result of the CLE session they now knew where to go for help with an employment problem.

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

- *The best thing about the employment law is get to know everyone have right at work.*
- *New legal terms like 'sham contracting'.*
- *About how much for the permanent and casual payment.*
- *The wage in different work type.*
- *It provides the legal wage standard and organisations we can ask for information and legal help.*
- *When you losing our job for wrong matter we can .get help many places.*
- *The best thing I learn is job problem and talk to the community legal centre for help.*
- *I know about our rights (awards, enterprise agreements and contracts).*
- *To make people know the right for both employment and employees.*

The CLE Program has also delivered information sessions to staff from agencies that work with newly arrived communities. As noted in the Law and Justice Foundation report, *Legal Australia-Wide Survey: Legal Need in Victoria*<sup>76</sup>

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

In this regard, the importance of community workers and an effective referral network are, in our submission, critical to increasing awareness of workers' rights in Australia. Community workers play a central role in referring clients who may not know where or how to seek legal assistance. Community workers from target communities provide an essential link between services and community members.<sup>77</sup>

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

These community-based relationships and networks are critical in order to strengthen support networks and to address migrant workers' lack of awareness of workplace rights.

Unfortunately, WEstjustice receives more requests for CLE community presentations than we have capacity to deliver. Similarly, the pilot Train the Trainer program received applications from more than five times the

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<sup>76</sup> Law and Justice Foundation (Christine Coumarelos, Deborah Macout, Julie People, Hugh M. McDonald, Zhigang Wei, Reiny Iriana and Stephanie Ramsie), *Legal Australia-Wide Survey: Legal Need in Victoria*, August 2012, 213.

<sup>77</sup> Preliminary Report, 21.

number of community leaders than there were places in the program. The success of the Program's CLE program shows that additional funding and resources ought to be made available for the delivery of regular sessions to community groups who may not otherwise have access to information and other services to raise awareness about employment law issues.

Such education programs are urgently required not only in the Western Suburbs of Melbourne, but elsewhere in metropolitan and regional Victoria. WEstjustice has already received requests to deliver education in Albury and Nhill. Regional programs are especially necessary given the concentration of migrant workers in food processing industries in regional towns.

WEstjustice recommends that similar programs be adopted and expanded across Australia. Recognising that newly arrived and refugee workers require targeted, face-to-face education programs to understand and enforce their rights at work, Governments should establish a fund to provide targeted education programs for vulnerable workers. Such programs should include:

- Direct education programs for community members;
- Train the trainer programs for community leaders;
- Education programs for community workers in key organisations working with newly arrived communities, and
- Other programs delivered in accordance with best practice education approaches.

WEstjustice proposes that mainstream agencies develop their own targeted resources and programs, but also provide funding for community organisations to distribute those resources and design and deliver essential face-to-face information sessions that align with local community needs.

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**RECOMMENDATION 23: FUND TARGETED EDUCATION PROGRAMS FOR VULNERABLE WORKERS**

Tailored education programs are required to raise awareness of laws and build trust and accessibility of services. The Government should establish a fund to provide targeted education programs for vulnerable workers. Such program should include:

- Direct education programs for community members
- Train the trainer programs for community leaders
- Education programs for community workers in key organisations working with newly arrived communities, and
- Other programs delivered in accordance with best practice education approaches.

In particular, we recommend funding community legal centres to develop and deliver these programs.

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**RECOMMENDATION 24: SPECIALIST EDUCATION PROGRAMS TO BE INCORPORATED INTO SCHOOL AND UNIVERSITY INDUCTION PROGRAMS FOR INTERNATIONAL AND LOCAL STUDENTS**

In recognition of the particular needs of young people and international students, the State Government must fund specific education programs in schools, TAFEs and universities for international and local students. Such

programs should be provided by community legal centres, unions or other suitably qualified community groups.

#### D. INTRODUCE AN OFFICE OF THE CONTRACTOR AND WORKER ADVOCATE

Currently, there are few or no services to assist vulnerable contractors. For our clients who don't speak any English, it is impossible to fill out a VCAT claim form without assistance. As noted above, very few community organisations provide assistance to vulnerable contractors – and the government-funded Independent Contractor Hotline no longer operates.

#### RECOMMENDATION 25: INTRODUCE AN OFFICE OF THE CONTRACTOR ADVOCATE

The State Government should establish an Office of the Contractor Advocate. The Advocate could 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 VCAT and other jurisdictions to recover minimum entitlements.

The Advocate could investigate the barriers that vulnerable contractors face to accessing jurisdictions like VCAT, and make recommendations to address this.

The Advocate could also investigate and recommend better regulation of websites like Gumtree, and work with such platforms to better protect workers rights.

#### E. BETTER PROTECTION FROM DISCRIMINATION AT WORK

Refugee and migrant women often experience significant physical, financial and emotional harm from discrimination, sexual harassment, unsafe work and unfair dismissals. Based on the experience of WEstjustice, women are more likely to be exploited by employers and experience discrimination at work, but are less likely to pursue discrimination claims.

