

# **The future of enforcement for migrant workers in Australia**

Lessons from overseas



THE UNIVERSITY OF  
**SYDNEY**

—  
Sydney Policy  
Lab

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## **Acknowledgement of Country**

We acknowledge the tradition of custodianship and law of the Country on which the University of Sydney campuses stand. We pay our respects to those who have cared and continue to care for Country.

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The Sydney Policy Lab is a multidisciplinary research institute at the University of Sydney and a nonpartisan space where people from all walks of life can meet and collectively develop plans for the future.

We exist to forge collaborative relationships between researchers, civil society, industry, politicians, and policymakers that are capable of creating new knowledge and driving change that would shape an Australia which is more equal, where power is in the hands of everyday people and where more people feel a secure sense of belonging in their own society.

The Sydney Policy Lab develops far-reaching, original research projects which unite the grounded wisdom that comes from everyday experience and the perspectives gained from rigorous scholarship. We work in partnership with institutions that seek to put new ideas into practice.

Our unique way of working strengthens the ability of our researchers and partners to collaboratively generate new ideas, transform the ways they work, and effect change.

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**The Future of Enforcement for Migrant Workers in Australia**

A Sydney Policy Lab policy paper authored by University of Sydney researchers and based on comparative international research and discussions with public and private lawyers, trade union officials, nongovernment sector representatives, and private consultants.<sup>1</sup>

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## 60 second summary

The current regulatory and enforcement landscape for migrant workers in Australia has multiple limitations that contribute to their exploitation – predominantly through underpayment – and the impacts of COVID-19 threaten to exacerbate this.

This report offers a series of pragmatic policy solutions to both motivate employers to engage with their employees fairly and remove barriers to justice for migrant workers who have been exploited and require redress.

Key ideas include bringing penalties for employers in line with consumer protection legislation; encouraging collaboration across government, industry, and worker organisations; and reforming the wage recovery system to reduce the duration and cost of migrant workers' claims.



## Executive summary

**The conversation about migrant working conditions in Australia remains as important as ever. Before COVID-19, more than 2 million temporary migrants in Australia accounted for up to 10 per cent of the Australian workforce in key sectors such as construction, healthcare, and hospitality. Many of these workers already experienced precarious work arrangements and minimal access to welfare payments, which continued during the pandemic.**

When it comes to ensuring fair wages and conditions, Australia has a well-documented enforcement gap between the number of workers experiencing exploitation and the number of actions taken against employers to ensure compliance. On top of the personal cost to families and communities, wage underpayments alone have been estimated to cost the Australian economy \$1.35 billion each year, particularly in sectors with high proportions of migrant and other precarious workforces, such as construction, retail, and accommodation and food services.

Research to date indicates that the Fair Work Ombudsman (FWO) does not have sufficient resources to achieve total wage compliance and monitoring and that current enforcement mechanisms relying on employer self-regulation and voluntary compliance arrangements have not significantly reduced migrant worker exploitation. While the 2019 Migrant Worker taskforce (the Fels Inquiry) was established to address some of these issues, and the Australian government endorsed all 22 resulting recommendations, substantive reforms are still being implemented.

Drawing on best practice approaches from the State of California (USA), Canada (the Provinces of Ontario, British Columbia and Alberta), New Zealand and the UK (England), this report provides the Australian government with practical policy reform recommendations which can help strengthen the system for the benefit of both workers and industry.

### The key recommendations are:

#### 1. Increasing and varying penalty enforcement levers

Including reforming civil penalty provisions, legislating adverse publicity orders, and introducing national licensing schemes.

#### 2. Coordinating action with cross-sector actors

Including through partnerships between government and non-government organisations and introducing public procurement standards for government.

#### 3. Creating a new wage recovery system

Including reduced barriers for vulnerable workers, costs recovery for legal representatives, and increasing the availability of low-cost jurisdictions for wage recovery.

## Law Reform on Civil Penalties and Other Punitive Orders

Current civil penalty provisions for employers do not serve to sufficiently motivate compliance. Compared to consumer law penalties where companies can be penalised up to 10 per cent of annual turnover, the maximum penalty for employers is capped at \$630,000. Sharpening the penalty tool to 10 per cent of a business's annual turnover, in addition to implementing adverse publicity mechanisms through formal court orders, could affect employer behaviour.

## Industry-wide Cultural Change through Licensing

Industry level certification provides a potential mechanism for institutionalising cultural change around exploitative labour practices. Evidence from the State of California (USA), across various sectors, suggests that subjecting employers to license suspension or cancellation for noncompliance with labour standards reduces worker exploitation. To make similar schemes work in Australia, the Fels Inquiry recommended moving from the current state-based approach to a national labour hire licensing and registration scheme. We endorse such an approach.

## Coordinated Enforcement Action

On top of increasing penalties, ensuring compliance must also involve workplace inspections and media pressure. Given the limited resources of the FWO, there is a potential role for strategic partnerships between worker and industry representative organisations, to share information about employer and employee labour law compliance – a role unions have utilised in Canada and the USA. Similarly, governments should adopt procurement and commissioning policies which mandate adherence to legislative protections and fair wage conditions.

## A New Wage Recovery System

Recovering unpaid money is difficult for all workers, but particularly for migrant workers. Barriers can include lengthy processing times, varying types of fees and filing costs, navigating a complex legal system in a second language without legal representation, a lack of clarity around the rights of gig economy workers, commonly known as independent contractors, as well as the fear of retaliation or dismissal. These barriers can serve the dual function of discouraging employees from asserting their rights and emboldening unscrupulous employers to take advantage of workers.



## This report recommends four policy strategies to address the limitations of the current wage recovery systems:

- 3.1. Amending wage recovery systems:** empowering state courts and amending procedures to create special industrial lists in Magistrates Courts could better distribute caseloads, reduce waiting times, and provide better access to justice.
- 3.2. Funding legal services and costs recovery:** legal costs recovery and protective costs order regimes for those supporting migrant workers can reduce barriers to disadvantaged workers making claims and create an important bargaining lever in any dispute resolution process.
- 3.3. Removing filing fees for migrant workers:** creating a mechanism to ensure that high filing fees do not deprive access to justice for lower-paid workers.
- 3.4. Amending the regulator's litigation policy:** funding and expanding the amicus curiae, "friend of the court," function of the FWO in small claims jurisdictions can take pressures off the court system without requiring the FWO to engage in costly and lengthy litigation.

