

# WAGE THEFT IN SILENCE

*Why Migrant Workers Do Not Recover  
Their Unpaid Wages In Australia*

Bassina Farbenblum and Laurie Berg | October 2018



## Authors

Bassina Farbenblum is Senior Lecturer in the Faculty of Law, UNSW Sydney. She is Director of the UNSW Human Rights Clinic and Co-Director of the Migrant Worker Justice Initiative.

Laurie Berg is Senior Lecturer in the Faculty of Law, University of Technology Sydney and Co-Director of the Migrant Worker Justice Initiative.

The Migrant Worker Justice Initiative ([www.mwji.org](http://www.mwji.org)) engages in detailed empirical research in Australia and globally to catalyse improved enforcement of rights and just remedies for migrant workers. It works with governments, business, civil society, trade unions and the education sector to develop pragmatic pathways for reform.

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## Acknowledgements

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The authors are very grateful to Dr Stephen Clibborn (University of Sydney, School of Business) for his collaboration on the design and execution of the National Temporary Migrant Work Survey. The survey content was substantially enhanced by Dr Clibborn's insights drawn from his groundbreaking earlier research on migrant workers' attitudes to exploitation and access to justice.

We are also very thankful to freelance social researcher and data analyst Christine Eastman ([christine@christineeastman.com](mailto:christine@christineeastman.com)) for her expert and insightful statistical analysis of the data contained in this report, and her contribution to the graphic representation of the data.

Angela Kintominas, Research Associate at the Migrant Worker Justice Initiative, provided excellent editorial assistance on the report. Yumeng Yue and Andreea Constantin provided valuable research assistance in the set up of the survey and the editing and re-coding of data. Lisa Jeffery assisted with compilation of initial contacts for survey distribution.

The authors deeply appreciate the time and effort contributed by the many individuals who voluntarily assisted with survey design and distribution, including:

- Isabel Salinaz Alcaraz, who passionately worked with the authors to develop and implement the survey distribution strategy, including recruitment and oversight of the Outreach Committee;
- The Outreach Committee and other volunteers who assisted with distribution of the survey within their community and language groups and with reviewing survey translations including: Ahmed Bishtawi, Anil Shrestha, Bhatar Reza, Charlin Feng, Emma Moore, Margherita Angelucci, Maria Azzurra Tranfaglia, Marvin Quevedo, Michael Fraser, Michael Tran, Miriam Thompson, Mizuki Kawano, Muhammed Zohaib Javed, Patrick Earle, Peter Luo, Sherry Huang, Sohoon Lee, Song Hyunseok, Wendy Tran and Yao-Tai Li;
- Organisational members of the Migrant Workers Rights Network and other trade unions and organisations throughout Australia who provided feedback on survey design and distributed information on the survey to their networks. These included the Salvation Army Freedom Partnership, United Voice, the National Union of Workers, Unions NSW, the Shop, Distributive and Allied Employees Association, Redfern Legal Centre, Australian Meat Industry Employees Union, Federation of Ethnic Community Councils of Australia, Korean Working Holiday Youth, Taiwanese Working Holiday Youth, Council of International Students Australia, along with many others;
- Universities and individual faculties that distributed the survey to their international students; and
- Dr Benjamin James Matthews who provided expert advice on social media distribution strategies.

We are grateful to each of the stakeholders who generously gave their time to participate in interviews for this research project, and to Fiona Allison and Alexandra Owens for their expert research assistance in preparation for the interviews.

Finally, the authors sincerely thank each of the current and former migrant workers who were willing to share information about their work experience in Australia and generously gave their time to complete the survey or participate in an interview or focus group for this study. We hope that by reflecting and amplifying your voices, this report contributes to improving migrant workers' ability to speak up and obtain redress for wage theft in the future.

## Executive summary

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Temporary migrant workers comprise up to 11% of the Australian labour market.<sup>1</sup> Underpayment within this workforce is both widespread and severe. In 2017, the report *Wage Theft in Australia: Findings from the National Temporary Migrant Work Survey* revealed that a substantial proportion of international students, backpackers and other temporary migrant workers were paid roughly half the legal minimum wage in their lowest paid job in Australia.<sup>2</sup> The scale of un-remedied underpayment of migrant workers in Australia is vast: 7-Eleven's internal wage repayment program alone repaid over \$150 million in unpaid wages to its mostly international student workforce.

Structural reforms are urgently required to address the drivers of exploitation. There is also a pressing need for remedial mechanisms that are accessible to individual migrant workers. Against a culture of impunity, predicated on employers' assumptions that migrant workers will remain silent, these mechanisms are critical to detecting wage theft and holding employers accountable.

Migrant workers' ability to seek remedies for underpayment is also an indicator of the efficacy of Australia's labour law regime and institutions. As this report and the *Wage Theft in Australia* report make clear, the number of reported complaints each year vastly underrepresents the depth and scope of underpayment of temporary migrant workers. To date, however, limited attention has been paid to the fundamental question of why migrant workers do not try to recover the wages they are owed. Previous research has mostly relied on public sources or observations by legal service providers, trade unions, the Fair Work Ombudsman (FWO) and others from whom only a small number of migrant workers have sought assistance. This study addresses a critical need for large scale first-hand data on the experiences and attitudes of the vast majority of underpaid temporary migrant workers who have endured wage theft in silence.

## Overview of the study

The report draws on responses from 4,322 migrant workers who participated in the National Temporary Migrant Work Survey (NTMW Survey), including over 2,250 participants who expressly acknowledged that they had been underpaid while working on a temporary visa in Australia. Focusing on this group of underpaid participants, it seeks to identify the practical, psychological and other factors that inhibit temporary migrant workers from recovering unpaid wages and, for those who do attempt to recover their wages, the institutions they approach and outcomes of their efforts. It also seeks to illuminate the ways in which these experiences and perceptions differ between different groups of temporary migrant workers including different nationalities and visa cohorts.

It is often assumed that migrant workers are reluctant to complain to authorities or attempt to recover unpaid wages due to their personal limitations: poor English language ability, lack of knowledge of rights and/or lack of familiarity with Western legal culture. The survey data paints a different picture. It indicates that a straightforward cost-benefit theory better explains why so few temporary migrant workers try to recover unpaid wages. That is, when the low likelihood and quantum of a successful outcome are weighed against the time, effort, costs and risks to immigration and/or employment status, it is rational that individual temporary migrant workers are not seeking remedies even if they are being significantly underpaid. It also identifies barriers created by a lack of knowledge and capacity that are more connected with the institutions themselves than personal limitations of migrant workers.

## Did participants try to recover unpaid wages?

Among the over 2,250 survey participants who acknowledged that they had been underpaid while working on a temporary visa in Australia, more than nine in ten (91%) suffered wage theft in silence. Only a small number sought to recover unpaid wages.

## Experience of participants who tried to recover unpaid wages

The overwhelming majority (97%) of underpaid temporary migrant workers did not contact the FWO for assistance. Among the 9% of participants who tried to recover unpaid wages, only one in three (32%) contacted the FWO.

Among the 194 participants who had tried to recover wages through any channel, two in three recovered nothing (67%). Fewer than one in six (16%) received the full amount they were owed. Within the group who went to the FWO, 58% recovered nothing. Only one in five (21%) recovered their full wages. Among international students who contacted their educational institution, 68% recovered nothing and only 7% recovered all their unpaid wages. The ten participants who contacted a union had the best outcomes, with the highest proportions of participants recovering all (30%) or some (40%) of their unpaid wages.

Several factors distinguished underpaid participants who tried to recover unpaid wages by contacting the FWO:

- 1. International students vs Working Holiday Makers.** Only 1% of underpaid international student participants approached the FWO compared with 4% of Working Holiday Makers (backpackers). However, the proportion of underpaid international students who tried to recover wages through any avenue was not substantially lower than for Working Holiday Makers: nine in ten international students went elsewhere. In particular, a third contacted someone at their university or college (34%). This included 38% of university students and 27% of vocational and English language students.

International students and Working Holiday Makers who tried to recover unpaid wages fared poorly, suggesting that for the majority, the risks and costs of pursuing a remedy were unwarranted. Among students who went to the FWO, one in two (52%) recovered nothing and only one in four (26%) recovered all of their unpaid wages. Working Holiday Makers had even poorer outcomes: 60% recovered nothing and only 17% recovered all of their unpaid wages.

- 2. Nationalities.** Among survey participants from Asian countries, the vast majority of those who tried to recover unpaid wages sought assistance from sources other than the FWO. Among participants from Pakistan, Nepal, the Philippines, Japan, Malaysia, Indonesia and India, not a single national who tried to recover unpaid wages went to the FWO. Ireland was the only other nationality for which this was the case. North America and Western Europe accounted for all the nationalities in which more than a third of participants who tried to recover unpaid wages did so by contacting the FWO, with the exceptions of Colombia and South Korea.

## Characteristics of participants who tried to recover unpaid wages

Several factors distinguished underpaid participants who had tried to recover unpaid wages:

- 1. Trade union membership.** Among those who had been a member of a trade union in Australia at some point, 28% of underpaid participants had tried or were planning to recover their wages, compared with 10% of underpaid participants who had never been a member of a trade union.
- 2. Paid less than agreed with employer.** All participants in this cohort were underpaid. However, among those who were at least sometimes paid less than they agreed with their employer, 17% tried to recover unpaid wages, compared with 8% of those whose employer paid the low wage they promised.
- 3. Knowledge of someone else who had contacted the FWO.** A higher proportion (20%) of those who knew someone who had contacted the FWO had tried to recover unpaid wages themselves, compared with participants in general (11%).
- 4. Nationalities.** Within the top ten nationalities with the highest proportions of underpaid participants who had tried to recover unpaid wages, seven were Asian and three were Western European (including a particularly high proportion of nationals of Pakistan (26%), Taiwan (25%) and Italy (22%)). Contrary to popular assumptions, participants from countries with a legal system and culture similar to that in Australia were the least likely to have sought to recover unpaid wages: among the five nationalities with the lowest proportion of participants who tried were Canada (6%), United Kingdom (4%), Ireland (4%) and the United States (2%).



## Characteristics of participants who were open to trying to recover unpaid wages in the future

It is commonly assumed that most migrant workers are not interested or willing to recover unpaid wages. In fact, well over half (54%) of underpaid survey participants had either already tried to recover wages (9%) or indicated they might try in the future (45%). This suggests that there is substantial value in devoting resources to interventions that seek to encourage underpaid migrant workers to report and address underpayment and other forms of exploitation, targeted based on the features and attitudes of this cohort:

1. **International students vs Working Holiday Makers.** Contrary to common assumptions, international students are not less willing to report or seek to address wage theft. Among participants who had not tried to recover their wages, 56% of international students were *open* to doing so in the future compared with 43% of Working Holiday Makers.
2. **Nationalities.** The ten nationalities with the highest proportions of participants who were open to trying to recover their wages were all countries in Asia. Between 58% and 78% of nationals from these Asian countries were open to trying to recover their wages, compared with 24% to 45% of nationals from the Western Europe and North America. Though there is a perception that migrant workers are reluctant to report wage theft by an employer of the same nationality or ethnicity, this was not as prevalent a barrier as a personal relationship with the employer.
3. **Awareness of another person who had contacted the FWO.** The proportion of participants open to wage recovery was higher (64%) among those who knew someone who had made contact with the FWO.
4. **Wage rates in lowest paid job.** There was no apparent connection between participants' openness to wage recovery and the extent of their underpayment.

## Factors that stopped underpaid survey participants from trying to recover unpaid wages

All underpaid participants who indicated that they had not tried to recover unpaid wages were asked to select the reasons why they might not or would not try to recover unpaid wages. Their responses suggested seven broad categories of barriers.

1. **Capacity, competence and lack of knowledge about how to recover wages.** Two in five underpaid participants (42%) reported that they had not tried to recover unpaid wages because they did not know what to do. This was not only attributable to unfamiliarity with Western legal culture or difficulties speaking English: it was the top reason given by participants of six of the largest seven nationalities, including the United Kingdom. Indeed, only 15% of participants selected '[m]y English is not good enough', suggesting that this concern may have been eclipsed by more significant barriers to wage recovery. Even among participants who found their lowest paid job through an internet site in their own language, only a third (32%) cited low English language ability as a barrier.

A third of participants (35%) reported that trying to recover wages was too much work. This may be a general suspicion that whatever is involved in recovering wages was too much work, and/or that attempting to find out what to do may have been too much work. One in six (16%) indicated that they perceived the forms to be too complicated.

2. **Social perceptions and relational factors.** Over a quarter of underpaid participants were reluctant to try to recover unpaid wages because they had 'agreed to the wage [they were] paid so have no complaint' (28%). A similar proportion (26%) were deterred because many people around them were being paid similarly and not doing anything about it.

3. **Fear of immigration consequences.** A quarter of participants indicated they had not or would not try to recover unpaid wages due to fear of possible immigration consequences (25%). A further 7% of participants identified a general concern about engaging with the government.
4. **Fear of job loss.** One in five (22%) underpaid participants who had not tried to recover unpaid wages was deterred by a fear of losing their job. This is likely a substantial underrepresentation since some survey participants would have already left that job prior to the survey.
5. **Pessimism about outcome.** One in five (20%) underpaid participants believed that even if they were successful their employer would not pay their entitlements, and the same proportion indicated they would not try to recover unpaid wages because they believed they would not be successful.
6. **Perception that amount of unpaid wages is not significant.** One in five participants (18%) perceived that the wage underpayment was 'not a lot of money'. This may have informed their view that wage recovery 'was too much work', and it is likely that many underestimated the full quantum of wages they were owed (including penalty rates or other Award entitlements).
7. **Temporariness of stay in Australia.** A very small number of participants (5%) identified as a barrier that they were leaving Australia soon. This may not indicate confidence that they could pursue a claim once they had left Australia but rather that this concern was eclipsed by others.

## Conclusion

In the absence of broader union membership or more accessible redress pathways, individual remedies remain beyond the reach of most exploited migrant workers in Australia. For most migrant workers, it is neither possible nor rational to seek to recover unpaid wages through existing forums.

However almost half of underpaid participants (45%) indicated that they were open to trying to recover unpaid wages in the future. This indicates that an investment of resources in ameliorating the practical barriers to wage recovery is warranted and will have an impact, alongside policy and institutional reforms. In particular, the data indicates that if the costs, effort and risks involved in wage recovery are reduced and the probability of achieving a satisfactory outcome is increased, a greater number of migrant workers would likely report underpayment and seek to recover the wages they are owed. Indeed, for participants who were open to trying to recover their wages, concerns about lack of knowledge or capacity were more significant barriers than social perceptions and relational factors that are harder to address.

This report provides the Commonwealth government and other stakeholders with an evidence base for reforms that will break the cycle of employer impunity and ensure that migrant workers do not continue to suffer wage theft in silence.



## Summary of key recommendations

1. **Establish a new specialised forum for wage recovery by migrant workers** which provides well-resourced individualised assistance and delivers remedies swiftly, with presumptions in the worker's favour if they have no payslips or if there is a widespread pattern of fraudulent recording of wages or hours worked.
2. **Reduce barriers to wage recovery** through existing forums (or a new forum). This includes:
  - 2.1. **Government should invest resources** in expanding services that provide advice and representation to migrant workers in relation to employment claims, including outside the FWO for international students;
  - 2.2. **Reforms to FWO processes**, including establishing a dedicated team and special procedures for addressing migrant workers' inquiries and providing significant practical assistance to those who report underpayment, as well as legislatively expanding the FWO's powers in relation to employers;
  - 2.3. **Regulatory and procedural reforms**, including:
    - 2.3.1. Establishing a firewall between the FWO and the Department of Home Affairs that prevents the FWO sharing information about visa breaches by migrant workers who seek its assistance;
    - 2.3.2. Amending the *Fair Entitlements Guarantee Act 2012* (Cth) to ensure that, like Australian workers, temporary migrant workers are entitled to recover unpaid wages if their employer goes into liquidation;
    - 2.3.3. Absent effective Commonwealth government enforcement and remediation, state governments should introduce criminal offences for knowingly and repeatedly engaging in wage theft, including compensation for victims (with assistance to make claims), and dedicated inspectorates;
    - 2.3.4. Reforming the small claims court jurisdiction to make it more accessible to migrant workers.
  - 2.4. **Businesses** should establish remedial processes to address underpayment within their business and supply chain, and **government** should enable and oversee these processes to ensure accessibility and procedural fairness.
  - 2.5. **Education providers** should establish services to provide advice and representation to international students in relation to employment issues.
  - 2.6. **Government and education providers should develop and effectively deliver targeted information** to international students and other temporary migrant workers before and after their arrival in Australia, including guidance on accessing remedies for unpaid wages.

## Section I: Introduction

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Underpayment of temporary migrant workers in Australia is both widespread and severe. In 2017, the report *Wage Theft in Australia: Findings from the National Temporary Migrant Work Survey* revealed that a substantial proportion of international students, backpackers and other temporary migrant workers were paid around half the legal minimum wage in their lowest paid job in Australia.<sup>3</sup> Most of them worked many hours in that job, indicating that, for a large number of workers, the sum of unpaid wages owed by the employer was substantial.

Temporary migrant workers now comprise up to 11% of the Australian labour market.<sup>4</sup> Intensified public attention to exploitation of this workforce has led to numerous legislative reforms, parliamentary inquiries, and government initiatives, including the establishment of the Migrant Workers' Taskforce and expanded efforts by the federal workplace regulator, the Fair Work Ombudsman (FWO).

However, to date, limited attention has been paid to the fundamental question of why migrant workers largely suffer wage theft in silence and do not try to recover the wages they are owed. Migrant workers' ability to report and seek remedies for underpayment is crucial for two reasons. First, individual workers, regardless of temporary visa status, are entitled to be paid the wages they are owed under Australian law. Their inability to recover unpaid wages in practice calls into question the efficacy of Australia's labour law regime and institutions. Second, in a context in which it is difficult for the FWO to detect underpayment across many businesses, migrant workers' ability and willingness to report wage theft and seek remedies are critical to the enforcement of labour laws and accountability of employers. Indeed, an assumption among employers that migrant workers will not report underpayment has likely contributed to a culture of impunity that facilitates ongoing exploitation.

The scale of un-remedied underpayment of migrant workers in Australia is vast. This was clearly demonstrated by 7-Eleven's internal wage repayment program which alone repaid more than \$150 million in unpaid wages to its mostly international student workforce.<sup>5</sup> Even outside such a context of systematic long-term underpayment, the amount of money owing to a very large number of migrant workers is significant. For example, if an international student worked as a casual employee at \$12 per hour for 20 hours per week over six months, he or she would be owed at least \$6,065,<sup>6</sup> not including significantly higher weekend penalty rates and other entitlements or higher wage rates under a relevant award.

Research to date on the extent of underpayments and wage recovery efforts has mostly relied on observations by legal service providers, trade unions, the FWO and others from whom migrant workers seek assistance. This has been supplemented by publicly available information within media reports or court cases relating to migrant workers who have come forward to address wage theft issues. However, as this report and the *Wage Theft in Australia* report make clear, the number of officially reported complaints each year vastly underrepresents the depth and scope of underpayment of migrant workers in Australia.

