



UNSW
SYDNEY

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600
eec.sen@aph.gov.au

31 July 2018

Dear Committee Secretary

Inquiry into the Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies

We welcome the opportunity to make a submission to the inquiry into wage theft in Queensland. Our submission concerns wage theft among temporary migrants, including international students and backpackers (Working Holiday Makers).

In November 2017, we published the findings of the National Temporary Migrant Work Survey, the most comprehensive study to date into wage theft and working conditions among international students, backpackers and other temporary migrants in Australia. The survey draws on responses from 4,322 temporary migrants across 107 nationalities of every region in the world, working in a range of jobs in all states and territories. Key findings from that research were published in our report *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*.¹ The report, attached as **Annexure A**, contains further data relevant to the terms of reference of the present inquiry into the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies.

The Survey addressed the characteristics of temporary migrants' lowest paid job, rates and method of pay, working conditions, how they found low paid work, their knowledge of Australian minimum wages and perceptions of their labour market. It was conducted online between September and December 2016, in 12 languages in addition to English. Most participants (55%) were international students, followed by around one third (33%) who were Working Holiday Makers while working in their lowest paid job in Australia.

We also direct the Committee to three further publications that address wage theft and wage recovery among temporary migrant workers in Australia and the role of the Fair Work Ombudsman (FWO), which more fully address a number of the terms of reference of this Inquiry:

- Bassina Farbenblum and Laurie Berg, 'Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman' (2017) 23(3) *Australian Journal of Human Rights* 310.
- 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 (<https://www.mwji.org/publications/>).
- Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and George Tan, *International Students and the Fair Work Ombudsman* (Fair Work Ombudsman, 2017) (<https://www.mwji.org/publications/>).

¹ Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (Migrant Worker Justice Initiative, November 2017) <<https://www.mwji.org/highlights/2017/11/14/report-released-wage-theft-in-australia-findings-of-the-national-temporary-migrant-work-survey>>.

Compliance with relevant workplace laws: survey data on underpayment and other forms of exploitation among cleaners

Across Australia in all industries, almost a third (30%) of participants earned \$12 per hour or less in their lowest paid job, while 46% of participants earned \$15 per hour or less. They received these unlawfully low rates of pay over a substantial number of hours each week. Almost three quarters (72%) of backpackers indicated that they worked 21 hours per week or more in their lowest paid job, and two thirds (64%) of international students reported that they worked between 9 and 20 hours each week.

Temporary migrants who worked as cleaners reported even lower rates of pay: 29% reported earning \$12 per hour or less in their lowest paid job -- approximately half the minimum wage for a casual worker at the time. Over half (55%) received \$15 per hour or less.

Survey data also reveal a number of significant characteristics of the temporary migrants whose lowest paid job was in cleaning. Ten per cent of temporary migrants from South Korea and 19% of temporary migrants from Brazil identified working as a cleaner as their lowest paid job in Australia. This included 13% of South Korean international students and 21% of Brazilian international students. A notable proportion of temporary migrants who reported that their lowest paid job was cleaning (12%) reported engaging in unauthorised work.² Unauthorised workers were twice as likely to earn very low wages than other international students.

Survey participants reported a number of other forms of exploitation while working as cleaners in Australia. Overall, 173 participants (5%) reported paying a sum of money (a 'deposit') up front for their job.³ 15% of these paid a deposit in order to gain a job as a cleaner. Overall, 168 participants (5%) reported that their passport was confiscated by an employer and/or accommodation provider. 10% of these were working as cleaners at the time. Both of these forms of exploitation may be indicators of criminal forced labour.

Reasons why underpayment is common among temporary migrants

Survey findings dispelled the misconception that temporary migrants are underpaid because they are unaware of minimum wage rates in Australia. Though they may not have known their precise entitlements, the overwhelming majority who earned \$15 or less knew that the legal minimum wage was higher (73% of international students and 78% of Working Holiday Makers). The reasons that wage theft occurs are more complex than a simple lack of knowledge. For example, one key reason why migrant workers accept underpayment is that they perceived that few people on their visa can expect to receive minimum wages under Australian labour law, and they were therefore operating in a parallel labour market with limited compliance with Australian labour law. At least 86% of survey participants believed that many, most or all other people on their visa are paid less than the basic legal minimum wage.

