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Senate Economics References Committee
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6 March 2020

Dear Committee Secretary,

Inquiry into the unlawful underpayment of employees' remuneration

We welcome the opportunity to make a submission to the inquiry into the unlawful underpayment of employees' remuneration. Our submission concerns wage theft among temporary migrants, including international students and backpackers (Working Holiday Makers).

We draw the Committee's attention to five 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. Laurie Berg and Bassina Farbenblum, [*Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*](#) (2017).

This report presents the 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.

This report presents findings on the characteristics of temporary migrants' lowest paid job, rates and method of pay, working conditions, how they found low paid work, their knowledge of Australian minimum wages and perceptions of their labour market. We conclude that a substantial proportion of international students, backpackers and other temporary migrants

were paid around half the legal minimum wage in Australia.

2. Bassina Farbenblum and Laurie Berg, [Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia](#) (2018).

This report presents further findings of the NTMW Survey, focusing on the question of why underpaid migrant workers do not try to recover the wages they are owed. This includes the experiences of the very few participants who tried to recover unpaid wages, the characteristics of participants who were open to trying to recover unpaid wages in the future and the factors that stopped underpaid survey participants from taking action to recover their wages. We conclude that, absent broader union membership or more accessible redress pathways, individual remedies remain beyond the reach of most exploited migrant workers in Australia.

3. 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.

4. 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.

5. 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.

In addition, this submission summarises key findings from a further forthcoming report: Bassina Farbenblum and Laurie Berg, *International Students and Wage Theft in Australia* (forthcoming, 2020). This 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. Almost two thirds had worked in paid employment in Australia. The report presents findings on these students' wage rates, other problems at work, whether they sought information or help for problems and where they did so. For participants who did not seek help for underpayment or other problems, it examines why this was the case. Finally it presents findings on all participants' knowledge and misconceptions about international students' rights, entitlements and responsibilities at work.

The study found that underpayment of international students is systemic and widespread: half of respondents were paid below the statutory minimum wage and over three quarters were paid below the minimum hourly wage for a casual employee. The proportion of international students reporting egregious levels of wage theft (\$12 or less per hour) has not improved since the 2016 National Temporary Migrant Work Survey. It found that underpayment appears to be structurally linked to workers being international students, and not to particular characteristics such as English language ability, level of education, or program of study.

This submission directs the Committee to key findings and recommendations in the five publications listed above, and summarises key findings from the forthcoming *International Students and Wage Theft in Australia* report. The authors will provide the Committee with a copy of the full report when it is published.

Forms of wage theft

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.¹
- Almost half (46%) earned \$15/hour or less, including 43% of international students and 46% of backpackers.²
- Underpayment was widespread across numerous industries but was especially prevalent in food services, and especially severe in fruit and vegetable picking.³
- Other reported forms of wage theft included:
 - 5% of respondents paid an upfront 'deposit' for a job in Australia.⁴
 - 4% of respondents indicated that their employer required them to pay money back in cash after receiving their wages.⁵

The forthcoming *International Students and Wage Theft in Australia 2020* report reveals that underpayment of international students continues to be systemic and widespread.

- Half of respondents were paid below the statutory minimum wage.
- Over three quarters were paid below the minimum hourly wage for a casual employee.
- The proportion of international students reporting egregious levels of wage theft (\$12 or less per hour) has not improved since the 2016 survey.
- Other reported forms of wage theft included:
 - 9% of respondents had not been paid at all for a period.
 - 3% of respondents indicated that their employer required them to pay money back in cash after receiving their wages.

Reasons for wage theft

Wage Theft in Silence and *Wage Theft in Australia* indicate that the number of reported complaints each year vastly underrepresents the depth and scope of underpayment of temporary migrant workers.⁶ Employers engage in wage theft for several reasons. Most obviously, employers seek to cut costs in order to make a profit. In an environment in which rent, materials and other fixed costs are high, and consumers (and in turn, retailers) demand ever cheaper goods and services, wages are perceived as the only flexible budget item. Those businesses that engage in wage theft are able to gain a competitive advantage by offering cheaper goods and services, driving others in their industry to do the same.

¹ 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 ('*Wage Theft in Australia*').

² Ibid 24-27.

³ Ibid 30-31.

⁴ Ibid 43-44.

⁵ Ibid 45.

⁶ Farbenblum and Berg, *Wage Theft in Australia* (n 1) 9; 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*').

Employers underpay migrant workers because they can. They are aware that many visa-holders will accept unlawfully low wages without complaint. These migrants may perceive themselves as seeking jobs in a saturated parallel labour market in which it is routine for migrant workers to receive illegally low wages. In the NTMW Survey, the large majority of international students and backpackers were aware of the Australian minimum wage and knew they were being underpaid. But they believed that few people on their visa can expect to receive the minimum wage, and perceived underpayment as endemic among people on their visa. At least 86% of temporary migrants who earned \$15 per hour or less believed that many, most or all other people on their visa are paid less than the basic national minimum wage.⁷ Work restrictions or incentives that relate to visas can also create vulnerabilities or pressure to engage in underpaid work. These include the 88 day regional work requirement for Working Holiday Makers and the 40 hour per fortnight work restriction on student visa Conditions 8105.⁸ The forthcoming *International Students and Wage Theft* report found that wage theft among international students was pervasive and not restricted to any particular characteristic such as nationality, poor English language ability or program of study (such as English-language or vocational students).