Overall, the health and economic crises brought on by COVID-19 have exacerbated economic insecurity across Australia. This increases the risk of labour exploitation for already vulnerable workers. This report provides practical policy solutions for Australia's labour enforcement landscape – in particular for migrant workers – with the aim of creating a robust regulatory environment that ensures the labour safety net extends to all those living and working in Australia.

## Introduction

The restriction of global migration flows during the COVID-19 pandemic has made it more important than ever to reflect on the conditions of migrant workers in Australia. The COVID-19 pandemic has highlighted Australia's dependence on migrant workers in crucial industries such as healthcare and seasonal work.<sup>2</sup> As economic adaptation and recovery begin, a system that protects migrant workers will be an essential part of the emerging employment landscape. During the economic downturn, when economic vulnerability has and will continue to increase, plugging holes in the current regulatory framework for migrant labour is imperative. Employment standards continue to be the terrain where business seeks minimal legislative intrusion and where worker advocates champion improved standards and enforcement.<sup>3</sup> This policy paper draws from overseas case studies and solutions to make some suggestions to balance out these competing interests.

Temporary migrant workers comprised 8–10 per cent of the Australian workforce when last measured in 2019.<sup>4</sup> As of 31 March 2020, the Department of Immigration and Border Protection predicts that there are 2.1 million temporary migrants in Australia.<sup>5</sup> The impact of unemployment on temporary migrant workers during COVID-19 is acutely felt, as they are ineligible for most social welfare payments in Australia<sup>6</sup> – contrary to the approaches taken in countries like New Zealand<sup>7</sup> and the United Kingdom.<sup>8</sup> Migrant workers' experiences of exploitation in Australia have been the subject of numerous media scandals, public inquiries,<sup>9</sup> and a federal government taskforce that was sparked by concern from both government and civil society over widespread wage underpayment.<sup>10</sup> The types of exploitation that migrant workers face form a spectrum, ranging from manipulative contractual practices that result in workers being underpaid – “wage theft” – through to serious modern slavery offences that deprive workers of liberty and occasionally their lives. Laurie Berg and Bassina Farbenblum recently conducted a survey of 6,000 temporary migrants to document the human impact of government policies on this group during the COVID-19 pandemic; it showed that their vulnerability has increased and that there is a need for greater protections.<sup>11</sup> A recent study into global immigration during COVID-19 conducted by the Sydney Policy Lab reached similar conclusions, particularly regarding access to social support and health services for temporary migrants.<sup>12</sup>

Following the Migrant Worker Taskforce inquiry and final report in 2019 (The Fels Inquiry), the Australian federal government endorsed all 22 proposed recommendations, unleashing a wave of public policy discussion around the criminalisation of wage theft, the implementation of a national labour hire registration scheme and reforms to the Fair Work Ombudsman (FWO), including a wider scope for infringement and compliance notices. However, no reforms have been implemented to date and momentum was lost once COVID-19 broke out and focus shifted to pressing public health issues. Nonetheless, as we move towards a COVID-19 “new normal,” the economic vulnerability of migrant workers will endure and perhaps become more pronounced. In this context, it is both prudent and necessary to address the issue of migrant exploitation in light of future policy reforms. There are generally two levers available when addressing the exploitation of migrant workers. The first is to reduce the circumstances of vulnerability for migrant workers, largely through social welfare support and removing the essential precarity of temporary migration by creating more certain pathways to permanent residency. The second is to sharpen the enforcement and regulatory landscape to better deter employer noncompliance – the focus of this report.

By considering best practice approaches to enforcement in the State of California (USA), the Province of Ontario (Canada), and the UK, this report provides the Australian government with some possible exemplars for how it might move forward on policy reform.

The report is structured as follows:

1. A brief overview of the current Australian enforcement landscape provides some context and an introduction to the Fair Work Ombudsman (**FWO**) and its operating framework.
2. A consideration of some changes to enforcement mechanisms that would achieve better general deterrence by increasing civil pecuniary penalties, legislating for adverse publication orders, and instituting business registration in particular problem industries.
3. A discussion on facilitating greater state partnerships with unions and nongovernment organisations for coordinated compliance actions.
4. A discussion of proposals for a reformed wage-recovery system in Australia to ensure that underpayment, the major issue that migrant workers face, can be remedied more appropriately.

## The Australian enforcement landscape

The enforcement gap is often viewed as both a cause and result of precarious work arrangements,<sup>13</sup> where subcontracting, temporary agencies and labour hire arrangements are used to fracture the traditional and direct relationship between employer and employee, creating a landscape of “fissured workplaces.”<sup>14</sup> The gap refers to the discrepancy between the number of workers experiencing exploitation, or not having their minimum employment terms met, and the number of enforcement action undertaken to ensure employer compliance.

The Fair Work Ombudsman (FWO) is the Australian labour inspectorate. It is charged with monitoring compliance, investigating violations, commencing legal proceedings, representing employees, and promoting cooperative workplace relations.<sup>15</sup> Given this exceptionally broad mandate, and at times competing interests, Australia’s enforcement gap is well studied and established.<sup>16</sup> The rights-based model of Australian labour law requires formal enforcement and recovery processes through the courts and the FWO, a resource intensive process at the best of times that is exacerbated by increasing numbers of precarious workers.

The move in many industrialised economies, with advanced labour markets and labour laws, including the UK,<sup>17</sup> the USA,<sup>18</sup> and Canada,<sup>19</sup> has been toward enforcement at the enterprise level. Australia is no different. Such an approach favours self-regulation mechanisms for employers and complaint-based enforcement for employees trying to recover their basic entitlements. These self-regulatory systems focus on educating workers on their entitlements, employers of their liabilities, and facilitating the aggrieved parties in reaching compromise or resolution. In a Canadian study of this dispute resolution strategy, Vosko showed that the majority of complaints were not resolved voluntarily and required adjudication by a third party; suggesting that self-regulation may not successfully resolve disputes. Furthermore — as has been well researched<sup>20</sup> — migrant workers are often reluctant to complain, so any new recovery mechanism would have to be accompanied by further compliance and enforcement reforms. On this point, a recent study by Associate-Professor Anna Boucher demonstrates that between 1996 and 2016, there were only 355 migrant worker complaints that were finalised by judgment for any labour law violation, underpayment being the largest category.<sup>21</sup> While this number only captures cases that were reported, and therefore excludes many that may have been commenced and settled in the usual course, or were never commenced at all, 355 finalised cases in a 20-year period is exceptionally low.

