

UNDERSTANDING INTERNATIONAL STUDENTS' PROFESSED SATISFACTION WITH UNDERPAID WORK IN AUSTRALIA

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Underpayment of international students is widespread and systemic in several industries in Australia. Recent studies have concluded that most do not complain or take action to address the underpayment and have identified a number of reasons why this is the case. One reason that has not been explored is that a substantial number of international students have expressed surprisingly high rates of satisfaction with their wages or their overall work in Australia despite receiving wages well below the legal minimum. This article explores data from two empirical studies conducted by the authors in which this was the case. It posits a range of hypotheses that may explain the students' professed satisfaction, drawing on other data from the surveys and elsewhere. If it is accepted that Australia should not have a de facto second-tier labour force of international students, the challenge for regulators, unions and others becomes how to detect and enforce underpayment if workers are 'satisfied' and will not come forward to report or challenge their conditions. Deeper understanding of the drivers of international student satisfaction may also provide some opportunities to dispel misconceptions and motivate international students to address or avoid poor conditions.

I INTRODUCTION

It is well understood that there is a large black market of underpaid international students in the Australian economy, particularly in industries such as

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hospitality.¹ The phenomenon of underpaid temporary migrants is not limited to Australia, but is a feature of temporary labour migration throughout the world.² It has also become clear that, in the vast majority of cases, international students 'suffer in silence' and do not approach the national labour regulator, the Fair Work Ombudsman ('FWO'), or take other action to address their underpayment.³ Scholarship and policy analysis have begun to explore the range of reasons why aggrieved international students do not act. These include structural, social and practical barriers to seeking help or bringing a claim against an underpaying employer. This article explores another possible explanation for this inaction: many students express satisfaction with their working conditions even when they received wages below the legal minimum, despite knowing they were being underpaid.

The authors have previously undertaken research for the FWO to investigate why international students are underrepresented among workers seeking the agency's assistance.⁴ Although there was a range of reasons why international students did not complain, one reason that emerged among participants in the research was that they were satisfied with their wages. This followed an earlier empirical study by two of the authors in which a majority of international students in a nationwide survey reported that they were satisfied with their overall work experience in Australia, despite receiving extremely low wages in their lowest-paid job.⁵

This apparent satisfaction with wage underpayment is deeply troubling as it suggests that wages below legal minimums have become normalised in the highly casualised industries in which international students work. If workers are satisfied with underpaid work, enforcement agencies (such as the FWO) and unions lose their main mechanism — complaints from workers — to uncover and address the problem of non-compliant wages and conditions in the workforce. The normalisation of underpaid casual work produces a two-tier labour market benefiting employers who underpay workers in the black

- 1 *Report of the Migrant Workers' Taskforce* (Report, March 2019) 108 <https://www.ag.gov.au/sites/default/files/2020-03/mwt_final_report.pdf> ('*Report of the Migrant Workers' Taskforce*'); Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report, March 2016) ch 8, 201, 203 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Report> ('*A National Disgrace*'); Bassina Farbenblum and Laurie Berg, *International Students and Wage Theft in Australia* (Report, June 2020) 8–9 ('*International Students and Wage Theft*'); Fair Work Ombudsman (Cth), *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* (Report, April 2016) 7–8.
- 2 See, eg, Jane Hardy, 'Migration, Migrant Workers and Capitalism' (2009) 122 (Spring) *International Socialism* <<http://isj.org.uk/migration-migrant-workers-and-capitalism/>>.
- 3 Bassina Farbenblum and Laurie Berg, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia* (Report, October 2018) 6, 29 ('*Wage Theft in Silence*').
- 4 See Alexander Reilly et al, *International Students and the Fair Work Ombudsman* (Report, March 2017) <<https://www.fairwork.gov.au/ArticleDocuments/1160/International-students-and-the-fair-work-ombudsman-report.pdf.aspx?Embed=Y>> ('*International Students and the FWO*').
- 5 See Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (Report, November 2017) ('*Wage Theft in Australia*').

economy. This in turn places pressure on compliant employers to reduce wages to remain competitive.

In order to address underpayment and poor working conditions among international students, enforcement agencies, unions, and service providers need a better understanding of the prevalence of expressed satisfaction among these workers, and the factors that may contribute to it.

As a foundation for addressing this gap, this article examines data from two empirical studies which cast light on these issues, in the context of evidence of other barriers that impede international students from taking action to recover unpaid wages. We consider several possible explanations for their expressed satisfaction. We consider the possibility that satisfaction may be connected with international students' restricted labour market and their need for income in Australia, ie they are lucky to have a job. We also consider students' benchmarking of their pay against prevailing wages among other international students rather than their legal entitlements. We explore other benefits international students derive from their work besides pay and consider whether they express satisfaction because, although the conditions are poor, they are consistent with what the employer promised at the outset. Finally, we examine whether international students may express satisfaction because they misapprehend the law and their legal rights and responsibilities.

II RESEARCH METHODS

This article draws on data from two empirical studies, in addition to a range of secondary sources. In this section, we provide a brief overview of the research methodology of each of the empirical studies.

A *The FWO Study*

The first study, the 'FWO Study', was conducted over four months from mid-August to mid-December 2016.⁶ It adopted a mixed methodological approach to analyse the experiences of international students in the Australian workforce and the barriers they faced in seeking assistance from the FWO in relation to workplace exploitation.

The study included a survey of international students conducted online from 4 October to 24 October 2016.⁷ Emails were sent to 7,241 students enrolled in

6 This study, conducted by Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and George Tan, was funded by the Fair Work Ombudsman. For further detail on research methods for this study, see Reilly et al, *International Students and the FWO* (n 4).

7 The survey was conducted pursuant to Ethics approval granted by the University of Adelaide.

the University of Adelaide and TAFE SA inviting them to participate. Of these, 903 students participated, yielding 766 valid responses (University of Adelaide, n = 671; TAFE SA, n = 149).⁸ The survey focused on respondents' employment experiences in paid and unpaid work,⁹ and motivations for undertaking this work while studying. This was based on participants' most recent job in Australia which may not have been their lowest-paid job. The survey also explored students' perceptions of their employers and how they responded to problems in the workplace. Finally, respondents were asked directly about their knowledge of the FWO, and their attitude to approaching the FWO for assistance with issues they faced in the workplace.

The confinement of survey data to international students in South Australia raises questions of whether that state is representative of the country as a whole, and whether the University of Adelaide and TAFE SA are representative institutions in South Australia or nationally. In most instances, survey responses yielded answers to the same or similar questions which appear in the national Census and Characteristics of Recent Migrants ('CORM') surveys in similar proportions, suggesting that the sample of respondents is broadly representative of international students nationally.¹⁰ However, the survey had only 766 valid responses, and when data was cross-tabulated, response rates were well under this number. There are, therefore, good reasons to treat any general findings with caution.

In addition to the survey, data was gathered through interviews with FWO staff and a Council of International Students Australia representative, and five focus

8 TAFE SA had a higher response rate compared to the University of Adelaide. A response rate of 10.6% is in line with expectations for such an online survey methodology: see generally Ronald D Fricker, 'Sampling Methods for Web and E-Mail Surveys' in Nigel Fielding, Raymond M Lee and Grant Blank (eds), *The SAGE Handbook of Online Research Methods* (SAGE Publications, 2008) 195. Emails were also sent to international students studying at Macquarie University and Macquarie University College. However, this cohort were not included in the study due to the very low response rate. Of the survey's valid responses, 54 student participants identified as both TAFE SA and University of Adelaide students producing the total valid response figure of 766.

9 For this study, unpaid work excludes volunteering or internships or placements that are counted for course credits.

10 Survey responses were compared to 2006 and 2011 data from the Australian Bureau of Statistics Census of Population and Housing and the 2010 and 2013 CORM surveys. To access the raw data of the Census of Population and Housing, see generally '2006 Census Data', *Australian Bureau of Statistics* (Web Page, 26 June 2017) <<https://www.abs.gov.au/websitedbs/censushome.nsf/home/historicaldata2006?opendocument&navpos=280>>; '2011 Census Data', *Australian Bureau of Statistics* (Web Page, 17 July 2017) <<https://www.abs.gov.au/websitedbs/censushome.nsf/home/historicaldata2011?opendocument&navpos=280>>. As to the CORM surveys, see Australian Bureau of Statistics, *Characteristics of Recent Migrants, Australia, Nov 2010* (Catalogue No 6250.0, 24 May 2011); Australian Bureau of Statistics, *Characteristics of Recent Migrants, Australia, Nov 2010* (Catalogue No 6250.0, 24 May 2011). The Census is conducted every five years. It does not distinguish between respondents according to visa status. Although it is possible to reduce the dataset to a group that will have a high proportion of international students, it is over-inclusive and can only provide an indicative picture of international student engagement in the Australian workforce. In contrast, the CORM Survey surveys non-citizens about their labour force status and other characteristics. However, some of the data outputs can be unreliable due to small numbers.

groups with international students.¹¹ This included three focus groups with 15 participants from the University of Adelaide, including students from China, Germany, Italy and Brazil. Two focus groups were held in Sydney with nine participants. One focus group consisted of five international students studying law at the University of New South Wales ('UNSW'). The other consisted of four international students studying at private vocational or English language colleges who were approached through Redfern Legal Centre, which has a specialist legal service for international students.

