

THE CHALLENGE OF RECOVERING UNDERPAID WAGES

**EMPIRICAL INSIGHTS FROM:
SOUTH-EAST MONASH LEGAL SERVICE INC.**

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ACKNOWLEDGMENT OF COUNTRY

SMLS acknowledges the Bunurong People and the Wurundjeri People, the Traditional Owners of the land where we work, and First Peoples language groups and communities across Victoria and Australia. We pay our respects to Elders past and present.

We celebrate the people, traditions, culture and strength of Aboriginal and Torres Strait Islander peoples, and the fight for survival, justice and country that has taken place across Victoria and Australia.

We thank the Traditional Custodians for caring for Country for thousands of generations.

SMLS recognises the ongoing impact of colonisation, dispossession and racism experienced by Aboriginal peoples. As a Community Legal Centre, we acknowledge the violence of Australian law and its ongoing role in processes of colonisation. We recognise that sovereignty was never ceded, and that this always was and always will be Aboriginal land.

CONTENTS

KEY MESSAGES	05
Findings	06
Conclusions	09
PART ONE: BACKGROUND & APPROACH	10
1.1 Introduction	10
1.2 Underpayment & civil justice: Evidence review	11
1.3 Priya's journey	12
1.3.1 Employee or contractor	14
1.3.2 The pathways are complex & legal help is important	15
1.4 How do workers recover underpaid entitlements	16
1.4.1 Direct negotiation & letters of demand	16
1.4.2 Fair Work Ombudsman	17
1.4.3 Courts & Tribunals	18
1.4.4 Fair Entitlements Guarantee	19
1.5 Research design	19
1.5.1 Study setting	20
1.5.2 Using administrative data for civil justice in CLCs	20
1.5.3 Data collection & analysis	21
PART TWO: FINDINGS	23
2.1 Client profile	23
2.2 Service characteristics	26
2.3 Claim characteristics	27
2.3.1 Other employment-related legal problems	27
2.3.2 Claims & recovery	28
2.3.3 Case duration	29

PART THREE: DISCUSSION & IMPLICATIONS	30
3.1 Key insights	30
3.1.1 The profile of underpayment clients receiving legal assistance	30
3.1.2 The profile of clients' claim is complex & changed overtime	31
3.1.3 Few clients recovered underpaid wages	33
3.1.4 Administrative data can provide important insights	33
3.2 Employee or contractor	34
PART FOUR: CONCLUSION	36
REFERENCES	38

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ACRONYMS

ACJI: Australian Centre for Justice Innovation
 CLC: Community Legal Centre
 FWO: Fair Work Ombudsman
 SMLS: South-East Monash Legal Service Inc



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KEY MESSAGES

Wage underpayment is also a significant civil justice problem. Despite this, little is known about happens when underpaid workers seek legal assistance to recover their wages. Which workers are seeking assistance? What do their claims involve? And do workers recover what they are owed?

Underpayment of workers by employers is a major problem in the regulation of work in Australia that is believed to have increased markedly in recent years (Clibborn & Wright, 2018; Senate Economic References Committee, 2022). The considerable media, policy and law reform attention to the issue has focused on the characterisation of this practice as 'wage theft', and associated regulatory and criminal penalties against wrongdoing employers (Balmer et al, 2019).

Wage underpayment is also a significant civil justice problem. Despite this, little is known about happens when underpaid workers seek legal assistance to recover their wages. Which workers are seeking assistance? What do their claims involve? And do workers recover what they are owed? Answers to these questions could provide valuable empirical evidence about the practical realities of wage recovery claims. This insight has strong potential for informing service design and delivery and procedural reform to support more accessible and effective civil justice in this area.

In 2020, South-East Monash Legal Service Inc. (SMLS) was awarded a Victoria Law Foundation Knowledge Grant to investigate the profile of wage underpayment clients and their claims and outcomes. The aims of the Employment Underpayment and Civil Justice Project were to:

- Investigate the characteristics of SMLS clients who had experienced unpaid wages;

- Identify the nature, range and duration of services provided to affected clients;
- Explore the outcomes legal action achieves (including the extent to which clients are recovering money through the civil justice system);
- Reveal the realities and complexities of legal processes seeking recovery of wages; and
- Build and consolidate capacity in SMLS to undertake research using the service's administrative data resources.

The research used a combination of case file analysis and routinely-gathered service data from the CLASS system to investigate underpayment claims dealt with by SMLS where the first client contact was between 1 January 2019 and 31 December 2020. The research was conducted in collaboration with the Australian Centre for Justice Innovation in the Faculty of Law at Monash University.

This report presents findings from our analysis of SMLS's administrative data. The report is complemented by an accompanying briefing that presents learnings from the collaborative research process underpinning the project (Leoncio, Grant and Newnham, 2022).

Part 1 of this report provides an overview of the background and approach of the research, including setting out the research design and approach. It also describes the complex legal processes by which workers who have experienced wage under-

payment might seek to recover their wages.

Part 2 presents the study findings, highlighting the profile of the clients, their claims, the services provided and outcomes achieved.

Part 3 provides a discussion of the findings and the limitations of the research, particularly by reference to the nature of the administrative data used in the analysis.

Part 4 concludes the report with a summary of the key takeaways from the research.

Below we summarise the key findings and conclusions from Parts 3 and 4 of this report.

FINDINGS

What were the characteristics of clients seeking to recover unpaid wages?

- In 2019-20, SMLS dealt with 209 new clients with employment underpayment claims (that is, their first contact was between 1 January 2019 and 31 December 2020). Slightly more clients in the cohort had matters that started in 2019 (55 per cent) than 2020 (45 per cent).
- Underpayment clients had an average age of 38 years at first contact with SMLS (range 15-72 years), with nearly two thirds aged 30 years or more.
- Underpayment clients had very limited financial resources. Twenty-nine per cent had no income, and a further 11 per cent reported annual income of \$15,600 or less. In total, 62 per cent of the client cohort had income below the 2020 full time annual minimum wage of \$39,000.
- Less than half of the client cohort had English as their main language spoken at home (38 per cent), while 58 per cent were Australian citizens or permanent residents. The clients were from 38 different countries of birth.

Underpayment of workers by employers is a major problem in the regulation of work in Australia that is believed to have increased markedly in recent years (Clibborn & Wright, 2018; Senate Economic References Committee, 2022).

What were the service characteristics of underpayment matters?

- Half of the underpayment clients (n=119, 52 per cent) were provided with 'advice only' services.
- There were 80 underpayment matters that were opened and closed during the period of our data collection (2019-20). A letter of demand seeking recovery was sent on the client's behalf in 59 per cent of closed matters, while SMLS prepared court documents in 17 per cent of cases and was on the court record for a client in 14 per cent of closed matters.
- Loss of contact with the client was the reason for file closure in 24 per cent of closed matters. The odds of file closure because contact was lost with the client were four times greater where the client did not have Australian citizenship or Permanent Residency (PR) compared with cases where the client was an Australian citizen or held PR status (OR 3.96, 95% CI 1.26-12.49, p=0.019).
- Additionally, the odds of file closure because contact was lost with the client were 78 per cent lower where a letter of demand was on file compared with cases where there was no letter of demand (OR 0.22, 95% CI 0.07-0.67, p=0.007).

What was the size of the claims made by employment underpayment clients, and did they recover unpaid wages?

- We were able to ascertain details of the amount of the claimed underpayment for 106 clients (51 per cent of the sample). The average amount of claimed underpayments was \$17,999 (median \$4,900), with more than half of clients alleging that the amount of the underpayment they sought to recover was \$5,000 or less.
- Seventeen clients recovered unpaid wages (21 per cent of clients in closed cases in the sample). Their average recovery was \$5,753 (median \$3,363, range \$103 to \$23,975), and on average clients who recovered unpaid wages received 72 per cent of the amount they had alleged they were underpaid (range 30 per cent to 100 per cent).
- The odds of a client making a claim that they had been underpaid by \$5,000 or more rather than less than \$5,000 were 3.4 times greater for clients with Australian citizenship or PR than those without Australian citizenship or PR (OR 3.37, 95%CI 1.48-7.69, p=0.004).
- We found that the odds of a client recovering wages were 3.3 times greater for clients whose main language was English than those whose main language was not English (OR 3.25, 95% CI 1.00-10.52, p=0.049).

What were the problem characteristics of the claims made by employment underpayment clients?

- More than half of the underpayment clients (59 per cent) reported experiencing one or more additional employment-related legal problems in addition to their underpayment problem. These included unfair dismissal (35 per cent), workplace bullying (11 per cent) and discrimination (7 per cent).
- The odds of a client reporting a dismissal-related problem were 4.2 times greater for clients with Australian citizenship or permanent residency (PR) than those without Australian citizenship or PR (OR 4.23, 95% CI 2.03-8.80), $p < 0.001$.
- Additionally, the odds of a client reporting a dismissal-related problem were 2.5 times greater for clients whose main language was English than those whose main language was not English (OR 2.52, 95% CI 1.27-5.01, $p = 0.009$).
- Underpayment clients also referred to a diverse range of additional legal problems, including:
 1. Underpayment of superannuation; 2. Physical and sexual assaults and injuries in the workplace, and related personal injury compensation claims (workers' compensation and victims of crime compensation); 3. Family law and family violence; 4. Employer allegations of worker misconduct and property damage; 5. Immigration; 6. Taxation; and 7. Social security debts.

Were there any differences in the profile of claims started in 2019 compared with those started in 2020?