To date, enforcement mechanisms that involve self-regulation and voluntary compliance arrangements with employers have not significantly reduced the level of exploitation experienced by migrant workers. Measuring the efficacy of enforcement regimes is empirically difficult. For the many employers underpaying their staff, the current system effectively treats unpaid wages as an interest free loan, funded by workers and repayable only by serving originating documents in a formal recovery process. Clearly there is a need for further enforcement mechanisms in Australia. The policy recommendations, below, draw on experiences in other jurisdictions: the State of California (USA), the Province of Ontario (Canada) and the UK. The benefit of this comparative analysis is both to understand where Australia’s employment protection system needs to be bolstered and to shape a new policy landscape for a post-COVID world.

## Enforcement reforms for general deterrence

As of October 2018, the FWO engaged a total of 717 staff, including 188 Fair Work Inspectors.<sup>22</sup> Tess Hardy approximates that this equated to one inspector for every 54,000 workers covered by the Fair Work Act 2009 (Cth).<sup>23</sup> A more recent estimate based on the current working population purports that there are 16 inspectors for every 1 million workers.<sup>24</sup> The standard set by the International Labour Organisation (ILO) in 2006 is one inspector for every 10,000 employees.<sup>25</sup> Given that Australia's numbers are far below the ILO standard, the FWO must in reality be selective with its enforcement activities and will not be able to achieve total compliance and monitoring. There are numerous sources that suggest that the extent of funding to public enforcement agencies correlates with their efficacy – most recently the Fels Inquiry.<sup>26</sup> Even with the increased budgetary promise of \$20 million for the FWO, following the 2015 7/11 scandal and passage of the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth), funding has remained unchanged in Australia.<sup>27</sup> While increasing funding, and thus the inspectorate's capacity, may help to address the systemic exploitation occurring across the labour market, calling for more money may fall on deaf ears in the current policy climate. Instead, some interim solutions are required.

Tess Hardy has tracked the FWO's shift from an interventionist compliance and enforcement strategy in 2006 to a cooperative and conciliatory approach to dispute resolution.<sup>28</sup> While current FWO policies note a distinct preference for alternative enforcement strategies, such as the creation of business guidelines and compliance orders, instead of pressing coercive sanctions like pecuniary penalties,<sup>29</sup> it has also been a successful litigator obtaining declarations, penalties, and compensation in recent years.<sup>30</sup> Hardy, Howe and Cooney note that the remedies sought have not "necessarily encourage[d] the institutionalisation of positive compliance practices," and that more severe remedies could be pressed through strategic litigation.<sup>31</sup> Anna Boucher's recent analysis does however point out that the FWO's policy of litigation is notably interventionist when compared to the workplace raids used in Alberta, Canada, the UK, and the State of California and should be commended on this basis.<sup>32</sup> Between 1996 and 2016, the FWO litigated 76 matters and represented 651 migrant workers.<sup>33</sup> Survey data suggests that exploitation remains prevalent across sectors.<sup>34</sup> This highlights the limitations of litigation without pecuniary penalties and compensation in deterring employer noncompliance.

In light of this, we make the following recommendations, which are examined in turn:

- 1.1 Law reform to legislate for increased civil penalties and other punitive orders including criminal sanctions to achieve a greater deterrence effect.
- 1.2 Implementing industry level certification and licensing as a way to change business practices that have normalised exploitation.

### 1.1. Law Reform on Civil Penalties and Other Punitive Orders

The Fels Inquiry (recommendation five) encouraged the federal government to increase civil penalties for violations of employment laws, to better parallel consumer and business law penalties in Australia.<sup>35</sup> Civil penalty litigation is a common feature of the Australian regulatory landscape, designed to respond to the range of motivations that drive compliance, and provide a means for regulators to pursue targeted enforcement with limited resources.<sup>36</sup> Under Australian Consumer Law, a company can be penalised the greater of \$10,000, three

times the benefit received, or 10 per cent of annual turnover in the preceding 12 months in certain circumstances.<sup>37</sup> In comparison, under the current Fair Work Act 2009 (Cth), a maximum penalty of \$133,200 for a company<sup>38</sup> and \$13,320 for a natural person for each breach can be ordered. The penalties for serious contraventions were increased following the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth). There are very few court cases using these provisions, most likely due to the protracted nature of litigation and the stringent litigation policy of the inspectorate.<sup>39</sup> Where companies have been egregiously underpaying staff, such as the estimated \$300 million underpayment of up to 5700 staff by Woolworths,<sup>40</sup> a single maximum penalty of \$630,000 under the new law is only 0.21 per cent of that total underpayment and represents a miniscule component of the company's overall profits. For perspective, in 2019 the FWO recovered \$40 million for more than 18,000 workers.<sup>41</sup> Given the prevalence of underpayment across the labour market, and across both small businesses and large multinational corporations, increasing penalties alone is unlikely to address the issue. However, sharpening the penalty tool for the 10 per cent of labour enforcement activities where the FWO pursues civil penalties<sup>42</sup> might recalibrate the calculus a business will run when deciding whether to underpay their staff and risk detection and penalty.

While there is merit to increasing pecuniary penalties to bring employment law breaches on par with civil penalties in other commercial dealings – and we endorse such a recommendation – it is also important to note that research measuring the effect of increasing penalties on compliance behaviour is inconclusive. For example, a study of civil penalties and breaches in the context of European corporate criminal liability yielded inconclusive benefit;<sup>43</sup> and in the UK, the use of harsher penalties was in fact proven to not alter compliance behaviour in the enforcement of work, health, and safety laws.<sup>44</sup> However, those studies were looking at the creation of quasi criminal offences to deter unlawful conduct and, just as Hardy noted in the Australian context, penalties tend to serve the function of legitimising regulators rather than institutionalising “sustainable compliance.”<sup>45</sup> Given that there is insufficient evidence to establish the utility of increasing existing penalties, we recommend pursuing alternative penalties to create more systemic effects: legislating for adverse publicity orders, license suspension orders, and license cancellation orders.

