



Australian Government
Department of Employment and Workplace Relations

31 March 2025

RE: Addressing corporate misuse of the Fair Entitlements Guarantee

Thank you for giving us the opportunity to comment on the above Discussion Paper, which was published in February 2025.

About the Migrant Workers Centre

The Migrant Workers Centre (MWC) is a community legal service that empowers migrant workers in Victoria to understand and enforce their workplace rights.

Our activities include free employment law services, education programs to raise awareness of workplace rights, and an advocacy program to amplify and support migrant workers' voices through research and policy development.

Since we were established in 2018, we have been working closely with government, unions, and civil society organisations to advance the rights of migrant workers in Australia.

Overview

The MWC welcomes the Government's commitment to enhancing the integrity of the Fair Entitlements Guarantee (FEG).

The FEG provides a crucial safety net for many eligible workers. Without access to the scheme, it is difficult for workers whose employers become insolvent to pursue unpaid entitlements. Ensuring the FEG is used correctly and effectively is necessary for the program to continue functioning as intended, providing financial protection for workers who need it most.

We are therefore pleased that the Consultation is looking at ways to enhance recovery under the FEG, and to tackle illegal or unethical corporate practices that harm all workers, rather than limiting access to it. We also welcome the exploration of additional reforms to address these issues.

As you are aware, temporary visa holders are currently not eligible for the FEG.

As we detail in our attached brief, *'Expanding the Fair Entitlements Guarantee'*, temporary visa holders are exposed to a greater risk of labour exploitation, in large part due to the precarious nature of their residency.

Temporary visa holders are also often targeted by corporate practices that deliberately avoid the payment of their entitlements, notably through ‘illegal phoenixing’.

Through our [legal and advocacy work](#), we have come across numerous cases where workers have had their entitlements delayed or withheld by unscrupulous employers, who subsequently disappear or liquidate to avoid their financial obligations. Aware that they are unlikely to be caught or face legal repercussions, these employers often ‘phoenix’ and continue exploiting temporary visa workers.

The exclusion of temporary visa holders from the FEG deprives them of essential financial protection when they need it most, particularly for those workers whose visa was tied to their now insolvent employer and are therefore facing limited new employment opportunities and the prospect of needing to depart Australia. It also results in lost intelligence on predatory corporate practices that would otherwise be captured through the FEG claims process, particularly in industries that are heavily reliant on migrant labour.

We refer to **Case Study 1** below as an example.

Case Study 1.

Workers from a cleaning company that was known for almost exclusively employing international students approached the MWC for help for underpayment of wages and other workplace offences. The MWC pursued the claims and engaged with the business to attempt financial recovery for the workers involved.

It became clear that the business was not going to willingly repay the underpayments.

The workers were called into a meeting with their manager and told that the company was closing. In the lead up to this meeting, the workers had not been paid for several weeks. The workers were usually paid in cash.

The manager told the workers that the company was insolvent and that they were “rebranding” and starting a new company. Some of the workers were told that they would be paid electronically from a ‘new company account’ (with the same registered address and a very similar name), while others were directed to contact the liquidator appointed to wind up the company.

As the majority of the workers were temporary visa holders, they were unable to make FEG claims and were left thousands out of pocket. The phoenixed company continued to operate.

While not directly addressed by the Discussion Paper, we believe that the consultation process creates an opportunity to implement broader reform that extends eligibility for the FEG to temporary visa holders and deters illegal corporate practices associated with their current exclusion from it.

Fundamentally, temporary visa holders are part of our society and should enjoy the same workplace rights and protections we all do. **Our recommendations are discussed in further detail in our attached brief.**

With respect to the questions raised by the Discussion Paper, we endorse the recommendation considered by Question 7:

- Section 596AA of the *Corporations Act 2001 (Cth)* should be amended to include superannuation guarantee charge (SGC) amounts. This will help ensure that employers are liable for these (by way of contribution orders) and reduce pressure on the use of the FEG to recover SGC amounts.

Should you have any questions, please feel free to contact me at **03 7009 6710** or via email at mkunkel@migrantworkers.org.au.

We look forward to reviewing the recommendations of the Discussion Paper.