This report seeks to address a critical need for large scale first-hand data on the experiences and attitudes of the vast majority of underpaid migrant workers who have not come into contact with service providers, trade unions or the FWO to complain or seek assistance to recover unpaid wages. It is based on data from the National Temporary Migrant Work Survey (NTMW Survey) which focused in particular on wage theft – employers pocketing a portion of workers' wages by undercutting minimum entitlements under Australian labour law. The survey is the most comprehensive study of working conditions and access to remedies among temporary migrant workers in Australia, with responses from 4,322 temporary migrant workers across 107 nationalities who worked in a range of jobs in all states and territories. Despite the survey's limitations (discussed under Method below), it is the broadest representation of temporary migrant workers' own accounts which could not be collected at this scale through other methods.

This report focuses in particular on survey responses from over 2,250 survey participants who explicitly acknowledged that they had been underpaid while working on a temporary visa in Australia. It seeks to identify the practical, psychological and other factors that inhibited temporary migrant workers from recovering unpaid wages

and, for those who did attempt to recover their wages, the institutions they approached and outcomes of their efforts. It also seeks to illuminate the ways in which these experiences and perceptions differ between different groups of temporary migrant workers including different nationalities and visa cohorts.

It is commonly accepted that wage recovery is challenging for all low wage workers in Australia. Union membership has declined, and workers have been left without an accessible adjudicatory forum through which they can bring wage claims against employers (besides going to court), with very few low-cost employment law services to advise and assist them. Although the FWO provides mediation services, these are not available to all workers and the agency does not operate as a worker advocate. The FWO recovers wages for a small subset of workers. However, it does so primarily in the context of strategic enforcement through a limited number of investigations and compliance activities.

Despite these challenges of labour law enforcement in Australia, it is nevertheless often assumed that the more significant factors driving *migrant workers'* unwillingness or inability to recover unpaid wages relate to their personal limitations: poor English language ability, lack of knowledge of rights and/or lack of familiarity with Western legal culture. Our previous research<sup>7</sup> and the findings of the NTMW Survey discussed in this report indicate that a straightforward cost-benefit theory better explains why so few migrant workers try to recover unpaid wages. When the low likelihood and quantum of a successful outcome are weighed against the time, effort, costs and risks to immigration and/or employment status, it is rational that individual migrant workers are not seeking to recover unpaid wages even if they are being significantly underpaid.

With notable exceptions, migrant workers do not often have a voice in public debate and policy formulation concerning them. This is in part because most are in Australia for short periods of time, live and work on the fringes of Australian society, are often not native English speakers, are young and, for many, are fearful of losing their job or jeopardising their visa if they speak out about working conditions. In undertaking the NTMW Survey, we sought to provide a platform for a large number of temporary migrant workers across the country to voice their experiences and perspectives. This report draws on their responses to establish an evidence base for policy makers and service providers to institute reforms that respond to migrant workers' diverse needs and make it both possible and rational for them to seek to recover their unpaid wages in the future.

*A cost-benefit theory explains why so few migrant workers try to recover unpaid wages. It is rational to stay silent when the effort, costs and risks involved in taking action are weighed against the low likelihood of success*

## Method

The first stage of the project involved a comprehensive literature review on access to justice for migrant workers and other vulnerable groups in Australia, including scholarly literature, public reports, submissions and reports from public inquiries, and other publicly available materials. The authors then conducted 6 focus groups with 26 temporary migrant workers in Sydney, Melbourne, and Brisbane, and 39 semi-structured long-form interviews with government agency officials, legal service providers, advocates, trade unions, researchers and individual temporary migrant workers. These were conducted between 11 November 2015 and 17 February 2017 in Sydney, Melbourne, Brisbane, Adelaide and Canberra (see list of interviewees at Appendix A).

Through the focus groups and interviews the authors identified a range of reasons why migrant workers do not seek to recover unpaid wages. The most common reasons were then put into a survey question that asked temporary migrant workers who had experienced underpayment whether they had sought to recover unpaid wages, and if not, which of those reasons were relevant to their decision. This formed part of the NTMW Survey which covered a range of other issues related to underpayment and wage recovery which was conducted online between September and December 2016. The survey was developed by the authors in collaboration with Dr Stephen Clibborn (University of Sydney), who had also identified reasons why migrant workers do not complain about underpayment within previous research into wage theft among international students and Working Holiday Makers.<sup>8</sup>

All survey participants had worked in Australia on a temporary visa. Most held one of the three dominant visa classes: international students who may work up to 40 hours per fortnight while their course is in session and unlimited hours during breaks; Working Holiday Makers – young travellers from certain countries with which Australia has a reciprocal relationship – who may work up to six months with any one employer during their year-long stay in Australia; and skilled temporary employees working for a sponsoring employer.<sup>9</sup> International students included participants studying at universities and vocational and English language colleges.

The survey was anonymous and was open to any individual who had worked in Australia on a temporary visa. It contained 32 multiple choice questions, in addition to a number of follow-up questions. A small number of questions allowed open answers, mostly where respondents selected 'Other' among multiple choice options. The survey was available in twelve languages in addition to English.<sup>10</sup> Each translation was checked by a different native speaker of that language, although it remains possible that certain words or phrases may have been understood differently in different languages.

The survey contained questions on the following topics:

1. **Participants' personal characteristics** including nationality, year of arrival and gender.
2. **Features of participants' lowest paid job in Australia**, including their hourly rate of pay in that job, type of job, visa while in that job (and for students, name of educational institution), average weekly hours, method of finding the job, geographic location of that job, whether they were paid by cash or bank transfer and whether they received pay slips.
3. **Participants' experience of some other indicators of exploitation**, at any stage during their time in Australia. These include payments for the job up-front, passport confiscation, payment of cash back to an employer, and immigration-reporting threats.
4. **Participants' knowledge and perceptions**, such as their knowledge of the minimum wage and their perception of the proportion of people on their visa who are underpaid.
5. **Participants' experience seeking help to obtain remedies for underpayment**, including whether underpaid participants sought help, where they went, whether they recovered their wages, and their knowledge of others' experiences.
6. **Participants' perceptions and attitudes to wage recovery**, including the reasons why participants had not tried to recover unpaid wages.

The authors' *Wage Theft in Australia* report, released in November 2017, addressed the first four areas. Key findings on these are summarised in this report in Section III.

This report presents findings on the last two topics, namely temporary migrant workers' experiences of attempting to recover unpaid wages (among the small number who did seek to obtain remedies for underpayment), and the perceptions and attitudes towards wage recovery of the rest who had not tried to recover unpaid wages. Unlike the second topic on wage rates and related working conditions which was confined to participants' lowest paid job, this portion of the survey related to participants' experience in relation to wage recovery for any job in which they had been underpaid in Australia.

The survey yielded 4,322 valid responses.<sup>11</sup> Participants were free to stop the survey at any time. As some participants exited the survey at different points before the end, the number of respondents varied between questions. As questions regarding wage recovery appeared in the second half of the survey, these had fewer respondents. Participants were recruited through various channels including via social media, emails from unions and service-providers, websites and flyers/posters at various locations and events, and were given a chance to win gift voucher prizes. For detailed discussion of the recruitment methodology and survey conditions, see Methodology in *Wage Theft in Australia*.<sup>12</sup>

The survey has a number of methodological limitations. Because it was anonymous, it is not possible to know whether any participant completed the survey more than once from different devices. It is also not possible to verify the accuracy of information provided by participants. However, there were not strong incentives for participants to provide inaccurate information or to repeat the survey multiple times; if this occurred it is likely to have involved only a small number of participants.

A further limitation may have arisen from a key method of distribution of the survey. Heavy reliance on promotion through social media may have contributed to underrepresentation of migrant workers who are less likely to access Australia-based social media groups or are less networked in Australia in general. This includes seasonal workers, asylum seekers on Bridging visas and unauthorised workers (for instance on tourist visas). However, it is also possible that these groups did not participate for other reasons such as lack of trust or greater fear of negative consequences of participation, despite the assurance of anonymity. The authors sought to mitigate potential lack of trust through safeguarding participants' anonymity. Concerns about weak English language skills were mitigated by translating the survey into twelve languages commonly spoken by migrant workers in Australia, though this did not cover all languages spoken by potential participants.

It is also possible that more of those who were willing to participate were migrant workers who had a desire to share information on poor workplace experiences. The authors sought to limit this possibility by offering a number of substantial prizes to create a different incentive for participation among a broader group. At the same time, it is possible that the participants earning lower wages were more likely than higher income earners to be motivated to complete the survey by the possibility of receiving prizes. Indeed, it is also possible that participants who took action to address underpayment were overrepresented in the sample. This is because those who participated may have already been connected to each other, or received a link to the survey by email from service-providers or trade unions which had previously assisted them. By taking the survey, all survey participants had demonstrated that they were willing to invest time and effort in sharing information about their working conditions as compared with many others who received information about the survey but did not participate.

Finally, there was an overrepresentation among participants of international students at UNSW Sydney (and to a lesser degree University of Technology Sydney). This is likely to be a result of particularly effective institutional survey dissemination and potentially greater participant trust in or identification with the authors because of their affiliation with those institutions.

Taking these considerations into account, the authors determined that the survey and selected distribution methods remained the most effective way to access large numbers of diverse migrant workers within populations that have historically been difficult to reach.

## Section II: Avenues for wage recovery in Australia

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Exploitation of migrant workers is now well documented in Australia.<sup>13</sup> Though there have been no large scale studies of migrant workers' access to remedies for unpaid wages and entitlements, several studies have considered this issue in particular contexts. In 2016, the **Not Just Work** report produced by WEstjustice documented the working experiences and related legal needs of newly arrived migrants and refugee workers in Melbourne's western suburbs, based on the organisation's experience as a legal service provider to this community.<sup>14</sup> Several academic studies have considered migrant workers' responses to underpayment in the context of specific cohorts and particular industries.<sup>15</sup> The FWO has also commissioned research<sup>16</sup> and undertaken inquiries<sup>17</sup> that examine exploitation of migrant workers and touch on issues related to access to remedies. The Law Council of Australia and other peak bodies have considered the legal needs and experiences of vulnerable groups in accessing justice for employment-related and other problems, including challenges faced by migrant workers.<sup>18</sup>

In recent years, a range of government and parliamentary inquiries have also addressed issues related to exploitation of migrant workers which have involved some discussion of access to employment-related remedies, to which numerous legal service providers, trade unions, NGOs and academics have made submissions. These have included inquiries into exploitation of migrant workers, modern slavery, human trafficking, labour regulation, and the cash economy, by the Productivity Commission,<sup>19</sup> Commonwealth Senate and Parliamentary Committees,<sup>20</sup> independent experts,<sup>21</sup> a Queensland parliamentary committee,<sup>22</sup> a New South Wales parliamentary committee,<sup>23</sup> the Commonwealth Auditor-General,<sup>24</sup> and the Black Economy Taskforce 2017.<sup>25</sup> Exploitation of migrant workers and access to justice are also under consideration by the federal Migrant Workers' Taskforce (due to report in 2018).<sup>26</sup>

This research, and previous studies undertaken by the authors,<sup>27</sup> point to a range of structural obstacles that impede migrant workers recovering unpaid wages in Australia. For a start, the complexity of labour law in Australia creates significant practical and substantive barriers to wage recovery. At a practical level, it is virtually impossible for most migrant workers to calculate the precise amount they have been underpaid as this involves correctly identifying the worker's classification under the relevant modern award, identifying applicable loadings and penalties, and applying these to relevant hours within each shift worked.

More broadly, new challenges for labour rights enforcement and individual remedies have arisen since the 1990s as Australia's temporary migration programs have rapidly expanded alongside the dramatic deregulation of the Australian labour market. In addition, businesses are increasingly turning to arrangements which devolve the traditional binary employment relationship between a worker and an employer, with increased prevalence of labour hire arrangements, franchise networks, supply chains and subcontracting. These business structures can shift employment obligations under the *Fair Work Act* to smaller enterprises which are less able to fulfil those obligations or remedy breaches.

A significant decline in union membership has left most individual workers having to seek redress for labour law violations on their own.<sup>28</sup> The avenues available to underpaid workers to pursue wage recovery in Australia do not provide large scale advice or representation to migrant workers and leave the overwhelming majority unable to pursue remedies for underpayment. This Section provides a brief overview of the three main avenues for wage recovery in Australia (besides a worker's direct complaint to his or her employer).

### 1. Trade unions and legal service providers

Both trade unions and legal service providers may assist workers to directly negotiate with the employer, file a claim in court, or approach the FWO. However, few migrant workers receive their assistance. Affordable legal advice and representation for employment claims is highly limited.<sup>29</sup> Migrant workers are generally unlikely to proactively seek trade union assistance, though trade unions in some industries (such as meat-packing, horticulture and commercial cleaning) have recruited and represented migrant workers with notable successes. Only 4% of respondents in the NTMW Survey stated that they were trade union members, compared with approximately 10% in the private sector.<sup>30</sup>



## 2. Courts

For wage claims under \$20,000, a worker can bring a case against the employer in the small claims jurisdiction of the Federal Circuit Court of Australia or the Magistrates Courts. This jurisdiction is more informal and is intended to be available to workers without legal representation. However, the very small number of migrant workers who use the courts are almost always assisted by trade unions or legal service providers because the complexity of applications still renders litigation inaccessible to this group. For example, even in the small claims division a self-represented litigant must correctly identify the legal entity of their employer as well as the legal instrument the employer has breached.<sup>31</sup> They must also prepare necessary affidavits and execute formal legal service of relevant documents on the employer. Among participants in the NTMW Survey, 1 in 12 (8%) did not even know who paid their wages, let alone the correct name of the employer's formal legal entity. In the context of an acute power imbalance in court between most migrant workers and their employers, even those few migrant workers who are able to file a claim have an understandably bleak view of the risks and likelihood of success.<sup>32</sup>

## 3. The FWO

This leaves the FWO as the principal avenue through which migrant workers may seek remedies for wage underpayment. Recognising the vulnerabilities of migrant workers, the agency has made significant efforts to address exploitative practices at a systemic level, including numerous high profile campaigns and inquiries. However, the FWO's core functions are not directed to the large-scale provision of individual remedies. Rather, they are oriented to strategic enforcement, systemic deterrence of noncompliance, and the promotion of harmonious workplaces.

In a previous study conducted with colleagues for the FWO, the authors found that many international students did not know how to contact FWO and found its website difficult to use.<sup>33</sup> Service providers note that it is difficult for migrant workers to contact the FWO on their own, and most require assistance to articulate their concerns in a manner that will engage the regulator's assistance.<sup>34</sup>

When a worker contacts the FWO, the regulator places a strong emphasis on enabling 'self help' by providing workers with information to address workplace issues themselves while preserving employment relationships.<sup>35</sup> Indeed, one of the agency's key performance targets is that 'at least 90% of requests for assistance involving a workplace dispute are finalised through education and dispute resolution services'.<sup>36</sup> Consistent with this target, the vast majority of individuals who contact the FWO's Infoline are directed to information on the regulator's website or are referred to other service providers, and receive no further assistance to recover unpaid wages.

However, for most migrant workers, preserving employment relationships and self-help are ill-suited to the context of their low wage employment. Many temporary workers are unlikely to retain their employment relationships if they complain; they are effectively dispensable in the saturated labour market of their low wage industries. At the same time, few migrant workers are able to engage in self-help strategies for the same reasons they are reluctant to complain at all, including the pronounced power disparity between them and their employers.

If the worker submits a formal Request for Assistance, the FWO may address the matter directly with the employer or facilitate a voluntary phone mediation between the employer and employee(s). The agency does not advocate on the worker's behalf and is under no obligation to achieve or enforce any particular outcome for the worker. It is difficult for migrant workers to advocate on their own behalf in this context. Moreover, the FWO has no power to compel an employer to participate in mediation and it has no obligation to pursue an employer who refuses to participate.

In only a small fraction of cases, an individual Request for Assistance will trigger a formal investigation. The FWO can issue a range of administrative sanctions against employers, including infringement notices, compliance notices, enforceable undertakings, and it can seek civil penalties through the courts. However, many migrant workers face further barriers to engaging the FWO's intervention if they do not have evidence of their underpayment

(for example, if they were paid in cash and/or without a payslip, as was the case for around half of all survey participants).<sup>37</sup> Although contraventions involving visa-holders are significantly overrepresented in each of the FWO's enforcement activities, each mechanism is used sparingly and the chances of contraventions being investigated and sanctioned remain low. Moreover, while remedies for individual workers may flow from these enforcement activities or be a means to achieving their goals, they are not a primary objective in their own right.

This leaves the majority of migrant workers who contact the FWO unlikely to recover their unpaid wages, as reflected in the survey results discussed in Section VII below.

*A decline in union membership has left many individual workers having to seek redress for labour law violations on their own, and the avenues available to pursue wage recovery in Australia do not provide large scale advice or representation*

## Section III: Key findings from the National Temporary Migrant Work Survey on underpayment of migrant workers

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*Wage Theft in Australia* reported on the first section of the NTMW Survey concerning wage rates and other working conditions experienced by temporary migrant workers who had worked in Australia. Key findings included:

1. **Scope of underpayment.** Almost a third (30%) of survey participants earned \$12 per hour or less in their lowest paid job. This was approximately half the minimum wage for a casual employee in many of the jobs in which temporary migrant workers work. Almost half (46%) of participants earned \$15 per hour or less (excluding 457 visa-holders).
2. **Weekly hours in job.** Temporary migrant workers worked a substantial number of hours in their lowest paid job. Almost three quarters (72%) of Working Holiday Makers indicated that they worked 21 hours per week or more, and two thirds (64%) of international students reported that they worked between 9 and 20 hours each week. A further 13% of students worked 21 hours or more.
3. **Job types.** Underpayment was widespread across numerous industries but the largest number of participants (38%) had their lowest paid job in the food services industry, including as waiters, kitchen hands and food servers. This was a far greater proportion than for any other industry, with around one in ten participants working in professional services (11%), horticulture (as vegetable or fruit pickers or packers or farm workers) (9%), commercial cleaning (9%), or retail (as shop assistants or in sales) (8%), and a smaller proportion across a range of other industries. The lowest pay rates were in horticulture and farm work.
4. **International students vs Working Holiday Makers.** A quarter (25%) of all international students earned \$12 per hour or less in their lowest paid job and 43% earned \$15 or less. University students did not earn substantially higher wages than students at vocational and English language colleges. A third (32%) of all Working Holiday Makers earned \$12 per hour or less and almost half (46%) earned \$15 or less in their lowest paid job.
5. **Employers widely pay migrant workers in cash and do not provide pay slips,** especially in food services and among Chinese workers. A substantial proportion (44%) of temporary migrant workers were paid in cash in their lowest paid job, and 50% reported that they never or rarely received pay slips. This rose to almost three quarters of those paid \$12 per hour or less (70% and 74% respectively).
6. **Nationalities.** Several Asian countries had the highest proportions of migrants earning \$17 per hour or less in their lowest paid job (81% of Chinese, 79% of Taiwanese and 75% of Vietnamese), compared with predominantly English-speaking countries that had the lowest proportions (35% of Americans, 38% of Irish and 41% of British). However, extremely poor wage rates (\$12 per hour or less) were reported by at least a fifth of temporary migrant workers from every nationality.
7. **How job found.** Most participants who earned between \$6 and \$12 per hour found their job either through a friend or family member (23%), by contacting their employer directly (24%), or through an internet site in their own language (21%). Among Koreans who earned \$6 to \$12 per hour, 59% found their job on a Korean-language website.
8. **International students and Working Holiday Makers were aware of the Australian minimum wage and knew they were being underpaid, but believed that few people on their visa could expect to receive that wage.** Among those earning \$15 per hour or less, three quarters of students (73%) and backpackers (78%) knew that the minimum wage was higher. Underpaid participants believed underpayment is endemic among people on their visa. At least 86% of migrant workers who earned \$15 per hour or less believed that many, most or all other people on their visa are paid less than the basic national minimum wage.

