

AUSTRALIA'S FUTURE HORTICULTURAL WORKFORCE: ASSESSING THE AGRICULTURAL VISA CONCEPT

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In this paper, we use an assessment of the agricultural visa concept to appraise the state of the horticultural workforce. We consider the agricultural visa concept in its own terms, and attempt to understand the effect an agricultural visa will have on the local workforce and existing visa pathways. The analysis has a particular focus on the the impact of an agricultural visa on segmentation in the horticulture labour market.

To date, consideration of an agricultural visa has been conducted without focusing on a detailed proposal. This has meant that the labour market effects of an agricultural visa have not been directly considered. We propose a particular model for an agricultural visa, bearing in mind Australia's proximity to South-East Asia and the Pacific, and drawing on the experience of agricultural visa programs in Canada and the United States. We remain unconvinced that there is a case for introducing an agricultural visa given the range of temporary migration visas currently operating in the horticultural labour market. However, we believe that an agriculture visa might have a role to play as a substitute for existing visa options, in particular, through the abolition of the second and third year WH visa extension, and to replace undocumented workers in horticulture. To make sense of the role an agricultural visa might play in the industry, in Part 2 the article introduces the global debate aound temporary labour migration. In Parts 3 and 4, it provides an overview of temporary migration in Australia, and the role of temporary migrant workers in the horticultural workforce. In Part 5, the paper discusses the unique regulatory environment for horticultural work in Australia. In Part 6, it addresses the

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vexed question of the extent to which migrant workers are a necessary part of the horticultural workforce. In Part 7, the article considers what role, if any, an agricultural visa might play in Australia, and considers features that would need to be part of its design. The article concludes that with the right regulatory framework in place, an agricultural visa might make a positive contribution in the horticulture labour market, but only if it were to replace existing incentives for working holiday makers to participate in the industry.

Global debate about temporary migrant workers

It is important to recognise at the outset that the analysis of temporary labour migration in Australia is part of a global phenomenon and contributes to broader debates about the benefits and detriments of temporary labour migration. There is a well-developed literature considering the labour and political rights of migrant workers. The focus of labour migration from developing to developed countries is on the potential of migration to redress global economic inequality and enhance the movement of people to places of economic opportunity (see, *eg.* Castles, de Haas and Miller 2014; Cohen 1987; Fudge and Strauss 2013; Howe and Owens 2016; Piore 1979; Ruhs and Anderson 2010; Waldinger and Lichter 2003; Costello and Freedland 2014). From the perspective of developing nations, labour migration has the potential to facilitate the distribution of wealth and the transfer of skills from developed to developing nations (ILO 2007).

From the perspective of host nations, governments must consider the interests of local workers and employers, which do not always coincide. Workers are concerned to have decent pay, conditions of work and labour opportunities consistent with basic economic, political and social entitlements that attach to citizenship (Marshall 1950). Employers may share these concerns of workers, but are also concerned to have a reliable source of low cost labour available to satisfy their demand for labour. Not surprisingly, it is employer groups that are among the most vocal advocates for the liberalisation of migrant labour schemes. In Australia, horticulture growers, through such bodies as the National Farmers Federation and AusVeg have been particularly effective in lobbying for liberalisation of visa pathways for migrant workers in Australia (see NFF nd; AusVeg nd).

In analysing the competing interests of sending and receiving countries, local and migrant workers and employers, Martin Ruhs has observed a trade-off between economic rights and political rights (Ruhs, 2013: 128), and also between the willingness of host nations to open migration pathways to workers (numbers) and the economic and political rights those workers enjoy (rights). (Ruhs 2013: 128, 154). This trade off has allowed developed nations to access cheap labour without committing to the workers, facilitating a commodification of labour (Rosewarne 2010: 103-105).

Temporary labour migration in Australia

Australia has experienced high levels of migration since World War II. The focus of post war migration was on settling permanent migrants to swell the population and the workforce. The rate of migration slowed in the 1970s and 80s but has risen markedly since then. In 1984-5, there were 10,200 permanent migrants in the skilled migration stream (Mares 2016). Thirty years later, in 2014-15, the number had risen to 127,774 (Mares 2016). In the same 30-year period, numbers in the family migration stream had a modest rise from 44,200 to 61,085, and the humanitarian stream fell from 14,207 to 13,756.

Long term temporary migration was a new phenomenon in the mid-1990s when temporary skilled migration (subclass 457) and international student (subclass 500) visas were introduced. Since the introduction of these visas, the number of temporary migrants with work rights has increased rapidly. International students enrolled to study in Australia have increased from under 100,000 in 1994 to nearly 900,000 in 2018 (Department of Education 2018), and WHM visa grants have risen from 40,273 in 1995-6 to 210,456 in 2017-18. (DHA 2018a; SSCEWRE 2006) Primary and secondary applicants on temporary skilled worker visas (subclass 457 visas until 17 March 2018, currently subclass 482 visas) have varied in this time period depending on economic demand. In the year to 30 June 2018, 34,450 applications were lodged and there was a total of 83,470 primary applicants in Australia. Including secondary applicants, who also have work rights, the number is likely to be close to 150,000 (DHA 2018b). Aggregating these numbers, there are well over 1 million temporary migrant workers in Australia with a range of work rights, operating in the same labour market as local Australian workers (Mares 2018). Although

international students and WHMs are eligible to work in agriculture, temporary skilled migrants can only be employed in certain occupations for which they have an approved employer-sponsor.

