



SUBMISSION TO THE SENATE ECONOMICS LEGISLATION COMMITTEE

Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016 (Cth) ***Treasury Laws Amendment (Working Holiday Maker Reform) Bill 2016 (Cth)***

Dr Joanna Howe, University of Adelaide
Associate Professor Alexander Reilly, University of Adelaide
Associate Professor Diane van Broek, University of Sydney
Dr Chris F. Wright, University of Sydney

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 Alexander 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.

Structure of submission

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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 or on Working Holiday Maker 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 impose a marginal tax rate for Working Holiday Makers to 19% should be accepted. It is vital that there is certainty around the tax arrangements for this visa in the lead up to the peak harvest season from November-May given that a large number of horticulture employers rely on Working Holiday Makers for picking, packing and grading jobs.

We also recommend the introduction of a register of employers who engage Working Holiday Makers. This is a welcome reform that will improve our understanding of where Working Holiday Makers are engaged in the Australian labour market and it will improve the transparency and accountability of the programme.

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. We do not think the proposed register of employers is a sufficient safeguard in this respect. We propose the development of a comprehensive and effective licensing and auditing system for labour hire firms.

It is clear to us there needs to be reform that provides the horticulture sector with a reliable and productive workforce. We do not accept that the Working Holiday Maker visa is fit for purpose in this respect. The Working Holiday Maker visa is useful for meeting short-term, seasonal needs of horticulture employers but is not a comprehensive solution to the labour supply challenges in horticulture. Other countries use dedicated sectoral visas (for example, an agricultural work visa) or a low skilled work visa pathway for certain occupations deemed to be in shortage in the local labour market. There is evidence to suggest that such an approach produces a more aligned, motivated and productive workforce and is better for protecting workers from labour market exploitation.

Any dedicated labour pathway must impose stringent sponsorship obligations, effective protections for workers including the capacity to switch employers easily, and involve the Department of Immigration, the FWO and independent workers' representatives in monitoring compliance with visa conditions – regulatory interventions which are absent from the current design of the Working Holiday Maker scheme.

List of Recommendations

Recommendation #1

The proposed tax rate for Working Holiday Makers of 19% from the first dollar earned should be introduced.

Recommendation #2

The proposed registration requirement for employers engaging Working Holiday Makers in a paid work capacity should be adopted.

Recommendation #3

3.1 There needs to be greater regulation over the use of labour hire in the Australian horticulture sector.

3.2 The regulatory framework should involve a mandatory licensing and auditing scheme overseen by an independent statutory agency.

3.3 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.

Recommendation #4

4.1 We recommend that the proposal to reduce the visa fee for Working Holiday Makers from \$440 to \$390 be rejected.

4.2 The Working Holiday Maker Programme should not be used as a defacto low skilled and unskilled labour migration pathway.

4.3 The Working Holiday Maker Programme should be reviewed in light of the labour needs of Australian sectors and industries where labour supply challenges exist and in light of other current and possible labour migration and local employment pathways.

4.4 The Working Holiday Maker Programme should be returned to its original roots as being primarily intended for 'cultural exchange'.

4.5 Where there are Australian sectors and industries which are currently heavily reliant on labour by Working Holiday Makers, there should be broader industry recommendations related to how the industry is supported and managed, including the potential of more targeted and effective labour migration and local employment pathways.

Submission

Recommendation #1

The proposed tax rate for Working Holiday Makers of 19% from the first dollar earned should be introduced.

1.1 It is critical to end the present uncertainty around the taxation arrangements for Working Holiday Makers. Horticulture employers currently rely heavily on Working Holiday Makers to meet their labour needs. For example, a 2016 national survey¹ of 332 vegetable growers conducted by the authors as part of the Horticulture Innovation project found that in the last five years 72% of growers who employed workers outside their family had used Working Holiday Makers for picking, packing and grading jobs. This demonstrates a heavy reliance on Working Holiday Makers to meet the current labour supply needs of the Australian vegetable industry. Given that the peak harvest season occurring from November-May is imminent, it is essential to end the tax uncertainty around the Working Holiday Maker Programme to ensure the stability of this labour supply for horticulture employers in the immediate to short term.