Although discrimination was commonly reported in consultations for our Preliminary Report<sup>78</sup> and women's outreach project,<sup>79</sup> this was not observed in our casework service. Less than one in ten employment law service clients received advice on discrimination.

Clients may believe they cannot "prove" their case, or experience low awareness of Australian laws, fear of legal processes and authority, and/or the deep pain that reliving traumatic events can evoke. Many clients

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<sup>78</sup> 47% of survey respondents reported that discrimination at work was common, somewhat common, or that they or someone they knew had experienced it: Catherine (Dow) Hemingway, 'Employment is the Heart of Successful Settlement: Overview of Preliminary Findings' (Preliminary Report, Footscray Community Legal Centre, February 2014) <[http://www.footscrayclc.org.au/images/stories/Footscray\\_CLC\\_Employment\\_Law\\_Project\\_-\\_Preliminary\\_Report.pdf](http://www.footscrayclc.org.au/images/stories/Footscray_CLC_Employment_Law_Project_-_Preliminary_Report.pdf)>, 8 (**Preliminary Report**).

<sup>79</sup> With financial support from the Victorian Women's Trust, WEstjustice explored the working experiences of women from newly arrived and refugee communities. In addition to analysing client data from our legal service, we engaged with various women's groups, including sewing groups, financial literacy classes and playgroups. At these meetings we shared information about workplace rights and responsibilities, and heard from women about their experiences at work. We heard similar stories over and over – a lady who had found work at a laundry, and told she did a great job and asked to come back early the next day. After telling her boss she could only come after dropping her child at school, she was told not to come back. Another lady, employed as a casual, promised her job back after taking time off to have her second child, and refused a job upon return. Women who never received a job interview until they anglicised their names, or who were warmly invited to an interview only to be told the position was taken when they saw her hijab.

suffered significant psychological injuries as a result of discriminatory behaviour at work—and such injuries may have prevented others from seeking legal assistance.<sup>80</sup>

There are practical considerations to low enforcement – many of the women we encountered had recently given birth or were pregnant. One of our clients with a newborn cancelled her appointment – it was simply too difficult. We were in and out of Court at the time another client’s baby was due – the strength and courage that it takes to pursue a case in such circumstances is incredible. Clients also faced family and community pressure to discontinue claims.

Workers who experience discrimination have a range of legal options including making a complaint to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC).<sup>81</sup> Each approach requires the complainant to make a written application and follow their case through. There is no proactive regulator who can run a case on behalf of a client,<sup>82</sup> or gather intelligence and prosecute an employer. Given the power imbalances and lack of enforcement, there are few incentives for employers to take positive steps to reduce discrimination.

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**RECOMMENDATION 26: TAKE THE ONUS OFF COMPLAINANTS BY INTRODUCING A DISCRIMINATION OMBUDSMAN OR EXPANDING VEOHRC AND/OR WORKSAFE POWERS TO INVESTIGATE AND ENFORCE BREACHES OF ANTI-DISCRIMINATION LAWS**

WEstjustice submits that the power and resources of the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) and/or WorkSafe (and the Australian Human Rights Commission (AHRC)) should be enhanced, and/or a Discrimination Ombudsman Office be established, to allow for the investigation and enforcement of breaches of anti-discrimination and sexual harassment laws.

In the UK, US and some Canadian jurisdictions, the regulator can provide advice and direct support to complainants. We consider that the VEOHRC (and AHRC) should have the power to assist clients with meritorious claims and run strategic litigation to promote compliance, just as the Fair Work Ombudsman (FWO) can stand in the shoes of an applicant and prosecute a company directly. Like the FWO, mediation and enforcement could be delivered by separate teams within the VEOHRC and AHRC, which we consider appropriate, given their specific expertise in anti-discrimination conciliation.

In addition to the problem of the complaints-based model, current remedies in anti-discrimination law often do not address the problem of discrimination. Most claims settle for financial compensation, without addressing the problem of discrimination itself – meaning businesses do not make any meaningful change.

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<sup>80</sup> According to VicHealth, ‘[t]here is a strong relationship between exposure to discrimination and poor mental health’: VicHealth, ‘More than tolerance: Embracing Diversity for Health’, (Summary Report, 2007), 11-12.

<sup>81</sup> Other options include the Australian Human Rights Commission (AHRC), Victorian Civil and Administrative Tribunal or the Fair Work Commission.

<sup>82</sup> The Fair Work Ombudsman does have a general protections team however it has only brought a small number of prosecutions. Victoria Legal Aid has an equality law program that provides invaluable assistance to vulnerable clients with discrimination claims – but still this places responsibility on an individual to bring a claim. The Victorian Equal Opportunity and Human Rights Commission has limited powers to investigate matters that are serious in nature, relating to a group of persons and cannot reasonably be expected to be resolved by dispute resolution (section 127, Equal Opportunity Act 2010 (Vic)). However, the powers of VEOHRC are significantly less than those of FWO, which include promoting compliance with the FW Act ‘including by providing education, assistance and advice to employees, employers...’, monitoring compliance, inquiring into and investigating ‘any act or practice that may be contrary’ to the FW Act, and commencing proceedings in Court to enforce the FW Act (section 682, FW Act).