Overview of the current Australian horticultural workforce

In 2010, the Fair Work Ombudsman reported that there were approximately 130,000 workers in Australia's horticulture industry (FWO 2010: 2). While adequate data is not collected on the volume of workers employed in each occupation within this workforce, the labour intensive work of picking, packing and grading comprises the majority of employment needs in the industry.

The profile of workers in the horticultural industry has changed significantly in the past 30 years. Up to the 1990s, the workforce was constituted predominantly of a range of local workers: residents in the towns and regions situated near farms; including recent school leavers and long-term unemployed people; recent migrants with permanent resident status, including humanitarian visa holders, who move to regions situated near farms in order to work; and itinerant workers, including retirees, who move from location to location in response to the seasonal demand for labour.

The workforce of the 21st century is constituted mainly of migrant workers on a range of visas, including: Working Holiday (WH) visas (subclass 417); Work and Holiday visas (subclass 462) (collectively WHMs); seasonal workers from the Pacific (SWP) (subclass 416); and more recently workers in the Pacific Labour scheme (PLS) (subclass 403); international students who are entitled to work 40 hours a fortnight during term time and full time during non-study periods; and humanitarian migrants on Safe Haven Enterprise Visas (SHEVs) (subclass 790); Temporary Protection visas (TPVs) (subclass 785) and Bridging Visa Es (BVEs) (subclass 050 and 051).

Among temporary migrants working in horticulture, WHMs are the most prevalent source of harvest labour in terms of absolute numbers, if not hours worked. Their engagement varies regionally. In 2017-8, 36,617 WHMs were granted a second-year extension on their 417 or 462 visa (Howe *et al* 2019: 130). A high proportion of these earned their visa extension from completing 88 days of work in the horticulture industry.

The reliance of the Australian horticulture industry on WHMs is unique around the world.

The Seasonal Worker Program (SWP) has grown steadily since its introduction. In 2017-18, 8459 visa approvals were granted under the SWP, up from 1473 in the first year of the program in 2012-3 (Howe *et al* 2019: 101). In 2018-19 the numbers increased by a further 44% to just under 11,550 (Lawton 2019). Workers in the SWP are employed predominantly on large farms with rotational crops which have the capacity to undertake the administrative burden of the application process. The SWP is used in areas that are not popular with WHMs (Howe 2019, p 102-111). The Department of Foreign Affairs and Trade has not yet reported on PLS numbers for its first year of operation from July 2018 to June 2019.

Finally, there is a prevalent number of undocumented workers in the industry. 'Undocumented workers' refers to migrant workers who are in breach of the law (the *Migration Act 1958* (Cth)) that regulates their presence in Australia. They include migrants who possessed a valid visa which has expired; migrants with a valid visa that does not permit them to work - most commonly tourist visas; and migrants holding a valid visa with limited work rights, who work in breach of these limits, most commonly international students in breach of a restriction preventing them from working for more than 40 hours a fortnight during semester.

The undocumented workforce is difficult to identify due to the desire of workers to remain anonymous, and thus it is only possible to speculate about the extent and nature of undocumented workers' involvement in horticultural work. However, there are clear indications that there is a high prevalence of undocumented workers in the industry. There have been regular media reports about undocumented workers in horticulture in the past few years (Howe 2019, 37). In interviews and focus groups in our horticultural workforce research, growers and workers consistently testified to the presence of a significant undocumented workforce and named the main source countries for undocumented workers as Malaysia, Indonesia, Thailand, Cambodia and Vietnam. (Howe 2019, 36). Citizens from these countries feature prominently in Department of Immigration and Border Protection data on visa overstayers (DIBP 2017, p2).

Despite widespread concerns about the high incidence of exploitation of migrant workers in low skilled horticulture employment, and the growing number of undocumented workers in the industry's workforce, the

horticulture industry continues to advocate for liberalisation of temporary worker visa pathways into the industry (Berg and Farbenblum 2017: 8; FWO 2018: 50; Underhill and Rimmer 2015: 608-9; SEERC 2016: 15-16; JSCFADT 2017: 287-8). In 2018, the industry lobbied hard for a dedicated agriculture visa (Worthington 2017; AusVeg 2019). Although the government rejected this, it modified the Working Holiday and Work and Holiday visa programs to extend the pool of countries who could use work in horticulture to secure a visa extension, removed the time restriction on WHMs working in horticulture for a single employer, and increased the visa extension for workers in horticulture from two to three years through the *Migration Amendment (Working Holiday Maker) Regulations 2019* (Cth) (Packham and Kelly 2018; DHA 2018). Like the second year visa extension before it, the third year extension to the WH visa is uncapped though there will be quotas for workers on the subclass 462 visa. There is no labour market testing, and there are no obligations on employers or sponsorship obligations (such as in the subclass 482 or 416 visas) to protect workers beyond Australian workplace law.