We recommend legislating adverse publicity orders for courts to issue to noncompliant employers as further deterrence, rather than leaving this as a discretionary remedy. An adverse publicity order requires any person who has been found liable for contravening a law to publish the details of such an offence. This is currently used in competition and consumer law.<sup>46</sup> Given that underpayments are often recovered through legal dispute resolution, providing the courts further orders would send a strong message that parliament intends to deter wage exploitation using diverse punitive tools. While there is a general power to make any order appropriate,<sup>47</sup> it remains at the discretion of courts to impose adverse publicity orders; as with other orders, such as compelling employers to provide evidence of continuing compliance with the FWO or auditing.<sup>48</sup> But leaving an order as a discretionary remedy often means that courts will not apply it. This is due largely to the limited remit of judges to adjudicate claims that comes before them and consider only the scope of relief that a claimant pleads.

In New Zealand, under the Health and Safety at Work Act 2015 (NZ), there are express ancillary orders that a court can impose on any offender, including adverse publicity orders,<sup>49</sup> restoration orders compelling the offender to remediate the offence with specified steps,<sup>50</sup> and project orders to improve work safety conditions.<sup>51</sup> These orders prove particularly useful when a company is insolvent and fines or penalties cannot be recovered. This is an issue that many migrant workers face in Australia when employers “phoenix,” or deliberately evade responsibilities, such as paying wages, by liquidating trading entities. Phoenix activity has been estimated to cost the Australian economy between \$1.78 to \$3.19 billion per annum.<sup>52</sup> In an example from New Zealand, 4 Hippos Farm Limited was a company

unable to pay fines of \$273,288 due to insolvency; an adverse publicity order was made (as well as a smaller reparation payment referable to its remaining assets) as a means to ensure reputational punishment when financial payment was untenable.<sup>53</sup> In order to whet judicial appetite towards making such orders, it is imperative that they be legislated in the *Fair Work Act 2009 (Cth)* and not left as a discretionary power.

There is further research in the UK that shows that adverse publicity is a more effective corporate deterrent than pecuniary fines.<sup>54</sup> A survey of business respondents by the UK Office of Fair Trading found that 89 per cent agreed with the statement that “the threat of adverse publicity associated with breaching consumer law is as important as any financial penalty.”<sup>55</sup> In the labour market context, there has been recognition that the UK Gangmasters and Labour Abuse Authority’s publication of all investigations and license revocation “has been found to be effective at deterring noncompliance activity.”<sup>56</sup> Taking this idea further, publishing breaches of labour laws more effectively through the reporting requirements of the FWO could also have a general deterrence effect; maintaining a public record of employers investigated by the inspectorate could provide a useful public accountability mechanism that brings corporate reputation more readily into the enforcement landscape.

## 1.2. Industry-Wide Cultural Change through Licensing

Historically, the enforcement of Australian labour law was conducted at the industry level by trade unions; since the 2000s enforcement has been largely passed on to the FWO at the level of the economy. Given resourcing and the practical difficulties of regulating industries with different practices, norms, and cultures there needs to be a return to the industry level with alternative policies. The FWO has focussed enforcement action on particular industries where there was a high level of exploitation, such as hospitality and cleaning services. But industry level certification or licensing could be another, more effective mechanism to institutionalise cultural change around exploitative labour practices.

Licensing labour hire firms has been discussed in the Australian context. Victoria, South Australia, and Queensland enacted labour hire licensing laws between 2018 and 2019. The Fels Inquiry noted, however, that the regimes “impose a significant regulatory burden on the entire labour hire industry and the host employers using them.”<sup>57</sup> It recommended a national labour hire licensing and registration scheme to provide a more uniform approach to the varied state approaches currently used across Australia. We endorse such a recommendation, especially given the positive cultural change and compliance outcomes that registration and the payment of security bonds have had in the State of California.

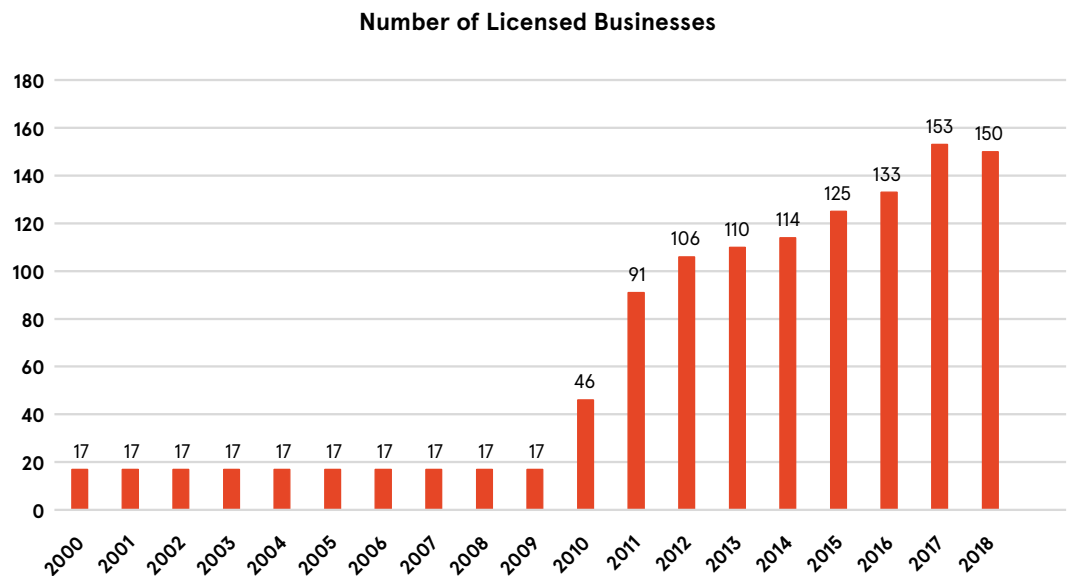
California’s Labor Commissioner’s Office has conducted regular occupation surveys since 2000 to assess exploitation occurring in various industries. These surveys then inform an evidence-led implementation of license and registration requirements across sectors. Businesses are required to apply for a license at the time of registration; in particularly exploitative industries, such as cleaning, car washing, and talent services an additional security bond is required. Consequentially, businesses are subject to license suspension orders or cancellation orders for particular contraventions or for multiple findings of noncompliance with labour standards.

Taking the example of talent agencies in California, where licensing was enacted in 2000, an analysis of the enforcement regime between 2000 and 2018 reveals that it has had a disciplining effect on business practices and reduced labour code violations. Between 1971 and 1999, 145 labour code violation cases were determined by the Labor Commissioner in the talent agency sector. Figure 1 provides details of the number of licensed talent agencies registered between 2000 and 2018, including any business that had its license reinstated.