There were two reasons why questions in the NTMW Survey focused on features of employment in participants' lowest paid job. First, it was necessary to confine questions about different aspects of employment to a single job in order to analyse the extent to which those factors coincide under different employment circumstances. Second, the survey focused on participants' lowest paid job (as opposed to any job) in order to enable analysis of the largest possible dataset on features of poorly paid jobs in which migrant workers work, and the factors that coincide with underpayment. As a result, the survey presents participants' worst experiences in Australia and does not capture participants' other experiences which might have been more positive for some.

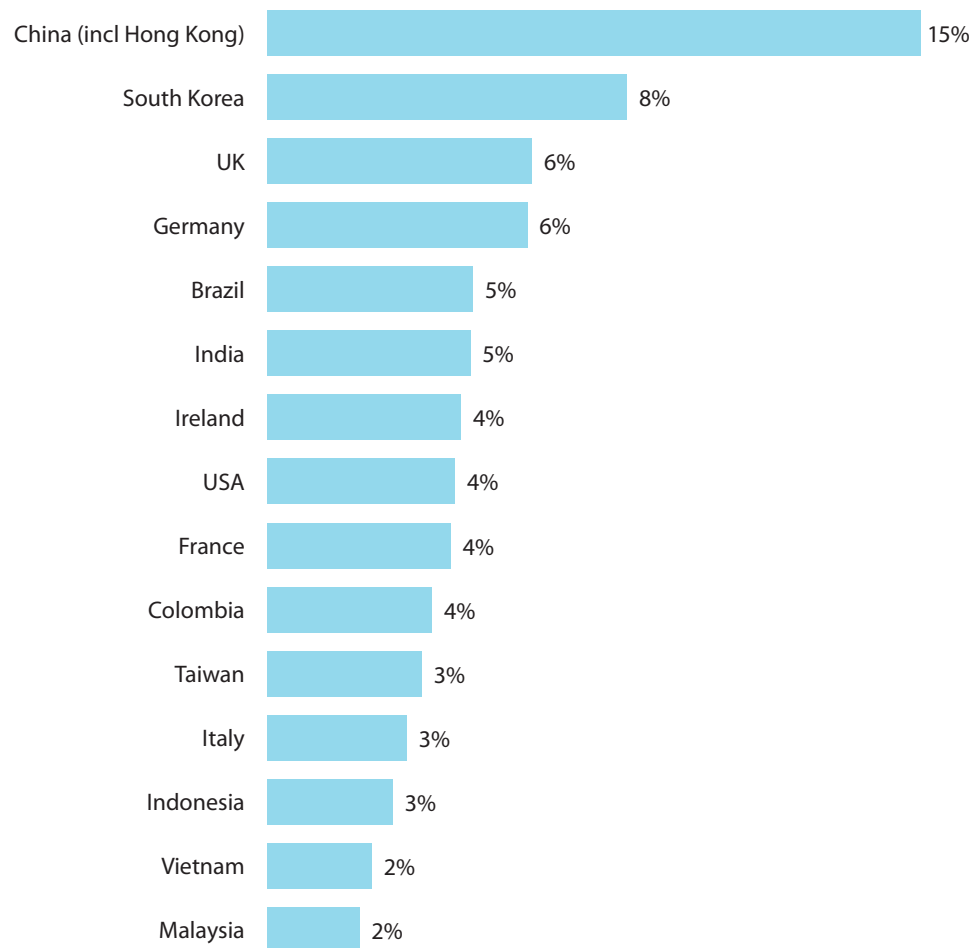
## Section IV: Demographic profile of survey participants

The NTMW Survey was undertaken by 4,322 participants who indicated that they had worked in Australia on a temporary visa. This section examines these participants' gender, nationality and year of arrival in Australia as well as their visa. Further details about the demographic profile of participants are discussed in *Wage Theft in Australia*.

### Nationality

Survey participants were nationals of 107 countries,<sup>38</sup> across every region of the world. Almost half (47%) were from countries in Asia, including 15% who were Chinese nationals (including Hong Kong) (Figure 1). For a breakdown of nationalities within each visa cohort, see *Wage Theft in Australia*.

Figure 1. Top 15 nationalities of participants (n= 2,398)



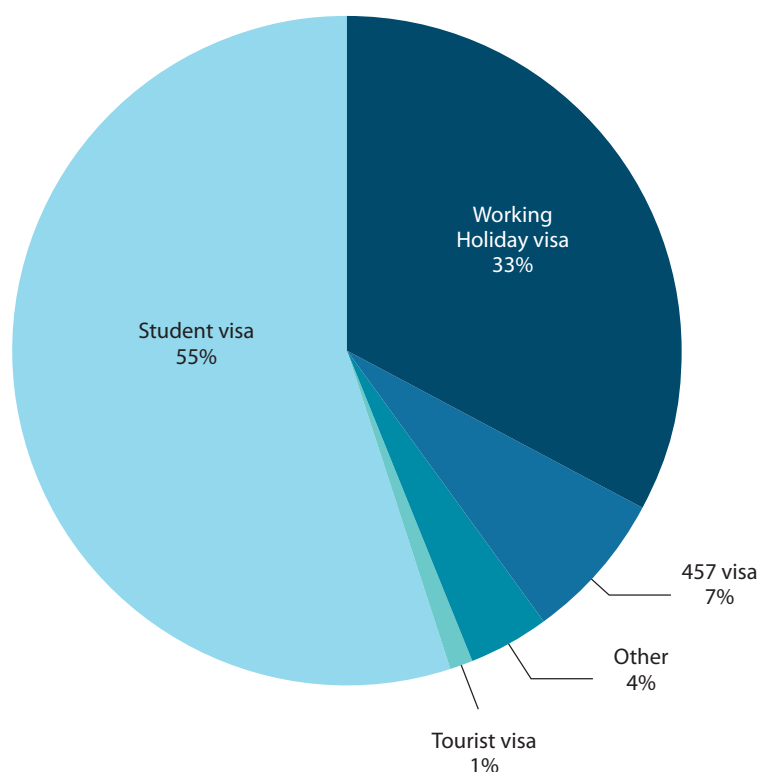
### Gender

A majority of participants (60%) were female. Eighteen participants indicated that their gender was other than male or female.

## Visa cohorts

Participants were asked what visa they held during their lowest paid job in Australia. As indicated in Figure 2, the majority (55%) of participants indicated that they were international students, followed by around a third (33%) who indicated they were Working Holiday Makers. These included Working Holiday visa holders (subclass 417) and Work and Holiday visa holders (subclass 462).<sup>39</sup> Seven per cent of participants held employer-sponsored Temporary Work Skilled (subclass 457) visas.<sup>40</sup> This proportion is substantially lower than the proportion of skilled visa holders among migrant workers nationally.<sup>41</sup> The remaining 5% of survey participants held tourist visas without work rights and a range of other temporary visas (including the Temporary Graduate visa available to certain international students at the conclusion of their studies).

**Figure 2.** Visa held by participants during their lowest paid job (n= 4,322)



Those participants who indicated that they held a student visa were asked the name of their educational institution at that time. Among international students, three quarters (77%) indicated that they were enrolled at a university while working in their lowest paid job. They were primarily studying at universities in New South Wales, with 738 who were students at UNSW Sydney and 314 who were students at University of Technology Sydney when working in their lowest paid job. One quarter of international students (23%) were studying at non-tertiary colleges including vocational institutions (VET) and English language colleges (ELICOS).

The proportion of university students to college students was substantially higher than the national figures, which indicate there is a larger proportion of international student enrolments in college courses compared with university courses.<sup>42</sup> Nevertheless, the survey data on work experiences of 523 college students is by far the largest sample of data from this student body which is notoriously difficult to reach, and which was not covered by the two previous large-scale studies on working conditions of international students in Australia, which included only university students.<sup>43</sup>

## Section V: Did migrant workers try to recover unpaid wages?

After responding to questions about their knowledge of minimum wage, participants were told that the legal minimum wage in Australia at the time of the survey was \$17.70 an hour but that they were probably entitled to more.<sup>44</sup> They were then asked, 'If you have been paid less than you were entitled to in any job, will you try to recover unpaid wages?'. They could select one of four options: 'Yes, I have tried'; 'Yes, I might try in the future', 'No, I will not try', or 'No, I have never been paid less than the minimum legal wage'. Those who indicated that they might try in the future were given a further option of selecting 'I plan to try'.

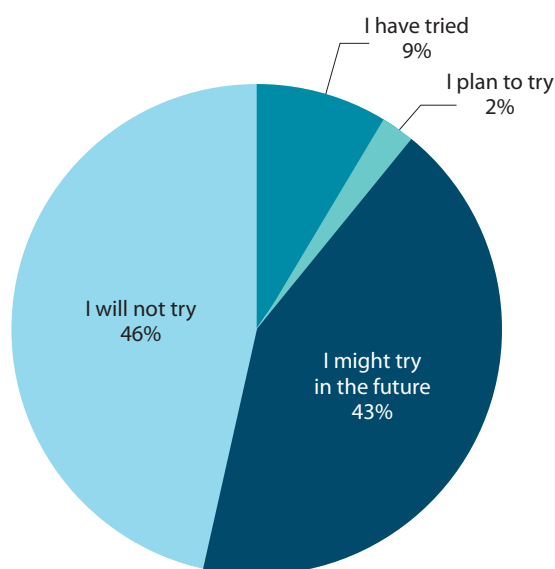
In contrast to the first part of the survey which focused on participants' lowest paid job in Australia, this set of questions was framed in terms of any job that participants had held in Australia. Participants' responses could therefore have related to underpayment in their lowest paid job or potentially in other jobs. This has implications for analysis of intersections between participants' responses in relation to their lowest paid jobs and their responses about wage recovery. It is not possible to assume that participants who indicated they had tried to recover unpaid wages had done so in relation to their lowest paid job rather than another job. However, if participants indicated that they had **not** tried to recover their wages, this meant that they had not tried to recover wages for their lowest paid job (or any other job). The following analysis therefore considers the features of participants' lowest paid job only where these intersect with not attempting to recover unpaid wages.

### What proportion of migrant workers tried to recover their unpaid wages?

Among the 2,258 participants who acknowledged they had been underpaid, 91% had not tried to recover their unpaid wages, as shown in Figure 3. It is likely that fewer than 9% of migrant workers in the general population would have tried to recover unpaid wages and that action-taking was overrepresented among survey participants. This is because by taking the survey, all survey participants had demonstrated that they were willing to invest time and effort in sharing information about their working conditions as compared with others who received information about the survey but did not participate. Furthermore, some likely received a link to the survey by email from a service provider or trade union that had previously assisted them.

Almost half of underpaid participants (46%) indicated they would not try to recover their unpaid wages. However, surprisingly, 45% of underpaid participants indicated that they were open to trying to recover their unpaid wages in the future, of whom 2% already planned to try.

**Figure 3.** Proportion of underpaid participants who had tried to recover wages, planned to recover, might try in the future or would not try (n= 2,258)





## Which cohorts of migrant workers tried to recover their unpaid wages?

In this section, we examine characteristics of the 11% of underpaid participants who indicated either that they had tried to recover their wages or were planning to do so. Together we describe this group as ‘participants who tried’.

### Nationality

Within the top ten nationalities with the highest proportion of underpaid participants who had tried to recover unpaid wages, seven were Asian and three were Western European (including a particularly high proportion of nationals of Pakistan (26%), Taiwan (25%) and Italy (22%)). Among the five nationalities with the lowest proportion of participants who tried (among those with 25 or more nationals) were Canada (6%), the United Kingdom (4%), Ireland (4%) and the United States (2%).

**Table 1.** Proportion of underpaid participants who tried to recover unpaid wages within nationalities with at least 25 underpaid participants who answered the question

Country	Proportion of underpaid participants within nationality who tried to recover wages	Number of underpaid participants who tried to recover	Total number of underpaid participants who answered question
Pakistan	26%	7	27
Taiwan	25%	23	93
Italy	22%	15	67
Nepal	17%	5	30
India	15%	14	94
Vietnam	14%	9	65
Netherlands	12%	4	33
Spain	12%	3	26
The Philippines	11%	4	35
Indonesia	11%	7	64
Colombia	10%	10	99
France	9%	7	77
China (incl Hong Kong)	9%	35	408
Japan	9%	4	47
Brazil	8%	7	86
Germany	8%	9	120
South Korea	7%	15	219
Canada	6%	2	31
Malaysia	5%	3	55
UK	4%	4	92
Ireland	4%	3	72
USA	2%	1	53

## Visa during lowest paid job

Participants were asked what visa they were on during their lowest paid job but were not asked their visa at the time of the survey. Although most participants would likely have been on the same visa during their lowest paid job and at the time at which they tried to recover unpaid wages and/or the time of the survey, there may be a small number for whom this was not the case. It is therefore possible that a small number of those who had tried to recover unpaid wages held a different visa at that time.

A similar proportion of underpaid international students (10%) and Working Holiday Makers (12%) tried to recover unpaid wages. However, as discussed in Section VII below, the organisations from which they sought assistance varied between the groups. There was little variation between university students and college students regarding the proportion who had tried to recover wages for this or another job (9% and 11% respectively). Among international students who knew someone who had been to the FWO, the proportion who tried to recover was slightly higher (13%). However, among Working Holiday Makers who knew someone who had been to the FWO, a substantially higher proportion had tried (20%).

## Further factors that distinguished participants who tried to recover unpaid wages from those who had not tried

Several factors distinguished underpaid participants who had tried to recover unpaid wages from underpaid participants who had not:

1. **Knowledge of someone else who had contacted the FWO.** A higher proportion (20%) of those who knew someone who had contacted the FWO had tried to recover unpaid wages themselves, compared with participants in general (11%). However, it is not known whether they attempted to recover their wages before or after knowing someone who had contacted the FWO.
2. **Paid less than agreed with employer.** Though all participants in this cohort were underpaid, among those who were at least sometimes paid less than they agreed or nothing at all in their lowest paid job, 17% tried to recover unpaid wages.<sup>45</sup> In contrast, only 8% of participants tried to recover their unpaid wages among those who were rarely or never paid less than the agreed wages in their lowest paid job, ie those who were paid the unlawfully low wage to which they had agreed.<sup>46</sup>
3. **Trade union membership.** Among those who had been a member of a trade union at some point in Australia, 28% of underpaid participants had tried or were planning to recover their wages, compared with 10% of underpaid participants who had never been a member of a trade union. Indeed, 10% of all underpaid participants who tried or were planning to recover were members of a trade union, compared with only 4% union membership among participants generally. This may be a result of the fact that migrant workers joined trade unions in order to complain about or recover their unpaid wages.

For a further two characteristics, there was a slight distinction between those who had tried to recover unpaid wages and those who had not:

1. **Social time with Australians.** Among participants who rarely or never spent social time with an Australian, 8% tried or planned to recover wages compared with 12% of participants who sometimes, often or very often spent social time with an Australian.
2. **Awareness of the statutory minimum wage at the time of participating in the survey.** Eleven percent of participants who were aware of the approximate statutory minimum wage at the time of the survey had tried to recover their unpaid wages, compared with 8% of participants who were not aware of the statutory minimum wage.

## Characteristics that did not distinguish participants who tried to recover unpaid wages from those who had not tried

For the following characteristics there was little difference between the group of participants who had tried to recover their wages and the group who had not:

1. **Gender.** Twelve percent of men and 10% of women had tried recover their unpaid wages.
2. **Intention to apply for residency or another visa, or having left Australia.** The proportion of participants who had tried to recover unpaid wages was similar to participants generally among those who had already obtained permanent residence by the time of the survey (10%), were planning to leave Australia (11%), were intending to apply for a different visa (10%) or were intending to apply for permanent residence (12%).
3. **Belief that underpayment of others on their visa was widespread.** Eleven per cent of participants had tried to recover unpaid wages among those who believed that many, most or all others on their visa were underpaid. This figure was the same for those who indicated that underpayment affected only some or almost no others on their visa.

## Prevalence of inaction in response to underpayment across different features of participants' lowest paid job

Inaction in response to underpayment across different features of participants' lowest paid job:<sup>47</sup>

- At least 91% of underpaid participants had not tried to recover their wages for their lowest paid job or any other job, regardless of the extent of the underpayment.<sup>48</sup>
- Regardless of whether participants were paid in cash in their lowest paid job, at least 87% had not tried to recover wages for that job or any other job.<sup>49</sup>
- At least 92% of participants in food services did not try to recover wages for that or any other job. Among participants whose lowest paid job was in fruit or vegetable picking or farm work, at least 87% had not tried to recover wages.
- At least 90% of participants had not tried to recover their wages regardless of whether they found their job through a friend or family member, an internet site in English (eg Gumtree), an internet site in their own language or by contacting their employer directly.

## Section VI: Which migrant workers were open to trying to recover wages?

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The previous section considered the responses of underpaid participants who had tried to recover unpaid wages. It is commonly assumed that few migrant workers would be willing to seek to recover unpaid wages. This was not the case among underpaid survey participants, among whom almost half (45%) indicated they might try to recover unpaid wages in the future. This section considers this cohort along with those who did try to recover their wages, whom we describe together as 'open to trying' to recover unpaid wages.

The size of this cohort (54% of underpaid participants) indicates that there is substantial value in developing interventions that seek to encourage underpaid migrant workers to report and address underpayment and other forms of exploitation. Understanding the features and attitudes of this cohort is fundamental to designing effective targeted programs and services.

At the same time, it is possible that the survey data may overrepresent the proportion of migrant worker who are genuinely open to attempting to recover unpaid wages. By virtue of participating in a survey on working conditions, some participants may be more concerned about underpayment or more dispositionally proactive than others who did not participate. In addition, participants' selection of 'might try' rather than 'won't try' may reflect a subconscious desire to see oneself, or be seen by others, as a person who contemplates action rather than inaction.