B The National Temporary Migrant Work Survey

The National Temporary Migrant Work Survey ('NTMW Survey')¹² was an anonymous online survey conducted between September and December 2016. It was available on a public website and was open to any individual who had worked in Australia on a temporary visa. It was available in 12 languages in addition to English.¹³

The survey yielded 4,322 valid responses, including 2,392 participants who held a student visa in their lowest-paid job. This included 1,705 international students studying at universities, and 523 studying at vocational or English language colleges. Participants were recruited through various channels including emails, social media, websites and flyers/posters at various locations and events. Social media recruitment included regular posting on a range of nationality-based, location-based, visa category-based, and other Facebook groups, as well as a dedicated Facebook page for the survey. Email distribution was conducted through a range of organisations, educational institutions, unions, consulates, and individuals throughout Australia. The survey also received coverage, with a link, via a number of news outlets.

The survey contained 32 multiple choice questions, in addition to a number of follow-up questions. It focused on participants' personal characteristics, features of their lowest-paid job in Australia, their experience of other indicators of exploitation, and their knowledge and perceptions. It also asked participants about their response to underpayment, including whether they took action and the outcomes, and explored barriers that prevented those who had not taken action from doing so.¹⁴

11 Focus groups and interviews were conducted pursuant to Ethics approval granted by the University of New South Wales ('UNSW').

12 The study was conducted by Laurie Berg, Bassina Farbenblum and Stephen Clibborn. The survey was conducted pursuant to Ethics approval granted by University of Technology Sydney. For further information on research methods for this study, see Berg and Farbenblum, *Wage Theft in Australia* (n 5) 10–11.

13 Each translation was checked by a different native speaker of that language. However, it remains possible that certain words or phrases may have been understood differently in different languages.

14 Findings of this aspect of the study were published in Farbenblum and Berg, *Wage Theft in Silence* (n 3).

There are a number of methodological limitations related to this survey.¹⁵ Questions relating to working conditions focused on participants' lowest-paid job and as a result, may not reflect other potentially more positive employment experiences. It is also possible that those who were willing to participate 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. Finally, there was an over-representation among participants of international students at UNSW (and to a lesser degree the 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 temporary migrants within populations that have historically been difficult to reach.

III INTERNATIONAL STUDENTS IN THE AUSTRALIAN WORKFORCE

This section provides an overview of the demographic profile of international students in Australia and their participation in the Australian workforce, as well as an explanation of the work entitlements of international students.

A Profile of International Students

In 2019, there were 956,773 international students enrolled in Australian education institutions, and 515,082 had commenced study.¹⁶ The top source countries for international students across all sectors in 2019 were China (27.3%), India (15.1%), Nepal (7.2%), Brazil (4.3%) and Vietnam (3.3%).¹⁷

Since the late 1980s, when universities were first permitted to enrol fee-paying international students, the number of international students experienced a more than 44-fold increase from initial enrolments of around 20,000 enrolments.¹⁸

In 2017, 7% of the world's international students studied in Australia, making

15 For a more comprehensive discussion of the study's limitations, see *ibid* 13.

16 'End of Year Summary of International Student Data 2019' (Data Summary, Department of Education, Skills and Employment (Cth), 2019) <<https://internationaleducation.gov.au/research/International-Student-Data/Documents/MONTHLY%20SUMMARIES/2019/December%202019%20End%20of%20year%20summary.pdf>>.

17 *Ibid*.

18 Andrew Norton and Ittita Cherastidham, Grattan Institute, *Mapping Australian Higher Education 2018* (Report No 2018-11, September 2018) 28 <<https://grattan.edu.au/wp-content/uploads/2018/09/907-Mapping-Australian-higher-education-2018.pdf>>.

it the third-largest destination country after the USA (18%) and the UK (8%).¹⁹ In 2019, the education-related activity of international students in Australia contributed \$37.6 billion to the economy.²⁰ The international education industry is Australia's third-largest export after coal and iron ore, and the largest services export, ahead of tourism.²¹

In 2015, the Department of Education and Training (Cth) reported that most international students are 20–4 years of age (43%) and 25–9 years of age (28%).²² Six percent of international students were aged over 35 years and 3.7% were less than 18 years of age.²³ Further, 52.5% of international students in Australia were male.²⁴

B International Students in the Australian Workforce

There is no large-scale or official data on the proportion of international students who undertake paid or unpaid work in Australia, because neither employers nor students are required to register their work with the government. However, limited quantitative data available suggests that many international students are engaged in employment in Australia. Among the 766 participants in the FWO Study, 57% of TAFE students were in paid employment, compared with 39% of university students.²⁵ In a new survey of over 5,000 international students, among those who had been in Australia for at least three months, 65% of international students indicated that they had held a paid job in Australia, including 59% of students enrolled in a Bachelor's degree program, 79% of students enrolled in a Master's degree program, 78% of international students enrolled in vocational courses and 68% of students undertaking English language study.²⁶

19 'The Global Context of Tertiary Student Mobility' (Research Snapshot, Department of Education (Cth), September 2019) <https://internationaleducation.gov.au/research/Research-Snapshots/Documents/RS_Global%20context.pdf>.

20 '2018–19 Export Income by State and Territory' (Research Snapshot, Department of Education and Training (Cth), December 2019) <<https://internationaleducation.gov.au/research/Research-Snapshots/Documents/Education%20infographic%20Australia%202018%E2%80%93319.pdf>>.

21 Tim Dodd, 'Education Exports Are Worth \$28 Billion a Year, Nearly 20pc More Than We Thought', *The Australian Financial Review* (online, 8 October 2017) <<https://www.afr.com/work-and-careers/management/education-exports-are-worth-28-billion-a-year-nearly-20pc-more-than-we-thought-20171005-gyvc8v>>; Deloitte Access Economics, *The Value of International Education to Australia* (Report, 2015) 1 <<https://internationaleducation.gov.au/research/research-papers/Documents/ValueInternationalEd.pdf>>.

22 'International Student Numbers 2015' (Research Snapshot, Department of Education and Training (Cth), February 2016) <<https://internationaleducation.gov.au/research/Research-Snapshots/Documents/Student%20Numbers%202015.pdf>>.

23 Ibid.

24 Ibid.

25 Alexander Reilly et al, *International Students and the FWO* (n 4) 4.

26 Farbenblum and Berg, *International Students and Wage Theft* (n 1) 25.

C International Students' Work Rights

The *Migration Act 1958* (Cth) outlines the conditions of international student visas.²⁷ International students have a range of rights and obligations that affect their residence in Australia. Students must have a base level of English language competency.²⁸ Students must be enrolled in a registered course of study throughout the term of their visa.²⁹ They can change courses, but only to a course of the same or a higher level than the registered course for which they were granted the visa.³⁰

Student visas come with secondary visa rights for partners and dependent children. There are detailed financial requirements that require students to have enough money to pay for course fees, travel and living costs for themselves and accompanying family members.³¹ As at the date of publication, students were required to have \$21,041, and \$7,362 for their partner, and \$3,152 for each child, to cover living costs for 12 months.³² International students must also have a health insurance policy.³³

International students have an automatic entitlement to work for a maximum of 40 hours a fortnight while a student's course is in session and unlimited hours during scheduled course breaks.³⁴ In addition, any family members on secondary student visas are entitled to work 40 hours a fortnight at all times.³⁵ Students and accompanying family cannot begin work until the course of study has commenced.³⁶ Courses are considered to be in session not only during the regular semesters, but also during exam periods regardless of whether a student has exams, and during semester breaks if the student is undertaking

27 For a summary of the eligibility requirements to obtain a student visa, see 'Subclass 500 Student Visa: Eligibility', *Department of Home Affairs (Cth): Immigration and Citizenship* (Web Page, 16 October 2020) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/student-500#Eligibility>>.

28 Ibid.

29 Ibid.

30 *Migration Regulations 1994* (Cth) sch 8 cl 8202.

