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SUBMISSION TO THE DEPARTMENT OF AGRICULTURE

Working holiday maker visa review

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About the authors

This submission has been prepared by the research team commissioned by Horticulture Innovation Australia to investigate labour supply options in the Australian vegetable industry (VG 15025, 2016). The research report, due in December 2016, will make recommendations as to how the labour needs of the Australian vegetable industry could be better addressed.

The research team consists of four researchers: two migration law scholars from the University of Adelaide (Associate Professor Alex Reilly and Dr Joanna Howe) and two employment relations scholars from the University of Sydney (Associate Professor Diane van den Broek and Dr Chris F. Wright).

The project employs a three stage mixed methodology approach, comprising of a literature review, an empirical stage encompassing a national survey of vegetable growers and case studies in two locations and the writing of the research report. Throughout the project the input of stakeholders has been sought. In carrying out the empirical stage, the project has been supported by the state vegetable bodies: VegetablesWA, AusVegSA, AusVeg Victoria, NSW Farmers and Growcom.

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Executive Summary

The Australian horticulture sector faces ongoing labour supply challenges. At present these are largely met through a combination of local workers and temporary migrant workers employed under the Seasonal Workers Programme (SWP) or on Working Holiday Maker (WHM) visas. As the latter group forms a significant portion of the harvest workforce, there should be no major regulatory change to the Working Holiday Maker visa without a set of corresponding reforms to other visa categories and the employment and social policy that governs local workers' engagement in the horticulture sector.

The proposal to increase the marginal tax rate for WHMs to 32.5% should be rejected at present. This tax rate is likely to deter WHMs from coming to Australia and to work in horticulture. This will necessarily increase the labour supply challenges facing the horticulture sector. It may be that there is a case for reducing the number of WHMs in the industry, but any change in current policy settings needs to be made in a coordinated way relying on a strong evidence base. At the present time, it is unclear how a shortfall in harvest workers caused by a reduction of WHMs could be met in the short to medium term. It is unlikely the shortfall could be met by the SWP in its present form or by increasing the numbers of local workers through incentives for the youth employed. Although both of these options provide scope for meeting the future labour needs of the horticulture sector, and there may be other regulatory solutions worth considering, more research needs to be done to establish the most reliable and productive workforce for the sector.

Another set of challenges facing the horticulture sector is the continuing vulnerability of its workforce. In part, this is due to the presence of unscrupulous migration and labour intermediaries. Whilst the use of these intermediaries, particularly when offering a labour hire service, has the potential to undermine labour standards for workers, we submit these risks can be largely moderated through a targeted and strong regulatory framework involving adequate sanctions for non-compliance which are properly enforced.

It is clear to us that there needs to be reform that provides the horticulture sector with a reliable and productive workforce. Nonetheless, as we are yet to receive the results of our national survey of vegetable growers and to complete our in-depth case studies as part of our project for Horticulture Innovation Australia, we are reluctant to propose what shape this reform should take. The results of our research project will be available at the conclusion of 2016 and we urge the Review to refrain from recommending substantial reform of the WHM programme until this time.

Recommendations

Theme #1: Visa labour needs of the agriculture and tourism sector

1.1 There should be no significant change made to either the SWP or the WHM visa until the publication of the research report commissioned by Horticulture Innovation Australia examining labour supply challenges in the Australian vegetable industry at the end of December 2016.

1.2 As the WHM programme presently plays a far more significant role in meeting the labour needs of the Australian horticulture sector than the SWP, any change in the regulatory framework needs to be done very carefully, and so as not to create a sudden gap in labour supply in the sector. A reform, such as the proposed introduction of a 32.5% tax rate for WHMs, that will have an adverse impact on labour supply, must be done in conjunction with complementary reforms to other migrant worker programmes.

Theme #2 Tax treatment for visa holders

2.1 The proposed tax rate of 32.5% from the first dollar earned should not be introduced.

2.2 At the present time, whilst both the WHM 2nd year visa extension and the SWP are being used to meet labour supply needs in the horticulture sector, we recommend that WHM visa holders should receive the same tax treatment as SWP visa holders. As such, WHM visa holders should pay a marginal tax rate of 15% from the first dollar earned. We recommend that in the near future, a further review be conducted of appropriate tax rates which compares the tax rates of all migrant workers, including SWP works WHMs, international students and 457 visa holders, and compares the tax rates in Australia with equivalent tax rates for migrant workers in other countries.

Theme #3 Relevant unemployment policies

3.1 The deployment of youth unemployed via the PaTH program will not sufficiently address the horticulture sector's labour needs for picking, packing and grading work during harvest time. PaTH should not be viewed as a suitable program for the horticulture sector and internships should not be given for these positions.

3.2 However, we support the development of other policies to attract youth unemployed to the horticulture sector as long as these workers are paid at, or above, the minimum wage and are given opportunities for continuing employment and career development. More work needs to be done in this area to encompass the full breadth of issues that contribute to labour challenges in the sector.

Theme #4: Protections for vulnerable workers

4.1 There needs to be greater regulation over the use of migration and labour intermediaries in the Australian horticulture sector. The regulatory framework should involve a mandatory licensing and auditing scheme overseen by an independent statutory agency.

4.2 The Fair Work Ombudsman, with its expertise in the horticulture sector, protecting vulnerable workers and conducting industry and workplace investigations, would be well-placed to have its remit expanded to coordinate the licensing and auditing scheme.

Response to the themes of the review

There are currently three main sources of workers in horticulture in Australia:

- Australian resident workers, also known as ‘local workers’;
- temporary migrant workers recruited under the Seasonal Workers Programme (SWP); and
- temporary migrant workers recruited from the Working Holiday Maker Programme (WHM).

Although SWP workers make up a small minority of the horticultural workforce,¹ they are highly valued as a stable, reliable and productive source of labour in horticulture.² However as this submission will demonstrate, the regulatory requirements of the SWP has led to its inadequacy in meeting the labour needs of some growers. There is a well-known ‘substitution effect’ whereby growers exhibit a preference for WHM workers over SWP workers due to the onerous requirements of employing SWP workers.

WHM workers remain an important element of the horticultural workforce but their length of stay and commitment to working in the sector is often confined by their desire to meet the 88 day work period requirement in order to gain a second year on their WHM visa. The key attribute of WHMs as a labour source is their flexibility. There are no restrictions to the work entitlements in their visas, other than a restriction that they cannot work for more than 6 months with one employer. This means that like local workers, they are able to move to where work is available. The flexible nature of the WHM visa lends itself to certain types of horticulture harvesting, with the stop-start nature of harvesting for certain produce (for example, grapes and cherries) lending itself to a reserve workforce that can quickly respond to sporadic, short-notice and short-term requests for labour.

The proportion of Australian local workers employed in the horticultural workforce has decreased over time and – without significant changes in labour market conditions, management practices and employment and social policy – it is unlikely this trend will reverse or that local workers will be able to replace WHM workers if the introduction of the backpacker tax leads to a decline in WHM numbers coming to Australia and working in horticulture. Farms tend to be located remotely away from population centres making it difficult to find workers, which is compounded by the relatively dirty, arduous and low-paid nature of farm work and the limited career opportunities it provides.³ Local workers tend to prefer stable, predictable work and are generally less willing to move to regional locations for seasonal work where accommodation services are patchy. Demographic analysis suggests that the regions find it difficult to retain Australian young people⁴, and recent industry

¹ In 2014-15, the cap was increased to 3250, and there were 3177 workers in the SWP: Department of Employment, Australian Government, *Annual Report 2014–15* (2015) 21 <https://docs.employment.gov.au/system/files/doc/other/em15-0085_emp_annual_report_2014-15_acc_20052016.pdf>.

² Leith R and Davidson A (2015) ‘Measuring the efficiency of horticultural labour: case study on seasonal workers and working holiday makers’, *Farm Policy Journal*, 12(2): 47-52

³ Geoff Mason and Wiemer Salverda (2010) ‘Low pay, living standards and employment’, in Jérôme Gautié and John Schmitt (eds), *Low Wage Work in the Wealthy World*, New York: Russell Sage Foundation, pp. 35-90, at p. 47

⁴ This is particularly the case for young people up to their mid-twenties, after which there is net migration to the regions. <http://www.regionalaustralia.org.au/wp-content/uploads/2014/11/Talking-Point-Super-Boomers-FINAL.pdf>

attempts to re-engage with, and recruit local workers have not been able to address the labour needs of the sector in anything more than a marginal way.⁵

Having provided this brief overview over how the horticulture sector's labour needs are currently being met, this submission will now turn to an examination of the issues raised by the four themes of the review.

Theme #1: Visa labour needs of the agriculture and tourism sector

This section of the submission will confine itself to a discussion of the visa options for filling labour needs of the Australian horticulture sector as this is within the research team's field of expertise.

Two regulatory initiatives seek to assist horticulture employers to meet their labour needs at harvest time. Both the Seasonal Workers Programme (SWP) and the opportunity for a second year on the Working Holiday (WH) visa following an 88-day period of paid employment in certain industries, were introduced, at least in part, to ameliorate labour supply challenges in horticulture. It has been repeatedly asserted that a key reason behind the limited take-up of the SWP is the success of the WH visa policy in attracting backpackers to regional Australia to earn a visa extension. Many observers have noted a 'substitution effect' stemming from the low regulatory burden associated with the WH scheme compared with the significant administrative burden and other costs inherent in the SWP's regulatory design.⁶

In order to try and understand why *one* regulation (the WH 2nd year extension) has proven far more effective in addressing labour supply challenges in horticulture than the *other* (the SWP), it is essential to understand the regulatory design of both reforms, their stated purpose, the impetus for their introduction and their ongoing management and impact. With this in mind, we now turn to a detailed examination of the two programmes.⁷

⁵ For example, see the recent, well-orchestrated campaign by the Queensland strawberry industry to attract local workers which although initially attracted one thousand job seekers to fill an initial screening survey to determine the applicant's availability and capacity, led to only 126 being interviewed and 52 direct placements. Within three months, approximately half of the placements had chosen not to continue with the placement. See: (<http://www.thesweetestjob.com.au/>).

⁶ See, eg, the observation from the chair of the Joint Standing Committee on Migration, Ms Louise Markus MP that '[w]hile the impetus for establishing the working holiday visa is for cultural exchange, the reality is it fills a significant labour gap within the industry and is indirect competition with the Seasonal Worker Programme.' Joint Standing Committee on Migration, Parliament of Australia, *Seasonal Change: Inquiry into the Seasonal Worker Programme*, (2016) vii. See also, Mares' excellent analysis: Peter Mares, 'Comparing Apples and Oranges', *Inside Story* (online), 5 July 2016 <<http://insidestory.org.au/comparing-apples-and-oranges>>.

⁷ Please see **Appendix A** for a comparative table on the SWP and WH programmes.

Background to the two regulatory initiatives

(i) The Seasonal Workers Programme

The Seasonal Workers Programme (SWP), which was established in 2008, and operated as a pilot until 2012, created a pathway for workers from select Pacific Island nations to work in the horticulture industry. In its first iteration, the pilot program offered visas for up to 2,500 workers from Kiribati, Papua New Guinea, Tonga and Vanuatu. Although in the first year only 100 visas were allocated, a little over half of these were taken up, with 56 visas issued to workers from Tonga and Vanuatu. Although this slow response was initially attributed to falling demand for horticulture workers because of the global economic downturn in 2008-2009,⁸ the numbers in the SWP have continued to grow steadily, although are a long way off representing a significant contribution to the horticulture labour force in Australia.⁹ Up to March 2012, there were 2,500 places available under the pilot scheme, and 1,093 Seasonal workers were employed under the scheme. The large majority of workers (over 80%) have come from Tonga.¹⁰

During the pilot phase, three sets of regulatory reforms sought to improve the attractiveness of the pilot to employers. These included opening up the pilot so as to allow direct employment of seasonal workers - in its original manifestation employment had to occur through labour-hire firms; removing geographical constraints so that employers in areas other than Robinvale-Swan Hill and Griffith could access workers under the pilot; changing employer contributions to visa holders' airfares depending on their country of origin, modifying the minimum period of work requirement and reducing employers' responsibility for domestic travel costs.¹¹ The Government also agreed to reduce the tax rate for Pacific seasonal workers from 29% to 15% for their first \$37,000 of taxable income.¹² Cumulatively, these reforms sought to improve the flexibility of the pilot, reduce employer risks and costs for involvement in the pilot and increase the amount of return for seasonal workers.

