FAIR WORK AMENDMENT (SUPPORTING AUSTRALIA'S JOBS AND ECONOMIC RECOVERY) BILL 2020

SUBMISSION TO THE SENATE STANDING COMMITTEE ON EDUCATION AND EMPLOYMENT

WESTJUSTICE COMMUNITY LEGAL CENTRE

5 February 2021

Acknowledgements

We acknowledge the traditional custodians of the land on which we work.

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This submission can be attributed to WEstjustice Community Legal Centre.

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

It also draws heavily on the submission of WEstjustice Community Legal Centre, JobWatch Inc. and Springvale Monash Legal Service to the Senate Select Committee on Temporary Migration (**Temporary Migration Submission**).[2]

We note that the views expressed in this submission are those of WEstjustice Community Legal Centre.

Publication

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

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[1] Liz Morgan (2020) available at: <https://www.westjustice.org.au/cms_uploads/docs/westjustice_mels_rlciss_clc_jointsubmission.pdf>
[2] Catherine Hemingway, Tarni Perkal and Liz Morgan (2020) available at: <https://www.westjustice.org.au/cms_uploads/docs/200730-wj-smls-jw-submission-temporary-migration-final.pdf>

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1. Introduction

WEstjustice Community Legal Centre (**WEstjustice**) welcomes the opportunity to make this submission to the Senate Standing Committee on Education and Employment (**Inquiry**).

The *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (**Bill**) has come at an important time. The COVID-19 pandemic has both highlighted and exacerbated the precarious situation of many Australian workers. COVID-19 has exposed cracks in our workplace relations framework, and shone a light on workers who operate in the shadow of the law.

Our clients are delivering takeaway food and deep cleaning our schools – they are providing essential care work and stocking supermarket shelves. Yet despite making significant contributions to the Australian economy and society, they frequently experience workplace exploitation. Young workers,[3] temporary visa holders, casuals, labour hire workers, independent contractors and women[4] have all been disproportionately affected or excluded entirely from protection.

Exploitation not only damages individual workers but undercuts businesses who are doing the right thing. It is essential that this Bill contributes to economic recovery in a way that promotes decent work and encourages compliance with the law, instead of rewarding those who use wage theft and exploitation as a business model.

We note that Springvale Monash Legal Service has also made a submission to the present inquiry. We endorse their recommendations and refer the Committee to this submission.

1.1 WEstjustice's Employment and Discrimination Law Program (EDLP)

WEstjustice is a community legal centre that provides free legal help and financial counselling support to people living in the western suburbs of Melbourne. We service legal needs in a way that addresses the systemic nature of disadvantage. WEstjustice believes in a just and fair society where the law and its processes don't discriminate against vulnerable people, and where those in need have ready and easy access to quality legal education, information, advice and casework services.

The WEstjustice EDLP seeks to improve employment outcomes, community participation and social cohesion, and reduce disadvantage, for vulnerable workers including migrants, refugees, asylum seekers, international students, other temporary visa holders, young people and women who have experienced family violence. We do this by empowering target communities to understand and enforce their workplace rights through the provision of quality tailored legal education, advice and casework services, and by using evidence from this work to effect systemic policy or legislative change aimed at improving the lives of all workers.

Our programs include:

- Migrant and Refugee Employment Law Service (**MRELS**);
- Youth Employment Project (**YEP**); and

3 Stefanie Dimov, Dr Tania King, Marissa Shields and Professor Anne Kavanagh, University of Melbourne, 'The Young Australians Hit Hard during COVID-19', Pursuit (25 May 2020) <https://pursuit.unimelb.edu.au/articles/the-young-australians-hit-hard-during-covid-19>.
4 Australian Human Rights Commission, 'The Gendered Impact of COVID-19' (5 July 2020) <http://humanrights.gov.au/about/news/gendered-impact-covid-19>.

- International Students' Employment and Accommodation Legal Service (**ISEALS**) (in partnership with Springvale Monash Legal Service and JobWatch Inc.).

To date our service has recovered over $500,000 in unpaid entitlements or compensation, trained over 2000 community members and agency staff, delivered six roll-outs of our award-winning Train the Trainer program, and participated in numerous law-reform inquiries and campaigns.

Based on evidence from our work, and extensive research and consultation, WEstjustice released the Not Just Work Report (**Not Just Work**), outlining 10 key steps to stop the exploitation of migrant workers.[5]

2. Scope of submission

This submission provides evidence-based recommendations and comments in respect of:

- Definition of casual employment
- Enterprise agreements – BOOT
- Compliance and enforcement

Our Temporary Migration and Unlawful Underpayments submissions referenced **above** contain recommendations to reduce work rights' breaches more generally. We see these broader changes as essential to ensuring that the Bill is effective.

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 international student clients (de-identified with names changed).

[5] Catherine Hemingway (2016) *Not Just Work: Ending the exploitation of refugee and migrant workers*, available at <https://www.westjustice.org.au/cms_uploads/docs/westjustice-not-just-work-report-part-1.pdf and https://www.westjustice.org.au/cms_uploads/docs/westjustice-not-just-work-report-part-2-(1).pdf> .

3. Summary of recommendations

In this submission, we make the following recommendations:

1. Definition of casual employment

Bill objective	Bill proposal	Recommendations (Also see Appendix One)
Increase certainty around casual employment, provide a pathway to permanent employment and ensure appropriate classification of all workers Page 34	Introduce a definition of casual employment and process for conversion to permanent employment. Provide casual employees with a Casual Employment Information Statement	**Recommendation 1: Casual conversion welcome, with amendments to protect vulnerable workers and promote secure work:** A statutory definition of casual employment and pathway to conversion is welcome, but we recommend amending the definition of casual employment to reflect the true substance of the relationship; removing the rewards for employers who fail to comply and ensuring the onus is on the employer to offer and action the conversion. If the employer fails to comply, an employee should be entitled to seek all entitlements plus penalties. **Recommendation 2: Statutory definition of employee needed:** To ensure further clarity for employers and employees, and stop sham contracting, we recommend introducing a definition of employee into the *Fair Work Act 2009* (**FW Act**). This definition must presume all workers are employees unless they are genuinely running their own business or on a vocational placement. **Recommendation 3**: **Limit the current sham contracting defence:** The recklessness/lack of knowledge defence for sham contracting should be removed, or expanded, to ensure that employers are liable when they fail to take reasonable steps to determine whether their workers are employees.

2. Enterprise agreements - BOOT

Bill objective	Bill proposal	Recommendations (Also see Appendix One)
To increase the number of Australians covered by enterprise agreements by making agreement making easier and faster	The Fair Work Commission is no longer required to consider whether the National Employment Standards (**NES**) are excluded by an enterprise agreement, and in limited circumstances may approve an agreement that does not pass the BOOT.	**Recommendation 4: Enterprise agreements cannot undercut minimum statutory entitlements:** WEstjustice opposes any amendments that erode statutory protections provided by the NES or Awards. To address the inherent power imbalance between employers and employees (particularly for vulnerable workers), there must be a mechanism for workers to recover statutory minimum wages and entitlements, even if they are agreement-covered.

