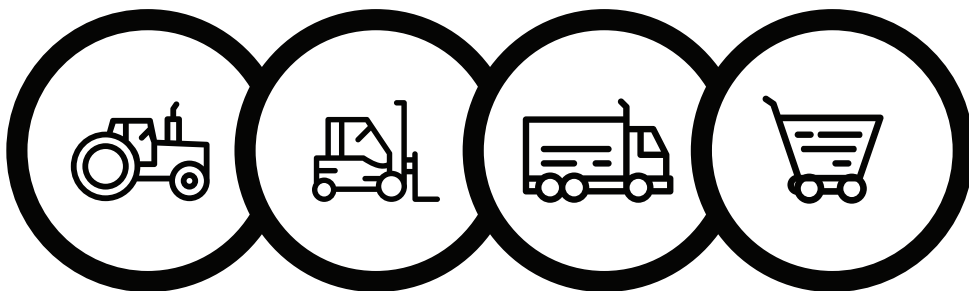


— 3 August 2020 —

# Submission to the National Agricultural Labour Advisory Committee



**Retail Supply Chain Alliance**

Fairness from the farm to your front gate



## **Prelude**

The Retail Supply Chain Alliance welcomes the opportunity to contribute to the Senate Standing Committee on Economics' Inquiry into the Unlawful Underpayment of Employees' Remuneration.

The Retail Supply Chain Alliance (the 'Alliance') represents and advocates for the rights of workers across the horticulture supply chain in Australia.

The Alliance is a coalition of trade unions that represent workers in each facet of the horticulture supply chain.

The Transport Workers' Union (TWU), the Australian Workers' Union (AWU), and the Shop Distributive and Allied Employees Union (SDA) are worker representatives who have formed the Retail Supply Chain Alliance, which together have coverage across the full spectrum of the horticulture industry supply chain.

The Alliance was formed in 2019 in an attempt to advance the cause for workers' rights and reduce exploitation across the horticulture supply chain in Australia.

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# 1. Introduction

Over the last decade Australia's horticulture industry has arguably become the most exploitative in the country. At the same time, it has become the most reliant sector on overseas migrant workers, and incidentally an international chronicle for obscene and inhumane workplace abuse and acts of modern slavery.

The extent of exploitation in the horticulture industry is undeniable, uncovered empirically by countless parliamentary inquiries, government taskforce reports, and media reporting. It also goes unanswered, with the obvious policy responses being ignored and side-lined year-on-year as more evidence is revealed and exploitation worsens.

Unlike other industries, the horticulture industry demands high-volumes of work in acute time frames, compensates on piecework, is regionally located and has a high-degree of non-monetary compensation associated with employment.

Over time, bad policy planning has meant that the industry has become structurally dependent on a migrant labour workforce, controlled by systemic and complex labour hire contract arrangements, and undetectable by workplace standard compliance and enforcement agencies.

Nefarious employment practices have become so commonplace that any employer attempting to be compliant becomes uncompetitive in the marketplace. Exploitation and illegality are now a focal cost-setting function of the horticulture industry.

Whilst the challenges are complex and areas for improvement vast, the goal for Australian policymakers is simple. That is, to create a framework that stops workers – local or migrant – from being underpaid, exploited, enslaved, and sexually abused.

First, this must begin with ensuring all participants in an employment contract are equally aware of their workplace rights and compensation. The industry's

dependency on visa schemes that provide greater bargaining power to employers to sign-off on visa renewals, a lack of literacy for workers, and multi-layered labour hire contract arrangements with doubtful compensation and deduction schemes, obfuscate this pursuit.

Second, transparency must exist so that if workplace rights are being abused, or people being exploited, that exploitation is clear and visible to stakeholders such as the government, civil society groups including unions, and most importantly, the worker themselves. The horticulture industry is unique in that it does not have as many licensing or compliance regimes associated with its functioning, compared to other industries. Coupled with the regionality and seasonality of the industry, workplace arrangements can be hastily put together and go undetected for a while before anyone has the chance to notice.

Thirdly, appropriate enforcement and compliance mechanisms must exist to reward good actors and punish bad actors. The complex supply-chain of labour hire contractors can – intentionally or unintentionally – allow for the diversion of authorities and the muddling of culpability.

The solution must be multi-faceted and ensure that the supply of labour is at first local, literate, and legal. It must also ensure that those looking to employ labour in the industry are compliant and, where not, the means to discover non-compliance are available. This report proposes four key areas of reform that would collectively help eradicate exploitation in the horticulture industry.

- **Redesign a visa system so it is fit for purpose** – in hope to level the playing field so that employers do not contain unscrupulous influence over labour.
- **Create a national labour hire licensing scheme** – so that any labour hire contractor can only operate if they are registered with the government.
- **Create a supply-chain accreditation scheme** – so that from the farm to the point of sale, dishonest employers are punished by their exclusion from the industry.

- **Establish greater enforcement and compliance** – so that the unique attributes of the horticulture industry can receive the bespoke enforcement framework it requires.

## **2. List of recommendations**

**Recommendation 1:** Given that exploitation is so severe, it is recommended to discontinue the Working Holiday Maker programme in its current form.

**Recommendation 2:** Any visa replacement of the Working Holiday Maker programme should provide a pathway to permanent migration.

**Recommendation 3:** establish auditing that includes assessment of non-wage related compensation, including accommodation, transport, and other fees.

**Recommendation 4:** include within the audit process a stakeholder engagement outreach with workers and not just firms.

**Recommendation 5:** provide greater access for unions to conduct audits and checks on site.

**Recommendation 6:** establish greater enforcement and auditing of SWP firms.

**Recommendation 7:** deepen the scope of SWP to other pacific partner countries so that it can service the reduction in WHM visa holders. This should include return working rights and pathways to citizenship.

**Recommendation 8:** Allow for predeparture information and an induction process for unions and civil society groups.

**Recommendation 9:** Formalise the induction process with unions, employers and civil society report backs and departmental oversight.

**Recommendation 10:** Maintain a public register of visa workers, their visa status, their worksite, living arrangements and labour hire employer.

**Recommendation 11:** Creation of criminal penalties for the use of undocumented workers by labour hire and growers.

**Recommendation 12:** establish a national labour hire licencing scheme with minimum provisions outlined in section 5.4.1., and allow unions for enhanced right of entry provisions to check time and wages record for all workers on short notice to enforce compliance.

**Recommendation 13:** establish a national accommodation provider licencing scheme with minimum provisions outlined in section 5.4.2., and remove any prohibitions on allowing unions to exercise right of entry on accommodation.

**Recommendation 14:** Establish a tripartite body of Government, industry and unions to oversee an industry accreditation scheme, including a labour hire accreditation scheme.

**Recommendation 15:** increase FWO funding by \$15 million per annum for five years, and expand FWO inspectors investigative powers to include acts of modern slavery.

**Recommendation 16:** establish an independent body with responsibility for safe standards of work including fair pay and conditions that operates exclusively on the transport supply chain.

**Recommendation 17:** all s483aa applications in the horticulture industry should be automatically granted within 24 hours.

**Recommendation 18:** the entry notice provisions in section 518 of the Fair Work Act should be amended to include agricultural and horticulture industry employees in same category as TCF outworkers.

**Recommendation 19:** Businesses in the horticulture industry who are required to report on modern slavery compliance should be subject to independent auditing, a responsibility that could be bestowed onto unions.



**Recommendation 20:** the Federal government provide grants to unions that are capable and willing to independently audit horticulture employers on their compliance with Australian workplace laws.

**Recommendation 21:** introduce legislation to criminalise wage theft and serious breaches of intentional workplace exploitation.

### 3. A working profile of exploitation

The horticulture industry requires workers to pick, package and process fresh produce in physically difficult, labour intensive environments; often in remote locations.

The workforce is characterised by complex labour hire arrangements, a high-turnover migrant workforce, and an emerging dependence on undocumented workers.

The consequence of this structure is a labour force characterised by low wages, demanding and insecure work, non-compliance with workers' entitlements, and considerable workplace exploitation akin to modern slavery. The reality is that being employed in horticulture in Australia – whether it be with a grower or labour hire contractor – will likely mean you are being exploited.<sup>1</sup>

The extent of this exploitation has been gradually revealed by an exposé of formal investigations, public and private inquiries, and media reporting over the previous two years.

The landmark report *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry*, published in 2019 by leading international experts on migration and industrial relations law, concluded an unprecedented and detailed three-year investigation into Australia's horticulture sector. The findings established that non-compliance with labour standards is endemic and multi-faceted, and that the horticulture industry has a structural reliance on undocumented workers.<sup>2</sup>

In 2018 the Fair Work Ombudsman (FWO) concluded the *Harvest Trail Inquiry*, the largest ever workers rights compliance inquiry conducted for the Australian

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<sup>1</sup> Harvest Trail Inquiry, Fair Work Ombudsman.

<sup>2</sup> <https://www.sydney.edu.au/content/dam/corporate/documents/business-school/research/work-and-organisational-studies/towards-a-durable-future-report.pdf>

Horticultural industry. Run over a four-year period, the FWO uncovered unpaid wages for over 2,500 workers and that in within 55% of employers investigated there had been a failure to comply with Australian workplace laws.<sup>3</sup>

In March 2019 the Federal Government released the final report of the Migrant Workers' Taskforce, which was chaired by Professor Allan Fels AO and which made 22 recommendations aimed at improving workplace protections for vulnerable migrant workers. The report identified horticulture as a 'high-risk industry' in relation to exploitation and made several recommendations to address exploitation such as introducing a national labour hire scheme.

Over the last 12 months there have also been several concurrent parliamentary inquiries that have directly or as a matter of scope focussed on exploitation in the horticulture industry.

In 2019 the Federal Parliament commenced an *Inquiry into Migration in Regional Australia*, which looked closely at employment arrangements in regional areas including for workers in the horticulture industry on working visas.

In the same year the Federal Parliament also commenced an Inquiry into Temporary Migration, which to date has included many submissions detailing exploitation cases in Australia's horticulture industry, often at the expense of migrant welfare.

Also, in 2019 the Senate referred an inquiry into the unlawful underpayment of employees' remuneration, spurred by rampant media reporting on wage theft in the hospitality and horticulture industries.

