

## I RESEARCH ASSIGNMENT

### *A Research Question*

Do economic influences on Australian small agricultural businesses create pressures to implement conditions for migrant-workers and ‘backpackers’ that may amount to exploitation that amounts to human trafficking and modern-day slavery? If so, what measures can policy makers take to offer a criminal deterrence against such behaviour or to incentivise legitimate pursuits of profit?

### *B Introduction*

Economic influences operate upon Australian small agricultural businesses that may incentivise operators to implement conditions for workers amounting to human trafficking. The theory relied upon draws on the seminal work of Becker. Becker has theorised that an individual will make a rational choice to engage in criminal activity where ([expected gains from crime] minus [expected legal sanctions]) are greater than [expected legitimate income].<sup>1</sup>

This paper will draw on examples of trafficking applied to migrant workers in the small agricultural sector with reference to Becker’s theory and examine a combination of government and industry policy, to determine the limitations of the current mesh of measures and to suggest improvements to reduce actual or perceived gains of criminal conduct.

### *C The Agricultural Sector in Australia*

The agriculture sector is important to Australia and is considered one of five globally significant Australian industries.<sup>2</sup> In 2009-2010 when the sector and all value-adding processes and activities supporting agriculture production were considered the sector

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<sup>1</sup> W. Kip Viscusi ‘Market Incentives for Criminal Behaviour’ in Richard B. Freeman and Harry J. Holzer (ed). *The Black Youth Employment Crisis* (University of Chicago Press, 1986) 301.

<sup>2</sup> Australian Government, Australian Trade and Investment Commission, *Why Australia Benchmark Report 2020*.

contributed to GDP to the amount of \$155 billion dollars or 12% of GDP.<sup>3</sup> At the time of the last census agriculture was Australia's single biggest contributor to GDP growth amounting to 0.5% of the 1.9% rise in GDP in the 2016-17 financial year.<sup>4</sup>

The agricultural sector's linkages to other supply chains highlights the criticality of the importance of being able to identify human trafficking in the vast supply chain it supports. For example, in 1998-99 the majority of agricultural output was used as an intermediate input for other sectors,<sup>5</sup> and while in 2010-11 there were approximately 307,000 people employed in the sector, there were 1.6 million employed when the entire supply chain was considered.<sup>6</sup>

#### D *Human Trafficking & Modern-Day Slavery*

The terms 'Human Trafficking' and 'Modern Day Slavery' are often used interchangeably. This paper uses the definitions from the *Modern Slavery Act 2018* (Cth) (MSA)<sup>7</sup> and refers to offences that would be an offence under sections 270<sup>8</sup> or 271<sup>9</sup> of the *Criminal Code 1995* (Cth) (CC) particularly forced labour.<sup>10</sup>

#### E *Exploitative Criminal 'expected benefits'*

Two categories of 'expected benefits' are explored including current drivers leading to an expectation of benefits and the factors tempering those expectations. These categories are:

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<sup>3</sup> National Rural Health Alliance Ltd, 'Economic contribution of regional, rural and remote Australia', *National Rural Health Alliance Ltd* (Webpage), <<https://www.ruralhealth.org.au/book/economic-contribution-regional-rural-and-remote-australia>>.

<sup>4</sup> Ray Johnson, 'Agriculture is now the powerhouse driving economic growth in Australia', *Agricultural Appointments* (Blog), 15 September 2017, <<https://www.agri.com.au/agriculture-is-now-the-powerhouse-driving-economic-growth-in-australia/>>.

<sup>5</sup> Australian Government, Productivity Commission, *Trends in Australian Agriculture, Productivity Commission Research Paper* (2005).

<sup>6</sup> National Rural Health Alliance Ltd, 'Economic contribution of regional, rural and remote Australia', *National Rural Health Alliance Ltd* (Webpage), <<https://www.ruralhealth.org.au/book/economic-contribution-regional-rural-and-remote-australia>>.

<sup>7</sup> *Modern Slavery Act 2018* (Cth).

<sup>8</sup> *Criminal Code 1995* (Cth) div 270.

<sup>9</sup> *Ibid* div 271.

<sup>10</sup> *Ibid* s 270.6.

‘profits to the farm or farmer, including the avoidance of loss’ and ‘profits to labour hire firms (LHF), or consultants’.

### 1 *Profit to Farms and Farmers*

Australian farms are historically small, family run businesses<sup>11</sup>, however market volatility and continual decline in terms of trade have gradually pushed the agricultural sector towards seeking economies of scale.<sup>12</sup> The Australian agriculture sector has always been one of Australia’s most volatile industries which effects output<sup>13</sup> seeking profit through scale offers an attractive proposition. There is however no guarantee that larger farms will lead to higher profits and attempting to do so often leads farmers to take risky investment decisions which often fail.<sup>14</sup> In addition there are those that are rejecting economies of scale in favour of looking for other ways to maximise profit.<sup>15</sup> Because of the economic headwinds facing many Australian farmers there are those who may feel compelled to engage in illegal activity in order to maximise their profits. Some have suggested that “to adequately address the issues, we must first understand why some farmers feel they have no choice but to act illegally”.<sup>16</sup>

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<sup>11</sup> Australian Government, Productivity Commission, *Trends in Australian Agriculture, Productivity Commission Research Paper* (2005).