31 'Subclass 500 Student Visa: Step by Step', *Department of Home Affairs (Cth): Immigration and Citizenship* (Web Page, 16 October 2020) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/student-500#HowTo>>.

32 *Migration (LIN 19/198: Evidence of Financial Capacity — Subclass 500 Visa and Subclass 590 Visa) Instrument 2019* (Cth) s 6(2).

33 'Subclass 500 Student Visa: Eligibility', *Department of Home Affairs (Cth): Immigration and Citizenship* (Web Page, 16 October 2020) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/student-500#Eligibility>>.

34 See visa conditions 8104 and 8105: *Migration Regulations 1994* (Cth) sch 8. This entitlement was changed from 20 hours a week on 26 March 2012: *Migration Legislation Amendment Regulation (No 1) 2012* (Cth) sch 5.

35 *Migration Regulations 1994* (Cth) sch 2 cl 8104.

36 Ibid sch 2 cls 8104(2), 8105(1A).

an extra course that will be credited to their degree.³⁷ There are no work limits on students studying a Master's degree by research or Doctorate course in Australia.³⁸

'Work' is defined in the regulations as 'an activity that, in Australia, normally attracts remuneration'.³⁹ International students are entitled to the same workplace rights as Australian workers under the *Fair Work Act 2009* (Cth) ('*Fair Work Act*'). They are subject to minimum wages in awards and the same remedies are available to them in case of a breach of their rights under the *Fair Work Act*.

IV EXPLOITATION OF INTERNATIONAL STUDENTS AND THEIR RELUCTANCE TO COMPLAIN

Although international students have the same legal protections at work as Australian workers, their acute vulnerability in the workplace is well known. International students are also particularly reluctant to seek the assistance of the FWO, even relative to other temporary visa-holders. This section sets out data from the FWO Study and the NTMW Survey that indicate widespread underpayment of international students, and illuminate the barriers inhibiting international students from taking action to recover their unpaid wages. New research from Farbenblum and Berg's Information for Impact survey of over 5,000 international students confirms that in 2019 the prevalence of egregious underpayment of international students remained unchanged.⁴⁰

37 See visa condition '8105: Work Restriction': 'Check Visa Details and Conditions: Student Visa (Subclass 500)', *Department of Home Affairs (Cth): Immigration and Citizenship* (Web Page, 26 February 2020) <<https://immi.homeaffairs.gov.au/visas/already-have-a-visa/check-visa-details-and-conditions/see-your-visa-conditions#>>.

38 *Migration Regulations 1994* (Cth) sch 2 cls 8104, 8105.

39 *Migration Regulations 1994* (Cth) reg 1.03 (definition of 'work').

40 Farbenblum and Berg, *International Students and Wage Theft* (n 1) 47.

A Widespread Underpayment of International Students

Exploitation of international students has been the subject of prominent media reports⁴¹ and academic inquiry⁴² for several years. In 2018, the Commonwealth Migrant Workers' Taskforce report stated that a significant number of international students were exploited at their workplace and this has been a feature of some sectors in the Australian labour market for years.⁴³ Widespread underpayment of international students' wages and entitlements in certain industries has been documented by parliamentary inquiries, FWO investigations and academic studies, including food services,⁴⁴ commercial cleaning,⁴⁵ hospitality,⁴⁶ horticulture,⁴⁷ and various franchises.⁴⁸ These sectors are also associated with casual work, low rates of unionisation and cash payment of wages.⁴⁹ Enforcement of labour laws

- 41 See, eg, Sam Langford and Marty Smiley, "They Told Me That They Could Pay Me \$12": Chinese Student Speaks Out about Wage Theft", *SBS News: The Feed* (online, 17 October 2019) <<https://www.sbs.com.au/news/the-feed/they-told-me-that-they-could-pay-me-12-chinese-student-speaks-out-about-wage-theft>>; Michael Koziol, "It's Just Abusive": Experts Issue Warning over Nepalese Student Surge", *The Sydney Morning Herald* (online, 22 December 2019) <<https://www.smh.com.au/national/it-s-just-abusive-experts-issue-warning-over-nepalese-student-surge-20191219-p53lhm.html>>. See also Samuel Yang, "Rogue Landlords" Prey on International Students in the "Wild West" of Australia's Rental Market, Report Finds", *ABC News* (online, 4 December 2019) <<https://www.abc.net.au/news/2019-12-04/landlords-prey-on-international-students-in-australia:study/11759672>> in relation to international student exploitation in the housing market.
- 42 See, eg, Iain Campbell, Martina Boese and Joo-Cheong Tham, 'Inhospitable Workplaces: International Students and Paid Work in Food Services' (2016) 51(3) *Australian Journal of Social Issues* 279 ('Inhospitable Workplaces'); Stephen Clibborn, 'Multiple Frames of Reference: Why International Student Workers in Australia Tolerate Underpayment' (2018) *Economic and Industrial Democracy* 143831:1–19; 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 ('Remedies for Migrant Worker Exploitation in Australia').
- 43 *Report of the Migrant Workers' Taskforce* (n 1) 37.
- 44 See Joo-Cheong Tham and Judy Fudge, 'Unsavoury Employer Practices: Understanding Temporary Migrant Work in the Australian Food Services Sector' (2019) 35(1) *International Journal of Comparative Labour Law and Industrial Relations* 31; Senate Education and Employment References Committee, Parliament of Australia, *Corporate Avoidance of the Fair Work Act 2009* (Report, September 2017) ch 6 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/AvoidanceofFairWork/Report> ('*Corporate Avoidance*'); *A National Disgrace* (n 1) ch 8; Campbell, Boese and Tham, 'Inhospitable Workplaces' (n 42) 279.
- 45 See Fair Work Ombudsman (Cth), *An Inquiry into the Procurement of Cleaners in Tasmanian Supermarkets: A Report by the Fair Work Ombudsman under the Fair Work Act 2009* (Report, February 2018) <<https://www.fairwork.gov.au/reports/inquiry-into-the-procurement-of-cleaners-in-tasmanian-supermarkets>>; Senate Education and Employment References Committee, Parliament of Australia, *Wage Theft? What Wage Theft: The Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies* (Report, November 2018) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ExploitationofCleaners/Report>.
- 46 *Corporate Avoidance* (n 44) 59.
- 47 Diane van den Broek et al, 'Pro-Market Governance, Migration Status and Worker Vulnerability: The Case of Australian Horticulture' (2019) *Economic and Industrial Democracy* 0143831X1986175: 1–21, 1.
- 48 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Fairness in Franchising* (Report, March 2019) xiv.
- 49 See Joo-Cheong Tham, Iain Campbell and Martina Boese, 'Why Is Labour Protection for Temporary Migrant Workers So Fraught: A Perspective from Australia' in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart Publishing, 2016) 173 ('Why Is Labour Protection for Temporary Migrant Workers So Fraught?'); Ann Arnold, 'The New Black: The Overworked, Underpaid, Cash-in-Hand Worker Is Becoming Increasingly Common', *The Monthly* (online, February 2017) <<https://www.themonthly.com.au/issue/2017/february/1485867600/ann-arnold/new-black>>.

is especially difficult in these industries where there is the structural reality of non-compliance.⁵⁰

As far back as 2005, a major empirical study found that 58% of working international students interviewed were earning less than the legal minimum wage.⁵¹ More recently, Clibborn found that of 1,400 international students at one university, 60% were paid below the federally mandated minimum wage.⁵² The scale of unremedied 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.⁵³

International students' vulnerability to underpayment is illustrated in a case involving three international student cleaners who continued to work for their employer despite never receiving remuneration.⁵⁴ Collectively they worked for 331 hours without receiving any of the \$7,083.36 they were entitled to for this period. As is often the case for international students who do not usually have the resources and knowledge to initiate their own legal proceedings, their case was advanced by the FWO in the Federal Court and significant penalties were awarded against the employer. The Court noted that these international students were 'particularly vulnerable' because of their lack of knowledge of Australian workplace standards and because English was not their first language.⁵⁵ The Court also observed the substantial challenges involved in the detection, investigation and prosecution of cases involving vulnerable workers unfamiliar with Australian law and dispute resolution processes.⁵⁶

The FWO Study and the NTMW Survey confirm the scope of underpayment and shed further light on its prevalence among different groups of international students.

