

ALL WORK, NO PAY

Report summary: Improving the legal system so migrants can get the wages they are owed

June 2024

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.⁷ 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 based on 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.



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 Worker Centres (MWCs), working women’s centres, university student legal services, Legal Aid Commissions 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.⁸ 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:

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

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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:

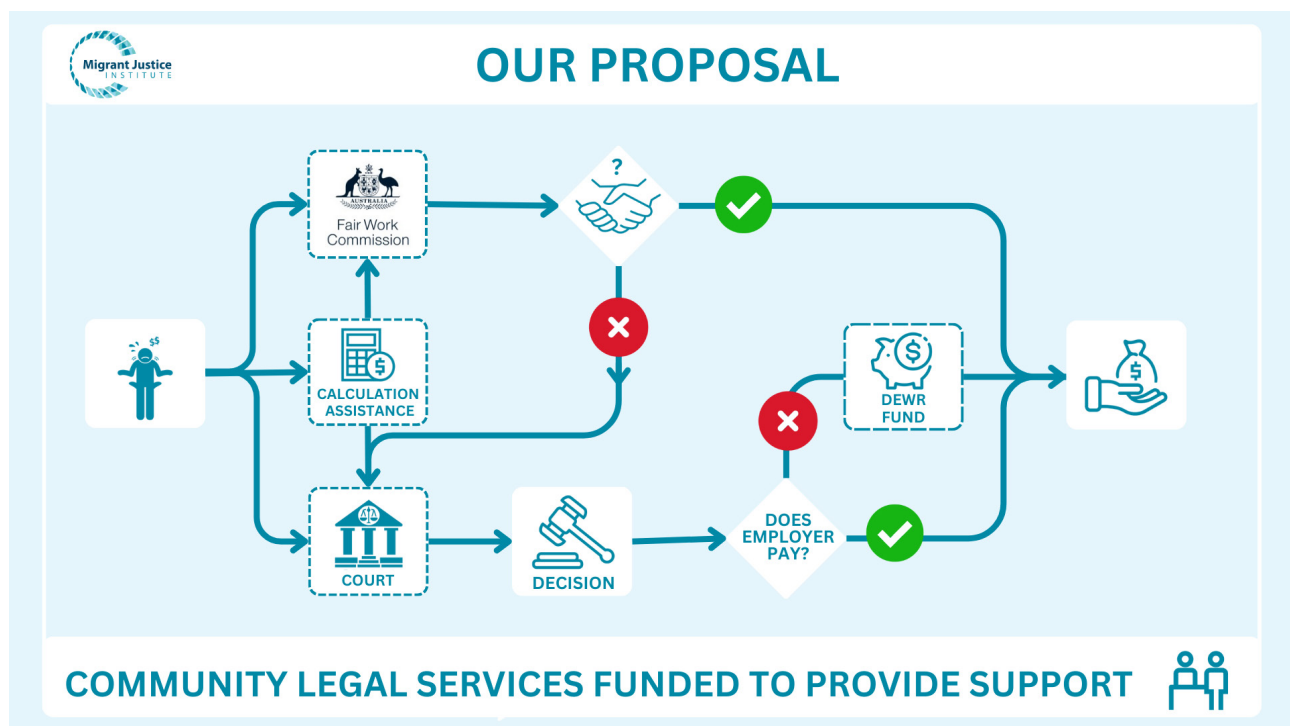
- Expanding availability of representation by legal assistance providers such as community legal services, unions, and migrant worker centres, for migrants who cannot self-represent;
- Establishing cost-effective forms of legal and other assistance that would enable some migrants to effectively self-represent; 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.⁹ 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 worker 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 issues 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 at 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 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 the 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.



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)

- 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 for the FWC 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 at 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 ineligible for CLC or MWC assistance. (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 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. 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 payslips** 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.



Endnotes

1. We note that there are various state and territory courts where claims can be pursued. However, this report focuses on the Commonwealth scheme as the primary wage recovery process and the subject of the DEWR review: see footnote 6.
2. Explanatory Memorandum, *Fair Work Bill 2009* (Cth) [2167]-[2168].
3. FCFCOA, [2022-23 Annual Report](#) (Report, 2023) 91.
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, [Final Report](#) (March 2019) 11 (Recommendation 12).
6. 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.
8. *Ibid* 7.
9. *FW Act* s 3(b) (Object of the Act).
10. Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth).
11. *Migration Amendment (Strengthening Employer Compliance) Act 2023* (Cth) Part 2.