

ANNEXURE D

WAGE THEFT

THE SHADOW

MARKET

Unions **NSW**



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Introduction

The exploitation of temporary migrant workers in Australia is a common and known problem that appears to be endemic throughout Australian workplaces. This exploitation persists despite numerous government inquiries,¹ legislative reforms² and in 2019, the establishment of The Migrant Workers' Taskforce whose recommendations are yet to be implemented.³

The practice of advertising employment positions in foreign languages, with rates of pay that are below the minimum wage, was first exposed by Unions NSW in our 2017 and 2018 wage theft reports.⁴ The custom was subsequently acknowledged in the Migrant Workers' Taskforce's 2019 report, which included a recommendation that a specific prohibition on advertising jobs with pay rates below the minimum wage be included in the Fair Work Act.⁵ This recommendation has not been implemented.

This is the third year since 2017 that Unions NSW has conducted an audit of jobs advertised in foreign languages that target temporary migrants. This year, over 4,000 ads were reviewed, making it the first large scale audit of job advertisements in foreign languages ever conducted in Australia. Over 1,000 of the ads were for positions in the horticultural industry, and will be discussed in a separate report.

This report will focus on the audit results of foreign language jobs advertised in NSW, excluding the horticultural industry. Our research analysed more than 3,000 ads, primarily in six languages; Chinese, Korean, Vietnamese, Nepalese, Spanish and Portuguese. The audit found that 72% (2,189) of the ads indicated a rate of pay, of which 88% offered rates below the minimum wages contained in the relevant Modern Award.

Unsurprisingly, this result reveals a serious setback when contrasted with the audit results of 2017 and 2018, which found 77% and 70% of the ads respectively to be advertising jobs below the minimum wage.

The audits of foreign language job advertisements conducted by Unions NSW in recent years demonstrate that current strategies to combat wage theft are ineffective and highlight an urgent need to remove the structural barriers that prevent the stamping out of exploitation of temporary migrants. Current barriers include a lack of visa system reform. Funding of unions and peak industrial organisations to lead proactive wage theft investigations is also recommended as a much needed strategy to mitigate the terrible effects of Australia's black market economy.

Key findings

- 72% of the 3,000 ads for jobs in NSW audited, specified a rate of pay for the role advertised.
- 88% of ads that provided a rate of pay were below the minimum wage stipulated by the relevant Modern Award.
- At 97.3%, the highest percentage of jobs advertised below the minimum wage were in the construction industry, followed by cleaning at 91.8%, hair and beauty at 87.9%, fast food at 87.5%, retail at 87.1%, hospitality at 87%, clerical at 84.3% and transport at 66.7%.
- 90.7% of job ads in Vietnamese were below the minimum wage, as were 88.3% of Korean ads, 87.9% of Chinese, 86.3% of Nepalese, 83.9% of Portuguese and 76.4% of Spanish ads.
- The COVID-19 crisis has intensified employer exploitative practices, with temporary migrants reporting an increase in sham contracting and offers of free trials lasting several hours.
- The self-acknowledged limitations of the Fair Work Ombudsman (FWO) to conduct investigations and mediations during the COVID-19 pandemic, have contributed to intensified wage theft and underscore the need to fund unions and peak industrial organisations to lead wage theft investigations.

Recommendations

- 1** The Federal Government to directly fund peak industrial organisations (both union and employer peak bodies) to undertake proactive investigations and prosecutions to identify and stamp out wage theft and exploitation. The COVID-19 crisis evidences the ineffectiveness of the FWO's strategy to eradicate wage theft.
- 2** The Federal government to provide welfare support for temporary migrants affected by the COVID-19 crisis, which has exacerbated their vulnerability to employers' exploitative practices.
- 3** Abrogate the 40 hours per fortnight visa condition for international students, to reduce pressure that prevents them from reporting exploitation.
- 4** Create a firewall between the FWO and the Department of Home Affairs (DHA) so vulnerable workers feel that they are not prevented from taking action against their employer for fear of visa cancellation or deportation.
- 5** Amend the Fair Work Act 2009 (Cth) to include a prohibition on advertising jobs with pay rates below the minimum wage, in line with the Migrant Workers' Taskforce 2019 recommendations.

Part One

Methodology

The Unions NSW audit 2020 focused specifically on online job advertisements. This approach is consistent with findings in academic research suggesting that almost half of temporary migrants find their jobs online.⁶ 36% of temporary migrants use Facebook for job search and Asian migrant workers routinely use websites that are exclusively in their native language.⁷

The audit was conducted by a multilingual and multidisciplinary group of eight researchers, under the supervision of a senior employment lawyer. Researchers' areas of expertise included law, IT, data analysis, translation, social work and political science. Tasks were distributed in line with researchers' language proficiencies and skills.

The researchers joined over 200 migrant community Facebook groups and categorised them by primary language used in the group, number of members and posting frequency to identify their relevance in the corresponding community. Researchers audited the six most used groups in each language.

Additionally, researchers audited the most popular websites used by speakers of various Asian languages, as directed by information gathered through migrant community focus groups. Ads in VietNews (hard copy newspaper) were also audited, following recommendations by the Vietnamese focus groups. Figures 1 and 2 provide examples of websites and social media channels used by migrant communities to find jobs in Australia.

The audit was conducted between late-December 2019 and August 2020 and focused on advertisements written in Chinese, Korean, Spanish, Nepalese, Portuguese and Vietnamese. These languages are consistent with the top ten nationalities of temporary migrants in Australia, according to government data.⁸

Researchers used coding, data extraction, online alerts and other IT methods to audit the highest number of ads possible. Over 3,000 ads for jobs across many industries (excluding the horticulture industry) were reviewed, with 2,189 indicating a rate of pay. Employers were contacted in cases where the rate of pay in the ad was not sufficiently descriptive to establish the level of underpayment. Ads that did not provide a rate of pay were excluded from the analysis. See Figure 3 for an example of an ad where phone calls were required to clarify rate of pay.

Ad rates of pay were compared with the legal wage, according to the relevant Award for that industry and position and consideration was given to differing rates for different contract types and times of work.

Importantly, job ads advertising internships and commission only based roles were excluded from the analysis. Additionally, repeated job ads on the same platform or cross - platforms were excluded.

Figure 1. Examples of foreign language websites.⁹



**Brasileiros em Sydney -
brasileiros.com.au**

Private group · 114.4K members



Figure 2. Examples of websites and social media channels identified during focus groups.

KOREAN	SPANISH	VIETNAMESE	NEPALESE	PORTUGUESE	CHINESE
www.hojunara	Colombianos en Sydney Australia	www.nguoiviettaiuc.com	nepali.kam.1 FB group	Brasileiros.com.au FB group	Sydney today
Korean Australian Community-Facebook	Españoles y latinos en Sydney	www.chouc.com	Ranjan Adhikari (Australiama Kaam)	Brasileiros em Sydney 2020	www.1688sydney.com
Koreans in Sydney	LATINOS en SYDNEY	www.timnhanhvietuc.com	Nepali lai kaam	Brasileiros na Australia brasileiros.com.au	www.yeeyi.com
Hojubada	Argentinos en Australia	VietNews	www.nepalilaikaam.com.au	Brasileiros na Australia - Estudantes	Chinese Community in Australia! FB group.