Recommendation #2

The proposed registration requirement for employers engaging Working Holiday Makers in a paid work capacity should be adopted.

2.1 The Bill requires that employers apply to the Australian Tax Office to register their business by filling out an approved form declaring that it is a 'genuine business requirement' to employ Working Holiday Makers. This is an undemanding self-attestation approach that is unlikely to impose a significant compliance burden on employers given that it is intended as a 'once off measure'.² As part of the registration process, an employer must agree to comply with the *Fair Work Act 2009* (Cth), to check the visa status of its employees and provide the ATO with information about the proposed employment of Working Holiday Makers. A failure to register will require the employer to withhold a 32.5% rate of tax from its Working Holiday Makers rather than 19%. This is intended to act as an incentive for employers to register to assist with their recruitment and retention efforts involving Working Holiday Makers.³ Registration can be cancelled if the employer is deemed 'not a fit and proper person'. The register is publicly available and as part of its role in establishing and maintaining the register, the ATO will provide an annual report on workforce statistics regarding Working Holiday Makers to the Treasury that will be tabled in the Australian Parliament. Working Holiday Makers who are employed by an unregistered employer will be able to receive a reimbursement for the excess tax withheld by the employer upon lodgment of their tax return as at this point, a 19% tax rate will apply to their earnings.

¹ Hereafter referred to as the National Vegetable Growers Survey 2016. This survey was conducted as a telephone survey of vegetable growers. The sample frame was based on contact lists provided by peak grower bodies in each state except for Tasmania. The full survey results will be published as part of a research report commissioned by Horticulture Innovation Australia in project VG 15025, 2016.

² *Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016*, Explanatory Memorandum (Commonwealth of Australia, 2016) para 1.39, p 21.

³ *Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016*, Explanatory Memorandum (Commonwealth of Australia, 2016) para 1.55, p 25.

2.2 The proposed register is a positive development. It is an important catalyst for growers and workers to commit to constructive relations and represents a significant opportunity to formalize relationships between co-dependent stakeholders. Up until this point, there has been no available, government-collected data on the work conducted by Working Holiday Makers in the Australian labour market, despite the significant evidence base emerging that these visa holders perform a substantial amount of low skilled and unskilled work in the Australian labour market. For example, a recent report by the Fair Work Ombudsman called this visa subclass:

An uncapped labour source...that fills a low-skilled labour gap in the domestic workforce, particularly the specified work requirement of the 417 visa program which fills the labour shortages associated with food production in regional and rural areas.⁴

2.3 A regulatory analysis of Australia's skilled and low-skilled labour migration pathways conducted by two of the authors noted the problematic nature of relying upon Working Holiday Makers as a de-facto low skilled labour source to address recruitment difficulties:

In our view, the presence of such a large and vulnerable migrant workforce, that is unregulated outside domestic labour law risks creating an underclass of workers who are invisible to the law...There is no way of knowing just how many, or where, ...working holiday makers engage in employment. The fact of their employment may only become visible when circumstances of exploitation occasionally come to light.⁵

2.4 In our view, the proposal to introduce a register of employers who engage Working Holiday Makers is a welcome reform that will increase the transparency of the programme and knowledge around the locations, the employers and the types of occupations and industries in which Working Holiday Makers are employed. That the ATO will be required to provide the Treasury with a report on the Working Holiday Maker scheme that will be tabled in parliament each year, will greatly assist more informed assessments of the labour market impact of the Working Holiday Maker programme and the experience of visa holders in the labour market. It will also go some way to addressing the vulnerability of Working Holiday Makers in the Australian labour market as it allows greater inter-agency cooperation between the FWO and the ATO through information sharing around employers who engage in the employment of Working Holiday Makers. This is likely to assist the FWO's investigative and enforcement efforts involving Working Holiday Makers. We welcome the official acknowledgement in the Explanatory Memorandum to the Bill that Working Holiday Makers are a potentially vulnerable group because of the 'likely limited knowledge of Australian workplace laws and likelihood of having limited access to social support networks in Australia'.⁶

