

Out of Limbo and into the Light: A Case for Status Resolution for Undocumented Migrant Workers on Farms

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Abstract

The Australian horticulture industry has endemic labour challenges, both in terms of poorly managed and distributed labour supply and a systemic problem of non-compliance with labour standards. A core component of both problems is the entrenched reliance on undocumented migrant workers. This article examines the extent of this reliance and considers policy solutions to address it. In particular, it proposes a model for the one-off status regularisation of undocumented migrant workers in the Australian horticulture industry.

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I Introduction

In a watershed moment for the Australian horticulture sector, the *National Agriculture Workforce Strategy* strongly recommended that the Australian Government introduce a one-off regularisation process for undocumented farm workers.¹ A month later, the National Party Federal Conference voted unanimously in favour of status resolution.² The presence of undocumented workers, which the *National Agriculture Workforce Strategy* estimates is between 60,000 and 100,000 workers,³ is the dark underbelly of a sector reliant on an overseas workforce to pick fresh fruit and vegetables. Undocumented workers form a critical part of the harvest workforce. Given complex supply chains transiting fresh fruit and vegetables from the farm to the consumer, undocumented workers are invisible to the Australian public. Yet, it is likely that all Australians, at one time or another, have purchased fruit and vegetables harvested through the labour of undocumented workers.⁴

This article contends that there are strong arguments in favour of status resolution for undocumented migrants on farms. First, this reform will help the sector's labour challenges. Although the horticulture sector has struggled for many years with difficulties in recruiting and retaining harvest workers, this was exacerbated when border restrictions were introduced due to the COVID-19 pandemic.⁵ Although regularising the status of undocumented workers will not increase the farm labour pool in Australia, it will improve the mobility of these workers. It will enable undocumented migrants to cross state borders and enable ethical growers, who previously did not have access to undocumented workers, to employ this substantial group of workers. Status regularisation is not a silver bullet for labour shortages on farms, but will make a sizable contribution to addressing them.

The second reason for a one-off regularisation process for undocumented farm workers is that it is needed to remove the susceptibility of this group to

¹ J Azarias, R Nettle and J Williams (National Agricultural Labour Advisory Committee), *National Agricultural Workforce Strategy: Learning to Excel* (Department of Agriculture, Water and the Environment (Cth), December 2020) 190 ('*National Agricultural Workforce Strategy*'). In this article, undocumented migrant farm workers refers to migrants working in the industry without an entitlement to work. These include: migrants on visas without work rights (such as tourists); migrants whose visas have expired; and migrants with a valid visa with work rights, but who work in breach of a condition of their visa.

² Anne Webster, 'National Party Federal Conference Supports Status Resolution' (Media Release, 30 March 2021) <<https://www.annewebster.com.au/media/national-party-federal-conference-supports-status-resolution/>>.

³ *National Agricultural Workforce Strategy* (n 1) 206, citing J Howe and A Singh, *COVID-19 and Undocumented Workers in the Australian Horticulture Industry* (University of Adelaide Law Research Paper No. 2020-137, 2020).

⁴ Jack Snape, 'Australian Berry and Citrus Farms Most at Risk of Having Slaving-Like Working Conditions, Woolworths Modern Slavery Report Finds', *ABC News* (online, 26 November 2020) <<https://www.abc.net.au/news/2020-11-26/berries-grapes-modern-slavery-coles-woolworths/12918122>>; Sarina Locke, 'Debt Bondage for Workers in Australian Horticulture Akin to Slavery, Inquiry Hears', *ABC News* (online, 19 October 2017) <<https://www.abc.net.au/news/rural/2017-10-19/debt-bondage-in-horticulture-sector-akin-to-slavery-in-australia/9057108>>.

⁵ Kath Sullivan, 'Farmers Fear Worker Shortage due to COVID-19 Restrictions despite Rising Unemployment', *ABC News* (online, 30 July 2020) <<https://www.abc.net.au/news/rural/2020-07-30/farm-labour-shortage-feared-due-to-coronavirus-controls/12504802>>.

exploitation. There have been myriad media exposés, inquiries and reports exposing wage theft and other forms of exploitation on farms.⁶ Poor labour standards on farms is made possible because undocumented workers are vulnerable to exploitation as they have no right to work in Australia and typically access farm work through unscrupulous contractors. If undocumented migrant workers are incentivised to regularise their status, they will be less likely to tolerate exploitation, more likely to join unions, and more likely to report exploitation to the Fair Work Ombudsman, Australia's workplace regulator, and other support services.

The third reason to introduce a one-off regularisation procedure is because there is no legitimate alternative that can address the labour crisis on Australian farms. The alternative to one-off regularisation is a policy of detection and deportation of undocumented workers. There has been a resounding public policy failure from successive federal governments over two decades to address the substantial presence of undocumented workers on farms. Despite the deployment of considerable resources and the development of a special taskforce in 2015, efforts to detect and deport undocumented workers have been so ineffective that undocumented workers have grown to become a key and significant part of the sector's workforce. Additionally, although introducing national labour hire licensing⁷ will have some bearing on improving labour standards in the sector, it will not address the substantial presence of undocumented workers.

Part II of this article examines the farm labour crisis and considers the arguments in favour of status resolution in terms of both meeting labour needs and addressing endemic exploitation. Part III examines the profile and prevalence of undocumented migrants in the horticulture sector and reviews government efforts to detect and deport undocumented farm workers. Part IV develops a skeletal framework for a one-off status resolution process and considers the arguments against status resolution and whether other reforms can address the labour crisis without the need for status resolution.

⁶ See, eg, 'Slaving Away: The Dirty Secrets Behind Australia's Fresh Food', *Four Corners* (Australian Broadcasting Corporation, 2015) <<https://www.abc.net.au/4corners/slaving-away-promo/6437876>>; Tom Stayner, 'New Report Warns Some Migrant Workers Paid Less than \$2 an Hour on Australian Farms', *SBS News* (online, 19 March 2021) <<https://www.sbs.com.au/news/new-report-warns-some-migrant-workers-paid-less-than-2-an-hour-on-australian-farms>>; 'More than \$1m in Lost Wages Recovered for 2,500 Fruit Farm Workers', *The Guardian* (online, 22 November 2018) <<https://www.theguardian.com/australia-news/2018/nov/22/more-than-1m-in-lost-wages-recovered-for-2500-fruit-farm-workers>>; Nick McKenzie and Richard Baker, 'Fruits of their Labour', *The Sydney Morning Herald* (online, 2016) <<https://www.smh.com.au/interactive/2016/fruit-picking-investigation/>>; Fair Work Ombudsman, *Harvest Trail Inquiry: A Report on Workplace Arrangements along the Harvest Trail* (Report, 2018); Joanna Howe, Stephen Clibborn, Alexander Reilly, Diane van den Broek and Chris F Wright, *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry* (Report, January 2019) <<https://www.sydney.edu.au/content/dam/corporate/documents/business-school/research/work-and-organisational-studies/towards-a-durable-future-report.pdf>> ('*Durable Future Report*'); Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report, March 2016).

⁷ Australian Government, *Australian Government Response: Report of the Migrant Workers' Taskforce* (March 2019) 3 <https://www.ag.gov.au/sites/default/files/2020-03/government_response_to_the_migrant_workers_taskforce_report.pdf>.

II The Farm Labour Crisis

The Australian horticulture sector is facing an urgent and immediate labour crisis. There are two dimensions to this crisis. The first concerns an inability to access sufficient labour. The geographically dispersed and seasonal nature of the horticulture sector means that these labour challenges are not universal across the sector and manifest differently during the harvest for certain commodities and at different times in the year. The second dimension of the labour crisis concerns endemic exploitation. This Part examines these ongoing labour challenges, which have a long history of affecting horticultural labour supply, but have been exacerbated by the COVID-19 pandemic. It is important to understand these dimensions before examining the prevalence and profile of undocumented migrant workers on farms.