In July 2018, the government also introduced a new Pacific Labour Scheme (PLS) to enable citizens from Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Timor-Leste, Tonga, Tuvalu and Vanuatu to engage in low and semi-skilled work in regional Australia for up to 3 years. The PLS is also uncapped, but is subject to labour market testing, and contains a range of safeguards to protect workers from exploitation. (DFAT 2019)

These changes to visa pathways into horticultural farm work in the second half of 2018 occurred with very little analysis of their implications for Australia's migration program as a whole, or for the long-term constitution of the low skilled labour force in horticulture.

The regulatory environment for horticultural work

There is not a conventional labour shortage in the horticulture industry although there are clearly identifiable labour supply challenges that make sourcing labour difficult (Howe *et al* 2019: 48-50). From the perspective of employers, these challenges include shortages of workers in certain parts of the industry, particularly in remote locations that are not attractive to WHMs or to other local and migrant workers, a shortage of workers

with the requisite skills and motivation to work effectively in the industry, a shortage of workers who are prepared to work for extended periods, or even for fixed periods, during a harvest. Employers report on the difficulty of retaining local workers who are not prepared to do the hard physical labour required in the industry, and on the unreliability of WHMs whose only motivation for engaging in work is to complete 88 days of work to be eligible for a visa extension (Howe *et al* 2019: 48).

A broader challenge for the industry as a whole is the presence of underpaid migrant workers, predominantly undocumented workers and WHMs. Unscrupulous employers and labour hire intermediaries who are prepared to exploit workers benefit at the expense of participants in the industry who comply with their legal obligations.

Horticultural workers face varying degrees of vulnerability based on their visa status, language, culture, and knowledge of Australian workplace rights. There is a significant and growing body of evidence suggesting that non-compliance with labour standards in the employment of temporary migrants is widespread in the horticulture industry. There is significant evidence in academic research (*eg.* Underhill and Rimmer 2015; Howe *et al* 2019), parliamentary inquiries (*eg.* SEERC 2016; JSCFADT 2017), publications from the Fair Work Ombudsman (*eg.* FWO 2016) and in the mainstream media (*eg.* Doherty 2017; FC 2015; Mackenzie and Baker 2016) that growers and labour-hire intermediaries acting in their individual, short-term interest, have exploited workers in a variety of ways, including underpayment, unsafe worksites, unreasonable and oppressive conditions of work, sub-standard and/or over-priced accommodation, coercion, bullying and sexual harassment (Berg and Farbenblum 2017).

The Fair Work Ombudsman's 2010 report found that 39% of horticulture employers were non-compliant with labour standards (FWO 2010: 1). The 2018 *Harvest Trail Inquiry* recovered more than a million dollars in wage underpayments and found widespread misuse of piece rates (FWO 2018: 4, 29). Further, the 2016 report found that more than one-third of WHMs surveyed were paid less than the minimum wage, 14% had to pay to secure regional work, and 6% had to pay an employer to 'sign off' on their regional work requirement (FWO 2016: 4). In 2017 an online survey of 4,322 temporary migrants in Australia found that the worst paid jobs are in fruit and vegetable picking, where 15% of respondents said they had

earned \$5 an hour or less and 31% had earned \$10 an hour or less (Berg and Farbenblum 2017: 6).

One strategy in response to this non-compliance is to improve workers' knowledge and awareness of their work rights and entitlements under Australian law. The Fair Work Ombudsman has a series of resources available for harvest workers and launched a new information campaign via social media in May 2019 (eg. FWO 2019a). The 2019 *Migrant Workers Taskforce Report* also investigated the adequacy of communication strategies between government agencies and migrant workers around their workplace rights. The report recommended that a new 'whole of government' strategy is required to address the exploitation of migrant workers (Fels and Cousins 2019: 9). The report also recommended that government work with industry and other stakeholders to improve information provision and dissemination amongst migrant workers and employers (Fels and Cousins 2019: 9).

While these recommendations are to be welcomed, they do not address underlying structural problems with the use of migrant labour. The problem for migrant workers may not be a lack of information about their rights, but a willingness to forgo their entitlements in order to work at all. As discussed earlier, migrant workers are particularly vulnerable as a result of their temporary visa status, their isolation from sources of support, their low level of unionization, their dependence on employers and labour hire intermediaries for the opportunity to work and for many of their basic requirements while living in Australia, and their determination to pay off debts associated with their travel to Australia and to send remittances home. Understanding this structural vulnerability is vital for consideration of the agricultural visa proposal which follows.