- The profile of claims differed in two important ways when we compared the cases commenced in 2019 with those commenced in 2020:
 1. The odds of a client reporting that they had experienced a dismissal-related problem were 2.4 times greater in 2020 than in 2019 (OR 2.4, 95% CI 1.12-5.17, $p = 0.03$); and
 2. The odds of a client making a claim that they had been underpaid by \$5,000 or more rather than less than \$5,000 were 3 times greater in cases commenced in 2020 than in 2019 (OR 3.0, 95% CI 1.34-6.60, $p = 0.007$).
- These findings may reflect the deteriorating economic conditions early in the COVID-19 pandemic, with dismissal claims attendant to wage underpayment being more prominent, together with a loss of employment that might otherwise have prevented some clients pursuing underpaid wages.
- Growing community awareness of wage underpayment may also have played a role, with larger claims being developed and brought forward over time.
- There was not a statistically significant difference in the duration of closed cases where they had been started in 2019 compared with 2020. Nor was there a difference in the proportion of cases closed based on their commencement year.

CONCLUSIONS

- Civil justice remains highly inaccessible for underpaid employees seeking to recover wages, even with expert assistance from a CLC.
 - the desired effect on improving access to justice for underpaid workers. The 'fast track' model introduced in the Industrial List of the Magistrates' Court of Victoria in April 2022 is one such example.
- Our research indicates that workers who are able to access legal assistance are a cohort with high levels of cultural and linguistic diversity experiencing considerable financial disadvantage. They are typically seeking to recover small amounts, and face substantial challenges. They are also experiencing a range of additional legal problems. The civil justice system is falling far short of providing these workers with the justice they are entitled to.
 - Linking CLASS data with information systematically extracted from case files records is a viable way to develop a profile of employment underpayment clients and their matters. This approach could be replicated to shed light on other types of legal problems, services and clients in CLC settings. It also has strong potential for helping inform systemic law reform and policy development to improve access to justice for those most in need.
- Given these findings, improving access to justice and the prospects of wage recovery likely requires far more than small-scale reform of civil procedure. More radical change, such as the establishment of a specialist wage recovery forum and better resourcing for legal assistance and representation are required (Berg & Farbenblum, 2020).
 - A range of aspects of CLC data practices and associated ethics infrastructure require improvement to maximise the benefits of research using administrative data (Leoncio, Grant & Newnham, 2022; McDonald et al, 2020).
- Where procedural improvements are implemented, it is crucial to evaluate whether they have

PART ONE

BACKGROUND & APPROACH

1.1 INTRODUCTION

A valuable body of research has explored the many and complex reasons why underpaid workers often do not pursue a remedy. Many of these reasons are connected to the vulnerabilities of groups of workers who are more likely to experience underpayment, particularly migrant workers (including international students).

Wage underpayment is a profound civil justice problem in Australia. The civil justice system formally provides the legal tools for workers who are underpaid by their employers to recover what they are owed. In practice, there are significant barriers preventing this system from operating as intended and expected, to the detriment of underpaid workers and the broader community.

Evidence of these challenges typically comes from surveys and interviews with affected workers, documenting the reasons why many do not take legal action, or expert analysis of legal processes and their likely limitations. A valuable body of research has explored the many and complex reasons why underpaid workers often do not pursue a remedy. Many of these reasons are connected to the vulnerabilities of groups of workers who are more likely to experience underpayment, particularly migrant workers (including international students). In light of this evidence, reforms are often recommended to improve claims procedures and costs rules thought to negatively affect the ability of underpaid workers to achieve wage recovery (see eg Chaudri & Boucher, 2021).

There is little research evidence about what happens when underpaid workers pursue a remedy with the assistance of a community legal service. Better understanding of the profile, service use and

outcomes of this group is important for improving the delivery of legal services, informing reform recommendations and improving access to justice for underpaid workers.

The Employment Underpayment and Civil Justice Project sought to generate a profile of the civil justice problem of employment entitlement underpayment recovery through analysis of administrative data about clients, services and outcomes in these actions at SMLS. The purpose of this work was to develop a profile of the clients, services and outcomes in SMLS cases involving underpayment recovery. To achieve this, the project involved the following components:

- Investigating the characteristics of underpaid clients and non-payers;
- Identifying the nature, range and duration of services provided to relevant clients by SMLS;
- Exploring the outcomes legal action achieves (including whether and to what extent these clients were able to recover underpaid wages through the civil justice system); and
- Revealing the reality and complexity of the current legal processes for people seeking entitlement recovery.

This report presents findings from analysis of data on clients, services and outcomes in entitlement underpayment matters commenced at SMLS in the period 2019-20.

1.2 UNDERPAYMENT & CIVIL JUSTICE: EVIDENCE REVIEW

The 2022 report of the Senate Inquiry into the matter identified that ‘in many industries, underpayment is deliberate and systematic, and often normalised, especially for migrant workers’ (2022: 5). A 2020 report by PwC suggested that approximately 13 per cent of the workforce in Australia is affected by entitlement underpayment (PwC Australia, 2020).

There is a long history of unlawful underpayment of employees’ remuneration in Australia. In recent times, however, a series of investigations, reviews and inquiries have identified unlawful underpayment practices occurring on a large scale (Senate Economic References Committee, 2022). The 2022 report of the Senate Inquiry into the matter identified that ‘[i]n many industries, underpayment is deliberate and systematic, and often normalised, especially for migrant workers’ (2022: 5). A 2020 report by PwC suggested that approximately 13 per cent of the workforce in Australia is affected by entitlement underpayment (PwC Australia, 2020). Women, migrant workers (including international students), young workers, First Nations people and workers in regional and remote areas are likely to face a heightened risk of entitlement underpayment (SERC, 2022).

Underpayment is particularly pernicious because it may go unnoticed by workers. Where workers recognise that they are underpaid, research indicates that the vast majority do not take steps to recover what they are owed, and those who do act may have little success. For example, 91 per cent of surveyed underpaid temporary migrant workers did not take steps to recover their wages, despite recognising that they were underpaid (Farbenblum & Berg, 2018). Two thirds of underpaid temporary migrant worker survey respondents who sought to recover wages recovered nothing, and fewer than 1 in 6 recovered the full amount owed (Farbenblum & Berg, 2018). This evidence of difficulties pursuing and achieving recovery is supported by a large body of key stakeholder submissions to recent inquiries.

To date, analysis and reform debates surrounding entitlement underpayment have mostly concen-

trated on civil and criminal penalties against employers. Workers’ entitlement recovery claims have been a lesser focus. Recovery is a paramount concern for individual workers, however. In the absence of effective avenues for workers to pursue recovery, employers are also insulated from the proper operation of civil justice. For many workers, the barriers to acting to recover unpaid entitlements are significant, including a lack of legal capability; fear of reprisals; lack of evidence, such as pay slips; the cost of taking action; lack of access to legal services; and procedural barriers such as small claims thresholds and legal costs rules (SERC, 2022; Farbenblum & Berg, 2018).

WOMEN, MIGRANT WORKERS (INCLUDING INTERNATIONAL STUDENTS), YOUNG WORKERS, FIRST NATIONS PEOPLE AND WORKERS IN REGIONAL AND REMOTE AREAS ARE LIKELY TO FACE A HEIGHTENED RISK OF ENTITLEMENT UNDERPAYMENT (SERC 2022).

Research exploring worker responses to underpayment has typically focused on limitations experienced by underpaid workers. More recently, however, Farbenblum & Berg (2018) drew on survey evidence to identify the cost-benefit analysis underpaid workers engage in when weighing the likely amount and low chance of a successful outcome in a recovery claim against the effort, resources and risks involved in taking legal action. This assessment reflects a range of structural obstacles to recovery, from legal complexity and assessing the underpayment, to the increased use of labour hire and gig-based work arrangements (Farbenblum & Berg, 2018). Even workers who obtain a court judgment in their favour often fail to recover funds, particularly if the responsible employer or entity has become

insolvent. Together this evidence suggests the civil justice system is performing well below expectations in underpayment recovery matters.

Where this civil justice dimension of underpayment is examined in reviews and inquiries, experts often recommend reforms to civil procedure to improve recovery. Among these proposals are changes to legal costs (including enhancing recovery and protective orders), reducing filing fees and the establishment of specialist low-cost and speedy case management approaches (Chaudhuri & Boucher, 2021). Fewer contributions engage with the challenges of successfully making underpayment recovery claims in the context of resource-constrained legal services, and the multiple legal problems workers are likely to experience alongside entitlement underpayment (Coumarelos et al, 2012). Exploring the client profile, services provided and outcomes achieved in the context of legal help for underpaid workers is another useful avenue for investigating these underexplored dimensions of underpayment recovery. In particular, this approach has good potential for helping us to better understand, design and invest in processes capable of delivering effective access to justice.

1.3 PRIYA'S JOURNEY

In this part, we describe the mechanisms by which an underpaid worker might seek to recover what they are owed. The pathways to recovery are complicated, unclear and challenging to navigate. This background provides important context for our research on the profile of underpayment clients and their claims.

To illustrate the challenge of recovering underpaid entitlements, we present the potential pathways for Priya, an anonymised and composite SMLS client with a typical entitlement underpayment matter. Priya worked as a cleaner for Sparkle Cleaners but was not paid in full for her work, nor was she paid any superannuation. Priya presented to SMLS seeking assistance to recover her underpaid wages and superannuation from Sparkle Cleaners. Starting

Exploring the client profile, services provided and outcomes achieved in the context of legal help for underpaid workers is a useful avenue for investigating these underexplored dimensions of underpayment recovery.

in the blue box indicating Priya's initial contact with SMLS, Figure 1 shows the array of possible legal pathways she might take, depending first on the legal distinction between whether or not she is an employee (or in a sham contracting arrangement) or independent contractor.