Farm Labour Supply Challenges

With international borders closed as a result of the COVID-19 pandemic, a significant decline in the supply of overseas labour has caused labour shortages. There have been multiple reports that growers have been ploughing fruit and vegetables back into the field or not harvesting produce because of an inability to find workers.⁸ As at February 2021, the National Lost Crop Register, an initiative designed by Growcom for growers to report anonymously the costs of ongoing labour shortages (which are beyond financial), estimated losses to have surpassed \$45 million.⁹ Further, economic modelling predicted that the industry would be short of up to 26,000 casual workers between November 2020 and June 2021.¹⁰ Notably, as this modelling was based on the assumption that the reopening date for international borders would be March 2021, it may have underestimated the shortfall given that borders remain at least partially closed for the remainder of 2021 as at the time of writing.

⁸ See, eg. Jessica Hayes, 'Farm Worker Shortage Could Mean More Expensive, Lower Quality Fruit and Vegetables This Summer', *ABC News* (online, 22 November 2020) <<https://www.abc.net.au/news/2020-11-22/christmas-lunch-to-cost-australians-more-in-2020/12901704>>; Natalie Kotsios, 'Picking Up the Pieces', *The Weekly Times* (Melbourne, 25 November 2020); Jon Daly and Conor Byrne, 'COVID-19 is Pushing Up Prices for NT Mangoes, but Growers are Battling to Pick Them', *ABC News* (online, 25 October 2020) <<https://www.abc.net.au/news/rural/2020-10-25/covid-19-is-driving-labour-shortages-and-higher-prices-nt-mango/12806046>>; Ellen Ransley, 'Overseas Labour Shortage Causes Fruit, Vegie Production to Fall, Prices to Rise', *News.com.au* (online, 3 March 2021) <<https://www.news.com.au/finance/money/costs/overseas-labour-shortage-causes-fruit-vegie-production-to-fall-prices-to-rise/news-story/2a3ae82dc34a583725fc6e4730a74583>>.

⁹ James Liveris, 'National Lost Crop Register Surpasses \$45 million in Losses at Farmgate Value Due to Worker Shortage', *ABC Rural* (online, 9 February 2021) <<https://www.abc.net.au/news/rural/2021-02-09/national-lost-crop-register-surpasses-45-million-in-losses/13132274>>. See also Growcom, 'Fruit and Veg Losses Top \$38 million' (Media Release, 8 January 2021) <<https://www.growcom.com.au/2021/01/08/fruit-and-veg-losses-top-38-million/>>.

¹⁰ Ernst & Young, *Seasonal Horticulture Labour Demand and Workforce Study: Public Report* (September 2020) 14.

1 *A Snapshot of the Farm Labour Market before COVID-19*

The number of workers in the horticulture sector is reported by the Australian Bureau of Agricultural and Resource Economics and Sciences ('ABARES') to be approximately 135,100.¹¹ Adequate data are not collected on the volume of workers required in each occupation within this workforce.¹² Nevertheless, it would appear that pickers, packers and graders comprise the largest group of workers in the horticulture sector. ABARES states that '[I]labourers accounted for around three-quarters of the workforce on vegetable farms and fruit and nut farms'.¹³ This means there are approximately 101,000 workers in the industry.¹⁴

Prior to the COVID-19 pandemic, temporary migrants were the main source of farm labour for harvesting fruit and vegetables, accounting for three-quarters of the workforce.¹⁵ In the year before the pandemic, the number of Working Holiday Makers ('WHMs') in the horticulture sector was steadily growing, with 43,219 second year visa grants for WHMs employed in 'specified work' for an 88-day period during the first year of their visa.¹⁶ Approximately 80% of these second year visa grants (over 36,000 WHMs) earned their visa extension through employment on farms.¹⁷ Although it is likely that some WHMs perform horticultural work outside of the 88 days, this is likely to be a small group. Notably, ABARES states that '[i]n ineligible postcode regions, backpackers made up just 9% of the workforce of vegetable farms'.¹⁸ In 2018–19, the Seasonal Worker Programme ('SWP') grew significantly, with approvals for 12,202 workers from Pacific countries to enter Australia for seasonal harvest work.¹⁹

¹¹ According to data provided by the Australian Government Department of Agriculture, Water and the Environment there were 135,100 workers on fruit, grape, nut and vegetable farms in 2020–21, down from 146,200 in 2019–20: see Department of Agriculture, Water and the Environment (Cth), Australian Bureau of Agricultural and Resource Economics and Sciences ('ABARES'), *Labour Use in Australian Agriculture: Analysis of Survey Results* (Web Page, 25 November 2021) <<https://www.awe.gov.au/abares/research-topics/labour>>.

¹² *National Agricultural Workforce Strategy* (n 1) ch 8 (workforce data and information).

¹³ Niki Dufty, Peter Martin and Shiji Zhao, *Demand for Farm Workers: ABARES Farm Survey Results 2018* (ABARES Research Report 19.10, September 2019) 13.

¹⁴ There are known difficulties in data collection in this area. On the one hand, data published by the Australian Bureau of Statistics ('ABS') is likely to undercount substantially the total horticultural workforce as it does not include overseas workers and contract workers, both of whom are key components of the horticultural labour force. ABS data are also unlikely to include undocumented workers. However, on the other hand, ABS data do potentially lead to workers being counted multiple times as seasonal production on some farms means workers can work on multiple farms. ABARES acknowledges the limitations of the available data and states that its figures are based on its 'best estimates' of labour use on farms drawing on ABS data on farm numbers and ABARES farm survey data: see Peter Martin, Lucy Randall and Tom Jackson, *Labour Use in Australian Agriculture* (ABARES Research Report 20.20, December 2020) 5 ('Key Caveats and Assumptions') <<https://doi.org/10.25814/gjyp-7g19>>.

¹⁵ Haydn Valle, Niki Millist and David Galeano, *Labour Force Survey* (ABARES report to the Department of Agriculture and Water Resources (Cth), May 2017).

¹⁶ Department of Home Affairs (Cth), Submission No 82 to Select Committee on Temporary Migration, Parliament of Australia, *Temporary Migration* (22 July 2020) 18.

¹⁷ Department of Home Affairs (Cth), *Working Holiday Maker Visa Program Report* (30 June 2019, Report BR0110) 33–4 ('WHM Report 30 June 2019').

¹⁸ Dufty, Martin and Zhao (n 13) 28.

¹⁹ *National Agricultural Workforce Strategy* (n 1) 180.

Given that ABARES data suggest that local Australian workers contribute to one-quarter of the 101,000 workers in the Australian horticulture sector,²⁰ this leaves a sizable amount — of close to 30,000 farm workers — unaccounted for by official labour statistics. There is increasing recognition that undocumented workers form the bulk of these unaccounted farm workers. The *National Agriculture Workforce Strategy* heard evidence that supported previous studies and surveys suggesting that undocumented workers constituted up to 90% of the workforce in some major horticulture production regions.²¹ Part III of this article explores the available data on the number and contribution of undocumented workers to farm labour supply.

The introduction of border restrictions in March 2020, as a result of the COVID-19 pandemic, has impacted each of these three main groups of temporary migrant labour on farms: WHMs, SWP visa holders and undocumented migrants. Although the number of undocumented workers has remained consistent since the pandemic because international border restrictions have meant that there have been no new arrivals into this cohort, by September 2020 WHMs and SWP workers had fallen by 48%.²² This article now turns to a discussion of how the COVID-19 pandemic has impacted farm labour supply in Australia.