² Participants were considered to be engaging in unauthorised work in two instances: first, if they reported working more than 20 hours per week while holding a student visa, since student visas permit a maximum of 40 hours work per fortnight while studies are in session (excluding those holding a postgraduate visa which carries no condition limiting work); and second, if they reported working while holding a tourist visa. It is possible that these figures over-represent or under-represent the true number of participants who engaged in unauthorised work. They may over-represent the number of unauthorised workers since not all students who worked an average of 20 hours per week would have engaged in unauthorised work. If the work had been undertaken when the student's studies were not in session the 40 hour restriction would not have applied. However it is also possible that these figures under-represent the true proportion of unauthorised workers, because some students may not have disclosed work in excess of 20 hours per week for fear of immigration consequences, despite the anonymity of the survey.

³ Anecdotal reports have suggested a practice of employers requiring prospective temporary migrant employees to pay an unlawful 'deposit' at the commencement of their job. Such 'deposits' are refundable to the employee on certain conditions such as remaining in the job for a certain period or giving an extended notice period before leaving. This could create further underpayment or may compel a temporary migrant to remain in a job under exploitative conditions.

Compliance with taxation laws and the role of the Australian Taxation Office (ATO)

Another reason why migrant workers accept underpayment may relate to lack of detailed understanding of, and concerns about, their tax liability. Forty one percent of temporary migrants who were working as cleaners in their lowest paid job were paid in cash. While not illegal, cash payments may indicate noncompliance with taxation liabilities on the part of employers and workers. Our empirical research from focus groups suggests that international students may be unaware they are entitled to the tax free threshold. As a result they are more willing to accept cash payments and lower wage rates under a misconception they are not earning significantly less than they would “on the books”.

Cash payments can deter workers from bringing attention to their working conditions or lodging a complaint for a number of reasons. First, cash payments are more difficult to verify and can undermine workers’ ability to evidence their underpayment in order to access remedies. Second, temporary migrants frequently expressed the belief that it is illegal to be paid in cash, and were under the impression they had engaged in illegal conduct by accepting cash payments. International students in particular expressed a fear that a failure to pay tax (and cash payment) could result in visa cancellation if reported. This acted as a deterrent against reporting exploitation or seeking to recover unpaid wages.

Recommendations:

The ATO can take a number of steps to address temporary migrants’ reluctance to bring attention to their poor working conditions. Our research indicates that these concerns would be assuaged if the ATO were to publicly indicate to international students that they would not be financially penalised if come forward to rectify outstanding tax payments. It would, however, be critical that this information not be shared with the Department of Home Affairs, in order to assure students who may have worked in excess of 40 hours per fortnight in contravention of their visa that their approach to the ATO would not jeopardise the validity of their visa. Failing such an assurance, the creation and distribution of information about the small penalties low-paid workers are likely to face in relation to unmet tax liability would reduce their concerns about adverse consequences from complaining about underpayment. Finally, the ATO should provide dedicated and confidential services to advise and assist international students in relation to tax issues.

The effectiveness and adequacy of agencies such as the Fair Work Ombudsman

The Fair Work Ombudsman (FWO) has demonstrated a strong commitment in recent years to prioritise efforts to address exploitation of migrant workers, as a group of vulnerable workers. However, it appears that FWO’s recovery of unpaid wages for individual workers remains limited. This analysis is based on (1) the findings of the National Temporary Migrant Work Survey on wage recovery by temporary migrants and (2) analysis of FWO data supplied to the authors recording the treatment paths applied to the 2,849 migrant workers who lodged Requests for Assistance (RFAs) with the regulator in the period 1 July 2014 - 31 December 2015.

Despite FWO’s significant efforts to engage migrant workers, it appears that relatively few contact the agency through its Infoline or other means. Of the 2,258 survey participants who recognised they had been underpaid, an overwhelming 91% had not tried to recover their unpaid wages through any means; less than 3% (62 individuals) contacted FWO.⁴ Four key sets of factors may contribute to temporary migrants’ reluctance to contact the FWO: lack of knowledge of rights and awareness of FWO; migrant workers’ attitudes regarding their rights and entitlement to make a claim; fear of losing employment; and fear of jeopardising immigration status.⁵

⁴ Bassina Farbenblum and Laurie Berg, ‘Migrant Workers’ Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman’ (2017) 23(3) *Australian Journal of Human Rights* 310, 317.

⁵ *Ibid*, 319ff. See also Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and George Tan, *International Students and the Fair Work Ombudsman* (Fair Work Ombudsman, 2017).

