



UNITED
WORKERS UNION

SUBMISSION

**National Agricultural
Labour Advisory
Committee**

**National Agricultural
Workforce Strategy**

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OVERVIEW

UWU welcomes the opportunity to make a submission to the National Agricultural Labour Advisory Committee and make recommendations in the development of a National Agricultural Workforce Strategy.

Our submission is focused on the Horticulture industry, and in particular on the working and living conditions of the essential workers who pick and pack fresh produce, and who make up the largest cohort of workers in Australian agriculture.

UWU represents thousands of these workers across Australia, including workers who are citizens and permanent residents, seasonal workers, international students, backpackers, refugees and asylum seekers, as well as undocumented workers.

Through years of on-the-ground organising, UWU has worked together with these workers to expose and start to collectively address pervasive forms of exploitation that have become entrenched in the horticulture industry.

Low pay, poor working conditions, a lack of job and visa security, and reprisals against those who speak out routinely force workers to leave, or prevent them from continuing to work in the industry. This undermines the development of an experienced, skilled and secure labour force, creating episodic but endemic labour supply challenges and shortages for the industry.

The ongoing existence of labour shortages and the prevalence and depth of exploitation in the industry are, of course, interrelated. They both revolve around a “churn and burn” attitude that views and treats farm workers as expendable. And they are both the result of decades of piecemeal, short-term, unregulated low-road solutions promulgated by industry associations and governments that have failed both workers and growers.

The development of a National Agricultural Workforce Strategy presents an opportunity to undertake a different long-term approach to addressing these challenges, one that is based on implementing solutions that raise standards and foster compliance, reduce the industry’s reliance on unscrupulous labour hire contractors, and enable workers to continue to work in the industry long-term, creating greater stability and certainty for both workers and growers.

As part of preparing this submission, UWU held a series of meetings in key growing regions and surveyed over 1,000 horticultural workers currently working on farms across Australia. The survey asked farm workers to share their experiences of and perspectives on:

- the challenges facing horticulture workers today;
- the key drivers of exploitation;
- the solutions that will facilitate the improvement of working conditions and pay of farm workers;
- what will enable them to continue to work in the industry, and more broadly, what the industry needs to do to attract and retain a secure, skilled workforce.

The results of the survey demonstrate that workers are commonly subjected to a wide range of exploitative practices in the industry, and regularly face retaliation when they seek redress.

Survey Results - Exploitation in the Horticulture Industry			
Percentage of workers who have been:			
Underpaid	63%	Given no access to toilet/drinking water	27%
Paid Cash	44%	Told not to join/talk to union	26%
Threatened for raising issues	33%	Punished or sacked for speaking up	25%
Faced dangerous/unsafe work	32%	Passport/visa controlled by contractor	18%
Based on UWU survey of 1,098 horticulture workers, July 2020.			

Through the survey, workers also identified six primary aspects of their experience working on farms that need improvement. These are:

- **Visa security**, including an amnesty for undocumented farm workers, pathway to permanent visa, and right of return for people on the Seasonal Worker Program
- **Job Security**: less contracting, less casualisation, more direct and permanent jobs
- **Better quality and more affordable accommodation**
- **Health and safety**
- **Education about workplace rights**, respect for freedom of association, and support to stand up and speak out against exploitation.
- Farm workers should be **treated with greater respect** for the skilled and essential work they do feeding Australia

This submission addresses each of these points, providing both the views and perspectives of workers, as well as detailed recommendations and priorities for action.

There is an emphasis in particular on those actions the Federal Government can undertake that will:

- have an immediate positive impact on the visa and job security of workers in the industry, and which will address labour shortages;
- close the gap between low prevailing wages and conditions in the industry and lawful minimum standards by addressing unfair competition, facilitating compliance and levelling the playing field;
- establish structures and pathways now that will assist in delivering long term solutions to structural or endemic problems;
- ensure that workers are educated and empowered, both as a mechanism for monitoring compliance, and to ensure they can play their rightful role as key industry stakeholders.

Over 80% of workers in the industry are either temporary migrant visa holders, or are undocumented.¹ As such, visa settings, regulations and pathways are of particular importance in making industry improvements. Accordingly, this submission includes a series of detailed and interconnected recommendations that outline a way for the Federal Government to better regulate industry visas and facilitate a transition towards purpose built, well-regulated visa pathways for the industry.

To ensure this transition is effective and successful, **it is essential that the Federal Government immediately address the industry's structural reliance on undocumented**

¹ Howe, J and Singh, A (2020) *COVID-19 and Undocumented Workers in the Australian Horticulture Industry*, p. 3

workers through a regularisation process that would provide these essential workers with access to a visa and a future in the industry.

In understanding both the drivers of and solutions to exploitation in the industry, the Government must comprehend the influence of supply chain pressures and the significant role that Coles and Woolworths' pricing and purchasing strategies play further down the chain in creating a demand and a market for insecure and underpaid work. Supermarkets must play a key role in raising standards in their supply chains and supporting the industry's sustainability through fair pricing that enables growers to meet the true cost of labour compliance over the long term.

The current closure of the international border, and the significant restrictions on interstate travel in response to the ongoing COVID-19 pandemic has revealed the fragility and insecurity of the industry's current visa and labour supply pathways, for both workers and growers. As the pandemic continues, and Seasonal Workers and Working Holiday Makers continue to leave the country, the prospect of labour shortages looms large over the industry, making it even more urgent that the status of undocumented workers be addressed and resolved.

The Federal Government must seize this unprecedented opportunity to make changes now that will not just address short-term challenges, but also facilitate the creation of a more stable, secure and supported workforce for the long-term sustainability of the industry.

Summary of Key Recommendations

UWU recommends that the Federal Government:

1. Take immediate action to resolve the immigration status of undocumented farm workers by making the necessary adjustments to the eligibility requirements of the subclass 408 visa to enable undocumented workers who have been undertaking work in the horticulture industry to apply for this visa and, if granted, continue their crucial work in the industry.
2. Expand the best practice employer-registration and worker-education requirements in the Seasonal Worker Program to all temporary migrant visa categories in the industry, including Working Holiday Maker visas.
3. Address horticulture's over-reliance on Working Holiday Maker (WHM) visas, and expand and further develop purpose-built, well-regulated temporary visa pathways for the industry, by:
 - a. Phasing out the requirement that WHMs undertake 88 days (or 6 months) work in specified regional industries in order to become eligible for visa extensions,
 - b. Ensuring Seasonal Workers have a "right to return" each season,
 - c. Expanding the scope of the Seasonal Worker Program (SWP) to include countries beyond the Pacific, and / or
 - d. Creating a dedicated Agriculture visa, which contains, at a minimum, the inbuilt protections contained in the SWP, including the employer-registration

and worker-education requirements, and includes a formal role for workers and their representatives in the design and governance of the visa.

4. Ensure that long-term industry workers, including participants in these programmes, have a pathway to permanency.
5. Introduce a National Labour Hire Licensing scheme only if:
 - a. A national scheme replicates and scales up the best-practice elements of the Victorian and Queensland state schemes, including a mechanism for interested parties to object to or seek review of the granting of a license, and covers all parts of the economy;
 - b. It includes a mandatory worker rights education requirement for all licensed labour hire operators;
 - c. It is introduced in conjunction with or following a visa regularisation process for undocumented workers in the industry.
6. Work with stakeholders to investigate ways to improve the standard and reduce the cost of accommodation for farm workers, including through government investment in the development of purpose-built, high-quality accommodation for harvest workers in key growing regions.
7. Create a specific 'Employment Justice' visa for temporary or undocumented migrant workers pursuing remedies through the Fair Work Act, or other causes of action, for unpaid wages and other breaches of relevant laws.

Our vision for horticulture workers

- A skilled horticulture workforce consisting of workers who have a desire and ability to work in the industry long term, and a stake in the industry's sustainability and success.
- A consistent set of best-practice regulations that ensure that workers in the industry, regardless of whether they are citizens, permanent residents or visa holders, are educated and empowered to:
 - Know about their workplace rights and are able to join the union in order to enforce their enjoyment of those rights;
 - Have secure employment, including an ability to continue to work (or return each season to work) in the industry;
 - Have a clear and attainable pathway to permanent migration, for those who want to make Australia their permanent home.
- Workers are paid fairly, treated with respect, work in a safe environment, and are empowered to participate in the ongoing process of monitoring and improving fair minimum conditions for all workers in the industry.

How the industry is changing: concentration of more workers in fewer, larger farms

Horticulture is the largest employer - both overall, and on an average per-farm basis - of workers in agriculture in Australia.²

In 2010, estimates put the total horticultural workforce at 130,000 workers.³ However, because of the high proportion of undocumented workers in the industry, the prevalence of informal work arrangements, and the fact that temporary migrant workers and contract or labour hire workers are not counted in ABS statistics, it very hard to track with certainly how many workers are working in the horticulture industry.⁴ The total number of workers in the industry is likely to be much higher.

