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Dear Committee Secretary,

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

We welcome the opportunity to make a submission to this inquiry. Our submission focuses in particular on wage theft among the largest group of working temporary migrants in Australia, international students, but also addresses other highly vulnerable groups such as temporary migrants who have engaged in unauthorised work.

As of 31 December 2019, there were 490,543 international students with work rights in Australia (including students' dependents).<sup>1</sup> International students make very significant contributions to the Australian community, education sector and the Australian economy. For many international students, the ability to work while studying in Australia is a critical factor in their ability to meet their living and other expenses in order to study here, and affects their choice of study destination in a highly competitive global international education market. Though it is not possible to know how many international students will work in Australia during their stay, our most recent research indicates this figure is around 65%.<sup>2</sup>

Australia can benefit from both temporary and permanent migration. Providing work rights to certain cohorts of migrants such as international students and Working Holiday Makers carries clear benefits, and does not necessarily require a pathway to permanent residence for those in Australia for a short period. However, a pathway to permanent residence is desirable for temporary migrants who are in Australia beyond a short period, who contribute to, and become part of, the Australian community. Many temporary visa holders spend years moving across and between visa categories without a pathway to permanence. As Peter Mares notes, a

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<sup>1</sup> Department of Home Affairs, *Student visa and Temporary Graduate visa program report* (Report, December 2019) 62.

<sup>2</sup> Bassina Farbenblum and Laurie Berg, *International Students and Wage Theft in Australia* (Report, Migrant Worker Justice Initiative, forthcoming).

fundamental problem with multi-step migration is that it creates a cohort of people who are “not quite Australian”—settled but unsettled, living in a state of extended temporariness and uncertainty that is distressing and demoralising. It can leave in limbo a range of temporary visa holders who have lived, studied and worked in Australia for many years, feel at home here, and want to stay, but are unable to find a foothold, especially amid ever-shifting migration regulatory settings.<sup>3</sup>

This submission outlines findings from our extensive research between 2016 and 2020 on wage theft among temporary migrants in Australia, which clearly has an impact on Australia’s labour market. Immigration settings contribute to exploitation of migrant workers and this submission canvasses several areas for reform. However, widespread underpayment of temporary migrants is also a symptom of broader weaknesses in labour law enforcement and remedial mechanisms in Australia, and wage theft is by no means restricted to these workers. This submission therefore addresses a range of necessary reforms to strengthen labour regulation and enforcement, including ensuring temporary migrants can effectively report non-compliance and obtain remedies.

## I. Impact of wage theft and breaches of workplace rights on temporary migrants

In [\*Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey\*](#) (2017), we present findings of the National Temporary Migrant Work Survey (NTMW Survey), the most comprehensive study to date into wage theft and working conditions among international students, backpackers and other temporary migrants in Australia. The survey draws on responses from 4,322 temporary migrants across 107 nationalities of every region in the world, working in a range of jobs in all states and territories. The survey was conducted online between September and December 2016, in 12 languages in addition to English. Most participants (55%) were international students, followed by around one third (33%) who were Working Holiday Makers while working in their lowest paid job in Australia.

Findings from the NTMW Survey confirm that wage theft is endemic among international students, Working Holiday Makers and other temporary migrants in Australia. For a substantial number of temporary migrants, it is also severe:

- Almost a third (30%) of survey participants earned \$12/hour or less - approximately half the minimum casual wage. This included 25% of international students and 32% of backpackers.<sup>4</sup>
- Almost half (46%) earned \$15/hour or less, including 43% of international students and 46% of backpackers.<sup>5</sup>

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<sup>3</sup> For a detailed discussion of this issue see Peter Mares, *Not Quite Australian: How Temporary Migration Is Changing the Nation* (Text Publishing, 2016).

<sup>4</sup> Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (Report, Migrant Worker Justice Initiative, 2017) 24-27, <<https://www.mwji.org/survey>> (*‘Wage Theft in Australia’*).

<sup>5</sup> Berg and Farbenblum, *Wage Theft in Australia* (n 4) 24-27.

- Underpayment was widespread across numerous industries but was especially prevalent in hospitality and food services, and especially severe in fruit and vegetable picking.<sup>6</sup>
- Other reported forms of wage theft included:
  - 5% of respondents paid an upfront 'deposit' for a job in Australia.<sup>7</sup>
  - 4% of respondents indicated that their employer required them to pay money back in cash after receiving their wages.<sup>8</sup>

In [\*Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia\*](#) (2018), we present further findings of the NTMW Survey, including confirmation that the overwhelming majority of underpaid migrant workers (91%) endured wage theft in silence.<sup>9</sup> The report focuses on the question of why underpaid migrant workers do not try to recover the wages they are owed. We discuss some of the reasons below.

A forthcoming report, *International Students and Wage Theft in Australia*, addresses wage theft among international students in Australia. The report presents findings from the 2019 Information for Impact Survey of over 5,000 international students, focusing on the 2,472 respondents who were asked about their working conditions in Australia. The authors will provide the Committee with a copy of the full report when it is published.

[CONFIDENTIAL MATERIAL REDACTED]

## II. Immigration settings contribute to exploitation of migrant workers and require reform

### 1. Condition 8105 contributes to exploitation and should be removed

Most student visas contain Condition 8105 which prohibits the student from working more than 40 hours per fortnight while their course of study is in session. This restriction profoundly contributes to exploitation of international students, and to their unwillingness to seek help for underpayment or report violations of workplace laws when they occur. The *Wage Theft in Australia* report revealed that students who worked 21 hours or more per week were more severely underpaid than other students.<sup>10</sup> Among these students who potentially worked in breach of Condition 8105, 45% earned \$12 per hour or less - about half the minimum wage for a casual worker. This was almost double the proportion of those who earned \$12 or less within the general international student population (25%). Almost a fifth (18%) of those working 21+

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<sup>6</sup> Ibid 30-31.

<sup>7</sup> Ibid 43-44.

<sup>8</sup> Ibid 45.

<sup>9</sup> Bassina Farbenblum and Laurie Berg, *Wage Theft in Silence: Why Migrant Workers Do Not Uncover Their Unpaid Wages in Australia* (Report, Migrant Worker Justice Initiative, 2018) 10 ('*Wage Theft in Silence*').

<sup>10</sup> Berg and Farbenblum, *Wage Theft in Australia* (n 4) 26.

hours per week earned \$10 per hour or less, compared with 11% of international students overall.

Condition 8105 creates a vicious cycle of exploitation. As the 7-Eleven case study demonstrated, it is often egregious underpayment that drives students to work in excess of 40 hours per fortnight in order to meet their basic living expenses. The one in four international students who are paid \$12 or less per hour must work twice as many hours to earn the equivalent of a worker paid the lawful minimum wage. Having breached their visa, they are then far more vulnerable to continuing exploitation.

