



Australian Government
Department of Employment
and Workplace Relations

Review of the Fair Work Act Small Claims Procedure

Report – February 2024



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The document must be attributed as the (*Review of the Fair Work Act Small Claims Procedure*).

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Introduction

The Migrant Workers' Taskforce (MWT) was established in 2016 to identify proposals for improvements in law, law enforcement and investigation, and other practical measures to more quickly identify and rectify any cases of migrant worker exploitation. The [Report of the Migrant Workers' Taskforce](#) (MWT Report) was released in March 2019 and made 22 recommendations. This included recommending that the Australian Government commission a review of the *Fair Work Act 2009* small claims procedure to examine how it can become a more effective avenue for wage redress for migrant workers (recommendation 12). The Government has committed to implement all of the MWT Report's recommendations as part of its Plan to Build a Stronger Pacific Family.

As part of the October 2022-23 Budget, the Government announced that it would conduct a review of the small claims procedure provided for in the Fair Work Act to examine how it can become a more effective avenue for wage redress for all workers in Australia. This includes, but is not confined to, migrant workers.

The Review commenced on 1 January 2023. This report presents the findings of the Review undertaken by the Department of Employment and Workplace Relations (the department), recommendations for reform, and potential next steps. Some of these recommendations will be a matter for Government, while others would fall within the responsibility of the courts, consistent with the separation of powers.

Purpose and scope

The purpose of the Review was to critically examine the current small claims procedure provided for in Division 3 of Part 4-1 of the Fair Work Act. This was undertaken with a view to identifying issues and efficiencies, and exploring more effective avenues for wage redress for workers in Australia (including migrant workers).

The Review considered the following three terms of reference:

1. The effectiveness of the courts' current small claims framework in providing an informal, cheap and fast means of pursuing claims for unpaid entitlements, and what (if any) enhancements could be made (practice, procedure and funding) to better achieve the objectives of the framework.
2. The merits of options to utilise alternative dispute resolution (ADR) to resolve small claims matters under the Fair Work Act, including options for reform and how these options would sit alongside existing court processes, costs and implementation issues.
3. Tripartite approaches to prevent, detect and resolve underpayment matters.

This report presents the Review's findings and recommendations to Government, for its consideration.

Governance

The Review was led by the Department of Employment and Workplace Relations (the department). It was aided by an interagency Consultative Committee consisting of the department, the Attorney-General's Department, the Fair Work Commission (FWC), the Fair Work Ombudsman (FWO), the Federal Circuit and Family Court of Australia (FCFCOA), and the Federal Court of Australia (FCA).

Consultation process

The department consulted with key stakeholders over the course of 2023. Stakeholders were chosen on the basis of being impacted by, or having expertise relevant to, the small claims procedure. To support a targeted and streamlined review, consultation was not open to the public.

The department conducted preliminary roundtables on 13 February 2023 with employer groups and other civil society stakeholders such as community legal centres (CLCs). These roundtables canvassed the current system and the use of tripartite approaches. The department also held a roundtable with representatives from state and territory justice departments and courts.

A consultation paper was confidentially provided to approximately 30 stakeholders on 3 May 2023, with submissions sought by 31 May 2023. Seventeen submissions were received.

Recommendations

1. The Government should consider whether the *Federal Court and Federal Circuit and Family Court Regulations 2022* should be amended to provide that, in small claims proceedings, an applicant is automatically exempt from paying a filing fee if the applicant:
 - a. is receiving, or has recently received, assistance from a migrant worker centre, industrial association, or the Fair Work Ombudsman, or
 - b. is claiming no more than \$5,000.
2. The Federal Circuit and Family Court of Australia should consider ways to more clearly communicate the availability of fee waivers on its website, and in all relevant educational resources and materials.
3. The *Fair Work Act 2009* should be amended to provide that:
 - a. if a worker is successful in a small claims proceeding, the court may make an order that the employer pay their legal costs, and
 - b. if a worker is unsuccessful, both parties bear their own costs.Appropriate safeguards should be included, such as an exception where an applicant issues or conducts proceedings vexatiously or unreasonably.
4. The Federal Circuit and Family Court of Australia should consider whether the 'Application – Fair Work Division' and 'Small claim under the *Fair Work Act 2009*' forms should be amalgamated and, in the process, consider any further simplifications that could be made.
5. The Federal Circuit and Family Court of Australia should consider developing a 'do it yourself kit' for small claim applications, similar to the one provided for family law proceedings.
6. The Government should continue to progress work on enhanced safeguard measures that would enable migrant workers to pursue recourse for workplace exploitation, including through the small claims procedure, with clear protections from visa cancellation or other adverse outcomes, as appropriate.
7. The Government should continue to progress its commitment to implement recommendation 13 of the Migrant Worker Taskforce Report, to extend access to the Fair Entitlements Guarantee to temporary migrant workers.
8. The Fair Work Ombudsman and the Federal Circuit and Family Court of Australia should consider:
 - a. information gaps relating to the small claims procedure amongst vulnerable workers, particularly migrant workers, to identify the needs of target audiences
 - b. additional small claims materials to address those needs, and
 - c. translating small claims materials into languages other than English.
9. Further work should be undertaken to consider whether additional funding is required for legal assistance in small claims matters, to enable:
 - a. the establishment of duty lawyer services
 - b. the provision of targeted community legal education initiatives, and
 - c. legal assistance providers to assist and represent more workers.
10. Once data on the effects of the increased monetary cap becomes available, the Department of Employment and Workplace Relations should consider whether any additional changes to the small claims procedure under the *Fair Work Act 2009* are necessary.

11. Noting differing views about the potentially complementary nature of extending small claims jurisdiction to a tribunal and establishing an industrial court, it is recommended that Government consider these options further and determine which option, if any, to pursue. In progressing the selected policy, stakeholder feedback, including that received as part of the Small Claims Review, should be considered.
12. The Department of Employment and Workplace Relations should continue its engagement with unions, business groups and social partners/community representatives to strengthen tripartism and constructive social dialogue in Australian workplace relations.

Background

The small claims procedure

Upon introduction, the Fair Work Act extended the small claims procedure that applied to proceedings in state magistrates courts under the *Workplace Relations Act 1996* to proceedings in the Federal Magistrates Court (as it was then known). The explanatory memorandum for the new Fair Work Act outlined that the intention of the procedure is to ‘ensure that claims for a relatively small amount of money are dealt with efficiently and expeditiously by the courts... [and] are not subject to onerous procedural requirements.’ The new Fair Work Act also increased the monetary limit that could be awarded under the small claims procedure from \$10,000 to \$20,000.

Section 548 of the Fair Work Act enables certain types of matters to be dealt with as small claims proceedings in the FCFCOA (Division 2), or a state or territory magistrates court. This includes:

- the underpayment of workplace entitlements
- certain proceedings relating to the conversion of casual workers to full-time or part-time employees, and
- disputes regarding fixed term contracts.

Various design features seek to ensure that the small claims procedure provides a cheaper, faster and more informal means of dispute resolution than would be the case in regular court proceedings. These include:

- the courts not being bound by formal rules of evidence
- the courts being able to act without regard to legal forms and technicalities, and
- representation by lawyers being permitted only with the leave of the court.

Recently, the Government’s *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (SJBPA Act) progressed two key reforms to the small claims procedure:

1. Increasing the monetary cap so that the small claims procedure can be used to recover employment entitlements up to \$100,000 (prior to 1 July 2023, the cap was \$20,000).
2. Confirming that the courts can award filing fees as costs to successful applicants.

These reforms commenced on 1 July 2023.

Previous reports and inquiries

Migrant Workers’ Taskforce Report

The MWT Report, commissioned in 2016 and released in 2019, found that only a small number of affected temporary migrant workers utilise the small claims procedure. The MWT Report identified a number of obstacles and deterrents to access, including:

- that the inherent legalism associated with the adversarial court and judge-based framework cannot be overcome by the relaxed procedural and evidentiary rules
- that the complexity of employment law and the small claims application process highlights a need for legal advice and representation in what is intended to be an informal and lawyer-less process
- the requirement to pay filing fees
- a lack of clarity as to the process for progressing a small claim, and
- the time it takes for matters to be finalised (in 2016–17 the average time between filing a claim and finalisation was 4.3 months).