A complicating factor in determining the criteria for an agricultural visa is that the regulatory frameworks governing the two main visas for work in horticulture, the WHM visa and the SWP, are so different (Howe et al 2018). The SWP and WHM visa programs vary in length, renewability, and sponsorship obligations. The SWP is a dedicated low skill labour visa and the WHM visa is a mixed purpose visa that allows WHMs to work and travel in Australia for one year, with the possibility of renewal for a second and third year. The different regulatory framework for these visas is already responsible for a high level of segmentation in the labour market (AgriLabour 2016). The only way this segmentation could be reduced

through the introduction of an agricultural visa is if it replaced one program and enhanced the other.

Of the two visa pathways into work in horticulture, there are more reported problems of worker exploitation with the WHM visa (FWO 2018: 32; FWO 2016: 23-24). This is not surprising given the absence of any specific employer obligations in the design of the visa. Unlike the SWP, employers have no obligation to become approved employers, arrange accommodation, contribute to travel costs, arrange medical insurance for workers, induct workers or provide them with pastoral care. WHMs often source work individually and are left to the vagaries of the market (namely working hostels) to secure accommodation and transport to farms.

The requirement that WHMs work for 88 days in regional areas as a condition of visa renewal has been effective in creating a substantial regional workforce for short term, casual work in the horticultural industry. The industry is reluctant to remove incentives for WHMs to work in regional areas for fear that this will lead to significant shortages in these areas (Birmingham and Colbeck 2019; NFF 2019: 29, 51). In fact, as indicated above, the work rights of WHMs have recently been liberalised, including provision for work in horticulture for a third year, and expanding the list of countries eligible for this visa extension.

The main limitation of the SWP is that the visa is only available for a period of six to nine months, although it is renewable for subsequent years. Furthermore, employers must guarantee a minimum amount of work during the visa period. This means that the visa is not well suited to year long, permanent work, nor to short term casual work. However, the introduction of the PLS in 2018 addressed this limitation, with visas available for up to three years.

The proposal for an agricultural visa must be considered within this highly complex labour market and regulatory environment. Employers pick and choose between different available groups of local and migrant workers, creating a highly-segmented labour market (Howe *et al* 2019: 48-69). For example, the availability of large numbers of WHMs for intense short term, casual work in some areas such as Bundaberg and Stanthorpe in Qld, Gingin and Wanneroo in WA, Griffith and Orange in NSW, and Mildura in Victoria (Howe 2019, 52-58) has meant that there has been little attempt to engage in employment programs for local workers, and little attempt to create longer term, permanent employment pathways. In areas where there is a glut of workers, there is downward pressure on wages and conditions.

Conversely, where there are acute shortages of workers, and employers are heavily reliant on labour hire intermediaries, employers are less inclined to look behind the labour hire contract and take responsibility for workers wages and entitlements.

Segmentation drives the decisions of employers and labour hire intermediaries to favour certain groups of workers over others, further stratifying the labour market and creating the possibility of choosing between classes of workers on the grounds of inappropriate criteria such as their ethnic background and their amenability to working in conditions of non-compliance with workplace laws.

Segmentation also leads to a substitution effect between local and migrant workers. The prevalence of WHMs wanting to work in horticulture for the whole of the second year of their WH visa has transformed the WH visa into a de facto horticulture visa in some areas, competing directly with the SWP (Reilly 2015). It is uncommon to find employers engaging Pacific seasonal workers if WHMs are available. Conversely, the proximity of horticultural regions to major urban centres, such as the proximity of Virginia in South Australia to Adelaide, has meant that the workforce is mainly constituted of recently arrived permanent migrants (Howe 2019, 58).

Concerns over segmentation, substitution and exploitation of workers in the horticulture labour market are likely to be reinforced by changes to the WHM visa program announced in November 2018, namely providing the opportunity for subclass 417 visa holders to apply for a third year of work if they complete six months of work in their second year, and extending this opportunity to Work and Holiday subclass 462 visa holders in regional areas throughout Australia, including the whole of South Australia and Tasmania. It is important to note that the subclass 462 visa includes a larger number of developing countries, including Indonesia, Malaysia, Peru, Thailand, Turkey and Vietnam.

The government has also foreshadowed that it will increase the cap on numbers for some countries in the subclass 462 visa program, a process it has already begun for Spain, Israel and Peru (DHA 2018a). The likely effect of these changes is to increase the overall number of WHMs in horticulture, and significantly increase the number of WHMs from less developed countries who are more likely to use the visa to facilitate full-time work in the industry for up to three years. One way of characterising the transformation of the WH visa program is that it has become more like

an agricultural visa without the introduction of appropriate regulatory safeguards to protect workers.

Having in mind these considerations, there are some clear parameters for an agricultural visa. In the next section, we set out important aspects of a regulatory framework for an agricultural visa, and offer some comments on its viability and appropriateness for the horticultural industry, drawing on the experience of other countries. Before doing this, the article addresses the highly contested issue of just how many migrant workers are required to satisfy the industry's labour requirements.