Noncompliant employers correctly assume 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 over 2,250 NTMW Survey 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.⁹ The overwhelming majority (97%) of underpaid temporary migrant workers did not contact the FWO for assistance.¹⁰ For discussion of the reasons migrant workers do not report or attempt to recover unpaid wages see *Best means of deterring, identifying and remediating wage theft*, below.

In addition to benefiting from a silenced workforce, employers are aware that external detection and accountability for wage theft is limited and unlikely. The FWO does not systematically investigate labour breaches, and when detected, often does not impose penalties beyond repayment of wages owed. As discussed below, migrant workers do not bring claims against employers in court and do not report wage theft to the FWO due to fears of visa cancellation and job loss, and a range of practical barriers. Without a right of entry, unions lack power to investigate potential wage theft and enable migrant workers to recover their wages.

⁷ Farbenblum and Berg, *Wage Theft in Australia* (n 1) 35.

⁸ 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) ('*A National Disgrace*') 164, 212-213, 215-216, 259-260; and Fair Work Ombudsman, *Inquiry into the wages and conditions of people working under the 417 Working Holiday Maker Program* (2016), 3.

⁹ Farbenblum and Berg, *Wage Theft in Silence* (n 6) 20.

¹⁰ *Ibid* 6.

Finally, noncompliant employers can evade liability through labour hire arrangements or by liquidating and phoenixing, with inadequate government regulation and oversight and absent robust accessorial liability provisions.

Best means of deterring and identifying wage theft and recovering unpaid entitlements

Detection of wage theft will remain illusive unless workers are incentivised to report wage theft. This will only occur when the high risks and costs of reporting are outweighed by protections and benefits to workers. Our research indicates that if resources are invested in creating safe accessible processes, a greater number of migrant workers would report and seek redress for unpaid wages in the future.¹¹

Reasons why migrant workers endure wage theft in silence

The *Wage Theft in Silence* report confirmed that the overwhelming majority of migrant workers (91%) endured wage theft in silence.¹² Both *Wage Theft in Silence* and *International Students and Wage Theft* illuminated key reasons why international students and other migrant workers are not seeking to recover unpaid wages through existing mechanisms, or to even try to get information or help for problems at work. Findings in the forthcoming *International Students and Wage Theft* report revealed the following barriers impeding international students from taking action in relation to wage theft and other problems at work:

Fear of job loss

By far the most common reason why international students did not seek information or help for problems was that they feared they would lose their job (selected by 48% of respondents). This fear appears well-founded, since 7% of respondents in this survey reported that they had in fact lost their job because they complained. Given that 45% of respondents did not experience any problems at work, and only a small portion of those who had problems would have complained to their employer, this indicates that many of those who complained to their employer did in fact lose their job. This finding underscores the importance of international students receiving expert representation and/or assistance, rather than being encouraged to approach an employer directly about a problem. It also suggests the importance of workers addressing problems collectively rather than individually to mitigate the risk of job loss if an international student seeks to assert her rights directly with her employer. Temporary migrants are especially vulnerable because, as casual employees or employees on short-term employment contracts,

¹¹ Farbenblum and Berg, *Wage Theft in Silence*, 42-46.

¹² Ibid 20.

they often do not have the benefit of unfair dismissal legal protections, or face insurmountable practical obstacles to enforcing protections.¹³

Pessimism about outcome

The risk of job loss far outweighs any potential benefit of taking action for many international students who perceive that there is nothing they can do to change their situation. The *International Students and Wage Theft* report reveals that almost four in ten respondents (37%) reported that they did not seek information or help for a problem at work because they 'didn't think having information or help would change anything'. This suggests a perception of endemic non-compliance in international students' saturated labour market, where power resides almost entirely with the employer absent opportunities for collective or individual redress and effective government enforcement. This perception can only be mitigated through systemic reforms that empower international students (and other workers) to report non-compliance and obtain redress, including through the establishment of a new forum which expedites wage recovery and resourcing of legal services to advise and assist international students to pursue claims, including on university campuses. It also demands more effective government investigation and enforcement on the part of the Fair Work Ombudsman and other regulators.

Perception of others' acquiescence

Four in ten students indicated that they did not seek information or help for a problem at work because many people around them had the same problems and they were not doing anything about it. This reinforces the importance of enabling collective action by migrant workers.

Fear of immigration consequences

It is now widely accepted that many international students do not report problems at work for fear of immigration consequences.¹⁴ Almost four in ten students (38%) in this survey reported that they did not seek information or help for a problem at work because they did not want 'problems that might affect my visa'. 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 may be partly because it affirmatively requires the FWO to pass on the worker's information to the DHA to obtain protection from visa cancellation. It may also partly stem from the fact that, for many, fear of visa loss extends beyond their current visa to a fear of jeopardising their prospect of obtaining a future visa including permanent residency for which the protocol provides no protection.

