



National Farmers'
F E D E R A T I O N

Submission on the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders

1 May 2015

Senate Education and Employment References Committee

NFF Member Organisations



Australian Chicken Growers' Council Ltd



CANEGROWERS



COTTON AUSTRALIA



Goat Industry Council of Australia Inc.



GrainCorp



NEW SOUTH WALES IRRIGATORS' COUNCIL



RICEGROWERS' ASSOCIATION OF AUSTRALIA INC



RIDLEY





The National Farmers' Federation (NFF) is the voice of Australian farmers.

The NFF was established in 1979 as the national peak body representing farmers and more broadly, agriculture across Australia. The NFF's membership comprises all of Australia's major agricultural commodities across the breadth and the length of the supply chain.

Operating under a federated structure, individual farmers join their respective state farm organisation and/or national commodity council. These organisations form the NFF.

The NFF represents Australian agriculture on national and foreign policy issues including workplace relations, trade and natural resource management. Our members complement this work through the delivery of direct 'grass roots' member services as well as state-based policy and commodity-specific interests.

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Statistics on Australian Agriculture

Social >

There are approximately 115,000 farm businesses in Australia, 99 percent of which are family owned and operated.

Each Australian farmer produces enough food to feed 600 people, 150 at home and 450 overseas. Australian farms produce around 93 percent of the total volume of food consumed in Australia.

Economic >

The agricultural sector, at farm-gate, contributes 2.4 percent to Australia's total Gross Domestic Product (GDP). The gross value of Australian farm production in 2012-13 was 47.9 billion – a 3 percent increase from the previous financial year.

Yet this is only part of the picture. When the vital value-adding processes that food and fibre go through once they leave the farm are added in, along with the value of all economic activities supporting farm production through farm inputs, agriculture's contribution to GDP averages out at around 12 percent (over \$155 billion).

Workplace >

The agriculture, forestry and fishing sector employs approximately 323,000 employees, including owner managers (174,800) and non-managerial employees (148,300).

Seasonal conditions affect the sector's capacity to employ. Permanent employment is the main form of employment in the sector, but more than 40 per cent of the employed workforce is casual. Almost 10 per cent of all workers are independent contractors and more than 50 per cent of farmers are self-employed owner-managers.

Approximately 60 per cent of farm businesses are small businesses. More than 50 per cent of farm businesses have no employees at all.

Environmental >

Australian farmers are environmental stewards, owning, managing and caring for 52 per cent of Australia's land mass.

Farmers are at the frontline of delivering environmental outcomes on behalf of the Australian community, with 94 per cent of Australian farmers actively undertaking natural resource management.

The NFF was a founding partner of the Landcare movement, which in 2014, celebrated its 25th anniversary.

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Executive Summary

Overseas workers play a small but important part in the Australian agriculture sector. Many agricultural industries are characterised by seasonal work, harvesting perishable goods destined for domestic and international markets. These industries are commonly located in regional or remote areas where demand for labour is high during peak seasons and labour supply is limited. Recent experience with the mining boom confirms that Australian agriculture also faces strong domestic competition for labour with other sectors of the economy. Redressing this imbalance through use of foreign workers is hugely important – it means that what is grown can be harvested and sold, not left to perish.

Australian agriculture needs policies and programs that drive growth and boost on-farm profitability and competitiveness. In our submission to the Agricultural Competitiveness White Paper, the NFF called for measures to boost the availability of foreign labour in regional areas by supplementing existing migration policy solutions to agricultural labour shortages.

This submission outlines the experience of the agriculture sector in relation to temporary migrants, and highlights the importance of these workers to the sector. It explains how Australian employment and work, health and safety laws apply to temporary migrants and provides some analysis on the extent of poor treatment of foreign workers in the sector. Key measures to improve the integrity and accessibility of temporary migration programs include a review of labour market testing requirements, implementation of key findings of the *Independent Review into Integrity in the Subclass 457 Programme* (the 457 Review) and responding to concerns about poor labour hire practices in a way that preserves access to bona fide service providers to the farm sector.

The challenge for policy makers and for industry is to ensure that Australia is recognised as a destination of preferred choice for migrants. Intake should reflect immediate and future skills and labour shortages, and be flexible and responsive enough to fill actual and projected gaps in labour market activity. Visa programs should be accessible, easy to use and affordable for Australian farmers. Experiences on farm should be positive and beneficial for both workers and their hosts. Importantly, migration programs should complement domestic skills policies, which must deliver the backbone of Australia's skilled labour needs.

1. Introduction

Temporary migration programs are an essential source of labour for many Australian farmers. The seasonal nature of agriculture, and its location in rural and remote areas of Australia, often makes it difficult to attract and retain Australian workers. For many farm businesses, low margins limit the capacity to offer higher wages as a means of incentivising agricultural work.