There have been several more parliamentary inquiries both at the state and federal level, many of which are still running, that also address issues of exploitation in the horticulture industry.

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<sup>3</sup> <https://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/national-campaigns/harvest-trail-inquiry>

The Australian media routinely report cases of worker exploitation in the forms of underpayment, contravention of NES entitlements, illegal use of visa schemes, effective slavery and in some instances horrific cases of sexual exploitation.

For instance, in March 2020 it was reported that a Queensland farmer was sexually exploiting several working migrants on the Working Holiday Maker program.<sup>4</sup> Devastatingly, cases of rape and other sexual exploitations are not uncommon across the country, having recently also been exposed in Victoria.<sup>5</sup> Last year, a case of aggravated kidnapping, rape, and indecent assault was also revealed in South Australia.<sup>6</sup>

In June 2020 it was revealed that one of Australia's newest visa schemes – the Pacific Labour Scheme – is not infallible against exploitation in the horticulture sector, as a quarter of workers' pay was cut to live in a four-bedroom home housing 8 adults.<sup>7</sup> This was also the case when the Australian Federal Police and the Australian Border Force commenced an investigation into labour exploitation in Victorian farms after further wage theft of Fijian workers was uncovered.<sup>8</sup> Earlier this year under the Seasonal Worker Program, it was also found that 70 workers were living in one house in Tasmania and paying up to \$130 a week in rent.<sup>9</sup>

Critically, the slew of activities exposing horticulture exploitation across public sector and non-profit inquiries, parliamentary investigations, and media reporting, are merely a sample. There are in fact many more inquiries, investigations, and

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<sup>4</sup> <https://www.abc.net.au/news/2020-03-03/south-burnett-farmer-in-court-backpacker-committal-hearing/12016018>

<sup>5</sup> <https://www.abc.net.au/news/2019-06-16/calls-to-regulate-backpacker-work-ahead-of-federal-visa-changes/11186178?nw=0>

<sup>6</sup> <https://www.abc.net.au/news/2019-05-14/pig-shed-rapist-gene-charles-bristow-sentenced-to-jail/11064658>

<sup>7</sup> <https://www.abc.net.au/news/2020-06-11/pacific-island-scheme-wages-deducted-high-rent-inverell/12336278>

<sup>8</sup> <https://www.abc.net.au/news/2019-11-16/police-probe-alleged-exploitation-of-fijian-workers-in-victoria/11626930>

<sup>9</sup> <https://www.abc.net.au/news/2020-02-14/seasonal-worker-program-under-scrutiny-after-70-people-in-house/11960818>

reporting that have featured in the public discourse over the last few years. They also tell little of the investigative work undertaken by the Fair Work Commission on a business-as-usual basis.

Over the last two years the Fair Work Ombudsman (FWO) have ruled on many enforceable undertakings in the horticulture sector, such as for labour hire firm Agri-Labour which underpaid 19 nationals of Vanuatu it employed under the SWP programme in Shepparton, Victoria.<sup>10</sup> It also recently prosecuted against Sydney horticulture labour-hire company Cherries Farm Employment Agency Pty Ltd for underpaying Chinese students under the minimum wage.<sup>11</sup>

The evidence for systemic and wide-spread exploitation in Australia's horticulture sector is empirical.

Yet despite this clear and ongoing evidence, there have been no structural or material adjustments in our regulatory or legislative frameworks that seek to address these challenges. This is despite the clear and worsening trends in the evidence and the obvious solutions that have been proposed by countless inquiries. The problems continue to get worse, not better.

### **3.1. Profiling the challenges**

Many exploitation cases showcase several dysfunctional attributes of the industry concurrently, such as the use of overseas labour, labour hire contracting, the multi-layered and complex supply chains, job precariousness, and others.

For this reason, it can be difficult to identify exactly which public policy solutions will adequately address exploitation. In short, there is no silver-bullet solution and any successful solution will require the pursuit of a package of inter-related reforms.

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<sup>10</sup> <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/april-2019/20190423-agri-labour-eu-media-release>

<sup>11</sup> <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/july-2019/20190705-cherries-farm-eu-media-release>

### **3.1.1. Dependency on migrant workers**

The horticulture industry is overwhelmingly dependent on the labour of overseas migrants.

The Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) found that the average horticulture farm employs 40-50 per cent of its workforce from the local permanent resident market. This means that a worker in the horticulture industry is most likely to be on an overseas visa, or their work status is unknown.

As a comparison to other regional industries, wheat or dairy farms typically comprise 90 per cent of permanent residents. This leaves horticulture uniquely dependent on migrant workers, which the FWO identify as causative of worker exploitation.

In its Harvest Trail Inquiry, the FWO found that 67% of all growers surveyed were employing overseas workers. Further, it reported that temporary visa holders are more vulnerable to exploitation due to a higher incidence of cultural and language barriers, low awareness of workplace rights and barriers to accessing assistance. It also recognises that the anchoring of visa status to employment means that workers can be made to feel 'captive' to their employer.

The final report of the Federal Government's Migrant Worker Taskforce also noted the inextricable link between the increasing number of temporary visa holders and the systemic spread of underpayment and risk of exploitation.

With a significant portion of the labour supply sourced from overseas, there is no denying that the machinations of the visa system have some bearing on the degree to which workers get exploited. For instance, the provisions for labour standards compliance between the Working Holiday Maker programme and the more stringent

Seasonal Workers' Programme differ substantially. The newer Pacific Labour Scheme, which was modelled off the SWP and curated for pacific island countries, also requires more compliance by growers than the WHM programme.

However, architectural improvements have not resolved the problem with exploitation in its entirety, as cases of exploitation have been found amongst workers that have migrated across all schemes. In addition, the existence and growth of the legacy scheme, the general complexity of overlapping visa schemes, lack of enforcement by regulators present a functional and lingering disincentive for growers to engage with more uncompromising newer schemes.

### **3.1.2. Excessive use of labour hire & supply chains**

The horticulture industry is structurally dependent on the use of labour hire contractors, which provides unscrupulous employers considerable opportunity to not comply with Australian workplace laws.

Australia's horticulture industry sources 37-56% of its labour from contract labour firms, depending on the specific type of produce. As can be seen in Figure 1 below, this compares to 3 to 12% in other agriculture industries such as in cotton, broadacre and dairy. This labour market distinction is further accentuated by a significant dependence on casual work, reflecting the acute seasonal patterns of horticulture work.

**Figure 1: Horticulture farms, employment type breakdown (%)**

	<b>Vegetables</b>	<b>Fruit &amp; Nut</b>	<b>Cotton</b>	<b>Dairy</b>	<b>Broadacre</b>
Permanent	28	24	57	78	79
Casual	35	20	31	21	18
Contract Labour	37	56	12	1	3

Source: ABARES 2018 survey

Whilst the use of labour hire contracting is not itself a means for exploitation, a significant dependency on it can obfuscate the recruitment process, disaggregate the employee-employer relationship and increase the risk for exploitation. In addition, when several contract labour firms are used to service a single farm or operating entity, supply-chain complexity can nurture a culture of non-compliance.

The FWO found that the increasing use of labour hire in the horticulture industry – in particular the multiple levels of subcontracting – increases the risk of non-compliance. As additional subcontractors enter the labour contracting chain, the increasing pressure of multiple players taking their profit can result in the legal employer of workers having insufficient funds to cover their full entitlements.<sup>12</sup>

### **Case Study: lack of clarity in the supply chain**

An established company that supplied fresh produce to major supermarkets was prosecuted for the detention of unlawful workers and an FWO investigation.

It was alleged workers were being paid \$13 per hour. When interviewed, workers were unable to identify who employed them or, at best, appeared only to know the employers' first name.

The FWO investigation found multi-level contracting arrangements and a complex web of financial transactions. Fair Work Inspectors identified at least three sub-contractors, although it was unclear whether other individuals in the supply chain were employees, subcontractors, or performing both functions, and to whom payments were being made beyond these points.

FWO found that the company lacked processes to track who was working on its farms or if workers were being paid correctly. As a result of the investigation, and

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<sup>12</sup> <https://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/national-campaigns/harvest-trail-inquiry>, page 36



with a view to mitigating reputational damage, the company sought to improve labour force governance by:

- Implementing a process to assess labour hire service providers
- Amending labour procurement agreements to ensure they produce clear operating expectations
- Regular auditing of its contractors.<sup>13</sup>

According to the landmark report *Towards a Durable Future*, there is one supply-side and one demand-side driver of the increasing use of contract labour in the Australian horticulture industry. On the supply-side, it is the emergence of several visa programs (namely the WHM, SWP and the newer PLS) that have provided opportunities for labour hire contractors to offer value to growers by streamlining compliance procedures, marketing activities for migrants, and the finding of accommodation. On the demand-side the cost pressures on farmers are reshaping the industry with a shift from micro and family farms to large-scale corporate farming. In particular, complex supply chains and increasing competition on the retail front for fresh produce, as well as greater unpredictability in crop yields, have incentivised growers to do what they can to preserve their contracting profit margins – even through illegality.

Both the FWO and the report *Towards a Durable Future* suggest that what is often described as a labour shortage in the horticulture industry is more akin to a recruitment difficulty. As growers are in need for acute labour supply, the outsourcing of the recruitment process – particularly when available labour is sourced from visa holders looking to fulfil their seasonal work obligations in the regions – becomes a valuable time saving and search cost reducing proposition.

### **3.1.3. Non-compliance with labour standards**

Whilst systemic non-compliance with labour standards is not common for most industries, some degree of non-compliance is generally found in most industries.

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<sup>13</sup> Enforceable Undertakings, Fair Work Ombudsman.

This requires an active enforcement or investigative agency, which is commonly undertaken by police, the judicial system, the department of home affairs and border control, unions and the Fair Work Ombudsman.

The unique attributes of the horticulture industry – seasonality, dependency on visa holders, regionality, and others – means that it needs greater enforcement frameworks to combat exploitation.

For instance, in its Harvest Trail Inquiry the FWO investigated 638 employers, equating to 4 per cent of all employers in the horticulture industry. It was found that more than 55% of employers investigated had failed to comply with Australian workplace laws.<sup>14</sup> A summary of those findings are as follows.