¹³ Joanna Howe, Laurie Berg, and Bassina Farbenblum, 'Unfair Dismissal Law and Temporary Migrant Labour in Australia' (2018) 46(1) *Federal Law Review* 19.

¹⁴ 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 1) 8. The chilling effect of this visa condition has also been recognised in Migrant Workers' Taskforce, *Report of the Migrant Workers' Taskforce* (n 8) 36-37; and Senate Education and Employment References Committee, *A National Disgrace* (n 8) 164, 212-213, 215-216, 259-260.

The most effective way to address this concern is to remove the 40 hour fortnightly work condition on student visas that gives rise to their vulnerability and related fear of visa cancellation. So long as this visa condition remains in place, government should establish an absolute firewall between the FWO and DHA that provides all migrant workers, regardless of visa status, with the necessary assurance that if they seek help from the FWO for exploitation at work their information will not be shared with DHA.

Perceptions of culpability

International students have a further set of work-related concerns that drive their fear of visa loss, based on a misperception of their own noncompliance. Four in five respondents believed that international students break the law by agreeing to wages less than the legal minimum. Further, 69% of respondents believed that international students are complicit in breaking the law when they accept payment of their wages in cash. It is entirely rational for international students who suspect they have broken the law to not seek help or draw attention to their situation.

These findings underscore the need for clear information delivered to international students to address both of these misconceptions. It is also important that government agencies and others exercise caution in framing their communications to avoid an impression that students are considered complicit in breaking the law if they accept underpayment. The ATO can also assuage international students' fears around cash payments by publicly indicating to international students that they can rectify outstanding tax payments without penalty, and that any information provided to the ATO regarding the number of hours they worked would not be shared with DHA.

Knowledge of entitlements

It is sometimes assumed that international students accept underpayment because they are unaware of the minimum wage in Australia.¹⁵ This was not the case, with only 16% of respondents not knowing the approximate legal minimum hourly wage for an adult. However, three quarters of respondents did not know that the legal minimum hourly wage for an adult in a *casual* position is at least \$23 per hour. This suggests that information campaigns for international students should focus on increasing awareness of casual loadings, penalty rates and other entitlements, not on the statutory minimum wage.

Another reason why international students may not take action in relation to wage theft is that they are not aware that most international students who are in Australia for the full financial year are entitled to the tax free threshold (i.e. no tax is payable on the first \$20,570 of annual income). 56% of respondents were under the misconception that all international students must pay tax on all wages they earn, mistakenly believing that being underpaid in cash and not

¹⁵ See e.g., Migrant Workers' Taskforce, *Report of the Migrant Workers' Taskforce* (n 8) 36; Senate Education and Employment References Committee, *A National Disgrace* (n 8) 318; and Productivity Commission, *Workplace Relations Framework* (Inquiry Report No 76, 2015) 919-920 ('*Workplace Relations Framework Inquiry*').

declaring their income leaves them in a similar position as if they were paid correctly and had complied with their taxation responsibilities. This suggests the importance of education by the ATO and education providers on international students' tax responsibilities and entitlements, and provision of assistance to lodge a tax return.

Not knowing how to enforce their legal rights or access assistance

A third of students (34%) reported that they did not seek information or help for a problem at work because they did not 'know where to go for information or help'.

Limited accessible assistance and legal advice

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.¹⁶ 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 owed.¹⁷

Poor outcomes of current wage recovery processes do not justify risks and costs

Wage Theft in Silence revealed that among the small number of survey participants who tried to recover unpaid wages through any channel, two in three recovered nothing (67%).¹⁸ Fewer than one in six (16%) received the full amount they were owed.¹⁹

When the likelihood and quantum of a successful outcome 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. Institutional reform is required to reduce the costs, effort and risks involved in reporting underpayment, and increase the likelihood that a migrant worker will successfully recover a significant portion of unpaid wages if they pursue a remedy. Indeed, *Wage Theft in Silence* revealed that almost half of underpaid participants (45%) were open to trying to recover unpaid wages in the future.²⁰

¹⁶ Migrant Workers' Taskforce, *Report of the Migrant Workers' Taskforce* (n 8) 58, 94; Farbenblum and Berg, *Wage Theft in Silence* (n 6) 38; 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, 1070-1071, 1080 ('Lessons from the 7-Eleven Wage Repayment Program'); 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, 324 ('Migrant workers' access to remedy'); and WEStjustice, *Not just work: Ending the exploitation of refugee and migrant workers* (Report, WEStjustice Western Community Legal Centre, 2016) 128, 139-140 ('Not Just Work').

¹⁷ WEStJustice, *Not Just Work* (n 16) 139; Farbenblum and Berg, *Wage Theft in Silence* (n 6) 14, 42.

¹⁸ Farbenblum and Berg, *Wage Theft in Silence* (n 6) 30.

¹⁹ *Ibid* 30.

²⁰ *Ibid* 20.

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.²¹ Only one in five (21%) recovered their full wages.²²

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.²³

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.²⁴ 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.²⁵

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).²⁶ In *Wage Theft in Silence*, a third (35%) of temporary migrants 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

²¹ Farbenblum and Berg, *Wage Theft in Silence* (n 6) 30.

