Reforming Australia's Temporary Migrant Labour Policy Regime

Submission to the Senate Select Committee on Temporary Migration

Inquiry into the impact of temporary migration on the Australian economy, wages and jobs, social cohesion and workplace rights and conditions

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We are academic researchers at the University of Sydney Business School who specialise in migrant labour issues. We welcome this opportunity to make a submission to the Senate Select Committee on Temporary Migration.

As we argue in a recent article published in the *Economic and Labour Relations Review* (Wright & Clibborn, 2020 – **see Attachment A**), Australia's system of temporary migration is inadequately protecting migrants in the workplace. Due to policy changes over the past 25 years, this system has increasingly come to resemble a guest-worker regime, where temporary migrants' rights are restricted, their capacity to bargain for decent working conditions with their employers is curtailed and their agency to pursue opportunities available to citizens and permanent residents is diminished.

Guest-worker schemes have been used in Western Europe, Singapore, Japan and Gulf Cooperation Council states, and through schemes specific to the agriculture industry in many countries (Davies, 2014; Martin, 2003; Yea & Chok, 2018). The features of these schemes vary, but most definitions point to policies restricting the rights of migrants to settle permanently, or to move freely between different employers, and making migrant workers' residency rights conditional upon retaining employment with their sponsoring employer (Baldwin-Edwards, 2011; Messina, 2007). Their essential feature is to curtail migrant workers' rights, agency and bargaining power, which can produce short-term dividends for businesses and governments seeking a more cost-efficient and productive workforce (Papademetriou & Sumption, 2011). While guest-worker schemes can provide migrant workers with better employment and income opportunities compared to those available in their home countries (Ruhs, 2013), these schemes have been found to contribute to migrant worker exploitation and labour market segmentation (Wright et al., 2017; Yea & Chok, 2018).

The ability of temporary migrants in Australia to seek redress if they are underpaid or otherwise mistreated is limited by visa rules that place considerable power in the hands of employers. Like the guest-workers of post-war Western Europe, temporary migrants in Australia 'constitute a disenfranchised class' (Walzer, 1983: 59). Visa rules that allow for differential treatment of temporary migrants compared to other workers in Australia present a fundamental injustice that needs to be rectified. This could be addressed by lifting restrictions on temporary migrants' pathways to citizenship and labour mobility and removing barriers to effective representation, regulation and enforcement. If such measures are not adopted, Australia may suffer a fate similar to countries with guest-worker schemes where, in many cases, these programmes were shut down because the policies designed to deliver short-term economic benefits inevitably produced unintended consequences and public hostility.

Our research directly relates to several issues specified in the Terms of Reference, notably the following, which our submission will address in turn:

1. Government policy settings, including their impact on the employment prospects and social cohesion of Australians;
2. The impact of temporary skilled and unskilled migration on Australia's labour market;
3. Whether permanent migration offers better long-term benefits for Australia's economy, Australian workers and social cohesion;
4. The impact of wage theft and breaches of workplace rights and conditions;
5. Policy responses to challenges posed by temporary migration.

1. Government policy settings, including their impact on the employment prospects and social cohesion of Australians

A striking finding from our research relates to the incoherent evolution of government policy settings over the past quarter century. In a 2017 article published in the *Comparative Labor Law and Policy Journal* (Wright & Clibborn, 2017 – **see Attachment B**), we noted that Australian immigration policy has maintained the pretence of channelling entrants through the 'front door' of highly regulated mechanisms of selection and control. Since 1996, immigration selection policies have been reformed with the intention of prioritising desired groups of applicants in skilled and other economic visa categories and making it more difficult for those would-be migrants that do not meet these criteria, such as those on humanitarian and family visas. In this context, the 'front door' of Australian immigration selection has become larger, but the protective wall of immigration control in which they are located has become more fortified (Geddes, 2003).

This characterisation of Australian immigration selection and control, which policymakers have actively sought to promote (Berg, 2016; Mares, 2016; Wright, 2014), overlooks a paradox. Notwithstanding the focus on maintaining an official policy based on skilled immigration entering through 'front doors', governments have opened 'side door' temporary work visa schemes that exist outside of its formal scope, such as student and working holiday visas. Furthermore, a growing number of unauthorised migrants who overstay their visas or work in breach of their visa conditions, have also been permitted through 'back door' migration channels (Clibborn, 2015; Howe et al., 2019). Loopholes in the regulation of temporary skilled visas have also led to side doors allowing employers to recruit often-vulnerable migrant workers into lower-skilled forms of employment (Boucher, 2019).