2 *The Impact of COVID-19 on Farm Labour Supply*

International border restrictions have prevented the arrival of WHMs who have typically formed a substantial part of the harvest workforce (see Table 1 below). In 2019–20 there was a 28.6% reduction in WHM visas granted (see Table 2 below).

Border restrictions also curtailed the operation of the SWP, which has been growing steadily since its inception in 2008, peaking at 12,202 visa approvals in 2018–19.²³ There were 9,824 visa approvals in 2019–20 up to March 2020 when visa processing was suspended due to Australia's international border closure. Nonetheless, the low rate of COVID-19 in Pacific countries, coupled with acute demand for labour by Australian growers, led to a number of initiatives during the pandemic to restart travel from Pacific countries to Australia under the SWP. In August 2020, the Australian Government announced a broader agreement to resume the SWP that states can opt in to.²⁴ Different state models have since been adopted. A first group of 160 workers arrived in September 2020 to work on mango farms in the Northern Territory.²⁵ By February 2021, the Queensland Government had flown in 782 workers from Pacific countries onto farms.²⁶ These workers were allowed to

²⁰ Martin, Randall and Jackson (n 14).

²¹ *National Agricultural Workforce Strategy* (n 1) 190.

²² Department of Agriculture, Water and the Environment (Cth), *Agricultural Forecasts and Outlook: December Quarter 2020* (ABARES Agricultural Commodities Report Vol 10.3, 2020) 41.

²³ *National Agricultural Workforce Strategy* (n 1) 180.

²⁴ Marise Payne, 'Seasonal and Pacific Workers to Help Fill Labour Gaps' (Media Release, 21 August 2020) <<https://www.foreignminister.gov.au/minister/marise-payne/media-release/seasonal-and-pacific-workers-help-fill-labour-gaps>>.

²⁵ Matt Brann, 'Mango Industry Celebrates as Seasonal Workers from Vanuatu Touch Down in Darwin', *ABC News* (online, 3 September 2020) <<https://www.abc.net.au/news/rural/2020-09-03/vanuatu-workers-arrive-in-darwin-to-pick-mangoes/12621234>>.

²⁶ Claire Bickers, 'SA's Plans to Fly in Pacific Island Seasonal Workers on Hold as State Eyes Alternative Quarantine Models', *The Advertiser* (online, 24 February 2021).

quarantine on Queensland farms while being employed from day one of their stay in Australia. The South Australian Government also trialled a program allowing Pacific workers to quarantine for 14 days in a regional facility prior to undertaking farm work.²⁷

Table 1: The number of WHM visas granted in 2018–19²⁸

WHM grants	Number	% change from 2017–18
First year visa grants (417 visa)	142,805	6.4% decrease
Second year visa grants (417 visa)	37,418*	14.0% increase
First year visa grants (462 visa)	23,012	6.2% increase
Second year visa grants (462 visa)	5,801	73.7% increase
Total visa grants (417 and 462 visas)	209,036	0.7% decrease

* 33,768 of the 417 second year grants worked in agriculture, forestry and fishing.

Table 2: The number of WHM visas granted in 2019–20²⁹

WHM grants	Number	% change from 2018–19
First year visa grants (417 visa)	92,282	35.3% decrease
Second year visa grants (417 visa)	28,316	24.3% decrease
Third year visa grants (417 visa)	2,075*	N/A
First year visa grants (462 visa)	19,845	13.8% decrease
Second year visa grants (462 visa)	6,128	5.6% increase
Third year visa grants	603 [#]	N/A
Total visa grants (417 and 462 visas)	149,249	28.6% decrease

* 75.3% of the third WHM visa applicants indicated that they undertook agricultural work to acquire their eligibility.

[#] 42.1% of the third WHM visa applicants indicated that they undertook agricultural work to acquire their eligibility.

The COVID-19 pandemic has also limited the movement of undocumented farm workers across state and territory borders. As state and territory governments responded to the pandemic by introducing border restrictions and travel permits to cross borders, undocumented workers were restricted to working only in the state or territory in which they reside, instead of being able to follow the harvest trail and access farm work in any jurisdiction. Their inability to produce a driver's licence or other official documentation means they would be unlikely to access a cross-border travel permit. Although cross-border permits have not been consistently enforced across jurisdictions, it is likely that this change has impacted the movement of undocumented farm workers and contributed to labour shortages in the horticulture sector since the beginning of the pandemic.

²⁷ Stephen Wade and David Basham, 'Paringa Regional Quarantine for Seasonal Ag Workers' (Media Release, 14 March 2021) <<https://www.premier.sa.gov.au/news/media-releases/news/paringa-regional-quarantine-for-seasonal-ag-workers>>.

²⁸ *WHM Report 30 June 2019* (n 17) 7–8, 33.

²⁹ Department of Home Affairs (Cth), *Working Holiday Maker Visa Program Report* (30 June 2020, Report BR0110) 7–8.

In response to border restrictions preventing the flow of temporary migrants from overseas, federal and state governments have introduced a range of initiatives to encourage local Australian workers to undertake harvest work. However, such initiatives have had limited success, even prior to the pandemic when unemployment rose. The Seasonal Workers Incentives Trial, which aimed to channel long-term unemployed Australian workers into the horticulture sector, only resulted in 277 workers taking part in 2017–18.³⁰ It is unsurprising, then, that such initiatives continue to be largely unsuccessful in addressing the significant shortfall of overseas workers in this COVID-19 era. For example, the Relocation Assistance to Take Up a Job program, which offers Australian workers up to \$6,000 to undertake harvest work in regional areas, attracted only 148 workers in its first month of operation.³¹ In sum, the COVID-19 pandemic has significantly affected farm labour supply in Australia. This has led to the emergence of acute and escalating labour challenges on farms.

III The Profile and Prevalence of Undocumented Workers on Farms

The precise number of undocumented workers in Australia is unknown. It is difficult to gather data on the profile of undocumented workers because of their interest, and that of their employers, in not being detected. Considering uncertainty in estimated numbers, there are between 60,000 and 100,000 undocumented workers in Australia.³² The Department of Home Affairs estimated that there were 62,900 visa overstayers as at 30 June 2018.³³ In most cases, these visa holders entered Australia on a subclass 600 visitor visa and applied for an asylum visa once onshore. However, as Wright and Clibborn note, departmental estimates are problematic given the sheer number of temporary migrants without any work rights, those with restricted work rights and the mounting numbers in recent years.³⁴ Thus, official figures likely underestimate the number of undocumented workers in Australia.

Undocumented workers are identified in a range of industries such as hospitality, massage, cleaning and construction, and there is now sufficient evidence establishing the significant prevalence of undocumented workers on Australian farms.³⁵ The horticulture sector is one where undocumented workers are more likely

³⁰ Howe et al, *Durable Future Report* (n 6) 130 (Table 14.1).

³¹ Marty McCarthy and Lucy Barbour, 'Farm Labour Incentives Failing and the Result Could be Crops Left Unharvested', *ABC News* (online, 4 December 2020) <<https://www.abc.net.au/news/rural/2020-12-04/harvest-in-jeopardy-as-farm-labour-incentives-fail/12947974>>.

³² *National Agricultural Workforce Strategy* (n 1) 206. Department of Immigration and Border Protection (Cth), *BE17/172 – Visa Overstays for the Financial Year — Programme 1.2: Border Management* (Budget Estimates Hearing, Question Taken on Notice, 22 May 2017) 2. Numbers are rounded, which may result in rounding errors. See also Stephen Howells, *Report of the 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007* (Report, 2011) 94.