Work in agriculture ranges from highly skilled to unskilled. People working in agriculture are typically farm owners and family members, share farmers, itinerant workers, students and other local casual workers, grey nomads, skilled migrants, backpackers and foreign workers temporarily in Australia to support a better life in their home country.

Migration policies that seek to address regional agricultural labour shortages are critical to the Australian economy. Analysis by the NFF in 2008 revealed:

- 22,000 fruit-picking positions were going begging in horticulture— costing horticultural farms, on average, \$100,000-a-year each in unpicked rotting fruit – while another 80,000 jobs were needed in skilled areas; and
- in the most extreme cases, farmers were losing \$250,000 per season in rotting produce due to the inability to find labour.

In many respects, labour shortages in the sector have been ameliorated by changes to the working holiday maker program in late 2005, which encouraged backpackers to work on farms. Despite this positive shift, attracting and retaining workers to agriculture remains an ongoing issue and a policy priority for the NFF and its members.

While the sector invests in programs to recruit, train and retain Australian workers, closing the gap from the local workforce is unlikely ever to be fully realised. High rates of youth unemployment in areas where tourism and agriculture are key industries, such as Cairns, suggest that availability to undertake entry-level work is not enough on its own to address labour shortages.

Initiatives to boost participation of Australian workers in the agriculture sector, including greater investment in education and skills and incentives to increase student uptake of agricultural work should be a core focus for government. In the meantime, we need to recognise that overseas workers will always play an integral part in the Australian agricultural workforce. Delivering a skilled and productive agricultural workforce for Australia means, among other things, ensuring that migration policy settings promote ongoing access for the sector to workers with the necessary skills, when and where they are needed, and without undue cost or red tape.

2. Use of migration programs in Australian agriculture

Temporary migration programs used most frequently by the agriculture sector are:

- the *Temporary Work (Skilled)* visa (subclass 457);
- the *Working Holiday Maker* visa (subclasses 417 and 462); and
- the *Seasonal Worker Program* (subclass 416).

The Temporary Work (Skilled) visa program

Under the Temporary Work (Skilled) visa program, employers can bring skilled overseas workers into Australia to fill skill shortages on a temporary basis, where those skills are not available locally. Terms and conditions of employment for sponsored workers must generally be no less favourable than those that would be provided to an Australian performing equivalent work in the same location. Employers must be lawfully operating a business and meet minimum training benchmarks. Labour market testing rules apply –technically, labour agreement arrangements are exempt from this requirement, although similar rules apply. Market salary rates must be at least equal to the Temporary Skilled Migration Income Threshold (TSMIT).

The total number of 457 visas granted Australia wide in 2013-14 was 51,940. Of these, 880 (or 1.7 per cent) were granted to applicants in the Agriculture, Forestry and Fishing industries.¹ Consistent with the all industries trend for 2013-14, demand for skilled workers on the 457 visa program fell sharply in agriculture, forestry and fishing, by 36.4 per cent.² Over the same period, the average nominated total remuneration for 457 visa holders in the agriculture sector was \$70,600, above the average weekly total earnings for all employees in May 2014 (\$58,548.01).³

The Working Holiday Maker Program

The Working Holiday Maker program was established to encourage cultural exchange and closer ties between participating countries. It was later modified⁴ to help Australian regional employers by encouraging short-term and casual work in specified industries in regional Australia. Specifically, working holiday makers in Australia on a 417 visa can extend their stay from 12 months to 2 years by working in regional areas in agriculture, forestry and fishing, mining or construction for at least 88 days. Working holiday makers on a 462 visa cannot

¹ Subclass 457 State/Territory summary report 2013-14 to 30 June 2014, Table 1.10.

² Subclass 457 State/Territory summary report 2013-14 to 30 June 2014, Table 1.10.

³ ABS, Catalog. 6302.0 *Average Weekly Earnings, Australia, May 2014* (calculated by multiplying average weekly earnings of \$ by 52.14)

⁴ According to the Department of Immigration and Citizenship's Budget Statement 2013-14, from 1 November 2005, the second year visa initiative for working holiday makers was "established to provide a pool of short term seasonal labour for the horticulture sector in regional Australia, due to ongoing and persistent labour shortages. It was subsequently expanded in 2006 to include the agriculture sector more generally and, in 2008, to include the mining and construction sectors."

extend their stay and there are limits on the number of working holiday makers from each country. Workers can work with one employer for up to 6 months. If a second visa is granted, workers can return to the same employer for another 6 months.

In 2013-14, a total of 239,592⁵ working holiday maker visas were granted:

- 229,378 working holiday makers (417 visa)
 - 183,428 first year visas (down 12.8 per cent) and
 - 45,950 second year visas (up 18.2 per cent)
- 10,214 working holiday makers (462 visa subclass) (up 13.3 per cent).

Analysis of work undertaken by working holiday makers shows that the two dominant industries attracting working holiday makers are 'accommodation and food services' (35%) and 'agriculture, forestry and fishing' (26%).⁶ Working holiday makers choose to work on farms overwhelmingly because this gives them access the second year visa. Approximately 90 per cent of working holiday makers (41,319) who qualified for the second year visa did agricultural work.