Changes in supermarket purchasing practices, and in particular the transition towards direct supply relationships between supermarkets and growers (rather than sourcing occurring primarily through wholesale markets) has significantly changed the industry over the past two decades.

Supermarkets have rewarded those growers better able to meet their demands for high volumes of high quality produce at lower prices with longer term contracts, facilitating those farms' further growth, as well as industry consolidation through mergers and acquisitions, and smaller operators exiting the industry because of price pressure.

The result has been the emergence of larger farms with more corporate management structures, employing a larger number of workers, and with more capital to invest. These larger farms have greater potential to invest in technologies that could improve the quality of certain jobs, and to pay workers higher wages.

In some cases, in certain commodities (particularly those that are less delicate and volume dependent such as potatoes or citrus), capital investment has been geared towards labour-saving technologies that have reduced manual handling, eliminating some jobs in certain parts of the growing or packing operation.

In other parts of the industry, larger growers have invested heavily in protected cropping technologies designed to extend the growing season, and facilitate year-round production. This has resulted in increases in the number of jobs, as well as the capacity of those jobs to be secure and ongoing. There are now, for example, several tomato glasshouses in the industry operating yearound, each employing between 200 and 700 workers.

The expansion of export markets - premised as it is on exporting the highest quality products at premium prices - will also increase the capacity of successful export-oriented growers to increase their earnings, which could also fund improvements in workers' wages and conditions.

Because of the perishability and delicate nature of most horticultural produce, and the need for it to be picked and packed quickly and delicately, the horticulture industry will continue to require a large number of workers who will perform essential harvest & packing functions by hand for the foreseeable future.

² Dufty, N, Martin P, and Zhaoh S (2019) *Demand for farm workers: ABARES farm survey results 2018*, Retrieved from: https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/abares/DemandForFarmWorkers_FarmSurveys2018_v1.0.0.pdf

³ Howe, J et al (2019). *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry*, Retrieved from <https://sydney.edu.au/content/dam/corporate/documents/business-school/research/work-and-organisational-studies/towards-a-durable-future-report.pdf>

⁴ Dufty, et al.

Exploitation of workers in the horticulture industry: key issues, causes and drivers

The results of UWU's survey of over 1,000 farm workers, undertaken in preparation for this submission, paint a devastating picture of the prevalence and depth of exploitation in the horticulture industry.

There are a number of interrelated factors that facilitate, drive and exacerbate the ongoing exploitation of workers in the industry, starting with the price pressure at the top of the supply chain created by the Supermarkets' market dominance.

Weak and rarely enforced minimum standards, an over-reliance on unscrupulous labour-hire contractors to employ and house workers, and a lack of job and visa protections or security make horticultural workers' hard work over long periods in difficult conditions even more unbearable.

A culture of impunity, where unlawful conduct is rarely punished and growers and labour hire companies are free to "churn and burn" workers is underwritten by a prevailing attitude in the industry in which workers are expected to take it or leave it. Many leave, but those who stay are often discouraged or fearful, and those who do speak out face threats and retaliation.

The poor prevailing wages and conditions that result are an *industry* problem, and affect *all* workers, whether citizens, permanent residents or temporary visa holders, driving workers from the industry and preventing others from wanting to enter it.

Supply chain price pressure

"You can strictly mandate the size, shape and colour of the apples you accept, so why do you keep wriggling out of mandating that the workers who pick and pack those apples aren't subject to wage theft and modern slavery?" Farm worker, Coles AGM, 2019.

It is well known that the major supermarkets Coles and Woolworths have huge power in the horticulture industry in Australia.

Depending on the commodity, the major supermarkets account for between 66% and 87% of the retail trade in horticulture products in Australia.⁵

As discussed above, in the past two decades, supermarkets have consolidated their power in the market through transitioning to direct supply relationships with growers and seeking to source directly through a smaller number of larger suppliers.

The result today is that almost all horticultural operations of any size in Australia now either supply Coles and/or Woolworths directly, or do so through a small number of large aggregators who specialise in supplying the supermarkets across a number of select product categories.

At the top of the supply chain, Coles and Woolworths' market dominance, pricing and purchasing strategies exert considerable price pressure on suppliers, growers and labour hire companies further down the chain, creating a demand and a market for insecure and underpaid work.

⁵ Nielsen, *Harvest to Home*, Retrieved from <https://www.harvesttohome.net.au/vegetables/latest-highlights/celery>

Efforts to improve the working conditions and sustainability of the industry must recognise and address these pervasive supply chain price pressures, and Coles and Woolworths must take a leading role in raising standards and supporting the industry through fair pricing.

Hard & dangerous work

Farm work is some of the most difficult and dangerous work in Australia. Whether picking fruit and vegetables or packing them, workers do physical, painful, repetitive work for hours on end, outside, often in extreme weather conditions. The work often involves bending in awkward and unsafe positions. Vegetable pickers, for example, often work standing but bent over 90 degrees picking vegetables from the ground, 8-10 hours a day, 6 days a week. The pace can be punishing. In a packing shed, the pace is often set by supervisors to match a machine or team, whereas field workers are often paid 'piece rate', which requires pickers to work very quickly for long periods to make any money.

Most farm workers do not feel empowered to report workplace injuries, either for fear of reprisals, the lack of any on-farm health and safety infrastructure, or a lack of knowledge about workplace OHS laws, and the employers' obligation to provide a safe workplace.

32% of workers surveyed reported experiencing dangerous or unsafe work, and 27% reported that they did not have access to toilets or drinking water.

Low wages & piecerates

Despite the difficulty of the work, horticulture workers are the lowest paid in Australia.

A survey of 655 horticulture workers undertaken by UWU in 2019 found that the **average hourly pay was \$14.80** before tax—well below the casual minimum wage of \$24.36/hour during the survey period.⁶ A number of other studies confirm that workers in the industry are routinely underpaid.⁷

There are two main drivers of low pay in the industry:

1. **Piece Rates** are widely used in the industry as they enable growers to avoid paying workers the minimum wage, and instead to pay workers by how much they pick or pack. In theory, this should not lead to lower pay as the Horticulture Award requires the price-per-piece to be high enough that the 'average competent worker' earns 15% more than the minimum wage. In practice, piece rates are routinely set at a level that makes it impossible for an average competent worker to earn even the minimum wage. The result is extensive and pervasive underpayment.
2. **Subcontracting.** The prevalence of subcontracting in the industry means that most farm workers do not work directly for the farm, but for a labour hire company. Unscrupulous labour hire operators, often individual contractors working with a series of subcontractors, take a cut of workers' wages and pay workers cash.

⁶ National Union of Workers (2019). *Farm Workers Speak Out*, Retrieved from:

https://www.nuw.org.au/sites/nuw.org.au/files/farm_workers_speak_out_nuw_report_web.pdf

⁷ Senate Education and Employment References Committee (2016). *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016, Retrieved from:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/~/_/media/Committees/ee_t_cte/temporary_work_visa/report/report.pdf Fair Work Ombudsman (2018), *Harvest Trail Inquiry*, Retrieved from

<https://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/national-campaigns/harvest-trail-inquiry>; Joint Standing Committee on Foreign Affairs, Defence and Trade (2017) *Hidden in Plain Sight - An Inquiry into Establishing a Modern Slavery Act in Australia*, Box 6.2, 'Human Trafficking Framework' Retrieved from

https://parlinfo.aph.gov.au/parlInfo/download/committees/reportint/024102/toc_pdf/HiddeninPlainSight.pdf;fileType=application%2Fpdf. Berg, L. and Farbenblum, B. (2018), *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia*, available at <https://www.mwji.org/highlights/wage-theft-in-silence>.

It is unsurprising that the industry is facing challenges to attract and retain workers when the prevailing rate of pay is significantly lower than the Australian minimum wage.

63% of workers surveyed reported being underpaid, and 44% reported being paid cash.

Insecure work & an over-reliance on labour hire contractors

Almost all farm workers are in insecure work that is casual, unpredictable, and indirect.

Growers' over-reliance on contractors has entrenched casual, insecure employment, even when the work is consistent and predictable. Workers routinely work for years at the same farm, or group of farms, and still are employed casually by contractors. Outsourcing creates distance between growers and workers that enables unlawful work practices to develop in the shadows.

Contractors in horticulture exercise a very high degree of control over workers' lives, and in most cases the contractor will also arrange accommodation and transport for workers. In the best cases, a labour hire company will arrange separate housing and a rented van, but charge workers fees at far above cost (a group of 10 workers in a rural area could expect to pay \$150 per person per week for a three bedroom house they share), leaving workers with as little as \$50 per week in take home pay. In the worst cases, a subcontractor will force workers to live with them, charging them exorbitant rent, monitoring their movements and conversations, and engaging in other controlling behaviours.

33% of workers surveyed reported being threatened by the contractor for making a complaint about wages and conditions.