<sup>12</sup> Jackson, T & Martin, ‘*Trends in the size of Australian farms*’, *Agricultural Commodities*, vol. 4, no. 3, pp. 122–131, viewed 23 August 2020.

<<https://search.ebscohost.com/login.aspx?direct=true&db=edsibc&AN=edsibc.635300971654194&site=eds-live&scope=site>>.

<sup>13</sup> Australian Government, Productivity Commission, *Trends in Australian Agriculture, Productivity Commission Research Paper* (2005) p 17.

<sup>14</sup> Jackson, T & Martin, ‘*Trends in the size of Australian farms*’, *Agricultural Commodities*, vol. 4, no. 3, pp. 122–131, viewed 23 August 2020.

<<https://search.ebscohost.com/login.aspx?direct=true&db=edsibc&AN=edsibc.635300971654194&site=eds-live&scope=site>>.

<sup>15</sup> Newsome, L 2020, ‘*Beyond “get big or get out”: Female farmers’ responses to the cost-price squeeze of Australian agriculture*’, *Journal of Rural Studies*, vol. 79, pp. 57–64, viewed 23 August 2020,

<<https://search.ebscohost.com/login.aspx?direct=true&db=edselp&AN=S0743016719314597&site=eds-live&scope=site>>

<sup>16</sup> National Farmer’s Federation, ‘Worker shortage holds farmers to ransom’, *National Farmer’s Federation* (Blog, 8 March 2019) <<https://nff.org.au/media-release/worker-shortage-holds-farmers-to-ransom/>>.

## 2 Challenges in Obtaining Labour

Obtaining labour to conduct seasonal farm-work is a challenge, much of labour force is provided by migrant labour, with many being channelled to complete 88 days of farm work under the Australian Governments 417 visa scheme<sup>17</sup> requiring young foreign workers wishing to extend their working holiday visa in Australia for a further 12-months to complete this work.<sup>18</sup> Labour shortages are common<sup>19</sup> and this issue has been exacerbated by the recent border closures in response to the COVID-19 pandemic.<sup>20</sup>

This difficult labour market coupled and a race against time to get produce to market instead of it 'withering-on-the-vine' has led to large numbers of farmers becoming dependant on 'unreliable and ill-suited forms of labour'.<sup>21</sup> The former President of the Australian Blueberry Grower's Association said 'You've got to get the crop off and you get who you can'.<sup>22</sup> The National Farmer's Federation (NFF) has suggested this results in conditions where some farmers determine they have no choice but to hire 'undocumented' migrants remaining in Australia in breach of visa conditions.<sup>23</sup> Some farmers have admitted that economic pressures also compel them to engage in practices contrary to Australian labour standards<sup>24</sup> including underpayments, poor accommodation, threats and violence.<sup>25</sup>

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<sup>17</sup> Australian Government Department of Home Affairs, 'working holiday visa (subclass 419) first working holiday visa', *Department of Home Affairs*, (Webpage, 18 June 2020) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/work-holiday-417/first-working-holiday-417>>.

<sup>18</sup> Australian Government Department of Home Affairs, 'working holiday visa (subclass 419) second working holiday visa', *Department of Home Affairs*, (Webpage, 18 June 2020) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/work-holiday-417/second-working-holiday-417>>.

<sup>19</sup> Mares, P., 2005, July. 'Seasonal migrant labour: a boon for Australian country towns.' *2nd Future of Australia's country towns conference* (pp. 11-13).

<sup>20</sup> Neef A. 'Legal and social protection for migrant farm workers: lessons from COVID-19.' *Agriculture and Human Values*. 2020 May 19:1.

<sup>21</sup> National Farmer's Federation, 'Worker shortage holds farmers to ransom', *National Farmer's Federation* (Blog, 8 March 2019) <<https://nff.org.au/media-release/worker-shortage-holds-farmers-to-ransom/>>.

<sup>22</sup> <https://www.abc.net.au/news/2020-09-15/backpacker-farm-workers-speak-of-wage-exploitation/12545294?nw=0>

<sup>23</sup> Howe, J., Clibborn, S., Reilly, A., van den Broek, D., Wright, C, 2015, 'Towards a durable future: tackling labour challenges in the Australian horticulture industry', The University of Sydney.

<sup>24</sup> National Farmer's Federation, 'Worker shortage holds farmers to ransom', *National Farmer's Federation* (Blog, 8 March 2019) <<https://nff.org.au/media-release/worker-shortage-holds-farmers-to-ransom/>>.

<sup>25</sup> Andreas Schloenhardt & Jarrod Jolly, *Trafficking in Persons in Australia myths and realities* (LexisNexis Butterworths 1<sup>st</sup> ed, 2013) p 55.