3. Compliance and enforcement

Bill objective	Bill proposal	Recommendations (Also see Appendix One)
Ensure widespread compliance with workplace laws and ensure non-compliant businesses don't gain competitive advantage	New criminal offence and increased penalties for non-compliance Increased small claims cap from $20,000 to $50,000 Federal Circuit Court and Magistrates Courts can refer small claims matters to the Fair Work Commission for conciliation and consent arbitration Prohibition on publishing job advertisements with pay rates below minimum wage	**Recommendation 5: We support increased penalties, job advertisement regulation and increased access to the small claims process** **Recommendation 6: Allow civil penalties in small claims:** to encourage vulnerable workers to take action against the most unscrupulous employers, promote early resolution of disputes, and ensure a stronger disincentive for employers to undercut statutory minimums. **Recommendation 7: Increased and well utilised regulator powers, reverse onus and cost consequences for employers who refuse to engage:** Introduce costs consequences if an employer unreasonably refuses to participate in a matter before the FWO or fails to comply with a Compliance Notice. Where the applicant has a Compliance Notice, the applicant is taken to be entitled to the amounts specified in the Compliance Notice unless the employer proves otherwise. If the employer is unsuccessful at Court, costs should automatically be awarded against them. **Recommendation 8: Promote compliance by requiring all employers to take reasonable steps to prevent exploitation:** Amend section 550 to remove the requirement for actual knowledge and 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. **Recommendation 9: Ensure job services agencies help workers access legal working arrangements:** Require job services agencies to: check that wage subsidy agreements provide for minimum legal pay rates; take steps to ensure workers are placed in jobs with correct minimum wage; and assist clients that are not paid or underpaid. **Recommendation 10: Extend franchisor/holding company liability to supply chains:** 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. **Recommendation 11: Widen the definition of responsible franchisor entity:** 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. **Recommendation 12: Clarify liability of all relevant third parties:** Insert a provision to clarify that responsible franchisor entities, holding companies and other third party entities who

Bill objective	Bill proposal	Recommendations (Also see Appendix One)
		contravene clause 558B should also be taken to have contravened the relevant provisions contravened by their franchisee entity/subsidiary/indirectly controlled entity. **Recommendation 13: Clarify the 'reasonable steps' defence:** Ensure that the 'reasonable steps' defence incentivises proactive compliance, including by requiring independent monitoring and financially viable contracts. **Recommendation 14: Ensure workers receive superannuation owed to them** by making it part of the NES, providing independent contractors with a legislative mechanism to pursue unpaid superannuation directly and removing the minimum earnings threshold and minimum age restrictions. **Recommendation 15: Increase funding for community legal centres to deliver dedicated employment law assistance to vulnerable workers, including temporary visa holders:** Without legal assistance, vulnerable workers cannot enforce their work rights and employers can exploit with impunity. The Federal Government must provide recurrent funding for community legal centres with specialist employment law expertise to provide targeted employment law assistance and education programs for vulnerable workers, including temporary visa holders. **Recommendation 16: Develop a comprehensive worker rights education plan:** Tailored education programs are required to raise awareness of laws, and build trust and accessibility of services. The Government must establish a fund to deliver these programs to community members, community leaders and agency staff. A comprehensive worker rights education plan should be developed so that temporary visa holders are given the right level of information about their work rights, at the right time (i.e. when they apply for a visa, on entry to Australia, when they fill in a Tax File Number declaration, when they apply for an Australian Business Number (**ABN**) etc.) and in a language and format that they can understand. **Recommendation 17: Specialist education programs should be incorporated into school and university induction programs for international students.**

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

4. Definition of casual employment

4.1 Recommendation 1: Casual conversion welcome, with amendments to protect vulnerable workers and promote secure work

The pandemic has revealed the social, economic and health risks of insecure work. Workers should not have to make an impossible choice between following government directions to stay home, and putting food on the table.

Approximately 52% of our young clients and46% of our international student clients are employed on a casual basis. Clients frequently report that they cannot refuse shifts, and we have seen cases where clients are no longer offered work after refusing a shift. Despite working regular hours, often for many years, our clients are often not aware of their right to take annual leave or paid personal leave. Most clients are not aware of the differences between casual and permanent employment, or even the difference between employees and independent contractors.

Recommendation 1: We welcome the introduction of a statutory definition of casual employee and pathway to conversion to permanent employment.

However it is essential that the proposed legislation be amended to remove perverse incentives that reward employers who fail to comply and allow the engagement of genuinely permanent workers in insecure roles. The laws must also be enforceable to promote compliance.

Accordingly, we recommend the following:

a) Remove incentive to engage all workers as casual

Under the proposed Bill, it is overly simple for an employer to engage any worker as a casual employee.

Notwithstanding the substance of any employment relationship, or the conduct of the parties involved, a worker will be casual if an employer offers employment without a firm advance commitment of ongoing work, and the employee accepts.[6] The **only** (exhaustive list) relevant factors to consider are whether the employer can choose to offer/not offer work; whether the employee can choose to work or refuse a shift; how the engagement is described; and any entitlement to casual loading under a fair work instrument.[7]

This limited focus on the offer/acceptance stage of employment is inherently unfair due to the extreme imbalance of power between employers and prospective employees. For vulnerable workers struggling to enter (or re-enter) the labour market, particularly in the current economic climate, any offer of employment will be accepted. This provision effectively allows employers to engage all staff as casual employees if they want to. All they must do is show that at the time of hiring, there is an absence of a firm commitment for ongoing work. In the context of COVID-19 recovery, it is foreseeable that this may involve all workers.

In its current form, the Bill overrides accepted common law principles that require consideration of the real substance, practical reality and true nature of a relationship. The Bill

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[6] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (Cth) (**Bill**) cl 15A(1).
[7] Bill cl 15A(2).

gives employers ultimate power. This amendment will undermine consistency – instead of relying on established principles and legal definitions to determine employment categories, workers will be forced to rely on opportunistic decisions determined by individual employers. It also requires all workers to wait at least 12 months to challenge their classification, effectively allowing employers to engage all workers as casual for at least 12 months without reproach.

COVID-19 has demonstrated why our workplace laws must promote and encourage secure forms of employment. The Bill in its current form does the opposite.

Recommendation 1(a): *Amend subclauses 15A(1) and (2) to align more closely with the common law test for casual employment – including focusing on the conduct of the parties and substance of the relationship, not just the offer/acceptance stage of employment. Delete subclauses 15A(3) and (4).*

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b) Remove rewards for failure to comply – deemed permanency needed

The Bill rewards employers who fail to comply.

Clause 15A(5) of the Bill proposes that a worker will remain a casual employee until they convert to permanent employment in accordance with Division 4A, or accept a different offer from their employer.

This means that if the employer fails to offer conversion, the worker will remain casual unless they take action to request a change.

This places the onus on vulnerable workers to proactively ensure they are categorised appropriately.

As noted above, our clients generally have low awareness of their workplace rights and responsibilities. They are also unlikely to take any action that may jeopardise their (already insecure) employment.

Instead of a presumption of insecure work, there must be a presumption of permanent employment that can be overturned if certain conditions are met.

