

ALL WORK, NO PAY

*Improving the legal system
so migrants can get the wages they are owed*

Catherine Hemingway, Fiona Yeh, Laurie Berg and Bassina Farbenblum | June 2024



About the Migrant Justice Institute

The Migrant Justice Institute is a nonpartisan law and policy organisation that seeks to achieve justice for migrant workers in Australia and globally. An independent non-profit founded in 2021, we are Australia's first (and only) national research and policy organisation dedicated to addressing migrant worker exploitation. We are dedicated to achieving fair treatment and justice for migrant workers globally, and in Australia.

Our rigorous research uncovers the reality of migrant worker exploitation and the operation of laws and systems in practice. We rely on strong relationships with migrant communities, trade unions and legal centres to develop innovative reforms that are grounded in migrants' lived experiences.

We educate government and business on the systemic issues that create a breeding ground for abuse, and we engage collaboratively to implement common-sense reforms. Our work has shaped practices of governments, businesses and international organisations in Asia, the USA and the Middle East, and has driven Australian government policy reforms on wage theft, access to justice, and pandemic-related support for migrant workers.

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This report should be cited as follows: Catherine Hemingway, Fiona Yeh, Laurie Berg and Bassina Farbenblum, *All Work, No Pay: Improving The Legal System So Migrants Can Get The Wages They Are Owed* (Migrant Justice Institute, 2024).



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Acknowledgments

We acknowledge the Traditional Owners and Custodians of the lands on which we work, including the Wurundjeri people of the Kulin Nation and the Gadigal, Gamaragal and Bedegal people of the Eora Nation, and acknowledge the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We acknowledge that sovereignty was never ceded and we support the self-determination of Aboriginal and Torres Strait Islander peoples.

We would like to sincerely thank representatives from a range of government agencies, unions, community legal centres, community organisations and law firms for their time, reflections and suggestions: the Australian Council of Trade Unions, the ANU Students' Association Legal Service, the Fair Work Commission, the Fair Work Ombudsman, the Federal Circuit and Family Court of Australia, JobWatch, Justice Connect, Maurice Blackburn, Migrant Workers Centre, Redfern Legal Centre, South-East Monash Legal Service, United Workers Union, WEstjustice, and Youth Law Australia.

We would like to thank Professor Andrew Stewart and Associate Professor Tess Hardy for sharing their expertise and insights. We are especially grateful to Professor Stewart for his generous and illuminating suggestions over several extensive discussions, and detailed comments on drafts of this report.

We are grateful to the registrars of the Federal Circuit and Family Court of Australia and assisting case managers who facilitated our observation of matters in the small claims list between May and September 2023.

We would also like to express our appreciation to: Maddocks, for providing substantial pro bono research to support this report; Jacqueline Parker, for her considered and valuable input into multiple drafts of this report; Natasha Grant, for her excellent research and editing assistance; and Sing-Sing Zhang, for her assistance with documenting observations of the small claims list.



Exploitation of migrant workers in Australia is widespread in numerous industries. When a worker is not paid their wages and entitlements, the primary mechanism available to hold their employer to account is to file an application in the “small claims” jurisdiction of the Federal Circuit and Family Court of Australia (FCFCOA).¹ This jurisdiction is intended to ‘ensure that claims for a relatively small amount of money are dealt with efficiently and expeditiously by the courts ... [and] not subject to onerous procedural requirements.’²

In reality, few workers file an application, let alone obtain a judgment. In 2022-23, among the hundreds of thousands of underpaid workers in Australia, only 137 small claims applications were filed in the FCFCOA across the entire country.³ The Grattan Institute has estimated that between 490,000 and 1.26 million workers are paid below the minimum wage in a year (based on 2018 data).⁴ This figure does not include the many additional workers who were paid above the basic minimum wage but less than their full entitlements, who would have substantial claims for unpaid wages.

In 2019, the Commonwealth Migrant Workers’ Taskforce recognised that the “small claims” court system is not enabling migrant workers to claim the wages they are owed. It recommended that the Government undertake a review of this jurisdiction,⁵ which is currently underway.⁶

As a result of the inaccessibility of this jurisdiction, hundreds of thousands of vulnerable workers who experience wage theft in Australia are left without recourse, and employers continue to exploit migrants and other vulnerable workers with impunity.

It is not clear that wages claims are being systematically resolved via other legal forums or by the Fair Work Ombudsman (FWO). In our survey of over 4,000 migrant workers, 9 out of 10 migrants who knew they were underpaid took no action.⁷ For these migrants, the risks and costs of taking action substantially outweighed the marginal prospect of success. However, 45% of these participants indicated that they were open to trying to recover unpaid wages in the future.⁸ This suggests that an investment of resources in reducing the costs and burdens of bringing a wage claim, and increasing the likelihood that workers who bring wage claims will obtain a timely positive outcome, would have an impact on the number of migrants who come forward to enforce their rights. This is especially the case given new visa protections that will be piloted in 2024 and which will reduce migration-related risks of bringing claims.

This report reveals why the small claims system has not been working for migrant workers and sets out a roadmap for reform. Our recommendations build upon work that is already underway within the FCFCOA to improve access to justice in the small claims process. The findings and recommendations are drawn from data from the FCFCOA and the Fair Work Commission (FWC); analysis of survey data from over 15,000 migrant workers; consultations with trade unions, academics, community organisations and legal service providers; and first-hand observations of 25 small claims hearings.

1 We note that there are various state and territory courts where small claims can be pursued. However, this report focuses on the federal scheme as the primary wage recovery process and subject of the DEWR review: see footnote 6.

2 Explanatory Memorandum, Fair Work Bill 2009 (Cth) [2167]-[2168].

3 FCFCOA, [Annual Reports: 2022-23](#) (Report, 2023) 91 (*2022-23 Annual Report*).

4 Brendan Coates, Trent Wiltshire and Tyler Reysenbach, Grattan Institute, [Short-Changed: How To Stop the Exploitation of Migrant Workers in Australia](#) (Report, May 2023) 6. Because underpayment includes payment below award or contractual wages and not just below minimum wage, a larger number of wage claims would certainly have arisen in the 12 month period of 2018.

5 Migrant Workers’ Taskforce (MWT), [Final Report](#) (March 2019) 11 (Recommendation 12).

6 Department of Employment and Workplace Relations (DEWR), [‘Amending the Fair Work Act Small Claims Process’](#) (October 2022).

7 Bassina Farbenblum and Laurie Berg, [Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia](#) (Report, 2018) 5 (*Wage Theft in Silence*).

8 Ibid 7.

Four reasons why the “small claims” jurisdiction is not working as intended for unrepresented migrant workers

1. Migrants struggle to file wage claims without legal assistance

The vast majority of migrant workers require legal assistance to file a wage claim. For many, legal assistance is unavailable. Without legal assistance, many migrant workers cannot:

- identify their legal entitlements and employing entity;
- calculate the sum of outstanding wages and entitlements, based on correct identification of their job classification and applicable wage rates under a modern award or enterprise agreement, with varying rates depending on time and hours worked. This often involves complex spreadsheet calculations for every day worked;
- raise the underpayment issue directly with their employer; and/or
- correctly complete the small claims court application.

2. Court proceedings can be too complex and technical for migrant workers to navigate without assistance

For migrant workers who manage to file an application, service requirements and court proceedings remain too complex, technical and formal for many to navigate without assistance, especially those who speak English as an Additional Language. Wage claims often cannot progress efficiently because parties struggle to provide required materials on time and/or in the correct form.

3. The small number of migrant workers who obtain a court order in their favour may never see the wages the employer is ordered to pay

Some migrant workers who obtain a judgment in their favour never obtain their outstanding wages because the employer disappears, liquidates or refuses to pay. Without assistance, migrant workers cannot initiate enforcement proceedings against recalcitrant employers. Where an employer liquidates or has no assets, enforcement proceedings are futile, and temporary visa holders are left without any safety net because they are ineligible for the Fair Entitlements Guarantee.

4. Affordable legal assistance is limited

Community Legal Centres (CLCs), Migrant Workers Centres (MWCs), working women’s centres, university student legal services and other free legal services need funding to meet the needs of Australia’s migrant workers. Complex calculations of workers’ wages and entitlements for every day worked are generally prohibitively resource-intensive for private and community lawyers, as are the requirements for filing and pursuing the claim through court. The limited affordable legal assistance that exists is therefore either directed to one-off advice, or representation of only a small number of workers. Private legal representation is not commercially viable for any but large wage claims because of the time and expense of running these matters. Workers are dissuaded from bringing matters if the wages they recover go largely to covering their legal costs.

Key recommendations

The *Fair Work Act 2009* (Cth) (*FW Act*) is intended to establish a ‘guaranteed safety net of fair, relevant and enforceable minimum legal rights and entitlements’ for all workers.⁹ Without a wage claim process that migrant workers can meaningfully access, the worker protections established under the *FW Act* are practically unenforceable and effectively hollow.

To fulfil the *FW Act’s* intent to provide workers with rights and entitlements that are enforceable, reforms to the wage claim process must achieve 3 key objectives:

- Increase legal assistance to enable migrants and other vulnerable workers to pursue wage claims;
- Establish simpler and more flexible and supported wage claim processes so workers can bring claims with limited and/or more efficient representation; and
- Ensure workers receive their wage judgments or settlements if an employer disappears, liquidates or refuses to pay.

ENDORSED BY



⁹ *FW Act* s 3(b) (Object of this Act).

Objective 1: Increase availability of legal advice and assistance for migrants and other vulnerable workers to pursue wage claims in a manner that is cost-effective and based on level of need, by:

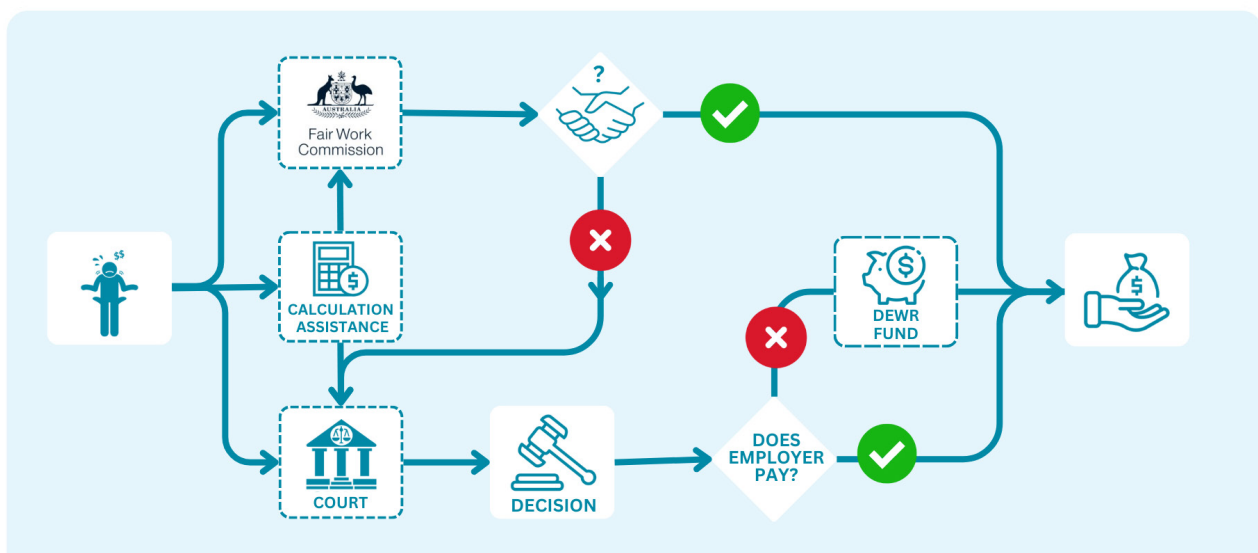
- Expanding availability of representation by legal assistance providers such as community legal services, unions and migrant workers centres for migrants who cannot self-represent;
- Establishing cost-effective forms of legal and other assistance that would enable some migrants to effectively self-represent; and
- Incentivising increased legal assistance by private lawyers.

1. Establish a **Wages and Superannuation Calculation Service** that would provide workers with a free and accurate calculation of the amount they are owed, based on information the worker provides about their job and the hours they worked each day (without verifying the accuracy of the worker's information). The worker could use this to resolve the issue with their employer, self-represent, or take this to a lawyer who would be able to provide quicker and less resource-intensive advice and/or representation. The Service would also develop, maintain and share its calculation tools with individuals, private lawyers and community lawyers to use themselves if they prefer. The Service could include a technical advisory service on wage rates and entitlements in alternative dispute resolution (ADR) forums. It would work collaboratively with existing services and could be coordinated by the FWC, the FWO or a non-governmental organisation such as a CLC. (Recommendation 14)
2. Establish a **one-way cost shifting or 'equal access costs' model** for wages and entitlements claims in the FCFCOA small claims jurisdiction. A worker who brings a successful wage claim could recover their legal costs from the employer. If the worker is unsuccessful, each party would bear their own costs (as is currently the case) unless the court finds a party has acted vexatiously or unreasonably, in which case the worker could be ordered to cover the employer's costs. This model is currently under consideration for federal anti-discrimination claims.¹⁰ More CLCs and MWCs could represent migrant workers in wage claims because the model would allow them to recoup a portion of the actual cost of their service via the use of conditional costs agreements. Private lawyers would be incentivised to represent workers in meritorious wage claims because workers would be able to pay private legal fees *and* retain the full amount of their wages that the employer is ordered to pay. The risk of costs will encourage employers to resolve meritorious claims efficiently both in court or in an ADR process. Effective safeguards and penalties can prevent lawyers from bringing unmeritorious claims on behalf of workers. (Recommendation 13)
3. Increase **funding for legal assistance providers including community-based legal services, and migrant workers centres** to assist the most vulnerable workers who require tailored assistance from beginning to end of a wage claim, or at particular stages. This includes assistance with contacting and negotiating with employers, drafting letters of demand, preparing court documents, serving documents, appearing at court, and enforcing a judgment when an employer does not comply with a court order. Greater funding should be allocated for employment law services in community legal centres, student legal services and other community-based service providers, so that centres can target services to the needs of their local region. Without this assistance, most vulnerable workers will never make it to court. Funding should also be provided for services to educate migrant worker communities about their legal rights and wage claim processes. (Recommendation 15)
4. Establish a **duty lawyer service** based at court to assist self-represented litigants to navigate court processes on the day of the hearing and understand any further action they must take after the hearing. If there are questions the applicant can address on the day (for example, identifying the correct employing entity), the registrar could stand a matter down for a period and the worker could receive legal advice on the spot, saving significant court time and resources to re-list a matter for a later date. This service could be staffed by CLC lawyers and MWCs. (Recommendation 6)

Objective 2: Establish simpler and more flexible wage claim processes so more workers can bring claims without legal representation, or with more limited and/or more efficient representation, by:

- Providing a faster, simpler, more flexible and more supported alternative route to resolving wage claims through the establishment of a new forum, recognising the inherent limitations of judicial processes; and
- Reducing the resources and technical knowledge required to lodge and pursue wage claims through the FCFCOA small claims jurisdiction.

We recommend improving accessibility of the current FCFCOA small claims process in several ways. However, there are limits to the flexibility that courts can provide given their constitutional mandate. We therefore recommend the establishment of a new forum for flexible conciliation of claims in the FWC as an *additional* and alternative first step, with the option to go to court if the claim is not satisfactorily resolved. If this additional alternative jurisdiction is established in the FWC, the most efficient court forum could be a new Fair Work Court attached to the FWC. Alternatively, the FWC process could also work alongside an improved FCFCOA small claims process.



COMMUNITY LEGAL SERVICES FUNDED TO PROVIDE SUPPORT



5. Establish a new **Fair Work Commission dispute resolution process for wages and entitlements**, ideally alongside a new **Fair Work Court**. (Recommendations 11 and 12)
 - a. Amend the *FW Act* to enable workers to make an application to the FWC to resolve disputes relating to wages and entitlements, similar to the existing general protections jurisdiction. This would enable workers to benefit from the FWC’s **more informal and supported case management**. A new FWC process for underpayment claims should include: a more user-friendly application form (without the need to fully articulate the claim at the outset, including full quantum of wages sought); support for workers to request employee records; FWC carriage of service; and liaison with employers and the power to make procedural orders to progress matters. Workers could access **compulsory conciliation for swift resolution of wage claims**, potentially alongside other claims such as unfair dismissal. If

conciliation is unsuccessful, the FWC should have the power to issue a certificate to that effect, and the worker could proceed to consent arbitration or with an application to court. The FWC would indicate to parties if it does not consider the claim to have reasonable prospect of success in arbitration or court, to discourage the pursuit of unmeritorious claims.

- b. Maximise the enforcement and deterrent impact of individual wage claims by **enabling a worker to elect to send a copy of their application to the FWO**.
 - c. Consider establishing a **new Fair Work Court** that sits alongside the FWC, with a number of Commissioners and Judges jointly appointed to both institutions. This could replace the small claims jurisdiction of the FCFCOA and would allow those who unsuccessfully attempted conciliation in the FWC or who are faced with an employer who has not complied with a FWC order to make a streamlined application to the court for enforcement. An **application to the court for an enforceable and precise determination of entitlements** should remain available to workers who wish to initiate proceedings in a court rather than the FWC (which may be their preference and must remain their right).
 - d. Introduce an **equal access costs model** in the small claims jurisdiction (whether in the FCFCOA or a new Fair Work Court), which could **incentivise employers to resolve claims by conciliation** at the FWC to avoid the risk of adverse costs if a meritorious matter proceeds to court.
- 6. Increase accessibility of the FCFCOA small claims process, particularly for unrepresented litigants, and require employers to provide workers with the information needed to bring claims.**
- a. The FCFCOA should be resourced to conduct user testing with migrant communities to **make the small claims application form more accessible**, so that workers understand the form and can make out their claims at the outset. Changes could include further information in plain language to explain technical concepts in the application, and the steps in the small claims process. (Recommendation 3)
 - b. The Government and the FCFCOA should implement a range of measures to **make service on the employer easier** in small claims matters. This includes: simplified service rules (for example, allowing service via email); additional funding for community legal service providers to assist with service and affidavits of service; and funding or fee waivers to enable community legal service providers to access relevant registration databases and Company Extracts to identify an employing entity's address for service. The Wages and Superannuation Calculation Service could also provide procedural guidance on service to any other workers who are able to self-represent or are not eligible for existing legal assistance services. (Recommendation 4)
 - c. The FCFCOA should continue to ensure **best practice use of interpreters** for applicants and respondents who speak English as an Additional Language. (Recommendation 7)
 - d. The FCFCOA Registry should be funded to introduce **further case management processes** where employers do not respond, or where applicants have not provided the necessary information for a claim to progress efficiently. While following up with parties may increase short-term administrative and resourcing costs for the Court, it may reduce the cost of the court process overall through faster resolution of matters with parties in attendance and prepared for hearing. The Government should also consider legislating **consequences for respondents who fail to attend** or comply with key procedural steps. (Recommendation 5)
 - e. The Government should amend the *FW Act* and *Fair Work Regulations 2009 (Cth)* (*FW Regulations*) to **mandate access to records required to calculate and serve a wage claim**. The *FW Act* should be amended to require employers to provide a **Statement of Working Conditions** to enable workers to

identify their legal entitlements. The Statement should set out the employee's job title, relevant workplace instrument, classification, type of employment, duties and location of work, wage rates, ordinary hours, and applicable overtime and penalty rates; as well as the employer's legal name, ABN and address for service (Recommendation 1). The *FW Regulations* should be amended to require employers to **provide additional information on pay slips** including individually itemising the purpose and amount of any deduction, and setting out, for each day worked, which hours are classified as ordinary and which attract a penalty or overtime rate. (Recommendation 2)

Objective 3: *Ensure migrant workers receive court-ordered wage payments when the employer disappears, liquidates or refuses to pay.*

7. **Establish a guarantee scheme, administered by the Commonwealth Department of Employment and Workplace Relations (DEWR)**, to ensure that any worker with a court order in their favour receives their lawful minimum entitlements if the employer disappears or refuses to pay. Under the scheme, DEWR would pay out small claims judgments and costs awards that remain unpaid after a certain period (for example, 60 days). Where appropriate, DEWR could refer the matter to FWO or legal service providers to recover the debt from the employer and pursue further enforcement action. To encourage employer rectification of the debt and reduce the number of claims under the scheme, DEWR could initially notify the employer that, if the judgment remains unpaid, the matter will be referred to the Department of Home Affairs, resulting in a possible ban on the employer hiring temporary visa holders (under the Prohibited Employer List effective from 1 July 2024).¹¹ Given the small number of final orders made in the small claims jurisdiction, the cost of such a scheme would not be significant. It could be funded by government or through an employer levy. (Recommendation 8)
8. Implement the Migrant Workers' Taskforce recommendation to **extend the Fair Entitlements Guarantee to temporary migrants** whose employer liquidates before a judgment debt is paid, as well as the larger group of migrant workers whose employer becomes insolvent outside the small claims context. The FEG should be available to all workers regardless of (undocumented) immigration status. The Government should also expand the definition of 'insolvency event' to include deregistration of a business. (Recommendation 9)

Conclusion

Reforms are urgently needed to ensure that basic rights and entitlements established under the *FW Act* are not illusory. To give meaning to the Act, the right to be paid correctly must be practically enforceable by all workers, especially migrants and other vulnerable workers who most frequently experience deliberate wage theft by employers who know they will not be held to account.

In 2024, the Government will introduce new migration regulations that will enable migrant workers to safely pursue wage claims without jeopardising their visa. This has genuine potential to disrupt systemic exploitation of migrant workers in Australia. However, in order to realise the potential of these reforms, the Government must use its current review of the small claims jurisdiction to ensure that those migrant workers who are willing to enforce their rights have an accessible process through which to do so. This report provides a roadmap for the reforms needed to achieve this critical objective.

¹¹ *Migration Amendment (Strengthening Employer Compliance) Act 2023 (Cth) Part 2.*

PART I. INTRODUCTION

Widespread underpayment of migrant workers (and local workers) is now well-documented.¹² Our previous survey of over 4,000 temporary visa holders found at least a third earned less than \$12 an hour.¹³ Yet, our survey found, nine out of ten of these migrant workers who knew they were underpaid took no action to address the underpayment.¹⁴ Three percent of those who were underpaid had contacted the Fair Work Ombudsman (FWO).¹⁵ A single worker had made a court claim and indicated that they recovered none of their wages.¹⁶ Of the survey participants who did not seek to recover their unpaid wages, a third reported that they thought that the amount of work involved is simply too much to justify taking any action.¹⁷ A second national survey we conducted three years later revealed that the prevalence and severity of exploitation among migrant workers in Australia had not diminished in the intervening period.¹⁸

There are a range of structural barriers that prevent migrant workers from enforcing their rights in a court or through other avenues. These include visa settings that cause workers to fear loss of the ability to stay in Australia if they report exploitation,¹⁹ an insufficiently resourced regulator and fear of job loss if a worker complains.²⁰

Fundamentally, for migrant workers in Australia the risks and costs of taking action to recover unpaid wages can substantially outweigh the slight prospect of success. The existing legal processes for wage recovery are often complex and inaccessible, particularly for migrant workers who are not represented. This incentivises employers to underpay their workers and disengage from dispute resolution, with the expectation that workers will struggle to hold them to account.