Figure 3. Example of an ad in which the employer was contacted to clarify rate of pay.

The Spanish add offered cleaning and painting work for AU\$130 per 8 hours work (hourly rate, \$16.25).¹⁰



Hola, (solo chicas) alguna interesada en trabajar en pintura (pintura, preparacion, limpieza) de viviendas en su mayoría, (interiores y exteriores) lunes a viernes de 7:00 am a 3:00 pm - 130 dolares al dia, para empezar el proximo lunes, que viva cerca a wolli creek o que tenga la
Posibilidad de ser recogida en wolli creek station o sus alrededores, gracias.

Characteristics and number of ads

Foreign language websites and social media groups are a main source of information for temporary migrants in Australia to find employment opportunities, social events, accommodation and other services. Unions NSW audit was conducted between December 2019 and August 2020 and focused on online job advertisements in Chinese, Korean, Vietnamese, Nepalese, Spanish and Portuguese. Our research analysed 2,189 ads that indicated a rate of pay.

As shown in Figure 4, the ads reviewed included, 1273 in Korean, 571 in Chinese, 151 in Vietnamese, 146 in Nepalese, 31 in Portuguese and 17 Spanish.

The majority of audited ads advertised positions in the cleaning industry (620). 486 were in hospitality, 404 were in retail, 224 were in construction and 99 were in hair and beauty, as shown in Figure 5.

Figure 6 contains a disaggregation by language of jobs advertised in each industry. At 317, a large proportion of ads

in Korean were in hospitality, while 305 were in retail, 216 in cleaning, 181 in construction and 45 were in hair and beauty.

Most Chinese ads advertised jobs in cleaning (287), while 91 were in hospitality and 56 in retail.

Ads in Vietnamese were mostly in hair and beauty (50), followed by retail (40) and hospitality (38).

Nepalese ads were mostly in cleaning (82) and hospitality (37).

Ads in Spanish and Portuguese were predominantly in construction and cleaning.

Ads in hospitality were advertised in the six languages, although considerably lower in Spanish and Portuguese, with only one job in Portuguese and two in Spanish being in hospitality. Figures 7 and 8 provide examples of Chinese and Korean ads in the hospitality industry.

Figure 4. Ads disclosing pay rate by language.

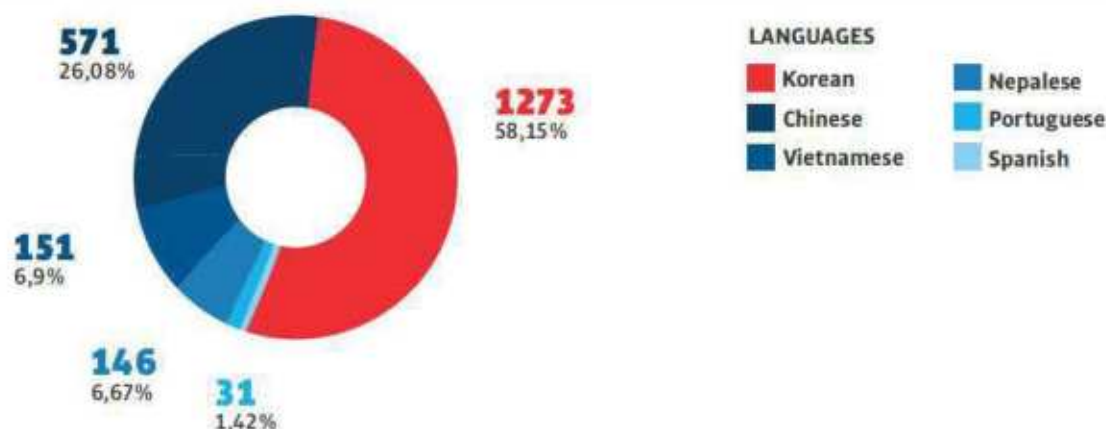


Figure 5. Ads audited per Industry.

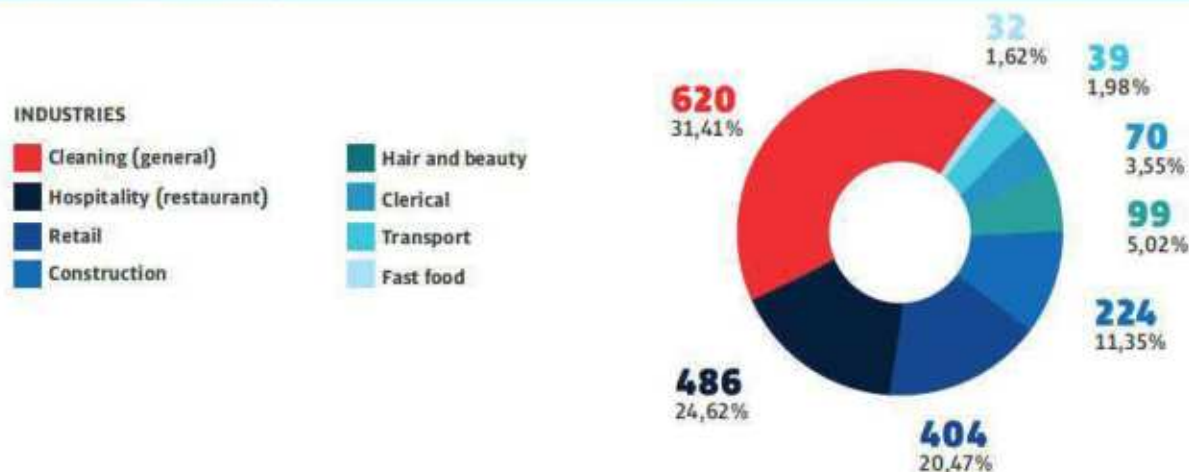


Figure 6. Number of ads audited, Industry vs language.