²² Ibid.

²³ Berg and Farbenblum, *Migrant workers access to remedy* (n 16) 321-323, 323-325.

²⁴ 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 8) 321-322; and WEstJustice, *Not Just Work* (16) 122, 142.

²⁵ Farbenblum and Berg, *Wage Theft in Silence* (n 6) 38.

²⁶ See also WEstJustice, *Not Just Work* (n 16) 86, 132.

complicated.²⁷ 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.²⁸ 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. We endorse *MELS/WEstJustice Submission Recommendation 19* regarding imposition of costs on employers who unreasonably refuse to participate in a matter before the FWO, and empowering the FWO to issue an Assessment Notice that sets out an employee's entitlements and can be used in court proceedings, alongside a new reverse onus of proof such that a worker is taken to be owed the amount in the Assessment Notice unless the employer proves otherwise.

A legislated firewall should be established between the FWO and the DHA.²⁹ This must prevent the FWO from sharing identifying information of any temporary migrant with DHA without their consent when the individual reports or seeks assistance in relation to a breach of his or her labour rights. This firewall should extend to workers whose visas prohibit work or who have overstayed their visa in Australia. This should replace the current protocol between the two agencies which permits sharing of this information, and would require a reconsideration of FWO's role in enforcement of visa conditions, for example in the Temporary Skills Shortage program.

Finally, the *Wage Theft in Australia* report revealed that 50% of participants never or rarely received payslips,³⁰ which to date has presented a substantial barrier to migrant workers receiving assistance from the FWO. Since the introduction of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth), a presumption applies in court that an underpayment has occurred in the absence of payslips, which may be rebutted by evidence by an employer of compliance with lawful wage rates. This presumption in favour of a worker who did not receive payslips should be similarly applied by the FWO at all stages including on the Infoline and considering whether to proceed with investigations and compliance actions.

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

²⁷ Farbenblum and Berg, *Wage Theft in Silence* (n 6) 36.

²⁸ WEstJustice, *Not Just Work* (n 16) 28, 133

²⁹ 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 16) 319-320; Productivity Commission, *Workplace Relations Framework Inquiry* (n 15) 932.

³⁰ Berg and Farbenblum, *Wage Theft in Australia* (n 1) 40.

reporting.³¹ 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 workplace audits to detect noncompliance and alert noncompliant employers to a greater risk of detection by the regulator and meaningful penalties.³²

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.³³

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 2009* (Cth), 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.³⁴ Only a single participant in the NTMW Survey reported that they had gone to court to recover unpaid wages.³⁵ This is consistent with a perception among legal practitioners that this jurisdiction is inaccessible to the overwhelming majority of migrant workers.³⁶

³¹ See Migrant Workers' Taskforce, *Report of the Migrant Workers' Taskforce* (n 8) 90-92; Farbenblum and Berg, *Wage Theft in Silence* (n 6) 11; Berg and Farbenblum, *Migrant workers access to remedy* (n 16) 322, 326; and Productivity Commission, *Workplace Relations Framework Inquiry* (n 15) 927.

³² See, e.g. Recommendations 5, 6, and 7 of the Migrant Workers' Taskforce, *Report of the Migrant Workers' Taskforce* (n 8) regarding penalties (at 9-10); Recommendation 31 of the Senate Education and Employment References Committee, *A National Disgrace* (n 8) 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 15) which recommended additional resources for the FWO to identify, investigate, and carry out enforcement activities (at 927).

³³ Farbenblum and Berg, *Wage Theft in Silence* (n 6) 6, 30.

³⁴ As discussed in Farbenblum and Berg, *Wage Theft in Silence* (n 6) 15; and Berg and Farbenblum, *Migrant workers access to remedy* (n 16) 313-314, 324.

³⁵ Farbenblum and Berg, *Wage Theft in Silence* (n 6) 28.

³⁶ *Ibid* 44.

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.³⁷ 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 worked³⁸
- 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 2009* (Cth) have occurred.³⁹

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
- 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

³⁷ 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>>.

³⁸ See Berg and Farbenblum, *Lessons from the 7-Eleven Wage Repayment Program* (n 16) 1084.

³⁹ 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).

- 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.⁴⁰

Further reforms to prevent and remedy wage theft

Reforms to visa settings under *Migration Act 1958* (Cth)

As noted above, visa settings clearly drive migrant workers into jobs characterised by extremely poor conditions including wage theft. These include the requirement that Working Holiday Makers prove employment for 88 days in designated areas and industries to be eligible for a second year visa (and prove 6 months of such employment to be eligible for a third year visa), and student visa conditions 8104 and 8105 which restrict students' work to 40 hours per fortnight while their studies are in session. Regulatory reforms are required to address the vulnerabilities created by current settings, including the following:⁴¹

1. Abolish the 40 hour student fortnightly work limit under Condition 8105

The most effective way to address this concern is to remove the 40 hour fortnightly work condition on student visas that gives rise to their vulnerability and related fear of visa cancellation. This would remove the possibility of a student breaching his or her visa based on the number of hours they work. As a result, it would remove a primary deterrent to international students reporting underpayment to the FWO or seeking help from their education provider or others. It would also diminish 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). It would establish far greater transparency around international students' working conditions and would enable underpayment to be detected and addressed more easily.