- 236 growers (28.2% of investigations) had monetary breaches relating to underpayment and not being paid at all.
- 120 growers (14.4% of investigations) had non-monetary breaches relating to failure to keep records of hours worked and payslips.
- 109 growers (13.05% of investigations) had both monetary and non-monetary breaches.<sup>15</sup>

Importantly, the exploitation challenges within the horticulture sector are equally about wage theft as they are about non-wage exploitation such as accommodation, physical and sexual abuse. As one of a few industries that typically host workers in remote locations, the packaging of accommodation into employee remuneration is a distinctly unique feature of horticulture.

On wage theft, the FWO found that 15 per cent of firms used piecework arrangements incorrectly, most commonly by applying group rates when not specified in the labour contracts. The piecework arrangement is a unique function of the horticulture industry and its featuring within exploitation cases is material.

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<sup>14</sup> <https://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/national-campaigns/harvest-trail-inquiry>

<sup>15</sup> Harvest Trail Inquiry Final Report, page 29.

## Case Study: Agri-Labour

Agri-Labour is a labour hire firm operating in the agricultural industry. It places over 7000 people each year in different agricultural sectors.

Throughout 2018 Agri-Labour employed workers from Vanuatu through the Seasonal Worker Programme to pick tomatoes at a farm near Shepparton, Victoria. Agri-Labour engaged workers as pieceworkers and guaranteed a minimum 30 hours work per week. Under the law, workers can be engaged as pieceworkers if the arrangement allows them to earn at least 15 per cent more per hour than the minimum hourly rate prescribed for their classification of employment.

After complaints were made, the FWO conducted an investigation and found that Agri-Labour was instead charging workers as per a group piecework arrangement, where workers were required to fill 400-kilogram bins of Roma tomatoes and were each paid an equal percentage of a piecework rate per bin filled.

As a result of charging workers under an arrangement that was not in the employment contract piecework earnings for Seasonal Workers picking cherry tomatoes was as low as \$12.80 per day. The 2019-20 minimum wage is \$19.49 per hour.<sup>16</sup>

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<sup>16</sup> Get source – FWO website for enforceable undertakings

## 4. A visa system fit for purpose

At any given time, the total number of temporary visa holders in Australia can range between 850,000-900,000. The many visa categories have been designed for eclectic purposes, and it can often prove challenging to make structural adjustments to a system that provide for such a significant portion of Australia's labour supply.

There is no doubt that the amplified visibility of exploitation cases has coincided with a commensurate increase in uptake of visa schemes, specifically the Working Holiday Maker, Seasonal Worker Programme, and the Pacific Labour Scheme.

For instance, the number of working holiday maker visa holders has increased by 51% over the last decade, and after its conception in 2012, the SWP now accounts for a further 10,000 workers.<sup>17</sup>

**Figure 2 – Visa categories in Australia**

Visa Category	Visa Description	No. persons
Student visa holders	Allows a stay in Australia for the duration of their studies.	486,934
Temporary Graduate visa holders	International students graduated from Australian institutions and that meet the skilled occupation list.	71,157
Temporary Skill Shortage and Temporary Work (Skilled) subclass visa holders	Skilled overseas workers to take up temporary work in Australia and must be employer sponsored.	147,339
Working Holiday Maker visa holders	For young people who want to holiday and work in Australia for up to a year. A second and third year is available for those whom work for three and six months in a specified field or industry in a regional area.	134,909

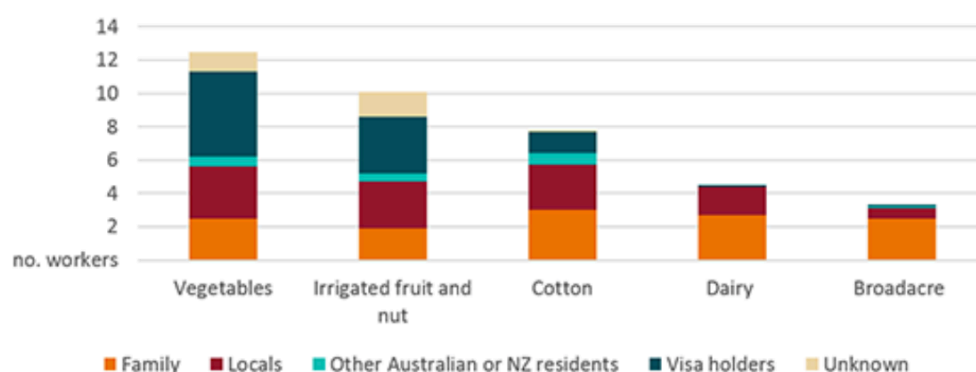
<sup>17</sup> <https://www.ag.gov.au/industrial-relations/migrant-workers-taskforce>, page 20

Other temporary visa holders	Includes an array of other visa-types, including the Seasonal Worker Programme and the Pacific Labour Scheme.	38,573
<b>Total</b>		<b>878,912</b>

Source: Migrant Workers Taskforce Report, March 2019

Whilst temporary migrant workers typically find work in an array of industries, those that complete work in agriculture tend to do so in horticulture. Figure 3 below shows that in vegetable farmers in particular, approximately 50 per cent of workers are temporary visa holders.

**Figure 3: Average workers per farm, 2017-18**



Source: ABARES 2018 survey

The seasonal nature of the regional horticultural workforce, combined with a reluctance to address structural employment problems or a business model built on exploitation, means that the industry is becoming more vulnerable to the nuances of the visa system. The substantial number of migrant workers that are employed in the industry subsequently presents unique policy challenges.

#### **4.1. Working Holiday Maker Programme**

The Working Holiday Maker (WHM) Program was established through a bilateral agreement in 1975 with the UK to enable young people to travel between the countries for the purpose of work and holidaying. Since then, the program has

expanded to include 42 countries through the conception and iterations of other free trade agreements.

The WHM programme grants visa holders the right to work for the full 12 months of their term and since 2005, offers visa holders the opportunity to renew their 12-month visa if they completed 88 days of work in specified industries in regional Australia. In 2018 it was announced that visa holders could apply for a further third year if they complete 6 months of work in their second year in regional Australia.

It should be noted that this program was not designed to accommodate the needs of Australia's labour market and the poorly conceived 'bolt on' has had enormous ramifications for Australia's horticultural labour market and sectoral integrity generally. The programme is now characterised by perverse incentives that are structured in such a way as to almost guarantee exploitation from employers and silence from the exploited. If this is a programme designed to build Australia's soft diplomatic power, it has failed miserably. If it has been designed as an efficient labour market supplement it has not just failed, it has eroded the broader labour market and displaced the opportunity for locals to work.

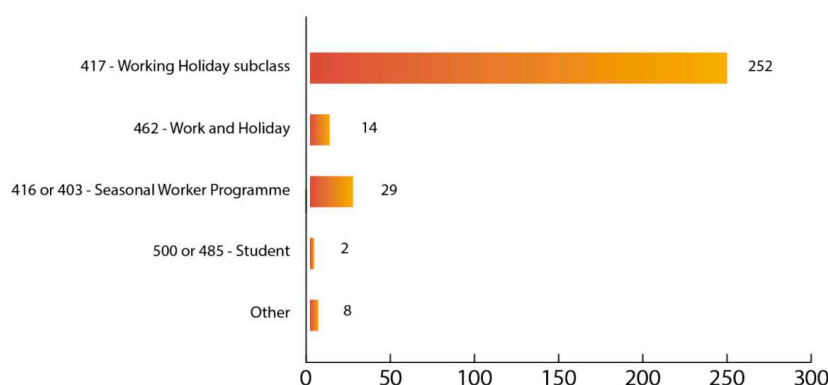
In 2017-18 there was approximately 210,456 people on working holiday visas, of which 17 per cent were in their second-year visa grants. Many of the countries with uncapped restrictions include Canada, the UK, the US, Germany, France, Hong Kong, Japan and Italy. Those with caps include China, Chile, Argentina, Indonesia and Israel.

Whilst there are no specific data on the number of WHM visa holders that complete work in the horticulture sector, secondary reporting from national surveys of growers indicate that the majority of labour in horticulture is dependent on visa holders.

For instance, Figure 4 shows that of the 420 growers investigated by the FWO for unlawful behaviour, more than 60 per cent sourced labour made available from the WHM program.

**Figure 4: Visa breakdown of FWO-investigated firms (420 growers)**

**Figure 7. Visa breakdown**



Source: FWO Harvest Trail Inquiry, page 31

WHM visa holders usually face limited English language literacy, cultural barriers, and commonly do not have a good understanding of workplace rights and entitlements. It was found that many WHMs are unlikely to report exploitative work when they are completing their 88 days because of their need to complete this work in order to gain a visa extension.<sup>18</sup>

Another facet of the WHM program is that given the acute seasonal nature of the contract – 88 days usually – visa holders are usually reliant on short-term stay accommodation which can be difficult to arrange affordably in short periods and without substantial lead time.

It is common for accommodation to be used as a mechanism to pay workers under award or minimum wage rates. For instance, accommodation providers (employers) disguise the cost of accommodation as ‘free’ but charge a weekly ‘job finding fee’

<sup>18</sup> <https://www.sydney.edu.au/content/dam/corporate/documents/business-school/research/work-and-organisational-studies/towards-a-durable-future-report.pdf>, page 13

or other type of levy. Accommodation in these instances are generally sub-standard and can subject workers to illegal OH&S risks.

The WHM program also does not require employers to liaise with community-based organisations, and so visa holders typically find accommodation through labour hire contractors or another intermediary. Many reports indicate that when accommodation is not overseen by a responsible third-party, the risk of exploitation increases substantially.<sup>19</sup>

A large portion of the workers that are granted WHM visas originate from countries that have smaller agriculture industries. The top three countries with most WHM visas granted in 2018-19 (and which make up a combined total of 46 per cent of all visas) are the United Kingdom, France, and Germany.<sup>20</sup>

In distinct contrast to other visa programs (such as the SWP) the implication is that many holiday makers are performing work duties by incidence rather than preference, which typically compromises the quality of labour supply. In short, farmers are recruiting overseas workers that are uninterested in that type of work. This tends to exacerbate exploitation by encouraging work practices that seek to overcome the associated unproductivity, many of which are unsafe.