To genuinely break the cycle of business impunity for exploitation, reforms must shift the burden of ensuring compliance with labour law from the most vulnerable party (employees) to where it fairly lies: business and government. The Federal Government has indicated that new visa protections will be established in 2024 to ensure that migrants who are exploited in the workplace can pursue a legal claim without jeopardising their visa.²¹ Reforms to the small claims process are now critical to ensure that migrant workers who access these new visa protections can effectively recover their unpaid wages.

12 Laurie Berg and Bassina Farbenblum, [Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey](#) (Report, 2017) (*Wage Theft in Australia*); Bassina Farbenblum and Laurie Berg, [International Students and Wage Theft in Australia](#) (Report, 2020); Grattan Institute (n 4).

13 Berg and Farbenblum, *Wage Theft in Australia* (n 12) 5.

14 Farbenblum and Berg, *Wage Theft in Silence* (n 7) 10.

15 Ibid 6.

16 Ibid 30.

17 Ibid 7.

18 Farbenblum and Berg, *International Students and Wage Theft in Australia* (n 12).

19 For this reason, we have proposed visa protections and a short-term visa for migrant workers who experience exploitation at work, which has been accepted by the Government: see Laurie Berg, Bassina Farbenblum and Sanmati Verma, Migrant Justice Institute and Human Rights Law Centre, [Breaking the Silence: A Proposal for Whistleblower Protections to Enable Migrant Workers to Address Exploitation](#) (2023).

20 Farbenblum and Berg, *Wage Theft in Silence* (n 7); Farbenblum and Berg, *International Students and Wage Theft in Australia* (n 12).

21 The Hon Andrew Giles MP, [‘Tackling Temporary Worker Exploitation’](#) (Speech, 5 June 2023).

The small claims jurisdiction is not working as intended for unrepresented migrant workers

An object of the *Fair Work Act 2009* (Cth) (*FW Act*) is ‘ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions’ (emphasis added).²² When a worker is not paid their wages and entitlements, the primary mechanism available to hold their employer to account is to file a claim for up to \$100,000 in the “small claims” jurisdiction of the Federal Circuit and Family Court of Australia (FCFCOA). This report focuses on this federal process, although workers may also pursue small claims for unpaid wages in state and territory magistrates courts.²³ The FCFCOA jurisdiction is intended to be reasonably informal to ‘ensure that claims for a relatively small amount of money are dealt with efficiently and expeditiously by the courts... [and] not subject to onerous procedural requirements.’²⁴

However, few workers recover their wages through this forum. In 2022-23, 137 small claims applications were filed in the FCFCOA.²⁵ It is not known how many of these applicants went on to obtain a favourable judgment, or then successfully recover any or all wages from their employer. This number should be seen against the Grattan Institute’s estimate that between 490,000 and 1.26 million workers are paid below the national minimum wage in a year (based on 2018 data).²⁶ This figure does not include the many additional workers who were paid above the basic minimum wage but less than their full entitlements, who would have substantial claims for unpaid wages. This suggests that hundreds of thousands of vulnerable workers who experience wage theft in Australia are left without recourse.

It is critical to ensure that the FCFCOA process is accessible – it is not clear that wages claims are being systematically resolved via other legal forums. It is not known how many wage claims are brought and resolved in most state and territory magistrates courts.²⁷ Although the Queensland Magistrates Court reports that, in 2021-22, 14 Fair Work small claims applications were filed in that jurisdiction,²⁸ disaggregated data on Fair Work small claims applications does not appear to be readily available from other jurisdictions.²⁹ Nor is there disaggregated data on the Fair Work wages matters brought in open court in the Federal Court of Australia (FCA), FCFCOA or an eligible state or territory court.³⁰ These jurisdictions retain the full formality of court procedure and are therefore even more difficult for applicants to navigate.

²² *FW Act* s 3(b) (Object of this Act).

²³ *Ibid* s 548(1)(a).

²⁴ Explanatory Memorandum, Fair Work Bill 2009 (Cth) [2167]-[2168].

²⁵ FCFCOA, *2022-23 Annual Report* (n 3) 91.

²⁶ Grattan Institute (n 4) 6.

²⁷ *FW Act* s 548; s 12 definition of ‘magistrates court’.

²⁸ President of the Industrial Court of Queensland, *2021-22 Annual Report* (Report, 2022) 20.

²⁹ For example, in the South Australia Employment Tribunal in 2021-22, 322 ‘Commonwealth monetary claims’ were resolved, but this may encompass wages and entitlements claims under the *FW Act* generally and not limited to small claims under \$100,000: South Australia Employment Tribunal, *Annual Report 2021-22* (Report, 2022) 12. In other jurisdictions, data on Fair Work small claims appeared to be aggregated with and so indiscernible from other types of civil small claims.

³⁰ In the FCA, ‘Fair Work claims’ are counted generally: see, eg, FCA, *Annual Report 2022-23* (Report, 2023) 24.

Nor is wage recovery for migrant workers comprehensively provided by the FWO.³¹ The national labour regulator can assist individuals with the recovery of wages, including through negotiation with employers or issuing compliance notices to employers. But the FWO does not systematically deliver remedies to migrant workers: the FWO recovered \$151,992 for migrant workers through its compliance activities in 2022-23, and \$824,443 in 2020-21.³² The FWO no longer provides a dedicated small claims service to vulnerable workers, and there is no other government agency that performs this function.³³

Objectives of this report

The small claims jurisdiction is not routinely delivering wage recovery for large numbers of migrant workers. This is a result of the legislative, policy and funding arrangements that currently underpin that jurisdiction. This report sets out the systemic obstacles that a migrant worker encounters at each stage of the process (along with other vulnerable workers who lack legal representation). It provides a roadmap for reform, including pragmatic and evidence-based reform recommendations designed to address these problems for migrant and non-migrant workers alike.

Our recommendations build upon work that is already underway to improve access to justice in the small claims process. Alongside the increase of the cap on small claims from \$20,000 to \$100,000 from 1 July 2023,³⁴ the FCFCOA introduced a registrar-led National Small Claims List to support national consistency and efficiency of the expanded jurisdiction, in the context of broader improvements to the accessibility of the court to vulnerable applicants.³⁵ Our previous survey found that 45% of underpaid participants would be open to recovering unpaid wages in the future,³⁶ suggesting a further investment of resources in improving the small claims system and increasing the chance of a timely and favourable outcome for workers would incentivise migrants to come forward to enforce their rights. More efficient resolution of claims in the FCFCOA would also reduce operating costs of the Court for government in the long term.

31 Farbenblum and Berg, *Wage Theft in Silence* (n 7) 6. As a result of visa fears, low rights awareness and language and cultural barriers, migrant workers rarely contact mainstream agencies for help: Catherine Hemingway, WESTjustice, [Not Just Work: Ending the Exploitation of Refugees and Migrant Workers](#) (Report, 2016) 11; Bassina Farbenblum and Laurie Berg, 'Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman' (2017) 23(3) *Australian Journal of Human Rights* 310, 318-325. Service providers have reported concerns that the FWO does not provide adequate assistance to vulnerable workers: Gabrielle Marchetti et al, JobWatch, South-East Monash Legal Service, and Westjustice, [Submission](#) to the Department of Home Affairs, *Exposure Draft Migration Amendment (Protecting Migrant Workers Bill) 2021* (August 2021); Liz Morgan, Tarni Perkal and Catherine Hemingway, WESTjustice, Springvale Monash Legal Service and JobWatch, [Submission No 119](#) to *Select Committee on Temporary Migration* (30 July 2020) 59-61.

32 FWO, [Annual Report 2022-23](#) (Report, 2023) 8, 31; FWO, [Annual Report 2020-21](#) (Report, 2021) 9. These figures may under-represent the amounts that are recovered for migrant workers, where, for instance, a worker is assisted by the FWO without a record of their visa status (including cases where employers self-report non-compliance and redress in relation to large volumes of employees). The FWO does not require workers to disclose their visa status when providing assistance.

33 The FWO previously had a dedicated small claims service which assisted a small number of vulnerable workers to complete small claims applications. However, the FWO has recently shifted its enforcement focus away from this type of individual assistance and increasingly focused on using compliance notices as its primary enforcement tool: see FWO, [Annual Report 2021-22](#) (Report, 2022) 3. We note that the recent KPMG review of the FWO states that its Legal Group supports small claims matters and is exploring small claims as an alternative pathway for certain compliance notice matters: KPMG, [Review of the Office of the Fair Work Ombudsman](#) (Final Report, December 2023) 42, 44.

34 *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) Schedule 1, item 651.

35 The Government allocated \$7.7 million to the FCFCOA over the forward estimates in its October 2022 Budget for an additional judge, four registrars and support staff to support the expansion of the small claims jurisdiction: Australian Government, [Budget Paper No 2](#) (Budget, October 2022-23) 103; FCFCOA, ['2022-23 Commonwealth Budget provides \\$71 million to the Federal Circuit and Family Court of Australia for World-Leading Innovations'](#) (Media Release, 26 October 2022).

36 Farbenblum and Berg, *Wage Theft in Silence* (n 7) 7.

However, there is a necessary and inherent limit to the informality that the FCFCOA can provide: as a court it must provide procedural fairness and impartiality to parties, and the Australian Constitution imposes important limits as to the exercise of judicial power by federal courts. In light of this, this report considers the benefits of an additional, more informal pathway for wage claims.

The Government is currently undertaking a review of the small claims process, implementing Recommendation 12 of the Migrant Workers' Taskforce (MWT).³⁷ We hope the Government's review of the small claims process triggers the same bold reforms that are being contemplated in the migration space and which are necessary to create a wage claim system that is genuinely accessible and efficiently delivers fair outcomes.

Scope of this report

This report is confined to underpayment claims made by employees (ie not independent contractors) in the FCFCOA, up to \$100,000. It does not address processes for the resolution of underpayment claims over \$100,000 (for example, bringing claims in open court in the FCFCOA or the FCA) or wage claims made in state or territory magistrates courts. This study is limited to the FCFCOA jurisdiction because this is the federal mechanism for wage recovery across Australia and this is the focus of the DEWR review.³⁸

Structure of this report

This report tracks the sequence of barriers that migrant workers face when using the small claims process. Following each barrier, we set out recommendations for reforms to overcome these barriers – both within and alongside the current court-based system.

- **Part II** provides an overview of the operation of the small claims jurisdiction and the limited legal assistance and representation available to these applicants.
- **Part III** documents the barriers that migrant workers face through the course of the small claims process. Mirroring the worker's journey through the process, these obstacles include: filing a small claim application with the court; once in court, obtaining a favourable judgment; and, once a favourable judgment has been made, enforcing court orders and getting paid. This Part also identifies the challenges to making a claim for migrant workers once they have returned to their home country.
- **Part IV** sets out the case for an additional pathway for wage recovery, by giving the Fair Work Commission (FWC) jurisdiction to resolve wage claims (alongside the existing small claims process in court). We set out why the FWC may be an accessible additional forum for both employees and employers and propose specific ways to capitalise on the strengths of the FWC's jurisdiction for the resolution of wage claims.
- In **Part V** we address the need for further resourcing for legal assistance and other legal support.

Methodology

Our findings and recommendations are drawn from:

- **Consultation** with community legal centres (CLCs), unions, legal practitioners, government agencies and academics, to understand the operation of the small claims process in practice, and to assess the viability of our findings and recommendations. We have consulted with:

³⁷ DEWR (n 6). DEWR was allocated \$0.2 million in 2022-23 and 2023-24.

³⁸ Ibid.

- Professor Andrew Stewart
- ANU Students' Association Legal Service
- Australian Council of Trade Unions
- Department of Employment and Workplace Relations
- Fair Work Commission
- Fair Work Ombudsman
- Federal Circuit and Family Court of Australia
- JobWatch
- Justice Connect
- Maurice Blackburn
- Migrant Workers Centre
- Redfern Legal Centre – Employment Rights Legal Service
- South-East Monash Legal Service
- Associate Professor Tess Hardy
- United Workers Union
- WEstjustice, and
- Youth Law Australia.

While we have consulted with a range of stakeholders, the views in this report (unless otherwise indicated) are our own.

- **Data on matters and case management** provided to us by the FCFCOA and the FWC.
- **First-hand observations of small claims matters** filed in the Sydney, Melbourne, Adelaide, and Darwin registries of the FCFCOA. We observed a total of 25 hearings across 23 matters in the small claims list between May and September 2023, the majority of which were in the Tuesday morning list.³⁹ These hearings were open to the public and conducted via Microsoft Teams meetings.
- **Pro bono research conducted by Maddocks** on equal access costs models that exist in Australia and other jurisdictions; the scale of costs for matters in the FCFCOA and FWC, and practical estimates of the legal costs of matters in both forums; and existing models for the enforcement of unpaid court judgments in Australia and internationally.
- **Data from our surveys of over 15,000 migrant workers between 2016 and 2020** which reveal the prevalence of underpayment of wages among migrant workers, the level of migrant workers' understanding of their entitlements, and their decision-making in relation to taking action to address underpayment.⁴⁰

³⁹ We observed one discrete hearing in 20 matters; in two matters, we observed the first and subsequent (being final) hearing; and in one matter, the claims of two workers were against the same employer and were heard together.

⁴⁰ Berg and Farbenblum, *Wage Theft in Australia* (n 7); Farbenblum and Berg, *Wage Theft in Silence* (n 7); Farbenblum and Berg, *International Students and Wage Theft in Australia* (n 12), Laurie Berg and Bassina Farbenblum, [As If We Weren't Humans: The Abandonment of Temporary Migrants in Australia During COVID-19](#) (Report, 2020).

Observations of small claims hearings

A registrar presided over all the hearings that we observed. These hearings involved cases at various stages, including first court dates focused on case management, subsequent hearings that continued to focus on case management, and hearings where matters were given a final determination. In two cases we observed the full progression of the matter i.e. the first court date as well as the second and final hearing a few weeks later.

Approximately a third of the matters that we observed (8 out of 23) involved migrant workers or workers who spoke English as an Additional Language (EAL). Two of these workers were represented by a CLC; the other six were self-represented. In total, in 16 of the 23 matters that we observed, the worker was self-represented. In three matters, the worker was represented by a union; in two matters, the worker was represented by a CLC (as above, both were migrant workers or workers who spoke EAL); and in one matter, the worker was represented by a private lawyer. Similar proportions of employers had legal representation: respondents were represented by a private lawyer in almost a third of the matters that we observed (7 out of 23).

Key limitations

There are a number of limitations to this study.

The majority of the hearings that we observed were in May to August 2023, with two in September 2023. All of these hearings were before registrars in cases filed in the Sydney, Melbourne, Darwin and Adelaide registries. The national roll-out of the registrar-run small claims list occurred from August 2023, with associated changes to pre-hearing case management (discussed below). Court data suggests that this new approach has improved resolution times nationally.

For most of the small claims matters that we observed (21 out of 23), we observed one discrete hearing rather than observing a matter in its entirety. As a result, we did not comprehensively observe the progression of matters across multiple hearings. We did not observe mediations conducted by the FCFCOA as they are confidential.

In our observations, it was often unclear whether a worker was a temporary visa holder, a recently arrived migrant worker, or indeed a migrant at all. It was clear, however, when a worker had trouble understanding proceedings and required an interpreter. Therefore, we have used the umbrella term 'migrant worker or worker who spoke EAL' to describe the common challenges faced by these workers in understanding and navigating court processes.

We did not observe conciliations or arbitrations in the FWC which are confidential in nature, although we consulted with relevant representatives from the FWC and legal practitioners experienced in these processes.

For this report, we have not conducted interviews, focus groups or consultations with migrant workers directly. Instead, we have consulted widely with organisations working directly with migrant worker communities, and relied on our survey data from over 15,000 migrant workers and earlier focus groups with migrant workers.

Abbreviations table

Abbreviation	Term in full
ADR	Alternative dispute resolution
ASIC	Australian Securities and Investment Commission
CALD	Culturally and linguistically diverse
CLC	Community legal centre
DEWR	Department of Employment and Workplace Relations
EAL	English as an Additional Language
FCA	Federal Court of Australia
FCFCOA	Federal Circuit and Family Court of Australia
<i>FCFCOA General Federal Law Rules</i>	<i>Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021 (Cth)</i>
FEG	Fair Entitlements Guarantee
<i>FW Act</i>	<i>Fair Work Act 2009 (Cth)</i>
<i>FW Regulations</i>	<i>Fair Work Regulations 2009 (Cth)</i>
FWC	Fair Work Commission
<i>FWC Rules</i>	<i>Fair Work Commission Rules 2024 (Cth)</i>
FWO	Fair Work Ombudsman
MWC	Migrant workers centre
MWT	Migrant Workers' Taskforce
National Standards	Recommended National Standards for Working With Interpreters in Courts and Tribunals
SAJER Bill	Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth)
Underpayments Inquiry	Inquiry into Unlawful Underpayment of Employees' Remuneration

PART II: OVERVIEW OF THE SMALL CLAIMS JURISDICTION: UNDERUTILISED AND INACCESSIBLE FOR UNREPRESENTED MIGRANT WORKERS

When introduced, the small claims jurisdiction was intended to ‘ensure that claims for a relatively small amount of money are dealt with efficiently and expeditiously by the courts... [and] not subject to onerous procedural requirements.’⁴¹ However, it does not appear to be working as intended for vulnerable and unrepresented workers.

Purpose of the small claims jurisdiction

The *FW Act* establishes two ways in which a worker may address small claims involving a range of contraventions, including unpaid wages and entitlements: the worker can choose to make a claim in the small claims procedure of a state or territory magistrates court, or in the Fair Work Division of the FCFCOA.⁴²

Several unique features of the small claims proceedings in the FCFCOA are designed to provide accessibility for unrepresented litigants. The court is not bound by rules of evidence or procedure and may act in an informal manner without regard to legal forms and technicalities.⁴³ So long as parties are given sufficient notice, the court can amend the papers commencing a proceeding (for example, by correcting the name of a respondent).⁴⁴ To aid swift decision-making, the court cannot order pecuniary penalties, or award more than \$100,000 (\$20,000 prior to 1 July 2023).⁴⁵

The FCFCOA ‘aims to minimise the number of events needed to dispose of such applications’ and ‘aims to finalise these matters on the first hearing date.’⁴⁶ Since August 2023, most cases are heard online on a weekly National Small Claims List conducted by registrars. In some weeks, a second directions list is conducted for more complex claims. While the registrar-run approach had been in place in some registries (eg in Victoria) for some time, it was adopted nationally in August 2023.⁴⁷ The registrar-led model is intended to be a ‘one-stop shop’ where the majority of small claims can be case managed, mediated, heard or determined by registrars, depending on the needs of each case. The National Small Claims List is primarily conducted electronically which has a number of benefits, including reducing costs and other barriers to parties’ attendance at court (particularly for those who reside far from capital city registries).

Court measures to improve access to justice

Alongside the expansion of the small claims jurisdiction to claims up to \$100,000, the court has established (and continues to refine) its national registrar-led approach, along with modifications to pre-hearing triage and case management processes, and to the information provided to parties in advance of court events.

Across its Fair Work and other jurisdictions, the FCFCOA has recently taken measures to afford greater

41 Explanatory Memorandum, Fair Work Bill 2009 (Cth) [2167]-[2168].

42 *FW Act* s 548. Under *FW Act* s 548(1B), certain disputes relating to casual employment can also be heard using the small claims procedure.

43 *Ibid* s 548(3).

44 *Ibid* s 548(4).

45 *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) Schedule 1, item 651.

46 FCFCOA, *2022-23 Annual Report* (n 3) 91.

47 *Ibid*.

accessibility to vulnerable communities, which, while not specifically targeted at small claims, may nonetheless have benefits for the small claims jurisdiction. These measures include:

- Appointment of a Director for Access, Equity and Inclusion to drive initiatives to make the Court more accessible and responsive to community needs. This includes consultation with community sector agencies representing migrant and refugee communities;⁴⁸
- A review of all court forms and website content to ensure they are accessible and easy to use, as part of its review of the *FCFCOA General Federal Law Rules* and Practice Directions;⁴⁹
- Establishment of a cross-agency working group including judicial officers and other court staff to identify areas where the Court can be made safer and more accessible for priority population groups. The group's mandate includes improvements to forms, protocols and communications to improve the courts' accessibility to those with limited English proficiency; and to ensure court users are linked in with community legal, migrant and refugee and other relevant services to assist them to fully engage with the justice process;
- Further education and training programs across the Court to equip judges, registrars and staff with the skills to effectively engage with people from migrant and refugee backgrounds in a culturally safe and trauma-informed way – including through the effective use of interpreters; and
- Publication of a Pronunciation of Names & Forms of Address Information Notice.⁵⁰

The Court has enhanced the support provided to vulnerable litigants in other priority jurisdictions. For instance, the court has introduced a pro bono legal assistance scheme for unrepresented litigants in its migration law jurisdiction.⁵¹ In its family law jurisdiction, the Court has introduced referral pathways to legal and social support services, and is assisted by Indigenous Family Liaison Officers who support Aboriginal and/or Torres Strait Islander litigants in engaging with the Court.⁵²

Our findings and recommendations seek to build upon these important measures.

Court data on current operation of the small claims jurisdiction

Most parties in the small claims jurisdiction are unrepresented: in 2022-23, 80% of applicants and 77% of respondents were unrepresented.⁵³

123 small claims were filed in the court between July 2023 and January 2024. In 2022-23, 137 small claims applications were filed in the FCFCOA (with 135 finalised and 101 pending).⁵⁴ 142 small claims applications

48 FCFCOA, '[One of Australia's Leading Family Violence Experts Appointed to the FCFCOA as Director – Family Violence and Indigenous Programs](#)' (Media Release, 28 July 2023).

49 FCFCOA, *2022-23 Annual Report* (n 3) 3.

50 FCFCOA, '[FCFCOA Information Notice: Pronunciation of Names and Forms of Address](#)'.

51 FCFCOA, *2022-23 Annual Report* (n 3) 96.

52 Ibid 25.

53 Data provided to authors by the FCFCOA by email (11 October 2023). This proportion is broadly reflected in 2021-22, where 27.7% of applicants were represented, and 30.4% of respondents were represented.

54 FCFCOA, *2022-23 Annual Report* (n 3) 91.

were filed in 2021-22, and 342 in 2020-2021.⁵⁵ The FCFCOA has observed a decline in small claims filings since 2021. There are a number of external factors that may contribute to this decline, such as the impact of COVID-19 and current economic and market conditions (including a competitive wage environment), noting a similar decline in filings in in this period in the broader Fair Work jurisdiction in the FCFCOA.

These numbers are small, given the evidence of systemic underpayment of tens or likely hundreds of thousands of migrant workers in Australia, and widespread underpayment in the broader community. This difference is particularly striking when set against the number of unfair dismissal claims lodged in the FWC in recent years (11,012 in 2022-23, and 13,096 in 2021-22).⁵⁶

According to the FCFCOA, in 2022-23 the median time for a small claims matter to be finalised was 2.8 months. Between 1 October 2023 and 1 February 2024, the average time from filing to finalisation fell to 2.1 months. We understand from the FCFCOA that, in the National Small Claims List, matters are generally triaged within 24 hours⁵⁷ and given a first court date 6 weeks after the application is filed (in part to provide the respondent with enough time to file a response). This would suggest that matters in this period are on average being resolved about 2.4 weeks after the first court date. We understand from the Court that if a small claim is assessed as more complex it would often be listed for a directions hearing earlier, approximately 3 weeks after filing. This is a significant improvement on previous years – in 2021-22, the median time in which a matter was finalised was 8.6 months.⁵⁸ This reduction may be due to the introduction of the national registrar-run list and associated case management improvements.

