

Introduction

AUSVEG has played a leading role with several industry and government organisations to improve non-compliance within the vegetable and potato industry, as well as the wider horticulture industry.

There are several important aspects to this discussion, including a high proportion of undocumented workers in the horticulture workforce, high rates of non-compliance, a complex award structure and the importance of a level-playing field in the sector.

The Fair Work Ombudsman's Harvest Trail report in 2018 found that 56% of the Australian horticulture industry was non-compliant. While the majority of these were relatively minor misdemeanors, there was no doubt the findings were alarming.

AUSVEG has since invested in and supported Fair Farms, an industry-led program run by Queensland member organisation Growcom that is designed to educate growers on their employer obligations. AUSVEG is continuing to support the roll out of the program nationally.

The program, which is still largely in its infancy since being launched nationally in June 2019, has now grown to have more than 80 registered farms in the process of becoming accredited Fair Farms businesses.

One of the main issues for employers and employees in horticulture is gaining a clear understanding of the industry award. This was made even more complicated with the recent introduction of overtime for casuals to the Horticulture Award, where an introductory period of just two weeks was allowed for growers, in an industry which already had severe non-compliance rates, to understand and then build into their businesses. This became significantly problematic particularly for growers with a large number of employees, as well as smaller businesses that possess a limited understanding of human resources and lack the ability to outsource Human Resources support.

This has been supported by the FWO through its Awards in Action program, but that program is still in its early stages of its roll out. There has already been significant feedback to the FWO from growers that the award is complicated and hard to read and/or understand.

The discussion paper raises the distinction between people who unknowingly make honest mistakes through misinterpretation of the award and become non-compliant, against those who are purposefully being non-compliant. This is something that the horticulture industry also battles with.

Some in the industry will say they are trying to do the right thing but have no other option and are forced to be non-compliant. The impact on the remainder of the industry is still the same.

Increasing the labour pool of a legal, willing and capable workforce is also a key component of ensuring growers have an opportunity to employ a fit and proper workforce. AUSVEG has been working with the federal government and other horticulture industry bodies around developing and improving visa pathways to help build that labour pool. Improvements to the Working Holiday Maker Program, Seasonal Worker Program, Pacific Labour Scheme and the addition of a proper Horticulture Industry Labour Agreement.

AUSVEG has advocated for a level playing field within the industry for some time and that message is getting stronger and stronger in horticulture as good growers are pushed to breaking point. Given that 60% of the total cost of production for horticulture growers is in labour costs, it becomes significantly uncompetitive when a grower is paying \$23 per hour, compared to somebody else paying \$18, or even less. That is then magnified again as larger scaled businesses employ 100+ people, it becomes more and more uncompetitive.

It is unclear whether stronger penalties for non-compliance around employees' wages and entitlements will be enough to deter people from continuing to be non-compliant, however greater resources should be allocated to identifying and prosecuting operators who break the law.

Part 1: Civil Penalties in the Fair Work Act

Current approach to determining penalties

- ***What level of further increase to the existing civil penalty regime in the Fair Work Act could best generate compliance with workplace laws?***
- ***What are some alternative ways to calculate maximum penalties? For example, by reference to business size or the size of the underpayment or some measure of culpability or fault.***
- ***Should penalties for multiple instances of underpayment across a workforce and over time continue to be ‘grouped’ by ‘civil penalty provision’, rather than by reference to the number of affected employees, period of the underpayments, or some other measure?***

Increasing penalties would be a step in the right direction to help deter people from being non-compliant, but it is unlikely to address the complete issue. Those who are willingly and intentionally breaking the law will likely continue to do so, as it referred to in the discussion paper that some entities perceive the existing penalties to be part of the ‘cost of doing business’. Increasing the penalties to help address serious contraventions may help, but it is unlikely to discourage those who show the most extreme cases of being non-compliant or help those who are unknowingly non-compliant.

Penalties based on the size of the business is good in theory but given that many non-compliant businesses operate in the cash economy, it would hard to ensure that the penalties are not calculated into their ‘cost of doing business’.

It is important to note that a stronger focus on enforcement is needed in conjunction with harsher penalties.