Noncompliant employers correctly assume that migrant workers will endure wage theft in silence and will not seek to recover wages or lodge complaints. *Wage Theft in Silence* found that among the large number of participants who acknowledged that they had been underpaid while working on a temporary visa in Australia, more than nine in ten (91%) did not try to recover unpaid wages.<sup>11</sup> The overwhelming majority (97%) of underpaid temporary migrant workers did not contact the FWO for assistance.<sup>12</sup>

It is now widely accepted that many international students do not report problems at work for fear of immigration consequences.<sup>13</sup> [CONFIDENTIAL MATERIAL REDACTED]

This suggests limited impact of the assurance protocol established between the Fair Work Ombudsman (FWO) and the Department of Home Affairs (DHA) in 2017 to address this concern. The ineffectiveness of the protocol is likely attributable to a number of shortcomings. First, it does not provide a guarantee that the DHA will not cancel the international student's visa. Rather, it indicates only that DHA 'will generally not' cancel a visa, detain or remove from Australia a visa-holder who has met the eligibility requirements of the protocol. Second, it affirmatively requires the FWO to pass on the worker's information to the DHA to obtain this potential protection from visa cancellation. For many international students, fear of visa loss extends beyond a fear of losing their current visa to a fear of jeopardising their prospect of obtaining a future visa including permanent residency for which the protocol provides no assurance. Third, the protocol only applies to a visa holder who seeks the assistance of the FWO and then assists the FWO with its inquiries, which a worker may not have the time or inclination to do. Finally, the protocol only applies to a worker whose visa permits work in Australia. It does not apply to workers on a Visitor visa or those who have overstayed their visa,

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<sup>11</sup> Farbenblum and Berg, *Wage Theft in Silence* (n 9) 20. Over 2,250 NTMW Survey participants acknowledged that they had been underpaid while working on a temporary visa in Australia.

<sup>12</sup> *Ibid* 6.

<sup>13</sup> Mandatory conditions 8105 (primary applicant) and 8104 (secondary applicant) apply to all student visas, limiting work hours to 40 per fortnight. See Berg and Farbenblum, *Wage Theft in Australia* (n 4) 8. The chilling effect of this visa condition has also been recognised in Migrant Workers' Taskforce, *Report of the Migrant Workers' Taskforce* (Commonwealth of Australia, 2019) 36-37; Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Visa Holders* (Parliament of the Commonwealth of Australia, 2016) 164, 212-213, 215-216, 259-260 ('*A National Disgrace*').

who are often most vulnerable to exploitation and most likely to remain silent in the face of exploitation.

When it comes to the exploitation of international students, the most effective way to render them less vulnerable to exploitation, and enable them to report exploitation when it occurs, is the removal of Condition 8105 from student visas. This would remove the possibility of a student breaching his or her visa based on the number of hours they work. Many students who are aware they have breached Condition 8105 will avoid contacting a government agency regardless of even the most stringent safeguards in place. Removal of Condition 8105 would remove altogether this fear of visa cancellation that deters many international students from reporting underpayment to the FWO or seeking help from their education provider or others. It would also diminish unscrupulous employers' leverage over international students whose stay in Australia is made precarious as a result of breaching Condition 8105 (often in the context of underpaid work). By enabling underpayment to be detected and addressed more easily, removal of Condition 8105 would establish far greater transparency around international students' working conditions.

There are three potential policy arguments against removing Condition 8105. First, there is a protectionist claim that allowing students to work unlimited hours would jeopardise their studies. This claim, however, is somewhat undermined by the fact that Condition 8105 does not limit the number of hours an international student may engage in volunteer work, or work online for the student's employer in their home country.<sup>14</sup> In any event, the concern is already well addressed by visa Condition 8202. This condition requires that international students maintain enrolment in an approved program of study, and maintain satisfactory attendance in their course as well as course progress for each study period as required by their education provider. There is no evidence that Condition 8105 serves any additional protectionist purpose. Those students who need to meet financial demands will work the hours needed to earn that amount regardless of visa settings, but will do so silently and out of sight of regulators. Indeed, those who are underpaid work far more hours to earn the equivalent of minimum wage, and Condition 8105 can create a vicious cycle in which students who have worked in excess of 40 hours per fortnight become more vulnerable to underpayment and more likely to remain silent. For these reasons, Condition 8202 provides the best way to ensure students are prioritising their studies and limiting time away from their studies engaging in paid work.

A second policy argument against the removal of Condition 8105 is that a student visa with unlimited work rights may encourage individuals to abuse the visa in order to work in Australia without a genuine intention to study. To ensure that the student visa program is not abused by individuals who are not appropriately engaged in their studies, the government should explore ways to strengthen policy settings related to programs of study, instead of relying on Condition 8105 for this purpose. Condition 8202 currently plays a critical role here as well in curbing abuse of the student visa because students who do not meet the academic requirements of their courses will have their visa cancelled. In addition, the Genuine Temporary Entrant (GTE)

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<sup>14</sup> Work is defined in *Migration Regulations 1994* (Cth) reg 1.03 as an activity that, in Australia, normally attracts remuneration.

eligibility requirement for the Student 500 visa provides a further safeguard to ensure the student visa program is accessed as intended. As part of the GTE assessment process, immigration officers evaluate the genuineness of an applicant's desire to study in Australia. This includes consideration of factors such as whether the course is consistent with the applicant's current level of education, whether the course is relevant to past or proposed future employment in the applicant's home country or a third country and expected salary and other benefits that the applicant would obtain in their home country or a third country with qualifications from the proposed course of study in Australia. The GTE requirement limits abuse of the student visa by denying a visa to applicants who appear to have motives other than gaining a quality education.

Nevertheless, there of course remains the possibility that, as with every type of visa, applicants will engage in undetected deception as to their true intentions in their application or that their intentions may change, and that this will happen more frequently with the incentive of unlimited work rights. Students with a far greater financial investment in their studies are unlikely to be abusing the visa program simply in order to work in Australia, given that any money they earn in low-waged jobs would be far eclipsed by their tuition fees. The concerns about misuse of the visa are therefore primarily restricted to those in short-term and less expensive study programs. Those primarily motivated to work in Australia may study one or more 'easy' courses with low commitments of time and effort that enable easier compliance with Condition 8202 while working. There is an argument that more of these students would do so if the entitlement to work were unrestricted.

It is for these students that the government is faced with the challenge of weighing the enhanced vulnerability to workplace exploitation that comes with restricted work rights against potential abuse of the student visa. Among student visa-holders who are primarily motivated to work, many are likely working in excess of 40 hours a fortnight in any event. Clearly, Condition 8105 does not provide a complete deterrent against these practices. However, it is possible that many more would apply for student visas in order to work if there were no penalties for working beyond 40 hours per fortnight, given that there is no cap on the student visa program. These concerns may be sufficiently grave to retain Condition 8105 for a smaller number of students for whom the likelihood of misuse of the visa is greatest. To minimise the number of individuals seeking a student visa for work purposes, the government could establish minimum requirements of courses that are eligible for a student visa with unrestricted work rights or impose other measures connected with oversight and regulation of shorter or less intensive courses with large international student enrolments. For these same reasons, it is also clear that a further restriction beneath 40 hours per fortnight for this cohort would not be effective in curbing exploitation. It would likely have the opposite effect - driving exploitation further underground among those students who are financially compelled to work in order to contribute to basic living expenses and course fees in Australia.

