

# Navigating Unfairness: The exclusion of temporary migrants from the Fair Entitlement Guarantee



# About Unions NSW

Unions NSW is the peak body for trade unions and union members in New South Wales. It consists of 48 affiliated trade unions and Trades and Labour Councils, representing approximately 600,000 workers across New South Wales. Affiliated trade unions cover the spectrum of the workforce in both the public and private sectors. Unions NSW aims to create a fairer and more just society and actively campaigns to improve workplace pay and conditions for all workers in New South Wales, regardless of their linguistic or cultural background.

In 2019, Unions NSW, in partnership with the Immigration Advice and Rights Centre (IARC), created Visa Assist, a not-for-profit service which provides free immigration advice and legal support to migrant workers in New South Wales who are union members. Campaigns led by Unions NSW under the Visa Assist umbrella have engaged over 30,000 migrant workers. The Visa Assist program has also provided almost 2500 legal services since its creation.

## Introduction

The Fair Entitlement Guarantee (FEG) scheme provides workers who lose their job due to liquidation or employer bankruptcy with financial assistance to recover some unpaid employment entitlements, including unpaid wages, annual leave, long service leave, payment in lieu of notice, and redundancy pay.<sup>1</sup> Temporary migrants are not covered by the FEG, despite paying taxes and contributing to Government revenue, only Australian Citizens, permanent residents, or New Zealand citizens (holders of a Special Category visa) are able to claim the benefit.<sup>2</sup>

The Migrant Workers' Taskforce recommended extending the FEG to temporary migrants, a recommendation that was accepted by the Government, acknowledging that abiding taxpayers should be equally protected by the scheme.<sup>3</sup> However, to date, no legislative changes have been implemented, which has intensified calls from different stakeholders to reform the FEG and expand its coverage to include temporary migrants.

The Government has publicly recognised that there is a 'crisis of exploitation' afflicting migrant workers in Australia.<sup>4</sup> The exclusion of temporary migrant workers from the FEG only perpetuates a culture of migrant worker exploitation, negating that temporary migrants are equally deserving of protection under Australian law. It also incentivises unscrupulous employers to engage in illegal phoenix activity. Extension of the FEG program to temporary migrant workers is a fundamental step to reducing migrant worker exploitation.

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<sup>1</sup>Fair Entitlements Guarantee Act 2012

<sup>2</sup>Ibid.

<sup>3</sup>Report of the Migrant Workers' Taskforce (Report, March 2019) [https://www.ag.gov.au/sites/default/files/2020-03/mwt\\_final\\_report.pdf](https://www.ag.gov.au/sites/default/files/2020-03/mwt_final_report.pdf)

<sup>4</sup>Minister for Immigration, Citizenship and Multicultural Affairs, 'Tackling Temporary Worker Exploitation' Speech at Trades Hall, 5 June 2023 available at <https://minister.homeaffairs.gov.au/AndrewGiles/Pages/tackling-temporary-worker-exploitation-05062023.aspx>

# Recommendations

## Extending the Fair Entitlement Guarantee to temporary migrants

Extend the Fair Entitlement Guarantee to workers on temporary visas, adopting the Migrant Workers Taskforce recommendation. Extending the FEG to temporary migrants is crucial to reducing migrant worker exploitation.

## Unpaid superannuation should be added to the list of entitlements paid by the FEG program

The Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023 enshrined a right to superannuation payments in the National Employment Standards (NES). Unpaid superannuation should be covered under the FEG program in the same way as other NES entitlements.

Migrant workers experience particularly high levels of super theft, and having superannuation covered under the program will increase the probability of them recouping their unpaid super.

## Migrant worker centres should be established in each state

Allocate resources to create migrant worker centres across the country, with a specific focus on developing initiatives that address the challenges faced by temporary migrant workers. These centres would provide immigration and employment legal advice, and facilitate employment dispute resolution, to ensure that migrant workers are informed on how to enforce their rights at work.

