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Earnings of horticulture pieceworkers

Expert report in reply of Greg Houston

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Contact Us

Sydney

Level 40
161 Castlereagh Street
Sydney NSW 2000

Phone: +61 2 8880 4800

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Contents

1. Introduction	1
1.1 Instructions	1
2. Summary of essential conclusions	2
2.1 Essential conclusions of Dr Underhill and Dr Howe	2
2.2 Essential findings of my first report	2
3. Underhill and Howe response reports	4
3.1 Dr Underhill's response report	4
3.2 Dr Howe's response report	8
4. Unions NSW report	13
4.1 Survey methodology and relevant findings	13
4.2 Assessment of the relevant Unions NSW findings	14
5. Declaration	16

1. Introduction

1. I have been asked by Seyfarth Shaw Australia (Seyfarth) to prepare this further report in the context of the application made by the Australian Workers Union (AWU) to the Fair Work Commission (FWC) to vary the Horticulture Award 2020 (MA000028) (the proceedings).

1.1 Instructions

2. Subsequent to finalising my first report in the proceedings,¹ I have been provided with:
 - a. a further report prepared by Dr Underhill,² responding to my first report;
 - b. a reply statement of Dr Howe,³ also in response to my first report; and
 - c. the submission of Unions NSW, which includes a study on pay and conditions in the horticulture industry.
3. Seyfarth has now asked me to review the response reports of both Dr Underhill and Dr Howe and to indicate whether any of the considerations raised in those reports alter the opinions expressed in my first report. Seyfarth has also asked me to review and comment on the findings of a joint study by Unions NSW and the Migrant Workers Centre⁴ (the Unions NSW report).
4. I have structured this further report, as follows;
 - a. in section two I describe the essential conclusions of the Underhill and Howe reports, and the findings of my first report in relation to those conclusions;
 - b. in section three I summarise the points made in relation to the findings of my first report in the Underhill and Howe response reports, and provide my opinion on the considerations raised by Dr Underhill and Dr Howe;
 - c. in section four, I summarise the key propositions relevant to my findings in the Unions NSW submission, and provide by opinion on those key propositions; and
 - d. in section five I set out my expert witness declaration.

¹ Greg Houston, *Earnings of horticulture industry pieceworkers*, 11 June 2021.

² Elsa Underhill, *Response to Mr Greg Houston's earnings of horticulture pieceworkers report*, 30 June 2021 (Underhill response report).

³ *Reply statement of Dr Joanna Howe*, 5 July 2021 (Howe response report).

⁴ Unions NSW and The Migrant Workers Centre, *Working for \$9 a day: Wage Theft & Human Rights Abuses on Australian Farms*, June 2021.

2. Summary of essential conclusions

5. In this section I describe the essential conclusions of the Underhill and Howe reports, including their response reports, and the findings of my first report in relation to those conclusions.

2.1 Essential conclusions of Dr Underhill and Dr Howe

6. In my opinion, there are three basic propositions that emerge from the Underhill and Howe reports (including their response reports) as regards the earnings of piece rate workers in the horticulture industry, ie:
- piece rate workers are paid less than the minimum award hourly rate of pay received by hourly paid casual workers; and
 - piece rates are set too low for the average competent worker to earn the hourly minimum, let alone the 'average competent worker' rate; and
 - low rates of pay for piece workers in horticulture encourages an unacceptably high level of unsafe work practices.
7. For ease of exposition in this report, I refer to these three conclusions as:
- 'the earnings relationship conclusion', since it concerns the relative levels of earnings for piece rate as compared with hourly paid workers in the horticulture industry;
 - 'the earnings level conclusion', since it concerns the absolute level of earnings for piece rate workers in the horticulture industry; and
 - 'the OHS causation conclusion', since it contends the existence of a causal relationship between piece rate earnings and unsafe work practices.
8. Dr Underhill presents an opinion in relation to all three of these conclusions, which:
- in relation to the earnings relationship and earnings level conclusions, can be found at paragraphs 25 and 41 (bullet point six) of her first report; and
 - in relation to the OHS causation conclusion, can be found at paragraph 41 (bullet point seven).
9. Dr Howe presents an opinion in relation to the earnings level conclusion only, which can be found at paragraph 19.
10. The earnings level conclusions made by Dr Underhill and Dr Howe are expressed in somewhat different terms, but both are to the same general effect as I describe at paragraph 6.b.

