

Short-changed

How to stop the exploitation of
migrant workers in Australia

Brendan Coates, Trent Wiltshire, and Tyler Reysenbach

May 2023



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Overview

The exploitation of migrant workers in Australia needs to stop. Exploitation hurts migrants, but it also weakens the bargaining power of Australian workers, harms businesses that do the right thing, damages our global reputation, and undermines confidence in our migration program.

Up to 16 per cent of recent migrants are paid less than the national minimum wage, compared to up to 9 per cent of all Australian workers. Recent migrants are 40 per cent more likely to be underpaid than long-term residents, even after accounting for the fact that migrant workers are typically younger, and work in less-skilled jobs in industries where exploitation is more common.

Three sets of reforms are needed to stamp out exploitation of migrant workers.

First, visa rules that increase migrants' risk of exploitation should be reformed. Many temporary visa-holders put up with mistreatment out of fear that their visa will be cancelled if they are working in breach of visa rules, or that they will lose their pathway to permanent residency. Temporary skill-shortage visas should be made portable, so migrants can flee from an exploitative employer. Sponsored workers should be able to apply for permanent residency after two years with any sponsoring employer. Working holiday makers should be limited to a single one-year visa. A review of international higher education should assess how students' work rights should change to reduce exploitation.

The Assurance Protocol has failed to encourage migrants working in breach of their visa conditions to report exploitation. It should be replaced with a strengthened Exploited Worker Visa Guarantee. And a new Workplace Justice visa should be created, to let migrants remain in Australia while they pursue claims for unpaid wages.

Second, workplace and migration laws must be strengthened and better enforced to deter exploitation. Few employers who underpay their workers get caught, and the penalties are far too small when they are caught. Employers who underpaid their workers were hit with penalties of just \$4 million in 2021-22, compared to \$3 billion collected by the Australian Taxation Office and \$232 million imposed for breaches of competition and consumer law.

The Fair Work Ombudsman should be renamed the Workplace Rights Authority and get greater powers and an extra \$60 million a year to step up its enforcement of workplace laws. It should have the power to fine employers who underpay their workers. Maximum court-ordered penalties should be increased, and criminal penalties should apply where employers knowingly underpay their workers. The government should commission an independent review to ensure that the Authority has the right strategy, structure, skills, and culture to enforce the law. The Australian Border Force has failed to sufficiently use its powers, including criminal sanctions, to punish employers of migrants working in breach of visa rules. These laws should be enforced, and strengthened.

Third, greater support should be offered to help migrant workers reclaim lost wages. Migrant Workers Centres should be established in each state, funding for community legal centres should be boosted, and the Fair Entitlement Guarantee should be extended to migrant workers.

These reforms would cost about \$115 million a year. That should be paid for by a levy on select temporary visas set at \$30 for each year of work rights the visa offers (raising \$45 million a year) and by larger penalties for employers who underpay their workers (raising at least \$70 million per year). Together, these reforms could help stamp out exploitation for good.

Recommendations

Reform visa rules to make migrants less vulnerable to exploitation

1. Make temporary skill-shortage visas portable so workers can leave exploitative employers.
2. Allow sponsored workers to apply for permanent residency after two years with any sponsoring employer.
3. Limit working holiday maker visas to a single one-year visa, and abolish the rules that permit holiday makers to extend their stay in Australia if they perform 'specified work'.
4. Make visas issued under the Pacific Australia Labour Mobility (PALM) scheme portable.
5. Commission an independent review of international higher education in Australia.
6. Replace the Assurance Protocol with a strengthened Exploited Worker Visa Guarantee.
7. Create a Workplace Justice visa to empower workers to report exploitation and stay in Australia to pursue outstanding claims.
8. Apply a 'preventing exploitation levy' on temporary visas of \$30 for each year of work rights offered.

Strengthen the enforcement of workplace and migration laws

9. Rename the Fair Work Ombudsman the Workplace Rights Authority and boost funding by \$60 million a year to \$230 million a year.
10. Empower the Authority to issue infringement notices for underpayment.
11. Increase maximum penalties for Fair Work Act contraventions that cover underpayment.
12. Change the test for 'serious contraventions' from knowing and systematic to reckless and systematic.
13. Introduce criminal penalties, with a maximum penalty of 10 years imprisonment, for employers who knowingly underpay workers.
14. Conduct an independent capability review of the Ombudsman to inform the strategy, structure, skills and culture of the new Authority.
15. Require the Authority to produce an annual report on the extent of migrant worker exploitation.
16. Require businesses to report hours worked on the Single Touch Payroll system, to help detect underpayment.
17. Increase Department of Home Affairs funding by \$10 million a year.
18. The Australian Border Force should pursue criminal cases against employers who knowingly employ migrants in breach of their visa conditions and conduct more investigations of suspect employers.
19. Establish new migrant exploitation offences in the Migration Act.
20. Issue all temporary visa-holders with work rights a tax file number upon arrival.

Close loopholes and better support migrants to pursue underpayment claims

21. Review the limits on data sharing among Phoenix Taskforce members and boost taskforce funding.
22. Change the sham contracting 'recklessness' test in the Fair Work Act to a test of 'reasonableness', and increase penalties.
23. Consolidate existing state schemes into a National Labour Hire Registration Scheme.
24. Establish a Migrant Workers Centre in each state and increase funding for Community Legal Centres.
25. Increase the number of points at which the Department of Home Affairs provides migrants with information about workplace laws and work rights.
26. Consider creating a new specialised workplace court or tribunal as part of the existing review of the small claims procedure.
27. Expand the Fair Entitlement Guarantee to include temporary visa-holders.

Table of contents

Overview	3
1 The exploitation of migrant workers is widespread	6
2 Reform visa rules to make migrants less vulnerable	21
3 Strengthen and better enforce workplace laws	44
4 Enforce migration laws to deter bad-faith employers	70
5 Close loopholes that allow employers to exploit migrant workers without sanction	77
6 Provide more support for migrant workers to pursue underpayment claims	81
7 How to pay for these reforms	92
A Measuring the extent of underpayment of migrants	95

1 The exploitation of migrant workers is widespread

The exploitation of migrant workers in Australia is widespread.

Between 5 per cent and 16 per cent of employed recently arrived migrants – or between 27,000 and 82,000 workers – are paid below the national minimum wage. And between 1.5 per cent and 8 per cent of recent migrants – between 6,500 and 42,000 people – are underpaid by at least three dollars an hour. Rates of underpayment fell during the pandemic as many temporary visa-holders left Australia and the unemployment rate fell, but we risk underpayment rising again now that many temporary visa-holders are returning.

Underpayment is also a significant problem for Australian workers. We estimate that between 3 per cent and 9 per cent of all employees are paid below the national minimum wage. And between 0.5 per cent and 4.5 per cent of all employees are paid at least three dollars an hour below the national minimum wage.

Recent migrants are at higher risk of exploitation because they tend to be younger, have less experience, and work in industries where exploitation is common. And migrants have additional vulnerabilities because of visa rules, their weaker bargaining power, cultural and social norms, and information barriers. Recent migrants are 40 per cent more likely to be underpaid than long-term residents with the same skills and experience and who work in the same job.

Recent governments have taken some steps to reduce the exploitation of migrant workers, but these actions don't go far enough, and progress has stalled since the pandemic. With temporary migrants returning to Australia in large numbers, now is the time to take decisive action to stamp out the exploitation of migrant workers.

1.1 Migrants account for a growing share of Australia's workforce

In 2016, one in three workers in Australia were born overseas, with 7 per cent holding a temporary visa.¹

The number of temporary visa-holders with work rights in Australia has increased dramatically in the past two decades. Temporary migrants include international students, working holiday makers, skilled temporary residents, New Zealand citizens, and seasonal workers. Excluding tourists, who don't have the right to work, there were 2.1 million temporary visa-holders in Australia in March 2023, up from 1.3 million in June 2010 (Figure 1.1).² The number of temporary visa-holders in Australia fell dramatically during the pandemic, but numbers have rebounded rapidly.³

Many industries rely heavily on migrant workers (Figure 1.2). Professional and health services employ large numbers of permanent skilled and family visa-holders, who typically earn high wages in high-skilled roles. Sectors such as hospitality rely much more on temporary migrants, especially international students, to fill less-skilled jobs at low wages. International students and working holiday makers make up a significant share of the hospitality workforce, and working holiday makers are also an important source of workers in agriculture.

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1. Mackey et al (2022, Figure 4.1). See Coates et al (2022b, Chapter 1) for an overview of Australia's permanent and temporary migration programs.
 2. Department of Home Affairs (2023a).
 3. Coates et al (2022b, Figure 1.7).

1.2 Australians expect migrant workers' rights to be upheld

Employees in Australia, including migrant workers, enjoy a range of protections in the workplace, including the right to a national minimum wage, 11 minimum standards relating to hours of work and leave entitlements set out in the Fair Work Act,⁴ the right to engage in industrial activities, and protection against unlawful discrimination, coercion, and sexual harassment.⁵

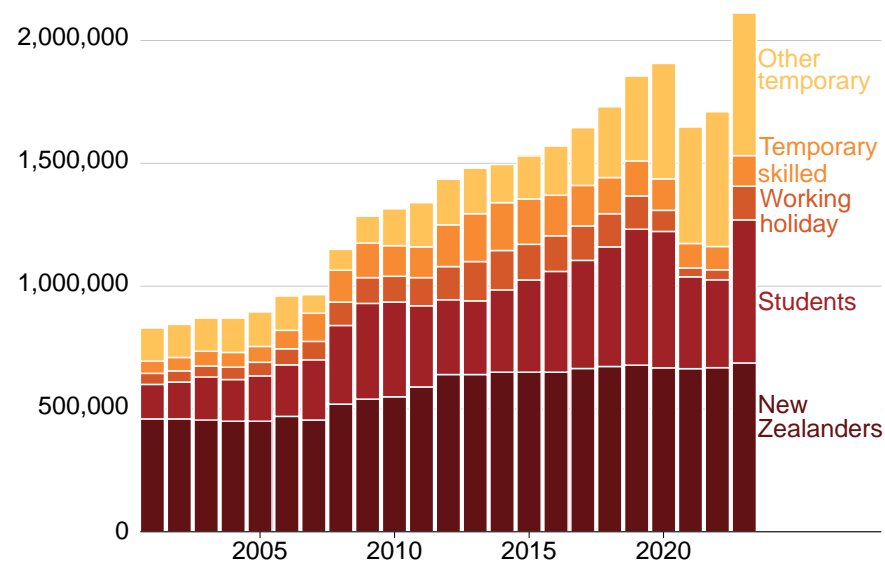
The National Minimum Wage sets the lower bound that all employees must be paid. Employees may be covered by an award which sets out the minimum wage and conditions for their industry or occupation. Casual workers are paid a 25 per cent loading on their wage to compensate for their lack of leave entitlements.

Australians expect that workers, including migrant workers, will be treated well in the workforce and have these workplace rights upheld. Following the 7-Eleven scandal (Box 1), polling showed that Australians supported international students receiving a fair wage.⁶ More recent polling showed two-thirds of Australians agree that everyone who works

4. These include maximum weekly hours of work of 38 hours per week (plus reasonable additional hours), notice of termination and redundancy pay, paid public holidays, and other provisions related to leave. Casual employees are only eligible for some entitlements.
5. See: Fair Work Ombudsman (2023a). The government has introduced the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023* to make it clear that migrant workers, including those without work rights, are entitled to the same workplace protections as all other workers (in line with recommendation 3 of the 2019 Migrant Workers' Taskforce report).
6. The question asked respondents to select which statement they most agreed with. 71 per cent chose the statement, 'Just like any workers, international students deserve to receive a fair wage'. 10 per cent chose 'International students are lucky to get any work and should be happy with whatever they are paid'. 11 per cent chose 'If international students are underpaid it drives down wages for others'. Essential Research (2015).

Figure 1.1: A growing number of temporary visa-holders reside in Australia with work rights

Number of temporary migrants, excluding tourists

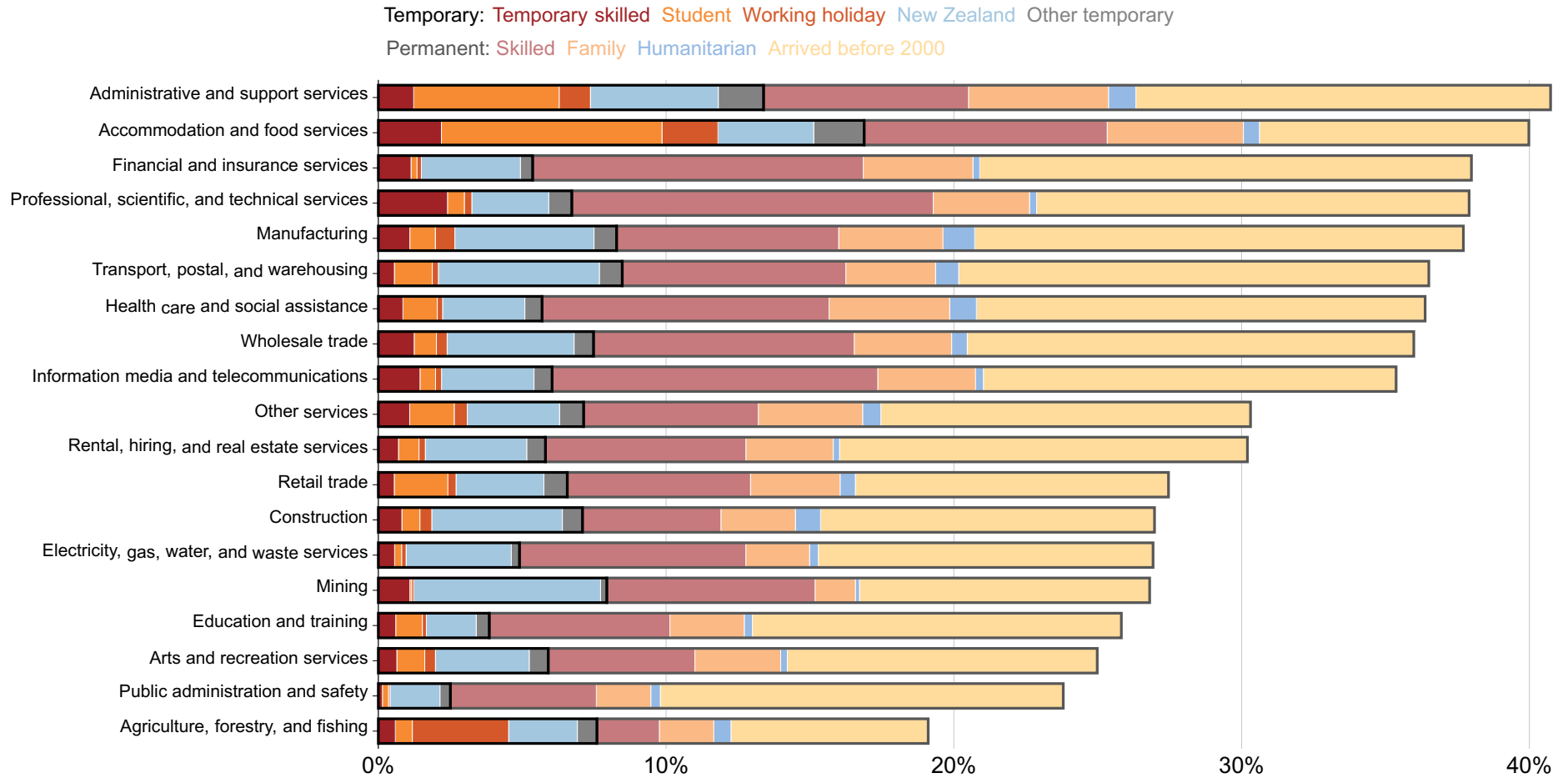


Notes: As at June each year, except for 2023 which is March 2023. There is a series break in 2017 where the definition of 'Other temporary' changed. 'Other temporary' is made up of bridging, temporary graduate, temporary protection, other temporary employment, and crew and transit visa-holders.

Sources: Australian Government (2018, Figure 16); Department of Home Affairs (2023a).

Figure 1.2: Temporary visa-holders make up a sizeable share of workers in most industries – although many more workers are here on permanent visas

Share of industry workers by migrant status, 2016



Notes: The remaining share were born in Australia or arrived before 2000. Permanent visa group comprises those who held a permanent visa between 2000 and 2016.

Source: Mackey et al (2022, Figure 5.1).

in Australia should be entitled to the same pay and working conditions regardless of their visa status.⁷

Australians respond strongly to cases of exploitation and expect perpetrators to be punished. After the discovery that MADE Establishment, a company part-owned by celebrity chef George Calombaris, had underpaid its workers (Box 1), patronage at Calombaris restaurants dropped significantly, forcing them to close.⁸

1.3 The exploitation of migrant workers hurts migrants and Australians

The widespread underpayment of many migrant workers causes them great harm. Severe underpayment forces many migrants to work gruelling hours.⁹ Migrant workers, especially those working in breach of their visa rules, are also at greater risk of other harms, such as bullying, sexual assault, or being injured in the workplace.¹⁰

But the exploitation of migrant workers also hurts many Australians. As the Director of Labour Market Enforcement in the UK recently noted:

Exploitation of workers is not just an offence against the individual – which is serious enough. It also undermines the competitiveness of compliant businesses that treat their workers fairly and with consideration. Worker exploitation can also have a destabilising impact on whole communities.¹¹

7. Essential Media (2021).

8. See Durkin et al (2020) and Forsyth (2019a).

9. For example, migrant chefs at Rockpool restaurants were reportedly working 20-to-30 hours of unpaid overtime on top of their 38-hour week: Schneiders and Millar (2019).

10. Boucher (2021). For example, 10 per cent of temporary visa-holders report suffering racism and prejudice at work, 7 per cent report verbal, physical, or psychological abuse, 6 per cent report unsafe work conditions, and 5 per cent report pressure to work outside their visa conditions: Hall and Partners (2016).

11. MAC (2022).

Box 1: Cases of exploitation in Australia

7-Eleven: In 2015, a joint Fairfax Media and *Four Corners* report uncovered widespread underpayment of 7-Eleven employees. This came after several Fair Work Ombudsman raids, which revealed a culture of non-compliance at stores, with 60 per cent of stores appearing to be underpaying staff.^a Professor Allan Fels was appointed by 7-Eleven to head an independent panel to assess workers' entitlements to backpay (but the process was brought in-house soon after). The total amount of wages paid back totalled more than \$173 million.^b This scandal was a driving force behind the government's decision to commission a report from the Migrant Workers' Taskforce, led by Fels, in 2016,^c and also led to the passing of the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

MADE Establishment: Between 2011 and 2017 several restaurants part-owned by celebrity chef George Calombaris underpaid 524 staff more than \$7.8 million. The underpayments were due to restaurants paying staff annualised salaries but failing to check whether wages were above minimum rates once overtime and penalty rates were applied.^d The underpayments continued even after the Fair Work Ombudsman warned the company, MADE Establishment, in 2015 about doing annual reconciliation checks. In 2019, MADE entered into an enforceable undertaking, a negotiated agreement between the business and the Fair Work Ombudsman which is legally enforceable in court, which included back-payment of wages and a contrition payment of \$200,000.^e

a. Fair Work Ombudsman (2016).

b. Clayton (2020).

c. Migrant Workers' Taskforce (2019a).

d. Marin-Guzman (2019a).

e. Marin-Guzman (ibid).

When migrants are not treated the same way as Australians, it undermines public confidence in the institutions and laws meant to protect all workers. Australians generally support a minimum wage and other employment standards.¹² But persistent and high-profile cases of the exploitation of migrant workers creates a perception that the workplace relations system and migration program are unjust or ineffective.¹³

The exploitation of migrant workers damages Australia's reputation as a destination for migrants, especially international students and skilled workers. Cases of underpayment and mistreatment can discourage migrants from wanting to come to Australia.¹⁴

The exploitation of migrant workers also undermines the integrity of Australia's migration program and risks the public withdrawing support for the program, which brings large benefits to Australia.¹⁵ Not only is exploitation unpopular, but Australians also do not support visas that are seen as providing access to cheap labour.¹⁶

Businesses that underpay migrant workers can also gain an unfair advantage.¹⁷ Businesses that do the right thing can't compete on an equal footing, and risk losing market share.¹⁸

Migrant worker exploitation might harm the wages and working conditions of Australian workers. Where businesses are pressured to lower the wages of all workers to remain competitive, this could put downward pressure on Australian wages.¹⁹ Systemic underpayment can potentially erode the bargaining power of Australian and migrant workers.²⁰

Some migrants may consent to, and arguably benefit from, being paid less than they are legally owed, because they are earning more than they would have in their home country.²¹ And in some cases, migrants may struggle to find work that pays the national minimum wage.²²

However, we should not tolerate underpayment as a means of allowing some migrants to support themselves in Australia, or as a back-door way of permitting more less-skilled migration to Australia.²³

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12. For example, two-thirds of voters supported a minimum wage increase in line with rising living costs after the 2022 election: Murphy (2022).
 13. In research for the Fair Work Ombudsman assessing consumer attitudes to unpaid farm work, consumers were surprised that underpayment occurred at all, because they thought laws prevented this: Instinct and reason (2017).
 14. For example, a series of high-profile cases of violence against Indian students in the late-2000s led to a decline in visa applications from India: Harrison (2009). More recently, rising housing costs have resulted in many international students struggling to afford rent, and they are not being made aware of this before moving, potentially hurting our reputation as an attractive destination for international students: Burgess and Wu (2023).
 15. Coates et al (2022b).
 16. Essential Media (2021).

-
17. They can also gain an unfair advantage by not providing minimum work conditions, such as under-investing in work health and safety.
 18. Daley (2019). See also evidence to the Senate Standing Committee on Economics inquiry into wage theft: Senate Standing Committee on Economics (2022).
 19. Many studies have found that migrants have little impact on incumbents' wages on average. But migration that is highly concentrated in low-paid sectors of the labour market may have bigger impacts on the wages of incumbents working in those sectors (see Coates et al (2022b, pp. 28–29)). However, little work has been done to assess the effect of migrant exploitation on workers' wages.
 20. Amoir and Manning (2021).
 21. For example, in a survey of underpaid migrants 28 per cent of migrants did not try to recover their wages because they agreed to the wage they were paid: Farbenblum and Berg (2018).
 22. The literature generally finds minimal effects on employment from higher minimum wages: Productivity Commission (2015a) and Bishop (2018).
 23. For example, students should not have to work full-time to support themselves, because they must demonstrate they have enough money to support themselves

Underpayment of migrants still has negative consequences even if a small number of migrants may benefit. It contributes to a norm that it is acceptable to underpay other migrants and other workers with limited bargaining power. It undermines the integrity of Australia's visa system. And it undermines general compliance with, and trust of, Australia's workplace laws.

1.4 The exploitation of migrant workers remains widespread

The exploitation of migrant workers typically includes underpayment of wages, unpaid superannuation, unpaid penalty rates, unpaid leave, cashback arrangements,²⁴ and excessive deductions for accommodation and transport. It can also include sexual harassment, bullying, and unsafe working conditions.²⁵

Migrants also face particular threats that relate to their migrant status, such as racism and discrimination, having their passports confiscated, being reported to the Department of Home Affairs, or being forced to pay an employer or middleman for obtaining a job or visa.²⁶

Underpayment is the most common form of exploitation of migrant workers. The most common breaches reported by the Fair Work Ombudsman in 2021-22 were for paying below the correct hourly rate, failing to pay correct weekend penalty rates, and failing to pay casual loading penalty rates.²⁷ One recent study found that more than 90 per cent of successful court cases involving migrants related to economic

violations rather than safety violations, criminal infringements, discrimination, or denial of leave entitlements.²⁸ However, where underpayment is present, other forms of exploitation of migrant workers are also more likely.²⁹

Underpayment does not always constitute intentional exploitation. Australia's industrial relations system is complex, and employers can make mistakes. Genuine mistakes by employers should not be considered the same as deliberate and systematic underpayments.³⁰

The remainder of this chapter focuses on the extent of substantial underpayment of migrant workers, and what drives it.³¹

1.4.1 Migrant workers are especially likely to be underpaid

Assessing the extent of underpayment of migrant workers, and other forms of exploitation, is difficult because such practices are unlawful. But a range of sources indicate that underpayment of migrant workers is widespread. And new Grattan Institute analysis shows that migrant workers are substantially more likely to be paid below the national minimum wage than long-term residents.

while in Australia as a condition of their visa. However, the Department of Home Affairs' information about living costs also needs to be kept up to date. The Department currently recommends a budget of \$21,000 a year for living costs — a figure which hasn't been updated since 2019: Burgess and Wu (2023).

24. Where employers demand payments in cash after they have paid employees, so that payslips still reflect the legal amount of pay: Treasury (2017, p. 60).

25. Hall and Partners (2016).

26. Berg and Farbenblum (2017) and Hall and Partners (2016).

27. Fair Work Ombudsman (2022a) and WEstjustice et al (2020, p. 7).

28. Boucher (2021) and Boucher (2023).

29. Community legal centres reported that while underpayment is typically the reason a migrant worker seeks help, there are often additional exploitative practices occurring at the workplace: interviews with community legal centres.

30. Mistakes can also benefit employees. For example, a survey by the Australian Payroll Association found that in 27 out of 39 audits, employers had overpaid workers: Marin-Guzman and Boddy (2020).

31. We regard three dollars or more below the national minimum hourly wage as a substantial underpayment.

Anecdotal and survey evidence points to widespread underpayment of migrant workers

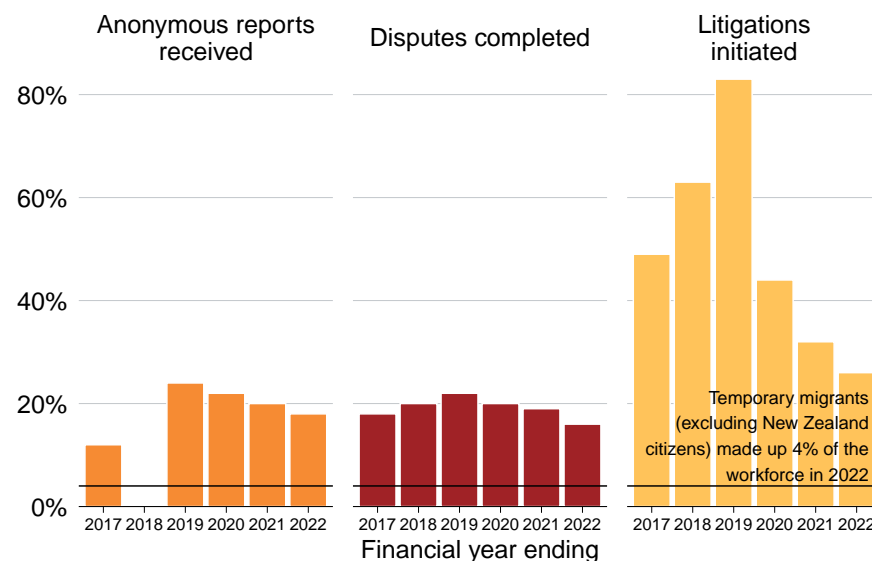
High-profile media investigations have long suggested that underpayment of migrant workers is widespread (Box 1).³²

The Fair Work Ombudsman has conducted several inquiries and investigations into the treatment of temporary visa-holders in Australian workplaces. Migrant workers and temporary visa-holders are continually over-represented among anonymous reports received by the Ombudsman. About 20 per cent of anonymous reports and disputes resolved involve migrants, and up to 80 per cent of litigations initiated by the Ombudsman in recent years involved migrants (Figure 1.3).³³

The Fair Work Ombudsman’s 2018 Harvest Trail Inquiry report found very high rates of non-compliance among employers in the agricultural sector, with more than 55 per cent of investigations determining that workplace laws had been breached, and nearly 30 per cent of investigations revealing wage theft. The Ombudsman later reported that its inspectors had revisited non-compliant businesses from that inquiry and found that about 46 per cent were still operating, and still non-compliant.³⁴

Recent surveys also suggest a sizeable share of migrant workers are exploited. A 2016 survey of more than 4,000 temporary migrant workers found that one-third received only about half the minimum pay

Figure 1.3: Migrant workers make up a large proportion of Fair Work Ombudsman activities
Percentage of Fair Work Ombudsman activities that involve a migrant worker



Notes: Migrant workers are not defined in the Fair Work Ombudsman’s annual report. The Productivity Commission (2015b) states these are mostly student and working holiday visa-holders.

Sources: Fair Work Ombudsman (2017), Fair Work Ombudsman (2018a), Fair Work Ombudsman (2019), Fair Work Ombudsman (2020a), Fair Work Ombudsman (2021) and Fair Work Ombudsman (2022a).

32. See also: Ferguson and Danckert (2015), Yang (2022) and Roe (2022).
 33. This is probably an under-count because visa status is recorded only if an individual brings it up.
 34. Senate Standing Committee on Economics (2022, p. 14).

to which they were entitled.³⁵ A 2021 survey of migrant workers holding temporary visas found that 65 per cent had suffered wage theft.³⁶

It is important to note that these studies typically rely on recruiting voluntary participants, who are more likely to complete a survey about wage theft if they had been a victim of it themselves. For example, a survey conducted in 2014-2015 that was weighted to reflect the temporary migrant population found that one-third of temporary migrant workers believed that they were underpaid compared with Australian workers.³⁷

Survey evidence also shows that exploitation does not fall evenly across all migrants. For example, working holiday makers and students are more likely to be underpaid than temporary skilled migrants.³⁸ Workers who struggled with English were more likely to report a negative work experience, such as discrimination, problems with their pay, or pressure to work outside their visa conditions.³⁹ Women were more likely than men to report instances of sexual harassment.⁴⁰

Grattan Institute's new analysis confirms that underpayment of migrant workers is widespread

Our new analysis, drawn from the Characteristics of Employment and the Employee Earnings and Hours surveys conducted by the Australian Bureau of Statistics, confirms that many migrant workers were paid below the national minimum wage in Australia.⁴¹

35. Berg and Farbenblum (2017). Minimum pay was defined at the national minimum wage for casuals, which includes a 25 per cent loading. Almost half of participants (excluding temporary skilled workers) earned \$15 per hour or less.

36. Migrant Workers Centre (2021).

37. Boucher et al (2020, p. 4).

38. Berg and Farbenblum (2017) and Hall and Partners (2016).

39. Hall and Partners (2016).

40. Hall and Partners (ibid).

41. The Employee Earnings and Hours survey does not collect data from businesses in the agricultural industry.

We estimate that recent migrants – those who arrived in Australia within the past five years – are twice as likely to be substantially underpaid than long-term residents.⁴² In 2022, between 5 per cent and 16 per cent of employed recent migrants – or 27,000 to 82,000 people – were paid below the national minimum wage (Figure 1.4).⁴³ And between 1.5 per cent and 8.5 per cent of employed recent migrants – between 6,500 and 42,000 people – were paid at least three dollars an hour below the national minimum wage.

Migrants who have been in Australia for longer, and are more likely to have secured permanent residency, are less likely to be underpaid.⁴⁴ Between 4 and 12 per cent of employed migrants who arrived between 5 and 9 years ago are paid below the national minimum wage, and between 1 and 6 per cent are paid at least three dollars an hour below the national minimum wage.

Underpayment is also a significant problem across the whole Australian workforce. We estimate that between 3 per cent and 9 per cent of all employees in Australia are paid below the national minimum wage, and between 0.5 per cent and 4.5 per cent of all employees are paid at least three dollars an hour below the national minimum wage.⁴⁵ Between 2.5 and 8 per cent of employed long-term residents – those

42. 62 per cent of recent migrants are on a temporary visa: Mackey et al (2022, Figure 3.15). Recent migrants on a permanent visa are less vulnerable to exploitation because they have fewer or no restrictions on their working conditions, and are typically more highly-skilled. So the rate of underpayment among temporary migrants is likely to be higher than for all recent migrants.

43. This includes a casual loading of 25 per cent where appropriate. Excludes anyone on junior rates. The higher number is from the 2022 Characteristics of Employment survey. The lower number is calculated by scaling the Characteristics of Employment survey for each migrant group to reflect the proportion of employees underpaid in the Employee Earnings and Hours survey in 2021, which does not contain migrant status.

44. Only 24 per cent migrants in Australia for between 5 and 9 years are on a temporary visa: Mackey et al (2022, Figure 3.15).

45. Grattan Institute analysis of ABS (2022a) and ABS (2022b).

born in Australia or arrived 10 or more years ago – were paid below the national minimum wage, and between 0.5 and 4 per cent are paid at least three dollars an hour below the national minimum wage.

These numbers are likely to be conservative estimates of the extent of underpayment, because the analysis does not account for cases where migrant workers are underpaid against the appropriate award rates (which are often higher than the national minimum wage), or where penalty rates or superannuation are not being paid appropriately.⁴⁶

The prevalence of underpayment appears to have fallen since the pandemic. Before the pandemic, between 8 to 22 per cent of recent migrants were paid below the national minimum wage, and recent migrants were three times as likely as long-term residents to be underpaid.⁴⁷ The decline in the relative rates of underpayment probably reflects the decline in the number of temporary visa-holders living in Australia, especially students and working holiday makers, who are most vulnerable to exploitation (see Section 1.4.4). The absence of many temporary visa-holders caused vacancy rates to spike in sectors that historically employed many temporary visa-holders, boosting workers' bargaining power in those sectors.⁴⁸ The very strong labour market, with the unemployment rate falling to a 50-year low in 2022, also contributed to the absolute rates of underpayment for both migrants and long-term residents falling.⁴⁹

46. Our measure of underpayment also excludes unpaid leave, cashback arrangements, and excessive deductions for employer expense like accommodation and transport.

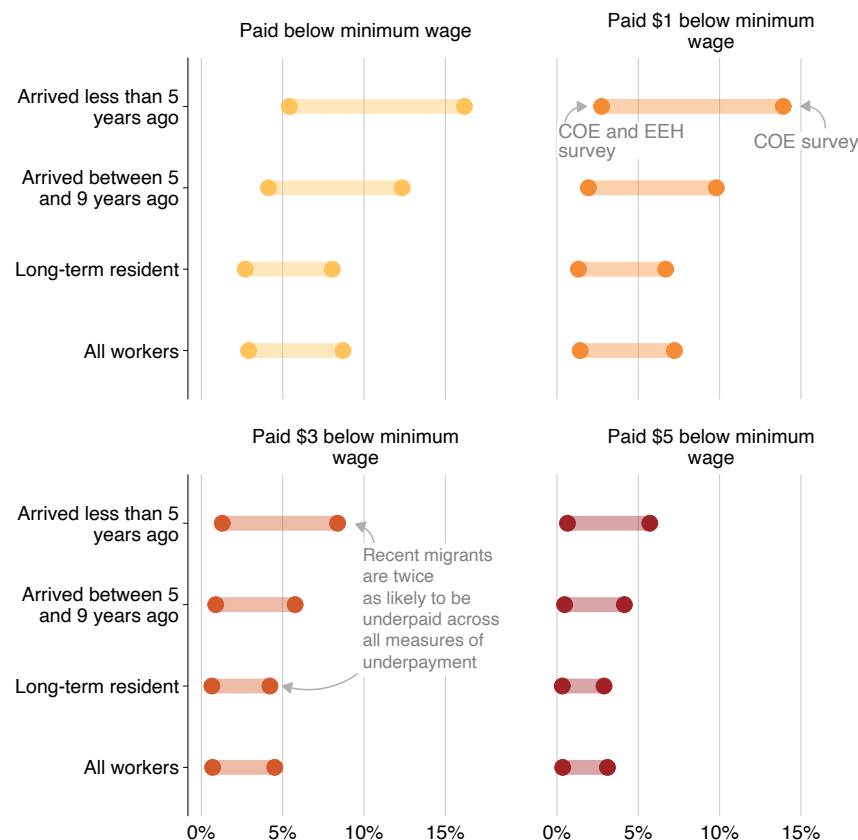
47. 2018 figures. Between 2.5 per cent and 13.5 per cent of all recent migrants were paid at least three dollars below the minimum national hourly wage.

48. See: Buckley and Elias (2022, Figure 4).

49. Between 3.5 and 9 per cent of all employees were paid below the national minimum wage and between 1 and 5 per cent of all employees were paid at least three dollars an hour below the national minimum wage in 2018.

Figure 1.4: Recent migrants are twice as likely to be paid below the minimum wage than long-term residents

Percentage of employees paid below the national hourly minimum wage by arrival year, 2022



Notes: Excludes award minimums, penalty rates, and other forms of underpayment. Includes 25 per cent casual loading where appropriate. Excludes employees on junior rates. The higher number is from the Characteristics of Employment (COE) survey. The lower number is calculated by scaling the COE proportions to reflect the rate of underpayment in the Employee Earnings and Hours survey. Long-term residents: arrived 10 or more years ago or born in Australia. See appendix A for more detail. Source: Grattan Analysis of ABS (2022a) and ABS (2019).

The numbers of students and working holiday makers are rising rapidly now that Australia's borders have reopened,⁵⁰ and vacancy rates in sectors such as hospitality, where many temporary visa-holders typically work, are beginning to fall.⁵¹ As a result, the rates of underpayment are likely to rise again.

