

Supporting strong and sustainable regions by addressing modern slavery risks

Submission to the Department of Home Affairs by the
NSW Anti-slavery Commissioner

26 July 2024

Acknowledgement of Country

As New South Wales Anti-slavery Commissioner, I acknowledge that Aboriginal and Torres Strait Islander peoples are the first peoples and traditional custodians of Australia and the oldest continuing culture in human history.

I acknowledge that First Nations communities in New South Wales have survived practices that today we call modern slavery. The legacies of that treatment continue to affect Aboriginal and Torres Strait Islander people today, and through them affect the New South Wales community and economy.

My Office and I pay our respects to elders past and present and commit to respecting the lands we walk on, and the communities we walk with.

We celebrate the deep and enduring connection of Aboriginal and Torres Strait Islander peoples to country and acknowledge their continuing custodianship of the land, seas and sky. We acknowledge their ongoing stewardship and the important contribution they make to our communities and economies.

We reflect on the continuing impact of government policies and practices and recognise our responsibility to work together with and for Aboriginal and Torres Strait Islander peoples, families and communities, towards improved economic, social and cultural outcomes, self-determination and for real freedom.

We advise this resource may contain images, or names of deceased persons in photographs or historical content.

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Published by the NSW Anti-slavery Commissioner

dcjnsw.info/antislaverycommissioner

First published: July 2024

Acknowledgements

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Executive summary

The submission aims to respond to two key questions posed in the ‘Supporting strong and sustainable regions: Review of Regional Migration Settings, Discussion Paper’ (hereafter Discussion Paper), namely:

- Question 4: How can we reform Working Holiday Maker [‘WHM’] program visa settings to limit exploitation, while still ensuring regional Australia can access the workers it needs?
- Question 5: How can we ensure a more consistent approach to lower paid migration across various visa products, as well as reflect our commitment to maintain the primacy of our relationships with the Pacific?

The submission argues that current policy settings for managing WHMs risk increasing vulnerability to modern slavery (specifically forced labour, deceptive recruiting and debt bondage) among some at-risk visa holders. It also argues that the framework may have unintended negative consequences for more closely regulated programmes such as the Pacific Australia Labour Mobility (PALM) scheme, by creating differences in treatment and compliance in different parts of the labour force. These differences incentivise employers (particularly in agriculture and horticulture) to turn away from workers under the PALM to WHMs, on a ‘cost-saving rationale’. The downside risks of these cost-savings fall not only on workers, but also on local communities that are forced to provide crisis accommodation, healthcare, and other forms of support when things go wrong. The current policy settings thus risk creating negative social externalities that fall on local communities and threaten the legitimacy of both the WHM and PALM schemes.

The submission advocates, instead, for a more systemic approach to management of lower-paid migrant workers across various visa categories. This would involve a non-discriminatory approach to regulation and rights protection of all migrant workers, including de facto migrant workers such as WHMs. This means removing potentially racialized and discriminatory distinctions between different types of migrants, including by:

- Removing the ‘specified work’ rule for extension of WHM visas – as has already been done for WHMs from the United Kingdom, following the death of a British backpacker in 2016; and
- Creating equivalent systems of protection, regulation and – where possible – culturally appropriate, place-based support mechanisms for WHMs, PALM and other temporary migrant workers, including through more deliberate and concerted engagement of State and local institutions.

Introduction

About the Office of the NSW Anti-Slavery Commissioner

The role of the NSW Anti-slavery Commissioner is an independent statutory office. The Commissioner operates independently of the NSW Government. The Commissioner’s work is supported by the Office of the NSW Anti-slavery Commissioner (OASC). The OASC is a small team of anti-slavery practitioners with expertise in trauma-informed support, human rights, commercial law, public policy, and communications. The team includes a person with lived experience.

About the Working Holiday Maker Program

The Australian Working Holiday Maker (WHM) Program started in 1975 as a cultural exchange program to promote reciprocal travel between youth in the United Kingdom (UK) and Australia. It has since diverged significantly from other WHM programs globally by transforming into a quasi-temporary labour migration program that supplies a significant workforce which helps meet

regional and rural labour demands, particularly in the agricultural sector. New South Wales generally hosts approximately a third of WHMs nationally, who could number around 53,000 WHMs in NSW, though exact data is not available.¹ This workforce is an important part of the rural and regional workforce mix underpinning economic security and prosperity in these regions.