The introduction of a discrimination ombudsman (operating as part of a strengthened VEOHRC/WorkSafe) would assist in addressing the fundamental causes of discrimination and sexual harassment as experienced by women in the workforce. Expanding the powers and resources of the VEOHRC and the AHRC would also assist in addressing the discrimination faced by migrant and refugee women in the course of their employment, or their exposure to the Australian labor market more broadly.

WEstjustice considers that the implementation of a well-resourced regulator with widespread enforcement powers would 'counter the deep pocket/repeat player advantage enjoyed by some respondents'.<sup>83</sup> It could promote systemic change within problem workplaces, by:

- Undertaking own-motion investigations and prosecutions
- Promoting and seeking systemic remedies (including workplace training and compliance audits)
- Running powerful education campaigns, and
- Championing the benefits of diverse workplaces free from exploitation.

A discrimination ombudsman could also support sexual harassment workplace claims; in light of the AHRC's recently released report on the extremely low levels of reporting sexual harassment incidents.<sup>84</sup>

In addition to the introduction of a new regulator, WEstjustice submits that the government can play a further role in reducing discrimination at work. Such steps should include:

- Expanding the limited positive duties in anti-discrimination laws that require employers to take certain steps to prevent discrimination occurring;
- Addressing the challenge of 'proving' discrimination by amending the law to introduce a reverse onus of proof, similar to the general protections provisions of the FW Act (complainants should be required to establish that they have a particular protected attribute and suffered unfavourable treatment. The employer should then be required to show that the unfavourable treatment was not because of the complainant's attribute. This is fairer as the employer has access to its own internal records and evidence about decision making, while the employee does not)
- Amending existing laws to require courts and tribunals to award remedies that promote systemic change
- Expanding existing reporting obligations to require companies to report publicly on diversity and anti-discrimination measures (as proposed)
- Funding targeted education campaigns for newly arrived and refugee workers, and
- Funding specialist legal services to provide free assistance to migrant workers experiencing discrimination at work.

## F. EXISTING AGENCIES MUST BE MORE ACCESSIBLE AND RESPONSIVE

As a result of low rights awareness, language, literacy, cultural and practical barriers, newly arrived workers rarely contact mainstream agencies for help. When they do make contact, meaningful assistance is needed. Agencies and commissions must take further steps to ensure that they are more accessible and responsive.

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<sup>83</sup> [Beth Gaze and Rosemary Hunter: Access to justice for discrimination complainants: courts and legal representation \(2009\) 32 UNSW Law Journal](#) 699, 699.

<sup>84</sup> 47% of survey respondents reported that discrimination at work was common, somewhat common, or that they or someone they knew had experienced it: Preliminary Report, 8.

Particularly relevant for this Inquiry, this includes regulators having sufficient funding and powers to address non-compliance and promote systemic reform. In order to make any enhanced enforcement powers effective agencies will require additional resources.

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## WHAT WORKS WELL

As set out in the Not Just Work report (chapter 4), key agencies including the FWO and FWC are taking several positive steps to ensure compliance with relevant laws. For example, numerous clients have received assistance via our warm referral process with FWO, whereby WEstjustice staff assist vulnerable workers to articulate their claims, then prepare a case summary which is sent directly to a FWO staff member with experience in migrant worker issues.

Further, agencies' participation in the WEstjustice Train the Trainer program has provided a number of community leaders with significantly improved awareness of services. For example, community leaders were able to visit FWO's Infoline centre and gain first-hand information about how FWO works. Information about FWO has now been shared with several newly arrived communities across the West. This collaboration resulted in a group of extremely vulnerable clients receiving assistance they would never have received otherwise.

### **Case study – cleaners benefit from the WEstjustice Train the Trainer program**

*WEstjustice received a phone call from a community leader who had recently completed the Train the Trainer Program. The leader had been approached by numerous community members who all worked for one employer. They felt concerned that they had been underpaid. The workers spoke no English and were very afraid about complaining—they did not want to lose their jobs. The trusted community leader arranged a meeting with WEstjustice at a familiar meeting place. WEstjustice lawyers attended, and advised the community members that it appeared there had been an underpayment. The lawyers gave information and advice about the minimum wage, and also the role of FWO. After building trust with the workers, and explaining the options moving forward, the workers agreed to meet with a FWO inspector and explain their situation. Another meeting was arranged. At this meeting, around 10 workers were assisted by WEstjustice staff and volunteers to complete complaint forms, as the workers did not speak English. FWO then liaised with the relevant employer and ultimately over \$20,000 in unpaid wages was recovered for numerous vulnerable community members. The workers said they would never have made a complaint without help from their community leader.*

Of particular benefit to newly arrived and refugee communities are the systemic outcomes flowing from investigations and FWO's ability to look at industry wide issues. Whenever possible and with our clients' consent we share intelligence with FWO about systemic breaches.