In our 2017 article, we found that the recent rapid growth of lower-skilled immigration in Australia is a manifestation of these widening 'side doors' and to a lesser extent of widening 'back doors', which have been opened due to two factors. First, the regulation of visas primarily designed for non-work purposes has been loosened, which has granted greater capacity for international student and working holiday visa holders to work. Second, the absence of an effective system of labour regulation enforcement and the creation of systems

of 'institutionalised dependence', such as employer sponsorship and other forms of coercion, has placed a greater number of temporary migrants in exploitative arrangements that take advantage of their migration status, often below minimum award standards. This amounts to a fundamental change in the nature of policy relating to skilled and labour immigration in Australia since the 1990s.

In another article published in 2018 in the *Economic and Labour Relations Review* (Clibborn & Wright, 2018 – **see Attachment C**), we examined in greater detail the fundamental changes in the labour enforcement regime that produced inadequacies for regulating the work of migrants and the practices of the employers and intermediaries that recruit them and utilise their labour.

For most of the 20th century, Australian unions held a central role in setting and enforcing minimum standards through the conciliation and arbitration system. Under that system, unions enjoyed legal status as parties to awards, while high union density and relatively free right to enter workplaces provided them with knowledge of employer non-compliance and opportunity to address it. This also deterred employers from breaching employment standards given the risk of detection (Hardy, 2011; Hardy & Howe, 2009; Maconachie & Goodwin, 2011). Unions now have relatively little role as enforcers of Australia's employment standards, no longer having any formal function as joint regulators with the state. This has resulted partly from union membership decline but is also due to their active marginalisation by governments through changes to industrial relations policy. The most notable of these changes were the Workplace Relations Act 1996 (Cth) and the 2005 'WorkChoices' amendments to that Act, which directly reduced the rights and roles of unions (Cooper & Ellem, 2008), whose enforcement role has not been restored under the Fair Work Act 2009 (Cth). The Fair Work Ombudsman (FWO), tasked with primary responsibility for enforcing employment standards, has never been sufficiently resourced to replace the roles that unions once played in enforcing minimum employment standards under the system in place prior to these reforms (Hardy & Howe, 2015).

Workers in large organisations and certain mainly public sector-related industries have greater access to collective protections. However, those working in smaller businesses and industries with low union density, such as agriculture and hospitality, are much more susceptible to employer non-compliance. This is particularly so in industries characterised by complex supply chains, the presence of intermediaries and fragmented business models, such as franchise operations, in which commercial pressures can produce conditions of non-compliance and obscure responsibility over labour standards (Johnstone et al., 2012). Temporary migrants are concentrated in these industries and organisations where employer non-compliance is most likely to occur (Berg & Farbenblum, 2017).

Finally, our 2015 article (Clibborn, 2015 – **see Attachment D**) identified a gap at the intersection of Australia's immigration and employment laws relating to undocumented migrant workers that has serious implications for employees, employers and policy. Australia

is host to a large and growing population of immigrants working without authorisation, either working in breach of visa conditions or working without any visa authorisation. These undocumented workers are particularly vulnerable to exploitation in the form of wage theft. Yet, they are not entitled to protection under Australia's employment laws. In addition to the implications for workers, there are broader policy concerns arising from the current system of regulation that effectively rewards employers of undocumented workers who are equally in breach of immigration law. Left uncorrected, current regulation may in fact be placing downward pressure on employment standards in some sectors and increasing undocumented immigrant work. As well as highlighting the inadequacy of the existing regulatory framework, the article explores potential avenues to address it. Reform solutions are offered to correct the problem, involving amending legislation to confirm that employment laws apply equally to all employees regardless of visa status and establishing an institutional 'firewall' between the FWO and the Department of Home Affairs. The first of these reforms has previously been accepted by a Senate Committee (Senate, 2016) and a bill, seeking to put it into effect, subsequently tabled in parliament (Fair Work Amendment (Protecting Australian Workers) Bill 2016).

