



Senate Committee on Temporary Migration
By email: temporarymigration.sen@aph.gov.au

27 March 2020

Dear Committee,

Submission to the Inquiry Temporary Migration

Thank you for the opportunity to make a submission to the abovementioned inquiry.

Please find **enclosed** Unions NSW's submission, accompanied by Annexure A "Lighting Up the Black Market: Enforcing Minimum Wages" and Annexure B "Wage Thieves: Enforcing Minimum Wages", which are both publications of Unions NSW.

Unions NSW wishes to apologise to the Committee for the delay in providing our submission. Noting the rapidly changing nature of the COVID-19 pandemic and its effects on workers, our resources have been redistributed on an urgent basis. We would be very grateful for the Committee's understanding in accepting this submission after the due date.

We look forward to making additional contributions to the inquiry process as required.

Yours sincerely,

Mark Morey
Secretary | Unions NSW

Unions NSW Submission

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

27 March 2020



Unions NSW
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Introduction

1. Unions NSW is the peak body for trade unions and union members in New South Wales with 48 affiliated trade unions and Trades and Labour Councils, representing approximately 600,000 workers across New South Wales. Affiliated trade unions cover the spectrum of the workforce in both the public and private sectors.
2. Unions NSW welcomes the opportunity to make a submission in relation to the impacts of temporary migration and commends the Senate for referring for inquiry the impact temporary migration has on the Australian economy, wages and jobs, social cohesion and workplace rights and conditions (the **Inquiry**).
3. Unions NSW and its affiliated unions have a proud history of engaging in the parliamentary process to protect and represent the interests of union members. Unions NSW frequently makes submissions to inquiries involving industrial relations and other issues which may impact members.
4. Unions NSW always endeavours to preserve the rights of migrant workers, who currently constitute 11%¹ of the Australian workforce, representing the second largest migrant workforce in the world². Our work in this area demonstrates that foreign workers in Australia often suffer the double standard of seeking employment in a parallel labour market which maintains inadequate compliance to Australian labour laws. More recently, our work scope has extended to social and housing inadequacies experienced by migrant workers, particularly in the face of the current Coronavirus (**COVID-19**) pandemic.
5. Two reports produced by Unions NSW which explore Wage Theft and its effects on migrant workers are annexed to this submission. **Annexure A** is “Lighting Up the Black Market: Enforcing Minimum Wages” (2017) and **Annexure B** is “Wage Thieves: Enforcing Minimum Wages” (2018). Both reports contain audits of job advertisements directed at temporary migrant workers and support this submission.
6. This submission will demonstrate the need for increased pathways to permanency for migrant workers who come to Australia, engage in society, pay taxes and enrich our communities. It will also discuss the economic stagnation caused by the high rotation of migrant workers and the discrimination and exploitation experienced by this group.

¹ Senate Education and Employment References Committee, Commonwealth of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (2016) 15.

² Organisation for Economic Cooperation and Development, *International Migration Outlook 2019* (online edition, 2019) chapter 3.

7. This submission will also make some current observations and call for urgent reform where COVID-19 and its impact on temporary migrant workers in Australia are concerned.
8. In the view of Unions NSW, the migration system currently operating in Australia is cultivating a class of temporary visa holders who are at all times exceedingly vulnerable³.

³ Senator Kim Carr 'Speech on the Migration Legislation Amendment (2017 Measures No. 4) Regulations' (Speech delivered at in the Australian Senate, Parliament House, Canberra, 5 December 2017) cited in Chris F. Wright and Stephen Clibborn, 'A guest-worker state? The declining power and agency of migrant labour in Australia' (2020) 31 *The Economic and Labour Relations Review* 34, 51.

Executive Summary

In respect of this inquiry, Unions NSW makes the following recommendations:

- (1) Create a firewall between the Fair Work Ombudsman and the Department of Home Affairs to facilitate temporary migrant workers to seek redress for underpayment without the fear of visa cancellation.
- (2) Develop a National Labour Hire Registration Scheme to improve visibility and accountability throughout industries.
- (3) Increase obligations on employers to put local workers and existing temporary migrants through training to fill roles.
- (4) Increase the Temporary Skilled Migration Income Threshold to reflect indexation since its last increase effective 1 July 2013.
- (5) Overhaul the labour market testing requirements to ensure that this process cannot be manipulated by employers.
- (6) Require employers to better investigate the possibility of employing local and existing migrant workers into available roles before seeking new migrant workers.
- (7) Enact policies requiring universities and colleges to create schemes specifically designed to integrate international students with their local peers.
- (8) Require universities to take responsibility for compliance with industrial laws by employing entities on their campuses. This can also be viewed as a supply chain liability.
- (9) Abrogate the 88 days of farm work required for Working Holiday Makers to secure their second-year visa.
- (10) Extend the time a Working Holiday Maker can stay with the same employer from six to 12 months.
- (11) Vest courts with powers to make additional enforcement orders including adverse publicity orders and banning orders.
- (12) Task the Department of Home Affairs with performing “welfare” checks on visa-holder workers and monitoring abuse of the scheme by employers.
- (13) Immediately reduce filing fees for applications involving Wage Theft in any Court with Small Claims jurisdiction to be equal to the Fair Work Commission application fee.
- (14) Reform the Small Claims process by creating a new cause of action in the Fair Work Commission.
- (15) Create a process to grant visa extensions to migrant workers who have proceedings on foot in relation to an employment matter.
- (16) Better Government regulation of migration agents and lawyers and increased funding to community legal centres who represent migrant workers.
- (17) Government funding to Unions NSW migration law program Visa Assist to extend the program nationally.

- (18) Immediately extend welfare support to all temporary migrants that remain in Australia during the COVID-19 pandemic and are impacted by the economic crisis triggered by the virus and the government's response to controlling the spread of the virus.
- (19) Increase accessibility of information about COVID-19 by publishing public health information and Government regulation in languages commonly used by migrant workers.
- (20) Provide immediate funding to union migration service Visa Assist, to facilitate the assisted navigation of the migration system during this uncertain time.

Unions NSW Submission Overview

9. This submission is broken into sections which correlate with the Inquiry's Terms of Reference as follows:
- a) government policy settings, including their impact on the employment prospects and social cohesion of Australians;
 - b) the impact of temporary skilled and unskilled migration on Australia's labour market;
 - c) policy responses to challenges posed by temporary migration;
 - d) whether permanent migration offers better long-term benefits for Australia's economy, Australian workers and social cohesion;
 - e) the impact of wage theft, breaches of workplace rights and conditions, modern slavery and human trafficking on temporary migrants; and
 - f) the effects of COVID-19 on temporary migrants.
10. In each section, a list of recommendations relating to that issue will be included where relevant.
11. Presently, Australia's migration model and visa scheme are divided into three main programs; migration, temporary entry and humanitarian. Of these, the temporary entry program is the largest, with almost 2 million temporary migrants in Australia in early 2019⁴.
12. Temporary migrant workers constitute approximately 6 % of the workforce in Australia⁵. The number of temporary work visas has theoretically been uncapped, with demand for migration at the core of our system⁶. Most notably, the number of international students coming to Australia has significantly increased in recent years⁷. This intake is Australia's 3rd biggest export, adding a record high of \$37.6 billion dollars to the economy in the 2018-19 financial year⁸.
13. For the purpose of this submission, "temporary migrant workers" and "migrant workers" will be used interchangeably. These terms include all foreign-born workers in Australia who hold a temporary visa with working rights but primarily international students, Working Holiday Makers (**WHMs**) and holders of a variety of skilled working visa, including the Temporary Skill Shortage visa (**TSS**).
14. A variety of visa subclasses exist for skilled temporary migrants, including for those working in regional areas. Skilled working visas typically grant the holder the right to stay 2 – 4 years in

⁴ Committee for the Economic Development of Australia, *Effects of temporary migration* (2019) 8.