Yours sincerely



Matt Kunkel
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Endorsed by





EXPANDING THE FAIR ENTITLEMENTS GUARANTEE

OVERVIEW

The Fair Entitlement Guarantee (FEG) is a scheme that provides workers who lose their job due to employer insolvency or bankruptcy with financial assistance to recover some unpaid entitlements. This includes unpaid wages, accrued leave, and redundancy pay. It provides a critical safety net for workers during what can be a financially difficult time.

Currently, temporary visa holders are excluded from the FEG scheme. Without coverage under the FEG, many of these workers—who often struggle to access legal assistance—have limited options to recover their unpaid wages and entitlements when their employer becomes insolvent.

This reflects a significant gap in protections for a large proportion of workers in Australia.

Migrant workers face a 'crisis of exploitation' in Australia.¹ The exclusion of temporary migrant workers from the FEG incentivises illegal 'phoenix' activity among employers looking to avoid their financial obligations. This, in turn, normalises the exploitation of migrant workers, particularly in industries heavily reliant on migrant labour.

Temporary visa holders are equally deserving of protection under Australian law. Excluding temporary visa holders from FEG assistance not only exposes them to financial hardship but also undermines the integrity of

Australia's labour laws and temporary labour migration programs. Their continued exclusion is tantamount to the Government tolerating the non-payment of employee entitlements to temporary migrants, but not to Australian citizens or permanent residents.²

As a "safety net scheme of last resort",³ the FEG should also be expanded in other respects to improve its utility in protecting the most vulnerable workers. We propose additional recommendations to address gaps in the FEG scheme.

RECOMMENDATIONS

1. Implement Recommendation 13 of the Migrant Workers' Taskforce Report (2019) to extend the coverage of the FEG to temporary migrant workers.
2. Add unpaid superannuation to the list of entitlements covered by the FEG.
3. Implement the Migrant Justice Institute's recommendation to establish a guarantee scheme in the small claims context to ensure that any worker with a court order in their favour receives their lawful entitlements if the employer disappears or refuses to pay.⁴

THE MIGRANT WORKERS CENTRE

The Migrant Workers Centre Ltd (MWC) is a not-for-profit organisation open to any workers in Victoria who were born overseas. We connect migrant workers with one another and empower them to understand and enforce their rights. MWC assists workers from emerging communities to address problems they encounter in workplaces and collaborates with unions and community partners to seek long-term solutions to the exploitation of migrant workers. We organise workshops, train community leaders, conduct research, develop policy recommendations, and bridge language barriers that limit workers' access to information. Our ultimate goal is to fix the system of labour exploitation in this country.

ACKNOWLEDGEMENT OF COUNTRY

The Migrant Workers Centre respectfully acknowledges the Wurundjeri people of the Kulin Nations, the traditional owners and custodians of this land on which we work. We pay our respects to their elders past and present and acknowledge that sovereignty was never ceded.



The Migrant Workers Centre is supported by the Victorian Government.

EVIDENCE BRIEF KEY POINTS

- In 2019, the Migrant Workers' Taskforce recommended extending the FEG to temporary migrant workers, a recommendation that was accepted by the Morrison Government but is yet to be legislated.
- The continued exclusion of temporary visa holders from the FEG incentivises illegal 'phoenix' activity, contributing to a broader culture of non-compliance among employers.
- Without access to the FEG, temporary visa holders who lose their job due to employer insolvency may experience severe hardship, particularly as many are not eligible for social security benefits.
- Although superannuation is a National Employment Standard entitlement, it is currently not covered by the FEG. Unpaid superannuation should be included to protect all workers from losing crucial retirement savings when their employer becomes insolvent.
- Even where a worker successfully obtains a court order for unpaid employment entitlements from a court process, they may never actually receive the money where the employer disappears or refuses to pay. A guarantee scheme, as recommended by the Migrant Justice Institute, should be implemented to ensure that these workers receive their lawful entitlements.



1. WHAT IS THE FAIR ENTITLEMENTS GUARANTEE?

The FEG provides workers who lose their job due to employer insolvency or bankruptcy with financial assistance to recover certain unpaid employment entitlements, including unpaid wages (up to 13 weeks), annual leave, long service leave, payment in lieu of notice (up to five weeks), and redundancy pay (up to four weeks per full year of service). It does not cover unpaid superannuation.