2. The impact of temporary skilled migration on Australia's labour market

Our research also provides insights into the impact of temporary skilled migration on Australia's labour market. An article recently published in the *Australian Journal of Management* (Wright & Constantin, 2020 – **see Attachment E**), which analysed survey data to identify employer motivations for sponsoring workers under the temporary skilled visa scheme, found that many employers use the scheme to address shortfalls of suitably qualified workers. These motivations are consistent with the temporary skilled visa scheme's objective of addressing skills shortages. However, a large share of employers in certain industries, particularly hospitality and construction, used the scheme for other reasons that do not form part of the scheme's objectives, such as to recruit workers with certain 'behavioural traits'. Such 'behavioural traits' encompassed employer perceptions that temporary skilled migrants were harder working, more loyal, having better attitudes and having a stronger work ethic than other groups of workers, including 'similar Australian workers'. The article highlighted employer sponsorship as playing a decisive role in this misuse of the temporary skilled visas by some employers.

Employer sponsorship is a fundamental design feature of Australia's temporary skilled visa scheme, both the 482 visa and the 457 visa before it. Employment sponsorship arrangements offer considerable advantages for employers and governments seeking to source skills efficiently (Sumption, 2019). However, the findings of the article highlighted the importance of independent verification of skills shortages before an occupation is eligible for sponsorship (Howe, 2013), which is not currently a feature of the temporary skilled visa system in Australia, even following the 2018 policy reforms that introduced the 482 visa.

While the vast majority of employers surveyed who engaged temporary sponsored skilled immigrants claimed to experience problems recruiting workers locally, skills shortages are distinct from skilled job vacancies and recruitment difficulties. Skills shortages are generally considered to be systemic shortfalls of available workers at the 'market' or prevailing wage rates offered within a labour market. By contrast, recruitment difficulties are shortages of workers caused by factors within an individual employer's control, such as offering wages and conditions that are below market rates which fail to attract a sufficient number of potential candidates (Healy et al., 2015; Junankar, 2009; Richardson, 2009). The article found than only 1% of employers surveyed claimed they would increase wages or provide other incentives to potential candidates as a means of addressing their recruitment challenges. This suggests that even if employers recruited temporary sponsored skilled migrants because of skills shortages that meet the generally accepted technical definition of a lack of suitably qualified workers, the skills shortages that existed were not acute. However, there may be exceptions to this, particularly among employers in regional and remote locations where geographical factors can inhibit efforts to attract and retain skilled workers regardless of the wages and conditions offered.

The findings presented in the article also indicated that policymakers should consider loosening regulations that constrain the mobility of temporary sponsored skilled migrants, which is a feature of temporary skilled immigration in Australia and typical among sponsored visa schemes internationally (Sumption, 2019; Wright et al., 2017). These constraints influence the nature of employer demand for temporary sponsored skilled migrants, in that limited mobility appears to influence employer perceptions of temporary sponsored skilled migrants as harder working, more loyal, having better attitudes and having a stronger work ethic.

The findings indicated that the recruitment challenges facing the employers of temporary sponsored skilled migrants could be addressed more comprehensively through alternative longer-term strategies aimed at retaining workers, including higher pay, improving job quality, greater training investment and coordination, providing career development opportunities and other steps likely to produce greater commitment and retention among existing and prospective employees (Backes-Gellner & Tuor, 2010). Hospitality, construction and manufacturing employers were much more likely than employers in other industries to cite the importance of 'behavioural traits' as a benefit of using the temporary sponsored skilled visa scheme, and to perceive temporary sponsored skilled migrants as harder working or more loyal that 'similar Australian workers'. While substantial minorities of employers in these industries attributed recruitment challenges to poor attitudes and low desire to work in their industries among local workers, their local recruitment difficulties are likely to reflect job quality deficiencies resulting from low pay and poor conditions (Knox et al., 2015).

The utilisation of temporary sponsored skilled migration to recruit workers perceived as having superior loyalty, work ethic and attitudes compared to other workers may be legitimate for employers when making decisions regarding new personnel. However, these

objectives are inconsistent with the explicit focus of temporary sponsored skilled visa regulations for addressing shortages of suitably qualified workers (Howe, 2013), and could potentially lead other workers to be displaced. As such, while temporary sponsored skilled migration may be beneficial in the short term for governments and employers seeking to source skills efficiently, if these schemes are not regulated properly they can have potentially adverse long-term implications for skills investment and for career development, and also for employers seeking to transition to more productive business strategies (Wright et al., 2019).