Third, there is a policy argument that allowing students to work unlimited hours would further saturate the labour market and limit work opportunities for residents and citizens. It is not clear that Condition 8105 is in fact substantially reducing the amount of work undertaken by international students, or that removing this visa condition would increase their labour market

participation. Many international students already work more than 40 hours per fortnight and are more likely to earn lower wages than other international students. If their vulnerability to underpayment was reduced by removing Condition 8105, they could work fewer hours to earn the equivalent amount. Measures discussed above in addition to Condition 8202 would be more effective at limiting labour market participation than Condition 8105. Ultimately, it is unclear that some of the jobs in which international students work would be desired by Australian residents and citizens. Indeed, in the absence of a large guest worker program, international students (and Working Holiday Makers) in Australia perform the work that is undertaken by migrant workers in most other OECD countries for this reason.

The protective effect of removing Condition 8105 cannot be achieved through other means. Some have suggested that, instead of removing Condition 8105 altogether, the government should explore alternative measures that limit the exercise of the Minister's discretion to cancel a student visa in the event of a breach. This could include an initial presumption in the worker's favour upon first breach, formal institution of one or more warnings prior to visa cancellation, and/or a number of factors that must be considered prior to cancellation such as whether the breach resulted from the conduct of an employer. In our opinion, these measures will have limited impact on the international students who are accepting underpayment in silence due to visa concerns. While they may limit the immediate punitive effect of Condition 8105, we understand that student visas are in fact very rarely cancelled on the basis of a breach of this condition.<sup>15</sup> Students' silent acquiescence to wage theft is therefore not based on a rational assessment of the likelihood of visa cancellation, but rather on the conclusion that drawing attention to their noncompliance with even a remote possibility of jeopardising their current visa or future visas is a risk that is not warranted.

At the same time, we acknowledge that removal of Condition 8105 is not a panacea to international student exploitation. This reform would not address broader labour market issues, employability of international students and fear of job loss as a deterrent to reporting or seeking assistance. However, at the very least, it throws the door wide open to international students who have left an exploitative job to report that wage theft and other workplace breaches and obtain remedies.

## 2. FWO's sharing with DHA of information regarding unauthorised work prevents reporting of exploitation and a firewall should be established

As discussed above, workers who fear even the slightest chance of jeopardising their current stay in Australia or a future visa are far less likely to contact the government or report exploitation (or report more serious conduct constituting forced labour or trafficking). This is the case for international students who have breached Condition 8105 but is also the case for workers on a Visitor visa, Bridging visa E (with no work rights) and visa-overstayers, among

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<sup>15</sup> For example, the Department of Immigration and Border Protection (DIBP) informed the authors that between 1 July 2012 and 30 June 2015, only 32 student visas were cancelled for breach of work rights, and that 102 visas of students' dependents were cancelled for breach of Condition 8104 their work rights: private communication between DIBP and Laurie Berg, 5 May 2016.

many others. These groups who are least likely to contact the FWO are also the most likely to be severely exploited.

If the government is genuinely committed to creating an incentive for workers to report wage theft and exploitation to FWO, it must establish a robust firewall between the FWO and the DHA.<sup>16</sup> The firewall must prevent the FWO from sharing with the DHA any identifying information of a temporary migrant who seeks the agency's assistance unless the FWO obtains the migrant's informed consent. It should extend not only to workers whose visa permits work (such as international students) but also to workers whose visas prohibit work or who have overstayed their visa in Australia.<sup>17</sup> This should replace the current protocol between the two agencies which permits sharing of this information. This proposal would require a reconsideration of FWO's explicit role in enforcement of visa conditions, for example in the Temporary Skills Shortage program, as well as compliance partnerships with DHA such as Taskforce Cadena. Firewalls limiting labour inspectorates' sharing of information with immigration authorities have been instituted in a number of jurisdictions including the United States, Brazil and Israel.

In the absence of a new robust firewall applying to all temporary migrant workers, we recommend strengthening the existing assurance protocol between FWO and DHA. At an absolute minimum, the amended protocol should have the following features:

- An absolute assurance against visa cancellation for those who meet the criteria (as opposed to 'generally will not cancel').
- In addition to exercising discretion not to cancel the worker's current visa, the DHA will not consider a worker's breach of visa conditions in determining whether to grant any future visa.
- Application to any worker who engages with the FWO, regardless of whether the worker assists the FWO or pursues a matter against an employer, and any worker who is involved in legal proceedings in relation to workplace exploitation.
- Application to visa holders who do not have work rights and to visa-overstayers.

The main policy argument against a firewall or expanded Protocol is that it would limit DHA's ability to collect intelligence on visa non-compliance, labour exploitation, forced labour, trafficking or other forms of organised criminal activity. However, it is clear that, in the current arrangement, DHA is likely gathering little if any intelligence from FWO about international students or other workers who have breached their visa, because they simply will not contact or otherwise engage with the agency. Far more intelligence could flow to DHA from the FWO if

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<sup>16</sup> Various proposals for a firewall between FWO and DHA have been made, see e.g. Senate Education and Employment References Committee, *A National Disgrace* (n 13) 319-320; Productivity Commission, *Workplace Relations Framework* (Inquiry Report No 76, 2015) 932 ('*Workplace Relations Framework Inquiry*'). For arguments in favour of a firewall more broadly, see François Crépeau and Bethany Hastie, 'The Case for 'Firewall' Protections for Irregular Migrants: Safeguarding Fundamental Rights' (2015) 2-3, *European Journal of Migration and Law (EMIL)* 157.

<sup>17</sup> Laurie Berg and Bassina Farbenblum, 'Exploitation of Unauthorised Migrant Workers in Australia: Access to the Protection of Employment Law' in Bernard Ryan (ed), *Migrant Labour and the Reshaping of Employment Law* (Hart Publishing, forthcoming) ('*Exploitation of Unauthorised Migrant Workers*').



FWO could assure visa holders it would not pass on any identifying information but could provide deidentified intelligence to DHA with a worker's consent. Clearly, the cost to Australia of the FWO's limited ability to identify and address rampant workplace exploitation among migrants working in breach of their visa condition is far greater than the benefit gained from any small amount of intelligence currently shared between the FWO and DHA under the existing arrangement.

In addition to this practical argument, there may also be a policy argument that temporary migrants should not have the benefit of government assistance for work undertaken in breach of their visa conditions. However, the FWO already assists workers who have breached their visa conditions and appropriately takes the position that the *Fair Work Act 2009* (Cth) ('*Fair Work Act*') applies to all workers regardless of visa status. In so doing, it prioritises the integrity of workplace laws in Australia and recognises the right of all workers to lawful remuneration for work performed regardless of immigration status.