(a) *Underpayment of Agricultural Labour*

The extent of underpayment is anecdotally very high, with Alan Fells, who chaired Federal Government's Migrant Workers' Taskforce between 2016 and 2018 stating that "there would be several hundreds of thousands of people underpaid."<sup>26</sup>

The remote and isolated nature of many farms coupled with the seasonal and transitory nature of the workforce leads to an obfuscation of the worker's plights which may offer an opportunity to engage in exploitative practices including underpayment<sup>27</sup> and while 'undocumented' workers are at a comparatively higher risk of exploitation many farmers engaged in non-compliant practices do so inadvertently, compelled by the economic imperative to harvest or plant their time sensitive crops without the capacity to engage in due diligence, else forgo the season's income.<sup>28</sup> Not all exploitation is inadvertent though and there are 'rogue labour hire' firms deliberately exploiting this workforce.<sup>29</sup>

3 *Profit to Labour Hire Firms and Consultants*

LHF act as 'middle-man' between workers and farms. The Recruitment and Consulting Services Association (RCSA) says some small farm operators are overborne by economic pressures or naïve and do not make reasonable enquires into the nature of the labour they are supplied to ensure that exploitative practices are not employed.<sup>30</sup> Additionally criminal syndicates operating outside of the agricultural industry are setting out to deliberately exploit foreign labour.<sup>31</sup>

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<sup>26</sup>Katri Uibu, 'There are new human rights here', *ABC News Online*, (Online, 15 September 2020) <<https://www.abc.net.au/news/2020-09-15/backpacker-farm-workers-speak-of-wage-exploitation/12545294?nw=0>>.

<sup>27</sup> International Labour Organisation, *Profits and Poverty: The economics of forced labour*, (2014).

<sup>28</sup> National Farmer's Federation, 'Worker shortage holds farmers to ransom', *National Farmer's Federation* (Blog, 8 March 2019) <<https://nff.org.au/media-release/worker-shortage-holds-farmers-to-ransom/>>.

<sup>29</sup> Kath Sullivan and Bridget Fitzgerald, 'Australian farmer' reliance on illegal labour as exploitation is readily accepted, report say, *ABC News Online*, (Online, 12 March 2019) <<https://www.abc.net.au/news/rural/2019-03-08/farm-labour-report-says-farmers-rely-on-illegal-labour/10881832>> and *Inspector Hortle v Aprint* [2007].

<sup>30</sup> Kath Sullivan and Bridget Fitzgerald, 'Australian farmer' reliance on illegal labour as exploitation is readily accepted, report say, *ABC News Online*, (Online, 12 March 2019) <<https://www.abc.net.au/news/rural/2019-03-08/farm-labour-report-says-farmers-rely-on-illegal-labour/10881832>>.

<sup>31</sup> Katri Uibu, 'There are no human rights here', *ABC News Online*, (Online, 15 September 2020) <<https://www.abc.net.au/news/2020-09-15/backpacker-farm-workers-speak-of-wage-exploitation/12545294?nw=0>>.

Some of the motives behind these organisations are more obvious than others for example, simply paying the workers a low rate of income, and charging the farmer a higher rate of income immediately results in increased profits. One method in which this type of exploitation can occur can be found in the complaints made by an alleged victim who has contacted the Fair Work Ombudsman (FWO) and has indicated that she was paid such a low rate that after working for two-months had only managed to save \$AUD70.<sup>32</sup> One method used by firms and farms is to contract migrant workers to be remunerated on a ‘piece-rate’ which compensates them based on, for example the number of plants they are able to pick or plant. Oftentimes the level of transparency behind how these rates were determined was absent. This contrasts with the way in which most Australian’s are engaged in wage work, compensated at protected hourly rates.<sup>33</sup> The current national minimum wage in Australia is \$19.84 an hour<sup>34</sup> however one alleged victim says that she received an effective rate of pay at a strawberry plantation of just \$2.50 per hour.<sup>35</sup>

LHF also exploit the migrant worker’s need for housing, in remote locations where options may be limited. For example, one victim has alleged that upon entering into an arrangement with a certain LHF she was made to stay in accommodation provided by the organisation at a cost to her of \$AUD125 dollars per week. This arrangement allegedly remained during her two-month engagement with the firm despite only being offered 16 days or paid work.<sup>36</sup>

Another alleged method used by LHF has been asking the victims of their exploitation to act, effectively as recruitment agents for further victims,<sup>37</sup> this opens up victims to criminal liability themselves.<sup>38</sup> One victim alleged she was offered \$AUS100 for each worker she could encourage to engage with the LHF.

#### F *Expectation of Legal Sanctions*

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<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Australian Government, ‘Employees pay, leave and entitlements’ *business.gov.au* (Webpage, 1 September 2020) <<https://www.business.gov.au/people/pay-and-conditions/employees-pay-leave-and-entitlements>>.

<sup>35</sup> Katri Uibu, ‘There are no human rights here’, *ABC News Online*, (Online, 15 September 2020) <<https://www.abc.net.au/news/2020-09-15/backpacker-farm-workers-speak-of-wage-exploitation/12545294?nw=0>>.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> *Criminal Code 1995* (Cth) div 271.

This section explores why farmers and LHF do not expect legal sanctions and reforms aimed at increasing these expectations. Factors explored include lack of education amongst farmers, LHF and victims, the remote nature of many of the workplaces leading to a lack of detection, a limited number of prosecutions relative to the number of complaints received, and inadequate penalties.

### *1 Lack of Education and Transparency*

It has been stated by the RCSA that many farmers are not in a position to determine if the workers provided through LHF are entitled to work in Australia and are receiving the pay and conditions to which they are legally entitled.<sup>39</sup> There are a number of proposed and extant initiatives discussed below.

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<sup>39</sup> Kath Sullivan and Bridget Fitzgerald, 'Australian farmer' reliance on illegal labour as exploitation is readily accepted, report say, *ABC News Online*, (Online, 12 March 2019) <<https://www.abc.net.au/news/rural/2019-03-08/farm-labour-report-says-farmers-rely-on-illegal-labour/10881832>>.