*It is commonly assumed that few migrant workers would be willing to seek to recover unpaid wages. This was not the case among underpaid survey participants, among whom almost half (45%) indicated they might try to recover unpaid wages in the future*

### Nationality

The ten nationalities with the highest proportions of participants who were open to trying to recover their wages were all countries in Asia (among countries with 25 or more underpaid participants who answered this question). Between 58% and 78% of nationals from these Asian countries were open to trying to recover their wages, compared with 24% to 45% of nationals from the Western Europe and North America. Indeed, among the 5 countries with the lowest proportion of nationals open to trying to recover unpaid wages were Canada (32%), United Kingdom (29%), United States (25%) and Ireland (24%). This might be attributable to less severe levels of underpayment.<sup>50</sup> But, overall, there was little difference in openness to wage recovery between participants who earned \$12 or less, \$13-15, or more than \$15 per hour in their lowest paid job.<sup>51</sup>

**Table 2.** Proportion of underpaid participants who were open to recovering unpaid wages within nationalities with at least 25 underpaid participants who answered the question

Country	Percentage of underpaid participants who tried or were open to recovering wages in future	Total number of underpaid participants who answered question
Malaysia	78%	55
India	76%	94
Nepal	73%	30
Japan	72%	47
South Korea	72%	219
Pakistan	70%	27
Taiwan	65%	93
Indonesia	63%	64
China (incl Hong Kong)	59%	408
Vietnam	58%	65
The Philippines	54%	35
Colombia	51%	99
The Netherlands	45%	33
Germany	43%	120
Brazil	41%	86
Italy	37%	67
France	32%	77
Canada	32%	31
Spain	31%	26
UK	29%	92
USA	25%	53
Ireland	24%	72

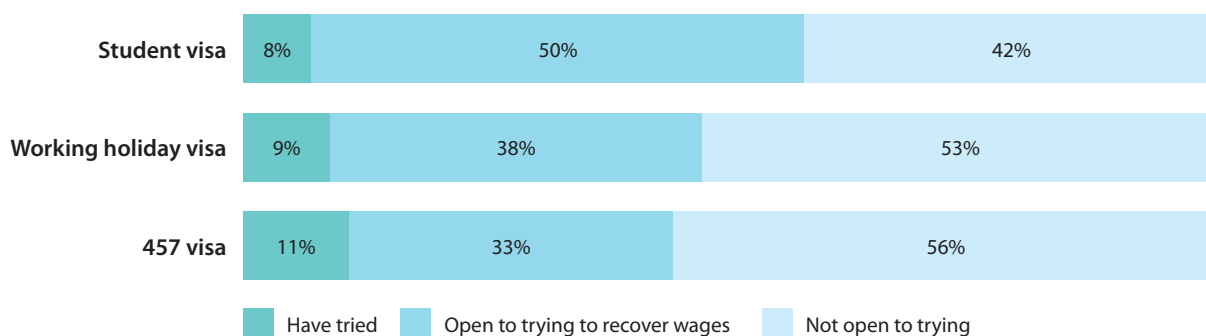
*The ten nationalities with the highest proportions of participants who were open to trying to recover their wages were all countries in Asia*

## Visa during lowest paid job

As discussed in the Section above, participants were asked about their visa during their lowest paid job. Although most participants would likely have remained on the same visa, there may be a small number who would have held a different visa when they tried to recover wages or at the time of the survey.

There is a perception that international students are reluctant to report or take action in relation to underpayment, because a far smaller proportion of international students seek the assistance of the FWO than other migrant workers. This survey data paints a different picture in two respects. First, as discussed in the previous Section, the proportion of students who had tried to recover wages is almost identical to Working Holiday Makers (although as discussed below, the institutions through which they seek help differ). Second, surprisingly, among those who had not tried to recover unpaid wages, a far greater proportion of underpaid international students were open to doing so in future (50%) compared with Working Holiday Makers (38%) or 457 visa holders (33%) (Figure 4). This suggests that if the costs and barriers to recovering wages could be reduced for international students, a substantial number would in fact come forward and take action in response to wage theft.

*Figure 4. Proportion of underpaid participants who had tried, were open to trying or were not open to trying to recover unpaid wages, among participants who held particular visas in their lowest paid job (n=2,183)*



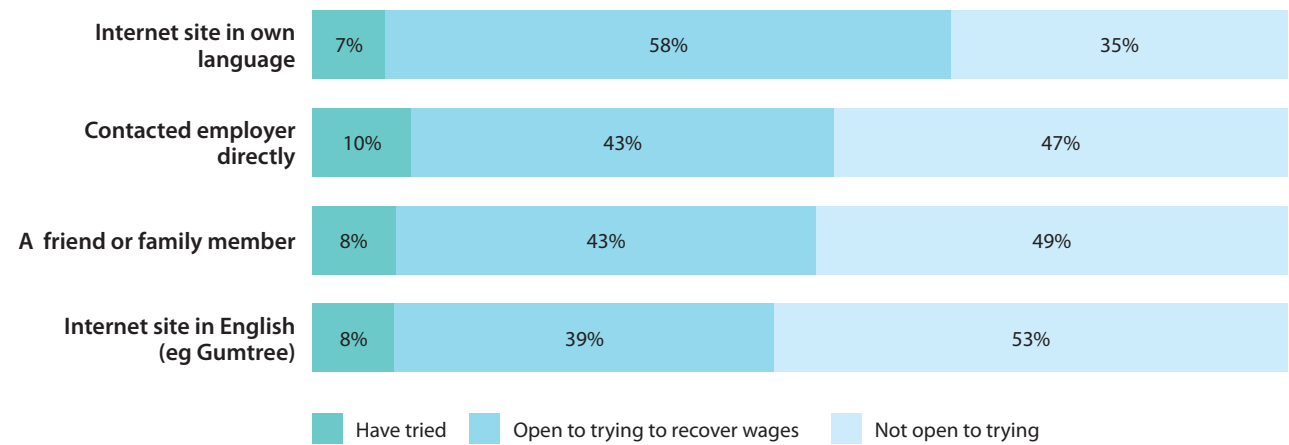
## How participants found their lowest paid job

There is a perception that migrant workers are reluctant to report wage theft by an employer of the same nationality or ethnicity. However, among survey participants who found their lowest job through an internet site in their own language,<sup>53</sup> two thirds (65%) had tried or were open to trying to recover unpaid wages for that or another job. This suggests that co-ethnic employment may not in fact present as substantial a barrier to migrant workers reporting and addressing wage theft as suspected. Indeed, as discussed in Section VIII below, among participants who found their lowest paid job through an internet site in their own language, only 15% feared that their employer would speak badly about them in the community if they sought to recover their wages.

The proportion of participants who had tried or were open to trying to recover wages was, however, substantially lower among participants who had a personal connection to their employer and found their lowest paid job through a friend or family member (51%).



Figure 5. Proportion of underpaid participants who had tried, were open to trying or were not open to trying to recover unpaid wages, among participants who found their lowest paid job through particular sources (n=1,886)



### Knowing someone who had contacted the FWO

Among participants who knew someone who had contacted the FWO, 64% indicated they might try to recover their unpaid wages, which remained unchanged regardless of whether the person they knew was successful or unsuccessful in recovering their wages through the FWO. This suggests that effective dissemination of migrant workers’ stories and experiences engaging with the FWO may encourage underpaid peers to take action themselves.

The converse, however, is also notable: even among those who knew someone who was successful at the FWO, 36% indicated they would not try to recover unpaid wages. This suggests that either they did not perceive similar prospects of success in their case, or the risks and costs of contacting the FWO outweighed the potential benefit they perceived. These figures were similar for those who were international students or Working Holiday Makers during their lowest paid job.

*Co-ethnic employment may not in fact present as substantial a barrier to migrant workers reporting and addressing wage theft as suspected*

# Section VII: What avenues did migrant workers pursue to recover wages and with what outcomes?

## Organisations contacted for assistance to recover wages

Participants who indicated that they had tried to recover unpaid wages were asked whom they contacted for help, and were able to select one or more organisations (Figure 6). Among the 197 participants who tried to recover their unpaid wages, a third (32%) contacted the FWO. This included two thirds (67%) of 457 visa holders, almost half (48%) of Working Holiday Makers, but only 18% of international students (Figure 7). This included 16% of university students and 27% of college students.

Among international students, a third (34%) contacted someone at their university or college. This included 38% of university students and 27% of college students.

Five per cent of participants contacted a trade union (Figure 6). Trade union assistance was more commonly sought by Working Holiday Makers (10%) than international students (3%). Trade union assistance was sought by participants whose lowest paid job was in food services (3%), horticulture (5%), cleaning (11%) and in meat or poultry work (67%) (though this was only 4 individuals).

Eight per cent of participants sought assistance from a law firm or community legal centre. International students more commonly sought help from legal service providers (11%) than Working Holiday Makers (4%).

Only a single individual (an international student) tried to recover unpaid wages by going to court and that participant may have contacted a service provider that assisted them to do so.

More than two fifths of participants (44%) indicated that they sought help from sources other than formal institutions, most likely friends, family, social media or other community contacts. Indeed, this was the most popular option for international students, among whom one in two (47%) sought help from informal sources.

Figure 6. Organisations contacted by underpaid participants for assistance to recover unpaid wages (n=194)

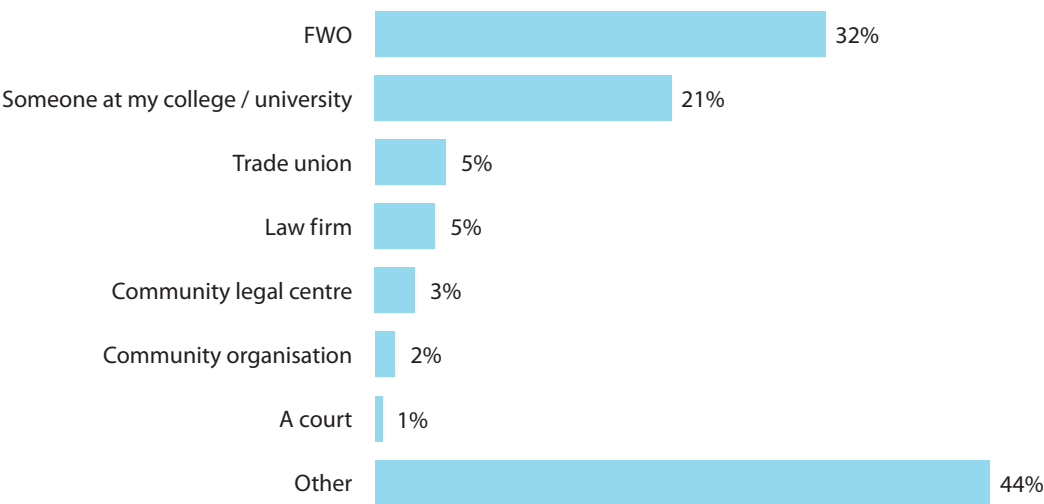
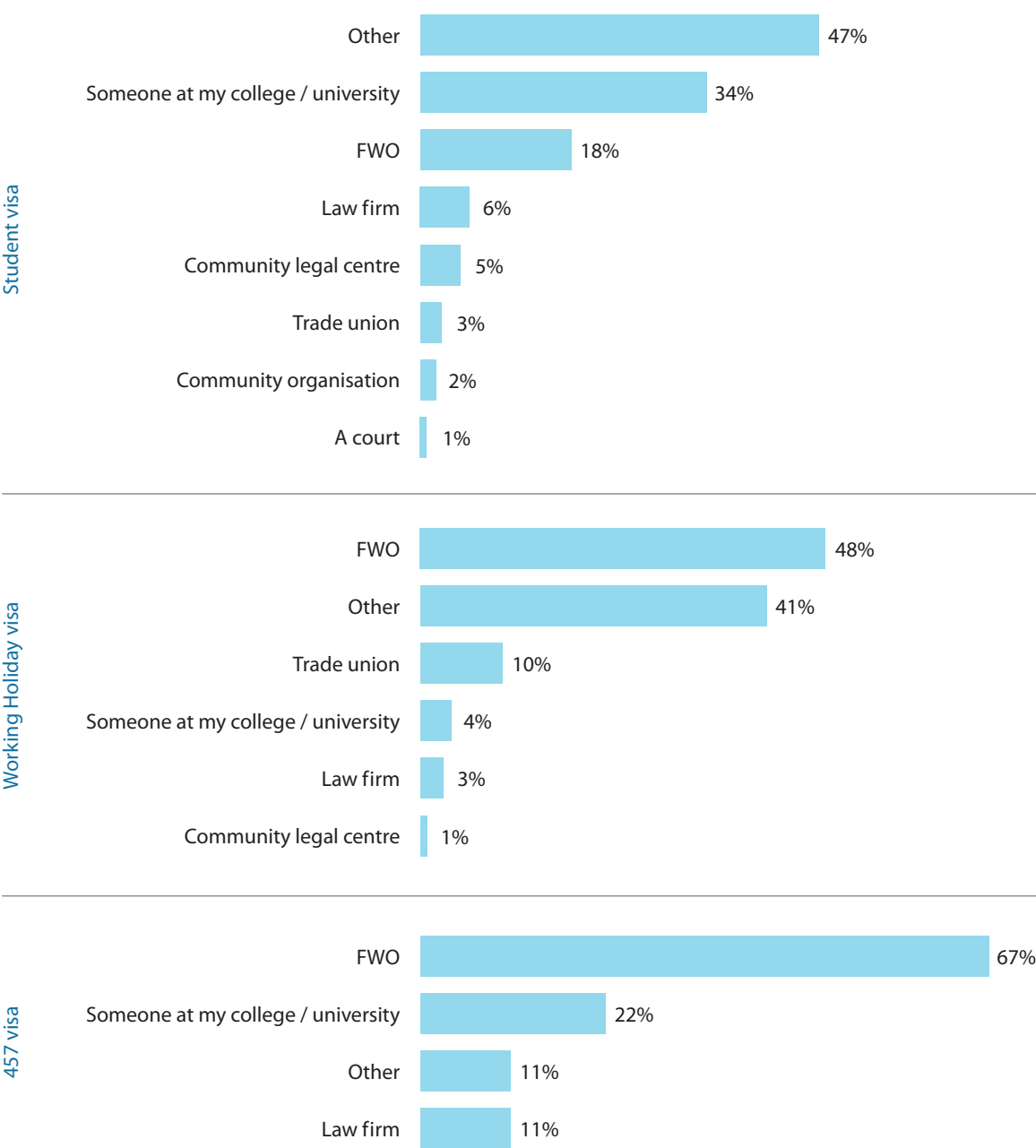


Figure 7. Organisations contacted by underpaid participants, by visa held during lowest paid job (n=186)



## Outcomes for migrant workers who tried to recover wages

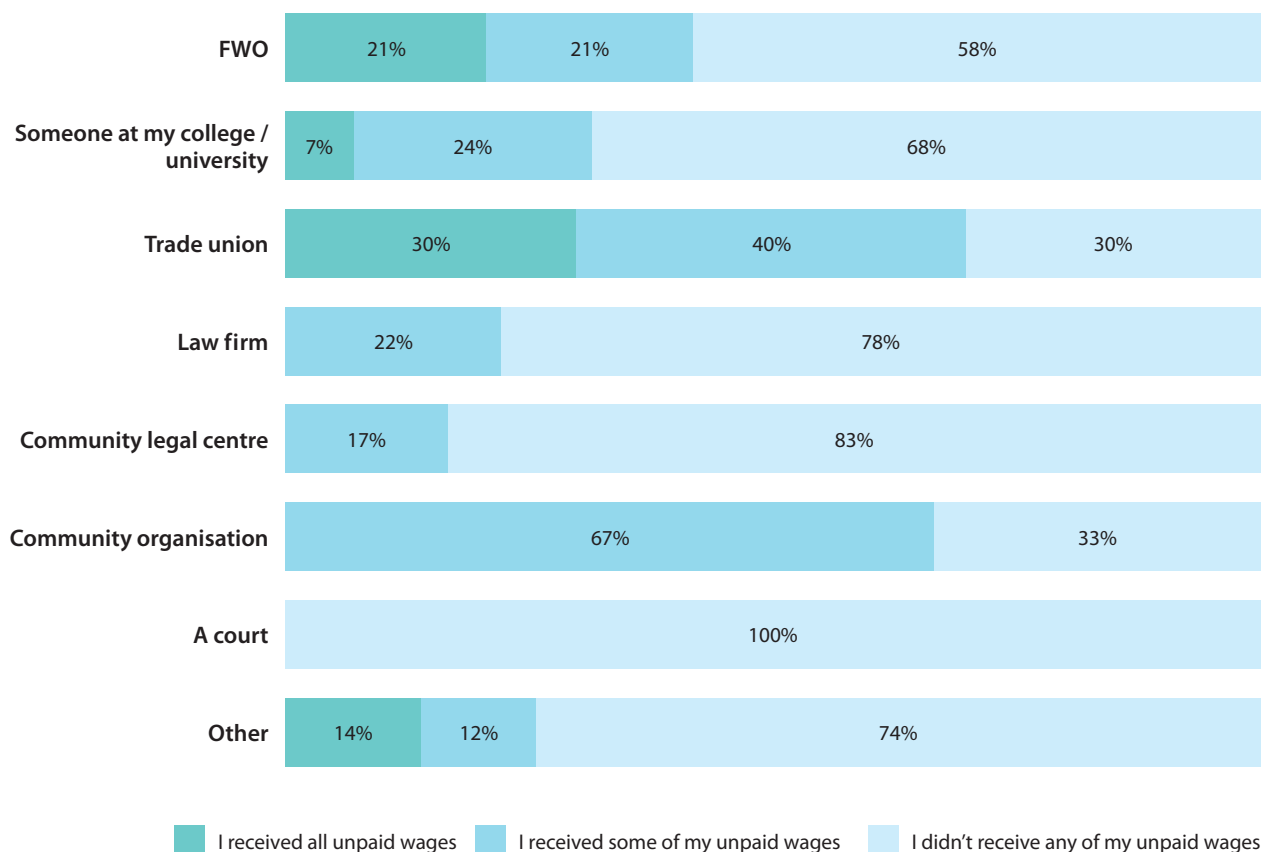
Participants who tried to recover their wages were asked whether they recovered all, some or none of their unpaid wages through the organisation from which they sought assistance.<sup>54</sup>

Of the 194 participants who had tried to recover wages, two in three recovered nothing (67%). Fewer than one in six (16%) recovered all their unpaid wages.

Three in five (58%) underpaid participants who sought assistance from the FWO did not recover any of their unpaid wages. Among participants who sought assistance from their college or university, over two thirds (68%) recovered nothing; only 7% recovered all of their unpaid wages.

The ten participants who contacted a trade union had the best outcomes, with the highest proportions of participants recovering all (30%) or some (40%) of their unpaid wages. The lone individual (an international student) who went to court recovered none of his or her wages.

*Figure 8. Proportion of wages recovered by participants who sought assistance to recover unpaid wages, by organisation contacted (n=194)*



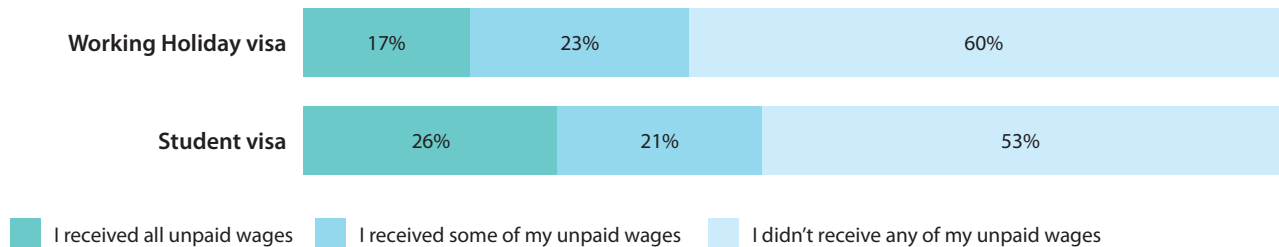
## Participants who contacted the FWO

### Visa held by survey participants who contacted the FWO

Among the 19 students who contacted the FWO, one in two (53%) recovered none of their unpaid wages (Figure 9). A fifth (21%) recovered some of their unpaid wages, but only one in four (26%) recovered all. Within this relatively small sample size, college students had poorer outcomes at the FWO than university students. Almost two thirds (63%) recovered none of their unpaid wages, compared with 46% of university students. Similarly, only one in eight (13%) college students recovered all of their unpaid wages, compared with more than a third (36%) of university students.

Working Holiday Makers who contacted the FWO had poorer outcomes than international students (Figure 9). Two fifths (60%) recovered none of their unpaid wages and only 17% recovered all that they were owed.