The WHM Program has undergone a dramatic expansion over the past several decades, with 49 countries now participating in the programme and 13 more agreements in negotiation as at December 2023.² Although Australian Governments have repeatedly emphasized that work should be supplementary to holiday activities, a significant proportion of WHMs engage in full-time work, especially in the agriculture/horticulture sectors. A change to visa settings in 2005 permitted WHMs to extend their stay (into a second year) if they completed three months of specific regional work in their first year (88 days). A second change, in 2016, allowed another such extension where a WHM completes six months of such work in their second year (179 days). This 'specified work' rule is now integral to the WHM Program and one that the employers in eligible regions have become reliant on to meet seasonal demands.³

Recent data shows that although many WHMs are from Western Europe (Table 1 below), a significant number come from Taiwan, Japan, South Korea, Indonesia, Vietnam, China and Thailand, numbering around 54,000 workers combined. Research suggests that these workers may be especially vulnerable because of limited English, and the greater likelihood to engage in the agriculture sector where there are well-established risks of exploitation and labour abuse.⁴

Table 1: Total number of Working Holiday (subclass 417) visa holders and Work and Holiday (subclass 462) visa holders in Australia as at 31 December 2023 by citizenship country (top six countries in each visa class)

Citizenship country	Visa holders as at 31 December 2023
Working Holiday (subclass 417)	
United Kingdom	31,018
France	20,341
Ireland	17,758
Taiwan	12,057

¹ Approximately 31 per cent of WHMs nationally were in NSW according to the Australian Bureau of Statistics, 2016. Census 2016. Canberra. Australian Bureau of Statistics. As cited in Department of Home Affairs, 2024. Supporting strong and sustainable regions: Review of Regional Migration Settings, Discussion Paper (June 2024). Canberra: Department of Home Affairs: Figure 13 (Distribution of WHM visa holders by Capital City and Rest of State 2016). Taking the total number of WHMs of 170,437 (WHMs visa holders in Australia at 31 December 2023 including both 417 and 462 visa classes. Department of Home Affairs, 2023. Working Holiday Maker visa program report. Canberra: Department of Home Affairs). This leads to an estimate of approximately 52,835 WHMs in NSW.

² Department of Home Affairs, 2023. Working Holiday Maker visa program report (31 December 2023). Canberra: Department of Home Affairs.

³ Howe, J., Clibborn, S., Reilly, A., van den Broek, D., & Wright, C. F., 2019. Towards a durable future: Tackling labour challenges in the Australian horticulture industry. University of Adelaide and University of Sydney. <https://www.sydney.edu.au/content/dam/corporate/documents/business-school/research/work-and-organisational-studies/towards-a-durable-future-report.pdf>

⁴ Vosko, L. F., 2023. Through the back-door: How Australia and Canada use working holiday programs to fulfill demands for migrant work via cultural exchange. *Journal of Industrial Relations*, 65(1), 88-111. <https://doi.org/10.1177/00221856221131579>. Komalasari, D and Setiawati, W, 2020. Critique towards Australian Work and Holiday Visa Subclass 462: Where does it leave Indonesian citizen? *Indonesian Journal of International Law*, Vol. 17 No. 3, pp. 387-412 <https://doi.org/10.17304/ijil.vol17.3.792>.

Citizenship country	Visa holders as at 31 December 2023
Japan	11,319
South Korea	10,446
Work and Holiday (subclass 462)	
Indonesia (capped)	7,411
Argentina (capped)	3,702
Vietnam (capped)	3,218
China, Peoples Republic of (capped)	2,974
United States of America	2,960
Thailand (capped)	2,905

Source: Department of Home Affairs, 2023. Working Holiday Maker visa program report (31 December 2023). Canberra: Department of Home Affairs.

Workers under the WHM Program and the PALM scheme often find themselves employed in the same regions and sectors in Australia, particularly in agriculture and horticulture. This overlap can lead to a substitution effect where employers may favour one group over the other based on availability, costs, and regulatory requirements.⁵

The WHM Program differs from other temporary migration programs in Australia in its light regulatory framework and the limited government oversight of migrant workers' experience. WHM employers must only adhere to the *Fair Work Act 2009 (Cth)* (which applies to all workers in Australia) and register with the Australian Taxation Office (ATO) as employers of WHMs. However, these requirements offer limited protection to visa holders, many of whom remain vulnerable to exploitation, especially when working on remote farms.⁶ In comparison, the PALM Scheme, which supplies workers to work in the same or similar settings, imposes a number of worker well-being related requirements on approved employers including provision of accommodation and transport, minimum take-home pay and working hours, signature of a formal deed, and greater government scrutiny of the management of workers. Other things (including costs) being equal, this may make the PALM Scheme less attractive to employers than the WHM Program.