In such situations, FWO's power to audit workplaces in an own motion investigation capacity removes the onus from individual complainants who are vulnerable, and enables systemic change across workplaces. Through the warm referral process, we have been able to bring matters to FWO's attention and FWO has used the information provided as part of broader investigations. Such actions enable FWO and WEstjustice to assist other vulnerable workers who haven't been able to complain directly.

Many clients have also benefited directly from FWO's individual complaint process, where as a result of mediation or other inspector action, with assistance from WEstjustice and FWO, clients have been able to enforce their rights in a supported and cost-effective way. We have had a number of cases resolve favourably for our clients at the FWO mediation stage. Unfortunately, before FWO's involvement, the employers were not willing to respond to our letters of demand. As noted in the wage theft section below, we submit that with increased powers and capacity, FWO would be better able to resolve complaints at this early stage.

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## WITHOUT HELP, WORKERS CANNOT ARTICULATE COMPLAINTS

WEstjustice recognises that numerous government agencies including the FWC and FWO have undertaken work to target services at newly arrived communities. However, as demonstrated by the prevalence and persistence of the employment problems faced by these communities, it is evident that further action is required.

Many clients may intuitively feel that they have been treated unfairly, but due to the barriers outlined above, have no sense of who to contact, or how to frame their complaint. Even once workers are made aware of a service, and are comfortable enough to contact it, resource constraints or communication difficulties mean that they may not receive sufficient assistance to articulate their complaint.

WEstjustice has found that prior to presenting at the ELS, some clients have initiated a complaint with an agency like the FWO but due to ignorance of their rights and the elements required to establish their claim, complaints may be closed due to a lack of sufficient detail. In other situations clients have presented to our service seeking assistance with one matter (e.g. missing a week of pay), only to discover far more extensive underpayment issues due to an incorrect hourly rate, lack of annual leave entitlements or superannuation issues.

In our experience mainstream agencies like the FWO have not been able to provide the assistance required to explore or assist clients to identify further issues and articulate the full extent of their complaints. Only the issues correctly identified and evidenced by the complainant will be pursued. This means that vulnerable workers often cannot enforce their rights, and some of the worst forms of abuse are allowed to continue undetected.

Our clients generally require active assistance from making a complaint through to mediations, and formally settling their dispute. The imbalance of power inherent in many of these disputes makes independent assistance for vulnerable workers crucial for efficient resolutions. Without direct assistance many newly arrived and refugee clients who have had their workplace rights breached will not be able to enforce them.

Even if workers learn enough to know that something is wrong, and manage to contact an agency, without ongoing assistance, they are often unable to achieve justice. Pavel's story above is a clear example.

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## CULTURAL RESPONSIVENESS FRAMEWORKS

As set out in the Not Just Work Report, agencies must take steps to improve their cultural responsiveness and accessibility.<sup>85</sup> Such frameworks should:

- Develop specific protocols and checklists for frontline staff to identify newly arrived and refugee clients and assist them to articulate their claims
- Provide frontline staff with adequate training and resources to be able to better identify and assist clients who experience sham contracting
- Provide information in a wider variety of community languages including those spoken by newly arrived and refugee communities, and in a variety of formats
- Participate in (and help resource) specifically targeted education and engagement programs run in partnership with community organisations

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<sup>85</sup> Hemingway, above n 1, 26.

- Employ dedicated staff with speciality expertise in assisting migrant workers (ideally multilingual) to provide practical face-to-face assistance
- Ensure effective collaboration between agencies, and between agencies and community organisations, and
- Undertake proactive compliance initiatives to achieve systemic reform in industries and areas where there is widespread exploitation of migrant workers.

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#### **RECOMMENDATION 27: AGENCIES NEED TO IMPROVE CULTURAL RESPONSIVENESS FRAMEWORKS**

WEstjustice recommends that agencies increase their accessibility by improving cultural responsiveness frameworks. This includes developing specific protocols and checklists for frontline staff, engaging dedicated staff and participating in and resourcing education and engagement programs.

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#### **RECOMMENDATION 28: GREATER COLLABORATION, RESOURCING AND ACTION TO ADDRESS THE SUPERANNUATION BLACK HOLE**

Agencies should also play a more active role in assisting with the detection and enforcement of unpaid superannuation. As discussed above, very few of our on-demand workforce clients receive any superannuation, and we found it extremely difficult to assist clients to obtain their minimum entitlements.

WEstjustice recommends that the Federal Government and FWO urgently address the issue of unpaid superannuation. It is estimated that unremitted superannuation is in the hundreds of millions of dollars. As argued by Helen Anderson and Tess Hardy, we agree that ‘more should be done to improve the detection and recovery of non-payments because of the importance of superannuation to both employees and the government.’ As Anderson and Hardy state, any model of enforcement that shifts the policing of unpaid superannuation to employees is flawed.’ 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.’<sup>86</sup>

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.