⁸ TNS Social Research 2010. *Interim evaluation of the Pacific Seasonal Worker Pilot Scheme: Executive summary*. <http://www.deewr.gov.au/Employment/Programs/PSWPS/Documents/PSWPSEvaluationExecSummary.pdf>

⁹ The Fair Work Ombudsman estimates that there are approximately 130 000 workers employed annually in the industry: Fair Work Ombudsman, 'Horticulture Industry Shared Compliance Program 2010' (Final Report, November 2010). Notably, in a recent analysis, Underhill and Rimmer observed that the horticulture labour force is comprised of three main groups of workers: local workers, working holiday makers and undocumented workers, with SWP visa holders constituting only a marginal and 'numerically insignificant' portion of the horticulture labour force: Elsa Underhill and Malcolm Rimmer, 'Layered Vulnerability: Temporary Migrants in Australian Horticulture' (2015) *Journal of Industrial Relations* 1, 5. Australia's SWP is also much smaller than the equivalent scheme in New Zealand, which had 7855 in its Recognised Seasonal Employer scheme in 2013-14: Employment New Zealand, *Facts & Figures: RSE Financial Year Stats* <<http://employment.govt.nz/er/rse/information.asp>>.

¹⁰ Danielle Hay and Stephen Howes, 'Australia's Pacific Seasonal Worker Pilot Scheme: Why has Take-Up Been So Low?' (Discussion Paper No 17, Development Policy Centre, April 2012) 2 <https://devpolicy.anu.edu.au/pdf/papers/DP_17_Australia's_Pacific_Seasonal_Worker_Pilot_Scheme.pdf>.

¹¹ Jesse Doyle and Stephen Howes, 'Australia's Seasonal Worker Program: Demand-Side Constraints and Suggested Reforms' (Discussion Paper, World Bank Group, 2015) 7-8.

¹² Ibid.

Deemed largely a success by a government-commissioned independent review,¹³ the pilot scheme was replaced by the introduction of an ongoing Seasonal Workers Program.¹⁴ With effect from 1 July 2012, the new program extended the pilot in three ways. First, by expanding the number of source countries to nine Pacific states,¹⁵ and Timor-Leste; second, by increasing its reach beyond horticulture through a trial to three new sectors (aquaculture, cotton and cane) and third, with the cap on the number of workers lifted to 12,000 over the four year period from 2012-2013 to 2015-2016.¹⁶ In 2015 another expansion of the SWP was announced,¹⁷ with the removal of annual limits on the number of visas issued, a reduction in the employer contribution to covering the visa holder's domestic and international transportation costs and the removal of the requirement that each visa holder be given a guaranteed minimum period of 14 weeks work.¹⁸ This has been replaced by a less concrete stipulation that the visa holder 'will benefit financially from their participation in the program'.¹⁹ The programme has also been expanded into other occupations in agriculture, including cattle, sheep, grain and mixed enterprises.²⁰ Despite these initiatives, numbers under the SWP are still small, although they are increasing each year. In 2012-13, there were 1473 workers in the programme, when the cap was 2000. In 2013-14, there were 2,014 workers in the programme. In 2014-15, the cap was increased to 3250, and there were 3177 workers in the programme.²¹

There are currently plans afoot to expand the SWP even further, as part of the development of Northern Australia.²² The introduction of a new five year pilot programme will provide up to 250 places for workers from the Pacific microstates with access to a two year visa (with the possibility of a one year extension) to work in lower skilled occupations in Northern Australia.²³ This pilot targets non-seasonal occupations with identified labour shortages. Additionally, a federal parliamentary inquiry

¹³ Cheryl Reed et al, 'Final Evaluation of the Pacific Seasonal Worker Pilot Scheme' (Final Report, TNS Social Research, September 2011) <https://docs.employment.gov.au/system/files/doc/other/pswps_-_final_evaluation_report.pdf>.

¹⁴ Bill Shorten, Kevin Rudd and Martin Ferguson, 'Pacific and East Timor Workers Helping Australian Farmers and Tourism Industry' (Joint Media Release, 18 December 2011).

¹⁵ Australia has signed memoranda of understanding (MOUs) with the governments of Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Timor-Leste, Tonga, Tuvalu and Vanuatu to enable citizens from these countries to participate in the programme.

¹⁶ Bill Shorten, Kevin Rudd and Martin Ferguson, above n 14.

¹⁷ Australian Government, *Agricultural Competitiveness White Paper* (2015) 13.

¹⁸ Department of Employment, Australian Government, *Seasonal Worker Program Expansion — Q&A* (Factsheet, 2016) <https://docs.employment.gov.au/system/files/doc/other/expansion_of_the_seasonal_worker_programme_-_faqs.pdf>.

¹⁹ Ibid.

²⁰ Department of Employment, Australian Government, *The Agriculture Sector and the Seasonal Worker Programme* (Factsheet, 8 February 2016) <<https://docs.employment.gov.au/node/35676>>.

²¹ Department of Employment, Australian Government, *Annual Report 2014–15* (2015) 21 <https://docs.employment.gov.au/system/files/doc/other/em15-0085_emp_annual_report_2014-15_acc_20052016.pdf>.

²² Australian Government, *Our North, Our Future: White Paper on Developing Northern Australia* (2016) <http://industry.gov.au/ONA/WhitePaper/Documents/northern_australia_white_paper.pdf>.

²³ Department of Foreign Affairs and Trade, Submission No 37 to Joint Standing Committee on Migration, *Seasonal Change: Inquiry into the Seasonal Workers Programme*, 2016, 6 [2.8].

undertaken by the Joint Standing Committee on Migration has recommended significant changes to the SWP to facilitate greater employment for Pacific Islander and Timor Leste citizens in the Australian horticulture sector as well as discussing options for expanding the SWP to other sectors and with a broader range of source countries.²⁴

In its pilot phase, the SWP had two objectives of apparently equal importance. One objective was to contribute to the economic development of the Pacific Island countries and the other was to address labour supply challenges in the Australian horticulture sector. The pilot programme was specifically established by the Australian Government to test:

Whether a seasonal work program could contribute to economic development in partner Pacific Island countries through seasonal workers' employment experience, remittances and training; and,

The benefits of seasonal workers to the Australian economy and to horticultural growers and other members of the horticulture industry who have demonstrated that they cannot source local labour.²⁵

Upon its introduction as a formal programme, these dual objectives were maintained, although they were reprioritised with development becoming the primary focus of the SWP. The implementation arrangements for the SWP which took effect on 1 July 2012 made it clear that the SWP aims to:

Contribute to economic development in partner countries by providing employment opportunities, remittances and opportunities for up-skilling and

In doing so the SWP will also provide benefits to the Australian economy and to Australian employers who can demonstrate that they cannot source suitable Australian labour.²⁶

The drafting of these objectives makes it clear that meeting labour supply challenges is a subsidiary objective of the programme, with the primary objective being one of contributing to the economic development of partner countries. There is an interesting comparison to be drawn with New Zealand's seasonal workers programme which, in part, provided the impetus and example for the introduction of the Australian scheme. New Zealand's Recognised Seasonal Employer programme gives primacy to the labour needs of employers, with its primary objective being to 'allow horticulture and viticulture businesses to supplement their New Zealand workforce with non-New Zealand citizen or resident workers when labour demand exceeds the available New Zealand workforce'.²⁷ The extent to which the SWP in its current iteration is capable of meeting the horticulture sector's labour needs is contested, with critics of the SWP pointing to its additional regulatory burden, longer timeframes, greater costs and limited source countries as reasons for the slow (albeit steady) take up. However, it

²⁴ Joint Standing Committee on Migration, Parliament of Australia, *Seasonal Change: Inquiry into the Seasonal Worker Programme*, (2016)

²⁵ Cited in Reed et al, above n 13, 12.

²⁶ Department of Employment, Australian Government, *Seasonal Worker Programme Implementation Arrangements (version 3.0)* (1 August 2015) <https://docs.employment.gov.au/system/files/doc/other/swp_implementation_arrangements_effective_1_august_2015.pdf>.

²⁷ For more information on the NZ scheme, see: <http://www.dol.govt.nz/initiatives/strategy/rse/>.

is possible that changing practices or more active promotion of the SWP by business could help to improve its uptake. For instance, Hay and Howes claim that “for the Pacific seasonal worker program to thrive, the horticultural industry needs to be shifted from its current reliance on an unregulated, less productive labour force to a reliance on a regulated, more productive labour force”.²⁸ This implies that the development of human resource management capability and strategies could enable farmers to better utilise their investment in SWP visa holders. According to Curtain, supermarket retailers, as commercially important and influential actors in the horticulture supply chain, have a role to play in encouraging farmers who supply their produce to use the scheme more extensively:

“A major increase in the take-up of the Seasonal Worker Program in Australia is only likely if corporate buyers, under pressure from domestic consumers, actively monitor the working conditions for the harvest workforce. Corporate buyers are in the best position to apply pressure on their suppliers for greater transparency and accountability for the health, safety and welfare of workers involved in the harvest”.²⁹

(ii) The 2nd Year Extension on the Working Holiday Maker Visa

The WHM programme includes two types of working holiday visas (visa subclass 417 and 462) which allow temporary migrants from 38 countries between 18 and 30 years of age to work while they holiday in Australia for up to a year.³⁰ Working holiday visas provide work entitlements for the full 12 months of the visa, but only for six months work with any one employer.³¹ The WHM programme has existed since 1975 and its purpose is to foster closer ties and cultural exchange between Australia and partner countries, with particular emphasis on young adults. The performance of work is meant to be incidental to the visa’s central purpose. Indeed, the DIBP states that ‘work in Australia must not be the main purpose of the visa holder’s visit’.³² However, the veracity of this statement of principle in practice is quite hollow. This section will examine how regulatory reforms to the WHM programme and its use by many WHMs, are producing a ready supply of low skilled temporary migrant workers.

The second type of WHM visa, the subclass 462 Work and Holiday visa, was introduced in 2005. It has additional eligibility requirements, including functional English, successful completion of two years of university study and a letter of support from the visa holder’s home government in the visa application. The number of subclass 462 visas from each country is capped, except for the USA. All recent WHM agreements with other countries have been for subclass 462 visas. Since 2014, there

²⁸ Danielle Hay and Stephen Howes (2012) *Australia’s Pacific Seasonal Worker Pilot Scheme: Why has take-up been so low?* Development Policy Centre, Australian National University, Canberra, at pp. 30-31, 37

²⁹ Richard Curtain (2016) *New Zealand’s Recognised Seasonal Employer Scheme and Australia’s Seasonal Worker Program: Why So Different Outcomes?* New Research on Pacific Labour Mobility Workshop, Australian National University, Development Policy Centre, 2 June, at p. 9

³⁰ The number of negotiations under way is at a historical high. In 2014–15 the Government signed Work and Holiday visa (subclass 462) arrangements with China, Israel, Portugal, Slovakia, Slovenia, Spain and Vietnam. The arrangements with Portugal and Spain were implemented in 2014–15, as was the arrangement with Poland (which was signed in 2013–14). Department of Immigration and Border Protection, Australian Government, *Working Holiday Maker Visa Programme Report* (31 December 2015) 8.

³¹ *Migration Regulations 1994* (Cth) regs 417.611, 462.611. See also, Department of Immigration and Citizenship, Australian Government, *Working Holiday Maker Visa Program Report* (30 June 2013) 4.