In 2022-23, 40% of small claims matters resolved at an administrative listing (that is, after the first court date, but before requiring substantive determination at a hearing or by judgment by a registrar eg where a matter is settled), while 50% resolved at a hearing or by judgment.⁵⁹ In 2021-22, 32% of small claims matters resolved at an administrative listing, while 60% of matters resolved at a hearing or by judgment.⁶⁰

This broadly aligns with observations made by the FCFCOA in a public seminar in September 2023, which were based on the registrar-run small claims list in Victoria which had been in place for some time. The FCFCOA indicated that ‘anecdotally, of those that proceed to the FCFCOA as a small claim, 50% proceed to first and final determination by a registrar within 6 weeks. That number includes defaults. And 80% are determined by a registrar within 6-12 weeks.’⁶¹ Representatives of the Court explained that a matter is considered to be resolved at a ‘first and final determination’ where it resolved after a single court hearing (for example, with consent minutes provided after the first hearing with no subsequent appearance from the parties).⁶²

It is important to consider that these timeframes for court proceedings would typically only come into play after a worker has already spent time identifying and attempting to resolve the underpayment. Generally, a worker will lodge an underpayment claim in court as a last resort. Before lodging, they may negotiate directly

⁵⁵ Ibid 97.

⁵⁶ FWC, [Annual Report 2022-23: Access to Justice](#) (Report, 2023) 21; FWC, [Annual Report 2021-22: Access to Justice](#) (Report, 2022) 22.

⁵⁷ FCFCOA, [‘Employment and Industrial Law Seminar’](#) (YouTube, 13 September 2023).

⁵⁸ Data provided to authors by the FCFCOA by email (11 October 2023). In 2018-19, each small claims case had been open before the court for an average of 5.6 months, and the average wait time between filing and the first hearing was 2.2 months: Senate Select Committee on Temporary Migration, Parliament of Australia, [Final Report](#) (2021) 51.

⁵⁹ Data provided to authors by the FCFCOA by email (11 October 2023).

⁶⁰ Ibid.

⁶¹ FCFCOA, [Employment and Industrial Law Seminar](#) (n 57). The FCFCOA in this seminar also reported that ‘in the past, less than 30% of cases have progressed to mediation, and fewer than 5% have been referred to a judge.’

⁶² Email from the FCFCOA (11 October 2023).

with their employer, seek legal assistance, make a request for employee records pursuant to section 535 of the *FW Act* and prepare a set of detailed calculations to determine the claim. Even where underpayment cases are heard and resolved within three months, workers could wait well over six months from the date of underpayment to receive a judgment for their lawful minimum entitlements. If an employer fails to comply with a court order, the wait can be much longer, or indefinite. This makes it especially important that any legal process, once commenced, reaches resolution as quickly as possible, and provides swift redress if a party fails to comply with court orders.

The small claims jurisdiction is currently not accessible to unrepresented migrant workers

Our observations of 25 small claims hearings at the FCFCOA in May to September 2023 reiterated the consensus view of service providers and experts over several years: the small claims process can still be highly complex and technical and, without legal or union assistance, largely inaccessible for many migrant workers.⁶³

Registrars generally facilitated access to justice by: speaking slowly and clearly; suggesting unrepresented applicants seek free legal assistance; explaining technical concepts; and explaining their reasoning and orders. At times, registrars made detailed and prescriptive orders to assist cases to progress – for example, specifying what documents to serve on the respondent and where to serve them, or specifying what further supporting information to include in an affidavit. As a result, if an unrepresented party or party who spoke EAL did not understand what was required of them on the day, they could seek further advice or clarification regarding next steps by showing this written procedural information to a lawyer or friend.

We also observed registrars making it clear to unrepresented applicants that the Court would accommodate them if they remained unrepresented, and to represented respondents that the Court expected that the represented party take the lead on any negotiations outside of court.

However, despite registrars' best efforts, we observed that technical legal concepts and complex legal processes appeared confusing for many unrepresented applicants, and even some respondents. Few unrepresented applicants that we observed managed to prepare their application in a complete way that allowed the matter to be determined by the registrar on the first court date. In several cases, the registrar adjourned the matter and made orders requiring parties to perform additional actions or submit revised documents. This stalled the progress of the matter as it could not be determined until a further hearing, some weeks in the future.

We observed applicants experience difficulty with:

- Identifying the employing entity;
- Setting out calculations of the underpayment amount;
- Completing documents in accordance with procedural requirements, such as annexing evidence to affidavits;

⁶³ Liz Morgan et al, WEstjustice, Migrant Employment Legal Service and Redfern Legal Centre, [Submission No 47](#) to Senate Economics References Committee, *Inquiry Into Unlawful Underpayment of Employees' Remuneration* (6 March 2020) 40 (Underpayments Inquiry); WEstjustice, Springvale Monash Legal Service and JobWatch, Submission to Select Committee on Temporary Migration (n 31); Hemingway (n 31); JobWatch, South-East Monash Legal Service, and WEstjustice, Submission on Exposure Draft (n 31) 23-4.

- Filing documents correctly with the court and serving documents correctly on the other side; and
- Understanding court processes and technical legal concepts broadly (for example, what an oath or affirmation is, what a mediation is, the difference between a legal submission and supporting evidence).

This was especially the case for self-represented migrant workers or workers who spoke EAL, but it was also the case for self-represented litigants who were not from a migrant background.

In light of these difficulties, it is unsurprising that the FCFCOA's small claims jurisdiction has been used by fewer than 200 individuals across the entire country each year.

Legal advice, assistance and representation is essential for most migrant workers in small claims matters but highly limited

The small claims jurisdiction was designed to enable workers to represent themselves and (as set out above) most workers using the process are self-represented. However, in the cases we observed, applicants with legal representation generally fared far better. Representatives' ability to understand and navigate the court's requirements resulted in stronger advocacy and matters being resolved more efficiently.

The following case study recounts a matter that we observed. It demonstrates how the small claims process can be inaccessible for an unrepresented worker due to language barriers, challenging with identifying the employing entity, and the difficulties of effecting service on the employer. It demonstrates that, in reality, without assistance from an employment lawyer or industrial officer in a union, the vast majority of vulnerable workers cannot bring or effectively progress a claim in court.

Case study: Challenges encountered by unrepresented workers in the small claims process

The applicant filed an application in the FCFCOA against an electrical service company for the payment of two days of work in late April 2023. The first court date was in late May 2023.

We did not have the benefit of understanding whether the applicant had asked for an interpreter in his application or throughout the proceedings. Though it was clear that English was not his first language, we did not observe the court raising the availability of using an interpreter with him.

The applicant had not clearly identified the employing entity or filed or served any supporting material for his claim. The Registrar questioned the applicant in an effort to ascertain the employing entity (by asking if he was employed by a company or an individual directly). The Registrar also instructed the applicant to file by affidavit any material which he sought to rely upon (including calculations of the alleged underpayment), file the affidavit through the court's online portal, receive a sealed copy, and serve it on the employer. Although the Registrar spoke slowly and clearly, it was not clear that the applicant understood these instructions.

The Registrar suggested that a community legal centre may be of assistance. Otherwise, the Registrar suggested to the applicant, 'you need to do your best to put it as clearly as possible.' The applicant responded that 'Justice Connect will help me.'

At the second court date in mid-July 2023, the applicant reported that he had been assisted by a community legal centre to set out his calculations. He had emailed supporting documents to the court (rather than filing them via the online portal) and had not served the relevant affidavit on the respondent. No response had been filed by the respondent. At the hearing, the Registrar adjourned the matter for a few hours so that the court could share the documents with the respondent and the respondent could consider them.

On return, the parties agreed to make oral submissions. When asked whether he wanted to make an oath or affirmation, the applicant answered 'I don't understand.' The Registrar explained that an oath had a religious connotation and that an affirmation was a civil statement. There was no explanation of what the applicant was swearing to, or the potentially serious consequences of not telling the truth. The applicant also struggled to repeat the affirmation and it was not clear that he understood the words that he was being asked to say.

The community legal centre's assistance to the applicant with setting out calculations proved critical, as the Registrar ultimately accepted the calculation of the underpayment and found in the applicant's favour.

On the same day, we observed another matter on its second court date. But this applicant was represented by a lawyer and had identified the employing entity and filed and served the details of the claim (including calculations) on the respondent. The Registrar found in the applicant's favour in a far shorter hearing.

Service providers that we interviewed emphasised the critical role of legal assistance for small claims applicants.⁶⁴ The FWO does not systematically provide individual assistance in small claims matters.⁶⁵ While unions provide assistance to their members, many temporary visa holders and other vulnerable workers (such as young people) are not a member of a union.⁶⁶ To enable these workers to access justice and recover unpaid wages, free legal assistance from community legal centres (CLCs), migrant workers centres (MWCs), working women's centres, university student legal services, and Legal Aid Commissions is essential. Funding for these services is essential.⁶⁷

In **Part III** we set out in detail the barriers to making a small claim in court, which demonstrate that access to legal assistance is critical to ensuring access to justice for migrant and other vulnerable applicants. In **Part V**, we set out our proposed model for meeting this crucial need for legal assistance.

The inability to recover legal costs in successful claims discourages workers and legal services from pursuing cases

Legal representation of migrant workers in wage claims is limited in part because the FCFCOA's Fair Work Division is a 'no-costs jurisdiction' in which each party bears their own legal costs (except in limited circumstances).⁶⁸ This means that there is no way for legal assistance and community legal service providers to recoup their costs when they assist workers to successfully recover their wages. There is no financial incentive for private lawyers to support this essential enforcement work where vulnerable workers cannot pay their full fees.

Furthermore, even if a worker succeeds in their claim, the costs that they incur to engage a private lawyer will likely exceed the court's award of compensation for the wages they are owed. This is especially the case in the small claims jurisdiction, where there is no ability to seek orders for penalties to be paid to the applicant,⁶⁹ and legal fees are substantial because of the time required to calculate and pursue wage claims.

⁶⁴ Consultation with Sharmilla Bargon, Senior Solicitor, Employment Law Practice, Redfern Legal Centre (26 October 2023); consultation with Ashleigh Newnham, Director of Advocacy and Development, South-East Monash Legal Service (16 May 2023).

⁶⁵ See footnote 33.

⁶⁶ The Grattan Institute found that migrant workers are less likely to be members of a union: Grattan Institute (n 4) 66-67. While our 2016 survey of migrant workers found only 4% of participants were trade union members, it also found that migrant workers who received help from a union had the best outcomes, with 30% recovering all, and 40% recovering some, of their unpaid wages: Farbenblum and Berg, *Wage Theft in Silence* (n 7) 30. The ILO has also recognised the important role that unions play in enforcing migrant worker claims for wage theft (particularly for those in insecure and informal forms of work): Katerine Landuyt, Sophia Kagan and Eliza Marks, ILO, [Wage Protection for Migrant Workers](#) (Guidance Note, 2023) 18.

⁶⁷ There is insufficient funding for CLC services: see, eg, Federation of Community Legal Centres Victoria, [Submission to the 2023 Victorian Budget](#) (February 2023) 3; Community Legal Centres Australia, '[What the New Federal Budget Means for Community Legal Centres](#)'; WEstjustice, Springvale Monash Legal Service and JobWatch, Submission to Select Committee on Temporary Migration (n 31) 22-25; JobWatch, South-East Monash Legal Service, and WEstjustice, Submission on Exposure Draft (n 31); Joanna Howe, Laurie Berg and Bassina Farbenblum, 'Unfair Dismissal Law and Temporary Migrant Labour in Australia' (2018) 46 *Federal Law Review* 19, 28. s

⁶⁸ *FW Act* s 570.

⁶⁹ As otherwise allowed for civil contraventions of the *FW Act* under s 546(3).

We welcome the amendment introduced by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) which permits a successful applicant to apply to recoup their filing fee from the respondent. As set out in the Explanatory Memorandum to that Act, this seeks to 'ensure [applicants] are not initially deterred from bringing small claims proceedings due to cost, and they keep more of any compensation that the court awards to them.'⁷⁰ However, as discussed in **Part V**, this measure only goes some way towards achieving the stated policy objective of removing cost-based deterrents to wages litigation, and must extend to legal costs incurred by a worker.

⁷⁰ Explanatory Memorandum, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth) [115].

PART III: REFORMS TO THE SMALL CLAIMS JURISDICTION

This Part outlines 10 barriers to justice within the small claims system and recommendations to address these barriers. Our recommendations set out a range of legislative, policy and funding reforms – in summary:

- the Government should amend legislation to increase awareness of rights so workers have the information they need to make claims; and the Government and the FCFCOA should introduce relaxed procedural rules to make it easier to progress a small claim in court;
- the Government should provide appropriate resourcing to the FCFCOA to further reduce complexity of the small claims process, within the Court's necessary impartiality to parties;
- the FCFCOA (with appropriate resourcing from the Government) should consult with migrant and vulnerable communities in its continuing work on improving the accessibility of the small claims process;
- the Government should legislate and resource a safety net for workers to get paid when their employer cannot or will not pay; and
- the Government should fund increased legal assistance to help applicants according to their level of need.

This Part contains three sections that follow the progression of a claim:

A. Obstacles to Filing a Small Claim

1. Understand legal entitlements
2. Identify employer
3. Calculate underpayment
4. Raise concerns with employer
5. Identify court process and complete court application

B. Obstacles to Getting a Judgment or Court Order

6. Serve application on employer
7. Engage employer in proceedings
8. Understand and participate in hearing

C. Obstacles to Enforcing a Court Order and Getting Payment

9. Enforce a court order if it is not paid
10. Access FEG when an employer cannot pay

III.A. Obstacles to Filing a Small Claim

To initiate proceedings in the small claims jurisdiction, workers must overcome at least five obstacles, each of which is challenging for many unrepresented migrant workers.

Without assistance, many migrant workers cannot identify their legal entitlements and employing entity

Many migrant workers, and other vulnerable workers, are impeded from pursuing underpayment claims against an employer because they:

- do not know that Australian labour laws apply to them;⁷¹
- do not know whether they are an employee or contractor;
- do not know whether an award or enterprise agreement applies to them;
- cannot identify their legal wages and other entitlements under the *FW Act* or the applicable award or agreement, because they do not know whether they are casual or permanent, or their correct classification and base rate of pay;
- do not know whether and when they are entitled to allowances, penalty rates and overtime rates;
- do not know whether wage deductions are lawful; and/or
- do not know the legal identity of their employing entity.

The *FW Regulations* specify the information that employers must provide on pay slips, including employer and employee names and the gross and net amount of payment.⁷² However, employers are not required to specify the following information on pay slips:

- Name of applicable employment instrument (for example, award or agreement) and classification/pay point within employment instrument;
- Type of employment (full-time, part-time or casual);
- Employer address for service;
- Start and finish times;

⁷¹ In our 2019 survey of 5,968 international students, around one third of international students believed they were not entitled to the same wage as Australians or were not sure if this was the case: Farbenblum and Berg, *International Students and Wage Theft in Australia* (n 12) 11.

⁷² *FW Regulations* r 3.46 provides that a pay slip must contain: the employer's and employee's name; the period to which the pay slip relates; the date on which the payment to which the pay slip relates was made; the gross and net amount of the payment; any amount paid to the employee that is a bonus, loading, allowance, penalty rate, incentive-based payment or other separately identifiable entitlement; the Australian Business Number (if any) of the employer; if an amount is deducted from the gross amount of the payment – the name, or the name and number, of the fund or account into which the deduction was paid; if the employee is paid at an hourly rate – the rate of pay for the employee's ordinary hours, the number of hours in that period for which the employee was employed at that rate, and the amount of the payment made at that rate; if the employee is paid at an annual rate of pay – the rate as at the latest date to which the payment relates; and specific information in relation to superannuation contributions, if the employer has made or intends to make them.

- Description of the type of work to be performed;
- Details of the location where the work is to be performed;
- Which hours in a day are ordinary hours and which hours attract a penalty/overtime rate; what the overtime rate of pay is; what penalty applies and what the penalty rate is; or
- Itemised deductions, in the case of multiple deductions.

Although employers are legally required to include their name and ABN on each pay slip, WEstjustice reports that this often does not occur at all, or the pay slip does not contain the full and correct legal name of the employer (for example, only contains the business name), or contains information relating to the entity paying the worker rather than employing the worker (for example, contains the details of the franchisor but not the franchisee) – or no pay slip is provided at all.⁷³ We saw first-hand how this can impede a claim’s progress – see **Case study: challenges to identifying the employing entity and service.**

Recently, it has become even harder for workers to identify the employing entity. Since November 2023, ABN Lookup no longer displays trading names and only displays registered business names and the entity (legal) name.⁷⁴ A worker who only knows their employer’s trading name can no longer use ABN Lookup to identify the legal name of the employer.

Recommendation: Amend the FW Act to require employers to provide a Statement of Working Conditions to enable workers to identify their legal entitlements and employing entity

One way of mandating access to the information that workers need to calculate and serve a wage claim is to require employers to provide this information on commencement of employment.⁷⁵ If the *FW Act* were amended to require employers to provide each worker with a tailored Statement of Working Conditions when their employment starts, a greater number of migrant workers would be able to identify their legal entitlements and ultimately file an application to recover wages in the small claims jurisdiction. The mandatory information could be provided as part of a written employment contract or by completing a template statement (for example, the Fair Work Information Statement could be expanded to prompt employers to provide the necessary information). The mandatory information could also be provided on pay slips, as well as in the proposed Statement at the start of employment.

Similar obligations exist in New Zealand, the UK and countries in the EU.⁷⁶ In New Zealand, employers are re-

⁷³ Consultation with WEstjustice (23 May 2023). See also Hemingway (n 31) 155.

⁷⁴ Australian Business Register, [‘Business Names/Trading Names FAQs’](#).

⁷⁵ As suggested by Sara Charlesworth and Iain Campbell, ‘The National Employment Standards: An Assessment’ (2020) 33 *Australian Journal of Labour Law* 36. Grattan Institute supports this recommendation: Grattan Institute (n 4) 87. Note that these reforms would also do much to implement MWT Recommendations 2 and 15-18 regarding improved education and information for international students.

⁷⁶ In the EU, the EU Directive on Transparent and Predictable Working Conditions requires member states to implement national laws requiring employers to provide information regarding essential terms and conditions of employment. Recent changes to the law have extended this obligation to provide a statement to all workers (not just employees) as well as requiring the statement to include other details of employment such as paid leave entitlements: Christin Dunkel and Hanno Timmer, [‘New Requirements for Employment Agreements in Europe’](#) *Lexology* (online, 6 October 2022). In the UK, there is a longstanding requirement under s 1 of the *UK Employment Rights Act 1996* that employees be given a ‘written statement of employment’, which must contain certain terms. See also Matthew Taylor, UK Department for Business, Energy & Industrial Strategy [Good Work: The Taylor Review of Modern Working Practices](#) (Report, 11 July 2017) 39.

quired to provide employees with a written employment agreement, which must include certain terms including the names of the employee and employer, a description of the work to be performed and wages payable.⁷⁷ Failure to provide such an agreement can result in an action by the Labour Inspectorate or a penalty.

This requirement will not assist those workers whose employers already disregard their basic obligations under the *FW Act*, such as the obligations to keep and provide employee records, and provide pay slips including the prescribed information.⁷⁸ To make claims easier for workers in these circumstances, failure to provide the Statement could lead to a reverse onus of proof, as exists in relation to employers' failure to provide records or pay slips under s 557C of the *FW Act*. If a worker then brings an underpayment claim in court, and an employer has failed to provide a Statement, the burden would rest on the employer to disprove the employee's allegations (for example, in relation to employing entity, award, classification rate of pay, and/or hours of work).⁷⁹ Failure to provide a Statement should be a civil remedy provision and subject to an infringement notice penalty from the FWO, similar to other record-keeping provisions.

Further consideration should be given to whether employers should be required to provide an updated Statement if their employment conditions (for example, their classification or rate of pay) change or the employer's details (for example, the legal employing entity or the address for service) change. Further consideration should also be given to whether to include contact details for relevant unions, free interpreting services, and the FWO in the Statement.

Recommendation 1: The Government should amend the *FW Act* to require employers to provide Statement of Working Conditions to workers on commencement

The Government should amend the *FW Act* to require employers to provide each employee with a Statement of Working Conditions at the commencement of their employment, to enable workers to identify their legal entitlements. The Statement should set out the job title, relevant workplace instrument, classification, type of employment, duties and location of work, wage rates, ordinary hours, and applicable overtime and penalty rates. It should also include the employer's legal name, ABN and contact details, including address for service.

Like the *FW Act* provisions relating to the failure to provide pay slips, failure to provide the Statement should lead to a reverse onus of proof in wages and entitlements claims brought by an employee against the employer, and should be a civil remedy provision subject to an infringement notice by the FWO.

Recommendation: Amend the *FW Regulations* to require employers to itemise deductions and provide overtime and penalty rate information on pay slips

There is also a need to mandate access to information about deductions, overtime and penalties, to assist a

⁷⁷ *Employment Relations Act 2000* (NZ) s 65.

⁷⁸ *FW Act* ss 535, 536.

⁷⁹ Further consideration would need to be given to how the proposed Statement requirements would interact with the existing record-keeping obligations eg where an employer keeps records as required under s 535 of the *FW Act*, but fails to provide a Statement. Section 557C(2) of the *FW Act* provides that the reverse onus does not apply if an employer has a 'reasonable excuse' for non-compliance, and this would continue to ensure that employers are not penalised unfairly.

worker to bring a wage claim.

Many workers are unable to determine whether deductions taken from their pay are lawful because employers are not required to itemise deductions.⁸⁰ For many workers, more than one deduction is made but only a total amount is listed. It is therefore impossible to ascertain the amount or purpose of any particular deduction in order to determine whether it was lawful. This is especially a concern for workers on the Pacific Australia Labour Mobility scheme whose employers routinely make multiple deductions from their pay.⁸¹ To remedy this problem, we propose regulation 3.46(2) of the *FW Regulations* be amended as follows:

If an amount is deducted from the gross amount of the payment, the pay slip must also include the name, or the name and number, of the fund or account into which the deduction was paid, a description of the purpose of the deduction, and if deductions are made for more than one purpose, an itemised list of each deduction and the amount deducted for each item.⁸²

Many workers also struggle to identify whether their employer is paying applicable overtime rates and other penalties. Under the current *FW Regulations*, an employer is only required to specify on a payslip any amount paid that is a loading, allowance or penalty rate;⁸³ and, if an hourly rate is paid, the rate of pay for ordinary hours, the number of hours in the payslip period for which the employee was paid at that rate, and the amount of the payment made at that rate.⁸⁴ Employers are not required to set out start and finish times, or which hours each day are classified as ordinary versus hours that attract overtime or penalty rates.

Recommendation 2: The Government should amend the *FW Regulations* to require pay slips to individually itemise deductions and establish hours paid at ordinary versus overtime or penalty rates

The Government should amend the *FW Regulations* to require that employers provide pay slips that individually itemise the purpose and amount of any deduction made from the employee's wages; and that set out, for each day worked, which hours are classified as ordinary hours versus hours that attract overtime or penalty rates (and what penalty applies).

Without assistance, many migrant workers cannot calculate their underpayment

Even with our recommendations of a tailored Statement of Working Conditions and itemised deductions and overtime/penalty rate information on pay slips, many migrant workers will still require assistance to calculate the specific quantum of an underpayment claim. To bring a small claim, a worker must set out in their application the quantum of the underpayment and the court orders sought.⁸⁵ This requires a worker to

⁸⁰ The only requirement is that if 'an amount is deducted from the gross amount of the payment, the pay slip must also include the name, or the name and number, of the fund or account into which the deduction was paid': *FW Regulations* r 3.46(2).