Working holiday makers spend an estimated average of \$14,910.77 each year while in Australia.⁷ This is an annual contribution of more than \$3.5 billion. Older working holiday makers (ages 25-30) spend 70 per cent more than their 18-19 year old counterparts.⁸

The Seasonal Worker Program

In March 2006, the NFF recommended that the Australian Government establish a seasonal worker visa program to address chronic labour shortages in the horticulture industry. The proposal was made on the basis that many farmers have difficulty attracting seasonal workers because short-term seasonal work is not an attractive employment option for many Australians.

Key elements of the NFF proposal were:

- an emphasis on employment of entry level workers, not catered for by other existing migration solutions for skilled and semi-skilled labour;
- the opportunity for entry-level workers to build skills as a pathway toward technical training;
- reciprocal benefits for employers and workers;
- reciprocal benefits for Australia and participating nations;

⁵ Department of Immigration and Border Protection *Working Holiday Maker Visa Programme Report* 30 June 2014

⁶ Tan Y, Richardson S, Lester L, Bai T and Sun L *Evaluation of Australia's Working Holiday Maker (WHM) Program* 27 February 2009, page II.

⁷ Tan et al, page IV; figures adjusted for inflation between 2008 and 2013.

⁸ Tan et al, page 34.

- pay and conditions set by the relevant industrial instrument;
- pre-departure briefings and community and cultural engagement while in Australia;
- placement of workers in areas where there is a demonstrated shortage of entry-level workers;
- access to approved employers with sound workplace relations, safety and migration practices;
- workers to be of 'good character', with a command of English, physically fit and able to do the work required;
- workers able to return in subsequent seasons;
- provision of training to workers;
- minimum visa period of three months;
- travel costs met by employers for visas of six months or more;
- comfortable accommodation provided as in-kind reward or arranged on behalf of workers at market or discount rates; and
- minimal red tape.

The Seasonal Worker Program, which initially commenced as a three year pilot scheme, largely adopted the NFF proposal. It aims to assist Australian employers who are unable to find enough local Australian workers to meet their seasonal labour needs, while contributing to the economic development of Timor-Leste, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu and more recently, Fiji. The program is ongoing for the horticulture sector, and includes a trial in the accommodation, aquaculture, cotton and cane sectors in selected regions. Access to workers is capped at a maximum number per industry sector, with a total of 12,000 places available.

The first workers arrived under the scheme in February 2009. Labour sending arrangements include eligibility criteria for workers, pre-departure briefings on living and working in Australia, on-arrival briefing for workers in Australia and employment in accordance with Australian workplace standards. Workers can come to Australia for a minimum of 14 weeks and a maximum six months, with the ability to return in following seasons. Employers of seasonal workers must be "approved employers" and may be direct employers or labour hire companies.

A more recent initiative is the "Add-on skills" training program, funded by government and providing training for workers in English literacy and numeracy, first aid, and information and communication technology. In addition, workers can gain recognition of prior learning toward Certificate I or II qualifications in their field of work.

Almost 3500 seasonal workers have been placed in the horticulture sector under the Program in 50 local government areas since its commencement, and this number continues to grow. Seasonal workers have been employed to undertake a range of work, including picking, packing, pruning, draining, grading and thinning. Some seasonal workers have even been promoted into supervisory roles.

In 2013-2014, 99 per cent of places allocated to the horticulture sector were filled. During the same period, of the places available to the four trial sectors of accommodation, aquaculture, cotton and cane, 51 places were filled in total (the majority in the accommodation sector). An evaluation of the Program in 2011 found that it can fill unmet demand for seasonal workers and provide a consistent, reliable, returning workforce that improves workforce planning and increases productivity.⁹ Anecdotal evidence also suggests that the Program is working well. Employers have commented on the many positive aspects of the Program, including access to a returning workforce, low levels of absenteeism and reduced staff turnover.

One grower, who halved the number of employees required to pick the same amount of fruit over a five year period through the use of seasonal workers, recently described the Program as an “excellent solution to the problem of labour shortages”.¹⁰ An ABARES study in December 2013 found that seasonal workers were, on average, significantly more efficient than working holiday makers. Seasonal workers earned on average 22 per cent more than working holiday makers and returning seasonal workers earned \$2.80 an hour (12 per cent) more on average than new workers. Unsurprisingly, seasonal workers who returned for another season were more efficient than new workers.¹¹

The Program is not without its issues. Costs are a major disincentive to greater uptake of the program, as is the fact that some costs are payable upfront on a ‘buy before you try’ basis. Commentary at the 2014 Seasonal Worker Program Conference suggested these initial costs were in the order of \$2000 per worker, once set-up costs, regulatory compliance and travel and accommodation arrangements were taken into account. In addition, there is the risk that costs will not be recovered if workers choose to leave the Program.