ELIGIBILITY CRITERIA

The FEG is administered by the Australian Department of Employment and Workplace Relations (DEWR) under the *Fair Entitlements Guarantee Act 2012* (Cth). Subject to certain exclusions, workers whose employment has ended will be eligible for the FEG if:

- At the time that their employment ended, they were an Australian citizen or, under the *Migration Act 1958* (Cth), the holder of a permanent visa or special category visa;
- Their employer experienced an '**insolvency event**' (liquidation or bankruptcy);
- The end of their employment:
 - was due to the insolvency of the employer;
 - occurred less than 6 months before the appointment of an insolvency practitioner for the employer; or
 - occurred on or after the appointment of an insolvency practitioner for the employer;
- They were an **employee** of the insolvent entity (contractors are not eligible);
- They are owed at least one employee entitlement covered by the scheme;
- They took reasonable steps to recover any entitlements owed to them before the 'insolvency event' occurred or have taken reasonable steps to prove those debts in the winding up or bankruptcy of the employer; and
- They lodged a valid claim no more than 12 months after the end of their employment or the insolvency event (whichever is the later).⁵

FEG assistance is only available where there is **no other source of funds** to pay outstanding entitlements to eligible employees due to the insolvency of the employer.

When an eligible claim is made, the Government pays the employee and then may seek to become a creditor to recoup these costs from the remaining assets of the employer during the liquidation process.

2. EXPAND COVERAGE TO TEMPORARY MIGRANT WORKERS

In its 2019 report to the Government, the Migrant Workers' Taskforce (MWT) recommended extending the FEG scheme to migrant workers on temporary visas. The Morrison Government committed to implementing this recommendation, stating:

Where [migrant workers on temporary visas] have been doing the right thing by satisfying their taxation obligations, the Government considers it reasonable that they, in turn, be protected by the FEG program.

Despite this, the expansion of the FEG has yet to be legislated, leaving temporary workers without the benefit of what the MWT has recognised as “an employment protection rather than a social security measure”⁶

Temporary visa holders play a significant role in Australia's economy. There are over 1.6 million temporary workers in Australia, contributing billions of dollars annually through taxes and economic activity.⁷ Australia's temporary workforce includes international students, graduates, skilled workers, and seasonal workers. They deserve equal protection under the law.

Australia is also out of step with international practice (see **Box 1**). Comparable jurisdictions to Australia **do not exclude temporary migrant workers from insolvency protections**. For example, eligibility for Canada's Wage Earner Protection Program is based on employment status, rather than citizenship or residency.⁸ In the United Kingdom, employees—including foreign nationals with work rights—may be eligible to apply for the government's Redundancy Payments Service for money owed.⁹

BOX 1. INTERNATIONAL PRACTICE

Adopted in 1949, the Protection of Wages Convention (C095) is an International Labour Organisation Convention (ILO) that establishes minimum international standards for the protection of wages, including on the status of worker wage claims if an enterprise enters insolvency. A Guidance Note to the ILO's standards states:

“... workers' claims arising out of their employment shall be protected by a privilege so that they are paid out of the assets of the insolvent employer before non-privileged creditors can be paid their share, or the payment of workers' claims shall be guaranteed through a guarantee institution such as a wage protection fund.”¹⁰

The Convention emphasises the importance of protecting all workers' claims, regardless of nationality or migration status.

Australia is a member state of the ILO and has ratified the Protection of Workers' Claims (Employer's Insolvency) Convention (C173), which revises the principles contained in C095. These principles are, in part, reflected in Australia's national laws, such as the Fair Work Act 2009 (Cth) and the Fair Entitlements Guarantee Act 2012 (Cth). Most member states adhere to the principles of the Convention or have formally ratified it. There is a wide diversity of approaches among them to wage and entitlement claims during insolvency.¹¹

In addition to the above rationale—that tax-paying temporary workers help to fund the FEG and should therefore be covered by it—there are further considerations for expanding coverage. These are discussed below.



ADDRESSING ILLEGAL 'PHOENIX' ACTIVITY AND LABOUR EXPLOITATION

Illegal phoenixing is a practice where directors intentionally transfer the assets of a company to a new entity, often at below-market value, before liquidating or abandoning the original company to evade outstanding debts, including unpaid employee entitlements. It allows unscrupulous employers to dodge their financial obligations while continuing operations through a newly established 'phoenix' company.