2.5 Nonetheless, it is important not to overstate the importance of the proposed registration requirement in addressing the systemic exploitation of Working Holiday Makers in the Australian labour market. By virtue of their youth, relative inexperience in the labour market, their visa holder

⁴ Fair Work Ombudsman, *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program* (Commonwealth of Australia, 2016) p 48.

⁵ Joanna Howe and Alexander Reilly, 'Meeting Australia's Labour Needs: The Case for a Low Skill Visa' (2015) 43(2) *Federal Law Review*, 259, p 285.

⁶ *Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016*, Explanatory Memorandum (Commonwealth of Australia, 2016) para 1.70, p 28.

status, their limited financial resources, their lack of local knowledge on workplace rights and their tendency to be employed in low skilled or unskilled jobs, and the resource constraints of government inspectorates and trade unions in industries where these workers are concentrated, Working Holiday Makers are extremely vulnerable. This point has been observed repeatedly in the academic literature,⁷ the media⁸ and now in a landmark inquiry and report by the Fair Work Ombudsman.⁹ Notably, the FWO report found that the 417 visa program created an environment where ‘unreasonable and unlawful requirements are being imposed on visa holders by unscrupulous businesses’, ‘exploitative workforce cultures are occurring in isolated and remote locations’ and ‘employers are making unlawful deductions from visa holders’ wages’.¹⁰ Thus, we argue that the exploitation of Working Holiday Makers is not ‘exceptional’ as the Explanatory Memorandum to the Bill suggests,¹¹ but is more likely to be endemic in the employment of many Working Holiday Makers. This is particularly true when a labour hire company is used as the employer of Working Holiday Makers.

2.6 It is necessary, therefore, to make a distinction between the proposed registration requirement, and an effective licensing and auditing scheme for labour hire firms that respectfully engage Working Holiday Makers. The latter is a more comprehensive reform involving the deployment of far greater resources than what is currently envisaged in the proposed Bill. In our view, a licensing and auditing scheme is a necessary reform to assist in alleviating the vulnerability of Working Holiday Makers in the Australian labour market. It is also a development that we strongly believe will fundamentally strengthen the integrity and longevity of the industry overall. The following recommendation develops this point further.

Recommendation #3

3.1 There needs to be greater regulation over the use of labour hire in the Australian horticulture sector.

3.2 The regulatory framework should involve a mandatory licensing and auditing scheme overseen by an independent statutory agency.

3.3 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.

⁷ For example, see Alexander Reilly, ‘Low-cost labour or cultural exchange?’ Reform the Working Holiday Visa Programme’ (2015) 26(3) *The Economic and Labour Relations Review* 474-489.

⁸ For example, see: ‘Slaving Away: The Dirty Secrets behind Australia’s Fresh Food’, *Four Corners*, Australian Broadcasting Commission, 4 May 2015; 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.

⁹ Fair Work Ombudsman, *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program* (Commonwealth of Australia, 2016).

¹⁰ *Ibid* p4.

¹¹ *Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016*, Explanatory Memorandum (Commonwealth of Australia, 2016) para 3.19, p 45.