³² Department of Immigration and Border Protection, Australian Government, *What is the Working Holiday Maker Program?* <<https://www.border.gov.au/Lega/Lega/Form/Immi-FAQs/what-is-the-working-holiday-maker-program>>.

have been 9 new Work and Holiday agreements, with Poland (200 places), Portugal (200), Spain (500), China (5000), Slovak Republic (200), Slovenia (200), Greece (500), Israel (500) and Vietnam (200).³³ Australia is currently negotiating a further 21 Work and Holiday visa arrangements with other countries.³⁴

A key reform to the subclass 417 visa occurred in 2005 when a new regulation was passed allowing visa holders who completed three months seasonal work in a regional location to receive a 12 month extension on their visa.³⁵ The Migration Regulations 1994 were amended in 2008 to change 'regional work' to 'specified work', to more accurately reflect which industries WH makers could work in to be eligible for a second WH visa. These industries now include plant and animal cultivation, fishing and pearling, tree farming and felling, mining and construction. 90 percent of first WHM visa holders use work in horticulture to gain a visa extension.³⁶

The rationale for adding the option of a second WH visa was 'to provide an incentive to Working Holiday makers to work in the harvest industry which is experiencing severe labour shortages'.³⁷ The Regulatory Impact Statement (RIS) accompanying changes to the Migration Regulations in 2005 stated:

Government and the industry need to make seasonal work in regional areas more attractive to the groups best suited to cater for this important market, including the young mobile unemployed and Working Holiday Makers. While young Australians are being strongly targeted by the Harvest Trail initiatives, little has been done to likewise encourage more Working Holiday Makers to undertake harvest work.³⁸

The RIS ran through six options for responding to labour challenges in horticulture, including expanding the high skilled subclass 457 visa, a seasonal or guest worker scheme, and a labour agreement pathway. It rejected using the subclass 457 visa because it was considered unreasonable to expect employers to 'demonstrate a satisfactory training record or use of new or improved technology' which is a requirement of this visa. The RIS also rejected a seasonal or guest worker scheme on the basis that such a scheme would be prone to worker exploitation and abuse and

³³ Department of Immigration and Border Protection, *Working Holiday Maker Visa Programme Report*, above n 31.

³⁴ The countries are Andorra, Austria, Brazil, Croatia, Czech Republic, Ecuador, Fiji, Hungary, India, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Mongolia, Peru, Philippines, San Marino, Singapore, Solomon Islands and Switzerland.

³⁵ *Migration Regulations 1994* (Cth), sch 2 r 417.211(5).

³⁶ Department of Immigration and Border Protection, Australian Government, *Working Holiday Maker Visa Programme Report* (31 December 2014). See also, Elsa Underhill and Malcom Rimmer, 'Itinerant Foreign Harvest Workers in Australia: The impact of Precarious Employment on Occupational Safety and Health' (2015) 13 *Policy and Practice in Health and Safety* 25, 28.

³⁷ United Working Holiday Makers in Australia, Submission No DR94 to Productivity Commission, *Migrant Intake into Australia*, December 2015, 7.

³⁸ Commonwealth Parliament, *Migration Regulation Amendments 2005 (No 9)* Regulatory Impact Statement: Changes to the Migration Regulations: Proposals to Expand the Working Holiday Makers Program (Supplementary Material) (2005) <<https://www.legislation.gov.au/Details/F2005L03190/Download>>.

because of doubts that a seasonal workers scheme would produce long-term benefits to sending countries.³⁹

In 2015 the Australian Government announced that the opportunity for a visa extension based on three months specified work would be expanded to include subclass 462 visa holders. However, unlike subclass 417 visa holders, subclass 462 visa holders are required to complete this work in Northern Australia.⁴⁰ This reform is yet to take effect but is likely to see increased labour mobility to this region and may assist in addressing labour needs of growers in Northern Australia.

As of December 2015, all applicants for a second WH visa must provide evidence not just of specified work in regional Australia, but of appropriate remuneration for that work. The most common evidence is payslips for the requisite work. This change was implemented in response to a concern that WHMs were more vulnerable to exploitation from their employers, particularly in relation to underpayment, when they relied on the employer to satisfy the work criteria for the second visa. In a media release issued in May 2015, the Assistant Minister for Immigration and Border Protection stated that volunteering would no longer be counted towards second working holiday visa extensions, because of a view that permitting unpaid work to be used in an application for an extension created ‘a perverse incentive for visa holders to agree to less than acceptable conditions in order to secure another visa’.⁴¹ Although this change addresses one form of exploitation, it still leaves WHMs vulnerable to exploitation in relation to the conditions of work they are prepared to undertake, and wage exploitation is still possible through falsified and inaccurate pay slips.

Although the Australian Government does not maintain records of the work destinations of WHMs, several studies indicate the importance of work to WHMs and their impact on the Australian labour market. Harding and Webster reported that in 1999–2000, 85% of working holiday makers engaged in paid employment during their visit to Australia.⁴² A report by the National Institute of Labour Studies in 2009 noted that about half of WHMs listed work as a ‘principal reason for coming to Australia’.⁴³ It also noted that 40% of WHMs spent the whole of their time in Australia in one urban location, which is a likely indication that works rather than travel was their primary activity during their time in Australia.

WH makers contribute to the economy through their work in horticulture, which is largely due to the formal incentives to work in horticulture in order to gain a 12 month extension on the visa’s term.⁴⁴

³⁹ Ibid.

⁴⁰ Department of Immigration and Border Protection, Australian Government, *Working Holiday Maker Visa (Subclasses 417 and 462) Initiatives to Support Northern Australia* <<https://www.border.gov.au/Trav/Visi/Visi-1/work-holiday-visas-noth-aus>>.

⁴¹ Assistant Minister for Immigration, Michaelia Cash, cited in: Alex Harman, *Labour Hire Reform Required: The Shocking Truth* (6 May 2015) Byte <<http://www.thebyte.com.au/labour-hire-reform-required-the-shocking-truth>>.

⁴² Glenys Harding and Elizabeth Webster, ‘The Working Holiday Maker Scheme and the Australian Labour Market’ (Report, Melbourne Institute of Applied Economic and Social Research, 15 August 2001) 6.

⁴³ Yan Tan et al, ‘Evaluation of Australia’s Working Holiday Maker (WHM) Program’ (Report, National Institute of Labour Studies Flinders University, 2009) 10.

⁴⁴ In 2014-2015, the vast majority (37, 974) of WH applicants for a second year on their visa were employed in the agriculture, forestry and fishing industries. Although this data is not disaggregated further, given the labour-intensive nature of horticultural work, it is likely that these workers were predominantly employed on farms during the harvest: DIBP (2015) *WHM Programme Report 2014-2015*, table 2.15.

WHMs 'consistently make up about 50–85% of the seasonal workforce' in this industry.⁴⁵ In a study of WHMs in Mildura, Jarvis and Peel found that 93–95% of WHMs were in the town for the purpose of work, and in 2010, 77% intended to apply for a second WHM visa.⁴⁶ Furthermore, 97% in 2009 and 95% in 2010 nominated employment as their primary motivation for visiting Mildura.⁴⁷ A study by Hay and Howe in 2012 found that 73% of horticulture businesses employed mainly WHMs.⁴⁸ They estimated that the number of WHMs working 'on farms' increased from 13,000 in 2001-2 to 37,000 in 2007-8. The National Farmers Federation estimated that 38% of horticultural workers were WH makers in 2008.⁴⁹

On average, 24% of WHMs take up a Second Working Holiday visa, although the take up is consistently higher from Asian countries when compared with European countries.⁵⁰ Among the latter, there was relatively high take up among WHMs from the UK (23%), Ireland (38%) and Italy (26%), but low take up for WHMs from Germany (7%), France (14%), and Sweden (11%). The take up rate was high among all Asian countries, including Taiwan (48%), South Korea (23%), Hong Kong (33%) and Japan (25%). These figures, which are broadly consistent with previous years, suggest that WHMs from developing countries and from Asian countries are more likely to complete work in regional Australia to make them eligible for the second year visa extension. In analysis conducted by an industry body of the Department's 2015 WHM Programme report, it was noted that whilst Western European nations tended to use the visa as a holiday visa, East and South East Asian nations used the programme more for its employment opportunities and associated financial benefits and were less likely to apply for a second year extension on the visa because of changes in the economic climate, such as a weakening Australian dollar.⁵¹

It is notable that Australia has a substantially larger WHM programme than countries with comparable migration profiles, and who are partners in the WHM visa programme. The United Kingdom has WHM partner relationships with 8 countries, including Australia, under its Tier 5 Youth Mobility visa scheme.⁵² In 2013, there were 20,857 participants in the scheme, including 10,845 (52%) from Australia.⁵³ In May 2014, Citizenship and Immigration Canada forecast that numbers in the International Experience Canada Programme would reach 20,000, which is a sharp increase on

⁴⁵ Yan Tan and Laurence H Lester, 'Labour Market and Economic Impacts of International Working Holiday Temporary Migrants to Australia' (2012) 18 *Population, Space and Place* 359, 373–4.

⁴⁶ Jeff Jarvis and Victoria Peel, 'Tourists for Hire: International Working Holidaymakers in a Work Based Destination in Regional Australia' (2013) 37 *Tourism Management* 114, 118.

⁴⁷ Ibid 122.

⁴⁸ Hay and Howes, above n 10.

⁴⁹ National Farmers' Federation, *Proposed Pilot Programme: Workforce from Abroad Employment Scheme* (2008) <www.nff.org.au/get/3025.pdf>.

⁵⁰ A total of 173,491 first Working Holiday visas were granted in 2014-15, a 5.4 per cent reduction compared to 2013-14 and that a total of 41,339 second Working Holiday visas were granted in 2014-15: see DIBP WHM Programme report 2014-2015, above n 31.

⁵¹ AusVeg Summary of the Working Holiday Maker Visa Programme Report 2015 (copy on file with author).

⁵² Home Office, *Tier 5 (Temporary Worker-Government Authorised Exchange) Visa* (8 July 2016) Gov.uk <<https://www.gov.uk/tier-5-government-authorised-exchange/overview>>.

⁵³ John Salt, 'Report of the United Kingdom Sopemi Correspondent to the OECD, 2011' (Report, Migration Research Unit, 2011) 86.

previous years.⁵⁴ At the same time, the UK and Canada have pathways for migrant workers to enter each country for low skilled work.¹ There is little doubt that the WH maker programme in Australia is substantially filling a demand for low skill work in the domestic economy.⁵⁵ This has been enabled by the regulatory reforms introduced since 2005 which create incentives for visa holders to perform paid work and the willingness of many visa holders who appear to be using the programme predominantly for a work purpose.

Relevance of this regulatory comparison of the SWP and WHM programme to the Review

This lengthy background to the introduction and currently regulatory approach of both programmes establishes a number of key points, pertinent to the focus of the review.

First, the SWP was introduced soon after regulatory reforms to the WH visa had focused on addressing labour needs in horticulture, and figures suggest that there has been a surge in WHM visa holders in the sector from that time. The prevalence of WHMs in the sector, and the lower costs and greater flexibility of employment associated with the WHM visa is likely to have had a direct impact on the take up of the SWP.

Second, the WHM programme presently plays a far more significant role in meeting the labour needs of the Australian horticulture sector than the SWP. Any change in the regulatory framework needs to be done very carefully, and so as not to create a sudden gap in labour supply in the sector. Any reforms that will have an impact on labour supply must be done in conjunction with complementary reforms to other migrant worker programmes and initiatives.

In this regard, there would need to be a significant increase in the uptake of workers in the SWP if it is to play a more prominent role in meeting the sector's labour needs. This is possible given there is no longer a cap on the number of workers in the SWP. However, there needs to be serious consideration to understanding the advantages and disadvantages for the industry of relying more extensively on the SWP. Evidence suggests that Pacific Seasonal workers are more productive and more reliable, but they come with a greater regulatory burden including significant up front costs.

The lack of stability in the horticultural workforce over time suggests there is a need to conduct a fundamental review of the labour supply options. Our current project, commissioned by Horticulture Innovation Australia, examines labour supply challenges in the Australian vegetable industry and concludes in December 2016. Any substantial reform should await the results of this report.

Reform options might include amendments to existing visa programmes (WH visa, SWP, and 457 visa) and might also include the introduction of a temporary agricultural visa program, based on the dedicated agricultural visa programs in other countries. Initiatives by industry associations and/or government to encourage farmers to develop human resource management capability and more sophisticated practices to attract local workers to the industry and to improve workforce retention and return is another potential solution yet to be investigated. We expand on this option below.