*(a) Worker Education*

In 2015 the Abbott government attempted to educate the potential victims by putting the onus of receiving adequate rates of pay on workers potentially at risk of exploitation by ensuring that they provided payslips or other evidence showing that they were adequately paid as a condition of seeking an extension for their second year visa.<sup>40</sup> Given the discrepancy in bargaining power between workers and their employers coupled with the fact that workers may still be exploited and still lose any chance to stay in Australia for another year some have indicated that this does not represent an effective or equitable solution and more onus should be placed on the employers.<sup>41</sup>

*(b) Industry and Worker Education*

The NFF continues to lobby for a specific agricultural visa, their rationale being that this would assist farmers to know that workers engaged are in Australia legitimately and employed under conditions compliant with Australian law, and that their presence in Australia was known to relevant authorities.<sup>42</sup> The NFF goes a step further and has suggested that only farmers that demonstrate compliance with laws designed to end the exploitation in this sector could access the proposed visa scheme.<sup>43</sup> Industry has also taken matters into their own hands to educate both farmers and their customers. One initiative is GroCom's Fair Farm initiative (FFI).<sup>44</sup> The FFI's primary objective is to lift employment practices in the horticulture sector aimed at reducing the risks of exploitation of workers through training, certification and market enforcement.<sup>45</sup>

*(i) Training*

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<sup>40</sup> Katri Uibu, 'There are new human rights here', *ABC News Online*, (Online, 15 September 2020) <<https://www.abc.net.au/news/2020-09-15/backpacker-farm-workers-speak-of-wage-exploitation/12545294?nw=0>>.

<sup>41</sup> *Ibid.*

<sup>42</sup> Kath Sullivan and Bridget Fitzgerald, 'Australian farmer' reliance on illegal labour as exploitation is readily accepted, report say, *ABC News Online*, (Online, 12 March 2019) <<https://www.abc.net.au/news/rural/2019-03-08/farm-labour-report-says-farmers-rely-on-illegal-labour/10881832>>.

<sup>43</sup> *Ibid.*

<sup>44</sup> Fair Farms, 'About Fair Farms', *Fair Farms*, (Webpage, 2019) <<https://www.fairfarms.com.au/about-us/>>.

<sup>45</sup> *Ibid.*

The objective of training is to provide both farmers and any related businesses in the supply chain, including LHF with the information required to make informed decisions about who to hire and how to maintain compliance with the relevant employment practices.<sup>46</sup>

*(ii) Certification*

The initiative offers certification, which following any necessary training and auditing of the involved business the FFI participant can be issued with a certificate which is used to demonstrate that the business is compliant with the Fair Farms Standard.

*(iii) market enforcement*

Finally, something called ‘market enforcement’ is applied which is another type of education whereby the proponents of the initiative liaise with the buyers of fresh produce in order to encourage them to commit to only purchasing produce from certified suppliers. Woolworths has agreed to recognise this certification<sup>47</sup> and it was recently given additional weight with retail grocery giant Coles agreeing to accept FFI certification as evidence that suppliers complied with Coles’ ethical sourcing policy.<sup>48</sup>

The final link in this supply chain from the ‘farmgate to the plate’ is the end consumer, who attends the grocery store to purchase their fresh produce. It has been said that “industry [needs] to continue to work with retailers to encourage more equitable returns for produce and to better educate consumers on the true costs of producing food.”<sup>49</sup> It is held that this type of transparency and education can drive customers at all levels to prioritise consuming products which have been produced in a supply chains free of worker exploitation. This concept is discussed later.<sup>50</sup> Governments rarely rely on solely on voluntary or market led compliance and often robust detection and enforcement regimes are needed to further

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<sup>46</sup> Ibid.

<sup>47</sup> Woolworths Group, ‘Woolworths welcomes the launce of the Fair Farms Initiative’, *Woolworths Group*, (Webpage, 1 July 2019) <<https://www.woolworthsgroup.com.au/page/community-and-responsibility/corporate-responsibility-news-updates/prosperity/woolworths-welcomes-the-launch-of-the-fair-farms-initiative>>.

<sup>48</sup> Growcom, ‘Coles accepts Fair Farms Certification’ (Media Release 26 May 2020) <<https://www.growcom.com.au/2020/05/26/coles-accepts-fair-farms-certification/>>.

<sup>49</sup> National Farmer’s Federation, ‘Worker shortage holds farmers to ransom’, *National Farmer’s Federation* (Blog, 8 March 2019) <<https://nff.org.au/media-release/worker-shortage-holds-farmers-to-ransom/>>.

<sup>50</sup> See section G 1.

increase both the perception of and actual implementation of sanctions, unfortunately it appears perceptions that these methods are currently inadequate has led many employers to continue exploiting workers.

## *2 Lack of Detection, Prosecution, and Penalties*

There are currently a number of measures in place which are currently limited in their effectiveness, discussed below are the actions of the FWO, the new National Labour Hire Registration Scheme (NLHRS), the reporting obligations of the MSA<sup>51</sup>, and the criminal sanctions of the CC<sup>52</sup>. There appears that there may be a perceived lack of expectation of sanctions because of the limited effectiveness of each of these measures.