The minimum period of commitment is inflexible in its application to industries affected by seasonal conditions. Many commodity groups, including dairy, are not able to access the program. There is no ability to vary start and finish dates in the event of natural disasters, such as floods and cyclones. Equally there is no ability to repatriate a worker who is found to be unsuitable on arrival in Australia.

These issues demonstrate that the Program needs some fine tuning to fully achieve

⁹ TNS Social Research *Final evaluation of the Pacific Seasonal Worker Pilot Scheme* September 2011

¹⁰ Ironbark Citrus, Presentation to the Seasonal Worker Conference, Gold Coast, 7-8 August 2014.

¹¹ Leith, R and Davidson, A *Measuring the efficiency of horticultural labour: Case study on seasonal workers and working holiday makers* Department of Agriculture, December 2013

its potential. All indications are that the Program can deliver increased productivity for the agriculture sector, which in turn benefits the Australian economy. Overall, the NFF considers that the Program is a unique and valuable scheme that brings together foreign aid and labour market policy for the economic benefit of Australia and participating nations.

3. Australian workplace and safety laws

Coverage of Australian and foreign workers

Overwhelmingly, Australian and overseas workers are covered by the *Fair Work Act 2009* (FW Act) and relevant modern awards or enterprise agreements as well relevant State or Territory work, health and safety laws. There are some exceptions to coverage, related to State decisions to refer power to the Commonwealth for the purposes of the FW Act. The reach of the FW Act also extends beyond Australian territorial boundaries in relation to certain seafarers and employees working overseas, where there is a relevant connection to Australia.

Importantly, coverage under Australian workplace and safety laws is not dependant on one's status as a citizen, permanent resident or visa holder. Any such approach would be likely to raise serious concerns in relation to discrimination. The exception to this rule appears to be in relation to persons who do not have work rights in Australia. In *Australian Meat Holdings P/L v Kazi*¹² an 'unlawful non-citizen' under the *Migration Act 1958* was found not to be capable of entering into a valid contract of employment with his employer:

"If it is in the national interest to prohibit unlawful non-citizens from performing work it must also be in that interest, it seems to me, to prohibit any such person obtaining rights under a contract to perform work. To do so would conduce to the object of the statute. I do not think therefore that the Act intended that a penalty should be the only consequence of a breach of s 235(3) [of the Migration Act].

*For the reasons which I have given, that a contract to perform work has as its whole object the doing of the very act which the statute prohibits, and that invalidity of a contract by a non-citizen to perform work is within the object stated in s 4(1), I think that the contract here was invalid."*¹³

This decision was cited by the Fair Work Commission in *Smallwood v Ergo Asia Pty Ltd*.¹⁴ In that case, there was no valid 457 visa arrangement between the employer and employee. Bissett C found that "*the Migration Act impliedly prohibits a contract of employment between the Applicant and the Respondent*" and concluded there was no relationship of employee and employer between the parties. It is implicit from this finding that work undertaken by the applicant for the respondent was not covered by the FW Act.

¹²[2004] QCA 147 (7 May 2004)

¹³ [2004] QCA 147 (7 May 2004)

¹⁴ [2014] FWC 964 (14 February 2014)

Cases like this highlight the importance of ensuring that visa arrangements are properly entered into. Workers without valid visas must be careful not to place themselves in the vulnerable position of not being protected by Australian laws when they need them most. For employers, the risk of substantial sanctions and penalties of up to \$255,000 per worker¹⁵ for failure to verify visa work rights operates as a significant incentive to comply.

In addition to modern award wages and conditions, foreign workers temporarily in Australia are entitled to have superannuation contributions made on their behalf into a relevant fund, as long as they earn the minimum amount each month. These payments can be cashed out by departing workers. In our view, this policy measure is worth reconsidering at the right time, given the underlying purposes of superannuation to provide an adequate level of retirement income, relieve pressure on the Age Pension; increase national savings and create a pool of patient capital to be invested as decided by fiduciary trustees.¹⁶ Each of these objectives can be achieved without the need to extend the benefit to temporary, foreign, workers.

Consistency of treatment under the Australian public health system is another issue in relation to migrant workers. While workers from countries which have reciprocal health care arrangements with Australia have some coverage under Medicare, others are responsible for their own health insurance unless agreement is reached with their employer. This can, and often does, mean that employers take on responsibility for the costs of private health insurance for foreign workers, a factor which should ultimately be taken into account when setting visa program fees and costs to stakeholders.

Labour market testing in the agriculture sector

The NFF supports measures to improve job opportunities for Australians in the labour market, but we do not support labour market testing. This is for two reasons: the regulatory impost, and the potential for it to expose employers to liability for discrimination.

Labour shortages in the agriculture sector are nothing new. The labour market testing regime makes no acknowledgment of this circumstance. Instead, it applies across the board, to all sectors and industries seeking access to migrant workers, both in relation to the 457 visa program and the Seasonal Worker Program.