⁸¹ Dr Mark Zirnsak, Uniting Church in Australia, Synod of Victoria and Tasmania, [Submission 14](#) to the Senate Standing Committees on Education and Employment, *Inquiry into the Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023* (14 April 2023) 4-5.

⁸² The Grattan Institute supports the substance of this recommendation: Grattan Institute (n 4) 87.

⁸³ *FW Regulations* r 3.46(1)(g).

⁸⁴ *Ibid* r 3.46(3)(b) and (c).

⁸⁵ FCFCOA, [Form 5: Small Claim Under the Fair Work Act 2009](#) (Small Claims Application Form).

precisely calculate what they think they are owed before commencing their legal claim. This is the case even where, because of the employer's failure to keep or provide a record or to provide a pay slip, the onus shifts to the employer to disprove the employee's allegations.⁸⁶

Calculating the quantum of underpayments is complex, time-consuming and a prohibitive barrier to many vulnerable workers pursuing claims for their lawful entitlements. Calculating an underpayment requires comparing what a worker was paid with their legal entitlements for each hour worked. Legal rates of pay change depending on days of the week and times worked, and even if an employee receives and retains their pay slips (which many migrant workers do not), it is difficult to determine what the employer paid them for each hour of work. While the FWO's Pay and Conditions Tool is available to workers, it assumes that workers can identify whether they are casual, part-time or full-time, and their correct classification; and then apply this information to the days and hours worked to calculate their entitlements.

WEstjustice reports that calculating the quantum of the underpayment often involves hours of work with detailed Excel spreadsheets – and is a task that many vulnerable workers could not complete without significant assistance.⁸⁷ Similarly, Justice Connect reports that identifying the correct award and correctly calculating the unpaid wage figure can be challenging for employees from a CALD background or those who have been underpaid for an extended period. Many applicants experience delay in finalising their applications due to the lengthy time it can take to complete complex calculations. When a worker is unable to complete the necessary calculations under the applicable agreement or award, they may be unable to file a claim with sufficient detail to satisfy the court, thereby preventing them from pursuing their claim.⁸⁸

Recommendation: Establish a Wages and Superannuation Calculation Service for vulnerable workers

The Government should establish a new service that provides a free and accurate calculation of amounts owing to a worker, based on information provided by the worker. This would significantly assist parties to resolve their disputes in a timely and informed manner. In **Part V (Recommendation 14)** we set out in detail the proposed role and functions of a new Wages and Superannuation Calculation Service.

Without assistance, many migrant workers are unable to raise the underpayment directly with their employer

It is beneficial for a worker to first try to resolve an underpayment dispute directly with their employer, before commencing a court claim. Early intervention is more likely to lead to positive and ongoing employment relationships, and also conserves the resources of the court.

Sometimes, there may be a misunderstanding that can be easily resolved. An attempt to resolve disputes would typically be done verbally or via a letter of demand, including a formal request for employee records under section 535 of the *FW Act* where necessary. However, many migrant and vulnerable workers would need legal representation, or at the very least a clear understanding of the quantum of their underpayment, to be able to negotiate effectively with their employer.

⁸⁶ *FW Act* 557C.

⁸⁷ Consultation with WEstjustice (16 May 2023).

⁸⁸ Consultation with Rebecca Chapman, Principal Lawyer, Services | Access Program, Justice Connect (1 November 2023).

Increased funding for legal assistance and the establishment of a Wages and Superannuation Calculation Service (see **Part V, Recommendations 14 and 15**) are therefore necessary to assist migrant workers to resolve disputes early and outside of court.

Without assistance, many migrant workers are unable to correctly complete the small claims court application

Underpaid migrant workers may not be aware that the small claims process exists and applies to their circumstances. In our previous survey of migrant workers, two in five underpaid participants (42%) reported that they had not tried to recover unpaid wages because they did not know what to do.⁸⁹ Once a worker is aware that the small claims process applies to their situation, they must then decide whether to pursue the claim in the FCFCOA or in their state or territory magistrates court. Workers may need legal assistance to identify the best forum to bring their claim (see **Recommendation 15**). Once a worker has settled on a jurisdiction, understanding and completing the small claims application form can also present a barrier to bringing a claim.⁹⁰

Recommendation: Provide additional resources to the FCFCOA to consult with migrant and vulnerable communities to improve accessibility of the small claims application form

The FCFCOA has recently revised the small claims application form to provide instructions to guide the applicant through the form.⁹¹ While the format has been substantially simplified, the form (by its nature) involves a number of legal and technical concepts. The FCFCOA is currently undertaking a review of forms and website content to enhance accessibility, alongside its review of the *FCFCOA General Federal Law Rules* and Practice Directions.⁹² The FCFCOA has also established a cross-agency working group seeking to improve the accessibility of forms, protocols and communications to those with limited English proficiency.

We recommend that the FCFCOA be appropriately resourced to consult with service providers and worker communities to ensure workers understand and can effectively use court forms and website content. Further guidance at this early stage that assists a worker to provide relevant information as comprehensively as possible would also help matters progress more efficiently once in court.

The approach taken by the FWC to application forms is instructive. As set out in **Part IV**, the FWC has a strong focus on improving access to justice and reducing complexity which is reflected in user-friendly forms that have been developed through usability testing.⁹³ Naturally, a court application requires more specificity in setting out a claim for determination of legal entitlements, compared to an application in a tribunal. Nevertheless, user testing with migrant communities and individuals who do not have legal expertise could improve the accessibility of the FCFCOA form.

Comparing the small claims application form to the FWC unfair dismissal and general protections (involving dismissal) application forms⁹⁴ suggests that changes could include:

⁸⁹ Farbenblum and Berg, *Wage Theft in Silence* (n 7) 7.

⁹⁰ FCFCOA, Small Claims Application Form (n 85).

⁹¹ FCFCOA, *2022-23 Annual Report* (n 3) 91.

⁹² *Ibid* 3.

⁹³ FWC, *Corporate Plan 2023-24* (2023) 9; FWC, *What's Next? The Fair Work Commission's Plan to Improve Access and Reduce Complexity For Our Users* (Report, 2018); FWC, 'Expansion of Online Lodgment Service' (6 July 2023).

⁹⁴ FWC, 'Form F2: Unfair Dismissal Application' (Unfair Dismissal Application Form); FWC, 'Form F8: General Protections Application Involving Dismissal' (General Protections Application Form).

- More guidance for workers who require assistance in a language other than English, noting that a court application form must be filed in English.
 - For example, the FWC's forms contain the National Interpreter Symbol, a nationally recognised symbol that indicates where people can seek language assistance.⁹⁵ Information is also provided in plain English on how to request an interpreter and translate text online.
- More explanation of the role of legal or other representatives. The small claims form asks: 'Is an organisation, such as a union, acting on your behalf?'. Providing more information on representation may prompt workers to consider the range of assistance that is available.
 - For example, the FWC's forms explain that: 'A representative is a person or organisation who is representing you. This might be a lawyer or paid agent, a union or a family member or friend. There is no requirement to have a representative.'⁹⁶
 - It would be helpful if the small claims form also included contact details for government-funded legal services in each jurisdiction, and the proposed Wages and Superannuation Calculation Service (**Recommendation 14**).
- More guidance on obtaining the requisite employer's details. The small claims form asks for the name of the employer or outworker entity, and the address or registered office. Applicants would benefit from more explanation of these concepts, and guidance on how to identify the legal name of the employer.
 - For example, the FWC forms provide: 'You should provide the legal name of the employer. The legal name is not the trading name or business name of the employer. The employer will usually be a person or a company (with a name ending in Pty Ltd or Ltd), or in some instances a partnership, an incorporated association, or a public sector employer. Your pay slips, PAYG payment summary, appointment letter or employment contract should give the legal name of the employer.'⁹⁷
- A section for naming accessories, and guidance about accessorial liability under the *FW Act*.
 - Redfern Legal Centre has reported that applicants who are able to identify accessories currently need to shoehorn this information into the employers' details section of the small claims form.⁹⁸ We observed small claims matters being adjourned in part because applicants had struggled to successfully identify accessories and/or demonstrate accessorial liability.
- Provide further guidance on how to identify the relevant workplace instrument and the alleged contraventions. The small claims form asks applicants to identify their 'classification level under applicable Modern Award, enterprise agreement, workplace determination or contract'; the workplace instrument that they allege has been breached (eg National Employment Standards, modern award, enterprise agreement, etc); and the relevant standard/term/provision/entitlement. There could be some more information about what these workplace instruments are and how a worker identifies what their claim falls under.

⁹⁵ FWC, [63 Forms Changed to Include New Interpreter Information](#) (21 May 2021).

⁹⁶ FWC, Unfair Dismissal Application Form (n 94); FWC, General Protections Application Form (n 94).

⁹⁷ Ibid.

⁹⁸ Consultation with Sharmilla Bargon, Senior Solicitor, Employment Law Practice, Redfern Legal Centre (16 November 2023).

- For example, the FWC general protections form identifies and hyperlinks the relevant provisions of the *FW Act*, and refers to a general protections benchbook resource.⁹⁹
- More simple expression. For example, the small claims form frames its request for contact details as: 'Where do you want notices from the Court sent?'. This could be rephrased as 'How would you prefer us to communicate with you?', which is the language used on the FWC forms.¹⁰⁰
- More information on the small claims process, including what the applicant can expect and what the process requires of them. While this information is available on the FCFCOA's website,¹⁰¹ it could be more accessible if provided within or linked by the form.
- The FWC general protections form cover sheet explains in plain language: who can make a general protections claim; what the FWC process will look like (conciliation, possibly consent arbitration); how to lodge the claim; and how service is effected.¹⁰²

Recommendation 3: The FCFCOA should be appropriately resourced to consult with relevant communities and conduct user testing to ensure the small claims application form is accessible for unrepresented migrant and other vulnerable workers

The Government should allocate resources to enable the FCFCOA to conduct user testing of the small claims application form and other written material, including on the court website, with migrant communities and individuals who do not have legal expertise. This and other consultation could inform revisions to improve the accessibility of these materials.

⁹⁹ FWC, General Protections Application Form (n 94).

¹⁰⁰ Ibid; FWC, Unfair Dismissal Application Form (n 94).

¹⁰¹ FCFCOA, '[Fair Work: I Want to Apply](#)'; FCFCOA, '[Fair Work: Small Claims](#)'.

¹⁰² FWC, General Protections Application Form (n 94).

III.B. Migrant Workers' Day(s) in Court: Obstacles to Getting a Judgment

If a worker manages to lodge their small claim application in the correct format, they face further barriers before obtaining a judgment or court order in their favour.

On the first court date, a registrar determines whether to hear and determine the claim on the day, refer the matter to same-day mediation with another judicial registrar, deal with the matter on default, or adjourn the matter and make orders for its future conduct (for example, in relation to service or filing; referring the matter to mediation on a later date; fixing a date for final hearing by a registrar; or referring the matter to a hearing before a judge).¹⁰³ Since the introduction of registrar-led hearings from 2019, the FWO, which previously played an active role as a 'friend of the court' in small claims matters, has played a less active role in hearings.¹⁰⁴

In recognition of the vulnerability of some parties, and their lack of familiarity with court procedure, registrars take certain steps to assist parties. For instance, we understand that for small claims matters which resolve at mediation, the registrar may recommend that the outcome is reflected in a consent order by the court. This obviates the need for self-represented parties to draft a settlement deed, and provides the benefit to the applicant of an enforceable order that they can rely on in the event of non-payment of any agreed sum.

However, despite the efforts and goodwill of presiding registrars, appearance in court or mediation remains exceptionally difficult for many migrant workers. First, they must serve their application properly on the employer. Second, they may face employer disengagement which impedes the progress of their matter. Finally, they must understand proceedings and present their case effectively in hearings or mediation. We observed claims stalling or being adjourned as a result of these difficulties.

We understand that the FCFCOA (through a cross-agency working group) is currently identifying ways to ensure that court users are linked in with community legal, migrant and refugee services to assist them in fully engaging with the justice process. Our recommendations build upon this work and, in **Part V**, make the case for further funding of legal services.

Without assistance, many migrant workers are unable to correctly serve their application on their employer

Even when a worker can identify the employing entity (which can be difficult or impossible – see **Recommendation 1**), service requirements can make it difficult for migrant and vulnerable workers to progress their case. This is particularly the case when employers engage vulnerable workers through complex commercial arrangements and trusts. In several matters that we observed, the applicant had either not served their application correctly on the employer, or had served the application and filed an affidavit of service but the employer had not received the application.

Under Rule 6.06 of the *FCFCOA General Federal Law Rules*, the applicant in a small claim must serve their application on the respondent 'by hand'. This means that if the applicant is employed by an individual, they must give a copy of their application to the person.¹⁰⁵ Practitioners report that it is not uncommon for

¹⁰³ FCFCOA, Fair Work: Small Claims (n 101).

¹⁰⁴ FWO, [Annual Report 2012-13](#) (Report, 2013) 38; Umeya Chaudhuri and Anna Boucher, Sydney Policy Lab, University of Sydney, [The Future of Enforcement for Migrant Workers in Australia: Lessons From Overseas](#) (Report, March 2021). Chaudhuri and Boucher note that the FWO's 2011-2012 pilot 'friend of the court' program received positive feedback. However, from 2016 the number of matters that FWO assisted has not been reported in annual reports, 'suggesting that it is no longer a priority'.

¹⁰⁵ *FCFCOA General Federal Law Rules* r 6.07.

individual respondents to be very good at 'going underground' and avoiding service.¹⁰⁶

If employed by a corporation, unincorporated association or organisation, the worker must 'leave a copy of the document with a person who is apparently an officer of or in the service' of the employer.¹⁰⁷ The *Corporations Act 2001* (Cth) allows for service on a company to be effected by leaving the document at, or posting it to, the company's registered office, or delivering a copy personally to a director residing in Australia.¹⁰⁸ However, determining the company's registered office or director generally requires an ASIC company search for a fee. Where the employer is a trustee of a trust, it can be impossible to determine who to serve an application on. Once service has been effected on an individual or corporation, the worker must then prepare an affidavit of service.¹⁰⁹

The FCFCOA has taken steps to simplify service for applicants. The Court has reported that as part of its National Small Claims List, guidance on service (including how to conduct an ASIC search) is provided in early case management communication with parties after an application or response has been filed. The FCFCOA also provides parties with referrals to legal assistance to identify who should be served, noting that the Court itself cannot provide legal advice in relation to service. The Court has also introduced a pro forma affidavit of service.¹¹⁰

While a party can apply to the court for an order dispensing with service or substituting another way of serving the document,¹¹¹ this is rare in practice. Instead, a registrar¹¹¹ on the first court date can take a practical approach to resolving service issues. We observed registrars dispensing with formal requirements of service. For example, in one hearing, the applicant had served their application on the respondent company via registered post but the company had not seen the application. As the parties were in contact over email, the Registrar directed the applicant to send their application via email and did not require the applicant to formally serve their application again.

While registrars intervene and provide flexibility once the matter is being heard, this does not address the difficulty of serving an application in the first instance. Nor does this overcome the time spent by the applicant trying to meet service requirements in the first instance, and the subsequent delay to proceedings in order to provide the respondent with the documents and adequate time to consider them.

The service process in the FCFCOA differs markedly to the FWC. In the case of unfair dismissal and general protections matters, once a worker lodges their application with the FWC, the FWC itself sends the application to the employing entity.¹¹²

¹⁰⁶ JobWatch, Submission 104 to Senate Education and Employment Committee, *Inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (February 2021) 29 (SAJER Bill).

¹⁰⁷ *FCFCOA General Federal Law Rules* r 6.08.

¹⁰⁸ *Corporations Act 2001* (Cth) s 109X.

¹⁰⁹ *FCFCOA General Federal Law Rules* r 6.05.

¹¹⁰ FCFCOA, *2022-23 Annual Report* (n 3) 91.

¹¹¹ *FCFCOA General Federal Rules* rr 6.14-6.15.

¹¹² *FWC Rules* Schedule 1.

Case study: challenges to identifying the employing entity and service

In one FCFCOA matter that we observed, the Registrar adjourned the matter three times as the applicant was unable to serve his application on the first and second respondents, a company and an individual respectively. Although the court had previously contacted the applicant about how to serve documents by post to the company's registered address, the applicant struggled to distinguish the first respondent and second respondent and remained unsure about whom he was required to serve his application. The applicant also said that he could not find the company respondent.

The Registrar told the applicant that he could conduct an ASIC search to gain the registered address of the company. The applicant stated that he had sought legal advice but was unsuccessful, admitting 'I'm not a lawyer, I'm scared of all the legal matters'.

The applicant had initially filed his application in late March 2023. After the three adjournments, a hearing was listed for October 2023.

Recommendation: Simplify service rules

The rules for service can be simplified to facilitate successful service in the first instance, without compromising procedural fairness or the rights of respondents. This could include amendments by the FCFCOA to the *FCFCOA General Federal Law Rules*, and by the Government to the *Corporations Act 2001* (Cth), to provide that if the respondent has an email address that they regularly use or have used to communicate with the applicant, sending the initiating materials by email will constitute service. Consideration should also be given to service by other channels such as text, instant message and social media platforms.¹¹³

Recommendation: Fund community legal services and migrant workers centres to assist with service, engage process servers, and access company information databases

Simplification of the rules of service would go some way towards improving the accessibility of the small claims jurisdiction. However, many migrant workers will still struggle with service and preparing affidavits of service. Additional government funding to legal assistance providers such as CLCs, and MWCs, is therefore critical (see **Recommendation 15**). A component of this funding could support a CLC or MWC to engage a process server where this is more cost-effective than the CLC or MWC pursuing service itself.

The Government should also fund community legal services to access relevant registration databases such as InfoTrack to determine a worker's employing entity. Alternatively, ASIC could be required to provide Company Extracts to non-profit legal services free of charge.

For workers who can self-advocate or are not eligible for existing legal assistance services, the Wages and Superannuation Calculation Service could also provide detailed procedural guidance about service.

¹¹³ This has been recommended by JobWatch: JobWatch (n 106) 29.

Recommendation 4: The Government and the FCFCOA should simplify service rules, and the Government should fund assistance with service

The FCFCOA should amend the rules for personal service of small claims – for example, to allow service via email.

The Government should implement a range of measures to make service less difficult in small claims matters, including:

- Amend service rules for corporations – for example, to allow service via email
- Fund community legal service providers to assist with service and affidavits of service
- Fund, or provide fee waivers to, community legal service providers to access relevant registration databases and Company Extracts to identify an employing entity's address for service, and
- Fund a Wages and Superannuation Calculation Service to provide procedural guidance on service to workers who are able to self-represent or are not eligible for existing legal assistance services. (see **Recommendation 14**).

Lack of response from employers can stop claims from progressing

In several first court dates that we observed, the employer had not provided a response. In three matters that we observed, there was no appearance from the respondent.

Lack of response and engagement from respondents can significantly delay the resolution of matters. Respondents to small claims matters are currently required to file a response within 28 days after they have been served with an application.¹¹⁴ If the hearing date is less than 28 days from when the employer is served, they are encouraged to file the response at least a few days before the hearing.¹¹⁵

In one matter that we observed, the applicant had filed his original application in April 2023, but the respondent had not filed a response by the first court date in June 2023 or by the second court date in August 2023. Although the applicant wished to proceed on the second court date, the matter was adjourned again so that the respondent could provide a response. We were not privy to the material before the Court but a default judgment may not have been appropriate based on the available evidence before the Court as provided by the applicant. The Court must be satisfied that it can make the order sought even in undefended proceedings. This example emphasises the need for case management processes to ensure that parties provide the information that is needed for a claim to progress and be resolved.

¹¹⁴ FCFCOA *General Federal Law Rules* r 4.03.

¹¹⁵ FCFCOA, '[Fair Work: I Have Been Served](#)'.

Recommendation: Appropriately resource the FCFCOA to continue to improve case management

The FCFCOA is currently taking steps to enhance its case management in small claims matters. The National Small Claims List is characterised by:

- An initial triage process by a registrar once a claim is lodged, to identify technical issues with the application materials and to fix a first hearing date;¹¹⁶
- Notice provided to the parties that the matter may be dealt with and determined on the first return date, with the aim of ensuring parties attend at the first hearing with all relevant material;¹¹⁷
- Before the first court date, providing parties with detailed procedural information to assist them to progress their matter, including instructions on filing supporting documentation. The court has reported that, where appropriate, it also now provides guidance on service in its initial contact with parties after an application or response has been filed, including how to conduct an ASIC search.
- Providing detailed interlocutory orders to parties that give specific information on what next steps they need to take (for example, in relation to service of the application on the respondent where not effected, or the filing of further material by parties).

As set out above, the FCFCOA is continuing to refine the triage and preliminary case management stages for the small claims procedure, particularly in relation to the information being provided to parties in advance of court events.

Further investment in proactive case management of small claims by the FCFCOA would ensure parties are fully informed and engaged in proceedings, and claims are resolved efficiently. The Government should appropriately resource the FCFCOA to continue to identify and implement optimal case management processes and interventions, while maintaining its impartiality towards parties.

Additional improvements could include contacting respondents who have not provided a response before the first court date, to incentivise attendance and participation at hearings. The Registry could also contact applicants or respondents while a proceeding is on foot and where they have not yet complied with registrars' interlocutory orders in advance of the next court date.

The FWC's approach to case management is instructive and demonstrates what further resourcing of case management can achieve. The FWC takes a proactive approach to engaging parties in matters, in recognition that 'noncompliance can cause delays in the processing of matters'.¹¹⁸ For example, in unfair dismissal matters, the FWC sends a letter to the respondent if they have not had any contact from them (for example, the respondent has not filed a response) three days before the scheduled conciliation.¹¹⁹

The FCFCOA should be resourced to conduct user testing and behavioural research (including with migrant communities) to identify how the small claims forms and correspondence could be designed to maximise parties' engagement. In 2020, the FWC conducted research to identify low-cost interventions to improve employer attendance and response rates in unfair dismissal cases.¹²⁰ At the time, 51% of employer responses were

¹¹⁶ FCFCOA, *2022-23 Annual Report* (n 3) 91.

¹¹⁷ *Ibid.*

¹¹⁸ FWC, [Behavioural Insights Project: Improving Compliance and Timeliness of Employers Responding to an Unfair Dismissal Application](#) (Report, March 2021) 4.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

filed 'on time' in accordance with FWC rules. To increase this, an internal working group at the FWC identified key 'behavioural insights' into employer non-compliance and used these insights to develop different versions of a letter prompting employers to file a response as soon as possible. These different versions of the letter were sent to various unrepresented small business respondents.

The FWC found that recipients of the letter with a 'social norm' feature ('3 out of 4 employers are able to lodge their completed Form F3 on time') were more likely to respond on time. Recipients of the letter with a 'call to action' feature ('Action required: We need to hear from you within 7 days' in red text) were even more likely to respond without additional follow-up. As a result of these findings, the FWC implemented the 'call-to-action' text as part of its suite of new Plain Language correspondence with employers.¹²¹ As a result, we understand case managers spend less time following up with respondents, and respondents are more engaged with the process and prepared for conciliation.