Insecure visas with no pathways to work in the industry long term

The agricultural visa system is deeply unequal, dividing workers based on their race and country of origin. Workers from Pacific Islands on the Seasonal Work Program, for example, have some protections through employer pre-approval, and can return home between seasons; other visa programs, such as the Working Holiday Maker programme, are completely unregulated.

A significant percentage of the industry is made up of undocumented workers, who are forced to work for unscrupulous labour contractors who deliver cost savings to growers by underpaying workers. The industry has come to rely on these workers.

Almost all farm workers are temporary visa holders with no guarantee of future work, and there is no dedicated, secure pathway for workers to remain working in the industry long-term.

Low quality, over-priced accommodation

Overpriced, cramped, over-crowded, accommodation is the reality for the majority of harvest workers in Australia, affecting workers on different visas equally but in different ways.

Growers rely on labour hire contractors not just to employ workers but also house them, and this connection between job and housing is used as a mechanism to extract considerable ancillary profit from workers.

Because of very low prevailing rates of pay in the industry, the high cost of housing has a disproportionately large impact on workers' take home pay.

Where they exist, minimum standards are too weak, and are poorly enforced.

With limited choice in most growing regions, accommodation providers have little incentive to improve quality and reduce price, and workers are expected to put up with it if they want to continue to work in the industry.

59% of workers surveyed have experienced over-priced accommodation, and 51% overcrowded accommodation.

Lack of respect

Farm workers feed Australia, yet are treated as if they are expendable, not essential.

Growers and other industry stakeholders expect horticulture workers to deftly harvest raspberries or bunch broccolini, quickly and consistently for hours at a time in difficult conditions, without damaging the produce, yet many refer to this work as "unskilled" or "low skilled".

Not only is farm worker labour socially and economically undervalued, but farm workers are also routinely subjected to discrimination, racism, intimidation, and sexual harassment at work.

Fear and retaliation discourage workers from raising issues and speaking about problems, and workers are often afraid of speaking to or joining the union.

Many workers who do join the union and speak up are targeted, threatened, punished or sacked.

26% of workers surveyed were told not to speak with the union, and 25% were sacked or punished for speaking up.

KEY PRIORITIES FOR ACTION

Simply put, in order to attract and retain workers in the industry, the wages, working conditions, job and visa security of horticulture workers must be improved.

Over the next several sections, we identify and discuss a range of solutions to address the root causes of exploitation in the industry. In doing so, we emphasise those actions the Federal Government can undertake that will:

- have an immediate positive impact on the visa and job security of workers in the industry, and which will address labour shortages;
- close the gap between low prevailing wages and conditions in the industry and lawful minimum standards by addressing unfair competition, facilitating compliance and levelling the playing field;
- establish structures and pathways now that will assist in delivering long term solutions to structural or endemic problems;
- ensure that workers are educated and empowered, both as a mechanism for monitoring compliance, and to ensure they can play their rightful role as key industry stakeholders.

If fully implemented, these recommendations will help to ensure the right regulatory structures, tools and pathways are in place to enable regulators, workers and their representatives, growers and other industry stakeholders to drive improvements in the industry, facilitating the development of a more stable, experienced and permanent workforce.

Visa security

Over 80% of workers in the industry are either temporary migrant visa holders, or are undocumented.

Workers in the industry are currently engaged through a patchwork of short-term, unregulated, ad-hoc visa pathways that do not provide adequate mechanisms that enable workers to remain in the industry for the long-term.

Below we explore how this failed approach hurts both workers and growers, and detail a series of interconnected recommendations that outline a way for the Federal Government to take a different approach based on coherent and consistent best-practice regulations, and the expansion and development of purpose-built, well-regulated visa pathways for the industry.

This will involve measures designed to :

1. Urgently resolve the status of undocumented workers in the industry;
2. Extend existing best-practice employer-registration and worker-education regulations across all temporary visas in the industry;
3. End the industry's reliance on ad-hoc unregulated work visas and further develop and scale-up regulated visa options;
4. Create a pathway to permanency for long-term visa holders in the industry

If fully implemented, these recommendations will raise standards and foster compliance, reduce the industry's reliance on unscrupulous labour hire contractors, and enable workers to continue to work in the industry long-term, creating greater stability and certainty for both workers and growers.

Urgently resolve the immigration status of undocumented workers

Multiple reports confirm that the Australian horticulture industry has become 'structurally reliant' on the labour of undocumented workers.⁸

These reports estimate that there are between 50,000 and 100,000 undocumented workers in Australia, and that roughly a third participate in the harvest labour workforce.⁹ It is inherently difficult to secure accurate data on the number of undocumented workers in the industry, because undocumented workers and the growers who utilise them both seek to remain undetected.

The term "undocumented" refers to a diverse group of migrant workers in a number of different situations, including:

- Workers whose visa has been cancelled or expired
- Workers with a valid visa, but not the right to work
- Workers who are working in breach of a condition of their visa
- Workers on a bridging visa who may or may not have work rights.

A significant number of undocumented workers working in the horticulture industry fall into the final bridging visa category, and are most commonly workers who have been granted a bridging visa as a result of making a protection visa application. In many cases, labour hire contractors or other middlemen operating as unlicensed migration agents, have made these applications on workers' behalf, often without the knowledge or control of workers.

Depending on an individual workers' visa history, workers on bridging visas may or may not have work rights, may lose work rights if there are changes in the status of their case, and in some cases may be entitled to apply for permission to work, but may not be able to do so without support, or be able to meet the requirements.

In some growing regions - particularly those further from major urban centres - undocumented workers make up the majority of the workforce and are used by most growers. For example, an industry survey in the Sunraysia region of Victoria found that 71% of growers had undocumented workers on their farms.¹⁰

The prevalence of undocumented workers in the horticulture industry, their vulnerability to exploitation, and the heightened risks these workers and the horticulture industry face as a result of the COVID-19 pandemic have been comprehensively documented in a report commissioned by UWU and produced by Associate Professor Joanna Howe and Dr Ankur Singh, titled: "Covid-19 and Undocumented Workers in the Australian Horticulture Industry". A copy of this report is **attached** to this submission.

In short, undocumented workers are the most vulnerable of all temporary migrant workers, as they lack secure work rights, have limited avenues to seek redress, and are vulnerable to threats or retaliation by labour hire contractors or growers if they raise concerns about their wages and conditions. As a result, despite being an essential part of the horticultural labour force, undocumented workers are subjected to some of the worst forms of exploitation, including:

- Systematic underpayment of wages

⁸ Howe, J et al (2019). *Towards a Durable Future*, p 40.

⁹ Ibid, p. 39; Howe and Singh (2020), p. 5; Segrave, M et al (2018) *Exploited and Illegal: Migrant Workers in Australia* (Interim Report), Retrieved from https://monash.figshare.com/articles/Exploited_and_illegal_Unlawful_migrant_workers_in_Australia/7159193; Malcolm Rimmer and Elsa Underhill, 'Temporary Migrant Workers in Australian Horticulture: Boosting Supply but at What Price?' in Massimo Pilati et al (eds), *How Global Migration Changes the Workforce Diversity Equation* (Cambridge Scholars Publishing, 2015) 143,145

¹⁰ Victorian Farmers Federation (2019), VFF Calls for Ag Visa to Legalise Workers, Retrieved from: http://vff.org.au/vff/Media_Centre/Media2019/VFF_calls_for_Ag_Visa_to_legalise_workers.aspx

- Unfair and unlawful deductions from pay
- Being required to live in a labour hire contractor's substandard accommodation in order to obtain work
- Having their passports and visa applications controlled by contractors, and
- A variety of other slavery-like practices

For the past several years, UWU has led a campaign to support undocumented workers to speak out about their experiences of exploitation and reveal the true nature of their critical contribution to the industry.

As public awareness about the industry's structural reliance on undocumented workers has grown, industry associations and growers have become increasingly willing to publicly recognise the prevalence of undocumented workers and their importance to the success of the industry, and in filling systemic labour shortages. As Victorian Farmers Federation Vice President Emma Germano has put it:

*"The grave reality is that undocumented workers account for a large proportion of Australia's seasonal harvest workforce. Farmers cannot share information that reflects this reality for fear of reprisal from government agencies."*¹¹

Indeed, despite being subjected to significant exploitation, many undocumented workers have been working in horticulture for a number of years, and have become some of the most highly experienced and skilled workers in the industry.

In a three-year study that involved interviews with a significant number of industry stakeholders, Associate Professor Joanna Howe found that many growers recognised that undocumented workers are highly productive. Comments from growers in these interviews include views that undocumented workers are:

- 70% more productive than backpackers
- "The best workers I ever had", and
- If undocumented workers were "on a work visa, it would be fantastic"¹²

Growers who would like to continue to engage these skilled workers currently have no lawful way of doing so, and undocumented workers remain dependent on unscrupulous labour hire contractors to work in the industry.