2.2 Essential findings of my first report

11. The essential findings of my first report were that:
- neither Dr Underhill's 'earnings relationship conclusion' nor 'earnings level conclusion' were capable of being validly drawn by reference to the data in her first and second surveys;⁵

⁵ Houston report, para 121 and 127.

- b. Dr Howe's 'earnings level conclusion' was also not capable of being validly drawn by reference to the data in the research upon which she relied;⁶ and
 - c. there is no economic reasoning that would give rise to the unambiguous expected relationship stated in Dr Underhill's 'OHS causation conclusion'.⁷
12. The principal shortcomings in the methodologies adopted by Dr Underhill and Dr Howe were that:
- a. the focus of the qualitative and quantitative research on which Dr Underhill relied was a particular sub-group of horticulture workers, being working holiday maker (WHM) workers, cannot be generalised as representing the population of horticultural workers in Australia in 2021;⁸
 - b. Dr Underhill did not present sufficient information for either her earnings relationship or earnings level conclusions to be reliably drawn;⁹ and
 - c. the absence of robust, quantitative analysis means there is no evidence from which it is safe to support Dr Howe's earnings level conclusion.¹⁰

⁶ Houston report, para 160.

⁷ Houston report, para 134.

⁸ Houston report, para 119.

⁹ Houston report, para 121 and 127.

¹⁰ Houston report, para 160-161.

3. Underhill and Howe response reports

13. I have reviewed the further report of Dr Underhill and the reply statement of Dr Howe, both of which respond to my first report. In this section I:
- first, summarise the points made in the Underhill and Howe response reports in relation to my earlier findings; and
 - then provide my opinion on the considerations raised by Dr Underhill and Dr Howe.

3.1 Dr Underhill's response report

14. In the material below I summarise the essential points made in the Underhill response report, and my opinion on the considerations raised.

3.1.1 Summary of points made by Dr Underhill

15. I understand the principal observations being made by Dr Underhill by way of response to the conclusions drawn my report as being that:
- an acknowledgement that the two surveys from which Dr Underhill drew her initial quantitative conclusions 'do not claim to be representative of the entire population' of horticultural workers;¹¹
 - 'it is impossible to construct a stratified sampling frame' that would be representative of the entire population of horticultural workers;¹²
 - non-probability sampling methods can approximate probability sampling, through the use of a wide range of recruitment tools to access a broad section of the population;¹³
 - that a wide range of recruitment processes was adopted, by gathering information from all states and the Northern Territory from a wide range of harvesting jobs;¹⁴
 - while not claiming to be a representative sample, the data from which Dr Underhill drew provides 'the best available evidence' in circumstances where probability sampling is impossible;¹⁵
 - re-analysis of the available earnings data by applying a Mann-Whitney U test indicates that Dr Underhill's earlier earnings relationship conclusion remains valid, ie, 'harvesting workers paid by the hour are paid more on average than those paid by piece rates.'¹⁶
16. For the reasons I explain briefly below, none of these observations cause me to change my earlier opinion that the information presented by Dr Underhill is insufficient for either her earnings relationship or earnings level conclusions to be reliably drawn.

3.1.2 Available data not representative of the population of interest

17. In my opinion, the responses given by Dr Underhill do not address the fundamental problem with drawing conclusions as to attributes of the entire population of horticultural workers using survey

¹¹ Underhill response report, paras 28.

¹² Underhill response report, paras 28.

¹³ Underhill response report, paras 29.

¹⁴ Underhill response report, paras 29.

¹⁵ Underhill response report, paras 30.

¹⁶ Underhill response report, paras 40 and 41.

information that, by its design, was targeted at a particular sub-group of those workers, being 'vulnerable groups' in the horticultural workforce.¹⁷

18. In my opinion, the focus of Dr Underhill's earlier research is not representative of the entire population of horticultural workers. By consequence, it is inescapable that the earnings-related data arising from that earlier research – or any statistical analysis of it – cannot be used to support the earnings relationship and earnings level conclusions drawn by Dr Underhill in relation to all horticultural workers.
19. In particular, the over-representation of WHMs in research project one is consistent with the stated focus of the research, ie, '*Layered vulnerability: Temporary migrants in Australian horticulture*'. However, such focus is not consistent with the question Dr Underhill was asked to address in her expert report, ie, the average earnings of pieceworkers in the horticulture industry in Australia.
20. The 'layered vulnerability' that Dr Underhill describes in her research suggests that the extrapolation she makes from this research to the population as a whole will cause her to under-estimate average earnings of employees engaged as piece workers. In my opinion, Dr Underhill does not make a sufficient assessment of the extent to which the sample reflects the population of interest (horticulture workers more generally). This substantially compromises the ability to generalise Dr Underhill's previous research findings to horticulture workers in Australia.
21. I also explain in my earlier report that the survey results that Dr Underhill presents are likely to suffer from self-response bias, because dissatisfied workers are likely to be over-represented. In her reply report, Dr Underhill noted that the survey offered a \$15 egift card to participants, which is expected to reduce the self-selection bias.¹⁸ Notwithstanding, the existence of self-selection bias in the survey appears to be a matter of agreement between myself and Dr Underhill.¹⁹