⁵⁴ *Canadian Working Holiday Visa Numbers Soar* (14 May 2014) Workpermit.com
<<http://www.workpermit.com/news/2014-05-14/canadian-working-holiday-visa-numbers-soar>>.

⁵⁵ Tan et al, above n 43.

Recommendations

1.1 There should be no significant change made to either the SWP or the WHM visa until the publication of the research report commissioned by Horticulture Innovation Australia examining labour supply challenges in the Australian vegetable industry at the end of December 2016.

1.2 As the WHM programme presently plays a far more significant role in meeting the labour needs of the Australian horticulture sector than the SWP, any change in the regulatory framework needs to be done very carefully, and so as not to create a sudden gap in labour supply in the sector. A reform, such as the proposed introduction of a 32.5 tax rate for WHMs, that will have an impact on labour supply, must be done in conjunction with complementary reforms to other migrant worker programmes.

Theme #2 Tax treatment for visa holders

At present, SWP workers pay a marginal tax rate of 15%. As identified in the preceding section, the decision to reduce the tax rate for SWP workers during the pilot phase of the programme was part of a suite of regulatory reforms designed to increase the uptake of the programme by both growers and workers from the Pacific. This decision acknowledges the potential for a high tax rate to act as a disincentive to working in Australia. In its 2014-2015 Budget the Government proposed that a tax rate of 32.5% be applied to workers holding a WHM visa. For a number of reasons, we believe this proposal is ill-conceived.

First, the discussion in Theme #1 identifies the similar regulatory objective of both the second year extension on the WH visa and the SWP in seeking to address labour supply challenges in horticulture. We submit that this means the tax rates for both programmes should be broadly similar or the ability of the second year extension on the WHM visa to achieve its regulatory purpose will be undermined. In fact, there is also an argument to be made that WHMs should pay less tax than the SWP counterparts given the lower level of regulatory and financial support they receive from the Australian Government. Unlike the SWP which is subject to substantial monitoring and oversight by a number of government departments, the WHM scheme is largely unregulated once a visa has been issued.

Second, the introduction of a different tax rate for workers holding a WHM visa will add an additional layer of regulatory complexity for growers, many of whom are small businesses without dedicated human resources personnel. For growers who employ both WHM visa holders and SWP visa holders, different tax rates will apply and will need to be accounted for in the calculation of workers' pay and on their pay slips.

Third, the introduction of a 32.5% marginal tax rate for WHM visa holders will compound their vulnerability in the Australian labour market. As noted in Theme #4 below, the scholarly literature establishes the vulnerability of WHM visa holders. They often work in low-wage jobs where they are easily replaceable, in casual work, are young and often have limited English language ability. Introducing a tax rate of 32.5% for workers who are employed in low wage jobs adds to their vulnerability by increasing their risk of not earning enough to support their living expenses. This is likely to force more WHM visa holders into undocumented work. As Sherrell convincingly points out, 417 visa holders do not have the same incentives to comply with Australian taxation law as residents and are more likely to take on the risk of being caught by accepting a higher cash payment where tax

is not deducted.⁵⁶ This provides leverage for unscrupulous employers to coerce WHMs into this situation, notwithstanding that employers face significant risks if they do so.⁵⁷

Recommendations

2.1 The proposed tax rate of 32.5% from the first dollar earned should not be introduced.

2.2 At the present time, whilst both the WHM 2nd year visa extension and the SWP are being used to meet labour supply needs in the horticulture sector, we recommend that WHM visa holders should receive the same tax treatment as SWP visa holders. As such, WHM visa holders should pay a marginal tax rate of 15% from the first dollar earned. We recommend that in the near future, a further review be conducted of appropriate tax rates which compares the tax rates of all migrant workers, including SWP works WHMs, international students and 457 visa holders, and compares the tax rates in Australia with equivalent tax rates for migrant workers in other countries.

Theme #3 Relevant unemployment policies

Youth access to the labour market in this rapidly changing world is proving more difficult than ever before. Over the years a number of special regulatory initiatives have sought to improve youth access, for example 'junior wages', apprenticeships and the increasing prevalence of formal 'work-integrated learning' components to courses as part of university and vocational courses.

The experience of workplace learning in one form or another is now increasingly common for young people internationally,⁵⁸ verging on mandatory in some industries.⁵⁹ Specific tools have also been established to connect students with internships and other study-related employment opportunities.⁶⁰ One reason for this growth is increasing awareness of the value of the apprenticeship model of learning. In a modern context it is referred to as a 'cognitive apprenticeship', a methodology which aims to enculturate students into authentic practice through activity and social interaction, and

⁵⁶ H Sherrell, 'A story that writes itself: Working holiday visas, tax incentives and illegal labour', *Inside Story* (online), 22 May 2015 <<http://insidestory.org.au/a-story-that-writes-itself-working-holiday-visas-tax-incentives-and-illegal-labour>>.

⁵⁷ See, further: Department of Immigration and Border Protection, *Employing legal workers guide*, 2015 <<http://www.border.gov.au/Busi/Empl/Empl/employing-legal-workers/legal-workers-a-guide-for-employers>>.

⁵⁸ Ross Perlin, *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy* (rev ed, Verso, 2012) ch 2.

⁵⁹ See, eg, Sabina Siebert and Fiona Wilson, 'All Work and No Pay: Consequences of Unpaid Work in the Creative Industries' (2013) 27 *Work, Employment and Society* 711.

⁶⁰ See, eg, the CSIRO's new platform, www.ribit.net.

'embeds the learning of skills and knowledge in the social and functional context of their use.'⁶¹ It is also a means to equip them with the 'employability skills' they require to be 'work-ready'.⁶²

In both the Terms of Reference for the Review, and in the Department of Agriculture's supporting materials, the possibility of enticing youth unemployed through the Youth Jobs PaTH Program into the labour market for agriculture and tourism-related jobs is given as an alternative to falling numbers of visa holders on the WHM programme if the tax rate of 32.5% is introduced.

The PaTH Program was announced in the 2015-2016 federal budget as a way to identify youth employed aged between 18 and 24 who would benefit from employability skills training and a work-based internship. The first stage of PaTH is to 'Prepare' the young person by providing them with a hands-on educational training program aimed at making them 'job ready'.⁶³

Although the details of the second stage of PaTH are yet to be properly fleshed out in a discussion paper, it seems that the 'Trial' phase will involve an unpaid internship of 4-12 weeks duration. Employers will be given an incentive payment of \$1000 to take on a PaTH Program participant.

Stage three of PaTH is 'Hire'. This is meant to encourage employers to employ the PaTH participant beyond the internship through establishing a formal employment relationship. Employers will be given financial incentives by the federal government to hire youth unemployed who have participated in PaTH.

We submit that there are a particular set of concerns around the use of PaTH as a mechanism for increasing the domestic labour force in horticulture in place of (or possibly complementing) the WHM programme. While the intent behind PaTH is an admirable one, that is to improve youth access to the labour market by developing their employability skills, we are concerned that PaTH is not suitable for low skilled manual work (picking, packing and grading) in the horticulture sector for a number of reasons.

First, it is difficult to concretely establish whether young unemployed people can be enticed into performing an internship in the Australian horticulture sector. This sector finds it difficult to attract local workers who are paid at the federal minimum wage more generally, let alone unpaid interns who will only be receiving a modicum of the minimum wage during the internship stage of PaTH. There are intrinsic aspects to horticultural work that render it more challenging than many other types of work. This work often involves hard physical work, early start times, long hours, inclement weather and perhaps, more importantly, relatively remote locations and limited career path. It is difficult to change these intrinsic factors that are likely to dissuade the youth unemployed from taking up an unpaid internship in the horticulture sector.

Second, the horticulture sector does not lend itself to PaTH because it will be difficult for PaTH participants to use their internship as a gateway to permanent work with the same employer. This is because an internship of 4-12 weeks in the horticulture sector is unlikely to lead to ongoing

⁶¹ Allan Collins, John Seely Brown and Susan Newman, *Cognitive Apprenticeship: Teaching the Craft of Reading, Writing and Mathematics* (Centre for the Study of Reading, University of Illinois, Technical Report 403, 1987), 1.

⁶² See Department of Education, Employment and Workplace Relations, *Employability Skills and Attributes Framework Background Paper* (2011), 1

⁶³ A copy of this discussion paper can be found here: <<http://www.employment.gov.au/youth-jobs-path>>.

employment, given that the norm in this sector is seasonal work. For most produce, the harvest is seasonal and not year-long and thus it is unlikely to enable PaTH participants to benefit from the 'Hire' stage in the PaTH Program.

Third, the low-skilled and repetitive nature of horticulture work does not meet the threshold that is normally part of an internship. Internships are meant to provide exposure to work that an individual would not normally have access to, had they applied for a job vacancy in that position. This is because interns are usually vastly underqualified for the job being performed by virtue of their youth, incomplete education or inexperience. It has become commonplace for high school students to complete a one week period of work experience and for university students to enter into longer internships that allow them exposure to the labour market in their field of study. Even where this has occurred, it is important to note that there have been critiques as to the value of these internships for young people.⁶⁴ For example, Ross Perlin in his famous book 'Intern Nation' states:

Are internships white collar apprenticeships? The answer is yes and no: on the one hand, internships are clearly presented in the same spirit, as a way to launch young people into their careers; on the other hand, internships fall far short of the apprenticeship model in nearly every respect ...⁶⁵

Not only is a horticultural internship unlikely to lead to ongoing employment, it will involve the performance of picking and packing work that the PaTH participant is likely to have had access to without the PaTH program by virtue of it being low-skilled. Unlike the traditional internship for white collar jobs, a horticultural internship is unlikely to provide the PaTH participant with access to interesting, high skilled work in the industry or to proper mentoring opportunities. Instead, a horticultural internship is predominantly going to involve the performance of actual work.

Fourth, the lack of resident labour willing to engage in horticultural work, particularly seasonal work, is an international issue.⁶⁶ In **Appendix B** we provide a case study of the UK horticulture sector and refer to research and media reports which establish that attempts in Germany, the United States and the United Kingdom to attract local workers to horticulture (including incentives for the unemployed) have done little to abate the declining presence of local workers in the sector or growers' reliance on temporary migrant workers to meet their labour needs. However, it should be acknowledged that low quality employment is prevalent in the horticulture sector internationally⁶⁷ and there is an argument that employers should play a more active role in addressing this scenario. Studies have found stronger preference among Australian farmers for migrant workers over other groups of workers because employers perceive the former group as more reliable, "work faster and harder" and willing to work

⁶⁴ Andrew Stewart and Rosemary Owens, *The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia*, Report for the Fair Work Ombudsman, 2013

⁶⁵ Perlin, above n 59, 45.

⁶⁶ Migration Advisory Committee, *Migrant Seasonal Workers: The Impact on the horticulture and food processing sectors of closing the Seasonal Agricultural Workers Scheme and the Sectors Based Scheme*, May 2013, chapter 4.

⁶⁷ For example, see Philip Martin (2009) *Importing Poverty? Immigration and the Changing Face of Rural America*, Yale University Press: New Haven; Ben Rogaly (2008) 'Intensification of workplace regimes in British horticulture: the role of migrant workers', *Population, Space and Place* 14(6): 497–510.

for lower wages.⁶⁸ Writing in the UK context, Scott explains an underlying reason of this preference among horticulture employers for large-scale recruitment of migrant labour:

“Immigration may make it easier for employers to control and manage all workers. This explains why in the food industry, for example, the oversupply of labour has been a common goal amongst employers and why the turn to low-wage migrants ... has been associated with intensified workplace regimes. The problem is that employers are unlikely to rationalise or explain their use of migrant labour in this way and are much more likely to talk in terms of the ‘good migrant worker’ versus ‘workshy locals’”.⁶⁹

This perspective is potentially relevant for identifying potential solutions for addressing the labour supply challenges in Australia. While we lack a clear picture of management practices and working conditions in Australian horticulture, studies indicate that the agriculture industry is characterised by recruitment and retention problems which are compounded by poor working conditions, low wages and work intensification (excessive hours and seven-day work patterns are commonplace), high employee turnover, lack of employer-provided training and minimal career development opportunities.⁷⁰ Employers could be encouraged to develop more sophisticated human resource management practices to attract workers more effectively. In surveys of Australian agriculture employers, the practices deemed most effective in improving retention include paying employees above the award, providing non-monetary benefits, offering flexible work hours and rostered time off, providing training and career development opportunities, use of employee engagement strategies and recognition of good performance. According to Nettle, “the quality of jobs and the availability of real careers in agriculture is essential for building a reputation to attract people into agriculture”.⁷¹

Fifth, uncertainties around the introduction of PaTH,⁷² getting it through the Senate, and the timeline on its introduction means that it is certainly not a viable labour supply solution for the Australian horticulture sector if the introduction of the 32.5% tax rate for WHM visa holders leads to a fall in WHM workers in horticulture. The Department of Employment’s website indicates that PaTH will begin in July 2017 which means that it cannot be used to meet the horticulture sector’s labour needs in the next peak harvest season (November 2016-May 2017) and is unlikely to be of sufficient scale to meet labour needs in the season after that.

