



# Short-changed: how to stop the exploitation of migrant workers in Australia

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**GRATTAN**  
Institute

# Short-changed: how to stop the exploitation of migrant workers

## **The exploitation of migrant workers appears widespread:**

- Up to 16% of recent migrants paid less than the national minimum wage (~22% before COVID)
- Migrants are twice as likely to be underpaid than long-term residents

## **Reform visa rules that make migrants less vulnerable to exploitation**

- **Temp sponsored workers:** lift wage threshold to \$70k; introduce portability; better transition to PR
- **Working holiday makers:** replace regional req's for 2nd & 3rd visa with a single 1-year WHM visa
- **International students:** evaluate work rights via review international higher education in Australia
- **Strengthen visa protections for exploited migrants** that pursue claims for unpaid wages

## **Strengthen the enforcement regime to deter bad-faith employers**

- **Reform the Fair Work Ombudsman**
  - **Powers:** issue infringement notices for underpayment; boost maximum court penalties
  - **Resources:** boost funding by \$60 million per year
  - **Rename:** rename the Ombudsman the Workplace Rights Authority
  - **Culture:** conduct independent capability review of Ombudsman to inform new Authority
- **Better enforce migration laws to punish employers of migrants working in breach of visa rules**
- **Close loopholes such as illegal phoenix activity; sham contracting & better regulate labour hire**

## **Support migrants to pursue underpayment claims**

- Establish a Migrant Workers Centre in each state & boost funding for community legal centres
- Reform the small claims court process & extend the Fair Entitlement Guarantee to include migrants

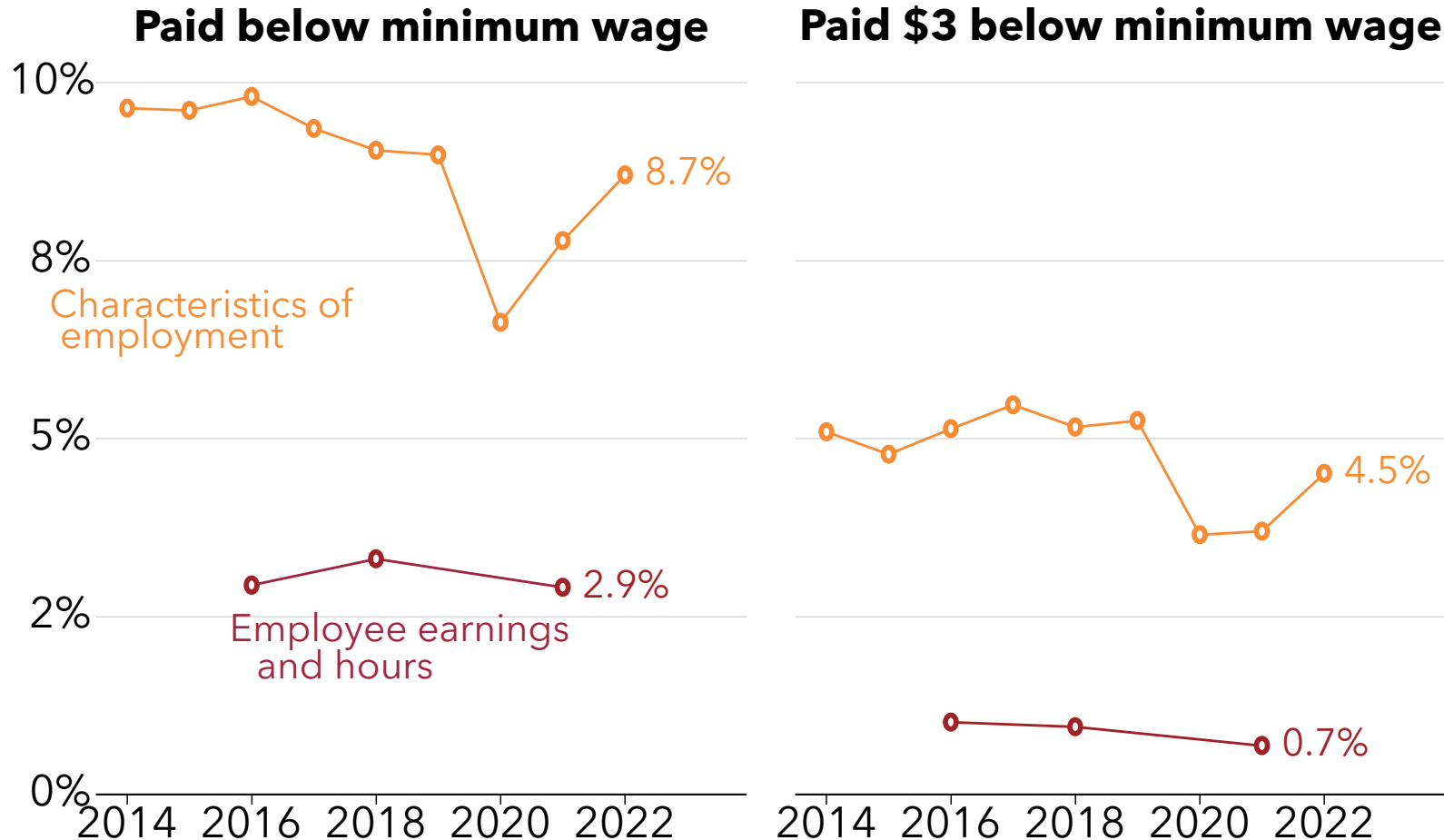
**Our recommendations are fully funded via levy on temporary visas & larger fines on employers**