### *(a) Fair Work Ombudsman*

There is a perception that FWO enforcement is rare, and when applied rarely leads to a prosecution or sanction. Documents obtained by ABC under Freedom of Information requirements have found that the FWO who is the responsible body for ensuring compliance with workplace law received 1,647 formal complaints in the 2019-20 financial year related to migrant workers and of those 1,412 or 86% were dealt with via education and / or dispute resolution and the remaining 14% dealt with via compliance and enforcement activities.<sup>53</sup> Ultimately only 3% of the total complaints resulted in a compliance outcome.<sup>54</sup> The FWO defends this approach on the basis that it helps to “maintain productive and cooperative employment relationships”<sup>55</sup> however the former chair of both the Australian Competition and Consumer Commission and the Federal Governments Migrant Worker’s Task Force 2016 – 2018, Alan Fels has said that the “The FWO, for whatever reason, has not done enough to deliver adequate law enforcement in that area,” and that he still feels the FWO’s

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<sup>51</sup> *Modern Slavery Act 2018* (Cth).

<sup>52</sup> *Criminal Code 1995* (Cth).

<sup>53</sup> Katri Uibu, ‘There are new human rights here’, *ABC News Online*, (Online, 15 September 2020) <<https://www.abc.net.au/news/2020-09-15/backpacker-farm-workers-speak-of-wage-exploitation/12545294?nw=0>>.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

efforts are “inadequate, given the scale of the problem”.<sup>56</sup> This appears to be true when even conduct resulting in death is met only with a fine.<sup>57</sup>

*(b) National Labour Hire Registration Scheme*

In 2019 The Federal Government implemented the NLHRS which has been welcomed by many industry groups.<sup>58</sup> The Government implemented it in direct response to the complaints related to the labour hire industry which have been addressed in this paper<sup>59</sup>, as well as to address the growing number of criminal syndicates operating directly to exploit migrant workers.<sup>60</sup> These measures are however implemented on a state-by-state basis and is only currently operating in Queensland, South Australia and Victoria.<sup>61</sup> The scheme requires any LHF operating in these states to be licenced.<sup>62</sup> The onus is however on businesses that uses workers provided from the LHF to ensure that the provider is licensed. Penalties for non-compliance range up to AUD\$500,000.<sup>63</sup>

There are potential issues which include the state-based nature of the scheme, the onus being on the farmers, and the costs and complications of obtaining a licence. The Chief Financial Officer of the Bayside Group a labour hire firm has indicated that in order to obtain a licence the firm must have a proven track record of compliance with legal obligations.<sup>64</sup> The firm also has to pay an application fee, and ongoing fees, as well as the costs of administering the

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<sup>56</sup> Ibid.

<sup>57</sup> Tom Major, ‘Backpacker employer Bradford Clark Rosten fined \$65,000 over death linked to heat stress, *The New Daily*, (Online, 9 October 2020) < <https://thenewdaily.com.au/news/queensland/2020/10/09/backpacker-farm-death-heat-stress/>>.

<sup>58</sup> Kath Sullivan and Bridget Fitzgerald, ‘Australian farmer’ reliance on illegal labour as exploitation is readily accepted, report say, *ABC News Online*, (Online, 12 March 2019) < <https://www.abc.net.au/news/rural/2019-03-08/farm-labour-report-says-farmers-rely-on-illegal-labour/10881832>>.

<sup>59</sup> CPA Australia, ‘Labour hire licensing scheme: What you need to know’, *CPA Australia*, (Website, December 2019) < <https://www.cpaustralia.com.au/public-practice/toolkit/inpractice/labour-hire-licensing-scheme-what-you-need-to-know>>.

<sup>60</sup> Kath Sullivan and Bridget Fitzgerald, ‘Australian farmer’ reliance on illegal labour as exploitation is readily accepted, report say, *ABC News Online*, (Online, 12 March 2019) < <https://www.abc.net.au/news/rural/2019-03-08/farm-labour-report-says-farmers-rely-on-illegal-labour/10881832>>.

<sup>61</sup> CPA Australia, ‘Labour hire licensing scheme: What you need to know’, *CPA Australia*, (Website, December 2019) < <https://www.cpaustralia.com.au/public-practice/toolkit/inpractice/labour-hire-licensing-scheme-what-you-need-to-know>>.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> CPA Australia, ‘Labour hire licensing scheme: What you need to know’, *CPA Australia*, (Website, December 2019) < <https://www.cpaustralia.com.au/public-practice/toolkit/inpractice/labour-hire-licensing-scheme-what-you-need-to-know>>.

program.<sup>65</sup> The Bayside group for example has an entire team of workplace relations specialists and indicated that they still found the process difficult.<sup>66</sup> Where multiple certifications and licenses are required this can require additional administrative teams.<sup>67</sup> This risks smaller businesses being unable to comply or, where businesses do choose to comply to pass on the costs to their customers, the farmers who may be driven away from these higher priced toward the potentially LHRs engaging in exploitative practices such as ‘criminal syndicates’ and ‘gang-masters’.<sup>68</sup> While these new initiatives are welcomed, they cannot be looked at in isolation. Additional legislative measures including the MSA<sup>69</sup> and the CC<sup>70</sup> are in place to attempt to assure further compliance, with mixed success.