This dead-end situation perpetuates the exploitation of undocumented workers, and creates an uncertain future for workers, growers and the industry. Skilled workers, with years of experience in the industry, want to be able to continue to work in the industry, but to do so legitimately, and free from the control of unscrupulous labour hire contractors.

In the mutual interests of both undocumented workers and the growers who have come to rely on them, UWU, as well as various industry organisations, such as the Victorian Farmers Federation, have advocated for an amnesty that resolves these workers' immigration status and enables them to continue to work in the industry.¹³

As a critical first step in addressing chronic worker exploitation and labour shortage issues in the industry, UWU recommends the Federal Government act immediately to resolve the immigration status of undocumented farm workers already in Australia, and enable them to continue to work in the industry.

¹¹ "Undocumented workers account for a large proportion of Australia's seasonal harvest workforce," *The Standard*, November 8, 2019, retrieved from: <https://www.standard.net.au/story/6481474/farmers-call-for-ag-visa-to-legalise-workers/>

¹² Howe, J et al (2019). *Towards a Durable Future*, p 40.

¹³ "VFF, union call for an amnesty on workers without visas as labour shortages hit home", *Weekly Times*, October 3, 2018. Retrieved from <https://www.weeklytimesnow.com.au/news/national/vff-union-call-for-an-amnesty-on-workers-without-visas-as-labour-shortages-hit-home/news-story/d408cac28e467e64f9aeb7bee53d6eb9>

How visa regularisation could be implemented immediately: the subclass 408 pathway

Enabling undocumented workers to apply for a Temporary Activity visa (subclass 408) through the newly-created “*Australian Government endorsed events (COVID-19 Pandemic event)*” stream is one potential pathway the Federal Government could utilise to undertake an immediate regularisation process for workers in Horticulture.

The Temporary Activity Visa (subclass 408) - ‘Australian Government Endorsed Events’ can be granted for up to four years. On 3 April 2020, the Federal Government introduced the COVID-19 Pandemic Event category, which enables temporary visa holders, or persons whose visas have expired within the 28 days prior to their visa application, to apply for a further temporary visa of 12 months’ duration to engage in work in ‘critical’ sectors, including agriculture.¹⁴ The flexible expansion of the existing subclass 408 visa category, through the rapid introduction of legislative instruments provided for extended eligibility relating to the ‘COVID-19 pandemic event,’ have enabled hundreds of Working Holiday Makers and Seasonal Worker Programme participants to continue their crucial work in Australia.¹⁵

With the international border closed, and significant restrictions on interstate travel during the ongoing COVID-19 pandemic, the introduction of this visa stream has been critical in enabling these essential workers to remain working in horticulture and avoiding potential labour shortages. As the pandemic continues, and some of these workers continue to leave the country, the prospect of labour shortages looms large over the industry, making it even more urgent that the status of undocumented workers be addressed. Border closures also remove the (unlikely) possibility that a visa regularisation encourages further irregular migration.

UWU recommends that the Federal Government make the necessary adjustments to the eligibility requirements of the subclass 408 visa to enable undocumented workers who have been undertaking work in the horticulture industry to apply for this visa and, if granted, continue their crucial work in the industry.

A visa regularisation process for undocumented workers - utilising the 408 pathway - could operate in the following way:

1. ‘Bar’ Lifting

- Undocumented workers who have previously had a visa application refused, or a visa cancelled, are barred from making further visa applications whilst they remain in Australia.¹⁶ However, that ‘bar’ may be lifted by the Minister exercising his personal powers under the Migration Act 1958 (‘the Act’);
- The Minister often utilises his personal powers in the public interest. For instance, the Minister exercised his personal powers under the Act to permit asylum seekers in the ‘legacy caseload, who arrived by boat from August 2012 onwards, to apply for Protection visas.¹⁷ Approximately 30,000 people fell in this category, roughly the

¹⁴ Migration (LIN 20/122: COVID-19 Pandemic event for Subclass 408 (Temporary Activity) visa and visa application charge for Temporary Activity (Class GG) visa) Instrument 2020.

¹⁵ Temporary Activity visa (subclass 408) Australian Government endorsed events (COVID-19 Pandemic event), Retrieved from: <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-activity-408/australian-government-endorsed-events-covid-19#About>

¹⁶ By s 48 of the Migration Act 1958 (the Act).

¹⁷ Parliament of Australia, Bills Digest - Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014. Retrieved from: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1415a/15bd040

same as the number of undocumented workers estimated to be currently working in the horticulture industry.¹⁸

- In order to have the Minister lift the 'bar' under the Act, undocumented workers may be required to demonstrate, say, 6 months' experience working in the Australian horticulture industry with a demonstrated commitment to continuing in the sector. An ancillary process could be established within the Department of Home Affairs to assess workers' employment evidence and to inform the Minister's exercise of his powers.
- This process could be implemented seamlessly within the current capacities of the Ministerial Intervention Unit of the Department of Home Affairs.

2. Application

- Once any necessary 'bar' had been lifted, undocumented workers could validly lodge an application for a subclass 408 visa in the 'Australian Government Endorsed Event' stream, based on the 'COVID-19 pandemic event' as defined in the relevant legislative instrument.
- The visa application would be uniquely suited to the circumstances of undocumented applicants; given its very limited documentary requirements, the absence of any form of employer nomination as a pre-requisite and the absence of a visa application charge.

3. Four Year Grant

- UWW recommends that undocumented workers be granted temporary visas for up to four years. A four year grant period would incentivise undocumented workers to come forward and apply, including those workers with bridging visas with and without work rights. It would also provide growers with a reasonable period of stability and certainty, which is crucial given the likely long-term effects of COVID-19 on labour supply.
- Visa holders' ongoing engagement in 'critical sector' work would be secured by the conditions of the subclass 408 visa, which require holders to continue to engage in the type of work in relation to which the visa was granted. While ensuring that temporary workers remain in critical sectors, the conditions attaching to subclass 408 visas are more suitable to the context of Australian horticulture than those of, say, the Temporary Skills Shortage (Subclass 482) visa which 'link' holders to a single employer. Subclass 408 visa holders may move between employers while remaining compliant with their visa conditions, provided that they remain working in a 'critical' sector, as defined from time to time.

Undertaking a visa regularisation process through the 408 pathway is attractive as it utilises an existing visa pathway, aligns with the Federal Government's existing strategy to manage visa insecurity for other essential horticulture workers, and would require almost no amendments to the existing visa category in order to facilitate its implementation.

More broadly, creating a pathway for undocumented farm workers to access a visa with work rights that enables them to continue working in the industry would:

- Effectively create a 'transition period' for the industry during which the Federal Government could undertake further changes to long-term industry visa settings (discussed in further detail below).

¹⁸ Kaldor Centre, 'The 'Legacy Caseload.' Retrieved from: <https://www.kaldorcentre.unsw.edu.au/publication/legacy-caseload>

- Raise industry employment standards by significantly reducing the industry's reliance on unscrupulous labour hire contractors whose business model of underpaying undocumented workers distorts prices and lowers wages in the labour market and undercuts compliant providers. A level playing field would raise prevailing conditions for all jobseekers, including citizens and permanent residents.
- Provide access to justice for the most highly exploited cohort of workers in the industry.

As such, UWW views the regularisation of undocumented workers' status as one of the highest priority measures the Federal Government should immediately undertake. Without a regularisation process, the effectiveness of broader efforts to improve compliance, raise standards, and develop a sustainable and skilled workforce in the industry will be limited.

Workers' perspectives on the need for visa regularisation

"Amnesty is important to migrant workers. Most farm workers are migrants. If migrants are not working here and they tell us to go home, I think the farm industry will go down. It's also important for Australians so we can supply people food. If the company sees we have a visa, then the company will have to pay people properly. If we don't get the proper wage, it's easier for us to fight the company when we have a visa." Robinvale, VIC

"I think it is very important to get an amnesty as most Australians don't do the work on farms. Locals can only do farm work for a few hours or a day. I've seen it myself. Government needs to listen to migrant farm workers and give people the right to work here. Without migrant workers the industry will collapse." Griffith, NSW

"It's easier to get a job on a farm but we need to have a visa to be able to work. We need more fairness even though we are migrant workers. Farm work is not an easy job, it is difficult, especially when it rains. I've stayed at home for 3.5 months now because of COVID-19." Springvale, VIC

Expand the best practice employer-registration and worker-education requirements in the Seasonal Worker Programme to all temporary migrant visa categories in the industry, including Working Holiday Maker visas.