These are not the only sources of workers in the sector. There also appears to be a significant number of undocumented workers in Australia and particularly in agriculture, including disengaged PALM workers who are particularly vulnerable to exploitation and labour abuse. The structural effect of this fragmented approach to regulation of different temporary migrant workers is that unscrupulous employers are incentivised to choose the workers that are the most vulnerable to exploitation, prompting 'a race to the bottom' in compliance.⁷

Another key factor – especially relevant in the context of NSW – is WHMs' reliance on labour hire companies, which the Migrant Worker Taskforce identified as having a key role in exploitation and

⁵ Howe et al., above n3.

⁶ National Agricultural Labour Advisory Committee, 2020. *National Agricultural Workforce Strategy*. Canberra: Department of Agriculture, Water and the Environment.

⁷ Howe et al., above n3.

coercion of vulnerable workers, as a way of increasing their profit margin.⁸ Unlike Victoria, Queensland and South Australia, NSW does not have any specific licensing regime or inspectorate focused on labour hire companies, though a national scheme is currently under discussion.

Modern slavery risks faced by working holiday makers

Low-wage migrants, particularly those employed in agriculture, are structurally at-risk to certain types of labour violations, as a result of the intersectional vulnerability of a precarious immigration status, remoteness/isolation, youth, language and literacy, and a range of other factors. The UN Special Rapporteur on Contemporary Forms of Slavery (who will conduct an official country visit to Australia in November 2024) has noted that such vulnerabilities can “constitute a breeding ground for contemporary forms of slavery”.⁹

Modern slavery offences in Australia include the crime of forced labour, where a person provides labour or services involuntarily, due to coercion, threat or deception, and a reasonable person in the position of the victim would not consider himself or herself to be free to stop providing services or leave the place where he/she provides those services.¹⁰

Because forced labour can be challenging to detect in practice, the International Labour Organization (ILO) has developed a set of indicators of forced labour that help to identify at-risk populations.¹¹ As Australia has ratified both the *Forced Labour Convention, 1930 (No. 29)* and the *Protocol of 2014 to the Forced Labour Convention, 1930*, on which the indicators are based, they can be considered a relevant framework for assessing the risks of forced labour in Australia. The 11 indicators are abuse of vulnerability, deception, restriction of movement, isolation, physical and sexual violence, intimidation and threats, retention of identity documents, withholding of wages, debt bondage, abusive working and living conditions and excessive overtime. This submission briefly summarizes available (albeit limited) evidence of how these indicators may apply to the context of WHMs.

Abuse of vulnerability

Academic studies and government reports indicate that unscrupulous employers and labour hire companies may exploit WHMs’ age, lack of English language skills and isolation to impose unfair conditions on WHMs.¹² According to the 2021 census, between a quarter and a third of migrants from Vietnam, South Korea, Thailand and Taiwan did not speak English; these are among the nationalities most likely to be employed in agriculture under the WHM Program.¹³

Another cause of vulnerability that may be abused by employers or intermediaries is the absence of any official, comprehensive site of horticulture job vacancies for WHMs, with many workers reliant

⁸ Migrant Workers' Taskforce, 2019. Report of the Migrant Workers' Taskforce. Department of Home Affairs. See also Cavanough, E and Wherrett, C. 2020. Blue Harvest: Wage theft and other labour infringements in the NSW Mid-North Coast’s 2019/20 berry harvest. Sydney: McKell Institute.

⁹ United Nations Special Rapporteur on contemporary forms of slavery, including its causes and consequences, 2023. End of Mission Statement, official visit to Canada. Geneva: Office of the High Commissioner for Human Rights, p3.

¹⁰ Section 270.6 of the *Criminal Code Act 1995 (Cth)*; Schedule 2 of *Modern Slavery Act (NSW)*.

¹¹ ILO, 2012. Indicators of Forced Labour. Geneva: International Labour Office. https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_203832.pdf

¹² See for example, Howe et al., above n3.