1 *The FWO Study*

In the FWO Study, participants were asked to indicate their hourly pay in their most recent job. Of the participants who were in paid employment, 39.9% reported receiving wages of \$17 per hour or less in their most recent job and a further 27.1%

50 Joanna Howe et al, 'A Critical Examination of the Relationship between Labour Hire Intermediaries and Growers in the Australian Horticulture Industry' (2019) 32(1) *Australian Journal of Labour Law* 83; Tham, Campbell and Boese, 'Why Is Labour Protection for Temporary Migrant Workers So Fraught?' (n 49) 173.

51 Chris Nyland et al, 'International Student-Workers in Australia: A New Vulnerable Workforce' (2009) 22(1) *Journal of Education and Work* 1, 7.

52 Clibborn (n 42) 7.

53 Berg and Farbenbelum, 'Remedies for Migrant Worker Exploitation in Australia' (n 42) 1035.

54 See *Fair Work Ombudsman v Terrence Cyril Thomas* [2013] FCCA 536.

55 *Ibid* [30] (Judge Riley).

56 *Ibid* [48] (Judge Riley).

received between \$17 and \$23 per hour.⁵⁷ It is not possible to determine how many of these wage payments are under the minimum wage rate. Although the federal minimum wage was \$17.70 at the time of the survey, junior rates are permitted for those under 21 years of age.⁵⁸ On the other hand, the minimum wage is higher under awards governing many of the industries in which the respondents worked, and higher again for casual workers who are entitled to a 25% casual loading.⁵⁹ Thus, it seems likely that well over 40% of respondents were receiving wages below their legal entitlements under Australian law.

Under the FWO Study:

Just under one-fifth (18%) of [participants in the FWO Study survey] indicated that they have been engaged in unpaid work in Australia. ... In answering this question, students were asked to exclude 'volunteering, any work for your family or work/internship/placement completed for course credit as part of your studies'. Students were then given three options to describe their unpaid work. Of [the 138 international students] who had engaged in unpaid work ... 23.3% ... described the work as an unpaid traineeship, 24% ... as an unpaid internship and 19.9% ... as an unpaid trial. These terms were not defined in the survey.⁶⁰ ... [O]ver 60% of students engaged in unpaid work for over one week, and over 30% engaged in unpaid work for between one and six months.⁶¹ ... [J]ust over a quarter of unpaid trials were for more than a week in duration, which is likely to breach laws relating to unpaid work. In relation to unpaid traineeships ... 14.7% ran for between one and three months, and 14.7% ran for between three and six months. Unpaid traineeships of this length are almost certain to be in breach of the law.⁶² ... In the focus groups, many students described being placed on a trial for lower pay, usually for three to four weeks, after which wages increased. This was presented as the norm in the hospitality industry.⁶³

2 The NTMW Survey

In the NTMW Survey, participants were asked to state their hourly wage in their lowest-paid job in Australia. Among the 2,392 international student participants, 65% reported receiving wages of \$17 per hour or less in that lowest-paid job.⁶⁴ The national minimum wage in Australia in the period between 2014 and 2016

57 Alexander Reilly et al, *International Students and the FWO* (n 4) 36.

58 Ibid 5.

59 Ibid.

60 Ibid 44. A 'further 12.3% (n = 15) of respondents specified other forms of unpaid work, including teaching, administration, farm job, newspaper delivery, tutoring, laboratory work and work at the university, which potentially should have been remunerated': at 44.

61 Ibid 45.

62 Ibid 45–6.

63 Ibid 46.

64 See Berg and Farberblum, *Wage Theft in Australia* (n 5) 27.

(when 69% of participants worked) was between \$16.87 and \$17.70 per hour.⁶⁵ Nearly a quarter of international student participants earned \$12 per hour or less in their lowest-paid job; 43% earned \$15 or less.⁶⁶ University students did not earn substantially higher wages than students at vocational and English language colleges. Forty-nine percent of college students earned \$15 per hour or less, compared with 42% of university students.⁶⁷ However, 7% of college students earned \$10 per hour or less, compared with 13% of university students.⁶⁸ Students who indicated they had worked more than 20 hours per week, potentially in breach of their visa conditions, earned substantially lower wages than other students.⁶⁹ Among students who worked 21 hours or more, 45% earned \$12 per hour or less. This is almost double the proportion within the general student population (25%).⁷⁰ Almost a fifth (18%) earned \$10 per hour or less, compared with 11% of students overall.⁷¹

Figure 1: Hourly Wage Rates in Participants' Lowest Paid Job⁷²



Figure 2: Hourly Wage Rates in Participants' Lowest Paid Job, Comparing University and College Students



65 Ibid 24.

66 Ibid 27.

67 Ibid.

68 Ibid.

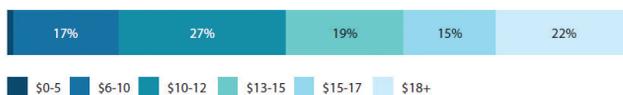
69 Ibid 48. As international students are only permitted to work a maximum of 40 hours per fortnight as a condition of their visa, working a greater number of hours would breach their visa conditions. It is possible that these figures over-represent or under-represent the true number of international student participants who engaged in work in contravention of their visa conditions. Some students may not have disclosed work in excess of 20 hours per week for fear of immigration consequences, despite the anonymity of the survey. At the same time, not all students who worked an average of 20 hours per week would have engaged in unauthorised work. If the work had been undertaken when the student's studies were not in session the 40 hour restriction would not have applied. In addition, the 40 hour per fortnight restriction would not have applied to university participants who held a postgraduate student visa: *ibid* 23.

70 Ibid 47.

71 The following graphics were taken from *ibid* 27.

72 Figures 1–3 have rounded raw data to the nearest whole percentage for each category. The data in corresponding text reflects the raw data directly.

Figure 3: Hourly Wage Rates in Participants' Lowest Paid Job for Students Working 21 Hours or More Per Week



Although most international students are not in full-time work, the vast majority of international student participants had worked many hours a week in their lowest-paid job.⁷³ Two in three students (64%) indicated they worked between 9 and 20 hours each week, with a further 13% reporting they worked at least 21 hours.⁷⁴ When comparing vocational and English-language college students with university students it is clear that the former worked more hours each week. Among college students, 64% reported they worked 16 hours or more per week, compared with 40% of university students.⁷⁵

Contrary to popular assumptions, underpaid international students knew they were receiving less than the Australian minimum wage. Among those students earning \$15 per hour or less, 73% knew that the national minimum wage was higher than what they were earning.⁷⁶ Indeed, a higher proportion of students at vocational and English-language colleges knew that the minimum wage was higher than what they were earning (86%), than students at universities (69%).⁷⁷ While knowledge of the legal basic minimum wage was prevalent among international students, most did not expect to receive it.⁷⁸

B Factors That Deter International Students from Taking Action When They Are Underpaid

Temporary migrants are generally less likely to report workplace exploitation and access legal remedies than local workers, and international students are the *least* likely among temporary migrants to make a complaint to the FWO. The overwhelming majority (90%) of international student participants in the NTMW Survey who acknowledged that they were underpaid took no action to recover their unpaid wages.⁷⁹ The 197 participants who had tried to recover their unpaid wages were asked about what avenue they pursued. Only 18% of international

⁷³ Ibid 22.

⁷⁴ Ibid 6.

⁷⁵ Ibid 23.

⁷⁶ Ibid 6.

⁷⁷ Ibid 7.

⁷⁸ Ibid 6.

⁷⁹ Farbenblum and Berg, *Wage Theft in Silence* (n 3) 20.

students had gone to the FWO, compared with two thirds (67%) of 457 visa holders and almost half (48%) of Working Holiday Makers.⁸⁰

The NTMW Survey and other recent research have identified a range of reasons why international students do not complain about underpayment and poor working conditions.⁸¹ This section provides a brief overview of findings from the NTMW Survey data, framed around seven broad categories.

1 International Students' Limited Capacity, Competence and Knowledge

The first category relates to students' limitations in their capacity and competence to take action and lack of knowledge about how to recover wages. A third of underpaid international student participants in the NTMW Survey (36%) reported that trying to recover wages was *too much work*.⁸² 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.

Almost half of underpaid international student participants (44%) reported that they had not tried to recover unpaid wages because *they did not know what to do*.⁸³ 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 in the survey, including the United Kingdom. Many international students have not worked before their job in Australia, and are unfamiliar with the legal frameworks, institutions and work practices either in their home country or Australia. Their youth and inexperience, and lack of access to advice of family members or friends with better knowledge of Australian work practices and laws, affect not only their ability to negotiate reasonable terms of employment but also their ability to anticipate and handle problems that arise in the employment relationship, and to seek external help in managing the relationship or to leave it if necessary.⁸⁴

Many international students are unfamiliar with the enforcement role of the

80 Ibid 28.

81 See *ibid*; Alexander Reilly, 'Protecting Vulnerable Migrant Workers: The Case of International Students' (2012) 25(3) *Australian Journal of Labour Law* 181 ('Protecting Vulnerable Migrant Workers'); Iain Campbell et al, 'Precarious Work and the Reluctance to Complain: Italian Temporary Migrant Workers in Australia' (2019) 29(1) *Labour and Industry* 98; Tham and Fudge (n 44).