Publicly available information about labour market testing requirements, or exemptions from those requirements, is not easy to find. In the context of the Seasonal Worker Program, information of the requirements is made available only after an employer becomes an 'Approved Employer'. For 457 visas, the description of labour market testing requirements is buried in general language

¹⁵ Department of Immigration and Border Protection *Employing Legal Workers Factsheet* <http://www.immi.gov.au/About/Pages/managing-australias-borders/employing-legal-workers.aspx>

¹⁶ The Treasury *Charter of Superannuation Adequacy and Sustainability and Council of Superannuation Custodians* <http://www.treasury.gov.au/Policy-Topics/SuperannuationAndRetirement/supercharter/Report/Chapter-4>

about a “commitment to local labour” and links to the detail of exemptions to labour market testing direct the user to the 457 visa homepage. 457 visa sponsorship applications must be completed online and (unlike most other visa programs) there is no hard copy alternative, which presents an additional challenge for rural and remote businesses where internet access is limited.

Labour market testing requirements for short-term migration programs represent a large commitment for little return. Approved Employers under the Seasonal Worker Program prepare a recruitment plan for each group of workers they seek to employ, place job advertisements for a minimum 2 week period, and report back to the Department of Employment, which administers the Program, before proceeding to recruit from overseas.

The requirement to advertise and offer work to Australian jobseekers before seeking to recruit foreign workers is problematic. Farmers are required to advertise jobs broadly, eliciting numerous responses from foreign workers and only very few from Australian workers. Each job application must be reviewed and responded to, requiring allocation of significant time and resources, when the reality is that most Australians are not looking for jobs that involve hard, physical work in rural, regional and remote areas. In some cases, our members tell us that Australian workers who have applied and been offered a job have refused the offer, advising that the application was only made to meet their job application quota for the month.

Significantly, the requirement to advertise job vacancies for Australian workers is not attached to any protection for employers from the legal implications of adopting a nationality-based recruitment and selection process. Racial discrimination laws, as well as the general protections under the FW Act, expose employers to liability if they advertise only for Australian workers or if they limit their consideration of job applications to those Australians who apply (to the exclusion of those from other countries).

In our submission, in regions where there is a demonstrated labour shortage (for example, regions eligible for the Seasonal Worker Program), labour market testing requirements should be removed as a red-tape reduction measure. In the meantime, employers should be protected from liability under discrimination laws for compliance with the regime.

4. Training and skills development

There is no doubt that temporary skilled migration schemes contribute to an overall improvement in the agricultural skills base in Australia. A key benefit of skilled migrant workers coming to Australia is that they bring their skills with them. As they apply their skills in rural businesses, local workers have the opportunity to learn first-hand from more skilled workers, so that over time, they too can pass on their skills to others.

The sector has experienced considerable variations in skill base as new processes and requirements bring new technical and specific roles across the industry. Regional, rural and remote employers genuinely face difficulties recruiting local people with the relevant skills. In recent years, industry has invested significantly in negotiation of labour agreements to overcome difficulties sourcing skilled farm workers in certain industries. A good example is the pork industry, which is in many ways in its infancy in Australia and where skilled piggery operators are not in large supply. This is different to the position in the United Kingdom, where the industry is a major agricultural sector of the economy.

The NFF supports the findings of the *Independent Review into Integrity in the Subclass 457 Programme* (the 457 Review) in relation to annual training fund contributions, based on the number of 457 visa holders sponsored, and reflecting the size of the business. In particular, we support reinvestment of training fund contributions into job readiness programs for disadvantaged groups as well as apprenticeships and traineeships in rural and regional areas. In agriculture, much of the training is done on-the-job, involving small businesses, family members and in geographic regions where formal training providers are scarce. This makes compliance with current training benchmarks difficult under the current regime. This is consistent with a key finding of the 457 Review that, on all sides of the political divide, there is general agreement that current training benchmarks are ineffective.

In many areas of Australia, youth unemployment is at unacceptably high levels. Employment support services actively seek out opportunities for disadvantaged youths, but struggle to overcome the hurdle of employer requirements for workers to be 'job ready'. In the farming context, 'job ready' means understanding how to interact in a workplace as well as holding basic farm skills (general knowledge of work, health and safety, operation of common farm vehicles and communications). Lifting skills in these areas among individuals who might otherwise find it hard to secure work on farms will boost employment participation rates in the Australian agriculture sector.

5. Access to information

As a significant user of migration programs, the agriculture sector must be able to get the information that it needs to access foreign workers in a way that complies with relevant laws. At the moment, there is no publicly available means of accessing this information with ease. The Department of Immigration and Border Protection (DIBP) publishes comprehensive fact sheets and guidelines on specific visa programmes, but they are very difficult to find.