The Federal Government's Seasonal Worker Programme (SWP) contains important mandatory employer obligations, which are designed to protect the temporary migrant workers from Pacific countries who work on farms across Australia.¹⁹ These requirements include:

- A registration process that requires employers to enter into a Deed of Agreement with the Department of Jobs to employ temporary migrant workers. This requirement provides the Federal Government, workers and their representatives with an important mechanism to hold employers accountable.²⁰

¹⁹ Seasonal Worker Programme, 'Implementation Arrangements', Retrieved from https://docs.employment.gov.au/system/files/doc/other/implementatn_arrangement_5_november_2018.pdf

²⁰ Ibid

- Mandatory worker rights education for all workers pre-departure and on-arrival in Australia, including a requirement that the employer invite trade unions to meet workers before they commence work.²¹

When they are properly enforced, these requirements work to empower temporary migrant workers to enforce their workplace rights. Employers who have breached workplaces laws are suspended from the SWP pending the satisfactory remediation of those breaches, and employers who fail to comply lose their ability to employ workers under the scheme. While there are certainly still instances of employer non-compliance in the SWP, overall these best-practice requirements are working to minimise the likelihood of worker exploitation.

By contrast, other heavily utilised temporary visas in the industry, including the 417 and 462 Working Holiday Maker (WHM) visas, are effectively unregulated and contain none of these protections, monitoring or oversight, despite the fact that workers on these visas are similarly structurally vulnerable to exploitation.

While employers in the SWP are required to submit recruitment plans and receive the Department's pre-approval to engage each new group of workers, labour hire contractors or growers who engage backpackers are not required to meet any additional requirements. As a result, there is no way for the Federal Government and other industry stakeholders to know which farms backpackers are working on, how much they are getting paid, or how much they are charged for accommodation.

Working Holiday Makers seeking to become eligible for a second-year visa must undertake 88 days work in the industry, and must provide proof of employment, which in effect involves employers "signing off" on their visa. This creates a structural dependence for backpackers on their employer - often a labour hire contractor - that is very similar to the Seasonal Worker Programme, but with no oversight and none of the protections available to SWP workers.

Numerous reports by the FWO, academic studies, media reports, and the experience of UWU members have demonstrated the widespread exploitation of backpackers and other temporary migrant visa holders that are the result of failures to ensure adequate and meaningful regulations and protections are in place for workers to hold their employers accountable.²²

Giving growers and labour hire contractors unlimited access to unregulated temporary visa pathways has and will continue to facilitate a race to the bottom in labour standards in the industry. Competition based on different standards of regulation (and cost) undermines efforts to encourage the uptake of better-regulated visa programs like the SWP, and limits the incentives growers have to make long-term investments in the workforce.

In order to improve compliance in the industry, the UWU recommends that the Federal Government make the Seasonal Worker Programme's best practice employer-registration and worker-education requirements mandatory requirements in all temporary visa programmes, including the Working Holiday Maker (WHM) visas.

Extending these best-practice requirements from the SWP would ensure there is regulatory consistency across the industry, creating a level playing field, and ensuring that regardless

²¹ Department of Education, Skills and Employment, 'Process to Become an Approved Sponsor' Retrieved from: <https://www.employment.gov.au/process-become-approved-employer>

²² See for example, Senate Education and Employment References Committee (2016). *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, Fair Work Ombudsman (2018), *Harvest Trail Inquiry*, Committee on Foreign Affairs, Defence and Trade (2017) *Hidden in Plain Sight - An Inquiry into Establishing a Modern Slavery Act in Australia*, Berg, L. and Farbenblum, B. (2018), *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia*, Howe (2019), Towards a durable future.

of which temporary visa they hold, workers in the industry have the same protections and mechanisms through which they are able to hold their employers accountable.

Employer registration would provide the Federal Government with a crucial mechanism to sanction employers who engage and exploit but do not directly sponsor temporary migrant workers, such as WHM and international students. As in the Seasonal Worker Programme, growers and Labour hire companies who fail to remediate violations of relevant laws could be prevented from engaging temporary migrant workers in the future, creating a strong disincentive to exploit temporary migrant workers.

Address horticulture's over-reliance on Working Holiday Maker visas as the industry's main temporary work visa

Over the past two decades, horticulture industry associations have advocated strongly for the introduction of a range of measures that incentivise (or compel) Working Holiday Makers to work in the horticulture industry. These measures include the introduction in 2005 of the second year visa for backpackers who work in specified regional industries, through to the more recent changes in 2018 that enable backpackers to work for the same employer for 12 months, increase the number of places, and introduce of third year visa, now tied to six rather than three months regional work in specified industries.

By agreeing to implement these measures, successive Federal Governments have enabled a visa program designed primarily to provide young people with an opportunity to come to Australia on a cultural exchange to be transformed into a de-facto industry work visa. This has facilitated and entrenched growers' reliance on backpackers to the point where Working Holiday Makers have become the main source of temporary labour for the horticulture industry, aside from undocumented workers.

Australia now relies more strongly on backpackers as a source of labour for the horticulture industry than any other country.²³

Even though there is now widespread acceptance that WHM are subject to systematic and widespread exploitation in the industry, and despite a myriad of other changes to the structure and scope of the programmes over the years, there have been no meaningful additional accountability mechanism or worker protections introduced to provide oversight over employment conditions or to enable backpackers to hold their employers accountable.

Over the long term, this over-reliance on WHMs is unsustainable and undesirable for a number of reasons, including:

- The vast majority of backpackers do not work in the industry because they want to, but because they need to in order to get a visa extension.
- The lack of stability or certainty for growers entrenches short-term planning and "churn and burn" attitudes towards workers in the industry as growers engage large numbers of workers for short periods of time.
- Short-term engagement, at the individual grower level, and in the aggregate, functions as a disincentive for growers and the industry to invest in workforce training and development.
- Industry stakeholders have no capacity to coordinate responses to labour shortages because the WHM programme does not involve visa sponsorship at either the individual grower or industry level.

²³ "Backpacker work plan creates more problems than it solves," *Sydney Morning Herald*, November 6, 2018. Retrieved from: <https://www.smh.com.au/politics/federal/backpacker-work-plan-creates-more-problems-than-it-solves-20181106-p50ean.html>

Rather than continuing to manipulate the Working Holiday Maker visa pathway to drive backpackers into the horticulture industry, the Federal Government should instead facilitate the expansion and further development of purpose built, well-regulated visa pathways for the industry.

The Federal Government could undertake and support a transition to more long-term, sustainable visa pathways in a number of interrelated ways.

Firstly, the Federal Government should phase out the requirement that WHMs undertake 88 days (or 6 months) work in specified regional industries in order to become eligible for visa extensions. This could be undertaken in conjunction with, or immediately following, the regularisation of currently undocumented workers' status (as described above). Backpackers would, of course, still be able to freely work in the industry, but would not have their eligibility for a visa extension tied to the performance of specified work.

Phasing out the 88 day requirement would further incentivise the industry's uptake of the Seasonal Worker Programme, which has expanded dramatically in the past 5 years,²⁴ and which not only has the strongest protections for workers, but also the greatest potential productivity gains for growers who invest in the programme, provided workers are returned each season, as is intended. **In order to secure long-term participation in the programme, workers should be guaranteed a "right to return" each season.**

In order to assist the industry in meeting any potential labour shortages arising from the reduction in the number of WHM working in the industry, the Federal Government should also undertake either or both of the following additional reforms:

1. **Expand the scope of the Seasonal Worker Program (SWP) to include countries beyond the Pacific.** These should specifically include Malaysia and Indonesia - being the countries from which most currently undocumented workers in the horticulture sector originate.²⁵
2. **Create a dedicated Agriculture visa.** UWU would only endorse a dedicated visa solution that contained at a minimum the inbuilt protections contained in the SWP, in particular the employer-registration and worker-education requirements, and included a formal role for workers and their representatives in the design and governance of the visa. An Agriculture visa should not be 'tied' to sponsorship by a particular employer, but should instead be based on an industry sponsorship model.²⁶ In this model, the industry, rather than an individual grower, would bear the responsibility of guaranteeing ongoing work, subject to rigorous compliance mechanisms, and provided there is a structural role for workers and their representatives in the design and governance of the visa.

Under either or both scenarios, priority should be given to ensuring that formerly undocumented workers who have gone through the visa regularisation process, are able to transition into these visa pathways, in order to ensure that they are able to continue to work in the industry long-term.

The outcome of this transition towards purpose-built well regulated visa pathways would be the development of a more stable harvest labour workforce in the industry, with Working

²⁴ "Australia's seasonal worker program now bigger than NZ's," *Devpolicy Blog*, Australian National University, July 5, 2019. Retrieved from: <https://devpolicy.org/australias-seasonal-worker-program-now-bigger-than-nzs-20190725/>

²⁵ A report of the Joint Standing Committee on Migration in 2016 found that most undocumented workers were from South East Asia and China; see Joint Standing Committee cited in Ariyawansa, S (2018) 'On the Backs of Migrant Workers – Imported Labour in the Australian Agricultural Sector', *Australian Journal of Legal Philosophy*, 43, p. 58.

²⁶ Howe (2019), *Towards a durable future*, p. 115

Holiday Makers augmenting and supplementing this skilled labour force, rather than dominating it.

Support workers' long-term participation in the industry by creating a pathway to permanency for horticulture workers.

The contribution of migrant workers to the success of the horticulture industry is immense and must be recognised and rewarded.