# Exploitation is bad for migrants, and many Australians

- Exploitation is bad for the migrants who are exploited
- But exploitation of migrant workers also hurts many Australians:
  - It weakens the bargaining power of workers and undermines the minimum wage
  - It promotes a 'race to the bottom' for employers
  - It harms Australia's ability to attract prospective skilled migrants
- Exploitation also threatens public confidence in Australia's migration program

# There are multiple data sources to measure underpayment in Australia

Proportion of individuals earning less than the minimum wage



There are multiple surveys of employees' remuneration:

- **Employee earnings and hours surveys employers' payrolls**
- **Characteristics of Employment surveys employees**, and reports their migrant status (i.e. length of stay in Australia)
- In practice rates of underpayment will be between these two surveys

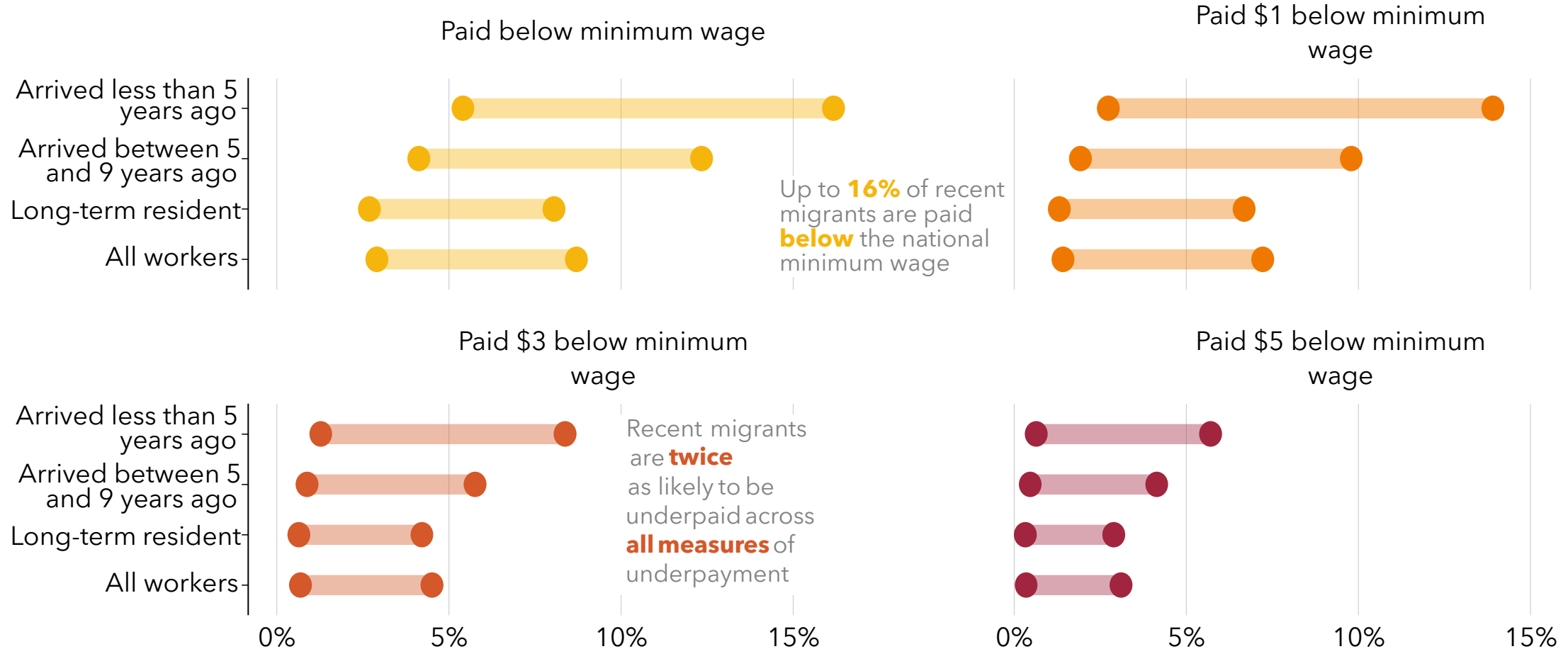
We estimate **rates of underpayment of recent migrants** as follows:

- **Upper bound:** use CoE estimates for recent migrants
- **Lower bound:** scale down CoE estimates for recent migrants by ratio of EEH / CoE underpayment



# Recent migrants are much more likely to be underpaid than long-term residents

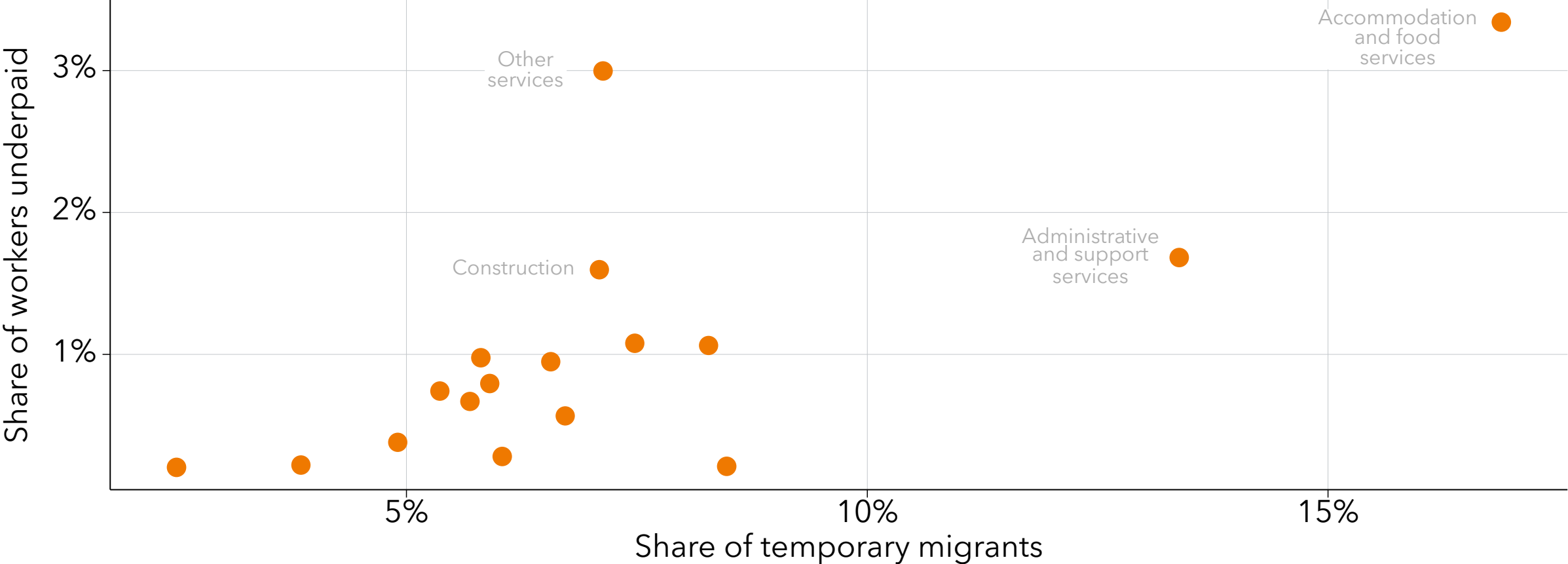
Proportion of employees paid below national minimum wage by year of arrival, 2022



Notes: Excludes award minimums, penalty rates, and other forms of underpayment. The upper bound estimate is from the Characteristics of Employment survey. The lower bound estimate is calculated by scaling the Characteristics of Employment proportions to reflect the proportion of employees underpaid in the Employee Earnings and Hours survey (which does not contain migrant status). Long-term residents = arrived 10 or more years ago or born in Australia. Source: Grattan Analysis of EEH and COE.