¹³ Australian Bureau of Statistics. Temporary visa holders in Australia (2021 Census). Canberra: Australian Bureau of Statistics. <https://www.abs.gov.au/statistics/people/people-and-communities/temporary-visa-holders-australia/latest-release>

on unofficial sources such as social media, Gumtree, hostels, labour hire and word of mouth to find work. This creates an information and bargaining power imbalance, that allows unscrupulous employers or intermediaries to exploit the need of WHMs to find horticulture work (to retain visa status), by imposing terms, conditions and treatment that maximise profits at the expense of worker protections.¹⁴ Because word of mouth between employers is also important, some WHMs may feel coerced to remain with an employer to receive a good recommendation for future employment. For example, WHMs in Coffs Harbour reported that poor feedback from a major regional employer could threaten future employment in other locations – leading some WHMs to avoid taking sick days or refraining from complaints as a way of retaining a good reputation with that employer to avoid being blacklisted by other employers.¹⁵

Moreover, without access to Medicare and often with limited private health insurance access and coverage,¹⁶ WHMs are vulnerable to exploitation because they cannot afford medical treatment. Employers can exploit this vulnerability by forcing WHMs to work under poor conditions, threatening them with job loss if they seek medical help, or denying them paid time off for illness or injury.

Withholding of wages

Withholding of wages is a common issue faced by WHMs. Employers may delay payment or fail to pay the full amount promised, using financial control to coerce workers into continued labour under exploitative conditions. The Fair Work Ombudsman's (FWO) 2016 survey of more than 4,000 WHM raised serious concerns about their working conditions, particularly while undertaking their 88 days of specified paid work.¹⁷ A majority of recipients (66 per cent) felt that employers take advantage of people on working holiday visas including by underpaying them. This was further elaborated in 2018 in the Fair Work Ombudsman *Harvest Trail* report, which investigated 638 businesses and found that 70 per cent of the employers who employed temporary workers — most of them WHM – had breached Australia's workplace laws.¹⁸ According to the FWO report:

“The incentive to obtain a second visa through completing three months (88 calendar days) of specified work means workers may be willing to accept substandard pay and conditions, and/or be unwilling to seek assistance from the FWO. Unscrupulous employers can use this as leverage to pay less, give notice periods that are outside award conditions, and withhold pay.”¹⁹

Academic research which surveyed 1,440 WHMs found that 32 per cent earned \$12 per hour or less and 46 per cent earned \$15 or less in their lowest paid job (at the time of the survey the standard hourly rate for a casual worker under the Horticulture Award was \$22.13).²⁰ Only 9 per cent of underpaid WHMs had taken action to recover their unpaid wages and only 4 per cent had contacted FWO about it.²¹

Abusive working and living conditions

Research with WHMs has found that some workers are forced to work in dangerous conditions without proper instructions. Many WHMs reported encountering unsafe work practices, including risks from machinery, climate, chemicals and other hazards, but felt compelled to comply due to the

¹⁴ Howe et al., above n3.

¹⁵ Cavanough and Wherrett, above n8.

¹⁶ Such as potential coverage gaps or the need to pay upfront medical costs.

¹⁷ Fair Work Ombudsman. 2016. Statement on 417 visa-holders. Fair Work Ombudsman (15 October 2016). <https://www.fairwork.gov.au/newsroom/media-releases/2016-media-releases/october-2016/20161015-417-inquiry-media-release>

¹⁸ Fair Work Ombudsman. 2018. Harvest Trail Inquiry. Fair Work Ombudsman. <https://www.fairwork.gov.au/sites/default/files/migration/1461/fair-workombudsman-harvest-trail-inquiry-report.pdf>

¹⁹ Ibid, p. 26.

²⁰ Berg, L and Farbenblum, B, 2017. Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey. Sydney: Migrant Worker Justice Initiative.

²¹ Ibid.

necessity of completing farm work to qualify for a visa extension, noting they had "no choice" but to accept the farm work under the conditions set by their employers.²²

Many WHMs are also vulnerable to abusive living conditions connected to their work, including overpriced and unsatisfactory accommodation and transportation. In contrast to the PALM Scheme which mandates that employers include detailed accommodation and transportation services as part of their sponsorship, WHMs typically depend on hostels and caravan parks with limited government oversight with respect to quality and safety. Moreover, accommodation providers often operate as labour hire companies or also provide transportation, further deepening the dependence of the workers on them and raising the possibility of abuse of vulnerability.²³

Debt bondage

Linked to issues of overcharging of accommodation and transport is the possible risk of debt bondage where high rent/charges can trap WHMs in a cycle of debt, making them financially dependent on their employers and unable to leave exploitative work conditions.²⁴ A number of reports including the Senate inquiry into the Working Holiday Maker program and media such as ABC's Four Corners have highlighted how WHMs are sometimes forced to pay exorbitant fees for recruitment, transportation, and accommodation, contributing to risks of debt bondage.²⁵