Recommendation 1(b): *Amend 15A(5) to include "(c) the employee is eligible for an offer for casual conversion in accordance with Subdivision B, even if such offer has not been made or accepted; (d) the employee is no longer a casual employee having regard to nature of the employment relationship, including the conduct of the parties."*

Amend 66B to include "(4) If an employer fails to make an offer in the circumstances described in subsection (1), an offer is taken to have been made and accepted in accordance with this Subdivision at the expiry of 21 days after the end of the 12 month period referred to in subsection (1)(a).

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c) Remove the right to opt out of providing workers with secure work

The Bill currently presumes that a worker will remain a casual employee until some positive step occurs to change this situation. It also allows employers to keep workers in casual positions indefinitely 'if there are reasonable grounds' not to make an offer for conversion. The test for reasonable grounds is extremely broad.

Our legislative framework does not allow employers to opt out of minimum wages or unfairly dismiss workers when it suits them. Employers should not be permitted to opt out of offering permanent employment, where the true substance of the relationship is that a worker is clearly a permanent employee.

If this exception must remain, we refer to Springvale Monash Legal Service's recommendation that the onus be on the employer to prove that reasonable grounds exist.to not offer casual conversion.

Recommendation 1(c): *Delete clause 66C.*

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d) Enforcement process/civil remedy provision needed

There are no penalties provided in the Bill if an employer fails to offer conversion to permanent employment as required by clause 66B, or fails to give written notice of why they are not offering conversion (per clause 66C(3), 66G, 66H).

An employee can request conversion, but many of our clients will not know they have the right to do this. Others will not be prepared to take action which could compromise their (already insecure) employment. More is needed to incentivise compliance.

An employee can also bring a dispute to the Fair Work Commission if their request is refused (66M(4)), but unless the employer agrees the FWC cannot arbitrate, they can only make a recommendation, express an opinion or hold a conciliation/mediation. This means there is no meaningful way for a worker to challenge a recalcitrant employer who is refusing conversion without reasonable grounds.

It is essential that the Bill provide an appropriate avenue for workers (and the Fair Work Ombudsman) to test conversion refusals by allowing the FWC or Federal Circuit Court to determine if an employer is in breach and making appropriate orders to rectify.

To further promote compliance, there must also be cost consequences for employers who fail to comply.

Recommendation 1(d): *Make clauses 66B(1), 66B(2), 66C(3), 66G, 66H(1), 66H(3) civil remedy provisions. If an employer contravenes these sections, we recommend that the employee be entitled to seek all entitlements owing plus penalties and costs.*

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e) Protections from unfair dismissal and other entitlements

Recommendation 1(e): *Ensure that the Bill does not reduce access to unfair dismissal or other FW Act entitlements for any workers. Unless the above amendments are accepted, the proposed amendments to Part 2 should not be allowed.*

4.2 Recommendations 2 & 3: Statutory definition of employee needed to increase certainty and stop sham contracting

In addition to the amendments outlined above, a further statutory definition is needed to meet the objectives of the Bill to increase certainty around casual employment. In addition to a definition of "casual employee" it is essential to introduce a definition of "employee".

a) 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.'[8]

The uncertainty and complexity of the common law test of employment makes compliance difficult for both employers and employees.

The exploitation of vulnerable workers through the use of sham contracting arrangements is rife – for example, around one in every five students the ISEALS service saw in the past 18 months was advised on sham contracting.

In our experience at ISEALS, 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).[9] All too often we have 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; and/or
- They were unable to take leave.

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

We have 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.

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.

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[8] Joellen Riley, 'Regulatory responses to the blurring boundary between employment and self-employment: a view from the Antipodes' *Recent Developments in Labour Law, Akademiai Kiado Rt*, 2013, 5.

[9] WEstjustice has also assisted clients outside these key industries, including in the education and clerical sectors.

When Alina started work she was given a 13 page 'contract for services' document to sign. Despite the words in the contract, she was told what hours to work, given a uniform and provided with all tools and cleaning equipment. She worked in a team of other 'contractors', all wearing the uniform of her boss' company. She wasn't allowed to delegate her work and certainly didn't feel like she was running her own business. Joe provided Alina with template invoices and told Alina she must get an ABN. Alina provided invoices and completed time sheets after each shift.

When Alina had worked for several weeks and not received any payment since starting the job, she contacted her boss about the issue and was ultimately terminated for making enquiries about her pay.

Similar to our comments in relation to offers of casual employment **above**, for a young worker, or 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 on which the work is offered. This creates a power imbalance, and, in many instances, principals (and employers) take advantage of the vulnerability of potential workers in this situation.

b) 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;[10] and
- They 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:

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[10] Australian Taxation Office, *Superannuation guarantee: who is an employee*?, SGR 2005/1, 23 February 2005.

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

It is unrealistic to expect that vulnerable 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.

c) 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 decision of the Full Bench of the FWC of *Amita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/as Uber Eats*[11], the Full Bench found that a driver who delivered food through Uber Eats was not an employee (and was therefore not entitled to bring an unfair dismissal claim). The Full Bench came to this conclusion notwithstanding the fact that they also found that the Applicant, Ms Gupta, was not conducting a business in her own right.

The previous FWC decision of *Kaseris v Rasier Pacific V.O.F,*[12] dealt with a similar factual scenario. In that instance,

Deputy President Gostencnik 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'.[13] 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:[14]

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

[11] [2020] FWCFB 1698
[12] *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610.
[13] Ibid [67].
[14] Ibid [66].

protection to participants in the digital economy. But until then, the traditional available tests of employment will continue to be applied.

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 Bill be amended to include a presumption of employment and an express inclusion of dependent contractors, as set out **below**.

Recommendation 2: *To ensure further clarity for employers and employees, and stop sham contracting, a statutory definition of "employee" must be introduced into the FW Act. This definition must presume all workers are employees unless they are genuinely running their own business or on a vocational placement.*

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d) Need for 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 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 new subsections 15(3) and (4) or 357A be inserted into the FW Act as follows:

> *(3) 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.*
>
> *(4) Subsection (3) does not apply if:*
>
> > *(a) 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; or*
> >
> > *(b) the individual is on a vocational placement.*
>
> *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:[15]

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[15] Andrew Stewart and Cameron Roles, ABCC Inquiry into Sham Arrangements and the Use of Labour Hire
in the Building and Construction Industry, 5.

'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.'

We support 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.[16]

We see 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.

We submit 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, 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. Please see Appendix One for further details.

e) Current defences are too broad

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

[16] Dosen & Graham (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.

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, we support 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:[17]

> *'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.'*

Recommendation 3: Limit the current defence. *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.*

4.3 Further recommendations to prevent sham contracting

In earlier submissions we have also recommended the following:

- Increase support at the time ABNs are given, and promote compliance via ongoing enforcement
- The FWC should be given the power to make Minimum Entitlements Orders and Independent Contractor Status Orders
- Extend outworker protections to contract cleaners and other key industries
- Introduce industry wide bargaining

Please see our Temporary Migration Submission for details.