It must be recognised that although a firewall may encourage more migrant workers to approach the FWO, it will never fully address many migrant workers' visa-related fears about taking action. Some may never trust a government institution. A firewall would also offer no protective benefits beyond the FWO context. For example, many would continue to be silenced by the fear that if they complain about their working conditions their employer may retaliate by reporting the worker's visa breach directly to DHA.

### 3. Implement policy of immediate automatic referral to FWO of individuals engaged in unauthorised work upon detection by DHA and prior to removal

There are additional ways in which immigration enforcement enables the perpetuation of labour exploitation with impunity. As discussed above, workers engaged in unauthorised work are often most vulnerable and most severely exploited. Employers know they will not complain for fear of removal. The vast majority of workers who hold visas without work rights, or who have overstayed a visa, are subject to summary removal once detected (with limited exceptions such as those whose circumstances amount to criminal trafficking and come forward as trafficking victims). These unauthorised workers are not proactively referred to the FWO or support services to report workplace exploitation or enforce any employment rights they may have prior to removal. A search of the DHA LEGEND.com database reveals no relevant policy or direction requiring the referral of unauthorised workers to FWO or support services (including to obtain legal advice) prior to removal, or notification to the migrant that they may have an employment claim. Rather, the only reference to employment claims in the context of removal is that '[t]he existence of unresolved claims or complaints should not stop or delay removal'.<sup>18</sup>

To address this gap, a protocol should be implemented under which DHA officers are required to provide automatic referrals to FWO for individuals engaged in unauthorised work upon

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<sup>18</sup> DIBP Procedures Advice Manual 3, 2016 'Removal from Australia'.

detection by DHA, and prior to removal.<sup>19</sup> The absence of such a referral protocol has significant consequences. First, it enables employers of unauthorised workers to engage in severe wage theft and other violations with impunity. Indeed, in one case we know of, immigration officials were aware that a labour hire operator withheld payments from unauthorised workers and then reported them, whereupon the officials rapidly removed the workers without payment.<sup>20</sup> Second, it deprives the FWO of critical intelligence on some of the most egregious instances of underpayment and other breaches of the *Fair Work Act*. Third, it denies workers the opportunity to secure fair pay for work performed in accordance with their entitlements under the *Fair Work Act*, undermining the integrity of Australia's labour law regime and breaching Australia's international human rights obligations.

In the vast majority of cases, however, such a protocol will likely only be meaningful if FWO's consideration of these complaints is accompanied by a short Bridging visa.

#### 4. Introduce bridging visa arrangements to pursue underpayment or other work-related claims

Migrant workers may be deterred from taking action against employers under workplace and occupational health and safety legislation because their stay in Australia will end, either because they lack a valid visa, their visa will expire before their claim is resolved or because they fear visa cancellation (if DHA detects breach of visa condition). Service providers have observed that it is very difficult to pursue claims on behalf of a worker who has returned home, and will generally de-prioritise taking these cases over workers who are present in Australia.<sup>21</sup>

We recommend the introduction of a new Bridging visa to regularise the status of these workers on any temporary visa and visa-overstayers at least for the duration of legal proceedings or investigations by relevant authorities.<sup>22</sup> A policy argument against this proposal is that it may create an incentive for a worker to bring an unmeritorious claim against their employer in order to extend a worker's stay in Australia. To address this concern, Bridging visa eligibility should be contingent on certification of the merits of the claim by a legal practitioner or officer of a relevant government agency such as the FWO or health and safety authority, with ordinary serious professional penalties for misrepresentation.<sup>23</sup> In addition, establishment of a new mechanism for swift adjudication of wage claims (proposed below) will ensure that the duration of the Bridging visa would be relatively short.

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<sup>19</sup> Berg and Farbenblum, 'Exploitation of Unauthorised Migrant Workers' (n 17); Laurie Berg, *Migrant Rights at Work: Law's Precariousness at the Intersection of Immigration and Labour* (Routledge, 2016) 285 ('*Migrant Rights at Work*').

<sup>20</sup> Stephen Howells, *Report of the 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007* (Cth of Australia, 2011), 57.

<sup>21</sup> Laurie Berg and Bassina Farbenblum, 'Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program' (2018) 41(3) *Melbourne University Law Review* 1051 ('*Lessons from the 7-Eleven Wage Repayment Program*').

<sup>22</sup> Berg, *Migrant Rights at Work* (n 17) 277ff.

<sup>23</sup> For a more extended discussion of this issue, see *ibid.*

## 5. Remove the criminal offence of unauthorised work and ensure labour protections apply to unauthorised workers

Section 235 of the *Migration Act 1958* (Cth) (*'Migration Act'*) establishes a criminal offence for work performed without visa authorisation - whether because the worker had overstayed a visa or worked contrary to a condition of an otherwise valid visa. This provision does not appear to have a deterrent purpose because temporary migrants who engage in unauthorised work already face a far more significant penalty in the form of visa cancellation and removal from Australia. Moreover, it does not serve any practical function and indeed, to our knowledge, has never been enforced. It can only be assumed that its purpose is symbolic, and we suggest that this symbolism is misguided and has detrimental consequences.

One legal consequence has been judicial interpretation of the interaction of section 235 with protections for workers under employment and workplace health and safety laws. There is conflicting caselaw on this issue, with some courts determining that the performance of work that amounts to a criminal offence under s 235 will void a contract of employment.<sup>24</sup> As a result, statutory schemes which protect workers under a contract of employment, such as the *Fair Work Act*, and other protective laws, will not apply. This renders unauthorised workers especially vulnerable to underpayment and other breaches of workplace laws. It grants impunity to their employers and indeed rewards them by enabling them to benefit from the worker's labour but then avoid remediating harms to the worker without consequence.

We recommend a number of amendments to ensure that the coverage of employment and workplace health and safety laws over unauthorised workers is placed beyond doubt:

1. Section 235 should be removed from the *Migration Act*.
2. If Section 235 is not removed, it should be amended so as to clarify that commission of this offence does not render protections under other statutes unenforceable.<sup>25</sup>
3. The *Migration Act*, the *Fair Work Act* and other relevant protective workplace legislation should be amended to clarify that a visa breach does not void a contract of employment and that *Fair Work Act* provisions apply even when a person has breached their visa conditions or has performed work in the absence of a visa.<sup>26</sup> Absent these amendments, a provision of the type found in some workers' compensation statutes should be inserted into the *Fair Work Act*, to specify that, as a matter of discretion, the illegality of an employment arrangement may be disregarded in any proceedings brought under the Act.

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<sup>24</sup> For a more detailed discussion of this caselaw, see *ibid* 170-178.

<sup>25</sup> Berg and Farbenblum, 'Exploitation of Unauthorised Migrant Workers' (n 17).

<sup>26</sup> *Ibid*; Berg, *Migrant Rights at Work* (n 17) 170. This recommendation has also been made in the following: Recommendation 23 of the Senate Education and Employment References Committee, *A National Disgrace* (n 13); and Recommendation 29.4 of the Productivity Commission, *Workplace Relations Framework Inquiry* (n 16) 931.