*Figure 9. Proportion of wages recovered by participants who contacted the FWO, for participants who held a student visa or a Working Holiday visa during their lowest paid job (n=54)*



### Nationalities of participants who contacted the FWO

Among participants from Asian countries, the vast majority of those who tried to recover unpaid wages sought assistance from sources other than the FWO (see Table 3). Among participants from Pakistan, Nepal, the Philippines, Japan, Malaysia, Indonesia and India, not a single national who tried to recover unpaid wages went to the FWO. Ireland was the only other nationality for which this was the case. North America and Western Europe accounted for all the nationalities in which more than a third of participants who tried to recover unpaid wages did so by contacting the FWO, with the exceptions of Colombia and South Korea.

A similar proportion of males and females approached the FWO.

**Table 3.** Nationalities of participants who contacted the FWO to recover unpaid wages (for nationalities with over 25 underpaid participants)

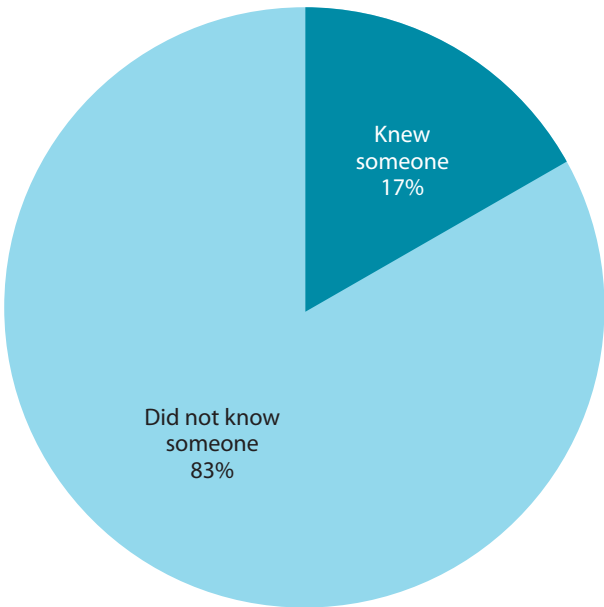
Nationality	Nationals who contacted the FWO as a proportion of nationals who tried wage recovery	Number of underpaid nationals who contacted the FWO	Number of underpaid nationals who tried wage recovery	Total number of underpaid nationals
Pakistan	0%	0	7	27
Nepal	0%	0	4	30
Philippines	0%	0	1	35
Japan	0%	0	3	47
Malaysia	0%	0	2	55
Indonesia	0%	0	6	64
Ireland	0%	0	2	72
India	0%	0	12	94
Vietnam	11%	1	9	65
Brazil	14%	1	7	86
China (incl Hong Kong)	23%	8	35	408
Taiwan	26%	6	23	93
Spain	33%	1	3	26
Germany	33%	3	9	120
Italy	47%	7	15	67
Colombia	50%	5	10	99
UK	50%	2	4	92
South Korea	53%	8	15	219
France	57%	4	7	77
The Netherlands	75%	3	4	33
Canada	100%	2	2	31
USA	100%	1	1	53



Participants' awareness of others who contacted the FWO

Among all survey participants, one in six knew a person who had tried to recover unpaid wages by contacting the FWO (Figure 10).

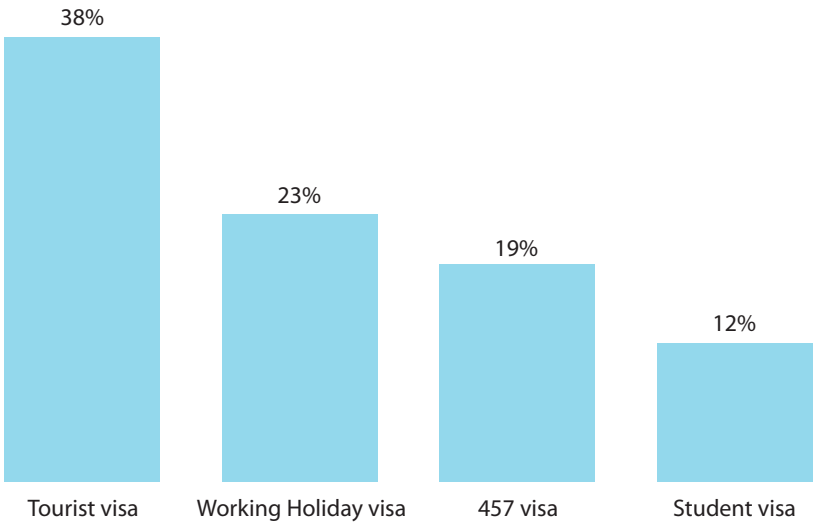
Figure 10. Proportion of participants who knew a person who had tried to recover unpaid wages by contacting the FWO (n=3,273)



Visa held by participants who knew someone who had contacted the FWO

Among the 1,754 respondents who held a student visa in their lowest paid job, only 12% knew someone who had contacted the FWO. This figure rose to 18% among college students, compared with only 10% of university students. Almost a quarter (23%) of Working Holiday Makers knew someone who had contacted the FWO.

Figure 11. Proportion of participants who knew someone who had contacted the FWO, among participants on certain visas during their lowest paid job (n=3,165)



**Nationality of participants who knew someone who had contacted the FWO**

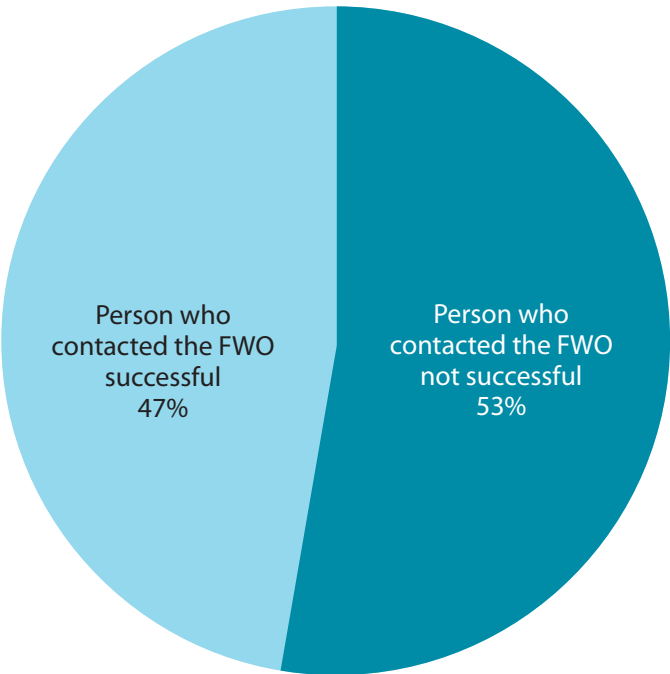
The nationalities with the highest proportion of participants who knew someone who had contacted the FWO were Taiwan (57%), Italy (28%), South Korea (28%), Brazil (23%) and France (23%). (Figure 15, Appendix C)

**Outcomes for individuals known by participants to have contacted the FWO**

Among all participants who knew a person who had contacted the FWO, there was a fairly even split between whether the person they knew had successfully recovered their unpaid wages through the FWO (53%) or not (47%) (Figure 12).

*Figure 12. Proportion of other people known by participants to have contacted the FWO who successfully recovered unpaid wages (n=546)*

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## Section VIII: Factors that stopped migrant workers from trying to recover unpaid wages

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Forty five percent of underpaid survey participants indicated that they had not tried to recover their unpaid wages but might try to do so in the future. A further 46% of underpaid participants indicated that they had not tried, and would not try, to recover their unpaid wages. Each of these categories of participants were then asked to select the reasons why they might not or would not try to recover their unpaid wages. The set of multiple choice reasons presented to participants was developed based on focus groups and interviews with migrant workers as well as interviews with service providers, government agency officials and community stakeholders in which these stakeholders were asked for their views on the factors that impede migrant workers recovering unpaid wages (for a list of interviewees, see Appendix A).

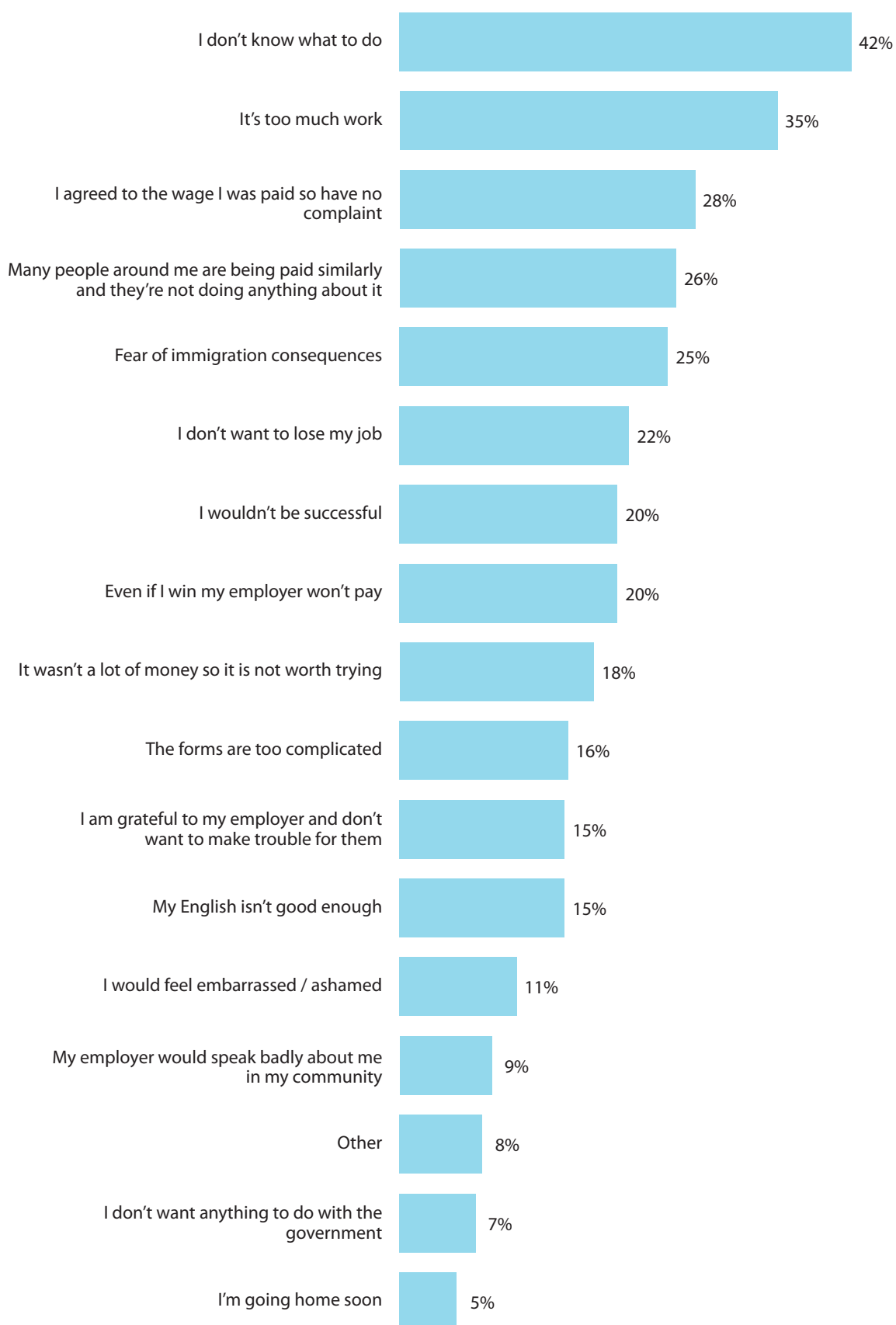
Participants could select more than one of the listed reasons and/or 'Other'. Notably only 8% of participants selected 'Other', suggesting that the options provided reflected the most significant barriers to wage recovery for most migrant workers. Participants were not asked to rank their reasons. As a result, the following analysis only considers the number of participants who selected a particular reason without reference to its importance to participants. The data also does not reflect whether the reasons selected relate to participants' lowest paid job or any other job in which they were underpaid, or whether some reasons relate to underpayment in one job and others relate to underpayment in a different job.

Figure 13 reflects the range of factors that participants indicated would or might stop them from trying to recover unpaid wages. Figure 14 shows the breakdown of factors selected by those who indicated that they **will not try** to recover unpaid wages and those selected by participants who were open to wage recovery and indicated that they **might try** to recover unpaid wages in the future.

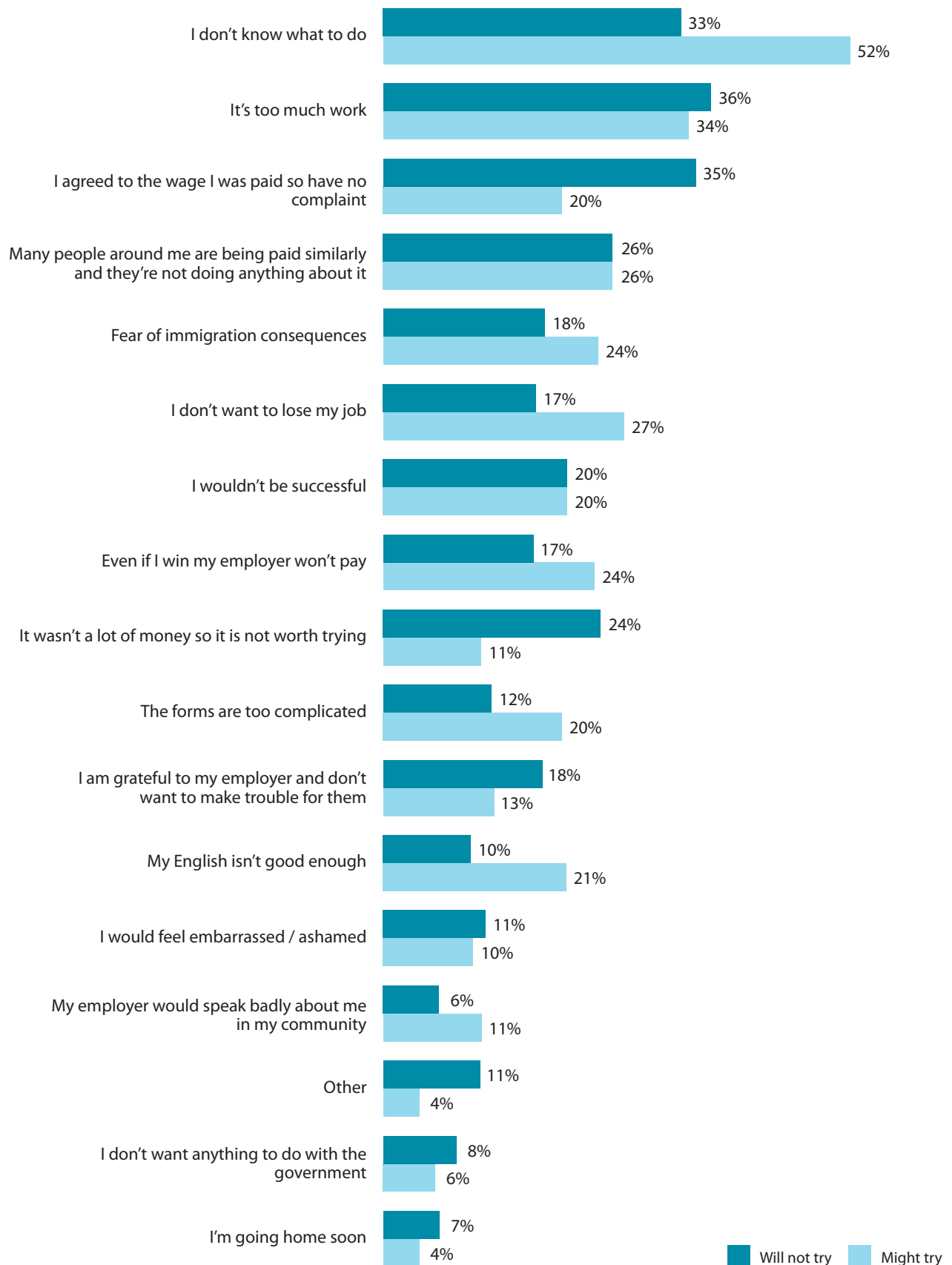
The discussion below considers the import of these factors, and how they vary among different cohorts. This includes differences between nationalities, among visa classes, methods of finding underpaying jobs, and between participants who knew a person who contacted the FWO and those who did not. In doing so, it seeks to inform the development of targeted interventions to address the barriers that impede migrant workers from reporting and addressing underpayment, with a particular focus on barriers impeding the category of participants who were open to trying in the future.

*46% of underpaid participants indicated that they had not tried, and would not try, to recover their unpaid wages*

**Figure 13.** Participants' responses to the question: 'What might stop you trying, or why won't you try, to recover unpaid wages from your employer?' (n=1,996)



**Figure 14.** Participants' responses to the question: 'What might stop you trying, or why won't you try, to recover unpaid wages from your employer?' for those who indicated they might try to recover unpaid wages, and those who indicated they will not try (n=1,996)



## Lack of capacity, competence or knowledge about how to recover wages

Concerns about lack of capacity or knowledge were identified by a substantial number of participants. As reported in *Wage Theft in Australia*, the vast majority of survey participants (79%) knew that minimum statutory pay rates in Australia were at least \$17 per hour at the time of the survey. However, far fewer were aware of the avenues through which they could recover unpaid wages. Two in five underpaid participants (42%) reported that they had not tried to recover unpaid wages because they did not know what to do. For some this may have been a lack of basic knowledge about the institutions and avenues available for wage recovery or where they would go for help. For others, it may have been a lack of detailed knowledge about precisely how to engage the assistance of the FWO or other service providers. For instance, among participants who knew someone who had successfully recovered unpaid wages through the FWO, 27% nevertheless indicated that they had not tried to recover their unpaid wages because they did not know what to do.

For others, not knowing what to do may reflect a lack of knowledge about how to **successfully** recover wages given what they knew about the available options. For example, among participants who knew a person who contacted the FWO but had not successfully recovered their wages, 46% indicated that they had not tried to recover wages because they did not know what to do. In other words, among this cohort who knew about the FWO, an even greater proportion indicated that they did not know what to do.

'I don't know what to do' was the top reason given by participants of five of the largest seven nationalities, including China, the United Kingdom, Colombia, India and Brazil (see Table 6, Appendix D). Practical barriers related to lack of knowledge or capacity were particularly significant for South Korean participants. However the fact that 'I don't know what to do' was selected by 43% of United Kingdom nationals suggests that lack of knowledge about how to recover wages is not only due to a lack of familiarity with a Western governmental or legal culture or difficulties speaking English.

A third of participants (35%) reported that trying to recover wages was too much work. This may be a general suspicion that whatever is involved in recovering wages was too much work, and/or that attempting to find out what to do may have been too much work.

Other responses related to lack of capacity, including that the forms are too complicated (16%). Perhaps surprisingly, only 15% of participants selected '[m]y English is not good enough', suggesting that this concern was eclipsed by more significant barriers to wage recovery. Since the survey was available in 11 languages in addition to English, respondents to this question would have included native English speakers and others with strong English language proficiency as well as those whose English may have been poor. Even among participants who found their lowest paid job through an internet site in their own language, only a third (32%) cited low English language ability as a barrier to wage recovery.