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. Second, 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. Third, allowing students to work unlimited hours would further saturate the labour market and limit work opportunities for residents and citizens.

⁴⁰ 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 8) 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).

⁴¹ The need for regulatory reform of visa settings has been recognised in the Senate Education and Employment References Committee, *A National Disgrace* (n 8); WEstJustice, *Not Just Work* (n 16); and Productivity Commission, *Workplace Relations Framework Inquiry* (n 15).

The first 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.

Secondly, in order 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) 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 penalty 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.

In relation to saturation of the local labour market, 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. First, it is clear that 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 were reduced by removing Condition 8105, they could work fewer hours to earn the equivalent amount. Second, measures discussed above in addition to Condition 8202 would be more effective at limiting labour market participation than Condition 8105. Finally, 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 removal of 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. 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. Establish a firewall between FWO and DHA, or substantially strengthen the current assurance protocol

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 especially the case for international students who have breached Condition 8105 but is also the case for workers on a Visitor visa, Temporary Skills Shortage visa, Bridging visa E (with no work rights) and visa-overstayers, among many others.

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. This must prevent the FWO from sharing with the DHA any identifying information of a temporary migrant who seeks the agency's assistance without the individual's informed consent. This firewall 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. 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 Cardena. 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 current protocol should have the following features:

- 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 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) 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 benefit 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. Introduce bridging visa arrangements for temporary visa holders to pursue claims

Some migrant workers are deterred from taking action against employers under workplace and occupational health and safety legislation because their stay in Australia will end, either because their visa will expire before their claim is resolved or because they fear visa cancellation (if DHA detects breach of visa condition). 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 investigation by relevant authorities.

A policy argument against this proposal is that it creates an incentive to bring unmeritorious claims in order to extend a worker's stay in Australia. To address this concern, 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 usual professional penalties for misrepresentation.

Improve legal services for migrant workers

Legal advice and representation for migrant workers is limited but essential for wage recovery in any forum.⁴² The FWO does not provide individualised assistance to calculate and recover

⁴² See Productivity Commission, *Access to Justice Arrangements* (Inquiry Report, vol 2, 5 September 2014) 734-736; Anna Booth, 'Report of the review of community-based employment advice services', (Report to the Fair Work Ombudsman, 30 September 2009).

unpaid wages other than for a very limited number of workers.⁴³ 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 is no recurrent funding for generalist community legal centres to provide this individualised assistance to vulnerable workers, and significant unmet need for these services. 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. We endorse *MELS/WestJustice Submission Recommendation 18* to this effect.

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.

Develop standards for business-led processes remediating large scale wage theft

Over the past two years, numerous large corporations have been found to have engaged in wage theft affecting thousands of workers. Several of these have set up their own wage repayment programs. With no transparency in relation to these programs it is difficult to determine their efficacy. However, it appears that, with the exception of 7-Eleven’s Wage Repayment Program, most have been inaccessible to many underpaid workers or have not included strong incentives for employee involvement. As a result, they have received an exceptionally low number of claims and paid out a negligible portion of wages owing to employees over many years of systemic wage theft.⁴⁴

As an increasing number of corporations seek to establish in-house wage repayment programs, it is important that minimum standards are set to ensure these programs are accessible to workers, especially migrant workers, and that they adhere to basic principles of due process

⁴³ Berg and Farbenblum, *Migrant workers access to remedy* (n 16); WEstJustice, *Not Just Work* (n 16).

⁴⁴ See e.g. Adele Ferguson, ‘Fair Work Ombudsman report on Caltex is a shocker’, *Australian Financial Review* (online, 4 March 2018) <<https://www.afr.com/opinion/fair-work-ombudsman-report-on-caltex-is-a-shocker-20180304-h0wyn3>>. See also discussion of Baiada’s wage repayment program in Berg and Farbenblum, *Lessons from the 7-Eleven Wage Repayment Program* (n 16) 1079-1080.

including reasonable limitation periods. It is also important that these processes have a degree of transparency and external accountability. Further recommendations for business-led redress mechanisms are contained in *Lessons from the 7-Eleven Wage Repayment Program*, along an analysis of the features of 7-Eleven's program that underpinned its effectiveness.

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 2009* (Cth), 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.⁴⁵ Respondents who were assisted by a union to recover wages reported the highest rates of wage recovery.⁴⁶

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).

Ensure labour protections for exploited workers engaging in unauthorised work

The Productivity Commission has recommended amendments to the *Migration Act 1958* (Cth) and the *Fair Work Act 2009* (Cth) 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.⁴⁷ See 'Exploitation of Unauthorised Migrant Workers' (forthcoming) for a more detailed discussion of wage theft among migrant workers who have overstayed their visa or worked contrary to visa conditions.

⁴⁵ Farberblum and Berg, *Wage Theft in Silence* (n 6).

⁴⁶ *Ibid* 30.