The need for migrant workers in Australian horticulture

The assessment of the case for an agricultural visa is highly dependent on how many migrant workers are projected to be required in the industry over time. Unfortunately, there is no clear way to make this projection. An initial complication is the way the local and migrant labour forces relate to each other. One effect of the high level of segmentation of the labour market, with such a wide range of workers with different levels of protection and rights, and with different incentives to work, is that the presence of migrant workers transforms the horticultural labour market in such a way that local workers become less competitive in the market and simply leave it (Reilly 2018). Research shows that as a result of the incentive to work for 88 days for a visa extension, WHMs are prepared to undertake this work for low pay and in poor conditions in order to secure the visa extension (FWO 2016). This regulatory distinction may well have been responsible for the clear perception of horticultural growers that WHMs were more reliable and productive workers than locals (Reilly 2018).

There is a further question of whether the local labour market for horticultural workers could be reinvigorated in the absence of low cost, unskilled migrant workers. As recently as the mid-1990s, local workers constituted the majority of the horticultural workforce (Reilly 2018, p.108). It remains unclear whether the local workforce declined because of the prevalence of WHMs in the labour market, or whether the increase of WHM working in horticulture was a response to a declining local workforce. In an inquiry into the horticultural labour force in 2006, the Senate Standing Committee on Employment, Workplace Relations and Education was not convinced that there was a shortage of workers, and

advocated for more strenuous efforts to employ local workers (SCCEWRE 2006). On the other hand, there is good evidence that at least in some locations, growers are unable to find local workers to harvest their crops (Howe 2019).

Another contested question is whether the SWP and the PLS have the capacity to meet growing demand in the horticultural workforce. After a slow start, the SWP has grown steadily since its introduction in 2012. Since the program has been fully operational from 2013, numbers have steadily increased, and are projected to reach over 10,000 in the 2018-19 financial year (Curtain 2019). A report of the Development Policy Centre and the World Bank in 2016 estimated that by 2040, the number of seasonal workers from the Pacific under the SWP would be between 29, 300 and 57, 500 (Curtain 2016). If the higher end of these numbers is correct, it may be that the SWP and PLS have the capacity to replace the second and third year WH visa extension without the need for an agricultural visa. There have been a range of reforms from the original conditions in the SWP pilot which have been designed to make the program more attractive to employers. First, the range of the program has been extended through increasing the eligible countries, introducing multi-entry visas, lifting the cap on workers, expanding the SWP into other occupations in the agriculture industry including cattle, sheep, grain and mixed enterprises, and reducing the tax rate for Seasonal Workers from 29% to 15% for their first \$37,000 of taxable income. In addition, there is a new condition that allows Seasonal Workers to change employers in limited circumstances (Curtin and Howes 2018).

Design considerations for an agricultural visa

Selecting source countries

To make a positive contribution to the horticulture labour market, an agricultural visa proposal must be aimed at addressing (and not exacerbating) issues of segmentation and substitution that are caused by the array of visa pathways to work in horticulture, and it must be designed to adequately protect migrant workers from exploitation in its own terms (Dornan, Howes and Curtain 2018).

In proposing design features for an agricultural visa, we draw on the experience of agricultural visa programs in the United States, Canada and New Zealand. We base our analysis on an agricultural visa for workers from Indonesia, Malaysia, the Philippines, Sri Lanka and Vietnam. As we argue below, if there is to be a new visa class for workers in horticulture, the most sensible approach is to establish a visa based on individual agreements with Australia's nearest neighbours with substantial agricultural industries. We assume that these countries can supply a suitably experienced workforce to satisfy the labour force demands of the Australian horticulture industry (based on the size of their agricultural workforces) and focus on whether it is possible to design an agricultural visa that adequately protects the rights of these workers within a regulatory framework that is acceptable to government, industry, local workers and unions. As we and others outline elsewhere, worker protections do not just flow from visa categories but also from the capacity of the regulatory environment to enforce these protections (*eg.* Howe *et al* 2019; van den Broek *et al* 2019; Preibisch 2018; Preibisch 2011; Rogaly 2008).

Assuming the SWP and PLS continue alongside a new agricultural visa, and assuming the WHM visa also continues as a one year visa with no potential for extension, there are a number of ways of selecting source countries for an agricultural visa.

One option is to make an agricultural visa available to some or all of the source countries in the WH visa program. There are a number of considerations here. Based on the participation rates of WHMs in horticulture currently, our research suggests that subclass 417 visa holders from Taiwan, Hong Kong and South Korea are most likely to take up an agricultural visa (Howe *et al* 2019: 112-18; see also AgriLabour 2016). WHMs on the 417 visa from Europe, NZ and Canada have generally only participated in horticulture for the 88 days required for a second year visa extension. Thus the WHM visa program is already providing a back door entry into agricultural work for visa holders from these countries (Reilly 2015: 474-489).