The MWT Report recommended that a review be conducted of the small claims procedure (Recommendation 12). The MWT Report indicated that this review should consider:

- the need for changes to court rules and procedure (for instance, the waiver of filing fees for migrant workers) and simplification of service rules and pre-hearing processes
- whether the FWC's processes for general protections, unfair dismissal and bullying claims could be usefully applied to the small claims procedure, including the courts adopting similar non-adversarial processes or the FWC becoming involved in the non-judicial aspects of a small claim
- increasing funding to the FWO and/or community legal services to support improved personalised assistance to potential applicants, and providing the courts with additional resources to expedite small claims matters
- whether costs should be awarded in small claims matters, and
- whether increasing the (then) monetary cap for recovery from \$20,000 is necessary.

Senate Economics References Committee inquiry into the unlawful underpayment of employees' remuneration

In the 2022 Senate Economics Reference Committee report on Unlawful Underpayment of Employees' Remuneration (Underpayments Inquiry Report), the Committee cited evidence from a range of stakeholders raising various issues relating to the current small claims procedure. These included:

- the complex, costly and time-consuming nature of court procedures generally
- the lack of awareness amongst workers regarding both their entitlements and avenues for redress
- insufficient evidence due to cash-in-hand remuneration and record falsification
- the inability to take action due to visa timeframes and employer liquidation or bankruptcy
- mistrust and fear of reprisal amongst workers (particularly temporary migrants on sponsored visas) regarding regulators, unions and employers (including loss of job hours and blacklisting from employment)
- a fear of adverse immigration consequences if a complaint or claim is made
- the inability to pursue wage and superannuation underpayments together, and
- the tax disadvantage of receiving owed entitlements in lump sum repayments.

The Committee recommended that the Government establish a small claims tribunal, ideally co-located with the FWC, to create a more effective procedure for employees to pursue wage theft (recommendation 5).

Changes to the court-based small claims procedure since 2019

Changes to FCFCOA practice

Since the release of the MWT Report in 2019, the FCFCOA has implemented several substantial changes to how small claims matters are handled, including:

1. The FCFCOA has moved to a registrar-led model for the conduct of small claims lists. When a small claim is filed it goes through an initial triage process by a registrar to identify any technical issues with the application materials and to fix a first hearing date. The applicant is

also provided with more detailed procedural information and 'next steps' information by email.

2. Most small claims are listed for first and final hearing approximately 6 weeks post filing, but more complex claims may be listed for a directions hearing approximately 3 weeks post filing. At the first hearing date, the registrar presiding over the list may:
 - a. if the matter is ready for final hearing, hear and determine the claim
 - b. if satisfied it is appropriate, deal with the matter on default
 - c. refer the matter to same-day mediation with another registrar (with multiple mediation slots available), or
 - d. adjourn the matter and make orders for its future conduct (those orders may relate to service of the application on the respondent; provide for the filing of further material by the parties; refer the matter to mediation with a registrar on a later date; fix a date for final hearing by a registrar; or, where appropriate, refer the matter for hearing by a judge).
3. Many small claims are resolved at the first return (whether by final determination, default or via mediation), helping to facilitate the efficient resolution of disputes at a low cost to the parties.
4. Matters are only referred to a judge in a minority of cases, having regard to the complexity and significance of a matter. The FCFCOA estimates that matters requiring referral to a judge currently account for less than 5% of all small claims fair work matters filed.
5. The FCFCOA conducts a national online list for all states and territories on a weekly basis. In some weeks a second directions list is conducted.
6. The majority of small claims matters are now heard electronically, with some special fixtures undertaken in person. Electronic hearings are also used to facilitate efficient and low-cost resolution of disputes, particularly for litigants in rural and regional locations.
7. While most litigants (both applicants and respondents) in small claims proceedings are self-represented, pursuant to s 548(5) and (8)¹ of the Fair Work Act, parties may seek the leave of the court to be represented by a lawyer or industrial association. There are no mandatory considerations when determining applications for leave to be represented.² In practice, where leave to be represented is sought, that leave is generally granted. The involvement of a lawyer or union representative often assists the parties and the court in the efficient conduct of proceedings. The court may grant leave subject to conditions designed to ensure that no other party is unfairly disadvantaged.

Court data shows a significant improvement in the timeliness of small claims matters since 2019. The time between a matter being filed and finalised reduced from an average of approximately 9 months in October 2020 to 6 weeks in November 2022. Additionally, in 2022-23 approximately 40% of matters were resolved or determined at an administrative listing, that is, after the first court date, but before requiring substantive determination at a hearing or judgment by a registrar.

Legislative amendments and current reform

As noted above, the SJPB Act recently increased the monetary cap to recover employment entitlements from \$20,000 to \$100,000 and confirmed that the courts can award filing fees as costs

¹ See also reg 4.11(3) of the *Fair Work Regulations 2009* (Cth).

² A summary of relevant factors was identified by Kendall J in *D'Sylva v Ellenbrook Family Medical Centre Pty Ltd; Bibok v Ellenbrook Family Medical Centre Pty Ltd* [2020] FCCA 1171 at [21].

to successful applicants. These changes commenced on 1 July 2023. A constraint for the Review therefore is that their effects are yet to be measured.

The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* received Royal Assent on 14 December 2023. Amongst a wide range of other measures, the Act introduced a new criminal offence for intentional wage theft.

There are also a number of reforms underway to protect the rights of temporary migrant workers. At the 2022 Jobs and Skills Summit, the Government committed to bring forward a package of reforms in 2023 to address the exploitation of temporary migrant workers. The Migration Amendment (Strengthening Employer Compliance) Bill 2023, introduced on 22 June 2023, would introduce a range of measures to protect temporary migrant workers, including measures to implement recommendations 19 and 20 of the MWT Report. These measures would:

- create new criminal offences and civil penalties for using a person's migration status to exploit them in the workplace, and
- create new powers to prohibit persons who have exploited temporary migrant workers from engaging additional temporary migrant workers for a period of time.

On 5 June 2023, a dedicated migrant worker exploitation package was jointly announced by Ministers Burke, Giles and O'Neil. Alongside the Strengthening Employer Compliance Bill, key measures include:

- a co-design process working with unions, business and civil society to explore proposed initiatives that would enable migrant workers to report exploitation without fear of negative impacts on their visa status, and to remain in Australia to pursue workplace justice.

Proposed initiatives in the co-design process include:

- enhanced protections against visa cancellation for migrant workers who have been exploited by their employers, and
- visa options that would enable migrant workers to remain in Australia for a period of time to pursue workplace justice (for example, by making claims for unpaid wages or entitlements, or to support an investigation).

Issue 1: The effectiveness of the current court-based small claims procedure

In line with the terms of reference, the consultation process sought feedback from stakeholders on the current state of the small claims procedure and how it could be made more accessible and effective for prospective applicants. This section outlines stakeholder views on how the existing court-based procedure is working, and suggestions for improvements. Feedback and consultation occurred whilst the FCFCOA continued to implement a number of changes to practice and operation of the small claims lists. Findings and recommendations are presented for the Government's consideration.

Stakeholder feedback

A number of stakeholders highlighted the recent changes that have been made to the small claims procedure and the way in which matters are handled. One stakeholder noted that the FCFCOA's move to a registrar-led model has meant that most applications are resolved on the first return, with only a minority of matters being referred to judges. The same stakeholder submitted that these changes, along with others such as electronic hearings and dedicated small claims lists, are achieving positive outcomes and appear to be effectively responding to the issues raised by the MWT Report and Underpayments Inquiry Report. This stakeholder also noted that the increased monetary cap and the clarification that filing fees can be awarded as costs will enable more workers to utilise the small claims procedure. Other stakeholders cautioned against any further substantial changes being made prior to the effects of the increased monetary cap being observed and reviewed.