3.1.3 Statistical tests applied by Dr Underhill

22. In my earlier report, I observed that the t-test undertaken and reported in the first Underhill report by way of support for her 'earnings relationship conclusion' was inappropriate and unreliable in the context of a non-probability based sample.²⁰ I also explained the principal difficulty with the sample data as there being no basis on which to expect it to be representative of the population of interest.²¹
23. In her response report, Dr Underhill applies an alternative, non-parametric statistical test,²² being the Mann-Whitney U test, which tests for the statistical significance of a difference in medians of two samples. To that extent, it is a test of Dr Underhill's earnings relationship conclusion, but not her earnings level conclusion. Dr Underhill contends the Mann-Whitney U test is capable of overcoming problems that arise when survey data does not meet all of the assumptions expected of probability samples.
24. In simple terms, in the context of seeking to test a hypothesis of the earnings relationship from, the Mann-Whitney U test overcomes the usual normal distribution assumption by testing for differences between then medians of two samples, rather than for differences in the mean. By focusing on the median, the Mann-Whitney U test places less (or no) weight on outlier values, and so avoids the need to assume values in the underlying population are normally distributed.

¹⁷ Underhill report, para 9b.

¹⁸ Underhill response report, para 9.

¹⁹ Underhill response report, para 51.

²⁰ Houston report, para 73.

²¹ Houston report, para 46.

²² A non-parametric statistical test does not rely on the usual conditional assumption (such as applies in relation to a t-test) that the relevant observations from the underlying population are normally distributed.

25. Dr Underhill finds that the median values for sample data in relation to both piece rate and hourly earnings for both research project one and two show differences that are statistically significant²³ and that:
- these results approximate what would be expected to be found for the sample population. [my emphasis]*
26. The difficulty with Dr Underhill's conclusion is that, while technically correct as stated, ie, there is a statistically significant difference in the median values for earnings of piece rate and hourly paid workers, such as conclusion is necessarily limited to 'the sample population'. Consistent with my explanation above, the sample population is that for vulnerable horticultural workers, but not all horticultural workers.
27. It follows that Dr Underhill is incorrect then to state that in her response report that:
- Our results reveal a statistically significant difference is indicated between average earnings for hourly rate and piece rate workers in horticulture. [my emphasis]*
28. Put simply, application of a Mann-Whitney U test is incapable of overcoming the fundamental problem that Dr Underhill seeks to draw conclusions in relation to the entire population of horticultural workers using survey data that, by design, is focused on vulnerable horticultural workers.

3.1.4 Dr Underhill's representative sample 'impossibility' contention

29. Dr Underhill states that 'it is impossible' to construct a stratified sampling frame for surveying horticultural workers in order to represent the entire population because:²⁴
- a. accurate data on the total size and occupation of the horticultural workforce does not exist;
 - b. a list of the total population from which to draw a sample does not exist;
 - c. contact details for the population do not exist;
 - d. a list of the population by state or by product being harvested does not exist; and
 - e. the population is itinerant – even if a list of the population were to exist, the location of employees and crop being picked is continually changing, undermining the relevance of any stratified sampling;
30. In light of these considerations, Dr Underhill concludes that any survey of horticulture workers must involve non-probability sampling methods and does not claim to be representative of the sector. Notwithstanding, Dr Underhill considers that this is 'the best evidence available' where 'probability sampling is impossible'.²⁵
31. Properly stratified sampling is often a challenging task and is likely to be so in relation to the population of horticultural workers. Ascertaining relevant characteristics of the population is also likely to be made more challenging by the dynamic nature of the dynamic nature of the horticultural workforce.
32. Notwithstanding, there is rarely a bright line as to whether stratification of a sampling frame is either 'possible' or 'impossible'. Rather, the purpose of stratification is to capture responses from different groups of workers/industry segments, recognising that there could be large differences across

²³ Underhill response report, para 43.