3. Whether permanent migration offers better long-term benefits for Australia's economy, Australian workers and social cohesion

Our abovementioned 2020 article in the *Economic and Labour Relations Review* (Wright & Clibborn, 2020 – **see Attachment A**) found that permanent migration offers better long-term benefits for workers – be they Australian citizens or migrants – than the existing temporary migration system. The article presents an historical and comparative analysis of the bargaining power and agency conferred on migrant workers in Australia under two different policy regimes. It compares the period from 1973-1996, when a dedicated permanent 'skilled' immigration program was implemented following the formal abolition of the White Australia policy, with the period since 1996 during which time there has been an unprecedented expansion of temporary labour migration.

Through an assessment of four criteria – a) residency status, b) mobility, c) skill thresholds and d) institutional protections – our findings show that migrant workers arriving in Australia in the period from 1973 to 1996 had high levels of bargaining power and agency. Since 1996, migrant workers' power and agency has been incrementally curtailed, to the extent that Australia's labour immigration policy resembles a guest-worker regime where migrants' rights are restricted, their capacity to bargain for decent working conditions with their employers is truncated, and their agency to pursue opportunities available to citizens and permanent residents is diminished. Our analysis indicates that, in contrast to the effectiveness of the 1973-1996 policy framework based on permanent residency, the temporary visa system that has emerged since 1996 is failing to protect temporary migrants at work.

Our main findings for each of the abovementioned criteria, which are widely acknowledged within academic research on migrant labour as the critical factors affecting migrant workers' bargaining power and agency (see, for instance, Bauder, 2006; Dauvergne, 2016), are summarised as follows:

a) Residency status

The almost exclusive focus on permanent visas from 1973 to 1996, accompanied by an effective system of labour standards enforcement (as discussed above), meant that migrant workers enjoyed the same social and employment rights and entitlements as Australian

citizens. With the creation and expansion of temporary visa schemes after 1996, temporary migrants initially had the opportunity to apply for permanent residency with a reasonable expectation that this would be granted so long as they fulfilled standard eligibility requirements. However, more recent policy changes, such as the creation of the temporary skilled (subclass 482) visa short-term stream, have removed this opportunity for some visa holders.

Furthermore, in every year from 1976 to 1996, 'permanent arrivals' consisting of foreign nationals eligible to settle permanently in Australia outnumbered 'long-term visitor arrivals', that is, foreign nationals intending to live in Australia for at least 12 months, but not permanently. This latter category includes temporary skilled, working holidaymaker (WHM) and international student visa holders, but not tourists. By contrast, long-term visitor arrivals have outnumbered permanent arrivals in every year since 1997. In 2018, the 583,300 long-term visitors arriving in Australia outnumbered the 107,670 permanent arrivals by more than fivefold. These trends mirror the large increase in temporary visas with work rights granted from 191,068 in 1996 to 816,719 in 2018. Permanent visa grants have also increased over the period but not by the same magnitude.

The large gap between temporary work and permanent visa grants reflects the erosion of the temporary-permanent migration pathway, as indicated in the rapid rise of migrants on 'bridging visas' waiting for their visa applications to be decided, due to processing delays. This can create significant vulnerability for temporary migrants on the long yet uncertain journey to permanent residency (Robertson & Runganaikaloo, 2014). According to Sherrell (2019), between 2013 and 2018, the number of people who had been on temporary visas for eight or more years increased threefold. Temporary migrants in Australia are denied or have restricted or conditional access to many of the rights and protections that citizens are entitled to, such as protection of income in the event of workplace injury, recovery of unpaid entitlements when their employer goes into administration, and subsidised health care, education and unemployment benefits. There are also high costs associated with obtaining temporary visas (Mares, 2016). As studies in other countries have found, the denial of such protections to migrant workers with temporary residency can weaken their bargaining power and agency relative to those with permanent residency (Bauder, 2008; Dauvergne & Marsden, 2014).

b) Mobility

A feature of permanent migration in Australia is the right of visa holders, like citizens, to move freely between employers. From 1973 to 1996, when immigration policy was built almost exclusively upon the principle of permanent residency, migrant workers could leave their employer in the event they were being mistreated or if they could receive better wages and conditions or utilise their skills more effectively with another employer.

By contrast, under temporary visas that have been created or expanded since 1996, migrant workers' mobility is restricted or conditional. Workers on temporary skilled (subclass 482), Seasonal Worker Program (SWP) and training visas have their residency rights tied to their employer sponsor; if the employment relationship with their sponsor ceases, they have a short timeframe to find another sponsor or face deportation. While international student and WHM visa holders are free to move between employers, there is a risk of employers reporting technical breaches for exceeding working hour limitations in the case of international students, and withholding documentation required for WHM applicants to gain visa extensions.