1.4.2 Recent migrants are more likely to be underpaid because they are younger and less-skilled

It's not surprising that recent migrants are more likely to be underpaid, since they tend to be younger.⁵² Young workers are more likely to be underpaid: 20-30 year-olds are almost six times more likely than 30-40 year-olds to be underpaid by more than \$3 per hour vis-a-vis the minimum wage.⁵³

Recently arrived migrants are also more likely to work in lower-skilled jobs.⁵⁴ Before the pandemic, nearly 20 per cent of recent migrants worked in hospitality, compared to just over 5 per cent of long-term residents.⁵⁵

Migrants are also more likely to work in industries where underpayment is higher (Figure 1.5). In 2018, temporary visa-holders accounted for nearly 20 per cent of workers in accommodation and food services, the industry with the highest reported rate of underpayment. Temporary visa-holders also account for a sizeable share of workers in

administrative and support services (which includes building cleaners) and in 'other services' (which includes personal care services such as beauticians and hairdressers), which also have high rates of underpayment.

1.4.3 Recent migrants remain more likely to be underpaid even after accounting for migrants' characteristics

Recent migrants are at higher risk of being exploited even after accounting for the fact they are younger, have fewer skills, and work in industries where exploitation is common.

Our analysis shows that recent migrants – those who arrived in Australia within the past five years – are 40 per cent more likely to be underpaid than long-term residents with similar skills working in the same job (Figure 1.6). Whereas migrants who first arrived in Australia between 5 and 9 years ago are 20 per cent more likely to be exploited than equivalent long-term residents.

Our analysis also shows that the likelihood of underpayment is higher for less-skilled workers; workers in agriculture, hospitality, and other services;⁵⁶ and those with fewer qualifications.⁵⁷

We also find that workers who are not union members are 65 per cent more likely to be underpaid than union members, after accounting for age, skill, industry, and other characteristics. However, the effect of union membership on underpayment is probably overstated, because union members are likely to have a stronger desire to protect their

50. Department of Home Affairs (2023a).

51. ABS (2023a).

52. Mackey et al (2022, Chapter 4).

53. Grattan analysis of ABS Employee Earnings and Hours. Younger people are more likely to work in industries with less compliance with workplace laws, such as hospitality. They also may have fewer job opportunities because they lack experience, and they typically have less knowledge about their workplace rights. See: UnionsACT (2017).

54. Mackey et al (2022, Figure 4.8).

55. Mackey et al (ibid, Figure 4.9).

56. Until last year, farm workers could legally be paid piece rates that meant they earned below the minimum wage. Changes in April 2022 mean that farm workers now have to be paid at least the minimum wage: Kelly (2022).

57. Grattan analysis of ABS (2022a). Estimate takes account of the characteristics in Figure 1.6. See Appendix A for more detail.

workplace rights, and that would probably remain the case had they not had an opportunity to join a union.⁵⁸

1.4.4 Why recent migrants are more likely to be underpaid than similar long-term residents

There are several reasons why recent migrants are more vulnerable to exploitation than long-term residents, even after accounting for migrants' characteristics and the jobs they hold.

First, visa rules, especially for temporary visa-holders, make migrants more vulnerable (see Chapter 2). Recent migrants are much more likely to be on temporary visas. About 60 per cent of migrants who had been in Australia for less than five years held a temporary visa, compared to 25 per cent of migrants who had been in Australia for between five and nine years.⁵⁹ Recent surveys of migrants also show that particular temporary visa-holders – especially students and working holiday makers – are twice as likely to be underpaid as other visa-holders, such as temporary sponsored workers.⁶⁰

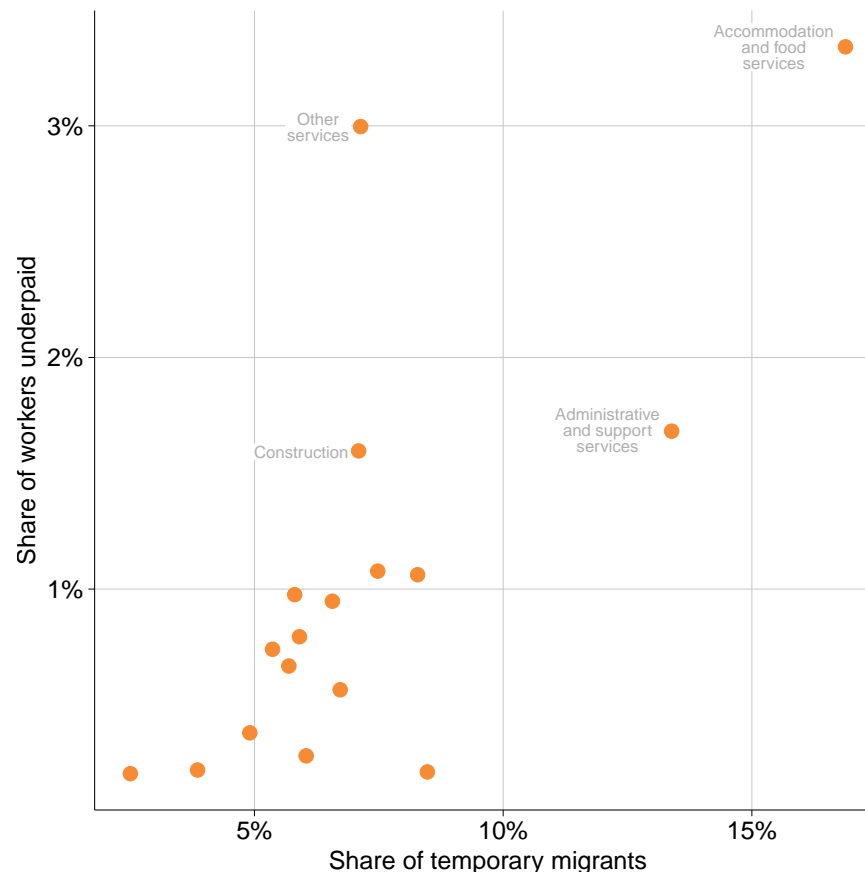
58. See Appendix A for more detail.

59. Mackey et al (2022, Figure 3.15).

60. Students and working holiday makers are also younger and less skilled than other temporary migrants, but survey evidence points to visa conditions as a particular problem. See: Berg and Farbenblum (2017), Stephen Clibborn (2021) and Hall and Partners (2016).

Figure 1.5: Migrants are more likely to work in industries where underpayment is more common

Share of workers underpaid by at least three dollars an hour, and the proportion of workers who are temporary migrants, by industry

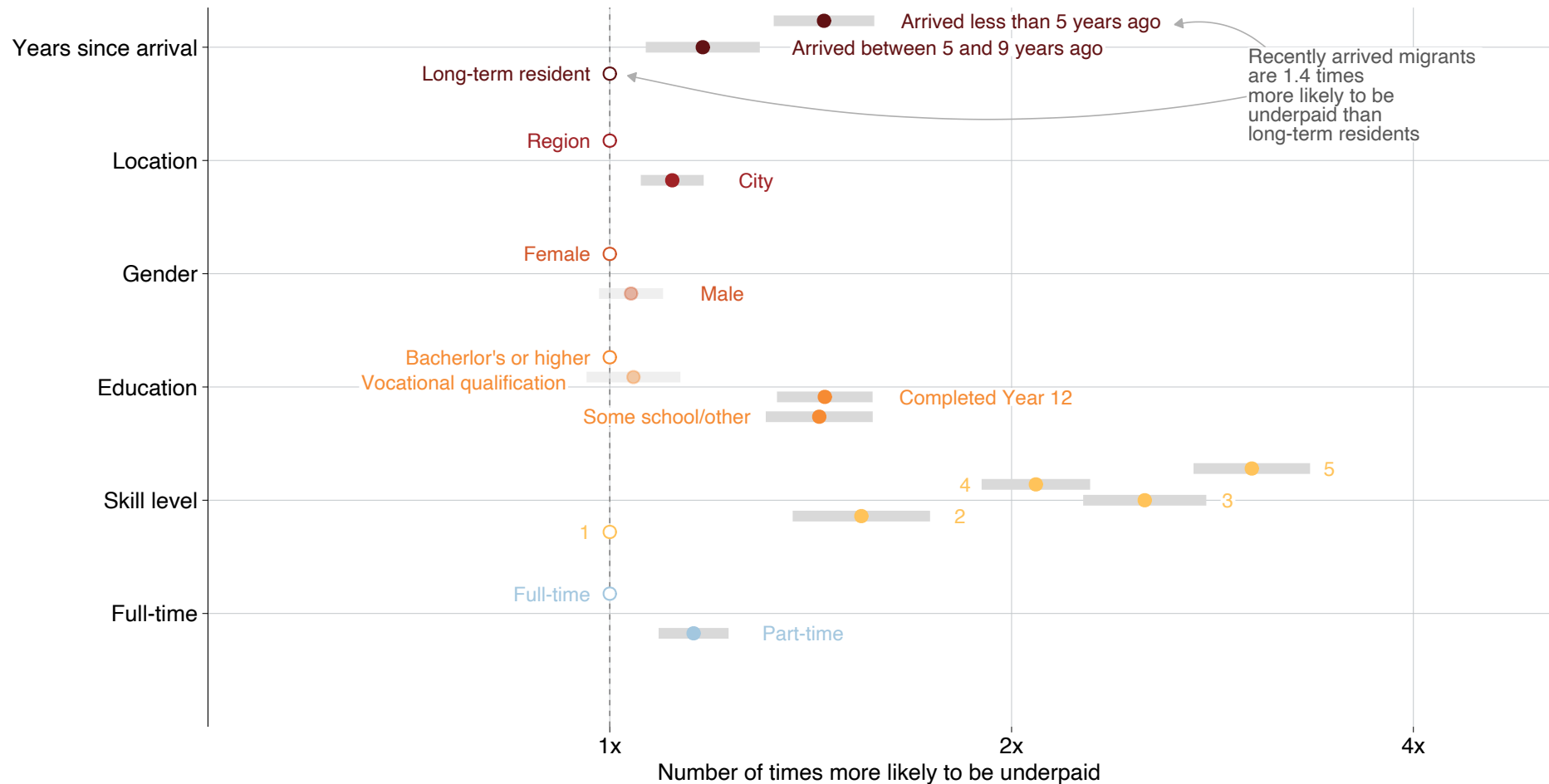


Notes: 2016 and 2018 samples have been combined to increase the sample size. Data suppressed where counts are below 10. The Employee Earnings and Hours survey does not collect data from businesses in the agricultural industry.

Source: Grattan analysis of ABS (2016a), ABS (2016b), ABS (2017) and ABS (2019).

Figure 1.6: Migrants are more likely to be underpaid even after accounting for demographic and job characteristics

All else being equal, how likely employees are to be paid \$3 dollars below the national minimum hourly wage compared to each base category (hollow circle)



Notes: Also accounts for industry, age, employment arrangement (i.e. independent contractor status), and casual employment. Long-term residents include people born in Australia and people who arrived more than 10 years ago. Pale results are not statistically significant. Because the probability of underpayment is low, the odds ratios can be interpreted as risk ratios. See Appendix A for details of methodology and more detailed results.

Source: Grattan analysis of ABS (2022a).

Second, migrants are likely to have less bargaining power in the labour market than long-term residents with similar skills and experience. This may be due to locals' stronger networks, discrimination against migrants, a lack of recognition of overseas qualifications and experience, or employer requirements that workers hold a permanent visa.⁶¹ These all contribute to migrants having fewer outside options, meaning many are forced to settle for poor-quality jobs.⁶² Many migrants also do not report their exploitation for fear of losing their job (see Chapter 6).

Third, there may be cultural and social factors that mean that migrants accept underpayment as part and parcel of getting a job in Australia. A 2016 survey by the Migrant Justice Institute found that about one-quarter of migrants who were underpaid did not try to recover their wages, because 'others were paid similarly and they were not doing anything about it'.⁶³ The experiences of their peers, or their experiences of the labour market in their home country, may mean that many migrants consider being underpaid to be the norm.⁶⁴

Fourth, migrants may not know what to do to ensure their rights are upheld.⁶⁵ Survey evidence suggests migrants are aware of the minimum wage,⁶⁶ but many migrants who are aware that they are underpaid do not report it because it is too hard, they do not know what to do, they are grateful for the job they have, or they fear the migration consequences.⁶⁷

61. For example, see: Migrant Workers Centre (2023a) and Berg and Farbenblum (2017).

62. Tham et al (2016).

63. Farbenblum and Berg (2018).

64. Clibborn (2021).

65. Productivity Commission (2015b, Chapter 29, p. 920). Language barriers may be a factor.

66. Farbenblum and Berg (2018).

67. Farbenblum and Berg (2018) and Reilly et al (2020). Migrants also face barriers to reporting other types of exploitation. For example, only 26 per cent of migrants

In the words of the Fair Work Ombudsman:

The over-representation of migrant workers in our disputes potentially reflects their unique situation: being new to the Australian labour market, not having baseline knowledge about workplace rights and entitlements, and potentially experiencing language and cultural barriers. Some migrant workers may also be reluctant to speak with public officials and may be concerned about their visa status if they raise issues. These factors can make migrant workers particularly vulnerable to exploitative practices from unscrupulous employers.⁶⁸

1.5 Recent reviews have proposed solutions, but progress stalled

Recent governments have taken some steps to reduce the exploitation of workers, and particularly migrant workers, but these changes don't go far enough and progress has stalled since the pandemic.

After the revelations of systemic underpayment at 7-Eleven stores (Box 1), the Coalition government in 2017 passed the Fair Work Amendment (Protecting Vulnerable Workers) Act that:

- Increased the penalties for underpayment and other breaches of the Fair Work Act by creating a new 'serious contravention' penalty that is 10 times larger than the standard penalties.
- Reversed the onus of proof so that employers need to demonstrate that they did not underpay workers when payslips were not kept.
- Expanded liability for underpayment to franchisors.
- Expanded the information-gathering powers of the Fair Work Ombudsman.

reported experiences of racism or discrimination to their superior, and only 33 reported instances of sexual harassment: Hall and Partners (2016).

68. Fair Work Ombudsman (2018a, p. 18).

The government also commissioned the Migrant Workers' Taskforce to look into the issue. The final report of the Taskforce in 2019 made 22 recommendations to address the exploitation of migrant workers. Some progress has been made since then. For example, the government amended the Fair Work Act in 2022 to include a prohibition on advertising jobs with an illegal pay rate, and increasing the maximum claim size for the small claims court from \$20,000 to \$100,000. There have also been some other piecemeal changes, such as improving the information provided to international students, an (unpublished) internal review of the Assurance Protocol,⁶⁹ and the Ombudsman using its enforcement tools more often (Chapter 3).

But progress has since stalled. For example, the former government introduced an amendment to the Migration Act to prevent employers from coercing a migrant into breaching their visa conditions, and exclude employers who have been convicted of underpaying migrants from hiring temporary visa-holders (Recommendations 19 and 20). Those amendments lapsed without passing the last parliament.

The Albanese Government has pledged to implement the recommendations of the Migrant Workers' Taskforce in full.⁷⁰ The new government also announced at the 2022 Jobs and Skills Summit that it intends to amend the Migration Act in 2023 to address worker exploitation, especially migrant worker exploitation. The government is also planning to legislate in the second half of 2023 its election commitments on 'same job, same pay' and criminalising wage theft.⁷¹

69. The Assurance Protocol is an agreement between the Department of Home Affairs and the Ombudsman, where Home Affairs may not cancel a migrant's visa if they have been exploited and breached their visa conditions: Fair Work Ombudsman (2023b) and Section 2.7.

70. See: Australian Government (2022a, p. 4).

71. Karp (2023).

1.6 This report shows how Australia can stamp out exploitation of migrant workers

The changes required to stamp out migrant worker exploitation go beyond what the government has committed to. This report shows what the government needs to do.

Chapter 2 shows how visa rules make migrant workers especially vulnerable to exploitation and how these visa rules should change.

Chapter 3 shows how to better enforce workplace laws to deter exploitation.

Chapter 4 shows why the Australian Border Force should use its expansive powers more often to sanction employers who do the wrong thing.

Chapter 5 shows why the government should close loopholes that permit employers to exploit migrant workers without sanction.

Chapter 6 shows how the government can create a better system that helps migrants to successfully claim unpaid wages.

Chapter 7 shows how to pay for our proposed reforms.

While this report is focused specifically on migrant workers, these changes would also stamp out exploitation – especially underpayment – among local workers.

1.7 What this report is not about

This report is **not a wholesale review of Australia's workplace relations system**. Although the complexity of wage setting arrangements affects the prevalence of underpayment, this report does not examine the appropriateness of those arrangements or the national minimum wage. Nor does this report cover other laws that affect the

well-being of migrant workers in Australia, such as occupational health and safety laws, or how the law should classify 'gig economy' workers.

This report is also **not about the broader design of Australia's migration program**. It does not consider all aspects of the design of visas that offer work rights. Previous Grattan Institute reports, including: *Rethinking permanent skilled migration after the pandemic* (2021) and *Fixing temporary skilled migration* (2022) showed how Australia's permanent and temporary skilled migration programs should be reformed. Our 2023 paper, *Australia's migration opportunity*, warned of the risks of expanding less-skilled migration solely for the purposes of filling labour shortages, especially with respect to exploitation.

2 Reform visa rules to make migrants less vulnerable

Some visa rules make migrants more vulnerable to exploitation by weakening their bargaining power in the workplace and discouraging them from reporting exploitation. These visas rules should be reformed, where practicable, to reduce migrants' risks of being exploited.

Temporary skill-shortage visas should be made portable, so migrants can flee from an exploitative employer. Sponsored workers should be able to apply for permanent sponsorship after two years with any sponsoring employer.

Australia's working holiday visa program has shifted away from its original goal of promoting cross-country cultural exchange towards being a supplier of cheap labour for agriculture and hospitality, which has resulted in widespread exploitation of young backpackers. Requirements for working holiday makers to undertake 'specified work', typically in regional areas, to extend their stay in Australia should be abolished. Instead, working holiday makers should be eligible for one 12-month visa, with longer visas available to migrants from countries that offer generous reciprocal rights to Australian working holiday makers.

The government should make visas issued under the Pacific Australia Labour Mobility (PALM) scheme portable, allowing workers to more easily change employers, to reduce the risk of exploitation.

The cap on working hours for international students makes students vulnerable to exploitation, because any breach of the cap leaves a student at risk of being deported. Historically set at 40 hours per fortnight, the cap will rise to 48 hours per fortnight from 1 July 2023. But uncapping student work rights risks turning student visas into a de facto low-skill work visa, undermining confidence in Australia's migration program and potentially leading to exploitation of these

non-genuine students. The government should commission an independent review of international higher education, which should cover what work rights should be granted to international students and how to strengthen requirements on students and course providers to ensure only students genuinely coming to study are granted student visas.

To encourage more migrants to report exploitation, the government should replace the Assurance Protocol with a strengthened Exploited Worker Visa Guarantee. The government should also introduce a Workplace Justice visa, to enable migrants to remain in Australia to pursue unpaid wages after their temporary visa has ended.

2.1 The number of migrants with restrictions on their work rights has increased substantially in the past decade

Temporary visa-holders with work rights are entitled to the same basic rights and protections as Australian citizens and permanent residents under Australian workplace law. But the visa conditions of particular temporary migrants place limits on where and when migrants can work while in Australia, which can increase the vulnerability of the worker to exploitation. For example:

- **Temporary sponsored workers:** must remain employed by their sponsoring employer as a condition of their visa.⁷² Since 2017, temporary skilled workers who stop working for their sponsoring employer must leave Australia within 60 days.⁷³ Temporary sponsored workers must work for their sponsoring employer for

72. Workers can change jobs if they are sponsored by a new employer. This is difficult, often requires a new visa to be granted, and in practice must be in a similar occupation.

73. Between 2013 and 2017, it was 90 days. Before 2013, it was 28 days.

three years, and be nominated by that employer for a permanent employer-sponsored visa.

- **Working holiday makers:** are not restricted in the number of hours they can work. But visa-holders who wish to extend their visa for a second or third year must undertake 'specified work', typically in regional areas. Visa-holders can also only work for a single employer for six months. Many of these rules were relaxed, temporarily, during the pandemic.
- **Pacific Australia Labour Mobility (PALM) scheme:** workers are restricted to working for their sponsoring employer in unskilled, low-skilled, and semi-skilled positions in their nominated industry and region.
- **Student visa-holders:** have historically been limited to working a maximum of 40 hours per fortnight during teaching periods, and unlimited work hours during vacation periods. Student work rights were uncapped during the pandemic. From 1 July this year, the cap will be 48 hours per fortnight during study periods.⁷⁴ Students who work in breach of their visa conditions are at risk having their visa cancelled, or having future visa applications rejected.

Safe Haven Enterprise Visa (SHEV) holders now have a pathway to a permanent visa after the government announced in early 2023 that they can apply for a permanent 'resolution of status' visa.⁷⁵ Previously, SHEV holders could only qualify for permanent visa pathways if they, or a member of their family, completed 42 months of study or work in a regional area during the five-year period of the SHEV, while also not claiming social security benefits.⁷⁶

74. Students working in aged care can work unlimited hours until the end of 2023.

75. Australian Government (2023a). The government abolished the SHEV and Temporary Protection Visas.

76. Unlike other regional visas, relevant regional areas for qualifying work and study towards the SHEV excluded Perth. See: Department of Home Affairs (2021a).

Other temporary visa-holders, such as tourists, have no work rights at all.

2.2 Temporary visa-holders should continue to be an important part of Australia's migration system

The number of temporary visa-holders in Australia has increased dramatically over the past two decades (Figure 1.1). Even if features that contribute to exploitation are removed, as we recommend in this chapter, a larger number of temporary visa-holders probably heightens the risk of migrant worker exploitation, for the following reasons.

First, most temporary visa-holders are not eligible for Medicare or income support payments such as JobSeeker, so the visa-holder may be more willing to work for low pay or conditions to keep their job than Australian residents or citizens.

Second, many temporary visa-holders want to secure permanent residency.⁷⁷ With a greater number of temporary residents vying for permanent residency, migrants' prospects of success are declining and wait times are rising. This situation may make some temporary migrants more desperate to jump through the hoops to secure a permanent visa.

But the benefits of temporary migration far outweigh the costs, so temporary migration should continue to remain an important part of the migration system.

Temporary migration offers large economic benefits to Australia.⁷⁸ Temporary visa-holders, especially temporary skilled workers and students, provide much of the applicant pool for permanent skilled migration. Temporary skilled migrants bring different skills and typically complement the work of incumbents rather than compete with them,

77. Coates and Reysenbach (2023).

78. Coates et al (2022b, p. 24).

boosting local workers' wages on average. Addressing genuine skills shortages helps the economy, and the labour market in particular, to adjust to shocks such as the recent mining boom, which generated a rapid increase in demand for specific occupations. Educating international students is Australia's fourth-biggest export, with total exports of \$37.5 billion in 2018-19.⁷⁹ And the working holiday maker programs enable cross-cultural exchanges, offering many Australians the opportunity to work and travel abroad.

Temporary visas also offer large social benefits. In an increasingly globalised world, temporary visas enable people to visit and stay with friends and relatives for an extended period. Temporary migration also offers migrants who may not be eligible for permanent residency the chance to come to Australia to work, travel, or study.⁸⁰

Improvements to existing visas, as outlined in this chapter, would help reduce exploitation of temporary visa-holders, as would making pathways to permanent residency clearer and less complex.⁸¹

2.3 Index the wage threshold for temporary sponsorship, open it to all occupations, and permit workers to switch employers

There is a documented history of exploitation of temporary skilled workers.⁸² The Fair Work Ombudsman has recouped unpaid wages from employers of temporary skilled workers,⁸³ and there have been numerous media reports and academic surveys uncovering exploitation of temporary skilled workers.⁸⁴

79. Department of Foreign Affairs and Trade (2020).

80. See Martin (2013).

81. Coates and Reysenbach (2023).

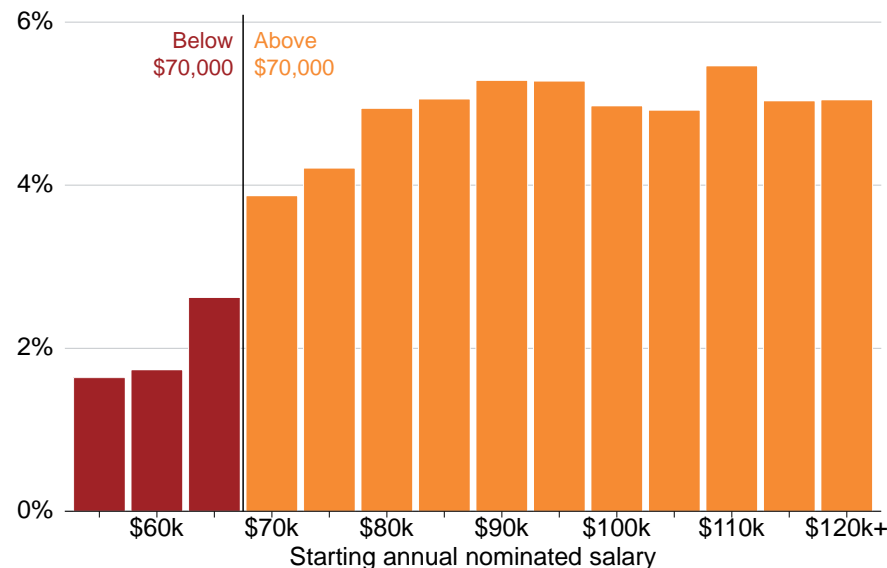
82. For example, see Boucher (2019), C. F. Wright and Clibborn (2020), Senate Standing Committee on Economics (2022) and Berg and Farbenblum (2017).

83. Fair Work Ombudsman (2023c).

84. For example, Mares (2022) and Berg and Farbenblum (2017).

Figure 2.1: Temporary skilled migrants with higher starting salaries have stronger wages growth

Average annual wage increase during temporary skilled visa



Source: Grattan analysis of ABS (2021a).

This exploitation is much more likely to occur in low-skill, low-wage jobs than high-skilled, high-wage jobs, because less-skilled migrants have weaker bargaining power, including fewer pathways to permanent residency, and are not well placed to protect themselves from being exploited.⁸⁵ For example, Figure 2.1 shows that Temporary Skill Shortage (TSS) visa-holders who earn less than \$70,000 a year on arrival get few or no pay rises while in Australia on temporary sponsorship, whereas those who start out on more than \$70,000 a year tend to get big pay rises, reflecting their stronger bargaining power.

85. Boucher (2023).

The average wages of temporary skilled migrants in Australia have fallen over time relative to wages of Australian workers, as employers have switched to sponsoring more lower-skilled, lower-wage workers for temporary visas.⁸⁶ After adjusting for inflation, the typical TSS visa-holder today earns about \$75,000, no more than the typical 457 visa-holder did in 2005, despite the wages of the average full-time Australian worker rising by about 20 per cent above inflation in that time.⁸⁷ Today, more than half of TSS visa-holders earn less than median full-time earnings (now \$82,000 a year), compared to 38 per cent of temporary skilled visa-holders in 2005.

The declining wages of TSS visa-holders reflects, in large part, the failure to index the Temporary Skilled Migrant Income Threshold (TSMIT) to changes in either prices or wages since 2013. The current TSMIT of \$53,900 (it will rise to \$70,000 on 1 July 2023) is lower than the wages earned by about 90 per cent of full-time workers.⁸⁸

2.3.1 Temporary sponsorship should be restricted to higher-wage jobs

Grattan Institute's 2022 report, *Fixing temporary skilled migration*, recommended that a new visa, the Temporary Skilled Worker (TSW) visa, replace the Temporary Skill Shortage (TSS) visa.⁸⁹ Temporary sponsorship should be available for migrants in any occupation earning more than \$70,000 a year. Exclusively targeting higher-wage jobs for temporary sponsorship would be likely to result in less exploitation of migrant workers. It would also simplify sponsorship for employers, and increase the pool of high-quality applicants for permanent residency.

86. Coates et al (2022a, Figure 1.5).

87. As measured by Average Weekly Ordinary Time Earnings (AWOTE). The TSS visa replaced the 457 visa in 2018.

88. ABS (2022b).

89. Coates et al (2022a).

The government has endorsed Grattan Institute's recommendation to increase the TSMIT to \$70,000.⁹⁰ Selecting higher-wage rather than lower-wage migrants will reduce the risks that employers game the rules to recruit and exploit lower-skilled migrants.

Under this change, existing TSS visa-holders currently in Australia would retain the right to work for the remainder of their visa. However, should their employer wish to renew their visa, the job would have to pay more than \$70,000.⁹¹

The TSMIT should be indexed to wages growth, to avoid a repeat of the 2013 to 2023 period where the TSMIT did not rise and the quality of the TSS program was eroded. The government should also abolish occupation lists, so that temporary sponsorship is open to all jobs.

Better enforcement of employers' sponsorship obligations by the Department of Home Affairs should also reduce exploitation (see Section 4.3). The Department should conduct more investigations to ensure sponsoring employers are meeting their obligations, and seek punishment for employers that breach their obligations.⁹²

2.3.2 Temporary sponsored visas should be made portable so migrants can more easily change employers

Current TSS visa rules require migrants to remain with their sponsoring employer or lose their visa. Binding workers to a single employer in this way is a common regulatory process for temporary work visas

90. O'Neil (2023) and Coates et al (2022b, p. 75). The higher TSMIT starts on 1 July 2023.

91. Labour agreements, which permit sponsorship for lower-wage jobs, should also be abolished: Coates et al (2022a, Section 4.4).

92. This would reduce the risk of exploitation of workers seeking a permanent visa via employer sponsorship, such as by an employer demanding 'cash back' in exchange for paying a wage of \$85,000 (Grattan's proposed wage threshold for permanent employer-sponsored visas). See: Coates et al (2022b).

across most high-income countries.⁹³ After all, temporary sponsorship isn't costless for employers: binding temporary skilled migrants gives employers confidence they won't immediately lose a sponsored worker once the worker gets to Australia.

Yet restricting labour mobility for temporary skilled visa-holders also entails some significant costs. Binding workers to sponsoring employers limits migrants' bargaining power, increases the risk that migrants are exploited, and results in many migrants not working in a role that best suits their skills and experience.⁹⁴

Binding workers also creates an environment where exploitation thrives, especially since the right of sponsored workers to remain in Australia, and to apply for permanent residency, depends on them remaining employed. Temporary sponsored workers in select occupations can be sponsored for a permanent visa after they have worked for their sponsoring employer for at least three years full-time while holding a Temporary Skill Shortage visa.⁹⁵

Temporary sponsored visas should be made portable, so sponsored migrants can more easily switch sponsoring employers should they find a better job once in Australia. This would enable migrants to walk away from employers who mistreat them. Portability between employers

would act as a quasi-enforcement mechanism against employers who mistreat their workers.⁹⁶

Workers on temporary skilled visas should be able to begin work for a new employer as soon as a new nomination is lodged, as occurs in the US,⁹⁷ rather than having to wait until the nomination has been approved, as is the case in Australia. Whereas sponsored workers must currently seek a new visa if they change employers, no new visa should be required to change jobs. Workers should be able to use their existing visa and simply switch employers. The visa would then be linked via the nomination to the new employer.

Temporary sponsored workers should also be able to remain in Australia without a nominated employer for three months.⁹⁸ Sponsored migrants have a strong incentive to find an employer with an eligible job, because this is the only pathway to remaining in Australia long term. And sponsored migrants without an employer would remain ineligible for public supports, such as unemployment benefits.

Others have proposed an industry-sponsorship model to allow TSS visa-holders to change jobs.⁹⁹ This approach would give people on temporary skilled visas the ability to change jobs within an industry without requiring a new visa. However, limiting workers to jobs in certain industries restricts portability unnecessarily, reducing the labour market matching benefits that greater portability offers. Under an

93. International equivalents of the Australian TSS visa are: the US H-1B visa, the Canadian Federal Skilled Worker visa, and the New Zealand Essential Skills visa. All bind workers to employers.

94. Allowing migrants to move to more suitable jobs should also result in a better allocation of labour across the economy, boosting productivity. The Productivity Commission (2022) states that 'Labour mobility is also a key factor in labour market matching, and hence with growth in wages and productivity'. See also Engbom (2022).

95. Department of Home Affairs (2022a).

96. According to Clemens and Gough (2018), visa portability is 'perhaps the single best thing the government could do to protect workers' rights'. See also Nowrasteh (2018).

97. United States Department of Labor (2016).

98. This period of time cannot be unlimited, or the visa would become a de-facto general work visa. Visa-holders were able to stay for 90 days between 2013 to 2016. In 2016, it was changed to 60 days: Meares (2013) and Department of Home Affairs (2023b).

99. For example, C. Wright (2022) proposes that employer associations and unions in the relevant sector or region could be the joint sponsors of TSS visa-holders.

industry-sponsorship model, for example, an accountant sponsored by a manufacturing firm would be tied to the manufacturing industry and unable to work in the finance industry.

2.3.3 Sponsorship fees should be reformed to support portability

Employers who sponsor workers for temporary skilled visas currently incur substantial upfront costs. Becoming a sponsor costs \$420, and each time a job is nominated, the fee is \$330.¹⁰⁰ The employer must also pay a Skilling Australians Fund (SAF) levy of \$1,200 per year of the visa for employers with a turnover of up to \$10 million, and \$1,800 per year of the visa for employers with a turnover of more than \$10 million.¹⁰¹ Visas are typically valid for two or four years, so total fees range between \$2,730 and \$7,530 per worker, equivalent to between 1 per cent and 3 per cent of the average wage for a temporary skilled visa-holder over the duration of their visa. All fees have to be paid upfront.

Some employers could be discouraged from incurring the costs of sponsoring temporary skilled workers if they couldn't guarantee they would retain the workers for an extended period. The federal government should therefore reduce the upfront costs of sponsorship, by switching from a system of upfront sponsorship fees to a small upfront fee and an ongoing monthly fee. The abolition of labour-market testing would also reduce costs.¹⁰²

Sponsors should have to pay \$1,000 to lodge a nomination. All remaining fees and costs – including the SAF levy – should be bundled up into one fee based on the number of workers sponsored. This fee should be charged to employers each month, as occurs in

100. Department of Home Affairs (2022b).

101. Ibid.

102. Coates et al (2022a).

Singapore.¹⁰³ The monthly fee would be equivalent to the revenue raised by all upfront charges today, less the proposed \$1,000 nomination fee.¹⁰⁴

Establishing a monthly payment system would involve some administrative costs, but the Department of Home Affairs already has systems in place for employers to pay invoices. Charging a \$1,000 nomination fee would protect the integrity of the nomination process and prevent spurious applications.¹⁰⁵

2.3.4 Change requirements for TSS visa-holders to get permanent employer sponsorship

Workers on a TSS visa have a pathway to permanent residency via an employer sponsorship arrangement if they work for the same employer and in the same occupation for three years on the TSS visa. Treasury research shows that most temporary skilled visa-holders who transition to permanent residency do so directly via this option.¹⁰⁶

These workers rely on their employer sponsoring them for permanent residency, which opens the door to exploitation. Some employers may not want a worker to gain permanent residency because the worker

103. Singapore imposes a levy on employers based on what sector they are in, how many workers they hire, and what proportion of workers are on a visa. In the construction sector, fees vary from \$300 to \$950 per month per worker. See Ministry of Manpower (2022).

104. The Skilling Australian Fund levy was legislated via the *Migration Amendment (Skilling Australians Fund) Bill 2018*, so switching to a monthly fee would require legislative amendments.

105. If a sponsor repeatedly failed to pay the fee, they would be barred from hiring workers on a Temporary Skilled Worker visa. As happens when an employer becomes insolvent or fails to comply with other sponsorship obligations, this would leave their temporary visa-holder without a sponsor and having to find alternative employment or risk losing their visa.

106. Based on temporary skilled visas granted in 2006-07: Treasury (2023, p. 9).

can then move to a different employer, or may use this as leverage to underpay a worker.

Making TSS visas portable should reduce the bargaining power of sponsoring employers, since a sponsored worker with a strong employment history could seek permanent sponsorship via another employer.

The government should also change the requirement to work with a single employer for at least three years to be eligible for permanent sponsorship, to two years experience with any sponsor. Applicants for permanent sponsorship would still have to meet other criteria, such as satisfying age and other eligibility criteria.¹⁰⁷ Visa fees for permanent sponsorship should be reviewed to ensure they are not a barrier to employers offering permanent sponsorship to existing TSS visa-holders.

Our previously proposed reforms to permanent points-tested visas would also offer higher-paid TSS visa-holders an alternative pathway to securing a permanent visa.¹⁰⁸

Home Affairs Minister Clare O’Neil has announced plans to introduce a new visa for care economy workers as part of the government’s migration policy overhaul.¹⁰⁹ It’s not yet clear whether holders of the new visa will ultimately be offered permanent visas. If they are, migrants with more skills, such as TSS visa-holders, could be pushed back down the queue for the limited number of permanent visas on offer each year.

107. For example, Grattan’s proposed reforms to employer-sponsored visas suggest a wage threshold of \$85,000. See: Coates et al (2022b).

108. Especially if the points test were amended to grant points for holding a higher-wage job in Australia. See: Coates et al (ibid, Section 3.7).