Another stakeholder acknowledged the changes made to the FCFCOA small claims procedure since the MWT Report. In particular, it highlighted the move to the registrar-led model and ready access to mediation, and the resulting reduction in delays, formality and costs. However, the stakeholder noted that whilst these changes have most likely improved the overall experience for applicants, it is unclear whether they have improved accessibility for vulnerable workers. This was echoed by the majority of stakeholders who, notwithstanding the recent changes, raised a number of issues and barriers to access, particularly for vulnerable workers.

Barriers to access

Cost

Many stakeholders submitted that filing fees remain a significant deterrent for workers accessing the small claims procedure. This is notwithstanding recent amendments to the Fair Work Act which confirmed that the court can award filing fees to a successful party as costs. For example, one stakeholder submitted that, in situations where a worker is owed a relatively small amount of money (for example, \$500-\$1000), a filing fee remains a substantial initial cost barrier to recovering entitlements. Similarly, another stakeholder submitted that young workers' claims may be low in monetary value, making the cost of the initial filing fee prohibitive. Another stakeholder noted that, although applicants are eligible for a fee waiver on the basis of being in receipt of legal assistance, the filing fee can be very expensive for those applicants who are not eligible for a waiver, particularly workers who have already been underpaid.

Stakeholder suggestions to address these issues include that:

- filing fees should be reduced or removed
- successful applicants should be able to recover filing fees and legal costs from the employer
- clients of all CLCs and working women's centres (WWC) should have access to an automatic fee waiver, and

- self-represented litigants should have a reduced filing fee, in line with the filing fee for unfair dismissal or general protections applications in the FWC.

Lack of penalties or consequences

Stakeholders submitted that the burden and risk of engaging in the court-based small claims procedure is predominantly carried by the worker, who has not received their legal entitlements. This is because no penalty or further repercussions are inflicted on the employer in small claims proceedings. For example, a stakeholder noted that:

At best, after months of stress and effort, applicants get what they should have been paid in the first place. Employers are not held accountable for underpaying their workers by being found subject to civil penalties and are not compelled to pay other workers correctly going forward.

A stakeholder highlighted that the inability to recover legal costs and the lack of access to civil penalties or other punitive measures makes the small claims procedure unattractive for vulnerable younger workers. Another stakeholder also submitted that there should be an ability to award penalties to representative unions.

Stakeholder suggestions to address these issues included that:

- civil penalties should be available in the small claims procedure to be awarded against employers
- in the event of a successful claim, the court should be given the power to make orders that the employer conduct a payroll audit to check whether all staff have been paid their minimum entitlements over a specified period, and report back to the court within a specific timeframe, and
- where legal representation is granted, there should be an expanded capacity to award legal costs to a successful claimant, noting that this should generally be confined to claimants (except where they are found to have been vexatious or unreasonable in the institution or conduct of the proceedings).

Complexity

Despite the small claims procedure aiming to be quicker, cheaper and less formal than ordinary court proceedings, many stakeholders submitted that the procedure is unduly complicated and legalistic. One stakeholder submitted that although the procedures and evidentiary rules are simplified to an extent, the court environment itself and a lack of understanding of the procedure create barriers to access. Another stakeholder highlighted that two separate application forms need to be prepared and filed to access the small claims procedure in the FCFCOA, creating an unnecessary barrier for workers. Another stakeholder submitted that the rules around service were too onerous, presenting significant obstacles for workers, especially where respondents are hard to track down or disappear.

Stakeholders also highlighted particular barriers faced by vulnerable workers. For example, a stakeholder submitted that, without legal assistance, many migrant workers cannot:

- identify their legal entitlements and employing entity
- calculate the precise sum of outstanding wages and entitlements
- correctly complete the application form
- correctly serve the application on their employer, or
- navigate the proceedings in the court.

A stakeholder stated that the vulnerabilities of their clients make it more challenging for them to establish what their rights are and where they come from. This is due to reasons including safety, shame, difficulty interpreting legislation and Modern Awards, and difficulty accessing appropriate

services. Another stakeholder noted that the process of completing forms, performing complex underpayment calculations, and self-representing in court can be prohibitively complicated for people with limited education and from culturally and linguistically diverse backgrounds. Another stakeholder noted that feedback from the legal profession supports the assertion that the small claims procedure remains inherently adversarial and complex.

Stakeholder suggestions to address these issues included that:

- the court should be required to serve initiating applications, similar to the FWC's process of serving respondents in relation to unfair and general protections dismissal applications
- the Rules around service on individuals should be modernised and simplified, to enable applicants to send the relevant paperwork electronically or by phone without first having to apply for substituted service
- there should be a reverse burden of proof, based on an expanded section 557C of the Fair Work Act, for all unpaid wage and entitlement claims
- the onus should be placed on a regulatory body, such as the FWO, to investigate and prosecute a claim on behalf of a victim of wage theft
- only one application form should be required to access the small claims procedure
- the application form should be greatly simplified, and
- assistance and support with the calculation of underpayments should be provided, for example through the establishment of a wages and superannuation calculation service.

Immigration status

Stakeholders submitted that temporary migrant workers face particular challenges in accessing the small claims procedure. A stakeholder submitted that they regularly deal with workers who are seriously exploited at work but who will not take legal action due to the risk of visa cancellation. Two stakeholders provided the example of employers threatening to report actual or fabricated breaches of visa conditions to the Department of Home Affairs in order to silence complaints about underpayment. Another stakeholder noted that there was significant uncertainty around the application of the Assurance Protocol³ between the Department of Home Affairs and the FWO, resulting in a reluctance to report to the FWO without a 'guarantee' against visa cancellation. This stakeholder also submitted that the short-term nature of employment can be a barrier for migrant workers, with their services finding that migrant workers sometimes do not initiate proceedings because they know they will not be able to remain in Australia to see the end of the court procedure.

Stakeholder suggestions to address these issues included that:

- judges and registrars should have relevant expertise and experience working with migrant communities and workers, and knowledge of the intersection of workplace exploitation and visas
- funding for CLCs and migrant worker centres should be increased, to increase their capacity to assist migrant workers and educate migrant worker communities about their legal rights including minimum entitlements
- effective visa protections should be provided to migrant workers who report exploitation or wage theft to the FWO, and these protections should be extended to claims progressing through the courts
- the Fair Entitlement Guarantee should be extended to migrant workers, and

³ The Assurance Protocol applies to people on temporary visas with permission to work. Under the Assurance Protocol, the Department of Home Affairs will not cancel a person's visa if they have breached their work-related visa conditions because of workplace exploitation, provided: they have sought advice or support from the FWO and they are assisting the FWO with inquiries; there is no other reason to cancel the person's visa, and; they have committed to following visa conditions in the future.

- all relevant court and FWO staff should be regularly trained on the impact of sexual harassment on complainants.

Language

A number of stakeholders raised language barriers as a significant obstacle for migrant workers and other workers with limited English language skills. One stakeholder noted that the FCFCOA website does not provide information about the small claims procedure in any language other than English, and stated:

If a worker does not have English as their first language, this may present significant barriers to them understanding how to make an application and prepare a claim. In addition, factsheets are often the only materials available in other languages – however migrant workers need access to materials such as practice notes, application forms, benchbooks and decisions if they are to be able to run their own cases.

Similarly, another stakeholder noted that their services regularly provide advice to workers with limited English language skills who have lodged small claims without fully understanding the scope of their claims, the procedure, the role of registrars, the significance of offers to settle and deeds of settlement. Another stakeholder also submitted that small claims proceedings are too complex and technical for migrant workers to navigate without assistance, especially for those for whom English is an additional language.

Stakeholder suggestions to address these issues included that:

- all court materials, including the application form, should be available in a range of translated languages
- the court should provide an interpreter and translator, in a similar way to a duty lawyer service
- court materials and guidance should be available in multiple formats, for example short-form videos
- the FWO and FCFCOA should employ a diverse workforce fluent in key migrant languages to educate, explain and assist vulnerable workers to navigate the complex rules and procedures
- the small claims jurisdiction should be multilingual, with easy access to interpreters, multilingual services, multilingual staff, and translated materials, and
- all relevant court and FWO staff should be regularly trained in cultural safety and the best practice use of interpreters.