In support of international scholarship suggesting that constraining migrants' mobility can diminish their power and agency (Cangiano & Walsh, 2014; Zou, 2015), Australian studies have identified such constraints as an important factor contributing to temporary migrant workers' vulnerability to underpayment and other forms of mistreatment (e.g. Howe et al., 2019; Reilly, 2012; Velayutham, 2013).

c) Skill thresholds

Like other groups of workers, migrant workers' skills and qualifications can influence their bargaining power with employers to negotiate good wages and conditions and their agency to move between employers. High-skilled migrants with scarce qualifications and experience tend to have stronger bargaining power and agency than lower skilled migrants who can be replaced more easily and may therefore be more tolerant of poor working conditions (Anderson, 2010; Dauvergne, 2016; Walsh, 2014). These findings are reflected in our analysis of the skill thresholds under labour immigration policy regimes in Australia.

From 1973 to 1996, Australian labour immigration policy focused solely on skilled immigration. This meant that foreign nationals seeking work visas were required to possess tertiary qualifications and skills in high demand. This did not preclude migrants from working in lower skilled occupations, which was an outcome for migrants facing challenges getting their skills recognised upon arrival (Groutsis, 2003). But it meant they had the required qualifications and experience to gain employment in high-skilled work once skill recognition was achieved.

Since 1996, the qualifications threshold for permanent skilled visas has remained high. This was initially the case for the temporary skilled visa, but reforms after 2001 expanded eligibility of this scheme to a large number of intermediate-skilled occupations not requiring university-level qualifications. Cases involving underpayment of temporary skilled visa holders disproportionately involve workers in such occupations, such as cooks and builders' labourers (Boucher, 2019). The expansion of international student visa intakes and changes to the WHM visa have encouraged large numbers of temporary migrants into low-skilled work in the hospitality, retail and horticulture industries. Perceptions by these workers that they are easily replaceable, which is a consequence of the low barriers to entry for these occupations,

is a factor contributing to widescale underpayment of temporary migrant workers in these industries (Clibborn, 2018).

d) Institutional protection

Labour market regulation is an important factor determining the extent to which migrant workers' bargaining power and agency is supported. In particular, previous scholarship has highlighted the role of trade unions and government inspectorates in institutionalising protections by establishing and enforcing decent labour standards. The absence of such institutional protections can allow employers to pay migrant workers below these standards to gain a competitive advantage (Afonso & Devitt, 2016; McGovern, 2007; Zou, 2015).

From 1973 to 1996, institutional protections for migrant workers were strong. The conciliation and arbitration and award systems provided relatively standardised wages and conditions for workers. An effective labour standards enforcement regime supported by strong unions helped to ensure that workers received the wages and conditions they were entitled to under the relevant industry or occupational awards (Goodwin & Maconachie, 2007; Hardy & Howe, 2009), including migrant workers (Quinlan & Lever-Tracy, 1990). The permanent immigration policy buttressed strong institutional protections for migrant workers, who had the same workplace rights and entitlements as Australian citizens.

This scenario has changed since 1996. Visa intakes have increased to unprecedented levels with many more migrants working in jobs where enforcement of labour standards is weak. This is the case not only among temporary migrants but also undocumented workers who form a large proportion of the horticulture workforce in certain regions (Howe et al., 2019; Underhill & Rimmer, 2016). While temporary migrants have de jure access to the minimum standards regulated in the relevant awards, there are considerable challenges to enforcing such standards among these workers. Temporary skilled visa holders, international students, and SWP and WHM visa holders are concentrated in industries and organisations with low levels of union representation (Clibborn, 2018; Department of Immigration and Border Protection, 2014; Howe et al., 2019). This has been affected by declining levels of union membership over the past three decades, as well as industrial relations policy changes, especially (but not only) those introduced by the Howard government, which intentionally weakened unions' role in regulating labour standards (Cooper & Ellem, 2008). Temporary migrants account for a disproportionate amount of the FWO's activities, yet the FWO has insufficient resources and faces structural challenges to enforcing labour standards in the parts of the labour market where temporary migrants are concentrated (Clibborn, 2015; Clibborn & Wright, 2018). Consequently, while institutional protections for migrant workers were strong prior to 1996, since then they have weakened considerably.