As Figure 1 demonstrates, there are multiple avenues available to Priya, depending on such factors as the nature of her legal relationship with the employer, the solvency of the employer, the type and magnitude of the underpayment, and the degree of any partial recovery Priya is able to achieve the steps she might take.

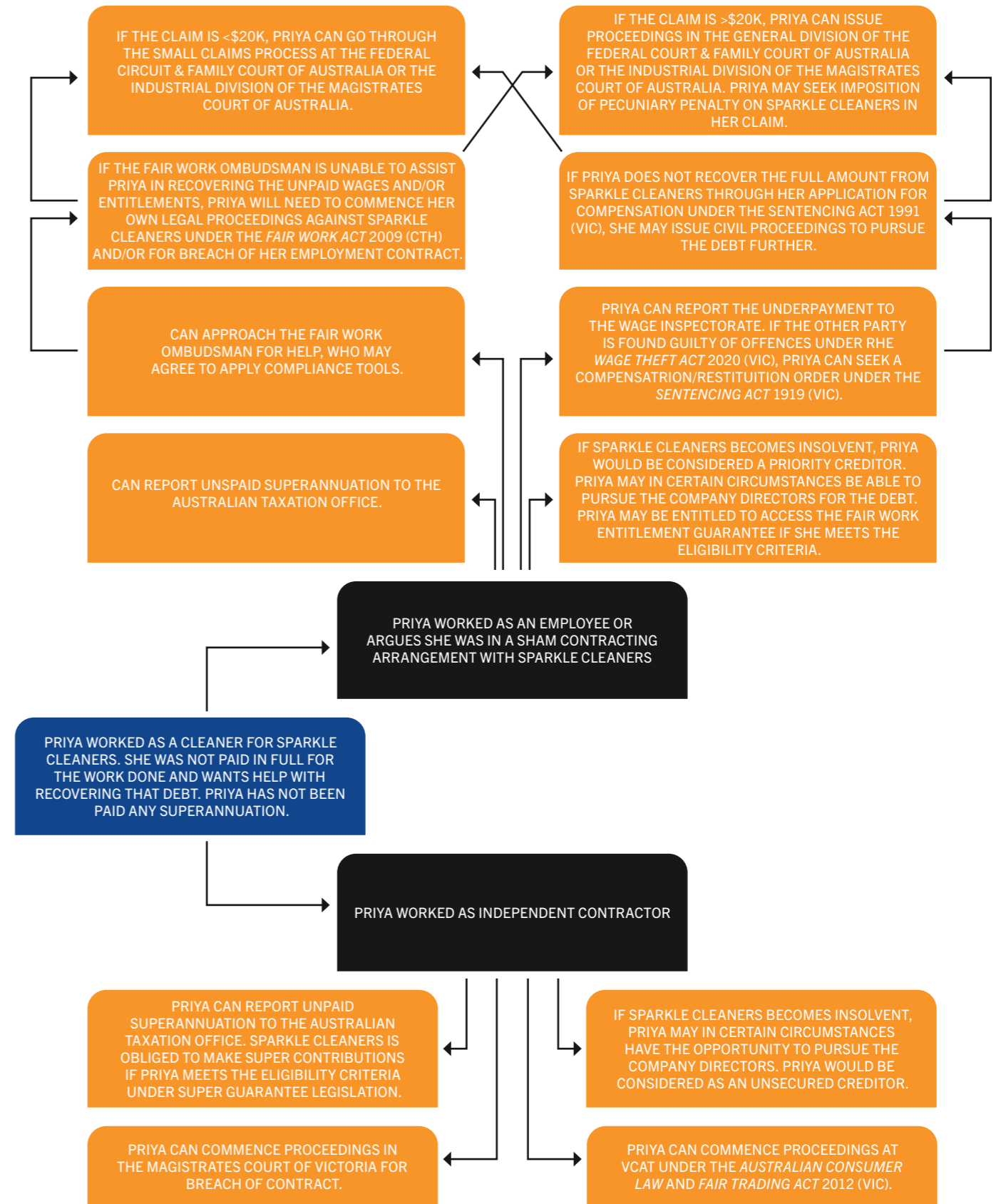


Figure 1: Map of formal legal mechanisms for recovery of underpaid entitlements

1.3.1 EMPLOYEE OR CONTRACTOR

The differential entitlements afforded to contractors incentivise some employers to misclassify workers to avoid their legal obligations (Greene 2019). This practice is referred to as sham contracting. In sham contracting situations, employees are unlawfully engaged as contractors (for example, the company requires workers to obtain ABNs despite it being inappropriate for the work).

One of the first steps in determining the appropriate course of legal action for a worker like Priya with an entitlement underpayment matter is determining whether the worker is an employee or contractor. This is critical because avenues of recovery are far more limited for independent contractors as they are not protected by the *Fair Work Act 2009* (Cth) ('Fair Work Act') and fall outside of the workplace relations framework (Hemingway 2018). Concerns about regulatory protections for these workers have become more prominent with the increasing prevalence of platform and on-demand forms of work, which often involve non-employment arrangements (James, 2020). Independent contractors do not have access to the FWO or the Fair Entitlements Guarantee. Contract law applies to the relationship between an independent contractor and a corporate defendant (Green, 2019), and underpayment matters have a classic debt recovery character: they may involve relatively small amounts of money, and the time, expense and effort associated with pursuing the underpayment (including enforcement) can quickly outweigh the debt.

Recent High Court decisions have changed the way the employee versus contractor determination is understood. These decisions have confirmed that where a comprehensive written contract exists (which is not subject to variations or disputes), that contract will determine the nature of the relationship (ie as one of employment or involving independent contracting) (*CFMEU & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd & Anor v Jamsek & Ors* [2022] HCA 2). This approach supersedes the previous greater emphasis on a multi-factorial approach that looked at the totality of the relationship.

The differential entitlements afforded to contractors incentivise some employers to misclassify workers to avoid their legal obligations (Green, 2019). This practice is referred to as sham contracting. In sham contracting situations, employees are unlawfully engaged as contractors (for example, the company requires a worker to obtain an Australian Business Number despite it being inappropriate for the work). This practice has been observed in settings including the road transport and distribution industry, the cleaning industry, the home and commercial maintenance industries and the construction industry (Hemingway, 2016). Where sham contracting can be established, a worker with an entitlement underpayment claim may be treated as an employee.

In work settings of various kinds, workers with limited job opportunities are unlikely to feel confident or comfortable interrogating the terms of their employment due to a perceived risk to their relationship with the employer and ultimately their employment. In the experience of SMLS, these concerns are particularly likely to be relevant for workers whose main language is not English, temporary visa holders, migrant workers, workers with disability, older workers and workers who have experienced long-term unemployment.

1.3.2 THE PATHWAYS ARE COMPLEX & LEGAL HELP IS IMPORTANT

Further complexity arises where workers' underpayment matters are accompanied by additional legal problems (Coumarelos et al 2012). These may include unfair dismissal; workplace bullying, harassment or injury; discrimination; and 'general protections' claims under the *Fair Work Act 2009* (Cth), for which civil remedies may be available.

As Figure 1 demonstrates, Priya's journey to recovery of unpaid entitlements may be a complicated one. The nature of the legal claim to be made and the pathways to pursue may not be clear in the absence of legal help. She may be required to engage with multiple agencies (for example, the Fair Work Ombudsman, the Australian Taxation Office, the Wage Inspectorate) and consider whether to commence proceedings in multiple forums (the Federal Circuit and Family Court of Australia, the Magistrates' Court of Victoria, and the Victorian Civil and Administrative Tribunal). Should the organisation responsible for the underpayment become insolvent, further avenues may open up to her. Each of these steps – and determining which to pursue – brings with it further delay in recovering what Priya may be owed.

Further complexity arises where workers' underpayment matters are accompanied by additional legal problems (Coumarelos et al, 2012). These may include unfair dismissal; work-

place bullying, harassment or injury; discrimination; and 'general protections' claims under the *Fair Work Act*, for which civil remedies may be available. Examples of such steps available to Priya as an employee include the following:

- If Priya also has an unfair dismissal claim, she can make an

PRIYA'S JOURNEY TO RECOVERY OF UNPAID ENTITLEMENTS MAY BE A COMPLICATED ONE. THE NATURE OF THE LEGAL CLAIM TO BE MADE AND THE PATHWAYS TO PURSUE MAY NOT BE CLEAR IN THE ABSENCE OF LEGAL HELP. SHE MAY BE REQUIRED TO ENGAGE WITH MULTIPLE AGENCIES (FOR EXAMPLE, THE FAIR WORK OMBUDSMAN, THE AUSTRALIAN TAXATION OFFICE, THE WAGE INSPECTORATE) AND CONSIDER WHETHER TO COMMENCE PROCEEDINGS IN MULTIPLE FORUMS (THE FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA, THE MAGISTRATES' COURT OF VICTORIA, AND THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL).

application to the Fair Work Commission under the *Fair Work Act*.

- If Priya was also bullied in the workplace, she can seek a stop bullying order from the Fair Work Commission under the *Fair Work Act* or a complaint or claim to WorkSafe under the *Occupational Health and Safety Act 2004* (Vic).
- If Priya has a workplace injury

claim, she can make a worker's compensation claim pursuant to the *Workplace Injury Rehabilitation and Compensation Act 2015* (Vic).

- If Priya also has a general protections claim against Sparkle Cleaners under the *Fair Work Act*, she may bring this claim to the Fair Work Commission or the Federal Circuit and Family Court of Australia.