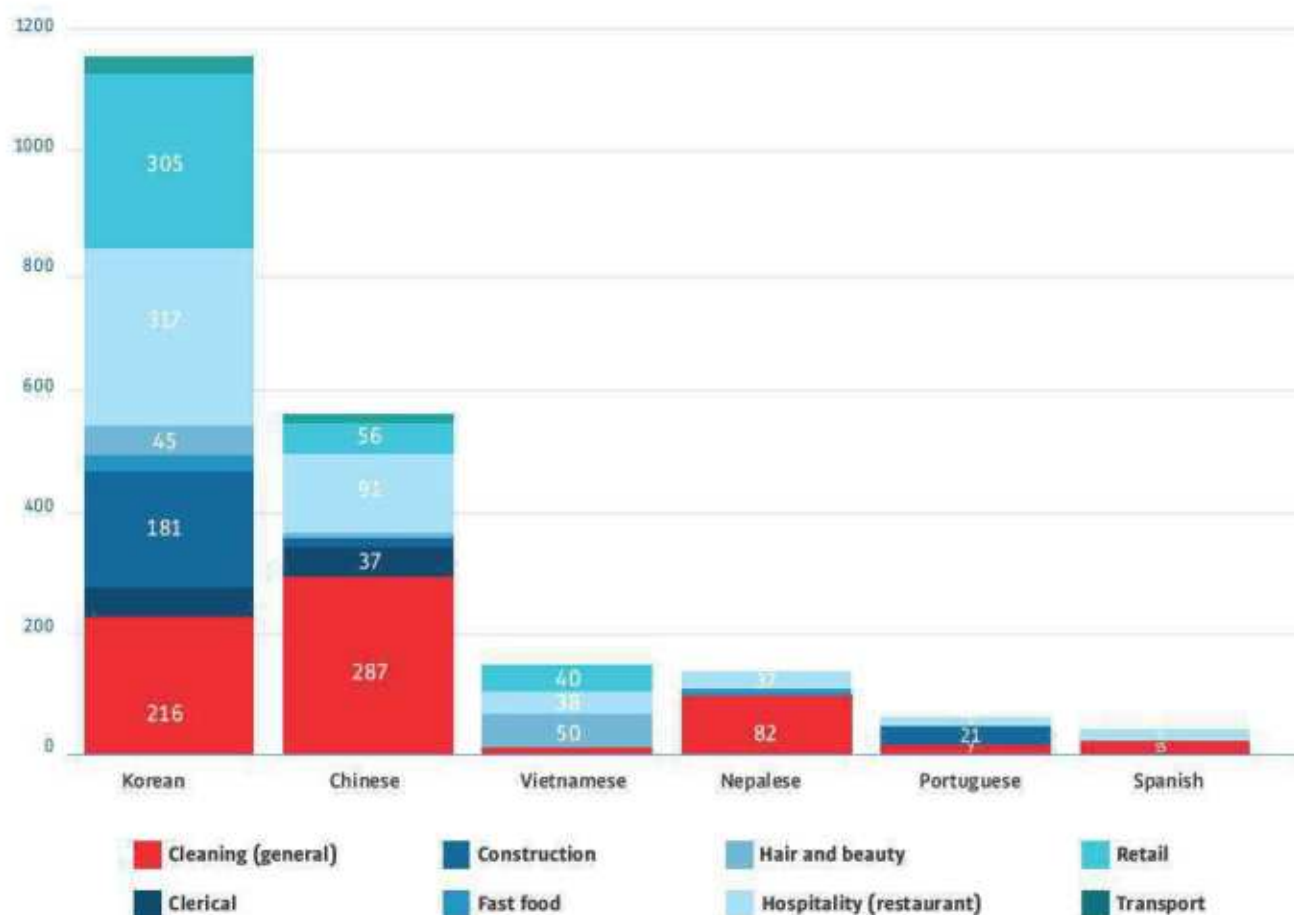


Figure 7. Korean ad advertising jobs in hospitality, with an hourly rate of \$11.¹¹



Figure 8. Chinese ad advertising a waiter position for \$12 per hour.³²



Audit Results

As illustrated in Figure 9, 1,928 (88%) of the 2,189 ads disclosing a rate of pay were offering an hourly rate below the minimum wage under the applicable award.

The majority of ads (31%) offered \$19 to \$20 an hour, 25% offered \$17 to \$18 and 23% offered \$13 to \$16. Only 9% of the ads offered \$21 to \$22 and 6% were willing to pay \$23 or more an hour. An hourly rate of \$10 to \$12 was advertised in 5% of the ads (Figure 11).

The lowest rate of pay advertised was \$8 per hour, for a position as a nail technician. The second lowest rate was \$10 per hour, with 38 jobs offering this rate (Figure 12).

The majority of ads audited (51%) were unclear about the type of contract (casual, full-time or part-time) and some referred to various types of contracts without indicating a

different rate of pay for casual, part-time or full-time. Similarly, no differing rate of pay was indicated for work during weekends or overtime.

Researchers made phone calls or sent text messages where necessary to confirm the type of contract and work times, and whether there was a different rate considering these criteria.

In instances where it was not possible to clarify the type of contract and work times, the rate provided in the ad was compared to the hourly rate for full-time or part time employees contained in the relevant award.

After researchers verified the type of contract, it was identified that 26% of the ads were offering casual work (Figure 10).

Figure 9. Percentage of job ads advertising positions below the minimum wage.

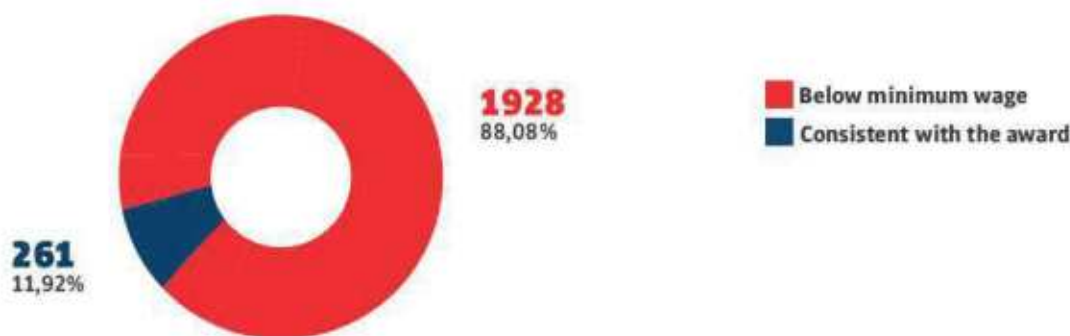


Figure 10. Type of contract.

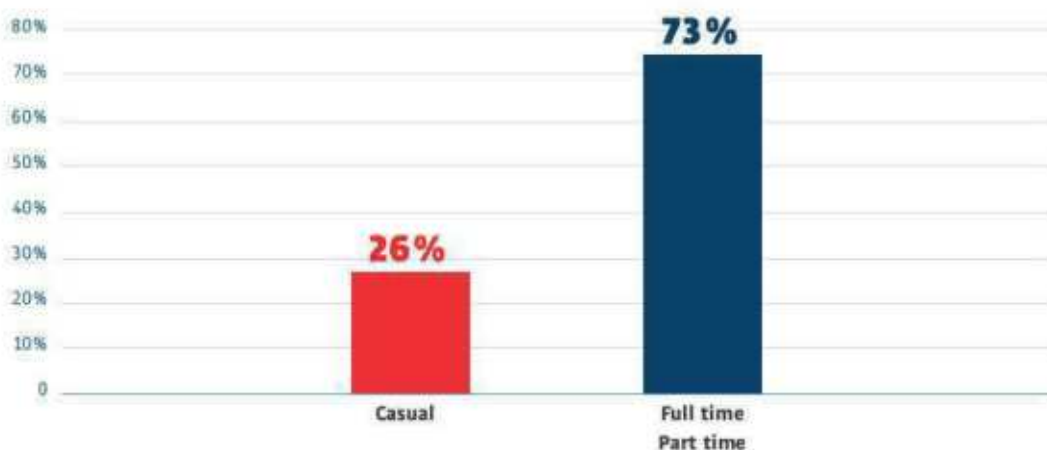


Figure 11. Hourly wage rates advertised.