# Migrants work in industries where underpayment is more prevalent

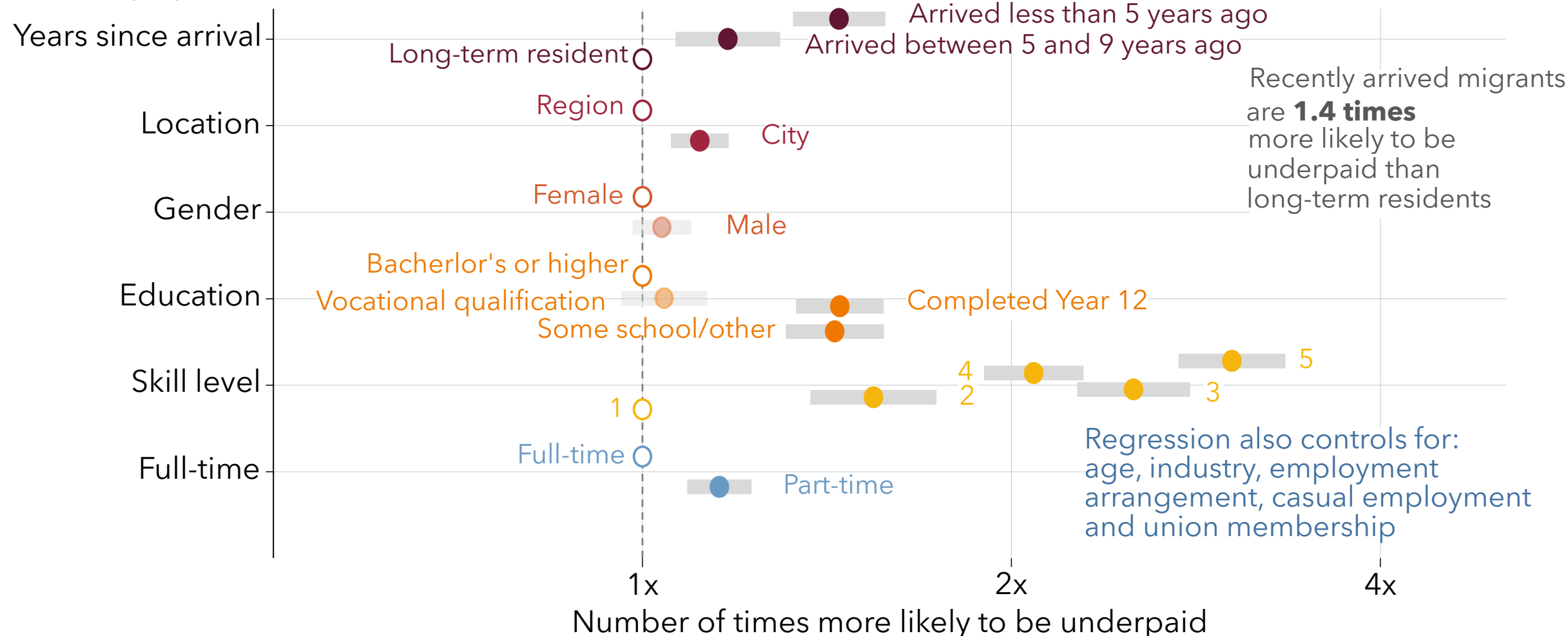
Share of workers underpaid by \$3 an hour and the proportion of workers who are temporary migrants by industry



Notes: 2016 and 2018 samples have been combined to increase the sample size. Data suppressed where counts are below 10. The Employee Earnings and Hours survey does not collect data from businesses in the agricultural industry. Source: ABS Census Temporary Entrants Integrated Dataset (2016), ABS Employee earning and hours (2016, 2018)

# Migrants are more likely to be underpaid even after accounting for demographic and job characteristics

All else equal, how likely are individuals to be paid \$3 dollars below the minimum wage compared to the base category



Source: Grattan analysis of characteristics of employment survey. Notes: Minimum wage is the minimum wage for that year. \$3 is in 2022 real terms. Long-term residents include individuals born in Australia and who arrived more than 10 years ago. Pale results are insignificant. Logistics regression is used to produce estimates. Psuedo-R2: 0.1930.

# How visa rules should change to make migrants less vulnerable to exploitation

Visa holder	Impact on migrants' bargaining power	Recommendation
<b>Temporary Skills Shortage (subclass 482)</b>	<ul style="list-style-type: none"> <li>• Visa tied to ongoing employment</li> <li>• Sponsorship by employer limits job switching</li> </ul>	<ul style="list-style-type: none"> <li>• Increase TSMIT to \$70,000</li> <li>• Longer time between jobs</li> <li>• Introduce portability</li> </ul>
<b>Working holiday makers (subclass 417/462)</b>	<ul style="list-style-type: none"> <li>• WHMs must prove they did eligible regional 'specified work': 88 days work for 2<sup>nd</sup> visa, 6 months work for 3<sup>rd</sup> visa</li> <li>• Extended to healthcare Australia-wide during COVID</li> </ul>	<ul style="list-style-type: none"> <li>• Replace with single 1-year WHM visa (i.e. no 'specified work' requirements for 2<sup>nd</sup> and 3<sup>rd</sup> WHM visas)</li> </ul>
<b>Pacific Australia Labour Mobility (PALM)</b>	<ul style="list-style-type: none"> <li>• Visa tied to ongoing employment</li> <li>• Minimal portability</li> </ul>	<ul style="list-style-type: none"> <li>• Introduce worker-initiated portability &amp; other protections</li> </ul>
<b>Students (subclass 500)</b>	<ul style="list-style-type: none"> <li>• Limit on work hours during semester: <ul style="list-style-type: none"> <li>• Historically 40 hours a fortnight</li> <li>• Uncapped during COVID</li> <li>• Capped at 48 hours a fortnight from July</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Review work rights as part of broader review of international higher education in Australia</li> <li>• Consider replacing with annual cap on hours worked (i.e. Finland)</li> </ul>
<b>Permanent employer sponsorship</b>	<ul style="list-style-type: none"> <li>• TSS visa holders must be with same employer for three years to be eligible for permanent sponsorship</li> </ul>	<ul style="list-style-type: none"> <li>• Change requirement to work 3 years with sponsoring employer to 2 years with any employer</li> <li>• Improved points test to provide an alternative pathway</li> </ul>