4. The impact of wage theft and breaches of workplace rights and conditions

It is clear from the weight of academic, media, union, FWO and government inquiry reports from recent years that wage theft, together with other forms of employer non-compliance with minimum employment standards, is a widespread problem in Australia. Like other developed nations, the problem disproportionally impacts temporary migrant workers in low-paid industries like hospitality, retail and horticulture (e.g. FWO, 2019). Our attached articles also provide insight into temporary migrant workers' experiences with wage theft and other employer non-compliance with minimum wage standards.

In relation to international student visa holders working in hospitality and retail, see the article published in the *Economic and Industrial Democracy* journal (Clibborn, 2018 – **Attachment F**). This article is based on a survey of 1,433 international university students and interviews with 40 of them. The student workers were generally confined to low-wage, underpaid jobs as they had little practical access to legally paid jobs. Of the sample working part-time as waiters and shop assistants, it finds 100% of them were paid under award minima. Many international students interviewed were aware of the National Minimum Wage but none was aware of their rights under the applicable award to minimum wage, overtime and penalty rates etc. The article explains why these temporary migrant workers tolerated wage theft. While migrants' reference to lower pay in their home country has long been accepted as explanation for their acceptance of low pay, it was not found to be a significant factor for international students. Instead the research found that they take cues from their peer international students. In this event, the article proposes policy solutions aimed at early provision of simplified information regarding both minimum wage expectations in jobs known for underpayment and clear, safe pathways for reporting non-compliance and recovering underpaid wages.

In relation to WHM visa holders working in horticulture, see the article published in the *UNSW Law Journal* (Clibborn, 2019a – **Attachment G**). This article presents a case study of a horticulture region of Southern Queensland that was dealing with problems caused by wage theft impacting working holiday makers. While much of our research discussed above has focussed on national-level policy contributions to the wage theft problem, this article illustrates the possibilities for local-level solutions as well as potential benefits of co-regulation. The case study explores the Australian horticulture industry's reliance on temporary migrant labour, examining how key community members recognised the serious risk of damage to the local economy caused by wage theft and other mistreatment of temporary migrants performing seasonal horticulture work. Some community members feared that a poor reputation, spread amongst backpackers on social media, would discourage future workers from visiting the region, leaving farms unable to harvest crops and negatively impacting the surrounding economy. Accordingly, these community members took steps to ensure better treatment of workers including compliance with employment laws. A model is presented for potential state interventions, via co-regulation at the local level to better ensure legal compliance.

To its credit, the Australian media has uncovered and reported many cases of employer noncompliance impacting temporary migrant workers. As we note in Clibborn & Wright (2018 – **Attachment C**), the reporting of underpayment of wages in the media increased markedly after 2015. In that article we examine two major contributors to increasing employer non-compliance with employment laws being policies increasing temporary migration and fragmenting of institutional employment protections. We also analyse why the Australian Government had done little to address the problem to that point, arguing that, despite the seriousness of the problem, the Australian Government had been either unable or unwilling to do more than make minor changes to policy and law to better ensure employer compliance with minimum employment standards due to 'conflicting imperatives of the state, business influence over the policy process and weak political incentives to address underpayment' (Clibborn & Wright, 2018: 208). At that time, the preponderance of evidence suggested that those primarily affected were temporary migrant workers on hourly pay rates below those mandated by applicable awards. We observed that the Australian Government had implemented only minor reforms, 'merely tinkering around the edges' and treating the problem 'as it might any public relations challenge: doing just enough to placate the media and the public so as to quell any outrage that might result in lost votes' (Clibborn & Wright, 2018: 221). However, given the nature of the news market, the most public attention has been paid to the most prominent businesses. For instance, there was significant coverage in 2019 of George Calombaris' MAdE Establishment hospitality business' and Woolworths supermarkets' admissions to underpayments of $7.8 million and about $300 million respectively (ABC News, 2019; Marin-Guzman, 2019). In both cases, permanent, salaried employees were found to have been underpaid due to long hours of work bringing their effective pay rates below award minimums.