Knowledge and capacity concerns presented barriers for a substantial number of participants who were open to trying to recover their wages – more so than for those who would not try, for whom social perceptions and relational factors were more salient (see below). Among those who said they were open to trying to recover their wages, over half (52%) selected 'I do not know what to do' as a factor that would stop them from trying as compared with only 33% of those who were not open to wage recovery. This reason was substantially more prevalent than any other within this group. Approximately twice as many participants who were open to trying to recover their wages identified as a barrier that their English is not good enough (21%) and that the forms were too complicated (20%), compared with those not open to wage recovery (10% and 12% respectively).

Although concerns about lack of capacity were not the only barriers, the fact that these were such substantial concerns among participants who were open to wage recovery suggests that efforts to educate and provide appropriate assistance, in migrant workers' own language, would warrant the resource investment and lead to more underpaid migrant workers reporting and attempting to recover unpaid wages.

## Social perceptions and relational factors

Social perceptions and relational factors accounted for the third and fourth most common responses overall. Over a quarter of underpaid participants were reluctant to try to recover unpaid wages because they had 'agreed to the wage [they were] paid so have no complaint' (28%). It is unclear whether these participants believed that they did not have a legal right to statutory minimum wages because they reached an agreement for a different wage rate, or whether they believed they did not have a moral or ethical right to complain about a wage rate they agreed to at the outset. This is consistent with the finding, discussed in Section V above, that a substantial proportion of participants tried to recover unpaid wages, when in their lowest paid job their employer paid them less than was agreed or nothing at all (17%). In contrast, among underpaid participants whose employer paid what they had agreed, only 8% tried to recover unpaid wages even though they were also underpaid. In other words, those who agreed to a wage of \$12 per hour, for instance, and were paid that amount were less likely to try to recover unpaid wages than those promised \$14 per hour who were paid \$12.

Having agreed to the wage presented a barrier for a far greater number of those opposed to wage recovery (35%) than for those who were open to trying (20%). That is, for over a third of those who would not try to recover their wages, this was because they had agreed to the wage (potentially in addition to other reasons).

A quarter (26%) of all underpaid participants indicated they might not or would not try to recover unpaid wages because many people around them were being paid similarly and not doing anything about it. This may reflect a number of concerns. Some participants may have been reluctant to give the impression that they believed they ought to earn more than their peers who were being paid similarly. Others may have taken the cue from their peers that inaction was socially appropriate, or assumed that because their peers were not taking action there were good reasons for not doing so. Some may have concluded from others' inaction that taking action was futile or not worth the risks and costs, especially given that 86% of survey participants who earned \$15 per hour or less in their lowest paid job believed that many, most or all people on their visa were paid less than the minimum wage.

Other social obstacles that were selected by fewer participants included a sense of gratitude to the employer for the job (15%) and shame or embarrassment around trying to recover unpaid wages (11%).

## Fear of immigration consequences

A quarter of participants indicated they had not or would not try to recover unpaid wages due to fear of possible immigration consequences (25%).<sup>56</sup> In addition, 7% of participants identified a general concern about engaging with the government.

A quarter (24%) of participants who held a 457 visa during their lowest paid job selected immigration concerns as a barrier to wage recovery. Temporary skilled visa-holders may fear that if they report underpayment they may lose their job, which could result in cancellation of their visa if their sponsoring employer terminates their employment and they were unable to find an alternative sponsor within 60 days. In addition, detection of underpayment may result in cancellation of their employer's sponsorship because sponsors are required to pay wages in accordance with the law. Again, in this circumstance, loss of sponsorship can trigger visa cancellation for skilled temporary migrant workers.

Immigration concerns were raised by 23% of participants who held a student visa in their lowest paid job. International students are permitted to work no more than 40 hours work per fortnight while their course is in session. Reporting underpaid work in excess of that limitation would expose the student to potential visa cancellation and removal from Australia. Even a remote possibility of removal in the middle of a student's studies profoundly shapes their behaviour.<sup>57</sup> Some are similarly deterred by the possibility that a complaint will trigger the detection of co-workers who may be working in breach of visa conditions.<sup>58</sup>

Among Working Holiday Makers, 17% were deterred from recovering unpaid wages by a fear of immigration consequences. Working Holiday Makers who wish to apply for a second year-long visa must have their employer certify that they have worked 88 days in certain industries in regional Australia. This group likely feared that if they reported underpayment their employer may not provide the certification which could preclude them from obtaining the second visa. International students and Working Holiday Makers who are paid in cash are also fearful that approaching the FWO will disclose an unpaid tax liability, which in turn could have financial and immigration consequences.<sup>59</sup>

Unsurprisingly, fear of immigration consequences was selected by twice as many participants who disclosed information that suggested they undertook work in contravention of their visa requirements (39%).

These concerns may be especially acute in relation to approaching the FWO, which is not precluded from sharing information with the Department of Home Affairs. In February 2017, after the survey was concluded, an informal arrangement was established between the FWO and the Department of Home Affairs regarding the detection of unauthorised work where a visa-holder seeks the FWO's assistance. From that time, the FWO's website has assured temporary visa-holders that their visa will not be cancelled if they were entitled to work, believe they have been exploited at work, have reported their circumstances to the FWO and are actively assisting the FWO in an investigation.<sup>60</sup> However, rather than assuring the worker of confidentiality, the agreement requires that the FWO share information about the migrant worker with the Department of Home Affairs in order to obtain the visa cancellation dispensation. It is therefore unclear whether this agreement has offered sufficient comfort to enable a greater number of underpaid migrant workers to come forward to the FWO than at the time of the survey.

## Fear of job loss

One in five (22%) underpaid participants were deterred from seeking to recover unpaid wages by a fear of losing their job. This is likely a substantial underrepresentation of the prevalence of this concern among migrant workers since some survey participants would no longer have been working in the relevant underpaid job at the time of the survey.

One in ten (9%) indicated a concern that trying to recover wages would cause their employer to speak badly about them in the community. This proportion increased to 15% among participants who found their lowest paid job through an internet site in their own language, including 22% of Koreans – a substantially higher proportion than other nationalities.

Fears of job loss or the prospect of future difficulties in finding employment would be relevant to many low waged workers but are likely especially acute for migrant workers for reasons related to conditions on temporary visas. Working Holiday Makers who lose their job may compromise their ability to obtain employer certification that they have worked 88 days in a relevant industry, and preclude their eligibility for a second year visa. Many international students have acute dependence on employment income to meet the high costs of living and studying in Australia, but have more limited access to a saturated job market. This is due to a range of reasons (including lack of language ability, work experience, local connections and discrimination) in addition to being restricted to working only 40 hours per fortnight. For sponsored skilled temporary visa-holders, job loss can result in visa cancellation if they do not find an alternative sponsor within a short period of time.

Fear of job loss was selected by a greater proportion of international students (26%) than participants who held other visas during their lowest paid job in Australia (17% of Working Holiday Makers and 13% of 457 visa-holders), as shown in Appendix E, Figure 17. This concern was also raised by a greater proportion of participants who *might* try to recover their wages (27%) than those who were not open to trying to do so (17%).



## **Pessimism about outcome**

A substantial proportion of participants were deterred from trying to recover their wages due to a perception of their employer's ability to evade liability and a lack of faith in the ability of the relevant institutions to deliver remedies to them. One in five (20%) underpaid participants believed that even if they were successful their employer would not pay their entitlements, and the same proportion stated that they believed they would not be successful.

These concerns were raised by a larger proportion of underpaid participants who found their lowest paid job through an internet site in their own language (30% believed they wouldn't be successful and 28% believed that even if they won their employer would not pay).

Perhaps surprisingly, these concerns did not appear to be substantially driven by a lack of evidence due to being paid in cash or not receiving payslips. Over two fifths of participants (42%) reported that they were paid in cash in their lowest paid job and just under half (49%) reported that they received payslips rarely or never. Among those who were paid in cash in their lowest paid job, 22% were concerned that they would not be successful (compared with 18% of those not paid in cash) and 22% were concerned that even if they won their employer would not pay (compared to 17% for those not paid in cash). For participants who rarely or never received a payslip in their lowest paid job, 22% were concerned that they would not be successful (compared with 17% of those who more frequently received payslips) and 23% were concerned that even if they won their employer would not pay (compared to 16% for those who more frequently received payslips).

## **Perception that amount of unpaid wages is not significant**

One in five participants (18%) indicated that a factor stopping them from trying to recover wages was a perception that the wage underpayment was 'not a lot of money'. It is possible that this perception informed their view that attempting to recover wages 'was too much work', where they were weighing their anticipated effort against potential outcomes. It is also possible, and indeed likely, that they underestimated the full quantum of wages they were owed. While participants demonstrated a high level of knowledge of minimum wage rates in Australia,<sup>61</sup> they may have lacked detailed knowledge of their precise entitlements which could have been significantly higher than the statutory minimum wage (due to conditions under the relevant modern award, a 25% casual loading, penalty rates on weekends and holidays, and for other reasons).

Among participants opposed to recovering their wages, a larger proportion (24%) provided as a reason that it was not a lot of money, compared with 11% of those open to trying.

## **Temporariness of stay in Australia**

A small number of participants (5%) were deterred by the fact that they were leaving Australia soon. This does not necessarily indicate that other participants had confidence that they could pursue a claim once they had left Australia. It is more likely that, for most, other concerns created such substantial barriers that they did not think about this factor.

## Section IX: Conclusion and recommendations

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Over the past decade, hundreds of thousands of young temporary migrant workers have entered into the low wage labour market in Australia, creating a large vulnerable underclass of workers. Among them, wage theft is both widespread and severe. As Australia continues to position itself as the destination of choice for international students and backpackers, there is a pressing need for reforms that prevent and reduce wage theft.

At the same time, there is a deepening and urgent need for accessible processes that enable migrant workers to report and recover unpaid wages. This is critical for individual migrant workers, and serves as an indicator of the efficacy of Australia's labour law regime and institutions. It is also currently the only route to large-scale detection of wage theft and employer accountability across thousands of Australian businesses.

This study reveals that some of the most significant barriers to wage recovery can be practically addressed. It also indicates that if resources are invested in doing so, a greater number of migrant workers would report and seek redress for unpaid wages in the future. However, in the absence of broader union membership and accessible redress processes, the study confirms that individual remedies remain beyond the reach of most migrant workers in Australia.

### **For most migrant workers, it is neither possible nor rational to seek to recover unpaid wages through existing forums**

More than nine in ten survey participants suffered wage theft in silence. Only a small number sought to recover unpaid wages. The overwhelming majority of survey participants who acknowledged that they had been underpaid while working on a temporary visa in Australia (91%) had not ever tried to recover the wages they were owed.

Among those survey participants who tried to recover unpaid wages through any channel, two in three recovered nothing (67%). Fewer than one in six (16%) received the full amount they were owed. Within the group who went to the FWO, 58% recovered nothing. Only one in five (21%) recovered their full wages.

When the likelihood and quantum of a successful outcome are weighed against the time, effort, costs and risks to immigration and/or employment status, it appears rational that individual migrant workers are not seeking remedies even if they are being significantly underpaid.

Even for migrant workers who are motivated to address underpayment despite the effort and risks involved, it is very difficult if not impossible for them to do so without assistance. Over half (52%) of participants who were open to wage recovery in the future indicated that they did not know what to do to recover unpaid wages – the most common barrier identified. There are currently limited avenues and resources available for advice, support and representation for individual migrant workers to seek to recover the wages they are owed.

This report provides an evidence base for developing interventions and considering service provision and structural reforms that would make it both possible and rational for migrant workers to seek to recover their unpaid wages. In addition to educating migrant workers about wage recovery options, these must focus on reducing the costs, effort and risks involved in reporting underpayment, and increasing the likelihood that a migrant worker will successfully recover a significant portion of unpaid wages if they pursue a remedy.

### **A new forum for wage recovery should be established**

There is a need for a new specialised forum through which migrant workers can seek to recover unpaid wages. The forum must be accessible to migrant workers including well-resourced individualised assistance to calculate wage claims, along with legal advice and representation. It must be able to deliver remedies swiftly, with presumptions

in the worker's favour in the absence of payslips or in the context of widespread patterns of fraudulent recording of wages or hours worked (as were revealed in 7-Eleven and other Australian franchises in recent years). Such a forum could either be created as an informal administrative process within or adjacent to the FWO, or it could potentially be established within another jurisdiction.<sup>62</sup>

## **Barriers to wage recovery through existing forums (or a new forum) can be reduced**

A number of the barriers that impede migrant workers recovering unpaid wages can be reduced.

### **Significant expansion of legal service provision for migrant workers**

Resources must be directed to establishing adequate services to advise and represent migrant workers in relation to employment claims. This could be achieved by establishing a new service, either attached to the FWO or independent from it. The fact that 10% of international student participants tried to recover unpaid wages but less than 2% went to the FWO suggests that at least for international students, support services would be most effective if they are independent from the regulator. The low number of international students who went to the FWO is not attributable to a general unwillingness to pursue wage recovery but rather is a result of other barriers to approaching the agency: 58% of international students indicated they were open to trying to recover unpaid wages, a higher proportion than for Working Holiday Makers or skilled sponsored visa holders.

This expanded service provision must also involve ensuring that trade unions, community organisations and legal service providers have substantially expanded capacity to provide targeted advice and representation to assist migrant workers to recover unpaid wages. The international education sector can also play a critical role in resourcing legal support services for international students, especially given that almost twice as many international student participants sought help from their educational institution to recover unpaid wages than from the FWO. Specialised support should assist workers to identify and substantiate all potential claims, including assistance with identifying the employer and calculating underpayment where it appears the worker may have a claim. These services should receive support from the FWO, including a 'fast track' to assistance by the regulator for migrant workers whom they assist and determine have bona fide claims.

### **Reforms to the FWO**

The FWO must be made more accessible to migrant workers.<sup>63</sup> This is especially the case for Asian migrant workers who were substantially less likely to contact the regulator. For a start, the FWO should establish a dedicated migrant worker team within its Infoline. This should include officers who are expert in the working conditions of migrant workers and their particular service needs. These officers should start from the assumption that self help will almost always be an inappropriate treatment path for migrant workers. Ideally, officers should be bilingual in the major language groups (eg Mandarin, Spanish, Korean), given that among participants who found their job through an internet site in their own language, a third (32%) cited low English language as a barrier to wage recovery.

In the absence of a new dedicated support service, the FWO's Overseas Workers' Team should be resourced to provide significant assistance to individual migrant workers who report underpayment. Assistance is required not only in terms of calculating unpaid wages. A third of participants (35%) reported that would not try to recover wages because it was too much work, and 16% indicated that they would not do so because the forms are too complicated. This suggests that migrant workers require substantial support to reduce and/or simplify the work they need to do to engage with the FWO's Request for Assistance process (or court processes). A dedicated accessible website portal for migrant workers should also be established, which should expeditiously link migrant workers to the Overseas Workers' Team, rather than primarily focus on providing information.

At a legislative level, power should be granted to enable the FWO to compel an employer to participate in mediation and/or rectify underpayment. If the FWO were to make determinations or issue Compliance Notices against employers that do not participate in mediation or rectify underpayment, this could be presented in court as evidence in favour of a worker's claim or create a presumption in favour of a worker.<sup>64</sup>

Finally, the *Wage Theft in Australia* report revealed that 50% of participants never or rarely received payslips, which to date has presented a substantial barrier to migrant workers receiving assistance from the FWO. This barrier can be simply addressed. If a migrant worker did not receive payslips, the FWO should assume that the worker's claim is true until the employer proves otherwise. Since 2017, this presumption applies to underpayment in court.<sup>65</sup>

## Regulatory reform

A quarter of participants indicated they had not or would not try to recover unpaid wages due to fear of possible immigration consequences (25%). A further 7% of participants identified a general concern about engaging with the government. To reduce this barrier a legislated firewall should be established between the FWO and the Department of Home Affairs. This must prevent the FWO from sharing with the Department of Home Affairs any information relating to contravention of a migrant worker's visa when the individual reports or seeks assistance in relation to a breach of his or her labour rights. This should replace the current protocol between the two agencies which still allows sharing of this information.

There is also greater scope for the Commonwealth parliament to establish responsibility for remedying wage theft on the part of businesses at the top of supply chains or other corporate structures in which workers are systematically underpaid. In 2017, the *Fair Work Act* was amended to establish liability for wage theft on the part of franchisors and lead companies in corporate groups.<sup>66</sup> These should be extended to apply to other organisational forms, such as supply chains and labour hire arrangements.<sup>67</sup> In addition, businesses should be required and assisted to establish robust and transparent processes for rectifying widespread underpayment within their franchise or associated businesses, similar to 7-Eleven's Wage Repayment Program.<sup>68</sup>

The *Fair Entitlements Guarantee Act 2012* (Cth) should be amended to provide for the non-discriminatory application of the Fair Entitlements Guarantee to all workers in Australia, including temporary migrant workers. This would ensure that, like Australian workers, migrant workers would be entitled to recover unpaid wages if their employer goes into liquidation.

In the absence of effective systematic enforcement and individual remedies for migrant workers at the Commonwealth level, state governments should establish accountability for exploitation by introducing criminal offences for knowingly and repeatedly engaging in wage theft. These offences should include provision for compensation for victims (with assistance to make claims), and a dedicated inspectorate for these crimes at the state level.

## Reform to court processes

Only a single participant in the NTMW Survey reported that they had gone to court to recover unpaid wages. This is consistent with a perception among legal practitioners that even the small claims jurisdiction established for wage claims is inaccessible to the overwhelming majority of migrant workers. Though it will always be difficult for migrant workers to go to court, legal service providers and other experts have suggested several reforms that could make the small claims jurisdiction more effective and accessible.<sup>69</sup> In addition to expansion of legal services for migrant workers discussed above, assistance with court processes could be expanded through the establishment of a dedicated duty solicitor, with the further possibility of pro-bono pilot programs to provide legal representation to migrant workers.

## Effective provision of information

This report has identified several areas in which information would reduce barriers to wage recovery.

- 1. Processes for wage recovery.** Among underpaid participants who had not tried to recover their unpaid wages, 42% reported that they did not know what to do. This indicates both the importance of accessible information on wage recovery processes and where and how migrant workers can seek help, and the depth of the need for legal advice and representation.
- 2. Wage rates under Australian law.** The *Wage Theft in Australia* report revealed that lack of knowledge about minimum wage in Australia was not a barrier to wage recovery for at least 78% of underpaid Working Holiday Makers and 73% of international students, who knew they were being paid less than the minimum wage. However, information about minimum wage rates and entitlements under Australian law could reduce barriers to wage recovery in two respects:
  - a. Basic information about minimum wages could assist the 22% of Working Holiday Makers and 27% of international students who did not realise that they were being underpaid. Others may benefit from reinforcement that minimum wage applies equally to migrant workers under law.
  - b. For those who knew the minimum wage, further information about entitlements including the 25% casual loading and evening/weekend penalty rates could provide migrant workers with a more accurate picture of the extent to which they have been underpaid and the sum of money they are owed. This could make the investment of effort to recover wages a more rational choice.
- 3. Agreeing to a wage does not make it legal.** Over a quarter of underpaid participants were reluctant to try to recover unpaid wages because they had 'agreed to the wage [they were] paid so have no complaint' (28%). Indeed, a larger proportion of participants tried to recover unpaid wages, when in their lowest paid job their employer paid them less than was agreed or nothing at all (17%), compared with other underpaid participants whose employer paid them what they had agreed. Migrant workers may be more willing to address underpayment if informed that agreeing to an unlawfully low wage does not make it legal, and does not affect their right to recover the full wages to which they are legally entitled.
- 4. Other migrant workers' successful wage recovery.** A quarter (26%) of participants indicated that they might not or would not recover wages because many people around them were paid similarly and were not doing anything about it. Though this is likely an accurate perception, if wage recovery processes are improved, spreading information about other migrant workers using them successfully may motivate others to do the same.