³³ Department of Home Affairs (Cth), *Incoming Government Brief* (2019) 172.

³⁴ Chris F Wright and Stephen Clibborn, 'Back Door, Side Door, or Front Door? An Emerging Defacto Low-Skilled Immigration Policy in Australia' (2017) 39(1) *Comparative Labor Law & Policy Journal* 165, 176.

³⁵ Marie Segrave, *Exploited and Illegal: Unlawful Migrant Workers in Australia* (Report, July 2017) <https://arts.monash.edu/_data/assets/pdf_file/0020/1532063/exploited-and-illegal_unlawful-migrant-workers-in-australia.pdf>.

to congregate because of the sector's reliance on unregulated labour hire contractors. This means growers can employ undocumented workers at arm's length and undocumented workers are more likely to find work in horticulture than in other industries because they can access this work through a contractor. Further, the sector's geographic dispersion and the remote locations of many farms means that undocumented workers are less likely to be detected in the labour market.

Rimmer and Underhill posit that the number of undocumented workers in the horticulture industry is likely to be a third of the harvest workforce.³⁶ Evidence given to a parliamentary inquiry by the Office of the Chief Trade Adviser to the Australian Government in 2016 suggested that the use of the SWP by growers had been marred by widespread reliance on 'existing cheaper sources of labour such as illegal workers'.³⁷ A discussion paper by Doyle and Howes in 2015 found that 'the use of illegal labour still seems to be widespread in the horticulture sector. Four out of five growers ... recognized that it was prevalent to at least some extent in the industry'.³⁸

A Industry and Growers Perspectives on the Prevalence of Undocumented Workers

There is increasing recognition by farm industry associations and individual growers that undocumented migrants form a critical part of the harvest workforce. According to these assessments, in some Australian growing regions, undocumented workers form the majority of the harvest workforce. A three-year study of labour use on Australian farms found that the horticulture industry had a 'structural reliance' on undocumented workers as a key source of farm labour.³⁹ The study, entitled, *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry* ('Durable Future Report'), interviewed growers and industry association officials who reported widespread use of undocumented workers on farms. For example, a Northern Territory grower estimated that undocumented workers comprise close to one fifth of the horticulture workforce in the greater Darwin region.⁴⁰ A Victorian industry association official suggested that 80% to 90% of the Mildura and Robinvale workforces rely on undocumented workers.⁴¹ A Wanneroo grower posited that 70% to 80% of the workforce in that region were undocumented workers, while another grower estimated that across Western Australia, at least half of the State's harvest workforce comprised of undocumented workers.⁴² The study found a problematic relationship between labour challenges facing the industry and the industry's reliance on undocumented workers.

³⁶ Malcolm Rimmer and Elsa Underhill, 'Temporary Migrant Workers in Australian Horticulture: Boosting Supply but at What Price?' in Massimo Pilati, Hina Sheikh, Francesca Sperotti and Chris Tilly (eds), *How Global Migration Changes the Workforce Diversity Equation* (Cambridge Scholars Publishing, 2015) 143, 145.

³⁷ Joint Standing Committee on Migration, *Seasonal Change: Inquiry into the Seasonal Worker Programme* (Report, May 2016) 98 [8.38].

³⁸ Jesse Doyle and Stephen Howes, *Australia's Seasonal Worker Program: Demand-Side Constraints and Suggested Reforms* (Discussion Paper, 2015) 25.

³⁹ Howe et al, *Durable Future Report* (n 6) 36.

⁴⁰ *Ibid* 39.

⁴¹ *Ibid*.

⁴² *Ibid*.

For example, a Wanneroo grower who was interviewed for the purposes of the study said:

If we take them [undocumented workers] out, I don't know what the level beyond crisis is, but that's where we're at. The reason I've cut back [on production] is because I cannot get enough legitimate workers and I cannot afford to take the risk of dealing with the people that are questionable ...⁴³

A Robinvale grower in the same study reported a similar view, stating that 'there's a percentage of workers around here that don't have work visas. ... That's a real worry for us because if you take them away, I don't know what Plan B is'.⁴⁴

In the most disturbing quote from the study, a labour supply contractor in Victoria observed:

In some areas in peak periods, and it still happens to this very day, I could walk into a paddock or into a street, and I could put on a blindfold and have a shotgun and twirl myself around, aim the shotgun in any direction, fire it, and there's a good likelihood that I'll hit an illegal worker ...⁴⁵

Thus, accounting for regional variations, the horticulture industry has a substantial reliance on undocumented workers. A number of growers and other stakeholders report that growers in some regions have no choice but to engage undocumented workers because of inadequate labour supply from legal sources of labour.

There is increasing acknowledgment by the horticulture industry that the employment of undocumented workers is not a marginal phenomenon. A 2019 survey performed by the Victorian Farmers Federation ('VFF') in the Sunraysia region found that 71% of growers believed they had undocumented workers working on their farm, with undocumented workers accounting for up to 28% of the total workforce in the region.⁴⁶ VFF Vice-President Emma Germano stated, '[t]he 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'.⁴⁷

In 2018, a discussion paper by the National Farmers' Federation advocating for visa reform to address labour shortages acknowledged the use of undocumented workers on farms. The discussion paper observed:

While it may be naïve to suggest that no members of the sector take advantage of illegal workers because they are cheaper than legitimate labour, by-and-large, where farmers are associated with these arrangements, it's because of their chronic labour shortages and the fact that they have little alternative.⁴⁸

⁴³ Ibid 40.

⁴⁴ Ibid.

⁴⁵ Ibid 41.

⁴⁶ Victorian Farmers Federation, *VFF Calls for Ag Visa to Legalise Workers* (7 November 2019) <https://www.vff.org.au/wp-content/uploads/2020/10/VFF-MR-_72_-VFF-calls-for-Ag-Visa-to-legalise-work.pdf>.

⁴⁷ Ibid.

⁴⁸ National Farmers' Federation, *Ag Visa Discussion Paper* (2018) (copy on file with author).

In 2020, a submission made by MADEC Australia⁴⁹ to a government inquiry stated that a ‘significant cohort’⁵⁰ of the horticulture workforce consists of undocumented workers and that within the sector there are ‘employment models that incorporate use of illegal labour as a standard practice’.⁵¹ The submission also notes the long-term presence of undocumented workers in the sector and their value to growers:

Often illegal workers have lived in the community for many years, are productive and reliable and it is easy to see why growers value their contribution. However, it cannot be denied that growers are also gaining a distinct financial advantage as illegal workers have substantially lower overheads due to not receiving super or workcover services. They are also unlikely to complain about working conditions or piece rates as they have a fear of being uncovered if they report issues to government agencies.⁵²

In summary, undocumented workers form a critical part of the workforce on Australian farms, though their contribution is usually masked and not acknowledged.

B *A Review of Government Efforts to Detect Undocumented Workers*

Detection of undocumented workers has been largely ineffective and failed to address the horticulture sector’s structural reliance on undocumented workers. It is important to acknowledge that these detection efforts have failed for over two decades. As far back as 1999, the Department of Immigration and Multicultural Affairs found substantial numbers of undocumented workers and recommended increased penalties on employers. At the time, horticulture industry associations opposed this on the basis that ‘it was not always possible to attract sufficient legal workers during the harvest’.⁵³ Since then, despite the deployment of considerable resources and the development of a special taskforce in 2015,⁵⁴ these detection efforts have been so futile that undocumented workers have grown to become a key and significant part of the sector’s workforce.