Evidently there was a significant increase in the number of talent agencies operating in California, despite the imposition of security bonds, which simply became an established cost of doing business. Between 2000 and 2009 each agency paid a US\$10,000 security bond and this amount was increased to US\$50,000 in 2010.

**Figure 1: Licensed talent agencies in California over time**



Source: State of California, Department of Industrial Relations, "License and Registration Search."  
Available at: <https://www.dir.ca.gov/dlse/DLSE-Databases.htm#>

Table 2 shows the number of labour code and licensing violation cases litigated by the Labor Commissioner's Office over the same period, 2000–2018. The data shows that less claims have been pursued over time, as more businesses began operating. This decrease could plausibly be the result of either a reduced need for enforcement or that the inspectorate is conducting less enforcement actions. The first is more likely, given that the security bond is forfeited for any violation and a business's licence can be suspended or cancelled. This suggests that having a capital loss at stake is a more effective deterrent than the mere possibility of the inspectorate auditing your business.

**Table 2: Table of litigated cases compared to number of licensed businesses**

| Year | Number of Licensed Businesses | Prosecuted Cases | Percentage |
|------|-------------------------------|------------------|------------|
| 2000 | 17                            | 9                | 53%        |
| 2001 | 17                            | 20               | 118%       |
| 2002 | 17                            | 17               | 100%       |
| 2003 | 17                            | 17               | 100%       |
| 2004 | 17                            | 18               | 106%       |
| 2005 | 17                            | 31               | 182%       |
| 2006 | 17                            | 8                | 47%        |
| 2007 | 17                            | 17               | 100%       |
| 2008 | 17                            | 8                | 47%        |
| 2009 | 17                            | 13               | 76%        |
| 2010 | 46                            | 4                | 9%         |
| 2011 | 91                            | 6                | 7%         |
| 2012 | 106                           | 22               | 21%        |
| 2013 | 110                           | 19               | 17%        |
| 2014 | 114                           | 3                | 3%         |
| 2015 | 125                           | 12               | 10%        |
| 2016 | 133                           | 8                | 6%         |
| 2017 | 153                           | 12               | 8%         |
| 2018 | 150                           | 13               | 9%         |

Source: State of California, Department of Industrial Relations, "License and Registration Search."  
 Available at: <https://www.dir.ca.gov/dlse/DLSE-Databases.htm#>

## Coordinated enforcement action

It is widely accepted by theorists of regulation and academic researchers that increasing penalties alone does not generate compliance. There must also be workplace inspections and media pressure on employers.<sup>58</sup> Historically, union officials played a more significant role in regulatory compliance, due to their access to worksites. With the erosion of the right of entry<sup>59</sup> and the continued focus on litigation against unions and their registration through the Registered Organisations Commission,<sup>60</sup> Hardy rightfully points out that there is limited political appetite for renewed union involvement in enforcement.<sup>61</sup> At the same time, workplace investigations are confounded by the increasingly fractured nature of work; by on-demand workforces and “fissured workplaces” that involve labour hire and franchise arrangements that scatter workers across various worksites. Given the success of coordinated compliance actions in other jurisdictions, there may be more support for the involvement of other actors in Australia.<sup>62</sup> Other jurisdictions offer some alternative approaches to state enforcement, including agreements with nongovernment organisations, cooperation with unions for information and data gathering, and the development of public procurement standards for government.

### The State of California

The State of California has implemented a “strategic partnership approach” alongside non-government bodies and community organisations to enforce workers’ rights.<sup>63</sup> It has been noted that these arrangements allow for “joint problem-solving,” as in the case of a partnership agreement between the Wage and Hour Division and the California Vanpool Authority, a non-profit that transports workers to farms in California’s Central Valley.<sup>64</sup> This “memorandum of understanding” emerged after numerous farmworkers died while being transported to and from farms by for-profit organisations. Under the memorandum, parties agreed to exchange information regarding employer and employee compliance with wage, safety, and health laws, administered by designated representatives and liaisons, that were otherwise undetected by the regulator.<sup>65</sup>

### The Province of Ontario

The Canadian experience in Ontario shows that it is necessary to develop a different role for unions: from an enforcer of laws on worksites to a partner of the regulator and source of information. In a study of the role of unions in Ontario, Vosko and Thomas argue that turning to unions and bolstering their regulatory role is a means “to support the ongoing efforts of other workers’ organisations to improve employer compliance with employment standards.”<sup>66</sup> Critically, they argue that when unions are present on worksites they can garner widespread public awareness to press on the reputational damage lever, which can benefit members and non-members alike and spotlight specific issues. One example is the Ontario Bad Boss Hotline that was organised in the 1990s by the Ontario Federation of Labour, the peak union body in the province, which compiled a critical mass of testimonials of labour law violations that was successfully used in lobbying efforts.<sup>67</sup>

Another approach that unions have been advancing in Ontario over the 2010s is lobbying for government procurement contracts to comply with labour standards. One strategic effort in 2012, resulted in government offices in Toronto being prohibited from engaging cleaning firms that violated Toronto's Fair Wage policy.<sup>68</sup> Australian unions and nongovernment organisations could similarly lobby governments to adopt procurement policies that mandate adherence to legislative protections and fair wage conditions. Anna Boucher and co-authors made a similar argument in a recent submission to the Australian Senate.<sup>69</sup> When determining what standards could be applied to the Australian public sector, reference can be made to Ireland's Ten-Year Framework Social Partnership Agreement 2006–2015.<sup>70</sup> This was one of the first governmental standards and agreements on labour rights compliance that set out basic requirements to only contract companies that comply with national labour laws and standards, to audit third-party contractors, and to effectively model behaviour. The momentum generated by recent labour hire inquiries, such as in the Victorian COVID-19 Hotel quarantine inquiry, and union reform efforts currently underway in Australia is an opportunity to pursue a like approach.