²⁴ Underhill response report, para 28.

²⁵ Underhill response report, para 29.

groups/segments. Put another way, the stratification process is designed to improve the representativeness of survey responses or any other form of gathered data.

- 33. For example, the population of horticultural workers could be segmented by:
 - a. growing area (geography) across Australia;
 - b. produce type; and/or
 - c. employee personal characteristics, such as age, gender, visa status, level of experience, etc.
- 34. Suppose further that, if 30 per cent of horticultural workers are employed in NSW, then it would be appropriate to collect 30 per cent of respondents from NSW. Similarly, if Australian local workers represent a material proportion of all horticultural workers (say 30-60 per cent), then it would be important to ensure that local workers are represented in a similar proportion of responses to any survey.
- 35. In any event, the presently available data can only properly be described as presenting pay outcomes for WHM workers, and cannot be extrapolated to a wider population of all horticultural workers, of which WHMs are only a subset.

3.1.5 Dr Underhill's OHS causation conclusion

- 36. In my earlier report, I noted that I did not have access to the underlying survey questions and responses.²⁶ Notwithstanding, I raised potential concerns with Dr Underhill's questionnaire, noting that there are inherently limited inferences that can be drawn from the results presented by Dr Underhill.²⁷
- 37. In her response, Dr Underhill considered that many of my comments were irrelevant, since I did not know the survey questions asked.²⁸ Dr Underhill provided an excerpt from the survey, which I show in the table below.

Table 3-1: Excerpt of survey questions from research report 1

Issue	Never	Rarely	Some-times	Often	Always
The way I am paid encourages me to take risks such as:					
(a) Not stabilising a ladder before climbing on it					
(b) Working in extreme heat (eg. 35 degrees +)					
(c) Not drinking water if it takes too long to access the water					
(d) Carrying excessive loads (eg. Climbing a ladder with a heavy bag of fruit)					
(e) Other unsafe tasks (please specify)					

Source: Underhill hill response report, p13.

²⁶ Houston report, para 79.

²⁷ Houston report, para 79.

²⁸ Underhill response report, para 65.

38. In my earlier expert report, I noted that it was unclear if the questions are applicable to all respondents²⁹ and if the survey allowed respondents to respond with 'I don't know' or 'not applicable/relevant'.³⁰ I further noted the absence of a 'not applicable' response would make the results less meaningful and harder to interpret, particularly for questions that are only applicable to a smaller proportion of respondents.³¹
39. Dr Underhill appears to confirm that 'not applicable' was not an option for respondents, at least for those questions set out in table 3-1 above. Dr Underhill contends that this is not an issue as the questions:³²

... were framed so that all respondents could respond to all questions. If a respondent did not use a ladder, then their response to how often the way they were paid encouraged them to not stabilise a ladder would be never. It is an event that has never occurred. They were not exposed to that kind of workplace risk.

Likewise for responses to how often a worker believed that the way they were paid encouraged them to work in extreme heat. If they did not work under conditions of extreme heat, then they would never experience their payment system encouraging them to work in conditions of extreme heat. They were not exposed to that kind of workplace risk.

40. In my opinion, it remains unclear if all respondents would be likely to approach the question in the manner suggested by Dr Howe. For example, it is possible that respondents may answer 'often' or 'always' because the way they are paid would encourage them to take risks if the risk did arise, even if it the risk would never arise.
41. Even if it all respondents were to answer the question in the manner suggested by Dr Underhill, ie, they select 'never' if they are not exposed to the risk, it still makes the results less meaningful. This is because we can no longer ascertain whether a respondent has selected 'never' because they are not exposed to the risk or because they are never encouraged to take risks because of the way they are paid.
42. In conclusion, my statement from my earlier expert report remains valid, ie:³³

It is unclear how a respondent would answer a particular question if it was not relevant and the survey did not allow for a 'not applicable' response. Notwithstanding, it is likely to make the results less meaningful and harder to interpret, particularly for questions that are only applicable to a smaller proportion of respondents.

3.2 Dr Howe's response report

43. In the material below I summarise the essential points made in the Howe response report, and my opinion on the considerations raised.