## Migrant workers are open to seeking to recover wages: investment of resources is warranted

There are some barriers to wage recovery that are very hard to address, and some migrant workers who are unlikely to attempt to achieve redress for wage underpayment in any conditions. For instance, one in five (22%) underpaid participants who had not tried to recover unpaid wages was deterred by a fear of losing their job. This is likely a substantial underrepresentation of the prevalence of this concern among migrant workers since some survey participants would no longer have been working in the relevant underpaid job at the time of the survey. Given the limited employment market for migrant workers, a fear of job loss is understandable and difficult to overcome. Some relational and social barriers are also difficult to overcome. For example, one in ten (11%) participants explained their failure to attempt to recover wages by pointing to the prospect of shame or embarrassment, and 15% would not try because they were grateful to their employer for the job.

At the same time, the prevalence or significance of these barriers are likely overestimated. It is often assumed that the vast majority of migrant workers are simply unwilling to seek to recover unpaid wages in Australia and that reforms would therefore have limited impact. The NTMW Survey clearly dispels this assumption. Almost half of

underpaid participants (45%) indicated that they were open to trying to recover unpaid wages in the future.

This indicates that if resources are invested in reducing the practical barriers to wage recovery and increasing the possibility of achieving a satisfactory outcome, a greater number of migrant workers would report underpayment and seek to recover the wages they are owed. Indeed, for participants who were open to recovering their wages, concerns about lack of knowledge or capacity were more significant barriers than social perceptions and relational factors.

This report provides the Commonwealth parliament and government agencies with an evidence base for reforms that will make it both possible and rational for migrant workers to address wage theft in Australia. This includes critical reforms to the FWO. The report also identifies important roles to be played by the international education sector, business, trade unions, legal service providers and other stakeholders to break the cycle of employer impunity and ensure that migrant workers do not continue to suffer wage theft in silence.

*This study reveals that some of the most significant barriers to wage recovery can be practically addressed. It also indicates that if resources are invested in doing so, a greater number of migrant workers would report and seek redress for unpaid wages in the future*

## Appendix A: Interviewees and focus groups

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Member of the 7-Eleven Fels Wage Fairness Panel, Melbourne, 29 March 2016  
7-Eleven management and Deloitte staff, Melbourne, 21 February 2017  
Worker Advocate, Phone, 2 May 2016  
Australian Tax Office Officials, Phone, 16 April 2016  
Community Legal Centre Lawyers, Sydney, 20 January 2016  
Community Legal Centre Lawyer, Sydney, 5 February 2016  
Community Legal Centre Lawyer, Sydney, 12 February 2016  
Community Legal Centre Lawyer, Adelaide, 23 February 2016  
Community Legal Centre Lawyer, Melbourne, 30 March 2016 (1)  
Community Legal Centre Lawyer, Melbourne, 30 March 2016 (2)  
Community Legal Centre Lawyer, Sydney, 27 April 2016  
Community Organiser, Sydney, 27 April 2016  
Community Organisation Leader, Sydney, 11 November 2015  
Community Organisation Leader, Sydney, 24 March 2016  
Community Organisation Leader, Melbourne, 29 March 2016  
Member of the Fair Work Commission, Sydney, 11 October 2016  
Fair Work Ombudsman Official, Adelaide, 24 February 2016  
Fair Work Ombudsman Official, Adelaide, 10 May 2016  
Focus Group of Korean Migrant Workers, Sydney, 21 March 2016  
Focus Group of Korean Migrant Workers, Sydney, 23 March 2016  
Focus Group of Taiwanese and Hong Kong Working Holiday Makers, Melbourne, 30 March 2016  
Focus Group of Former 7-Eleven Workers, Brisbane, 16 June 2016  
Focus Group of International Students, Sydney, 12 October 2016  
Focus Group of International Students, Sydney, 13 October 2016  
Former 7-Eleven Worker, Sydney, 29 April 2016  
Former 7-Eleven Worker, Phone, 4 May 2016  
Law Firm Lawyer, Sydney, 29 February 2016  
Law Firm Lawyer, Phone, 14 March 2016  
Law Firm Lawyer, Melbourne, 26 April 2016  
Law Firm Lawyers, Phone, 16 June 2016  
Legal Aid NSW Lawyers, Sydney, 8 February 2016  
Trade Union Staff, Melbourne, 27 January 2016  
Trade Union Staff, Sydney, 23 February 2016  
Trade Union Staff, Sydney, 23 February 2016  
Trade Union Staff, Adelaide, 24 February 2016  
Trade Union Staff, Adelaide, 24 February 2016  
Trade Union Staff, Phone, 21 March 2016  
Trade Union Staff, Phone, 22 March 2016  
Trade Union Staff, Sydney, 14 April 2016  
Trade Union Staff, Phone, 27 April 2016  
Trade Union Staff, Phone, 5 May 2016  
Trade Union Staff, Adelaide, 31 May 2016  
Working Holiday Maker, Sydney, 2 June 2016  
Working Holiday Maker, Sydney, 29 April 2016  
Women's Legal Centre Lawyer, Adelaide, 23 February 2016

## Appendix B: Proportion of international students and Working Holiday Makers in each nationality who had tried or were planning to try to recover unpaid wages

*Table 4. Proportion of participants in each nationality who had tried or were planning to try to recover unpaid wages, among those who held a student visa in their lowest paid job*

Nationality	Proportion of underpaid student participants within nationality who tried or were open to trying to recover	Total number of underpaid student participants in nationality
Pakistan	28%	25
Bangladesh	25%	12
Nepal	19%	27
Mexico	18%	11
India	16%	89
Vietnam	15%	62
Indonesia	12%	57
France	11%	9
Venezuela	11%	9
Colombia	10%	97
Germany	10%	10
Brazil	9%	79
China (incl Hong Kong)	8%	383
UK	8%	12
The Philippines	7%	29
Thailand	7%	14
Japan	6%	17
Taiwan	5%	22
Malaysia	4%	53
South Korea	2%	49
Spain	0%	20
Singapore	0%	15
USA	0%	14
Italy	0%	13
Iran	0%	8

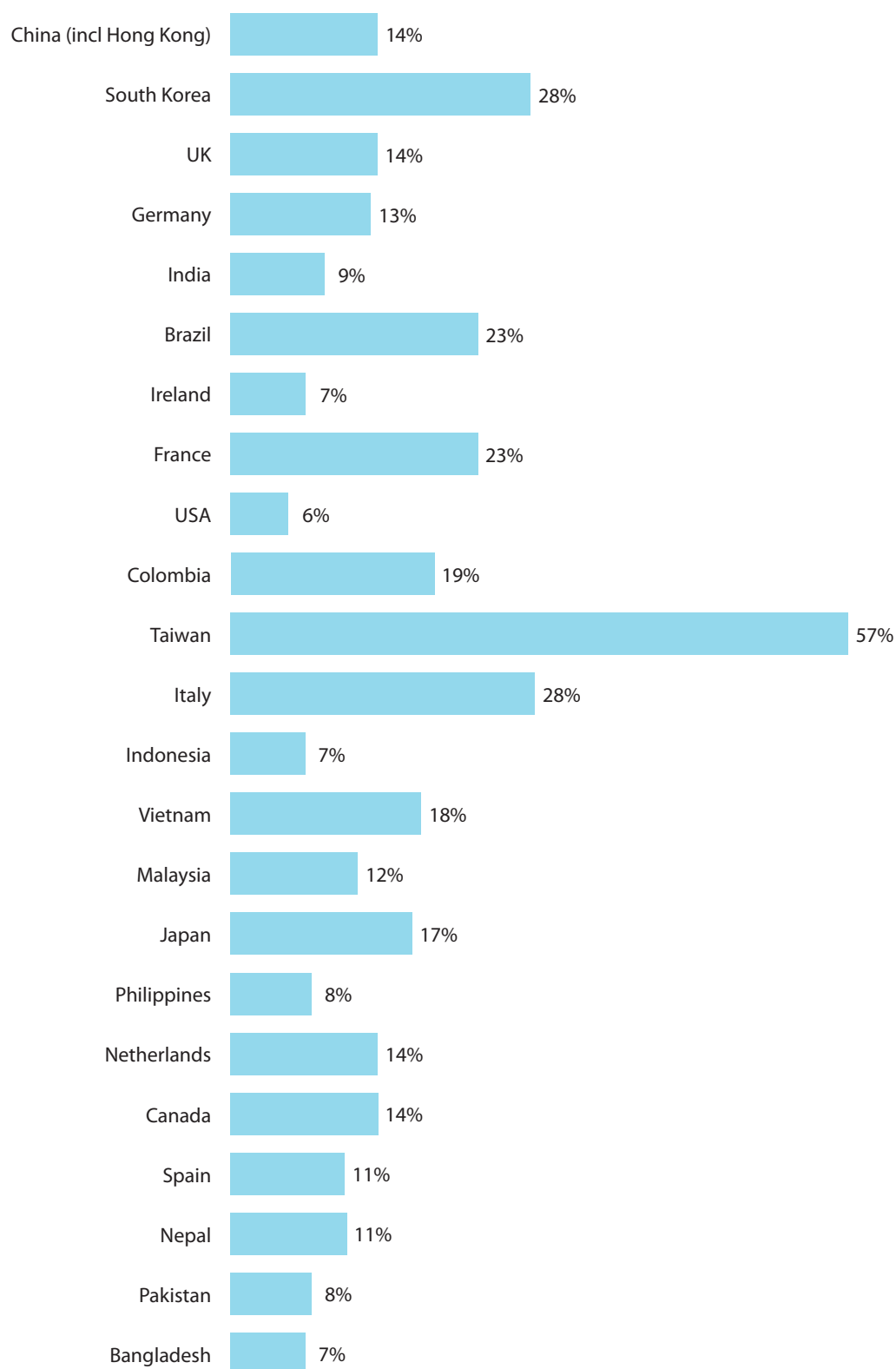


**Table 5.** Proportion of participants in each nationality who had tried or were planning to try to recover unpaid wages, among those who held a Working Holiday visa in their lowest paid job

Nationality	Proportion of underpaid Working Holiday Maker participants within nationality who tried or were open to trying to recover	Total number of underpaid Working Holiday Maker participants in nationality
Taiwan	31%	64
Belgium	29%	7
Italy	28%	47
China (incl Hong Kong)	22%	18
Chile	22%	9
Denmark	20%	10
The Netherlands	17%	24
Japan	10%	29
South Korea	9%	160
France	9%	57
Germany	8%	106
Estonia	6%	16
Ireland	5%	60
UK	4%	76
Canada	4%	27
USA	3%	32
Sweden	0%	9

## Appendix C: Nationalities of participants who know someone who had contacted the FWO

*Figure 15. Nationalities of participants who knew someone who had tried to recover unpaid wages by contacting the FWO, as a proportion of participants of each nationality who answered the question (for nationalities with 30 or more participants) (n=2,713)*

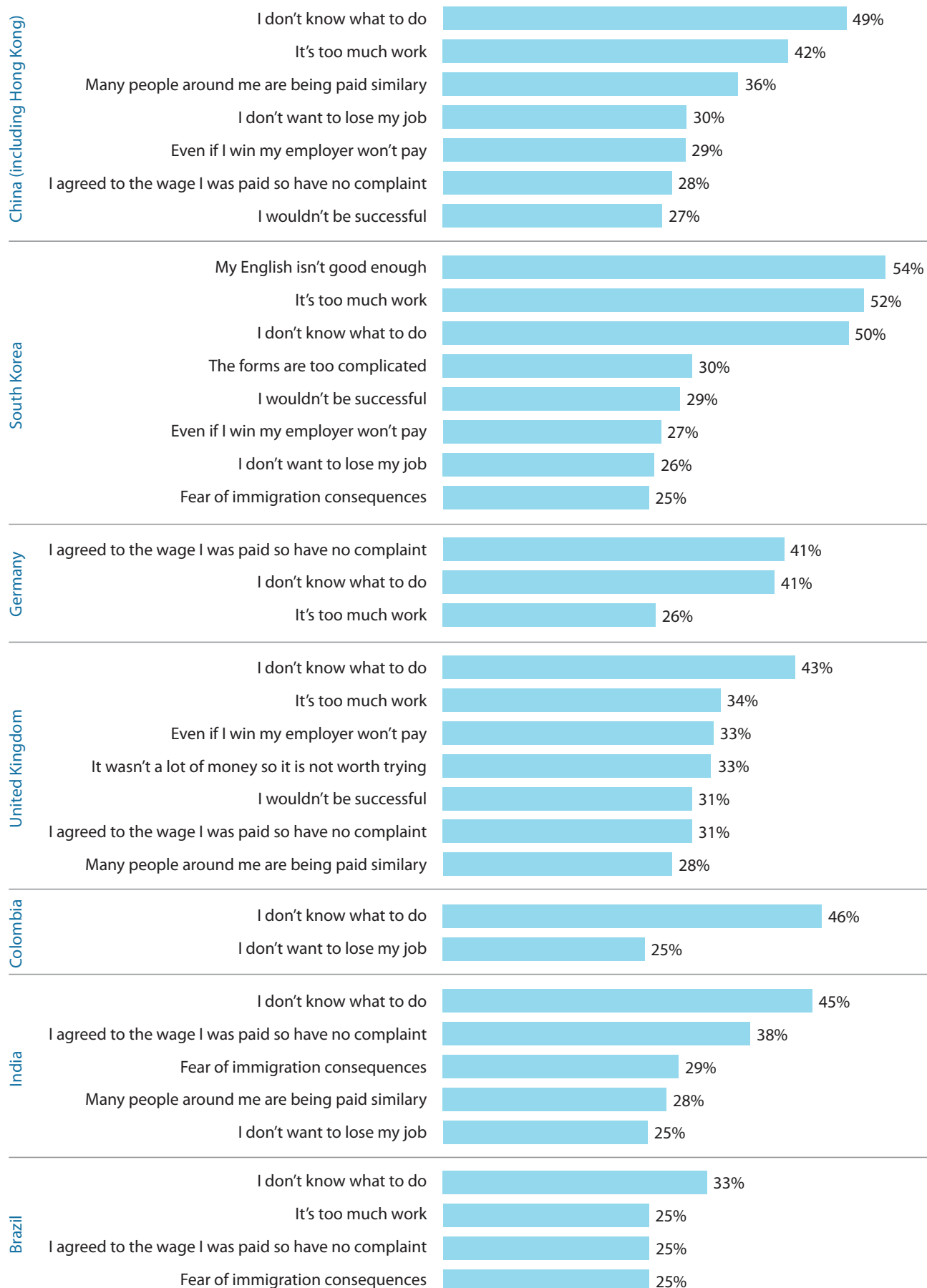


## Appendix D: Barriers by nationality

**Table 6.** Proportion of participants in nationality who chose select barriers, for nationalities with at least 20 participants who answered question (n= 1,712)

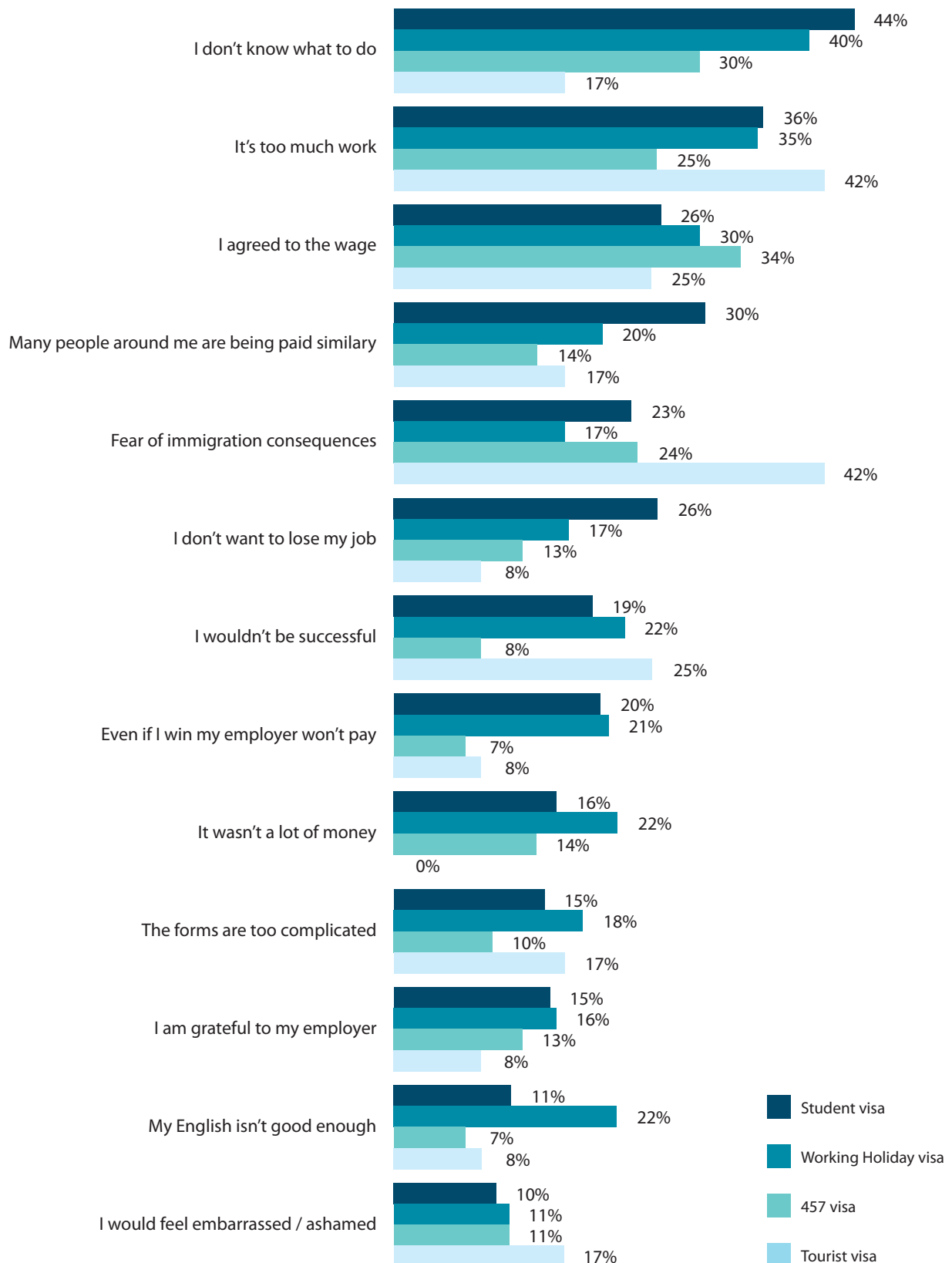
	Fear of immigration	I don't know what to do	It's too much work	My English isn't good enough	I don't want to lose my job	I am grateful to my employer	Many people around me are being paid similarly and they're not doing anything about it
China (incl Hong Kong)	20%	50%	42%	16%	30%	21%	36%
South Korea	25%	50%	52%	54%	27%	9%	16%
UK	16%	44%	34%	0%	11%	11%	29%
Germany	11%	40%	26%	5%	19%	22%	24%
India	29%	45%	19%	0%	25%	18%	28%
Brazil	25%	33%	25%	13%	15%	10%	9%
Ireland	3%	24%	24%	0%	7%	6%	10%
France	16%	26%	26%	7%	9%	25%	16%
USA	19%	32%	45%	0%	15%	13%	28%
Colombia	24%	47%	22%	17%	25%	14%	24%
Taiwan	29%	38%	43%	36%	29%	17%	21%
Italy	17%	27%	13%	8%	8%	12%	19%
Indonesia	21%	45%	43%	5%	38%	18%	41%
Vietnam	22%	63%	35%	7%	35%	13%	43%
Malaysia	17%	46%	37%	6%	23%	23%	52%
Japan	16%	48%	50%	45%	11%	7%	23%
The Philippines	35%	35%	55%	0%	16%	23%	26%
The Netherlands	23%	31%	38%	0%	19%	19%	19%
Canada	21%	34%	24%	0%	14%	17%	21%
Spain	9%	35%	22%	13%	9%	9%	17%
Nepal	23%	42%	31%	0%	31%	8%	35%
Pakistan	37%	32%	37%	5%	16%	5%	26%