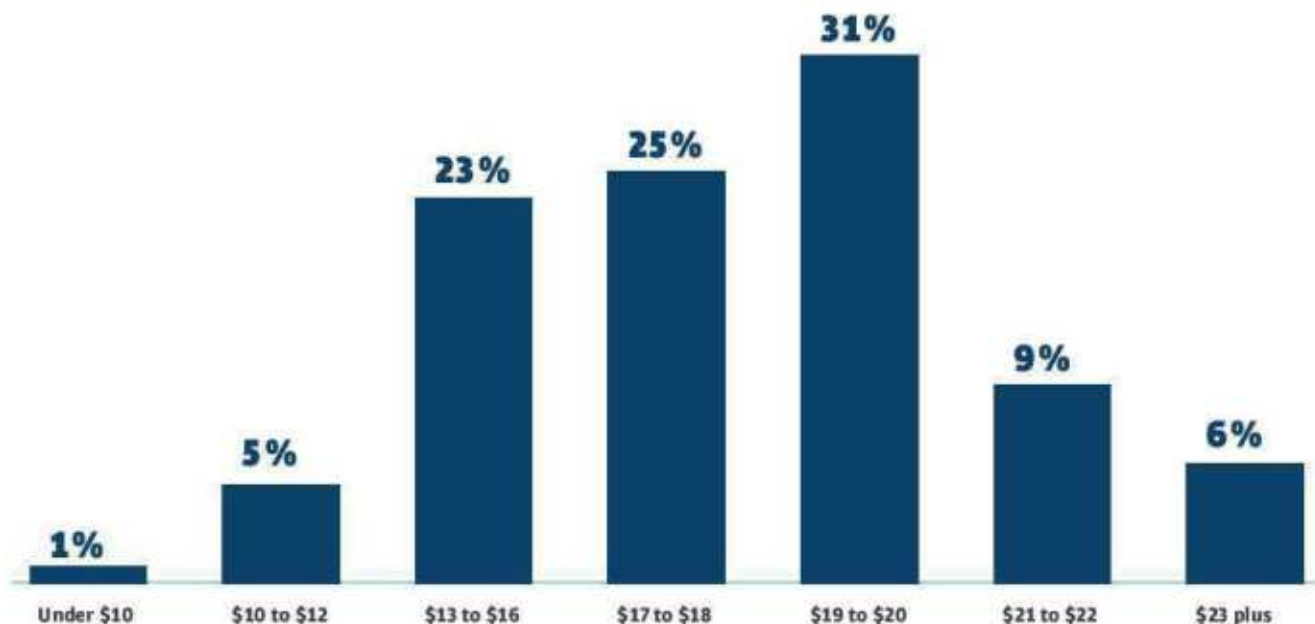


Figure 12. Vietnamese job ad for a nail technician offering \$10 an hour.¹³

Tìm nữ phụ dọn dẹp trong shop và làm việc linh tính trong shop Nails

Ngày đăng: Thứ bảy, ngày 29/02/2020 **Lương: 10\$/giờ**
Khu vực: Haymarket, NSW (Inner Sydney)

Tìm nữ phụ dọn dẹp trong shop và làm việc linh tính trong shop Nails

Cần tìm 1 bạn nữ 18 tuổi-25 tuổi

Không cần kinh nghiệm sẽ được training

Lương : thỏa thuận

Vui lòng liên hệ qua số điện thoại để biết thêm thông tin chi tiết.

Thông tin liên hệ

Liên hệ: **[REDACTED]**
Mobile: **[REDACTED]**
Email: **[REDACTED]**
Địa chỉ: Haymarket

Lưu ý: Khi bạn gọi điện liên hệ với người đăng tin này, xin vui lòng nói cho họ biết bạn biết được thông tin này trên website "http://nguoivietaiuc.com" (Người Việt Tại Úc.COM). Xin chân thành cảm ơn!

Thông tin bài đăng

Khu vực: Haymarket, NSW (Inner Sydney)
Lĩnh vực: Cleaner & Housekeeper
Mã tin: **[REDACTED]**
Ngày cập nhật: 29/02/2020
Ngày kết thúc: 29/03/2020
Loại tin: Tin thường

Underpayment by industry

Construction

In the construction industry, 97.3% of advertised jobs offered an hourly rate of pay below the applicable award. 40.2% ranged from \$13 to \$16, 25% from \$17 to \$18 and 20.1% from \$19 to \$20. Only 10.7% offered \$23 or more.

The average underpayment in the construction industry was \$6.2 per hour. See Figure 14 for a distribution of rates of pay in the construction industry and Figure 15 for the average level of underpayment in the Industry.

14% of job advertisements in Korean and 68% in Portuguese were in construction. See Figure 6 above.

Cleaning

As illustrated in Figure 13, of the job advertisements in the cleaning industry, 91.8% were offering an hourly rate below the award. A large proportion (35.32%) offered \$19 to \$20 an hour, while 10% offered \$17 to \$18, 14.2% offered \$13 to \$16 and 12.1% offered \$23 or more.

The average underpayment in the cleaning industry was \$5 per hour.

88.2% of job advertisements in Spanish were for cleaning, as were 50.3% of jobs advertised in Chinese and 56.2% of jobs in Nepalese. See Figure 6 above.

Hair and beauty

In the hair and beauty industry, 87.9% of advertised jobs offered an hourly rate of pay below the award minimum wage. 42.4% of the rates of pay ranged from \$19 to \$20 per hour, 28.3% from \$13 to \$16 and 11.1% from \$17 to \$18.

The average underpayment in the hair and beauty industry was \$4 per hour.

33% of job advertisements in Vietnamese were in hair and beauty. See Figure six above.

Fast food, retail and hospitality

In fast food, 87.5% of jobs were advertised at below award rates.

In retail 87.1% of jobs were advertised at below award rates. For 37.1% and 22.2% of the advertised retail positions, the rate of pay ranged from \$19 to \$20 and \$17 to \$18 per hour, respectively.

In Hospitality, 87% of jobs were advertised at below award rates. 34.3% of the rates of pay in the hospitality industry ranged from \$17 to \$18 and 27.9% from \$13 to \$16 per hour.

Figure 13. Underpayment by industry.