### III. A discourse of international students' complicity in their exploitation is silencing victims of wage theft

A discourse has emerged among government agencies in which international students are characterised as 'complicit' in the problem of widespread exploitation because they knowingly agree to be underpaid. For example, in its inquiry report on exploitation of international students in 7-Eleven stores around the country, the FWO described a 'culture of complicity' between franchisees and employees because employees were participating in activities to conceal their underpayment (including paying cash back to their employers after wages were paid, or receiving fraudulent payslips that did not correspond with wages paid).<sup>27</sup> This construction is reinforced by employers who lead workers to believe they are collaborating to break the law by accepting underpayment in an arrangement that supposedly benefits the employer and the worker. This perception of culpability can be compounded in situations where the student is knowingly working in breach of visa conditions.

This construction of international students' culpability in their exploitation is deeply problematic. Obviously, it is the responsibility of the employer to pay the worker correctly, and not the responsibility of the worker to ensure he or she is not underpaid. This discourse wrongly assumes that international students elect to be underpaid or could somehow compel their employer to pay them correctly or find a job that complies with Australian labour laws. It is now abundantly clear that most international students work in a labour market in which noncompliance with minimum wage rates is the norm, and most international students are unable to secure compliant jobs (see data in Impact of Wage Theft section above). Indeed, the *Wage Theft in Australia* report revealed that, among international students who earned \$15 per hour or less, 86% believed that many, most or all other international students were earning less than the statutory minimum wage.<sup>28</sup> In a highly competitive labour market for low-paid jobs, international students have no bargaining power or leverage over a prospective or current employer and will generally simply lose their job if they protest underpayment.

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### IV. Labour market challenges posed by temporary migration must be addressed through strengthened labour law enforcement, not only migration policy settings

Widespread underpayment of international students, and other temporary visa-holders, clearly has an impact on Australia's labour market. However, this underpayment is a symptom of broader weaknesses in labour law enforcement and remedial mechanisms in Australia, rather than the cause. As would be expected, regulatory weaknesses are most manifest among the

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<sup>27</sup> Fair Work Ombudsman, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and Addressing the Drivers of Non-Compliance in the 7-Eleven Network* (Report, April 2016) 32.

<sup>28</sup> Berg and Farbenblum, *Wage Theft in Australia* (n 4) 36.

most vulnerable workers - those who have least power in the employment relationship and face barriers to complaining or taking action in the face of exploitation - including temporary migrants, but also including Australian young workers, permanent migrants and other vulnerable workers. Regulatory weaknesses are clearly not confined to these most vulnerable workers: as recent media revelations indicate, underpayment and other non-compliance with employment laws are perpetrated to varying degrees throughout workplaces across Australia.

As noted above, the *Wage Theft in Silence* report confirmed that the overwhelming majority of migrant workers (91%) endured wage theft in silence.<sup>29</sup> Among the small number of survey participants who tried to recover unpaid wages through any channel, two in three recovered nothing (67%).<sup>30</sup> Fewer than one in six (16%) received the full amount they were owed.<sup>31</sup>

Detection of wage theft will remain illusive unless workers are incentivised to report wage theft. When the likelihood and quantum of a successful outcome under current processes are weighed against the time, effort, costs and risks to immigration and/or employment status, it appears rational that individual migrant workers are not seeking remedies even if they are being significantly underpaid.

This perception can only be mitigated through systemic reforms that empower international students (and other workers) to report non-compliance and obtain redress, and reforms to institutional mechanisms to deliver swift and certain outcomes to the workers who do so. Indeed, *Wage Theft in Silence* revealed that despite the very low number of underpaid international students who had attempted to recover the wages they were owed, over half (56%) were open to trying to do so in the future.<sup>32</sup> Detection and deterrence of wage theft also requires substantially expanded investigation and enforcement on the part of the Fair Work Ombudsman and other regulators.

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<sup>29</sup> Farbenblum and Berg, *Wage Theft in Silence* (n 9) 20.

<sup>30</sup> *Ibid* 30.

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid* 7.

## 1. Reforms to the Fair Work Ombudsman

We have canvassed shortcomings and recommendations for reform of the FWO's policies and practices to address wage theft of migrant workers in detail in *Wage Theft in Silence, Lessons from the 7-Eleven Wage Repayment Program*, and *Migrant Workers' Access to Remedy*. We highlight some relevant findings and recommendations from *Wage Theft in Silence* here.

*Wage Theft in Silence* revealed that among those participants who tried to recover unpaid wages through the FWO, 58% recovered nothing.<sup>33</sup> Only one in five (21%) recovered their full wages.<sup>34</sup>

Although international students are often advised to contact the FWO regarding wage theft, the FWO focuses on strategic compliance activities and directing self-help. It does not provide an individual wage recovery mechanism. Nor is the regulator a worker advocate, either in terms of partisan support for a worker or providing the practical assistance most migrant workers need to calculate and pursue the wages they are owed.<sup>35</sup>

The FWO must receive increased resources to identify, investigate and carry out enforcement activities against employers that are underpaying workers.

The FWO should also receive additional funding to be made more accessible to migrant workers.<sup>36</sup> For a start, the FWO should establish a dedicated migrant worker team within its Infoline. This should include officers who are expert in the working conditions of migrant workers and their particular service needs. These officers should start from the assumption that self-help will almost always be an inappropriate treatment path for migrant workers. Ideally, officers should be bilingual in the major language groups (e.g. Mandarin, Spanish, Korean), given that among participants who found their job through an internet site in their own language, a third (32%) cited low English language as a barrier to wage recovery.<sup>37</sup>

In the absence of a new dedicated support service, the FWO's Overseas Workers' Team should be resourced to provide significant assistance to individual migrant workers who report underpayment. Assistance is required to calculate unpaid wages, as well as substantial support to reduce and/or simplify the work needed to engage with the FWO's Request for Assistance process (or court processes).<sup>38</sup> In *Wage Theft in Silence*, a third (35%) of temporary migrants

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<sup>33</sup> Farbenblum and Berg, *Wage Theft in Silence* (n 9) 30.

<sup>34</sup> *Ibid*,

<sup>35</sup> Laurie Berg and Bassina Farbenblum, 'Migrant workers' access to remedy for exploitation in Australia: The role of the national Fair Work Ombudsman' (2017) 23(3) *Australian Journal of Human Rights* 314, 321-323, 323-325 ('*Migrant workers access to remedy*').

<sup>36</sup> See also Joanna Howe, Laurie Berg and Bassina Farbenblum, 'Unfair Dismissal Law and Temporary Migrant Labour in Australia' (2018) 46(1) *Federal Law Review* 19; Senate Education and Employment References Committee, *A National Disgrace* (n 13) 321-322; and WEstjustice, *Not just work: Ending the exploitation of refugee and migrant workers* (Report, WEstjustice Western Community Legal Centre, 2016) 122, 142 ('*Not Just Work*').

<sup>37</sup> Farbenblum and Berg, *Wage Theft in Silence* (n 9) 38.