## New wage recovery system

There has been a pressing need for reforms to the wage recovery system, to better provide migrants with accessible redress for the overwhelmingly common experience of wage theft. Both the Fels Inquiry and new data from the Migrant Worker Rights Database demonstrate that underpayment is the workplace violation that migrant workers are most likely to experience.<sup>71</sup> However, recovering unpaid money remains fraught with the particular vagaries of civil litigation; lengthy delays and procedural difficulties, for example, are obstacles to individual migrant workers navigating the system. Furthermore, relying on the regulator to recover wages for individuals fails to acknowledge its limited resources, stretched mandate, and the reality that the benefit of FWO-led litigation is limited to cases of extreme underpayment. Arguments canvassed in this section were made by Anna Boucher, Umeya Chaudhuri and James Hall in their submission before the Senate Economic References Committee in 2020.<sup>72</sup>

### The Limitations of Current Systems

Details of lengthy processing times and variation in fees and filing procedures across the federal and state systems show that legal recourse to recover unpaid wages is fraught with difficulties. The Small Claims Division of the Federal Circuit Court was created to provide a quick, cheap, and informal process for workers to claim underpayments up to \$20,000.<sup>73</sup> As of July 2020, the filing fee for a claim under \$10,000 is \$245 and for claims between \$10,000 and \$20,000 it is \$400.<sup>74</sup> It takes an average 1712 days – more than four years – for proceedings to be finalised at the Federal Circuit Court.<sup>75</sup> In addition, the Fels Inquiry and community legal practitioners have reiterated the limited uptake of legal remedies by migrant workers due to the perceived difficulty of pursuing litigation.<sup>76</sup> Numerous studies and reports both from Australia and overseas also show that vulnerable workers are reluctant to personally enforce their legal entitlements, largely due to the fear of retaliation or dismissal.<sup>77</sup>

Gig economy workers face even greater issues when using the current system. On-demand workers are largely migrants and are often regarded as independent contractors and paid per task, rather than as employees paid an hourly wage. This is a legal distinction that the courts have battled with in famous litigation involving Uber and Foodora, among others.<sup>78</sup> Money earned varies under these two arrangements and any claim for underpayments will be based on a worker's employment relationship – a relationship that cannot be adjudicated in a small claims court designed to determine the underpayment. For example, Jeremy Rhind is a Deliveroo driver suing the company on the basis that he should have been paid an hourly rate of \$19.49 as an employee instead of the \$9.00 he made per delivery as an "independent contractor." This matter was listed for a two-day hearing on 5 November 2020.<sup>79</sup> On average it takes a worker "up to eight months" to reach a determination of the employment relationship in the Fair Work Commission (FWC).<sup>80</sup> Mr Rhind had his day in court more than 17 months after he filed proceedings. The lengthy litigation involved in determining the independent contractor or employee question, prior to claiming an underpayment, does not equal a "just, quick, and efficient" small claims process.

If Australia is to retain a system where enforcement is largely self-led by the affected individual, significant reform to the new wage recovery system is required. Currently, the FWC is a tribunal empowered to administer the Fair Work Act 2009 (Cth), where the rules of evidence and legal procedure do not apply.<sup>81</sup> This type of forum offers the greatest likelihood of success for migrant workers trying to navigate the complexities of the Australian legal system. However, the FWC cannot be empowered to determine the rights and liabilities of parties during wage disputes.<sup>82</sup> In 2019, the Australian Labor Party suggested a new small claims court that could determine rights and liabilities. However, a statutory body

adjudicating and enforcing rights and liabilities would be performing a judicial function, breaching an established constitutional principle from the 1956 *Boilermaker's* case.<sup>83</sup> The constitutional principle emerged from a challenge made to a finding of contempt from the Commonwealth Court of Conciliation and Arbitration that a judicial function was being exercised by an arbitral court that was not so empowered by Chapter III of the Australian Constitution, which empowers only federal courts to exercise judicial power. The High Court of Australia held that a court cannot discharge both arbitral and judicial powers, establishing the separation of these powers. There must thus be a clear separation between institutions like the FWC, which have arbitral powers,<sup>84</sup> from courts that make declarations and determinations of rights and liabilities.

The following four policy strategies will be considered to address areas of much needed reform, including the limitations of wage recovery systems:

- 3.1 Amending wage recovery systems in state courts in Australia
- 3.2 Funding legal services and costs recovery
- 3.3 Removing filing fees for migrant workers
- 3.4 Amending the FWO's litigation policy

### 3.1. Amending wage recovery systems in state courts

Empowering state courts to absorb underpayment claims is an option that could distribute caseloads across the federal and state courts, reduce waiting times, and provide meaningful access to justice. Workers are currently able to bring claims in state Magistrates Courts<sup>85</sup> for underpayments ranging from between \$50,000 to \$250,000, with the limit varying in each state.<sup>86</sup> When there is a claim under \$20,000, the rules of evidence and procedure do not apply. Facilitating an accessible forum to have small disputes resolved would be the best option.<sup>87</sup> The benefit in the state jurisdiction is that, for small claims up to \$2,500, the filing fees across the various states are lower than in the Federal Circuit Court, ranging from \$150 to \$182.<sup>88</sup> However, the greatest limitation here is that the magistrates hearing these matters do not necessarily have expertise in industrial and labour law to support their interpretation of the complex interaction between the Fair Work Act 2009 (Cth) and modern awards to give effect to the “just, quick, and efficient” resolution of disputes. Only Queensland and Victoria have established industrial divisions within their respective Magistrates Courts.<sup>89</sup> The complexities of Australian labour law necessitate a more specialised judiciary to resolve wage disputes.

Amending current case management processes in the state Magistrates Courts for employment related small claims could be a useful and readily available approach to addressing current accessibility issues. State courts generally aim to clear 80–90 per cent of civil cases filed within 6–12 months<sup>90</sup> and the majority of these matters are settled, arbitrated, or undefended claims. The Queensland government introduced the Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020 (QLD) in July 2020, which allows fair work claims to be brought to the Industrial Magistrates Court, where the registrar is empowered to order the parties to attend conciliation to resolve their dispute. The conciliation process in its current form replicates the FWC's model, where conciliated agreements can be effected by orders of the Industrial Magistrates Court. The bill also provides for claimants to be represented by a union official for a small claim, including during conciliation. While the bill has not passed, it proposes adding an alternative dispute resolution tool to the normal course of civil case management that would get around some of the constitutional limitations raised earlier.

While bolstering and streamlining the civil procedures at the Magistrates Court level would be useful in jurisdictions like Queensland and Victoria, where there is an established division for industrial disputes that allows magistrates to resolve and case manage disputes, this may not translate to other states like NSW where there are only general and small claims divisions.