3.2.1 Summary of points made by Dr Howe

44. The apparent focus of Dr Howe's response report is to provide further support for the earnings level conclusion stated at paragraph 19 of her first report, ie:³⁴

The data from my research outlined at [6] has supported a finding that piece rates are generally set at levels which mean that workers who are on a piece rate don't earn at least Award minimum

²⁹ Houston report, paras 82.

³⁰ Houston report, paras 83.

³¹ Houston report, paras 84.

³² Howe report, paras 68-69.

³³ Houston report, paras 84.

³⁴ Howe report, para 19.

rates, in fact they are paid well below the Award minimum rates, generally earning less than \$15 an hour.

45. Dr Howe's report responds to four observations made in my first report, namely:³⁵
- a. my statement that it is not clear how Dr Howe reaches the conclusion that workers on piece rate earn 'less than \$15 an hour';³⁶
 - b. my observation that 'survey results report that 65 per cent of piece rate workers are paid above the award rate';³⁷
 - c. where I state that the national temporary migrant work survey provides 'limited' insight;³⁸ and
 - d. where I state that the Fair Work Ombudsman report is of 'limited relevance'.³⁹
46. In the material below, I discuss Dr Howe's response to each of these points and confirm the basis by which I have not altered any of the opinions expressed in my earlier report.

3.2.2 Unclarity as to the basis for Dr Howe's earnings level conclusion

Overview of Dr Howe's response

47. At paragraph 155-157 of my first report, I state that:⁴⁰

155. Research report JH-1 does not appear to quantify the average pay received by piece rate workers or the proportion of piece rate workers that earn an hourly rate below the minimum wage.

156. Rather, Dr Howe's conclusion that piece rate workers generally earn an hourly rate that is 'well below the Award minimum rates' appears to be based on outcomes of the focus group and findings from two other relevant reports, which I note at paragraph 150 above.

157. It is not clear how Dr Howe reaches the conclusion that workers who are on a piece rate earn 'less than \$15 an hour' based on the research report JH-1.

48. By way of response, Dr Howe states that:⁴¹

I am making this statement as a general, expert assessment formed through my extensive and robust mixed methodology research of labour practices in the horticulture industry over many years.

49. Dr Howe follows this statement with a detailed summary of the findings and data from her three year research project (JH-1).
50. Dr Howe's summary includes tabulated extracts of responses from focus group participants and interviewees related to piece rates and low wage earnings. The summary sets out 30 extract responses and suggests that these are 'a representative sample' of the types of responses received.⁴² Dr Howe then states that these responses indicate extremely low wages for piece rate workers involved in the study.⁴³

³⁵ Howe response report.

³⁶ Houston report, paras 155-157.

³⁷ Houston report, para 159.

³⁸ Houston report, paras 168.

³⁹ Houston report, paras 172.

⁴⁰ Houston report, paras 155-157.

⁴¹ Howe response report, para 19.

⁴² Howe response report, para 22.

⁴³ Howe response report, para 22.

Assessment of Dr Howe's response

51. Dr Howe's response does not cause me to alter the opinions I express in para 155-157 of my first expert report has not changed after reviewing Dr Howe's report. My reasoning is that:
- a. Dr Howe's reply report confirms that her opinion is based on outcomes of interviews and focus groups – it follows that the evidence Dr Howe seeks to rely on is qualitative in nature and so cannot be used to draw quantitative conclusions with any degree of statistical confidence;
 - b. the extracts presented by Dr Howe indicate that the vast majority of responses on low hourly earnings from piece rates are from working holiday makers (WHMs) which, alone, are not representative of the horticultural workforce. I note that:⁴⁴
 - i. of the 30 extract responses on low earnings from piece rates, 28 are from WHM interviews or focus groups; and
 - ii. of the 28 responses from WHMs, six did not contain information on hourly earnings from piece rates.
 - c. furthermore, participation in the interviews and focus groups is likely to suffer from self-selection bias, where those WHMs that do participate in the interviews/focus group are different to those who have not participated – for example, dissatisfied workers, including those that are underpaid, would be more likely to participate in the interviews and focus groups.

3.2.3 Dr Howe's response to paragraph 159 of my expert report

Overview of Dr Howe's response

52. I state in my first report that: ⁴⁵

Further, Dr Howe presents findings from the national survey of vegetable growers in her appendices to research report JH-1. I discuss these results in more detail in section 3.3 below, but note here that these survey results report that 65 per cent of piece rate workers are paid above the award rate (of \$17 for full and part time workers, or \$22 for casual workers).