Undocumented workers have an incentive to remain invisible to authorities because they risk deportation if detected. Evidence in the *Durable Future Report* suggests that undocumented workers tend to be located in more isolated areas and keep to themselves. As one local representative in the Wide Bay–Burnett region of Queensland reported, ‘[a] lot of people in town may not even see them. They sleep. They work. They sleep. They go back to Bundy and get supplies, they come back. Yeah, they’re very quiet.’⁵⁵ A representative of the Fair Work Ombudsman reported,

⁴⁹ MADEC is a not-for-profit organisation that has been operating within the horticulture sector for over 50 years and has a contract with the Department of Education, Skills and Employment to operate the Harvest Trail Information Service. See MADEC Australia Pty Ltd, Submission No 70 to Joint Standing Committee on Migration (Cth), *Inquiry into the Working Holiday Maker Program* (2019).

⁵⁰ *Ibid* 4.

⁵¹ *Ibid* 5.

⁵² *Ibid*.

⁵³ Department of Immigration and Multicultural Affairs (Cth), *Review of Illegal Workers in Australia: Improving Immigration Compliance in the Workplace* (Report, 1999) 27.

⁵⁴ See below nn 63–6 and accompanying text.

⁵⁵ Howe et al, *Durable Future Report* (n 6) 40.

‘[w]e hear about all these illegal workers, but [when we visit farms] we just don’t see them.’⁵⁶

It seems that undocumented workers are adept at avoiding detection and have sophisticated, well-developed strategies in the event of a Border Force raid. In the *Durable Future Report*, an officer from the Stanthorpe police force in Queensland observed that during a raid, ‘it’s like mice abandoning the ship’,⁵⁷ with a former undocumented worker describing the need to respond quickly upon the arrival of enforcement authorities: ‘Someone just shouts, “Immigration!” And that’s it, forget about your harvesting, and everything, and your lunchbox and fssht! Whoa! ... I’ve been running for almost 5 years’.⁵⁸

This is consistent with media reports indicating that undocumented workers shout code words to alert other undocumented workers in the same row that a raid is occurring,⁵⁹ and also with the opening anecdote of a 2006 Senate Committee inquiry report into harvest labour:

[Senate Committee] members touring an isolated farm just north of Euston on the Murray River, suddenly came across a team of grape pickers hard at work. Taking fright at our unexpected appearance, they fled down the vine rows toward the other end of the field. The committee had been mistaken for immigration officers conducting a raid on illegal workers.⁶⁰

Undocumented workers are also difficult to detect because of their tendency to be housed in private dwellings (usually share houses), often owned or leased by their contractor. As one labour hire contractor reported in the *Durable Future Report*, ‘[t]hey [undocumented workers] just hide. Like let’s say, you rent a house and something like that and you can hide easy.’⁶¹ A former undocumented worker described how contractors are vigilant in ensuring undocumented workers do not make local connections and remain concealed, describing how ‘the contractor will just sleep in the car outside [the houses of undocumented workers] and watch them. So no-one walks outside.’⁶²

The Australian Border Force, which is the enforcement agency housed within the Department of Home Affairs, is charged with the responsibility of detecting undocumented workers. In 2015, the Australian Government established a specialist multi-agency taskforce, known as Taskforce Cadena, to target and disrupt the organisers of visa fraud, illegal work and the exploitation of foreign workers.⁶³ There is only one mention of Taskforce Cadena’s work in the 2017–18 and 2018–19 annual

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Emma Field, ‘Illegal Malaysian Farm Labourer Told About “Kangaroo Call” When Starting Work’, *The Weekly Times* (online, 6 August 2015) <<https://www.weeklytimesnow.com.au/news/national/illegal-malaysian-farm-labourer-told-about-kangaroo-call-when-starting-work/news-story/eb02f7037082803af6ced386775540d6>>.

⁶⁰ Senate Standing Committee on Employment, Workplace Relations and Education, Parliament of Australia, *Perspectives on the Future of the Harvest Labour Force* (Report, October 2006) vii.

⁶¹ Howe et al, *Durable Future Report* (n 6) 40.

⁶² Ibid.

⁶³ Australian Border Force, Australian Government, ‘Taskforce Cadena’ (Web Page, 16 November 2021) <<https://www.abf.gov.au/about-us/taskforces/taskforce-cadena>>.

reports of the Department of Home Affairs.⁶⁴ The former report states that the Taskforce has completed 17 operations and executed 24 warrants to investigate visa fraud, illegal work and the exploitation of foreign workers.⁶⁵ The 2018–19 report refers to ‘the execution of a combination of 50 *Migration Act* and *Crimes Act* warrants, issuing of 40 Illegal Worker Warning Notices and the referral of 25 matters to partner agencies including allegations of human trafficking’.⁶⁶ Additionally, the annual reports of the Department of Home Affairs suggest a steady decline in compliance activity targeting the location of undocumented workers and employers who employ these workers, despite the number of such workers and employers being at record levels.⁶⁷ It is highly unlikely that this reported level of enforcement activity is able to address the scale of undocumented work in the horticulture labour market.

IV A Proposed Model for Status Resolution

There are different ways in which a one-off status resolution process can be introduced. International examples of regularisation programs demonstrate that determining eligibility can be a challenge. A study of regularisation programs in Europe found that criteria for eligibility generally included length of residence, employment or possibility of future employment (for example sponsorship by an employer), humanitarian concerns, and in some cases integration into the local society and academic or professional qualifications.⁶⁸ This study noted that

between 1973 and 2008, 68 programs were implemented in Europe; a few targeted multiple groups of people, and over half were based on labor regulation [sic]. Of those people granted regularization during this period, 87 percent were unauthorized labor migrants.⁶⁹

The Centre on Migration, Policy and Society at the University of Oxford produced a study on regularisation programs for undocumented migrants in nine European Union countries and the United States (‘US’).⁷⁰ The study identified a number of factors that contribute to implementation challenges including: a lack of publicity; having overly strict requirements that limit migrant participation; application fraud; lack of administrative preparation; and the reversion of legalised immigrants to undocumented status.⁷¹ A United Nations policy brief on the impact of COVID-19 on international migration proposes that countries should explore ‘various models of regularisation pathways for migrants in irregular situations’ as part of their

⁶⁴ Department of Home Affairs (Cth), *Annual Report 2017–18* (2018) 29; Department of Home Affairs (Cth), *Annual Report 2018–19* (2019) 22.

⁶⁵ Department of Home Affairs (Cth), *Annual Report 2017–18* (n 64) 29.

⁶⁶ Department of Home Affairs (Cth), *Annual Report 2018–19* (n 64) 22.

⁶⁷ Abul Rizvi, ‘Peter Dutton’s Legacy — Australia’s Biggest Labour Trafficking Scam’, *Independent Australia* (online, 4 April 2021) <<https://independentaustralia.net/politics/politics-display/peter-duttons-legacy--australias-biggest-labour-trafficking-scam,14954>>.

⁶⁸ Kate Brick, ‘Regularizations in the European Union: The Contentious Policy Tool’ (Migration Policy Institute, December 2011).

⁶⁹ *Ibid* 7.

⁷⁰ Amanda Levinson, *The Regularisation of Unauthorized Migrants: Literature Survey and Country Case Studies* (Centre on Migration, Policy and Society, University of Oxford, 2005) 6.