The WHM programme was not designed to insure against the risk of exploitation, and nor was it originally conceived to fill a labour shortage. It was developed as a means to improve diplomatic relations with a foreign country, and over time haphazard adjustments to the programs in the form of extensions, uncapped restrictions with some countries, and more, has resulted in a structural dependence on mostly unqualified, uninterested short-term overseas labour who are more concerned with extending their holidays in Australia. Critically, the very nature of an uncapped limit on visa grants is diametrically opposite to a flexible short-term labour-shortage policy response.

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<sup>19</sup> [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>20</sup> <https://www.homeaffairs.gov.au/research-and-stats/files/working-holiday-report-jun-19.pdf>, page 28



**Recommendation 1: Given that exploitation is so severe, it is recommended to discontinue the Working Holiday Maker programme in its current form.**

**Recommendation 2: Any visa replacement of the Working Holiday Maker programme should provide a pathway to permanent migration.**

#### **4.2. Seasonal Workers Programme**

The Seasonal Worker Programme (SWP) is an initiative overseen by the Department of Employment, Skills, Small and Family Business, which seeks to assist employers in the agriculture and accommodation sectors to fill employment gaps unable to be met by the Australian workforce. In particular, it provides workers in Pacific Island countries and Timor-Leste with the opportunity to come to Australia to upskill and earn money, operating as an economic development initiative and aid to neighbouring countries.

The SWP and PLS are an important part of Australia's foreign policy settings and acknowledge the deep relationship between Australia and its pacific neighbours. Given the multifaceted importance of this scheme, it is critical that workers under this scheme are protected from exploitation and that the scheme operates with total integrity.

In acknowledgement of this, the SWP was developed with greater safeguards and is overseen by the department of employment.

- Employers have to be approved in advance.
- Employers are subject to site visits and audits.
- Employers have to provide an induction for workers and invite the FWO and unions.
- Employers can be suspended from the SWP for non-compliance.
- Employers are responsible for arranging pastoral care and accommodation.

- Employers are subject to monitoring by the FWO.<sup>21</sup>

Since July 2012, over 28,000 visas have been granted to seasonal workers, including 8,459 for the June 2018 year. The 2018 saw a 37% increase in visas granted, and the uptake is likely to increase further in coming years.

Of the firms investigated by the FWO, a total of 7 per cent of employers sourced labour from the SWP.

Preliminary evidence suggest that the program is under-utilised because there is a perception by growers that the process is too cumbersome and potentially costly. A less generous interpretation might be that employers prefer to use schemes with less oversight of unscrupulous behaviour. Comparatively, when employing WHM visa holders, employers can deploy their own accommodation arrangements, avoid potential administration costs and generally comply with a lower level of workplace compliance and stakeholder management.

Still, the SWP contains inherent shortcomings that expose workers to exploitation just the same as if they were employed by another scheme.

Firstly, there have been many cases of exploitation found by workers under the SWP. The FWO found that of the 420 growers not complying with workplace laws, 29 had employed workers under the SWP. This suggests that despite the involvement of the employment arrangement at conception, there is limited continual oversight and enforcement of labour standards and program requirements.

Secondly, SWP workers are vulnerable to inflated deductions from pay for accommodation and 'social levies', which are obfuscated amongst complicated employment arrangements. For instance, a group of Fijian workers were found to

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<sup>21</sup> <https://www.sydney.edu.au/content/dam/corporate/documents/business-school/research/work-and-organisational-studies/towards-a-durable-future-report.pdf>

have been overcharged and workers had little knowledge about the purpose of these charges.<sup>22</sup>

Thirdly, just like across other visa programs, workers are unlikely to submit complaints to the FWO because of their desire to remain in Australia for the duration of the season and to return for subsequent seasons. In one investigation it was found that SWP workers in Griffith reported a fear of retributions (including beatings) and of their passports being held by the sponsoring employer.<sup>23</sup>

**Recommendation 3: establish auditing that includes assessment of non-wage related compensation, including accommodation, transport, and other fees.**

**Recommendation 4: include within the audit process a stakeholder engagement outreach with workers and not just firms.**

**Recommendation 5: provide greater access for unions to conduct audits and checks on site.**

**Recommendation 6: establish greater enforcement and auditing of SWP firms.**

**Recommendation 7: deepen the scope of SWP to other pacific partner countries so that it can service the reduction in WHM visa holders. This should include return working rights and pathways to citizenship.**

**Recommendation 8: Allow for predeparture information and an induction process for unions and civil society groups.**

**Recommendation 9: Formalise the induction process with unions, employers and civil society report backs and departmental oversight.**

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<sup>22</sup> <https://www.abc.net.au/news/2019-11-16/police-probe-alleged-exploitation-of-fijian-workers-in-victoria/11626930>

<sup>23</sup> <https://www.sydney.edu.au/content/dam/corporate/documents/business-school/research/work-and-organisational-studies/towards-a-durable-future-report.pdf>, page 13

**Recommendation 10: Maintain a public register of visa workers, their visa status, their worksite, living arrangements and labour hire employer.**

#### **4.3. Undocumented workers**

There exists a sizeable illegal secondary labour market in Australia which, amongst others, services the horticulture industry.

An illegal worker is a non-citizen who is working without a visa or working in breach of their visa conditions. Mostly they involve workers that have overstayed their visa and are engaged in illegal working arrangements.

Illegal labour arrangements are particularly conducive to exploitation because typically an illegal worker is aware of their breaches and rely upon their employers' discretion. That discretion is often used as a means to exploit workers' in the form of non-compliance and in some instances, sexual harassment.

The estimates for the size of the illegal secondary labour market range from 20,000 to 100,000. The Migrant Workers' Taskforce reported that an updated figure for those that overstayed their visa is likely to be 62,900, and the number of those that were working is approximately 20,000.

The landmark report Towards a Durable Future which conducted an unprecedented investigation into workplace arrangements in the horticulture industry found that the horticulture industry has a structural reliance on undocumented migrant workers as a key source of labour. It also found that growers regard undocumented workers as highly productive.

**Recommendation 11: Creation of criminal penalties for the use of undocumented workers by labour hire and growers.**

#### **4.4. The COVID-19 opportunity**

The COVID-19 pandemic has created unprecedented societal disruption, resulting in human fatalities, the destruction of social welfare, and severe economic inequality. As entire industries temporarily shut down, and consumer demand shattered, the outlook for the Australian labour force is arguably the most unsettling since the Great Depression.

Whilst COVID-19 has been presented as a temporary health crisis, it is undoubtedly true that it will create long-lasting economic destruction. With more than 3.5 million people on government-subsidised wages – or one quarter of the labour force – there is no question that once subsidies phase out Australia will resurface with a significant unemployment problem.<sup>24</sup> Federal Treasury forecasts the unemployment rate to be 9.25 per cent in the December 2020 quarter, almost double the natural rate of unemployment.<sup>25</sup> Importantly, it should be noted that regional unemployment is substantially higher and, in some LGAs, can reach up to 25%.

Getting people back to work will be more important than ever. Policymakers will also need to mitigate the duration of unemployment to avoid the onset of the far more economically corrosive long-term unemployment. Aside from the consequence of substantial welfare costs, long-term unemployment is self-perpetuating and socially destructive.

More than ever, Australian policymakers will have to do everything they can to preserve the social fabric of the nation by ensuring the labour market functions purposefully for those left jobless by the crisis.

Since the crisis began, non-essential migration has been effectively frozen. Whilst workers with specialist skills and people regrouping with family members have been

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<sup>24</sup> <https://www.afr.com/politics/federal/job-support-extended-but-payments-reduced-20200720-p55dkg>

<sup>25</sup> <https://www.theaustralian.com.au/nation/politics/economic-update-jobless-rate-to-hit-925pc-deficit-largest-since-wwii-josh-frydenberg-says/news-story/64c44f9b1933c6ddc8c52e5c450fed10>

able to travel into the country, large portions of the student visa cohort as well as temporary holiday visas have stopped immigrating to Australia.

Net overseas migration in 2019 reached 210,700, which included 553,500 people immigrating to Australia, and 322,900 immigrating overseas.<sup>26</sup> In 2020, the federal government forecasts net overseas migration to fall to 34,000. Experts expect this figure to remain low for most of the next decade.

For a long time, the biggest challenge against wholesale reform of Australia's visa system has been industries' overreliance on temporary migrant workers – particularly in horticulture. That is, if workers became temporarily unavailable due to teething effects of a structural change in the volume of migrant workers, it could compromise Australia's food security.

The COVID-induced record-high unemployment rate and record-low migration rate provides an opportunity to reset Australia's visa framework and establish a more dependable, compliant, and economically beneficial labour force.

It has been estimated that there could be 50,000 job vacancies in Australia's regions made available due to the cessation of inbound migration during COVID.<sup>27</sup> This is a rare and unique opportunity to ameliorate Australia's unemployment crisis and achieve wholesale reform to our visa framework which could provide economic benefits for decades.

This must involve eradicating the WHM programme and instituting a direct and on-the-ground Government employment program to engage with growers and labour hire contractors to help fill job vacancies in our regions with local workers.

When international borders begin to open up, the Australia government should respond to any future acute labour supply shortages by focusing on our regional

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<sup>26</sup> <https://www.theguardian.com/australia-news/2020/jul/07/coronavirus-means-australia-wont-meet-migration-forecasts-for-a-decade>

<sup>27</sup> <https://www.abc.net.au/news/rural/2020-06-24/working-holiday-maker-inquiry-called-migration-inquiry-suspended/12388868>

neighbouring countries, with stringent compliance procedures executed by a more robust SWP programme. This must include providing a pathway to permanent residency for all temporary migrant workers where possible. It should also be accompanied with a closer monitoring of the uptake of these programs and trends within them, to ensure no permanent or structural attributes rematerialize in our temporary migrant system.

COVID-19 has presented policymakers with an opportunity to eradicate exploitation in our labour force, and the only way to salvage that prospect is to act boldly and definitively.

## 5. A national labour hire licensing scheme

Labour hire contractors are currently at the core of compliance problems in the horticulture industry.

It is widely acknowledged that the prevalence of labour hire firms in the horticulture industry aides and abets the widespread use of undocumented workers, regularly results in non-compliance with conditions in the Horticulture Award and allows some growers to generate a perceived legal and moral distance between their business and compliance issues.