The MWT found that illegal phoenixing is a "common practice" amongst labour hire companies that engage temporary workers.¹² It is estimated that illegal phoenix activity costs businesses, employees, and the government \$4.89 billion annually, including \$155 million in unpaid entitlements to employees.¹³

The exclusion of temporary workers from the FEG incentivises illegal phoenixing. Aware that they are not covered by the FEG, and are unlikely to seek legal recourse, unscrupulous employers hire temporary visa holders, withhold or delay the payment of their entitlements, and then 'phoenix' the company to avoid their financial obligations (see **Case Study 1**). Employers that are caught underpaying staff may also threaten to go into liquidation as a tactic to force workers to accept a smaller settlement.

Research shows that temporary migrant workers are exposed to a greater risk of exploitation, largely due to the precarious nature of their migration status.¹⁴ They frequently experience a range of labour violations, including underpayment of wages, non-payment of entitlements, sham contracting, and excess or unexplained deductions from their wages.¹⁵

Although many migrant workers wish to recover unpaid wages and entitlements, they are often discouraged by fears of employer retaliation, potential visa complications, and a lack of understanding of how to proceed.¹⁶ For those who do choose to take action, success is limited due to various obstacles, including procedural complexities, challenges in navigating the legal system, and poor access to legal support. Additionally, there is a widespread belief among workers that employers will not be held accountable for workplace violations.¹⁷

'Phoenixed' companies often continue to exploit migrant workers because the financial benefits of doing so far outweigh the risk of any potential repercussions. This contributes to a broader culture of impunity and non-compliance, particularly in industries like agriculture, horticulture, and meat-processing, which rely heavily on migrant labour to fill shortages. Broadening FEG coverage would not only safeguard temporary migrant workers from financial hardship but also help deter against exploitative business practices.

CASE STUDY 1

In response to a media investigation, 38 meat workers contacted the Migrant Workers Centre (MWC) regarding alleged unpaid entitlements and wages. These workers were allegedly engaged by a prominent labour hire operator that reportedly placed temporary visa holders into 42 different meatworks across regional Australia.

The Australian Taxation Office alleged that the director 'phoenixed' various subsidiary companies to avoid the payment of up to \$163 million in unpaid taxes. As temporary visa holders, the workers were ineligible to make claims under the FEG.

By expanding the FEG to temporary visa holders, the Government will also be able to respond to a gap in regulatory oversight whereby workers are routinely exploited by illegal phoenix operators. Through the FEG's claim assessment process, the Government collects intelligence about predatory corporate practices. The Government provides this data to the Phoenix Taskforce, a cross-government program dedicated to stamping out illegal phoenixing activities. Under the current scheme, the Government is not able to effectively identify, monitor, and manage illegal phoenix operators that target temporary visa holders.¹⁸

The MWT noted that the likely additional costs of extending the FEG to temporary migrants would be "in the order of \$20 million per year". However, these costs would be offset the "more successful the Government is in dealing with phoenix traders."¹⁹



LACK OF SOCIAL SECURITY AND OTHER SUPPORTS

For migrant workers on temporary visas, losing work due to employer insolvency or bankruptcy can lead to severe hardship. It places immediate pressure on their ability to provide basic necessities like food and housing. For many migrants on temporary visas, this hardship is compounded by ineligibility to access social security benefits such as income support and healthcare.

The Office of the NSW Anti-slavery Commissioner recently reported that temporary migrant workers, particularly those who are disengaged and undocumented, are increasingly reliant on informal community networks and agencies for support and survival. However, these organisations often struggle with limited resources and are unable to meet growing demand, leaving many workers at risk of destitution.²⁰

Consequently, recovering unpaid wages and entitlements is crucial for temporary workers. Making a claim under the FEG is typically more straightforward and effective than pursuing legal action to recover unpaid entitlements (and in some cases, no legal action is available) (see **Section 4**).²¹

Without access to the FEG, temporary visa holders who lose employment due to employer insolvency may face severe hardship, impacting their ability to provide for themselves and their families. This can have substantial multiplier effects, diminishing the economic contributions of these workers in local communities—especially in regional areas where migrant labour is in high demand—due to their reduced spending power.

RECOMMENDATION 1

Implement Recommendation 13 of the Migrant Workers' Taskforce Report (2019) to extend the coverage of the Fair Entitlements Guarantee to temporary migrant workers.