53. Notwithstanding, I also note the potential limitations of the findings of this national survey.⁴⁶
54. Dr Howe states that the survey of vegetable growers is 'not particularly useful' for ascertaining wages received by piece rate workers, apparently because:⁴⁷
- a. the survey has limitations, which are typical of most survey research;
 - b. the nature of the industry (seasonality, geographical dispersion, reliance on contractor, largely temporary migrant workforce, presence of undocumented workers) means it is difficult to quantify piece rates or undertake a representative survey;
 - c. it would be difficult to use quantitative survey to assess whether piece rate workers are being underpaid as this hinges upon average competency – even if a survey found that a large proportion were being paid under the award hourly rate, this does not necessarily mean that these workers were paid in breach of the award;

⁴⁴ Howe response report, para 22.

⁴⁵ Houston report, para 159.

⁴⁶ Houston report, para 165.

⁴⁷ Howe response report, paras 29-36.

- d. small sample size in relation to the piece rate question limits the meaningfulness of the survey results;
- e. survey respondents are unlikely to admit to paying workers below the award requirements; and
- f. the survey does not include labour hire contractors, which are prevalent in the sector and where problems of non-compliance are concentrated.

Assessment of Dr Howe's response

55. I agree with many of Dr Howe's observations, and that it is likely to be challenging to undertake quantitative analysis within the sector. Notwithstanding, many of the limitations that Dr Howe has identified in relation to the quantitative analysis contained in her research report JH-1 apply equally to the qualitative analysis, ie:
- a. qualitative analysis also has limitations, typical of most similar analysis;
 - b. the nature of the sector also means it is difficult to interview a representative group of horticulture workers;
 - c. the sample size in the qualitative analysis is also small – Dr Howe's reply report indicates that there were 70 instances in which pay was mentioned during the interviews and focus groups;⁴⁸ however, some of these could be the same respondent expressing their views at different points of the interview or focus group, so that the sample size underpinning Dr Howe's qualitative analysis is at most 70 respondents; and
 - d. it may be difficult to understand whether respondents are underpaid because of competency or other reasons.
56. It follows that my initial observation continues to be valid, ie: ⁴⁹
- The absence of robust, quantitative analysis means it is impossible to demonstrate with any degree of statistical confidence the average hourly wage earned by piece rate workers and the distribution of earnings.
57. On these considerations, there is no basis on which to alter the opinion as expressed in my first report.

3.2.4 National temporary migrant survey provides limited insight

58. In my first report, I note in relation to the national temporary migrant survey that:⁵⁰

Noting that I have not reviewed the survey or report in detail, I observe as follows:

- a. the survey is focused on temporary migrant workers, which is a subset of horticulture workers – it follows that there is limited ability to use the survey results to draw conclusions regarding the average pay of an 'average competent worker'; and
- b. the authors have noted a number of limitations with the methodology, which were not acknowledged in Dr Howe's report.

59. Dr Howe states in her response report that:

⁴⁸ Howe response report, para 21.

⁴⁹ Houston report, para 171.

⁵⁰ Houston report, para 173.

- a. although the survey has methodological challenges, this would be true of any quantitative survey of temporary migrant workers;⁵¹
- b. the survey response is used for a limited purpose by Dr Howe – it demonstrates that the worst paid jobs were in fruit and vegetable picking and is consistent with the research findings in research report JH-1;⁵²
- c. that my observations that ‘the respondents to the survey are temporary migrant workers and so represent only a sub-group of workers’ ‘exposes a lack of understanding of the horticulture labour market in Australia’.⁵³ Further, Dr Howe points to: ⁵⁴
 - i. a 2016 study that found close to 70 per cent of seasonal horticultural workers were visa holders; and
 - ii. the national survey of vegetable growers, which found that 78 per cent of those surveyed engaged visa holders, including 72 per cent who engaged WHMs.

60. Notwithstanding Dr Howe’s response, which I have summarised above, my observations on the temporary migrant survey remains unchanged, because:

- a. the methodological limitations remain; and
- b. the survey results continue to be relevant only to a sub-group of workers across the whole horticulture workforce.

3.2.5 Dr Howe's response to paragraph 172 of my expert report

61. In my first report, I state in relation to the FWO report: ⁵⁵

I have not reviewed this report, although I note that the subject of this report is the pay of WHMs in general. WHMs are only a subset of horticulture workers, while WHMs also work in other sectors. In light of this, Dr Howe’s report and its findings are of limited relevance to whether there is underpayment of piece rate workers in the horticultural sector.