109. O’Neil (2023).

2.4 A one-year working holiday maker visa should replace ‘specified work’ requirements for extending visas

Australia’s working holiday maker program is supposed to support cross-country cultural exchange. According to the Department of Home Affairs, the purpose of the program is ‘to foster people-to-people links between Australia and partner countries’.¹¹⁰

But in practice, the working holiday visa program has shifted towards being a supplier of cheap farm labour, which has resulted in widespread exploitation of young backpackers.¹¹¹ Australia is the only country, of all countries to whom we offer a reciprocal working holiday maker visa, that offers a visa extension in exchange for specified work in remote areas or in particular industries.¹¹²

Requirements for working holiday makers to undertake ‘specified work’, typically in regional areas, to extend their stay in Australia should be abolished. Instead, all working holiday makers should be eligible for one 12-month visa, with the exception of citizens from countries that offer Australians a longer duration visa.

2.4.1 Working holiday makers are able to extend their stay in Australia if they meet ‘specified work’ requirements

Australia currently has the largest working holiday maker program in the OECD.¹¹³ In 2019, there were about 150,000 working holiday makers in Australia (Figure 2.2).

110. Department of Home Affairs (2022c).

111. Parkinson et al (2023, p. 89).

112. New Zealand offers a three-month extension for working holiday makers who work in the viticulture or horticulture industries: Immigration New Zealand (2023). Australia doesn’t have to offer a working holiday maker visa to New Zealanders because they can come to Australia on a Special Category (subclass 444) visa.

113. Department of Home Affairs (2020, p. 4).

Working holiday makers come to Australia on one of two visas, depending on their country of citizenship: the Working Holiday (subclass 417) visa, and the Work and Holiday (subclass 462) visa.¹¹⁴ The working holiday maker visas are largely reciprocal, typically providing young Australians with similar opportunities overseas.¹¹⁵

Working holiday makers do not need to work as a condition of their visa and have historically been restricted to working for a single employer for no more than six months.¹¹⁶ However, most working holiday makers (84 per cent) combine travel opportunities with some work while in Australia.¹¹⁷ Many working holiday makers never leave: 32 per cent of migrants who arrived on a working holiday maker visa in 2006-07 had transitioned to a permanent visa by 2016-17.¹¹⁸

Since 2005, the working holiday maker program has offered incentives for working holiday makers to work in regional Australia in seasonal labour occupations, or industries ‘experiencing critical labour shortages’. In exchange for three or six months of ‘specified work’, working holiday makers become eligible to apply for a further stay in Australia on either a second or third visa.¹¹⁹ Specified work includes plant and animal cultivation, fishing and pearling, tree farming and felling, mining, and construction.

114. The 19 countries in the subclass 417 stream are not subject to annual quotas, whereas the 27 countries in the subclass 462 stream, predominately developing countries, are subject to annual quotas (excluding the US): Mackey et al (2022, Box 3). In this report, we refer to both visas collectively as the ‘working holiday maker program’ and visa-holders as ‘working holiday makers’.

115. Department of Home Affairs (2022c).

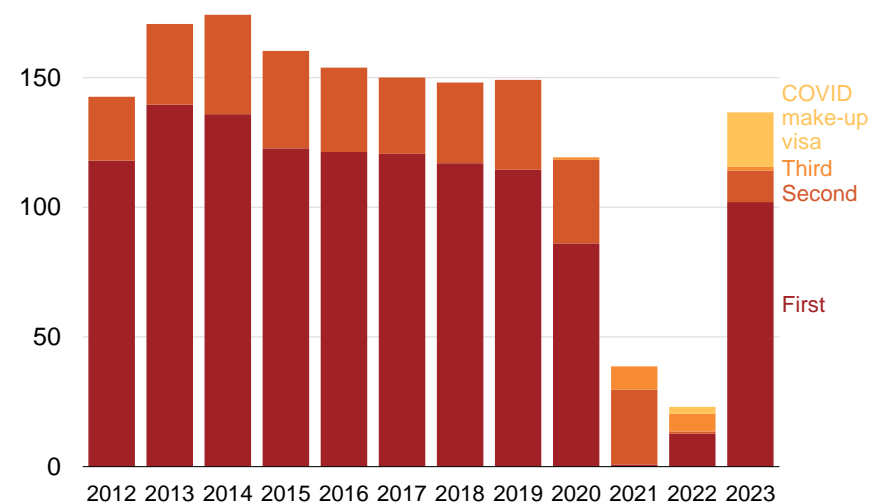
116. Working holiday makers must typically be between 18 and 30 years old and meet financial, health, and character requirements. The restriction on working holiday makers working for the same employer for more than six months was relaxed during the pandemic but is being reinstated on 1 July 2023.

117. Joint Standing Committee on Migration (2020, p. 13).

118. Treasury (2023, p. 11).

119. Department of Home Affairs (2020, p. 4).

Figure 2.2: There were about 150,000 working holiday makers in Australia before the pandemic, with one in four on a second visa
Number of working holiday maker visa-holders in Australia, as at March each year, by type, 000s



Note: The COVID make-up visa was offered to working holiday makers who didn't use their visa, or people who returned home due to the pandemic (officially called the offshore/onshore nil visa application charge working holiday maker visa).

Source: Department of Home Affairs (2023a).

The definition of ‘specified work’ was expanded during the pandemic. For example, ‘specified work’ currently includes critical COVID-19 work in the healthcare or medical sectors anywhere in Australia, construction work in regional Australia, and work in the tourism and hospitality sectors in northern, remote, or very remote Australia.¹²⁰

Before COVID, between one quarter and one third of all working holiday makers extended their visa for a second year.¹²¹ In the six months to the end of December 2019 – the last reporting period before Australia’s international borders were closed – there were 87,467 first-year visas granted under the working holiday maker program (including both sub classes), and a further 21,966 second-year visas granted.¹²² Over that same period, 78.5 per cent of the second working holiday visa applicants indicated they engaged in agricultural work to acquire eligibility for an extension, whereas 9 per cent did construction work, and 1.4 per cent did mining work.¹²³

2.4.2 Specified work requirements make working holiday makers more vulnerable to exploitation

There is vast evidence that specified work requirements for working holiday makers to extend their stay in Australia are a major contributor to exploitation.¹²⁴ These requirements increase the bargaining power of

employers, since they know that working holiday makers must complete the three or six months of specified work within a given year if they are to extend their stay in Australia.¹²⁵ Forcing working holiday makers to work in the horticulture sector, especially in regional, rural, or remote Australia, also makes it more difficult for them to seek assistance if they are exploited.¹²⁶

Before COVID, a growing share of working holiday makers were second-year 462 visa-holders from developing countries. The highest second-to-first-year backpacker visa ratio, which indicates those most likely to come to Australia and stay for agricultural work, were from Vietnam and Indonesia.¹²⁷

The Fair Work Ombudsman provided evidence that 6 per cent of all formal disputes during the year 2019-20 involved allegations in relation to working holiday makers.¹²⁸ Working holiday makers are young and less-skilled, tend to work in industries with higher rates of underpayment, notably hospitality and agriculture (Chapter 1), and may have poor English skills.

In 2018 the Fair Work Ombudsman investigated 638 harvest trail businesses and found that 70 per cent of the employers who employed temporary workers — most of them working holiday makers — had breached Australia’s workplace laws.¹²⁹ According to the Ombudsman:¹³⁰

120. Department of Home Affairs (2022d).

121. The ratio of second-year to first-year visa applications in 2019-20 was 31 per cent, exceeding the 2018-19 ratio of 26 per cent: ANU Development Policy Centre, Submission 68 to working holiday maker inquiry, 2020 (pp. 3-4).

122. Working holiday makers were only granted the opportunity to stay in Australia for a third year from 1 July 2019. The number of visa-holders extending their stay for a third year was 8,242 in 2021-22. But because this cohort was affected by the pandemic, that number may not be representative of future trends.

123. Department of Home Affairs (2022e).

124. Migrant Workers’ Taskforce (2019a); Parkinson et al (2023, p. 89); Joint Standing Committee on Migration (2020, p. 69); Select Committee on Temporary Migration (2021, p. 110); Howe et al (2019); and Boucher (2023, p. 157).

125. Changes to visa rules from December 2015 mean that employers no longer need to sign off that specified work requirements have been met. Instead, working holiday makers can provide pay slips as evidence that the work has been undertaken.

126. Law Council of Australia, Submission 90, pp. 10–11. Economics References Committee, Unlawful underpayment of employees’ remuneration, p. 31.

127. Orton and Howes (2019).

128. Joint Standing Committee on Migration (2020, p. 65).

129. Fair Work Ombudsman (2018b, p. 26).

130. *Ibid.* (p. 26).

The incentive to obtain a second visa through completing three months (88 calendar days) of specified work means workers may be willing to accept substandard pay and conditions, and/or be unwilling to seek assistance from the FWO. Unscrupulous employers can use this as leverage to pay less, give notice periods that are outside award conditions, and withhold pay.

According to a 2016 survey, the working holiday maker visa had the most reports of negative migrant worker experiences of all the temporary visa categories.¹³¹ A survey by the Migrant Justice Institute found that almost half of all working holiday makers reported being paid well below the minimum wage (see Figure 2.3). An Adventure Tourism Victoria (ATV) survey of working holiday makers found that 20 per cent were paid less than \$10 an hour.¹³² According to ATV, the need to work in specified locations in specified industries to qualify for a second or third year visa drives workplace exploitation.¹³³

Exploitation of working holiday makers goes beyond underpayment, with reports of sexual assault, unsafe housing, false job offers, and intimidation, including confiscation of passports and valuables in lieu of unpaid debts.¹³⁴ Exploited workers were also more likely to seek the FWO's assistance once their employment had ceased and the 88-days had been signed-off, suggesting that these work requirements made workers reluctant to report exploitation while it could threaten their visa status.¹³⁵

131. Hall and Partners (2016, p. 113); and Boucher (2023, p. 157).

132. Joint Standing Committee on Migration (2020, p. 65).

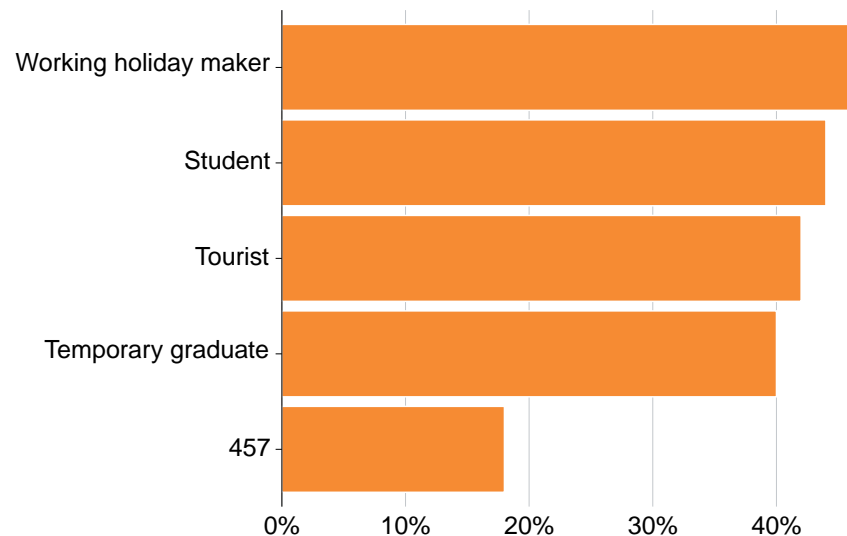
133. Representatives from ATV told the Joint Standing Committee inquiry into the working holiday maker program: 'We had wage brackets, essentially, and the average wage of our respondents was \$16.97. The minimum wage in Australia is \$19.84. JobKeeper is currently \$1,500 and JobSeeker is currently \$1,200, so it's vastly below what you would expect. It's because of that second year visa. We're dangling that carrot, and exploitation in some instances is put up with.'

134. Migrant Workers' Taskforce (2019a, p. 119); and Boucher (2023, Chapter 4).

135. Fair Work Ombudsman (2018b, p. 32).

Figure 2.3: Working holiday makers and students are the most likely to be underpaid

Percentage of survey participants earning less than \$15 an hour, by visa type



Notes: The minimum wage was \$18 an hour in 2017, however, the survey asked respondents about their lowest ever wage, which may have been several years earlier. The survey authors use \$15 an hour as an indicator of underpayment.

Source: Berg and Farbenblum (2017).

2.4.3 Working holiday makers should be offered a single 12-month visa, and specified work requirements should be abolished

Requirements for working holiday makers to undertake specified work to extend their stay in Australia should be abolished. Instead, all working holiday makers should be eligible for one 12-month visa, with the exception of citizens from countries eligible for the 417 working holiday visa that offer Australians a longer duration visa.¹³⁶ The working holiday maker program should be refocused on its original purpose of facilitating cultural exchange.¹³⁷

Australia is the only country with a reciprocal working holiday maker visa that offers a visa extension in exchange for specified work in remote areas.¹³⁸ Most countries only offer a 12-month visa or less, with Canada, the UK, and Japan the exceptions. Norway and Peru offer a 12-month visa with the option to renew for another 12 months.

The specified work requirement of the working holiday maker visa provides the agricultural industry and regional areas with a large, flexible pool of workers to meet the highly-seasonal demand. But the cost is increased worker exploitation.

In effect, the specified work requirement sells visa extensions via cheaper labour to the agricultural industry and some regional areas,

136. This recommendation is in line with the Select Committee on Temporary Migration, which recommended that the specified work requirement for farm work be abolished and the working holiday maker program be 'refocused on its original purpose of facilitating cultural exchange' (Select Committee on Temporary Migration (2021, Recommendation 9)) and the Review of the Migration System (Parkinson et al (2023, p. 89)).

137. Select Committee on Temporary Migration (2021, Recommendation 9); and Parkinson et al (2023, Recommendation 23).

138. Migrant Workers' Taskforce (2019a, p. 122): 'In the case of working holiday makers, it has been pointed out that other countries with similar schemes do not apply this kind of restriction to qualify for a second year of the visa.'

which flows through to lower prices and a greater variety of produce for Australians. It has also shifted Australia's working holiday program away from its primary objective of supporting cross-country cultural exchange to a program aimed at providing cheap labour to help solve regional Australia's workforce challenges.¹³⁹ If working holiday makers want to remain in Australia to work, they should apply for explicit employment-related pathways.¹⁴⁰

As part of the Australia-UK Free Trade Agreement that will come into effect on 31 May 2023, UK passport-holders aged between 18 and 35 will be eligible for three one-year working holiday visas without any specified work requirement.¹⁴¹ It's likely that more countries in the 417 working holiday program will seek exemptions from the specified work requirement for their citizens if free trade agreements are signed in the future.

2.4.4 Removing specified work requirements would reduce the number of working holiday makers working in the regions

Removing specified work requirements would reduce the number of workers available to employers in regional areas, especially in agriculture.

Our proposed reforms would probably reduce the number of working holiday makers in Australia. In December 2019 there were 141,142 working holiday makers in Australia, with 33,479 of these on a second or third visa (24 per cent of the total). Under our proposed reforms, the number of second or third visa holders would drop to zero, but this would be partly offset by a rise in the number of working holiday makers from countries which offer Australian backpackers a

139. Ibid (p. 113).

140. Parkinson et al (2023, p. 89).

141. Department of Home Affairs (2022f). The changes to the working holiday maker visa will come into force sometime before 31 May 2025.

longer-term visa (initially Canada, Japan, and the UK, but with more likely to follow).

Working holiday makers have historically accounted for about 3 per cent of the agricultural workforce,¹⁴² and a much larger share of the workforce in some regions and industries.¹⁴³ Before COVID, about one in four working holiday makers in Australia – about 30,000 to 35,000 people – were on a second or third working holiday visa (Figure 2.2).¹⁴⁴ About four in five of these people worked in agriculture.

Removing specified work requirements would not preclude certain regions or industries from attracting backpackers. If working conditions improve, then backpackers may decide to do seasonal work in regional areas to fund their Australian holiday. The workforce gap in agriculture also could be filled by an expanded Pacific Australia Labour Mobility (PALM) scheme (once improvements to that scheme have been made, see Section 2.5). The new minimum wage for piece workers, introduced in 2022, could also attract more local workers.¹⁴⁵

Limiting the duration of working holiday visas would reduce tourism spending marginally. In 2019, working holiday makers spent \$2.6 billion in Australia, or an average of \$8,550 each.¹⁴⁶ But many backpackers would be eligible for a tourist visa (typically three months), or may decide to study in Australia, if they want to extend their stay.¹⁴⁷

142. As of the 2016 Census. See Mackey et al (2022, Figure 5.1).

143. Joint Standing Committee on Migration (2020, p. 61); Howe et al (2019, p. 19); and Fair Work Ombudsman (2018b, p. 2).

144. This is equivalent to about 15,000 full-time workers assuming 88 days of work for 25,000 to 30,000 working holiday makers on a second visa and 176 days for 5,000 working holiday makers on a third visa.

145. Under the changes, employees can still be paid a piece rate, but they have to be paid at least the minimum wage for each hour they work.

146. Austrade (2022).

147. In 2019, working holiday makers stayed an average of 149 nights in Australia: Austrade (ibid).

2.5 The Pacific Australia Labour Mobility scheme should allow workers to move between employers

The Pacific Australia Labour Mobility (PALM) scheme allows Australian businesses to hire workers from Pacific Island countries and Timor-Leste to primarily work in low- and semi-skilled jobs in the agriculture sector and in regional and rural Australia.¹⁴⁸ Employers can recruit workers for seasonal work (up to nine months) or for longer-term placements of one to four years (in any sector in regional Australia and in limited sectors in metropolitan locations). The PALM scheme is designed, in part, to fulfil Australia's foreign and development policy priorities.¹⁴⁹

There were 37,700 PALM scheme workers Australia in March 2023 (up from 35,100 in December 2022), with about 70 per cent working in agriculture.¹⁵⁰

The PALM scheme has a stronger regulatory framework than other visas that lower-skilled migrant workers use, such as student and working holiday maker visas.¹⁵¹

Key regulatory features of the PALM scheme include:¹⁵²

- To become an Approved Employer, employers must be approved by the Department of Employment and Workplace Relations and a

148. Department of Foreign Affairs and Trade (2022a). The PALM stream sits within the subclass 403 Temporary Work (International Relations) visa. It replaced the Pacific Labour Scheme visa and the Seasonal Worker Program visa. Most advanced economies have a seasonal worker program to meet agriculture workforce needs, for example the Canadian Seasonal Agricultural Worker Program and the New Zealand Recognised Seasonal Employer scheme.

149. Department of Home Affairs (2022g).

150. Prime Minister of Australia (2023) and data request from the Department of Employment and Workplace Relations.

151. Howes and Sharman (2022).

152. PALM (2022a).

Temporary Activities Sponsor status granted by the Department of Home Affairs.

- The Department of Employment and Workplace Relations monitors compliance.
- Mandatory briefing by Fair Work Ombudsman and union representatives upon arrival in Australia.
- Migrants need a minimum 30 hours of work per week, averaged over the duration of their employment in Australia.
- Minimum accommodation requirements: accommodation plans must be submitted with recruitment applications, and accommodation is inspected.
- On-arrival briefings and pre-departure training and briefings.
- Country liaison officers to support workers in Australia (appointed by some governments).

Yet even under the more highly-regulated PALM visa, exploitation and mistreatment occurs.¹⁵³ Low-wage workers, particularly those in remote locations, are poorly placed to protect themselves from employers who are prepared to break the law. Poor-quality and overcrowded housing, excessive deductions for expenses such as accommodation and transport, deliberately not offering sufficient work, unsafe working conditions, and mistreatment by rogue labour hire firms are the most common forms of exploitation.¹⁵⁴

The government has announced plans to make changes to the PALM scheme and the Department of Employment and Workplace

153. Worker mistreatment is regularly reported in the media. For example, see Marie (2022) and Doherty (2017).

154. Howes and Sharman (2022), Marie (2022) and Doherty (2017). Excessive monitoring of behaviour includes employers banning alcohol and sexual relationships.

Relations is currently developing a new PALM Approved Employer deed and guidelines.¹⁵⁵ Proposed changes include: allowing workers on long-term placements to bring their immediate family to Australia, underwriting upfront travel costs paid by employers, incorporating the Australian Agriculture Visa into the PALM scheme, pay parity with local workers, improved transparency around pay and deductions, strengthened requirements to provide reasonable accommodation and more employer-initiated portability.¹⁵⁶

The government should make further changes to the PALM scheme to reduce exploitation.

The most important reform to reduce exploitation in the PALM scheme is to allow workers to change employers.¹⁵⁷ Currently, workers are tied to their sponsoring employer. The draft PALM approved employer deed and guidelines proposes to expand eligibility for employer-initiated movements of workers to different authorised employers, as well as enabling to workers to move to a new employer if they fear for their safety.¹⁵⁸ These changes don't go far enough. Workers should be free to change to another approved employer if they find a better employer, or to escape mistreatment or underpayment. Portability should not predominately be limited to employer-initiated changes.¹⁵⁹

To help workers make an informed decision before moving to a new employer, a third-party accreditation system for trusted employers

155. Department of Employment and Workplace Relations (2023a).

156. PALM (2022b); and Department of Employment and Workplace Relations (2023a).

157. PALM (2022b); and Parkinson et al (2023, p. 89).

158. Department of Employment and Workplace Relations (2023a).

159. Department of Foreign Affairs and Trade (2022b). Given the upfront costs of the scheme for employers, notably flights and visa costs, it is reasonable to require a worker to pay off any debts before they can move employers, or alternatively, to allow the new employer to refund the initial employer the balance of unpaid upfront costs. PALM workers typically pay back their employer over a 12-to-16 week period: PALM (2022c).

should be introduced.¹⁶⁰ Introducing portability would be a major change to the PALM scheme and would require consultation with Pacific partner countries, and better auditing of approved employers.¹⁶¹

Employers should be able to share PALM workers if there is a need, for example if there is insufficient work at one location, but only with the workers' consent. Most PALM workers would be happy to move to a new employer if more work was available there, because a lack of work is a major complaint among PALM workers.¹⁶² The proposed changes to employer-initiated portability in the draft PALM deed and guidelines are a step in the right direction.¹⁶³

Other changes that would improve the PALM scheme include: improving pre-departure briefings from the home country's labour sending office; stronger enforcement to ensure mandated briefings of workers on arrival happen, and extending these to include family members; ensuring migrants have better understanding of health insurance; requiring employers to itemise deductions on payslips; more inspections of worker accommodation; making all contract information available in the worker's language; requiring countries to place at least one liaison officer in Australia once their number of workers reaches a certain minimum; and regular surveys of PALM employers and workers.¹⁶⁴ In the 2023 Budget, the government allocated more funding to the PALM scheme to improve support for workers.

If the above reforms were implemented and exploitation of the PALM scheme was reduced, the scheme could be expanded to offset the reduction in the number of working holiday makers due to the changes we recommend in Section 2.4 and if labour shortages in agriculture persist.¹⁶⁵ The government committed to expanding the PALM scheme in the 2023 Budget. The government should help under-represented countries – Papua New Guinea, Timor-Leste, Solomon Islands, and Kiribati – to send more workers.¹⁶⁶ The government should also consider expanding the scheme to south-east Asian countries.

2.6 Work rights for international students should be reviewed as part of a review of international higher education

International students are one of the largest cohorts of temporary visa holders. There were 582,800 international students in Australia as at March 2023 (Figure 1.1).

International students have historically been limited to working a maximum of 40 hours per fortnight during teaching periods, with unlimited work hours during vacation periods. The government has increased the cap on work hours during teaching periods to 48 hours per fortnight from 1 July 2023.¹⁶⁷

160. Department of Foreign Affairs and Trade (2022b, p. 3). Returning seasonal workers could be given the option to choose their employer.

161. Discussions with the Development Policy Centre.

162. The Development Policy Centre suggest a 'Joint Approval to Recruit' mechanism, which would allow a group of employers to share workers according to need: Howes and Sharman (2022).

163. Department of Employment and Workplace Relations (2023a).

164. Howes and Sharman (2022), Kanan and Putt (2022) and Migrant Justice Institute (2022a, p. 12).

165. Select Committee on Temporary Migration (2021, Recommendation 8).

166. Howes and Sharman (2022). Recent announcements from countries such as Timor-Leste and Solomon Islands indicate there is strong demand from residents to enrol in the PALM scheme: Belarmino De Sa (2023) and Solomon Islands Government (2023).

167. International students can work unlimited hours during teaching periods through to 30 June 2023, and 48 hours per fortnight from then on (Department of Education (2023)). Masters by research and PhD students are not limited in the number of hours they can work. Students working in aged care are exempt from the cap until December 2023.

This cap on working hours is intended to prevent non-genuine students from coming to Australia on a student visa and working full-time.¹⁶⁸ Most comparable countries have a similar cap on working hours.¹⁶⁹

The cap on working hours is a major contributor to exploitation of working international students.¹⁷⁰ Students who have worked more than allowed under their visa conditions, possibly due to pressure from their employer or because of severe underpayment (as occurred in the 7-Eleven scandal), are unlikely to complain to their employer about working conditions or report exploitation to the Fair Work Ombudsman due to fear of having their visa cancelled.¹⁷¹ This creates a vicious cycle: once a student has breached their visa and their employer knows this, they become more vulnerable to exploitation.

Unsurprisingly, students who report working more than 20 hours per week are also more likely to report being more severely underpaid than other students.¹⁷²

168. International students must be considered a 'genuine temporary entrant' and are required to demonstrate they can support themselves in Australia before being granted a visa.

169. Australia's new 48-hour cap per fortnight is more generous than the caps in Canada, New Zealand, the US, and the UK, where students can typically work 20 hours per week. Finland allows students to work any number of hours in a given week, as long as for the year their average working hours are no more than 30 a week. Sweden has no cap on working hours but students must study for at least 40 hours per week. According to the Migrant Workers' Taskforce (2019a, p. 122): 'The restriction [in Australia] does reflect to some degree evidence that student education performance tends to drop off if they work more than 40 hours per fortnight.'

170. According to Farbenblum and Berg (2020, p. 3), 'This restriction profoundly contributes to exploitation of international students, and to their unwillingness to seek help for underpayment or report violations of workplace laws when they occur'. See also: Boucher (2023, p. 158).

171. Despite these fears, very few student visas are cancelled for breaching the cap on work hours: Farbenblum and Berg (2020, p. 7).

172. Berg and Farbenblum (2017).

2.6.1 But abolishing the cap completely could make exploitation worse

While the cap on working hours does contribute to exploitation, expanding students' work rights could have unintended consequences. It risks turning student visas into a de facto low-skill work visa, which could undermine the integrity of the visa system while also encouraging more exploitation.

When work rights were relaxed during the pandemic, and then completely uncapped in January 2022, it coincided with a big jump in student visa lodgements and a decline in the proportion of visa applications granted.¹⁷³ The sharp rise in visa applications was not surprising given the re-opening of the borders. The number of student visa applications in the nine months to March 2023 was the highest on record (see Figure 2.4).

Visa application grant rates, which fell to 65.4 per cent in October 2022 and 86.1 per cent over the six months to December 2022, from 91 per cent in the first half of 2022 and about 90 per cent in the years leading up to the pandemic. This decline suggests there was a surge in applications from non-genuine students attracted by the unlimited work rights.¹⁷⁴

Grant rates for student visa applications from Nepal and Pakistan fell most significantly. For Nepal, grant rates fell from 80.3 per cent in 2018-19 to 69.6 per cent in the six months to December 2022. For Pakistan, grant rates fell from 82.2 per cent in 2018-19 to 60.7 per

173. The changes to work rights were aimed at addressing labour shortages and enabling students to bolster their income.

174. Rizvi (2022) and Rizvi (2023a). The Department of Home Affairs stated there was an increase in fraudulent information in student visa applications: Lucas and Prezel (2023).

cent in the six months to December 2022.¹⁷⁵ Visa grants rates from India, the biggest source country during this period, fell significantly in September and October 2022.¹⁷⁶ Pre-pandemic, international students from these countries, and particularly from Nepal, were more likely to be working while studying in Australia than students from other countries, indicating some recent visa applicants were attracted by the unlimited work rights.¹⁷⁷ Migration agents may also have played a role in falling grant rates, by encouraging non-genuine students to apply for student visas.

For China, grant rates fell only marginally compared to pre-COVID. And grant rates for Vietnam, Brazil, and Colombia, three of the largest source countries, rose.

In addition to the changes to student work rights, there is also evidence that non-genuine students came to Australia to take advantage of the 408 COVID-19 pandemic event visa, which allows the holder up to 12 months of unlimited work rights.¹⁷⁸ There are media reports that some students have switched to a subclass 408 after arriving on a student visa and enrolling in a short course.¹⁷⁹ And according to media reports of the Nixon review into the integrity of the migration system, 15 per cent of all student visa-holders in the VET system withdrew from their course and failed to re-enrol in another course, but remained in Australia despite breaching the key condition of their visa.¹⁸⁰

175. For higher education applications from Nepal, the grant rate fell to 77.5 per cent in the six months to December 2022 from 92 per cent in 2018-19. For Pakistan higher education: 88.8 per cent down to 70.8 per cent.

176. Wootton (2022). There are reports that some students from India are quitting high-fee university courses and switching to low-fee VET (Vocational Education and Training) courses soon after arriving in Australia: Hare (2023a).

177. Grozinger and Parsons (2020).

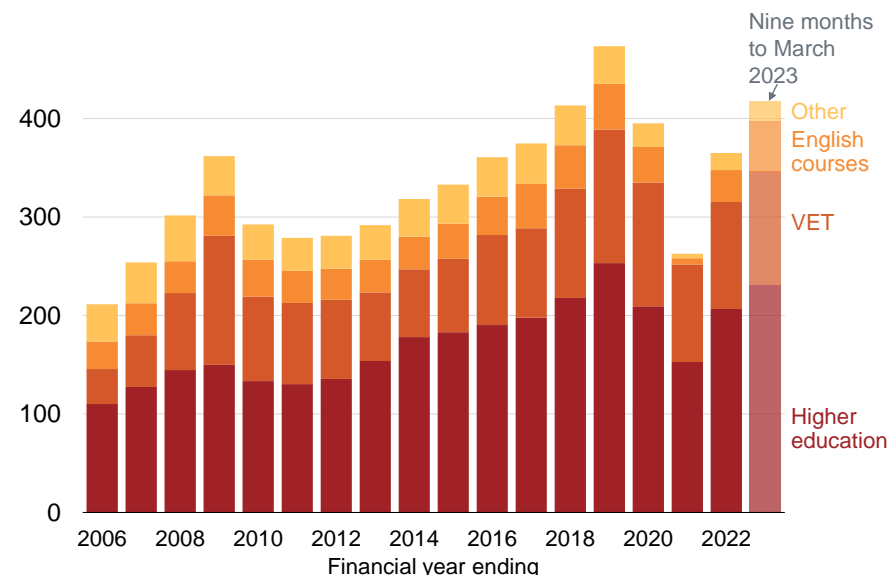
178. Rizvi (2023a).

179. Dodd (2023); and Hare (2023b).

180. McKenzie and Bachelard (2023).

Figure 2.4: Student visa applications recovered strongly once borders reopened

Student visa lodgements, financial years, by sector, 000s



Notes: VET = Vocational Education and Training. 2022-23 financial year is nine months ending March 2023. 'Higher education' includes higher education and postgraduate research sectors. 'Other' includes foreign affairs and defence sectors, non-award, and schools sector.

Source: Australian Government (2023b).

Overall, the evidence from 2022 and early 2023 indicates that removing the cap on working hours or significantly increasing the cap may lead to more non-genuine students migrating to Australia primarily to work.¹⁸¹

While the Department of Home Affairs can reject applications from students it perceives as non-genuine, relying on this process would create extra stress on an already overburdened visa system, waste resources, and increase the risk of large numbers of non-genuine students arriving, which could erode public trust in the international student program.¹⁸²

Uncapped working hours may also dilute the quality of higher education in Australia, because non-genuine students may enrol in poor-quality courses or struggle to complete their course due to working too many hours.

2.6.2 A review of international higher education in Australia should explore alternatives to the current cap

We recommend the government commission an independent review of international students in higher education in Australia, which should examine what work rights should be granted to international students as well as the standards of higher-education providers catering to international students.

Our recommended review should be in addition to the review that is being run as part of the Australian Universities Accord.¹⁸³ The Accord review has only a narrow remit in regard to international students and

does not include a review of the quality of the vocational education and training (VET) sector.¹⁸⁴

A review of international students in higher education should evaluate alternatives to the current system of a fortnightly cap on work hours, such as an annual cap on total hours during study periods, an approach used in Finland. An annual cap on average work hours, such as 20-to-30 hours per week, would be more flexible for students, and would reduce the bargaining power of employers who knowingly coerce students to work in breach of their visa rules in a given fortnight.¹⁸⁵

The review should evaluate whether the regulatory regime needs to be strengthened to weed out providers of low-quality courses,¹⁸⁶ or by strengthening English language requirements for international students.¹⁸⁷ It should consider whether providers should be required to track attendance more closely and how this could be done using technology. The review should investigate whether rogue migration and education agents contribute to non-genuine students entering Australia. And the review should consider whether the ‘genuine temporary entrant test’ could be changed to a ‘genuine student’ test, as recommended in the Review of the Migration System.¹⁸⁸

These changes would reduce, but not eliminate, the risks of relaxing rules on students’ work rights.

181. The unlimited work rights offered by the subclass 408 visa has also contributed to non-genuine students coming to Australia.

182. Rizvi (2022).

183. Department of Education & Training (2023).

184. Home Affairs Minister Clare O’Neil said in April that she is working with other ministers to ‘lift the requirements for international students to enter and study in Australia’: O’Neil (2023).

185. However, an annual cap on work hours may be harder to enforce, especially where migrants work for multiple employers in a given year.

186. There was a crackdown on poor-quality vocational education providers in 2015. See Hurst (2015).

187. The minimum International English Language Test System (IELTS) score is 5.5 to study a VET course and 6 to study at a university. See: Coates et al (2021, Box 6).

188. Parkinson et al (2023, p. 122).

2.7 Better legal protections are needed to get more migrant workers to report exploitation

Many migrants do not report exploitation because they fear they will be deported, or that it will ruin their chances of securing a permanent visa, or because they have left the country and find it too difficult to pursue a claim from overseas.

A 2016 survey of temporary migrant workers by the Migrant Justice Institute found that only 9 per cent of participants who stated that they had been underpaid while working on a temporary visa had tried to recover unpaid wages. The fear of migration consequences is one of the main reasons migrants don't try to recover unpaid wages (see Figure 2.5).¹⁸⁹ For example, once migrants underpaid by 7-Eleven franchisees saw that the government would take no action against those who worked in breach of their visa conditions, applications for redress flooded in (see Box 1).¹⁹⁰ Figure 2.5 also shows that some migrants don't report exploitation because they will soon leave Australia.

Even with the changes to visa rules recommended in this chapter, some migrants would still breach their visa conditions due to exploitation. We support the proposals by the Migrant Justice Institute and the Human Rights Law Centre¹⁹¹ that the government introduce an Exploited Worker Visa Guarantee to protect workers who report

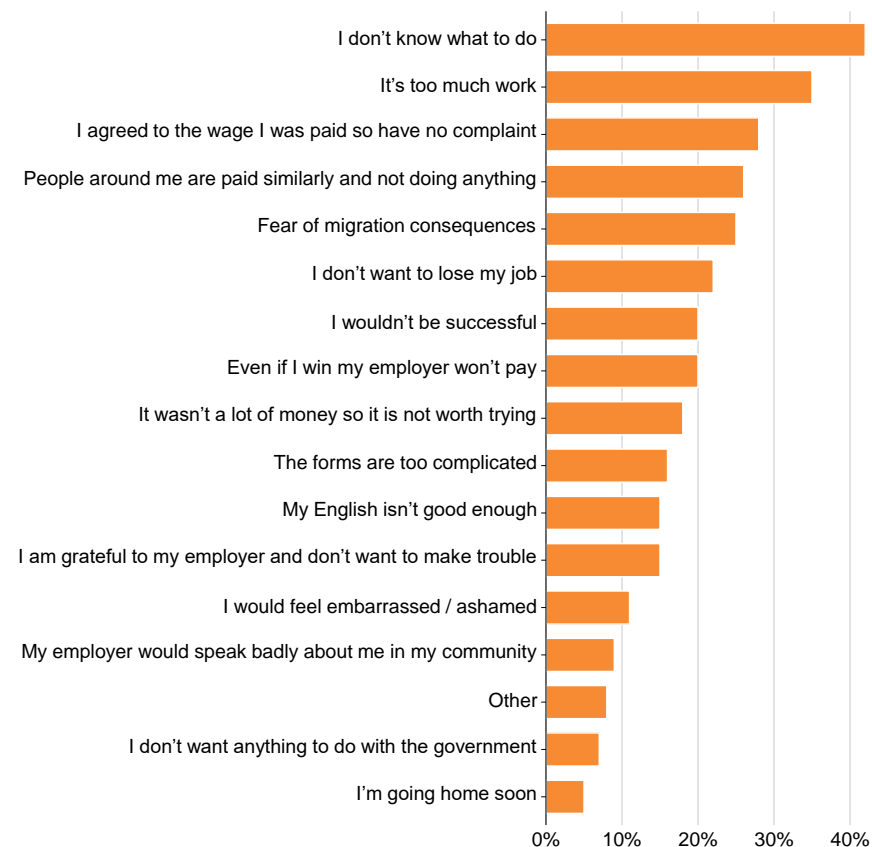
189. Farbenblum and Berg (2018).