⁵ Migrant Workers Taskforce, Commonwealth of Australia, *Report of the Migrant Workers' Taskforce* (2019) 6.

⁶ Committee for the Economic Development of Australia, *Effects of temporary migration* (2019) 38.

⁷ Migrant Workers Taskforce, Commonwealth of Australia, *Report of the Migrant Workers' Taskforce* (2019) 6.

⁸ Leith van Onselen, *Australia's \$37.6b international student export con* (25 November 2019) Macro Business <<https://www.macrobusiness.com.au/2019/11/australias-37-6b-international-student-export-con/>>.

Australia and some impose conditions around who the holder must work for (i.e. a sponsoring employer) and how much they must be paid annually⁹.

15. Australia is a proudly diverse and welcoming nation. However, evidence shows these values are not consistently and readily replicated when it comes to the experience of migrant workers. Exploitation is rife and the current system prevents foreigners from setting down roots and becoming integrated into Australian society.
16. This submission provides Unions NSW's insight into the rotating door of migrants unable to seek permanent conditions in Australia and the problems this presents on various fronts. It is Unions NSW's view that temporary and permanent pathways for migrant works should be linked, to guarantee equal working conditions for all, and permit and encourage foreigners to become a part of our society.

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

17. In the opinion of Unions NSW, the current temporary migration system is convenient for the Federal Government for three key reasons:
 - i. Migrant workers are not familiar with the Australian industrial environment, meaning they are less likely to participate in formal and informal industrial bargaining processes. As a result, conditions of employment are kept down through the high turnover of workers. As a result, wages in entire industries can stagnate.
 - ii. Migrant workers are often liable to a higher rate of income tax and, depending on their home country, cannot access Medicare (or a reciprocal health agreement), public education or government financial support. The economic result of this works to the advantage of the Government both now and in the future¹⁰. It is estimated by the Migration Council of Australia that by 2050, migrant workers in Australia will be contributing 10% more to the economy on average than existing Australian workers¹¹.
 - iii. Migrant workers, due to their relatively short stay in Australia with limited opportunity to progress to permanent residency and citizenship, do not have the opportunity to vote or otherwise have their say about their experience in the migration system and

⁹ Department of Home Affairs, *Getting a visa* (15 November 2019) Immigration and citizenship <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing>>.

¹⁰ Productivity Commission, Commonwealth of Australia, *Migrant Intake into Australia* (2016) v.

¹¹ Migrant Council of Australia, *The Economic Impact of Migration* (2015) 2.

how it should be remodelled for migrant workers arriving in the future. It goes without saying that the experience of temporary migration perpetuates itself.

18. Through this convenience and a significant level of complacency, Unions NSW believes that Australia has inadvertently created a guest worker scheme akin to the Kafala system widely used in Gulf countries, the practical effect of which is a second-tier labour market where many migrants are treated as second-class citizens¹². This second labour market has been perpetuated not by the endorsement of the public, as in the Persian Gulf, but by our Federal Government not correcting industrial and visa laws that are failing to achieve their purpose, and the continued and systematic exploitation of migrant workers by employers who are well aware of the power they can wield.
19. This second-tier market is both created and propagated by the distinct lack of pathways to permanent residency for migrants to Australia. A 2019 report by the Committee for Economic Development of Australia “Effects of temporary migration” (**CEDA Report**) demonstrated that on average, 55% of temporary skilled migration visa holders were receiving permanent residency within an average of 5 years¹³. The data, which is provided by the Department of Immigration and Border Protection showed that the remaining 45% of these visa holders leave Australia within 16 years. By contrast, the CEDA Report demonstrates 84% of international students leave Australia within 20 years of receiving their first visa, with the remaining 16% who gain permanent residency doing so after an average of 4 years.
20. For both groups, it is common for visa holders to apply for and hold several successive visa subclasses in order to prolong their stay before acquiring permanency. Bridging visas are frequently relied on as applicants wait for the outcome of more long term visa applications. In March 2019, there were 230,000 people in Australia holding a bridging visa¹⁴. This is the highest recorded figure of bridging visas and to our mind demonstrates the significant demand and urgent need for greater permanent migration schemes.

¹² Williams Jason Essomba, “Labor Immigration into the Gulf: Policies and Impacts” Sciences Po Kuwait Program (2017) 9.

¹³ Committee for the Economic Development of Australia, *Effects of temporary migration* (2019) 36.

¹⁴ *Ibid*, 43.

Case Study: Jessie

Over the last 8 years, Jessie has applied for numerous visas in order to obtain her permanent residence. In 2012, she applied for a student visa to undertake a foundation course at the University of Sydney. The following year, she applied for a second student visa and commenced a Bachelor of International and Global Studies and a Bachelor of Laws. Following completion of these degrees in 2018, she applied for a graduate visa 485 in order to obtain full working rights and to gain some professional experience. In 2019, she then applied for a skilled visa 189 and was finally granted permanent residence.

21. Unions NSW knows from our deep involvement in migrant groups that the transiency associated with not having a pathway to permanency in Australia breeds a vulnerability to exploitation. This vulnerability will be specifically discussed later in the submission. Prior to the COVID-19 crisis, there were one million temporary migrants rotating through our workforce; meaning that 11% of workers in Australia were already transitory. The effect of the pandemic now not only means that a large portion of foreigners are unemployed and unable to seek Government assistance in our country but are disenfranchised and extremely isolated and without family support.
22. Many jobs such as fruit picking are only done by migrants and only out of necessity, primarily to gain a second-year WHM visa. If greater pathways were in place, there might be a greater chance of people staying in these rural areas and setting down roots in rural communities. The transiency of migrant workers is strongly linked to the vulnerability to which they are exposed by the current migration system.
23. The general vulnerability of impermanence also extends to a vulnerability to exploitation by employers, the result of which can be a suppression of wages and conditions for all workers.
24. Whilst there exists a systemic issue of underpayment of wages and conditions (**Wage Theft**) in Australia, it is undeniable that migrant workers are significantly more likely to be exploited by their employers and less likely to make a complaint to this effect or recover unpaid wages. This reluctance is frequently linked to migrants' perceived personal limitations such as poor English language, lack of knowledge of rights and or/lack of understanding of Australian legal culture¹⁵.

¹⁵ Laurie Berg and Bassina Farbenblum, 'Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia' (October 2018) 5.

Frequently, migrant workers continue to suffer exploitation as they are afraid that speaking up may negatively affect their visa status.