<sup>38</sup> See also WEstJustice, *Not Just Work* (n 36) 86, 132.

who had been underpaid reported that they would not try to recover wages because it was too much work, and 16% indicated that they would not do so because the forms are too complicated.<sup>39</sup> A dedicated accessible website portal for migrant workers should also be established, which should expeditiously link migrant workers to the Overseas Workers' Team, rather than primarily focusing on providing information.

Currently, the FWO lacks power to compel employers to attend FWO mediations. At a legislative level, power should be granted to enable the FWO to compel an employer to participate in mediation and/or rectify underpayment.<sup>40</sup> If the FWO were to make determinations or issue Compliance Notices against employers that do not participate in mediation or rectify underpayment, this could be presented in court as evidence in favour of a worker's claim or create a presumption in favour of a worker.

In addition to these reforms to enable migrant workers to report and recover unpaid wages, substantial reforms should be implemented to strengthen the FWO's independent investigation and enforcement functions to ensure that detection of wage theft is not unduly reliant on worker reporting.<sup>41</sup> As unions' right of entry and other powers have diminished, it has become even more critical that FWO is given stronger information-gathering powers. The FWO should also routinely use Infringement Notices, Letters of Caution and Compliance Notices to compel employers to engage in dispute resolution and remediate wage theft. For instance, the scope of Compliance Notices should be expanded to include use where an employer unreasonably fails to engage in mediation and employer non-compliance should result in default court judgment. This requires increased resources to the FWO to take further action in many mediated wage theft disputes, alongside increased resources for the FWO to conduct a greater number of unannounced workplaces audits to detect noncompliance and alert noncompliant employers to a greater risk of detection by the regulator and meaningful penalties.<sup>42</sup>

## 2. Establishment of an accessible and effective wage recovery forum

There is currently no accessible mechanism for migrant workers (or other low-waged workers) to recover unpaid wages. As noted above, the FWO does not provide an individual wage recovery mechanism. Only 3% of underpaid participants in the NTMW Survey approached the FWO for assistance and three in five of those did not recover any unpaid wages.<sup>43</sup>

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<sup>39</sup> Farbenblum and Berg, *Wage Theft in Silence* (n 9) 36.

<sup>40</sup> WEstJustice, *Not Just Work* (n 36) 28, 133

<sup>41</sup> See Migrant Workers' Taskforce, *Report of the Migrant Workers' Taskforce* (n 13) 90-92; Farbenblum and Berg, *Wage Theft in Silence* (n 9) 11; Berg and Farbenblum, *Migrant workers access to remedy* (n 35) 322, 326; and Productivity Commission, *Workplace Relations Framework Inquiry* (n 16) 927.

<sup>42</sup> See, e.g. Recommendations 5, 6, and 7 of the Migrant Workers' Taskforce, *Report of the Migrant Workers' Taskforce* (n 13) regarding penalties (at 9-10); Recommendation 31 of the Senate Education and Employment References Committee, *A National Disgrace* (n 13) which recommended an independent review of the resources and powers of the FWO, including penalty provisions (at 327); and Recommendation 29.2 of the Productivity Commission, *Workplace Relations Framework Inquiry* (n 16) which recommended additional resources for the FWO to identify, investigate, and carry out enforcement activities (at 927).

<sup>43</sup> Farbenblum and Berg, *Wage Theft in Silence* (n 9) 6, 30.

The courts are similarly rarely utilised by migrant workers, primarily because they are inaccessible in practice. A small claims jurisdiction of the Fair Work Division of the Federal Circuit Court (FCCA) was introduced in 2009 (*Fair Work Act*, s 548) in an effort to increase the accessibility of certain civil remedy proceedings for individual plaintiffs. However, although these procedures are more informal and not bound by formal rules of evidence, the complexity of applications creates prohibitive barriers for most temporary migrants.<sup>44</sup> Only a single participant in the NTMW Survey reported that they had gone to court to recover unpaid wages.<sup>45</sup> This is consistent with a perception among legal practitioners that this jurisdiction is inaccessible to the overwhelming majority of migrant workers.<sup>46</sup>

As recognised by the ALP in its election platform in 2019, there is a need for a new specialised forum through which migrant workers can seek to recover unpaid wages.<sup>47</sup> Such a forum could be established as a new independent jurisdiction or sit within the Fair Work Commission (FWC), recognising potential constitutional challenges that must be overcome. The forum should have the following key features:

- accessible to migrant workers including well-resourced individualised assistance to calculate wage claims, along with legal advice and representation
- ability to deliver remedies swiftly (e.g. resolution of claims within 90 days)
- evidentiary presumptions in the worker's favour in the absence of payslips or in the context of widespread patterns of fraudulent recording of wages or hours worked<sup>48</sup>
- the ability to group complaints or file representative proceedings on behalf of multiple workers
- standing for unions to file proceedings on behalf of members.

Further reforms have been proposed to the FWC, including new powers to make orders in the public interest to compel employers or lead firms to address systematic underpayment where the Commission is reasonably satisfied that serious widespread breaches of the *Fair Work Act* have occurred.<sup>49</sup>

In the absence of a new forum, the following reforms should be introduced to make the small claims jurisdiction more effective and accessible:

- increased jurisdictional limit of the small claims jurisdiction of the Fair Work Division of the FCCA from \$20,000 to \$30,000

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<sup>44</sup> As discussed in Farbenblum and Berg, *Wage Theft in Silence* (n 9) 15; and Berg and Farbenblum, *Migrant workers access to remedy* (n 35) 313-314, 324.

<sup>45</sup> Farbenblum and Berg, *Wage Theft in Silence* (n 9) 28.

<sup>46</sup> *Ibid* 44.

<sup>47</sup> Phillip Coorey, 'Labor accelerates fair pay push with wage-theft tribunal' *Australian Financial Review*, (online, 14 May 2019) <<https://www.afr.com/politics/federal/labor-accelerates-fair-pay-push-with-wage-theft-tribunal-20190514-p51n0r>>.

<sup>48</sup> See Berg and Farbenblum, *Lessons from the 7-Eleven Wage Repayment Program* (n 21) 1084.

<sup>49</sup> The authors thank Anthony Forsyth and other participants at the Workshop on Effective Redress for Migrant Workers for these insights (Melbourne Law School, 7 December, 2017).



- establishment of a dedicated list for underpayment-related matters, ideally with a specialist set of federal judges
- ability to group complaints, join applications or file representative proceedings where the aggrieved workers are employed by the same employer entity or corporate group, which would substantially reduce the resources required by service providers to represent each individual worker
- prescribed time-frames to ensure claims are dealt with expediently, which is important for migrant workers whose visa will soon end
- changing current costs rules so that legal costs can be awarded to a worker whose claim is successful or where the employer does not participate in mediation
- provision for penalties against employers
- reducing evidentiary burdens on workers, for example by drawing an adverse inference against an employer who does not cooperate with the FWO or fails to comply with FWO sanctions
- expanded remedies available to include compensation for financial loss, hurt, humiliation and distress as well as orders designed to achieve systematic reform, such as training for employers and penalties for egregious employer behaviour.<sup>50</sup>

### 3. Further reforms to address challenges related to workplace exploitation of temporary migrants

#### i. Improve legal services for migrant workers

Even for migrant workers who want to try to recover unpaid wages, it is very difficult if not impossible for them to do so without assistance in any forum.<sup>51</sup> The FWO does not provide individualised assistance to calculate and recover unpaid wages other than for a very limited number of workers.<sup>52</sup> Rather, their focus is on telephone-based ‘self-help’, directing workers who seek assistance to online materials or referring them to external legal service providers. Self-help is inappropriate for vulnerable migrant workers who are generally unable to pursue wage claims (or enforce other rights) without individualised assistance.