3. ADD UNPAID SUPERANNUATION TO THE SCHEME

Although superannuation is a legal entitlement under both superannuation and employment legislation, it is not covered by the FEG. This omission leaves workers vulnerable to losing a substantial part of their retirement savings if their employer becomes insolvent. As of 1 July 2024, the scheme has been recalibrated to allow recovery of unpaid superannuation charge amounts owed by employers, where certain criteria are met. It does not cover superannuation guarantee amounts, which are the compulsory contributions employers are required to make.

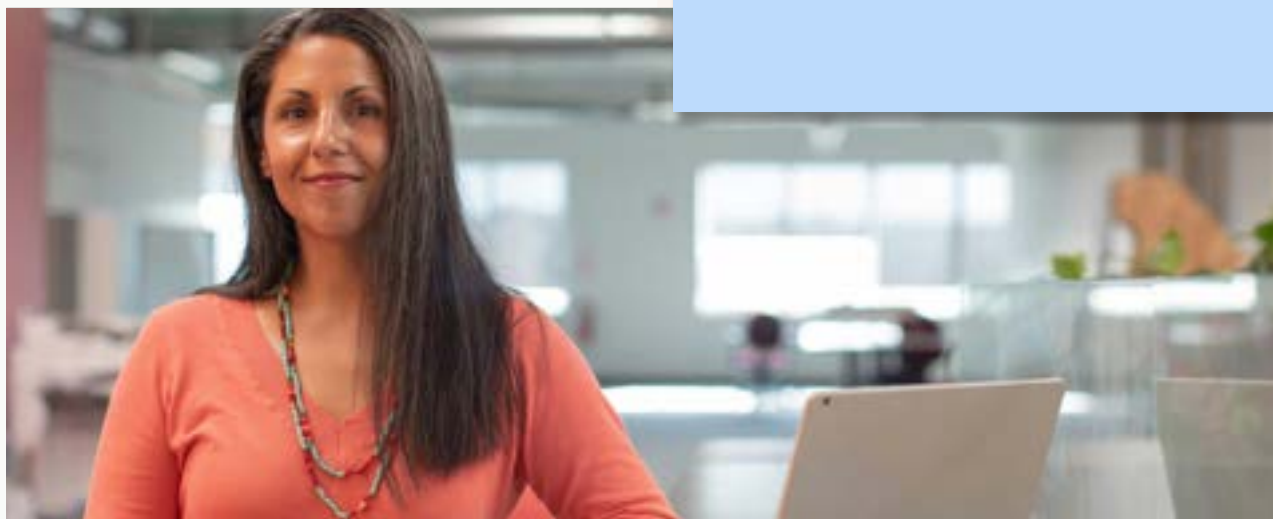
Superannuation is not just a workplace benefit—it is a vital component of workers' long-term financial security. When superannuation contributions are withheld or unpaid, workers are deprived of both immediate and future financial protections. Superannuation is also a public good, as workers with insufficient retirement funds may ultimately become reliant on the age pension.

Migrant workers are particularly at risk, as they often face additional barriers in recovering unpaid superannuation. A recent report by the Migrant Workers Centre revealed that 18% of the total workers surveyed were not paid superannuation. The report, which analysed differences between those on pathway visas and those without, found that non-pathway arrivals^a are significantly more likely to not receive the superannuation contributions they are entitled to (22%).²² The majority of non-pathway arrivals are on temporary visas and therefore ineligible for the FEG.

Superannuation is a crucial safety-net entitlement and must be covered by the FEG. Including superannuation in the FEG would ensure that all workers, regardless of their visa status, receive their full entitlements.

RECOMMENDATION 2

Add unpaid superannuation to the list of entitlements covered by the Fair Entitlements Guarantee.



4. ESTABLISH A GUARANTEE SCHEME IN THE SMALL CLAIMS CONTEXT

One of the primary mechanisms for the recovery of under- or unpaid wages and entitlements is through the small claims jurisdiction of the Federal Circuit and Family Court of Australia.²³ The small claims jurisdiction, which can handle claims of \$100,000 or less,²⁴ was established with simplified procedural rules to enable the more efficient resolution of claims.

In 2019, the MWT recognised that the small claims process is largely ineffective for addressing wage theft among migrant workers, citing complexities, high fees, the need for a high level of legal support, and long resolution times.²⁵ A review is currently underway to address these issues.²⁶ The Migrant Justice Institute's report, *All Work, No Pay*, provides an in-depth analysis of the inaccessibility of the small claims process and offers recommendations for reform.²⁷ We endorse these recommendations in full and see their implementation as essential to improving access to justice outcomes for migrant workers.