25. Many migrant workers exist in an ongoing state of fear that their conduct or failure to comply with directions of employers, however unreasonable, will have negative impacts upon their visa. The *National Temporary Migrant Work Survey* found 4% of participants had disclosed being threatened with reports to the Department of Home Affairs by someone in their workplace¹⁶. For these reasons, migrant workers are significantly less likely to confront their employer about their working conditions, nor make a complaint to the Fair Work Ombudsman (**Ombudsman**).
26. Unions NSW would like to see the cultivation of a system in which all workers, but especially migrant workers feel safe and comfortable in raising their concerns. A strong element of this process will be developing clearer and more accessible pathways to permanency.
27. In addition, and in the more immediate term, Unions NSW recommends the careful development of a firewall between the Department of Home Affairs and the Ombudsman to facilitate a clear delineation between a worker's visa and their inalienable workplace rights. The administrative spotlight on the absolute nature of workplace rights will inevitably benefit all workers in Australia through the clear message that non-compliance with industrial laws will not be tolerated.
28. Another means of encouraging migrant workers to feel stable and make complaints about exploitation they are experiencing would be the employment and specific distribution of bilingual and multilingual Ombudsman inspectors to areas and industries with a particular cultural or linguistic concentration. For example, the US Department of Labor has made concerted outreach efforts to Hispanic populations through the We Can Help campaign which centred upon engaging Spanish speaking workers in relation to their rights under the *National Labor Relations Act*¹⁷. This campaign was intended to supplement the material circulated in workplaces and led to a heightened rate of enforcement of the industrial rights of migrant workers.
29. Employing bilingual and multilingual Ombudsman inspectors may also help to decrease exploitation occurring at all. The Unions NSW reports at **Annexure A** and **Annexure B** each contain an audit of job advertisements targeted at migrant workers. If the Ombudsman's

¹⁶ Ibid, 43.

¹⁷ David Weil, *The Fissured Workplace* (Harvard University Press, 2017) 253.

capability were to be extended to accessing exploitative material in languages other than English, the manipulative behaviour may be stopped before it results in Wage Theft.

30. The job advertisement audits in **Annexure A** and **Annexure B** are just another indicator in the multitude of evidence that temporary migrant workers experience a disproportionate exposure to exploitation and underpayment.
31. Noting the chasm of labour rights for many migrant workers in Australia, Unions NSW's Visa Assist program, a collaboration with the Immigration Advice and Rights Centre (**IARC**), facilitates union members who are visa holders to resolve immigration issues whilst their union supports their workplace rights. Visa Assist is further discussed in paragraphs 99 to 102 of this submission.
32. Unions NSW also believes that many of the visa restrictions placed on temporary migrant workers operate to increase their vulnerability. These will be further discussed in the section "Policy responses to challenges posed by temporary migration".
33. Issues associated the experience of migrant workers can also be attributed to policy surrounding the obligations upon and incentives available to employers. An evaluation of the industrial landscape and slow or no growth in wages will show that there is presently insufficient obligation or incentive for employers to train local workers and existing migrant workers to perform roles¹⁸. As a result, where existing workers are not upskilled, new migrant workers are often brought in to fill roles for a short period (i.e. up to two years), after which time they are replaced by another new migrant worker on the same salary. This is one example of how the current availability for employers to fill positions with temporary workers in whom they do not need to invest suppresses wage growth.
34. This is illustrated by the resources boom in Western Australia and North Queensland in the early 2000s, where migrant workers heavily populated mining jobs and were able to earn significant amounts of money in short stints. Whilst many local workers also participated in this boom, Unions NSW is of the opinion that Australia missed an enormous opportunity to develop a skilled local workforce who could have progressed through this industry and for the most part kept the money earned in the Australian economy.

¹⁸ Committee for the Economic Development of Australia, *Effects of temporary migration* (2019) 85.

Sham Contracting

35. Another trend Unions NSW has seen rising in recent years which disproportionately affects migrant workers is companies disguising an employment relationship as one of 'client' and 'independent contractor', or **Sham Contracting**. Sham Contracting encourages an arm's length commercial relationship between parties and usually involves the purported 'client' (the employer) paying the 'independent contractor' (the employee) an agreed hourly rate and not affording entitlements such as penalty rates and leave accruals contained in the applicable industrial instrument. This practice also seeks to evade income tax requirements.

Case Study: Didier

Didier is an international student from Colombia. He worked for a cleaning company Monday to Friday 09:00 – 13:00 and Sundays 12:30 – 16:30, regularly attended the company's training sessions, wore a company uniform and was almost always available at short notice to fill roster vacancies.

At the commencement of his employment contract the employer required Didier to provide an ABN and demanded he did not disclose the name of his employer to third parties.

Didier was wrongly classified as an independent contractor; the relationship between he and his employer, including the level of control present amounted to an employment relationship.

36. In 2018, food delivery company Foodora was found to be in a sham contracting arrangement with their riders and owed more than \$8 million to its workers, who the Fair Work Commission (**Commission**) found to be employees at law¹⁹. In this case, Foodora workers were required to wear and use company-branded merchandise and be available for certain shifts. The Commission found the company exercised a significant level of control over its workers that they were employees. As with platforms like Uber Eats and Deliveroo, a significant number of Foodora's exploited delivery riders were international students²⁰.
37. Sham Contracting is a particularly common practice in the construction industry, which is another sector with a large representation of migrant workers. PricewaterhouseCoopers recently found the annual underpayment bill in the construction sector is as high as \$320

¹⁹ *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.

²⁰ Peggy Giakoumelos, "Horrible hunger games": Protesters accuse Uber Eats of being a wage cheat' SBS (online), 14 May 2019 <<https://www.sbs.com.au/news/horrific-hunger-games-protesters-accuse-uber-eats-of-being-a-wage-cheat>>.

million²¹. It is; however, hardly alarming businesses are so readily engaging in this risky conduct which limits and endangers both workers and the economy. Since the Australian Building and Construction Commission commenced in its present form in 2016, it has not prosecuted a single employer for Sham Contracting but has directed \$3.2 million to prosecuting unions in the last three years²².

38. Of more immediate concern is the current unknown number of temporary migrants in Australia who are without work, and unable to return to their home countries during the COVID-19 crisis. To date, this group has not been included in provisions for access to social security and even if they have the option and ability to uproot and return home, are unlikely to find work in their home countries, where the conditions may be worse. It is very unclear what will happen to this group of people. Unions NSW recommends that Centrelink programs are extended to existing temporary migrants for the duration of the COVID-19 crisis.
39. **Recommendation:** Create a firewall between the Ombudsman and the Department of Home Affairs so vulnerable workers feel they can seek assistance and take action against those who have exploited them, without the additional fear of visa cancellation or deportation²³.
40. **Recommendation:** develop a National Labour Hire Registration Scheme to improve visibility and accountability throughout industries.
41. **Recommendation:** increase obligations on employers to put local workers and existing temporary migrants through training to fill roles.

The impact of temporary skilled and unskilled migration on Australia's labour market

42. In the view of Unions NSW, the ability for foreigners to come to Australia and work is inherently positive. It allows jobs to be filled, diversifies the workforce and drives the continued growth of the nation's economy²⁴. However, the present demand-driven temporary migration scheme operating in Australia causes a rotating door of both migrants and visas and reduces security for workers. The high rotation caused by the inherent transience of temporary migration negatively effects the labour market.

²¹ Ewin Hannan, 'ABCC defends focus on pursuing unions', *The Australian* (online), 22 January 2020 <<https://www.theaustralian.com.au/nation/politics/abcc-defends-focus-on-pursuing-unions/news-story/b6290507335c02c736b6b35ab279028d>>.

²² Ibid.

²³ Migrant Workers Taskforce, Commonwealth of Australia, *Report of the Migrant Workers' Taskforce* (2019) 51.

²⁴ Committee for the Economic Development of Australia, *Effects of temporary migration* (2019) 59.