Enforcement

Stakeholders submitted that enforcement of FCFCOA court orders can be very difficult. One stakeholder highlighted that workers need to go through two lengthy court procedures to seek enforcement, starting by enforcing the judgement in the federal court and then progressing to the enforcement procedures of the relevant Supreme Court. Another stakeholder submitted that, in numerous cases, migrant workers who obtain a judgement never obtain their outstanding wages because the employer disappears, liquidates or refuses to pay. Similarly, another stakeholder stated that many of its clients who have managed to get court orders in their favour never in fact receive the compensation or other payments ordered (for example, interest). A fourth stakeholder further submitted that:

On the rare occasion that they have elected to go down the enforcement pathway, for example by making an application to the sheriff for a warrant to seize and sell assets, they have been unsuccessful in recovering the amounts of the court orders, either because the employer had cleared out of the address where the sheriff turned up or because the sheriff didn't find sufficient assets in the respondent's name.

This stakeholder noted that an alternative is for workers to apply to the Australian Financial Security Authority for a bankruptcy notice and then serve that notice on the respondent. However, the notice costs \$470 with no possibility of a fee waiver. A number of stakeholders highlighted that migrant workers are ineligible for the Fair Entitlement Guarantee.

Stakeholder suggestions to address these issues included that:

- the court should be given responsibility to ensure that court orders in relation to small claims matters are enforced
- the Fair Work Act should be amended to make it clear that an accessorial liability claim can be brought in a small claims proceeding, and
- the Fair Entitlement Guarantee should be extended to migrant workers.

Lack of legal assistance

Almost all stakeholders raised the lack of access to legal advice and/or representation as a significant barrier for workers seeking to access to the small claims procedure. For example, one stakeholder noted that the lack of legal services, coupled with the complexity of the legal framework governing employment, was the main barrier for employees. Another stakeholder also cited lack of affordable legal advice and representation as a barrier. A third stakeholder highlighted that:

All the best possible factsheets or DIY kits in the world will never be a good substitute for legal representation. The current reality is that many workers are not union members. If they cannot afford a private lawyer, then they rely on [CLCs] or [WWCs] to advise and represent them... If CLCs and WWCs are not adequately funded to assist more workers who wish to access the small claims mechanism, workers are unlikely to enforce their minimum employment entitlements.

Another stakeholder submitted that migrant workers are unable to complete or navigate most of the steps required in the small claim procedure without legal assistance.

Stakeholder suggestions to address these issues included that:

- the circumstances in which leave for legal representation will be granted should be clarified
- there should be an exception to the rule that parties may only be represented with the leave of the court where an applicant is represented by a CLC or WWC
- the Fair Work Act should be amended to provide that parties are entitled to be represented unless the court determines otherwise in the circumstances of the case (including the size of the claim and whether the other party is represented)
- funding should be provided to CLCs in each state and territory to provide legal assistance in the small claims jurisdiction
- CLCs and WWCs should be adequately resourced to represent more clients in small claims proceedings
- funding should be provided to CLCs to provide education and raise awareness
- CLCs with relevant experience, and unions in the relevant industries, should be funded to provide a duty lawyer service to assist applicants, and
- the FWO should be funded to reinstate its pre-lodgement small claims service.

Findings and recommendations to Government

Recent improvements to the small claims procedure made by the FCFCOA have made a significant difference in terms of timeliness, and changes to processes are continuing to be implemented. In 2022-23, the median time taken for a small claims matter to be finalised was 2.8 months. In 2021-22, this figure was 8.6 months. However, it is clear that the procedure remains underutilised, with only 137 small claims applications filed in 2022-23, and 342 small claims applications filed in 2020-21 (with the decrease in 2022-23 likely attributable in part to the effects of the COVID-19 pandemic). In

contrast there were 13,096 unfair dismissal claims lodged at the FWC in 2021-22. Several inquiries, including the MWT and the Senate Inquiry into Unlawful Underpayment of Employees' Remuneration, have found that underpayment continues to be an issue in Australian workplaces. Analysis from the department using data from the Household, Income, and Labour Dynamics in Australia Survey (2021) shows that 10.2% of all employees appeared to be receiving less than the National Minimum Wage.

The nature of employment law, the adversarial court system, and the need for procedural fairness means that the procedure will inevitably remain inherently legalistic. This is notwithstanding the aim of the small claims procedure to achieve simplicity and efficiency, and improvements made by the FCFCOA. Submissions to the Review clearly indicate a consistent view that vulnerable workers experience considerable barriers accessing and navigating the procedure, and that improvements should be made to improve access to justice for these workers. Though the detail of stakeholder suggestions for improvement differs, there is sufficient commonality on a number of issues to enable a number of findings to be made. These are outlined below, along with recommendations to Government.

Finding 1: Filing fees are an initial cost barrier to wage recovery

There are two ways through which applicants in small claims proceedings can have their filing fee exempted. Currently, regulation 2.05 of the *Federal Court and Federal Circuit and Family Court Regulations 2022* (the Regulations) provides that an individual is entitled to a general exemption from paying the full fee amounts if they meet any of the following criteria:

- have been granted legal aid under a legal aid scheme or service established under a law of the Commonwealth or of a state or territory or approved by the Attorney-General (i.e., any person taken on as a client by a CLC, Aboriginal and Torres Strait Islander Legal Service (ATSIL) or Family Violence Prevention Service (FVPS) would qualify for an exemption, rather than there being a requirement for a formal grant of legal aid);
- are the holder of any of the following cards issued by the Commonwealth: a Health Care Card, a Pensioner Concession Card, a Commonwealth Seniors Health Card and any other card that certifies their entitlement to Commonwealth health concessions;
- are serving a sentence of imprisonment, are otherwise detained in a public institution or is in immigration detention within the meaning of the *Migration Act 1958*;
- are younger than 18 years old; or
- are receiving youth allowance or Austudy payment under the *Social Security Act 1991* or benefits under the ABSTUDY Scheme.

If an individual does not meet the criteria set out at regulation 2.05, they can still apply under regulation 2.06 to have their filing fee exempted if payment of the fee would cause them financial hardship. The registrar will take into consideration the person's income, living expenses, assets and liabilities when considering a financial hardship waiver. This mechanism is reviewable by the Administrative Appeals Tribunal.

The criteria provided for in regulation 2.05 would likely benefit from expansion in the context of small claims proceedings. This is because they do not capture all the categories of organisations that assist one of the most vulnerable cohorts in the small claims jurisdiction: temporary migrant workers. Although there is an exemption for persons receiving legal assistance from a CLC, ATSIL or FVPS, this does not cover situations where a worker is receiving assistance from a migrant worker centre, industrial association or the FWO. Though migrant workers may also apply for a financial hardship exemption, this requires the provision of detailed financial information and additional evidence. This may provide an extra layer of complexity to the procedure.

One option to address this issue is to amend the Regulations so they extend the exemption to small claims proceedings where an applicant is receiving, or has recently received, assistance from a migrant worker centre, industrial association, or the FWO. Alongside capturing migrant workers who would otherwise face greater challenges in accessing the benefit of this exemption, such an approach would also capture cohorts in the broader Australian population who could equally merit these protections but may experience challenges in acquitting the requirements to discharge eligibility requirements. It additionally addresses a potential inconsistency that workers may receive Government-subsidised assistance to pursue their claim, given their particular financial and other circumstances, but face a risk of having to pay their own filing fees. Further consideration would be needed to assess the financial implications and quantify the funding impost associated with such a change.

The *Legal Aid Schemes and Services Approval 2023* list commenced on 23 September 2023 and gives effect to regulation 2.05, and lists services approved by the Attorney-General. This includes all CLCs, ATSILs, and FVPSs. The list allows people who receive legal assistance from the providers listed within it to be exempt from court fees (e.g., document filing or service provision fees). It applies to court fees payable in proceedings before the FCFCOA, the Federal Court and the High Court. A similar mechanism for identifying relevant migrant worker centres and industrial associations in relation to a new filing fee exemption for the small claims procedure may also need to be considered and established.