# Extending the Fair Entitlement Guarantee to temporary migrants

The exploitation of migrant workers in Australia is widespread. Research from the Grattan Institute indicates that up to 16% of recent migrants are paid below the national minimum wage and migrants are twice as likely to be underpaid as long-term residents.<sup>6</sup> The level of exploitation is likely to be higher, as the study does not account for underpayment against award wages,<sup>7</sup> nor other forms of exploitation, including non-payment of workplace entitlements resulting from employers' illegal phoenix activity. The Migrant Workers' Taskforce found that 'illegal phoenixing' is a common practice use by employers, including labour hire companies, 'to avoid employee entitlement obligations'.<sup>8</sup> It's estimated that illegal phoenix activity costs between

\$2.85 billion and \$5.13 billion annually, comprising unpaid creditors (between \$1,162 million to \$3,171 million), unpaid employees entitlements (between \$31 million to \$298 million), and the Government cost from unpaid taxes and compliance (around \$1,660 million).<sup>9</sup>

Exclusion of temporary migrant workers from the FEG incentivises illegal phoenix activity, leading unscrupulous employers to hire migrant workers, delay paying salaries, and subsequently file for insolvency to avoid payment.

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<sup>6</sup>The Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023

Figure 1. Migrant worker Facebook post warning the community about illegal phoenix activity.

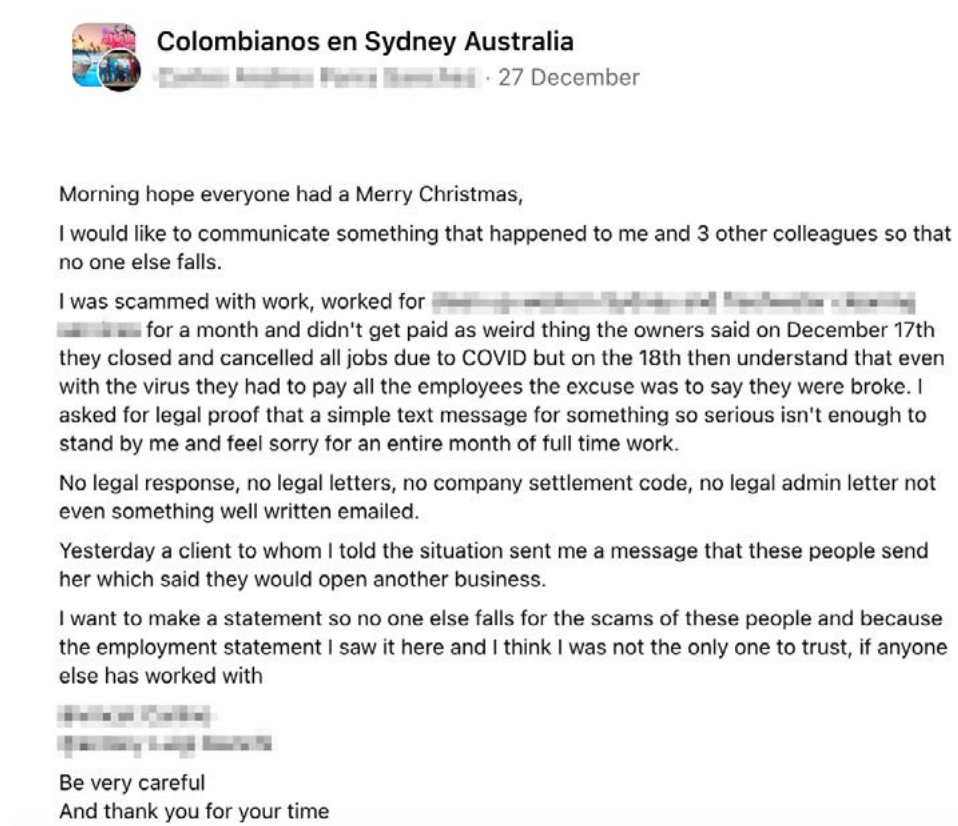
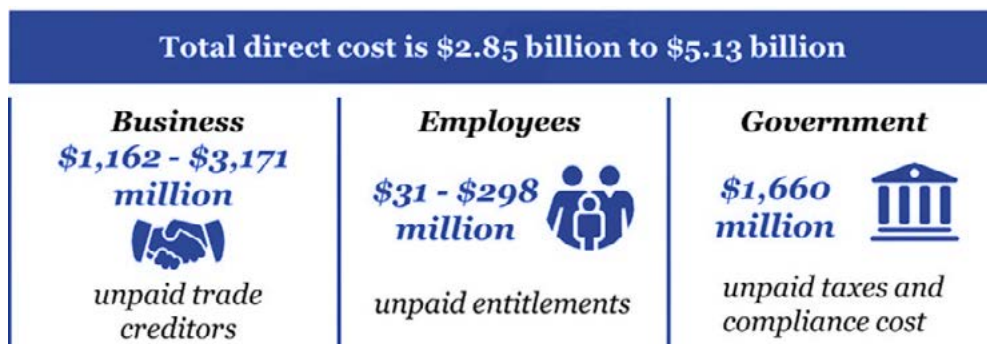


