

WAGE THEFT IN SILENCE

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

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The Migrant Worker Justice Initiative (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.

Executive summary

Temporary migrant workers comprise up to 11% of the Australian labour market.¹ 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.² 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.