If the agricultural visa was extended also to some or all of the countries in the Work and Holiday (subclass 462) program, visa holders from developing countries including Chile, China, Indonesia, Malaysia, Peru, Thailand and Vietnam are the most likely to apply.

In our view, it is preferable to completely separate an agricultural visa from the WH visa programs given that they have separate aims. Most WHMs

do not come from agricultural backgrounds, and are not in Australia predominantly to engage in agricultural work. The majority of WHMs are from developed countries with a focus on travel, supplemented by short periods of work. A number of reports have found SWP workers to be more productive than WHMs, particularly SWP workers who return to work in second and subsequent seasons (ABARES 2018).

An agricultural visa will work most effectively in Australia as a standalone visa with its own regulatory framework appropriate for short term, low skilled migrant work, which is not in direct competition with a less regulated WH visa. In our view, it should replace the current WH visa extension arrangements. We also consider that the most appropriate source countries for the visa are neighbouring South-East Asian countries, such as Indonesia, Malaysia, Vietnam, the Philippines and Sri Lanka. There are a range of reasons to favour these countries for an agricultural visa. They have strong agricultural industries (*eg.* UNFAO 2018) and a workforce with experience in low skilled agricultural work (*eg.* ILO 2017); they have similar climates to many horticultural regions in Australia; and their proximity to Australia reduces travel costs. Furthermore, countries in the South East Asian region have particular geopolitical significance for Australia and introducing a labour migration pathway offers the opportunity to strengthen these relationships.

In choosing particular source countries, there are a range of factors to consider, including workers' experience in horticulture, relative GDP and comparative wage rates; English language proficiency; and the impact of short-term labour migration on workers' countries of origin. A central concern for any proposed new visa is to minimise worker exploitation, which is a particular risk for low skilled temporary migrant workers from developing countries.

In 2017, the average monthly income in Australia was \$4280, compared with Malaysia \$804, Sri Lanka \$321; the Philippines \$305; Indonesia \$295; and Vietnam \$180 (World Data, 2019). The disparity in average wages between Australia and neighbouring countries makes it likely that there will be high demand for an agricultural visa among workers in these countries, but also that there will be an incentive for many workers to agree to work well below the minimum wage in Australia. Income disparity between host and sending countries exacerbates the vulnerability of workers, and means particular attention needs to be paid to the regulatory framework required to prevent wage theft and worker exploitation.

The term of the visa

The government is highly unlikely to accept low skilled horticultural workers on permanent visas, given the current focus on skilled migration to Australia. There may be some appetite for providing temporary horticultural workers with the opportunity to apply for permanent residency pending a successful period of work. However, such an arrangement leaves workers highly vulnerable to exploitation at the hands of employers who have the power to affect workers' chances of attaining permanent residence.

Considering the much more likely option of a temporary visa, there are a number of regulatory questions. First, what is the appropriate term for the visa? There are several factors to consider. From an economic perspective, there are questions about the gap in the labour market that the visa is intended to fill, and the relationship with existing visa pathways into horticulture work. There is a clear incentive for growers to advocate for a visa term that is as long as possible to reduce training costs associated with a regular turnover of workers, and to have workers with experience in the industry for longer periods. AusVeg and the National Farmers Federation Horticulture Council have proposed a visa for a minimum of two years with the possibility of extending to four years (AusVeg 2019).

Another design issue is whether the visa, whatever its length, should be renewable. Providing the opportunity for workers to renew their visas encourages workers to commit to farms and reduces visa overstay (Basok 2007; Hennebry and Preibisch 2012: e19). Workers who return for work will have greater familiarity with Australia, its language, culture and laws, which will potentially decrease their vulnerability in the workplace and make them more productive workers over time. However, it is important that visa renewal is independently assessed and is not at the discretion of individual growers who can use their power over future migration outcomes as a lever for making unreasonable demands of workers.

Some commentators have argued that the longer the period of the visa, the stronger the responsibility on states to offer a pathway to permanent settlement (Walzer 1983: 56-61; Reilly 2016: 293). In relation to temporary skilled workers, a report commissioned by the Australian government noted that it is desirable to have an absolute limit on the number of years a visa holder can remain in Australia. As Barbara Deegan stated in a review of the subclass 457 visa in 2008, '[v]isa holders should

not be permitted to live in Australia, in vulnerable circumstances, under a temporary visa which is repeatedly renewed.’ (Deegan 2008: 51).

From the perspective of the welfare of workers, it is important that workers be provided with sufficient time to work in order to make a reasonable return on their financial investment to travel to Australia for work. On the other hand, a major concern of a long-term visa is the length of time workers are separated from their families (Asis 2006: 45; Ukwatta 2010: 148-9).