190. Berg and Farbenblum (2018, p. 31).

191. Migrant Justice Institute and Human Rights Law Centre (2023). These proposals are supported by more than 40 other organisations, including legal service providers, unions, and community peak bodies. These reforms have also been recommended by others. For example, Recommendation 16 of the Senate Standing Committee on Economics (2022) inquiry into migrant exploitation was for the government to 'explore reform to visa laws to allow migrant workers who have been exploited or underpaid to remain in Australia until the relevant legal processes for recovery of lost wages or conditions is finalised'.

Figure 2.5: Underpaid migrants cite a range of reasons for not seeking to recover their wages

Percentage of respondents who might or plan to try to recover unpaid wages in future or had not tried and would not try to recover wages



Notes: Respondents could select more than one of the listed reasons and/or 'Other'. There were 1,996 respondents.

Source: Farbenblum and Berg (2018, Figure 13).

exploitation from their visa being cancelled, and a Workplace Justice visa that would enable a worker to stay in Australia while they pursued an exploitation claim.¹⁹²

2.8 The Assurance Protocol should be replaced with an Exploited Worker Visa Guarantee

The government should replace the ‘Assurance Protocol’, the current mechanism which protects workers who report exploitation from their visa being cancelled, with an Exploited Worker Visa Guarantee.

2.8.1 The Assurance Protocol has numerous weaknesses so is rarely used

The Assurance Protocol between the Department of Home Affairs and the Ombudsman was established in 2017.¹⁹³ It states that the Department won’t cancel a temporary visa-holder’s visa if they have breached work-related visa conditions because of workplace exploitation, as long as: the migrant has sought advice or support from the Fair Work Ombudsman and is helping with inquiries; there is no other reason to cancel the visa (for example, for national security or character reasons); and the migrant has committed to following visa conditions in future.¹⁹⁴

But the Assurance Protocol has rarely been used. Between 2017 and 2021, only 77 temporary visa-holders used the protocol.¹⁹⁵

192. If these proposals were adopted, a ‘firewall’ that stopped the Department of Home Affairs and the Fair Work Ombudsman from sharing information about a migrant who had breached their visa would not be needed by most migrants and could be counterproductive. See: Senate Standing Committee on Economics (2022, Recommendation 17).

193. Fair Work Ombudsman (2023b).

194. Ibid.

195. Migrant Justice Institute and Human Rights Law Centre (2023, p. 10). The Ombudsman has made few referrals to the Department of Home Affairs; the Department has not rejected any applications.

The Assurance Protocol has not been used because of the following weaknesses:

- It is not enshrined in law or policy, which makes migrants and their lawyers reluctant to trust the process.¹⁹⁶
- Knowledge of the Assurance Protocol is limited within the Fair Work Ombudsman’s office and among migrant workers.¹⁹⁷
- There is uncertainty about whether it extends to people who work on temporary visas without work rights.¹⁹⁸
- There is no clear appeal process, only an internal appeal to a team leader at the Ombudsman.¹⁹⁹
- It is available only to workers who are helping the Ombudsman with its inquiries. So it is not available for exploited workers where the Ombudsman is not making further inquiries due to, for example, what they perceive as inadequate evidence or lack of agency resources.²⁰⁰
- It is not available to workers who seek to address their exploitation through union action, court action, or the Fair Work Commission.
- Protection is restricted to offences within the Ombudsman’s remit, so does not include, for example, health and safety violations or sexual harassment.

196. Migrant Justice Institute and Human Rights Law Centre (ibid).

197. According to community legal centres, some FWO inspectors had no knowledge of the Protocol.

198. The website states: ‘For temporary visa-holders who don’t have permission to work attached to their visa, Home Affairs will consider each case on its merits.’

199. Interview with Employment Rights Legal Service.

200. The Ombudsman requires strong evidence of exploitation before it investigates a case further or litigates, which means few cases are pursued (based on conversations with the Victorian Migrant Workers Centre and community legal centres).

2.8.2 A new strengthened protocol is needed: the Exploited Worker Visa Guarantee

An Exploited Worker Visa Guarantee should replace the Assurance Protocol. This Guarantee would reassure migrants that their visa will not be cancelled if they report exploitation at the hands of their employer, even if they have breached their visa conditions. It should have the following features:

- **Eligibility:** available to migrant workers whose visa would be cancelled after breaching visa conditions due to exploitation.
- **Type of exploitation or mistreatment covered:** a non-trivial breach of labour law. A Ministerial Direction should specify the list of workplace contraventions that give rise to protection against cancellation. It should be restricted to cases where the underpayment exceeds \$2,000.
- **Action required by the worker:** evidence of a meritorious claim that a contravention has occurred and that the worker is taking action to address it. Demonstrated by: certification by a government enforcement agency (for example, the Fair Work Ombudsman) that is conducting inquiries in relation to the visa-holder's employment; a court, tribunal, or commission certifying that a worker's ongoing presence in Australia is required for the conduct of its proceedings; certification by an employment law practitioner. In addition, the worker must have reported the contravention to a relevant government authority.
- **Legal instrument:** regulations issued pursuant to s116(2) of the Migration Act, prescribing that a visa is not to be cancelled in circumstances where a worker has a claim that a contravention has occurred and is taking action to address it (i.e. is a whistleblower).
- **Length:** the same duration as the current visa.

- **Work rights:** as per current visa.
- **Future visas:** same visa pathways as the current visa. The Guarantee should make clear that migrants who report exploitation while in breach of their visa conditions will not be disadvantaged when applying for future visas.

The Exploited Worker Visa Guarantee should be designed with the above characteristics so as to minimise the risk that a temporary visa-holder uses the Guarantee multiple times to enable them to work more than allowed and remain in the country.²⁰¹

Visa holders without work rights, and undocumented migrant workers, would not be eligible for the Exploited Worker Visa Guarantee because they do not have a visa with work rights attached.²⁰²

2.9 Introduce a Workplace Justice visa, to enable a worker to stay in Australia while they pursue an exploitation claim

The government should introduce a Workplace Justice visa, which would allow migrant workers who have suffered exploitation to remain in Australia to pursue their legal claim.

This would overcome a major barrier to migrants reporting exploitation – the end of a visa often means there is little incentive for a migrant to report exploitation, because pursuing an unpaid wages claim from overseas is extremely difficult. As the Migrant Justice Institute recently

201. Migrant Justice Institute and Human Rights Law Centre (2023, p. 5).

202. Under the Assurance Protocol, for temporary visa holders who don't have work rights the Department of Home Affairs will consider each case on its merits. However, this is no different to any visa decision, where the Department has discretion about whether to cancel a visa. Visa-holders without work rights and undocumented migrant workers would be eligible for the proposed Workplace Justice visa (see Section 2.9).

noted, 'it is virtually impossible for a migrant worker to pursue a legal claim against an employer once they have returned home'.²⁰³

Enabling a migrant worker to stay in Australia to report exploitation would not only increase access to individual justice when workers were exploited, it would act as a deterrence measure by increasing the risks of underpayment for employers. It would lead to more reporting of employers who exploit workers, increasing the intelligence available to the Fair Work Ombudsman and other authorities. Fewer unscrupulous employers would mistreat migrant workers if the employer know the workers were able to stay in the country and pursue a claim.²⁰⁴ Chapter 6 outlines how the small claims process can be reformed to speed up unpaid wage claims.

2.9.1 The Workplace Justice visa

The Workplace Justice visa should have the following features:

- **Eligibility:** available to migrant workers whose visa would expire or be cancelled before their claim is resolved, or who are undocumented.
- **Type of exploitation or mistreatment covered:** a non-trivial breach of labour law. A Ministerial Direction should specify the list of workplace contraventions that enable a visa to be issued. It should be restricted to cases where the underpayment exceeds \$2,000.
- **Action required by the worker:** evidence of a meritorious claim that a contravention has occurred and that the worker is taking action to address it. Demonstrated by: certification by a government enforcement agency that is conducting inquiries

203. Migrant Justice Institute and Human Rights Law Centre (2023, p. 8); discussions with community legal centres.

204. Ibid.

in relation to the visa-holder's employment; a court, tribunal, or commission certifying that a worker's ongoing presence in Australia is required for the conduct of its proceedings; certification by an employment law practitioner. In addition, the worker must have reported the contravention to a relevant government authority.

- **Length:** between three and 12 months, at the discretion of the Department of Home Affairs.²⁰⁵ The worker could get a subsequent Workplace Justice visa if they can demonstrate that a legal process or investigation remains on foot (a higher threshold than for the initial visa). The visa would become invalid if the visa-holder abandoned the claim (however, they would be permitted to genuinely settle the claim).
- **Work rights:** full work rights, irrespective of their earlier visa, so they can support themselves while they remain in Australia.
- **Conditions:** the worker could not abandon the claim or cease to cooperate with authorities.

The assessment of the merits of a claim should be done by a government agency, court, or specialist legal professional (as with the Exploited Worker Visa Guarantee).

There are risks from creating a new visa that would enable temporary migrants to remain in the country for longer than their initial visa allows. The Workplace Justice visa might encourage some migrants to claim exploitation then get the visa to extend their stay, or to collude with their employer to make a claim of exploitation. Another risk is that the full working rights offered to Workplace Justice visa-holders – possibly more generous than the visas they currently hold – would

205. The Migrant Justice Institute and Human Rights Law Centre proposal recommends six to 12 months.

encourage people to claim the visa.²⁰⁶ But because the visa is limited to a maximum of 12 months, the benefits from full work rights are limited.

The Workplace Justice visa would be designed to minimise these risks.²⁰⁷

Recent events show that new visas can be abused if not well-designed. The subclass 408 COVID-19 pandemic event visa, which offers visa-holders the ability to stay in Australia for 12 months and work unlimited hours in selected industries, such as hospitality, aged care, and healthcare, was introduced during the pandemic to give international students who couldn't return home the ability to work full-time.²⁰⁸ Media reporting indicates this visa has been exploited by non-genuine students seeking entry to Australia to work.²⁰⁹ Students have reportedly enrolled in a short course but then transferred to a 408 visa soon after arriving to gain access to the unlimited work rights.²¹⁰

Another sign that the visa has been misused is that the number of subclass 408 visas issued has increased significantly since the pandemic ended. There were 93,000 408 visa holders in Australia in March 2023, up from 28,000 in June 2022 and about 10,000 pre-COVID.²¹¹

206. This situation is different to people arriving and making a claim for a temporary protection visa in order to get a bridging visa with work rights while their claim progresses through the Department of Home Affairs and the courts, because this can take years, whereas the Workplace Justice visa would have a short duration.

207. Migrant Justice Institute and Human Rights Law Centre (2023, p. 5).

208. Hare (2023b).

209. Dodd (2023); and Hare (2023b).

210. Dodd (2023); and Hare (2023b).

211. Department of Home Affairs (2023a).

The benefits from the Workplace Justice visa would far outweigh the costs and risks from the additional protections. As the Migrant Justice Institute argues:²¹²

On balance, if government is serious about breaking the cycle of migrant worker exploitation and detecting and prosecuting forced labour and modern slavery, hypothetical concerns about potential misuse of the visa are far outweighed by the significant systemic benefit of enabling undocumented workers to remain in Australia for a short period to bring claims upon detection... It is not possible to completely eliminate risks. However, given the pervasive, entrenched nature of migrant worker exploitation, the prospect of making genuine systemic inroads into labour noncompliance in Australia justifies the mitigated risks... New incentive structures are necessary to reverse the strong incentives currently in place for migrant workers to stay silent.

The Workplace Justice visa would create more work for the Department of Home Affairs, and the visa would cost money to set up.²¹³ But a key feature of the protections – outsourcing assessment of the merits of a claim to a government agency, court, or specialist legal professional – means the costs for the Department to administer the visa would be minimised.²¹⁴

2.10 Migrants without work rights need more protection

There are an estimated 60,000 to 100,000 migrants without work rights, including 'undocumented workers', working in Australia.²¹⁵ These migrants have either entered Australia illegally, overstayed their visa, or have a visa without work rights, for example a tourist visa.

212. Migrant Justice Institute and Human Rights Law Centre (2023, p. 22).

213. We estimate \$10 million in 2023-24 (Figure 7.1).

214. More of the costs will be borne by community legal centres, which we have recommended the government provide additional funding to (see Figure 7.1).

215. National Agricultural Labour Advisory Committee (2020, p. 206).

These workers, if detected, may be fined, detained, and deported, and employers who allow an 'unlawful non-citizen' to work may be fined or face criminal sanctions (although this rarely happens, see Chapter 4).²¹⁶

Migrants without work rights are highly vulnerable to exploitation due to the power imbalance between worker and employer and the threat of being deported.²¹⁷

The presence of undocumented migrants working in Australia at well below the minimum wage reduces the bargaining power of other workers, especially in sectors such as agriculture.²¹⁸

A growing number of migrants whose claim for asylum was rejected remain in Australia illegally or on bridging visa E, a visa which doesn't always have work rights.²¹⁹

Most migrants without work rights are currently not covered by Australia's workplace laws.²²⁰ However, in March 2023 the government introduced a Bill that, if passed, will extend protections under the Fair Work Act to all migrants without work rights, including people who have overstayed their visa.²²¹

But even if this change passes parliament, few migrants without work rights would report exploitation or claim underpayment due to a fear of being deported. This Bill will only be effective if the government introduces the Workplace Justice visa we recommend in Section 2.7.²²²

216. Clibborn (2015, p. 466).

217. Segrave (2017); Clibborn (2015); and Howe (2021).

218. Fair Work Ombudsman (2018b).

219. Rizvi (2023b).

220. Clibborn (2015, p. 466).

221. Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023.

222. Segrave (2017, p. 8).

3 Strengthen and better enforce workplace laws

Too few employers who underpay workers in Australia get caught. And when they do, they face weak penalties.

The Fair Work Ombudsman reports that the amount of unpaid wages recovered from employers rose from \$30 million in 2017-18 to more than \$500 million in 2021-22. Yet this largely reflects an increase in self-disclosures by large employers in response to award changes, rather than Ombudsman action to target substantial underpayment of vulnerable workers. And total penalties levied on employers by courts and the Ombudsman have actually fallen in recent years, to just \$4 million in 2021-22 (down from \$6 million in 2019-20).

To toughen its stance on breaches of workplace rights, the government needs to make major changes to the Fair Work Ombudsman. The Ombudsman should be granted greater powers, and renamed the Workplace Rights Authority. It should have the power to fine employers who underpay workers. Maximum court-ordered penalties against employers should be increased. Criminal penalties should apply when employers knowingly underpay their workers.

The Workplace Rights Authority will need more resources to step up enforcement. Funding for the Ombudsman has not kept pace with its responsibilities. Australia has fewer workplace inspectors than most comparable countries. Ombudsman funding for its core responsibilities of upholding workplace laws has fallen in real terms since 2010, while the Australian workforce has grown 25 per cent. The annual budget of the new Authority should be increased by \$60 million a year (compared to the existing budget of the Ombudsman) to \$230 million a year.

An independent capability review should ensure the Authority has the right strategy, structure, skills, and culture to enforce the law.

3.1 The Fair Work Ombudsman is responsible for deterring exploitation in the workplace

The principal body for enforcing workers' rights in Australia is the Fair Work Ombudsman, an independent statutory agency charged with enforcing the Fair Work system.²²³

The Ombudsman's role is to 'promote harmonious, productive, and cooperative workplace relations'.²²⁴ Its functions include providing education, assistance, and advice to employees and employers, including helping with dispute resolution. The Ombudsman also monitors, investigates, and enforces compliance with Australia's workplace laws.²²⁵

Alongside the Ombudsman, the Fair Work Commission plays important roles in administering the Fair Work Act, such as by setting the minimum wage and reviewing awards. The Commission is also responsible for resolving disputes related to the Fair Work Act, such as unlawful dismissal, workplace bullying, and determining applications for right-of-entry permits.

The Fair Work Ombudsman is in charge of enforcing the law; the government determines the laws it must enforce, the enforcement tools it has at its disposal, and how much funding it receives to enforce the law.

223. The Ombudsman was established by the Fair Work Act 2009, replacing the former agency, the Workplace Ombudsman. In the same year, all states and territories (except Western Australia) referred a substantial portion of their employment law powers to the Commonwealth. The national system covers about 87 per cent of employees across the country. See: Fair Work Ombudsman (2023d).

224. Fair Work Ombudsman (2022b).

225. Section 682 of the Fair Work Act outlines the functions of the Fair Work Ombudsman.

3.1.1 The Ombudsman has a range of tools

The Ombudsman has a range of tools to enforce workplace laws (Figure 3.1):

- Infringement notices are issued where employers fail to keep records or provide adequate payslips, and have small fines attached to them.
- Compliance notices are issued when an inspector forms a reasonable belief that an employer has breached their employment obligations, such as by underpaying a worker. A compliance notice requires that an employer rectify the breach. For example, if they have underpaid an employee, this would mean paying back the wages owed to the employee.²²⁶
- The Ombudsman can take employers to court, and the court can issue penalties of up to \$16,500 for individuals and \$82,500 for corporates, in addition to rectifying the breach. ‘Serious contraventions’, where the employer had knowledge of the contravention and there was a systematic pattern of conduct, have maximum penalties 10 times the size of standard contraventions.²²⁷
- Companies can self-disclose to the Ombudsman that they have breached the Fair Work Act. The Ombudsman can choose to enter

226. Compliance notices do not have penalties attached to them, but if an employer refuses to comply with them the Ombudsman can take the matter to court and the court can issue penalties for non-compliance of up to \$8,250 for an individual or \$41,250 for a body corporate. Employers can apply to the court to have the compliance notice reviewed. Compliance notices do not require employers to pay interest: Fair Work Ombudsman (2020b) and Fair Work Ombudsman (2023e).

227. Franchisors and holding companies can be held responsible when they have a significant amount of influence or control over their franchisee or subsidiary. Directors, company officers, and other businesses in a supply chain can also be held liable, although this rarely happens due to the high burden of proof: Fair Work Ombudsman (2022c).

into an enforceable undertaking, which is an agreement negotiated between the Ombudsman and the employer to rectify the breach and often includes additional obligations such as audits of payroll, training for human resources staff, setting up a dispute resolution process, and contrition payments. The Ombudsman can take an employer to court if they fail to comply with the agreement.²²⁸ Not every self-disclosure will have an enforceable undertaking attached to it. Instead, the employer may simply pay back the wages owed and the Ombudsman takes no action.²²⁹

3.2 Enforcement of workplace laws should focus on deterrence of deliberate and systematic misconduct by employers

There are many migrants in Australia and many more workplaces. The Ombudsman cannot hope to check on every single business to ensure they are following the letter of the law. A focus fostering a general culture of compliance with the law would mean that migrants were less likely to be exploited in the first place.

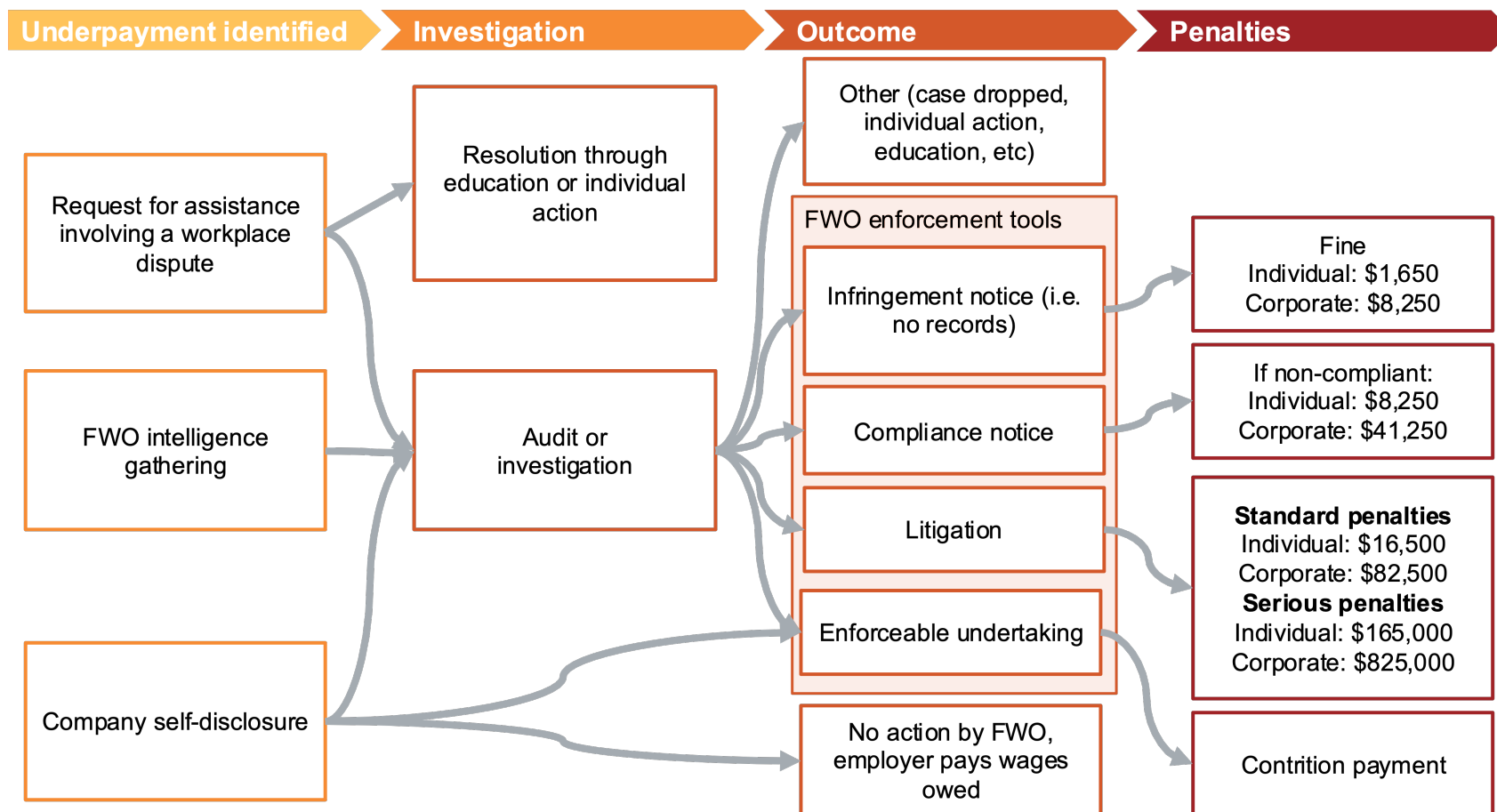
Deterrence is best achieved when employers believe it is likely that they would be caught for breaking the law, and fear the punishment that comes with it. Reputational risks also appear to be an important form of deterrence for larger companies.²³⁰

228. Fair Work Ombudsman (2020b).

229. The Ombudsman can take other enforcement action if necessary. For example, after a self-disclosure from Commonwealth Bank, the Ombudsman has taken it to court under the ‘serious contraventions’ provisions: Marin-Guzman (2021a).

230. Johnson (2020).

Figure 3.1: The Fair Work Ombudsman deals with exploitation in a variety of ways



Notes: These pathways represent likely outcomes rather than being exhaustive. For example, self-disclosures which are egregious or employers refusing to cooperate can prompt court action. Infringement notices can only be issued for record-keeping breaches. Court penalties are maximum penalties and generally group all employees together. Contribution payments are negotiated.

Sources: Fair Work Ombudsman (2020b) and Fair Work Ombudsman (2023e).

Underpayment can sometimes be unintentional. Australia's industrial relations system is complex, and compliance with awards is not always straightforward.²³¹ This complexity contributes to inadvertent underpayment, particularly by small businesses. Other cases of underpayment reflect the use of outdated payroll software.²³² In evidence to a recent Senate inquiry on underpayment, the Cheesecake Shop said:

Not even large businesses can get it right. What hope do Mum and Dad operators have? We have found that compliance is best achieved from within, by ensuring all stakeholders are clear on their obligations. Employees are the best and cheapest form of compliance audit – provided they know what they are entitled to. Simplify the minimum wage and award system to improve compliance and lower compliance costs.²³³

Government should make the system less complex where possible, for example by reforming the Fair Work Commission's processes for reviewing awards.²³⁴ The Albanese government has committed to a review of awards as part of the 2023 Budget.²³⁵ Where it is not feasible to reduce complexity, government and regulators should try to make it easier to comply with the law,²³⁶ including by supporting the adoption and development of regulatory technology.²³⁷

231. Productivity Commission (2015a, p. 4). Many instances of underpayment reflect confusion about what award applies.

232. Senate Standing Committee on Economics (2022, Chapter 1).

233. Senate Standing Committee on Economics (ibid, p. 55).

234. See, for example, Productivity Commission (2023).

235. Marin-Guzman (2023a).

236. For example, the Fair Work Commission is rewriting awards into plain language. And the Fair Work Ombudsman operates the Employer Advisory Service program, which provides free personalised advice to small businesses about how to meet their award obligations: Productivity Commission (2023, p. 110).

237. For example, the Fair Work Commission has developed the Modern Awards Pay Database API, which can be used to automate updates to award terms after

Enforcement of workplace laws should still address unintentional underpayment, since the impact of underpayment on workers is the same regardless. As the Ombudsman noted in 2020:

Nearly three-quarters of employers that breached the law said they weren't aware of the rules, which is not an excuse. Businesses are failing the basic requirements of being a responsible employer if they are not carrying out adequate due diligence before hiring.²³⁸

Small, unintentional underpayments are best dealt with using softer regulatory tools such as voluntary compliance deeds, perhaps paired with small sanctions, whereas large civil and criminal penalties should apply where employers clearly intend to exploit their workers.

Many agencies already adopt this approach. For example, the Australian Tax Office tailors its enforcement action to the attitude of the business to compliance. Businesses that show less intention to comply with the law face harsh sanctions, whereas those that want to comply but struggle to are given support (Figure 3.2).

3.3 The Ombudsman has stepped up its enforcement of workplace laws but is yet to achieve genuine deterrence

To enforce workplace laws, the Fair Work Ombudsman has historically relied heavily on mediation and dispute resolution, and much less on formal enforcement such as issuing fines or taking court action.²³⁹

the annual minimum wage review or other changes to the award: Productivity Commission (ibid, p. 107).

238. Senate Standing Committee on Economics (2022, p. 56).

239. Farbenblum and Berg (2017) found that when the Ombudsman used compliance and enforcement measures, remedies were far more likely to be obtained, and often for greater amounts, than when complaints were resolved informally.

Until 2019, the Ombudsman had a formal target to resolve more than 90 per cent of disputes through education and dispute resolution.²⁴⁰ The Ombudsman recovered just \$30 million in wages each year between 2017 and 2019, compared to total wages paid to Australian workers of about \$1 trillion a year (Figure 3.3).²⁴¹

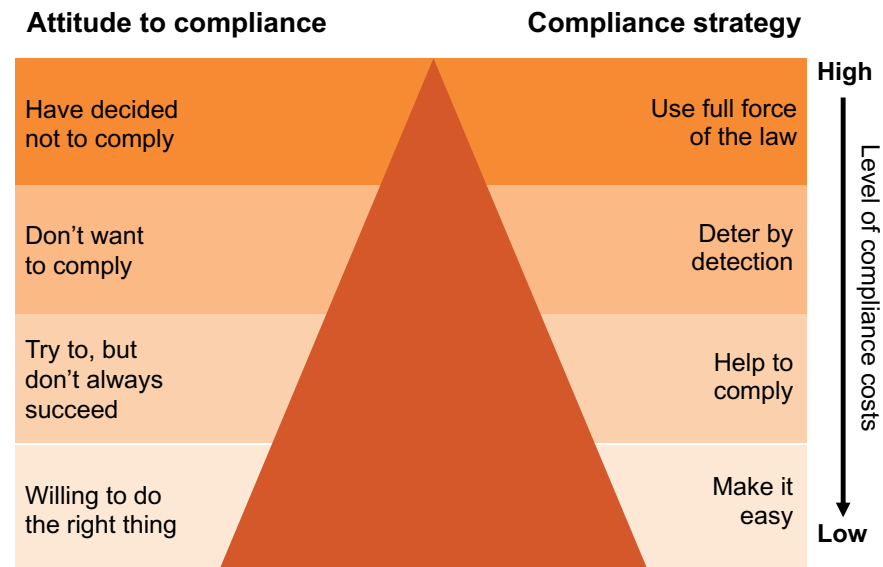
The 2019 Migrant Workers’ Taskforce report called for the Fair Work Ombudsman to have a ‘much stronger enforcement response than has been evident to date’.²⁴² In response, the Ombudsman updated its compliance policy in 2019 to better incorporate elements of the enforcement model in Figure 3.2. At the time, the head of the Ombudsman’s office said:

While it can be difficult as a regulator to find the right balance between using enforcement tools and getting a timely outcome, I am conscious that Parliament has given us increased powers and more resources, so it’s on us to send a strong message of deterrence to would-be lawbreakers.²⁴³

The Ombudsman also made changes to its organisational objectives. The target to resolve more than 90 per cent of disputes through education and dispute resolution was removed, and the Ombudsman is now resolving more cases through enforcement.²⁴⁴

The Ombudsman has also significantly expanded its use of compliance notices. The Ombudsman issued 10 times as many compliance notices in the 2021-22 financial year compared to the 2017-18 financial year. This has resulted in an increase in the number of litigations, as the Ombudsman is now taking more employers who fail to comply with the

Figure 3.2: The Australian Taxation Office tries to maximise compliance by tailoring its enforcement activities
ATO compliance model



Source: Azarias (2014, Chart 6).

240. Fair Work Ombudsman (2018a), Fair Work Ombudsman (2019) and Fair Work Ombudsman (2020a).

241. Grattan analysis of ABS (2021b).

242. Migrant Workers’ Taskforce (2019a, p. 6).

243. Fair Work Ombudsman (2020c).

244. In 2021-22, 77 per cent of disputes were resolved through education and dispute resolution, compared to 96 per cent in 2018-19: Fair Work Ombudsman (2019) and Fair Work Ombudsman (2022a).

compliance notice to court (Figure 3.4). The Ombudsman also freed up its own resources by putting the onus onto employers to calculate the amount of wages owed.²⁴⁵

The Ombudsman has also significantly increased the amount of unpaid wages it has recovered from employers. Before 2019-20, it collected about \$40 million in unpaid wages each year. In 2021-22, it collected more than \$500 million in unpaid wages. Of that, about \$280 million was from large corporates.²⁴⁶

3.3.1 The increase in enforcement does not appear to be deterring bad-faith employers

While the Fair Work Ombudsman purports to have adopted a stronger and more strategic risk-based approach to regulation, this does not appear to have changed the behaviour of bad-faith employers. Much more needs to be done.

As shown in Chapter 1, many workers, and especially migrant workers, are still paid less than the national minimum wage.²⁴⁷

The Ombudsman continues to report high non-compliance with workplace laws. About 78 per cent of investigations in 2021-22 revealed non-compliant behaviour, with an average underpayment per worker of \$5,300.²⁴⁸

Most of the increase in wages recovered does not relate to serious underpayment. Almost three-quarters of wages recovered came

245. Marin-Guzman (2023b).

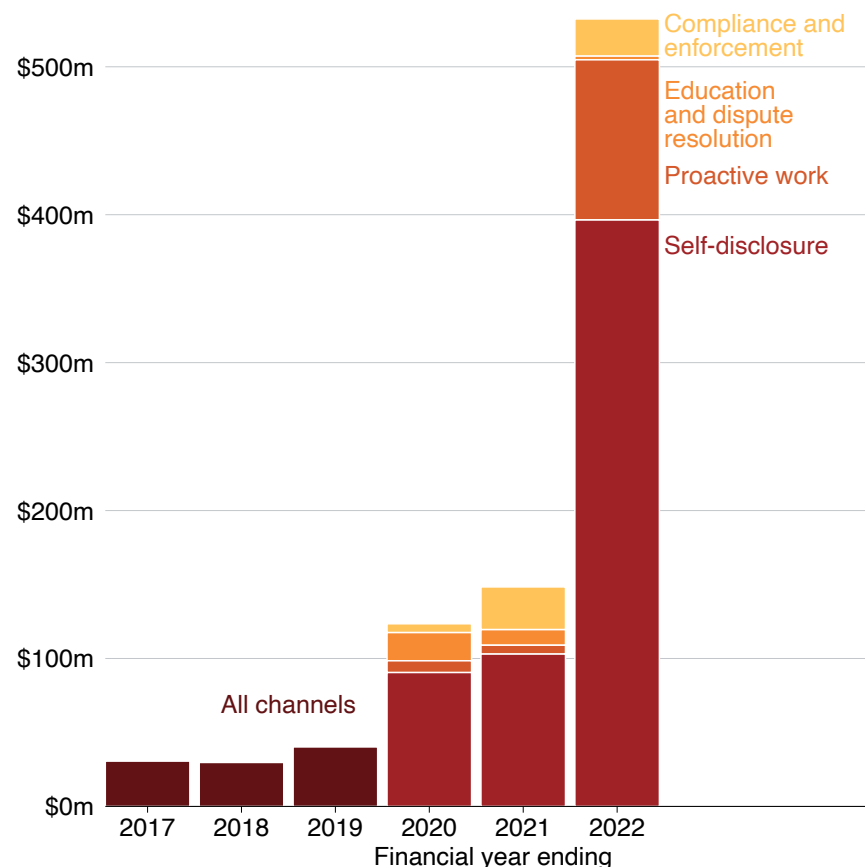
246. The Ombudsman defines a large corporate as a business with more than \$250 million in gross income per financial year.

247. This is despite the fact that the Ombudsman targets its enforcement activities toward migrants, see Figure 1.3.

248. Mostly underpayments of hourly wages, penalty rates, and casual loadings: Fair Work Ombudsman (2022a). Investigations are not random and are targeted based on the Ombudsman's research and intelligence.

Figure 3.3: The recent jump up in wages recovered mainly reflects an increase in self-disclosures by employers

Wages recovered, by enforcement activity



Notes: Compliance and enforcement, and education and dispute resolution, both arise from requests for assistance involving workplace disputes. Proactive work is self-initiated investigations by the Ombudsman. Data broken down by channel not available prior to 2020.

Source: Data supplied by the Fair Work Ombudsman.

via self-disclosures by employers (Figure 3.3). This increase in self-disclosures is probably driven by changes to award rules following the underpayments at Woolworths, Coles, Target, and Ashurst, where salaried staff working overtime or penalty shifts were not adequately compensated. From 1 March 2020, the Fair Work Commission made changes to multiple awards, requiring employers to show they are reconciling hours and pay for award-covered staff.²⁴⁹ These changes led to a variety of businesses reviewing their payroll and discovering underpayment.²⁵⁰ The Ombudsman has also begun to enforce these rules, taking businesses to court for paying workers less than required under enterprise agreements or awards.²⁵¹

These changes may also be the result of an increased focus by the FWO on large corporates. For example, the Ombudsman wrote to the top 100 listed companies in 2020 to put them on notice about the underpayments they were observing in large corporates. The letter requested that companies ensure they were compliant with workplace laws.²⁵²

However, most of the industries affected by these changes, such as finance and law, are not the industries where vulnerable migrants predominantly work (see Figure 1.2), nor where egregious underpayment and exploitation occur.

These self-disclosures also do not relate to cases of serious underpayment. The initial wave of underpayments in 2020 were likely addressing

249. Awards covered include the Banking, Finance, and Insurance Award, Legal Services Award, and Horticulture Award. See Belic (2021). The Commission has also subsequently made changes to the pay rules for salaried workers in hospitality: Marin-Guzman (2022a).

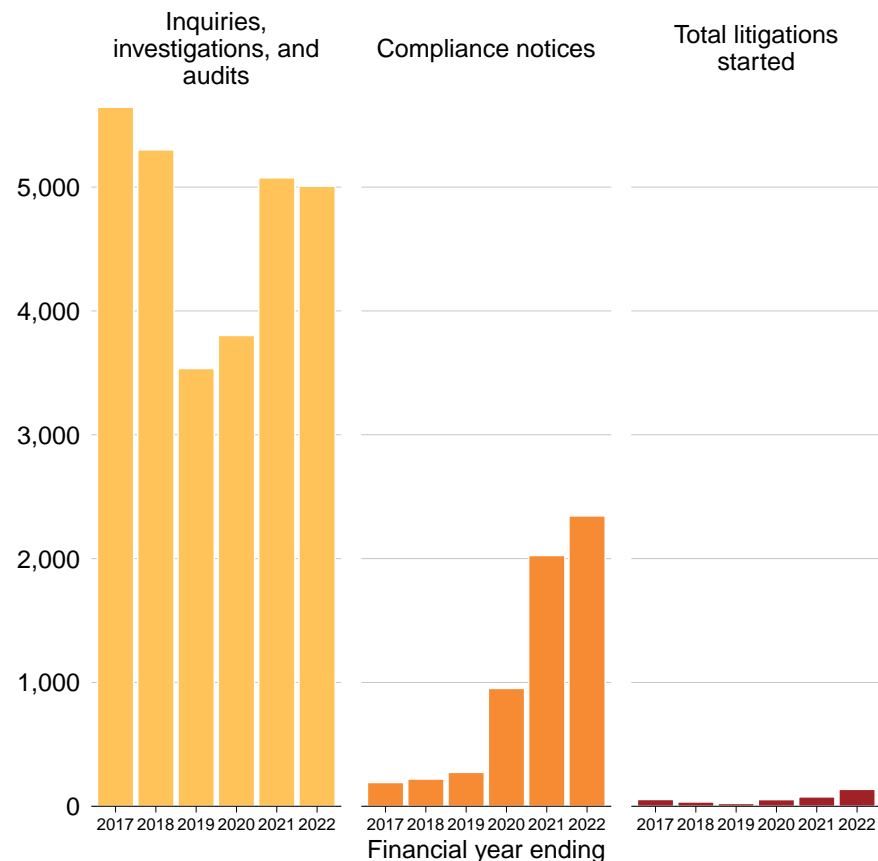
250. For example, law firms Clayton Utz, Herbert Smith Freehills, Gilbert + Tobin, and DLA Piper all found they underpaid graduates thousands of dollars: Marin-Guzman and Wootton (2021).