# Better legal protections are needed: the Exploited Worker Visa Guarantee should replace the Assurance Protocol; and a new Workplace Justice Visa

## Exploited Worker Visa Guarantee

**Eligibility:** migrant workers whose visa would be cancelled after breaching their visa due to exploitation

**Type of exploitation or mistreatment covered:** a non-trivial breach of labour law. A Ministerial Direction should specify the list of workplace contraventions that give rise to protection against cancellation. Underpayment exceeds \$2,000.

**Action required by the worker:** evidence of a meritorious claim that a contravention has occurred and worker is taking action to address it. Demonstrated by: certification by a government enforcement agency; a court; certification by a lawyer. The worker must have reported the contravention to a relevant government authority.

**Legal instrument:** regulations issued pursuant to s116(2) of the Migration Act

**Length:** The same duration as the current visa.

**Work rights:** as per current visa.

**Future visas:** same visa pathways as the current visa (no prejudice for future visa applications).

## Workplace Justice visa

**Eligibility:** migrant workers whose visa would expire or be cancelled before their claim is resolved, or who are undocumented.

**Type of exploitation or mistreatment covered:** a non-trivial breach of labour law. A Ministerial Direction should specify the list of workplace contraventions that enable a visa to be issued. Underpayment exceeds \$2,000.

**Action required by the worker:** evidence of a meritorious claim that a contravention has occurred and worker is taking action to address it. Demonstrated by: certification by a government enforcement agency; a court; certification by a lawyer. The worker must have reported the contravention to a relevant government authority.

**Length:** ~3-12 months, at DHA's discretion. The worker can get a subsequent Workplace Justice visa. The visa would become invalid if the visa-holder abandons the claim (however they would be permitted to genuinely settle the claim).

**Work rights:** full work rights, irrespective of their earlier visa.

**Conditions:** the worker cannot abandon the claim or cease to cooperate with authorities.

# The Fair Work Ombudsman is in charge of enforcing Australia's labour laws

The Fair Work Ombudsman is Australia's workplace regulator

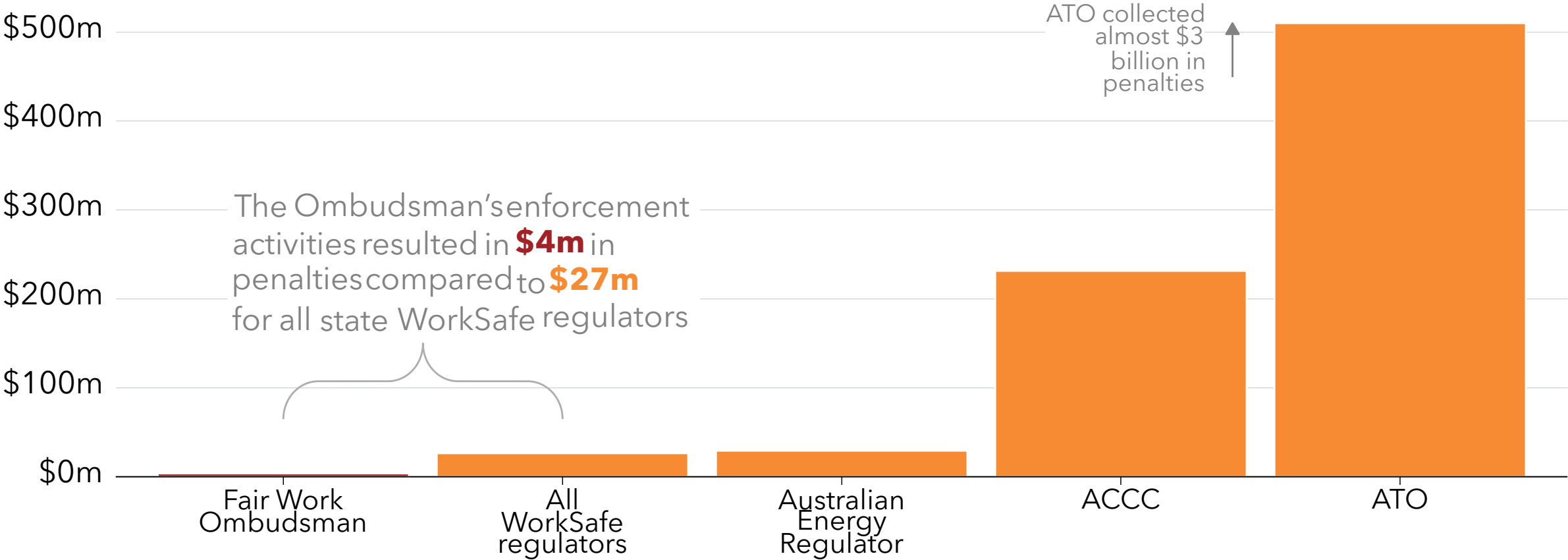
It is in charge of enforcing labour laws in the Fair Work Act