Deception

The Migrant Workers' Taskforce noted a number of types of situations where employers deceive WHMs about the nature of the work, wages, and working conditions including:

- when accommodation providers disguise the cost of accommodation as 'free' but charge a weekly 'job finding fee' (constituting rent); and
- where proprietors lure WHMs to a regional or remote location on the premise of a non-existent (or insecure) job, and then undertake to provide accommodation that might be overcrowded, of poor condition or overpriced. "Workers do not formally agree to these deductions and may be coerced into accepting these costs as part of their employment conditions."²⁶

Isolation and restriction of movement

Many WHMs completing their specified work period are located in remote areas with limited access to public transportation, making it difficult to leave exploitative situations or seek help. As noted above, WHMs often rely on their employers for both transportation and accommodation, giving employers significant control over their movements. This dependency can be exploited, with some employers using it to restrict WHMs' freedom, keeping them confined to the farm or worksite and otherwise socially isolated.²⁷ Instances have been reported where WHMs are not allowed to leave the premises or are only transported under the employer's conditions, effectively trapping them in exploitative work situations.²⁸

²² Howe et al, above n3. Rimmer, M and Underhill, E. 2015. 'Temporary Migrant Workers in Australian Horticulture: Boosting Supply but at What Price?' in Massimo Pilati et al (eds), *How Global Migration Changes the Workforce Diversity Equation*, Cambridge Scholars Publishing, 163.

²³ Ibid.

²⁴ For example, Cavanough and Wherrett, above n8, note that in Coffs Harbour, NSW, houses occupied by WHMs net the landlords approximately three times the median rent of certain suburban areas in the region.

²⁵ Migrant Workers' Taskforce, above n8. Meldrum-Hanna, C and Russell, A. 2015. 'Slaving Away', Four Corners, ABC (online 4 May, 2015) <http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm>

²⁶ Migrant Workers' Taskforce, above n8, p119.

²⁷ Ibid.

²⁸ Howe et al, above n3.

Physical and sexual violence

The requirement of an 88 day work rule may enable “perpetrators of sexual harassment ... to force migrant women to have sex or carry out sexual acts in exchange for their signature on the paperwork”.²⁹ There have been credible allegations of sexual violence against WHMs including numerous media reports of WHMs being threatened with sexual violence by employers during transportation, at the workplace and in the accommodation.³⁰ The Retail Supply Chain Alliance (RSCA) noted in its submission to the Inquiry into the Working Holiday Maker program (2020) that “cases of rape and other sexual exploitations [of WHMs] are not uncommon across the country”.³¹ The incidence of these cases is likely to be vastly underreported for a number of reasons, notably risks of retaliation and termination of visa status.

Intimidation and threats

Intimidation and threats are not uncommon for WHMs. They report, in particular, threats of deportation or blacklisting in the industry – preventing them achieving their specified work requirements to retain a valid visa – if they complain about their conditions. This serves to reduce their agency, silence WHMs and coerce them into involuntary work.

Retention of identity documents

There are instances where employers retain WHMs' passports or other identity documents, effectively preventing them from leaving the job or seeking help. This practice has been highlighted in a number of reports including the Migrant Workers' Taskforce,³² although the prevalence of this indicator has not been easy to gauge.

While the presence of a single indicator in any given case may not imply that a person has suffered the Australian offence of forced labour, the presence of multiple indicators across the sector is a sign of significant risks of forced labour for WHMs. In the remaining sections of this submission, we offer recommendations for strengthening g the WHM Program and other complementary reforms.

²⁹ Howe, J., Shi, E., & Clibborn, S., 2022. *Fruit Picking in Fear: An Examination of Sexual Harassment on Australian Farms*. Melbourne University Law Review, 45(3), 1140-1174, 1159.