Alongside the expansion and development of purpose built, well-regulated temporary visa pathways for the industry, the Federal Government should ensure that long-term industry workers, including participants in these programmes, have a pathway to permanency.

UWU believes that temporary migration will only be sustainable and productive where it is linked with correlative permanent visa pathways, rather than a 'permanently temporary' state of repeated short-term visas.²⁷

A pathway to permanency for long-term temporary visa holders will encourage workers to continue to work in the industry, and encourage growers to invest in their workforces, creating a more stable, skilled and experienced industry workforce.

Critically, permanent transition should not depend upon employer sponsorship. Rather, self-nominated permanent visa pathways should be created for temporary migrant workers whose ongoing work in horticulture is evidence in itself of their skills and contribution.

Creating a pathway to permanency will encourage and facilitate further permanent settlement in those rural and regional communities that support a large horticultural industry. This will compliment other initiatives being undertaken to promote the creation of vibrant rural and regional communities, and will assist in improving the long-term sustainability of both the industry and those communities.

Secure Employment & Decent Work

Almost all horticulture workers are in insecure work that is casual, unpredictable and indirect.

ABARES puts the percentage of the horticultural workforce who are casual or contract workers at 72% for vegetable farms, and 76% for fruit farms.²⁸ Because of problems with data collection due to the prevalence of undocumented workers and irregular work, in reality this is likely much higher, and closer to 90%.

Insecure work is a significant barrier to retaining workers in the industry. Improving the quality of harvest jobs and the job security of workers will help to attract and retain workers, both citizens, permanent residents and temporary visa holders.

There are two main ways to do this:

1. Improve the wages, conditions and quality of casual harvest labour jobs by regulating labour hire operators in the industry

²⁷ Mares, P. (2016) *Not Quite Australian: How Temporary Migration is Changing the Nation*.

²⁸ Duffy, et al (2019) *Demand for farm workers: ABARES farm survey results 2018*.

2. Encourage and facilitate the creation of more secure, direct, part-time and permanent jobs in the industry

Growers' over-reliance on contractors has entrenched casual, insecure employment in the industry, even when the work is consistent and predictable. Industry trends, including the continued emergence of larger farms, as well as investments in technologies to create longer seasons means the industry will continue to have a greater capacity to support a larger percentage of secure, permanent jobs.

Supporting measures that increase job quality and security is a crucial part of creating greater stability and predictability for workers and growers, providing significant long-term benefits to the industry.

Holding labour hire operators accountable

UWU strongly supported the introduction of state level labour hire licensing regimes as an important first step in raising employment standards and holding labour hire operators accountable, not only in the horticulture industry but across the economy.

Although these schemes have only recently been introduced, the initial application and registration process in Queensland and Victoria has introduced much-needed transparency about the operations of labour hire providers, and forced these operators to provide evidence of their compliance with workplace laws.

Crucially, both of these state schemes provide important mechanisms through which industry participants can object to, and seek a review of, the granting of a license to applicants on the grounds that a provider does not or will not comply with their obligations. These are crucial new tools for all industry participants, including workers and their advocates, to hold labour hire operators accountable.

The Federal Government's approach to labour hire regulation should be to build on and strengthen initiatives already being undertaken at the state level. Labour hire operators in the industry should be subject to as much regulatory scrutiny as possible. "Light touch" regulatory approaches, or those with a "low regulatory burden" on providers, such as has been proposed by the Migrant Worker Taskforce will not be sufficient to address the depth and breadth of non compliance among unscrupulous operators and the host employers who engage them.²⁹

UWU does not support proposals to limit a national labour hire licensing scheme to specific sectors of the economy.

UWU supports the introduction of a National Labour Hire Licensing scheme only if a national scheme replicates and scales up the best-practice elements of the Victorian and Queensland state schemes, including a mechanism for interested parties to object to or seek review of the granting of a license.

As well as replicating the best-practice requirements of the state schemes, the Federal Government should introduce additional measures that would facilitate greater levels of compliance, and increase the chances that the schemes are successful in raising employment standards. This should include:

²⁹ Migrant Workers' Taskforce (2019) *Report of the Migrant Workers' Taskforce*. Retrieved from: https://www.ag.gov.au/sites/default/files/2020-03/mwt_final_report.pdf p. 105-106

1. **A mandatory worker rights education requirement for all licensed labour hire operators.** This requirement should be modelled on the existing obligations on labour hire providers in the Seasonal Worker Programme to undertake comprehensive worker rights education pre-deployment, including by inviting trade unions to meet workers before they commence work. Educating and empowering workers to be the everyday monitors of their own working conditions is a crucial part of facilitating compliance.
2. **Ensuring a national labour hire licensing scheme is introduced in conjunction with or following a visa regularisation process for undocumented workers in the industry.** Doing so will ensure undocumented workers are enabled to continue to work legitimately in the industry, provide regulators with crucial information about unscrupulous contractors, and significantly decrease the likelihood that these contractors are able to continue to operate outside the system.

The industry's over-reliance on unscrupulous contractors who underpay workers in cash has distorted the labour market in the industry by making labour costs a key point of competition, undermining the pay and job security of all workers. This unfair competition has driven the prevailing wage in the industry significantly below the minimum wage.

There is potential for a strong licensing regime to assist in increasing much-needed scrutiny on the widespread use of piece rates in the industry. The prospect of significant fines, and/or the loss of license to operate in the marketplace will act as a deterrent for those growers and contractors who misuse piece rates to underpay workers.

Strong regulation that includes significant penalties for hosts and contractors is necessary to level the competitive playing field and close the gap between low prevailing wages and conditions in the industry and lawful minimum standards.

Supporting direct and secure employment in the industry

The industry has the capacity to support a larger number of direct, secure, permanent jobs, particularly as industry conditions continue to favour the growth of larger farms, and investment in protected cropping and other technologies that expand the growing season year round.

Year-round work should be permanent and secure

For the past 5 years, UWU has led a campaign to engage with some of these larger growers, particularly in the tomato, lettuce, and potato industries, to end their unnecessary reliance on labour hire contractors and invest in their workforces by transitioning to direct and permanent employment.

At these workplaces, some casual workers had worked on site for contractors in a regular and systematic manner year-round for over 10 years. Claims from growers that they must rely on labour contractors to find and retain workers are clearly misleading in these circumstances.

Collective negotiations between these employers and UWU have resulted in the creation of hundreds of secure and direct jobs, and ongoing agreed processes for workers to convert to permanent work over time.

While the union has been successful in challenging these growers' long-standing practices, beliefs about the desirability or necessity of engaging workers through labour hire remain pervasive throughout the industry.

More needs to be done to encourage growers with longer seasons or year-round production to reduce their reliance on labour hire contractors, as the expansion of direct, secure employment will benefit workers and growers and significantly improve the industry's ability to attract and retain workers.

Coordination of regional harvests

While the short-term nature of much horticulture harvest and pruning work means that the periods of work assignment at each farm or in each crop or region can be relatively short compared to other industries, that does not necessarily mean that the period of engagement with a labour hire company must be short, or the employment model be casual.

There are a number of ways that growers can coordinate harvest needs across different crop types within a growing region, or across farms in different regions, which can facilitate the creation of year-round harvest and pruning crews engaged by reputable labour hire operators on a more permanent basis. In this way, greater cooperation among growers will assist in further rationalising of the number of smaller contractors in the industry.

This more-coordinated model is already operating to a certain degree in the Seasonal Worker Programme, where some groups of workers move between a different growers' farms, or a single grower's farms in different regions as seasons change. In the SWP, approved employers must have their recruitment (and contingency) plans approved by the government to ensure there is adequate work for the group.

There are significant mutual benefits for workers and growers in the development of more formal permanent, skilled, harvest work crews in the industry. For workers, it means greater job security, and a permanent stake in the industry, and for growers, a greater level of certainty that skilled and experienced workers are available when needed.