43. The ease with which skilled and unskilled workers can come to Australia, and the difficulty with which they can attain permanency and put down roots in the community undermines conditions and wage rises. As each new worker comes into a role, they can be given the salary of the worker who filled the place before them and has now left.

Skilled migration

44. In the understanding of Unions NSW, skilled migration refers to those foreigners who come to Australia on working visas for which they qualified according to their education, skill and experience in their profession. There are several visa subclasses available for workers in various occupations, which are assessed and published annually following various labour market testing processes.
45. It is undeniable that skilled migration schemes facilitate a more diverse and highly skilled workforce, both in Australia and abroad. Participating in the trade of highly-educated and skilled workers extends the capabilities of our workforces and assists in the sharing of information globally.
46. However, the means by which this trade is performed can have a negative effect on the fiscal elements of industry.
47. The current Temporary Skilled Migration Income Threshold (**TSMIT**) is \$53,900, which has remained unchanged since 1 July 2013, despite having previously been increased with annual indexation. This is a clear example of why temporary migration facilitates the stagnation of wages, with the salary expectations on employers lower for migrants than for local workers. The net result is that roles can be filled by migrants on a 2-4 year basis on a lower starting wage and can then be replaced by another who fits that category.
48. Ordinarily, skilled visas are made available for occupations on the basis that there are insufficient suitable local workers to perform these roles²⁵. Despite the assessment of skill shortages, Unions NSW believes there is insufficient policy in respect of labour market testing and that this testing can be manipulated by industries seeking to maintain lower wages and conditions through employing foreigners²⁶.
49. Unions NSW would like to see an overhaul in policy in relation to the assessment of skills shortages, namely:

²⁵ Ibid, 78.

²⁶ Senate Education and Employment References Committee, Commonwealth of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (2016) 75.

- more stringent regulation of labour market testing such that the system cannot be manipulated to facilitate industries acquiring cheaper foreign labour; and
 - a requirement for industries to have to take account of temporary migrants who are already in Australia and may be aided (for example through training and facilitating pathways to permanency) to fill the skills gap in that industry.
50. It is clear to Unions NSW that skilled migration benefits Australia, however, needs to be overhauled such that foreigners who come here to work can move towards permanency and the labour market is adequately assessed and not manipulated by employers looks for cheaper worker.
51. **Recommendation:** increase the TSMIT to reflect indexation since its last increase effective 1 July 2013.
52. **Recommendation:** overhaul the labour market testing requirements to ensure that this process cannot be manipulated by employers seeking cheaper labour.
53. **Recommendation:** require employers to better investigate the possibility of employing local and existing migrant workers into available roles before seeking new migrant workers.

Unskilled migration

54. Unions NSW acknowledges that unskilled temporary migrants participate in many different industries. It is particularly obvious that many unskilled migrants such as international students and WHMs perform jobs that Australian workers may not want to do such as harvest and work in the gig economy. Notably, the transiency of migrant workers facilitates their participation in harvest work in rural areas. This is an effective lens through which to understand how the current migration system is failing both the economy and migrant workers.
55. The Ombudsman's Harvest Trail Inquiry report revealed that almost 70% of businesses involved in seasonal harvesting of fresh fruit, vegetables and wine grapes (the **Harvest Trail**) employed visa holders, who were primarily WHMs aged 18-31²⁷. In 2016, an Ombudsman inquiry into the 417 Working Holiday Visa Program acknowledged that the 88-day requirement had facilitated the extensive exploitation of workers²⁸. In November 2018, another Ombudsman inquiry

²⁷ Fair Work Ombudsman, Commonwealth of Australia, *A report on workplace arrangements along the Harvest Trail* (2018) 2.

²⁸ Fair Work Ombudsman, Commonwealth of Australia, *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program* (2016) 4.

confirmed there had been no improvement to the situation²⁹. This exploitation manifested in a variety of ways, but primarily in respect of wages and conditions. This is specifically discussed in paragraphs 78 to 81.

56. The Harvest Trail illustrates the ways that temporary migration can also suppress wages and conditions, and employers are aware of the very low risk attached to breaching industrial laws intended to protect migrant workers who are likely too afraid or ill-informed to complain.
57. The erosion of pathways to permanency means that unskilled migrants must often weigh up the risks of their residency status with the exploitation they will likely face at work as a result of that status. Unions NSW strongly recommends the removal of visa conditions which bonds unskilled migrants to work and employers as a means of reducing the choice to be made between residency and workplace rights.

Policy responses to challenges posed by temporary migration

58. It is Unions NSW's firm belief that Australia needs an overhaul of its migration system with an increase in permanent pathways and regulation to prevent exploitation of migrant workers. Migration is an essential element to the population growth Australia needs, and Unions NSW is cognisant that this system requires better mechanisms to facilitate foreigners joining our communities and benefitting them.
59. As is of particular impact during the COVID-19 crisis, consideration needs to be given when changing the Australian migration system to the possibility of expanding migrant workers' access to the nation's public infrastructure such as health care and education. Such a change will increase the inclusion of migrants in the community and have practical economic outcomes for migrant workers and their families. Unions NSW believes that as migrant workers are taxpayers (and often pay tax at a higher rate), they should equally benefit from tax-funded services.
60. In addition to a change in the principals underpinning the migration system, greater support structures need to be created to assist migrants to adapt to their new environment and not become isolated. The first 3 months after a migrant's arrival is particularly crucial. This is a period when newcomers are most open to a deepened involvement in their new society.

²⁹ Fair Work Ombudsman, Commonwealth of Australia, *A report on workplace arrangements along the Harvest Trail* (2018).

However, if migrants feel they have experienced racism or been ostracised, they will often retreat to their own cultural community for social acceptance³⁰.

61. To this end, Unions NSW would also like to see an expansion of the family reunion visa schemes. Family connection is critical to social inclusion and participation and allows for a broader social engagement. For example, a migrant worker whose child attends an Australian school has the additional opportunity to become immersed in that school community. Similarly, workers who are able to bring their spouse to Australia are more likely to set down roots and make community contributions, rather than staying for the purpose of their work only and returning home with the money they have earned³¹.
62. International students are particularly vulnerable to isolation, despite social integration and immersion into the country in which they're studying being something they look forward to³².
63. Research conducted by the City of Sydney into the wellbeing of International Students found that cross-cultural relationships between local and international students were "challenging and rare", and that few programs existed in education facilities to integrate these groups and cultivate familiarity³³. The City of Sydney report also demonstrated that international students are actively seeking greater avenues to become embedded with their Australian peers and venture beyond their own cultural 'bubble'³⁴.
64. Unions NSW recommends the Government enact policy requiring universities and colleges to create schemes through which the social isolation of international students is reduced. This may involve pre-designed "buddy" systems or promoting awareness to Australian students of the unique experience of international students, as a means of fostering empathy.
65. Another policy deficiency in relation to migrant workers is the absence of an ability to or requirement for universities and colleges to ensure that people who work on campus (for example contractors and employees of food outlets) are not underpaid. Noting that many international students find work within their university or college, those facilities ought to have a greater responsibility to ensure that exploitation is not occurring.

³⁰ University of Technology Sydney Institute for Public Policy and Governance, *The Wellbeing of International Students in the City of Sydney* (Prepared for the City of Sydney) (2016) 12.

³¹ Organisation for Economic Cooperation and Development, *International Migration Outlook 2019* (online edition, 2019) chapter 3.

³² Christopher Lawson (on behalf of Australian Education International), *International higher education student satisfaction with accommodation in Australia* (2013) 6.