• If Priya has a sexual harassment claim, she may consider taking action including:

- Applying to the Fair Work Commission for a stop sexual harassment order under the *Fair Work Act*;
- Making a complaint to the Victorian Equal Opportunity and Human Rights Commission or the Victorian Civil and Administrative Tribunal under the *Equal Opportunity Act 2010* (Vic) or a complaint to the Australian Human Rights Commission and then to the Federal Circuit and Family Court of Australia under the *Sex Discrimination Act 1984* (Cth); and
- Making a general protections claim for contravention of s 351 of the *Fair Work Act* to the Fair Work Commission or the Federal Circuit and Family Court of Australia.

¹ General protections arise under the *Fair Work Act 2009* (Cth) and are intended to protect workers from a range of unlawful actions based on protected rights. The general protections are civil remedy provisions and contravening employer actions can give rise to employee claims and compensation and financial penalties that flow to the employee (Stewart et al, 2016, pp. 664-90).

- If Priya alleges she has been discriminated against by Sparkle Cleaners, she may:
 - Make a complaint to the Victorian Equal Opportunity and Human Rights Commission or the Victorian Civil and Administrative Tribunal under the *Equal Opportunity Act 2010* (Vic);
 - Make a complaint to the Australian Human Rights Commission and then to the Federal Circuit and Family Court of Australia

under the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth) and/or the *Sex Discrimination Act 1984* (Cth); or

- Make a general protections application for contravention of s 351 of the Fair Work Act to the Fair Work Commission or the Federal Circuit and Family Court of Australia.

1.4 HOW DO WORKERS RECOVER UNDERPAID ENTITLEMENTS?

To recover underpaid entitlements, workers may pursue such direct steps as:

- Letters of demand and negotiation with the employer;
- Approaching the Fair Work Ombudsman;
- Pursuing proceedings in relevant courts and tribunals (with associated appropriate dispute resolution and judgment debt enforcement mechanisms); and
- Pursuing fair entitlements guarantee claims.

Additionally, workers may indirectly recover underpayments where the employer is convicted or found guilty of an offence under sections 6, 7 or 8 of the *Wage Theft Act 2020* (Vic) and a restitution order is made in the worker's favour under the *Sentencing Act 1991* (Vic) (s 84(4A)-(4C)). In this section, we provide further detail on the main direct recovery mechanisms.

1.4.1 DIRECT NEGOTIATION AND LETTERS OF DEMAND

In rare cases, employers responsible for widespread underpayment have established remediation schemes to deal with large numbers of approaches by underpaid workers.

The first step that employees and contractors are encouraged to pursue to recover underpaid entitlements is direct negotiation with the alleged underpayer. This is typically followed by formal correspondence if the employer refuses to engage. Community legal centres can assist clients to draft letters of demand to request that the underpayment is remedied (Hemingway 2016). Unions may also play a role in this kind of advocacy on behalf of workers where they are union members (Berg & Farbenblum, 2018).

Even at this relatively early stage of the process, workers may face significant barriers to recovery. Workers may not be able to identify the name or ABN of the company involved, and may not have been provided with written contracts of employment or payslips (Hemingway, 2016). Employers also may not respond to correspondence and letters of demand (Hemingway, 2016).

In rare cases, employers responsible for widespread underpayment have established remediation

schemes to deal with large numbers of approaches by underpaid workers. Following the revelation of rampant underpayment practices in 7-Eleven franchises, 7-Eleven engaged Deloitte Australia to administer and investigate recovery claims, with a review mechanism through the Fair Work Ombudsman (Berg & Farbenblum, 2018). Such company-level remedial mechanisms may facilitate a high rate of recovery for workers, but the practice is not widespread (Berg & Farbenblum, 2018) and voluntary in the absence of legal proceedings.

1.4.2 FAIR WORK OMBUDSMAN

The Fair Work Ombudsman has reported increasing success in recovering wages for underpaid workers, with its work extracting \$148m in 2020-21 for nearly 70,000 workers. The majority of this work was associated with self-reported non-compliance and back payment by large corporate entities.

If direct negotiation does not succeed, an employee may approach the Fair Work Ombudsman ('FWO'). The FWO may then provide advice or dispute resolution tools to assist parties to negotiate with employers, investigate, issue compliance notices or engage in litigation (FWO, 2022).

The FWO has reported increasing success in recovering wages for underpaid workers, with its work extracting \$148m in 2020-21 for nearly 70,000 workers. The majority of this work was associated with self-reported non-compliance and back payment by large corporate entities. The FWO's investigations in response to worker requests for assistance – which focus on 'more complex or significant matters', involving vulnerable workers, serious non-compliance or non-cooperation by employers – resulted in recovery of \$28.7m in underpayments (FWO, 2021). In some cases, the FWO may esca-

late the matter to litigation on behalf of employees. However, the FWO has a limited remit, and focuses its efforts on serious and systemic issues and those with a public interest dimension (FWO, 2022). Such cases are infrequent and reserved for the most serious contraventions. The FWO is therefore unlikely to provide intensive assistance to individuals with relatively small-scale claims, in the absence of other compelling factors (Berg & Farbenblum 2017).

THE FWO MAY THEN PROVIDE ADVICE OR DISPUTE RESOLUTION TOOLS TO ASSIST PARTIES TO NEGOTIATE WITH EMPLOYERS, INVESTIGATE, ISSUE COMPLIANCE NOTICES OR ENGAGE IN LITIGATION (FWO, 2022).

1.4.3 COURTS AND TRIBUNALS

Court remains a highly inaccessible process for underpayment recovery actions (Bargon & Featherstone 2019). The procedural burdens associated with court prevent many workers from opting into judicial processes. In the aftermath of the 7-Eleven scandal, no 7-Eleven employees sought to recover their wages through courts (Berg & Farbenblum 2018).

Workers may also pursue claims through relevant court and tribunal processes. Employees can access courts empowered by the Fair Work Act. The Fair Work Act introduced a small claims jurisdiction into the Fair Work Division of the Federal Circuit and Family Court of Australia. The small claims jurisdiction covers awards up to \$20,000 (Fair Work Act 2009 (Cth) s 548(2)(a)). The division is not bound to formal rules of evidence and procedures (s 548(3)).

ENFORCEMENT OF JUDGMENTS IS A POORLY UNDERSTOOD AND NEGLECTED AREA OF CIVIL JUSTICE. WHERE A PERSON WHO 'WINS' IN COURT IS UNABLE TO SECURE THE COURT-ORDERED OUTCOME, IT CAN UNDERMINE CONFIDENCE IN THE CIVIL JUSTICE SYSTEM.

'fast track' pathway, implemented in its current form on 11 April 2022, involves accelerated timelines for filing of responses to complaints and referral to pre-hearing conferences with a Judicial Registrar with industrial relations expertise (MCV, 2022; CSV, 2022).

Contractors may initially bring their dispute to VCAT under the jurisdiction granted by the Australian Consumer Law and Fair Trading Act 2012 (Vic) ('ACLFTA'). VCAT may determine a dispute arising between a purchaser and supplier of goods or services. If a supplier commences proceedings in court and the amount claimed is less than \$15,000, the court must dismiss the proceedings if the purchaser

has applied to VCAT (ACLFTA ss 183, 189). Alternatively, the Magistrates' Court has the jurisdiction to hear civil claims for debt (*Magistrates' Court Act 1989* (Vic) s 100).

Court is generally understood as providing a highly inaccessible process for underpayment recovery actions (Bargon & Featherstone, 2019). The procedural burdens associated with litigation prevent many workers from opting into judicial processes. In the aftermath of the 7-Eleven scandal, no 7-Eleven employees sought to recover their wages through courts (Berg & Farbenblum, 2018). Only one participant among 4,322 migrant workers surveyed in the 2017 National Temporary Migrant Work Survey reported that they had gone to court (Farbenblum & Berg, 2018). Reforms implemented in the Magistrates' Court of Victoria in 2022 have sought to improve access to justice for workers seeking to recover wages by facilitating early resolution and simplifying processes (CSV, 2022).

MEDIATION

Mediation is often a prerequisite to a matter proceeding through court and is attempted early in small claims litigation. Parties to a dispute may engage private mediation services or free mediation services. Small claims divisions of courts and tribunals generally encourage parties to attend mediation or other appropriate dispute resolution conferences in the pre-trial process.

ENFORCING JUDGMENTS OBTAINED IN CIVIL PROCEEDINGS

Even where a successful judgment is secured by an underpaid worker, they may not always recover the funds they are entitled to. This may occur, for

example, where a default judgment is entered and the employer continues to refuse to acknowledge the litigation. In 2019–20, 17,387 (42 per cent) of finalised claims in the Victorian Magistrates' Court involved default orders (MCV, 2020). Where a judgment debtor does not comply with court or tribunal orders, workers may need to pursue independent post-judgment enforcement proceedings to effect recovery.

Enforcement of judgments is a poorly understood and neglected area of civil justice. Where a person who 'wins' in court is unable to secure the court-ordered outcome, it can undermine confidence in the civil justice system. The minimal empirical evidence we have about judgment enforcement comes from the NSW Local Court: nearly two thirds of cases required one or more post-judgment steps (Law Reform Commission, 1987), and in more than half of cases the amount sought was \$5000 or less (Forell & Mirrlees-Black, 2016).

1.4.4 FAIR ENTITLEMENTS GUARANTEE

In limited, last-resort circumstances, the Fair Entitlements Guarantee (pursuant to the *Fair Entitlements Guarantee Act 2012* (Cth)) may assist employees to recover unpaid wages and entitlements where the end of their employment was connected to the insolvency or bankruptcy of their employer.