82 Farbenblum and Berg, *Wage Theft in Silence* (n 3) 37.

83 *Ibid* 53.

84 Michael Campbell, 'Perspectives on Working Conditions of Temporary Migrant Workers in Australia' (2010) 18(2) *People and Place* 51, 52.

FWO,⁸⁵ with almost three quarters (73.9%) of participants in the FWO Study survey reporting that they had no prior knowledge of FWO. Most are also not members of trade unions, and only 4% of participants in the NTMW Survey were members of a trade union.⁸⁶ Although international students are informed of the work conditions under their visa, they are not provided with information on unions and other support services that are available should they encounter problems at work, and there is no legal requirement that this information be provided.

Among international student participants in the NTMW Survey, 11% selected '[m]y English isn't good enough' as a reason for not trying to recover wages.⁸⁷ Poor English language skills may affect some international students' ability to understand workplace agreements and negotiate legal conditions of work with their employer at the outset, or to stand up to their employer when they are underpaid or unreasonable requests are made of them. Linguistic barriers may increase the difficulties students face in investigating their labour rights and standards, accessing advice or support, and engaging with service providers and institutions who offer this support. Linguistic barriers may also limit the labour market for international students who are then channelled into pursuing jobs with employers with similar ethnic background, against whom international students may be less willing to complain.

2 Fear of Immigration Consequences

International students' visa conditions significantly contribute to their vulnerability to poor working conditions,⁸⁸ and their reluctance to complain about underpayment and other workplace violations. Nearly a quarter of international student participants in the NTMW Survey indicated they had not or would not try to recover unpaid wages due to fear of possible immigration consequences (23%).⁸⁹

For all international students in Australia, any breach of visa condition 8105 potentially produces two extremely serious consequences: first, the international student faces the prospect of visa cancellation under s 116(1)(b) of the *Migration*

85 See, eg, the submission of the Federation of Ethnic Communities' Councils of Australia which suggests that many visa holders are unaware of enforcement mechanisms, including the FWO's role: Federation of Ethnic Communities' Councils of Australia, Submission No 69 to the Productivity Commission (Cth), *Inquiry into Workplace Relations* (13 March 2015) 2–3 <<https://www.pc.gov.au/inquiries/completed/workplace-relations/submissions>>.

86 Farbenblum and Berg, *Wage Theft in Silence* (n 3) 14, citing 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>>.

87 Farbenblum and Berg, *Wage Theft in Silence* (n 3) 53.

88 Laurie Berg, *Migrant Rights at Work: Law's Precariousness at the Intersection of Immigration and Labour* (Routledge, 2016) 98 ('*Migrant Rights at Work*').

89 Farbenblum and Berg, *Wage Theft in Silence* (n 3) 53.

Act 1958 (Cth); and, secondly, he or she commits a strict liability criminal offence under s 235. Any breach, however minor, inadvertent or coerced, can yield these consequences under Australian law.

In February 2017, a new policy moderated the penalty for a breach of the work condition in student visas and other visas with work rights in an effort to reduce the vulnerability of temporary migrant workers who report workplace exploitation.⁹⁰ This policy states that the Department of Immigration and Border Protection (now the Department of Home Affairs) will not cancel a visa if ‘the visa holder commits to abiding by visa conditions in the future; and [if] there is no other basis for visa cancellation’.⁹¹ Despite pressure from some quarters, the government chose not to introduce a general visa amnesty to protect visa holders who have breached a work entitlement in their visa while being exploited by their employer. It was argued that this was unnecessary because the Department of Home Affairs ‘has ample discretion to take the full range of factors that have impacted upon these people into account in any dealings with them’.⁹² However, this discretionary approach to determining whether an international student’s visa is cancelled for breach of condition 8105 does not provide any *guarantee* to international students.⁹³ The possibility of visa cancellation, however unlikely, provides a powerful disincentive to report workplace exploitation in situations where an employer has coerced an international student to work in excess of the fortnightly limit. This means that, in negotiating pay and conditions of work, an unscrupulous employer can still hold the threat of visa cancellation and deportation over students who have breached their visa conditions.⁹⁴

Though some international students are coerced by their employer or knowingly work in breach of condition 8105 for a variety of reasons, others become vulnerable

90 See ‘Workers Rights and Restrictions’, *Department of Home Affairs (Cth): Immigration and Citizenship* (Web Page, 12 December 2019) <<https://immi.homeaffairs.gov.au/visas/working-in-australia/work-rights-and-exploitation>>.

91 Michaelia Cash and Peter Dutton, ‘Turnbull Government Welcomes Action from the Migrant Workers’ Taskforce’ (Joint Media Release, Department of Education, Skills and Employment (Cth) and Department of Immigration and Border Protection (Cth), 15 February 2017) <<https://ministers.dese.gov.au/cash/turnbull-government-welcomes-action-migrant-workers-taskforce>>.

92 Latika Bourke, ‘7-Eleven Pay Scandal: Visa Reprieves to Be Decided Case by Case’, *The Sydney Morning Herald* (online, 28 September 2015) <<http://www.smh.com.au/federal-politics/political-news/7eleven-pay-scandal-visa-reprieves-to-be-decided-case-by-case-peter-dutton-20150928-gjwcu.html>>.

93 See also Adam Gartrell, ‘Migrant Workers “Left Exposed” by Workplace Watchdog Amnesty Promise’, *The Sydney Morning Herald* (online, 2 April 2018) <<https://www.smh.com.au/politics/federal/migrant-workers-left-exposed-by-workplace-watchdog-amnesty-promise-20180402-p4z7d8.html>>. The Freedom of Information request made by Unions NSW to the Department of Home Affairs reveals that the agreement between the FWO and Home Affairs is a non-binding agreement and that the FWO has no control over Home Affairs exercising its discretion over whether to deport a visa holder.

94 See Laurie Berg and Bassina Farbenblum, ‘Exploitation of Unauthorised Migrant Workers in Australia: Access to the Protection of Employment Law’ in Bernard Ryan (ed), *Migrant Labour and the Reshaping of Employment Law* (Hart Publishing, forthcoming).

to visa cancellation when they engage in an inadvertent breach.⁹⁵ In some circumstances students become vulnerable when it is difficult to comply with the restrictions,⁹⁶ such as where the beginning and end times of the employment cannot be precisely anticipated, or where the employer exerts pressure on the student to exceed the visa restriction.⁹⁷ For example, in one case, an international student who had worked five hours over the fortnightly work hours limit on a number of occasions had her visa cancelled despite her excellent academic results, her strong commitment to study, the inadvertent nature of the excessive hours worked and the pressures placed upon her to undertake additional duties by her employer. In this case, the international student was employed as a cleaner of guestrooms at a hotel but was sometimes delayed in the performance of her work because of the equipment malfunctioning or because guests departed after the check-out time and she had to clean their rooms post-departure. The Migration Review Tribunal rejected her argument that she felt pressured to stay at work by her supervisor in order to complete her allocated tasks and that this gave rise to exceptional circumstances beyond her control.⁹⁸ In another case, involving a minor breach of the fortnightly work hours restriction, an international student was forced to cover an absent co-worker's shift or risk losing his job.⁹⁹ An investigation into 7-Eleven convenience stores described numerous employers who used the visa rules to coerce international student workers into working longer hours for remuneration below the legal minimum and without complaint.¹⁰⁰

3 Fear of Job Loss

In the NTMW Survey, approximately one in four (26%) underpaid international student participants who had not tried to recover unpaid wages was deterred by a fear of losing their job.¹⁰¹ This is likely a substantial underrepresentation since some survey participants would have already left their job prior to the survey. For many international students, fear of job loss is particularly acute because securing employment is very important but highly challenging in a constricted labour market, as discussed in detail in Part V(B) below.

95 Indeed, an Annual National Audit Office Report of 2010–11 found that one of the most common ways for a breach of the work hour restriction to come to the notice of the Department of Immigration was for students to voluntarily attend 'a [Department] office to clarify their immigration status': Australian National Audit Office, Commonwealth, *Management of Student Visas: Department of Immigration and Citizenship* (Audit Report No 46, 2010–11) 114. See also Reilly, 'Protecting Vulnerable Migrant Workers' (n 81) 189–90.