³³ University of Technology Sydney Institute for Public Policy and Governance, *The Wellbeing of International Students in the City of Sydney* (Prepared for the City of Sydney) (2016) 53.

³⁴ Ibid.

66. **Recommendation:** enact policies requiring universities and colleges to create schemes specifically designed to integrate international students with their local peers.
67. **Recommendation:** require universities to take responsibility for compliance with industrial laws by employing entities on their campuses. This can also be viewed as a supply chain liability.
68. Unions NSW suggests below two significant policy issues in relation to visa restrictions upon temporary migrants that should be changed to reduce the exploitation experienced by these groups.

Visa Restrictions – Students

69. Current visa restrictions placed on international students compound experiences of exploitation and require reform. International students are restricted to working 40 hours per fortnight during their course and unlimited hours during course breaks. Research has shown large numbers of international students regularly work over these restrictions³⁵. The low, often below Award rates of pay many temporary migrant workers are subjected to regularly drive them to work additional hours in order to earn a living wage.
70. The 40-hour work restriction sends international students to the cash economy to disguise their visa violation, exposing them to further exploitation and is not an effective means of ensuring this visa class is being used appropriately.
71. Given the ‘off the books’ nature of these employment relationships, migrant and student workers are unlikely to receive payslips for their work which creates an evidentiary issue when workers seek to recoup unpaid wages.
72. There is also confusion around the application of the 40-hour working limit to independent contractors, particularly those who work in transport services like taxi driving and gig economy food delivery. For these workers, although they are only earning money while driving a

Case Study: Marcello

Marcello is an international student from Brazil who has been working as a food delivery driver for almost 2 years. The company he works for classifies him as an independent contractor, but he is treated as an employee. He is not being paid superannuation and receives an average of \$12 per hour. Additionally, he must adhere to set shifts and if he does not, his future shifts may be reduced. Marcello knows this is below the minimum hourly rate but as English is his second language, his work options are limited.

³⁵ Laurie Berg and Bassina Farbenblum, ‘Wage theft in Australia: Findings of the National Temporary Migrant Work Survey’ (20 November 2017) 17.

passenger or delivering food, waiting time between jobs is still counted as 'work'³⁶. For food delivery riders, taking into account the time between jobs, the hourly rate of pay can be as low as \$6.67 per hour³⁷.

73. International students working outside of their visa restrictions are reluctant to report or seek to rectify underpayment, due to fear of alerting Government authorities to their additional working hours.

Case Study: Maria

Maria is an international student from South America and since arriving in Australia has worked in hospitality for no more than \$13 per hour. One of her employers explained to her he would declare she was working 20 hours per week for minimum wage, however, for her to receive the pay for 20 hours' work, she would need to work 36 hours per week.

74. The aim of the 40-hour work restriction is to ensure international students are genuinely studying while in Australia on a student visa. However, it is evident the intent of the restrictions is not achieving its goal. It is instead contributing to the exploitation and underpayment of workers acting as a push factor towards the need for international students to work additional hours to afford to live in Australia.
75. In the opinion of Unions NSW, the Federal Government should scrap the 40-hour limit on international students and bolster visa condition 8202 (Meet course requirements)³⁸ which already places obligations on international students in respect of attendance and academic performance requirements. This provides sufficient means to ensure students are genuinely studying and complying with their visa requirements.
76. Removing the 40-hour fortnightly work limit on international students will empower these workers to seek more legitimate jobs with employers who are more likely to pay them their legal entitlements, rather than pursuing exploitative environments by necessity. It will also mean that those students who continue to choose to work in the gig economy will not risk

³⁶ *Verma v Minister for Immigration & Anor* [2017] FCCA 69 at 15.

³⁷ Transport Workers Union, *Snapshot: on demand food delivery riders* (2018).

³⁸ Department of Home Affairs, *Check visa details and conditions* (13 December 2019) Immigration and citizenship <<https://immi.homeaffairs.gov.au/visas/already-have-a-visa/check-visa-details-and-conditions/see-your-visa-conditions#>>.

being penalised for breaching their visa conditions when their waiting time is counted as “work”.

77. Like many students who engage in, learn from and enrich our workplaces throughout their studies, international students should be given greater opportunity to earn a living, gain experience and immerse themselves in a variety of areas of Australian life. By removing this impractical condition, the culture of exploitation in which many students work in excess of 40 hours per fortnight but receive pay for far less can be eliminated.

Visa Restrictions – Working Holiday Makers

78. The requirement for WHMs to undertake 88 days of regional work to receive a second year visa is another indicator of the vulnerability of temporary migrant workers. An additional visa condition preventing WHMs from working for one employer for longer than six months severely limits employment opportunities and creates another barrier for reporting exploitation³⁹.
79. The underpayment of WHMs is a standard practice among many employers. The *National Temporary Migrant Work Survey* highlighted 32% of WHMs were paid \$12 per hour or less⁴⁰ which is consistent with the findings of the Unions NSW report which is **Annexure B** to this submission.
80. The six-month employment restriction placed on WHMs limits their employment opportunities⁴¹. Employers are reluctant to invest time into training employees, restricting workers to casual or temporary employment opportunities. WHMs who have worked for an employer for more than six months are violating their visa requirements and face the prospect of visa cancellation. This is a similar scenario to international students working in excess of 40 hours per fortnight; for both, an additional barrier is created to taking action against employers to recoup stolen wages.
81. As discussed earlier in this submission, the Ombudsman – in conducting inquiries – has found a continued level of exploitation of WHMs associated with the requirement for them to perform 88 days of regional work. Inquiries have also found it has led to increased exposure to unsafe

³⁹ Visa subclasses 417 and 462.

⁴⁰ Laurie Berg and Bassina Farbenblum, ‘Wage theft in Australia: Findings of the National Temporary Migrant Work Survey’ (20 November 2017) 26.

⁴¹ United WHY, *Vulnerabilities of Working Holiday Makers and Policy Recommendations* (2016) 9.

situations⁴², longer working hours⁴³, hazardous work environments, discrimination and sexual harassment⁴⁴.

82. Since December 2015, WHMs seeking a second year visa have had to provide pay slips to the Department of Home Affairs evidencing that wages earned during their 88 days of regional work are consistent with Award minimums⁴⁵. While the purpose of this regulation was to reduce exploitation, in practice it has accentuated the dependence of WHMs on employers providing pay slips⁴⁶ in order to remain in the country and reducing the preparedness of workers to make formal complaints.
83. Below are several examples of the many social media advertisements Unions NSW sees demonstrating common Wage Theft conditions experienced by WHMs seeking to satisfy their visa requirements:



⁴² Fair Work Ombudsman, Commonwealth of Australia, *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program* (2016) 6.

⁴³ Ibid.

⁴⁴ Senate Education and Employment References Committee, Commonwealth of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (2016) 167.

⁴⁵ Department of Home Affairs, *Specified subclass 462 work* (17 January 2020) Working Holiday Maker (WHM) program < <https://immi.homeaffairs.gov.au/what-we-do/whm-program/specified-work-conditions/specified-work-462>>.

⁴⁶ Fair Work Ombudsman, Commonwealth of Australia, *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program* (2016) 43.



Chris Kindle • Backpacker Jobs in Australia



25 February 2019 · 🌐

I've been offered a trial shift (8 hours in total) and he will pay me \$7 an hour during the trial and if accepted he will pay \$12 an hour.

Someone please tell me this is illegal?