FWO and the ATO need to be appropriately resourced to pursue unpaid superannuation claims, and community legal centres should be funded to assist.

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#### **ENHANCED POWERS TO AID EFFICIENT RESOLUTION AVOID THE NEED FOR COURT**

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 vulnerable workers – these employers know that their workers 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, WEstjustice usually sends a letter of demand to the employer setting out our calculations and the amount owed. We routinely find that employers ignore this correspondence. For some cases, we have found that

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<sup>86</sup> Helen Anderson and Tess Hardy, ‘Who should be the super police? Detection and recovery of unremitted superannuation’ (2014) 37(1) *UNSW Law Journal* 162, 162.



assistance from the FWO to investigate and mediate disputes has meant that employers are more likely to participate in settlement negotiations.

However, in the experience of WEstjustice, 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. For example:

#### **Case study – Sumit**

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

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

*Sumit's employer did not respond, so we assisted 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. WEstjustice 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 or incentivises employers to attend mediations conducted by the FWO.

Ideally, in addition to compulsory mediation, 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 also occur in circumstances where there is a dispute – the FWO should be empowered to make a binding determination.

Like the Australian Financial Complaints Authority (AFCA), 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.

The ACFA, like FWO, is an independent and impartial ombudsman service. In the first instance, AFCA usually refers the matter to the relevant financial firm. If this does not resolve the issue, AFCA will review the file and contact each of the parties to clarify issues/request further information. AFCA will try and assist parties to

resolve their issue, but if agreement cannot be reached, the AFCA has the power to make a binding determination. As the AFCA website explains, if informal approaches are unsuccessful:<sup>87</sup>

*we may then use more formal methods, where we may provide a preliminary assessment about the merits of your complaint, or we may make a decision (called a determination). If we make a determination that is in your favour and you accept it, the financial firm is required to comply with the determination and any remedy that we award.*

The FWO's structure is different from that of the AFCA (which is membership-based). Although FWO could be empowered to make a determination, there needs to be a basis on which to oblige the employer to abide by any such determination.<sup>88</sup> There are several options for addressing this issue:

- All license schemes (including the on-demand workforce license schemes recommended **above**, and any existing labour hire license schemes) should require license holders to agree to be bound by FWO determinations, and
- The Federal Government could amend the FW Act such that if a case proceeded to Court because an employer failed to comply with a FWO determination, there would be a reverse onus (where an employer is required to disprove any determination), and automatic cost consequences if the Court finds in the employee's favour (see recommendation 29 **below**).

WEstjustice calls for a review of current FWO powers and processes, and recommends that powers be expanded to enable such determinations and wherever possible, make them binding on employers. This recommendation echoes the Senate Education and Employment References Committee's call for an independent review of the resources and powers of the FWO.<sup>89</sup>

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.

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#### WESTJUSTICE'S RECOMMENDATIONS TO IMPROVE FWO'S ENFORCEMENT POWERS

In order to increase the likelihood that matters will resolve earlier through employer attendance at mediations, it is proposed that there be costs consequences if an employer unreasonably refuses to participate in a matter before the FWO.

In addition, in the event that the employer nevertheless refuses to participate in a mediation, or mediation fails, it is proposed that the FWO issue an Assessment Notice that sets out the FWO's findings as to the employee's entitlements. An applicant may then rely on the Assessment Notice in the court proceeding. Where the applicant has an Assessment Notice, the applicant is taken to be entitled to the amounts specified in the Assessment Notice unless the employer proves otherwise.

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<sup>87</sup> See <<https://www.afca.org.au/what-to-expect/consumers/>>, last accessed 20 February 2019.

<sup>88</sup> Making binding determinations as to legal entitlements is the role of the judiciary rather than the executive.

<sup>89</sup> Education and Employment References Committee, The Senate, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (March 2016), xiv, 278–283; 327–328.

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## RECOMMENDATION 29: COST CONSEQUENCES FOR EMPLOYERS WHO REFUSE TO ENGAGE WITH FWO AND ASSESSMENT NOTICES FOR EMPLOYERS WHO REFUSE TO ENGAGE OR HAVE UNMERITORIOUS CLAIMS

We propose to amend section 570(2)(c)(i) to refer to matters before the FWO as well as the FWC, and to amend section 682 in relation to Functions of the Ombudsman. This amendment will make it clear that there will be costs consequences if an employer unreasonably refuses to participate in a matter before the FWO or fails to abide by an Assessment Notice. For details see Appendix One.

Further, where an employer refuses to participate in mediation, or where mediation fails, we recommend that FWO have the power to issue an Assessment Notice that sets out the FWO's findings as to the employee's entitlements. An applicant may then rely on the Assessment Notice in the court proceeding. Where the applicant has an Assessment Notice, the applicant is taken to be entitled to the amounts specified in the assessment notice unless the employer proves otherwise. If the employer does not prove otherwise, there should be an automatic award of costs against the employer.