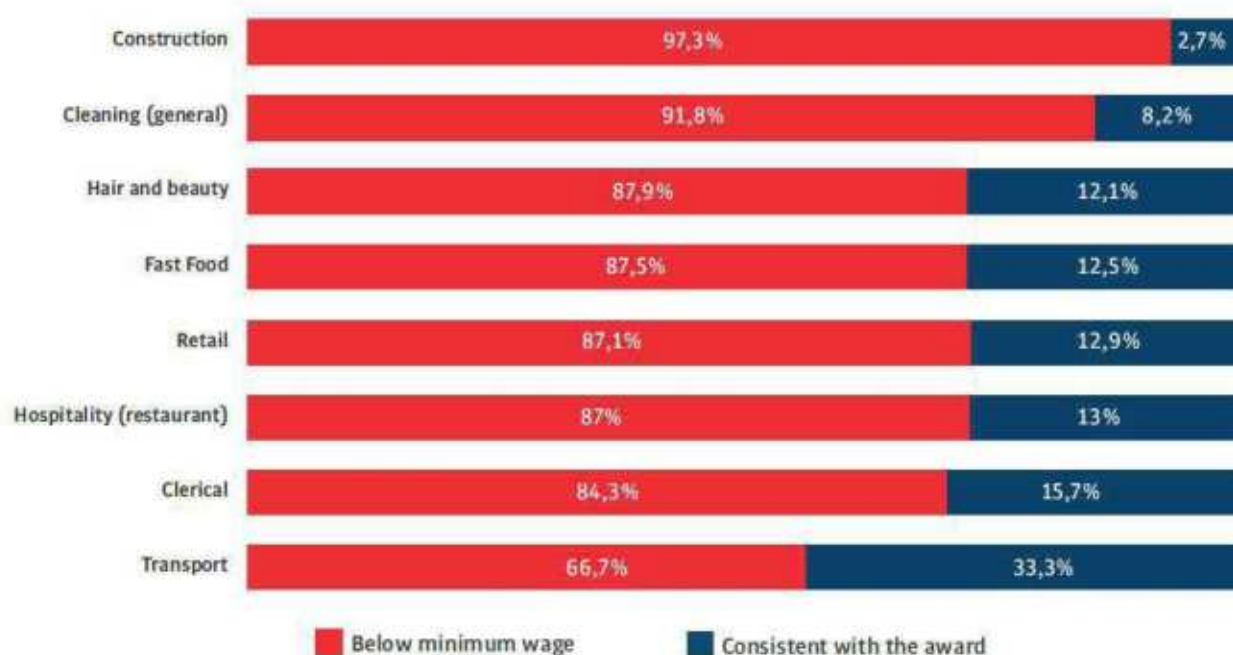


Figure 14. Advertised rate of pay by industry.



Figure 15. Average underpayment by industry.



Underpayment by language group

Job advertisements in Vietnamese

An overwhelming majority of the ads in Vietnamese advertised rates of pay below the minimum wage (90.7%). A significant number of those ads offered positions in hair and beauty (34.1%), retail (29.5%), hospitality (25.8%) and cleaning (9.1%) (Figure 17).

As indicated in Figure 18, the majority of ads offered an hourly rate of pay from \$13 to \$16 (46%), while 21% offered \$10 to \$12 and 17% offered \$19 to \$20 an hour.

Job advertisements in Korean

As shown in Figure 16, 88.3% of the job ads in Korean offered hourly rates below the minimum wage. Of those ads, 27.3% were in hospitality, 25.3% in retail, 20.8% in cleaning and 17.4% in construction.

The rate of pay offered in the majority of Korean ads ranged from \$19 to \$20 an hour (35%). Only 9% of the ads offered \$21 to \$22 an hour. A large proportion of the ads (32%) offered \$17 to \$18, while 19% offered \$13 to \$16 (Figure 19).

Job advertisements in Chinese

As illustrated in Figure 16, 87.9% of the job ads in Chinese offered rates below the minimum wage. 54.2% were in cleaning, 18.4% in hospitality and 11.3% in retail.

The largest share of Chinese job ads (30%) advertised an hourly rate of \$13 to \$16. 27% offered \$19 to \$20, 18% offered \$17 to \$18 and 11% offered \$10 to \$12 an hour.

Job advertisements in Nepalese

86.3% of the job ads in Nepalese advertised an hourly rate below minimum wage. Of those, 68.4% were in cleaning and 23.1% were in hospitality (Figure 17).

In 30% of the Nepalese job ads, the offered rate of pay ranged from \$19 to \$20 an hour. 25% offered \$17 to \$18 and 18% offered \$21 to \$22 per hour.

Job advertisements in Spanish and Portuguese

83.9% of job ads in Portuguese offered an hourly rate below the award minimum wage, as did 76.5% of those in Spanish. 73.1% of the Portuguese ads were for positions in the construction industry and 23.1% were in cleaning. 100% of Spanish job ads offering hourly rates below award minimum wage were in cleaning (Figure 17).

In Spanish ads, 94% offered \$23 or more an hour, as did 87% of those in Portuguese.

Figure 16. Underpayment by language group.

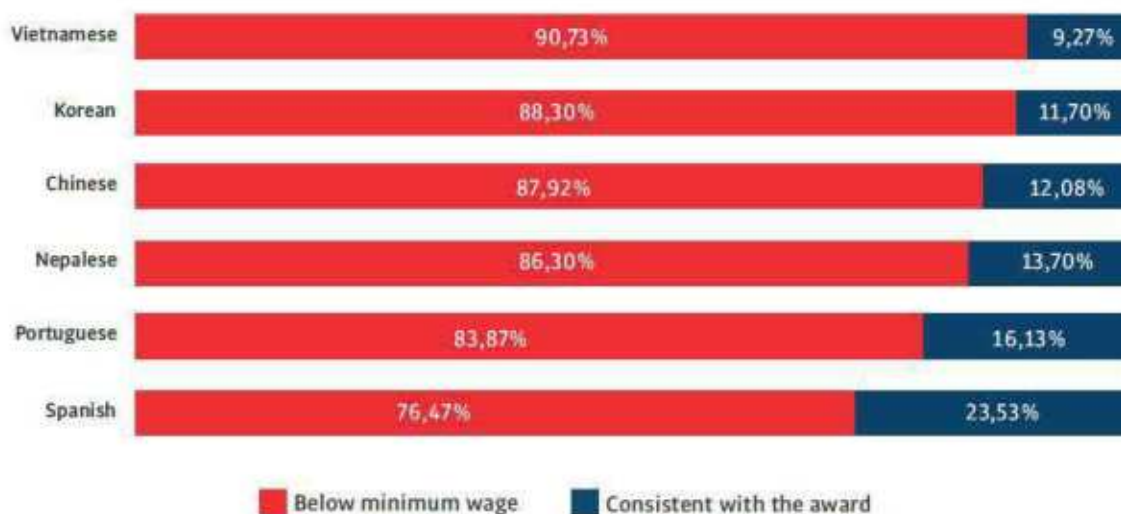


Figure 17. Underpayment by language and industry.