Additionally, the Government could consider whether filing fees be removed entirely for claims up to \$5,000. While expanding the filing fee exemption for small claims proceedings (as outlined above) may help to address filing fees as a barrier to accessing the procedure more generally, removing filing fees for claims up to \$5,000 could address the particularly acute barrier posed in the context of especially small claims. This barrier is reflected by stakeholder feedback, such as the Migrant Workers Centre's estimation that the majority of claims they see are between \$1,000 and \$5,000, where the filing fee of \$265 would represent 26.5% of the former and over 5% of the latter. Removing filing fees for claims under \$5,000 may overcome the most basic barrier for those who most need to access the procedure: low-income workers seeking to recoup smaller amounts that nevertheless represent significant sums in the context of their earnings. This change would be consistent with the purpose of the small claims procedure in providing accessible redress for workers, while also bringing the procedure in the federal jurisdiction into greater alignment with state and territory jurisdictions such as South Australia (where there are no fees at all for small claims of any amount). The financial implications of such an exemption would need to be considered, as well as the appropriateness of treating small claims applicants differently to applicants in other jurisdictions of the FCFCOA who would still be required to pay filing fees subject to either the general or financial hardship exemption applying.

The FCFCOA website sets out all general federal law fees clearly on its website. However, although fee exemptions are noted, this information is only provided via a small note at the bottom of the page and is easily overlooked. Detailed information about exemptions is provided through a link to the Federal Court website. Information about fee exemptions could be more readily available to applicants in the small claims jurisdiction, especially self-represented applicants.

Recommendation 1

The Government should consider whether the *Federal Court and Federal Circuit and Family Court Regulations 2022* should be amended to provide that, in small claims proceedings, an applicant is exempt from paying a filing fee if the applicant:

- a. is receiving, or has recently received, assistance from a migrant worker centre, industrial association, or the Fair Work Ombudsman, or
- b. is claiming no more than \$5,000.

Recommendation 2

The Federal Circuit and Family Court of Australia should consider ways to more clearly communicate the availability of fee waivers on its website, and in all relevant educational resources and materials.

Finding 2: Increased deterrents for employers are needed

The risk and burden of small claims proceedings is predominantly borne by vulnerable applicants, and there may be little incentive for employers to quickly and fairly resolve the dispute. Legal costs for a full day hearing for a small claims matter in the FCFCOA may amount to more than, or a substantial portion of, the amount of unpaid wages. The inability to recover these costs serves as a barrier to accessing representation. As outlined by stakeholders, many vulnerable workers require legal representation or assistance to access and navigate small claims matters.

While some stakeholders suggested that penalties should be available in small claims matters to serve as a deterrent to employers, this may have the unintended effect of adding additional complexity and delay to proceedings. In small claims proceedings, the court is not bound by rules of evidence or procedure and parties are generally self-represented. These features of the procedure are designed to enable courts to balance procedural fairness with the need to resolve claims more swiftly than is possible through traditional civil litigation. As such, the policy position reflected in the Fair Work Act is that the informal nature of the small claims procedure precludes the availability of pecuniary penalties. If penalties were to be made available, a corresponding change in procedural requirements may introduce additional complexity and delay into the procedure.

Stakeholders have also suggested that the court should be given the power to make orders that the employer conduct a payroll audit. On the face of it, there could be some merit to this suggestion in terms of enhancing the identification and rectification of underpayment matters. However, it is important to bear in mind where one employee has been found to have been underpaid, it does not necessarily mean *all* employees are also being underpaid. Benefit of doubt should be applied, and a finding in one set of small claims proceedings does not stop other employees who believe that they have been underpaid from also coming forward. Further work would desirably occur to better work through these issues prior to a concrete position being adopted.

The ability to recover legal costs from employers would serve as a powerful incentive for early resolution, including through mediation. The ability to award costs may also incentivise private firms to assist workers in their small claims applications and enable CLCs to represent more workers because they would be able to recoup costs through conditional costs agreements.

To ensure that the question of legal costs does not in itself become a barrier to workers accessing the procedure, a costs order should generally only be available to successful applicants. There should be an exception where an applicant is found to have issued or conducted proceedings vexatiously or unreasonably.

Recommendation 3

The *Fair Work Act 2009* should be amended to provide that:

- a. if a worker is successful in a small claims proceeding, the court may make an order that the employer pay their legal costs, and
- b. if a worker is unsuccessful, both parties bear their own costs.

Appropriate safeguards should be included, such as an exception where an applicant issues or conducts proceedings vexatiously or unreasonably.

Finding 3: Further simplification to court procedure is needed

Further simplifications to the court-based procedure could be considered, noting that changes to the procedure are still being implemented by the FCFCOA. In particular, feedback from stakeholders indicates that the application form and service requirements could be simplified. While significant improvements have been made within the FCFCOA's handling of small claims matters in recent years, stakeholder feedback reflects that there may be more that can be done to increase accessibility and assist applicants.

To apply for small claims an 'Application – Fair Work Division' and a 'Form 5: Small claim under the Fair Work Act 2009' must be completed and filed, along with supporting documents. If the application relates to the conversion of casual employment, a 'Form 5A: Small claim under the Fair Work Act 2009' casual conversion dispute is used instead of Form 5. Combining these forms may remove duplication and result in less complexity for self-represented applicants. However, the potential impact of this change on other areas of the FCFCOA's fair work jurisdiction has not been considered.

Although the FCFCOA website provides information about how to apply for a small claim, this information may be difficult to navigate, especially for vulnerable self-represented applicants such as migrant workers. It may assist applicants to have all relevant information available on the face of the application form(s). This could be done, for example, through the development and provision of a 'do it yourself kit,' in the same way the FCFCOA does for family law matters. If the FCFCOA ultimately decided not to amalgamate the application forms for the small claims procedure, the creation of a clear and simple 'do it yourself kit' may also help to overcome any complexity in the two application forms, if packaged together. Considering the FWO's role in providing guidance for workers, the FCFCOA may consider consulting with the FWO in the creation of a 'do it yourself kit,' including to avoid duplication of efforts across these two bodies.

The Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021 provide that, where an employer is a sole trader, the application must be served in person. Where an employer is a corporation, the documents may also be delivered by express or registered post. If an applicant cannot serve the documents in this way, they must apply for substituted service. This requires filing an additional application and affidavit, adding another layer of complexity. The formal and complex legal requirements around service may present a significant barrier to vulnerable workers in particular. However, the FCFCOA must be sure that the respondent is aware of the application and has had an opportunity to respond.

In turn, this complexity may be best addressed through the provision of additional legal assistance funding (see recommendation 9). The main barrier of serving an application on an employer is the legal complexity of the process. Many workers are not aware of who their employer or corporation is and therefore have difficulty identifying the correct person to serve. Further complexities arise when the worker is employed by a corporation, unincorporated association or organisation. For the worker to correctly serve the documents they need the address of the company's registered office or details of the director. This generally requires an ASIC company search, which has a fee. Case

studies provided by stakeholders demonstrate that workers who have received legal assistance have been able to effectively file and serve details of the claim to the respondent.

Recommendation 4

The Federal Circuit and Family Court of Australia should consider whether the 'Application – Fair Work Division' and 'Form 5: Small claim under the *Fair Work Act 2009*' forms should be amalgamated and, in the process, consider any further simplifications that could be made.

Recommendation 5

The Federal Circuit and Family Court of Australia should consider developing a 'do it yourself kit' for small claim applications, similar to the one provided for family law proceedings.

Finding 4: Migrant workers require effective visa protections and additional safeguards to encourage bringing a small claim

Fear of immigration consequences and the temporary nature of their stay in Australia have consistently been identified as obstacles for migrant workers to bring claims for unpaid wages. Migration matters represent the largest area of filing in general federal law in the FCFCOA (Division 2), meaning that judges and registrars have relevant experience in both migration and employment matters. There is existing work underway on measures for:

- enhanced protections against visa cancellation for migrant workers who have been exploited by their employers, and
- visa options that would enable migrant workers to remain in Australia for a period of time to pursue workplace justice (for example, by making claims for unpaid wages or entitlements, or to support an investigation).