To do this, we propose to include a new section 717A to provide for the issue of Assessment Notices that:

- Applies where an employer has failed to attend a mediation conducted by the FWO, or mediation fails, and an inspector reasonably believes that a person has contravened one or more of the relevant provisions, and
- Requires the notice to include certain information (see drafting suggestions).

We also propose to include a new section 557B in Division 4 of Part 4-1 that will have the effect of reversing the onus of proof where an applicant has an Assessment Notice. For details please see Appendix One.

Finally, we recommend that all license schemes (including the on-demand workforce license schemes recommended **above**, and any existing labour hire license schemes) should require license holders to agree to be bound by FWO Assessment Notices.

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## PROACTIVE COMPLIANCE AND MORE RESOURCING

Unfortunately, not all exploited workers are 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 WEstjustice 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 vulnerable.

It is essential that agencies take proactive measures in key industries and locations where there is suspected widespread exploitation – like contract cleaning. Such measures should include inspection of records and actions to recover any discovered underpayments. FWO has undertaken such initiatives in the past,<sup>90</sup> however more extensive and regular initiatives are required.

WEstjustice appreciates that without increased funding, 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. WEstjustice echoes recommendation 29.2 of the Productivity Commission in its report on the Workplace Relations Framework:

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<sup>90</sup> See FWO's Tasmanian Contract Cleaners Report, above n 12.

*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.*

At the very least, an independent review of the resources and powers of the FWO should be undertaken, as recommended by the Senate Education and Employment References Committee.<sup>91</sup>

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### **RECOMMENDATION 30: INCREASED RESOURCING AND MORE PROACTIVE COMPLIANCE REQUIRED**

WEstjustice recommends more proactive compliance and increased resourcing of the FWO. Recognising that vulnerable workers, particularly those engaged in the on-demand workforce, are not always able to bring a complaint themselves, agencies must be adequately resourced to identify systemic issues and respond proactively.

### **CONCLUSION**

It is essential that our workplace relations framework protects those most at risk of exploitation. We believe our recommendations will strengthen legal frameworks and processes to ensure that on-demand workers can access fair pay and decent work.

We thank the Inquiry for considering this important issue and providing us with the opportunity to provide this submission.

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<sup>91</sup> Education and Employment References Committee, above n 40.

## APPENDIX ONE: COMPILATION OF WESTJUSTICE'S DRAFTING SUGGESTIONS

Proposed changes to the *Fair Work Act 2009* (Cth) (changes are tracked via underline/strikethrough)

Part One: Sham contracting		
Type of change	Section	WEstjustice's drafting suggestions
Amend existing provision	357	<p><b>357 Misrepresenting employment as independent contracting arrangement</b></p> <p>(1) A person (the <b>employer</b>) 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.</p> <p>Note: This subsection is a civil remedy provision (see Part 4-1).</p> <p>(2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:</p> <ul style="list-style-type: none"> <li>(a) did not know; <del>and</del></li> <li>(b) was not reckless as to whether; <u>and</u></li> <li>(c) <u>could not reasonably be expected to know that</u></li> </ul> <p>the contract was a contract of employment rather than a contract for services.</p>
Insert new provision	357A	<p>(1) An individual who performs work for a person (the principal) under a contract with the principal is taken to be an employee (within the ordinary meaning of that expression) of the principal and the principal is taken to be the employer (within the ordinary meaning of that expression) of the individual for the purposes of this Act.</p> <p>(2) <u>Subsection (1) does not apply if it can be established that the individual was completing work for a client or customer of a business genuinely carried on by the individual.</u></p> <p><u>Note: When determining whether a business is genuinely carried on by an individual, relevant considerations include revenue generation and revenue sharing arrangements between participants, and the relative bargaining power of the parties.</u></p> <p>See Recommendations one and two for background information.</p>

Part One: Increased accountability in franchises, labour hire and supply chains Division 4A – Responsibility of responsible franchisor entities and holding companies for certain contraventions		
Type of change	Section	WEstjustice’s drafting suggestions
Insert new subsection	558AA	<p>A person who is responsible for a contravention of a civil remedy provision is <u>taken to have contravened that provision.</u></p> <p>See Recommendation Nine for background information.</p>
Amend and insert new subsection	558A	<p><b>558A Meaning of <i>franchisee entity</i>, <del>and responsible franchisor entity</del> and <i>responsible supply chain entity</i></b></p> <p>(1) A person is a <b><i>franchisee entity</i></b> of a franchise if:</p> <ul style="list-style-type: none"> <li>(a) the person is a franchisee (including a subfranchisee) in relation to the franchise; and</li> <li>(b) the business conducted by the person under the franchise is substantially or materially associated with intellectual property relating to the franchise.</li> </ul> <p>(2) A person is a <b><i>responsible franchisor entity</i></b> for a franchisee entity of a franchise if:</p> <ul style="list-style-type: none"> <li>(a) the person is a franchisor (including a subfranchisor) in relation to the franchise; and</li> <li>(b) the person has <del>a significant degree of</del> influence or control over the franchisee entity’s affairs.</li> </ul> <p>(3) <u>A person is a responsible supply chain entity if 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</u></p> <ul style="list-style-type: none"> <li><u>(a) the person is 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</u></li> <li><u>(b) the person is the recipient or beneficiary of the goods supplied or produced or services performed by the worker.</u></li> </ul> <p>See Recommendations Seven and Eight for background information.</p> <p><i>Note that minor amendments will also need to be made to 558B(3), 558C and in Part 7 – application and transitional provisions. We do not provide drafting instructions for these minor amendments.</i></p>