5. Enterprise agreements – BOOT

5.1 Recommendation 4: Enterprise agreements cannot undercut minimum statutory entitlements

We support the Bill's objective to increase the number of Australians covered by enterprise agreements by making agreement making easier and faster.

However, decreasing protections and promoting insecure work is not the way to achieve this.

Already at WEstjustice we have seen many clients (particularly young people) who are paid significantly less than they would be entitled to under an applicable Award, due to old enterprise agreements, or agreements that may have passed the BOOT in respect of ull time permanent staff, but do not adequately protect the rights of young people working mostly on weekends.

Our clients, who are often school age, have not been able/willing to challenge these unfair agreements (for various reasons including the complexity in terminating an agreement or fact that they are no longer working for their employer).

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[17] 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.

Recommendation 4: *WEstjustice opposes any amendments that further erode statutory protections provided by the NES or Awards. To address the inherent power imbalance between employers and employees (particularly for vulnerable workers), there must be a mechanism for workers to recover statutory minimum wages and entitlements, even if they are agreement covered.*

6. Compliance and enforcement

6.1 Recommendation 5: Support for increased penalties, job advertisement regulation and increased access to the small claims process

It is not fair that non-compliant businesses act with impunity and gain competitive advantage. More must be done to ensure laws are complied with.

Recommendation 5: *WEstjustice supports the Bill's proposed amendments to promote compliance, including increased penalties, the increased small claims cap, and the ability for Courts to refer matters to the FWC for conciliation and consent arbitration.*
We also welcome the prohibition on publishing job advertisements with pay rates below minimum wage. We hope that this also deters platforms that regularly host such ads from continuing to do so due to the accessorial liability provisions in section 550 of the FW Act.

However, more is needed. We recommend the following amendments to the Bill to maximise effectiveness and incentivise compliance.

6.2 Recommendation 6: Allow civil penalties in small claims

Many vulnerable workers cannot bring a claim without help. Even with the simplified processes of the small claims procedure, the required steps (determining legal pay rate, calculating underpayments, filling out a claim form etc.) are impossible for many (for example those who cannot read or write, or cannot do so in English).

Without assistance from private lawyers or a reliable community service, these workers are unable to enforce their rights.

In a no costs jurisdiction, there is no financial incentive to support this essential enforcement work. Even if a worker is successful in pursuing a claim, they go to all the financial and non-financial costs of litigation, simply to recover what they were entitled to in the first place (minus legal costs if they engage a private lawyer).

We recognise that introducing costs consequences would prevent many vulnerable workers from taking action. Therefore, we suggest a one-way costs shifting, and/or the introduction of civil penalties to promote private enforcement.

Recommendation 6: *To encourage vulnerable workers to take action against the most unscrupulous employers, promote early resolution of disputes, and ensure a stronger disincentive for employers to undercut statutory minimums.*

6.3 Recommendation 7: Increased and well utilised regulator powers, reverse onus and cost consequences for employers who refuse to engage

Even if the small claims cap is lifted and penalties can be sought, the legal process remains inaccessible to many vulnerable workers.

An effective regulator is essential to effective enforcement. Yes as a result of low rights awareness, language, literacy, cultural and practical barriers,

vulnerable workers rarely contact mainstream agencies for help. When they do make contact, meaningful assistance and action is critical.

We have assisted many clients who were turned away from FWO and were unable to enforce their rights without support. For example:

> **Case study – Pavel**
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> Pavel is a newly arrived refugee. He does not speak much English and cannot write. He got his first job as a cleaner. He often worked 12 or 14 hour shifts but was only paid for five hours' work each shift. He was also paid below the minimum pay rate. Pavel came to us because he had not been paid his last two weeks' pay. He did not know it was illegal to only be paid five hours' work for a 12 hour shift.
>
> 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 (the Inspector advised Pavel because he didn't give notice he had no underpayment claim).
>
> We helped Pavel make a new complaint to the Fair Work Ombudsman and negotiated with his employer to receive back payment. We later learned that Pavel assisted two of his friends to negotiate back pay and legal pay rates going forward.

In earlier submissions we recommend that agencies take further steps to ensure that they are more accessible and responsive,[18] introduce cultural responsiveness frameworks and increase proactive compliance measures in target industries.

In addition to the above, we recommend enhanced powers and resources for FWO to effectively investigate and respond to all meritorious complaints, and promote the early resolution of disputes, as set out **below**.

a) Enhanced powers and resources to investigate and respond to all complaints, and 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, we usually send a letter of demand to the employer setting out our calculations and the amount owed. We routinely find that employers ignore this

[18] See for example, Temporary Migration Submission, page 59.

correspondence. For some cases, we have found that assistance from the FWO to investigate and mediate disputes has meant that employers are more likely to participate in settlement negotiations.

However, in our experience, it is unfortunately common for employers to refuse to attend mediation with employees in cases of non-payment of wages. For many clients, this has meant that the FWO has closed the file, rewarding employers who refuse to engage.

Similarly, in cases where a client has worked for an employer for less than two months, FWO may refuse to schedule a mediation or issue a compliance notice, 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 and refused investigations 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 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 and FWO is compelled to take action except where a case is clearly outside of jurisdiction or unmeritorious) 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. In addition to providing these powers, FWO must be adequately resourced to ensure the powers are routinely used.

b) The ACFA model

We recommend that a model similar to that used in the regulation of financial services be adopted to increase compliance with the FW Act.

Like the Australian Financial Complaints Authority (**AFCA**), a regulator/body should investigate and take action in relation to all complaints, except those that clearly fall outside the regulator's jurisdiction or are clearly without merit.

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:[19]

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

'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.'

Like the ACFA model, if a determination is made by the regulator, the Respondent employer should be bound. The Applicant employee should be able to determine whether or not they accept the determination. If they do not accept it, they retain the option of proceeding to Court. Importantly, the regulator 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 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.[20] There are several options for addressing this issue:

- All license schemes (including the on-demand workforce license schemes recommended in our On Demand Inquiry submission,[21] and any existing labour hire license schemes) should require license holders to agree to be bound by FWO determinations (or the determinations of a new enforcement body);
- All employers be required to hold an 'employer license' which requires license holders to agree to be bound by determinations and pay an 'employer license fee' which funds the enforcement body;
- The Bill must be amended 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.

We call for a review of current FWO powers and processes, and recommend that FWO 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.[22]

Further, more regular 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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[20] Making binding determinations as to legal entitlements is the role of the judiciary rather than the executive.
[21] See <https://www.westjustice.org.au/cms_uploads/docs/westjustice-submission--inquiry-into-the-victorian-on-demand-workforce-final.pdf>
[22] Education and Employment References Committee, The Senate, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (March 2016), xiv, 278–283; 327–328.

c) Recommendations to improve enforcement

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 or Compliance Notice that sets out the FWO's findings as to the employee's entitlements. An applicant may then rely on the Compliance Notice or Assessment Notice in the court proceeding. Where the applicant has a Notice, the applicant is taken to be entitled to the amounts specified in the Notice unless the employer proves otherwise.

Recommendation 7: Increased and well utilised regulator powers, reverse onus and cost consequences for employers who refuse to engage
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 or Compliance 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 a Notice that sets out the FWO's findings as to the employee's entitlements. An applicant may then rely on the 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 or Compliance. 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 and Compliance Notices (or the determinations of a newly established body).