The Federal Government's Migrant Workers' Taskforce argued in their March 2019 report that the lack of a regulatory framework for labour hire firms nationally was a key motivator of non-compliance of Australian workplace laws.

Several other key investigations have similarly concluded the need for a national labour hire licensing scheme, including the Towards a Durable Future report, which identified several key insights relating to labour hire in the horticulture industry.<sup>28</sup>

This included recognising that there is a legitimate role that labour hire contractors can play in the horticulture industry. However, whilst compliant labour hire contractors can help address acute labour supply challenges, reduce recruitment difficulties and even reduce worker exploitation by centralising HR practices, the non-compliant cohort overwhelmingly undermine the industry's track record for exploitation and create an incentivised race to the bottom where firms compete on exploitative business models.

No serious progress will be made in terms of addressing compliance levels in the horticulture industry unless a national approach to the regulation of labour hire contractors is established.

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<sup>28</sup> Howe, Gibborn, Reilly, van den Broek and Wright, *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry* (2016) page 25.



For instance, the regulation of labour hire contractors that partake in the SWP significantly reduced scope for non-compliant contractors. The introduction of state-based labour hire licensing schemes in Victoria and Queensland have also successfully reduced incidences of non-compliance by labour hire contractors, and created a level playing field amongst businesses in the industry.

Problematically, the numerous schemes seek to achieve this objective with different regulatory approaches, and there remains inherent political risk with regard to a committed long-term model in any state.

For this reason, almost any review that addresses non-compliance of workplace laws in the Australian horticulture industry recommends the introduction of a national labour hire licensing scheme. *Towards a Durable Future* notes that the introduction of labour hire licensing in a number of international jurisdictions has reduced non-compliance with labour standards by contractors involved in the horticulture industry.

In short, a national scheme would require all labour hire contractors to routinely apply for a license to ensure they are complying with Australian workplace laws. There are however many architectural considerations that would impact the efficacy of the compliance the licensing regime would accomplish.

As a starting point the existing labour hire licensing schemes in Queensland and Victoria could offer the basis of a potential national model.

### **5.1. A closer look at the Queensland labour hire licensing scheme**

Labour hire in Queensland is governed by the *Labour Hire Licensing Act 2017*. From 15 June 2018, all Queensland labour hire providers have been required to hold a licence, and all users of labour hire were prohibited from engaging an unlicensed labour hire provider.

The effect of the scheme is twofold:

- It requires all labour hire providers operating in Queensland to hold a labour hire licence; and
- It restricts labour hire users in Queensland to engaging *licensed* labour hire providers.

The Act considers a person/business to be a labour hire provider if they supply a worker to another person/business to perform work, either directly or through an intermediary and if they hold an obligation to pay the worker for the work they perform.

Exemptions to the otherwise mandatory requirement that labour hire providers hold a licence include:

- Genuine sub-contracting arrangements; and
- Supply of high-income workers (in excess of \$142,000 p.a.).<sup>29</sup>

To apply for a license, the scheme requires applicants to pass a fit and proper person test which is made of both the business and each executive officer. The test involves assessing against various criteria such as the applicant's criminal history, history of insolvency, and the financial viability of the business.

Applicants must also report the number of visa workers they supply, pay a licence fee, and comply with other state and federal workplace laws.<sup>30</sup> Licenses are valid for one year from the date they are granted.

#### **5.1.1. Compliance**

The Labour Hire Licensing Compliance Unit (LHLCU) oversees regulation and compliance with the scheme. The Act grants the LHLCU broad powers to search licensees' premises and workplaces, and to conduct audits of licensees. In

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<sup>29</sup> See sections 7(4) and 8(2), Queensland Act.

<sup>30</sup> *Labour Hire Licensing Act 2017* (Qld) ss 31, 32.

addition, workers are able to lodge a complaint to the LHLCU regarding mistreatment through the internet, phone, or via an anonymous tip line.

Operating without a licence exposes the labour hire provider to penalties of:

- Up to 1034 penalty units or 3 years imprisonment for individuals; and
- Up to 3000 penalty units for corporations.

Civil and criminal penalties apply for:

- The provision of labour hire without a licence;
- The advertising of labour hire on the basis that you do not have a licence;
- Entering into an arrangement with an unlicensed labour hire provider; and
- Entering into an arrangement for the supply of a worker for the purpose of avoiding the obligations imposed by the Act.
- The names of the companies who have had their license suspended or cancelled are publicly available on the Queensland Government's website.<sup>31</sup>

## **5.2. A closer look at the Victorian labour hire licensing scheme**

Victoria's labour hire licensing scheme came into effect on 29 April 2019 under the *Labour Hire Licensing Act 2018* ('Victorian Act'). Operators were granted a six-month period to sign up to the scheme.

Where the Queensland scheme is limited to labour hire arrangements within Queensland's borders,<sup>32</sup> the Victorian scheme applies not only in relation to work performed within Victoria but also with work performed outside Victoria.<sup>33</sup>

A business requires a labour hire licence if:

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<sup>31</sup> Available at: <https://ols.oir.qld.gov.au/licence-register/>.

<sup>32</sup> Section 5, Victorian Act.

<sup>33</sup> Section 6(2), Victorian Act.

- The provider supplies one or more individuals to another person (a host) to perform work as part of the host's business or undertaking, where the provider pays the worker;
- Where the provider recruits one or more individuals to perform work as part of the host's business, where the provider pays the worker and provides them with accommodation;
- Where the provider recruits/places one or more individuals as independent contractors to perform work in and as part of a host's business or undertaking, and the provider manages the individuals contract performance; or
- Where they are part of a 'deemed labour hire' arrangement – wherein the business performs activities in commercial cleaning, horticultural and meat/poultry processing industries.
- It does not bear on whether there is a contract between the provider of labour hire and host.

To apply for a license, the scheme requires a fit and proper person test.<sup>34</sup> For example, whether in the past 10 years the person was guilty of indictable offence involving fraud, dishonesty or drug trafficking.

Licences remain in force for no longer than 3 years from the date they are granted.<sup>35</sup> Fees are tiered based on the providers annual turnover. They range from \$1,599.48 to \$7,878.92 annually.

### **5.2.1. Compliance**

Compliance with the Victorian Scheme is enforced by three arms:<sup>36</sup>

- Victorian Labour Hire Licensing Authority (enforcement and investigatory powers are similar to those available to Qld);

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<sup>34</sup> Section 22, Victorian Act.

<sup>35</sup> Section 26, Victorian Act

<sup>36</sup> Part 4, Victorian Act

- Labour Hire Licensing Commissioner; and
- Inspectors.

The Victorian Labour Hire Licensing Authority is proactive in monitoring licensee compliance with the scheme. This is achieved through a variety of means, including:

- Mandating a compliant management system (including ensuring that translation services are available to workers who report a problem);
- Campaigns and inquiries (particularly into high risk sectors); and
- Requirements that licensees must lodge information annually regarding matters such as number of workers supplied and compliance with relevant laws/industrial instruments, including migration and taxation law.<sup>37</sup>

The Authority is empowered to issue infringement notices for non-compliance, impose conditions upon the licence, and suspend or cancel the licence.

As with Queensland, the Authority publishes the names of businesses who have had action taken against them or investigations on foot in relation to their licence.

Penalties apply to the provision and use of unlicensed labour hire:

- up to 800 penalty units for individuals; and
- up to 3200 penalty units for bodies corporate.

Penalties for the use of labour hire with an unlicensed labour hire service provider:

- up to 800 penalty units for individuals; and
- up to 3200 penalty units for bodies corporate.

### **5.3. Accommodation providers**

In addition to labour hire contractors, hostels and boarding house providers play a critical role in the provision of labour to the Australian horticulture industry.

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<sup>37</sup> Section 34, Victorian Act.

Growers are heavily reliant on accommodation providers to facilitate the procurement of temporary migrant workers, but also as a means to recruit workers. A national survey of Vegetable growers revealed that 40% of growers surveyed had used labour hire firms to access workers and 29% had recruited through hostels. Growers that sourced labour from hostels were more likely to employ temporary migrants, and 15% of growers surveyed had a formal business relationship with a hostel that provided accommodation to their workers.<sup>38</sup>

*Towards a Durable Future* identified that accommodation providers can play a positive role in promoting compliant growers but can also be a source of exploitation, particularly for vulnerable migrant workers:

- *Working hostels and other accommodation providers play a central role in managing labour supply challenges in many regions by supplying farm workers to growers. Some of these also play a role in fostering greater compliance with labour standards by selectively choosing growers and only sending workers to farms with a reputation for compliant labour relations.*
- *There is considerable variation in the costs of privately-operated accommodation and transportation services both between and within different groups of workers. The more vulnerable the worker, the more likely they are to be exposed to exploitation through being forced into poor quality, high cost accommodation close to farm locations. The variation in accommodation and transport arrangements, and the degree of vulnerability of different workers, means regulation of accommodation and transport needs to be sensitive to local circumstances, and the most effective response to problems with exploitation of workers is through collaboration of the various stakeholders.*<sup>39</sup>

Given accommodation providers are another embedded source of labour for the horticulture industry and a current source of exploitation, it is appropriate for them to subject to a licensing regime which should be regulated by the same National body that has carriage of the National labour hire licensing scheme.

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<sup>38</sup> Howe, Cibborn, Reilly, van den Broek and Wright, *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry* (2016) page 86.

<sup>39</sup> Ibid at page 85.

## **5.4. A National labour hire and accommodation licensing regime for the horticulture industry**

### **5.4.1. National labour hire licensing scheme**

Given the extensive amount of work that led to the creation of the Queensland and Victorian labour hire licensing schemes, a National licensing scheme for the horticulture industry should include the key components from these schemes.