Investing in Accommodation as key industry infrastructure

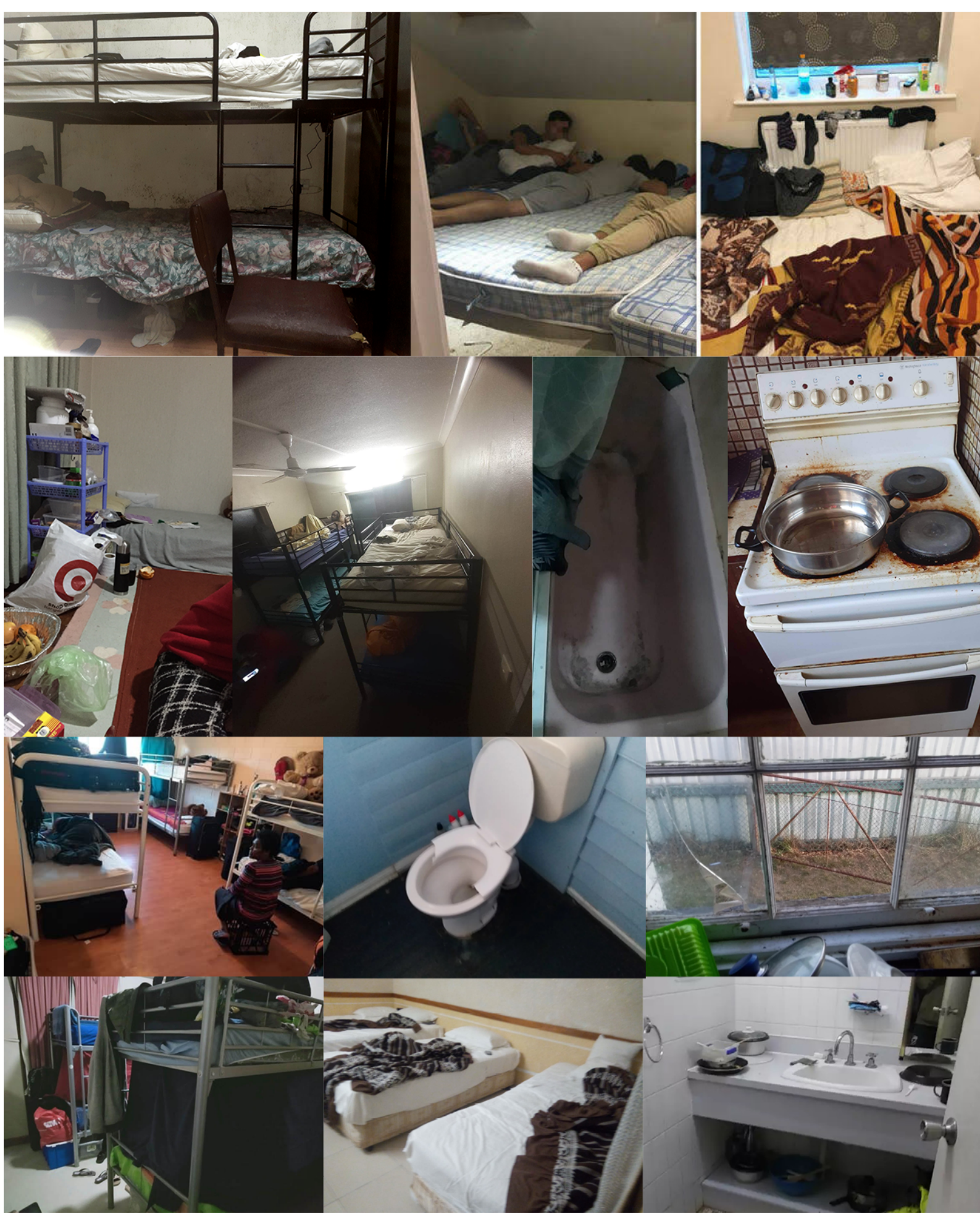
Overpriced, cramped, over-crowded, accommodation is the reality for the majority of harvest workers in Australia, affecting workers on different visas equally but in different ways.

The results of UWU's survey reveal that workers face a number of interrelated issues with temporary accommodation, as reflected in the table and photographs below:

Percentage of workers who experienced:	
Overpriced rent	59%
Overcrowded	51%
Poor quality	38%
Lack of Privacy	33%
Poor health and safety	31%
No Choice - must stay in contractor/employer accommodation	29%
Bills are too high	28%

Only 2 % of workers surveyed reported "no problems" with housing.

Examples of sub-standard, overcrowded accommodation submitted by workers as part of UWU's survey



Although there are a number of factors contributing to the development of this temporary housing crisis in the industry, **a key driver is the extent to which workers' accommodation is organised and controlled by labour hire contractors, and is used as a mechanism to extract considerable ancillary profit from workers.**³⁰

Indeed, the industry's overall reliance on labour contractors stems in part from growers' reliance on contractors not just to source and employ workers, but also to house them. Some growers have completely outsourced this responsibility to their contractors and turned a blind eye to the way contractors have used housing to profit from workers' vulnerability. In other cases, growers are working with contractors to house workers in their own accommodation on-farm, at exorbitant rates. In either of these cases, there are few incentives for growers to invest in low cost, high quality accommodation.

There are a number of ways that accommodation is linked to the provision of work in the industry:

- In the **Seasonal Worker Programme**, the Approved Employer - either a grower or a labour hire contractor - must provide accommodation to workers, and have the accommodation (and price) approved by the government before workers arrive. While workers can in theory move out of the accommodation, the lack of alternative choices in most growing regions means workers, particularly those in large groups, are stuck in the accommodation provided by the Approved Employer, with little capacity to negotiate change.
- "Working hostels" facilitate the recruitment of **Working Holiday Makers** through formal or informal arrangements with local growers and labour hire companies, and require workers to stay at the accommodation while they find them work.
- Labour hire contractors rent houses and operate unlicensed rooming houses, requiring workers, particularly **undocumented workers**, to stay in their house as a condition of work. In this scenario, unscrupulous contractors often lower margins charged to growers for labour hire services in order to win the contract, then recoup lost margins by extracting exorbitant rents from workers.

There are a number of additional factors and barriers that contribute to or exacerbate the problem, including:

- The lack of adequate temporary housing and accommodation stock in most key growing regions, limiting workers' choice;
- A general failure of local councils and other housing regulators to enforce minimum standards;
- A willingness by the Department Jobs in administering the Seasonal Worker Programme to accept and approve widely variable standards and prices of accommodation;
- Unacceptably weak standards for what constitutes 'acceptable' or 'suitable' accommodation for migrant farm workers, based on deeply ingrained biases and double-standards. This is often expressed (or is an unspoken assumption) in attempts to explain or excuse poor quality accommodation by claiming that workers are "used to it" or that it is "better than in their home country".

Overcoming these barriers, raising accommodation standards, and lowering the price workers pay will involve both:

- An increase in the level of scrutiny and stronger regulation of the existing temporary accommodation stock, and

³⁰ Howe (2019) *Towards a durable future*, p. 88. Forsyth, A (2016) *Victorian Inquiry into the Labour Hire Industry and Insecure Work*, Retrieved from: https://engage.vic.gov.au/download_file/14739/2415

- Greater investment by industry and the government in purpose-built, high quality, low cost accommodation.

It is critically important that initiatives to improve the quality and standard of accommodation do not force workers to bear the costs of these improvements through increases in rental prices. The very low prevailing rates of pay in the industry mean that overpriced accommodation has a disproportionately large impact on workers' take home pay. Increasing accommodation prices will only exacerbate this problem.

In the Seasonal Worker Programme, and through labour hire licensing regulations, more can be done to ensure that workers are not being overcharged for accommodation. This will require a greater level of scrutiny around the 'market rate' for housing in each region, whether accommodation services are truly being provided to workers 'at cost', and whether these rates are fair and reasonable, considering the quality. This is particularly the case in regions with few accommodation options and where labour hire providers are leasing private dwellings to accommodate workers, effectively setting the 'market rate' based on what they choose to charge workers.

Perversely, this lack of alternative housing options in some regions creates strong disincentives for regulators to apply close scrutiny to housing cost and quality, whether under direct, or indirect pressure from growers or not. While this is not acceptable, it demonstrates that a comprehensive solution to the crisis that aims to reduce costs to workers must involve the development of new housing options.

Over the past several years, some larger growers have recently begun to make investments in higher quality housing for their harvest workforces, as part of a strategy to attract and retain workers. While some of these new facilities are undoubtedly improvements over existing accommodation options, the scale and cost of needed investment means that the industry should not rely alone on individual growers to shoulder the burden. Besides, best-practice solutions should limit, rather than further entrench, workers' dependence on individual growers or labour hire operators for accommodation.

Instead, the industry and government should pursue a model of housing development that treats housing as part of the industry's critical infrastructure needed to support, attract and retain the harvest labour workforce, supported by industry collectively, rather than individually, and underwritten by direct government investment.

UWU recommends the Federal Government work with stakeholders to investigate ways to raise the standard and reduce the cost of accommodation for farm workers, including through government investment in the development of purpose-built, high-quality accommodation for harvest workers in key growing regions.

Not only does overcrowded, poor quality housing present significant risks not just to workers' safety, but also significant public health risks, particularly in the context of the COVID-19 pandemic.³¹

³¹ Howe and Singh (2020)

KEY DRIVERS OF CHANGE

At the top and the bottom of the horticultural supply chain, there are two powerful forces that must be effectively harnessed as key drivers in efforts to improve conditions for workers in the industry.

From the bottom up, educated and **empowered workers** have the power to act as the most effective monitors of compliance with minimum conditions.

From the top down, the **major supermarkets** have the power to improve standards through more worker-inclusive supply chain compliance mechanisms.

Education and empowerment of workers

A successful strategy to attract and retain workers in the horticulture industry must involve both listening to what workers say are the barriers and solutions to industry labour issues, and recognising that workers themselves must play a key role in facilitating improvements to standards and compliance in the industry.