6.4 Recommendation 8: Ensure job services agencies help workers access legal working arrangements:

It is essential that job services agencies support unemployed workers to find decent, safe and legal work. In the context of COVID recovery, it is particularly important to ensure that agencies are not subsidising businesses who are ripping off vulnerable workers.

WEstjustice has observed a number of underpayments cases where clients have found employment with assistance from a job services agency. Often, the provider will give the employer a wage subsidy agreement, and the employer will receive financial incentives to employ our clients.

Unfortunately, some such employers proceed to underpay their workers, yet still receive financial benefits from the job services providers.

> **Case study: Mansur**
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> Mansur worked at a recycling facility sorting different types of plastics. He obtained his job through a job services agency. He did not have a written employment contract. Mansur was not paid for two weeks' work. He visited WEstjustice for help. WEstjustice obtained the Wage Subsidy Agreement between the jobactive provider and employer, and noticed that the agreed rate of pay did not comply with minimum standards under the applicable Modern Award.

We have observed several wage subsidy agreements that provide for illegal rates of pay. This means that job services agencies are subsidising employers that are paying unlawful wage rates to their staff. This is simply unacceptable, in circumstances where the job services agencies are complicit in the underpayment of vulnerable workers.

It is essential that urgent steps be taken to ensure that job services agencies assist workers to find decent, legal work, as part of the COVID recovery.

Job services agencies must be required to subject all wage subsidy agreements to external review, to ensure compliance with minimum working entitlements. Further, providers must be properly funded to provide support to workers who are not paid properly. Employers must face serious consequences if they engage with providers then fail to provide minimum entitlements.

Providers must be required to contact workers and offer assistance where they suspect wages are not being paid correctly. If they do not provide adequate assistance, or are found to be repeatedly referring clients to employers known to underpay staff (which we have seen), there must be a contractual penalty enforced by the Government or an appropriate agency. In the below example, the provider was clearly aware that an employer was non-compliant, however they did not contact our client, who continued to work for the employer without any remuneration for several weeks:

> **Case study: Sam**
>
> Sam's jobactive provider found him a job as a butcher. Sam was paid half of the minimum wage. After some months, Sam's employer lost his wage subsidies because he was not providing proper records to the jobactive provider. Sam's boss didn't tell him what had happened—he let Sam continue working. Sam didn't get any pay at all for several weeks. When Sam asked why he wasn't being paid, the boss blamed the jobactive provider for failing to pay the wage subsidy.

Recommendation 8: *Require job services agencies to: check that wage subsidy agreements provide for minimum legal pay rates; take steps to ensure workers are placed in jobs with correct minimum wage; and assist clients that are not paid or underpaid.*

6.5 Recommendations 9-13: Promoting proactive compliance and increased accountability in labour hire, supply chains and franchises

In addition to the proposed Bill, we also welcome 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 vulnerable workers 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. 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.

a) The problem

Many vulnerable workers 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.'[23]

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.'[24] Although 'both of [these] entities enjoy the benefits of acting as an employer, one will unfairly circumvent labour regulation.'[25] We have seen this

[23] 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.
[24] Craig Dowling, 'Joint Employment and Labour Hire Relationships – Victoria Legal Aid – Professional Legal Education', 5 October 2015, 1-2.
[25] Ibid.

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.

b) 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.[26] 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.[27]

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 – 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 us 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 our 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.

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.

c) 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

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[26] Richard Johnstone et al, Beyond employment: the legal regulation of work relationships (The Federation Press, 2012) 49.
[27] Ibid 67.

process, one franchisor refused to participate, and six franchisors ignored the FWO entirely.[28] 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.

d) 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.

e) 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 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

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[28] '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.

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.'[29] We 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.'[30]

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:[31]

> *'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.

f) Accessorial liability

The accessorial 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 assessorial liability of the host employer or those at the apex of a supply chain or franchise. Although the FWO may be able to rely on previous warnings or compliance notices issued to particular companies or individuals to show knowledge in some cases, for others, it is often unobtainable.

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

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[29] Fair Work Ombudsman, 'Injury 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') '

[30] Professor Andrew Stewart and Dr Tess Hardy, Submission 8, Inquiry into the exploitation of general and specialist cleaner 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 >, last accessed 26 July 2018, 3.s

[31] Ibid.

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,[32] 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 accessorial liability provisions arising under other statutes suggest that the courts may well take a fairly restrictive approach to these questions.'[33]

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).

g) Recommendation 9: Promote compliance by requiring all employers to take reasonable steps to prevent exploitation:

Employers should not be rewarded for wilful blindness. If an employer has not taken steps to prevent a contravention, it must be held to account. The current requirement to show 'actual knowledge' of a contravention is too onerous and rewards employers who choose to turn a blind eye to potential exploitation in their businesses.

We recommend amendments to section 550 to remove the requirement for actual knowledge and require directors and other accessories to take positive steps to ensure compliance within their business or undertaking. This is similar to the obligations already placed on franchisors and holding companies under section 558B.

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[32] 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>.

[33] Hardy, above n 53, 10.

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.

Recommendation 9: *Remove requirement for actual knowledge and require accessories to take positive steps to ensure compliance. Amend section 550 to require directors and other accessories to take positive steps to ensure compliance with the laws within their business or undertaking. Ensure that failure to rectify a breach will also constitute involvement in a contravention.*

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h) Recommendation 10: Extend liability to all relevant third parties

We recommend 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 we 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.

Recommendation 10: *Extend liability to all relevant third parties.*
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.

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i) Recommendation 11: Widen the definition of responsible franchisor entity

We also recommend 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.

Recommendation 11: *Widen the definition of responsible franchisor entity.*
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.

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j) Recommendation 12: Clarify liability of all relevant third parties

For clarity, we recommend 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.

Recommendation 12: *Clarify liability of all relevant third parties.*
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.

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k) Recommendation 13: 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.

Recommendation 13: *Clarify the 'reasonable steps' defence.*
Ensure that the 'reasonable steps' defence incentivises proactive compliance, including by requiring independent monitoring and financially viable contracts.

6.6 Recommendation 14: Ensure all workers receive superannuation

At least one quarter of the ISWRLS clients to date have a legal question relating to superannuation or not being paid superannuation. Very few international student 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 for international student workers, who cannot work full time hours.

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.

We recommend 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.

Recommendation 14: *Ensure workers receive superannuation owed to them 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*

6.7 Recommendations 15-17: Need for community legal services and education programs

In addition to legislative change, targeted legal and education services are essential to achieve compliance.

Community legal centres (**CLCs**) provide vital advocacy, education and legal services to some of Australia's most vulnerable workers, including international students,[34] young people,[35] women experiencing family violence[36] and newly arrived migrant and refugee communities (including temporary visa holders).[37]

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[34] WEstjustice, JobWatch and Springvale Monash Legal Service (**SMLS**) are currently funded by the Victorian Government to operate the *International Students' Work Rights Legal Service* in partnership with Study Melbourne Student Centre and Victoria Legal Aid.