Survey data also suggests that a substantial number of those migrant workers who do contact the agency do not recover most or any of their unpaid wages. Of the 547 survey participants who knew someone who had approached FWO, almost half (47%) of the claimants were unsuccessful in recovering their wages.⁶ Among the 62 participants who had contacted FWO themselves, 36 (58%) recovered none, 13 (21%) recovered some, and only 13 (21%) recovered all of their unpaid wages.⁷

These low individual recovery rates cited by survey participants accord with the FWO's own data supplied to the authors. Of the 2,849 temporary migrant RFAs resolved by FWO, at least 88% concerned wage issues. Only 12% of these recorded a recovery of any wages and, of those, two in five (39%) recovered \$1,000 or less.⁸ Although data is unavailable on the amount of money these workers were seeking, it seems likely that most workers would have sought amounts substantially more than \$1,000 to warrant the time, effort and risks involved in pursuing a remedy.

Where FWO used an approach such as mediation, which focuses on voluntary inter-party resolution, very few migrant workers were recorded as obtaining remedies, and, where they did, the amounts were small. Conversely, in the limited cases in which FWO used compliance and enforcement measures, remedies were far more likely to be obtained, and often for greater amounts, than for RFAs resolved informally between the parties.⁹

The low numbers of temporary migrants who contact FWO at all suggest the importance of addressing barriers to approaching the FWO for these groups. Further, the limited success that many temporary migrants have when they contact the FWO directly suggests that these vulnerable individuals need a far higher level of assistance than the FWO provides in order to pursue wage claims.¹⁰

Measures designed to ensure workers have adequate representation, knowledge of their rights and access to remedies

There are a range of initiatives the Commonwealth government could take to ensure that migrant workers can practically access remedies for rights violations. This will both assist those specific individuals but also help to detect patterns of underpayment and ensure accountability on the part of employers, including contract cleaners. Facilitating individual remedies can, over time, remove employers' expectation of impunity for underpayments.

Providing information about workplace rights is not sufficient to meaningfully improve migrant workers' access to remedies. What is required is a migrant-centred and migrant-informed approach that appreciates that migrant workers are rational actors who will more likely pursue remedies when they are accessible and the risks and costs are outweighed by the prospect of obtaining a just outcome.

Recommendations:

To this end, the Commonwealth government should:

1. Create a simple and accessible mechanism through which individual migrant workers can recover wages, whether within the FWO or adjacent or external to it.
2. Until such a mechanism is established, modify FWO strategic priorities to promote not only rates of case resolution and systemic enforcement actions, but also recovery of unpaid wages

⁶ Bassina Farbenblum and Laurie Berg, 'Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman' (2017) 23(3) *Australian Journal of Human Rights* 310, 318.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid, 318-19.

¹⁰ 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; Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and George Tan, *International Students and the Fair Work Ombudsman* (Fair Work Ombudsman, 2017).

for individual workers as a target and metric of success. This would need to be accompanied by a significantly increased resource allocation for FWO. As part of this effort:

- a. FWO should establish a dedicated expert point of contact within its Infoline for migrant workers. It should be assumed that migrant workers will receive an increased level of assistance from expert staff and will not be directed to self-help. FWO's website should also be designed to more expeditiously link migrant workers to FWO's assistance, rather than primarily focus on providing information.
 - b. FWO should consider adopting a presumption in favour of the migrant worker rather than the current presumption in favour of the employer, especially in cases of missing or falsified employment records and payslips. This is necessary to account for evidentiary hurdles that are often the result of exploitation in the first place, and would accord with the new reverse onus of proof introduced by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth).
 - c. To increase the likelihood that a migrant worker who makes a claim will recover a significant portion of his or her unpaid wages, resources should be devoted to providing tailored assistance to help identify and substantiate all potential claims and explicitly advocate on the worker's behalf.
 - d. Risks to workers should be reduced through the creation of a firewall between the FWO and the Department of Home Affairs (DHA) to ensure that workers' immigration status remains confidential. The 2017 protocol between FWO and DHA does not go far enough towards achieving this end because it does not provide an assurance to visa-holders that no adverse visa consequences will attend their complaint to FWO.
3. Increase resourcing for Legal Aid, community legal centres and other forms of support to enable temporary migrants to recover unpaid wages from employers, recognising the high level of support that most need in order to formulate and pursue a claim. This includes assistance to calculate wage claims and representation of employees in direct negotiations with employers.
 4. Supporting a sector-wide response among universities, ELICOS and VET providers to deliver appropriate information and support services to assist international students to avoid and address wage theft, including legal assistance.

Yours sincerely

Bassina Farbenblum
Senior Lecturer
UNSW Sydney

Dr Laurie Berg
Senior Lecturer
University of Technology Sydney