³⁰ Uibu, K, 2015. 'From Sexual Harassment to Being Underpaid: I've Seen How the Work-for-Visa System Is Broken', ABC News (online, 31 July 2015) <https://www.abc.net.au/news/2015-07-31/uibu-ive-seen-how-the-work-for-visa-system-isbroken/6661910>, Feller, J, 2018. 'Backpackers Reveal Stories of Sexual Assault, Exploitation while Working on Australian Farms', ABC News (online, 8 June 2018) <https://www.abc.net.au/news/2017-07-17/rosie-ayliffe-uncovers-backpacker-farm-work-horror-stories/8687868>; Bermingham, K, 2019. 'Man on Trial over Rape, Kidnap of Backpacker on His Pig Farm', The Sydney Morning Herald (online, 5 February 2019) <https://www.smh.com.au/national/manon-trial-over-rape-kidnap-of-backpacker-on-his-pig-farm-20190205-p50vvc.html>; Kelly, C, 2021. "Modern Slavery": This Is What It Is Really Like Working on Aussie Farms', The New Daily (online, 14 June 2021) <https://thenewdaily.com.au/news/2020/11/16/farm-workaustralia-exploitation>. Uibu, K, 2020. 'There are no human rights here', ABC News (Web Page, 16 September 2020). <https://www.abc.net.au/news/2020-09-15/backpacker-farm-workers-speak-of-wage-exploitation/12545294>

³¹ Retail Supply Chain Alliance, 2020. Submission to the Inquiry into the Working Holiday Maker program. Canberra: Parliament of Australia. https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Migration/WorkingHolidayMaker/Submissions

³² Migrant Workers' Taskforce, above n8.

Recommendation 1: Remove the 88 day and 179 day specified work rule to reduce the risk of coercion experienced by some WHMs

While it may be a choice for WHMs whether to seek to extend their visa for a second or third year through performance of ‘specified work’, important observers – including the United States Department of State in its annual *Trafficking in Persons Report* – have identified the specified work rule as a key driver of coercion risks for WHMs.³³

Research with WHMs indicated that a significant majority of participants said that they would not have worked in the horticulture industry without the incentive of earning a second-year visa, with respondents comparing completing the 88 days to a “prison sentence” and referring to having “no choice” but to accept exploitative work because of the need to complete farm work in order to get a visa extension.³⁴

In June 2021, Australia removed the 88-day requirement for British citizens as part of the Australia-UK Free Trade Agreement.³⁵ This may have been prompted by the death of a British backpacker in 2016, and a campaign by her mother to remove the ‘specified work rule’, which she argued put her daughter in a dangerous situation.³⁶

While some industry groups have noted their opposition to removing the specified requirement because of fear of labour market shortages, there is no reason that WHMs could be not be incentivized to voluntarily choose to work in regional settings through better wages and working conditions in the sector, tax incentives or other inducements, which would also make the sector more attractive to local workers. In particular, extending the same provisions offered to UK WHMs to other nationalities could:

- ensure that farms can attract more motivated and committed workers who choose agricultural jobs willingly, potentially increasing productivity and quality of work, and reducing turnover (and associated training, payroll and onboarding costs). Workers who feel respected and fairly treated are often more efficient and reliable (as noted by the difference in productivity between WHM and seasonal workers under the former Seasonal Worker Program, now PALM).³⁷
- decrease the risk of legal penalties and reputational costs associated with labour exploitation. Enhanced compliance with fair work standards can protect businesses from fines, legal battles, and reputational damage, which can be costly and disruptive. As the WHM is intended as a cultural exchange program, greater protection will also strengthen Australia’s reputation. As foreign jurisdictions, such as the European Union, adopt increasingly tight rules around human rights due diligence, regulatory and even market access, risks associated with abuse of workers are becoming more pronounced, especially for firms that produce for export markets.

³³ United States Department of State, 2024. *Trafficking in Persons Report for Australia (2023)*. Washington DC: United States Department of State.

³⁴ Howe et al, above n3, p98.

³⁵ Department of Home Affairs, 2024. Working Holiday (subclass 417) visa arrangements for UK passport holders. From 1 July 2024, UK passport holders can be granted up to three separate Working Holiday visas without having to meet any specified work requirements.

³⁶ Uibu, K, 2021. Rosie Ayliffe, mother of murdered backpacker, welcomes Australian government's visa program change, ABC (17 June 2021). <https://www.abc.net.au/news/2021-06-17/rosie-ayliffe-welcomes-governments-change-to-visa-program/100221204>

³⁷ Zhao, S, Binks, B, Kruger H, Xia, C and Stenekes, N, 2018. A comparison between seasonal workers and working holiday makers. Canberra: Australian Bureau of Agricultural and Resource Economics and Sciences, Research Report 18.1: p1.

Recommendation 2: If the specified work rule is retained, more robust measures should be considered to protect both WHMs and PALM workers

Stakeholders across government, trade unions and industry have argued for more robust protections to meet the needs of both workers and farmers.