A better mechanism is to establish supply chains that demand its participants to demonstrate that they are ethical employers. AUSVEG is working with the major supermarkets and other channels to market to establish industry “rules” that limit access to markets to those that do the right thing in a manner that is not overly onerous on growers. AUSVEG encourages to support these initiatives that use a “carrot” rather than a ‘stick’.

Fair Work Amendment (protecting vulnerable workers) Act 2017

- ***Have the amendments effected by the Protecting Vulnerable Workers Act, coupled with the FWO’s education, compliance and enforcement activities, influenced employer behaviour? In what way?***
- ***Has the new ‘serious contravention’ category in the Fair Work Act had, or is it likely to have, a sufficient deterrent effect?***

There is no doubt the amendment has raised awareness among growers. There is also no doubt that some of the FWO's education, compliance and enforcement activities would have some influence over employer behavior, but there has been some movement from industry to address some of these issues through industry-led programs such as Fair Farms.

A program such as Fair Farms, which was only launched nationally in June 2019, has already experienced strong uptake, which shows a willingness to address some of these concerns.

Extending liability

- ***Do the existing arrangements adequately regulate the behaviour of lead firms/head contractors in relation to employees in their immediate supply chains?***
- ***Should actual knowledge of, or knowing involvement in, a contravention of a workplace law be the decisive factor in determining whether to extend liability to another person or company? If not, what level of knowledge or involvement would be appropriate? Would recklessness constitute a fair element to an offence of this type?***
- ***What degree of control over which aspects of a business is required before a business owner should be expected to check the compliance of contractors further down the supply chain?***
- ***What are the risks and/or benefits of further extending the accessorial liability provisions to a broader range of business models, including where businesses contract out services?***

The vegetable and potato industry experiences significant seasonal peaks and troughs in demand for labour. Depending on the crops grown some businesses will operate and require labour all year round. Alternatively, crops that are harvested annually are likely to have a high demand for labour for a much shorter period, often just a matter of weeks. This can mean a heavy reliance on labour hire contractors.

Accessorial liability has been a key concern among growers due to the reliance on Labour Hire contractors, given a grower will often be able to do initial visa checks on a worker, but it becomes difficult during peak periods where the workforce will be significant and it is driven by the contractor themselves.

AUSVEG has been supportive of introducing a National Labour Hire Licencing Scheme and believes that it will help address some of the challenges in changing behaviours in this space.

Labour hire providers are a very important resource for growers. Having access to a mature, robust and reliable labour hire sector will benefit the horticulture sector.

AUSVEG supports the appropriate form of labour hire regulation that imposes liability on entities that use forms of illegitimate labour hire. We also support legislative arrangements that penalise businesses that benefit from another person's/body's contravention in circumstances where they knew or ought to reasonably have known of that contravention.

AUSVEG supports a national scheme that would also displace current state-led schemes, which is particularly relevant to growers operating in several states have to navigate a multitude of different schemes, significantly adding to the costs.

Sham contracting

- ***Should there be a separate contravention for more serious or systemic cases of sham contracting that attracts higher penalties? If so, what should this look like?***
- ***Should the recklessness defence in subsection 357(2) of the Fair Work Act be amended? If so, how?***

AUSVEG believes that if there is to be a separate contravention, then the regulation needs to be targeted. Stronger enforcement of existing sham contracting laws would be supported, particularly given the increased funding to the Fair Work Ombudsman in 2018.

Part II: Criminal sanctions

- *In what circumstances should underpayment of wages attract criminal penalties?*
- *What consideration/weight should be given to the whether an underpayment was part of a systematic pattern of conduct and whether it was dishonest?*
- *What kind of fault elements should apply?*
- *Should the Criminal Code [see the Schedule to the Criminal Code Act 1995 (Cth)] be applied in relation to accessorial liability and corporate criminal responsibility?*
- *What should the maximum penalty be for an individual and for a body corporate?*
- *Are there potential unintended consequences of introducing criminal sanctions for wage underpayment? If so, how might these be avoided?*
- *Are there other serious types of exploitation that should also attract criminal penalties? If so, what are these and how should they be delivered?*

AUSVEG would be supportive of the change if adding criminalised sanctions will provide regulators and the courts the appropriate tools to address serious contraventions to the FWA and is reserved for the most serious forms of exploiting vulnerable employees.