[35] For example the WEstjustice *Youth Employment Project* delivers legal and education services to young people through our School Lawyer program, youth hubs and key partner organisations. The School Lawyer Program framework is available here. SMLS also has a School Lawyer program at three high schools, as well as youth programs at various youth outreach centres.

[36] For example, JobWatch is currently funded by the Victorian Government to operate the *Family & Domestic Violence and the Workplace Project*. This is designed to assist Victorian workers by giving free and confidential legal advice in situations where family or domestic violence impacts on the worker's employment.

[37] For example, SMLS has partnerships with ethno-specific associations where we empower migrants and temporary visa holders to make informed decisions about work by delivering regular employment law education programs. For more information about SMLS's employment legal services, for example see here. See also C Hemingway, *Not Just Work: Ending the exploitation of refugee and migrant workers*, 2016 (**Not Just Work**) for details of the WEstjustice migrant and refugee employment law service.

Leveraging our strong community connections, we address a critical service gap for those workers who:

- are not yet in a union; and / or
- cannot afford private legal assistance; and / or
- due to cultural, language, literacy and/or practical barriers, are:
    - not able to understand or enforce their workplace rights without support from a trusted community-based service (Not Just Work, pp 86-91; Social Ventures Australia, School Lawyer Program Framework, pp 5, 8-9 (**SLPF**)
    - unlikely to find or access a government agency's services without targeted education and ongoing support (Not Just Work, pp 129, 102-123)
    - unable to find or access a telephone information line or self-help-based website or who need more assistance than a telephone information or self-help-based advice service alone can provide (Not Just Work, pp 139-147), and
    - in need of in-situ, targeted and timely support to ensure early intervention and resolution of problems before they escalate.

The most vulnerable workers often aren't unionised and are not able to access the necessary level of support they require from the Fair Work Ombudsman (**FWO**) or other government agencies. CLCs are independent, trusted agencies, based in local communities that can provide support to vulnerable workers across a range of legal and non-legal issues in an effective way to improve employment outcomes and social cohesion, in partnership with local communities.

Due to our ongoing engagement work with communities and community stakeholders (including participation in community networks; delivering training to community leaders and agency workers so they can identify legal issues and refer clients to our service; and direct community legal education to target communities), we assist clients who would not seek help or enforce their rights without us.[38]

Through our embedded and multidisciplinary service delivery models (for example, by having lawyers provide outreach services at Study Melbourne,[39] the Fair Work Commission,[40] in schools, youth hubs, hospitals and other community organisations; and by making warm referrals within generalist services and to our community partners), we provide high-quality, place-based and holistic services to our clients at convenient locations. We offer a unique lens and strong understanding of the trends and common problems vulnerable workers face. Importantly, in collaboration with our community partners, we seek to address systemic issues identified in our casework and education/education programs by drawing on both our technical expertise, and ground-level experience. Our reports and law reform submissions document common problems facing vulnerable workers, legislative gaps and barriers to enforcement and compliance. Importantly, they also provide evidence-based recommendations for reform, including sample drafting.[41]

In 2009 the Fair Work Ombudsman conducted a review of the need for and provision of Community-Based Employment Advice Services (**CBEAS**) in the light of the introduction of

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[38] Temporary Migration Submission, 22.
[39] For the International Students' Work Rights Legal Service.
[40] For the Workplace Advice Service which is delivered at the Fair Work Commission by JobWatch and SMLS.
[41] See for example, Not Just Work; WEstjustice Submission; WEstjustice submission 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, July 2018 (Cleaners Inquiry).

the Fair Work regime (**Booth Report**). The Booth Report highlights the importance of CBEAS for vulnerable workers:[42]

> 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.

CLCs have a long history of improving employment outcomes for those most vulnerable.[43] For example, as discussed in our Temporary Submission (pp 20-26), since January 2018, WEstjustice, Springvale Monash Legal Service (**SMLS**) and JobWatch Inc. have partnered to deliver targeted employment law services to international students as part of the International Students' Work Rights Legal Service (**ISWRLS**):

> The ISWRLS is funded by the Victorian Government and runs out of the Study Melbourne Student Centre. It has provided legal assistance to over 440 international students, successfully recovering nearly $325,000 in unpaid wages and entitlements and compensation for unfair treatment at work. We have also delivered over 30 employment law community education sessions to hundreds of students, student leaders, ambassadors and intermediaries working with students from education institutions.
>
> Exploitation is widespread. 70% of our clients were underpaid or not paid at all, and one fifth of our clients were in sham contracts. Our service plays a critical role in recovering wages and compensation, helping individuals to get their jobs back and keep their jobs, receive statements of service, letters of reference or retrospective resignation to assist with getting new jobs. Importantly we have also facilitated referrals to unions, regulators and support agencies for related and other issue assistance. We have made 113 legal referrals and 20 non legal referrals.
>
> At a workplace and industry level we have helped to bring multiple workers together, and refer them to the Migrant Workers Centre for collective assistance. We have also reported 38 cases to the Fair Work Ombudsman. We have also assisted a number of clients with WorkCover claims and referrals.
>
> Importantly, From the client survey feedback we have received, nearly all of the clients (between 98-100%) report that the service contributes to giving them a positive experience as an international student; that they felt well supported and heard; and would return to use the service and recommend the service to others.
>
> Specifically they report that after seeing a lawyer they understand their work rights better; they feel better prepared for future jobs in Australia; and have improved their ability to enforce their rights and/or make informed decisions about work related matters (96-100%).
>
> In addition, nearly all clients (between 96-100%) also report that the legal service was easy to access; and that an individual service (either virtual or face to face) was better

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[42] Anna Booth, 'Report of the review of community-based employment advice services', Report to the Fair Work Ombudsman, 30 September 2009, 14.
43 See for example Not Just Work.

than other ways of getting assistance (because they felt more confident and comfortable, can explain and ask questions properly, and more clear and helpful responses). 25% of the clients reported that without ISWRLS, they would have not have gotten any help with their work rights problem.

We would like to draw your attention to the work of CLCs, and request that in addition to legislative change, the Government provide funding to better facilitate our integral role in the enforcement of workplace laws, and pursuit of decent, secure work for all Australians.

a) Increase funding for community legal centres to deliver dedicated employment law assistance to vulnerable workers

Without assistance, vulnerable workers cannot enforce their rights, and the employers who are doing the wrong thing are not held to account. Community legal centres with employment law expertise are necessary to work alongside regulators and unions to provide much needed support to workers on temporary visas.

Recommendation 15: *The Government should increase funding for community legal centres to deliver dedicated employment law assistance to vulnerable workers, including temporary visa holders***.**

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b) Comprehensive worker rights education plan

We regularly provide community legal education to vulnerable workers and those who work with them (intermediaries), and have delivered six roll-outs of our award-winning Train the Trainer program. Unsurprisingly, we find low levels of understanding of Australian workplace laws, and particularly worker rights.

Community legal education programs are essential to ensure workers understand the law, and know who to contact if they have a problem. As documented in Not Just Work, our programs are fully evaluated and have demonstrated impact.