⁷¹ *Ibid* 6–7.

responses to the COVID-19 pandemic.⁷² It states that ‘this crisis is an opportunity for countries to “recover better” through socioeconomic inclusion and decent work for people on the move’.⁷³ Drawing on this international research examining various models of regularisation programs, this part develops a proposed model that is intended for undocumented migrants in the horticulture sector, recognising that not all undocumented migrants are in this sector and that the proposed model can be scaled up to operate on a more general basis across all sectors. However, given the likely political constraints in introducing status resolution, the proposed model is both modest and one that can be introduced using the existing visa framework.

A *Modification to the Temporary Activity Visa (Subclass 408)*

In response to the COVID-19 pandemic, the Australian Government has already established a visa framework that could be adapted to enable undocumented workers to regularise their status, by way of the Australian Government Endorsed Event (‘AGEE’) Stream of the Temporary Activity (subclass 408) visa. Status regularisation could be achieved by extending the eligibility criteria under the subclass 408 visa to permit undocumented workers to validly apply for the visa. In other words, it can be achieved with minimal amendments to the *Migration Regulations 1994* (Cth), and within the context of existing frameworks established to respond to the COVID-19 crisis.

In February 2020, in response to international border closures and persistent labour shortages in ‘critical sectors’ including horticulture, the Australian Government extended the AGEE Stream of the subclass 408 visa to applicants engaged in work related to a ‘COVID-19 Event’ — that is, working in a critical sector related to COVID-19 rebuilding efforts and either unable to leave Australia or apply for another visa due to the pandemic. Eligibility for the subclass 408 visa was extended to applicants who did not currently hold a valid visa, but had held a visa in the past 28 days.⁷⁴ As a matter of policy, the Department of Home Affairs undertook to grant AGEE-Stream subclass 408 visas for a period of 12 months, although the maximum grant period for the visa is four years.⁷⁵

Status regularisation may be extended to undocumented workers with a demonstrated history of employment in the horticulture industry by including the subclass 408 visa among the classes of visa for which applicants may validly apply in Australia, despite having previously had a visa application refused or a visa cancelled.⁷⁶ This could be supported by an amendment to the eligibility requirements

⁷² United Nations, *Policy Brief: COVID-19 and People on the Move* (June 2020) 3.

⁷³ *Ibid* 11.

⁷⁴ This was achieved by the *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*, introduced with effect from 4 April 2020.

⁷⁵ Department of Home Affairs (Cth), *Temporary Activity Visa (Subclass 408): Australian Government Endorsed Events (COVID-19 Pandemic Event)* (Web Page, 1 November 2021) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-activity-408/australian-government-endorsed-events-covid-19>>; Department of Home Affairs (Cth), *Subclass 408: Temporary Activity Visa* (Web Page, 1 July 2021) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-activity-408>>.

⁷⁶ *Migration Regulations 1994* (Cth) reg 2.12.

for subclass 408 in sch 2 of the *Migration Regulations 1994* (Cth) to include applicants who do not currently hold a valid visa, but are able to provide evidence of having worked in the horticulture industry for a period of six months. Such evidence may include: letters of support (or other evidence of employment) from former or prospective employers; evidence of continued residence in a growing region; letters of endorsement from labour unions or industry associations; labour market data showing labour shortages in a particular growing region; and/or an offer of employment from a prospective employer based on past experience. A selection of this evidence could be provided with an application, although there does need to be appropriate recognition of the difficulties for undocumented migrants in sourcing evidence of their prior work given their precarious immigration status.

The Temporary Activity (subclass 408) visa is an attractive vehicle for status regularisation for a number of reasons. First, it is an existing visa that has recently been extended (through the AGEE Stream) to workers who are unable to leave Australia and are contributing to economic rebuilding efforts. Second, the threshold requirements and fees involved in validly applying for the visa are minimal⁷⁷ and therefore suit the unique situation faced by undocumented workers, who may have limited evidence of former employment or finances to support a visa application. Third, the subclass offers a grant period of up to four years, making it attractive to undocumented workers as a means of regularising their status. Fourth, implementing status regularisation by *permitting* undocumented workers to validly apply for a visa (without positively *granting* them a visa) ensures the integrity of the regularisation process. That is, it will be the responsibility of undocumented workers to apply proactively for the visa and meet the eligibility criteria, in order to achieve status resolution — rather than this being done uniformly, by way of a blanket policy implemented by the Australian Government.

As part of this adjustment to the visa framework, the Australian Government should undertake to refrain from investigations of employers in the horticulture sector who have previously engaged undocumented workers either directly or through contractors. This is an important component of the reform package to ensure industry buy-in and broad support and cooperation by growers. It also appropriately acknowledges the challenges growers have faced for many years in accessing legal farm labour.

B *A Pathway to Permanency within the Proposed Framework*

A status resolution program should be accompanied by the creation of a permanent visa pathway to encourage uptake and participation. A failure to provide a genuine commitment to develop a permanent pathway will mean that the one-off status resolution will not succeed in incentivising sufficient numbers of undocumented workers to regularise their immigration status. Lessons from other countries that have introduced regularisation processes suggest that the model of status

⁷⁷ Ibid sch 1 cl 1237.

regularisation is important and that the incentive must be strong enough or very few undocumented workers will come forward.⁷⁸

Thus, the introduction of a one-off regularisation process should be accompanied by an announcement that a self-nominated permanent visa pathway will be made available to workers after two years' work in horticulture while holding a Temporary Activity (Subclass 408) visa. Existing permanent visa pathways will need to be modified to permit subclass 408 visa holders to transition to permanent residency.⁷⁹ The design of appropriate pathway requirements should be the subject of further stakeholder consultation within the coming 12 months to ensure that it is accessible to applicants and accommodates the unique conditions of the horticulture labour market.

C *Status Resolution in Historical Context*

It is important to acknowledge that the introduction of a status regularisation process via the subclass 408 visa is not as dramatic a break with past immigration policy as it may first appear. Even in the 1980s under the Fraser Government a 'Regularisation of Status Program' was introduced to enable 'lawful and unlawful non-citizens who had arrived before 1 January 1980 to apply for permanent residency by the end of the calendar year'.⁸⁰ Over a six-month period from 30 June to 31 December 1980, 14,000 individuals from more than 90 countries were accepted through the regularisation program.⁸¹ According to news reports at the time, only one applicant was rejected — an escapee from an overseas mental hospital who had been convicted of manslaughter — and the two oldest applicants under the 1980 scheme were elderly undocumented migrants who had managed to live illegally in Australia for decades before presenting themselves to authorities at the age of 95 and 73.⁸²

Even after the introduction of the 1980 scheme, there was a continuing emphasis on encouraging undocumented workers to come forward through a general status resolution policy, although it was not universally offered. In a number of farm

⁷⁸ See generally, Levinson (n 70); Brick (n 68); Sébastien Chauvin, Blanca Garcés-Mascareñas and Albert Kraller, 'Working for Legality: Employment and Migrant Regularization in Europe' (2013) 51(6) *International Migration* 118. Recently, US President Biden has sent a Bill to Congress that, if passed, would allow 'undocumented individuals to apply for temporary legal status, with the ability to apply for green cards after five years if they pass criminal and national security background checks and pay their taxes': see The White House, 'Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System' (Press Release, 20 January 2021) 2.

⁷⁹ There are existing barriers that would prevent WHMs or SWP applicants from accessing the permanent visa pathway. For instance, former SWP visa holders are subject to condition 8503, which prevents them from applying for another visa while in Australia, unless the condition is waived. While SWP participants may have had condition 8503 waived to enable them to apply for subclass 408 visas, a separate waiver request would need to be made (and granted) in order for those visa holders to apply for a permanent visa in the future.