The agriculture sector was extremely disappointed to lose the DIBP Outreach Officer programme in the 2014-15 Budget, effective from 1 July 2014. There is simply no equivalent, affordable, alternative. The use of migration agents is no answer: their fees, particularly for skilled migration visas, average \$2,000 to

\$5,000 or more. The Department's Employer Hotline closes at 4.30pm, and the Migration Blog does not answer individual queries, so one is left trawling through reams of information that is not relevant to the query in the hope of finding commentary on the particular issue in question. In our view, a 'live chat' function might offer a more useful alternative and we look forward to the outcomes of the Skilled Migration Review, which we hope will go a long way to simplifying current complexity of programs.

Visa Entitlement Verification Online (VEVO) is good in theory, but not the simple tool that it is made out to be. For example, why does an employer have to register to check if a worker has a valid visa? Why does the Department need a list of employers who are simply trying to comply with their obligations under migration law? In our view, there must be a simpler way for employers to check that a person has work rights than spending hours navigating complex online forms.

There has been a focus in recent months on improving the information available to migrant workers. The FW Act requires every new employee to be given a Fair Work Information Statement upon commencement of employment. In addition, the FWO and the Department of Immigration and Border Protection have each published fact sheets for migrant workers. Working holiday makers (at least from developed nations) are generally tech-savvy and knowledgeable: they can find the information they need, when they need it. Similarly, skilled foreign workers can be expected to have a reasonable level of education and understanding of how to access information on matters that affect them. Where this is not the case, it is likely to relate to English language competency more than anything else.

Similarly, the structured nature of the Seasonal Worker Program ensures that workers have access to the information they need. Many may not have strong English speaking skills, and this is managed through the appointment of team leaders who act as the liaison point for workers and employers. An emphasis on cultural exchange and understanding is embedded into the program, and information is provided through briefing sessions both before and after workers arrive in Australia.

6. Treatment of temporary migrants in agriculture

The agriculture sector has operated under regulated working arrangements for longer than any other industry in Australia, since 1907 when the Pastoral Award was first made. Overwhelmingly, Australian farmers do their best to comply with the heavy and ever-increasing regulatory burden in the sector, including in relation to modern award wages and conditions.

We recognise that there are concerns in the community about how foreign workers in the sector are treated and we are aware of cases where individual farmers and contractors have chosen not to do the right thing. The NFF and its members are proud of our produce and our people. We believe in a fair days' pay for a fair days' work. We work hard to ensure that farmers in Australia understand their

award obligations, including through the establishment of dedicated industrial relations advisory services for members, and we have no sympathy for those who have a wilful disregard for the law, including Australian workplace and migration laws. Those who act in this way drag the rest of the industry down, and make it harder for everyone else to compete.

In our view, the extent of poor treatment in the sector can sometimes be overstated. A review of the data released by the Fair Work Ombudsman (FWO) outlining its exercise of powers under the *Migration Act 1958* from 18 September 2013 to 30 September 2014 identifies only 5 concerns about compliance with visa conditions that can be directly attributable to the agriculture sector, out of a total of 2311 cases.¹⁷ According to the FWO's annual report for 2013-14, visits in August and September 2013 to strawberry growers in the regional Queensland identified underpayment of approximately 150 backpackers, in the order of \$133,000 (an average of \$886 per person). Three businesses were issued with infringement notices (on-the-spot fines) and 11 employers received letters of caution.

These figures are not perfect, but nor are they unusually high. The agriculture sector is committed to constantly lifting employment standards. The NFF has worked closely with the Fair Work Ombudsman and its predecessors over many years to support education and awareness campaigns and promote compliance in the industry. As an industry, we are also being proactive – through implementation of Best Management Practice programs (covering matters such as workplace relations, human resources and work, health and safety), initiatives to support Employer of Choice status and the development a broader based, Best Practice Scheme for Agricultural Employment. We are always willing to work more closely with government or the authorities on strategies to improve compliance.

At the same time, the sector continues to drive productivity growth in the face of variable seasonable conditions, low margins and time critical operations. Our capacity to achieve these outcomes relies, in part, on access to temporary migrants so that we can reach our harvest potential each year, for the benefit of the sector and the economy as a whole.

Role of recruitment agents

Employment can be a complex and time-consuming process, from recruitment and selection to processing of payroll. For this reason, many employers in the agriculture sector choose to outsource the function to labour hire firms, particularly where there is a short-term need for a number of casual workers. This is a necessary service to the sector and when done well, can create strong working relationships that last over many years.

A good example is in relation to the Seasonal Worker Program, where labour hire operators can register to become Approved Employers. Those who are determined

¹⁷ 457 Visa Monitoring - Details Report (18.9.13 to 30.6.14); 457 Visa Monitoring - Details Report (1.7.14 to 30..14) <http://www.fairwork.gov.au/about-us/accessing-information>

to participate in the Program work hard to develop relationships with the workers they recruit as well as the employers receiving workers from overseas. They provide an additional, and invaluable, pastoral care support service for their workers during their stay in Australia. This is particularly important to the agriculture sector, where recruitment of seasonal workers often coincides with the busiest times of the year, when there is limited capacity to devote to administration.