By ensuring parties are informed, prepared, and in attendance, more proactive case management in the FCFCOA increases access to justice for all parties. While this would increase the operating costs of the Court for government in the short-term, more proactive case management could ultimately reduce these costs due to more efficient resolution of court matters. Naturally, the impact of any adjustments should also be measured, to ensure that interventions are making a positive impact and achieving their objectives.

The Government should also consider legislative changes that could incentivise compliance with court requirements. One option is the introduction of penalties in the *FW Act* for an employer's failure to file a response within the required timeframe. Alternatively, given the small claims jurisdiction currently cannot order penalties, the *FW Act* could be amended to provide clear costs consequences for employers who fail to file a response without reasonable excuse.

Recommendation 5: Fund the FCFCOA to introduce further case management processes, and consider legislating consequences for non-compliance with court requirements

The Government should resource the FCFCOA to conduct research into small claims correspondence and case management procedures to increase accessibility and efficiency of small claims matters. This could include more proactive case management where employers have not responded or where employees have not provided the information required for a matter to proceed.

The Government should also consider introducing legislative consequences where a respondent fails to comply with key procedural steps (for example, fails to file a response without reasonable excuse).

Small claims proceedings remains too complex, technical and formal for migrant workers to navigate without assistance

Once a proceeding is on foot, presenting evidence and legal submissions, or attending a mediation and negotiating terms of a settlement, is difficult for many unrepresented migrant workers. We observed workers struggle to:

- Identify the employing entity and, where an individual (for example, company director) is named as

¹²¹ Ibid 9.

the second respondent, making submissions as to how the individual is accessorially liable;

- Quantifying the underpayment claim in sufficient detail;
- Correctly preparing materials requested by the registrar (for example, making legal submissions, or annexing supporting evidence such as a contracts of employment to affidavits);
- Meeting the registrar’s request to correctly file materials with the court and then serve materials on the respondent, while allowing sufficient time for the respondent to consider the materials; and
- Understanding technical concepts and court procedure (for example, what an oath or affirmation is; what a mediation is; what a written legal submission is and how this differs from supporting evidence).

Unrepresented workers need support to overcome these barriers and effectively progress and resolve their matters. Justice Connect’s Federal Self Representation Service provides extremely valuable assistance to workers at all stages of the proceeding, including one-hour appointments for legal advice on discrete issues (see **Part V**). However, this service does not provide assistance on the day of the hearing.¹²²

Recommendation: Establish a duty lawyer service for the small claims list

Ideally, all vulnerable workers with meritorious legal claims would receive ongoing assistance as needed from a CLC, MWC, university student legal service or Legal Aid Commission (see **Recommendation 15**). The FCFCOA is currently identifying ways to connect court users to relevant legal services that can assist them in engaging with the justice process. However, in the absence of funding for these essential services, and/or for workers who have not engaged with a legal assistance service or union before court, it is essential that a duty lawyer service be funded to operate in the National Small Claims List. The FCFCOA has introduced a similar scheme with pro bono providers in its migration law jurisdiction, recognising a greater need for free legal assistance amongst unrepresented litigants in migration matters (comprising 79% of litigants).¹²³

A duty lawyer service would assist self-represented litigants to navigate and understand court processes on the day of the hearing. If there are any issues that the applicant needs to address on the day (for example, identifying the correct employing entity), the registrar could stand a matter down for a period so that the worker could receive legal help on the spot. A duty lawyer could also support the applicant after the hearing to ensure that the applicant understands the content of the court’s interlocutory or final orders and any further action they must take. This would save the court significant time as well as the resources required to re-list a matter at a later date. CLCs and MWCs could be funded to coordinate and staff this service.

¹²² Consultation with Rebecca Chapman, Principal Lawyer, Services | Access Program, Justice Connect (1 November 2023); Justice Connect, [‘Self Representation Service’](#).

¹²³ FCFCOA, *2022-23 Annual Report* (n 3) 96.

Recommendation 6: Establish a duty lawyer service for small claims list

The Government should fund a duty lawyer service to assist self-represented litigants to navigate and understand court processes on the day of the hearing. This could be staffed by community legal centre lawyers and migrant workers centres.

Recommendation: Best practice use of interpreters

The FCFCOA provides parties with a free interpreting service upon request. Applicants can request an interpreter on the small claim application form. The standard response template for employers does not ask whether they require an interpreter.¹²⁴

The *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (National Standards), developed by the Judicial Council on Diversity and Inclusion, establish 'best practice and procedure for courts and tribunals, judicial officers, the legal profession, and interpreters when an interpreter is required during a proceeding.'¹²⁵ The FCFCOA's Interpreter Policy and Guidelines provide that the Court will have regard to the National Standards in determining whether a person requires an interpreter.¹²⁶

Training for judges in working with interpreters has occurred in accordance with the recommendations of the National Standards, and is a part of the induction material for new judges. The FCFCOA is rolling out training to other court staff on effectively engaging with people from a migrant and refugee background, including through the effective use of interpreters.

Offering an interpreter

Standards 10 and 16.3 of the National Standards set out that in determining whether a person requires an interpreter, judicial officers should apply a four-part test: (1) explaining the role of an interpreter and asking the party about an interpreter, using an open question; (2) assessing English speaking ability by asking the party to speak in narrative form through open-ended questions; (3) assessing comprehension by reading to the party two sample questions using some legal terminology, and asking the party to explain what was said; and (4) assessing the party's response and any other communication.¹²⁷

In our observations, we did not always see interpreters offered in line with these best practice principles. We observed:

- Two matters where the worker clearly spoke EAL but no interpreter was offered.
- One matter where the worker spoke EAL and was offered an interpreter but the worker declined.

¹²⁴ FCFCOA, '[Response: General Federal Law](#)'.

¹²⁵ Judicial Council on Diversity and Inclusion, '[Recommended National Standards for Working with Interpreters in Courts and Tribunals](#)' (March 2022) 5.

¹²⁶ FCFCOA, '[Interpreter Policy and Guidelines](#)' 1.

¹²⁷ Judicial Council on Diversity and Inclusion (n 125) 16, 51, 95 (Annexure 4).

- One matter where a respondent employer who spoke EAL made explicit he did not understand the proceedings, but was not offered an interpreter – see **Case study: language barriers** below.

We note that it is possible that these individuals had not requested an interpreter in their application form.

In addition, Justice Connect has observed that, while the court provides an interpreter whenever requested, in some instances parties represented by lawyers on a pro bono basis were asked by the court to provide their own interpreter for the proceedings.¹²⁸

It is clear that the Court's use of interpreters may be dependent on resourcing and the availability and reliability of interpreters on the day. When interpreters are not made available to an applicant, it may be because they have not requested an interpreter in their application and there is no interpreter available on the day. It is critical that the Court and interpreting services are adequately resourced to meet need including urgent need on the court date.

Best practice guidelines have suggested the court should undertake an assessment even if an interpreter is not requested or refused. When a party has refused an interpreter, the National Standards suggest that in complex matters and where there is doubt as to the party's understanding or ability to make themselves understood, the court should insist on an interpreter being made available.¹²⁹ While an applicant may have excellent functional English and decline to request an interpreter on a form, once in a court situation, they may struggle with technical language (for example, 'affidavit', 'annexure', 'lodgement'). It may not be until this point that a worker realises they need help.

The Centre for Culture, Ethnicity and Health has similarly observed that in certain circumstances, an institution should not accept a client's refusal of an interpreter (which could be due to, for example, reliance on family members; pride or embarrassment; and/or concerns about the interpreter maintaining confidentiality and privacy). It suggests that one should seek to clarify and address these reasons as part of their offer of an interpreter.¹³⁰ We recommend that the FCFCOA's policies, practice directions, and training equip judicial officers including registrars to offer an interpreter in line with best practice guidelines, and assess and address the reasons why an interpreter might be refused. The Court's best practice use of interpreters should be informed by consultation with migrant communities and the service providers who best understand the language needs of these communities.

Using an interpreter

Best practice should extend to the use of interpreters once engaged. Once an interpreter is engaged, Standard 17.9 of the National Standards specifies that: 'Judicial officers should speak at a speed and with appropriate pauses so as to facilitate the discharge by the interpreter of their duty to interpret'. The Standards also specify that, for hearings conducted via audio-visual link (as most small claims hearings are), 'the judicial officer should ensure that the interpreter is given enough time to interpret what is being said and that they have an opportunity to raise any issues and ask any questions they may have.'¹³¹

¹²⁸ Consultation with Rebecca Chapman, Principal Lawyer, Services | Access Program, Justice Connect (1 November 2023).

¹²⁹ Judicial Council on Diversity and Inclusion (n 125) 54.

¹³⁰ Centre for Culture, Ethnicity and Health, [Assessing the Need for an Interpreter](#) (Fact Sheet, 2014).

¹³¹ Judicial Council on Diversity and Inclusion (n 125) 100 (Annexure 6).

In our observations, we did not always see interpreters used in line with these best practice principles. We observed:

- One matter where an interpreter was present but the worker was asked to raise his hand if he required interpreting (and did not raise his hand) – see **Case study: language barriers** below.
- Matters where interpreters were present but the registrar did not pause to allow time for interpreting, or confirm with the applicant that they understood.

Case study: Language barriers

In one matter, an unrepresented applicant had requested an interpreter, who was present. Instead of automatically using the interpreter to interpret all conversations, the Registrar asked the applicant if he agreed to raise his hand if he wanted anything interpreted. The applicant responded ‘yes’ (although it was not clear he had understood the question). The applicant proceeded not to raise his hand for the duration of the hearing, and his wife was permitted by the Registrar to ask one clarifying question (whether they could come back to court if the employer does not pay).

In another matter, where the respondent employer spoke EAL, the respondent told the Registrar that ‘my English is not good, it’s hard to understand sometimes’ and notably struggled to answer the Registrar’s questions. Although the Registrar assured the respondent that the court could understand him and repeatedly assured him that he could take his time, no interpreter was offered. The respondent did not seem to understand the court process, and sought to continue giving evidence after final orders had been made by the Registrar.

Additional support

We recognise that the FCFCOA is continuing to consider how to ensure court users are linked in with migrant and refugee and other relevant services as needed to assist them in fully engaging with the justice process. We recommend that the Government consider appropriately resourcing and formalising these support mechanisms for CALD parties in the FCFCOA. This would benefit not only the small claims jurisdiction but also the Court’s large migration law jurisdiction. This could be in the form of cultural liaison officers (similar to the Indigenous Liaison Officer model in the Court’s family law jurisdiction).

Recommendation 7: Best practice use of interpreters

The FCFCOA should continue to ensure best practice use of interpreters for applicants and respondents who speak English as an Additional Language. The Court and interpreting services must be appropriately funded to provide quality interpreting services whenever needed.

Negotiating effectively in mediations

For workers referred by the court to mediation, a Wages and Superannuation Calculation Service could provide technical experts to give information on possible job classifications (see **Recommendation 14**). This could assist workers without representation to understand their legal entitlements and be better positioned to negotiate and settle. The presence of a third-party independent advisor could also facilitate better outcomes at mediations.

III.C. Obstacles to Enforcing a Court Order and Collecting Payment where Employers Disappear, Liquidate or Refuse to Pay

Even when a worker successfully obtains a court order for their unpaid wages from the small claims process, they may never recover the wages and entitlements owing to them. South-East Monash Legal Service reports that employers often disregard FCFCOA orders, simply refusing to pay the quantum of the judgment.¹³² Redfern Legal Centre has reported wages can remain unpaid from court orders made as far back as 2019.¹³³

Migrant workers face a series of complicated legal steps when seeking to enforce an unpaid debt in a court order. The worker can first send a letter of demand. Where the employer nonetheless continues to evade the court order, the worker must then determine the most appropriate legal action to pursue among several different options, all of which are complex.¹³⁴ The worker could send an examination notice to the employer or apply for a further order from the Supreme Court to enforce the debt. The court order sought could be an examination order (compelling the employer to attend court to answer questions about their financial position), a warrant to seize and sell property, or a garnishee order (for example, to enable recovery of the debt from the employer's bank account). If, through accessorial liability provisions in the *FW Act*, orders have also been made against individuals 'involved' in the underpayment in addition to the employing entity, a worker could also pursue those individuals.

The worker would require legal advice to navigate these options and would incur significant additional expense to pursue any of them. In many cases, this expense will exceed the amount sought to be recovered. And, where a respondent company or individual has few assets, enforcement action may be futile. While the FWO has at times pursued legal proceedings to enforce unpaid judgment debts following litigation it has initiated,¹³⁵ it does not appear to assist workers to enforce debts arising out of a small claims court order. Redfern Legal Centre reports that it can be difficult to find pro bono legal support for enforcement proceedings.¹³⁶

The obstacles faced by migrant workers in enforcing court orders are shared by Australian workers whose employer disappears or refuses to pay. However, in a narrow set of circumstances, a safety net is available for Australian citizen and resident workers. Where a wage claim is brought and the employing company subsequently liquidates, Australian citizens, holders of permanent visas and temporary visa holders from New Zealand are able to access the Fair Entitlements Guarantee (FEG), which provides a critical safety net for workers when their employer becomes insolvent and cannot pay outstanding wages and entitlements.¹³⁷

¹³² Consultation with Ashleigh Newnham, Director of Advocacy and Development, South-East Monash Legal Service (16 May 2023). See also Hemingway (n 31) 159; Eloise Cox et al, South-East Monash Legal Service, [The Challenges of Recovering Underpaid Wages: Empirical Insights](#) (Report, 2022) 18-19; JobWatch (n 106) 29.

¹³³ Consultation with Sharmilla Bargon, Senior Solicitor, Employment Law Practice, Redfern Legal Centre (16 November 2023). See also Tarni Perkal, WEstjustice, [Reforms To Address Corporate Misuse Of the Fair Entitlements Guarantee Scheme: A Submission to the Australian Government's Consultation into the Fair Entitlements Guarantee scheme](#) (30 June 2017) 3.

¹³⁴ FCFCOA, '[General Federal Law: Enforcement](#)'.

¹³⁵ Susannah Moran, '[FWO Turns Up Heat On Court Breaches](#)', *The Australian* (online, 1 February 2013).

¹³⁶ Consultation with Sharmilla Bargon, Senior Solicitor, Employment Law Practice, Redfern Legal Centre (16 November 2023).

¹³⁷ *Fair Entitlements Guarantee Act 2012* (Cth) s 10(1)(g) provides for eligibility for Special Category visa holders who are New Zealanders.

However, all other temporary migrants are not eligible for FEG assistance.¹³⁸ The MWT has recommended that the FEG be extended to all temporary visa holders with work rights.¹³⁹ While the Government has committed to implementing all MWT recommendations,¹⁴⁰ it has not yet expanded the FEG scheme, leaving temporary migrant workers without the benefit of even this limited safety net.

South-East Monash Legal Service reports that when a vulnerable migrant worker has overcome all of the obstacles to making a claim that we have set out above and has obtained a judgment in their favour, and yet *still* recovers none of their wages, this can undermine their faith in the Australian legal system.¹⁴¹ This strongly deters other workers from pursuing legal claims to recover unpaid wages, and emboldens employers to routinely underpay workers with impunity.

Recommendation: Establish a guarantee scheme, administered by DEWR, to cover court-ordered wage payments owing to workers and pursue non-compliant employers

The Government should ensure that any worker with a court order in their favour from the small claims process receives their lawful minimum entitlements. We recommend the introduction of a guarantee scheme administered by DEWR (or another government agency) which pays unpaid judgment (or enforceable settlement) debts to affected workers. We recommend that this be available to a worker who can demonstrate they have a court-ordered wage payment from the small claims jurisdiction which remains unpaid, for example, 60 days after it is due.

The scheme would pay the worker what a worker would have received had the respondent employer complied with the court order. That is, if a worker also has a costs order for legal fees in their favour – including under our proposed equal access costs model (**Recommendation 13**), or under existing *FW Act* provisions (for example, where the respondent has incurred the applicant’s legal costs via an unreasonable act or omission)¹⁴² – they should also be able to recoup those costs from this scheme.

Clearly, the establishment of this scheme should not leave a recalcitrant employer without any penalty for non-payment of a judgment. DEWR could determine whether resources should be deployed to seek reimbursement, by itself taking enforcement action against the employer to recover the debt. Where appropriate, DEWR could refer the matter to the FWO or legal service providers to recover the debt from the employer and pursue further enforcement action. This could operate in a similar way to the government’s FEG Recovery Program, which funds actions to recover sums advanced under FEG.¹⁴³

Government agencies are involved in helping workers to pursue unpaid debts in other countries. In the UK, workers who are owed compensation from an employer under an award by an employment tribunal can apply to the Department for Business and Trade to issue a warning notice to the employer, giving the employer 28

¹³⁸ See, eg, Sally Brooks, ‘[Employers Left with Fewer Places to Hide Their Money from Underpaid Workers after Landmark Ruling](#)’ ABC News (online, 1 June 2022).

¹³⁹ MWT (n 5) 96-98 (Recommendation 13).

¹⁴⁰ The Hon Andrew Giles MP (n 21).

¹⁴¹ Consultation with Ashleigh Newnham, Director of Advocacy and Development, South-East Monash Legal Service (16 May 2023).

¹⁴² *FW Act* s 570(2).

¹⁴³ In 2022-23, \$26.7 million was returned to government through the FEG Recovery Program: DEWR, [Annual Report 2022-23](#) (Report, 2022) 24.

days to pay, after which they can be fined and publicly named.¹⁴⁴ In England and Wales in particular, a worker can also apply through a Fast Track system for enforcement officers to seize money or property to pay the judgment debt.¹⁴⁵ In France, labour court registries are required to send a copy of judicial decisions to the regulator, who plays a significant role in enforcing unpaid judgments.¹⁴⁶

A guarantee scheme in Australia could also be linked with the Prohibited Employer List introduced by the *Migration Amendment (Strengthening Employer Compliance) Act 2024* (Cth). From 1 July 2024, the Minister for Home Affairs can exercise discretion to ban an employer from hiring temporary visa holders, where that employer has been found to have contravened a civil remedy provision of the *FW Act* (among other circumstances).¹⁴⁷ This would include the contraventions that underpin a small claim.

We suggest that, when a worker notifies DEWR of their unpaid debt, DEWR then notifies the employer that the Minister of Home Affairs has the power to place the employer on the Prohibited Employer List. DEWR might then advise the employer that, unless the employer provides DEWR with evidence of payment of the debt within 14 days, the matter will be referred to the Department of Home Affairs or the Minister for Home Affairs for further action. In addition, for the benefit of all current and future employees of that recalcitrant employer, DEWR could refer individual directors to ASIC to prevent phoenixing, and/or to FWO to investigate other potential contraventions. These penalties and investigations would create a new incentive for the employer to pay the outstanding judgment debt and maximise the deterrence and remediation impact of individual small claims. This is also likely to reduce the number of debts that would need to be funded by DEWR.

Given the small number of judgments currently being delivered in the small claims jurisdiction, the cost of such a scheme would not be significant. The scheme could be funded by government (like the FEG). Alternatively, it could be funded by a levy on employers. Employer-funded wage insurance schemes exist in the UAE¹⁴⁸ and the UK.¹⁴⁹

¹⁴⁴ UK Government, '[Make A Claim To An Employment Tribunal](#)'.

¹⁴⁵ Ibid.

¹⁴⁶ *Code du Travail* (France) arts R8252-10, R8252-12. This is also covered by a detailed policy document: Directeur du Travail, *Mode D'emploi Pour Le Contrôle De L'emploi Illégal Du Salaire Étranger Sans Titre De Travail* (Report, October 2017).

¹⁴⁷ *Migration Amendment (Strengthening Employer Compliance) Act 2024* (Cth) proposed s 245AYH.

¹⁴⁸ UAE Ministry of Human Resources and Emiratization, '[Value of the Insurance Product Increased to AED 250 for Establishments Not Committed to Paying Workers' Wages](#)' (Media Release, 12 April 2021).

¹⁴⁹ Employees and employers in the UK contribute to the National Insurance Fund, which funds the Insolvency Service. The Insolvency Service makes payments to workers who are owed redundancy and/or notice pay from their insolvent employers: see UK Government, '[Explaining Your Redundancy Payments](#)'.

Recommendation 8: DEWR guarantee scheme to enforce court orders and pursue non-compliant employers

To ensure no worker obtains a court-ordered wage payment in the small claims jurisdiction but remains unpaid, the Government should establish a guarantee scheme, administered by DEWR, that pays unpaid debts to affected workers. DEWR could then decide whether to deploy resources to take enforcement action against the employer and recover the debt.

To minimise the number of matters to be paid under this scheme, DEWR could also notify the employer that, if the debt remains unpaid, the matter will be referred to the Department of Home Affairs resulting in a possible ban on the employer hiring temporary visa holders, under the Prohibited Employer List which will come into effect from 1 July 2024.

Recommendation: Implement the Migrant Workers' Taskforce recommendation to extend the FEG to cover all workers in Australia

In addition, the Government should implement Recommendation 13 of the MWT to expand the FEG scheme to temporary migrant workers. This would assist not only the small number of migrant workers who otherwise meet the FEG eligibility criteria and whose employer liquidates after they have brought a small claim but also the larger group of migrant workers whose employer is rendered insolvent outside of the context of a wage claim in the small claims jurisdiction. An expanded FEG could sit alongside the proposed DEWR guarantee scheme. The FEG scheme could compensate workers for unpaid court-ordered debts and unpaid employee entitlements from insolvent employers, while the guarantee scheme could be restricted to workers whose employers remain solvent.

Recent amendments to the *FW Act* and *Migration Act* clarify that all workers are entitled to workplace protections, including undocumented workers.¹⁵⁰ In keeping with this, we recommend that, beyond the terms of the MWT Recommendation, the FEG scheme should be available to *all* workers in Australia regardless of (undocumented) immigration status. Similar schemes extend to undocumented workers in New York,¹⁵¹ California¹⁵² and the European Union.¹⁵³

Finally, for all workers, regardless of immigration status, FEG should be expanded in another respect. Currently, FEG is only available where an 'insolvency event' has occurred. As set out in a submission by WEstjustice:

There are two main issues with the definition of an insolvency event that limit its utility in protecting the most vulnerable workers:

¹⁵⁰ Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023, Schedule 1; *FW Act* s 40B; *Migration Amendment (Strengthening Employer Compliance) Act 2024* (Cth) proposed s 245APA.

¹⁵¹ Department of Labour, New York State, '[Wage Theft Prevention Act: Frequently Asked Questions](#)' (2021); Lauren K Dasse, 'Wage Theft in New York: The Wage Theft Prevention Act As a Counter to an Endemic Problem' (2012) 16(01) *CUNY Law Review* 97.

¹⁵² Legislative Analyst's Office, California, '[Expansion of State Labor Enforcement Activities](#)' (3 May 2012).

¹⁵³ The EU '[Employers' Insolvency Directive](#)' (2008/94/EC) grants rights to all workers (including migrant workers and undocumented workers) in relation to their employer's insolvency and obliges member states to ensure government agencies take over outstanding remuneration claims resulting from insolvency (article 3). The liability of these agencies can be limited but minimum standards are established (article 4).

- An insolvent company that doesn't have any assets is not required to appoint a liquidator and therefore does not meet this definition, and
- Deregistration does not fall within the definition of an insolvency event ...

An employer that cannot afford to pay its employees their wages and other entitlements is technically insolvent in that it is unable to pay its debts as and when they become due. However if the company has no assets to disperse, then there is no need to appoint a liquidator, with the result that there is no insolvency event for the purposes of the FEG. Consequently, many deserving people for whom the legislation is supposed to operate are missing out on their entitlements.¹⁵⁴

As set out in this submission, where employers deregister just before proceedings are commenced or after a court order is made in the worker's favour, a worker is left unable to enforce their unpaid wages and entitlements.