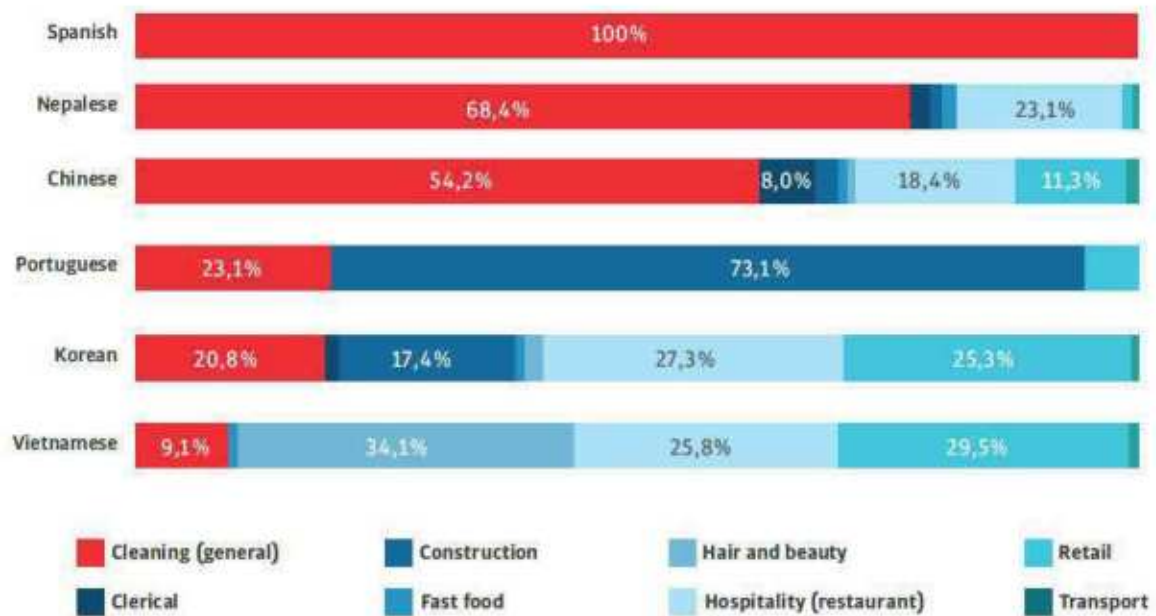


Figure 18. Vietnamese ads rate of pay.

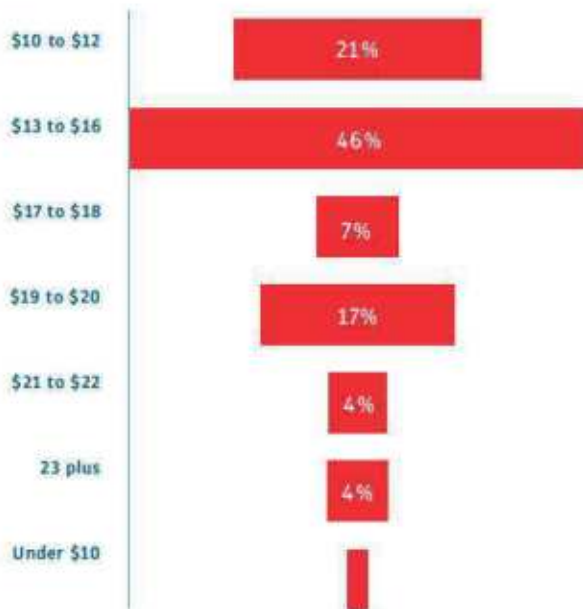
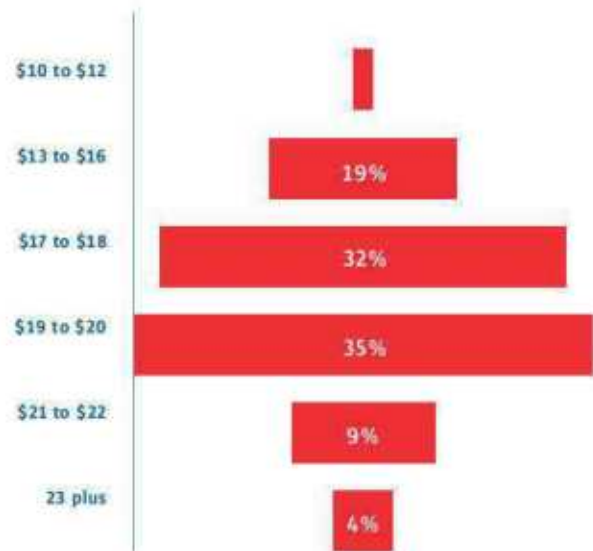


Figure 19. Korean ads rate of pay.



Part Two

Intensification of other exploitative practices

Sham Contracting

Other forms of exploitation were evidenced in Unions NSW Audit, including employers disguising an employment relationship as one of 'client' and 'independent contractor', or sham contracting. Employees who have been victim of sham contracting were often required by their employer to provide an Australian Business Number (ABN).¹⁴

Sham contracting encourages an arm's length commercial relationship between parties and usually involves the purported 'client' (the employer) paying the 'independent contractor' (the employee) an agreed hourly rate and not affording entitlements such as penalty rates and leave accruals contained in the applicable industrial award.¹⁵

A large majority of the ads audited in Spanish and Portuguese did not disclose a rate of pay. Of the 86 Portuguese ads audited, only 31 indicated a rate of pay, as did only 17 of the 126 Spanish ads. Importantly, ads in those languages also showed the lowest level of underpayment, with over 87% of the ads offering a rate of pay of \$23 or more.

Despite this finding suggesting a lower level of wage theft in those communities, 38% of ads in Portuguese that disclosed

a rate of pay required workers to hold an ABN and operate as an independent contractor, as did 25% of those ads in Spanish. This practice was also observed in Korean and Nepalese ads, although to lesser degrees. However, despite the purported requirement to operate using an ABN, a significant number of these ads suggest the existence of an employment relationship. At law this relationship is established by a multi-factorial test which requires an assessment of the totality of the relationship including but not limited to regularity of working hours, level of employer control and supervision, provision and/or requirement of a uniform and whether or not the worker has a right to delegate the work.¹⁶ Figure 21 illustrates the typical content of ads requiring an ABN.

Numerous temporary migrant social media posts in Portuguese and Spanish suggest a widespread practice of sham contracting, with temporary migrants frequently reporting negative experiences. Temporary migrant experiences with sham contracting are illustrated by Figures 22 and 24.

Figure 20. Portuguese ads requiring an ABN.

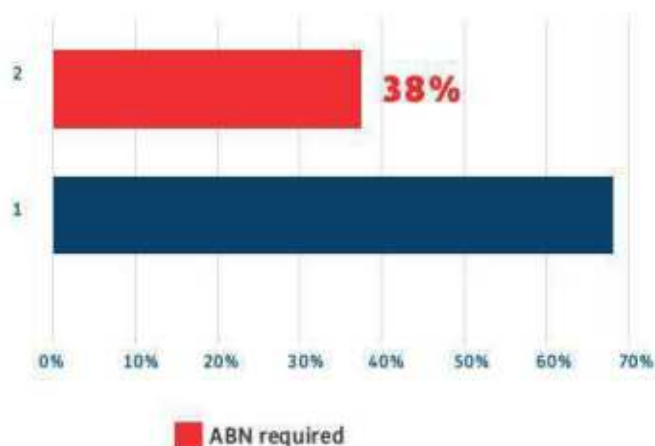


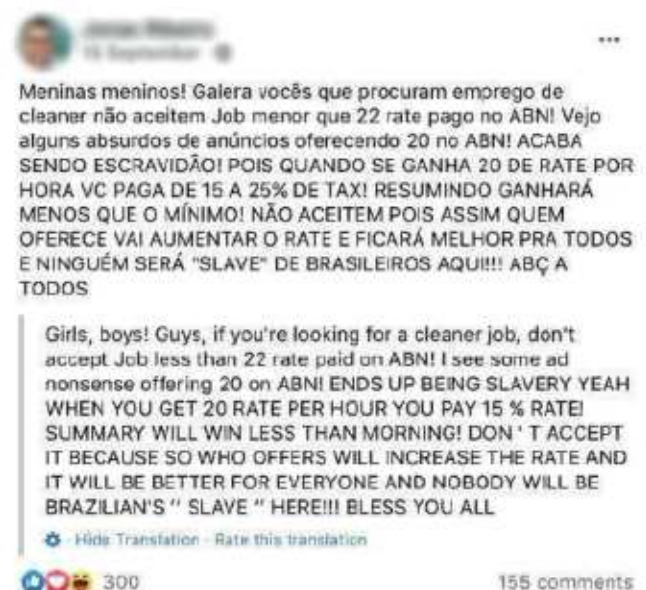
Figure 21. Nepalese ad requiring an ABN.¹⁷