Insert new subsection	558B(2A)	<p><b>558B Responsibility of responsible franchisor entities, <del>and holding companies and responsible supply chain entities</del> for certain contraventions</b></p> <p><u>(2A) A person contravenes this subsection if:</u></p> <ul style="list-style-type: none"> <li>(a) <u>an employer contravenes a civil remedy provision referred to in subsection (7) in relation to a worker; and</u></li> <li>(b) <u>the person is a responsible supply chain entity for the worker; and</u></li> <li>(c) <u>either</u> <ul style="list-style-type: none"> <li>a. <u>the responsible supply chain entity or an officer (within the meaning of the Corporations Act 2001) of the responsible supply chain entity knew or could reasonably be expected to have known that the contravention by the employer would occur; or</u></li> <li>b. <u>at the time of the contravention by the employer, the responsible supply chain entity or an officer (within the meaning of the Corporations Act 2001) of the responsible supply chain entity knew or could reasonably be expected to have known that a contravention by the employer of the same or a similar character was likely to occur.</u></li> </ul> </li> </ul> <p>Note: This subsection is a civil remedy provision (see this Part).</p> <p><i>Reasonable steps to prevent a contravention of the same or a similar character</i></p> <p>(3) A person does not contravene subsection (1), <del>or (2)</del> <u>or (2A)</u> if, as at the time of the contravention referred to in paragraph (1)(a), <del>or (2)(b)</del> <u>or (2A)(a)</u>, the person had taken reasonable steps to prevent a contravention by the franchisee entity or subsidiary of the same or a similar character.</p> <p>(4) For the purposes of subsection (3), in determining whether a person took reasonable steps to prevent a contravention by a franchisee entity or subsidiary (the <b>contravening employer</b>) of the same or a similar character, a court may have regard to all relevant matters, including the following:</p> <ul style="list-style-type: none"> <li>(a) the size and resources of the franchise or body corporate (as the case may be);</li> <li>(b) the extent to which the person had the ability to influence or control the contravening employer's conduct in relation to the contravention referred to in paragraph (1)(a) or (2)(b) or a contravention of the same or a similar character;</li> <li>(c) any action the person took directed towards ensuring that the contravening employer had a reasonable knowledge and understanding of the requirements under the applicable provisions referred to in subsection (7);</li> <li>(d) the person's arrangements (if any) for assessing the contravening employer's compliance with the applicable provisions referred to in subsection (7);</li> </ul>
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		<p>(e) the person's arrangements (if any) for receiving and addressing possible complaints about alleged underpayments or other alleged contraventions of this Act within:</p> <ul style="list-style-type: none"> <li>(i) the franchise;</li> <li>(ii) the body corporate or any subsidiary (within the meaning of the <i>Corporations Act 2001</i>) of the body corporate; <u>or</u></li> <li><u>(iii) the person's supply chain arrangements as the case may be;</u></li> </ul> <p>(f) the extent to which the person's arrangements (whether legal or otherwise) with the contravening employer encourage or require the contravening employer to comply with this Act or any other workplace law.</p> <p>See Recommendation Seven for background information.</p>
Insert new legislative note	558B(4)	<p><u>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.</u></p> <p>See Recommendation 10 for background information.</p>

Part One: Increased accountability for accessories		
Type of change	Section	WEstjustice's drafting suggestions
Repeal and substitute	550	<p><b>550 Involvement in contravention treated in same way as actual contravention</b></p> <p>(1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.</p> <p>Note: If a person (the <b><i>involved person</i></b>) 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)).</p> <p>(2) A person is <b><i>involved in</i></b> a contravention of a civil remedy provision if, and only if, the person:</p> <ul style="list-style-type: none"> <li>(a) has aided, abetted, counselled or procured the contravention; or</li> </ul>