The seasonal worker program manages the problem of family separation by limiting the length of the visa to less than a year but allowing repeat migration. Visas are a maximum of eight months in a calendar year in the SAWP program in Canada (GOC 2018a), and nine months in Australia’s SWP program (DHA 2019). Repeat migration may address the problem of long term absence, but creates new problems as a result of repeat absences which disrupt family life over a longer period. A World Bank report on the social impacts of the Seasonal Worker Program in Vanuatu and Tonga reported a number of negative impacts from time away from family including a breakdown in trust in marital relations, and failure of fathers to provide care or financial support for their families. (World Bank, 2017, pp.20-23) There were also positive social impacts, particularly as a result of remittances flowing to families, skills development and, for women migrant workers, empowerment (World Bank 2017, pp17-20). The problem of family separation may be tempered for longer visas by making visas multiple entry. However, workers may be disinclined to make the substantial investment of returning home to family if this is not required.

Sponsorship models

Sponsorship provides some advantage because it ensures that workers are provided with a minimum level of employment and pastoral care. However, sponsorship can also contribute to exploitation through tying workers to a relationship of unequal power which they cannot leave without risking their visa status and future work prospects, which intensifies the inherently unequal nature of employment relations (Groutsis, van den Broek and Wright 2017: 1855. See also Costello 2015: 210; Howe 2016: 136).

It may be that an untied visa is inappropriate for agricultural workers from poor South-East Asian countries with limited English language.

Agricultural workers from these countries are likely to have far less capacity than WHMs to travel around the country in search of appropriate work opportunities, and negotiate fair terms of work. They are likely to have little, if any, prior travel experience, no familiarity with the Australian labour market, and will face language and cultural barriers to finding employment and accommodation. In short, they would form a class of extremely precarious workers at risk of exploitation and destitution.

A potential alternative is to develop an industry sponsorship model, in which the horticulture industry is responsible for applying for visas and organising accommodation, transport and pastoral care for workers. According to Canadian scholar Delphine Nakache (2013: 89-90), industry and regional-based sponsorship reduces the susceptibility of migrant workers to exploitative practices that can be created by individual employer sponsorship models that limit worker mobility.

An industry sponsorship model requires a high level of commitment from the industry to effectively organise visas, accredit employers, register workers and organise accommodation, transport and pastoral care across the industry. It requires buy-in from other stakeholders, including key government agencies and unions. International research on codes of conduct and certification schemes indicate that unions and other stakeholders outside of industry play a productive role in protecting workers from exploitation and ensuring compliance with labour standards (see, *eg* .Donaghey 2014). An industry model still requires a high level of oversight from an external regulator to ensure employers are complying with minimum conditions of employment. In fact, we would argue that an industry model should only be considered in conjunction with increased oversight from the Fair Work Ombudsman and through a formal role for unions.

Employer obligations

If an agricultural visa is offered to workers from South East Asian countries, workers will require a high level of employer and sponsor support. Analysis of agriculture visa schemes in the United States, Canada and New Zealand suggests a number of sponsorship obligations are necessary, including a contribution to the worker's costs of travel to Australia and to the worksite, along with accommodation and meals. Under the H-2A visa, the sponsor pays all international travel costs, half at

the beginning and half at the end of the contract and all transport costs to the place of work. The sponsor also provides meals and accommodation (USCIS 2019). Under the Canadian SAWP, employers must organise and pay for inspections of accommodation (GOC 2019), and under the New Zealand RSE, sponsors must provide acceptable medical insurance (INZ 2018: WH1.25.1).

Each scheme provides minimum hours of work. Under the H-2A visa, workers must be paid for 35 hours of work per week (USCIS 2019). Both the SAWP and RSE programs require a minimum commitment of 240 hours of work (BCFGA 2019: 13; INZ 2018: WH1.20.5(b)(i)). Under the SAWP this must be provided within a six week period (BCFGA 2019: 1). The SAWP and RSE require pay to be at the market rate, while the H-2A requires pay at more than the minimum wage (INZ 2018: WH1.20.15).

All the schemes have a rigorous regime of labour market testing. Under the H-2A, employers must submit a job order form to the State Workforce Agency at least two months before a job commences and locals must be offered the job up to three days before an H-2A worker commences (CRS 2017: 9, 14). Under the SAWP, jobs must be advertised on the National Job Bank for at least 14 days, and employers must submit an application that outlines the impact of hiring migrant workers on the local labour market (BCFGA 2019). Under the RSE, the New Zealand Work and Income Department keeps a register of job vacancies, checking vacancies against potential local labour sources in the region before approving the use of RSE workers (INZ 2018).

Despite the sponsorship obligations in these schemes, a high level of worker exploitation is reported in the H-2A and SAWP schemes, though less so in the New Zealand RSE (Hennebry and McLaughlin 2012: 118; GOC 2018; Newman 2011; Maclellan 2008: 16). This indicates just how difficult it is to protect vulnerable migrant workers in domestic labour markets.