Stakeholder submissions also show that enforcement remains a significant issue in the small claims jurisdiction, and that migrant workers in particular are unable to pursue enforcement without assistance. This issue could be addressed through the provision of additional legal assistance funding (see recommendation 9 below). However, for migrant workers whose employer enters liquidation or bankruptcy following a small claim, the provision of legal assistance will not help. Extending the Fair Entitlements Guarantee (FEG) to temporary migrant workers, as recommended by the MWT Report, would provide an additional safety net that may encourage temporary migrant workers to initiate a small claim. The Government has committed to implementing this recommendation of the MWT Report.

Eligibility under FEG is limited to employees who are Australian citizens, permanent visa holders or special category visa holders (New Zealand citizens). As already highlighted in this Review, stakeholders have highlighted that temporary migrant workers do not qualify under the FEG and that the FEG should be extended to migrant workers.

Extending the FEG to migrant workers would provide an avenue for temporary migrant workers to seek redress when the respondent enters liquidation or bankruptcy. Stakeholders have noted that in some cases temporary migrant workers go through the small claims procedure only to find that the respondent has entered liquidation or bankruptcy. The small claims procedure can be daunting for any worker, and time, effort and money would go into the undertaking, only to find out that they would not be receiving their outstanding entitlements. This currently acts as a deterrent for vulnerable migrant workers in seeking to use the small claims procedure.

Recommendation 6

The Government should continue to progress work on enhanced safeguard measures that would enable migrant workers to pursue recourse for workplace exploitation, including through the small claims procedure, with clear protections from visa cancellation or other adverse outcomes, as appropriate.

Recommendation 7

The Government should continue to progress its commitment to implement recommendation 13 of the Migrant Workers' Taskforce Report, to extend access to the Fair Entitlements Guarantee to temporary migrant workers.

Finding 5: The small claims jurisdiction requires multilingual resources and materials

ABS data from the 2021 Census showed that more than half (59% or 945,600) of temporary residents used a language other than English at home, with temporary residents on student visas the most likely to use another language at home (91%). Although the FCFCOA makes use of interpreters and translators at present, the FCFCOA website does not provide translated versions of its small claim procedure information. Further, though the FWO website provides professionally translated information about workplace rights in over 30 languages, this information does not include small claims procedure resources. However, website users are able to use the FWO's auto-translate tool to translate most of its website into over 30 languages. Given the overrepresentation of temporary migrant workers in cases of systemic underpayment, resources and materials designed to assist workers should be targeted to their needs, and available in a range of languages and formats.

There is expense and difficulty associated with translating materials from English into multiple different languages and the translation of small claims materials will likely need to be undertaken in a targeted manner to be effective. As materials generally need to be drafted with translatability as a goal from the outset, key information or information that is expressed in language that is already readily translatable may need to be identified for translation first. Redrafting of other existing small claims materials to ensure that they are all suitable for translation will represent a longer-term project. Further consideration of the funding impost associated with such initiatives will be needed.

Recommendation 8

The Fair Work Ombudsman and the Federal Circuit and Family Court of Australia should consider:

- a. information gaps relating to the small claims procedure amongst vulnerable workers, particularly migrant workers, to identify the needs of target audiences
- b. additional small claims materials to address those needs and translating small claims materials into languages other than English.

Finding 6: Additional funding is required to enable CLCs, WWCs and migrant worker centres to represent and assist vulnerable workers

Many of the barriers identified by stakeholders, especially for temporary migrant and other vulnerable workers, are inherent in the legal system. Fear of visa cancellation, limited English skills, lack of resources (including time), competence and lack of knowledge about how to determine their correct entitlements have been identified as the main factors stopping migrant workers from trying to recover wages, and the barriers created by these factors are deeply connected with legal institutions themselves. One stakeholder observed that applicants that had legal representation generally fared better, and had stronger and more streamlined advocacy, resulting in matters being

processed and resolved more efficiently. Although the Fair Work Act provides that '[a] party to small claims proceedings may be represented in the proceedings by a lawyer only with the leave of the court,' there is no evidence that this leave is not granted when sought.

The Government should consider whether legal assistance and representation could be increased to ensure that vulnerable workers are able to access justice. This should include the establishment of duty lawyer services and additional funding for CLCs, WWC and migrant worker centres to assist and represent more workers. Additionally, consideration could be given to the provision of greater funding for these organisations to provide targeted community legal education to vulnerable and migrant workers regarding their workplace rights and entitlements, to better enable workers to identify underpayment and exploitation.

Relevantly, it is noted that the National Legal Assistance Partnership (a national partnership agreement between the Government and all states and territories for Australian Government funded legal assistance) is currently under review, with a report anticipated in March 2024. The Terms of Reference for the NLAP Review include 'a holistic assessment of legal need and all Commonwealth legal assistance funding,' including the 'quantum, prioritisation, allocation, distribution mechanism, and timing and length of existing Commonwealth funding' for legal assistance. Any consideration of further funding for CLCs, WWCs and migrant workers centres, in line with recommendation 9, would need to consider the outcomes of the NLAP Review.

Recommendation 9

The Government should undertake further work to consider whether additional funding is required for legal assistance in small claims matters, to enable:

- a. the establishment of duty lawyer services
- b. the provision of targeted community legal education initiatives, and legal assistance providers to assist and represent more workers.

Finding 7: The effect of the raised monetary cap should be examined and reviewed

The effects of the increased monetary cap should be reviewed to determine whether any additional changes are required to the small claims procedure under the Fair Work Act. Allowing for a minimum of 12 months to have elapsed from commencement of the \$100,000 cap on 1 July 2023, this will only be possible in mid to late 2024. In considering any additional enhancements, stakeholder feedback and suggestions for improvements canvassed during this Review should be considered (while opportunities for stakeholders to provide further feedback should also be considered).

Recommendation 10

Once data on the effects of the increased monetary cap becomes available, the Department of Employment and Workplace Relations should consider whether any additional changes to the small claims procedure under the *Fair Work Act 2009* are necessary.

Issue 2: Use of alternative dispute resolution in a tribunal

In line with the terms of reference, the consultation process sought feedback from stakeholders on whether conferring jurisdiction on a tribunal to handle small claims would be beneficial. This consultation canvassed what features of such arrangements would be beneficial for vulnerable workers.

Stakeholder feedback

Only a small number of stakeholders were unsupportive of conferring jurisdiction upon a tribunal. Almost all stakeholders agreed that, if this jurisdiction were extended to a tribunal, that tribunal should be the FWC rather than another existing tribunal or a new tribunal.

Those stakeholders that were unsupportive of extending small claims jurisdiction highlighted improvements that have been made to the small claims procedure within the FCFCOA since 2019, in addition to the recent amendments increasing the small claims cap to \$100,000. For example, one stakeholder highlighted the inherent complexity of underpayment matters and noted that the small claims procedure is functioning very well in this context. As it did in the context of issue 1, this stakeholder stated that the Government should wait for the impact of the new small claims cap to manifest before making any changes. It further suggested that the key barriers to migrant workers seeking redress lie in migration law.

The majority of stakeholders that made submissions were supportive of such an extension of jurisdiction. However, to overcome issues such as the inability of tribunals to make binding judicial determinations, three stakeholders specifically suggested that this should be undertaken in the form of a dual industrial court and tribunal. Similarly, other stakeholders raised the potential of dual appointments between the FCFCOA and FWC to overcome issues with the enforcement of FWC orders, while the utility of the dual court and tribunal process in the South Australian Employment Tribunal was also reflected upon favourably.

Simplified procedure

Various stakeholders submitted that conferring small claims jurisdiction on the FWC would result in less complexity than the current court-based procedure. One stakeholder noted that the FWC has simplified case management processes, procedures and forms. For example, personal service is not required to commence FWC unfair dismissal or general protections proceedings, as the FWC provides the initiating application to the respondent employer directly. This stakeholder also suggested that, if small claims were extended to the FWC, application forms for claims that commonly co-occur with underpayment (for example, general protections) could include a section on whether the applicant also has a claim for unpaid entitlements. Further, another stakeholder noted that underpayments are already informally considered as part of many applicants' general protections claims in the FWC.