1.5 RESEARCH DESIGN

The Employment Underpayment and Civil Justice Project explored cases where a worker alleges underpayment and acts by seeking advice from a CLC. We achieved this through analysis of data generated by SMLS in the course of providing legal assistance to clients with wage and entitlement underpayment claims. This part provides details on the setting for the research, the nature of the administrative data used and the process of data collection and analysis.

Significant difficulties can arise in the process of post-judgment enforcement. Procedural barriers may further disincentivise claimants from advancing proceedings. Delays in actioning enforcement prevent many claims from progressing to full recovery and debtors may draw out proceedings by not attending hearings (Legal Affairs Committee, 2014). Post-judgment enforcement is also constrained by the assets of the employer. Some assets may be exempted from enforcement, and employers may have insufficient assets to meet judgment debts, or deregister to delay or avoid their obligations, making them 'judgment proof' (Gilles, 2006). In such circumstances, meritorious claims may effectively not be enforceable (Gilles, 2006).

1.5.1 STUDY SETTING

As a CLC, SMLS applies eligibility criteria in determining whether clients are assisted beyond initial advice and the nature of ongoing assistance.

SMLS is a community legal service based in the southeast region of Melbourne. SMLS has a long history of providing free legal advice and assistance to community members experiencing vulnerability and disadvantage. Its practice spans a broad range of areas of law, including employment law. In 2019 and 2020, SMLS provided legal assistance to over 12,700 clients. Of those clients, more than 1600 (around 13 per cent) sought assistance in relation to an employment law matter.

As a CLC, SMLS applies eligibility criteria in determining whether clients are assisted beyond initial advice and the nature of ongoing assistance. In the context of underpayment claims, the eligibility criteria include a means test, indicators of disadvantage or vulnerability experienced by the client, the

merits of the case, the extent to which the client matter may be more appropriately referred to the FWO for assistance, and Centre capacity. Extending the client assistance to include assistance with litigation is also dependent on the client continuing to meet eligibility criteria. Most of the ongoing work undertaken by the Centre is limited to pre-litigation advice and negotiations or assistance with appropriate dispute resolution such as representation at mediation or conciliation.

1.5.2 USING ADMINISTRATIVE DATA FOR CIVIL JUSTICE RESEARCH IN CLCs

In this project, we linked two sources of administrative data to build a profile of the clients and cases in wage underpayment matters.

Administrative data is information collected and stored as part of the everyday functions of organisations, rather than for a specific research purpose (McDonald et al, 2020; Woollard et al, 2014; Broadhurst et al, 2021; McLennan, 2018). There are many advantages and challenges associated with the use of this kind of data for research.

In this project, we linked two sources of administrative data to build a profile of the clients and cases in wage underpayment matters. The first of these was the Community Legal Assistance Service System (CLASS), which is used to facilitate reporting about the performance of SMLS' service (McDonald et al, 2020; Bellerose & Mulherin, 2020). The sec-

ond was data we collected from case files through a review of key documents in digital client files.

In a separate report arising out of this project we explored the nature and varieties of administrative data generated by CLCs and how they might be used for research (Leoncio, Grant & Newnham, 2022). Drawing on our experiences in this project, we made a series of recommendations about how data practices might be improved in order to better utilise this valuable resource (Leoncio, Grant & Newnham, 2022).

1.5.3 DATA COLLECTION AND ANALYSIS

The research team engaged in an iterative process of identifying variables of interest, developing a coding handbook, and collecting data by inputting it into a custom spreadsheet. The coding handbook contained agreed definitions of key variables, drawing on the staff consultations and research team expertise.

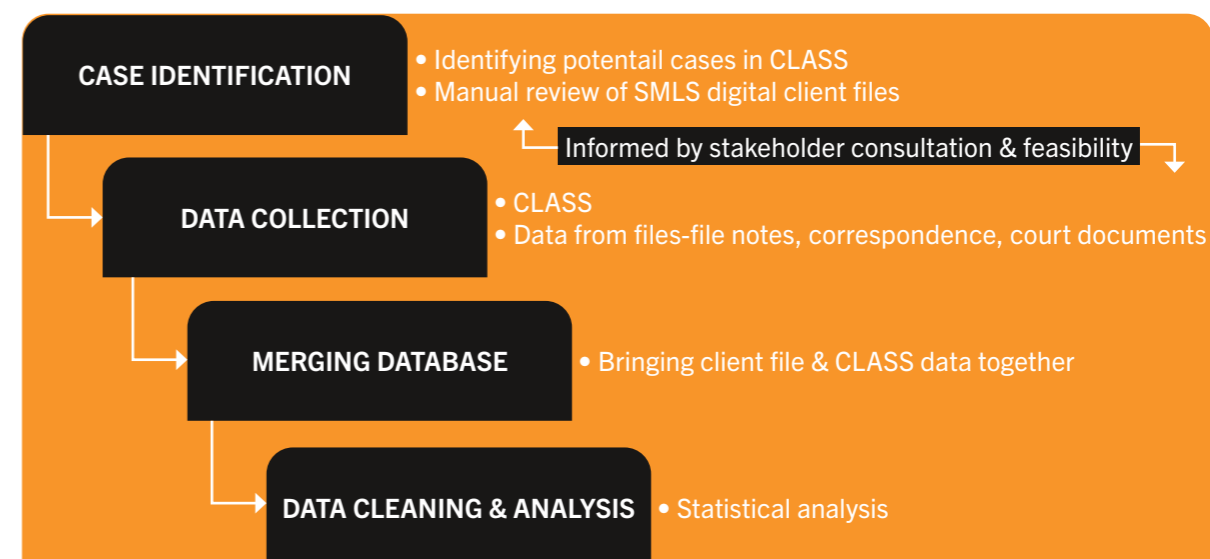


Figure 2: Overview of data collection & analysis

We engaged in a multi-stage process of identifying relevant cases, collecting data about those cases (CLASS and case files), cleaning and merging the two sets of data and analysing the merged dataset to generate findings. This process is summarised in Figure 2 and explained further below. We obtained human research ethics approval from Monash University for the research (project ID 31017; see further Leoncio, Grant and Newnham 2022)).

We began by identifying relevant client matters and testing the available data. To assist with these tasks, we consulted SMLS staff about their data-related practices and understanding. Early in the project, we conducted a group consultation session with 14 SMLS lawyers and followed this up with one-on-one interviews with four lawyers who specialised in employment law. These consultations enabled

us to establish which data we should extract from CLASS and the most relevant parts of the client files for obtaining information relevant to our research.

The client population of interest for the research was those who first contacted SMLS regarding their underpayment matter between 1 January 2019 and 31 December 2020. Both 'advice only' matters (where assistance generally did not extend beyond the first appointment with the clients and assistance is limited to the provision of advice, information and referrals) and case work matters (where further assistance was provided beyond that first appointment) were included. Candidate cases for inclusion in the study were identified in CLASS. Two SMLS lawyer members of the research team with employment law expertise ('SMLS investigators') reviewed the digital client file for each candidate case to ensure that it involved an underpayment

claim and therefore met the inclusion criteria. The knowledge and understanding of these investigators in the subject matter of the project was crucial for ensuring the most relevant data was used in the research (Buhler & Kaiser-Derrick 2020).

The research team engaged in an iterative process of identifying variables of interest, developing a coding handbook, and collecting data by inputting it into a custom spreadsheet. The coding handbook contained agreed definitions of key variables, drawing on the staff consultations and research team expertise. The SMLS investigators conducted a pilot on a sub-sample of client files to test whether they independently extracted the same data from identical files. Findings from the pilot were presented and discussed in a project meeting. Learnings from this process were implemented as refinements to the coding guide and spreadsheet, which were then

applied to client files for the final study sample to collect study data. Data were also extracted from CLASS for study cases. A summary of the variables is provided in Table 1 below. A number of additional variables were derived based on the case file analysis and CLASS variables.

Once the data collection was complete, the CLASS and client file datasets were merged and data cleaning and statistical analysis were performed. We used frequency counts and percentages to describe the characteristics of the clients and their cases, and chi-square and t-tests as well as logistic regression, as appropriate, to explore differences between variables of interest across sub-groups. Analyses were conducted using Stata SE software, Version 14 (StataCorp 2019), with significance set at $p \leq 0.05$.

DATA SOURCE	VARIABLES
Case File Analysis	<ul style="list-style-type: none"> • Data of file open letter • Data of close file letter • Claimed underpayment amount • Underpayment recovery amount • Data of file open letter • Data of close file letter • Additional problem - General employment • Additional problem - Dismissal • Additional problem - Bullying • Additional problem - Discrimination • Additional problem - Other
CLASS Data	<ul style="list-style-type: none"> • Problem type • Assistant type • File opening date • Birth Date • Gender • Country of birth • Disability status • Main language spoken at home • Residency status • Education level completed • Income group
Derived From Case File & CLASS Data	<ul style="list-style-type: none"> • Case year • Client age at case start • File opening date • Case duration • Any recovery • Country of birth • File closed

Table 1: Summary of variables

PART TWO FINDINGS

This part of the report presents the findings from our analysis. The analysis focused on employment entitlement matters with digital client files dealt with by SMLS where the first client contact was between 1 January 2019 and 31 December 2020. The data collection was undertaken in 2021 and completed in September 2021.

First we present the characteristics of this cohort of SMLS underpayment clients, before turning to the services provided and the nature of their claims.