⁶⁸ Justine Evesson, Michelle Jakubauskas and John Buchanan (2009). *Choosing a Sustainable Future: Workforce Development in Victorian Primary Industries*, Workplace Research Centre, Sydney.

⁶⁹ Sam Scott (2013). ‘Migration and the employer perspective: Pitfalls and potentials for a future research agenda’. *Population, Space and Place*, 19(6): 703-713, at pp. 706-707

⁷⁰ Evesson et al., above n 69; Ruth Nettle (2015) ‘More than workforce shortages: How farm human resource management strategies will shape Australia’s agriculture future’, *Farm Policy Journal*, 12(2): 17-27

⁷¹ Nettle, above 71, 24

⁷² On the point of whether amendments will need to be made to the *Fair Work Act 2009* (Cth) in order to introduce PaTH, see: Mark Kenny, ‘Coalition’s \$840 million interns plan illegal: lawyers’, *The Sydney Morning Herald*, 12 May 2016 <<http://www.smh.com.au/federal-politics/federal-election-2016/coalitions-840-million-interns-plan-illegal-lawyers-20160511-gosd1e.html>>.

Recommendations

3.1 The deployment of youth unemployed via the PaTH program will not sufficiently address the horticulture sector's labour needs for picking, packing and grading work during harvest time. PaTH should not be viewed as a suitable program for the horticulture sector and internships should not be given for these positions.

3.2 However, we support the development of other policies to attract youth unemployed to the horticulture sector as long as these workers are paid at or above the minimum wage and are given opportunities for continuing employment and career development.

Theme #4: Protections for vulnerable workers

The role of Labour and Migration Intermediaries in the Australian horticulture sector

The Australian horticulture sector lends itself to the presence of intermediaries. Whilst growers have expertise in producing fresh fruit and vegetables, they do not usually possess the human resources experience or knowledge on how to recruit and organise a workforce. Most horticulture work cannot be mechanised, and employers in the sector therefore require a reliable supply of productive labour. However, there is a great deal of uncertainty over the current and future workforce needs in the sector as a substantial portion of horticulture work is seasonal, low skilled and requires labour at short notice. There is also increasing pressure on growers to supply quality fresh produce at competitive prices according to a tightly pre-programmed schedule with the major supermarkets. To meet these production schedules and to meet peaks and troughs in labour demand, it is becoming common practice for growers to rely on labour contractors to facilitate labour supply in an efficient and timely manner,⁷³ and for contractors to move teams of workers to different sites on the harvest trail according to the needs of growers.⁷⁴ A recent study by Underhill and Rimmer found that 27% of farm workers surveyed received their remuneration for horticulture work from a contractor.⁷⁵

Despite the legitimate role for labour and migration intermediaries in the Australian horticulture sector,⁷⁶ there seems to be mounting evidence of improper behaviour by intermediaries and a

⁷³ For evidence of this practice abroad, in the case of UK and South African horticulture, see: Stephanie Barrientos, "'Labour Chains" Analysing the Role of Labour Contractors in Global Production Networks' (Working Paper 153, Brooks World Poverty Institute, July 2011) 8. See also, Ben Rogaly, 'Intensification of Workplace Regimes in British Horticulture: The Role of Migrant Workers' (2008) 14 *Population, Space and Place* 497.

⁷⁴ For examples of this in the Chilean horticulture industry, see Salame and Morales, 2000 and Barrientos and Kritzing 2004

⁷⁵ Elsa Underhill and Malcolm Rimmer, 'Itinerant foreign harvest workers in Australia: the impact of precarious employment on occupational safety and health' (2015) 13(2) *Policy and Practice in Health Safety* 25, 27.

⁷⁶ Although this paper focuses on the Australian horticulture industry, this problem is no means unique to Australia. On exploitation of migrant workers in agriculture elsewhere, see, eg: Jennifer Gordon, 'Roles for Workers and Unions in Regulating Labour Recruitment in Mexico' in Joanna Howe and Rosemary

growing chorus of demands to address this.⁷⁷ As the Productivity Commission recently observed, '[I]labour hire companies figure prominently in cases of migrant exploitation, particularly in industries such as horticulture and food processing'.⁷⁸ Pandora's box was opened in 2015 when a prominent television investigation by the ABC's Four Corners programme uncovered the abundant use of unscrupulous intermediaries in horticulture, leading to underpayment of wages, substandard housing, unlawful deductions for transport and other costs and even in some instances, sexual harassment.⁷⁹ At an anecdotal level other subsequent media reports found similar problems with the use of unscrupulous intermediaries in horticulture,⁸⁰ which is supported by submissions from the not-for-profit sector.⁸¹ An empirical analysis of the presence of intermediaries on the harvest trail made similar findings, concluding that Australian horticulture remains a sector where non-compliance with labour laws is rife.⁸²

A recent case involving a Taiwanese national whose application for a second Working Holiday visa was rejected due to lack of documentation of her work in a regional area, also found evidence of rampant

Owens (ed) *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart, 2016) Chapter 15 - forthcoming. Charles Wolfson, Petra Herzfeld Olsson and Christopher Thörnqvist 'Forced Labour and Migrant Berry Pickers in Sweden' (2012) 28(2) *International Journal of Comparative Labour Law and Industrial Relations* 147.

⁷⁷ 'SA announces parliamentary inquiry SA labour hire inquiry into labour hire industry following Four Corners report' ABC News (online), 6 May 2015 <<http://www.abc.net.au/news/2015-05-06/parliamentary-inquiry-into-labour-hire-industry/6449714>>; The Hon Daniel Andrews MP, 'Labour Hire Inquiry' (Media Release, 5 May 2015) <<http://www.premier.vic.gov.au/labour-hire-inquiry/>>; The Honourable Curtis Pitt, 'Parliamentary inquiry to investigate rogue labour hire operators' (Media Release, 3 December 2015) <<http://statements.qld.gov.au/Statement/2015/12/3/parliamentary-inquiry-to-investigate-rogue-labour-hire-operators>>; Senator the Hon Michaela Cash, 'Ministerial Working Group to help protect vulnerable foreign workers' (Media Release, 15 October 2015) <<https://ministers.employment.gov.au/cash/ministerial-working-group-help-protect-vulnerable-foreign-workers>>

⁷⁸ Australian Government, *Workplace Relations Framework, Productivity Commission Inquiry Report* Volume 2, No. 76 (2015) 935.

⁷⁹ 'Slaving Away: The Dirty Secrets behind Australia's Fresh Food', *Four Corners*, Australian Broadcasting Commission, 4 May 2015.

⁸⁰ Mark DeBono, 'Crackdown Continues on Exploitation of Migrant Workers on Victorian Farms', *ABC News Just In*, 22 May 2015; Tobi Loftus, 'Queensland labour company allegedly left fruit pickers from Vanuatu without pay', *The Sydney Morning Herald*, 14 January 2015; Kallee Buchanan, 'Horticulture businesses audited amid backpacker exploitation claims in Bundaberg in Southern Queensland,' *ABC News Just In*, 23 June 2014; Bridget Brennan and Lucy McNally, 'Fruit picking industry operator investigated over claims of bullying, sexual harassment in Mildura', *ABC News Just In*, 6 January 2015.

⁸¹ Dr Mark Zimsak, Uniting Church in Australia Synod of Victoria and Tasmania, Submission by the Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia to the Senate Education and Employment Committee to the Inquiry into the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders, May 2015.

⁸² Diane van den Broek, Dimitria Groutsis, Malcolm Rimmer and Elsa Underhill, 'Enterprising Middle Men on the Harvest Trail: Ethics, Society and Migrant Work' in *The Political Economy of Work and Labor Markets: Workplace Regimes in Comparative Perspective*, *Society for the Advancement of Socio-Economics Conference*, Chicago, United States, 12th July 2014. See also, Elsa Underhill and Malcolm Rimmer, 'Layered vulnerability: Temporary migrants in Australian horticulture' (2015) *Journal of Industrial Relations* 1.

use of unscrupulous labour hire arrangements within the horticulture sector.⁸³ In this case the applicant claimed she had worked on the Covino farm in Gippsland for more than 88 days, however she was unable to provide evidence to substantiate this. She gave oral evidence that she was referred to the farm through an agency and did not know the name of the company that employed her, and that she received cash payments. The Tribunal accepted that the applicant's evidence was credible and entirely consistent with investigations by the media into Covino Farm's labour hire practices in 2015. The horticulture sector itself has admitted it has a problem, hosting an 'Overseas Workers in Agriculture Forum' in August 2015 and producing an industry code of conduct governing grower-labour hire arrangements. This forum determined the importance of the horticulture sector in working closely 'with regulatory authorities on identifying opportunities to lift standards in the industry and prevent the existence of contract labour hire firms that do not do the right thing'.⁸⁴ The Fair Work Ombudsman has had substantial involvement in the horticulture sector, partnering with the sector to gauge compliance in 2009 and finding over a third of farmers in breach of the award,⁸⁵ launching a three year education campaign in 2013 informing employers and employees working of their rights and obligations at work,⁸⁶ initiating a review of working holiday makers to begin in 2016,⁸⁷ and acknowledging its extensive efforts in pursuit of issues relating to temporary migrant workers in horticulture.⁸⁸ In 2015 the federal government announced Taskforce Cadena, a joint taskforce involving several government departments and agencies, with an objective of uncovering and prosecuting exploitative labour hire companies and a ministerial working group to help protect vulnerable migrant workers.⁸⁹ According to the head of the Taskforce, Commander Nockels, the objective of its investigations is to expose 'unscrupulous middlemen hiring the overseas workers' and its gaze is fixed on the presence of seasonal and low-skilled temporary migrant workers in food processing and agriculture.⁹⁰

Growers' use of migration intermediaries as labour hire providers is problematic in a number of ways. Firstly and perhaps most importantly, this practice tends to be accompanied by significant wage underpayments and as a means of exerting greater labour control over workers. By providing accommodation, credit and transport to workers, intermediaries have various additional means of labour control at their disposal which both enhance the precarity of migrant workers and their

⁸³ 1417296 [2015] MRTA 409.

⁸⁴ PMA Australia-New Zealand, "'Overseas workers in agriculture" forum' (on file with author).

⁸⁵ Tess Hardy, 'Enrolling Non-State Actors to Improve Compliance with Minimum Employment Standards' (2011) 22 *The Economic and Labour Relations Review* 117.

⁸⁶ Fair Work Ombudsman, 'Harvest trail campaign' <<https://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/national-campaigns/harvest-trail-campaign>>; Fair Work Ombudsman, Annual Report 2014-2015, 22.

⁸⁷ Fair Work Ombudsman 'Fair Work Ombudsman to review entitlements of overseas visa holders on working holidays' (Media release, 4 August 2015).

⁸⁸ See: Fair Work Ombudsman, 'Statement in Response to 4-Corners Report' (Media Release, 7 May 2015) <<http://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/may-2015/20150507-fwo-statement-in-response-to-4-corners>>.

⁸⁹ Minister for Employment, Michaelia Cash, 'Ministerial working group to help protect vulnerable foreign workers,' Media Release, 15 October 2015; Joint Standing Committee on Migration, Seasonal Worker Program, Committee Hansard, 13 November 2015, 55, oral evidence of Mr Nockels, Department of Immigration and Border Protection.