The National Farmers' Federation has previously argued for a dedicated agricultural visa with more robust regulation and protections than currently provided to WHMs, including settings which:³⁸

- provide an employer approval or accreditation system to ensure that workers are not subjected to mistreatment, ranging from minor issues like underpayments to severe abuses like modern slavery; and
- provide local visa caps based on reliable data and set in consultation with regions and industry, instead of a labour market testing process.

The authors of the 2020 National Agricultural Workforce Strategy appeared to agree that many of these regulatory elements were important in ensuring protection of workers in the sector, though rather than a dedicated agricultural visa, recommended similar measures be integrated in a revised WHM Program.³⁹ Among the recommendations, which also relied on learnings from the experience of the PALM Scheme, the authors of the Strategy proposed introducing:

- A 'fit and proper person' registration process for employers seeking to employ WHMs, including a database of registered employers; verification that the employer has not been prosecuted for workplace breaches; ability to deregister an employer for non-compliance (preventing them from employing other migrant workers)⁴⁰;
- Mandatory in-person induction for workers prior to being employed in the agricultural sector. Such inductions should be no weaker than the induction requirement under PALM which requires an invitation to representatives of the FWO and the relevant union.
- For WHMs, prior to arrival in Australia, to apply for an Australian tax file number with information to be provided in the worker's own language, on their rights and entitlements as migrant workers in Australian workplaces and how to take action if they are not being treated lawfully.

Although the Discussion Paper excludes reforms to the PALM scheme, it must be noted that the two schemes are invariably inter-linked and that, moreover, it is important to ensure a non-discriminatory approach to workers in different visa categories.⁴¹ As noted by the National Agricultural Workforce Strategy, the PALM scheme has introduced a number of important innovations in the protection of workers, which could be replicated in the WHM Program – or consolidated as one (for example, a

³⁸ National Farmers Federation, 2021. A dedicated agricultural visa. <https://nff.org.au/key-issue/dedicated-agriculture-visa/>

³⁹ National Agricultural Labour Advisory Committee, 2020. *National Agricultural Workforce Strategy*. Canberra: Department of Agriculture, Water and the Environment.

⁴⁰ This last requirement was partly achieved with the promulgation of the *Migration Amendment (Strengthening Employer Compliance) Act 2024 (Cth)*, which creates a Prohibited Employer list that restricts employers from hiring migrant workers. However, the burden of proof required for an employer to be placed on the list (conviction, civil penalty order) is much higher than what would be the case if an employer could be de-registration from a registered employers list, perhaps managed by the Department of Employment and Workplace Relations.

⁴¹ 'Universality' having been identified in the Migration Review as a key labour migration 'guardrail' (Department of Home Affairs, 2023. Review of the Migration System. Canberra: Department of Home Affairs).

joint register of approved employers or a ‘blacklist’ of de-registered employers; or joint induction programmes for both PALM workers and WHMs).

In essence, harmonizing some of the rules around portability, worker induction, and employer registration/monitoring for the PALM and WHM programs would create a consistent regulatory framework that benefits both workers and employers. Such harmonization would ensure a level playing field for workers across different visa classes, reducing the risk of regulatory arbitrage by employers who might otherwise exploit differing standards. Additionally, it would simplify administrative processes and reduce compliance burdens for employers by standardizing procedures, thus fostering a fairer and more efficient labour market. This approach could still allow room for differing pastoral care requirements – given that PALM workers will likely stay with an employer for a longer period and may need greater support to integrate into the community. However, some degree of alignment between the schemes would support better workforce management, enhance worker protection, and streamline employer responsibilities, ultimately contributing to a more equitable and functional system for all stakeholders involved.

Recommendation 3: Better use of state government and local actors’ leverage and capabilities to address overcharging and unfair deductions

WHMs (and PALM workers) in Australia face significant challenges with overpriced accommodation and transport. Place-based solutions, especially those developed with State government and local government buy-in and support, can play an important role in addressing these challenges.

The Migrant Workers’ Taskforce observed the poor standard of accommodation provided to many WHMs in the 2019 report and recommended that “the Minister write to the Prime Minister requesting that accommodation issues affecting temporary migrant workers be placed on the Council of Australian Governments (COAG) agenda to [work with] state and territory governments to address accommodation issues affecting temporary migrant workers — particularly working holiday makers undertaking ‘specified work’ in regional Australia”. The topic remains as relevant as it was at the time of the publication of the Migrant Workers’ Taskforce Report and would benefit from attention by the National Cabinet (formerly COAG).