2.1 CLIENT PROFILE

We identified 209 SMLS clients with employment underpayment problems whose first contact with the service was between 1 January 2019 and 31 December 2020. The demographic and other characteristics of these clients (excluding missing data) are presented in Table 2 below.

MATTER YEAR START	
2019	55%
2020	45%
GENDER	
Female	45%
Male	55%
AGE (AT FIRST APPOINTMENT)	
15-19	2%
20-29	30%
30-39	34%
40-49	13%
50-59	14%
60-69	7%
≥70	2%

Table 2 Client characteristics (n=209)
Cont. next page

EDUCATION (HIGHEST COMPLETED)	
Secondary or Below	35%
Certificate or Diploma	21%
Tertiary	44%
DISABILITY	
Yes	9%
No	91%
INCOME	
Nil	29%
\$1-\$299 weekly (\$1-\$15,599/yr)	11%
\$300-\$599 weekly (\$15,600-\$31,199/yr)	21%
\$600-\$999 weekly (\$31,200 - \$51,999/yr)	29%
\$1000-\$1499 weekly (\$52,000-\$77,999/yr)	7%
\$1500-\$1999 weekly (\$78,000-\$103,999/yr)	3%
ONGOING EMPLOYMENT (AT 1 ST APPOINTMENT)	
Yes	23%
No or Disputed	77%

Table 2: Client characteristics (n=209)

The mean age of underpayment clients at their first contact with SMLS was 38 years (median 35 years, range 15-72 years), with nearly two thirds of the clients aged 30 or more (65 per cent). There were slightly more male than female clients (55 per cent versus 45 per cent). Nearly a third of the clients (29 per cent) reported having no income, with another 11 per cent having income between \$1 and \$15,600 per year.

Useful context for this profile data is provided by comparing it with the demographic characteristics of new clients using services in Victorian CLCs.

In our sample, 18.2 per cent of clients were aged 25 or less. This was statistically significantly higher (p=0.01) than the proportion of services provided by Victorian CLCs in 2018-19 to clients of that age range (12.5 per cent) (Bellerose & Mulherin, 2020). Interestingly, the proportion of clients in our sample aged 50 or more (20.7 per cent) was significantly less (p=0.005) than the equivalent proportion of services provided to clients in that age range by Victorian CLCs in 2018-19 (29.6 per cent) (Bellerose & Mulherin, 2020). In terms of income levels, there was a significantly greater proportion of clients in our sample who reported no income (29.2 per

cent) than amongst new users of CLC services in Victoria in 2018-19 (11.5 per cent) (p <0.001). There was however a greater proportion of services in the broader CLC profile provided to clients with low as opposed to no income than the proportion of low income clients in our cohort (58.2 per cent versus 31.2 per cent respectively; p <0.001).

The clients in our sample had high levels of education: 44 per cent had a tertiary education (bachelor degree or above). Less than a quarter of the clients were in ongoing employment at the date of their first contact with SMLS, with employment having ceased or the subject of dispute for 77 per cent of the clients.

Table 3 presents the client profile in terms of language, citizenship and country of birth.

Clients in the cohort were from 38 different countries of birth, with nearly three quarters of clients (74 per cent) born outside Australia. Slightly more than half of the clients were Australian citizens or permanent residents (58 per cent). English was the main language spoken at home for 38 per cent of the clients, with Spanish (14 per cent) and Mandarin (14 per cent) the next most prevalent main languages. In comparison to the proportion of services provided to new clients whose main language was not English in Victorian CLCs in 2018-19 (15.6 per cent), there was a statistically significantly greater proportion of clients in our sample whose main language spoken at home was not English (62 per cent; p <0.001).

MAIN LANGUAGE - ENGLISH	
Yes	38%
No	62%
AUSTRALIAN CITIZEN OR PERMANENT RESIDENT	
Yes	58%
No	48%
COUNTRY OF BIRTH	
Australia	26%
India	13%
Columbia	12%
China	8%
Sri Lanka	4%
Other	27%

Table 3: Client language, citizenship and birth country (n=209)

²Calculation based on Bellerose & Mulherin (2020, p 126). CLASS categorises 'low income' as earnings between \$1 and \$599 per week (below \$31,200 per year) (Bellerose & Mulherin 2020). Bellerose and Mulherin include the missing data in the proportions they report (income data missing for 19.3 per cent of services): in our sample, income data were missing for 18.2 per cent of clients. For the purposes of comparison in the analysis above we revised the Bellerose and Mulherin data to include only services where the client's income level was known (omitting missing data).

2.2 SERVICE CHARACTERISTICS

The CLASS data indicated that 119 of the underpayment clients (52 per cent) were provided with ‘advice only’ service. Circumstances where assistance may not go beyond one-off advice include where clients do not qualify for further assistance (because of failure to satisfy the means test or the absence of relevant disadvantage); clients decline ongoing assistance (including where the client is in a position to self-advocate effectively and are satisfied with receiving advice and information to enable them to do so); a lawyer assesses the client’s claim as lacking sufficient merit; ongoing assistance is not required (that is, the client’s need is addressed in a single appointment); or SMLS does not otherwise have capacity to assist.

closed due to loss of contact with the client. We examined the odds of a file being closed in these circumstances based on client characteristics, using binary logistic regression.

We examined whether cases involving clients without Australian citizenship or permanent residency (PR) were more or less likely to be closed for loss of contact with the client than cases involving clients with Australian citizenship or PR. We found that the odds of file closure because contact was lost with the client were 4 times greater where the client did not have Australian citizenship or PR compared with cases where the client was an Australian citizen or held PR status (OR 3.96, 95% CI 1.26-12.49, p=0.019).

SERVICES	CLIENTS	FEMALE	MALE
Letter of demand	47 (59%)	46%	54%
Preparation of court docs	13 (17%)	50%	50%
On court record	11 (14%)	60%	40%
Attended ADR	5 (6%)	20%	20%
File closed because of lost contact	19 (24%)	58%	42%

Table 4: Service characteristics in closed files (n=80)

We explored the nature of the services provided to the underpayment clients for whom additional work beyond initial advice was performed, limiting this analysis to the closed files (n=80) (Table 4). A letter of demand was located on the client file in 47 cases (59 per cent of closed cases). Thirteen clients were assisted with the preparation of court documents (17 per cent of closed cases) and SMLS was on the court record as acting for a client in 11 cases (14 per cent of closed cases). There was no significant difference in the provision of these services to male and female clients.

We also examined whether cases where a letter of demand was prepared were more or less likely to be closed for loss of contact with the client than cases where no letter of demand was prepared. We found that the odds of file closure because contact was lost with the client were 78 per cent lower where a letter of demand was on file compared with cases where there was no letter of demand (OR 0.22, 95% CI 0.07-0.67, p=0.007).

We undertook a more detailed examination of the characteristics of cases where the file was

2.3 CLAIM CHARACTERISTICS

We explored the characteristics of clients’ claims, including the presence of other legal problems and the amount of the alleged underpayment. We also investigated closed cases to explore whether any underpaid wages were recovered, and if so, the amount of the recovery relative to the client’s alleged loss.

2.3.1 OTHER EMPLOYMENT-RELATED LEGAL PROBLEMS

We explored the characteristics of clients’ claims, including the presence of other legal problems and the amount of the alleged underpayment. We also investigated closed cases to explore whether any underpaid wages were recovered, and if so, the amount of the recovery relative to the client’s alleged loss.

- Social security debts

We undertook a more detailed examination of the profile of clients reporting dismissal-related legal problems. We found that:

- The odds of a client reporting a dismissal-related problem were 4.2 times greater for clients with Australian citizenship or permanent residency (PR) than those without Australian citizenship or PR (OR 4.23, 95% CI 2.03-8.80), p <0.001).
- The odds of a client reporting a dismissal-related problem were 2.5 times greater for clients whose

In the case file review, we identified other legal problems that clients experienced and sought information and advice about in conjunction with their underpayment matter. These included:

ADDITIONAL EMPLOYMENT LEGAL ISSUES	TOTAL	FEMALE	MALE
Other employment issues	59%	49%	51%
Dismissal	35%	55%	45%
Bullying	11%	60%	40%
Discrimination	7%	64%	36%

Table 5: Presence of additional employment issues (n=209)

- Underpayment of superannuation
- Physical and sexual assaults and injuries in the workplace, and related personal injury compensation claims (workers’ compensation and victims of crime compensation)
 - Family law and family violence
 - Employer allegations of worker misconduct and property damage
 - Immigration
 - Taxation; and

main language was English than those whose main language was not English (OR 2.52, 95% CI 1.27-5.01, p=0.009).

- The odds of a client reporting that they had experienced a dismissal-related problem were 2.4 times greater in 2020 than in 2019 (OR 2.4, 95% CI 1.12-5.17, p=0.03).

2.3.2 CLAIMS & RECOVERY

Key findings from the analysis of the magnitude of clients' claims and recoveries are presented in Table 6. We were able to ascertain details of the amount of the claimed underpayment for 106 clients (51 per cent of the sample). The average amount of wages clients claimed they had been underpaid was \$17,999 (median \$4,900), with more than half of clients reporting that the amount of the underpayment they sought to recover

we undertook a more detailed examination of the profile of cases where clients claimed they had been underpaid by \$5,000 or more. We found that:

- The odds of a client making a claim that they had been underpaid by \$5,000 or more rather than less than \$5,000 were 3 times greater in cases commenced in 2020 than in 2019 (OR 3.0, 95% CI 1.34-6.60, p=0.007).
- The odds of a client making a claim that they

AMOUNT CLAIMED (MEAN, RANGE) (n=106)	\$17,999 (\$54-\$353,967)
\$50-\$999	17 (16%)
\$1000-\$1999	13 (12%)
\$2000-\$4999	23 (22%)
\$5000-\$9999	12 (13%)
\$10,000-\$19,999	19 (18%)
\$20,000 or more	20 (19%)
ANY RECOVERY OBTAINED IN CLOSED CASES (n=80)	17 (21%)
AMOUNT RECOVERD (MEAN, RANGE) (n=17)	\$5735 (\$103-\$23,975)
IF RECOVERY OCCURED, AMOUNT AS % OF CLAIM (MEAN, RANGE) (n=14)	72% (30% - 100%)

Table 6: Underpayment claims and recovery

was \$5,000 or less.