96 Berg, *Migrant Rights at Work* (n 88) 99.

97 For more on the deportability of international students: see Joanna Howe, 'A Legally Constructed Underclass of Workers: The Deportability and Limited Work Rights of International Students in Australia and the United Kingdom' (2019) 48(3) *Industrial Law Journal* 416, 425–9.

98 *Kaur v Minister for Immigration and Citizenship* (2012) 266 FLR 102, 109 [37] (Burnett FM).

99 See 0909314 [2010] MRTA 522 (2 March 2010).

100 For a full account, see Adele Ferguson et al, 'Revealed: How 7-Eleven Is Ripping Off Its Workers', *The Age* (online, 2015) <<http://www.theage.com.au/interactive/2015/7-eleven-revealed/>>.

101 Farberblum and Berg, *Wage Theft in Silence* (n 3) 53.

4 *Difficulty of Recovering Wages in Practice*

One in five (20%) underpaid participants in the NTMW Survey indicated that they would not try to recover unpaid wages because they believed they would not be successful, and 19% believed that even if they were successful, their employer would not pay their entitlements.¹⁰²

There are a range of reasons why international students may fail to successfully recover their unpaid wages. International students (and other workers) face a range of barriers to bringing a claim against their employer in court or to engaging the FWO's assistance to recover their wages.¹⁰³ These are exacerbated by the widespread payment of wages in cash in many industries in which international students work, often with a failure to issue correct pay slips in contravention of Australian law.¹⁰⁴ Record keeping and pay slip obligations play a pivotal role in monitoring compliance with industrial instruments and in aiding both employees and the FWO to verify and prove income and entitlements.¹⁰⁵ Without pay slips, international students are more vulnerable to exploitation and face increased barriers to recovering their wages. In particular, they lack accurate information of payments and deductions that have been made and lack evidence to substantiate their claim of underpayment. In one case involving 39 workers, many of whom were international students employed by a Japanese restaurant, the employer kept no record of pay slips which the court said meant that employees 'were denied proof of their employment and income or the ability to check and seek advice about their entitlements.'¹⁰⁶ Recent legislative amendments have ameliorated this disadvantage faced by workers who have not been issued pay slips by shifting the burden to the employer to prove that wage payments were compliant.¹⁰⁷ However, international students may nevertheless perceive that they are unlikely to succeed in a wage recovery claim where they have no proof of what payments were made and it is their word against their employer's.

102 Ibid 53.

103 For a detailed discussion of these barriers, see Bassina Farbenblum and Laurie Berg, 'Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman' (2017) 23(3) *Australian Journal of Human Rights* 310, 318–21, 323–6.

104 As to the form and content requirements to issue correct payslips: see *Fair Work Regulations 2009* (Cth) regs 3.45–6.

105 As has been noted by the court in a case concerning temporary migrant workers, '[w]ithout proper pay slips employees are significantly disempowered, creating a structure within which breaches of the industrial laws can easily be perpetrated': *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd* [2012] FMCA 258, [67]. See also *Fair Work Ombudsman v Orwill Pty Ltd* [2011] FMCA 730, [21].

106 *Fair Work Ombudsman v Kojima* [2013] FCCA 976, [33] (Judge O'Sullivan). In this case, workers were owed close to \$100,000 in unpaid wages and the Court noted their vulnerability and the difficulty in detecting breaches of workplace law for vulnerable workers: at [1], [69].

107 *Fair Work Act 2009* (Cth) s 557C(1).

5 Other Barriers

One in five international student participants in the NTMW Survey (18%) perceived that the wage underpayment was '*not a lot of money*', which may have informed their view that wage recovery '*was too much work*'.¹⁰⁸ However, it is likely that many underestimated the full quantum of wages they were owed, as a result of their limited awareness or understanding of casual loadings, penalty rates and other award entitlements.

Finally, a very small number of participants (5%) identified as a barrier that *they were leaving Australia soon*.¹⁰⁹ 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. International students are acutely aware of their temporary status which can create both subjective and objective barriers in making complaints about workplace exploitation. Dauvergne and Marsden observe that temporary migrant workers' compromised membership status deters '*individual complaints and test-case litigation ... by the very fact of temporary status, given the time it takes to see a legal complaint through*'.¹¹⁰ The difficulties and cost involved in pursuit of litigation once workers have left the jurisdiction is illustrated in one case where the FWO arranged for former international students to return to Australia for a period of time in order to pursue a case against an employer.¹¹¹

V INTERNATIONAL STUDENTS' SATISFACTION DESPITE UNDERPAYMENT

This section considers survey data from the FWO Study and the NTMW Survey on international students' expressed levels of satisfaction with their work despite underpayment. We then explore a range of possible explanations for this phenomenon, drawing on data from survey responses and focus groups within the FWO Study.

A Data on International Students' Satisfaction Despite Underpayment

The NTMW Survey asked participants whether they were satisfied with their experience of working in Australia overall. Among international students who were paid \$12 per hour or less in their lowest-paid job, 51% stated they were either

108 Farbenblum and Berg, *Wage Theft in Silence* (n 3) 8, 41.

109 Ibid.

110 Catherine Dauvergne and Sarah Marsden, 'The Ideology of Temporary Labour Migration in the Post-Global Era' (2014) 18(2) *Citizenship Studies* 224, 236.

111 See *Fair Work Ombudsman v Sakuraya Warrigal Pty Ltd* [2016] FCCA 2033.

dissatisfied or very dissatisfied with their overall work experience in Australia. Perhaps surprisingly, despite this substantial underpayment, 49% expressed satisfaction with their work experience in Australia overall. This includes 48% of university students and 53% of students at private colleges including vocational and English language colleges.

Satisfaction rates were lowest among those whose lowest-paid job was as commercial cleaners (40%) and convenience store and petrol station attendants (42%), and higher for international students whose lowest-paid job was in food service (47%), retail (50%) and office work (50%). A lower proportion of those who earned between \$6 and \$10 per hour in their lowest-paid job expressed satisfaction with their work experience in Australia (40%), compared with those who earned \$10 to \$12 per hour (51%).

These figures relate to international students' satisfaction with their work experience in Australia overall. Some of those who were satisfied would have no doubt moved on from their lowest-paid jobs to better work opportunities, and focused on those when appraising their overall experience of working in Australia. Others may have been genuinely satisfied with their experience in their lowest-paid job despite underpayment.

To explore this further, the FWO Study survey asked participants whether they were happy with their pay in their most recent job. Among the 128 participants paid \$17 per hour or less in that job, 34 (26.6%) indicated that they were happy with their pay.¹¹² Despite the decrease in participants' reported satisfaction with their pay at lower wage levels, further exploration is required into the finding that over one-quarter of students who were paid less than the minimum hourly wage were happy with their pay.¹¹³ In the next section, we draw on the survey responses of these 34 students, along with focus group data and other sources, to posit reasons why students who receive wages below the minimum may nonetheless be satisfied with their pay.

B Possible Explanations for Students' Satisfaction

This section considers a range of reasons why international students may express satisfaction with wages below legal minimums. It is important to bear in mind that 'satisfaction' is a highly subjective concept and may mean different things to different people. According to *Lexico* (a dictionary collaboration with Oxford University Press), satisfaction means '[f]ulfilment of one's wishes, expectations, or needs, or the pleasure derived from this'.¹¹⁴ In other words, some international

¹¹² Reilly et al, *International Students and the FWO* (n 4) 38.

¹¹³ *Ibid.*

¹¹⁴ *Lexico* (online at 24 December 2020) 'satisfaction' (def 1).

students may express satisfaction because their pay was as expected or because their needs were fulfilled, even if they ideally would have liked better.

1 International Students Feel Pressure to Take Underpaid Jobs in a Tight Labour Market

In the FWO Study survey, participants who expressed satisfaction with their pay in their most recent job were then asked: 'Which statement reflect [sic] why you are happy with your pay?'.¹¹⁵ Among those receiving less than \$17 per hour, 61.8% of respondents stated that they felt 'lucky to have a job' and 'grateful to their employers'.¹¹⁶ Focus group participants similarly expressed the sentiment that work was hard to come by for international students, and that they were lucky to have a job at all.

International students face a range of challenges to securing any kind of work in Australia, let alone work related to their field of study. The number of unskilled jobs available is far smaller than the numbers of international students (and local students)¹¹⁷ who are looking for local work. Many do not have previous work experience, and face linguistic, cultural and other barriers to engaging in the Australian workforce. Compounding these barriers, in the FWO Study survey, 54% of international students stated that the 40 hours per fortnight work limitation on their visa made it more difficult for them to find work.