		<p>(b) has induced the contravention, whether by threats or promises or otherwise; or</p> <p>(c) has been in any way, by act or omission, directly or indirectly, <del>knowingly</del> concerned in or party to the contravention; or</p> <p>(d) has conspired with others to effect the contravention.</p> <p><u>(3) For the purposes of paragraph (2)(c), a person is concerned in a contravention if they:</u></p> <p><u>(a) knew; or</u></p> <p><u>(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</u></p> <p><u>(c) became aware of a contravention after it occurred, and failed to take reasonable steps to rectify the contravention.</u></p> <p><u>(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.</u></p> <p><u>(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:</u></p> <p><u>(a) the size and resources of the person;</u></p> <p><u>(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;</u></p> <p><u>(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;</u></p> <p><u>(d) the person's arrangements (if any) for assessing the contravening person's compliance with this Act;</u></p> <p><u>(e) the person's arrangements (if any) for receiving and addressing possible complaints about alleged underpayments or other alleged contraventions of this Act;</u></p> <p><u>(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.</u></p> <p>See Recommendation 11 for background.</p>
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Insert new section	550A	<p><b><u>Primary duty of care</u></b></p> <p>(1) <u>A person conducting a business or undertaking must ensure, so far as is reasonably practicable, compliance with this Act in respect of:</u></p> <p>(a) <u>workers engaged, or caused to be engaged by the person; and</u></p> <p>(b) <u>workers whose activities in carrying out work are influenced or directed by the person,</u></p> <p><u>while the workers are at work in the business or undertaking.</u></p> <p>(2) <u>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.</u></p> <p>(3) <u>Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable:</u></p> <p>- <u>[insert any further specific requirements here]</u></p> <p><b><u>Meaning of worker</u></b></p> <p>(1) <u>A person is a <b>worker</b> if the person carries out work in any capacity for a person conducting a business or undertaking, including work as:</u></p> <p>(a) <u>an employee; or</u></p> <p>(b) <u>a contractor or subcontractor; or</u></p> <p>(c) <u>an employee of a contractor or subcontractor; or</u></p> <p>(d) <u>an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or</u></p> <p>(e) <u>an outworker; or</u></p> <p>(f) <u>an apprentice or trainee; or</u></p> <p>(g) <u>a student gaining work experience; or</u></p> <p>(h) <u>a volunteer; or</u></p> <p>(i) <u>a person of a prescribed class.</u></p> <p><b><u>What is reasonably practicable</u></b></p> <p><b><u>What is reasonably practicable in ensuring compliance</u></b></p> <p><u>In this Act, <b>reasonably practicable</b>, in relation to a duty to ensure compliance with this Act, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring compliance, taking into account and weighing up all relevant matters including:</u></p> <p>(a) <u>the likelihood of the risk concerned occurring; and</u></p>
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Part Three: Powers of the Fair Work Ombudsman		
Type of change	Section	WEstjustice's drafting suggestions
Insert new section into FW Act	557B	<p>(1) <u>If in an application in relation to a contravention of a civil remedy provision referred to in subsection (2), the Fair Work Ombudsman has issued an assessment notice to the employer in relation to the applicant, it is presumed that the employer owes the amounts specified in the notice to the applicant, unless the employer proves otherwise.</u></p> <p>(2) <u>The civil remedy provisions are the following:</u></p> <p><u>(a) subsection 44(1) (which deals with contraventions of the National Employment Standards);</u></p> <p><u>(b) section 45 (which deals with contraventions of modern awards);</u></p> <p><u>(c) section 50 (which deals with contraventions of enterprise agreements);</u></p> <p><u>(d) section 280 (which deals with contraventions of workplace determinations);</u></p> <p><u>(e) section 293 (which deals with contraventions of national minimum wage orders); and</u></p> <p><u>(f) section 305 (which deals with contraventions of equal remuneration orders).</u></p> <p>See Recommendation 29 for background information.</p>
Amend FW Act	570(2)(c)(i)	<p>At the end of section 570(2)(c)(i) add the words '<u>or the FWO, or failed to comply with an assessment notice</u>' after 'FWC'.</p> <p>See Recommendation 29 for background information.</p>
Insert new subsection	682	<p><u>1(ca) make assessments of amounts owed by employers to employees.</u></p> <p>See Recommendation 29 for background information.</p>
Insert new subsection	717A	<p><b><u>717A Assessment notices</u></b></p> <p>(1) <u>This section applies if:</u></p> <p><u>(a) an employer has by notice been invited to attend a conference conducted by the FWO;</u></p> <p><u>(b) the employer unreasonably refused to participate in that conference or the conference failed to resolve the dispute; and</u></p> <p><u>(c) the FWO reasonably believes that the employer has contravened one or more of the following:</u></p>

		<p><u>(i) a provision of the National Employment Standards;</u></p> <p><u>(ii) a term of a modern award;</u></p> <p><u>(iii) a term of an enterprise agreement;</u></p> <p><u>(iv) a term of a workplace determination;</u></p> <p><u>(v) a term of a national minimum wage order;</u></p> <p><u>(vi) a term of an equal remuneration order.</u></p> <p><u>(2) The FWO may give the employer a notice (assessment notice) that sets out:</u></p> <p><u>(a) the name of the employer to whom the notice is given;</u></p> <p><u>(b) the name of the person in relation to whom the FWO reasonably believes the contravention has occurred;</u></p> <p><u>(d) brief details of the contravention;</u></p> <p><u>(e) the FWO's assessment of the amounts that the person referred to in paragraph (c) above is owed by the person referred to in paragraph (a) above; and</u></p> <p><u>(e) any other matters prescribed by the regulations.</u></p> <p>See Recommendation 29 for background information.</p>
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