Seventeen clients recovered unpaid wages (21 per cent of clients in closed cases in the sample). Their average recovery was \$5,753 (median \$3,363, range \$103 to \$23,975), and on average clients who recovered unpaid wages received 72 per cent of the amount they had alleged they were underpaid (range 30 per cent to 100 per cent).

Looking first at the cases where the magnitude of the claimed underpayment was known (n=109),

had been underpaid by \$5,000 or more rather than less than \$5,000 were 3.4 times greater for clients with Australian citizenship or PR than those without Australian citizenship or PR (OR 3.37, 95%CI 1.48-7.69, p=0.004).

We then investigated the likelihood of a client recovering an amount of underpaid wages in closed cases (n=80), based on a range of client characteristics.

We found that the odds of a client recovering

wages were 3.3 times greater for clients whose main language was English than those whose main language was not English (OR 3.25, 95% CI 1.00-10.52, p=0.049).

There was no statistically significant variation in the odds that a client achieved recovery of underpaid wages on the basis of their gender, claim year, residency status or income (nil versus some income), according to binary logistic regression analyses.

2.3.2 CASE DURATION

We also explored the duration of the closed cases (n=80) – that is, the time from the date the case was opened to the date of the close file letter. Amongst these cases, the mean duration was 5.1 months (median 3 months, range 0-29 months).

As would be expected, cases where a letter of demand or court documents were prepared were of considerably longer duration than those without those items. Cases with a letter of demand involved case durations 3.6 months longer than cases without a letter of demand (95% CI 1.31-5.95, p=0.003). Cases with court documents involved case durations 6.3 months longer than cases without court documents (95% CI 3.21-9.30, p <0.001). Additionally, cases where the claimed underpayment was \$5,000 or more were 2.9 months longer than cases where the claimed underpayment was less than \$5,000 (95% CI 0.06-5.76, p=0.045).

Care must be taken in interpreting the case duration findings given the 'right censoring' of the data. This refers to the fact that some cases – particularly those commenced in 2020 – would likely have closed after our data collection concluded in September 2021, and we were unable to include those data in our study.

A T-test indicated that the difference between the average case time for closed cases commenced in 2019 (5 months) and 2020 (5.3 months) was not statistically significant (p=0.82). Nor was the differ-

ence between the proportion of cases commenced in 2019 that had concluded by the completion of the data collection (49 of 115) compared with the proportion of 2020 cases that concluded in that period (28 of 94) (Chi-square test, p=0.19). Nonetheless, a sizeable proportion of cases remained open at the point our data collection concluded, and the ultimate duration of these cases is unknown.

PART THREE

DISCUSSION & IMPLICATIONS

This part brings together the findings of the research, highlighting the key insights and locating them in the existing evidence base on underpayment recovery. It draws on this analysis to make recommendations for practice and service development, reform and future research.

3.1 KEY INSIGHTS**3.1.1 THE PROFILE OF UNDERPAYMENT CLIENTS RECEIVING LEGAL ASSISTANCE**

Our research has provided important information in the form of a profile of the clients who received legal help with new civil employment underpayment recovery matters from a large CLC, starting in 2019 and 2020. In the period 2019-20, SMLS engaged with 209 new clients seeking assistance in relation to wage underpayment matters.

Perhaps the most striking feature of our cohort's profile is that the clients are clearly experiencing considerable financial disadvantage. Nearly a third had no income (29 per cent), and in total 62 per cent reported income below the 2020 full time annual minimum wage of \$39,000 (FWC, 2020). This is consistent with the eligibility criteria for access to services in a CLC setting. Importantly, however, this is a cohort that can least afford being underpaid and encountering difficulty recovering their wages. The average amount of claimed underpayment at \$17,999 (median \$4900) in our sample is particularly considerable in the context of the low levels of income of the client group. For those earning the minimum wage, \$4900 of unpaid wages represents more than 10 per cent of their annual income.

The average age of the underpayment clients was 38 years (median 35 years), and only 18 per cent of the clients were aged 25 or less – fewer, in fact, than were aged 50 years or more (21 per cent). In recent years, there has been a considerable focus on the extent of wage underpayment experienced by migrant workers and particularly international students (Farbenberg & Blum, 2018). In light of that research, our cohort is perhaps older than might initially be expected. A number of factors might explain the age profile of the clients in our sample. Legal needs research has demonstrated that younger people (those aged 15 to 24) are less likely than those in other age groups to take action in response to a legal problem and to seek legal advice (Coumarelos et al, 2012). Recent analyses of the approach of international students to the problem of underpayment have identified that workers experiencing underpayment may be reluctant to take legal action for a range of reasons, including the high costs of action in view of the low chances of recovery (Farbenberg & Blum, 2018; Campbell, et al 2019). It is also possible that younger people might be seeking assistance from one of the specialist youth CLCs in Victoria rather than SMLS. Our

findings are reflective of the profile of people with underpayment problems who were provided with legal assistance at a single CLC, and not broader legal need in relation to underpayment problems. Still, it is possible that there are more older workers experiencing these problems than is commonly thought. Our analysis is not capable of addressing this question in depth and further investigation of this issue is warranted.

3.1.2 THE PROFILE OF CLIENTS' CLAIMS IS COMPLEX AND CHANGED OVER TIME

Our analysis identified that clients with underpayment claims often experienced other related legal problems. Some of these were additional employment law problems (unfair dismissal and workplace bullying and discrimination, and underpayment of superannuation). Other prominent problems evident from the case file review included assault and injury, family law and family violence problems, and issues related to immigration, tax and social security. These findings are consistent with the clustering of legal needs found in the LAW Survey and other studies of justiciable problems (Coumarelos et al, 2012). Underpayment problems do not occur in isolation from a broader context of legal problems that workers experience.

Our analysis of the characteristics of clients' claims also revealed that there are important differences in the types of claims made by different groups of clients. In our sample, clients with Australian citizenship or PR were 3.4 times more likely to have underpayment claims involving larger amounts of unpaid money, and were 4.2 times more likely to have claims involving an unfair dismissal component, than those without Australian citizenship or PR. Additionally, our analysis of closed files identified that cases involving clients without Australian citizenship or PR were more likely to be closed by reason of loss of contact with the client.

These findings raise important but complex questions about the different profile of claims amongst clients. It is too simplistic an interpretation

to suggest that Australian citizen and permanent resident clients are more likely to be experiencing larger underpayments and dismissal-related problems at work than other clients. Legal needs studies have suggested that the reported low prevalence of legal problems experienced by people with non-English main languages may be in part a product of the non-recognition of problems (Coumarelos et al, 2012). Research on the experience of wage underpayment consistently indicates there may be particular risks and vulnerabilities associated with migrant workers' experience of wage underpayment, including fear of reprisal, challenges documenting underpayments and low legal capability (SERC, 2022). Others suggest that the costs of taking action outweigh the likely benefits for these workers, leading to non-pursuit of remedies (Farbenblum & Berg, 2018).

Our findings indicate that these factors may flow through into the setting of legal services provided in a CLC setting, and shape the way legal help seeking is formulated – that is, whether dismissal claims are raised alongside underpayment claims, and the magnitude of claims that are brought. These findings may have utility in informing initial client interview practice and service delivery, given some clients may be reluctant to discuss additional legal dimensions of their problems. The question of whether there are systematic differences between the claims brought by different subsets of underpaid workers is a matter worthy of further exploration. Our findings provide support for calls for im-

migration law reform to address the visa-related vulnerabilities that contribute to migrant workers' reluctance to pursue claims, as well as the value of a 'one stop shop' approach where dismissal matters could be pursued alongside underpayment matters in a single forum (see SERC, 2022).

We also identified that the claims of clients first seen in 2019 (n=115) differed in important ways compared with those first seen in 2020 (n=94). There were significantly greater odds of claims commenced in 2020 involving larger sums of underpaid wages (3 times greater than 2019 new clients) and also an unfair dismissal dimension (2.4 times greater than 2019 new clients). One potential explanation for these differences include the impact of growing community awareness of the problem of wage underpayment contributing to larger claims being developed and brought. Additionally, the deteriorating economic and employment conditions created by the early stages of the COVID-19 pandemic may also have contributed to the greater prominence of dismissal claims attendant to wage underpayment, and loss of ongoing employment that might otherwise have prevented some clients pursuing underpaid wages. These impacts of the pandemic have been particularly borne by migrant workers, who are excluded from public welfare measures (Clibborn & Wright, 2020). The pandemic brought about a range of changes in the delivery of services in Victoria's community legal assistance sector, including clients presenting with a greater number of legal problems and related issues (Kutin et al, 2022). Our findings in relation to the underpayment clients seen at SMLS provide an illustration of this, given that they straddle the pre-pandemic and early pandemic stages.

In our sample, clients with Australian citizenship or PR were 3.4 times more likely to have underpayment claims involving larger amounts of unpaid money, and were 4.2 times more likely have claims involving an unfair dismissal component, than those without Australian citizenship or PR.