For Australian and migrant workers, FEG should be expanded beyond situations where a liquidator has been appointed, to circumstances where the company is insolvent or has been deregistered.

Recommendation 9: Implement MWT recommendation to extend FEG to migrant workers

The Government should implement MWT Recommendation 13 to expand the Fair Entitlements Guarantee so that all workers in Australia are entitled to access the scheme, regardless of immigration status.

The Government should also expand the definition of 'insolvency event' to include deregistration of a business.

¹⁵⁴ Perkal (n 133) 3-4.

III.D. Further Obstacles to Pursuing a Small Claim for Migrant Workers who Return Home

Many temporary visa holders do not bring claims during their stay because they do not want to jeopardise their visa. Once their visa comes to an end, they must return home immediately and do not have an opportunity to extend their stay in order to bring a claim for unpaid wages and entitlements. We are pleased that the Government has accepted our recent proposal to pilot a short-term visa for this purpose in 2024.¹⁵⁵ Regardless, some workers will continue to elect to return home.

The FCFCOA's shift to online hearings has removed a substantial barrier to migrant workers' ability to pursue claims from abroad. However, several other barriers remain. These include, for example, having affidavits or other legal documents properly witnessed and prepared, and effecting service according to the rules (noting that the Court can respond flexibly at the first court date if this proves difficult). The FCFCOA does not provide guidance on how workers residing overseas can have their affidavits and other legal documents properly witnessed and prepared, and effect service in compliance with the rules. In addition, Redfern Legal Centre reports that some countries such as China may not allow migrant workers who have returned home to provide evidence in foreign proceedings.¹⁵⁶

CLCs are often unable to help workers who do not reside in their catchment area, and report that they do not have resources to cover the time and complexity of running matters for clients who have returned home. No other assistance is available through Australian diplomatic missions or otherwise. Realistically, small claims can only be pursued if a migrant worker is in Australia.

Recommendation 10: Enable migrant workers who have returned home to pursue wage claims from abroad

The Government should identify and implement measures to make the small claims process genuinely accessible to applicants who are overseas.

¹⁵⁵ Migrant Justice Institute and Human Rights Law Centre (n 19).

¹⁵⁶ Consultation with Sharmilla Bargon, Senior Solicitor, Employment Law Practice, Redfern Legal Centre (16 May 2023).

PART IV: AN ADDITIONAL FORUM FOR RESOLVING SMALL CLAIMS DISPUTES

The FWC is widely regarded as an accessible and user-friendly tribunal forum to resolve employment claims within its jurisdiction.¹⁵⁷ Building upon the discussion in **Part III** of several features of the FWC, this Part discusses in more detail how the FWC facilitates access to justice for migrant and vulnerable workers.

Given that a court established under Chapter 3 of the Australian Constitution cannot be made as accessible or informal as the FWC, this section explores a range of reform options that would enable workers to utilise FWC processes to resolve wage disputes, as an addition and alternative to the existing court-based small claims process. Nothing in this section diminishes the need for an accessible court avenue for wage recovery through the small claims process. The FWC should provide an *additional*, quick dispute resolution pathway for wage recovery that some workers may see as preferable to a court process.

IV.A. The Fair Work Commission is an accessible forum for employment disputes

The FWC has a strong focus on access to justice, including for vulnerable workers

The FWC has a strong focus on access to justice and a demonstrated commitment to continuous improvement of its processes.¹⁵⁸ The FWC uses digital transformation and ‘modern best practice techniques like plain language, behavioural insights and user experience design’ to increase accessibility for users.¹⁵⁹ This is evident from ongoing changes to the FWC’s information resources and case management.

In regards to information resources, the FWC has refined its website and online forms through usability testing;¹⁶⁰ designed resources in 28 community languages to help those from CALD backgrounds better understand the FWC’s role and how it can help them;¹⁶¹ and developed detailed benchbooks and an online learning platform.¹⁶²

In regards to case management, the FWC regularly commissions research on client experience and uses research findings to implement measures that can better meet the needs of tribunal users. This includes using behavioural insights to inform correspondence to employers to encourage their timely lodgment of responses (as discussed in **Part III.B**); and ensuring correspondence to self-represented parties unfamiliar with tribunal procedures is in plain language.¹⁶³

¹⁵⁷ Professor Andrew Stewart et al, [Submission 56](#) to the Senate Education and Employment Legislation Committee, *Inquiry into the SAJER Bill* (5 February 2021); Law Council of Australia, Submission 90 to the Underpayments Inquiry (6 March 2020); ACTU, Submission 38 to the Underpayments Inquiry (6 March 2020).

¹⁵⁸ FWC, *Corporate Plan 2023-24* (n 93).

¹⁵⁹ FWC, Expansion of Online Lodgment Service (n 93).

¹⁶⁰ Ibid; FWC, [‘Welcome To Our New Website’](#) (13 February 2022).

¹⁶¹ FWC, [‘Information In Your Language’](#); FWC, [‘Resources Available In Community Languages’](#) (13 October 2023); FWC, [‘Animations To Support You In Unfair Dismissal Cases’](#) (29 June 2023). See also the FWC’s commitment to provide guidance materials in over 100 community languages: FWC, [Corporate Plan 2022-23](#) (2022) 10.

¹⁶² FWC, [‘General Protections Benchbook’](#); FWC, [‘Online Learning Portal’](#).

¹⁶³ FWC, [Plain Language Redrafting of Unfair Dismissal Correspondence](#) (Report, 10 May 2019); FWC, [‘Initiatives to Help Small Business’](#); FWC, [‘Client Experience Feedback & Research’](#).

Part III sets out our case for resourcing the FCFCOA so that it can implement similar measures to the FWC (to the extent possible for a court) to improve access to justice for court users. As discussed below, there is evidence that many of these measures have had a meaningful impact on the efficiency and accessibility of the FWC.

It is simpler for a worker to file an application in the FWC

Justice Connect and WEstjustice report that initiating an application in the FWC is much simpler for applicants than commencing proceedings in the FCFCOA, for a number of reasons.¹⁶⁴ These reasons include:

- **Identifying the employing entity:** the FWC application forms for unfair dismissal and general protections matters contains more guidance for the worker on identifying the legal name of the employer, compared to the current small claims application form (see **Part III.B**).
- **Completing the application form:** the FWC forms provides more guidance to workers on how to make their claim (see **Part III.B**). Importantly, workers also do not have to state their claims with the degree of specificity that they would in court (with the trade-off that the FWC cannot provide a precise judicial determination of legal entitlements).
- **Cheaper filing fees:** it is less costly to file a claim in the FWC (although applicants can now recover filing fees for small claims).¹⁶⁵ According to Professor Andrew Stewart and others, 'it is likely that a lower filing fee is far more appealing to an unrepresented litigant than providing a court-based mechanism for recovery of the filing fee upon conclusion of the matter.'¹⁶⁶
- **Union representation:** as identified by Stewart and others, applications in the FWC can be initiated by a union representing the worker's interests, and unions are not required to seek leave to appear at the FWC.¹⁶⁷ In the small claims process, unions like legal representatives must seek the leave of the court to represent claimants, although (as we observed first-hand) this leave is readily granted by the court.

FWC rules and processes quicken and simplify the resolution of claims

Once an application is filed, generally claims at the FWC appear to resolve swiftly. For instance, in 2022-2023, the median time from lodgment to conciliation of unfair dismissal applications in the FWC was 33 days.¹⁶⁸ This appears to be driven by FWC rules and processes which provide support to parties. For example:

- **Service:** the FWC provides the initiating application to the respondent employer directly, without the applicant having to serve it.¹⁶⁹ This is significant as we observed many applicants in the FCFCOA struggle to meet service requirements themselves.
- **Engaging employers:** the FWC takes a proactive approach to contacting employers who have not

¹⁶⁴ Consultation with Rebecca Chapman, Principal Lawyer, Services | Access Program, Justice Connect (9 May 2023); consultation with WEstjustice (16 May 2023).

¹⁶⁵ The filing fee for a FWC application in 2023-24 is \$83.30: FWC, '[Fees and Costs](#)'; Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth) Part 24; *FW Act* s 548(10).

¹⁶⁶ Stewart et al (n 157) 52.

¹⁶⁷ Ibid; *FW Act* s 365(b).

¹⁶⁸ FWC, *2022-23 Annual Report* (n 56) 20.

¹⁶⁹ *FWC Rules* Schedule 1.

submitted responses to applications, and uses research to revise its correspondence to encourage employer attendance and engagement (see **Part III.B**). Justice Connect and WEstjustice report that the FWC is often proactive in assisting both parties to attend and participate in their matters.¹⁷⁰

- **Resolving a matter:** Neither the small claims jurisdiction nor the FWC are bound by formal rules of evidence.¹⁷¹ However, the FWC prioritises the quick resolution of matters via ADR. In unfair dismissal and general protections matters, FWC conciliators assist parties to settle matters at a conference in the first instance.¹⁷² Only when conciliation is unsuccessful does a matter progress to a hearing in the FWC (in the case of unfair dismissal matters) or consent arbitration in the FWC or court (for general protections matters involving dismissal). By contrast, mediation in the FCFCOA is at the discretion of the registrar and occurs in fewer than 30% of cases.¹⁷³
- **Incentives to conciliate and resolve matter early:** The FWC's costs regime incentivises parties to resolve a claim at conciliation rather than taking a matter to court. Parties generally bear their own costs for matters before the FWC, but risk an adverse costs order if they unreasonably refuse to participate in a FWC conciliation and the matter proceeds to court.¹⁷⁴ This provides the employee with some leverage as it encourages a reluctant respondent to participate in conciliation at the FWC.¹⁷⁵ No such inducement operates in the small claims jurisdiction of the court to incentivise the resolution of claims at mediation, although we did observe registrars encouraging parties to discuss settlement outside of court.
- **Resolving multiple matters:** It is open to parties to raise and resolve related employment matters in the one conciliation forum at the FWC. As Stewart and others have observed, many underpayment issues tend to arise in the context of an unfair dismissal or general protections claim (such as a failure to pay termination and/or redundancy entitlements in full).¹⁷⁶

The FWC could house the Wages and Superannuation Calculation Service

Our proposed Wages and Calculation Service (see **Recommendation 14**) could be housed by the FWC. This function could complement work already undertaken by the FWC to maintain an up-to-date awards database and calculate entitlements under awards in determining whether enterprise agreements pass the Better Off Overall Test.¹⁷⁷

¹⁷⁰ Consultation with Rebecca Chapman, Principal Lawyer, Services | Access Program, Justice Connect (9 May 2023); consultation with WEstjustice (16 May 2023). For instance, Justice Connect recalled that in one matter the FWC contacted the employer, prompting them to file a response prior to conciliation.

¹⁷¹ *FW Act* ss 548(3), 591.

¹⁷² Note it is mandatory to conciliate for general protections (involving dismissal) matters, but consent of the parties is required for conciliation of general protections (not involving dismissal) matters: *FW Act* ss 368, 374.

¹⁷³ FCFCOA, Employment and Industrial Law Seminar (n 57).

¹⁷⁴ *FW Act* ss 611, 570(2)(c). The value of this costs rule was recognised by the SAJER Bill which included a legislative note making clear that this costs rule applied equally to small claims proposed to be referred to the FWC for ADR.

¹⁷⁵ Stewart et al (n 157) 53.

¹⁷⁶ Stewart et al (n 157) 52.

¹⁷⁷ FWC; [‘Modern Awards Pay Database’](#); FWC, [‘How We Apply the Better Off Overall Test’](#).

IV.B. The FWC offers benefits that a court-based process cannot

Registrars who conduct the National Small Claims List are clearly committed to flexibility and enabling parties to participate in accordance with the jurisdiction's objective to be as accessible as possible.¹⁷⁸ However, as a Chapter 3 court, the FCFCOA exercises judicial power under the Australian Constitution. Unlike the FWC, the FCFCOA offers a precise determination of legal rights, and makes enforceable orders. In providing a binding judicial determination of legal rights, court processes necessarily involve a degree of formality to safeguard procedural fairness. This limits the extent to which court processes can be made simpler and more accessible to migrant and vulnerable workers.

Creating a new jurisdiction for wage recovery in the FWC overcomes the barriers that arise from court procedure. A number of experts and the ACTU have therefore recommended the FWC as an accessible and user-friendly forum to resolve underpayment claims.¹⁷⁹ The legislative, policy and funding reforms proposed in **Part III** of this report would certainly enhance the accessibility of the FCFCOA. But further benefits for wage claims arise through use of a tribunal, benefits which are simply unavailable in a judicial forum:

- Commencing underpayment proceedings with an application that sets out the claim at a high level of generality, without having to specify the precise legal entitlements sought (dispensing with the need for detailed calculations of the quantum of compensation sought at an early stage);
- Carriage of service on the employer by the FWC, and ongoing close engagement with the parties to progress the matter, which cannot be done by a court due to the heightened need for impartiality;
- Mandatory conciliation in the first instance with cost incentives to conciliate, which can encourage employers to engage and remove the need for parties make legal submissions with evidence at an early stage of the claim;
- The ability to resolve multiple employment matters in one forum. This is particularly beneficial to migrant and vulnerable workers, whose problems at work often give rise to multiple types of legal claims. Due in part to the separation of powers under the Constitution, the *FW Act* vests jurisdiction for resolution of different workplace disputes in different forums. As a result, while workers commonly experience unfair dismissal and wage theft while working for the same employer, they must pursue a claim for the former in the FWC and the latter in a court. Allowing the FWC to hear wage claims would capitalise on the FWC's expertise in resolving a wide range of workplace disputes and, given its informal dispute resolution function, its capacity to hear and deal with multiple workplace matters together,¹⁸⁰ and
- If the FWC were to house the Wages and Superannuation Calculation Service, and potentially be co-located with a Fair Work Court (see below) – the ability to have a clear 'one-stop shop' in the FWC for resolving wage claims, which is not possible in the court.

¹⁷⁸ Explanatory Memorandum, Fair Work Bill 2009 (Cth) [2167]-[2168].

¹⁷⁹ Stewart et al (n 157); Law Council of Australia (n 157); ACTU (n 157); Australian Manufacturing Workers' Union, Submission 16 to the Senate Education and Employment Committee, *Inquiry into the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (4 October 2023) 13, 15; Sheldon Oski, Lead Industrial Officer (VIC/TAS) – Strategic Power, United Workers' Union (consultation in person and via email on 22 August 2023 and 2 October 2023).

¹⁸⁰ Select Committee on Temporary Migration (n 58) Recommendation 32 (establishment of a small-claims tribunal separate to the court hierarchy); Senate Standing Committees on Economics, [Systemic, Sustained and Shameful: Unlawful Underpayment of Employees' Remuneration](#) (Underpayments Inquiry Final Report, March 2022) Recommendation 5 (establish a small claims tribunal, ideally co-located with the FWC).

There is, however, a trade-off for any worker who might opt to use the FWC process. This is that while the FWC has the power to make orders in relation to disputes, it and the conciliation process does not provide a precise determination of entitlements.¹⁸¹ However, for many workers, the possibility of quicker and cheaper resolution of the matter in a more accessible forum will outweigh the benefit of a precise determination of legal entitlements which can only be provided by the court. Currently, workers who cannot overcome the barriers of a court process, as set out above, opt to do nothing – and recover nothing. For many workers, a cheap and fast process that offers some compensation is far better than nothing.

The Government has recently recognised the value of supplementing court-based avenues for redress with the ability to bring a claim in the low-cost, informal jurisdiction of the FWC. It recently passed legislation creating a new jurisdiction in the FWC for independent contractors to bring unfair contract claims.¹⁸² DEWR recognised that independent contractors have rarely pursued remedies in the FCA for unfair contracts, likely due in part to the length, complexity and cost of judicial proceedings.¹⁸³ Creating a new jurisdiction in the FWC to recover unpaid FW Act entitlements would yield similar benefits for employees. Increased private enforcement activity via the FWC would also lead to improved proactive compliance.

The previous government also drafted legislation that would have empowered the FCFCOA to refer small claims matters to the FWC for conciliation.¹⁸⁴ These provisions were removed from the Bill before its passage through Parliament, and the proposed reforms would still have required workers to file a small claim in court in the first instance. For this reason, we do not consider that this model of reform addresses the core barriers to accessing the small claims jurisdiction for vulnerable workers. However, it does reflect a broad acceptance of the view that the FWC can offer a simpler and more user-friendly forum for the adjudication of wage claims.

Workers should have the choice of whether to commence their claim in the FWC or proceed directly to court

There are several reasons why a worker may prefer to go directly to court and use either the small claims process or bring their underpayment claim in open court. These include:

- A worker prefers to obtain a binding judicial determination of the precise quantum of their wages and other entitlements (which the FWC as an administrative tribunal does not have the power to give);
- The worker seeks a binding order as to legal remedies;
- The worker is pessimistic about the prospects of success of a FWC conciliation (for example, where an employer is unresponsive despite FWC engagement, or has indicated that they will not settle the matter at conciliation);
- The parties have attempted resolution via conciliation in the FWC but it has not been successful;
- The worker and employer have a technical legal dispute regarding how a legislative instrument is to be applied; and/or
- The worker wishes to pursue penalties against the employer (in which case the worker would need to bring the matter in open court).

It is essential to maintain a direct pathway to court for these workers.

¹⁸¹ *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140.

¹⁸² Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) Part 3A-5.

¹⁸³ *Independent Contractors Act 2006* (Cth) Part 3; DEWR, [‘Employee-Like’ Forms of Work and Stronger Protections for Independent Contractors](#) (Consultation Paper, 13 April 2023) 16.

¹⁸⁴ SAJER Bill Schedule 5, Part 2.

IV.C. Establishing a jurisdiction to resolve wage claims in the FWC, and considering a new Fair Work Court

The FWC should have power to deal with wages disputes

Building on the recommendations of Stewart and others,¹⁸⁵ we recommend that the *FW Act* be amended to provide workers with a choice of forums when they have been underpaid. A worker should be able to elect to either file a small claim in court, or make an application to the FWC to deal with the dispute. We propose that workers be able to bring a claim in the FWC for all remuneration-related disputes, including the payment of minimum wages and entitlements (such as penalty rates, overtime, and leave).

Like the general protections (involving dismissal) jurisdiction, we propose that workers be able to bring wages and/or entitlements disputes for conciliation in the FWC in the first instance. The FWC should be empowered to deal with the dispute by compulsory conciliation (with no requirement for employer consent).¹⁸⁶ If conciliation is successful, the matter would settle and be resolved. If conciliation is unsuccessful, and if the FWC is satisfied that all reasonable attempts to resolve the dispute (other than by FWC arbitration) have been or are likely to be unsuccessful, the FWC can issue a certificate to that effect. The FWC would inform the parties if it considers that FWC arbitration or a court application in relation to the dispute would not have a reasonable prospect of success.¹⁸⁷ This can protect against workers pursuing unmeritorious claims either in arbitration or court.¹⁸⁸

Following the issuing of a certificate, if the parties agree to arbitration by the FWC, the FWC will then determine the matter.¹⁸⁹ For general protections (involving dismissal) matters, the FWC can make an order for the payment of compensation, amongst other orders.¹⁹⁰ If the parties do not agree to arbitration, the matter can proceed to determination by a court, and the court application must be made within 14 days of the certificate being issued.¹⁹¹

Critically, we recommend longer limitation periods than what is currently provided for filing general protections (involving dismissal) disputes (21 days after the date of dismissal). Under the *FW Act*, an applicant must file a wage claim with the court within six years from the date of the underpayment.¹⁹² We suggest that the limitation period for underpayment claims at the FWC align with this six year limitation for claims at court. This would ensure that applicants who have claims close to the limitation period are not deterred from bringing a claim in the FWC.

¹⁸⁵ Stewart et al (n 157) 51-55.

¹⁸⁶ *FW Act* s 368.

¹⁸⁷ *Ibid*.

¹⁸⁸ *Ibid* 370. Note the previous government sought to align with these provisions when it proposed to bring small claims within the FWC's dispute resolution functions: SAJER Bill proposed s 548C(8).

¹⁸⁹ *FW Act* s 369.

¹⁹⁰ *Ibid* s 369(2). The scope of orders available to the FWC in these situations would need to be considered further. We note that the SAJER Bill sought to limit available orders to compensation. However, we would propose a broader range of orders, including systemic remedies such as audits or reporting obligations, to maximise the deterrent impact of each individual claim.

¹⁹¹ *Ibid* s 370.

¹⁹² *Ibid* s 545.

As in the general protections and unfair dismissal regimes,¹⁹³ to avoid confusion and ‘forum shopping’, workers would be prevented from pursuing multiple wage claims at once. This would prevent, for example, a worker from simultaneously pursue an underpayment case in the FWC and a court.

Recommendation: A user-friendly application form for underpayment disputes at the FWC

As an administrative rather than judicial body, FWC application forms require less detail and are far easier for workers to complete. We propose that any new application form for a FWC wages dispute should preserve the flexible approach of existing FWC forms (analysed in **Part III.A**).

The form should guide the worker to provide information about their underpayment but, unlike a FCFCOA small claims application, not require a precise calculation of entitlements or specification of the remedy sought. For example, the FWC application form for general protections (involving dismissal) claims includes broad, guiding questions such as:

- What date did you begin working for the employer?
- What date were you notified of your dismissal?
- What date did your dismissal take effect?
- Describe the actions of the employer, including any reasons given for your dismissal, that have led you to make this application.
- What outcome are you seeking by lodging this application?¹⁹⁴

In line with this approach, the FWC application form for a wage claim could ask questions such as:

- What were your duties?
- What was your hourly rate (and classification, if known)?
- What was the total amount of money you received?
- Did you work regularly?
- Please complete the template diary spreadsheet to show the hours you worked (to the best of your knowledge).
- Did you take breaks?
- Were you paid for any leave?
- What outcome are you seeking by lodging this application?

¹⁹³ Under *FW Act* ss 725-732, a person is prevented from making an application or complaint in relation to their dismissal if they have already made a different listed complaint which has not been withdrawn. Similar restrictions apply in respect of non-dismissal general protections and anti-discrimination laws: *FW Act* s 734.

¹⁹⁴ FWC (n 94) General Protections Application Form. Note that the applicant is nonetheless required to identify the legal basis of their claim in the application form: see ‘Alleged contravention’.

The form could then prompt the worker to attach any supporting documents such as pay slips or bank statements.

Provision of this information is far more manageable for a worker than that required by the current small claims court application form, which requires the applicant to identify the relevant term of an award or enterprise agreement, and the full and exact quantum of their claim.

Recommendation: Requesting employer records and calculations

A new FWC application form for a wage claim should also include a checkbox or another way for a worker to request employer records (engaging the employer's statutory obligation to provide these to an employee or former employee upon request).¹⁹⁵ While employment lawyers would know to make such a request on behalf of an applicant, many unrepresented workers would not be aware that they had the right to make this request, or the consequences of an employer's refusal to provide records (i.e. that it constitutes a contravention of the *FW Act*).¹⁹⁶ By including this request on the form, the legal process can support unrepresented workers and ensure represented workers avoid unnecessary legal expense (as their lawyer would not need to send this request).