In recognition of the particular needs of young people and international students, the Federal Government should fund specific education programs in schools, TAFEs and universities for international (and ideally local) students. Such programs should be provided by community legal centres, unions or other suitably qualified community groups.

Recommendation 16: *Develop a comprehensive worker rights education plan*
A comprehensive worker rights education plan should be developed so that workers (including young people and temporary visa holders) are given the right level of information about their work rights, at the right time (i.e. when they apply for a visa, on entry to Australia, during relevant school programs/curriculums, when they fill in a Tax File Number declaration, when they apply for an ABN etc.) and in a language and format that they can understand.

Recommendation 17: Specialist education programs
Specialist education programs should be incorporated into school and university induction programs for international students.

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7. 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 vulnerable 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.

8. Appendix One: Compilation of drafting suggestions

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

Part 1: Definition of casual employee

Recommended amendments to the Bill:

Type of change	Clause	Drafting suggestions
Amend Bill	15A	Amend subclauses 15A(1) and (2) to align more closely with the common law test for casual employment – including focusing on the conduct of the parties and substance of the relationship, not just the offer/acceptance stage of employment. (1) A person is a casual employee of an employer if: ~~(a) an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and~~ ~~(b) the person accepts the offer on that basis; and~~ ~~(c) the person is an employee as a result of that acceptance;~~ their employer (by words or conduct) makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work. (2) For the purposes of subsection (1), in determining whether, ~~at the time the offer is made,~~ the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, regard must be had ~~only~~ to the following considerations: (a) whether the employer can elect to offer work and whether the person can elect to accept or reject work; (b) whether the person will work only as required; (c) whether the employment is described as casual employment; (d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument. (e) the real substance, practical reality and true nature of the employment relationship (f) the relative bargaining power of the parties Note: Under Division 4A of Part 2-2, a casual employee who has worked for an employer for at least 12 months and has, during at least the last 6 ~~(3) To avoid doubt, a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.~~

		~~(4) To avoid doubt, the question of whether a person is a casual 7 employee of an employer is to be assessed on the basis of the offer 8 of employment and the acceptance of that offer, not on the basis of 9 any subsequent conduct of either party.~~ (5) A person who commences employment as a result of acceptance of an offer of employment in accordance with subsection (1) remains a casual employee of the employer until: (a) the employee's employment is converted to full-time or part-time employment under Division 4A of Part 2-2; or (b) the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and 17 commences work on that basis; (c) the employee is eligible for an offer for casual conversion in accordance with Subdivision B, even if such offer has not been made or accepted; or (d) the employee is no longer a casual employee having regard to nature of the employment relationship, including the conduct of the parties See Recommendation 1 for background information.
Amend Bill	66B	Add: (4) If an employer fails to make an offer in the circumstances described in subsection (1), an offer is taken to have been made and accepted in accordance with this Subdivision at the expiry of 21 days after the end of the 12 month period referred to in subsection (1)(a).
Amend Bill	66C	Delete entire section
Amend Bill	Various	Make clauses 66B(1), 66B(2), 66C(3), 66G, 66H(1), 66H(3) civil remedy provisions.
Amend Bill	Various	Ensure that the Bill does not reduce access to unfair dismissal or other FW Act entitlements for any workers. Unless the above amendments are accepted, the proposed amendments to Part 2 should not be allowed.

Recommended amendments to the FW Act:

Statutory definition of employee

Type of change	Section	Drafting suggestions
Insert new provision	15 (or 357A)	(3) 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. (4) Subsection (3) does not apply if: (a) 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; or (b) the individual is on a vocational placement.

		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. See Recommendations 2 and 3 for background information.
Amend existing provision	357	**357 Misrepresenting employment as independent contracting arrangement** (1) A person (the ***employer***) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor. Note: This subsection is a civil remedy provision (see Part 4-1). (2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer: (a) did not know; ~~and~~ (b) was not reckless as to whether; and (c) could not reasonably be expected to know that the contract was a contract of employment rather than a contract for services.

Part 3: Compliance and enforcement

Cost consequences for employers who refuse to engage with FWO

Type of change	Section	Drafting suggestions
Insert new section into FW Act	557B	(1) 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 or compliance 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. (2) The civil remedy provisions are the following: (a) subsection 44(1) (which deals with contraventions of the National Employment Standards); (b) section 45 (which deals with contraventions of modern awards); (c) section 50 (which deals with contraventions of enterprise agreements); (d) section 280 (which deals with contraventions of workplace determinations); (e) section 293 (which deals with contraventions of national minimum wage orders); and (f) section 305 (which deals with contraventions of equal remuneration orders). See Recommendation seven for background information.
Amend FW Act	570(2)(c)(i)	At the end of section 570(2)(c)(i) add the words 'or the FWO, or failed to comply with an assessment or compliance notice' after 'FWC'. See Recommendation 7 for background information.
Insert new subsection	682	1(ca) make assessments of amounts owed by employers to employees. See Recommendation 7 for background information.
Insert new subsection	717A	**717A Assessment notices** (1) This section applies if: (a) an employer has by notice been invited to attend a conference or interview conducted by the FWO; (b) the employer unreasonably refused to participate in that conference or interview, or the conference failed to resolve the dispute; and (c) the FWO reasonably believes that the employer has contravened one or more of the following: (i) a provision of the National Employment Standards; (ii) a term of a modern award; (iii) a term of an enterprise agreement; (iv) a term of a workplace determination; (v) a term of a national minimum wage order; (vi) a term of an equal remuneration order.

Type of change	Section	Drafting suggestions
		(2) The FWO may give the employer a notice (assessment notice) that sets out: (a) the name of the employer to whom the notice is given; (b) the name of the person in relation to whom the FWO reasonably believes the contravention has occurred; (c) brief details of the contravention; (d) the FWO's assessment of the amounts that the person referred to in paragraph (b) above is owed by the person referred to in paragraph (a) above; and (e) any other matters prescribed by the regulations. See Recommendation 7 for background information.

Increased accountability in franchises, labour hire and supply chains
Division 4A – Responsibility of responsible franchisor entities and holding companies for certain contravention

Type of change	Section	Drafting suggestions
Insert new subsection	558AA	A person who is responsible for a contravention of a civil remedy provision is taken to have contravened that provision. See Recommendation 11 for background information.
Amend and insert new subsection	558A	**558A Meaning of franchisee entity, ~~and~~ responsible franchisor entity and responsible supply chain entity** (1) A person is a **franchisee entity** of a franchise if: (a) the person is a franchisee (including a subfranchisee) in relation to the franchise; and (b) the business conducted by the person under the franchise is substantially or materially associated with intellectual property relating to the franchise. (2) A person is a **responsible franchisor entity** for a franchisee entity of a franchise if: (a) the person is a franchisor (including a subfranchisor) in relation to the franchise; and (b) the person has ~~a significant degree of~~ influence or control over the franchisee entity's affairs. (3) A person is a responsible supply chain entity if 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. See Recommendations nine and ten for background information. 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.
Insert new subsection	558B(2A)	**558B Responsibility of responsible franchisor entities, ~~and~~ holding companies and responsible supply chain entities for certain contraventions** (2A) A person contravenes this subsection if: (a) an employer contravenes a civil remedy provision referred to in subsection (7) in relation to a worker; and (b) the person is a responsible supply chain entity for the worker; and (c) either a. 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 b. 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. Note: This subsection is a civil remedy provision (see this Part). Reasonable steps to prevent a contravention of the same or a similar character (3) A person does not contravene subsection (1), ~~or~~ (2) or (2A) if, as at the time of the contravention referred to in paragraph (1)(a), ~~or~~ (2)(b) or (2A)(a), the person had taken reasonable steps to prevent a contravention by the franchisee entity or subsidiary of the same or a similar character. (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 **contravening employer**) of the same or a similar character, a court may have regard to all relevant matters, including the following: (a) the size and resources of the franchise or body corporate (as the case may be); (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;