3.1.3 FEW CLIENTS RECOVERED UNDERPAID WAGES

Our analysis demonstrated that relatively few clients recovered unpaid wages: 21 per cent of the clients with closed cases (n=17) recovered money. Clients whose main language was English were 3.3 times more likely to recover wages than those whose main language was not English. There were no other client characteristics associated with a greater chance of recovering wages.

Previous research has identified a complex range of reasons why underpaid employees might not pursue the wages they are lawfully owed. These reasons include fears of immigration consequences or losing work, concerns about the acquiescence of others or the employee's own culpability, lack of access to legal information, assistance and advice, and beliefs that a positive outcome is unlikely (Berg & Farbenblum, 2020). Many of these factors are unrelated to the legal strength of the underpaid worker's claim.

Our findings illustrate that even in the context of legal advice and assistance provided to a diverse range of clients in the setting of an established and experienced CLC, significant barriers to recovery persist. These findings are therefore best understood as a reflection of the difficulties of navigating recovery in the civil justice system, even with a lawyer. In practice, the civil justice system is often ineffective in facilitating the recovery of underpay-

ments, particularly when 'small' amounts of money are in dispute (Arup & Sutherland, 2009). The striking finding that non-English main language had such a bearing on the odds of recovery amongst the client cohort perhaps reflects the multiple ways in which language barriers can operate to impede access to justice, from amassing evidence to navigating legal advice and action and ultimately obtaining a remedy. Taken together, our findings suggest that small-scale and piecemeal modifications to civil procedures for recovery matters are unlikely to have a significant impact on underpaid workers' access to civil justice and unpaid wages.

3.1.4 ADMINISTRATIVE DATA CAN PROVIDE IMPORTANT INSIGHTS

Our research provides an example of the benefits of undertaking analyses involving administrative data in the CLC context. As McDonald et al have identified (2020), a number of Victorian CLCs are engaged in effective use of administrative data to shed light on the nature and impacts of legal problems and service delivery

This work is particularly important for informing current debates and reform efforts, and can provide much needed empirical insight into how the civil justice system is functioning. In our accompanying report on the process of our research, we have made a number of recommendations about how CLCs might go about undertaking this work and the kind of research ethics and data quality infrastructure needed to support it (Leoncio, Grant and Newnham, 2022; see also McDonald et al, 2020).

3.2 STUDY LIMITATIONS

In assessing the research, its findings and their interpretation, it is critical to understand the context for and limitations of our analysis. Our findings relate to the new underpayment clients in a single CLC over a two-year period, and are not generalisable to other CLC client cohorts.

OUR CONSULTATION WITH THE LEGAL PRACTITIONERS ON STAFF SUGGESTED THAT THERE MAY BE A LIMITED NUMBER OF INSTANCES WHERE A CLIENT MIGHT BE ASSISTED WITH A DISMISSAL ISSUE AND IT LATER CAME TO LIGHT THAT THE CLIENT HAD ALSO HAD A CLAIM FOR UNPAID WAGES. WHERE A MATTER CHANGES PROBLEM TYPE (OR DEVELOPS AN ADDITIONAL PROBLEM TYPE) IN THE COURSE OF THE SERVICES BEING PROVIDED TO THE CLIENT, WE CANNOT BE SURE THAT LAWYERS HAVE A CONSISTENT PRACTICE OF RECORDING BOTH MATTER TYPES IN CLASS.

As we documented in our related report on the research process in this project (Leoncio, Grant & Newnham, 2022), there are limitations associated with the quality of the administrative data we have used. The quality, accuracy and completeness of the CLASS data relies on the work of staff responsible for data entry, and this affects the reliability of the findings and the associated interpretation (McDonald et al, 2020; Bellerose & Mulherin, 2020). Though we implemented a range of data quality promotion measures in our use of the CLASS data and our file review process, we cannot exclude the possibility of errors. It is possible that we have not identified all relevant client matters that would be in scope for our sample. Our consultation with the legal practitioners on staff suggested that there may be a limited number of instances where a client might be assisted with a dismissal issue and it later came to light that the client had also had a claim for unpaid wages. Where a matter changes problem type (or develops an additional problem type) in the course of the services being provided to the client, we cannot be sure that lawyers have a

consistent practice of recording both matter types in CLASS. Additionally, where a client is assisted with two types of legal problems (such as a dismissal claim and an underpayment claim), negotiations commonly lead to a global settlement sum to cover both matters, so it may be challenging to determine what proportion of a settlement is attributable to the underpayment claim.

Another critical consideration is the limited nature of the insight achievable with the data available for the study and the associated need for caution in its interpretation. The scope of the research did not extend to assessing the merits of clients' claims nor their prospects of success. Additionally, while we have presented data on the small proportion of underpayment clients who recovered wages, this is only one of the outcomes the legal assistance provided by a legal service generates, and it is also not driven only by the service a client is provided with. In isolation, the administrative data we explored is unable to uncover the underlying reasons for clients not recovering payments. Clients may elect, for example, to discontinue their pursuit of a legal remedy. Clients may opt not to pursue their claims through court proceedings due to concerns with its impact on their visa or ongoing employment. There may be evidentiary difficulties with proving a claim given that clients may present with poor employment records or insufficient information about the identity of their employer. Some clients may make the assessment that the cost, time and energy involved in litigation exceeds the value of their claim.

Most significantly, the research does not capture the non-monetary benefits clients may have gained from receiving legal assistance from SMLS. Over-reliance on an outcome like the amount of money recovered disregards important dimensions of legal services in CLC settings that cannot be easily quantified (Butler, 2022; Curran & Crockett, 2013). Less easily measured but nonetheless important benefits of services provided to underpayment clients include:

- Contributions to the client's ability to make informed choices for their matter;
- Provision of legal education about such matters as the need to maintain records associated with employment, and entitlement to wages and superannuation;
- Impacts on client legal capability, understanding of or confidence in the justice system;
- Encouragement for clients to engage in help-seeking behaviour and to seek help early where problems arise; and
- Social, psychological and wellbeing-related benefits for clients associated with having an advocate assist them with navigating the system and advancing their interests.

Alternative research designs and data would be required to explore these impacts and outcomes for underpayment clients. For example, establishing routine or standard approaches to follow up clients after their receipt of legal assistance would enable us to learn more about outcomes clients experience from their perspective. Such information would also contribute to the development of an evidence base about what services are most effective for different types of legal matters and client cohorts.

The scope of the research did not extend to assessing the merits of clients' claims nor their prospects of success.

PART FOUR

CONCLUSION

The existing research on wage recovery has tended to focus on reasons for employee inaction in the face of underpayment legal problems, and recommended modification of court rules and claims processes as means to improve access to civil justice for workers. Our research indicates that workers who are able to access legal assistance are a cohort with high levels of cultural and linguistic diversity experiencing considerable financial disadvantage.

Our research investigated the profile of employment underpayment matters dealt with by SMLS where the clients were first seen between 1 January 2019 and 31 December 2020. We demonstrated the feasibility of developing a linked dataset combining CLASS records with information systematically extracted from case files. Using this approach, we were able to generate new insight into the clients seeking to use the civil justice system to recover wages with legal assistance, the nature of the claims being made and the outcomes achieved in these matters. Taken together, our findings confirm that civil justice for underpaid employees remains highly inaccessible, even with legal assistance.

The existing research on wage recovery has tended to focus on reasons for employee inaction in the face of underpayment legal problems, and recommended modification of court rules and claims processes as means to improve access to civil justice for workers. Our research indicates that workers who are able to access legal assistance are a cohort with high levels of cultural and linguistic diversity experiencing considerable financial disadvantage. They are typically seeking to recover small amounts, and are rarely successful. They are also experiencing a range of additional legal problems. The civil justice system is falling far short of providing these workers with the justice they are entitled to.

These findings suggest that to improve access to justice and the prospects of wage recovery, far more than small-scale reform of civil procedure is required. More radical interventions, such as the establishment of a specialist wage recovery forum with provision for group complaints and resourcing legal assistance and representation, may be stronger candidates for effective change (Berg & Farberblum, 2020).

Additionally, where procedural improvements are implemented, it is crucial to evaluate whether they have the desired effect on improving access to justice for underpaid workers. The 'fast track' model introduced in the Industrial List of the Magistrates' Court of Victoria in April 2022 is one such example. Who uses this process, whether it achieves different or better results than the previous arrangements and what the experience is like for worker claimants are all questions worthy of empirical investigation. This kind of inquiry would be best pursued by the relevant courts, and requires appropriate justice data infrastructure (McDonald et al, 2021; Byrom, 2020).

Many CLCs are actively engaged in the use of administrative data to inform research and analysis on service delivery and access to justice (McDonald et al, 2020). There remains considerable scope to do more, however. In the course of our research we identified a range of aspects of CLC data and as-

sociated ethics infrastructure that require improvement for this opportunity to be maximised (Leoncio, Grant & Newnham, 2022). Enhanced data quality will boost the prospects for future work using CLASS data (McDonald et al, 2020). We note, for example, that we originally intended that our project would explore the experience of independent contractors seeking to recover amounts they had not been paid for services rendered, an issue of increasing importance in light of the growth of the gig economy and on-demand workforce. Unfortunately, our consultations revealed that the relevant data were insufficiently reliable on the classification of these matters for us to pursue this analysis. Other aspects of the data, such as the binary nature of the way gender data are collected, should also be reviewed for their impact on future research exploring the experiences of different cohorts of clients in CLC contexts, consistent with practices in other organisations (see McDonald et al, 2020).

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