3.4 The Australian horticulture sector lends itself to the presence of labour hire firms. 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, characterised by high fluctuations in demand, 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,¹² and for contractors to move teams of workers to different sites on the harvest trail according to the needs of growers.¹³

A recent study by Underhill and Rimmer found that 27% of farm workers surveyed received their remuneration for horticulture work from a contractor.¹⁴ This is fairly consistent with our 2016 national survey¹⁵ of 332 vegetable growers conducted by the authors as part of the Horticulture Innovation project. This found 40% of employers surveyed had used labour hire firms to access workers and about 30% had recruited through Youth Hostels. Our survey also found a significant variation in the way growers engage with labour hire firms. Among those who have used labour hire contract workers, about half said that the last time they used them they were aware of the wage rate to be paid to the workers themselves. Of these, about 70% said the labour hire firm provided written documentation about the rate paid to workers and about 40% said they had input to settling the wage rate paid to workers. This suggests that whilst some vegetable growers more closely scrutinise labour hire arrangements and oversee the wages and conditions of workers, many others do not.

3.5 Despite the legitimate role for labour and migration intermediaries in the Australian horticulture sector,¹⁶ there seems to be mounting evidence of improper behaviour by intermediaries and a

¹² 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.

¹³ For examples of this in the Chilean horticulture industry, see Salame and Morales, 2000 and Barrientos and Kritzinger 2004

¹⁴ 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.

¹⁵ Above, n 1.

¹⁶ 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 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.

growing chorus of demands to address this.¹⁷ As the Productivity Commission recently observed, '[l]abour hire companies figure prominently in cases of migrant exploitation, particularly in industries such as horticulture and food processing'.¹⁸ 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.¹⁹ At an anecdotal level other subsequent media reports found similar problems with the use of unscrupulous intermediaries in horticulture,²⁰ which is supported by submissions from the not-for-profit sector.²¹ 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.²²

3.6 Thus, it seems that there is a disjuncture between horticulture employers' growing and substantial reliance on labour hire firms to access and organise workers, and the mounting evidence that there is a significant amount of exploitation of workers occurring by labour hire firms in this sector. It appears that the case for regulation is strong, and indeed this is the finding of a recent SA inquiry and an Australian Senate inquiry, both of which recommended the establishment of a comprehensive

¹⁷ '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>>

¹⁸ Australian Government, *Workplace Relations Framework, Productivity Commission Inquiry Report* Volume 2, No. 76 (2015) 935.

¹⁹ 'Slaving Away: The Dirty Secrets behind Australia's Fresh Food', *Four Corners*, Australian Broadcasting Commission, 4 May 2015.

²⁰ 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.

²¹ 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.

²² 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.

licensing and auditing regime.²³ It seems there may be some appetite for this type of regulation from the labour hire peak body, RCSA, which is working with the FWO to examine the possibility of FWO involvement in an RCSA created and sponsored compliance certification scheme for blue collar on-hire.²⁴

3.7 Two international jurisdictions, in which greater regulation of labour hire firms has proven successful, albeit to varying degrees, offer guidance on how an Australian regulatory framework could be developed for Working Holiday Makers employed via labour hire firms.

3.8 Manitoba, Canada

3.9 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.²⁵ 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.²⁶ 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'.²⁷ 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.

²³ Parliament of South Australia, Economic and Finance Committee, 'Final Report Inquiry Into The Labour Hire Industry', 93rd Report Of The Economic And Finance Committee (18 October 2016); The Senate Education and Employment References Committee, 'A National Disgrace: The Exploitation of Temporary Work Visa Holders' (Commonwealth of Australia, 2016).

²⁴ Fair Work Ombudsman, Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program (Commonwealth of Australia, 2016) p51.

²⁵ *Worker Recruitment and Protection Act*, C.C.M.S.C. W197.

²⁶ 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.

²⁷ 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.

3.10 Gangmasters Licensing Authority, United Kingdom

3.11 A similar, but somewhat less effective approach is undertaken by the United Kingdom's Gangmasters Licensing Authority (GLA). The GLA emerged as a regulatory response after the tragic drowning of Chinese undocumented migrant workers picking cockles in Morecambe Bay.²⁸ The GLA is a statutory authority that regulates the supply of workers in agriculture, food-processing, forestry and shellfish gathering industries by requiring that labour hire agencies be licensed.²⁹ 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.³⁰ 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.³¹

3.12 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.