It uses a variety of tools to enforce the law:

- Education and advice
- Small fines (only for incorrect recording keeping)
- Orders to pay back money
- Litigation (including court penalties)

# The Ombudsman collects much less in penalties than other regulators

Penalties imposed by regulators, 2021-22



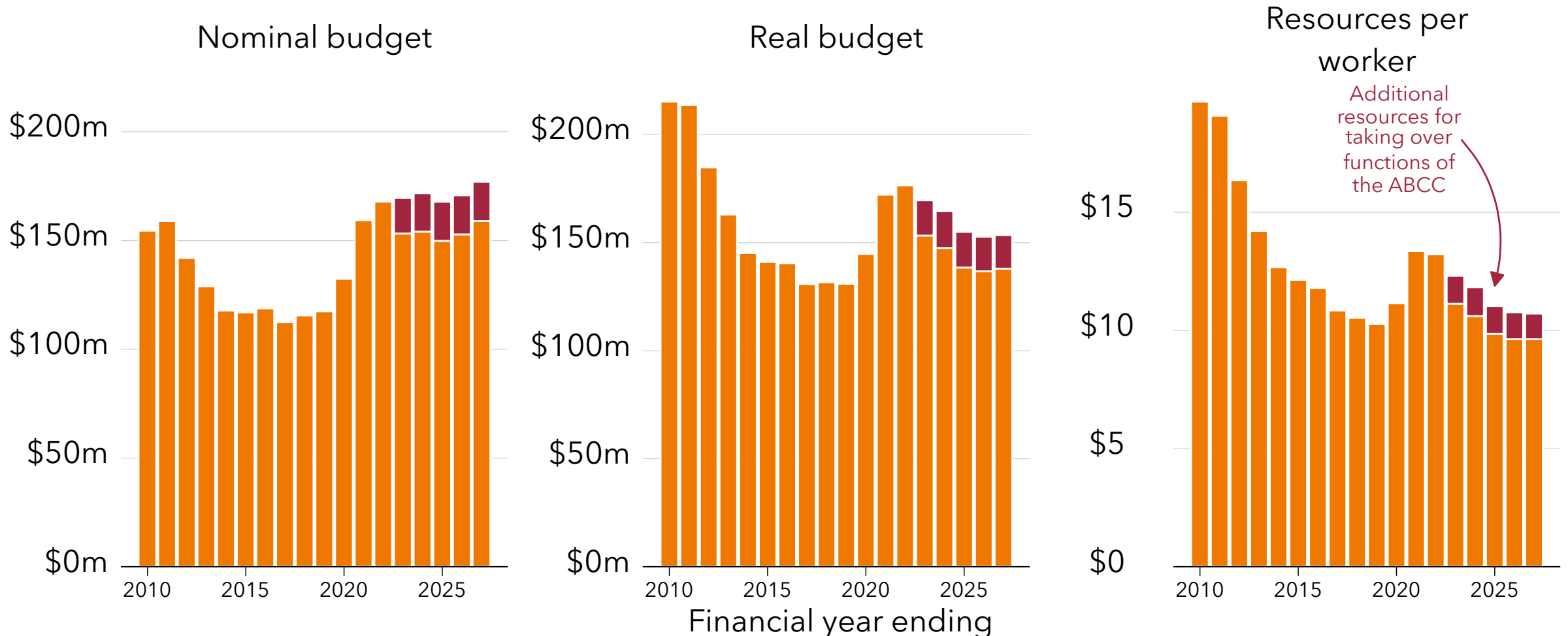
Notes: ACCC, Australian Energy Regulator, WorkSafe Vic, SafeWork NSW only include court-ordered penalties. Contrition payments, court-ordered penalties and infringement notices are included for the Ombudsman. ATO penalties include collected penalties and interest. All WorkSafe regulators includes all states and territories. Source: Annual reports.