Pursuing unpaid entitlements through the small claims process can be challenging. Community legal centres have reported instances where, even after workers pursue the recovery of their entitlements, employers de-register either shortly after an order is made or just before proceedings start.²⁸ Many of these employers 'phoenix,' disappear, or simply disregard the court order (see **Case Study 2**). Although these obstacles in enforcing court orders are shared by all workers, temporary visa holders do not have access to the FEG in circumstances where the employing company liquidates. This leaves many migrant workers—even those with favourable court rulings—without a critical safety net.

CASE STUDY 2

Three workers on Working Holiday Visas were hired by a labour hire company to work on farms in regional Victoria. The workers faced extensive exploitation, including underpayment and non-payment of entitlements.

The workers took the matter to court using the small claims process. The workers received a court order in their favour, with the labour hire company required to compensate each of them between \$5,000 and 6,000. However, the company went into liquidation the next day, and the workers were unable to pursue the matter further.

In cases involving contraventions of the *Fair Work Act 2009* (Cth), the worker could bring a claim against a person "involved in" the contravention, such as a director, who had the requisite practical connection to and knowledge of the contravening.²⁹ This means that, in small claim proceedings, third parties who were involved in a contravention cannot escape liability by the company simply de-registering.³⁰ However, in small claims proceedings, the court's powers are limited in the types of orders it can make—it cannot impose pecuniary penalties or award amounts exceeding \$100,000. Further, it is common for workers to find that the individual does not have the financial capacity to pay the amount ordered, and they face the same enforcement difficulties as they face against an insolvent corporate employer.

For workers who have invested significant time and resources in pursuing a claim, this experience can erode their confidence in the Australian legal system. It can also deter other workers from seeking justice, further emboldening employers to exploit migrant workers with impunity.

To address this, the Migrant Justice Institute (MJI) has recommended the establishment of a guarantee scheme, administered by DEWR, to ensure that any worker with a court order in their favour receives their lawful entitlements if the employer disappears or refuses to pay. Under the scheme, DEWR would pay small claims judgments and costs awards that remain unpaid after a set period (e.g., 60 days). DEWR could then refer cases to the Fair Work Ombudsman or legal services for debt recovery and further enforcement.³¹ If the judgment remains unpaid, DEWR may refer the matter to the Department of Home Affairs. This could result in the employer being added to the Prohibited Employer List, which could ban them from hiring temporary visa holders.³²

As the MJI suggests, an expanded FEG could complement the proposed guarantee scheme:

The FEG scheme could compensate workers for unpaid court-ordered debts and unpaid employee entitlements from insolvent employers, while the guarantee scheme could be restricted to workers whose employers remain solvent.³³

RECOMMENDATION 3

Implement the Migrant Justice Institute's recommendation to establish a guarantee scheme in the small claims context to ensure that any worker with a court order in their favour receives their lawful entitlements if the employer disappears or refuses to pay.

^a **Pathway visas** are permanent or temporary visas that provide a clear and certain pathway to qualify for permanent residency after meeting specific criteria, such as skilled occupation requirements, nomination or sponsorship, and health and character requirements.

Non-pathway visas do not provide a clear or formal process for the visa holder to transition to permanent residency or long-term status in the country. These types of visas are typically limited in duration, have restrictive conditions, and may be tied to specific purposes like tourism, short-term work, or temporary study.

ENDNOTES

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15. Laurie Berg and Bassina Farberblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (Report, Migrant Worker Justice Initiative, 2017); Grattan Institute, *Short changed: How to Stop the Exploitation of Migrant Workers in Australia* (Report, 2023) 13.
16. Bassina Farberblum and Laurie Berg, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia* (Report, Migrant Worker Justice Initiative, 2018) 7-8. *Ibid.*
17. MWC, *Submission to the Department of Employment and Workplace Relations regarding the scheme of assistance established under the Fair Entitlements Guarantee* (Submission, August 2022) 3.
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19. Office of the NSW Anti-slavery Commissioner, *Be Our Guests: Addressing urgent modern slavery risks for temporary migrant workers in rural and regional New South Wales* (Report, September 2024) 24.
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