### 3.2. Funding legal services and costs recovery

Amending wage recovery systems in state courts must be implemented in conjunction with funding for legal services and the recovery of costs to meaningfully improve access to remedies. Currently, the FWO's small claims division of the Federal Circuit Court is a no costs jurisdiction, as it was intended to allow self-represented parties to advocate quickly and less formally without the fear of an adverse costs order. However, for many migrant workers who are unfamiliar with legal processes, experience language barriers, and intersecting vulnerabilities, self-representation is a hindrance rather than a factor that increases parity between parties. Data from the Migrant Worker Rights Database shows that of the 949 migrant workers who had finalised judgments between 1996 and 2016 in Australia, only 8 per cent were self-represented, or represented by a nonlegal representative such as a family member; the majority had some form of legal representation. There was also inequality in legal representation of migrant workers compared to employers; comparatively, only 0.7 per cent of the 428 employers in these cases were self-represented. While these levels of self-representation are quite low, indicating that legal representatives are still involved in the large majority of employment related disputes, these statistics are derived from cases that reached judgment and do not include any matters that may have been settled or resolved at an earlier stage. Regardless, it can be inferred that workers who pursue litigation to achieve justice are most likely to do so when they have access to some form of formal legal representation. Allowing for costs to be recovered for underpayment claims by workers could increase demand and capacity for public legal services for workers pursuing these claims.

Introducing costs to a wage recovery scheme does carry a significant risk of an adverse costs order being made for an unsuccessful litigant, where they would be liable to pay their own and the other side's legal expenses. This has been regarded as a deterrent to pursuing legal action, although there is no empirical data on any litigant's risk calculus. So while it has been noted that "the expense of litigation is one of the most fundamental problems confronting the civil justice system,"<sup>91</sup> awarding costs in a proceeding could allow legal practitioners representing workers, including community legal centres and trade unions, to assist more individual workers to achieve better outcomes. This largely reflects the limited resources of these organisations and the significant costs incurred by litigation that are not recoverable if workers pursue underpayment in court. That said, in the area of migrant worker claims, empirical evidence from the Migrant Worker Rights Database demonstrates that migrant workers have a far higher success rate in claims than the opposing employers; for instance, the success rate across the database's Australian cases is as high as 95 per cent for migrant workers recovering unpaid wages.<sup>92</sup> As such, the risk appears low in the unpaid wages area.

At the same time, we recommend that a maximum costs order is mandated for wage recovery claims, if costs were introduced; vulnerable applicants would otherwise be discouraged from proceeding. In a costs jurisdiction, under rule 40.51 of Federal Court Rules 2011 (Cth), a party can apply for a maximum costs order, where the court must exercise discretion with regard to all circumstances. These orders are commonly known as protective costs orders and are often issued to all parties involved in litigation, rather unilaterally to one party.<sup>93</sup> In extrajudicial commentary reviewing protective costs orders in the NSW jurisdiction, Justice Nicola Pain of the NSW Land and Environment Court noted that these orders were made when "expenditure was found to be disproportionate to the matters



in dispute or the amount of money sought.”<sup>94</sup> Furthermore, Justice Beach of the Federal Court of Australia noted that the purpose of rule 40.51 is “not so much a desire to limit the exposure of a respondent to an adverse costs order in complex and lengthy commercial litigation, but rather with concerns relating to access to justice, public interest, and a desire to limit the costs of all parties in less complex and shorter cases.”<sup>95</sup> There is clearly a capacity for protective costs to be a mandatory part of any costs regime in wage recovery, an area where claim amounts are moderate to low and where there are issues of access to justice for migrant workers. Ensuring a statutory guideline for making such protective orders will be essential to the success of this recommendation.

Protective costs orders in other jurisdictions have been treated in different ways. In the UK, the Court of Appeal has limited these orders to public interest claims where an applicant has no private interest or benefit at all.<sup>96</sup> Comparatively, the Supreme Court in Canada has not curtailed such costs-capping orders; it instead emphasises access to justice, a right of indemnity of costs by a successful party, a litigant’s capacity to pay for litigation where no other realistic option exists for bringing the issues to trial, and special circumstances that divert from the rule that costs follow the event.<sup>97</sup> The Canadian approach appears initially more in step with the approach taken to date by individual judges of the Federal Court when exercising discretion, but ultimately it remains a discretionary power.

In the Government of Western Australia’s response to its parliamentary inquiry into wage theft, in December 2019, it adopted the recommendation to make costs recoverable, although no such law has yet been enacted.<sup>98</sup> In the civil context, only a minority of cases are determined at trial; as in Western Australia, where of the 45,777 finalised civil cases, only 537 or 0.01 per cent went to trial.<sup>99</sup> The majority of underpayment claims will not be determined at trial, where the majority of costs are incurred. However, increasing access to legal representatives who can appear at trial will provide an important bargaining lever in the dispute resolution process that will likely increase the ability of migrants to meaningfully obtain justice.

### 3.3. Removing filing fees for migrant workers

The Fels Inquiry recommended waving filing fees for migrant workers.<sup>100</sup> The current system’s high filing fees deprive many low-paid workers access to the courts. Having an established mechanism to waive fees, especially for small underpayment claims can resolve this. Access to the courts was recently considered in a case in the UK, where the Supreme Court unanimously held that filing fees for the Employment Tribunal are unlawful because they impede an individuals’ access to justice, which it considered “inherent in the rule of law.”<sup>101</sup>

### 3.4. Amending the regulator’s litigation policy

In the State of California, the Division of Labor Standards in the Labor Commissioner’s Office (a state body under the Secretary of Labor) is empowered to recover unpaid wages in the course of their investigations and through administrative “wage claim adjudications.” The division will undertake a settlement conference with the employer to attempt resolution, but if unresolved a wage claim hearing is then listed before a deputy (similar to a government official). This ensures that the investigation and resolution of wage disputes can be achieved within one body; and is thus characterised as an administrative decision. This could not be directly implemented in Australia given the limitations on statutory bodies exercising judicial functions.<sup>102</sup> However, the Californian experience is useful in demonstrating the benefit of having a single body consolidate information from investigations and enforcement activities and adjudicate and determine wage disputes.