⁹⁰ Emma Field, 'Taskforce Cadena targets agriculture and food processing industries', *The Weekly Times*, 1 September 2015.

dependence on the intermediary. Secondly, the use of a third party to source labour and to be responsible for wages and conditions allows growers to simultaneously claim immunity from the legal consequences which ensue from non-compliance with the Fair Work Act 2009 (Cth),⁹¹ whilst taking advantage of the many behavioural and cost benefits of using a precarious labour source for picking, packing and grading jobs.⁹² Although, as Tham, Campbell and Boese point out, while it is incumbent upon the employer to identify their obligations to employees and to ensure these are met, the use of labour hire migration intermediaries provides a convenient smokescreen by which employers can avoid this responsibility.⁹³ Thirdly, this situation tends to allow intermediaries to control access to horticulture jobs that can have the effect of preventing local workers from accessing these types of jobs because of reliance on ethnic recruitment networks.⁹⁴ Fourthly, the practice of some growers to rely on unscrupulous migration intermediaries penalises the many responsible growers who find it difficult to compete with rogue growers. It gives those that rely on unscrupulous migration intermediaries an unfair competitive advantage in being able to exert greater labour control and reduce wage costs. In *Kentwood*, the court recognised that non-compliance with Australian law through the use of migration intermediaries in labour hire situations ‘can also give the non-compliant employer an unfair comparative advantage against competing Australian businesses and workers operating lawfully’.⁹⁵

The use of migration intermediaries in horticulture also reveals the symbiotic relationship between intermediaries and growers in reducing wage costs and exerting greater labour control in return for mutually enlarged profits. A recent study found that migrant workers in horticulture were frequently

⁹¹ Although there are accessorial liability provisions in the Fair Work Act 2009 in section 550(1) which allow employers who are an accessory to a breach of the law to be held to account, this can be quite difficult to prove. For example in *Australian Competition and Consumer Commission v IMB Group Pty Ltd* [2003] FCAFC 17 at 135 the Court held that before any accessorial liability will arise, it is necessary to establish the subjective element of knowledge of each of the essential elements of the contravention. The Court there noted that knowledge may be constructive in the sense that it may be possible to show willful blindness in relation to the elements of the contravention, but absent such a finding it is necessary to establish actual knowledge on the part of the person to whom it is sought to sheet home accessorial liability in respect of a contravention.

⁹² See, for example: Chris Wright and Andreea Constantin, ‘An analysis of employers’ use of temporary skilled visas in Australia’, Submission to the Senate Education and Employment References Committee Inquiry into the impact of Australia’s temporary work visa programs on the Australian labour market and on the temporary work visa holders, 1 May 2015; Siew-Ean. Khoo, Peter McDonald, Carmen Voigt-Graf and Graeme Hugo, ‘A global labor market: Factors motivating the sponsorship and temporary migration of skilled workers to Australia’ (2007) 41(2) *International Migration Review* 480.

⁹³ See: Joo-Cheong Tham, Iain Campbell and Martina Boese, ‘Why is Labour Protection for Temporary Migrant Workers so Fraught? A Perspective from Australia’ in Joanna Howe and Rosemary Owens (ed) *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart, 2016) Chapter 8 – forthcoming. See also: *Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (In Liquidation) & Ors* [2013] FCCA 52, para 35 (24 April 2013).

⁹⁴ In Sweden, for example, unskilled migrant labour is channeled into different occupations through ‘ethnic recruitment networks’. See Diane van den Broek, William Harvey and Dimitria Groutsis, ‘Commercial migration intermediaries and the segmentation of skilled migrant employment’ (2015) *Work, employment and society* 1-12. This phenomenon was poignantly exposed in the Four Corners programme ‘Slaving Away: The Price of Our Fresh Food’ when a labour hire operator was caught on camera rebuking his recruiter, ‘Don’t bring any more European people here’, and a bit later on ‘I want Asian girls’, after two European female workers spoke to him in order to recover unpaid wages from their time as pickers.

⁹⁵ *Fair Work Ombudsman v Kentwood Industries Pty Ltd* (No 3) [2011] FCA 579 at [38].

exploited by labour hire contractors, hostel operators and other intermediaries seeking to 'sell' migrant labour to employers. This study found that the increasing 'commercialisation of migration' has opened up possibilities for entrepreneurship but that this has ethical implications as entrepreneurs do not necessarily have social ethics or the same impetus to act ethically as employers. The study concluded that the presence of migration intermediaries has resulted in a race to the bottom for horticulture wages in Australia. Whilst this study largely relied on working holiday makers on the 417 visa, it does illustrate what can happen in a system which allows employer demand to determine the composition of a country's migrant worker intake.⁹⁶ If employers' demand for labour is the main criterion, entrepreneurs such as migration intermediaries will seek to meet this demand in order to make a profit. This can lead to the creation of migrant labour supply chains where the promised 'triple win' goes unrealised. Whilst the employer gets access to cheap labour and the intermediary makes a profit,⁹⁷ the migrant worker receives less their legal entitlement and is often treated in a manner that is unfair and undermines their dignity.⁹⁸

Additionally, many horticulture workers are, in effect, undocumented workers as they work for growers who give them cash-in-hand payments. This makes them 'illegal workers' whose presence in the labour market 'tends to result in sub-standard employment practices, breaches of health and safety laws and is associated with and encourages abuses of the welfare and taxation systems'.⁹⁹ Typically, these workers are organised by intermediaries who possess invaluable links to growers and can provide these workers with access to jobs as well as the necessary supporting infrastructure such as accommodation and transport.¹⁰⁰ A recent study of growers found that 79 per cent of growers recognised the presence of undocumented workers in the horticulture sector with only three per cent

⁹⁶ Compare the Swedish situation where intermediaries are paid large amounts of money to facilitate temporary migration flows: Samuel Engblom, 'Reconciling Openness and High Labour Standards? Sweden's Attempts to Regulate Labour Migration and Trade in Services' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford, Oxford University Press, 2014) 354.

⁹⁷ Underhill and Rimmer suggest that a contractor working in horticulture can make a profit of \$10,000 per week, see: Elsa Underhill and Malcolm Rimmer, 'Temporary Migrant Workers in Australian Horticulture: Boosting Supply But At What Price?' in *How Global Migration Changes the Workforce Diversity Equation* (Cambridge Scholars Publishing, 2015) edited by Massimo Pilati et al, 159. Also, the use of migration intermediaries offering labour hire services in the offshore sector is another example. In the case of *Fair Work Ombudsman v Pocomwell Ltd and Others (No 2) [2013] FCA 1139* four Philippine workers were hired by a labour hire company on an offshore drilling platform within Australia's economic zone and were paid AUD\$5.36 per hour to paint oil rigs when the minimum wage in Australia for that type of work was \$14.31. The labour hire company Pocomwell, in contrast, was receiving \$2,576 in respect of the hire of each painter, indicating the ability of intermediaries to make considerable profits from making low-cost labour available to employers. The Fair Work Ombudsman was unable to succeed in this case because it was unable to prove that the rig fell under the jurisdiction of the *Fair Work Act 2009* (Cth).

⁹⁸ As Tham, Campbell and Boese observe, employers possess not just a legal duty but a moral duty to ensure their workers are treated fairly and with respect and dignity: See: Joo-Cheong Tham, Iain Campbell and Martina Boese, 'Why is Labour Protection for Temporary Migrant Workers so Fraught? A Perspective from Australia' in Joanna Howe and Rosemary Owens (ed) *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart, 2016) Chapter 8 - forthcoming.

⁹⁹ Stephen Howells, Report of the 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007 (Department of Immigration, 2010) 25.

¹⁰⁰ Stephen Howells, Report of the 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007 (Department of Immigration, 2010) 22.

stating a position that they were not used at all.¹⁰¹ In situations where these undocumented workers are visa over-stayers or on visas without work rights such as tourist visas, they are even more susceptible to exploitative conduct by an intermediary given that if they are uncovered they face the possibility of deportation. For all temporary migrant workers, any breach in the performance of work could produce two extremely serious consequences: first, the temporary migrant worker faces the prospect of visa cancellation under section 116(1)(b) of the Migration Act 1958 (Cth); and, secondly, he or she commits a strict liability criminal offence under section 235 of that same legislation. An investigation by *The Age* newspaper described the business model of intermediaries in this situation in the following terms ‘agents in China levy spotters’ fees to procure workers for labour hire contractors who then bribe migration agents’, which *The Age* exposed as part of a growing problem of illicit labour contractors infiltrating the horticulture industry in Victoria.¹⁰² A more recent investigation by FWO inspectors and DIBP officials into visa fraud and worker exploitation as part of Operation Cloudburst involving eleven operations, some of which were on farms, led to the detention of 38 illegal workers, six of whom had been working in breach of their visa conditions and two of which were operating exploitative labour hire arrangements.¹⁰³ The shadowy presence of undocumented workers in Australian horticulture is not new. In its final report, the members of the Senate Standing Committee on Employment, Workplace Relations and Education refer to one of two memorable moments in their investigation of the future of the harvest workforce in 2006 as involving a situation during their tour of an isolated farm when a team of grape pickers took fright at the committee’s unexpected appearance, immediately dispersing amongst the vine rows.¹⁰⁴ The committee had been mistaken for immigration officers conducting a raid on illegal workers. Thus, a number of inquiries and studies have consistently and independently confirmed the presence of undocumented workers in horticulture and their organization through migration intermediaries. There is a pressing need for this issue to be addressed.¹⁰⁵ A failure to do so may lead to the realization of Costello and Freedland’s ominous warning that temporary migrant labour programmes may produce ‘permanent undocumented migration, and a permanent population of exploitable undocumented migrants’.¹⁰⁶

Reform proposals to address the use of labour and migration intermediaries

With the preceding part attempting to shine a light on exploitative labour hire practices by some intermediaries, the task of this section is to explore the regulatory possibilities. Although some might argue that there is no legitimate role for migration and labour intermediaries within the horticulture

¹⁰¹ Jesse Doyle and Stephen Howes, *Australia's Seasonal Worker Program: Demand-side Constraints and Suggested Reforms* (2015) World Bank Group, Washington, DC13.

¹⁰² Andrew Rule, ‘Worker scam exposed’, *The Melbourne Age*, 10 October 2009.

¹⁰³ P Dutton and M Cash, ‘Illegal Workers Targeted Nationally’, Minister for Immigration and Border Protection, Media Release, 28 May 2015.

¹⁰⁴ Senate Standing Committee on Employment, Workplace Relations and Education, *Perspectives on the Future of the Harvest Workforce* (Commonwealth of Australia, 2006) vii.

¹⁰⁵ By way of contrast, in New Zealand measures to address the challenge of undocumented workers in horticulture have been fairly successful. See further, Rochelle Ball, ‘Australia’s Pacific Seasonal Worker Pilot Scheme and its interface with the Australian horticultural labor market: is it time to refine the policy?’ (2010) 25 *Pacific Economic Bulletin* 114, 116; 2014a. Immigration New Zealand, *Immigration fraud*, Wellington: Immigration NZ.

¹⁰⁶ Cathryn Costello and Mark Freedland ‘Seasonal Workers and Intra-Corporate Transferees in EU Law – Capital’s Handmaidens?’ in Joanna Howe and Rosemary Owens (ed) *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart, 2016) Chapter 2 - forthcoming.

sector, this is not the view taken here. Whilst the use of these intermediaries, particularly when offering a labour hire service, has the potential to undermine labour standards for workers, we argue these risks can be largely moderated through a targeted and strong regulatory framework involving enforced and tough sanctions for non-compliance. The obvious exception here is intermediaries involved in organized undocumented workers. The labour hire operations of these intermediaries are outside the law and need to be uncovered and closed down.

The regulatory possibilities, which we examine in this section, seek to achieve greater accountability, scrutiny and transparency for the actions of intermediaries and the employers who rely upon them. We examine two international jurisdictions in which greater regulation of intermediaries has proven successful, albeit to varying degrees. Both offer guidance on how an Australian regulatory framework could be developed.