⁸⁰ Australian National Audit Office ('ANAO'), *Onshore Compliance — Visa Onstayers and Non-Citizens Working Illegally* (ANAO Audit Report No 2, 2004–05) 27 <https://www.anao.gov.au/sites/default/files/ANAO_Report_2004-2005_02.pdf>.

⁸¹ Else Kennedy, 'Amnesty Debate Brings Back Memories', *Sunraysia Daily* (online, 27 March 2021) <<https://www.sunrasyiadaily.com.au/politics/4002115/amnesty-debate-brings-back-memories>>.

⁸² *Ibid.*

regions, the Department of Immigration and Border Protection (as it then was) worked with local stakeholders to implement a status dispute resolution approach that sought to identify undocumented workers in a particular location and to assist them to regularise their visa status.⁸³ This was a more successful method of encouraging undocumented workers to come forward and seek legal and visa assistance. While status resolution is still a service undertaken by the Department of Home Affairs and is listed on its website,⁸⁴ these outreach activities, which encourage undocumented workers to self-report, are now far less frequent.

D *Alternatives to Status Resolution*

This article has already identified the difficulties in detection and deportation within the Australian context in addressing the substantial presence of undocumented migrants on farms. Even with substantial resources, it is unlikely that stronger border management can address the scale of the current enforcement challenge. However, it is important to consider whether there are any other alternatives to status resolution or detection and deportation that may be efficacious. A number of inquiries have proposed a federal labour hire licensing scheme and this is a reform that the Australian Government has committed to introducing.⁸⁵ It is possible that federal labour hire licensing can make a contribution to improving labour standards in the horticulture sector and addressing some growers' reliance on undocumented migrants. It is also possible that improving the substitution effect between the WHM program and SWP may lead to better compliance with labour standards on farms.⁸⁶

As set out in this article, segmentation in the horticultural labour force has been a key factor, driving down wages and conditions across the industry. The substitution of temporary and undocumented workers in certain regions has suppressed wages to the extent that work in the horticulture sector is unattractive to most potential workers. Differential visa status, and the ability of labour agents to leverage this in an attempt to lower production costs for growers, are the key causes of the labour exploitation rife throughout the industry. Immigration reform is critical to stabilising and improving wages and conditions in the industry.

Although there are other reforms that can be undertaken to address labour shortages and exploitation, for example, labour hire licensing or regulating the WHM visa to match the worker-protective requirements in the SWP, none of these address the core challenge, which is the industry's structural reliance on undocumented workers. These reforms do not remove the existence of this cohort within the horticultural labour market.

⁸³ Howe et al, *Durable Future Report* (n 6) 41.

⁸⁴ Department of Home Affairs (Cth), *Status Resolution Service* (Web Page, 30 May 2019) <<https://immi.homeaffairs.gov.au/what-we-do/status-resolution-service>>.

⁸⁵ Australian Government, *Australian Government Response: Report of the Migrant Workers' Taskforce* (Report, March 2019) 3.

⁸⁶ Joanna Howe, Diane van den Broek, Alex Reilly and Chris F Wright, 'A Tale of Two Visas: Interrogating the Substitution Effect between Pacific Seasonal Workers and Backpackers in Addressing Horticultural Labour Supply Challenges and Worker Exploitation' (2018) 31(2) *Australian Journal of Labour Law* 209 ('A Tale of Two Visas').

Even in jurisdictions where labour hire licensing has been introduced, it is difficult for the licensing authority and compliance units to meet the scale of the enforcement challenge. For example, in Queensland, only one in nine contractors were audited and investigated in the first year that licensing was introduced.⁸⁷ Less than 1% of the total number of applications for licences were refused or given a conditional licence.⁸⁸ Only two contractors had their licence revoked and 68 had their licence suspended.⁸⁹ The paucity of these numbers — which were across all industries, although a focus was given to horticulture and poultry — points to the difficulty in labour hire licensing being the mechanism by which the horticulture sector reduces its reliance on undocumented workers.

Thus, labour hire licensing is part of the solution to endemic exploitation, but cannot address the substantial presence of undocumented migrants on farms unless there is an incentive for this cohort to come forward and regularise their status. Being on a valid visa will mean undocumented migrants will be far less likely to seek employment with unscrupulous contractors.

E *Common Objections to Status Resolution*

1 *Status Resolution Sets a Bad Precedent*

Senator Michaela Cash has argued against status resolution on the basis that ‘an amnesty would send a dangerous message that it’s okay to flout our strong visa and migration rules — principles that this government has worked incredibly hard over a period of time to secure’.⁹⁰ Similarly, at Senate Estimates, Secretary for the Department of Home Affairs Michael Pezzullo stated:

[i]t’s a matter for government in the end because governments can change policy in terms of guidance issued by ministers under the *Migration Act*. But, as a matter of policy, it would not be our advice to change direction, because of the perverse incentive created to get to Australia, overstay your visa and go to ground. Periodic so-called amnesties ... would create an incentive for people to get themselves smuggled into Australia, effectively on false pretences ... until such time as a government of the day said, ‘Amnesty time — now come forward’. You would just get recurring cycles. The policy is a matter for government, but I certainly wouldn’t be advising them to go down that path.⁹¹

This objection is based on the premise that status resolution would send a dangerous message that it is acceptable to enter Australia and become an unlawful non-citizen in the hope that it will one day lead to a temporary work visa or even permanent

⁸⁷ *National Agricultural Workforce Strategy* (n 1) 197.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *2020–21 Budget Estimates*, 19 October 2020, 134.

⁹¹ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *2020–21 Additional Estimates*, 22 March 2021, 190–1.

residency. Although this objection appears reasonable, it has a number of weaknesses.

First, there is evidence that, in some instances, migrant workers are victims themselves, having been forced into undocumented work through a complex network of offshore and onshore labour hire contractors and migration agents who have a business model of recruiting overseas workers on visas without work rights such as tourist visas. Howells' landmark report of unauthorised work in Australia emphasised the role of offshore agents who supply tourist visas that do not permit work:

There are many people who come to Australia on a tourist visa ... but who work to support their stay ... This method of gaining access to the labour market in Australia by non-citizens has proved reasonably successful and so it becomes attractive for organisers to arrange for tourist visas and passage to Australia and then to arrange work and some form of accommodation. ...

A person then meets them on arrival and takes them to a workplace. They may not actually meet the employer, rather they perform work and they are 'paid' by the intermediary. They may move from one workplace to another.⁹²

Further, the Durable Future Report

case studies suggest that Howells' depiction of offshore networks producing an undocumented workforce is an apt description of how some undocumented workers arrive in the Australian horticulture industry. It appears that organised crime does have a role in misleading workers in their home countries and enticing them into significant debt to fund an all-inclusive package involving a visa, flights, pre-arranged accommodation and employment.⁹³

Second, upon reflection, it makes little sense that a one-off regularisation process would draw a wave of new undocumented workers given that Australia is an island nation and every new arrival by plane is forced to go through border security. The situation in Australia is not analogous to the US–Mexico border, for example. Moreover, if a one-off regularisation process is introduced, as proposed by the *National Agriculture Workforce Strategy*,⁹⁴ it will be largely justified on the basis of the COVID-19 pandemic and the public health imperative to vaccinate all people residing in Australia. The pandemic is clearly an exceptional, unprecedented circumstance. If status resolution is introduced, it will have been more than 41 years since the last status resolution policy. It seems illogical that someone would move to a country in anticipation of living underground and working in exploitative jobs, in hope that they will be able to commence their pathway to permanency four decades later.

Third, evidence from the introduction of status resolution arrangements abroad suggests that the precedent-setting risk of this policy can be mitigated through the design of the regularisation process and accompanying reforms. For example, in Orrenius and Zavodny's working paper on the consequences of status regularisation on undocumented migrants, the authors conclude:

⁹² Howells (n 32) 55–6 [122]–[123].