Edit: if anyone has any work to offer then let me know!

Much appreciated.

Thanks



Victoria Kindle, Juan Romero Brufau and 178 others · 278 comments



Marta Escobar Casas • Australia Backpackers



10 November · 🗺️

'ONCE IN A LIFE TIME EXPERIENCE- WORK FOR ACCOMMODATION ON A REMOTE ISLAND IN THE WHITSUNDAYS

Hello everybody!

Palms Bay Resort are looking for some hard working team players to join us for a minimum of two weeks on our beautiful Island.

Just 20 minutes from Shute Harbour (35' from Airlie Beach), we offer a unique opportunity like no other.

For just 4.5 hours of work a day, we offer free accommodation and use of all of the resorts 4 star facilities including snorkelling, swimming, kayaking, tennis, fishing and stunning bushwalks.

All are welcome! If you would like to apply for this great opportunity then please drop me a PM and send an email to

palmsbayresort@gmail.com with

your availability, a brief introduction about yourself and current location and we will be sure to get back to you with more information if you meet the requirements.

Thanks and have a great day everyone!

PLEASE IF YOU CAN'T COMMIT FOR A MINIMUM OF TWO WEEKS OR YOU ARE NOT WILLING TO WORK FOR ACCOMMODATION DO NOT CONTACT US.'

84. Additionally, in the wake of the unprecedented bushfires experienced throughout Australia which spanned beyond the summer 2019/20 season, a government policy was enacted which permitted WHMs to satisfy their 88 day working requirement by assisting in the Government's rebuilding scheme⁴⁷. Unions NSW considers this blatant exploitation of unskilled workers and their desperation to comply with an unnecessary visa condition. Additionally, the policy puts these workers at significant risk and is an inappropriate response to a national problem.
85. On 5 November 2018, the Federal Government announced proposed changes to the Working Holiday Visa Program⁴⁸. The changes included the introduction of a third year visa option for WHMs who undertake six months of specified work in regional Australia. While the announcement lacked operational details, it is clear the focus of the changes will not disturb the priority to support agriculture businesses⁴⁹. To date, no additional measures have been implemented to combat Wage Theft or the exploitation of temporary migrant workers.
86. Despite the Ombudsman's knowledge of the abuse and exploitation of WHMs, few proactive actions have been undertaken to effectively protect these workers or to reduce exploitation. Arguably, the Government's 2018 changes continue to prioritise the labour needs of businesses and do nothing to protect vulnerable workers.
87. **Recommendation:** Place requirements upon universities and colleges to provide international students with information about their workplace rights and direct them to join their relevant union.
88. **Recommendation:** Abrogate the 88 days' farm work required for WHMs to secure their second year visa. By the Ombudsman's own admission, this requirement facilitates backpackers working for less than minimum wage⁵⁰.
89. **Recommendation:** Extend the time a WHM can stay with the same employer from six to 12 months.

⁴⁷ Migrant Workers Centre, 'Morrison Government's Backpacker Bushfire Rebuilding Scheme Invitation for Exploitation and Injury' (Media Release 24 February 2020).

⁴⁸ The Hon Scott Morrison, Prime Minister of Australia, 'Doorstep with the Member for Forde' (Media Release, 5 November 2018).

⁴⁹ Ibid.

⁵⁰ Fair Work Ombudsman, Commonwealth of Australia, *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program* (2016) 30.

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

90. Migration has been a key factor in Australia's economic success and has underpinned sustained economic growth in Australia. Our various post-war migration schemes have fundamentally shaped and strengthened economic development and will again be vital in the wake of COVID-19.
91. Recent research reveals that 28% of Australian citizens were born overseas and nearly half of all residents have at least one parent who was born elsewhere⁵¹. Over the past 70 years, Australia welcomed more than seven million permanent migrants to Australia⁵² who have diversified our community in a multitude of ways.
92. Australia's previous success with permanent migration schemes emphasises the need to rebuild pathways to permanency. Unions NSW's firm position is that it is better to bring in migrants who will come to Australia and stay, become part of the fabric of our society, put their kids into our schools and pay taxes. Currently, despite the strong desires of temporary migrants to establish themselves in Australia on a permanent basis, people feel unable to stay and set down roots. As a result, there is a lack of economic and cultural investment.
93. It is clear that offering pathways to permanent residence will bolster the Australian economy. This will come through depleted avenues for exploitation, resulting in wages being paid at the legal rates followed by commensurate income taxes.
94. Australia needs a larger population to maintain growth. The current system is a symptom of our inherent xenophobia and a cause of economic stagnation.

The impact of wage theft, breaches of workplace rights and conditions, modern slavery and human trafficking on temporary migrants

95. In the experience of Unions NSW, Wage Theft is predominately caused by the enormous opportunity that exists for employers to take advantage of their workers in order to cut costs with very little chance of being caught. A disproportionate number of migrant workers experience this illegal treatment.

⁵¹ Committee for the Economic Development of Australia, *Effects of temporary migration* (2019) 13.

⁵² *Ibid.*

96. Unions NSW understands the Ombudsman has approximately 177 inspectors conducting workplace investigations under the current system of auditing⁵³. This equates to roughly to one inspector for every 72,000 employed people in Australia⁵⁴ and is blatantly not enough to competently and adequately protect the rights of workers. Presently, the chance of an employer getting caught underpaying staff is attractively low.
97. Recent highly publicised litigation has shed light on the systematic and far-reaching exploitation of vulnerable workers in our communities⁵⁵. The 7-Eleven case, which played out over several years and included an Ombudsman's inquiry into compliance in the network⁵⁶ demonstrated underpayment was a business model and required conduct for franchisees to make a profit⁵⁷.
98. After unannounced visits by Ombudsman inspectors to 20 7-Eleven stores in September 2014, the Ombudsman reported 60% of these were underpaying staff and falsifying their payroll⁵⁸. 90% of the staff in these 20 stores reported being visa holders and of these 84% were young men on student visas⁵⁹. It became clear 7-Eleven's modus operandi was employing male international students whom they could exploit with little resistance.
99. In 2019 Unions NSW pioneered its Visa Assist program partnership with IARC to provide free immigration advice and legal assistance to migrant workers who are union members. The need for this type of service free from bias is increasingly important and the program has been operating at full capacity since its launch.

⁵³ David Marin-Guzman, 'Employer groups should police underpayments: unions', *The Australian Financial Review* (online), 5 March 2020 <<https://www.afr.com/work-and-careers/workplace/employer-groups-should-police-underpayments-unions-20200305-p54748>>.

⁵⁴ Australian Government, *Industry Information* (3 February 2020) Labour Market Information Portal <<http://lmip.gov.au/default.aspx?LMIP/GainInsights/IndustryInformation>>.

⁵⁵ Laurie Berg and Bassina Farbenblum, 'Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program' (2018) 41(3) *Melbourne University Law Review* 1035, 1038.

⁵⁶ Fair Work Ombudsman, Commonwealth of Australia, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven* (2016) 4.

⁵⁷ Adele Ferguson and Klaus Toft, '7-Eleven investigation: Business model ripping off workers, former consumer watchdog says', *ABC News* (online), 31 August 2015 <<https://www.abc.net.au/news/2015-08-31/7-eleven-business-model-ripping-off-workers-allan-fels/6733658>>.

⁵⁸ *Ibid.*

⁵⁹ Fair Work Ombudsman, Commonwealth of Australia, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven* (2016) 46.