⁴⁷ See, e.g. Recommendation 23 of the Senate Education and Employment References Committee, *A National Disgrace* (n 8); and Recommendation 29.4 of the Productivity Commission, *Workplace Relations Framework Inquiry* (n 15) 931.

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.

A Commonwealth labour hire licensing scheme should be introduced.⁴⁸ Currently, separate state-based licensing schemes exist in Queensland, South Australia and Victoria. Having multiple schemes in operation may result in differential treatment and outcomes for vulnerable employees, and also imposes additional regulatory and cost burdens on labour hire operators and host businesses that operate across state borders. As such, the Migrant Workers' Taskforce has expressed a preference for a single national regulatory scheme rather than different and overlapping state-based schemes.⁴⁹ However, a national scheme should be introduced only if it is at least as strong as current state-based regimes, with a well-resourced inspectorate and effective mechanism for de-registration of licensed providers which includes avenues for meaningful worker and union input.

A Commonwealth scheme must involve strict licensing standards related to compliance with workplace and other laws and require remediation of breaches in order to obtain or renew licence. There must also be obligations on hosts to use only licenced providers based on a public register of licensed providers, and penalties for not doing so, as recommended in a number of relevant reviews.⁵⁰

Phoenixing activity should be addressed to ensure that directors are not able to close down companies to avoid debts to workers, and then open a new company without penalty. Commonwealth anti-phoenixing laws should be strengthened, and greater resources should be invested in enforcement of existing laws, along with stronger corporate regulation and oversight. This should include straightforward and cost-effective mechanisms for identifying the employing entity, relevant directors and further details on sole traders and trustees of trusts. There is also a clear need to increase the penalty for directors in order to send the right signal and to help combat the pernicious effects of illegal phoenix activity.⁵¹ We support the recommendation by Helen Anderson regarding introduction of Director Identity Numbers and other improvements to the company registration process to enable Australian Securities and Investments Commission (ASIC) to gather more information at the time a company is formed.⁵²

⁴⁸ See e.g. Migrant Workers' Taskforce, *Report of the Migrant Workers' Taskforce* (n 8); and Senate Education and Employment References Committee, *A National Disgrace* (n 8); WEstJustice, *Not Just Work* (n 16) 179.

⁴⁹ Migrant Workers' Taskforce, *Report of the Migrant Workers' Taskforce* (n 8) 105-107; and Senate Education and Employment References Committee, *A National Disgrace* (n 8) 327-328.

⁵⁰ Migrant Workers' Taskforce, *Report of the Migrant Workers' Taskforce* (n 8) 107; Senate Education and Employment References Committee, *A National Disgrace* (n 8) 327-328.

⁵¹ Senate Education and Employment References Committee, *A National Disgrace* (n 8) 325.

⁵² Helen Anderson, 'Sunlight as the disinfectant for phoenix activity' (2016) 24 *Company and Securities Law Journal* 257, 263-267.

The Fair Entitlements Guarantee Act 2012 (Cth) should be amended to ensure that, like Australian workers, temporary migrant workers are entitled to recover unpaid wages if their employer goes into liquidation. Extending access to the Fair Entitlements Guarantee (FEG) to eligible migrant workers has been recommended by the Migrant Workers' Taskforce, recognising that the circumstances relating to underpayments make them differentiable from social security payments, which are limited to Australian residents.⁵³

Section 550 of the Fair Work Act 2009 (Cth) is inappropriately limited to the franchise context, and sets a low standard that does not adequately establish liability for wrongdoing by franchisors. We support the Migrant Workers' Taskforce recommendations to extend the accessorial liability provisions of the Act to cover situations where businesses contract out services to persons.⁵⁴ In particular, s 550 should be amended to extend accessorial liability to lead companies in a supply chain, as well as head contractors and labour hire. Section 550 should also be amended to reduce the level of knowledge of or involvement in a contravention that is required to trigger accessorial liability.⁵⁵ In addition, obligations imposed on lead firms must include responsibility to remediate underpaid workers within a short timeframe where their suppliers or franchisees have failed to do so. This measure would shift the burden to businesses to pursue recalcitrant suppliers or franchisees for any money paid in remediation, rather than leaving the burden on underpaid workers who are least able to pursue a recalcitrant (and potentially liquidated and phoenixed) entity for unpaid wages. It would also strongly incentivise lead firms to ensure their suppliers pay workers correctly in the first instance.

Sham contracting arrangements should be addressed to ensure employers cannot misclassify workers as independent contractors in order to avoid the application of workplace laws and other statutory obligations. As set out in the *Not Just Work Report*, one way to achieve this is by introducing independent scrutiny and education at the time of applying for an ABN.⁵⁶ We endorse Recommendations 1 to 4 and 25 in *MELS/WEstJustice Submission* regarding: the introduction of independent scrutiny and education at the time that an application for an ABN is made (Rec 1); introduction of more extensive education programs and targeted assistance to make sham contracting laws meaningful for CALD workers (Rec 2); increasing 'on-the-spot' inspection and assessment of industries at risk of sham contracting by regulators (Rec 3); establishment of an Office of the Contractor Advocate to provide information to individual workers and businesses about whether they are independent contractors or employees, investigate and report on systemic non-compliance, and assist vulnerable workers to navigate local court, tribunals and other jurisdictions to recover minimum entitlements (Rec 4); and creation of a rebuttable presumption that an employment relationship exists with a requirement that principals to prove that contractors are operating their own business (Rec 25).