At the same time, many students feel great pressure to work in Australia. For some, this is because they perceive a strong need to gain Australian work experience, discussed below. For many others, working in Australia is essential to meet their living expenses. Although international students are required to have money upfront to cover their living expenses for the duration of their studies in Australia,¹¹⁸ they and their families commonly meet these financial requirements by taking out loans or mortgaging their homes.¹¹⁹ Indeed, the survey revealed that respondents were strongly reliant on the income from their Australian employment for basic living expenses. Three in four (74.2%) of respondents reported that they directed their pay towards their food and other living expenses and close to one in two (45.4%) indicated that their pay went towards rent. More than 10% of respondents used their pay to cover visa expenses and repay loans for their course fees.¹²⁰ There may also be familial expectations that students will

115 Reilly et al, *International Students and the FWO* (n 4) 119.

116 *Ibid* 5, 40.

117 The job market for people without qualifications in Australia is already extremely tight: see Anglicare Australia, 'Jobs Availability Snapshot 2019' (Report, 2019) 4 <<https://www.anglicare.asn.au/docs/default-source/default-document-library/jobs-availability-snapshot-2019.pdf?sfvrsn=4>>.

118 *Migration Regulations 1994* (Cth) cl 500.214(2).

119 Jacqui Mills and Lily Zhang, United Voice, Submission No 163 to Department of Immigration and Citizenship (Cth), *Strategic Review of the Student Visa Program* (2011) 10.

120 Reilly et al, *International Students and the FWO* (n 4) 43.

send money home as soon as a visa is granted.¹²¹

When asked why people work in jobs of \$9 or \$10 per hour, one participant stated that

[m]y classmate told me that it might be the easiest way for them to earn the money because they don't have much work experience in a specific field so they have to do some labour job. But actually they know that these types of labouring jobs are very low paid or low salary.¹²²

With these financial and familial pressures, for some students there is an urgent need to work and they may be prepared to put up with poor conditions of employment to maintain a stream of income. At the same time, international students may have more limited social and community networks from which to find work than residents. It may be that international students express a degree of satisfaction for wages below the legal minimum because any income is better than none, but this may be closer to acquiescence than genuine satisfaction. One focus group participant noted:

Maybe they don't have enough financial support from their parents so they need to work so sometimes they don't care about how they get paid. I think deep in their heart they really do care but they couldn't change that because normally international students holding student visa couldn't get permanent job or even part-time job. So this is the only way they can get money.¹²³

2 Students Benchmark Their Pay against Peers and Not Their Legal Entitlements

Among survey participants paid below the minimum wage, only 11.8% stated that they were happy with their pay because it is at least as much as people are paid for similar work in their country of origin. A much larger proportion (32.4%) stated they were happy with their pay because their friends were 'paid a similar amount' or less.¹²⁴ This reflects another phenomenon, noted by Stephen Clibborn, that international students often use their peer group as their 'frame of reference' for identifying the appropriate wage for certain kinds of work, rather than either the legal minimum wage or prevailing wages in their country of origin.¹²⁵ A number of focus group participants noted that their friends were receiving equivalent wages

121 Andrew Trounson and Luke Slattery, 'Safety Net Urged for International Students', *News.com.au* (online, 17 August 2009) <<https://www.news.com.au/news/safety-net-urged-for-international-students/news-story/c39adaf8802f1f2cdb5af9bf93461930?sv=975e2cf236c4efd09b6e1ebe0f139488>>.

122 Reilly et al, *International Students and the FWO* (n 4) 40.

123 *Ibid.*

124 *Ibid* 40–1.

125 Clibborn (n 42) 13–14. See also Michael J Piore, *Birds of Passage: Migrant Labor and Industrial Societies* (Cambridge University Press, 1979).

below the legal minimum and this conditioned their own wage expectations. As one international student told us: 'We consider \$10 as a minimum and \$13 isn't bad. I see many local students if they are paid at minimum wage they would complain a lot but not international students.'¹²⁶ Indeed, just over a quarter (26%) of underpaid students participating in the NTMW Survey were deterred from taking action to recover their wages because many people around them were being paid similarly and not doing anything about it.¹²⁷

International students appear to frequently understand themselves to occupy a unique place in the labour market. The NTMW Survey asked participants about their perceptions of the labour market for workers on their visa. Participants were told the national basic minimum wage at the time of the survey and were then asked to estimate the proportion of people on their visa who were paid less than that amount. The overwhelming majority of international students (86%) believed 'many, most, or almost all' international students were paid less than \$17.70 per hour which was the national minimum wage at the time of the survey.¹²⁸

3 Students Are Satisfied with Underpaid Work because the Conditions of the Job Are as Promised

The NTMW Survey explored the connection between temporary migrants' acquiescence to underpayment and participants' pay expectations at the outset of the job. Only 8% of underpaid survey participants tried to recover their unpaid wages where the employer paid the worker what they had agreed at the outset, even if this was well below minimum wage.¹²⁹ In contrast, 17% of underpaid participants had tried to recover unpaid wages among those whose employer paid them less than was agreed.¹³⁰ For instance, participants whose employer told them they would receive \$12 per hour and received that amount were less likely to try to recover unpaid wages than participants whose employer promised them \$14 per hour but paid them \$12 per hour.¹³¹

It is unclear, however, precisely why these participants did not try to recover unpaid wages. It may be that they believed that, having agreed to a different wage rate, they did not have a legal right to enforce statutory minimum wages. Alternatively, it is also possible that they had no cause for dissatisfaction with a wage rate they agreed to at the outset.

126 Reilly et al, *International Students and the FWO* (n 4) 41.

127 Farbenblum and Berg, *Wage Theft in Silence* (n 3) 36.

128 Berg and Farbenblum, *Wage Theft in Australia* (n 5) 36.

129 Farbenblum and Berg, *Wage Theft in Silence* (n 3) 6, 22, 39.

130 Ibid.

131 Ibid.

4 International Students Value Other Aspects of the Job, or Want to Believe They Had a Positive Experience

Some international students may be happy to receive an income considerably below the legal minimum because they are gaining other benefits from the experience of work. This is especially the case among students who do not rely on work for living expenses. For some students, enjoyment of the work itself or the social context of the work (such as social connections with other workers or their employer) may lead them to express satisfaction for low pay rates. A focus group participant stated: ‘I like my job [in make-up] even though they pay me \$11 under the minimum wage. I still feel happy because they treat me like family.’¹³²

In fact, more than half of all participants in the FWO Study survey (54.6%) indicated that money was not their main reason for engaging in part-time work.¹³³ For many, the desire for Australian work experience (26.7%) or work experience in their fields of study (21.2%) were the main reasons for engaging in part-time work in Australia.¹³⁴ A number of focus group participants discussed employment as a way to improve their English, gain knowledge of the Australian workplace, and enhance their curriculum vitae.¹³⁵ They were primarily motivated to maximise their opportunity to attain well-paid employment in their area of study in Australia or abroad in the future. This may be important to students who wish to attain permanent residence for whom employment in certain fields may improve their prospects.¹³⁶ These students are vulnerable in the labour market because of the importance of these other goals to them, and the limited opportunities available to international students. Like students who need the income, these students may also be satisfied with work under poorer conditions provided that their other goals are satisfied. Many settle for low paid or even unpaid work (long periods in unpaid trials¹³⁷ or unpaid internships)¹³⁸ as a means of securing employment. Indeed, as noted in Part IV(A)(1) above, 18% of participants in the FWO Study survey indicated that they have engaged in unpaid work in Australia, and almost

132 Reilly et al, *International Students and the FWO* (n 4) 40.

133 Ibid 42.

134 Ibid 42–3.

135 Ibid.

136 By mid-2014, there were 10,361 applications made by international students for permanent residence: see Berg, *Migrant Rights at Work* (n 88) 96.

137 For example, in 2005, a mandatory 900 hours (paid or unpaid) work experience requirement for permanent residency applications for international students in certain trades courses created a link between unpaid work and permanent residency that led to an oversupply of labour in certain industries, particularly in hairdressing and cooking. The case of *Bhatia v Minister for Immigration* [2015] FCCA 409 (*‘Bhatia’*) reflects the difficulties of international students in attempting to meet the 900 hour requirement, and the lack of clarity that existed regarding whether it was in breach visa of condition 8105 limiting working hours to 40 per fortnight. See also *Bhatia* (n 137), discussed in Joanna Howe, Andrew Stewart and Rosemary Owens, ‘Temporary Migrant Labour and Unpaid Work in Australia’ (2018) 40(2) *Sydney Law Review* 183, 195–6.