251. See for example the case of the Commonwealth Bank, where the Ombudsman alleges staff were underpaid \$16 million: Marin-Guzman (2021a).

252. Fair Work Ombudsman (2021).

Figure 3.4: The Ombudsman has changed its enforcement strategy and now issues more compliance notices, but litigation remains rare

Number of enforcement activities undertaken by the Fair Work Ombudsman



Note: Court cases can also be for non-compliance with a notice issued by the Ombudsman.

Sources: Fair Work Ombudsman (2017), Fair Work Ombudsman (2018a), Fair Work Ombudsman (2019), Fair Work Ombudsman (2020a), Fair Work Ombudsman (2021) and Fair Work Ombudsman (2022a).

longer-term and more entrenched issues, whereas the more recent wages recovered are likely driven by employers undertaking audits and fixing less serious or more recent underpayments. This is reflected in wages recovered. Wages recovered per worker peaked in 2019-20, at about \$5,000 per worker, but have since dropped to less than \$1,500 per worker, lower than in 2016-17 (Figure 3.5). In the first set of large corporate underpayments in 2019-20, the average underpayment per worker was about \$7,500, whereas now the average underpayment for large corporates is about \$1,000 per worker.²⁵³

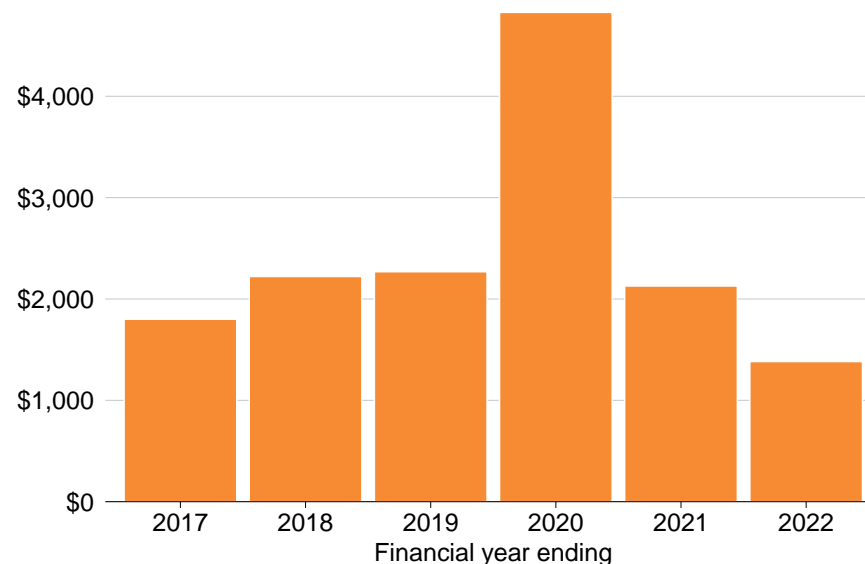
The increase in wages recovered by the Ombudsman is not as a result of their enforcement activities. Only 10 per cent of wages were collected through enforceable undertakings and 4 per cent were collected through compliance notices.²⁵⁴

The increase in wages recovered by the Ombudsman has not coincided with a ramp-up in penalties levied on employers. In fact, total penalties issued by the Ombudsman, or via the courts for breaches of workplace laws, have halved since 2018 to \$4 million in 2021-22.²⁵⁵ The Ombudsman secured just \$1.8 million in court-ordered penalties for matters involving the exploitation of migrant workers in 2021-22.²⁵⁶

By comparison, other regulators secured much more in penalties (see Figure 3.6). The ATO collected almost \$3 billion in penalties in 2021-22,²⁵⁷ and the ACCC secured \$231.6 million. The NSW Worksafe regulator secured more in penalties than the Fair Work Ombudsman, securing \$8 million in 2021-22. Across Australia, all

Figure 3.5: Wages recovered per worker peaked in 2019-20, but were lower in 2021-22 than they were in 2016-17

Average wages recovered per worker



Sources: Fair Work Ombudsman (2017), Fair Work Ombudsman (2018a), Fair Work Ombudsman (2019), Fair Work Ombudsman (2020a), Fair Work Ombudsman (2021) and Fair Work Ombudsman (2022a).

253. Fair Work Ombudsman (2020a) and Fair Work Ombudsman (2022a).

254. Fair Work Ombudsman (2021).

255. Court-ordered penalties may increase as courts begin to rule on high-profile cases of underpayment, such as the current case against the University of Melbourne, where the Ombudsman is seeking penalties based on serious contraventions of the Fair Work Act. See: Fair Work Ombudsman (2023f).

256. Fair Work Ombudsman (2022a, p. 30).

257. Includes interest collected.

WorkSafe regulators secured \$27 million in fines, or more than six times the penalties collected by the Ombudsman in that year.

The Ombudsman has had some success using the expanded serious contravention powers. The first case was finalised in late 2020 and resulted in the court issuing \$191,646 in penalties against the business and \$38,394 against the manager for underpaying workers by \$5,111.²⁵⁸ The Ombudsman has won at least two other cases where penalties exceeded \$250,000,²⁵⁹ and has commenced several other litigations seeking penalties for serious contraventions, including against the Commonwealth Bank and the University of Melbourne.²⁶⁰

More cases are going to court – the 2021-2022 financial year was the first year the Ombudsman initiated more than 100 cases, although many are for non-compliance with a compliance notice. Of the 81 cases in 2021-2022 with published litigation outcomes, 68 were for non-compliance with a compliance notice and only 13 were initiated for other breaches such as underpayment.²⁶¹

Court-ordered penalties are falling. The median penalty in 2021-22 was about \$16,000, well down from previous years (including cases to enforce a compliance notice) (Figure 3.7). Penalties have fallen even when cases enforcing compliance notices are excluded, down to \$50,000 in 2021-22 from \$120,000 in 2017-18.²⁶²

Similarly, the increase in self-disclosures by employers has not coincided with an increase in enforceable undertakings. In 2021-22,

258. Fair Work Ombudsman v Tac Pham Pty Ltd & Anor [2020] FCCA 3036. See:

Fair Work Ombudsman (2021). The business had previously been fined for underpayment and had been required to attend training.

259. Fair Work Ombudsman (2021) and Fair Work Ombudsman (2022a).

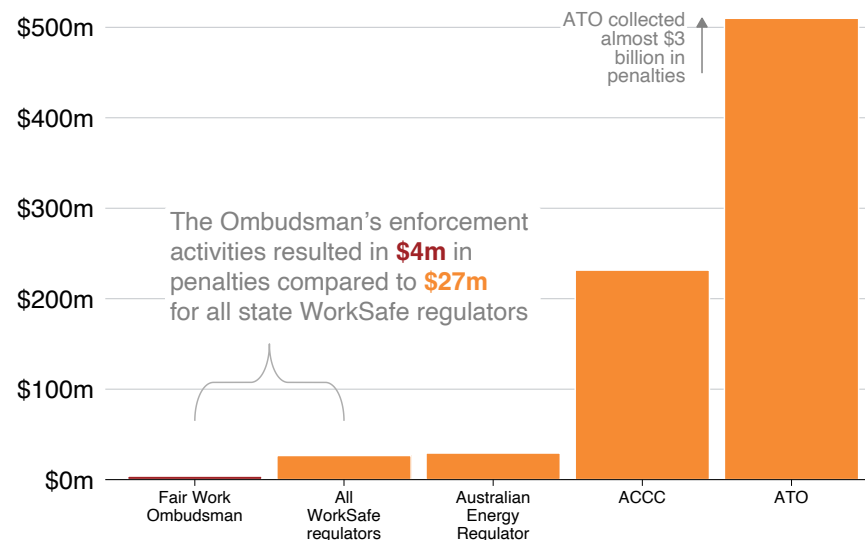
260. Fair Work Ombudsman (2023g) and Fair Work Ombudsman (2022a).

261. Grattan analysis of Fair Work Ombudsman (2022d).

262. The maximum penalty for non-compliance with a compliance notice is half the size of the standard penalties. See Fair Work Ombudsman (2023e).

Figure 3.6: The Ombudsman secures much less in penalties than other regulators

Penalties from fines and court decisions due to regulator enforcement activities, 2021-22



Notes: The ACCC, Australian Energy Regulator, and WorkSafe regulators only include court-ordered penalties. Contrition payments, court-ordered penalties, and infringement notices are included for the Fair Work Ombudsman. ATO penalties include collected penalties and interest. 'All WorkSafe regulators' includes all states and territories.

Sources: Fair Work Ombudsman (2022a), ACCC and AER (2022), WorkSafe Victoria (2023), Department of Customer Service (NSW) (2022), Australian Taxation Office (2022a), SafeWork SA (2020), Office of the Work Health and Safety Prosecutor (2022), DMIRS (WA) (2022), Department of Justice (Tas) (2022), ACT Government (2021) and Northern Territory Government (2022).

the Ombudsman entered into just nine enforceable undertakings, less than half that of the previous year, collecting only \$50 million in wages and \$776,000 in contrition payments.²⁶³

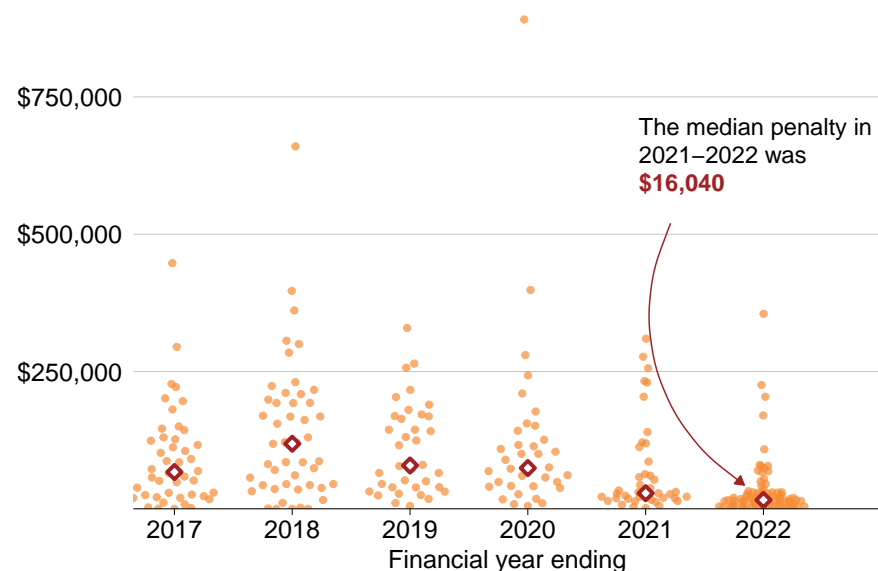
Many stakeholders say they lack confidence in the Ombudsman to detect and punish underpayment and other breaches of workplace laws. In submissions to the Senate Standing Committee on Economics, several organisations pointed out problems with the Ombudsman, including insufficient enforcement of the law, especially record-keeping requirements, the penalties imposed by the Ombudsman being too low, cases taking too long to be resolved or not being progressed at all, and providing information and support to migrants that was inaccessible or unhelpful.²⁶⁴

3.4 The Fair Work Ombudsman should be renamed the Workplace Rights Authority

To better reflect its role in enforcing workplace laws, the Fair Work Ombudsman should be renamed the Workplace Rights Authority.

The renaming would signal that the role of the workplace regulator is to uphold workers' rights, including by taking action against employers who breach workplace laws.²⁶⁵

Figure 3.7: Court-ordered penalties appear to be going down over time
Penalty from Ombudsman litigation outcomes



Notes: Data are not complete due to parsing errors. Totals are broadly similar to those reported in Ombudsman publications.

Source: Fair Work Ombudsman (2022d).

263. The Ombudsman entered into 19 enforceable undertakings in 2020-21 and collected \$80 million in wages. See Fair Work Ombudsman (2021) and Fair Work Ombudsman (2022a).

264. See Senate Standing Committee on Economics (2022), WEstjustice et al (2020), Hospo Voice (2020), Bornstein (2020) and United Workers Union (2020).

265. The roles and responsibilities of the Fair Work Ombudsman and the Fair Work Commission are often confused because of their similar names. See: Fair Work Ombudsman (2022e) and Australian Payroll Association (2022).

3.5 The Workplace Rights Authority should more strongly enforce workplace laws to deter bad-faith employers

The Workplace Rights Authority should step up enforcement of workplace laws to deter employers who knowingly underpay their workers. In particular, the Authority should make greater use of tools that can detect underpayment, and impose penalties on employers for underpaying their workers.

3.5.1 The number of targeted investigations should be increased

The Workplace Rights Authority should increase the number of employers audited each year in high-risk industries, particularly agriculture, which has very high rates of exploitation.²⁶⁶ Just under 20 per cent of the Ombudsman's audits and investigations in 2020-21 were self-initiated investigations.²⁶⁷

There are more than a million employing businesses in Australia, but the Ombudsman completes only about 5,000 investigations each year – that is, less than 0.05 per cent of businesses can expect to be investigated in any given year. At that rate, it would take 200 years for all businesses to be investigated.²⁶⁸ The high rate of non-compliance that the Ombudsman's self-initiated investigations find underlines the need to do more.

Evidence shows that self-initiated investigations from regulators can have a broader deterrence effect because they come as a surprise, and tend to attract more media coverage.²⁶⁹

266. See Kelly (2022). Agriculture has often been part of the Ombudsman's annual compliance priorities, which focus on areas which show a blatant disregard for the law and are of significant scale. The 2022-23 priorities are: fast food, restaurants, and cafes; agriculture; sham contracting; large corporate and university sectors; and contract cleaning: Fair Work Ombudsman (2023h).

267. Fair Work Ombudsman (2022a).

268. ABS (2023b)

269. Weil (2010).

Regulators in some overseas jurisdictions do more directed investigations. In the Wages and Hours Division of the US Department of Labour, about 45 per cent of investigations are self-initiated. About 65 per cent of the UK's investigations into national minimum wage compliance are self-initiated.²⁷⁰

3.5.2 The government should invest in the Workplace Rights Authority's capacity to detect exploitation

Increasing data matching and the use of machine learning tools could help the Ombudsman to increase the speed and efficiency with which it tackles wage theft.²⁷¹

The Workplace Rights Authority should make use of tax data, particularly Single Touch Payroll data.²⁷²

The government should enhance the Single Touch Payroll system to improve the detection of non-compliance with minimum wages. Namely, requiring businesses to report hours worked, so that hourly wages can be derived.²⁷³ Most payroll software already records hours, so the compliance burden is minimal.

Improved data matching would help the Authority support businesses to comply with labour laws. For example, detecting when businesses have

270. UK Department for Business and Trade and Department for Business, Energy & Industrial Strategy (2022) and Department of Labour Wages and Hours Division (2023).

271. See for example Kariotis and Howe (2021). See also Section 4.7, where we recommend that temporary migrants with work rights be automatically issued a tax file number (TFN) upon arrival in Australia.

272. The Ombudsman can currently request data from the ATO under the Tax Administration Act 1953 for the purpose of ensuring an entity's compliance with the Fair Work Act 2009.

273. This would be most valuable for employees working irregular hours as casuals or part-time employees.

not updated their payroll after a minimum wage increase, and sending a reminder notice.

3.5.3 More cases should be pursued in court

The Ombudsman targets the cases it takes to court towards vulnerable employees, such as migrants.²⁷⁴ But it will only take on cases where it deems there is sufficient evidence to do so and it is in the public interest to do so.²⁷⁵ As a result, it has a much higher rate of success than cases brought forward by others, such as individuals, community legal centres, or unions.²⁷⁶ Recent research has pointed out that this is a cautious approach to case selection and may result in only winnable cases being tried in the courts.²⁷⁷

Other regulators take a much stronger approach to their court action. For example, Rod Sims, then chair of the ACCC, said:

Our job is to take people to court. Hit them hard. Send a message. That's the only way we're going to get respect for the law.²⁷⁸

The Ombudsman's most powerful enforcement tool is taking employers to court for breaches of the Fair Work Act (Figure 3.1). But few wage disputes are resolved in court. The Ombudsman initiated about 5,000 audits, inquiries, and investigations in the 2021-22 financial year and issued 2,345 compliance notices, but only 137 cases were taken to court (Figure 3.4). The Workplace Rights Authority should take more employers to court for underpaying workers, and should seek larger penalties.

274. The presence of vulnerable workers is one of the factors it considers when determining whether a case is in the public interest.

275. Fair Work Ombudsman (2020b).

276. Boucher (2023, Figure 8.1)

277. Howe and Cooney (2023) and Boucher (2023).

278. Fullerton (2018).

3.5.4 Contribution payments in enforceable undertakings should be aligned with the size of the underpayment

In June 2019, the head of the Fair Work Ombudsman stated that enforceable undertakings and contribution payments would from then on be the default position in cases of larger, corporate underpayments that are self-reported to the regulator:

Our default position now is that an enforceable undertaking with the FWO will be required, as a minimum, and those enforceable undertakings will require the employer to meet the cost of getting their underpayments verified by experts contracted to the FWO, so that the burden of calculating what is owed is not put onto the taxpayer.

Employers that self-report should also expect to make a contribution payment reflecting the seriousness of their contravening conduct, because it is simply not acceptable for businesses to throw their hands up when they've been underpaying workers and expect to move on without consequences once the back pay is in the workers' accounts.²⁷⁹

The Ombudsman has stepped up its use of enforceable undertakings recently. But few enforceable undertakings include contribution payments, and when contribution payments are made, they appear to be too small to be a credible deterrent for employers.

For example, the enforceable undertaking entered into by George Calombaris's MADE Establishment (Box 1) had a contribution payment of \$200,000, just 2.5 per cent of the value of the underpayment. Such low penalties feed the perception that penalties for underpayment are just a cost of doing business in industries such as hospitality.²⁸⁰ The fine came just two months after the Ombudsman updated its enforcement policy.

279. Fair Work Ombudsman (2020c).

280. Forsyth (2019a).

Just half of all enforceable undertakings between mid-2019 and February 2023 required contrition payments (Figure 3.8).²⁸¹ It seems that the size of the contrition payment included in enforceable undertakings since 2019 is generally between 3 per cent to 7 per cent of the underpayment. And the size of the underpayment does not seem to be related to whether an employer must pay a contrition payment or not (Figure 3.8).

According to the Ombudsman's enforcement and compliance policy, the nature and extent of the underpayment should be considered when determining a contrition payment.²⁸²

Increasing the size of the maximum court-ordered penalties would help the new Workplace Rights Authority impose larger contrition payments (see Section 3.6.3), because employers will not agree to a large contrition payment as a penalty if they will not face one in court. But the Authority should also place more emphasis on the size of any underpayment when deciding whether to require contrition payments and the size of any payment.

3.5.5 The Workplace Rights Authority should offer explicit guidance on payroll audits

Businesses often contract independent professional service firms to audit the quality of their self-disclosure. But concerns have been raised about the integrity of wage remediation programs overseen by large professional services firms. For example, the 7-Eleven remediation program was criticised by Professor Allan Fels, after it was brought

281. Noting the Ombudsman does not generally require contrition payments from not-for-profits.

282. Other factors include whether underpayments have been rectified, any other steps that have already been taken to address the breach, and the size of the penalties that the court may impose.

back in-house.²⁸³ The Ombudsman has taken some businesses to court for failing to calculate their backpay correctly.²⁸⁴

There is scope to improve public confidence in self-disclosures. The Workplace Rights Authority should offer more explicit guidance on the processes for external audit of payroll records.²⁸⁵ It should adopt an approach similar to ASIC, which in its regulatory guides outlines how it defines and assesses who qualifies as an independent expert.²⁸⁶

The Authority should also continue to conduct quality checks of auditor reports to be reasonably assured they are accurate.²⁸⁷

The Authority should consider how companies should assess their payroll if they use software to help them comply with the law.²⁸⁸

3.6 The Workplace Rights Authority needs more powers to effectively enforce the law

The Workplace Rights Authority should be granted stronger powers than the Fair Work Ombudsman. Other regulators, such as the ATO and the ACCC, have stronger powers (Figure 3.10). They have stronger powers to gather information. They are able to issue fines for breaches of the law (not just for failing to keep records). Court-ordered fines are larger. And criminal sanctions are available for serious breaches of the law.

283. Corsetti (2016).

284. See, for example, Woolworths and Super Retail Group: Marin-Guzman (2021b) and Marin-Guzman and LaFrenz (2023).

285. The Ombudsman does provide some guidance for small businesses auditing their payroll: Fair Work Ombudsman (2023i).

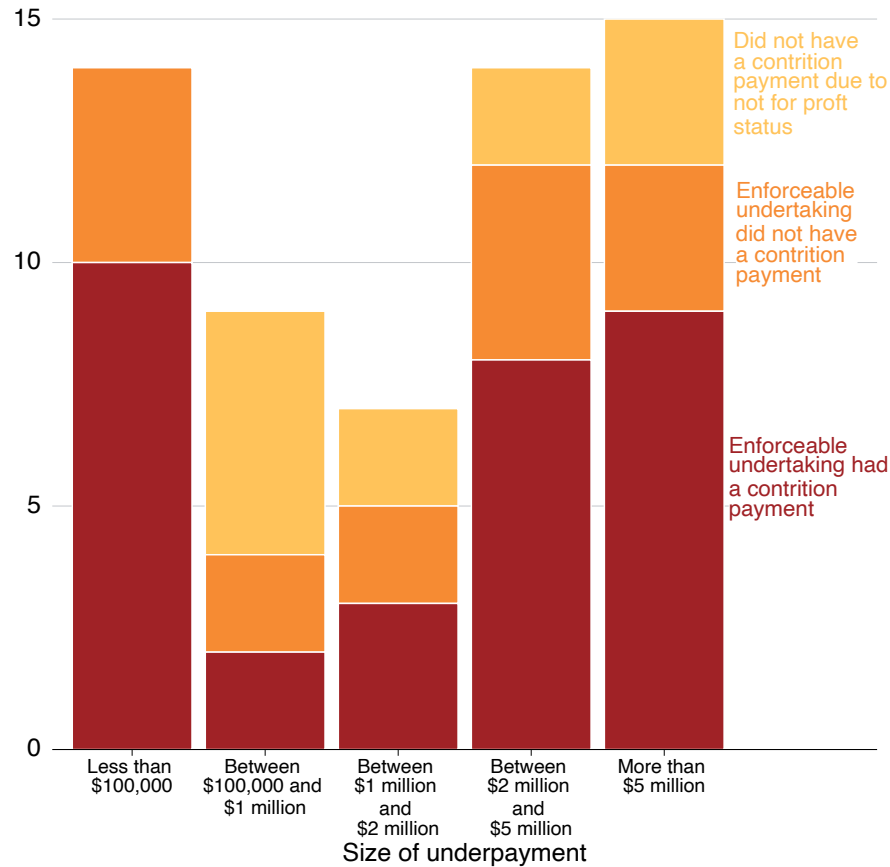
286. See, for example, ASIC (2021), which documents the criteria that need to be met for ASIC to accept an independent expert as part of an enforceable undertaking, including being independent from the organisation hiring them.

287. Like the Ombudsman has done in the cases of Super Retail Group and Woolworths: Marin-Guzman and LaFrenz (2023) and Marin-Guzman (2021b).

288. Productivity Commission (2023)

Figure 3.8: The size of the underpayment does not seem to affect whether an organisation must make a contrition payment

Number of enforceable undertakings, by size of total underpayment

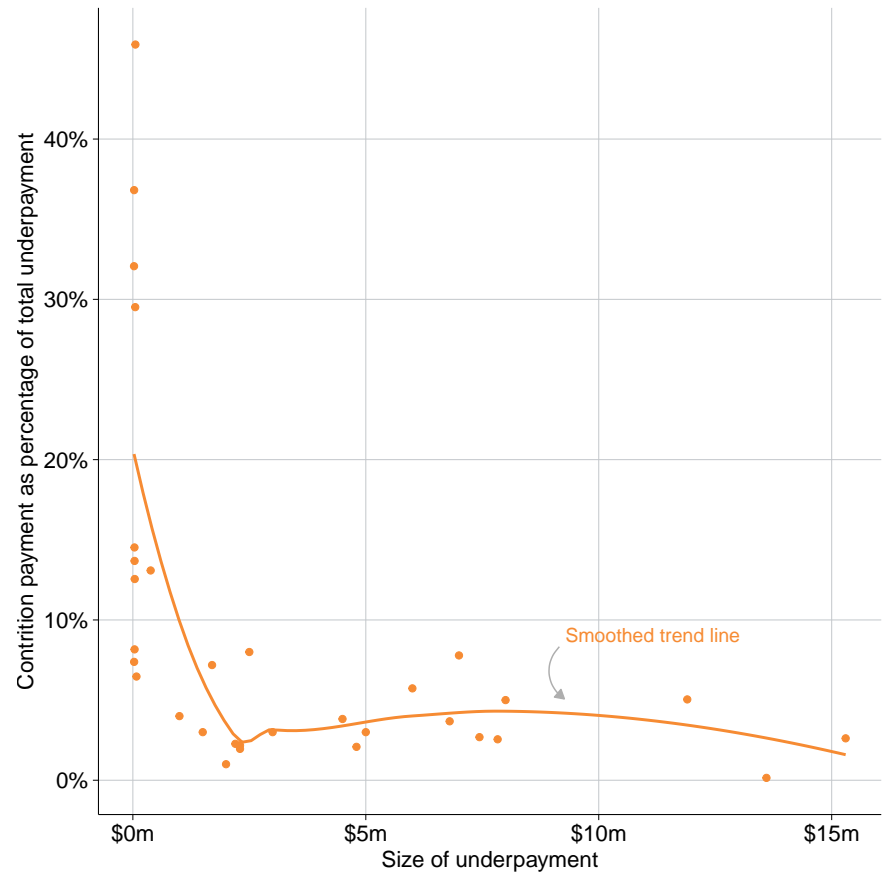


Notes: Contains enforceable undertakings from mid-2019 to February 2023. Data scraped mid-February 2023.

Source: Data scraped from FWO website.

Figure 3.9: Smaller underpayments generally attract a higher relative contrition payment

Size of contrition payment vs the total underpayment



Notes: Contains enforceable undertakings from mid-2019 to February 2023. Data scraped mid-February 2023. Only includes enforceable undertakings with contrition payments.

Source: Data scraped from FWO website.

These changes would strengthen the hand of the Authority when it comes to using the Ombudsman's existing less punitive tools, such as compliance notices and enforceable undertakings.

3.6.1 Other regulators have stronger and better-designed penalties

The ATO and the ACCC can both require a person to give evidence. By contrast, the Fair Work Ombudsman must apply to the Administrative Appeals Tribunal to issue a notice to give evidence.²⁸⁹

The Ombudsman has limited powers to issue fines. It can issue an infringement notice to an employer who has failed to keep appropriate records or issue pay slips.²⁹⁰ But the only time an employer faces penalties for underpayment is if the Ombudsman successfully takes them to court or if the employer agrees to a contrition payment as part of an enforceable undertaking.

By contrast, the ACCC can fine businesses for breaches of the Australian Consumer Law,²⁹¹ and the ATO can fine taxpayers for making an untrue claim on their tax return (and paying less tax as a result).²⁹² Granting the Workplace Rights Authority the right to issue administrative penalties to employers who underpay their workers would increase deterrence.

The size of penalties the Ombudsman can issue is also much smaller than for other regulators. The Ombudsman can fine an individual

\$1,650 for failing to keep records. By contrast, the ATO can fine an individual \$5,500 for making a misleading statement on their tax return,²⁹³ and the ACCC can fine individuals \$3,300 for breaches of the Australian Consumer Law.²⁹⁴

The penalties available in court for breaches of the Fair Work Act are also much smaller than those for comparable laws. The maximum penalty for serious contraventions is \$165,000 for individuals and \$825,000 for corporations (see Figure 3.10). Breaches of the Australian Consumer Law have a maximum penalty of \$2.5 million for individuals and \$50 million for businesses.

The penalties and fines available to other regulators are also better designed, because they are proportionate to the size of a benefit a business or person gets from breaking the law. For example, the ATO can issue penalties of 25 per cent of the tax shortfall when a taxpayer failed to take reasonable care, 50 per cent when they were reckless, and 75 per cent when they intentionally disregarded the rules.²⁹⁵ Court penalties for anti-competitive behaviour are tied to the value of the benefit. The maximum court-ordered penalty is \$50 million, or three times the reasonably attributable benefit, or 30 per cent of annual turnover, whichever is the highest.²⁹⁶

289. When the powers were introduced to parliament in 2017, they did not have additional constraints on them. But the laws were amended to have these additional 'safeguards'. This followed concerns from unions and business groups that there was insufficient merit to warrant such coercive powers: Senate Education and Employment Committee (2017).

290. Migrant Workers' Taskforce (2019a, p. 90) and Fair Work Ombudsman (2022f).

291. Australian Competition and Consumer Commission (2022a).

292. Australian Taxation Office (2022b).

293. \$5,500 is where an individual fails to take reasonable care. The fine is larger if they are found to have behaved recklessly (\$11,000) or with wilful disregard for the law (\$16,500): Australian Taxation Office (ibid).

294. Australian Competition and Consumer Commission (2022a).

295. Australian Taxation Office (2022b).

296. Australian Competition and Consumer Commission (2022a).

Figure 3.10: The Fair Work Ombudsman lacks the powers of other regulators

	ACCC	ATO	Fair Work Ombudsman
Information-gathering powers	<p>Can demand info by issuing a s155 notice for suspected contraventions of the Competition and Consumer Act</p> <ul style="list-style-type: none"> Penalties: \$27,500 or 2 years in prison for individuals; \$137,500 for corporates 	<p>Can demand information by issuing notices for information in a range of circumstances, including verifying information provided</p> <ul style="list-style-type: none"> Penalties: \$5,500 	<p>Inspectors can request records and documents, as well as request further information on premise (e.g. examine records, interview an individual with their consent)</p> <ul style="list-style-type: none"> Penalties: \$16,500 for individuals; \$82,500 for corporates <p>To coerce an interview, must apply to the AAT for a FWO notice</p> <ul style="list-style-type: none"> Penalties: \$165,000 for individuals; \$825,000 for corporates
Admin penalties:	Record keeping	Failing to provide information ¹ (\$1,650 for individuals; \$8,250 for corporates)	Record-keeping breaches (\$5,500)
	Other breaches	<p>Breaches of the Australia Consumer Law (unconscionable conduct, false/misleading conduct)</p> <ul style="list-style-type: none"> \$3,300 for individuals; \$16,500 for corporates; \$165,000 for listed companies 	<p>Penalties are proportionate to tax shortfall (at ATO discretion)</p> <ul style="list-style-type: none"> Based on behaviour,² range from 25% to 75% of tax shortfall Higher penalties apply for repeat offenders
Court-ordered penalties:	Civil	<p>Penalties are \$2.5m for individuals and \$50m for corporates or:</p> <ul style="list-style-type: none"> 3x the reasonably attributable benefit 30% of annual turnover 	Orders to pay penalties
	Criminal	Criminal penalties apply (10 years in jail and \$550,000 per offence) for cartel conduct	Up to 10 years imprisonment under the fraud provisions of the criminal code

No penalties for other breaches of the Fair Work Act (i.e. not for underpayments)

- Instead can require firms to merely redress breach (i.e. underpayment)
- Interest is not paid on back payments

Ombudsman can enter into enforceable undertakings, which can include negotiated contrition payments + other remedies. Back payments generally include interest.

More limited penalties

- Contraventions: \$16,500 for individuals and \$82,500 for corporates
- Serious contraventions: \$165,000 for individuals and \$825,000 for corporates penalties

Outstanding wages must be paid back (+ interest)

No criminal penalties

Notes: 1. In response to a substantiation notice, which differs from a s155 notice. It is used to support a claim an individual makes, for example, in advertising. 2. Behaviour defined as failed to take reasonable care (25 per cent); was reckless (50 per cent); and had intentional disregard (75 per cent). Penalties (\$5,500 to \$16,500) also apply when there is no shortfall.

Sources: Australian Competition and Consumer Commission (2022a), Australian Competition and Consumer Commission (2022b), Fair Work Ombudsman (2022g), Senate Education and Employment Committee (2017), Australian Taxation Office (2022c) and Fair Work Ombudsman (2020b).

By contrast, when the Ombudsman goes to court, the penalties are per breach of the Fair Work Act, and breaches are often grouped together. Recent research found that where there were multiple contraventions of the same entitlement relating to the same employees, courts reduced the maximum penalty by grouping the contraventions together even if those contraventions occurred over a period of time.²⁹⁷

And the ACCC and the ATO are both able to pursue criminal charges, whereas the Ombudsman is not.²⁹⁸

3.6.2 Align the Workplace Rights Authority's powers with the powers of other regulators

The government should align the Workplace Rights Authority's powers to those of the other regulators. The underpayment of workers by an employer is no less serious a breach of the law than breaches of competition and consumer law and tax laws.

The Authority should have strong information-gathering powers. It should have the right to issue infringement notices for underpayment, and to require interest on underpayment when issuing compliance notices.

Court-ordered civil penalties should rise substantially, and maximum penalties should reflect the size of the overall underpayment and the severity of that underpayment per worker. Criminal penalties should apply where employers systematically underpay their workers.

297. Howe and Cooney (2023). The principle for grouping is enshrined in the Fair Work Act, which outlines that breaches that occur in a single 'course of conduct' are a single breach.

298. Wage theft is a criminal offence in Queensland and Victoria, but not under the Fair Work Act.

The Workplace Rights Authority should have strong information-gathering powers

The Workplace Rights Authority should not have to apply to the AAT for a notice to seek additional information.²⁹⁹

Currently, inspectors are able to enter a premise, request records, and make copies of records, among other activities. But inspectors are unable to coerce individuals to submit to an interview without seeking a FWO notice. In 2021-22, the Ombudsman sought a FWO notice to coerce interviews just three times.³⁰⁰

The Workplace Rights Authority should be able to issue fines for underpayment

When the Workplace Rights Authority reasonably believes underpayment or any other form of exploitation has occurred, it should be able to fine businesses for non-compliance with the Fair Work Act via an infringement notice (as can be done now for record-keeping breaches).³⁰¹ The government should also increase the maximum fine to \$3,300, to bring it into line with the fines from other regulators.

The Authority should maintain the discretion to not issue a fine in cases of genuine errors that lead only to small underpayments.

299. Migrant Workers' Taskforce (2019a, Recommendation 9). The Albanese Government has committed to implementing all the recommendations of the Migrants Workers' Taskforce.

300. Fair Work Ombudsman (2022a). By contrast, the ACCC used its powers under the Competition and Consumer Act more than 500 times in 2021-22. Note that the ACCC does not have inspector powers and must issue a search warrant or compulsory requests for information: ACCC and AER (2022).

301. The Attorney-General's Department notes that while infringement notices are not intended to be a sanction or an admission of guilt, they are an important tool for managing less severe offences, particularly where there is a high volume of uncontested contraventions: Attorney-General's Department (2023).

These changes would mean the Authority could issue more and larger fines, in a wider variety of circumstances and closer to the time of infringement, making the costs of exploiting workers more salient to employers.

The Migrant Workers' Taskforce noted:

It is not clear why the FWO does not have the power to issue infringement notices in relation to matters other than record keeping and pay slip breaches. There will be many cases where the circumstances would warrant the issuing of an infringement notice rather than having to pursue other weaker or stronger enforcement remedies.³⁰²

Back payment should contain interest

Compliance notices can be an effective remedy for less severe cases of underpayment – employees can be paid back quickly and the Ombudsman does not have to expend resources on costly litigation. However, compliance notices do not currently include the payment of interest on unpaid wages, meaning that employers who underpay their workers are being offered an interest-free loan at the expense of the worker.

It should be a requirement that all back payments contain interest set at the Reserve Bank's cash rate plus 4 per cent, in line with the interest courts would require on back-paid wages.³⁰³

3.6.3 Increase maximum court-ordered civil penalties

The civil order penalties for underpayment should be increased to send a clear message to employers that underpayment will not be tolerated.

The Department of Employment and Workplace Relations has released a consultation paper suggesting civil penalties be increased to \$82,500 for individuals and \$412,500 for corporates, and penalties for 'serious contraventions' be 10 times the standard penalties. It also proposes a new penalty that is three times the total underpayment.³⁰⁴ This does not go far enough to be an effective deterrent.

The maximum penalty for standard breaches should be raised to \$495,000 for individuals (from \$16,500 now) and \$2.475 million for corporates (from \$82,500 now) per breach, or three times the total underpayment, whichever is higher. For 'serious contraventions', the penalties should be raised to \$990,000 for individuals (from \$165,000 now) and \$4.95 million for corporates (from \$825,000 now) per breach, or 5 times the total underpayment, whichever is higher.