Timely resolution of matters

A stakeholder noted that, in the 2021-22 financial year, 50% of FWC cases were finalised within five weeks of lodgement, and 90% were finalised within 13 weeks of lodgement.

Enforcement of orders

Stakeholders raised issues relating to the enforcement of orders and settlements in relation to the potential extension of jurisdiction to the FWC (as with the current court-based court procedure). One stakeholder noted that, for Constitutional reasons, the FWC has power to make orders in

relation to disputes but not to issue binding judicial determinations. Additionally, this stakeholder noted that only a court has power to order deterrent penalties against employers (noting, however, that penalties are currently unavailable in the small claims procedure). This stakeholder proposed that, if small claims were extended to the FWC, referrals of matters to a court would need to be streamlined. Relatedly, a stakeholder noted that where an order is made by the FWC, it is possible for the courts to order payment of a penalty. This stakeholder recommended that court penalties be made available for non-payment of FWC small claims orders.

Currently, many small claims heard within the FCFCOA are resolved by ADR, so applicants are required to take additional action within the courts to recover their entitlements in the event that employers do not comply with settlement agreements. Additionally, as noted by various stakeholders, enforceability issues also extend to court orders, with many employers simply not complying with orders and applicants often declining to pursue them through even more complicated enforcement proceedings. Therefore, enforceability issues require solutions at all levels of the small claims procedure, regardless of the body in which small claims are heard.

Increased accessibility for migrant workers

Stakeholders submitted that conferring small claims jurisdiction on the FWC could assist migrant workers to recover their entitlements. For example, one stakeholder noted that the FWC having jurisdiction over most fair work matters, but not small claims, inhibits migrant workers' ability to bring a wage claim by requiring them to pursue remedies in different jurisdictions. This would be the case for all vulnerable workers, not just migrant workers. However, findings from the National Temporary Migrant Work Survey revealed that a substantial proportion of temporary migrant workers are being underpaid. Stakeholders also noted that the FWC's filing fees are much lower than those in the FCFCOA.

This stakeholder outlined several other features that it stated make the FWC more accessible for vulnerable applicants compared to the FCFCOA. These include simplified case management processes and procedures (including the forms required for filing applications and relaxed service requirements) and the FWC's existing jurisdiction and workplace relations expertise. Further, stakeholders noted that the FWC's industrial knowledge may be particularly helpful to migrant workers who are often employed in industries where workers are subject to specific pressures and exploitation risks.

One stakeholder noted that the FWC is generally a well-recognised body amongst workers and that workers may be more likely to have some level of familiarity with the FWC as a means of seeking redress compared to the courts. Many migrant workers on temporary work visas will have received briefings about their workplace rights, including information about the FWC and the FWO. Additionally, even if workers are not familiar with the FWC to begin with, they may be more likely to approach a tribunal with the expectation of a relatively informal redress process. Conversely, the prospect of undertaking a court procedure is likely to seem far more intimidating (even with ADR processes available with the courts, which workers are unlikely to be aware of in any case).

Establishment of an industrial court

Although out of scope for the Review, three stakeholders separately volunteered a proposal to establish a new industrial court. These stakeholders considered that an industrial court could overcome current issues with the small claims procedure and the resolution of fair work matters more generally. In particular, two stakeholders emphasised the benefits of a dual industrial court and tribunal model to:

- streamline existing processes between the FWC and the courts, enabling matters to be heard in a single jurisdiction

- address enforceability issues with FWC orders, and
- ensure workplace relations matters are dealt with by specialist judges with the requisite expertise.

Recommendations to Government

Conferral of jurisdiction on a tribunal to hear small claims via ADR should be deferred. This reform could instead be considered alongside future examination of complementary options (for example, as some stakeholders suggested, the establishment of a dedicated federal industrial court). Joint consideration of related reforms to the Fair Work jurisdictional framework would avoid duplication of effort and enable interactions between these jurisdictions to be effectively managed. The establishment of any industrial court is a matter for Government and would require close consideration of constitutional issues.

Recommendation 11

Noting differing views about the potentially complementary nature of extending small claims jurisdiction to a tribunal and establishing an industrial court, it is recommended that Government consider these options further and determine which option, if any, to pursue. In progressing the selected policy, stakeholder feedback, including that received as part of the Small Claims Review, should be considered.

Issue 3: Use of tripartite approaches to prevent, detect and resolve underpayment matters

There was limited engagement from stakeholders on Issue 3. Some suggested that they already engage in what they consider to be tripartism through collaborative engagement with other workplace relations stakeholders. Stakeholders highlighted that community-based organisations are deeply embedded in the communities they serve and that it is important they are included in any tripartite model. Stakeholders noted that many organisations have structures and processes in place to effectively navigate and manage the workplace relations systems for their clients. It was suggested that there was merit in better information-sharing across regulators to avoid conflicting advice.

There are various ongoing efforts within the department to advance tripartism, and the FWO is actively exploring opportunities to increase consultation and collaboration with workplace participants and stakeholders. Some of the existing tripartite efforts, should continue to be built upon, and are discussed further below. This Report also notes that the FWO returned \$1.041 billion to more than 635,000 underpaid workers across 2021-22 and 2022-23.

Stakeholder feedback

Stakeholders again noted the complexity of the system. They made a number of suggestions relating to education and information for employers and employees, and collaboration between employers and workers' representatives.

Some stakeholders cautioned against the use of tripartism in the context of addressing underpayments, fearing that it might mean compliance and enforcement approaches based on making agreements with non-compliant employers, or that it might involve deputisation of organisations such as unions to undertake regulator functions. For example, one stakeholder noted its strong opposition to employee organisations being provided with standing to commence criminal proceedings against employers and individuals for wage underpayments.

Education and information

The Fair Work Education and Information Program funded organisations to educate employees and employers throughout Victoria about the Fair Work Act when it first became law. A stakeholder advised that this was an extremely successful example of tripartism, which saw it directly engage with over 8,500 employees and employers across over 330 events, with information spreading to larger segments of the community. This stakeholder suggested that a similar large-scale education program could present an opportunity for tripartite collaboration between community organisations, vulnerable workers, and employers to improve compliance and engagement in enforcement processes.

Stakeholders noted the need to engage directly with vulnerable workers and their communities, beyond simply delivering campaigns via seminars and other formal methods. For example, one stakeholder noted its work with community organisations, such as the Multicultural Community Services of Central Australia, the Australian Red Cross and the Central Australian Women's Legal Services, to deliver education on workplace rights and raise awareness in relation to workplace exploitation and modern slavery. This work highlights the need for initiatives that connect traditional workplace relations stakeholders with organisations that may have more direct community links to communicate key messages about workplace rights.

Collaboration between employers and workers' representatives

A strong example of a collaborative initiative between employers and workers' representatives was given by one stakeholder. This was Ethical Clothing Australia, which involves agreements whereby employers provide worker representatives right of entry to audit pay and time records, in exchange for certification that a brand's goods were ethically produced. Worker representative and union involvement is an inherent feature of this arrangement, with community language representatives also engaged by Ethical Clothing Australia and unions. This process applies to entire supply chains and networks, with all parties in the supply chain or network agreeing to be audited and the responsibility remaining with the principal employer or brand to ensure all parties are audited.

Recommendations to Government

The Government is committed to tripartism and to enhanced consultation on workplace relations reforms. This is reflected in the department's extensive consultation with unions, employer groups and other relevant social partners on recent workplace relations legislation, including the:

- *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*
- *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023*
- *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*, and the
- Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023.

Business, unions and Government committed to work proactively together to strengthen tripartism and constructive social dialogue in Australian workplace relations, as an outcome of the September 2022 Jobs and Skills Summit. This builds upon existing tripartite initiatives.

Tripartite initiatives underway within the department are listed below, with two of these having been established following the Jobs and Skills Summit while others represent longstanding tripartite mechanisms in workplace relations.