Case Study: Darsha

Darsha came to Australia from India on a subclass 407 training visa. Before his arrival, Darsha signed a contract to work for one of Australia's biggest hotel groups. However, once he arrived, he was asked to sign a new contract which required him to pay above-market rent for accommodation at the hotel and precluded him from renting elsewhere.

Darsha was never paid overtime, despite often having to do extended shifts. When he complained about his working conditions, Darsha lost his job and his training visa was cancelled. A student visa application was then rejected by the Department of Home Affairs.

Visa Assist helped Darsha to successfully appeal the Department of Home Affairs decision, allowing him to remain in Australia.

100. Unions NSW and IARC know anecdotally that there are a number of less than transparent migration agents and immigration lawyers who mislead migrants when it comes to the rules governing their stay in Australia. In some circumstances, migrants are even encouraged to apply for visas not in their best interests.
101. Of the 4322 respondents to the *National Temporary Migrant Work Survey*, more than 2250 responded they had been victim of Wage Theft, with only 1 in 10 of these seeking to recover what was owed to them⁶⁰. Of the underpaid respondents, 32% responded they would not seek to recover stolen wages due to fear of immigration consequences or not wanting to be involved with the Government⁶¹.
102. 7% of survey respondents disclosed they had undertaken unauthorised work in contravention of their visa conditions⁶² (for example by working more than 40 hours per fortnight on a student visa), and of these 39% indicated they would not make a claim to recover unpaid wages due to fear of immigration consequences⁶³. A service such as Visa Assist is a crucial service for vulnerable migrant workers whose employment issues are increasingly intertwined with their visa conditions.
103. Wage Theft in Australia is a significant and widespread practice effecting some of our most vulnerable workers. Whilst some key legislative changes have been made such as the *Fair Work*

⁶⁰ Laurie Berg and Bassina Farbenblum, 'Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia' (October 2018) 5.

⁶¹ Ibid, 8.

⁶² Laurie Berg and Bassina Farbenblum, 'Wage theft in Australia: Findings of the National Temporary Migrant Work Survey' (20 November 2017) 46.

⁶³ Laurie Berg and Bassina Farbenblum, 'Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia' (October 2018) 40.

Amendment (Protecting Vulnerable Workers) Act 2017 (Cth) which increased penalties and extended liability for Wage Theft to franchisors in some circumstances⁶⁴, greater mechanisms for deterrence are required. It is clear from the evidence that Wage Theft is pervasive and diverse and in the opinion of Unions NSW, must be criminalised.

104. Unions NSW notes that the Federal Government accepted Recommendation 7 of the Migrant Workers' Taskforce to give courts specific power to make additional enforcement orders, including adverse publicity orders and banning orders, against employers who underpay migrant workers⁶⁵. We also note that Attorney-General Christian Porter is currently considering implementation of this recommendation and seeking community input as to the operation of the current system⁶⁶.
105. Unions NSW also supports Recommendation 7 of the Migrant Workers' Taskforce and proposes that the potential bans on offending employers from employing migrant workers be extended to include a ban on employing young people up to the age of 25. Such bans will largely protect two vulnerable groups from employers found guilty of exploitation.
106. We further propose that banning orders span a fixed term (for example, 2 years) and can only be lifted following an audit wherein the employer demonstrates they have consistently met stringent measures. Finally, Unions NSW recommends that those employers subject to a banning order are also subject to a yearly review at their own expense after its completion, to demonstrate ongoing compliance. If these reviews reveal further non-compliance, criminal sanctions may be imposed.
107. In our view, the imposition of banning orders on businesses will have a strong deterrent effect on other employers and drive behavioural change⁶⁷.
108. **Recommendation:** Vest courts with powers to make additional enforcement orders including adverse publicity orders and banning orders prohibiting employers from employing migrant workers and people under the age of 25 for a fixed term following non-compliance.

⁶⁴ Fair Work Ombudsman, 'Fair Work Ombudsman discusses new laws with franchising sector' (Media Release, 9 October 2017).

⁶⁵ Migrant Workers Taskforce, Commonwealth of Australia, *Report of the Migrant Workers' Taskforce* (2019) 9.

⁶⁶ Australian Government, *Improving protections of employees' wages and entitlements: further strengthening the civil compliance and enforcement framework* (February 2020) Attorney-General's Department <<https://www.ag.gov.au/Consultations/Pages/improving-protections-of-employees-wages-and-entitlements-strengthening-the-civil-compliance-and-enforcement-framework.aspx>>.

⁶⁷ Migrant Workers Taskforce, Commonwealth of Australia, *Report of the Migrant Workers' Taskforce* (2019) 86.

109. **Recommendation:** Department of Home Affairs tasked with performing “welfare” checks on visa holder workers and monitoring abuse of the scheme by employers. In the view of Unions NSW, there needs to be auditing of businesses who employ visa holder workers, particularly in high risk areas where employers sponsor visa workers to come to Australia and then exploit them by charging unreasonable living expenses and clawing back wages, as occurred at the Hydro Majestic⁶⁸.
110. The process for recovering unpaid wages through the court system is overly complex, time consuming and expensive. The current process under the FW Act for making claims up to \$20,000 involves an individual making an application to their state Magistrate’s Court or the Federal Circuit Court and paying filing fees of up to \$390⁶⁹. Additionally, applicants must prepare affidavits and carry out legal service upon their employer, once they have correctly identified the entity paying (or not paying) their wages⁷⁰.
111. For many workers, particularly vulnerable workers such as young and migrant workers it is neither possible nor rational to seek to recover stolen wages⁷¹ and even for native English speakers the process is difficult to navigate. The *National Temporary Migrant Work Survey* showed 42% of participants would not try to recover wages from their employer because they “don’t know what to do”, whilst 16% responded “the forms are too complicated”, demonstrating this group had attempted to start the process but were deterred by the inherent difficulty.
112. It can take months for Courts to provide a decision and this does not include the time required to have a Court Order enforced. For example, a former employee of Allans Billy Hyde received a favourable court decision, but months later, had still not been paid⁷². In such cases, the onus falls on the aggrieved employee to commence further proceedings to have the Court Order enforced.
113. A more simplified process is urgently needed. The Commission’s jurisdiction should be expanded and vested with the power to decide on disputes regarding Wage Theft outside of

⁶⁸ Anna Patty, ‘Luxury Blue Mountains hotel group clawing back wages from migrant workers’, *The Sydney Morning Herald* (online), 7 July 2019 <<https://www.smh.com.au/business/workplace/luxury-blue-mountains-hotel-group-clawing-back-wages-from-migrant-workers-20190703-p523od.html>>.

⁶⁹ Federal Circuit Court of Australia, *General Federal Law Fees* (1 July 2019) Federal Circuit Court of Australia <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/fees-and-costs/fees-gfl/fees-gfl>>.

⁷⁰ Laurie Berg and Bassina Farbenblum, ‘Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia’ (October 2018) 15.

⁷¹ *Ibid*, 42.

⁷² Triple J, ‘Owed \$20K: Fair Work Ombudsman failing underpaid workers, victims say’, *Hack*, 27 June 2018 (Avani Dias and Matilda Marozzi).

underpayment disputes arising in other industrial matters. The Commission process is more time efficient, less reliant on technicalities and is more accessible for workers. This will provide a more user-friendly forum for all employees and especially temporary migrant workers to enforce their entitlements.

114. Criminalising Wage Theft will also necessitate some amendments to immigration laws. Recent case law identifies the deficiencies of the current visa regime in respect of migrant workers' ability to pursue their unpaid entitlements.