There are concerns in the sector about less reputable labour hire contractors, who charge farmers for workers at the award rate of pay without passing this on to their workers, or who operate in the cash economy. This is of particular concern, given that employers are ultimately responsible for breaches of migration law under the *Migration Amendment (Reform of Employer Sanctions) Act 2013* and also vulnerable to prosecution for accessorial liability under section 550 of the FW Act. This issue needs to be addressed in a way that preserves access for the sector to bona fide service providers.

7. Visa program concessions

Labour agreements

Labour agreements are designed to address genuine, systemic labour market shortages, rather than accommodate an employer's preference for a particular overseas worker. They are generally operative for two to three years, and allow for both temporary and permanent visas to be granted.

Labour agreements are used in the agriculture sector to overcome barriers to access for 457 visa workers, related to the Australian Bureau of Statistics (ABS) Australian and New Zealand Standard Classification of Occupation (ANZSCO) series (discussed further below). Many farmers do not want a highly qualified farm manager, but rather are seeking skilled senior farm hands responsible for daily operational tasks including milking cows, detecting/treating animal health issues and animal husbandry. These skills are currently not recognised in ANZSCO. Exacerbating this problem, the restrictive approach to recognition of relevant skills means that without an agriculture-related degree, workers are ineligible for sponsorship under the 457 visa programme by a farm employer. This is so even if workers hold other relevant qualifications, for example in engineering, project management, electrical or business administration. The skilled occupation list and consolidated skilled occupation list exclude key agricultural occupations, such as farm overseer or farm manager.

On the administrative side, preparing and negotiating a labour agreement application is time-consuming task requiring specialist expertise beyond the resources of most individual farmers. It takes more than two years and a substantial commitment of private and public resources to negotiate a labour agreement. Overcoming these barriers has required support from industry-owned Research and Development Corporations, who are marginally better placed to

manage heavy workloads and navigate government processes, but who still lack the specific migration expertise and adequate policy resources to undertake the task on their own. Australian Pork led the way for the pork industry, and more recently, Dairy Australia is working with the dairy industry in relation to a 'pilot' labour agreement for skilled dairy workers. The aim is to establish a base from which individual farmers can work when sourcing skilled workers from overseas.

The NFF welcomed recent recommendations of the 457 Review that labour agreement negotiation times be significantly improved. The recommendation is one that should be implemented without delay. In the meantime, further thought should be given as to why, after having gone to the significant effort of negotiating a 'template' labour agreement, a second round of negotiations must begin so that individual employers can access the workers they need. Once government is satisfied that a particular skill is needed in a particular industry, because of evidence presented through the labour agreement negotiation process, it is a triumph of process over outcomes to require individual employers to prove this over and over again. Instead, where there is a labour agreement covering the occupation of those workers, access to 457 visa workers should be streamlined where prospective employers agree to operate in accordance with the template labour agreement. This would cut years off the delay in access to workers and reduce both taxpayer and business costs significantly.

Other concessions

Until 14 September 2009, employers in regional Australia could seek concessions in the minimum salary and skills requirements for a nominated 457 visa position. This recognised the special skill needs of regional Australia and the need for regionally based employees to access lower skill and salary requirements reflecting local market conditions (and as certified by a regional certifying body).

This concessions regime was abolished in 2009, making it harder to access the 457 visa program for employers in areas where market salaries are lower than the national average. The Temporary Skilled Migration Income Threshold (TSMIT) framework can operate as a barrier to access for farmers in regional areas where skilled workers are paid market salary rates that are either below the TSMIT or the English Language Salary Exemption Threshold (ELSET).

Given the difficulty that regional and rural employers face recruiting local people with relevant skills and attracting semi-skilled people to remote areas, NFF considers that some concessions should be reintroduced to address acute skills requirements in regional areas. To this end, we welcome recommendations of the 457 Review that regional concessions should be reintroduced (albeit on a more limited, case by case basis).

8. Pathways to permanency

Small farm employers find it difficult to access employer sponsored pathways due to compliance requirements, paperwork, associated costs and red tape. As a result, they commonly seek alternative sources of labour, including backpackers on working holiday visas who seek out work in regional areas in such numbers that harvest demands can be met, with minimal cost in comparison to sponsored workers.

A common frustration among the farming community is the inability to retain good workers who first come to work on a farm under a working holiday visa. For example, the Regional Sponsored Migration Scheme (RSMS) does not accommodate this need and barriers to access to the 457 programme mean that agricultural operators continue to face difficulty in securing ongoing, suitable employees at the middle and entry level.

Ongoing widespread and severe drought in Queensland has led to significant labour shortages, with members reporting difficulty sourcing experienced stockmen and women as well as station hands. Positive experiences with working holiday makers who have demonstrated skills and experience, but do not hold an agricultural qualification, lead to frustration when a mutual desire for continuing working relationships is defeated by the lack of pathways to permanency for temporary migrants.