One practical solution to address the issue of overcharging of WHMs in housing and transportation is through a ‘fair price’ index developed at local level. Based on inputs from a range of local actors such as WHMs, local residents, landlords, transport companies, trade unions and community organizations, governments could establish benchmark prices for different types of accommodation (e.g., shared housing, single rooms, apartments) and transport services (e.g., public transport fares, ride-sharing costs), ensuring the index reflects regional cost variations to account for differences in living expenses between urban and rural areas). The index would improve workers’ access to reliable market information, which the government could disseminate through an online platform/app where the index is published and updated. This platform could also provide information on which entity to contact to report instances of overcharging (local authorities, Department of Employment and Workplace Relations – for PALM approved employer-provided accommodation). The index could be updated (biannually, for example), to reflect changes in market conditions and ensure the data remains current.

By establishing and promoting a fair pricing index for accommodation and transport, WHMs can be empowered to make informed decisions about their accommodation and transport options, rather than being dependent on their employer for information. Combined with other complementary measures, WHMs may in future be better protected from excessive charges, making their stay in Australia more financially manageable and reducing the risk of exploitation and modern slavery.

Recommendation 4: Ensure WHMs have the same rights as national workers to social protection and support services

A key factor for why WHMs may be vulnerable to coercion on the part of an employer is the financial precariousness that results from limited access to social safety nets.

As noted by organizations such as the Migrant Workers' Centre (informed by voices of WHMs themselves), such workers should be eligible for Medicare enrolment.⁴² In this respect, Australia can look to effective systems in other countries as benchmarks. For instance, in the UK, WHMs are covered by the National Health Service (NHS) which provides a comprehensive range of services.⁴³ Similarly, in South Korea, all temporary residents staying longer than six months must register for the National Health Insurance.

WHMs should also have access to the Fair Entitlement Guarantee (FEG) – a federal scheme protecting workers from employer bankruptcy – which is currently only available to Australian citizens and permanent residents. Currently, WHMs are not only vulnerable to withholding of wages, but also loss of their entitlements if the company goes bankrupt or 'phoenixes' (which may be especially common in the case of labour hire companies). Having eligibility under the *Fair Entitlements Guarantee Act 2012* (Cth) would help to protect them from financial destitution and risk of exploitation.⁴⁴

Finally, a more comprehensive approach to providing services and support at a local level – to WHMs, PALM workers, and other migrant workers (including refugees and long-term migrants) can be an effective way of ensuring that no one is 'left behind', while also reducing duplication. That is, providing inclusive legal, humanitarian and other support services through a comprehensive approach can lead to better resource allocation, reducing redundancy and ensuring that all workers receive appropriate and timely support. For example, many refugee programs already have established networks for providing legal assistance, language training, and social services. Extending these services to WHM and PALM workers, with appropriate resourcing, would help them navigate the complexities of their employment conditions and reduce their vulnerability to exploitation.

A more ambitious, longer-term reform could see the setting up of regional migrant hubs that serve as central points for all migrant workers, including WHMs, PALM workers, refugees, and other migrants. These hubs could provide a range of culturally-informed services, from legal assistance and health care to housing support and employment counselling. The centres could also organize training and education for workers and be supplemented with mobile outreach services to reach workers in remote areas, ensuring they receive consistent support regardless of their location.

⁴² Migrant Workers Centre, 2020. Submission to the Joint Standing Committee on Migration regarding the Inquiry into the Working Holiday Maker Program (24 July 2020).

⁴³ The equivalent scheme in the UK is called the Youth Mobility Scheme. Applicants on this scheme must pay an immigration health surcharge.

⁴⁴ Migrant Workers Centre, above n42.

Conclusion

This Submission has addressed two key questions on reforming the WHM Program and ensuring consistent approaches to lower-paid migration. It highlighted that current WHM policy settings increase vulnerability to modern slavery, particularly forced labour, among some WHMs. Additionally, these policies may negatively impact more regulated programs like the PALM scheme by incentivizing employers to preference WHMs over PALM workers for cost-saving reasons. The submission advocates for a systemic approach to managing lower-paid migrant workers across various visa categories, proposing the removal of the 'specified work' rule for WHM visa extensions. Should these requirements remain, more stringent protective measures should be implemented to safeguard both WHMs and PALM workers. Additionally, there should be an enhanced role for State governments and local authorities to address issues such as overcharging and unfair deductions, particularly in cases of rural accommodation and transportation. Finally, it is crucial to ensure that WHMs receive the same social protection and support services as national workers and permanent migrants, fostering a fair and equitable working environment for all.

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