At a minimum, a National labour hire licensing for the horticulture industry must include:

- a National scope. The movement of labour across State and Territory boundaries and the extent of current compliance problems necessitates a scheme that operates on a National level;
- strict legal obligations on all labour hire contractors to be licensed and for all growers to ensure they only engaged licensed providers;
- a one-year limit on licence operating periods to ensure that labour hire contractors are subjected to regular scrutiny. This period is warranted given the extent of current compliance problems. A longer period may be considered in the future once a compliance culture is established;
- a fit and proper person test which ensures licenses are only issued to businesses that can establish they comply with all applicable industrial, immigration and safety laws and not to persons with a criminal history;
- a well-resourced National Compliance Unit. The Unit must be given extensive inspection and audit requirements and allow for anonymous complaints. It is critical that applications are properly scrutinised, and that strong action is taken against any unlicensed labour hire contractors and any growers that engage unlicensed contractors;
- a strong civil and criminal penalty regime needs to be available as a deterrent to unlawful and illegal behaviour. However, the deterrent effect will only be

achieved if a well-resourced regulator is known to be closely monitoring the industry and taking enforcement action;

- a requirement that only licensed labour hire contractors can employ visa workers and that the details of all visa workers contracted for employment are registered with the National Compliance Unit.
- a public list must be maintained of licensed labour hire contractors including any contractors who have had their licence suspended or cancelled.

**Recommendation 12: establish a national labour hire licencing scheme with minimum provisions outlined in section 5.4.1., and allow unions for enhanced right of entry provisions to check time and wages record for all workers on short notice to enforce compliance.**

#### **5.4.2. National accommodation provider licensing scheme**

The regulatory body given responsibility for administering a National labour hire licensing scheme should also administer a licensing regime for hostel and boarding house operators that provide accommodation to workers in the horticulture industry.

The accommodation licensing scheme should be similar to the labour hire licensing scheme and include the following elements:

- a National scope. The movement of labour across State and Territory boundaries and the extent of current compliance problems necessitates a scheme that operates on a National level;
- strict legal obligations on all accommodation providers to be licensed and for all growers to ensure people working on their farm are staying with a licensed accommodation provider;
- a one-year limit on licence operating periods to ensure accommodation providers are subjected to regular scrutiny. This period is warranted given the extent of current compliance problems. A longer period may be considered in the future once a compliance culture is established;



- a fit and proper person test which ensures licenses are only issued to businesses that can establish they comply with all applicable laws and in particular are providing accommodation of a sufficient standard and at a reasonable price;
- a well-resourced National Compliance Unit. The Unit must be given extensive inspection and audit requirements and allow for anonymous complaints. It is critical that applications are properly scrutinised, and that strong action is taken against any unlicensed accommodation providers and any growers that engage unlicensed providers;
- a strong civil and criminal penalty regime needs to be available as a deterrent to unlawful and illegal behaviour. However, the deterrent effect will only be achieved if a well-resourced regulator is known to be closely monitoring the industry and taking enforcement action; and
- a public list must be maintained of licensed accommodation providers including any providers who have had their licence suspended or cancelled.

**Recommendation 13: establish a national accommodation provider licencing scheme with minimum provisions outlined in section 5.4.2., and remove any prohibitions on allowing unions to exercise right of entry on accommodation.**

## **6. Downward pressure – a supply chain accreditation scheme**

As explored throughout this submission, the supply chain arrangements in the horticulture sector can be complex and their structure can pose a significant obstacle to ensuring that minimum legal standards are observed at all levels.

In the horticulture sector, as with many others, the supply chain is expanded with middlemen such as labour providers. Such arrangements permit the offloading of liability regarding legal minimum entitlements to other actors in the supply chain rather than the actor for which the work is being performed, which complicates an otherwise straightforward relationship. For example, growers may use a labour hire provider or other less credible or established sources for the provision of labour during the harvesting season.

Additional layers in the supply chain have the effect of placing further barriers to ensuring that people employed in the sector receive their minimum legal entitlements. Although accreditation schemes are voluntary measures and should not be used as a singular regime to improve conditions in an industry, accreditation schemes can be very useful as a complement to a broader policy and regulatory approach.

In addition to seeking improvements in the sector via legislative means, regulatory enforcement by government bodies, and through additional appropriate legal powers of relevant unions in the sector, it is certainly possible to bring about further change in the sector through the establishment and proliferation of an accreditation scheme only accessible by actors in a fully compliant supply chain. The use of an accreditation scheme has the potential to positively impact compliance with minimum legal entitlements and should be considered in any proposed solution to rampant and intentional non-compliance in a sector. Importantly, accreditation schemes can assist in increasing the power of two important actors within the supply chain: the end retailer and the customer.

## **6.1. Overview of Accreditation Schemes**

Accreditation schemes are created with the registration of special categories of trademarks called Certification Trade Marks (CTM). CTMs require a set of rules that must be met in order for an entity to be able to display the CTM on their product. Anyone wishing to display the CTM must apply to the owner of the CTM. The process of obtaining a CTM involves Intellectual Property Australia and the Australian Competition and Consumer Commission (ACCC). Should an entity display a CTM without approval from the owner, penalties apply for misleading conduct – up to \$1.1 million. Relevantly, the rules of a CTM must specify the following:

- The requirements that users must meet for the CTM to be applied to them;
- The process for determining whether the goods or services meet the certification requirements;
- The attributes that a person must have in order to become an approved certifier in relation to the CTM;
- The requirements that the owner of the CTM, or approved user of the CTM, must meet in order to use the CTM in relation to goods or services;
- Any other conditions imposed on CTM users such as fees, or restrictions on the use of the CTM in advertising;
- A dispute resolution procedure for where there is disagreement around whether the good or service meets the CTMs requirements;
- A dispute resolution procedure for any other issue relating to the CTM itself; and
- Any other matter the ACCC requires to be included.

A distinct advantage of the use of accreditation schemes via CTMs is the direct, identifiable manner in which consumers can make purchasing decisions on the basis of what the scheme promotes. Of course, as the consumer will be involved in the regulation of supply chains through the use of an appropriately registered CTM,

legislated consumer protections will apply<sup>40</sup>, which are enforced by the ACCC. The ACCC takes a proactive and robust approach to the regulation of consumer rights and should misleading conduct related to the use of a CTM be discovered and reported, the offending entity may be subject to significant fines and other penalties. Owners of a CTM are also entitled to sue any business using the CTM without permission or for any infringement on the trademark.

## **6.2. Consumers**

One unique feature of an accreditation scheme that is generally missing from other methods of improving conditions for workers in a particular sector is the direct involvement of the end consumer. Well-known accreditation schemes have proven to assist consumers to ‘vote with their dollar’ by identifying a feature of a particular product that consumers may wish to support. For example, RSPCA Australia’s ‘RSPCA Approved Farming’ scheme identifies for consumers animal products that have been produced consistent with current standards in animal welfare. Should a consumer wish to support this initiative, they will choose to buy the products that display this particular CTM. Other initiatives include Fair Trade and Ethical Clothing Australia.

Consumers have been proven to make purchasing decisions in a supermarket setting on the basis of the identification of elements of the product that they wish to support.<sup>41</sup> The introduction of an accreditation scheme will allow consumers to become directly involved in the rewarding of actors in the horticultural supply chain that provide workers with their legal entitlements, and effectively punish those who don’t. Ethical consumers can reward growers, logistics operators and retailers for ethical choices that do not exploit workers and deny market share to bad actors.

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<sup>40</sup> See Schedule 2 of the *Competition and Consumer Act 2010* (Australian Consumer Law).

<sup>41</sup> For example, consistent consumer education of the conditions in which battery hens live has seen a sharp increase in the market share of free-range eggs in Australia – from 20.3% of total volume in 2006 to 47% of total volume in 2019. Conversely, cage eggs have sharply decreased in market share from 74.9% of total volume in 2006 to 40% of total volume in 2019. Please see annual reports of Australian Eggs Limited.

This would have a powerful impact and help to smash the business model of exploitation that is currently rampant in the sector.

### **6.3. Public Relations Opportunities**

Unlike regulatory schemes that necessarily deal with the disincentivisation of *bad* behaviour, accreditation schemes provide companies with an opportunity to deal with a negative feature of their business – here, exploitation that exists in their supply chains – in a ‘positive’ way through a public relations lens, which amounts to incentivisation of *good* behaviour. Companies that are at risk of being implicated in exploitative behaviour or arrangements, particularly those which exercise a degree of authority over the supply chain, may be especially attracted to seeking to remove these elements of the supply chain internally and on a voluntary basis via an accreditation scheme rather than externally through the imposition of regulation.

By voluntarily signing up to an accreditation scheme developed specifically to deal with a negative feature of its business, a powerful actor in a supply chain can show itself to be actively pursuing improvements in the sector and use this to its advantage in advertising as an example of it exercising its corporate social responsibility. When this is contrasted against changes in a supply chain being made as the result of regulatory behaviour that attracts fines and negative publicity, it would appear to be an easy choice for such actors.

### **6.4. Powerful Supply Chain Actors**

Clearly, an accreditation scheme that only involves the actors in a supply chain that have little influence in the supply chain itself will prove itself a failure in forcing positive change very quickly. For a voluntary scheme to have any impact on lawlessness and noncompliance in an industry, it is essential that the most powerful actors in a supply chain are active participants.

As addressed above, such actors may be motivated to participate in an accreditation scheme on the basis of good publicity, claims of corporate social responsibility, and in preference to the other methods of addressing widespread, systematic exploitation within the actor's supply chain.

The most powerful actor in a supply chain controls, to a certain extent, the economic reality of those actors below it. Should a powerful actor in a supply chain, which in the case of the horticulture sector would be a major supermarket, actively participate in a scheme that recognises lawful practices at all levels of the chain, the effect would be that actors that are not recognised as such will be effectively prohibited from providing goods for that supermarket to sell. Thus, compliance with legal entitlements is incentivised and the competitive advantage derived by illegal operators undercutting legitimate ones with exploitation business models will be at least partially dealt with, as a major sector of the market is established solely for those operators which are legitimate and recognised as such. Again, business models that rely on exploitation will be smashed, while those that are built on legal and ethical practices will be rewarded with market access.

### **6.5. A Genuine Tripartite Initiative**

Another potential benefit of establishing an accreditation scheme in conjunction with regulatory and legislative improvements is the opportunity to establish a genuine tripartite initiative between unions, government and industry that seeks a common goal.

Although unions and industry may have opposing interests from time to time, both have an interest in the eradication of exploitation and assisting the proliferation of legitimate, compliant businesses and protecting these businesses from being undercut by other businesses in the sector that can 'afford' to do so by means of exploiting the workforce. The Government has an inherent interest – and indeed an obligation – to ensure that people performing work in Australia receive their minimum entitlements and are not subject to exploitative or inhumane conditions.