In Australia, the SWP program uses a sponsorship model that mirrors closely the obligations in the agricultural visa schemes in the United States, Canada and New Zealand. First, employers are required to become Approved Employers before applying to recruit workers. Employers are responsible for arranging accommodation and travel insurance for workers, although these expenses could be deducted from workers' wages. Employers are required to provide pastoral care, and an induction to work on the farm. Employers contribute to international travel costs. Employers

are subject to audits conducted by the Department of Jobs and Small Business, and to monitoring by the Fair Work Ombudsman.

However, the regulatory burden on employers has been reduced over time to encourage greater uptake of seasonal workers. Compared to the pilot program, the minimum work guarantee has been removed, and replaced with a requirement that Seasonal Workers 'will benefit financially from their participation in the program' (Curtin and Howes 2018; DJSB 2018). Employers' contribution costs for international travel has been reduced from \$500 to \$300. They are no longer required to organise training for workers, and must only engage in new labour market testing as part of the application process every six months, instead of every three.

These modifications to the program are designed to make the SWP more competitive with the WHM visa. It is instructive that the reforms to the program were all aimed at achieving greater administrative efficiency, and to lower the burden of regulation and sponsorship on employers. This is an example of how the highly-segmented labour market in Australia puts downward pressure on worker protections in a dedicated labour migration program such as the SWP. In the United States, Canada and New Zealand, there is no equivalent reliance of the industry on an unregulated source of migrant labour such as the WHM visa scheme in Australia.

A major concern about implementing an agricultural visa is that similar pressure to liberalise conditions of the visa at the expense of worker rights will occur. For this reason, in our view an agricultural visa should only be contemplated in Australia if it does not have to compete with other migrant labour visa options other than the SWP which, as we discuss below, would contain equivalent worker protections and employer obligations. Furthermore, before an agriculture visa is considered, there needs to be a much greater understanding of the horticulture workforce including total numbers, and the proportion of local and migrant workers. Finally, the industry needs to address the phenomenon of undocumented migrant workers in the field. The agriculture visa offers a potential replacement for these workers, if the extent and nature of their presence can be identified in the industry.

Relationship between an Agricultural visa and the SWP

As we have emphasised throughout this paper, the case for an agricultural visa is premised on there being a demonstrable labour shortage in

horticulture. The proliferation of short term, low skill migrant worker visa options in horticulture makes it difficult to demonstrate any such shortage. In particular, there may be significant potential growth in the SWP and PLS that negates the need for a separate agricultural visa. However, if the WH visa programs were restricted by abolishing the second and third year visa options, this is likely to create a shortfall in the number of available workers. An increased shortfall is also a likely consequence of addressing the presence of undocumented workers in the industry, although it may be that policy arrangements could ensure some of these workers, once identified could transfer to a new agriculture visa or be accommodated within the SWP. These two changes are necessary precursors for introducing an agriculture visa and would require market research to indicate whether the effect of these changes was a labour shortage that could not be filled by local workers or the SWP and PLS.

A crucial design consideration to be addressed in this case is the relationship between an agricultural visa and the SWP. Two design features are crucial to ensure that the agricultural visa does not substitute for SWP workers. First, the sponsorship obligations discussed above must be at least as onerous and probably more so than the SWP. Second, an agricultural visa should be phased in country by country with a cap on numbers for each country that is introduced to gauge the level of take up, and the impact on the SWP. Finally, the FWO should be specifically resourced to monitor the introduction of an agricultural visa and the role for unions in giving worker inductions in the SWP should be replicated in a new agriculture visa and also strengthened to provide them with an ongoing role alongside FWO. This conservative approach is warranted, given the geo-political significance of the SWP, and to ensure vulnerable workers on the agricultural visa are not subject to wage theft or exploitation.

Conclusion

Migrant workers are particularly vulnerable to exploitation in industries such as horticulture where minimising labour costs are a core business strategy (see, *eg.* Gautié and Schmitt 2009; Tham, Campbell and Boese 2016). The insecure immigration status of temporary migrant workers means they are more dependent on work and less able to move between

jobs. Obligations to their family in their home countries also means workers are more invested in maintaining an income.

Even without the pressure to be competitive with other less regulated visa options, the wide gap between wages and conditions of work in Australia and likely source countries for an agricultural visa raises doubts about whether an agricultural visa program can provide adequate protection against the exploitation of migrant workers. An agricultural visa program would require buy-in from industry associations, growers, unions and other stakeholders, and a strong presence of the Fair Work Ombudsman to ensure its success. Many regulatory questions remain to be addressed, in particular achieving a successful transition from the industry's reliance on WHMs, to use of the agricultural visa for low skilled work in the industry and to address the reliance on undocumented workers.

In our view, with the right regulatory framework in place, an agriculture visa might play a positive role in the horticulture labour market in Australia, but only if it was to replace the WHM visa extension for work in regional Australia, if it mirrored the employer responsibilities in the SWP, and if it was coupled with more robust and extensive oversight and enforcement mechanisms. However, while the unregulated WHM visa is available to growers, there is no incentive for the industry to support an agricultural visa with these characteristics.

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