In this way the character of reported wage theft changed in 2019. Employer non-compliance was no longer viewed as primarily affecting temporary migrant workers performing hourly labour in franchises, hospitality or horticulture but included citizens in full-time, salaried roles. One positive sign was the rush of business self-reporting to the FWO after publication of the news of Woolworths' underpayment (Hannan, 2019). There appears to be some media-driven self-regulation taking place in large corporations in response to the recent uncovering of underpayment of salaried employees. As noted above, large firms are also more likely to have some union involvement. We submit that the Senate Committee, and the government, should resist the temptation to base policy on recent prominent media coverage. Rather, any regulatory reform, related to both temporary migration and enforcement of employment laws, should target the known most affected workers: low-waged hourly workers, predominantly temporary migrants, in less prominent businesses in industries like hospitality, retail and horticulture.

5. Policy responses to challenges posed by temporary migration

Given that temporary migrants in Australia are more likely to suffer underpayment of wages and other mistreatment by employers than citizens and permanent residents, a number of policy responses are proposed. These responses involve reforms to both Australia's temporary migration and industrial relations schemes.

As noted above (and see Wright & Clibborn, 2020), Australia's migration regime exposes temporary migrants to wage theft and other forms of mistreatment at work due to current restrictions on mobility, residency status, skill thresholds and institutional protection. Therefore, we recommend that these four factors should form the guiding principles for responding to challenges posed by temporary migration, as outlined below:

1. Reforms should ensure that temporary migrant workers maintain or are granted mobility between employers so they may exit from exploitative arrangements currently facilitated by their dependence upon employers created by some visa arrangements. In particular, the employer sponsorship mechanisms that regulate the temporary skilled visa, Seasonal Workers Program and other visa schemes tend to produce a productive yet controlled and immobile migrant workforce. Such arrangements ignore 'the profound inequality of non-citizen workers – who depend on employers in order to even enter or remain in the labour market' (Dauvergne and Marsden, 2014: 528). Such conditions typically grant employers a significant degree of power over migrant workers, which can result in these workers being exploited.

2. Reforms should recognise the benefits to social inclusion of permanent migration and certainty created by a clear temporary-permanent migration pathway. Residency and citizenship are key determinants of whether migrant workers are likely to be treated fairly or unfairly by their employers. Temporary residency necessarily restricts the agency of migrant workers because can it limits their capacity to find alternative employment if they are being mistreated and may entail limited access to public benefits that can increase their financial dependence on their employer. By contrast, permanent residency and citizenship greatly enhance migrants' ability to access their employment and social rights and to exit from exploitative employment relationships without fear that this could lead to deportation.

3. Reforms should introduce independent verification of skill shortages through the creation of an expert advisory body, modelled on the Migration Advisory Committee in the United Kingdom. This expert advisory body should be tasked with assessing existing supply and demand within the Australian labour market and regional labour markets and the appropriate roles for domestic skill formation institutions and skilled immigration policy in addressing these shortages. Using employer demand and sponsorship as a proxy for determining labour market needs, as reflected in the regulatory design of the temporary skilled visa program, can be effective at

addressing the short-term needs of individual employers. However, it can serve to distort the labour market in the long-term, by encouraging employers to develop structural preferences for migrant labour in ways that can erode opportunities for the local workforce. As Professor Martin Ruhs (2013) from the European University Institute argues, skilled immigration policies must be designed with reference to a broader range of policy principles other than simply 'employer interests'. As well as independently verifying employer claims that labour immigration is needed to fill skill shortages, Australian governments must focus more attention on policy alternatives for utilising the existing and potential domestic supplies of skilled labour, such as structured training programs, active labour market programs and requirements by employers in low-wage industries to improve job quality and thereby the attractiveness of work in these industries.

4. Institutional protections of employment rights must serve temporary migrant workers better, a point which we expand on as follows:

As the FWO has never been adequately resourced to fulfil the primary employment law enforcement function that the state once shared effectively with unions, Australia's labour enforcement function must be adequately funded.

a) Funding of Fair Work Ombudsman

The recent submission to the Commonwealth Attorney-General's Department in response to the September 2019 Discussion Paper analyses the FWO's current funding and notes that it is lower now than ten years ago and considerably lower on a per employee basis (Clibborn, 2019b – **Attachment H**). Therefore, it is recommended to significantly increase the FWO's budget. A strong state labour enforcement agency is an important part of increasing chances of catching non-compliant employers, of encouraging voluntary compliance by increasing employer perceptions of being caught, and of adequately protecting temporary migrant workers.