Case Study: Sebastien

In 2017, Sebastien (a French citizen) made an unfair dismissal claim against the Italian restaurant, Baia the Italian Pty Ltd¹. Sebastien had his visa sponsorship withdrawn by his former employer while lodging an underpayment claim of \$11,000. Although an expediated hearing before the Commission was requested, the process was slowed down by the company's refusal to respond to the application or to identify the appropriate office bearer. The company had previously told Sebastien to 'go ahead' and contact the Ombudsman as the company had never been prosecuted.

By the time the Commission ruled in favour of Sebastien he had already returned to France, making enforcement of the finding against the company, who refused to participate in the hearing, near impossible.

115. Lengthy court processes and visa limitations create a disincentive for migrant workers to enforce their rights. Workers who have had their wages stolen should not have their claims limited by their ability to remain in the country.
116. Visa holders pursuing workplace entitlements should be granted a visa extension allowing them to remain and work in Australia until their claim has been settled. A similar safeguard already exists for witnesses or complainants in criminal law cases⁷³, providing them with the right to temporarily remain in the country, for the period needed to assist with the case. No equivalent alternative is available for victims of Wage Theft or other workplace rights violations.
117. The two **annexed** Unions NSW reports include audits of job advertisements perpetuating Wage Theft. With three-quarters of the advertised jobs Unions NSW reviewed offering rates of pay below the Award minimum, there is clearly a systematic issue of underpayment within certain sectors of the economy. To address this issue a culture of disincentivising Wage Theft with increased oversight should be introduced rather than persisting with the failed sporadic

⁷³ *Migration Act 1958* (Cth) ss155 – 161.

investigative approach overseen by the Ombudsman who seeks to take enforcement action in no more than 10% of requests for assistance”⁷⁴.

118. **Recommendation:** Immediately reduce filings fees for applications involving Wage Theft in any Court with Small Claims jurisdiction to be equal to the Commission application fee (currently \$73.20⁷⁵).
119. **Recommendation:** Reform the Small Claims process by creating a new cause of action in the Commission through which exploited workers can have their underpayment resolved efficiently and in a cost-effective manner.
120. **Recommendation:** Create a process to grant visa extensions to migrant workers who have proceedings on foot in relation to an employment matter. This will be on par with the current provisions for victims of crime to remain in Australia whilst their matter is heard.
121. **Recommendation:** Better Government regulation of migration agents and lawyers and increased funding to community legal centres operating in this space, such as IARC.
122. **Recommendation:** Additional funding to expand the current union migration law program, Visa Assist run by Unions NSW and IARC. Currently, Visa Assist provides free migration law advice and legal services to any union member in NSW who requires it, but with an increase in funding the program could be expanded nationally.

COVID-19

123. The constantly changing nature of the COVID-19 crisis, including mass business closures and job cuts and insufficient government stimulus packages has further highlighted the second-class status suffered by temporary migrants. In particular, the following remains unclear for migrant workers in Australia:

- whether, if they have the means and ability to return home, their home countries will allow them to return during the COVID-19 crisis;
- whether the Australian Government will include temporary migrants in stimulus packages and permit access to social security during this unprecedented time and, if so, under what scheme or regulation;

⁷⁴ Fair Work Ombudsman, Commonwealth of Australia, *Annual Report 2018-19* (2019) 11.

⁷⁵ Fair Work Commission, *Lodge an Application* (24 December 2019) Fair Work Commission

<<https://www.fwc.gov.au/disputes-at-work/how-the-commission-works/lodge-an-application#field-content-1-heading>>.

- how temporary migrants will survive the COVID-19 crisis period if they have lost their job, are not entitled to social security support, exhausted their resources and are unable to return home;
- how they are expected to adhere to social distancing. This is particularly pertinent for WHMs and international students who often share sleeping quarters with 2 or more people and work in casualised employment with no access to paid sick leave or isolation leave; and
- whether visa extensions and amnesties will be granted in light of global travel restrictions.

124. Additionally, we note that those migrant workers currently on bridging visas may be unable to leave Australia (particularly at short notice) until they receive the outcome of their substantive visa application, without jeopardising that application. This is likely to create an additional level of stress for many visa holding workers.

125. Unions NSW is also concerned that in light of the existing additional vulnerability of migrant workers, these groups may be more likely to be chosen when businesses are cutting jobs. With less likelihood of having family support, it is looking likely that there will be many temporary migrants stranded and jobless in Australia.

126. The recommendations of Unions NSW in respect of temporary migrants affected by COVID-19 are as follows:

- Government to extend the stimulus support packages to include migrant workers for a determined period (i.e. the duration of the crisis) and permit access to social security for the same period;
- increase accessibility of information by publishing public health information and Government regulation in languages commonly used by migrant workers, as soon as possible after this information is announced; and
- Government provide immediate funding to union migration service Visa Assist, to facilitate the assisted navigation of the migration system during this uncertain time.

127. If nothing else the COVID-19 crisis we are currently experiencing should be an indicator that our migration system needs reform to support all workers here as we would citizens and permanent residents, including by extending the pathways to permanency residency in Australia.

Case Study: Margaret

Margaret is a temporary migrant from Denmark who works casually in the retail industry and is expecting her first child later this year. Margaret is on a bridging visa awaiting a spousal visa in Australia. After COVID-19 struck, Margaret's shifts were cut and due to her pregnancy, her doctor advised her not to attend work if she would risk exposure to COVID-19.

Margaret's employer does not offer paid sick leave to casual employees affected by COVID-19 and she is now relying on her Australian partner's wages and a small amount of savings. Margaret's partner works in the community sector and is on a salary of \$57,000.

As Margaret is not an Australian citizen or permanent resident, she is not able to access the government's new assistance packages. Margaret has lived in Australia for nearly two years and even if she could return to Denmark, would no longer be eligible for social security there. Without government assistance, Margaret and her partner will be in financial distress. 69% of their income now goes toward paying their rent.

Conclusion

128. Migration is one of Australia's largest exports and has been a key driver of economic growth throughout the last century. Australia's recovery from the COVID-19 crisis will also be largely dependent on its facilitation of migration, in particular by accepting people willing to resettle in Australia to participate in our workforce and raise their children.
129. Unions NSW believes that Australia needs to expand the avenues available for permanent migration and give preference to these avenues to temporary migrant workers who have already demonstrated a contribution to our economy and society. In our view, migrant workers who have worked and paid taxes in Australia for four years should have expanded opportunity to apply for and be granted permanent residence. We believe that pathways to permanency will not be flooded by migrant workers currently in Australia; those workers who wish to return to their home countries will do so. It is also worth noting that the matter of migrant workers attaining Australian citizenship is a separate issue with vastly different requirements, and one upon which this submission is not intended to comment.
130. This submission has demonstrated how the current system is failing both the Australian workforce at large, through permitting a high turnover of foreign workers and commensurate stagnation of wages, and migrant workers who are vulnerable to exploitation.
131. A major reform and national plan for migration is needed and it is needed now. Australia needs to make immediate and temporary provisions to protect its guest workers and law makers need

to put weight behind the words of Minister for Employment Michaelia Cash and demonstrate that “the exploitation of anyone will not be tolerated”⁷⁶.

⁷⁶ Senator the Hon Michaelia Cash, Minister for Employment, ‘Migration Workers Taskforce taking action’ (Media Release, 27 October 2016).

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