# The Fair Work Ombudsman has weaker enforcement powers than other regulators

	ACCC	ATO	Fair Work Ombudsman
<b>Information gathering powers</b>	<p>Can <b>demand</b> info by issuing a s155 notice for suspected contraventions of the Competition and Consumer Act</p> <ul style="list-style-type: none"> <li>Penalties: \$27,500 or 2 years in prison for individuals; \$137,500 for corporates</li> </ul>	<p>Can <b>demand</b> information by issuing notices for information, such as verifying information</p> <ul style="list-style-type: none"> <li>Penalties: \$5,500</li> </ul>	<p>Inspectors can request records and documents, as well as request further information on premise (e.g. examine records, interview an individual with their consent)</p> <ul style="list-style-type: none"> <li>Penalties: \$16,500 for individuals; \$82,500 for corporates</li> </ul> <p>To coerce an interview, must apply to the AAT for a FWO notice</p> <ul style="list-style-type: none"> <li>Penalties: \$165,000 for individuals; \$825,000 for corporates</li> </ul>
<b>Admin penalties:</b>	<b>Record keeping</b>	Failing to provide information <sup>1</sup> (\$1,650 for individuals; \$8,250 for corporates)	<b>Infringement notices</b> issued for <b>record-keeping breaches</b> (\$1,650 for individuals; \$8,250 for corporates)
	<b>Other breaches</b>	<p>Breaches of the Australia Consumer Law (unconscionable conduct, false/misleading conduct)</p> <ul style="list-style-type: none"> <li>\$3,300 for individuals; \$16,500 for corporates, \$165,000 for listed companies)</li> </ul>	<p><b>No penalties</b> for other breaches of the Fair Work Act (i.e. not for underpayments)</p> <ul style="list-style-type: none"> <li>Instead can require firms to merely redress breach (i.e. underpayment), interest is not paid on back payments</li> </ul> <p>Ombudsman can enter into enforceable undertakings, which can include negotiated contrition payments + other remedies. Back payments generally include interest.</p>
<b>Court-ordered penalties:</b>	<b>Civil</b>	<p>Penalties are \$2.5m for individuals and \$50m for corporates or:</p> <ul style="list-style-type: none"> <li>3x the reasonably attributable benefit</li> <li>30% of annual turnover</li> </ul>	<p>Orders to pay penalties</p> <ul style="list-style-type: none"> <li>Contraventions: \$16,500 for individuals and \$82,500 for corporates.</li> <li>Serious contraventions: \$165,000 for individuals and \$825,000 for corporates penalties for serious contraventions.</li> </ul> <p>Outstanding wages must be paid back (+ interest)</p>
	<b>Criminal</b>	Criminal penalties apply (10 years in jail and \$550,000 per offence) for cartel conduct.	<b>No criminal penalties</b>

# The Ombudsman's funding per worker is lower today than when it was established

Total real appropriations budgeted for the Fair Work Ombudsman, 2022 dollars



Total appropriations for Fair Work Ombudsman (Outcome 1 following the inclusion of the Registered Organisations Commission in 2017-18). Real calculated using a composite index of WPI and CPI reflecting the Ombudsman's wages and other expenses. Forward projections for the number of employees use a one per cent assumption. RBA projections are used for WPI and CPI. Sources: BP4 (2009-2023), ABS (2022), PBS (2021).



# How to better support migrants to pursue underpayment claims

- **Boost supports to help exploited migrants recover unpaid wages**
  - Establish a Migrant Workers Centre in each state
  - Increase funding for community legal centres
  - Devote some extra funding for the new Workplace Rights Authority to migrant worker support
- **Improve migrants' understanding of workplace rights:**
  - Increase the number of points the Department of Home Affairs sends migrants with work rights information about workplace laws
  - A 'Real Fair Work Information Statement' that outlines working conditions
- **Explore creating a new specialised workplace court or tribunal** as part of the review of the small claims procedure that is being undertaken in 2023
- **Make further changes to the small claims process**, such as by:
  - Allowing virtual hearings for all cases; and
  - Allowing workers that have been underpaid by the same employer to file group complaints.
- **Expand the Fair Entitlement Guarantee to include migrant workers**

# Our recommendations are fully funded by a \$30 a year levy on temporary visas higher revenue from larger penalties on employers that underpay workers

New spending	Amount per year (\$millions)
Funding for the new Workplace Rights Authority	60
Funding for the Department of Home Affairs to better enforce migration laws	10
More funding for community legal centres	7
Migrant workers centre in each state	10
Expand Fair Entitlements Guarantee	13
Workplace Justice visa	10
More funding for Phoenix Taskforce	5
<b>Total</b>	<b>115</b>