Consideration should be given to a new category of visa which enables working holiday makers to remain in Australia under sponsorship on the basis that their qualifications and experience are relevant to the business of the sponsoring employer, even if their qualifications are not specific to the particular industry sector. While we supports recommendations in the 457 Review promoting pathways to permanent residency, in our view, consideration of this issue should not be limited to the circumstances set out in the 457 Review.

9. Summary of recommendations

In summary, the NFF recommends:

- raising awareness about making sure that visa arrangements are validly entered into;
- ensuring that the costs of private health insurance for foreign workers are not borne solely by Australian employers;
- remove labour market testing requirements in regions where there is a demonstrated labour shortage (for example, regions eligible for the Seasonal Worker Program);
- introduce legislation to ensure that employers are not liable under discrimination laws for compliance with labour market testing requirements;

- implement the findings of the *Independent Review into Integrity in the Subclass 457 Programme* (the 457 Review), including in relation to:
 - improved capacity to amend the list of skilled occupations eligible for 457 visas where there is a business case for change;
 - reinvestment of training fund contributions into job readiness programs for disadvantaged groups, and greater uptake of apprenticeships and traineeships in rural and regional areas;
 - labour agreement negotiation times being significantly improved;
 - promoting pathways to permanent residency; and
 - reintroduction of regional concessions;
- restore the Outreach Officer programme and improve accessibility of information about migration programs;
- address poor conduct by recruitment agencies / labour hire firms in a way that preserves access for the sector to bona fide service providers;
- expand the Seasonal Worker Program to all agricultural industries; and
- streamline industry access to 457 visa workers under approved industry labour agreements.

Visas for overseas workers in agriculture

Attachment A

The following is a brief summary of some of the temporary visas that can be held by overseas workers employed by Australian farmers.

Visa	Purpose	Who is eligible	Length of stay	Key restrictions
Working Holiday (subclasses 417 and 462)	To encourage cultural exchange and closer ties between arrangement countries.	The visa is available to young adults (aged 18-30) from participating partner countries.	A visa holder can work and holiday in Australia for up to 12 months (including a period of study up to four months).	Workers can only work with each employer for up to 6 months.
Second Working Holiday (subclass 417)	To help Australian regional employers by encouraging Working Holiday visa holders to seek short-term and casual work in specified industries in regional Australia.	First time Working Holiday (subclass 417) visa holders who undertake three months (88 days) 'specified work' in an eligible regional Australia postcode. 'Specified work' includes (among other things) general maintenance crop work, harvesting and/or packing fruit and vegetable crops and immediate processing of animal products.	Eligible workers can work and holiday for a further 12 months in Australia.	Workers can return to work for a further six months for any employer they worked for while on their first Working Holiday visa.
Special Program visa (subclass 416) for the Seasonal Worker Programme A small-scale, three-year trial ending in June 2015 extends the visa program to other industries including cotton, cane, aquaculture and tourist accommodation.	To assist horticulture employers who cannot source sufficient local labour during the harvest season.	Growers who are Approved Employers can employ workers from participating Pacific countries (East Timor, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu).	Four, five or six months.	This program is open to employers in the horticultural industry with the number of visa places capped at 12 000 over four years.

Visa	Purpose	Who is eligible	Length of stay	Key restrictions
<p>Temporary Sponsored Business (subclass 457)</p>	<p>Allows employers to bring skilled overseas workers into Australia to fill skill shortages on a temporary basis, where those skills are not available locally.</p>	<p>Skilled workers on the <u>Consolidated Skilled Occupations List</u> or specified in a Labour Agreement.</p>	<p>Any period between 1 day and 4 years.</p>	<p>In most cases, terms and conditions of employment for sponsored workers must be no less favourable than those that would be provided to an Australian performing equivalent work in the same location.</p> <p>Employers must be lawfully operating a business and meet minimum training benchmarks.</p> <p>Labour market testing rules apply (arrangements under labour agreements are exempt but have similar requirements).</p> <p>Market salary rate must be at least equal to the Temporary Skilled Migration Income Threshold (TSMIT).</p>

Common agricultural occupations eligible for sponsorship through the 457 and 187 programme Attachment B

Occupation	ANZSCO Code
Agricultural Engineer	233912
Agricultural Consultant	234111
Agricultural Scientist	234112
Veterinarian	234711
Crop Farmers nec*	121299
Apiarist	121311
Beef Cattle Farmer	121312
Dairy Cattle Farmer	121313
Deer Farmer	121314
Goat Farmer	121315
Horse Breeder	121316
Mixed Livestock Farmer	121317
Pig Farmer	121318
Poultry Farmer	121321
Sheep Farmer	121322
Livestock Farmers nec*	121399
Mixed Crop and Livestock Farmer	121411
Shearer	361211
Veterinary Nurse	361311

*nec= Not Elsewhere Classified