Figure 2. The cost of illegal phoenix activity



<sup>6</sup>Grattan Institute, Brendan Coates, Trent Wiltshire, Tyler Reysenbach, Short-changed: How to stop the exploitation of migrant workers in Australia 2023

<sup>7</sup>Ibid.

<sup>8</sup>Report of the Migrant Workers' Taskforce (Report, March 2019) [https://www.ag.gov.au/sites/default/files/2020-03/mwt\\_final\\_report.pdf](https://www.ag.gov.au/sites/default/files/2020-03/mwt_final_report.pdf)

<sup>9</sup><https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/#:~:text=The%20economic%20ipact%20of%20illegal,%241%2C162%20million%20to%20%243%2C171%20million>

The exclusion of temporary migrants from the FEG is discriminatory and perpetuates a culture of migrant worker exploitation, negating that temporary migrants are equally deserving of protection under Australian law. Temporary migrants comprise approximately 7% of the Australian workforce,<sup>10</sup> they pay taxes and for some cohorts, at higher rates than Australian citizens. For example, the working holiday maker tax rate is 15% on the first dollar they earn, in contrast, Australian resident taxpayers are entitled to a \$18,200 tax-free threshold.<sup>11</sup> The Migrant Workers Taskforce acknowledged that the FEG is differentiable from social security payments and linked to the employment relationship. Employees are taxed on their income, and temporary migrant workers as taxpayers contribute to the cost of the program.<sup>12</sup>

The Migrant Workers' Taskforce recommended that the government extend access to the Fair Entitlements Guarantee program to temporary migrant workers.<sup>13</sup> The recommendation was accepted by the Government, acknowledging that abiding taxpayers should be equally protected by the scheme. However, to date, no legislative changes have been implemented.<sup>14</sup> If the government is serious about reducing migrant worker exploitation, the FEG should be expanded to include temporary migrant workers.

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<sup>10</sup>Grattan Institute, Mackey, Will; Coates, Brendan; Sherrell, Henry, Migrants in the Australian workforce: a guidebook for policy makers

<sup>11</sup>Australian Taxation Office, information available at <https://www.ato.gov.au/Individuals/Coming-to-Australia-or-going-overseas/Coming-to-Australia/Working>.

<sup>12</sup>Report of the Migrant Workers' Taskforce (Report. March 2019) [https://www.ag.gov.au/sites/default/files/2020-03/mwt\\_final\\_report.pdf](https://www.ag.gov.au/sites/default/files/2020-03/mwt_final_report.pdf). See also, Grattan Institute, Brendan Coates, Trent Wiltshire, Tyler Reysenbach, Short-changed: How to stop the exploitation of migrant workers in Australia 2023

<sup>13</sup>Report of the Migrant Workers' Taskforce (Report. March 2019) [https://www.ag.gov.au/sites/default/files/2020-03/mwt\\_final\\_report.pdf](https://www.ag.gov.au/sites/default/files/2020-03/mwt_final_report.pdf)

<sup>14</sup><https://www.dewr.gov.au/migrant-workers-taskforce/resources/government-response-migrant-workers-taskforce-report>





**“My name is Ana. I arrived in Australia on a student visa four and a half years ago. I started with an English course, then studied human resources, health, and safety at work.**

**I was working as a recruitment coordinator from January to July 2023. I was paid \$50.53 per hour, but I was a part-time employee, due to the conditions of my visa.**