Simply put, educated and empowered workers are the best monitors of industry working conditions.

There are inherent limitations on the resources of regulators to effectively police the industry, particularly as so much of the industry operates in regional and remote areas.

Both labour hire licensing schemes and regulated visa pathways that involve potential sanctions for unscrupulous employers rely on workers speaking up about problems when they arise. For this to happen effectively, workers must be educated about their rights, and supported when they have the courage to speak up.

As outlined above, UWW recommends that the Federal Government ensure farm workers are systematically educated about their workplace rights both:

- As a requirement of all temporary visas in the industry, and
- As a requirement of complying with labour hire regulations

These would be obligations that growers and labour hire companies engaging workers in the industry would be required to meet, and would involve employers ensuring that trade unions are invited to participate in worker education sessions, as is already happening in the industry under the requirements of the Seasonal Worker Programme.

Numerous government inquiries into the exploitation of temporary migrant workers have emphasised the importance of providing more and better-targeted information to migrant workers about their workplace rights as a key strategy to reduce the likelihood of exploitation.³²

However in seeking to address this need, it is important to recognise that it is not so much the information itself, but rather who delivers the information, and in what regulatory context, that is most crucial.³³ This is because workers are underpaid, for example, not primarily because they do not know the minimum wage rate, but because they lack the tools, meaningful recovery pathways and support to enforce their enjoyment of the right to earn the minimum wage.³⁴ A 2018 study of the challenges temporary migrant workers in Australia

³² Migrant Workers' Taskforce (2019) *Report of the Migrant Workers' Taskforce*; Senate Education and Employment References Committee (2016). *A National Disgrace: The Exploitation of Temporary Work Visa Holders*.

³³ *A National Disgrace*, p. 319.

³⁴ Berg, L. and Farberblum, B. (2018), *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia*, p. 48

face in recovering underpaid wages found that those workers who were members of the union experienced the best outcome, and were the most likely to recover all or some of their wages.³⁵

Positive respect for workers' rights to Freedom of Association, and the key role of trade unions in supporting workers to be educated about and enforce their rights is critical to the empowerment of workers in the industry and the success of efforts to better regulate visa and job pathways and create a more stable and better treated and supported workforce.

In an industry where exploitation is widespread and endemic, the relatively lower incidence of worker exploitation in the Seasonal Worker Programme - where trade unions have a structured role in both worker education and the governance of the scheme - shows that this approach is already working on the ground and should be more broadly applied.

The table below compares the incidence of exploitative practices reported by Seasonal Workers in UWU's survey of horticulture workers, compared to workers on all other temporary visas (including undocumented workers):

Seasonal Workers vs other temporary migrant workers (TMW)		
Percentage of workers who have been:	SWP	Other TMW
Underpaid	49%	67%
Paid Cash	2%	56%
Threatened for raising issues	33%	34%
Faced dangerous/unsafe work	15%	39%
No access to toilet/drinking water	10%	34%
Told not to join/talk to union	32%	25%
Punished or sacked for speaking up	20%	28%
Passport/visa controlled by contractor	20%	20%
Based on UWU survey of 1,098 horticulture workers, July 2020.		

As the comparison demonstrates, Seasonal Workers still face hostility to their right to Freedom of Association and to speak up about exploitation, however there are structures, oversight and support from the union to protect those rights, and, as is shown, to significantly reduce the incidence of exploitation. Although Seasonal Workers are not paid cash, the prevalence of piece rates across the industry shows that underpayment and low pay is still a significant concern for Seasonal Workers, as it is for all workers in the industry.

³⁵ Farberblum, B and Berg, L (2018) *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia*, p. 6. Retrieved from: <https://www.mwji.org/s/Wage-theft-in-Silence-Report.pdf>

Better protecting visa workers who speak up

It is clear that more must be done to protect those workers who speak up, particularly because the number of temporary migrant workers in the industry means that not only do workers fear that they may lose their job if they report exploitation, but also that they may also jeopardise their visa (or visa extension) and, in the case of undocumented workers, that they may be reported to Immigration.

The absence of visa security for victims of exploitation creates a significant disincentive for temporary migrant workers to speak out, and fundamentally undermines the efficacy of expanded protections for migrant workers under the Fair Work Act.³⁶

In addition to the measures outlined above, **UWU recommends the Federal Government create a specific ‘Employment Justice’ visa for temporary or undocumented migrant workers pursuing remedies through the *Fair Work Act*, or other causes of action for unpaid wages and other breaches of law.** The visa could be modelled on the Criminal Justice or Referred Stay visas that currently exist to protect victims of criminal conduct or trafficking in Australia.

The introduction of this visa would support, facilitate and encourage workers to seek redress and would ensure regulators have the information they need to effectively hold unscrupulous operators accountable.

The Key Role of the Supermarkets

“We have an issue where the retailers really drive who can be paid. That’s how it works. They are the big drivers in our sector.” - Industry association official, Queensland.³⁷

Everybody involved in the industry knows that Coles and Woolworths have unparalleled power in the supply chain, and can, if they chose, be the drivers of systematic improvements in the working and living conditions of workers in the industry.

Despite making public commitments to improve compliance in their horticultural supply chains, so far the supermarkets have largely limited this to the development of a number of third-party auditing programmes to verify compliance with their codes of conduct.

Whether these auditing and certification schemes are organised by retail industry ethical sourcing platforms (SEDEX), the labour hire industry (Staffsure) or by horticulture industry associations (Fair Farms), they all:

- rely on a conflicted, self-regulation model
- will have limited effectiveness in proactively identifying non-compliance, yet
- do nothing to educate or empower workers, and
- operate as a smokescreen rather than as a deterrent to exploitation.

The results of UWU’s survey demonstrate the depths of exploitation of workers in the industry and the extent of non-compliance with the Supermarket’s ethical supply codes. Relying on auditing systems that are based on self-assessment and reporting, and on verification by industry associations or other third parties, will be insufficient to overcome the significant barriers to compliance and facilitate meaningful change for workers in the industry.

³⁶ Fair Work Amendment (Protecting Vulnerable Workers) Act 2017.

³⁷ Howe (2019) *Towards a durable future*, p. 22.

The ILO and the World Bank have found these kinds of “private compliance initiatives” (codes of conduct, auditing, certification schemes or other self-reporting mechanisms) to be of limited effectiveness, and identify the “absence of a comprehensive and accountable means of engaging workers as well as their unions,” as a key determinative factor.³⁸

The only effective way to end exploitation is to ensure workers are:

- educated about their rights;
- have the freedom to choose to be supported by their union;
- are empowered to speak out and are protected when they raise issues, and;
- have access to effective grievance mechanisms with agreed consequences for non-compliance.

Coles and Woolworths must move beyond third-party monitoring regimes, take direct responsibility for compliance and formally include workers and their unions in proactively verifying compliance with minimum standards in their supply chains.

These efforts must be undertaken alongside commitments by the Supermarkets to support the continued improvement of wages and conditions in the industry by paying growers fair prices that protect the long-term sustainability of the industry.

³⁸ ILO (2016). *Workplace Compliance in Global Supply Chains*, p. 20-15. Retrieved from: https://www.ilo.org/sector/Resources/publications/WCMS_540914/lang-en/index.htm; World Bank (2003) “Strengthening Implementation of Corporate Social Responsibility in Global Supply Chains”, Retrieved from: http://siteresources.worldbank.org/INTPSD/Resources/CSR/Strengthening_Implementatio.pdf.

CONCLUSION

In order to attract and retain workers in the industry, the wages, working conditions, job and visa security of horticulture workers must be improved.

In this submission, we have sought to articulate in detail those solutions that workers themselves have identified as key to addressing some of the industry's pervasive and intractable labour problems.

We have emphasised those actions that the Federal Government can take that will have an immediate positive impact on the visa and job security of workers in the industry, while at the same time establish structures and pathways now that will facilitate long-term solutions to structural problems.

In particular, we have focused on how the Federal Government can create a consistent set of best-practice standards, in both the regulation of visa pathways and labour hire operators, that will facilitate compliance, level the playing field, and close the gap between low prevailing wages and conditions and lawful minimum standards, by addressing unfair competition.

In the horticulture industry, workers are often spoken of, spoken to, or spoken about, but are rarely listened to. For the industry to genuinely address and end exploitation, this attitude must change. Workers must be empowered and supported to police compliance in the industry, and must be respected and recognised as key industry stakeholders.

Decades of piecemeal, short-term, unregulated low-road solutions to the industry's problems have failed both workers and growers. The Federal Government now has an unprecedented opportunity to lead the industry to take a different course.

The response to the current crisis created by COVID-19 border restrictions presents an unprecedented opportunity to undertake a series of initiatives that will give workers and growers more stability and certainty both now and for the long-term. This must begin with a regularisation process that resolves the status of undocumented workers and enables them to continue their essential work in the industry.

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