*(c) Modern Slavery Act 2018*

The MSA<sup>71</sup> is another relatively new federal government initiative. The objective of the Act is to ensure that large organisations create a regimen to identify and eliminate human trafficking and modern-day slavery from their supply chains.<sup>72</sup> The legislation only creates this obligation for businesses earning over \$AUD100 million dollars (the reporting entity).<sup>73</sup> The obligations includes identifying any modern slavery in supply chains and to create risk management plans to eliminate and prevent it, and to provide a modern slavery statement indicating the extent to which the organisation complies with their obligations.<sup>74</sup> This once again places the onus on a person other than the small agricultural concern which is the subject of our paper. Theoretically any organisation within the reporting entities supply chain to be included in the risk assessment, however for large organisations like Coles and Woolworths the number of components in their supply chains can be large and complex and the cost of compliance for large organisations to thoroughly and proactively investigate each small supplier may be outweighed by the lack of expectation in sanctions. The Act currently

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<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Dietz T, Estrella Chong A, Grabs J, Kilian B. ‘How effective is multiple certification in improving the economic conditions of smallholder farmers? Evidence from an impact evaluation in Colombia’s Coffee Belt.’ *The Journal of Development Studies*. 2020 Jun 2;56(6):1141-60.

<sup>68</sup> Kath Sullivan and Bridget Fitzgerald, ‘Australian farmer’ reliance on illegal labour as exploitation is readily accepted, report say, *ABC News Online*, (Online, 12 March 2019)< <https://www.abc.net.au/news/rural/2019-03-08/farm-labour-report-says-farmers-rely-on-illegal-labour/10881832>>.

<sup>69</sup> *Modern Slavery Act 2018* (Cth).

<sup>70</sup> *Criminal Code 1995* (Cth).

<sup>71</sup> *Modern Slavery Act 2018* (Cth).

<sup>72</sup> Law Council of Australia, ‘Modern Slavery Act’ (Factsheet, Law Council of Australia, July 2020).

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

does not include any penalties, nor is there a requirement for the modern slavery statement to be independently verified audited or assured.<sup>75</sup> This effectively means that larger organisations may simply ask their suppliers to ensure them that their operations are free from modern slavery and take at ‘face-value’ their responses, of course increasing the prevalence of initiatives like the FFI<sup>76</sup> can assist larger organisations in this regard to voluntarily request independent assurance. These initiatives will not ensure compliance from those who do not have the time or knowledge to properly investigate their own operations, or those suppliers who choose to be unscrupulous. The lack of enforcement measures in the Act do not mean that it is a completely ineffective mechanism in terms of Becker’s theory, the ability for the Government to publish details of a non-compliant organisation may impact upon the organisations expectations of legitimate profits, perhaps to obtain certification as an ethical supplier smaller farms may need to be proactively involved in their customers modern slavery statement further discussed below.<sup>77</sup> While the MSA does not provide for criminal sanctions for the kinds of offences discussed in this paper, the CC<sup>78</sup> does.

*(d) Commonwealth Criminal Code*

The CC<sup>79</sup> criminalises some of the potential alleged offences already discussed in this paper where they could be categorised as forced labour.<sup>80</sup> However the lower expectation of criminal sanctions from this legislation is likely to be driven by a number of the factors this paper has already discussed including the remote and isolated nature of the labour force,<sup>81</sup> a lack of understanding from the alleged perpetrators that what they are engaged in is a serious crime of this nature,<sup>82</sup> and perhaps most importantly for those determined to break the law the low rate of success in prosecuting these crimes. Between 2004 and 2017 more than 750 human trafficking and slavery cases were referred to the Australian Federal Police (AFP)

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<sup>75</sup> Ibid.

<sup>76</sup> See section F 1 (b).

<sup>77</sup> See section G 1.

<sup>78</sup> *Criminal Code 1995* (Cth).

<sup>79</sup> Ibid.

<sup>80</sup> *Criminal Code 1995* (Cth) s 270.6.

<sup>81</sup> Ibid.

<sup>82</sup> Kath Sullivan and Bridget Fitzgerald, ‘Australian farmer’ reliance on illegal labour as exploitation is readily accepted, report say, *ABC News Online*, (Online, 12 March 2019) <<https://www.abc.net.au/news/rural/2019-03-08/farm-labour-report-says-farmers-rely-on-illegal-labour/10881832>>.

resulting in just 20 successful prosecutions.<sup>83</sup> A charge for forced labour can be successfully prosecuted where a reasonable person in place of the victim due to coercion, threat or deception finds themselves in a position not to be free to cease providing their labour or leave the place where the labour is provided.<sup>84</sup> This coercion does not have to mean that escape was practically impossible, and the current definition in the CC considers that the labour can be obtained through more subtle forms of coercion, rather than through force or threats.<sup>85</sup> Relevant factors in the reasonable person test include the economic relationship between the victim and offence, the terms of any agreement between them and the personal circumstances of the victim including their lawful presence in Australia, understanding of the English language and their social and physical dependence on the alleged offender.<sup>86</sup> There are circumstances in which the alleged victims we have discussed would meet the criteria for this test, however it also may be due to the very same circumstances they find themselves in that they are reluctant to come forward, and that knowing this the alleged offenders may not apprehend an expectation of criminal sanction.