138 Andrew Stewart and Rosemary Owens, *Experience or Exploitation: The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia* (Report, January 2013) 51–9.

two thirds (61.6%) reported having received useful skills and experience from unpaid work.¹³⁹

It is also possible that, rather than genuine contentment with their wages, international students express satisfaction in order to construct a positive narrative about their overall experience in Australia or their work experience in particular — whether for themselves, or to relate to family and friends back home.

5 International Students Misapprehend Their Legal Position

One possible explanation for underpaid international students' satisfaction is that they did not in fact know that their wages were below the legal minimum. International student participants in the NTMW Survey were asked what they believed was the minimum wage at the time (at the time, it was \$17.70 per hour). Among students who believed the minimum wage was less than \$16 per hour, ie who did not know the minimum wage, 57% expressed satisfaction with their work experience in Australia. In contrast, 45% of those who knew the minimum wage was \$16 per hour or more indicated they were satisfied. This suggests that satisfaction of some students may be attributable to the fact that they do not realise that they have been paid less than their legal entitlements. In fact, there would likely be a greater proportion of international students for whom this would be the case if they were aware of their full entitlements (including in many cases higher basic wages rates, and evening and weekend penalty rates under an award, and a 25% wage loading for the casual positions many international students hold). For example, a student paid \$16 per hour may be satisfied because they are paid close to what they believe is the minimum wage, but they do not realise that in fact they may be entitled to \$23 per hour as a casual worker or more on a weekend.

International students may also consider that they are being paid approximately what they are entitled because they wrongly believe they are required to pay tax on all of their income, and are therefore in an equal or better position receiving lower wages in cash. Farbenblum and Berg's new Information for Impact survey has found that 56% of international students wrongly believed that 'all international students must pay tax on all wages they earn', when in fact many international students do not have to pay tax on their first \$20,570 (the tax-free threshold) as they are residents for tax purposes.¹⁴⁰

International students may also be satisfied with underpayment because they believe they are complicit in breaking the law. For some students, this relates to acceptance of wages in cash. Among international students who participated in the NTMW Survey, 49% were paid in cash, and 72% of these participants earned

139 Reilly et al, *International Students and the FWO* (n 4) 46.

140 Farbenblum and Berg, *International Students and Wage Theft* (n 1) 11.

\$12 per hour or less. Among participants in the Information for Impact survey, half (51%) were affirmatively under the misconception that a worker has broken the law if he or she is paid in cash. A further 18% did not know whether this was the case or not. In addition, almost two thirds (62%) affirmatively held the misconception that a worker who agrees to be underpaid has themselves broken the law. A further 19% did not know whether this was the case or not.¹⁴¹

VI INTERNATIONAL STUDENTS' SATISFACTION WITH LOW WAGES DOES NOT MAKE UNDERPAYMENT ACCEPTABLE

Some may take the view that if many international students are content with jobs below the minimum wage, there is no reason for the government and others to invest resources in addressing this situation. Some may go even further to suggest that if international students and other temporary migrants are willing to work for less, employers should be legally entitled to pay them a lower wage.

These positions are deeply problematic for a range of reasons. For a start, the fact that international students are prepared to work in underpaid jobs does not mean they freely choose to do so. Rather, it is more likely that their need to earn money and to gain Australian work experience compel them to enter the labour market which is constricted for various reasons already discussed. Thus, if international students report being 'satisfied' with non-compliant wages (as they did in our surveys), for many this may reflect resignation to a tight and challenging job market for international students, rather than genuine satisfaction. This might invite the view that it is acceptable to pay international students less because they seek, and receive, other benefits from working in Australia. However, this view becomes untenable when recognising that all work provides non-wage benefits, which are expected to be enjoyed in addition to the fair remuneration for work performed.

In reality, lapses in enforcement of wages for international students and other vulnerable workers have created a second-tier labour market for these workers. This erodes both the tradition and contemporary evolution of Australian labour law. The notion of a minimum wage originated in the infamous *Ex parte HV McKay ('Harvester Case')*,¹⁴² where Higgins J determined that the basic wage should be sufficient to sustain a male breadwinner and his family so they are 'regarded as a human being living in a civilised community'¹⁴³ in 'a condition of frugal comfort ... estimated by current human standards'.¹⁴⁴ This important decision established a framework for an Australian minimum wage, which many

141 Ibid 43–5.

142 (1907) 2 CAR 1, 3–4 (*'Harvester Case'*).

143 Ibid 1.

144 Ibid 4.

referred to as a 'living wage' because Higgins' formulation took into account the monetary amount required to support a worker's life. A Higginsian approach rejects an argument that international students should receive lower wages because they might be prepared to work for lower wages, because there is no evidence to suggest that international students face lower living costs than local workers. Another relevant Australian labour law principle is that of 'equal pay for work of equal value' which embodies the *International Labour Organisation Equal Remuneration Convention 1951 (No 100)*.¹⁴⁵ Although the origin of this principle was in the need to provide equal pay for women workers performing work of comparable value to their male counterparts, it has purchase here. If international students are performing the same work as local workers, then the wage rate and conditions for this work should be the same.

In the longer term, systemic underpayment of international students can erode job opportunities for local workers by making 'cheaper' international students more attractive to employers.

VII CONCLUSION

In two empirical studies, international students expressed surprisingly high rates of satisfaction with their wages or their overall work in Australia despite receiving wages well below the legal minimum. This article has explored a range of potential factors that may explain this expressed satisfaction. However, it is important to bear in mind that 'satisfaction' is a highly subjective concept and may not have been understood by international students to mean that their entitlements or desires were fulfilled. For some, it may reflect a sense of resignation in light of limited alternatives rather than genuine contentment. Others may have understood satisfaction to mean that their expectations or needs were met, even if they wished conditions were better.

Our research suggests that international students may express satisfaction with underpaid work because of their reliance on income from employment in Australia, coupled with the recognition that there are few part-time jobs paying above minimum wage that are available to them. International students may be satisfied with low wages because they peg their wage expectations to the perceived prevailing wage among other international students rather than Australian standards. In other words, \$12 per hour is satisfactory because their peers are earning the same or less. Others may accept underpayment because the work provides other benefits which are more important to them than pay. These include pressure to gain local work experience and local employer

¹⁴⁵ See, eg, the *Industrial Relations Reform Act 1993* (Cth) which authorises the making of equal remuneration orders for specified employees or groups of employees on the basis of the 'equal remuneration for work of equal value' principle: at pt VIA div 2.

contacts in order to gain future work in Australia or in their home country. Some international students may be satisfied with underpaid work because they view their underpaid job as temporary and either unrelated or a stepping stone to their ultimate professional occupation after graduation. Others may express satisfaction because they derive social benefits from the work, or because they wish to construct a positive narrative of their work or time in Australia, either for themselves or their family and friends at home.

International students may also have misconceptions about the law and their legal rights and responsibilities. Lack of knowledge about the minimum wage rate in Australia was clearly a factor in some students' satisfaction with their poorly paid job. Some may have been satisfied because they wrongly believed that they were better off with low wages paid in cash. Because they were unaware that they would not have been required to pay tax on the first \$20,570 earned, they may have believed this was approximately equivalent to being paid their full entitlements. Others may have expressed satisfaction because they believed that if they agreed to the wage and conditions at the outset, they should have no cause to feel dissatisfied when these were as expected. And some may have expressed satisfaction because they believed they were complicit in breaking the law — either by accepting cash payment of wages, or by agreeing to be underpaid.

These findings reflect some themes in the theoretical literature identifying why humans comply in the face of domination. Charles Tilly identified a number of answers, including that '[s]ubordinates ... get something in return for their subordination', that 'subordinates become implicated in [the] systems that ... oppress them', and that 'subordinates remain unaware of their true interests' because of a dominant alternative ideological framing of their position.¹⁴⁶

If it is accepted that Australia should not have a de facto second-tier labour force, the challenge for regulators, unions and others becomes how to detect and enforce underpayment if workers are 'satisfied' and will not come forward to report or challenge their conditions. This demands well-resourced involvement by a range of stakeholders in educating international students, and detecting potential breaches and enforcing labour laws. This includes involvement by the FWO and other government agencies, as well as education providers, unions, legal service providers, diplomatic missions and community groups. Further research is also required to understand in more detail the complex attitudes of international students towards low-paid work, including testing the hypotheses laid out in this article in relation to the factors that may underpin international students' expressed satisfaction with underpaid work.

146 Charles Tilly, 'Domination, Resistance, Compliance ... Discourse' (1991) 6(3) *Sociological Forum* 593, 594.