b) Co-Regulation

Enforcement of employment laws for temporary migrant workers ideally involves more than just the state labour enforcement agency. While significantly increasing the FWO's budget is important, there are numerous non-state actors who the Government could better support to be part of the enforcement solution. This involves both their funding and removal of barriers to their effective operation. Following is a brief overview in relation to three such groups of actors: unions; community legal centres and other community-based migrant representative groups; and temporary migrant workers themselves.

i) Including unions as co-regulators

As noted above, Australia once enjoyed an effective system of co-regulation under which the state and unions shared responsibility for enforcing minimum employment standards. But now unions have relatively little role as enforcers of Australia's employment standards. Nonetheless, unions continue to recover a significant quantum in unpaid wages owing to their members. For instance, in their 2018 'Wage Thieves' report, Unions NSW stated:

> "In the past five years the NSW Construction and General Division of the Construction Forestry Mining Maritime and Energy Union (CFMMEU) recovered $31.2 million in unpaid entitlements for members. The average amount of underpaid wages recovered for each member was $2,261.54. In NSW just four unions, collectively recovered an average of $20.93 million over a one year period. In April 2017, the Health Services Union (HSU) acted on behalf of members at Guardian Property Services who had been paid as little as $14 an hour. Following negotiations with the union, the company agreed to pay two workers $90,000 in unpaid wages" (Unions NSW, 2018:11).

This compares to $40.2 million recovered on behalf of underpaid workers in 2018-19 (FWO, 2019). A number of submissions to inquiries (e.g. submissions to the current Senate inquiry into Unlawful underpayment of employees' remuneration from the Shop, Distributive and Allied Employees Association (SDA) and the United Workers Union (UWU)) already outline some measures that would assist unions to carry an additional burden of enforcing employment laws such as expanding rights for unions to inspect employer pay records. We recommend that the government explore options to increase unions' capacity to enforce minimum wage laws.

ii) Enabling community legal centres and other community migrant representative groups

Research has identified vulnerable migrant workers' reluctance to seek to enforce their legal rights, or to engage with state labour enforcement agencies or unions, due to factors such as mistrust of state institutions and unions and fear of deportation (Clibborn, 2018, Farbenblum and Berg, 2018; Campbell et al, 2019). Further, while many temporary migrant workers, such as international students, are aware that they are being underpaid (Berg and Farbenblum, 2018; Clibborn, 2018), they are commonly unaware of the true extent of their underpayment given their relative familiarity with the National Minimum Wage but almost complete lack of awareness of applicable award wages, penalty rates, overtime etc (Clibborn, 2018).

For these reasons, as well as the prohibitive costs of hiring a private lawyer, community legal centres and other community migrant representative groups offer temporary migrant workers valuable sources of information and representation. They can be effective conduits through which temporary migrant workers can exercise their legal rights. However, these groups often

struggle to remain financially viable. Their staff's time is often spent applying for funding of various kinds rather than performing their core duties.

We recommend that the government re-examine its funding model for the community sector to ensure that groups contributing to enforcement of employment laws are adequately funded. Additionally, we recommend reviewing the potential benefit to community legal centres of cost orders following successful recoveries of unpaid wages and reviewing the potential to reduce burdens on community legal centres (and other legal practitioners) that a streamlined, small claims regime might deliver.

iii) Facilitating temporary migrant worker participation in employment law enforcement

Underpinning the recommendations in this section is the necessity for a change in Australian policymakers' approach to temporary migrant workers, making enforcement of employment laws a national priority. In contrast, the present priority is enforcement of migration laws in relation to temporary migrant workers (Clibborn, 2015, Howe, 2018). As noted above, many temporary migrant workers are aware that they are underpaid (i.e. that their employers are breaching employment laws) but they choose not to report their employers nor seek to recover unpaid wages. Therefore, if enforcement of employment laws is a priority, these workers are a potentially significant part of the solution. Union and community legal centre representation, as noted above, will go some way to involving these workers in increasing employer compliance. However, there remain some significant barriers, currently increasing migrant workers' vulnerability to exploitation and preventing them from accessing justice. These barriers should be removed as follows:

- Amend legislation to confirm that employment laws apply to all employees regardless of visa status (see above and **Attachment D**)
- Implement a 'firewall' between the FWO and the Department of Home Affairs so that the FWO does not share any information about temporary migrant workers with the Department of Home Affairs (see above and **Attachment D**)
- Reform Australia's temporary migration system to increase the power and agency of temporary migrant workers in the labour market, applying the general principles of increasing mobility, creating clear pathways to permanency, and introducing independent verification of skill shortages.

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