2.1 Manitoba, Canada

In response to growing concern over substantial recruitment fees that were forcing temporary migrant workers into exploitative work, the Manitoba province passed legislation that required employers wishing to access overseas labour to register their interest with the authorities and for foreign recruiters to be licensed under the scheme.¹⁰⁷ According to Fudge and Parrott, employer registration is the most critical part of Manitoba's regulatory framework because it forces employers to register their interest and to await contact by the Immigration Branch of the province to ask questions as to the nature of the recruitment process and to be advised as to their liability in the event of recruitment costs borne by the worker.¹⁰⁸ The legislation places full legal responsibility for illegally charged placement fees by a foreign recruiter on the employer and enables these fees to be returned to the worker through enforcement by the province's Employment Standards Branch. This has precipitated a shift towards direct employer recruitment and a reduced reliance on intermediaries, as well as being a useful 'mechanism for screening out unscrupulous employers'.¹⁰⁹ In addition to employer registration, the legislative requirement that foreign recruiters be licensed goes some way to addressing the tendencies for intermediaries to be used as a way of exerting greater labour control or reducing wages and conditions. The licensing requirement involves a three stage process of qualifications. The recruiter must be a member of good standing of either the Law Society of Manitoba or the Immigration Consultants of Canada Regulatory Council and must provide comprehensive financial information on the individual's business and position. A bond must be provided of \$10,000 in order to receive a license. Substantial penalties of up to \$25,000 for an individual and of up to \$50,000 for a corporation, are imposed for non-compliance with the legislation. The case of Manitoba reveals the potential for a highly regulated framework that effectively targets the potential for intermediaries to be involved as recruiters to exploit temporary migrant workers.

2.2 Gangmasters Licensing Authority, United Kingdom

A similar but somewhat less effective approach is undertaken by the United Kingdom's Gangmasters

¹⁰⁷ *Worker Recruitment and Protection Act, C.C.M.S.C. W197.*

¹⁰⁸ Judy Fudge and Daniel Parrott, 'Placing Filipino Caregivers in Canadian Homes' in Kendra Strauss and Judy Fudge, *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (Routledge, London, 2013) 85-89.

¹⁰⁹ Judy Fudge and Daniel Parrott, 'Placing Filipino Caregivers in Canadian Homes' in Kendra Strauss and Judy Fudge, *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (Routledge, London, 2013) 87.

Licensing Authority (GLA). The GLA emerged as a regulatory response after the tragic drowning of Chinese undocumented migrant workers picking cockles in Morecambe Bay.¹¹⁰ The GLA is a statutory authority which regulates the supply of workers in agriculture, food-processing, forestry and shellfish gathering industries by requiring that labour hire agencies be licensed.¹¹¹ Under the Gangmasters (Licensing) Act (2004), it is illegal both to operate as, or enter into an agreement with, an unlicensed gangmaster. In issuing licenses the GLA takes into account whether the applicant is a fit person and whether the applicant meets the detailed licensing standards, included being registered for tax, arranging wage payments on time and above the legal minimum, not mistreating workers and not withholding identity documents. Additionally, the GLA scrutinises license applications relying upon checks with other government departments and can decide on the basis of these further inquiries as to whether an application inspection is necessary or a license should be refused. Twenty-seven per cent of applicants have had their application rejected or additional license conditions applied.¹¹² Nonetheless, a weakness of the GLA licensing scheme is that once a license is approved, its renewal each year is fairly simple and does not encompass an automatic inspection.¹¹³

The GLA has a team of inspectors and currently conducts around 180 inspections per year, out of an estimated 1180 gangmasters. The GLA also works with other enforcement agencies to achieve its objectives such as UK Border Agency and launches litigation where necessary. For example, the GLA was the first UK enforcement agency to secure a Slavery and Trafficking Prevention Order (STPO) under the *Modern Slavery Act 2015* (UK) against two Lithuanian gangmasters who had transported two males, the Subatkis twins, to the UK and forced them to work in food factories in a highly exploitative arrangement. The convicted gangmasters were sentenced to a three and a half year jail term as well as the STPO which prevents them operating as gangmasters in the future.

According to UK scholar Anne Davies, the GLA model suffers from three weaknesses: first, the regulator does not have sufficient civil penalties at its disposal which forces recourse to litigation and stymies its ability to rely on other non-criminal penalties to induce cultural change amongst labour providers; second, the GLA finds it difficult to address the issue of phoenixing and third, the regulator's remit does not extend to assisting affected workers when an operator has their license revoked and the workers lose their jobs.¹¹⁴ So, for example, in the aforementioned case, the Subatkis twins lost both their jobs and their accommodation when their gangmasters were charged, described as being 'cast adrift' with 'no family to turn to and no work in the UK but feeling unable to go back to Lithuania for fear of reprisals from associates of Ratautas and Samurin [the convicted gangmasters]'.¹¹⁵ Although the GLA's actions rightly convicted and stopped the business of the

¹¹⁰ For an overview of the GLA regime, see Mick Wilkinson with Gary Craig, and Aline Gaus, *Forced Labour in the UK and the Gangmasters Licensing Authority* (The Wilberforce Institute, University of Hull, 2010).

¹¹¹ See further, <<http://www.gla.gov.uk>>.

¹¹² Nick Clark, 'Enforcement in the workplace' in Bernard Ryan (ed), *Labour Migration in Hard Times: Reforming Labour Market Regulation* (Institute of Employment Rights, 2013) 89.

¹¹³ Gangmasters Licensing Authority, *Licensing Standards* (May 2012), para 5.5.

¹¹⁴ ACL Davies in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford, Oxford University Press, 1st ed, 2014) 93.

¹¹⁵ Felicity Lawrence, 'Lithuanian gangmasters jailed in modern slavery and trafficking case' *The Guardian* (online), 23 January 2016 <<http://www.theguardian.com/uk-news/2016/jan/22/lithuanian-gangmasters-jailed-in-modern-slavery-and-trafficking-case#img-1>>. For an example of a more responsive and strategic regulatory approach to labour market enforcement, see Rosemary Owens, 'Temporary Labour Migration and Workplace Rights in Australia: Is Effective Enforcement Possible?' in Joanna Howe and Rosemary

gangmasters, the affected workers were left without any formal assistance from the government agency.

Going forward it seems likely that the GLA will have its role extended. The Cameron Conservative Government's Immigration Bill 2015-2016 was introduced into the UK parliament in September 2015 and seeks to extend the GLA's remit to all areas, with the agency renamed as the Gangmasters Licensing and Labour Abuse Authority and through the appointment of a Director of Labour Market Enforcement.¹¹⁶

Some have raised concern, however, that this extension of the GLA's role will be diluted by other measures, such as the government's proposal for 'flexible' licensing which will weaken the licensing requirement and prevent sufficient scrutiny and oversight over labour hire practices.¹¹⁷

Recommendations

4.1 There needs to be greater regulation over the use of migration and labour intermediaries in the Australian horticulture sector. The regulatory framework should involve a mandatory licensing and auditing scheme overseen by an independent statutory agency.

4.2 The Fair Work Ombudsman, with its expertise in the horticulture sector, protecting vulnerable workers and conducting industry and workplace investigations, would be well-placed to have its remit expanded to coordinate the licensing and auditing scheme.

Owens (ed) *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart, 2016) Chapter 18 - forthcoming.

¹¹⁶ Department for Business, Innovation and Skills, *Tackling Exploitation in the Labour Market: Government Response*, January 2016.

¹¹⁷ See, for example, 'Slavery experts "deeply concerned" at plans to water down UK labour inspection', (12 January 2016) Focus on Labour Exploitation <<http://www.labourexploitation.org/news/slavery-experts-deeply-concerned-plans-water-down-uk-labour-inspection>>.

Appendix A: Comparative Table of the SWP and WHM Programme

	Seasonal Worker Programme (Subclass 416 Visa)	Working Holiday Programme (Subclass 417 visa and subclass 462 visa)
Costs for applying for the visa ¹¹⁸	\$365	\$440
Visa processing times ¹¹⁹	2–3 months.	<ul style="list-style-type: none"> For subclass 417, 6 days for the first working holiday visa application and 21 days for the second working holiday visa application. For subclass 462, the web application is 6 days (paper applications are 14 days).
Who administers the visa?	The DoE, ¹²⁰ with support from the DFAT, the DIBP, Department of Agriculture, Austrade and the FWO. ¹²¹	The DIBP. ¹²²
Eligibility criteria for employing workers under each visa	<p>Either Organisations or Contractors can apply to become Approved Employers under the SWP. The eligibility criteria for each, is outlined below:</p> <p><u>Organisations</u>¹²³</p> <ul style="list-style-type: none"> is an eligible business registered and operating in Australia in a sound financial position and has an ABN is an 'Organisation' for the purposes of the <i>Migration Regulations 1994</i> (Cth) has good immigration practices and a history of compliance with immigration legislation 	There is no eligibility criteria for employing workers on a WH visa.

¹¹⁸ Department of Immigration and Border Protection, Australian Government, *Fees and Charges for Visas* <<https://www.border.gov.au/Trav/Visa/Fees#>>.

¹¹⁹ Department of Immigration and Border Protection, Australian Government, *Temporary Work Visa Processing Times* <<https://www.border.gov.au/about/access-accountability/service-standards/temporary-work-visa-processing-times>>.

¹²⁰ *PAM3*, above n **Error! Bookmark not defined.**, Sch 2 Visa 416 — Special Program [P Sch2.416-1.6].

¹²¹ Joint Standing Committee on Migration, above n 6, 6 [2.11].

¹²² Department of Immigration and Border Protection, Australian Government, *Working Holiday Maker Visa Programme Report* (30 June 2015) 2 <<http://www.border.gov.au/ReportsandPublications/Documents/statistics/working-holiday-report-june15.pdf>>.

¹²³ Department of Employment, Australian Government, *Seasonal Worker Programme Application Form* (22 September 2015) 2 <https://docs.employment.gov.au/system/files/doc/other/em15-0096_seasonal_workers_programs_forms_application_04_acc_2.pdf>.

	<ul style="list-style-type: none"> • has a history of compliance with Australian workplace relations, work health and safety legislation, and other relevant laws • understands and will comply with the programme requirements. <p><u>Contractors</u>¹²⁴</p> <p>‘must have been in operation for at least five years and have a record of compliance with immigration and workplace relations requirements.’</p>	
Application process of becoming an Approved Employer	<ul style="list-style-type: none"> • An employer must complete an expression of interest form,¹²⁵ which is lengthy (19 pages) and contains a number of areas of duplication.¹²⁶ The form must be lodged with the DoE.¹²⁷ • Employers that satisfy the programme’s criteria are offered a Deed of Agreement which comes into effect when the employer completes and receives Special Programme Sponsorship (Visa subclass 416) with the DIBP. The Deed sets out the employer’s obligations.¹²⁸ • The FWO is also expected to assess approved employer applications.¹²⁹ Thus, there is considerable paperwork across 3 government bodies.¹³⁰ 	No application process is required for employers who engage workers on the WH visa.
Processing times in accessing	<ul style="list-style-type: none"> • It takes 12 weeks to become an Approved Employer.¹³¹ 	There is no processing time as the employer is not responsible for the

¹²⁴ Department of Immigration and Border Protection, Australian Government, *New Arrangements for Contractors Interested in Becoming Approved Under the Seasonal Worker Programme* (4 December 2015) <<https://www.employment.gov.au/news/new-arrangements-contractors-interested-becoming-approved-under-seasonal-worker-programme>>.

¹²⁵ Form 1416 is available from: <<https://www.border.gov.au/Forms/Documents/1416.pdf>>.

¹²⁶ Apple & Pear Australia Limited, Submission No 33 to Joint Standing Committee on Migration, *Seasonal Change: Inquiry into the Seasonal Worker Programme* (6 August 2015) 2.

¹²⁷ PAM3, above n **Error! Bookmark not defined.**, Sch 2 Visa 416 — Special Program [P Sch2.416-2.4].

¹²⁸ Department of Employment et al, Submission No 2 (Supplementary Submission) to Joint Standing Committee on Migration, *Seasonal Change: Inquiry into the Seasonal Worker Programme* 6 [1.14].

¹²⁹ Apple & Pear Australia Limited, above n 126, 2.