In Australia, the system is heterogeneous. The FWO has relied on referring workers to the small claims jurisdiction to recover wages in order to minimise the number of full investigations.<sup>103</sup> Historically, the regulator's litigation policy would be to investigate or provide further assistance to vulnerable workers, like migrants, for claims under \$5,000.<sup>104</sup> A previous pilot program in Melbourne and Coffs Harbour in 2011–2012, had a FWO lawyer appear as an *amicus curiae* (Latin for "friend of the court") in the small claims division of the Federal Circuit Court. The regulator was not a party to the dispute but assisted the magistrate in determining points of law and resolving the matter efficiently and quickly.<sup>105</sup> In Howe, Hardy and Cooney's review of the 2011–2012 pilot program, they recount positive responses to the FWO's *amicus curiae* approach, as such an approach was not as resource intensive as the FWO initiating and running litigation. The program was expanded in 2012 to assist 92 claimants,<sup>106</sup> then 50 applicants in 2012–2013,<sup>107</sup> 90 in 2013–2014,<sup>108</sup> and 172 in 2014–2015.<sup>109</sup> From 2016 onwards, when the Registered Organisations Commission was created, the annual reports no longer disclosed the numbers of applicants assisted by this program, suggesting that it is no longer a priority.<sup>110</sup> The FWO's emphasis on education and alternative dispute resolution in its compliance policies has left this approach under used.<sup>111</sup> Funding and expanding the *amicus curiae* function of the FWO in the small claims jurisdictions could also provide an efficient way to deal with pressures on the court system when dealing with complex underpayment claims. It would also relieve the FWO of fully funding and proceeding with lengthy litigations for the many vulnerable workers with small unpaid wages claims.

## Conclusion

Wage underpayment has been estimated to cost the Australian economy \$1.35 billion each year. The greatest losses to wage theft have been in construction (\$320 million loss); healthcare and social assistance (\$220 million loss); accommodation and food services (\$190 million loss); and retail (\$180 million loss).<sup>112</sup> The COVID-19 pandemic has exacerbated economic insecurity across Australia and with it the risk of increasing exploitation. It is now imperative that the government implements legislative safeguards to incorporate sustainable cultural change in the labour market. Reform efforts must aim to address the two most commonly cited causes of underpayment:

1. Cutting labour costs through various business models, such as franchising, independent contracting, and labour hire companies, that fracture employment relationships to increase profit margins.<sup>113</sup>
2. The enforcement gap that has seen a relative decline in funding to the labour inspectorate over the decade leading to 2020 alongside continued growth in the labour market.<sup>114</sup>

This report focuses on reforms to enforcement in an attempt to plug holes in Australia's regulatory landscape. These policy reforms are directed to government, given that business practices are heterogeneous across industries and therefore require more deliberately resourced and specific policy changes.

### The key recommendations are:

#### 1. Increasing and varying penalty enforcement levers

- 1.1 Legislative and policy reform around civil penalty provisions for strategic litigation efforts, and to explicitly provide for adverse publicity orders.
- 1.2 Implementing evidence-based, nationwide licensing regimes for industries with widespread exploitation.

#### 2. Coordinating action with other actors

- 2.1 Creating stronger partnerships with unions and non-government community organisations through government contracts or memorandums of understanding.

#### 3. New wage recovery system

- 3.1 Law reform to civil processes in state Magistrates Courts across Australia could provide another low-cost and accessible jurisdiction to recover wages.
- 3.2 Law reform to allow costs to be recoverable by legal representatives acting for vulnerable migrant workers, with a requirement for a maximum costs order, to deter employers proceeding to judgment.
- 3.3 Law reform to lower filing fees for particularly vulnerable workers.
- 3.4 Funding and expanding the amicus curiae, "friend of the court," function of the Fair Work Ombudsman in small claims jurisdictions.

Vulnerability will rise as temporary migrants face continued economic, financial, and personal hardship during the COVID-19 pandemic. Creating a robust regulatory environment to enforce migrant workers' rights is required now more than ever to ensure that the labour safety net extends to all those living and working in Australia.

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- 76 *Ibid.*, 93–94.
- 77 For Australian examples see Berg Farbenblum, "Wage Theft" and Campbell, I., Tranfaglia, M.A., Tham J.C. and Bose, M. "Precarious work and the reluctance to complain: Italian temporary migrant workers in Australia," *Journal of Labour & Industry: A Journal of the social and economic relations of work* 29(1), 2018, 98–117. For a US study that shows that a single worker complaint was only raised after an average of 130 violations of overtime penalties were incurred, see Weil, D. and Pyles, A. "Why Complain? Complaints, compliance and the problem of enforcement in the US Workplace," *Comparative Labor Law and Policy Journal* 27, 2006, 59–92.
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- 80 Victorian Government. Industrial Relations Victoria. "Report of the Inquiry into the Victorian On-Demand Workforce" (Melbourne: Victorian Government: 2020), 154.
- 81 *Fair Work Act 2009 (Cth)*, s591.
- 82 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (*Boilermakers*)
- 83 *Ibid.*
- 84 *Construction, Forestry, Mining and Energy Union v BHP Billiton Nickel West Pty Ltd* [2017] FWC 217.
- 85 They are also referred to as Magistrates Courts in numerous jurisdictions across Australia.
- 86 Limit of \$150,000 in Queensland under *Magistrates Court Act 1921 (Qld)*, s4; s3 definition of "jurisdictional limit" is \$100,000 in Victoria under the *Magistrates Court Act 1989 (Vic)*; \$100,000 jurisdictional limit is set out in *Magistrates Court Act 1991 (SA)*, s8; a limit of \$50,000 is set out in Western Australia in *Magistrates Court (Civil Proceedings) Act 2004 (WA)*, s4; a limit of \$50,000 is set out in Tasmania in *s7 Magistrates Court (Civil Division) Act 1992 (Tas)*, s4; a limit of \$100,000 is set out in New South Wales in *Local Court Act 2007 (NSW)*, s29; a limit of \$250,000 is prescribed in the ACT and NT under *Magistrates Court Act 1930 (ACT)*, s257 and *Local Court Act 2015 (NT)*, s12.
- 87 *Fair Work Act 2009 (Cth)*, s548.
- 88 In the Magistrate's Court of Victoria, the filing fee for a claim under \$1000 is \$151.50; in the Magistrate's Court in Queensland for a claim less than \$2500 the fee is \$183.20; in the NSW Local Court a small claim under \$20,000 can be filed for \$105.
- 89 *Magistrates Court Act 1921 (Qld)*, Pt5A; *Magistrates Court Act 1989 (Vic)*, s4(2A)–(2B).
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