**One Monday morning, without any warning, we were told to go home and start looking for a job, while also completing our pending tasks. They mentioned that the company was closing the following Wednesday due to bankruptcy.**

**I was owed a week’s pay and 10 days of annual leave. The liquidation company asked me for some documents, but they didn’t have enough money to pay me back. They used the money to pay superannuation to other employees instead. I also contacted the Fair Entitlements Guarantee (FEG), but they said I wasn’t eligible because I’m on a student visa. Only citizens and permanent residents are covered by the FEG.**

**I’m currently unemployed and finding a job is difficult because of my visa restrictions. Companies are interested in my experience and studies but lose interest when I tell them I’m only available part-time.**

**I have had emotional difficulties such as anxiety, depression, uncertainty, and feelings of helplessness.**

**I don’t find it fair that workers on visas are excluded from the FEG.”**

**Ana, Recruitment coordinator.**



**“I have been in Australia for four years. I worked as a kitchen hand for a company that had a restaurant, plus a warehouse. I worked there for four months, eight hours a day and seven days a week during 2022. The pay was \$28 an hour.**

**Without any notice or explanation, my employer, on a regular workday, did not open the door to me and the other workers. My employer informed us 20 days later that the company was bankrupt and was going to be liquidated, but when the payment of the salaries owed to the workers during the liquidation process began, we were informed that due to our immigration status, we did not have the right to a payment of the weeks owed- that is, the vast majority of workers were discriminated against due to our status as international students.**

**In my particular case they owed me the sum of \$2000.”**

**Lina, Kitchen hand**

# Unpaid superannuation should be added to the list of entitlements claimable under the scheme

Currently, the FEG program only covers five workplace entitlements; unpaid wages (capped at 13 weeks), annual leave, long service leave, payment in lieu of notice, and redundancy pay.<sup>15</sup> The FEG program does not cover unpaid superannuation.<sup>16</sup> Super theft is widespread in Australia. Industry Super estimated that in 2018-19 employers failed to pay \$5bn a year in super, “unpaid super affected more than a quarter of employees, costing each affected worker an average of \$1,700 per year.”<sup>17</sup>

Non-payment of superannuation to migrant workers is a systematic practice among employers.<sup>18</sup> For example, during the COVID 19 crisis lockdowns, one of the forms of support offered to workers on temporary visas was to access their superannuation.<sup>19</sup> However, thousands of temporary migrant workers discovered that their employers had not made their contributions. In fact, some employers went into liquidation, resulting in temporary migrants having no prospect of being able to recover their unpaid super.<sup>20</sup>

**“My name is Gus. I have been in Australia for 7 years. I worked for a café in 2019 and 2020 when the COVID-19 crisis occurred.**

**To survive during the crisis, I tried to get early access to my superannuation, which was one of few support options the Government gave international students, however, when I checked my super account I discovered that my employer had not paid my superannuation contributions. I asked my boss for an explanation and only received bad treatment and rudeness. The contributions owed were \$4,000. Unfortunately, due to my status as an international student, I was never able to recover that money.”**

**Gus, Hospitality worker**

Currently, workers claiming unpaid Superannuation contributions from insolvents or bankrupts should pursue payment through the Australian Taxation Office.<sup>21</sup> Unfortunately, this frequently does not lead to their claims being addressed and they end up caught between the ATO and the liquidators who each tell them to contact the other party. This is particularly difficult for migrant workers who lack support networks and have limited awareness around how to enforce their workplace rights.