Employer records can be a helpful starting point for the worker to assess the evidence that can support their underpayment claim. If the worker regards the records as largely accurate, these documents can assist a worker to prepare and articulate their own position and gather their own evidence, in advance of conciliation. Using the records, the worker may undertake calculations themselves or (pursuant to **Recommendations 14 and 15**) seek assistance from the Wages and Superannuation Calculation Service, or a legal assistance provider such as a CLC, or MWC. If the worker regards the records as false or inaccurate, obtaining them at this early stage nonetheless gives a worker time to consider what other evidence they can marshal to support their claim.

If the employer fails to provide records, the reverse onus of proof in the *FW Act* should apply: if the matter were to proceed to court, the employer would have the burden of disproving the allegation of underpayment.¹⁹⁷ As the FWO can issue an infringement notice to the employer for a failure to provide employee records, the risk of penalty could further incentivise employers to provide records.

Recommendation: Maximise deterrent impact and remediation flowing from individual claims

Resolving matters in private conciliations that may result in non-disclosure agreements is not aimed at 'developing and legitimising norms of workplace practice beyond the individual employer' (as noted by Stewart and others).¹⁹⁸ Where an employer has underpaid one vulnerable worker, it would not be unusual to discover that the employer has also underpaid other vulnerable workers.

In order to better detect systemic underpayment and maximise the deterrent impact of individual wage claims, the new FWC application form for wage claims could also contain a checkbox option where the worker

¹⁹⁵ *FW Act* s 535; *FW Regulations* r 3.42.

¹⁹⁶ *FW Act* s 535.

¹⁹⁷ *Ibid* s 557C.

¹⁹⁸ Stewart et al (n 157) 54.

could elect to have a copy of the application form sent to the FWO. This would ensure that critical intelligence is provided to the FWO as often as possible, enabling strategic enforcement action against repeat offenders or for the most egregious breaches.

Recommendation: Permit FWC to triage and make procedural orders

Upon receipt of an application, the FWC would triage the matter. Modelled on the FWC's existing broad powers to inform itself in relation to any matter before it,¹⁹⁹ the FWC should have a range of discretionary powers to 'deal with' the dispute in addition to conciliation or arbitration – that is, through making procedural orders or directions to progress the matter and facilitate resolution. For example, if the claim lacks sufficient information, and to deter unmeritorious claims, the FWC could contact the applicant to seek further information or evidence. Or, if appropriate, the FWC could order that the employer file a response, attaching their calculations of the underpayment, or that the employer organise an independent audit of their payroll.

If not already provided by the FWC's broad power to inform itself, these powers could be specifically enumerated in legislation, or if more flexibility is needed, a broad discretionary power could be legislated subject to further articulation (for example, in a FWC Practice Note).

We suggest introduction of a new legislative requirement to comply with any FWC orders or directions, to promote compliance with such directions and the efficient resolution of claims.²⁰⁰ We note that, to promote genuine and meritorious engagement with FWC processes, there exist adverse costs consequences for unreasonably refusing to participate in a matter before the FWC, if the matter then proceeds to court;²⁰¹ and for instituting or responding to a FWC application vexatiously or without reasonable cause or where it should have been reasonably apparent that the application or response had no reasonable prospects of success.²⁰²

Recommendation: Consider establishing a new Fair Work Court

If a FWC dispute does not resolve at conciliation, there should be a streamlined process for the referral of matters from the FWC to a court. One way this could be achieved is by establishing a new Fair Work Court that sits alongside the FWC and is dedicated to hearing industrial matters. This is a model which has previously existed in a number of Australian states, currently exists in the South Australian Employment Tribunal, and has recently been re-introduced in NSW with legislation establishing that the NSW Industrial Relations Commission can sit as the NSW Industrial Court.²⁰³ In NSW, this will allow the Commission to operate both as a

¹⁹⁹ *FW Act* ss 368, 590, 595. Under s 789FE, the FWC has various powers to deal with applications relating to bullying: it can 'start to inform itself of the matter under section 590, it may decide to conduct a conference under section 592, or it may decide to hold a hearing under section 593'.

²⁰⁰ We acknowledge Sheldon Oski, Lead Industrial Officer (VIC/TAS) – Strategic Power, United Workers' Union for providing this suggestion in consultation (via email on 2 October 2023). Mr Oski suggested: 'you would want to make the requirement to file a response a statutory obligation under the *FW Act* or by an order from a [Commissioner], as from my experience with Form F3s for unfair dismissals, it is not uncommon for employers to simply refuse to do them and that undermines the utility of the process.'

²⁰¹ *FW Act* s 570(2)(c).

²⁰² *Ibid* s 611.

²⁰³ *South Australian Employment Tribunal Act 2014* (SA). In NSW from 1996 until 2016, the Industrial Relations Commission could sit as the Industrial Relations Court; this has been re-established through the passage of the Industrial Relations Amendment Bill 2023 (NSW).

‘tribunal for an arbitral purpose and as a separate industrial court for judicial purposes’.²⁰⁴

Experts, including Stewart, have argued for the dual appointment of legally qualified commissioners to the FWC and the Fair Work Court.²⁰⁵ This is the model of appointment that will proceed in the NSW Industrial Commission/Court, where judicial members can also act as a conciliator or arbitrator.

This model could facilitate a swift referral of a matter where an employer does not agree to arbitration or does not comply with a FWC order, potentially eliminating the need for the work to lodge a fresh application (and supporting documentation) to the court.²⁰⁶ Non-compliance with an FWC order is already a civil remedy provision that can be heard by a court.²⁰⁷ With the streamlined integration of FWC conciliation with a court outcome, the prospect of judicial enforcement and a possible penalty order would be real in the mind of the employer, encouraging them to resolve the matter early or comply with the FWC order they have been given.²⁰⁸ Furthermore, FWC conciliation or arbitration proceedings whilst quick are ultimately private and can have limited impact beyond or even on the individual employer’s behaviour. A more streamlined pathway to judicial enforcement via a Fair Work Court would allow information against recalcitrant employers to become publicised more easily, providing intelligence about non-compliance to enforcement actors such as the FWO and unions. These factors would have flow-on benefits for specific and general deterrence.

While a Fair Work Court could provide a more seamless process for workers who initiated a wage claim in the FWC, we recognise that the creation of new specialised court alone does not remove the barriers to migrant workers obtaining a determination of unpaid wages which stem from the formality of judicial procedures. Indeed, several issues that we have identified for vulnerable workers accessing the FCFCOA would continue to arise in a Fair Work Court. For this reason, our recommendations in **Part III** about the FCFCOA would remain relevant to any new judicial forum.

The Fair Work Court could replace the FCFCOA in being responsible for the federal small claims jurisdiction. However, we recognise that the costs of establishing a new institution are considerable and there are potentially implications for, eg, the fixed tenure of FCFCOA judicial officers. Where resourcing is limited, it should be directed first and foremost to providing critical legal assistance to vulnerable workers and to reforming the existing court-based process.

Recommendation: Use an equal access costs model in court to encourage employers to resolve the matter in the FWC

We recommend an equal access costs model in the small claims process, which could subject an unsuccessful employer to an adverse costs order (see **Recommendation 13**), while maintaining the current cost-neutral jurisdiction in the FWC (where parties generally bear their own costs). An equal access costs model would

²⁰⁴ NSW, *Parliamentary Debates*, Legislative Assembly, 23 November 2023, 43 (Ms Sophie Cotsis). We note that the NSW Industrial Commission/Court would not hear Fair Work small claims as it sits within the NSW workplace relations (rather than national) system, which applies to NSW public sector and local government employees only. Small claims made in NSW would be heard in the NSW Local Court or the FCFCOA.

²⁰⁵ Andrew Stewart, quoted in ‘Killer Argument for Labor to Set Up Fair Work Court’ (Workplace Express, 13 May 2022); Andrew Stewart, ‘Polls Apart? What the Federal Election Could Mean for Workers and Employers’ (Webinar, Centre for Decent Work & Industry, Queensland University of Technology, 11 May 2022); Law Council of Australia (n 157) 13-14.

²⁰⁶ Andrew Stewart, Workplace Express (n 205); Andrew Stewart, Webinar (n 205); Law Council of Australia (n 157).

²⁰⁷ See, eg, *FW Act* s 369(3); s 539 item 11.

²⁰⁸ ACTU (n 157).

provide a powerful incentive for employers to resolve disputes in the FWC, to avoid the possibility of an adverse costs order in court. In a small claims matter involving a full day hearing, an unsuccessful employer could be liable for approximately \$15,000.²⁰⁹ In addition to the potential for adverse costs orders in the small claims jurisdiction, employers would be further incentivised to engage in FWC processes by the potential for adverse cost consequences in court where a party unreasonably refuses to participate in a matter before the FWC involving the same facts.²¹⁰

²⁰⁹ Research brief provided to authors by Maddocks on 23 August 2023. Maddocks kindly assisted with calculating this estimate, based on the scale of costs in the *FCFCOA General Federal Law Rules*, Schedule 2:

Initiating an application	\$3,354.70
Preparation for final hearing – one day matter	\$7,543.02
Final hearing costs for attendance of solicitor	\$342.09
Daily hearing fee – for a full day hearing	\$2,512.56
Advocacy loading (50% of the daily hearing fee)	\$1,256.28
Total	\$15,008.75

²¹⁰ *FW Act* s 570(2)(c).

Recommendation 11: Extend the FWC's jurisdiction to wage claims

The *FW Act* should be amended to enable the FWC to assist with the resolution of wages and entitlements disputes, by:

- Allowing employees to make an application to the FWC to deal with a dispute relating to wages and/or entitlements, modelled on the FWC's existing general protections (involving dismissal) jurisdiction. Employees should retain the right to make a wages claim directly to court if they prefer.
- Enabling the FWC to triage matters and make procedural orders to progress the matter.
- Enabling the FWC to conduct compulsory conciliation to resolve the matter. Where conciliation is unsuccessful, arbitration should be available with the consent of both parties, or the worker could pursue the claim in court. The FWC would advise parties if it considers that arbitration or a court claim would not have a reasonable prospect of success.

A new FWC application form for a wages and/or entitlements dispute should:

- Assist vulnerable workers to demonstrate and progress their claims efficiently and fairly, by: retaining the accessible features of current FWC forms; enabling employees to lodge an application without complete calculations (instead being prompted to provide information about duties, hours and dates worked and income received); and including an option for the worker to submit a formal request for employee records under the *FW Regulations*.
- Assist with the detection and resolution of systemic underpayment issues, by including an option for the worker to send a copy of their application to the FWO.

Recommendation 12: Consider establishing a new Fair Work Court

The Government should consider establishing a new Fair Work Court to sit alongside the FWC, with legally qualified Commissioners and Judges jointly appointed to both institutions.

PART V: ACHIEVING NECESSARY LEGAL ASSISTANCE AND REPRESENTATION FOR SMALL CLAIMS

Many migrant workers simply cannot pursue an underpayment claim against an employer without assistance. Even if every one of our recommendations in this report were implemented, unaided vulnerable workers would still be unable to bring a clear underpayment claim and comply with procedural requirements, even in a highly informal process. Targeted legal assistance and/or representation is critical for some workers to recover their minimum entitlements. For others who may fare somewhat better on their own, legal assistance would improve the efficiency of proceedings and the prospect of a successful outcome.

The FCFCOA is continuing to consider how to link court users with community legal services. Legal assistance services must be appropriately resourced in order for such referrals to be effective.

Current services are piecemeal, underfunded and cannot meet demand

Some workers can benefit from the self-help models that exist for small claims matters. Workers who are more able to self-represent can be empowered to bring their claims effectively by information and guidance from the FCFCOA, FWO or FWC, and/or from periodic or one-off advice from legal assistance providers.

The FCFCOA and FWO websites provide information about the small claims process, and Redfern Legal Centre has reported that the FWO's Small Claims Guide is very useful for their clients and is the most frequently accessed among the links they provide for materials on the FWO website.²¹¹ The FWC also has many information and education resources for tribunal users (see **Part IV**).

At the FCFCOA and FCA in Victoria, NSW, ACT and Tasmania, Justice Connect's Federal Self Representation Service provides free, one-hour appointments to some self-represented applicants in small claims (and other employment law) matters. Lawyers from private firms provide one-off advice to enable workers to represent themselves, but do not provide ongoing representation.²¹² Where appropriate and where resources permit, Justice Connect can provide multiple advice appointments or assist some clients to find ongoing pro bono assistance, but this does not occur regularly.²¹³

The FWC's Workplace Advice Service similarly provides free legal advice for employees or small business employers who are not represented (or not a member of a union or employer association), in relation to dismissal, general protections, bullying, or harassment claims. It organises a one-off, one-hour appointment with a law firm or a CLC.²¹⁴ This Service has been found to give parties 'the tools to proceed' and ultimately make cases 'much more structured, more efficient, and ultimately much more fair'.²¹⁵ Like the Federal Self Representation Service, it does not provide representation.

Self-representation services such as these are critical. However, in our observations we found (and others have

²¹¹ FCFCOA, 'Fair Work: Small Claims (n 101); FWO, '[Small Claims Guide](#)'; Consultation with Sharmilla Bargon, Senior Solicitor, Employment Law Practice, Redfern Legal Centre (26 October 2023). Redfern Legal Centre has further suggested that the Guide be translated into community languages.

²¹² Justice Connect, Self Representation Service (n 122). We note that there are other self-representation advice services that provide advice in relation to small claims matters in other states.

²¹³ Consultation with Rebecca Chapman, Principal Lawyer – Services | Access Program, Justice Connect (1 November 2023).

²¹⁴ For the list of partner organisations, see FWC, '[Legal Advice From the Workplace Advice Service](#)'.

²¹⁵ Centre for Innovative Justice, [RMIT University - Final Report for Fair Work Commission: Evaluation of Pro Bono Program](#) (Report, 1 September 2016) 11.

argued) that for many vulnerable workers this level and model of assistance is simply not enough.²¹⁶ Migrant and other vulnerable workers require ongoing and targeted assistance.

Free and community-based employment legal services have been widely recognised as critical to providing ongoing and holistic assistance to migrant and vulnerable workers.²¹⁷ CLCs and MWCs provide assistance at all stages of the small claims process from education about rights to bringing claims to enforcing judgments. These services have the trust of migrant workers and are expert at place-based service delivery to effectively assist vulnerable workers. University student legal services can provide both migration and employment advice to international students, who often make up more than half of their client base.²¹⁸ Legal Aid NSW similarly reports that since the introduction of its Employment Law Practice, employment law has been in the top four legal issues about which clients seek advice.²¹⁹

However, there is no recurrent, dedicated funding stream for these services to deliver affordable employment law education, advice, casework and representation to vulnerable workers.²²⁰ Funding for CLCs to provide employment-related help is often limited to particular categories of clients or legal matters, and time-limited.

As a result, legal assistance providers including CLCs cannot meet demand:²²¹

- Redfern Legal Centre reports that for every two employment law advices they provide, they refer approximately one client away. They refer away 54% of callers.²²²
- South-East Monash Legal Service reports that their appointments for employment matters usually book out the day they are made available to the public.²²³
- WEstjustice and South-East Monash Legal Service report that:²²⁴

JobWatch, a community legal centre specialising in employment matters, cannot meet 57% of demand for telephone assistance (even fewer receive casework support and the most vulnerable will not utilise

²¹⁶ WEstjustice, Springvale Monash Legal Service and JobWatch, Submission to Select Committee on Temporary Migration (n 31) 23.

²¹⁷ As an example of the impact of CLC assistance: WEstjustice, SMLS and JobWatch deliver targeted employment law services to international students in Victoria as part of the International Students Employment and Accommodation Legal Services. Since 2016 and as at July 2022, they had jointly recovered more than \$867,000 in unpaid entitlements for their clients: WEstjustice, South-East Monash Legal Service and JobWatch, [Submission On Additional Workplace Relations Measures Being Considered For 2023: Stand Up For Casual Workers](#) (6 April 2023).

²¹⁸ In 2022-23, international students comprised: 68% of clients of the Tasmanian University Student Association Student Legal Service (TUSA SLS); 52% of the clients of the University of Melbourne Student Union Legal Service (UMSU Legal Service); 67% of the clients of the ANU Students' Association Legal Service (ANUSA Legal Service); and 60% of the clients of the UTS Student Legal Service. Data provided by ANUSA Legal Service, UMSU Legal Service, TUSA SLS and Youth Law Australia (and other members of the National Student Legal Services Network).

²¹⁹ National Legal Aid, [Submission](#) to the Independent Review of the National Legal Assistance Partnership (October 2023) 27.

²²⁰ This builds on the Select Committee on Temporary Migration (n 58) Recommendation 39 (that FWO enter into a formal partnership with registered organisations in the shared mission of combating temporary visa worker exploitation).

²²¹ See footnote 67.

²²² Consultation with Sharmilla Bargon, Senior Solicitor, Employment Law Practice, Redfern Legal Centre (26 October 2023).

²²³ Consultation with Ashleigh Newnham, Director of Advocacy and Development, South-East Monash Legal Service (16 May 2023).

²²⁴ WEstjustice Community Legal Centre and South-East Monash Legal Service, [Joint Submission to Victorian Inquiry Into Sustainable Employment for Disadvantaged Jobseekers](#) (2019) 9. See also South-East Monash Legal Service, *The Challenges of Recovering Underpaid Wages* (n 132) 9; and South-East Monash Legal Service, [Submission](#) to Environment and Planning Committee, Legislative Assembly of Victoria, *Inquiry Into Employers and Contractors Who Refuse To Pay Their Subcontractors For Completed Works* (31 May 2023) 7.

a telephone service). Justice Connect, a community organisation that helps facilitate pro bono referrals, reports that employment law is one of the top four problems that people request assistance for [in Justice Connect's Access Program] ... In Victoria, Legal Aid does not provide assistance with employment matters (except where discrimination is involved) and frequently refer matters to other services. Apart from WEst-justice and SMLS, there are no other targeted employment law services for newly arrived, refugee or asylum seeker communities in Victoria, and our services are frequently inundated.

Greater, tiered assistance is needed

Three levels of assistance to enable all workers to enforce their rights

To overcome barriers to justice within the small claims process, three levels of assistance are required.

1. In order for self-represented workers to bring and progress their claims effectively and efficiently, they must have access to information, assistance and advice.

Recommendations

- Establish a new Wages and Superannuation Calculation Service that provides information, support, calculation assistance, and technical assistance (for example, on terms and conditions of awards or enterprise agreements, similar to the function served by the FWO at mediations) to self-represented workers; and referrals to legal services for those who require more comprehensive representation (**Recommendation 14**)
 - Establish a duty lawyer service in the FCFCOA (**Recommendation 6**).
2. Vulnerable workers should be able to engage legal assistance providers that provide free, accessible, ongoing and holistic assistance or representation.

Recommendations

- Increase funding to legal assistance providers such as CLCs, MWCs and student legal services (**Recommendation 15**)
 - Establish a Wages and Superannuation Calculation Service that can support legal assistance providers such as CLCs, and MWCs, to assist and/or represent vulnerable workers, by providing efficient claim calculation tools and technical experts in ADR processes to provide information to parties on terms and conditions in relevant workplace instruments (**Recommendation 14**)
 - Change the rules regarding costs, to enable service providers to recover a portion of their legal costs from the employer when their client obtains a judgment in their favour, to create a new income stream for community-based service-providers (**Recommendation 13**)
 - Implement a number of recommendations to make the small claims process more efficient, cost-effective and accessible to reduce the resources required for community legal services to represent workers, and enable legal practitioners to assist more workers (**Recommendations 3, 4, 5, 7**).
3. Private practitioners should be encouraged to assist workers who need assistance, but do not qualify for legal assistance from an existing service.

Recommendations

- Enable workers with a court order in their favour to recover their legal costs from the employer to incentivise lawyers to provide representation on a ‘no win no fee’ basis (see **Recommendation 13**)
- Establish a Wages and Superannuation Calculation Service that can assist workers to calculate their entitlements prior to seeking private legal assistance to increase private lawyers’ willingness to take on workers’ wage claims because preparing these claims requires fewer resources (see **Recommendation 14**).

Recommendation: Increase availability of legal representation by enabling workers who bring successful claims to recover legal costs

The resources required to undertake underpayment calculations and pursue an underpayment matter means that small claims are not commercially viable for private firms. The availability of lawyers willing to represent migrant workers in wage claims is highly limited, in part because the FCFCA small claims division is a ‘no-costs jurisdiction’ in which each party bears their own legal costs. This means there is no way for community legal service providers to recoup their costs when they assist workers, and there is no financial incentive for private lawyers to support this essential enforcement work where vulnerable workers cannot pay their full fees.

Equal access costs models currently operate both within and outside of employment contexts. In the United States, to encourage workers to enforce their labour rights, the employer must pay a worker’s attorney’s fees and costs where the worker is successful.²²⁵ In Australia, the Government in November 2023 proposed an equal access costs model for federal anti-discrimination claims to ensure that legal representation is financially viable and accessible so that anti-discrimination protections are upheld in practice.²²⁶ This model seeks to address how the risk of an adverse costs order can operate as a significant barrier to accessing justice and may deter individuals, particularly vulnerable individuals, from commencing legal proceedings.²²⁷ An equal access costs model also exists in Australian whistleblower protection laws.²²⁸

We propose adoption of a similar equal access or one-way costs shifting model²²⁹ to enable vulnerable workers to access the small claims jurisdiction in Australia. Under this asymmetric approach, the court would award legal costs against the employer where a worker is successful. If the worker is unsuccessful, each party would bear their own costs. We do not propose a costs-following-the event model (where the unsuccessful party pays the costs of both parties). This is because the financial risk of an adverse costs order for an applicant

²²⁵ If a worker is unsuccessful, each party bears their own costs: *Fair Labour Standards Act of 1938*, 19 USC §216(b). In the D.C. area, cost shifting has been paired with statutorily enshrined lawyer fees. This approach has reportedly improved access to justice for workers, creating financial incentives for lawyers to pursue cases, especially with smaller claims: see Matthew Fritz-Mauer, ‘The Ragged Edge of Rugged Individualism: Wage Theft and the Personalization of Social Harm’ (2021) 54(3) *University of Michigan Journal of Law Reform* 735, 762.

²²⁶ Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth). Equal access costs models also exist in: the US in employment-related discrimination matters (US Equal Employment Opportunity Commission, Management Directive 110 (August 2015) ch 11); the US in civil actions brought by or against the US or any agency or official of the US (28 United States Code §2412); and the UK in personal injury matters (Qualified One-Way Costs Shifting regime: *Civil Procedure Rules 1998* (UK) rr 44.13-44.17).

²²⁷ Explanatory Memorandum, Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth) 3.

²²⁸ *Corporations Act 2001* (Cth) s 1317AH; *Public Interest Disclosure Act 2013* (Cth) s 18.

²²⁹ Tess Hardy, [Submission 85](#) to the Underpayments Inquiry (February 2020) [37]; Melanie Schleiger, Victoria Legal Aid, quoted in [Jenkins Defends “Cost Neutral” Harassment Cases](#) *Workplace Express* (online, 2 November 2022).

would prevent most vulnerable workers from taking action at all, even if the worker was confident of the merits of their claim.²³⁰

An equal access costs model would encourage workers to pursue their legal entitlements and substantially improve access to justice. Pursuing a claim would be worthwhile for more workers because they would retain the full amount of compensation (the wages they were owed in the first place) without having to deduct their legal fees from the award of compensation.

An equal access costs model would also encourage more CLCs and MWCs to represent migrant workers in wage claims because it would allow these organisations to recoup a portion of the actual cost of their service via the use of conditional costs agreements.²³¹ We understand that some CLCs use conditional costs agreements with their clients in anticipation of possible litigation. These agreements could include a provision stating that costs will only be payable if certain conditions are met (for example where the worker has a 'successful outcome' which can be defined to include where the client obtains money from the other side as costs). This costs model would also encourage private lawyers to represent workers in meritorious wage claims because workers would be able to pay private legal fees *and* retain the full amount of compensation.