Figure 16. Top barriers for select nationalities, showing barriers selected by at least 25% of participants (n=1,029)



## Appendix E: Barriers for international students, Working Holiday Makers, 457-visa holders and tourists

Figure 17. Barriers by category of visa held by participants during lowest paid job (n=1,944)



## Endnotes

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- 1 Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (March 2016) 15.
- 2 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (20 November 2017) <<https://www.mwji.org/publications/>> ('Wage Theft in Australia').
- 3 Ibid.
- 4 Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (March 2016) 15.
- 5 7-Eleven Wage Repayment Program (Website, 11 December 2017) (at 'Claim Determination') <[www.wagerepaymentprogram.com.au](http://www.wagerepaymentprogram.com.au)>. See also 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.
- 6 Calculation based on casual loading applied to national minimum wage of \$18.93 as of 1 July 2018.
- 7 See eg 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; Berg and Farbenblum, 'Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program', above n 5; Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and George Tan, *International Students and the Fair Work Ombudsman* (Fair Work Ombudsman, 2017).
- 8 Stephen Clibborn, 'Multiple Frames of Reference: Why International Student Workers in Australia Tolerate Underpayment' (2018) *Economic and Industrial Democracy* (forthcoming); Stephen Clibborn, 'It Takes a Village: Civil Society Regulation of Employment Standards for Temporary Migrant Workers in Australian Horticulture' (2019) *UNSW Law Journal* (forthcoming).
- 9 At the time of the survey these temporary migrant workers held 457 visas.
- 10 The survey was available in Arabic, Bahasa Indonesia, Chinese (Traditional), Chinese (Simplified), French, German, Italian, Japanese, Korean, Nepali, Spanish and Vietnamese.
- 11 All analysis in this report includes valid responses only and has been conducted using SPSS V23 and V24.
- 12 Berg and Farbenblum, *Wage Theft in Australia*, above n 2, 11.
- 13 Stephen Clibborn and Chris F Wright 'Employer Theft of Temporary Migrant Workers' Wages in Australia: Why Has the State Failed to Act?' (2018) 29(2) *Economic and Labour Relations Review* 207; Laurie Berg, *Migrant Rights at Work: Law's Precariousness at the Intersection of Immigration and Labour* (Routledge, 2016), 96ff; Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart Publishing, 2016); Alexander Reilly, 'Protecting Vulnerable Migrant Workers: The Case of International Students' (2012) 25 *Australian Journal of Labour Law* 181.
- 14 Catherine Hemingway, 'Not Just Work: Ending the Exploitation of Refugee and Migrant Workers' (WEstjustice Employment Law Project, Final Report, November 2016).
- 15 Iain Campbell, Martina Boese and Joo-Cheong Tham, 'Inhospitable Workplaces? International Students and Paid Work in Food Services' (2016) 51 *Australian Journal of Social Issues* 279; Clibborn, 'Multiple Frames', above n 8; Elsa Underhill and Malcolm Rimmer, 'Layered Vulnerability: Temporary Migrants in Australian Horticulture' (2015) 58 *Journal of Industrial Relations* 608.
- 16 See eg Reilly et al, above n 7.
- 17 See eg Harvest trail inquiry (report forthcoming in 2018); Fair Work Ombudsman, *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program* (October 2016); Fair Work Ombudsman, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and Addressing the Drivers of Non-Compliance in the 7-Eleven Network* (April 2016); Fair Work Ombudsman, *Inquiry into Trolley Collection Services Procurement by Woolworths Limited* (June 2016).
- 18 Law Council of Australia, *The Justice Project: Final Report* (August 2018); Christine Coumarelos, Deborah Macourt, Julie People, Hugh M McDonald, Zhigang Wei, Reiny Iriana and Stephanie Ramsey, 'Legal Australia-Wide Survey: Legal Need in Australia' (Access To Justice and Legal Needs, Vol 7, Law and Justice Foundation of New South Wales, August 2012); Federation of Community Legal Centres (Victoria), *Putting the Law to Work: Meeting the Demand for Employment Law Assistance in Victoria* (August 2014).

- 19 Productivity Commission, *Workplace Relations Framework* (Inquiry Report No 76, 30 November 2015). See also Productivity Commission, *Migrant Intake Into Australia* (Inquiry Report No 77, 13 April 2016); Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014).
- 20 See eg Senate Legal and Constitutional Affairs Legislation Committee, *Modern Slavery Bill 2018 [Provisions]* (August 2018); Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia* (December 2017); Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *An Inquiry Into Human Trafficking, Slavery and Slavery-like Practices* (July 2017); Senate Education and Employment References Committee, *The Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies* (report forthcoming); Senate Education and Employment Legislation Committee, *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 [Provisions]* (9 May 2017); Senate Education and Employment References Committee, *Corporate Avoidance of the Fair Work Act* (September 2017); Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (March 2016); *Inquiry into the Working Holiday Maker Reform Package* (November 2016); Joint Standing Committee on Migration, Parliament of Australia, *Seasonal Change: Inquiry into the Seasonal Worker Programme* (May 2016); Senate Legal and Constitutional Affairs Legislation Committee, *Migrant Amendment (Temporary Sponsored Visas) Bill 2013 [Provisions]* (June 2013); Senate Legal and Constitutional Affairs References Committee, *Framework and Operation of Subclass 457 Visas, Enterprise Migration Agreements and Regional Migration Agreements* (June 2013); Human Rights Sub-Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Trading Lives: Modern Day Human Trafficking* (June 2013).
- 21 John Azarias, Jenny Lambert, Peter McDonald and Katie Maylon, *Robust New Foundations: A Streamlined, Transparent and Responsive System for the 457 Programme: An Independent Review into Integrity in the Subclass 457 Programme* (September 2014); Barbara Deegan, *Visa Subclass 457 Integrity Review: Final Report* (October 2008).
- 22 Education, Employment and Small Business Committee, Queensland Parliament, *Inquiry into Wage Theft in Queensland* (report forthcoming).
- 23 Select Committee on Human Trafficking in New South Wales, Legislative Council, New South Wales Parliament, *Human Trafficking in New South Wales* (October 2017).
- 24 Australian National Audit Office, Australian Taxation Office, *Strategies and Activities to Address the Cash and Hidden Economy* (The Auditor-General, ANAO Report No 27, 2015-16).
- 25 Australian Government Treasury, *Black Economy Taskforce: Final Report* (October 2017).
- 26 Department of Jobs and Small Business, 'Migrant Workers' Taskforce' (3 September 2018) <<https://www.jobs.gov.au/migrant-workers-taskforce>>.
- 27 See above n 7.
- 28 In 2012, a comprehensive Law and Justice Foundation study identified that 6% of 20,716 respondents across Australia had an employment-related legal problem in the past year: Coumarelos et al, above n 18, 60. Similarly, a smaller study by the Australia Institute found that 7% of respondent had employment law problems Australia-wide: Richard Denniss, Josh Fear and Emily Millane, *Justice for All: Giving Australians Greater Access to the Legal System* (Institute Paper No 8, Australia Institute, March 2012) 1. WEStjustice data suggests that this figure would be significantly higher for newly arrived and temporary migrant workers: Hemingway, above n 14, 139. Note also the complicated employment advice landscape for vulnerable workers, described as the 'referral roundabout': Anna Booth, 'Report to the Fair Work Ombudsman of a Review of Community-Based Employment Advice Services' (Report, Cosolve, 30 September 2009), 26. Productivity Commission has recognised that employment law is a major gap in civil law assistance: Productivity Commission, *Access to Justice Arrangements* (Inquiry Report Overview No 72, 5 September 2014) 30.
- 29 Legal Aid NSW Lawyers, Sydney, 8 February 2016. State governments have supported the establishment of legal services for international students, though these have limited capacity. For example in NSW, Redfern Legal Centre has an international student service, and in Victoria, the Study Melbourne Student Centre provides advice and assistance to international students on workplace issues and works with the International Student Work Rights Centre on individual claims. Trade unions have also expanded dedicated services for migrant workers, including the Migrant Worker Centre established at Melbourne Trades Hall in 2018 which focuses on advocacy and collective action on behalf of migrant workers.
- 30 Bradley Bowden, 'Three Charts On: The Changing Face of Australian Union Members' *The Conversation* (online) 5 July 2017 <<https://theconversation.com/three-charts-on-the-changing-face-of-australian-union-members-80141>>.

- 31 Legal Aid NSW Lawyers, Sydney, 8 February 2016.
- 32 Focus Group of International Students, Sydney, 12 October 2016.
- 33 Reilly et al, above n 7, 6.
- 34 Farbenblum and Berg, 'Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman', above n 7, 324-5 citing Legal Aid NSW Lawyers, Sydney, 8 February 2016. See also Hemingway, above n 14, 129.
- 35 Fair Work Ombudsman, *Corporate Plan 2015–19* (2015).
- 36 Fair Work Ombudsman, *The Fair Work Ombudsman and Registered Organisations Commission Entity Annual Report 2016–17*, 10.
- 37 Berg and Farbenblum, *Wage Theft in Australia*, above n 2, 38-40.
- 38 Participants were asked their nationality at the end of the survey and only 75% of participants answered this question. The nationalities of the remaining 25% of participants are unknown. Among participants who answered this question, nationalities at the time of the survey included (in descending order of number of participants): China (including Hong Kong), South Korea, United Kingdom, Germany, Brazil, India, Ireland, United States of America, France, Colombia, Taiwan, Italy, Indonesia, Vietnam, Malaysia, Japan, the Philippines, Canada, Pakistan, Spain, Nepal, Sweden, Bangladesh, Iran, Chile, Denmark, Estonia, Australia, Belgium, Singapore, Mexico, Thailand, Sri Lanka, Russia, Venezuela, Nigeria, Mauritius, Portugal, Jordan, Turkey, Argentina, Afghanistan, Ecuador, Finland, Kenya, Peru, Poland, Czech Republic, Slovakia, South Africa, Bhutan, Bulgaria, Cyprus, Fiji, Greece, Lebanon, Mongolia, Myanmar, Norway, Switzerland, Zimbabwe, Austria, Cambodia, Hungary, Macedonia, Namibia, North Korea, Saudi Arabia, Somalia, Sudan, Syria, Uruguay, Albania, Andorra, Angola, Azerbaijan, Bahamas, Barbados, Benin, Bolivia, Cameroon, Cape Verde Islands, Costa Rica, Croatia, Cuba, Dominican Republic, Eritrea, Ethiopia, the Gambia, Ghana, Honduras, Iraq, Jamaica, Kazakhstan, Malta, Montenegro, Papua New Guinea, Rwanda, Serbia, Swaziland, Tanzania, Tunisia, Uganda, Ukraine, and Zambia.
- 39 The large proportions of international students and Working Holiday Makers are broadly consistent with the predominance of these groups among migrant workers in Australia generally. However, among survey participants there was a higher proportion of Working Holiday Makers compared with international students than there is in Australia generally. Survey participants included three Working Holiday Makers to every five students, while national stock figures indicate around one Working Holiday Maker to every four students. The number of Working Holiday Makers (visa subclasses 417 and 462) in Australia on 30 June 2015 was 143,918, with 137,376 on 30 June 2016: Department of Immigration and Border Protection, *Working Holiday Maker Visa Programme Report* (30 June 2016) 34. The number of student visa holders in Australia on 30 June 2015 was 374,564; with 401,423 on 30 June 2016: Department of Immigration and Border Protection, *Student Visa and Temporary Graduate Visa Programme Trends* (30 June 2016) 44.
- 40 On 18 April 2017, the federal government announced the abolition of the Temporary Work (Skilled) (subclass 457) visa and its replacement with a new Temporary Skill Shortage visa (subclass 482).
- 41 The number of 457 visa holders in Australia on 30 June 2016 was 170,590, with 188,000 on 30 June 2015: Department of Immigration and Border Protection, *Temporary Entrants and New Zealand Citizens in Australia on 30 June 2016* (2016) 2.
- 42 In 2016, 43% of international student enrolments were at universities, 47% were at VET or ELICOS institutions and the rest were at secondary schools or non-award students: Department of Education and Training, *End of Year Summary of International Student Enrolment Data - Australia - 2016* (December 2016). National figures may not, however, reflect absolute numbers of students as college students may enrol in multiple courses, which university students would be less likely to do.
- 43 Chris Nyland, Helen Forbes Mewett, Simon Marginson, Gaby Ramia, Erlenawati Sawir and Sharon Smith, 'International Student-workers in Australia: A New Vulnerable Workforce' (2009) 22(1) *Journal of Education and Work* 1; Clibborn, 'Frames of Reference', above n 8.
- 44 Between 2014 and 2016 (when 69% of participants worked in Australia), the statutory minimum wage in Australia for an adult was between \$16.87 and \$17.70 per hour. However, these wage levels understate most migrant workers' entitlements since the vast majority of international students and Working Holiday Makers work as casual workers. Casual positions attract a 25% loading in lieu of regular hours, paid leave and other entitlements. Therefore, at the time of the survey most migrant workers were entitled to at least \$22.13 per hour as casual workers. Indeed, this does not take into account further increases to which they were likely entitled such as penalty rates or allowances under relevant Awards or other enterprise agreements.
- 45 Of the 3,346 participants who answered this question, 21% (716 participants) indicated that they were sometimes, often or always paid less than agreed or nothing at all, while 79% (2,630 participants) indicated they were rarely or never paid less than agreed or nothing at all.



- 46 However, it is not possible to know that they had tried to recover wages for that job rather than another job.
- 47 This analysis considers the features of participants' lowest paid job where these intersect with *not* attempting to recover unpaid wages. This is because participants who indicated they had tried to recover unpaid wages may have done so in relation to a job other than their lowest paid job. However, where participants indicated that they had not tried to recover their wages, it is clear that they had not tried to recover wages for their lowest paid job (or any other job).
- 48 At least 91% of underpaid participants who earned \$0-12 per hour in their lowest paid job had not tried to recover unpaid wages, compared with 93% of those who earned \$13-15 per hour, and 91% of those who earned \$15 per hour or more.
- 49 Ninety-one per cent of participants who were paid in cash and 87% of participants who were paid otherwise had not tried to recover unpaid wages.
- 50 The United States, United Kingdom and Ireland had the highest proportions of migrant workers earning more than \$17 per hour (65% of migrant workers from the United States, 62% from Ireland, and 59% from the United Kingdom). By contrast, several non-English speaking Asian countries had the lowest proportions of workers earning this wage rate (19% of Chinese migrant workers, 21% of Taiwanese and 25% of Vietnamese): Berg and Farbenblum, *Wage Theft in Australia*, above n 2, 28.
- 51 'Yes, I might try in the future' was selected by 43% of participants who earned \$0-12 per hour, 43% of participants who earned \$13-15 per hour, and 46% of participants who earned \$15 or more per hour.
- 52 See eg Reilly et al, above n 7, 5-6.
- 53 Among participants who earned \$6 to \$12 per hour, Korean nationals were most likely to find their job through an internet site in their own language (59%), followed by Japanese nationals (48%), Chinese nationals (33%), Taiwanese nationals (32%) and Vietnamese nationals (10%): Berg and Farbenblum, *Wage Theft in Australia*, above n 2, 33.
- 54 Participants who selected multiple organisations were not able to specify which organisation had led to the positive outcome.
- 55 It is not possible to know whether participants contacted the FWO to recover unpaid wages for their lowest paid job or another job, however it is likely that only a small number of participants would have changed visa types between their lowest paid job and when they contacted the FWO.
- 56 This includes participants who selected either 'I don't want to lose my visa' or 'I don't want the Immigration Department to know' or both, the responses of whom were combined for the purpose of this analysis.
- 57 Focus Group of International Students, Sydney, 12 October 2016; Community Legal Centre Lawyer, Melbourne, 30 March 2016 (1); Community Legal Centre Lawyer, Melbourne, 30 March 2016 (2).
- 58 Working Holiday Maker, Sydney, 29 April 2016.
- 59 Focus Group of International Students, Sydney, 12 October 2016.
- 60 This applies as long as the visa-holders commits to abiding by visa conditions in the future and there is no other basis for visa cancellation (such as on national security, character, health or fraud grounds).
- 61 As reported in *Wage Theft in Australia*, the overwhelming majority of survey participants knew that minimum statutory pay rates in Australia were at least \$17 per hour at the time of the survey. This included around three quarters of international students (73%) and Working Holiday Makers (78%).
- 62 Some have suggested that an expansion of the Fair Work Commission's jurisdiction may present a possible forum, though there may be constitutional barriers that require further examination in relation to the separation of powers between the judicial and the executive branches of the Commonwealth government. See eg Paul Karp, 'Australia Needs Tough Cop To Fight Wage Theft, Sally McManus Says' *The Guardian* (online) 27 April 2018 <<https://www.theguardian.com/australia-news/2018/apr/27/australia-needs-tough-cop-to-fight-wage-theft-sally-mcmanus-says>>.
- 63 For discussion of recommendations in relation to the FWO, see generally, Farbenblum and Berg, 'Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman', above n 7.
- 64 The authors thank Dr Tess Hardy for this insight. See also Hemingway, above n 14, 28 (Recommendation 6).
- 65 *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth).

66 *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth).

67 The provisions relating to franchise and holding companies should also be strengthened: Tess Hardy, Submission No 62 to Senate Standing Committees on Education and Employment, *Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders*, 2015.

68 For discussion of the Program and recommended features of business-led remedial processes, see Berg and Farbenblum, 'Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program', above n 5.

69 These include: establishment of a dedicated list for underpayment-related matters, ideally with a specialist set of federal judges; providing the ability to group complaints, join applications or file representative proceedings where the aggrieved workers are employed by the same employer entity or corporate group, which would substantially reduce the resources required by service providers to represent each individual worker; setting prescribed time-frames to ensure claims are dealt with expediently, which is important for migrant workers whose visa will soon end; changing current costs rules so that legal costs can be awarded to a worker whose claim is successful or where the employer does not participate in mediation; reduce evidentiary burdens on workers, for example by drawing an adverse inference against an employer who does not cooperate with the FWO; and expand remedies available to include compensation for financial loss, hurt, humiliation and distress as well as orders designed to achieve systematic reform, such as training for employers and penalties for egregious employer behaviour. The authors thank Gabrielle Marchetti, Dr Tess Hardy, Professor Joo-Cheong Tham, and other participants at the Workshop on Effective Redress for Migrant Workers for these insights (Melbourne Law School, 7 December, 2017).