3.13 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 extent to assisting affected workers when an operator has their license revoked and the workers lose their jobs.³² 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

²⁸ 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).

²⁹ See further, <<http://www.gla.gov.uk>>.

³⁰ 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.

³¹ Gangmasters Licensing Authority, *Licensing Standards* (May 2012), para 5.5.

³² 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.

Lithuania for fear of reprisals from associates of Ratautas and Samurin [the convicted gangmasters]’.³³ Although the GLA’s actions rightly convicted and stopped the business of the gangmasters, the affected workers were left without any formal assistance from the government agency.

3.14 Going forward it seems likely that the GLA will have its role extended. The 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.³⁴

3.15 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.³⁵

3.16 In sum, both best practice at the international level and the recent evidence base being established regarding the increasing reliance on Working Holiday Makers by Australian employers engaged through a labour hire firm, suggests that there is a case for stronger regulation and enforcement in this area. This will not only protect vulnerable workers but enable growers to have greater confidence that the labour hire firms they engage to organise their staff is doing so in a legally compliant manner.

Recommendation #4

4.1 We recommend that the proposal to reduce the visa fee for Working Holiday Makers from \$440 to \$390 be rejected.

4.2 The Working Holiday Maker Programme should not be used as a defacto low skilled and unskilled labour migration pathway.

4.3 The Working Holiday Maker Programme should be reviewed in light of the labour needs of Australian sectors and industries where labour supply challenges exist and in light of other current and possible labour migration and local employment pathways.

4.4 The Working Holiday Maker Programme should be returned to its original roots as being primarily intended for ‘cultural exchange’.

³³ 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 Owens (ed) *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart, 2016) Chapter 18 - forthcoming.

³⁴ Department for Business, Innovation and Skills, *Tackling Exploitation in the Labour Market: Government Response*, January 2016.

³⁵ 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>>.

4.5 Where there are Australian sectors and industries which are currently heavily reliant on labour by Working Holiday Makers, there should be broader industry recommendations related to how the industry is supported and managed, including the potential of more targeted and effective labour migration and local employment pathways.

4.6 We recommend rejecting the visa charge for Working Holiday Makers on the basis that this visa category should not be used as a defacto low skilled work visa pathway and a reduced fee is likely to improve the attractiveness of this visa to prospective Working Holiday Makers. It is significant that this Bill and its Explanatory Memorandum openly acknowledges and affirms the substantial work contribution of Working Holiday Makers. Up until this point, whilst scholars have noted the significant labour market impact of Working Holiday Makers,³⁶ official government documents have consistently affirmed the ‘cultural exchange’ purpose of the programme with ‘work incidental to the purpose of the visa’.³⁷ The WHM programme has existed since 1975 and its consistent stated objective has been one of fostering closer ties and cultural exchange between Australia and partner countries, with particular emphasis on young adults. The performance of work is intended to be incidental to the visa’s central purpose. Indeed, the DIBP states in its policy guidance that ‘work in Australia *must not* be the main purpose of the visa holder’s visit’.³⁸

4.7 It is significant, then, that in a number of places, the Explanatory Memorandum recognises the central role of the Working Holiday Maker scheme in meeting labour shortages in the Australian economy. For example, the Explanatory Memorandum states:

Working holiday makers are an *important source* of Australia’s international tourism and a *key source* of seasonal labour in regional areas, particularly in the agriculture, horticulture, tourism and hospitality sectors. The reforms recognise the *important contribution* of working holiday makers to the Australian economy. The reforms seek to increase Australia’s attractiveness as a destination of choice for working holiday makers.³⁹

Whilst not the original intention, the Working Holiday Maker programme has been acknowledged as being *a strong contributor of supplementary labour*, particularly to the tourism and agriculture industries which are heavily reliant on seasonal labour.⁴⁰

³⁶ For example, see: Joanna Howe and Alexander Reilly, ‘Meeting Australia’s Labour Needs: The Case for a Low Skill Visa’ (2015) 43(2) *Federal Law Review*, 259; Alexander Reilly, ‘Low-cost labour or cultural exchange?’ Reform the Working Holiday Visa Programme’ (2015) 26(3) *The Economic and Labour Relations Review* 474-489.