Figure 22. Student victim of sham contacting desperately looking for guidance after his employer refused to recognise an employment relationship.¹⁸



Figure 23. International student warning about ABN requirement as an exploitative practice and tax implications.¹⁹



Sham Contracting focus group

A focus group of twenty temporary migrants who were or had worked using an ABN was hosted in August 2020. Participants were asked 20 questions to establish whether their relationship fulfilled the characteristics of an employment relationship or if they performed their work as independent contractors. None of the temporary migrants interviewed performed their role without supervision.

The requirement of an ABN was frequently justified by employers under the misleading statement that they were trying to protect international students who were working more than 40 hours per fortnight.

Figure 24. Focus group, sham contracting findings.²⁰

	CONTROL	HOURS	RISKS AND EXPECTATIONS	HOURLY RATE	PAYMENT	OTHER OBSERVATIONS
Juan	Juan was working as an air conditioner technician. An ABN was required in order to start receiving payments.	Juan had regular hours from 9 am to 5 pm and worked at the same site for over 2 years.	He was supervised by the same boss as Australian born workers working with a TFN.	\$25 · No superannuation.	Weekly	He was fired during the COVID-19 crisis, with his employer saying he was not entitled to a redundancy payment.
Lu	Lu was working as a cleaner for a contractor of the state government and was required to have an ABN to start work.	She had regular hours, Monday to Friday from 6 am to 2 pm and also had to work on weekends after 5 pm.	Employer was constantly supervising her work and threatening to fire her when not satisfied with the work.	\$19 · Same payment for weekends and overtime. · No superannuation. · Male workers were paid a higher rate. · Irregular reimbursement for cleaning products.	Fortnightly	Lu was fired after complaining about the low rate and that she had suffered a back injury.
Pedro	Pedro was working as a cleaner in a construction site for over a year. He was constantly forced to work more than 20 hours a week and was required to provide an ABN so that, according to the employer, he would not have problems with immigration.	Regular working hours, Monday to Friday three times a week from 12:30 am to 4:30 am.	Constant bullying and supervision.	\$20 · Same rate during weekends and night-time. · No superannuation.	Pedro was regularly paid every two weeks but was not paid for the last two periods.	Pedro has tried to pursue the payment of his wages but the employer is falsely arguing that Pedro caused some damages in the construction site and that the amount in damages is equivalent to the wages due.
Gautamm	Gautamm was doing drafting work for a construction company.	He was working every day from 9 am to 5 pm and a roster for weekend work was given weekly.	His hours of work were permanently supervised by the employer.	\$25 · No superannuation. · Same rate during weekends and night-time.	Gautamm was not getting paid and decided not to return to the office until he was.	Employer has threatened to report him to the Immigration Department as he was working more than 20 hours a week. Gautamm is scared and prefers not to pursue any action as he expects to be able to apply for PR in the future.

COVID-19 crisis and intensification of exploitative practices

During the COVID-19 crisis, the Federal Government excluded temporary migrants from the JobSeeker and JobKeeper assistance schemes, ignoring academics, unions, not-for-profit organisations and businesses warning about a looming humanitarian crisis and the economic consequences this could have for Australia as a whole.

The level of hardship experienced by temporary migrants was well documented by Unions NSW through a large-scale survey of over 5,000 temporary migrants,²¹ which indicated that 65% had lost their job, 23% experienced a reduction in work hours and 43% were skipping meals on a regular basis to survive.

Unsurprisingly, the lack of government support to temporary migrants led to an increase in another forms of work exploitation, which has been reported in migrant community social media groups. Temporary migrants have been reporting unpaid trials of excessive length. See Figure 25 of a temporary migrant reporting a 14-hour unpaid trial.

Other temporary migrants have reported employment offers establishing a trial period for several days with a payment well below the minimum wage. See Figure 26.

A significant number of temporary migrants are experiencing delays or non-payment of their wages and have approached the FWO, only to be told that they are not able to assist due to the COVID-19 crisis. See Figure 28 for a response by FWO to a temporary migrant reporting exploitation. A statement by the FWO regarding their limited assistance during COVID times is also published on their website. See Figure 29.

Figure 25. International student reporting a 14-hour unpaid trial.²²



Figure 26. International student received an offer for a 5-day trial, paying \$8.75 an hour.²³

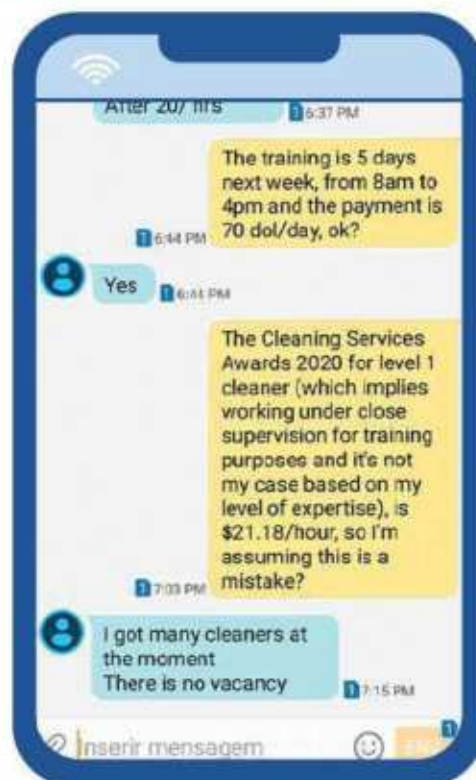


Figure 27. Temporary migrant expressing her frustration with no success through legal action.²⁴



Figure 28. Response by the FWO to a temporary migrant reporting exploitation.²⁵

In a letter to them Fair Work wrote:

"My review revealed a range of complex legal issues relating to employment award coverage or award-free employees.

To determine award coverage requires months of work, including multiple site visits and interviews.

In this current COVID climate, I cannot conduct site visits or interviews.

Also the business has closed and may not reopen in the future"

Figure 29. FWO statement acknowledging limitations to support workers.²⁶

What has changed

Demand for our services is significantly higher because of COVID-19.

In order to meet the increased demand for services, we are giving higher priority to customers whose workplaces have been disrupted by COVID-19.

We are prioritising customers seeking advice, education and assistance about workplace entitlements and obligations in the following areas:

- employers and employees who have been impacted by COVID-19
- small business employers
- employees who are currently employed

What it means for you

We are experiencing a higher than usual volume of calls and enquiries, occasionally resulting in longer than usual wait times for matters that are not COVID-19 related. We are updating the information on our website regularly to help you find the information you need and answers to your questions. We also have information and resources to help you try to resolve issues in the workplace.