The test for 'serious contraventions' should be changed to 'reckless and systematic' behaviour. Penalties should be graduated, to give a clear indication to the courts of the range of penalties they should be applying.³⁰⁵

It is also important to align penalties to other regulators, so that employers take payroll compliance as seriously as their compliance with tax law or competition law. As Tony Burke, the federal Minister for Employment and Workplace Relations, noted:

People are used to the fact you have to comply with tax law. You make sure you get your tax return right, and you get some advice to make sure you're getting it right. People are used to the fact that you have to comply with planning law. If you're undergoing a major build, you get some advice to get your planning law right. There's been an attitude for too long that you can second-guess your employment law.³⁰⁶

304. Department of Employment and Workplace Relations (2023b).

305. Research shows that in two-thirds of underpayment cases the courts applied less than half of the maximum penalty available: Howe and Cooney (2023).

306. Burke (2023a).

302. Migrant Workers' Taskforce (2019a, p. 90)

303. Federal Court of Australia (2022).

The low level of maximum civil penalties for underpayment constrains the courts from issuing higher penalties in particularly egregious cases. The courts should be able to come down hard on employers who intentionally take advantage of their workers.

3.6.4 Introduce criminal penalties for wilful and systematic underpayment

Criminal penalties for wage theft already exist in Queensland and Victoria. In both states, wage theft carries a maximum penalty of 10 years in jail.³⁰⁷

The federal government should introduce criminal penalties for wage theft, as the Albanese Government has committed to doing.³⁰⁸

The penalties should apply only to deliberate and clearly egregious cases of underpayment and exploitation.³⁰⁹ The maximum jail sentence attached to the new criminal offence should be 10 years, consistent with state laws.³¹⁰ The maximum financial penalty for criminal underpayment should be set at \$1.98m for individuals and \$9.9m for corporates for each breach, or 10 times the total underpayment, whichever is higher.

Currently, wilful breaches of tax or consumer laws carry with them the threat of going to jail, but the underpayment of workers does not. As the Migrant Workers' Taskforce noted:

307. Queensland Office of Industrial Relations (2023) and Victorian Government (2023a). The Victorian government also created the Wage Inspectorate to enforce the new laws: Victorian Government (2023b). The South Australian government has committed to introduce wage theft laws: Duggan (2022).

308. Australian Government (2022a, p. 7) and Australian Labor Party (2023).

309. Victoria wage theft laws apply to cases of deliberate and dishonest underpayment: Victorian Government (2023a). Queensland wage theft laws apply to deliberate underpayment: Queensland Office of Industrial Relations (2023).

310. Wage theft laws introduced (but not passed) in 2020 were criticised because the jail terms were only four years and diluted existing state laws: Marin-Guzman (2021c).

The introduction of criminal sanctions would provide a clear signal to unscrupulous employers that exploitation of migrant workers is unacceptable, and the consequences of doing so can be severe.

Evidence shows that a significant jump in consequences improves compliance with the law. A 2016 study of wage laws in the US found that small changes to civil and criminal penalties had no effect on underpayment, but laws that tripled the amount of damages owed reduced the prevalence of underpayment by about 30 per cent.³¹¹

3.7 The Workplace Rights Authority should get more funding than the Fair Work Ombudsman

The total budget of the Fair Work Ombudsman is \$170 million in 2023-24, or about \$12 per worker in Australia. The Ombudsman's funding has not kept pace with its expanding responsibilities (Figure 3.11).

The Ombudsman's funding has fallen particularly sharply when compared to the size of the labour force, which has increased by 25 per cent since 2010. Per employed person, and taking account of wage growth, the Ombudsman's funding is projected to be about 45 per cent lower by 2027 than when the Ombudsman was established in 2009.

The Ombudsman received a funding boost in 2020-21 to support its activities during COVID.³¹² And then when that funding was due to expire the Ombudsman received a funding boost of roughly the same size to take over the functions of the Australian Building and Construction Commission (ABCC). So while funding has remained higher than before, the remit of the Ombudsman also increased.³¹³

The Ombudsman needs more labour resources. Australia has 1 inspector per 100,000 workers, which is well below the ILO

311. Galvin (2016).

312. Australian Government (2022b).

313. Australian Government (ibid).

recommendation of 10 inspectors per 100,000 workers for developed countries.³¹⁴

There is also general consensus among stakeholders that the Ombudsman needs more resources to do an effective job of enforcing the law.³¹⁵

3.7.1 The Workplace Rights Authority needs a \$60-million-a-year budget boost

Funding for the Workplace Rights Authority should be increased by \$60 million a year (compared to the existing budget for the Ombudsman), to \$230 million a year.³¹⁶

With additional resources, the new Authority would be better equipped to investigate and prosecute breaches of workplace laws, to better educate the public on their rights under the law, and to support workers who are seeking unpaid wages.³¹⁷ More resources would also enable the Authority to invest in its capacity to analyse data in order to enhance its detection of breaches of the law.

3.8 Renaming the Fair Work Ombudsman as the Workplace Rights Authority would be an opportunity for a cultural reset

Without the right culture, any additional resources or expanded powers would be unlikely to reduce migrant worker exploitation substantially.

The Ombudsman appears to still consider itself a mediator and arbitrator, despite the change to its enforcement policies. Its stated

314. Gallo and Thinyane (2021) and Grattan analysis of data from the Fair Work Ombudsman.

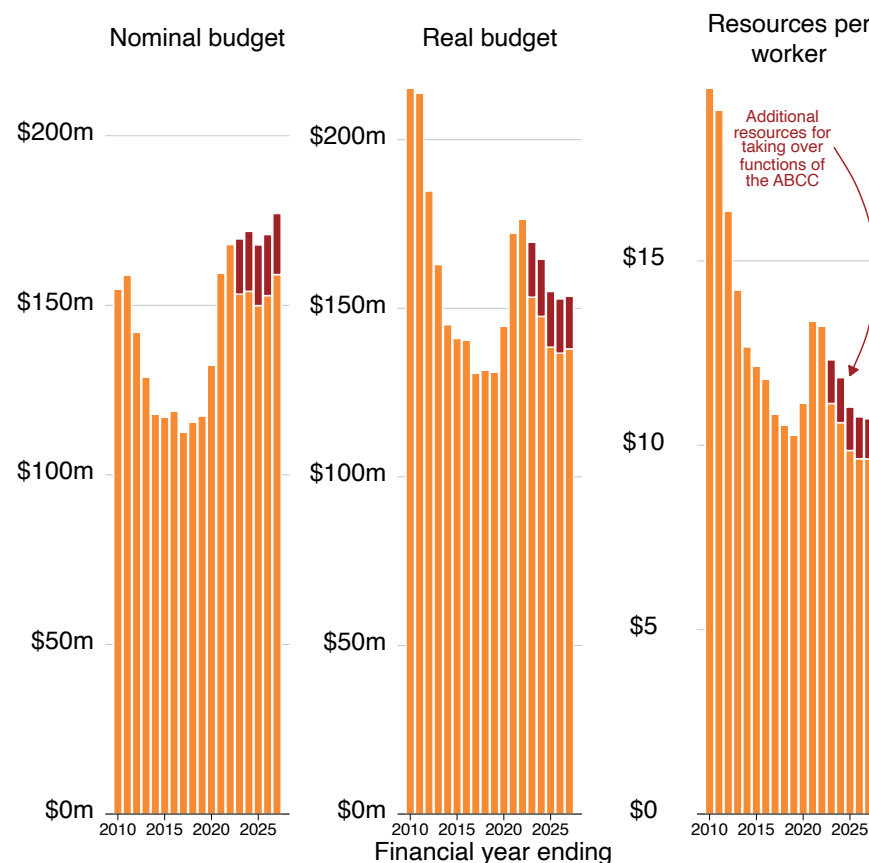
315. See Senate Standing Committee on Economics (2022, pp. 49-51).

316. A \$60 million increase would return per-worker, real funding to about where it was in 2011-12.

317. In Chapter 6, we recommend \$5 million of this increased funding be devoted to providing more assistance to migrant workers seeking unpaid wages.

Figure 3.11: The Fair Work Ombudsman’s real funding per worker is well below where it was in the early 2010s

Total appropriations budgeted for the Fair Work Ombudsman



Notes: ABCC = Australian Building and Construction Commission. ABCC functions were transferred in 2022 to the Ombudsman. Total appropriations for Fair Work Ombudsman (Outcome 1 following the inclusion of the Registered Organisations Commission in 2017-18). Real figures calculated using a composite index of WPI and CPI growth. Workforce forecast to grow by 1 per cent per year. RBA forecasts are used for WPI and CPI. 2027 assumes the 2026 level of funding for the ABCC.

Sources: Grattan analysis, Australian Government (2022c), ABS (2022c) and DEWR (2022).

purpose is to ‘promote harmonious, productive, cooperative, and compliant workplace relations’,³¹⁸ with no mention of its role in enforcing labour laws.³¹⁹ In contrast, the purpose of the ACCC is to ‘administer and enforce the Competition and Consumer Act 2010 and other legislation, promoting competition, fair trading, and regulating national infrastructure for the benefit of all Australians’.³²⁰

As noted by the Ombudsman, it is hard for a regulator to balance being forceful and punitive, and cooperative and fair.³²¹

The most effective regulators do both. Punishments are seen as fairer and warranted when regulators also make use of their softer powers.³²² For example, research into the effect of the ‘aggressive, no-holds barred’ use of the media by the ACCC during Allan Fels’ term as chair found that there was improved compliance among businesses that viewed the ACCC as threatening, but there was even better compliance among businesses that viewed the regulator as strong and fair.³²³

An independent review of the Fair Work Ombudsman should inform what changes are needed to the strategy, structure, skills, and culture of the renamed Workplace Rights Authority for it to more effectively enforce the law. The Albanese Government announced a review into the Ombudsman in the 2023 Budget, but this will focus on the Ombudsman’s new remit after taking over the functions of the Australian Building and Construction Commission in 2022.³²⁴ A

318. Fair Work Ombudsman (2023j).

319. This echoes the function of the Ombudsman outlined in s682(a) of the Fair Work Act, but ignores the others contained in s682(b) through to s682(e) which relate to its enforcement role, such as making investigations, monitoring compliance with the Act, and taking matters to court.

320. Australian Competition and Consumer Commission (2023).

321. Fair Work Ombudsman (2020c).

322. Hardy (2021, p. 39)

323. Parker and Nielsen (2011).

324. Marin-Guzman (2023a).

broader review would signal that the Authority is serious about stopping exploitation.

The review should be modelled on the 2019 review of the Australian Prudential Regulation Authority (Box 2) and should examine:

- **Leadership and culture:** does the Authority have the right culture and enforcement posture? Are leaders setting the right tone? Is the structure of the Authority’s governance and leadership fit for purpose?
- **Authority:** is the current mandate to ‘promote harmonious, productive, cooperative, and compliant workplace relations in Australia’ fit for purpose? Are there any legal ambiguities preventing the Authority from doing its work effectively?
- **Strategy:** does the Authority have the right strategy for ensuring compliance? Is it effectively using its enforcement powers? Are Authority investigations adequately targeted? Is the Authority undertaking sufficient intelligence gathering and data analysis?
- **Operational capability:** does the Authority have the staff capability it needs? Is it adequately resourced? Are there any other tools it needs?
- **Accountability:** is the Authority transparent in how it is using resources, communicating its decisions, and demonstrating its effectiveness? Are the external accountability mechanisms adequate?

The results of the review should be made public. And the Authority should be reviewed regularly – at least every five years.

3.9 The Workplace Rights Authority should be transparent about its enforcement activities

The Fair Work Ombudsman currently publishes high-level statistics about its activities, such as the number of compliance notices issued and litigations commenced. It issues media releases shaming employers for breaching the law.³²⁵ It reports against its Key Performance Indicators in its annual report.

Similar bodies overseas release much more detailed information about their enforcement activities. For example, the UK's Department for Business, Energy, and Industrial Strategy publishes a detailed breakdown of all its enforcement activities, as well as its estimates of the prevailing rate of underpayment.³²⁶ The US Wages and Hours Division has a detailed database of all its enforcement activity going back to 1985.³²⁷

Australia's new Workplace Rights Authority should make more statistics publicly available.³²⁸ As a starting point, it should publish how many litigations and investigations have been started and completed, the quantum of wages recovered, how many workers were affected, and what penalties were issued. This information should be broken down by location, industry, and migrant status, at a minimum. In time, the published data should be expanded to include rates of compliance with workplace laws (as measured by random audits) and rates of re-offending among businesses previously caught underpaying their workers.

These data and evaluations should be made public. It would help build trust in the Authority if the public could see that the law was being

325. For example: Fair Work Ombudsman (2023k).

326. UK Department for Business and Trade and Department for Business, Energy & Industrial Strategy (2022).

327. US Department of Labor (2023).

328. The data should be published in a machine-readable format.

Box 2: The capability review of the Australian Prudential Regulation Authority

The Australian Prudential Regulation Authority (APRA) was subject to a capability review in 2019, following recommendations from the Financial System Inquiry, the Financial Services Royal Commission, and the Productivity Commission.^a In particular, the Productivity Commission was concerned that APRA's regulatory focus was too skewed towards maintaining prudential standards, rather than improving results for superannuation fund members.

The review examined whether APRA had the ability to deliver its mandate in a changing environment. The review noted:

There are no simple solutions to raising APRA's capabilities. It operates in a complex, uncertain, and dynamic environment. It requires highly skilled staff with good judgment and courage. They need to be supported by strong leadership and technology. APRA also needs to use its independence, powers, and authority to greater effect to shape its future.^b

APRA has made changes in response to the review, such as publishing clear benchmarks to assess super funds' performance and improve member results. It has also committed to increasing diversity among senior managers, adopted more innovative communications with consumers, and increased its transparency.^c

APRA is now subject to regular reviews by the Financial Regulator Assessment Authority.^d

a. See: Treasury (2014), Hayne (2019) and Productivity Commission (2018).

b. Treasury (2019).

c. Shapiro et al (2022).

d. The first such review commenced in late-2022.

enforced and that the regulator was doing an effective job. Trust in the Authority is especially critical for migrant workers. In the 7-Eleven remediation process, showing that claims were successful and that migrants were protected from migration consequences encouraged more people to come forward.³²⁹ Making the data and evaluations public would also signal to employers that the Authority was serious about tackling underpayment.

3.10 Australia needs better evidence to assess the extent of underpayment and progress towards stamping it out

As shown in Chapter 1, there is a lack of systematic evidence on the extent and nature of underpayment of workers in Australia. Much of the public evidence is anecdotal and piecemeal, having been generated by media investigations or self-selecting surveys.

The lack of clear data limits understanding of the true extent of the problem. As noted by Associate Professor Anna Boucher, ‘without an accurate mapping of patterns of violations, we cannot know whether media reporting reflects a ‘few bad eggs’ on the part of employers or systemic, legally entrenched disadvantage’.³³⁰

Only when the 7-Eleven underpayment scandal came to light was Australia’s enforcement regime reassessed, at which point the Migrant Workers’ Taskforce identified substantial problems, which are still yet to be fixed.

Regular assessment and reporting on the extent of worker exploitation is critical. It would keep the issue on the government’s agenda, and enable the government to intervene quickly to make changes where necessary. It would also improve the detection of underpayment and the targeting of enforcement activity.

329. Berg and Farbenblum (2018).

330. Boucher (2019, p. 278).

To improve the evidence base, the Workplace Rights Authority should publish an annual report on the state of worker exploitation, informed by a high-quality independent survey of workers in Australia (including migrant workers by the visa they hold). The report should make use of data across government, such as the Single Touch Payroll and other administrative data.

3.11 Greater union coverage and access to workplaces would probably reduce exploitation

Few migrant workers are union members. Among employees in 2022, just 3.8 per cent of migrants who arrived in Australia less than five years earlier were members of a trade union, compared to 14 per cent of employees born in Australia. Union membership among recent migrants is lower than among workers born in Australia across all age groups (Figure 3.12). International students have particularly low rates of union membership.³³¹

Unions have historically played an important role in combating worker exploitation.³³² But the power of unions to combat exploitation has diminished over time, for two main reasons.

First, there has been a large decline in union membership in recent decades. In 1988, 43.1 per cent of employees were union members. By 2022, that had fallen to 12.5 per cent.³³³

Second, greater restrictions have been placed on union officials’ right of entry to workplaces. Under current laws, entry to workplaces is generally restricted to union officials with an entry permit if they reasonably suspect the employer has breached the Fair Work Act or

331. Boucher (ibid).

332. Senate Standing Committee on Economics (2022, p. 24); McKell Institute (2019, p. 35); Productivity Commission (2015a, p. 173); and Fels and Cousins (2019, p. 85).

333. ABS (2023c).

to check compliance with state and territory work health and safety laws.³³⁴

Low representation and a lack of access mean unions directly help few migrants who have suffered exploitation.³³⁵

3.11.1 Union involvement tends to reduce exploitation and helps workers reclaim unpaid wages

There is strong evidence that strong union involvement in a workplace, or being a union member, reduces the chance of worker exploitation and improves the prospects of a worker reclaiming unpaid entitlements.

In evidence to a recent Senate inquiry, Associate Professor Stephen Clibborn said:³³⁶

The reduction in union density over the last number of decades, combined with the limits on their ability to enter the workplace and be part of the enforcement solution, has contributed to the current rise in wage theft and other employer noncompliance.

Grattan Institute analysis shows that workers who are not union members are 65 per cent more likely to be underpaid than union members (see Section 1.4.3).

Other evidence shows workers who receive assistance from unions, the Fair Work Ombudsman, or other legal help have a higher chance of reclaiming unpaid wages.³³⁷ Union members are much more familiar

334. Productivity Commission (2015a, p. 173), Australian Council of Trade Unions (2020) and Fair Work Commission (2022). An exception to the right-of-entry laws was made for outworkers in the textile, clothing, and footwear industry. Union officials can enter these workplaces without notice, and officials can inspect records of non-union members (Part 6-4A of the Fair Work Act). See Section 3.12.

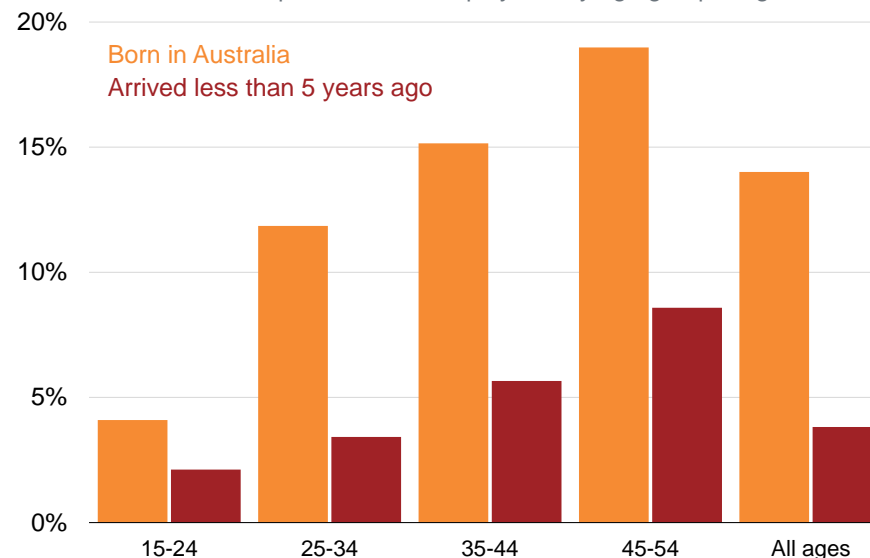
335. Boucher (2019) shows that during the period 1996 to 2016, unions represented few workers in court cases or at the Fair Work Commission.

336. Senate Standing Committee on Economics (2022, p. 25).

337. Boucher (2019, p. 301).

Figure 3.12: Recent migrants are much less likely to be a member of a union than workers born in Australia

Trade union membership as share of employees, by age group, August 2022



Notes: Trade union member in main job. Age group 55-64 not shown due to small sample size.

Source: ABS (2022a).

with workplace terms such as penalty rates, workers compensation, and enterprise bargaining agreements.³³⁸ The Unite union was the group to take action against 7-Eleven for underpaying its workers,³³⁹ and the National Tertiary Education Union has exposed underpayment of casual workers by universities.³⁴⁰ More union involvement, in combination with stronger regulation, has probably helped reduce exploitation among PALM scheme workers.³⁴¹

3.11.2 But more union involvement could have other, wide-reaching consequences

Increasing union membership among migrant workers, and the Australian workforce generally, would probably reduce exploitation. But raising rates of union membership is far from straightforward.

Lower union membership is, in part, a reflection of the shift away from (heavily unionised) manufacturing, and towards (less unionised) services industries. Improving migrant workers' knowledge of their workplace rights would probably boost union membership, as would establishing a Migrant Workers Centre in each state (as we recommend in Chapter 6). But more radical policies, such as allowing unions to charge a bargaining fee in Enterprise Agreements, may impinge on workers' rights to freedom of association.³⁴²

Allowing unions greater right of entry would also probably reduce exploitation of migrant workers. It would mean more labour inspectors at no direct cost to government. But there are potential costs to employers and the economy from expanded right-of-entry laws for

unions. A recent Productivity Commission review of workplace laws said:³⁴³

Entry to investigate a workplace can impose costs on the employer, too, through disruptions and administrative costs, and thus may be used strategically as leverage in an industrial dispute... To the extent that the outcomes lead to excessive bargaining power, this is not only inimical to the interests of employers, but also the community as a whole.

A complete analysis of the costs and benefits of expanding right-of-entry laws and other measures to strengthen the role of unions in identifying and recovering unpaid wages is beyond the scope of this report.

3.12 The government should consider extra protections for workers in specific industries

The Fair Work Act contains special provisions which offer additional protections to textile, clothing, and footwear (TCF) outworkers.³⁴⁴ These provisions were added because these workers were considered highly vulnerable to exploitation.

The provisions enable TCF outworkers to claim unpaid wages from any part of the supply chain, expands right of entry for unions, and deems outworkers to be employees in certain circumstances. Some experts regard these provisions as highly successful at protecting TCF outworkers from exploitation and have advocated for similar provisions

338. Discussions with Migrant Workers Centre.

339. Fels and Cousins (2019, p. 85).

340. Hare (2023c).

341. Schneiders (2022).

342. Marin-Guzman (2019b).

343. Productivity Commission (2015a, p. 174).

344. Fair Work Act Part 6-4A (added to the Act in 2012 by the *Fair Work Amendment (Textile, Clothing, and Footwear Industry) Act 2012 (Cth)*). Outworkers are workers who perform their work at home or at a place that wouldn't normally be thought of as a business: Fair Work Ombudsman (2023I).

to apply to other industries with high rates of exploitation, such as cleaning and security.³⁴⁵

If exploitation continues at high rates in certain industries, notably agriculture and hospitality (see Figure A.1), then the government should consider creating additional industry-specific provisions in the Fair Work Act to provide greater protections to workers in these industries.

345. Discussion with Migrant Justice Institute, WEstjustice, Community Legal Centre et al (2020, Recommendation 15), Forsyth (2020) and Hardy (2018).

4 Enforce migration laws to deter bad-faith employers

The Australian Border Force (ABF) has significant powers to investigate and punish employers of sponsored workers who are breaching their visa conditions. Under the Migration Act, anyone who allows a migrant to work in breach of their visa conditions is liable for criminal penalties.

But these laws are not being strongly enforced. Bad-faith employers who exploit migrants are at little risk of being punished.

The ABF should conduct more investigations of suspect employers, and sanction employers who are breaking the law. Using its powers more forcefully would send a powerful signal to employers, migrants, and the broader community that exploitation of migrants will not be tolerated.

The ABF should be granted additional powers by making it an offence for an employer to coerce or exert undue influence or pressure on a migrant worker to accept work arrangements that breach their visa conditions. Employers of unsponsored migrant workers, such as students, who are sanctioned for breaching the Migration Act should be prohibited from employing other migrant workers.

These changes should be accompanied by stronger protections for exploited workers against visa cancellation.

4.1 The Australian Border Force is responsible for enforcing migration laws

The ABF has general powers under the Migration Act to issue punishments in cases where employers hire workers in breach of their work rights, such as rostering a student for more than 20 hours or hiring a visa-holder who does not have work rights.

It is also in charge of ensuring the sponsors of workers, such as those who hire Temporary Skill Shortage visa-holders or permanent employer

nominated visa-holders, meet their sponsorship obligations. This includes ensuring sponsors pay employees above the Temporary Skilled Migration Income Threshold or Australian Salary Market Rate, and are employing workers in their nominated occupation.³⁴⁶

4.2 The ABF rarely punishes businesses that employ migrant workers in breach of visa rules

Under the Migration Act, anyone who allows a migrant to work in breach of their visa conditions is liable to criminal penalties of up to five years imprisonment. The offences include:³⁴⁷

- Allowing or referring an individual to work in violation of their visa conditions.
- Allowing or referring an unlawful non-citizen to work.
- Allowing a migrant to be exploited and work (and the employer knows of, or is reckless as to knowing about, the exploitation).
- Asking for or receiving a benefit for a 'sponsorship-related event'.

The penalties for offences under the Migration Act are much harsher than the penalties for offences under the Fair Work Act (Chapter 3).

346. Coates et al (2022a).

347. Division 12 of the Migration Act. The maximum penalties are \$1,650 for individuals and \$8,250 for corporations per breach for a first notice, and \$3,300 for individuals and \$16,500 for corporations per breach for subsequent notices. Civil penalties are up to \$82,500 for a corporation and \$16,500 for an individual for each failure, and up to five years imprisonment for some offences. The definition of exploitation includes slavery or a condition similar to slavery, servitude, or forced labour. A 'sponsorship-related event' includes granting a sponsored visa and becoming a work or family sponsor (Migration Act section 245AQ).

These powers have the potential to discourage bad-faith employers from exploiting migrant workers.

Yet enforcement of laws by the ABF is rare, slow, and weak.³⁴⁸ In the 2019-20 and 2020-21 financial years, only four infringement notices were issued from eight investigations under these powers.³⁴⁹

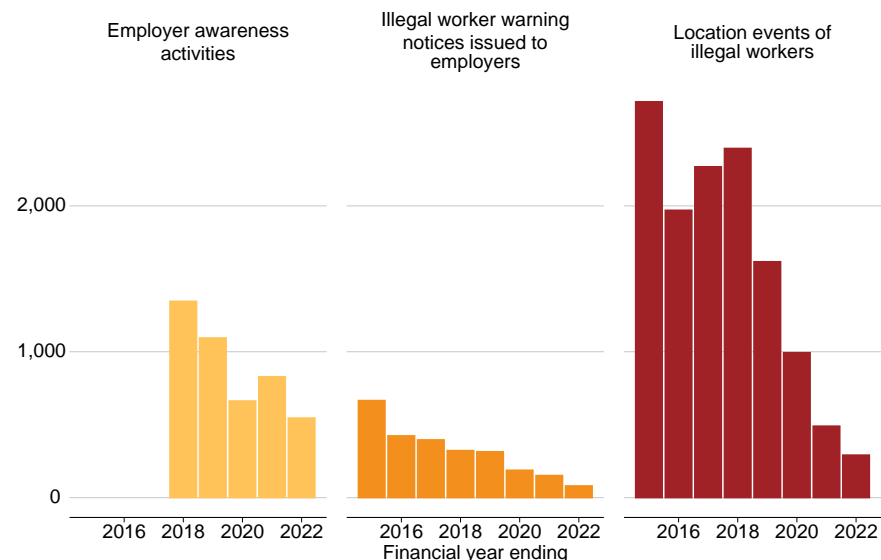
The Migrant Workers’ Taskforce concluded that the ABF has made little use of sanctions against employers who have been involved in underpayment of migrant workers.³⁵⁰ According to a former Deputy Secretary of the Department of Immigration and Citizenship, Abul Rizvi, ‘the rewards from exploitation are substantial; the risks are small’.³⁵¹

Figure 4.1 shows that there was a decline in enforcement activity related to migrant workers and rogue employers before COVID, and a further decline during the pandemic. Since the mid-2010s, fewer illegal workers have been found, fewer illegal work warning notices have been issued to employers, and there have been fewer employer awareness activities to deter migrant worker exploitation.

4.3 The ABF does not enforce sponsorship obligations effectively

The ABF has powers to pursue criminal and civil penalties against the sponsors of temporary skilled migrants for sponsorship-related offences

Figure 4.1: The ABF’s enforcement activities relating to migrant workers and sponsoring employers are declining
Number of illegal work compliance activities by the ABF



Sources: Rizvi (2023); Department of Home Affairs annual reports.

348. Others have reached the same conclusion. For example, the Migrant Justice Institute (2023, p. 3) says: ‘These existing offence provisions have been utilised very infrequently since their introduction.’

349. See Department of Home Affairs (2021b). There were three other investigations into offences in relation to sponsorship obligations. None of the three went to court: Department of Home Affairs (2021c). The Department of Home Affairs’ IT system ‘CRIMS’ does not record whether investigations were referred to other authorities. The Commonwealth Director of Public Prosecutions has the final say on what cases proceed to court.

350. Migrant Workers’ Taskforce (2019a, p. 123).

351. Rizvi (2021).

and work-related offences.³⁵² Sponsors have obligations to ensure a sponsored employee works only in the occupation nominated on their visa, that the annual earnings of the sponsored employee are at least the same as those stated on the nomination application, and that the employment conditions of the sponsored worker are not less favourable than those of an equivalent Australian worker.³⁵³

The main sanction the ABF imposes for breaching a sponsorship obligation is the cancellation of the sponsorship arrangement. Other sanctions include barring the sponsor from sponsoring workers for a period of time, issuing an infringement notice, and seeking a civil penalty order.

Figure 4.2 shows that businesses that employ sponsored workers are most commonly sanctioned for failing to provide information to the Department of Home Affairs as part of their sponsorship agreement, followed by breaches of visa conditions such as the employee not working in the nominated occupation. Most businesses that are sanctioned are banned from employing other sponsored workers.

Figure 4.3 shows that since 2015, only 11 per cent of sanctioned businesses have been fined by the ABF, including in cases where employers were charging migrants for the cost of sponsoring them.

Sanctions often appear to come too late. Figure 4.4 shows that more than a quarter of the businesses that breach sponsorship obligations have cancelled their ABN and shut their business before sanctions are imposed. This in part reflects that directors who illegally ‘phoenix’ often employ and exploit migrant workers (see Section 5.1). It also reflects that the ABF is not regularly checking on businesses that employ migrants. Fair Work Inspectors have the power under the Migration Act to investigate sponsorship obligations.³⁵⁴

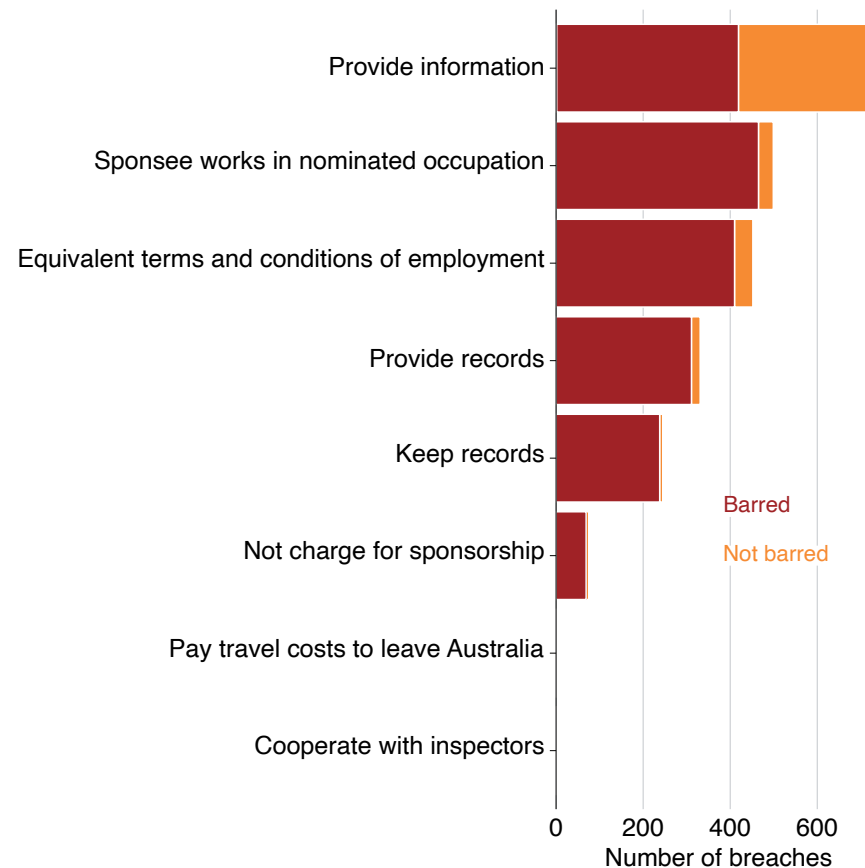
352. Under s140K of the Migration Act.

353. Department of Home Affairs (2023c).

354. Migration Act Division 3A, Subdivision F.

Figure 4.2: Businesses are most commonly sanctioned for failing to provide information, and most sponsors that breach their obligations are barred from sponsoring other workers

Breaches from the register of sanctioned sponsors, by whether they were barred or not, since March 2015

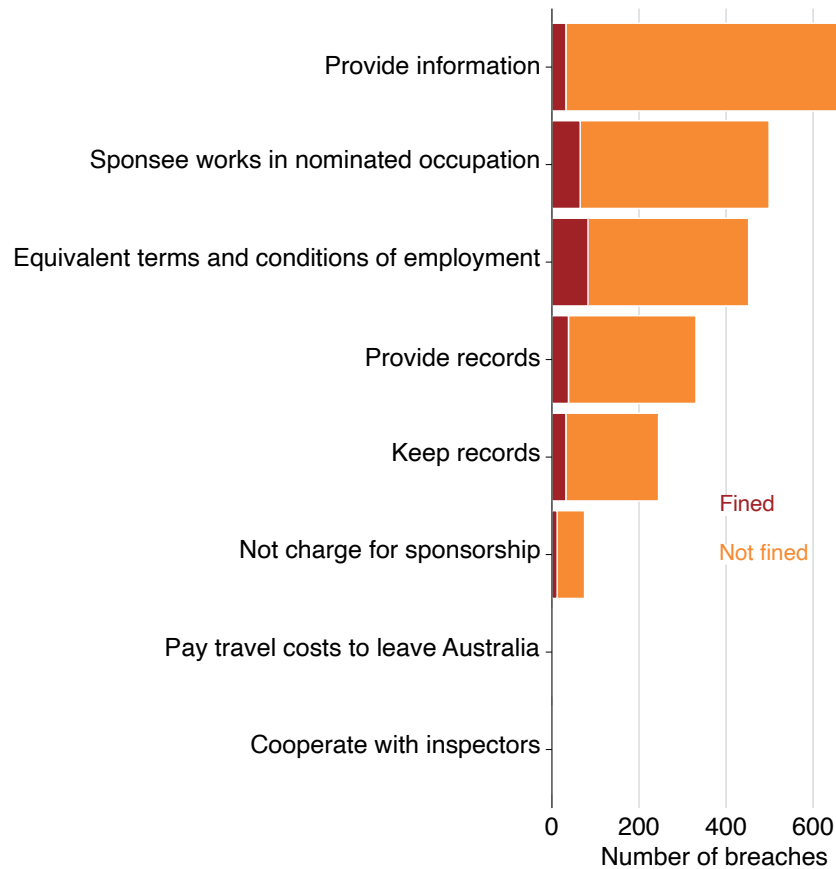


Notes: One employer can be sanctioned for multiple offences. Obligations 2.80A, 2.86A, 2.87B, and 2.87C have been collapsed into the broader regulation. Seven instances where a breach wasn't listed have been excluded from the analysis.

Source: Australian Border Force (2023).

Figure 4.3: Few businesses that breach sponsorship obligations are fined

Breaches from the register of sanctioned sponsors, by whether they were fined or not, since March 2015

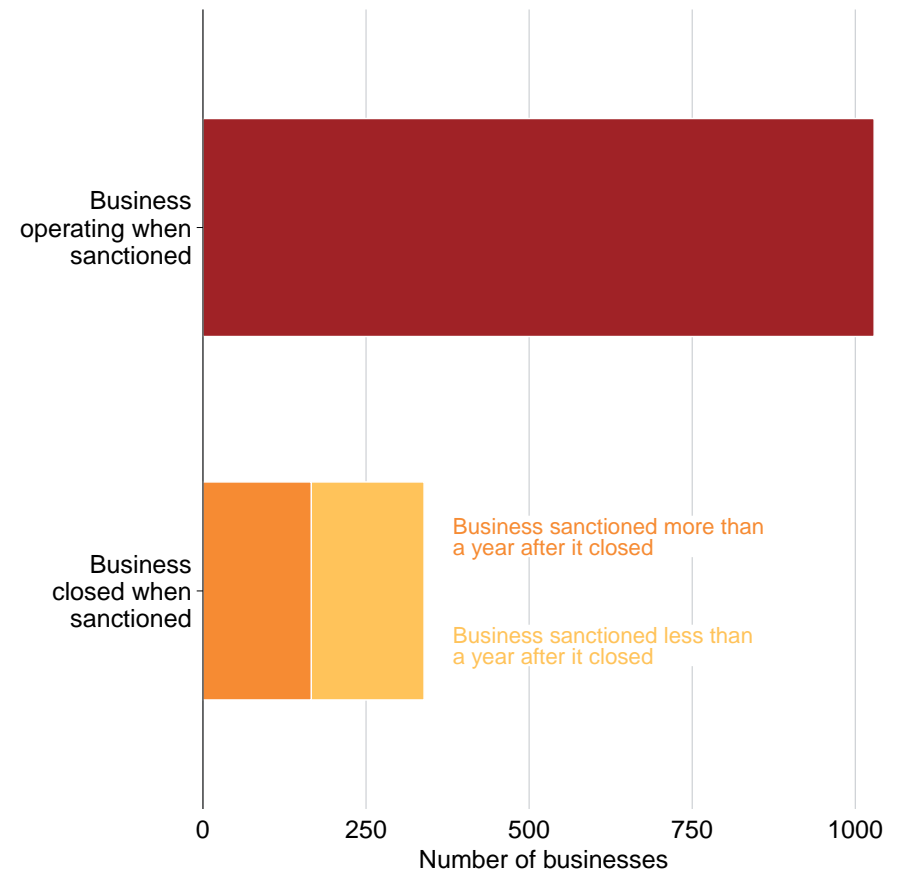


Notes: One employer can be sanctioned for multiple offences. Obligations 2.80A, 2.86A, 2.87B, and 2.87C have been collapsed into the broader regulation. Seven instances where a breach wasn't listed have been excluded from the analysis.