New revenue source	Amount per year (\$millions)
Higher contribution payments, court penalties and fines	70+
A \$30 a year levy on temporary visas with work rights	45
<b>Total</b>	<b>115</b>

Notes: 2023-24 dollars. Funding for the Workplace Rights Authority returns funding to what the Fair Work Ombudsman had in 2012-13 per work in real terms in 2023-24 (calculated by inflating Fair Work Ombudsman appropriations by a weighted average of the CPI and WPI) (\$55 million) plus an extra \$5 million to provide more assistance to migrant workers claiming unpaid wages. The Fair Entitlements Guarantee spending estimate is a net figure (i.e. accounting for receivables from liquidated companies). For the 'preventing exploitation levy' costing, PALM visa grants estimated to be 20,000 per year.

Source: Grattan analysis

# The government announced a package of reforms in June 2023 and is acting quickly to implement them

Reform announced	Status
Make it a criminal offence to coerce someone into breaching their visa condition	Introduced to parliament
Prevent employers from hiring people on temporary visas where they have exploited migrants (serious, repeated or deliberate non-compliance with Migration Act and workplace laws)	Introduced to parliament
Increase penalties and new compliance tools for the ABF to deter exploitation (compliance notices and enforceable undertakings)	Introduced to parliament
Repeal section 235 of the Migration Act (which criminalises breaching a visa condition)	Introduced to parliament
Stronger, codified Assurance Protocol	Introduced to parliament
Extra funding for the Australian Border Force	Announced in May 2023 budget
Stronger penalties for the Fair Work Ombudsman (election commitment)	Consultation begun
Firewall between Department of Home Affairs and Fair Work Ombudsman	Consultation begun
Whistleblower visa pilot	Consultation begun
180 days between employer sponsors for temporary skilled visas (increased from 60-90 days)	Unsure
Information and education initiatives (including expanded role for third-parties)	Unsure
Protections for exploited migrants reliant on employer for a future visa	Unsure

# But there is much more to be done to tackle exploitation

## Reform visa rules to make migrants less vulnerable to exploitation

1. Make temporary skill-shortage visas portable so workers can leave exploitative employers.
2. Allow sponsored workers to apply for permanent residency after two years with any sponsoring employer.
3. Limit working holiday maker visas to a single one-year visa, and abolish the rules that permit holiday makers to extend their stay in Australia if they perform 'specified work'.
4. Make visas issued under the Pacific Australia Labour Mobility (PALM) scheme portable.
5. Commission an independent review of international higher education in Australia.
6. Replace the Assurance Protocol with a strengthened Exploited Worker Visa Guarantee.
7. Create a Workplace Justice visa to empower workers to report exploitation and stay in Australia to pursue outstanding claims.
8. Apply a 'preventing exploitation levy' on temporary visas of \$30 for each year of work rights offered.

## Strengthen the enforcement of workplace and migration laws

9. Rename the Fair Work Ombudsman the Workplace Rights Authority and boost funding by \$60 million a year to \$230 million a year.
10. Empower the Authority to issue infringement notices for underpayment.
11. Increase maximum penalties for Fair Work Act contraventions that cover underpayment.
12. Change the test for 'serious contraventions' from knowing and systematic to reckless and systematic.
13. Introduce criminal penalties, with a maximum penalty of 10 years imprisonment, for employers who knowingly underpay workers.
14. Conduct an independent capability review of the Ombudsman to inform the strategy, structure, skills and culture of the new Authority.
15. Require the Authority to produce an annual report on the extent of migrant worker exploitation.
16. Require businesses to report hours worked on the Single Touch Payroll system, to help detect underpayment.
17. Increase Department of Home Affairs funding by \$10 million a year.
18. The Australian Border Force should pursue criminal cases against employers who knowingly employ migrants in breach of their visa conditions and it should more investigations of suspect employers.
19. Establish new migrant exploitation offences in the Migration Act.
20. Issue all temporary visa-holders with work rights a tax file number upon arrival.

## Close loopholes and better support migrants to pursue underpayment claims

21. Review the limits on data sharing among Phoenix Taskforce members and boost taskforce funding.
22. Change the sham contracting 'recklessness' test in the Fair Work Act to a test of 'reasonableness', and increase penalties.
23. Consolidate existing state schemes into a National Labour Hire Registration Scheme.
24. Establish a Migrant Workers Centre in each state and increase funding for Community Legal Centres.
25. Increase the number of points at which the Department of Home Affairs provides migrants with information about workplace laws and work rights.
26. Consider creating a new specialised workplace court or tribunal as part of the existing review of the small claims procedure.
27. Expand the Fair Entitlement Guarantee to include temporary visa-holders.



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