For example many of the alleged victims discussed in this paper have spoken of their accommodation being provided by their employer, meaning if they were to complain they may forfeit a place to live others have also spoken of the geographical isolation, which may mean that the alleged victims are unable to afford to immediately leave the area we have also discussed the issue of backpackers wanting to secure their second year visa extension by carrying out work in the agricultural sector as well as the fact that some migrant workers may not be legally allowed to stay and or work in Australia and risk deportation if they speak up.<sup>87</sup> All of these factors may discourage victims from coming forward and from providing evidence to aid prosecution because of the potential consequences to the victims. This is another reason why increased transparency and education through for example FFI and the NLHRS, may provide an additional barrier between victims and exploitation by making it clear to workers, customers, consumers and what it means to be an accredited organisation and what kind of behaviour to expect and how to encourage this using market forces<sup>88</sup> which

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<sup>83</sup> Parliament of Australia, 'Inquiry into establishing a Modern Slavery Act in Australia 7. Criminal justice responses', *Parliament of Australia* (Webpage, 15 February 2017) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/ModernSlavery/Final\\_report/section?id=committees%2Freportjnt%2F024102%2F25297](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Final_report/section?id=committees%2Freportjnt%2F024102%2F25297)>.

<sup>84</sup> *Criminal Code 1995* (Cth) s 270.6.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Australian Meat Holdings v Kazi* [2004] QCA 14.

<sup>88</sup> See section G 1.

may represent a critical part of the final thread of Becker's theorem to provide incentive to comply with the law, through the expectation of legitimate profits.<sup>89</sup>

### *G Expected Legitimate Income*

Some farmers appear to turn to illegal methods of obtaining labour as they feel that without resorting to these methods that their expectation of legitimate profits will be diminished.<sup>90</sup> This section discusses factors that negatively influence the expectation of legitimate profits and tools available to policy makers to increase that expectation. Timely access to labour is paramount to the agricultural sector, without the right labour at the right time farmers are forced to forgo legitimate profits. The NFF's 2030 roadmap has concluded that solving the deficit of labour in the agricultural workforce is an essential element to achieving a farm gate annual output value of \$AUD100 billion by 2030.<sup>91</sup> The NFF has highlighted dual objectives of improving farmers' profits and the wages of workers and has recognised that the wages represent one of the largest portions of farm related expenditure.<sup>92</sup> Reforms aimed at reducing the exploitation of workers in this sector must be met with an increase in the timely supply of 'legitimate labour'.<sup>93</sup> Other profit maximisation methods are also required to ensure that reforms do not simply result in an increase in labour costs and ultimately to a reduction in farm profits, which according to Becker would drive some operators to continue to look for ways to commit crimes in order to maximise profits.<sup>94</sup>

#### *1 Consumer Led Expected Income*

As well as increasing labour supply some other ways of maximising the expectation of legitimate income may be to educate consumers and retailers about the real costs of food production and encourage a consumer led drive towards more equitable returns for farmers. This paper has highlighted above initiatives like the FFI and the NLHRS however this paper suggests that a lack of consumer knowledge about the plight of migrant workers maybe

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<sup>89</sup> W. Kip Viscusi 'Market Incentives for Criminal Behaviour' in Richard B. Freeman and Harry J. Holzer (ed). *The Black Youth Employment Crisis* (University of Chicago Press, 1986) 301.

<sup>90</sup> See section E 2.

<sup>91</sup> National Farmers' Federation, '2030 Road Map Australian agricultures plan for a \$100 billion industry' <[https://nff.org.au/wp-content/uploads/2020/02/NFF\\_Roadmap\\_2030\\_FINAL.pdf](https://nff.org.au/wp-content/uploads/2020/02/NFF_Roadmap_2030_FINAL.pdf)>

<sup>92</sup> National Farmer's Federation, 'Worker shortage holds farmers to ransom', *National Farmer's Federation* (Blog, 8 March 2019) <<https://nff.org.au/media-release/worker-shortage-holds-farmers-to-ransom/>>.

<sup>93</sup> See section G 2.

<sup>94</sup> W. Kip Viscusi 'Market Incentives for Criminal Behaviour' in Richard B. Freeman and Harry J. Holzer (ed). *The Black Youth Employment Crisis* (University of Chicago Press, 1986) 301.

skewing an organisations perception of the increased legitimate profits at stake by being legally compliant. It is suggested that industry and policy-makers may take this a step further and implement a household, consumer-based branding campaign to encourage consumers to only purchase agriculture produce that has been shown to be free from exploitative agricultural practices.

Industry groups and policy makers may consider the adoption of a highly visible marketing campaign perhaps by making use of a logo to identify to consumers which products are produced in a manner free from modern slavery, for example that the product has been produced with FFI sourced produce. There is some evidence that consumers are willing to pay a premium for products that uphold social values or point to sustainable and ethical practices.<sup>95</sup> On the other hand obtaining certification is not a cost-free option<sup>96</sup> discussed above<sup>97</sup> and price premiums alone do not translate to higher profits when balanced against additional costs.<sup>98</sup> In Colombia's small-scale coffee industry additional levels of certification did not translate to additional economic benefits.<sup>99</sup> For these reasons any efforts made by industry and policy makers to capitalise on a marketing initiative leading to premium prices accruing to farmers must carefully balance strategies to minimise costs and maximise efficacy. Effective initiatives of this nature have been found to include public information campaigns which accompany the use of a logo<sup>100</sup> to increase consumers' understanding of the meaning behind the logo. Visibility of the logo has also been found to be more effective in attracting consumers to purchase the products.<sup>101</sup> Other strategies include ensuring that products bearing the logo are placed in a specific section of retailers premises, alongside other ethically or sustainably sourced products or by Using the products in public catering

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<sup>95</sup> Annunziata A, Mariani A, Vecchio R. 'Effectiveness of sustainability labels in guiding food choices: Analysis of visibility and understanding among young adults.' *Sustainable Production and Consumption*. 2019 Jan 1;17:108.