Source: Australian Border Force (2023).

Figure 4.4: A quarter of businesses have closed by the time sanctions are imposed

Number of businesses with an active ABN at the time of sanction, since 2015



Note: Excludes 10 businesses that only had infringement notices.

Sources: Australian Border Force (2023) and Australian Business Register (2023).

4.4 The Department of Home Affairs is overly focused on penalising migrant workers, not exploitative employers

The Department is overly focused on taking action against migrants rather than employers who breach the Migration Act. Of the Key Performance Metrics in the department's annual report under the objective to ensure compliance with migration law, most relate to apprehending and detaining unlawful migrants. Only two relate to employers.³⁵⁵

While illegal migrants and blatant breaches of visa conditions undermine the integrity of the migration system, if employers are afraid of the consequences of hiring a migrant in breach of their visa conditions, then migrants will not be able to work in breach of their visa conditions in the first place.

4.5 Fewer resources have been devoted to enforcement activity

A decline in overall funding for the Department, fewer resources devoted to enforcement activity, and wasteful spending have all contributed to the current situation of minimal and weak enforcement of laws aimed at curbing migrant worker exploitation.

Total resourcing for the Department fell by 17 per cent in real terms between 2016-17 and 2022-23.³⁵⁶ Department resources devoted to onshore compliance and detention fell by 22 per cent in real terms between 2016-17 and 2022-23. In the 2023 Budget, the government allocated \$50 million over four years from 2023–24, and additional ongoing funding, for additional enforcement and compliance activities. ABF staff numbers fell from 6,183 in 2016-17 to 5,667 in 2018-19.³⁵⁷

355. Department of Home Affairs (2022h).

356. Grattan analysis of Department of Home Affairs annual reports and portfolio budget statements.

357. Rizvi (2020).

The Department has spent large sums on wasteful initiatives, such as the opening and closing of the Christmas Island detention centre in early 2019 and the re-opening of the centre for the Murugappan family in August 2019.³⁵⁸ According to former departmental deputy secretary Abul Rizvi, 'Having wasted millions of dollars on a range of misadventures, they simply do not have the resources to do the standard immigration compliance work that is required'.³⁵⁹

4.6 The Department of Home Affairs has large capability gaps

The Department has some capability gaps that hinder its ability to enforce the law effectively.

A 2015 Australian National Audit Office report on managing compliance with visa conditions concluded that:³⁶⁰

There are weaknesses in almost all aspects of the Department of Immigration and Border Protection's arrangements for managing visa holders' compliance with their visa conditions, including in key corporate functions that support the administration of Australia's migration and visa programs. These weaknesses undermine the Department's capacity to effectively manage the risk of visa holders not complying with their visa conditions – from simple overstaying through illegal working to committing serious crimes.

The government accepted all recommendations from the audit, but it is not clear to what extent they have been implemented because the Department of Immigration and Border Protection was changed to the Department of Home Affairs the following year.

358. Rizvi (ibid). The Murugappan family, a family from Sri Lanka that were seeking asylum in Australia, were sent to immigration detention on Christmas Island in August 2019 after their claim for asylum was rejected. They were transferred to Perth in 2021 due to illness and were granted bridging visas in May 2022 by the newly elected Albanese Government: Crowe (2022).

359. Rizvi (2020).

360. Australian National Audit Office (2015).

4.7 The ABF should increase enforcement activity and shift the focus from migrants to employers

The ABF should conduct more investigations of suspect employers, and seek punishment for employers who breach their obligations. This includes prosecuting employers under the criminal offence provisions in the Migration Act.

The ABF should pursue penalties against sponsors who breach their sponsorship obligations. And when the ABF does sanction employers, it needs to happen faster so the business doesn't shut down first.

The Department should report on how many investigations were conducted and the enforcement outcomes from them.

It should continue to improve its data matching capabilities to better investigate breaches. And it should use the director identification number to help target businesses that engage in phoenixing.

To improve post-arrival monitoring and compliance, temporary visa holders with work rights should be issued a tax file number (TFN) upon arrival in Australia, as recommended in the recent Review of the Migration System.³⁶¹ This should be done automatically, with the Department of Home Affairs sending visa details to the Australian Taxation Office (ATO) when the visa holder arrives.

4.8 The government should expand the powers of the ABF to punish bad-faith employers

The Albanese Government intends to tackle migrant worker exploitation by implementing some of the recommendations of the Migrant Workers' Taskforce and the provisions of the abandoned Migration Amendment (Protecting Migrant Workers) Bill 2021.³⁶²

³⁶¹.Parkinson et al (2023, p. 4).

³⁶².Migrant Workers' Taskforce (2019a, p. 12); and Australian Government (2022a, p. 4).

These include making it an offence for an employer to coerce or exert undue influence or pressure on a migrant worker to accept or agree to work arrangements that breach their visa conditions, or to use visa conditions to coerce a worker.

The government should give the ABF the power to prohibit sanctioned employers from employing additional migrant workers. A broader array of unlawful employer activity should be included in the 'migrant worker sanction' definition, such as breaches of occupational health and safety laws and all civil remedy provisions in the Fair Work Act.³⁶³

Additional changes that the government should consider include:

- Granting to the new Workplace Rights Authority the power to prohibit employers from employing additional migrant workers.
- Including individual directors and employers found to be in breach of the Migration Act laws on the sanctioned sponsored list.
- Expanding the sanctions list to include businesses recommended by the Fair Work Ombudsman for sanction.

4.9 Stronger enforcement needs to be complemented by adequate protections for migrants

Aggressive enforcement action may further scare migrants from reporting exploitation if it is not accompanied by stronger protections for exploited workers.

As part of the government's Migration Act changes, there should be explicit protections to ensure migrant workers are not penalised for

³⁶³.Migrant Justice Institute (2022b, p. 13).

unlawful employer activity that is discovered by the ABF.³⁶⁴ And, as recommended in Chapter 2, the government should create an Exploited Worker Visa Guarantee, so a migrant worker's visa will not be cancelled if they report exploitation.

4.10 The ABF should be subject to regular independent reviews

The ABF should be subject to independent review every five years. These reviews should track the ABF's progress in improving enforcement outcomes and its general operational activities. The results of the reviews should be made public, to promote accountability.

³⁶⁴For example, by including in the amendments that if a breach of a visa condition occurred due to exploitation, the breach will not result in the exercise of the Minister's discretion under s116 to cancel the visa due to that breach: Migrant Justice Institute (2022b, Recommendation 3).

5 Close loopholes that allow employers to exploit migrant workers without sanction

Illegal practices such as ‘phoenixing’ and sham contracting are used by rogue employers to exploit workers and avoid paying tax without sanction.

The use of labour hire is a legitimate business practice, but unscrupulous labour hire operators and illegal use of labour hire services by some businesses contributes to worker exploitation.

Migrants are often the victims of multiple unscrupulous practices. The Migrant Workers’ Taskforce found that, ‘Employers, including labour hire companies, that underpay overseas workers may also engage in other undesirable practices such as avoidance of tax obligations, sham contracting, or phoenixing to avoid employee entitlement obligations’.³⁶⁵

Ending these illegal business practices and deceptive employment methods would help reduce exploitation of workers, and especially migrant workers.

5.1 Crack down on illegal phoenix activity

Illegal phoenix activity occurs when a new company continues the business of a company that has been liquidated to avoid paying outstanding debts, including unpaid taxes and employee entitlements.³⁶⁶ Illegal phoenix activity cost employees between \$31 million and \$298 million in unpaid entitlements in 2015-16.³⁶⁷

Successive state and federal governments have tried to combat phoenixing. In 2014, the Phoenix Taskforce, a group of 39 federal, state, and territory agencies, was established to investigate and limit

phoenix activity.³⁶⁸ The Morrison Government passed new laws to combat phoenixing in 2020.³⁶⁹ These amendments imposed new criminal offences and civil penalties on directors and others, including advisers, who engage in phoenix activity.³⁷⁰

Laws requiring company directors to hold a unique director identification number took effect in 2021.³⁷¹ This identification number attaches to a director for life, and should help identify directors involved in phoenixing and stop them from repeated phoenixing.

But the federal government should do more to help migrant workers who are victims of phoenixing.

The government should extend the Fair Entitlements Guarantee program to include temporary visa-holders (see Section 6.6). This would enable the workers to recoup some of their entitlements if their employer goes into liquidation.

The government should increase funding for the Phoenix Taskforce by \$5 million per year, so it can improve its data analytics capabilities. Data sharing helps give advance warning of potential phoenixing.³⁷² A 2019 Australian National Audit Office audit of the Phoenix Taskforce found that legislation prevents data sharing.³⁷³ Where possible, the

368. Australian Taxation Office (2023). The Fair Work Ombudsman is a member of the Taskforce.

369. Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020.

370. The key change was new offences that prohibit ‘creditor-defeating dispositions’ of company property (s588FDB of the Corporations Act). See: Marsh Legal (2020).

371. Australian Securities and Investments Commission (2023).

372. For example, if a company is accruing significant unpaid employee entitlements, tax debts, and other debts, then enabling agencies to communicate and compare data might prevent phoenixing.

373. Australian National Audit Office (2019).

365. Migrant Workers’ Taskforce (2019a, p. 13).

366. Australian Securities and Investments Commission (2022).

367. PwC (2018).

government should remove the limits on data sharing among Phoenix Taskforce members.

The government should pursue better collaboration between the ATO, ASIC, and the Department of Home Affairs to identify and deport temporary visa-holders who commit illegal phoenixing.³⁷⁴ And the government should add directors who have been found to engage in illegal phoenix activity to the ABF sanctions list.

5.2 Crack down on sham contracting

Sham contracting occurs when an employer deliberately classifies a legitimate employee as an independent contractor to avoid paying award wages and providing entitlements such as annual leave and superannuation.

Sham contracting is illegal. Section 357 of the Fair Work Act states it is illegal to knowingly or 'recklessly' represent to an employee that they are an independent contractor when they are not.³⁷⁵

Migrant workers are liable to be deliberately misclassified as a contractor because they often have weak bargaining power and minimal knowledge of Australia's workplace rights.³⁷⁶

Sham contracting, and unscrupulous labour hire practices, are more likely to occur in complex supply chains where it can be difficult for the worker to identify who is obligated to pay their wages.

374. National Agricultural Labour Advisory Committee (2020).

375. Fair Work Ombudsman (2022h). Courts can impose penalties for sham contracting, with the maximum penalty per contravention \$16,500 for individuals and \$82,500 for corporations. Employers are also not allowed to dismiss or threaten to dismiss an employee in order to engage them as an independent contractor to do the same or almost the same work.

376. Migrant Workers Centre (2021, p. 33). 5 per cent of working migrants who arrived in Australia less than five years ago were independent contractors (according to the ABS definition), compared to 8 per cent of workers born in Australia (Grattan analysis of ABS (2022a)). See also: Treasury (2017, p. 35).

To deter misclassification of legitimate employees as independent contractors, the government should tighten the sham contracting provisions in the Fair Work Act. It should follow the recommendation of the Productivity Commission to change the 'recklessness' test to an objective test of 'reasonableness'. This would lower the bar for a successful prosecution for sham contracting.³⁷⁷ As recommended by the 2017 Black Economy Taskforce, better scrutiny of ABN applications would also reduce sham contracting by not allowing employees to obtain an ABN.³⁷⁸ Automatically granting all temporary migrants with work rights a tax file number (TFN) upon arrival in Australia, as we recommend in Chapter 4, should also help to reduce sham contracting.³⁷⁹

The government should increase penalties for sham contracting, particularly for serious contraventions.³⁸⁰

The current approach to determining a working relationship creates uncertainty for workers and employers. Yet it remains the best approach. An alternative approach, creating a statutory definition of an employee, could be easily 'gamed' by employers and would need to be continually updated in response to new commercial developments (for example, the 'gig' economy).³⁸¹

377. Productivity Commission (2015b, p. 797): 'The requirement that an employer must have been 'reckless' for them to be prosecuted for misrepresenting the nature of an employment contract is too high a hurdle for legal action. Changing from a test of 'recklessness' to a test of 'reasonableness' would help discourage sham contracting.' The Black Economy Taskforce also supported this recommendation (Treasury (2017, Recommendation 10.3)).

378. WEStjustice et al (2020, p. 23); and Treasury (2017, p. 85).

379. Parkinson et al (2023, p. 4). The migrant should also be given information about what the definition of an employee is and other workplace rights (see Section 6.4).

380. Treasury (2017) Recommendation 10.3. In its response to the Black Economy Taskforce, the former government agreed in principle with this recommendation.

381. Productivity Commission (2015b, p. 797).

Reforms recommended in this report should reduce instances of sham contracting among migrant workers – for example, increasing education about Australia’s workplace laws among migrant workers, empowering workers to chase unpaid wages, and ensuring the proposed Workplace Rights Authority has sufficient resources and powers to investigate and punish rogue employers.

5.3 Register labour hire services

Labour hire providers contract out workers to ‘host’ firms, typically so these firms can meet volatile or seasonal workforce needs. Under a labour hire arrangement, the risks and liabilities of employing a worker sit with the labour hire provider.³⁸² In 2022, 1.2 per cent of employed people were labour hire workers, and that share has been broadly unchanged since 2014 (Figure 5.1).³⁸³ Labour hire workers typically have much less job stability than other workers.³⁸⁴

There is extensive evidence that labour hire facilitates exploitation of workers, including migrant workers. The Migrant Workers’ Taskforce report found serious cases of migrant exploitation by labour hire operators and firms using labour hire services.³⁸⁵ The Fair Work Ombudsman has found that companies were using complex sub-contracting and labour hire arrangements to avoid employer obligations.³⁸⁶ A 2016 Victorian inquiry into the labour hire industry found many instances of exploitation by rogue operators.³⁸⁷

Exploitation in the labour hire industry particularly affects migrant workers because they are three times more likely than a worker born in Australia to be employed by a labour hire firm (see Figure 5.1). Migrants are also more likely to work in industries where labour hire exploitation is more prevalent, notably the horticulture, meat processing, security, and cleaning industries.³⁸⁸

Labour hire arrangements can make it more difficult for exploited workers to reclaim unpaid wages and entitlements, because the more complex legal relationship means it can be difficult for a worker to figure out who has legally employed them.³⁸⁹

The government should create a National Labour Hire Registration Scheme, with the aim to consolidate existing state schemes. A licensing scheme would make it easier for governments to identify, ban, and fine labour hire providers that mistreat their workers, and also punish firms that exploit labour hire workers.³⁹⁰ The national scheme should operate similarly to the schemes in Victoria, South Australia, the ACT, and Queensland, and eventually replace them (see Box 3).³⁹¹ In the interim, existing state regulators of labour hire should harmonise their approaches, including using consistent definitions of ‘labour hire services’.³⁹²

382. Victorian Government (2016, p. 48). A labour hire worker can be an independent contractor, or an employee of the labour hire provider.

383. ABS (2022a).

384. ABS (2022d).

385. Migrant Workers’ Taskforce (2019a, p. 101). The Taskforce also found a tendency among labour hire firms to phoenix to avoid paying employee entitlements.

386. Senate Standing Committee on Economics (2022, p. 70).

387. Victorian Government (2016, p. 25).

388. Victorian Government (2016, p. 14) and Migrant Workers’ Taskforce (2019a, p. 101). Labour hire is also a problem in the construction sector. A 2019-20 audit by the Australian Building and Construction Commission of 63 labour hire companies found 64 per cent were non-compliant in relation to remuneration.

389. Migrant Workers’ Taskforce (2019a, p. 102): ‘a complex supply chain structure with multiple layers of contracting can worsen the situation, making it hard to determine which entity is responsible for wage underpayments. As a result, unscrupulous labour hire operators may be less likely to be held accountable.’

390. Migrant Workers’ Taskforce (2019a, Recommendation 14), Senate Standing Committee on Economics (2022, Recommendation 15), Victorian Government (2016) and Forsyth (2019b).

391. Senate Standing Committee on Economics (2022, p. xii).

392. Currently, state bodies have different definitions and requirements: Corrs Chambers Westgarth (2018).

Box 3: The Victorian Labour Hire Authority

The Victorian Labour Hire Authority was established in 2019 in response to a 2016 inquiry into the labour hire industry by Professor Anthony Forsyth.^a

The Authority requires that labour hire providers be licensed or face penalties exceeding \$145,000 for an individual and \$590,000 for a corporation.^b All people involved in a labour hire provider must pass a ‘fit and proper person’ test. For example, the person must not have been found to have contravened a workplace law, labour hire industry law, or minimum accommodation standard, in the past five years.^c Licensed labour hire providers must report on their activities every 12 months.

‘Hosts’ (businesses that use the services of a labour hire firm) must use only licensed labour hire providers.^d A host that knows or has reasonable grounds to suspect that the supply of workers is designed to circumvent labour hire laws is also subject to large fines.

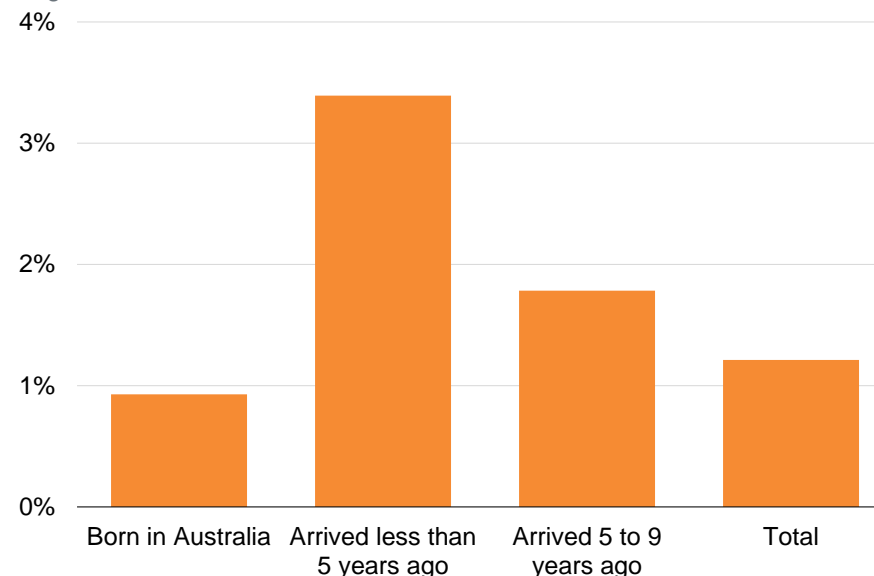
In 2021-22 the Authority cancelled 373 licences. Among the most common reasons for cancellation were non-compliance with legal obligations relating to workplace, taxation, and superannuation laws.^e

The Authority made an operating profit of \$7.5 million in 2021-22.

- a. Victorian Government (2016).
- b. Labour Hire Authority (2023).
- c. Labour Hire Authority (ibid). Refused, cancelled, or suspended labour hire licences are listed on the Authority’s website.
- d. Penalties exceed \$145,000 for an individual and \$590,000 for a corporation: Labour Hire Authority (ibid).
- e. Labour Hire Authority (2022).

Figure 5.1: Recent migrants are much more likely than people born in Australia to be labour hire workers

Labour hire workers, by year of arrival in Australia, percentage of employees, August 2022



Note: Labour hire workers defined in the Characteristics of Employment survey as ‘people who found their job through a labour hire firm/employment agency and are paid by the labour hire firm/employment agency’, and employed as a labour hire worker in main job.

Source: ABS (2022a).

6 Provide more support for migrant workers to pursue underpayment claims

Changing visa rules, strengthening the enforcement of workplace and migration laws, and closing other loopholes should reduce the exploitation of migrant workers. But even with those reforms, some employers will continue to underpay migrant workers.

Few migrants currently pursue their employer for unpaid wages. This chapter outlines how to better support migrant workers to successfully claim unpaid wages.

To improve migrants' understanding of workplace laws and to support workers to uphold their rights, we recommend the creation of a Migrant Workers Centre in each state, increased funding for Community Legal Centres, and more assistance from the Workplace Rights Authority. These reforms would also assist local workers, especially many younger workers, to claim unpaid wages.

Claiming unpaid wages is often costly, slow, and cumbersome. As part of the 2023 review of the small claims process, the creation of a new specialised workplace court or tribunal should be considered. And the government should expand the Fair Entitlement Guarantee to include migrant workers.

As recommended in Chapter 2, the government should create an Exploited Worker Visa Guarantee, so a migrant worker's visa will not be cancelled if they report exploitation, and a Workplace Justice visa that enables a worker who has suffered exploitation to remain in Australia to pursue their unpaid wages.

A better system for workers to claim unpaid wages will deter employers from underpaying migrant and local workers alike. Increasing the chances that businesses will have to pay back wages, potentially with large fines, will discourage businesses from underpaying workers in the first place.

6.1 Few migrants who have been underpaid seek to recover their wages

Most migrants who have been underpaid do not try to recover their unpaid wages. A 2017 survey of temporary migrant workers found that of the 2,258 participants who stated that they had been underpaid while working on a temporary visa, only 9 per cent tried to recover unpaid wages (Figure 6.1).³⁹³ A further 2 per cent stated that they 'plan to try' in the future, and 43 per cent said that they 'might try in the future'.

6.1.1 There are many reasons migrant workers do not attempt to recover unpaid wages

Underpaid migrant workers cite a variety of reasons for why they did not try to recover unpaid wages (see Figure 2.5). Not knowing what to do, and the difficulty of the process, were the two most common. Fear of negative consequences was a major factor: one quarter cited 'fear of migration consequences' as a reason for not trying, and 22 per cent stated they didn't want to lose their job.³⁹⁴

However, 28 per cent of underpaid migrant workers did not seek to recover wages because they agreed to the wage and appeared to be satisfied. Research indicates this might be driven by these workers feeling they have limited choice and need to work, rather than genuine satisfaction with being underpaid.³⁹⁵ Some underpaid workers may

393. Farbenblum and Berg (2018). The authors note that the 9 per cent figure is likely to be an overstatement, because the participants were willing to invest time and effort in sharing information.

394. A similar list of barriers to redress was cited in the Senate Standing Committee on Economics (2022, p. 66).

395. Reilly et al (2020).

genuinely be satisfied with their employment arrangements, but as described in Section 1.3, underpayment hurts other Australians.

A general lack of knowledge of workplace laws among migrant workers also contributes to few migrants seeking unpaid wages.³⁹⁶ Migrant workers are often aware of the minimum wage but are often not aware of applicable award wage rates that may apply, as well as penalty rates and overtime. Therefore, many migrants often do not know they are being underpaid, and others underestimate the degree to which they are underpaid.³⁹⁷

A 2021 survey of 734 migrant workers by the Migrant Workers Centre found low levels of knowledge about Australia’s workplace laws, with 35 per cent of respondents not having any familiarity with basic workplace rights.³⁹⁸ The Migrant Workers’ Taskforce found that some migrants believed workplace laws did not apply to them because they were migrant workers.³⁹⁹

According to a 2018 report from the Migrant Justice Institute:⁴⁰⁰

A cost-benefit theory explains why so few migrant workers try to recover unpaid wages. It is rational to stay silent when the effort, costs, and risks involved in taking action are weighed against the low likelihood of success... At a practical level, it is virtually impossible for most migrant workers to calculate the precise amount they have

396. Senate Standing Committee on Economics (2022, p. 66).

397. Clibborn (2020, p. 7). Berg and Farbenblum (2017, p. 34) find similarly.

398. Migrant Workers Centre (2021, p. 33). Respondents were asked if they were familiar with any of these terms: penalty rate, workers compensation, industry award, redundancy pay, and enterprise bargaining agreement. Half of respondents knew of penalty rates, just 18 per cent knew about enterprise bargaining. These results probably overstate the knowledge of the wider migrant worker population, because many of the participants were followers of the Migrant Workers Centre on social media so were more exposed to discussion about workplace rights.

399. Migrant Workers’ Taskforce (2019b).

400. Farbenblum and Berg (2018, p. 11).

Figure 6.1: Very few underpaid migrant workers have tried to, or plan to try to, recover their unpaid wages

Share of migrant workers who stated they had been underpaid, by whether they will try and recoup wages



Note: Share of 2,258 respondents in the migrant worker survey who stated they had been underpaid.

Source: Farbenblum and Berg (2018, Figure 3).

been underpaid as this involves correctly identifying the worker's classification under the relevant modern award, identifying applicable loadings and penalties, and applying these to relevant hours within each shift worked.

6.2 Workers use various supports when they seek to recover unpaid wages

Migrants seeking unpaid wages contact a range of people for assistance. The 2017 Migrant Justice Institute survey found that among the 9 per cent of participants who tried to recover unpaid wages, 32 per cent contacted the Fair Work Ombudsman for assistance (Figure 6.2). Only a small proportion directly contacted unions, Community Legal Centres (CLCs), or lawyers. However, migrants are often referred to CLCs by initial contacts such as the Ombudsman, migrant settlement services or universities (or in Victoria, the Migrant Workers Centre). International students often contact their education institution for assistance.

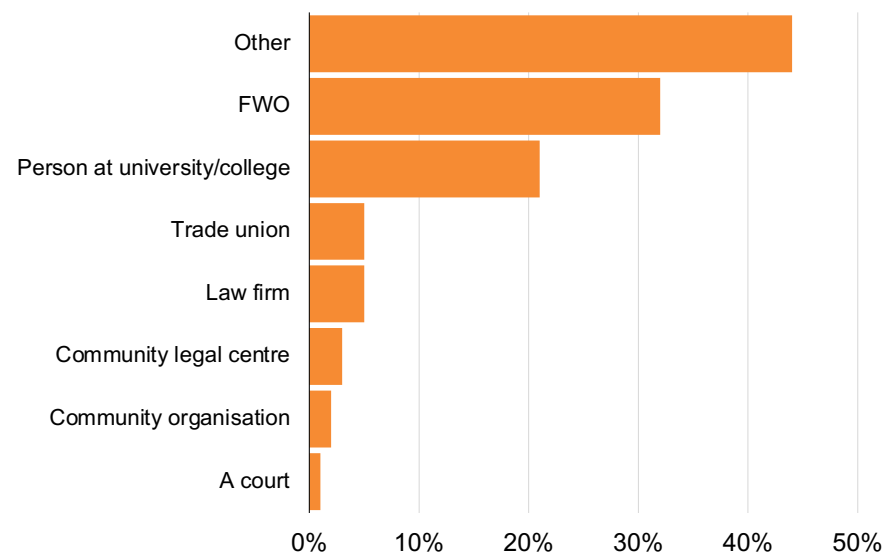
About 44 per cent of participants who tried to recover unpaid wages contacted 'other' organisations or people for help, including colleagues, friends, or family. This indicates a lack of knowledge or trust of formal institutions.

Migrants can approach an employer directly, but the power disparity between many migrant workers and their employers means this approach is unlikely to be successful in many cases.⁴⁰¹

401. Farbenblum and Berg (2017). Approaching an employer with assistance from a union or lawyer is more likely to lead to success. For example, the Migrant Workers Centre stated that a well-crafted letter of demand can be effective.

Figure 6.2: Migrants seeking unpaid wages contact a range of organisations and people for assistance

Organisations and people contacted by survey participants for assistance to recover unpaid wages, share of total



Notes: FWO = Fair Work Ombudsman. Respondents were able to select one or more organisations or people. 194 respondents.

Source: Farbenblum and Berg (2018, Figure 6).

6.2.1 Workers can pursue unpaid wages via the small claims process

The small claims process enables workers to seek unpaid wages through a more informal process than most other court proceedings.⁴⁰² Small claims courts operate within the Fair Work Division of the Federal Circuit and Family Court, and also in state and territory magistrates courts.

Most migrants who use the small claims process receive assistance from a CLC, other legal representation, or from a union, to gather evidence, prepare court documents, and serve court documents on their employer.⁴⁰³ The Ombudsman also provides assistance, such as basic information on the small claims process and calculating pay rates.⁴⁰⁴

Very few workers, including migrant workers, use the small claims process to seek unpaid wages, because the process is too complex.⁴⁰⁵ As Figure 2.5 showed, not knowing what to do was the main reason for not pursuing a claim, followed by it being too much work. One recent study found that migrants who received assistance from the Ombudsman, unions, or legal help had a higher chance of success in claiming unpaid wages.⁴⁰⁶

402. Fair Work Act s548. The small claims process is 'not bound by any rules of evidence and procedure' and may act 'without regard to legal forms and technicalities'.

403. The small claims process is usually conducted without lawyers, unless the court gives leave to be represented. According to Chaudhuri and Boucher (2021, p. 22), of the 949 migrant workers who had finalised judgments between 1996 and 2016, only 8 per cent were self-represented or assisted by a non-legal representative.

404. For example: Fair Work Ombudsman (2022i). The Ombudsman used to offer more substantial assistance, such as completing court application forms and filing and serving court documents: Department of Employment and Workplace Relations (2020) and Farbenblum and Berg (2017).

405. Farbenblum and Berg (2017, p. 8).

406. Boucher (2019, p. 301).

6.2.2 Migrants can seek assistance from various organisations to claim unpaid wages

Underpayment claims often involve a lot of work, such as compiling evidence to calculate the extent of underpayment, which makes legal representation expensive.⁴⁰⁷ Many organisations, notably CLCs, have insufficient resources and funding to help all workers, including migrant workers, who seek it.⁴⁰⁸

Fair Work Ombudsman

In addition to its role of enforcing workplace laws (see Chapter 3), the Ombudsman provides advice and information on pay and conditions, interpreting awards, and how to pursue an underpayment claim.⁴⁰⁹

The Ombudsman has broad discretion about what action it will take in response to a claim of underpayment.⁴¹⁰

The Ombudsman can issue a compliance notice or enter into an enforceable undertaking to require an employer to refund unpaid wages (see Section 3.1.1). The Ombudsman can help resolve a dispute between an employee and employer through education or dispute resolution.⁴¹¹ The Ombudsman has moved towards using its enforcement powers, particularly compliance notices, to require employers to pay back wages (see Chapter 3).⁴¹²

407. Discussions with Maurice Blackburn and CLCs. Farbenblum and Berg (2017) state that 'For numerous CLCs and private firms, the sheer resource intensiveness of this process is one of the greatest obstacles in representing temporary migrants to recover their unpaid entitlements'. See also: Senate Standing Committee on Economics (2022, p. 107).

408. Bucci (2022a); Bucci (2022b); and Clibborn (2020).

409. Fair Work Ombudsman (2022j); and Fair Work Ombudsman (2022k).

410. Farbenblum and Berg (2017). Interviews with Community Legal Centres indicated the Ombudsman typically provides limited assistance to migrant workers.

411. The Ombudsman has stopped using formal mediation to solve disputes.

412. Marin-Guzman (2022b). Farbenblum and Berg (2017, p. 24) argue that the Ombudsman's use of compliance notices is a good step, because dispute

The Ombudsman can provide support to workers to pursue underpayment claims in the small claims process.⁴¹³ It can also act as a ‘friend of the court’ in unpaid wages cases, but has been doing this less frequently in recent years.⁴¹⁴

The Ombudsman can also commence its own proceedings in court, and also represent employees.⁴¹⁵ However, Ombudsman litigation on behalf of a worker is uncommon. The Ombudsman’s Compliance and Enforcement Policy states that it is more likely to litigate in cases involving exploitation of vulnerable workers, but the public interest in pursuing litigation is also considered, which typically means litigation will be pursued only if it will deter other employers.⁴¹⁶

Using the Ombudsman doesn’t guarantee success. Of 62 participants in a recent Migrant Justice Institute survey who had contacted the Ombudsman themselves, 36 recovered nothing, 13 recovered some, and only 13 recovered all of their unpaid wages.⁴¹⁷

Community Legal Centres

CLCs are a low-cost way for migrant workers to obtain legal advice. Migrants are often referred to CLCs from initial contacts such as

resolution or mediation is not useful for many migrant workers claiming underpayment due to the power disparity between the parties and the temporary nature of many employment relationships.

413. Migrant Workers’ Taskforce (2019a, p. 94). According to Department of Employment and Workplace Relations (2020), in 2018-19 the Ombudsman assisted more than 1,000 people through the small claim process, recovering \$1,123,616 in unpaid entitlements.

414. Migrant Workers’ Taskforce (2019a, p. 94): As a friend of the court, the Ombudsman’s legal officers assist the court on points of law and the application of industrial instruments. The Ombudsman attended small claims processes as a ‘friend of the court’ in more than 400 matters in 2018-19, but only 220 in 2019-20. Later annual reports do not report ‘friend of the court’ statistics.

415. Fair Work Act s682(1).

416. Fair Work Ombudsman (2020b, p. 10).

417. Farbenblum and Berg (2017).

the Ombudsman, student support centres, or settlement service providers.⁴¹⁸ CLCs provide advice on dealing with the Ombudsman, assistance with mediation with an employer, calculating the extent of underpayment, preparing evidence, service of court documents, and advocacy at court.⁴¹⁹

Unions

Unions can provide assistance to exploited workers who are members. However, few migrant workers are union members, so unions directly help few migrants pursue claims of underpayment (see Section 3.11 for more detail on the role of unions).

6.3 The current system for workers to recover unpaid wages is failing

The current supports available to migrant workers to claim unpaid wages are insufficient.

Very few underpaid migrant workers successfully recoup their unpaid wages. According to the 2017 Migrant Justice Institute survey, of the 194 participants who had tried to recover wages, two in three recovered nothing and only 16 per cent recovered all their unpaid wages.⁴²⁰

The Senate Standing Committee on Economics found that:⁴²¹

418. Senate Standing Committee on Economics (2022, p. 110); interviews with CLCs. Universities and other higher education organisations are an important source of providing information about working rights to students and are the number one point of contact for students who are claiming underpayment. For example: Department of Education (2022). The Ombudsman refers people to CLCs only when the assistance required is outside its scope or jurisdiction.

419. Clibborn (2020, p. 7): ‘Community Legal Centres and other community migrant representative groups offer temporary migrant workers a valuable source of information and representation. They can be effective conduits through which temporary migrant workers can exercise their legal rights.’

420. Farbenblum and Berg (2018, p. 30).

421. Senate Standing Committee on Economics (2022, p. 107).

current avenues for redress and justice do not meet the needs of underpaid workers, particularly low-paid and vulnerable workers – with existing options proving variously intimidating, inaccessible, costly, complex, inefficient, and ineffective.

6.3.1 Recent changes to the Fair Work Act will not solve the problem of few migrant workers recovering unpaid wages

The government passed amendments to the Fair Work Act in December 2022 that included two major changes to the small claims process:⁴²² an increase in the maximum amount that can be awarded from \$20,000 to \$100,000; and allowing the court to award filing fees as costs to successful applicants.⁴²³ Another amendment requires the Fair Work Commission and Ombudsman to provide guidelines, other materials, and community outreach in multiple languages.⁴²⁴

But these changes, while welcome, are not enough to solve the problem of few migrant workers successfully claiming unpaid wages. The small claims process will still be too complicated for most people, and especially migrants with English as a second language, to pursue without some assistance.

6.4 Provide more support and information to help exploited migrants claim unpaid wages

Exploited migrant workers need more support to seek redress.

422. The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022.

Changes to the small claims process come into effect on 1 July 2023. See also: Parliament of Australia (2022). These changes were made in response to recommendation 12 of the 2019 Migrant Workers' Taskforce report.

423. This provision enables the court to apply the typical rule that a successful party is entitled to their costs: Clayton Utz (2022).

424. Parliament of Australia (2022, p. xxxiv).

6.4.1 Improve migrants' understanding of workplace rights

As outlined in Section 6.1.1, many migrant workers find it difficult to understand Australia's employment laws, which makes it hard for them to work out if they're being underpaid.

Increasing the general understanding of Australia's workplace laws among migrant workers would prevent underpayment and encourage more to claim unpaid wages.

To improve migrants' understanding of workplace rights, we recommend:

- The Department of Home Affairs send out workplace information to new migrants at multiple points. For example when a visa is issued, when a person arrives in Australia, and then a few weeks after arrival.
- The proposed Workplace Rights Authority provide more information on workplace rights to migrant settlement services and English language schools.
- The Workplace Rights Authority improve and expand its relationships with CLCs and migrant workers centres so that it can refer migrants to these services more often.
- A Migrant Workers Centre be established in each state, and these centres run information campaigns.