## 6.6. A Test Case for Regulation

It is necessary for legislative change, increased regulation and an accreditation scheme to work in conjunction to remove exploitation in the horticulture industry. However, as the wheels of legislative change can move slowly and an accreditation scheme can be formed and proliferate relatively quickly, the lessons learned by, and outcomes of an accreditation scheme may be useful in determining what aspect of the horticulture industry require the most regulation and the most legislative intervention.

Further, an accreditation scheme, properly supported by unions, industry and government, may potentially serve as a precursor to even more regulatory measures for the sector. To be clear, the case for the requirement of immediate regulatory and legislative change has been made for the horticulture sector, and it is very convincing. These changes must be made and must be made quickly. An accreditation scheme can test the appetite for voluntary change within the sector, and if successful perhaps no regulatory and legislative amendments other than those already posed in this submission will be required. If unsuccessful, this may be compelling evidence that more regulatory and legislative change is required.

### Case Study: Ethical Clothing Australia

Ethical Clothing Australia (**ECA**) is an organisation created by the then Textile, Clothing and Footwear Union of Australia (**TCFUA**) in collaboration with business and employer groups representing the clothing industry in Australia, such as the New South Wales Business Chamber and Australian Industry Group.

The organisation was created in 2000 in response to the TCFUA's growing concern regarding the exploitation of what is referred to in the industry as 'outworkers' – people working from their homes or from another residential setting such as a

garage. These workers are particularly vulnerable to exploitation, wage theft and working in unsafe work environments.

ECA created an accreditation scheme through a CTM initially titled 'No Sweatshop Label', which was later re-branded as 'Ethical Clothing Australia'. The first business to apply for accreditation through the scheme was Australian Defence Apparel – the owner of the largest uniform manufacturing facility in Australia – in November 2000. Australian Defence Apparel is still an accredited business with the scheme.

The major focus of ECA has been the accreditation of manufacturers in the textile, clothing and footwear (**TCF**) industry. To be successful in accessing the CTM for Ethical Clothing Australia, a business must apply to ECA and commit to an independent audit undertaken by the TCFUA (now part of the Manufacturing Division of the Construction, Forestry, Maritime, Mining and Energy Union) to ensure that all workers are receiving appropriate pay and entitlements in accordance with the relevant Modern Award and that there is a safe work environment.

Once accredited, the business can use the CTM on their Australian made products only and can advertise compliance with the scheme. To remain accredited, a business must submit to the audit each year and comply with the Code of Practice developed by ECA. Accreditation fees start at \$320+GST per year.

ECA is most likely the only accreditation scheme in Australia that specifically and actively targets compliance with Australia's workplace laws and instruments and involves the relevant trade union – undeniably an expert in the industry – as a key part of the process. The union also provides training, education and information kits to relevant businesses (particularly local businesses) regarding their legal compliance with workplace laws.

ECA has received funding from the Federal Government (2008-2012) and the Victorian State Government (2015-2020) throughout its 20-year existence, and has been successful in identifying manufacturers and retailers in the TCF industry that



are committed to meeting their respective workers' legal entitlements, and in some cases to manufacturing the majority of their garments in Australia.

Unlike the TCF industry, the retail market for products of the horticulture industry is highly concentrated due to the proliferation of large supermarket chains such as Coles, Woolworths and ALDI.<sup>42</sup> Due to the sheer size of these supply chain actors, securing the explicit support of one or all of these chains has the potential to meaningfully increase compliance within a not insignificant sector of the horticulture supply chain. The attraction for such chains is of course these companies being able to show that they are actively dealing with worker exploitation as an issue in their supply chains, rather than being only reactive regarding such exploitation when it is uncovered.

Additionally, one main challenge that was in place for ECA was the identification of the number of outworkers in the industry due to the clandestine and mobile nature of sweatshops in Australia. This issue will not be as pronounced for the horticulture industry due to the scale of the farms and facilities where products are grown and harvested.

Noting the intermittent Government support for ECA despite its goals being undoubtedly government business, the RSCA proposes that the Federal Government is directly involved in an accreditation scheme for the horticulture industry – from concept to enforcement.

### **6.7. Accreditation Scheme for the Horticulture Industry**

The RSCA proposes to create an accreditation scheme for the horticulture sector that chiefly focuses on the removal of worker exploitation at all levels within the supply chain – from grower to retailer. As the RSCA seeks a tripartite approach to this scheme, we suggest the scheme is developed, administered and enforced by a separate not-for-profit organisation that is created solely for that purpose. This

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<sup>42</sup> Coles has over 800 supermarkets nationally, Woolworths almost 1000, and ALDI over 500.

organisation will be funded by the Federal Government, industry and unions, and the executive will comprise of representatives of each. As a separate, tripartite body, the organisation will be viewed as legitimate and impartial in its operation.

Once this organisation is established, an accreditation scheme, along with the CTM and the required rules for the CTM, will be developed with input from all of the representatives. The scheme for the horticulture supply chain can be based simply on a requirement for 'best practice' – in the case of the horticulture supply chain, this translates to transparency of operations and compliance with minimum employment entitlements and working arrangements for all employees.

The RSCA will actively approach large supermarket chains – some of which it already has formalised relationships with – throughout the development process to secure their support and active participation in the scheme. These chains, as the most powerful actors in the horticulture industry supply chain, will provide a strong incentive to the actors sitting at the levels below to seek accreditation and maintain compliance with the scheme.

Once the scheme is developed, the process of creating and applying for a CTM will be followed by the organisation. Once the CTM is established, the organisation can assess applications for the use of the CTM and receive fees for the usage of the CTM on a business's product. The organisation can use these fees, in addition to funding received from the Federal Government, to enforce the use of the CTM and provide education and support in the sector.

An accreditation scheme would work toward ensuring consumer-driven compliance of workplace standards in a way that visa reform and a national labour hire licencing scheme could not. This would impose an implicit externality tax on labour hire contractors and growers that are not accredited, and establish a level playing field amongst good and bad actors in the industry.

**Recommendation 14: Establish a tripartite body of Government, industry and unions to oversee an industry accreditation scheme, including a labour hire accreditation scheme.**

## **7. Enforcement and compliance**

As explored in section 2 of this submission, non-compliance of Australian workplace laws in the horticulture industry is rampant. This has been uncovered not because of a material increase in regular prosecution activity, but because of concerted activities, underpinned by media interest and parliamentary scrutiny, that have sampled the sector and uncovered horrifying instances of exploitation.

The fact that for well over a decade exploitation cases in the horticulture industry have increased considerably without any adjustments to the modus operandi of government agencies is unacceptable. Whilst reform to the visa system and the introduction of a national labour hire licencing regime are critical, further consideration to the existing efficacy of government enforcement activities are required.

In summary, the RSCA believes the lack of enforcement in the horticulture industry is driven three major factors.

1. The Fair Work Ombudsman (FWO), as the key government agency for ensuring compliance, is significantly under-resourced. In the 2019-20 Federal budget the FWO was allocated approximately \$110 million which, when compared to 2009-10, is a funding reduction in real terms.
2. The FWO does not have the legislative powers to investigate and prosecute against breaches of the Modern Slavery Act.
3. Unions traditionally ensured industry sector award compliance through workplace inspections/investigations with time and wages checks of all employees. Ongoing legislative restrictions on how unions undertake these activities have enabled the exploitation of agricultural and horticultural workers to become normalised to point where non-compliance is now the normal industry practice.

Each of these challenges could be ameliorated by the following solutions.

### **7.1. An increase of funding to the FWO**

An increase in funding to the FWO of \$15 million each year for 5 years would provide the ombudsman a requisite coverage of exploitation across an industry that is geographically challenging to access and regulate. The funding must be quarantined towards a dedicated agriculture and horticulture compliance team of 90 FWO inspectors who are based in regional agricultural and horticultural centres.

The investigative and enforcement powers of all FWO inspectors should be amended to allow all FWO inspectors to investigate and act on modern slavery in all industries including the agriculture and horticulture industries.

As industry compliance is proven to return to normal levels this team and funding can be reduced, however an ongoing dedicated regionally based agriculture and horticulture compliance team of FWO inspectors must be retained as a deterrent for the foreseeable future.

**Recommendation 15: increase FWO funding by \$15 million per annum for five years, and expand FWO inspectors investigative powers to include acts of modern slavery.**

### **7.2. Stronger and enforceable audits and union inspection rights**

#### **a) Growers**

Growers are the critical link in the supply chain. It is on the farms and in the packing sheds where the exploitation of vulnerable workers is most likely to occur.

Industry developed self-compliance audits and programs like Fair Farms are perhaps well intentioned but lack reliability, enforcement and are often toothless or 'paper audit' process with little credibility. To provide workers and the community with any assurance of compliance to the law, they need a worker's engagement

and actual on the ground checks. On farm compliance audits would require that growers are ensuring workers on their farms are being paid correctly and not exploited.

For industry compliance audits to be truly effective they need to have unannounced on-farm audits conducted by independent auditors with actual industry compliance knowledge. Industry compliance audits should be required to have the following minimum requirements.

- Have endorsement from the relevant worker representatives to ensure they properly address worker exploitation.
- Have the requirement for growers to cooperate with unannounced independent on-farm audits.
- Have agreed independent auditors who are appointed through a tripartite process between the major retailers, Unions and industry.

## **b) Freight**

Further down the supply chain of the horticulture industry in freight, there are a large number of transport operators, where the industry contains low barriers to entry and high levels of competition. The retail supply chain accounts for one-third of Australia's road freight movements and transport operators compete on extremely low margins (sometimes at or below cost) in a price-taking environment.

Sub-contracting throughout the supply chain is rife and, in many cases, both the retail client and head contractor do not have complete visibility or transparency as to who is carrying their freight and the conditions under which they are operating.