The risk of mounting costs would also give workers and their representatives leverage in negotiations with recalcitrant employers. The risk of an adverse costs order would encourage the use of offers of compromise, and incentivise employers to settle a matter outside of court or in an ADR process (including if wage claims could be brought in the FWC).

It is important to ensure that this costs model does not open the floodgates to predatory lawyers pursuing unmeritorious cases, charging exorbitant fees, or stymying genuine negotiations, especially if the worker is too vulnerable to assess their case independently. Three key safeguards would deter unmeritorious claims and protect both workers and employers, including smaller businesses, as reflected in the current Bill in relation to federal anti-discrimination claims.²³² First, the worker already risks a costs order against them if they bring a claim vexatiously or without reasonable cause and this risk would and should continue to exist within an equal access costs model.²³³ Second, because lawyers would only be paid if the worker succeeds in their claim, the time and effort required to bring wage claims provide a natural disincentive for lawyers bringing claims with low prospects of success. Third, we recommend the *FW Act* be amended to allow a court to award costs against a legal representative or agent who has caused costs to be incurred by the opposing party because of an unreasonable act or omission, or where they encouraged an application that had no reasonable prospect of success. Similar provisions already exist in relation to claims brought to the FWC.²³⁴ This safeguard is especially important in respect of vulnerable migrant workers, who at times may not understand the proceedings due to language and other barriers.

An equal access costs model can be established through an amendment to section 570 of the *FW Act*, which provides for costs when a party to a small claims proceeding acts vexatiously or unreasonably. A new subsection should provide that (a) if a worker is successful in a small claims proceeding, their employer is required to pay the worker's legal fees in addition to their legal minimum entitlements, and (b) if a worker is

²³⁰ As noted by Hardy, one-way costs shifting can ensure that 'the prospect of having an adverse costs order awarded claimants does not inhibit access to justice': Hardy (n 229) 13.

²³¹ See footnote 209.

²³² Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth) proposed s 46PSA(6).

²³³ *FW Act* paras 570(2)(a) and (b).

²³⁴ *Ibid* ss 376, 780.

unsuccessful in a small claims proceeding, both parties bear their own costs, except where the court is satisfied that a party has acted vexatiously or unreasonably (incorporating the existing exception in section 570).

A second option is to amend section 548 of the *FW Act* which allows the court to make a costs order for filing fees, as follows:

Costs for filing fees and legal fees paid in relation to the proceedings

(10) *If the court makes an order (the small claims order) mentioned in subsection (1) against a party to small claims proceedings, the court may make an order as to costs against the party for any filing fees paid to the court and legal fees paid by the party that applied for the small claims order.*

As currently drafted, however, the provision only provides the court with *discretion* to make a costs order, which may not provide sufficient certainty to incentivise private legal representation or encourage workers to proceed if they anticipate their legal costs will substantially reduce the value of the compensation award.

Nonetheless, the court retains a general discretion to depart from the fixed, event-based scale of costs set out in the court rules,²³⁵ and to determine how to calculate costs to which a party may be entitled.²³⁶ We propose that these discretions continue to apply an equal access costs model. It may be appropriate at times for the court to apply the scale of costs to determine the quantum of a costs order (for example, where an employer has been recalcitrant or unwilling to engage in settlement negotiations).²³⁷ It may be appropriate in other circumstances for the court to exercise its discretion to award a lower costs order than the scale of costs would otherwise provide, such as where the quantum of underpayment is low and the matter was straightforward and resolved quickly.

Recommendation 13: Equal access costs model

The Government should amend the *FW Act* to apply an 'equal access costs model' to small claims. Section 570 should be amended to provide that (a) if a worker is successful in a small claims proceeding, their employer is required to pay the worker's legal fees in addition to their legal minimum entitlements, and (b) if a worker is unsuccessful in a small claims proceeding, both parties bear their own costs, except where the court is satisfied that a party has acted vexatiously or unreasonably.

To further disincentivise predatory lawyers bringing unmeritorious claims, an applicant's lawyer or agent should also be subject to a costs order for unreasonable acts or omissions or bringing claims without reasonable prospects of success.

Recommendation: Establish a new Wages and Superannuation Calculation Service

We recommend that the Government establish a new Wages and Superannuation Calculation Service (Calculation Service) that would provide free and accurate calculations of amounts owed to a worker based on information that the worker provides about their job and the hours they worked each day. The Calculation Service would address a critical unmet and resource-intensive need – calculations assistance – to enable self-

²³⁵ *FCFCOA General Federal Law Rules*, Schedule 2.

²³⁶ *Ibid* r 22.02(2): provides that the court may, when making an order for costs, set the amount of the costs or set the methods for calculation of the costs.

²³⁷ Such a costs order could be significant: see footnote 209.

represented workers, community lawyers and private lawyers to run their claims more efficiently. This in turn would allow more community lawyers and private lawyers to assist a wider pool of workers to pursue their claims.

The Calculation Service would be a clear, first port of call for workers seeking assistance with calculating their underpayment, or information on the small claims process more broadly. It would provide a centralised source of information, referral and support services for workers, and help screen unmeritorious claims and prevent them from proceeding. If reforms are introduced to create a new jurisdiction for wage recovery through the FWC (see **Recommendation 11**), the Calculation Service should also be available to workers who lodge a claim there. The court and the FWC could refer all workers to the Calculation Service in the first instance.

Critically, the Calculation Service would fill gaps and increase the efficiency and effectiveness of existing support services and bodies, rather than replace them. The Service would work in conjunction with self-representation services, community legal centres and community-based service providers, migrant workers centres, student legal services, Legal Aid Commissions, the FCFCOA, the FWC and private practitioners.

The Calculation Service would tailor its level of assistance to a worker depending on the individual worker's needs. This would ensure that resources are targeted where needed. For vulnerable workers, the Service would work in partnership with legal assistance providers including CLCs and MWCs around Australia. For workers who do not need comprehensive assistance by a CLC or private lawyer, the level of assistance provided by the Service could be determined in accordance with eligibility criteria. For example, for some workers, the Service may refer them to an online tool and provide high-level guidance, while for other workers, the Service may assist with inputting information into a tool, completing calculations in their entirety and providing step-by-step support.

The Calculation Service would not provide legal advice – it would input information provided by the worker, and not verify it. If a worker is unsure of their classification or award, for example, the Service could refer the worker to the FWO or a CLC to obtain this information, and then provide calculations assistance based on what the worker tells them.

The Service could be established as a new standalone service, or be coordinated by the FWO or the FWC. It could also be coordinated by a non-governmental organisation such as a CLC.

We propose that the functions of the Calculation Service be as follows:

1. Develop, maintain and share calculation tools

The Calculation Service should develop, use, share and update tools to efficiently calculate amounts owing to workers based on their legal entitlements. We recommend that the Government fund the Service (or another body) to design smart spreadsheets or apps that enable insertion of relevant data (for example, award, classification, dates and hours of work and breaks) and then automatically calculate the amounts owed. These spreadsheets could be linked to, or build on, the FWC's awards database²³⁸ to automatically update with increases to award pay and allowances. These tools could be shared with service providers such as CLCs and MWCs, to assist them to deliver place-based advice and casework.

²³⁸ FWC, '[Modern Awards Pay Database](#)'.

2. Undertake or check calculations for individuals and service providers

As set out above, an individual (eg someone who is able to self-represent, or is ineligible for legal assistance from an existing service) may be eligible for the Calculation Service to undertake or check calculations for them directly.

In the case of vulnerable workers represented by a CLC, MWC or lawyer – in less complex cases, service providers could use the tools to calculate clients' outstanding entitlements themselves. In more complex or resource-intensive cases, service providers could perform the initial work of providing advice on the relevant classification/rate of pay and hours, and then provide this information to the Service to input into smart spreadsheets to calculate the quantum of the claim. In either circumstance, the Service would dramatically reduce the time required for a lawyer to assist a worker, and would substantially increase the capacity of these providers to assist more workers.

3. Technical advisory service in ADR

To promote the timely and fair resolution of wage disputes, the service could also be available to provide an expert or technical advisory service in ADR in all forums. This would be similar to the technical advisory role played by experts from the FWO in mediations organised by the FWO.²³⁹ The Service could provide technical experts to advise on, for example, rates of pay applicable to certain classifications, to assist parties to understand their legal entitlements and facilitate timely resolution of claims.

However, it may be difficult to establish the required degree of independence for a CLC or FWC representative to provide a technical advisory role in ADR forums. If a CLC or FWC were to coordinate the Service, it is suggested that the technical advisor function be delegated to the FWO or another independent body.

4. Work collaboratively to complement and enhance the work of other organisations

As discussed above, self-representation advice services such as the Justice Connect Self Representation Service are critical. The FWO is available to provide information on award classification and rates of pay. Courts and the FWC provide information about employment claims processes. CLCs, MWCs and student legal services are best placed to assist the most vulnerable workers. It is not suggested that the Service replace any of these existing services. Instead, the Service can enhance and streamline the work of existing services, for example through:

a. Referral service

The Service could provide workers with warm referrals to legal assistance providers such as CLCs and MWCs, or refer workers to the FWO, self-representation services, court or commission registries, or duty solicitor services (see **Recommendation 6**) as appropriate. CLCs and other legal assistance providers could also refer workers to the Service if they believe they could self-represent with a lower level of assistance, or if they are not eligible for existing legal assistance services.

b. Information and education resources

Provide information, practical assistance and education resources on small claims processes (where gaps are identified in FWO, court or Commission offerings). As set out in **Recommendation 4**, this could include procedural guidance regarding service for workers who are able to self-advocate or are

²³⁹ The formalisation of the FWO's mediation functions and use of Technical Liaison Officers is referred to in: FWO, *Fair Work Ombudsman Operations Manual* (August 2013) 18-19; Australian National Audit Office, *Delivery of Workplace Relations Services by the Office of the Fair Work Ombudsman* (2012) 80.

not eligible for existing legal assistance services, as well as information about different options for bringing small claims (for example, choice of forum between the FCFCOA, a magistrates court or the FWC if a wage jurisdiction is established) and their relative advantages and disadvantages.

Recommendation 14: Wages and Superannuation Calculation Service

The Government should fund a Wages and Superannuation Calculation Service. This Service could:

- Develop, maintain and share tools to efficiently calculate amounts owing to workers;
- Undertake or check calculations of wages, entitlements and superannuation for unrepresented workers directly, or in partnership with community legal centres and migrant workers centres for the most vulnerable workers;
- Provide a technical advisory service in alternative dispute resolution processes;
- Provide warm referrals to legal assistance providers such as community legal centres, migrant workers centre, and student legal services;
- Provide information, practical assistance and education resources on small claims processes where gaps are identified, including regarding service (per **Recommendation 4**); and
- Link with a duty solicitor service (per **Recommendation 6**).

Recommendation: Increase funding for legal assistance providers including community legal services, and migrant workers centres, to assist migrant workers to access the small claims process

For the most vulnerable workers, including many migrant workers, tailored and ongoing assistance in employment law matters is required from the beginning to the end of a matter.

Legal assistance providers like CLCs and student legal services, and MWCs, have a strong track record of providing targeted information and education to communities about their rights and where they can get help.²⁴⁰ This is needed to help workers identify when they have a legal problem and where to get help.

When a worker needs legal help, these services provide early intervention, being embedded in and trusted by the community such that vulnerable workers feel safe to contact them. This helps resolve disputes before they escalate and promote ongoing employment. If a dispute cannot be resolved, CLCs and MWCs assist workers to navigate court and legal processes. In employment and small claims matters, CLCs and MWCs assist workers

²⁴⁰ Grattan Institute (n 4) 88. See, eg, the WEstjustice Employment and Equality Law Program education program, which includes a Train the Trainer program, information sessions for community members, and training for professionals who work with target communities so they can identify when their clients have a claim and make appropriate referrals. WEstjustice has also developed a suite of infographic materials to assist clients to understand complex legal advice: WEstjustice, [Migrant and Refugee Employment Law – Infographics Project](#). In addition, the TUSA SLS run by TUSA and Youth Law Australia runs immigration law information sessions for international students at the University of Tasmania at least twice a year, with 349 students registering for the most recent session in June 2024: consultation with Youth Law Australia (11 June 2024).

with calculating underpayments, contacting and negotiating with employers, drafting letters of demand, preparing court documents, serving documents and preparing affidavits of service, appearing at court, and ensuring compliance with additional, complex court processes and procedures. CLCs also provide assistance to workers to recover superannuation via the small claims process, including where unpaid wages have already been back-paid by the employer but unpaid superannuation has not.²⁴¹ These services also provide critical assistance with enforcing a court order, when an employer does not comply.

This continuity of assistance (rather than a piecemeal approach where assistance is provided only at various touchpoints) would ensure efficiency and is necessary to make sure that vulnerable workers do not fall through the cracks (for example, if a lawyer is not on the record a worker may receive correspondence from the court but not understand it nor bring it to anybody's attention). This is resource-intensive, but necessary to ensure accessibility, efficiency and justice.

Greater funding should be allocated for employment law services including in community legal centres and other community-based service providers so that centres can target services to the needs of their local region. Without this assistance, most vulnerable workers simply will never make it to court.

We support the Grattan Institute's recommendation that the Government increase funding for CLCs that specialise in employment and migration law by \$7 million per year to facilitate migrant workers' wage recovery.²⁴² We also support the Grattan Institute's recommendation that the Government provide \$10 million per year to establish and run MWCs in each state and territory. The Grattan Institute argues that these (and other recommended) measures could be funded by higher penalties and a 'preventing exploitation levy' of \$30 per year on temporary visas with work rights.²⁴³

Recommendation 15: Increased funding for legal assistance providers including community legal services, and migrant workers centres

The Government should provide recurrent, dedicated funding to legal assistance providers including community legal services, and migrant workers centres, to deliver education and legal services to migrant workers so that they can access the small claims process and enforce their rights.

²⁴¹ Consultation with Youth Law Australia (12 June 2024).

²⁴² Grattan Institute (n 4) 88.

²⁴³ Ibid 92.

PART VI: CONCLUSION

The Federal Government will introduce new visa protections in 2024 to ensure that migrants who are exploited in the workplace can pursue a legal claim without jeopardising their visa.²⁴⁴ The small claims process holds great promise. With considered reforms proposed in this report, we believe it could play a greater role in the enforcement of the *FW Act*.

To ensure a healthy ecosystem of compliance with workplace laws, a number of additional structural barriers must be addressed.

First, we need a more effective regulator. We recommend that the Government implement MWT Recommendation 10 in full, and undertake a wholesale review of the FWO as a matter of urgency. Distinct from the recent FWO review which focused on improving efficiency,²⁴⁵ a review of the FWO in line with the MWT Recommendation should thoroughly consider how to improve the accessibility of FWO services for migrant workers. In particular, it should consider the establishment of a migrant worker support unit, ways to increase coordination between FWO and community legal service providers, and a scheme of binding FWO determinations, building on the Australian Financial Complaints Authority model.

Second, laws must also be reformed to encourage those with leverage to promote compliance. This includes a review of legal liability in supply chains, and a strengthening of accessorial liability provisions.

Finally, we recommend that data collection protocols be established in the FCFCOA and FWC to ensure that the impact of any reforms can be properly monitored and assessed.

We have no doubt that each institution, agency, union and community organisation we have worked with are aligned: wage theft must stop. It is time to work together to ensure that the enforcement burden be shifted to where it should lie: on those with the power to employ.

²⁴⁴ The Hon Andrew Giles MP (n 21).

²⁴⁵ KPMG (n 33); MWT (n 5) Recommendation 10: that the Government 'consider whether the Fair Work Ombudsman requires further resourcing, tools and powers to undertake its functions' including in relation to vulnerable and exploited workers.

Overcoming Obstacles to Filing a Claim

Recommendation 1: The Government should amend the FW Act to require employers to provide Statement of Working Conditions to workers on commencement

The Government should amend the FW Act to require employers to provide each employee with a Statement of Working Conditions at the commencement of their employment, to enable workers to identify their legal entitlements. It should set out the job title, relevant workplace instrument, classification, type of employment, duties and location of work, wage rates, ordinary hours, and applicable overtime and penalty rates. It should also include the employer's legal name, ABN and contact details, including address for service.

Like the FW Act provisions relating to the failure to provide pay slips, failure to provide the Statement should lead to a reverse onus of proof in wages and entitlements claims brought by an employee against the employer, and should be a civil remedy provision subject to an infringement notice by the FWO.

Recommendation 2: The Government should amend the FW Regulations to require pay slips to individually itemise deductions and establish hours paid at ordinary versus overtime or penalty rates

The Government should amend the FW Regulations to require that employers provide pay slips that individually itemise the purpose and amount of any deduction made from the employee's wages; and that set out, for each day worked, which hours are classified as ordinary hours versus hours that attract overtime or penalty rates (and what penalty applies).

Recommendation 3: The FCFCOA should be appropriately resourced to consult with relevant communities and conduct user testing to ensure the small claims application form is accessible for unrepresented migrant and other vulnerable workers

The Government should allocate resources to enable the FCFCOA to conduct user testing of the small claims application form and other written material, including on the court website, with migrant communities and individuals who do not have legal expertise. This and other consultation could inform revisions to improve the accessibility of these materials.

Overcoming Obstacles to Getting a Court Order

Recommendation 4: The Government and the FCFCOA should simplify service rules, and the Government should fund assistance with service

The FCFCOA should amend the rules for personal service of small claims – for example, to allow service via email.

The Government should implement a range of measures to make service less difficult in small claims matters, including:

- *Amend service rules for corporations – for example, to allow service via email in small claims*
- *Fund community legal service providers to assist with service and affidavits of service*
- *Fund, or provide fee waivers to, community legal service providers to access relevant registration databases and Company Extracts to identify an employing entity's address for service, and*
- *Fund a Wages and Superannuation Calculation Service to provide procedural guidance on service to workers who are able to self-represent or are ineligible for assistance from community legal centres or migrant workers centres. (See Recommendation 14)*

Recommendation 5: Fund the FCFCOA to introduce further case management processes, and consider legislating consequences for non-compliance with court requirements

The Government should resource the FCFCOA to conduct research into small claims correspondence and case management procedures to increase accessibility and efficiency of small claims matters. This could include more proactive case management where employers have not responded or where employees have not provided the information required for the matter to proceed.

The Government should also consider the introduction of legislative consequences where a respondent fails to comply with key procedural steps (for example, fails to file a response without reasonable excuse).

Recommendation 6: Establish a duty lawyer service for small claims list

The Government should fund a duty lawyer service to assist self-represented litigants to navigate and understand court processes on the day of the hearing. This could be staffed by community legal centre lawyers and migrant workers centres.

Recommendation 7: Best practice use of interpreters

The FCFCOA should continue to ensure best practice use of interpreters for applicants and respondents who speak English as an Additional Language. The Court and interpreting services must be appropriately funded to provide quality interpreting services whenever needed.

Overcoming Obstacles to Enforcing a Court Order and Collecting Payment

Recommendation 8: DEWR guarantee scheme to enforce court orders and pursue non-compliant employers

To ensure no worker obtains a court-ordered wage payment in the small claims jurisdiction but remains unpaid, the Government should establish a guarantee scheme, administered by DEWR, that pays unpaid debts to affected workers. DEWR could then decide whether to deploy resources to take enforcement action against the employer and recover the debt.

To minimise the number of matters to be paid under this scheme, DEWR could also notify the employer that, if the debt remains unpaid, the matter will be referred to the Department of Home Affairs resulting in a possible ban on the employer hiring temporary visa holders, under the Prohibited Employer List which will come into effect from 1 July 2024.

Recommendation 9: Implement MWT recommendation to extend FEG to migrant workers

The Government should implement MWT Recommendation 13 to expand the Fair Entitlements Guarantee so that all workers in Australia are entitled to access the scheme, regardless of immigration status.

The Government should also expand the definition of 'insolvency event' to include deregistration of a business.

Overcoming Obstacles to Pursuing a Small Claim for Migrant Workers Who Return Home

Recommendation 10: Enable migrant workers who have returned home to pursue wage claims from abroad

The Government should identify and implement measures to make the small claims process genuinely accessible to applicants who are overseas.

Establishing An Additional Forum for Resolving Small Claims Disputes

Recommendation 11: Extend the FWC's jurisdiction to wage claims

The FW Act should be amended to enable the FWC to assist with the resolution of wages and entitlements disputes, by:

- *Allowing employees to make an application to the FWC to deal with a dispute relating to wages and/or entitlements, modelled on the FWC's existing general protections (involving dismissal) jurisdiction. Employees should retain the right to make a claim directly to the court if they prefer.*
- *Enabling the FWC to triage these matters and make procedural orders to progress the matter.*
- *Enabling the FWC to conduct compulsory conciliation to resolve the matter. Where conciliation is unsuccessful arbitration should be available with the consent of both parties, or the worker could pursue the claim in court. The FWC would advise parties if it considers that arbitration or a court application would not have a reasonable prospect of success.*

A new FWC application form for a wages and/or entitlements dispute should:

- *Assist vulnerable workers to demonstrate and progress their claims efficiently and fairly, by: retaining the accessible features of current FWC forms; enabling employees to lodge an application without complete calculations (instead being prompted to provide information about duties, hours and dates worked and income received); and including an option for the worker to submit a formal request for employee records under the FW Regulations.*
- *Assist with the detection and resolution of systemic underpayment issues, by including an option for the worker to send a copy of their application to the FWO.*

Recommendation 12: Consider establishing a new Fair Work Court

The Government should consider establishing a new Fair Work Court to sit alongside the FWC, with Commissioners and Judges jointly appointed to both institutions.

Achieving Necessary Legal Assistance and Representation for Small Claims

Recommendation 13: Equal access costs model

The Government should amend the FW Act to apply an 'equal access costs model' to small claims. Section 570 should be amended to provide that (a) if a worker is successful in a small claims proceeding, their employer is required to pay the worker's legal fees in addition to their legal minimum entitlements, and (b) if a worker is unsuccessful in a small claims proceeding, both parties bear their own costs, except where the court is satisfied that a party has acted vexatiously or unreasonably.

To further disincentivise predatory lawyers bringing unmeritorious claims, an applicant's lawyer/agent should also be subject to a costs order for unreasonable acts/omissions or bringing claims without reasonable prospects of success.

Recommendation 14: Wages and Superannuation Calculation Service

The Government should fund a Wages and Superannuation Calculation Service. This Service could:

- *Develop, maintain and share tools to efficiently calculate amounts owing to workers;*
- *Undertake or check calculations of wages, entitlements and superannuation for unrepresented workers directly, or in partnership with community legal centres and migrant workers centres for the most vulnerable workers;*
- *Provide a technical advisory service in alternative dispute resolution processes;*
- *Provide warm referrals to legal assistance providers such as community legal centres, migrant workers centres, and student legal services;*
- *Provide information, practical assistance and education resources on small claims processes where gaps are identified, including regarding service (see Recommendation 4); and*
- *Link with a duty solicitor service (per Recommendation 6).*

Recommendation 15: Increased funding for legal assistance providers including community legal services, and migrant workers centres

The Government should provide recurrent, dedicated funding to legal assistance providers including community legal services, and migrant workers centres, to deliver education and legal services to migrant workers so that they can access the small claims process and enforce their rights.