6.4.2 Make it easier for workers to work out if they're being underpaid

While most migrant workers know what the minimum wage is, fewer know their entitlement to penalty rates and other allowances, which makes it hard for them to calculate the extent of any underpayment.⁴²⁵

425. Berg and Farbenblum (2017, p. 34); and Clibborn (2020, p. 7).

The Ombudsman provides a 'Pay and Conditions Tool' that helps workers calculate their remuneration, and an app that helps workers record their hours, including by using GPS tracking to automatically record hours.⁴²⁶

While these are helpful, more needs to be done to assist migrant workers understand what they should be getting paid.

We recommend that all workers be provided with a 'Real Fair Work Information Statement' that describes in detail working conditions upon commencement of employment.⁴²⁷ Similar obligations exist in New Zealand, the UK, and some European Union countries.

Some of the most vulnerable migrant workers rely on employers to provide accommodation and transport, the costs of which are deducted from their gross pay. The government should amend the Fair Work Act to require employers to itemise deductions on each payslip, to make it clearer what the employer is deducting from a worker's gross pay.⁴²⁸

6.4.3 The proposed Workplace Rights Authority should provide assistance to migrants claiming underpayment

As part of the additional \$60 million funding for the proposed Workplace Rights Authority recommended in Chapter 3, \$5 million should be allocated to providing more assistance to migrant workers seeking unpaid wages.

426. Fair Work Ombudsman (2022j). The Employment Rights Legal Service stated that it has had only one client use the Ombudsman's 'Record My Hours' app.

427. Based on: Migrant Justice Institute (2022a, pp. 10–12). Campbell and Charlesworth (2020) state that it should include 'job title (and classification), wage rates, working-time conditions including applicable premia for overtime and unsocial hours of work, type of employment, and the name of the relevant regulatory instrument (eg, award, enterprise agreement)'.

428. Migrant Justice Institute (2022a, p. 12).

The Authority should carefully select the claims it pursues through the courts, so that it maximises the deterrence effect of litigation (see Chapter 3).⁴²⁹

6.4.4 The Workplace Rights Authority should assist workers who are not given payslips

Proving underpayment is particularly difficult when the worker doesn't receive payslips, or the payslips contain insufficient detail to work out if the worker is paid correctly.⁴³⁰ A Migrant Justice Institute survey found that 50 per cent of participants never or rarely received payslips, and this proportion was higher among migrants receiving very low wages.⁴³¹

The Fair Work Act places the burden in court proceedings on the employer to prove employees were paid correctly when the employer has failed to meet their record-keeping and pay slip obligations.⁴³²

The Workplace Rights Authority should offer assistance to a worker who claims to have been underpaid if the worker did not receive payslips.⁴³³ Currently, the Ombudsman often demands a higher standard of proof than required in a court before beginning an investigation or assisting a worker.⁴³⁴

429. Fair Work Ombudsman (2020b, p. 10): 'Enforcing the law and obtaining court orders sends a powerful public message to others not to engage in similar conduct (general deterrence)... Stopping and deterring people from engaging in unlawful behaviour now and in the future makes the need to comply with Commonwealth workplace laws real for individuals (specific deterrence).'

430. Under the Fair Work Act, employers are required to make and keep accurate and complete records and provide pay slips: Fair Work Ombudsman (2022i).

431. Berg and Farbenblum (2017, p. 40).

432. The change was introduced in 2017: Fair Work Ombudsman (2022i). See also Farbenblum and Berg (2018, p. 44).

433. Farbenblum and Berg (ibid, p. 44). See Figure 3.1.

434. Based on an interview with the Employment Rights Legal Service. Under the Fair Work Act, Ombudsman inspectors need a 'reasonable belief' that a contravention of the Fair Work Act has occurred before issuing a compliance notice. During our

The Ombudsman has partly taken this step with its use of compliance notices. When a compliance notice is issued, the onus is then on the employer to work out the quantum of underpayment and to repay the worker.⁴³⁵

6.4.5 Increase Community Legal Centres' funding so they can assist more migrant workers

The federal government should boost funding for Community Legal Centres that specialise in employment law and migration law by \$7 million a year, so they are able to assist more workers, especially migrant workers, seeking unpaid wages.⁴³⁶

CLCs are under-resourced and often have to rely on volunteer staff. CLCs typically pay below market wages for lawyers. The funding boost needs to be significant, so CLCs can handle more cases brought by migrant workers.⁴³⁷

CLCs are jointly funded by federal and state governments, but because this recommended change is to enforce federal laws, the federal government should provide the extra funding.

Funding for CLCs should also be committed for longer, to better enable CLCs to invest in their services for exploited migrant workers.⁴³⁸

conversations with CLCs, some expressed the view that the Ombudsman was too conservative with the cases it takes on.

435. Ombudsman Sandra Parker stated in 2019, 'Where an employer is issued with a compliance notice, the onus will be on them to get their house in order': Fair Work Ombudsman (2020c).

436. This was also suggested by the Migrant Workers' Taskforce: Migrant Workers' Taskforce (2019a, p. 95): 'increased funding to the Ombudsman and/or community legal services to support improved personalised assistance to potential claimants to help them make a small claim and providing the courts with additional resources to expedite matters within the small claims jurisdiction'.

437. Discussions with CLCs. Bucci (2022a), Bucci (2022b), Migrant Workers' Taskforce (2019a, p. 95) and Clibborn (2020).

438. Discussions with CLCs.

In combination with more funding for CLCs, the Workplace Rights Authority should more readily refer to CLCs people seeking assistance to make a claim for unpaid wages.⁴³⁹

Migrants who don't trust government bodies might be more willing to contact and seek assistance from CLCs.⁴⁴⁰ CLCs are more suited to providing tailored assistance, and they act purely as an advocate for the worker, unlike the Ombudsman which has numerous roles. Recovering wages after a judgment can be difficult, so CLCs should also assist with enforcing a court order to pay a worker.

6.4.6 Establish a Migrant Workers Centre in each state

A Migrant Workers Centre, funded by the federal government, should be established in each state and territory, at a total cost of \$10 million per year.⁴⁴¹

These centres should be based on the Victorian Migrant Workers Centre,⁴⁴² which educates migrant workers about their rights, supports wage claims, and connects migrants with suitable legal advice where needed.

The main functions of the new migrant workers centres should be to:⁴⁴³

439. The Workplace Rights Authority could expand the Fair Work Ombudsman's existing community engagement program to provide more funding to CLCs via its community grants. In 2020 the Ombudsman gave \$7.2 million to five not-for-profit organisations to 'provide vulnerable groups with advice, information, and assistance about workplace laws': Fair Work Ombudsman (2020d).

440. Senate Standing Committee on Economics (2022, p. 110) and Clibborn (2020). Some CLCs noted that migrant workers can even be distrustful of CLCs, possibly due to perceived connection to government.

441. Funding amount based on the government's commitment of \$8 million per year in the October 2022 Budget to fund Working Women's Centres in each state and territory: Australian Government (2022b, p. 55).

442. Funded by a \$2.18 million Victorian Government grant in 2021-22 for the centre's operations: Department of Families Fairness and Housing (2022, p. 217).

443. Based on: Migrant Workers Centre (2022).

- Educate workers about workplace safety and rights.
- Assist workers from emerging communities on problems they encounter at workplaces, including underpayment, workplace injuries, harassment, and bullying.
- Provide assistance and advice on migration law matters.⁴⁴⁴
- Collaborate with community partners to organise events and grassroots campaigns on workplace rights for migrants.
- Help workers who face language barriers.
- Promote workplace rights via mainstream and ethnic community media outlets.

6.5 Make further changes to the small claims process

The government should make further changes to the small claims process, to make it easier for workers, including migrant workers, to claim unpaid wages.

The government should:

- Allow small claims proceedings to be held virtually if requested by a claimant.⁴⁴⁵
- Ensure judges with specialised knowledge of employment law hear underpayment cases.⁴⁴⁶

444. This could be similar to the Visa Assist service offered by Unions NSW.

445. Most small claims proceedings can be heard virtually, but it is not guaranteed. In the Federal Circuit and Family Court it is up to the discretion of the judicial officer as to whether a request for proceedings to be held virtually is granted. In the Magistrates' Court of Victoria all small claims proceedings can be held online: Magistrates' Court of Victoria (2022).

446. Chaudhuri and Boucher (2021, p. 21).

- Enable workers who have been underpaid by the same employer to make a group complaint.⁴⁴⁷
- Allow electronic or centralised 'service' of documents for the small claims process.

6.5.1 A workplace tribunal that operates as part of the Fair Work Commission may be a better option

An alternative to changing rules and procedures under the current small claims process would be to create a new specialised tribunal to deal with underpayment cases and other workplace disputes. This option should be considered as part of the review of the small claims process that is being conducted in 2023.⁴⁴⁸

The Migrant Justice Institute, the Senate Standing Committee, and various academics have all called for a new tribunal that sits within or works with the Fair Work Commission to replace the current system.⁴⁴⁹

The Senate Standing Committee recommended that the government 'establish a small claims tribunal, ideally co-located with the Fair Work Commission, to create a simple, affordable, accessible, and efficient process for employees to pursue wage theft, including Superannuation Guarantee non-compliance'.⁴⁵⁰ Some Community Legal Centres propose that a new tribunal be based on the applicant-led model for bringing unfair dismissal claims at the Fair Work Commission.⁴⁵¹

If established, a new tribunal should:

447. Migrant Justice Institute (2020, pp. 17–18).

448. Department of Employment and Workplace Relations (2023c). This was Recommendation 12 of the 2019 Migrant Workers' Taskforce report.

449. Farbenblum and Berg (2018); Senate Standing Committee on Economics (2022, Recommendation 5).

450. Recommendation 5 of Senate Standing Committee on Economics (ibid).

451. WEStjustice et al (2020, p. 40); and Fair Work Commission (2023).

- Be low cost and informal.
- Be able to mediate disputes and make decisions on wage claims.
- Allow virtual hearings for all cases.
- Be a 'one-stop-shop' for all workplace matters.⁴⁵²

6.6 Expand the Fair Entitlements Guarantee program to include temporary migrant workers

The Fair Entitlements Guarantee (FEG) provides financial assistance to eligible employees who have lost their job due to the liquidation or bankruptcy of their employer and who are owed employee entitlements which are not able to be paid by their employer or from another source.⁴⁵³ The Guarantee covers five workplace entitlements: wages, annual leave, long service leave, payment in lieu of notice, and redundancy pay.⁴⁵⁴

Workers on a temporary visa are not eligible for FEG assistance, except for New Zealand citizens on a special category visa.⁴⁵⁵

The government should expand the Guarantee to include temporary migrant workers. Temporary migrant workers that work pay tax while in Australia, so they should be eligible for what is, in effect, taxpayer-funded insurance for workers against company insolvency.⁴⁵⁶

452. Migrant Justice Institute (2020). In the October 2022 Budget the government stated it will amend the Fair Work Act 2009 to expressly prohibit sexual harassment in the workplace: Australian Government (2022d, p. 27).

453. Department of Employment and Workplace Relations (2022a).

454. Department of Employment and Workplace Relations (2022b). Some entitlements are subject to maximum thresholds. Unpaid superannuation contributions must be claimed through the ATO.

455. Department of Employment and Workplace Relations (ibid).

456. The FEG is different to social welfare because, unlike Medicare and the Age Pension, it is linked to employment. Some migrant workers pay a higher rate of tax than local workers. For example, working holiday makers pay 15 per cent tax

The Migrant Workers' Taskforce recommended that the FEG be expanded to include temporary migrants, but that 'it should exclude people who have deliberately avoided their taxation obligations'.⁴⁵⁷ In its response the report, the Morrison Government agreed to examine whether to extend the FEG to temporary migrant workers, but so far no action has been taken by the new federal government.⁴⁵⁸

The Senate Standing Committee recommended extending the FEG to migrant workers, and that superannuation be included.⁴⁵⁹ Advocates for migrant workers' rights have also called for the FEG to include migrant workers.⁴⁶⁰

The federal government funds the FEG, and typically recovers some of its outlays as part of the liquidation process. The FEG cost an estimated \$122.7 million in 2021-22, but the program recovered \$31.6 million, meaning a net cost of about \$91 million.⁴⁶¹ The government forecasts the gross cost of the FEG to rise to \$183 million in 2022-23 due to an expected rise in insolvencies and delayed court cases due to the pandemic.⁴⁶²

We estimate that expanding the FEG to include temporary visa-holders would cost the government about \$13 million per year if temporary

on the first dollar they earn, while local workers get the \$18,200 tax-free threshold before being taxed 19 cents per dollar they earn.

457. Migrant Workers' Taskforce (2019a, Recommendation 13).

458. Senate Standing Committee on Economics (2022, p. 103).

459. Senate Standing Committee on Economics (ibid, Recommendations 11 and 15).

460. The Migrant Justice Institute, Migrant Workers Centre (2023b), Redfern Legal Centre (2022), and Whitson (2022).

461. The net cost of the FEG would probably have been lower if court cases had not been delayed due to the pandemic (Attorney-General's Department (2022) and information obtained from the Department of Employment and Workplace Relations).

462. Australian Government (2022c) and information obtained from the Department of Employment and Workplace Relations.

migrants were to claim FEG payments at double the rate of Australian citizens and permanent residents.⁴⁶³

Curtailling illegal phoenix activity would reduce the cost of the FEG by reducing the number of liquidations (see Section 5.1).

6.7 Establish a right to superannuation in the National Employment Standards

The National Employment Standards (NES) are 11 minimum employment entitlements, including public holidays, maximum weekly hours, and annual leave, that cover all employees in the national workplace relations system.⁴⁶⁴

We recommend that a right to superannuation be included in the NES.

The Albanese Government included a right to superannuation in the NES in the Protecting Worker Entitlements Bill, which it introduced to parliament in March 2023.⁴⁶⁵

Including superannuation in the NES would enable underpaid migrant workers and the proposed Workplace Rights Authority to pursue superannuation claims concurrently with other workplace entitlements, rather than having to pursue unpaid superannuation separately via the Australian Taxation Office.⁴⁶⁶ Employers who don't pay their workers

superannuation would also be liable for penalties under the Fair Work Act if superannuation was included in the NES.

463. Grattan analysis based on information obtained from the Department of Employment and Workplace Relations. The Migrant Workers' Taskforce received evidence that the cost of extending the FEG to cover migrant workers would be about \$20 million per year: Migrant Workers' Taskforce (2019a, p. 97).

464. Fair Work Ombudsman (2022m).

465. Parliament of Australia (2023), Australian Government (2022e, p. 36) and Burke (2023b). This was also a 2022 Jobs and Skills Summit commitment: Australian Government (2022a, p. 7).

466. Senate Standing Committee on Economics (2022, p. 127). Temporary migrants can be paid their superannuation balance after they leave Australia. See: Australian Taxation Office (2022d).

7 How to pay for these reforms

This report recommends a series of reforms to reduce the exploitation of migrant workers in Australia. We estimate these reforms would cost about \$115 million a year (Figure 7.1). We recommend the budgetary cost of these reforms should be funded from two sources.

First, higher contrition payments, court penalties, and fines from employers that underpay their workers should raise at least \$70 million a year. It may take some time for higher penalties to flow through into additional revenue for the government, especially for court-ordered penalties. Some of our recommendations, especially those in Chapter 5, may also increase government tax revenues by reducing the size of the black economy, although we do not account for any such impact in our costings here.⁴⁶⁷

In the long-term, our package of reforms should reduce underpayment, which may mean less revenue from contrition payments and fines imposed on firms that exploit their employees. At the same time, spending on some initiatives may not be needed long-term if the culture towards underpaying workers changes.

Second, the government should apply a ‘preventing exploitation levy’ of \$30 per year on temporary visas with work rights granted to migrants, which would be added to the visa charge upon application.⁴⁶⁸ We estimate this levy would raise \$45 million a year, assuming that total annual visas granted for students, working holiday makers, Temporary Skill Shortage workers, and temporary graduates return

Figure 7.1: The reforms recommended in this report are fully funded

New spending	Amount per year
Funding for the new Workplace Rights Authority	\$60m
Funding for the Department of Home Affairs	\$10m
More funding for community legal centres	\$7m
Migrant Workers Centre in each state	\$10m
Expand Fair Entitlements Guarantee	\$13m
Workplace Justice visa	\$10m
More funding for Phoenix Taskforce	\$5m
Total new spending	\$115m
New revenue source	Amount per year
Higher contrition payments, court penalties, and fines	\$70m+
\$30 per year ‘preventing exploitation levy’ on temporary visas with work rights	\$45m
Total new revenue	\$115m+

Notes: 2023-24 dollars. The Fair Entitlements Guarantee spending estimate is a net figure (i.e. accounting for funds recovered from liquidated companies).

Source: Grattan analysis.

⁴⁶⁷The black economy was estimated to be about \$50 billion in 2017 (3 per cent of GDP): Treasury (2017, p. 23).

⁴⁶⁸For example, a levy of \$90 would be applied to a three-year student visa. For a nine-month PALM visa, the levy would be \$22.50.

to 2018-19 levels (Figure 7.2).⁴⁶⁹ It would broadly cover the cost of our migrant-specific recommendations, such as establishing Migrant Workers Centres in each state (\$10 million per year), expanding the Fair Entitlements Guarantee (\$13 million per year), and funding to create the Workplace Justice visa (\$10 million per year), as well as contributing to more resources for the Workplace Rights Authority.

The levy would mean a modest increase in the cost of temporary visas with work rights (Figure 7.2).

According to the Productivity Commission, there are two main rationales for visa charges: recovering government costs and raising revenue, and influencing the composition and/or level of the migrant intake.⁴⁷⁰

Our proposed exploitation levy aligns with the objective of cost recovery, because the levy would fund reforms that would directly assist many migrant workers, such as additional workplace inspectors, Migrant Workers Centres in each state, and access to the Fair Entitlements Guarantee. An annual fee would be appropriate, because the longer a temporary migrant is in Australia, the more likely they are to use these services.

The current approach to charging fees for visas is complex and lacks transparency. Visas fees are currently higher than administration fees, not consistent with the fiscal impact of different visas, and rarely align with the objective of influencing the composition of the intake.⁴⁷¹ The

469. The estimate includes visas granted to primary and secondary visa-holders but excludes school student visas. As the PALM visa was created in 2022, we estimate PALM visa grants to be 20,000 per year. To cover any shortfall in revenue in the short term, the levy could be set at \$40 per year for the first one to two years. We estimate that a \$40 levy would raise about \$60 million per year.

470. Productivity Commission (2016, p. 532).

471. Ibid (p. 529).

Figure 7.2: Our proposed ‘preventing exploitation levy’ on temporary visas with work rights raises the cost of a visa only modestly

Visa	Number of visas granted in 2018-19	Visa fee	Visa fee plus levy	Change in visa fee
Pacific Australia Labour Mobility (PALM) visa	n/a	\$325	\$360	11%
Working Holiday visa and Work and Holiday visa	209,036	\$635	\$665	5%
International student visa	394,918	\$710	\$785	11%
Temporary Graduate visa	63,994	\$1,890	\$1,950	3%
Temporary Skill Shortage visa – short-term	33,333	\$1,455	\$1,515	4%
Temporary Skill Shortage visa – medium-term	45,647	\$3,025	\$3,115	3%
Temporary Skill Shortage visa – labour agreement	2,995	\$3,025	\$3,115	3%

Notes: Visa fees include the increases to fees that start on 1 July 2023. Visa grants numbers include primary and secondary visas (excludes visas granted to school students). For the PALM visa, employers pay \$325 plus other costs for health checks and police certificates and a contribution towards flights, but recoup most of the costs from workers. The average levy paid for each visa class is calculated by assuming an average visa length within each visa class. For example, the average student visa length is assumed to be 2.5 years. For Temporary Skill Shortage visas, the visa fee is what is paid by the applicant (excludes employer nomination and application fees and the Skilling Australians Fund levy). The short-term stream includes standard business sponsorship visas.

Sources: Grattan analysis; Department of Home Affairs (2022i).

government increased visa charges in the 2023 Budget. It should reform visa charges as part of its Migration Strategy.⁴⁷²

The levy would be paid by the visa applicant. For the Temporary Skill Shortage visa, the levy would be paid by the sponsoring employer.⁴⁷³ For the PALM visa, the levy would add to the upfront costs paid by the employer, but those costs could be recouped from the worker. For student and working holiday maker visas, the levy would be paid by the migrant.

Irrespective of who pays the levy initially, the true cost is likely to be shared between the migrant and the sponsor or sector. For example, universities might respond to the levy by offering slightly discounted fees to international students. Sponsoring employers may slightly reduce their wage offer to temporary sponsored visa-holders, to recoup the costs of the levy.

If, as we intend, the levy led to an improvement in the treatment of many migrant workers in Australia, that could make Australia a more attractive destination for other migrants, irrespective of the additional charge on visas.

472. Department of Home Affairs (2023d).

473. We recommend the upfront fee nomination fee be replaced by a monthly fee.

Appendix A: Measuring the extent of underpayment of migrants

This report uses data from the Characteristics of Employment (COE) and Employee Earnings and Hours (EEH) surveys by the Australian Bureau of Statistics (ABS) to measure the extent of underpayment in Australia. The ABS uses random samples to select participants for the surveys, so our analysis does not have some of the methodological limitations of other surveys (discussed in Chapter 1.)

Our analysis blends the two surveys together to take advantage of the more detailed characteristics documented in the COE survey, and the more precise measurement of income and hours in the EEH survey.

We use the COE survey to assess the impact of job and demographic characteristics on individuals' likelihood of being underpaid.

A.1 The Characteristics of Employment survey

The COE survey has been published every August since 2014, as a supplement to the Labour Force Survey. It is a survey of households and uses the ABS Address Register as the sample frame.⁴⁷⁴ The survey includes migrants who have been or intend to be in Australia for at least 12 months.⁴⁷⁵

The survey includes a range of questions about individuals' job characteristics, including occupation, job skill level, independent contractor status, union status, earnings, and hours. It also includes a broad range of demographic characteristics, such as years since arrival, highest level of education attained, and country of birth.

474. ABS (2022e).

475. This methodology is used to capture people who count toward the population in Australia. While technically people who have been in or intend to be in Australia for 12 out of 16 months are considered part of Australia's population, for ease in interviewing the ABS simplifies the sample frame to individuals who are or intend to be in Australia for at least 12 months: ABS (2023d).

A.2 The Employee Earnings and Hours survey

The EEH is a survey of employers. It is sampled in two steps. First, the ABS gets a sample of businesses from the ABS Business Register. Second, employees are randomly sampled from the business' payroll.⁴⁷⁶

The EEH survey collects data on a much narrower range of characteristics than the COE survey. EEH collects data on gender, age, and a limited number of job characteristics, such as occupation and industry.

Agricultural businesses are excluded from the EEH survey. There is anecdotal evidence of a large amount of underpayment in this sector.⁴⁷⁷

A.3 Comparing the COE and EEH surveys

The EEH survey has much more precise measures of earnings and is considered a better survey for analysing employee earnings, because earnings are obtained from payroll data.⁴⁷⁸

In contrast, the COE survey relies on employees recalling their earnings. As a result, the survey is subject to recall and rounding problems, which means it may overstate the extent of underpayment.

476. ABS (2022f).

477. ABS (2022f) and Fair Work Ombudsman (2018b).

478. See ABS (2023e) for more detail. Both Bray (2013) and the Productivity Commission (2015a) choose the EEH to measure reliance on the minimum wage, partly due to the greater precision in earnings and because it is one of the few surveys that collect the method of setting pay (e.g. award, enterprise agreement, etc).

But the EEH survey also is likely to understate the extent of underpayment, because some employers are unlikely to admit to underpaying their workers.⁴⁷⁹

As the Productivity Commission noted:

Crucially, surveys differ according to who reports income, with all but the Survey of Employee Earnings and Hours (EEH) relying on employee-reported income and hours, which can be vulnerable to recall and rounding error. On the other hand, these surveys contain rich information on respondents' characteristics and attributes, such as demographics and household income, and are an important source of policy-relevant information. The EEH lacks this detail and omits agricultural workers, a sector with high rates of minimum-wage reliance, as measured by other surveys.⁴⁸⁰

A.4 Measuring underpayment

We adopt an approach that is similar to many other economics papers that assess the characteristics of minimum-wage workers.⁴⁸¹ Yet there are reasons beyond non-compliance with labour laws that may cause someone to report an hourly wage below the national minimum wage. These include: some employees are excluded from the national minimum wage;⁴⁸² employees may work long hours or unpaid overtime in the survey period, but are otherwise compensated during the rest of the year for their overtime; employees may receive non-monetary benefits through a salary-sacrifice arrangement; and there is potential mis-measurement in how earnings and hours are reported.

479. This is despite the ABS making it clear that the survey will not be used for compliance.

480. Productivity Commission (2015a, p. 203).

481. Leigh (2007), Nelms et al (2011), Bray (2013) and Productivity Commission (2015a).

482. These include apprentices and trainees, people who receive junior rates, and employees with a disability.

However, research that explores these reasons concludes that the most likely explanation for reported hourly wages below the minimum is non-compliance with labour laws, particularly because the patterns of payment below minimum wage largely reflect anecdotal evidence about where non-compliance occurs.⁴⁸³

We construct our measure of underpayment using the national minimum hourly wage rate for the year that the survey was conducted. To account for small errors in recall, and to measure the distribution of underpayment, we define underpayment as being paid either at least zero, one, three, or five real dollars below the national minimum hourly wage.⁴⁸⁴ One, three, or five real dollars are Average Weekly Ordinary Time Earnings (AWOTE)-adjusted, 2022 dollars. We restrict our analysis to employees older than 20, to exclude those that receive junior pay rates well below the national minimum wage,⁴⁸⁵ and who are paid more than zero dollars an hour.

We apply a casual loading of 25 per cent to the minimum wage where employees are defined as casual (EEH survey) or do not have annual leave entitlements (COE survey).

This definition of underpayment is conservative because it does not account for underpayment of award conditions and penalty rates, which are often higher than the minimum wage. It also does not capture underpayment that relates to underpaid superannuation, or cashback arrangements.

483. Nelms et al (2011).

484. Analysis in the UK found at least 20 per cent of underpaid jobs reported a rate of £5.50, when the minimum wage was £5.52: Nelms et al (ibid, p. 41).

485. Including or excluding 21-year-olds made no difference to the results.

A.5 Measuring the extent of migrant underpayment

We use both surveys to construct a range of likely underpayment in Australia,⁴⁸⁶ with a blend of the EEH and COE as a lower bound and just the COE as an upper bound (noting our conservative choice of how to define underpayment) (see Figure 1.4).

We look at three groups of employees: migrants who arrived in Australia less than five years ago, migrants who arrived between five and nine years ago, and long-term residents. Long-term residents are migrants who have been in Australia for at least 10 years, or people who were born in Australia.

The EEH survey does not report migrant status, so to create our lower bound we scale the data in COE to reflect the rate of underpayment in EEH.

We do this by first calculating the ratio between the overall rates of underpayment in the COE and EEH. For example, in 2018, the overall rate of underpayment of at least three real dollars below minimum wage in COE was 5.4 times bigger than in EEH. We then scale the rate of underpayment for each migrant group in the COE by this ratio to arrive at our lower bound. The proportion of employed migrants who arrived less than five years ago and who were paid at least three real dollars below the national minimum hourly wage was 13.5 per cent in the COE. Dividing by 5.4 gives us a lower bound of 2.5 per cent.

486. We also used the Household, Income, and Labour Dynamics in Australia (HILDA) survey as a point of comparison, with the results broadly similar to the COE survey. However, given that it is not representative of migrants since the top-up sample that occurred in 2011 (see Sherrell (2019)) and is subject to the same rounding and recall bias as the COE survey, we do not use HILDA in our final estimates.

A.6 Measuring the effect of demographics and job characteristics on underpayment

We run a logistic regression using microdata from the COE survey to assess the effect of demographic characteristics and job characteristics on the likelihood that an employed individual is paid below the minimum wage (in their main job).

This enables us to assess whether it is migrants' characteristics that drive the higher rates of underpayment we observe (for example, because migrants are more likely to be young and work in lower-skilled jobs), or whether there is something inherent about their migrant status that makes them more vulnerable to underpayment (such as visa conditions, language barriers, or discrimination).

The outcome variable in Table A.1 is whether an employee is paid at least three real dollars below the national minimum hourly wage. We use this measure because it captures substantial underpayments, as opposed to minor underpayments, which are more likely to be unintentional.

The point estimates do not materially change with other outcome measures. Other outcome measures tested are: zero, one, and five dollars below the national minimum hourly wage, as well as whether employees were paid at least 30 per cent, 20 per cent, or 10 per cent below the minimum wage. We also ran the regression using the survey weights and unweighted, and the results did not materially change.

Controlling just for demographic characteristics, we find that migrants are significantly more likely to be underpaid than long-term residents (Figure A.1). Recent migrants (less than five years in Australia) are more than 2.7 times more likely to be underpaid, and migrants who arrived in Australia between five and nine years ago are 1.6 times more likely to be underpaid.

However, when we control for job characteristics, we find the relative likelihood of underpayment falls – recent migrants are 1.45 times more likely than long-term residents to be underpaid, and migrants who arrived between five and nine years ago are 1.17 times more likely than long-term residents to be underpaid. This suggests migrants' job characteristics, such as skill level, form of employment, and industry, are important drivers of underpayment, but migrant status is more important.

Demographic characteristics associated with underpayment include age, location, and education. Gender was found not to have an association with underpayment. We observe a non-linear relationship with age, reflecting that young people and older people are more likely to be underpaid.⁴⁸⁷ Before controlling for industry, employees outside capital cities are more likely to be underpaid than employees in capital cities, probably due to the high rates of underpayment in agriculture. But after controlling for industry and other job characteristics, this relationship swaps and capital-city employees are 1.11 times more likely to be underpaid than their regional counterparts.

More education is also associated with a lower likelihood of being underpaid. But once job characteristics are controlled for, VET-qualified employees are no more likely to be underpaid than employees with a bachelor's degree or higher, but they are both less likely to be underpaid than employees with no tertiary qualification.

Job characteristics that are associated with underpayment include whether an individual was part-time, the skill requirements of their job, and their industry.

Employees in part-time jobs are 1.15 times more likely than full-time workers to be underpaid. Employees in skill level 1 jobs (the highest

skill level) are the least likely to be underpaid. Less-skilled workers are more likely to be underpaid. Employees with the lowest-skilled jobs (skill level 5) are three times more likely to be underpaid than skill level 1 employees.

Employees in agriculture and hospitality are more likely to be underpaid than employees in the mining industry, after controlling for the fact that employees may be in more insecure work and may have less-skilled jobs (see Figure A.1).⁴⁸⁸

Casuals are six times more likely than non-casuals to be underpaid. But this finding should be treated with caution, because casuals work more irregular hours and their reported earnings are more likely to be inaccurate.⁴⁸⁹

We restrict our sample to employees, so in theory, none of them should be independent contractors. However, the ABS has different frameworks for defining the employed population, and for defining employee arrangements. As a result, employees can be classified as independent contractors.⁴⁹⁰

The fact that independent contractors are more likely to be underpaid should not be interpreted as evidence of 'sham contracting', because there may be legitimate reasons employees are classified differently under the two systems.⁴⁹¹

488. Combined with the finding that regional workers are less likely to be underpaid once industry is controlled for, there is very strong evidence that underpayment is common in the agricultural industry.

489. Failure to pay the 25 per cent casual loading explains part, but not all, of the high estimate. When our underpayment measure is whether employees are paid at least 30 per cent below the minimum hourly wage, the point estimate drops from 5.9 to 4.5.

490. See ABS (2022g) for more detail.

491. We controlled for employment arrangements, because they can affect whether the minimum wage should apply. But our results do not change materially according to whether we include or exclude employment arrangements.

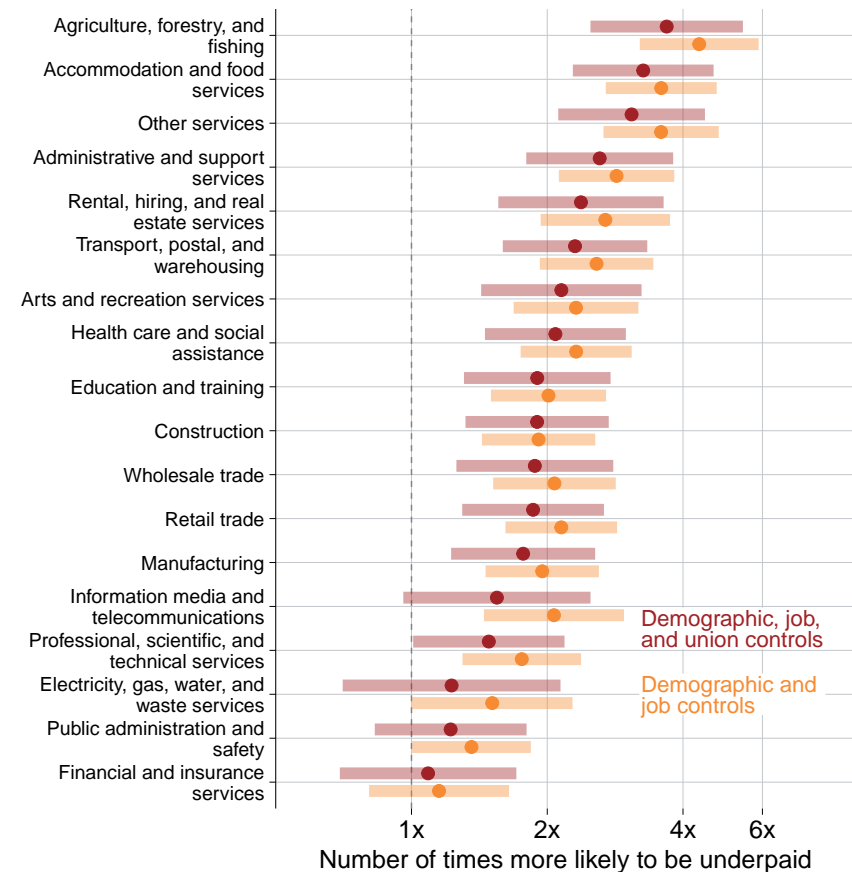
487. We also did the analysis restricting our population to 20-64 year-olds and the results did not change.

Non-unionised employees are 1.6 times more likely to be underpaid than employees who are members of a union, after controlling for demographic and job characteristics (Table A.1).⁴⁹²

We tested for a variety of interactions, including: migrant status and whether the employee was studying; migrant status and whether the employee worked in agriculture; migrant status and whether the employee was in a regional area. But because of the small populations in the survey (for example, international students) these tests were insufficiently powered to detect any significant effects.

Figure A.1: Employees in agriculture and hospitality are most likely to be underpaid, even after accounting for job characteristics

How likely employees are to be paid at least \$3 below the minimum wage, compared to employees in the mining industry



Source: Grattan analysis of ABS (2022a).

492. We include this as a separate regression because union status is asked only every two years.

Table A.1: Regression results

Outcome variable: Paid \$3 (real) below the national minimum hourly wage	Just demographic controls		Demographic and job controls		Demographic, job, and union controls	
Migration status (Long-term residents)						
Arrived between 5 and 9 years ago	1.60	(0.076)	1.17	(0.059)	1.15	(0.078)
Arrived less than 5 years ago	2.76	(0.112)	1.45	(0.064)	1.42	(0.085)
Age						
Age	0.82	(0.004)	0.90	(0.005)	0.90	(0.007)
Age squared	1.00	(0.000)	1.00	(0.000)	1.00	(0.000)
Location (Regional)						
City	0.97	(0.025)	1.11	(0.031)	1.12	(0.042)
Highest education achieved (Bachelor's degree or higher)						
Completed Year 12	2.68	(0.103)	1.45	(0.061)	1.36	(0.077)
Some school/other	3.11	(0.132)	1.44	(0.068)	1.43	(0.089)
Vocational qualification (cert 3 or higher)	1.68	(0.063)	1.04	(0.043)	1.034	(0.057)
Gender (Female)						
Male	1.23	(0.030)	1.04	(0.029)	1.049	(0.040)
Full-time status (Full-time)						
Part-time			1.16	(0.036)	1.12	(0.046)
Casual status (Permanent)						
Casual			5.92	(0.177)	5.40	(0.217)
Form of employment in main job (Employee)						
Independent contractor			1.59	(0.117)	1.60	(0.163)
Skill level (Skill level 1 - most skilled)						
Skill level 2			1.54	(0.093)	1.41	(0.113)
Skill level 3			2.51	(0.136)	2.45	(0.174)
Skill level 4			2.09	(0.010)	1.89	(0.120)
Skill level 5			3.03	(0.155)	2.87	(0.195)
Union status (In union)						
Not in union					1.59	(0.109)
Year fixed effects		Yes		Yes		Yes
Industry fixed effects (division)		No		Yes		Yes
Pseudo-R2		0.0581		0.193		0.1861
Observations		175,133		175,133		97,603

Notes: Base category in brackets. Union status is asked only every two years. City defined on Greater Capital City Statistical Areas.

Source: Grattan analysis of ABS (2022a).

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