<sup>96</sup> Ibid p 108. and Dietz T, Estrella Chong A, Grabs J, Kilian B. 'How effective is multiple certification in improving the economic conditions of smallholder farmers? Evidence from an impact evaluation in Colombia's Coffee Belt.' *The Journal of Development Studies*. 2020 Jun 2;56(6): p 1142.

<sup>97</sup> Internal reference

<sup>98</sup> Dietz T, Estrella Chong A, Grabs J, Kilian B. 'How effective is multiple certification in improving the economic conditions of smallholder farmers? Evidence from an impact evaluation in Colombia's Coffee Belt.' *The Journal of Development Studies*. 2020 Jun 2;56(6):p 1158.

<sup>99</sup> Dietz T, Estrella Chong A, Grabs J, Kilian B. 'How effective is multiple certification in improving the economic conditions of smallholder farmers? Evidence from an impact evaluation in Colombia's Coffee Belt.' *The Journal of Development Studies*. 2020 Jun 2;56(6):p 1157.

<sup>100</sup> Annunziata A, Mariani A, Vecchio R. 'Effectiveness of sustainability labels in guiding food choices: Analysis of visibility and understanding among young adults.' *Sustainable Production and Consumption*. 2019 Jan 1;17: p 114.

<sup>101</sup> Ibid p 109.

settings, such as universities or the cafeterias of the military and civil service buildings accompanied with an education campaign has been another suggested method for increasing efficacy.<sup>102</sup> Finally it has been suggested that labelling practices have a strong impact on public perceptions of such initiatives<sup>103</sup> and involving consumers in the logo design process might lead to a greater level of efficacy.<sup>104</sup> The Australian Government may be particularly interested in this strategy given recent public controversy related to a new made in Australia logo.<sup>105</sup> As promising as such demand side initiatives are, industry and Governments should also look to the supply side reforms.

## *2 Labour Market Led Expected Profits*

Currently the use of certain forms of migrant labour including those on working holiday class 417 visas have offered farmers an option that currently makes labour available to them legitimately amidst ongoing labour shortages,<sup>106</sup> but has also been shown to increase the risk of exploitation for these individuals. It has been argued that this visa scheme is ‘providing farmers the easy option’<sup>107</sup> and that ‘experts<sup>108</sup> and workers’ unions have called for the visa program to be shut down due to its exploitative nature’<sup>109</sup> however removing this scheme without replacing it ‘could cost the Australian economy \$13 billion’.<sup>110</sup> Therefore governments should strongly consider the lobbying from industry to implement an agricultural visa to create a legitimate means of maximising legitimate supply side cost advantages, as discussed above.<sup>111</sup>

## *H Conclusion*

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<sup>102</sup> Ibid p 114.

<sup>103</sup> Ibid

<sup>104</sup> Ibid

<sup>105</sup> Emily Sakzewski ‘Is the famous Australian Made kangaroo logo really changing?’, *ABC News Online* (online, 1 July 2020) <<https://www.abc.net.au/news/2020-07-01/is-the-famous-australian-made-kangaroo-logo-really-changing/12410214>>.

<sup>106</sup> Neef A. ‘Legal and social protection for migrant farm workers: lessons from COVID-19.’ *Agriculture and Human Values*. 2020 May 19:1.

<sup>108</sup> Doyle, J and Howes, S., *Australia’s Seasonal Worker Program: Demand-side constraints and suggested reforms* <<https://openknowledge.worldbank.org/bitstream/handle/10986/21491/943680WP0Box380nd0Suggested0Reforms.pdf?sequence=2>>

<sup>109</sup> Katri Uibu, ‘There are new human rights here’, *ABC News Online*, (Online, 15 September 2020) <<https://www.abc.net.au/news/2020-09-15/backpacker-farm-workers-speak-of-wage-exploitation/12545294?nw=0>>.

<sup>110</sup> Ibid.

<sup>111</sup> Internal ref

This paper has explored examples of worker exploitation which may amount to at best non-compliance with Australian workplace law, through human trafficking and modern-day slavery at the more extreme end of the spectrum. By applying Becker's theorem this paper explored several drivers as to why operators in the Australian agricultural sector may be driven to commit these crimes due to a low expectation of criminal sanctions, compared with a relatively higher profit from engaging in the conduct relative to the expected profits of operating legitimately. This paper has explored constraints inherent in Australia's compliance framework which should be further researched and strengthened. In addition, this paper has propped that education and awareness campaigns should be implemented at levels of the supply chain. Finally, the paper has outlined two potential reforms that may increase expected economic benefits through potential demand-side and supply-side reforms. This paper recommends conducting further research including identifying other strategies for increasing perceived economic benefits including reforms to increase market access for small agricultural concerns, providing marketing assistance and support to farmers,<sup>112</sup> this paper then recommends further research into these methods, those mentioned in this paper and other novel approaches to apply Becker's theory to increase compliance and to subject these methods to a cost benefit analysis before applying them to the sector.

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<sup>112</sup> Dietz T, Estrella Chong A, Grabs J, Kilian B. 'How effective is multiple certification in improving the economic conditions of smallholder farmers? Evidence from an impact evaluation in Colombia's Coffee Belt.' *The Journal of Development Studies*. 2020 Jun 2;56(6):p 1158.

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