⁵³ Migrant Workers' Taskforce, *Report of the Migrant Workers' Taskforce* (n 8) 97-98. See also, Senate Education and Employment References Committee, *A National Disgrace* (n 8) 151; and WEstJustice, *Not Just Work* (n 16) 158.

⁵⁴ Migrant Workers' Taskforce, *Report of the Migrant Workers' Taskforce* (n 8) 93.

⁵⁵ See, e.g. Senate Education and Employment References Committee, *A National Disgrace* (n 8) 307-310; WEstJustice, *Not Just Work* (n 16) 173.

⁵⁶ WEstJustice, *Not Just Work* (n 16).

We endorse Recommendation 25.1 of the Productivity Commission Report regarding amendment of the *Fair Work Act 2009* (Cth) to make it unlawful to misrepresent a current or proposed employment arrangement as independent contracting (under s. 357) where the employer could reasonably be expected to know otherwise.⁵⁷ We also endorse the insertion of a new Part 6-4B into the Act, as set out in the *Fair Work Amendment (Making Australia More Equal) Bill 2018* (Cth) introduced by Adam Bandt in 2018. The new part would allow the FWC to make minimum entitlements orders in respect of one worker or a class of workers, and their constitutionally-covered businesses. It could make orders in relation to a particular industry or part of an industry or a particular kind of work.

Reforms to Federal Government procurement practices

The Federal Government should modify its procurement practices to ensure that public contracts are only awarded to those businesses that do not engage in wage and superannuation theft. This is critical both to model best practice, and to drive shifts within industries in which wage theft is endemic and part of the business model. Setting new procurement standards enables government to create commercial incentives for suppliers to reform their practices. This may drive compliance not only in order to obtain government business, but also to be recognised more generally in the market as a preferred supplier that has been vetted by government. Procurement standards should incorporate best practice industry-specific compliance frameworks. For example, for Commonwealth leased office property, the government should adopt requirements from the Cleaning Accountability Framework.⁵⁸ This comprehensive framework establishes best practice tendering and compliance approaches in outsourced cleaning services.

Australian companies are becoming increasingly aware of the need to ensure that workers within their broader business are employed in accordance with the *Fair Work Act 2009* (Cth). Some, such as 7-Eleven, have accepted responsibility not only for oversight of franchisee wage payments going forward, but for ensuring that workers within the entire business network have recovered unpaid wages.⁵⁹ However, few other businesses have recognised their responsibility to ensure wage recovery within a larger network of suppliers or subsidiaries when wage theft is detected. It is therefore critical that government procurement settings extend beyond ensuring that contracts are awarded to businesses that comply with wage and superannuation requirements, and include suppliers' commitment to remediation of wage theft when detected with appropriate processes for doing so. Government must also develop standards for evaluating compliance with this requirement both in terms of remediation of previous and future

⁵⁷ Productivity Commission, *Workplace Relations Framework Inquiry* (n 15) 915-916.

⁵⁸ Cleaning Accountability Framework, 'Guide to the CAF Building Certification Scheme' (2019) <<https://www.cleaningaccountability.org.au/building-certification/>>. CAF is an independent, multi-stakeholder initiative focused on improving labour standards in the cleaning industry in Australia.

⁵⁹ See e.g. Berg and Farbenblum, *Lessons from the 7-Eleven Wage Repayment Program* (n 16).

underpayment, with clear consequences for non-compliance. In doing so, government can model the importance of ensuring wage recovery and enable businesses to adopt standards for evaluating remediation efforts and remedial processes of current and prospective suppliers.

Summary of Recommendations

RECOMMENDATION	PAGE
1. 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.	10
2. The FWO should establish a dedicated support service for migrant workers, with personnel who are experts 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.	10
3. 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.	11
4. 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.	11-12

5.	Grant powers to the FWO to issue an Assessment Notice that sets out an employee’s entitlements which can be used in court to establish a presumption in the worker’s favour regarding the employer’s debt to the worker.	11
6.	Because of the very high prevalence of sham contracting among temporary migrants, the FWO should routinely apply a presumption that a temporary migrant seeking its assistance is an employee, regardless of whether he or she was paid under an ABN (if, upon investigation, it appears the worker was genuinely an independent contractor, the FWO could then decline further involvement).	21
7.	The FWO should apply the <i>Fair Work Act</i> presumption of underpayment in favour a worker who did not receive payslips at all stages of its involvement with a worker, including on the Infoline and when considering whether to proceed with investigations and compliance actions.	11
8.	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. This should replace the current protocol between the two agencies which permits (and requires) sharing of a worker’s identifying information, and would require a reconsideration of FWO’s role in enforcement of visa conditions, for example in the Temporary Skills Shortage program.	11, 17
9.	Remove the 40 hour fortnightly work condition on student visas (Condition 8104/8105) for all students, or at least for students enrolled in longer-term courses that require more intensive study and greater financial investment.	8, 14
10.	Institute a formal system of warnings by DHA prior to visa cancellation for breach of work conditions.	16
11.	Introduce bridging arrangements for all temporary visa holders, and visa-overstayers, to pursue meritorious claims under workplace and occupational health and safety legislation if their visa would expire or be cancelled before their claim is resolved.	18