¹³⁰ Ibid.

¹³¹ Joint Standing Committee on Migration, above n 6, 8 [2.18].

workers		lodgement of the WHM visa.
Restrictions on accessing workers	<ul style="list-style-type: none"> Labour market testing: before seeking access to seasonal workers, an approved employer must advertise for a 2-week period and within 3 months of the employer seeking to bring seasonal workers into Australia.¹³² Prior to recruiting seasonal workers, approved employers must also submit information to the DoE about the arrangements for seasonal workers, such as how many seasonal workers they would like to employ, the proposed work and accommodation arrangements.¹³³ 	No labour market testing is required. ¹³⁴
Can you hire workers as casuals?	Yes	Yes
Additional guarantees of the employer under the SWP when compared with the WHM	<ul style="list-style-type: none"> Provide 'briefings to seasonal workers on arrival into Australia and before departing back home'. Must guarantee seasonal workers a minimum average of 30 hours per week. Report to Government. Provide pastoral care for workers (eg church, community activities, medical appointments and personal shopping). Pay superannuation (at 9.5%) — the paperwork for this is considered burdensome for both workers and approved employers.¹³⁵ 	
Do employers have to provide	<ul style="list-style-type: none"> Approved employers must pay for the full cost of each seasonal workers' return international airfare and domestic transfer arrangements up front. The employer can then 	WHMs are required to manage their own affairs. ¹⁴⁰

¹³² Ibid 118 [9.28].

¹³³ Ibid 9 [2.22].

¹³⁴ Ibid 118 [9.28].

¹³⁵ Ibid 10 [2.26]; Apple & Pear Australia Limited, above n 126, 4. For a detailed assessment of the obligations of Approved Employers, see: Department of Employment, *Seasonal Worker Programme Implementation Arrangements (version 3.0)*, above n 26, 10–11.

accommodation, transport for the workers?	<p>recoup any amount over \$500 from the seasonal worker's pay over time.¹³⁶ However, there is always the risk that employers will not be able to recover such costs if workers choose to leave the Program.¹³⁷</p> <ul style="list-style-type: none"> Employers are responsible for organising transport to and from work and accommodation (at the seasonal workers' expense).¹³⁸ Organising these aspects and the paperwork of calculating how much to recoup from the worker's pay are considered an extra burden on employers.¹³⁹ 	
Piece rates or hourly rates?	Can be paid hourly or piece rates under the relevant award. There is no longer any requirement to provide a minimum period of work, however the employer needs to ensure that visa holder 'will benefit financially from their participation in the program'. ¹⁴¹	Can be paid hourly or piece rates under the relevant award.
Do employers have to provide pay slips and contracts of employment to	Once approved, an employer must provide the DoE a draft of the employment contract as well as the Letter of Offer made to the seasonal worker. ¹⁴²	All applicants for a second working visa must provide pay slips as evidence of appropriate remuneration with their application to the DIBP. ¹⁴³ This administrative requirement is placed

¹⁴⁰ Apple & Pear Australia Limited, above n 126, 4.

¹³⁶ Joint Standing Committee on Migration, above n 6, 124 [9.54]; Department of Employment, Australian Government, *Guidance for Approved Employers on the Deed of Agreement for the Seasonal Worker Programme* (6 May 2016) <<https://www.employment.gov.au/guidance-approved-employers-deed-agreement-seasonal-worker-programme>>.

¹³⁷ National Farmers' Federation, Submission No 21 to Joint Standing Committee on Migration, *Seasonal Change: Inquiry into the Seasonal Worker Programme* (10 July 2015) 15.

¹³⁸ Department of Employment, Australian Government, *Factsheet — Approved Employers and the Seasonal Worker Programme* (18 June 2015) <<https://docs.employment.gov.au/node/7748>>.

¹³⁹ Apple & Pear Australia Limited, above n 126, 4; Robert Leith and Alistair Davidson, 'Measuring the Efficiency of Horticultural Labour: Case Study on Seasonal Workers and Working Holiday Makers' (Report, Australian Bureau of Agricultural and Resource Economics and Sciences, December 2013) 5 <https://docs.employment.gov.au/system/files/doc/other/abares_-_measuring_the_efficiency_of_horticultural_labour.pdf>.

¹⁴¹ Department of Employment, Australian Government, *Seasonal Worker Program Expansion – Q&A*, above n 18.

¹⁴² Apple & Pear Australia Limited, above n 126, 4.

¹⁴³ Department of Immigration and Border Protection, Australian Government, *Employer Obligations and Pay Slip Evidence* <<https://www.border.gov.au/WorkinginAustralia/Pages/employer-obligations-and-payslip-evidence.aspx>>.

the DIBP/DoE/DFAT for workers?		upon the visa holder not the employer of WH visa holders.
How long can a visa holder be employed for?	<ul style="list-style-type: none"> The <u>minimum</u> stay is determined in consultation with the DoE based on information provided by an approved employer, which demonstrates that the seasonal worker will benefit financially from the SWP.¹⁴⁴ Seasonal workers from Papua New Guinea, Fiji, Samoa, Solomon Islands, Timor-Leste, Vanuatu and Tonga can be employed for a <u>maximum</u> period of six consecutive months.¹⁴⁵ Seasonal workers from Kiribati, Tuvalu and Nauru can be employed for a <u>maximum</u> period of nine consecutive months.¹⁴⁶ 	<p>Visa holders can do any kind of work over the course of their 12-month stay in Australia. The only restriction is that they are not permitted to work for more than 6 months with one employer, unless given permission by the DIBP.¹⁴⁷</p> <p>WH makers on the 417 visa (and in the near future on the 462 visa) can extend their stay from 12 months to two years by working in regional areas in agriculture, forestry and fishing, construction or mining for at least 88 days.¹⁴⁸</p>

¹⁴⁴ Department of Employment, Australian Government, *Guidance for Approved Employers on the Deed of Agreement for the Seasonal Worker Programme*, above n 136.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Department of Immigration and Border Protection, Australian Government, *Working in Australia — Six Months with One Employer* <<https://www.border.gov.au/Trav/Work/Empl/WHM-six-months-one-employer>>.

¹⁴⁸ National Farmers' Federation, Submission No 14 to Education and Employment References Committee, *The Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders*, 1 May 2015, 18–19.

APPENDIX B

Case Study: Labour Needs in the UK Horticulture Industry

In May 2013 the UK's Migration Advisory Committee (an independent statutory agency charged with advising the government on issues relating to labour migration) provided a report to the UK Government on the role of migrant seasonal workers in the UK horticulture industry.¹⁴⁹ The context for this report was the Government's decision to close the Seasonal Agricultural Workers Scheme (SAWS) and the Sectors Based Scheme (SBS). Although SBS had a marginal role in meeting UK horticulture's labour needs, SAWS had a much longer pedigree, having been in place for over sixty years, although only open to workers from Bulgaria and Romania (A2 countries) since 2008. Between 2008 and 2013 SAWS permitted a quota of 20,000 A2 country workers into the UK to work in agriculture, most of whom ended up in horticulture. At the end of 2013 A2 country workers were no longer subject to any restrictions to where they work in the European Union.

The UK Government asked MAC to consider the impact of this change, the ability of local workers to meet the industry's labour needs and whether there should be a replacement for SAWS for workers from non-EU countries.

The report was sceptical of the ability of British local workers being able to address the labour shortfall which would come about from the closure of SAWS. In doing a comparative analysis of incentives in the USA and Germany to entice local workers into the industry and restrictions on growers' access to temporary migrant workers, the report found that these did not largely work. The report referenced a new pilot programme being introduced by the UK Department of Work and Pensions to encourage British workers into horticulture. This programme offered training and a guarantee job in horticulture for 200 workers in its first year. Subsequent reports suggest that take-up from this programme has been slow and that local workers still play only a marginal role in the British horticulture industry. In part, reflects the difficult (even 'hellish' working conditions in the industry),¹⁵⁰ but also the high level of unpredictability in the horticulture industry which makes the work less appealing to local job seekers who prefer to have a defined period of employment in the one location.

The report concluded that the closure of the SAWS would not initially lead to a decline in the current supply of workers to the horticulture industry as Bulgarian and Romanian workers would still be willing to initially be employed in the industry. However, the report predicted that over time these workers would move to other sectors with better pay and conditions and that a new source of seasonal labour would be required over the medium to long term or the horticulture industry would need to consider alternatives if increased labour costs could not be absorbed without impacting its size. The report predicted that this could lead to a loss of permanent employment (mainly for UK locals) and a contraction in the size and profitability of the horticulture industry, and that it was a question for the Government to consider whether this may lead to the land and resources currently

¹⁴⁹ Migration Advisory Committee, *Migrant Seasonal Workers: The Impact on the horticulture and food processing sectors of closing the Seasonal Agricultural Workers Scheme and the Sectors Based Scheme*, May 2013.

¹⁵⁰ Jon Austin, 'Back-breaking work for peanuts – why British workers won't slave on farms swamped by EU migrants', *The Daily Express*, 20 August 2016 < <http://www.express.co.uk/news/uk/701860/Back-breaking-hell-paid-peanuts-why-Brits-won-t-slave-on-farms-swamped-by-EU-migrants>>. This article referred to the experience of a regional town's jobs centre who had referred 40 local unemployed for bulb-picking work, with only 18 completing the induction program and only 5 ending up employed as bulb-pickers.

used for horticulture in an alternative manner which may possibly produce greater economic efficiency.

The question of how to meet the British horticulture industry's labour needs has become even more acute since the Brexit vote which creates uncertainty as to whether EU workers will be allowed to enter Britain to work in the horticulture industry.¹⁵¹ Up until this point, the EU's freedom of movement principle has provided easy access to the British labour market for EU country nationals. The closure of SAWS, coupled with the Brexit vote is leading to fresh calls for Britain to consider introducing a dedicated labour migration pathway for migrant workers in horticulture.

What does the report say about...?

Local workers - *'The SAWS has not displaced British labour. Rather it was the deficient supply of British workers which led to the expansion of the SAWS. This raises a thorny issue. Once a low-skill, low-wage sector becomes immigrant-intensive, is it feasible for the native population to regain the jobs?'* (p3)

'It is hard to find international evidence of policies that have succeeded in encouraging large numbers of domestic workers to re-enter and take up low-wage agricultural jobs currently done by migrants. The closure of the Bracero programme in the United States in 1964 was followed by an increase in illegal immigration. Attempts to incentivise German workers to take up employment in agriculture using wage subsidies appear to have failed, as the number of foreign seasonal agricultural workers practically doubled between 1994 and 2005.' (p87)

The impact of labour shortages— *'If a farmer experiences labour shortages, addressing these shortages is likely to translate into an increase in costs. This could occur via several inter-related mechanisms: increased wages, increased costs of recruitment and increased production costs. Importantly, an increase in the costs of labour may translate into higher prices further along the supply chain which can then impact on the demand for the product. If consumers were unwilling to accept current quantities of British produce at a higher price, the evidence suggests this will result in greater substitution towards imported produce. Such an outcome would have an adverse impact on British horticulture. If the cost of labour per unit of output increases, substitution to more capital-intensive technology becomes more viable. However, this depends on whether such technology is available and would have the effect of reducing the cost of labour per unit of output. We have not seen evidence that this is a likely scenario, at least in the short to medium term. Therefore, a likely consequence of this chain of events would be industrial restructuring. Effectively this means that horticultural activity in the UK would be reduced to a level which could be sustained by the labour available at new wage rates. The remaining land and other resources currently used by horticulture would then be released for alternative economic activities.'* (p11-12)

The likely impact of closing the SAWS – *'In the medium term, farmers are likely to experience increasing difficulties sourcing the required level of seasonal labour from the UK (including the UK) labour market. A new source of seasonal labour is likely to be required, or the horticulture sector will need to consider alternatives if increased labour costs cannot be absorbed without impacting its size.'* (p12)

¹⁵¹ Jez Fredenburgh, 'Farming's access to migrant labour if Britain left the EU', *Farmers Weekly*, 20 May 2016, <<http://www.fwi.co.uk/news/analysis-farmings-access-to-labour-if-the-UK-left-the-eu.htm>>.