Where Enterprise Agreements have been struck with major transport companies who perform retail work there are some controls that exist in relation to work that major transport companies have directly contracted out, such as:

- Minimum rates of pay and conditions provided to employees and/ or owner-drivers of sub-contractors;
- WHS and Industrial Inductions of employees and/ or owner-drivers of sub-contractors;
- The ability of the Union to audit sub-contractors to ensure they are meeting their minimum obligations and with the ability for the major transport company to take action against sub-contractors who are failing to meet these obligations; and
- Requirements for employees and/ or owner-drivers of sub-contractors to undertake minimum training requirements, adhere to safe driving plans and other safety mechanisms.

However, outside of these direct contractual relationships between major transport companies and sub-contractors (and where an Enterprise Agreement allows the above to occur), the only other mechanisms that are available to investigate and enforce against transport operators who are not complying with their minimum employment obligations is for the Union to individually pursue companies (limited by restrictions in the Fair Work Act) or the Fair Work Ombudsman to undertake investigations. Both of these options are time-consuming, costly, inefficient and will generally only uncover one example at a time when the problem is systemic in nature. It has been established by academic reports, parliamentary inquiries, coronial findings and industrial tribunals that rates and methods of pay on the one hand are directly linked to safe performance of work on the other.<sup>43</sup> One obvious

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<sup>43</sup> *Safe Payments Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry*, the National Transport Commission with the Honourable Lance Wright QC and Professor Michael Quinlan, October 2008. See also: *R v Randall John Harm*, District Court of New South Wales, per Graham J, 26<sup>th</sup> August 2005; *Long Distance Truck Drivers: On road performance and economic reward*, December 1991, Federal Department of Transport and Communications; *In Re Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No 2)* [2006] NSWIRComm 328 the Full Bench of the Industrial Relations Commission of NSW said: “we consider that the evidence in the proceedings establishes that there is a direct link between methods of payment and/ or rates of pay and safety outcomes”; *National Road Freight Industry Inquiry, Report of Inquiry* to the Minister for Transport, Commonwealth of Australia, (1984), Canberra; *Beyond the Midnight Oil, An Inquiry into the Managing Fatigue in Transport*, House of Representatives Standing

example is that breaches in terms of minimum rates of pay and the inability of transport operators to cover their costs can lead to breaches of fatigue management laws which has deadly consequences for both transport workers and all road users.

In a recent Federal Court Decision in relation to major retailer Aldi's supply chain, when looking at outsourced work performed on the 'in-bound' leg and the amount actually received by the transport worker (that is, work arriving into the distribution centre), the Court found that Aldi 'had no knowledge or paid insufficient attention to the amount received (if any)'.<sup>44</sup> Further, the Court found that 'the pressure put on drivers transporting Aldi goods inevitably, but regrettably, occasioned contraventions by drivers of safety standards imposed by Aldi.'<sup>45</sup>

To ensure that these issues are addressed, an independent body with responsibility for safe standards of work including fair pay and conditions must be established in the retail road transport supply chain. The powers of such a body must include:

1. Universal application of a system of binding, enforceable and safe standards. The standards will cover all parties in the transport supply chain / contract networks to ensure safe performance, planning and appropriate payments. The standards will focus on eliminating economic and contractual practices that place undue pressure on transport supply chains / contract networks;
2. Appropriate, enforceable payments and related conditions for all operators and workers, regardless of label;
3. The capacity to resolve (including where necessary through binding decisions) transport supply chain / contract networks disputes;
4. Appropriate and adequate enforcement regime; and

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Committee on Communication, Transport and the Arts, October 2000, Canberra; C. Jones, J. Dorrian and D. Dawson, 'Legal Implications of Fatigue in the Australian Transportation Industries', 45 *JIR* 344 at 351; Professor Michael Quinlan, *Report into Safety in the Long Haul Trucking Industry*, A report Commissioned by the Motor Accidents Authority of New South Wales, 2001, Sydney; R Johnstone, 'The Legal Framework for Regulating Road Transport Safety: Chains of Responsibility, Compliance and Enforcement', March 2002, National Research Centre for OHS Regulation, the ANU; *WorkCover Authority of NSW v Hitchcock* (2005) 139 IR 439.

<sup>44</sup> *ALDI Foods Pty Limited as General Partner of Aldi Stores (a Ltd Partnership) v Transport Workers' Union of Australia* [2020] FCA 269 at [99].

<sup>45</sup> *Ibid* at [101].



5. Appropriate resourcing of supply chain / contract networks auditing, training and education through an industry fund.

**Recommendation 16: establish an independent body with responsibility for safe standards of work including fair pay and conditions that operates exclusively on the transport supply chain.**

### **c) Retail**

Workplace exploitation in the retail sector has become increasingly prevalent. This is driven by a combination of insufficient FWO penalties and the constrained capacity of trade unions to inspect workplaces and enforce compliance.

A Senate Committee established to inquire about exploitation across 7-Eleven retail stores found consistent evidence of systemic exploitation widespread across the country. The egregious findings were found to be commonplace across the franchise sector more broadly and included the following.

- **Unpaid training** – workers were required to perform unpaid work as a trainee employee;
- **Half-pay scam** – workers were issued pay slips outlining their work hours were half their actual hours, halving their pay;
- **Cash-back scam** – following the breaking of the story in the media, some franchisees started to pay workers correctly only to force workers to pay back a substantial part of their wage, in cash, back to the franchisee. This cash was then used to pay other workers in cash;
- **Common Bank Account** – large groups of workers had their wages paid into a common bank account owned by the Franchisee. It was up to the Franchisee how little to pay the worker;
- **Unpaid Superannuation** – workers were paid little or no superannuation;
- **Work Health and Safety** – many workers were subject to violence at work by customers, no compensation was provided for workplace injury;
- Staff required to pay for drive offs and for goods stolen by customers; and

- **Visa rorting by 7 Eleven Franchisees** – evidence that franchisees were procuring payments from vulnerable workers with a view to sponsoring them on a 457 visa.

Trade unions play an essential role in helping workers' understand their employee rights and identify exploitation. When unions work with their members to discover exploitation, and when they audit exploitation across a sect of their membership, malpractice and theft becomes less common.

In the case of 7-Eleven, exploitation was concealed because those subjected to it were not union members. Trade unions must be afforded the proper legislative powers to ensure effective compliance of their entire area of coverage, outlined within the industrial relations system.

Existing Right of Entry laws impede upon trade unions' responsibility to enter workplaces suspected of underpaying their employees. Given the lack of enforcement capacity of the Fair Work Ombudsman, as articulated in this submission, it is essential that trade unions have their inspection and enforcement powers restored in full.

### **7.3. Union ROE – seeking information and relevant residential sites**

#### **7.3.1. Undocumented cash payments and underpayments**

The current restrictions imposed on Unions to conduct simple time and wages checks of all employees operating in horticultural workplaces encourages non-compliance.

Currently, for a Union to access the pay records of non-members they are required to make an s483AA application. This process is time-consuming and requires the Union to demonstrate the likelihood of serious and ongoing breaches of the Act.

Whilst this process is underway the employer has the opportunity to move (hide) undocumented workers and cash payments.

**Recommendation 17: all s483aa applications in the horticulture industry should be automatically granted within 24 hours.**

### **7.3.2. Undocumented workers and modern slavery**

The current Right of Entry (ROE) notice periods for Unions to conduct workplace inspections for suspected contraventions of the Fair Work Act and other instruments of workplaces operating in the horticultural industry encourages non-compliance.

Currently for a Union to access a workplace to conduct an inspection on behalf of a suspected contravention of the Act, the Union must provide at least 24 hours' advance notice to the employer.

This advanced notice provides the employer the opportunity to move (hide) undocumented workers and slavery practices.

A Union also cannot access employees' accommodation as part of an inspection on behalf of a contravention of the Act.

This restricted access to workers accommodation allows employers to charge workers exploitative fees for substandard accommodation. It also allows employers the opportunity to hide undocumented workers and slavery practices.

**Recommendation 18: the entry notice provisions in section 518 of the Fair Work Act should be amended to include agricultural and horticulture industry employees in same category as TCF outworkers.**

### **7.4. Audit based on modern slavery act obligations.**

The current requirements under the [2018 Commonwealth Modern Slavery Act](#) (2018 MSA) require businesses with a turnover of more the \$100 million to report on their compliance with the Act each year. The 2018/19 reports are due by March 2021 and will be made public for review.

Despite this requirement, there are no provisions in place to ensure that the report is independently audited and that the public report is used to enforce provisions in real-time, rather than several years later.

**Recommendation 19: Businesses in the horticulture industry who are required to report on modern slavery compliance should be subject to independent auditing, a responsibility that could be bestowed onto unions.**

#### **7.5. Government funding for unions to assist in properly regulating the sector**

The federal government should make grants available to unions that are capable and willing to audit and report on workplace compliance in the horticulture industry. This could reduce the total cost impost on the FWO which would have to station regional operators, and instead solicit the services of unions that are already regionally located or visit sites.

By way of example, unions employ trained organisers with significant industry experience who understand the unique challenges faced by employers and workers in these industries. These officials are familiar with workplace law and frequently visit regional sites on account of their general workplace organising responsibilities. The benefits to the industry and enforcement of the law would be several-fold.

- Provide government, workers and industry with certainty around the independence of compliance checks.

- Ensure integrity of compliance with industry-based programs like the Fair Farms initiative to ensure any employers purporting to adhere to higher standards are in fact compliant.
- Provide a model for industry compliance enforcement at half the cost of the minimum funding needed for the FWO.
- Conduct intelligence-based award education and compliance checks through the current and enhanced ROE provisions.

**Recommendation 20: the Federal government provide grants to unions that are capable and willing to independently audit horticulture employers on their compliance with Australian workplace laws.**

#### **7.6. Stronger penalties for breaches**

##### **a) Civil**

The degree of exploitation in the horticulture industry is evidence that civil penalties imposed on unlawful operators is not enough to deter non-compliance.

In addition, there are many instances where unscrupulous employers evade their penalties by declaring bankruptcy and general phoenixing activity.

To combat these challenges, the Victorian government has recently enacted wage theft legislation which seeks to address serious wage theft and workers exploitation as criminal matters.

In effort to deter the structural exploitation in the horticulture industry the federal government should give serious consideration to developing and enacting legalisation that makes serious and intentional wage theft and worker exploitation a criminal offence punishable by imprisonment.

**Recommendation 21: introduce legislation to criminalise wage theft and serious breaches of intentional workplace exploitation.**