		(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); (d) the person's arrangements (if any) for assessing the contravening employer's compliance with the applicable provisions referred to in subsection (7); (e) the person's arrangements (if any) for receiving and addressing possible complaints about alleged underpayments or other alleged contraventions of this Act within: (i) the franchise; (ii) the body corporate or any subsidiary (within the meaning of the Corporations Act 2001) of the body corporate; or (iii) the person's supply chain arrangements as the case may be; (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. See Recommendation nine and ten for background information.
Insert new legislative note	558B(4)	Note: Reasonable steps that franchisor entities, holding companies and indirectly responsible entities can take to show compliance with this provision may include: ensuring that the franchise agreement or other business arrangements require all parties to comply with workplace laws, providing all parties with a copy of the FWO's free Fair Work handbook, requiring all parties to cooperate with any audits by FWO, establishing a contact or phone number for employees to report any potential underpayment or other workplace law breaches and undertaking independent auditing. See Recommendation 12 for background information.

Increased accountability for accessories

Type of change	Section	Drafting suggestions
Repeal and substitute	550	**550 Involvement in contravention treated in same way as actual contravention** (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision. Note: If a person (the **involved person**) is taken under this subsection to have contravened a civil remedy provision, the involved person's contravention may be a serious contravention (see subsection 557A(5A)). Serious contraventions attract higher maximum penalties (see subsection 539(2)). (2) A person is **involved in** a contravention of a civil remedy provision if, and only if, the person: (a) has aided, abetted, counselled or procured the contravention; or (b) has induced the contravention, whether by threats or promises or otherwise; or (c) has been in any way, by act or omission, directly or indirectly~~, knowingly~~ concerned in or party to the contravention; or (d) has conspired with others to effect the contravention. (3) For the purposes of paragraph (2)(c), a person is concerned in a contravention if they: (a) knew; or (b) could reasonably be expected to have known, that the contravention, or a contravention of the same or a similar character would or was likely to occur; or (c) became aware of a contravention after it occurred, and failed to take reasonable steps to rectify the contravention. (4) For the purposes of paragraph 3(b), a person will not be taken to be reasonably expected to have known that the contravention, or a contravention of the same or a similar character would or was likely to occur if, as at the time of the contravention, the person had taken reasonable steps to prevent a contravention of the same or a similar character. (5) For the purposes of subsection (4), in determining whether a person took reasonable steps to prevent a contravention of the same or a similar character, a court may have regard to all relevant matters, including the following: (a) the size and resources of the person; (b) the extent to which the person had the ability to influence or control the contravening person's conduct

Type of change	Section	Drafting suggestions
		in relation to the contravention or a contravention of the same or a similar character; (c) any action the person took directed towards ensuring that the contravening person had a reasonable knowledge and understanding of the requirements under this Act; (d) the person's arrangements (if any) for assessing the contravening person's compliance with this Act; (e) the person's arrangements (if any) for receiving and addressing possible complaints about alleged underpayments or other alleged contraventions of this Act; (f) the extent to which the person's arrangements (whether legal or otherwise) with the contravening person encourage or require the contravening person to comply with this Act or any other workplace law. See Recommendation 9 for background.
Insert new section	550A	**Primary duty of care** (1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, compliance with this Act in respect of: (a) workers engaged, or caused to be engaged by the person; and (b) workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking. (2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that compliance with this Act in respect of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking. (3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable: - [insert any further specific requirements here] **Meaning of worker** (1) A person is a **worker** if the person carries out work in any capacity for a person conducting a business or undertaking, including work as: (a) an employee; or (b) a contractor or subcontractor; or (c) an employee of a contractor or subcontractor; or (d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or

Type of change	Section	Drafting suggestions
		(e) an outworker; or (f) an apprentice or trainee; or (g) a student gaining work experience; or (h) a volunteer; or (i) a person of a prescribed class. **What is reasonably practicable** **What is reasonably practicable in ensuring compliance** In this Act, **reasonably practicable**, 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: (a) the likelihood of the risk concerned occurring; and (b) the degree of harm that might result from the risk; and (c) what the person concerned knows, or ought reasonably to know, about: (i) the risk; and (ii) ways of eliminating or minimising the risk; and (d) the availability and suitability of ways to eliminate or minimise the risk; and (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk. **Person may have more than 1 duty** A person can have more than 1 duty by virtue of being in more than 1 class of duty holder. **More than 1 person can have a duty** (1) More than 1 person can concurrently have the same duty. (2) Each duty holder must comply with that duty to the standard required by this Act even if another duty holder has the same duty. (3) If more than 1 person has a duty for the same matter, each person: (a) retains responsibility for the person's duty in relation to the matter; and (b) must discharge the person's duty to the extent to which the person has the capacity to influence and control the matter or would have had that capacity

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		but for an agreement or arrangement purporting to limit or remove that capacity. **Management of risks** A duty imposed on a person to ensure compliance with this Act requires the person: (a) to eliminate risks to compliance, so far as is reasonably practicable; and (b) if it is not reasonably practicable to eliminate risks to compliance, to minimise those risks so far as is reasonably practicable. **Duty of officers** (1) If a person conducting a business or undertaking has a duty or obligation under this Act, an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation. (2) The maximum penalty applicable for an offence relating to the duty of an officer under this section is the maximum penalty fixed for an officer of a person conducting a business or undertaking for that offence. (3) An officer of a person conducting a business or undertaking may be convicted or found guilty of an offence under this Act relating to a duty under this section whether or not the person conducting the business or undertaking has been convicted or found guilty of an offence under this Act relating to the duty or obligation. (5) In this section, **due diligence** includes taking reasonable steps: (a) to acquire and keep up-to-date knowledge of the obligations in this Act; and (b) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the risks associated with those operations; and (c) to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to compliance with this Act from work carried out as part of the conduct of the business or undertaking; and (d) to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding risks and responding in a timely way to that information; and

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		(e) to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act; and **Examples** For the purposes of paragraph (e), the duties or obligations under this Act of a person conducting a business or undertaking may include: • ensuring compliance with notices issued under this Act; • ensuring the provision of training and instruction to workers about workplace laws. (f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e). **Duty to consult with other duty holders** If more than one person has a duty in relation to the same matter under this Act, each person with the duty must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter. Note further drafting will be required for this section, but these are some examples for consideration. See Recommendation 9 for background.