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<sup>15</sup>Fair Entitlements Guarantee Act 2012

<sup>16</sup>Fair Entitlements Guarantee Act 2012

<sup>17</sup><https://www.industrysuper.com/media/super-scandalous-how-to-fix-the-5-billion-scourge-of-unpaid-super/>

<sup>18</sup>Laurie Berg and Bassina Farbenblum, As If We Weren't Humans: The Abandonment of Temporary Migrants in Australia During COVID-19 2020)

<sup>19</sup><https://community.ato.gov.au/s/question/a0J9s0000001Bif/p00021356>

<sup>20</sup>Laurie Berg and Bassina Farbenblum, As If We Weren't Humans: The Abandonment of Temporary Migrants in Australia During COVID-19 (2020)

<sup>21</sup><https://www.dewr.gov.au/fair-entitlements-guarantee>



**“My name is Sara, and I’m from Colombia. I came to Australia in July 2018 on a tourist visa and currently hold subclass 482 visa, which was granted in March 2021.**

**I studied international business and have a postgraduate degree in finance. Last year, I worked as a Contracts Administrator for a construction company which went into liquidation. My FEG claim was rejected, as this only covers permanent residents and citizens.**

**As of today, only \$2,575.21 after taxes has been paid to me after a dividend of 75 cents was declared by the liquidators. This corresponds to what I was owed for annual leave. The other entitlements are unpaid, and it was suggested that I should claim them from the FEG.**

**To this date, I’m still owed the outstanding superannuation. The liquidators insist they have transferred the funds to the ATO and that it’s now the ATO who should pay me. However, every time I contact the ATO they say they cannot access the company accounts and that they can see that I’m owed money, but the funds are not there.**

**This has left me in limbo between the ATO and the liquidators who each tell me to contact the other party.**

**There is no entity in Australia who is there to support migrants like me who are on temporary work visas. ASIC who supervises the liquidators clearly says on their website that they don’t settle individual cases. I feel unprotected and very frustrated, as there is no one I can reach out to for help.**

**I also feel that the FEG should cover people on temporary work visas, as we are taxed like citizens but then have no rights.”**

**Sara, Contracts Administrator**





**“I came to Australia in 2022 under a Working Holiday Visa. I was working full-time as a marketing specialist at a consulting firm and worked for the company for over a year.**

**During my last 4 months of employment, I didn't receive any superannuation payments and when I decided to ask my employer, I was informed that the business would go bankrupt. I was terrified, as the employer was also late with payment of my last salary.**

**I contacted the FEG following advice from a coworker, however, I was informed that due to my visa status, I was not entitled to claim the unpaid wages. I was also informed that even eligible workers were not able to claim unpaid superannuation under the FEG.”**

**Catalina, Marketing specialist**

# Migrant worker centres should be established in each state

Academic research suggests that contrary to general misconceptions, over half of temporary migrants are open to trying to recoup their unpaid wages.<sup>22</sup> A constant observation from temporary migrant workers affected by workplace exploitation is the lack of services providing guidance on the enforcement of their claims. Migrant workers could benefit considerably from an increase in services delivering educational programs and providing general employment law and immigration advice. The Grattan Institute recommended the creation of a Migrant Workers Centres in each state and territory as an effective strategy to reduce migrant worker exploitation. Similarly, The Committee for Economic Development of Australia (CEDA) recommended an increase in services aimed at reducing migrant worker exploitation, specifically referring to Unions NSW Visa Assist Program as a proven mechanism advocating for and providing free legal advice to migrant workers.<sup>23</sup>

**“I arrived in Australia in 2021. I’ve had three types of visas since then: tourist, student, and a Covid Visa 408.**

**Last year, I worked for a company as a Machine Sleeve Operator. I was in charge of picking and packing fresh food. I had to weigh the right quantity, put it on the line and run the sleeve machine.**

**My hourly wage was \$28.46, and my fortnightly pay was between \$1600 and \$1900. The company declared bankruptcy and owed me \$2,800. I contacted the Fair Work Ombudsman, the Fair Entitlements Guarantee (FEG), and the company, but all of them said that it was impossible for them to pay me my salary and that I was not eligible for other types of help.**

**I was finally able to find another job, but it was an extremely difficult period and was devastating not to receive any type of support or guidance and being refer from entity to entity without receiving effective help. As a taxpaying, law-abiding international student, I believe that we need more support, not to mention that we deserve equal labour rights, and we should not be excluded from the Fair Entitlement Guarantee.”**

**Diana, Machine Sleeve Operator**



<sup>22</sup>Laurie Berg and Bassina Farbenblum, Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia (2018).

<sup>23</sup>Committee for Economic Development of Australia (CEDA), Australia's Future Migration System 2023.

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