³⁷ Department of Immigration and Citizenship, Australian Government, *Working Holiday Maker Visa Program Report* (30 June 2013).

³⁸ 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>>.

³⁹ *Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016*, Explanatory Memorandum (Commonwealth of Australia, 2016) p10.

⁴⁰ *Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016*, Explanatory Memorandum (Commonwealth of Australia, 2016) para 3.12, p 43.

Working Holiday Makers are a *vital* source of labour to Australia, particularly to the tourism and agriculture industries which make important contributions to the Australian economy and are expected to be *drivers of future economic growth*.⁴¹

4.8 It is a welcome development that the significant labour market impact of Working Holiday Makers is being officially acknowledged. Whilst Australia officially has a skilled migration programme (the subclass 457 visa), successive federal governments have been reluctant to acknowledge the role of Working Holiday Makers (and international students) in providing a substantial amount of low and unskilled labour. Notably, the Bill also seeks to further enable the work contribution of Working Holiday Makers through its proposal to allow Working Holiday Makers to stay with the one employer for 12 months as long as the second 6 months of their employment is in a different region.⁴² The stated rationale of this reform is economic – to reduce turnover, recruitment and training costs for employers. It will be implemented via the Department of Immigration updating its policy guidance.

4.9 However, now that the ‘important contribution’ of Working Holiday Makers has been recognised by the government and their capacity to be ‘drivers of future economic growth’ has been acknowledged, we need to assess whether a defacto low skilled work visa such as the Working Holiday Maker is in the national interest. By way of comparison, most other countries do not rely on a side-door labour source such as this and have significantly smaller working holiday maker cohorts. These other countries use dedicated sectoral visas (for example, an agricultural work visa) or a low skilled work visa pathway for certain occupations deemed to be in shortage in the local labour market. There is evidence to suggest that such an approach produces a more aligned, motivated and productive workforce,⁴³ and is better for protecting workers from labour market exploitation.

4.10 Any dedicated labour pathway must impose stringent sponsorship obligations, effective protections for workers including the capacity to switch employers easily, and involve the Department of Immigration, the FWO and independent workers’ representatives in monitoring compliance with visa conditions – regulatory interventions which are absent from the current design of the Working Holiday Maker scheme.

4.11 We will be expanding on this recommendation in our final research report for Horticulture Innovation, but we suggest that our proposal here is consistent with other recent federal government inquiries which have recommended a rethink of the Working Holiday Maker Programme’s substantial work impact, and a consideration of its inconsistency with the Seasonal Workers Programme.⁴⁴ Our

⁴¹ *Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016*, Explanatory Memorandum (Commonwealth of Australia, 2016) para 3.39, 49.

⁴² *Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016*, Explanatory Memorandum (Commonwealth of Australia, 2016) para 3.71-3.77, p 56.

⁴³ For example, see: 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; See also: Jesse Doyle and Stephen Howes, ‘Australia’s Seasonal Worker Program: Demand-Side Constraints and Suggested Reforms’ (Discussion Paper, World Bank Group, 2015).

⁴⁴ 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,

analysis is also consistent with the FWO's analysis of the Working Holiday Maker Programme which suggests that this visa is being used primarily for a work purpose and lacks sufficient regulatory protection to safeguard visa holders from exploitation in the labour market. Our analysis is also in keeping with the submissions of other parties to this inquiry, calling for a 'root and branch review of the rules surrounding the visa system' (KPMG) and 'the need to have a deep review into not just the taxation but also the systemic labour issues within the broader agricultural sector' (Tasmanian Fruit Growers Association).

'Comparing Apples and Oranges', *Inside Story* (online), 5 July 2016 <<http://insidestory.org.au/comparing-apples-and-oranges>>.