⁹³ Howe et al, *Durable Future Report* (n 6) 42, citing *ibid* 55–6 [122]–[123].

⁹⁴ *National Agricultural Workforce Strategy* (n 1) 190.

An amnesty is most likely to succeed if accompanied by a guest worker program that allows low-skilled workers to legally enter the US and either gives such workers sufficient incentives to return to their home countries or provides them with a legal way to remain permanently in the US. A successful amnesty must also incorporate workplace enforcement to eliminate job opportunities for undocumented workers and stop the cycle of illegal immigration.⁹⁵

Exemplifying this approach, the *National Agriculture Workforce Strategy* recommended that a one-off regularisation process be introduced alongside the expansion and improvement of the SWP and WHM programs, stronger border enforcement and national labour hire licensing.⁹⁶ Cumulatively, this suite of reforms will both increase and improve labour supply by creating legal pathways for temporary migrants into the Australian horticulture sector and better enforcement of immigration rules and labour standards.

2 *Tying Undocumented Migrants to Farm Work Will Create Precarity*

A second objection against the model for one-off status resolution proposed in this article is that it will tie undocumented migrants to working in the horticulture industry in order to create a pathway from a temporary work visa to permanent residency. It is certainly true that migration frameworks that link the performance of work to a migration outcome have the potential to produce vulnerability among temporary migrants.

The WHM visa extension model is emblematic of this problem. In the WHM program, visa holders are given either a second- or third-year extension on their visa if they have performed specified work in a particular industry for a set period of time. Most WHMs earn a second year on their visa after completing 88 days on a farm. This has been found to produce significant vulnerability in WHMs doing farm work.⁹⁷

The SWP is also a tied visa. It ties seasonal workers from Pacific countries to the agriculture industry. However, this visa is regulated more extensively, involves trade unions in a worker-induction process and has a rigorous pre-approval process for growers seeking to access seasonal workers. This visa is also subject to auditing and has requirements that growers be responsible for worker induction, pastoral care and accommodation. Unlike the WHM program, which has been beset by problems of worker exploitation, the SWP has proved a far better model for ensuring temporary migrants are less vulnerable to underpayment and

⁹⁵ Pia M Orrenius and Madeline Zavodny, *What are the Consequences of an Amnesty for Undocumented Immigrants?* (Federal Reserve Bank of Atlanta, Working Paper No 2004-10, 2004) 2.

⁹⁶ *National Agricultural Workforce Strategy* (n 1).

⁹⁷ Fair Work Ombudsman, *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program* (October 2016) 25; Sarah Martin, '#88daysaslave: Backpackers Share Stories of Farm Work Exploitation', *The Guardian* (online, 26 September 2019) <<https://www.theguardian.com/australia-news/2019/sep/26/88daysaslave-backpackers-share-stories-of-farm-work-exploitation>>; Alison Rahill, 'How 88 Days Can Turn Into a Nightmare of Debt and Despair for Backpackers', *ABC News* (online, 18 July 2017) <<https://www.abc.net.au/news/2017-07-18/how-88-days-can-turn-into-a-nightmare-of-debt-and-despair/8716564>>.

mistreatment,⁹⁸ although it must be acknowledged that there are still ongoing challenges with enforcing labour standards for Pacific workers in this visa program.

The contrast between these two models demonstrates that the mere fact of a tie between the performance of work and a migration outcome is not inherently the problem, although it has the potential to create vulnerability. Where temporary migrants are on tied visas, there needs to be robust oversight of where these workers are employed and enforcement of their rights under the law.

The status regularisation model proposed in this article is to rely on the subclass 408 visa, which ties undocumented migrants to essential industries and requires evidence of six months' employment in horticulture. The subclass 408 visa is not, strictly speaking, an employer-sponsored or nominated visa category; therefore, the usual issues of employer dependence and associated possibility of exploitation do not arise.⁹⁹ While applicants under the status regularisation pathway will be required to demonstrate six months' work experience in horticulture, the visa conditions do not compel holders to remain with the same employer. Condition 8107, to which the visa would be subject, would require visa holders broadly to maintain their eligibility for the visa through ongoing employment in the horticulture sector. However, once their visas status was secured, visa holders would have the necessary bargaining power and mobility to leave employers offering sub-standard conditions.

Nonetheless, it is important that ongoing work is done by government, industry and other stakeholders to implement the key recommendations of the *National Agriculture Workforce Strategy* that seek to address the vulnerability of temporary migrants employed in the horticulture sector. In addition to a one-off status regularisation process, the Strategy proposed: national labour hire licensing; further regulation of the WHM to minimise exploitation and to mirror worker-protective elements in the SWP; and a national portal for advertising job vacancies. These reforms will be critical to ensuring subclass 408 visa holders and other categories of temporary migrants are not exploited on farms.

V Conclusion

The horticulture sector faces an urgent and immediate labour crisis that requires government action. A key dimension of this crisis is the inability of undocumented workers to respond swiftly to job vacancies and their susceptibility to exploitation. The introduction of a status regularisation process has the potential to address both challenges.

In its ground-breaking inquiry, the *National Agriculture Workforce Strategy* has strongly recommended that the Government introduce a one-off regularisation

⁹⁸ Howe et al, 'A Tale of Two Visas' (n 86); Beth Orton, 'Working Holiday Makers Not a Long-Term Solution for Horticulture', *Devpolicy Blog* (Blog Post, 19 August 2020) <<https://devpolicy.org/working-holiday-makers-not-a-long-term-solution-for-horticulture-20200819/>>.

⁹⁹ Joanna Howe, 'Contesting the Demand-Driven Orthodoxy: An Assessment of the Australian Regulation of Temporary Labour Migration' in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Bloomsbury, 2016) 131.

process for undocumented farm workers so that they can legally work on Australian farms.¹⁰⁰ This recommendation has the potential to address both the labour shortage dimension and the exploitation dimension of the current labour crisis on Australian farms. It will have an immediate effect on labour supply by enabling undocumented workers to move freely in the industry and across state borders. It will give ethical growers access to a workforce that they have previously been unable to engage. It will also substantially reduce the vulnerability of these workers to exploitation based on their precarious immigration status and will reduce labour supply to unethical growers who continue to undercut the competition by underpaying undocumented workers. Further, by regularising the status of undocumented workers, this will enable government, industry and unions to develop broad agreement on how other visa programs, such as the SWP, can be expanded and improved to better meet growers' labour needs.

This article has sought to build on the strong recommendation in the *National Agriculture Workforce Strategy* and examine how a one-off regularisation process can be implemented in practice. It is essential that the model introduced is one that appropriately incentivises undocumented workers to come forward to regularise their status. That is why this article has proposed a model that involves a four-year temporary work visa tied to the horticulture sector, coupled with a commitment to develop a pathway to permanent residency after two years. The international literature discussed in this article demonstrates that there are myriad implementation challenges for regularisation programs and it is important that these are addressed in the design of the proposed one-off status resolution process.

There has been some concern that the introduction of a status resolution process rewards growers who have knowingly exploited these workers in the past. This article contends that rather than 'rewarding' unscrupulous growers, regularising the status of undocumented workers will instead raise prevailing employment standards in the industry and make it harder for those unscrupulous labour hire operators and growers to derive a competitive advantage by exploiting vulnerable undocumented workers. At the same time, a status resolution process will provide all growers in the industry with access to a larger formal labour pool.

¹⁰⁰ *National Agricultural Workforce Strategy* (n 1) 190.