12.	Grant powers to the FWC 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 <i>Fair Work Act 2009</i> (Cth) have occurred.	14
13.	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">● Accessible to migrant workers including well-resourced individualised assistance to calculate wage claims, along with legal advice and representation;● The 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;● 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.	13
14.	In the absence of a new forum in the recommendation above, introduce the following reforms to the small claims jurisdiction: <ul style="list-style-type: none">● 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.	13-14

15.	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
16.	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
17.	Establish minimum standards for corporate wage repayment programs in response to underpayment of large numbers of workers. These should be practically accessible to vulnerable workers, especially migrant workers and adhere to basic principles of due process, transparency and accountability with reasonable limitations periods in which workers may bring a claim. These processes must also have a degree of transparency and external accountability, and should include the provision of assistance to workers to make claims.	19-20
18.	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.	20
19.	Amend the <i>Migration Act 1958</i> (Cth) and the <i>Fair Work Act 2009</i> (Cth) to clarify that a visa breach does not void a contract of employment and that <i>Fair Work Act</i> provisions apply even when a person has breached their visa conditions or has performed work in the absence of a visa.	20
20.	Introduce a Commonwealth labour hire licensing scheme with a well-resourced inspectorate and effective mechanism for de-registration of licensed providers, which includes avenues for meaningful worker and union input on conduct of specific operators. The scheme should establish strict licensing standards related to compliance with workplace and other laws and require remediation of breaches in order to obtain or renew a licence. There must also	21

be obligations on hosts to use only licenced providers based on a public register of licensed providers, and penalties for not doing so. A national scheme should be introduced only if it is at least as strong as current state-based regimes in all of these respects.

21.	Strengthen Commonwealth anti-phoenixing laws by committing additional resources to enforcement of existing laws and stronger corporate regulation and oversight, as well as increasing penalties for directors. There should also be a straightforward and cost-effective mechanism for identifying the employing entity, relevant directors and further details on sole traders and trustees of trusts.	21
22.	Amend the <i>Fair Entitlements Guarantee Act 2012</i> (Cth) to extend access to the FEG to temporary visa-holders.	22
23.	Address sham contracting arrangements, including by: introducing independent scrutiny and education at the time of applying for an ABN; introducing more extensive education programs and targeted assistance to inform CALD workers about sham contracting; increasing ‘on-the-spot’ inspection and assessment of industries at risk of sham contracting by regulators; establishing an Office of the Contractor Advocate to provide information, investigate and report on non-compliance and assist vulnerable workers to recover minimum entitlements; and creating a rebuttable presumption that an employment relationship exists with a requirement that principals prove that contractors are operating their own business. This presumption should be applied by the FWO in its interactions with migrant workers (see Recommendation 6 above).	22-23
24.	Amend the <i>Fair Work Act 2009</i> (Cth) to make it unlawful to misrepresent a current or proposed employment arrangement as independent contracting where the employer could reasonably be expected to know otherwise.	23
25.	Amend the <i>Fair Work Act 2009</i> (Cth) to insert a new Part 6-4B as per the <i>Fair Work Amendment (Making Australia More Equal) Bill 2018</i> (Cth).	23
26.	Amend s 550 of the <i>Fair Work Act 2009</i> (Cth) to impose accessorial liability on all relevant third parties involved in workplace contraventions including lead firms in a supply chain, as well as head contractors and lead firms who deploy labour hire services. Reduce the level of knowledge of or involvement in a contravention that is required to trigger accessorial liability. Impose further obligations on lead firms including responsibility to remediate	22

underpaid workers within a short timeframe where their suppliers or franchisees have failed to do so.

27.	Modify federal Government procurement practices to ensure that public contracts are only awarded to those businesses that do not engage in wage and superannuation theft, and that demonstrate a commitment to remediating previous and future underpayment of workers with appropriate processes for doing so. Develop standards for evaluating compliance with clear consequences for non-compliance.	23
28.	Invest resources in research to develop and implement evidence-based information materials and ongoing education for international students. Ensure information materials and campaigns focus on increasing international students’ awareness of casual loadings, penalty rates and other entitlements, and taxation obligations and entitlements, as well as addressing students’ misconceptions about their culpability.	9-10
29.	Ensure government communications avoid giving an impression that students are considered complicit in breaking the law if they accept underpayment.	9
30.	The ATO and education providers should assist international students to prepare a tax return, including publicising the ATO’s free anonymous telephone information line to international students and developing and disseminating of accessible multilingual materials on their taxation responsibilities that dispel common misperceptions.	10

We welcome the opportunity to discuss these recommendations further, and anticipate providing further research and best practice guidance on business-led wage recovery processes in due course.

Sincerely,

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Confidential submission – not to be publicly released until authorised by authors

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