62. In her response report, Dr Howe contends that the FWO report is relevant and notes that, although WHMs are employed in many industries, the FWO report is largely about WHMs who do an 88 day placement to earn a visa extension. The vast majority of this group work in the horticulture industry.⁵⁶ As such, FWO report is relevant report for this context.

63. Notwithstanding these points, my observations on the FWO report remains unchanged. In particular, WHMs are only subset of temporary migrant worker, which is then only a subset of the overall horticulture workforce.

⁵¹ Howe response report, para 39.

⁵² Howe response report, para 40.

⁵³ Howe response report, para 41.

⁵⁴ Howe response report, para 41.

⁵⁵ Houston report, para 172.

⁵⁶ Howe response report, para 43.

4. Unions NSW report

64. In this section I summarise the key propositions relevant to my findings in the Unions NSW report, and provide my opinion on those key propositions.
65. The Unions NSW report draws on an online study of more than 1,300 workers⁵⁷ in the horticulture industry from late September 2020 until late February 2021.⁵⁸ The study sought to examine workplace relations in the Australian horticulture industry and:
- a. sets out several findings on workplace conditions and pay in light of those survey results; and
 - b. makes a number of recommendations to improve pay and conditions for workers in the sector.
66. Noting the broad scope of matters covered in the Unions NSW report, I have confined my observations to:
- a. the report's conclusion that underpayment levels were 'severe';
 - b. the approach by which the study arrives at this conclusion; and
 - c. the extent to which its conclusions can be applied to the horticultural workforce, generally.
67. I note that the Unions NSW report does not seek to draw any conclusions as to the relative level of earnings by piece rate workers in the entire horticultural sector.

4.1 Survey methodology and relevant findings

68. The focus of the study and survey appears to be temporary migrant workers in the Australian horticulture sector. The survey was conducted online and was distributed to different migrant communities by email, online events, and social media platforms – the survey was presented in Chinese and English.⁵⁹
69. The survey asked respondents to answer questions concerning:⁶⁰
- a. the respondent (eg, age, nationality, gender identify, and current visa status), whether they have worked in the horticulture sector, and location of their work;
 - b. piece rate agreements and other employment conditions, such as experience with specific crops and role performed when working, and how their employer calculated the piece rate; and
 - c. their employment type and wage more generally, as well as other employer misconducts and grievances they have experienced.

⁵⁷ Unions NSW and The Migrant Workers Centre, *Working for \$9 a day: Wage Theft & Human Rights Abuses on Australian Farms*, June 2021, p 6.

⁵⁸ Unions NSW and The Migrant Workers Centre, *Working for \$9 a day: Wage Theft & Human Rights Abuses on Australian Farms*, June 2021, p 9.

⁵⁹ Unions NSW and The Migrant Workers Centre, *Working for \$9 a day: Wage Theft & Human Rights Abuses on Australian Farms*, June 2021, p 9.

⁶⁰ Unions NSW and The Migrant Workers Centre, *Working for \$9 a day: Wage Theft & Human Rights Abuses on Australian Farms*, June 2021, p 9.

70. Respondents were also asked to provide their contact information if they wished to share their experience in more detail.⁶¹
71. More than 1,300 people participated in the survey, but only 1,001 indicated that they have worked on an Australia farm in the last two years.⁶² The analysis in the Unions NSW report focused on the 1,001 workers.
72. The majority of respondents (84 per cent) were on a temporary visa, with Australia citizens and permanent residents representing 11 per cent and 5 per cent of respondents.⁶³ Of those on a temporary visa, 64 per cent were on a working holiday visa and 25 per cent were on a work and holiday visa.
73. Based on the survey responses received, the Unions NSW report found that 'underpayment levels were severe', and noted further that:⁶⁴

Piece rate workers reported, in some instances, earning less than \$1 an hour. 15% of piece rate workers indicated earning between \$0 to \$7 an hour, 29% earned \$8 to \$11 an hour, 19% between \$12 to \$15 an hour and 16% earned \$16 to \$19 an hour. Only 11% were paid \$20 to \$23 an hour. Contrary to suggestions that the piece rates allowed workers to earn above the minimum wage, only 2% reported earning \$26 or more an hour.