There are currently limited free legal avenues and resources available for advice, support and representation for individual migrant workers to calculate and pursue the wages they are

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<sup>50</sup> The authors thank Gabrielle Marchetti, Tarni Perkal, Catherine Hemingway, Dr Tess Hardy, Professor Joo-Cheong Tham, and participants at the Workshop on Effective Redress for Migrant Workers for insights that shaped these recommendations (Melbourne Law School, 7 December, 2017). The Migrant Workers’ Taskforce, *Report of the Migrant Workers’ Taskforce* (n 13) recognised the need for reforms to the small claims jurisdiction and recommended that a review of the jurisdiction be undertaken (see Recommendation 12, pp. 94-95, 98).

<sup>51</sup> Migrant Workers’ Taskforce, *Report of the Migrant Workers’ Taskforce* (n 13) 58, 94; Farbenblum and Berg, *Wage Theft in Silence* (n 9) 38; Berg and Farbenblum, *Lessons from the 7-Eleven Wage Repayment Program* (n 21) 1051, 1070-1071, 1080; Productivity Commission, *Access to Justice Arrangements* (Inquiry Report, vol 2, 5 September 2014) pp. 734–736; and WEstJustice, *Not Just Work* (n 36) 128, 139-140.

<sup>52</sup> Berg and Farbenblum, *Migrant workers access to remedy* (n 35); WEstJustice, *Not Just Work* (n 36).

owed.<sup>53</sup> There is no recurrent funding for generalist community legal centres to provide this individualised assistance. Resources should be directed to expanding the capacity of community legal centres and trade unions to provide individualised advice and representation to assist migrant workers to calculate and recover unpaid wages, coordinate and deliver education programs to vulnerable workers and pursue strategic policy and law reform objects arising from casework and education programs.

The international education sector can also play a critical role in resourcing legal support services for international students. We recommend that universities be supported to provide on-campus legal services to international students for enforcement of workplace rights including wage recovery claims, as well as general employment and taxation law advice.

Both community legal centres and international student legal services should have a 'fast track' to assistance by the FWO for migrant workers whom they assist and determine have bona fide claims.

## ii. Empower unions to assist and represent migrant workers

In light of the FWO's limited capacity to inspect workplaces to detect wage theft, and migrant workers' unwillingness to report it (see discussion above), unions can play a critical role in uncovering wage theft, pressuring employers to comply with the *Fair Work Act*, and supporting workers to claim unpaid wages. This is especially important for the many migrant workers who are extremely reluctant to act individually.

Although unions in some industries (such as meat-packing, horticulture and commercial cleaning) have proactively sought to recruit and represent temporary migrants with notable successes, temporary migrants are generally unlikely to proactively seek union assistance. Only 4% of respondents in the NTMW Survey stated that they were union members. Among those who had been a member of a trade union, 28% of underpaid participants had tried or were planning to recover their wages, compared with 10% of underpaid participants who had never been a member of a trade union.<sup>54</sup> Respondents who were assisted by a union to recover wages reported the highest rates of wage recovery.<sup>55</sup>

In order for unions to enable migrant workers to recover wages and prevent future wage theft, their right-of-entry must be restored and strengthened. Right of entry should extend to enforcing awards and minimum entitlements wherever the relevant union can show they have rights of industrial coverage over relevant workers (rather than actual membership).

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<sup>53</sup> WEstJustice, *Not Just Work* (n 36) 139; Farbenblum and Berg, *Wage Theft in Silence* (n 9) 14, 42.

<sup>54</sup> Farbenblum and Berg, *Wage Theft in Silence* (n 9).

<sup>55</sup> *Ibid* 30.

### iii. Further law reforms including extending liability and supply chain measures

Further regulatory reform is necessary to address current gaps in accountability for employers engaged in wage theft. We direct this Committee to our submission to the Senate Economics References Committee Inquiry into the unlawful underpayment of employees' remuneration, in which we made further recommendations regarding:

- A Commonwealth labour hire licensing scheme;
- Reforms to address phoenixing activity;
- Amendments to the *Fair Entitlements Guarantee Act 2012* (Cth);
- Expansion of section 550 of the *Fair Work Act* to establish appropriate liability within supply chains and franchises;
- Reforms to better target sham contracting arrangements;
- Development of minimum standards for business-led processes remediating large scale wage theft; and
- Modifications to federal government procurement practices.

## V. Further information and recommendations

We draw the Committee's attention to additional publications in which we address the nature and causes of wage theft among temporary migrant workers in Australia, as well as the reasons why temporary migrants endure wage theft in silence.

1. Bassina Farbenblum and Laurie Berg, 'Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman' (2017) 23(3) *Australian Journal of Human Rights* 310.

This article focuses on the role of the national labour inspectorate, the Fair Work Ombudsman (FWO). It considers the extent to which individual migrant workers seek assistance from FWO to recover their personal unpaid wages, and the remedial outcomes of individual claims lodged with the agency. We illuminate structural factors contributing to migrants' reluctance to engage with FWO, as well as factors contributing to low wage recovery rates for those who do contact FWO. We recommend reforms to incorporate a new migrant-centred approach that recalibrates the risks and costs of seeking remedies against the likelihood of obtaining a just outcome.

2. Laurie Berg and Bassina Farbenblum, '[Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program](#)' (2018) 41(3) *Melbourne University Law Review* 1035.

This article uses the systematic exploitation of 7-Eleven's international student workforce as a case study to illuminate systemic barriers that prevent temporary migrants from accessing remedies for unpaid entitlements within existing legal and institutional frameworks. The article examines the Wage Repayment Program established by 7-Eleven as a case study of a business-led redress mechanism to rectify large-scale underpayment. We identify the attributes of the program that contributed to its unusual

accessibility and efficacy, and which may point to conditions needed to improve temporary migrants' access to justice through state-based institutions and business-led redress processes.

3. Laurie Berg and Bassina Farbenblum, 'Exploitation of Unauthorised Migrant Workers in Australia: Access to the Protection of Employment Law' in Bernard Ryan (ed), *Migrant Labour and the Reshaping of Employment Law* (Hart Publishing, forthcoming)

This chapter presents findings on the prevalence and nature of exploitative work experienced by migrants engaging in unauthorised work in Australia, including workers who have overstayed their visa, and those who have worked in breach of their visa conditions. It examines serious barriers which prevent unauthorised workers from avoiding or addressing wage theft and suggests regulatory reforms in response. These include legislative action to ensure the validity of employment contracts of those engaging in unauthorised work and an enforceable firewall regarding immigration status to decrease unauthorised workers' fear of detection when seeking FWO assistance.