Post-Jobs and Skills Summit initiatives

Productivity Education and Training Fund

The Commonwealth is providing grant funding for key employer and worker representative organisations to engage with Government on workplace reforms, and for training and education activities for their members, to support understanding and implementation of the Government's workplace relations reform agenda. This supports the suite of tripartite initiatives in workplace relations.

National Construction Industry Forum

The Forum's role is to provide advice to Government on a broad range of issues relating to work in the building and construction industry including safety, workplace relations, skills and training, industry culture, diversity and gender equity, and productivity.

Long-Standing tripartite initiatives in workplace relations

National Workplace Relations Consultative Council

The National Workplace Relations Consultative Council is a legislated tripartite forum to discuss workplace relations matters of national concern. Appointed members are nominated by employer and worker representative organisations. National Workplace Relations Consultative Council sub-committees include the Committee on Industrial Relations, which provides feedback to Government

on proposed legislation and the International Labour Affairs Committee, which consults on international labour matters.

Net Zero Economy Agency

The Net Zero Economy Agency is a precursor to the establishment of a legislated Net Zero Authority. The Authority will work with the complex array of communities and organisations, including employer and worker groups, impacted by, and in a position to contribute to, supporting the transformation to a clean energy economy.

Jobs and Skills Australia

Jobs and Skills Australia will take a partnership approach to ensure that its advice matches and responds to the evolving demands of the economy and to Australia's workforce and learners, and supports the delivery of the skilled workers Australia needs. The Jobs and Skills Australia Consultative Forum will support Jobs and Skills Australia with advice from tripartite partners on key matters relating to Jobs and Skills Australia's interim operations.

Cleaning Accountability Framework

The Cleaning Accountability Framework (CAF) provides compliance certification in the cleaning industry, which the FWO helped to develop and in which it is an active partner. The CAF offers building certification by working with cleaners, worker representatives, tenants, contractors, property owners, facility managers and investors across the supply chain to ensure ethical labour practices in the cleaning industry, including the assurance of fair pay and decent working conditions.

Safe Work Australia

Safe Work Australia works collaboratively with Commonwealth, state and territory governments, employers and workers to drive national policy development as the national policy body on work health and safety and workers' compensation matters.

Ministerial Advisory Council on Skilled Migration

The Ministerial Advisory Council on Skilled Migration is a tripartite body, comprising industry, unions, state and territory government representatives and other members nominated by the Minister for Immigration, Citizenship and Multicultural Affairs. The Council provides advice to the Minister on Australia's temporary and permanent skilled migration programs and associated matters.

Recommendation 12

The Department of Employment and Workplace Relations should continue its engagement with unions, business groups and social partners/community representatives to strengthen tripartism and constructive social dialogue in Australian workplace relations.

Additional stakeholder feedback

In response to the consultation paper, stakeholders provided additional feedback relating to the small claims procedure and addressing underpayment more generally, outside of the three issues detailed above. Some of this feedback is summarised below and includes the role of CLCs and working women's centres, and unions and right of entry. Many responses also raised the need for increased funding for CLCs and other organisations engaged in supporting workers' rights, while also increasing consultation on the development of government policy and laws. The need for memoranda of understanding or similar mechanisms to ensure proper collaboration and information-sharing between the FWO and organisations such as CLCs was also raised.

Wraparound services

Stakeholders noted the need for 'wraparound' services beyond the purely legal dimension of assisting workers in relation to their rights. For example, one stakeholder noted that specific gender and intersectional issues should be taken into account when developing or funding services to support vulnerable workers, noting former Sex Discrimination Commissioner Kate Jenkins's finding that WWCs are the most effective, victim-centric model for delivering support and advocacy to women. This stakeholder also noted the need to fund services for workers who are not able to secure help from a union, lawyer or other advocate. This stakeholder highlighted the need for a holistic, advocacy, socio-legal/workplace relations model (that takes into account nuances around coercion, gender inequality etc.) as this is often preferred by workers such as vulnerable women, and this kind of model is needed to prioritise prevention of non-compliance.

Given the difficulties (and even fear, on account of employment and immigration-related consequences) faced by workers in lodging complaints, the stakeholder also suggested that organisations dedicated to supporting workers should be able to lodge complaints with the FWO on their behalf.

The FWO and information-sharing

Various proposals were raised in relation to the FWO. These included a dedicated migrant worker support unit, a fulsome review of the FWO's functions, a wage and superannuation calculation service, increased data collection, increased focus on deterrence, and enforcement of unpaid judgments by the FWO (with an insurance scheme where employers are unable to pay).

A stakeholder also suggested that CLCs and organisations such as WWCs would be greatly assisted if the FWO could share more of its resources, including company searches necessary for service of documents and underpayment calculation tools. This stakeholder also suggested that amounts recovered through enforceable undertakings should be distributed to organisations that assist vulnerable workers with underpayment claims, particularly to organisations that regularly refer clients to the FWO.

Another stakeholder proposed that there should be an information-sharing system between courts, tribunals and agencies such as the FWO and FWC. This stakeholder said this would aid the detection of repeat offenders, especially the most serious, for further scrutiny, investigation and potential penalties.

Another stakeholder also raised the need for better information-sharing across regulators including the FWO, the FWC, the Australian Taxation Office, the Australian Securities and Investments Commission, and the Department of Home Affairs. This stakeholder emphasised that employment issues often co-occur. For example, where there is underpayment there are likely to be issues such as non-compliance with Work Health and Safety laws. This stakeholder suggested that agencies need

to communicate better, with alerts raised when complaints are made on particular issues or repeatedly about particular organisations, to inform other regulators and allow for coherence of compliance investigations.

Unions and right of entry

A stakeholder recommended extending the provisions of Part 6-4A of the Fair Work Act (relating to the Textile, Clothing and Footwear Industry) to other industries with a high incidence of non-compliance and vulnerable workers. Among other measures to ensure increased protection for workers, these provisions include enhanced union right of entry, coupled with more detailed record-keeping requirements.

Another stakeholder emphasised the importance of union right of entry, stressing that unions are the only institution with the capacity, scale and connection to workers to adequately address wage theft. This stakeholder also noted unions' specialist knowledge of the features of employment in particular industries (for example, piece rates in agriculture and horticulture and haulage rates in road transport), which generalist regulators may not have or may not be able to develop due to resource constraints. In relation to right of entry, this stakeholder noted the onerous and time-consuming procedural and accreditation requirements, in addition to the legislative requirements. This stakeholder submitted that the Queensland system of right of entry should form the basis of reforms to the national system. Further, this stakeholder proposed that, given the challenge of calculating potential underpayment, the right of current or former employees to access their employment records should be strengthened to include a right to access those records in the most convenient electronic format available.

This stakeholder also proposed that Australia take steps toward implementing International Labour Organization Convention 135. Such steps include providing a right to representation by a workplace delegate, entitlement for delegates to have paid leave for training, a right for delegates to engage in discussion with workers and union officers during work time, a right for delegates to use an employer's facilities to communicate with members and their union, and rights for employees to attend union meetings.

Conclusion

This Review has been conducted in line with Recommendation 12 of the MWT Report and has identified potential reforms that could make the small claims procedure a more effective avenue for wage redress for workers generally (including migrant workers). These reforms can be implemented now to further build on the improvements to the small claims procedure made via the Secure Jobs, Better Pay Bill.

The department thanks all stakeholders for their participation in the Review. Stakeholders will continue to be consulted as needed as measures approved by Government are developed.

The Review has formed part of the Government's overall reform agenda for Australia's national workplace relations system. There will be ongoing opportunities for stakeholders to contribute further to workplace relations reform as the Government continues to carry out its agenda.

Next Steps

There are a number of recommendations that are a matter for Government, and further work is needed to establish cost requirements. Some of the recommendations made will require cross-portfolio work and collaboration. There are certain matters canvassed in this Review that will be a matter for the FCFCOA to consider in the first instance.

This Report and its recommendations are provided for the Government's consideration. As a number of recommendations require further consideration and consultation, additional advice will be provided in due course.