4.2 Assessment of the relevant Unions NSW findings

4.2.1 Sample is not representative of the horticulture industry

74. I note at paragraph 68 above that⁶⁸ the focus of the study appears to be temporary migrant workers in the horticulture sector and appears to have been distributed mainly to temporary migrant workers. By consequence, 84 per cent of the respondents were temporary migrant workers, of which 89 per cent were working holiday makers.⁶⁵
75. However, the report also describes the broader 'horticultural industry' workforce, noting that around 142,000 people work in the industry, of which the total number of temporary visa holders is between 44,000-65,000.⁶⁶ It follows that less than half of workers in the industry are temporary visa holders.
76. I note further that working holiday makers are also a sub-group of temporary migrant workers. It follows that, even though WHMs may be a significant sub-group of temporary migrant workers, it is unclear if pay outcomes for WHMs are representative of other temporary migrant workers.
77. Finally, I note that the Unions NSW report does not appear to present the findings as representative of the population of horticultural workings and, in my opinion, this is appropriate.

⁶¹ Unions NSW and The Migrant Workers Centre, *Working for \$9 a day: Wage Theft & Human Rights Abuses on Australian Farms*, June 2021, p 9.

⁶² Unions NSW and The Migrant Workers Centre, *Working for \$9 a day: Wage Theft & Human Rights Abuses on Australian Farms*, June 2021, p 10.

⁶³ Unions NSW and The Migrant Workers Centre, *Working for \$9 a day: Wage Theft & Human Rights Abuses on Australian Farms*, June 2021, p 11.

⁶⁴ Unions NSW and The Migrant Workers Centre, *Working for \$9 a day: Wage Theft & Human Rights Abuses on Australian Farms*, June 2021, p 6.

⁶⁵ Working holiday makers are temporary visitors to Australia who hold a working holiday visa or work and holiday visa. For further information, see <https://www.ato.gov.au/business/your-workers/in-detail/employers-of-working-holiday-makers/>, accessed on 15 July 2021.

⁶⁶ Unions NSW and The Migrant Workers Centre, *Working for \$9 a day: Wage Theft & Human Rights Abuses on Australian Farms*, June 2021, p 4.

4.2.2 Sample likely to be compromised by self-selection bias

78. I describe in my first report⁶⁷ that online surveys suffer from self-selection bias. In this context, dissatisfied workers can be expected to be more likely to fill in online surveys. It is also unclear if the Unions NSW report has sought to minimise selection bias by providing an incentive to participate, thereby raising the likelihood of participation by those who are not dissatisfied. It follows that it is unclear as to the extent to which the survey responses are likely to be representative of the outcomes for WHMs or temporary migrant workers.
79. Seyfarth Shaw has provided me copies of advertising material used by Unions NSW to encourage participants to take the survey, one part of which I depict in Figure 4-1 below.
80. In my opinion, the manner in which the survey has been advertised and designed is likely to enhance self-selection bias. By way of example, the figure below sets out one of the images use to advertise the survey, which is titled “piece rates & exploitation”.

Figure 4-1: advertisement material used to promote the Unions NSW report survey



Source: material provided by Seyfarth Shaw

81. Furthermore, the introduction to the survey is as follows:⁶⁸

Farm workers are often subject to exploitation. Many are paid less than the Award and work very long hours. In particular, those working by piece rate struggle to earn a living wage with many being forced to pay exorbitant prices for accommodation and transport provided by their employer. Such oppressive conditions are at times endured because of the need to meet visa requirements.

This survey aims to identify issues experienced by workers in the horticulture sector as a result of unfairness in the current wage structure. Results will be used to raise awareness and to assist in the fight for legal reform.

82. The above highlights that the advertisement and survey have been designed to encourage workers who have been ‘exploited’ by their employers. It follows that this is likely to enhance self-selection bias by encouraging workers who have been exploited to participate in the survey.

⁶⁷ Houston report, paras 49-53.

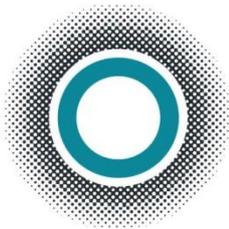
⁶⁸ First page of the survey.

5. Declaration

83. I confirm that, in preparing this report I have made all inquiries that I believe are desirable and appropriate and that no matters of significance that I regard as relevant have, to my knowledge, been withheld from the Court.

A handwritten signature in blue ink that reads "Greg Houston". The signature is written in a cursive style with a large, stylized initial "G".

Greg Houston
16 July 2021



HOUSTONKEMP

Economists

Sydney

Level 40
161 Castlereagh Street
Sydney NSW 2000

Phone: +61 2 8880 4800