## Summary of Recommendations

|   | <b>RECOMMENDATION</b>  | <b>PAGE(S)</b> |
|---|--|----------------|
| 1 | Remove the 40-hour fortnightly work condition on student visas.  | 4-8            |
| 2 | Establish a firewall between the FWO and DHA to prevent the sharing of information identifying temporary migrants when the individual reports to the FWO or seeks assistance in relation to a breach of his or her labour rights. The firewall should extend to all non-citizens, including those whose visas prohibit work or who have overstayed their visa in Australia.  | 8-9            |
| 3 | In the absence of a new robust firewall applying to all temporary migrant workers, strengthen the existing assurance protocol between FWO and DHA. At an absolute minimum, the protocol should have the following features: <ul style="list-style-type: none"> <li>● An absolute assurance against visa cancellation for those who meet the criteria (as opposed to 'generally will not cancel').</li> <li>● In addition to exercising discretion not to cancel the worker's current visa, the DHA will not consider a worker's breach of visa conditions in determining whether to grant any future visa.</li> <li>● Application to any worker who engages with the FWO, regardless of whether the worker assists the FWO or pursues a</li> </ul> | 9              |

matter against an employer, and any worker who is involved in legal proceedings in relation to workplace exploitation.

- Application to visa holders who do not have work rights and to visa-overstayers.

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|---|--|-------|
| 4 | Implement protocol under which DHA officers are required to provide automatic referrals to FWO for individuals engaged in unauthorised work upon detection by DHA, and prior to removal  | 10    |
| 5 | Introduce a new Bridging visa for temporary visa holders, and visa-overstayers, to pursue meritorious claims under workplace and occupational health and safety legislation at least for the duration of legal proceedings or investigation by relevant authorities. Bridging visa eligibility should be contingent on certification of the merits of the claim by a legal practitioner or officer of a relevant government agency such as the FWO or health and safety authority, with ordinary serious professional penalties for misrepresentation.   | 10-11 |
| 6 | Remove section 235 from the <i>Migration Act 1958</i> (Cth).   | 11-12 |
| 7 | If section 235 is not removed, amend section 235 to clarify that commission of this offence does not render protections under other statutes unenforceable.  | 12    |
| 8 | Amend the <i>Migration Act 1958</i> (Cth), the <i>Fair Work Act 2009</i> (Cth) and other relevant protective workplace legislation to clarify that a visa breach does not void a contract of employment and that workplace protections apply even when a person has breached their visa conditions or has performed work in the absence of a visa. Absent these amendments, a provision of the type found in some workers' compensation statutes should be inserted into the <i>Fair Work Act</i> , to specify that, as a matter of discretion, the illegality of an employment arrangement may be disregarded in any proceedings brought under the Act. | 12    |
| 9 | Ensure government communications avoid giving an impression that students are considered complicit in breaking the law if they accept underpayment and deliver information to international students to counter these misconceptions.  | 12-13 |

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|----|--|-------|
| 10 | The ATO should publicly indicate to international students that they can rectify outstanding tax contributions without penalty, ideally accompanied by an assurance that any information provided to the ATO regarding the number of hours worked would not be shared with DHA.  | 13    |
| 11 | Commit additional resources to the FWO to identify, investigate and carry out enforcement activities against employers who underpay workers. This includes resourcing further action in mediated wage theft disputes, and conducting a greater number of unannounced workplaces audits to detect noncompliance and alert noncompliant employers to a greater risk of detection by the regulator with meaningful penalties on top of wage repayment.  | 15    |
| 12 | The FWO should establish a dedicated support service for migrant workers, with personnel who are expert in the working conditions of migrant workers and their particular service needs, and who are, ideally, bilingual. This team should operate a separate dedicated stream within the existing FWO Infoline, and also provide significant assistance to individual migrant workers who report underpayment, to calculate unpaid wages and simplify engagement with the RFA process or court processes. In the absence of a dedicated support service, the FWO's Overseas Workers' Team should be resourced to provide these functions. | 15-16 |
| 13 | A dedicated accessible website portal for migrant workers should also be established, which should expeditiously link migrant workers to an individual in the Overseas Workers' Team, rather than primarily focusing on providing online information.  | 16    |
| 14 | Promote routine use by the FWO of Infringement Notices, Letters of Caution and Compliance Notices to compel employers to engage in dispute resolution and remediate wage theft, including by expanding the scope of Compliance Notices to include use where an employer unreasonably fails to engage in mediation and employer non-compliance should result in default court judgment  | 16    |
| 15 | Establish a new specialised wage recovery forum, either as a new independent jurisdiction or associated with the Fair Work Commission. The forum should have the following key features: <ul style="list-style-type: none"> <li>• Accessible to migrant workers including well-resourced individualised assistance to calculate wage claims, along with legal advice and representation;</li> <li>• The ability to deliver remedies swiftly (e.g. resolution of claims within 90 days);</li> </ul>   | 16-17 |

- Evidentiary presumptions in the worker’s favour in the absence of payslips or in the context of widespread patterns of fraudulent recording of wages or hours worked;
- The ability to group complaints or file representative proceedings on behalf of multiple workers; and
- Standing for unions to file proceedings on behalf of members.

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16 In the absence of a new forum in the recommendation above, introduce the following reforms to the small claims jurisdiction: 17-18

- Increase jurisdictional limit from \$20,000 to \$30,000;
- Establish a dedicated list for underpayment-related matters, ideally with a specialist set of federal judges;
- Introduce ability to group complaints, join applications or file representative proceedings;
- Introduce prescribed time-frames to ensure claims are dealt with expediently;
- Amend current costs rules so that legal costs can be awarded to a worker whose claim is successful or where the employer does not participate in mediation;
- Introduce provisions for penalties against employers;
- Reduce evidentiary burdens on workers; and
- Expand remedies available to include compensation for financial loss, hurt, humiliation and distress as well as orders designed to achieve systematic reform.

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17 Expand the capacity of community legal centres and trade unions to provide individualised advice and representation to assist migrant workers to calculate and recover unpaid wages, coordinate and deliver education programs to vulnerable workers and pursue strategic policy and law reform objects arising from casework and education programs. These services should have a ‘fast track’ to assistance by the FWO for migrant workers whom they assist and determine have bona fide claims. 18-19

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18 Require universities to provide on-campus legal services to international students for enforcement of workplace rights including wage recovery claims, as well as general employment and taxation law advice. These services should have a ‘fast track’ to assistance by the FWO for migrant workers whom they assist and determine have bona fide claims. 19

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- 19 Restore and strengthen unions' right-of-entry powers. These should extend to enforcing awards and minimum entitlements wherever the relevant union can show they have rights of industrial coverage over relevant workers, regardless of whether those workers are union members. 19
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We welcome the opportunity to discuss these recommendations with the Committee.

Sincerely,

**Bassina Farbenblum**

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**Laurie Berg**

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