We encourage employees and employers to work together to find practical solutions to any issues that arise in the workplace.

We are prioritising requests for assistance where there are allegations of serious non-compliance with workplace laws, including (but not limited to) the JobKeeper provisions on the Fair Work Act.

In adjusting our services to meet the changing needs of the community, we currently have limited capacity to offer some of our regular dispute resolution and mediation services.

To help contain the spread of COVID-19, we have also closed our offices for face-to-face counter service and appointments.

Part Three

The Federal Government should fund unions and peak industrial organisations

The COVID-19 crisis evidences the FWO's failure to stamp out the exploitation of temporary migrant workers. FWO's failure to assist migrant worker victims of exploitation during the crisis has only intensified already severe levels of exploitation.

In the experience of Unions NSW, wage theft is predominately caused by the enormous opportunity that exists for employers to take advantage of their workers, in order to cut costs with very little chance of being caught. Unions NSW understands the FWO has approximately 250 inspectors conducting workplace investigations under the current system of auditing. This equates to roughly one inspector for every 51,000 employed people in Australia, which is blatantly not enough to competently and adequately protect the rights of workers. Presently, the chance of an employer getting caught underpaying staff is attractively low.

The Federal Government should fund unions and peak industrial organisations to lead investigations of wage theft. Unions have a strong record of advocating on behalf of workers who have been underpaid and successfully recovering unpaid wages. Academic survey results suggest that workers who approached a trade union for assistance with underpayments had at least some wages recovered in 70% of cases.²⁷ This contrasts with the FWO's rate of success in 42% of cases. In NSW alone, an assessment of just four unions found they collectively recovered \$20.93 million over a one-year period.

Unions have been working intensively with migrant communities, identifying their needs and providing funding to initiatives that respond to migrant worker concerns. In 2019, Unions NSW pioneered its Visa Assist program partnership with the Immigration Advice and Rights Centre (IARC) to provide free immigration advice and legal assistance to migrant workers who are union members in NSW. The need for this type of service free from bias is increasingly important and the program has been operating at full capacity since its launch.²⁸

Unions NSW and IARC know anecdotally that there are a number of less than transparent migration agents and immigration lawyers who mislead migrants when it comes to the rules governing their stay in Australia. In some circumstances, migrants are even encouraged to apply for visas not in their best interests.

Of the 4,322 respondents to the National Temporary Migrant Work Survey, conducted by the Migrant Workers Justice Initiative, more than 2,250 responded they had been victim of Wage Theft, with only 1 in 10 seeking to recover what was owed to them. Of the underpaid respondents, 32% stated that they would not seek to recover stolen wages due to fear of immigration consequences or not wanting to be involved with the Government.

7% of survey respondents disclosed they had undertaken unauthorised work in contravention of their visa conditions (for example, by working more than 40 hours per fortnight on a student visa), and of these, 39% indicated they would not make a claim to recover unpaid wages due to fear of immigration consequences. A service such as Visa Assist is a crucial service for vulnerable migrant workers whose employment issues are increasingly intertwined with their visa conditions.

Unions are also better equipped than the FWO to assist migrant workers as many employ multilingual and bilingual organisers, themselves often part of the migrant communities. These elements are key to overcoming the barriers that in many instances prevent temporary migrants from reporting exploitation and organisations from conducting accurate wage theft investigations.

Figure 30. Case study: Unions NSW successfully recovering wages for a migrant worker.²⁸

CASE STUDY

Ms Hun is originally from Korea. She worked in a restaurant from 2016 to 2019. During this time, Ms Hun was paid well below the minimum wage established by the Restaurant Industry Award 2010. She was also not paid superannuation, provided payslips or given regular breaks during her shifts.

Ms Hun was aware she was being underpaid but was too afraid to bring it up with her employer. She eventually quit her job and approached the Fair Work Ombudsman in an attempt to recover her unpaid wages.

The mediation process conducted by the Fair Work Ombudsman was unsuccessful. Ms Hun experienced great frustration at the power imbalances and cultural and language barriers, and what she perceived as a hopeless process after being exploited for more than three years.

Ms Hun joined her union. Unions NSW assisted Ms Hun during negotiations with her employer and acquired for her more than \$140,000, including \$17,000 in unpaid superannuation.

Visa reform

International students are restricted to working 40 hours per fortnight during their course and unlimited hours during course breaks. Research has shown that a large number of international students regularly work beyond these restrictions.³⁰

Academics, unions and other organisations have highlighted that this restriction is not an effective means of ensuring that international students are genuinely studying and in fact facilitates wage theft and other exploitative practices by employers.³¹

The increase in reports of sham contracting through migrant community social channels exposed in this report evidences the need to abolish the 40-hour working limit, which is currently used by employers to exploit temporary migrants' fear of being deported if in breach of their visa conditions.

The Federal Government should scrap the 40-hour work limit on international students and focus on attendance and academic performance requirements to ensure international students are genuinely studying when in Australia. During the COVID-19 crisis, the Government temporarily lifted this restriction for international students working in supermarkets and permanently for those working in care industries.³² This showed that there is no policy justification for maintaining the 40-hour limit.

Additionally, a firewall between the Fair Work Ombudsman and the Department of Home Affairs must be created to facilitate temporary migrant workers in seeking redress for underpayment, without the fear of visa cancellation.

Conclusions

The Unions NSW Audit shows an increase in the number of advertised jobs offering rates below applicable minimum wages and exposes the failure of the FWO to take appropriate action to stamp out exploitation and wage theft among temporary migrant workers.

The COVID-19 crisis has intensified the already endemic exploitation of temporary migrants, with the lack of assistance by the FWO encouraging employment abuse, as employers know well that breaches of industrial laws will seldom be investigated.

Based on Unions NSW's experience, employees who seek the FWO's assistance are encouraged to compromise to reach settlements by negotiating of money to which they were unequivocally entitled in the first place. Contemporaneously, as pecuniary penalties cannot be enforced in mediation, employers are able to move on unscathed, unpenalised and likely undeterred from repeating their behaviour.

Noting the incompetence of the work conducted by the FWO, unions urge the Federal Government to fund unions and peak industrial organisations to lead proactive investigative efforts to identify and stamp out wage theft and exploitation. By having the power to prosecute, peak bodies will also be able to support businesses who are paying their employees correctly and consistently according to industrial instruments by seeking pecuniary penalties for those who do not. Without penalising employers who are underpaying, anti-competitive behaviour is effectively encouraged to the detriment of businesses who are abiding by their legal obligations.

The increase in sham contracting identified by Unions NSW research exposes the 40-hour per fortnight visa restriction on international students as an ineffective mechanism to ensure that international student are genuine students, and only facilitates employer exploitative practices, using migrants' fears against them.

Foreign job ads offering positions for below the minimum wage are increasing, and the Federal Government should immediately implement the recommendations of the Migrant Workers' Taskforce, including the recommendation to amend the Fair Work Act to include a prohibition on advertising jobs with pay rates below the minimum wage.

Endnotes

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